SUPREME COURT COPY

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
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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 2(B)

Pages 367 - 744, § 2.5 - § 2.12

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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VOLUME 2(B)

2 JACOBS CASE

2.5 HANDPRINTING COMPARISON ISSUES: IN LIMINE

2.5.1 ARGUMENT OVERVIEW

Even if the photo of the Love Insurance note was properly admitted, the trial judge erred in failing to consider whether the handprinting comparison opinion of the prosecution experts satisfied *People v. Kelly* (1976) 17 Cal.3d 24.

Moreover, in denying the § 352 and due process challenges to the handprinting expert, the judge erroneously shifted the burden to the defense and unfairly failed to consider evidence relevant to the reliability of the expert testimony including defense expert testimony, proficiency studies and in-court testing.

2.5 HANDPRINTING COMPARISON ISSUES: IN LIMINE

2.5.2 PROCEDURAL AND FACTUAL BACKGROUND

A. Introduction

The prosecution sought to introduce expert testimony comparing the printing on the Love Insurance note found in the Jacobs' bathroom with the known printing of David Lucas. The expert testimony was twofold: (1) a comparison of the similarities and differences between the writings of Lucas and the note; and (2) the expert's opinion that he was "reasonably certain" that Lucas wrote the Love Insurance note. The defense argued that the evidence was inadmissible under *Kelly*, due process and Evidence Code § 352.

Judge Hammes ruled that *Kelly* was inapplicable and that neither due process not § 352 required its exclusion. However, in making these rulings the judge failed to properly exercise her discretion because she did not allow the defense to present proficiency studies which would have shown an error rate of 36% for handwriting comparison experts and 45% for handprinting comparison experts. Furthermore, Judge Hammes refused to allow in-court testing of the expert's reliability.

In sum, Judge Hammes failed to properly exercise her discretion. Furthermore, Lucas was denied hi due process right to a full and fair hearing and his rights to due process and reliability in the determination of both guilt and penalty in a capital case. (8th and 14th Amendments.)

Accordingly, the judgment should be reversed.

B. Procedural Background

1. *Kelly* Challenge

The defense objected to the admission of handwriting comparison

testimony when the case was before Judge Kennedy. (RTK 602.) In response to the *Kelly* objection the prosecution's handwriting expert admitted he did not know of any specific empirical studies which had validated handwriting comparison. (RTK 609.) Such testing had been done by persons in the field; not by disinterested experts. (RTK 611.) 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. (RTK 613.)

However, when the case was reassigned to Judge Hammes the handwriting issue was reopened. Before Judges Hammes, the defense again sought to mount a *Kelly* challenge to the reliability and admissibility of handwriting comparison testimony by prosecution experts. (RTH 4106-07; CT 9263-80; 10276-84.) However, Judge Hammes responded that the defense was "attacking the Eiffel Tower" (RTH 4109:27-28) and ruled that *Kelly* did not apply to handwriting comparison and the defense would have the burden of proving that the testimony should not be admitted:

> . . .[Y]ou're just attacking something so often received and so generally accepted that I think the defense is going to ultimately bear the burden of showing the court otherwise . . . [I]t is so well known and so often received that it is one of those areas that passes the burden back to the defense immediately . . . (RTH 5463; see also RTH 5468-70 [handwriting comparison is not a "new or novel" technique]; RTH 4106-13; compare RTH 5891 [prosecution burden as to electrophoresis testimony].)

Prior to the in limine testimony of prosecution handwriting expert John Harris, the defense attempted to renew the *Kelly* objection based on Judge Kennedy's prior resolution of the issue against the prosecution. (RTH 8115-17.) However, Judge Hammes concluded that her ruling "should prevail."

(RTH 8117.)[312]

The judge ruled that *Kelly* did not apply to handwriting comparison evidence because (1) the evidence was not scientific and (2) such evidence is not "new" since it is authorized by statute and has long been admitted, as a matter of course, in courts of law. (RTH 8160-61.)

Prior to the testimony of prosecution expert Manuel Gonzales,[313] the defense entered into the record a continuing *Kelly* objection to any opinion testimony Gonzales might offer. (RTH 8556.)

Subsequently, prior to the resumption of Harris' testimony, the judge explained that she might "rethink" her *Kelly* ruling on the handwriting if, "in the normal cross-examination for the other purposes[314] . . . it came to my attention . . . that a *Kelly* issue was beginning to develop. . . ." (RTH 13843:12-15.) However, the judge reaffirmed her ruling that she would not "permit . . . affirmative evidence to be brought in on this issue of handwriting comparison . . . handwriting is not *Kelly*." (RTH 13843:10-11.)

2. Due Process And Evidence Code § 352 Challenge: Exclusion Of In-Court Testing; Defense Experts And Proficiency Studies

Notwithstanding her ruling denying a *Kelly* hearing, Judge Hammes

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[312] Defense Attorney Feldman brought to the court's attention Judge Kennedy's conclusion that handwriting was a *Kelly* issue. The court responded by noting that Kennedy's statement was off-the-cuff whereas her's was reasoned out. Judge Hammes found good cause for making a new ruling. (RTH 8115.)

[313] Gonzales collected the printing samples from Lucas. (RTT 2377-79; 2382-84.)

[314] The judge noted that witness Harris could be cross-examined with respect to the *Hitch* and consolidation issues for which his testimony was being offered. (RTH 13842.)

did agree that the handwriting expert could be cross-examined in light of the defense objection to his testimony under Evidence Code § 352.[315]

During the cross-examination of the expert, John Harris, the defense sought to test his reliability by comparing printing from an undisclosed author (Exhibit 473), with the Love Insurance note. (RTH 13899.)[316] However, the judge sustained the prosecution's objection to this inquiry. (RTH 13900.)

After the testimony of Harris the defense asked to present their own experts as to the reliability of handwriting comparison. (RTH 17406-07.) The defense maintained that the experts would be relevant to their § 352 and due process objections to Harris' testimony. (RTH 17407; see also CT 9263-9336; 10276-10284; 11209-11216; 11217-28.) The defense also argued that their expert testimony was relevant to the judge's exercise of discretion under Evidence Code § 1418 which uses the discretionary term "may" as to the permissibility of handwriting. (RTH 17488.)[317]

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[315] The defense stated the objection as follows:

> . . .[W]hat little probative value his testimony has, is substantially outweighed by the prejudicial effect given that anybody can look at the same materials and form their own opinions, and it [is] not necessary to permit expert testimony on the subject. (RTH 13844:1-5.)

[316] It was later revealed that Exhibit 473 had been written by David Woods. (RTH 8155-57.) Rochelle Coleman, in a police interview, had stated that the printing on the Love Insurance note was David Woods'. (RTH 7939.) However, Judge Hammes precluded the defense from presenting the evidence because it was hearsay and did not meet either the state of mind or excited utterance exceptions to the hearsay rule. (RTH 7949; see also § 2.6.4, pp. 467-77 below, incorporated herein.)

[317] Despite initially stating, "I think it's 1417," defense counsel then (continued...)

The judge reaffirmed her ruling that *Kelly* did not apply but conditionally allowed the expert testimony as to the § 352 and due process challenges:

> I am not going to even consider this for the question on the *Kelly* area because I have made my ruling on that, but as I indicated previously, I think that you are entitled to attack the constitutionality of the statute. (RTH 17489; see also RTH 17512 [not talking about reliability in a *Kelly* context; it does go to § 352 and constitutionality of the statute].)

However, the judge said that she would not make a final decision until she heard the "foundation for the expertise." (RTH 17489.)

The defense offered the testimony of two experts, Dr. Mark P. Denbeaux and Dr. Michael J. Saks.[318] However, Judge Hammes refused to admit or consider either expert's testimony as to the reliability of handprinting comparison. (RTH 17518-20; 17584.)[319/320]

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[317](...continued)
said, "It's between 1417 and 1420. . . ." He was obviously referring to Evidence Code § 1418, "Comparison of Writing by Expert Witness." § 1418 provides as follows:

> The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

[318] The judge did consider Saks to be an expert as to the scientific method. (RTH 17584.)

[319] The judge's rationale for finding Dr. Saks not to be an expert in handwriting – i.e., lack of actual experience in the field (RTH 17519), was also equally applicable to Dr. Denbeaux. Thus, Dr. Denbeaux's testimony was limited to the legal history of handwriting comparison evidence. (RTH
(continued...)

The defense also sought admission of five different proficiency studies from 1975 through 1987 which would show that even handwriting experts had up to a 36% error rate when comparing seemingly similar writings and handprinting experts had a 45% error rate. (RTH 17523; In Limine Exhibits 586, 587 and 588; see also § 2.5.3(C), pp. 383-85 below, incorporated herein.) The defense asked the judge to take judicial notice of the proficiency studies as being adjudicative facts and under the truth and evidence provisions of Proposition 8 but the judge refused. (RTH 17567.) The defense pointed out that the court had already admitted such tests in serology and relied on them to admit the prosecution's electrophoresis expert. (See Volume 4, § 4.3, pp. 1124-45, incorporated herein.) However, the judge still refused to consider them. (RTH 17568.) The defense informed the judge that she was frustrating the defense in its attempt to show that handprinting analysis is not what it purports to be. The defense contended that Dr. Saks' testimony regarding the proficiency studies would show that handwriting comparison is a subjective analysis that has a false aura of expertise. (RTH 17576.)[321] In other words,

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[319](...continued)
25439.)

[320] At the request of the defense Judge Hammes "took notice" of Saks' and Denbeaux's handwriting testimony for purposes of the *Hitch/Trombetta* motion to exclude the Love Insurance note. (RTH 24623; 25439-49.) However, the judge relied on her own "lay"comparison of the handprinting to conclude that Lucas authored the note and, hence, that the fingerprint would not have been exculpatory. (RTH 25439-40.)

[321] The defense also noted that Dr. Saks was being offered to help the court formulate an appropriate *Zamora* instruction on an error rate regarding the loss of the actual handwriting. (RTH 17579.) Feldman also noted that the defense would be requesting a cautionary instruction regarding the unreliability of identification testimony. (RTH 17581.)

Dr. Saks would explain that there is a lot about handwriting analysis that does not meet the eye. One example is that if you look at two samples and compare them and say that they are indistinguishable, that conclusion may be undermined by showing that there are some 500 or more people out there with similar handwriting but which were not analyzed. (RTH 17582.) The judge repeated that she did not find Dr. Saks to be an expert in handwriting comparison. (RTH 17584.)

In response to this ruling the defense offered to call a witness from Collaborative Testing Services to discuss the handwriting and handprinting proficiency tests. However, the judge stated that she believed that the area is "virtually unassailable" and that she would not allow such testimony under any circumstances. (RTH 17625.) This ruling precluded much of the proposed defense testimony. (RTH 17634.)

C. Trial Testimony Of The Expert

At trial the prosecution expert, John Harris, testified that he was "reasonably certain" Lucas was the author of the Love Insurance note. (RTT 2309.) David Oleksow, a forensic document examiner testifying for the defense, originally concluded that, due to numerous unexplained variations in the writing, he could neither identify nor eliminate Lucas as being the writer of the Love Insurance note. (RTT 8982-83.) However, after reviewing additional samples of Lucas' writing, Oleksow concluded that there were sufficient similarities to conclude that Lucas "probably" authored the note. (RTT 8994-95.)

2 JACOBS CASE

2.5 HANDPRINTING COMPARISON ISSUES: IN LIMINE

2.5.3 STATEMENT OF FACTS

A. Prosecution Experts

Manuel Gonzales, the documents examiner and handwriting analyst for the Sheriff's Department, took exemplars from Lucas on January 2, 1985 at the County jail. Gonzales asked Lucas to write out "Love Insurance" and a telephone number. (RTH 8558.) Gonzales, who knew the samples were for comparing Lucas' printing, had Lucas write on little pieces of paper because sometimes handwriting changes with respect to the size of the paper involved. He also had Lucas write his name on four envelopes. (RTH 8559; In Limine Exhibit 145.)[322] Gonzales was reasonably certain that Lucas was not handcuffed while giving the exemplars. It is important that the writer not be restrained as restraints may affect the handwriting. (RTH 8568.)[323] Exemplars can be affected by the posture of the person making the exemplar. Handcuffs would also adversely affect the sample. (RTH 8176; RTH 13926.)[324] Lucas was cooperative while preparing the samples and did not

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[322] He had Lucas write some of the exemplars while standing. (RTH 8564.)

[323] Gonzales conceded that Lucas may have been shackled but has no recollection either way. (RTH 8577.) He was not absolutely certain that Lucas was unrestrained at the time he wrote the exemplars. (RTH 8583.) John Simms, who was taking hair samples from Lucas at the time (RTH 8557), had no recollection of any restraints on Lucas. (RTH 8628.) Harris could not rule out the possibility that the person who wrote Exhibit 165 was handcuffed. (RTH 13926.)

[324] John Simms testified that Lucas was seated most of the time during the exemplar taking. (RTH 8638.)

hamper Gonzales in any fashion. There was no indication that Lucas was trying to disguise his handwriting. (RTH 8569.)

John J. Harris, testified as a questioned documents expert. Harris had five to six times more experience with handwriting comparison than handprinting comparison. (RTH 8210.) Harris tried to raise handprinting from the original of the Love Insurance note but due to the condition of the note, he was unable to do so. (RTH 8123.) Instead, he used various photographs of the note which he compared with exemplars taken from Lucas. (RTH 8122.) He also looked at the probation and parole reports for samples of Lucas' handwriting. (RTH 8123-35.)

Harris testified that the person who wrote the Lucas exemplars wrote the Love Insurance note "with reasonable certainty." (RTH 8143; 8172-73.) However, he could not quantify what "reasonable certainty" meant on a percentage basis. (RTH 8154.)[325]

According to Harris, there is a lot of handwriting similarity in the general population; some people write alike. (RTH 8157.)[326] In fact, some people write so much alike that Harris does not have the ability to distinguish between them. (RTT 8158.) Unlike fingerprint comparison, there is no standard number of similarities or differences required before an opinion of

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[325] Harris did not normally present his conclusions to another expert for verification but he did show them to his wife who is a retired documents examiner. (RTH 13879.) He showed her the documents and she looked at them. However, he could not recall discussing the intricacies of the case with her. (RTH 13885.) He could not recall if his wife ever used a magnifying glass to examine the documents. He was not even sure if she arrived at an opinion. (RTH 13886.)

[326] Harris wrote an article to that effect about the similarities of the Smith signatures at the Registrar of Voters office in L.A. (RTH 8157; Exhibit 474.)

a match or a nonmatch may be rendered. (RTH 13899.) Rather, the art of handwriting comparison involves common sense. (RTH 13873.)

The more of a sample an expert has to test, the better. (RTH 8158; 8279.) It would be best to have a substantial volume of the questioned handwriting. (RTH 8156.) Also, it is better to have the original of the questioned handwriting, and not a Polaroid photograph. (RTH 8156; see also RTH 8616 [testimony of Manuel Gonzales: Originals are always preferable . . . but some analysis can be done from good photos].)[327]

Harris was satisfied with the amount of printing that was available to him even though there were only eleven out of a possible 52 letters and 5 out of 10 numerals. (RTH 8162.)[328] He conceded, however, that his comparison of the printing was hindered by the fact that a majority of the letters in the alphabet could not be compared. (RTH 8164; see also *United States v. Prime* (W.D. Wash. 2002) 220 F.Supp.2d 1203, 1212 n. 5 [". . . trial courts should be wary of identification based on small samples of handwriting"].)

Harris testified that most of Lucas' handwriting forms are rather individualistic. The individualism appears in the letters and in the combination of letters and the spacing. (RTH 8206.)[329] However, Harris

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[327] The original is more important when dealing with a check forgery or alteration; less important when comparing straight handwriting. (RTH 8157.)

[328] The original placement of the Lucas exemplars on the charts (Exhibits 148 and 149) was done by Harris. The charts were prepared for the preliminary hearing. (RTH 13863.)

[329] Some of the characteristics of Lucas' printing that Harris noted were: the "2" with the large loop coming down; the "8" in a draftsman style which is two individual circles rather than one stroke; the "L" has a pen drag
(continued...)

could not say if the writer of the note was left or right-handed (RTH 8216.) Harris also noticed a difference between the note and the exemplars.[330]

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[329](...continued)
or hook at the top as do a large number of the L's in the exemplars; the capital "I" with two big bars at the top; the "N" with a rounded right side; the fact that the "S" has a similarity to a "5" or a "Z"; a narrow "U" and a narrow "R" even though it is obscured by a fold in the paper; a nondescript "A"and an "N"with a rounded right side; the "C"in the bottom corner has an extra stroke and is not finished. (RTH 8218-20.) Lucas made his "7s" both ways, sometimes with a bar and sometimes without a bar. (RTH 8221.)

The "C" was composed of two strokes and appeared to be careless or accidental which may have been caused by writing on a small piece of paper. (RTH 8223.) This and the triangular "O" in the phone number appeared to indicate that the note may have been written in an unusual position or in a careless manner. (RTH 8225.) Harris thought that the handwriting on the note was written while the paper was small rather than being a piece of a larger paper that was subsequently torn. (RTH 8226.)

[330] Harris conceded that the "C"and the "E" differed between the note and the exemplars. (RTH 8232.) He also conceded that the requirements for an identification are that all identifying details of the disputed matter must occur in the same way in the known specimens unless there is a logical explanation for an obvious deviation. (RTH 8321.)

Harris, who examined the document and the exemplars using a five power illuminated magnifier, concluded that both "E's" on the note were made with three strokes. However, there was a difference between the "E" on the note and some of the "E's" on the exemplars. (RTH 13856; 13859; 13860.) Harris selected exemplars that were the ones most typical of Lucas' handwriting. He picked the ones with the four stroke "E's" as being most typical (RTH 13864.)

A four stroke E is rarer than a three or two stroke E in his opinion. Most common is a three stroke E. The four stroke is a more carefully done one as by a draftsman. (RTH 13866.)

In order to determine whether one individual wrote something, it is necessary to assess the existence of variations. (RTH 13861.) However, in the present case, the questioned document provided only a limited amount of writing for comparison purposes. (RTH 13862.) The "O" in the note was a

(continued...)

However, However, there are variations in handwriting from time to time as it is made. (RTH 8277.) To Harris these differences did not indicate a different writer, just variations. (RTH 13889.) The variations between the note and the exemplars, according to Harris, were within an acceptable range of variations of the Lucas handwriting. (RTH 13916; 13937 [people consistently write with a certain variation].)[331] He conceded that he did not use the term "fundamental differences" in his written report in the same sense he used it in court. (RTH 13920.)

Harris did not measure the slant of the note and the exemplars but just visually compared them. (RTH 13931.) Harris could not say if the markings on the back of the note were written by the same person. (RTH 13934.) It was

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[330](...continued)
continuous loop but the "O" in the exemplar was not. (Harris called it a minuscule gap. (RTH 13868.) The "O's" would look dissimilar only to a defense attorney, not to him. (RTH 13869.) He did not use any device to measure the gaps found in the letters in the note and in the exemplars. (RTH 13870.) There was one stroke for the "C" in the note but there seems to be a false start or another little stroke near it that belongs neither to the "C" or the "E". (RTH 13871.) In his opinion, that was an extraneous mark on the note. (RTH 13872.) Harris admitted that the delta or heart shaped "O" in the note did not appear in any of the exemplars. (RTH 13873.)

The "I" in the note had a perpendicular line that went below the line of the bottom parallel line. There was no such thing in the exemplar. There was also a hook at the end of the top bar and went to the top of the "N". (RTH 13887.) There was no hook in the note. The top bar extended well past the top portion of the "N" in the note. Some of the exemplars had this phenomenon but others did not. (RTH 13888.)

[331] For example, he conceded that the heart-shaped "O" is a difference. (RTH 13917.) But, to Harris this difference was an accident, rather than being a natural characteristic. (RTH 13918.) Harris referred to the heart-shaped "O" as a freak but otherwise said there were no fundamental differences between the note and the exemplars. (RTH 13921.)

not significant for him as a documents examiner. (RTH 13935.)

Harris had no background in the physiology of the hand. (RTH 13935.) However, he testified that he could often identify abnormalities in handwriting such as would be caused by drugs, alcohol, or Parkinson's disease. There was nothing to indicate any such abnormalities in the maker of the Love Insurance note. (RTH 13936.)

B. Defense Experts

1. Dr. Michael Saks

Michael Saks, a professor who had done research into the area of the theory and background of handwriting comparison, had expertise both as a social scientist, a statistician and as a research methodologist. (RTH 17487.)[332]

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[332] Dr. Saks' primary background was research and methodology in social psychology. He had done research into the legal process and various aspects of it. He has a law degree from Yale University. (RTH 17490; CT 5067-68.) He had a M.S.L. degree, which is for people who work in the law but who do not need a J.D. to practice law. His primary interest was to study the decision-making process in the legal field. (RTH 17491.) In the law schools he taught students the applications of research methodology and statistics in the social science areas. He also taught a program at the University of Virginia to appellate judges on social science and the judicial process. (RTH 17492.) At the University of Iowa, he taught some straight law courses, as well as the psychology/sociology courses that he taught at Boston College. His resume listed various awards and professional affiliations. (RTH 17493.) Some of his research has been cited with approval by the United States Supreme Court and he has helped to draft model laws for the Department of Health and Human Services. He also acted as a consultant for the new Federal Sentencing Laws. He also was a consultant to the Federal Judicial Center, the U.S. Congress, the L.A. Sheriff, the North Carolina and Massachusetts Attorney Generals and the National Science Foundation. (RTH 17495.) He was the Editor in Chief of Law and Human Behavior and was on the editorial boards of other publications that mostly reflect the intersection of law and social science. (RTH 17497.) He wrote a treatise on "The use of Scientific Evidence in Litigation" with a Richard Van Duizend. He has also

(continued...)

Dr. Saks studied handwriting comparison proficiency studies and the general reliability of document examiners. (RTH 17487; 17500.) He started his research into the area by contacting the leading documents examiner with the Chicago Police Department and was referred to a large list of books and articles in the field. (RTH 17501.) Materials he examined in this area included the Journal of Forensic Science, the Forensic Science Journal, the Journal of Police Science and others. He also reviewed the handwriting comparison proficiency studies including those done by the Collaborative Testing Services (CTS) from 1984 through 1987. (RTH 17502-03.)[333]

Dr. Saks' was trained in statistics and taught statistics to his students, including judges. (RTH 17507.) He was qualified to advise others on how to conduct proficiency studies and how to evaluate proficiency studies that have been done. (RTH 17511.)

2. Dr. Denbeaux

Dr. Mark P. Denbeaux, a law professor, extensively studied the viability of expert testimony on handwriting comparison. Denbeaux was not a handwriting expert himself but he researched the foundations of the field. (RTH 17418.)[334]

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[332](...continued)
taught various courses in research methodology. (RTH 17498.) He also did work in connection with jury verdicts and the size of the jury involved. (RTH 17499.)

[333] There are a number of reasons for proficiency studies; one of which is to enable police labs to determine the general level of the proficiency of their employees. Also such studies help to check on the state of the art. The general purpose is to inform those in the fields regarding how well they are doing and to pinpoint any weaknesses. (RTH 17504.)

[334] He had also discussed his findings with key people in the field (continued...)

The courts were originally very hostile to handwriting comparison testimony, both in American and in England. Courts would routinely call it the lowest form of evidence.[335] However, a major shift in public opinion in this area occurred with the Lindbergh baby trial. The public and courts perceived that the handwriting analysis proved that Hauptman was guilty. (RTH 17436.) Thus, even though the experts had no formal schooling in this area, no structure, no determination as to personal aptitude of the person making the comparison; no further testing of the ability of the persons claiming this skill occurred after the Lindbergh baby case. (RTH 17437.)

A handwriting comparison is essentially a "show-up" that is, a one-on-one comparison of the unknown handwriting with that of the suspect. It is not a line-up in which samples from several different persons are compared to the unknown. (RTH 17431.)

The only way that people learn to become handwriting experts is at the knee of another expert – there are no schools, no courses, etc. (RTH 17442.) There are no credentials that must be earned, no academy or anything of that nature. Denbeaux knew of no certification process in that area. (RTH 17443.) There are no internal tensions in the discipline and very little written about it from a negative standpoint. No one has any economic interest to attack or challenge the field. (RTH 17444; 17467.)

Denbeaux compared handwriting to wine tasting; some people have a certain knack for identifying wine and others do not. (RTH 17445.) However, no one has ever demonstrated that people have the ability to pick

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[334](...continued)
including comparison experts, law enforcement, etc. (RTH 17418.)

[335] In the 19th century virtually every jurisdiction precluded such evidence. (RTH 17422.)

out handwriting in the same way that people have demonstrated that they can pick out wines. (RTH 17446.) There has never been any demonstration that when two sets of handwriting are similar that an expert is in any greater position to distinguish between them than a layman. (RTH 17447-48.)

The literature in the field is all anecdotal in nature rather than systematic. Handwriting experts do not have any categories or a taxonomy of terms. There are no licensing procedures in this area. (RTH 17450-51.) Dr. Denbeaux was not aware of any objective credential system. (RTH 17452.)

Denbeaux knew of that no court had ever compelled handwriting experts to demonstrate the reliability of their techniques. (RTH 17419.) One of the things that lawyers would do to handwriting analysts was to make them do in-court experiments. (RTH 17434.) Most courts enthusiastically adopted these procedures. California was among the courts that allowed this type of cross-examination of the alleged expert. (RTH 17435.)[336]

C. Proficiency Studies

Through Dr. Saks the defense sought to introduce proficiency studies as evidence relating to the unreliability of handwriting comparison testimony. (RTH 17502-03; In Limine Exhibits 586, 587, 588.) The studies were conducted by Collaborative Testing Services, Inc. (CTS) with the Forensic Sciences Foundation, Inc. as the "Program Affiliate." (*Ibid.*) These studies showed a 36% error rate among handwriting experts and a 45% error rate n the one handprinting study. (*Ibid.*; see also Faigman, et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, (West 2002), § 28-

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[336] One method used by Dr. Denbeaux in his research was to have the suspect write one exemplar and have nine of his students try to imitate the handwriting and put those into the line-up. The expert was to select the one that was the suspect's. (RTH 17468.)

2.3.1-28-2.3.3, pp. 445-55; § 2.5.2(B)(2), pp. 370-75 above, incorporated herein.)

However, the trial court refused to allow and consider this evidence. (RTH 17625; 17634.)

D. In-Court Testing Of The Prosecution Expert

The defense also sought, during the in limine testimony of witness Harris, to conduct an in-court test of his ability. The judge precluded the defense from doing so. (See § 2.6.2, pp. 445-52 below, incorporated herein.)

2 JACOBS CASE

2.5 HANDPRINTING COMPARISON ISSUES: IN LIMINE

ARGUMENT 2.5.4

THE JUDGE ERRONEOUSLY DENIED A *KELLY* HEARING

A. Introduction

Under *People v. Kelly* (1976) 17 Cal.3d 24 a new or novel scientific technique must be excluded unless t has gained general acceptance in the relevant scientific community. In the present case, the trial judge precluded the defense from mounting a *Kelly* challenge to the prosecution handprinting expert because handprinting comparison is neither a scientific nor a new or novel technique. (RTH 4106-13; 5463; 5468-70.) This ruling was error.

B. A *Kelly* Hearing Should Have Been Held As To Handprinting Comparison

1. The *Kelly* Formulation

It has long been the rule in California that expert testimony based upon scientific or technical analysis is not admissible at trial unless the proponent of the expert testimony can establish: (1) the reliability of the analysis or method used; (2) that the expert witness is properly qualified as an expert in the use of that method; and (3) that the correct method was used in the particular case. (*People v. Kelly*, *supra*, 17 Cal. 3d at 30; *People v. Dellinger* (1984) 163 Cal. App. 3d 284, 292-296 [applying *Kelly* to anthropomorphic dummy experiments].) Hence, in California, the standard for the admission of expert testimony based upon a scientific or technical analysis is called the "*Kelly*" test."[337]

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[337] Prior to the advent of *Daubert v. Merrell Dow Pharmaceuticals,* (continued...)

Under the *Kelly* formulation, the task for determining whether a given type of analysis was reliable was "assigned . . . to the members of the scientific community."[338] (*People v. Leahy* (1994) 8 Cal. 4th 587, 594 quoting *People v. Kelly, supra,* 17 Cal. 3d at 30.) A method is deemed reliable if it has "gained general acceptance" in the scientific community. (*Id.*; see also *People v. Shirley* (1982) 31 Cal. 3d 18, 54 ["It is the proponent of such testimony, of course, who has the burden . . . of demonstrating by means of qualified and disinterested experts that the new technique is generally accepted as reliable in the relevant scientific community"]; *People v. Dellinger, supra,* 163 Cal. App. 3d at 293 [no corroborative testimony that the technique was accepted within the scientific community].)

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (*Huntingdon v. Crowley* (1966) 64 Cal. 2d 647, 653 quoting *Frye v. United States, supra,* 293 F. at

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[337](...continued)
Inc. (1993) 509 U.S. 579 which overruled *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 the standard was called the *Kelly/Frye* test. (*People v. Leahy* (1994) 8 Cal.4th 587, 593.)

[338] The terms "analysis," "procedure," "method," or "technique" are used interchangeably throughout the cases and literature. The courts have applied such terms to any kind of testimony based upon an experts "manipulation of physical evidence, such as lie detectors, experimental systems of blood typing, voiceprints, identification by human bite marks, and microscopic analysis of gunshot residue." (*In Re Amber B.* (1987) 191 Cal. App. 3d 682, 686.)

1014.)

As one California court put it: "The core of the [*Kelly*] rule is that the admissibility of new scientific evidence is not dependent on the evaluation of the technique or process by judges, but rather on a finding that a clear majority of the relevant scientific community accepts the technique as reliable. (*People v. Joehnk* (1995) 35 Cal. App. 4th 1488, 1501.) Hence, under *Kelly* the judge does not actually determine reliability but simply conducts a "nose count" of the experts in the field. (See *People v. Bolden* (2002) 29 Cal.4th 515, 546; *People v. Leahy*, *supra*, 8 Cal.4th at 602; see also *United States v. Hines* (D. Mass. 1999) 55 F.Supp.2d 62, 66.)

The *Kelly* formulation has been called "conservative" by this Court. (*People v. Leahy, supra,* 8 Cal. 4th at 602.) By that the Court meant that some techniques will remain inadmissible until the court is "reasonably certain that the pertinent scientific community no longer views them as experimental or of dubious validity." (*Id.)* As a result, the court noted, "some criticism has been directed at the *Kelly* standard, primarily on the ground that the test is too conservative, often resulting in the prevention of the admission of relevant evidence." (*Id.* at 602.) Nevertheless, this Court in *Leahy* court decided that it was better to exercise "considerable judicial caution in the acceptance of evidence" than to adopt a less rigorous standard of admission. (*Id.*)

The *Kelly* formulation differs to a degree from the standard now applied by federal courts, although the "general acceptance" standard of *Frye* is still considered. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, the Supreme Court recognized that the *Frye* standard had been used by the federal courts for over 70 years. However, the Supreme Court ruled in *Daubert* that a more liberal standard of admissibility had been adopted by the federal courts in 1975 when the Federal Rules of Evidence

became effective. (See *People v. Leahy, supra,* 8 Cal. 4th at 596 [the "rigid" *Frye* standard was at odds "with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony"].) In *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137 the Supreme Court indicated that the admissibility of expert testimony from technical fields is governed by the same criteria as the admission of scientific expert testimony.

Under *Daubert* the court must look to five factors, none of which alone controls, to determine the admissibility of expert testimony. Among the factors which the federal court must consider in determining the admissibility of expert testimony is whether the method or analysis at issue in the expert's testimony has been subject to peer review and publication, the error rate for the analysis or method, the existence and maintenance of standards and controls, and the degree to which the analysis or method has been accepted in the scientific community. (*Daubert v. Merrill Dow Pharmaceuticals, Inc., supra,* 509 U.S. 579.) While it is now one factor among several, it is clear that the federal courts still consider the "general acceptance test" of *Frye* in determining admissibility of expert testimony. (See *United States v. Hines, supra,* 55 F. Supp.2d at 65 [*Frye* standard "still important"].) Thus, while federal law is not determinative, it may still guide the courts in California concerning the general acceptance within the scientific community of any particular method or technique that is the subject of expert testimony. Further, since the *Daubert/Kumho* test is more liberal in favor of admissibility, any evidence that cannot satisfy *Daubert* also cannot satisfy *Kelly, a fortiori.*[339]

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[339] In *People v. Leahy, supra,* 8 Cal.4th at 594, this Court concluded that *Daubert* affords no compelling reason for abandoning *Kelly* in favor of (continued...)

2. Handprinting Comparison Is An Unproven Scientific Technique To Which *Kelly* Should Be Applicable

Kelly addressed the admissibility of expert testimony based upon the application of "a new scientific technique." (*People v. Kelly*, *supra*, 17 Cal. 3d at 30.) *Kelly* made no attempt to explain what qualified as a "new" technique. *Kelly* made no attempt to explain what technique was or was not "a new scientific technique." Therefore, for many years, "[w]hile the standards imposed by the [*Kelly*] rule (were) clear, the definition of 'new scientific technique' (was) not." (*People v. Stoll* (1989) 49 Cal. 3d 1136, 1155.) At most it could be said: "The test is usually applied to novel devices or processes involving the manipulation of physical evidence, such as lie

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[339](...continued)
the more "flexible" approach outlined in *Daubert*. The Court "deemed the more cautious Frye formulation preferable to simply submitting the matter to the trial court's discretion for decision in each case." (*Id.* at 595.) Elsewhere in the opinion, the Court refers to *Frye's* "austere standard" and its "essentially conservative nature." (*Id.* at 595, 603.) Since the Court explicitly held that *Kelly* is more cautious, conservative, and austere than *Daubert*, it follows that a technique that cannot pass muster under *Daubert* certainly must fail the more stringent *Kelly* test. Moreover, in applying *Kelly*, the court in *Leahy* relied on many of the indicia of scientific reliability found determinative in *Daubert*. (See *Id.* at 609 [to be qualified as a *Kelly* expert on an HGN test, witness must have "some understanding of the processes by which alcohol ingestion produces nystagmus, how strong the correlation is, how other possible causes might be masked, what margin of error has been shown in statistical surveys, and a host of other relevant factors].) The *Daubert* reliability factors are therefore highly relevant to the *Kelly* standard. Even aside from *Kelly*, these factors are relevant because "the reliability and thus the relevance of scientific evidence is determined . . . under the requirement of Evidence Code section 350, that '[n]o evidence is admissible except relevant evidence." (*Id.*, at 598.) In other words, even apart from *Kelly*, scientifically unreliable evidence is irrelevant and hence inadmissible. (See also § 2.5.5(B), pp. 411-13, below, incorporated herein.)

detectors, experimental systems of blood typing, voice prints, identification by human bite marks, and microscopic analysis of gunshot residue." (*In Re Amber B.* (1987) 191 Cal. App. 3d 682, 686.)

This Court clarified these issues in *Leahy*. The Court determined that a technique was "scientific" if in name and description it supposedly provides some "definitive truth." The Court stated: "[A] technique or procedure may be deemed 'scientific' for purposes of *Kelly/Frye* if 'the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury." (*People v. Leahy*, *supra*, 8 Cal. 4th at 606.) "Handwriting analysis" in both name and description is exactly the kind of technique that purports to provide some "truth" that "the expert need only recognize and report to the jury." The "handwriting expert" claims that through his or her analysis the true author of a particular document can be determined.[340] Such a determination carries the "aura of certainty" that science provides and certainly would be viewed by the jury as "scientific." Indeed, a leading hornbook on this area of the law, *Scientific Evidence in Criminal Cases*, Moenssens, Moses, and Inbau, 1973 Ed., describes handwriting analysis as the "scientific examination of questioned documents" to determine, in part, "whether some specimen of handwriting or typewriting has been made by a suspected individual." (*Id.*,

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[340] "Handwriting identification experts believe they can examine a specimen of adult handwriting and determine whether the author of that specimen is the same person or a different person than the author of any other example of handwriting, if both specimens are of sufficient quantity and not separated by years or the intervention of degenerative disease." (*Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise*, Michael Risinger and Michael Saks, 82 Iowa L. Rev. 21, 35 (1996).)

at 410, 411.) More recent discussions of handwriting analysis still described it as "a respectable forensic science discipline." (*Handwriting Identification Evidence in the Post-Daubert World*, Andre Moenssens, U.M.K.C. Law Rev. Vol. 66, 251, 310 (1997).) Handprinting analysis is just the type of analysis that is subject to the *Kelly* formulation. Thus, in a case decided long before *Daubert*, the Ninth Circuit ruled that handwriting analysis was subject to the *Frye* standard. The Ninth Circuit noted simply: "It is undisputed that handwriting analysis is a science in which expert testimony assists a jury." (*United States v. Fleishman* (9th Cir. 1982) 684 F.2d 1329, 1337.)[341]

"In determining whether a scientific technique is 'new' for *Kelly* purposes, long-standing use by police officers seems less significant a factor than repeated use, study, testing and confirmation by scientists or trained technicians." (*People v. Leahy*, *supra*, 8 Cal. 4th at 605.) In *Leahy* the Court held that the determination whether a technique was "new" turned not on its history of use in the scientific community but whether it was "settled in law." (*Id.* at 606.) The Court held that if the technique was "repeatedly challenged in court" and had "a recent history of legal challenges to (it's) admissibility . . . it seems appropriate that we deem the technique 'new' or 'novel' for purposes of *Kelly*." (*Id.*)

Handprinting analysis is precisely the kind of technique the Court in

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[341] Several federal courts prior to 1999 held that the *Daubert* standard did not apply to handwriting analysis because it was a "technical" not a "scientific" technique. (See, e.g. *United States v. Jones* (6th Cir. 1997) 107 F.3d 1147.) These cases were overruled by *Kumho Tire Co. v. Carmichael*, *supra*, 526 U.S. 137, in 1999 when the Supreme Court ruled that *Daubert* applied to both scientific and technical fields of expert testimony. (See, e.g. *United States v. Hines*, *supra*, 55 F.Supp. 2d at 66 ["*Kumho* extended *Daubert* to nonscientific fields . . . that are based on observations, not traditional science"].)

Leahy deemed "new" or "novel." It has an extensive "recent history of legal challenges" to its admissibility. Indeed, the current trend is to bar the admission of exactly the kind of handwriting analysis that is at issue here. (See e.g., *United States v. Rutherford* (D. Neb. 2000) 104 F. Supp.2d 1190, 1193 ["As such, the Court finds it prudent to join an ever-growing number of federal district courts that have found it necessary to place limits on the proffered testimony of a handwriting expert (*United States v. Van Wyk* (D. N.J. 2000) 83 F. Supp. 2d 515; *United States v. Santillan* (N.D. Cal. Dec. 3, 1999) 1999 U.S. Dist. LEXIS 21611, 1999 WL 1201765; *United States v. Hines* (D. Mass. 1999) 55 F.Supp.2d 62 and *United States v. McVeigh* (D. Colo. 1997) 106 F.3d 325)"]; see also *United States v. Starzecpyzel* (S.D.N.Y. 1995) 880 F. Supp. 1027, 1036 [Were the court to apply *Daubert* to the proffered FDE (forensic document examiner) testimony, it would have to be excluded." Each of these federal courts which examined the admissibility of handwriting analysis did so despite the fact that the federal standard under *Daubert*, like the *Kelly/Frye* formulation, was about "new fields" and "new methodology." (*United States v. Hines*, *supra*, 55 F.Supp.2d at 66 fn. 11.)

As these cases illustrate, the fact that an allegedly scientific procedure has been accepted by courts in the past does not insulate that procedure from challenge based on advances in scientific thinking. Northern California Federal District Court Judge Lowell Jensen put the matter bluntly: "The government is correct in their assertion that pre-*Daubert/Kumho*/Ninth Circuit precedent supports the admissibility of (handwriting) testimony; however, the world has changed. The Court believes that . . . a past history of admissibility does not relieve this Court of the responsibility of now conducting *Daubert/Kumho* analysis as to this proffered expert testimony." (*United States v. Santillan, supra,* 1999 U.S. Dist. LEXIS 21611, 1999 WL 1201765

at 4; see also, *United States v. Hines*, *supra*, 55 F.Supp.2d at 67 ["The Court is plainly inviting a reexamination even of 'generally accepted' venerable, technical fields"]; but see *United States v. Paul* (11th Cir. 1999) 175 F.3d 906, 910-11; *United States v. Jones* (6th Cir. 1997) 107 F.3d 1147, 1160-61.)

This Court is in agreement with this forward-looking approach. In *People v. Soto* (1999) 21 Cal.4th 512, 540-541 n. 31, the Court emphasized that "In a context of rapidly changing technology, every effort should be made to base that controlling effect on the very latest scientific opinions . . ." (See also, *People v. Allen* (1999) 72 Cal.App.4th 1093, 1101 [the issue is not when a new scientific technique is validated, but whether it is or is not valid; that is why the results generated by a scientific test once considered valid can be challenged by evidence that the test has since been invalidated]; *People v. Smith* (1989) 215 Cal.App.3d 19, 25 [in determining whether a particular technique is generally accepted "defendant is not foreclosed from showing new information which may question the continuing reliability of the test in question or to show a change in the consensus within the scientific community concerning the scientific technique"].)

The above cases amply demonstrate that in the last two years there has been an explosion of legal challenges to the admissibility of handwriting analysis. *Leahy* expressly opened the door for such challenges in California when it held that even well-established procedures would be subject to reexamination as "new" under the *Kelly* formulation if the general acceptance of those well-established procedures became open to question. That is exactly what has happened to handwriting analysis. As will be demonstrated below, when the scientific community recently examined the reliability of handwriting analysis it found "serious problems."

3. The Prosecution Failed To Empirically Prove The Basic Premise Underlying Handprinting Comparison Testimony

The underlying premise of testimony which identifies handwriting as belonging to one individual is that the handwriting of that individual is so unique that all other writing can be distinguished from it. "Handwriting analysis proposes a theory that each person's handwriting is unique, and involves a method by which a trained expert can identify each writing's author." (*United States v. Lewis* (S.D. W. Va. 2002) 220 F.Supp.2d 548, 553; see also *United States v. Hidalgo* (D.C. Ariz. 2002) 229 F.Supp.2d 961, 967.) Absent empirical proof of such uniqueness, any opinion – whether expert or lay – is **not** sufficiently reliable to be admissible. Hence, even if an expert may point out similarities or differences between the writings, any opinion as to the ultimate issue of who wrote the questioned document should be excluded. "The role of the handwriting expert is primarily to draw the jury's attention to similarities between a known exemplar and a contested sample." (*United States v. Crisp* (4th Cir. 2003) 324 F.3d 261, slip opn. at 26; see also *United v. States v. Hines* (D. Mass. 1999) 55 F.Supp.2d 62.)[342]

4. The Scientific Community Has Not Validated Handprinting Comparison As A Reliable Technique

Prior to the Civil War, almost no American jurisdiction permitted the testimony of handwriting experts. (*Exorcism of Ignorance as a Proxy For*

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[342] A number of cases which have addressed the issue "distinguish between a questioned document examiner's testimony comparing the [document] with the exemplars and identifying similarities and differences, and testimony concerning the document examiner's inferences of authorship based on those similarities." (Faigman, et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, (West 2002), § 28-1.4.3, p. 423; see e.g., *United States v. Crisp, supra*; *United States v. Hines*, *supra*.)

