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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 52

HON. JOSEPH L. CALL, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff,)
)
 v.)
)
 STEVEN GROGAN,)
)
 Defendant.)

No. A 267861

REPORTERS' DAILY TRANSCRIPT

Monday, June 28, 1971

Tuesday, June 29, 1971

APPEARANCES OF COUNSEL:

(See Volume I)

COPY

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1 LOS ANGELES, CALIFORNIA, MONDAY, JUNE 28, 1971, 9:45 A.M.

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4 (Conference in chambers with both counsel
5 and the defendant not reported.)

6 THE COURT: Now, gentlemen, in People against Grogan
7 some rather serious matters have arisen that it would be
8 necessary that we go over one day, just simply continue.
9 Literally send you home or about your business for one day
10 but to be here promptly at 9:30 tomorrow morning and we will
11 continue.

12 Incidentally, we have one juror who has phoned in
13 to the clerk and that will require further examination, that
14 apparently she is a pretty sick woman. That is what she has
15 told the clerk. I am just making that observation. We will
16 have to take that up also tomorrow morning. That is another
17 matter entirely.

18 But I am simply pointing that out to counsel here.
19 Is there any objection by counsel or defendant that we
20 continue to 9:30 tomorrow morning?

21 MR. KATZ: No objection, your Honor.

22 MR. WEEDMAN: No objection, your Honor.

23 THE COURT: All right, we will then, ladies and gentlemen,
24 have to go until 9:30 tomorrow morning. Now, let me admonish
25 you again do not discuss this case at all or come to any opinion
26 or conclusion. Kindly return promptly at 9:30 tomorrow because
27 time is of the essence. That is, we must move along and we
28 have been. I am not critical of any situation at all. We

1 have been.

2 If you will return tomorrow morning at 9:30 sharp
3 we will go ahead. And you are excused until then. Thank you
4 very much, folks.

5 (at 9:50 a.m. an adjournment was taken
6 to Tuesday, June 29, 1971, 9:30 a.m.)
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LOS ANGELES, CALIFORNIA, TUESDAY, JUNE 29, 1971, 11:15 A.M.

(The following proceedings were had
in chambers:)

THE COURT: Now, we are in chambers in People against Grogan; both counsel are here, defendant is here, the reporters are here, sheriff is here, clerk is here.

Yesterday, Monday, the 28th -- today is the 29th -- Mrs. Dora S. Lewis, No. 6 juror, had phoned in yesterday morning that she was ill to such a capacity and extent that she couldn't come to court; and I believe I advised counsel yesterday morning early of that situation but because of other conditions that existed we went over until this morning.

Now, the juror is not here and has not phoned in. It is my assumption that she is not here because of her illness and undoubtedly she is relying, I assume, upon the fact she hasn't been told by the court to come back or leave bed or to get in here with affidavits of illness. In any event, I am assuming she is ill, as indicated here.

Now, we are up against the position of excusing this woman, whether the court exercises its peremptory, its right to find for cause exists and proceed, whether the court must attempt to get her in here for further examination and then proceed to accept her or proceed with her or excuse her or other problems.

I am of the opinion I have, as the court, the right to excuse her -- she is not here -- and to move forward.

1 That's just my opinion, the right of the court to proceed.

2 Counsel for plaintiff or defendant may want her
3 here for further examination and that could be their right,
4 I am not passing on it one way or the other.

5 Now, first we will take the People and the
6 defendant -- do the People have any objection -- then you
7 state yours fully, Mr. Weedman.

8 MR. WEEDMAN: Yes, thank you.

9 THE COURT: -- to the court forthwith, upon the showing
10 we have here, excusing her at this time as a juror, prospec-
11 tive juror, however we want to call it in this case?

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1 MR. KATZ: No objection, your Honor.

2 THE COURT: How about the defendant.

3 MR. WEEDMAN: Yes, your Honor, we do respectfully object
4 to her being excused. We will object on the ground -- and by
5 the way we don't wish to unduly prolong a trial or in any way
6 obstruct the normal progress of the trial but bearing in mind the
7 the rights of the defendant, I will respectfully object to
8 her being excused, your Honor. I will offer to stipulate that
9 voir dire of the remaining prospective jurors may continue
10 until such time as perhaps more adequate cause for her being
11 excused is established or until indeed she may appear in court.
12 But for now I will object to her being excused, your Honor, on
13 behalf of the defendant.

14 THE COURT: Had she been passed for cause?

15 MR. WEEDMAN: Yes, your Honor.

16 THE COURT: Well, I think the code section is broad
17 enough to permit me to excuse her on the showing made and to
18 proceed. We have of course many jurors to pick from and I
19 don't know if the court is forced to withhold further proceed-
20 ings until we can get her in here, because if I attempt to
21 voir dire some of these jurors in the absence of another juror
22 that may or may not be accepted by one of the parties -- I am
23 not saying this in criticism. You are fully within your
24 rights. Let me get that clear.

25 MR. WEEDMAN: I appreciate that, your Honor.

26 THE COURT: Then we have other legal problems of voir
27 diring the jury whether the jurors are all in the box -- I
28 think the code says they should be all in the box before

1 examination and passing for what is commonly known as for cause
2 or exercising for cause or not, or accepting. For purposes of
3 voir dire I think the code section right on that, too, disturbs
4 me if I do attempt to hold up proceedings I will have to hold
5 up everything until we could get her in here. That is unknown.
6 She could very well be bedridden. I don't know why she would
7 lie, but that I can't go into. I don't know, I do have this
8 showing. I am inclined to overrule your objection after noting
9 it carefully. The transcript shows it. I will exercise or
10 rather excuse this juror upon the showing made and with your
11 objection in, I can excuse her.

12 It would probably be better when I get on the bench
13 for the sake of both parties not to go into these arguments
14 or discussions, simply to say Mrs. Dora S. Lewis is, for what
15 the court considers to be -- that isn't pulling you in on it --
16 for what the court considers to be good substantial cause,
17 excusing Dora S. Lewis. And then we will call another juror.
18 Now, I know of no reason you have to repeat your objections.
19 They are all made here in chambers.

20 MR. WEEDMAN: I agree with that, your Honor.

21 THE COURT: It is up to you. I am not trying to tell
22 anybody how to try a lawsuit.

23 MR. WEEDMAN: No, I agree with the court, there is no
24 need to restate the objections in front of the jury. Yes,
25 your Honor.

26 THE COURT: Your opposition is fully noted.

27 MR. WEEDMAN: Yes, thank you, your Honor.

28 THE COURT: All right, let's go ahead then.

1 MR. WEEDMAN: Very well. Thank you.

2 MR. KATZ: Thank you.

3 (The following proceedings were had
4 in open court:)

5 THE COURT: Now, gentlemen, I am calling the case of
6 People against Steve Grogan. The defendant is here in court.
7 Defendant's counsel is here. People's counsel is here. Are
8 you ready to proceed, gentlemen?

9 MR. WEEDMAN: Yes. Thank you, your Honor.

10 MR. KATZ: People are ready, your Honor.

11 THE COURT: All right. Now, we have all of the jurors
12 that were here when we last adjourned, last recess or adjourned
13 the court with the exception of Mrs. Dora S. Lewis, No. 6. And
14 I merely say to the jury, ladies and gentlemen, without going
15 into any of the reasons, for reasons that I think are fully
16 justified the court is excusing Mrs. Lewis from this matter
17 and from this case from her place in the jury box. I am not
18 excusing her from jury service, I don't mean that. She is
19 excused as a juror or a prospective juror in this case. Now,
20 next, we will call, Mr. Clerk, another juror to take the place
21 of Mrs. Lewis, if you will..

22 THE CLERK: Richard E. Penske, P-e-n-s-k-e.
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RICHARD E. PENSKE

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2 BY THE COURT:

3 Q Now, I am going to ask you, Mr. Juror, several
4 questions that you probably have heard me ask the other jurors
5 that have been called to the jury box when jurors have been
6 excused.

7 Have you heard everything that I have said since
8 we started the picking of the jury here several days ago in
9 this case? Have you heard everything that I have said to the
10 jurors in the jury box?

11 A Yes, I have.

12 Q Did you hear me read the charge that has been
13 preferred against the defendant by the People?

14 A Yes, I have.

15 Q Now, I am going to ask you to assume that you have
16 been selected as a juror to try this case. I am going to ask
17 you to assume the case has been tried and, incidentally,
18 before we take that last assumption I will back up.

19 The case has been tried; the jury has gone to the
20 jury room; at that time the jury could make a finding of not
21 guilty as charged or the jury could make a finding of guilty
22 as charged.

23 Is that clear to you?

24 A Yes, sir.

25 Q Now, assuming for the purpose of the next hypo-
26 thetical question or questions that the jury has made a
27 finding of guilty as charged; assume they set the degree as
28 first degree murder and at that point I will inject another

1 supposition, that the jury could make a finding of second
2 degree murder. At that point if it were second degree murder
3 it would conclude the case in its entirety.

4 However, assume that the finding is murder first
5 degree. Now, if you got that far along, then there is a next
6 or subsequent step, the penalty trial or penalty hearing.

7 Please assume you are in a penalty hearing and
8 you have heard the testimony offered on the hearing; you are
9 ready to decide the question of capital punishment or life
10 imprisonment. The jury must make a decision as to one of
11 these two penalties at the penalty hearing.

12 Now, are all the procedural steps clear in your
13 mind?

14 A Yes, they are.

15 Q I want you to assume you are voting on the question
16 of penalty now, and I will ask you this question: at that time
17 would you automatically vote against the imposition of the
18 death penalty without regard to any evidence that might be
19 developed at the trial of this case?

20 A No.

21 THE COURT: All right. I will pass the juror and defen-
22 dant may inquire for cause.

23 MR. WEEDMAN: Thank you, your Honor.

24 Q Would you pronounce your name for us, please.

25 A Penske.

26 Q Penske?

27 A Right.

28 Q What do you do for a living, sir?

1 A I am an inspector, Air Research.

2 Q I am sorry, you are employed by whom?

3 A Air Research.

4 Q Have you any prior criminal jury experience?

5 A No, I haven't.

6 Q With respect to the question of the death penalty
7 are there any cases that you can, perhaps, conceive of in which,
8 perhaps, if the matter of penalty was submitted to you you
9 would invariably vote for the death penalty?

10 A No.

11 Q Without, again, without regard to the evidence --
12 how do you feel about the death penalty, Mr. Penske?

13 A I think it is a deterrent.

14 Q And by that I take it you mean that you feel that
15 when the death penalty is given to someone that that acts to
16 prevent, perhaps, the commission of a crime by someone else?

17 A That's right.

18 Q Since, obviously, it is a deterrent to the person
19 that is executed, since obviously he is not going to commit any
20 more crimes -- do you have any strong preference, that is,
21 for the death penalty as against life imprisonment, say, in
22 a first degree murder case, such that would interfere with
23 your fairly considering the evidence and listening to your
24 fellow jurors with respect to penalty?

25 A No.

26 Q Do you, inasmuch as you feel it is a deterrent,
27 would you be willing to consider evidence tending to show that
28 it is not a deterrent or would your mind be closed on that

1 subject?

2 A No, I'd like the evidence.

3 Q Do you feel, though, that as you sit there now
4 that your feeling that it is a deterrent is so strong that
5 you could not fairly consider such evidence as I have suggested:
6 that is, evidence that the imposition of the death penalty
7 is not a deterrent?

8 MR. KATZ: Excuse me, I will object as an improper
9 question, since that is not a proper issue which can be
10 presented ^{to} for the jury.

11 THE COURT: Mr. Reporter, let me have a reading.

12 (The pending question was read as follows:)

13 "Q Do you feel, though, that as
14 you sit there now that your feeling that it
15 is a deterrent is so strong that you could not
16 fairly consider such evidence as I have
17 suggested: that is, evidence that the imposi-
18 tion of the death penalty is not a deterrent?"

19 MR. KATZ: I am willing to argue this, your Honor.

20 THE COURT: It might possibly be asked with a prejudging
21 of facts.

22 Can you change your question a little, or somewhat,
23 to arrive at the same thought? I think you are entitled to
24 an answer, to change your question a little.

25 Will you read it again; would you, please?

26 (The pending question was read as follows:)

27 "Q Do you feel, though, that as you
28 sit there now that your feeling that it is a

1 deterrent is so strong that you could not
2 fairly consider such evidence as I have
3 suggested: that is, evidence that the imposi-
4 tion of the death penalty is not a deterrent?"

5 MR. KATZ: Objection that it is argumentative.

6 THE COURT: If you knock out that last portion of your
7 question and put a period where I indicated, I think you are
8 entitled to an answer.

9 MR. WEEDMAN: Very well, your Honor.

10 THE COURT: All right.

11 Read it up to where I put the period; then the
12 witness may answer.

13 (The pending question was read as follows:)

14 "Q Do you feel, though, that as you
15 sit there now that your feeling that it is a
16 deterrent is so strong that you could not
17 fairly consider such evidence as I have
18 suggested?"

19 THE COURT: Can you answer that?

20 MR. KATZ: If your Honor please, I will respectfully
21 object that it is ambiguous.

22 THE COURT: Overruled.

23 Is that your question?

24 MR. WEEDMAN: Yes, your Honor.

25 MR. PENSKE: I am still confused because of the evidence --

26 THE COURT: Whatever your answer is, you answer it.

27 I may say to the jury that --

28 MR. WEEDMAN: All right.

1 MR. PENSKE: I don't understand --

2 THE COURT: Let me make a question here: in answering
3 your question a juror is entitled to say, if this is the truth,
4 "I can't answer the question, I have to have more facts."

5 Maybe you don't need to say that; maybe you can
6 answer the question. Then, answer it.

7 I mean, you are not just caught in a lock there.
8 If you can't answer it, you are entitled to say, "I can't
9 answer that until I have more facts or until I know more about
10 the case."

