he shot the Senator. Appellant had capacity to harbor malice aforethought, to form maturely and meaningfully an intent to kill his victim, to premeditate, and to reflect upon the gravity of the contemplated act. (Rep. Tr. pp. 7619, 7621-23, 7665-67, 7671-72.)

In arriving at this conclusion Dr. Pollack took into account the following psychological functions of appellant:

> ". . . Consciousness, state of awareness, alertness, the capacity for attention, the ability to perceive, to develop percepts, to make meaningful associations out of what the individual senses, the person's ability to have foresight, the ability to look forward . . . , abilities to recall, as well; the ability to understand . . . and . . . .
>
> ". . . .
>
> ". . . the evaluation of emotions and . . . evaluation of the freedom of choice." (Rep. Tr. pp. 7643-44.)

Among the reasons for Dr. Pollack's conclusions that appellant did not suffer from diminished mental capacity or psychotic mental illness were appellant's lack of any impairment in consciousness, reasoning,

alertness, memory, or associations prior to the date of the assassination, the fact that appellant asked and answered certain questions both immediately prior to and subsequent to the assassination, the adequate planning undertaken by appellant, the testimony of witnesses to the effect that appellant's emotions did not appear very disturbed at the time of the assassination, the particular motives which impelled appellant's act, and Dr. Pollack's opinion that appellant's writings were not indicative of psychosis. (Rep. Tr. pp. 7668, 7670-71, 7681-87.)

Dr. Pollack testified that at the February 2, 1969, conference among the various psychiatrists and psychologists, "Dr. Diamond expressed a great deal of anger and resentment at my not committing myself." (Rep. Tr. p. 7768.)

PENALTY PHASE

The prosecution offered no additional evidence at the penalty phase of the proceedings. (Rep. Tr. p. 8878.)

The only additional evidence offered by the defense was further testimony by appellant's mother, Mrs. Mary Sirhan. In response to the single

question posed by the defense, "In his entire life, before this shooting, was Sirhan Sirhan ever at any time in any trouble with the law?", she testified, "He has never been. And that is not from me or from him. That is because I raised him up to the law of God and his love." There was no cross-examination of Mrs. Sirhan. (Rep. Tr. p. 8879.)

CONTENTIONS ON APPEAL[3/]

Relative to the Guilt Phase

Appellant contends that:

1. The trial court, with respect to appellant's two unsuccessful attempts to enter a plea of guilty, committed error in

(a) rejecting appellant's pretrial offer to plead guilty to first-degree murder upon condition that appellant be guaranteed a life sentence,

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3/ In the interest of clarity, the listing of appellant's contentions is organized in the manner in which the contentions are answered in Respondent's Brief, rather than in the order in which they appear in Appellant's Opening Brief. The arguments in Respondent's Brief are cross-referenced to those in Appellant's Opening Brief.

(b) denying appellant's motion for mistrial founded upon pretrial publicity concerning the possible plea of guilty,

(c) permitting the prosecution to introduce in evidence before the jury appellant's admission of guilt, made previously in court outside the presence of the jury, at a time when appellant was seeking to enter an unconditional plea of guilty, and

(d) refusing to bar the prosecution, in its argument to the jury at the penalty phase, from urging death as the proper punishment after the prosecution had expressed willingness to accept a plea of guilty conditioned upon a life sentence;

2. The evidence "unequivocally" indicates diminished mental capacity on the part of appellant, and therefore he should have been convicted of only manslaughter or, at most, second-degree murder;

3. The seizure of

(a) the notebooks from appellant's room, and

(b) the envelope from the trash area behind the Sirhan residence

was unlawful under the Fourth and Fourteenth Amendments to the federal Constitution;

4. The prosecution's decision to proceed against appellant by way of grand jury indictment rather than preliminary hearing and information deprived him of due process of law and equal protection of the laws under the Fourteenth Amendment;

5. The alleged exclusion of racial minorities and other identifiable segments of the general population from

(a) the grand jury which indicted appellant, and

(b) the jury venire from which the jury that tried appellant was selected

deprived him of due process of law and equal protection of the laws under the Fourteenth Amendment;

6. The trial court deprived appellant of a fair trial by refusing to hold an evidentiary hearing on the issue whether the exclusion of jurors opposed to capital punishment resulted in an unrepresentative jury at the guilt phase and increased the likelihood of appellant's being convicted;

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Relative to the Penalty Phase

Appellant contends that

7. His punishment was fixed by a jury from which prospective jurors were improperly excluded, because of their views on capital punishment,

(a) by the trial court's excusal of certain jurors for cause, and

(b) by the prosecution's use of peremptory challenges to certain other jurors;

8. 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";

9. The absence of fixed standards to guide the jury in deciding between the death penalty and life imprisonment denied appellant due process of law and equal protection of the laws under the Fourteenth Amendment;

10. The death penalty constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments; and

11. This Court should exercise discretion to reduce appellant's punishment to life imprisonment.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR WITH RESPECT TO APPELLANT'S TWO UNSUCCESSFUL ATTEMPTS TO ENTER A PLEA OF GUILTY

A. Appellant Had No Constitutional or Other Right to Enter a Plea of Guilty to First-Degree Murder Conditioned Upon His Being Guaranteed a Life Sentence

Appellant contends that the trial court's "rejection of the negotiated plea denied appellant equal protection of the law" and further constituted "an abuse of discretion." (App. Op. Br. pp. 287, 329.)

