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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. )

No. A 267861

STEVEN GROGAN, )

Defendant. )

REPORTERS' DAILY TRANSCRIPT

Friday, July 2, 1971

APPEARANCES OF COUNSEL:

(See Volume I)

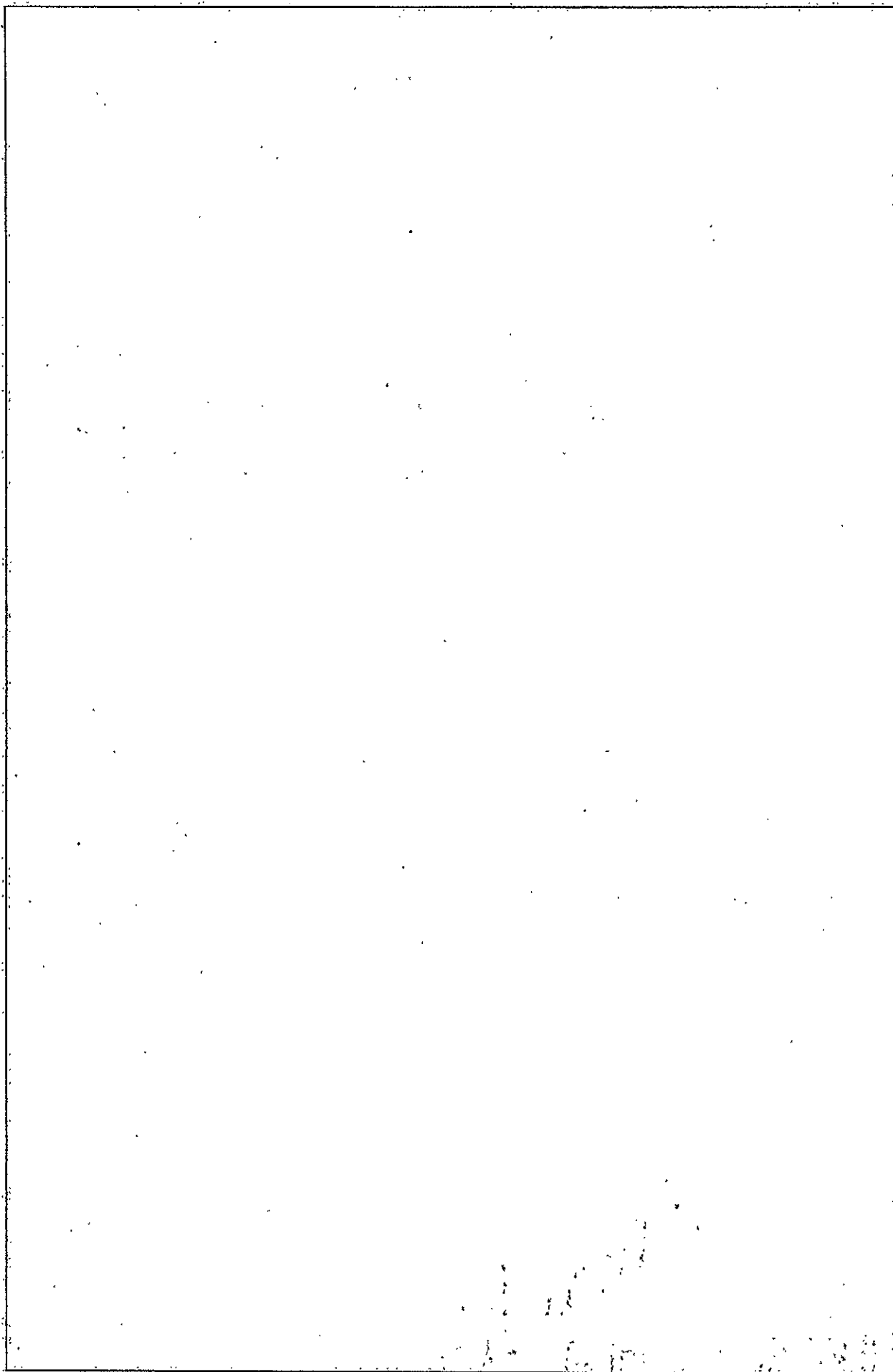
Reported by:

VERNON W. KISSEE, C.S.R.  
HAROLD E. COOK, C.S.R.  
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LOS ANGELES, CALIFORNIA, FRIDAY, JULY 2, 1971

9:35 A.M.

THE COURT: Now, gentlemen, we will go ahead.

We have a new panel of jurors here. In People against Steve Grogan. The defendant is here in the courtroom. Defendant's counsel is here. People's counsel is here.

May we stipulate our jurors are in the jury box, all are back again plus the new gentleman whose name was called just before I recessed last night.

MR. WEEDMAN: So stipulated, your Honor.

MR. KATZ: So stipulated.

THE COURT: Thank you.

Now, Mr. Winn, you are one of the new jurors that came in last night. And we have all of the seats filled with new prospective jurors. So I am going over the full scheme or panorama, procedurally only, of the lawsuit we are in the process of picking the jury for. And I would say I will take a reasonable time to explain the procedural structure to you but feel, ladies and gentlemen, I am talking to every one of you folks that are seated in the courtroom so that if one of the ladies and gentlemen in the jury is excused and your name is called and you take the place then I won't have to individually go through all of the instructions or procedures or information that I am giving to the gentleman in the jury box because you can listen carefully to me, if you will, please, bear with me as I go along here.

I will try to stay right on the point. It is not

1 a lecture, it is not a talk in law, it is just enough of what  
2 I have to give and must give in the statement of the principles  
3 here. So that the court will know and the lawyers will know  
4 and the defendant will know and the People will know, frankly,  
5 whether they are satisfied to have you as a juror or not.

6 To a great extent and to an absolute extent, to  
7 the certain number of jurors, that right is absolute, whether  
8 the People or the defendant want a juror, that is an absolute  
9 right up to a certain number with each of the two parties,  
10 the plaintiff or the defendant.

11  
12 CHARLES R. WINN

13 BY THE COURT:

14 Q Now, let's start at scratch, Mr. Winn, if we can.  
15 First, this is a criminal case we are starting to try or picking  
16 the jury for. The name of the case is the People of the State  
17 of California, the plaintiff, against Steve Grogan.

18 Now, Mr. Grogan, would you first stand up, please,  
19 so everybody can see you, then turn around.

20 (Defendant stands.)

21 THE COURT: Thank you, Mr. Grogan.  
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Q Number one, do you know Mr. Grogan at all?

A No.

Q The defendant's lawyer or attorney is Mr. Weedman, the gentleman right here. Thank you.

And the People's counsel, the deputy district attorney is Mr. Katz, this gentleman right here. Thank you, Mr. Katz.

Now, do you, Mr. Winn, know either of these two attorneys at all?

A No, your Honor.

Q Thank you.

Now, the next step is that I am going to read to you the charge that has been filed against the defendant. I am going to read it word for word.

The charge is set forth in what is called the indictment that was rendered or what the law calls found; that means decided on by the Grand Jury. It reads as follows:

"The said Steve Grogan" -- that's the defendant --  
"is accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment of the crime of murder in violation of Section 187, Penal Code of California, a felony, committed prior to the filing of this indictment and as follows, that between the 16th day of August, 1969, and the first day of September 1969 at and in the County of Los Angeles, State of California, the said Steve Grogan did wilfully, unlawfully and

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1           feloniously and with malice aforethought  
2           murder Donald Jerome (Shorty) Shea, a human  
3           being."

4           Now, that is the charge and that is set forth in  
5           the indictment that was rendered by the Grand Jury, and the  
6           indictment was then filed after being rendered by the Grand  
7           Jury. It was filed in the Superior Court on or about  
8           December 29, 1970; and on the indictment being filed in court  
9           the defendant was thereafter arraigned -- advised of the  
10          charges against him -- at that time; appeared with counsel  
11          and the case automatically, as is every criminal case in the  
12          State of California, it is set for jury trial, because the  
13          jury trial -- and the defendant pleaded not guilty -- and on  
14          a plea of not guilty, which every defendant has an absolute  
15          right to make, no matter what the charges are, or not,  
16          everybody has the absolute right to pleading not guilty.

17          The moment that a plea of not guilty is rendered  
18          the case receives a jury trial; that just follows, like one,  
19          two, three. The jury trial follows.

20          In other words, it is an absolute matter of right,  
21          everybody to receive a jury trial when the plea -- or, if  
22          the case is put to trial by the plea of not guilty.

23          A court trial can be had, but that has nothing to  
24          do with this situation; so there is no need for me to go into  
25          it. The jury trial is a matter of right and that's what  
26          we are at this time; so, therefore, skipping over a period of  
27          time because it wouldn't serve any purpose to go into  
28          procedural matters that have taken place or may not have taken

1 place, we are up to the point where we are picking the jury  
2 to go to trial on these charges.

3 Now, in this case there will be a number of  
4 principles of law, many principles of law that will be read  
5 to the jury, discussed with the jury in a fashion that the  
6 court will tell the jury what the law is, and there are almost  
7 invariably, but not always, the statements of law follow and  
8 will follow in this case what is commonly known as instructions  
9 after the case has been fully tried and argued to the jury;  
10 then the court states the law to the jury, then the jury  
11 goes to the jury room for the decision of guilty or not  
12 guilty.

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1                   However, there are some principles of law that I  
2 am going to state to you at this time because it can well be  
3 that some questions either the court or the attorneys will  
4 ask you about the principles of law that I am going to give  
5 you could be stated something like this.

6                   After I read the law to you one of the counsel may  
7 ask you, "Well, you have heard the law the court has just read  
8 to you. Will you follow that law or will you not follow it?"  
9 Because if you say, "Well, I don't want to follow that law"  
10 then causes would exist to excuse you or any other juror.

11                   If you say, "Yes, I will follow the law" then the  
12 counsel know you will follow the law.

13                   Incidentally, as a juror, while we are passing  
14 along on that subject, let me say that the juror is the sole  
15 judge of the facts. So don't confuse the thinking that because  
16 I tell you what the law is that I am trying to tell you what  
17 the facts are. Remember that. I am merely stating this is the  
18 law. It is against the law or the law says certain things  
19 constitute the law. But I don't tell, I have no business, I  
20 have no right to tell you or to suggest to you what the facts  
21 are. You and the other 11 jurors have the sole and exclusive  
22 right, duty, to find on the credibility, that is, the truthful-  
23 ness of witnesses.

24                   And to spell it out, to literalize it, if a witness  
25 takes the stand, or any number of witnesses take the stand,  
26 and then in the case for the People and for the defendant,  
27 then when the jurors go to the jury room the jurors will say --  
28 the individual jurors will say "Well, I think" to yourselves

1 in the jury room at that time, "I think that Mrs. Smith was  
2 telling the truth. I am inclined to believe Mrs. Smith."

3 Or, "I don't think Mrs. Smith was telling the truth.  
4 I don't believe what she said."

5 Or, you may say, "I think part of what she said is  
6 true" or, "I don't think the rest is true."

7 And some other juror may say, "Well, I believe  
8 everything she said."

9 Another juror may say, "Well, I don't believe her."  
10 And that is the time the jury will settle on what are the  
11 facts. They will pass on the facts. It is the jury that  
12 decides what the facts are.

13 In other words, remember that I have nothing to do  
14 with it. I don't go in the jury room and say, "Well, I think  
15 so and so." That is out. I don't do it. I have no right to.  
16 I don't attempt to go near you and I constantly will admonish  
17 you throughout the trial because I will be called on to make  
18 certain rulings of law, that because I make a ruling of law  
19 that the witness may answer a question or may not answer a  
20 question has nothing to do with my feeling in the case. I am  
21 doing it because the law prescribes a certain legal procedure  
22 that must be followed.

23 The counsel's question may be a good question or  
24 not good. Let us put it that way. Or not proper is a better  
25 word. May be a proper question or not proper. If it isn't  
26 proper, an objection is made by the other counsel, in effect I  
27 say, "Well, the question is not a proper question." I rule on  
28 it by saying, "Objection sustained" or I might say "Objection

1 overruled."

