

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE)
OF CALIFORNIA,)

Plaintiff and Respondent,)

v.)

DAVID ALLEN LUCAS,)

Defendant and Appellant.)

Case No. S012279
(San Diego Superior
Court No. 73093/75195)

SUPREME COURT
FILED

AUG 15 2003

Frederick K. Ohlrich Clerk

DEPUTY

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

HONORABLE LAURA PALMER HAMMES, JUDGE, PRESIDING
HONORABLE FRANKLIN B. ORFIELD, MOTIONS JUDGE
HONORABLE WILLIAM H. KENNEDY, MOTIONS JUDGE

APPELLANT'S OPENING BRIEF - VOLUME 1

Pages 1- 48

THOMAS LUNDY
Attorney at Law
State Bar No. 57656
2500 Vallejo Street, Suite 105
Santa Rosa, CA 95405
Telephone: (707) 524-8112

Attorney for Defendant and Appellant
DAVID ALLEN LUCAS
Under Appointment by the Supreme
Court of California

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | | |
|--------------------------------|---|-------------------------|
| THE PEOPLE OF THE STATE |) | Case No. S012279 |
| OF CALIFORNIA, |) | (San Diego Superior |
| |) | Court No. 73093/75195) |
| |) | |
| Plaintiff and Respondent, |) | |
| |) | |
| v. |) | |
| |) | |
| DAVID ALLEN LUCAS, |) | |
| |) | |
| Defendant and Appellant. |) | |

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

HONORABLE LAURA PALMER HAMMES, JUDGE, PRESIDING
HONORABLE FRANKLIN B. ORFIELD, MOTIONS JUDGE
HONORABLE WILLIAM H. KENNEDY, MOTIONS JUDGE

APPELLANT'S OPENING BRIEF - VOLUME 1

Pages 1- 48

THOMAS LUNDY
Attorney at Law
State Bar No. 57656
2500 Vallejo Street, Suite 105
Santa Rosa, CA 95405
Telephone: (707) 524-8112

Attorney for Defendant and Appellant
DAVID ALLEN LUCAS
Under Appointment by the Supreme
Court of California

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| VOLUME 1 | |
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | cxxxviii |
| 1.1 STATEMENT OF THE CASE | 1 |
| A. Information, Arraignment And Counsel: CR 73093 | 1 |
| B. Information, Arraignment And Counsel: CR 75195 | 3 |
| C. Procedural Overview | 4 |
| D. Proceedings Regarding Johnny Massingale | 5 |
| E. Prosecution Notices Of Aggravation Against Lucas | 6 |
| F. In limine Motions: All Cases | 7 |
| 1. Severance Of Counts/Consolidation | 7 |
| 2. Vindictive Prosecution | 7 |
| 3. Recusal Motion | 7 |
| 4. Jury Composition | 7 |
| G. In limine Motions: Jacobs | 8 |
| 1. <i>Hitch/Trombetta</i> Suppression Motion Concerning Loss Or Destruction Of Fingerprint On Love Insurance Note | 8 |
| 2. Defense Challenges To Opinion Testimony Comparing The Handprinting On The Love Insurance Note With The Handprinting Of Lucas | 9 |

| | | |
|------------|---|-----------|
| 3. | Denial Of In-Court Testing Of The Handprinting Expert | 10 |
| 4. | Exclusion Of Rochelle Coleman’s Statement That Another Person Was The Author Of The Love Insurance Note | 10 |
| H. | In limine Motions: Santiago | 11 |
| 1. | <i>Pitchess</i> Motion | 11 |
| 2. | <i>Ballard</i> Motion | 12 |
| 3. | Eyewitness Identification Issues | 13 |
| 4. | Expert Testimony Regarding Eyewitness Identification | 14 |
| I. | In limine Motions: Swanke | 14 |
| 1. | Challenge To Electrophoresis Evidence | 14 |
| 2. | Hearsay Statement By Shannon Lucas | 15 |
| J. | In Limine Motions: Penalty | 16 |
| 1. | Motion To Exclude 1973 Prior Rape Conviction .. | 16 |
| K. | Jury Selection | 16 |
| L. | The Guilt Trial | 17 |
| M. | The Penalty Trial | 19 |
| N. | New Trial Motion And Imposition Of Sentence | 19 |
| 1.2 | STATEMENT OF FACTS: OVERVIEW | 22 |
| 1.3 | OVERVIEW OF ARGUMENT | 24 |

1.4 JURY ISSUES

1.4.1 THE DEFENSE DID NOT HAVE A FAIR OPPORTUNITY TO LITIGATE ITS CHALLENGE TO THE COMPOSITION OF LUCAS' JURY 25

A. Introduction 25

B. Proceedings Below 25

C. Judge Orfield Improperly Denied Discovery 28

1. Introduction 28

2. Necessity For Additional Discovery 28

3. The Failure To Allow Access To The Necessary Jury Commission Information Was Error ... 30

D. Judge Hammes Erroneously Relied On Judge Orfield's Denial Of Discovery To Deny The Request For More Current And Complete Jury Selection Information . 32

E. Judge Hammes Erroneously Refused An Evidentiary Hearing On The Jury Composition Challenge 33

1. Offer Of Proof 33

2. Denial Of An Evidentiary Hearing By Judge Hammes 34

3. An Evidentiary Hearing Should Have Been Granted As To The Underrepresentation Of Hispanics 35

4. The Judge Erroneously Denied An Evidentiary Hearing On Whether 18 To 24 Year Olds Are A Cognizable Class 37

| | | |
|-------|---|----|
| 5. | The Defense Was Not Given A Fair Opportunity To Prove Systematic Exclusion | 37 |
| F. | The Error Violated Lucas’ State And Federal Constitutional Rights | 38 |
| G. | The Judgment Should Be Reversed | 40 |
| 1.4.2 | JUDGE HAMMES ABUSED HER DISCRETION BY ALLOWING THE MEDIA TO PUBLISH THE JURORS’ NAMES AND ADDRESSES | 41 |
| A. | Proceedings Below | 41 |
| B. | The Accused’s “Overriding Interest” In A Fair Trial Justifies Precluding Publication Of Jurors’ Names And Addresses In A High Profile Case | 42 |
| C. | Judge Hammes Abused Her Discretion By Failing To Consider Whether The Risk Of An Unfair Trial Outweighed The Media’s Right To Publish The Jurors’ Names And Addresses | 43 |
| D. | The Names And Addresses Of The Jurors Should Not Have Been Published In The Present Case | 44 |
| E. | The Error Violated The Federal Constitution | 46 |
| F. | The Judgment Should Be Reversed Because The Error Was Structural | 47 |
| G. | The Error Was Prejudicial As To Guilt Under Harmless-Error Analysis | 47 |
| H. | The Error Was Prejudicial As To Penalty | 48 |

VOLUME 2(A) - JACOBS CASE

| | | |
|-----|--|----|
| 2.1 | JACOBS CASE: STATEMENT OF THE CASE | 49 |
|-----|--|----|

2.2 JACOBS CASE: STATEMENT OF FACTS

| | | |
|----|---|----|
| A. | Activities Of The Defendant, Victims And Others On Or About May 4, 1979 | 56 |
| B. | Description Of The Crime Scene And Location Of Physical Evidence | 61 |
| C. | Victim Wounds..... | 65 |
| 1. | Suzanne Jacobs | 65 |
| 2. | Colin Jacobs | 67 |
| D. | Suzanne Jacobs' Alcohol Consumption | 68 |
| E. | Serological Evidence | 69 |
| F. | Fiber Evidence | 70 |
| G. | Shoe Print Pattern Found At The Jacobs Scene | 71 |
| 1. | The Partial Print In Exhibit 19 Could Have Been Made By Different Varieties And Sizes Of Boots Or Shoes | 71 |
| 2. | Shoe Print Comparison: Prosecution Evidence | 73 |
| 3. | Shoeprint: Defense Evidence | 75 |
| a. | <i>Precision Metal Boots Were Not Normally Worn Outside Of Work</i> | 75 |
| b. | <i>Boots Found In Lucas' Closet Were Inconsistent With The Shoeprint</i> | 75 |
| c. | <i>Fairhurst's Boots Were Consistent With The Print</i> | 76 |
| H. | The Love Insurance Note | 77 |

| | | |
|----|--|-----|
| 1. | Loss of Fingerprint On Love Insurance Note | 77 |
| 2. | Handwriting Comparison: Prosecution | 81 |
| 3. | Handwriting Comparison: Defense | 84 |
| 4. | Purchase Of Insurance From The Love Agency By Lucas | 87 |
| I. | Analysis/Comparison Of Fingerprint Evidence Found At Jacobs Scene | 88 |
| J. | Hair Evidence Found At Scene | 89 |
| 1. | Human Hair Characteristics | 89 |
| 2. | Failure To Preserve Root Sheath | 91 |
| 3. | Hair Comparison | 92 |
| 4. | Chain Of Custody | 95 |
| K. | MG Evidence | 95 |
| 1. | MG Evidence: Prosecution | 95 |
| 2. | MG Evidence: Defense | 96 |
| L. | Lucas' Presence At The Salvation Army | 99 |
| M. | Lucas' Employment At Precision Metal | 100 |
| N. | The Arrest And Prosecution Of Johnny Massingale | 100 |
| 1. | Massingale: Defense Evidence | 100 |
| a. | <i>Pre-Confession Events</i> | 100 |
| b. | <i>Interview Preliminaries</i> | 105 |

| | | |
|------|--|-----|
| c. | <i>The First Interview</i> | 105 |
| i. | Interview Events | 105 |
| ii. | Massingale Denied That He Knew Nelson | 106 |
| iii. | Massingale Denied That He Carried A Knife | 107 |
| iv. | Massingale Denied Guilt | 107 |
| d. | <i>Discussion Between Massingale And Pace After The First Interview</i> | 108 |
| e. | <i>Massingale's Confession: The Second Interview</i> | 110 |
| f. | <i>Third Interview: Taped Confession</i> | 113 |
| g. | <i>Fourth Interview: Second Taped Confession</i> | 113 |
| h. | <i>Massingale Denied That He Would Hit A Woman</i> | 114 |
| i. | <i>Massingale's Contact With The San Diego Salvation Army Rescue Mission</i> | 114 |
| j. | <i>Massingale California Highway Patrol Contacts</i> | 115 |
| 2. | Massingale: Prosecution Evidence | 115 |
| O. | Tree Trimmer Evidence: Defense | 119 |
| P. | Potential Evidence Overlooked By The Prosecution | 121 |
| 1. | The Cigarette Butt | 121 |
| 2. | Wine Glass | 121 |

| | | |
|----|--|-----|
| 3. | Blood Typing Of Hair | 121 |
| 4. | Bite Marks On Apple Found In Jacobs' Residence | 122 |
| 5. | Blood Samples Of Suzanne And Colin Jacobs ... | 122 |
| 6. | Other Items Not Examined Or Tested: Prosecution | 122 |
| Q. | Other Offenses Evidence | 122 |
| R. | Factors Of Similarity And Dissimilarity Between Offenses | 128 |
| | CHART 2.2(R)(1) -- Comparison of Suzanne Jacobs to Garcia | 128 |
| | CHART 2.2(R)(2) - Comparison of Suzanne Jacobs to Santiago | 130 |
| | CHART 2.2(R)(3) -- Comparison of Suzanne Jacobs to Strang | 132 |
| | CHART 2.2(R)(4) -- Comparison of Suzanne Jacobs to Swanke | 134 |
| | CHART 2.2(R)(5) -- Comparison of Colin Jacobs to Amber Fisher | 137 |

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

| | | |
|-------|--|-----|
| 2.3.1 | THE JACOBS CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SANTIAGO, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE JACOBS CRIMES AS EVIDENCE CONNECTING HIM TO THE SANTIAGO INCIDENT | 139 |
|-------|--|-----|

- A. Introduction 139
- B. Procedural Background 140
- C. Statement Of Facts 145
 - 1. Overview: Statement Of Consolidation Facts 145
 - 2. The Jacobs Case 146
 - 3. The Garcia Case 154
 - 4. The Santiago Case 161
 - 5. The Strang/Fisher Case 166
 - 6. The Swanke Case 172
 - 7. Electrophoresis 180
 - 8. Wound Comparison Testimony 181
 - a. *Dr. Katsuyama* 181
 - b. *Dr. Robin* 183
 - c. *Dr. Geiberger* 185
 - d. *Dr. Bucklin* 186
 - e. *Other Throat Slashing Cases* 189
 - 9. Lucas' Arrest And Search Of Home 191
 - 10. Testimony Of Dr. Penrod 192
- D. Comparison Of Similarities And Differences: Jacobs vs. Santiago 196

| | | |
|----|---|-----|
| 1. | Date Of The Offenses | 196 |
| 2. | The Victims | 196 |
| | <i>a. Number Of Victims</i> | 196 |
| | <i>b. Age And Sex Of Victims</i> | 196 |
| 3. | Time And Place Of The Attack | 196 |
| | <i>a. Time Of Day</i> | 196 |
| | <i>b. Place Of The Attack</i> | 197 |
| 4. | Circumstances Of The Attack | 197 |
| | <i>a. Victim Abduction Before Assault</i> ... | 197 |
| | <i>b. Tying Or Restraint Of Victim Prior To Assault</i> | 197 |
| | <i>c. Use Of Ligature/Ligature Marks</i> ... | 197 |
| | <i>d. Removal Of Victim's Clothing</i> | 197 |
| | <i>e. Sexual Overtones</i> | 197 |
| | <i>f. Movement Of Victim After The Attack</i> | 198 |
| 5. | Throat Cutting Wounds | 198 |
| | <i>a. Throat Cutting Multiple Strokes</i> ... | 198 |
| | <i>b. Location Of Throat Cuts</i> | 198 |
| | <i>c. Depth Of Throat Cut; Jugular/Carotid Severed</i> | 198 |
| 6. | Nature Of Other Wounds | 198 |

| | | |
|----|---|-----|
| | <i>a. Stabbing</i> | 198 |
| | <i>b. Facial Or Head Wounds</i> | 199 |
| | <i>c. Hypoxia/Petechiae</i> | 199 |
| | <i>d. Defensive Wounds</i> | 199 |
| E. | Expert Testimony Comparing The Offenses | 199 |
| | 1. Dr. Katsuyama | 199 |
| | 2. Dr. Robin | 200 |
| | 3. Dr. Geiberger | 200 |
| | 4. Dr. Bucklin | 200 |
| F. | Legal Principles | 201 |
| | 1. Separate Incidents Are Not Cross-Admissible To Prove Identity Unless They Share Characteristics So Unusual And Distinctive As To Be Like A Signature | 201 |
| | 2. Each Incident Must Be Evaluated Independently | 203 |
| | 3. Similarities And Differences Between The Incidents Must Be Evaluated | 203 |
| G. | The Santiago Attack And The Jacobs Murders Did Not Share Signature-Like Similarities | 203 |
| H. | The Error Violated Lucas' State And Federal Constitutional Rights | 206 |
| I. | The Error Was Prejudicial | 208 |

| | | |
|-------|---|-----|
| 1. | Allowing The Jury To Improperly Cross-Consider Other Crimes Is Highly Prejudicial | 208 |
| 2. | The Jacobs' Evidence Was Closely Balanced | 208 |
| 3. | Because The Error Was Substantial The Judgement Should Be Reversed | 210 |
| 4. | Even If Guilt Is Not Reversed, The Penalty Judgment Should Be | 212 |
| | | |
| 2.3.2 | THE SWANKE CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN JACOBS, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE SWANKE CRIMES AS EVIDENCE CONNECTING HIM TO THE JACOBS INCIDENT ... | 213 |
| A. | Introduction | 213 |
| B. | Procedural And Factual Background | 213 |
| C. | Comparison Of Similarities And Differences: Jacobs vs. Swanke | 213 |
| 1. | Date Of The Offenses | 213 |
| 2. | The Victims | 213 |
| a. | <i>Number Of Victims</i> | 213 |
| b. | <i>Age And Sex Of Victims</i> | 214 |
| 3. | Time And Place Of The Attack | 214 |
| a. | <i>Time Of Day</i> | 214 |

| | | | |
|----|-----------|---|-----|
| | <i>b.</i> | <i>Place Of The Attack</i> | 214 |
| 4. | | Circumstances Of The Attack | 214 |
| | <i>a.</i> | <i>Victim Abduction Before Assault</i> . . . | 214 |
| | <i>b.</i> | <i>Tying Or Restraint Of Victim Prior To Assault</i> | 214 |
| | <i>c.</i> | <i>Use Of Ligature</i> | 214 |
| | <i>d.</i> | <i>Removal Of Victim's Clothing</i> | 215 |
| | <i>e.</i> | <i>Sexual Assault</i> | 215 |
| 5. | | Throat Cutting Wounds | 215 |
| | <i>a.</i> | <i>Throat Cutting Multiple Strokes</i> . . . | 215 |
| | <i>b.</i> | <i>Location Of Throat Cuts</i> | 215 |
| | <i>c.</i> | <i>Depth Of Throat Cut; Jugular/Carotid Severed</i> | 215 |
| 6. | | Nature Of Other Wounds | 216 |
| | <i>a.</i> | <i>Stabbing</i> | 216 |
| | <i>b.</i> | <i>Facial Or Head Wounds</i> | 216 |
| | <i>c.</i> | <i>Hypoxia/Petechiae</i> | 216 |
| | <i>d.</i> | <i>Defensive Wounds</i> | 216 |
| D. | | Expert Testimony Comparing The Offenses | 216 |
| E. | | Legal Principles | 217 |
| F. | | The Swanke Attack Did Not Share Signature-Like Similarities Of The Jacobs Murders | 217 |

| | | |
|-------|---|-----|
| G. | The Error Violated Lucas’ State And Federal Constitutional Rights | 219 |
| H. | The Error Was Prejudicial | 221 |
| 1. | Allowing The Jury To Cross-Consider Other Crimes Is Highly Prejudicial | 221 |
| 2. | The Jacobs’ Evidence Was Closely Balanced | 221 |
| 3. | Because The Error Was Substantial The Judgement Should Be Reversed | 221 |
| 4. | The Penalty Judgment Should Be Reversed Even If Guilt Is Not | 222 |
| 2.3.3 | THE STRANG/FISHER CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN JACOBS, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE STRANG/FISHER CRIMES AS EVIDENCE CONNECTING HIM TO THE JACOBS INCIDENT | 224 |
| A. | Introduction | 224 |
| B. | The Jurors Were Erroneously Permitted to Rely On Strang/Fisher To Convict On The Other Charges . | 224 |
| C. | The Error Violated Lucas’ State And Federal Constitutional Rights | 225 |
| D. | The Error Was Prejudicial | 227 |
| 2.3.4 | THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL | 230 |
| A. | Overview | 230 |

| | |
|---------|---|
| 2.3.4.1 | THE PRELIMINARY INSTRUCTIONS GAVE UNDUE AND PREJUDICIAL EMPHASIS TO THE OTHER CRIMES EVIDENCE 231 |
| | A. The Other Crimes Evidence Was Emphasized To The Exclusion Of Other Evidence 231 |
| | B. The Other Crimes Evidence Was Erroneously Emphasized In Violation Of State Law And The Federal Constitution 232 |
| | C. The Error Was Prejudicial 235 |
| 2.3.4.2 | THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE THE JURORS TO DETERMINE THAT THE DEFENDANT COMMITTED THE OTHER OFFENSE BEFORE CROSS-CONSIDERING IT 237 |
| | A. Introduction 237 |
| | B. Procedural And Factual Background 237 |
| | C. The Judge Erroneously Refused To Require A Threshold Finding Requirement 243 |
| | D. The Error Violated The Federal Constitution 247 |
| | E. Because The Error Was Structural The Judgment Should Be Reversed 249 |
| | F. Because The Error Was Substantial, And The Jacobs Evidence Closely Balanced, The Judgment Should Be Reversed . 250 |

| | | | |
|---------|----|---|-----|
| | G. | The Error Was Prejudicial As To Penalty | 251 |
| 2.3.4.3 | | THE INSTRUCTIONS IMPERMISSIBLY ALLOWED THE JURY TO CROSS- CONSIDER THE CHARGES ON THE ISSUE OF IDENTITY WITHOUT MAKING THE PREREQUISITE FINDING THAT THE OTHER OFFENSES SHARED SIGNATURE- LIKE SIMILARITIES | 252 |
| | A. | Introduction | 252 |
| | B. | Procedural Background | 252 |
| | C. | Evidence Code § 403 Required The Judge To Instruct On The Preliminary Factual Finding Of Signatory Significance . | 255 |
| | D. | The Error Violated The Federal Constitution | 256 |
| | E. | The Error Was Prejudicial As To Jacobs | 257 |
| 2.3.4.4 | | THE OTHER CRIMES INSTRUCTION UNCONSTITUTIONALLY FAILED TO PRESENT THE DEFENSE SIDE OF THE ISSUE | 260 |
| | A. | Introduction | 260 |
| | B. | Legal Principles | 260 |
| | C. | The Instruction In The Present Case Unconstitutionally Precluded The Jury From Considering The Defense Side Of The Issue | 261 |

| | | | |
|---------|----|---|-----|
| | D. | The Instruction Unjustifiably Favored The Prosecution | 263 |
| | E. | The Instruction Violated Lucas' Federal Constitutional Rights | 264 |
| | F. | The Error Was Prejudicial | 267 |
| 2.3.4.5 | | THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE JUROR UNANIMITY AS TO THE EXISTENCE OF THE REQUISITE CROSS-OFFENSE SIMILARITY NEEDED AS A PREREQUISITE TO CONSIDERATION OF OTHER CRIMES EVIDENCE | 270 |
| 2.3.4.6 | | THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT | 275 |
| 2.3.5 | | LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION .. | 277 |
| 2.3.5.1 | | THE JUDGE ERRONEOUSLY REFUSED TO CONSIDER THE CONFESSION OF JOHNNY MASSINGALE AND OTHER DEFENSE EVIDENCE IN DECIDING THE CROSS-ADMISSIBILITY/CONSOLIDATION MOTION | 277 |
| | A. | Introduction | 277 |
| | B. | Procedural Background | 278 |
| | C. | Statement Of Facts | 278 |

| | | |
|----|--|-----|
| D. | Defense Evidence Must Be Considered In Deciding Cross-Admissibility Under Evidence Code § 1101(b) And § 352 As Well As Article I, § 28(d) Of The California Constitution | 279 |
| | 1. Cross-Admissibility Requires Independent Evidence Of The Defendant's Guilt As To The Other Offenses | 279 |
| | 2. The Defendant's Connection With The Other Offenses Cannot Be Reliably Evaluated Without Consideration Of The Defense Evidence | 281 |
| E. | Failure To Consider The Defense Evidence Violated The Federal Constitution | 282 |
| F. | The Cross-Admissibility Ruling Was Unfair And Unreliable Because The Judge Refused To Consider The Defense Evidence | 284 |
| G. | Allowing Cross-Admissibility Violated Lucas' Federal Constitutional Rights | 291 |
| H. | The Cross-Admissibility Ruling Was Prejudicial | 293 |
| I. | Alternatively The Matter Should Be Remanded For A New Cross-Admissibility Determination Before A Different Judge | 299 |

| | |
|---------|--|
| 2.3.5.2 | THE TRIAL JUDGE ERRONEOUSLY FAILED TO CONSIDER EXPERT TESTIMONY REGARDING THE INABILITY OF JURORS TO HEED LIMITING INSTRUCTIONS IN CROSS-ADMISSIBILITY CASES 301 |
| A. | Introduction 301 |
| B. | Procedural Background 301 |
| C. | Legal Principles 303 |
| D. | The Judge Prejudicially Erred In Refusing To Consider Dr. Penrod’s Testimony 303 |
| E. | Alternatively The Matter Should Be Remanded For A New Cross-Admissibility Determination Before A Different Judge 306 |
| 2.3.5.3 | THE JUDGE ERRONEOUSLY FAILED TO RULE ON THE CROSS-ADMISSIBILITY OF EACH OFFENSE INDEPENDENTLY . . . 307 |
| A. | Introduction 307 |
| B. | Procedural Background 307 |
| C. | Legal Principles 308 |
| D. | By Failing To Conduct Independent Cross-Admissibility Analysis Judge Hammes Abused Her Discretion . . . 308 |
| E. | The Error Violated The Federal Constitution 309 |
| F. | The Judgment Should Be Reversed . 311 |

G. Alternatively The Matter Should Be Remanded For A New Cross-Admissibility Hearing Before A Different Judge 311

2.3.5.4 BY BOOTSTRAPPING HER FINDINGS THE JUDGE DENIED LUCAS A FAIR AND RELIABLE IN LIMINE DETERMINATION AS TO CROSS-ADMISSIBILITY AND OTHER CRUCIAL EVIDENTIARY ISSUES 312

A. Introduction 312

B. The Judge Assumed Lucas Was Guilty Of Each Separate Offense In Finding That The Offenses Were Cross-Admissible 312

C. The Judge Assumed The Offenses Were Cross-Admissible In Finding That Lucas Was Guilty Of Each Individual Offense 313

D. The In Limine Rulings Were Unfair And Unreliable Due To The Bootstrapping 314

E. The Error Violated The Federal Constitution 314

F. The Error Was Prejudicial 317

G. If The Judgment Is Not Reversed, The Matter Should Be Remanded For A New Evidentiary Hearing 319

1. The Matter Should Be Remanded 319

2. On Remand A Different Judge Should Be Assigned 319

| | | |
|---------|--|-----|
| 2.3.5.5 | THE JUDGE ERRONEOUSLY DENIED AN EVIDENTIARY HEARING ON WHETHER THE PROSECUTION’S MOTION TO CONSOLIDATE WAS A VINDICTIVE RESPONSE TO LUCAS’ ATTEMPT TO EXERCISE HIS RIGHT TO A SPEEDY TRIAL | 320 |
| A. | Introduction | 320 |
| B. | Procedural And Factual Background | 321 |
| C. | Prosecutorial Charging Decisions Motivated By Vindictiveness Are “Patently Unconstitutional” | 324 |
| D. | Whether The Presumption Of Vindictiveness Applies | 325 |
| E. | Assuming The Presumption Of Vindictiveness Does Not Apply, Lucas Should Have Been Given An Opportunity To Prove Actual Vindictiveness . . . | 326 |
| F. | The Judgement Should Be Reversed | 328 |
| G. | Alternatively, The Matter Should Be Remanded For An Evidentiary Hearing Before A Different Judge | 329 |

2.4 LOVE INSURANCE NOTE: ADMISSIBILITY ISSUES

| | | |
|-------|---|-----|
| 2.4.1 | ARGUMENT OVERVIEW | 331 |
| 2.4.2 | THE LOVE INSURANCE NOTE WAS INADMISSIBLE BECAUSE THE PROSECUTION LOST A USABLE LATENT FINGERPRINT WHICH HAD BEEN LIFTED FROM THE NOTE | 333 |

| | | |
|----|---|-----|
| A. | Introduction | 333 |
| B. | Factual And Legal Background | 333 |
| C. | Because Destruction Of The Note And Loss Of The Print Violated The Federal Constitution Sanctions Should Have Been Imposed | 337 |
| 1. | Fundamental Fairness Requires The State To Preserve Evidence That May Play A Significant Role In The Trial | 337 |
| 2. | Bad Faith Must Be Shown If The Evidence Was Only “Potentially Useful” To The Defense | 339 |
| 3. | The <i>Trombetta</i> Requirements Were Met In The Present Case | 342 |
| 4. | Because <i>Trombetta</i> Was Satisfied, No Showing Of Bad Faith Was Required | 343 |
| 5. | The <i>Trombetta</i> And <i>Youngblood</i> Requirements Should Be Relaxed Where The Lost Evidence Impairs The Reliability Of The Guilt And/Or Penalty Adjudication In A Capital Case ... | 343 |
| 6. | Lucas’ Federal Constitutional Rights Were Violated And The Purported Photo Of The Note Should Have Been Excluded | 344 |
| 7. | Alternatively The Jury Should Have Been Instructed Regarding The Inferences To Be Drawn From The Lost Note | 344 |
| 8. | The Error Was Prejudicial | 346 |

| | | |
|-------|--|-----|
| 2.4.3 | THE JUDGE FAILED TO MAKE THE REQUIRED PRELIMINARY FINDING OF ACCURACY AND/OR TO INSTRUCT THE JURORS ON THE NEED TO MAKE SUCH A FINDING BEFORE ADMITTING/CONSIDERING THE PHOTOGRAPH OF THE LOVE INSURANCE NOTE IN LIEU OF THE ORIGINAL UNDER EVIDENCE CODE SECTIONS 1400 AND 1401 | 348 |
| A. | Introduction | 348 |
| B. | The Judge Was Obligated To Make A Preliminary Finding | 349 |
| C. | The Error Violated The Federal Constitution | 350 |
| D. | The Errors Were Prejudicial | 351 |
| 2.4.4 | BECAUSE THE COPY OF THE LOVE INSURANCE NOTE WAS NOT CERTIFIED IT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE | 354 |
| A. | Introduction | 354 |
| B. | Legal Principles | 354 |
| C. | The Photograph In The Present Case Was Not Certified | 357 |
| D. | The Error Violated Lucas' State And Federal Constitutional Rights | 357 |
| E. | The Error Was Prejudicial | 358 |
| 2.4.5 | THE JUDGE FAILED TO EXERCISE HER DISCRETION TO DECIDE WHETHER OR NOT THE PHOTOGRAPH OF THE LOVE INSURANCE NOTE WAS ADMISSIBLE UNDER THE BEST EVIDENCE RULE | 360 |
| A. | Introduction | 360 |

| | | |
|----|--|-----|
| B. | The Best Evidence Rule Applied To The Note . . . | 360 |
| C. | The Best Evidence Rule Required The Judge To Weigh Any Deficiencies In The Photograph Before Admitting It As A Substitute For The Original | 362 |
| D. | The Judge Erroneously Failed To Exercise Her Discretion In The Present Case | 363 |
| E. | The Error Violated Lucas' Federal Constitutional Rights | 364 |
| F. | The Judgment Should Be Reversed | 364 |
| G. | Alternatively, The Matter Should Be Remanded Because The Judge Failed To Exercise Her Discretion | 366 |

VOLUME 2(B) - JACOBS CASE

2.5 HANDPRINTING COMPARISON ISSUES: IN LIMINE

| | | |
|-------|---|-----|
| 2.5.1 | ARGUMENT OVERVIEW | 367 |
| 2.5.2 | PROCEDURAL AND FACTUAL BACKGROUND . . . | 368 |
| A. | Introduction | 368 |
| B. | Procedural Background | 368 |
| 1. | <i>Kelly</i> Challenge | 368 |
| 2. | Due Process And Evidence Code § 352 Challenge: Exclusion Of In-Court Testing; Defense Experts And Proficiency Studies . | 370 |
| C. | Trial Testimony Of The Expert | 374 |
| 2.5.3 | STATEMENT OF FACTS | 375 |
| A. | Prosecution Experts | 375 |
| B. | Defense Experts | 380 |

| | | |
|-------|---|-----|
| 1. | Dr. Michael Saks | 380 |
| 2. | Dr. Denbeaux | 381 |
| C. | Proficiency Studies | 383 |
| D. | In-Court Testing Of The Prosecution Expert | 384 |
| 2.5.4 | THE JUDGE ERRONEOUSLY DENIED A <i>KELLY</i> HEARING | 385 |
| A. | Introduction | 385 |
| B. | A <i>Kelly</i> Hearing Should Have Been Held As To Handprinting Comparison | 385 |
| 1. | The <i>Kelly</i> Formulation | 385 |
| 2. | Handprinting Comparison Is An Unproven Scientific Technique To Which <i>Kelly</i> Should Be Applicable | 389 |
| 3. | The Prosecution Failed To Empirically Prove The Basic Premise Underlying Handprinting Comparison Testimony | 394 |
| 4. | The Scientific Community Has Not Validated Handprinting Comparison As A Reliable Technique | 394 |
| C. | Even If A <i>Kelly</i> Hearing Was Not Necessary For Handwriting Comparison, A Hearing Was Required As To Handprinting Comparison | 400 |
| D. | <i>Kelly</i> Should Not Be Limited to Expert Opinions Regarding Matters That Are Both “New” and “Scientific” | 401 |
| E. | Even If Prong One of <i>Kelly</i> Is Not Applicable to Handprinting Comparison, Prong Three Should Be Applicable | 403 |

| | | |
|-------|--|-----|
| F. | The Failure To Hold A <i>Kelly</i> Hearing Violated The Federal Constitution | 404 |
| G. | Judge Hammes Was Bound By Judge Kennedy’s Ruling Excluding The Expert Handprinting Opinion | 405 |
| H. | Admission Of The Handprinting Comparison Evidence Was Prejudicial | 406 |
| I. | Alternatively The Matter Should Be Remanded For A Hearing Before A Different Judge On Lucas’ Challenge To The Handwriting Comparison Testimony | 408 |
| 2.5.5 | IN CONSIDERING THE SECTION 352 AND DUE PROCESS OBJECTIONS TO THE HANDPRINTING COMPARISON EVIDENCE, THE JUDGE ERRONEOUSLY REFUSED TO CONSIDER THE EXPERT WITNESSES, PROFICIENCY STUDIES AND IN-COURT TESTING OFFERED BY THE DEFENSE | 410 |
| A. | The Section 352, Due Process And Statutory Discretion Objections | 410 |
| B. | The Objections Necessarily Required A Determination Of Relevancy, Probative Value And Reliability . . | 411 |
| C. | The Judge Refused To Consider The Defense Experts And The Proficiency Studies Which Would Have Shown High Error Rates For Handprinting And Handwriting Comparison | 413 |
| D. | Judge Hammes Erroneously Found That Dr. Saks Was Not An Expert As To Handwriting Comparison . . | 415 |
| E. | The Failure To Consider The Defense Experts And The Proficiency Studies Was An Abuse Of Discretion | 416 |
| F. | The Prosecution Expert Was Erroneously Allowed To Testify Because The Judge Erred In Precluding In-Court Testing Of Handprinting Expert’s Ability To Identify Lucas’ Printing | 418 |

| | | |
|-------|---|-----|
| 1. | Introduction | 418 |
| 2. | Procedural Background | 418 |
| 3. | Legal Principles | 419 |
| G. | Failure To Admit And Consider The Defense Experts, The Proficiency Studies And To Allow In-Court Testing Violated Lucas' Federal Constitutional Rights ... | 423 |
| H. | Admission Of The Handprinting Comparison Evidence Was Prejudicial At Trial | 427 |
| I. | Judge Hammes' Failure To Consider The Defense Experts And Proficiency Studies Tainted Her Ruling On The <i>Hitch/Trombetta</i> Motions Regarding The Lost Fingerprint | 430 |
| 2.5.6 | THE JUDGE ERRONEOUSLY ADMITTED THE PROSECUTION'S HANDWRITING EXPERT TESTIMONY BECAUSE (1) THE BURDEN WAS SHIFTED TO THE DEFENSE AND (2) THE PROBATIVE VALUE OF THE EXPERT'S OPINION WAS OUTWEIGHED BY THE PREJUDICIAL IMPACT | 432 |
| A. | The Judge Erroneously Failed To Require the Prosecution, As The Proponent Of The Evidence, To Prove Its Relevance And Admissibility Under The Rules Of Evidence | 432 |
| B. | Harris' Opinion As To The Author Of The Note Should Have Been Excluded Under Evidence Code § 352, § 1417 and State And Federal Due Process Principles | 434 |
| 2.5.7 | HANDPRINTING COMPARISON FROM A PHOTOGRAPH SHOULD BE EXCLUDED AS UNRELIABLE | 438 |

2.6 HANDPRINTING COMPARISON ISSUES: TRIAL

| | | |
|-------|--|-----|
| 2.6.1 | ARGUMENT OVERVIEW | 444 |
| 2.6.2 | EVEN IF THE HANDPRINTING OPINION WAS PROPERLY ADMITTED EXCLUSION OF THE DEFENSE EXPERTS, PROFICIENCY STUDIES AND IN-COURT TESTING AT TRIAL WAS PREJUDICIAL ERROR .. | 445 |
| A. | The In Limine Rulings Foreclosed Presentation Of The Defense Evidence At Trial | 445 |
| B. | The Error Violated The California Constitution .. | 446 |
| C. | The Errors Violated Lucas' Federal Constitutional Rights | 446 |
| D. | The Errors Were Prejudicial | 449 |
| 2.6.3 | CLARK'S OPINION THAT LUCAS AUTHORED THE LOVE INSURANCE NOTE SHOULD HAVE BEEN EXCLUDED | 452 |
| A. | Introduction | 452 |
| B. | Procedural Background | 452 |
| C. | There Was No Foundational Showing That Lucas' Handprinting Was Sufficiently Unique To Allow Clark To Reliably Testify, Based On His Memory Of Lucas' Handprinting From Seen Years Before, That Lucas Wrote The Love Insurance Note | 455 |
| D. | The Jury Was Not Instructed On The Foundational Showing | 458 |
| E. | Clark's Opinion Was Not Helpful To The Jury ... | 459 |
| F. | Lay Opinion As To Handwriting Per Evidence Code § 1416 Should Not Apply To Handprinting | 460 |

| | | |
|-------|--|-----|
| G. | Clark’s Testimony Should Have Been Excluded Under Evidence Code § 352 | 461 |
| H. | Failure To Exclude Clark’s Lay Opinion Violated The Federal Constitution | 462 |
| I. | The Error Was Prejudicial | 463 |
| 2.6.4 | THE JUDGE ERRED IN EXCLUDING ROCHELLE COLEMAN’S STATEMENT THAT DAVID WOODS AUTHORED THE LOVE INSURANCE NOTE | 466 |
| A. | Introduction And Procedural Background | 466 |
| B. | Facts | 467 |
| C. | Relevancy | 467 |
| D. | Lay Opinion Testimony Is Admissible To Prove Lack Of Authentication | 468 |
| E. | Admissibility For Truth Of The Matter As Spontaneous Declaration | 468 |
| F. | Admissibility For The Nonhearsay Purpose Of Showing That The Love Insurance Note Printing Was Not Unique | 469 |
| G. | Admissibility For The Nonhearsay Purpose Of Showing The Prosecution Expert Was Biased | 469 |
| H. | Lucas’ Right To Present A Defense Outweighed The Domestic Rules Of Evidence Upon Which Coleman’s Statement Was Excluded | 470 |
| I. | Exclusion Of Coleman’s Statement Was Especially Erroneous And Prejudicial Because The Defense Was Not Permitted To Impeach The Prosecution Expert With Woods’ Handprinting | 472 |

| | | |
|------------|---|-----|
| J. | The Error Violated Lucas' Federal Constitutional Rights | 473 |
| K. | The Error Was Prejudicial | 475 |
| 2.6.5 | THE JUDGE ERRED IN DENYING THE DEFENSE REQUEST TO REQUIRE THE JURY TO MAKE A PRELIMINARY FINDING OF UNIQUENESS BEFORE USING HANDWRITING COMPARISON FOR PURPOSES OF IDENTIFICATION | 477 |
| 2.7 | HAIR EVIDENCE | |
| 2.7.1 | THE FAILURE TO PROPERLY PRESERVE THE HAIR FOUND IN SUZANNE JACOBS' HAND VIOLATED LUCAS' FEDERAL CONSTITUTIONAL RIGHTS ... | 482 |
| 2.8 | THIRD PARTY GUILT ISSUES | |
| 2.8.1 | DENIAL OF FAIR OPPORTUNITY TO CONFRONT JOHNNY MASSINGALE | 485 |
| A. | Introduction | 485 |
| B. | Factual Background Regarding Massingale's Confessions | 487 |
| C. | Barring Lucas From Cross-Examining Massingale As To Bias Was Prejudicial Error | 488 |
| 1. | Denying Cross-Examination Of A Prosecution Witness As To Financial Bias Violated Lucas' State And Federal Constitutional Rights ... | 488 |
| 2. | Prohibiting Cross-Examination Of Massingale As To Financial Bias Was Reversible Error .. | 494 |
| D. | The Prosecution's Failure To Comply With Discovery Orders Violated Lucas' Federal Constitutional Rights | 497 |

| | | |
|-------|--|-----|
| 1. | The Prosecution Erroneously Failed To Disclose The Police Report That Massingale Had Assaulted His Wife Until Massingale Had Completed His Testimony | 497 |
| 2. | The Prosecution Failed To Disclose The Four Photos Shown To Massingale In Kentucky, Until Massingale Had Completed His Testimony | 501 |
| E. | The Errors Were Cumulatively Prejudicial | 505 |
| 2.8.2 | IT WAS ERROR TO REFUSE A CALJIC 2.03 CONSCIOUSNESS OF GUILT INSTRUCTION AS TO MASSINGALE | 508 |
| A. | Introduction | 508 |
| B. | Consciousness Of Guilt Principles Apply To Third Party Suspects | 509 |
| C. | CALJIC 2.03 Should Have Been Available To The Defense Because It Would Have Been Available To The Prosecution | 511 |
| D. | The Refusal Of The Defense Instructions Was Prejudicial | 512 |
| 2.8.3 | THE JUDGE FAILED TO FULLY AND CORRECTLY INSTRUCT ON THE DEFENSE THEORY OF THIRD PARTY GUILT | 514 |
| A. | Introduction | 514 |
| B. | Procedural Background | 514 |
| C. | Legal Necessity To Correctly Relate The Third Party Guilt Theory To The Presumption Of Innocence | 516 |

| | | |
|-------|---|-----|
| D. | The Third Party Suspect Instruction Improperly Imposed The Burden On The Defense To “Raise” A Reasonable Doubt | 517 |
| E. | The Error Violated Lucas’ Federal Constitutional Rights | 520 |
| F. | The Errors Were Prejudicial | 522 |
| 2.8.4 | REFUSING TO RECUSE THE DISTRICT ATTORNEY’S OFFICE DEPRIVED LUCAS OF A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE | 525 |

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

| | | |
|-------|---|-----|
| 2.9.1 | THE PRELIMINARY GUILT PHASE INSTRUCTIONS TILTED THE FIELD IN FAVOR OF THE PROSECUTION | 529 |
| A. | Introduction | 529 |
| B. | Failure To Properly State The Jurors’ Duty | 531 |
| C. | Failure To Instruct On The Prosecution’s Burden To Prove Guilt Beyond A Reasonable Doubt | 533 |
| D. | Improper Admonition That Jury Must “Determine The Question Of “Guilt Or Innocence” | 534 |
| E. | Improper Emphasis Of Cross-Admissibility Of Other Crimes In The Preliminary Instructions | 534 |
| F. | The Prosecution-Oriented Preliminary Instructions Were Likely To Have Influenced The Jurors In Favor Of The Prosecution | 534 |
| G. | The Preliminary Instructions Were Prejudicial ... | 535 |

| | | |
|-------|--|-----|
| 2.9.2 | BY ALLOWING THE PROSECUTORS, OVER DEFENSE OBJECTION, TO REFER TO THEMSELVES AS REPRESENTATIVES OF “THE PEOPLE” THE TRIAL JUDGE VIOLATED LUCAS’ STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL | 538 |
| A. | Introduction | 538 |
| B. | Summary Of Proceedings Below | 538 |
| C. | Calling The Prosecution “The People” Violates State And Federal Constitutional Principles And The Rights They Guarantee | 539 |
| D. | The Judgement Should Be Reversed | 545 |
| 2.9.3 | BECAUSE THERE WAS EVIDENCE UPON WHICH EITHER LUCAS OR JOHNNY MASSINGALE COULD HAVE BEEN HELD LIABLE FOR JACOBS, A CAUTIONARY ACCOMPLICE INSTRUCTION SHOULD HAVE BEEN GIVEN | 551 |
| A. | Introduction | 551 |
| B. | The Definition Of “Accomplice” As The Term Is Used In Penal Code § 1111 | 551 |
| C. | Accomplice Testimony Instructions Were Required Under The Circumstances Of This Case | 554 |
| D. | The Error Violated The Federal Constitution | 555 |
| E. | The Error Was Prejudicial | 556 |
| 2.9.4 | THE DEFENSE REQUEST FOR AN “IMMUNITY AGREEMENT” INSTRUCTION WAS ERRONEOUSLY DENIED | 558 |
| A. | Proceedings Below | 558 |

| | | |
|-------|--|-----|
| B. | Denial Of The Instruction Was Error | 558 |
| C. | The Error Violated The Federal Constitution | 559 |
| D. | The Error Was Prejudicial | 561 |
| 2.9.5 | THE JUDGE’S CONSISTENT AND ARBITRARY DENIAL OF REQUESTED PRELIMINARY FINDING INSTRUCTIONS, WHICH WERE MANDATORY UNDER EVIDENCE CODE § 403(c), VIOLATED LUCAS’ DUE PROCESS RIGHTS | 563 |
| A. | Proceedings Below | 563 |
| B. | Preliminary Fact Instructions Which Were Denied | 563 |
| 1. | Perpetrator Identity Of Other Offense As Prerequisite To Cross-Consideration Of That Offense | 563 |
| 2. | Comparative Identification (Handprinting, Shoe Print And Hair Comparison Evidence) | 563 |
| 3. | Expert Opinion (Handprinting, Shoe Print And Hair Comparison Evidence) | 564 |
| 4. | Chain Of Custody | 564 |
| 5. | Electrophoretic Results – Speculative Data | 565 |
| 6. | Authentication Of The Photograph Of The Love Insurance Note | 565 |
| C. | The Judge Erroneously Denied The Defense Requests Because Preliminary Fact Instructions Are Mandatory Upon Request | 565 |
| D. | The Consistent And Arbitrary Denial Of Preliminary Fact Instructions In The Present Case Violated The Federal Constitution | 566 |

| | | |
|-------|---|-----|
| E. | The Error Was Prejudicial | 568 |
| 2.9.6 | THE TERM “EXPERT WITNESS” SHOULD NOT HAVE BEEN USED AT TRIAL OR IN THE JURY INSTRUCTIONS | 570 |
| 2.9.7 | THE JUDGE IMPROPERLY REJECTED THE DEFENSE REQUEST TO DEFINE THE TERM “INFERENCE” IN THE JURY INSTRUCTIONS | 574 |
| A. | Proceedings Below | 574 |
| B. | The Judge Is Obligated To Define Terms With Special Legal Meanings | 575 |
| C. | “Inference” Has A Special Legal Meaning | 575 |
| D. | Correct Juror Understanding Of The Term Inference Was Important In Jacobs | 575 |
| E. | The Error Violated The Federal Constitution | 576 |
| F. | The Error Was Prejudicial | 577 |
| 2.9.8 | THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY NOT TO CONSIDER ALL THE EVIDENCE ... | 579 |
| 2.9.9 | THE JUDGE ERRONEOUSLY DENIED THE DEFENSE REQUEST TO SPECIFY WHICH OPINION TESTIMONY WAS CIRCUMSTANTIAL EVIDENCE | 585 |
| A. | Introduction | 585 |
| B. | Proceedings Below | 585 |
| C. | Comparative Identification Opinion Testimony Is Circumstantial Evidence | 586 |
| D. | The Jurors Would Not Have Understood That Opinion Testimony Is Circumstantial Evidence | 587 |

| | | |
|--------|---|-----|
| E. | The Error Violated Lucas’ Federal Constitutional Rights | 587 |
| F. | The Error Was Prejudicial | 588 |
| 2.9.10 | THE JUDGE SHOULD HAVE DELETED THE INSTRUCTION TITLES FROM THE WRITTEN INSTRUCTIONS OR CAUTIONED THE JURY REGARDING USE OF THE TITLES | 590 |
| A. | Introduction | 590 |
| B. | The Legal Principles | 590 |
| C. | The Titles In The Present Case Were Constitutionally Deficient | 593 |
| D. | The Error Violated Lucas’ Federal Constitutional Rights | 596 |
| E. | The Judgment Should Be Reversed | 598 |
| 2.9.11 | THE JUDGE IMPROPERLY COERCED THE JURORS BY ADMONISHING THEM THAT THEY WERE EXPECTED TO REACH A JUST VERDICT | 600 |
| 2.9.12 | THE FINAL INSTRUCTIONS WERE CUMULATIVELY DEFICIENT | 605 |
| A. | Introduction | 605 |
| B. | The Judge Improperly Framed The Issues In Terms Of Finding Guilt Or Innocence | 605 |
| C. | The Willfully False Instruction Improperly Failed To Define “Material” | 607 |
| D. | The “Probability Of Truth” Language In CALJIC 2.21.2 Combined With The “Convincing Force” Language Of CALJIC 2.22 Lessened The Prosecution’s Burden | 608 |

| | | |
|--------|---|-----|
| E. | The Credibility Of Witness Instruction Was Improperly Limited To Persons Who Testified Under Oath . . | 610 |
| F. | Numerous Instructions Were Improperly Limited To The Testimony Of “Witnesses” | 615 |
| G. | The Instructions Improperly Failed To Instruct The Jurors Regarding Transcripts Read Into The Record | 618 |
| H. | The Instructional Errors Were Cumulatively Prejudicial | 619 |
| | | |
| 2.9.13 | THE INSTRUCTIONS GIVEN IN THE LUCAS TRIAL WERE NOT SUFFICIENTLY UNDERSTANDABLE TO SATISFY THE 8TH AND 14TH AMENDMENT RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION | 622 |
| | | |
| A. | Introduction | 622 |
| B. | The Importance Of Jury Instructions Is Beyond Dispute | 623 |
| C. | The Judicial Council’s Blue Ribbon Commission Has Formally Found That The CALJIC Instructions Do Not Ensure Juror Understanding Of The Law | 623 |
| D. | The United States Supreme Court Has Also Corroborated The Findings Of The Blue Ribbon Commission | 624 |
| E. | Empirical Studies Corroborate The Blue Ribbon Commission’s Findings That The CALJIC Instructions Are “Impenetrable To The Ordinary Juror” | 625 |
| F. | Actual Juror Questions In The Lucas Case Further Corroborate The Findings Of The Blue Ribbon Committee | 628 |

- G. Juror Confusion And Misunderstanding Of The Jury’s Instructions Violates The Federal Constitution . . . 628
- H. Juror Confusion And Misunderstanding As To Jury Instructions Undermines The Reliability Of The Verdicts And Necessitates Reversal 629
 - 1. The 8th And 14th Amendments Requires Heightened Reliability As To Both Guilt And Penalty 629
 - a. *Death Is Different* 629
 - b. *Greater Reliability Required As To Both Guilt And Penalty* 629
 - 2. The Fourteenth Amendment Requires That The Guilt And Penalty Verdicts Be Reliable . . . 630
- I. The Judgment Should Be Reversed 631