After selection of the jurors but prior to selection of the alternate jurors, a conference was held in chambers at which appellant's counsel indicated that they and their client were prepared to have him "plead guilty and accept a life sentence." (Rep. Tr. p. 2651; see also Rep. Tr. pp. 2867, 2876-77, 2879-84.) Appellant, on the advice of his counsel, dropped his initial demand that he be "guaranteed a parole at the end of 7 years." (Rep. Tr. p. 2883.) For various reasons, detailed in conjunction with subargument I(D) herein, the prosecution (including

District Attorney Younger personally) concurred in the request for a life sentence upon a plea of guilty. (Rep. Tr. pp. 2651-52, 2657-58; see also Rep. Tr. pp. 2660, 2868-73, 2877, 2885-86.) However, the trial court declined to accept the conditional plea, stating:

> ". . . I have given this a great deal of thought . . . but the ramifications of this thing I think should be thoroughly given to the public. I appreciate the cost. I appreciate the sensation, but I am sure it would just be opening us up to a lot of criticism and criticism by the people who think the jury should determine this question.
>
> "We have a jury and whatever expense is incurred from here on out would only be negligible with what I think would be incurred if we did otherwise. Obviously, in open court if there was a plea of murder, then you could have a trial to determine the degree and the penalty, that would be all right with me." (Rep. Tr. pp. 2658-59.)
>
> ". . . I think you have got a very much interested public but I don't let the public influence me but, at the same time, there are

a lot of ramifications and they continually point to the Oswald matter and they just wonder what is going on because the fellow wasn't tried. I'm not concerned with this penalty. If they come out with second, that is all right with me. That is the jury's business . . . ." (Rep. Tr. pp. 2659-60.)

". . . . I have thought about it practically continually since I felt that the matter of penalty should be tried by a jury." (Rep. Tr. p. 2874; see also Rep. Tr. p. 2877.)

Although "our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons," Griffin v. Illinois, 351 U.S. 12, 17, appellant has failed to demonstrate how he or any group of which he is a part has been treated differently, let alone invidiously discriminated against, in not being permitted to plead guilty to a capital offense with the guarantee of a life sentence.

There was nothing arbitrary or capricious in the above-quoted reasons advanced by the trial court in denying the conditional plea proffered by appellant.

See Oyler v. Boles, 368 U.S. 448, 456. Although these reasons were in part based upon the extraordinary nature of appellant's case and its impact on the administration of justice, this does not give rise to a claim of denial of equal protection of the laws.

> ". . . To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' . . ."
>
> Rinaldi v. Yeager, 384 U.S. 305, 309.

Appellant characterizes the lack of fixed standards to guide a trial court in determining whether to accept such a conditional plea as analogous to the lack of fixed standards to guide juries in determining the issue of punishment in a capital case. (App. Op. Br. pp. 329-30.) Yet this Court in rejecting the constitutional attack on the latter procedure noted the numerous decisions upholding against constitutional attack the unguided discretion of trial courts in non-capital sentencing.

In re Anderson, 69 Cal. 2d 613, 626.

With reference to appellant's constitutional claim, the following recent statement by the United States Supreme Court is significant:

> "Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, see Lynch v. Overholser, 369 U.S. [705,] 719 [(1962)] (by implication), although the States may by statute or otherwise confer such a right. . . ."

North Carolina v. Alford, 400 U.S. 25, 38(n.11).

California has not conferred by statute, or otherwise, the nonconstitutional right mentioned in the Alford opinion. On the contrary, Penal Code section 1192.3 provided[4/] expressly that appellant's plea

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4/ Repealed in 1970 when the expanded provisions of Penal Code section 1192.5 were enacted, section 1192.3 provided:

> "Upon a plea of guilty to an information or indictment for which the jury has, on a plea of not guilty, the power to recommend, the discretion of imposing, or the option to impose a certain punishment, the plea may specify the punishment to the

of guilty, specifying the punishment, could be entered only in the event "such plea is accepted by the prosecuting attorney in open court and is approved by the court."

The trial court's responsibility to determine the matter of punishment, rather than leave it to stipulation by the parties, is further indicated by Penal Code sections 12 and 13. Section 12 declares that "The several sections of this Code . . . devolve a duty upon the Court authorized . . . to determine and impose the punishment prescribed," and section 13 declares that "Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment . . . must be determined by the Court authorized to pass sentence."

The exercise by trial courts of "discretion as to meaningful sentencing alternatives" in plea bargaining was recognized by this Court in People v. West, 3 Cal. 3d 595, 605, with specific reference to former section 1192.3 and section 1192.5. Id.,

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same extent as it may be specified by the jury on a plea of not guilty. Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant cannot be sentenced to a punishment more severe than that specified in the plea."

607-08. In fact, were the parties free by statute to bind the trial court in fixing a defendant's punishment, the separation of powers mandated by the California Constitution might be impaired.

See People v. Tenorio, 3 Cal. 3d 89.

There is "recognition--implied in statutes and express in decisional authority--that the judicial power must include the power to control a cause." People v. Tenorio, supra at 93. Inherent in this judicial power is the right to reject a plea of guilty.

People v. Clark, 264 Cal. App. 2d 44, 46-47.

It was a proper exercise of discretion for the trial court to consider the factors it did. "Judicial discretion is that power of decision exercised to the necessary end of awarding justice." People v. Surplice, 203 Cal. App. 2d 784, 791. The trial court was correct in taking into account the "community's need[s]" in exercising discretion on this matter affecting punishment, People v. Smith, 259 Cal. App. 2d 868, 873, and the public's right to know. This Court may take judicial notice of the confusion and speculation that have ensued from the conviction of Reverend Martin Luther King's assassin upon a plea of guilty without any public airing of the underlying

facts. Evid. Code §§ 451(f), 459.

The case of People v. Bravo, 237 Cal. App. 2d 459, 461, relied on by appellant "as removing all discretion from the court" (App. Op. Br. p. 301), holds only that once the trial court has accepted a guilty plea it is bound thereby. Id., 461-62.

Respondent submits that the trial court did not err in refusing to accept appellant's conditional plea of guilty, and that there is no support in the record for appellant's innuendo (App. Op. Br. pp. 309, 339) that the proffered plea was arbitrarily rejected merely because the trial court desired to preside over a "sensational case" and had a "phobia concerning fancied public criticism."

B. Having Taken All Possible Steps to Ensure the Secrecy of the Unsuccessful Plea Negotiations, the Trial Court Did Not Err in Denying Appellant's Motion for Mistrial Founded Upon the Nonprejudicial Pretrial Publicity Which for Unknown Reasons Ensued

Appellant contends that the trial court erred in denying his motion for mistrial founded upon pre-trial publicity concerning the possible plea of guilty. (App. Op. Br. p. 212.).

At the conclusion of the aforementioned

proceedings, which took place in chambers, the trial court ordered that the record of these proceedings be sealed. (Cl. Tr. p. 185; Rep. Tr. p. 2661.)