Rational Knowledge; The Lessons of Handwriting Identification "Expertise", Risinger, Denbeaux, and Saks, U. of Penn. L. Rev. Vol 137, 731, 762 (1989), hereafter just *Risinger*.) That largely changed when Albert Osborn set out "to become a founding father of 'scientific' handwriting identification in the United States." (*Id.* at 765.) In 1910, Osborn published the book "Questioned Documents." John H. Wigmore, "the 800 pound gorilla of American evidence law," wrote the introduction to Osborn's handwriting analysis book. (*Id.*, at 768.) Over the next thirty years, Osborn and Wigmore together "brought 'scientific' handwriting identification from a phenomenon barely tolerated by courts to a recognized source of useful and dependable information . . ." (*Id.*, at 769.)[343] Osborn and Wigmore obtained the "ultimate triumph of this vision" when Osborn testified in the Lindbergh baby kidnapping case in 1935. His testimony was key to the conviction of Bruno Hauptman in that case. "For nearly sixty years after the affirmance of *State v. Hauptman*, no reported opinion rejected handwriting expertise nor displayed much skepticism towards it." (Michael J. Saks, *Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise*, 82 Iowa L. Rev. 21, 27 (1996) [hereinafter Risinger & Saks, *Science & Nonscience*].) "The validity of handwriting analysis has been assumed in Wigmore's treatises, and virtually, every standard evidence treatise since that point." (*United States v. Hines, supra*, 55 F.Supp.2d at 68, fn. 14.) However, as *Risinger* and his colleagues found, Osborn and Wigmore advocated the acceptance of handwriting

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[343] See also *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, Michael Saks, Hastings L.J., Vol. 49, 1069, 1096 (1998): "Together, Osborn and Wigmore conducted a quarter century public relations campaign on behalf of 'scientific' handwriting identification expertise as practiced by Osborn and described in his book."

analysis "despite the absence of a shred of empirical evidence of anyone's ability to do what Osborn claimed he and others of his trainees and followers could do." (*Risinger*, p. 769.)

Writing in 1989, *Risinger* set out to determine if the scientific community had found handwriting analysis reliable. He wrote:

> Our literature search for empirical evaluation of handwriting identification turned up one primitive and flawed validity study from nearly 50 years ago, one 1973 paper that raises the issue of consistency among examiners but that presents only uncontrolled impressionistic and anecdotal information not qualifying as data in any rigorous sense, and a summary of one study in a 1978 government report. Beyond this, nothing. (*Risinger*, p. 738.)

Risinger concluded: "If handwriting expertise were offered for the first time today with this published record as its foundation, courts would almost certainly reject it." (*Id.*, at 740.)

When *Risinger* looked at the individual studies that had been done to date, he found that, in fact, handwriting experts were not reliable. In 1939, Fred Inbau, one of the authors of *Scientific Evidence in Criminal Cases* cited above, conducted a test which "failed to produce any meaningful difference between document examiners and others" such as a layperson. In any event, the "methodological defects in the study prevent it from being used as a basis to draw virtually any conclusion." (*Risinger*, p. 741; see also *Brave New "Post-Daubert World" - A Reply to Professor Moenessens,* Risinger, Denbeaux and Saks, 29 Seton Hall L. Rev. 405, 416 (1998) [everyone concedes that the 1939 Inbau study was so flawed that it provided no meaningful data on expert's abilities, or their marginal advantage over lay persons, which was our original conclusion].) The Forensic Science Foundation conducted a number of studies in 1975, 1984, 1985, 1986 and

1987 which were never published. When all five test results were combined, *Risinger* found that a "rather generous reading of the data would be that in 45% of the reports forensic document examiners reached the correct finding, in 36% they erred partially or completely, and in 19% they were unable to draw a conclusion." (*Risinger*, p. 747.) When the data from the 1975 test was omitted because that test was considered "unrealistically easy," *Risinger* found that "the examiners were correct 36% of the time, incorrect 42%, and unable to reach a conclusion 22% of the time. (*Id.*, at 748.)

Largely in response to *Risinger*'s 1989 Exorcism article, a new study was conducted and the results reported in Writer Identification by Professional Document Examiners, Kam, Fielding, and Conn, 42 J. Forensic Science 778 (1997). The Kam Study, as it became know, claimed that its test results "lay to rest the debate over whether or not professional document examiners possess writer-identification skills absent in the general public. They do." (*Id.*, at 785.) The Kam Study claimed that the professional document examiners tested in that study had an error rate of 6.5% while a group of nonprofessionals had an error rate of 38.3%. (*Id.*, at 779.)

The Kam Study, however, was found to be deeply flawed and roundly criticized. In *Science and Nonscience In the Courts: Daubert Meets Handwriting Identification Expertise*, *supra*, 82 Iowa L. Rev. at pp. 60-62, numerous flaws in the methodology used by Kam were identified. In a later article, *Brave New "Post-Daubert World*, Michael Saks, 29 Seton Hall L. Rev. 405, 419-424 (1998), hereafter just *Saks*, additional flaws were identified. For instance, *Saks* found that the Kam Study was based upon a "sorting test of a type encountered rarely, if at all, in actual practice." (*Id.* at 423.) Additionally, *Saks* noted that "the experts and nonexperts took the test under different incentive structures which would be expected to yield more

false positives for the nonexperts . . ." (*Id.*, at 426.) Finally, *Saks* noted that perhaps the most serious problem with the Kam Study was "the possibility that some of the document examiners, but not the nonexpert participants, had helpful information about the test in advance of its administration." (*Id.*, at 428.) Thus *Saks* concluded that the Kam Study "had several serious flaws, which leave open questions as to its actual meaning, and third, even if taken at face value, the study does not mean what (it) seems to claim . . ." (*Id.* at 420.)

The courts have also panned the Kam Study. "While Kam has conducted several interesting and important tests, purporting to validate handwriting analysis, they are not without criticism. They cannot be said to have 'established' the validity of the field to any meaningful degree." (*United States v. Hines*, *supra*, 55 F.Supp.2d at 68-69; see also *United States v. Santillan*, supra, 1999 WL 1201765: "Because of this lack of data and structural flaws, peer review of this study and its usefulness in evaluating the reliability of handwriting experts is of limited value.") In *United States v. Rutherford*, supra, 104 F. Supp. 2d at 1193, Moshe Kam testified at a hearing. After reviewing "the four Kam studies submitted by the government," the court concluded "that handwriting analysis testimony on unique identification lacks both the validity and reliability of other forensic evidence, such a fingerprint identification or DNA evidence."

Writing in the summer of 2000, Michael Saks was able to still say: "There are no meaningful, and accepted validity studies in the field" of handwriting analysis. (*Banishing Ispe Dixit: The Impact of Kumho Tire on Forensic Identification Science*, Michael Saks, 57 Wash. & Lee L. Rev. 879, 899 (2000).) Even those who support it have recognized that handwriting analysis is "[l]acking a meaningful body of data from controlled experiments

. . ." *Writer Identification by Professional Document Examiners*, *supra*, at p. 778. Many of the courts which have addressed the issue have reached the same conclusion.

In *United States v. Jones*, *supra*, 107 F.3d at 1157, the Sixth Circuit noted that "academicians and forensic document examiners alike have recognized the lack of empirical evidence in the field of handwriting analysis." In *United States v. Starzecpyzel*, *supra*, 880 F.Supp. at 1038 the court was more blunt. It stated: "The government, on the other hand, produced no evidence of mainstream scientific support for forensic document examination." (Emphasis in original.) (But see *United States v. Paul*, *supra*, 175 F.3d 906, 910-11.) In *United States v. Hines*, *supra*, 55 F.Supp.2d at 69 the court stated:

> There is no data that suggests that handwriting analysts can say, like DNA experts, that this person is "the" author of the document. There are no meaningful, and accepted validity studies in the field . . . There is no academic field known as handwriting analysis. This is a "field" that has little efficacy outside of a courtroom. There are no peer reviews of it.

In *United States v. Rutherford*, *supra*, 104 F. Supp. 2d at 1193, where Moshe Kam testified in person, the court held "that handwriting analysis testimony on unique identification lacks both the validity and reliability of other forensic evidence, such as fingerprint identification or DNA evidence." In *United States v. Santillan*, supra, 1999 U.S. Dist. LEXIS 21611, *14, 1999 WL 1201765 at 5, the District Court for the Northern District of California, which had also reviewed the Kam Study, stated: "Nothing has been presented to the Court that the opinion of a handwriting "expert" as to the unique identity of the author of the questioned handwriting is a valid or reliable expert opinion. No tests or studies or the accuracy of such an opinion have as

yet been conducted." (See also, *People v. Scheid* (1997) 16 Cal.4th 1, 7 [the prosecution's handwriting expert opined that defendant wrote the directions, but on cross-examination, he acknowledged that he could not attribute the diagram to anyone].)

In sum, critics and supporters alike agree that there is no consensus in the scientific community concerning the reliability of handwriting analysis. Hence, the trial judge erred in precluding the defense from making a *Kelly* challenge to the prosecution's handwriting comparison expert.

C. Even If A *Kelly* Hearing Was Not Necessary For Handwriting Comparison, A Hearing Was Required As To Handprinting Comparison

Even if Judge Hammes correctly ruled that handwriting was sufficiently well accepted to satisfy *Kelly*, the present case involved handprinting not handwriting.

Handprinting has received far less attention and acknowledgment than handwriting. For example, Harris testified that the overwhelming majority of the cases in which he had testified involved handwriting not handprinting.[344] Moreover, Harris acknowledged that there is no catalog of printed letters which can be used for comparison and analysis of handprinting. (RTH 8211.)

While Harris testified that there are some articles which address handprinting, he didn't specify any. (RTH 8210.) Nor has the proficiency testing of handprinting been prolific. When he testified for the defense in *United States v. Fujii* (N.D. Ill. 2000) 152 F.Supp.2d 939, Michael Saks "was

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[344] Harris said that five out of six cases involve handwriting. (RTH 8209-10.)

aware of only one" proficiency test involving handprinting.[345] (*Id.* at 941.)

In sum, in the present case, as in *Fujii*, the record left the court with "no idea whether there is a recognized and accepted expertise in identifying handprinted documents. . . ." (*Fujii*, 152 F. Supp.2d at 941.)

D. *Kelly* Should Not Be Limited To Expert Opinions Regarding Matters That Are Both "New" and "Scientific"

It was demonstrated above that the expert handprinting opinion testimony is novel, scientific evidence as defined by *People v. Leahy, supra,* 8 Cal.4th 587. However, even if the technique didn't meet the *Leahy* requirements, it still should be reviewed under *Kelly*.[346] Merely because a scientific procedure is old or well established does not mean that it is reliable. (See generally *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.) To the contrary, the older the procedure the more likely that its scientific underpinnings may have been proven false by modern science. Indeed, many of the oldest and most established techniques have recently been challenged as unreliable.[347] Accordingly, to the extent that *Kelly* acts as the

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[345] In that study only 13% of the handwriting experts tested got the right answer; 45% identified the wrong person. (*Fuji, supra*, at 941.)

[346] Judge Hammes refused the defense request for a *Kelly* hearing on the reliability of handprinting comparison opinion testimony because such testimony way now a new or novel scientific subject matter. (RTH 8160-61.)

[347] See e.g., *United States v. Plaza* (E.D. Pa. 2002) 179 F.Supp.2d 492 [excluding, in part, expert testimony comparing fingerprints]; Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint "Science" is Revealed*, 75 Southern California Law Review 605 (2002); James E. Starrs, *Judicial Control Over Scientific Supermen: Fingerprint Experts and Others Who Exceed The Bounds*, (1999) 35 Crim. L. Bull. 234, 243-246 [describing two cases in England in which misidentifications were made despite the fact that (continued...)

reliability gatekeeper in California (see *People v. Bolden* (2002) 29 Cal.4th 515, 544), it violates the federal constitution to allow an "old" scientific technique into evidence without determining that it satisfies *Kelly*.[348]

Similarly, the fact that an expert opinion is not scientific does not assure its reliability. (See e.g., *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137.)

In the present case, there was a very real issue as to whether handprinting comparison could have satisfied *Kelly*. Despite longstanding recognition that handwriting comparison is as a field upon which testimony could be given, the defense experts and the proficiency studies proffered by the defense suggested that handwriting comparison could fall short of the general acceptance required by *Kelly*. Indeed, Judge Kennedy actually ruled that the handprinting opinion should be excluded under *Kelly*. (See RTK 613.)

Accordingly, handprinting comparison opinion evidence should not have been admitted into evidence without a *Kelly* reliability determination.

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[347](...continued)
the British examiners insist on 16 points for an identification and triple check fingerprint identifications]; Steele, *All We Want You To Do Is Confirm What We Already Know": A Daubert Challenge to Firearms Identifications*, 38 Crim L. Bull. 1 (July/August 2002); Benjamin Bachrach, *Ballistics Identification: How Sure Are We That A Match Is A Match?,* AFTE Conference 2000 ["The subjective nature of current ballistic identification criteria poses a serious problem for the use of ballistic evidence evaluations in court. Perhaps the most compelling evidence of the need for a quantifiable methodology for firearms identification comes from the *Daubert* decision"].

[348] Of course, if the technique has already passed *Kelly* muster, then *Kelly* need not be satisfied again unless new evidence has come to light. (See *People v. Bolden*, *supra*, 29 Cal.4th at 547.)

E. Even If Prong One of *Kelly* Is Not Applicable to Handprinting Comparison, Prong Three Should Be Applicable

Under *Kelly*, even in cases where general acceptance of the technique has been proven (*Kelly*, Prong 1) the prosecution must still demonstrate that scientifically correct procedures or methods were used in the case at bar. (*Kelly*, Prong 3.)[349] Prong 3 requires the proponent of expert testimony to demonstrate that correct scientific procedures were used in the particular case. (*People v. Kelly, supra,* 17 Cal.3d at 30; see also *People v. Leahy*, *supra*, 8 Cal.4th at 595.)

In the present case, *Kelly* Prong 3 was not satisfied and, therefore, the expert testimony on handprinting comparison should have been excluded. Judge Hammes found that the investigating authorities negligently failed to follow their own procedures for processing and preserving the Love Insurance note. (RTH 25443.) As a result the handprinting comparison methodology was suspect since the comparison had to be made from a photograph rather than the original note. (See § 2.5.7, pp. 438-43 below, incorporated herein.)

Moreover, special additional procedures should be followed with respect to written documents. They "should be placed in a protective covering to guard against accidental tears, folds, pen marks, finger marks, or smudges." (Williard, *When and How to Use an Examiner of Disputed Documents*, 29 Practical Lawyer 27, 29 (Vol. 2) (1983).)

Accordingly, prong three of *Kelly* was not satisfied and the handprinting comparison testimony should have been excluded for this reason as well.

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[349] See Volume 4, § 4.3, pp. 1124-45, incorporated herein for additional discussion of *Kelly*, Prong 3.)

F. The Failure To Hold A *Kelly* Hearing Violated The Federal Constitution

The ruling denying such a *Kelly* hearing violated the federal constitution because it allowed the jury to consider unreliable expert opinion simply because that opinion was based on a technique which did not meet the new and scientific requirements of *Kelly*. The Due Process Clause of the Fourteenth Amendment and the heightened reliability requirements of the Eighth Amendment forbid juror consideration of unreliable evidence in a capital case regardless of whether or not the evidence is based on a new or scientific technique. (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; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Moreover, the ruling also violated the federal constitution because the expert's testimony constituted highly prejudicial evidence in a closely balanced case. The state and federal Due Process Clauses protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v. Olivas* (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.)

Further, denial of a *Kelly* hearing precluded the defense from impeaching the prosecution testimony based on its lack of acceptance in the scientific community. Hence, Lucas' constitutional rights to present a

defense, due process, confrontation and compulsory process were violated. The United States Supreme Court has again and again noted the "fundamental" or "essential" character of a defendant's right both to present a defense, (*Crane v. Kentucky* (1986) 476 U.S. 683, 687; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19), and present witnesses as a part of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v. Arkansas* (1987) 483 U.S. 44, 55; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; *Webb*, *supra*, 409 U.S. at 98; *Washington*, *supra*, 388 U.S. at 19.) The Court has variously stated that an accused's right to a defense and a right to present witnesses emanate from the Sixth Amendment (*Taylor*, *supra*, 484 U.S. at 409; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867) the Due Process Clause of the Fourteenth Amendment (*Rock*, *supra*, 483 U.S. at 51; *Trombetta*, *supra*, 467 U.S. at 485; *Chambers*, *supra*, 410 U.S. at 294; *Webb*, *supra*, 409 U.S. at 97; *In re Oliver* (1948) 333 U.S. 257), or both. (*Crane*, *supra*, 476 U.S. at 690; *Strickland v. Washington* (1984) 466 U.S. 668, 684-85; *Washington*, *supra*, 388 U.S. at 17-18.)

Finally, because Lucas was arbitrarily denied his state created right to a *Kelly* determination of reliability, 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. Judge Hammes Was Bound By Judge Kennedy's Ruling Excluding The Expert Handprinting Opinion

When the defense sought to relitigate Judge Kennedy's previous denial of their discovery motion, Judge Hammes ruled that she was bound to adopt the previous ruling under Code of Civil Procedure § 170 in the absence of

good cause to change the ruling.

H. Admission Of The Handprinting Comparison Evidence Was Prejudicial

Precluding a *Kelly* hearing as to the prosecution handprinting comparison testimony as to the Love Insurance note was especially damaging to Lucas for two reasons.

First, the expert opinion that Lucas authored the note to a "reasonable certainty" was likely to have an undue influence on the jurors. "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Kelly*, *supra*, 17 Cal.3d at 31.) Thus, "[t]he expert opinion testimony created a significant danger that the jurors would conclude erroneously that they were not the best qualified to assess the [evidence], that they should second guess their own judgment, and that they should defer to the Government's experts." (*United States v. Hanna* (9th Cir. 2002) 293 F.3d 1080, 1087.)[350]

Second, the expert testimony conveyed, as a given truth, the essential assumption that all handprinting is unique and individualistic. In other words, Harris' opinion, to a "reasonable certainty" that Lucas authored the note assumed, that the 13 block printed letters and seven numbers on the Love Insurance note were so unique that the author could be determined to the

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[350] This risk is present even if the evidence is within bounds of the jury's ordinary experience. "Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value. On the other hand, the risk of unfair prejudice is real. By appearing to put the expert's stamp of approval on the government's theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged." (*United States v. Gonzalez-Maldonado* (1st Cir. 1997) 115 F.3d 9, 17-18.)

"reasonably certain" exclusion of all other persons.[351] Because the defense was not permitted to challenge this essential premise, the jurors were free to fully rely on this premise, as did Judge Hammes (RTH 25439-40), to conclude that Lucas must have authored the note based on their perceived similarities between the note and Lucas' printing.

Hence, the error was substantial, and because the Jacobs case was closely balanced (see § 2.3.1(I)(2), pp. 209-11 above, incorporated herein) the error was prejudicial under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) Therefore, the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was

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[351] The jury instructions improperly legitimized Harris' status as an "expert" by describing him as an "expert." (See § 2.9.6, pp. 572-75 below, incorporated herein.)

prejudicial, individually and cumulatively, as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[352] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." 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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

I. Alternatively The Matter Should Be Remanded For A Hearing Before A Different Judge On Lucas' Challenge To The Handwriting Comparison Testimony

As demonstrated above, the trial court's improper admission of "expert" handwriting comparison testimony without having permitted a *Kelly* challenge to that testimony prejudiced Lucas at both phases of trial and requires reversal of Lucas' convictions and sentence of death. Alternatively, if the Court believes it possible to remedy the trial court's error by permitting

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[352] 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.]

a post-trial *Kelly* hearing, the matter may be remanded for a new hearing on the motion at which the burden is properly imposed upon the prosecution. (See *People v. Leahy*, *supra*, 8 Cal.4th at 610-11 [remand as proper remedy for erroneous in limine hearing on admissibility of expert testimony].)

Such a remand should be to a different judge. Having already determined and ruled that Lucas should be executed, it would be virtually impossible for Judge Hammes to remain totally impartial no matter how "objective and disciplined [she] may be. . . ." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 15.) Therefore, if the matter is remanded, it should be heard by a different judge. (See *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 576; *People v. Stanley* (1984) 161 Cal.App.3d 144, 156; *United States v. Mikaelian* (9th Cir. 1999) 168 F.3d 380, 387-88; *United States v. Clark* (2nd Cir. 1973) 475 F.2d 240, 251.)

2 JACOBS CASE

2.5 HANDPRINTING COMPARISON ISSUES: IN LIMINE

ARGUMENT 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

A. The Section 352, Due Process And Statutory Discretion Objections

Apart from the *Kelly* challenge to the handprinting comparison testimony (see § 2.5.4, pp. 385-410 above, incorporated herein), the defense sought to offer expert testimony and proficiency studies regarding the reliability of handwriting comparison testimony in support of is Evidence Code § 352 and due process challenge to the prosecution's handprinting comparison testimony. The defense also argued that the judge should consider reliability in exercising her discretion under Evidence Code § 1418 which uses the discretionary term "may" as to the admissibility of handwriting comparison testimony. (RTH 17488-89.)[353]

In response to this request, Judge Hammes reaffirmed her ruling that

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[353] Despite initially stating, "I think it's 1417," defense counsel then said, "It's between 1417 and 1420. . . ." He was obviously referring to Evidence Code § 1418, "Comparison of Writing by Expert Witness." § 1418 provides as follows:

> The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

Kelly did not apply but did conditionally allow the defense expert testimony as to the § 352 and due process challenges:

> I am not going to even consider this for the question on the [*Kelly*] area because I have made my ruling on that, but as I indicated previously, I think that you are entitled to attack the constitutionality of the statute. (RTH 17489; see also RTH 17512 [not talking about reliability in a [*Kelly*] context; it does go to § 352 and constitutionality of the statute].)

B. The Objections Necessarily Required A Determination Of Relevancy, Probative Value And Reliability

The § 352 objection required the judge to weigh the probative value of the evidence against its prejudicial effect. (See *People v. Green* (1980) 27 Cal.3d 1, 25.) To do so the judge was required to evaluate the relevance of the evidence which necessarily encompassed an evaluation of its reliability. (See *People v. Coddington* (2000) 23 Cal.4th 529, 622 [records were admissible because "they were sufficiently reliable to be relevant . . ."]; see also *People v. Leahy*, *supra*, 8 Cal.4th at 598 ["No evidence is admissible except relevant evidence."]; *People v. Douglas* (1990) 50 Cal.3d 468, 529 [evidence was "relevant and reliable"]; *People v. Craig* (1978) 86 Cal.App.3d 905 [even though *Kelly* does not apply generally to dog tracking, reliability of individual dog must be proven].) Additionally, because the evidence was in the form of expert testimony the 352 balancing necessarily encompassed an evaluation of whether, and to what extent, the evidence would be helpful to the jurors. (Evidence Code § 801.)[354]/[355]

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[354] Evidence Code § 801 provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond

(continued...)

Similarly, since due process inherently entails judicial balancing, the above considerations of relevance and helpfulness were material to the resolution of the due process objection also. Finally, because Evidence Code § 1418 uses the discretionary term "may" this, too, calls for weighing of reliability and probative value.

In sum, the actual reliability of the handprinting testimony was a matter which the trial judge was required to consider in ruling on the § 352, due process and statutory discretion objections. Hence, the judge was obligated to consider evidence relevant to the reliability of the handprinting opinion testimony. (See also Calif. Const. Art. I, § 28(d).)

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[354](...continued)
common experience that the opinion of an expert would assist the trier of fact and;

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. (Stats. 1965, c. 299, § 2, operative Jan 1, 1967.)

[355] For example, in *United States v. Dorsey* (4th Cir. 1995) 45 F.3d 809, the Fourth Circuit upheld the exclusion of the testimony of two forensic anthropologists that surveillance photographs taken in two banks during robberies did not depict the defendant. The court concluded that the evidence could not possibly assist the trier of fact. As stated by the court, "comparison of photographs is something that can sufficiently be done by the jury without help from an expert." (Id. at 815.) Handwriting examiners' testimony is nothing more than comparing the visually obvious similarities or dissimilarities of "pictures" of known and questioned writings.

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

The judge conditionally allowed defense expert Dr. Mark Denbeaux to testify as to the lack of any formal licensing or certification process required for handwriting "experts." (RTH 17450-52.) The only way people become such an expert is at the knee of another expert. (RTH 17431-43.) Dr. Denbeaux further testified that there has never been any demonstration that when two sets of handwriting are similar that an expert is in any greater position to distinguish between them than a layman. (RTH 17447-48.) The literature in the field is all anecdotal in nature rather than systematic. Handwriting experts do not have any categories or a taxonomy of terms. (RTH 17450-51.)

The judge also allowed Dr. Michael Saks to conditionally testify about the use of proficiency studies to inform persons in a given field regarding the reliability of their techniques and methods. (RTH 17503-04.) In the case of handwriting and handprinting comparison there was one proficiency study conducted in 1975 and four more between 1984 and 1987. (RTH 17502-06; In Limine Exhibits 586, 587 and 588.)

However, Judge Hammes ultimately ruled that Dr. Saks was not qualified to testify on the issue of handwriting comparison. (RTH 17584.) Therefore, the judge refused to allow or consider his testimony on the handwriting issue. She further ruled that Dr. Saks could not testify about the proficiency studies and that those studies would not be admitted into evidence. (RTH 17523.) The defense asked the judge to take judicial notice of the proficiency studies as being adjudicative facts and under the truth and

evidence provisions of Proposition 8 but she refused. (RTH 17567.)[356] The defense argued that the judge was frustrating the defense in its attempt to show that handwriting analysis is not what it purports to be. The defense contended that Dr. Saks' testimony regarding the proficiency studies would show that handwriting comparison is a subjective analysis that has a false aura of expertise. (RTH 17576.)[357] In other words, Dr. Saks would explain that there is a lot about handwriting analysis that does not meet the eye. One example is that if you look at two samples and compare them and say that they are indistinguishable, that conclusion may be undermined by showing that there are some 500 or more people out there with similar handwriting but which were not analyzed. (RTH 17582.) The judge repeated that she did not find Dr. Saks to be an expert in handwriting comparison. (RTH 17584.)

In response to this ruling the defense offered to present a witness from Collaborative Testing Services to discuss the handwriting proficiency tests. However, the judge stated that she believed that the area is "unassailable" and that she would not allow such testimony under any circumstances. (RTH 17624.) This ruling precluded much of the proposed defense testimony in several areas. (RTH 17634.)

The handwriting studies were conducted by Collaborative Testing

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[356] The defense pointed out that the court had already admitted such tests in serology and knew how they are conducted. However, the judge still refused to consider them. (RTH 17568.)

[357] The defense also noted that Dr. Saks was being offered to help the court formulate an appropriate *Zamora* instruction on an error rate regarding the loss of the actual handwriting. (RTH 17579.) Feldman also noted that the defense was going to request the type of cautionary instruction described by Denbeaux about handwriting being the least credible form of identification testimony. (RTH 17581.)

Services, Inc. with The Forensic Sciences Foundation as a "Program Affiliate." (See In Limine Exhibits 586, 587 and 588.) The studies would have shown an overall error rate of 36% for handwriting comparison experts. (*Ibid.*; see also *Exorcism of Ignorance as a Proxy For Rational Knowledge; The Lessons of Handwriting Identification "Expertise,"* Risinger, Denbeaux, and Saks, U. of Penn. L. Rev. Vol 137, p. 26, 747 (1989), hereafter just *Risinger.*) The handprinting study would have shown an error rate of 45%. (See In Limine Exhibit 587.) In *United States v. Fujii* (N.D. Ill. 2000) 152 F.Supp.2d 939, 941, Dr. Saks discussed this study noting that only 13% of the experts got the right answer and 45% got the wrong one.

D. Judge Hammes Erroneously Found That Dr. Saks Was Not An Expert As To Handwriting Comparison

Judge Hammes concluded that Dr. Saks was not an expert and was not qualified to testify about the unreliability of handwriting comparison because he did not have any direct experience in the field and only could offer "abstract criticism." (RTH 17518-20; 17584; 25439-40.) This ruling was patently erroneous.

Surely an academic who has devoted his or her efforts to the study of a field or technique should be able to offer the results of that study without having to first become a practicing purveyor of the technique. This would mean that the only persons qualified to testify as to the unreliability of astrology would be practicing astrologists. Obviously, this is not the rule as illustrated by the field of polygraph testing in which Dr. David C. Raskin, because of his years of research and study in the area "is generally acknowledged as the nation's foremost polygraph expert (*United States v. Cordoba* (C.D. Cal. 1998) 991 F.Supp. 1199, 1201, n. 6) – even though he isn't a practicing polygrapher himself.

Similarly, Dr. Saks' studies and research were relevant and material even though he was not a practicing handprinting comparison expert.[358] Accordingly, Judge Hammes erroneously refused to allow or consider his testimony as well as the proficiency studies about which he would have testified.[359]

Moreover, Dr. Saks' criticisms would not have been abstract. His testimony would have addressed crucial, concrete issues such as whether or not handprinting is sufficiently unique to allow for reliable comparison. Further, he would have discussed specific and concrete proficiency studies which had been conducted with respect to both handwriting and handprinting.

E. The Failure To Consider The Defense Experts And The Proficiency Studies Was An Abuse Of Discretion

As discussed above, to properly exercise her discretion to balance the relevant factors under Lucas' § 352 and due process objections it was necessary for the judge to consider and evaluate the reliability of the handprinting comparison testimony. However, because the judge refused to consider the testimony of Dr. Saks and the proficiency studies, she could not

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[358] Cases in which Dr. Saks has been allowed to give evidence as an expert on the lack of establishment of the reliability of handwriting analysis include, among others, *United States v. Saelee* (D.C. Ala. 2001) 162 F.Supp.2d 1097; *United States v. Hidalgo, supra,* 229 F.Supp.2d 961; *United States v. Fujii*, *supra*, 152 F.Supp.2d 939 [on an issue of handprinting]; and *United States v. Starzecpyzel* (S.D. N.Y 1995) 880 F.Supp. 1027, 1036.

[359] Dr. Saks has since published several articles on the subject. (See Michael J. Saks, *Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise*, 82 Iowa L. Rev. 21, 65 (1996); D. Michael Risinger, Mark Denbeaux and Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification Expertise,* 137 U. Pa. L. Rev. 731 (1989).)

properly exercise her discretion because she did not have a full and accurate understanding of the material facts. For example, it was obvious from the judge's comments during her denial of the *Hitch/Trombetta* motion, that she was convinced, as a lay person, that Lucas was the author of the Love Insurance note. (RTH 25439-40.) This opinion was based on her observations of the similarities between the note and Lucas' printing. In other words, because Lucas' printing was similar to the printing on the note, the judge assumed that Lucas could reliably be identified as the author of the note to the exclusion of all others simply based on those observed similarities.

Yet it was this crucial assumption that Dr. Saks and the proficiency studies would have countered. The fact that the actual experts would err as often as 36% of the time with handwriting and 45% of the time with handprinting would have provided a dramatically different view of the evidence and undermined the essential assumption of uniqueness upon which Judge Hammes relied.[360] (*United States v. Saelee, supra*, 162 F.Supp.2d at 1103 [proficiency tests "raise serious questions about the reliability of the methods currently in use"]; see also *United States v. Lewis* (S.D. W. Va. 2002) 220 F.Supp.2d 548 [prosecution failed to meet testing burden].) Hence, the defense experts and the proficiency studies were clearly relevant. (See e.g., *People v. Morris* (1988) 199 Cal.App.3d 377, 390 [proficiency studies considered re: reliability of serology]; *United States v. Saelee, supra*; *United States v. Lewis*, *supra*.) By failing to consider them in making her ruling on the handprinting opinion testimony, Judge Hammes abused her discretion: A

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[360] As defense counsel explained, the studies demonstrated that there is a lot about handwriting analysis that does not meet the eye. And further the studies would show that even if the samples appear to be indistinguishable they may indeed have been written by different persons. (RTH 17582.)

sound exercise of judicial discretion requires that "all the material facts . . . must be both known and considered. . . ." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; see also *People v. Jordan* (1986) 42 Cal.3d 308, 316; *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897-98; *Harris v. Superior Court* (1977) 19 Cal.3d 786, 796; *People v. Giminez* (1975) 14 Cal.3d 68, 72; *People v. Rist* (1976) 16 Cal.3d 211, 219; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65; *Gossman v. Gossman* (1942) 52 Cal.App.2d 184, 195; 9 Witkin, *Cal. Procedure*, Appeal, § 358, pp. 406-408.)

Because Judge Hammes did not consider all the material facts, she did not exercise "informed discretion." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348 fn. 8.) The judge was also obligated to consider relevant evidence on this issue under the California Constitution. (Art. I, § 28(d).)

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

1. Introduction

Judge Hammes disallowed the defense request to test, in open court, the ability of the prosecution handprinting expert, John Harris, to identify Lucas' handprinting. This ruling denied the defense an opportunity to fully confront and cross-examine a key prosecution witness in violation of Lucas' state and federal constitutional rights to confrontation, due process and fair trial by jury. (Calif. Const. Art. I, sections 1, 7, 15, 16, 17 and 28(d); U.S. Const. 6th and 14th Amendments.) The ruling also violated the due process and Eighth Amendment requirement that both the guilt and sentencing phases of a capital trial be reliable.

2. Procedural Background

John Harris, testifying as a prosecution expert, concluded with

"reasonable certainty" that Lucas was the author of the Love Insurance note. (RTH 8142; 8154.) 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. (RTH 13899-13902.) However, the judge denied the defense request, ruling that it was "not within the scope of direct. . . ." (RTH 13902.)

After the trial court denied this defense evidence Lucas filed a trial brief on the issue (CT 11209-216), and the prosecution filed a responsive brief. (CT 3359-61.) The defense argued that its expert, Dr. Denbeaux, would provide support for the in-court testing of witness Harris. (RTH 17424.) However, the judge did not change her ruling disallowing the defense evidence and she again denied the request at trial. (RTT 8155-57.)[361]

3. Legal Principles

The type of cross-examination requested by the defense of Harris was permissible under California and multi-jurisdictional authority. "Wherever a special qualification is required for testimony to a certain fact, the fact of that qualification is ascertainable logically by particular instances of the witness' failure to possess or to exercise it." (Wigmore on Evidence, § 991, p. 922, emphasis supplied.) "On cross-examination there is no doubt that these particular instances may be brought out by questions to the witness himself – subject to the trial court's discretion in restricting an examination too trivial or too lengthy." (*Id.* at 922, emphasis supplied.) Wigmore, in discussing cross-examination by testing a witness' qualifications by specific instances,

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[361] At trial the defense informed the court that David Woods had written the exemplar with which the defense wanted to test Harris. However, the judge ruled that the defense should make an offer of proof that David Woods committed the Jacobs murders. (RTT 8157.)

noted that in the context of handwriting testimony, the weapon which the trial court improperly denied the defense is powerful:

> When, for example, the witness has sworn positively that the disputed signature is genuine, and then, on examining a new signature submitted to him, he declares with equal positiveness that it is a forgery and perhaps points out the (to him) unmistakable marks of difference, the testimony of a single unimpeachable witness that he saw the supposed forgery written by the person bearing that name disposses at once of the trustworthiness of the first witness and the certainty of his conclusion. In many other similar ways a single test of this sort will serve to demolish the most solid fabric of handwriting testimony. There should be no limitations whatsoever on the power of employing these tests. (Wigmore on Evidence, p. 289, 295, § 2015.)

In *Neal v. Neal* (1881) 58 Cal. 287, this Court was presented in a land title case with an issue involving a defendant testifying in his own behalf that the signature on an instruction was a forgery and not genuine. On cross-examination the defendant was presented with a document which purported to have been signed by him and had been used in the case for comparison. Plaintiff counsel asked, "Look at this signature, 'Joseph W. Neal,' and state whether that is your genuine signature?" Defense counsel's objection that "it was not legitimate cross-examination" was sustained. (*Id.* at 288.) The Court found the ruling to be erroneous:

> The question was, doubtless, asked for the purpose of testing the accuracy and judgment of the defendant, as a witness, as to his own signature, which constituted the subject-matter of his direct examination. It was, therefore, responsive to the examination in chief. A witness may be asked on his cross-examination any question which tends to test his accuracy, veracity, or credibility. "The power of cross-examination," says Greenleaf, "has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has

> devised for the discovery of truth. By means of it the situation of the witness with respect to the parties, and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and the description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony." (Greenleaf on Evidence, [sec.] 446.)
>
> . . .
>
> At all events plaintiff's counsel had the right on cross-examination to test the ability and judgment of the witness upon the subject of his own signature. (*Id.*, at 288-289.)

This rule applies to expert testimony as well. In *Johnston Harvester Co. v. Miller* (Mich. 1888) 72 Mich. 265 [40 N.W. Rep. 429], two experts in handwriting who had never seen the defendant write based their opinions on handwriting comparisons. (*Id.*, at 271.) "To test the value of their evidence, the counsel for the defense asked them to make comparisons between two signatures of the witness Reynolds in the case, – one admitted by him to be genuine, and the other claimed by him to have been written by another than himself, but by his authority and direction." (*Id.*, at 272.) The object was to show the fallibility and unreliable character of the testimony, and plaintiff's counsel insisted on appeal that such inquiry was error. This claimed error was rejected:

> The sequel showed that the opinions of the experts were of but little worth, and we are not disposed to limit or confine the opportunities for testing and determining the accuracy and value of expert evidence. These men were testifying entirely from comparison, and it was competent by the comparison thus made

> upon cross-examination to show that they differed radically in their views of the similarity of letters, and that one as well as both might be easily mistaken in their assumptions from a comparison of signatures. The fact that the witnesses did not know whether the signatures were made by one man or two but added to the value of the test. (*Id.*, at 272.)

Other courts have concluded that the attempted cross-examination by the defense in the instant case was proper and relevant to "test the skill of the expert" and show that the handwriting expert is not reliable. (*Travelers' Ins. Co. v. Sheppard* (Ga. 1890) 85 Ga. 751 [12 S.E. 18, 35-36]; *Wooten v. Department of Human Resources* (Ga. App. 1979) 152 Ga. App. 304 [262 S.E.2d 583, 585].) In *Browning v. Gosnell* (Iowa Sup. 1894) 91 Iowa 448 [59 N.W. 340], which approved such cross-examination, the court held:

> We think it is proper, when a witness testifies to the genuineness of a handwriting or signature, to test the value of his evidence thoroughly, and for that purpose he may be asked to give his opinion as to the genuineness of signatures which are prepared for that purpose, and in the handwriting of any person. . . .[E]very reasonable opportunity should be afforded, on cross-examination, to test the value of the opinion of the witness. . . ." [Emphasis added.] (*Id.*, at 458.)

Hence, the judge's ruling deprived the defense of "the right to test, in an effective and practical manner, the accuracy and worth of the opinions [of Harris]" which were designed to "cause doubt upon the credibility of the witness and his skill as an expert." (*Hoag v. Wright* (1903) 174 N.Y. Rep. 36, 43.)

> It is better to take a little time to see whether the opinion of the witness is worth anything, rather than to hazard life, liberty or property upon an opinion that is worth nothing. The evils and injustice arising from the use and abuse of opinion evidence in relation to handwriting are so grave, that we feel compelled to depart from our own precedents to some extent and to establish

> further safeguards for the protection of the public. As the hostility of witnesses to a party may be shown as an independent fact, although it protracts the trial by introducing a new issue, so, as we think, the incompetency of a professed expert may be shown in the same way and for the same reason; that is, because it demonstrates that testimony otherwise persuasive, cannot be relied upon. (*Id.*, at 44.)
>
> . . .
>
> Is not the competency of a witness upon handwriting always a relevant fact, inasmuch as his opinion is not relevant unless he is competent to express it? The competency of a witness is a fact necessary to be known in order to learn the value of his opinion. . . . It is not enough to permit the opinion of an incompetent witness to be met by the opinion of a witness who is competent, for the jury may not be able, even when instructed by the cross-examination, to tell the good from the bad, unless they are guided by further evidence. (*Id.*, at 46.)
>
> . . .
>
> The value of an opinion does not depend upon the skill and knowledge professed by the witness, but upon the skill and knowledge which he actually possesses, and the accuracy of such knowledge the jury must judge. (Rogers Expert Testimony, 59.) (*Id.*, at 47.)

Accordingly, Judge Hammes erroneously precluded the defense in-court testing of witness Harris.

G. Failure To Admit And Consider The Defense Experts, The Proficiency Studies And To Allow In-Court Testing Violated Lucas' Federal Constitutional Rights

The right to present evidence is a linchpin of the due process right to a fair hearing and that right was violated here. (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].) Allowing only the prosecution to present evidence also violated due process by unjustifiably creating an imbalance between the prosecution and defense. "[I]n the absence of a strong

showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon* (1973) 412 U.S. 470, 475.) Hence, the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (*Ibid.*; see also *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the co-defendant];*Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully bu not the prosecution witnesses]; *Washington v. Texas* (1967) 388 U.S. 14 [accomplice permitted to testify for the prosecution but not for the defense]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

Additionally, the Sixth and Fourteenth Amendments to the federal constitution guarantee the rights to due process, confrontation and compulsory process. (See *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 294; *Webb v. Texas, supra,* 409 U.S. 95; *Washington v. Texas, supra,* 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.)

Furthermore, the Fourteenth Amendment requires that no one can be deprived of liberty without at least the basic due process rudiments of a day in court; at a minimum, the rights to counsel, to examine the witnesses against him, and to offer testimony. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51.) Thus, 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]; *Futentes v. Shevin* (1972) 407 U.S. 67, 80 [the opportunity to be heard is one of the immutable principles of justice which inhere in 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].)

The constitutional principles set forth above were applicable to the in limine hearing regarding the prosecution's handprinting expert in the present case. In *Holt v. Virginia* (1965) 381 U.S. 131, 136, the United States Supreme Court concluded that "[t]he right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues." (See also *Bell v. Burson* (1971) 402 U.S. 535, 541-42.) Implicit within these decisions was the right to an evidentiary hearing to resolve disputed material issues of fact. The right to object and the right to file motions would be useless if the accused is arbitrarily precluded from introducing evidence in support of those motions. (See *Reece v. Georgia* (1955) 350 U.S. 85, 89 ["the right to object to a grand jury presupposes an opportunity to exercise that right"]; *People v. Vickers*, *supra*, 8 Cal.3d at 457-58.)

Moreover, exclusion of the defense evidence at the in limine hearing reduced the reliability of the proceeding in violation of the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) in a capital trial. The Due Process Clause of the Fourteenth Amendment and the heightened reliability requirements of the

Eighth Amendment forbid juror consideration of unreliable evidence in a capital case. (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; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Moreover, the ruling also violated the federal constitution because the expert's testimony constituted highly prejudicial evidence in a closely balanced case. The state and federal Due Process Clauses protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v. Olivas* (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.)

Further, precluding the defense from impeaching the prosecution expert at the in limine hearing violated Lucas' constitutional rights to present a defense, due process, confrontation and compulsory process were violated. The United States Supreme Court has again and again noted the "fundamental" or "essential" character of a defendant's right both to present a defense, (*Crane v. Kentucky* (1986) 476 U.S. 683, 687; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19), and present witnesses as a part of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v. Arkansas* (1987) 483 U.S. 44, 55; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; *Webb, supra*, 409 U.S. at 98; *Washington, supra*, 388 U.S. at

19.) The United States Supreme Court has variously stated that an accused's right to a defense and a right to present witnesses emanate from the Sixth Amendment (*Taylor*, *supra*, 484 U.S. at 409; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867) the Due Process Clause of the Fourteenth Amendment (*Rock*, *supra*, 483 U.S. at 51; *Trombetta*, *supra*, 467 U.S. at 485; *Chambers*, *supra*, 410 U.S. at 294; *Webb*, *supra*, 409 U.S. at 97; *In re Oliver* (1948) 333 U.S. 257), or both. (*Crane*, *supra*, 476 U.S. at 690; *Strickland v. Washington* (1984) 466 U.S. 668, 684-85; *Washington*, *supra*, 388 U.S. at 17-18.)

Finally, because Lucas was arbitrarily denied his state created rights under California law, including Evidence Code section 352, 1416, and the right to present relevant and material evidence under the California Evidence Code (§ 350-§ 352) and the California Constitution (Art. I, § 28(d)), 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.)

H. Admission Of The Handprinting Comparison Evidence Was Prejudicial At Trial

As discussed above, Judge Hammes ruled on the defense motions to exclude the handprinting comparison testimony without considering defense evidence directly relevant to the probative value of the handprinting evidence. Hence, the judge failed to soundly exercise her discretion (under Evidence Code § 352, § 1416 and due process) and the prosecution evidence was erroneously admitted at trial and considered by the jurors.

This error was prejudicial in two important ways.

First, the expert opinion that Lucas authored the note to a "reasonable

certainty" was likely to have an undue influence on the jurors. "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Kelly*, *supra*, 17 Cal.3d at 31.) Thus, "[t]he expert opinion testimony created a significant danger that the jurors would conclude erroneously that they were not the best qualified to assess the [evidence], that they should second guess their own judgment, and that they should defer to the Government's experts." (*United States v. Hanna* (9th Cir. 2002) 293 F.3d 1080, 1087.)[362]

Second, the expert testimony conveyed, as a given truth, the essential assumption that all handprinting is unique and individualistic. In other words, Harris' opinion, to a "reasonable certainty" that Lucas authored the note assumed, that the 13 block printed letters and seven numbers on the Love Insurance note were so unique that the author could be determined to the "reasonably certain" exclusion of all other persons.[363] Because the defense was not permitted to challenge this essential premise, the jurors were free to fully rely on this premise, as did Judge Hammes (RTH 25439-40), to conclude that Lucas must have authored the note based on their perceived similarities between the note and Lucas' printing.