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

- 2.10.1 THE INSTRUCTIONS WERE CONSTITUTIONALLY DEFICIENT BECAUSE THEY FAILED TO ADEQUATELY EXPLAIN AND DEFINE THE BURDEN OF PROOF 633
 - A. Introduction 633
 - B. The Instructions Were Deficient And Misleading Because They Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence 633
 - C. The Instructions Failed To Explain That Lucas’ Attempt To Refute Prosecution Evidence Did Not Shift The Burden Of Proof 634

| | | |
|----|---|-----|
| D. | The Jurors Should Have Been Told That A Conflict In The Evidence And/Or A Lack Of Evidence Could Leave Them With A Reasonable Doubt As To Guilt | 636 |
| E. | CALJIC 2.90 Failed To Inform The Jury That The Presumption Of Innocence Continues Throughout The Entire Trial, Including Deliberations | 636 |
| F. | CALJIC 2.90 Improperly Described The Prosecution’s Burden As Continuing “Until” The Contrary Is Proved | 638 |
| G. | The Term “Burden” Should Have Been Defined | 640 |
| H. | The Jury Should Have Been Instructed That The Prosecution’s Burden Applied To Every Essential Element Of The Charge | 640 |
| I. | The Error Violated The Federal Constitution | 641 |
| J. | The Judgment Should Be Reversed | 642 |

| | | |
|--------|---|-----|
| 2.10.2 | THE INSTRUCTIONS WERE DEFICIENT AND MISLEADING BECAUSE THEY FAILED TO AFFIRMATIVELY INSTRUCT THAT THE DEFENSE HAD NO OBLIGATION TO PRESENT OR REFUTE EVIDENCE | 643 |
|--------|---|-----|

| | | |
|----|--|-----|
| A. | Introduction | 643 |
| B. | Legal Principles | 643 |
| C. | Omission Of The Required Instruction In The Present Case | 644 |

| | | | |
|--------|----|--|-----|
| | D. | Other Instructions Reinforced The Misconception That The Defendant Must Produce Evidence In Order To Raise A Reasonable Doubt | 646 |
| | E. | The Error Violated Lucas’ Federal Constitutional Rights | 651 |
| | F. | The Error Was Prejudicial | 652 |
| 2.10.3 | | THE BURDEN OF PROOF INSTRUCTION FAILED TO ADEQUATELY DEFINE THE STANDARD OF PROOF | 654 |
| | A. | Proceedings Below | 654 |
| | B. | Apart From Its Use Of The “Moral Certainty” Language, CALJIC 2.90 (5th ed. 1988) Was Deficient For Failure to Adequately Explain The Standard Of Proof | 655 |
| | C. | The Error Violated The Federal Constitution | 656 |
| | D. | The Judgment Should Be Reversed | 657 |
| 2.10.4 | | THE JUDGE ERRONEOUSLY REFUSED THE DEFENSE REQUEST FOR INSTRUCTIONS COMPARING THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT WITH OTHER LESSER BURDENS | 658 |
| | A. | Proceedings Below | 659 |
| | B. | The Comparison Of Burden Instruction Was Legally Correct | 660 |
| | C. | The Judge’s Rejection Of The Comparison Instruction Violated The Federal Constitution | 662 |

| | | | |
|--------|----|--|-----|
| | D. | The Error Was Prejudicial | 663 |
| 2.10.5 | | CALJIC 2.90 ERRONEOUSLY IMPLIED THAT REASONABLE DOUBT REQUIRES THE JURORS TO ARTICULATE REASON FOR THEIR DOUBT | 665 |
| | A. | Introduction | 665 |
| | B. | Proceedings Below | 665 |
| | C. | Legal Principles | 665 |
| | D. | The Error Violated The Federal Constitution | 668 |
| | E. | The Judgement Should Be Reversed | 669 |
| 2.10.6 | | CALJIC 2.90 UNCONSTITUTIONALLY ADMONISHED THE JURY THAT A POSSIBLE DOUBT IS NOT A REASONABLE DOUBT . . . | 671 |
| | A. | Introduction | 671 |
| | B. | Legal Principles | 671 |
| | C. | A Possible Doubt May Be Reasonable | 672 |
| | D. | The Error Violated The Federal Constitution | 675 |
| | E. | The Error Was Prejudicial | 676 |
| 2.10.7 | | THE JUDGE ERRONEOUSLY INSTRUCTED THE JURORS TO TAKE INTO ACCOUNT MORAL CONSIDERATIONS IN DECIDING GUILT . . . | 678 |
| | A. | Proceedings Below | 678 |
| | B. | The Instruction Was Constitutionally Erroneous | 678 |

| | | | |
|-------------|----|---|-----|
| | C. | The Error Violated The Federal Constitution | 680 |
| | D. | The Erroneous Instruction Requires A Reversal Of The Judgments Of Conviction | 681 |
| 2.10.8 | | THE CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS (CALJIC 2.01 AND 2.02) UNCONSTITUTIONALLY LIGHTENED THE PROSECUTION’S BURDEN OF PROOF, AND ALSO CREATED A MANDATORY CONCLUSIVE PRESUMPTION OF GUILT, UNDER THE CIRCUMSTANCES OF THIS PARTICULAR CASE | 683 |
| 2.10.9 | | THE BURDEN OF PROOF PRINCIPLES OF CALJIC 2.01 WERE UNCONSTITUTIONALLY LIMITED TO CIRCUMSTANTIAL EVIDENCE | 691 |
| | A. | Introduction | 691 |
| | B. | Presumption Of Innocence Principles Apply With Equal Force To Both Direct And Circumstantial Evidence | 691 |
| | C. | The Error Violated The Federal Constitution | 695 |
| | D. | The Error Was Prejudicial | 696 |
| 2.11 | | DELIBERATION ISSUES | |
| 2.11.1 | | THE JUDGE VIOLATED STATE LAW AND THE FEDERAL CONSTITUTION BY ALLOWING THE JURORS TO READ THE TRIAL TRANSCRIPTS IN THE JURY ROOM | 698 |
| | A. | Introduction | 698 |
| | B. | Procedural Background | 698 |

| | | |
|----|--|-----|
| C. | The Defendant’s Right To Personal Presence At Trial Is Grounded Upon Fundamental Constitutional Rights | 705 |
| D. | The Absence Of Defense Counsel From A Critical Stage Of The Trial Violates The Accused’s Constitutional Rights | 707 |
| E. | Private Reading Of Testimony In The Deliberation Room Violates The Federal Constitution’s Public Trial Guarantee | 707 |
| F. | The Reading Of Testimony Is A Critical Stage Of The Trial | 707 |
| G. | Allowing The Jurors To Read The Transcripts Without Supervision Or Instruction And In The Absence Of The Judge Violated State Law And The Federal Constitution | 708 |
| H. | A Readback Proceeding Is No Less Critical If The Reading Is Done By A Juror Instead Of The Reporter | 712 |
| I. | Neither Counsel Nor Lucas Waived The Rights Involved | 713 |
| | 1. There Was No Waiver By Counsel . | 714 |
| | 2. Lucas Did Not Waive His Rights . . . | 714 |
| J. | The Denial Of Lucas’ Rights To Be Personally Present, To Have The Assistance Of Counsel, And Presence Of The Judge, And To Due Process Requires Reversal Of Lucas’ Convictions | 717 |
| | 1. The Denial Of Counsel Was Reversible Error | 717 |

- ii. Does The Testimony Concern Matters Which Are Inconsequential To The Defendant, Or Are Uncontested? 722
- iii. Was The Prosecution's Evidence Overwhelming As To All Elements Of Guilt? 722
- iv. Did The Court Adequately Instruct The Jury Concerning The Readback? 723
- v. Was The Defendant On Trial For His Life? ... 723

e. *In The Present Case All Of The Relevant Criteria Favor Reversal* 723

2.11.2 ALLOWING THE JURY TO READ BACK TESTIMONY TO THEMSELVES IN THE JURY ROOM VIOLATED LUCAS' RIGHT TO A PUBLIC TRIAL 725

- A. Introduction 725
- B. Procedural Background 725
- C. The Right To Public Trial Applies To The Entire Trial And The Right Is Violated By Closure Of Any Part Of The Trial, Absent Waiver Or Compelling Necessity 725
- D. The Public Trial Guarantee Applied To The Proceedings Held In The Present Case 727

| | | | |
|-------------|----|--|-----|
| | E. | The Error Violated The Federal Constitution | 728 |
| | F. | There Was No Waiver Or Satisfactory Showing Of Necessity | 728 |
| | | 1. Waiver | 728 |
| | | 2. There Was No Showing Of Necessity | 729 |
| | G. | The Denial Of The Right To Public Trial Requires Reversal | 730 |
| 2.11.3 | | THE JUDGE ERRED IN ALLOWING THE JURY TO READ PORTIONS OF THE TESTIMONY DURING DELIBERATIONS WITHOUT ANY INSTRUCTIONS AS TO THE PROPER USE OF THE TRANSCRIPTS | 731 |
| | A. | Introduction | 731 |
| | B. | Legal Principles | 731 |
| | C. | The Failure To Give Any Cautionary Instructions In The Present Case Violated Lucas’ Federal Constitutional Rights | 733 |
| | D. | The Error Was Prejudicial | 734 |
| 2.11.4 | | THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON | 736 |
| 2.12 | | CUMULATIVE ERROR: JACOBS | |
| | A. | Introduction | 741 |
| | B. | The Errors Cumulatively Violated The Federal Constitution | 741 |

| | | |
|----|--|-----|
| C. | The Errors Were Cumulatively Prejudicial | 742 |
| D. | The Jacobs Errors Were Prejudicial As To The Santiago And Swanke Convictions | 743 |
| E. | The Swanke And Santiago Errors Were Prejudicial As To Jacobs | 743 |

VOLUME 3 - SANTIAGO CASE

| | | |
|------------|---|------------|
| 3.1 | SANTIAGO STATEMENT OF CASE | 745 |
|------------|---|------------|

3.2 SANTIAGO STATEMENT OF FACTS

| | | |
|-----|---|-----|
| A. | Prosecution Evidence | 757 |
| 1. | Background | 757 |
| 2. | The Abduction And Assault Of Jodie Santiago . . . | 759 |
| 3. | Discovery Of Santiago After The Assault | 765 |
| 4. | Santiago’s Injuries | 767 |
| 5. | Analysis Of The Recovery Scene | 770 |
| 6. | Medication Given To Santiago In The Hospital . . | 771 |
| 7. | Law Enforcement Contact With Santiago In The Hospital | 771 |
| 8. | Santiago’s Treatment After Leaving The Hospital | 772 |
| 9. | Composite Drawing With Detective Gillis Of The Seattle Police | 773 |
| 10. | Treatment Of Santiago By Psychiatrist Wendy Freed | 774 |
| 11. | Santiago’s Disability Award | 774 |

| | | |
|-----|--|-----|
| 12. | Interview Of Santiago In Seattle By Detectives Henderson, Fullmer And Bove On December 4, 1984 | 775 |
| 13. | The Santiago Photo Lineup | 777 |
| 14. | First Car Trip: Santiago Driven By Lucas' House Twice | 780 |
| 15. | Second Car Trip: Santiago Driven By Lucas' House Two More Times | 780 |
| 16. | Execution Of The Search And Arrest Warrants .. | 784 |
| 17. | Extra Judicial Matters Seen By Santiago | 784 |
| 18. | Santiago's Testimony Regarding The Vehicle ... | 785 |
| 19. | Rape Kit Evidence | 786 |
| 20. | In-Court Identification Of Lucas By Santiago | 787 |
| 21. | Vehicle Evidence | 787 |
| | <i>a. License Plate</i> | 787 |
| | <i>b. Louvers</i> | 788 |
| | <i>c. Computerized Voice</i> | 789 |
| | <i>d. Miscellaneous Evidence Regarding Lucas' 280-Z</i> | 789 |
| | <i>e. Lucas Traded In His 280-Z For A Toyota Pick-Up Truck</i> | 791 |
| B. | Defense Evidence | 792 |
| 1. | Santiago's Post Traumatic Stress Disorder And Other Mental Psychological Impairments | 792 |

| | | |
|----|---|-----|
| a. | <i>Dr. Zeidman</i> | 792 |
| b. | <i>Lucy Berliner</i> | 793 |
| c. | <i>Dr. Wendy Freed</i> | 794 |
| d. | <i>Dr. Zigelbaum</i> | 796 |
| 2. | Vehicle Evidence | 798 |
| 3. | Lucas' House | 801 |
| a. | <i>Objects On The Porch</i> | 801 |
| b. | <i>Post-Photo Lineup Drivebys</i> | 802 |
| c. | <i>Presence Of Other People At Lucas' House</i> | 805 |
| 4. | Alibi Evidence | 805 |
| C. | Other Offenses Evidence | 807 |
| | CHART 3.2(C)(1) -- Comparison Of Santiago To Strang | 807 |
| | CHART 3.2(C)(2) -- Comparison Of Santiago To Swanke | 809 |

3.3 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL ISSUES

| | | |
|-------|---|-----|
| 3.3.1 | EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL STATEMENT OF FACTS | 811 |
| A. | The Attack | 811 |
| B. | Santiago's Hospitalization | 813 |
| C. | Defensive Wounds | 815 |

| | | |
|----|---|-----|
| D. | Pretrial Identification Procedures By Law Enforcement During Santiago’s Hospitalization | 815 |
| E. | Events After Santiago’s Release From The Hospital And Return To Seattle | 821 |
| F. | The Arrest Of Lucas And The Photo Lineup | 825 |
| G. | In Santiago’s View, Lucas’ Photo Was The Only One Which Matched Her Description Of The Attacker | 829 |
| H. | Post-Lineup Interaction Between Santiago And The Detectives | 829 |
| I. | Whether Santiago Saw The Photo Lineup In The Homicide Office On December 15, 1984 | 830 |
| J. | Identification Of Lucas’ House And Vehicle Seat Covers | 830 |
| K. | Expert Testimony Regarding Eyewitness Identification . . | 830 |
| | 1. Judge Hammes’ Ruling That Buckhout And Loftus Were Not Experts | 830 |
| | 2. The Excluded Expert Testimony As To The Unfairness Of The Photo Lineup | 832 |
| | a. <i>The Photo Lineup Should Be Assembled To Reflect The Features Described By The Victim</i> | 832 |
| | b. <i>The Photos Should Be Similar To Each Other</i> | 834 |
| | 3. Excluded Expert Testimony Concerning Lay Misconceptions Regarding Eyewitness Identification | 836 |
| | a. <i>Misconception: Eyewitness Confidence Does Not Correlate With Reliability</i> | 838 |

| | | |
|-------|---|-----|
| b. | <i>Misconception: Stress Increases Reliability</i> | 840 |
| c. | <i>Misconception: Accuracy As To Particular Details Increases Reliability</i> | 841 |
| d. | <i>Misconception: Witness Estimates Of The Durations Of Events Are Accurate</i> | 842 |
| e. | <i>Misconception: Constructing Composite Drawings Increases Reliability</i> | 844 |
| f. | <i>Misconception: The Presence Of A Weapon Increases Reliability</i> | 845 |
| 4. | Excluded Expert Testimony Concerning Impact Of Post Event Influences | 845 |
| a. | <i>Memory Is Not A Video Tape Machine</i> | 845 |
| b. | <i>Post-Event Information Affects Reliability</i> . | 845 |
| c. | <i>The Adverse Impact Of New Information On Reliability Increases With The Passage Of Time</i> | 847 |
| d. | <i>Post Lineup Reinforcement</i> | 847 |
| 3.3.2 | A SERIES OF PROBLEMS DENIED LUCAS A FULL AND FAIR OPPORTUNITY TO DEMONSTRATE THAT SANTIAGO'S IDENTIFICATIONS OF LUCAS AND OF LUCAS' HOUSE WERE UNRELIABLE AND WERE THE INADMISSIBLE PRODUCT OF SUGGESTIVE PRETRIAL PROCEDURES | 848 |
| A. | Introduction | 848 |
| B. | The Defense Was Denied A Fair Eyewitness Identification Hearing | 848 |

| | | |
|----|--|-----|
| 1. | Inadequate Record Of The Pretrial Procedures | 848 |
| | a. <i>Santiago Was Suffering From Amnesia And Other Psychological And Physical Impairments Which Limited Her Recall Of The Identification Procedures</i> | 848 |
| | b. <i>Failure Of Law Enforcement To Make And Preserve Adequate Records Of Pretrial Identification Procedures</i> . . | 849 |
| | c. <i>Record Deficiencies As To Specific Contacts</i> | 850 |
| | i. Hospital Contact June 11, 1984 | 850 |
| | ii. Hospital Contact June 15, 1984 | 851 |
| | iii Hospital Contact June 26, 1984 | 851 |
| | iv Identi-Kit Composite With Agent Gillis | 852 |
| | v December 4, 1984 Composite Drawing And Interview In Seattle | 852 |
| | vi Construction Of The Photo Array | 852 |
| | vii The Photo Lineup | 852 |
| | viii Identification Of Lucas' Residence | 854 |
| 2. | Exclusion Of District Attorney Testimony . | 855 |

| | | |
|-------|---|-----|
| 3. | Refusal To Consider Eyewitness Expert Testimony | 856 |
| C. | Lucas Was Denied A Meaningful Opportunity To Challenge The Reliability Of Santiago's Identifications | 856 |
| D. | The Denial Of A Full And Fair Hearing Violated Lucas' Federal Constitutional Rights | 857 |
| E. | The Error Was Prejudicial | 859 |
| 1. | The Santiago Judgment Should Be Reversed | 859 |
| 2. | The Swanke And Jacobs Convictions Should Also Be Reversed | 860 |
| 3. | The Error Was Prejudicial As To Penalty .. | 861 |
| F. | If The Judgement Is Not Reversed, The Matter Should Be Remanded For A New Hearing Before A Different Judge | 861 |
| 1. | The Matter Should Be Remanded | 861 |
| 2. | On Remand A Different Judge Should Be Assigned | 862 |
| 3.3.3 | SANTIAGO'S IDENTIFICATION OF LUCAS WAS THE PRODUCT OF UNNECESSARILY SUGGESTIVE PRETRIAL PROCEDURES CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION, AND SHOULD HAVE BEEN SUPPRESSED | 863 |
| A. | Introduction: Suggestive Identification Procedures | 863 |
| B. | Procedural Background | 863 |

| | | |
|----|---|-----|
| C. | Treatment Of Identification In Arguments To Jury | 865 |
| D. | Jury Instructions On Eyewitness Identification ... | 865 |
| E. | Standard Of Review: Suggestive Identification Procedures | 866 |
| F. | Legal Principles: Suggestive Identification Procedures | 867 |
| | 1. Due Process | 867 |
| | 2. Eighth Amendment Reliability | 868 |
| | 3. Two-Pronged Constitutional Test | 869 |
| G. | The Pretrial Identification Procedures In The Present Case Were Unnecessarily Suggestive | 870 |
| | 1. The Events Prior To The Photo Lineup Were Suggestive And Conducive To An Irreparable Mistaken Identification | 870 |
| | 2. The Photo Lineup Was Unnecessarily Suggestive And Conducive To An Irreparable Mistaken Identification | 871 |
| | <i>a. Photo Lineup Principles</i> | 871 |
| | <i>b. The Photo Lineup In The Present Case Was Suggestive</i> | 873 |
| | i. No Photo Other Than Lucas' Had Bulging Eyes | 873 |
| | ii. No Photo Other Than Lucas' Had Feathered Hair | 874 |
| | iii. Not All The Photos Had Facial Hair That Matched Santiago's Description | 874 |

- iv No Photo Other Than Lucas' Had Clothing That Matched Santiago's Description 874
- v Other Discrepancies Between The Photo Spread And Santiago's Description 875
- vi Lucas' Photo Was Larger Than The Others 875
- vii In Light Of All The Circumstances The Photo Spread Was Unnecessarily Suggestive And Conducive To An Irreparable Mistaken Identification 876
- c. *The Events After The Photo Lineup Improperly Reinforced And Tainted The Lineup And In-Court Identifications Of Lucas* 876
- H. The Judge Erroneously Found That Santiago's In-Court Identification Of Lucas Was Reliable And Free From The Taint Of The Pretrial Identification Procedures And Circumstances 876
 - 1. The Judge's Ruling Was Based On A Mischaracterization Of The Evidence 876
 - 2. The Prosecution Did Not Prove That The Identification Was Reliable And Free From The Taint Of The Pretrial Suggestiveness 878
- I. The Failure To Exclude Santiago's Identification Of Lucas Violated The Federal Constitution 878
- J. Failure To Exclude The Identification Was Prejudicial 880

| | | |
|-------|---|-----|
| 1. | The Santiago Judgment Should Be Reversed | 880 |
| 2. | The Swanke And Jacobs Convictions Should Also Be Reversed | 881 |
| 3. | The Error Was Prejudicial As To Penalty .. | 881 |
| 3.3.4 | THE RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION REQUIRE THAT THE WITNESS BE GIVEN FULL AND FAIR INSTRUCTIONS PRIOR TO VIEWING THE PHOTO SPREAD | 883 |
| A. | Introduction | 883 |
| B. | Reliability Is Required By The Federal Constitution | 883 |
| C. | To Be Reliable, A Witness Should Be Instructed Prior To Viewing The Lineup | 884 |
| 1. | The Pre-Lineup Admonition Given In This Case | 884 |
| 2. | Proper Pre-Lineup Instruction | 887 |
| D. | Santiago Was Not Fully And Fairly Instructed Prior To Being Shown The Lineup | 888 |
| E. | The Error Violated The Federal Constitution | 889 |
| F. | The In-Court Identification Was Tainted By The Photo Lineup | 890 |
| G. | The Error Was Prejudicial | 890 |
| 3.3.5 | THE RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION REQUIRE DOUBLE-BLIND SEQUENTIAL PHOTO LINEUPS | 891 |
| A. | Introduction | 891 |

- B. Reliability Is Required By The Federal Constitution 891
- C. To Be Reliable A Photo Lineup Should Be “Double-Blind” And Sequential 892
 - 1. Double-Blind Lineups Increase Reliability . 892
 - 2. Sequential Lineups Are More Reliable 892
- D. The Lineup In The Present Case Was Unreliable . 894
- E. The Error Violated The Federal Constitution 894
- F. The In-Court Identification Was Tainted By The Photo Lineup 895
- G. The Error Was Prejudicial 895

3.4 IDENTIFICATION OF LUCAS’ HOUSE AND SEAT COVERS: PRETRIAL ISSUES

3.4.1 IDENTIFICATION OF LUCAS’ HOUSE AND SEAT COVERS: PRETRIAL STATEMENT OF FACTS 896

- A. Identification Of Lucas’ Residence 896
 - 1. The First Drive-By Session 896
 - 2. Meeting In The Homicide Office 897
 - 3. The Second Drive-By Session 898
- B. Santiago’s “Identification” Of The Sheepskin Seat Covers On Lucas’ Truck 901

3.4.2 THE JUDGE ERRONEOUSLY REFUSED TO DETERMINE WHETHER SANTIAGO’S IDENTIFICATIONS OF LUCAS’ HOUSE AND SEAT COVERS SHOULD BE SUPPRESSED AS THE UNRELIABLE PRODUCT OF SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES 902

| | | |
|----|--|-----|
| A. | Introduction | 902 |
| B. | Procedural Background | 902 |
| C. | The Exclusionary Principles Mandated By The Federal Constitution Should Apply To Identification Of Inanimate Objects | 903 |
| D. | In The Present Case The Identification Of Lucas' House And Seat Covers Should Have Been Excluded . . . | 905 |
| E. | Relief Is Warranted Due To The Trial Judge's Failure To Consider The Motion To Exclude The Identifications | 906 |
| 1. | The Santiago Evidence Was Closely Balanced | 906 |
| a. | <i>Santiago Was The Only Identifying Witness</i> | 906 |
| b. | <i>The Photo Spread Was Suggestive</i> .. | 907 |
| c. | <i>Santiago Knew The Detectives Had A Suspect Who Was In The Photo Spread</i> | 907 |
| d. | <i>Post-Lineup Events Reinforced Santiago's Choice Of Lucas' Photo</i> | 908 |
| e. | <i>Santiago Was Cognitively Impaired By Severe Closed Head Trauma And Post Traumatic Stress Disorder</i> | 909 |
| f. | <i>Santiago Had An Emotional Need To Identify Someone As Her Attacker</i> .. | 909 |
| g. | <i>Santiago's Recollection Of The Abductor's License Plate Excluded Lucas As The Attacker</i> | 910 |

| | | |
|----|--|-----|
| h. | <i>Other Inconsistencies In The Description Of The Vehicle</i> | 910 |
| i. | <i>Santiago's Alcohol Use Before The Abduction</i> | 911 |
| j. | <i>Impact Of Stress And Weapon Focus</i> | 911 |
| k. | <i>Suggestiveness Of The House Identification</i> | 911 |
| l. | <i>The Jury Deliberated For Ten Days And Requested Readback Of The Testimony</i> | 912 |
| 2. | The Error Was Independently Substantial And Prejudicial | 912 |
| F. | The In-Court Identification Of Lucas Should Also Have Been Excluded Because It Was Intertwined With And Reinforced By The Suggestive Identification Of His House And Seat Covers | 913 |
| G. | Alternatively The Matter Should Be Remanded For A New Hearing Before A Different Judge | 914 |
| 1. | The Matter Should Be Remanded | 914 |
| 2. | On Remand A Different Judge Should Be Assigned | 914 |

3.5 EYEWITNESS IDENTIFICATION: TRIAL ISSUES

| | | |
|-------|---|-----|
| 3.5.1 | EXCLUSION OF THE TESTIMONY OF EYEWITNESS IDENTIFICATION EXPERTS WAS ERROR | 916 |
| A. | Introduction | 916 |
| B. | Procedural Background | 917 |

| | | |
|----|--|-----|
| 1. | In Limine Motion | 917 |
| 2. | Renewed Motion | 918 |
| 3. | Voir Dire | 918 |
| 4. | Treatment Of Eyewitness Testimony In Defense Counsel's Opening Statements To The Jury | 919 |
| 5. | Discussion Of Eyewitness Identification In Summations To The Jury | 919 |
| 6. | Jury Instructions On Eyewitness Identification | 919 |
| C. | Expert Testimony On Eyewitness Identification Should Be Admitted Whenever Such Testimony May Be Helpful To The Jury In Fairly And Accurately Appraising The Reliability Of Eyewitness Identification Testimony, And Especially Where, As Here, There Is A Danger That The Jury May Give The Eyewitness Testimony A False Aura Of Credibility Based On Misconceptions About Eyewitness Identification And/Or A Failure To Fully Appreciate The Effects Of Suggestive Pretrial Identification Procedures | 920 |
| 1. | Expert Testimony Should Be Admitted In A Given Case If There Is A Danger That The Jury May Reach Its Verdict Based On Misconceptions As To The Reliability Of The Identification | 920 |
| 2. | The Judge Erroneously Ruled That Drs. Buckhout And Loftus Were Not Experts .. | 921 |
| 3. | The Judge Erroneously Assumed That Lack Of Corroboration Is A Threshold Prerequisite To The Admission Of Eyewitness Expert Testimony | 921 |

| | | |
|------|--|-----|
| 4. | Even If Corroboration Is A Threshold Issue, Judge Hammes Improperly Relied On The Other Charges As Corroboration | 922 |
| a. | <i>The Defense Was Denied A Fair Opportunity To Contest The Other Offenses Before Trial</i> | 923 |
| b. | <i>Reliance On The Other Charges As Corroboration Was Unreliable Due To The Danger Of Improper Bootstrapping</i> | 924 |
| 5. | In the Present Case, Eyewitness Expert Testimony Was Needed To Dispel Or Counter Common Misconceptions About Eyewitness Identification That Jurors Were Likely To Apply To Santiago's Identification Testimony . . . | 924 |
| a. | <i>Juror Misconceptions About Eyewitness Identification Applicable To The Present Case</i> | 924 |
| i. | Misconception: Eyewitness Confidence Does Not Correlate With Reliability | 924 |
| ii. | Misconception: Stress Increases Reliability | 925 |
| iii. | Misconception: Accuracy As To Particular Details Increases Reliability | 925 |
| iv. | Misconception: Witness Estimates Of The Durations Of Events Are Accurate | 925 |
| v. | Misconception: Constructing Composite Drawings Increases Reliability | 925 |

| | | | |
|----|-----|---|-----|
| | vi. | Misconception: The Presence Of A Weapon Increases Reliability | 926 |
| 6. | | In the Present Case, Eyewitness Expert Testimony Was Needed To Fully Explain The Flawed Nature Of The Photo Lineup And Its Potential Impact On The Reliability Of Santiago’s Identification Testimony | 926 |
| | a. | <i>The Photo Lineup Should Be Assembled To Reflect The Features Described By The Victim</i> | 926 |
| | b. | <i>The Photos Should Be Similar To Each Other</i> | 926 |
| | c. | <i>Prior To The Photo Lineup The Witness Should Be Expressly Told That The Suspect May Not Be Among The Photos</i> | 926 |
| | d. | <i>Other Instructions Regarding The Suspect Should Be Given</i> | 927 |
| | e. | <i>Impact Of Not Performing A Double-Blind Sequential Lineup</i> | 927 |
| | f. | <i>Impact Of Post-Lineup Reinforcement</i> | 927 |
| 7. | | In the Present Case, Eyewitness Expert Testimony Was Needed To Explain The Potential Impact Of Post Event Factors, In Addition To The Photo Lineup, On The Reliability Of Santiago’s Identification Testimony | 927 |
| | a. | <i>Memory Is Not A Video Tape Machine</i> | 927 |

| | | | |
|-------|----|--|-----|
| | b. | <i>Post-Event Information Affects Reliability</i> | 927 |
| | c. | <i>The Adverse Impact Of New Information On Reliability Increases With The Passage Of Time</i> | 927 |
| | d. | <i>Composite Drawings</i> | 927 |
| | e. | <i>Suggestive Photo Lineup</i> | 927 |
| 8. | | In the Present Case, There Were A Number Of Factors Casting Doubt On Any Conclusion That Santiago’s Identification Testimony Was Reliable And Thus Making The Need For Eyewitness Expert Testimony All The More Compelling | 928 |
| | a. | <i>Deficiencies In The Record Of The Present Case</i> | 928 |
| | b. | <i>Contradictions In The Record</i> | 928 |
| | c. | <i>The Photo Lineup Procedures Were Suggestive</i> | 928 |
| 9. | | The Judge Misstated The Evidence In Ruling On The Motion | 928 |
| 10. | | Conclusion: The Expert Testimony Was Erroneously Excluded | 929 |
| D. | | The Santiago Evidence Was Closely Balanced ... | 929 |
| E. | | The Error Was Federal Constitutional Error | 929 |
| F. | | The Error Was Prejudicial | 931 |
| 3.5.2 | | EXCLUSION OF SANTIAGO’S SUBJECTIVE IMPRESSION OF THE PHOTOS IN THE LINEUP WAS ERROR | 934 |

- A. Exclusion Of Santiago’s Observations About The Lineup Was Error 934
- B. The Error Violated The Federal Constitution 935
- C. The Error Was Prejudicial 936

3.6 SANTIAGO CREDIBILITY/RELIABILITY ISSUES

3.6.1 FAILURE TO PERMIT NEUROPSYCHOLOGICAL AND PSYCHOLOGICAL TESTING AGREED TO BY SANTIAGO WAS ERROR 938

- A. Introduction 938
- B. Proceedings Below 938
- C. A Privilege May Be Waived By The Beneficiary Of The Privilege 944
- D. Denial Of The Right To Obtain And Present Exculpatory Evidence On A Material Issue Is Fundamental Constitutional Error 945
- E. Precluding An Accused From Contacting A Consenting Material Witness Violates The Federal Constitution 947
- F. In The Present Case Santiago’s Testimony Reasonably Indicated That She Would Consent To The Testing Requested By The Defense 948
- G. The Error Was Prejudicial 949

3.6.2 EXCLUSION OF EXPERT TESTIMONY AS TO SANTIAGO’S ABILITY TO REMEMBER THE MATTERS TO WHICH SHE TESTIFIED WAS ERROR 951

- A. Proceedings Below 951

| | | |
|-------|--|-----|
| B. | Constitutional Right To Present Defense Evidence | 951 |
| C. | Domestic Rules Of Exclusion Must Be Balanced Against The Federal Constitutional Rights Of The Accused: Due Process And Right To Present A Defense | 952 |
| D. | Domestic Rules Of Evidence Must Be Balanced Against The Federal Constitutional Rights Of The Accused: The Presumption Of Innocence And Trial By Jury | 954 |
| E. | In The Present Case The Balance Favored Admission Of The Evidence | 955 |
| F. | The Error Violated Lucas' Federal Constitutional Right To Present A Defense | 955 |
| G. | The Error Was Prejudicial | 956 |
| 3.6.3 | IT WAS ERROR TO EXCLUDE EVIDENCE AS TO THE IMPORTANCE OF TESTING IN EVALUATING SANTIAGO'S ABILITY TO REMEMBER | 957 |
| A. | Proceedings Below | 957 |
| B. | A Criminal Defendant Has A Constitutional Right To Present Defense Evidence | 958 |
| C. | Domestic Rule Of Exclusion Must Be Balanced Against Federal Constitutional Right To Present Defense Evidence | 958 |
| D. | Domestic Rule Of Evidence Must Be Balanced Against The Right To Proof Beyond A Reasonable Doubt And Trial By Jury | 958 |
| E. | In The Present Case The Balance Favored Admission Of The Evidence | 958 |

3.6.4 THE JUDGE ERRED IN EXCLUDING EVIDENCE THAT SANTIAGO LEFT A BAR WITH A STRANGER THE NIGHT BEFORE THE ATTACK 960

A. Introduction 960

B. Procedural Background 960

C. Statement Of Facts 961

D. The Evidence Was Admissible 961

E. Exclusion Of The Defense Theory Evidence Violated The State And Federal Constitutions 962

F. The Error Was Prejudicial 964

3.7 ISSUES RELATING TO THE CREDIBILITY OF THE INVESTIGATING DETECTIVES

3.7.1 THE JUDGE ERRONEOUSLY EXCLUDED EVIDENCE THAT THE SANTIAGO HOMICIDE DETECTIVES GAVE FALSE AND/OR MISLEADING TESTIMONY AND BLATANTLY VIOLATED THE SUSPECT’S *MIRANDA* RIGHTS IN ANOTHER INVESTIGATION 967

A. Introduction 967

B. The *Cavanaugh* Case 968

C. Statement Of Facts 970

1. Perjury And Misconduct Of Detectives Henderson And Fullmer In The *Cavanaugh* Case 970

 a. *Overview: The Detectives Committed Serious Misconduct* 970

 b. *Detective Henderson’s Miranda Violations In Cavanaugh* 970

| | | |
|------|---|-----|
| i. | Overview | 970 |
| ii. | <i>Miranda</i> Violation During The Seven Minutes After Cavanaugh Asked For An Attorney | 971 |
| iii. | Miranda Violation By Direct Questioning After Cavanaugh's Statement | 974 |
| c. | <i>Detective Henderson's Misleading Testimony About The Miranda Violation</i> | 975 |
| i. | Seven Minute Hiatus Violation | 975 |
| ii. | Direct Questioning <i>Miranda</i> Violation | 976 |
| d. | <i>Detective Fullmer's False Testimony Concerning Discovery Of The Tape Recorder</i> | 976 |
| i. | Background | 976 |
| ii. | Entry Of Mrs. Cavanaugh's House At 12:30 p.m. | 977 |
| iii. | Fullmer's False Statement That He Could See The Tape Recorder In The Purse When He First Entered | 978 |
| iv. | Fullmer's False Statement That He Moved The Purse And Then Saw The Red Light | 978 |
| v. | Fullmer's Assertion Of The Fifth Amendment At The Internal Affairs Investigation | 979 |

| | | |
|----|---|-----|
| e. | <i>Failure Of The Detectives To Take Adequate Notes In Cavanaugh</i> | 979 |
| 2. | Miranda Violations In The Lucas Case . . . | 980 |
| 3. | <i>Miranda</i> Violations In Cases Besides the Lucas And <i>Cavanaugh</i> Cases | 980 |
| D. | Rulings Below | 981 |
| E. | Specific Acts Of Misconduct By The Homicide Detectives Were Relevant | 982 |
| F. | To Be Admissible, Prior Acts Of Giving Untruthful Or Misleading Testimony Need Not Be Conclusively Proven So Long As Substantial Evidence Of The Prior Act Is Presented | 983 |
| G. | Exclusion Of Evidence Of The Perjury And Misconduct Was An Abuse Of Discretion | 983 |
| 1. | Introduction | 983 |
| 2. | The Credibility Of The Detectives Was A Crucial Factual Issue In Santiago | 984 |
| 3. | Santiago Was Crucial To The Other Counts | 987 |
| 4. | The Prior Acts Of Untruthfulness Were Highly Probative | 987 |
| 5. | Judge Hammes Finding Of Corroboration As To Santiago Improperly Assumed That The Detectives Were Telling The Truth | 988 |
| 6. | The Judge Erroneously Assumed That The Evidence Would Take “Weeks” To Present | 989 |

- H. The Error Violated Lucas’ Federal Constitutional Rights 990
- I. The Error Was Prejudicial 991
- J. Alternatively, The Matter Should Be Remanded For A New In Limine Hearing Regarding The Admissibility Of Santiago’s Identification 993

3.7.2 THE JUDGE ERRONEOUSLY PRECLUDED THE DEFENSE THEORY THAT THE DETECTIVES INTENTIONALLY ASSEMBLED A SUGGESTIVE PHOTO LINEUP 994

- A. Introduction 994
- B. Procedural Background 995
- C. The Defendant’s Constitutional Rights To Present Evidence Supporting The Defense Theory Of The Case 995
- D. Exclusion Of The Defense Theory Evidence Was Prejudicial Error 996

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.1 THE JACOBS CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SANTIAGO, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE JACOBS CRIMES AS EVIDENCE CONNECTING HIM TO THE SANTIAGO INCIDENT 998

- A. Jacobs Should Not Have Been Cross-Admissible With Santiago 998
- B. The Error Was Prejudicial As To Santiago 998

| | | |
|---------|---|------|
| C. | The Error Was Prejudicial As To Jacobs And Swanke | 999 |
| D. | The Error Was Prejudicial As To Penalty | 1000 |
| 3.8.2 | THE SWANKE CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SANTIAGO, AND THUS THE JUDGE ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE SWANKE CRIMES AS EVIDENCE CONNECTING HIM TO THE SANTIAGO INCIDENT | 1001 |
| 3.8.3 | THE STRANG/FISHER CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SANTIAGO, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE STRANG/FISHER CRIMES AS EVIDENCE CONNECTING HIM TO THE SANTIAGO INCIDENT | 1003 |
| 3.8.4 | THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL | 1005 |
| A. | Overview | 1005 |
| 3.8.4.1 | THE PRELIMINARY INSTRUCTIONS GAVE UNDUE AND PREJUDICIAL EMPHASIS TO THE OTHER CRIMES EVIDENCE | 1006 |
| 3.8.4.2 | THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE THE JURORS TO DETERMINE THAT THE DEFENDANT COMMITTED THE OTHER OFFENSE BEFORE CROSS-CONSIDERING IT | 1008 |

| | | |
|---------|---|------|
| 3.8.4.3 | THE INSTRUCTIONS IMPERMISSIBLY ALLOWED THE JURY TO CROSS-CONSIDER THE CHARGES ON THE ISSUE OF IDENTITY WITHOUT MAKING THE PREREQUISITE FINDING THAT THE OTHER OFFENSES SHARED SIGNATURE-LIKE SIMILARITIES | 1010 |
| 3.8.4.4 | THE OTHER CRIMES INSTRUCTION UNCONSTITUTIONALLY FAILED TO PRESENT THE DEFENSE SIDE OF THE ISSUE | 1012 |
| 3.8.4.5 | THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE JUROR UNANIMITY AS TO THE EXISTENCE OF THE REQUISITE CROSS-OFFENSE SIMILARITY NEEDED AS A PREREQUISITE TO CONSIDERATION OF OTHER CRIMES EVIDENCE | 1014 |
| 3.8.4.6 | THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT | 1016 |
| 3.8.5 | LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION... 1018 | |
| 3.8.5.1 | IN DECIDING THE CROSS-ADMISSIBILITY/CONSOLIDATION MOTION THE JUDGE ERRONEOUSLY REFUSED TO CONSIDER THE CONFESSION OF JOHNNY MASSINGALE AND OTHER DEFENSE EVIDENCE | 1018 |

| | | |
|---------|--|------|
| 3.8.5.2 | THE TRIAL JUDGE ERRONEOUSLY FAILED TO CONSIDER EXPERT TESTIMONY REGARDING THE INABILITY OF JURORS TO HEED LIMITING INSTRUCTIONS IN CROSS-ADMISSIBILITY CASES | 1020 |
| 3.8.5.3 | THE JUDGE ERRONEOUSLY FAILED TO RULE ON THE CROSS-ADMISSIBILITY OF EACH OFFENSE INDEPENDENTLY . . | 1021 |
| 3.8.5.4 | BY BOOTSTRAPPING HER FINDINGS THE JUDGE DENIED LUCAS A FAIR AND RELIABLE IN LIMINE DETERMINATION AS TO CROSS-ADMISSIBILITY AND OTHER CRUCIAL EVIDENTIARY ISSUES . . . | 1022 |
| 3.8.5.5 | THE JUDGE ERRONEOUSLY DENIED AN EVIDENTIARY HEARING ON WHETHER THE PROSECUTION’S MOTION TO CONSOLIDATE WAS A VINDICTIVE RESPONSE TO LUCAS’ ATTEMPT TO EXERCISE HIS RIGHT TO A SPEEDY TRIAL | 1024 |

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

| | | |
|-------|--|------|
| 3.9.1 | THE PRELIMINARY GUILT PHASE INSTRUCTIONS TILTED THE FIELD IN FAVOR OF THE PROSECUTION | 1025 |
| A. | Introduction | 1025 |
| B. | Failure To Properly State The Jurors’ Duty | 1026 |
| C. | Failure To Instruct On The Prosecution’s Burden To Prove Guilt Beyond A Reasonable Doubt | 1026 |
| D. | Improper Admonition That Jury Must “Determine The Question Of “Guilt Or Innocence” | 1026 |

| | | |
|-------|--|------|
| E. | Improper Emphasis Of Cross-Admissibility Of Other Crimes In The Preliminary Instructions | 1026 |
| F. | The Prosecution-Oriented Preliminary Instructions Were Likely To Have Influenced The Jurors In Favor Of The Prosecution | 1026 |
| G. | The Preliminary Instructions Were Prejudicial . . | 1026 |
| 3.9.2 | BY ALLOWING THE PROSECUTORS, OVER DEFENSE OBJECTION, TO REFER TO THEMSELVES AS REPRESENTATIVES OF “THE PEOPLE” THE TRIAL JUDGE VIOLATED LUCAS’ STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL | 1028 |
| 3.9.3 | THE JUDGE’S CONSISTENT AND ARBITRARY DENIAL OF REQUESTED PRELIMINARY FINDING INSTRUCTIONS, WHICH WERE MANDATORY UNDER EVIDENCE CODE § 403(c), VIOLATED LUCAS’ DUE PROCESS RIGHTS | 1029 |
| 3.9.4 | THE TERM “EXPERT WITNESS” SHOULD NOT HAVE BEEN USED AT TRIAL OR IN THE JURY INSTRUCTIONS | 1030 |
| 3.9.5 | THE JUDGE IMPROPERLY REJECTED THE DEFENSE REQUEST TO DEFINE THE TERM “INFERENCE” IN THE JURY INSTRUCTIONS | 1031 |
| 3.9.6 | THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO NOT CONSIDER ALL THE EVIDENCE . . | 1032 |
| 3.9.7 | THE JUDGE SHOULD HAVE DELETED THE INSTRUCTION TITLES FROM THE WRITTEN INSTRUCTIONS OR CAUTIONED THE JURY REGARDING USE OF THE TITLES | 1034 |
| 3.9.8 | THE JUDGE IMPROPERLY COERCED THE JURORS BY ADMONISHING THEM THAT THEY WERE EXPECTED TO REACH A JUST VERDICT | 1036 |

| | | |
|--------|---|------|
| 3.9.9 | THE FINAL INSTRUCTIONS WERE CUMULATIVELY DEFICIENT | 1038 |
| A. | Introduction | 1038 |
| B. | The Judge Improperly Framed The Issues In Terms Of Finding Guilt Or Innocence | 1038 |
| C. | The Willfully False Instruction Improperly Failed To Define “Material” | 1038 |
| D. | The “Probability Of Truth” Language In CALJIC 2.21.2 Lessened The Prosecution’s Burden | 1039 |
| E. | The Credibility Of Witness Instruction Was Improperly Limited To Persons Who Testified Under Oath . | 1039 |
| F. | Numerous Instructions Were Improperly Limited To The Testimony Of “Witnesses” | 1039 |
| G. | The Instructions Improperly Failed To Instruct The Jurors Regarding Transcripts Read Into The Record | 1039 |
| H. | The Instructional Errors Were Cumulatively Prejudicial | 1039 |
| 3.9.10 | THE INSTRUCTIONS GIVEN IN THE LUCAS TRIAL WERE NOT SUFFICIENTLY UNDERSTANDABLE TO SATISFY THE 8TH AND 14TH AMENDMENT RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION | 1040 |

3.10 JURY INSTRUCTIONS: BURDEN OF PROOF

| | | |
|----|---|------|
| A. | Introduction | 1042 |
| B. | The Instructions Were Constitutionally Deficient Because They Failed To Adequately Explain And Define The Burden Of Proof | 1044 |

| | | |
|----|---|------|
| C. | The Instructions Were Deficient And Misleading Because They Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence | 1044 |
| D. | The Burden Of Proof Instruction Failed To Adequately Define The Standard Of Proof | 1044 |
| E. | The Judge Erroneously Refused The Defense Request For Instructions Comparing The Burden Of Proof Beyond A Reasonable Doubt With Other Burden | 1045 |
| F. | The Reasonable Doubt Instruction Erroneously Implied That Reasonable Doubt Requires The Jurors To Articulate Reason And Logic For Their Doubt | 1045 |
| G. | The Reasonable Doubt Instruction Unconstitutionally Admonished The Jury That A Possible Doubt Is Not A Reasonable Doubt | 1045 |
| H. | The Judge Erroneously Instructed The Jurors To Take Into Account Moral Considerations In Deciding Guilt | 1046 |
| I. | The Circumstantial Evidence Instructions (CALJIC 2.01 And 2.02) Unconstitutionally Lightened The Prosecution’s Burden Of Proof, And Also Created A Mandatory Conclusive Presumption Of Guilt, Under The Circumstances Of This Particular Case | 1046 |
| J. | The Burden Of Proof Principles Of CALJIC 2.01 Were Unconstitutionally Limited To Circumstantial Evidence | 1047 |

3.11 DELIBERATION ISSUES

| | | |
|--------|---|------|
| 3.11.1 | THE JUDGE VIOLATED STATE LAW AND THE FEDERAL CONSTITUTION BY ALLOWING THE JURORS TO READ THE TRIAL TRANSCRIPTS IN THE JURY ROOM | 1048 |
|--------|---|------|

| | | |
|--------|--|------|
| 3.11.2 | ALLOWING THE JURY TO READ BACK TESTIMONY TO THEMSELVES IN THE JURY ROOM VIOLATED LUCAS' PUBLIC TRIAL RIGHTS | 1050 |
| 3.11.3 | THE JUDGE ERRED IN ALLOWING THE JURY TO READ PORTIONS OF THE TESTIMONY DURING DELIBERATIONS WITHOUT ANY INSTRUCTIONS AS TO THE PROPER USE OF THE TRANSCRIPTS | 1052 |
| 3.11.4 | THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON | 1054 |

3.12 CUMULATIVE ERROR: SANTIAGO

| | | |
|----|--|------|
| A. | Introduction | 1056 |
| B. | The Errors Cumulatively Violated The Federal Constitution | 1056 |
| C. | The Errors Were Cumulatively Prejudicial | 1057 |
| D. | The Santiago Errors Were Prejudicial As To The Jacobs And Swanke Convictions | 1058 |
| E. | The Swanke, Jacobs And Strang/Fisher Errors Were Prejudicial As To Santiago | 1058 |
| F. | The Santiago Errors Were Prejudicial As To The Penalty Determinations | 1059 |

VOLUME 4 - SWANKE CASE

| | | |
|------------|---------------------------------------|-------------|
| 4.1 | SWANKE STATEMENT OF CASE | 1061 |
|------------|---------------------------------------|-------------|

| | | |
|------------|---|------|
| 4.2 | SWANKE STATEMENT OF FACTS | 1068 |
| A. | Prosecution Evidence | 1068 |
| 1. | Background | 1068 |
| a. | <i>Alcohol And Drug Use By Frank Clark And David Lucas</i> | 1068 |
| b. | <i>Activities Of Frank Clark And David Lucas On November 19, 1984</i> | 1069 |
| c. | <i>Activities Of Anne Swanke</i> | 1071 |
| d. | <i>The Abduction Of Anne Swanke</i> | 1071 |
| e. | <i>Post-Abduction Events</i> | 1074 |
| i. | Scratches On Lucas' Face | 1074 |
| ii. | Leyva's Contact With The Police | 1077 |
| iii. | Discovery Of Anne Swanke's Body | 1077 |
| 2. | Analysis And Description Of The Crime Scene And Other Physical Evidence | 1078 |
| 3. | Injuries To The Victim And Autopsy Report | 1081 |
| 4. | Lucas' Arrest, Search Of His Person And House | 1085 |
| 5. | Shannon Lucas Interview | 1086 |
| 6. | Search Of Lucas' Truck | 1087 |
| 7. | Search Of The Carpet Maintenance Business | 1088 |
| 8. | Serological Evidence | 1088 |

| | | |
|----|---|------|
| a. | <i>ABO Testing By San Diego Sheriff's Department</i> | 1088 |
| | Chart: SWANKE BLOOD EVIDENCE - SAN DIEGO SHERIFF'S OFFICE | 1091 |
| b. | <i>Electrophoretic Testing By San Diego County Sheriff's Department</i> | 1090 |
| c. | <i>Testing By Serological Research Institute (SERI)</i> | 1092 |
| | i. Evidence Sent To SERI | 1092 |
| | ii. The Extra Fingernail | 1093 |
| | iii. Brian Wraxall's Qualifications ... | 1093 |
| | iv. Standards And Procedures At SERI | 1094 |
| | v. Testing Procedures Used By SERI In The Present Case | 1095 |
| | vi. SERI's Testing Of Swanke's, Santiago's, Shannon's and Lucas' Blood | 1099 |
| | vii. SERI's ABO Testing Of The Sheepskin | 1100 |
| | viii. SERI's Genetic Marker Testing Of The Sheepskin | 1101 |
| | ix. SERI's Testing Of The Fingernails | 1102 |
| | x. Summary Of SERI's Conclusions . | 1106 |
| | Chart: SWANKE BLOOD EVIDENCE - SERI (GROUP I-III) | 1107 |

| | | |
|----|---|------|
| | Chart: SWANKE BLOOD EVIDENCE - SERI (Gm and Km) | 1110 |
| | xi. Wraxall's Civil Suit | 1110 |
| B. | Defense Evidence | 1112 |
| | 1. Background | 1112 |
| | a. <i>Drug And Alcohol Use By Frank And Cecelia Clark</i> | 1112 |
| | b. <i>Scratches On Lucas' Face</i> | 1113 |
| | c. <i>Other Persons In The Vicinity Of Where The Body Was Found</i> | 1114 |
| | 2. Defense Testimony Regarding The Physical Evidence | 1114 |
| | a. <i>Vehicle Description At The Kidnap Site</i> .. | 1114 |
| | b. <i>Fingerprint Evidence</i> | 1114 |
| | c. <i>Dog Chain</i> | 1115 |
| | d. <i>Hair Evidence</i> | 1116 |
| | e. <i>Serological Evidence</i> | 1118 |
| | i. ABO Testing Of Sheepskin Stain On Passenger Seat | 1118 |
| | 1. San Diego County Lab | 1118 |
| | 2. ABO Testing By SERI | 1118 |
| | ii. Electrophoretic Testing By SERI | 1119 |

| | | | |
|-----|------|--|------|
| | iii. | Gm/Km Testing By SERI | 1122 |
| | iv. | Wraxall's Character | 1123 |
| | C. | Other Offenses Evidence | 1123 |
| 4.3 | | THE PROSECUTION FAILED TO MEET ITS <i>KELLY</i> BURDEN TO PROVE THE ADMISSIBILITY OF THE BLOOD ANALYSIS EVIDENCE | 1124 |
| | A. | Introduction | 1124 |
| | B. | Proceedings Below | 1126 |
| | C. | Factual Overview | 1127 |
| | | 1. Introduction | 1127 |
| | | 2. SDSO Testing | 1127 |
| | | 3. SERI Testing | 1127 |
| | D. | Legal Principles | 1128 |
| | | 1. <i>Kelly</i> Prong 1 | 1128 |
| | | 2. <i>Kelly</i> Prong 3 | 1129 |
| | E. | The ABO Testing Evidence Failed To Satisfy Prong 3 Of <i>Kelly</i> | 1130 |
| | | 1. Applicability of Prong 3 | 1130 |
| | | 2. SDSO Testing For ABO | 1131 |
| | | 3. SERI Testing For ABO | 1131 |
| | F. | The SERI Electrophoresis Testing Failed Prong 3 Of <i>Kelly</i> Because It Reported Matches When The Readers Disagreed | 1132 |

| | | |
|----|---|------|
| G. | The Failure To Comply With The Double-Reader Agreement Requirement Was Not Excused By Photographing The Results | 1134 |
| 1. | Introduction | 1134 |
| 2. | There Was No Substantial Evidence Of A Community Consensus That Photography Eliminated The Double Agreement Requirement | 1134 |
| 3. | Even If Photos Could Supplant Double-Reader Agreement, It Was Not Proven That SERI Used A Reliable Scientific Procedure To Obtain The Photos | 1136 |
| H. | Failure Of SERI To Follow Its Own Electrophoresis Protocol Violated Prong 3 | 1137 |
| I. | The SERI Electrophoretic Testing Should Have Been Excluded Under <i>Kelly</i> , Prong 3, As Subjective And Unreliable Due To Lack Of “Match Criteria” And Other Objectively Verifiable Scientific Standards | 1138 |
| 1. | The Legal And Scientific Community Has Rejected Expert Conclusions Which Are Based On The Subjective Experience Of The Expert Rather Than Objective Standards And Criteria | 1138 |
| 2. | The Conclusions In The Present Case Were Substantially Founded On The Subjective Experience Of Brian Wraxall Rather Than Objective Criteria | 1139 |
| 3. | Subjective Expert Opinions Should Be Excluded Under <i>Kelly</i> | 1140 |
| J. | The Wraxall Gm and Km Electrophoresis Results Should Have Been Excluded Under Prong 1 And Prong 3 Of <i>Kelly</i> .. | 1140 |
| 1. | The Wraxall Method Was Not Being Used By Any Other Lab And Therefore Failed To Satisfy Prong 1 Of <i>Kelly</i> | 1140 |

| | | | |
|-----|----|---|------|
| | 2. | SERI’s Gm/Km Methodology Failed Prong 3 Of <i>Kelly</i> Because Unstained Controls Were Not Used For The Fingernails | 1141 |
| | 3. | The SERI Gm/Km Testing Failed To Satisfy Prong 3 Of <i>Kelly</i> Because Confirming Photos Were Not Taken | 1142 |
| K. | | The <i>Kelly</i> Errors Violated The Federal Constitution ... | 1143 |
| | 1. | Subjective Expert Opinions Should Be Excluded Under The Federal Constitution | 1143 |
| | 2. | The Erroneous Failure To Exclude Expert Opinion Testimony Under <i>Kelly</i> Arbitrarily Denied Lucas’ State Created Rights | 1143 |
| L. | | The Error Was Prejudicial And, Therefore, Lucas’ Convictions And Sentence Of Death Should Be Reversed | 1144 |
| 4.4 | | <i>KELLY VIOLATES THE FEDERAL CONSTITUTION TO THE EXTENT THAT THE JUDGE HAS NO DISCRETION TO CONSIDER IMPORTANT FACTORS RELEVANT TO RELIABILITY</i> | 1146 |
| | A. | Introduction | 1146 |
| | B. | The <i>Frye</i> Test Is Unconstitutional Because It Undermines The Trial Judge’s Gate Keeping Authority And Bars Relevant Evidence At The In Limine Hearing | 1147 |
| | C. | Admission Of Unreliable Evidence Violates The Federal Constitution | 1149 |
| | D. | The Error Was Prejudicial | 1152 |
| 4.5 | | CONDUCTING ELECTROPHORETIC TESTING WITHOUT NOTIFICATION OF DEFENSE COUNSEL VIOLATED LUCAS’ CONSTITUTIONAL RIGHTS | 1153 |

| | | |
|-------|--|-------------|
| A. | Proceedings Below | 1153 |
| 1. | Overview | 1153 |
| 2. | Electrophoretic Blood Testing Was Conducted .. | 1153 |
| 3. | The Electrophoretic Analysis Was Subjective ... | 1154 |
| 4. | The Electrophoretic Gels Were Not Preserved .. | 1154 |
| 5. | Photography Did Not Adequately Preserve The Results | 1155 |
| B. | The Constitutional Rights To Counsel And Confrontation Require The Prosecution To Notify Defense Counsel Before Conducting Blood Testing Which Cannot Be Preserved | 1156 |
| C. | The Judgment Should Be Reversed | 1158 |
| 4.6 | SWANKE: NON-KELLY EVIDENTIARY ISSUES | |
| 4.6.1 | THE JUDGE UNDERMINED THE DEFENSE THEORY OF THIRD PARTY GUILT BY EXCLUDING EVIDENCE THAT ANNE SWANKE WAS AFRAID OF HER FORMER BOYFRIEND, JIM CAPASSO, AND THAT CAPASSO ACTED SUSPICIOUSLY AND FURTIVELY AFTER SWANKE'S DISAPPEARANCE | 1160 |
| A. | Proceedings Below | 1160 |
| B. | The Error Violated State Law And The Federal Constitution | 1161 |
| C. | The Error Was Prejudicial | 1163 |
| 4.6.2 | ADMISSION OF PROSECUTION EVIDENCE: SHANNON LUCAS STATEMENTS TO THE POLICE IDENTIFYING A DOG CHAIN | 1165 |

| | | |
|----|--|------|
| A. | Proceedings Below | 1165 |
| B. | The Judge’s Original Ruling Denied Admission Of Shannon’s Statements | 1167 |
| C. | The Judge Reversed Her Decision And Ruled The Statements Admissible | 1168 |
| D. | Shannon Lucas’ Statements Were Not An Excited Utterance Under The Hearsay Rule | 1169 |
| 1. | The Judge Erroneously Ruled That Seeing The Dog Chain Was An “Exciting Event” | 1169 |
| 2. | Shannon’s Statement About The Dog Chain Was An Inadmissible Hearsay Opinion | 1169 |
| 3. | Admission Of Shannon’s Hearsay Statements Violated David Lucas’ Confrontation Rights | 1171 |
| 4. | Shannon’s Statements Should Have Been Excluded Under The Marital Privilege | 1173 |
| 5. | Admission Of The Entire Tape Under Evidence Code § 356 Did Not Justify The Confrontation Violation . | 1175 |
| 6. | The Statements Should Have Been Excluded Under Evidence Code § 352 | 1176 |
| 7. | The Error Violated Lucas’ Federal Constitutional Rights | 1177 |
| 8. | The Error Was Prejudicial | 1177 |

