"We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. . . ." Id., 517-18.

The court did, however, leave open the possibility that such a showing might be made in some future case. Id., 520(n.18).

This Court, subsequent to Witherspoon and several months prior to appellant's trial, denied the petitioners' motion for an evidentiary hearing regarding the foregoing claim in In re Anderson, supra, 69 Cal. 2d 613, noting that the pending studies were of a "'sociological or psychological nature'" and that therefore the "'prospect is remote'" that pending studies "'will yield views of human behavior of such incontestable, eternal truth that existing constitutional doctrines will have to retreat before them. Such studies hold too little promise to warrant what would amount to an indeterminate stay of the judicial process in a critical area.'" Id., 621.

Respondent would add moreover that by their very nature as sociological assertions, appellant's arguments would more properly be directed to the Legislature than to the courts.

Significantly, the evidence proffered by appellant was before the United States Supreme Court in Witherspoon and was rejected as insufficient to establish the point presently urged. Appellant's offer of proof was that "the testimony of this witness Zeisel would be in substance as is set forth in the document that I now hold in my hand . . . . The document is entitled, "'Some Data on Juror Attitudes Toward Capital Punishment."'" (Rep. Tr. p. 8970.) The described study was marked as Defendant's Exhibit VV for identification. (Rep. Tr. p. 8971.) At page vi of the Introduction to the study, it is stated that an earlier draft "was used by defense counsel in their briefs in Witherspoon v. Illinois and Bumper v. North Carolina, both now awaiting hearing in the United States Supreme Court." At page vii it is stated that the study "has been expedited in its publication in the hope that it may prove useful to the litigants in the two Supreme Court cases referred to." Moreover the study's

references, perhaps somewhat out-of-date, are to California Polls and Gallup Polls of 1960, 1965, and 1966, and a California Poll of 1967. (Exh. VV, pp. 12, 14-15, 17, 21-23.)

See Witherspoon v. Illinois, supra at 517(n.10).

Respondent submits that the passing of time has not endowed the foregoing material with any more persuasiveness than it had in 1968, when its conclusions were rejected by the United States Supreme Court in Witherspoon.

See also Bumper v. North Carolina, supra, 391 U.S. 543, 545;

People v. Terry, 2 Cal. 3d 362, 382;

In re Eli, 71 Cal. 2d 214, 218, cert. denied, 396 U.S. 1020;

In re Arguello, 71 Cal. 2d 13, 16-17;

People v. Beivelman, 70 Cal. 2d 60, 78-80;

People v. Gonzales, 66 Cal. 2d 482, 498-99;

People v. Nicolaus, supra, 65 Cal. 2d 866, 882.

VII

APPELLANT'S PUNISHMENT WAS NOT FIXED AT DEATH BY A JURY FROM WHICH PROSPECTIVE JURORS WERE IMPROPERLY EXCLUDED BECAUSE OF THEIR VIEWS ON CAPITAL PUNISHMENT

Appellant contends that he is entitled to a new trial on the matter of penalty because his punishment was fixed at death by a jury from which prospective jurors were improperly excluded because of their views on capital punishment. Appellant bases his claim of error on the trial court's excusal for cause of one prospective juror and five prospective alternate jurors[35/] in alleged violation of the principles set forth in Witherspoon v. Illinois, supra, 391 U.S. 510, 522-23 (App. Op. Br. pp. 553, 555-56), and on the "prosecution's use of peremptory challenges to remove veniremen who under Witherspoon would be improperly excused for cause." (App. Op. Br. p. 570.)

Respondent submits that examination of the

35/ The excusal of alternates must be considered since two alternates ultimately served on the jury which convicted appellant and fixed his punishment. (Rep. Tr. pp. 7369-70, 8719-20, 8739, 8840-41.) See People v. Bandhauer, 1 Cal. 3d 609, 617-18.

voir dire of the prospective juror and alternates in question establishes that appellant's contentions are without merit.

