ADMIRAL DEWEY ADAMSON,

Petitioner,

—vs.— No. 102

PEOPLE OF THE STATE
OF CALIFORNIA,

Respondent.

Washington, D.C.
Wednesday, January 15, 1947.

The above-entitled matter came on for hearing before the Supreme Court of the United States at 4:21 o'clock p.m.

BEFORE:

FREDERICK MOORE VINSON, *Chief Justice*
HUGO L. BLACK, *Associate Justice*
STANLEY F. REED, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
FRANK MURPHY, *Associate Justice*
ROBERT H. JACKSON, *Associate Justice*
WILEY B. RUTLEDGE, *Associate Justice*
HAROLD HITZ BURTON, *Associate Justice*

APPEARANCES:

MORRIS LAVINE, ESQ., *619-620 A.G. Bartlett Building, 215 West Seventh Street, Los Angeles 14, California, on behalf of Petitioner.*

PROCEEDINGS

ORAL ARGUMENT OF
MORRIS LAVINE, ESQ.,
ON BEHALF OF PETITIONER

MR. LAVINE: Mr. Chief Justice, may it please the Court, my distinguished opponent and Assistant Attorney General of the State of California: This case involves the death penalty of Admiral Dewey Adamson.

The question involved in this case is the constitutionality of a constitutional provision which was engrafted into the law of the State of California in 1934. That provision, which changed the existing law as it had existed in the State of California from the time when a defendant might first take the witness stand in a criminal case in 1866, provided as follows, in the portion which is before Your Honors for determination as to its constitutionality and validity, and upon which this death judgment was based. That provision is: "Article I, Section 13. Permitting Comment on Evidence, and Failure of Defendant to Testify in Criminal Case. In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial, to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel.

"No person shall be twice put in jeopardy for the same offense nor be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law." And then comes the new portion which is under attack here: "But in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury." That is the provision upon which this case proceeded to trial and judgment.

The case involves the death of Stella Blauvelt, a 64-year-old widow, in an apartment located at Apartment 410 on one of our streets in the City of Los Angeles. The defendant is colored.

In the case, at the time the woman was found in July of 1944, there were certain features about her discovery. She was found about two days—a day and a half or so—after her death. According to the coroner it was two days from the time of her

death that he made the autopsy examination. The clothes of the woman were thrown up. There was a tear in her panties, and there was an exhibition of part of her features. Her stockings were off. Her shoes were off. There was lacking any evidence of anything being taken except that from a circumstantial evidence point of view witnesses stated that they had seen Mrs. Blauvelt up to that morning at least, and from two days before until that morning, with some rings on her finger, which they described as diamond rings. The gold band was still on the finger. Her wristwatch was still on her person.

According to the testimony of other witnesses in the building, the person who was in that apartment was heard about 3:30 in the afternoon. There was some comment by Mrs. Blauvelt who said, "What do you want of me?" Then there was a noise, and then there was complete silence. That condition remained until sometime between 6:00 and 8:00 in the evening, when the person who was in that apartment apparently left the apartment. The key was heard to turn, and somebody was heard to leave.

Now at no time was the defendant ever seen in or about the apartment. About a month later he was apprehended, and by reason of certain fingerprint evidence of some of the fingers of each of the hands which it was claimed was found on a garbage disposal door, the defendant was claimed to have been the person whose fingers matched in some respects in a number of points with the fingerprints which were taken by means of latent fingerprints from that garbage disposal door.

There was no other evidence to connect this defendant. When those fingerprints were placed on that door or how, or whether they were the actual fingerprints of the defendant, was left entirely to conjecture, except for the testimony of one police officer and one sheriff's office official who said those matched with the fingerprints of the defendant, although each of them admitted under cross-examination that there were a number of points of dissimilarity. In the examination of the prints, all of these dissimilarities they claimed were explainable dissimilarities because there was paint and smudge, and there were a number of things on the door.

Not another thing connected this defendant with the murder. There was no evidence that he had done a single thing to kill Mrs. Blauvelt. Not a single scintilla of evidence ever connected him with the murder.

But there were three other pieces of evidence introduced by the prosecution in this case. One of those pieces of evidence related to a conversation which the defendant was supposed to have had in a liquor establishment and was supposed to have been overheard by another colored lady sitting in the next seat, where

there was some question asked by the defendant of another person as to whether he wanted to buy a diamond ring. There was no diamond ring exhibited. There never was any evidence that the defendant ever had any diamond ring.

And then there was another bit of evidence which the prosecutor introduced, and that was the tops of certain stockings which were taken from a room at which the defendant lived—the tops of women's stockings. It was conceded by the prosecutor that those stockings or those tops in no wise matched the stockings which were on the person or in the premises of Mrs. Blauvelt.

Now the defendant did not take the witness stand. And it is in the record that the defendant had been convicted some twenty-four years before and served a term of imprisonment in the State Penitentiary in Missouri; and that seventeen years before he had also served a term of imprisonment. He admitted, according to California procedure, those two prior convictions, and under our California law there could be no evidence about that introduced.

I will continue in the morning.

[Whereupon, at 4:30 o'clock p.m., the Argument in the above-entitled matter was recessed, to reconvene the following day.]

ADMIRAL DEWEY ADAMSON,
Petitioner,

—vs.— No. 102

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Washington, D. C.
Thursday, January 16, 1947.

Oral Argument in the above-entitled matter was resumed, pursuant to recess,

BEFORE:

FREDERICK MOORE VINSON, *Chief Justice*
HUGO L. BLACK, *Associate Justice*
STANLEY F. REED, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
FRANK MURPHY, *Associate Justice*
ROBERT JACKSON, *Associate Justice*
WILEY B. RUTLEDGE, *Associate Justice*
HAROLD H. BURTON, *Associate Justice*

APPEARANCES:

MORRIS LAVINE, ESQ., *619-620 A.G. Bartlett Building, 215 West Seventh Street, Los Angeles 14, California, on behalf of Petitioner.*

WALTER L. BOWERS, ESQ., *Assistant Attorney General of California, 600 State Building, Los Angeles 12, California, on behalf of Respondent.*

PROCEEDINGS

ORAL ARGUMENT OF
MORRIS LAVINE, ESQ.,
ON BEHALF OF PETITIONER—RESUMED

MR. LAVINE: May it please the Court; Mr. Bowers: As we concluded yesterday, I was pointing out to the Court that the defendant had suffered two previous convictions of felony. Under California law—

MR. JUSTICE MURPHY: What were those for?

MR. LAVINE: They were for burglary, Your Honor. Robbery and burglary, I believe. They were some 24 years before. The record shows the first conviction on page 5: Burglary and larceny in the State of Missouri, Jackson County, February 3, 1920; and robbery in the State of Missouri, June 30, 1927. From that time on there was no other offense. The record does not disclose that there was any other offense against the petitioner here.

However, under California procedure, a defendant who has suffered a previous conviction of felony may admit that felony prior to trial or prior to the case going before the jury, and then that is no longer in issue. In other words, there cannot be any evidence presented against him regarding that fact. That fact is withheld from the jury unless the defendant takes the witness stand. If he takes the witness stand, then he is subject to impeachment on that ground the same as any other witness.

Therefore, when a defendant has suffered a prior conviction of felony, counsel are always put to the difficult task of weighing in the balance whether to let the accused go on the witness stand and disclose his past records and thus place him on trial for something that had happened many years before, as in this instance, or to keep him off the witness stand with no disclosure of those facts to the jury.

MR. JUSTICE FRANKFURTER: I am not sure I got the significance of the California statute. What changes does it make? What is the situation without the statute?

MR. LAVINE: You mean in the prior conviction of felony?

MR. JUSTICE FRANKFURTER: Yes. You said the California statute did something, and I didn't get the significance.

MR. LAVINE: Section 1025 of the Penal Code provides that where an accused has suffered a prior conviction of a felony, that that accusation must be filed against him in the indictment or information upon which he is placed upon trial; but that if he admits those facts at the time of arraignment or plea or at any time prior to his taking the witness stand, that fact cannot be alluded to in any manner whatsoever during trial of the case, if he is not a witness in the case.

MR. JUSTICE FRANKFURTER: That couldn't be done apart from statute except in the exceptional cases where a prior conviction is relevant in making out a scheme or what-not?

MR. LAVINE: Well, the California statute made it mandatory to allege the prior conviction as a part of the indictment or information. Under normal procedure—

MR. JUSTICE FRANKFURTER: You mean if a man is indicted for burglary you must set forth in the indictment that he was ten years before indicted for passing a check?

MR. LAVINE: That is correct, Your Honor.

MR. JUSTICE FRANKFURTER: And with a view—

MR. LAVINE: That is correct.

MR. JUSTICE FRANKFURTER: —with a view to punishment? Does it bear on that?

MR. LAVINE: Yes, it increases the punishment.

MR. JUSTICE FRANKFURTER: For that purpose. But it isn't relevant to the issues, is it, in California?

MR. LAVINE: Well, it becomes relevant to the issues, and it is proper to read it to the jury except for that statute which prevents it, because you read the indictment or information to the jury. And if the defendant denies his prior conviction or if he attacks its validity for any ground whatsoever, then it becomes an issue before the jury.