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.1 THE JACOBS CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SWANKE, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE JACOBS CRIMES AS EVIDENCE CONNECTING HIM TO THE SWANKE MURDER 1179

A. Jacobs Should Not Have Been Cross-Admissible With Swanke 1179

B. The Error Was Prejudicial As To Swanke 1179

C. The Error Was Prejudicial As To Jacobs And Santiago 1180

D. The Error Was Prejudicial As To Penalty 1180

4.7.2 THE SANTIAGO CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SWANKE, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE SANTIAGO CRIMES AS EVIDENCE CONNECTING HIM TO THE SWANKE INCIDENT 1182

4.7.3 THE STRANG/FISHER CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SWANKE, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE STRANG/FISHER CRIMES AS EVIDENCE CONNECTING HIM TO THE SWANKE MURDER .. 1184

4.7.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL 1186

| | | |
|---------|---|------|
| 4.7.4.1 | THE PRELIMINARY INSTRUCTIONS GAVE UNDUE AND PREJUDICIAL EMPHASIS TO THE OTHER CRIMES EVIDENCE | 1186 |
| 4.7.4.2 | THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE THE JURORS TO DETERMINE THAT THE DEFENDANT COMMITTED THE OTHER OFFENSE BEFORE CROSS-CONSIDERING IT | 1188 |
| 4.7.4.3 | THE INSTRUCTIONS IMPERMISSIBLY ALLOWED THE JURY TO CROSS-CONSIDER THE CHARGES ON THE ISSUE OF IDENTITY WITHOUT MAKING THE PREREQUISITE FINDING THAT THE OTHER OFFENSES SHARED SIGNATURE-LIKE SIMILARITIES | 1190 |
| 4.7.4.4 | THE OTHER CRIMES INSTRUCTION UNCONSTITUTIONALLY FAILED TO PRESENT THE DEFENSE SIDE OF THE ISSUE | 1192 |
| 4.7.4.5 | THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE JUROR UNANIMITY AS TO THE EXISTENCE OF THE REQUISITE CROSS-OFFENSE SIMILARITY NEEDED AS A PREREQUISITE TO CONSIDERATION OF OTHER CRIMES EVIDENCE | 1194 |
| 4.7.4.6 | THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT | 1196 |
| 4.7.5 | LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION . . | 1198 |

| | | |
|---------|--|------|
| 4.7.5.1 | THE JUDGE ERRONEOUSLY REFUSED TO CONSIDER THE CONFESSION OF JOHNNY MASSINGALE AND OTHER DEFENSE EVIDENCE IN DECIDING THE CROSS-ADMISSIBILITY/CONSOLIDATION MOTION | 1198 |
| 4.7.5.2 | THE TRIAL JUDGE ERRONEOUSLY FAILED TO CONSIDER EXPERT TESTIMONY REGARDING THE INABILITY OF JURORS TO HEED LIMITING INSTRUCTIONS IN CROSS-ADMISSIBILITY CASES | 1200 |
| 4.7.5.3 | THE JUDGE ERRONEOUSLY FAILED TO RULE ON THE CROSS-ADMISSIBILITY OF EACH OFFENSE INDEPENDENTLY ... | 1201 |
| 4.7.5.4 | BY BOOTSTRAPPING HER FINDINGS THE JUDGE DENIED LUCAS A FAIR AND RELIABLE IN LIMINE DETERMINATION AS TO CROSS-ADMISSIBILITY AND OTHER CRUCIAL EVIDENTIARY ISSUES | 1202 |
| 4.7.5.5 | THE JUDGE ERRONEOUSLY DENIED AN EVIDENTIARY HEARING ON WHETHER THE PROSECUTION'S MOTION TO CONSOLIDATE WAS A VINDICTIVE RESPONSE TO LUCAS' ATTEMPT TO EXERCISE HIS RIGHT TO A SPEEDY TRIAL | 1204 |

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

| | | |
|-------|---|------|
| 4.8.1 | THE PRELIMINARY GUILT PHASE INSTRUCTIONS TILTED THE FIELD IN FAVOR OF THE PROSECUTION | 1206 |
| A. | Introduction | 1206 |
| B. | Failure To Properly State The Jurors' Duty | 1207 |

| | | |
|-------|--|------|
| C. | Failure To Instruct On The Prosecution’s Burden To Prove Guilt Beyond A Reasonable Doubt | 1207 |
| D. | Improper Admonition That Jury Must Determine The Question Of “Guilt Or Innocence” | 1207 |
| E. | Improper Emphasis Of Cross-Admissibility Of Other Crimes In The Preliminary Instructions | 1207 |
| F. | The Prosecution-Oriented Preliminary Instructions Were Likely To Have Influenced The Jurors In Favor Of The Prosecution | 1207 |
| G. | The Preliminary Instructions Were Prejudicial | 1207 |
| 4.8.2 | BY ALLOWING THE PROSECUTORS, OVER DEFENSE OBJECTION, TO REFER TO THEMSELVES AS REPRESENTATIVES OF “THE PEOPLE” THE TRIAL JUDGE VIOLATED LUCAS’ STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL | 1209 |
| 4.8.3 | THE JUDGE’S CONSISTENT AND ARBITRARY DENIAL OF REQUESTED PRELIMINARY FINDING INSTRUCTIONS, WHICH WERE MANDATORY UNDER EVIDENCE CODE § 403(c), VIOLATED LUCAS’ DUE PROCESS RIGHTS | 1211 |
| 4.8.4 | THE TERM “EXPERT WITNESS” SHOULD NOT HAVE BEEN USED AT TRIAL OR IN THE JURY INSTRUCTIONS | 1212 |
| 4.8.5 | THE JUDGE IMPROPERLY REJECTED THE DEFENSE REQUEST TO DEFINE THE TERM “INFERENCE” IN THE JURY INSTRUCTIONS | 1213 |
| 4.8.6 | THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY NOT TO CONSIDER ALL THE EVIDENCE | 1214 |

| | | |
|--------|--|------|
| 4.8.7 | THE JUDGE ERRONEOUSLY DENIED THE DEFENSE REQUEST TO SPECIFY WHICH OPINION TESTIMONY WAS CIRCUMSTANTIAL EVIDENCE | 1215 |
| 4.8.8 | THE JUDGE SHOULD HAVE DELETED THE INSTRUCTION TITLES FROM THE WRITTEN INSTRUCTIONS OR CAUTIONED THE JURY REGARDING USE OF THE TITLES | 1216 |
| 4.8.9 | THE JUDGE IMPROPERLY COERCED THE JURORS BY ADMONISHING THEM THAT THEY WERE EXPECTED TO REACH A JUST VERDICT | 1218 |
| 4.8.10 | THE FINAL INSTRUCTIONS WERE CUMULATIVELY DEFICIENT | 1219 |
| A. | Introduction | 1219 |
| B. | The Judge Improperly Framed The Issues In Terms Of Finding Guilt Or Innocence | 1219 |
| C. | The Willfully False Instruction Improperly Failed To Define “Material” | 1220 |
| D. | The “Probability Of Truth” Language In CALJIC 2.21.2 Lessened The Prosecution’s Burden | 1220 |
| E. | The Credibility Of Witness Instruction Was Improperly Limited To Persons Who Testified Under Oath . . . | 1220 |
| F. | Numerous Instructions Were Improperly Limited To The Testimony Of “Witnesses” | 1220 |
| G. | The Instructions Improperly Failed To Instruct The Jurors Regarding Transcripts Read Into The Record | 1220 |
| H. | The Instructional Errors Were Cumulatively Prejudicial | 1220 |

| | | |
|--------|---|------|
| 4.8.11 | THE INSTRUCTIONS GIVEN IN THE LUCAS TRIAL WERE NOT SUFFICIENTLY UNDERSTANDABLE TO SATISFY THE 8TH AND 14TH AMENDMENT RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION | 1221 |
| 4.8.12 | THE JUDGE FAILED TO FULLY AND CORRECTLY INSTRUCT ON THE DEFENSE THEORY OF THIRD PARTY GUILT | 1223 |
| A. | Introduction | 1223 |
| B. | Procedural Background | 1224 |
| C. | Legal Necessity To Correctly Relate The Third Party Guilt Theory To The Presumption Of Innocence | 1224 |
| D. | The Third Party Suspect Instruction Improperly Imposed The Burden On The Defense To “Raise” A Reasonable Doubt | 1224 |
| E. | The Error Violated Lucas’ Federal Constitutional Rights | 1224 |
| F. | The Errors Were Prejudicial | 1224 |

4.9 JURY INSTRUCTIONS: BURDEN OF PROOF

| | | |
|----|---|------|
| A. | Introduction | 1226 |
| B. | The Instructions Were Constitutionally Deficient Because They Failed To Adequately Explain And Define The Burden Of Proof | 1228 |
| C. | The Instructions Were Deficient And Misleading Because They Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence | 1228 |
| D. | The Burden Of Proof Instruction Failed To Adequately Define The Standard Of Proof | 1228 |

| | | |
|----|---|------|
| E. | The Judge Erroneously Refused The Defense Request For Instructions Comparing The Burden Of Proof Beyond A Reasonable Doubt With Other Burden | 1229 |
| F. | The Reasonable Doubt Instruction Erroneously Implied That Reasonable Doubt Requires The Jurors To Articulate Reason And Logic For Their Doubt | 1229 |
| G. | The Reasonable Doubt Instruction Unconstitutionally Admonished The Jury That A Possible Doubt Is Not A Reasonable Doubt | 1229 |
| H. | The Judge Erroneously Instructed The Jurors To Take Into Account Moral Considerations In Deciding Guilt | 1230 |
| I. | The Circumstantial Evidence Instructions (CALJIC 2.01 And 2.02) Unconstitutionally Lightened The Prosecution’s Burden Of Proof, And Also Created A Mandatory Conclusive Presumption Of Guilt, Under The Circumstances Of This Particular Case | 1230 |
| J. | The Burden Of Proof Principles Of CALJIC 2.01 Were Unconstitutionally Limited To Circumstantial Evidence . . | 1230 |

4.10 DELIBERATION ISSUES

| | | |
|--------|--|------|
| 4.10.1 | THE JUDGE VIOLATED STATE LAW AND THE FEDERAL CONSTITUTION BY ALLOWING THE JURORS TO READ THE TRIAL TRANSCRIPTS IN THE JURY ROOM . . | 1232 |
| 4.10.2 | ALLOWING THE JURY TO READ BACK TESTIMONY TO THEMSELVES IN THE JURY ROOM VIOLATED LUCAS’ PUBLIC TRIAL RIGHTS | 1234 |
| 4.10.3 | THE JUDGE ERRED IN ALLOWING THE JURY TO READ PORTIONS OF THE TESTIMONY DURING DELIBERATIONS WITHOUT ANY INSTRUCTIONS AS TO THE PROPER USE OF THE TRANSCRIPTS | 1236 |

| | | |
|-------------|--|-------------|
| 4.10.4 | THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON | 1238 |
| 4.11 | CUMULATIVE ERROR: SWANKE | 1240 |
| A. | Introduction | 1240 |
| B. | The Errors Cumulatively Violated The Federal Constitution | 1240 |
| C. | The Errors Were Cumulatively Prejudicial | 1241 |
| D. | The Swanke Errors Were Prejudicial As To The Jacobs And Santiago Convictions | 1242 |
| E. | The Santiago, Jacobs And Strang/Fisher Errors Were Prejudicial As To Swanke | 1242 |
| F. | The Swanke Errors Were Prejudicial As To The Penalty Determinations | 1243 |

VOLUME 5 - GARCIA AND STRANG/FISHER CASES

5.1 GARCIA CASE

| | | |
|--------------|---|-------------|
| 5.1.1 | GARCIA CASE: STATEMENT OF CASE | 1245 |
| 5.1.2 | THE GARCIA CASE: STATEMENT OF FACTS ... | 1248 |
| A. | Prosecution Evidence | 1248 |
| 1. | Activities Of The Defendant, Victim And Others On Or About December 8, 1981 | 1248 |
| a. | <i>Whether Lucas Was Looking For An Apartment</i> | <i>1248</i> |
| b. | <i>Use Of Alcohol And Marijuana By Frank Clark And David Lucas</i> | <i>1249</i> |

| | | |
|----|--|------|
| c. | <i>Whether Lucas Worked On December 8, 1981</i> | 1250 |
| d. | <i>Annette Goff And William Greene Put Their House On The Market</i> | 1250 |
| e. | <i>The Stapletons</i> | 1251 |
| f. | <i>Annette Goff's Activities In The House Prior To The Murder</i> | 1253 |
| g. | <i>Telephone Calls Among Goff, Greene And Garcia On December 8, 1981</i> | 1253 |
| h. | <i>Discovery Of Garcia's Body</i> | 1255 |
| i. | <i>Investigation Of William And Richard Greene</i> | 1257 |
| 2. | Description Of The Crime Scene And Physical Evidence | 1258 |
| 3. | Injuries To The Victim And Autopsy Report | 1261 |
| 4. | Analysis Of The Physical Evidence | 1263 |
| a. | <i>Hair Evidence</i> | 1263 |
| b. | <i>Blood And Fingernail Evidence</i> | 1263 |
| c. | <i>Fingerprints</i> | 1263 |
| d. | <i>Knife Comparison Evidence</i> | 1263 |
| e. | <i>Summary Of Physical Evidence</i> | 1264 |
| 5. | Events Subsequent To December 8, 1981 | 1264 |
| a. | <i>William Greene Evidence</i> | 1264 |
| b. | <i>Stapleton Identification Of Lucas</i> | 1265 |

| | | |
|----|--|------|
| B. | Defense Evidence | 1266 |
| 1. | Alibi Evidence | 1266 |
| 2. | Lucas Moved To A New Residence In November, 1981 | 1268 |
| 3. | Evidence That Bruce Bartley Left The Marijuana Bud | 1269 |
| 4. | Comparison Of Knife Stain On Garcia's Pants With Different Knives | 1270 |
| C. | Other Offenses Evidence | 1271 |
| | CHART 5.1.2(C)(1) -- Comparison Of Garcia To Santiago | 1271 |
| | CHART 5.1.2(C)(2) -- Comparison Of Garcia To Strang | 1273 |
| | CHART 5.1.2(C)(3) -- Comparison Of Garcia To Swanke | 1275 |

5.2 STRANG-FISHER CASE

| | | |
|-------|--|------|
| 5.2.1 | STRANG-FISHER CASE: STATEMENT OF CASE | 1277 |
| 5.2.2 | THE STRANG/FISHER CASE: STATEMENT OF FACTS | 1280 |
| A. | Prosecution Evidence | 1280 |
| 1. | Rhonda Strang's Contact With David Lucas And Frank Clark | 1280 |
| 2. | Rhonda's Fear Of Her Husband, Robert, Because Of His Involvement With Drugs | 1281 |

| | | |
|----|--|------|
| 3. | Lucas' Absenteeism At Work | 1282 |
| 4. | Lucas' Absence From Descanso | 1282 |
| 5. | The Events Of October 23, 1984 | 1284 |
| 6. | Analysis And Description Of The Crime Scene And Other Physical Evidence | 1285 |
| 7. | Robert Strang's Work Routine | 1289 |
| 8. | Autopsies Of The Victims | 1290 |
| | <i>a. Blood Samples</i> | 1290 |
| | <i>b. Amber Fisher Autopsy</i> | 1290 |
| | <i>c. Rhonda Strang Autopsy</i> | 1292 |
| 9. | Lucas' Arrest | 1294 |
| B. | Defense Evidence | 1294 |
| | 1. Robert's Prior Assaults Of Rhonda | 1294 |
| | <i>a. Ronnie Christensen's Observations</i> | 1294 |
| | <i>b. The July 8, 1984 Altercation At The Strang House</i> | 1295 |
| | <i>c. Richard La Follette's Observations</i> | 1297 |
| | <i>d. Paul Fortin's Observations</i> | 1297 |
| | <i>e. Peggy Shelton's Observations</i> | 1298 |
| | <i>f. Robert Pulled A Gun On Rhonda In August, 1984</i> | 1298 |
| | <i>g. Observations Of Ron Adler</i> | 1299 |

| | | |
|-----|--|------|
| h. | <i>Observations Of Arthur Garcia</i> | 1299 |
| i. | <i>Arguments Between Rhonda And Robert The Night Before The Murder</i> | 1299 |
| 2. | Robert's Drug Use | 1299 |
| 3. | Rhonda's Fear Of Robert And His Associates | 1302 |
| 4. | Robert's Fetish For Knives | 1305 |
| 5. | Whether Rhonda Strang Always Locked Her Doors | 1305 |
| 6. | Affair Between Michael O'Brien And Rhonda Strang | 1305 |
| 7. | Robert Strang's Sexual Advances Toward Peggy Shelton | 1306 |
| 8. | Direction Of The Wounds Was Right To Left | 1306 |
| 9. | Trip To Disneyland | 1306 |
| 10. | Failure Of Robert Strang To Show Emotion At Rhonda's Funeral | 1307 |
| C. | Other Offenses Evidence | 1307 |
| | CHART 5.2.2(C)(1) -- Comparison Of Strang To Swanke | 1308 |

5.2.3 STRANG/FISHER: THIRD PARTY GUILT ISSUES

| | | |
|---------|---|------|
| 5.2.3.1 | THE JUDGE FAILED TO FULLY AND CORRECTLY INSTRUCT ON THE DEFENSE THEORY OF THIRD PARTY GUILT . . . | 1310 |
| A. | Introduction | 1310 |

- B. Procedural Background 1311
- C. Legal Necessity To Correctly Relate The Third Party Guilt Theory To The Presumption Of Innocence 1311
- D. The Third Party Suspect Instruction Improperly Imposed The Burden On The Defense To “Raise” A Reasonable Doubt 1311
- E. The Error Violated Lucas’ Federal Constitutional Rights 1311
- F. The Errors Were Prejudicial As To Guilt .. 1311
- G. The Error Was Prejudicial As To Penalty .. 1313

5.2.4 STRANG/FISHER: CROSS-ADMISSIBILITY ISSUES

- 5.2.4.1 THE STRANG/FISHER CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN THE OTHER CHARGES, AND ACCORDINGLY THE JUDGE ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE STRANG/FISHER CRIMES AS EVIDENCE CONNECTING HIM TO THE OTHER CHARGES 1314

5.2.5 STRANG/FISHER CROSS-ADMISSIBILITY ISSUES: INSTRUCTIONS – OVERVIEW 1316

- 5.2.5.1 THE PRELIMINARY INSTRUCTIONS GAVE UNDUE AND PREJUDICIAL EMPHASIS TO THE OTHER CRIMES EVIDENCE 1317

| | |
|---------|--|
| 5.2.5.2 | THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE THE JURORS TO DETERMINE THAT THE DEFENDANT COMMITTED THE OTHER OFFENSE BEFORE CROSS-CONSIDERING IT 1319 |
| 5.2.5.3 | THE INSTRUCTIONS IMPERMISSIBLY ALLOWED THE JURY TO CROSS-CONSIDER THE CHARGES ON THE ISSUE OF IDENTITY WITHOUT MAKING THE PREREQUISITE FINDING THAT THE OTHER OFFENSES SHARED SIGNATURE-LIKE SIMILARITIES 1321 |
| 5.2.5.4 | THE OTHER CRIMES INSTRUCTION UNCONSTITUTIONALLY FAILED TO PRESENT THE DEFENSE SIDE OF THE ISSUE 1323 |
| 5.2.5.5 | THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE JUROR UNANIMITY AS TO THE EXISTENCE OF THE REQUISITE CROSS-OFFENSE SIMILARITY NEEDED AS A PREREQUISITE TO CONSIDERATION OF OTHER CRIMES EVIDENCE 1325 |
| 5.2.5.6 | THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT 1327 |

5.2.6 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

- 5.2.6.1 THE JUDGE ERRONEOUSLY REFUSED TO CONSIDER THE CONFESSION OF JOHNNY MASSINGALE AND OTHER DEFENSE EVIDENCE IN DECIDING THE CROSS-ADMISSIBILITY/CONSOLIDATION MOTION 1329
- 5.2.6.2 THE TRIAL JUDGE ERRONEOUSLY FAILED TO CONSIDER EXPERT TESTIMONY REGARDING THE INABILITY OF JURORS TO HEED LIMITING INSTRUCTIONS IN CROSS-ADMISSIBILITY CASES 1332
- 5.2.6.3 THE JUDGE ERRONEOUSLY FAILED TO RULE ON THE CROSS-ADMISSIBILITY OF EACH OFFENSE INDEPENDENTLY ... 1334
- 5.2.6.4 BY BOOTSTRAPPING HER FINDINGS THE JUDGE DENIED LUCAS A FAIR AND RELIABLE IN LIMINE DETERMINATION AS TO CROSS-ADMISSIBILITY AND OTHER CRUCIAL EVIDENTIARY ISSUES 1336
- 5.2.6.5 THE JUDGE ERRONEOUSLY DENIED AN EVIDENTIARY HEARING ON WHETHER THE PROSECUTION'S MOTION TO CONSOLIDATE WAS A VINDICTIVE RESPONSE TO LUCAS' ATTEMPT TO EXERCISE HIS RIGHT TO A SPEEDY TRIAL 1338

5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

- 5.2.7.1 THE PRELIMINARY GUILT PHASE INSTRUCTIONS TILTED THE FIELD IN FAVOR OF THE PROSECUTION 1340

- A. Introduction 1340
- B. Failure To Properly State The Jurors’
Duty 1341
- C. Failure To Instruct On The Prosecution’s
Burden To Prove Guilt Beyond A
Reasonable Doubt 1341
- D. Improper Admonition That Jury Must
Determine The Question Of “Guilt Or
Innocence” 1341
- E. Improper Emphasis Of Cross-Admissibility
Of Other Crimes In The Preliminary
Instructions 1341
- F. The Prosecution-Oriented Preliminary
Instructions Were Likely To Have
Influenced The Jurors In Favor Of The
Prosecution 1341
- G. The Preliminary Instructions Were
Prejudicial 1341

5.2.7.2 BY ALLOWING THE PROSECUTORS, OVER
DEFENSE OBJECTION, TO REFER TO
THEMSELVES AS REPRESENTATIVES OF
“THE PEOPLE” THE TRIAL JUDGE
VIOLATED LUCAS’ STATE AND FEDERAL
CONSTITUTIONAL RIGHTS TO DUE
PROCESS AND A FAIR TRIAL 1343

5.2.7.3 THE JUDGE’S CONSISTENT AND
ARBITRARY DENIAL OF REQUESTED
PRELIMINARY FINDING INSTRUCTIONS,
WHICH WERE MANDATORY UNDER
EVIDENCE CODE § 403(c), VIOLATED
LUCAS’ DUE PROCESS RIGHTS 1345

| | | |
|---------|--|------|
| 5.2.7.4 | THE TERM “EXPERT WITNESS” SHOULD NOT HAVE BEEN USED AT TRIAL OR IN THE JURY INSTRUCTIONS | 1347 |
| 5.2.7.5 | THE JUDGE IMPROPERLY REJECTED THE DEFENSE REQUEST TO DEFINE THE TERM “INFERENCE” IN THE JURY INSTRUCTIONS | 1349 |
| 5.2.7.6 | THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY NOT TO CONSIDER ALL THE EVIDENCE | 1351 |
| 5.2.7.7 | THE JUDGE SHOULD HAVE DELETED THE INSTRUCTION TITLES FROM THE WRITTEN INSTRUCTIONS OR CAUTIONED THE JURY REGARDING USE OF THE TITLES | 1352 |
| 5.2.7.8 | THE JUDGE IMPROPERLY COERCED THE JURORS BY ADMONISHING THEM THAT THEY WERE EXPECTED TO REACH A JUST VERDICT | 1354 |
| 5.2.7.9 | THE FINAL INSTRUCTIONS WERE CUMULATIVELY DEFICIENT | 1355 |
| | A. Introduction | 1355 |
| | B. The Judge Improperly Framed The Issues In Terms Of Finding Guilt Or Innocence | 1356 |
| | C. The Willfully False Instruction Improperly Failed To Define “Material” | 1356 |
| | D. The “Probability Of Truth” Language In CALJIC 2.21.2 Lessened The Prosecution’s Burden | 1356 |

| | | | |
|----------|----|---|------|
| | E. | The Credibility Of Witness Instruction Was Improperly Limited To Persons Who Testified Under Oath | 1356 |
| | F. | Numerous Instructions Were Improperly Limited To The Testimony Of “Witnesses” | 1356 |
| | G. | The Instructions Improperly Failed To Instruct The Jurors Regarding Transcripts Read Into The Record | 1356 |
| | H. | The Instructional Errors Were Cumulatively Prejudicial | 1356 |
| | I. | The Errors Were Prejudicial As To Penalty | 1356 |
| 5.2.7.10 | | THE INSTRUCTIONS GIVEN IN THE LUCAS TRIAL WERE NOT SUFFICIENTLY UNDERSTANDABLE TO SATISFY THE 8TH AND 14TH AMENDMENT RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION | 1357 |
| 5.2.8 | | JURY INSTRUCTIONS: BURDEN OF PROOF | 1359 |
| | A. | Introduction | 1359 |
| | B. | The Instructions Were Constitutionally Deficient Because They Failed To Adequately Explain And Define The Burden Of Proof | 1360 |
| | C. | The Instructions Were Deficient And Misleading Because They Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence | 1361 |
| | D. | The Burden Of Proof Instruction Failed To Adequately Define The Standard Of Proof | 1361 |

| | | |
|----|---|------|
| E. | The Judge Erroneously Refused The Defense Request For Instructions Comparing The Burden Of Proof Beyond A Reasonable Doubt With Other Burden | 1362 |
| F. | The Reasonable Doubt Instruction Erroneously Implied That Reasonable Doubt Requires The Jurors To Articulate Reason And Logic For Their Doubt | 1362 |
| G. | The Reasonable Doubt Instruction Unconstitutionally Admonished The Jury That A Possible Doubt Is Not A Reasonable Doubt | 1362 |
| H. | The Judge Erroneously Instructed The Jurors To Take Into Account Moral Considerations In Deciding Guilt . | 1363 |
| I. | The Circumstantial Evidence Instructions (CALJIC 2.01 And 2.02) Unconstitutionally Lightened The Prosecution’s Burden Of Proof, And Also Created A Mandatory Conclusive Presumption Of Guilt, Under The Circumstances Of This Particular Case | 1363 |
| J. | The Errors Were Prejudicial As To Guilt | 1363 |
| K. | The Errors Were Prejudicial As To Penalty | 1364 |

5.2.9 DELIBERATION ISSUES

| | | |
|---------|---|------|
| 5.2.9.1 | THE JUDGE VIOLATED STATE LAW AND THE FEDERAL CONSTITUTION BY ALLOWING THE JURORS TO READ THE TRIAL TRANSCRIPTS IN THE JURY ROOM | 1365 |
| 5.2.9.2 | ALLOWING THE JURY TO READ BACK TESTIMONY TO THEMSELVES IN THE JURY ROOM VIOLATED LUCAS’ PUBLIC TRIAL RIGHTS | 1367 |

| | | |
|---------|--|------|
| 5.2.9.3 | THE JUDGE ERRED IN ALLOWING THE JURY TO READ PORTIONS OF THE TESTIMONY DURING DELIBERATIONS WITHOUT ANY INSTRUCTIONS AS TO THE PROPER USE OF THE TRANSCRIPTS . | 1369 |
| 5.2.9.4 | THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON | 1371 |

VOLUME 6 - PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.1 PENALTY PHASE STATEMENT OF CASE

| | | |
|----|--|------|
| A. | Trial | 1373 |
| B. | Deliberations | 1375 |
| 1. | First Note From The Jurors (July 18, 1989) | 1375 |
| 2. | The Judge's Response To The First Note | 1376 |
| 3. | The Second Note From The Jury (July 19, 1989) . | 1377 |
| 4. | The Third Note From The Jury (July 19, 1989) ... | 1379 |
| 5. | The Court's Response To The Second And Third Notes (July 19, 1989) | 1380 |
| 6. | Supplemental Instruction Following Inspection Of The Deliberation Room (July 19-July 20, 1989) | 1381 |
| 7. | Proceedings Regarding Discharge Of Juror D.O. (July 21-July 24, 1989) | 1384 |
| 8. | Juror L.G.'s Visit To San Quentin (July 24, 1989) | 1386 |
| 9. | Extrinsic Evidence Regarding 1973 Rape | 1386 |

| | | |
|-----|---|------|
| 10. | Substitution Of Alternate Juror T.W. For Juror D.O | 1387 |
| 11. | Notes Regarding The Death Of Juror P.W.'s Father (July 24-July 25, 1989) | 1387 |
| 12. | Jurors' Requests For Atascadero Diagnosis; Testimony Of Dr. Marks And Lucas' Mother | 1387 |
| C. | Verdict; New Trial And Modification Motions | 1388 |

6.2 PENALTY PHASE STATEMENT OF FACTS

| | | |
|----|---|------|
| A. | Prosecution Evidence: Case In Chief | 1389 |
| B. | Defense Evidence | 1389 |
| 1. | Family And Background | 1389 |
| 2. | Attorney Gilham | 1405 |
| 3. | Atascadero Testimony Of Loyal Tallchief | 1406 |
| 4. | Dr. Marks | 1408 |
| 5. | Prison Conditions | 1415 |
| C. | Prosecution Rebuttal Evidence | 1426 |
| 1. | Laura Stewart Testimony | 1426 |
| 2. | "Pruno" Incident | 1427 |
| 3. | Possession Of A Broomstick | 1429 |
| D. | Defense Surrebuttal Evidence | 1430 |

6.3 1973 RAPE CONVICTION: VOIR DIRE

6.3.1 THE TRIAL COURT IMPROPERLY PRECLUDED VOIR DIRE AS TO WHETHER LUCAS' PRIOR RAPE CONVICTION WOULD PREVENT THE JURORS FROM PERFORMING THE REQUIRED WEIGHING OF AGGRAVATION AND MITIGATION 1432

A. Introduction 1432

B. Procedural Background 1432

C. The Law Requires Inquiry Into Whether A Prior Conviction To Be Offered In Aggravation Would Preclude The Juror From Considering A Life Sentence 1434

D. The Lucas Trial Judge Erroneously Precluded Any Voir Dire Regarding The Impact Of The Prior Rape Conviction On The Prospective Jurors' Ability To Consider A Life Sentence 1437

E. The Death Sentence Should Be Reversed 1438

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALITY

6.4.1 OVERVIEW 1440

A. Nature Of The Prior Conviction 1440

B. The Defense Motion To Strike 1442

1. Ineffective Assistance Of 1973 Trial And Appellate Counsel 1442

a. *Trial Counsel: Attorney Gilham* ... 1442

b. *Appellate Counsel: Attorney Arm* .. 1444

| | | |
|-------|---|------|
| 6.4.2 | PROCEEDINGS BELOW | 1446 |
| A. | The Motion To Strike | 1446 |
| B. | The 1973 Trial (<i>People v. Lucas</i> , CR 29369): Procedural History | 1447 |
| C. | Appeal | 1453 |
| 6.4.3 | STATEMENT OF FACTS | 1456 |
| A. | Prosecution Evidence At 1973 Trial | 1456 |
| B. | Defense Evidence At 1973 Trial | 1460 |
| 1. | Alibi Evidence | 1460 |
| 2. | Testimony That Briseno Was At The Cook Residence Between 10:30 And 11:00 p.m. | 1461 |
| 3. | Testimony Of David Lucas | 1462 |
| 4. | Defense Theory That Hopkins Committed The Offense | 1463 |
| 5. | Lucas' Successful Polygraph | 1464 |
| 6. | <i>Coram Nobis</i> Testimony Of Briseno's Friend Alejandrina Casas | 1464 |
| a. | <i>Phone Call With Briseno At 10:00 p.m. On Sunday Night</i> | 1464 |
| b. | <i>Briseno's Request That Casas Not Tell Anyone About The Phone Call</i> | 1465 |
| 7. | Ruling Of Judge Welsh Denying A New Trial | 1466 |

| | | |
|----|---|------|
| C. | The Prosecution Changed Its Theory As To When The Offense Occurred | 1467 |
| 1. | Prosecution Timing Theory: Preliminary Hearing (10:00-10:30 to 11:00-11:15 p.m.) | 1467 |
| 2. | Prosecution Timing Theory: Opening Statement (10:00 to 11:00 p.m.) | 1467 |
| 3. | Prosecution Timing Theory: Fresh Complaint Argument (10:00 to 11:00 p.m.) | 1468 |
| 4. | Prosecution Timing Evidence At Trial (9:30-11:00 p.m.) | 1468 |
| 5. | Prosecution Timing Theory: Closing Argument (9:15/9:30 to 10:30 p.m.) | 1470 |
| 6. | The Prosecution's Theory On Appeal (9:30-11:00 p.m.) | 1472 |
| 7. | Court Of Appeal Timing Determination (9:30-11:00 p.m.) | 1472 |
| D. | Evidence Presented At The Motion To Strike The 1973 Prior Conviction | 1473 |
| 1. | Trial Counsel: G. Anthony Gilham | 1473 |
| a. | <i>Overview</i> | 1473 |
| b. | <i>Gilham's Failure To Present The Testimony Of Alejandrina Casas To The Jurors</i> | 1474 |
| 2. | Appellate Counsel: Fred Arm | 1474 |
| a. | <i>Preparation And Argument Of The Appeal</i> | 1474 |

- b. *Failure To Obtain Transcripts Of The Opening Statements And Closing Arguments* 1478
- c. *Rough Draft Arguments Omitted From Appellant's Opening Brief* 1478
- d. *Appellate Investigation* 1479
- e. *Treatment Of Casas' Coram Nobis Testimony* 1479
- 3. Louis S. Katz 1480
 - a. *Katz' Qualifications And Experience* 1480
 - b. *Katz' Opinion Regarding Attorney Gilham* 1481
 - c. *Katz' Opinion Regarding Appellate Attorney Arm* 1481

6.4.4 THERE WAS SUBSTANTIAL DOUBT THAT JUDGE HAMMES WAS ENTIRELY IMPARTIAL AT THE HEARING CHALLENGING THE ADMISSIBILITY OF THE 1973 PRIOR RAPE CONVICTION AND ACCORDINGLY JUDGE HAMMES ERRED IN DENYING LUCAS' MOTION THAT SHE RECUSE HERSELF 1483

- A. Introduction 1483
- B. Procedural Background 1483
- C. The Disqualification Motion Was Timely 1485
- D. The Disqualification Statement Was Legally Sufficient 1486
 - 1. Disqualification Should Be Granted If There Is An Appearance Of Bias Or Prejudgment 1486

| | | |
|-------|---|------|
| 2. | It Appears That Judge Hammes Had Prejudged The Issue | 1487 |
| E. | The Failure Of Judge Hammes To Disqualify Herself Violated The Federal Constitution | 1487 |
| F. | The 1973 Prior Conviction Should Have Been Excluded | 1488 |
| G. | The Failure To Exclude The Prior Conviction Was Prejudicial | 1488 |
| 6.4.5 | TRIAL COUNSEL IN THE 1973 PROCEEDINGS PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO PRESENT A KEY WITNESS WHO WOULD HAVE COMPLETELY UNDERMINED THE PROSECUTION’S THEORY OF THE CASE | 1489 |
| A. | Proceedings Below | 1489 |
| B. | Right To Effective Counsel: Failure To Investigate And Present Key Evidence | 1490 |
| C. | Ineffective Assistance Of Counsel: Standard | 1491 |
| D. | In The Present Case Both Prongs Of <i>Strickland</i> Were Met | 1492 |
| 1. | Prong One Of <i>Strickland</i> Was Met | 1492 |
| 2. | Prong Two Of <i>Strickland</i> Was Met | 1494 |
| a. | <i>Casas’ Testimony Undermined The Prosecution’s Theory Of The Case</i> . | 1494 |
| b. | <i>Casas’ Testimony Would Have Undermined Briseno’s Credibility</i> | 1495 |
| c. | <i>The Deliberations Were Closely Balanced</i> | 1496 |

| | | |
|-------|--|------|
| E. | Conclusion: The Prior Conviction Should Have Been Stricken. | 1497 |
| F. | Juror Consideration Of The 1973 Prior Rape Conviction Was Prejudicial | 1497 |
| 6.4.6 | BECAUSE APPELLATE COUNSEL RELIED ON MRS. LUCAS TO “ORCHESTRATE” AND PAY FOR THE APPEAL, HE DID NOT GIVE HIS UNDIVIDED LOYALTY TO DAVID LUCAS | 1498 |
| A. | Introduction: Overview Of Appellate Attorney Arm’s Conflict | 1498 |
| B. | A Conflict Of Interest By Appellate Counsel Violates The Federal Constitution | 1499 |
| C. | An Unconstitutional Conflict Results When An Attorney’s Loyalty Is Divided Between The Client And A Third Person | 1500 |
| D. | A Financial Conflict Between The Attorney And Client Violates The Federal Constitution | 1501 |
| E. | The Rules Of Professional Responsibility Require Special Safeguards When An Attorney’s Fee Is Paid By A Third Person | 1502 |
| F. | Arm Considered Mrs. Lucas To Be His Employer And Deferred To Her Wishes | 1503 |
| G. | Under The Retainer Arrangement, David Lucas Would Forfeit Substantial Appellate Rights Unless Mrs. Lucas Made Supplemental Payments To Arm | 1506 |
| H. | David Lucas Did Not Waive Arm’s Conflict | 1507 |
| 1. | Under The Federal Constitution A Purported Waiver Of A Fundamental Right Is Not Valid Unless, On The Face Of The Record, It Is Knowing And Intelligent | 1507 |

| | | |
|----|--|------|
| 2. | Under State Law And “The Rules Of Professional Responsibility” A Waiver Of A Conflict Must Be In Writing To Be Valid | 1508 |
| 3. | There Was Neither Written Consent Nor Knowing And Intelligent Waiver In The Present Case | 1508 |
| I. | Arm’s Loyalty To Mrs. Lucas Adversely Affected His Representation Of David Lucas | 1510 |
| 1. | Failure To Present Alejandrina Casas’ Testimony To The Jurors | 1511 |
| 2. | Failure To Offer Casas’ Prior Inconsistent Statement Regarding Briseno’s Request Not To Reveal The 10:00 P.M. Call | 1512 |
| 3. | Casas’ Inadmissible Hearsay That Briseno Said Lucas Was The Assailant Should Have Been Stricken | 1512 |
| 4. | Failure To Object To The Prosecution’s Last-Minute Change Of Theory | 1513 |
| 5. | Failure To Object To Including The “On Or About” Language From The Information In The Jury Instructions | 1515 |
| 6. | Failure to Request Defense Theory Instructions On Alibi | 1516 |
| 7. | Allowing The Jury To Hear And Consider Evidence That Lucas Was “Stoned On Marijuana” | 1517 |
| 8. | Miscellaneous Other Claims | 1518 |
| J. | The Financial Conflict Adversely Affected Arm’s Representation Of Lucas | 1519 |

| | | |
|-------|---|------|
| 1. | Failure To Investigate | 1519 |
| 2. | Failure To Obtain Transcripts Of The Opening And Closing Statements | 1519 |
| 3. | Failure To File A Petition For Rehearing In the Appellate Court And Petition For Hearing (Review) In This Court | 1520 |
| | <i>a. Arm Abandoned David Lucas Because Mrs. Lucas “Didn’t Wish To Expend Further Funds”</i> | 1520 |
| | <i>b. A Petition For Rehearing Should Have Been Filed And Granted</i> | 1521 |
| | <i>c. A Petition For Hearing Was Potentially Meritorious</i> | 1521 |
| K. | Under The Federal “Actual-Conflict” Standard, The 1973 Conviction Is Constitutionally Tainted, And The Motion To Strike The 1973 Conviction And Exclude It From Lucas’ Penalty Trial Should Have Been Granted . . | 1522 |
| L. | Striking The 1973 Prior Was Also Required Based On California’s Legal Standards And Requirements For Attorney Conflicts | 1523 |
| | 1. State Constitutional Error | 1523 |
| | 2. Derivative Federal Constitutional Error . . . | 1524 |
| M. | The Death Sentence Should Be Reversed Due To The Failure To Strike The Prior Rape Conviction | 1525 |
| 6.4.7 | APPELLATE COUNSEL’S FAILURE TO REPRESENT LUCAS FOLLOWING THE APPELLATE DECISION AFFIRMING THE 1973 CONVICTION UNDERMINED LUCAS’ FEDERAL CONSTITUTIONAL RIGHTS . . . | 1531 |

| | | |
|----|---|------|
| A. | Introduction | 1531 |
| B. | The Evaluation Of The Potential Merit Of Post-Affirmance Petitions Is A Crucial Appellate Function | 1531 |
| C. | Appellate Counsel Is Obligated To Represent The Client At Least Through The Petition For Rehearing | 1532 |
| D. | David Lucas Was Totally Deprived Of Counsel At The Post-Affirmance Stage Of His Appeal From The 1973 Conviction | 1533 |
| E. | The Total Absence Of Post-Affirmance Counsel Was Prejudicial Per Se Under The Federal Standard ... | 1533 |
| F. | The Absence Of Counsel Raised A Presumption Of Prejudice Under California Law | 1534 |
| G. | The Presumption Of Prejudice Cannot Be Rebutted Because A Petition For Rehearing Should Have Been Filed And Granted | 1535 |
| 1. | Overview | 1535 |
| 2. | The Jury Could Have Relied Upon The Prosecution's Theory That The Abduction Occurred From 9:30 To 10:30 | 1536 |
| 3. | Casas' Testimony Was Critical Because It Would Have Undermined The 9:30 To 10:30 Theory | 1537 |
| 4. | The Appellate Court Erroneously Assumed That The Jury Found The Abduction Ended At 11:00 | 1537 |
| 5. | The Court Of Appeal Misconstrued The Appellate Argument As A Sufficiency Claim Rather Than An Abuse Of Discretion Claim | 1538 |

| | | |
|------------|---|------|
| 6. | Conclusion: The Presumption Of Prejudice Cannot Be Overcome | 1540 |
| H. | The Death Judgment Should Be Reversed Due To The Denial Of The Motion To Strike | 1541 |
| 6.4.8 | APPELLATE COUNSEL'S FAILURE TO RAISE THE CASAS ISSUE ON APPEAL WAS CONSTITUTIONALLY INEFFECTIVE | 1542 |
| 6.5 | 1973 RAPE CONVICTION: EXCLUSION OF DEFENSE EVIDENCE AT THE PENALTY TRIAL | |
| 6.5.1 | EXCLUSION OF LUCAS' SUCCESSFUL POLYGRAPH TEST AS TO CRUCIAL AGGRAVATING EVIDENCE VIOLATED THE FEDERAL CONSTITUTION | 1543 |
| A. | Introduction | 1543 |
| B. | Lucas Had A Constitutional Right To Present Polygraph Test Evidence As Mitigation And To Explain Or Deny Aggravating Evidence | 1545 |
| C. | The Polygraph Evidence Should Have Been Admitted | 1547 |
| D. | Standards Of Prejudice | 1548 |
| E. | The Prosecution Cannot Meet Its Burden Of Demonstrating That The Error Was Harmless Beyond A Reasonable Doubt | 1550 |
| 6.5.2 | THE JUDGE ERRONEOUSLY PRECLUDED THE DEFENSE FROM INFORMING THE JURORS ABOUT THE FACT THAT CASAS' TESTIMONY WAS NOT PRESENTED AT THE TRIAL ON THE 1973 RAPE CHARGE | 1551 |
| A. | Introduction | 1551 |
| B. | Proceedings Below | 1551 |

- C. When The Prosecution Seeks To Use A Prior Conviction As Aggravation Under Factor (b) The Defense Should Be Allowed To Present Evidence Contesting Whether The Defendant Committed The Alleged Offense 1553
- D. The Eighth Amendment Requires That A Capital Defendant Be Given An Opportunity To Explain Or Deny The Prosecution’s Aggravating Evidence 1555
- E. Evidence That Lucas Did Not Commit The 1973 Rape Should Have Been Allowed 1558
- F. The Penalty Judgment Should Be Reversed 1558

6.6 1973 PRIOR CONVICTION: INSTRUCTIONS

- 6.6.1 THE JUDGE IMPROPERLY PERMITTED THE JURORS TO RELY ON THE CURRENT GUILT PHASE CONVICTIONS IN DECIDING WHETHER LUCAS’ GUILT OF THE 1973 RAPE WAS PROVEN BEYOND A REASONABLE DOUBT . 1559
 - A. Proceedings Below 1559
 - B. The Factor (b) Determination Must Be Made Without Consideration Of The Guilt Phase Convictions . . . 1560
 - C. In The Present Case The Instructions Erroneously Allowed The Jurors To Rely On The Guilt Convictions In Making The Factor (b) Determination 1562
 - D. The Error Was Prejudicial 1564
- 6.6.2 THE FACTOR (B) INSTRUCTION FAILED TO REQUIRE THE JURORS TO FIND BEYOND A REASONABLE DOUBT THAT LUCAS COMMITTED THE 1973 RAPE 1565

VOLUME 7 - PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.1 PENALTY PHASE STATEMENT OF CASE 1567

7.2 PENALTY PHASE STATEMENT OF FACTS 1567

7.3 ERRORS RELATED TO THE ATASCADERO EVIDENCE

7.3.1 LUCAS WAS IMPROPERLY INDUCED TO LEAVE THE *IN CAMERA* HEARING ON DEFENSE COUNSEL’S INEFFECTIVENESS 1567

A. Introduction 1567

B. Procedural Background 1568

C. The Accused Has An Absolute Right To Personal Presence During A Discussion Of Counsel’s Competence . . 1571

D. Because Counsel Had A Conflict Of Interest At The Hearing Lucas Was Denied His Constitutional Right To Counsel 1573

E. The Judge Violated Her Duty To Protect Lucas’ Rights 1574

F. Lucas’ Absence Violated The Eighth Amendment 1574

G. Any Waiver Of Presence By Lucas Should Not Be Validated 1575

H. The Error Was Structural And, Therefore, Reversible Per Se 1576

I. The Error Was Prejudicial Under Harmless-Error Analysis 1576

7.3.2 THE JUDGE IMPROPERLY ADMONISHED THE JURY TO ACCEPT THE ATASCADERO DIAGNOSIS AS A PROVEN FACT 1578

- A. Introduction 1578
- B. Procedural Background 1578
- C. Legal Analysis 1579
- D. The Error Violated The Federal Constitution 1581
- E. The Prosecution Cannot Meet Its Burden Of Demonstrating That The Error Was Harmless Beyond A Reasonable Doubt 1582

7.4 PROSECUTORIAL MISCONDUCT IN PENALTY ARGUMENT

7.4.1 THE PROSECUTOR IMPROPERLY RELIED ON BIBLICAL LAW AND A “GOOD VERSUS EVIL” PARADIGM FOR THE SENTENCING DECISION 1584