11 If you are able to answer a question yes or no,
12 then answer it yes or no.

13 Now, why don't you repeat your question again,
14 see where we are, we have had so much argument.

15 MR. WEEDMAN: Perhaps I could try all over again, your
16 Honor?

17 THE COURT: All right, start all over again, see where
18 you are.

19 Q BY MR. WEEDMAN: Mr. Penske, is your feeling that
20 the death penalty is a deterrent so strong that you could not
21 consider, in a penalty phase, obviously, evidence to the
22 contrary so as to afford the defendant a fair consideration of
23 options that you might have as a juror?

24 A Yes, I could consider it.

25 Q You could consider it?

26 A Yes.

27 Q Do you think you could consider it to a degree
28 that we could at least feel safe -- that is, the defendant could

1 at least feel safe in having you as a juror on a possible
2 penalty phase?

3 A I think so.

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1 Q Mr. Penske, a good many people we find for reasons
2 that sometimes are obscure, have very, very strong feelings
3 about the death penalty, and these feelings take the form of
4 "the death penalty just ought to be given more. And if I was
5 on a jury and a man was convicted of first degree murder I
6 would show them, I would give him the death penalty." Do you
7 belong to that class of person?

8 A No.

9 Q Okay. Have you in your lifetime given any parti-
10 cular thought to the issue of capital punishment?

11 A I have, yes.

12 Q Have you had occasion perhaps to discuss this with
13 other persons?

14 A No, I haven't.

15 Q Do you feel that capital punishment should be
16 imposed more often than you believe it is imposed in the
17 criminal courts in this state?

18 MR. KATZ: Excuse me, your Honor. There is an objection
19 on the grounds it is immaterial and argumentative. The only
20 issue is whether or not the juror would automatically impose
21 the death penalty upon the return of a first degree murder
22 conviction.

23 MR. WEEDMAN: Your Honor, the juror in voir dire for
24 cause is considered a witness and is sworn --

25 THE COURT: Let me have the question, please.

26 (The question was read by the reporter
27 as follows:

28 "Q Do you feel that capital punishment

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1 should be imposed more often than you believe
2 it is imposed in the criminal courts in this
3 state?"

4 THE COURT: Well, I would be inclined to think the
5 question is a little ambiguous. I will sustain the objection.
6 If you clarify it in a little more simple components, it may
7 be all right.

8 MR. WEEDMAN: I will try. Thank you, your Honor.

9 Q Do you feel that capital punishment is imposed in
10 this state as often as it should be?

11 MR. KATZ: Objection. Immaterial, your Honor.

12 MR. PENSKE: I really don't know.

13 THE COURT: I will sustain the objection. It is somewhat
14 argumentative. It calls for some prejudging. I don't think
15 it goes to voir dire. I will be inclined to sustain the
16 objection to the last question.

17 MR. WEEDMAN: Very well, your Honor.

18 Q How do you feel, if you have any particular feel-
19 ings, about the manner and the extent to which capital punish-
20 ment is imposed in the State of California?

21 MR. KATZ: Excuse me, your Honor. Again there is an
22 objection on the grounds it is immaterial and argumentative
23 and calls for philosophical discourse.

24 THE COURT: Sustained. Conclusion and speculation.

25 MR. WEEDMAN: If I may be heard, your Honor?

26 THE COURT: All right. Go ahead.

27 MR. WEEDMAN: This is a death penalty case. I am
28 entitled to a fair examination of any prospective juror

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1 relative to the death penalty, and it is in the nature of
2 cross-examination. It seems to me that I am entitled to
3 test a prospective juror's feelings about capital punishment.

4 THE COURT: Well, I think your supposition has to depend
5 to a great extent on what the situation is in this case. Now,
6 let me show you what I mean. Read the question, Mr. Reporter.

7 (The question was read by the reporter
8 as follows:

9 "Q How do you feel, if you have any
10 particular feelings, about the manner and
11 extent to which capital punishment is imposed
12 in the State of California?")

13 THE COURT: Now, you get into a hypothetical argumenta-
14 tive situation. The question is whether he will exercise a
15 fair, unbiased judgment in arriving at decisions in this case,
16 factual conclusions must be fairly and impartially judged.
17 And can you do that? I am not trying to tell you how to ask
18 your question, I am talking somewhat to myself. Can you do
19 that in arriving at a position on the death penalty, if such
20 a situation should arise in this case? Can you put your
21 personal convictions, your personal feelings, whether you
22 are personally for or against the death penalty, can you
23 impartially arrive at the judgments in this case?

24 Such questions as those, they are clearly permis-
25 sible in my opinion. But your question tends to go into an
26 argumentative basis, why do you do this? Why do you do that?
27 That is not the issue. The question is no matter what your
28 convictions are, will you arrive at a fair and impartial

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1 verdict? Can you put your feelings to one side?

2 MR. WEEDMAN: But I don't know what the feelings are.

3 THE COURT: That is why I am disturbed about the manner
4 of the framing of the question.

5 MR. WEEDMAN: I am trying to find out of course what
6 those feelings are. It seems to me -- well, first of all, your
7 Honor, I certainly agree with your Honor's statement of a
8 proper question.

9 THE COURT: Yes.

10 MR. WEEDMAN: It is merely to explore within that area
11 that I am attempting to ask the question that I have asked.

12 THE COURT: Well, if the question were asked something
13 along this line "No matter what your convictions are, whether
14 you are for capital punishment or against capital punishment,
15 can you sidestep those personal convictions, those personal
16 feelings and render your judgment fairly and impartially with
17 the facts or conclusions you make, construed or put together
18 with the law as given to you by the court?" Of course that is
19 your ultimate, pretty much your ultimate question.

20 MR. WEEDMAN: I agree certainly, your Honor.

21 THE COURT: If you can just weave it around that, I have
22 no objection. I think you went a little into the philosophical
23 or social reasons as to why he thinks it. That is another
24 thing. The question is does he have them. Do you feel this
25 way? That is all right. No argument about it. Or do you
26 feel this way or do you feel this way, fine. Now, with all
27 that feeling what about the case? There is the situation.

28 MR. WEEDMAN: Well, I will submit it without any further

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1 argument certainly, and thank you, your Honor.

2 Q Mr. Penske, in the event that you are convinced by
3 clear convincing evidence to a moral certainty and beyond a
4 reasonable doubt that my client has committed a willful,
5 deliberate, premeditated killing without justification or
6 excuse, would you, in a penalty phase, impose the death penalty
7 without regard to any other evidence?

8 MR. KATZ: Excuse me, your Honor. There is an objection
9 to that question and I will argue that in chambers, if you
10 wish.

11 MR. WEEDMAN: We can argue it right here as far as I am
12 concerned.

13 THE COURT: Read the question, please.

14 (The question was read by the reporter
15 as follows:

16 "Q Mr. Penske, in the event that you
17 are convinced by clear convincing evidence to
18 a moral certainty and beyond a reasonable doubt
19 that my client has committed a willful, deliberate,
20 premeditated killing without justification or
21 excuse, would you, in a penalty phase, impose
22 the death penalty without regard to any other
23 evidence?"

24 MR. KATZ: May I be heard, your Honor.

25 THE COURT: He can't answer that yes or no. Because it
26 calls for prejudging of testimony that I don't know or we don't
27 know in the case. I can't answer the question myself. I mean,
28 I don't know.

1 MR. WEEDMAN: Well, your Honor, supposing Mr. Penske's
2 answer was yes. If his answer was yes then I would submit
3 that that tells us what he would do automatically.

4 THE COURT: No, you would have to take into consideration,
5 considering all of the testimony, if your conclusions after
6 considering all of the testimony produced at the trial,
7 produced certain convictions, would you do so and so? You are
8 asking for prejudging there. If you are convinced from the
9 testimony this and if you are convinced this, if you are
10 convinced this, what would you do? What would be your voting?

11 MR. WEEDMAN: Well, when your Honor asks a juror would
12 he automatically reject any consideration of the death penalty
13 you are asking him to prejudge.

14 THE COURT: Yes.

15 MR. WEEDMAN: I am merely asking the other side of the
16 coin.

17 THE COURT: Well, I ask according to the phraseology of
18 the Supreme Court.

19 MR. WEEDMAN: That is right.

20 THE COURT: Would you automatically reject the death
21 penalty regardless of any testimony?

22 MR. WEEDMAN: That is right.

23 THE COURT: That is the wording, that is the law.

24 MR. WEEDMAN: That is right.

25 MR. KATZ: Your Honor, may I be heard.

26 THE COURT: I am arguing law here, not facts.

27 MR. WEEDMAN: That is right.

28 THE COURT: But that question supposes a rejection of

1 everything. Would you just reject everything that is testified
2 to in the case? Would you reject it all and refuse to vote
3 for the capital punishment? Just reject everything. Would
4 you consider nothing? That is the way that question is phrased.

5 MR. WEEDMAN: Well, what I am saying, your Honor, is
6 would a prospective juror reject all such evidence and
7 automatically impose the death penalty, is my question. I
8 don't want to use the word automatic because it is a loaded
9 word.

10 THE COURT: If you ask it like that --

11 MR. WEEDMAN: I don't like the word automatic. I don't
12 think anybody would do anything automatically, your Honor.

13 THE COURT: If you turn that question around, I have no
14 objection. If you turn it around the way you indicated there.

15 MR. WEEDMAN: Well, I will try that, your Honor.

16 THE COURT: The word rejection is one thing. But to ask
17 him would you vote guilty, is another thing. You see, you have
18 to change your question. To reject all the testimony is one
19 thing. If you ask him -- you can rephrase your question
20 without asking would you vote guilty for the death penalty.
21 That is the thing. If you could rephrase your question you
22 are entitled to it.

23 MR. WEEDMAN: Well I will try then, your Honor.

24 THE COURT: All right. Try it again.

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5B.

1 Q BY MR. WEEDMAN: If during the guilt phase,
2 Mr. Penske, you are convinced that the defendant has committed
3 first degree murder, a willful, premeditated killing with
4 malice aforethought without justification or excuse, would
5 you then in the penalty phase impose the death penalty without
6 consideration of anything else other than the fact that my
7 client in your mind stands convicted of first degree murder?

8 A No, I wouldn't.

9 THE COURT: Now, I might say I am in full accord with the
10 propriety of that question. I think that is very well stated.
11 I mean you posed it properly.

12 MR. WEEDMAN: Thank you, your Honor. Sorry it took me
13 so long to do so.

14 THE COURT: I want to say to the jury the comments I made
15 in argument here, I am not trying to hassle you or disturb
16 you.

17 MR. WEEDMAN: I appreciate that.

18 THE COURT: But it is merely as though I were talking with
19 you in chambers to get a proper question there. I think the
20 last question posed, the question is proper.

21 MR. WEEDMAN: Thank you.

22 THE COURT: I am not speaking in criticism to either
23 counsel when I have any discussion with you.

24 MR. WEEDMAN: I am sure we both understand that.

25 THE COURT: Go ahead. Thank you.

26 MR. WEEDMAN: Thank you.

27 Q I take it, Mr. Penske, by your last answer before
28 you would consider either penalty you are going to consider

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1 all of the evidence in the case, indeed both evidence surround-
2 ing the commission of the offense as well as evidence in
3 mitigation or aggravation during a penalty phase?

4 A That's right.

5 Q In other words, you are going to sit back and you
6 are going to wait and you are going to listen and then you are
7 going to make up your mind whether or not life imprisonment
8 is appropriate or the death penalty is appropriate in this
9 case, am I right on that?

10 A That's right.

11 Q Do you understand, Mr. Penske, that the law has no
12 preference one for the other, the law merely requires that you
13 be fair to both sides, that you listen and consider all of the
14 evidence? What you do thereafter is totally within your
15 discretion; do you understand that?

16 A Yes.

17 Q Okay. This case I am sure you have heard over and
18 over may last a couple more months. Would that cause you any
19 personal hardship?

20 A I'm afraid it would.

21 Q I probably should have asked that at the outset.
22 Can you tell us about that?

23 MR. KATZ: Excuse me your Honor. One statement Mr. Weedman
24 stated I don't think is correct. I don't think the case will
25 last a couple of months. It may last six weeks.

26 THE COURT: Let me hear the question, please.

27 (The question was read by the reporter
28 as follows:)

5b-3

1 "Q This case I am sure you have
2 heard over and over may last a couple more
3 months. Would that cause you any personal
4 hardship?"

5 THE COURT: You may answer the question. Overruled.

6 MR. PENSKE: I am employed. I don't get a salary, I
7 receive just part of my wages while I am on jury duty and I
8 put in for a 30-day leave for jury duty.

9 Q BY MR. WEEDMAN: You won't be paid for beyond 30
10 days then?

11 A I don't even know that, really. But I am not
12 receiving my full pay now when I am on duty.

13 Q Even this 30 days is causing you some financial
14 hardship?

15 A Yes. Well, I am on the fourth week.

16 Q Are you married?

17 A I am divorced.

18 Q Are you supporting anyone other than yourself?

19 A I help my mother and father out. They are retired.

20 Q Are you asking to be excused on the ground that
21 it would cause you some financial hardship?

22 A It would be a hardship for me, yes.
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6-1

1 MR. KATZ: I will ask permission to --

2 MR. WEEDMAN: Yes, perhaps Mr. Katz has some questions
3 in that regard, your Honor.

4 THE COURT: All right.

5 BY MR. KATZ:

6 Q Mr. Penske, as I understand it you are employed
7 with Airesearch; is that correct?

8 A That's right.

9 Q And does that firm, for the tenure of your jury
10 duty, pay the difference between what you are receiving from
11 the county for services performed as a juror and the salary
12 that you would ordinarily receive?

13 A That's right.

14 Q All right; so, in other words, taking the county
15 money that you will eventually receive for jury services
16 performed and the money that you receive from Airesearch, you
17 are receiving full salary; is that right?

18 A Over the long period, it would be right.

19 Q All right.

20 Now, at this time I take it you don't know
21 whether or not Airesearch would be willing to continue this
22 procedure if you were selected to serve as a member of this
23 jury panel in the trial which may go six weeks to two months;
24 is that right?

25 A I don't know that now, no.

26 Q Would you be able to call your employer and
27 ascertain that fact as to whether or not they would be willing
28 to release you for services to be performed in connection with

1 a jury function and determine whether or not you will receive
2 pay?