2 Now, the confusion sometimes in the minds of jurors  
3 is that because I make a ruling I tell a witness "Answer the  
4 question" or "Don't answer it," that I have some feeling in the  
5 matter or I am trying to advance some thinking of the witness or  
6 pass on the facts. My rulings don't pass on facts at all. I  
7 pass only on the question, is the question good or bad. That  
8 simplifies it down. If it is bad or not proper, then I say,  
9 "Objection sustained." If it is a proper question I say to  
10 the witness in effect, "You go ahead and answer the question."  
11 And that is where the ruling comes in. It has no reflection of  
12 my thinking because my thinking has no business in the case.  
13 You understand that. I have no right to inject myself in the  
14 factual situation, what are the facts, to the jury. That is  
15 your business.

16 Now, let's at this point go into this matter. As  
17 I have said, this is a criminal case. In a criminal case before  
18 we even get to the case as everyone of us are in this courtroom  
19 right here, you, me, you and everybody else, the defendant and  
20 the lawyers, everybody here in this courtroom right now is  
21 presumed to be innocent of the commission of any kind of a crime  
22 at all. Everybody here carries with him, is clothed with a  
23 presumption, what the law calls a presumption. Everybody here  
24 is presumed to be innocent.

25 As you go down the street and go out the door you  
26 may not be talking about it but it is there. I am presumed to  
27 be innocent. You are presumed to be innocent. Anybody in  
28 the courtroom who walks out or stands here or sits here is not

1 presumed to be guilty of anything. The law says the  
2 presumption is a presumption of innocence. Presumed to be  
3 innocent until you may be confronted with a criminal case or  
4 charge and the presumption of innocence still carries along.

5 So that Mr. Grogan, seated right here, is charged  
6 with murder as I just read to you. He is presumed to be  
7 innocent right now as you see him. He is presumed to be  
8 innocent just as I am or you are or anybody here. He is  
9 presumed to be innocent. And the doctrine of the presumption  
10 of innocence carries along with any defendant right straight  
11 through the trial as he sits there, as the testimony is  
12 received that presumption doesn't stop because he has been  
13 arrested. That doesn't affect the presumption. Because he is  
14 in trial and witnesses may testify doesn't change the presump-  
15 tion. He is presumed to be innocent. All through the trial  
16 as he sits there he is presumed to be innocent.

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1 And the presumption of innocence does not change  
2 until such a time that -- and here's your question mark --  
3 that the case -- that the jury, when the case is finally given  
4 to the jury, the jury, if it should vote guilty, then the  
5 presumption stops and the defendant is found guilty.

6 Is that clear to you?

7 A Yes, sir.

8 Q Now, on the other hand, if the jury goes in the  
9 jury room and finds not guilty, then the presumptions never  
10 stopped going on, nothing has ever interrupted that presumption  
11 of innocence, the defendant is presumed to be innocent.

12 You go to the jury room, he is presumed to be not  
13 guilty; you vote not guilty, the presumption of innocence has  
14 never been interrupted.

15 Is that clear to you?

16 A Yes.

17 Q The only thing that stops it is if the jury says,  
18 "We find the defendant guilty as charged"; then the presumption  
19 stops and he's found guilty of the crime.

20 Now, procedurally -- I am only talking from  
21 procedure, what you find in the law books and trying to put it  
22 to you in as simple a fashion as I can -- is it fairly clear  
23 to you up to this point?

24 A Yes, it is.

25 Q How the procedure runs?

26 A Yes.

27 Q Now, let's see where we are -- oh, yes, I am back  
28 to my -- one more, while I am on this point: now, in a criminal

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1 case the burden of proof -- by that I mean the amount of  
2 proof necessary to prove a defendant, any defendant guilty;  
3 that's the burden of the People. It is up to the People --  
4 I am shifting my thinking as I go along here -- the burden is  
5 on the People to prove the defendant guilty and that is in  
6 line with what I just told you, that the defendant is presumed  
7 to be innocent all the time until the jury may find the defendant  
8 guilty.

9 All right, without trying to argue the matter, if  
10 the defendant is presumed to be innocent, then it is obvious  
11 he doesn't have to prove himself not guilty, he's presumed to  
12 be innocent.

13 That's one of the reasons that the People, the  
14 duty or burden is on the People to prove a defendant guilty,  
15 if they can do so; they must prove the defendant guilty at  
16 the trial.

17 That's where we are, starting the trial. The  
18 burden is on the People, not on the defendant to establish  
19 anything at that juncture. The People must prove the defendant  
20 guilty and the standard that the law sets up to establish  
21 the People's case, the Penal Code refers to it as reasonable  
22 doubt, and stated in more of an elaborate fashion, the  
23 doctrine of reasonable doubt means the People must prove the  
24 defendant guilty, the law states to a moral certainty and  
25 beyond a reasonable doubt. That is the burden of the People.

26 They must prove to the satisfaction of all of  
27 you jurors in the jury box, if you are selected, you must  
28 say, in effect, in your deliberations, and all 12 of you must

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1 do this to render a verdict of guilty or not guilty, but  
2 to establish or make a finding of not guilty as charged all  
3 of the members of the jury must be able to say in effect,  
4 "We feel the People have proven their case and they" --  
5 "and we feel that they have proven the defendant guilty to a  
6 moral certainty and beyond a reasonable doubt; that's the  
7 way we feel about it."

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1 Now, that's in substance what the jury must find;  
2 and then if they feel that way, that's their feeling, they  
3 feel that the People have met that burden of proof, they have  
4 proven the defendant guilty to a moral certainty and beyond a  
5 reasonable doubt, they feel that way, they should vote guilty,  
6 if they first factually make that finding that the People have  
7 sustained that amount of proof; and if they have not sustained  
8 that, if the jury, or any one of the jurors may say, when you  
9 are taking a vote they say, "Well, we" -- or "I" -- "I don't  
10 think the People have proven the defendant guilty to a moral  
11 certainty and beyond a reasonable doubt, I don't think so";  
12 then it is automatic from that point on, that mental conclusion,  
13 if that factual standard is met, they should vote not guilty  
14 because the People haven't met the burden of proof that is on  
15 the People.

16 Now, procedurally have I made that clear to you?

17 A Yes.

18 Q Thank you.

19 Now, in this case there will be, as I started in  
20 sometime ago here to state, there will be some legal principles  
21 that will be repeated to the jury and some factual matters that  
22 must be determined by the jury in accordance with these legal  
23 instructions.

24 The jury still finds the facts; that is to say,  
25 certain things are true or not true, is the right of the jury,  
26 nobody ever touches the factual findings of the jury. There  
27 is some law that says what facts the jury can consider, what  
28 they may not consider.

1                   Now, in this case, and I will ask the People to  
2 stop me and interrupt me if I misstate anything at this point --  
3 in the trial of a case, murder, where a defendant is charged  
4 with murder, it is a general proposition, or invariably but not  
5 always, is a better way of putting it, the People, in putting  
6 on their case will have what is called direct evidence, some-  
7 times called positive evidence, which may be brought into the  
8 courtroom by a witness who may take the stand.

9                   To illustrate the point, the witness may say, "I  
10 know John Smith, the man who is charged with being the victim  
11 or the so-called deceased person, the man who is charged with  
12 being killed" -- not the defendant, the man that is charged  
13 with being killed.

14                   I am putting it this way to try to make it as easy  
15 as I can -- and the witness will say, "I knew that man when he  
16 was alive and I saw his body when he was dead."

17                   Now, that establishes the fact by an eyewitness  
18 that the man that is charged with being murdered or killed, the  
19 deceased man, was seen with the eyes, was seen dead: "I know  
20 this man that is charged with being dead; I knew him alive, I  
21 saw him dead. I say he was dead. I saw him dead."

22                   The body is established as a dead body. Is that  
23 clear to everybody?

24                   Generally that is, in effect, what the witness or  
25 witnesses will testify to and it may be established further by  
26 the witness saying, "I saw the man deceased; here's a picture  
27 of him deceased; this is the deceased man, this is the body."

28                   The picture is admitted in evidence as plaintiff's

1 A or 1. So, what is sometimes called the dead body or the  
2 corpus, is established; the death is established by somebody  
3 who, in effect, saw him dead.

4 Now, in this case no one will take the stand to  
5 testify that they saw the deceased person, Shorty, as a dead  
6 person; nobody saw the body dead, but the People are relying  
7 on other evidence, what is called circumstantial evidence to  
8 establish the death of Shorty in other ways, in other means that  
9 will be developed from the evidence. They will attempt to prove  
10 to you that Shorty, deceased, was dead as the result of the  
11 actions as charged in the indictment here by the defendant.

12 That method of proof, as I have indicated the  
13 People will produce evidence, that is called circumstantial  
14 evidence.

15 The People are entitled to have a juror in the jury  
16 box who will say, in substance, and this will be restated to you  
17 by the district attorney, that you will not automatically  
18 reject such testimony, that you will fairly and impartially  
19 consider it; that you may or may not make a finding one way or  
20 the other, but that you will not reject the testimony simply  
21 because there is nobody on the stand that says, "I saw the dead  
22 body."  
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1 Have I substantially got that point correctly?

2 MR. KATZ: Yes. Thank you, your Honor.

3 THE COURT: It is a touchy point. I don't want to under-  
4 state it or overstate it one way or the other. You can  
5 reaffirm it in your question.

6 MR. KATZ: Thank you, your Honor.

7 THE COURT: I am trying to get the basic principle over.

8 Now, I am going to read to you what the law says  
9 on circumstantial evidence and what we have referred to as the  
10 dead body, corpus delicti. It commonly means -- dead body  
11 means a dead body, but it doesn't always mean that. If  
12 you will listen to me as I state what the law is respecting  
13 the proof that a person is dead, although there is no visual  
14 observation of the dead body.

15 Now, I have got four basic instructions. I will  
16 read them all to you. One I have gone over. I am not trying  
17 to over and underemphasize anything, but I will take this  
18 in continuity.

19 The presumption of innocence I have already  
20 stated to you. However, as I read along here without any  
21 attempt to overemphasize or underemphasize, I have to maintain  
22 a position of impartiality between the People and the defen-  
23 dant just as you jurors do. Remember that now, you folks  
24 have to be impartial, you can't take sides. To put it  
25 literally and positively, you can't take sides on this and  
26 have a fair trial. You cannot do that. If you feel you are  
27 prejudiced one way or the other you have an absolute duty to  
28 say "Well, I think some way about this. I feel some way about

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1 this. I feel swayed."

2 Then, folks, you should raise your hand and say,  
3 "I just can't be impartial." And we will get another juror.  
4 So you must keep your minds open.

5 Now, I am going to go right through these again.  
6 Now, here is the doctrine again of presumption of innocence.

7 "A defendant in a criminal action is  
8 presumed to be innocent until the contrary  
9 is proved. And in case of a reasonable doubt  
10 whether his guilt is satisfactorily shown  
11 he is entitled to an acquittal. This presump-  
12 tion places upon the State the burden of  
13 proving him guilty beyond a reasonable  
14 doubt. Reasonable doubt is defined as follows:  
15 It is not a mere possible doubt because every-  
16 thing relating to human affairs and depending  
17 on moral evidence is open to some possible or  
18 imaginary doubt. It is that state of the  
19 case which after the entire comparison and  
20 consideration of all the evidence leaves the  
21 minds of the jurors in that condition that  
22 they cannot say they feel an abiding convic-  
23 tion to a moral certainty of the truth of the  
24 charge."

25 Now, that is what is called the doctrine or a  
26 statement of the law respecting reasonable doubt. Now, I am  
27 going to read you the instruction on what is commonly called  
28 the corpus delicti. That is, the dead body. I am going to

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1 read that instruction to you. And I will read it again maybe  
2 a number of times as we go along here.