MR. JUSTICE FRANKFURTER: I just want to be clear. This bears on the question of whether or not he is an habitual offender so as to be punished accordingly. But is it relevant to the proof of the charge of burglary that ten years before he was convicted of passing a fraudulent check?

MR. LAVINE: It isn't relevant, Your Honor. But it becomes relevant under the procedure if he takes the witness stand, because then the prosecutor goes into it with meticulous care; or if he denies this prior conviction at the time of plea then it becomes an

issue of fact for the jury to determine under our California procedure.

MR. JUSTICE FRANKFURTER: If a man is up on murder, or a charge of murder, and he takes the witness stand, can he be impeached? Can the State ask him about his convictions for passing a forged check twenty years before?

MR. LAVINE: Yes, Your Honor.

MR. JUSTICE JACKSON: The change this statute makes, then, is to allow comment. Is that it?

MR. LAVINE: The change of the statute before Your Honors now is to allow comment upon the failure of the defendant to explain or deny personally—personally, Your Honor—personally by his own testimony any facts in the case against him.

MR. JUSTICE JACKSON: The only thing it does is to make that a subject for comment?

MR. LAVINE: Well, it does more than that, Your Honor.

MR. JUSTICE JACKSON: Well comment, or the danger of comment, may put some heat on him, so to speak, to take the stand, but the statute doesn't.

MR. LAVINE: Well, the statute doesn't directly, but indirectly it is the back door method of compelling him to take the stand.

MR. JUSTICE JACKSON: Yes.

MR. LAVINE: And to use Your Honor's language, it does put "heat" on every defendant to take the stand, and he does take it except for cases where he has been or has suffered prior convictions of felony in most cases.

So that the result of this statute which is under attack here is to bring about testimonial compulsion. In other words, where from the historical point of view a defendant was presumed innocent and his plea of not guilty put the facts in the case in issue, and he was thereafter presumed to be innocent for all purposes and the burden of proof was upon the prosecution to prove by relevant and substantial evidence the facts in the case against him, this statute has changed that particular situation.

It will be recalled, historically, Your Honors, that up to about 1866—

MR. JUSTICE REED: Before you get into that, I am not clear as to what you meant by your references to the indictment containing the prior conviction.

MR. LAVINE: Well, Your Honors, under California practice, it

is mandatory under Section 1025 of the Penal Code of the State of California for the prosecutor to develop in his case, in his presentment, whether a defendant has been previously convicted of a felony. Now, then, in accordance with that procedure, either the indictment or information alleges the charge. That is, in this charge—murder—

MR. JUSTICE REED: Are these two entirely different questions? Are you using that as a part of your argument against the right to comment on taking the stand?

MR. LAVINE: I am using it as part of the reasons for not permitting the prosecutor to comment on the failure of the defendant to take the witness stand.

MR. JUSTICE REED: Did that happen in this case?

MR. LAVINE: Yes, Your Honor.

MR. JUSTICE REED: He did not comment with regard to his prior convictions?

MR. LAVINE: No, Your Honor. He did not comment on his prior convictions. What he did comment on was his failure to take the witness stand upon grounds which he left the jury to infer were because of the facts in the case. And there were many, many comments which he made on very insufficient evidence.

But the real reason that the defendant couldn't take the witness stand in this case, as in many cases in the State of California, is that he had suffered a prior conviction of a felony, and if he had gone on the witness stand then he would have exposed his past, including those particular things that he did 24 years ago and 17 years ago, and the prosecutor could have gone into that had he taken the witness stand, and thus placed him on trial.

MR. JUSTICE REED: You are using this as an illustration of the evils that might come?

MR. LAVINE: That is correct, Your Honor.

MR. JUSTICE REED: They are two entirely different statutes, of course.

MR. LAVINE: They are two entirely different statutes.

May I point out the opinion of the Court in its comment on that particular phase of it to illustrate the evils of the thing? Page 392 of the record, Your Honors: "There has been much criticism of the present state of the law, which places a defendant who has been convicted of prior crimes in the dilemma of having to choose between not taking the stand to explain or deny the evidence

against him, thereby risking unfavorable inferences, and taking the stand and having his prior crimes disclosed to the jury on cross examination." Citing some Law Journals, and so forth.

"In the present case defendant admitted two prior felony convictions for which he served terms of imprisonment in the Missouri State prison. The fact of the commission of these crimes was not offered or introduced into evidence and would have been inadmissible under the general rule with respect to prior crimes. Had defendant taken the stand, however, the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony." And then the Court goes on, commenting on the subject: "Court and prosecutor are left no alternative but to comment on defendant's failure to deny or explain evidence against him as though the sole reason for his silence was that he had no favorable explanation. Any change in the law in this respect, however, must be made by the Legislature."

With that proposition I disagree.

MR. CHIEF JUSTICE VINSON: In the California practice, after the recitation in the indictment of former convictions, do they go into details of the former criminal acts?

MR. LAVINE: Yes, Your Honor. Page three of the record shows that they allege the exact details of what the prior convictions were for.

MR. CHIEF JUSTICE VINSON: That's the charge?

MR. LAVINE: Yes, Your Honor.

MR. CHIEF JUSTICE VINSON: But do they retry the case?

MR. LAVINE: Well, if he took the witness stand he would be subject to the prosecutor going into the nature of the prior case.

MR. CHIEF JUSTICE VINSON: Well, the jury gets that, don't they, from the indictment?

MR. LAVINE: No, they do not, because—that is, if he doesn't take the witness stand. If he takes the witness stand—

MR. CHIEF JUSTICE VINSON: Is the indictment read to the jury?

MR. LAVINE: Not that portion which relates to the prior conviction. That is excluded under Section 1025 of the Penal Code in accordance with the long practice of legislative policy in respect to any reference to a defendant who has not elected to take the witness stand.

MR. JUSTICE FRANKFURTER: If he doesn't take the witness stand, therefore, that is not read, and the jury is not apprised of it?

MR. LAVINE: That is correct.

MR. JUSTICE FRANKFURTER: May the prosecutor comment on the fact that he didn't take the stand and did not subject himself to disclosure regarding past offenses?

MR. LAVINE: He may not go that far. He may comment fully, as he did in this case. The Court said, in this case—

MR. JUSTICE FRANKFURTER: Comment on what, Mr. Lavine? On his failure to take the stand in this case? Can he go on and say, "If he had taken the stand, I would have brought out that he had committed two other crimes"?

MR. LAVINE: Not that far, Your Honor; not that far, but he goes almost that far. He leaves the jury with the inferences, as far as inadequate evidence is concerned.

MR. JUSTICE FRANKFURTER: As to this charge?

MR. LAVINE: As to this charge.

MR. JUSTICE FRANKFURTER: I understood your answers to the Chief Justice's questions to mean the allegations of prior convictions in the indictment are withheld from the jury.

MR. LAVINE: That is correct.

MR. JUSTICE FRANKFURTER: And may not be put to the jury if the defendant does not take the witness stand.

MR. LAVINE: That is correct.

MR. JUSTICE MURPHY: You say the prosecutor can comment on his failure to take the stand?

MR. LAVINE: Yes, Your Honor. That is the issue here before Your Honors—as to whether such a statute which permits him to do that violates the Fourteenth Amendment.

MR. JUSTICE MURPHY: What instructions does the judge give to the jury about that subject?

MR. LAVINE: Well, we offered several instructions, which were refused. The one and only instruction which the Court gave in this case was that it was the right of the Court and counsel to comment on the failure of the defendant to explain or deny any evidence against him, and to comment on the evidence, the testimony, and the credibility of the witnesses.

Now that is all that the court instructed the jury in this case. We offered several instructions—that is, the counsel who was trying the case offered several instructions to the effect that while it was the right of the prosecutor to comment on the failure of the

defendant to take the stand, it didn't relieve the prosecutor of the burden of establishing guilt beyond a reasonable doubt, and by competent and legal evidence.

That instruction was refused, as were a whole series of instructions which were offered by the defense to remove the presumption or inferences which the prosecutor argued from in this case.

Let me point out—

MR. JUSTICE RUTLEDGE: What does the California Supreme Court—in the portion you read from the opinion on page 393—mean when it says the Court and prosecutor are left no alternative but to comment on the defendant's failure? Does that mean they have to do it?

MR. LAVINE: Well, that would be the language of the decision, to do that—either the Court or the prosecutor. I don't know of a prosecutor who hasn't commented on the defendant's failure to take the stand.

MR. JUSTICE RUTLEDGE: Does this mean that it is the duty of the Court and prosecutor to do it, and not a matter of their discretion?

MR. LAVINE: That is what the opinion would seem to hold under that language, Your Honor.

In connection with that statute, Your Honors, which is here under attack, may I take up very briefly the historical background that pervades the situation against self-incrimination. This statute goes farther than that and makes the mere silence of a defendant in the courtroom evidence to convict him in a trial.

MR. JUSTICE FRANKFURTER: Could you tell briefly what the difference between this statute and the *Twining* statute is?

MR. LAVINE: Yes, Your Honors. The *Twining* statute is not a statute. It is a rule of practice in the State of New Jersey. There is no statute in New Jersey.

However, I have researched the *Twining* case, and I find from the discussions of judges and others that it is only permissible in that State where the evidence is direct and not where it is circumstantial. In the *Twining* case—

MR. JUSTICE FRANKFURTER: At this point I just wanted to know what the scope of the right of comment that was sustained in that case was compared with the scope of the right to comment in this case.