Prospective Juror Alvidrez was asked, "Are you telling me that it is impossible for you to think of any set of facts that would, in accordance with your conscience, enable you to vote for a guilty verdict wherein you knew there was a possibility that a death verdict might follow?" She responded, "A guilty verdict, yes, a penalty, no." Asked, "But you could not vote for a death penalty in the penalty phase of a trial?", she responded that she "could not." She responded further that she could "conceive of no set of facts" enabling her to do so and that "there is no possible crime of murder where [she] could ever vote for a verdict of death" "under any circumstances at all."[36/]

36/ The five prospective alternates likewise were properly excluded under Witherspoon. Prospective alternate Lewis would be unable to find a defendant guilty even if the evidence justified a finding of guilt. She would "automatically refuse to impose" the death penalty "regardless of any evidence that might be developed during the trial." (Rep. Tr. pp. 2495-97.) Prospective alternate Katrenich "automatically" could not "inflict the death penalty" "[r]egardless of the evidence" and under "no set of facts and under no circumstances, no matter how horrible." (Rep. Tr. p. 2532.) Prospective alternate Lipson stated he

(Rep. Tr. pp. 903-05.)

The trial court, in the course of jury voir dire conducted several months after Witherspoon, properly excused the juror and prospective jurors in question after they "made unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial

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would "automatically refuse to vote for a death penalty, . . . notwithstanding the evidence." He could "conceive of no case, no set of facts . . . so terrible" as to enable him to vote for the death penalty. (Rep. Tr. p. 2696.) Prospective alternate Hart stated her "strong reservations against the death penalty" and noted that she therefore could not vote for a guilty verdict. Then asked, "No matter how terrible the facts are, how horrendous they are, how awful they are, you could not under any circumstances vote for guilt?", she responded, "I have strong convictions." (Rep. Tr. pp. 2767-68.) Prospective alternate Acuma was asked, "do you entertain such conscientious opinions concerning the death penalty that you would be unable to find a defendant guilty if the evidence should justify such a finding of guilty." He replied, "I wouldn't be able to, with a clear conscience, to find a guilty verdict," "no matter what the facts were, no matter how terrible, how horrendous." Mr. Acuma then stated that he could sit on the first phase of the trial but that he did not "believe" there were any "circumstances under which [he] could conceivably vote the death penalty." (Rep. Tr. pp. 2788-89.)

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of the case before them." (Emphasis by the court.)

Witherspoon v. Illinois, supra at 522(n.21).

See also People v. Terry, supra, 2 Cal. 3d 362, 379-80;

People v. Floyd, 1 Cal. 3d 694, 723-27;

People v. Miller, 71 Cal. 2d 459, 468-71;

People v. Mabry, 71 Cal. 2d 430, 444-45;

People v. Tolbert, 70 Cal. 2d 790, 808-11;

People v. Hill, 70 Cal. 2d 678, 701 & n.3.

Appellant's contention that the prosecution was not free to exercise its peremptory challenges as it saw fit is clearly without merit. This Court will not "engage in conjecture regarding the prosecutor's reasons for exercising some of his peremptory challenges to excuse some jurors who had reservations concerning the death penalty."

People v. Floyd, supra, 1 Cal. 3d 694, 727.

The United States Supreme Court also expressed a similar conclusion in Swain v. Alabama, supra, 380 U.S. 202, refusing to

". . . hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any

particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. . . ." Id., 222. See also Groppi v. Wisconsin, 400 U.S. 505, 510.

VIII

THE TRIAL COURT DID NOT ERR IN EXCLUDING, AT THE PENALTY PHASE, TESTIMONY CONCERNING THE ARAB-ISRAELI CONFLICT

Appellant contends that the trial court erred in excluding testimony "relative to the social, historical, economic, and political dimensions of the Arab-Israeli conflict during the Sirhan childhood in Palestine." (App. Op. Br. p. 636; see Rep. Tr. pp. 8856-58, 8873-75.)

Respondent submits that the offered evidence was totally irrelevant to the jury's determination of penalty in the present proceedings because, as defense counsel conceded at trial, it in no way involved appellant's personal experience. (Rep. Tr. p. 8874.) To be contrasted is the abundant evidence of appellant's life in Jerusalem which was put in evidence by

the defense at the guilt phase and never controverted by the prosecution.

