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SUPREME COURT
STATE OF WASHINGTON

No. 80643-8

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BY DONALD B. CARRETT
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK *h*

STATE OF WASHINGTON,

Respondent,

v.

COVELL PAUL THOMAS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Sergio Armijo, Judge

Petitioner
SUPPLEMENTAL BRIEF OF APPELLANT

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A. ISSUES ON REVIEW

1. Can a defendant be convicted, under the state and federal constitutions, of aggravated murder and sentenced to life in prison without parole where the court's instructions do not require the jury to find beyond a reasonable doubt either that he committed the murder or that he intended that a murder be committed?

2. Where an aggravated murder case is remanded for the jury to determine whether the defendant intended the murder of the victim and whether the aggravating circumstances apply to him rather than his accomplice, do instructions requiring the jury to accept as fact that he is guilty of premeditated murder create a mandatory presumption, in violation of the state and federal constitutions, and constitute a comment on the evidence in violation of the state constitution?

3. Do the state and federal Double Jeopardy Clauses prohibit retrial for the greater crime of premeditated murder with aggravating circumstances without reversing the conviction for the lesser crime of premeditated murder?

4. Does a trial court have authority to empanel a jury to consider whether the aggravating factors to establish aggravated murder have been proven where there is no statutory authority to do so?

5. Is the state's use of a peremptory challenge to excuse the only African-American juror on the jury panel impermissible under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), where the only reason for the challenge is the juror's expression of concern over the under representation of African Americans on the panel and the state makes no effort to clarify the juror's comment that the state liked the under representation?

B. STATEMENT OF THE CASE

On mandatory review this Court reversed Mr. Thomas's aggravated murder conviction and death sentence and remanded the case for the prosecutor to elect either: (1) to impose judgment and sentence for first

degree murder or (2) to again seek to prove at a trial that Mr. Thomas was guilty of aggravated murder. This Court held that neither the “to convict” instruction nor the special verdict form had required the jury to find that Mr. Thomas intended the murder or that the aggravating factors applied to him rather than his accomplice; and that the jury must make such findings before Mr. Thomas could be sentenced for aggravated murder or a capital crime. State v. Thomas, 150 Wn.2d 821, 876, 83 P.3d 970 (2004).

The defense theory on retrial was that the co-defendant Edward Rembert fired the shots that killed Richard Geist and that the initial jury, given the court's instructions, may have found Mr. Thomas guilty because it believed he acted with knowledge that his actions would facilitate a robbery and not a murder. The trial court, however, ruled that it was unnecessary for the jury to determine that Mr. Thomas intended to facilitate a murder, not just a robbery, and instructed the jury that Mr. Thomas was – as a matter of law - guilty of premeditated murder in the first degree. Consequently, the jury was asked to determine only whether “[t]he defendant committed the murder to conceal the commission of a crime or to protect or conceal the identify of any person committing a crime;” or if the “murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree, or residential burglary.” CP 181.

On review, the Court of Appeals affirmed. 2007 WL 2379653 (Wash. App. Div. 2). This Court granted review on all issues except the issue of prosecutorial misconduct raised by Mr. Thomas in his Statement of Additional Grounds in the Court of Appeals.

C. ARGUMENT

1. MR. THOMAS'S CONVICTION FOR AGGRAVATED MURDER SHOULD BE REVERSED; NO JURY FOUND THAT HE INTENDED THE DEATH OF THE VICTIM OR THAT THE AGGRAVATING FACTORS APPLIED PERSONALLY TO HIM.

This Court reversed Mr. Thomas's conviction for aggravated murder because the trial court's "to-convict" instruction and aggravating factors special verdict form at the first trial, taken together, allowed the jury to convict him without ever finding that he "in particular had the intent to murder Geist or that the aggravating factors specifically applied to him as opposed to his accomplice." State v. Thomas, 150 Wn.2d 821, 876, 83 P.3d 960 (2004). The first jury never found that Mr. Thomas intended the murder because the trial court's "to-convict" instruction did not require it to find that Mr. Thomas acted with knowledge that he was facilitating "the" charged crime (murder) rather than just "a" crime (e.g., robbery or burglary). Moreover, the erroneous "special verdict" instruction did not require the prosecutor to prove, and the jury to find, that the

aggravating factors specifically applied to Mr. Thomas. In Re Howerton, 109 Wn.App. 494, 501, 36 P.3d 565 (2001).