Later that day, February 10, 1969, at another conference in chambers, the trial court indicated that it did not intend to begin sequestering the jury until 8:00 p.m. on February 12th since alternate jurors remained to be picked on February 11th (Cl. Tr. p. 186) and February 12th was a legal holiday. (Rep. Tr. p. 2726.) Immediately following the trial court's remark, defense counsel addressed the court but voiced no objection to the court's intended action. (Rep. Tr. p. 2727.) On the morning of February 11th the alternate jurors were picked and sworn. (Cl. Tr. p. 186.) Defense counsel likewise did not object later that morning when the trial court adjourned the proceedings with the following statement to the jurors and alternates: "Now I know you don't want to go to a hotel this noon and stay there all this afternoon and all day tomorrow, tomorrow being a holiday; I am going to ask you to report to the Biltmore Hotel not later than 8:00 o'clock tomorrow evening." (Rep. Tr. pp. 2854-55.)

Upon taking the adjournment the trial court

further cautioned the jurors:

> "You are again admonished you have a duty not to converse among yourselves or with anyone else on this matter or anything pertaining to it. You are not to form or express an opinion until the matter is finally submitted to you for that purpose.
>
> "You are not to read any newspaper or any other written article or listen to any TV or radio broadcast related to this case, and if you should inadvertently see or hear such report, you are to disregard it and not permit it to influence you in your deliberations."[5/]

(Rep. Tr. p. 2855 (emphasis added).)

When the court reconvened on the morning of February 13, 1969, following the holiday recess, a conference was held in chambers relative to publicity

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5/ The trial court subsequently noted that this admonition had been given "on numerous occasions, at each and every adjournment throughout this matter" (Rep. Tr. p. 2890) and that each of the jurors had indicated on voir dire that he would be uninfluenced by what he had heard or read outside the court, that he could be a fair and impartial juror, and that he could decide the case solely on the evidence produced in court and the law as given by the trial court. (Rep. Tr. pp. 2921-22.)

that had occurred regarding the confidential plea negotiations of February 10th. (Rep. Tr. pp. 2856-57, 2863-95.)

At this conference defense counsel represented to the court that none of the information which formed the basis for the objectionable publicity had emanated from the defense. (Rep. Tr. p. 2884.) The prosecution represented that it was not responsible for the release of this information. (Rep. Tr. p. 2885.) The trial court indicated that it was unaware of how the information had been released to the news media (Rep. Tr. p. 2885), remarking:

> "Someone, some way -- who it is I don't know and I'm not going to try to find out -- has revealed everything that went on in these chambers, in spite of the fact that I sealed the record." (Rep. Tr. p. 2888.)
>
> "I am sure none of my staff told it. I am sure of it." (Rep. Tr. p. 2894.)

Thereafter, in open court but outside the presence of the jury, appellant moved for mistrial on the ground of publicity. (Rep. Tr. p. 2896.) In support of this motion the defense offered in evidence five editions of the Los Angeles Times of February 12,

1969, bearing a headline on the front page, "Sirhan Guilty Plea now appears likely.'" (Rep. Tr. p. 2897.) Also offered in evidence by the defense were scripts or transcripts of radio broadcasts in the Los Angeles area, each referring to current "rumor" or "speculation" that appellant might enter a plea of guilty.[6/] (Rep. Tr. pp. 2897-2902.)

The trial court, at the request of defense counsel (Rep. Tr. pp. 2923-25), examined each of the jurors and alternate jurors individually in chambers.[7/] (Rep. Tr. pp. 2927-79.) Thereafter the trial court denied the motion for mistrial (Cl. Tr. p. 188; Rep. Tr. p. 2997), holding:

6/ Appellant's Opening Brief sets forth the newspaper article (at pp. 239-44) and portions of the radio reports (at pp. 245-46).

7/ Inspector Conroy of the Los Angeles Sheriff's Office was also called as a witness by the trial court. He testified that he was in charge of arrangements for the jurors during the time they were sequestered. The jurors and alternates did not have television, radio, or telephones in their rooms at the hotel where they stayed. They had access to a telephone under the supervision of a deputy sheriff and to newspapers from which stories, relating to the present proceedings, were excised. A television was available to them in each of two recreations rooms but had cut-off switches monitored by deputy sheriffs. (Rep. Tr. pp. 2981-85.)

". . . I think the record would show that practically everyone, if not everyone's responses to questions by the Court said they could set aside these matters if they did hear them and decide the case only on the evidence produced here in court and the law as stated to them by me . . . ."

(Rep. Tr. pp. 2996-97.)

See People v. McKee, 265 Cal. App. 2d 53, 57, 59.

Appellant's Opening Brief is incorrect in several respects in stating (at p. 217) that "nine regular jurors and three alternate jurors had learned of appellant's intention to plead guilty to first degree murder and at least one regular juror indicated that it would be difficult to return a verdict of less than first degree murder after exposure to said aforementioned publicity."

First, appellant omits to state that the one juror (Mr. Evans), whose responses appellant stresses (App. Op. Br. pp. 217, 247-50) as indicative of an inability to return less than a verdict of guilty of first-degree murder, was excused because of the death of his father and never participated in the deliberations

leading to the guilt verdict. (Cl. Tr. pp. 251-52; Rep. Tr. pp. 8719-20, 8739.) Also excused, because of serious illness, was another juror (Mr. Morgan) who had some slight exposure to the publicity.[8/] (Cl. Tr. p. 227; Rep. Tr. pp. 7369-70. Cf. App. Op. Br. p. 252.)

Secondly, only four (not nine) jurors learned of the news media reports that appellant might enter a plea of guilty.[9/] Of the other jurors, two had heard

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8/ The names of the jurors who ultimately participated in the two verdicts are reflected in the polling of the jury. (Rep. Tr. pp. 8849-51, 8940-41.) There is no evidence or argument advanced by appellant indicating that either of the excused jurors influenced the jury to the detriment of appellant.