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[362] This risk is present even if the evidence is within bounds of the jury's ordinary experience. "Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value. On the other hand, the risk of unfair prejudice is real. By appearing to put the expert's stamp of approval on the government's theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged." (*United States v. Gonzalez-Maldonado* (1st Cir. 1997) 115 F.3d 9, 17-18.)

[363] The jury instructions improperly legitimized Harris' status as an "expert" by describing him as an "expert." (See § 2.9.6, pp. 572-75 below, incorporated herein.)

Hence, the error was substantial, and because the Jacobs case was closely balanced[364] the error was prejudicial under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) Therefore, the judgment should be reversed under the *Watson* standard.

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.

Finally, 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 because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[365] and the error was

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[364] See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein [Jacobs case was closely balanced].

[365] 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.]

substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." 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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

I. Judge Hammes' Failure To Consider The Defense Experts And Proficiency Studies Tainted Her Ruling On The *Hitch/Trombetta* Motions Regarding The Lost Fingerprint

The defense moved to exclude the Love Insurance note because the prosecution had lost or destroyed a useable latent fingerprint which had been lifted from the note. (See § 2.4.2, pp. 333-48 above, incorporated herein.) Judge Hammes denied this motion based on her strongly held lay opinion that Lucas was the author of the note:

> Together, the testimony of Dr. Saks and Dr. Denbeaux proffered that there is no basis to place credence in the testimony of handwriting comparison experts because the handwriting comparison field has never been validated in a way that scientific procedures are validated, monitored, i.e., through published studies, blind testing – blind trial testing, proficiency tests, and certification.
>
> Testimony of these gentlemen was not persuasive to this court. Their abstract criticism did nothing to detract from the

> graphic blow-up displays in this case prepared by Mr. Harris and showing without question, to any lay person, the incredibly close match between the Love Insurance note printing and the exemplars from Mr. Lucas. No matter what the partial print with only three points would have shown, in this court's opinion it would not undermine the graphic evidence that it is, in fact, Mr. Lucas' printing on the Love Insurance note. (RTH 25439:6-25440:5.)

This fixed view of Judge Hammes as to the author of the note was an unenlightened lay opinion. Had she admitted and considered the full testimony of Dr. Saks and the proficiency studies her faulty lay assumptions would have been discredited. Therefore, the errors concerning the handprinting evidence also require reversal of the ruling on the *Hitch/ Trombetta* motion.

2 JACOBS CASE

2.5 HANDPRINTING COMPARISON ISSUES: IN LIMINE

ARGUMENT 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

Even without consideration of the excluded expert witness, proficiency studies and in-court testing of the expert, the judge erroneously overruled the defense objections to the prosecution's expert's handprinting testimony based on Evidence Code § 352, § 1418 and due process.

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

As set forth above, notwithstanding the judge's ruling that *Kelly* did not apply to the handprinting experts, the prosecution still had the burden or proving that the evidence was relevant and otherwise admissible in the face of the other objections of the defense pursuant to Evidence Code § 352, § 1418 and due process. (See § 2.5.5(A), pp. 410-12 above, incorporated herein.) "As is true with all evidence . . . if an objection is made the proponent of this evidence has the burden of establishing its particular relevance. [Citations.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1091, Baxter, J., concurring; see also *People v. Kaurish* (1991) 52 Cal.3d 648, 693 [proponent of evidence has burden of establishing all preliminary facts pertinent to relevancy]; Evidence Code § 403.) Judge Hammes violated this fundamental rule by shifting the burden to the defense after commenting that the defense was "attacking the Eiffel Tower." (RTH 4109.) "...[Y]ou're just

attacking something so often received and so generally accepted that I think the defense is going to ultimately bear the burden of showing the court otherwise . . . [I]t is so well known and so often received that it is one of those areas that passes the burden back to the defense immediately. . . ." (RTH 5463; see also RTH 17575.)

This ruling violated California law. (See Evidence Code § 403 and § 500; *People v. Kaurish* (1990) 52 Cal.3d 648, 693.)

Accordingly, the judge did not apply the correct legal standard and her resultant admission of the handprinting comparison evidence was an abuse of discretion. 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].)

Furthermore, the erroneous burden shifting made the in limine proceeding fundamentally unfair in violation of the state and federal

constitutional principles set forth in the next section below.

B. Harris' Opinion As To The Author Of The Note Should Have Been Excluded Under Evidence Code § 352, § 1418 and State And Federal Due Process Principles

The judge herself recognized that the primary helpfulness of the expert to the jury was to point out similarities or differences that lay persons might not see themselves. (RTH 25439-40.) On the other hand, the expert opinion as to the authorship of the note added nothing which the jurors could not see for themselves. As the judge observed, lay persons could see the similarities between the note and Lucas' printing simply by comparing the two. (RTH 25439-40.) Hence, the probative value of the expert's opinion as to authorship was low. (See *United States v. Gonzalez-Maldonado* (1st Cir. 1997) 115 F.3d 9, 17 ["expert testimony that is within the bounds of a jury's ordinary experience generally has little probative value"].)

Moreover, apart from the general unreliability of handwriting comparison evidence, several additional facts made the expert's opinion as to authorship especially unreliable:

1. The questioned document only had 21 characters. (See § 2.2(H)(2), pp. 81-84 above, incorporated herein);

2. The characters on the note were in printing, not cursive. (See § 2.5.4(C), pp. 400-01 above, incorporated herein);

3. Lucas may have been handcuffed when he supplied the exemplars. (See § 2.2(H)(2), pp. 81-84 above, incorporated herein); and

4. The original document was not available for comparison. (RTT 8988-89.)

Accordingly, as argued by the defense, even if the expert was properly allowed to point out similarities and differences, he should not have been

permitted to express his opinion that he was "reasonably certain" Lucas was the author of the note. (RTT 17576-78.) Such a resolution, which has been dubbed the "Hines/McVeigh approach" in one text, has been adopted by numerous courts. (See Faigman, et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, (West 2002) § 28-1.4.3, pp. 422-27; see also *United States v. Hidalgo* (D. Ariz. 2002) 229 F.Supp.2d 961; *United States v. Rutherford* (D. Neb. 2000) 104 F.Supp.2d 1190.) Not only did admission of this evidence violate Evidence Code § 352 it also violated the federal constitution. Accordingly, pursuant to Evidence Code § 352, § 1418 and the Due Process Clause of the state and federal constitutions, the expert opinion as to authorship should have been excluded.

Failure to exclude this unreliable evidence violated Lucas' state (Art. I, sections 1, 7, 15, 16, 17 and 28(d)) and federal (6th and 14th Amendments) constitutional rights to due process, fair trial by jury, confrontation, and fair trial by jury. (See generally *Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85.)

Moreover, because the expert's opinion was unreliable, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendments) of the federal constitution. (*White v. Illinois*

(1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because Lucas was arbitrarily denied his state created rights under California law, including Evidence Code sections 350, 351, 352, 500, 501, 1417 and 1418, 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.)

The error was prejudicial because the handprinting comparison testimony was key evidence in a closely balanced case.[366]

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) Therefore the judgment should be reversed under the *Watson* standard.

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

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[366] See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein .

should be reversed under the federal harmless-error standard.

Finally, 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 because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[367] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." 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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[367] 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.].

2 JACOBS CASE

2.5 HANDPRINTING COMPARISON ISSUES: IN LIMINE

ARGUMENT 2.5.7

HANDPRINTING COMPARISON FROM A PHOTOGRAPH SHOULD BE EXCLUDED AS UNRELIABLE

Elsewhere Lucas contends that handprinting comparison testimony is too unreliable to be admitted under any circumstances. (See § 2.5.4, pp. 385-410 above, incorporated herein.) However, even if such testimony may be admitted when the original writings are used, it should be precluded when the comparison is from a photograph of the original writing.[368]

The question of whether copies can be used as the basis for an expert handwriting comparison was answered many years ago by this Court. (See *Spottiswood v. Weir* (1885) 66 Cal. 525.) The *Spottiswood* case is cited in the Law Revision Commentary to Evidence § 1418.

In *Spottiswood*, this Court held as follows:

> It is quite clear that the press copy of the letter was inadmissible, until the nonproduction of the original was properly accounted for. But further than this, an expert witness was given specimens of Chambers' handwriting, and was permitted to compare them with the press copy of the letter alleged to have been written by him to Mrs. Weir, and to give his opinion as to the genuineness of the original of the copy. This was not permissible under any rule with which we are acquainted. It is essential that the document whose genuineness is sought to be proved should itself be produced. When the disputed writing is produced, evidence resulting from a comparison of it with other proved or admitted writings is not

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[368] The defense moved to exclude the Love Insurance note for failure to authenticate it under Evidence Code § 1400 and § 1401 and also under § 352. (CT 11217-28.)

> regarded as evidence of the most satisfactory character, and by some courts is entirely excluded. It would be adding vastly to the danger of such evidence, to permit evidence to be given from a comparison of genuine writings with a press copy of the writing whose genuineness is disputed. Indeed, in this very case the expert, on cross-examination, testified that "it would be very dangerous to decide on a press copy, for sure." [Emphasis added.] (*Id.* at 529.)

Spottiswood remains the law in California to this day. The opinion has also been followed in other states and attempts to distinguish the case have been rebuffed. For example, in *Geer v. Missouri Lumber & Mining Co.* (Mo. 1896) 134 Mo. 85 [34 S.W. 1099], the Missouri Supreme Court refused to distinguish *Spottiswood* on the grounds of technological advancement:

> It is well settled law in this state that writings can only be used as standards with which to compare a disputed handwriting when no collateral issue can be raised in respect to their genuineness. They are generally allowed only when admitted to be genuine, or when their genuineness is established in the cause. *Rose v. First Nat'l Bank* (Mo. 1887) 91 Mo. 399, 402 [3 S.W. 876]; *Randolph v. Loughlin* (N.Y. 1872) 48 N.Y. 456. Ordinarily the original itself is used, and it has been held that copies, either by tracing, or produced by a press or machine, however correct they may be, cannot be used as standards. *Com. v. Eastman*, 1 Cush. 189; *Spottiswood v. Weir*, 66 Cal. 529, 6 Pac. 381; *Cohen v. Teller*, 93 Pa. St. 128. But it is said that the original affidavit was on file in the interior department at Washington, and could not be produced at the trial, and the art of photography and lithographing is so perfect that a photolithographic copy of the writing is an exact representation of the original, and should be admitted, from the necessity of the case. It is unquestioned that a very close imitation of an object can be obtained by photography, but it is not a fact, of which judicial knowledge may be taken, that "all the appearances of a written document are capable of such exact reproduction that the copy will fully represent the original." *Maclean v. Scripps*, 52 Mich. 219, 17 N. W. 815, and 18 N.W.

> 209. Without determining whether such a copy, the original of which would be admissible as a standard, and could not be produced, could be substituted, we are satisfied it could not be done unless preliminary proof was first made that the copy was exact and accurate in all respects. There was no such proof, as preliminary to the introduction of this copy. The officer merely certifies that the copy is of the same size, and "is a true and literal exemplification of the original." This certificate might have been made to a written copy as well as to this one. The perfection of a photograph depends upon many circumstances and conditions, such as skill of the operator, the correctness of the lenses, "the purity of the chemicals, the accuracy of the focusing, the angle at which the original to be copied was inclined to the sensitive plate," etc. *Taylor Will Case*, 10 Abb. Prac. (N.S.) 300. The slightest defect or imperfection in the photography or lithographing would destroy the sufficiency of the copy as a standard for the comparison. Opinions are often formed on the slightest strokes of the pen, or the most delicate shading of the letters. "The certainty of expert testimony in these cases is not so well assured as that we can afford to let in the hazard of errors or differences in copying, though it be done by howsoever a scientific process. Besides, as before said, there is no proof of the manner and exactness of the photographic method used." *Hynes v. McDermott* (N.Y. 1880) 82 N.Y. 41. The court did not err in excluding the copies as standards of comparison.

The *Spottiswood* rationale remains viable even among handwriting professionals. Reviewing the scientific literature on the topic, Professors Imwinkelreid and Giannilli state in their treatise 2 *Scientific Evidence* (3rd ed. 1999), p. 193: "Originals rather than photostats or photographs of original writings are needed. A copy may omit some of the identifying characteristics of the person's handwriting style, such as indications of pen pressure, hesitation points, and other minute pen movements"; see also Federal Bureau of Investigation, *Handbook of Forensic Services* (1999) "Questioned Documents Examinations: Handwriting and Hard Printing."

A leading expert in the field, Ronald Morris, a former Secret Service Document Examiner, writes in his book *Forensic Handwriting Identification: Fundamental Concepts and Principles* (2000 ed.), p. 204: "In handwriting and handprinting identification cases, the FDE wants only original documents for complete examination purposes. Copies of documents, as a general rule, do not provide an accurate reproduction of all the features of a writing, and may even contain trash marks or other defects, the presence of which could be misinterpreted."

Accordingly, the expert handprinting comparison testimony should not have been admitted. Failure to exclude this testimony violated Lucas' state (Art. I, sections 15 and 16) and federal (6th and 14th Amendments) constitutional rights to due process, fair trial by jury, confrontation and effective representation of counsel. (See e.g., *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-99; *Conde v. Henry* (9th Cir. 2002) 198 F.3d 734, 739-40; see also *Gilmore v. Taylor* (1993) 508 U.S. 333; *Taylor v. Illinois* (1988) 484 U.S. 400, 408-09; *Martin v. Ohio* (1987) 480 U.S. 228, 233-34; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

The error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because Lucas was arbitrarily denied his state created rights under California law, including Evidence Code sections 352, 1400, 1401 and 1418, 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.)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, 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 because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[369] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless. (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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[369] 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.].

2 JACOBS CASE

2.6 HANDPRINTING COMPARISON ISSUES: TRIAL

2.6.1 ARGUMENT OVERVIEW

Even if the prosecution's handwriting experts were properly admitted, numerous prejudicial errors were committed at trial concerning the handprinting on the Love Insurance note. There errors included the following:

§ 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.

§ 2.6.3 Clark's Opinion That Lucas Authored The Love Insurance Note Should Have Been Excluded.

§ 2.6.4 The Judge Erred In Excluding Rochelle Coleman's Statement That David Woods Authored the Love Insurance Note.

§ 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.

2 JACOBS CASE

2.6 HANDPRINTING COMPARISON ISSUES: TRIAL

ARGUMENT 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

A. The In Limine Rulings Foreclosed Presentation Of The Defense Evidence At Trial

Assuming arguendo that the prosecution's handprinting comparison testimony was properly admitted before the jury, the judge's in limine rulings were also prejudicial because they precluded Lucas from effectively challenging the reliability of the handprinting expert at trial. By ruling in limine that Drs. Denbeaux and Saks were not experts the judge foreclosed the presentation at trial of their testimony as to the unreliability of the prosecution's expert handprinting comparison evidence, including the failure to scientifically test and verify the reliability of the methodology. Nor was Dr. Saks able to testify at trial about the error rates found in the proficiency studies which had been conducted. (See generally *People v. Morris* (1991) 53 Cal.3d 152, 188-91.)[370] In sum, the defense was unconstitutionally denied a

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[370] Judge Hammes stated that she might be "open" to an offer of the proficiency studies themselves at trial. (RTT 17632-33.) However, such studies, standing alone without Dr. Saks' explanation, would have given an incomplete picture. Moreover, given Judge Hammes' strong view that the field was "unassailable," any further offers of proof at trial would no doubt have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Chavez* (1980) 26 Cal.3d 334, 350 fn 5; *People v. Williams* (1976) 16 Cal.3d 663, 667 fn 4; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-13.) (continued...)

fair opportunity to confront and impeach that testimony.

Additionally, the in limine denial of the defense request to conduct in-court testing of John Harris (see § 2.5.5, pp. 410-32 above, incorporated herein), also foreclosed such testing at trial. (*People v. Morris*, *supra*.)

B. The Error Violated The California Constitution

Because the defense experts, the proficiency studies and the in-court testing was relevant to a material issue at trial, they should have been admitted pursuant to Article I, § 28(d) of the California Constitution.[371]

C. The Errors Violated Lucas' Federal Constitutional Rights

By precluding the defense from effectively challenging the reliability of the handprinting comparison testimony, Judge Hammes' in limine rulings violated Lucas' state and federal constitutional rights to due process, compulsory process, confrontation, trial by jury and to present a defense. (Cal. Const. Art. I, sections 7, 14, 15 and 16; U.S. Const. 6th and 14th Amendments.) These constitutional provisions require the trial judge to allow the accused to present evidence from which the jury may draw inferences germane to witness reliability. (*Davis v. Alaska* (1974) 415 U.S. 308, 316-17; see also *Douglas v. Alabama* (1965) 380 U.S. 415; *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [error in excluding a statement relating to the

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[370](...continued)

[371] In June 1982 the voters, by adopting Proposition 8, added section 28, subdivision (d) (§ 28(d)), the "Right to Truth-in-Evidence" provision, to article I of the California Constitution. This section provides that except under certain statutes already in effect, or thereafter enacted by a two-thirds vote of each house of the Legislature, "relevant evidence shall not be excluded in any criminal proceeding." (See also *People v. Alvarez* (2002) 27 Cal.4th 1161, 1173; *People v. Mickle* (1991) 54 Cal.3d 140, 168.)

credibility of a child witness was of constitutional magnitude based on *Crane v. Kentucky* (1986) 476 U.S. 683, 690-91].)

"A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.) "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 ["...counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . ."].)

Furthermore, the error violated Lucas' constitutional right to present a defense. The United States Supreme Court has again and again noted the "fundamental" or "essential" character of a defendant's right both to present a defense, (*Crane v. Kentucky* (1986) 476 U.S. 683, 687; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19), and present witnesses as a part of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v.*

Arkansas (1987) 483 U.S. 44, 55; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; *Webb*, *supra*, 409 U.S. at 98; *Washington*, *supra*, 388 U.S. at 19.) The Court has variously stated that an accused's right to a defense and a right to present witnesses emanate from the Sixth Amendment (*Taylor*, *supra*, 484 U.S. at 409; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867) the Due Process Clause of the Fourteenth Amendment (*Rock*, *supra*, 483 U.S. at 51; *Trombetta*, *supra*, 467 U.S. at 485; *Chambers*, *supra*, 410 U.S. at 294; *Webb*, *supra*, 409 U.S. at 97; *In re Oliver* (1948) 333 U.S. 257), or both. (*Crane*, *supra*, 476 U.S. at 690; *Strickland v. Washington* (1984) 466 U.S. 668, 684-85; *Washington*, *supra*, 388 U.S. at 17-18.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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.)

Further, because Lucas was arbitrarily denied his state created rights to present relevant and material evidence under the California Evidence Code (§ 350-§352) and the California Constitution, Art. I, § 28(d), 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.)

D. The Errors Were Prejudicial

The error was prejudicial for two reasons. First, the expert opinion that Lucas authored the note to a "reasonable certainty" was likely to have an undue influence on the jurors. "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Kelly*, *supra*, 17 Cal.3d at 31.) Thus, "[t]he expert opinion testimony created a significant danger that the jurors would conclude erroneously that they were not the best qualified to assess the [evidence], that they should second guess their own judgment, and that they should defer to the Government's experts." (*United States v. Hanna* (9th Cir. 2002) 293 F.3d 1080, 1087.)[372]

Second, the expert testimony conveyed, as a given truth, the essential assumption that all handprinting is unique and individualistic. In other words, Harris' opinion, to a "reasonable certainty" that Lucas authored the note assumed, that the 13 block printed letters and seven numbers on the Love Insurance note were so unique that the author could be determined to the "reasonably certain" exclusion of all other persons.[373] Because the defense

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[372] This risk is present even if the evidence is within bounds of the jury's ordinary experience. "Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value. On the other hand, the risk of unfair prejudice is real. By appearing to put the expert's stamp of approval on the government's theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged." (*United States v. Gonzalez-Maldonado* (1st Cir. 1997) 115 F.3d 9, 17-18.)

[373] The jury instructions improperly legitimized Harris' status as an "expert" by describing him as an "expert." (See § 2.9.6, pp. 572-75 below,

(continued...)

was not permitted to challenge this essential premise, the jurors were free to fully rely on this premise, as did Judge Hammes (RTH 25439-40), to conclude that Lucas must have authored the note based on their perceived similarities between the note and Lucas' printing.

Hence, the error was substantial, and because the Jacobs case was closely balanced[374] the error was prejudicial under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) Therefore, the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial, individually and cumulatively, as to penalty, under both the state

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[373](...continued)
incorporated herein.)

[374] See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.

and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[375] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." 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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[375] 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.].

2 JACOBS CASE

2.6 HANDPRINTING COMPARISON ISSUES: TRIAL

ARGUMENT 2.6.3

CLARK'S OPINION THAT LUCAS AUTHORED THE LOVE INSURANCE NOTE SHOULD HAVE BEEN EXCLUDED

A. Introduction

Over defense objection Frank Clark was permitted to testify that the Love Insurance note was "Dave's [Lucas'] writing." (RTT 3838.) Admission of this testimony was reversible error because: (1) The prosecution did not establish the foundational requirement of uniqueness; (2) Clark's opinion was not helpful to the jury and (3) the evidence should have been excluded under Evidence Code § 352.

B. Procedural Background

The defense objected to the prosecution's proffer of Frank Clark's opinion that Lucas authored the Love note on several grounds. (RTT 3827-37.) The judge suggested that the opinion was admissible on the same basis that Clark's opinion was admitted to identify the carpet company's business records:

> The Court: 1416 is the code section that is appropriate. That is the section that has been used to get Mr. Clark's opinion of all the previous exhibits now that have been entered, the 200, 201, 202, 203 Exhibits where he has identified for the jury that writing that, in his opinion, is Mr. Lucas [sic] versus others at CMC.
>
> And based on the clear amount of time, just in months and years that he's had an opportunity to see Mr. Lucas' handwriting, the thousands of numbers that he's seen Mr. Lucas write over a period of time with all of those payroll records and dispatch sheets and so on, along with Mr. Lucas' printing, I think that there is clearly foundation for Mr. Clark to form a lay opinion as to whether or not the writing on the Love Insurance

note appears to be consistent with Mr. Lucas' writing. (RTT 3829:20-3830:6.)

The defense pointed to the distinction between company writing with a limited number of employees at the carpet company as opposed to the entire universe:

> Mr. Landon: Now, Mr. Clark's ability to make certain identifications on work documents, again, comes from his knowledge of who was working with those particular documents and his knowledge that there was a limited number of people who had access to those particular documents and who would be making entries on those documents. Some little scrap of paper, which we don't even have the original of, for him to take a look at a photograph of that is highly prejudicial and does fall, I believe, outside of the law from the standpoint that he's being asked to do something beyond that which is just lay opinion. If it is, then the jury should have an opportunity to do that and Mr. Clark's not needed to add anything to that. That's cumulative and highly prejudicial. (RTT 3834:20-3835:4.)

The judge ruled against the defense stating:

> The Court: I don't find that the prejudice in this case actually is the kind of undue prejudice that the cases talk about where it leads the jury to a conclusion of guilt based on improper considerations. I think these are proper considerations and I think that weight is what you're getting to, and these areas are clearly subject to cross-examination. And you may well make headway with a lot of cross-examination in those areas. (RTT 3835:8-15.)

Once the court made clear that it was denying the defense motion to exclude Clark's opinion testimony, the defense requested a cautionary instruction concerning opinion testimony of a lay witness, CALJIC 2.81.[376]

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[376] In determining the weight to be given to an opinion expressed by any witness [who did not

(continued...)

The judge declined to give any cautionary instruction, ruling that the preliminary instruction was sufficient. (RTT 3838; 3863-67; 3871-73.)[377] In fact, however, the lay opinion witness opinion instruction, CALJIC 2.81, was

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[376](...continued)

> testify as an expert witness], you should consider [his] [her] credibility, the extent of [his] [her] opportunity to perceive the matters upon which his opinion is based and the reasons, if any, given for it. You are not required to accept such an opinion but should give it the weight, if any, to which you find it entitled. (CALJIC 2.81 [Opinion Testimony of Lay Witness] 5th ed., 1988.)

[377] The preliminary instruction, given prior to the commencement of the guilt trial, advised the jury as follows:

> Regarding expert witnesses, a person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training or education sufficient to qualify him or her as an expert on the subject to which the testimony relates. Duly qualified experts may give opinions on questions in controversy at a trial.
>
> To assist you in deciding such questions you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.
>
> In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this you should consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.
>
> You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable. (RTT 12; CALJIC 2.80 [Expert Testimony], 5th ed. 1988.)

not given until the end of the guilt phase. (RTT 12197.)[378]

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

An essential underlying premise of an identification opinion based on a comparison of physical evidence such as fingerprinting, handwriting or hair is that the item being compared is sufficiently unique to make a reliable identification. In the case of fingerprints, many experts assume that no two fingerprints are alike and, hence, if there are enough points of similarity, the examiner may make an absolute identification. (See Faigman, et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, *supra*, § 27-2.1.2 [4], pp. 379-80.) On the other hand, it is generally accepted that hair is not sufficiently unique to narrow the identification to any single person. (See § 2.2(J)(3), pp. 92-95 above, incorporated herein.) However, in the case of handprinting, no empirical studies have resolved the issue of uniqueness. (See § 2.5.4(B)(3), p. 394 above, incorporated herein.) Moreover, the uniqueness issue may vary from case to case depending on the amount and nature of the writing. Some types of writing may be extremely unique while others may be much more generic.

In the present case the prosecution, as the proponent of the evidence,

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[378] That instruction was the following:

> In determining the weight to be given to any lay opinion expressed, you should consider the witness' credibility, the extent of his or her opportunity to perceive the matters upon which the opinion is based, and the reasons, if any, given for it. You are not required to accept such an opinion, but should give it the weight, if any, to which you find it entitled. (RTT 12197.)

had the burden of making the foundational showing of uniqueness. (See § 2.5.4(B)(1), pp. 385-89 above, incorporated herein.) In this regard, the prosecution failed to meet its burden. No evidence of empirical studies, or any other evidence, established that the small amount of printing on the Love Insurance note was so unique that it would only match one person.[379] In fact, the record was to the contrary, since the printing was apparently similar to the printing of David Woods' as well. Rochelle Coleman looked at the printing on the Love Insurance note and exclaimed, "That's David's [Woods'] handwriting." (See § 2.6.4, pp. 466-77 below, incorporated herein.)

Nor did the prosecution make any foundational showing as to Frank Clark's ability to reliably identify the two words and eight numbers which were block printed on the note as "[Lucas'] writing." In fact, the circumstances suggest that such a foundational showing could not have been made for several reasons. First, there was no evidence that Clark had ever before observed Lucas print the exact content of the note. Second, the content of the note was a limited amount of block printing. Third, Clark didn't even have the aid of actual exemplars by which to compare the handprinting as did the experts. Fourth, it had been several years since Clark had actually observed Lucas' printing, so his comparison was necessarily based purely on memory.

Accordingly, Clark was actually asked to do more than was asked of the experts. In the case of an expert it is assumed that the examiner is able to identify the writer of a document because from years of training and

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[379] See *United States v. Prime* (W.D. Wash. 2002) 220 F.Supp.2d 1203, 1212, n.5 [". . .trial courts should be wary of identification based on small samples of handwriting"].

professional experience, the expert is familiar with characteristics of writing based on professional criteria, and he can apply those criteria to determine authorship. The theory is that a person's writing retains certain basic characteristics, even if writings were produced in different circumstances and have different letters and letter patterns. The expert can allegedly determine identity because he or she made tens of thousands of comparisons in his career, knows the tendencies of human beings when writing in the English language, knows specific types of letter formations, and knows what's similar and different based on his vast experience. (But see § 2.5.6, pp. 432-38 above, incorporated herein.)

Judge Hammes' ruling here was that Frank Clark had precisely those same abilities as an expert is assumed to have. He was asked to make a comparison between (1) a photograph of the Love Insurance note, and (2) his memory of completely different documents from several years earlier. However, there is no evidence that Clark had any training in the field of handwriting analysis -- let alone handprinting comparison, no knowledge of the professional criteria for such a task, no knowledge of the science or methodology of handprinting comparison (e.g., no knowledge of loops, rills, lines, letter patterns, writing patterns, etc.), and no background in examining documents. Yet he was being called upon to give an opinion that Lucas, rather than anyone else in the world, was the author of the Love Insurance note, based on common characteristics -- never identified -- between a photograph of a random document with no context and his memory of seeing Lucas' writing in his business records years ago.[380] Absent any foundational evidence

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[380] We're not talking about a lay opinion witness identifying an exact image, i.e., identifying a signature when the lay opinion witness has seen that (continued...)

that a lay witness can reliably "identify" someone's writing -- or here, handprinting -- under these rather extreme circumstances, there's simply no basis for admitting this type of evidence as anything more than guesswork.

Accordingly the identification testimony of Frank Clark should have been excluded for want of the required foundational showing.

D. The Jury Was Not Instructed On The Foundational Showing[381]

Even assuming that the foundational showing of uniqueness can be made based solely on examining the writing itself, without the aid of empirical evidence concerning the range and distinctiveness of printing styles or the singularity of any particular printing style, that foundational finding must ultimately be made by the jury. (Evidence Code § 403.) In the present case

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[380](...continued)
same signature before. We're talking about a lay opinion witness recalling that image of other writings he has seen before; then determining the "pertinent characteristics" of those writings which supposedly link them to David Lucas (whatever those may be); then having the expertise to apply those pertinent characteristics to the very small exemplar which has contents different from any writing Clark had ever seen before. There was no foundation that Clark was qualified to do that. (Cf. *Commonwealth v. Grauman* (1912) 52 Pa. Super. 204, 211.) In fact, Clark was called upon to do far more than experts, because (1) Clark testified without a known exemplar of Lucas' in front of him (if he had the exemplar, his opinion would be inadmissible because the jury could do the same thing, and also because Evidence Code § 1416 doesn't allow a lay opinion witness to "compare"as Evidence Code § 1417 and § 1418 do), (2) he hadn't seen Lucas' writing in years, and (3) all he had was a photograph of the subject writing to compare against his memory of writing he hadn't seen in years. Experts at least have exemplars. Clark was called upon to make a 'scientific' determination of the characteristics of Lucas' writing in a vacuum without either context or an exemplar, and conclude that the Love Insurance note contained those characteristics.

[381] See § 2.9.5(B)(3), p. 566 below, incorporated herein [addressing this argument more fully as an independent claim].

the defense asked that the jury be instructed on its duty to conduct the foundational evaluation (CT 14551) and, therefore, the judge was obligated to so instruct the jury. (Evidence Code § 403(c)(1).)[382] The judge's failure to do so was error.

E. Clark's Opinion Was Not Helpful To The Jury

There was nothing about the evidence before the jury that made Frank Clark's opinion sufficiently helpful or necessary to warrant its admission into evidence under Evidence Code § 800.[383] Situations which justify the admission of lay opinion involve witness opinion based on facts not directly available to the jury. (E.g., *People v. Medina* (1990) 51 Cal.3d 870, 886-87 [whether defendant "understood" a conversation]; *People v. Garcia* (1972) 27 Cal.App.3d 639, 643, fn. 3 [whether a person was drunk]; *People v. Mixon* (1982) 129 Cal.App.3d 118, 127-31 [ID from surveillance photo where the

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[382] Evidence Code § 403(c)(1) provides:

> (c) If the court admits the proffered evidence under this section, the court:
>
> (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

[383] Evidence Code § 800 provides:

> "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony."

(Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

defendant's appearance had changed].) However, in the present case, Clark offered no greater perception of the facts than was all ready before the jury. The jury had before it the note as well as a substantial quantity of Lucas' printing in the form of exemplars. Hence, if anything, the jury was in a better position than Clark to compare the writings since Clark only saw Lucas' writing during the course of their business – no evidence indicated that Clark ever saw Lucas' printing of the exact words and number as they appeared on the Love note. Hence, Clark's opinion added nothing and should have been excluded.

F. Lay Opinion As To Handwriting Per Evidence Code § 1416 Should Not Apply To Handprinting

Evidence Code § 1416 permits lay opinion as to "whether a writing is in the handwriting of a supposed writer. . . ."[384]

The question of whether the statutory term "handwriting" applies to

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[384] Evidence Code § 1416 provides in full:

> A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:
>
> (a) Having seen the supposed writer write;
>
> (b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;
>
> (c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or
>
> (d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

both cursive writing and handprinting has not been addressed by the courts. However, the statutory language of Evidence Code § 1418, and the Law Revision Comment thereto, suggest that the Legislature intended Evidence Code § 1416 to only apply to cursive writing. Section 1418 provides as follows:

> § 1418. Comparison of writing by expert witness
>
> The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered of (b) otherwise prove to be genuine to the satisfaction of the court. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

Notably, § 1418, unlike § 1416, uses the term "writing" instead of "handwriting." The Law Revision Comment explains the significance of this change:

> Section 1418 is based on that portion of Code of Civil Procedure Section 1944 that permits a witness to compare questioned handwriting with handwriting the court has found to be genuine. However, Section 1418 applies to any form of writing, not just handwriting. This is in recognition of the fact that experts can now compare typewriting specimens and other forms of writing as accurately as they could compare handwriting specimens in 1872.

Accordingly, § 1416, which is limited to "handwriting" should not apply to "handprinting."

G. Clark's Testimony Should Have Been Excluded Under Evidence Code § 352

Even if the issues addressed above did not independently justify exclusion of Clark's testimony, they greatly undermined its probative value. Moreover, the opinion itself was highly prejudicial due to the danger that the

jury, unaware that Clark was really in no better position to judge whether the note was written by Lucas, would place undue reliance on Clark's opinion since he was obviously familiar with Lucas' writing.

Accordingly, the potential prejudice of Clark's opinion outweighed its probative value and therefore, it should have been excluded under Evidence Code § 352. (See generally *People v. Green* (1980) 27 Cal.3d 1, 25.)

H. Failure To Exclude Clark's Lay Opinion Violated The Federal Constitution

Admission of Frank Clark's unreliable lay opinion was federal constitutional error because the Due Process and Cruel and Unusual Punishment Clauses 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.)

Also, verdict reliability is also required for any criminal conviction 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.) Additionally, the highly prejudicial impact of Clark's lay opinion rendered its erroneous admission unconstitutional. The state and federal Due Process Clauses protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v.*

Olivas (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.)

Further, because Lucas was arbitrarily denied his state created rights under California law, including Evidence Code sections 350, 351, 352, 403, 800 and 1416, 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.)

I. The Error Was Prejudicial

Clark's opinion that Lucas authored the Love Insurance note was prejudicial in the same manner as the expert's opinion.

First, the jurors were likely to have given undue weight to Clark's testimony simply because he had seen Lucas' handwriting on a regular basis years before and because he gave no indication of being anything but positive about his opinion.

Second, admission of Clark's opinion implied to the jurors as a given truth, the essential assumption that all handprinting is unique and individualistic. In other words, Clark's unqualified opinion that Lucas authored the note assumed, that the 13 block printed letters and seven numbers on the Love Insurance note were so unique that the author could be positively determined to the exclusion of all other persons. Because the defense was not permitted to challenge this essential premise, the jurors were free to fully rely on this untested assumption, as did Judge Hammes (RTH 25439-40), to conclude that Lucas must have authored the note based on their perceived similarities between the note and Lucas' printing. In reality, neither the assumption of uniqueness, nor the conclusion of authorship, were by any means reliable. (See § 2.5.6, pp. 432-38 above, incorporated herein.)

Therefore, because the Jacobs case was closely balanced (see §

2.3.1(I)(2), pp. 209-11 above, incorporated herein), and the identity of the author of the Love note was an important issue in Jacobs, the error in allowing Frank Clark's testimony must be viewed as a substantial error and the judgment should be reversed under the state standard of harmless error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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, the judge exacerbated the prejudice by refusing the defense requests for a contemporaneous cautionary instruction and, instead relying on the preliminary instructions which included a cautionary instruction on expert opinion testimony but not lay opinion. (See § 2.9.1, pp. 529-37 below, incorporated herein.)

Further, 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.

Finally, 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 because it undermined the mitigating theory

of lingering doubt. The penalty trial was closely balanced[385] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." 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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[385] 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.].

2 JACOBS CASE

2.6 HANDPRINTING COMPARISON ISSUES: TRIAL

ARGUMENT 2.6.4

THE JUDGE ERRED IN EXCLUDING ROCHELLE COLEMAN'S STATEMENT THAT DAVID WOODS AUTHORED THE LOVE INSURANCE NOTE

A. Introduction And Procedural Background

The prosecution was permitted to present both expert and lay opinion testimony that David Lucas authored the Love Insurance note. (See § 2.2(H)(2), pp. 81-84 above, incorporated herein.) To counter this evidence the defense sought to introduce the taped statement of Rochelle Coleman who was familiar with the writing of David Ray Woods,[386] and who stated during a taped interview that the Love Insurance note was "David's [Woods'] writing." (RTT 7339.)

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. (CT 13948-49.)

The judge denied the defense request, ruling that the statement was not spontaneous and that Wood's actual handwriting would be the "best evidence." (RTT 7950-51.)

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[386] David Woods was a potential suspect in the Jacobs murders. Jimmie Joe Nelson had originally told San Diego Police Department Detective David Ayers that David Woods, rather than Johnny Massengale, was the man who had confessed to the throat slashing murders of a woman and child in the east part of San Diego. (RTT 7882; 8544-45; 8547-48.) Nelson later told Ayers that it was Massingale and not Woods who was the San Diego killer, and explained that he had been angry at Woods because Woods had tried to frame him for a murder that Woods had committed. (RTT 7882-84; 7906.)

B. Facts

Rochelle Coleman was familiar with David Woods' writing, both printing and cursive. (Defendant's Trial Exhibit 660, p. 12.) She had lived with Woods and received at least one printed letter from him. (Defendant's Trial Exhibit 660, pp. 6, 12.) However, at the time of Lucas' trial Rochelle Coleman was dead and thus unavailable as a witness. (CT 13948.) Prior to her death, on January 27, 1980, Coleman was interviewed and made statements to three police officers Sissy Messick of Sierra Blanca, Texas Ranger Pedro G. Montemayor, and Detective David Ayers of the San Diego Police Department. (RTT 7928-29; Defendant's Trial Exhibit 660.) When presented with the Love Insurance note, Coleman identified the writing on the note as being the printing of David Woods. In support of her identification, Coleman stated that she had letters over at the Sierra Blanca Sheriff's Office which had been printed by Woods if they wanted to match the printing on the note. She knew the printing was "identical." (Defense Trial Exhibit 660, pp. 12-13.)

In August 1980, Woods admitted to Coleman that he had killed two other people, and he would not hesitate to do it again. (*Id.* at 7-8.) Woods did not name the people whom he had killed. (*Ibid.*)

C. Relevancy

The defense offered the Coleman statement into evidence for two purposes:

1) For the truth of the matter asserted to prove that the writing on the Love Insurance note was not David Lucas' writing. (CT 13949.)

2) Alternatively for the nonhearsay purpose of negating the underlying assumptions used by the prosecution handwriting expert, i.e., that (1) people necessarily have different habits when printing, (2) that any unique habits can

be discerned from the Love Insurance printing. (CT 13950.)

D. Lay Opinion Testimony Is Admissible To Prove Lack Of Authentication

The prosecution sought, through both lay and expert opinion testimony, to attempt to authenticate the Love Insurance note as being printed by David Lucas. (See § 2.2(H)(2), pp. 81-84 above, incorporated herein.) The issue of authentication, which was for the jury to determine (see § 2.9.5(B)(6), pp. 567 below, incorporated herein), was a material issue upon which the defense had a right to present evidence. (See generally § 2.3.5.1(E), pp. 282-84 above, incorporated herein.) Lay opinion is an authorized basis for either proving or disproving authentication (Evidence Code § 1416), and was permitted when offered by the prosecution.

E. Admissibility For Truth Of The Matter As Spontaneous Declaration

Like Shannon Lucas' hearsay identification of a dog chain (see Volume 4, § 4.6.2, pp. 1167-80, incorporated herein), Coleman's identification of the printing on the Love Insurance note was admissible under the spontaneous statement exception to the hearsay rule, as applied by this Court. (Evidence Code § 1240.) As noted by the prosecutors in their "Memorandum of Law Regarding Admissibility Of Spontaneous Declaration Of Shannon Lucas," the fact that the declaration was elicited by question did not deprive the statement of spontaneity if made under the stress of excitement. (CT 10272-75.) Indeed, the circumstances leading up to the Shannon Lucas and Rochelle Coleman interviews were identical, i.e., the police interviewed each woman in connection with a homicide case in which her husband/boyfriend was a prime suspect. The men were in custody. The women were presented with physical evidence which the police believed linked the men to the crimes, and

the women made statements about the physical evidence which allegedly linked the evidence to the suspects.

Moreover, Coleman's identification was actually more reliable than Shannon Lucas' identification. Coleman, unlike Shannon Lucas, made the identification without hesitation and offered to support her identification with further evidence of Woods' printing, i.e., the note or notes that Woods had printed which were in the custody of sheriff authorities. Hence, Coleman's identification had particular reliability, and should have been admitted into evidence in order to give the trier of fact a complete and objective view of the Love Insurance note evidence.

F. Admissibility For The Nonhearsay Purpose Of Showing That The Love Insurance Note Printing Was Not Unique

Both the lay opinion testimony of Frank Clark and the opinion testimony of two prosecution handwriting experts were founded on the essential assumption that no two persons print alike. (See § 2.5.4(B)(3), p. 394 above, incorporated herein.) Hence, the fact that Woods' printing was sufficiently similar to the Love note printing to cause Rochelle Coleman to believe that Woods authored the note was relevant to counter the allegation of uniqueness advanced by the prosecution.

In this manner, Coleman's statement was admissible for a nonhearsay purpose, even if it was inadmissible to show that Woods actually did author the note. (See e.g., *People v. Williams* (1992) 3 Cal.App.4th 1535, 1542; *People v. Nealy* (1991) 228 Cal.App.3d 447, 452; *People v. Goodall* (1982) 131 Cal.App.3d 129, 143.)

G. Admissibility For The Nonhearsay Purpose Of Showing The Prosecution Expert Was Biased

Rochelle Coleman's identification of David Woods' printing on the

Love Insurance note should also have been admitted for the nonhearsay purpose of impeaching the prosecution's expert's opinion by bringing to the jury's attention that (1) the expert failed to consider all evidence available to the expert in evaluating an identification, thereby conducting an inadequate investigation in the authorship of the note; (2) that the expert's failure to inquire, investigate, or ascertain whether an identification had been made by a lay-person acquainted with someone's printing other than Lucas shows prosecution bias and improper dependence on the prosecutors to provide relevant information, thereby proving a lack of objectivity and prosecution bias.

It is elementary that a defendant has the right to show the bias, interest, or improper motive of a prosecution witness. (Witkin, *California Evidence* (3d ed.), Vol. 3, § 1985, p. 1942.) In particular, an expert being influenced by the party retaining him is a proper matter for impeachment. (*Id.*, at 1943.) And the defense has the right to impeach an expert's "skill," "experience," "training," and "reasons" for an opinion. (Evidence Code sections 801 and 802.)

Accordingly, the evidence should have been admitted on this basis as well.

H. Lucas' Right To Present A Defense Outweighed The Domestic Rules Of Evidence Upon Which Coleman's Statement Was Excluded

Even if Coleman's declaration was technically inadmissible under the rules of evidence, it should still have been admitted under the circumstances.

The U.S. Supreme Court has consistently held that domestic rules of evidence may not be arbitrarily and unjustifiably invoked to preclude a criminal defendant's right to present a defense. (See *Rock v. Arkansas* (1987)

483 U.S. 44; *Green v. Georgia* (1979) 442 U.S. 95; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Washington v. Texas* (1967) 388 U.S. 14.)