At the retrial, a jury was again allowed to convict Mr. Thomas without finding beyond a reasonable doubt that he had the intent to murder or that the aggravating factors applied to him rather than his accomplice. This is because the jurors were instructed by the court that Mr. Thomas was guilty of premeditated murder; thus alleviating its duty to consider an essential element: whether he acted with or without knowledge that his actions would facilitate a murder.

Although asked to determine whether Mr. Thomas's reason for committing the murder was to conceal the identity of the person committing the crime or the commission of the crime, the court's instructions prohibited the jurors from considering Mr. Thomas's theory of why that question should be answered in the negative. CP 181. If, for example, Mr. Thomas's theory that he did not commit the murder or intend that it be committed, then the aggravating factor would not apply. However, the jury was precluded from reaching any such conclusion since the court instructed it that Mr. Thomas was, in fact, guilty of first degree premeditated murder. Nevertheless, the jurors asked the court during deliberations whether the aggravating factor instruction referred only to the defendant or all persons involved in the robbery and whether it

mattered "which of these persons had the firearm or deadly weapon." CP 234-236. Clearly they were concerned about who fired the shots and who did not, but received no clarification from the trial court and no means of finding that the aggravating factors did not apply specifically to Mr. Thomas. For these reasons, the court's instructions on remand did not cure the problem which the retrial was mandated to cure.

The trial court on remand and the Court of Appeals ignored the central importance of the "to-convict" instruction in deciding whether the aggravating factors have been proven. The aggravated murder statute is not like the exceptional sentencing provisions of the Sentencing Reform Act (SRA) which provide that an enhanced sentence "must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense [the elements of the crime]." State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 117 (1986). The aggravated murder statute requires a finding of premeditated intent to commit murder; it cannot be based on felony murder or the deliberate indifference alternative of first degree murder. RCW 10.95.020. The legislature limited the enhanced penalties for aggravated murder to those proven to have the specific mental state of premeditated intent and expressly excluded those who intended only a robbery. Absent proof of

that intent enhancement penalties of life without parole or death cannot be imposed.

Further, the absence of jury instructions to require the jury to find that Mr. Thomas either committed the murder or intended the murder or that the aggravating factors applied personally to him rather than an accomplice, violated the state and federal constitutional right to due process and the right to a jury trial under In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000); In re Howerton, 109 Wn. App. 494, 501, 36 P.3d 565 (2001). Mr. Thomas's intent was an element of aggravated murder and he had a right to a jury determination of that element in a retrial on the issue of whether he was guilty of aggravated murder. The jurors were not allowed to consider that he did not commit the murder to conceal the crime or the identity of the persons committing it because he intended only that a robbery be committed.

The state may argue that under Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), any error is harmless and that this Court was wrong to hold otherwise in its initial decision. This argument should be rejected for three reasons: (1) the Court of Appeals held that this Court's "ruling in Thomas's first appeal . . . controls our

decision here,” and the state did not seek review of that holding; (2) the law of the case doctrine precludes reconsideration of the prior decision in this case, and (3) the jury question alone establishes that the error was not harmless.

Under the law of the case doctrine, the parties and the trial court are bound by the holding of this Court on appeal unless applying it would work a manifest injustice to one party, with no corresponding injustice to the other party if the former decision were set aside. State v. Worl, 129 Wn.2d 416, 424, 918 P.2d 905 (1996) (citing Greene v. Rothschild, 68 Wn.2d 1, 414 P.2d 1013 (1966)). Here, it would clearly be an injustice to Mr. Thomas to reconsider the former decision in this case. The state could have, but did not seek review at the United States Supreme Court of the decision in this case, and it would be a manifest injustice to consider a subsequent decision of that Court which was filed well after the retrial and could not justify the trial court’s failure to follow the decision of this Court. Second, the United States Supreme Court left open the issue of whether the error could not be harmless under state law. See State v. Recuenco, ____ Wn.2d ____, 180 P.3d 1276 (2008). And finally, the error could not be harmless in any case as demonstrated by the jury’s interest in considering the issue of who fired the shots and whether the factors would apply to Mr. Thomas.

The fundamental error in this case is that Mr. Thomas was granted a remedy by this Court in his former appeal only to be denied that remedy on remand. As a result, he is convicted of aggravated murder without a jury finding that he committed either the *actus reus* or the *mens rea* of the crime. This is constitutional error.

2. THE INSTRUCTIONS REQUIRING THE JURY TO ACCEPT AS A FACT THAT MR. THOMAS IS GUILTY OF PREMEDITATED MURDER CREATED A MANDATORY PRESUMPTION AND A COMMENT ON THE EVIDENCE IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

The court, on remand, by instructing the jury to take as fact that Mr. Thomas was guilty of premeditated murder, effectively eliminated essential facts that were constitutionally required to be proven by the state and determined by the jury. This was in clear violation of Mr. Thomas's due process guarantees.

The Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution require the state to bear the "burden of persuasion beyond a reasonable doubt of every essential element of a crime." State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); State v. Hanna, 123 Wash.2d 704, 710, 871 P.2d 135 (quoting Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 1970-71 85

L.Ed.2d 344 (1985)), cert. denied, 115 S.Ct. 299 (1994); In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt. State v. Roberts, 147 Wn.2d 330, 58 P.3d 889 (2002); see also RCW 9A.04.100(1) (“Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.”). This precept also applies to any fact necessary for an enhanced sentence beyond that permitted by a plea or jury verdict. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Although the state may use presumptions and inferences to assist in meeting its burden of proof, Hanna, 123 Wn.2d at 710, it may not do so in a manner that relieves it of its obligation to prove every element beyond a reasonable doubt. Generally, presumptions fall into two categories: mandatory presumptions and permissive inferences. State v. Deal, 128 Wn.2d at 698. The former requires a jury to find a presumed fact from a proven fact; whereas the latter merely permits, but does not require, the jury to find a presumed fact from a proven fact. A mandatory presumption, therefore, is treated with caution since it possesses the capability to run afoul of the due process guarantees when it serves to relieve the state of its

obligation to prove all elements of the crime charged (or factors of the enhanced sentence). Deal, 128 Wn.2d at 699; Sandstrom v. Montana, 442 U.S. 510, 523 – 24, (1979). The standard for determining whether an instruction creates a mandatory, rather than a permissive, presumption is whether a reasonable juror might interpret the presumption as mandatory. Deal, at 699.

Further, Article IV, § 16 of the Washington State Constitution prohibits judges from instructing the jury that matters of fact have been established as a matter of law. State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979); State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); State v. Levy, 132 P.3d 1076, 1081 (2006). Specifically, Article IV, § 16 reads: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

Here, the court’s instructions cannot be categorized as anything but creating a mandatory presumption and an improper comment on the evidence. The state was required to prove every essential element or fact before an increased sentence was permitted, including whether Mr. Thomas intended the murder of the victim and whether the aggravating circumstances apply to him rather than an accomplice. Nevertheless the court instructed the jury that Mr. Thomas was, as a matter of law, guilty of premeditated first degree murder and therefore intended to cause the death

of Richard Geist. No instruction permitted them to decide that he was not guilty of aggravated murder because he intended only to facilitate a robbery not a murder. The court's instruction violated Mr. Thomas's rights to due process under the state and federal constitutions.

3. RETRIAL ON THE AGGRAVATING FACTORS VIOLATED THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.

The Double Jeopardy Clauses of the Fifth Amendment and Const. art. 1 § 9 prohibit: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306-307, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984); State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

Here, the retrial on the aggravating factors violated Mr. Thomas's state and federal constitutional rights to be free of double jeopardy because he was prosecuted for the greater offense of aggravated murder without reversing his conviction for first degree murder. This is tantamount to a second prosecution for a greater crime after conviction. See State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (erroneous

jury instruction on school zone enhancement resulted in vacating enhancement, not retrial on the enhancement).

The Court of Appeals overlooked that Mr. Thomas's murder conviction was affirmed and final when it held that "double jeopardy is not implicated because the Supreme Court ordered a rehearing after Thomas's initial appeal and, therefore, Thomas's case was never final." Slip op. at 6. If the state elected not to retry Mr. Thomas on the aggravating factors, his conviction for first degree premeditated murder was final.

Moreover, retrial on the aggravated murder charge was not analogous to affirming an underlying conviction but remanding for trial on aggravating factors in an SRA case. The aggravating factors that can support an exceptional sentence under the SRA are separate factors independent of and necessarily different from the elements of the underlying offense. Nordby, supra. In contrast, aggravated murder includes proof of guilt of premeditated first degree murder. It is defined by statute, RCW 10.95.020, in a manner similar to a definition of a crime and is analogous to a higher degree of a crime based on additional factors.¹ Premeditated murder is effectively a lesser included offense of

¹ Former RCW 10.95.020, reads in relevant part:

aggravated murder: each element of premeditated first degree murder is necessarily an element of aggravated murder. See State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). Double jeopardy prohibits conviction of a greater offense after conviction of a lesser offense.