9/ Juror Elliott did not read the newspaper, hear the radio, or observe television. Someone mentioned to him "[s]omething sort of peculiar, about a guilty plea or something like that but I didn't pay any attention to that." Three or four persons told him, "'Well, you may be there for a week,'" predicating their statement on a newspaper article. (Rep. Tr. pp. 2946-47.) Juror Bortells "tried not to listen to people" but was "told it was possible that it wouldn't last very long" because "there was some arrangement" between counsel as to sentence by which appellant was going to plead guilty. (Rep. Tr. pp. 2947-49.) Juror Glick heard "something" over the radio "to the effect that the defendant was pleading guilty." He had not read the newspaper story. (Rep. Tr. pp. 2952-53.) Juror Broomis saw the newspaper headline and was told by his wife that "Sirhan pled guilty" according to a radio broadcast. (Rep. Tr. pp. 2958-59.) Each of these four jurors indicated, however, that the limited publicity to which he had been exposed would not influence him or cause him to

absolutely nothing,[10] and two jurors only were approached by persons who started to say something about the case but were stopped by the juror. One of these jurors saw her mother carrying a newspaper but noticed only the word "Sirhan."[11] Two jurors were told only that the trial might not last as long as contemplated and another juror that there might not be a trial, but none of these jurors attached substantial significance to the remarks.[12] The remarks of the remaining juror are somewhat equivocal but are viewed by respondent as reflecting no exposure to the objectionable publicity.[13]

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form an opinion about the case, and that he would set aside anything he had heard and decide the case solely on the evidence presented in court and the law as stated by the trial court. (Rep. Tr. pp. 2946, 2949, 2952, 2954, 2959-60.)

10/ Juror Martinez (Rep. Tr. pp. 2942-43) and Juror Grace (Rep. Tr. pp. 2956-57).

11/ Juror Frederico (Rep. Tr. pp. 2935-37) and Juror Stillman (Rep. Tr. pp. 2970-74).

12/ Juror Brumm (Rep. Tr. pp. 2933-35), Juror Stitzell (Rep. Tr. pp. 2960-64), and Juror Busby (Rep. Tr. pp. 2937-39).

13/ Juror Galindo in effect indicated to the trial court that none of the publicity had reached him and that no mention had been made to him of the newspaper article. Then he was asked by defense counsel, "Did you by any chance see the headline in the Times yesterday?" Mr. Galindo responded, "Yes. I think I was going home but I decided not to go because I was

Thirdly, appellant errs in stating that the jurors enumerated by him "had learned of appellant's intention to plead guilty to first degree murder" (App. Op. Br. p. 217 (emphasis added)), because not one of the twelve jurors who participated in the verdicts indicated that he had heard of the degree of the offense involved in the possible plea. In other words those four jurors who were exposed to some publicity gave no indication that they were informed that the contemplated plea was one of first-degree murder as opposed to second-degree murder or manslaughter.

This circumstance is very significant in evaluating appellant's claim of error. Apparently none of the jurors read the newspaper article; those who were exposed to the publicity were either directly

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close to coming here and I decided I'd better not." (Rep. Tr. pp. 2944-45.) Respondent submits that Mr. Galindo's reply, "Yes," in conjunction with the words that follow, indicates either a typographical error in the record or a failure on his part to give a responsive answer to the question. This conclusion is supported by the fact that the court and counsel failed to ask Mr. Galindo any of the questions, relating to his ability to remain uninfluenced by the exposure to publicity, which they directed to each of the jurors who admitted being so exposed. Moreover, it is significant that in making his argument on the motion for mistrial, defense counsel specified the individual jurors who he thought had been exposed to the publicity, and concluded "Those were the jurors that responded that they had heard something about it" without mentioning Juror Galindo. (Rep. Tr. pp. 2987-89.)

affirmative error by a trial court, or its failure to take proper measures to ensure the defendant's constitutional right to a fair trial.

Thus in Sheppard v. Maxwell, 384 U.S. 333, the United States Supreme Court noted that the "carnival atmosphere at trial could easily have been avoided"; "the court should have insulated the witnesses"; and "the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion." Id., 358-59. Also cited by appellant and clearly distinguishable are,

E.g., Estes v. Texas, 381 U.S. 532 (reversible error to permit the televising of the defendant's trial over his objections);

Turner v. Louisiana, 379 U.S. 466 (reversible error to assign principal prosecution witnesses in capital case as bailiffs in charge of the jury);

Rideau v. Louisiana, 373 U.S. 723 (reversible error to deny change of venue in a capital case after the small community in which the

trial was held had been repeatedly exposed to the defendant's televised in-custody confession, which was not received in evidence);

Irvin v. Dowd, 366 U.S. 717 (reversible error to deny change of venue after police had released press releases stating that the defendant had confessed to six murders);

Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968) (error for trial court to fail to examine jurors individually as to their information concerning the case and the source of their knowledge);

Mares v. United States, 383 F.2d 805, 809 (10th Cir. 1967) (same);

Maine v. Superior Court, 68 Cal. 2d 375 (trial court's erroneous denial of change of venue);

People v. Lambright, 61 Cal. 2d 482 (trial court's erroneous instruction that jury had right to hear and observe news media accounts of the trial).

Other cases cited by appellant are distinguishable for various reasons, such as their involving affirmative misconduct by jurors (bringing inadmissible newspaper accounts into the jury room) or having been decided on

nonconstitutional grounds.

The present case provides a marked contrast to the authority on which appellant relies. The trial court took every reasonable precaution and was, in the words of defense counsel, "as careful as a Judge could humanly be in this case" "to see to it that this trial is a fair trial." (Rep. Tr. p. 2917.) There was an order, in effect since June 7, 1968, restricting the dissemination of publicity concerning the case (Rep. Tr. pp. A-38-42, A-50 (modified); Cl. Tr. pp. 17, 35-37, 49), and the record of the in-chamber conference at which the plea negotiations took place was sealed. (Cl. Tr. p. 185; Rep. Tr. p. 2661.) As previously indicated, the jury was properly cautioned by the trial court relative to out-of-court information concerning the case, both prior to and subsequent to the occurrence of the objectionable publicity. The defense never requested sequestration of the jurors prior to selection of the alternates, nor did it seek a change of venue or a continuance as a result of the incident in question.