The Supreme Court has applied a balancing test in resolving conflicts between state rules of evidence and federal constitutional right to present a defense, weighing the interest of the defendant against the state interest in the rules of evidence. (*Chambers*, *supra*, 410 U.S. at 295; *Green v. Georgia*, *supra*, 442 U.S. at 97; *Washington v. Texas*, *supra*, 388 U.S. at 19-23.) Several federal circuit courts of appeal have also utilized such a test. (*Pettijohn v. Hall* (1st Cir. 1979) 599 F.2d 476, 486; *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970; *Alicea v. Gagnon* (7th Cir. 1982) 675 F.2d 913, 923; see also *Newman v. Hopkins* (8th Cir. 2001) 247 F.3d 848 [refusal to permit defendant to present voice exemplar evidence to establish that he does not speak with an Hispanic accent violated right to present a defense; domestic rule excluding voice exemplar evidence was an unreasonable application of clearly established federal law providing that a defendant has the constitutional right to present favorable evidence to the jury]; *Lajoie v. Thompson* (9th Cir. 2000) 217 F.3d 663 [constitutional error to apply state rape shield laws literally where State's interest outweighed by defendant's]; *Perry v. Rushen* (9th Cir. 1983) 713 F.2d 1447, 1449; see also *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Corona* (1989) 211 Cal.App.3d 529, 544 ["[A] rule of evidence may not be enforced if it would infringe the right to a fair trial"].)

This balancing principle has also been recognized in California. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 704; *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

Exclusion of evidence has been found to be arbitrary or

disproportionate "where it has infringed upon a weighty interest of the accused." (*United States v. Scheffer* (1998) 523 U.S. 303, 308; see also *Franklin v. Duncan* (9th Cir. 1995) 70 F.3d 75, 83 [exclusion of evidence violated defendant's constitutional right to present a defense].) A domestic rule of evidence may not be used to exclude evidence if it "significantly undermined fundamental elements of the accused's defense." (*Scheffer*, 523 U.S. at 315.) However, rules excluding evidence from criminal trials "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" (*Id.* at 308.)

In the present case, Coleman's statement undermined the reliability of the crucial prosecution handprinting evidence by challenging the prosecution's assumption of uniqueness and by providing evidence that someone other than Lucas may have written the note found at the crime scene. Accordingly, Rochelle Coleman's declaration should have been admitted notwithstanding the domestic rules of evidence.

Hence, exclusion of the evidence violated the federal constitution.

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

Judge Hammes excluded Coleman's statement because Woods' own writing would be the best evidence on the issue. (RTT 7950-51.) However, when the defense sought to test the prosecution expert with a sample of Woods' printing the judge did not allow the defense to do so. (See § 2.5.5, pp. 410-32 above, incorporated herein.)

The combined impact of these errors was to give the prosecution evidence a false aura of reliability. An unreliable verdict of conviction for any

criminal offense violates the federal constitution. Verdict reliability is 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.)

Moreover, in a capital case the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) require 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.)

J. The Error Violated Lucas' Federal Constitutional Rights

Exclusion of Coleman's statement violated Lucas' right, as a criminal defendant, to present a defense which is a fundamental element of the Due Process, Trial By Jury and Compulsory Process Clauses of 6th, and 14th Amendments to the United States Constitution. (See *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19.) Suppression of evidence by the prosecution may implicate 14th Amendment federal due process principles. (See e.g., *Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58 [governmental bad faith required]; *Kyles v. Whitley* (1995) 514 U.S. 419, 436 [governmental bad faith not required]; *Brady v. Maryland* (1963) 373 U.S. 83, 87 [same].)

Criminal defendants are constitutionally assured "a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485.) The guarantee arises from either the Confrontation Clause and the Due Process Clause. (See e.g., *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588.) The guarantee applies to criminal

defendants in state court. (See *Trombetta*, 467 U.S. at 485.) It may be violated when a defendant is prevented from presenting evidence important to his defense. (See e.g., *Id.* at 488-89 [failure to preserve breath samples that might have provided grounds for impeachment]; see also *Gilmore v. Taylor* (1993) 508 U.S. 333, 344 and cases cited therein; *Lopez-Alvarez, supra*, 970 F.2d at 588 [limitation on cross-examination of prosecution witness about hearsay statements that could have cast doubt on his credibility].)

The error also violated Lucas' federal constitutional rights to due process and a fair trial by jury (6th and 14th Amendments) which require that the jury assess witness credibility. "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.) "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (DC Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . ."].)

Trial errors which impair the jury's central function of assessing the credibility of witnesses implicate the accused's federal constitutional right to due process and trial by jury. (See *Franklin v. Henry* (9th Cir. 1997) 122 F.3d

1270, 1273 [error in excluding a statement relating to the credibility of a child witness was of constitutional magnitude based on *Crane v. Kentucky* (1986) 476 U.S. 683, 690-91.)

Further, because Lucas was arbitrarily denied his state created right to present relevant evidence in his defense under California Evidence Code sections 300-352, 800, 801, 1240, 1416 and the California Constitution (Art. I, § 28(d)), 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.)

K. The Error Was Prejudicial

The handprinting testimony presented by the prosecution was crucial evidence in a closely balanced case. Exclusion of Rochelle Coleman's testimony gave the prosecution experts a false aura of reliability and, therefore, the judgment should be reversed.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.

Finally, 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 because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[387] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." 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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[387] 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.].

2 JACOBS CASE

2.6 HANDPRINTING COMPARISON ISSUES: TRIAL

ARGUMENT 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

Evidence Code § 403[388] requires the judge to instruct, upon request, as to any preliminary factual finding which the jury is required to make.

In the present case the defense requested that the jury be instructed that opinions of identity based upon handprinting comparisons may not be considered by the jurors unless:

> . . . The specimens or items compared are unique to one individual, and only one individual, and that the comparison method is capable of proving the uniqueness so as to give rise to a reasonable inference of identity without speculation or guesswork. (CT 14551.)[389]

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[388] Evidence Code § 403 provides, in pertinent part, as follows:

> (c) If the court admits the proffered evidence under this section, the court:
> (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

[389] COMPARATIVE TECHNIQUES – PROOF OF IDENTITY

> Before opinions based on comparative techniques may be offered in an attempt to prove an inference of identity, the following preliminary fact must be proved by the party offering the evidence:

(continued...)

The judge's denial of this instruction (RTT 11437) was error because the uniqueness of the handprinting on the Love Insurance note was essential to its relevance. (See § 2.5.4(B)(3), p. 394 above, incorporated herein.)

This error violated Evidence Code § 403. It also violated the state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to

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[389](...continued)

1. That the specimens or items compared are unique to one individual, and only one individual, and that the comparison method is capable of proving the uniqueness so as to give rise to a reasonable inference of identity without speculation or guesswork.

Over the course of time it has been established that fingerprints are unique to one individual, and only to one individual, and that the comparative technique is capable of proving uniqueness so as to give rise to a reasonable inference of identity. The weight to be given by any such evidence is for you to determine.

Evidence has also been introduced in this trial tending to indicate that comparative techniques for fingerprint evidence may be used for purposes of exclusion. The weight of any such evidence is for you to determine.

Absent proof of the following specimens being unique to one individual, and only one individual, and that the comparison method being capable of proving uniqueness so as to give rise to an inference of identity, they may be considered by you only for the limited purposes of exclusion and negating an inference of identity:

1. Comparative microscopy of hair;
2. Comparative band reading of results obtained after electrophoretic testing of blood;
3. Comparative analysis of handprinting;
4. Comparative analysis of boot prints;
5. Comparative analysis of knife prints.

The weight of any such evidence is for you to determine. (CT 14551-52.)

due process and a fair trial by jury (6th and 14th Amendments) which require that the jury assess witness credibility. "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 ["...the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials..."].) "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.)

The error also violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas his state created rights under California law, including Evidence Code § 403, to have the jury make the necessary foundational finding before considering what was otherwise a crucial but unreliable piece of evidence. (*Hicks v. United States* (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.)

Moreover, the error also violated the Cruel and Unusual Punishment

Clause of the federal constitution (8th and 14th Amendments) which require 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 Amendments) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

The error was prejudicial. Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) This is especially true in a capital trial where "evidence of other crimes . . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed. . . ." (*People v. McClellan* (1969) 71 Cal. 2d 793, 805; *People v. Jones* (1996) 13 Cal.4th 535, 585.) This is so because of the jurors' tendency to condemn the accused on the basis of perceived disposition to commit criminal acts. (*People v. Thompson, supra*, 27 Cal.3d at 317.) Therefore, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.

Finally, 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 because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[390] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." 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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[390] 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.].

2 JACOBS CASE

2.7 HAIR EVIDENCE

ARGUMENT 2.7.1

THE FAILURE TO PROPERLY PRESERVE THE HAIR FOUND IN SUZANNE JACOBS' HAND VIOLATED LUCAS' FEDERAL CONSTITUTIONAL RIGHTS

The prosecution argued that the hair found in Suzanne Jacobs' hand was consistent with the hair of David Lucas. (RTT 2152-58.) At least one, and possibly as many as seven, of those hairs had a root attached to it which could have been tested serologically. (RTH 13232; 20218-19.) The results of those serological tests could have excluded Lucas and, thus, undermined the prosecution's theory regarding the hair. (RTH 14401; 15068-72.) Such tests were discussed in published journal articles as early as 1979. (RTH 13217.)

However, it was necessary to refrigerate the hair root to properly preserve it and, because this was not done, no serological testing of the hair was ever done. (RTH 13227; 20218-21.)

The defense filed a *Hitch/Trombetta* motion based on the failure to preserve the hair evidence. (CT 8334-60.) Judge Hammes denied the motion because "the technology at the time on electrophoretic analysis of those hair root sheaths was just in its infancy." (RTH 25444.) Therefore, since such testing was not being done "in routing case work at that time . . . we cannot fault the detectives for not having preserved the hair root sheaths. . . ." (RTH 25445.) This ruling was reversible error.

Even assuming there was no bad faith in failing to preserve the evidence, the loss of the evidence still violated Lucas' constitutional rights

because the requirements of *Trombetta*[391] and *Youngblood*[392] should not apply when the lost evidence makes the trial fundamentally unfair and impaired the reliability of the guilt and/or penalty adjudication in a capital case.

An unreliable verdict of conviction for any criminal offense violates the federal constitution. 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.)

Moreover, in a capital case 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.)

In the present case the failure to properly preserve the hair evidence undermined the fairness and reliability of the guilt trial. This is so because the prosecution was permitted to argue that the hairs found in Suzanne Jacobs' hand were from Lucas when they had failed to preserve evidence which not only could have disproved this prosecution theory but could have exonerated Lucas.

Moreover, the reliability of the penalty verdict was also impaired because lingering doubt was a primary defense theory at the penalty trial and

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[391] *California v. Trombetta* (1984) 467 U.S. 479.

[392] *Arizona v. Youngblood* (1988) 488 U.S. 51.

because the Jacobs case was closely balanced.[393] In sum, the prosecution cannot meet its burden of proving the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

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[393] 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.].

2 JACOBS CASE

2.8 THIRD PARTY GUILT ISSUES

ARGUMENT 2.8.1

DENIAL OF FAIR OPPORTUNITY TO CONFRONT JOHNNY MASSINGALE

A. Introduction

Prior to the arrest of Lucas, the San Diego District Attorney's office filed death penalty charges against Johnny Massingale for the Jacobs murders. (CT 9254-9255.) Massingale was held to answer and the trial was set for January 14, 1985. (CT 8557.) The prosecution argued that Massingale's confessions to two acquaintances were true and his confessions to police officers were true and voluntary. (CT 3958, 12583-12585.)[394]

However, in December of 1984, on the eve of Massingale's capital trial, Lucas became a suspect in the Jacobs murders. (CT 5775.) On January 4, 1985, the charges against Massingale were dismissed. (CT 8554, 8557.) Lucas was first charged with the Jacobs murders, with allegations of special circumstances, on March 13, 1985. (CT 5680-5681.) On May 24, 1985, Massingale's motion, pursuant to Penal Code § 851.8, to seal all records regarding his arrest for the Jacobs murders was granted on. (CT 8597.)[395]

The San Diego District Attorney's office reversed itself and implicitly validated Massingale's recantation of his confessions by calling Massingale as a witness at Lucas' trial to provide affirmative evidence that he had not

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[394] At Massingale's preliminary hearing the court found sufficient evidence to bind over Massingale even without considering Massingale's confession to the police. (CT 8631-8633.)

[395] Massingale testified at Lucas' preliminary hearing on July 1, 1985. (PHT (CR 75195) 780.)

committed the Jacobs murders or the 1984 murders charged against Lucas. Massingale testified that he never had confessed to Jimmie Joe Nelson (RTT 856-857) or John "Shorty" Smith (RTT 722-724) and that he had been coerced into confessing to law enforcement while in Harlan, Kentucky. (RTT 691, 764, 786-789, 807-812, 820, 864, 866, 900, 902.)

Lucas was prevented from fully confronting Massingale's self-serving testimony because Judge Hammes ruled that the defense could not cross-examine Massingale as to his financial bias due to his civil suit for damages and because the prosecution failed to disclose evidence which was potentially exculpatory to Lucas or which would have impeached Massingale during his testimony. These errors prevented Lucas from discrediting prosecutorial evidence and from raising a reasonable doubt as to Lucas' own guilt, thereby denying Lucas his Sixth Amendment right to confrontation. In contrast, Massingale's self-serving testimony enabled the prosecution to discredit his earlier confessions.

Clearly, Massingale was a key witness whose testimony was essential to convict Lucas for the Jacobs murders. Moreover, the death penalty could not have been imposed against Lucas if he had not been convicted of the Jacobs murders.[396] Accordingly, the denial of Lucas' right to confrontation on the questions of whether Massingale's testimony was truthful and whether there was a reasonable doubt that Lucas committed the Jacobs murders was uniquely and fundamentally prejudicial requiring reversal. (*People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135, 1138-1140.)

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[396] Lucas was convicted of one other murder, the murder of Anne Swanke, but the only special circumstance alleged or found was multiple murder, a finding which, in light of the jury's verdicts, required conviction on the Jacobs counts. (CT 5573; 14240.)

B. Factual Background Regarding Massingale's Confessions

San Diego authorities were led to Massingale because he had revealed key facts to Nelson and Smith while hitchhiking in 1980, which only the killer, or someone who had talked to the killer, would know.[397] (RTT 8140.) In particular, Massingale separately told Nelson and Smith that he had killed a woman and small boy in San Diego in 1979. (RTT 7816-7831, 7864-7867, 7896, 8543-8544.) Massingale bragged to Smith and Nelson that he had nearly cut off the woman's head. (RTT 7816, 7818, 7831, 7864-7865, 7859-7860, 7899-7900.)[398] He mentioned the names "Sue Ann" or "Suzanne" to Nelson and "Anne" to Smith. (RTT 7818, 7864, 7866-7867, 7897, 7905, 7920-7921.) Massingale described a white wood frame house with a blue vehicle. (RTT 7821, 7864-7866.)[399]

Nelson repeated these details to law enforcement authorities in Alabama and Texas and, finally, to San Diego Police Department [hereafter "S.D.P.D."] Detective David Ayers; none of these officials provided details of the crimes to Nelson.[400] By June of 1982, San Diego authorities had

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[397] The police withheld details of the killings from the public which could be used to verify that a suspect was the killer. (RTT 479-80.)

[398] Suzanne Jacobs' throat was severely cut with the wound extending from ear to ear and all the way to the vertebrae. (See RTT 4162-63.)

[399] The Jacobs home was a white, wood frame house. There was also a blue Volkswagen bug in the driveway. (Trial Exhibit 4, photo C.)

[400] On December 7, 1980, Nelson told Alabama Detective Sergeant Harold Phillips in a taped statement the same details from Massingale's confession, including that victims had a white wood frame house and a blue vehicle; the tape was lost. (RTT 7869, 7910, 7918, 7922-7924, 8896-8898.) Phillips knew no details of the crimes when he interviewed Nelson. (RTT 7783, 8589.) Phillips relayed information to S.D.P.D. authorities, who did not (continued...)

located and identified Massingale through leads given by Nelson; however, they did not contact Massingale until March of 1984. (RTT 8036, 8561, 8563.) In 1984, he confessed to Kentucky State Troopers Denny Pace and H.D. Howard and then to S.D.P.D. Detectives David Ayers and William Green, who had traveled to Harlan, Kentucky, to interrogate Massingale. (RTT 8031; 8034.)

C. Barring Lucas From Cross-Examining Massingale As To Bias Was Prejudicial Error

In violation of Lucas' Sixth Amendment right to confrontation, the trial court precluded defense counsel from cross-examining Johnny Massingale as to his possible financial bias. (RTT 698-699, 710-714.)[401] At the time of Lucas' trial, Massingale had pending a federal civil lawsuit against San Diego

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(...continued)
provide him with crime details. (RTT 7755-7756, 7765, 7781, 7783.)

When Nelson was transferred to Texas, Phillips played his taped interview to Texas Ranger Pedro Montemayor. (RTT 7923.) In December of 1980, Nelson talked about Massingale to Montemayor, who did not provide Nelson with information about the crimes. (RTT 7792, 7872.) On December 15, 1980, Montemayor sent a teletype to San Diego authorities regarding the 1979 murders. (RTT 7792, 7796, 8542-8543.) S.D.P.D. Detective Green recalled that Montemayor relayed information of the murders of a woman named "Sue Ann" and a young boy in a little town east of San Diego. (RTT 7998-8000.)

On January 26 and 27, 1981, when S.D.P.D. Detective Ayers interviewed Nelson in Texas, Nelson gave him the name "Johnny" and provided identifying information about Smith. (RTT 8543-8549.) Ayers did not provide crime details to Nelson. (RTT 8548.) In April of 1981, San Diego authorities learned Massingale's full name from Smith. (RTT 8006-8007.) In October of 1981, Nelson twice identified Massingale in a photo line-up. (RTT 7804-7808, 7876-7877.)

[401] Lucas also raised this error in his motion for a new trial, which was denied. (CT 14872, 14878-14881.)

authorities for damages allegedly sustained following his own arrest for the Jacobs murders.[402] However, defense counsel was prohibited from cross-examining Massingale about the unique fact of this civil lawsuit. Preventing cross-examination about Massingale's financial interest in establishing that Lucas committed the Jacobs' murders deprived the jury of powerful impeachment evidence.

1. Denying Cross-Examination Of A Prosecution Witness As To Financial Bias Violated Lucas' State And Federal Constitutional Rights

"[A] criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the

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[402] After the capital charges against Massingale were dismissed, he obtained a finding of "factual innocence" and an order sealing all records relating to his arrest pursuant to Penal Code § 851.8 (RTT 291-292) and then filed a civil lawsuit in federal court against the San Diego authorities responsible for arresting and prosecuting him. (RTT 370, 710-711, 3403.) Moreover, Massingale filed a petition in Lucas' case to inspect and copy exhibits because he needed to prove in his civil suit that Lucas was guilty of the murders. (CT 3402-3405.)

Massingale's federal lawsuit, Civil Action No. 85-2762-R(CM) filed in the United States District Court for the Southern District of California, named David R. Ayers, William F. Green, Denny Pace, Pedro G. Montemayor, Jimmie Joe Nelson, Wayne A. Burgess, Paul Ybarrando, The State of Kentucky, The State of Texas, the City and County of San Diego, and Does One through Fifty as defendants. According to the District Court docket for that case, on April 30, 1990, roughly six months after judgment was entered against Lucas, Massingale settled his lawsuit for $75,000. Pursuant to Evidence Code § 452(d) it is requested that this Court take judicial notice of this fact.

witness.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318.) The United States Supreme Court has "recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Davis v. Alaska*, *supra*, 415 U.S. 308, 316, citing *Greene v. McElroy* (1959) 360 U.S. 474, 496; *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 678-679.)

This Court has determined that "wide latitude should be given to cross-examination designed to test the *credibility of a prosecution witness in a criminal case*." (*People v. Belmontes* (1988) 45 Cal.3d 744, 780, emphasis added.) Subject to the "broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." (*Davis v. Alaska*, *supra*, 415 U.S. 308, 316.)

Defense counsel was entitled under the California Rules of Evidence, the California Constitution (Art. I, § 28(d)) and the federal constitution (6th, 8th and 14th Amendments) to inform the jurors that Massingale had a bias in testifying to the facts as he did, because Massingale was financially interested in the outcome of Lucas' trial. It has long been held that the bias of a witness may be shown by demonstrating that the witness has "a financial interest in the outcome of the [trial] terminating favorably for the party for whom he testified[.]" (*Staley v. State Bar of California* (1941) 17 Cal.2d 119, 143.)

Obviously, such a rule has even greater significance in a death penalty case. In the penalty retrial of one capital case, defense counsel improperly failed to expose on cross-examination that a witness, who testified about facts connected to an arson, was possibly biased because that witness had also filed a federal civil suit which sought damages from that arson. (*People v. Easley*

(1988) 46 Cal.3d 712, 727-728.) This Court ruled that the "defense counsel could have demonstrated that [the witness] had a bias–i.e., that it was in his financial interest to establish that defendant had been hired by [a third party] to commit the arson, because he [the witness] had a lawsuit pending on that ground. . . ." (*Id.* at 728.)

Here, the trial court erroneously prevented defense counsel from showing that Massingale's testimony shifting the blame to Lucas was motivated, at least in part, by his hope to gain a large award in his civil suit.[403] Massingale stood to benefit in his suit for damages if he could demonstrate through his testimony at Lucas' trial that the police and district attorney improperly prosecuted him instead of Lucas. In particular, if Lucas was convicted of the Jacobs murder, Massingale could use this in his civil action as demonstrable proof that his confession was coerced. Certainly, Lucas' conviction would carry great weight with Massingale's civil jury. Hence, it was clearly in Massingale's financial best interest to do whatever he could to help get Lucas convicted. (See e.g., *Wheeler v. United States* (1st Cir. 1965) 351 F.2d 946, 947-48 [error to preclude cross-examination as to witness' intent to claim reward from IRS for providing information on alleged tax fraud by defendant which was subject of the prosecution]; *Bowen v. State* (2001) 556 S.E.2d 252, 253-54 [error to exclude witness's claim against the

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[403] During Massingale's testimony at Lucas' trial, his lawyer [James Tetley], sat in the courtroom. (RTT 711-712, 751, 799-800, 899.) Defense counsel made an offer of proof that Massingale had told another witness, Kentucky State Trooper Denny Pace, that if he [Massingale] had retained a good lawyer he could have made a million dollars suing on an earlier arrest in Chicago, so he was having a lawyer in the courtroom now. (RTT 711-714.) Defense counsel contended that, during cross-examination, Massingale looked at Tetley for guidance. (RTT 751.)

state's Crime Victims Emergency Fund based on incident involved in case, which could permit witness to obtain money from the State if defendant was convicted].)

Massingale's testimony also gave him the opportunity to provide self-serving evidence that he had been coerced by the police into confessing and making up details of the crime. (RTT 689-690, 703, 760, 763-764, 814, 880.) Massingale had a financial incentive to portray himself as a person who had a poor memory and who could be "mixed up" during questioning, either by the police or defense counsel. (RTT 700, 707, 709, 717, 749, 791, 876-877, 899.) Thus, his self-serving testimony at Lucas' trial, which was not subjected to full cross-examination, provided Massingale a basis to deny or to excuse any past statements or testimony which tended to incriminate him and which would diminish the value of his civil suit.[404] Because this evidence was relevant to a material issue, its exclusion violated the federal constitution. (See § 2.3.5.1(E), pp. 282-84 above, incorporated herein.)

Further, Lucas was denied his Sixth Amendment right to confrontation when he was prohibited from exposing Massingale's financial motive.[405] (*Davis v. Alaska*, *supra*, 415 U.S. 308 at 316-317; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at 678-679.) Exposure of such a motive might well have caused the jury to discredit Massingale's evidence denying knowledge of the Jacobs murders. Lucas' right to confrontation was violated because "the

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[404] At one point, Massingale even equivocated on identifying his own voice on a tape confessing to Ayers and Green. (RTT 809-810.)

[405] As noted above, Massingale repeatedly used his testimony to deny having met Nelson or having any recollection of him. (RTT 716-718, 856.) However, Massingale had acknowledged on tape to Pace: "Okay. Maybe I do know him [Nelson]." (RTT 699-700.)

prohibited cross-examination might reasonably have produced 'a significantly different impression of [the witness'] credibility. . . .'" (*People v. Belmontes*, *supra*, 45 Cal.3d 744, 780, quoting *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 680.)

Additionally, Lucas was denied his federal constitutional rights to due process, trial by jury, representation of counsel, compulsory process and confrontation (6th and 14th Amendments) which permit a criminal defendant to present through counsel evidence and valid defense theories in defending against a criminal prosecution. (See *Gilmore v. Taylor* (1993) 508 U.S. 333; *Taylor v. Illinois* (1988) 484 U.S. 400, 408-09; *Martin v. Ohio* (1987) 480 U.S. 228, 233-34; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

Further, because the error arbitrarily denied Lucas his state created rights to present relevant and material evidence under the California Evidence Code (§350-§352) and the California Constitution, Article I, § 28(d), 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.)

2. Prohibiting Cross-Examination Of Massingale As To Financial Bias Was Reversible Error

The standard of prejudice for a violation of the Confrontation Clause by a restriction of cross-examination is "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at 684; *Coy v. Iowa* (1988) 487 U.S. 1012, 1021-1022.) In the present case, the error in restricting the cross-examination of Massingale was prejudicial because it was not harmless beyond a reasonable doubt.

When cross-examination improperly has been limited, the prejudicial effect of the error can be evaluated by considering a number of factors, including the importance of the witness's testimony to the prosecution's case, whether the testimony was cumulative, whether there was evidence corroborating or contradicting the witness, the extent of the cross-examination actually permitted and the overall strength of the prosecution's case. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 684.)

First, the prosecution's case as to the Jacobs murders was closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.)

Second, Massingale's testimony was crucial to convicting Lucas of the Jacobs murders. Lucas' primary attack on the prosecution's case was a defense that Massingale had committed those two murders. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017; *People v. Hall* (1986) 41 Cal.3d 826,

833.)[406] Lucas elicited evidence that Massingale had revealed intimate details of the crimes in confessions to two people in 1980, that Massingale had been in a police photo lineup in 1981, long before Lucas became a suspect, and that Massingale had confessed to law enforcement in 1984. Attacking Massingale's recantation of all these confessions was critical to Lucas' defense.

Third, Massingale's evidence was not cumulative.

Fourth, no other evidence corroborated Massingale's testimony. In fact, his evidence was contradicted by Nelson, Smith, Pace, Ayers and Green. (See § 2.2(N), pp. 100-19 above, incorporated herein.)

Fifth, the cross-examination of Massingale, to the extent permitted by the trial court, merely allowed Massingale to present himself as having a poor memory and being easily "mixed up," as noted above. Full cross-examination of Massingale's bias in testifying would have provided "a significantly different impression of [his] credibility. . . ." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 680), and enabled the jury to see Massingale as a mercenary litigant, calculatingly portraying himself as memory-impaired and easily misled in order to bolster his chances for a monetary recovery in his federal lawsuit against the San Diego authorities.

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[406] Under a defense of third party culpability, Lucas did not have to prove that Massingale committed the murders; it was only necessary for the jurors to have a reasonable doubt as to Lucas' guilt based on the third party guilt theory. (*People v. Hall* (1980) 28 Cal.3d 143, 159; see also § 2.8.3(C), pp. 516-17 below, incorporated herein.) On the other hand, because of Massingale's confession, the prosecution, which bore the burden of proving Lucas' guilt beyond a reasonable doubt, necessarily also bore the burden of proof and persuasion that Massingale, who had confessed to the murders, did not commit them. (Penal Code § 1096; Evidence Code § 520; see also *People v. Madison* (1935) 3 Cal.2d 668.)

Moreover, the prosecution destroyed one of the most significant piece of evidence: a fingerprint on the Love Insurance note, which might have been exculpatory of Lucas or inculpatory of Massingale; and, the prosecution failed to preserve the image of the fingerprint through photography. (See § 2.4.2, pp. 333-48 above, incorporated herein.)

Even though Massingale had been declared "factually innocent" of the Jacobs murders,[407] the trial court was obligated to allow Lucas to provide his jury with all relevant evidence bearing upon Massingale's credibility. (See *Davis v. Alaska*, *supra*, 415 U.S. 308; Calif. Const., Art. I, § 28(d).)

As the United States Supreme Court has held, "to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Lucas was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" (*Davis v. Alaska*, *supra*, 415 U.S. at 318.)

Accordingly, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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

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[407] Lucas was neither a party to nor served with Massingale's motion filed pursuant to Penal Code § 851.8, which the prosecution did not oppose. (CT 8560-8578, 8597.) Moreover, James Tetley, counsel for Massingale, filed his declaration in support of the § 851.8 motion in which he stated on information and belief that "Nelson now says that he got the information on the Jacobs killings from a source other than Massingale." (CT 8569.) In fact, Tetley's statement was false. Nelson testified at trial that Massingale confessed to the Jacobs murders, revealing details of the crimes. (See § 2.2(N)(1)(a), pp. 100-105 above, incorporated herein.)

appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp.209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

D. The Prosecution's Failure To Comply With Discovery Orders Violated Lucas' Federal Constitutional Rights

1. The Prosecution Erroneously Failed To Disclose The Police Report That Massingale Had Assaulted His Wife Until Massingale Had Completed His Testimony

Although Johnny Massingale testified on January 10 and 11, 1989, that he would never hit a woman [RTT 806], the prosecution did not disclose to the defense until approximately January 12 or 13, 1989, a police report that

Massingale had assaulted his wife on December 30, 1988. (RTT 1153-1156.) Defense counsel promptly objected to the prosecution's failure to disclose timely impeaching evidence of a key witness in a capital case in violation of discovery orders obtained by the defense [RTT 1153-1156, 10367, 10484-10486], filed a motion for mistrial, exclusion of evidence and other sanctions for violations of such discovery orders [CT 14101-14107; 14148-14151], and filed a motion for a new trial on the same grounds. (CT 14872-14879.) The motions were denied. (RTT 10502-10504, 13640-13641.)

The prosecution's failure to disclose material evidence favorable to Lucas violated the due process clause of the state (Art. I, sections 1, 7, 15, 16 and 17) and federal (14th Amendment) constitutions. (*United States v. Bagley* (1985) 473 U.S. 667, 682; *Brady v. Maryland* (1963) 373 U.S. 1194.) The prosecution had a duty to learn of such impeaching evidence known to the San Diego police, and provide it to the defense, even though the police had failed to reveal the information to the prosecution. (*Kyles v. Whitley* (1995) 514 U.S. 419.)[408]

"Disclosure, to escape the *Brady* sanction, must be made at a time when the disclosure would be of value to the accused." (*United States v. Davenport* (9th Cir. 1985) 753 F.2d 1460, 1462.) The impeaching evidence was not available to Lucas during cross-examination of Massingale, the only time such evidence would have had a powerful impact on attacking Massingale's truthfulness and his testimony asserting his own nonviolence towards women. (CT 14106-14107, 14875-14876, 14879; RTT 9594-9599.)

Had the prosecution disclosed the police report, defense counsel would

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[408] It should be noted that the City Attorney's office, which was defending San Diego authorities in Massingale's civil lawsuit, apparently had the police report and gave it to the prosecution in this case. (RTT 10476.)

have been able to catch Massingale in a lie. (RTT 9594.) This was especially important because Massingale's testimony was generally insulated from meaningful cross-examination.[409] In contrast, the later introduction of evidence of the assault through other witnesses had minimal impact on attacking Massingale's credibility, because the jury was deprived of Massingale's reaction. (RTT 8535-8537.) Thus, the prosecution withheld information that would have put teeth in the attack on Massingale.

Depriving the defense of the opportunity to have the jury evaluate Massingale's demeanor when confronted with his lie deprived Lucas of a crucial component of his federal constitutional right to confrontation. (U.S. Const., 6th and 14th Amendments; *Ohio v. Roberts* (1980) 448 U.S. 56, 63-64.)

Further, by impairing the effectiveness of Lucas' defense the error also violated his federal constitutional rights to due process, compulsory process, trial by jury and representation of counsel. (6th and 14th Amendments.) (See *Gilmore v. Taylor* (1993) 508 U.S. 333; *Taylor v. Illinois* (1988) 484 U.S. 400, 408-09; *Martin v. Ohio* (1987) 480 U.S. 228, 233-34; *Crane v. Kentucky*

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[409] Massingale's blanket denials of confessing to Smith or Nelson, coupled with his repeated recitations of poor memory, suggestibility, and coercion by law enforcement insulated him from admitting any fact on which defense counsel could conduct meaningful cross-examination, as noted above. Moreover, when defense counsel aggressively cross-examined Massingale about his prior confessions and knowledge of the Jacobs murders, the trial court, in front of the jury, told defense counsel to "lighten [his] tone." (RTT 701-704.) The trial court also showed sympathy for Massingale by telling defense counsel, in front of the jury, to pay for the Marlboro cigarettes borrowed from Massingale to be used as an exhibit [RTT 733-734] ; the court told defense counsel later she was just trying to be "nice" to Massingale because defense counsel was "very hardnosed" with Massingale. (RTT 736-740.)

(1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

Further, because the error arbitrarily denied Lucas his state created rights to discovery and to present relevant and material evidence under the California Evidence Code (§ 350-§ 352) and the California Constitution (Art. I, sections 1, 7, 15, 16, 17 and 28(d)), 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.)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely

balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2. The Prosecution Failed To Disclose The Four Photos Shown To Massingale In Kentucky, Until Massingale Had Completed His Testimony

During his testimony, Massingale was unable to identify which photographs had been shown to him in Kentucky when he was interrogated by S.D.P.D. Detectives Ayers and Green and Kentucky State Trooper Pace.[410] (RTT 873.) Nevertheless, Massingale asserted that he had obtained inculpatory details of his confession from an unknown number of photographs

[410] Massingale testified that he had not previously seen the photographs which were shown in court. (RTT 873.)

of the crime scene shown to him by officers Pace, Ayers and Green.[411] (RTT 814-815, 818-820, 871-873.)

Even though defense counsel repeatedly had tried to find out which of the many crime scene photographs actually had been shown to Massingale in Kentucky (RTT 9604), a fact noted by the trial court (RTT 10504-10506), the prosecution did not disclose which specific photographs had been shown to Massingale by Ayers and Green until Massingale had completed his testimony and the prosecution was cross-examining Ayers.[412] (RTT 8593-8595, 10504-10507.)

Defense counsel immediately objected to this failure to timely disclose favorable evidence as to a key witness in a capital case in violation of discovery orders obtained by the defense. (RTT 8606-8609, 10367-10370, 10486-10487.) Citing that error, Lucas moved for a mistrial, exclusion of evidence and other sanctions for violations of discovery orders [CT 14101-14103, 14107] and moved for a new trial. (CT 14872-14879.) Lucas' motions

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[411] However, Massingale stated that he may not have been shown any photographs before he first confessed to Pace in an unrecorded confession. (RTT 899-900.) Massingale said Ayers and Green showed him photographs of Smith and Nelson; they did not show him photographs of people inside the house. (RTT 874-875.) He recalled seeing a photograph of the kitchen with a note on the table and the "rest of them," and claimed that Pace opened a briefcase from San Diego and unbound a set of photographs while Ayers and Green were out of the room. (RTT 690-691, 819-820, 883-890, 895-897.) Massingale said Ayers and/or Green showed him a photograph of a white house with two trees. (RTT 814, 818, 872.) Massingale was not shown a photograph of a blue "bug" automobile. (RTT 874.)

[412] Without the identifying numbers on the original photographs, defense counsel had not been able to review the specific photographs shown to Massingale in Kentucky when questioning Massingale, Ayers and Green. (RTT 8573-8574, 8578-8584, 9604-9605).

were denied. (RTT 10504-10507, 13640-13641.)

The Due Process Clause of the Fourteenth Amendment of the federal constitution was violated by the prosecution's failure to disclose material evidence favorable to Lucas. (*United States v. Bagley*, *supra*, 473 U.S. at 682.) The disclosure of the photographs was not made at the time it would have had value for the accused. (*United States v. Davenport*, *supra*, 753 F.2d 1460, 1462.)

The photographs were not available to Lucas during cross-examination of Massingale, the only time such evidence would have enabled defense counsel to review the photographs with Massingale in order to attack his testimony that he did not commit the Jacobs murders and only confessed key details of the murders after seeing them in crime scene photographs.[413] Cross-examining Massingale was critical to establishing Lucas' defense of third party culpability as to the Jacobs murders and defeating a basis to impose the death penalty.

Depriving the defense of the opportunity to have the jury evaluate Massingale's demeanor deprived Lucas of a crucial component of his federal constitutional right to confrontation. (U.S. Const., 6th and 14th Amendments; *Ohio v. Roberts* (1980) 448 U.S. 56, 63-64.) In addition, Massingale's asserted memory lapse of the events in issue, including any crime scene

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[413] As noted above, Massingale's confessions in 1980 to Smith and Nelson, nearly four years prior to seeing any photographs, described key details of the crimes. Moreover, Massingale's confessions in 1980 and 1984 remained consistent. His confessions to law enforcement in 1984 contained essentially the same details as he had told Nelson and Smith in 1980. (RTT 7816, 7818, 7821, 7831, 7864-7867, 7879-7880, 7896, 7899-7900, 7905; Preliminary Hearing Transcript, hereinafter PHT (case No. CR 73903) 855-857, 859-863, 866.)

photographs shown to him, so frustrated Lucas' right to cross-examine Massingale as to violate the Confrontation Clause of the Sixth Amendment. (See, dictum in *Delaware v. Fensterer* (1985) 474 U.S. 15, 20-21.)

Further, by impairing the effectiveness of Lucas' defense the error also violated his federal constitutional rights to due process, compulsory process, trial by jury and representation of counsel. (6th and 14th Amendments.) (See *Gilmore v. Taylor* (1993) 508 U.S. 333; *Taylor v. Illinois* (1988) 484 U.S. 400, 408-09; *Martin v. Ohio* (1987) 480 U.S. 228, 233-34; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

Further, because the error arbitrarily denied Lucas his state created rights to present relevant and material evidence under the California Evidence Code (§ 350-§ 352) and the California Constitution (Art. I., sections 1, 7, 15, 16, 17 and 28(d)), 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.)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp.209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

E. The Errors Were Cumulatively Prejudicial

The foregoing errors which impaired Lucas' efforts to attack and impeach Massingale's recantation of his confessions to the Jacobs murders

were individually and cumulatively prejudicial. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (*Delzell v. Day* (1950) 36 Cal.2d 349, 351; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180; *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798.)

When errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.) Accordingly, this Court's review of guilt phase errors is not limited to the determination of whether a single error, by itself, constituted prejudice.

Moreover, this Court has recognized that there is a "special emphasis upon the need for reliability in the capital context. . . . " (*People v. Horton* (1995) 11 Cal.4th 1068, 1134.) Similarly, the United States Supreme Court has determined that there is "a special need for reliability in the determination that death is the appropriate punishment in any capital case." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [internal citations and quotation marks omitted].) Since Lucas' convictions for the Jacobs murders provided the only basis for imposing the death penalty against him, determining the reliability of his convictions for those two murders requires this court's strictest scrutiny. (*Kyles v. Whitley, supra,* 514 U.S. at 422; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118; *Gardner v. Florida* (1977) 430 U.S. 349, 363; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

As noted above, the prosecution destroyed the most significant piece of evidence in the Jacobs murders, the fingerprint on the Love Insurance note,

which could have exculpated Lucas or inculpated Massingale,[414] and used minimal circumstantial evidence to argue that Lucas had committed the Jacobs murders. In addition, the reliability of the jury's finding that Lucas, rather than Massingale, committed the Jacobs murders was undermined by multiple errors during the trial's guilt phase, raised elsewhere in this brief.

The cumulative effect of these errors violated Lucas' rights to due process, trial by jury, confrontation, compulsory process and representation of counsel guaranteed under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 16, 17 and 28(d) of the California Constitution. Lucas was precluded from exercising his right to effective cross-examination and from effectively presenting his defense of third party culpability. The extraordinary situation of Massingale's confessions required that Lucas be permitted to present evidence to impeach Massingale's in-court recantation. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408-409.)

Accordingly, even if the foregoing errors were not individually reversible, they cumulatively call for reversal of the guilt and penalty judgments.

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[414] See § 2.4.2, pp. 333-48 above, incorporated herein.

2 JACOBS CASE

2.8 THIRD PARTY GUILT ISSUES

ARGUMENT 2.8.2

IT WAS ERROR TO REFUSE A CALJIC 2.03 CONSCIOUSNESS OF GUILT INSTRUCTION AS TO MASSINGALE

A. Introduction

Johnny Massingale, the third party suspect who confessed to the Jacobs murders, made a number of clearly false statements which demonstrated a consciousness of guilt. Accordingly, the defense requested an instruction based on CALJIC 2.03 which would have instructed the jurors as follows:

> If you find that a suspect of a crime made a willfully false or deliberately misleading statement concerning the crime or crimes for which he was suspected, for the purpose of misleading or warding off suspicion, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, but may strengthen inferences of guilt arising from other facts.
>
> The weight and significance of willfully false or deliberately misleading statements, if any, and any inferences of consciousness of guilt arising therefrom, are matters for your determination. However, inferences of consciousness of guilt arising from any such statements is a type of circumstantial evidence, and the circumstantial evidence instructions must be applied. (CT 14497.)

However, the court flatly refused these and any other defense instructions relating to Massingale:

> Now, I will just tell you right off the bat . . . unless I see case law to the contrary, that instructions geared to defendants, for instance, on confessions, admission, et cetera, are not to be applied to third party suspects.

> We would create tremendous confusion by gearing instructions towards third party suspects, other than the special that I think the defense is entitled to that pinpoints their crucial and entire defense, which is alibi . . . and . . . third party suspects, and I think those two things have to be given to the jury with special instructions with an understanding that they may create reasonable doubt and, therefore, they understand the proper position of that.
>
> But I don't think that we can give those other specific instructions relating to defendants; to wit, such things as confessions, admissions to third party suspects. We don't apply them to third party suspects.
>
> Absent case law to the contrary, that's going to be my ruling. (RTT 11407:5-23.)

This ruling was erroneous because (1) it deprived the defense of an opportunity to fully instruct the jury on its theory of the case, and (2) it violated due process by depriving the defense of the very same instructions which are given, as a matter of course, when requested by the prosecution.

B. Consciousness Of Guilt Principles Apply To Third Party Suspects

The consciousness of guilt concepts articulated in CALJIC 2.03 was at the heart of the defense theory against Johnny Massingale. The evidence established that Massingale made a number of false statements concerning his activities with and statements to Jimmy Joe Nelson and John "Shorty" Smith. Massingale denied ever carrying a knife larger than a couple of inches, denied hitting a woman, said he did not tell Nelson anything or give Nelson anything and denied ever using blotter paper LSD. (RTT 702-709.) Hence, the jury could reasonably have drawn an inference that Massingale exhibited a consciousness of guilt.

Accordingly, because consciousness of guilt based on false statements was an important defense theory instructions, their refusal was error under

state law. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 575.) Moreover, "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63 [citing *Stevenson v. United States* (1896) 162 U.S. 313, 332 [refusal of voluntary manslaughter instruction in murder case where self defense was primary defense constituted reversible error]; see also *Keeble v. United States* (1973) 412 U.S. 205, 208; *United States v. Zuniga* (9th Cir. 1993) 6 F.3d 569, 570-71; *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-02; *United States v. Hicks* (4th Cir. 1984) 748 F.2d 854; 857-58.)

In sum, refusal of the defense theory instructions on Massingale's consciousness of guilt violated Lucas' federal constitutional rights to due process, trial by jury, confrontation, compulsory process and representation of counsel. (6th and 14th Amendments.) (See e.g., *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-99; *Conde v. Henry* (9th Cir. 2002) 198 F.3d 734, 739-40; see also *Gilmore v. Taylor* (1993) 508 U.S. 333; *Taylor v. Illinois* (1988) 484 U.S. 400, 408-09; *Martin v. Ohio* (1987) 480 U.S. 228, 233-34; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) It also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

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.)