In an analogous situation this Court in People v. Nye, 71 Cal. 2d 356, upheld the trial court's refusal to admit in evidence a motion picture relating to the defendant's earlier years. The Court held,

> "Had the film been even to a partial degree an accurate portrayal of defendant's adolescent years, the trial court undoubtedly would have allowed it to be shown to the jury. However, . . . the film does not even attempt to portray defendant's activities at the ranch. Rather, it was a staged and contrived presentation, in which . . . defendant . . . plays the part of a boy at the ranch . . . . Under the circumstances, it was irrelevant and immaterial on the issue of penalty, and the trial court properly excluded it." Id., 371-72.

The Court in Nye "noted that the scope of admissible evidence under section 190.1 of the Penal Code is not so broad as to allow the introduction into evidence of anything no matter how

remote its relation to the defendant's background." Id., 372. The Court also upheld the exclusion of a portion of a court-martial report as inadmissible hearsay. Id.

See also People v. Mitchell, 63 Cal. 2d 805, 814-15, cert. denied, 384 U.S. 1007.

Respondent submits that the aforementioned evidence proffered by the defense at the penalty proceedings below was properly excluded as irrelevant and immaterial on the sole issue before the jury, the proper punishment to be imposed.[37/]

IX

THE ABSENCE OF FIXED STANDARDS TO GUIDE THE JURY ON THE MATTER OF PENALTY IS NOT UNCONSTITUTIONAL

Appellant contends that the absence of fixed standards to guide the jury in deciding between the

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37/ The trial court's equitable position in ruling on the relevance of proffered evidence is illustrated by the court's also excluding from evidence (at the guilt phase) the prosecution's motion picture of Senator Kennedy's final speech delivered moments before the Senator was assassinated by appellant. (Rep. Tr. pp. 7355-61.)

death penalty and life imprisonment denied appellant due process of law and equal protection of the laws under the Fourteenth Amendment. (App. Op. Br. p. 607.)

The argument advanced by appellant was rejected by this Court in In re Anderson, supra, 69 Cal. 2d 613, 621-28, and this year by the United States Supreme Court in McGautha v. California, ___ U.S. ___, 39 U.S.L.W. ____ (decided May 3, 1971).

X

THE DEATH PENALTY IS NEITHER CRUEL NOR UNUSUAL PUNISHMENT

Appellant contends that "the death penalty is so fortuitous and unrelated to culpability that it offends the Eighth Amendment's proscription of cruel and unusual punishment." (App. Op. Br. p. 635.)

This argument has been rejected repeatedly by the courts, and appellant has advanced no argument or authority which could cause this Court to abandon its prior pronouncements on the subject.

In re Anderson, supra, 69 Cal. 2d 613, 629-32.

See also Trop v. Dulles, 356 U.S. 86, 99;

In re Kemmler, 136 U.S. 436, 447.

XI

THIS COURT SHOULD REFUSE, AS IT HAS IN ALL PAST CASES, TO RE-DETERMINE THE PUNISHMENT IN A CAPITAL CASE

Appellant contends that this Court should substitute its judgment for that of the trier of fact and reduce his punishment to life imprisonment. (App. Op. Br. p. 411.)

"This court has uniformly rejected requests to reduce the penalty from death to life imprisonment," People v. Lookadoo, 66 Cal. 2d 307, 327, holding that "it has no power to substitute its judgment as to choice of penalty for that of the trier of fact."

In re Anderson, supra, 69 Cal. 2d 613, 623.

Respondent submits that the aggravated circumstances of the present offense, involving as it does a calculated political assassination, lack of remorse on appellant's part, and appellant's superior educational and intellectual background, hardly suggest this case as a vehicle for abandoning this Court's commendable policy of deference to the decision of the trier of fact on the matter of punishment in a capital case. It is difficult to imagine a less deserving object of mercy than an assassin who has expressed his desire to be

"recorded by history" as the individual who "triggered" World War III. (Rep. Tr. pp. 4987-90.) The jury as trier of fact, and the trial court on motion for new trial and for reduction of punishment (Rep. Tr. p. 9048), determined that justice would best be served by imposition of the death penalty in this case, and respondent submits that there is no reason to disturb this determination.

CONCLUSION

For the foregoing reasons the judgment should be affirmed in its entirety.

Respectfully submitted,

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