MR. LAVINE: I am going to compare them, Your Honors. I anticipated Your Honors' question in that respect.

In *Twining* v. *New Jersey*, the court there commented as far as both of the defendants were concerned. The court pointed out in that case very fully, with a very full charge to the jury, as to all the safeguards of innocence that surround a defendant. It was a very full charge.

He pointed out, as far as Vreedenberg was concerned, that there was one situation. Now he said:

> Now, Twining has also sat here and heard this testimony, but you will observe there is is this distinction to the conduct of these two men in this respect. The accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say it is for you to say whether he might say, 'Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I can not. Nobody will think it strange if I do not go upon the stand to deny it, because Vreedenberg is uncertain as to whether I was there. He wouldn't swear that I was there.' So consequently, the fact that Twining did not go upon the stand can have no significance at all.
>
> You may say that the fact that Cornell did not go upon the stand has no significance. You may say so because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.
>
> You may, gentlemen, under the evidence in this case, either convict both these men, or you may acquit both . . .

And so forth.

Now, the court there points out that it is only in the case of direct evidence.

MR. CHIEF JUSTICE VINSON: Direct accusation, isn't it?

MR. LAVINE: Well, there was direct evidence of the presence of Cornell at the place. There was direct evidence. There wasn't direct evidence, but only circumstantial evidence, as to Twining.

MR. CHIEF JUSTICE VINSON: The language in the Court's

instructions, as I read it, directly said, "You have the right to consider the fact that he does not go on the stand where a direct accusation is made against him."

MR. LAVINE: That is correct. But the direct accusation has also been construed to be direct evidence. That is to say, where a person directly defines or says that someone was present at a scene, but not where it rests upon circumstantial evidence.

MR. JUSTICE BLACK: Are you attempting to distinguish the *Twining* case on the grounds of the constitutional level that there is a difference between commenting on his evidence where the evidence is circumstantial and where the evidence is direct?

MR. LAVINE: Yes, Your Honor.

MR. JUSTICE BLACK: Is that your only challenge?

MR. LAVINE: No, Your Honor. I think the *Twining* case should be overruled by this Court, and I so request this Court to do it.

I think that since the *Twining* case in 1908 many things have occurred which demonstrate to this Court the error of that majority rule. The language of Justice Harlan in the minority opinion in *Twining* v. *New Jersey* should be the law of this country. Justice Harlan very fully shows where such proceedings are violative of due process of law, and it is pointed out that the *Twining* decision wasn't a necessary decision under the facts of that case. It was assumed for the purpose of determining a decision that certain facts could be so, and that is pointed out.

But I point out to Your Honors in respect to the facts of this case that the situation that existed in the *Twining* case is distinguishable. But, going farther than mere distinction, I say that a statute which permits either the Court or counsel to comment upon the failure of a defendant personally to deny or explain evidence in the case against him is to turn the clock back to the Star Chamber Session, and to substitute, for the orderly procedure of introducing competent, independent evidence of the guilt of an accused, a reliance by a prosecutor on his ability to scare or cope with a defendant who is unable to meet that situation.

MR. JUSTICE BLACK: Are you asking that the *Twining* case be overruled on the reasoning of the majority or the minority?

MR. LAVINE: On the reasoning of the minority. On the reasoning of Justice Harlan in that case.

MR. JUSTICE BLACK: You are taking the position that the Fourteenth Amendment provides only for—or applies this provision of the Bill of Rights to the states?

MR. LAVINE: Correct, Your Honor. And I believe that since this time this Court has had repeated occasions to point out that the Fourteenth Amendment is a restriction upon the states in many ways, which is comparable to the situation here.

For instance, starting with *Brown* v. *Mississippi*, and in your own illustrious decision in *Chambers* v. *Florida*, where the Court has held that a confession taken from a person outside of the courtroom is inadmissible because it is taken under such circumstances as to be proscribed by the Fourteenth Amendment. And this Court has zealously protected that provision.

MR. JUSTICE BLACK: But the *Chambers* case in a note pointed out the two lines of thought. It said that this Court had never agreed on the views Justice Harlan expressed in a number of cases.

MR. LAVINE: That may be true. But the views of Justice Harlan in this case, I think, afford sounder reasoning in respect to our great Bill of Rights; and not only in respect to our own Bill of Rights, but in respect to the factual situation as is developed in this particular case.

Your Honors will see the evil of a situation such as presented by the California statute. It says that a defendant must personally deny the evidence against him. It is the back door to compelling him to subject himself to a very full and very excruciating cross-examination.

Most prosecutors are schooled, experienced men. They can take a poor colored person like this and tear him to pieces. If he had got on the stand, he would have had to have admitted things that happened 24 and 17 years ago. How then could he explain or deny to the belief or satisfaction of the jury any of the things upon which the prosecutor called upon him to explain or deny?

MR. JUSTICE FRANKFURTER: That is a double-edged sword in the hands of a prosecutor. It may arouse sympathy as much as antipathy.

MR. LAVINE: It seldom happens, Your Honor, and I have been around criminal courts a long time. Once the defendant takes the witness stand and admits a prior crime—at least of a type or similarity which may be involved in the one on trial—he's a "gone gosling," to use a popular expression.

MR. JUSTICE FRANKFURTER: When you say "similar," you introduce a new factor and it becomes relevant. In every other domain except a court of law it becomes relevant.

MR. LAVINE: Well, I say any crime, whether it's similar or dissimilar. I tried a case where a defendant had been, at the age of

fifteen, committed in the penitentiary in Illinois for something that was entirely irrelevant to the case, and I had to put him on the stand under the particular facts of the case, as I viewed it. But I could see the jury entirely frown upon his testimony, and if I could have kept him off the stand, which I could have prior to this statute, I would have done so.

But since this statute is almost compulsory in most cases to put the defendant on the stand, it just puts him in a position where he must subject himself to every kind of questioning.

Now, Your Honor, I think you had a question before.

MR. JUSTICE JACKSON: I wanted to ask you if jurors aren't pretty shrewd in weighing the relative ability of a poor defendant and a sharp prosecutor. True, of course, there is disparity of intelligence in a good many of those cases, but juries are human beings. I always thought they were pretty shrewd judges of that sort of thing.

MR. LAVINE: Well, unfortunately, the record of conviction of those kind of things doesn't match up with that shrewdness, especially where they are confronted with a prior conviction of felony.

MR. JUSTICE JACKSON: Your proposition is that a man is constitutionally entitled to have his case decided without that knowledge?

MR. LAVINE: It's a strange thing. In my personal practice I can say I have won more cases keeping defendants off the stand than I have putting them on the stand.

MR. JUSTICE JACKSON: Sure, we all have. That isn't necessarily a good test though whether it's a good thing. I have seen advantage taken of this situation, as you have, of course, where the jury are kept in ignorance of facts that, as Mr. Frankfurter says, would be weighed everywhere, including in my mind and your mind.

MR. LAVINE: But the jury is instructed, Your Honor, under normal circumstances. And it is a part of the Federal law, and it was adopted by Congress and adopted by 41 States of the Union which are thought to have also had in mind the welfare of society and the constitutional orbit within which their statutes should pass, which says that no presumption should be taken against a defendant who fails to take the witness stand.

MR. JUSTICE FRANKFURTER: When was that conclusion first drawn from the privilege against self-incrimination, as far as Federal law is concerned?

MR. LAVINE: 1866.

MR. JUSTICE FRANKFURTER: That's a long time since that act of 1789. It was long in doubt, wasn't it, whether the privilege of self-incrimination—and even then it wasn't unanimously recognized—carried with it that presumption. So when you say it was put into the Constitution, is it accurate to say what you just said—when it was about 75 years after it was put in that it was given that construction?

MR. LAVINE: Yes, Your Honor, but the reason for that was that historically prior to that time a defendant couldn't even take the witness stand. He was presumed innocent. His plea of not guilty put in issue the question of guilt or innocence as it does in every case. Then it was upon the prosecutor to proceed and prove his guilt beyond a reasonable doubt to overcome that presumption.

In 1866 that situation was changed, and the defendant was first given the right to take the witness stand. Now from that time on, from that period on, then the courts by almost unanimous procedure—or the legislatures of most of the states—put into their statutes that a defendant could take the witness stand, that there should be no presumption against him if he failed to take the witness stand. And that has been the law in all of the states with the exception of New Jersey and Iowa, and New Jersey limited its procedure to cases where direct evidence and direct evidence alone was involved.

MR. JUSTICE FRANKFURTER: And what you are saying is, that that which the states did as a matter of policy they have now been constitutionally denied from changing? That is your proposition?

MR. LAVINE: No, that isn't the proposition, Your Honor. They had the right to do that along with the Federal Government. But the issue is broader than that. The issue is whether in any situation where the State gives the defendant the privilege of taking the witness stand, whether that privilege can be used as a trap, whether he can be then compelled to take the witness stand by another statute some years later by trick and device or by language which is compulsory; and if he fails to do that, that that evidence in the courtroom, that proceeding in the courtroom, thereby becomes evidence of his guilt of a crime which took place at some other point at some other time or some other place.