The error also violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas' state created right to instruction on his theory of the case. (*Soule v. General Motors Corp.*, *supra*; *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. CALJIC 2.03 Should Have Been Available To The Defense Because It Would Have Been Available To The Prosecution

When there is evidence a defendant made a false statement, or did something else evincing "consciousness of guilt," the prosecution routinely obtains a standard jury instruction that the jury can consider the false statement as a circumstance tending to prove consciousness of guilt. Such instructions are so acceptable that they have been incorporated as standard CALJIC instructions for decades. (See e.g., CALJIC 2.03, 2.06 and 2.52.) (See e.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1223; *People v. Cain* (1995) 10 Cal.4th 1, 34; *People v. Harris* (1992) 10 Cal.App.4th 672, 675, fn, 3; *People v. Kelly* (1991) 1 Cal.4th 495, 531-532.)

Hence, if the district attorney had been prosecuting Massingale, as he nearly did, CALJIC 2.03 would undoubtedly have been requested and given to the jury. No less latitude should have been given Lucas who was, in effect, prosecuting Massingale. To apply one set of rules when the district attorney prosecutes a defendant and another when a defendant "prosecutes" a third party creates an imbalance which violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Lindsay v. Normet* (1972) 405 U.S. 56, 77; *Green v.*

Georgia (1979) 442 U.S. 95, 97; *Cool v. United States* (1972) 409 U.S. 100; *Webb v. Texas* (1972) 409 U.S. 95, 97-98; *Washington v. Texas* (1967) 388 U.S. 14; *Chambers v. Mississippi* (1973) 410 U.S. 284.)

D. The Refusal Of The Defense Instructions Was Prejudicial

Because the failure to apply the principles of CALJIC 2.03 and 2.62 to third party guilt fundamentally undermined the primary defense theory to the charges upon which the death sentence was predicated, the omission should be reversible per se as structural error. (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 .)

Alternatively, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.8 THIRD PARTY GUILT ISSUES

ARGUMENT 2.8.3

THE JUDGE FAILED TO FULLY AND CORRECTLY INSTRUCT ON THE DEFENSE THEORY OF THIRD PARTY GUILT

A. Introduction

The defense theory in Jacobs was third party guilt based on the confessions of Johnny Massingale.[415] Accordingly, the third party guilt instructions were especially critical. Special instruction was required both to adequately explain the defense theory and to relate that theory to the prosecution burden of proof. Without accurate and complete instruction the jurors' natural inclination would have been to improperly view the issue in terms of whether or not the defense had proven that Massingale committed the murders. Therefore, the third party guilt instruction given in the present case was insufficient to assure that the jury understood and properly applied the burden of proof to the third party guilt defense theory.

B. Procedural Background

The defense requested a number of third party guilt instructions.[416] The

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[415] See RTT 7813-37 [Testimony of John Smith]; RTT 7850-7922 [Testimony of Jimmy Nelson]; RTT 7995-8016; 8029-44; 8057-74; 8077-96; 8104-8117 [Testimony of William Green]; RTT 8465-81; 8483-8516; 8520-23 [Testimony of Denny Pace]; RTT 8559-67; 8576-97 [Testimony of David Ayers].

[416] See CT 14733 ["Burden of Proof Re: 3rd Party Evidence"]; CT 14520 ["Reasonable Doubt–identity of Another"]; CT 14521 ["Opportunity and Motive–reasonable Doubt"]; CT 14512 ["Oral Statements"]; CT 14514 (continued...)

judge agreed to give the burden of proof instruction but only after substantially modifying it, including the title. (RTT 11588-94; CT 14733.)[417] In its final form the instruction provided as follows:

"THIRD PARTY SUSPECT EVIDENCE"

> The defendant has presented evidence in this trial for the purpose of showing that a person or persons other than the defendant may have committed a crime or crimes charged.
>
> If after a consideration of the entire case, such third party evidence, alone or together with other evidence, raises a reasonable doubt whether the defendant committed a crime or crimes charged, you must give the defendant the benefit of that doubt and find him not guilty. (CT 14313.)

The court flatly denied the defense requests for additional third party culpability instructions. (RTT 11309-310; 11407; 11416-19; 11421.)

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[416](...continued)
["Confession and Admission–defined"]; CT 14516 ["Volunteered Statements"]; CT 14517 ["Identity Established by Confession or Admission"]; CT 14518: RTT 11319-20 ["Criminal Suspect Testifying–adverse Inference May Be Drawn"].

[417] The requested instruction was as follows:

BURDEN OF PROOF RE: THIRD PARTY SUSPECT EVIDENCE

> Evidence has been produced in this trial for the purpose of showing that a person other than the defendant committed the crime(s) charged.
>
> The burden is on the prosecution to prove beyond a reasonable doubt that it was the defendant and not another person who committed the charged offenses.
>
> If after consideration of all of the circumstances of the case, you have a reasonable doubt whether the defendant or some other person committed the crime(s) charged, you must give the defendant the benefit of that doubt and find him not guilty. (CT 14733.)

C. Legal Necessity To Correctly Relate The Third Party Guilt Theory To The Presumption Of Innocence

It is well established that the defendant may rely on the theory that a third party committed the charged offense, also known as "third party culpability evidence." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017; *People v. Hall* (1986) 41 Cal.3d 826, 833.)

However, it is not the defendant's burden to prove that the third party is guilty, rather the prosecution must prove that the third party is not guilty. (*People v. Hall, supra*, 41 Cal.3d at 829, 833; see also *People v. Figueroa* (1986) 41 Cal.3d 714, 722; *People v. Madison* (1935) 3 Cal.2d 668, 677 [prosecution must prove that no other person committed the crime charged].) Therefore, when evidence of third party culpability has been presented, the defense has a right to an instruction on third party culpability which relates the third party defense theory to the prosecution's burden of proof. (See generally *People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120; *People v. Wright* (1985) 45 Cal.3d 1126, 1136-1137; *People v. Adrian* (1982) 135 Cal.App.3d 335, 342; see Evid. Code, § 502.)

Such an instruction is crucial because it is only natural for the jury to view a third party guilt issue as a question of whether the defendant or third party is the culprit. This is so because, by its nature, such a defense is typically raised by affirmative defense evidence that suggests someone else committed the crime. Such evidence quite naturally would prompt the jurors to ask whether or not the other person is really the culprit. Indeed, this is how the issue is usually postured after trial. As a people we abhor conviction of the innocent but, outside of the trial itself, this abhorrence is vindicated only when the defendant has affirmatively proven his or her innocence. (See e.g., *Herrera v. Collins* (1993) 506 U.S. 390, 420 [assuming arguendo that a "truly

persuasive demonstration of 'actual innocence'" made after trial would render the execution unconstitutional]; see also www.deathpenaltyinfo.org/innoc.html [tracking the post-conviction exoneration of innocent death row prisoners].)

Hence, at trial the presentation of a third party guilt defense theory presents special concerns because applying the presumption of innocence to such a defense theory is both conceptually complex and at war with the jurors' intuition.

Moreover, the issue is further complicated by the fact that the jury must decide the guilt of two different persons – the accused and the third party – under two different standards. Unless these difficult concepts are clearly and fully articulated there can be no assurance that the jurors reliably decided the issue under the correct constitutional standards.

In the present case the third party suspect instruction failed to provide such assurances of reliability for a number of reasons.

D. The Third Party Suspect Instruction Improperly Imposed The Burden On The Defense To "Raise" A Reasonable Doubt

The most fundamental, yet conceptually counter-intuitive, aspect of a third party guilt case is that the defendant need not prove the guilt of the third party. (See *People v. Madison*, *supra*, 3 Cal.2d at 677.) Hence, even though the defendant presents the evidence against the third party and even though the defense attorney in effect acts as the prosecutor of the third party, all of this is done within the ambit of the defendant's presumption of innocence. The third party has no presumption of innocence and the defense has no burden of proof whatsoever.

In the present case the instruction failed to adequately convey this crucial principle. The instruction contained no express statement of the

prosecution's burden such as the following which was requested by the defense but denied by the judge:

> The burden is on the prosecution to prove beyond a reasonable doubt that it was the defendant and not another person who committed the charged offenses. (CT 14733.)

Moreover, the language that was included in the instruction improperly shifted the burden of proof to Lucas. First, the instruction misleadingly informed the jury that the defense had presented the third party evidence "for the purpose of showing that a person or persons other than the defendant may have committed a crime or crimes charged." (CT 14313.) The language "for the purpose of showing" improperly implied that it was Lucas' obligation to "show" or prove that the third party committed the crime. Hence, the first sentence of the instruction erroneously shifted the burden of proof.[418]

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[418] The failure of the defense to object to the instructional error does not preclude appellate review of that error because the substantial rights of the defendant were affected. (Penal Code § 1259; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; *People v. Renteria* (2001) 93 Cal.App.4th 552, 560; *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) Moreover, even if an erroneous instruction is requested by the defense, it is still reviewable on appeal unless the invited error doctrine applies. "Error is invited only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness. [Citation.]" (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1031; see also *People v. Millwee* (1998) 18 Cal.4th 96, 158-59; *People v. Bradford* (1997) 14 Cal.4th 1005, 1057; *People v. Beardslee* (1991) 53 Cal.3d 68, 88-89; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1264; *People v. Jones* (1997) 58 Cal.App.4th 693, 708.) In other words, the error is reviewable unless it is clear from the record that counsel had a deliberate tactical purpose in suggesting or acceding to the instruction, and did not act out of ignorance or mistake. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332; see also *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.)

Furthermore, the trial court is under an affirmative duty to give, sua

(continued...)

Moreover, the second sentence of the instruction erroneously required Lucas to "raise a reasonable doubt . . ." as to his guilt. This language also undermined the presumption of innocence by shifting the burden of persuasion to the defense. Defendant's burden consists solely of "producing evidence" to support defense theories such as self-defense, alibi and third party guilt. (*People v. Loggins* (1972) 23 Cal.App.3d 597, 603.) Once the evidence is admitted by the court, it is error to instruct the jury that the defendant bears a burden of proof. (*Id.* at 601-604 [former CALJIC 5.15 was erroneous because it instructed the jury that "the burden is on the defendant to raise a reasonable doubt" regarding his self defense theory]; compare CALJIC 5.15 (5th Ed. 1988 cf., 6th Ed. 1996) ["If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty"(emphasis added); CALJIC 4.51 ["If . . .you have a reasonable doubt that the defendant was present . . . you must find [him] [her] not guilty." (Emphasis added.)].) Language requiring that the evidence "create" or "raise" a reasonable doubt"can be interpreted as shifting the burden to [the] defendant

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[418](...continued)
sponte, correctly phrased instructions on a defendant's theory of defense where it is obvious that the defendant is relying upon such a defense, or if there is substantial evidence to support it. (*People v. Stewart* (1976) 16 Cal.3d 133, 140.) "[A] court may give only such instructions as are correct statements of the law. [Citation]." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) This duty requires the trial court to correct or tailor an instruction to the particular facts of the case even though the instruction submitted by the defense was incorrect. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [judge must tailor instruction to conform with law rather than deny outright]; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924 ["trial court erred in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"].)

to prove that he did not commit the crime . . . ." (*People v. Branch* (1996) 637 N.Y.S.2d 892; see also *People v. Hill* (1998) 17 Cal.4th 800, 845; People *v. Victor* (1984) 465 N.E.2d 817.)

E. The Error Violated Lucas' Federal Constitutional Rights

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Neder v. United States* (1999) 527 U.S. 1; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Erroneous instruction undermining the proof beyond a reasonable doubt standard is a violation of the Due Process Clause and the Trial By Jury guarantees of the federal constitution. (6th and 14th Amendments) (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277.) Moreover, certain errors, "whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function" (*Sullivan*, 508 U.S. at 281) are structural in nature. The consequences of an error "are necessarily unquantifiable and indeterminate" (*Id.* at 191; see also *People v. Roder* (1983) 33 Cal.3d 491, 498-99; *Lanigan v. Maloney* (1st Cir. 1988) 853 F.2d 40, 46-47 [instruction equating proof beyond a reasonable doubt with "proof to a degree of moral certainty," coupled with confusing civil standard of preponderance, created a significant risk that jury would find guilt based on a level of proof below that required by the Due Process Clause].)

Moreover, by undermining the defense theory of third party guilt the error implicated Lucas' right to present a defense which is a fundamental element of due process, trial by jury and compulsory process as guaranteed by the Sixth and Fourteenth Amendments of the federal constitution and by the

California Constitution. (Art. I, sections 1, 7, 15, 16 and 17.) The United States Supreme Court has again and again noted the "fundamental" or "essential" character of a defendant's right both to present a defense, (*Crane v. Kentucky* (1986) 476 U.S. 683, 687; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19), and present witnesses as a part of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v. Arkansas* (1987) 483 U.S. 44, 55; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; *Webb*, *supra*, 409 U.S. at 98; *Washington*, *supra*, 388 U.S. at 19.) The Court has variously stated that an accused's right to a defense and a right to present witnesses emanate from the Sixth Amendment (*Taylor*, *supra*, 484 U.S. at 409; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867) the Due Process Clause of the Fourteenth Amendment (*Rock*, *supra*, 483 U.S. at 51; *Trombetta*, *supra*, 467 U.S. at 485; *Chambers*, *supra*, 410 U.S. at 294; *Webb*, *supra*, 409 U.S. at 97; *In re Oliver* (1948) 333 U.S. 257), or both. (*Crane*, *supra*, 476 U.S. at 690; *Strickland v. Washington* (1984) 466 U.S. 668, 684-85; *Washington*, *supra*, 388 U.S. at 17-18.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

The error also violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas' state created right to instruction on his theory of the case and on the correct burden of proof instructions per Evidence Code § 502. (*Soule v. General Motors Corp.*, *supra*; *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Errors Were Prejudicial

The deficiencies in the third party guilt instructions were especially prejudicial in the present case because the other two defense theory instructions, alibi (CT 14312) and eyewitness identification (CT 14286) did not require Lucas to "raise" a reasonable doubt.[419]

Hence, the jurors would have reasonably inferred that a different standard applied to the third party guilt theory which required Lucas to "raise" a reasonable doubt.[420]

Additionally, other instructions further reinforced the burden shifting misconception by inaccurately suggesting that the jury must decide whether or not Lucas was innocent. (See § 2.10.1(B), p. 633 below, incorporated herein.) This in turn implied that the jury must decide whether or not Massingale was guilty, since only by demonstrating his guilt could Lucas

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[419] These instructions correctly informed the jurors to acquit if they "have a reasonable doubt . . . . " (CT 14312; 14286.)

[420] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See § 2.3.4.1(A), p. 231-32, n. 243 above, incorporated herein.)

prove his innocence.

Furthermore, the general burden of proof instruction, CALJIC 2.90, was itself deficient and misleading (see § 2.10.1, pp. 633-42 below, incorporated herein) thus compounding the deficiencies of the third party guilt instruction.

And, even if CALJIC 2.90 had not been deficient, it could not have cured the deficiencies in the third party guilt instruction. CALJIC 2.90 is not adequate to inform the jury as to the burden applicable to affirmative defenses. (See *Francis v. Franklin* (1985) 471 U.S. 307, 322; *People v. Adrian* (1982) 135 Cal.App3d 335, 342; see also *People v. Brown* (1984) 152 Cal.App.3d 674, 677-78 [Former CALJIC 2.91 and 2.20 "are not alone sufficient to render the failure to give requested instruction linking reasonable doubt to identification harmless error"].) All CALJIC 2.90 does is tell the jury that a reasonable doubt as to "guilt" warrants an acquittal. (See *Adrian*, 135 Cal. App.3d at 342.) This instruction may work when the jury is reviewing the elements of the offense,[421] but as to a defense theory such as third party guilt, the absence of a specific burden instruction erroneously suggests that the defendant is required to prove his or her theory before the defense is applicable. And, this erroneous view comported with the prosecution's argument.[422]

In sum, the third party guilt instruction, especially when considered with the other instructions, unconstitutionally shifted the burden of proof and failed to require the prosecution to prove every essential element of the charge

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[421] But see § 2.10.1, pp. 633-42 below, incorporated herein.

[422] The prosecutor reinforced the erroneous instructions in his argument by asking the jury: "If it is not Mr. Lucas, who was it?" (RTT 11834.) This implied that Lucas was obligated to prove the guilt of a third party.

beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.)

Because this deficiency fundamentally misstated the prosecution's burden of proof and undermined the primary defense theory to the charges upon which the death sentence is predicated, structural error was committed and the judgment should be reversed without a showing of prejudice. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

Alternatively, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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, under the federal standard the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Here, the prosecution cannot meet that burden. The Jacobs case was closely balanced, especially in light of Johnny Massingale's confession. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore, the instruction which improperly shifted the burden on this crucial issue was a substantial error which cannot be shown to be harmless beyond a reasonable doubt.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.8 THIRD PARTY GUILT ISSUES

ARGUMENT 2.8.4

REFUSING TO RECUSE THE DISTRICT ATTORNEY'S OFFICE DEPRIVED LUCAS OF A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE

The defense moved to recuse the District Attorney's office, District Attorney Miller, and Deputy District Attorneys Williams and Clarke. (CT 3702, 3707-3708, 3810-3814, 5708, 12474, 12577-12586.) The motion was denied. (CT 5211.)

Penal Code § 1424 establishes the statutory standard for recusal of a district attorney and provides for recusal where a "conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial." Courts exercised their right to recuse the prosecutor to assure fairness to the accused even before enactment of § 1424 in 1980. (*People v. Conner* (1983) 34 Cal.3d 141, 146.) "[A]n appearance of a conflict may well signal the existence of a disabling conflict." (*People v. McPartland* (1988) 198 Cal.App.3d 569, 574.)

The San Diego District Attorney's office made arguments on the truthfulness of Massingale's confession, which were in direct opposition, depending on whether it was prosecuting Massingale or Lucas for the Jacobs murders. (CT 12584-12585.) Additionally, depending on whether it was prosecuting Lucas or defending against Massingale's civil suit,[423] the District

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[423] Ayers and Green were sued by Massingale individually and in their capacities as police officers; Green and Wayne Burgess were sued as investigators of the District Attorney's office; other San Diego officials and (continued...)

Attorney's office took directly opposing positions as to the voluntariness of Massingale's confession to police and as to its propriety in initiating two separate capital prosecutions for the Jacobs murders. (CT 12584-12585.)

Thus, the same District Attorney's office which, while prosecuting Massingale, asserted that Massingale's confession to law enforcement was voluntary [CT 8546-8550, 12583], reversed itself by implicitly adopting Massingale's claim in Lucas' trial that Massingale was coerced by law officers into confessing to the Jacobs murders and had been given the details of the murder scene by law enforcement.[424]

In addition, the prosecutor made entirely inconsistent arguments regarding modus operandi at Lucas' two preliminary hearings. The prosecutor effectively whipsawed the evidence against Lucas by taking advantage of two separate preliminary hearings. The prosecutor argued the similarity of all the charged offenses when it was helpful [Lucas' second preliminary hearing] and argued dissimilarity when similarity would have undermined its case or theory [Lucas' first preliminary hearing].[425] (CT 672, 744-748.) As a result, Lucas

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[423](...continued)
entities that were involved in Massingale's prosecution were also sued. (CT 3403; 12577-12583.)

[424] The prosecution's arguments were so inconsistent as to border on duplicity, as when the prosecutor claimed in Lucas' case that it had never characterized Massingale's statements as "confessions" [CT 3918] when, in fact, the prosecution had done so when prosecuting Massingale and, in particular, when opposing Massingale's motion to dismiss under Penal Code § 995. (CT 3958.) Also, Deputy District Attorney McArdle had entered Massingale's confessions into evidence at Massingale's preliminary hearing. (CT 12585.)

[425] At Lucas' first preliminary hearing on the Santiago, Strang/Fisher, and Swanke cases, the court had quashed Lucas' subpoena to Massingale. (continued...)

was denied due process at his first preliminary hearing. (CT 744-748.)

To complicate matters further, although William Green was one of two San Diego Police Department detectives who had obtained Massingale's confession in Kentucky, he became the District Attorney's main investigator in Lucas' prosecution, even though he thought Massingale might have committed the murders. (CT 12583-12584.) As noted above, Massingale, testifying for the prosecution, accused detectives Green and Ayers of coercing his confession. Clearly, Mr. Green performed conflicting functions and his continued involvement in the prosecution of Lucas was improper and supplied an additional reason for granting Lucas' motion to recuse. (CT 12584-12585.)

The prosecution spoke "out of both sides of its mouth" by defending Ayers and Green in the civil suit and by implicitly attacking them in appellant's criminal case.[426] (CT 12584-12585.) The aggregate effect of the interlocking circumstances here mandated recusal. (*People v. Conner*, *supra*, 34 Cal.3d at 148-149.) The Due Process Clause of the state and federal

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[425](...continued)
(CT 744.) The defense had wanted to show that the same supposed "modus operandi" had been committed with a different perpetrator. (CT 745-746.) The prosecutor opposed any testimony about Massingale's confessions to the Jacobs' murders. (CT 745.) Then, at Lucas' second preliminary hearing for the Jacobs and Garcia murders, the same prosecutor argued that the Santiago, Strang/Fisher, and Swanke cases constituted other crimes for purposes of proving identity through modus operandi. (CT 744-746.)

[426] Deputy District Attorney Williams [the lead prosecutor against Lucas] appeared in federal court during Massingale's litigation when Deputy District Attorney McArdle [the prosecutor against Massingale] appeared at the counsel table, argued in favor of county counsel, and offered that Deputy District Attorney Clarke [the second prosecutor against Lucas] could make a statement to that court. (CT 3599, 12585.)

constitutions also required recusal. (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 268, citing *Ganger v. Peyton* (4th Cir. 1967) 379 F.2d 709; see also generally *Smith v. Phillips* (1982) 455 U.S. 209; *Berger v. United States* (1935) 295 U.S. 78.)

The error also violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas' state created right to recusal under the circumstances of this case. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

The error requires reversal because the district attorney's fairness is essential to the integrity of the process. Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (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 .)

Alternatively, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.)

Accordingly, the judgment should be reversed. (*People v. Conner*, *supra*, 34 Cal.3d at 149.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.1

THE PRELIMINARY GUILT PHASE INSTRUCTIONS TILTED THE FIELD IN FAVOR OF THE PROSECUTION

A. Introduction

The old adage that "you never get a second chance to make a first impression" is especially applicable to the preliminary instructions of a jury trial. Those first instructions can have a huge impact on the jury because they are the first formal instructions from the court and are given before the jury hears any evidence. (See § F, below, discussing the "primary effect" of preliminary instructions.)

In the present case the preliminary instructions were prejudicial to the defense and beneficial to the prosecution for two reasons:

1. The most fundamental principles of the presumption of innocence and prosecution's burden to prove guilt beyond a reasonable doubt were entirely omitted from the preliminary instructions.

2. The preliminary instructions specifically set forth the primary prosecution theory of the case but not the defendant's.

Accordingly, the preliminary instructions, as discussed in the arguments that follow, violated Lucas' state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jury fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due

process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Additionally, the preliminary instructions violated Lucas' state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to a fair trial by jury and due process (6th and 14th Amendments) which require that the procedures utilized in a criminal trial be fair. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 668.)

There should be absolute impartiality as between the People and the defendant in the matter of instructions. (See *People v. Moore* (1954) 43 Cal.2d 517, 526; see also *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)

"[I]n the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon* (1973) 412 U.S. 470, 475.) Hence, the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (*Ibid.*; see also *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the co-defendant]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Washington v. Texas* (1967) 388 U.S. 14 [accomplice permitted

to testify for the prosecution but not for the defense]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

The preliminary instructions also violated the Cruel and Unusual Punishment and the Due Process Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because the errors arbitrarily denied Lucas his state created rights under the California Constitution and statutory law, they 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.)

B. Failure To Properly State The Jurors' Duty

In both the preliminary and final instructions the judge instructed the jurors that the "essence" of their duty was to be "judges of facts . . . [and to] . . . determine from the evidence produced here what the facts are." (RTT 11; see also final instructions CT 14276 ["both the People and the defendant have a right to expect that you will . . . reach a just verdict regardless of the consequences."]; CT 14348 ["You are impartial judges of the facts."].)

These instructions misstated the "essence" of the jury's duty, which is not to decide which version of the facts is the "truth," but rather is to decide whether the prosecution has proved the defendant guilty beyond a reasonable doubt. (See e.g., *United States v. Pine* (3rd Cir. 1979) 609 F.2d 106, 107-08 [and cases collected therein].) Instructions such as those given in the present case "improperly invite the jury to simply choose between competing versions of the facts, rather than to decide whether the government has carried its burden of proving guilt beyond a reasonable doubt." (See *6th Circuit Pattern Jury Instructions - Criminal* 1.02 [Jurors Duties] commentary (1991).) An instruction which compromises the prosecution's burden to prove guilt beyond a reasonable doubt violates fundamental federal constitutional principles. (See *Sullivan v. Louisiana* (1993) 505 U.S. 275, 277; see also *Sparf v. United States* (1895) 156 U.S. 51, 102-107; *Starr v. United States* (1894) 153 U.S. 614, 625.) Moreover, as an abstract concept, telling the jury to "judge" the facts and reach a "just verdict" suggests that the jury must determine whose version of events is more likely true, the prosecution's or the defendant's. Therefore, such an instruction conflicts with the prosecution's burden to prove guilt beyond a reasonable doubt. (*United States v. Balderas* (5th Cir. 1994) 11 F.3d 1218, 1223.) "...[T]he question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights." (*Mitchell v. United States* (1999) 526 U.S. 314, 330; see also *In re Winship* (1970) 397 U.S. 358.)

Moreover, other instructions received by the jurors reinforced the erroneous description of the jurors' duties. For example, the juror pamphlet which all potential jurors received before trial stated that their function was

to "find . . . what actually happened." (CT 10725.) And, the final instructional admonition to reach a "just verdict" further contributed to the overall misguidance of the jurors.[427]

C. Failure To Instruct On The Prosecution's Burden To Prove Guilt Beyond A Reasonable Doubt

The preliminary instructions failed to include any instruction on the presumption of innocence and the prosecution's burden to prove guilt beyond a reasonable doubt. (RTT 11-16.) This was a significant omission because it meant that throughout the entire trial – up until the final instructions – the jurors heard the evidence without any judicial instruction as to rudimentary constitutional principles which governed their consideration of such evidence. "The firm commitment to presumed innocence which can be overcome only by proof beyond a reasonable doubt is the touchstone of American criminal jurisprudence." (*Illinois Pattern Jury Instructions - Criminal*, IPI-Criminal 4th 2.03, note [Presumption Of Innocence- Reasonable Doubt- Burden Of Proof Generally] (West, 4th ed. 2000); see also *Carella v. California* (1989) 491 U.S. 263, 265; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-24.) In *United States v. Veltmann* (11th Cir. 1993) 6 F.3d 1483, 1493, the court was "troubled" by absence of instruction on the presumption of innocence at the beginning of the trial. "Although the court charged the jury on the presumption before they retired to deliberate, we believe it extraordinary for a trial to progress to that stage with nary a mention of this jurisprudential bedrock." (*Ibid.*) Accordingly, the instructions violated Lucas' federal constitutional rights set forth in § 2.10.1, pp. 633-42 below, incorporated

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[427] Informing the jury that the parties "have a right to expect that [the jury] will . . . reach a just verdict . . ." was also improperly coercive. (See § 2.9.11, pp. 602-06 below, incorporated herein.)

herein.

D. Improper Admonition That Jury Must "Determine The Question Of "Guilt Or Innocence"

As discussed above, the judge failed to instruct on the presumption of innocence and the prosecution's burden to prove guilt beyond a reasonable doubt. This error was exacerbated by improperly admonishing the jurors that they "must determine the question of the guilt or innocence of the defendant." (See § 2.9.12(D), pp. 610-12 below, incorporated herein.)

E. Improper Emphasis Of Cross-Admissibility Of Other Crimes In The Preliminary Instructions

See § 2.3.4.1, pp. 231-36 above, incorporated herein.

F. The Prosecution-Oriented Preliminary Instructions Were Likely To Have Influenced The Jurors In Favor Of The Prosecution

As a matter of common sense it is obviously likely to be prejudicial to the defense to include pro-prosecution instructions and exclude pro-defense instructions from the preliminary instructions. (See e.g., Cronan, John P., *Is Any of This Making Sense?* 39 Am. Crim. L. Rev. 1187, 1249 [discussing importance of preliminary instructions].) Moreover, there is empirical evidence which corroborates the prejudicial impact of not giving a preliminary presumption of innocence instruction.

One study, by Kassin and Wrightsman,[428] postulated that there would be fewer guilt verdicts in criminal trials when certain basic instructions are presented at the beginning of a trial before jurors may have made up their mind about the case. The instructions included in this study were the

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[428] Kassin, S.M., & Wrightsman, L.S., *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 Journal of Personality and Social Psychology 1877-1887 (1979).

presumption that the defendant is innocent, that the prosecution has the burden of proof, and that all crime elements must be proved by the prosecution. Kassin and Wrightsman found that University of Kansas undergraduates who had viewed a one-hour videotape of an auto theft trial and had been given pre-instruction produced significantly fewer guilty verdicts (37%), than participants instructed after the evidence. They attributed their results to a "primacy effect." A primacy effect occurs when information presented early is remembered better than information presented in the middle or the end. This is manifested in the finding that the participants who get pre-instruction appear to presume innocence, but participants who get post-instruction appear to presume guilt.

G. The Preliminary Instructions Were Prejudicial

Because the preliminary instructions tilted the playing field in favor of the prosecution, structural error was committed and the judgment should be reversed without a showing of prejudice. (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.)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the errors were substantial because the preliminary instructions favored the prosecution and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Additionally, the errors in the preliminary instructions were cumulatively prejudicial when considered together with the other errors committed during Lucas' trial. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial: the combined (aggregate) prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone]; *Delzell v. Day* (1950) 36 Cal.2d 349, 351; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180; *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520.)

Further, when errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.) Accordingly, this Court's review of guilt phase errors is not limited to the determination of

whether a single error, by itself, constituted prejudice.

Finally, even if the errors were not prejudicial as to guilt, they were prejudicial as to penalty. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 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

A. Introduction

During voir dire and throughout trial the prosecutors, over defense objection, referred to themselves as "The People." This description was corroborated by the comments and instructions of the trial judge who also consistently referred to the prosecution as "The People." Reference to the prosecution in this manner was fundamentally unfair and contrary to the letter and spirit of the state and federal constitutions.

B. Summary Of Proceedings Below

Prior to commencement of voir dire the defense objected to characterizing the prosecution as "The People" "in voir dire and during the course of the proceedings." (RTH 26108.)

The prosecutor responded that "we are representatives of the people." (RTH 26110.) The defense maintained that at the very least a clarifying instruction should be given:

> I think the issue the defense is trying to bring out here is that if the term "People" is to be used, then there has to be with it some instruction or indication that that refers to the prosecution side in the case because we could choose anything that would be a name on a piece of paper for plaintiff, but the reality is that, in effect, it is the prosecution's side and they have an interest in prosecuting this case to find Mr. Lucas guilty, and

> they have an interest to seek his death; that's what they're doing. I mean, they have charged the offenses, and they are seeking a finding of guilt and seeking to have him put to death in the proceeding.
>
> So, in effect, in an adversary system it is not totally correct certainly to indicate that in the general sense that the prosecution is representing all of our interests in that obviously, as Mr. Feldman indicated, he and myself have not only an interest, but a duty to seek that Mr. Lucas is not killed in these proceedings and that . . . He is not found guilty of any offense that the prosecution has not proved beyond a reasonable doubt . . . . " (RTH 26112:10-28.)
>
> . . .
>
> Mr. Williams and Mr. Clarke are representatives of the district attorney's office. The district attorney's office has chosen to prosecute this case, and they are an adversary party in this proceeding just like the defense is, and so they should not take into the analysis by the jury any unfair advantage or misconception that they are, for instance, representing everyone in a – in other words, that they are not carrying, for instance, the banner of Mr. Lucas into this proceeding. They clearly are carrying the banner of the prosecution. (RTH 26113:12-21.)

The court denied the defense request concluding that: "The district attorney's office represents the people of the State of California. (RTH 26113.)

C. Calling The Prosecution "The People" Violates State And Federal Constitutional Principles And The Rights They Guarantee

It is fundamentally incorrect and unfair to refer to the prosecuting bodies of the state of California as "The People" in criminal cases. The prosecution is part of the executive branch of government we the people established in the federal constitution. (*Clinton v. Jones* (1997) 520 U.S. 681.) The prosecution is part of the State. It is not "The People." Indeed, this is a distinction which every federal district and 45 of the 50 states recognize

by referring to the prosecution in criminal cases as either "The State," "The Commonwealth," or "The United States," depending upon the jurisdiction. In stark contrast, only California, Colorado, Illinois, Michigan and New York refer to the prosecution as "The People."[429]

Referring to the prosecution as "The People" violates criminal defendants' state and federal substantive due process rights. In *Washington v. Glucksberg* (1997) 521 U.S. 702, 710, the United States Supreme Court recognized that to find whether a substantive due process right exists and has been violated, "We . . . examin[e] our Nation's history, legal traditions, and practices." [Washington state statute criminalizing assisted suicide did not violate substantive due process because historical analysis and current state consensus showed no fundamental right to assisted suicide]. Both our nation's history and legal practices indicate that referring to the prosecution as "The People" violates substantive due process rights.

As appellant has set forth above, the vast majority of jurisdictions in the United States recognize the constitutionally correct way for a jurisdiction's legal system to refer to its prosecution is not as "The People." The Supreme Court recognized in *Duncan v. Louisiana* (1968) 391 U.S. 145 that while "virtually unanimous adherence" to a standard "may not conclusively establish it as a requirement of due process," such overwhelming consensus "does reflect a profound judgment about the way in which law should be enforced and justice administered." (*Id.* at 155.) California currently operates in a tiny minority of jurisdictions which have not yet recognized the more

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[429] This result is based on a Lexis search of official reporters' case titles in each jurisdiction and a review of the available pattern jury instructions for all jurisdictions throughout the nation.

constitutionally sound manner of administering justice. The virtually unanimous adherence to this standard elsewhere indicates California's practice of calling the prosecution "The People" violates due process.

Historically, it is virtually beyond dispute that the framers of the federal constitution and its amendments envisioned "the People" and "the State" as fundamentally different. According to its Preamble, "We the People . . . ordain and establish this Constitution for the United States of America."[430] In this Constitution, we the people vested powers in three branches of government – executive, legislative and judiciary. These checks and balances were designed to prevent the state from overzealously usurping the rights of the very people who granted authority to those branches of government.

Maintaining the correct relationship between individual people and the state was so overwhelmingly crucial that when the Constitution was amended with the Bill of Rights, four of the ten amendments explicitly delineated the rights of "the people" (Fourth Amendment), a "person" (Fifth Amendment) and "the accused" (Sixth Amendment) in criminal matters.[431] Later, the Fourteenth Amendment articulated specific protection of individual liberties from state (versus federal government) encroachment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

On the other hand, the government is emphatically not referred to as

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[430] The Preamble to the California state Constitution begins similarly: "We, the People . . ."

[431] The Eighth Amendment guarantees against excessive bail, fines and cruel and unusual punishment, but does not refer specifically to any actors.

"The People" anywhere in the document. It is the people whose rights the constitution was drafted to protect. (See *Collins v. City of Harker Heights* (1992) 503 U.S. 115, 126 [noting that the Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression"]; *Wolff v. McDonnell* (1974) 418 U.S. 539, 558 ["[T]he touchstone of due process is protection of the individual against arbitrary action of the government" (emphasis added)]; *People v. Hill* (1998) 17 Cal.4th 800, 818-819 [the prosecution represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is . . . that justice shall be done," citing *Berger v. United States* (1935) 295 U.S. 78, 88].)

As well as violating substantive due process rights, referring to the prosecution as "The People" also violates criminal defendants' state and federal constitutional rights to a fair trial by a jury of their peers, and to the presumption of innocence. The fact that "The People" have charged a defendant with a crime necessarily means that the people of his community cannot presume he is innocent. "The People" are not starting with a tabula rosa. "The People" have charged him with a crime. Calling the prosecution "The People" necessarily blurs and confuses critical distinctions. It is the prosecution's duty, on behalf of the executive branch of government, to litigate against criminal defendants. It the jury's duty, as representatives of the people of a defendant's community, to listen impartially to the evidence presented by the prosecution and then decide whether guilt has been proven.[432]

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[432] See *J.E.B. v. Alabama ex rel. T.B.* (1993) 511 U.S. 127; *Powers v. Ohio* (1991) 499 U.S. 400; *Batson v. Kentucky* (1986) 476 U.S. 79 [establishing protections to ensure juries are not selected based on impermissible exclusionary practices].

Unfortunately, in California, both groups purportedly represent "The People" of the state – the jurors actually, and the prosecution putatively through its title in criminal cases. Thus, confusion necessarily reigns when all are referred to as "the People."

All, that is, except the defendant in a criminal case. While California's custom unconstitutionally aligns groups of people who have vastly different tasks to perform in the criminal justice system, it simultaneously excludes the defendant. The caption of every California criminal case reads "The People of the State of California versus The Defendant." This dichotomy is reinforced in every criminal case when, inter alia, the jury is instructed with CALJIC No. 1.00 ("Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence . . . .") and CALJIC No. 17.40 ("The People and the defendant are entitled to the individual opinion of each juror").

In other words, there are "The People," and then there is "the defendant." Appellant acknowledges that while the message is subtle and likely unintentional, these oppositional phrases necessarily imply to jurors that defendants are somehow "other than" people. And, even more ironically and importantly, while the dichotomy suggests "the Defendant" is not one of "The People," the dichotomy expressly states the government is.

This distinction in the language that juries hear over and over again in court is critical. One need only look to recent changes in legal language to see that the courts are becoming increasingly aware of what linguists and sociologists have learned: language shapes perceptions.[433] We no longer

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[433] "We dissect nature along lines laid down by our native languages. The categories and types that we isolate from the world of phenomena we do (continued...)

exclusively use "he" to refer to the third person, singular. Similarly, CALJIC No. 1.27 defines "firefighter," rather than only a "fireman" and CALJIC No. 1.26 defines "peace officer," rather than "highway patrolman," or "policeman." These changes in the language of the criminal justice system reflect our belief that the precise words we choose actually do reflect and shape people's perceptions.

From the beginning of the proceedings and consistently throughout trial, pitting "The People" against "the Defendant" literally suggested to Lucas' jury that he was something (at worst) or someone (at best) other than the rest of us. To the extent this dichotomy suggests criminal defendants are something other than people, this clearly violates due process. To the extent this dichotomy suggests criminal defendants are someone other than the people, this violates the defendant's right to trial by jury of his or her peers

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342;

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[433](...continued)
not find there because they stare every observer in the face; on the contrary, the world is presented in a kaleidoscopic flux of impressions which has to be organized by our minds – and this means largely by the linguistic systems in our minds. We cut nature up, organize it in this way – an agreement that holds throughout our speech community and is codified in the patterns of our language. The agreement is, of course, an implicit and unstated one, but its terms are absolutely obligatory; we cannot talk at all except by subscribing to the organization and classification of data which the agreement decrees." (Whorf, *Language, Thought and Reality* (MIT Press 1956), pp. 247-248.)

Burger v. Kemp (1987) 483 U.S. 776, 785.)

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.)

In sum, California's reference to the prosecution as "The People" versus "the Defendant" violates both the letter and spirit of the state and federal Constitutions. The phrase "The People" impermissibly aligns two separate bodies with different functions – the prosecution and the jury – at the same time the phrase "versus the Defendant" excludes the defendant from the community of his peers who form his jury.

Appellant urges this Court to recognize this error, which is simple to remedy. A prosecutorial agency of the state of California – in accord with the practice followed by the prosecutorial agencies of 45 other states and the federal government – should refer to itself as "the State of California." Let "The People" judge whether a defendant's guilt has been proven, as the state and federal constitutions demand.[434]

D. The Judgement Should Be Reversed

Referring to the prosecution as "The People" represents the quintessence of structural, rather than trial, error and thus requires reversal per

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[434] The fact that criminal cases in California have always referred to the prosecution as "The People" does not necessarily mean the behavior comports with the state and federal constitutions. For example, before the United States Supreme Court decided *Gideon v. Wainwright* (1963) 372 U.S. 335, the courts had not recognized for nearly two-hundred years that the federal constitution guaranteed indigent criminal defendants the right to counsel.

se.[435] A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) That is precisely what occurs when the prosecution is referred to as "The People." This ubiquitous reference permeates the criminal justice system and necessarily affects the framework within which any defendant's trial proceeds.

Structural error occurs in only a very limited number of situations: lack of an impartial trial judge (*Tumey v. Ohio* (1927) 273 U.S. 510); total deprivation of right to counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335); denial of right of self-representation at trial (*McKaskle v. Wiggins* (1984) 465 U.S. 168); denial of right to public trial (*Waller v. Georgia* (1984) 467 U.S. 39); unlawful exclusion of grand jurors of defendant's race (*Vasquez v. Hillery* (1986) 474 U.S. 254); and erroneous reasonable-doubt instruction to jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Referring to the prosecution as "The People" fits precisely into this list. All these errors represent "structural defects in the trial mechanism, which defy analysis by 'harmless-error' standards." (*Arizona v. Fulminante*, *supra*, 499 U.S. at 309.) As set forth above, it is undeniably error to refer to the prosecution as "The People." However, it is not possible to measure that error on a case-specific basis. The error defies harmless-error analysis. The defect

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[435] In the present case the prosecution was called "The People" throughout the trial – from start to finish. This reference was especially prejudicial as to the jury instructions, which have an especially important stature in the eyes of the jury. (See e.g. *Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

In the present case the instructions included numerous references to "The People." (See e.g., Guilt: preliminary instructions RTT 13, 15, 16, final instructions RTT 12185, 12189, 12191, 12192, 12201, 12202, 12211, 12212, 12213, 12214, 12217; Penalty RTT 12589, 12594.)

is structural, and thus requires reversal per se.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

Moreover, it has been recognized by many commentators, and at least one state court, that the prosecution often relies on a process of dehumanization of the accused in a capital trial in order to obtain a death verdict.[436] As if taking his cue from this script, the prosecutor here did all that

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[436] See e.g., Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 Cornell L. Rev. 655, 699 (1989) [At the sentencing phase of a capital case prosecutors and defense attorneys frequently do battle over the "otherness"of the offender. Prosecutors seek to dehumanize defendants while defense attorneys attempt the reverse]; Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361, 441 (1996) [speaking to the death penalty jurisprudence which dehumanizes the defendant in order to more easily cast him out of the human community]; Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev. 1447, 1453 (1997)
(continued...)

he could to transform the defendant from a human being into a monster, and "evil" "butcher." (RTT 11752; 13277.) The prosecution labeled the defendant as "a butcher, a single solitary butcher. A butcher with a lust for death and nothing short of that." (RTT 11761.) By calling him a "demon," "a butcher who revels in hearing the human outcry," the prosecution portrayed Lucas as less than human in the minds of the jurors. (RTT 11762.)[437] He was described as some kind of monster, a "sadistic killer" "on the prowl" and "on the hunt" with a "lust for death" and a "grin on his face." (RTT 11783; 11787-88; 11792; 11794; 11796; 11799; 11809; 11811.) The prosecutor knew this depiction of the defendant as a monster would move the jury toward a sentence of death for a being they viewed as less than human.[438] After

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[436](...continued)
[There are important social and psychological dimensions to the process by which the dehumanization of capital defendants helps jurors to condemn them to death]; 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 (1999) [jurors in capital cases psychologically distance themselves from the defendant and their decision to sentence him to death by dehumanizing the defendant; by questioning the very humanity of the defendant, jurors are more easily able to justify the death penalty]; *Bonifay v. State* (Fla. 1996) 680 So.2d 413, 418 ["Further, we do find that the use of the word 'exterminate' or any similar term which tends to dehumanize a capital defendant to be improper. We condemn such argument and caution prosecutors against arguments using such terms"].

[437] The objections to this terminology by defense counsel were overruled by the court. (RTT 11775-79.)

[438] See e.g., Banner, *Article: Rewriting History: The Use of Feminist Narratives To Deconstruct The Myth Of The Capital Defendant*, 26 N.Y.U. Rev. L. & Soc. Change, 569, 588 (1990-91) ["The archetype of evil takes various forms. In our criminal justice system, the general public is only given
(continued...)

hearing the prosecutor's arguments, the local media immediately pounced on this depiction of the defendant as a "butcher" with "front page headlines" in the newspapers with "every television and radio station" reporting that the "prosecutor call Lucas butcher." (RTT 12044.) It was a portrayal that had a profound effect on the outcome of his trial, as the prosecutor could then align the jury on the side of "The People," while portraying the defendant as something less than human, which was to be exterminated.