- A. Introduction 1584
- B. Proceedings Below 1584
- C. Prosecution Reliance On Higher Religious Authority Is Improper 1588
- D. The Religious Theme In The Present Case Unconstitutionally Called For Imposition Of Death Upon Lucas 1589
- E. Apart From Its Religious Approach, The Prosecutor’s “Good Versus Evil” Argument Misconstrued The Nature Of The Penalty Determination 1591
- F. The Improper Argument Warrants Reversal Of The Death Judgment 1592

| | | |
|-------|---|------|
| 7.4.2 | THE PROSECUTOR’S ARGUMENT IMPROPERLY MINIMIZED THE JURORS’ ROLE IN DETERMINING THE PUNISHMENT; URGED THAT THE JURORS WERE DUTY BOUND TO RETURN A DEATH SENTENCE AND ENCOURAGED THE JURORS TO DISREGARD OR DISCOUNT THE MITIGATING EVIDENCE | 1594 |
| A. | Introduction | 1594 |
| B. | Minimizing The Jurors’ Role | 1594 |
| C. | Implying A Duty To Reach A Particular Result . . . | 1595 |
| D. | Encouraging Jurors To Disregard Or Discount Mitigating Evidence | 1595 |
| E. | The Error Was Prejudicial | 1596 |
| 7.4.3 | THE PROSECUTOR IMPROPERLY ENCOURAGED THE JURY TO DISREGARD AND/OR DISCOUNT THE MITIGATING EVIDENCE BY EXPRESSLY MISLEADING THE JURY AS TO THE APPROPRIATE BASES FOR JUDGMENT, AND BY APPEALING TO PASSION (AND PURPORTED EXTRA-RECORD FACTS) IN ORDER TO TRIVIALIZE MITIGATING EVIDENCE | 1597 |
| 7.4.4 | BOTH INDIVIDUALLY AND CUMULATIVELY THE PROSECUTOR’S MISCONDUCT WAS PREJUDICIAL | 1601 |

7.5 PENALTY PHASE: JUROR ISSUES

| | | |
|-------|--|------|
| 7.5.1 | THE PENALTY JURY WAS NOT IMPARTIAL BECAUSE A JUROR WAS SUBSTANTIALLY LEANING IN FAVOR OF DEATH | 1602 |
| A. | Introduction | 1602 |
| B. | Proceedings Below | 1603 |

| | | |
|----|--|------|
| 1. | Because This Case Involved Child Victims, Juror S.B. Was Substantially Leaning In Favor Of The Death Penalty | 1603 |
| 2. | Disposition Of The Juror | 1604 |
| C. | California Law Requires Excusal Of Penalty Phase Jurors Who Are Substantially Leaning In Favor Of Either Side | 1607 |
| D. | Fundamental Principles Of Due Process Require Death Penalty Jurors To Be Impartial | 1607 |
| E. | The Accused's Right To An Impartial Trial By Jury Requires Excusal Of Jurors Who Are Substantially Leaning In Favor Of Death | 1609 |
| F. | The Eighth Amendment Requires Death Penalty Jurors To Be Impartial | 1610 |
| G. | The Defendant Cannot Waive The Right To A Reliable, Unbiased And Impartial Sentencing Determination In A Capital Trial | 1610 |
| H. | Requiring The Defense To Exercise All Peremptories, To Preserve The Error For Review, Unconstitutionally Forced The Defense To Make A Choice Of Rights | 1613 |
| I. | Arbitrary Denial Of A State Created Right Violates The Due Process Clause Of The Federal Constitution . | 1614 |
| J. | The Judgment Should Be Reversed | 1615 |
| 1. | The Error Was Structural | 1615 |
| 2. | Alternatively, The State Bears The Burden To Demonstrate Harmless Error Beyond A Reasonable Doubt | 1616 |

| | | |
|-------|--|------|
| 3. | The State Cannot Meet Its Burden Of Demonstrating That The Error Was Harmless | 1619 |
| | <i>a. The Penalty Deliberations Were Closely Balanced</i> | 1619 |
| | <i>b. The Instructions Did Not Preclude The Jurors From Putting The Burden On Lucas During The Penalty Deliberations . .</i> | 1620 |
| | <i>c. The Error Was Substantial</i> | 1621 |
| 7.5.2 | THE JURORS WERE IMPROPERLY ALLOWED TO MAKE UP THEIR MINDS AS TO PENALTY BEFORE HEARING THE EVIDENCE, ARGUMENTS AND INSTRUCTIONS | 1622 |
| | A. The Judge’s Admonition Permitted Premature Consideration By Implication | 1622 |
| | B. Allowing Premature Consideration Of Penalty Violated The State And Federal Constitutions | 1623 |
| | C. The Error Was Structural | 1624 |
| | D. Alternatively, The Prosecution Cannot Meet Its Burden Of Demonstrating Beyond A Reasonable Doubt That The Error Was Harmless | 1624 |
| 7.5.3 | FAILURE TO RE-VOIR DIRE THE JURORS PRIOR TO THE PENALTY TRIAL AND TO GIVE AN ADEQUATE CAUTIONARY INSTRUCTION WAS PREJUDICIAL ERROR | 1626 |
| | A. Proceedings Below | 1626 |
| | B. Re-Voir Dire Is Permissible Under Evidence Code § 1089 | 1627 |

| | | |
|----|---|------|
| C. | Re-Voir Dire Was Necessary In The Present Case | 1628 |
| D. | The Error Violated Lucas' Federal Constitutional Rights | 1628 |
| E. | The Error Was Prejudicial | 1630 |
| F. | The Instructions Did Not Cure The Prejudice | 1631 |
| G. | The Penalty Judgement Should Be Reversed | 1634 |

7.6 PENALTY PHASE INSTRUCTIONS

| | | |
|-------|--|------|
| 7.6.1 | THE LINGERING DOUBT INSTRUCTION UNDERMINED A CRUCIAL PENALTY PHASE DEFENSE THEORY | 1636 |
| A. | Introduction | 1636 |
| B. | Procedural Background | 1636 |
| C. | California Law Recognizes Lingering Doubt As A Mitigating Factor | 1637 |
| D. | Because The Instruction Was Permissive, The Jurors Were Not Required To Consider Lingering Doubt | 1637 |
| E. | Failure Of The Instruction To Require Consideration Of Each Offense Individually | 1638 |
| F. | The Instruction Failed To State That Lingering Doubt Was A Mitigating Factor | 1639 |
| G. | The Instruction Failed To Define Lingering Doubt | 1640 |
| H. | The Arguments Of Counsel Did Not Cure The Error | 1640 |
| I. | The Error Violated The Federal Constitution | 1641 |
| J. | The Error Was Prejudicial Under Both The State And Federal Standards Of Prejudice | 1642 |

| | | |
|-------|--|------|
| 7.6.2 | BECAUSE THE INSTRUCTIONS ONLY PERMITTED CONSIDERATION OF MITIGATING EVIDENCE “THAT THE DEFENDANT OFFERS,” IMPORTANT MITIGATING EVIDENCE WAS NOT CONSIDERED | 1643 |
| A. | Introduction | 1643 |
| B. | The Prosecution Evidence Included Factors Which The Jurors Could Have Found To Be Mitigating | 1644 |
| C. | The Error Violated The Federal Constitution | 1645 |
| D. | A New Penalty Trial Should Be Ordered | 1645 |
| 1. | The Error Was Structural | 1645 |
| 2. | If Not Structural, The Prosecution Cannot Demonstrate Beyond A Reasonable Doubt That The Error Was Harmless | 1646 |
| 7.6.3 | THE INSTRUCTIONS UNCONSTITUTIONALLY PRECLUDED THE JURY FROM CONSIDERING LUCAS’ GOOD BEHAVIOR AT TRIAL AS MITIGATION | 1647 |
| A. | The Instructions Erroneously Precluded Consideration Of Lucas’ In-Court Demeanor | 1647 |
| B. | The Error Violated State Law And The Federal Constitution | 1648 |
| C. | The Error Was Prejudicial | 1649 |
| 7.6.4 | INSTRUCTIONAL USE OF THE TERM “EXPERT” TO DESCRIBE CERTAIN PENALTY PHASE WITNESSES WAS ERROR | 1650 |
| 7.6.5 | THE JURY INSTRUCTIONS, AS LIKELY CONSTRUED BY THE JURY IN LIGHT OF THE PROSECUTOR’S ARGUMENT, UNCONSTITUTIONALLY CHARACTERIZED THE PENALTY DECISION AS A CHOICE BETWEEN GOOD AND BAD | 1652 |

| | | |
|-------|--|------|
| 7.6.6 | BY FAILING TO INSTRUCT THE JURY THAT NEITHER PARTY HAD THE BURDEN OF PROOF AT PENALTY THE JUDGE FAILED TO ASSURE JUROR IMPARTIALITY | 1655 |
| A. | Proceedings Below | 1655 |
| B. | Under California Law Neither Party Has The Burden Of Proof At Penalty | 1656 |
| C. | The Judge Was Obligated To Instruct On The Burden | 1656 |
| D. | Failure To Instruct On The Burden Of Proof Violated Lucas' State And Federal Constitutional Rights ... | 1657 |
| E. | The Penalty Judgment Should Be Reversed | 1658 |
| 7.6.7 | THE JUDGE ERRONEOUSLY REFUSED THE DEFENSE REQUEST FOR AN INSTRUCTION PERMITTING JUROR CONSIDERATION OF SYMPATHY FOR LUCAS' FAMILY | 1659 |
| A. | Proceedings Below | 1659 |
| B. | The Federal Constitution Requires That The Jurors Be Permitted To Consider The Impact Of The Defendant's Execution On His Friends And Family | 1660 |
| C. | Sympathy For The Defendant's Friends And Family Should Be A Mitigating Factor Under The Eighth Amendment | 1660 |
| D. | Because The Requested Instruction Embodied A Key Defense Theory At The Penalty Trial It Should Have Been Given | 1662 |
| E. | The Error Was Prejudicial | 1662 |

7.6.8 THE JUDGE’S SUPPLEMENTARY INSTRUCTION UNCONSTITUTIONALLY LIMITED THE JURORS’ CONSIDERATION OF MITIGATING EVIDENCE TO THE SPECIFIC MATTERS ENUMERATED IN THE INSTRUCTIONS 1664

7.6.9 THE JUDGE ERRONEOUSLY DENIED THE REQUESTED INSTRUCTION PRECLUDING JUROR CONSIDERATION OF FUTURE DANGEROUSNESS 1666

7.7 PENALTY PHASE: DELIBERATION ISSUES

7.7.1 THE JUDGE IMPROPERLY COERCED THE JURY AFTER IT REPORTED BEING DEADLOCKED AT PENALTY 1669

A. Introduction 1669

B. Procedural Background 1670

C. Legal Principles 1670

D. The Judge Improperly Responded To The Jurors’ Announced Deadlock In The Present Case 1670

1. Instructing Jury To Continue Without Inquiry 1670

2. Improper Reference To The Length Of The Trial 1670

3. Improper Instructions That Deadlock Would Result In A New Penalty Trial 1671

4. Failure To Instruct Each Juror To Follow His Or Her Own Conscience 1672

5. Inspection Of The Deliberation Room And Supplemental Instructions To Consider Guilt Evidence 1676

| | | |
|-------|---|------|
| E. | The Errors Violated The State And Federal Constitution | 1676 |
| F. | The Coercion Of The Jury Was Structural Error . . . | 1677 |
| G. | Alternatively, The Prosecution Cannot Demonstrate Beyond A Reasonable Doubt That The Errors Were Harmless | 1677 |
| 7.7.2 | THE JUDGE ENGAGED IN JURY-TAMPERING BY ORDERING THE BAILIFF TO INSPECT THE DELIBERATION ROOM DURING RECESSES, AND BY GIVING A SPECIAL SUPPLEMENTAL INSTRUCTION IN LIGHT OF WHAT THE BAILIFF LEARNED | 1678 |
| A. | Introduction | 1678 |
| B. | Any Intrusion Into Jury Privacy During Deliberation Violates Fundamental Constitutional And Statutory Safeguards | 1678 |
| C. | In The Present Case The Judge Improperly Invaded The Jurors' Privacy | 1679 |
| D. | The Judge Improperly Used The Knowledge Gleaned From The Jury Room Intrusion To Influence The Course Of The Deliberations | 1682 |
| E. | The Jury Tampering Violated The Federal Constitution | 1685 |
| F. | The Error Was Structural And Reversible Per Se . . | 1686 |
| G. | If Not Reversible Per Se, The Secret Monitoring Of The Deliberations And The Unwarranted Supplemental Instruction Were Prejudicial To Lucas | 1688 |
| 1. | Standard Of Prejudice: Prosecution Has Burden Of Proving The Errors Were Harmless Beyond A Reasonable Doubt | 1688 |

| | | |
|-------|--|------|
| 2. | The Prosecution Cannot Meet Its Burden . . . | 1688 |
| 7.7.3 | ASSUMING ARGUENDO THAT IT WAS PROPER TO RELY ON THE BAILIFF’S AND JUDGE’S OBSERVATIONS OF THE JURY ROOM, THE RESULTANT FINDING WAS UNFAIR, UNRELIABLE AND UNCONSTITUTIONAL | 1691 |
| 7.7.4 | THE SPECIAL SUPPLEMENTAL PENALTY INSTRUCTIONS IMPROPERLY LIMITED THE JURORS’ CONSIDERATION OF THE GUILT PHASE EVIDENCE TO “EVIDENCE OF THE CIRCUMSTANCES OF THE CRIMES” | 1694 |
| A. | Introduction | 1694 |
| B. | Procedural Background | 1694 |
| C. | Limiting Consideration Of The Guilt Phase Evidence To The “Circumstances Of The Crimes” Excluded Important Guilt Phase Mitigation | 1697 |
| D. | The Error Violated State Law And The Federal Constitution | 1699 |
| E. | The Penalty Judgment Should Be Reversed | 1700 |
| 7.7.5 | AFTER RECEIVING NOTICE THAT A JUROR’S FATHER HAD DIED, THE JUDGE ERRONEOUSLY FAILED TO DETERMINE WHETHER THE JUROR COULD CONTINUE TO FULFILL HER DUTIES | 1702 |
| A. | Procedural Background | 1702 |
| B. | When Given Notice That Good Cause To Discharge A Juror May Exist, The Trial Court Has A Sua Sponte Obligation To Determine Whether The Juror Should Be Discharged | 1705 |

| | | |
|-------|---|------|
| C. | The Death Of A Juror’s Parent Is Sufficient Cause To Trigger The Court’s Duty To Exercise Its Discretion | 1706 |
| D. | In The Present Case Judge Hammes Failed To Exercise Any Discretion With Respect To Juror P.W. | 1706 |
| E. | The Judge’s Failure To Determine Juror P.W.’s Ability To Deliberate Violated Lucas’ Federal Constitutional Rights | 1707 |
| F. | An Error Which Adversely Impacts A Juror’s Ability To Deliberate Fairly Undermines The Structure Of The Trial And Is Reversible Per Se | 1708 |
| G. | If Not Structural, The Error Is Reversible Under Both The State And Federal Standards Of Prejudice | 1708 |
| 7.7.6 | THE JUDGE’S DISPOSITION OF THE JUROR NOTES REGARDING THE DEATH OF JUROR P.W.’S FATHER, WITHOUT NOTIFYING LUCAS OR HIS COUNSEL OF THE NOTES OR PERMITTING LUCAS TO BE HEARD ON THE MATTER, VIOLATED LUCAS’ RIGHTS TO COUNSEL, TO DUE PROCESS, AND TO A FAIR AND RELIABLE CAPITAL SENTENCING PROCEEDING | 1710 |
| A. | Neither Lucas Nor His Counsel Were Given Notice That The Juror’s Father Had Died | 1710 |
| B. | The Error Violated Lucas’ Federal Constitutional Rights To Counsel, To Due Process And To A Fair And Reliable Capital Sentencing Proceeding | 1712 |
| C. | The Denial Of Counsel In The Present Case Was Constitutional Error Because It Happened At A Crucial Stage Of The Proceedings Which May Have Affected Lucas’ Substantial Rights | 1714 |
| D. | Under The Federal Constitution The Denial Of Counsel Was Reversible Error Per Se | 1715 |

| | | |
|-------|--|------|
| E. | Under The State Constitution The Denial Of Counsel Raised A Presumption Of Prejudice Which Cannot Be Rebutted | 1716 |
| 7.7.7 | THE PRESENCE OF INADMISSIBLE PREJUDICIAL EVIDENCE IN THE JURY ROOM THROUGHOUT THE PENALTY DELIBERATIONS CREATED A PRESUMPTION OF PREJUDICE WHICH WAS NOT REBUTTED | 1717 |
| A. | Procedural Background | 1717 |
| B. | The Juror Consideration Of Extrinsic Evidence Violated The Federal Constitution | 1718 |
| C. | Juror Exposure To Extrinsic Evidence Creates A Presumption Of Prejudice | 1720 |
| D. | The Presumption Of Prejudice Was Not Rebutted In The Present Case | 1720 |
| E. | Even Without The Presumption Of Prejudice The Judgment Should Be Reversed | 1722 |
| 7.7.8 | THE JUDGE IMPROPERLY ALLOWED THE JURORS TO READ SELECTED TRIAL TRANSCRIPTS IN THE JURY ROOM | 1723 |
| A. | Introduction | 1723 |
| B. | Procedural Background | 1723 |
| C. | The Defendant’s Right To Personal Presence At Trial Is Grounded Upon Fundamental Constitutional Rights | 1731 |
| D. | The Absence Of Defense Counsel From A Critical Stage Of The Trial Violates The Accused’s Constitutional Rights | 1732 |

| | | |
|----|--|-------------|
| E. | Private Reading Of Testimony In The Deliberation Room Violates The Federal Constitution’s Public Trial Guarantee | 1732 |
| F. | The Reading Of Testimony Is A Critical Stage Of The Trial | 1732 |
| G. | Allowing The Jurors To Read The Transcripts Without Supervision Or Instruction And In The Absence Of The Judge Violated State Law And The Federal Constitution | 1734 |
| H. | A Readback Proceeding Is No Less Critical If The Reading Is Done By A Juror Instead Of The Reporter | 1738 |
| I. | Neither Counsel Nor Lucas Waived The Rights Involved | 1739 |
| | 1. There Was No Waiver By Counsel | 1739 |
| | 2. Lucas Did Not Waive His Rights | 1740 |
| J. | The Denial Of Lucas’ Rights To Be Personally Present, To Have The Assistance Of Counsel, The Presence Of The Judge, And To Due Process Requires Reversal Of Lucas’ Convictions | 1742 |
| | 1. The Denial Of Counsel Was Reversible Error | 1742 |
| | <i>a. Under The Federal Constitution The Denial Of Counsel Was Reversible Error Per Se</i> | <i>1742</i> |
| | <i>b. The Absence Of Counsel Raised A Presumption Of Prejudice Under California Law</i> | <i>1743</i> |
| | 2. Absence Of The Judge Should Be Reversible Error Per Se | 1743 |

| | | |
|----|--|------|
| 3. | The Absence Of Lucas Was Reversible Error | 1744 |
| a. | <i>The Amount Of Influence The “Readback” Had Upon The Jury Is Impossible To Determine</i> | 1744 |
| b. | <i>The Error Was Structural And Reversible Per Se</i> | 1745 |
| c. | <i>If Harmless-Error Analysis Is Employed There Should Be A Heavy Burden On The Prosecution To Prove The Error Harmless</i> | 1746 |
| d. | <i>The Courts Have Considered Several Specific Criteria In Determining Whether The Prosecution Has Met Its Burden Of Establishing Harmless Error</i> | 1746 |
| | i. Was Counsel Present During The Reading? | 1747 |
| | ii. Does The Testimony Concern Matters Which Are Inconsequential To The Defendant, Or Are Uncontested? | 1747 |
| | iii. Was The Prosecution’s Evidence Overwhelming? | 1748 |
| | iv. Did The Court Adequately Instruct The Jury Concerning The Readback? | 1748 |
| | v. Was The Defendant On Trial For His Life? | 1748 |
| e. | <i>In The Present Case All Of The Relevant Criteria Favor Reversal</i> | 1749 |

| | | |
|--------|--|------|
| 7.7.9 | ALLOWING THE JURY TO READ BACK TESTIMONY TO THEMSELVES IN THE JURY ROOM VIOLATED LUCAS' RIGHT TO A PUBLIC TRIAL | 1751 |
| A. | Introduction | 1751 |
| B. | Procedural Background | 1751 |
| C. | The Right To Public Trial Applies To The Entire Trial And The Right Is Violated By Closure Of Any Part Of The Trial, Absent Waiver Or Compelling Necessity ... | 1751 |
| D. | The Public Trial Guarantee Applied To The Proceedings Held In The Present Case | 1753 |
| E. | The Error Violated The Federal Constitution | 1754 |
| F. | There Was No Waiver Or Satisfactory Showing Of Necessity | 1754 |
| 1. | Waiver | 1754 |
| 2. | There Was No Showing Of Necessity | 1755 |
| G. | The Denial Of The Right To Public Trial Requires Reversal | 1755 |
| 7.7.10 | THE JUDGE ERRED IN ALLOWING THE JURY TO READ PORTIONS OF THE TESTIMONY DURING DELIBERATIONS WITHOUT ANY INSTRUCTIONS AS TO THE PROPER USE OF THE TRANSCRIPTS | 1757 |
| A. | Introduction | 1757 |
| B. | Legal Principles | 1757 |
| C. | The Failure To Give Any Cautionary Instructions In The Present Case Violated Lucas' Federal Constitutional Rights | 1759 |

| | | |
|--------|--|------|
| D. | The Error Was Prejudicial | 1760 |
| 7.7.11 | THE JUDGE IMPROPERLY FAILED TO GIVE CRUCIAL SUPPLEMENTAL INSTRUCTIONS ORALLY | 1761 |
| A. | Introduction | 1761 |
| B. | Procedural Background | 1761 |
| C. | The Error Violated The Federal Constitution | 1761 |
| D. | Failure To Orally Instruct The Jury Is Reversible Error | 1762 |
| 7.7.12 | JURORS' CONSIDERATION OF THE CONSEQUENCES OF DEADLOCK WAS MISCONDUCT | 1765 |
| A. | Procedural Background | 1765 |
| B. | Juror Consideration Of Extrinsic Matters Is Misconduct Which Raises A Presumption Of Prejudice | 1765 |
| C. | The Presumption Of Prejudice Was Not Rebutted In The Present Case Because The Judge Failed To Fulfill Her Duty To Inquire | 1766 |
| D. | The Error Was Prejudicial Under Harmless-Error Analysis | 1767 |
| 7.7.13 | THE JUDGE ERRONEOUSLY INSTRUCTED THE JURORS ON THE STATUTORY PROCEDURES WHICH WOULD BE FOLLOWED IF THEY FAILED TO REACH A VERDICT | 1768 |
| A. | The Trial Judge Erred | 1768 |
| B. | The Error Violated The Federal Constitution | 1768 |
| C. | The Presumption Of Prejudice Was Not Rebutted In The Present Case Because The Judge Failed To Fulfill Her Duty To Inquire | 1769 |

| | | |
|------------|---|------|
| D. | The Error Was Prejudicial Under Harmless-Error Analysis | 1769 |
| 7.7.14 | THE JUDGE ERRONEOUSLY INSTRUCTED THE JURORS ON THE STATUTORY PROCEDURES WHICH WOULD BE FOLLOWED IF THEY FAILED TO REACH A VERDICT | 1770 |
| 7.8 | CONSTITUTIONAL CHALLENGES TO THE DEATH JUDGMENT | |
| 7.8.1 | THE STATE MAY NOT EXECUTE AN ACCUSED WHOM IT HAS NOT AFFORDED FAIR AND RELIABLE PROCEDURAL PROTECTION | 1774 |
| 7.8.2 | CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT LUCAS' TRIAL, VIOLATES THE UNITED STATES CONSTITUTION | 1777 |
| A. | Lucas' Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad | 1778 |
| B. | Lucas' Death Penalty Is Invalid Because Penal Code § 190.3(a) As Applied Allows Arbitrary And Capricious Imposition of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution | 1783 |
| C. | California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Trial On Each Element Of A Capital Crime; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution | 1790 |

1. Lucas' Death Verdict Was Not Premised On Findings Beyond A Reasonable Doubt By A Unanimous Jury That One Or More Aggravating Factors Existed And That These Factors Outweighed Mitigating Factors; His Constitutional Rights To Jury Determination Beyond A Reasonable Doubt Of All Facts Essential To The Imposition Of A Death Penalty Was Thereby Violated 1791
 - a. *In The Wake Of Ring, Any Aggravating Factor Necessary To The Imposition Of Death Must Be Found True Beyond A Reasonable Doubt* 1792
 - b. *Ochoa and Walton* 1797
 - c. *The Requirements of Jury Agreement and Unanimity* 1799

2. Even If Proof Beyond A Reasonable Doubt Were Not The Constitutionally Required Burden Of Persuasion For Finding (1) That An Aggravating Factor Exists, (2) That The Aggravating Factors Outweigh The Mitigating Factors, And (3) That Death Is The Appropriate Sentence, Proof By A Preponderance Of The Evidence Would Be Constitutionally Compelled As To Each Such Finding 1805

3. Even If There Could Constitutionally Be No Burden of Proof, The Trial Court Erred In Failing To Instruct The Jury To That Effect 1807

4. California Law Violates the Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors 1808

5. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty 1811
 6. The Prosecution May Not Rely In The Penalty Phase On Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For The Prosecutor To Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As A Factor In Aggravation Unless Found To Be True Beyond A Reasonable Doubt By A Unanimous Jury 1816
 7. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Impermissibly Acted As Barriers To Consideration Of Mitigation By Lucas' Jury 1817
 8. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction 1817
- D. The California Statute Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Noncapital Defendants 1819
- E. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution 1828

| | | |
|-----|---|-------------|
| 7.9 | CUMULATIVE ERROR: THE CUMULATIVE EFFECT OF THE ERRORS WARRANTS REVERSAL OF THE DEATH JUDGMENT | 1831 |
| A. | Introduction | 1831 |
| B. | The Errors Cumulatively Violated The Federal Constitution | 1831 |
| C. | The Errors Were Cumulatively Prejudicial | 1832 |
| | CONCLUSION | 1835 |

**TABLE OF AUTHORITIES
VOLUMES 1-3**

CASES

| | <u>Page</u> |
|--|---|
| <i>Alicea v. Gagnon</i> (7th Cir. 1982) 675 F.2d 913 | 473 |
| <i>Amaya-Ruiz v. Stewart</i> (9th Cir. 1997) 121 F.3d 486 | 716 |
| <i>In Re Amber B.</i> (1987) 191 Cal. App. 3d 682 | 389, 392 |
| Amendment; <i>Castaneda v. Partida</i> (1977) 430 U.S. 482 | 38 |
| <i>American Cyanamid Co. v. Electrical Indus., Inc.</i> (5th Cir. 1980) 630 F.2d 1123 | 663 |
| <i>Arizona v. Fulminante</i> (1991) 499 U.S. 279 | 40, 47, 248, 321, 332, 514, 530, 537, 547, 599, 607, 632, 719, 735 740 |
| <i>Arizona v. Youngblood</i> (1988) 488 U.S. 51..... | 343, 344, 346, 347, 348 ,475 |
| <i>Badger v. Cardwell</i> (9th Cir. 1978) 587 F.2d 968 | 707 |
| <i>Barnard v. Henderson</i> (5th Cir. 1975) 514 F.2d 744 | 341 |
| <i>Batson v. Kentucky</i> (1986) 476 U.S. 79 | 543 |
| <i>Bean v. Calderon</i> (9th Cir. 1998) 163 F.3d 1073 | 205, 219, 225 |
| <i>Beardshall v. Minuteman Press Int'l. Inc.</i> (3rd Cir. 1981) 664 F.2d 23 | 662 |
| <i>Beck v. Alabama</i> (1980) 447 U.S. 625 | 46, 205, 219, 225, 233, 248, 256, 270, 280, 283, 296, 314, 320, 346, 354, 360, 367, 406, 427, 437, 443, 450, 464, 475, 482, 485, 495, 502, 506, 508, 512, 523, 533,545, 561, 567, 568, 589, 594, 598, 604, 615 618, 620, 621, 631, 642, 652, 657, 664, 669, 676, 681, 696, 739, 742 |

| | |
|--|--|
| <i>Bell v. Burson</i> (1971) 402 U.S. 535 | 39, 282, 427 |
| <i>Berger v. United States</i> (1935) 295 U.S. 78 | 530, 543 |
| <i>Binion v. Chater</i> (7th Cir. 1997) 108 F.3d 780 | 662 |
| <i>Blackledge v. Perry</i> (1974) 417 U.S. 21 | 328, 329 |
| <i>Bollenbach v. United States</i> (1946) 326 U.S. 607 | 247, 255, 271, 319, 353, 449, 476, 481, 546, 556, 561, 571, 568, 624, 688 |
| <i>Bonifay v. State</i> (Fla. 1996) 680 So.2d 413 | 549 |
| <i>Borden Kircher v. Hayes</i> (1978) 434 U.S. 357 | 329 |
| <i>Bouie v. Columbia</i> (1964) 378 U.S. 347 | 204 |
| <i>Bowen v. State</i> (2001) 556 S.E.2d 252 | 493 |
| <i>In re Bower</i> (1985) 38 Cal.3d 865 | 328, 329, 333 |
| <i>Bradley v. Duncan</i> (9th Cir. 2002) 315 F.3d 1091 | 443, 512 |
| <i>Brady v. Maryland</i> (1963) 373 U.S. 1194 | 500 |
| <i>Brady v. Maryland</i> (1963) 373 U.S. 83 | 39 |
| <i>Brady v. Maryland</i> (1963) 373 U.S. 83 | 475 |
| <i>Breeland v. Blackburn</i> (5th Cir. 1986) 786 F.2d 1239 | 205, 219, 225 |
| <i>Brooks v. Tennessee</i> (1972) 406 U.S. 605 | 718 |
| <i>Brown v. Bowen</i> (7th Cir. 1988) 847 F.2d 342 | 662 |
| <i>Browning v. Gosnell</i> (Iowa Sup. 1894) 91 Iowa 448 | 424 |

| | |
|--|--|
| <i>Burger v. Kemp</i> (1987) 483 U.S. 776 | 46, 205, 219, 225, 234, 248, 256, 270, 280, 283, 296, 314, 320, 346, 354, 360, 367, 406, 428, 437, 443, 450, 464, 475, 482, 485, 495, 502, 506, 512, 523, 533, 545, 561, 569, 589, 594, 598, 604, 615, 619, 620, 621, 642, 652, 657, 664, 669, 677, 682, 696, 739, 743 |
| <i>Bustamante v. Eyman</i> (9th Cir. 1972) 456 F.2d 269 | 707, 709, 721 |
| <i>Buzard v. McAnulty</i> (Tex. 1890) 77 Tex. 438 | 352 |
| <i>Cabana v. Bullock</i> (1986) 474 U.S. 376 | 274 |
| <i>Cage v. Louisiana</i> (1990) 498 U.S. 39 | 640, 642, 652, 657, 662, 664, 667, 669, 672, 673, 676, 679, 681, 686, 688, 689 696 |
| <i>Caldwell v. Mississippi</i> (1985) 472 U.S. 320 | 630 |
| <i>California v. Green</i> (1970) 399 U.S. 149 | 630 |
| <i>California v. Ramos</i> (1983) 463 U.S. 992 | 630 |
| <i>California v. Trombetta</i> (1984) 467 U.S. 479 | 9, 51, 233, 265, 331, 340, 341, 342, 343, 344, 346, 347, 407, 428, 449, 475, 476, 485, 523, 581, 582 |
| <i>Campbell v. Louisiana</i> (1998) 523 U.S. 392 | 38 |
| <i>Campbell v. Wood</i> (9th Cir. 1994) 18 F.3d 662 | 716 |
| <i>Capital Traction Co. v. Hof</i> (1899) 174 U.S. 1 | 710 |
| <i>Carella v. California</i> (1989) 491 U.S. 263 | 535, 687, 690, 691 |
| <i>In re Carmaleta B.</i> (1978) 21 Cal.3d 482..... | 43, 312 |
| <i>Carroll v. Abbott Laboratories, Inc.</i> (1982) 32 Cal.3d 892 | 204, 295, 420 |

| | |
|--|--|
| <i>Carter v. Kentucky</i> (1981) 450 U.S. 288 | 624, 688 |
| <i>Castaneda v. Partida</i> (1977) 430 U.S. 482 | 25, 26, 27 |
| <i>Chambers v. Florida</i> (1940) 309 U.S. 227 | 204, 218, 224, 295, 313, 407, 428, 437, 464 |
| <i>Chambers v. Mississippi</i> . (1973) 410 U.S. 284 | 39, 233, 265, 266, 281, 331, 407, 408, 426, 428, 429, 443 450, 473, 495, 501, 506, 512, 514, 523, 532, 581, 598, 707 |
| <i>Chapman v. California</i> (1967) 386 U.S. 18 | <i>passim</i> |
| <i>Clarke v. Commonwealth</i> (Va. 1932) 159 Va. 908 .. | 637 |
| <i>Clinton v. Jones</i> (1997) 520 U.S. 681 | 540 |
| <i>Collins v. City of Harker Heights</i> (1992) 503 U.S. 115 | 543 |
| <i>Com. v. Eastman</i> , 1 Cush. 189 | 441 |
| <i>Commonwealth v. Bird</i> (Pa. 1976) 240 Pa. Super. 587 . | 648 |
| <i>Commonwealth v. Gould</i> (Mass. 1980) 380 Mass. 672 . | 581 |
| <i>Commonwealth v. Grauman</i> (1912) 52 Pa. Super. 204 | 460 |
| <i>Commonwealth v. Oleynik</i> (Pa. 1990) 524 Pa. 41 | 591 |
| <i>Commonwealth v. Perry</i> (Mass. 1982) 385 Mass. 638 | 581 |
| <i>Commonwealth v. Peterman</i> (Pa. 1968) 430 Pa. 627 . | 709 |
| <i>Conde v. Henry</i> (9th Cir. 1999) 198 F.3d 734 | 582 |
| <i>Conde v. Henry</i> (9th Cir. 1999) 198 F.3d 734 . | 580 |
| <i>Conde v. Henry</i> (9th Cir. 2002) 198 F.3d 734 | 443, 512 |

| | |
|--|---|
| <i>Connecticut v Johnson</i> (1983) 460 U.S. 73 | 691 |
| <i>Cool v. United States</i> (1972) 409 U.S. 100 | 232, 264, 266, 513, 532, 571, 591, 597, 603, 618 |
| <i>Cooper v. Sowders</i> (6th Cir. 1988) 837 F.2d 284 | 204, 218, 224, 295, 313, 407, 428, 464 |
| <i>In re Cortez</i> (1971) 6 Cal.3d 78 | 204, 277, 295, 420 |
| <i>Cowan v. Superior Court</i> (1996) 14 Cal.4th 367 | 663 |
| <i>Coy v. Iowa</i> (1988) 487 U.S. 1012 | 496 |
| <i>Crane v. Kentucky</i> (1986) 476 U.S. 683..... | 233, 265, 266, 331, 407, 408, 428, 429 443, 450, 476, 449, 495, 501, 506, 512, 557,561, 568, 581 |
| <i>In re Cristella C.</i> (1992) 6 Cal.App.4th 1363 | 663 |
| <i>Curtis v. Duval</i> (1st Cir. 1997) 124 F.3d 1 | 718 |
| <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> (1993) 509 U.S. 579 | 388, 390, 391, 392, 394, 395, 404 |
| <i>In re David B.</i> (1977) 68 Cal.App.3d 931 | 329 |
| <i>Davidson v. Riley</i> (2nd Cir. 1995) 44 F.3d 1118 | 319 |
| <i>Davis v. Alaska</i> (1974) 415 U.S. 308..... | 247, 255, 271, 319, 329, 353, 448, 449, 472, 476, 481,491, 492, 494, 498, 556, 561,568, 707 |
| <i>Davis v. United States</i> (D.C. App. 1986) 510 A.2d 1051 | 596 |
| <i>Dawson v. Delaware</i> (1992) 503 U.S. 159 | 204, 218, 224, 247, 295, 313, 407, 428, 437 |

| | |
|---|--|
| <i>Delaware v. Fensterer</i> (1985) 474 U.S. 15 | 506 |
| <i>Delaware v. Van Arsdall, supra</i> , 475 U.S. 673 | 491, 492, 494, 495, 496, 497 |
| <i>Delzell v. Day</i> (1950) 36 Cal.2d 349 | 508, 538, 620, 743 |
| <i>In re Dennis</i> (1959) 51 Cal.2d 666 | 721 |
| <i>Diaz v. United States</i> (1912) 223 U.S. 442 | 715 |
| <i>Donnelly v. DeChristoforo</i> | |
| (1974) 416 U.S. 637 | 46, 47, 205, 219, 225, 234, 248, 256, 296, 314, 320, 346, 354, 360, 367, 407, 428, 437, 444, 450, 464, 475, 482, 485, 495, 502, 506, 513, 523, 533, 546, 561, 569, 583, 589, 594, 599, 604, 615, 619, 620, 621, 630, 631, 642, 652, 657, 664, 669, 677, 682, 696, 739, 740, 742, 743 |
| <i>Douglas v. Alabama</i> (1965) 380 U.S. 415 | 448, 583, 715, 730 |
| <i>Dowling v. United States</i> (1990) 493 U.S. 342 | 244 |
| <i>Drope v. Missouri</i> (1975) 420 U.S. 162 | 716 |
| <i>DuBarry Int'l. Inc. v. Southwest Forest Industries, Inc.</i> | |
| (1991) 231 Cal.App.3d 552 | 663 |
| <i>DuBois v. Sparrow</i> (1979) 92 Cal.App.3d 290 | 351, 566 |
| <i>Du Jardin v. City of Oxnard</i> (1995) 38 Cal.App.4th 174 | 508, 538, 621, 743 |
| <i>Duckworth v. State</i> (Ark. 1907) 83 Ark. 192 [103 S.W. 60] | 582 |
| <i>Dudley v. Duckworth</i> (7th Cir. 1988) 854 F.2d 967 | 473 |
| <i>Duncan v. Louisiana</i> (1968) 391 U.S. 145 | 46, 541, 739 |
| <i>Duren v. Missouri</i> (1979) 439 U.S. 357 | 3, 31, 35, 36, 38, 40 |

| | |
|--|--|
| <i>Eddings v. Oklahoma</i> (1982) 455 U.S. 104 | 508 |
| <i>Edelbacher v. Calderon</i> (9th Cir. 1998) 160 F.3d 582 | 631 |
| <i>Edmondson v. State Bar</i> (1981) 29 Cal.3d 339 | 635 |
| <i>Elledge v. Dugger</i> (11th Cir. 1987) 823 F.2d 1439 | 280 |
| <i>Estelle v. McGuire</i> (1991) 502 U.S. 62 | 271, 531, 577, 588, 594, 598, 603, 609, 613 619, 629, 657 669 |
| <i>Evans v. State</i> (Ga. App. 1978) 148 Ga.App. 422 [251 S.E.2d 325] | 734 |
| <i>Faretta v. California</i> (1975) 422 U.S. 806 | 707 |
| <i>Fisher v. Roe</i> (9th Cir. 2001) 263 F.3d 906 | 182, 711, 712, 719 |
| <i>Ford v. Wainright</i> (1986) 477 U.S. 399 | 631 |
| <i>Francis v. Franklin</i> (1985) 471 U.S. 307 | 525, 593, 602, 607, 647, 651, 690 |
| <i>Franklin v. Duncan</i> (9th Cir. 1995) 70 F.3d 75 | 474 |
| <i>Franklin v. Henry</i> (9th Cir. 1997) 122 F.3d 1270 | 448, 476, 557, 561, 568 |
| <i>Frazer v. United States</i> (9th Cir. 1994) 18 F.3d 778 | 718 |
| <i>Frye v. United States</i> (D.C. Cir. 1923) 293 F. 1013 | 388, 389, 390, 391, 394 |
| <i>Futentes v. Shevin</i> (1972) 407 U.S. 67 | 32, 38, 282, 318, 427 |
| <i>Ganger v. Peyton</i> (4th Cir. 1967) 379 F.2d 709 | 530 |
| <i>Gardner v. Florida</i> (1977) 430 U.S. 349 | 508, 631, 716 |
| <i>Geders v. United States</i> (1976) 425 U.S. 80 | 718 |
| <i>Geer v. Missouri Lumber & Mining Co.</i> (Mo. 1896) 134 Mo. 85 [34 S.W.1099] | 352, 441 |

| | |
|--|---|
| <i>Gideon v. Wainwright</i> (1963) 372 U.S. 335..... | 546, 547 |
| <i>Giles v. State</i> (Ark. 1977) 251 Ark. 413 [549 S.W.2d 479 | 582 |
| <i>Gilmore v. Taylor</i> (1993) 508 U.S. 333 | 47, 205, 219, 225, 234, 248, 256, 270, 280, 283, 296, 314, 320, 346, 354, 360, 367, 406, 428, 437, 443, 450, 464, 475, 482, 485, 495, 501, 502, 506, 512, 523, 533 545, 561, 569, 582, 589, 594, 598, 604, 615, 619, 620, 621, 630, 631, 642, 652, 657, 664, 669, 677, 682, 696, 739, |
| <i>Glee v. State</i> (Fla. Dist. Ct. App. 1994) 639 So.2d 1092 | 721 |
| <i>Gore v. State</i> (Fla. 1998) 719 So.2d 1197 | 631 |
| <i>Gossman v. Gossman</i> (1942) 52 Cal.App.2d 184 | 204, 295, 420 |
| <i>Gray v. Mississippi</i> (1987) 481 U.S. 648 | 532 |
| <i>Green v. Georgia</i> (1979) 442 U.S. 95 | 233, 263, 281, 426, 472, 473, 513, 532, 597, 631 |
| <i>Greene v. McElroy</i> (1959) 360 U.S. 474 | 492 |
| <i>Greer v. Miller</i> (1987) 483 U.S. 756 | 569, 583, 621, 740, 742 |
| <i>Gregg v. Georgia</i> (1976) 428 U.S. 153..... | 624 |
| <i>Harris v. Superior Court</i> (1977) 19 Cal.3d 786 | 204, 295, 420 |
| <i>Harris v. United States</i> (D.C. App. 1985) 489 A.2d 464 | 720 |
| <i>Hernandez v. Ylst</i> (9th Cir. 1991) 930 F.2d 714 | 39, 47, 206, 219, 225, 248, 255, 256, 266, 283, 296, 309, 315, 320, 332, 360, 367, 408, 429, 438, 444, 450, 465, 477, 481, 496, 502, 507, 513, 524, 530, 533, 557, 562, 567, 573, 578, 583, 589, 598, 604, 609, 616, 619, 620, 642, 652, 658, 664, 670, 677, 682, 696, 713, 717, 729, 735, 740 |

| | |
|---|---|
| <i>Herrera v. Collins</i> (1993) 506 U.S. 390 | 518 |
| <i>Herring v. New York, supra</i> , 422 U.S. 853 | 718 |
| <i>Hicks v. Oklahoma</i> (1980) 447 U.S. 343 | 39, 47, 206, 219, 225, 248, 266, 283, 309, 315, 320, 328, 332, 354, 367, 408, 429, 438, 444, 450, 465, 477, 496, 502, 506, 513, 524, 530, 533, 557, 562, 567, 573, 578, 583, 589, 598, 604, 609, 615, 619, 620, 642, 652, 658, 664, 670, 677, 682, 696, 713, 717, 729, 735, 740 |
| <i>Hicks v. U.S.</i> (1980) 447 U.S. 343 | 360 |
| <i>Hicks v. United States</i> (1980) 447 U.S. 343 | 255, 256, 481 |
| <i>Hilbish v. State</i> (Alaska Ct. App. 1995) 891 P.2d 841 | 673 |
| <i>Holland v. United States</i> (1954) 348 U.S. 121 | 673 |
| <i>Holt v. Virginia</i> (1965) 381 U.S. 131 | 33, 39, 282, 331, 427 |
| <i>Hopt v. Utah</i> (1884) 110 U.S. 574 | 46, 715, 739 |
| <i>Huntingdon v. Crowley</i> (1966) 64 Cal. 2d 647 | 389 |
| <i>Hynes v. McDermott</i> (N.Y. 1880) 82 N.Y. 41 | 442 |
| <i>Illinois v. Allen</i> (1970) 397 U.S. 337 | 707, 715, 716 |
| <i>Izazaga v. Superior Court</i> (1991) 54 Cal.3d 356 | 263 |
| <i>J.E.B. v. Alabama ex rel. T.B.</i> (1993) 511 U.S. 127 | 543 |
| <i>Jackson v. Commonwealth</i> (Va. 1870) 60 Va. 656 | 709, 719, 720 |
| <i>Jackson v. Virginia</i> (1979) 443 U.S. 307 | 522, 611, 642, 652, 657, 664, 669, 676, 681, 686, 696 |

| | |
|---|---|
| <i>Jiminez v. Meyers</i> (9th Cir. 1993) 40 F.3d 976..... | 601, 602 |
| <i>In re Johnson</i> (1965) 62 Cal.2d 325 | 717 |
| <i>Johnson v. Mississippi</i> (1988) 486 U.S. 578 | 508, 630, 631 |
| <i>Johnson v. United States</i> (1997) 520 U.S. 461 | 718 |
| <i>Johnson v. Zerbst</i> (1938) 304 U.S. 458 | 716, 717, 730 |
| <i>Johnston Harvester Co. v. Miller</i> (Mich. 1888) 72 Mich. 265..... | 423, 424 |
| <i>Keeble v. United States</i> (1973) 412 U.S. 205 | 512 |
| <i>King v. Superior Court</i> (2003) 107 Cal. App. 4th 929 | 708 |
| <i>Kokas v. Commonwealth</i> (Ky. 1922) 194 Ky. 44 | 709, 721, 724 |
| <i>Krulewitch v. United States</i> (1949) 336 U.S. 440 | 307 |
| <i>Kumho Tire Co. v. Carmichael</i> (1999) 526 U.S. 137 | 391, 394, 405 |
| <i>Kyles v. Whitley</i> (1995) 514 U.S. 419 .. | 39, 46, 205, 219, 225, 234, 248, 256, 270, 280, 283, 296, 314, 320, 346, 354, 360, 367, 406, 428, 437, 443, 450, 464, 475, 485, 495, 500, 502, 506, 512, 523, 533, 545, 561, 568, 589, 594, 598, 604, 615, 618, 620, 621, 631, 642, 652, 657, 664, 669, 677, 681, 696, 739, 742 |
| <i>Lajoie v. Thompson</i> (9th Cir. 2000) 217 F.3d 663 | 473 |
| <i>Lane v. Sullivan</i> (8th Cir. 1990) 900 F.2d 1247 | 662 |
| <i>Lanigan v. Maloney</i> (1st Cir. 1988) 853 F.2d 40 | 522 |
| <i>Lankford v. Idaho</i> (1991) 500 U.S. 110 | 630 |
| <i>Leary v. United States</i> (1969) 395 U.S. 6 | 576 |

| | |
|--|-----------------------------------|
| <i>Lile v. McKune</i> (D. Kan. 1999) 45 F.Supp.2d 1157 | 344 |
| <i>Lindsay v. Normet</i> (1972) 405 U.S. 56 | 233, 281, 426, 513, 532, 597 |
| <i>Little v. United States</i> (10th Cir. 1934) 73 F.2d 861 | 709 |
| <i>Lockhart, Lockhart v. McCree</i> (1986) 476 U.S. 162 | 306 |
| <i>In re Lopez</i> (1970) 2 Cal.3d 141 | 717 |
| <i>Lopez-Alvarez, supra</i> , 970 F.2d at 588 | 476 |
| <i>Lostutter v. Estate of Larkin</i> (Kan. 1984) 235 Kan. 154 [679 P.2d 181] | 662 |
| <i>In re M.</i> (1969) 70 Cal.2d 444 | 663 |
| <i>M.M.J. v. R.N.J.</i> (Utah Ct. App. 1995) 908 P.2d 345 | 662 |
| <i>Maclean v. Scripps</i> , 52 Mich. 219, 17 N. W. 815 | 441 |
| <i>Mak v. Blodgett</i> (9th Cir. 1992) 970 F.2d 614 | 569, 583, 621, 740, 742 |
| <i>Mandelbaum v. United States</i> (2nd Cir. 1958) 251 F.2d 748 | 635 |
| <i>In re Marriage of Weaver</i> (1990) 224 Cal.App.3d 478 | 663 |
| <i>Marshall v. Walker</i> (1983) 464 U.S. 951 | 569, 583, 621, 740, 742 |
| <i>Martin v. Ohio</i> (1987) 480 U.S. 228 | 443, 495, 501, 506, 512, 581 |
| <i>Martineau v. Perrin</i> (1st Cir. 1979) 601 F.2d 1196 | 730 |
| <i>Mary M. v. City of Los Angeles</i> (1991) 54 Cal.3d 202 | 447 |
| <i>Mathews v. United States</i> (1988) 485 U.S. 58 | 512 |
| <i>McKaskle v. Wiggins</i> (1984) 465 U.S. 168 | 547 |
| <i>McKinney v. Rees</i> (9th Cir. 1993) 993 F.2d 1378 | 205, 219, 225, 247, 296, 314, 437 |

| | |
|---|---|
| <i>McMillan v. Pennsylvania</i> (1986) 477 U.S. 79 | 582 |
| <i>Mempa v. Rhay</i> (1967) 389 U.S. 128 | 708 |
| <i>Mills v. Maryland</i> (1988) 486 U.S. 367 | 630 |
| <i>Mitchell v. United States</i> (1999) 526 U.S. 314 | 534 |
| <i>Moore v. Chesapeake & O.R. Co.</i> (1951) 340 U.S. 573 | 635 |
| <i>Mullaney v. Wilbur</i> (1975) 421 U.S. 684 | 606, 693 |
| <i>Mullins v. State</i> (Ala. Crim. App. 1977) 344 So.2d 539 | 734 |
| <i>NBC Subsidiary (KNBC-TV), Inc. v. Superior Court</i> (1999) 20 Cal.4th 1178 | 42 |
| <i>Neal v. Neal</i> (1881) 58 Cal. 287 | 422, 423 |
| <i>Near v. Cunningham</i> (3d Cir. 1963) 313 F.2d 929 | 715 |
| <i>Neder v. United States</i> (1999) 527 U.S. 1 | 522, 567, 611, 642, 652, 657, 664, 669, 676, 681, 696 |
| <i>Newman v. Hopkins</i> (8th Cir. 2001) 247 F.3d 848 | 473 |
| <i>Nishikawa v. Dulles</i> (1958) 356 U.S. 129 | 635, 693 |
| <i>North Carolina v. Pearce</i> (1969) 395 U.S. 711 | 329 |
| <i>Ohio v. Roberts</i> (1980) 448 U.S. 56 | 501, 505 |
| <i>In re Oliver</i> (1948) 333 U.S. 257.. | 31, 38, 233, 266, 282, 318, 331, 408, 426, 429, 450, 523 |
| <i>Packer v. Hill</i> (9th Cir. 2002) 291 F.3d 569 | 602 |

| | |
|--|---|
| <i>Panzavecchia v. Wainwright</i> (5th Cir. Unit B 1981) 658 F.2d 337 | 205, 219, 225 |
| <i>Patterson v. New York</i> (1977) 432 U.S. 197 | 274 |
| <i>Payne v. Superior Court</i> (1976) 17 Cal.3d 908 | 330 |
| <i>Payne v. Tennessee</i> (1991) 501 U.S. 808 | 204, 218, 224, 295, 313, 407, 428, 437, |
| <i>Penry v. Lynaugh</i> (1989) 492 U.S. 302 | 631 |
| <i>Penson v. Ohio</i> (1988) 488 U.S. 75 | 708, 718 |
| <i>People v. Adrian</i> (1982) 135 Cal.App.3d 335 | 518, 525, 606, 686 |
| <i>People v. Aikens</i> (NY 1983) 465 N.Y.S.2d 480 | 711, 719 |
| <i>People v. Albertson</i> (1944) 23 Cal.2d 550 | 224, 238, 244, 245, 246, 247, 248, 279, 318, 564 |
| <i>People v. Alcala</i> (1984) 36 Cal.3d 604 | 200, 205, 218, 224, 244, 295, 314 |
| <i>People v. Alexander</i> (1985) 163 Cal.App.3d 1189 | 35 |
| <i>People v. Allen</i> (1999) 72 Cal.App.4th 1093 | 396 |
| <i>People v. Allen</i> (CA 1993) 20 Cal.App.4th 846 | 662 |
| <i>People v. Alvarez</i> (2002) 27 Cal.4th 1161 | 253, 448 |
| <i>People v. Alvarez</i> (1974) 44 Cal.App.3d 375 | 252 |
| <i>People v. Anderson</i> (1983) 144 Cal.App.3d 55 | 267 |
| <i>People v. Andrews</i> (1989) 49 Cal.3d 200 | 552 |
| <i>People v. Attard</i> (N.Y. App. Div. 1973) 346 N.Y.S.2d 851 | 638 |