3 A I could call and find out, yes, sir.

4 Q Now, assuming for a moment that your employer would
5 continue to pay you the difference between your salary and
6 what you now presently receive by way of jury service, would
7 that cause you additional hardship?

8 A It would, because I wouldn't be receiving the money
9 for quite a while.

10 Q I take it this hardship is such that you would not
11 be able to live from day to day; is that correct?

12 A Well, I can live from day to day but I would get
13 behind in everything that I have, I am sure.

14 Q Do you think you would be so concerned about your
15 financial straits, as it were, that you would be unable to pay
16 full and careful attention to the facts as they unfold during
17 the course of this trial?

18 A I really don't know.

19 Q I take it you are asking to be excused, sir?

20 A Yes, I would ask to be excused, sir.

21 MR. KATZ: I will stipulate --

22 THE COURT: Pass for cause?

23 MR. KATZ: I will stipulate.

24 MR. WEEDMAN: Yes, offer to stipulate that Mr. Penske
25 may be excused, your Honor.

26 THE COURT: All right, thank you very much.

27 Thank you, sir. Call another juror.

28 MR. KATZ: Your Honor, may we have a short conference in

1 chambers on the record?

2 THE COURT: I thought you stipulated?

3 MR. KATZ: Yes -- without reference to this juror.

4 THE COURT: No, let's get another juror.

5 You want another?

6 MR. KATZ: Yes, I was just going to ask to see the court
7 in chambers, on the record.

8 THE COURT: Well, let me get the other juror first, if
9 you will.

10 MR. KATZ: Yes, thank you.

11 THE CLERK: Earl Mitchell, M-i-t-c-h-e-l-l.

12 THE COURT: Now, let me get my voir dire here, if you
13 will.

14
15 EARL MITCHELL,

16 BY THE COURT:

17 Q Now, Mr. Juror, have you heard everything that I
18 have said to the other jurors since we started the picking of
19 the jury in this case?

20 A Yes, I have.

21 Q Did you hear me read the charge that has been filed
22 against the defendant in this case?

23 A Yes.

24 Q Now, I want you to assume you have been selected as
25 a juror in this case; you have gone to the jury room to decide
26 the case. At that point the jury could make the finding of
27 not guilty; they could make a finding of guilty.

28 Assume the jury found the defendant guilty. At

1 that point the jury could make a finding of second degree
2 murder and that would conclude the case. The jury could make
3 a finding of first degree murder.

4 If the jury makes a finding of first degree murder
5 then there is another hearing held, called a penalty hearing.

6 Now, are you clear up to that point?

7 A I am.

8 Q At the penalty hearing the jury must decide on
9 punishment, whether it is the death penalty or life imprison-
10 ment; that is up to the jury.

11 Is that clear to you?

12 A Yes, it is.

13 Q Now, assume that you are in the penalty hearing
14 and you have heard all the testimony, you are voting on the
15 question of the death penalty or life imprisonment. Suppose
16 you are voting on it; now, I want to ask you this question:
17 at that time, when you are voting on that question, would you
18 automatically vote against the imposition of the death penalty
19 without regard to any evidence that might have been produced
20 at the trial of this case?

21 A Yes, I would.

22 Q The answer is "Yes"?

23 A Yes, that's right.

24 Q All right. Is there any question in your
25 mind about it.

26 A No, no question about.

27 THE COURT: I think, gentlemen, that is a pretty clear
28 statement.

1 Is there any further examination; and, if not, I
2 would excuse him.

3 MR. WEEDMAN: I will agree, your Honor, that Mr. Mitchell
4 be excused.

5 THE COURT: I will excuse you.

6 MR. KATZ: That is under 1073 and 1074(8) of the Penal
7 Code?

8 THE COURT: Just a minute.

9 You can go, sir. Thank you, sir.

10 I make a finding, for cause and, further, that the
11 answers, the very honest answers of the juror indicates that
12 the court should excuse under the Witherspoon ruling as well
13 as the fact that I find that there exists for cause grounds
14 to excuse the juror, which I do under section 1073.2 and
15 1074, subdivision 8.

16 I think that covers it.

17 Well, we are up to about 4 minutes of 12; let's
18 go over till 2 o'clock. If you will kindly return promptly
19 we will get right under way.

20 Do not discuss the case or come to any opinion or
21 conclusion.

22 Thank you, gentlemen.
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6A

1 (The following proceedings are
2 had in chambers:)

3 THE COURT: Counsel and defendant are in chambers;
4 sheriff and reporter.

5 Go ahead.

6 MR. KATZ: Your Honor, I asked for this meeting because
7 I was disturbed about the nature and the course of Mr. Weedman's
8 latest inquiries.

9 I would like to state by way of preface that I am
10 very pleased with the questions that Mr. Weedman has properly
11 framed. I think he has been doing a very professional job
12 and a very fine job, so I have no quarrel with the general
13 tenor of his questioning.

14 However, some of the latest questions have been the
15 so-called "why" questions which your Honor observed in connec-
16 tion with the discourse between counsel and the court. I
17 don't think we can use this jury room as a forum by which to
18 determine the propriety or impropriety of the laws of this
19 State. They have to accept the laws as given to them by his
20 Honor at the conclusion of the case.

21 Now, in connection with the death penalty the only
22 issue, really, is whether or not someone is opposed to the
23 death penalty or whether they prefer life imprisonment; and
24 then after that fact is ascertained it is proper to inquire
25 whether those views are so deep-seated that they would
26 automatically refuse to consider in this case and vote a
27 certain result, whether it is in favor of life or in favor of
28 the death penalty.

6a-1

1 To ask, "Well, is it your theory that the death
2 penalty is proper because it is a deterrent?" is not a proper
3 kind of inquiry.

4 Now, in essence Mr. Weedman is asking that kind of
5 argumentative question in asking, "Well, why do you think the
6 death penalty is proper?" This is not a proper course of
7 inquiry. He can ask whether or not he favors the death
8 penalty, whether he opposes the death penalty, whether his
9 feelings are reasonably fixed, whether he is flexible in that
10 regard; but I think that's as far as either counsel can go in
11 that area because, otherwise, we are going to get into a
12 philosophical discourse between counsel and the prospective
13 juror, the answers to which may poison the other minds of the
14 jury and serve as a forum to discuss, in fact, the propriety
15 of the laws of the State of California, and I think that is
16 improper.

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1 THE COURT: Go ahead.

2 MR. WEEDMAN: Your Honor, I would just respectfully
3 suggest that counsel wait until he hears the question rather
4 than putting words in my mouth, first of all, and trying to
5 ask your Honor to prejudge my questions with respect to
6 objections.

7 THE COURT: Yes. Well, I think to a certain point
8 Mr. Weedman is correct, although I do agree a great deal in
9 what you say, but it is very hard for the court to tell
10 counsel "don't ask this, don't ask that."

11 I will make the observation I think you are basically
12 correct as to trying to get in a philosophical discussion.

13 MR. WEEDMAN: Well, I also agree with that, your Honor.

14 THE COURT: Yes. Let's wait until the questions are asked.
15 Let's take the next step and see where we go.

16 MR. KATZ: Thank you.

17 THE COURT: All right. Thank you.

18 MR. WEEDMAN: All right. At 2 o'clock then, your Honor?

19 THE COURT: Yes. Thank you.

20 MR. WEEDMAN: Thank you.

21 THE COURT: Thank you.

22 (At 12 noon, a recess was taken
23 until 2 p.m. of the same day.)
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LOS ANGELES, CALIFORNIA, TUESDAY, JUNE 29, 1971

2:15 P.M.

THE COURT: All right.

Now, gentlemen, People against Steve Grogan.

MR. WEEDMAN: Your Honor, I wish to apologize for being late. I made a mistake of getting off on the new Third Street exit; it forced me to go downtown to Sixth and I got involved in a construction area, and I am very sorry for that, your Honor.

THE COURT: It is all right.

Defendant is here, Steven Grogan; counsel is here; People are here; the jury is in the jury box.

We had just excused one of the jurors, No. 6, so call another name, if you will, please, Mr. Clerk.

MR. KATZ: Juror No. 1, I believe, your Honor --

MR. WEEDMAN: No, No. 6.

MR. KATZ: I am sorry. I stand corrected.

THE CLERK: John F. Markert, M-a-r-k-e-r-t.

JOHN F. MARKERT

BY THE COURT:

Q Now, Mr. Juror, I will ask you some questions. Have you been in the jury -- back of the courtroom as a prospective juror since we started the picking of the jury in this case?

A Yes, sir.

Q And have you heard all of the statements I have
made to the other jurors?

A Yes, sir, your Honor.

Tke 9

1 Q Did you hear me read the charge that has been
2 filed against the defendant in this case?

3 A Yes.

4 Q Now, I want you to assume that you have been
5 selected as a juror to try this case. Assume that the case
6 has been tried and you have gone to the jury room to decide
7 the case. At that point the jury could bring in a verdict
8 of not guilty as charged which would conclude the case entirely,
9 or they could bring in a verdict of guilty as charged. If
10 the jury should bring in a verdict -- assume the jury brought
11 in a verdict of guilty as charged and set the degree at
12 second degree murder. That also would conclude the case.

13 However, assume that the jury brought in a verdict
14 of first degree murder, then there would be a subsequent
15 hearing held, a penalty hearing. Assume that you are in the
16 position of having finished or concluded the penalty hearing.
17 At the penalty hearing the jury must make a finding of
18 penalty of either the death penalty or life imprisonment.

19 Now, I am going to ask you to assume that you are
20 in a situation or a position where you are voting on a
21 question of the death penalty or life imprisonment. At that
22 time would you automatically vote against the imposition of
23 the death penalty without regard to any evidence that might
24 be developed during the trial of this case?

25 A No.

26 THE COURT: Thank you. I will pass the juror for cause.

27 The defendant may inquire.

28 MR. WEEDMAN: Thank you, your Honor.

1 THE COURT: Very well.

2 Q BY MR. WEEDMAN: That is Mr. Markert?

3 A Yes, sir.

4 Q Mr. Markert, in the event that there was a finding
5 of guilty of murder in the first degree in this case are your
6 feelings about the death penalty such that you would impose
7 the death penalty without further consideration of the
8 evidence?

9 A Well, in this particular case I have sat here for
10 the past week and a half. This case is based on circumstantial.

11 Q Well, the prosecutor has indicated that that may
12 well be the case.

13 A All right.

14 Q Yes.

15 A In any case, if the charge was guilty on facts
16 I probably would consider it.

17 Q It's the fact of its being perhaps largely a cir-
18 cumstantial evidence case?

19 A Right.

20 Q Well, in that event then perhaps just so the record
21 will be clear, tell us what you think you would do or would not
22 do.

23 A In what way?

24 Q With respect to penalty.

25 A Well, providing the facts were brought and the
26 testimony was brought it, and there was a factual case, in
27 other words, other than circumstantial, in my belief that the
28 charge and having pointed out to the defendant being guilty,

1 and providing both -- all went that way after deliberation
2 I probably would go that way. And of course I could go the
3 other way if he was proven the other way out, too.

4 Q Well, let's see now if we understand. First of
5 all, it appears as though the case will be largely a circum-
6 stantial evidence case, but let's just proceed on that
7 assumption whether it is true or not at this point.

8 So assuming that the prosecution case is a circum-
9 stantial evidence case do you feel first of all that you could
10 follow the court's instructions and enter into an appraisal
11 of the evidence from both sides during the guilt phase,
12 during the first part of the case?

13 A Right.

10

10-1

1 Q In other words, you wouldn't have any objections
2 to circumstantial evidence as long as you were so satisfied
3 beyond a reasonable doubt and to a moral certainty of the
4 guilt of the defendant, as far as that kind of evidence goes?

5 A I would -- naturally I would look at it with an
6 open mind.

7 Q Certainly.

8 A Both ways.

9 Q But the fact that it is ^a circumstantial evidence --

10 A Circumstantial --

11 Q -- case, you wouldn't say, "Well, I am not going
12 to listen to that at all because it is circumstantial evidence"?

13 A No, I wouldn't put -- I'd have to listen; I would
14 want to listen, I would look at it with an open mind.

15 Q Certainly.

16 A And appraise it this way.

17 Q And then, of course, assuming that you are satisfied,
18 even though it is circumstantial evidence, that it is a first
19 degree murder case, then, of course, you'd have to go into a
20 penalty phase; you understand that, of course?

21 A Right.

22 Q Now, bearing in mind, of course, that you would
23 still have a circumstantial evidence case as far as guilt is
24 concerned, what would you do with respect to the death penalty
25 as far as there is circumstantial evidence?

26 A Let me put it this way, with due respect to the
27 defendant as well as the prosecution and defense, I still
28 feel this way. I don't think you are going to get my fair --

1002

1 how would I put it -- view on this due to the fact it is
2 circumstantial.

3 Q In other words, you feel --

4 A Instead of digging right down into it, I am going
5 to feel this way, it is still circumstantial either way you
6 look at it.

7 Q But you feel --

8 A But --

9 Q Go ahead.

10 A -- just as his Honor said, in any other case would
11 I go, if it was up and it was all factual, toward the death
12 penalty in any case, yes -- no, I wouldn't argue against the
13 death penalty but I would argue the point of circumstantial;
14 that's my argument.

15 Q Well, so we'll be clear about it, you have no
16 objection to using circumstantial evidence in the guilt phase
17 of the trial?

18 A Right, I have no argument at that point.

19 Q But you feel that in a penalty phase that you
20 would not impose the death penalty in a circumstantial evidence
21 case?

22 A On circumstantial evidence.

23 Q Would you at least listen to and in any way
24 consider such evidence as part of the penalty phase of the case?

25 A I would listen; yes, I would.

26 Q Referring back to Mr. Katz' illustration of the
27 child and the cookie jar, I suppose you remember that case?

28 A Yes, I do.

1 Q I suppose that it certainly could be said, thinking
2 about that example, that circumstantial evidence can sometimes
3 be stronger than direct evidence?

4 A Beyond the child with the cookie in his face, the
5 other one putting his finger to it, it is still circumstantial,
6 unless there was one other person to witness it, to say, "Yes,
7 this is it."