In sum, calling the prosecution "The People" contributed to the death

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[438](...continued)
access to 'facts' which 'underscore defendant's deviance and facilitate their dehumanization,' leading society to view capital defendants 'as genetic misfits, as unfeeling psychopaths who kill for the sheer pleasure of it, or as dark, anonymous figures who are something less than human.' Prosecutors utilize – and in doing so, strengthen – this already prevalent myth"]; Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547, 547 (1995) [referring to the myth of demonic agency in capital punishment which dehumanizes defendants by substituting their crimes for their personhood]; Harding, *Symposium: Picturing Justice: Images Of Law And Lawyers In The Visual Media: Essay: Celluloid Death: Cinematic Depictions of Capital Punishment*, 30 U.S.F.L. Rev. 1167, 1170 (1996) ["The presentment of these positions is primarily accomplished by employing and exploring the 'monster v. human' argument. Characterizing the condemned as a monster objectifies and dehumanizes the condemned. In turn, this makes it psychologically tolerable for some members of the public to support capital punishment. Thus, from this perspective, a 'thing,' and not a human, is killed"]; Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. Davis L. Rev. 155, 246 (1999) ["Not much about American capital punishment offers cause for optimism and this Article is no exception. The evidence of arbitrariness, excessiveness, discriminatory application, and dehumanization is consistent with a terror management model of the death penalty as an authoritarian anxiety buffer. As such, capital punishment amounts to the manifestly irrational practice of legalized human sacrifice – the ritualistic, symbolic enactment of control over death itself as a nonconscious defense against fear of death awareness"].)

sentence by reinforcing the district attorney's strategy of dehumanizing Lucas. From the beginning of the proceedings and consistently throughout trial, pitting "The People" against "the Defendant" literally suggested to Lucas' jury that he was something (at worst) or someone (at best) other than the rest of us.

Hence, the error was substantial and the death judgment should be reversed.

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 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

A. Introduction

This Court has expressly held that an "accomplice" as defined by the applicable statute – unlike in common usage – may be someone who acts alone in committing the crime for which the defendant is on trial. Accordingly, the judge had a sua sponte obligation to instruct that Johnny Massingale's testimony should be viewed with distrust.[439]

B. The Definition Of "Accomplice" As The Term Is Used In Penal Code § 1111

An accomplice is defined for Penal Code § 1111[440] purposes as "one

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[439] The issue of whether accomplice instructions should have been given is one that this Court should consider even though not raised by the parties below. (*People v. Andrews* (1989) 49 Cal.3d 200, 213.)

[440] Penal Code § 1111 states:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other testimony as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the

(continued...)

who is liable to prosecution for the identical offense charged against the defendant on trial," which means one who was liable to prosecution for that offense at the time the acts were committed. (*People v. Wallin* (1948) 32 Cal.2d 803, 808.) The term, as used in § 1111, includes perpetrators as well as aiders and abettors. (*People v. Belton* (1979) 23 Cal.3d 516, 523; *People v. Gordon* (1973) 10 Cal.3d 460, 468.)

In order for the protections of Penal Code § 1111 to apply, the defendant must show by a preponderance of the evidence that the witness was an "accomplice" as defined in § 1111. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 968.) But "if the facts are disputed or susceptible of different inferences, the question whether the witness is an accomplice should be submitted to the jury." (*People v. Mayberry* (1975) 15 Cal.3d 143, 159.)

The plain meaning of § 1111 is that it is <u>not</u> necessary for two or more persons to have participated in the commission of a crime in order for the corroboration requirement to apply. This is the <u>precise</u> holding of *People v. Gordon*, *supra*, 10 Cal.3d at 468. If a defendant is on trial for al alleged offense, and a preponderance of the evidence shows that a witness against the defendant was himself "liable to prosecution [as a perpetrator] for the identical offense charged against the defendant," Penal Code § 1111 applies, and an accomplice instruction must be given. In other words, although the word "accomplice" in everyday usage might connote multiple criminal actors, its definition as used in § 1111 does not require multiple actors or that the defendant be a criminal actor.

"[W]here the evidence indicates that the crime may have been

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[440](...continued)
defendant on trial in the cause in which the testimony of the accomplice is given.

committed by either the witness or the defendant, but not necessarily by both, the witness's testimony incriminating the defendant is no tainted and subject to suspicion than the testimony of a suspected aider or abettor or coconspirator." (*People v. Gordon*, *supra*, 10 Cal.3d at 468.) As a result, the defendant does not even have to admit that he committed a crime in order to make the showing that a witness falls under Penal Code § 1111. (*People v. Hoover* (1974) 12 Cal.3d 875, 881.)

The reason for this definition of "accomplice" under Penal Code § 1111 stems from the important policies underlying the statute. "The rationale for requiring corroboration of an accomplice is that the hope of immunity or clemency in return for testimony which would help to convict another makes the accomplice's testimony suspect, or the accomplice might have other self-serving motives that could influence his credibility." (*People v. Belton*, *supra*, 23 Cal.3d at 525.) "To prevent convictions from being based solely upon evidence from such inherently untrustworthy sources, the legislature enacted § 1111 to require corroboration whenever an accomplice provided the evidence upon which conviction was sought." (*Id.*)

Any "witness" who is potentially liable to prosecution for the very same offense for which the defendant is being tried has excellent "self-serving motive[s] that could influence his credibility"– namely, a desire to avoid conviction for the offense (or to minimize his culpability) and pass the blame onto someone else. "In such a case, the motivation to fabricate is based on the hope or expectation not merely of leniency or an offer of immunity, but of complete freedom from criminal liability in the event of the defendant's conviction." (*People v. Gordon*, *supra*, 10 Cal.3d at 468.)

The defendant does not have to show by a preponderance of the evidence that the witness committed the crime for which the defendant is on

trial. The defendant need only show that the witness was a person defined by § 1111 – one who, at the time of the act, was "liable to prosecution for the identical offense charged against the defendant." (Emphasis added.]

A person is "liable to prosecution" if with every legitimate inference drawn in favor of the accusation, a reasonable suspicion could be entertained that the person had participated in an offense. (*People v. Hoban* (1985) 176 Cal.App.3d 255, 260.) Consequently, this standard defines the appellant's burden under § 1111: to show by a preponderance of the evidence that a reasonable suspicion could be entertained that the witness had participated in the offense for which the defendant is on trial. The burden of showing a person may be prosecuted is, of course, much less than that of showing the person should be convicted. It is sufficient for these purposes if one person – including the defendant – testifies that the witness committed the crime, because unlike proof at trial, liability to prosecution may be based on the uncorroborated testimony of one person alleged to be an accomplice. (*People v. McRae* (1947) 31 Cal.2d 184, 186.)

As shown below, this criterion was easily met in this case, and a cautionary accomplice instruction was required.

C. Accomplice Testimony Instructions Were Required Under The Circumstances Of This Case

Without doubt the evidence raised a reasonable suspicion that Johnny Massingale committed the Jacobs murders. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore, the following accomplice instruction should have been given:

> The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and

caution and in the light of all the evidence in the case. (CALJIC 3.18 (1988) bound volume.)[441]

D. The Error Violated The Federal Constitution

The state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and a fair trial by jury (6th and 14th Amendments) require that the jury assess witness credibility. "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.) "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (DC Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 ["...the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and

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[441] Even if there had been a factual issue as to whether that had been established by a preponderance of the evidence, the issue of whether Johnny Massingale was "liable to prosecution" for the offense of which Lucas had been convicted – whether a reasonable suspicion may have been harbored at the time of the act – should have been resolved by a jury, properly instructed to resolve the issue with an instruction such as CALJIC 3.19.

standards appropriate for criminal trials. . . ."].)

Procedures, jury instructions or the absence of jury instructions which result in the impairment of the jury's central function of assessing the credibility of witnesses may implicate the defendant's federal constitutional right to trial by jury. (See *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [error in excluding a statement relating to the credibility of a child witness was of constitutional magnitude based on *Crane v. Kentucky* (1986) 476 U.S. 683, 690-91.)

Finally, because Lucas was arbitrarily denied his state created right under California law, including Penal Code § 1111, to a cautionary instruction on accomplice testimony, 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.)

E. The Error Was Prejudicial

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial because Massingale, having previously confessed to the very crimes charged against Lucas, was obviously the key witness in the case. The failure to instruct that the testimony of such a key witness must be viewed with distrust was obviously a substantial error which should be reversible in light of the weak prosecution evidence. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.)

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.4

THE DEFENSE REQUEST FOR AN "IMMUNITY AGREEMENT" INSTRUCTION WAS ERRONEOUSLY DENIED

A. Proceedings Below

The prosecution granted immunity to Frank Clark as to potential drug use prosecution in exchange for Clark's testimony against David Lucas. (RTT 3800; 3916-17.) In light of this immunity agreement the defense requested the following instructions:

> Immunity from prosecution and other favors or assistance provided a witness by law enforcement agents, including the prosecutors, may be considered in assessing the witness' believability.
>
> An immunity agreement may constitute a motive for bias. (CT 14504; RTT 11313.)

The judge denied the request. (RTT 11402; CT 14504.)

B. Denial Of The Instruction Was Error

CALJIC 2.20 instructs the jury on the general factors to use in assessing a witness' credibility including the presence of bias and self-interest. In *People v. Harvey* (1984) 163 Cal.App.3d 90, 112-13, the court concluded that if the defendant requests that the jury be instructed to view an immunized witness with distrust, "there is no question he [is] [would have been] entitled to it." (See also, *People v. Pitts* (1990) 223 Cal.App.3d 606, 880-81; Rucker & Overland, *California Criminal Forms & Instructions* (1983), Bancroft-Whitney Co., § 38.27A; but see *People v. Daniels* (1991) 52 Cal.3d 815, 867

fn. 20 [no sua sponte duty].)

In *People v. Hunter* (1989) 49 Cal.3d 957, 976-78, this Court held that the jury may not be instructed to view the immunized witness with "suspicion" or "greater care." (See also *People v. Echevarria* (1992) 11 Cal.App.4th 444, 449-51 [no error to refuse instruction to view testimony with distrust].) However, an instruction in language similar to that requested in the present case, together with CALJIC 2.20 was held to "adequately" inform the jury. (*Id.* at 978: "You should determine whether _____'s testimony has been affected by the grant of immunity or by [his] [her] prejudice against the defendant. You should weigh [his] [her] testimony by the same standards by which you determine the credibility of other witnesses.")

Accordingly, the judge erred in refusing the immunity instruction requested by the defense.

C. The Error Violated The Federal Constitution

By impairing the jurors' ability to fairly and reliably evaluate the important testimony of Frank Clark, the error violated Lucas' state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights (6th and 14th Amendments) to due process, trial by jury, confrontation and compulsory process. "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.) "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of

witnesses." (*United States v. Hayward* (DC Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . ."].)

In sum, because the failure to instruct on immunity impaired the jurors' ability to fairly and reliably assess credibility of an important witness Lucas' federal constitutional rights were violated. (See e.g., *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [error in excluding a statement relating to the credibility of a child witness was of constitutional magnitude based on *Crane v. Kentucky* (1986) 476 U.S. 683, 690-91.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

Further, because denial of the instruction arbitrarily denied Lucas' state

created right to a cautionary instruction regarding immunity, 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.)

D. The Error Was Prejudicial

The Jacobs case was closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Thus, Frank Clark's lay opinion testimony that Lucas authored the Love Insurance note was important prosecution evidence. However, the jurors could have inferred that Clark's opinion was unreliable because it was based on his memory of Lucas' printing from years before and because he had never actually seen Lucas print the exact three words and telephone number appearing on the note. In this context, it was crucial for the jury to know that Clark testified pursuant to an immunity agreement. This fact would have had a substantial bearing on whether or not to credit Clark's testimony. Accordingly, denial of the requested immunity instruction was prejudicial error under *People v. Watson* (1956) 46 Cal.2d 818, 836.

Moreover, because the error violated Lucas' federal constitutional rights the judgment should also be reversed under the federal standard because the prosecution cannot demonstrate beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.)

Finally, 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 because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[442] and the error was

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[442] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein (continued...)

substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." 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 substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[442](...continued)
[close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 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

A. Proceedings Below

The defense requested, under the mandatory authority of Evidence Code § 403(c), numerous instructions admonishing the jurors that they must make certain preliminary findings of fact before considering various crucial items of evidence. These instructions were erroneously denied.

B. Preliminary Fact Instructions Which Were Denied

The defense requested the following § 403(c) instructions, all of which were denied:

1. Perpetrator Identity Of Other Offense As Prerequisite To Cross-Consideration Of That Offense

The judge denied crucial preliminary fact instructions regarding consideration of other offenses which was required by *People v. Albertson* (1944) 23 Cal.2d 550, 578-80. (See § 2.3.4.2, pp. 237-51 above, incorporated herein.) This instruction was relevant to all the charges since they all were ruled to be cross-admissible with each other.

2. Comparative Identification (Handprinting, Shoe Print And Hair Comparison Evidence)

> Before you may consider any opinion testimony based on a comparative identification technique, you must first find, as a preliminary fact, that the proponent of the evidence has

established a foundation which proves that the items compared are reasonably comparable.

Absent the proponent establishing the preliminary fact, you must disregard the opinion testimony. (CT 14632.)

This instruction was relevant to crucial evidence in Jacobs (handprinting, shoe print and hair comparison evidence) and Swanke (blood comparison evidence).

3. Expert Opinion (Handprinting, Shoe Print And Hair Comparison Evidence)

If you find that expert opinion testimony is based upon speculative or conjectural data, you should disregard any such opinion based on such data. You may consider the remainder of an opinion, not affected by the improper use of speculative or conjectural data, and give it the weight to which it is entitled. (CT 14631.)

This instruction was relevant to crucial evidence in Jacobs (handprinting, shoe print and hair comparison evidence) and Swanke (blood comparison evidence).

4. Chain Of Custody

Physical evidence draws no weight merely because it was received. Where expert opinion evidence or lay opinion evidence involving human body specimens, such as blood, hair, tissue, and fingernails, or physical evidence taken from a crime scene or other location is offered by a party, the party introducing the opinion evidence has a burden of proving the identity of the items analyzed or viewed by the expert or lay witness. Identification of the specimen or item is a preliminary fact which must be proved before there may be consideration of any opinion testimony regarding the items. (CT 14531-32.)

This instruction was relevant to Jacobs ([hair], see § 2.2(J)(4), p. 95 above, incorporated herein) and Swanke ([fingernails], see Volume 4, § 4.2(A)(8)(c)(ii), p. 1093, incorporated herein).

5. Electrophoretic Results – Speculative Data

The trial court ruled that the electrophoretic results could not be considered unless the results were confirmed by an adequate photograph. (CT 13837.) Hence, the adequacy of the photos was a preliminary fact for the jury to find before considering the various electrophoretic results. The defense instruction on this preliminary fact was erroneously denied.[443]

This evidence was relevant to Swanke.

6. Authentication Of The Photograph Of The Love Insurance Note

See § 2.4.3, pp. 348-53 above, incorporated herein.

C. The Judge Erroneously Denied The Defense Requests Because Preliminary Fact Instructions Are Mandatory Upon Request

Evidence Code § 403 requires the judge to instruct the jury to make the required preliminary fact findings of authenticity before considering the evidence. (*People v. Epps* (2001) 25 Cal.4th 19, 27 [preliminary finding of authenticity by trial judge does not preclude jury from reaching a contrary conclusion]; see also *DuBois v. Sparrow* (1979) 92 Cal.App.3d 290, 296-97 [§ 403(c)(1) specifically preserves the parties' right, on request, to have the

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[443] The requested instruction was the following:

> If, after any review and analysis of photographs depicting the results of electrophoretic testing, you are not able to observe banding patterns, or if the banding patterns are so diffuse and vague as to prevent a determination that separate and distinct banding patterns [sic], then you may not consider any opinion testimony based on the electrophoretic runs. As a matter of law, results of electrophoretic runs that are not depicted and confirmed by photographs is speculative and conjectural, and may not be considered by you. (CT 14630.)

It was denied by Judge Hammes. (RTT 11479.)

jury determine authenticity and to disregard this evidence if it finds against authenticity].)

Accordingly, the judge violated Evidence Code § 403.

D. The Consistent And Arbitrary Denial Of Preliminary Fact Instructions In The Present Case Violated The Federal Constitution

Judge Hammes' consistent and arbitrary denial of preliminary fact instructions required by Evidence Code § 403 violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas' state created rights. (*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.)

Additionally, the Sixth Amendment right to trial by jury requires the jurors to decide all factual issues presented by the evidence. (See *Ring v. Arizona* (2002) 534 U.S. 1103; *Neder v. United States* (1999) 527 U.S. 1; *Beck v. Alabama* (1980) 447 U.S. 625, 633-38; *People v. Figueroa* (1986) 41 Cal.3d 714.) Hence, removing the § 403 factual findings from the jury violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to trial by jury.

Moreover, because the jurors were not required to make the required preliminary findings, their assessment of the evidence was not fair and reliable and, thus, further violated Lucas' federal (U.S. Const., 6th and 14th Amendment) rights to due process, trial by jury, confrontation, compulsory process and to present a defense which require the jury to make all required factual findings. "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part

of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.) "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . ."].)

Procedures, jury instructions or the absence of jury instructions which result in the impairment of the jury's central function of assessing the credibility of witnesses may implicate the defendant's federal constitutional right to trial by jury. (See *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [error in excluding a statement relating to the credibility of a child witness was of constitutional magnitude based on *Crane v. Kentucky* (1986) 476 U.S. 683, 690-91].)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

The state law errors discussed in the present argument and throughout this brief cumulatively produced a trial setting that was fundamentally unfair and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

E. The Error Was Prejudicial

The preliminary fact instructions which were refused related to the most crucial aspects of the prosecution's case such as cross-admissibility and handprinting comparison. Therefore, because the Jacobs case was closely balanced (see § 2.3.1(I)(2), pp. 209-11 above, incorporated herein), rejection of the required instructions was prejudicial under the state standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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 it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Given the closeness of the evidence in Jacobs and the

devastating impact of the cross-admissibility ruling, the prosecution cannot meet its burden under *Chapman*. Therefore, the judgment should be reversed under the federal standard as well.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.6

THE TERM "EXPERT WITNESS" SHOULD NOT HAVE BEEN USED AT TRIAL OR IN THE JURY INSTRUCTIONS

The jury was consistently admonished that certain witnesses should be considered "experts." The term "expert witness" was used throughout the trial from voir dire (e.g., RTH 35312-13; 35316), to preliminary instructions (e.g., RTT 12), to the opening statements (e.g., RTT 26-27; 56; 91), to examination of the witnesses (e.g., RTT 548, 618, 942, 1076, 1102), to closing argument (e.g., RTT 11766-67; 11772; 11825-26), to the final instructions. (CT 14303, 14304, 14305.)

By designating certain witnesses as "experts," the judge gave those witnesses undue stature and emphasis in the eyes of the jury. It is fundamental that no particular witness should be given undue emphasis or otherwise singled out for special consideration. (See e.g., *Bollenbach v. United States* (1946) 326 U.S. 607.)

Even if judicial comment does not directly express an opinion about the defendant's guilt, an instruction that is one-sided or unbalanced violates the California Constitution (Art. I, sections 7, 15, 16 and 17), the California Rules of Evidence (§ 1101) and the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Cool v. United States* (1972) 409 U.S. 100; *Webb*

v. Texas (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Quercia v. United States* (1933) 289 U.S. 466, 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537 [judge's comments require a new trial if they show actual bias or the jury "perceived an appearance of advocacy or partiality"]; *People v. Gosden* (1936) 6 Cal. 2d 14, 26-27 [judicial comment during instructions is reviewable on appeal without objection below].)

"Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation]. Read as a whole they should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory,' [citation] nor overemphasize the importance of certain evidence or certain parts of the case [citation]." *(United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *People v. Wright* (1988) 45 Cal.3d 1126, 1135; *United States v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45.) Moreover, the instruction was improperly argumentative because it directed the jury's attention to specific evidence and "impl[ied] the conclusion to be drawn from that evidence." (*People v. Harris* (1989) 47 Cal.3d 1047, 1098, fn. 31; see also *People v. Wright, supra,* 45 Cal.3d at 1135.)

These fundamental principles were violated throughout the present case by use of the term "expert witness." Designating a witness as an "expert" raises the danger that the jury will give undue emphasis to the "expert" testimony. (See e.g., Stephen A. Saltzburg, "Testimony from an Opinion Witness: Avoid Using the Word "Expert" at Trial," Criminal Justice, Summer 1994, p. 35; see also *5th Circuit Pattern Jury Instructions - Criminal 1.17* [Expert Witness] (2001); *7th Circuit Federal Jury Instructions - Criminal 3.07* [Weighing Expert Testimony] ¶¶ 1 Comment (1999) ["term 'expert' has

been omitted to avoid the perception that the court credits the testimony of such a witness"]; *11th Circuit Pattern Jury Instructions - Criminal Basic Instructions* 7 [Expert Witnesses] (1997) [witness not referred to as expert in body of Instruction]; *Oklahoma Uniform Jury Instructions - Criminal*, OUJI-CR 9-42 [Credibility Of Opinion Witness] (Oklahoma Center for Criminal Justice, 2nd ed. 1996, 1997 Supp.).)

In sum, by using the term "expert" to describe certain witnesses, many of whom–such as the handwriting experts in the Jacobs case – were the standard bearers of the prosecution's theory of the case, the judge unfairly commented on the evidence in violation of Lucas' state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights (6th and 14th Amendments) to a fair trial by jury and due process.

Further, because the error arbitrarily denied Lucas his state created right to neutral, nonargumentative jury instructions, 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.)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial because the instructions bolstered the testimony of the prosecution's case which relied heavily on expert testimony and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed

under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.7

THE JUDGE IMPROPERLY REJECTED THE DEFENSE REQUEST TO DEFINE THE TERM "INFERENCE" IN THE JURY INSTRUCTIONS

A. Proceedings Below

Because the standard instructions did not define the term "inference," the defense requested that it be defined as follows:

> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
>
> An inference must be based on a rational connection between the fact proved and the fact to be inferred. Before a rational connection can be found, there must be a finding with substantial assurance that the fact proved gives rise to the fact to be inferred.
>
> An inference cannot be based on suspicion, imagination, speculation, conjecture or guess work.
>
> Evidence which produces suspicion, imagination, speculation, conjecture or guess work must be disregarded. (CT 14493.)

The judge denied this request because she believed it was covered by other instructions. (RTT 11620-23.)

CALJIC 2.00, ¶ 5, which was given provided as follows:

> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. (CT 14282, ¶ 5.)

B. The Judge Is Obligated To Define Terms With Special Legal Meanings

While a trial court has no sua sponte duty to give amplifying or clarifying instructions in the absence of a request where the terms used in the instructions given are "commonly understood by those familiar with the English language" the court does have a duty to define terms which have a "technical meaning peculiar to the law." (*People v. McElheny* (1982) 137 Cal.App.3d 396, 403; see also *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52; *People v. Hill* (1983) 141 Cal.App.3d 661, 668.)

C. "Inference" Has A Special Legal Meaning

Under the federal constitution an inference must not simply be logical and reasonable. "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact upon which it is made to depend. [fn omitted]." (*Leary v. United States* (1969) 395 U.S. 6, 36; see also, *Ulster County v. Allen* (1979) 442 U.S. 140, 165-66.)

D. Correct Juror Understanding Of The Term Inference Was Important In Jacobs

All of the evidence in Jacobs was circumstantial. In fact, the jurors were obligated to make important preliminary inferences before crucial prosecution evidence could even be considered relevant.

For example, before finding the Love Insurance note to be relevant the jury was required to infer that it was actually left by the killer. (See defense requested instruction on this, CT 14636.) And, if it was left by the killer the relevance of the note further depended on the inference that the killer was the person who wrote the note. (See § 2.4.2(C)(3), pp. 342-44 above,

incorporated herein [defense theory that Massingale could have been wearing Lucas' clothes left at the Salvation Army].) And, if the killer wrote and left the note, there was yet another inferential leap necessary. That is, the jurors were required to infer that Lucas was the author based solely on the few block printed letters and numerals on the note. This final inference was itself based on the dual inferences that: (1) no two people in the world would have printed those letters and numerals in the same way, and (2) authorship may be reliably determined by comparing the unknown block printing with known samples from a suspect.

In sum, the making of inferences was an essential function for the Lucas jurors. Yet, without instructing the jurors as to the correct legal meaning of the term, there is no assurance that the jurors made the required inferences reliably and in the manner required by the federal constitution.

E. The Error Violated The Federal Constitution

Because the judge failed to define the term inference as defined by the Supreme Court's interpretation of the federal constitution, the error violated the state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jurors fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].) Moreover, juror assessment of the evidence under the correct rules and legal principles is also guaranteed by the federal constitutional rights to trial by jury, confrontation, compulsory process and right to present a defense. (See §

2.3.4.2(D), pp. 247-49 above, incorporated herein.)

Further, allowing the jury to rely on irrational or arbitrary inferences to convict Lucas violated his federal constitutional rights under the Due Process and Trial By Jury Clauses (6th and 14th Amendments) which require the prosecution to prove every essential issue beyond a reasonable doubt. (*Ulster County v. Allen*, *supra*, 440 U.S. 140; see also *In re Winship* (1970) 397 U.S. 358.)

Further, because the error arbitrarily denied Lucas his state created rights under California law to definition of instructional terms with technical legal meaning, 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 Error Was Prejudicial

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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].) Because the Jacobs case was closely balanced, and the prosecution's case was based entirely upon inferences the jurors were required to make, the prosecution cannot prove that the error was harmless beyond a reasonable doubt. Therefore, the judgment should be reversed under the federal harmless-error standard.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.8

THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY NOT TO CONSIDER ALL THE EVIDENCE

If the jury is permitted, at its option, to not consider evidence which has been admitted, then the accused's state and federal constitutional right to due process, fair trial by jury, confrontation, compulsory process, effective assistance of counsel and verdict reliability are violated. (Calif. Const. Art. I, sections 1, 7, 15, 16 and 17; U.S. Const. 6th, 8th and 14th Amendments.) This is so because all of the above rights depend on fair consideration by the jury of all evidence presented at trial.

Hence, jury instructions which give the jurors the option to not consider portions of the evidence constitute structural error which undermine the most fundamental underpinnings of the judicial process. (See *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734 [right to present evidence is meaningless if jury is not required to consider it]; cf., *People v. Williams* (2001) 25 Cal.4th 441, 457 [jury instructions may not permit juror nullification]; *People v. Cox* (1991) 53 Cal.3d 618, 696 [defendant as well as the prosecution has a right to the reasoned, dispassionate and considered judgment of the jury].)

Using the term "should" instead of "must" effectively informs the jury that while it is recommended that it consider the defense evidence, it is not obligated to do so. For example, instructions are defective if they inform the jury that consideration of voluntary intoxication is permissive ("you may consider . . .") rather than mandatory. (See e.g., *State v. Foster* (1995) 528

N.W.2d 22, 28 [jury should be instructed that it "must consider the evidence regarding whether the defendant was intoxicated at the time of the alleged offense"].) Modification using the word "may" instead of "must" is erroneous because a "jury could interpret this to mean that it need not consider that evidence at all." (*Ibid.*) To assure the defendant's constitutional right to consideration of all the evidence, the jury should be instructed that it "must" consider evidence of voluntary intoxication. (See *State v. Ortiz* (Conn. 1991) 217 Conn. 648 [588 A.2d 127, 137-38] [jury properly instructed that it "must" consider evidence of intoxication on issue of specific intent]; see also *Commonwealth v. Perry* (Mass. 1982) 385 Mass. 638 [433 N.E.2d 446, 453] [jury should be instructed to consider evidence of intoxication in determining degree of criminal culpability]; *Commonwealth v. Gould* (Mass. 1980) 380 Mass. 672 [405 N.E.2d 927, 935] [jury should be instructed to consider evidence of substantial mental impairment in determining degree of murder].)

The federal constitutional rights to fair trial by jury and due process (6th and 14th Amendments) require that the jury consider exculpatory evidence upon which the defendant relies. (See e.g., *Rock v. Arkansas* (1987) 483 U.S. 44, 61 [domestic rule of evidence may not be used to exclude crucial defense evidence]; *Martin v. Ohio* (1987) 480 U.S. 228, 233 [instruction that jury could not consider self defense evidence in determining whether there was a reasonable doubt about the State's case would violate *In re Winship* (1970) 397 U.S. 358; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

Jury consideration of all the evidence is also required by the federal constitutional rights to due process, trial by jury, compulsory process, confrontation and right to present a defense. (6th and 14th Amendments.) (See e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *California v. Trombetta* (1984) 467

U.S. 479, 485; *Gilmore v. Taylor* (1993) 508 U.S. 333.) Criminal defendants are constitutionally assured "a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485.) This guarantee arises from the Confrontation Clause and the Due Process Clause of the federal constitution. (See *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588.) In any system of ordered liberty, a defendant must have the right to jury consideration of any competent evidence offered in his or her defense. Our traditional notions of fair play require no less. (*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 85.)[444]

The foregoing rights are violated by jury instructions which permit the jurors to convict the defendant without having considered all of the evidence. (See *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-42 [the right to present evidence is meaningless if the jury is not required to consider it]; see *People v. Cox* (1991) 53 Cal.3d 618, 696 [defendant as well as the prosecution has a right to the reasoned, dispassionate and considered judgment of the jury]; *Giles v. State* (Ark. 1977) 251 Ark. 413 [549 S.W.2d 479, 484-85] [misconduct for jurors to arbitrarily and completely disregard mitigating evidence of defendant's severe cognitive impairment due to organic brain syndrome]; *Duckworth v. State* (Ark. 1907) 83 Ark. 192 [103 S.W. 601, 602] [relevant and competent testimony in a criminal case should not be

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[444] "[T]he thing that we purport to care about in guaranteeing the right to trial by jury [is] providing for the kind of decisionmaker who is most likely to listen to, actually hear, and be open to full and separate consideration of, each and every item of evidence an accused may offer in support of his or her case." (Katherine Goldwasser, *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*, (1998) 86 Geo. L. J. 621, 639.)

arbitrarily disregarded by the jury]; *People v. Sumner* (Ill. App. 1982) 107 Ill.App.3d 368 [437 N.E.2d 786, 788] [jury must consider all of the evidence; trier of fact cannot simply ignore exculpatory evidence].)

Further, because the error arbitrarily denied Lucas his state created rights 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.)

Additionally, the state law errors discussed in the present argument and throughout this brief cumulatively produced a trial setting that was fundamentally unfair and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

In the present case numerous jury instructions were given which used the permissive terms "should consider" or "may consider." (See e.g., CT 14287; CT 14294; CT 14295; CT 14298; CT 14299; CT 14303; CT 14305; CT 14306; CT 14310; CT 14311.)[445] These terms permitted the jury to not

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[445] The defense made a specific request to change "should" to "shall" or "must" in CALJIC 2.83 ["RESOLUTION OF CONFLICTING EXPERT TESTIMONY"]. (CT 14305; RTT 11163-64.) In light of the judge's denial of this request, making similar requests as to other instructions would have been futile. (See *People v. Bain* (1971) 5 Cal.3d 839, 849, fn. 1; *Douglas v. Alabama* (1965) 380 U.S. 415, 422 ["No legitimate state interest would have been served by requiring repetition of a patently futile objection, . . . in a (continued...)

consider crucial portions of the evidence in violation of the above constitutional principles. (See CT 14295 [telling jury that it "may," as opposed to "must," consider evidence of prior inconsistent statements – i.e., Massingale's confessions – which went to the heart of the defense case]; and CT 14310 [telling jury that in determining whether characteristic method connects the crimes the jury "may," as opposed to "must," look to the distinctiveness of marks of similarity – which undermined the legitimacy of the jury's use of other crimes evidence and precluded a fair and reliable result].)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates

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[445](...continued)
situation in which repeated objection might well affront the court or prejudice the jury beyond repair"]; see also 9 Witkin, *Cal. Procedure* (4th ed. 1997), Appeal, § 387 at pp. 437-38].)

Moreover, the instructions affected Lucas' substantial rights and, therefore, should be considered under Penal Code § 1259. The failure of the defense to object to an instructional error does not preclude appellate review of that error if the substantial rights of the defendant were affected. (Penal Code § 1259; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; *People v. Renteria* (2001) 93 Cal.App.4th 552, 560; *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.9

THE JUDGE ERRONEOUSLY DENIED THE DEFENSE REQUEST TO SPECIFY WHICH OPINION TESTIMONY WAS CIRCUMSTANTIAL EVIDENCE

A. Introduction

The crucial principles set forth in the circumstantial evidence instructions did not apply to direct evidence. (But see § 2.10.9, pp. 691-97 below, incorporated herein.) Hence, it was critical that the jurors correctly understand to which evidence the circumstantial evidence principles applied. With regard to opinion testimony this determination was particularly difficult and, therefore, the judge erred in refusing to instruct the jury on this point.

B. Proceedings Below

The prosecution relied heavily on opinion testimony regarding crucial issues such as handwriting comparison in Jacobs and serology analysis in Swanke. The judge instructed the jury regarding circumstantial evidence as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.
>
> If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (CT 14283; see also 14284.)

At the instruction conference the judge refused the following instruction, requested by the defense:

> Expert opinion testimony and lay opinion testimony are a type of circumstantial evidence and not direct evidence.
>
> Therefore, the circumstantial evidence instructions shall be applied to opinion testimony considered by you to any evidence offered by a criminalist, serologist, handwriting analyst, fingerprint analyst, shoe comparison analyst, tracking analyst, hair comparison analyst, or any other analyst.
>
> The circumstantial evidence instructions shall also be applied to all lay opinion testimony. (CT 14523.)

C. Comparative Identification Opinion Testimony Is Circumstantial Evidence

Comparative opinion evidence, such as the testimony of the handwriting experts, is circumstantial evidence because the testimony of the witness is based on inferences drawn from the observed circumstances. (See *People v. Gentry* (1968) 257 Cal.App.2d 607, 611 ["[o]pinion evidence . . . it must be remembered, is a type of circumstantial evidence and not direct evidence]; see also *People v. Goldstein* (1956) 139 Cal.App.2d 146, 153-54 [expert opinions regarding matters such as handwriting, ballistics and fingerprints is circumstantial].)

D. The Jurors Would Not Have Understood That Opinion Testimony Is Circumstantial Evidence

The jurors were given the following definitions of direct and circumstantial evidence:

> Evidence is either direct or circumstantial.
>
> Direct evidence is evidence that directly proves a fact, without the necessity of an inference. It is evidence, which by itself, if found to be true, establishes that fact.
>
> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.
>
> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. (CT 14282 ¶ 2-4.)

From these definitions, as reasonably interpreted,[446] the jurors could have concluded that the opinion testimony as to matters such as handwriting comparison and serology analysis was direct evidence. For example, the jurors reasonably could have concluded that the handwriting expert's opinion that Lucas likely wrote the Love Insurance note was direct evidence. That is, Harris' opinion that Lucas wrote the note "directly prove[d]" that fact. Similarly, the jurors could have concluded that Brian Wraxall's opinion that the blood under the Swanke fingernails was consistent with Lucas and the blood on the sheepskin seat cover was consistent with Swanke's directly proved those facts.

E. The Error Violated Lucas' Federal Constitutional Rights

To the extent that the principles stated in CALJIC 2.01 relate to the prosecution's burden to prove guilt beyond a reasonable doubt the failure to require jury consideration of those principles as to certain evidence violates

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[446] *Estelle v. McGuire* (1991) 502 U.S. 62.

the state (Art I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) rights to due process and trial by jury. (See (*In re Winship* (1970) 397 U.S. 358; *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Further, because Lucas was arbitrarily denied his state created right to special instruction on, and consideration of, the circumstantial evidence, 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.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

F. The Error Was Prejudicial

In Jacobs the handprinting opinions – the experts and Frank Clark – were the linchpins of the prosecution's case which the prosecutor relied heavily on in support of its theory that Lucas authored the Love Insurance note. The Jacobs case also involved other important opinion testimony concerning shoe print and microscopic hair comparison. (See § 2.2(F) and (G), pp. 70-77 above, incorporated herein.) Accordingly, because the Jacobs

case was closely balanced (see § 2.3.1(I)(2), pp. 209-11 above, incorporated herein), Lucas was prejudiced by the failure to instruct the jury that the opinion testimony was circumstantial rather then direct evidence. "'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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.10

THE JUDGE SHOULD HAVE DELETED THE INSTRUCTION TITLES FROM THE WRITTEN INSTRUCTIONS OR CAUTIONED THE JURY REGARDING USE OF THE TITLES

A. Introduction

Twelve copies of the written instructions were given to the jury during the guilt and penalty deliberations. (RTT 12177; 13239; CT 14347; 14395.)

Many of the individual instructions contained a specific title at the top of the page in all capital letters over defense objection. (RTT 11550; 11556.) This was improper and prejudicial because certain important and discrete principles were not included in a separately titled instruction, and did not appear at all in the title of any of the given instructions. This had the effect of giving undue emphasis to some principles and less emphasis to others.

B. The Legal Principles

It is well settled that no single instruction or item of evidence should be given undue emphasis. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135; *Commonwealth v. Oleynik* (Pa. 1990) 524 Pa. 41, 46-47 [568 A.2d 1238].) Similarly, any procedure which results in the undue emphasis or ignorance of a material legal principle is improper.

An instruction that is one-sided or unbalanced violates the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based

on the accomplice testimony]; *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Quercia v. United States* (1933) 289 U.S. 466, 470; see also generally *Wardius v. Oregon* (1973) 412 U.S. 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537.) "Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation] . . . [the instructions] should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory'. . . nor overemphasize the importance of certain evidence or certain parts of the case." (*United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *U.S. v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45; *State v. Pecora* (Mont. 1980) 190 Mont. 115 [619 P.2d 173, 175].)

Hence, a number of jurisdictions specifically recommend that titles should not be included on the written instructions given to the jury. For example, in Hawaii the jury instruction committee has specifically stated that "titles are not part of the instructions and are not intended to be read to the jury. . . ." (*Hawaii Pattern Jury Instructions - Criminal, HAWJIC Introduction* (West, 1998); see also *5th Circuit Pattern Jury Instructions - Criminal* 1.17 [Expert Witness] note (2001) ["When the judge gives written instructions to the jury, the judge may wish to delete the title 'expert witness'"]; *Alaska Pattern Criminal Jury Instructions* General use notes (Alaska Bar Association, 1987) [titles of instructions are not intended to come to the attention of the jury]; *Idaho Criminal Jury Instructions, ICJI Introduction and General Directions for Use* (Idaho Law Foundation, Inc., 1995) [subject and title "must be omitted"]; *Wisconsin Jury Instructions - Criminal, WIS-JI-Criminal* 926 [Contributory Negligence] comment p. 2 (University of

Wisconsin Law School, 1999) ["The term 'contributory negligence' is used only in the title of the instruction. The Committee recommends that the title not be communicated to the jury and has drafted this instruction without using the term"].)[447]

This Court briefly addressed the issue of instructional titles in *People v. Bloyd* (1987) 43 Cal.3d 333, 355 and held that no error is committed when descriptive titles – even if erroneous – are on the written instructions submitted to the jury. However, if titles are included, it should be presumed that the jurors read and relied on those titles. "Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v. Hardy* (1992) 2 Cal.4th 86, 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324-25, fn 9.)[448] Hence, an inaccurate or misleading title may be a substantial error if it leaves the reviewing court in doubt as to whether a given legal principle was over-emphasized or under-emphasized due to the formatting of the written instructions. Failure of the jury to fully and fairly consider all the legal rules

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[447] On the other hand, in North Dakota, it is recommended that the heading of the instruction be given to make oral delivery of the instructions more understandable and assist the jury in reviewing the instructions in the juryroom. (*North Dakota Pattern Jury Instructions, NDJI-criminal Introduction*, page 1 (State Bar Association of North Dakota, 1985).)

[448] The reality that the jurors will rely on the titles is also reflected by the numerous jury instruction committees who have directly addressed the question. (See above.)

set forth in the jury instructions violated state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jury fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

C. The Titles In The Present Case Were Constitutionally Deficient

In the present case, the titling and formatting of the written instructions provided added emphasis and visibility to those principles which were stated in the title of an instruction and less emphasis to other principles which were

not highlighted in that manner.[449]

For example, the crucial principle that the established listing of factors relevant to appraising the reliability of eyewitness identification testimony applies to the eyewitness identification of inanimate objects was not included in a separate instruction with an appropriate title, but was buried in the instruction entitled "FACTORS TO CONSIDER IN PROVING IDENTITY BY EYE WITNESS TESTIMONY." (CT 14287.)

Similarly, the fundamental rule that the jury must not consider penalty in deciding guilt was not included in the titles of the written instructions. Instead, the principle was contained in an instruction with a title suggesting that the rule barring consideration of penalty had a much narrower applicability: "SPECIAL CIRCUMSTANCES – JURY MUST NOT CONSIDER PENALTY." (CT 14346.)

Another important principle that was de-emphasized – because it was set forth in an instruction with an inappropriate title – was the rule that no instruction should be considered an expression of the judge's opinion as to the facts. This instruction logically belonged under the instruction entitled "JURY NOT TO TAKE CUE FROM JUDGE." (CT 14352.) Instead, however, it appeared within another instruction whose title did not describe the principle: "ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE." (CT 14343.)

Nor were there any discrete instructions defining what is "evidence." The definition was included within an instruction dealing with inferences: "DIRECT AND CIRCUMSTANTIAL EVIDENCE–INFERENCES." (CT

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[449] Judge Hammes denied defense counsel's request that the titles (captions) be removed. (RTT 11550.)

14282.)

Another instruction was titled "BURDEN OF PROVING IDENTITY BASED SOLELY ON EYE WITNESSES" [emphasis added]. (CT 14286.) Yet the instruction actually dealt with proving identity based on eyewitness testimony in combination with "any other evidence in this case . . ." Unless the jurors believed that the identity in Santiago was based "solely on eyewitnesses," they would have had no reason to go beyond the title of this instruction, and Lucas would have been deprived of the crucial protection of the second paragraph of that instruction which stated:

> If, after considering the circumstances of any eye witness identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime or crimes charged, you must give the defendant the benefit of that doubt and find him not guilty.

Yet another instruction contained the following nonsensical title: "OF EVIDENCE TO SUPPORT FINDING OF PREMEDITATION AND DELIBERATION." Obviously, this title did not match the content of the instruction which addressed the relationship between a "particularly brutal" killing and premeditation and deliberation. (CT 14327.)

The titles of other instructions were misleading because the instructions did not include all the principles applicable to the title. For example, the first instruction was entitled "RESPECTIVE DUTIES OF JUDGE AND JURY." Yet, that instruction did not include one of the most fundamental jury duties of all: to determine whether the prosecution has proven guilt beyond a reasonable doubt. (CT 14275-76; see also § 2.9.1(C), pp. 533-34 above, incorporated herein.) Another instruction included in the title: "STIPULATED FACTS." (CT 14278.) Yet this instruction only discussed stipulated facts in a portion of a single sentence. (CT 14278.) Two additional

full sentences relating to stipulated facts were to be found in another instruction which did not include "stipulated facts" in the title. (CT 14275 [RESPECTIVE DUTIES OF JUDGE AND JURY].)

As a general proposition the trial judge should assure that no particular instruction or group of instructions is given undue emphasis of de-emphasis. (See generally *United States v. Sutherland* (5th Cir. 1970) 428 F.2d 1152, 1157-58; *United States v. Piatt* (8th Cir. 1982) 679 F.2d 1228, 1231; *United States v. Parr* (11th Cir. 1983) 716 F.2d 796, 809; *Davis v. United States* (D.C. App. 1986) 510 A.2d 1051, 1053.) However, in the present case the misleading titles were especially prejudicial to Lucas because they de-emphasized crucial defense instructions, including those dealing with eyewitness identification and the duty of the jury. Hence, the misleading titles undermined the fairness and reliability of the deliberative process at both the guilt and penalty phases.