3 "The term corpus delicti as used in  
4 these instructions concerning murder does  
5 not mean the production of the body or any  
6 part thereof, of the alleged deceased.  
7 Every crime, whether it be burglary, robbery  
8 or any other offense requires the proof of a  
9 corpus delicti. The term corpus delicti  
10 means the proof of the essential elements  
11 of the particular crime with which a defen-  
12 dant may be charged. The corpus delicti of  
13 murder consists of two elements. Number one,  
14 proof of the death of the alleged deceased.  
15 Number two, proof that the death of the  
16 alleged deceased was caused by some criminal  
17 agency. Either or both of these two essential  
18 elements which constitute the corpus delicti  
19 of the crime of murder need not be proved by  
20 direct evidence but may be proved circumstantially  
21 or inferentially. It is not necessary in order  
22 to establish the corpus delicti for murder that  
23 the body or any part thereof of the alleged  
24 deceased be produced as such. Nor that any  
25 witness be produced who has seen or found the  
26 body or any part thereof of the alleged deceased  
27 in death."  
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Now, let's stop right there.

Q Mr. Juror -- and I am only talking procedurally -- have you understood everything that I have said here?

A Yes.

Q Is it clear to you?

A It is clear.

Q That is what I want. Would you want me to read it again to you for clarity only?

A It is not necessary.

Q Is that clear to you?

A It is clear.

THE COURT: All right. Now, the next question.

You have noticed that I have mentioned quite a number of times the words circumstantial evidence and direct evidence. Of course the juror may very readily say to himself, "Well, I need more help or I need more advice as to what is direct evidence and what is circumstantial evidence." I have touched upon it as we go along here.

I, of course, can't say too much at one time or I won't be saying anything. So I have to segment and come back to it.

Now, I am going to read you the instruction. There are two basic instructions on circumstantial evidence. And here we are. Now, here is this instruction that gives you the difference between circumstantial evidence and direct evidence. And I will read it.

"The testimony of a witness or a writing,  
a material object or anything presented to the

1 senses offered to prove the existence or the  
2 nonexistence of a fact is either direct or  
3 circumstantial evidence. Direct evidence  
4 means evidence that directly proves a fact  
5 without an inference and which in itself if  
6 true conclusively establishes that fact.  
7 Circumstantial evidence means evidence that  
8 proves a fact from which an inference of the  
9 existence of another fact may be drawn. An  
10 inference is a deduction of fact that may  
11 logically and reasonably be drawn from another  
12 fact or group of facts established by the  
13 evidence. It is not necessary that facts be  
14 proved by direct evidence. They may be proved  
15 also by circumstantial evidence or by a  
16 combination of direct evidence and circum-  
17 stantial evidence. Both direct evidence  
18 and circumstantial evidence are acceptable  
19 as a means of proof. Neither is entitled to  
20 any greater weight than the other."

21  
22 Now, I am going to read to you further on the  
23 sufficiency of circumstantial evidence.

24 "You" means the jury, "are not permitted  
25 to find the defendant guilty."

26 And I am speaking of any defendant in giving this  
27 instruction.

28 "You are not permitted to find the  
defendant guilty of the crime charged against

1 him based on circumstantial evidence unless  
2 the proved circumstances are not only con-  
3 sistent with the theory that the defendant  
4 is guilty of the crime but cannot be reconciled  
5 with any other rational conclusion. And each  
6 fact which is essential to complete a set of  
7 circumstances necessary to establish the  
8 defendant's guilt has been proved beyond a  
9 reasonable doubt. Also if the evidence is  
10 susceptible of two reasonable interpretations,  
11 one of which points to the defendant's guilt  
12 and the other to his innocence, it is your  
13 duty to adopt that interpretation which points  
14 to the defendant's innocence and reject the  
15 other which points to his guilt."

16 Now, procedurally, further, when all of the testi-  
17 mony is produced in the case and the case has been argued and  
18 the jury is sent to the jury room, the jury then makes a find-  
19 ing, "We, the jury, find the defendant either guilty or not  
20 guilty of the crime charged." That is step number one, after  
21 discussing the case amongst yourselves.

22 Now, if the jury finds the defendant not guilty  
23 the case at that juncture is concluded in its entirety. It is  
24 all through. There are no further transactions. The verdict  
25 of the jury, not guilty, is final and conclusive. The whole  
26 case is tried.

27 I have to assume both sides of this question --  
28 if the jury finds the defendant guilty of murder then the jury

1 must make a finding of degree. That is to say, the jury must  
2 make a finding of first degree murder or second degree murder.

3 If the jury finds the defendant guilty and sets  
4 the degree as second degree murder, then the case is concluded  
5 at that juncture, as far as the jury is concerned. The jury  
6 is excused and the case is concluded at that point as far as  
7 the jury is concerned with the finding of second degree murder.

8 If the jury makes a finding of guilty first degree  
9 murder then there is another step that has to be taken. That  
10 is called the penalty hearing. At that point and after the  
11 penalty hearing, the jury must make or set the penalty, and  
12 the penalty that must be set by the jury is either death or  
13 life imprisonment. That is what must be found at the penalty  
14 hearing if the other procedural steps have been followed by  
15 the jury.

16  
17 Q Now, I am going to ask you to assume that you have  
18 been sworn and are a juror in this case and assume that we have  
19 tried the case, all the testimony has been put in, the case has  
20 been argued and you have gone to the jury room. And assume --  
21 and I am not asking anybody to concede anything, but I have to  
22 get those assumptions in to ask this question -- assume that  
23 you are at a position where the jury is voting on the question  
24 of penalty, of the death penalty or life imprisonment. Now,  
25 if you will put yourself in that position right there, you are  
26 voting on that question, I am going to ask you this question  
27 here: at that time and place, as I have indicated, would you  
28 automatically vote against the imposition of the death penalty  
without regard to any evidence that might have been developed

1 at the trial of this case before you?

2 A No, your Honor.

3 Q The answer is no?

4 A No.

5 THE COURT: Now, let's see where we are. I think I have  
6 covered the field fairly well. I want to again say all of this  
7 elaboration I have made, it is all a procedural elaboration or  
8 statement of procedure. And I am not trying to, and not  
9 intending to speak -- it just isn't a statement for or on  
10 behalf of any one person at all, it is a general statement of  
11 criminal law or criminal procedure. The rights of the  
12 defendant, the rights of the People. I think probably I have  
13 covered the situation up to this point.

14 Now, the law says defendant's counsel may question  
15 you, then the People's counsel may question you, then other  
16 procedures follow.

17 So you may proceed, Mr. Weedman, for cause or voir  
18 dire.

19 MR. WEEDMAN: Thank you so much, your Honor.

20 THE COURT: Yes, sir.

21 MR. WEEDMAN: Thank you.

22 I think I can safely speak for Mr. Katz indicating  
23 that both counsel are grateful that Judge Call initially  
24 discusses these rather difficult problems with the jury. Not  
25 all courts do, and I think it is very helpful for the jury.  
26 And we are both very grateful for it.

27 Q Mr. Winn, may I inquire as to your business or  
28 occupation, please.

1           A       I work for the City of Beverly Hills, truck  
2 driver.

3           Q       Is there a Mrs. Winn?

4           A       Yes, housewife.  
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1 All right, fine.

2 It is estimated that this trial may last some six  
3 to eight weeks. Would that cause you any personal hardship,  
4 if you are selected as a juror?

5 A No, not that I know of.

6 Q With respect to prior jury experience, have you  
7 sat on any criminal cases before?

8 A Yes.

9 Q What kind of cases were those, if there was more  
10 than one?

11 A Just one.

12 Q All right. What kind of a case was that?

13 A Criminal; rape.

14 Q A rape case?

15 A A rape case.

16 Q All right, and did you arrive at a verdict in that  
17 case?

18 A Yes, we did.

19 Q You needn't tell us what it is.

20 Was that during your present tour of jury duty?

21 A Yes.

22 Q I take it, Mr. Winn, that you obviously wouldn't  
23 apply anything that you may have learned in that case, particu-  
24 larly by way of law, to this case, understanding that these  
25 criminal cases can be vastly different and each case must  
26 turn on its own evidence and on its own particular instructions  
27 are given to you by the court?

28 A Yes, I understand.

6-2

1 Q With respect to the problem of the death penalty,  
2 will you understand that this is the only opportunity that  
3 we have to discuss the death penalty with prospective jurors  
4 and that merely because we are discussing it it does not  
5 necessarily mean that this case is going to have to go to  
6 any kind of penalty hearing?

7 A Yes.

8 Q As Judge Call has already indicated, the matter  
9 may as well as not, and certainly looking at it at this point,  
10 end in a verdict of not guilty, in which case you would not  
11 have to worry about penalty at all in this case.

12 I am sure you appreciate that?

13 A I understand.

14 Q However, since we are forced to talk about the  
15 death penalty at this time, let me ask you this question, let's  
16 suppose that after a full, complete, thorough consideration  
17 by you and your fellow jurors, all of the evidence in this  
18 case during the guilt phase, the first phase of the trial,  
19 you are satisfied beyond a reasonable doubt and to a moral  
20 certainty that my client has committed a willful, premeditated  
21 killing of another person with malice aforethought, it is  
22 not justified in any way, it is not excused in any way, it  
23 is murder of the first degree; do you feel as you sit there  
24 now, Mr. Winn, that you would automatically impose the death  
25 sentence?

26 A Yes.

27 Q All right.

28 With respect to your answer, now, let me point out

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1 to you that during the penalty phase, so-called, if it should  
2 ever get to that point, there may well be additional evidence  
3 produced for the benefit of the jurors, and so the jurors  
4 during the penalty phase may properly consider, obviously,  
5 all of the evidence they heard during the guilt phase of the  
6 trial and, in addition to that, consider all of the evidence  
7 that they have heard relative to possible mitigation or  
8 possible aggravation.

9 Now, would you, notwithstanding additional such  
10 evidence during the penalty phase automatically vote for the  
11 death penalty, if you are, as I have indicated, convinced in  
12 your heart and in your mind that my client has committed this  
13 crime of a willful, premeditated, malicious murder?

14 MR. KATZ: Excuse me, your Honor; there is an objection  
15 on the ground that it is asking this juror to prejudge the  
16 evidence.

17 THE COURT: Do you care to reframe it? Do you want to  
18 reframe --

19 MR. NEEDMAN: Let me attempt to reframe it, your Honor,  
20 in the interest of time.

21 Thank you, your Honor.

22 THE COURT: All right, reframe it.

23 Q BY MR. NEEDMAN: Assuming that during a penalty  
24 phase you would hear additional evidence from both sides,  
25 would you, notwithstanding such evidence, automatically vote  
26 for the death penalty?

27 A No.

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1 Q In a first degree murder conviction?

2 A No, I would not.

3 Q I feel that I should have asked more foundational  
4 questions before I hit you with that "automatic" matter.

5 I take it from your first answer that you probably  
6 hadn't been really told yet that there would be two phases of  
7 this trial if it goes to a penalty phase and that the second  
8 phase of the trial would involve additional evidence which  
9 you would be expected to hear and weigh and consider.

10 Do you understand that now, I am sure?

11 A Yes.

12 Q And so, I take it, Mr. Winn, that your answer is  
13 that understanding that now, your answer is that you would  
14 wait until you hear any and all evidence produced at the  
15 penalty phase?

16 A That's correct.

17 Q And even then you wouldn't automatically impose  
18 either one penalty or the other, but you would go into the jury  
19 room and sit down with your fellow jurors and discuss the  
20 propriety of either the death penalty or life imprisonment?

21 A That's correct.

22 Q Understanding, of course, that it is still within  
23 your absolute discretion, that the law expresses no preference  
24 one for the other; you may, nonetheless, return any kind of  
25 penalty verdict you care to, it is entirely up to you.

26 But, do you appreciate the law does require that  
27 you at least consider both possibilities, the death penalty  
28 and life imprisonment; okay?

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1 A All right.

2 Q All right.

3 Can you conceive of circumstances surrounding  
4 a first degree murder conviction which would, notwithstanding  
5 any further evidence adduced at a penalty hearing, make you  
6 automatically impose the death penalty?

7 MR. KATZ: Excuse me, your Honor; that question, I think,  
8 asks the juror to prejudge the evidence, because the circum-  
9 stances may be such as to warrant, in that juror's opinion,  
10 the infliction of the death penalty.