Cf. People v. Tidwell, 3 Cal. 3d 62, 68-69; People v. O'Brien, 71 Cal. 2d 394, 399-401.

The view of appellant's trial counsel was

that the publicity was

> ". . . not the fault of the Court, it's not the fault of counsel for the defendant, and I am not accusing [prosecution] counsel . . , either.
>
> "As I say, I am not pointing the finger at anyone. I don't know where it came from." (Rep. Tr. p. 2919.)

The obvious question, then, is whose alleged error is appellant seeking to have reviewed as the basis for reversal of the judgment? If it is the news media's "error," the following observation seems well in point:

> "The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial. Such an outcome would give to the press a power over judicial proceedings which may not be countenanced. . . ."
>
> Mares v. United States, supra, 383 F.2d 805, 808 (10th Cir. 1967).

Moreover if the news media "erred," its error may well have been nothing more than an exercise of the customary journalistic talent for deduction and surmise. Unless it was members of the Sirhan

family who revealed the pending plea negotiations (and the newspaper article indicates contact between the family and the press at this time, App. Op. Br. pp. 239, 244), it appears that the newspaper story did not result from a leak of information; as previously indicated, those present at the in-chambers conference represented that they they were not responsible for the disclosure. It is quite conceivable that the newspaper story was merely the result of logical deductions having been drawn from observable facts. The delay in proceeding with the trial was noticeable, and as the trial court observed after the conference but prior to the news media reports, "the District Attorney shows up this morning and everybody outside is saying, 'Why was the District Attorney up there?'" "We've got a lot of smart people out there." (Rep. Tr. p. 2728.) "I said he came to show me his respect, but they know that isn't the truth." (Rep. Tr. p. 2729.) The news reports in question are couched in terms of belief, surmise, and speculation. That this was indeed their origin is suggested by the fact that the newspaper article suggests that a guilty plea would probably be entered with "an understanding or a firm belief that a life term would be the maximum

penalty," while stating the belief that the trial court was "inclined to accept the change of plea, with the understanding that the matter would proceed immediately to some form of penalty trial before a jury." (App. Op. Br. pp. 239, 240.) In fact, as is apparent from the foregoing, this belief was erroneous since defense counsel were agreeable to a guilty plea only in the event there would not be a penalty trial before a jury.

Finally, even if it be assumed that error of a constitutional magnitude occurred when four of the jurors learned of the negotiations for entry of a guilty plea of an unspecified nature, it is clear beyond a reasonable doubt that such error was not prejudicial and would not require reversal of the judgment. Harrington v. California, 395 U.S. 250, 254; Chapman v. California, 386 U.S. 18, 21-24; People v. McKee, supra, 265 Cal. App. 2d 53, 57, 59. This is because evidence of appellant's courtroom outburst, in which he stated, "'I killed Robert Kennedy wilfully, premeditatively, and with twenty years of malice aforethought,'" was properly received in evidence before

the jury.[14] (See subargument I(C) herein.) Thus the pretrial publicity concerning the possible plea could not have had any effect on those four jurors aware of it once they were presented with the aforementioned testimonial confession, a piece of self-inculpation far more probative than the earlier speculation which they were duty-bound to disregard.[15]

Cf. People v. Cotter, 63 Cal. 2d 386, 398, vacated, 386 U.S. 274;

People v. Jacobson, 63 Cal. 2d 319, 330-31, cert. denied, 384 U.S. 1015.

C. The Trial Court Properly Permitted the Prosecution to Cross-Examine Appellant as to His Previous Courtroom Outburst in Which He Had Admitted His Guilt and Again Sought to Plead Guilty

Appellant contends that the trial court erred

14/ Appellant's courtroom outburst was not a direct result of the trial court's refusal to accept appellant's previously proffered offer to plead guilty with the guarantee of a life sentence, nor was it a product of the publicity which attended the rejected plea. See Parker v. North Carolina, 397 U.S. 790, 795-96.

15/ Interestingly, appellant sought (unsuccessfully) to introduce, at the penalty phase, evidence of the plea negotiations. (Rep. Tr. pp. 8859-67.) See Pen. Code § 1192.4.

in permitting the prosecution to introduce in evidence before the jury appellant's prior admission of guilt made at a time when he was seeking to enter an unconditional plea of guilty. (App. Op. Br. p. 264.)

On cross-examination (in the presence of the jury) appellant was asked if he was sorry that Senator Kennedy was dead. He replied, "I'm not sorry, but I'm not proud of it either." In response to a further question appellant admitted having previously stated during the course of the trial (outside the presence of the jury), "'I killed Robert Kennedy wilfully, premeditatively, and with twenty years of malice aforethought.'" (Rep. Tr. pp. 5336-37.)

At this point defense counsel specifically stated at bench that the question was not objectionable but that the context in which appellant's statement was made should be introduced. Defense counsel then stated that the context of the statement could instead be brought out on redirect examination, and the trial court properly agreed. (Rep. Tr. p. 5337.)

On redirect examination defense counsel examined appellant further regarding the statement, eliciting the circumstances under which it had been made. Defense counsel introduced the entire colloquy

which had occurred between appellant and the trial court at the time, which indicated that appellant was then "very angry" with his attorneys for wanting to call certain witnesses, sought to dismiss his counsel and enter a plea of guilty, and planned to offer no defense. (Rep. Tr. pp. 5339-41, 5345-46.) It was when the trial court then asked appellant for his reason for wanting to so plead, that appellant made the statement in question. (Rep. Tr. p. 5347.) The court refused to accept the plea and ordered that the trial proceed, finding appellant incapable of representing himself. (Rep. Tr. pp. 5348-51.) Thereafter, after conferring with his mother and an advisor, appellant agreed to proceed with the trial, represented by his counsel, once they agreed not to call two girls as witnesses. Appellant subsequently was "very much" satisfied with his attorneys. (Rep. Tr. pp. 5353-54, 5357.)