| | |
|---|-----------------------------------|
| <i>People v. Babbitt</i> (1988) 45 Cal.3d 660 | 473 |
| <i>People v. Bain</i> (1971) 5 Cal.3d 839 | 583, 715, 730 |
| <i>People v. Balderas</i> (1985) 41 Cal.3d 144 | 201, 224 |
| <i>People v. Barthleman</i> (1898) 120 Cal. 7 | 694 |
| <i>People v. Bassett</i> (1968) 69 Cal.2d 122 | 657 |
| <i>People v. Bean</i> (1988) 46 Cal.3d 919 | 200, 201, 204, 218, 224, 259, 260 |
| <i>People v. Beardslee</i> (1991) 53 Cal.3d 68 | 520, 610 |
| <i>People v. Bell</i> (1989) 49 Cal.3d 502 | 35 |
| <i>People v. Belmontes</i> (1983) 34 Cal.3d 335 | 204, 295, 420 |
| <i>People v. Belmontes</i> (1988) 45 Cal.3d 744 | 492, 495 |
| <i>People v. Belton</i> (1979) 23 Cal.3d 516 | 553, 554 |
| <i>People v. Bender</i> (1995) 27 Cal.2d 164 | 693, 695 |
| <i>People v. Bigelow</i> (1984) 37 Cal.3d 731 | 278 |
| <i>People v. Blankenship</i> (1959) 171 Cal.App.2d 66 | 608 |
| <i>People v. Bloyd</i> (1987) 43 Cal.3d 333 | 593 |
| <i>People v. Bolden</i> (2002) 29 Cal.4th 515 | 404, 405 |
| <i>People v. Bradford</i> (1997) 14 Cal.4th 1005 | 520 |
| <i>People v. Branch</i> (1996) 637 N.Y.S.2d 892 | 522 |
| <i>People v. Brew</i> (1984) 161 Cal.App.3d 1102 | 723 |
| <i>People v. Brown</i> (1984) 152 Cal.App.3d 674 | 525 |

| | |
|--|---|
| <i>People v. Brown</i> (1988) 45 Cal.3d 1247 | 668 |
| <i>People v. Brown</i> (1988) 46 Cal.3d 432 | 48, 210, 222, 228, 235, 250, 258, 268, 273, 303, 310, 323, 350, 356, 362, 369, 411, 432, 439, 445, 453, 467, 478, 483, 563 |
| <i>People v. Brown</i> (1993) 17 Cal.App.4th 1389 | 200, 205, 218, 224, 244, 295, 314 |
| <i>People v. Buffum</i> (1953) 40 Cal.2d 709 | 508, 538, 620, 743 |
| <i>People v. Buford</i> (1982) 132 Cal.App.3d 288 | 35 |
| <i>People v. Burgener</i> (2003) 29 Cal.4th 833 | 31, 35, 37, 38 |
| <i>People v. Burgener</i> (1986) 41 Cal.3d 505 | 689 |
| <i>People v. Byrnes</i> (1948) 84 Cal.App.2d 72 | 731 |
| <i>People v. Cain</i> (1995) 10 Cal.4th 1 | 513 |
| <i>People v. Carpenter</i> (1997) 15 Cal.4th 312 | 224, 238, 244, 245 |
| <i>People v. Carroll</i> (1947) 79 Cal.App.2d 146 | 694 |
| <i>People v. Castillo</i> (1997) 16 Cal.4th 1009 | 231 |
| <i>People v. Chavez</i> (1980) 26 Cal.3d 334 | 39, 282, 426, 447 |
| <i>People v. Coddington</i> (2000) 23 Cal.4th 529 | 413 |
| <i>People v. Coleman</i> (1985) 38 Cal.3d 69 | 307 |
| <i>People v. Conner</i> (1983) 34 Cal.3d 141 | 333, 527, 529, 530 |
| <i>People v. Corona</i> (1989) 211 Cal.App.3d 529 | 473 |
| <i>People v. Cox</i> (1991) 53 Cal.3d 618 | 580, 582 |

| | |
|---|--------------------|
| <i>People v. Coyer</i> (1983) 142 Cal.App.3d 839 | 369 |
| <i>People v. Craig</i> (1978) 86 Cal.App.3d 905 | 413 |
| <i>People v. Crandell</i> (1988) 46 Cal.3d 833 | 689 |
| <i>People v. Dail</i> (1943) 22 Cal.2d 642 | 602, 690 |
| <i>People v. Daniels</i> (1991) 52 Cal.3d 815 | 559 |
| <i>People v. Davis</i> (1984) 161 Cal.App. 3d 796 | 44, 313 |
| <i>People v. Dellinger</i> (1984) 163 Cal. App. 3d 284 | 388, 389 |
| <i>People v. Dewberry</i> (1959) 51 Cal.2d 548 | 231 |
| <i>People v. Diaz</i> (1951) 105 Cal.App.2d 690 | 715, 730 |
| <i>People v. Doane</i> (1988) 200 Cal.App.3d 852 | 717 |
| <i>People v. Douglas</i> (1990) 50 Cal.3d 468 | 413 |
| <i>People v. Eagen</i> (Colo. Ct. App. 1994) 892 P.2d 426 | 344, 346 |
| <i>People v. Easley</i> (1988) 46 Cal.3d 712 | 492, 493 |
| <i>People v. Echevarria</i> (1992) 11 Cal.App.4th 444 | 560 |
| <i>People v. Edelbacher</i> (1989) 47 Cal.3d 983 | 496, 518 |
| <i>People v. Epps</i> (2001) 25 Cal.4th 19 | 351, 352, 566 |
| <i>People v. Ewoldt</i> (1994) 7 Cal.4th 380 | 200, 259, 260, 278 |
| <i>People v. Falsetta</i> (1999) 21 Cal.4th 903 | 521 |
| <i>People v. Figaro</i> (1986) 41 Cal.3d 714 | 275, 518, 567 |
| <i>People v. Ford</i> (1964) 60 Cal.2d 772 | 508, 538, 621, 743 |

| | |
|---|---------------------------------|
| <i>People v. Foster</i> (1926) 198 Cal. 112 | 694 |
| <i>People v. Freeman</i> (1994) 8 Cal.4th 450 | 626, 680, 681 |
| <i>People v. Frutos</i> (1984) 158 Cal.App.3d 979 | 727 |
| <i>People v. Frye</i> (1998) 18 Cal.4th 894 | 707 |
| <i>People v. Fudge</i> (1994) 7 Cal.4th 1075 | 521 |
| <i>People v. Garcia</i> (1972) 27 Cal.App.3d 639 | 461 |
| <i>People v. Garcia</i> (1988) 201 Cal.App.3d 324 | 352, 364, 366 |
| <i>People v. Gentry</i> (1968) 257 Cal.App.2d 607 | 587 |
| <i>People v. Gibson</i> (1976) 56 Cal.App.3d 119 | 307 |
| <i>People v. Giminez</i> (1975) 14 Cal.3d 68 | 204, 295, 420 |
| <i>People v. Goodall</i> (1982) 131 Cal.App.3d 129 | 471, 472 |
| <i>People v. Goodchild</i> (1976) 242 N.W.2d 465 | 635 |
| <i>People v. Goodwin</i> (1997) 59 Cal.App.4th 1084 | 42 |
| <i>People v. Gordon</i> (1973) 10 Cal.3d 460 | 553, 554 |
| <i>People v. Gordon</i> (1990) 50 Cal.3d 1223 | 521 |
| <i>People v. Gosden</i> (1936) 6 Cal. 2d 14 | 232, 265, 572, 603, 615 |
| <i>People v. Green</i> (1980) 27 Cal.3d 1 | 43, 44, 307, 313, 413, 435, 464 |
| <i>People v. Guerrero</i> (1976) 16 Cal.3d 719 | 307 |
| <i>People v. Guiton</i> (1993) 4 Cal.4th 1113 | 227, 280 |
| <i>People v. Hall</i> (1980) 28 Cal.3d 143 | 497, 606, 685 |

| | |
|---|--|
| <i>People v. Hall</i> (1986) 41 Cal.3d 826 | 496, 518 |
| <i>People v. Hamilton</i> (1988) 46 Cal.3d 123 | 269, 333 |
| <i>People v. Hardy</i> (1992) 2 Cal.4th 86 | 593, 647 |
| <i>People v. Harris</i> (1984) 36 Cal.3d 36 | 35, 36 |
| <i>People v. Harris</i> (1989) 47 Cal.3d 1047 | 31, 264, 572 |
| <i>People v. Harris</i> (1992) 10 Cal.App.4th 672 | 513 |
| <i>People v. Hartman</i> (1984) 103 Cal. 242 | 727 |
| <i>People v. Harvey</i> (1984) 163 Cal.App.3d 90 | 201, 559 |
| <i>People v. Haston</i> (1968) 69 Cal.2d 233 | 201, 252 |
| <i>People v. Haywood</i> (1952) 109 Cal.App.2nd 867 | 694 |
| <i>People v. Hill</i> (1983) 141 Cal.App.3d 661 | 576 |
| <i>People v. Hill</i> (1998) 17 Cal.4th 800 | 447, 522, 538, 543, 620, 644, 646, 743 |
| <i>People v. Hines</i> (1964) 61 Cal.2d 164 | 729 |
| <i>People v. Hitch</i> (1974) 12 Cal.3d 641 | 9, 51, 52, 340, 341, 373 |
| <i>People v. Hoban</i> (1985) 176 Cal.App.3d 255 | 555 |
| <i>People v. Holt</i> (1984) 37 Cal.3d 436 | 200, 205, 218, 224, 244, 295, 314 |
| <i>People v. Hoover</i> (1974) 12 Cal.3d 875 | 554 |
| <i>People v. Horton</i> (1995) 11 Cal.4th 1068 | 296, 314, 488, 508, 708, 719 |
| <i>People v. Hughes</i> (Ariz. 1967) 102 Ariz. 118 | 662 |
| <i>People v. Humphrey</i> (1996) 13 Cal.4th 1073 | 434 |

| | |
|---|--|
| <i>People v. Hunter</i> (1989) 49 Cal.3d 957 | 560 |
| <i>People v. Huston</i> (1989) 210 Cal.App.3d 192 | 260 |
| <i>People v. Jackson</i> (1996) 13 Cal. 4th 1164 | 31, 513 |
| <i>People v. Jiminez</i> (1978) 21 Cal.3d 595 | 43, 44, 313, 435 |
| <i>People v. Johnson</i> (1980) 26 Cal.3d 557 | 280 |
| <i>People v. Johnson</i> (1992) 3 Cal.4th 1183 | 687 |
| <i>People v. Johnson</i> (Ill. App. Ct. 1972) 4 Ill. App.3d 539 [281 N.E.2d 451] | 638 |
| <i>People v. Jones</i> (1984) 151 Cal.App.3d 1027 | 35 |
| <i>People v. Jones</i> (1996) 13 Cal.4th 535 | 204, 206, 218, 220, 224, 226, 257, 295, 297, 313, 321, 407, 428, 464, 482 |
| <i>People v. Jones</i> (1997) 58 Cal.App.4th 693 | 520 |
| <i>People v. Jordan</i> (1986) 42 Cal.3d 308 | 204, 295, 420 |
| <i>People v. Kaanehe</i> (1977) 19 Cal.3d 1 | 304, 323, 334, 369, 411 |
| <i>People v. Kaurish</i> (1991) 52 Cal.3d 648 | 434, 435, 473 |
| <i>People v. Kelly</i> (1976) 17 Cal.3d 24 | 9, 15, 33, 51, 52, 306, 335, 370, 371, 372, 373, 375, 388, 389, 390, 391, 392, 394, 396, 403, 404, 405, 406, 407, 408, 411, 412, 413, 429, 451 |
| <i>People v. Kelly</i> (1991) 1 Cal.4th 495 | 513 |
| <i>People v. Kipp</i> (1998) 18 Cal.4th 349 | 200 |
| <i>People v. Kirk</i> (1999) 74 Cal.App.4th 1066 | 359 |

| | |
|---|--|
| <i>People v. Kohler</i> (1855) 5 Cal. 72 | 721, 724 |
| <i>People v. Lara</i> (2001) 86 Cal.App.4th 139 | 43, 44, 312, 313, 435 |
| <i>People v. Lawson</i> (1987) 189 Cal.App.3d 741 | 593, 647 |
| <i>People v. Leahy</i> (1994) 8 Cal.4th 587 | 303, 323, 333, 369, 389, 390, 391, 392, 393, 394, 396, 404, 405, 411, 413 |
| <i>People v. Litteral</i> (1978) 79 Cal.App.3d 790 | 710, 711 |
| <i>People v. Loggins</i> (1972) 23 Cal.App.3d 597 | 521, 667 |
| <i>People v. Madison</i> (1935) 3 Cal.2d 668 | 497, 518, 519 |
| <i>People v. Magana</i> (1990) 218 Cal.App.3d 951 | 689 |
| <i>People v. Marsden</i> (1970) 2 Cal.3d 118 | 4, 50, 325 |
| <i>People v. Marshall</i> (1996) 13 Cal.4th 799 | 352 |
| <i>People v. Marzett</i> (1985) 174 Cal.App.3d 610 | 607 |
| <i>People v. Maurer</i> (1995) 32 Cal.App.4th 1121 | 520 |
| <i>People v. Mayberry</i> (1975) 15 Cal.3d 143 | 553 |
| <i>People v. McClellan</i> (1969) 71 Cal. 2d 793 | 206, 220, 226, 257, 297, 321, 482 |
| <i>People v. McDonald</i> (1984) 37 Cal.3d 351 | 306 |
| <i>People v. McElheny</i> (1982) 137 Cal.App.3d 396 | 576, 641 |
| <i>People v. McGlothlin</i> (1998) 67 Cal.App.4th 468 | 303 |
| <i>People v. McGreen</i> (1980) 107 Cal.App.3d 504 | 508, 538, 621, 743 |
| <i>People v. McPartland</i> (1988) 198 Cal.App.3d 569 | 527 |
| <i>People v. McRae</i> (1947) 31 Cal.2d 184 | 555 |

| | |
|---|------------------------------|
| <i>People v. Medina</i> (1990) 51 Cal.3d 870 | 245, 274, 461 |
| <i>People v. Medina</i> (1995) 11 Cal.4th 694 | 224, 244, 274 |
| <i>People v. Michaels</i> (2002) 28 Cal.4th 486 | 330 |
| <i>People v. Mickle</i> (1991) 54 Cal.3d 140 | 448 |
| <i>People v. Millwee</i> (1998) 18 Cal.4th 96 | 520 |
| <i>People v. Minor</i> (1980) 104 Cal.App.3d 194 | 369 |
| <i>People v. Miranda</i> (1987) 44 Cal.3d 57 | 105, 269 |
| <i>People v. Mixon</i> (1982) 129 Cal.App.3d 118 | 461 |
| <i>People v. Mixon</i> (1990) 225 Cal.App.3d 1471 | 641, 693 |
| <i>People v. Moore</i> (1954) 43 Cal.2d 517 | 232, 263, 264, 266, 532, 597 |
| <i>People v. Moreland</i> (1970) 5 Cal.App.3d 588..... | 729 |
| <i>People v. Morris</i> (1988) 199 Cal.App.3d 377 | 419 |
| <i>People v. Morris</i> (1991) 53 Cal.3d 152 | 447, 448 |
| <i>People v. Musselwhite</i> (1998) 17 Cal.4th 1216 | 277 |
| <i>People v. Nation</i> (1980) 26 Cal.3d 169 | 341 |
| <i>People v. Naumcheff</i> (1952) 114 Cal.App.2nd 278 | 694 |
| <i>People v. Nealy</i> (1991) 228 Cal.App.3d 447 | 471 |
| <i>People v. Newberry</i> (Ill. 1995) 166 Ill.2d 310 [652 N.E.2d 288] | 344 |
| <i>People v. Noble</i> (2002) 100 Cal.App.4th 184 | 602, 651, 690 |
| <i>People v. Nunez</i> (1983) 144 Cal.App.3d 697 | 723 |

| | |
|--|--|
| <i>People v. Olivas</i> (1976) 17 Cal.3d 236 | 204, 218, 224, 295, 313, 407, 428, 464 |
| <i>People v. Pastor Cruz</i> (1993) 16 Cal.App.4th 322 | 344 |
| <i>People v. Pierce</i> (1967) 66 Cal.2d 53 | 608 |
| <i>People v. Pitmon</i> (1985) 170 Cal.App.3d 38 | 576 |
| <i>People v. Pitts</i> (1990) 223 Cal.App.3d 606 | 559 |
| <i>People v. Ramirez</i> (1979) 25 Cal.3d 260 | 32, 39, 282, 319, 427 |
| <i>People v. Reeder</i> (1978) 82 Cal.App.3d 543 | 473 |
| <i>People v. Renteria</i> (2001) 93 Cal.App.4th 552 | 520, 584 |
| <i>People v. Reyes-Martinez</i> (1993) 14 Cal.App.4th 1412 | 688 |
| <i>People v. Riel</i> (2000) 22 Cal.4th 1153 | 610 |
| <i>People v. Rist</i> (1976) 16 Cal.3d 211 | 44, 204, 295, 313, 420, 435 |
| <i>People v. Rivera</i> (1981) 127 Cal.App.3d 136 | 329 |
| <i>People v. Rivera</i> (1984) 157 Cal.App.3d 736 | 266 |
| <i>People v. Rivers</i> (1993) 20 Cal.App.4th 1040 | 610 |
| <i>People v. Robertson</i> (1989) 48 Cal.3d 18 | 663 |
| <i>People v. Roder</i> (1983) 33 Cal.3d 491 | 522 |
| <i>People v. Rodrigues</i> (1994) 8 Cal.4th 1060 | 711 |
| <i>People v. Roybal</i> (1998) 19 Cal.4th 481 | 342, 344 |
| <i>People v. Ruiz, People v. Ruiz</i> (1988) 44 Cal.3d 589 | 305 |
| <i>People v. Saille</i> (1991) 54 Cal.3d 1103 | 518 |

| | |
|---|--|
| <i>People v. Salas</i> (1976) 58 Cal.App.3d 460 | 230, 695 |
| <i>People v. Sam</i> (1969) 71 Cal.2d 194 | 204, 218, 224, 295, 313, 407, 428, 464 |
| <i>People v. Scheid</i> (1997) 16 Cal.4th 1 | 402 |
| <i>People v. Shirley</i> (1982) 31 Cal. 3d 18 | 389 |
| <i>People v. Shoals</i> (1992) 8 Cal.App.4th 475 | 608 |
| <i>People v. Silberman</i> (1989) 212 Cal.App.3d 1099 | 280 |
| <i>People v. Slaughter</i> (2002) 27 Cal.4th 1187 | 520, 584 |
| <i>People v. Smith</i> (1989) 215 Cal.App.3d 19 | 396 |
| <i>People v. Smith</i> (1992) 9 Cal.App.4th 196 | 520, 584 |
| <i>People v. Soto</i> (1999) 21 Cal.4th 512 | 396 |
| <i>People v. Stanley</i> (1984) 161 Cal.App.3d 144 | 304, 323, 334, 369, 411 |
| <i>People v. Stewart</i> (1976) 16 Cal.3d 133 | 521 |
| <i>People v. Stewart</i> (1985) 171 Cal.App.3d 59 | 204, 295, 420 |
| <i>People v. Stoll</i> (1989) 49 Cal. 3d 1136 | 392 |
| <i>People v. Sumner</i> (Ill. App. 1982) 107 Ill.App.3d 368 | 583 |
| <i>People v. Superior Court (Greer)</i> (1977) 19 Cal.3d 255 | 324, 325, 529 |
| <i>People v. Superior Court (Marks)</i> (1991) 1 Cal.4th 56 | 688 |
| <i>People v. Superior Court (Marten)</i> (1979) 98 Cal.App.3d 515 | 325 |

| | |
|--|--|
| <i>People v. Sutton</i> (1993) 19 Cal.App.4th 795..... | 39, 47, 206, 219, 225, 248, 255, 256, 266, 283, 296, 309, 315, 320, 332, 360, 367, 408, 429, 438, 444, 450, 465, 477, 481, 496, 502, 507, 513, 524, 533, 557, 562, 567, 573, 578, 583, 589, 598, 604, 609, 615, 619, 620, 642, 652, 658, 664, 670, 677, 682, 696, 713, 717, 729, 735, 740 |
| <i>People v. Tapia</i> (1994) 25 Cal.App.4th 984 | 520 |
| <i>People v. Taylor</i> (2000) 80 Cal.App.4th 804 | 303, 334 |
| <i>People v. Teitelbaum</i> (1958) 163 Cal.App.2d 184 | 728 |
| <i>People v. Tewksbury</i> (1976) 15 Cal.3d 953 | 553 |
| <i>People v. Thompkins</i> (1987) 195 Cal.App.3d 244 | 624 |
| <i>People v. Thompson</i> (1980) 27 Cal.3d 303 | 199, 206, 208, 220, 226, 234, 244, 256, 257, 297, 321, 482 |
| <i>People v. Thompson</i> (1988) 45 Cal.3d 86 | 278 |
| <i>People v. Towler</i> (1982) 31 Cal.3d. 105 | 693 |
| <i>People v. Van Bushkirk</i> (1976) 61 Cal.App.3d 395 | 303, 369 |
| <i>People v. Vann</i> (1974) 12 Cal.3d 220 | 643 |
| <i>People v. Vickers</i> (1972) 8 Cal.3d 451 | 39, 281, 283, 330, 425, 427 |
| <i>People v. Victor</i> (1984) 465 N.E.2d 817 | 522 |
| <i>People v. Viramontes</i> (2001) 93 Cal.App.4th 1256 | 520 |

| | |
|---|---|
| <i>People v. Von Villas</i> | |
| (1992) 11 Cal.App.4th 175 | 47, 209, 221, 226, 234, 249, 257, 267, 272, 302, 321, 332, 349, 355, 361, 367, 410, 431, 438, 444, 452, 466, 477, 482, 499, 502, 507, 514, 526, 537, 557, 569, 573, 578, 584, 590, 599, 604, 622, 632, 653, 658, 665, 670, 677, 682, 697, 735, 740 |
| <i>People v. Wade</i> (1995) 39 Cal.App.4th 1487 | 606, 608 |
| <i>People v. Wallin</i> (1948) 32 Cal.2d 803 | 553 |
| <i>People v. Wash</i> (1993) 6 Cal.4th 215 | 681 |
| <i>People v. Watson</i> (1956) 46 Cal.2d 818 | 47, 209, 227, 234, 249, 257, 267, 302, 321, 322, 332, 349, 355, 361, 367, 368, 409, 410, 431, 438, 444, 452, 466, 477, 482, 498, 499, 502, 503, 507, 514, 526, 537, 557, 562, 569, 573, 578, 584, 599, 604, 632, 653, 658, 665, 670, 677, 678, 682, 683, 697, 735, 740, 744 |
| <i>People v. Wickersham</i> (1982) 32 Cal.3d 307 | 520 |
| <i>People v. Wiley</i> (1976) 18 Cal.3d. 162 | 695 |
| <i>People v. Williams</i> (2001) 25 Cal.4th 441 | 580 |
| <i>People v. Williams</i> | |
| (1971) 22 Cal.App.3d 34 | 48, 234, 249, 257, 267, 302, 322, 333, 355, 361, 368, 410, 431, 438, 444, 452, 466, 477, 483, 499, 503, 507, 508, 514, 538, 548, 558, 574, 579, 585, 590, 599, 605, 621, 622, 632, 643, 653, 659, 665, 671, 678, 683, 698, 736, 741, 743, 745 |
| <i>People v. Williams</i> (1976) 16 Cal.3d 663 | 447 |
| <i>People v. Williams</i> (1992) 3 Cal.App.4th 1535 | 471 |

| | |
|---|--|
| <i>People v. Wilson</i> (1992) 3 Cal.4th 926 | 687 |
| <i>People v. Woodberry</i> (1970) 10 Cal.App.3d 695 | 635 |
| <i>People v. Woods</i> (1991) 226 Cal.App.3d 1037 | 715, 730 |
| <i>People v. Wright</i> (1988) 45 Cal.3d 1126 | 264, 518, 572, 591 |
| <i>People v. Zamora</i> (1980) 28 Cal.3d 88 | 348, 376, 416 |
| <i>Perry v. Leeke</i> (1989) 488 U.S. 272 | 708, 718 |
| <i>Perry v. Rushen</i> (9th Cir. 1983) 713 F.2d 1447 | 473 |
| <i>Pettijohn v. Hall</i> (1st Cir. 1979) 599 F.2d 476 | 473 |
| <i>Pitchess v. Superior Court</i> (1974) 11 Cal.3d 531 | 11, 23, 50, 287 |
| <i>Plata v. State</i> (Tex. Crim. App 1996) 926 S.W.2d 300 | 641 |
| <i>Powell v. Alabama</i> (1932) 287 U.S. 45 | 718 |
| <i>Powers v. Ohio</i> (1991) 499 U.S. 400 | 543 |
| <i>Press-Enterprise Co. v. Superior Court</i> (1984) 464 U.S. 501 | 727 |
| <i>Press-Enterprise Co. v. Superior Court</i> (1984) 464 U.S. 501 | 42, 731 |
| <i>Press-Enterprise Co. v. Superior Court</i> (1986) 478 U.S. 1 | 42 |
| <i>Proctor v. Butler</i> (11th Cir. 1987) 831 F.2d 1251 | 205, 219, 225 |
| <i>Proffitt v. Wainwright</i> (11th Cir. 1982) 685 F.2d 1227 | 715 |
| <i>Quercia v. United States</i> (1933) 289 U.S. 466 | 232, 265, 572, 592, 603, 615, 618, 689 |
| <i>Randolph v. Loughlin</i> (N.Y. 1872) 48 N.Y. 456 | 441 |
| <i>Reagan v. United States</i> (1895) 157 U.S. 301 | 232, 264, 532, 597 |

| | |
|---|--|
| <i>Reece v. Georgia</i> (1955) 350 U.S. 85 | 39, 283, 331, 427 |
| <i>Reliance Ins. v. McGrath</i> (N.D. Cal. 1987) 671 F.Supp. 669 | 637 |
| <i>Rexall v. Nihill</i> (9th Cir. 1960) 276 F.2d 637 | 637 |
| <i>Richmond v. Embry</i> (10th Cir. 1997) 122 F.3d 866 | 495, 502, 506 |
| <i>Riley v. Deeds</i> (9th Cir. 1995) 56 F.3d 1117 | 710, 711, 719 |
| <i>Ring v. Arizona</i> (2002) 534 U.S. 1103 | 567 |
| <i>Rock v. Arkansas</i> (1987) 483 U.S. 44 | .233, 265, 266, 282, 319, 331, 407, 408, 426, 428, 429, 443, 472, 495 449, 450, 501, 506, 512, 523, 581 |
| <i>In re Rodriguez</i> (1987) 119 Cal.App.3d 457 | 48, 234, 249, 257, 267, 302, 322, 333, 355, 361, 368, 410, 431, 438, 444, 452, 466, 477, 482, 499, 503, 507, 508, 514, 538, 548, 558, 574, 578, 585, 590, 599, 605, 621, 622, 632, 643, 653, 658, 665, 670, 678, 683, 698, 735, 741, 743, 745 |
| <i>Rose v. First Nat'l Bank</i> (Mo. 1887) 91 Mo. 399[3 S.W. 876] | 441 |
| <i>Rose v. Superior Court</i> (2000) 81 Cal.App.4th 564 | 304, 323, 334, 369, 411 |
| <i>Rovinsky v. McKaskle</i> (5th Cir. 1984) 722 F.2d 197 | 727, 728, 730, 731 |
| <i>Sandstrom v. Montana</i> (1979) 442 U.S. 510 | 274, 275, 535, 687, 693 |
| <i>Savage v. Estelle</i> (9th Cir. 1988) 924 F.2d 1459 | 717 |
| <i>United States v. Scheffer</i> (1998) 523 U.S. 303..... | 474 |
| <i>Sheppard v. Maxwell</i> (1966) 384 U.S. 333 | 46, 739 |
| <i>Simmons v. Blodgett</i> (9th Cir. 1997) 110 F.3d 39 | 637, 693 |
| <i>Simmons v. South Carolina</i> (1994) 512 U.S. 154 | 627 |

| | |
|--|------------------------------|
| <i>In re Smiley</i> (1967) 66 Cal.2d 606 | 717 |
| <i>Smith v. Phillips</i> (1982) 455 U.S. 209 | 46, 530, 739 |
| <i>Snyder v. Massachusetts</i> (1934) 291 U.S. 97 | 707 |
| <i>Soule v. General Motors Corp.</i> (1994) 8 Cal.4th 548 | 511, 513, 524 |
| <i>Sparf v. United States</i> (1895) 156 U.S. 51 | 534 |
| <i>Spottiswood v. Weir</i> (1885) 66 Cal. 525 | 440, 441, 442 |
| <i>Staley v. State Bar of California</i> (1941) 17 Cal.2d 119 | 492 |
| <i>Starr v. United States</i> (1894) 153 U.S. 614 231, 265, 534, 571, 591, 603, 614, 618 | |
| <i>State v. Antwine</i> (Kan. App. 1980) 4 Kan.App.2d 389 | 709 |
| <i>State v. Beal</i> (N.M. 1944) 48 N.M. 84 | 709 |
| <i>State v. Blackwell</i> (Ga. App. 2000) 245 Ga. App. 135 | 344 |
| <i>State v. Foster</i> (1995) 528 N.W.2d 22 | 580, 581 |
| <i>State v. Gammill</i> (Kan. App. 1978) 2 Kan.App.2d 627 | 709 |
| <i>State v. Goff</i> (1980) 272 S.E.2d 457 | 637 |
| <i>State v. Greenwold</i> (Wis. Ct. App. 1994) 189 Wis.2d 59 | 344 |
| <i>State v. Hawk</i> (Tenn. Crim. App. 1985) 688 S.W.2d 467 | 205, 219, 225, 247, 296, 314 |
| <i>State v. Hutchinson</i> (Tenn. 1994) 898 S.W.2d 161 | 640 |
| <i>State v. Kennedy</i> (Minn. 1998) 585 N.W.2d 385 | 662 |
| <i>State v. Lawrence</i> (Iowa 1969) 167 N.W.2d 912 | 726, 727, 729 |
| <i>State v. Mains</i> (1983) 669 P.2d 1112 | 648 |

| | |
|---|--|
| <i>State v. Mak</i> (Wash. 1986) 105 Wn.2d 692 | 737, 738 |
| <i>State v. Miller</i> (W. Va. 1996) 197 W. Va. 588 | 644 |
| <i>State v. Norris</i> (Kan. App. 1985) 10 Kan.App.2d 397 | 733 |
| <i>State v. Ortiz</i> (Conn. 1991) 217 Conn. 648 | 581 |
| <i>State v. Pecora</i> (Mont. 1980) 190 Mont. 115 | 592, 618 |
| <i>State v. Terrazas</i> (Ariz. 1997) 189 Ariz. 580 | 662 |
| <i>State v. Tharp</i> (Wash. App. 1980) 27 Wn. App. 198 | 638 |
| <i>State v. Wilson</i> (N.J. 2002) 165 N.J. 657 | 712 |
| <i>State v. Youngblood</i> , 153 Ariz. 50 | 344 |
| <i>Stevenson v. United States</i> (1896) 162 U.S. 313 | 512 |
| <i>Stone v. New England Ins. Co.</i> (1995) 33 Cal.App.4th 1175 | 663 |
| <i>Strickland v. Washington</i> (1984) 466 U.S. 668 | 233, 266, 331, 408, 429, 450, 523, 707 |
| <i>Stuart v. State</i> (Idaho 1995) 127 Idaho 806 | 344 |
| <i>Sturgis v. Goldsmith</i> (9th Cir. 1986) 796 F.2d 1103 | 707 |
| <i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275 | 40, 47, 249, 275, 321, 332, 514, 526, 530, 537, 547, 589, 599, 606, 607, 611, 632 642, 643, 652, 653, 657,658, 662, 663, 664, 669, 670, 677 676, 681, 686, 691,696, 697,719,735, 740 |
| <i>Taylor v. Illinois</i> (1988) 484 U.S. 400 | 233, 265, 266, 331, 407, 428, 443, 449, 450, 495, 501, 506, 509, 512, 523 |
| <i>Taylor v. Kentucky</i> (1978) 436 U.S. 478..... | 569, 583, 621, 740, 742 |

| | |
|--|-------------------------|
| <i>Taylor v. Louisiana</i> (1975) 419 U.S. 522 | 38 |
| <i>Thompson v. City of Louisville</i> (1960) 362 U.S. 199 | 630 |
| <i>Travelers' Ins. Co. v. Sheppard</i> (Ga. 1890) 85 Ga. 751 | 424 |
| <i>Trombetta</i> , 467 U.S. 479 [see <i>California v. Trombetta</i>]..... | |
| <i>Truax v. Corrigan</i> (1921) 257 U.S. 312 | 31, 38, 282, 318, 426 |
| <i>Tumey v. Ohio</i> (1927) 273 U.S. 510 | 547 |
| <i>Turner v. United States</i> (1970) 396 U.S. 398 | 693 |
| <i>Twiggs v. Superior Court</i> (1983) 34 Cal.3d 360 | 328 |
| <i>U.S. Ex. Rel. Bennett v. Rundle, supra</i> , 419 F.2d at 606 | 728 |
| <i>Ulster County v. Allen</i> (1979) 442 U.S. 140 | 576, 578 |
| <i>United States v. Abell</i> (D.C. 1982) 552 F.Supp. 316 | 738 |
| <i>United States v. Bagley</i> (1985) 473 U.S. 667 | 500, 505 |
| <i>United States v. Balderas</i> (5th Cir. 1994) 11 F.3d 1218 | 534 |
| <i>United States v. Belcher</i> (W.D.Va. 1991) 762 F.Supp. 666 | 344 |
| <i>United States v. Binder</i> (9th Cir. 1985) 769 F.2d 595 | 714 |
| <i>United States v. Bohl</i> (10th Cir. 1994) 25 F.3d 904 | 344 |
| <i>United States v. Chagra</i> (5th Cir. 1983) 701 F.2d 354 | 727, 728 |
| <i>United States v. Clark</i> (2nd Cir. 1973) 475 F.2d 240 | 304, 323, 334, 369, 411 |
| <i>United States v. Clawson</i> (D. Oregon 1994) 842 F.Supp. 428 | 662 |
| <i>United States v. Crane</i> (9th Cir. 1992) 979 F.2d 687 | 231 |

| | |
|--|---|
| <i>United States v. Crisp</i> (4th Cir. 2003) 324 F.3d 261 | 397 |
| <i>United States v. Cronin</i> (1984) 466 U.S. 648 | 708, 718 |
| <i>United States v. Davenport</i> (9th Cir. 1985) 753 F.2d 1460 | 500, 505 |
| <i>United States v. DeLuca</i> (1st Cir. 1998) 137 F.3d 24 | 42 |
| <i>United States v. Delaney</i> (8th Cir. 1984) 732 F.2d 639 | 738 |
| <i>United States v. Dorsey</i> (4th Cir. 1995) 45 F.3d 809 | 414 |
| <i>United States v. Dove</i> (2nd Cir. 1990) 916 F.2d 41 | 232, 264, 572, 592, 603, 618 |
| <i>United States v. Echeverri</i> (3rd Cir. 1988) 854 F.2d 638 | 230 |
| <i>United States v. Edmond</i> (D.C. Cir. 1995) 52 F.3d 1080 | 42 |
| <i>United States v. Epley</i> (6th Cir. 1995) 52 F.3d 571 | 734 |
| <i>United States v. Escobar de Bright</i> (9th Cir. 1984) 742 F.2d 1196 | 267, 512 |
| <i>United States v. Estrada</i> (8th Cir. 1995) 45 F.3d 1215 | 738 |
| <i>United States v. Fleishman</i> (9th Cir. 1982) 684 F.2d 1329 | 394 |
| <i>United States v. Frazin</i> (9th Cir. 1986) 780 F.2d 1461 | 707 |
| <i>United States v. Frederick</i> (9th Cir. 1996) 78 F.3d 1370 | 743 |
| <i>United States v. Fujii</i> (N.D. Ill. 2000) 152 F.Supp.2d 939 | 403, 417, 418 |
| <i>United States v. Gagnon</i> (1985) 470 U.S. 522 | 707 |
| <i>United States v. Gaudin</i> (1995) 515 U.S. 506 | 247, 255, 271, 319, 353, 449, 476, 481, 531, 556, 561, 568, 577, 594, 598, 604, 609, 619, 629, 697 |
| <i>United States v. Gonzalez-Maldonado</i> (1st Cir. 1997) 115 F.3d 9 | 409, 430, 436, 451 |

| | |
|--|--|
| <i>United States v. Goodwin</i> (1982) 457 U.S. 368 | 329 |
| <i>United States v. Groves</i> (9th Cir. 1978) 571 F.2d 450 | 329 |
| <i>United States v. Hairston</i> (9th Cir. 1995) 64 F.3d 491 | 267 |
| <i>United States v. Hanna</i> (9th Cir. 2002) 293 F.3d 1080 | 409, 430, 451 |
| <i>United States v. Hayward</i> . (D.C. Cir 1969) 420 F.2d 142 | 247, 255, 271, 319, 353, 449, 476, 481, 556, 561, 568 |
| <i>United States v. Hernandez</i> (9th Cir. 1994) 27 F.3d 1403 | 711, 712, 714, 734 |
| <i>United States v. Hicks</i> (4th Cir. 1984) 748 F.2d 854..... | 512 |
| <i>United States v. Hidalgo</i> (D.C. Ariz. 2002) 229 F.Supp.2d 961 | 397, 418, 437 |
| <i>United States v. Hines</i> (D. Mass. 1999) 55 F.Supp.2d 62..... | 391, 394, 395, 398, 401, 402 |
| <i>United States v. Jackson</i> (1968) 390 U.S. 570 | 31, 328 |
| <i>United States v. James</i> (9th Cir. 1978) 576 F.2d 223 | 694 |
| <i>United States v. Jones</i> (6th Cir. 1997) 107 F.3d 1147 | 394, 396, 402 |
| <i>United States v. Kupau</i> (9th Cir. 1986) 781 F.2d 740 | 709 |
| <i>United States v. Laurins</i> (9th Cir. 1988) 857 F.2d 529 | 232, 265, 572, 592, 603, 615, 618 |
| <i>United States v. Lewis</i> (S.D. W. Va. 2002) 220 F.Supp.2d 548 | 397, 419 |
| <i>United States v. Lopez-Alvarez</i> (9th Cir. 1992) 970 F.2d 583 | 475, 582 |
| <i>United States v. Lujan</i> (9th Cir. 1991) 936 F.2d 406 | 734 |
| <i>United States v. Maccini</i> (1st Cir. 1983) 721 F.2d 840 | 644, 645, 646 |

| | |
|---|------------------------------|
| <i>United States v. Mason</i> (9th Cir. 1981) 658 F.2d 1263 | 602 |
| <i>United States v. McCracken</i> (5th Cir. 1974) 488 F.2d 406 | 232, 264, 572, 592, 603, 618 |
| <i>United States v. Mikaelian</i> (9th Cir. 1999) 168 F.3d 380 | 304, 323, 334, 369, 411 |
| <i>United States v. Morrison</i> (1980) 449 U.S. 361 | 347 |
| <i>United States v. Neujahr</i> (4th Cir. 1999) 173 F.3d 853 | 232, 264, 572, 603, 618 |
| <i>United States v. Parr</i> (11th Cir. 1983) 716 F.2d 796 | 596 |
| <i>United States v. Paul</i> (11th Cir. 1999) 175 F.3d 906 | 396, 402 |
| <i>United States v. Payne</i> (9th Cir. 1990) 944 F.2d 1458 | 638 |
| <i>United States v. Piatt</i> (8th Cir. 1982) 679 F.2d 1228 | 596 |
| <i>United States v. Pine</i> (3rd Cir. 1979) 609 F.2d 106 | 534 |
| <i>United States v. Plaza</i> (E.D. Pa. 2002) 179 F.Supp.2d 492 | 404 |
| <i>United States v. Prime</i> (W.D. Wash. 2002) 220 F.Supp.2d 1203 | 380, 386, 458 |
| <i>United States v. Ramirez-Rodriguez</i> (9th Cir. 1977) 552 F.2d 883 | 693 |
| <i>United States v. Rodgers</i> (6th Cir. 1997) 109 F.3d 1138 | 733, 734 |
| <i>United States v. Ruesga-Martinez</i> (9th Cir. 1976) 534 F.2d 1367 | 329 |
| <i>United States v. Rutherford</i> (D. Neb. 2000) 104 F.Supp.2d 1190 | 395, 401, 402, 437 |
| <i>United States v. Sacco</i> (9th Cir. 1989) 869 F.2d 499 | 714 |
| <i>United States v. Saelee</i> (D.C. Ala. 2001) 162 F.Supp.2d 1097 | 418, 419 |

| | |
|---|--|
| <i>United States v. Sandoval</i> (9th Cir. 1993) 990 F.2d 481 | 734 |
| <i>United States v. Santillan</i> 1999 U.S. Dist. LEXIS 21611, 1999 WL 1201765 | 395, 402 |
| <i>United States v. Scheffer</i> (1998) 523 U.S. 303 | 46, 248, 255, 271, 320, 354, 449, 473, 476, 481, 556, 560, 568, 739 |
| <i>United States v. Schilleci</i> (5th Cir. 1977) 545 F.2d 519 | 733 |
| <i>United States v. Snell</i> (5th Cir. 1998) 152 F.3d 345 | 738 |
| <i>United States v. Sorrentino</i> (3d Cir. 1949) 175 F.2d 721 | 728 |
| <i>United States v. Starzecpyzel</i> (S.D.N.Y. 1995) 880 F. Supp. 1027 | 395, 402, 418 |
| <i>United States v. Sutherland</i> (5th Cir. 1970) 428 F.2d 1152 | 596 |
| <i>United States v. Unruh</i> (9th Cir. 1987) 855 F.2d 1363 | 512 |
| <i>United States v. Valenzuela-Bernal</i> (1982) 458 U.S. 858 | 233, 266, 331, 407, 428, 450, 523 |
| <i>United States v. Veltmann</i> (11th Cir. 1993) 6 F.3d 1483 | 535 |
| <i>United States v. Wade</i> (1967) 388 U.S. 218 | 708 |
| <i>United States v. Walker</i> (7th Cir. 1993) 9 F.3d 1245 | 640 |
| <i>United States v. Wilson</i> (1914) 232 U.S. 563 | 673 |
| <i>United States v. Wolfson</i> (5th Cir. 1978) 573 F.2d 216 | 689 |
| <i>United States v. Zuniga</i> (9th Cir. 1993) 6 F.3d 569 | 267, 512 |
| <i>United v. States v. Hines</i> (D. Mass. 1999) 55 F.Supp.2d 62 | 397 |
| <i>U.S. v. Neujahr</i> (4th Cir. 1999) 173 F.3d 853 | 592 |

| | |
|--|---|
| <i>Vasquez v. Hillery</i> (1986) 474 U.S. 254 | 547 |
| <i>Victor v. Nebraska</i> (1994) 511 U.S. 1 | 625, 626, 656, 673, 675, 676, 680 |
| <i>Walker v. Engle</i> (6th Cir. 1983) 703 F.2d 959 | 204, 205, 218, 219, 224, 225, 295, 296, 313, 314, 407, 428, 464 |
| <i>Walker v. United States</i> (D.C. Cir. 1963) 322 F.2d 434 | 723, 728 |
| <i>Waller v. Georgia</i> (1984) 467 U.S. 39..... | 547 |
| <i>Wardius v. Oregon</i> (1973) 412 U.S. 470 | 33, 233, 263, 264, 281, 426, 513, 532, 592, 597, 615, 618 |
| <i>Ware v. United States</i> (7th Cir. 1967) 376 F.2d 717..... | 721, 722 |
| <i>Washington v. Glucksberg</i> (1997) 521 U.S. 702 | 233, 265, 266, 331, 407, 408, 428, 429, 450, 523 |
| <i>Washington v. Texas</i> (1967) 388 U.S. 14 | 39, 233, 263, 265, 281, 331, 407, 426, 428, 449, 473, 475, 514, 523, 532, 597 |
| <i>Webb v. Texas</i> (1972) 409 U.S. 95 | 39, 231, 233, 265, 266, 281, 331, 407, 408 426, 428, 429, 449, 450, 475, 523, 532, 571, 597, 603, 615 |
| <i>Werkman v. Howard Zink Corp.</i> (1950) 97 Cal.App.2d 418..... | 624 |
| <i>Westbrook v. Arizona</i> (1966) 384 U.S. 150 | 716 |
| <i>Wheeler v. United States</i> (1st Cir. 1965) 351 F.2d 946 | 493 |

| | |
|--|---|
| <i>White v. Illinois</i> (1992) 502 U.S. 346 | 47, 205, 219, 225, 234, 248, 256, 296, 314, 320, 346, 354, 360, 367, 406, 428, 437, 443, 450, 464, 475, 482, 485, 495, 502, 506, 512, 523, 533, 546, 561, 569, 589, 594, 598, 604, 615, 619, 620, 621, 630, 631, 642, 652, 657, 664, 669, 677, 682, 696, 739, 743 |
| <i>In re William F.</i> (1974) 11 Cal.3d 249 | 330 |
| <i>Williams v. Superior Court</i> (1984) 36 Cal.3d 441 | 201, 224, 277 |
| <i>Wilson v. Caskey</i> (1979) 91 Cal.App.3d 124 | 637, 693 |
| <i>In re Winship</i> (1970) 397 U.S. 358 . | 247, 274, 522, 525, 534, 578, 581, 589, 606, 611, 639, 640, 642, 644, 652, 657, 663 667, 669, 672, 676 679, 680, 681,685 686, 692, 696,697 |
| <i>Wolff v. McDonnell</i> (1974) 418 U.S. 539 | 204, 543 |
| <i>Woodson v. North Carolina</i> (1976) 428 U.S. 280 | 630, 631 |
| <i>Wooten v. Department of Human Resources</i> (Ga. App. 1979) 152 Ga. App. 304 [262 S.E.2d 5 | 424 |
| <i>Youngblood,Arizona v. Youngblood</i> (1988) 488 U.S. 51 | 485 |

STATUTES

| | |
|--|--|
| Cal. Const. Art I, §§ 1, 7, 15, 16 | <i>passim</i> |
| Evidence Code § 350-§ 352)..... | 283, 296, 309, 315, 320, 332, 429, 450, 495, 502, 506 |
| Evidence Code § 502 | 518 |
| Evidence Code sections 500, 501 | 642, 652, 658, 664, 670, 677, 682, 696 |
| Evidence Code § 1416 | 10, 12, 14, 15, 16, 54, 206, 219, 223, 225, 254, 255, 256, 277, 279, 296, 307, 308, 309, 314, 320, 326, 336, 348, 351, 352, 357, 358, 359, 360, 364, 365, 367, 371, 374, 375, 412, 413, 414, 429, 434, 435, 437, 440, 454, 460, 461, 462, 463, 464, 468, 469, 470, 479, 480, 481, 497, 524, 564, 566, 567 |
| Evidence Code sections 1500-1511..... | 365 |
| Penal Code § 118 | 608 |
| Penal Code § 187 | 2, 3 |
| Penal Code § 190.2(a) | 2, 3, 19 |
| Penal Code § 190.3 | 6, 7, 50 |
| Penal Code § 207 | 2 |
| Penal Code § 245 | 3 |
| Penal Code § 261 | 2, 3 |
| Penal Code § 667 | 2 |
| Penal Code § 851.8 | 5, 487, 491, 498 |

| | |
|-----------------------------|------------------------------|
| Penal Code §190.2(a) | 118 |
| Penal Code § 977 | 717 |
| Penal Code § 987 | 3, 21 |
| Penal Code § 995 | 528 |
| Penal Code § 1096 | 497 |
| Penal Code § 1111 | 552, 553, 554, 557 |
| Penal Code § 1118.1 | 17 |
| Penal Code § 1138 | 710, 711, 713, 731, 732, 735 |
| Penal Code §1118.1 | 17, 18 |
| Penal Code § 1259 | 238, 520, 534, 684 |
| Penal Code § 1260 | 369 |
| Penal Code §1382..... | 140, 326 |
| Penal Code § 1385 | 303 |
| Penal Code § 1424 | 527 |
| Penal Code § 12022.7 | 2, 55 |
| Penal Code § 12022 | 3, 20, 55 |
| Penal Code § 12022(b) | 2 |