Now, Mr. Justice Jackson, the other day I heard you comment on the fact that lawyers are notably poor witnesses—and lawyers are, even though they are college graduates.

How much poorer, then, are witnesses such as this type of defendant. But more than that—

MR. JUSTICE JACKSON: Witnesses by one truthful answer can "riddle" the lawyer. I have seen it. A smart cross-examiner that takes on a negro is apt to come to grief—or a woman. You know it. You have tried a lot of law suits.

MR. LAVINE: That does happen occasionally, but it is the exception rather than the rule, Mr. Justice Jackson.

But you added one other thesis, and that was the point I was about to make. You said in the *Hickman* case a lawyer would create new evidence which would be new evidence in the case, as I understood your statement, by making up some statement of his oral interview. Well, here the evidence is created in the very courtroom itself by the defendant's failure to take the witness stand. In other words, it isn't something that happened at the scene of the crime. It isn't a piece or a circumstance of evidence of somebody having seen him, or something of that sort. It is a fact which is created in the courtroom itself by the defendant's failure to take the stand.

And without limitation the California law gives the prosecutor the right to draw any inferences, to comment on it. So we have in this particular case.

We have fourteen places where the prosecutor commented on the failure of the defendant to take the stand in matters which were at the most irrelevant in some respects—at least irrelevant testimony.

MR. JUSTICE JACKSON: Now the California Court says that no objection was taken, and that unless objection was taken, and that unless objection is taken at the time it cannot be reviewed on appeal. That is the rule in my State—that we had to make our objection immediately or else it was passed. Counsel could correct it to avoid mistrial. How do you answer the Court's position on it?

MR. LAVINE: There are two answers to that, Your Honor. In the first place, the defendant offered proposed instructions covering these subjects. Those instructions were refused. There is also a provision in the California law that no exception need be taken from the refusal of an instruction. The defendant's instructions which were refused—there are a whole series of them—are published in the record commencing at page nineteen, I believe.

MR. JUSTICE JACKSON: Your assignments of error here are based on the statute?

MR. LAVINE: Yes, Your Honor.

MR. JUSTICE JACKSON: And the statements of counsel under them, not on the instructions?

MR. LAVINE: That is correct. But the statute is what we have to attack it on, as I understand the proceeding here. We attach the statute under the Fourteenth Amendment, and all that took place under it is certainly relevant for Your Honors to consider. It is true that we attack the statute inherently and so construed and applied in this case, Your Honors, and so we construe it in its application to everything that happened in the case. That is under our assignments of error and our specifications of error.

MR. JUSTICE JACKSON: There is a question whether you properly raised your question to compel the California Courts to pass on it, because this Court ordinarily doesn't pass on questions the Court below has said were not reviewable by it. The question of properly raising it as a Federal question.

MR. LAVINE: We think we did properly raise the Federal question. It is true in this case the objections were not made by the counsel who tried the case. I tried a subsequent case which is still before Your Honors—*Greenburg* v. *California*—tried before the identical judge and involving the identical question and identical procedure as here. Throughout the trial I did object to the instructions and requested instructions based on the Fourteenth Amendment to the Constitution of the United States.

That case, of course, does raise that particular question which wasn't raised here in the question of instructions. But I still think our specifications of error and assignment of errors as to the statute inherently and as construed and applied in this case, page 9 of our brief, and page 410, et. seq., of the record, sets forth our assignment of errors on the very question of permitting comment upon the failure of the defendant to explain or deny the questions against him.

We raised those particular questions in the Supreme Court of California, and we raised the questions which I have been arguing here directly on the statute involved, in both this case and in *Greenburg* v. *The People of the State of California*, in which that portion of the record is a little more clearly presented.

MR. CHIEF JUSTICE VINSON: Do you have any authority upon the point that your rule, providing that no exception need be taken to the refusal of instructions, cures the failure to object to the statement of counsel?

MR. LAVINE: No, Your Honor. In our State practice it is different than in the Federal practice. The mere presentation of the instructions to the Court is ample and his declination to give those instructions constitutes error which can be raised on appeal.

MR. CHIEF JUSTICE VINSON: Well, that is in regard to the instructions. Now that being the case, does it have anything to do with curing the failure to object to statements?

MR. LAVINE: Yes, Your Honor.

MR. CHIEF JUSTICE VINSON: Can you cite those? Have you those cases?

MR. LAVINE: No, I have not. But I will be glad to furnish them to the Court.

Now, Your Honors, the subject is vast, and it is hard to cover all of the matters. There were fourteen different places, as I counted them, in which the prosecutor commented on the failure of the defendant to explain or deny his testimony.

He started out, page 336. He said, "I do not stand here, members of the jury, in the capacity of representing any private client. I stand here in the capacity of a sworn officer of the law, a part of the District Attorney's office, for the purpose of presenting the facts available to you, intending to see that a proper verdict is arrived at." Thereupon he places himself before the jury as a public officer.

We go on, and he comments upon the fact that the defendant was at the Colony Club where some woman said that she heard the defendant speak about some ring, or that the defendant had spoken about asking someone if they wanted to buy a ring. The prosecutor says, "The defendant has not taken the stand; he has not denied that; it is uncontradicted in the testimony. There he sits, not getting on the stand, not giving you what his version of the situation is. You have got the right, members of this jury, to consider the fact and consider that four hundred and some odd pages of testimony are uncontradicted from the lips of this defendant. Why?

Then he goes on—

MR. JUSTICE DOUGLAS: Where are you reading from, Mr. Lavine?

MR. LAVINE: Page 343 of the record.

Then we have again the evidence in this case according to one of the officers. They found some top parts of stockings in his room. Now those are the similar type that we have seen colored boys put on their heads and fasten down their hair. It was conceded by the prosecutor that those stockings which were found in the room were unconnected in any way with the stockings which the deceased had. But the prosecutor goes on to say, "The defendant has not seen fit to explain"—that is page 346—"what these stockings are doing in his room. It is rather an unusual

situation where we find stockings gone and three women's stockings in the room of the defendant."

Then, skipping a little bit down to the bottom of the page: "Now, I do not say that the type of stockings found in the room of the defendant are from the same stocking that was found underneath her. The evidence does not indicate that. I will say to you frankly, they are not. But we do have this circumstance of finding those stocking tops there in the room of the defendant." Then he goes on to say, page 347: "No explanation; nothing said or testified by him as to what they are doing in his room. The record is silent."

Then, a little farther down the page, he comments upon the finding of a pillow in the room of the deceased with some blood on that, and then he goes on to say, page 348, at the top of the page: "That in itself, with reference to the condition of those pillows there, appearing to be blood, indicate that the defendant had remained in that apartment for some considerable period of time; a considerable period of time; unquestionably those pillows were changed. Why, I don't know. The man over here knows, but he does not tell."

And then we go on, page 350. They depict the deceased's garments, or the pants that Mrs. Blauvelt had on, with a tear across the crotch, and then they go on to describe the stockings off the body. At the bottom of the page: "Now the defendant has not explained that. He has not told you why. I would have liked to find out, if he had gotten on the stand, and I think you would have liked to have known why. I ask you, when you get into the jury room, to look at People's Exhibit 34."

And then again the prosecutor commented on some statements which were made to police officers, page 367: "The officer says, 'You know what day it happened on.' He replied it happened on the 24th, and he wants to know what day of the week it is, and he told him it was Monday. He said, 'I know where I was Monday. I will have my witnesses and I can prove it.' Again he says, 'I will have my attorney and all my alibi witnesses there when the time comes.' Have you heard from the lips of the defendant or a single witness called by the defendant where he was other than in that apartment? If he had alibi witnesses that would testify, they would be up here testifying."

Then, later on, he calls attention to the fact that the defendant rested without putting the defendant on the stand, and he says, page 368: "The reason is, fingerprints; powerful evidence. So far as this defendant is concerned, as I said before, he does not have to take the stand. But it would take about twenty or fifty horses to keep someone off the stand if he was not afraid. He does not tell you. No. Now one more thing and I will conclude."

And then on page 369 at the bottom of the page: "And here we started out in this case with the defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand, or did not put any witnesses on the stand, he stood here with that presumption removed, based on the evidence in this case."

Then on page 370, a little farther on: ". . .we have brought witnesses in here, we have shown you what our side of the case is. You have seen it. If there is any mystery that has occurred in this case, it is a mystery from the defense side of this case. Did the defense clear up any mystery? The answer to that is 'No.' "

And then on page 372, the prosecutor said, "He could explain how his prints got on there, and he could explain what he was trying to do when he was selling or attempting to sell a diamond ring." Mind you, there was no evidence that the defendant had any diamond ring that come from this deceased. Nobody saw any. There was not one scintilla of evidence. "He could have done that. Neither he nor witnesses did it. Those are matters which all have been testified to and are here in this case."

And finally, in conclusion, the prosecutor on page 379 said, "I am going to just make this one statement to you: Counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty'? Not one word from him, and not one word from a single witness."

Now I submit, Your Honors, that under all of the cases which have been submitted such an attempt is unconstitutional. First, the statute itself is, in effect, testimonial compulsion. It forces the defendant to go on the stand.