When the trial court, after the aforementioned cross-examination and redirect examination of appellant, instructed the jury that appellant's in-court admission was "not to be considered as to the truth or falsity thereof, but only the fact that the statement was made," defense counsel objected and asked the trial court to

instruct the jury that the statement could be considered as a reflection of appellant's state of mind. The trial court then told the jury to disregard the limiting instruction previously given and that it would give them "instructions covering this point" in the final instructions. (Rep. Tr. pp. 5368-73.) The final instructions included CALJIC 54-A (rev. ed.) (contradictory statements of witness admissible only for purpose of impeachment and not as proof of truth of matter asserted). (Cl. Tr. p. 301; Rep. Tr. p. 8810.)

Even had the cross-examination of appellant as to his in-court admission been improper, appellant would be precluded from making his present claim of error by his failure to object, on the ground presently raised, to the admissibility of the statement. Evid. Code § 353; People v. Robinson, 62 Cal. 2d 889, 894. Moreover, by insisting that consideration of the statement not be limited to impeachment, appellant made applicable the rule that a party may not be heard to complain of invited error.

People v. Terry, 61 Cal. 2d 137, 150, cert. denied, 379 U.S. 866.

It is clear that defense counsel had not merely overlooked a possible ground of objection but

rather had made a deliberate, tactical decision to let the evidence in question go before the jury. What his reasons were are not important, but it is possible that he viewed appellant's courtroom outburst as so outrageous as to be indicative of irrational behavior and perhaps supportive of the defense of diminished capacity. It bears mention in this regard that defense counsel inquired of appellant during the ensuing redirect examination whether appellant could have actually entertained malice against Senator Kennedy twenty years previously, when appellant was four years of age and certainly unaware of Kennedy's existence, and appellant replied that he did not know the meaning of the term malice at that age. (Rep. Tr. p. 5339.)

Respondent submits that even if the merits of appellant's contention could be reached, appellant would not prevail on his present claim of error.

Appellant seeks to bring himself within the provisions of Evidence Code section 1153, which provides:

> "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is

inadmissible in any action or in any proceeding of any nature . . . ."[16/]

It is clear from the foregoing recital of the circumstances attending appellant's courtroom outburst that his in-court admission was not the type of evidence whose exclusion is contemplated by section 1153. The situation involved does not evoke the concern underlying the statute, viz., that offers to plead guilty, plea negotiation, and the right to withdraw one's plea not be discouraged. Cf. People v. Quinn, supra, 61 Cal. 2d at 555(n.2); People v. Hamilton, supra, 60 Cal. 2d at 114. Appellant's outburst in mid-trial was hardly a meaningful and intelligent decision to enter a plea. Rather it reflected a momentary but nonetheless intense disagreement with the strategy of his trial counsel. It appears that neither the trial court or counsel nor appellant himself took seriously his threat to plead guilty. Rather appellant's gesture was viewed as a

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16/ A similar provision, Penal Code section 1192.4, appears to apply only to pleas specifying the degree of the offense or the punishment to be imposed. Appellant's courtroom outburst, to the extent that it related to an attempted plea, contemplated instead an unconditional plea. See also People v. Quinn, 61 Cal. 2d 551, 554-55; People v. Wilson, 60 Cal. 2d 139, 155-56; People v. Hamilton, 60 Cal. 2d 105, 113-14.

ploy (ultimately successful) to get his attorneys to retract their decision to call certain witnesses whom appellant did not wish called.

Evidence of appellant's outburst was just as admissible as other types of statements volunteered to the authorities, see People v. Tahl, 65 Cal. 2d 719, 743-44, cert. denied, 389 U.S. 942, and there is ample precedent for receiving in evidence such in-court admissions of guilt.

People v. Perry, 14 Cal. 2d 387, 394;
People v. Laursen, 264 Cal. App. 2d 932, 946-47.
See also Evid. Code §§ 1220, 1235.

Respondent submits that appellant's confession of malice aforethought was admissible, and that furthermore the action of his trial counsel precludes appellant from asserting this matter as error on appeal. Finally, even if appellant's statement were deemed an offer to plead, any error in its admission would be harmless (particularly in light of the court's final limiting instruction) as was the erroneous admission of an offer to plead guilty in People v. Wilson, supra, 60 Cal. 2d 139, 156, and People v. Hamilton, supra, 60 Cal. 2d 105, 114.

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D. The Trial Court Did Not Err in Refusing to Bar the Prosecution From Urging Death as the Proper Penalty After the District Attorney Had Expressed His Willingness to Accept a Plea of Guilty Conditioned Upon a Life Sentence

Appellant contends that the trial court erred in permitting the prosecution, in its argument to the jury at the conclusion of the penalty phase, to urge death as the proper punishment after the prosecution had expressed willingness to accept a plea of guilty conditioned upon a life sentence. (App. Op. Br. p. 341.)

At the conference held in chambers prior to commencement of the trial, at which appellant had sought to enter a plea of guilty conditioned upon a guarantee of a life sentence (see Argument I(A) herein), the prosecution--including District Attorney Evelle Younger personally--had concurred in the request for a life sentence upon a plea of guilty. (Rep. Tr. pp. 2651-52, 2657-58; see also Rep. Tr. pp. 2660, 2868-73, 2877, 2885-86.) Mr. Younger remarked,

> "[N]ow that we have gotten our psychiatrist's report, a man whom we have great confidence in, we are in a position where we can't conscientiously urge the death penalty, number one. Number two, we don't think under any

circumstances we would get the death penalty even if we urged it and number three, we don't think we can justify the trial under these circumstances." (Rep. Tr. p. 2651.)

At a subsequent conference held in chambers immediately prior to the arguments of counsel at the conclusion of the guilt phase, defense counsel requested that the trial court "instruct the District Attorney . . . not to make a request for the death penalty and that they should affirmatively recommend life." The trial court refused this request. (Rep. Tr. p. 8343.)

In support of his request, defense counsel cited the prosecution's willingness to accept a life sentence prior to the commencement of the trial, and to recommend such a sentence to the jury in the event the matter of penalty were tried subsequent to a plea of guilty to first-degree murder. (Rep. Tr. pp. 8339-40.) Defense counsel also stated that the prosecution had said if the matter of guilt went to jury trial, the prosecution "would then not affirmatively recommend life, nor . . . affirmatively ask for the death penalty, but would just leave it up to the jury." (Rep. Tr. p. 8341.)