8 Q Well, let me give you an example, perhaps, of
9 circumstantial evidence, and that would be -- well, I think I
10 am correct in this, I hope so -- I was going to say fingerprint
11 evidence, but I better back away from that; I'm not sure where
12 that falls.

13 MR. KATZ: That is circumstantial.

14 MR. WEEDMAN: All right; Mr. Katz, then, appears to
15 agree with my first impression that fingerprint evidence is
16 circumstantial evidence.

17 Q And I think we all agree that fingerprint evidence
18 is very, very strong. I don't think anyone feels that two
19 people have ever been shown to have identical fingerprints.

20 With that kind of circumstantial evidence illustra-
21 tion in mind, do you feel that maybe you could now begin to
22 accept, at least in principle, the idea of circumstantial
23 evidence as opposed to direct?

24 A Now, there's where confusion starts in there.
25 Fingerprints, in my opinion, would more or less --

26 Q Be direct evidence?

27 A More or less.

28 Q Yes, I see. Well, I think I follow your thinking,

1 and that's why I hesitated when I came up with that example
2 because I think I see why you think it is direct evidence.
3 Okay.

4 A Apart from, let's say, guilt established by
5 circumstantial evidence in the case, would that fact, alone,
6 absolutely preclude you from at least considering the
7 imposition of the death penalty?

8 A No, I wouldn't say that. Let's see, let's have
9 that again.

10 Q Would the fact of guilt -- this is a hypothetical
11 question, of course -- would the fact that guilt is established
12 solely by circumstantial evidence absolutely preclude you,
13 irrespective of any other evidence that may come in, absolutely
14 preclude you from even considering the imposition of the death
15 penalty?

16 A I wouldn't know how to answer that.

17 Q Well, let me try and rephrase it.

18 Assuming that the only evidence of guilt comes
19 from circumstantial evidence and you now go into the penalty
20 phase, with that in mind would you absolutely be unable to
21 even consider the imposition of the death penalty?

22 A Even though the guilt, due to the circumstances --
23 I wouldn't even consider it, the death penalty in this case,
24 on that.
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11

EXHIBIT 1
10/10/70

Tke 11

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Q Now in addition to such evidence of course

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coming from the guilt phase and you are entitled to consider

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that, naturally, during the penalty phase -- in addition to

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that there is other evidence in mitigation and perhaps in

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aggravation of the offense. Would you consider that with

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respect to the death penalty, or would you even, despite

7

that additional evidence in mitigation and in aggravation,

8

reject any consideration of the death penalty because the

9

guilt is established --

10

A I would do the latter.

11

Q -- by circumstantial evidence?

12

A I would reject it due to the circumstantial

13

evidence.

14

Q So no matter how we cast it, if guilt comes from

15

circumstantial evidence you would not consider --

16

A I couldn't consider it.

17

Q -- imposition of the death penalty?

18

A Not in all fairness to myself as well as to the

19

defendant or either party.

20

Q So what we are saying is that if guilt was

21

established here through circumstantial evidence only you

22

would automatically vote against the death penalty?

23

A That's right.

24

Q Okay. So we will finally be clear about it you

25

would nonetheless feel that you could accept the court's

26

instructions during the guilt phase with respect to circumstan-

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tial evidence?

28

A Yes, I would accept it.

11-2

1 Q I hope that you understand that despite the fact
2 we are talking about the utilization of circumstantial
3 evidence leading to guilt, that it is perfectly proper for the
4 jury if they so see fit to reject circumstantial evidence?
5 In other words, the mere -- I mean we understand each other
6 obviously, that just because it is circumstantial evidence
7 doesn't mean it is any better than direct evidence?

8 A No.

9 Q I mean we spent so much time talking about circum-
10 stantial evidence I just wanted to ask you one rather obvious
11 question.

12 A Right.

13 Q In other words, you understand that if the jury is
14 not satisfied with respect to the evidence, irrespective of
15 whether it is direct or circumstantial evidence, then they
16 should reject it?

17 A Right.

18 MR. WEEDMAN: Okay. Your Honor, inasmuch as there has
19 been some, I guess for the prosecution, rather provocative
20 replies to the questions about the death penalty on the part
21 of this prospective juror, rather than my going into perhaps
22 some lengthy general questions, maybe Mr. Katz would like to
23 inquire on this particular area.

24 THE COURT: Well, you can pose the question, whatever it
25 is.

26 MR. WEEDMAN: All right, your Honor. I will continue.

27 Q It has been estimated that this trial may last as
28 much as eight weeks. Mr. Katz is more optimistic than that,

1 and I certainly hope that he is correct in a six-week
2 estimate. As a matter of fact, I had joined in a six-week
3 estimate originally.

4 In any event, if it lasted eight weeks, would you
5 suffer a personal hardship?

6 A Well, I work for the government and I have been
7 allowed 30 days or 20 days, whatever the case may be, for
8 jury duty. And the only hardship it would create is my depart-
9 ment, because I am a supervisor in that particular department.

10 Q What sort of work do you do?

11 A The vehicle maintenance facility for the Federal
12 Government. It is automotive maintenance.

13 Q I see. You are a supervisor?

14 A Supervisory position. Like I say, they haven't
15 replaced me yet with any other help. I had to go during my
16 lunch hour and in the morning and the evening to catch up with
17 whatever paperwork there has to be done.

18 Q Our experience, of course, has been that the
19 Federal Government will continue to pay you --

20 A They will.

21 Q -- right, if you have to serve beyond the 30 days
22 on the jury?

23 A If it does go on.

24 Q But that is the only hardship?

25 A Other than the workload.

26 Q So it would perhaps be a hardship on your fellow
27 workers but not narrowly at least a hardship on you personally?

28 A No.

1 Q Have you heard of Charles Manson?

2 A Yes, sir, I have.

3 Q Can you tell us briefly what you have learned or
4 what you may recall, however dimly it might be, about Charles
5 Manson?

6 A Well, I have read about everything that I imagine
7 has been printed on paper. My only means of information of
8 any of the case or any case such as the Charles Manson case.
9 And I feel this way, that I am against it, all the way. I
10 have read -- I won't go into detail, but of what I have read
11 I am against their concept, the way of thinking. And this is
12 only circumstantial, as to what I have read.

13 Q Certainly.

14 A Right.

15 Q In other words, you formed some opinion --

16 A I haven't seen anything that has changed my mind
17 in that manner or in that case that I would say go for him.
18 And that is why I say I want to be fair about this with your
19 client as well as the People's end of it.

20 Q Certainly. Now, we anticipate that the evidence
21 will show an association between my client and Charles Manson.
22 That indeed, using the phrase very loosely -- I don't want
23 to be bound to it by my questions on voir dire -- but very
24 loosely speaking the evidence may well show that my client
25 is a member of the "Manson family." Would that evidence,
26 should it emerge, do you feel so prejudiced against my client
27 that you could not give a fair evaluation of all of the
28 evidence?

1 A I feel I wouldn't be fair.

2 MR. WEEDMAN: All right. Well, I appreciate your candor
3 very much. And I am sure the prosecution is likewise grateful
4 for it.

5 Your Honor, I think on that basis I would respect-
6 fully challenge Mr. Markert, 1073, subsection 2, your Honor.

7 MR. KATZ: I think counsel is correct. The People would
8 join, and I thank Mr. Markert.

9 THE COURT: Do you join in the stipulation?

10 MR. KATZ: Yes, your Honor.

11 THE COURT: Very well. I will excuse you. Thank you.

12 MR. WEEDMAN: Thank you, Mr. Markert.

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1 THE COURT: Counsel, do you want to step up here, just
2 the two of you, at the bench a minute, if you will,

3 (Conference at the bench with both
4 counsel not reported.)

5 THE COURT: Now we will call another juror.

6 THE CLERK: Miss Arlene M. Hoffman, H-o-f-f-m-a-n.

7
8 ARLENE M. HOFFMAN

9 BY THE COURT:

10 Q Now, lady, I will first of all examine you a little
11 more profoundly on these basic questions in just a moment.

12 Have you been in the courtroom ever since we
13 started picking the jury in this case?

14 A Yes, I have.

15 Q Have you heard everything that I have said to the
16 other jurors in the jury box?

17 A Yes.

18 Q Now, I am going to jump over a number of very
19 important questions and get to this question. If this case,
20 the trial of this case should take six weeks or two months --
21 I don't know how long it would take, I am asking you to assume
22 that -- would that create -- would that time element create
23 such a hardship on your part that it would bias or prejudice
24 or affect your thinking or your judgment in the case? Would
25 it serve as an aggravating factor that you couldn't be --
26 your mind couldn't be free and unbiased in the trial of the
27 case?
28

A Yes, I'm afraid it would.

11a-2

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Q The answer is yes?

A Yes.

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1 THE COURT: Do you, counsel, want to inquire on that
2 point?

3 MR. KATZ: Yes, your Honor, if we may.

4 THE COURT: Let's take the defendant first; did you want
5 to inquire?

6 MR. WEEDMAN: I will defer to Mr. Katz, your Honor.

7 THE COURT: People want to inquire?

8 MR. KATZ: Well, yes, *Carroll* caring the onus, if you will --
9 Mr. Weedman, as you can see, is a very fine attorney and it is
10 quite a tactic.

11 BY MR. KATZ:

12 Q In any event, let me ask you this question: may I
13 ask you the basis -- and I am not trying to pry --

14 A Yes.

15 Q -- but can you please explain to the court and
16 counsel the basis for your hardship?

17 A Well, it would be at work, I am afraid I might be
18 replaced in my department.

19 Q May I ask you this question: with whom are you
20 employed?

21 A American Airlines.

22 Q And in what capacity, ma'am?

23 A In tourist -- tour coordinator.

24 Q How long have you been employed there?

25 A In this particular department, a year.

26 Q How long have you been employed with the company?

27 A 13 years.

28 Q And do you think you have pretty good tenure

12-2

1 there so that basically your job with American Airlines is
2 secure?

3 A The job, itself, yes.

4 Q And do you think that in the event that you were
5 required, because we felt you would make a fine juror in this
6 trial for, say, a period of six weeks, that the company would
7 penalize you and cause you to lose your job?

8 A Yes, it could happen.

9 Q In other words, you are saying that after 13 years
10 of tenure with American Airlines and by reason of the fact you
11 would be required to serve for, say, six or eight weeks in a
12 murder trial for the county, that American Airlines would
13 possibly cause the termination of your services?

14 A Not termination of services, but in this particular
15 job.

16 Q All right; so what we are saying is that you have
17 at the present time a job that you like very much; is that
18 correct?

19 A That's correct.

20 Q All right. Now, assuming for a moment that you
21 lost that particular job would you possibly be reduced to some
22 other level whereby you would not receive the same salary, or
23 would it be kind of a lateral transfer, whereby you would
24 perform other functions and receive basically the same salary?

25 A I don't believe I would lose salary, no.

26 Q All right, so that what you are worried about is
27 that you may possibly be transferred from the job which you
28 enjoy now and find rewarding and placed in some other

12-3

1 department; is that correct?

2 A That's right.

3 Q Are you married, ma'am?

4 A No.

5 Q Are you the sole support of yourself?

6 A Yes.

7 Q Do you believe that if selected as a juror in this
8 trial and were required to serve possibly six or eight weeks
9 that this, in itself, would cause you a financial hardship --
10 or, let me ask it this way --

11 A No.

12 Q All right, your answer is "No."

13 I take it, then, the company would pay the differ-
14 ence between what the county is paying for jury service and
15 your present salary scale, is that correct, for the period of
16 service?

17 A Yes.

18 Q Let me ask you this question, and please think
19 very carefully before you answer it -- and again, I am not
20 trying to badger, please understand that -- do you think that
21 if selected as a juror you would be willing to consider all
22 of the evidence, to give both sides the benefit of your
23 individual opinion and impartially evaluate everything that
24 unfolds during the course of the trial?

25 Could you do that?

26 A I would probably feel anxious about getting back
27 to work; it might bias me, yes.

28 Q That is very understandable, but let me ask you

1 this: despite the fact that you might feel a little anxious
2 about it, do you think that if his Honor instructed you both
3 sides were entitled to the undivided attention of each juror
4 that you could give us the undivided attention?

5 A I don't think so.

6 Q All right. Let me state this, and this is the
7 last question and I will preface it with this remark: I hope
8 you appreciate the spirit in which I am asking this question.

9 It is very easy, if you are of a mind not to serve,
10 as you can see by the way the questions are asked, to give a
11 certain response; you know that it is very easy to say, "I am
12 against the death penalty," if you want to get off the panel,
13 or that, "I would always vote for the death penalty," if you
14 want to get off the panel.

15 You can see that.

16 A Yes.

17 Q In the same connection it is easy to say, "I have
18 a hardship," in the event you don't want to serve and be
19 excused.

20 Bearing all this in mind and bearing in mind the
21 responsibility of every citizen to perform a function, to sit
22 as a juror, if selected as a juror would you promise the court
23 and promise counsel that you would, in fact, give us your
24 undivided attention and fairly and impartially weigh the
25 evidence in this case?

26 A Yes.

27 MR. KATZ: Thank you, ma'am. Your Honor, I think the
28 juror is very candid in answering some very difficult questions,

1 and accordingly indicated she could and would be impartial.

2 THE COURT: Do you stipulate or not?

3 MR. KATZ: No stipulation.

4 THE COURT: Do you stipulate or not?

5 MR. KATZ: No stipulation.

6 THE COURT: All right, then I think I will -- upon that
7 point I will pass the juror and allow it for counsel on
8 possible questions of peremptory or not.

9 MR. KATZ: Excuse me, your Honor --

10 THE COURT: All right.

11 MR. KATZ: -- would your Honor ask the Witherspoon
12 questions, your Honor?

13 THE COURT: Do you want to stipulate?

14 MR. KATZ: I don't believe your Honor had asked the
15 Witherspoon questions.

16 THE COURT: No, I'm going to stand on the statement
17 there and proceed; unless there is a stipulation I won't
18 proceed on that. I am not criticizing anyone.