11 THE COURT: Do you want to try to reframe, or shall I  
12 rule?

13 MR. WEEDMAN: I would appreciate a ruling on that; thank  
14 you, your Honor.

15 THE COURT: Let me have the statement of counsel, will  
16 you, Mr. Reporter.

17 (The pending question was read by the  
18 reporter as follows:)

19 "Q Can you conceive of circumstances  
20 surrounding a first degree murder conviction  
21 which would, notwithstanding any further  
22 evidence adduced at a penalty hearing, make  
23 you automatically impose the death penalty?"

24 THE COURT: I will sustain the objection, "Can you  
25 conceive of circumstances" calls for speculation.

26 I don't think it is in the realm of factual situa-  
27 tions, not before the court; I think it would have to stand  
28 on an abstract statement, "Will you do this or won't you do

1 that?" But when asked the opinion, "Can you conceive of  
2 circumstances" calls for speculation.

3 I would sustain the objection.

4 MR. WEEDMAN: Very well. Thank you, your Honor.

5 Q Mr. Winn, would you, irrespective of the facts  
6 that may be developed during the guilt phase of this trial,  
7 and should it, of course, result in a first degree murder  
8 conviction, would you, irrespective of those facts, continue  
9 to assure us that you would consider any additional evidence  
10 adduced at the penalty phase before arriving at a decision  
11 as to penalty?

12 A I would consider all phases of it.

13 Q In other words, you are not going to make up your  
14 mind about anything here, I take it it is fair to say, until  
15 you have heard everything that we have to -- by "we" I mean  
16 Mr. Katz and myself -- have to offer on the subject?

17 A Correct.

18 Q And that is pretty obvious, I suppose, because  
19 that is the fair thing to do, isn't it, Mr. Winn?

20 A Yes.

21 Q In connection with possible opinions you may have  
22 formed because of pretrial publicity, have you heard of the  
23 name of Charles Manson?

24 A Yes.

25 Q Have you heard the phrase, the expression, the  
26 Manson family?

27 A Yes.

28 Q Have you formed any opinion based on what you have

1 heard and perhaps, indeed, read, and perhaps discussed  
2 relative to Charles Manson and the Manson family?

3 A I have formed an opinion, I think.

4 Q Okay.

5 Now, if the evidence in this case, Mr. Winn, should  
6 tend to show an association between my client and the Charles  
7 Manson family, would that fact, standing alone, tend to  
8 prejudice you against my client so that he could not have a  
9 fair and impartial trial here?

10 A I don't think so.

11 Q Is your opinion that you have formed about the  
12 Manson family and Charles Manson such that you feel that it  
13 might cause you some problems in evaluating the evidence that  
14 is presented to you in this courtroom?

15 A Well, I couldn't say at this time; I'd have to  
16 hear the evidence.

17 Q Well, let me ask you perhaps more directly, have  
18 you learned that Charles Manson was accused of murder?

19 A Yes.

20 Q And that he was convicted of murder?

21 A Yes.

22 Q And that he was convicted of some seven murders?

23 A Well, I don't know the exact number.

24 Q Approximately.

25 A But I heard.

26 Q Certainly multiple murders?

27 A Yes.

28 Q And in that connection did you learn or did

1 you come to understand that this was so despite the fact  
2 that Mr. Manson was not personally present at any of the --

3 A Yes.

4 Q -- actual homicides?

5 And did you learn that Mr. Manson was sentenced  
6 to die --

7 A Yes.

8 Q -- for these variety of murders?

9 Did you learn that other persons, other defendant,  
10 were likewise charged along with Mr. Manson and that they  
11 were likewise convicted and sentenced to die?

12 A Yes.

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1 Q All right.

2 I take it it would probably be a fair assumption  
3 on our part that your opinion with respect to Charles Manson  
4 and the Manson family is not a good one?

5 A No, I wouldn't say that.

6 Q Supposing during the course of this trial it  
7 should develop that my client was, loosely speaking, because  
8 we are not sure, really, what this phrase means; but he was,  
9 indeed, loosely speaking, a member of the so-called family; do  
10 you think that you would be able, if the evidence is very close  
11 in this case, do you think you'd be able to keep this opinion  
12 that you have formed out of your deliberations?

13 A I would like to keep an open mind.

14 Q Supposing the case is one where you have been in  
15 the jury room, now, with your fellow jurors for perhaps  
16 several days and you have gone over the evidence over and over  
17 and over and you simply are unable, even after so much time, to  
18 make up your mind, you can't really decide who's telling the  
19 truth and if they are telling the truth, whether it is  
20 relevant, and so on and so on and so on, you cannot decide, in  
21 other words, whether the People have a case,

22 Do you think at that time, Mr. Winn, you and, of  
23 course, certainly very humanly would allow your opinion about  
24 the Manson family to make up your mind for you?

25 A No.

26 Q Do you appreciate, Mr. Winn, in your case -- let  
27 me start over.

28 In your particular case, Mr. Winn, since you know

6b-2 1 your opinion most intimately, do you think that it would  
2 present a substantial problem for you?

3 In other words, do you think that you would have to  
4 actively resist a temptation to, for example, say, "Well, it is  
5 a close case. Mr. Katz has certainly put on a lot of evidence  
6 here and, of course, the defendant has put on evidence. I  
7 can't really make up my mind; but, after all, I mean, don't we  
8 all know, we have read the papers, watched television, don't  
9 we all know what kind of people these Manson people are? Mr.  
10 Grogan must be guilty."

11 Will you permit yourself to indulge in that kind  
12 of --

13 A No.

14 Q -- reasoning in this case?

15 Supposing one of your fellow jurors said to you,  
16 "Now, look, Mr. Winn, we have been in here four or five days  
17 and you are the only one that hasn't made up his mind so far  
18 here. Doesn't your good common sense tell you that where  
19 there is association with someone as bad as Charles Manson  
20 that he's really a no goodnik and, for heaven's sakes, must be  
21 guilty?"

22 What if one of your fellow jurors told you that;  
23 would you buy that or would you continue to exercise your own  
24 opinion based on the evidence that is in this court, only?

25 A I'd go by the evidence in the court.

26 Q And, Mr. Winn, can you promise us all here that  
27 you will actively resist considering any evidence, any informa-  
28 tion that doesn't come to you through this courtroom, exhibits

6b-3

1 produced in this courtroom, accompanied by the court's instruc-  
2 tions and the like; can you promise us that?

3 A Yes.

4 Q Judge Call has touched upon a matter which is quite  
5 important to both sides here and it is the matter of circum-  
6 stantial evidence; and after Judge Call's discussion with you  
7 do you now accept the fact that in California circumstantial  
8 evidence is just as good as direct evidence?

9 A Yes, I do.

10 Q And that circumstantial evidence may be used to  
11 prove any fact that is in dispute?

12 A I understand.

13 Q Now, inasmuch as we had such a discussion, however,  
14 do you likewise understand that circumstantial evidence,  
15 because we have been talking about it so much, is no better  
16 than any other kind of evidence?

17 A I understand that.

18 Q And you understand, further, Mr. Winn, that even  
19 though you are permitted to utilize circumstantial evidence  
20 you are also permitted, if you feel it is proper to do so, to  
21 reject it?

22 A Yes.

23 Q Okay.

24  
25 In other words, just because we have been talking  
26 about circumstantial evidence I am sure you understand that it  
27 is just like any other evidence, it may be accepted by you and  
28 may be utilized by you; it may be rejected by you, may be  
discarded by you. It is up to you to sift through and see

1 where the value lies.

2 I am sure you understand that?

3 A I understand.

4 Q As part of the circumstantial evidence rule of law  
5 have you any quarrel with the portion of the circumstantial  
6 evidence law which says, in effect, that where circumstances  
7 are susceptible to reasonable interpretations, one of which  
8 points to the defendant's guilt, the other of which points to  
9 his innocence, that you are required -- that you must -- adopt  
10 that reasonable interpretation which points to his innocence?

11 A Yes.

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1 Q All right. Do you feel that you would be up to  
2 the rather difficult task, Mr. Winn, of not permitting your-  
3 self to adopt unreasonable -- or strike that -- of not adopt-  
4 ing the reasonable interpretations which point to guilt  
5 when there exists reasonable interpretations which point to  
6 innocence with respect to a given piece of circumstantial  
7 evidence? Would you be able to do that?

8 A Yes, I would be able to do that.

9 Q I take it, Mr. Winn, that that rape case being  
10 your only criminal jury, that might be fair to say that you  
11 still, you are still in a distict process of learning?

12 A Right.

13 Q And that in perhaps this business of circumstantial  
14 evidence had not been discussed with you before?

15 A No, it had not.

16 MR. WEEDMAN: Okay.

17 THE COURT: Pardon me, Mr. Weedman.

18 MR. WEEDMAN: Yes.

19 THE COURT: I think we will take a short recess and  
20 then go right ahead. I will ask the jury do not discuss the  
21 case at all or come to any opinion or conclusion. We will  
22 proceed in just a few minutes. Thank you, folks.

23 (Recess.)  
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1 THE COURT: Now, gentlemen, we will go right ahead in  
2 People against Grogan. The defendant is here, both counsel are  
3 here. The jurors are here.

4 Go right ahead.

5 MR. WEEDMAN: Thank you, your Honor.

6 I promised my wife I would wear the red underwear  
7 she bought me for Father's Day. And that is the one day that  
8 my pants go.

9 (General laughter.)

10 Well, she will get a little laugh out of it.

11 Q Mr. Winn, during the course of the trial there  
12 will be certain objections raised both by myself and by Mr.  
13 Katz. It is almost inevitable and you have had some jury  
14 experience. I am sure you appreciate we are trying to shape  
15 the evidence as we feel it should be shaped as a matter of law,  
16 and I am sure you won't think that either of us are trying to  
17 somehow obscure the proceedings or we are trying to be obstruc-  
18 tionists in any way doing that; is that correct?

19 A Yes.

20 Q Mr. Winn, have you any relatives or close friends  
21 who are engaged in law enforcement?

22 A No.

23 Q In the event that police officers testify in this  
24 case would you treat their testimony, Mr. Winn, just as you  
25 treat any other witness's testimony?

26 A Yes, I would.

27 Q And therefore not apply any so-called artificial  
28 standards as, for example, all police officers lie, or all

7a-2

1 police officers tell the truth, or all police officers have  
2 infallible memories and so on. Those are artificial standards,  
3 I am sure you will agree. And so will you then obviously  
4 in the case of a police officer consider the fact that he is  
5 a police officer. Presumably he is trained to be an observer.  
6 He is presumably trained to make accurate reports and he is  
7 trained to have a retentive memory.

8 But that nonetheless he, like anyone else, if  
9 you are satisfied such is the case, may be mistaken. You  
10 have no quarrel with any of those statements I have just made?

11 A No.

12 Q All right, sir. Thank you. And finally, Mr. Winn,  
13 if the evidence in this case should show that my client has  
14 had in the past a lifestyle, a way of living which you find  
15 repugnant in any way, will you not permit that alone to  
16 influence your judgment respecting his guilt or innocence in  
17 this case?

18 A I would not.

19 MR. WEEDMAN: All right, sir. Pass Mr. Winn for cause.  
20 Thank you, Mr. Winn.

21 THE COURT: Pass for cause. All right. People.

22 MR. KATZ: Yes. Thank you, your Honor.

23 First of all my sincere apologies to the 11  
24 prospective members of the panel who are presently seated in  
25 the jury box because they have heard all of the questions that  
26 counsel and I have been belaboring for the past four or five  
27 days. So I hope that you 11 other prospective members of the  
28 panel will permit us the opportunity to ask Mr. Winn a few

1 questions, understanding the necessity for so doing.

2 Q Perhaps I should ask you at the outset whether  
3 or not you will be prejudiced against Mr. Grogan by reason  
4 of his counsel wearing red shorts.