The fact that aggravating factors have been held not to be elements of an offense, but sentencing enhancements, State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823 (1985), should not alter the analysis. The lesson of the Sixth Amendment cases from the United States Supreme Court establish there is no constitutional difference between an element of a crime and a sentence enhancement. Washington v. Receunco, *supra*. In Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), Justice Scalia, joined by Justices Thomas and Rehnquist, held that "murder plus one of more aggravating circumstances' is a separate offense from 'murder' simpliciter." Sattazahn, 537 U.S. at 108.

Nor was the remand in Mr. Thomas's case a remand for a capital penalty phase trial. Under Washington's death penalty statute, the jury must find the defendant guilty of first degree premeditated murder with

A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a) as now or hereafter amended, and one or more of the following circumstances exist . . .

aggravating factors in order for there to be a penalty phase trial. Had the state elected to seek the death penalty again on retrial, there would potentially have been a retrial on aggravated murder and a penalty phase trial. RCW 10.95.060(3), cited by the Court of Appeals, by its plain terms applies only to the penalty phase of trial where the jury “has not heard evidence of the aggravated first degree murder of which the defendant stands convicted.”² (emphasis added). Slip op. at 7.

Retrial in order to find circumstances to support a sentence of life without parole is essentially a retrial to support a conviction for a more serious crime without reversing the conviction for a lesser included crime. This violates double jeopardy.

4. RCW CHAPTER 10.95 DOES NOT PROVIDE A MECHANISM FOR EMPANELING A JURY TO CONSIDER ONLY AGGRAVATING FACTORS.

On remand, the state sought to increase the sentence authorized for first degree murder to life without the possibility of parole by trying Mr.

² It is questionable whether Mr. Thomas should have been tried under procedures set forth in RCW 10.95. For example, under RCW 10.95.050(1) sets out when a special sentencing proceeding may take place, which includes when a defendant has been “adjudicated guilty of aggravated first degree murder.” As noted, this Court reversed Mr. Thomas’s aggravated first degree murder conviction. Additionally, the purpose of RCW 10.95.050 special sentencing proceeding is to determine whether, taking into consideration mitigating factors, a person convicted of aggravated murder should be punished by death. This was not at issue in Mr. Thomas’s remand.

Thomas with aggravating factors charged under RCW 10.95. The state did not seek an exceptional sentence under the Sentencing Reform Act (RCW 9.94A). Consequently, the statutory authority for the retrial must fall under the purview of RCW 10.95 and not the Sentencing Reform Act (SRA). As such, there is nothing in RCW 10.95 – as compared to RCW 9.94A - that allows for the empanelling of a jury solely to determine whether aggravators are present. This is true even if the underlying conviction for first degree murder is considered to be affirmed.

Under RCW 10.95.050(4), a trial court has authority to empanel a jury to consider whether the death penalty should be imposed (a) after the defendant pleads guilty to aggravated murder, (b) after a judge determines that the defendant is guilty of aggravated murder or (c) after the appellate court remands the case for a new sentencing-phase hearing. Mr. Thomas's remand simply did not fall within any of these authorized scenarios. Nevertheless, the trial court, without statutory authority, empanelled a jury solely to consider whether aggravating factors were proven in order to increase Mr. Thomas' punishment to life in prison without parole. There is nothing in RCW 10.95 that grants the trial court such authority.

Further, neither the SRA nor any other statute provides authority to convene a jury in Mr. Thomas's situation. Although 2007 amendments to RCW 9.94A.537 authorize the trial court authority to empanel a jury at a

new sentencing hearing, its application is specific to aggravators listed in RCW 9.94A.535(3) which were relied on by the trial court in imposing a previous exceptional sentence. That is not the case here. Mr. Thomas was charged under RCW 10.95, not RCW 9.94A; the aggravating factors were not previously relied upon by a trial court; and the factors were not set out in RCW 9.94A.535(3). Therefore, amended RCW 9.94A.537(2) is inapplicable.

As this Court has recognized in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), and State v. Frampton, 95 Wn.2d 469, 637 P.2d 922 (1981), it is for the legislature and not the courts to provide procedures for convening juries.³ In Frampton

³ In State v. Recuenco, 163 Wn.2d 428, 439, 780 P.3d 1276 (2007), this Court held that the legislature *had* established a procedure for submitting a firearm special verdict to the jury, in providing a procedure for submitting a deadly weapon enhancement to the jury and defining a firearm as a deadly weapon. Here, the purpose of a RCW 10.95 proceeding is to determine whether a death sentence should be imposed. Nothing in that proceeding can be construed as authorizing a trial on aggravating factors. In fact, as set out above, the RCW 10.95 proceeding is limited to instances in which the defendant has already been adjudicated of aggravated murder, thus expressly excluding Mr. Thomas.