19 MR. KATZ: I understand that.

20 THE COURT: I want to make a clear record here. There
21 is no stipulation?

22 MR. KATZ: No, at this point there is not.

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1 BY THE COURT:

2 Q Now, lady, I have other questions to ask you.

3 You told me you had heard everything that I stated
4 to the other jurors in the jury box and you had heard me read
5 the charge in this case; that's right?

6 A Yes, sir.

7 Q All right.

8 Now, I want you to assume that you have been
9 selected as a juror, you have heard all of the testimony, you
10 have gone to the jury room to decide the case.

11 Now, at that time the jury could make a finding of
12 guilty or not guilty. If the jury decides not guilty, the
13 case is concluded. If the jury decides guilty, then the jury
14 also would have to make a finding of degree. If the jury made
15 a finding of second degree murder, the case also would be
16 concluded as far as the jury is concerned. If the jury should
17 make a finding of first degree murder, then there would be a
18 subsequent hearing that is commonly known as a penalty hearing.

19 After the penalty hearing the jury would make a
20 finding of the penalty, which would either be one of two
21 penalties, a death penalty or a life imprisonment penalty.

22 Is that all clear to you?

23 A Yes, sir.

24 Q If you will, please, assume, lady, that the penalty
25 hearing is concluded and you are about to vote, or are going
26 to vote on the question of penalty. At that time would you
27 automatically vote against the imposition of the death penalty
28 without regard to any evidence that might have been developed

12a-2

1 at the trial of this case?

2 A No.

3 THE COURT: "No," thank you.

4 Now, I will pass this lady for cause, and counsel
5 for defendant may examine.

6 MR. WEEDMAN: Thank you, your Honor.

7 Q In the event this matter gets to a penalty phase,
8 do you feel that you would automatically impose the death
9 penalty?

10 A No, no.

11 Q When I ask the question, of course, I am talking
12 about a finding of murder in the first degree, which means
13 willful, premeditated, with malice aforethought; still, under
14 those circumstances you would weigh the evidence and give
15 consideration to the People's position with respect to the
16 death penalty and our obvious position to anything but the
17 death penalty?

18 A Yes.

19 Q Have you had prior jury experience, Miss Hoffman?

20 A Yes, I have; that was a civil case.

21 Q Was that on your present tour?

22 A Yes.

23 Q Okay. I am sure you appreciate that the
24 instructions that you will be given, if you are chosen here
25 as a juror, at the conclusion of the case, will differ
26 markedly from the instructions that you received in the civil
27 case.

28 A Yes.

1 Q I am sure you appreciate already that there are
2 substantial differences in the burden of proof and the quantum
3 of proof that is required here for a verdict?

4 A I was on jury duty two and a half years ago and at
5 that time had two criminal cases.

6 Q What kind of cases were those, Miss Hoffman?

7 A Robbery; they were both robbery.

8 Q Both criminal cases, both robbery cases?

9 A Yes.

10 Q I take it, it is obvious that you wouldn't apply
11 anything that you felt that you had learned there --

12 A No, no.

13 Q -- in making any determination about the evidence--

14 A No.

15 Q -- or the verdict or judgment in this case?

16 Okay.

17 I take it you have heard of Charles Manson?

18 A Yes, I have.

19 Q And the Manson family?

20 A Yes.

21 Q Have you formed any opinion about Charles Manson
22 and the Manson family?

23 A In a way, yes.

24 Q It is a rather difficult question --

25 A Yes.

26 Q -- to throw at you, and perhaps you can attempt to
27 answer for us, at least, what is your opinion?

28 A Well, just like a foreign person --

1 Q If the evidence here should show that my client,
2 Mr. Grogan, is a friend of Charles Manson's and perhaps in
3 large measure approves or adopts what could be called the
4 lifestyle of Charles Manson, do you feel that that would so
5 prejudice you that you couldn't give my client a fair trial
6 on the evidence in this case?

7 A No, because he's a different person.

8 Q Sure. Is there anything at all about the fact that
9 this case may show -- that is, may show that my client is
10 associated in some way with Charles Manson, that makes you feel
11 that you could not give my client a fair trial here?

12 A No.

13 Q Is there anything at all about that that makes you
14 feel that you couldn't give the People a fair trial in this
15 case?

16 A No.

17 Q In other words, you are not going to lean over
18 backwards, I take it; you are going to try and stand up just
19 as straight as you can --

20 A Consider both sides.

21 Q -- and consider both sides; okay.

22 Now, supposing during the guilt phase of the trial
23 you realize that you are faced with a very close case, you
24 find that there are all kinds of events that are perhaps
25 equivocal in your mind, that you can't quite make up your
26 mind who is telling the truth, you can't make up your mind
27 that anyone is telling the truth, as a matter of fact, and
28 perhaps several days have gone by.

1 Will you finally allow your opinion of Charles
2 Manson, gained from another case and from pretrial publicity,
3 to now come in and affect your judgment with respect to the
4 evidence?

5 A Well, I can see where it might, you know, influence
6 my thinking, if, as you say, it was --

7 Q A close case?

8 A -- a close case.

9 Q Certainly. I take it from your answer, then, that
10 you feel, at least there is a possibility in such a situation
11 that you would resolve the matter against my client because of
12 his association with Charles Manson?

13 A Well, if it was almost a toss of the coin situation.

14 Q You feel in that case because the evidence in your
15 own mind is evenly divided --

16 A Uh-huh.

17 Q -- you would resolve the doubt against my client by
18 virtue of everything you have heard and read about Charles
19 Manson and the Manson family?

20 A Right.

21 MR. WEEDMAN: Well, I appreciate your honesty in the
22 matter and it is something that obviously we are very concerned
23 about in this case.

24 Your Honor, I think in view of Miss Hoffman's
25 answer, I will challenge her for cause under 1073, subsection
26 2, your Honor.
27
28

Tke 13.

1 MR. KATZ: Your Honor, may I have the opportunity to
2 question the prospective juror.

3 THE COURT: Well, I think the juror -- I won't excuse
4 her for cause. You may proceed with your examination.

5 MR. KATZ: If counsel has concluded.

6 THE COURT: Do you pass?

7 MR. WEEDMAN: Well, I thought perhaps counsel was just
8 asking leave to inquire on this one point. I am not finished.

9 THE COURT: Well, I am satisfied for cause. Now,
10 anything further from the defense?

11 MR. WEEDMAN: Well, yes. I will go forward, your Honor.

12 THE COURT: All right.

13 (Conference between counsel not reported.)

14 MR. WEEDMAN: Mr. Katz and I feel it would be appropriate
15 and perhaps save time if he would go forward on just this
16 question on pretrial publicity.

17 THE COURT: I think it is a matter of peremptory. I am
18 satisfied for cause. Now, you may continue.

19 MR. WEEDMAN: Well, there may be a stipulation, your
20 Honor. Just a time saver.

21 THE COURT: If you have any questions, go ahead.

22 MR. WEEDMAN: Very well, your Honor.

23 THE COURT: I pass for cause at this time.

24 Q BY MR. WEEDMAN: On this point, Miss Hoffman,
25 so the record will be clear about it, you are telling us that
26 there could arise a situation where you could not be fair to
27 my client because of what you know about Charles Manson and
28 the Manson family?

13-2

1 A Well, say I was undecided, you know, really. And
2 I couldn't come to any conclusion. I would be swayed both ways.
3 Then yes, it would influence me.

4 Q Yes. I have used ugly words in the last question.
5 I said you would be unfair. No one in this society wants to
6 be unfair.

7 A That's right.

8 Q I think you would agree with that. And I used
9 the strong language so we will have a strong record really,
10 here. So even using that language then, distasteful as it
11 would be and as much as you don't want to be anything but
12 fair, would you say then clearly that if it is shown that
13 my client is an associate of Charles Manson, that you could
14 not give him a fair appraisal of the evidence?

15 A Yes.

16 MR. WEEDMAN: All right. I will renew my motion, your
17 Honor.

18 THE COURT: All right.

19 MR. KATZ: People will not object.

20 MR. WEEDMAN: For cause under 1073.2, your Honor.

21 THE COURT: Well, I think I pass her for cause. I will
22 ask you these questions. This is a repeat.

23 Q BY THE COURT: Do you feel that you could be fair
24 and unbiased at arriving at a verdict in this case?

25 A Well, I have to that -- to that question I would
26 say no.

27 THE COURT: Read the answer, please.

28 (The answer was read by the reporter as follows:

13-3

1 "A Well, I have to that -- to that
2 question I would say no."

3 Q What is the reason? Why do you give that answer?

4 A Perhaps because I have already formed an opinion.

5 THE COURT: Do you want to stipulate or not, gentlemen?

6 MR. KATZ: Yes. The People will stipulate, your Honor.

7 MR. WEEDMAN: Yes, your Honor.

8 THE COURT: I will excuse you. All right. I will excuse
9 and thank you, lady. You are excused.

10 Call another juror, yes. Thank you.

11 THE CLERK: Mrs. Jackie H. Baker, B-a-k-e-r.

12
13 MRS. JACKIE H. BAKER

14 BY THE COURT:

15 Q Now, lady, I have one or two preliminary questions
16 I want to ask you.

17 You have heard all of the questions and the state-
18 ments that I have made to the other jurors, is that correct?

19 A Yes, I have.

20 Q Did you hear me read the charges that have been
21 filed against the defendant?

22 A Yes, I did.

23 Q Now, let's assume you have been sworn to act as a
24 juror and you are a juror in this case, and let's assume you
25 have heard all the testimony and the case goes to the jury
26 to decide the case.

27 Now, the jury can make a finding of not guilty
28 at that time or the jury can make a finding of guilty. You

13-4

1 understand that?

2 A Yes.

3 Q Now, please assume the jury has made a finding
4 of guilty because of the subsequent questions I have to ask you.
5 I myself ask you to make that assumption for the moment. Now,
6 assume the jury makes a finding of guilty, the jury must set
7 the degree of the crime. If they set guilty second degree
8 murder the case is concluded as far as the jury is concerned.
9 If the jury makes a finding of first degree murder then there
10 must be a penalty hearing for the jury to decide what the
11 penalty will be. You understand that now?

12 A Yes, I do.

13 Q And the jury must make a finding of penalty, of
14 the death penalty or life imprisonment. Now, I want you to
15 assume that you are on the jury and you pass through, you have
16 had the penalty hearing and you are in the jury room deciding
17 on penalty. I am going to ask you at that time if in voting
18 on penalty, if you would automatically vote against the
19 imposition of the death penalty without regard to any evidence
20 that might be developed in the trial of this case before you?

21 A No.

22 Q The answer is no?

23 A No.

24 Q Thank you. Now, I am going to add one more
25 question to my questions. You have heard me say and counsel
26 say this case could take six weeks, could take two months.
27 It might be less. I don't know. I don't want to give you the
28 wrong impression. But let's say six weeks to two months.

13-5

1 Now, if that were the case, would the length
2 of the trial itself that I have just indicated, would that
3 cause a prejudice in your mind or would it affect or upset you
4 in some way because of the length of the trial that you could
5 not be fair and unbiased in the trial, or would you be working
6 under pressure where you couldn't give your full thinking and
7 an open mind to all of the issues in the case? Would it
8 affect your judgment in that way?

9 Now, before you answer the question I don't want
10 to confuse it myself to you. The fact that a juror may have
11 to work over the juror's time as a juror, or that it might
12 create and undoubtedly does create hardships, particularly to
13 a juror if they are married or have a family or have to cook
14 meals or a thousand things, that in itself is not a ground
15 to be excused. The hardships must be such that they prejudice
16 or they create a situation in the mind of the juror that the
17 juror cannot be absolutely fair and impartial and he can't
18 put his full, clear, conscientious judgment on the trial of
19 this case.

20 Now, do you have any such situations like that
21 the length of the trial would disturb you in such a way or
22 in such a manner that you could not keep a clear, open mind
23 throughout the entire trial?

24 A No, I don't think so.

25 Q The answer is no?

26 A No.

27 THE COURT: Thank you, lady. I will pass that lady for
28 cause on both of the basic issues.

13-6

1 Now, you can inquire, gentlemen, on both of those
2 problems.

3 MR. WEEDMAN: Thank you, your Honor.

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Tke 13a

BY MR. WEEDMAN:

Q Is there a Mr. Baker?

A Yes.

Q What does he do for a living?

A He is a clerk at the post office.

Q Are you employed?

A Yes, I am.

Q What do you do for a living?

A I am a supervisory clerk for the Veterans Administration.

Q I see. Have you had any prior criminal jury experience?

A Just one.

Q Was that during your present tour of duty?

A Yes, I was just an alternate, though.

Q I see.

A For about five days.

Q What sort of a trial was that?

A Criminal.

Q What was the charge in that case?

A Driving under the influence of alcohol and possession of narcotics.

Q I see. With respect to the death penalty, would you automatically impose the death penalty if you are satisfied beyond a reasonable doubt and to a moral certainty that my client has committed first degree murder?

A No.

14

The 14.

1 Q In other words, you are telling us that, as many
2 of the other prospective jurors have, that you would wait and
3 hear all of the evidence and then you would make up your mind
4 as to what the appropriate penalty would be, life imprisonment
5 or the death penalty?

6 A Right.

7 Q Is the mere fact that we have an indictment here,
8 a grand jury indictment, is the mere fact that my client has
9 been charged with a crime and brought in here, to your mind
10 some evidence that he must have done something, or will you
11 wait and hear what the evidence in this case?

12 A I think I would wait to see what the evidence is.

13 Q Okay; as a reasonable human being I am sure that
14 you suspect that the People have got something to talk about
15 or we wouldn't be here.

16 A Right.

17 Q But as a juror -- as a juror, you will wait, then,
18 until you hear the evidence before you begin to make up your
19 mind whether or not my client has done anything wrong?

20 A Yes.

21 Q Have you any quarrel with the idea that the People
22 have the burden of proof in this case, Mrs. Baker?

23 A No.

24 Q Have you any quarrel with the idea that my client,
25 as far as the law is concerned, need not prove his innocence;
26 but, rather, that it comes from the other direction, that the
27 People must prove the defendant guilty?