MISCELLANEOUS

| | |
|-----------------------|--|
| CALJIC 2.00, ¶ 5..... | 575, 693 |
| CALJIC 2.01 | 240, 246, 588, 637, 649, 684, 686, 687, 688, 689, 690, 692, 695 |

| | |
|---------------|---|
| CALJIC 2.11 | 648 |
| CALJIC 2.20 | 559, 560, 611 |
| CALJIC 2.21.1 | 616 |
| CALJIC 2.21.2 | 608, 609, 610, 616, 650 |
| CALJIC 2.23 | 616 |
| CALJIC 2.27 | 617, 651 |
| CALJIC 2.50.1 | 245 |
| CALJIC 2.60 | 649 |
| CALJIC 2.61 | 650 |
| CALJIC 2.80 | 456 |
| CALJIC 2.81 | 455, 456 |
| CALJIC 2.83 | 583 |
| CALJIC 2.90 | 524, 525, 623, 626, 637, 638, 639, 640, 641, 645, 655, 656, 661, 666, 672, 679, 680, 689, 690 |
| CALJIC 2.90 | 625 |
| CALJIC 3.18 | 556 |
| CALJIC 3.19 | 556 |
| CALJIC 4.51 | 521 |
| CALJIC 5.15 | 521 |
| CALJIC 16.835 | 607 |

| | |
|---|--------------------|
| CALJIC 290 | 646 |
| CALJIC No. 1.00 | 544, 607, 688 |
| CALJIC No. 1.26 | 545 |
| CALJIC No. 1.27 | 545 |
| CALJIC No. 17.40 | 544 |
| 1st Circuit Model Instructions Criminal No. 1.01 | 640 |
| 8th Circuit Model Instructions Criminal No. 1.01 | 640 |
| <i>6th Circuit Pattern Jury Instructions - Criminal</i> 1.02 | 534, 675 |
| <i>5th Circuit Pattern Jury Instructions - Criminal</i> 1.17 | 592 |
| <i>11th Circuit Pattern Jury Instructions - Criminal Basic Instructions</i> 7..... | 573 |
| <i>Alaska Pattern Criminal Jury Instructions</i> 1.52 | 674 |
| BAJI 2.62 | 656 |
| <i>2 Scientific Evidence</i> (3rd ed. 1999), p. 193..... | 442 |
| <i>Bandes, Empathy, Narrative, and Victim Impact Statements</i> , 63 U. Chi. L. Rev. 361, 441 | 548 |
| <i>Banishing Ispe Dixit: The Impact of Kumho Tire on Forensic Identification Science</i> , Michael Saks, 57 Wash. & Lee L. Rev. 879, 899 | 401 |
| <i>Banner, Article: Rewriting History: The Use of Feminist Narratives To Deconstruct The Myth Of The Capital Defendant</i> , 26 N.Y.U. Rev. L. & Soc. Change, 569, 588 | 549 |
| <i>Black's Law Dictionary</i> (5th Ed. 1979) p. 881 | 609 |
| <i>Brave New "Post-Daubert World" - A Reply to Professor Moenessens, Risinger, Denbeaux and Saks</i> , 29 Seton Hall L. Rev. 405, 416 | 398, 399, 400, 417 |

| | |
|---|---------------|
| Bugliosi, "Not Guilty and Innocent — <i>The Problem Children Of Reasonable Doubt</i> ," 4 <i>Crim. Justice J.</i> 349..... | 607 |
| <i>Combined With The "Convincing Force" Language Of CALJIC 2.22</i> | 609, 610, 617 |
| <i>Connecticut Selected Jury Instructions - Criminal 2.8 [General Jury Instructions-Reasonable Doubt]</i> | 674 |
| Constanzo & Constanzo, <i>Jury Decision Making in the Capital Penalty Phase</i> , 16 | 628 |
| <i>Criminal Jury Instructions For The District of Columbia 2.09, [Reasonable Doubt]</i> | 674 |
| Cronan, John P., <i>Is Any of This Making Sense?</i> 39 <i>Am. Crim. L. Rev.</i> 1187, 1249 [discussing importance of preliminary instructions] | 536 |
| D. Michael Risinger, Mark Denbeaux and Michael J. Saks, <i>Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification Expertise</i> , 137 <i>U. Pa. L. Rev.</i> 731 | 418 |
| Dinse, Berger, & Lane, <i>Vermont Jury Instructions - Civil & Criminal 5.09 [Instruction: Foreperson]</i> | 738 |
| Faigman, et al., <i>Modern Scientific Evidence: The Law and Science of Expert Testimony</i> , (West 2002), § 28-2.3.1-28-2.3.3, pp | 386, 397, 437 |
| Federal Judicial Center (1988) <i>Pattern Criminal Jury Instructions</i> , No. 22 | 644 |
| Federal Judicial Center, <i>Pattern Criminal Jury Instructions 21 [Definition Of Reasonable Doubt]</i> | 661 |
| <i>Forensic Handwriting Identification: Fundamental Concepts and Principles</i> (2000 ed.), p. 204 | 443 |
| Goldstein, <i>The State and the Accused: Balance of Advantage in Criminal Procedure</i> , 69 <i>Yale L.J.</i> 1149, 1180-92 | 264 |

| | |
|--|-----|
| Haney, Santag and Costanzo, " <i>Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death</i> " 50 Journal of Social Sciences No. 2 | 627 |
| Haney, <i>The Social Context of Capital Murder: Social Histories and the Logic of Mitigation</i> , 35 Santa Clara L. Rev. 547, 547 | 549 |
| Haney, <i>Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death</i> , 49 Stan. L. Rev. 1447, 1453 | 548 |
| Harding, <i>Symposium: Picturing Justice: Images Of Law And Lawyers In The Visual Media: Essay: Celluloid Death: Cinematic Depictions of Capital Punishment</i> , 30 U.S.F.L. Rev. 1167, 1170 | 550 |
| Hrones & Homans, <i>Massachusetts Jury Instructions - Criminal 1-2 [Reasonable Doubt]</i> | 661 |
| <i>Instructions for Virginia & West Virginia 24-401 [Reasonable Doubt Defined Generally]</i> | 675 |
| <i>Iowa Criminal Jury Instructions 100.18 [Duties Of Jurors-Selection Of A Foreman/Forewoman]</i> | 737 |
| James E. Starrs, <i>Judicial Control Over Scientific Supermen: Fingerprint Experts and Others Who Exceed The Bounds</i> (1999) 35 Crim. L. Bull. 234, 243-246 | 404 |
| <i>Judges, Scared to Death: Capital Punishment as Authoritarian Terror Management</i> , 33 U.C. Davis L. Rev. 155, 246 | 550 |
| Kassin and Wrightsman, Kassin, S.M., & Wrightsman, L.S., <i>On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts</i> , 37 | 536 |
| Katherine Goldwasser, <i>Vindicating the Right to Trial By Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence</i> (1998) 86 Leonard B. Sand, et al., 1 <i>Modern Federal Jury Instructions</i> , § 4.01 | 640 |

| | |
|--|---------------|
| Leventhal, <i>Charges To The Jury And Requests To Charge In A Criminal Case</i> (New York) 6:15 [Witnesses-Missing Witness Inference] | 646 |
| Marla Sandys, <i>Cross-Overs-Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines</i> , 70 | 628 |
| Michael J. Saks, <i>Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise</i> , 82 Iowa L. Rev. 21,27 .. | 398, 418 |
| North Dakota Pattern Jury Instructions, <i>NDJI-criminal Introduction</i> , page 1 | 28, 420, 593 |
| O'Malley, Grenig & Lee, <i>Federal Jury Practice and Instructions</i> 12:10 [Presumption Of Innocence, Burden Of Proof, And Reasonable Doubt] | 674 |
| Pillsbury, <i>Emotional Justice: Moralizing the Passions of Criminal Punishment</i> , 74 Cornell L. Rev. 655, 699 | 548, 572 |
| Richard Weiner, <i>The Role of Declarative Knowledge in Capital Murder Sentencing</i> , 28 | 628 |
| <i>Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise</i> , Michael Risinger and Michael Saks, 82 Iowa L. Rev. 21, 35 | 393 |
| <i>Science and Nonscience In the Courts: Daubert Meets Handwriting Identification Expertise</i> , <i>supra</i> , 82 Iowa L. Rev. at pp. 60-62 | 400, 401 |
| <i>South Carolina Criminal Jury Instructions</i> 1-14 [Reasonable Doubt Charge] (South Carolina Bar, 1995); McClung, & Carpenter, <i>Texas Criminal Jury Charges</i> 1 (II) [proper.chg] | 674 |
| Whorf, <i>Language, Thought and Reality</i> (MIT Press 1956), pp. 247-248 | 545 |
| Wigmore on Evidence | 421, 422 |
| <i>Wisconsin Jury Instructions - Criminal</i> , <i>WIS-JI-Criminal</i> 926..... | 592, 638, 675 |
| Witkin, <i>California Evidence</i> (4th Ed.) § 86 | 279 |

Whitman, *Communicating with Capital Juries: How Life Versus Death
Decisions Are Made, What Persuades, and How to Most Effectively
Communicate the Need for a Verdict of Life*, 11 Cap. Def. J. 263, 265 548

Williard, *When and How to Use an Examiner of Disputed Documents*,
29 Practical Lawyer 27, 29 (Vol. 2) 406

TABLE OF AUTHORITIES

Volumes 4-7

CASES

| | <u>Page</u> |
|--|---|
| <i>Alford v. State</i> (Fla. 1975) 307 So.2d 433 | 1727 |
| <i>In re Ali</i> (1966) 230 Cal.App.2d 585 | 1544 |
| <i>Allen v. United States</i> (1896) 164 U.S. 492 | 1336, 1598, 1599, 1600, 1601, 1602, 1611, 1662, 1733, 1735, 1736, 1738 |
| <i>Amaya-Ruiz v. Stewart</i> (9th Cir. 1997) 121 F.3d 486 | 1662 |
| <i>Apprendi v. New Jersey</i> (2000) 530 U.S. 466 | 1708, 1711, 1712, 1713, 1714, 1729, 1730 |
| <i>Arizona v. Fulminante</i> (1991) 499 U.S. 279..... | 183, 1186, 1199, 1209, 1210, 1212, 1511, 1632, 1665 |
| <i>Atkins v. Virginia</i> (2002) 122 S.Ct. 2248 | 1726, 1729, 1735, 1741 |
| <i>Auto Equity Sales Inc. v. Superior Court</i> (1962) 57 Cal.2d 450 | 1432 |
| <i>Babson v. United States</i> (9th Cir. 1964) 330 F.2d 662 | 1606 |
| <i>Badger v. Cardwell</i> (9th Cir. 1978) 587 F.2d 968 | 1654 |
| <i>Balfour v. State</i> (Miss. 1992) 598 So.2d 731 | 1487, 1548 |
| <i>Ballard v. Superior Court</i> (1966) 64 Cal.2d 159 | 1395, 1403, 1421, 1426, 1428, 1449 |
| <i>Ballard v. State Bar</i> (1983) 35 Cal.3d 274 | 1514 |
| <i>Barclay v. Florida</i> (1976) 463 U.S. 939 | 1725 |

| | |
|--|--|
| <i>Barefoot v. Estelle</i> (1983) 463 U.S. 880 | 1484 |
| <i>Beck v. Alabama</i> (1980) 447 U.S. 625 | <i>passim</i> |
| <i>Bell v. Burson</i> (1971) 402 U.S. 535 | 1618 |
| <i>Bennett v. Scroggy</i> (6th Cir. 1986) 793 F.2d 772 | 1625 |
| <i>Blystone v. Pennsylvania</i> (1990) 494 U.S. 299 | 1589 |
| <i>Booth v. Maryland</i> (1987) 482 U.S. 496 | 1588 |
| <i>Boyde v. California</i> (1990) 494 U.S. 370 | 1573 |
| <i>Boykin v. Alabama</i> (1969) 395 U.S. 238 | 1451 |
| <i>Bracy v. Gramley</i> (1997) 520 U.S. 899 | 1433 |
| <i>Brewer v. State</i> (Ind. 1981) 417 N.E.2d 889 | 1727 |
| <i>Brooks v. Tennessee</i> (1972) 406 U.S. 605 | 1664 |
| <i>Brown v. Louisiana</i> (1980) 447 U.S. 323 | 1715 |
| <i>Brown v. Myers</i> (9th Cir. 1998) 137 F.3d 1154 | 1437 |
| <i>Buchanan v. Angelone</i> (1998) 522 U.S. 269 | 1483, 1492 |
| <i>Bullington v. Missouri</i> (1981) 451 U.S. 430 | 1717 |
| <i>Burger v. Kemp</i> (1987) 483 U.S. 776 | 1130, 1137, 1160, 1203, 1213, 1321, 1434, 1493, 1499, 1509, 1515, 1559, 1574, 1580, 1595, 1603, 1612, 1637, 1681, 1685, 1691, 1743 |
| <i>Burks v. United States</i> (1978) 437 U.S. 1 | 1480 |
| <i>Bush v. Gore</i> (2000) 531 U.S. 98 | 1738 |

| | |
|--|---|
| <i>Bustamante v. Eyma</i> (9th Cir. 1972) 456 F.2d 269 | 1506, 1510, 1542, 1654,1656, 1667 |
| <i>Cabana v. Bullock</i> (1986) 474 U.S. 376 | 1693 |
| <i>Cage v. Louisiana</i> (1990) 498 U.S. 39 | 1203, 1205, 1321, 1323 |
| <i>Caldwell v. Mississippi</i> (1985) 472 U.S. 320 | 1466, 1487, 1523, 1526, 1527, 1528, 1533, 1547, 1548, 1631, 1632,1643, 1692 |
| <i>California v. Green</i> (1970) 399 U.S. 149 | 1155 |
| <i>California v. Ramos</i> (1983) 463 U.S. 992 | 1737 |
| <i>California v. Trombetta</i> (1984) 467 U.S. 479 | 1136 |
| <i>Campbell v. Rice</i> (9th Cir. 2002) 302 F.3d 892..... | 1504, 1505, 1507, 1509, 1511 |
| <i>Campbell v. Wood</i> (9th Cir. 1994) 18 F.3d 662 | 1510, 1542, 1662 |
| <i>Capital Traction Co. v. Hof</i> (1899) 174 U.S. 1 | 1657 |
| <i>Carella v. California</i> (1989) 491 U.S. 263 | 1515 |
| <i>Carnley v. Cochran, supra</i> , 369 U.S. at 516-517 | 1451 |
| <i>In re Carpenter</i> (1995) 9 Cal.4th 634 | 1546, 1563 |
| <i>Carroll v. Abbott Laboratories, Inc.</i> (1982) 32 Cal.3d 892 | 1630 |
| <i>Carter v. Kentucky</i> (1981) 450 U.S. 288 | 1585 |
| <i>Castillo v. Estelle</i> (5th Cir. 1974) 504 F.2d 1243 | 1446 |
| <i>Castle v. United States</i> (5th Cir. 1968) 399 F.2d 642 | 1444 |
| <i>Catlin v. Union Oil Co.</i> (1916) 31 Cal.App. 597 | 1151, 1154, 1155 |
| <i>Chambers v. Florida</i> (1940) 309 U.S. 227 | 1498 |

| | |
|--|------------------------------------|
| <i>Chambers v. Mississippi</i> (1973) 410 U.S. 284 | 1136, 1137, 1148, 1492, 1617, 1655 |
| <i>Chandler v. Florida</i> (1981) 449 U.S. 560 | 1521 |
| <i>Chapman v. California</i> (1967) 386 U.S. 18 | <i>passim</i> |
| <i>Charfauros v. Board of Elections</i> (9th Cir. 2001) 249 F.3d 941 | 1738 |
| <i>In re Cindy L.</i> (1997) 17 Cal.4th 15 | 1456 |
| <i>Clemons v. Mississippi</i> (1990) 494 U.S. 738 | 1487, 1547 |
| <i>Coker v. Georgia</i> (1977) 433 U.S. 584 | 1727 |
| <i>Cole v. Arkansas</i> (1948) 333 U.S. 196 | 1444, 1457, 1544 |
| <i>Coleman v. Alabama</i> (1970) 399 U.S. 1 | 1142 |
| <i>Collins v. State</i> (Ark. 1977) 548 S.W.2d 106 | 1728 |
| <i>Commonwealth v. Mikell</i> (Pa. 1999) 556 Pa. 509 | 1459 |
| <i>Commonwealth v. O'Neal</i> (1975) 327 N.E. 2d 662 | 1732 |
| <i>Commonwealth v. Peterman</i> (Pa. 1968) 430 Pa. 627 | 1656 |
| <i>Conde v. Henry</i> (9th Cir. 1999) 198 F.3d 734 | 1625 |
| <i>Cool v. United States</i> (1972) 409 U.S. 100 | 1494, 1610 |
| <i>Cooper v. Sowders</i> (6th Cir. 1988) 837 F.2d 284 | 1498 |
| <i>Cooper v. Superior Court</i> (1961) 55 Cal.2d 291 | 1433 |
| <i>In re Cordero</i> (1988) 46 Cal.3d 161 | 1436 |
| <i>In re Cortez</i> (1971) 6 Cal.3d 78 | 1295, 1630 |
| <i>Cowan v. Superior Court</i> (1996) 14 Cal.4th 367 | 1542 |

| | |
|--|---|
| <i>Craig v. North Carolina</i> (1987) 484 U.S. 887 | 1692 |
| <i>Crane v. Kentucky</i> (1986) 476 U.S. 683 | 1136, 1137, 1146, 1147, 1617 |
| <i>Curtis v. Duval</i> (1st Cir. 1997) 124 F.3d 1..... | 1638, 1664 |
| <i>Cuyler v. Sullivan</i> (1980) 446 U.S. 335 | 1464 |
| <i>Darden v. Wainwright</i> (1986) 477 U.S. 168 | 1527 |
| <i>Daubert v. Merrell Dow</i> (1993) 509 U.S. 579 | 1133, 1134, 1135 |
| <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> (1993) 509 U.S. 579 | 1115 |
| <i>Davis v. Alaska</i> (1974) 415 U.S. 308 | 1148, 1156, 1515, 1617, 1655 |
| <i>Davis v. Erickson</i> (1960) 53 Cal.2d 860 | 1624 |
| <i>Davis v. Georgia</i> (1976) 429 U.S. 122 | 1541 |
| <i>Dawson v. Delaware</i> (1992) 503 U.S. 159 | 1498 |
| <i>Delaney v. United States</i> (1st Cir. 1952) 199 F.2d 107 | 1539, 1553 |
| <i>Delzell v. Day</i> (1950) 36 Cal.2d 349 | 1214, 1533, 1744 |
| <i>In re Dennis</i> (1959) 51 Cal.2d 666 | 1667 |
| <i>Diaz v. United States</i> (1912) 223 U.S. 442..... | 1506, 1662 |
| <i>Donnelly v. DeChristoforo</i> (1974) 416 U.S. 637 | 1130, 1136, 1160, 1213, 1494, 1500, 1515, 1559, 1574, 1580, 1595, 1603, 1612, 1637 1681 |
| <i>Douglas v. Alabama</i> (1965) 380 U.S. 415 | 1617, 1661, 1674 |
| <i>Douglas v. California</i> (1963) 372 U.S. 353 | 1444 |

| | |
|---|------------------------------|
| <i>Drope v. Missouri</i> (1975) 420 U.S. 162 | 1662, 1663 |
| <i>Du Jardin v. City of Oxnard</i> (1995) 38 Cal.App.4th 174 | 1214, 1533, 1744 |
| <i>Duncan v. Louisiana</i> (1968) 391 U.S. 145 | 1433, 1559, 1690 |
| <i>Dyer v. Calderon</i> (9th Cir. 1998) 151 F.3d 970 | 1540, 1546 |
| <i>Eddings v. Oklahoma</i> (1983) 455 U.S. 104 | 1485, 1531, 1573, 1720, 1732 |
| <i>Edelbacher v. Calderon</i> (9th Cir. 1998) 160 F.3d 582 | 1745 |
| <i>Enmund v. Florida</i> (1982) 458 U.S. 782 | 1727, 1735 |
| <i>Escobedo v. Illinois</i> (1964) 378 U.S. 478 | 1142 |
| <i>Estelle v. McGuire</i> (1991) 502 U.S. 62 | 1205, 1323, 1569, 1591, 1680 |
| <i>Evans v. State</i> (Ga. App. 1978) 148 Ga.App. 422 | 1678 |
| <i>Evitts v. Lucey</i> (1985) 469 U.S. 387 | 1444, 1474 |
| <i>Faretta v. California</i> (1975) 422 U.S. 806 | 1654 |
| <i>First National Bank v. De Moulin</i> (1922) 56 Cal.App. 313 | 1153, 1157, 1158 |
| <i>Fisher v. Roe</i> (9th Cir. 2001) 263 F.3d 906 | 1658, 1659, 1666 |
| <i>Ford v. Wainwright</i> (1986) 477 U.S. 399 | 1693, 1729, 1735, 1736 |
| <i>Francis v. Franklin</i> (1985) 471 U.S. 307 | 1467, 1501, 1515, 1561, 1624 |
| <i>Frank v. Magnum</i> (1915) 237 U.S. 309 | 1444 |
| <i>Franklin v. Henry</i> (9th Cir. 1997) 122 F.3d 1270 | 1617 |
| <i>Franklin v. Lynaugh</i> (1988) 487 U.S. 164 | 1566, 1570 |
| <i>Frazer v. United States</i> (9th Cir. 1994) 18 F.3d 778 | 1638, 1664 |

| | |
|---|--|
| <i>Frazier v. United States</i> (1948) 335 U.S. 497 | 1540 |
| <i>Frye v. United States</i> (D.C. Cir. 1923) 293 F. 101 | 1115, 1118, 1133, 1134 |
| <i>Frye v. United States</i> (D.C. Cir. 1923) 293 Fed. 1013 | 1133 |
| <i>Furman v. Georgia</i> (1972) 408 U.S. 238 | 1523, 1696, 1700, 1724, 1726, 1729, 1741 |
| <i>GE v. Joiner</i> (1997) 522 U.S. 136..... | 1121, 1127 |
| <i>Garcia v. Superior Court</i> (1997) 14 Cal.4th 953..... | 1394 |
| <i>Gardner v. Florida</i> (1977) 430 U.S. 349 | 1484, 1493, 1542, 1663, 1693, 1737, 1745 |
| <i>In re Gay</i> (1998) 19 Cal.4th 771..... | 1623 |
| <i>Geders v. United States</i> (1976) 425 U.S. 80 | 1639, 1664 |
| <i>Gideon v. Wainwright</i> (1963) 372 U.S. 335 | 1494 |
| <i>Gilbert v. California</i> (1967) 388 U.S. 263 | 1142 |
| <i>Gilmore v. Taylor</i> (1993) 508 U.S. 333 | 1130, 1137, 1160, 1203, 1213, 1321, 1434, 1493, 1499, 1509, 1515, 1559, 1574, 1580, 1595, 1603, 1612, 1637, 1681, 1685, 1691 |
| <i>Glasser v. United States</i> (1942) 315 U.S. 60 | 1444, 1451, 1446, 1541 |
| <i>Glee v. State</i> (Fla. Dist. Ct. App. 1994) 639 So.2d 1092 | 1667 |
| <i>Godfrey. (Jones v. Kemp</i> (N.D. Ga. 1989) 706 F.Supp. 1534 | 1521 |
| <i>Godfrey v. Georgia</i> (1980) 446 U.S. 420 | 1521, 1523, 1582, 1696 |
| <i>Gossman v. Gossman</i> (1942) 52 Cal.App.2d 184 | 1630 |
| <i>Government of the Virgin Islands v. Parrott</i> (3rd Cir. 1977) 551 F.2d 553 ... | 1560 |
| <i>Gray v. Raines</i> (9th Cir. 1981) 662 F.2d 569 | 1457 |

| | |
|--|---|
| <i>Green v. Georgia</i> (1979) 442 U.S. 95 | 1148, 1484 |
| <i>Greer v. Miller</i> (1987) 483 U.S. 756 | 1213, 1500, 1743 |
| <i>Gregg v. Georgia</i> (1976) 428 U.S. 153 | 1484, 1523, 1541, 1693, 1722, 1726, 1727, 1729, 1732, 1737 |
| <i>Griffin v. Illinois</i> (1956) 351 U.S. 12 | 1444 |
| <i>Griffin v. United States</i> (1991) 502 U.S. 46 | 1715, 1720 |
| <i>Guzman v. Sabourin</i> (S.D. N.Y. 2000) 124 F.Supp.2d 828 | 1445 |
| <i>Harmelin v. Michigan</i> (1991) 501 U.S. 957 | 1716, 1723, 1737 |
| <i>Harris</i> , 465 U.S. at 52 | 1699, 1726 |
| <i>Harris v. Superior Court</i> (1977) 19 Cal.3d 786 | 1630 |
| <i>Harris v. United States</i> (D.C. App. 1985) 489 A.2d 464 | 1666 |
| <i>Harris v. Wood</i> (9th Cir. 1995) 64 F.3d 1432 | 1745 |
| <i>Henderson v. Morgan</i> (1976) 426 U.S. 637 | 1451 |
| <i>Hendricks v. Calderon</i> (9th Cir. 1995) 70 F.3d 1032 | 1487, 1547 |
| <i>Hernandez v. Ylst</i> (9th Cir. 1991) 930 F.2d 714 | passim. |
| <i>Herring v. New York</i> (1975) 422 U.S. 853 | 1553, 1639, 1664 |
| <i>Hicks v. Oklahoma</i> (1980) 447 U.S. 343 | passim. |
| <i>Hilton v. Guyot</i> (1895) 159 U.S. 113 | 1740, 1742 |
| <i>Hitchcock v. Dugger</i> (1987) 481 U.S. 393 | 1486, 1531, 1547, 1577 |
| <i>In re Hitchings</i> (1993) 6 Cal.4th 97 | 1539 |

| | |
|---|--|
| <i>Holloway v. Arkansas</i> (1978) 435 U.S. 475 | 1444, 1445, 1508, 1509 |
| <i>Holt v. Virginia</i> (1965) 381 U.S. 131 | 1618 |
| <i>Hopt v. Utah</i> (1884) 110 U.S. 574 | 1510, 1542, 1662, 1690 |
| <i>Hughes v. United States</i> (6th Cir. 2001) 258 F.3d 453 | 1543 |
| <i>Hunt v. Mitchell</i> (6th Cir. 2001) 261 F.3d 575 | 1545 |
| <i>Illinois v. Allen</i> (1970) 397 U.S. 337 | 1654, 1662 |
| <i>Irvin v. Dowd</i> (1961) 366 U.S. 717 | 1433, 1434, 1541, 1559, 1560 |
| <i>Izazaga v. Superior Court</i> (1991) 54 Cal.3d 356 | 1494 |
| <i>Jackson v. Commonwealth</i> (Va. 1870) 60 Va. 656 | 1656, 1665, 1666 |
| <i>Jackson v. Virginia</i> (1979) 443 U.S. 307 | 1203, 1321 |
| <i>Jimenez v. Myers</i> (9th Cir. 1993) 12 F.3d 1474 | 1601, 1602 |
| <i>In re Johnson</i> (1965) 62 Cal.2d 325 | 1663 |
| <i>Johnson v. Mississippi</i> (1988) 486 U.S. 578 | 1487,1526, 1533,1548 1716, 1729, 1731 |
| <i>Johnson v. Singletary</i> (11th Cir. 1998) 162 F.3d 630..... | 1543 |
| <i>Johnson v. United States</i> (1997) 520 U.S. 461 | 1143, 1474, 1638, 1664 |
| <i>Johnson v. Zerbst</i> (1938) 304 U.S. 358 | 1451, 1510, 1662, 1663, 1675 |
| <i>Jurek v. Texas</i> (1976) 428 U.S. 262..... | 1484, 1493 |
| <i>Karis v. Calderon</i> (9th Cir. 2002) 283 F.3d 1117 | 1468, 1550 |
| <i>Keenan v. Superior Court</i> (1982) 31 Cal.3d 424 | 1693 |

| | |
|---|--|
| <i>People v. Fierro</i> (1991) 1 Cal.4th 173 | 1114, 1115, 1116, 1119, 1120, 1122, 1124, 1125, 1126, 1127, 1128, 1129, 1133, 1134, 1135, 1136, 1137, 1143, 1728 |
| <i>Kelly v. South Carolina</i> (2002) 534 U.S. 246 | 1502, 1569 |
| <i>Kentucky v. Stincer</i> (1987) 482 U.S. 730 | 1506, 1507 |
| <i>King v. Superior Court</i> (2003) 107 Cal. App. 4th 929 | 1655 |
| <i>Kinsella v. United States</i> (1960) 361 U.S. 234 | 1736 |
| <i>Kokas v. Commonwealth</i> (Ky. 1922) 194 Ky. 44 [237 S.W. 1090] | 1656, 1667, 1669 |
| <i>Kowis v. Howard</i> (1992) 3 Cal. 4th 888 | 1394 |
| <i>Kumho Tire Co. v. Carmichael</i> (1999) 526 U.S. 137 | 1121, 1134, 1135 |
| <i>Kyles v. Whitley</i> (1995) 514 U.S. 419 | <i>passim</i> |
| <i>Langford v. Day</i> (9th Cir. 1997) 110 F.3d 1380 | 1542 |
| <i>Lankford v. Idaho</i> (1991) 500 U.S. 110 | 1692 |
| <i>Lesko v. Lehman</i> (3rd Cir. 1991) 925 F.2d 1527 | 1527 |
| <i>Lewis v. Jeffers</i> (1980) 497 U.S. 764 | 1521, 1523 |
| <i>Lewis v. United States</i> (1892) 146 U.S. 370 | 1510, 1542 |
| <i>Lindsay v. Normet</i> (1972) 405 U.S. 56 | 1494 |
| <i>Little v. United States</i> (10th Cir. 1934) 73 F.2d 861 | 1656 |
| <i>Lockett v. Ohio</i> (1978) 438 U.S.586 | <i>passim</i> |
| <i>Lockhart v. McCree</i> (1986) 476 U.S. 162 | 1560 |

| | |
|---|------------------------------|
| <i>Lombardi v. California S. R. Co.</i> (1899) 124 Cal. 311 | 1541 |
| <i>In re Lopez</i> (1970) 2 Cal.3d 141 | 1663 |
| <i>Lord v. Wood</i> (9th Cir. 1999) 184 F.3d 1083 | 1437 |
| <i>Lowenfield v. Phelps</i> (1988) 484 U.S. 231 | 1600 |
| <i>Lucas v. Superior Court</i> (1988) 201 Cal.App.3d 149..... | 1431 |
| <i>Lysick v. Walcom</i> (1968) 258 Cal.App.2d 136 | 1444 |
| <i>Mach v. Stewart</i> (9th Cir. 1997) 137 F.3d 630 | 1546, 1563 |
| <i>Magill v. Dugger</i> (11th Cir. 1987) 824 F.2d 879 | 1746 |
| <i>Mak v. Blodgett</i> (9th Cir. 1992) 970 F.2d 614 | 1213, 1500, 1743, 1745, 1746 |
| <i>Marino v. Vasquez</i> (9th Cir. 1987) 812 F.2d 499 | 1642, 1685, 1688 |
| <i>Marshall v. United States</i> (1959) 360 U.S. 310 | 1642, 1685, 1688 |
| <i>Marshall v. Walker</i> (1983) 464 U.S. 951 | 1213, 1500, 1743 |
| <i>Martineau v. Perrin</i> (1st Cir. 1979) 601 F.2d 1196 | 1674 |
| <i>Mathews v. United States</i> (1988) 485 U.S. 58 | 1625 |
| <i>Mattox v. United States</i> (1895) 156 U.S. 237 | 1155 |
| <i>Maxwell v. Florida</i> (1986) 479 U.S. 972 | 1692 |
| <i>Maxwell v. Superior Court</i> (1982) 30 Cal.3d 606 | 1452, 1454 |
| <i>Maynard v. Cartwright</i> (1988) 486 U.S. 356 | 1706 |
| <i>McCarver v. North Carolina</i> , O.T.2001, No. 00-8727 | 1741 |
| <i>McCleskey v. Kemp</i> (1987) 481 U.S. 279 | 1735, 1736 |

| | |
|---|--|
| <i>McDonough Power Equip. v. Greenwood</i> (1984) 464 U.S. 548 | 1539 |
| <i>McKinney v. Rees</i> (9th Cir. 1993) 993 F.2d 1378 | 1499 |
| <i>McKoy v. North Carolina</i> (1990) 494 U.S. 433 | 1531, 1577 |
| <i>Mempa v. Rhay</i> (1967) 389 U.S. 128 | 1143, 1475, 1637, 1655 |
| <i>Michigan v. Jackson</i> (1985) 475 U.S. 625 | 1451 |
| <i>Mickens v. Taylor</i> (2002) 535 U.S. 162 | 1464 |
| <i>Mills v. Maryland</i> (1988) 486 U.S. 367 | 1531, 1567, 1570 1720, 1724, 1730, 1739 |
| <i>Monge v. California</i> (1998) 524 U.S. 721..... | 1712, 1716, 1717,1732, 1737, 1739 |
| <i>Morgan v. Illinois</i> (1992) 504 U.S. 719 | 1387, 1388, 1390, 1539, 1541, 1543, 1544, 1558 1631 |
| <i>Mullins v. State</i> (Ala. Crim. App. 1977) 344 So.2d 539 | 1678 |
| <i>In re Murchison</i> (1955) 349 U.S. 133 | 1433, 1434 |
| <i>Murray's Lessee v. Hoboken Land and Improvement Co.</i> (1855) 59 U.S.(18 How.) 272 | 1715, 1720 |
| <i>Murray v. State</i> (Fla. 2002) 838 So.2d 1073 | 1122 |
| <i>Murtishaw v. Woodford</i> (9th Cir. 2001) 255 F.3d 926 | 1467, 1549 |
| <i>Myers v. Ylst</i> (9th Cir. 1990) 897 F.2d 417 | 1723, 1739 |
| <i>Near v. Cunningham</i> (3d Cir. 1963) 313 F.2d 929 | 1662 |
| <i>Neder v. United States</i> (1999) 527 U.S. 1 | 1203, 1321, 1514, 1563 |
| <i>Offutt v. United States</i> (1954) 358 U.S. 11 | 1433, 1434 |

| | |
|--|------------------------------------|
| <i>In re Oliver</i> (1948) 333 U.S. 257 | 1137, 1457 |
| <i>Osborne v. United States</i> (8th Cir. 1965) 351 F.2d 111 | 1467, 1550 |
| <i>Parker v. Gladden</i> (1966) 385 U.S. 363 | 1642, 1685, 1688 |
| <i>Patton v. Yount</i> (1984) 467 U.S. 1025 | 1539 |
| <i>Paxton v. Ward</i> (10th Cir. 1999) 199 F.3d 1197 | 1485 |
| <i>Payne v. Tennessee</i> (1991) 501 U.S. 808 | 1498, 1588, 1590 |
| <i>Penry v. Johnson</i> (2001) 532 U.S. 782 | 1390, 1590, 1625 |
| <i>Penry v. Lynaugh</i> (1989) 492 U.S. 302 | 1531, 1577, 1589 |
| <i>Penson v. Ohio</i> (1988) 488 U.S. 75 | 1475, 1636, 1638, 1639, 1655, 1664 |
| <i>People of Terr. Of Guam v. Marquez</i> (9th Cir. 1992) 963 F.2d 1311 | 1681 |
| <i>People v. Adams</i> (1993) 6 Cal.4th 570 | 1514 |
| <i>People v. Adcox</i> (1988) 47 Cal.3d 207 | 1700 |
| <i>People v. Adcox</i> , No. S004558 | 1703 |
| <i>People v. Aikens</i> (NY 1983) 465 N.Y.S.2d 480 | 1658, 1665 |
| <i>People v. Ainsworth</i> (1988) 45 Cal.3d 984 | 1557 |
| <i>People v. Albertson</i> (1944) 23 Cal.2d 550 | 1167 |
| <i>People v. Alcala</i> (1984) 36 Cal.3d 604 | 1391, 1499 |
| <i>People v. Allen</i> (1978) 77 Cal.App.3d 924 | 1644 |
| <i>People v. Allen</i> (1986) 42 Cal.3d 1222 | 1711, 1733, 1735, 1736 |
| <i>People v. Allison</i> , No. S004649 | 1702, 1705 |

| | |
|--|------------------|
| <i>People v. Anderson</i> (2001) 25 Cal.4th 543 | 1711 |
| <i>People v. Anderson</i> , No. S004385 | 1704, 1705 |
| <i>People v. Apalatequi</i> (1978) 82 Cal.App.3d 970 | 1462 |
| <i>People v. Arias</i> (1996) 13 Cal.4th 92 | 1568, 1569 |
| <i>People v. Ashmus</i> (1991) 54 Cal.3d 932 | 1488, 1548, 1559 |
| <i>People v. Ashmus</i> , No. S004723 | 1705 |
| <i>People v. Avena</i> , No. S004422 | 1705 |
| <i>People v. Babbitt</i> (1988) 45 Cal.3d 660 | 1470 |
| <i>People v. Bacigalupo</i> (1993) 6 Cal.4th 457 | 1697 |
| <i>People v. Bain</i> (1971) 5 Cal.3d 839 | 1661, 1674 |
| <i>People v. Balderas</i> (1985) 41 Cal.3d 144 | 1497 |
| <i>People v. Barboza</i> (1981) 29 Cal.3d 375 | 1446 |
| <i>People v. Barnett</i> (1998) 17 Cal.4th 1044 | 1629 |
| <i>People v. Barraza</i> (1979) 23 Cal.3d 675 | 1599 |
| <i>People v. Bean</i> , No. S004387 | 1704, 1705 |
| <i>People v. Beeler</i> (1995) 9 Cal.4th 953 | 1630, 1633 |
| <i>People v. Belmontes</i> (1988) 45 Cal.3d 744 | 1517, 1582, 1687 |
| <i>People v. Belmontes</i> , No. S004467 | 1702, 1705 |
| <i>People v. Benson</i> (1990) 52 Cal.3d 754 | 1529, 1530 |
| <i>People v. Benson</i> , No. S004763 | 1702, 1704 |

| | |
|--|--|
| <i>People v. Birks</i> (1998) 19 Cal.4th 108 | 1494 |
| <i>People v. Bittaker</i> (1989) 48 Cal.3d 1046 | 1387, 1558, 1701 |
| <i>People v. Bloom</i> (1989) 48 Cal.3d 1194 | 1387 |
| <i>People v. Bobo</i> (1990) 229 Cal.App.3d 1417 | 1146 |
| <i>People v. Bolden</i> (2002) 29 Cal.4th 515 | 1126, 1134 |
| <i>People v. Bolin</i> (1998) 18 Cal.4th 297 | 1714 |
| <i>People v. Bonillas</i> (1989) 48 Cal.3d 757 | 1557 |
| <i>People v. Bonin</i> , No. S004565 | 1704 |
| <i>People v. Boyette</i> (2002) 29 Cal.4th 381 | 1539, 1543 |
| <i>People v. Boyette, supra</i> , 29 Cal.4th 417-18 | 1540 |
| <i>People v. Brew</i> (1984) 161 Cal.App.3d 1102 | 1669 |
| <i>People v. Brown</i> (1976) 61 Cal.App.3d 476 | 1539, 1553 |
| <i>People v. Brown</i> (1985) 40 Cal.3d 512 | 1484, 1492, 1517, 1523, 1524, 1562, 1711 |
| <i>People v. Brown</i> (1988) 45 Cal.3d 1247 | 1569 |
| <i>People v. Brown</i> (1988) 46 Cal.3d 432 | 1488, 1548, 1710 |
| <i>People v. Brown</i> (1993) 17 Cal.App.4th 1389 | 1499 |
| <i>People v. Brown</i> (1994) 8 Cal.4th 746 | 1456 |
| <i>People v. Brown</i> , No. S004451 | 1702, 1705 |
| <i>People v. Brownell</i> (Ill. 1980) 404 N.E.2d 181 | 1727 |
| <i>People v. Bruneman</i> (1935) 4 Cal.App.2d 75 | 1605 |

| | |
|---|------------------------------|
| <i>People v. Buffum</i> (1953) 40 Cal.2d 709 | 1214, 1533, 1744, 1745 |
| <i>People v. Bull</i> (1998) 185 Ill.2d 179 | 1740 |
| <i>People v. Burgener</i> (1988) 41 Cal.3d 505 | 1629, 1631 |
| <i>People v. Bustamonte</i> (1981) 30 Cal.3d 88 | 1142 |
| <i>People v. Byrnes</i> (1948) 84 Cal.App.2d 72 | 1675 |
| <i>People v. Cain</i> (1996) 10 Cal.4th 1 | 1567, 1568 |
| <i>People v. Cain</i> , No. S006544 | 1705 |
| <i>People v. Cardenas</i> (1982) 31 Cal.3d 897 | 1460 |
| <i>People v. Carpenter</i> , No. S004654 | 1703, 1704, 1705 |
| <i>People v. Carrera</i> , No. S004569 | 1701, 1703 |
| <i>People v. Cash</i> (2002) 28 Cal.4th 703 | 1385, 1389, 1390, 1391, 1539 |
| <i>People v. Chadwick</i> (1906) 4 Cal.App. 63 | 1151, 1157, 1158 |
| <i>People v. Champion</i> (1995) 9 Cal.5th 879, 908 | 1387, 1558 |
| <i>People v. Chapman</i> (1993) 15 Cal.App.4th 136..... | 1389 |
| <i>People v. Chavez</i> (1980) 26 Cal.3d 334 | 1492, 1618 |
| <i>People v. Chessman</i> (1951) 38 Cal.2d 166 | 1392, 1469 |
| <i>People v. Clair</i> , No. S004789 | 1704 |
| <i>People v. Clark</i> (1993) 5 Cal.4th 950 | 1465 |
| <i>People v. Coddington</i> , No. S008840 | 1702, 1705 |
| <i>People v. Comtois</i> , No. S017116 | 1705 |

| | |
|---|------------------|
| <i>People v. Cooks</i> (1983) 141 Cal.App.3d 224..... | 1658 |
| <i>People v. Cooper</i> (1991) 53 Cal.3d 771 | 1126 |
| <i>People v. Corona</i> (1978) 80 Cal.App.3d 684 | 1446 |
| <i>People v. Cox</i> (1991) 53 Cal.3d 618 | 1566 |
| <i>People v. Crandell</i> (1988) 46 Cal.3d 833 | 1630, 1631, 1633 |
| <i>People v. Crawford</i> (1982) 131 Cal.App.3d 591 | 1585 |
| <i>People v. Crittenden</i> (1994) 9 Cal.4th 83 | 1559 |
| <i>People v. Cuccia</i> (2002) 97 Cal.App.4th 785 | 1509 |
| <i>People v. Cunningham</i> (2001) 25 Cal.4th 926 | 1629, 1630, 1632 |
| <i>People v. Dagnino</i> (1978) 80 Cal.App.3d 981 | 1637 |
| <i>People v. Dancer</i> (1996) 45 Cal.App.4th 1677 | 1465 |
| <i>People v. Davenport</i> (1985) 41 Cal.3d 247 | 1730 |
| <i>People v. Davis</i> (1995) 10 Cal.4th 463 | 1558, 1629, 1685 |
| <i>People v. Davis</i> , No. S014636 | 1703 |
| <i>People v. Deere</i> , No. S004722 | 1704 |
| <i>People v. Diaz</i> (1951) 105 Cal.App.2d 690 | 1662, 1674 |
| <i>People v. Diedrich</i> (1982) 31 Cal.3d 263 | 1718 |
| <i>People v. Dillon</i> (1983) 34 Cal.3d 441 | 1155, 1542, 1698 |
| <i>People v. Doane</i> (1988) 200 Cal.App.3d 852 | 1663 |
| <i>People v. Dunkle</i> , No S014200 | 1586, 1703, 1722 |

| | |
|---|------------------|
| <i>People v. Duran</i> (1983) 140 Cal.App.3d | 1598 |
| <i>People v. Dyer</i> (1988) 45 Cal.3d 26 | 1700 |
| <i>People v. Easley</i> (1983) 34 Cal.3d 858 | 1531, 1573, 1577 |
| <i>People v. Edelbacher</i> (1989) 47 Cal.3d 983 | 1145, 1696, 1730 |
| <i>People v. Edwards</i> , No. S004755 | 1702, 1705 |
| <i>People v. Elliot</i> (1960) 54 Cal.2d 498 | 1541 |
| <i>People v. Espinoza</i> (1992) 3 Cal.4th 806 | 1629, 1631 |
| <i>People v. Fairbank</i> (1997) 16 Cal.4th 1223 | 1707, 1709, 1722 |
| <i>People v. Farnam</i> (2002) 28 Cal.4th 107 | 1710 |
| <i>People v. Fauber</i> (1992) 2 Cal.4th 792 | 1722 |
| <i>People v. Fauber</i> , No. S005868 | 1703, 1704, 1705 |
| <i>People v. Figueroa</i> (1986) 41 Cal.3d 714 | 1514, 1515 |
| <i>People v. Figueredo</i> (1955) 130 Cal.App.2d 498 | 1644 |
| <i>People v. Filson</i> (1994) 22 Cal.App.4th 1841 | 1441, 1467, 1549 |
| <i>People v. Ford</i> (1964) 60 Cal.2d 772 | 1214, 1533, 1744 |
| <i>People v. Frank</i> (1985) 38 Cal.3d 711 | 1159 |
| <i>People v. Freeman</i> (1978) 22 Cal.3d 434 [alibi] | 1458 |
| <i>People v. Freeman</i> (1994) 8 Cal.4th 450 | 1520, 1533 |
| <i>People v. Freeman</i> , No. S004787 | 1702, 1703, 1705 |
| <i>People v. Frierson</i> (1979) 25 Cal.3d 142 | 1436 |

| | |
|---|------------------------------|
| <i>People v. Frierson</i> , No. S004761 | 1702 |
| <i>People v. Frutos</i> (1984) 158 Cal.App.3d 979 | 1672 |
| <i>People v. Frye</i> (1998) 18 Cal.4th 894 | 1465, 1655 |
| <i>People v. Gainer</i> (1977) 19 Cal.3d 835 | 1467, 1549, 1598, 1599, 1602 |
| <i>People v. Gaston</i> (1978) 20 Cal.3d 476 | 1463 |
| <i>People v. Gates</i> (1987) 43 Cal.3d 1168 | 1491, 1557 |
| <i>People v. Ghent</i> , No. S004309 | 1702, 1705 |
| <i>People v. Gibson</i> (1976) 56 Cal.App.3d 119 | 1644 |
| <i>People v. Giminez</i> (1975) 14 Cal.3d 68 | 1630 |
| <i>People v. Gonzalez</i> (1990) 51 Cal.3d 1179 | 1577 |
| <i>People v. Gosden</i> (1936) 6 Cal. 2d 14 | 1169, 1282, 1611 |
| <i>People v. Green</i> (1980) 27 Cal.3d 1 | 1159, 1529 |
| <i>People v. Guiton</i> (1993) 4 Cal.4th 1116 | 1478 |
| <i>People v. Gurule</i> (2002) 28 Cal.4th 557 | 1514, 1625 |
| <i>People v. Hall</i> (1986) 41 Cal.3d 826 | 1145 |
| <i>People v. Hamilton</i> (1963) 60 Cal.3d 105 | 1563, 1564 |
| <i>People v. Hamilton</i> (1989) 48 Cal.3d 1142 | 1730 |
| <i>People v. Hamilton</i> , No. S004363 | 1703 |
| <i>People v. Hardy</i> (1948) 33 Cal.2d 52 | 1464, 1644 |
| <i>People v. Hardy</i> (1992) 2 Cal.4th 86 | 1444, 1464, 1466, 1624, 1701 |

| | |
|---|---|
| <i>People v. Harris</i> (1984) 36 Cal.3d 36 | 1484 |
| <i>People v. Hart</i> (1999) 20 Cal.4th 546 | 1126 |
| <i>People v. Hartman</i> (1984) 103 Cal. 242 | 1672 |
| <i>People v. Hawkins</i> (1995) 10 Cal.4th 920 | 1566 |
| <i>People v. Hawkins</i> , No. S014199 | 1702 |
| <i>People v. Hawthorne</i> (1992) 4 Cal.4th 43 | 1585, 1709, 1719, 1724 |
| <i>People v. Hayes</i> (1990) 52 Cal.3d 577 | 1538, 1719, 1720, 1721, 1724 |
| <i>People v. Hernandez</i> (1988) 47 Cal.3d 315 | 1467, 1549 |
| <i>People v. Hill</i> (1998) 17 Cal.4th 800 | 1214, 1520, 1522, 1524, 1533, 1744 |
| <i>People v. Hillhouse</i> (2002) 27 Cal.4th 469 | 1542, 1543, 1698 |
| <i>People v. Hines</i> (1964) 61 Cal.2d 164 | 1674 |
| <i>People v. Hoffmann</i> (1970) 7 Cal.App.3d 39 | 1458 |
| <i>People v. Hogan</i> (1982) 31 Cal.3d 815 | 1637 |
| <i>People v. Holloway</i> (1990) 50 Cal.3d 1098 | 1564, 1642, 1685, 1688 |
| <i>People v. Holt</i> (1984) 37 Cal.3d 436 | 1499, 1631, 1745 |
| <i>People v. Holt</i> (1997) 15 Cal.4th 619 | 1487, 1506, 1507, 1548 |
| <i>People v. Horton</i> (1995) 11 Cal.4th 1068 | 1466, 1475, 1487, 1548, 1636, 1637, 1639, 1656, 1665, 1745 |
| <i>People v. Hovey</i> (1980) 28 Cal.3d 1 | 1386, 1389 |
| <i>People v. Howard</i> , No. S004452 | 1702, 1705 |

| | |
|---|------------------------|
| <i>People v. Hughey</i> (1987) 194 Cal.App.3d 1383 | 1153, 1155, 1156 |
| <i>People v. Jackson</i> (1985) 167 Cal.App.3d 829 | 1465 |
| <i>People v. Jackson</i> (1991) 235 Cal.App.3d 1670 | 1745 |
| <i>People v. Jackson</i> , No. S010723 | 1705 |
| <i>People v. Jeff</i> (1988) 204 Cal.App.3d 309 | 1457 |
| <i>People v. Jenkins</i> (2000) 22 Cal.4th 900 | 1558, 1585, 1685 |
| <i>People v. Jennings</i> (1991) 53 Cal.3d 334 | 1491, 1501 |
| <i>People v. Jennings</i> , No. S004754 | 1702 |
| <i>People v. Jimenez</i> (1992) 11 Cal.App.4th 1611 | 1540 |
| <i>People v. Johnson</i> (1964) 229 Cal.App.2d 162 | 1644 |
| <i>People v. Johnson</i> (1980) 26 Cal.3d 557 | 1464 |
| <i>People v. Jones</i> (1973) 9 Cal.3d 546 | 1458 |
| <i>People v. Jones</i> (1996) 13 Cal.4th 535 | 1499 |
| <i>People v. Jordan</i> (1986) 42 Cal.3d 308 | 1630 |
| <i>People v. Karis</i> (1988) 46 Cal.3d 612 | 1464, 1642, 1685, 1688 |
| <i>People v. Kaurish</i> (1990) 52 Cal.3d 648 | 1568, 1703 |
| <i>People v. Keenan</i> (1988) 46 Cal. 3d 478 | 1602 |
| <i>People v. Kelly</i> (1976) 17 Cal.3d 24 | 1114, 1118, 1137 |
| <i>People v. Kimble</i> , No. S004364 | 1704 |
| <i>People v. Kipp</i> (2001) 26 Cal.4th 1100 | 1159 |

| | |
|--|------------------------------------|
| <i>People v. Kipp</i> , No. S004784 | 1704 |
| <i>People v. Kipp</i> , No. S009169 | 1704 |
| <i>People v. Kirkpatrick</i> (1994) 7 Cal.4th 988 | 1389 |
| <i>People v. Knight</i> (1987) 194 Cal.App.3d 337 | 1446 |
| <i>People v. Kohler</i> (1855) 5 Cal. 72 | 1667, 1669 |
| <i>People v. Lang</i> (1974) 11 Cal.3d 134 | 1444, 1454, 1481 |
| <i>People v. Lanphear</i> (1984) 36 Cal.3d 163 | 1577 |
| <i>People v. Lawson</i> (1987) 189 Cal.App.3d 741 | 1624 |
| <i>People v. Leahy</i> (1994) 8 Cal.4th 587 | 1119, 1133 |
| <i>People v. Ledesma</i> (1987) 43 Cal.3d 171 | 1436 |
| <i>People v. Litteral</i> (1978) 79 Cal.App.3d 790 | 1657, 1658 |
| <i>People v. Livaditis</i> , No. S004767 | 1703 |
| <i>People v. Love</i> (1960) 53 Cal.2d 843 | 1529 |
| <i>People v. Lucas</i> (1995) 12 Cal.4th 415 | 1387, 1398, 1487, 1538, 1548, 1558 |
| <i>People v. Lucas</i> , No. S004788 | 1701, 1703 |
| <i>People v. Lucero</i> (1988) 44 Cal.3d 1006 | 1730 |
| <i>People v. Lucero</i> , No. S012568 | 1705 |
| <i>People v. Markus</i> (1978) 82 Cal.App.3d 477 | 1467, 1549 |
| <i>People v. Marsden</i> (1970) 2 Cal.3d 118 | 1217, 1507, 1508, 1510 |
| <i>People v. Marshall</i> (1990) 50 Cal.3d 907 | 1728 |

| | |
|--|------------------------|
| <i>People v. Marshall</i> (1996) 13 Cal.4th 799 | 1486, 1566 |
| <i>People v. Martin</i> (1986) 42 Cal.3d 437 | 1723, 1735 |
| <i>People v. Mathews</i> (1994) 25 Cal.App.4th 89 | 1467, 1549 |
| <i>People v. Matteson</i> (1964) 61 Cal.2d 466 | 1644 |
| <i>People v. Mattson</i> (1990) 50 Cal.3d 826 | 1540 |
| <i>People v. Mayfield</i> (1993) 5 Cal.4th 142 | 1444 |
| <i>People v. Mayfield</i> (1997) 14 Cal.4th 668 | 1577 |
| <i>People v. McCullough</i> (1940) 38 Cal.App.2d 387 | 1426, 1456 |
| <i>People v. McGreen</i> (1980) 107 Cal.App.3d 504 | 1214, 1533, 1744 |
| <i>People v. McKenzie</i> (1983) 34 Cal.3d 616 | 1446 |
| <i>People v. McLain</i> , No. S004370 | 1702, 1705 |
| <i>People v. McNeal</i> (1974) 90 Cal.App.3d 830 | 1631 |
| <i>People v. McPeters</i> , No. S004712 | 1704 |
| <i>People v. Medina</i> (1995) 11 Cal.4th 694 | 1177, 1292, 1566, 1717 |
| <i>People v. Melton</i> (1988) 44 Cal.3d 713 | 1491, 1730 |
| <i>People v. Melton</i> , No. S004518 | 1704 |
| <i>People v. Miller</i> (1990) 50 Cal.3d 954 | 1598 |
| <i>People v. Miller</i> (1996) 46 Cal.App.4th 41 | 1502, 1569 |
| <i>People v. Milner</i> (1988) 45 Cal.3d 227 | 1526, 1527 |
| <i>People v. Miranda</i> (1987) 44 Cal.3d 57 | 1718 |

| | |
|--|------------------|
| <i>People v. Miranda</i> , No. S004464 | 1702 |
| <i>People v. Morales</i> (1989) 48 Cal.3d 527 | 1698, 1701 |
| <i>People v. Morales</i> , No. S004552 | 1703 |
| <i>People v. Moreland</i> (1970) 5 Cal.App.3d 588 | 1674 |
| <i>People v. Morris</i> (1991) 53 Cal.3d 152 | 1126 |
| <i>People v. Mozingo</i> (1983) 34 Cal.3d 926 | 1436 |
| <i>People v. Mroczko</i> , <i>supra</i> , 35 Cal.3d at 104-105 | 1465 |
| <i>People v. Murtishaw</i> (1981) 29 Cal.3d 733 | 1594 |
| <i>People v. Musselwhite</i> (1998) 17 Cal.4th 1216 | 1295 |
| <i>People v. Nessler</i> (1997) 16 Cal.4th 561 | 1541 |
| <i>People v. Nicolaus</i> (1991) 54 Cal.3d 551 | 1560, 1701 |
| <i>People v. Nunez</i> (1983) 144 Cal.App.3d 697 | 1668 |
| <i>People v. Ochoa</i> (2001) 26 Cal.4th 398 | 1713, 1714 |
| <i>People v. Ochoa</i> (1998) 19 Cal.4th 353 | 1590, 1591 |
| <i>People v. Olivas</i> (1976) 17 Cal.3d 236 | 1499, 1732, 1733 |
| <i>People v. Oliver</i> (1987) 196 Cal.App.3d 423 | 1605, 1606 |
| <i>People v. Osband</i> , No. S005233 | 1702 |
| <i>People v. Ozuna</i> (1963) 213 Cal.App.2d 338 | 1644 |
| <i>People v. Padilla</i> , No. S014496 | 1703 |
| <i>People v. Phillips</i> , (1985) 41 Cal.3d 29, 711 P.2d 423 | 1704, 1745 |