5 A (General laughter.)  
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1 Q I take it that you understand that while I meant  
2 that in a light vein it is very important not to be influenced  
3 by extraneous factors which have nothing to do with the trial,  
4 such as how I dress, whether I wear a vest, or what Mr. Weedman  
5 is wearing at a given time or even what Mr. Grogan is wearing.

6 You understand these are artificial standards and  
7 have nothing to do with the case; isn't that correct?

8 A Right.

9 Q Now, Mr. Winn, his Honor at the very beginning  
10 indicated within certain parameters what the responsibility is,  
11 for example, of the jury and what the responsibility is of the  
12 judge; for example, you are the judge of the facts, you are the  
13 sole and exclusive judge of the facts, the judge doesn't  
14 determine what the facts are, I don't determine what the facts  
15 are and Mr. Weedman doesn't determine what the facts are.

16 In that connection, the judge determines what the  
17 law is and what kind of evidence he will permit to be offered  
18 in the course of this trial and it has to meet certain  
19 stringent rules of evidence.

20 If, for example, something is prejudicial and has  
21 nothing to do with the probative value in regards to issues  
22 with which you are concerned, it doesn't come<sup>in</sup>, you understand  
23 that?

24 A I understand.

25 Q And in that spirit, Mr. Weedman asked you very  
26 sincerely the question whether or not you would set aside any  
27 opinion you may have against Mr. Manson which you have learned  
28 from the news media and judge this case solely upon the facts

1 in this case, and to which you responded in the affirmative,  
2 that you would do that; and, further, Mr. Weedman had asked  
3 you the question whether or not if the evidence showed that  
4 Mr. Grogan was perhaps closely associated with Mr. Manson that  
5 you could keep whatever prejudices you have against Mr. Manson  
6 aside and judge the evidence impartially, fully and fairly; and  
7 again you indicated you could.

8 Now, my question to you in this regard, and it is  
9 a logical extension of that, is if in accordance with the  
10 rules of evidence there is, for example, evidence of associa-  
11 tion with Mr. Grogan and Mr. Manson, will you promise that you  
12 will impartially weigh that evidence and consider it for the  
13 proper purpose for which it is offered, in accordance with  
14 his Honor's instructions?

15 A I would.

16 Q All right.

17 So, in other words, merely because you may have  
18 seen, or read or heard something outside this trial doesn't  
19 mean that merely because -- and, if it does -- some of that  
20 subject matter appears in the courtroom, that you are totally  
21 to disregard it because you heard it outside, you are to put  
22 aside any impression you have with respect to having heard,  
23 read or seen about that subject matter outside but to consider  
24 it here and evaluate it here in the light of the evidence in  
25 this case.

26 Would you do that?

27 A I would.

28 Q Now, Mr. Winn, I think I have a duty at the outset

1 to tell you, and let me preface what I am about to tell you  
2 with the following observation: it is so important to  
3 reinforce it <sup>in</sup> to each and every juror's mind, in this state  
4 upon the return of a first degree verdict, then the jury must  
5 decide the proper penalty, which may be life or it may be  
6 death; and in that connection, you will never get to that  
7 issue unless and until there is a return of a first degree  
8 murder verdict.

9 Do you understand that?

10 A I understand.

11 Q Now, taking it one step further, assuming that the  
12 jury votes murder in the first degree, then additional  
13 evidence may or may not be presented in what we call the  
14 penalty hearing, or the penalty phase of the trial, such as  
15 evidence in mitigation of the <sup>offense</sup> evidence, perhaps evidence in  
16 aggravation of the offense, evidence showing the circumstances  
17 surrounding the commission of the crime, considerations of the  
18 defendant's background and history.

19 These are all things which a juror may properly  
20 consider together with the evidence adduced at the guilt phase  
21 to determine the proper penalty in this case.

22 You understand that?

23 A I understand.

24 Q Now, I don't know if you understand this point,  
25 and this is a very important one: there can be no return of a  
26 death penalty verdict unless all 12 jurors vote for death.

27 Do you understand that now?

28 A I understand.

1 Q All right.

2 Now, that means that if 11 jurors vote for the  
3 death penalty in their heart and their mind and their  
4 conscience and in their sole and absolute discretion and you,  
5 for example, as the 12th juror refrain from the death penalty  
6 and vote for life, there is no death penalty in this case.

7 You understand that?

8 A Yes.

9 Q Would it be fair to say if you were of a mind, as  
10 you sit here now, that under no circumstances will you ever  
11 consider the death penalty, there could be no return of the  
12 death penalty in this case; isn't that correct?

13 A That's right.

14 Q So that it necessarily follows that the People  
15 could not get a fair trial on that issue should we reach that  
16 issue, isn't that right, if you were of that frame of mind?

17 A Yes.

18 Q So what I am doing, then, is asking you in the  
19 light of these observations and the light of the fact that  
20 there can be no return of the death penalty verdict unless and  
21 until 12 jurors unanimously vote for death, do you think that  
22 if the facts and the circumstances were such as to warrant the  
23 return of a death penalty, in your sole and absolute discretion,  
24 that you could and you would vote the death penalty?

25 A Yes.

26 Q Now, you understand that after you get back into  
27 the jury room and discuss the issue of penalty, and let's  
28 assume that all 12 jurors vote the death penalty, you would,

1 nevertheless, be required to come right back into this jury  
2 box and be seated where you are sitting and tell the court  
3 by your verdict, for the crime of which Mr. Grogan is  
4 convicted of murder in the first degree he has been sentenced  
5 to die; could you do that?

6 A Yes.

7 Q If it was consistent with your sole and absolute  
8 discretion and your conscience and your heart and your mind,  
9 could you do that?

10 A I could.

11 Q Do you believe in the principle, sir, that all  
12 persons should be treated equally under the laws?

13 A I do.

14 Q And I take it that you are aware of the fact that,  
15 as all thinking citizens are, that, unfortunately, this is not  
16 always the case; isn't that correct?

17 A That's correct.

18 Q And, nevertheless, in a courtroom we try to put our  
19 prejudices aside if we can and we try to give both sides a full  
20 and fair trial; and that's what we are trying to do in this  
21 case, you understand that?

22 A I understand.  
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1 Q In that sense we are seeking one thing and I  
2 think it is fair to state that we are seeking the ascertainment  
3 of the truth. Would you agree with that?

4 A I agree.

5 Q Do you believe that regardless of the person's  
6 exterior appearance, yellow, green, purple, whatever his  
7 ethnic background is, that he should be treated equally under  
8 the law?

9 A Right.

10 Q All right. If you were convinced beyond a reason-  
11 able doubt and to a moral certainty that Mr. Grogan committed  
12 the crime of murder in the first degree would you hesitate in  
13 voting guilty solely because of the evident youth of Mr. Grogan?

14 A I -- would you --

15 Q Let me backtrack for a moment. Yes, and let me  
16 state at the outset I am not trying to ask any trick questions.  
17 If there is something in my question which causes you to become  
18 confused at all, please ask me to restate it or reframe it and  
19 I will be happy to do so. Because many times I lose my thought  
20 and I become confused and I will perhaps confuse you.

21 So let's backtrack and see if we understand one  
22 another. You are to base your verdict in the guilt phase  
23 based solely upon the evaluation of the evidence in the case.  
24 Isn't that correct?

25 A That's correct.

26 Q Now, in that connection you know, as having served  
27 on a jury before you are not to have your verdict influenced by  
28 any sympathy you may have for the defendant or any passion or

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1 prejudice you have against the defendant, isn't that correct?

2 A That's right.

3 Q Now, you will note as you see Mr. Grogan here he  
4 is in view of you, that he is a rather young man. Do you think  
5 that fact alone would cause you to render you unable to vote  
6 him guilty of murder in the first degree?

7 A No.

8 Q All right. So what we are saying is that when we  
9 extend this concept that all people are equal under the laws,  
10 that whether a person is young or old or middle aged, or  
11 what have you, if the facts in the case warrant the return of  
12 the first degree murder verdict you would unhesitatingly vote  
13 that, is that correct?

14 A Yes, I would.

15 Q So what you are saying then is that you would not  
16 give to this defendant some benefit which you would not give  
17 to any defendant who finds himself in the same situation; is  
18 that correct?

19 A Right.

20 Q Now, you heard his Honor very clearly, and I thank  
21 him for doing so, discuss this concept of circumstantial evidence;  
22 did you not?

23 A I did.

24 Q In that connection Mr. Weedman asked you a question  
25 which pertains to one of the principles you will find in  
26 circumstantial evidence instructions, and that says that  
27 where there are two reasonable inferences -- and I underscore  
28 reasonable -- one of which points to the innocence of the

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1 defendant and the other pointing to the guilt of the defendant,  
2 you are dutybound to reject that which points to the guilt  
3 and must adopt and accept that which points to the innocence  
4 of the defendant.

5 Now, you indicated you had no quarrel with that  
6 concept, is that correct?

7 A That's correct.

8 Q Now, if his Honor will instruct you in that same  
9 instruction that where there are two inferences, one of which  
10 is unreasonable and which points to the innocence of the  
11 defendant, the other being reasonable and pointing to the guilt  
12 of the defendant, the court will instruct you that you are  
13 dutybound to again reject that which is unreasonable and  
14 adopt that which is reasonable, would you do that?

15 A I would.

16 Q If that reasonable interpretation, that reasonable  
17 inference pointing to the guilt of the defendant created in  
18 your mind an abiding conviction to a moral certainty of the  
19 truth of the charge, I take it you would not hesitate to vote  
20 guilty; is that correct?

21 A That's correct.

22 Q Now, his Honor indicated to you at the outset this  
23 is a circumstantial evidence case in that there will be no  
24 presentation of the body or any parts thereof. There will be  
25 no eyewitness to the killing. There will be no evidence or  
26 testimony of a witness who had observed the body in death.

27 Do you understand that?

28 A I understand.

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1 Q Now, if from the circumstantial evidence in this  
2 case you felt an abiding conviction to a moral certainty  
3 that Mr. Grogan had murdered Mr. Shea, would you refuse to  
4 vote guilty solely because we failed to produce the body or  
5 any parts thereof or an eyewitness to the killing?

6 A No, I would not.

7 Q All right. So what you are telling me is that  
8 you would not require the People to produce a body or to  
9 produce an eyewitness to the killing or an eyewitness to  
10 having observed the body in death, if the evidence in this  
11 case created an abiding conviction to a moral certainty that  
12 Mr. Shea is dead, that he met his death by a criminal agency  
13 and that Mr. Grogan was responsible for his death; is that  
14 correct?

15 A That's correct.

16 Q Now, do you feel because our case rests wholly  
17 upon circumstantial evidence that you would require the People  
18 to prove their case beyond all doubt and to demonstrate that  
19 degree of proof which excludes all possibility of error, or  
20 would you, rather, require the People to sustain their burden  
21 of proof which is required in all cases, namely, that degree  
22 of proof which creates an abiding conviction to a moral  
23 certainty of the truth of the charge?

24 A Yes, I would.

25 Q All right. So in other words, we are not again  
26 going to make the People prove a greater degree of proof than  
27 that which we are already required to prove in law; is that  
28 correct?

1           A       That's right.

2           Q       You realize that the People are not required to  
3 prove and demonstrate this degree of proof which excludes  
4 all possibility of error and creates absolute certainty in  
5 your mind, for such proof is rarely if ever possible; do  
6 you understand that?

7           A       I understand.

8           Q       Now, I would like to give just one short example  
9 of circumstantial evidence and then ask you a question.

10                   I am going to ask all of the prospective jurors  
11 who are now seated behind the railing to listen to this  
12 because I won't give it again in the interests of saving  
13 time. And in due respects to the other 11 jurors I am going  
14 to change the example because they have already heard it.

15                   I want you to assume for a moment you are out in  
16 the desert and you are 100 miles from any metropolitan area  
17 and there are no cars in sight and there are no buildings  
18 in sight except one building. And it seems to be a building  
19 in which refreshments are served. And there is one person  
20 there and he has three pies on a counter.