28 A As I said, I'd have to look at both sides.

14-2

1 Q Well, have you any quarrel with the idea that
2 my client does not have to come in here and prove to you that
3 he is innocent?

4 A No.

5 Q Okay. In other words, if following all the
6 evidence and following proper consideration of the evidence
7 your conclusion is that the People have not satisfied you that
8 my client is guilty, then you are going, I take it, to find
9 him not guilty?

10 A If that happens to be the case, yes.

11 Q If that happens to be the case, okay.

12 And, as you sit there now, I take it your state
13 of mind, at least, is such that you don't know where this case
14 is going to go?

15 A Right.

16 Q You don't know whether it is going to guilty or
17 to not guilty?

18 A That's true.

19 Q Now, with respect to this matter of the burden being
20 on the People to prove guilt, have you any quarrel with the
21 idea that -- the idea of not guilty simply means that the People
22 have not met their burden of proof?

23 A No.

24 Q And I take it from your answer, then, that again,
25 just stating it another way, that if you are not satisfied
26 that the People have proven their case to a moral certainty
27 and beyond a reasonable doubt, that you are going to acquit
28 my client even though, Mrs. Baker, you may still have some

1 lingering doubt as to whether my client actually did it or
2 not?

3 A No.

4 Q You have no quarrel with that idea?

5 A No.

6 Q So that as far as the burden goes, the burden is
7 on Mr. Katz and on the prosecution in this case and not upon
8 my client here to somehow convince you that he is innocent
9 before you could find him not guilty?

10 A No.

11 Q Okay.

12 It is a subtle point, Mrs. Baker, and I appreciate
13 your answers to it very much.

14 You have had prior jury experience. I am sure
15 you have been instructed before, you have been questioned
16 before, but I particularly wanted to ask you about the idea
17 of the right of the People and the right of the defendant to
18 the individual opinion of each juror.

19 Imagine this 11 to 1 situation that I talked about
20 earlier. Supposing you are the one person on the jury who
21 doesn't agree with the other 11 people. Would you change your
22 mind just in an effort to get along with them?

23 A No.

24 Q You'd listen, of course?

25 A I'd listen, yes.

26 Q But once you had made up your mind and it didn't
27 appear that they had anything else to add to your thinking,
28 I take it that you would hold fast even though it would mean,

1 perhaps, not arriving at a verdict in this case?

2 A Yes.

3 Q And that, of course, is just a way of asking you
4 if you have any objection to the idea that this is not a
5 majority rule here; that when a vote is taken in the jury room
6 it is a collection of individual opinions?

7 A Everyone has a right to his own thinking.

8 Q That's right, and the defendant and the People
9 have a right to your individual opinion, isn't that so?

10 A That's true.

11 Q Okay.

12 Finally, have you formed any opinion with respect
13 to Charles Manson and the Manson family you think might inter-
14 fere with your giving my client a fair trial?

15 A I don't think so.

16 Q I take it you know that Charles Manson was not only
17 accused of but was convicted of --

18 A Yes.

19 Q -- of the most heinous murders; and, indeed, was
20 sentenced to die with respect to those.

21 Can you promise me, Mrs. Baker, if you are selected
22 as a juror here, that you won't allow that to creep into this
23 trial? Can you promise me that you will judge my client on
24 the evidence as presented to you in this case and not on some-
25 thing you may have read in a newspaper or seen on television
26 in some other case that has nothing to do with this trial?

27 A I would try.

28

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14a.

1 Q And the last area I wanted to ask you about,
2 now, many people have different lifestyles -- if the evidence
3 shows, and I am sure it will, that my client has a lifestyle
4 that is radically different from the majority of people in this
5 country, would you permit that, alone, to prejudice you against
6 my client as far as the criminal charge is concerned?

7 A At this point I don't think so.

8 Q Well, do you feel that there is a likelihood that
9 you might be unduly prejudiced against my client if, for
10 example, his life philosophy, totally apart from any evidence
11 of the crime, just talking about his own personal outlook on
12 life, if it is radically different than yours, do you think
13 that that would prejudice you with respect to the crime that
14 he is accused of here?

15 A I don't think so.

16 Q In other words, I take it you will admit, certainly,
17 that there can be various disagreeable people out there, there
18 can be people out there that you don't like, that you wouldn't
19 have anything to do with, that perhaps even would repel you,
20 personally; but that, certainly, standing alone, is no evidence
21 of their guilt and has no place in a courtroom.

22 A No.

23 MR. WEEDMAN: Thank you very much, Mrs. Baker.

24 I will pass for cause, your Honor.

25 THE COURT: People?

26 MR. KATZ: Yes, thank you.

27 Q Mrs. Baker, I will stand back so I will give you
28 some breathing room. It is not pleasant for counsel to sit

1 right on top of the prospective jurors and talk with them.

2 Now, let me raise this unpleasant subject matter
3 of the death penalty for a moment and, if we can establish a
4 dialog in that area, it must become apparent to you as you
5 listened to the questions day in and day out that if the
6 evidence unfolds as anticipated and if, and I underscore "if,"
7 the jury convicts Mr. Grogan of murder in the first degree
8 based upon having an abiding conviction to a moral certainty
9 of the truth of the charge, the People in the penalty phase
10 will deliberately prevail upon the jury to return a death
11 verdict.

12 Is that clear?

13 A Yes.

14 Q So, you understand in that spirit I am obliged
15 to ask you some questions concerning your ability, your willing-
16 ness to consider impartially both sides of the coin with
17 respect to the proper penalty in this case; is that correct?

18 A Right.

19 Q In this connection, Mrs. Baker, have you given any
20 thought to the death penalty prior to being called for jury
21 duty?

22 A Not too much, no.

23 Q All right.

24 As you sit here now, without telling me why you
25 may view something in a different light, are you opposed to
26 capital punishment?

27 A No.

28 Q All right. I take it, then, that you are willing

1 to accept the law in California which says that upon the
2 return of a first degree murder verdict that a death verdict
3 is permitted or a life imprisonment verdict is permitted.

4 You accept that law; is that correct?

5 A Right.

6 Q And I take it that you can conceive of circumstances
7 in which you, yourself, would be willing to personally participate
8 in a death verdict; is that correct?

9 A I think so, yes.

10 Q Mrs. Baker, getting right down, if I may, to the
11 nitty gritty in this area, it is one thing to say that, "I
12 believe in the abstract that capital punishment is justified,"
13 for whatever reason you believe it is justified, and it is
14 another thing to say, "I can personally participate in a
15 death penalty verdict."

16 Do you appreciate the distinction?

17 A You mean I, myself, participate with the other
18 jurors?

19 Q Yes, you appreciate the distinction, on the one
20 hand saying, "Well, yes, I think that capital punishment in
21 the State of California is justified," when you are talking
22 with your friends on the one hand, and on the other hand
23 saying, "My gosh, I am going to be called upon to perhaps
24 participate, myself, in joining with 11 other jurors in a
25 death verdict."

26 Do you appreciate the distinction?

27 A I think I can.

28 Q What I am driving at is this --I think you have

1 already anticipated the following questions -- if you felt
2 in your heart and your mind and your conscience that in this
3 case, based upon the evidence presented at both phases of the
4 trial, that this case warranted the death penalty, could you
5 vote the death penalty and come back into the seat where you
6 are sitting now and by your verdict tell the defendant he
7 is sentenced to death?

8 A Yes, I could.

9 Q It is a pretty difficult task, isn't it?

10 A Yes; I couldn't say until the time comes.

11 Q You understand, as Judge Call told you on many
12 occasions, that you are not obliged to vote any way and you
13 are not obliged to precommit yourself at this time, because
14 you don't know what the evidence in the case is.

15 A That's right.

16 Q We may or may not get to the penalty phase, and
17 that will depend upon whether the jury returns a verdict in the
18 first degree.

19 A I'd first have to listen to the evidence.

20 Q Do you hold any antipathy toward the prosecution
21 because I have told you very candidly that if we do, in fact,
22 reach the penalty phase I will, in fact, prevail upon each
23 and every juror to return a death verdict in this case?

24 A That's true.

25 Q I take it you don't feel any hostility ^{to me} to me because
26 I am discussing this subject with you openly; is that correct?

27 A No; that's correct.

28 Q Now, the prospective juror that we talked with a

1 few moments ago, Mr. Markert, was quite open about the
2 subject concerning circumstantial evidence and, I might add,
3 very refreshingly so.

4 In that connection, you heard him give his views
5 concerning circumstantial evidence, did you not?

6 A Right.

7 Q And you heard the discussion basically between
8 Mr. Weedman and Mr. Markert; is that correct?

9 A Right.

10 Q There are some jurors, and it is nothing to be
11 ashamed of in this regard, who have a feeling, "Well, I don't
12 mind the circumstantial evidence in some criminal cases,
13 perhaps lesser cases involving a stolen automobile or a
14 forgery or perhaps even a robbery or a theft of some kind
15 or a burglary, but, my gosh, when you are asking for a first
16 degree murder verdict, I don't like the sound of 'circumstantial
17 evidence.'"

18 Do you have that kind of feeling about circumstan-
19 tial evidence?

20 A I never thought about it in that light.

15-1

1 Q All right. Let me ask you to think about it in
2 that light and give some thought to it. This case allegedly
3 involves a murder. We are asking for you to consider whether
4 or not based wholly upon circumstantial evidence there is
5 sufficient evidence to warrant the return of a first degree
6 murder verdict. Do you understand that?

7 A I understand.

8 Q You understand we are not talking about robbery or
9 theft or burglary or any of the other lesser offenses, we are
10 talking about the crime of murder, is that correct, Mrs.
11 Baker?

12 A Right.

13 Q Now, in that regard are you willing to consider
14 circumstantial evidence in this case?

15 A Yes.

16 Q Now, did you hear his Honor state at the very
17 outset of these proceedings last Tuesday or Wednesday that
18 there will be no evidence of the body, there will be no
19 eyewitness to the killing, there will be no production of any
20 witness who has observed the body in death; so you understand
21 that?

22 A I understand that.

23 Q Nonetheless, assuming that you are convinced
24 beyond a reasonable doubt to a moral certainty, based only
25 upon circumstantial evidence, that the defendant murdered
26 Shorty Shea, will you vote or would you refuse to vote guilty
27 of murder in the first degree solely because the evidence was
28 based upon circumstantial evidence?

15-2 1

A No.

2 Q All right. So what you are telling me is that you
3 would not require the People to produce the body or an
4 eyewitness to the killing or eyewitness to having observed the
5 body in death and you would vote for murder in the first degree
6 if -- and I say if the circumstantial evidence in this case
7 created an abiding conviction to a moral certainty of the
8 truth of the charge, is that correct?

9 A Yes.

10 Q I take it that you accept the principle of law
11 which says that circumstantial evidence and direct evidence are
12 entitled to equal weight with respect to the burden of proof,
13 is that correct?

14 A That's correct.

15 Q I take it you will not require the People to
16 sustain any greater burden of proof merely because and solely
17 because we are relying upon circumstantial evidence in a
18 murder case, is that correct?

19 A That is true.

20 Q Now, you understand that in a criminal case we are
21 only required to prove our case beyond a reasonable doubt and
22 to a moral certainty, is that correct?

23 A Right.

24 Q Therefore you will not require us to demonstrate
25 that degree of proof which excludes all possibility of error?

26 A Right.

27 Q All right. And in that connection, if in fact, we
28 just sustain that burden of proof which creates in your mind

15-3

1 an abiding conviction to a moral certainty of the truth of the
2 charge, then you will unhesitatingly vote for conviction, is
3 that correct, if we can do that?

4 (Short pause.)

5 Q Would you like me to rephrase the question?

6 A Would you, please.

7 Q I certainly will.

8 What I am driving at is this, that in the law,
9 whether it is petty theft, a grand theft case, a robbery case,
10 or a burglary case, or a murder case, our burden of proof
11 remains the same, isn't that correct?

12 A True.

13 Q So that even in order to secure a petty theft
14 conviction we would always have to prove that case against
15 that defendant beyond a reasonable doubt and to a moral
16 certainty, you understand that?

17 A Right.

18 Q Now, that burden does not change merely because we
19 go up the steps to more serious offenses, you understand that?

20 A I understand.

21 Q If we get to a murder case that burden is still the
22 same, beyond a reasonable doubt and to a moral certainty, isn't
23 that right?

24 A Right.

25 Q Merely because it is a murder case I take it you
26 will not require us to demonstrate that degree of proof which
27 excludes all possibility of error because such proof is rarely
28 if ever possible, isn't that correct?

15-4

1 A Right.

2 Q I take it your answer will be the same even though
3 our case rests wholly upon circumstantial evidence, isn't
4 that correct?

5 A Right.

6 Q If you will listen very carefully to this next
7 question and give it some thought before you answer it, you
8 know this case is based wholly upon circumstantial evidence.
9 You do not know what the evidence is in the case before you.

10 A Right.

11 Q Are you of such a state of mind that irrespective
12 of the evidence produced at this trial you would automatically
13 refuse to vote the death penalty?

14 THE COURT: Wait a minute. Read me the question, please.

15 (The question was read by the reporter
16 as follows:

17 "Q Are you of such a state of mind
18 that irrespective of the evidence produced at
19 this trial you would automatically refuse to
20 vote the death penalty?")

21 THE COURT: Go ahead. You can answer the question.

22 Well now, wait a minute. I am sorry. I don't want
23 you to misconstrue my interruptions. I just want to recheck.
24 Read it again.

25 (The question was ready by the reporter
26 as follows:

27 "Q Are you of such a state of mind
28 that irrespective of the evidence produced at

15-5

1 this trial you would automatically refuse to
2 vote the death penalty?"

3 THE COURT: All right. The fact I may pose a question
4 doesn't mean the question isn't a good question to ask, but I
5 want to digest it sometimes for my own mind. Now, you can
6 answer the question.

7 MRS. BAKER: No.

8 MR. KATZ: Thank you, ma'am.

9 THE COURT: The same could be true with defendant's
10 counsel. I might stop and want a rereading to clarify it in
11 my own mind. So my interrupting could go either way and I am
12 not trying to harass either counsel. Go ahead.