Deputy District Attorney Howard found these

remarks to be "fairly accurate," but Chief Deputy District Attorney Lynn Compton stated that he had no recollection of the last-mentioned representation ever having been made, and the trial court correctly noted that no such representation was ever made on the record.[17/] Defense counsel maintained, however, "That's what Mr. Howard and Mr. Fitts said to me" and related that he had communicated this to appellant. (Rep. Tr. p. 8341.)

The trial court remarked, "I can conceive that the District Attorney may have had a certain opinion several weeks ago, and after hearing all the evidence he might have changed his mind." Mr. Compton added, "[T]he fact remains that one of the considerations in whether or not the defendant should be given life would be the fact that we would have avoided a lengthy trial." (Rep. Tr. pp. 8343-44.)

Upon conclusion of the guilt phase and the defense's presentation of evidence on the issue of

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17/ The only thing in the record which supports appellant's allegation, that the prosecution disclaimed any intention of urging the jury to return a death penalty in the event the issue of guilt went to trial, is the "Declaration of Grant B. Cooper in Support of Motion for New Trial" filed on the very day of the hearing of said motion. (Rep. Tr. p. 9007; Cl. Tr. pp. 495-504.)

penalty, Mr. Howard delivered the prosecution's sole argument at this phase of the proceedings. The argument was exceedingly short. (Rep. Tr. pp. 8883-88.) Although it was not an antiseptically neutral argument--and there was absolutely no reason for it to be, it was a fair and balanced consideration of the factors favoring and mitigating against a death sentence.

Mr. Howard noted that the "only question now is the proper punishment for a political assassin," referred to the "awesome discretion of each individual juror," and noted that it was "within the province of the prosecution to suggest to you some of the factors that you may determine worthy of consideration." (Rep. Tr. pp. 8883, 8885.)

Among the factors enumerated by Mr. Howard were the effect of political assassination on American society, appellant's demeanor during the trial and in particular on the witness stand, and the fairness of appellant's trial. (Rep. Tr. pp. 8883-84, 8885-86, 8888.)

On the other hand Mr. Howard called attention to appellant's having "spoke[n] knowledgeably" about the growth of the Zionist movement "and the justification in his words for the Arab dream." (Rep. Tr. pp.

8885-86.) And most significantly, Mr. Howard was generous in his characterization of the psychiatric defense advanced in appellant's behalf:

> "We have never disputed that Sirhan Sirhan is abnormal, only this extent of the abnormality, only the legal significance, if any.
>
> ". . . We cannot presume to advise you as to the extent that mental illness within the confines of full legal responsibility should influence you in the determination of a proper penalty.
>
> "We recognize that it is a significant factor for your consideration. We do not believe that it should be the only and sole determining factor. . . ." (Rep. Tr. pp. 8884-85.)

Mr. Howard concluded his argument by asking the jurors to "have the courage of your conviction" and the "courage to write an end to this trial, and to apply the only proper penalty for political assassination" in this country. (Rep. Tr. p. 8888.)

On the basis of the aforementioned portions of the record, it is respondent's position that:

1. There does not exist substantial evidence in the record to indicate that the prosecution ever committed itself to not urging death as the proper penalty in the event the issue of guilt went to trial.

2. Any expression by the prosecution prior to trial regarding the advisability of securing appellant's plea to first-degree murder in exchange for concurrence in a recommendation of life imprisonment was tentative and left the prosecution free to reconsider death as the proper penalty once (a) a lengthy and expensive trial could no longer be avoided by acceptance of the foregoing compromise, (b) the defense's psychiatric and psychological evidence, anticipated as impressive on the basis of short and tentative written reports, crumbled and evaporated as one witness after another contradicted himself and his colleagues even prior to the devastating test of cross-examination. On the other hand the conclusions of the psychiatrist who testified on behalf of the prosecution, although strongly suggestive of mental illness, ended up as an effective refutation of appellant's defense of diminished capacity. (See Rep. Tr. pp. 9031-34, and Argument II herein.)

3. Assuming the prosecution were somehow committed to not urging the jury to return a penalty

of death, this commitment was not broken by the above-described argument of Mr. Howard. Upon denying appellant's motion for new trial on this ground, the trial court observed, "I don't feel that the District Attorney affirmatively asked for the death penalty. I listened to this very carefully, the whole thing." (Rep. Tr. p. 9036.)

4. Finally, again assuming a broken commitment, the defense has failed to show that it was misled or relinquished any right or privilege by reliance on any representation made by the prosecution.

The opening statement of the defense, made prior to the calling of the prosecution's first witness, admonished the jury, "Everyone here is under great responsibility, for a life is at issue." (Rep. Tr. p. 3059.) There is nothing in the record which indicates that the prosecution, the defense, or the trial court conducted themselves other than with the possibility in mind of a potential death verdict.

To be contrasted with appellant's situation are the cases which he cites where a defendant has, by entry of a plea of guilty or waiver of jury trial, given up a substantial right. And even there such relinquishment, to constitute deprivation of a constitutional right, must have resulted from an actual

misrepresentation by the prosecuting attorney or other public officer. As this Court held in People v. Reeves, 64 Cal. 2d 766, cert. denied, 385 U.S. 952, in order to vitiate a plea there must be "apparent substantial corroboration of or connivance in such misrepresentations by a responsible public officer, relied on in good faith by the defendant, and the misrepresentations must actually operate to preclude the exercise of the defendant's free will and judgment." Id., 776-77.

Cf. United States v. Jackson, 390 U.S. 570, 581.

What this Court said with respect to the claim of the defendants in People v. Gilbert, 25 Cal. 2d 422, who had pleaded guilty to first-degree murder, is somewhat applicable to appellant:

> ". . . Of course the defendants hoped that they would escape the supreme penalty; that was the purpose of their pleas. That also, apparently, was the hope and purpose of their counsel. But hope or belief not founded on a false or fraudulent representation or promise does not constitute extrinsic fraud or denial of due process. It is apparent, as above shown, that there was no false or

fraudulent representation or promise actually made by any responsible officer of the state to the defendants either for the purpose of tricking them into waiving trial and pleading guilty, or otherwise. There is not a vestige of evidence which would support the conclusion that any person concerned in this case wilfully sought to deprive the defendants of any legal right." (Emphasis by the Court.)