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1 And an individual walks up to the counter, there  
2 being no other persons within 100 miles of this little shack  
3 where they are selling pies, where this one person is selling  
4 pies. He asks how much the pies are and the individual who is  
5 selling the pies says, "Well, it's a dollar seventy-five a pie."  
6 And the person who wanted to buy the pie says, "Well, thank  
7 you, I don't have the money." And he starts to walk away.

8 The proprietor or the seller of the pies turns  
9 around for a moment to look in the other direction, and when  
10 he turns back about 15 seconds later he notices that there  
11 aren't three pies any more on that counter, that there are  
12 only two. And he sees the individual who had originally  
13 inquired about the pie, with a pie, and he is walking away  
14 and he is about 200 feet away from this shack where he was  
15 selling the pies, and there are no other persons within 100  
16 miles of the place.

17 Now, that proprietor would draw the inference,  
18 would he not, and would be reasonable to do so, that the person  
19 who had originally inquired about the pies and who was  
20 presently in possession of one, took one without his permission;  
21 isn't that correct?

22 A That's right.

23 Q That is a reasonable inference, isn't it?

24 A That's right.

25 Q All right.

26 So all we are talking about then in circumstantial  
27 evidence is you must draw inferences from facts which are  
28 proven to you; isn't that right?

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1 A Correct.

2 Q And the last quick example is your wife comes home  
3 and she drives, for example, a Cougar. And she gets out of the  
4 car and you hear the car but you don't see her driving it. And  
5 she is about 3 feet from the car and you come to greet her at  
6 the front door, and you conclude that she drove home in that  
7 car. You don't see anybody else around. But yet you didn't  
8 see her drive it, did you?

9 A No.

10 Q That is a reasonable inference to be drawn, too,  
11 isn't that correct?

12 A That's right.

13 Q Isn't it fair to say in your everyday life you  
14 draw inferences, and from the inferences that you draw you act  
15 upon them, whether you punish a child for doing something, or  
16 you take certain action? Isn't that correct?

17 A That's right.

10

1 Q I take it you would not hesitate, then, to draw  
2 reasonable inferences from facts that are proven to you by  
3 circumstantial evidence; is that correct?

4 A That's correct.

5 Q Now, it has been alleged in this indictment that  
6 Mr. Shea, the decedent, the alleged decedent, was killed  
7 between the dates August 16, 1969, and September 1, 1969.

8 Assuming for a moment that the People proved beyond  
9 a reasonable doubt and to a moral certainty that Mr. Grogan  
10 murdered Mr. Shea between those dates alleged in the indictment,  
11 would you, nevertheless, require the People to prove the exact  
12 date and the exact time of the death before voting guilty?

13 A I don't think so.

14 Q All right.

15 You say you don't think so?

16 Let me explain it this way, because I am not trying  
17 to trap you into any answer: we are only required to conform  
18 our proof to the allegations in the indictment, or the accusa-  
19 tion, if you will; and the accusation alleges that Mr. Shea  
20 met his death between the dates August 16, 1969 and September  
21 1, 1969; and if you were convinced beyond a reasonable doubt  
22 and to a moral certainty that he, in fact, met his death during  
23 the period of time alleged in the indictment, I take it you  
24 wouldn't require us to prove the exact time and the exact date  
25 of his death; is that correct?

26 A That's right.

27 Q Is there any reason why you could not be fair and  
28 impartial to both sides, Mr. Winn?

1 A No, there is not.

2 Q May I ask you just generally what general area you  
3 reside in?

4 A Southwest area of Los Angeles.

5 Q And, incidentally, with respect to police officers  
6 do you feel that police officers -- and some people, oddly  
7 enough, have this opinion -- would do anything in order to  
8 secure a conviction, such as take the stand and stretch the  
9 truth?

10 A No, I don't think they would.

11 Q Do you think that you would be willing to apply  
12 the same standards in judging the testimony of police officers  
13 as you would any other witness who takes the stand?

14 A I would.

15 Q In other words, if his testimony is reasonable, if  
16 it is consistent with the other objective evidence presented  
17 in this case and you feel that it is worthy of weight, then  
18 you are entitled to accept it.

19 If, on the other hand, you feel it is not worthy  
20 of consideration, you are free to reject it because you are the  
21 sole and exclusive judges of the facts; is that fair enough?

22 A Right.

23 Q And it may come to pass that the People will have  
24 certain witnesses who are loosely termed former members of the  
25 Manson family.

26 Would your opinions be such concerning the Manson  
27 family in general that you would automatically refuse to  
28 consider their testimony in light of the objective evidence?

1 A No.

2 Q All right.

3 I take it you would want to hear what they have to  
4 say, you'd observe their demeanor on the stand and you'd judge  
5 their testimony in the light of all the evidence made known to  
6 you; is that right?

7 A I would.

8 Q Mr. Winn, lastly, since you have had experience as  
9 a juror, I take it that you have been part of this <sup>judicial</sup> judicious  
10 process of give and take in that you have discussed your  
11 conclusions with jurors back in the jury room and you have  
12 listened to their conclusions; is that right?

13 A I have.

14 Q And I take it that you probably found that to be  
15 not only an interesting experience but a pretty rewarding one;  
16 isn't that right?

17 A It was.

18 Q Mr. Winn, do you think that if you were selected  
19 as a juror in this case and you found a lot of issues that  
20 needed discussion that you'd be willing to listen to the opinions  
21 and conclusions of the other 11 members of the panel?

22 A Yes, I would.

23 Q And I take it you wouldn't take the attitude, as  
24 some jurors have in the past, "Well, I know how I am going to  
25 vote and I am going to sit in the corner until you come  
26 around to how I feel. I don't want to listen to what you have  
27 to say."

28 You wouldn't take that attitude, would you?

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1 A No, I would not.

2 Q And I take it that if another juror wanted to know,  
3 "Well, Mr. Winn, that is an interesting point you raise. Can  
4 you tell me the basis for your conclusion or your assumption?"

5 Will you be willing to explain to that juror,  
6 patiently, how you arrived at your conclusion?

7 A Yes, I would.

8 Q And if you thought, for example, that when you  
9 initially entered the jury room that you were going to vote a  
10 certain way but after hearing the reasons for the conclusions  
11 of the other 11 jurors, assuming they had different conclusions  
12 and you thought that those conclusions were reasonable and  
13 you reexamined your own conclusions in light of their explana-  
14 tion, would you put your pride aside and would you change your  
15 view if, not by duress, and not by coercion, but by reason and  
16 logic you were convinced their view was right?

17 A Yes, I would.

18 MR. KATZ: Thank you, sir.

19 Pass for cause.

20 THE COURT: Now, let's see, gentlemen, where we were.

21 Do the People have a peremptory?

22 MR. KATZ: People accept the panel as now constituted.

23 THE COURT: Very well. How about the defendant?

24 MR. WEEDMAN: Your Honor, we will thank and excuse  
25 Mr. Cooley.

26 THE COURT: Very well.

27 THE CLERK: George W. McGregor, M-c G-r-e-g-o-r.  
28

GEORGE W. MCGREGOR

BY THE COURT:

Q Now, I will ask you, Mr. Juror -- take it that you have heard everything that I have said this morning, you were seated in the courtroom?

A Yes.

Q I want you to assume that you have been sworn to try this case as a juror and assume you are a juror for the purpose of this question; and to assume the case has been tried and that the jury is sent to the jury room to try the case.

Now, assume that, and at that time the jury could make a finding of not guilty or the jury could make a finding of guilty as charged.

Now, if the jury makes a finding of not guilty, the case is concluded in its entirety.

If the jury makes a finding of guilty as charged and sets the degree of the crime murder second degree, then the jury is to say -- that is to say they have no further duties, their duties are concluded on the finding of murder second degree.

If the finding of the jury is guilty first degree murder, then the court must hold a penalty hearing; and at the penalty hearing the jury must determine whether the penalty is the death penalty or life imprisonment.

Is that all clear to you?

A Yes.

Q Now, if you will please assume that you have arrived at this status where the jury has held a penalty

1 hearing and you are voting on the question of penalty, I want  
2 to ask you this question: at that time would you automatically  
3 vote against the imposition of the death penalty without  
4 regard to any evidence that might be developed at the trial of  
5 this case before you?

6 A No, sir.

7 Q Thank you.

8 Now I will ask you another question, do you know of  
9 any reason at all that you could not be fair and impartial if  
10 you are selected to try this case?

11 A No, sir.

12 Q I will ask you this, should there be called any  
13 witnesses to the stand here to testify to any facts -- I would  
14 ask you if you could put to one side entirely any personal  
15 feelings or convictions, likes or dislikes that you might have  
16 against such a witness and decide this case with an open mind,  
17 entirely on the facts as you believe the facts to be, in  
18 accordance with the law; but you are the judge of the facts,  
19 and disregard personal feelings or prejudices, if you have any,  
20 against any witness who may be called to testify?

21 A Yes.

22 THE COURT: Thank you.

23 Defendant may inquire.

24 MR. WEEDMAN: Thank you, your Honor.

25 Q Mr. McGregor, may I ask you your business or  
26 occupation, please.

27 A Banking.

28 Q By whom are you employed?

1 A Bank of America.

2 Q Mr. McGregor, is there a Mrs. McGregor, and if so,  
3 is she employed?

4 A No.

5 Q I take it you are not married; is that so?

6 A I am married -- divorced.

7 Q I see.

8 Mr. McGregor, should this trial last as much as  
9 eight weeks, will it cause you any personal hardship?

10 A Yes, it would.

11 Q Will you tell us about that, please.

12 A I have a letter that would cause hardship on my  
13 job to be away that long.

14 Q You say you have a letter?

15 A I have a letter to the court to that effect.

16 Q Would you care to present that to the court,  
17 Mr. McGregor?

18 MR. WEEDMAN: Your Honor, may I?

19 THE COURT: Yes.

20 Is that all right, counsel?

21 MR. KATZ: I have no objection, your Honor.

22 THE COURT: All right.

23 (Document handed to court.)

24 THE COURT: Well, suppose you counsel step up here a  
25 minute, will you come up, please.

26 MR. WEEDMAN: Yes, your Honor.

27 THE COURT: I don't think you need the reporter, unless  
28 you want him. It is up to you, any way you want it.

1 MR. WEEDMAN: I think we can do without him.

2 THE COURT: All right. If you want him, call him in.

3 (Unreported discussion between court  
4 and counsel.)

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THE COURT: Now we are back in session.

Mr. McGregor, I have in my hand your letter and I have read the letter from your employer. I appreciate the letter but I do not feel that it constitutes legal ground for excuse. I recognize your situation. If your employer complains, tell him to complain to me and not to hold it against you. Fire at me, not you.

And I do think I will overrule the letter because in the event that you are held, your services are needed as a juror. Thank you very much, though, for your statement, for this letter.

Now, where were we, gentlemen? I had finished, I had passed for cause?

MR. WEEDMAN: Yes, I believe you have, your Honor.

THE COURT: All right.

BY MR. WEEDMAN:

Q Apart from the letter you have presented to the court, Mr. McGregor, are there any other personal hardship problems?

A No.

Q With respect to your perhaps having to serve as much as eight weeks on this jury?

A No.

Q All right, sir. In the matter of your experience as a juror have you sat previously on any criminal cases?

A No.

Q With respect to the matter of the death penalty would you in the kind of first degree murder case that I

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1 discussed a few moments ago with Mr. Winn automatically impose  
2 the death penalty?

3 MR. KATZ: Excuse me, your Honor. There is an objection  
4 on the grounds that it is ambiguous at this point. I don't  
5 know what counsel has reference to.

6 MR. WEEDMAN: Very well. I will withdraw the question.

7 THE COURT: All right. It is withdrawn.

8 Q BY MR. WEEDMAN: In the event, after careful delibera-  
9 tion of all the evidence in the guilt phase, Mr. McGregor,  
10 you conclude that my client has committed first degree murder,  
11 a willful, premeditated malicious killing of another human being  
12 without any justification or excuse, would you automatically  
13 impose the death penalty without regard to additional evidence  
14 that may be presented to you?

15 A Yes.

16 MR. WEEDMAN: You would. Well, your Honor, I would respect-  
17 fully challenge the juror for cause under Section 1073,  
18 subdivision 2, your Honor.