13 MR. KATZ: Thank you so much, your Honor.

14 Q Mrs. Baker, do you feel that it is impossible for
15 a person or a group of persons to hide a body so that it may
16 never be found again?

17 A Yes, it could be quite possible.

18 Q All right. So you do have a belief that under some
19 circumstances it is possible, is that correct?

20 A It could be.

21 Q All right. It has been said by way of his Honor
22 reading the indictment that the alleged death occurred between
23 August 16th, 1969 and September 1st, 1969. Assuming for a
24 moment that we met our burden of proof and created in your
25 mind an abiding conviction to a moral certainty that the
26 defendant murdered Shorty Shea between those dates, would you
27 nevertheless require the People to show the exact time and the
28 exact date of Shea's death before voting guilty?

15-6

1 A No.

2 Q All right. Do you understand that our only burden
3 is to show within those perimeters, that is, between August
4 16th, 1969 and September 1st, 1969 that Mr. Shea allegedly met
5 his death by criminal agency, you understand that?

6 A Yes.

7 Q I take it you understand his Honor's explanation
8 concerning the corpus delicti of murder, that it consists of
9 two essential elements, one, a death, and two, a death caused
10 by a criminal agency, and that corpus delicti may be proved
11 entirely by circumstantial evidence; do you understand that?

12 A I understand that.

13 Q Will you follow his Honor's instructions in that
14 regard should he instruct you to that effect at the conclusion
15 of this case?

16 A Yes, I will.

17 Q I take it you would not require the People to
18 produce the body or any parts thereof in order to prove the
19 corpus delicti, should we by other competent evidence prove
20 to your satisfaction and in accordance with law that Mr. Shea
21 met his death by reason of a criminal agency, is that correct?

22 A Right.

15a

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1 Q All right. Let's move on to another subject, if
2 we may.

3 At some point of time during the voir dire of some
4 prospective jurors we raised this issue of conspiracy. Let me
5 first preface discussion of this subject with you by the
6 following observation. If selected as a juror you are the
7 trier of fact in this case. Do you understand that?

8 A I understand.

9 Q In that connection only you -- and when I speak of
10 you I am speaking of you collectively-- can determine what the
11 facts are in this case. You understand that?

12 A (Nodding head affirmatively.)

13 Q I am sorry. I didn't get your response.

14 A Yes.

15 Q In that connection if you decide that there is
16 sufficient evidence and in accordance with his Honor's
17 instructions to believe that a conspiracy took place between
18 Mr. Grogan and some other persons to kill Mr. Shea, I take it
19 then that you would be willing to follow his Honor's instruc-
20 tions which would be given to you at the conclusion of the
21 case, is that correct?

22 A That's correct.

23 Q All right. And I take it that in that connection
24 if his Honor instructed you that every act, every declaration--

25 MR. WEEDMAN: Excuse me, your Honor. Forgive me for
26 interrupting counsel but I think it is clear where his
27 question is going to go. Perhaps we could approach the bench,
28

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1 your Honor.

2 THE COURT: Read the statement first, please.

3 (The record was read by the reporter
4 as follows:

5 "Q I take it that in that connection
6 if his Honor instructed you that every act,
7 every declaration" --

8 MR. KATZ: I never had a chance to finish the question,
9 your Honor.

10 THE COURT: I am inclined to sustain the objection if it
11 is made. I don't know what I will instruct. If you ask the
12 jury if they will follow instructions I do give, why, you may
13 do so. But if you pinpoint them of course I don't know.

14 MR. KATZ: May I be heard, your Honor. Your Honor
15 considered this issue the day before yesterday and you set
16 forth a guideline by which I could ask certain questions, and
17 you indicated that if I explained to the jury number one, that
18 they are the sole and exclusive judges of the facts in this
19 case and assuming --

20 THE COURT: Well, propound your question in chambers.
21 Let me give you another ruling on it if you will. Because I
22 don't know what you are going to ask. I tell you, let's take
23 a short recess.

24 Please do not discuss the case or come to any
25 opinion or conclusion. We will proceed in just a few minutes.
26 I am talking to the jury.

27 If you will step in, counsel, and let me have
28 your question, please.

15a-3

(The following proceedings were had
in chambers:)

THE COURT: Now the defendant is here and counsel.

Let's back up there to the prosecution's basic
question then. Now, give me that.

(The record was read by the reporter
as follows:

"Q I take it that in that connection
if his Honor instructed you that every act,
every declaration" --

MR. KATZ: I was interrupted, your Honor.

THE COURT: Finish your statement.

MR. KATZ: All right.

If his Honor instructed you at the conclusion of
the facts in this case that each member of the conspiracy is
liable for each act and bound by each declaration of any other
member of the conspiracy in furtherance of the object and
design of the conspiracy, will you follow that instruction?

THE COURT: Now, is that the exact statement pulled out
of the instruction?

MR. KATZ: Very close, yes, your Honor.

THE COURT: All right. Let's get that instruction.
Do you have that? Give me that instruction.

MR. KATZ: May I get it.

THE COURT: Yes, certainly you can.

MR. KATZ: Thank you, your Honor.

(Short pause.)

THE COURT: Thank you.

1 MR. KATZ: (Handing) Thank you, your Honor.

2 THE COURT: Yes. Now, I am going to ask you again to go
3 back and read the first basic question that I asked you before,
4 and the prior question.

5 (The record was read by the reporter
6 as follows:

7 "Q In that connection only you --
8 and when I speak of you I am speaking of
9 you collectively -- can determine what the
10 facts are in this case. You understand
11 that?

12 "A Yes.

13 'Q In that connection if you
14 decide that there is sufficient evidence
15 and in accordance with his Honor's instructions
16 to believe that a conspiracy took place between
17 Mr. Grogan and some other persons to kill Mr.
18 Shea, I take it then that you would be willing
19 to follow his Honor's instructions which would
20 be given to you at the conclusion of the case,
21 is that correct?

22 "A That is correct.

23 "Q All right. And I take it that in
24 that connection if his Honor instructed you
25 that every act, every declaration" --)

26 THE COURT: Now I think if you want to ask what I
27 anticipate you do, I think you should base it on at least the
28 first paragraph here. I am not saying as to how much less.

1 In other words -- read the counsel's propounded question.

2 (The record was read by the reporter
3 as follows:

4 "Q And I take it that in that connec-
5 tion if his Honor instructed you that every
6 act, every declaration" --)

7 THE COURT: Now, I think it should probably be that each
8 member of a criminal conspiracy is liable for each act and
9 bound by each declaration of every other member of the
10 conspiracy if said act or said declaration is in furtherance
11 of the object of the conspiracy. I think that should be
12 incorporated in your question.

13 MR. KATZ: Your Honor, I am not trying to get into
14 semantics with your Honor, but my question was simply whether
15 they would be willing to follow his Honor's instructions to
16 the effect --

17 THE COURT: Then you should say "would you follow his
18 Honor's instructions when he instructs you upon a conspiracy"
19 without pulling out segments of it. You have segmentized it
20 there in your question. That is why I say you should follow
21 the instruction itself and take an answer in a general way,
22 "will you follow the court's instructions on conspiracy? Yes."
23 But if you pull out segments of it then you should follow the
24 instruction.

25 Now, I have instructed them on it. I did read it
26 to them in full.

The 16.

MR. KATZ: All I am going to ask --

THE COURT: Repeat your question, sir, so we can give you another ruling.

MR. KATZ: I am willing to incorporate the first paragraph of CALJIC 6.11, which relates to conspiracy and joint responsibility, and ask the following question --

THE COURT: All right.

MR. KATZ: "If his Honor should instruct you at the conclusion of the case that each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy, if said act or said declaration is in furtherance of the object of the conspiracy, will you follow that instruction?"

THE COURT: All right.

Is there an objection there?

MR. WEEDMAN: Yes, your Honor, I would --

THE COURT: All right. You state your objection.

MR. WEEDMAN: Yes, your Honor.

I will object to it, not on the ground that that is not the law in California --

THE COURT: All right.

MR. WEEDMAN: -- but rather on the ground that, number one, conspiracy is not charged in this case; number two, that while I admit the prosecutor may seek the receipt into evidence of certain items of evidence on a theory of a conspiracy, that the law in this area is quite technical, is quite complex, and I believe it unfair to the defendant to permit to the prosecutor to single out those portions of the extensive law

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1 on circumstantial evidence which are most favorable to the
2 prosecutor's hypothesis or position in this case.

3 Thirdly, I object that the constant reiteration of
4 the word "conspiracy" in this case is unduly prejudicial to
5 the defendant; and, fourthly, as I have indicated earlier, I
6 do not believe that the People have anything but the very
7 thinnest case for a legitimate conspiracy theory in this
8 matter, your Honor, and I reiterate our position here that
9 the People certainly should not be permitted to prove up any
10 alleged conspiracy by the declarations of alleged conspirators.

11 Now, I have examined, as I have indicated, most
12 of the evidence that I believe that the People have in their
13 possession and it seems to me that your Honor is opening up,
14 if you permit this question, you are opening up an area that
15 permits me to explore all of the law with this jury relative
16 to circumstantial evidence, and I don't think that that is
17 appropriate nor do I think it is proper. I think it would
18 ultimately be prejudicial to the People's case, and by the
19 same token, if your Honor permits this question, it would then
20 logically permit the People to go on and develop all manner
21 of instructions by reading them to individual jurors, a
22 practice which I think, admittedly, is not current in the
23 superior court system of this County.

24 THE COURT: Excuse me -- did I cut in on you?

25 MR. WEEDMAN: No, you did not; thank you, your Honor.

26 THE COURT: I would permit, if you don't overplay it,
27 as counsel points out, I would permit your last question and
28 then I think it is asked and answered. I think it is covered.

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1 MR. KATZ: That's my only question, your Honor.

2 THE COURT: All right.

3 Then I would also permit, because it is not a
4 matter charged in the complaint, I would permit counsel, if
5 you desire to or not -- I don't know whether it would serve
6 a purpose or not -- to simply say to the jury in a rebuttal,
7 "Do you understand, also, on the question of conspiracy
8 that that is a factual matter that can be only concluded by
9 the jury based on facts that may be produced at the trial,
10 construed with the law that the court gives you. There may
11 or may not be a conspiracy; do you understand that, Mr. Juror?"

12 I would permit that question if you desire to
13 ask it after counsel propounds his question. I think it would
14 put a balancing in there, if you care to; I don't know whether
15 a purpose would be served or not.

16 MR. WEEDMAN: I would respectfully urge, your Honor, and
17 again I am interested in the protection of my client --

18 THE COURT: "Do you understand that position; do you
19 understand that question?"

20 You could put in that question.

21 MR. WEEDMAN: I would appreciate that opportunity,
22 but by the same token I feel that it would be thereafter
23 appropriate for me to pull certain circumstantial evidence
24 instructions and read them at length to this jury and there-
25 after inquire if they would follow such instructions if they
26 are given in this case.

16a

16a-1

1 THE COURT: I think then it would segmentize it out too
2 far and the People would go back again and we are too far away.

3 I would be inclined to hold it down to those two
4 questions, the question counsel has propounded, and you can
5 reread the statement on circumstantial evidence if you desire;
6 and you can ask that question.

7 MR. WEEDMAN: Would your Honor thereafter permit me to
8 inquire by way of particular CALJIC instructions whether or
9 not if given they would follow them to the extent that they
10 indicate the proof of the conspiracy may not be made by
11 evidence of extrajudicial statements of alleged co-conspirators
12 that a corpus delicti for a conspiracy must be proven before
13 any such --

14 THE COURT: Before such statements may be given?

15 MR. WEEDMAN: -- come into play; and, further --

16 THE COURT: Isn't that apparent from the instruction,
17 itself?

18 MR. WEEDMAN: Not from the instruction, it is not, your
19 Honor; there is nothing in Mr. Katz' question which alerts
20 this jury to the foundational requirements for the admission
21 of such declarations by alleged co-conspirators; and to that
22 extent, as I have said earlier, very unfair to my client.

23 MR. KATZ: Your Honor, may I respond to that?

24 THE COURT: Yes, surely.

25 MR. KATZ: Mr. Weedman is --

26 THE COURT: Let me read this again and then I will --
27 go ahead.

28 MR. KATZ: Yes.

1 Mr. Weedman is attempting to preinstruct the jury
2 on each and every aspect of the law of conspiracy.

3 I am not attempting to do so by my very limited
4 questioning in regard to the law of conspiracy. What I am
5 attempting to do is to examine their state of mind, assuming
6 the foundational requirements that, in accordance with your
7 Honor's instructions, they believe the facts show a conspiracy
8 to have been established, do they have any quarrel with the
9 proposition that acts and declarations made by members of a
10 co-conspiracy may be used against other members of the
11 conspiracy.

12 Now, obviously I am saying this by paraphrasing it.
13 I intend to use the language contained in the first paragraph
14 of CALJIC instruction 6.11 and ask them basically do they have
15 any quarrel with the principle that says that each member of
16 a criminal conspiracy is liable for each act and bound by
17 each declaration of every other member of the conspiracy, if
18 said act or said declaration is in furtherance of the object
19 of the conspiracy, because many jurors do have a lay prejudice
20 and bias against --

21 THE COURT: Well, I would go this far, I would allow the
22 question to be propounded as indicated a few moments ago and
23 I would allow defense counsel to state to the jury, and this
24 woman in specific, "Do you understand, Mrs. Jones, that there
25 must be a proof of conspiracy, a factual proof, decision by
26 the jury that there is a conspiracy, in pursuance and
27 accordance with the law before acts or declarations of members
28 of the conspiracy are binding on other members of the

1 conspiracy?"