D. The Error Violated Lucas' Federal Constitutional Rights

Because the instructional titles made the instructions unbalanced and in some cases one-sided in favor of the prosecution, they violated Lucas federal constitutional rights to due process, trial by jury under the Sixth and Fourteenth Amendments. There should be absolute impartiality as between the People and the defendant in the matter of instructions. (See *People v. Moore* (1954) 43 Cal.2d 517, 526; see also *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)

"[I]n the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon* (1973) 412 U.S. 470, 475.) Hence, the Due Process and

Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (*Ibid.*; see also *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the co-defendant]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Washington v. Texas* (1967) 388 U.S. 14 [accomplice permitted to testify for the prosecution but not for the defense]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

Additionally, the erroneous titles also violated Lucas' state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jurors fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Further, because the error arbitrarily denied Lucas his state created rights 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.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

E. The Judgment Should Be Reversed

Because proper jury consideration of the jury instructions is a fundamental underpinning of the entire trial process, the misleading titles were structural error and the judgment should be reversed without a showing of prejudice. (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.)

Moreover, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson*

standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.11

THE JUDGE IMPROPERLY COERCED THE JURORS BY ADMONISHING THEM THAT THEY WERE EXPECTED TO REACH A JUST VERDICT

The jury was never expressly instructed regarding the propriety and/or desirability of not reaching a verdict. In the preliminary instructions the jurors were told: ". . . each of you, for yourself, must determine the question of the guilt or innocence of the defendant." (RTT 13.)

In the final instructions the jurors were admonished that they would be expected to render a "just verdict."[450] Although another instruction hinted that a verdict need not be reached,[451] the absence of any specific instruction on the matter failed to assure that the verdicts were uncoerced.

At best the jurors were left in a state of confusion; at worst, they improperly believed that they should reach a verdict because the judge and all the parties expected them to do so.

Hence, the instructions were deficient. Unless the jurors understand that they are not required to reach a verdict there is a danger of improper juror

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[450] "Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences." (CT 14276, last sentence.)

[451] "The People and the defendant are entitled to the individual opinion of each of you. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so." (CT 14347, first paragraph and first sentence of second paragraph.)

coercion. (See *Jiminez v. Meyers* (9th Cir. 1993) 40 F.3d 976.) It is essential that all the jurors understand that conscientiously held beliefs must not be surrendered simply for the purpose of reaching a verdict. (See *United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268; see also *Packer v. Hill* (9th Cir. 2002) 291 F.3d 569, 580; *Jiminez v. Meyers*, *supra*.) However, when conflicting instructions are given on the issue the required assurance is lacking.

A conflict between instructions does not clarify either instruction. As the United States Supreme Court observed in *Francis v. Franklin* (1985) 471 U.S. 307, 322: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (See also *People v. Noble* (2002) 100 Cal.App.4th 184, 191 [contradictory instructions on burden of proof in MDO proceeding made it impossible to determine whether the jury reached its verdict using the correct burden].)

Similarly, this Court has recognized that: "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury." (*People v. Dail* (1943) 22 Cal.2d 642, 653.)

Moreover, the error in the present case was especially significant because the jury was deadlocked at the penalty trial and the judge erroneously failed to assure that the jurors would not surrender their individual consciences to reach a verdict. (See Volume 7, § 7.7.1, pp. 1671-79, incorporated herein.) Thus, the weight of the judge's admonition regarding the expectation of a verdict would have been especially heavy.

Even if judicial comment does not directly express an opinion about the

defendant's guilt, an instruction that is one-sided or unbalanced violates the California Constitution (Art. I, sections 7, 15, 16 and 17) and the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Quercia v. United States* (1933) 289 U.S. 466, 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537 [judge's comments require a new trial if they show actual bias or the jury "perceived an appearance of advocacy or partiality"]; see also *People v. Gosden* (1936) 6 Cal. 2d 14, 26-27 [judicial comment during instructions is reviewable on appeal without objection below].)

"Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation]. Read as a whole they should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory,' [citation] nor overemphasize the importance of certain evidence or certain parts of the case [citation]." *(United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *United States v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45.)

Further, the improper juror coercion violated Lucas' state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that

the jury fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because the error arbitrarily denied Lucas his state created rights under California law to a fair, impartial and uncoerced verdict, 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.)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 2.9.12

THE FINAL INSTRUCTIONS WERE CUMULATIVELY DEFICIENT

A. Introduction

Numerous instructional deficiencies in the final instructions were individually and cumulatively deficient and prejudicial.

B. The Judge Improperly Framed The Issues In Terms Of Finding Guilt Or Innocence

In a number of final instructions, as well as the preliminary instructions (see RTT 13, CT 14276, 14283 14311, 14350), the judge stated the issues facing the jury in terms of finding "guilt or innocence."[452]

This language conflicted with the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281; see also *In re Winship* (1970) 397 U.S. 358.)

One of the most fundamental principles of criminal law is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684.) And, an essential rule which emanates from this burden is that the defendant need not prove his or her innocence, but need only raise a reasonable doubt as to guilt. (See *People v. Hall* (1980) 28 Cal.3d 143, 159; see also *People v. Adrian* (1982) 135 Cal.App.3d 335, 342; but see *People v. Wade* (1995) 39 Cal.App.4th 1487,

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[452] See e.g., CT 14276 ["None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent."]

1491-92 [holding that it was not error to give the "guilty/innocent" language, but failing to address whether the language should be changed upon request].) Hence, jury instructions which suggest that the jury must decide between "guilt" or "innocence" violate the defendant's state (Art. I § 15) and federal (6th and 14th Amendments) constitutional rights to due process and trial by jury. (See also Bugliosi, "*Not Guilty and Innocent — The Problem Children Of Reasonable Doubt,*" 4 Crim. Justice J. 349 (1981).)

Indeed the CALJIC committee appears to have recognized this problem in their 6th Edition, in which CALJIC 1.00 was amended by replacing the term "innocent" with "not guilty." (See also, 1990 Revision of CALJIC 17.47 which deleted the "guilt or innocence" language of the former instruction. (See also CALJIC 16.835, lines 10-11.)

Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (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 .)

Alternatively, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.)[453]

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[453] The correct formulation of guilty and not guilty was given in some instructions. (CT 14312-13; 14316-18; 14331; 14336-37; 14345.) However, these instructions did not cure the error. (*Francis v. Franklin, supra,* 471 U.S. at 322; see also *People v. Marzett* (1985) 174 Cal.App.3d 610, 615-17; R. Traynor (1970), "*The Riddle of Harmless Error.*"

C. The Willfully False Instruction Improperly Failed To Define "Material"

The judge gave CALJIC 2.21.2 which provided as follows:

> A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars. (CT 14297.)

However, this instruction could not have been reliably and consistently applied by the jurors because there is no assurance that they knew a "material part" of a witness' testimony must relate to a fact which could be "determinative of the case."

Although it has been stated that CALJIC 2.21.2 contains a correct statement of the law (*People v. Blankenship* (1959) 171 Cal.App.2d 66, 83-84), the existing case law does not set forth a definition of the term "material part." To the extent that the term appears to be one with a technical legal meaning, it should be defined for the jury. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 489-90 [court must instruct sua sponte as to those terms which have a technical meaning].)

People v. Wade (1995) 39 Cal.App.4th 1487, 1495-96 held that "material" as used in CALJIC 2.21.2 carries its ordinary meaning of "substantial, essential, relevant or pertinent" and does not require sua sponte definition. However, given the context of CALJIC 2.21.2, the proper definition of "material part" should be taken from those cases which construe the materiality element of the crime of perjury. (Penal Code § 118.) In this regard, this Court has held that the test for materiality is "whether the statement could probably have influenced the outcome of the proceedings. .

. ." (*People v. Pierce* (1967) 66 Cal.2d 53, 61.) Thus, "material part" of someone's testimony must relate to a fact which could be "determinative of the case." (*Black's Law Dictionary* (5th Ed. 1979) p. 881; definition of "material evidence.")

In sum, because this instruction affected the jury's consideration of the evidence, the error violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th, 8th and 14th Amendments) constitutional rights to due process and fair trial by jury, which require that the jurors fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Moreover, because Lucas was arbitrarily denied his state created right to definition of technical terms used in jury instructions, 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.)

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

The judge gave the following instruction:

> A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the

evidence, you believe the probability of truth favors his or her testimony in other particulars. (CT 14297.)[454]

When CALJIC 2.21.2 is applied to a defense witness, the "probability of truth" language has been held to be proper. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 94-95.) However, the considerations are different when the instruction is applied to a prosecution witness who provides the critical evidence against the defendant. An instruction which tells the jury that crucial prosecution testimony must be accepted based on a "probability" standard is "somewhat suspect." (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046; but see *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [even if "probability of truth" language was "somewhat suspect" standing alone, as a whole the instructions were correct].) Although the court in *Rivers* did not hold that the giving of CALJIC 2.21.2 was prejudicial error, its "concerns" about use of the instruction where it affects the crucial testimony of a sole percipient witness provides a basis for modifying the instruction when appropriate.

This error was exacerbated by CALJIC 2.22 [weighing conflicting testimony] which informed the jurors that the final test was the "convincing force"[455]which evokes a probability or preponderance standard rather than

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[454] This instruction was consistent with the pre-voir dire juror pamphlet which all prospective jurors received. It stated: "Act on the evidence only if you find it reasonable and probable." (CT 10730.)

[455] The jurors were instructed as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony

(continued...)

proof beyond a reasonable doubt.

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Neder v. United States* (1999) 527 U.S. 1; *Jackson v. Virginia* (1979) 443 U.S. 307.) Misinstruction on the prosecution's obligation to prove guilt beyond a reasonable doubt is structural error which is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

E. The Credibility Of Witness Instruction Was Improperly Limited To Persons Who Testified Under Oath[456]

Important evidence in this trial came from out-of-court statements by persons who did not testify and out-of-court statements of witnesses who did testify. However, the instruction on witness credibility (CALJIC 2.20) was expressly limited to "testimony" of a "witness" by the following introductory language:

> Every person who testifies under oath or affirmation is

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[455](...continued)
of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side as against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence. (CT 14300.)

[456] This argument assumes arguendo that the jury did in fact consider out-of-court statements as part of the evidence. In another argument it is shown that under the literal language of the instructions, out-of-court statements were not evidence. (See § 2.9.12(F), pp. 617-20 below, incorporated herein.)

a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: . . . (CT 14292.)[457]

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[457] The entire instruction provided as follows:

Every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or the ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive;

Evidence of the existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward this action or toward the giving of testimony;

A statement previously made by the witness that is consistent or inconsistent with the testimony of the witness;

The character of the witness for honesty or truthfulness or their opposites;

An admission by the witness of untruthfulness;

The witness' prior conviction of a felony. (CT 14292-

(continued...)

This language limited the important evidentiary principles set forth in the body of the instruction to the testimony of witnesses. Hence, the instruction was not applicable to out-of-court statements from persons who did not testify under oath.[458] Additionally, even as to witnesses who did testify, out-of-court statements of those witnesses were excluded from the purview of the instruction because such statements were not "testimony." Given the language which made the instruction specifically applicable to witnesses and testimony, the jury reasonably would have concluded (see *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72) that the instruction did not apply to (1) nonwitnesses and (2) any out-of-court statements from nonwitnesses and witnesses.[459]

This error fundamentally impacted the fairness and reliability of the trial. First, the error allowed the jury to consider crucial portions of the evidence without first assessing "anything that has a tendency in reason to prove or disprove the truthfulness of the [statement] . . . ." (CT 14292.) This reduced the reliability of the jury's verdict because the jury was allowed to

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[457](...continued)
93.)

[458] Out-of-court statements played a crucial evidentiary role in this case. Among the out -of-court statements admitted into evidence were the following: Shannon Lucas (Trial Exhibits 212 and 213); Santiago (RTT 7635-36 [identification of Lucas]; RTT 7636 [identification of Lucas' car] RTT 10950-51 [identification of Lucas' house]); Massingale (Trial Exhibits 517A, 518 and 518A) and Jimmy Joe Nelson (Trial Exhibits 659 and 659A).

[459] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See § 2.3.4.1(A), p. 231-32, n. 243 above, incorporated herein.)

take crucial out-of-court statements[460] at face value without assessing them under the witness reliability instructions.[461] Thus, some evidence may have been given more weight than it warranted while other evidence may have been given less weight.

Second, by making the instruction applicable to testimony, and not out-of-court statements, the judge effectively told the jury that one class of evidence should generally be treated differently than the other. Hence, the jury could have concluded either that out-of-court statements are more probative because they do not have to be assessed under the instructions, or are less probative because they were not made under oath. In either case the jury would have been acting under a fundamental misunderstanding because no particular evidence should be given special or undue emphasis. Even if judicial comment does not directly express an opinion about the defendant's

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[460] For example, the out-of-court statements of Shannon Lucas and Jodie Santiago were introduced and played an important role in the prosecution's guilt phase case. (See Volume 3, § 3.2, pp. 757-810 and Volume 4, § 4.2, pp. 1068-1123, incorporated herein.)

[461] The following instruction specifically referred to "a witness' previous statements" in the context of cognitive impairment:

> In evaluating the testimony of witnesses or a witness' previous statements, you should consider all of the factors surrounding their testimony or statements, including any evidence regarding cognitive impairment. "Cognitive" means the ability to perceive, to understand, to remember, and to communicate any matter about which the witness has knowledge. (CT 14294.)

However, at most this instruction set up a conflict with the general witness credibility instruction. Moreover, by referring to statements of a "witness" this instruction would have fortified the jury's understanding that the out-of-court statements of nonwitnesses could be taken at face value.

guilt, an instruction that is one-sided or unbalanced violates the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Wardius v. Oregon* (1973) 412 U.S. 470; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Quercia v. United States* (1933) 289 U.S. 466, 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537 [judge's comments require a new trial if they show actual bias or the jury "perceived an appearance of advocacy or partiality"]; see also *People v. Gosden* (1936) 6 Cal. 2d 14, 26-27 [judicial comment during instructions is reviewable on appeal without objection below].)

Moreover, by limiting the credibility factors to "testimony" the instruction undermined the reliability of the jurors' credibility assessment as to crucial nontestimonial evidence. Hence, the instruction violated the federal constitution. Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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.)

Further, because the error arbitrarily denied Lucas his state created rights 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. Numerous Instructions Were Improperly Limited To The Testimony Of "Witnesses"

The following instructions were improperly limited to the testimony of witnesses:

"DISCREPANCIES IN TESTIMONY"

> Discrepancies in a witness' testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. (CT 14296; CALJIC 2.21.1.)

"WITNESS WILLFULLY FALSE"

> A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars. (CT 14297; CALJIC 2.21.2.)

"BELIEVABILITY OF WITNESS – CONVICTION OF A FELONY"

> The fact that a witness has been convicted of a felony, if such be a fact, may be considered by you only for the purpose

of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impair a witness' believability. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness. (CT 14299; CALJIC 2.23.)

"WEIGHING CONFLICTING TESTIMONY"

You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side as against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence. (CT 14300; CALJIC 2.22.)

"SUFFICIENCY OF TESTIMONY OF ONE WITNESS"

Testimony concerning any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends. (CT 14301; CALJIC 2.27.)

The limitation of these instructions to "testimony" made them applicable to some portions of the evidence and inapplicable to others. For example, there were important discrepancies between the out-of-court statements and in-court testimony of key witnesses such as Jodie Santiago and Johnny Massingale.

By making the instruction applicable to testimony and not out-of-court

statements the judge effectively told the jury that one class of evidence should generally be treated differently than the other. Hence, the jury could have concluded either that out-of-court statements are more probative because they do not have to be assessed under the instructions, or are less probative because they were not made under oath. In either case the jury would have been acting under a fundamental misunderstanding because no particular evidence should be given special or undue emphasis.

An instruction that is one-sided or unbalanced violates the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony]; *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Quercia v. United States* (1933) 289 U.S. 466, 470; see also generally *Wardius v. Oregon* (1973) 412 U.S. 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537.)

"Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation] . . . [the instructions] should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory'. . . nor overemphasize the importance of certain evidence or certain parts of the case." (*United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *United States v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45; *State v. Pecora* (Mont. 1980) 190 Mont. 115 [619 P.2d 173, 175].)

Moreover, by improperly restricting the jurors' consideration of important salutary principles to "witnesses" the instruction undermined the

reliability of the jurors' verdicts. Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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.)

Further, because Lucas was arbitrarily denied his state created right to full and correct instruction of the jury, 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 Instructions Improperly Failed To Instruct The Jurors Regarding Transcripts Read Into The Record

The judge denied the defense request for instruction regarding consideration of transcripts from other proceedings which were read into the record. (CT 14499.) Without this instruction the jury had no guidance regarding their consideration of such transcripts. Since the transcript testimony was given out of the presence of the jurors, they may have been tempted to give it less weight than the in-court testimony of the other witnesses.

Failure of the jury to fully and fairly consider all the evidence violated

the federal constitutional rights to due process, fair trial by jury, confrontation, compulsory process and effective assistance of counsel. (6th and 14th Amendments.) (See e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].) (See § 2.3.4.2(D), pp. 247-49 above, incorporated herein.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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.)

Further, because Lucas was arbitrarily denied his state created right to instruction of the jury on the rules applicable to evidentiary transcripts, 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.)

H. The Instructional Errors Were Cumulatively Prejudicial

The instructional errors described in the above argument were cumulatively prejudicial when considered together with each other and with

all of the other guilt and penalty phase errors in Lucas' trial. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial: the combined (aggregate) prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone]; *Delzell v. Day* (1950) 36 Cal.2d 349, 351; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180; *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520.)

State law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.) Accordingly, this Court's review of guilt phase errors is not limited to the determination of whether a single error, by itself, constituted prejudice.

Further, the errors also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

These errors were prejudicial as to Jacobs because the evidence was closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, 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.

Finally, even if the errors were not prejudicial as to guilt, they were prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 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

A. Introduction

Because heightened reliability is required as to both guilt and penalty in a death penalty case, it is especially important that the jurors fully understand the instructions they are given by the judge. However, three independent resources of the highest stature – the United States Supreme Court, the California Judicial Council's Blue Ribbon Committee and respected researchers – have all questioned the understandability of the instructions given in Lucas' trial. As a result of the United States Supreme Court criticism, the most critical guilt phase instruction – CALJIC 2.90 – was revised for purposes of clarity. As a result of the Blue Ribbon Committee findings a "total re-writing" of the California instructions has been undertaken. And, as a result of numerous studies by the academic community it has been empirically demonstrated that Lucas' jurors more than likely labored under fundamental misunderstandings of the crucial precepts it was required to apply before imposing a death sentence.

Moreover, this likelihood was demonstrated by actual juror questions in the present case which demonstrated misunderstanding of the most basic and fundamental sentencing principles upon which they had been instructed.

B. The Importance Of Jury Instructions Is Beyond Dispute

"It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia* (1976) 428 U.S. 153, 193 [opn. of Stewart, Powell, and Stevens, JJ.]; see also *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Bollenbach v. United States* (1946) 326 U.S. 607, 612; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.)

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States*, 326 U.S. at 612.)

Hence, instructions which are confusing or difficult to understand undermine the very foundation of the right to trial by jury: "Many lawyers share the belief that instructions are given little consideration in the deliberations of jurors. While this may be true in some cases, I believe they follow them to the extent they understand them and give up only when they become bewildered." (*Werkman v. Howard Zink Corp.* (1950) 97 Cal.App.2d 418, 428, Shinn, P.J. concurring.)

C. The Judicial Council's Blue Ribbon Commission Has Formally Found That The CALJIC Instructions Do Not Ensure Juror Understanding Of The Law

The preface to the drafts for the Proposed Judicial Council instructions provided the following description of why the Blue Ribbon Commission found that CALJIC should be "totally rewritten" –

In December of 1995, the Judicial Council established a Blue

> Ribbon Commission on Jury System Improvement. The Commission's mission was to 'conduct a comprehensive evaluation of the jury system and [make] timely recommendations for improvement.' After extensive study, the commission made a number of recommendations to the Chief Justice and the Judicial Council, one of which was that the Council create a Task Force on Jury Instructions to draft more understandable instructions. The recommendation stemmed from the Commission's conclusion that 'jury instructions as presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror.' In light of the Commission's view that jurors could be accurately instructed on the law in language more easily absorbed and understood, the Judicial Council acted on the recommendation, creating the current Task Force. The Chief Justice noted the two principal goals underlying the creation of more intelligible instructions are '(1) making juror's experiences more meaningful and rewarding and (2) providing clear instructions that will improve the quality of justice by insuring that jurors understand and apply the law correctly in their deliberations.'" [Emphasis added.]

If after "extensive study" by a Blue Ribbon Commission the Judicial Council decides to embark upon a long and costly total "re-writing" of the standard jury instructions then it must be concluded that the CALJIC instructions–such as those given in the present case–were seriously defective in their ability to convey the necessary legal principles to the jury.

D. The United States Supreme Court Has Also Corroborated The Findings Of The Blue Ribbon Commission

> To be a meaningful safeguard, the reasonable-doubt standard must have a tangible meaning that is capable of being understood by those who are required to apply it. It must be stated accurately and with the precision owed to those whose liberty or life is at risk. (*Victor v. Nebraska* (1994) 511 U.S. 1, 29, Blackman and Souter, concurring and dissenting.)

While *Victor* rejected the due process challenge to CALJIC 2.90–concluding that "taken as a whole, the instructions correctly convey the concept of reasonable doubt to the jury"– five of the court's nine justices criticized the instruction with words ranging from "archaic" to "indefensible."

In response to criticism of the term "moral certainty" in *Victor*, this Court concluded that CALJIC 2.90 should be modified by deleting the "moral certainty" standard, leaving only the "abiding conviction" language as the measure of reasonable doubt. (*People v. Freeman* (1994) 8 Cal.4th 450, 504.)

CALJIC followed suit with its 1994 revision of 2.90, which included the *Freeman* revision. The legislature amended PC 1096 to comply with *Freeman* effective June 30, 1995. In sum, the United States Supreme Court, the California Supreme Court, the California Legislature and CALJIC have all recognized that the definition of reasonable doubt given in Lucas' case was sufficiently confusing to require revision. Hence, conviction under the old instruction must be considered less reliable due to the widely recognized potential for juror confusion.

Moreover, in the present case the definition of reasonable doubt was perhaps the most crucial instruction, given the defense theory which rested entirely upon the alleged failure of the prosecution to meet its burden of proving guilt beyond a reasonable doubt. In this context the archaic language of the instruction given to Lucas' jury significantly reduced the reliability of both the guilt and penalty verdicts.

E. Empirical Studies Corroborate The Blue Ribbon Commission's Findings That The CALJIC Instructions Are "Impenetrable To The Ordinary Juror"

Empirical studies further corroborate the Blue Ribbon Commission's Findings as to the inability of jurors to understand and follow the CALJIC

instructions.

For example, in a study of ten separate California juries, the following findings were made: (1) Consideration of mitigating evidence– "[F]ully 8 out of the 10 California juries included persons who dismissed mitigating evidence because it did not directly lessen the defendant's responsibility for the crime itself." (2) Comprehension of Legal Crimes and Legal Terms– "Of the 30 California jurors interviewed, only 13 showed reasonably accurate comprehension of the concepts of aggravating and mitigating." (See Haney, Santag and Costanzo, "*Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*" 50 Journal of Social Sciences No. 2 (Summer 1994).)

This and other studies established that a substantial majority (almost 25%) of death-qualified jurors erroneously believe that life without parole will allow the parole or judicial system to release the defendant in less than 10 years due to overcrowding and other factors and over 75% disbelieve the literal language of life without parole. (Haney, Santag and Costanzo, *supra*, ["Four of five death juries cited as one of their reasons for returning a death verdict, the belief that a sentence of life without parole did not really mean that the defendant would never be released from prison. . . ."]; see also *Simmons v. South Carolina* (1994) 512 U.S. 154.) Moreover, a juror's belief as to the meaning of the sentences is the single most important reason for voting for a particular verdict. (CACJ Forum (1994) Vol. 21, No. 2, p. 45.)

Other corroborative studies include the following:

James Frank and Brandon K. Applegate, *Assessing Juror Understanding of Capital Sentencing Instructions*, 44 Crime and Delinquency No. 3 (1998) – A mock jury study revealed that juror comprehension of sentencing instructions is limited, especially with regard to instructions

dealing with mitigation. The defendant is typically disadvantaged by the misunderstandings. However, juror comprehension can be improved by rewriting the instructions and by giving jurors copies of the instructions.

Richard Weiner, *The Role of Declarative Knowledge in Capital Murder Sentencing*, 28 Journal of Applied Psychology, No. 2 (1998) – A mock jury study indicated that juror comprehension was low, both in relation to procedural knowledge, and declarative knowledge. The less the jurors understand the mitigation instructions, the more likely they are to impose the death penalty.

Marla Sandys, *Cross-Overs–Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 Indiana Law Journal 1183, 1220-1221 (1995) – The decision making process is "governed by confusion, misunderstanding and even chaos. Jurors decide life-and-death questions laboring under numerous misconceptions about the utility and operation of capital punishment– sometimes unclear about the import of certain kinds of evidence (including something as basic as whether the evidence is aggravating or mitigating), almost always confused over the meaning of the all important capital instructions, in some instances wrong about the decision rules by which they are to reach a sentencing verdict, and unclear about (or highly skeptical of) the ultimate consequences of the very alternatives between which they must choose." (*Id.* at 1225.) Furthermore, jurors who are misled by the capital instructions into believing that the judicial formulas dictate a certain outcome in their deliberations usually have the outcome of death in their mind. (*Id.* at 1226.)

Constanzo & Constanzo, *Jury Decision Making in the Capital Penalty Phase,* 16 Law and Human Behavior, 185 (1992) – Mock jurors do not fully understand the meaning of the most critical legal terminology used in the

sentencing phase instructions, especially the terms aggravation and mitigation. (*Id.* at 188.)

In sum, these studies corroborate the Blue Ribbon Commission's finding that the CALJIC instructions are "impenetrable to ordinary jurors."

F. Actual Juror Questions In The Lucas Case Further Corroborate The Findings Of The Blue Ribbon Committee

See Volume 6, § 6.1(B), pp. 1377-90, incorporated herein [penalty instruction questions].

G. Juror Confusion And Misunderstanding Of The Jury's Instructions Violates The Federal Constitution

Jury instructions which are confusing and difficult for lay jurors to understand violate the state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jury fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."]; see also § B, above, incorporated herein.)

H. Juror Confusion And Misunderstanding As To Jury Instructions Undermines The Reliability Of The Verdicts And Necessitates Reversal

1. The 8th And 14th Amendments Requires Heightened Reliability As To Both Guilt And Penalty

a. Death Is Different

"[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability. . . . " (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Lankford v. Idaho* (1991) 500 U.S. 110, 125-26; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Mills v. Maryland* (1988) 486 U.S. 367, 377; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330; *California v. Ramos* (1983) 463 U.S. 992, 998-999 fn 9.)

b. Greater Reliability Required As To Both Guilt And Penalty

Even in noncapital cases a certain standard of reliability is constitutionally required. This is so because "[r]eliability is . . . a due process concern." (*White v. Illinois* (1992) 502 U.S. 346, 363-64.) The Due Process clauses of the federal constitution (14th Amendment) require that criminal convictions be "reliable and trustworthy." (*California v. Green* (1970) 399 U.S. 149, 164 [due process might prevent convictions where a reliable evidentiary basis is totally lacking]; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 and cases collected at fn. 22 [due process "cannot tolerate" convictions based on false evidence]; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204.)

However, an even higher standard of reliability is required under the 8th and 14th Amendments in capital cases, because death is different. The 8th

and 14th Amendments require a "greater degree of accuracy" and reliability. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Thus when the state seeks death, courts must ensure that every safeguard designed to guarantee "fairness and accuracy" in the "process requisite to the taking of a human life" is painstakingly observed. (*Ford v. Wainright* (1986) 477 U.S. 399, 414; see also *Gardner v. Florida* (1977) 430 U.S. 349; see also *Gore v. State* (Fla. 1998) 719 So.2d 1197, 1202 [in death case "both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects"].) As a result, in a capital case heightened reliability is required as to both guilt (see *Beck v. Alabama* (1980) 447 U.S. 625, 627-46) and penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Gilmore v. Taylor* (1993) 508 U.S. 333, 338-45; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328; *Johnson v. Mississippi* (1988) 486 U.S. 578, 587; *Green v. Georgia* (1979) 442 U.S. 95, 96-97.)

And, this requirement of reliability extends to post-conviction review where "the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422 ["[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."].)

2. The Fourteenth Amendment Requires That The Guilt And Penalty Verdicts Be Reliable

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

I. The Judgment Should Be Reversed

In view of the above, both the guilt and penalty judgments in the present case should be reversed because the failure of the instructions to satisfy the most fundamental and rudimentary reliability requirements constituted structural error which infected the entire trial. (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 .)

The guilt judgment should also be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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 in the Jacobs case 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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 2.10.1

THE INSTRUCTIONS WERE CONSTITUTIONALLY DEFICIENT BECAUSE THEY FAILED TO ADEQUATELY EXPLAIN AND DEFINE THE BURDEN OF PROOF

A. Introduction

The basic burden of proof instruction (CT 14285; RTT 12189) and other crucial instructions given in the present case[462] used the term "burden" or "burden of proof" in defining the presumption of innocence and the prosecution's burden of proof. However, while these terms may be well known and understood by lawyers and judges, they should have been further defined and explained to the jury.[463]

B. The Instructions Were Deficient And Misleading Because They Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence

See § 2.10.2, pp. 645-55 below, incorporated herein.[464]

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[462] See CT 14286; RTT 12189 [burden of proof: identity]; CT 14338; RTT 12211 [burden as to special circumstances].

[463] The defense requested several instructions further defining the prosecution's burden of proof. (See CT 14565-69.) To the extent that these requests did not encompass the deficiencies raised in this argument, such deficiencies were not waived because they impaired Lucas' substantial rights. (Penal Code § 1259.)

[464] Nor were instructions addressing Lucas' failure to testify sufficient. These instructions provided as follows:

> A defendant in a criminal trial has a constitutional right not to testify. You must not draw any inference from the fact

(continued...)

C. The Instructions Failed To Explain That Lucas' Attempt To Refute Prosecution Evidence Did Not Shift The Burden Of Proof

Given the instructional failure to explain that Lucas had no obligation to present affirmative evidence, it follows, *a fortiori*, that the instructions erroneously failed to explain that Lucas' presentation of evidence did not alter the burden.

Simply stated, the prosecution's burden of proof is not satisfied merely by the rejection or disbelief of the defense evidence. "[D]isbelief of a witness does not establish that the contrary is true, only that the witness is not credible. [Citations]." (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 704.) In other words, "rejection of testimony 'does not create affirmative evidence to the contrary of that which is discarded.' [Citation]." (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343; see also *Nishikawa v. Dulles* (1958) 356 U.S. 129, 137 ["disbelief of petitioner's story . . . [cannot] fill the evidentiary gap in the Government's case"]; *Moore v. Chesapeake & O.R. Co.* (1951) 340 U.S. 573, 576 [disbelief of a witness will "not supply a want of proof"]; *Mandelbaum v. United States* (2nd Cir. 1958) 251 F.2d 748, 752 ["the disbelief of a witness does not necessarily establish an affirmative case"]; *People v. Goodchild*

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[464](...continued)
that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way. (CT 14289.)

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element. (CT 14290.)

(1976) 242 N.W.2d 465, 469-70 ["mere disbelief in a witness's testimony does not justify a conclusion that the opposite is true without other sufficient evidence supporting that conclusion"].)

Accordingly, when the prosecution has failed to present sufficient credible evidence to meet its burden of proof, the jury should not be permitted to utilize its disbelief of the defendant's testimony or other defense evidence to conclude that the prosecution's burden has been met.[465] The failure to adequately inform the jury concerning this principle violated Lucas' federal constitutional rights to trial by jury and due process (6th and 14th Amendments) by allowing the jury to convict Lucas even though the prosecution did not met its burden of proving him guilty beyond a reasonable doubt.[466]

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[465] For example, in the Jacobs case, Lucas relied heavily on the confession of Johnny Massingale. Without proper instruction the jurors would have been tempted to conclude that rejection of Massingale's confession was affirmative evidence of Lucas' guilt.

[466] Deering's California Evidence Code § 702 included a "suggested form" which instructs the jury on this issue:

> As I have instructed you, you are the sole judges of the credibility of witnesses and of the weight to be given the testimony of each. If, however, you should disbelieve the testimony of a witness, that circumstance does not warrant your finding that the direct opposite of such testimony is true, for disbelief in testimony, in whole or in part, is not the equivalent of affirmative evidence to the contrary of the disbelieved testimony.

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

CALJIC 2.90 was incomplete and misleading because it failed to expressly inform the jury that reasonable doubt could be based on a conflict in the evidence and/or a lack of evidence. Reasonable doubt may arise from a conflict in the evidence, lack of evidence or a combination of the two. (See *Georgia Suggested Pattern Jury Instructions - Criminal Cases* part 2 (D) p. 7 [Instruction D] (Carl Vinson Institute of Government, University of Georgia, 2nd ed. 2000).) This is so because two equally probable conflicting inferences do not overcome a burden of proof. When conflicting inferences are equally probable or, in other words, when the evidence is in equipoise, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42; see also *Rexall v. Nihill* (9th Cir. 1960) 276 F.2d 637, 644; *Reliance Ins. v. McGrath* (N.D. Cal. 1987) 671 F.Supp. 669, 675; *Wilson v. Caskey* (1979) 91 Cal.App.3d 124, 129 ["Equal probability does not satisfy a burden of proof . . ."].)

Moreover, even if one of two inferences is more probable, it may still not rise to the level of proof beyond a reasonable doubt. (See § 2.10.8, pp. 685-92 below, incorporated herein [CALJIC 2.01 and 2.02 improperly equate a reasonable inference with proof beyond a reasonable doubt].)

E. CALJIC 2.90 Failed To Inform The Jury That The Presumption Of Innocence Continues Throughout The Entire Trial, Including Deliberations

It is well recognized that the presumption of innocence continues throughout the entire trial and applies to every stage, including deliberations. (See *Clarke v. Commonwealth* (Va. 1932) 159 Va. 908 [166 S.E. 541, 545-

46]; see also *State v. Goff* (1980) 272 S.E.2d 457, 463 [the burden never shifts to the defendant].) Hence, it is improper to give the jury the impression that the presumption of innocence continues until the jury, in its discretion, decides that it should end. (See *United States v. Payne* (9th Cir. 1990) 944 F.2d 1458, 1462-63; see also *People v. Johnson* (Ill. App. Ct. 1972) 4 Ill. App.3d 539 [281 N.E.2d 451, 453]; *People v. Attard* (N.Y. App. Div. 1973) 346 N.Y.S.2d 851; *State v. Tharp* (Wash. App. 1980) 27 Wn. App. 198 [616 P.2d 693, 700]; *Washington Pattern Jury Instructions - Criminal*, WPIC 1.01 [Advance Oral Instruction-Introductory] comment (West, 2nd ed. 1994) [words "during your deliberations" were inserted into this instruction "to avoid any suggestion that the presumption could be overcome before all the evidence is in"].) "It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, 'until such time, if at all, as it is overcome by credible evidence' is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon the accused. [Citations.]" (*Wisconsin Jury Instructions - Criminal*, *WIS-JI-Criminal* 140 [Burden Of Proof And Presumption Of Innocence] comment p. 4 (University of Wisconsin Law School, 2000).)

Hence, CALJIC 2.90 as given in the present case was deficient because it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations.[467] (See also § 2.10.1(C), pp. 634-

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[467] CALJIC 2.90 (5th Ed. 1988) provided as follows:

(continued...)

35 above, incorporated herein.) The defense requested that such an instruction be given. (CT 14519.)[468]

F. CALJIC 2.90 Improperly Described The Prosecution's Burden As Continuing "Until" The Contrary Is Proved

The judge used CALJIC 2.90 (5th Ed. 1988) to instruct the jury, in pertinent part, as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved. . . (CT 14285.)

Use of the term "until" in this instruction undermined the prosecution's burden of proof. "Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." [Emphasis added; internal citation and quotation marks omitted.]

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[467](...continued)

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CALJIC 2.90, 5th ed. 1988.)

[468] That instruction was as follows:

> This presumption of innocence applied throughout the course of the trial, and applies even during the jury deliberations. (CT 14519.)

(*In re Winship* (1970) 397 U.S. 358, 364.) This principle is a bedrock element of the federal constitutional rights to a fair trial by jury and due process. (6th and 14th Amendments.) Any instructional language which dilutes or reduces the prosecution's burden is constitutionally suspect. (See e.g., *Cage v. Louisiana* (1990) 498 U.S. 39.)

CALJIC 2.90 undermined the presumption of innocence by improperly replacing the word "unless" with the word "until." Use of the word "until" is less clear and definitive than "unless." That is, "until" implies that the proof will be forthcoming, while "unless" implies that sufficient proof might not ever be presented.

In apparent recognition of how use of the term "until" fails to comport with *Winship,* and thus risks misleading the jurors, other standard pattern instructions throughout the nation use "unless" or "unless and until." (See e.g., ICJI (Idaho) No. 1501 ["unless"]; OUJIC (2nd Ed.) No. 1 [same]; *State v. Hutchinson* (Tenn. 1994) 898 S.W.2d 161 [same]; CJI (New York) (1st Ed. 1983) No. 3.05, ¶ 2, sent.2 ["unless and until"]; KRS 532.025 (Kentucky) [same]; CJI (Washington D.C.) (4th Ed.) 1.03 [same]; UCrJI (Oregon) No. 1006 [same]; 1st Circuit Model Instructions Criminal No. 1.01 [same]; 8th Circuit Model Instructions Criminal No. 1.01 [same].)

Alternatively, it has been recommended that the jury be more directly instructed on this point as follows:

> **The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt.** [Emphasis added.]

(Leonard B. Sand, et al., 1 *Modern Federal Jury Instructions*, § 4.01; Form

4-1 (1994).)

Another alternative is the following instruction from *United States v. Walker* (7th Cir. 1993) 9 F.3d 1245, 1250:

> **The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.**

Hence, the instruction in the present case was deficient because it implied that the prosecution would meet its burden. Moreover, the instruction also failed to assure that the presumption of innocence would remain in place throughout the trial and during deliberations. (See § 2.10.1(E), pp. 636-38 above, incorporated herein.)

G. The Term "Burden" Should Have Been Defined

Because a "burden" in legal terms has a technical meaning it should be defined, sua sponte. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403-04.)

Hence, the jury should have been instructed as follows:

> A burden of proof draws a line. If the prosecution fails to cross that line, regardless of how close it may have come, then the prosecution has not met its burden of proof. (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1484.)

H. The Jury Should Have Been Instructed That The Prosecution's Burden Applied To Every Essential Element Of The Charge

Neither CALJIC 2.90 nor the specific CALJIC instructions which define the elements of the charged offenses contained an "application paragraph" which expressly informed the jury exactly what must be proved before Lucas could be convicted. The absence of such an "application

paragraph" was reversible error. (Cf., *Plata v. State* (Tex. Crim. App 1996) 926 S.W.2d 300.)

I. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because Lucas was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, 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.)

J. The Judgment Should Be Reversed

The giving of an instruction which dilutes the standard of proof for conviction is reversible error per se. Any error in defining reasonable doubt for a jury cannot be deemed harmless because the error goes to the very heart of our system of criminal trials and deprives the criminal defendant of his or her right to be convicted only upon a finding by the jury of guilt beyond a reasonable doubt as correctly defined. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) This court has reached a similar conclusion (*People v. Vann* (1974) 12 Cal.3d 220, 225-226).

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 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

A. Introduction

The instructions in the present case omitted one of the most fundamental underpinnings of the presumption of innocence: the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of all the other instructions, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt. Accordingly, the structural integrity of the trial was undermined and the judgment should be reversed.

B. Legal Principles

The essence of the presumption of innocence is that the defense has no obligation to present evidence, refute the prosecution evidence or to prove or disprove any fact. (See *In re Winship* (1970) 397 U.S. 358; see also *People v. Hill* (1998) 17 Cal.4th 800, 831 [". . .to the extent [the DA] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence. . ."]; see also *State v. Miller* (W. Va. 1996) 197 W. Va. 588 [476 S.E.2d 535, 557] [if requested court must instruct that defendant has no obligation to offer evidence]; *United States v. Maccini* (1st Cir. 1983) 721 F.2d 840, 843; Federal Judicial Center (1988) *Pattern Criminal Jury*

Instructions, No. 22 ["[A] defendant has an absolute right not to ... offer evidence."].)

As the judge told the jury in *Maccini*:

> I take this occasion to state to the jury one of the fundamental principles of American jurisprudence, which is that the burden is upon the [prosecution] in a criminal case to prove every essential element of every alleged offense beyond a reasonable doubt. That is, the burden is upon the [prosecution] to prove guilt beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. There's no burden on [defendant] to produce any evidence. In every case, and I have no doubt in this case as well, the defendant will be presenting evidence by way of cross-examination of [prosecution] witnesses. The defendant relies upon evidence elicited by cross-examination. So that the opportunity that [defendant] will have, as the defendant in every case has, to bring out certain facts by way of cross-examination and by way of argument and analysis to the jury, does not in any way imply a necessity on the part of the defendant to produce any evidence. That's fundamental. There is no need of the defendant to produce any evidence. There is no need in law for him to take advantage of the opportunity. He doesn't have to put a single question on cross-examination if counsel decides not to do so. The bottom line is that the burden is on the [prosecution] to prove guilt beyond a reasonable doubt. There is no burden on the defendant to prove his innocence, and there's no burden on the defendant to come forward with a single item of evidence or testimony. (*United States v. Maccini* (1st Cir. 1983) 721 F.2d 840, 843.)

C. Omission Of The Required Instruction In The Present Case

The instructional language which purported to define and explain the presumption of innocence was the first paragraph of CALJIC 2.90 which provided as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt. (CT 14285; CALJIC 290 [Presumption Of Innocence – Reasonable Doubt – Burden Of Proof], ¶ 1 (5th Ed. 1988).)

This instruction was deficient because it failed to expressly explain the "presumption of innocence." While this fundamental concept may be well known to those familiar with criminal and constitutional law, it cannot be assumed that lay jurors would fully understand its meaning and effect. Indeed, even some of those educated in the law have difficulty with the concept. (See e.g., *People v. Hill*, *supra*, 17 Cal.4th at 831 [prosecutor argued that there must be affirmative evidence which raises a reasonable doubt].) Hence, this technical but crucial term should have been more fully defined for the jury with language such as the following:

> [T]he burden is upon the [prosecution] to prove guilt beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. There's no burden on [defendant] to produce any evidence. (*United States v. Maccini*, *supra*, 721 F.2d at 843.)

or

> The prosecution has the burden of proving the accused guilty beyond a reasonable doubt. Therefore, a defendant in a criminal case is not required to call any witnesses to establish his own innocence. Although you may draw an inference adverse to the prosecution from the failure of the prosecution to present certain evidence, you may not draw such an inference against the accused. (National Criminal Jury Instruction Compendium § 36.2.3.4 (www.juryinstruction.com); cf. Leventhal, *Charges To The Jury And Requests To Charge In A Criminal Case* (New York) 6:15 [Witnesses–Missing Witness

Inference] ¶ 3 (West, 1999).)

or

> You will always bear in mind . . . that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. (5th Circuit Pattern Jury Instructions, Criminal (1997) 1.09, ¶ 3.)

Such an instruction is especially important in cases where the defense presents affirmative evidence, because the jurors will be naturally inclined to view their duty as deciding whether the defense evidence has proven or disproven the facts in issue.

Hence, in the present case, which involved probing cross-examination and presentation of substantial evidence on affirmative defense theories such as alibi and third party guilt, the danger of some improper burden shifting was especially high, and the failure to fully define the burden of proof was a crucial error.

D. Other Instructions Reinforced The Misconception That The Defendant Must Produce Evidence In Order To Raise A Reasonable Doubt

When considering the instructions as a whole [as required by the instructions (CT 14277) and presumed by the law],[469] the jurors were reasonably likely to assume that the defense had the burden of producing sufficient evidence to raise a reasonable doubt. The instructions from which

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[469] "Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v. Hardy* (1992) 2 Cal.4th 86, 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324-25, fn 9.)

such an erroneous assumption would have been made included the following:

1. "RESPECTIVE DUTIES OF JUDGE AND JURY" (CT 14275-76.)