| | |
|---|--|
| <i>People v. Pierce</i> (1979) 24 Cal.3d 199 | 1631 |
| <i>People v. Pitmon</i> (1985) 170 Cal.App.3d 38 | 1568 |
| <i>People v. Pitts</i> (1990) 223 Cal.App.3d 606 | 1745 |
| <i>People v. Pope</i> (1979) 23 Cal.3d 412 | 1437, 1438, 1455, 1456, 1458, 1459, 1460, 1461 |
| <i>People v. Proctor</i> (1992) 4 Cal.4th 499 | 1598 |
| <i>People v. Purvis</i> (1963) 60 Cal.2d 323 | 1539, 1553 |
| <i>People v. Raley</i> (1992) 2 Cal.4th 870 | 1717 |
| <i>People v. Ramirez</i> (1990) 50 Cal.3d 1158 | 1491 |
| <i>People v. Ranney</i> (1931) 213 Cal. 70 | 1389, 1540 |
| <i>People v. Ray</i> (1996) 13 Cal.4th 313 | 1491 |
| <i>People v. Reilly</i> , 3 Cal.3d 421 | 1479 |
| <i>People v. Reilly</i> (1987) 196 Cal. App.3d 1127 | 1121, 1125 |
| <i>People v. Reilly</i> , No. S004607 | 1705 |
| <i>People v. Rhodes</i> (1974) 12 Cal.3d 180 | 1433 |
| <i>People v. Rist</i> (1976) 16 Cal.3d 211 | 1129, 1630 |
| <i>People v. Roberts</i> (1992) 2 Cal.4th 271 | 1147 |
| <i>People v. Robertson</i> (1982) 33 Cal.3d 21 | 1161, 1487, 1491, 1501, 1548, 1563, 1564 |
| <i>People v. Rodrigues</i> (1994) 8 Cal.4th 1060 | 1658, 1687 |
| <i>People v. Rodriguez</i> (1981) 115 Cal.App.3d 1018 | 1142 |

| | |
|--|------------|
| <i>People v. Rodriguez</i> (1986) 42 Cal.3d 1005 | 1465 |
| <i>People v. Rodriguez</i> (1986) 42 Cal.3d 730 | 1562, 1736 |
| <i>People v. Roof</i> (1963) 216 Cal.App.2d 222 | 1644 |
| <i>People v. Roybal</i> (1998) 19 Cal.4th 481 | 1520 |
| <i>People v. Sam</i> (1969) 71 Cal.2d 194 | 1499 |
| <i>People v. Samayoa</i> , No. S006284, | 1704 |
| <i>People v. Sanchez</i> (1995) 12 Cal.4th 1 | 1466 |
| <i>People v. Sandoval</i> (1992) 4 Cal.4th 155 | 1521, 1524 |
| <i>People v. Scott</i> , No. S010334 | 1705 |
| <i>People v. Seabourn</i> (1992) 9 Cal.App.4th 187 | 1459 |
| <i>People v. Sears</i> (1970) 2 Cal.3d 180 | 1483 |
| <i>People v. Seden</i> (1974) 10 Cal.3d 703 | 1585 |
| <i>People v. Sheldon</i> (1989) 48 Cal.3d 935 | 1598, 1602 |
| <i>People v. Shirley</i> (1982) 31 Cal.3d 18 | 1114 |
| <i>People v. Silva</i> (1988) 45 Cal.3d 604 | 1594 |
| <i>People v. Sims</i> (1958) 165 Cal.App.2d 108 | 1745 |
| <i>People v. Singer</i> (1990) 226 Cal.App.3d 23 | 1465 |
| <i>People v. Slaughter</i> (2002) 27 Cal.4th 1187 | 1576 |
| <i>People v. Snow</i> (2003) 30 Cal.4th 43 | 1569 |
| <i>People v. Soto</i> (1999) 21 Cal.4th 512 | 1118, 1134 |

| | |
|--|--|
| <i>People v. Stanley</i> (1995) 10 Cal.4th 764 | 1590, 1699 |
| <i>People v. Stewart</i> (1985) 171 Cal.App.3d 59 | 1630 |
| <i>People v. Stewart</i> , No. S020803 | 1702 |
| <i>People v. Superior Court (Engert)</i> (1982) 31 Cal.3d 797 | 1697 |
| <i>People v. Superior Court (Manuel G.)</i> (2002) 104 Cal.App.4th 915 | 1469 |
| <i>People v. Sutton</i> (1993) 19 Cal.App.4th 795 | passim. |
| <i>People v. Taylor</i> (1990) 52 Cal.3d 719 | 1468, 1550, 1714 |
| <i>People v. Teitelbaum</i> (1958) 163 Cal.App.2d 184 | 1673 |
| <i>People v. Thomas</i> (1972) 8 Cal.3d 518 | 1433 |
| <i>People v. Thompkins</i> (1987) 195 Cal.App.3d 244 | 1624 |
| <i>People v. Thompson</i> (1980) 27 Cal.3d 303 | 1162, 1279, 1280, 1391, 1499, 1541, 1560 |
| <i>People v. Thompson</i> (1988) 45 Cal.3d 86 | 1566 |
| <i>People v. Thornton</i> (1974) 11 Cal.3d 738 | 1483 |
| <i>People v. Triplett</i> (1993) 16 Cal.App.4th 624 | 1159 |
| <i>People v. Valentine</i> (1988) 207 Cal.App.3d 697 | 1460 |
| <i>People v. Vann</i> (1974) 12 Cal.3d 220 | 1204 |
| <i>People v. Venegas</i> (1998) 18 Cal.4th 47 | 1115, 1118, 1119, 1121, 1126 |
| <i>People v. Vickers</i> (1972) 8 Cal.3d 451 | 1618 |
| <i>People v. Visciotti</i> , No. S004597 | 1702 |

| | |
|---|------------------------------------|
| <i>People v. Wagner</i> (1975) 13 Cal.3d 612 | 1644 |
| <i>People v. Waidla</i> , No. S020161 | 1703 |
| <i>People v. Walker</i> (1988) 47 Cal.3d 605, 765 P.2d 70 8 | 1701 |
| <i>People v. Wash</i> (1993) 6 Cal.4th 215 | 1126, 1520, 1521 |
| <i>People v. Watson</i> (1956) 46 Cal.2d 818 | passim. |
| <i>People v. Weaver</i> (2001) 26 Cal.4th 876 | 1544 |
| <i>People v. Webb</i> , No. S006938 | 1703 |
| <i>People v. Welch</i> (1999) 20 Cal.4th 701 | 1522, 1585 |
| <i>People v. Wheeler</i> (1978) 22 Cal.3d 258 | 1717 |
| <i>People v. Wheeler</i> (1992) 4 Cal.4th 284 | 1491 |
| <i>People v. Whitson</i> (1944) 25 Cal.2d 593 | 1458 |
| <i>People v. Williams</i> (1971) 22 Cal.App.3d 34 | 1131, 1138, 1143, 1214, 1215, 1744 |
| <i>People v. Williams</i> (1988) 45 Cal.3d 1268 | 1524 |
| <i>People v. Williams</i> (1991) 9 Cal.App.4th 865 | 1469 |
| <i>People v. Williams</i> (1997) 16 Cal.4th 153 | 1498 |
| <i>People v. Williams</i> , No. S004365 | 1703 |
| <i>People v. Woodard</i> (1979) 23 Cal.3d 329 | 1441 |
| <i>People v. Woods</i> (1991) 226 Cal.App.3d 1037 | 1662, 1674 |
| <i>People v. Wright</i> (1990) 52 Cal.3d 367 | 1491 |

| | |
|---|--|
| <i>People v. Zapien</i> (1993) 4 Cal.4th 929 | 1642, 1685, 1688 |
| <i>People v. Zapien</i> , No. S004762 | 1701, 1703 |
| <i>People v. Zerillo</i> (1950) 36 Cal.2d 222 | 1745 |
| <i>Perry v. Leeke</i> (1989) 488 U.S. 272..... | 1636, 1637, 1638, 1639, 1655, 1664, 1665 |
| <i>Phillips v. Seely</i> (1974) 43 Cal.App.3d 104 | 1446 |
| <i>Powell v. Alabama</i> (1932) 287 U.S. 45 | 1639, 1665, 1693 |
| <i>Powell v. United States</i> (9th Cir. 1965) 347 F.2d 156 | 1624 |
| <i>Press-Enterprise Co. v. Superior Court</i> (1984) 464 U.S. 501 | 1672, 1675 |
| <i>Proffitt v. Florida</i> (1976) 428 U.S. 242 | 1720, 1725 |
| <i>Proffitt v. Wainwright</i> (11th Cir. 1982) 685 F.2d 1227 | 1662 |
| <i>Profitt v. Florida</i> (1976) 428 U.S. 242 | 1727 |
| <i>Public Trials</i> , annot., 61 L.Ed.2d 1018 | 1675 |
| <i>Pulley v. Harris</i> (1984) 465 U.S. 37 | 1699, 1725, 1726, 1728 |
| <i>Purdy v. State</i> (Ind. 1977) 267 Ind. 282 | 1681 |
| <i>Quercia v. United States</i> (1933) 289 U.S. 466 | 1169, 1282, 1610, 1611, 1615 |
| <i>Reid v. Covert</i> (1957) 354 U.S. 1 | 1736 |
| <i>Remmer v. United States</i> (1954) 347 U.S. 227 | 1642, 1685, 1688 |
| <i>Remmer v. United States</i> (1956) 350 U.S. 377 | 1606 |
| <i>Reynolds v. United States</i> (1879) 98 U.S. 145 | 1560 |
| <i>Rice v. Wood</i> (9th Cir. 1996) 77 F.3d 1138 | 1434, 1509 |

| | |
|--|--|
| <i>Richardson v. United States</i> (1999) 526 U.S. 813 | 1718 |
| <i>Riddle v. State</i> (S.C. 1992) 308 S.C. 361 [418 S.E.2d 308] | 1459 |
| <i>Riley v. Deeds</i> (9th Cir. 1995) 56 F.3d 1117 | 1136, 1657, 1658, 1665 |
| <i>Ring v. Arizona</i> (2002) 536 U.S. 584 | 1708, 1723, 1725, 1729, 1739 |
| <i>Roberts v. Louisiana</i> (1976) 428 U.S. 325 | 1484, 1493 |
| <i>Roberts v. Louisiana</i> (1977) 431 U.S. 633 | 1484, 1493 |
| <i>Rock v. Arkansas</i> (1987) 483 U.S. 44 | 1136, 1137, 1148 |
| <i>In re Rodriguez</i> | |
| (1987) 119 Cal.App.3d 457 | 1131, 1138, 1143, 1214, 1215, 1744, 1745 |
| <i>Rodriguez v. Marshall</i> (9th Cir. 1997) 125 F.3d 739 | 1601 |
| <i>Romano v. Oklahoma</i> (1994) 512 U.S. 1 | 1527 |
| <i>Romine v. Georgia</i> (1988) 484 U.S. 1048 | 1601 |
| <i>Rose v. Clark</i> (1986) 478 U.S. 570 | 1434 |
| <i>Roseboro v. State</i> (S.C. 1995) 317 S.C. 292 [454 S.E.2d 312] | 1459 |
| <i>Ross v. Oklahoma</i> (1988) 487 U.S. 81 | 1541, 1543 |
| <i>Rovinsky v. McKaskle</i> | |
| (5th Cir. 1984) 722 F.2d 197 | 1671, 1672, 1673, 1674, 1675 |
| <i>Rummel v. Estelle</i> (5th Cir. 1979) 590 F.2d 103 | 1436 |
| <i>Rupe v. Wood</i> (9th Cir. 1996) 93 F.3d 1434 | 1485 |
| <i>Sabariego v. Maverick</i> (1888) 124 U.S. 261 | 1741 |
| <i>Sandoval v. Calderon</i> (9th Cir. 2000) 241 F.3d 765 | 1468, 1550 |

| | |
|---|---|
| <i>Santosky v. Kramer</i> (1982) 455 U.S. 745 | 1712 |
| <i>Satterwhite v. Texas</i> (1988) 486 U.S. 249 | 1486, 1487, 1547 |
| <i>Savage v. Estelle</i> (9th Cir. 1988) 924 F.2d 1459 | 1663 |
| <i>Sawyer v. Smith</i> (1990) 497 U.S. 227 | 1387, 1541 |
| <i>Sheppard v. Maxwell</i> (1966) 384 U.S. 333 | 1690 |
| <i>Sheppard v. Rees</i> (9th Cir.) 909 F.2d 1234 | 1457 |
| <i>Shortridge v. State</i> (Iowa 1991) 478 N.W.2d 613 | 1494 |
| <i>Silva v. Woodford</i> (9th Cir. 2002) 279 F.3d 825 | 1542 |
| <i>Simmons v. United States</i> (1968) 390 U.S. 377 | 1544, 1545 |
| <i>Skinner v. Oklahoma</i> (1942) 316 U.S. 535 | 1733 |
| <i>Skipper v. South Carolina</i> (1986) 476 U.S. 1 | 1484, 1493, 1531, 1573, 1577, 1589, 1590, 1625 |
| <i>In re Smiley</i> (1967) 66 Cal.2d 606 | 1663 |
| <i>Smith v. Phillips</i> (1982) 455 U.S. 209 | 1631, 1643, 1690 |
| <i>Smith v. Robbins</i> (2000) 528 U.S. 259 | 1454 |
| <i>Snyder v. Massachusetts</i> (1934) 291 U.S. 97 | 1506, 1654 |
| <i>Sochor v. Florida</i> (1992) 504 U.S. 527 | 1541 |
| <i>Solberg v. Superior Court</i> (1977) 19 Cal.3d 182 | 1433 |
| <i>Songer v. Wainwright</i> (1985) 469 U.S. 1133 | 1531, 1577 |
| <i>Soule v. General Motors Corp.</i> (94) 8 Cal.4th 548 | 1590 |
| <i>Spain v. Rushen</i> (9th Cir. 1989) 883 F.2d 712 | 1637 |

| | |
|---|------------------------|
| <i>Spaziano v. Florida</i> (1984) 468 U.S. 447 | 1693 |
| <i>Standen v. Whitley</i> (9th Cir. 1993) 994 F.2d 1417 | 1483 |
| <i>Stanford v. Kentucky</i> (1989) 492 U.S. 361 | 1740 |
| <i>Starr v. United States</i> (1894) 153 U.S. 614 | 1169, 1282, 1610, 1611 |
| <i>State v. Antwine</i> (Kan. App. 1980) 4 Kan. App.2d 389 | 1656 |
| <i>State v. Bartholomew</i> (Wash. 1982) 98 Wn.2d 173 | 1497 |
| <i>State v. Beal</i> (N.M. 1944) 48 N.M. 84 | 1656 |
| <i>State v. Bobo</i> (Tenn. 1987) 727 S.W.2d 945 | 1729 |
| <i>State v. Dixon</i> (Fla. 1973) 283 So.2d 1 | 1727 |
| <i>State v. Gammill</i> (Kan. App. 1978) 2 Kan.App.2d 627 | 1656 |
| <i>State v. Goodman</i> (1979) 257 S.E.2d 569 | 1709 |
| <i>State v. Hawk</i> (Tenn. Crim. App. 1985) 688 S.W.2d 467 | 1499 |
| <i>State v. Hightower</i> (1996) 146 N.J. 239 | 1487, 1547 |
| <i>State v. Iosefa</i> (Haw. Ct. App. 1994) 77 Haw. 177 | 1681 |
| <i>State v. Lamb</i> (N.D. 1996) 541 NW2d 457 | 1681 |
| <i>State v. Lawrence</i> (Iowa 1969) 167 N.W.2d 912 | 1671, 1672, 1673 |
| <i>State v. Lee</i> (La. 1988) 524 So.2d 1176 | 1486, 1547 |
| <i>State v. Mak</i> (Wash. 1986) 105 Wn.2d 692 | 1689 |
| <i>State v. McCormick</i> (Ind. 1979) 272 Ind. 272 | 1497 |
| <i>State v. Morton</i> (N.J. 1998) 155 N.J. 383 | 1510, 1542 |

| | |
|--|---|
| <i>State v. Norris</i> (Kan. App. 1985) 10 Kan.App.2d 397 | 1677, 1681, 1682 |
| <i>State v. Pecora</i> (Mont. 1980) 190 Mont. 115 | 1610 |
| <i>State v. Pettway</i> (Conn. App. 1995) 39 Conn.App. 63 | 1483 |
| <i>State v. Pierre</i> (Utah 1977) 572 P.2d 1338 | 1709, 1727 |
| <i>State v. Richmond</i> (Ariz. 1976) 560 P.2d 41 | 1728 |
| <i>State v. Simants</i> (Neb. 1977) 250 N.W.2d 881 | 1709, 1727 |
| <i>State v. Stewart</i> (N.J. Super. Ct. 1978) 162 N.J. Super. 96 [392 A.2d 234] ... | 1527 |
| <i>State v. Stewart</i> (Neb. 1977) 250 N.W.2d 849 | 1709 |
| <i>State v. White</i> (Del. 1978) 395 A.2d 1082 | 1724 |
| <i>State v. Wilson</i> (N.J. 2002) 165 N.J. 657 | 1659 |
| <i>State v. Wood</i> (Utah 1982) 648 P.2d 71 | 1709 |
| <i>States v. Meadows</i> (5th Cir. 1979) 598 F.2d 984 | 1624 |
| <i>In re Steven B.</i> (1979) 25 Cal.3d 1 | 1462 |
| <i>Stovall v. Denno</i> (1967) 388 U.S. 293 | 1136 |
| <i>Strickland v. Washington</i> (1984) 466 U.S. 668 | 1137, 1395, 1436, 1437, 1439, 1441, 1445, 1457, 1460, 1464, 1510, 1655, 1716, 1717, |
| <i>Stringer v. Black</i> (1992) 503 U.S. 222..... | 1731 |
| <i>Sturgis v. Goldsmith</i> (9th Cir. 1986) 796 F.2d 1103 | 1654 |
| <i>In re Sturm</i> (1974) 11 Cal.3d 258 | 1723 |

| | |
|---|---|
| <i>Sullivan v. Louisiana</i> | |
| (1993) 508 U.S. 275 | 1183, 1186, 1199, 1202, 1203, 1204, 1205, 1277, 1321, 1323, 1486, 1487, 1547, 1554, 1563, 1574, 1586, 1604, 1613, 1632, 1665, 1679, 1682, 1691, 1694, 1721, 1722 |
| <i>Sumner v. Shuman</i> (1987) 483 U.S. 66 | 1531, 1577 |
| <i>Tan v. California Fed. Sav. & Loan Assn.</i> (1983) 140 Cal. App. 3d 800 | 1480 |
| <i>Tanner v. United States</i> (1987) 483 U.S. 107 | 1606, 1642, 1685, 1688 |
| <i>Taylor v. Illinois</i> (1988) 484 U.S. 400..... | 1136, 1137, 1147 |
| <i>Taylor v. Kentucky</i> (1978) 436 U.S. 478 | 1213, 1500, 1743, 1745 |
| <i>Thompson v. Oklahoma</i> (1988) 487 U.S. 821 | 1727, 1740 |
| <i>Townsend v. Sain</i> (1963) 372 U.S. 293 | 1722 |
| <i>Trop v. Dulles, supra</i> , 356 U.S. at 101 | 1741 |
| <i>Tuilaepa v. California</i> (1994) 512 U.S. 967 | 1491, 1590, 1701, 1732 |
| <i>Tumey v. Ohio</i> , 273 U.S. 510..... | 1546 |
| <i>Tumey v. Ohio</i> (1927) 273 U.S. 510 | 1509 |
| <i>Tumey v. Ohio</i> (1972) 273 U.S. 510 | 1433, 1434 |
| <i>Turner v. Calderon</i> (9th Cir. 2002) 281 F.3d 851 | 1390 |
| <i>Turner v. Louisiana</i> (1965) 379 U.S. 466 | 1642, 1685, 1688 |
| <i>Turner v. Murray</i> (1986) 476 U.S. 28 | 1387, 1558 |
| <i>Turner v. Murray</i> (1986) 476 U.S. 28, 90 L.Ed.2d 27 [plur. opn.] | 1737 |
| <i>U.S. Ex. Rel. Bennett v. Rundle, supra</i> , 419 F.2d at 606 | 1673 |

| | |
|--|------------------------------------|
| <i>United States v. Beattie</i> (9th Cir. 1980) 613 F.2d 762 | 1601 |
| <i>United States v. Abell</i> (D.C. 1982) 552 F.Supp. 316 | 1689, 1690 |
| <i>United States v. Allsup</i> , 566 F.2d 68 | 1546 |
| <i>United States v. Annigoni</i> (9th Cir. 1996) 96 F.3d 1132 | 1545, 1546 |
| <i>United States v. Antar</i> (1994) 38 F.3d 1348 | 1605 |
| <i>United States v. Ash</i> (1973) 413 U.S. 300 | 1142 |
| <i>United States v. Binder</i> (9th Cir. 1985) 769 F.2d 595 | 1661 |
| <i>United States v. Bonam</i> (9th Cir. 1985) 772 F.2d 1449 | 1600, 1601 |
| <i>United States v. Brown</i> (D.C. Cir. 1987) 823 F.2d 591 | 1606 |
| <i>United States v. Bruton</i> (1968) 391 U.S. 123 | 1562 |
| <i>United States v. Chagra</i> (5th Cir. 1983) 701 F.2d 354 | 1671, 1672 |
| <i>United States v. Cronic</i> (1984) 466 U.S. 648 | 1143, 1475, 1636, 1638, 1655, 1664 |
| <i>United States v. Delaney</i> (8th Cir. 1984) 732 F.2d 639..... | 1690 |
| <i>United States v. Dove</i> (2nd Cir. 1990) 916 F.2d 41 | 1610, 1611 |
| <i>United States v. Epley</i> (6th Cir. 1995) 52 F.3d 571 | 1678 |
| <i>United States v. Estrada</i> (8th Cir. 1995) 45 F.3d 1215 | 1690 |
| <i>United States v. Figueroa</i> (2nd Cir. 1980) 618 F.2d 934 | 1644 |
| <i>United States v. Fioravanti</i> (3d Cir. 1969) 412 F.2d 407 | 1600 |
| <i>United States v. Frazin</i> (9th Cir. 1986) 780 F.2d 1461 | 1654 |
| <i>United States v. Frederick</i> (9th Cir. 1996) 78 F.3d 1370 | 1214, 1744 |

| | |
|--|------------------------|
| <i>United States v. Gagnon</i> (1985) 470 U.S. 522 | 1654 |
| <i>United States v. Gaudin</i> (1995) 515 U.S. 506 | 1680 |
| <i>United States v. Hairston</i> (9th Cir. 1995) 64 F.3d 491 | 1459 |
| <i>United States v. Hanna</i> (9th Cir. 2002) 293 F.3d 1080 | 1137 |
| <i>United States v. Hellman</i> (5th Cir. 1977) 560 F.2d 1235 | 1513 |
| <i>United States v. Hernandez</i> (9th Cir. 1994) 27 F.3d 1403 | 1659, 1660, 1677 |
| <i>United States v. Hicks</i> (4th Cir. 1984) 748 F.2d 854 | 1625 |
| <i>United States v. Iribe-Perez</i> (10th Cir. 1997) 129 F.3d 1167 | 1546, 1563 |
| <i>United States v. Kupau</i> (9th Cir. 1986) 781 F.2d 740 | 1656 |
| <i>United States v. Lambert</i> (8th Cir. 1979) 604 F.2d 594 | 1513 |
| <i>United States v. Laurins</i> (9th Cir. 1988) 857 F.2d 529 | 1169, 1282, 1610, 1611 |
| <i>United States v. Lujan</i> (9th Cir. 1991) 936 F.2d 406 | 1677 |
| <i>United States v. Mason</i> (9th Cir. 1981) 658 F.2d 1263 | 1601, 1602 |
| <i>United States v. McCracken</i> (5th Cir. 1974) 488 F.2d 406 | 1610, 1611 |
| <i>United States v. Neujahr</i> (4th Cir. 1999) 173 F.3d 853 | 1610 |
| <i>United States v. Noble</i> (3rd Cir. 1946) 155 Fed.2d 315 | 1681 |
| <i>United States v. Owens</i> (1988) 484 U.S. 554 | 1155 |
| <i>United States v. Rodgers</i> (6th Cir. 1997) 109 F.3d 1138 | 1677, 1678 |
| <i>United States v. Sacco</i> (9th Cir. 1989) 869 F.2d 499 | 1660 |
| <i>United States v. Sanchez</i> (9th Cir. 1999) 176 F.3d 1214 | 1527 |

| | |
|--|------------------|
| <i>United States v. Sandoval</i> (9th Cir. 1993) 990 F.2d 481 | 1678 |
| <i>United States v. Scheffer</i> (1998) 523 U.S. 303 | 1485, 1690 |
| <i>United States v. Schiff</i> (2nd Cir. 1979) 612 F.2d 73 | 1644 |
| <i>United States v. Schilleci</i> (5th Cir. 1977) 545 F.2d 519 | 1677 |
| <i>United States v. See</i> (9th Cir. 1974) 505 F.2d 845 | 1693 |
| <i>United States v. Snell</i> (5th Cir. 1998) 152 F.3d 345 | 1690 |
| <i>United States v. Sorrentino</i> (3d Cir. 1949) 175 F.2d 721 | 1672 |
| <i>United States v. Thomas</i> (1997) 116 F.3d 606 | 1605 |
| <i>United States v. Valenzuela-Bernal</i> (1982) 458 U.S. 858 | 1137 |
| <i>United States v. Wade</i> (1967) 388 U.S. 218 | 1142, 1636, 1656 |
| <i>United States v. Wallace</i> (9th Cir. 1988) 848 F.2d 1464 | 1745 |
| <i>United States v. Wauneka</i> (9th Cir. 1988). 842 F.2d 1083 | 1601 |
| <i>United States v. Wolfson</i> (5th Cir. 1978) 573 F.2d 216 | 1615 |
| <i>United States v. Young</i> (1985) 470 U.S. 1 | 1519 |
| <i>United States v. Zuniga</i> (9th Cir. 1993) 6 F.3d 569 | 1459 |
| <i>U.S. v. Crosby</i> (9th Cir. 1996) 75 F.3d 1343 | 1146 |
| <i>U.S. v. Neujahr</i> (4th Cir. 1999) 173 F.3d 853 | 1611 |
| <i>U.S. v. Vallejo</i> (9th Cir. 2001) 237 F.3d 1008 | 1146 |
| <i>Vasquez v. Hillery</i> (1986) 474 U.S. 254 | 1546 |
| <i>Von Moltke v. Gillies</i> (1948) 332 U.S. 708 | 1451 |

| | |
|--|---|
| <i>Wade v. Calderon</i> (9th Cir. 1994) 29 F.3d 1312 | 1528 |
| <i>Wainwright v. Witt</i> (1983) 469 U.S. 412 | 1389, 1541 |
| <i>Walker v. Engle</i> (6th Cir. 1983) 703 F.2d 959 | 1499, 1745 |
| <i>Walker v. United States</i> (D.C. Cir. 1963) 322 F.2d 434 | 1668, 1672 |
| <i>Wardius v. Oregon</i> (1973) 412 U.S. 470 | 1494, 1540, 1610 |
| <i>Ware v. United States</i> (7th Cir. 1967) 376 F.2d 717..... | 1667, 1668 |
| <i>Washington v. Texas</i> (1967) 388 U.S. 14 | 1136, 1137, 1148, 1492, 1494, 1618 |
| <i>Weaver v. Thompson</i> (9th Cir. 1999) 197 F.3d 359..... | 1602 |
| <i>Webb v. Texas</i> (1972) 409 U.S. 95 | 1136, 1137, 1169, 1282, 1492 1611, 1617 |
| <i>Westbrook v. Arizona</i> (1966) 384 U.S. 150 | 1663 |
| <i>Westbrook v. Milahy</i> (1970) 2 Cal.3d 765 | 1732 |
| <i>White v. Illinois</i> (1992) 502 U.S. 346 | 1130, 1136, 1160, 1213, 1494, 1515, 1559, 1574, 1580, 1595, 1603, 1612, 1637, 1681, 1743 |
| <i>White v. Schotten</i> (6th Cir. 2000) 201 F.3d 743 | 1473, 1474 |
| <i>In re Williams</i> (1969) 1 Cal.3d 168 | 1436 |
| <i>Williams v. Florida</i> (1970) 399 U.S. 78 | 1606, 1611 |
| <i>Williams v. Lynaugh</i> (1987) 484 U.S. 935 | 1497 |
| <i>Williams v. Superior Court</i> (1984) 36 Cal.3d 441 | 1295 |
| <i>Williams v. Taylor</i> (2000) 529 U.S. 362 | 1436 |
| <i>Williams v. Woodford</i> (9th Cir. 2002) 306 F.3d 665 | 1566 |

| | |
|--|---------------------------------------|
| <i>Wilson v. Cowan</i> (6th Cir. 1978) 578 F.2d 166 | 1437 |
| <i>Winebrenner v. United States</i> (8th Cir. 1945) 147 F.2d 322 | 1539, 1553 |
| <i>In re Winship</i> (1970) 397 U.S. 358 | 1202, 1203, 1277, 1321, 1514, 1515 |
| <i>Witherspoon v. Illinois</i> (1968) 391 U.S. 510 | 1541 |
| <i>Withrow v. Larkin</i> (1975) 421 U.S. 35 | 1433 |
| <i>Wood v. Georgia</i> (1981) 450 U.S. 261 | 1444, 1445, 1508 |
| <i>Woodford v. Visciotti</i> (2002) 537 U.S. 19 | 1468, 1550 |
| <i>Woodson v. North Carolina</i> (1976) 428 U.S. 280..... | 1390, 1484, 1493, 1692, 1731, 1736 |
| <i>Yates v. Evatt</i> (1991) 500 U.S. 391..... | 1486, 1547 |
| <i>Zant v. Stephens</i> (1983) 462 U.S. 862 | 1697, 1731, 1737, 1745 |

OUT OF STATE STATUTES

| | |
|---|------|
| 21 U.S.C. § 848 | 1718 |
| 21 U.S.C. § 848, subd. | 1717 |
| 42 Pa. Cons. Stat. Ann. § 9711 | 1724 |
| 42 Pa. Cons. Stat. Ann. § 9711(c)(1); S.C. Code Ann. §§ 16-3-20(A); S.D. Codified Laws Ann. § 23A-27A-5 | 1709 |
| Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 | 1708 |
| Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) | 1724 |
| Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) | 1709 |

| | |
|---|------------------------|
| Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 | 1709 |
| Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992) | 1559, 1606, 1708, 1717 |
| Fla. Stat. Ann. § 921.141(3) (West 1985) | 1724 |
| Md. Ann. Code art. 27, §§ 413(d), | 1708 |
| Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 | 1724 |
| Miss. Code Ann. § 99-19-103 | 1708 |
| Mont. Code Ann. § 46-18-306 | 1724 |
| N.M. Stat. Ann. § 31-20A-3 | 1709 |
| Neb. Rev. Stat. § 29-2522 | 1724 |
| Nev. Rev. Stat. Ann. § 175.554(3) | 1709 |
| Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 | 1724 |
| Ohio Rev. Code § 2929.04 | 1709 |
| Okla. Stat. Ann. tit. 21, § 701.11 | 1709, 1724 |
| S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5..... | 1724 |
| Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) | 1709 |
| Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) | 1724 |
| Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. §§ 6-2-102(d) | 1709 |

Wash. Rev. Code Ann. § 10.95.060(4) 1709

CALIFORNIA STATUTES

| | |
|---|--|
| Civil Code § 3513 | 1542 |
| Code of Civil Procedure § 231(d) | 1544 |
| Code of Civil Procedure §170.1(a) | 1397 |
| Code of Civil Procedure sections §170 | 1433 |
| Code of Civil Procedure §170.1(a)(6). | 1432 |
| Code of Civil Procedure §1881. | 1157, 1218 |
| Evidence Code § 350 | 1130, 1145, 1151, 1152, 1154, 1156, 1158, 1159, 1188, 1295, 1307, 1455, 1460, 1485, 1486, 1497, |
| Evidence Code § 352..... | 1130, 1159, 1460 1498, 1585, 1586, 1720 |
| Evidence Code § 356 | 1159 |
| Evidence Code § 403..... | 1134, 1160, 1188, 1307, 1483, 1488 |
| Evidence Code § 413 | 1486 |
| Evidence Code sections 500, 501 | 1203, 1321 |
| Evidence Code § 520 | 1721 |
| Evidence Code § 1023.. | 1557 |
| Evidence Code § 1101 | 1497, 1498 |
| Evidence Code § 1250 | 1264 |
| Penal Code § 167 | 1606 |

| | |
|-----------------------------|---|
| Penal Code § 187 | 1061, 1246 |
| Penal Code § 189 | 1698 |
| Penal Code § 190.2 | 1066, 1695 |
| Penal Code § 190.2(a) | 1061, 1062 |
| Penal Code § 190.3 | 1062, 1491, 1562, 1566, 1623, 1700, 1701, 1706, 1711, 1713, 1724, 1725, 1729, 1738 |
| Penal Code § 190.4(b) | 1338, 1599 |
| Penal Code § 207 | 1061, 1399 |
| Penal Code § 245 | 1398, 1401 |
| Penal Code § 261 | 1335, 1348, 1397, 1398, 1401 |
| Penal Code § 264 | 1398, 1401 |
| Penal Code § 977 | 1506, 1510, 1664 |
| Penal Code § 1043 | 1506 |
| Penal Code § 1089 | 1345, 1557 |
| Penal Code § 1128 | 1606 |
| Penal Code § 1138 | 1657, 1658, 1660, 1676, 1678 |
| Penal Code § 1170 | 1733 |
| Penal Code § 1118.1 | 1065, 1402 |
| Penal Code § 1259 | 1566, 1567, 1569, 1576 |
| Penal Code § 1322 | 1158, 1160 |
| Penal Code § 1324 | 1062 |

| | |
|----------------------------|------------------|
| Penal Code § 1385 | 1422 |
| Penal Code § 12021 | 1389 |
| Penal Code § 12022.7 | 1061,1065, 1247 |
| Penal Code § 12022 | 1061, 1398, 1246 |

MISCELLANEOUS

| | |
|---|--|
| CALJIC 2.01 | 1206, 1207, 1324 |
| CALJIC 2.06 | 1440 |
| CALJIC 2.50 | 1460, 1497 |
| CALJIC 2.62 | 1421, 1428 |
| CALJIC 2.90 | 1198, 1201, 1205, 1206, 1277, 1319, 1323, 1324 |
| CALJIC 4.71 | 1458 |
| CALJIC 8.85 | 1572 |
| CALJIC 8.88 | 1387, 1700, 1710 |
| CALJIC 8.87 | 1713 |
| California Attorneys For Criminal Justice/California Public Defenders Association Death Penalty Defense Manual (2001 Supplement), <i>Jury Issues</i> , §VII, p | 1544 |
| Constanzo & Constanzo, <i>Jury Decision Making in the Capital Penalty Phase</i> , 16 | 1595 |
| Constanzo & Constanzo, <i>Life or Death Decision: An Analysis of Capital Jury Decision Making Under The Special Issues Sentencing Framework</i> , 18 | 1595 |

| | |
|---|------------|
| Criminal Law Practice Series, <i>Appeals and Writs in Criminal Cases</i> , § 1.167 | 1472 |
| Eisenberg & Wells, <i>Deadly Confusion: Jury Instructions in Capital Cases</i> , 79 Cornell Law Rev. 1 | 1595 |
| Goodpaster, "The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases" (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled "Guilt Phase Defenses And Their Penalty Phase Effects"]..... | 1746 |
| Houck, M.M., Budowle, B., <i>Correlation of Microscopic and Mitochondrial DNA Hair Comparisons</i> , 47 | 1135 |
| Imwinkelried, Giannelli, Gillian, Lederer, <i>Courtroom Criminal Evidence</i> § 3104, p | 1513 |
| <i>Jecker, Torre & Co. v. Montgomery</i> (1855) 59 | 1742 |
| John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, <i>Future Dangerousness in Capital Cases: Always "At Issue,"</i> 86 | 1595, 1596 |
| <i>Kozinski and Gallagher, Death: The Ultimate Run-On Sentence</i> , 46 Case W. Res.L.Rev.1, 30 | 1729 |
| <i>Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge</i> , 53 Va.L.Rev. 123, 126 | 1601 |
| O'Malley, Grenig & Lee, <i>Federal Practice and Instructions</i> 9:03 [Communication Between Court And Jury] pp | 1624 |
| R. King and K. Norgard, <i>What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings</i> (1999) 26 Fla.St.U.L.Rev. 1119 | 1590 |
| <i>Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking</i> (1990) 6 Crim. and Civ. Confinement 339, 366..... | 1740 |
| <i>Shatz and Rivkind, supra</i> , 72 N.Y.U. L.Rev. at 1325 | 1698 |

*Shatz and Rivkind, The California Death Penalty Scheme: Requiem for
Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 1698

*Stephen P. Garvey, Essay: Aggravation and Mitigation in Capital Cases:
What do Jurors Think?* 98 Colum. L. Rev. 1538, 1563 1566

The "Probability Of Truth" Language In CALJIC 2.21.2 1197, 1318

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | | |
|--------------------------------|---|-------------------------|
| THE PEOPLE OF THE STATE |) | Case No. S012279 |
| OF CALIFORNIA, |) | (San Diego Superior |
| Plaintiff and Respondent, |) | Court No. 73093/75195) |
| vs. |) | |
| DAVID ALLEN LUCAS, |) | |
| Defendant and Appellant. |) | |

VOLUME 1

1.1 STATEMENT OF THE CASE¹

A. Information, Arraignment And Counsel: CR 73093

On March 18, 1985, a six-count information was filed in case number 73093 (hereinafter “CR 73093”) in San Diego Superior Court alleging in Counts One and Two that Lucas kidnapped Jodie Santiago² June 8 and 9,

¹ Abbreviations used for the reporter’s transcripts are as follows: “RTO” refers to pretrial proceedings before Judge Orfield. (Pretrial volumes 9 through 49.) “RTK” refers to pretrial proceedings before Judge Kennedy. (Pretrial volumes 50 through 65.) “RTH” refers to in limine proceedings before Judge Hammes (Pretrial volumes 70 through 309.) Reporter’s Transcript of the Trial (Volumes 1 through 73) are referred to as “RTT” The Clerk’s Transcripts are referred to as “CT.”

² During trial Jodie Santiago changed her last name to Robertson due to marriage. (RTT 7314.) However, she will be referred to as Santiago throughout this brief.

1984 in violation of Penal Code § 207(a)³ and attempted to murder Santiago in violation of Penal Code Sections 187/664. Counts Three and Four alleged that on or about October 23, 1984, Lucas murdered Rhonda Strang and Amber Fisher in violation of Penal Code § 187. Counts Five and Six alleged that on or about November 20, 1984, Lucas kidnapped Anne Swanke in violation of Penal Code § 207(a) and murdered Swanke in violation of Penal Code § 187.

It was further alleged in Counts One through Six that Lucas personally used a knife in the commission of the crimes within the meaning of Penal Code § 12022(b) and in Counts One and Five that Lucas had inflicted great bodily injury on the victims within the meaning of Penal Code § 12022.7. (CT 70-72.)

The information further alleged the following special circumstances: that the murder alleged in Count Six was committed in the commission of a kidnapping, in violation of Penal Code § 207(a) and § 190.2(a)(17)(ii)⁴ and that Lucas had been convicted of more than one offense of murder within the meaning of Penal Code § 190.2(a)(3). Additionally, as a first prior, it was alleged that on or about August 16, 1973, Lucas had been convicted of a serious felony, a rape, in violation of Penal Code § 261, within the meaning of Penal Code § 667(a) and § 1192.7(c)(3). (CT 70-72.)⁵

On March 22, 1985, Lucas was arraigned and entered a plea of not

³ All references are to the Penal Code unless otherwise noted.

⁴ The kidnapping special circumstance was subsequently dismissed by the Court of Appeal on a pretrial writ. (C004114.)

⁵ The information also alleged a prior conviction of possession with intent to distribute marijuana in violation of Title 21, § 841(a)(1) and (b), and Title 18, § 2 of the United States Code but that prior was subsequently dismissed. (CT 70-72.)

guilty as charged in the information in CR 73093. (CT 4598.)

On April 24, 1985, Alex L. Landon was appointed as second counsel to represent Lucas in CR 73093, pursuant to Penal Code § 987(d). (CT 93.)

On July 17, 1985, Jeffrey Stuetz was appointed as co-counsel for Lucas in CR 73093, pursuant to Penal Code § 987(d). (CT 4608.)

B. Information, Arraignment And Counsel: CR 75195

On August 1, 1985, an information was filed in case number 75195 (hereinafter “CR 75195”) in San Diego Superior Court alleging in Counts One and Two, that on or about May 4, 1979, David Allen Lucas murdered Suzanne and Colin Jacobs in violation of Penal Code § 187. Count Three alleged that on or about December 8, 1981, Lucas murdered Gayle Garcia in violation of Penal Code § 187. It was further alleged in Counts One through Three that Lucas personally used a knife in the commission of the crimes within the meaning of Penal Code § 12022(b). (CT 5744-45.)

The information further alleged a multiple-murder special circumstance within the meaning of Penal Code § 190.2(a)(3). The information also alleged, inter alia, a 1973 prior conviction for rape in violation of Penal Code § 261.⁶

On August 1, 1985, Lucas was arraigned on the information in CR 75195 and entered a plea of not guilty to the charges and denied the priors and special circumstance allegations. (CT 15029.) William B. Saunders of the

⁶ The information also alleged prior convictions for assault with a deadly weapon in violation of Penal Code § 245(a) and possession with intent to distribute marijuana in violation of Title 21, § 841(a)(1) and (b), and Title 18, § 2 of the United States Code. (CT 5744-45.) However, those were subsequently dismissed. (CT 4625.)

Office of the Public Defender was appointed to represent Lucas in CR 75195.⁷ (CT 15029.)

On July 29, 1986, Saunders was relieved as counsel. (CT 15158-59.) On August 4, 1986, Steven Feldman was appointed to represent Lucas in CR 75195. (CT 15160.)

On January 27, 1986, in CR 73093, at Lucas' request, G. Anthony Gilham was relieved as counsel of record under the authority of *People v. Marsden* (1970) 2 Cal.3d 118. (CT 4633.)

C. Procedural Overview

Judge Orfield originally presided over the in limine proceedings in both CR 73093 (Santiago, Strang/Fisher, Swanke) and CR 75195 (Jacobs, Garcia).

On November 13, 1986, CR 75195 was sent out to trial before Judge Kennedy. (CT 15180.) CR 73093 was to be tried after completion of the trial in CR 75195. (CT 4802.)

In December 1986, the prosecution moved to consolidate the trial of both cases. (CT 9350-9406.) Because Judge Orfield was no longer available (CT 4804) and Judge Kennedy was disqualified on both cases (CT 10300-04), the cases were assigned to Judge Hammes for all purposes. (CT 4808; 4811.)⁸

Judge Hammes heard all the in limine matters de novo except for certain rulings of Judge Orfield which she decided not to reconsider. (See RTH 4242-45.)

Judge Hammes eventually granted the prosecution's motion to

⁷ Saunders had been appointed on March 13, 1985. Christopher Blake was appointed co-counsel in CR 75195 on January 27, 1986. (CT 6711.)

⁸ Judge Hammes disclosed her prior employment as a Deputy District Attorney and her husband's current employment in the District Attorney's office. (CT 15235.)

consolidate. (RTH 22512-13; CT 5211-12.)

A single jury was selected to try the consolidated cases before Judge Hammes. The jury convicted Lucas of the Jacobs, Santiago and Swanke charges. (CT 5565-66; 5569-73.) The jurors could not reach a verdict as to Strang/Fisher. (CT 5563.) The jurors acquitted Lucas of the Garcia charges. (CT 5567-68.)

The jury then heard the penalty evidence and eventually returned a verdict of death. (CT 5600.) Earlier in its deliberations the jurors stated that they were hopelessly deadlocked as to penalty, but Judge Hammes instructed them to continue deliberating. (CT 5588.) After 2½ days of deliberation a juror was dismissed for cause and an alternate substituted. (CT 5593-94.) After 5 more days of deliberation the jurors eventually returned a verdict of death. (CT 5595-600.)

Judge Hammes denied the automatic modification motion and imposed the death. (CT 5604-04A.)

D. Proceedings Regarding Johnny Massingale

Based primarily on Johnny Massingale's admissions to two witnesses and his taped confessions to law enforcement officers, Massingale was charged with the Jacobs murders by a San Diego county complaint filed on March 19, 1984. (CT 9254.) After a preliminary hearing, the magistrate found probable cause to hold Massingale to answer and an information was filed in Superior Court on May 13, 1984 which charged Massingale with the Jacobs' murders. (CT 4726; 9255.)

After Lucas' arrest for the Swanke and Santiago offenses, the charges against Massingale were dismissed and Lucas was charged with the Jacobs offenses. (CT 5680-81; 9255-56.)

On May 2, 1985, Massingale filed a Penal Code § 851.8 motion for

finding of factual innocence. (CT 8560-74; 9256.) The San Diego County District Attorney did not oppose the motion and on May 24, 1985 Judge Gill made the finding. (CT 8578-79; 8587; 8603-06.)

The prosecution informed Lucas' counsel, William Saunders, by letter of Massingale's factual innocence request. (CT 8592-95.) Saunders filed a Petition for Amicus Standing but apparently did not appear. (CT 8597-601.)

After the finding of factual innocence Lucas' attorneys requested that the charges against Massingale be reinstated. (CT 8544-8636.)

On December 10, 1986, in CR 75195, Judge Kennedy denied Lucas' motion to reinstate the charges against Johnny Massingale. (CT 15201-203.)

E. Prosecution Notices Of Aggravation Against Lucas⁹

On December 23, 1985, in CR 73093 and 75195, the prosecution filed a "Notice Of Evidence In Aggravation" pursuant to Penal Code § 190.3. (CT 1263-66; 9214-17; 9503-06.)

On February 7, 1986, the Court of Appeal, Fourth Appellate District struck the kidnapping special circumstance alleged in connection with Swanke murder count (PC 190.2(a)(17). (D004114.)

On July 7, 1986, in CR 75195, the prosecution filed its first amended "Notice Of Evidence In Aggravation" pursuant to § 190.3. (CT 6842-6845.) This motion was granted over objection. (CT 1697-700; 1709-12; 4721.)

On November 3, 1986, the prosecution filed a second amended "Notice Of Evidence In Aggravation" pursuant to Penal Code § 190.3 in CR 73093.

⁹ On January 13, 1988, Judge Hammes stated that she was bound by California court opinions upholding the constitutionality of § 190.2(b). (RTT 19208-19216.) As to the motion to strike the notices in aggravation, Judge Hammes ruled that the motions were timely filed and not vague. (RTT 19216.)

(CT 2261-63.)

On January 21, 1988, the prosecution filed a second amended “Notice Of Evidence In Aggravation” pursuant to Penal Code § 190.3 in CR 75195. (CT 5104; CT 11844-45.)

F. In Limine Motions: All Cases

1. Severance Of Counts/Consolidation (See Volume 2, § 2.3, pp. 139-331, incorporated herein.)

The defense motion for severance of the Garcia and Jacobs charges was denied by Judge Kennedy. (CT 15197.) Subsequently, Judge Hammes ruled, over defense objection, that all the charges were cross-admissible and could properly be consolidated for trial by a single jury. At the consolidation hearing, the judge precluded the defense from presenting any evidence including the testimony of Dr. Penrod an expert who had been allowed to testify by Judge Orfield.

2. Vindictive Prosecution (See Volume 2, § 2.3.5.5, pp. 320-30, incorporated herein.)

The prosecution moved to consolidate all the charges at the eleventh hour after Lucas asserted his right to a speedy trial. Accordingly, the defense filed a supplemental motion alleging prosecutorial vindictiveness as another ground for denying consolidation and as a ground for recusal of the San Diego county District Attorney’s Office.

On June 6, 1988, Judge Hammes denied the defense request for an evidentiary hearing on vindictiveness and denied the defense motions without hearing any testimony.

3. Recusal Motion (See Volume 2, § 2.8.4, pp. 525-28, incorporated herein.)

Because third party suspect Johnny Massingale had filed a wrongful

prosecution action against the County of San Diego, the defense moved to recuse the District Attorney's office, District Attorney Miller, and Deputy District Attorneys Williams and Clarke. The motion was denied.

4. Jury Composition (See § 1.4.1, pp. 25-40 below, incorporated herein.)

The defense filed a motion challenging the jury selection process in San Diego County. They were provided an opportunity to conduct juror surveys and were given access to jury selection data for September 1985, December 1985 and January 1986. However, the defense request for data from a majority of the months in 1986 was denied by Judge Orfield and Judge Hammes. Judge Hammes also denied the defense request for an evidentiary hearing to show that Hispanics and persons between 18 and 24 years of age were unconstitutionally under represented.

G. In Limine Motions: Jacobs

1. Hitch/Trombetta Suppression Motion Concerning Loss Or Destruction Of Fingerprint On Love Insurance Note (See Volume 2, §2.4.2, pp. 333-48, incorporated herein.)

At the Jacobs scene, a small note was found on the throw rug in the bathroom. Written on this note were the words "Love Insurance" and a telephone number for the agency. After the note was seized, the detectives directed the evidence technician to use ninhydrin on the note to try to raise fingerprints on it. This was done and some latent print images were raised. There were five or six points of identification on the note which gave it value as an elimination print. However, the evidence technician was unaware that ninhydrin fades with time and he did not photograph the note after it was treated with ninhydrin. When the case was later investigated in December 1980, no photograph of the fingerprint could be found. Moreover, the print

on the original note had disappeared. Efforts were made to raise the print again but nothing worked. As a result, the fingerprint was lost and the original printing on the note was obliterated.

Due to the loss of the fingerprint and destruction of the original note, the defense moved for sanctions under *People v. Hitch* (1974) 12 Cal.3d 641. The trial court found that *Hitch* had been supplanted by *California v. Trombetta* (1984) 467 U.S. 479. Applying *Trombetta*, Judge Hammes found that the Love Insurance note would not have been exculpatory because, in her view, Lucas was the person who authored the note. The motion was denied.

2. Defense Challenges To Opinion Testimony Comparing The Handprinting On The Love Insurance Note With The Handprinting Of Lucas (See Volume 2, § 2.5, pp. 367-444, incorporated herein.)

The defense objected to the admission of handwriting comparison testimony when the case was before Judge Kennedy. The defense sought to exclude expert opinion as to handprinting comparison based on *People v. Kelly* (1976) 17 Cal.3d 24, Evidence Code § 352 and due process. Judge Kennedy sustained the *Kelly* objection on the basis that the prosecution had not met their burden of producing disinterested expert witnesses on the validity of the techniques.

However, when the case was reassigned to Judge Hammes the handwriting issue was reopened. The defense again sought handwriting comparison testimony. Judge Hammes excluded proficiency studies of handwriting and handprinting, denied the defense request for a *Kelly* hearing and rejected the other grounds for exclusion raised by the defense.

The judge also rejected the defense motion to exclude the lay opinion of Lucas' business partner, Frank Clark, that Lucas wrote the Love Insurance

note.

3. Denial Of In-Court Testing Of The Handprinting Expert (See Volume 2, § 2.5.5(F), pp. 418-24, incorporated herein.)

John Harris, handwriting comparison expert for the prosecution, concluded with “reasonable certainty” that Lucas was the author of the Love Insurance note. The defense challenged the reliability of this conclusion in limine and sought to support this challenge by testing, in open court, Harris’ ability to identify Lucas’ printing. However, the judge denied the defense request, ruling that it was “not within the scope of direct. . . .”