2 MR. WEEDMAN: Your Honor, may I also make -- I am sorry.

3 THE COURT: Go ahead.

4 MR. WEEDMAN: May I make this observation, your Honor --

5 THE COURT: Yes.

6 MR. WEEDMAN: If your Honor feels, and I am not question-
7 ing your considered judgment in this matter, your Honor,
8 because I know you are giving this your best thought, but in
9 the event that your Honor feels that this is a proper question
10 for Mr. Katz to ask, then I would at this time respectfully
11 request an evidentiary hearing outside the presence of the
12 jury relative to those matters which Mr. Katz intended to
13 introduce at this trial relative to a conspiracy; and
14 particularly relative to those declarations and acts and
15 admissions of alleged co-conspirators, and I say that parti-
16 cularly for this reason: we are into an area now, your Honor,
17 where Mr. Manson is on trial for his life in Department 106
18 charged in the Shorty Shea murder case as well as another
19 murder case; Bruce Davis is awaiting a hearing before the
20 Supreme Court relative to various motions to sever, but not-
21 withstanding that is likewise awaiting trial as a defendant
22 in the alleged murder of Shorty Shea.

23 There are numerous statements, declarations of
24 these other defendants, as well as admissions, declarations
25 allegedly made by my own client, all of which, your Honor,
26 should be and will be, I am confident, explored as to their
27 admissibility by your Honor prior to their being submitted
28 to the jury; and it is my feeling at this point that your

1 Honor will simply not permit the prosecution to introduce what
2 I anticipate, frankly, Mr. Katz is going to try to get into
3 evidence; and to open up this whole complex area of conspiracy
4 at this time under the guise of voir dire of Mrs. Baker, your
5 Honor, I believe is getting into an area which is going to
6 lead us on the rocks, your Honor.

16B

16B

1 THE COURT: I am inclined at this time to refuse the
2 request. I may revamp my own thinking.

3 I think there is a certain correctness in trying
4 to avoid too much stress on conspiracy. I don't know, either,
5 to the extent that there may be proof; I am not saying that
6 you can or can't prove it. I don't know.

7 I may revamp my thinking and either sustain
8 defendant's objection or a generalized statement to this
9 effect:

10 "Mrs. Smith, you heard the court read to all
11 of the prospective jurors here the instructions on conspiracy?"

12 The answer, theoretically, would be "Yes."

13 "Will you follow the instructions of the court
14 if a conspiracy is found to exist?"

15 I think that gets at what you are trying to get at.

16 MR.KATZ: Your Honor, we may go back to the observation
17 that such a general question is totally innocuous in regards
18 to the response it elicits because, frankly, that juror doesn't
19 have in mind the subject matter contained in that instruction;
20 and if you were to ask me that same question I could candidly
21 answer that I don't have in mind each and every principle --

22 THE COURT: I might be able to -- to conceivably settle
23 the question -- by reading to the jury the full instruction
24 on circumstantial evidence and asking the juror, if a
25 conspiracy is found -- or, asking the juror, "Will you follow
26 that law if you are selected to try this case as a juror?"

27 MR. WEEDMAN: Your Honor --

28 THE COURT: That might answer the question without a lot

16b-2

1 of pulling and hauling.

2 MR. KATZ: Your Honor, if I may respond, because Mr. Weedman
3 has made very strong statements, and I don't blame him for
4 making those statements on behalf of his client, to the effect
5 that there is no conspiracy.

6 There is no question in my mind but that your
7 Honor at the appropriate time will find a conspiracy to exist
8 and it will go to the jury under 403 of the Evidence Code;
9 and just because Mr. Weedman refuses to look at the facts,
10 in, I think, an objective fashion --

11 THE COURT: Let's back up for a minute. I think if I
12 read that instruction to the jury and ask the question, "That
13 is the law; will you follow that law if you are selected as
14 a juror in this case?" --

15 MR. WEEDMAN: Your Honor, may I point out this, too,
16 we are getting into an Aranda problem here, it seems to me.
17 We are getting into an area where Mr. Katz, I think -- and he
18 can certainly reply -- where I feel that Mr. Katz is going to
19 be attempting to circumvent the clear intention of our
20 Supreme Court with respect to the demands --

21 THE COURT: That instruction actually is in your favor
22 as far as that goes; that is a very stringent instruction here.
23 You read that instruction --

24 MR. WEEDMAN: Your Honor, what it says, your Honor, is --

25 THE COURT: You take your second paragraph there, too.

26 MR. WEEDMAN: What it says is, "The act of one co-
27 conspirator, pursuant to the furtherance of the common design
28 of the conspiracy is the act" --

1 THE COURT: He has to prove that.

2 MR. WEEDMAN: " -- is the act of all conspirators."

3 That is the most damaging, I respectfully urge,
4 your Honor, the most damaging kind of thing to my client's
5 position here. Mr. Katz is really trying to tell us, your
6 Honor, that he is going to try to get into evidence statements
7 of other defendants in this matter. People v. Aranda says
8 you can't do that as a basic Hornbook rule now, your Honor.

9 MR. KATZ: First of all, your Honor, Aranda applies only
10 to a joint trial; that is unequivocally clear.

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1 THE COURT: Well --

2 MR. WEEDMAN: That is not so, Mr. Katz.

3 THE COURT: I will read this instruction, advise the
4 jury that if there is a conspiracy or not is a factual matter
5 that must be determined by the jury in accordance with the
6 law. Will they follow the law? And I will sustain objections,
7 further objections. If the answer is "Yes, I will so follow"
8 then I would sustain further objections further on, any other
9 further objections.

10 MR. WEEDMAN: Well, just friendly then for the record,
11 your Honor --

12 THE COURT: I will ask the question.

13 MR. WEEDMAN: I will object then for the record, your
14 Honor, --

15 THE COURT: Go ahead. All right.

16 MR. WEEDMAN: -- to having the court read this instruc-
17 tion on the ground that it is only a partial exposition of the
18 law of conspiracy and to read one segment of the law to the
19 jury without reading it all to them is to perhaps mislead the
20 jury, all to my client's prejudice, your Honor.

21 THE COURT: Well, I will stand on the ruling. I will
22 stand on the ruling.

23 Let's go ahead.

24 MR. WEEDMAN: Your Honor, may we have a brief recess. I
25 had an urgent call from my office.

26 THE COURT: Yes. We will take a brief recess and then go
27 right ahead.

28 (Recess.)

(The following proceedings were had
in open court:)

THE COURT: Now, lady, I am going to talk to you for a minute, but I am talking to all of the jurors here in the courtroom, too. That is, I want them to hear what I say but I am speaking to you and I will ask you for the answer.

Q There have been some questions pointed to the question of conspiracy, whether or not, as we try this case, whether or not a conspiracy has been proved or not by the People depends on what the facts are, how the jury determines the facts and also whether the facts as accepted by the jury or not accepted by the jury under the law, put the two together, create a conspiracy or show that a conspiracy has been created.

Basically it gets -- probably it is fair to say basically it gets to facts. The jury must find the facts and apply the law to those facts. Decide if there has been a conspiracy. Is that clear to you?

A Yes.

Q You see, when I am asking these questions I am trying to ask them in such a way that I am not trying to pinpoint them for anybody, I am trying to speak impartially to the facts. You understand that much?

A Yes, I do.

Q Whether or not a conspiracy will have been established is one of the problems or the matters that will be attempted to be established by the People. It is not a problem of the defendant to establish, it is the People's

1 problem. Now, at the conclusion of the trial I will read to
2 all of the jurors the law respecting conspiracy, what is a
3 conspiracy, what must be proven by the People to establish a
4 conspiracy. What flows from the establishment of a conspiracy.
5 That is to say to what extent statements of the conspirator
6 are applicable to or may be used in connection with other
7 conspirators.

8 I am not going to read all of the law of
9 conspiracy at this time. I am trying to cull it down as much
10 as I can at this time to the question of finding if the jurors
11 are fair and impartial in their minds and have an open mind
12 when they start the trial of this case.

13 Now, I will ask you this question. This will be
14 one of the statements that I will read to the jurors, a
15 statement of law that I will read to you at the conclusion of
16 the case on conspiracy. It is just one of the statements.
17 It isn't the whole conspiracy law by any means. It is one of
18 the statements. And I make that clear. And this is the
19 statement:

20 "Each member of a criminal conspiracy
21 is liable for each act and bound by each
22 declaration of every other member of the
23 conspiracy if said act or said declaration
24 is in furtherance of the object of the
25 conspiracy. The act of one conspirator
26 pursuant to or in furtherance of the common
27 design of the conspiracy is the act of all
28 conspirators. Every conspirator is legally

1 responsible for an act of a co-conspirator
2 that follows as one of the probable and
3 natural consequences of the object of the
4 conspiracy even though it was not intended
5 as a part of the original plan and even
6 though he was not present at the time of
7 the commission of such act."

8 Now, number one, if I read that statement of law
9 to you, which I do read to you, will you follow that statement
10 of law? Will you follow the law as I have stated it to you?

11 A Yes.

12 Q Number one?

13 A Yes.

14 Q Now, I want to get this clear. This statement I
15 have just read to you presupposes -- it assumes that a criminal
16 conspiracy has been created. The jury, before this principle
17 of law can become applicable, the jury must first find a
18 conspiracy, because if you don't find a conspiracy then this
19 principle of law doesn't apply. Is that clear to you?

20 A Yes.

21 Q So that there must first be established a
22 conspiracy and established and accepted by the jury to a moral
23 certainty and beyond a reasonable doubt, and if you find those
24 factual matters so acceptable then this statement of law
25 applies, is that clear to you?

26 A Yes.

27 Q Now, I am not arguing one side as against the
28 other, I am trying to state the law to you.

1 A I understand.

2 Q With that in mind and with the statement I have
3 just read to you word for word you understand a conspiracy
4 must first be proved and established, if the jury finds it is
5 proved and established, you understand what I read to you
6 about the statements or the declarations of the various members
7 if there is such a thing as a conspiracy?

8 A Yes.

9 Q That they are binding, you might say, on other
10 members of the conspiracy. Would you follow the law as far
11 as the law is concerned as in the manner that I have read it
12 to you?

13 A Yes.

14 Q I am not in any way suggesting how you find on
15 the facts. You may say there is -- "I think the facts of the
16 case establish a conspiracy." You may say "I don't think the
17 facts in the case establish a conspiracy."

18 Those matters are for you. I am only reading the
19 law at this moment that applies. If the jury says, "Well,
20 yes, there is a conspiracy." They may say, "No, there is no
21 conspiracy." I am trying rehash back and forth to show you
22 that my whole premise is based on factual matters that are
23 for the jury.

24 And if, but not conceding, if a conspiracy is
25 established the statement that I just read to you about the
26 binding nature of statements or acts of co-members of the
27 conspiracy, each member of a criminal conspiracy is liable
28 for each act and bound by each declaration of the other members,

1 that is a statement of law.

2 Would you follow that law in the event that you
3 first found that a criminal conspiracy existed?

4 A Yes, I would.

5 THE COURT: All right. I will withhold further questions
6 along that line. I think I have tried to fairly state it.

7 MR. KATZ: Yes, I certainly appreciate your Honor's
8 help. I have no further questions in regards to conspiracy.
9 I appreciate it.

10 THE COURT: Very well. Do both sides pass for cause?

11 MR. KATZ: I just have about one or two more questions.

12 THE COURT: You have further questions?

13 MR. KATZ: Yes, but not in this area.

14 THE COURT: All right. Go ahead.

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BY MR. KATZ:

Q Mrs. Baker, I think that it is ^{obvious} common at this time that merely because Mr. Weedman or myself or the court are obliged to ask you certain questions that that suggests that these issues will unfold during the course of the trial; you understand that?

A Right.

Q And as you sit here now, you agree with me you do not know what the evidence in this case is; isn't that correct?

A That is true.

Q And merely because, for example, his Honor broached to you the subject of conspiracy in no way suggests that the evidence will establish a conspiracy or, indeed, that the People are even relying on the theory of conspiracy.

Q You understand that?

A Right.

Q So as you sit here now you know nothing about the case and I take it you have the ability to give both sides a fair and impartial determination of the defendant's guilt or innocence; is that correct?

A That's correct.

Q And, lastly, let me ask you this: Mr. Weedman has posed this question to other prospective jurors on the panel that if you were in the jury room and you were now going to discuss the merits of the case and determine whether or not in your own mind you have an abiding conviction to a moral certainty and you walked into the room and you felt one way or

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1 the other with regard to the guilt or innocence of the
2 defendant, before voting, I take it, you would be willing to
3 listen to the conclusions of the other 11 jurors and to
4 exchange your reasoning in regards to your conclusion; is
5 that correct?

6 A Yes, I would.

7 Q And I take it you wouldn't just walk in there and
8 say, "I know how I am going to vote and regardless of what
9 you people say to me I am not going to change my vote."

10 You wouldn't have that attitude, would you?

11 A No, I wouldn't.

12 Q And you understand that pride, really, in essence,
13 has no place in the courtroom and that we are only interested
14 in one thing and that's the ascertainment of the truth; isn't
15 that correct?

16 A That's right.

17 Q And I am sure you will give us, if selected as a
18 juror, your best effort to render a fair and impartial
19 determination of the defendant's guilt or innocence; is that
20 correct?

21 A That's correct.

22 MR. KATZ: Thank you.

23 Pass for cause.

24 THE COURT: Now, the peremptory challenge, if any,
25 gentlemen, will go over until tomorrow.

26 MR. WEEDMAN: For the record, your Honor, inasmuch as
27 Mr. Katz has broached this subject of conspiracy, there are
28 just one or two questions I'd like to ask Mrs. Baker in that

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1 connection, even though I passed her for cause.

2 MR. KATZ: I have no objection.

3 MR. WEEDMAN: Thank you, Mr. Katz.

4 THE COURT: Well, if it is very limited. I don't want to
5 open again. If it is a limited questioning, I have no objection
6 if counsel doesn't.

7 MR. WEEDMAN: That was just for the record, your Honor,
8 so tomorrow --

9 THE COURT: Let's go to tomorrow at 9:30; I will ask
10 all jurors, there is nothing ahead of us, if you will be here
11 promptly, we'll proceed.

12 Do not discuss the case or come to any opinion.
13 Thank you very much.

14 (At 4 p.m., an adjournment was taken
15 until 9:30 a.m. of the following day,
16 Wednesday, June 30, 1971.)
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