Moreover another significant concern rests with the Court of Appeals' reliance on RCW 10.96.060(3) to conclude that the rules of evidence do not apply in a hearing on aggravating circumstances. State v. Thomas, 2007 WL 2379653, pg. 4. Although RCW 10.95.060(3) may permit evidentiary restrictions when a capital jury is considering punishment under RCW 10.95, but does not comport with due process

and Martin, the court concluded that since the statute did not authorize empanelling a jury to determine the existence of an aggravating factor when a defendant entered a plea of guilty to first degree murder, the trial court could not create one on its own. The same situation exists here. Trial proceeded on the premise that Mr. Thomas remained convicted of first degree murder. There is no statutory procedure under RCW 10.95 for empanelling a jury on remand to consider -- not whether a death sentence should be imposed -- but whether aggravating factors have been proven to increase punishment to life without the possibility of parole. The retrial solely on the aggravating factors was improper.

5. EXCUSING AN AFRICAN-AMERICAN JUROR FOR EXPRESSING UNHAPPINESS THAT HE WAS THE ONLY AFRICAN-AMERICAN ON THE JURY NOT A RACE-NEUTRAL REASON UNDER BATSON.

In State v. Hicks, ___ Wn.2d ___, 181 P.3d 831 (2008), this Court affirmed that excusing the only African- American on the jury panel could establish a prima facie case of purposeful discrimination, which if not explained by a non-pre-textual, race-neutral reason, could constitute a

when the issue is whether the state has proven beyond a reasonable doubt to a jury the existence of an aggravating factor to increase punishment. Blakely, supra.

denial of equal protection under the state and federal constitutions. Hicks, at ¶¶ 28, 39.

Insofar as the trial court's denial of the challenge under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), rested on its conclusion that that excusing the lone minority member could not, as a matter of law, establish a prima facie case of discrimination (RP 122), the court clearly erred under Hicks.

The court also erred insofar as it may have found that the state gave a race-neutral reason and determined that it was not pre-textual. It is undisputed that the prosecutor's reason for excusing the only African-American on the jury panel was that the juror expressed some anger about the under-representation of African Americans in the jury pool, in response to what he perceived as a racist comment – a question about whether it was human nature for a person to make a judgment when they walked into a courtroom. RP 120-122; RP(supp) 4. The fact that the juror was concerned about an African-American man being tried for a most serious crime by a jury with no African-Americans on it was hardly a race-neutral reason for excusing him.

The juror made a comment implying that the state liked not having African-Americans on the jury panel and a system that excluded blacks for

juries. RP(supp) 4. The prosecutor, however, made no effort to explore this feeling with the juror or clarify the reason for his comment.

Other than this comment, the juror's *voir dire* answers gave no indication of bias against either party. He indicated that he was comfortable working in a group and understood the need to listen to other people and appreciate their ideas. RP(supp) 2. He indicated that he thought O.J. Simpson was entitled to be presumed innocent, but that he was found not guilty rather than innocent. RP(supp) 3,5.

The fact that the challenged juror expressed a belief about racial discrimination in the criminal justice system without more should not be deemed a sufficient race-neutral reason to excuse a juror. There is, in fact, ample evidence that this was, as a general matter, a realistic view and a view expressed by Justice Thurgood Marshall in his concurring opinion in *Batson*. Justice Marshall cited several studies in support of his view, including a case in which prosecutors explained that they routinely struck black jurors (*State v. Washington*, 375 S. 2d 1163 (LA 1979)0, and a prosecutor's instructional manual from Dallas County, Texas, advising prosecutors to strike all minority jurors. *Batson*, 476 U.S. at 1727. More recently, a American Bar Association discussion on "Race and the Death Penalty," Focus on Law Studies, The Death Penalty, Spring 1997, Vol. XII, Number 2, included a statement by one of the interviewed experts,

Duke law professor James Coleman, “[i]n capital cases, prosecutors routinely move to exclude all black jurors, on the ground that such jurors would be sympathetic to the black defendant. . . . The criminal justice system will never be fair or nondiscriminatory until it is administered by both black and white citizens, until prosecutors and jurors are forced routinely to deal with the experiences of black people and to factor those experiences into their decision. There is no such thing as a race neutral decision in the criminal justice system, when it affects black people and when their voice is not part of the discussion leading to the decision.” Expressions of sentiments such as these cannot, without more, be deemed sufficient grounds for being removed from a jury.

C. CONCLUSION

Petitioner respectfully submits that his conviction for aggravated murder reversed and dismissed.

DATED this 16th day of July, 2008.

Respectfully submitted,

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