Second, it shifts the burden of proof. And in respect to public policy, Mr. Justice Jackson, I think it would make a lot of prosecutors mighty lazy and rely on their ability to get a confession from a defendant on the witness stand in court, a thing that is very similar to the condemnation of the Wickersham Commission of getting extra-judicial confessions out of court.

My time is short. I want to leave the remaining time for reply. If Your Honors have any questions before I sit down, I am ready to answer them.

ORAL ARGUMENT OF WALTER L. BOWERS, ESQ., ON BEHALF OF RESPONDENT

MR. BOWERS: Of course, as this is a death penalty case, it must receive, and I think the record clearly shows that it has received, the fullest consideration.

It's not an easy thing to condemn a man to death. It is not even a very pleasant task to argue toward that end. In this instance, the appellant, of course, is entitled to a full and a fair hearing. He is entitled that no stone shall be left unturned in his defense. We think the record demonstrates that no such stone has been left unturned.

Time tends to swing the pendulum of pity away from the victim and toward the condemned murderer. We still have a stern duty to see that the perpetrator is brought to justice.

There is no question before us of the insufficiency of the evidence. The jury has passed upon that in the first place. The trial court passed upon it in the denial of a motion for new trial. And the Supreme Court of the State finally passed upon it.

But we are here concerned solely with whether or not the appellant here has been accorded due process at every stage of the proceedings. Now, as I understand from the decisions of this Court, the question of due process is not an evenly balanced matter of whether or not there has been some error of law occurring in the case. But it concerns itself with whether or not a defendant has had a full and a fair trial, with whether or not the practice objected to is such as to be shocking to the conscience or so abhorrent to the fundamental principles of justice as to be said without question that it violates due process.

Counsel for appellant has not cited a single case in support of the contention that the California provision or similar provisions permitting comment upon the absence of a defendant in a criminal case to explain or deny evidence against him or permitting the jury to give consideration to that fact is invalid.

The Court here has already mentioned the *Twining* case. The *Twining* case undoubtedly has been considered since 1908 by both the courts and by law writers generally as determinative of this proposition. The *Twining* case is not the only expression of the Court on that proposition.

In the case of *Palko* v. *Connecticut*, this Court affirmed the expression in the *Twining* case, and said that justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

And again in *Snyder* v. *Massachusetts*, this Court, calling attention to the *Twining* case, said, "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State."

Now as a matter of fact, the California law does not go to the extent of requiring self-incrimination. The section of the California Constitution in which this provision is found also specifically provides that no defendant may be required to take the witness stand. There is nothing, we believe, in the language of the California law which by any means can be said to require compulsory self-incrimination.

There is a similar provision in the Ohio Constitution which I believe has been there since 1912. Also in Iowa, and I believe in Vermont and New Jersey it is permitted under the rulings of those States to comment upon the absence of a defendant on the stand or his failure to deny or explain evidence against him.

Now the California Supreme Court and the appellate courts of that state have never held nor considered that the California law warrants any inference or presumption of guilt. In *People* v. *Zoffel*, in 35 app. 215, in which the State Supreme Court denied a hearing, that Court said, speaking on this subject, "Respondent contends that such cards were admissible as against the appellant and that her failure to take the stand and deny having written them raises some kind of presumption or inference of guilt. The burden rests on the prosecution and not on the defense. Section 13 of Article I of the State Constitution permitting the prosecution to comment on the failure of the defendant to take the stand cannot be used to supply a failure of proof by the prosecution."

And again in the case of *People* v. *Sawaya*, 46 Cal. App. 2nd 466, in which the State Supreme Court likewise denied a hearing, that Court said:

> The fact that the constitutional provision provides that in a criminal case, whether or not a defendant testifies, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented on by the Court or counsel and may be considered by the Court or the jury, does not deprive a defendant of his right to stand mute, nor does it relieve the prosecution of the burden of establishing his guilt beyond a reasonable doubt and by competent and legal evidence.
>
> The exercise by a defendant of his constitutional privilege to remain silent and demand that the People make a case against him beyond a reasonable doubt does not of itself directly and immediately tend to connect him with the commission of the crime charged against him. When a defendant chooses not to explain allegedly incriminatory circumstances offered in corroboration of testimony given by conceded accomplices, and when as a matter of law some corroborative evidence falls short of the quality and kind demanded by Section 1111 of our Penal Code, this Court is given no alternative but to set aside an ensuing conviction based thereon.

MR. JUSTICE RUTLEDGE: Does that mean his silence is not evidence in the case?

MR. BOWERS: I think it does, Your Honor.

MR. JUSTICE RUTLEDGE: Then why would it be commented on?

MR. BOWERS: It was specifically held that silence in that case cannot supply the place—

MR. JUSTICE RUTLEDGE: That is not the question.

MR. BOWERS: —of legal proof.

MR. JUSTICE RUTLEDGE: May not supply the place of some proof. But is the proof itself in addition to that?

MR. BOWERS: I think the Supreme Court of the State in this particular case in its opinion sets forth just how far that fact may be considered.

MR. JUSTICE RUTLEDGE: Well, is it proof? Does it have the quality of proof? The inference which may be drawn? I don't mean sole or sufficient proof of itself, but isn't it the very purpose of the statute to make the silence of evidentiary or probative value if the jury wishes to treat it as such, in addition to what else the State may require to be proved?

MR. BOWERS: I think it has to this extent, Mr. Justice Rutledge: Not that it is any proof in itself, but where any circumstantial or direct evidence against a defendant are offered and introduced in evidence, the failure to deny or explain the same leaves the inference with the jury that there is no explanation or denial.

MR. JUSTICE RUTLEDGE: That's proof then.

MR. BOWERS: And the jury may infer—

MR. JUSTICE RUTLEDGE: It's evidence.

MR. BOWERS: —the inference from it.

MR. JUSTICE RUTLEDGE: It's evidence.

MR. BOWERS: To that extent it is evidence.

MR. JUSTICE RUTLEDGE: From which probative inferences may be drawn?

MR. BOWERS: Yes, Your Honor.

MR. JUSTICE REED: What probative inference is drawn in a case like that that you just mentioned where there is some evidence introduced by the prosecution, and then the defendant doesn't testify?

MR. BOWERS: Let's take in the present instance in the case before us. There was positive evidence introduced that the fingerprints of the defendant were found on the garbage compartment door leading into the room where the woman was murdered. Now the failure to explain or deny those fingerprints leaves the inference, probative inference if you please, of the fact that those were the fingerprints of the defendant—and further the inference that could be drawn that they were placed there at the time of the entry into that apartment at the time that the woman was murdered.

MR. JUSTICE REED: Suppose he had gone on the stand and denied it? That inference could still have been drawn.

MR. BOWERS: That inference could have still been drawn.

MR. JUSTICE REED: I don't understand what additional force it would have. I understand it is a great force in argument when the counsel comes and comments on the fact that he did not testify. But is there any additional evidence to be drawn from his statement?

MR. BOWERS: I don't think there is any additional evidence that can be drawn.

MR. JUSTICE REED: Or any additional inference?

MR. BOWERS: Or any additional inference which might not be drawn in any event.

MR. JUSTICE RUTLEDGE: But it is a fact from which the jury is permitted to strengthen whatever inference might exist with reference to other evidence.

MR. BOWERS: That may well be true. In other words, it is the same thing as we know naturally in any walk of life that if you or I are accused of something, if we stand silent and can't deny it the inference can be drawn that we have no denial.

MR. JUSTICE RUTLEDGE: If it is evidence, if it has probative value, that is what I mean. And one is put between the alternatives of allowing that evidence to go in on the basis of inference, and himself taking the witness stand. Whether or not the self-incrimination applies, isn't that a form of compulsion? It certainly isn't strictly voluntary.

MR. BOWERS: Well, if the Court please, there is no question but that it puts a defendant who has been previously convicted of crimes in the position of having to determine whether or not he shall go on the stand and be subjected to the inquiry which goes to the extent of asking him whether or not he has ever been convicted of felony and he answers, "Yes."

MR. JUSTICE RUTLEDGE: However remotely related or unrelated to the present crime in time and character the other offense may be, doesn't it actually put that defendant in a position which no other person charged with crime, and under a compulsion which no other person charged with crime, is subject for purposes of defense?

MR. BOWERS: It puts him under no other compulsion than any other witness or any other defendant who may seek either to go on the stand or to stay off the stand. His failure to go on the stand to explain or deny any circumstances subjects him to the same inference.

MR. JUSTICE RUTLEDGE: But by the very fact that it is charged that he has committed the prior crime, that plus the compulsion to testify in order to avoid the inference, seems to me does put him in a different class from any other.

MR. BOWERS: The fact that he is charged with a prior crime, if the Court please, makes no particular difference.

MR. JUSTICE RUTLEDGE: It destroys his whole credibility.

MR. BOWERS: Let me enlarge on that.

MR. JUSTICE RUTLEDGE: I'd like to hear you on it.

MR. BOWERS: He is no different in that instance from anybody who has been convicted of a prior crime. In other words, the charge against him makes no difference. If he were not charged with a prior crime and went on the stand and were asked the question, he would still be in the same situation.

MR. JUSTICE RUTLEDGE: But that compulsion in his situation is different from what any other defendant not previously convicted would face, because the very nature of the admission which he would be forced to make on cross-examination would destroy the whole effect of his testimony.