19 THE COURT: Do the People want to speak on that point?

20 MR. KATZ: Yes, we would like to examine Mr. McGregor.

21 THE COURT: Are you satisfied or do you want to examine?

22 MR. KATZ: I would like to examine Mr. McGregor.

23 THE COURT: Go ahead. Then I will go back to you in just  
24 one minute, Mr. Weedman.

25 Go ahead.

26 BY MR. KATZ:

27 Q Mr. McGregor, I am sure you appreciate the spirit  
28 in which these questions are asked of you, that Mr. Weedman

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1 certainly isn't trying to embarrass you, nor am I, you  
2 appreciate that. In that connection, sir, we are obliged to  
3 examine your state of mind in regards to the death penalty  
4 to determine whether or not you can give both sides a fair  
5 trial on the issue of penalty; you appreciate that, is that  
6 correct?

7 A Yes.

8 Q And in that connection you understand that if there  
9 is a penalty phase of this trial there may be additional evidence  
10 presented in the course of the penalty phase proceeding that  
11 is evidence perhaps in mitigation of the offense, evidence in  
12 aggravation of the offense, evidence showing the background,  
13 the history of Mr. Grogan. You may properly consider that  
14 along with the evidence presented in the guilt phase, and  
15 from that determine in your absolute and sole discretion the  
16 proper penalty in this case; do you understand that?

17 A Yes.

18 Q In other words, if you were of a mind, and I think  
19 Mr. Weedman was driving at this, that you would automatically  
20 vote the death penalty, each and every time following conviction  
21 of murder in the first degree without considering at all the  
22 evidence in the penalty phase, then you would not be an accept-  
23 able juror; you appreciate that?

24 A Yes.

25 Q All right. Now, would you be willing to consider  
26 whatever evidence might be presented in the penalty phase before  
27 you would make a decision as to the proper penalty in this case?

28 A Yes.

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1 Q I take it that assuming for a moment that Mr.  
2 Grogan was convicted of murder in the first degree by the jury  
3 you would wait until you heard all of the evidence in the  
4 penalty phase before making a decision as to whether or not  
5 Mr. Grogan should live or die, is that correct?

6 A That's correct.

7 Q I take it you are not telling us that you would  
8 automatically, on each and every ballot, irrespective of the  
9 evidence in the penalty phase vote for death, is that correct?

10 A I did not mean that, no.

11 MR. KATZ: All right. Thank you. I have no further  
12 questions.

13 Q BY MR. WEEDMAN: Mr. McGregor, in the event that you  
14 have found my client guilty of murder in the first degree as  
15 I described a moment ago and no evidence at all is produced  
16 during the penalty phase, in other words, all you have then  
17 are the circumstances surrounding the killing, you have found  
18 that my client did it maliciously, wilfully, without justifica-  
19 tion or excuse, would you then automatically impose the death  
20 penalty?

21 MR. KATZ: I would object on the grounds that it now asks  
22 the juror to prejudge the evidence on the guilt phase, that  
23 being the sole basis for the determination of the evidence.

24 THE COURT: I will sustain your objection. Sustained.

25 Q BY MR. WEEDMAN: Mr. McGregor, would you have to  
26 hear evidence beyond the guilt phase in this trial in order to  
27 avoid the automatic imposition of the death penalty?  
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MR. KATZ: Again, your Honor, I think it requires a juror

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to prejudge the quality and kind and measure of the evidence  
adduced at the guilt phase.

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1 THE COURT: Well, let's have the question. Read the  
2 question, Mr. Reporter.

3 (The pending question was read by  
4 the reporter as follows:)

5 "Q Mr. McGregor, would have to hear  
6 evidence beyond the guilt phase in this trial  
7 in order to avoid the automatic imposition of  
8 the death penalty?"

9 THE COURT: Well, it assumes an automatic imposition of  
10 the death penalty for one thing. The witness has at this point,  
11 as I understand it, stated that it wouldn't be automatic.

12 MR. KATZ: That's correct, your Honor.

13 THE COURT: He would discuss, he would consider the  
14 evidence. I will sustain the objection the way it is phrased.

15 Q BY MR. WEEDMAN: Mr. McGregor, what if any kind  
16 of evidence would you require during a penalty phase in order  
17 to avoid automatically imposing the death penalty?

18 MR. KATZ: Same objection, your Honor, for the reason  
19 previously stated.

20 THE COURT: I will sustain it.

21 MR. WEEDMAN: Well, your Honor, if I may be heard for the  
22 record I am willing to discuss the matter outside the presence  
23 of the jury or here.

24 MR. KATZ: I would rather have it outside the presence  
25 of the jury.

26 THE COURT: All right. You can come in chambers and argue  
27 if you desire.

28 (Proceedings in chambers with both counsel

11a-2

1 and the defendant present:)

2 THE COURT: We are in chambers. The defendant is here.  
3 First restate your question so we can start with the proper  
4 foundation.

5 MR. WEEDMAN: May we have it reread, your Honor?

6 THE COURT: Yes.

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

9 "Q Mr. McGregor, what if any kind of  
10 evidence would you require during a penalty phase  
11 in order to avoid automatically imposing the  
12 death penalty?"

13 THE COURT: It is fallacious on two grounds. Then you  
14 can argue. What kind of evidence is not a statement of evidence,  
15 it is not evidence in this case. We will be arguing the law  
16 of other cases, other death penalty cases, number one.

17 Number two, it assumes that he is going to auto-  
18 matically vote a death penalty and he hasn't told us he would  
19 automatically vote a death penalty as I understand it.

20 MR. WEEDMAN: He did when I first questioned him.

21 THE COURT: Well, I don't think he understood. The question  
22 confused me. That doesn't mean that it would confuse somebody  
23 else.

24 MR. KATZ: My later questioning, your Honor, brought out  
25 the fact that he would not automatically impose the death  
26 penalty upon the return of a first degree murder verdict.

27 THE COURT: Well, I will sustain it on that ground. I  
28 don't think the testimony indicates that he would automatically --

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1 if he said he would automatically impose the death penalty  
2 I will excuse, and then we are just wasting time. And I don't  
3 think that is it, because he indicated that he would consider  
4 the question one way or the other on the penalty phase.

5 MR. WEEDMAN: Well, your Honor, I may be in error but of  
6 course during the voir dire the witnesses are sworn and in  
7 effect are testifying with respect to voir dire matters.  
8 And the conduct of voir dire as your Honor I am sure, better  
9 than counsel knows, rules of evidence apply. I am permitted,  
10 it would seem to me, to cross-examine in a sense, this witness,  
11 relative to his, at least on the face, equivocal statements  
12 with respect to the death penalty.

13 THE COURT: Well, we are fighting shadows. The question  
14 is you ask the question would you automatically vote for the  
15 death penalty? Now, first of all if he says yes, he should  
16 get off of there.

17 MR. WEEDMAN: Counsel wouldn't permit that kind of a  
18 question. If your Honor will, I will be happy to ask it.

19 THE COURT: Well, yes.

20 MR. KATZ: That is not true, your Honor, if counsel asks  
21 a question "Would you automatically vote the death penalty  
22 irrespective of the evidence following the return of a first  
23 degree murder verdict?" then I have no objection to that  
24 question.

25 MR. WEEDMAN: But your Honor, the point is --

26 THE COURT: I will permit after you hear -- if the jury  
27 convicts the defendant and there is a penalty phase, at the  
28 penalty phase would you automatically vote the death penalty?

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1 We are through. I will excuse.

2 MR. KATZ: No, without regard to the evidence --

3 THE COURT: Yes, without considering the evidence from  
4 the testimony in this case.

5 MR. KATZ: That's right.

6 THE COURT: Now, would you automatically vote the death  
7 penalty? That is the end of it.

8 MR. WEEDMAN: Your Honor, I really asked just to come  
9 into chambers so I could make a bit of a record here.

10 THE COURT: Surely.

11 MR. WEEDMAN: I amply recognize your Honor has already  
12 ruled. I respect that, your Honor.

13 THE COURT: That is all right.

14 MR. WEEDMAN: In such a matter I thought I should particu-  
15 larly try and protect the record. For the record I would urge  
16 the proposition that neither side is required to produce  
17 evidence during the penalty phase. So that I should therefore  
18 be permitted to probe the juror's state of mind relative to  
19 the death penalty by asking a question in the form of "Following  
20 a first degree murder conviction, during the guilt phase would  
21 you automatically impose the death penalty if there was no  
22 evidence adduced at the penalty phase?" It seems to me to  
23 probably --

24 THE COURT: Let me get my own thinking, and I will let  
25 you talk some more because I have got to answer these. Give  
26 my thinking. It assumes the People are not going to put --  
27 it is a rather unusual assumption. It assumes the People are  
28 going to hold a penalty hearing and remain mute.

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1 MR. WEEDMAN: They may.

2 THE COURT: Is it your intention to hold a penalty hearing,  
3 Mr. Katz, if there is a first degree verdict of guilty,  
4 first degree?

5 MR. KATZ: Yes, your Honor.

6 THE COURT: All right. With that showing I think we are  
7 back fighting shadows. If the district attorney says, "No,  
8 we are not going to hold a penalty hearing" then I think you  
9 are in a position to ask your question. But I would make  
10 a ruling standing by my former position of objection sustained.

11 Now, go ahead with your next position.

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2 MR. WEEDMAN: Well, just assuming, of course, that the  
3 prosecution did not put on any evidence at the penalty phase  
4 and assuming that the defendant does not, is a proposition only  
5 for purposes of exploring this juror's state of mind; and I  
6 admit that the People intend to put on evidence during the  
7 penalty phase --

8 THE COURT: Well, let's argue the law, not the facts.

9 If the People didn't put on a penalty hearing, the  
10 could would be immediately relegated to passing judgment on  
11 life imprisonment; and the minimum of the two requisites there,  
12 there wouldn't be a penalty hearing, I'd take hold and say,  
13 as a matter of fact, "Very well, I consider this first degree  
14 conviction to proceed on the basis of life imprisonment."

15 I mean, that's --

16 MR. KATZ: No, that's not --

17 THE COURT: -- from the standpoint --

18 MR. KATZ: That's not correct, your Honor.

19 MR. WEEDMAN: No; excuse me, your Honor, what I meant  
20 was -- I am sorry, I may have misspoken myself --

21 THE COURT: There wouldn't be any point in talking about  
22 it; that's what I am getting at.

23 MR. WEEDMAN: I think I misspoke myself.

24 It would be a penalty hearing, all right; in other  
25 words, the jury would still discuss the penalty. Counsel would  
26 argue the penalty --

27 THE COURT: I don't think I'd allow them. I don't think  
28 I can make a decision; I am not so sure -- I am not so sure --  
now, wait a minute, I may withdraw my own thinking.

1 MR. KATZ: I think I could assist --

2 THE COURT: It would take a stipulation. We have got to  
3 have something for the jury to consider.

4 MR. KATZ: No, your Honor; may I --

5 THE COURT: You can't just say, "We are in a penalty  
6 hearing," period. There would have to be a statement or a  
7 clearance that all of the testimony at the trial on the merits  
8 is to be considered --

9 MR. WEEDMAN: That's correct, your Honor.

10 THE COURT: -- fully. Yes, you have to have something  
11 for the jury on the penalty hearing.

12 MR. WEEDMAN: That is very correct, your Honor.

13 THE COURT: All right.

14 MR. WEEDMAN: But assuming that to be the case, and there  
15 would be no further, the issue would still be for the jury the  
16 question of the penalty.

17 THE COURT: That's correct.

18 MR. WEEDMAN: Your Honor, that really, then -- perhaps  
19 your Honor has hit on it; that is the thrust of my question.

20 In other words, and I certainly obviously didn't  
21 make it clear, if this juror, after hearing all of the evidence  
22 during the guilt phase --

23 THE COURT: All right.

24 MR. WEEDMAN: -- and then, of course, taking that guilt  
25 phase evidence into the penalty phase with him --

26 THE COURT: All right.

27 MR. WEEDMAN: -- but not having any additional evidence --

28 THE COURT: All right.

1 MR. WEEDMAN: -- would he automatically impose the death  
2 penalty.

3 MR. KATZ: That is asking him to prejudge the evidence,  
4 because he has heard all the evidence in the guilt phase; he  
5 has heard the quality of the killing, he has heard the  
6 circumstances surrounding the killing.