4. Exclusion Of Rochelle Coleman’s Statement That Another Person Was The Author Of The Love Insurance Note (See Volume 2, § 2.6.4, pp. 467-77, incorporated herein.)

To counter the prosecution’s expert and lay opinion testimony that David Lucas authored the Love Insurance note, the defense sought to introduce the taped statement of Rochelle Coleman who was familiar with the writing of David Ray Woods, and who stated during a taped interview that the Love Insurance note was “David’s [Woods’] writing.”¹⁰ The defense offered Coleman’s statement as a spontaneous lay opinion that Lucas did not author the note (Evidence Code § 1416) and for the nonhearsay purpose of establishing that the handprinting on the Love Insurance note was not unique.

Judge Hammes denied the defense request, ruling that the statement was not spontaneous and that Wood’s actual handprinting would be the “best evidence.”

¹⁰ At the time of Lucas’ trial Rochelle Coleman was dead and unavailable as a witness. (CT 13948.)

H. In Limine Motions: Santiago

1. *Pitchess* Motion (See Volume 3, § 3.7.1, pp. 967-93, incorporated herein.)

On March 11, 1986, in CR 75195, the defense filed a motion for an order to produce documents for inspection, specifically requesting documents in the San Diego Sheriff's Department personnel records of Detectives Fullmer, Henderson, Fisher and Hartman. (CT 6387-6405.) The defense also filed a motion to produce documents requesting personnel records of two officers in the National City Police Department. (CT 6406-6424.) This was in regards to whether Lucas was a suspect prior to December 11, 1984. (CT 6407-08.)

On April 7, 1986, Judge Orfield ruled that, with regard to the *Pitchess* motion served on the Sheriff's Department, the defense was entitled to have the court review the subpoenaed documents *in camera* to determine their relevance to the case. Judge Orfield found no relevant records and ordered them sealed. (CT 15089.)

On January 15, 1987, in response to a local case in which case Detectives Henderson, Fullmer and Fisher were accused of acts of professional misconduct, failing to follow required duties and procedures, including lying on the witness stand, in order to obtain conviction of the suspect (*People v. Cavanaugh*), the defense made an informal *Pitchess* motion. (RTK 2490-97.) Subsequently, a formal *Pitchess* motion was filed. (CT 10050-64.)

On March 12, 1987, Judge Hammes ruled that the defense should be given discovery of the Internal Affairs investigation but not the conclusions and findings of that investigation. (RTH 4466.)

On May 24, 1988, in CR 75195, the defense filed a petition for a writ

of mandate regarding the *Pitchess* motion concerning Detectives Henderson and Fullmer. (D008106.)

On May 2, 1988, after reviewing the Internal Affairs records (In Limine Exhibit 1) and the transcripts in *People v. Cavanaugh*, Judge Hammes ruled that the specific evidence of misconduct in *Cavanaugh* should be excluded under Evidence Code § 352 because the homicide detectives were merely “tangential witnesses.” (RTH 24496.) The judge also concluded that Santiago’s testimony was otherwise corroborated and the *Cavanaugh* evidence would “take weeks” and thus require undue consumption of time. (RTH 24494-98.)

2. *Ballard Motion* (See Volume 3, § 3.6.1, pp. 938-50, incorporated herein.)

On July 14, 1986, in CR 73093 before Judge Orfield, the defense filed a motion for psychiatric and neurological examination of witness Jodie Santiago. On July 15, 1986, in CR 73093, the defense filed a motion for psychiatric and neurological testing of Jodie Santiago.

On July 16, 1986, the court received testimony from Dr. Heywood Zeidman, the psychiatrist who treated Santiago at Grossmont Hospital in June 1984 shortly after the attack. However, Dr. Zeidman declined to testify as to matters to which the patient-psychiatrist privilege applied. Nonetheless, Santiago – who initially opposed release of her medical and mental treatments by four Seattle doctors – waived her privilege as to her medical records from Grossmont Hospital in San Diego. Zeidman then completed his testimony. Thereafter, on September 23, 1986 Santiago executed written waivers as to the four Seattle doctors: Snow, Davis, McLean, and Kamm.

On August 20, 1986, in CR 73093, counsel argued the *Ballard* motion and Judge Orfield denied the motion. (CT 4749.)

On September 12, 1986, in CR 73093, the defense filed a petition for a writ of mandate and stay regarding the denial of the *Ballard* motion which was summarily denied on September 19, 1986. (CT 2046). (D005135.)

On October 1, 1986, in both cases, the defense made a motion to reopen the *Ballard* motion. The motion was granted. (CT 4760; 15172.)

On November 4, 1986, Judge Orfield heard argument on the renewed *Ballard* motion for psychiatric and neurological examinations of Jodie Santiago. (CT 4781.) Judge Orfield determined that it would be inappropriate to order the testing of the witness and denied the motion. (CT 4781.)

On May 3, 1988, Judge Hammes ruled that Santiago had not willingly volunteered to undergo psychological/neurological testing. The request that she submit to such testing was denied. (CT 5187-5191.)

On May 1, 1989, during trial, the defense renewed its motion for a neuropsychological examination of witness Jodie Santiago. The motion was denied. (CT 5508.)

3. Eyewitness Identification Issues (See Volume 3, § 3.3, pp. 811-95, incorporated herein.)

The defense filed a motion before Judge Hammes to suppress Jodie Santiago's identification of David Lucas based on suggestive and unreliable identification procedures. (CT 8315-29.) The motion also sought suppression of Santiago's identification of Lucas, his house and the seat covers in Lucas' car due to inherently suggestive identification procedures.

The court denied the motion as to Santiago's identification of Lucas finding that the procedures were not suggestive and that, in any event, Santiago's in-court identification of Lucas was independent of any such procedures.

4. Expert Testimony Regarding Eyewitness Identification (See Volume 3, § 3.5.1, pp. 918-35, incorporated herein.)

The prosecution raised an in limine objection to expert testimony regarding eyewitness identification testimony. (CT 3365-71.) At the in limine hearing the defense presented the testimony of Dr. Robert Buckhout. (RTH 17880-18014.)

Judge Hammes originally ruled that expert testimony on eyewitness identification was not admissible because Santiago's identification was corroborated. Eventually, however, the judge found that the defense experts, Dr. Robert Buckhout and Elizabeth Loftus were "not experts" because their research was not based on actual crimes and victims.

At trial, Judge Hammes precluded both the prosecution and the defense experts from specifically testifying as to Jodie Santiago's ability to remember the events to which she testified. This ruling was based primarily on Evidence Code § 352 and the judge's strong desire not to allow the trial to become a "battle of the experts."

I. In Limine Motions: Swanke

1. Challenge To Electrophoresis Evidence (See Volume 4, §4.3, pp. 1124-45, incorporated herein.)

The defense made a (then) *Kelly/Frye* motion to exclude expert testimony regarding the blood analysis of the material found under Anne Swanke's fingernails and the stain found on the sheepskin seat cover in Lucas' truck. (CT 10446-61.)

After a lengthy hearing Judge Hammes ruled that ABO typing by absorption-elution on aged blood evidence was not subject to *Kelly/Frye* and "the correctness of the scientific procedures employed is therefore a jury question." Further, that electrophoresis and the BAS Multisystem were

accepted by a consensus of the scientific community. (CT 13825.) Additionally, Judge Hammes ruled that any deficiencies in the electrophoretic methodology actually used in the Lucas case were cured by only allowing into evidence results which were photographed and that the absorption-inhibition testing for the genetic markers Gm and Km in the Lucas case satisfied both Prong 1 and Prong 3 of *Kelly*.

2. Hearsay Statement By Shannon Lucas (See Volume 4, § 4.6.2, pp. 1165-78, incorporated herein.)

On December 16, 1984, following David Lucas' arrest that morning, Lucas' wife, Shannon Lucas, underwent a lengthy, taped interrogation by San Diego County Detectives Robert Fullmer and Craig Henderson. The detectives showed her a dog choke chain which they did not tell Shannon allegedly had been found around the neck of the body of Anne Swanke. Shannon stated the chain belonged to one of their dogs.

The prosecution moved to admit Shannon's hearsay testimony regarding the dog chain on the basis that it was an "excited utterance" under the "spontaneous declaration" exception to the hearsay rule per Evidence Code § 1240.

The defense opposed admission of the statements because they reflected Shannon's deliberate opinion and, therefore, did not fall under the "spontaneous declaration" exception to the hearsay rule. It was also argued the statements should be barred under the marital privilege (Evidence Code § 970), and because their probative value was outweighed by the prejudicial impact. (Evidence Code § 352.)

The judge ruled Shannon Lucas' statements concerning the dog chain were inadmissible hearsay. The court found her statements were not "spontaneous declarations" since they were a mere "description of an opinion

... the event or condition that's being described is the internal opinion of Mrs. Lucas." The judge further found, pursuant to Evidence Code § 352, that the probative value of the opinion testimony outweighed its "prejudicial effect" and the testimony was of "misleading quality" because it "implies a certainty and the ability to recognize something unique that is not there."

On December 1, 1988, the judge reversed her original decision and ruled that Shannon's statements fell under the "spontaneous declaration" exception to the hearsay rule asserting that the statements were spontaneous reaction to an "exciting event."

J. In Limine Motions: Penalty

1. Motion To Exclude 1973 Prior Rape Conviction (See Volume 6, § 6.4, pp. 1442-47, incorporated herein.)

The defense made a Motion to Strike the prior conviction based on claims that both trial counsel and appellate counsel had been ineffective. (CT 7745-81.) Judge Hammes originally refused to hear the motion ruling that it was procedurally barred and substantively suspect. However, the Court of Appeal, in a published decision, ordered Judge Hammes to entertain the Motion to Strike which she did, after first denying a defense request that she recuse herself for purposes of the motion.

On November 22, 1988, the judge denied the Motion to Strike, ruling that there was no ineffective assistance of counsel and that the 1973 prior conviction would remain in full force and effect for purposes of aggravation at the penalty trial.

K. Jury Selection

On August 22, 1988, Judge Hammes reviewed the hardship forms and addressed the prospective jurors with regard to pre-*Hovey* instructions. (CT 5235-36; 15531-32.)

On August 23, 1988, jury selection commenced. (CT 5237-38; 15535-36.) Jury selection continued from August 24 until December 7, 1988. (CT 5239-50; 5362-69; 15533-47; 15639-46.)

On October 27, 1988, the defense filed a trial brief regarding the scope of death penalty voir dire. (CT 4526-31; 13507-512.)

On December 1, 1988, the defense filed a written motion for reconsideration of the rulings concerning the challenge for cause against prospective Jurors Anderson, S.B.,¹¹ Greeson, Hadlock, Hawthorne, Hix, Loveday, Miller, Toth, Trujillo, Veal, Wier, H.L. Williams, and P.E. Williams. The motion for reconsideration was denied. (RTH 35541.)

On December 8, 1988, jury selection was completed. (CT 5359-61; 15647-49.)

On December 12 and 13, 1988, alternate jurors were sworn to try the case. (CT 5370-76; 15650-56.)

On December 15, 1988, jury instructions were discussed. (CT 5377; 15657.)

L. The Guilt Trial

On January 3, 1989, the trial commenced. (CT 5378-81.)

On April 12, 1989, the prosecution rested their case. (CT 5485.) The defense renewed its motion for severance, incorporating all previous pleadings. The defense also moved for a judgment of acquittal for insufficient evidence pursuant to Penal Code § 1118.1. The court denied both motions. (CT 5486.)

On May 23, 1989, the defense renewed its motion for acquittal

¹¹ To respect the jurors' privacy, only their initials will be used throughout this brief.

pursuant to Penal Code §1118.1. The motion was denied. The defense rested its case and the prosecution commenced rebuttal testimony. (CT 5531-32.)

On May 30, 1989, a renewed motion for acquittal pursuant to Penal Code §1118.1 was denied. (CT 5540.) Both the prosecution and defense rested their case. (CT 5541.)

On May 31, 1989, the defense filed a trial brief regarding the judges duties in considering jury instructions. (CT 14206-13.)

On June 6, 1989, the court and counsel discussed jury instructions. (CT 5545-46.)

On June 7, 1989, the defense reopened briefly, then both the prosecution and defense rested again. The prosecution made its opening argument to the jury and the defense moved for a mistrial based on improper prosecution argument. The judge denied the motion. (CT 5550-51.) The defense made its closing argument. (CT 5551.)

June 9, 1989, the prosecution presented rebuttal argument. The defense objected to the prosecution's closing argument, citing prosecution error and improper argument, and again moved for a mistrial. The judge denied the motion, finding no error by the prosecution. (CT 5553-54.)

On June 12, 1989, the court instructed the jurors and they began deliberation. (CT 5555.)

On June 21, 1989, the jurors informed the court that they had reached verdicts on some counts but were deadlocked on others. (CT 5563.) The jurors were polled and the verdicts recorded. (CT 5563.) The jury found David Allen Lucas guilty of the murders of Suzanne and Colin Jacobs, as charged in Counts One and Two and further found that Lucas, in the commission of the offenses, personally used a deadly and dangerous weapon within the meaning of § 12022(b). (CT 5565-66; 14232-3.) The jury found

Lucas not guilty of the murder of Gayle Garcia as charged in Count Three. (CT 5567; 14234.) The jury found Lucas guilty of kidnapping Jodie Santiago, in violation of § 207(a), as charged in Count Four, and further found that he had used a deadly weapon within the meaning of § 12022(b), and further that he inflicted great bodily injury within the meaning of § 12022.7. (CT 5569; 14236.) Lucas was also found guilty of attempted murder as charged in Count Five, as well as the weapon use and great bodily injury allegations. (CT 5570; 14237.) The jury returned verdicts of guilty in Count Eight, the kidnapping of Anne Swanke, along with the weapon use and great bodily injury allegations. (CT 5571; 14238.) The jury also returned a verdict of guilty on Count Nine, the murder of Anne Swanke, as well as the weapon use allegation. (CT 5572; 14239.) The jury also found true the multiple murder special circumstance allegation. (Penal Code § 190.2(a)(3).) (CT 5573; 14240.) The court inquired of the jury as to Counts 6 and 7, the Strang/Fisher murders, and found the jury hopelessly deadlocked as to those counts. The court declared a mistrial as to Counts 6 and 7. (CT 5563.)

The judge instructed the jurors regarding the penalty trial and then excused them until commencement of that trial. The jurors were not precluded from considering penalty during the 15 day recess prior to commencement of the penalty trial. (See Volume 7 § 7.5.2, pp. 1622-25, incorporated herein.)

M. The Penalty Trial

See Volume 6, § 6.1, pp. 1375-90, incorporated herein.

N. New Trial Motion And Imposition Of Sentence

On August 25, 1989, the defense filed a motion for a new trial. (CT 14870-95.)

On August 31, 1989, the defense filed a supplement to its motion for

a new trial. (CT 14896-98.)

On September 7, 1989, the prosecution filed a statement in aggravation pursuant to § 1170(b) and Judicial Council Rule 437. (CT 14899-914.) The prosecution also filed a response to the defense's motion for a new trial. (CT 14915-20.)

On September 8, 1989, a Probation Department Report was filed regarding Lucas. (CT 14923-60.)

On September 14, 1989, the defense filed a statement in mitigation pursuant to § 1170(b). (CT 14981-84.) The defense also filed a response to the Probation Department Report. (CT 14985-88.)

On September 19, 1989, the defense motions for a new trial and for modification of the verdict were heard. The motion for a new trial was denied, with the judge finding no error in law or any misconduct by the prosecution. (CT 5604.) The motion for modification of the penalty as to Counts One, Two and Nine was denied. Judge Hammes concluded that the aggravating factors substantially outweighed the mitigating factors and that the verdict of death was warranted. As to Counts One, Two and Nine the judge entered a judgment of death. As to the Penal Code § 12022(b) allegations, the court sentenced Lucas to one year for each allegation, said terms stayed per § 654, pending execution of the sentence as to Counts One, Two and Nine. (CT 5604.) The court then proceeded with sentencing as to Counts 4, 5, and 8, considering oral statements from the victims and victim's families. (CT 5604.) On Counts 4, 5, and 8, Lucas was sentenced to a total term of 17 years, stayed pending execution of the death sentence. (CT 5604.) It was further ordered that in the event the death penalty was modified or commuted to a term of prison with a possibility of parole, the term for Counts One, Two and Nine would be consecutive to one another and additional terms

of one year each under Penal Code § 12022(b); for Counts One, Two and Nine be added to the modified term of prison for a total of 26 years to life for each of those counts. (CT 5604.) The defense moved for a stay under § 654, and to stay execution until all appellate matters could be conducted, and for specific discovery. The motions were denied. (CT 5603.) The defense filed an appeal from the judgement of the court. (CT 14992.) The defense also filed a motion for an order confirming appointment of trial counsel pursuant to Penal Code § 987(b) and 1240.1(b)(1). (CT 14993-5.) The court ordered that the appointment of Steven E. Feldman and Alex L. Landon be continued until the entire record on appeal was certified. (CT 14996.)

On September 25, 1989, the prosecution dismissed the Strang/Fisher counts in the furtherance of justice. (CT 5678; 15658.)

On September 28, 1989, the court filed the judgment of death. (CT 14999-15006.)

1.2 STATEMENT OF FACTS: OVERVIEW

The charges against Lucas emanated from the incidents briefly summarized as follows:

1. May 4, 1979, killing of victims Suzanne and Colin Jacobs—referred to herein as the “Jacobs case”;
2. December 8, 1981, killing of Gayle Garcia—referred to herein as the “Garcia case”;
3. June 8, 1984, kidnap and attempted killing of Jodie Santiago – referred to herein as the “Santiago” case;
4. October 23, 1984, killing of Rhonda Strang and Amber Fisher – referred to herein as the “Strang/Fisher case” and;
5. November 19, 1984, kidnap and killing of Anne Swanke – referred to herein as the “Swanke case.”

The factual statements for the trial evidence are set forth as follows:

Volume 2, § 2.2 Jacobs: Statement of Facts

Volume 3, § 3.2 Santiago: Statement of Facts

Volume 4 § 4.2 Swanke: Statement of Facts

Volume 5 § 5.1 Garcia: Statement of Case and Facts

Volume 5 § 5.2 Strang/Fisher: Statement of Case and Facts

Volume 6 § 6.4.3 Prior Rape Conviction: Statement of Facts

Volume 7 § 7.2 Penalty: Statement of Facts.

The facts most directly relevant to the consolidation and cross-admissibility in limine motions are set forth below at Volume 2, § 2.3.1(C), pp. 145-96, incorporated herein.

The facts more specifically relevant to other case-specific in limine motions are set forth in the discussion of these motions in the subsequent case specific volumes as follows:

§ 2.3.1(C), Consolidation

§ 2.3.5.1, Cross-admissibility

§ 2.5.3, Handprinting Comparison

§ 3.3.1, Eyewitness Identification Of Lucas

§ 3.4.1, Eyewitness Identification Of Lucas' House

§ 3.7.1(C), *Pitchess* Motion re: *Cavanaugh* Case.

1.3 OVERVIEW OF ARGUMENT

Due to the number and complexity of the claims raised in Appellant's Opening Brief, the brief has been divided into seven volumes which provide the following organization structure:

Volume I: Jury Arguments § 1.4 and § 1.5.

Volume II: Arguments relating to the Jacobs charges, § 2.3 - § 2.12.

Volume III: Arguments relating to the Santiago charges, § 3.3 - § 3.12.

Volume IV: Arguments relating to the Swanke charges, § 4.3 - § 4.6.

Volume V: Strang/Fisher – Arguments: § 5.2.3 - § 5.2.9.

Volume VI: Penalty Phase: Prior Conviction Issues, § 6.3 - § 6.6.

Volume VII: Penalty Phase: Non-Prior Conviction Issues, § 7.3 - § 7.9.

1.4 JURY ISSUES

ARGUMENT 1.4.1

THE DEFENSE DID NOT HAVE A FAIR OPPORTUNITY TO LITIGATE ITS CHALLENGE TO THE COMPOSITION OF LUCAS' JURY

A. Introduction

The defense made a preliminary showing of systematic underrepresentation of Hispanics and young persons (age 18-24) on the panels from which Lucas jury was drawn. However, the defense didn't have a fair opportunity to challenge the composition of the jury panels because: (1) the judge refused to order necessary discovery, and (2) the motion was erroneously rejected based on the defense offers of proof, thus improperly foreclosing an evidentiary hearing.

Accordingly, Lucas was denied a jury selected from a fair cross-section of the community, a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. (*Castaneda v. Partida* (1977) 430 U.S. 482.)

B. Proceedings Below

On August 8, 1985, Judge Gamer, in CR 73093, issued an order for disclosure of information to the San Diego County Jury Commissioner. The order allowed the defense access to the July 15, 1985 "qualified jurors' list" including: (a) a hard copy of the list; (b) summonses collected from the jurors; (c) written excuses from the jurors; (d) names and addresses of persons who provided written excuses; and (e) names and addresses of persons who did not appear. (CT 158-59.) The order also authorized Dr. Oscar Kaplan to distribute a questionnaire to available jurors on August 19, 26, and 28, 1985.

(*Ibid.*) The defense received the requested information and Dr. Kaplan distributed the questionnaires. (CT 2196.)¹²

On November 25, 1985, Judge Gamer issued another order for the same materials but for a later qualified jurors' list and for distribution of questionnaires in December, 1985 and January, 1986. (CT 2128-29.) The defense received the requested information and the questionnaires were distributed. (CT 2106; 2131.)

On June 30, 1986, Judge Orfield, in CR 75195, issued an order for (1) qualified juror lists; (2) certified juror lists and (3) juror pay cards. (CT 2107; 6832-33.)

On July 8, 1986 the defense, in CR 75195, filed a "Motion to Postpone Jury Selection Pending Compliance With Code of Civil Procedure 225" which requires that juror not responding to the jury service summons be "resummoned." (CT 6848-56.) The prosecution responded to this motion by requesting that it be joined with the anticipated jury composition challenge motion. (CT 6869-71.)

On September 26, 1986, defense counsel in CR 73093 and CR 75195 filed a joint "Motion to Discover Juror Information." (CT 2063; 2101.) This motion requested 33 different items relating to the jury selection process of the San Diego Jury Commissioner. (*Ibid.*)

On November 4, 1986, Judge Orfield denied the discovery. (RTO 8582.)

In CR75195, on November 20, 1986, Judge Kennedy also denied the request for discovery already denied by Judge Orfield. (RTK 52.) Judge

¹² Results were obtained from 581 potential jurors. (CT 2106; 2126.) 44 jurors were Hispanic which was approximately 7% of the total. (*Ibid.*; see also § 1.4.1(C)(2), pp. 28-30 below, incorporated herein.)

Kennedy did grant a request to allow additional surveys of potential jurors. (RTK 52.) The additional surveys ordered by Judge Kennedy were conducted by Dr. John Weeks in November and December 1986. (RTK 1362.)¹³

The two cases were combined and assigned to Judge Hammes for all purposes in February, 1987. (CT 2722; 4808; 4811.)

On March 11, 1987 the defense again moved for discovery of jury composition information from the Jury Commissioner. (RTH 4231-47.) This motion sought more current and complete information regarding the selection procedures utilized in San Diego County than had been sought before Judges Orfield and Kennedy. (CT 9968.) It also requested additional surveys. (*Ibid.*) The request for more current and complete jury selection information was denied but the survey request was granted. (RTH 4242-45; CT 968-69.) In denying access to the Jury Commissioner's materials Judge Hammes ruled that she was bound by Judge Orfield's earlier denial of discovery under Code of Civil Procedure § 170. (RTH 4242-45.)

On May 12, 1988 the declaration of Ed Bronson was admitted in support of the jury composition motion. (RTH 25104; In Limine Exhibit 746B.)

On June 13, 1988 Judge Hammes held a hearing on the prosecution's motion to exclude the defense jury composition evidence. (RTH 25636-25715.) The defense made an offer of proof as to the underrepresentation of Hispanics and 18 to 24 year-olds. (*Ibid.*) The judge denied all the offers of proof and denied an evidentiary hearing on the jury composition challenge. (RTH 25663-66; 25709-10.)

¹³ Approximately 9.5% of the potential jurors surveyed were Hispanic. (RTK 1379.) There were 78 Hispanics out of a total of 817. (RTK 1434.)

C. Judge Orfield Improperly Denied Discovery

1. Introduction

Judge Hammes deferred to Judge Orfield's discovery ruling under the authority of Code of Civil Procedure § 170. (RTH 4242-45.) Therefore, because the Orfield ruling was prejudicially erroneous, Judge Hammes' ruling was also erroneous.

2. Necessity For Additional Discovery

In 1985, the defense received discovery of master juror lists, juror summonses collected, written excuses submitted by jurors with identifying information for those persons and identifying information for persons who did not appear. (See § 1.4.1(B), pp. 25-28 above, incorporated herein.) However, this information was limited to a period of three months: July 1985 and December 1985-January 1986. (*Ibid.*) Because a new master jury list was compiled and utilized for most of 1986, and because it was necessary to have the information for a continuous period of at least a full year to conduct an accurate study (RTH 8323), the defense filed a new discovery motion before Judge Orfield. This new motion requested that Judge Orfield allow access to jury selection information and selection procedures from December 16, 1984 through November 1, 1986. (CT 2063-2104.)

The surveys conducted by Dr. Kaplan in August 1985 and December 1985-January 1986 revealed that of the potential jurors who reported for service in response to the original summons, 8% were Hispanic. (RTO 8281-82.)^{14/15}

¹⁴ The jury commissioner tabulation was slightly different because they did not include one of the days included by Dr. Kaplan. (RTO 8488.)

¹⁵ As a matter of policy the commissioner's office did not send any
(continued...)

In 1980 Hispanics were 14.7% of the population in San Diego county according to U.S. Census figures. (RTO 8313-14; In Limine Exhibit 6-C/7-W.) Based on past and present census figures and predicted activity, the Hispanic population in the San Diego County was projected to be 17.25% of the total population in 1985. (RTO 8314-17; In Limine Exhibit 6-C/7-W.)

Dr. Edgar Butler, a recognized expert in the field (RTO 8296-99), testified that the data showed “a possible underrepresentation of Hispanic population” and that a review of the San Diego County jury selection system was warranted. (RTO 8320-21.) Such a review would be directed toward determining (1) if there was underrepresentation and (2) where the underrepresentation might be occurring within the system. (RTO 8300; 8315; 8336.)

To conduct this two-pronged review it would be necessary to “go through the various systems in the jury selection procedures [in] the Jury Commissioner’s Office and the data collected there to evaluate that in a systematic way.” (RTO 8318.) However, there appeared to be limited information about “what happens to people once they are within the system.” (RTO 8306; 8321.)¹⁶ Therefore, Dr. Butler testified that it would be necessary to systematically go through the qualification and impanelment process.

¹⁵(...continued)

follow-up letter to persons who did not respond to the summons. (RTO 8058-59.) The highest “no show” rates occurred in 9 or the 12 counties with the highest rates of Hispanic population. (RTO 9282-83.)

¹⁶ This lack of knowledge was in part due to the inability of the Commissioner’s office to conduct its own independent study. (RTO 8321.)

(RTO 8306-07.)¹⁷ Accordingly, there would need to be two types of discovery not yet provided.

First, it would be necessary to have “specific information regarding the computer program which is used to help compose jury lists and help, in effect, select the jurors. . . .” (RTO 8416.) “[I]t would be of great assistance to have as much knowledge as possible about the operation and characteristics of the computerized jury processing system in operation in San Diego County. This knowledge, of course, would include a description of the evolution of this computerized system over the past year to access whether there had been any changes made during . . . that time period.” (RTO 8417.)

Second, it would be necessary to obtain the jury selection data, such as the qualified juror list, written excuses, no-shows, etc., for a continuous one year period over the past year to avoid statistical aberrations. (RTO 8323; 8417-18 [need to go back several months to avoid chance of errors; the greater the number of months the greater the potential for accuracy].) The previous data was for only 3 noncontiguous months: August 1985 and December 1985-January 1986. (See § 1.4.1(B), pp. 25-28 above, incorporated herein.)

3. The Failure To Allow Access To The Necessary Jury Commission Information Was Error

Judge Orfield denied the requested discovery because of the burden it would impose and because no justification had been shown. (RTO 8582.) This ruling was error.

¹⁷ Dr. Butler observed:

[T]here is a virtual lack of information about the . . . Spanish-Origin population as they go through the jury selection procedures. . . [T]he little bit of information that we do have suggests that there is underrepresentation. (RTO 8321.)

A defendant who seeks access to this information is obviously not required to justify that request by making a prima facie case of underrepresentation. Rather, upon a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion, the court must make a reasonable effort to accommodate the defendant's relevant requests for information designed to verify the existence of such underrepresentation and document its nature and extent. [Citation.] Moreover, in this case, some of the information sought, such as master lists of jury pools, as well as general jury selection policies and practices, are judicial records that are or should be available to the public. [Citations.] (*People v. Jackson* (1996) 13 Cal. 4th 1164, 1194-95.)

In the present case, the defense more than satisfied the *Jackson* standard. The offers of proof suggested over an 8% absolute disparity and close to a 50% absolute disparity as to Hispanics based on projected census figures. Such a disparity was clearly sufficient, especially considering that to this day, more than 15 years later, the United States Supreme Court has not resolved the question of what method of disparity analysis should be used. (See *People v. Burgener* (2003) 29 Cal.4th 833, 856-57.)

Accordingly, Judge Orfield's denial of discovery, and Judge Hammes' subsequent adoption of that denial, erroneously precluded the defense from obtaining the information and data necessary to fully develop its prima facie burden. (See generally *Duren v. Missouri* (1979) 439 U.S. 357; *People v. Harris* (1989) 47 Cal.3d 1047, 1077-78.)

Denial of a fair opportunity to litigate a material pretrial issue violates the state and federal constitutions. Both the California and federal constitutions guarantee the defendant a right to "his day in court" (*In re Oliver* (1948) 333 U.S. 257, 273), free from arbitrary adjudicative procedures. (*Truax v. Corrigan* (1921) 257 U.S. 312, 332 [due process clause requires that

every man shall have the protection of “his day in court,” and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry]; *Fuentes v. Shevin* (1972) 407 U.S. 67, 80 [the opportunity to be heard is one of the immutable principles of justice which inhere the very idea of free government and is a central component of procedural due process]; *People v. Ramirez* (1979) 25 Cal.3d 260, 268 [California Due Process Clause protects against arbitrary adjudications].)

D. Judge Hammes Erroneously Relied On Judge Orfield’s Denial Of Discovery To Deny The Request For More Current And Complete Jury Selection Information

After the cases were assigned to Judge Hammes, the defense moved for more current and complete information from the Jury Commissioner for purposes of the jury composition challenge. (RTH 4231-47.) This renewed motion was based on changed circumstances including: (1) the Jury Commissioner’s Office was using a new computer system for selecting jurors, and (2) in March 1986, a new qualified juror list was selected thus providing data that was not available when Judge Orfield ruled. (RTH 4231-37.)

Nevertheless, Judge Hammes ruled that she was constrained by Code of Civil Procedure § 170 to adopt Judge Orfield’s ruling absent a showing of good cause not to do so. (RTH 4242-45.) This ruling was error for two reasons.

First, the defense had shown ample good cause to depart from Judge Orfield’s denial. Due to the passage of time the need for new jury composition data was crucial. Not only was the previous data supplied to the defense over 14 months old, but the computer system by which the data was generated had changed. It was plainly unfair and unreasonable to require

Lucas to meet his prima facie burden of showing systematic underrepresentation without allowing him access to information about the system and the latest data it was producing. (See generally *Holt v. Virginia* (1965) 381 U.S. 131.)

Second, Judge Hammes' reliance on Code of Civil Procedure § 170 in this situation revealed a lack of fairness and impartiality on her part. In another situation, when the defense asked her to rely on Judge Kennedy's previous ruling that *Kelly* applied to handwriting experts, Judge Hammes refused to accept Judge Kennedy's ruling. (See RTH 8117.) Nor were there any circumstances at all upon which to justify overruling Judge Kennedy's order that *Kelly* should apply.

Accordingly, Lucas was denied his constitutional right to an impartial judge. Additionally, by unjustifiably giving the prosecution more favorable treatment than the defense, Judge Hammes violated Lucas' rights under the Due Process Clause of the federal constitution. (*Wardius v. Oregon* (1973) 412 U.S. 470.)

For these reasons, Judge Hammes' denial of the discovery motion was error.

E. Judge Hammes Erroneously Refused An Evidentiary Hearing On The Jury Composition Challenge

1. Offer Of Proof

Based on surveys conducted in January and February 1988, 10.7% of the potential jurors who reported for duty were Hispanic. In comparison, it was estimated that Hispanics comprised at least 14% of the total eligible jurors. (RTH 25638-40.)¹⁸ The surveys showed that 9% of the persons

¹⁸ This figure was reached by making adjustments to the overall
(continued...)

reporting for duty were between the ages of 18 and 24. (RTH 25694.) In comparison, it was estimated that the 18-24 age group was approximately 22% of the total eligible jurors. (RTH 25694-95.)

The defense also offered to prove through expert testimony that the age group of 18 to 24 year olds met the constitutional definition of a cognizable class because they had beliefs and attitudes which were generally unique to that group and that they have distinct views and viewpoints. (RTH 25643-50.)

2. Denial Of An Evidentiary Hearing By Judge Hammes

The judge erroneously denied the requested evidentiary hearing because the showing was “insufficient” to show underrepresentation of Hispanics. (RTH 25666.)

As to the 18-24 age group the judge noted that the disparity of nearly two-thirds is the “kind of statistic that you can’t ignore . . . [A] two-thirds differential is something that would have to be explored.” (RTH 25696.) The judge also admitted that the cognizability question “is a very difficult area.” (RTH 25709.)¹⁹

Nevertheless, the judge denied an evidentiary hearing because: (1) “you can’t absolutely draw the lines and identify what youth is” and (2) “I don’t think there is anything to suggest that young people are less apt to convict than older people. . . .” (RTH 25710-11.)

¹⁸(...continued)
population percentage of 17.25%. (*Ibid.*)

¹⁹ In fact, the judge invited the defense to “take this decision up because I don’t think it’s easy at all.” (RTH 25709.)

3. An Evidentiary Hearing Should Have Been Granted As To The Underrepresentation Of Hispanics

The judge denied an evidentiary hearing as to Hispanics on the theory there was an insufficient showing of underrepresentation.²⁰ Although the disparities shown in the offer of proof would have been within this Court's "tolerance" level (see *People v. Burgener* (2003) 29 Cal.4th 833, 860) the United States Supreme Court has "not yet definitively spoken" on the issue of what type and amount of disparity is constitutionally significant. (*Id.* at 856-57.) Moreover, the 3.3% absolute disparity proffered in the present case was greater than the 1.8 percent figure for blacks found unrepresentative in *People v. Alexander* (1985) 163 Cal.App.3d 1189, 1199; and is on a par with the 3.6 percent absolute disparity held to demonstrate under-representation in *People v. Buford* (1982) 132 Cal.App.3d 288, 296; and the 3.9 percent absolute discrepancy deemed prima facie proof of a violation in *People v. Jones* (1984) 151 Cal.App.3d 1027, 1031; but see *People v. Bell* (1989) 49 Cal.3d 502, 527

²⁰ The elements which a defendant must establish in order to make a prima facie showing of a violation of the fair cross-section requirement are well established. The defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to the systematic exclusion of the group in the jury selection process." (*Duren v. Missouri* (1979) 439 U.S. 357, 364, quoted in *People v. Harris* (1984) 36 Cal.3d 36, 50.) If a prima facie violation is shown, the burden shifts to the prosecution to come forward with available evidence of explanation and justification, in order to enable the court to determine whether the county is doing all that can reasonably be expected to achieve the constitutional goal. (*People v. Buford* (1982) 132 Cal.App.3d 288, 299.) However, a trial court's erroneous finding that the defendant has failed to make a prima facie showing of a violation of his fair cross-section right is reversible per se. (*People v. Harris, supra*, 36 Cal.3d at 59.)

[5 percent figure questioned].)²¹

More importantly, the 3.3% figure in the present case was, of necessity, “speculative” and only an estimate. (RTH 25655.) This was so because the defense was denied the current and complete jury selection information it needed. (RTH 25656-57.) As explained by defense counsel, the 14% jury eligible might actually be higher (RTH 25655) but without the requested discovery that could not be determined:

The defense attempted in a pretrial motion to obtain the data that would not [require] us to get involved in speculation, but to get specific, and that motion was denied . . . So we have to deal with the data that is available to us. (RTH 25657.)

In particular, the 14% figure for total Hispanic juror eligibles was based on a total population estimate of 16.4%. (RTH 25660.) However, because a census had not been taken for over seven years the actual percentage of Hispanics in San Diego was not known and could have been as high as 20%. (RTH 25661.) Hence, the juror eligibility figure and the absolute disparity could actually have been several percentage points higher which would have put it above the 5.3% absolute disparity which this Court held sufficient to meet the underrepresentation prong of *Duren* in *People v. Harris* (1984) 36 Cal.3d 36, 47.

However, the defense was not permitted to conduct its proposed sampling of the community to update the census figures. (RTH 25661-62.) Accordingly, the judge erroneously denied an evidentiary hearing on this

²¹ The defense expert who testified before Judge Kennedy, Dr. John Weeks, stated that the 2.8% disparity between 12.3% and 9.5% (calculated from 1985 surveys) was statistically significant. (RTK 1382-84.) Dr. Weeks was 95% certain that this difference could not have happened by chance alone. (RTK 1381.)

issue.

4. The Judge Erroneously Denied An Evidentiary Hearing On Whether 18 To 24 Year Olds Are A Cognizable Class

The underrepresentation of 18 to 24 year olds was constitutionally significant. Both the absolute disparity of over 13% and the comparative disparity of almost two-thirds dwarves the disparities which have been deemed insufficient in other cases. (See *People v. Burgener, supra*, 29 Cal.4th at 860.)

Hence, the defense should have been given an evidentiary hearing on the issue of whether the excluded group was a cognizable class. The offer of proof provided sufficient cause for a hearing. The offer indicated that the group had distinct and unique views and Judge Hammes herself believed that the question was a difficult one. (RTH 25709.)

Moreover, neither this Court nor the United States Supreme Court has ruled that the young are not a cognizable class.

For all these reasons, an evidentiary hearing should have been held.

5. The Defense Was Not Given A Fair Opportunity To Prove Systematic Exclusion

In *People v. Burgener, supra*, 29 Cal.4th at 857, this Court failed to reach the issue of whether the young are a distinctive group because the defense failed to identify a specific systemic basis for the disparity. (*Id.* at 858.) In the present case, by comparison, the defense was not given a fair opportunity to meet its prima facie burden as to systematic exclusion because it was denied access to current and complete information about the system. Such information was necessary to conduct the full review of the system necessary to pinpoint the cause of the disparity. (See § 1.4.1(B), pp. 25-28 above, incorporated herein.)

Accordingly, a finding by this Court that Lucas failed to meet his evidentiary burden would be a violation of due process under both state and federal constitutions. (Art. I, sections 1, 7, 15, 16 and 17; 14th Amendment.)

F. The Error Violated Lucas' State And Federal Constitutional Rights

“Under the federal and state Constitutions, an accused is entitled to a jury drawn from a representative cross-section of the community. [Citations.]” (*People v. Burgener, supra*, 29 Cal.4th at 855-56.) “That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community.” (*Ibid.*; see also *Duren v. Missouri* (1979) 439 U.S. 357; *Taylor v. Louisiana* (1975) 419 U.S. 522, 530.) Hence, the underrepresentation of Hispanics and young persons from Lucas' jury violated his Sixth Amendment rights. Moreover, because Lucas was only 18 years old in 1973, when he allegedly committed the rape prior conviction, and 24 years old when he allegedly committed the Jacobs murder, the underrepresentation of young persons violated the Equal Protection Clause of the federal constitution. (14th Amendment; *Castaneda v. Partida* (1977) 430 U.S. 482, 494.) Moreover, under *Campbell v. Louisiana* (1998) 523 U.S. 392, 397-98, Lucas should have third party standing to assert underrepresentation of both Hispanics and young persons as a violation of the Equal Protection Clause.

Furthermore, the denial of a fair opportunity to litigate the underrepresentation claims through denial of discovery and an evidentiary hearing independently violated the Due Process Clauses of the state (Art. I, section 16) and federal (14th Amendment) constitutions. Both the California and federal constitutions guarantee the defendant a right to “his day in court” (*In re Oliver* (1948) 333 U.S. 257, 273), free from arbitrary adjudicative

procedures. (*Truax v. Corrigan* (1921) 257 U.S. 312, 332 [due process clause requires that every man shall have the protection of “his day in court,” and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry]; *Fuentes v. Shevin* (1972) 407 U.S. 67, 80 [the opportunity to be heard is one of the immutable principles of justice which inhere the very idea of free government and is a central component of procedural due process]; *People v. Ramirez* (1979) 25 Cal.3d 260, 268 [California Due Process Clause protects against arbitrary adjudications].)

Moreover, the Sixth and Fourteenth Amendments to the federal constitution guarantee the defense the rights to confrontation, compulsory process and due process. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Webb v. Texas* (1972) 409 U.S. 95; *Washington v. Texas* (1967) 388 U.S. 14, 17-19.) The right to call witnesses is also expressly guaranteed under the California Constitution. (See *People v. Chavez* (1980) 26 Cal.3d 334, 353.) These fundamental constitutional rights to be heard and to call witnesses apply to motion hearings as well as to the jury trial itself. (See *Holt v. Virginia, supra*, 381 U.S. 131, 136; *Bell v. Burson* (1971) 402 U.S. 535, 541-42.) The right to present evidence is a linchpin of the due process right to a fair hearing. (See *People v. Vickers* (1972) 8 Cal.3d 451, 457-58 [fundamental fairness requires full access to the courts and a meaningful opportunity to be heard]; see also *Reece v. Georgia* (1955) 350 U.S. 85, 89.)

Furthermore, the denial of discovery was an independent constitutional violation. The state (Cal. Const. Art. I, §§ 7, 15 and 16) and federal constitutional rights to due process, compulsory process and a fair trial by jury (5th, 6th and 14th Amendments) are implicated when a criminal defendant is deprived of material evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419;

Brady v. Maryland (1963) 373 U.S. 83.)

Finally, because Lucas was arbitrarily denied his state created rights, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

G. The Judgment Should Be Reversed

Because the rulings erroneously denied Lucas a fair opportunity to challenge the composition of the jury panels from which his jury was chosen, structural error was committed and the judgement should be reversed. (See generally *Duren v. Missouri*, *supra*; cf., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Sullivan v. Louisiana* (1993) 508 U.S. 275.) The erroneous failure to find a prima facie showing under *Duren* is reversible error. (See § 1.4.1(E)(3), n. 20, pp. 35 above, incorporated herein.) It follows, *a fortiori*, that the denial of a fair opportunity to make such a prima facie showing is also reversible error.

1.4 JURY ISSUES

ARGUMENT 1.4.2

JUDGE HAMMES ABUSED HER DISCRETION BY ALLOWING THE MEDIA TO PUBLISH THE JURORS' NAMES AND ADDRESSES

A. Proceedings Below

Lucas' case was the object of intense media publicity. In pretrial surveys 85% of the population recognized the case and 50% believed Lucas was guilty. (RTH 26048-49; 26062.) Because the change of venue motion was denied, the defense was concerned that the jurors selected to try Lucas' case would feel pressure from others in the community thus jeopardizing Lucas' federal constitutional right to a fair and impartial jury. (RTH 26048-49; 26052; 26063; CT 3988.) Thus, the defense argued that, on balance, the need to protect Lucas' federal constitutional rights outweighed the media's interest in publishing the jurors' personal identification information and, therefore, they should be precluded from doing so. (RTH 26063-66; CT 3986-88.) The media attorneys opposed the defense motion arguing that their right to publish was guaranteed by the First Amendment. (RTH 26054-56.)

Judge Hammes found that there was no "compelling . . . need" for the public to have the juror contact information and that the "interests of justice" would not be "best served by publication of the jurors [sic] names." (RTH 26074.) Nevertheless, the judge denied the defense motion under the mistaken assumption that she had no other alternative:

On the first issue of defendant's request for an order barring publication of jurors names, that is denied. Such an order in this case would constitute an illegal prior restraint on publication in contravention of the first amendment. (RTH 26073.)

. . .

[T]he law is clear, even as to the full names, identities and addresses, whatever comes out in the court. In our democratic country the freedom of the press is given highest priority. As the attorneys for the press pointed out, our U.S. Supreme Court has refused to permit prior restraint of press even in the face of threats to national security, to the Sixth Amendment rights of criminal defendants, to the health of holocaust survivors, and to the privacy right of homeowners. (RTH 26074.)

B. The Accused's "Overriding Interest" In A Fair Trial Justifies Precluding Publication Of Jurors' Names And Addresses In A High Profile Case

Notwithstanding the First Amendment rights of the media, "an accused's interest in a fair trial constitutes an 'overriding interest' supporting closure" of the trial to the public. (See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1207; *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 14.) Hence, it is beyond dispute that the trial judge has the discretion to order the far less comprehensive limitation of foreclosing publication of the jurors' names and addresses upon a showing of good cause. (See Code of Civil Procedure § 237 [jurors' names may be kept confidential upon a showing of good cause]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084 [excluding juror names from the public, but not the attorneys, did not violate Code of Civil Procedure § 237 or accused's constitutional right to a public trial]; *United States v. DeLuca* (1st Cir. 1998) 137 F.3d 24, 31; *United States v. Edmond* (D.C. Cir. 1995) 52 F.3d 1080, 1089.)

In sum, juror anonymity has a limited impact on the overall openness of the trial and, thus, can and should be ordered when justified. (See e.g., *Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 513 [partial

closure of voir dire may be appropriate to protect privacy interests of individual jurors].)

C. Judge Hammes Abused Her Discretion By Failing To Consider Whether The Risk Of An Unfair Trial Outweighed The Media's Right To Publish The Jurors' Names And Addresses

From her ruling allowing publication of the jurors' names and addresses it is clear that Judge Hammes did not soundly exercise her discretion. Instead of weighing the risk of an unfair trial against the First Amendment interests of the media, she incorrectly concluded that she had no other choice but to allow publication. Thus, the record does not reflect the required weighing of the interests at issue. (See e.g., *People v. Green* (1980) 27 Cal.3d 1, 25 [discretionary balancing must be apparent on the record]; see also *People v. Jiminez* (1978) 21 Cal.3d 595, 609.) The judge did discuss the publication of the juror information and found "no compelling public need to know. . . ." (RTH 26074.) And, she further stated that "I cannot find that the interests of justice are best served by the publication of the jurors' names." (*Ibid.*) Nevertheless, the judge denied the defense motion because the "freedom of the press is given the highest priority" and under United States Supreme Court precedent "the press had a protected right to publish just about anything, including the jurors names in this case. . . ." (RTH 26074.)

Hence, by giving the press "the highest priority" above "the Sixth Amendment rights of criminal defendants" the judge misconstrued the nature of her discretion which required a weighing of Lucas' right to a fair trial against the First Amendment rights at issue. The failure of Judge Hammes to perform the required weighing and balancing of interests was an abuse of discretion.

"[W]here fundamental rights are affected by the exercise of discretion

by the trial court, . . . such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action.” (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; *People v. Lara* (2001) 86 Cal.App.4th 139, 166; *People v. Davis* (1984) 161 Cal.App. 3d 796, 802-803.) To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision. [Citation.]” (*People v. Lara, supra*, 86 Cal.App.4th at 166.) “A court which is unaware of the scope of its discretionary powers can no more exercise informed discretion than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.” (*Ibid.*; see also *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

Hence, if the judge applies an incorrect standard or misapplies the standard then the court has not “properly exercised” is discretion. (*People v. Lara, supra*; see also *People v. Rist* (1976) 16 Cal.3d 211, 220 [trial court’s failure to consider all factors relevant to admissibility of prior conviction]; see also *People v. Green* (1980) 25 Cal.3d 1, 25 [record must affirmatively demonstrate that court conducted correct balancing required by Evidence Code § 352]; *People v. Jiminez* (1978) 21 Cal.3d 595, 609 [cannot presume that correct standard was applied when the record is silent].)

D. The Names And Addresses Of The Jurors Should Not Have Been Published In The Present Case

Had the judge properly exercised her discretion she would have concluded that juror anonymity was more than justified. Given the highly publicized and inflammatory nature of the charges, there was a very real danger that the jurors would feel public pressure that would undermine Lucas’ right to a fair trial. Not only did the trial receive extensive publicity as it

progressed, but defense counsel received “death threats” prior to trial and at least one juror received “death threats” during the trial.^{22/23} While this death threat occurred after the judge had already ruled, it illustrates that the danger was real. Accordingly, the trial judge abused her discretion in not considering this very real danger.

²² To respect the jurors’ privacy, only their initials will be used throughout this brief.

²³ There were two anonymous letters, one was sent to Anthony Gilham and one to Alex Landon. The letters made death threats to the attorneys for representing Lucas. (CT 4762 [Landon informs court he receive a threatening letter; court ordered prosecutor to see that FBI received the letter and envelope]; RTO 7821-23 [In Limine Court Exhibit 20-21]; CT 15201-03; RTK 873; 922-23 [In Limine Exhibit L-20/Court’s Exhibit 2]; RTH 3827.) The letters were sealed.

Juror A.R. sent a note to the court on July 12, 1989 regarding anonymous, threatening telephone calls she received. The note stated:

“Your Honor . . . I had three phone calls last night threatening my life, but also including obscenities. The first one I quickly hung up. The second I was expecting a phone call from my husband, who works nights. So I answered again. The third one went on my recorded and I left it there.

It was not a voice I recognized and surely had nothing to do with this trial, but since this has never happened to me before, I felt I should let you know. [Juror] A.R.” (RTT 12864.)

Originally the juror wasn’t going to mention the call to the court, but after she told the other jurors about it they convinced her to inform the court. (RTT 12866; 12874-75.) The judge voir dired the other jurors about this. (RTT 12880-903; CT 5580.)

Additionally, the court clerk received an anonymous phone call referring to one of the jurors by name (“Mrs. C.D.”) and accusing her of talking with Mrs. Lucas. (CT 24221.)

In another incident, a “courtwatcher” came up to Juror A.B. and asked him some questions about the testimony. (RTT 4523.)

E. The Error Violated The Federal Constitution

By allowing publication of the jurors' names and addresses Judge Hammes failed to assure that the deliberations were full, fair and free of undue influence. This violated Lucas' state (Cal. Const. Art I, sections 1, 7, 15, 16 and 17) and federal (6th, 8th and 14th Amendment) constitutional rights to due process, fair trial by jury and verdict reliability. The Sixth Amendment right to trial by an "impartial jury" is "fundamental to the American scheme of justice . . ." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) This right, and/or the Due Process Clause (14th Amendment) is abridged if any juror has been subjected to undue influence during deliberations. (See e.g., *United States v. Scheffer* (1998) 523 U.S. 303, 314 [per se rule of exclusion is permissible for evidence that "is likely to influence the jury unduly . . ."]; *Smith v. Phillips* (1982) 455 U.S. 209, 217 ["Due process means a jury capable and willing to decide the case solely on the evidence before it. . ."]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [prosecution's comment, not violating specific constitutional provision, violates due process if it unfairly influenced the jury]; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363 [right to fair and impartial trial by jury uninfluenced by news accounts]; *Hopt v. Utah* (1884) 110 U.S. 574, 583 [accused has the right to "the judgment of the jury upon the facts, uninfluenced by any direction from the court as to the weight of evidence"].)

The Cruel and Unusual Punishment Clause of the federal constitution (8th and 14th Amendments) requires heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776,

785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Finally, because the error arbitrarily denied Lucas his state created rights to a fair and impartial trial by jury under the California Constitution (Art I., sections 1, 7, 15, 16 and 17) and statutory law, it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Judgment Should Be Reversed Because The Error Was Structural

Because the error undermined the entire structure of the trial, it was structural error and the judgment should be reversed. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by “harmless-error” standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

G. The Error Was Prejudicial As To Guilt Under Harmless-Error Analysis

The error was prejudicial under the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) because the Love Insurance note was the key prosecution evidence in a closely balanced case. (See Volume 2, § 2.3.1(I)(2), pp. 209-11, incorporated herein.) “‘In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.’ [Citation].” (*People*

v. *Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

H. The Error Was Prejudicial As To Penalty

Even if the error was not prejudicial as to guilt, it was prejudicial, individually and cumulatively, as to penalty, under both the state and federal standards of prejudice. The penalty trial was closely balanced²⁴ and, therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that error, the jury would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

²⁴ See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].