MR. BOWERS: That is true, Your Honor, and he would be subject to the same situation as any defendant who had been previously convicted—of having to admit he had been convicted of felony—for whatever that was worth, as to the credibility of his testimony in the case.

MR. JUSTICE RUTLEDGE: In other words, it is, in effect, a form of compulsion upon him to testify to his prior convictions.

MR. JUSTICE BURTON: Wouldn't that go then to the validity of bringing in the previous convictions rather than the validity of ability to comment on failure to testify?

MR. BOWERS: I don't think, Mr. Justice Burton, I can follow to that extent, because the question of the previous convictions is merely a proposition for the Habitual Criminal Act for the fixing of the punishment, and there is no distinction to be drawn between the fact of his being charged with a prior conviction and the fact that he might have been formerly convicted whether he was so charged or not.

MR. JUSTICE BURTON: Mr. Justice Rutledge was bringing that in as an incident that arises out of this present provision relating to comment on his failure to take the stand. And by bringing into the merits of the trial his previous convictions it goes to the validity of bringing that in, rather than the validity of permission to comment on the failure to testify.

MR. BOWERS: That may well be true.

MR. JUSTICE JACKSON: Now if you are a perfectly innocent by-stander, and you see an accident in the street, and you are summoned as a witness without any interest in the case, either one of the lawyers can ask you if you have ever been convicted, and you have got to tell him, subject to penalty for perjury if you don't. Is there any constitutional rule that prohibits California from making a defendant, if he takes the stand—or is it any wrong to him—to make him disclose that he is a felon? It isn't disclosed if he doesn't take the stand. The only penalty, if he doesn't take the stand, the prosecutor can say, "Why didn't he take the stand and deny it?" That's all.

MR. BOWERS: That is correct, if Your Honor pleases. There is no question about that. There may be a slight line of difference to be drawn, however: That in the case of a witness, while it may be degrading and humiliating to him to admit a previous conviction, he is not on trial nor subject to any punishment, whereas the defendant personally is on trial and is subjecting himself to punishment. Now that, as I see it, is the only mark of distinction between the two instances.

MR. JUSTICE BLACK: I suppose if the Fifth Amendment applied to the States and prohibited self-incrimination, that would apply whether the evidence involved related to previous convictions or something else, wouldn't it?

MR. BOWERS: I think that is correct, Your Honor.

MR. JUSTICE BLACK: Wholly immaterial?

MR. BOWERS: Yes.

MR. JUSTICE BLACK: So if that Fifth Amendment applies, do you think that it would prevent the State from doing what was done here?

MR. BOWERS: Well, if the Court please, I think that there has been a distinction drawn between the comment upon the failure to explain or deny evidence against a party, which is of course common enough in civil cases, and the requirement of self-incrimination. I think that there is a distinction there.

MR. JUSTICE BLACK: What I meant was, assuming that the provision against self-incrimination applies to the states, would you say that this particular comment that was made here on failure to testify violated that Fifth Amendment?

MR. BOWERS: I don't believe it would.

MR. JUSTICE BLACK: You don't think it would?

MR. BOWERS: No, I don't think it would.

MR. JUSTICE BLACK: Has it been a rule, so far as the search and seizure provision is concerned, that it was not merely search and seizure that was prohibited but that you couldn't use any evidence obtained to get other evidence? Is that a part of the constitutional rule as you understand it? And if that is true, why would not comment on the failure to testify come within the finality of that principle? Assuming that the search and seizure rule is not merely a rule of fairness which the state and Federal courts impose on their own courts.

MR. BOWERS: It seems to me that if we go to that extent of assuming—as I understand the cases on that, they hold that evidence produced by search and seizure in a state matter and not prohibited by the state may be utilized by the Federal courts, and vice versa. Now apparently Your Honor is drawing a distinction between the construction that has been placed—

MR. JUSTICE BLACK: Maybe I shouldn't have used that illustration. What I meant was this—I used it as a simple analogy—does the provision against self-incrimination, the Fifth

Amendment, go so far as to say that not a rule of fairness in trial but the constitutional provision itself is violated by the fact that a counsel comments on the failure to testify?

MR. BOWERS: I don't believe I would be prepared to answer that, Your Honor.

MR. JUSTICE BLACK: Well, he is challenging it. One of his challenges to your action is that the Fifth Amendment does apply. He says so. He says that the *Twining* case was wrong and the Fifth Amendment does apply. He argues that this violates the Fifth Amendment. You are not prepared to argue whether it does or not?

MR. BOWERS: I am prepared to argue, Your Honor, to the point that this Court has consistently held—

MR. JUSTICE BLACK: Suppose it has; and suppose it overruled it. Suppose he said this would come within the prohibition of the Fifth Amendment. What do you say?

MR. BOWERS: I do not think so. I do not think this is compulsory self-incrimination. In other words, the only compulsory feature at all in respect to it is not an absolute compulsion but is the fact that in this particular instance and in similar instances where there has been a prior conviction that taking the stand, if he does take the stand, requires a disclosure of the prior conviction which may affect the credibility of his testimony.

MR. JUSTICE BLACK: I wasn't asking you in connection merely with that. I was asking about the rule because if the rule applies, I assume it would apply no more and no less to a comment on failure to take the stand and deny a previous conviction as it would to all others. I assume it would be the same thing. But in your judgment, does the Fifth Amendment itself preclude all comment by counsel on the fact that the defendant has failed to testify?

MR. BOWERS: Not to the extent here that he has failed to explain or deny evidence against him.

MR. JUSTICE BLACK: Your line there is that it is a general rule of evidence, as I understand it, well-recognized and based on common practice, that when circumstances are shown to have occurred and there has been no satisfactory explanation of them from anybody, the jury has a right to consider those inferences that they draw from the circumstances, and in doing that they have the right to consider nobody has explained it?

MR. BOWERS: That's right.

MR. JUSTICE BLACK: Here, is it not true, the only man who could explain it would be the defendant?

MR. BOWERS: Presumably the only man who could explain it. Or at least he would be the man who would explain them in this particular instance. It would be the defendant. In other words, his fingerprints are found on the door at the time. He is then the one, and presumably the only one—there may be others that can, there might be other witnesses who could be produced who had seen him at some other time handle the door and place his fingerprints on there—but presumably he is the one to explain the fact how his fingerprints came on that door.

MR. JUSTICE BLACK: I assume if the Fifth Amendment did apply, counsel wouldn't have violated it by arguing long and constantly that there has been no contradiction of these facts. I have heard him even go so far as to say "no contradiction by anybody of these facts." So I presume you would get down to the point here: Instead of saying "no contradiction of these facts at all" that violated the Constitution, he said, "the defendant didn't deny." You really have a line about like that, don't you?

MR. BOWERS: That's about it.

MR. JUSTICE BLACK: Assuming that the Fifth Amendment applies?

MR. BOWERS: That is correct, Your Honor. That is correct.

MR. JUSTICE FRANKFURTER: These are decisions in the state courts, are they not, holding that comment on the failure to take the stand is included? There is no decision of this Court as far as I know. I suppose in the Federal judiciary the problem hasn't been raised to become important because a statute governs the matter since whatever it is—1870 something.

MR. BOWERS: I think that is true. There is a decision, I think, in the Iowa Court—I'm not certain whether that touches precisely on that—it's mentioned in our brief in *State* v. *Ferguson*. No, I think that goes to the extent that the fact of choosing not to testify does not come within what is contemplated in due process of law.

Now this Court, as I understand the *Twining* case and the *Palko* case and *Snyder* v. *Massachusetts*, has held that the due process clause and the privileges and immunities clause do not prohibit or abridge the right of the States to require self-incrimination, or, that is, to require, if necessary, a defendant to take the stand as a witness for the State.

MR. JUSTICE BLACK: We have certainly had cases which—according to the degree of forcing the testimony under one form or another, whatever form you reached it—have held that a state couldn't do it. *Carter, Smith* v. *Texas, Chambers,* and numerous

others held that you couldn't force people to give this testimony against themselves and then use it.

Now the approach, of course, has been different. But so far as the area within which those cases were decided, I suppose you could hardly say that some parts of the spirit or the prohibitions of the Fifth Amendment, there, were not made applicable to the state by one reasoning or another.

MR. BOWERS: Haven't they all been decided, Your Honor, primarily and fundamentally upon the manner in which the confession or the testimony was forced out of the defendant?

MR. JUSTICE BLACK: In the main those who have supported those decisions have gone on the majority argument in the *Twining* case, unquestionably, as we have spoken in several other cases. Nevertheless, the fact remains that the states have been prohibited from forcing testimony under certain circumstances.

MR. BOWERS: That is correct, Your Honor. And the force of all of those decisions is based upon the manner in which the confession is forced.

MR. JUSTICE BLACK: It has been more or less the nature to look at the whole proceeding and see whether they are so offensive to what is stated to be the fundamental ideas of justice as to be such that they just shouldn't be used in this country.

MR. BOWERS: I think that is correct, Your Honor. I think Your Honor states very succinctly the basis, and that is whether or not they have been adduced or forced out under such circumstances as violate our fundamental concepts of justice.