7 THE COURT: Yes, you see, it would -- "would you  
8 automatically?"

9 Now, let's wait a minute --

10 MR. WEEDMAN: Supposing he answered it "Yes," then I  
11 think, your Honor --

12 THE COURT: "Automatically impose the death penalty?"

13 MR. WEEDMAN: If he answered it "Yes," I think he'd be  
14 properly challenged.

15 THE COURT: Supposing he said, "Yes, I'd automatically  
16 impose the death penalty"?

17 MR. KATZ: Your Honor, may I make one observation, if I  
18 may?

19 Mr. Weedman is very correct when he says the law  
20 does not place the burden either on the defendant or the People  
21 to prove which penalty is the proper penalty in this case upon  
22 the return of a first degree murder conviction; so, therefore,  
23 the jury may, after considering the evidence, if any, presented  
24 at the penalty phase, for whatever reasons they have, vote in  
25 accordance with their sole and absolute discretion, the death  
26 penalty; and they may predicate that verdict based wholly on  
27 the evidence presented at the guilt phase.

28 Now, his question assumes that they have heard all

1 of the evidence; they learned the circumstances surrounding  
2 the killing, they made finding, for example, from the evidence  
3 that it was a particularly horrible and egregious crime and  
4 that it was without justification and without cause and that  
5 the culpability of the defendant is so great that in the  
6 absence of any further evidence under these peculiar  
7 circumstances, then it warrants a death penalty -- they don't  
8 know that; they can't prejudge the case.

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2 THE COURT: Let me take hold in this way, it could be  
3 handling the question -- first let me give you a record and  
4 say, as just framed, I would be inclined to sustain the  
5 objection; I am trying to give you a record here now.

6 Now, let's see if we can revamp it: if you were to  
7 state to the juror, "Mr. Juror, if you'll assume that you are  
8 at the penalty hearing and no further testimony will be produced  
9 in this case, and assume that there is no further testimony  
10 at the penalty hearing and that at the penalty hearing you are  
11 entitled to consider on the penalty hearing the testimony that  
12 has been heretofore produced at the trial of this action; but  
13 on the question of penalty, now, if such a situation should  
14 exist and you are reconsidering the testimony for the purpose  
15 of setting penalty, I want to know, are you going to automatically  
16 vote the death penalty?

17 There you could put your question in --

18 MR. WEEDMAN: That's correct, your Honor.

19 MR. KATZ: Your Honor, I would object to that question  
20 because, again, it is asking the juror to prejudge the quality,  
21 nature and kind of evidence adduced at the guilt phase.

22 If he says would he automatically refuse to consider  
23 life imprisonment, irrespective of the evidence, presented in the  
24 guilt phase, then I agree he can ask that question; but it has  
25 to be --

26 THE COURT: This is what -- I said that.

27 MR. KATZ: It was not contained in your Honor's question.

28 THE COURT: I said it was to be presumed, if it was, could  
be as evidence at the preliminary phase.

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1 MR. WEEDMAN: Yes, you did, your Honor.

2 THE COURT: I said that.

3 MR. KATZ: Yes, you did, your Honor, but I think the  
4 court is missing the thrust of my objection.

5 Once they are told they can consider the death  
6 penalty based upon the evidence presented at the guilt phase,  
7 then they <sup>MAY</sup> properly vote the death penalty without any  
8 other evidence.

9 THE COURT: Yes, I can see that.

10 MR. WEEDMAN: That's right.

11 MR. KATZ: So you can't ask a juror at this time, not  
12 knowing what the evidence is going to be in the guilt phase,  
13 whether or not he would automatically vote the death penalty  
14 unless you tag along the addendum, "irrespective of the  
15 evidence" -- "irrespective of the kind and nature of the  
16 killing, would you automatically vote the death penalty without  
17 consideration of any further evidence?"

18 That is what we want to know.

19 MR. WEEDMAN: Well, your Honor, I agree completely with  
20 your Honor's question; I wish I had asked it that way, we  
21 might have saved some time; and surely we have a right to have  
22 a juror who will not automatically impose the death penalty,  
23 even though --

24 THE COURT: Excuse me. Now read my --

25 MR. WEEDMAN: I won't say any more, your Honor.

26 THE COURT: Let me hear my question back there, Mr. Reporter,  
27 and read the suggestion that I just made -- it is after 12  
28 o'clock.

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1                   Make a note of this, X it or something; here's  
2 a possible question:

3                   "Mr. Juror, if you assume that we are at the  
4 position or holding or have held, about to hold a death penalty  
5 hearing, no additional testimony is given and it is -- the  
6 case is turned over or submitted to the jury on the death  
7 penalty hearing on the basis of all the testimony heretofore  
8 given in the trial of this action, without further testimony  
9 being given on the position of the death penalty hearing,  
10 if that should be the situation, now, if that is the situation,  
11 at this hearing, with that testimony before you, would you  
12 automatically vote for the death penalty on the basis of that  
13 testimony?"

14                  MR. KATZ: Well, then, your Honor, again I respectfully  
15 object on two grounds: Number one, the People, just as the  
16 defendant, are entitled to jurors who favor the death penalty,  
17 just as the defendant is entitled to have people on the jury  
18 who favor life imprisonment.

19                  The only issue is whether, irrespective -- and that  
20 is the key -- irrespective of the evidence, would they vote  
21 automatically?

22                  THE COURT: "Automatically."

23                  MR. KATZ: One way or the other. If they would, then they  
24 do not comply with Witherspoon and 1073.2 and 1074.8 of the  
25 Penal Code and should be excused.

26                  What you are telling them, in effect, by your  
27 question is, "Mr. Juror, I am going to tell you you can consider  
28 all of the evidence in this case presented at the guilt phase;

1 I am going to tell you you can consider the gravity of the  
2 offense, the manner in which the decedent met his death, the  
3 personal culpability of the defendant, and I am further going  
4 to tell you, assume there is no further evidence presented at  
5 the penalty phase, would that evidence cause you, without  
6 further evidence, to automatically vote the death penalty?"

7 You are asking the juror to prejudge.

8 MR. WEEDMAN: Your Honor --

9 MR. KATZ: You are asking the juror to prejudge the  
10 evidence because at that point they are considering the evidence  
11 on the issue of penalty.

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1 THE COURT: Well, I don't necessarily agree with you,  
2 but if you were to put in your question "Would you automatically  
3 vote against the death penalty or would you consider this  
4 testimony as testimony at the death penalty hearing and then  
5 after having considered it, would you vote automatically for  
6 the death penalty?"

7 MR. WEEDMAN: I agree, your Honor.

8 THE COURT: I think if you put that in, in other words,  
9 I only partially agree. Maybe that covers you or doesn't. If  
10 you add that in there I think you are entitled to give the  
11 question.

12 MR. WEEDMAN: Of course, Mr. Katz will always have an  
13 opportunity to come back.

14 THE COURT: Well, I will allow it if you will add that  
15 in. I think it should be added in there.

16 MR. WEEDMAN: All right, your Honor. I will.

17 THE COURT: If you add that in I will overrule the  
18 objection, if it is re-asked, and I will allow the question  
19 to be asked the juror.

20 MR. WEEDMAN: Very well, your Honor.

21 THE COURT: Maybe we had better go over.

22 MR. WEEDMAN: Perhaps, your Honor, we could ask that  
23 question now and get an answer.

24 THE COURT: All right. Then we will go over.

25 MR. WEEDMAN: All right.

26 THE COURT: All right.

27 (The following proceedings were had  
28 in open court:)

1 THE COURT: Now we will go ahead.

2 MR. WEEDMAN: Thank you, your Honor.

3 Q Mr. McGregor, assuming now that you have completed  
4 the guilt phase of the trial and from that guilt phase the jury  
5 has arrived at a verdict of a willful premeditated killing of  
6 another human being without justification or excuse. In short,  
7 a first degree murder which, of course, means maliciously as  
8 well. And of course thereafter you go into the penalty hearing  
9 and you are instructed naturally that you are to consider the  
10 evidence from the guilt phase. Do you understand me so far?

11 A Yes.

12 Q Okay. Now, in the event, during the so-called  
13 penalty phase, no additional evidence is produced --

14 THE COURT: Now, this is an assumption, just an assump-  
15 tion.

16 All right. I am not trying to interrupt you, but  
17 I want to get that clear.

18 MR. WEEDMAN: Thank you.

19 THE COURT: Go ahead now.

20 Q BY MR. WEEDMAN: Assuming no additional evidence  
21 is produced so all you have to consider now is the first  
22 degree murder, my question then is would you automatically  
23 impose the death penalty?

24 MR. KATZ: Objection for the record, your Honor.

25 THE COURT: Now the objection in there.

26 MR. KATZ: Yes, the objection for the record, on the  
27 grounds previously stated in chambers.

28 THE COURT: All right. Now, I am going to add in there

1 the question is: would you automatically vote for the death  
2 penalty? I am going to amplify the question. If you did or  
3 didn't vote for the death penalty at that time and place as  
4 indicated by counsel, would you consider such evidence that was  
5 given at the trial, analyze it with your fellow jurors,  
6 consider it, and then the question is would you automatically  
7 vote for the death penalty or would you consider it carefully  
8 with an open mind before passing your vote or rendering your  
9 vote? That is what the question is.

10 Now, restate it. I am not trying to disrupt your  
11 question, but I am trying to get it clear to the juror.

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

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1           Q       In other words, Mr. McGregor, for purposes of our  
2 question you are in the penalty phase now and you have well in  
3 mind the first degree murder conviction. You are now convinced  
4 as the law requires you to be convinced that my client has  
5 committed a willful, premeditated, malicious murder. And  
6 you are convinced beyond a reasonable doubt and to a moral  
7 certainty as you must be.

8                       Would you in the penalty phase in the absence of  
9 additional testimony automatically return a death penalty verdict?  
10

11          A       I -- in returning a death penalty I would have to  
12 hear the viciousness and the evidence of how vicious the crime  
13 was, probably before the passing the death penalty.

14          Q       All right. That is fine. In other words, Mr.  
15 McGregor, what you are telling us then is that if you go  
16 into a penalty phase you are not going to automatically do  
17 anything?

18          A       Yes.

19          Q       But you are going to wait until you have considered  
20 the evidence in light of the penalty determination?

21          A       Before passing the death penalty I would want to  
22 hear every possible bit of evidence.

23          Q       Surely. And we don't wish to mislead you here  
24 because the chances are very likely that both sides will  
25 introduce evidence during the penalty phase, do you understand  
26 that?

27          A       Yes.

28          Q       That we would not, it is merely an assumption for  
purposes of trying to find out how you feel frankly about the

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1 death penalty.

2 A Yes.

3 Q Okay.

4 A Yes.

5 MR. WEEDMAN: Perhaps we should adjourn.

6 THE COURT: All right.

7 I think, folks, we are after 12. Now, we will  
8 recess.

9 Now, ladies and gentlemen, under the circumstances  
10 as they are, we will go over from this time -- you are now  
11 down to ten minutes after 12 on Friday -- until Tuesday.  
12 Theoretically Monday is the 4th of July, which it isn't, but  
13 it is supposed to be.

14 So we will go till Tuesday at 9:30 and continue.  
15 Now, several things keep in mind, folks. Return to this court-  
16 room. Kindly return promptly because we cannot operate without,  
17 certainly, the jurors here that are in the box and we must  
18 have you all here promptly. And next you must not, ladies  
19 and gentlemen, any of you discuss the case with anybody at all  
20 or come to any opinion or conclusion.

21 And we will go over until 9:30 Tuesday morning.  
22 Thank you very much.

23 (At 12:10 p.m. an adjournment was taken  
24 until 9:30 a.m. on Tuesday, July 6, 1971.)  
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