People v. Gilbert, supra at 437-38.

See also People v. Nixon, 34 Cal. 2d 234, 236-37, cert. denied, sub nom. Murphey v. California, 338 U.S. 895;

In re Hough, 24 Cal. 2d 522, 527.

Cf. People v. Griggs, 17 Cal. 2d 621, 623-24.

For the foregoing reasons respondent submits that there was nothing improper in the trial court's refusal to restrict the scope of the prosecution's argument to the jury.

II

THERE WAS SUFFICIENT SUBSTANTIAL EVIDENCE TO ESTABLISH THAT APPELLANT POSSESSED THE MENTAL CAPACITY REQUISITE FOR COMMISSION OF FIRST-DEGREE MURDER

Appellant contends that this Court should modify the judgment to reduce the degree of the offense to "manslaughter or at worst second-degree murder" because

> "the evidence adduced in this case showed unequivocally that Sirhan lacked the capacity to maturely and meaningfully premeditate, deliberate and reflect upon the gravity of his contemplated act or form an intent to kill due to his paranoid schizophrenic personality, the alcohol he imbibed and the dissociated state in which he found himself at the time of the killing; . . . moreover, he was unable to comprehend his duty to govern his actions in accord with the duty imposed by law and thus did not act with malice aforethought. . . ." (App. Op. Br. p. 357.)

This Court has declared, with reference to

the proof required to sustain a conviction against the contention of diminished mental capacity, that the "true test must include consideration of the somewhat limited extent to which this defendant could maturely and meaningfully reflect upon the gravity of his contemplated act." (Emphasis by the Court.)

People v. Wolff, 61 Cal. 2d 795, 821.

In contending that he lacked the capacity to assassinate Senator Robert Kennedy, appellant relies principally on the cases of People v. Wolff, supra, 61 Cal. 2d 795; People v. Goedecke, 65 Cal. 2d 850; People v. Nicolaus, 65 Cal. 2d 866; and People v. Bassett, 69 Cal. 2d 122. (App. Op. Br. pp. 359-70, 388, 405-06.)

Analysis of these cases, and application of the principles set forth therein to the evidence at hand, establishes that appellant's claim of diminished capacity is without merit.

In Wolff, supra, this Court reduced the conviction of first-degree murder to second-degree murder. The defendant, a fifteen-year-old boy at the time of the offense, had killed his mother by beating her with an ax handle and choking her. According to the unanimous opinion of four psychiatrists, the

defendant was permanently and schizophrenically insane to such an extent that, although he had ample time for any normal person to reflect maturely and appreciatively on his contemplated act and to arrive at a cold, deliberated, and premeditated conclusion, "the extent of his understanding, reflection upon it and its consequences" was materially "vague and detached" with reference to "the quantum of his moral turpitude and depravity." Id. , 821-22.

In People v. Goedecke, supra, 65 Cal. 2d 850, the defendant while sane killed his father, for which the defendant was convicted of first-degree murder, and killed his mother, brother, and sister for which the jury found him guilty of second-degree murder but insane. The victims came to their death by being beaten and stabbed. Although there was a conflict in the psychiatric testimony regarding the defendant's ability to form an intent to kill and to premeditate the killing, there was no psychiatric testimony as to the extent to which the defendant could maturely and meaningfully reflect upon the gravity of his contemplated act. Relying upon the "bizarre nature of the crime" and the fact that his "actions during the commission of the killings and

afterwards were completely foreign to his character and to his relationship with his family," the Court concluded that the defendant's understanding and reflection upon the intended act and its consequences "fell short of the minimum essential elements of first degree murder, especially in respect to the quantum of reflection, comprehension and turpitude of the offender." Id., 857-58.

People v. Nicolaus, 65 Cal. 2d 866, involved a defendant who had killed his three children by shooting them each in the head after buying them toys to make them happy, taking them for a ride, and having them climb into the trunk of his car. The various psychiatrists expressed conflicting opinions on the issue of the defendant's capacity to premeditate the killings, but neither of the psychiatrists who testified for the prosecution "expressed an opinion as to the extent of the defendant's ability to maturely and meaningfully reflect upon the gravity of his contemplated act" and one of them apparently failed to take into account the defendant's previous history of bizarre and abnormal conduct. Because of the "character of the killing" and the "quantum of personal turpitude of the actor," this Court

concluded that the evidence was insufficient to sustain the finding that the murders were of the first degree. Id., 873, 878.

The Bassett case involved the first-degree murder conviction of a "youth suffering since childhood from deep-seated paranoid schizophrenia, who at the age of 18 methodically executed his mother and father." People v. Bassett, supra, 69 Cal. 2d 122, 124. This Court defined its duty, in evaluating the evidence of the defendant's mental capacity, as

> ". . . twofold. First, we must resolve the issue in the light of the whole record --i.e., the entire picture of the defendant put before the jury--and may not limit our appraisal to isolated bits of evidence . . . . Second, we must judge whether the evidence of each of the essential elements constituting the higher degree of the crime is substantial; it is not enough . . . simply to point to 'some' evidence supporting the finding . . . ." (Emphasis by the Court.) Id., 138.

In concluding that the prosecution's psychiatric testimony introduced on rebuttal was not substantial, the

Court stressed that neither of two prosecution psychiatrists had examined the defendant in person and both testified merely on the basis of a lengthy hypothetical question posed by the prosecuting attorney. Although both psychiatrists had phrased their conclusions in terms of the defendant's ability to reflect maturely and meaningfully upon the gravity of the contemplated act, their conclusions were found to lack probative force in light of the material and reasoning by which the opinions were arrived at. Id., 141-46. The Court found the testimony of a third psychiatrist called by the prosecution so "self-contradictory" that it could not be substantial. The Court concluded, "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." Id., 148.

From the foregoing cases the following principles may be culled: this Court will not adhere to its usual deference to the findings of the trier of fact (1) where the finding of requisite mental capacity is contradicted by unanimous psychiatric testimony and by the other evidence in the case,