MR. JUSTICE BLACK: But I understand his argument approaches this from two phases. One of them seems to be that, because he continues to argue about what is fair and what is wrong and unjust. Then I understood him also to say that beyond that he thought the majority in the *Twining* case should be overruled and the minority ruling should be the one which would apply to the Fifth Amendment as it is written, which would require us, if that should be done, to say whether or not this particular conduct violated the Fifth Amendment, not because of its essential unfairness as the others did, but because the Fifth Amendment prohibits it.

That gets down to the question I am asking you as to whether or not if that should be the case you would say the Fifth Amendment with its language prohibits it.

MR. JUSTICE FRANKFURTER: It may prohibit something historically settled rather than offend any deep sense of justice. That is one of the real differences in these two views.

MR. BOWERS: That is why there is the differentiation, and I think innumerable cases can be cited where this Court has held the Fifth Amendment does not apply to the states here.

But aside from that point, the basis of the determination, as I understand it, of a violation of the Fourteenth Amendment and the due process and the privileges and immunities clause must go, as Your Honor stated, as to whether or not it is such a shock to our sense of justice—

MR. JUSTICE BLACK: Suppose it goes the other way. What is your argument there as to the Fifth Amendment?

MR. BOWERS: Well, if Your Honor please, if we assume that the Fifth Amendment is applicable, then I think my argument, as I stated before, is based upon the differentiation between the absolute compulsion of a defendant to take the stand in a criminal case, and the premise that their failure to explain or deny evidence against them is not such self-compulsion.

Now it seems to me—and I am not going to take up much of the time of the Court to do this—but I want to call attention to this one circumstance, because, as Your Honor said, the question, as I see it, is whether or not the mere fact of this California provision, the fact of the Ohio constitutional provision, the fact of the Iowa and New Jersey decisions to the same effect, which have stood for a long period of time, are such as can be said to shock the sense of fundamental justice in violation of the Fourteenth Amendment. Now remember that the American Bar Association has studied this proposition. There is no question but that there is a lot of argument upon the basis of whether or not it is a better or worse practice to follow.

But I want to call attention just to the brief 1938 American Bar Association Report where the matter for the study of this question was referred to a committee. The report states that 178 judges answered the questionnaire and summarized the result in the five States—California, Iowa, New Jersey, Ohio, and Vermont—where this provision is in effect. That the replies of the judges show that 93.65 percent regard comment as an important and proper aid in the administration of justice, while only 2.65 percent consider it definitely unfair to the accused, the others listing it as relatively unimportant.

MR. JUSTICE JACKSON: Is that a comment by counsel or comment by the court?

MR. BOWERS: I think this refers to either comment by the court or counsel, similar to the California provision which allows comment by either court or counsel. And I think the Ohio provision is the same, and the other States—that comment may be

made by either the court or counsel, and that the inference may be considered by either the court or the jury.

MR. JUSTICE JACKSON: May I ask you about your practice in California?

MR. BOWERS: Yes, Your Honor.

MR. JUSTICE JACKSON: Now at the close of the People's case, I suppose the defendant is entitled to make some kind of a motion to test the sufficiency of the case at that point?

MR. BOWERS: That is correct, Your Honor.

MR. JUSTICE JACKSON: And at that point no question could be made as to whether he had or had not testified?

MR. BOWERS: That is correct.

MR. JUSTICE JACKSON: So that the State must make a complete case such that if it were believed, would warrant the conviction before any comment would be in order?

MR. BOWERS: That is correct, Your Honor, and if there were no evidence sufficient to establish a *prima facie* case for the People without the lack of the inference to be drawn from failure of the defense to put up on the case, at that point the Court could move—or the counsel could move—for dismissal.

MR. JUSTICE JACKSON: The Court couldn't say on that motion, "We'll see what the defendant says about that"?

MR. BOWERS: No, Your Honor.

MR. JUSTICE JACKSON: He can't use the defendant's testimony?

MR. BOWERS: We must come to the extent that the prosecution has put in evidence a case sufficient to warrant it going to a jury before the question of the defendant's failure to explain or deny comes into consideration.

MR. JUSTICE JACKSON: It turns on weight and not on sufficiency?

MR. BOWERS: That's right.

MR. JUSTICE REED: Do you know whether in the other States you referred to there is also the practice of putting into the indictment the fact of a man's former convictions?

MR. BOWERS: I do not know if that is true or not.

MR. JUSTICE REED: Does it seem of significance to you that California does put those former convictions into the indictment

and permits cross-examination on them? Does that make your constitutional provision better or worse?

MR. BOWERS: No, I don't think that that affects the matter, because, if the Court please, our California law does not put those former convictions into the indictment and permit cross-examination on them.

MR. JUSTICE REED: Only when the defendant takes the stand, as I understand it. At least, that's what counsel says.

MR. BOWERS: I don't want to disagree with Mr. Lavine because Mr. Lavine has a very large experience in criminal cases. But my understanding is that, when a defendant appears upon the stand the same as any other witness, as far as the prosecution can go is to ask him whether or not he has been convicted of a former felony. Now from that point on, I doubt whether or not the details are to be brought out unless the defendant seeks to do so by his own counsel. I may be incorrect in that.

MR. JUSTICE REED: Suppose the defendant denies that he has been convicted. How would they introduce that evidence?

MR. BOWERS: I think the indictment would not be evidence of that but they would have to introduce it by certification of the former conviction.

MR. JUSTICE REED: Then the conviction would show the type of crime he had been convicted for?

MR. BOWERS: That is correct, Your Honor, but, of course—

MR. JUSTICE REED: It's merely because every witness would be subject to that?

MR. BOWERS: It's merely because every witness would be subject to that, and, of course, it is improbable that the defendant would admit at the beginning of a trial the prior convictions, because the defendant, as part of the procedure in California, either admits or denies the prior convictions.

Now it would be improbable that he would admit the previous convictions for the record and then when he went on the stand as a witness and he was asked if he had been convicted of a former felony would state that he had not been.

MR. JUSTICE REED: He admits or denies for the record when he pleads to the indictment?

MR. BOWERS: Yes.

MR. JUSTICE REED: And even after that he can still be asked on the stand whether he had been guilty of the former crime?

MR. BOWERS: If he was placed upon the stand, yes, because they are entirely two separate and distinct propositions. The charge of former convictions is in the indictment solely for the purpose of establishing whether he is an habitual criminal.

MR. JUSTICE REED: If he offers himself as a witness, the sole purpose of questioning him, the sole purpose of asking him if he has been formerly convicted, is to test the weight and credibility of his testimony.

MR. JUSTICE JACKSON: How many convictions does it take to make a habitual criminal?

MR. BOWERS: Two previous convictions.

MR. JUSTICE JACKSON: If he had two previous convictions, and it had no place in the indictment, or if the District Attorney who had drawn the indictment hadn't put in the charges or hadn't been informed, but if he took the stand I suppose you could still ask him on the stand?

MR. BOWERS: That is perfectly true. The question of any witness on the stand of whether he has been convicted of felony is solely separate and apart from any question of indictment or whether it is charged in the indictment. It has nothing whatsoever to do with it.

MR. JUSTICE BLACK: The statement in the indictment, as I understand it—the law of California does not permit comment on that where it is admitted. That is correct, isn't it?

MR. BOWERS: That is correct, Your Honor.

MR. JUSTICE BLACK: Secondly, the law of California, and all the other states I suppose, allows you to impeach a witness in one of two ways—by attacking his character or by proving he was guilty of an offense involving moral turpitude. And you could prove this man had been convicted of an offense if he took the stand. So where is there anymore compulsion on him in connection with taking the stand by reason of the fact that you put that in the indictment than by reason of the fact that you didn't?

MR. BOWERS: There isn't any, Your Honor. And I think counsel was drawn into maybe stressing that a little bit more by the questions of the Court when he cited the fact of the previous convictions in the indictment showing on the record as a premise for the situation that the defendant was in in not taking the stand.

In other words, if there had been no mention in the indictment at all, there would have been nothing in the record to show whether the defendant had been previously convicted of a

felony or not, and therefore the argument that he was required to go on the stand to deny or explain the matters or else be subjected to the question of a felony would still have been utterly hypothetical.

MR. JUSTICE BLACK: They'd still be there. I suppose everybody who at any time ever defended a man has wondered about whether to put him on, because he knew if he did they would either attack his character or prove that he had been convicted of a crime.

MR. BOWERS: That is true, Your Honor. So the fact that the California law puts that in the indictment has nothing to do with the subject matter here but is merely for the purpose of establishing in those instances the status of the defendant, if convicted, as a habitual criminal.

MR. BOWERS: Yes.

MR. JUSTICE RUTLEDGE: And not before the jury?

MR. BOWERS: No, he makes the admission before the judge, if he admits the prior convictions. If his plea—

MR. JUSTICE BLACK: That is the point we have here. He did admit it.

MR. BOWERS: Yes. If he denies the prior convictions that becomes an element of the case the same as any of the other charges, and that is subject to proof, and the jury must determine that from the proof.

MR. JUSTICE BLACK: I suppose the jury fixes the amount of the punishment in some instances in California, or does it?

MR. BOWERS: The only way in which the jury fixes the punishment is in this particular case where they find a defendant guilty of murder in the first degree and make no recommendation, when it then becomes incumbent upon the Court to impose the death penalty.

Now I just want to conclude with giving the Court here the result of the Bar Association's report on the practice of this, and the experience under it. As I said before, it showed that 93.65 percent of the judges regarded comment as an important and proper aid in the administration of justice. Over 85 percent say that it seldom if ever causes the prosecuting attorney to be less diligent in his search for evasion of guilt, which is a reply, I believe, to counsel's statement here that it would result in a prosecutor relying upon that fact and not putting in the evidence.

The report goes on to say that the answers of the judges are

most important, partly because of the lack of any prejudice in their point of view and partly because many of them have had experience both as prosecuting officers and as defense counsel before being elevated to the bench.

That report summary that I have just read is found in 8 Wigmore on Evidence, at page 425, 426, in the Third Edition.

Now, in conclusion, it just seems to me that it is incomprehensible that a practice which has been followed for such a length of time and which finds the report of practically all of the judges in the State in which it is followed as considering that it is favorable in the administration of justice, can be said to be so shocking to the conscience and abhorrent to our fundamental concept of justice as to be violative of the due process clause of the Fourteenth Amendment, which is the only question brought before this Court.

MR. JUSTICE BLACK: Suppose that it would be so shocking under our general idea.

MR. BOWERS: No, I wouldn't admit that, if Your Honor please. I think the shocking part always comes in in the way in which the confession is forced. We admit confessions which are voluntarily given in criminal cases by the defendant.

MR. JUSTICE BLACK: That is, not compelled by force?

MR. BOWERS: By the force which is used. Now if you mean by force the fact that a defendant in a criminal case can be called as a witness for the State, this Court has said in the cases that I mentioned that that is not violative of due process, and he can be subject to orderly inquiry.

MR. JUSTICE FRANKFURTER: Has any state actually required an accused to take the witness stand? I believe there are only a very few.

MR. BOWERS: There are only a very few states.

MR. JUSTICE FRANKFURTER: A handful of states that roughly may have applied the *Twining* rule. Is there any state that affirmatively requires an accused to take the stand subject to testimonial compulsion in open court like any other witness?

MR. BOWERS: Now as this report stated, I think that there were five states which followed this practice which we have here. Now if my recollection serves me right, the State of Maine for a while had such a provision, and I think it was subsequently repealed.

MR. JUSTICE FRANKFURTER: Maine is not in the states?

MR. BOWERS: No, Your Honor. That law has been repealed.

But I believe, if I recall correctly, that for some seven or eight years the State of Maine had a provision there which permitted the State to call the defendant as a witness for the State.

MR. JUSTICE FRANKFURTER: I believe Iowa has no privilege against self-incrimination in the Constitution, and it has no statute. Does that mean in Iowa defendants can be called as witnesses?

MR. BOWERS: I understand that it does.

MR. JUSTICE FRANKFURTER: Do you happen to know whether they actually do?

MR. BOWERS: No, I do not know whether they actually do or not, but I know in Iowa the State Constitution has no such provision as we have in California against calling—

MR. JUSTICE FRANKFURTER: —the accused?

MR. BOWERS: —the accused to the stand.

MR. JUSTICE FRANKFURTER: And they have no statute.

MR. BOWERS: And they have no statute.

MR. JUSTICE FRANKFURTER: In New York some of the so-called provisions of the Bill of Rights were merely statutes having all the force of the Constitution, but I believe in Iowa he is just as any other witness. And I wonder what they actually do.

MR. BOWERS: That is correct, Your Honor. Just like any other witness. And the courts there have construed that as being valid and proper to call him to the stand or to comment upon his absence or failure to deny.

MR. JUSTICE FRANKFURTER: I suppose Iowa has as large probably—I'm guessing now—probably as large a percentage of indigenous English stock population as any state in the Union, hasn't it? Isn't it likely to?

MR. BOWERS: A fair amount.

MR. JUSTICE JACKSON: Does your State have that rule that my State has of deprivation of a fair trial if counsel mentions the fact the defendant has insurance?

MR. BOWERS: I think it does, Your Honor.

MR. JUSTICE JACKSON: Well, if your state should apply that rule and say that counsel should be permitted to show that a defendant is insured in spite of the fact that most of the states of the union have held that to be an unfair trial, do you think the Constitution would prohibit that?

MR. BOWERS: I don't think so, Your Honor. I think that is a matter of policy. And if the state determined to follow that policy, I can see nothing that could be said to be so unfair and so abhorrent to our ideas of justice as to violate the constitutional due process clause.

MR. JUSTICE JACKSON: I am not advocating it. I thought it was a silly rule and I always violated it. And if defendants would be frank about why they didn't take the stand, I don't think it would always hurt. I suppose it would become a constitutional question.

MR. BOWERS: I assume it would be called a constitutional question very fairly, but I certainly can see no reason whatsoever that it could be held to be a violation of due process. It doesn't seem to me that that procedure is by any means so unfair that it goes against all our ingrained sense of justice.

MR. CHIEF JUSTICE VINSON: Mr. Bowers, on page 393 of the opinion of the Court of California, we find this language: "The prosecutor commented seven times in oral argument on defendant's silence. Defendant did not object below to these comments. In the absence of such objection, it is the general rule that misconduct of the district attorney cannot be urged on appeal."

As I understood counsel for the petitioner, he said that he tendered a charge to the Court in regard to this statute.

MR. BOWERS: That is correct.

MR. CHIEF JUSTICE VINSON: That the charge or the instructions were in several different forms, and each one of them was refused. Now is there any authority in California that would say that the refusal to grant these instructions would cure the failure of counsel for the defendant making an objection to improper or allegedly improper statements of the prosecutor?

MR. BOWERS: I know of none, Your Honor, and I am satisfied that there are none. The rule in California is to the effect that the comments of counsel must be objected to at the time in order to take advantage of on appeal, unless the comment is of such a nature that no admonition by the Court could cure the same.

Does that answer Your Honor's question?

MR. CHIEF JUSTICE VINSON: Yes, I understand.

REBUTTAL ARGUMENT OF MORRIS LAVINE, ESQ., ON BEHALF OF PETITIONER

MR. LAVINE: Might I state, Your Honor, in respect to that, that the answer of counsel on that question doesn't meet the issue, because by statute the prosecutor was allowed to comment, and even though the matter came up the question was fully raised before the Court as to its violation of the Fourteenth Amendment.

MR. CHIEF JUSTICE VINSON: But the question is whether or not raising the point in the offered instructions cures the failure to make the objection at the time.

MR. LAVINE: I will present some points on that, Your Honor, and I also want to ask leave of the Court to file a closing brief. I got the State's brief after I was in Washington here in the last few days, Your Honor, and I would like leave of the Court to include those authorities and closing comments in a brief—serving it on the State, of course.

MR. CHIEF JUSTICE VINSON: All right.

MR. LAVINE: Your Honor, there were several points raised, and I will try to answer all of them as briefly as I can.

I would like to address myself to the *Boyd* case, Your Honor, in which Your Honors have repeatedly quoted the decision of the Court that any compulsory discovery by extorting the party's oath or compelling the production of his private books or papers to convict him of crime or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

And so I say that a statute which permits that to be done is offensive to the instincts of an American and should not be permitted to stand under the due process clause of the Fourteenth Amendment.

MR. CHIEF JUSTICE VINSON: Let us assume that we don't have a statute. What would be your position, under the thought of self-incrimination, of inquiring of a defendant or of a witness as to his having committed a former felony?

MR. LAVINE: Well, I think it would be abhorrent to ask him any questions whatsoever in respect to the matter. I think that that has been our historical guarantee from the time of the Fifth Amendment, which I respectfully assert is incorporated in all our fundamental doctrines.

Only the other day Mr. Justice Reed said our ideas rebel against double jeopardy in any state. But the same provision is contained in the Fifth Amendment as to double jeopardy as against the matters here. And so they are on a parity in both matters.

Now, Your Honors, my time is up, but I want to call the attention of Mr. Justice Jackson to the procedure in California in respect to an advised verdict. It is contained on page 329 of the record. As a matter of fact, we do not have either a directed verdict or a motion for judgment of acquittal as is now the practice in the Federal Courts, but all we have is the advised verdict. The Court can advise the jury to acquit if it is so minded.

That is the extent to which our California practice permits verdicts and motions applied for—the advised verdict. The Court denied it on two grounds, one being "I never instruct the jury until both sides rest." So that as far as the Court was concerned, even an advised verdict was not possible there.

Now there are several other questions which Your Honors asked and which are difficult to answer in the brief time here, but I will answer them in the brief.

But I do want to add one other ground, Your Honors, to the grounds which Mr. Justice Black cited. That there is also a shifting which Mr. Justice Black cited. That there is also a shifting of the burden of proof under this particular statute because it shifts the burden of proof unconstitutionally, as I read the case of *Tot* v. *The United States*, because there is an arbitrary presumption here if the defendant doesn't take the stand. Thus the statute says that the jury can consider arbitrarily that he could have explained or denied the matters even though there are other reasons why he couldn't explain or deny them. And if the statute permits an arbitrary presumption or inference which is untrue or could be untrue in any respect, it is an unconstitutional shifting of the burden of proof.

[Whereupon, at 1:56 o'clock p.m., oral argument in the above-entitled matter was concluded.]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 102

ADMIRAL DEWEY ADAMSON, *Petitioner*

—vs.—

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR REHEARING

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