This instruction described the jurors' duties in terms of "determin[ing] the facts" and "reach[ing] a just verdict. . . ." These descriptions implied a weighing of the evidence presented by both parties to determine what actually happened which would be consistent with the jurors' natural intuition. However, the jurors' duty under the presumption of innocence is not to determine the ultimate truth but rather to determine whether the prosecution had proved guilt beyond a reasonable doubt and, hence, this instruction was misleading. (See § 2.9.1(B), pp. 531-33 above, incorporated herein.)

2. "PRODUCTION OF ALL AVAILABLE EVIDENCE NOT REQUIRED." (CT 14281; CALJIC 2.11.)

> Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

This "missing witness" instruction exacerbated the deficient presumption of innocence instruction by implying that the defense had the obligation to present evidence. By expressly telling the jury that neither side is required to "call . . . all" potential witnesses to an event or "produce all objects or documents . . ." the instruction suggested that the production of evidence by both sides was required. (See e.g., *Commonwealth v. Bird* (Pa. 1976) 240 Pa. Super. 587 [361 A.2d 737, 739] [reversible error to instruct jury that it could draw inference against defendant for failure to call bystander as witness even though the instruction also permitted the jury to draw an inference against the prosecution for its failure to call the same witness]; *State*

v. Mains (1983) 669 P.2d 1112, 1117.)

3. "SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE GENERALLY." (CT 14283-84.)

The circumstantial evidence instructions also exacerbated the deficiencies of the presumption of innocence instruction.

It is true that CALJIC 2.01, ¶ 2 specifically stated that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (1st sentence; CT 14283.) However, this paragraph reasonably addressed only the prosecution's evidence and did nothing to explain how the defense evidence should be considered in light of the prosecution's burden.

Moreover, the next paragraph reinforced the misconception that the defense must present evidence to prove innocence:

> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt. (Paragraph 3, CT 14283.)

This misconception was also implied in the second paragraph of CALJIC 2.02. (CT 14284-85.)

4. "DEFENDANT NOT TESTIFYING – NO INFERENCE OF GUILT MAY BE DRAWN." (CT 14289; CALJIC 2.60.)

This instruction was limited to the defendant's failure to testify it did not apply to the failure to present evidence. Hence, this instruction further reinforced the misconception that the defense had the burden of producing

evidence to raise a reasonable doubt.[470]

5. "DEFENDANT MAY RELY ON STATE OF EVIDENCE." (CT 14290; CALJIC 2.61.)

This instruction did discuss the defendant's reliance on a failure of proof by the prosecution:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element. (CT 14290.)

However, by making the instruction specifically applicable to "deciding whether or not to testify"[emphasis added] and by admonishing that "no lack of testimony on defendant's part will supply a failure of proof . . ." [emphasis added] the instruction, by implication did not apply to the defendant's failure to present evidence.

6. "WITNESS WILLFULLY FALSE." (CT 14297; CALJIC 2.21.2.)

This instruction further implied that the defendant was required to produce evidence to raise a reasonable doubt by admonishing the jury to evaluate a witness's testimony in terms of whether "the probability of truth favors his or her testimony. . . ." (See also § 2.9.12(D), pp. 610-12 above, incorporated herein.)

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[470] When a generally applicable instruction is made specifically applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See § 2.3.4.1(A), p. 231-32, n. 243 above, incorporated herein.)

7. "SUFFICIENCY OF TESTIMONY OF ONE WITNESS." (CT 14301; CALJIC 2.27.)

The jury was instructed:

> Testimony concerning any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends. [Emphasis added] (CT 14301.)

By specifically referring to "any fact required to be established by the prosecution . . . ," this instruction suggested by implication that some facts were required to be proven by the defense. Hence, the instruction contributed to the misleading message of the instructions as a whole that the defense has a burden as to affirmative defense theories to raise a reasonable doubt.

In sum, the instructions as a whole perpetrated the misconception that the defense had the burden of raising a reasonable doubt. It is true that some specific instructions purported to relate the presumption of innocence to specific defense theories. (See e.g., 14286; 14312; 14313.) However, the language of the alibi and eyewitness instructions (CT 14286; 14312) conflicted with the language of the third party guilt instruction in this regard. (CT 14313.) (See § 2.8.3, pp. 514-24 above, incorporated herein.)

Moreover, the fact remains that, at best, these instructions were in conflict with the numerous other instructions implying that the defense must come forward with evidence to raise a reasonable doubt. In the absence of express instruction on this principle it cannot be determined which of the conflicting instructions the jury relied upon. (See *Francis v. Franklin* (1985) 471 U.S. 307, 322; see also *People v. Noble* (2002) 100 Cal.App.4th 184,

191.)

E. The Error Violated Lucas' Federal Constitutional Rights

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because the error arbitrarily violated Lucas' state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, 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.)

F. The Error Was Prejudicial

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally undermined the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was

prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 2.10.3

THE BURDEN OF PROOF INSTRUCTION FAILED TO ADEQUATELY DEFINE THE STANDARD OF PROOF

A. Proceedings Below

The defense argued that the standard instruction on the presumption of innocence and proof beyond a reasonable doubt (CALJIC 2.90 (5th ed. 1988)) "does not focus sufficiently on the standard the prosecutor must meet, but rather focuses just on the concept of reasonable doubt." (RTT 11343.) Therefore, the defense requested the following instructions:

> "Clear and convincing" evidence requires a higher standard of proof than proof by a preponderance of the evidence.
>
> "Clear and convincing" evidence means clear, explicit, and unequivocal evidence, so clear as to be unmistakable, which creates a high probability of the truth of the facts for which it is offered as proof, so as to leave no serious or substantial doubt as to its truth, and is sufficiently strong to command the unhesitating assent of every reasonable and impartial mind. (CT 14568.)
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> . . .
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> "Proof beyond a reasonable doubt" requires a higher standard of proof than proof by clear and convincing evidence, and is the heaviest burden imposed in law.
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> Proof beyond a reasonable doubt requires evidence that is clear, explicit, and unequivocal, so clear as to be unmistakable, which persuades to a near certainty of the truth of the facts for which it is offered as proof, so as to leave no reasonable doubt as to its truth, and is sufficiently strong to command the assent of every reasonable and impartial mind to a moral certainty and an abiding conviction. (CT 14569.)

The judge denied the defense requested instructions and gave the following standard instruction:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CT 14285.)

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

In *Victor v. Nebraska* (1994) 511 U.S. 1 the "moral certainty" version of CALJIC 2.90 was challenged based on its use of the terms "moral certainty" and "moral evidence." However, another constitutional challenge to the standard instruction, independent of its archaic language, is its focus on the concept of reasonable doubt without adequately explaining what the standard of proof really is.

For example, the accepted definition of clear and convincing evidence per BAJI 2.62 is as follows:

> "Clear and convincing" evidence means evidence of such convincing force that is demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence. (BAJI 2.62 (8th ed. 1994).)

From the language of CALJIC 2.90 it would not be clear to reasonable jurors[471] that proof beyond a reasonable doubt is a substantially higher standard than the clear and convincing evidence standard.

The explanation offered by the defense was an accurate statement of the standard (See e.g., *People v. Bassett* (1968) 69 Cal.2d 122, 139) and, therefore, denial of the request was federal constitutional error. (*Sullivan v. Louisiana*, *supra*.)

C. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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*

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[471] Jury instructions should be reviewed in light of how they would be understood by a reasonable juror. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

(1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because Lucas was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code including Evidence Code sections 500, 501 and 502, 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.)

D. The Judgment Should Be Reversed

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally undermined the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 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

A. Proceedings Below

The defense requested instructions defining clear and convincing evidence and informing the jury that proof beyond a reasonable doubt is a "higher standard of proof" as follows:

> "Clear and convincing" evidence requires a higher standard of proof than proof by a preponderance of the evidence.
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> "Clear and convincing" evidence means clear, explicit, and unequivocal evidence, so clear as to be unmistakable, which creates a high probability of the truth of the facts for which it is offered as proof, so as to leave no serious or substantial doubt as to its truth, and is sufficiently strong to command the unhesitating assent of every reasonable and impartial mind. (CT 14568.)
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> . . .
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> "Proof beyond a reasonable doubt" requires a higher standard of proof than proof by clear and convincing evidence, and is the heaviest burden imposed in law.
>
> Proof beyond a reasonable doubt requires evidence that is clear, explicit, and unequivocal, so clear as to be unmistakable, which persuades to a near certainty of the truth of the facts for which it is offered as proof, so as to leave no reasonable doubt as to its truth, and is sufficiently strong to command the assent of every reasonable and impartial mind to a moral certainty and an abiding conviction. (CT 14569.)

The judge denied the request (RTT 11446-47; CT 14568-69) and gave

CALJIC 2.90 (5th ed. 1988) as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CT 14285.)

B. The Comparison Of Burden Instruction Was Legally Correct

A comparison of burdens is a common and accepted method of distinguishing between the preponderance and clear and convincing standards. (See e.g., Federal Judicial Center, *Pattern Criminal Jury Instructions* 21 [Definition Of Reasonable Doubt] (1988) [comparing burden in civil trial]; *Uniform Criminal Jury Instructions (Oregon)*, UCrJI 1001 [General Instructions-Introduction] ¶ 4. (Oregon State Bar, 1998)]; *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-5-1 [Burden Of Proof] (State Bar of South Dakota, 2000); *Mississippi Model Jury Instructions - Criminal*, MJI-Criminal C:1:8 [Burden Of Proof; Evidentiary Matters -- Reasonable Doubt] (West, 2000).) There is no reason why the comparison model shouldn't also be used in distinguishing proof beyond a reasonable doubt from other lesser standards. (See generally Hrones & Homans, *Massachusetts Jury Instructions - Criminal* 1-2 [Reasonable Doubt] (Lexis, 2nd ed. 1999) ["It is not sufficient for the prosecution to establish a probability, even a strong probability, that the charge against the defendant is more likely to be true than

not. That is not enough"].) Such a comparison provides added perspective and helps assure that there is no dilution of the reasonable doubt standard. Such dilution would be a structural error in violation of the federal constitution. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281; *Cage v. Louisiana* (1990) 498 U.S. 39.)

It is beyond dispute that proof beyond a reasonable doubt is a "significantly higher than the 'clear and convincing' standard." (*State v. Terrazas* (Ariz. 1997) 189 Ariz. 580 [944 P.2d 1194, 1199]; see also *People v. Hughes* (Ariz. 1967) 102 Ariz. 118 [426 P.2d 386, 390-91]; *State v. Kennedy* (Minn. 1998) 585 N.W.2d 385, 389.) And, the clear and convincing standard is itself "much higher" than the preponderance standard. (See *Beardshall v. Minuteman Press Int'l. Inc.* (3rd Cir. 1981) 664 F.2d 23, 25; *Lostutter v. Estate of Larkin* (Kan. 1984) 235 Kan. 154 [679 P.2d 181,188]; *M.M.J. v. R.N.J.* (Utah Ct. App. 1995) 908 P.2d 345, 349-52.) It follows, *a fortiori*, that proof beyond a reasonable doubt is a "much higher standard" than preponderance of the evidence. (*People v. Allen* (CA 1993) 20 Cal.App.4th 846, 857 [25 CR2d 26]; see also *Brown v. Bowen* (7th Cir. 1988) 847 F.2d 342, 345-46 ["all burdens of persuasion deal with probabilities. The preponderance standard is a more-likely-than-not rule, under which the trier of fact rules for the plaintiff if it thinks the chance greater than 0.5 that the plaintiff is in the right. The reasonable doubt standard is much higher, perhaps 0.9 or better"]; *Binion v. Chater* (7th Cir. 1997) 108 F.3d 780, 783 [same]; *Lane v. Sullivan* (8th Cir. 1990) 900 F.2d 1247, 1252 ["much higher"]; *United States v. Clawson* (D. Oregon 1994) 842 F.Supp. 428, 430; *United States v. Washington* (N.D. Ill. 1993 840 F.Supp. 562, 573 ["substantially more demanding legal standard"].)

Without a comparison instruction there is a danger that the jury will

unconstitutionally convict under the lesser standard even if proof beyond a reasonable doubt is defined. Moreover, since the proof beyond a reasonable doubt standard is for the benefit of the accused, he or she should have the right to waive definition of that standard and utilize a comparative instruction based on the lesser standard.[472]/[473]

C. The Judge's Rejection Of The Comparison Instruction Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re*

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[472] A criminal defendant may waive rights that exist for his or her own benefit. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) "Permitting waiver . . . is consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights." (*People v. Robertson* (1989) 48 Cal.3d 18, 61; see also *Cowan*, *supra*, 14 Cal.4th at 371]; see also Civil Code § 3513 [party may waive right that exists for the party's benefit].)

[473] One definition of clear and convincing evidence is that it "requires that the existence of disputed facts be highly probable." (*American Cyanamid Co. v. Electrical Indus., Inc.* (5th Cir. 1980) 630 F.2d 1123, 1127; see also *9th Circuit Model Jury Instructions - Criminal* 6.4, comment [Insanity] (2000).) However, *Stone v. New England Ins. Co.* (1995) 33 Cal.App.4th 1175, 1211, fn. 29 held that the "high probability" language, although legally correct, "does not go far enough." (*Stone*, *supra*, 33 Cal.App.4th at 1212; see also *DuBarry Int'l. Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 566, fn 19; *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487, fn. 8.) The fact that proof beyond a reasonable doubt is a significantly heavier burden is based on the well-settled principle that clear and convincing evidence is an "intermediate" or "middle" quantum of proof between the significantly lesser preponderance test and the significantly greater reasonable doubt test. (See *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1369; *In re M.* (1969) 70 Cal.2d 444, 458.)

Winship (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because Lucas was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, 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.)

D. The Error Was Prejudicial

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally

undermined the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 2.10.5

CALJIC 2.90 ERRONEOUSLY IMPLIED THAT REASONABLE DOUBT REQUIRES THE JURORS TO ARTICULATE REASON FOR THEIR DOUBT

A. Introduction

Because this case presented the jurors with closely balanced factual issues to resolve, an accurate definition of reasonable doubt was critical. Therefore, the judgment should be reversed because the definition of reasonable doubt given by the judge implied that the jurors must articulate logic and reason for their doubt.

B. Proceedings Below

The jury was given then standard instruction (CALJIC 2.90 (5th Ed. 1988)) on presumption of innocence. (CT 14285.) The second paragraph of that instruction defined reasonable doubt as follows:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CT 14285.)

C. Legal Principles

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged.' [Citations.]" (*Cage v. Louisiana* (1990) 498 U.S. 39; see also *In re Winship* (1970) 397 U.S. 358, 364.) The reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." (*Winship*, 397 U.S. at 363; see also *Cage*, 498 U.S. at 40.) "Among other things, 'it is a prime instrument for reducing the risk of convictions resting on factual error.' [Citation.]" (*Ibid.*)

An essential conceptual underpinning of the presumption of innocence is that the accused bears no burden of proof whatsoever. (See *In re Winship*, *supra*.) It is not the obligation of the accused to "raise" or "create" any specified threshold of doubt. (See *In re Winship*, *supra*; see also *People v. Loggins* (1972) 23 Cal.App.3d 597, 601-04; see also § 2.8.3, pp. 514-24 above, incorporated herein [third party].) Nor is the jury required to "find" any particular degree or amount of doubt before it may acquit. (See *In re Winship*, *supra*.) Rather, the jurors must acquit under all circumstances unless they find that the prosecution has proven every fact essential to conviction beyond a reasonable doubt. (*Ibid.*)

Accordingly, it is constitutionally erroneous to expressly require the jurors to articulate concrete reasons for their doubt." (*People v. Antommarchi* (N.Y. 1992) 80 N.Y.2d 247, 252 [604 N.E.2d 95, 98]; see also *Siberry v. State* (Ind. 1893) 133 Ind. 677 [33 N.E. 681].) When jurors are required to articulate reasons for acquitting "[t]he burden . . . is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt." (*State v. Cohen* (Iowa 1899) 108 Iowa 208 [78 N.W. 857, 858].) In short, "jurors are not bound to give reasons to others for the conclusion reached. [Citations.]" (*Ibid.*)

Moreover, the essence of reasonable doubt is a failure of proof. "It is the want of information and knowledge that creates the doubt." (*Siberry v.*

State, *supra*, 33 N.E. at 688.) Such "want of knowledge" is not necessarily capable of expression as an affirmative or logical "reason" for the doubt which is felt. This would require the juror to "prove a negative." Hence, such an instruction unconstitutionally misstates the burden of proof. "It is the lack of information and knowledge satisfying the members of the jury of the guilt of the accused, with that degree of certainty required by the law, which constitutes a reasonable doubt, and if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not." (*Siberry v. State*, *supra*, 33 N.E. 681 at 689.)

In the present case the jurors were not expressly instructed that they must articulate reason and logic for their doubt. However, the instructional language implied as much. By requiring more than "mere possible or imaginary doubt" the instruction suggested to the jurors that the reason and logic for their doubt should first be articulated and then evaluated against the "mere possible or imaginary" standard.

Moreover, to the extent that the instruction was ambiguous in this regard, reference should be made to the arguments of counsel to determine the jurors' probable resolution of the ambiguity. (*People v . Brown* (1988) 45 Cal.3d 1247, 1256.) In the present case, the district attorney interpreted the "possible doubt" language as follows:

> But in analyzing the evidence and whether or not reasonable doubt exists, do this:
>
> First of all, ask yourself, "Based upon my full examination and assessment of this case, do I have any doubt?" That's the first question. Then ask yourself, "If the answer . . . is yes, I have some doubt," if you come to that conclusion, then you must take step number two and analyze that doubt and say to yourself, "Well, okay. Here is the doubt. Do I have any

reason and logic that I can attach to that doubt?"

If you can attach reason and logic to that doubt, then the doubt is a reasonable one and you should acquit Mr. Lucas of these charges.

If that doubt is only a possible doubt or an imaginary doubt, then you should not acquit Mr. Lucas. You should convict him of the crimes he's charged with. (RTT 12168-69.) [Emphasis added.]

In sum, as reasonably interpreted by the jurors (*Estelle v. McGuire* (1991) 502 U.S. 62), the instructions required an articulation of their doubts before such doubts could be considered sufficient to acquit.

D. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because the error arbitrarily violated Lucas' state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, 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.)

E. The Judgement Should Be Reversed

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally undermined the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 2.10.6

CALJIC 2.90 UNCONSTITUTIONALLY ADMONISHED THE JURY THAT A POSSIBLE DOUBT IS NOT A REASONABLE DOUBT

A. Introduction

The judge gave the standard CALJIC definition of reasonable doubt which provided as follows:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CT 14285; CALJIC 2.90 (5th Ed. 1988).)

The language admonishing the jury that "reasonable doubt . . . is not a mere possible doubt . . ." was unconstitutional because it failed to adequately limit the scope of possible doubt.

B. Legal Principles

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' [Citations.]" (*Cage v. Louisiana* (1990) 498 U.S. 39; see also *In re Winship* (1970) 397 U.S. 358, 364.) The reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." (*Winship*, 397 U.S. at 363; see also *Cage*, 498 U.S. at 40.) "Among other things, 'it is a prime instrument for reducing the risk of convictions resting on

factual error.' [Citation.]" (*Ibid.*)

C. A Possible Doubt May Be Reasonable

Unlike an imaginary doubt,[474] a possible doubt may be based on fact. When driving on a two-lane road reasonable drivers do not pass on a blind curve because it is "possible" that a car may be coming in the other lane. Cautious investors regularly eschew the higher returns and opt for the lower return of an insured bank account because it is "possible" they may lose principal in a more lucrative but riskier investment.

In other words, merely because a doubt is only possible does not make it unreasonable or insignificant. In the final analysis, the question of reasonable doubt should be measured by reasonable reliance rather than possibility. If the doubt is sufficient to cause a juror to reasonably rely on it in making important decisions then the doubt is reasonable, even if it is merely possible. (See e.g., *Victor v. Nebraska*, *supra*, 511 U.S. 1, 20-21 [hesitate to act language "gives a commonsense benchmark for just how substantial such a [reasonable] doubt must be"].) This formulation of reasonable doubt was approved in *United States v. Wilson* (1914) 232 U.S. 563, 570 and has since been endorsed by a number of state and federal courts. (See e.g., *Holland v. United States* (1954) 348 U.S. 121, 140; *Hilbish v. State* (Alaska Ct. App. 1995) 891 P.2d 841, 850-51.) The federal circuits that provide for definition of reasonable doubt and many states use the *Wilson/Holland* hesitation concept. For example, the Eighth Circuit clarifies the "possible doubt" by relating it to the notion of reliance:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable

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[474] Obviously, a doubt based on imagination rather then the evidence should not be validated.

> doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

(*8th Circuit Model Jury Instructions - Criminal* 3.11 [Reasonable Doubt] (2000); see also O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* 12:10 [Presumption Of Innocence, Burden Of Proof, And Reasonable Doubt] para. 3 (West, 5th ed. 2000).)

Other jurisdictions include similar definitions. (See e.g., *Pennsylvania Suggested Standard Criminal Jury Instructions*, Pa. SSJI (crim) 7.01, [Presumption Of Innocence: Burden Of Proof; Reasonable Doubt] ¶ 3, sent. 2 (Pennsylvania Bar Institute, PBI Press, 06/75); *South Carolina Criminal Jury Instructions* 1-14 [Reasonable Doubt Charge] (South Carolina Bar, 1995); McClung, & Carpenter, *Texas Criminal Jury Charges* 1 (II)(B)(2) [proper.chg] ¶ 4 (James Publishing, 1999); *Criminal Jury Instructions For The District of Columbia* 2.09, [Reasonable Doubt] sent. 3 (Bar Association of the District of Columbia, 4th ed. 1993); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-3 [Reasonable Doubt (Alternate 2)] (State Bar of South Dakota, 2000); *Alaska Pattern Criminal Jury Instructions* 1.52 [Presumption Of Innocense, Burden Of Proof Beyond A Reasonable Doubt] para. 2 (Alaska Bar Association, 1987); *Arkansas Model Jury Instructions - Criminal*, AMCI 2d 110 [Introductory Instructions-Reasonable Doubt] (Lexis, 2nd ed. 1997); *Colorado Jury Instructions*, COLJI - Crim 3:04 [Presumption Of Innocense-Burden Of Proof Generally-Reasonable Doubt] para. 3 (West, 1983); *Connecticut Selected Jury Instructions - Criminal* 2.8 [General Jury Instructions-Reasonable Doubt] para. 1 (The Commission on Official Legal

Publications - Judicial Branch, 3rd ed. 1996); *Idaho Criminal Jury Instructions*, ICJI 103A [Reasonable Doubt (Alternative)] para. 3 (Idaho Law Foundation, Inc., 1995); *Maryland Criminal Pattern Jury Instructions*, MPJI-Cr 1.04 [Reasonable Doubt] para. 3 (Micpel, 1999); *New Mexico Uniform Jury Instructions - Criminal*, UJI Criminal 14-5060 [Presumption Of Innocense; Reasonable Doubt; Burden Of Proof] para. 2 (Lexis, 1998); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-2 [Reasonable Doubt (Alternate 1)] para. 1 (State Bar of South Dakota, 2000); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-3 [Reasonable Doubt (Alternate 2)] (State Bar of South Dakota, 2000); *Instructions for Virginia & West Virginia* 24-401 [Reasonable Doubt Defined Generally] para. 1 (Lexis, 4th ed. 1996); *Wisconsin Jury Instructions - Criminal*, WIS-JI-Criminal 140 [Burden Of Poof And Presumption Of Innocence] para. 5 (University of Wisconsin Law School, 2000); *6th Circuit Pattern Jury Instructions - Criminal* 1.03 [Presumption Of Innocence, Burden Of Proof, Reasonable Doubt] ¶ 5 (1991).)

Alternatively, it may be said that reasonable doubt "does not mean a captious or speculative doubt, or a doubt from mere whim, caprice, or groundless conjecture." (*Siberry v. State*, *supra*, 133 Ind. 677, 687.)

However, in the present case reasonable doubt was not so defined. Instead, the jury was admonished that a doubt is not reasonable if it is "merely possible." Such a definition unconstitutionally allowed the jurors to reject a doubt as unreasonable even if they would reasonably have relied on a similar degree of doubt in their own important affairs.[475]

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[475] *Victor v. Nebraska* (1994) 511 U.S. 1 briefly addressed this issue and concluded that the "mere possible" language was used in the sense of a (continued...)

Moreover, by stating that merely possible doubt was unreasonable, the instruction unconstitutionally implied some obligation on the part of the accused to raise a probable doubt as to his or her guilt. It is unconstitutional to require the accused to assume any burden of proof as to reasonable doubt. (See e.g., *In re Winship*, *supra*; § 2.10.1, pp. 633-42 above, incorporated herein.)

Yet, if doubt which is merely possible is insufficient, then the jurors could only have concluded that the doubt must be at least probable to elevate it above a mere possibility.

D. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of

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[475](...continued)
"fanciful doubt." (*Victor*, *supra*, 511 U.S. at 18.) The Court reached this conclusion without analysis of the actual language instead relying on the argument of counsel to provide a limiting definition of the "mere possible" language. That is, defense counsel told the jury: "Anything can be possible . . . [A] planet could be made out of blue cheese. But that's really not in the realm of what we're talking about." (*Victor*, *supra*, 511 U.S. at 17.) In the present case, by contrast, there was no such argument by counsel. Therefore, the instruction improperly diluted the burden of proof.

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.)

Further, because Lucas was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code including Evidence Code sections 500, 501 and 502, 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.)

E. The Error Was Prejudicial

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally undermined the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the

present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 2.10.7

THE JUDGE ERRONEOUSLY INSTRUCTED THE JURORS TO TAKE INTO ACCOUNT MORAL CONSIDERATIONS IN DECIDING GUILT

A. Proceedings Below

The trial court instructed the jury in this case in the standard language of former CALJIC No. 2.90:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: it is not a mere possible doubt; because everything relating to human affairs, and depending upon **moral** evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a **moral** certainty, of the truth of the charge. (CT 14285 [Emphasis added.])

B. The Instruction Was Constitutionally Erroneous

A criminal defendant's due process rights under the Fourteenth Amendment to the United States Constitution include the right to be convicted only if the evidence proves his guilt beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.)

In *Cage v. Louisiana* (1990) 498 U.S. 39, 40 the United States Supreme Court held that a Louisiana instruction which equated "reasonable doubt" with "grave uncertainty" and "actual substantial doubt" and also

contained references to "moral certainty," rather than evidentiary certainty, improperly diluted the prosecution's burden of proof and violated the defendant's federal constitutional due process rights.

In *Victor v. Nebraska* (1994) 511 U.S. 1, affirming *People v. Sandoval* (1992) 4 Cal.4th 155, the United States Supreme Court purported to distinguish California's reasonable doubt instruction from that of Louisiana's and held that CALJIC No. 2.90's references to moral evidence and moral certainty, while confusing and not to be condoned, did not mislead the jury as to the prosecution's burden of proof to such an extent as to render the instruction unconstitutional. Nonetheless the plurality opinions of the various Supreme Court Justices contain clear warnings that the High Court could find the references to morality in conflict with the beyond a reasonable doubt standard of proof set forth in *Winship*, *supra* in an appropriate future case (see majority opinion at 127 L.Ed.2d at 597, and see Justice Kennedy's and Justice Ginberg's remarks about California's use of the term "moral evidence" and "moral certainty" as being both indefensible and unhelpful at 127 L.Ed.2d at 601.) This Court has implicitly recognized as much by stating that "it is clear that giving CALJIC No. 2.90 is not error, **at least not yet**" (*People v. Freeman* (1994) 8 Cal.4th 450, 503.) The instruction has since been revised to eliminate the references to morality. However, cases in which the former instruction was given continue to come before this Court.

The due process clauses of the federal and California Constitutions encompass the right to be convicted only upon proof beyond a reasonable doubt based on the evidence, rather than "moral certainty." CALJIC No. 2.90 violates this right and improperly allows juries to inject considerations of morality into their deliberations and to find a defendant guilty based upon their moral outrage rather than a dispassionate consideration of the evidence.

One member of this Court has implicitly recognized as much by noting that even trial judges have mistakenly informed juries that the term "moral certainty" is the opposite of "immoral certainty" and may have a religious connotation (see concurring opinion of Chief Justice George in *People v. Freeman*, *supra* at 8 Cal.4th 529). This Court has condemned in another context such invocations to higher morality or religion as inconsistent with a jury's constitutional duty to determine the questions presented to it by objectively evaluating the evidence and applying California law. (*People v. Wash* (1993) 6 Cal.4th 215, 260-261; *People v. Freeman*, *supra* at 8 Cal.4th 515.) It should not hesitate to do so here.

Therefore, this Court should declare that the use of the terms "moral certainty" and "moral evidence" in a jury instruction defining proof beyond a reasonable doubt improperly allows conviction based upon passion and moral outrage.

C. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, Sections 7, 15 and 16) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because Lucas was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code including Evidence Code sections 500, 501 and 502, 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.)

D. The Erroneous Instruction Requires A Reversal Of The Judgments Of Conviction

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally undermined the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the

present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 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

CALJIC 2.01[476] and 2.02,[477] pattern instructions defining the

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[476] CALJIC 2.01 as given in this case provided as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.
>
> If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. [Emphasis added.] (CT 14283.)

[477] The CALJIC 2.02 instruction given in this case provided, in pertinent part:

(continued...)

sufficiency of circumstantial evidence were given at the end of the guilt phase trial. As demonstrated below, a portion of these instructions undermined the accuracy of the verdicts, operated as a mandatory conclusive presumption, and misled the jury about the burden of proof on the ultimate issue of guilt or innocence, violating the Sixth, Eighth and Fourteenth Amendments. The error was prejudicial and reversible.

The prosecution in a criminal case is constitutionally required to prove a defendant guilty beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) An essential aspect of this burden is that the defendant need not prove his innocence, but need only raise a reasonable doubt of guilt. (*See People v. Hall* (1980) 28 Cal.3d 143, 159 [over'd o.g. in *People v. Newman*

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[477](...continued)

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. But you may not find the defendant guilty of the offenses of Murder or Attempted Murder, nor may you find the existence of Infliction of Great Bodily Injury or Personal Use of a Deadly and Dangerous Weapon unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state, but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state, and the other to the absence of the specific intent or the mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state. If on the other hand one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable, and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. [Emphasis added.] (CT 14284.)

(1999) 21 Cal.4th 413, 415]; *People v. Adrian* (1982) 135 Cal.App.3d 335, 342.) CALJIC 2.01 and 2.02 told the jury that, if one interpretation of the evidence appeared reasonable and another unreasonable, it would be the jury's duty to accept the reasonable interpretation, contrary to the due process requirement that appellant may be convicted only on proof of guilt beyond a reasonable doubt. (*In re Winship, supra,* 397 U.S. at 361-364; *Jackson v. Virginia*, *supra*, 443 U.S. at 318-319.)

CALJIC 2.01 and 2.02 as given in the present case were worded so the jury had to decide between Lucas' "guilt" and "innocence." This improperly shifted the burden of proof away from the prosecution, violating the defendant's state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal (U.S. Const. 6th, 8th and 14th Amendments) constitutional rights to due process and trial by jury. (See generally *In re Winship* (1970) 397 U.S. 358.)

Moreover, these instructions required that the jury accept an indication that the evidence was incriminatory if it "appeared reasonable," i.e., a standard substantially below proof beyond a reasonable doubt. In *Cage v. Louisiana* (1990) 498 U.S. 39, the United States Supreme Court addressed a similar problem, concerning instructions that equated reasonable doubt with grave or substantial doubt and therefore unconstitutionally allowed a finding of guilt based on a degree of proof below that required by the due process clause. (*Id.* at 41.)

If due process is violated by jury instructions requiring reasonable doubt to be grave or substantial, as in *Cage*, then the instant jury instructions are also vocative of the Sixth, Eighth and Fourteenth Amendments, as they negated reasonable doubt if evidence of guilt merely "appeared reasonable." Reversal is automatic. (*Sullivan v. Louisiana, supra,* 508 U.S. at 278-282.)

Furthermore, these instructions also constituted an impermissible

mandatory, conclusive presumption of guilt upon a preliminary finding that evidence of guilt merely "appears reasonable." Such a presumption violates not only due process, but also appellant's right to a jury trial under the Sixth Amendment by removing fundamental questions from the jury. (*Carella v. California* (1989) 491 U.S. 263, 265.)

This Court has stated CALJIC 2.01 and 2.02 have no constitutional infirmity. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1234; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943.) Assuming the correctness of these opinions on the facts of those cases, they should not apply on the facts of this case, where the evidence of the crucial elements, identity and mental state, were substantially circumstantial. Those cases also did not directly resolve some of the issues raised below.

In giving the portion of the instructions highlighted above, the trial court mandatorily directed the jury that it must come to a given conclusion in a particular set of circumstances. As a result, the trial court's instruction directed the jury under some circumstances to find identity and premeditation and deliberation based solely on an interpretation of the evidence that is "reasonable," and not proof beyond a reasonable doubt.

This instruction would not pose any constitutional problems if the standard of proof in a criminal case were "reasonableness." But the standard of proof required for criminal conviction is not "reasonableness," but "beyond a reasonable doubt." Anything that undermines the standard of proof beyond a reasonable doubt is unconstitutional. (*Carella v. California, supra,* 491 U.S. 263.) So is anything that creates a conclusive presumption. (*Sandstrom v. Montana* (1979) 442 U.S. 510.)

A juror who is trying to figure out the correct burden of proof in a circumstantial evidence case will hear two versions of it—one saying the

prosecution must prove its case beyond a reasonable doubt, and the other saying the jury "**must accept** [a] reasonable interpretation" of the evidence. The juror will assume both are correct, and will try to harmonize them. The only way to do so is to assume that a "reasonable interpretation" of circumstantial evidence fulfills the requirement of "beyond a reasonable doubt." That is the conclusion a juror will draw under such circumstances; and if the jury could so interpret the instruction, there is constitutional error of the same nature as that in cases such as *Cage v. Louisiana, supra,* 498 U.S. 39.

Furthermore, in this case, the trial court gave CALJIC No. 1.00, and thereby told the jury, "You must accept and follow the law as I state it to you, whether or not you agree with the law." (CT 14275.) A reasonable juror could have concluded that the instruction that (s)he must accept a reasonable interpretation of circumstantial evidence – if (s)he found that there was one – "was one of the 'rules of law' the juror 'must accept and follow.'" (*People v. Reyes-Martinez* (1993) 14 Cal.App.4th 1412, 1418.) The effect of that instruction on CALJIC 2.01 and 2.02 has never been considered by this Court. Other cases are not authority for propositions not considered. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66.) The impact of CALJIC 1.00 on these issues is thus a question of first impression.

The trial court is the final authority on the law as far as jurors are concerned (*Carter v. Kentucky* (1981) 450 U.S. 288, 302, and its words carry extremely great weight. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) Thus, if a trial court tells jurors that they "**must**" accept something, the jurors would correctly consider themselves bound notwithstanding any other

instructions.[478] There would be simply nothing to guide a juror that (s)he should not do precisely what the trial judge said that (s)he "**must**" do, and a reasonable juror could well take this instruction to supersede any other given the mandatory nature of it. Even if part of the instruction were correct, when the infirm portion of the instruction is considered as well, "it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." (*Cage v. Louisiana, supra,* 498 U.S. at 41.)

Because the correctness of the instruction may only be determined after considering the charge as a whole, a reviewing court must look to see if the instruction on reasonable doubt (CALJIC 2.90) redeems the deficiencies in the language of CALJIC 2.01 and 2.02. (*See People v. Crandell* (1988) 46 Cal.3d 833, 874; *People v. Burgener* (1986) 41 Cal.3d 505, 538; *People v. Magana* (1990) 218 Cal.App.3d 951, 956.)

It does not. CALJIC 2.01 and 2.02 and CALJIC 2.90 set up competing standards for deciding guilt, and the tension between them would confuse a reasonable juror. CALJIC 2.01 and 2.02 asked the jurors to provide their own "reasonableness" standard to resolve the questions of identity and mental state. The instructions failed to specify that the burden was upon the prosecution to prove guilt beyond a reasonable doubt. The actual wording

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[478] Even if jurors might consider <u>why</u> they would be required to adopt a "reasonable" interpretation of circumstantial evidence (though they are not supposed to), they would presumably conclude this is simply some requirement based in law somewhere of which they have no particular understanding. They would naturally defer to the trial judge, since "it is [her] words . . . which carry an authority bordering on the irrefutable." (*United States v. Wolfson* (5th Cir. 1978) 573 F.2d 216, 221; *accord, e.g., Quercia v. United States* (1933) 289 U.S. 466, 470.)

gave no indication that reasonable doubt applied to the resolution of the issues they described. A reasonable juror would abide by the clear mandate of the instruction and resolve these issues on the "reasonableness" standard the instructions specify.

Moreover, nothing in CALJIC 2.90 specifically referred to or qualified the "reasonableness" standard in CALJIC 2.01 and 2.02, and thus CALJIC 2.90 cannot be said to have qualified the error in that standard. (*Francis v. Franklin*, *supra*, 471 U.S. at 322-323.) "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (*Id.* at 322; see also *People v. Noble* (2002) 100 Cal.App.4th 184, 191 [contradictory instructions on burden of proof in MDO proceeding made it impossible to determine whether the jury reached its verdict using the correct burden].)

Similarly, this Court has recognized that: "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury." (*People v. Dail* (1943) 22 Cal.2d 642, 653.)

If even a single juror evaluated the circumstantial evidence according to a standard more lenient than reasonable doubt, then the burden of proof was effectively shifted onto Lucas to prove his innocence, and his constitutional rights have been violated.

Because these errors involved the basic standard to be applied at trial, they undermined the accuracy of the verdicts and operated as a mandatory, conclusive presumption, here violating the Fifth, Sixth, Eighth and Fourteenth Amendments. Therefore, reversal is subject to a special harmless-error

analysis, which is ". . . wholly unlike the typical form . . ." (*Carella v. California supra*, 491 U.S. at 267-278 [conc. opn. of Scalia, J.].) The use of conclusive presumptions, such as those used here, can be held harmless ". . . only in those 'rare situations' when the reviewing court can be confident that [such an] error did not play any role in the jury's verdict," such as an instruction regarding a charge on which the defendant was acquitted or an element of a crime that the defendant admitted. (*Id.* at 269-270 [quoting *Connecticut v Johnson* (1983) 460 U.S. 73, 87 [conc. opn. of Scalia, J.]].) This is not such a "rare situation."

Since these instructions improperly diluted the standard of proof beyond a reasonable doubt, it is reversible per se, as violating the Sixth and Fourteenth Amendments. (*Sullivan v. Louisiana, supra,* 508 U.S. at 279-281.) But even if the standard were less and the prosecution was permitted to show harmless error under the *Chapman* standard, it could not do so here given the close balance of the Jacobs evidence which was entirely circumstantial. Accordingly, the judgment should be reversed.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.10 JURY INSTRUCTIONS: BURDEN OF PROOF

ARGUMENT 2.10.9

THE BURDEN OF PROOF PRINCIPLES OF CALJIC 2.01 WERE UNCONSTITUTIONALLY LIMITED TO CIRCUMSTANTIAL EVIDENCE

A. Introduction

This case involved crucial factual issues which required the jury to evaluate and weigh direct evidence. Indeed, two of the most important factual issues in the case – Johnny Massingale's confession and Santiago's identification of Lucas – were direct evidence issues. Hence, the defense requested that the standard circumstantial evidence instructions (CALJIC 2.01 and 2.02) be supplemented with an instruction informing the jury that "if direct evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt." (CT 14496; see also RT 11308-08; 11398-400.) The trial judge's refusal of this instruction erroneously permitted Lucas to be convicted upon direct evidence despite the existence of a reasonable interpretation of that evidence pointing to his innocence. This error prejudicially undermined the presumption of innocence and violated Lucas' state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury.

B. Presumption Of Innocence Principles Apply With Equal Force To Both Direct And Circumstantial Evidence

It is axiomatic that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." (*In Re Winship* (1970) 397 U.S. 358, 364.) This requires the state to prove "'every ingredient of an offense beyond a reasonable doubt. . . .'" (*Sandstorm v. Montana* (1979) 442 U.S. 510, 524.) Moreover, it is a violation of due process for a statutory scheme to lessen the prosecution's burden of proving every element of the charged offense. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 699.)

It has been long and widely recognized that the prosecution's burden to prove guilt beyond a reasonable doubt is equally applicable whether the evidence is direct, circumstantial or a combination of both. (See CALJIC 2.00; see also *People v. Towler* (1982) 31 Cal.3d. 105, 118 [standard of review on appeal is the same for direct and circumstantial evidence].)

Because the nature of a burden of proof is to require one party to produce more evidence than the other (see *People v. Mixon* (1990) 225 Cal.App.3d 1471, 1484), when the evidence is evenly balanced, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42; see also *Wilson v. Caskey* (1979) 91 Cal.App.3d 124, 129 see also generally *Nishikawa v. Dulles* (1958) 356 U.S. 129, 137 [equally probable inferences of intent from the act committed created an "evidentiary gap"]; *United States v. Ramirez-Rodriguez* (9th Cir. 1977) 552 F.2d 883, 884 citing *Turner v. United States* (1970) 396 U.S. 398.) In the context of proof beyond a reasonable doubt, this principle was long conveyed to the jury in terms of instructions such as the following:

> If the evidence in this case is susceptible of two constructions or interpretations each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

This instruction was given in *People v. Bender* (1995) 27 Cal.2d 164, 175-177 and this Court held that it was "eminently proper. . . ." (See also *People v. Naumcheff* (1952) 114 Cal.App.2nd 278, 281 ["If from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case it is your duty to adopt the one of innocence and find the defendant not guilty"]; *People v. Foster* (1926) 198 Cal. 112, 127 [jury instructed that: "considering the evidence as a whole, if it was susceptible of two reasonable interpretations, one looking 'toward guilt and the other towards the innocence of the defendant, it was their duty to give such facts and evidence the interpretation which makes for the innocence of the defendant'"]; *People v. Barthleman* (1898) 120 Cal. 7, 10 ["if the evidence points to two conclusions, one consistent with the defendant's guilt, the other consistent with the defendant's innocence, the jury are bound to reject the one of guilt and adopt the one of innocence, and acquit the defendant"]; *People v. Haywood* (1952) 109 Cal.App.2nd 867, 872 ["The testimony in this case if its weight and effect be such as two conclusions can be reasonably drawn from it, the one favoring the defendant's innocence, and the other tending to establish his guilt, law, justice and humanity alike demand that the jury shall adopt the former and find the accused not guilty"] ; *People v. Carroll* (1947) 79 Cal.App.2d 146, 150 ["You are instructed that if from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, it is your duty to adopt the one of innocence and find the defendant not guilty"]; *United States v. James* (9th Cir. 1978) 576 F.2d 223, 227.)[479]

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[479] The instruction in *James* provided as follows ". . . if you view the evidence in this case as reasonably permitting either of two conclusions, one

(continued...)

However, CALJIC has limited the applicability of this principle to circumstantial evidence only. Yet, *People v. Bender*, *supra*, upon which CALJIC relies for its circumstantial evidence instruction (CALJIC 2.01) did not limit the "two reasonable interpretations" instruction to circumstantial evidence. Hence, while the circumstantial evidence instruction itself need not be given when the prosecution does not substantially rely on circumstantial evidence (see *People v. Wiley* (1976) 18 Cal.3d. 162, 175), an instruction applying the same principles to all the evidence is "eminently proper. . ." (*People v. Bender*, *supra*, 27 Cal.2d at 177.)

Additionally, limitation of the CALJIC 2.01 principle is especially prejudicial because it implied to the jury that those principles do not apply to direct evidence. Such a result flows naturally and reasonably from the distinctions the instructions make between direct and circumstantial evidence and the express limitation of the "two-interpretations" rule to circumstantial evidence only. As recognized in *People v. Salas* (1976) 58 Cal.App.3d 460, 474-75, if an instruction is expressly made applicable to one element to the exclusion of another, the jury made reasonably conclude that the instruction is limited to the specified element.[480]

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[479](...continued)
pointing to innocence and the other pointing to guilt, you must necessarily adopt the conclusion pointing to innocence, because so long as that is a reasonable conclusion and it exists, it would be impossible to find guilt beyond a reasonable doubt, because the very existence of a reasonable alternative on the other side would preclude you from finding guilt beyond a reasonable doubt."

[480] See § 2.3.4.1(A), pp. 231-32, n. 243 above, incorporated herein [maxim expressio unius est exclusio alterius].

C. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require 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.)

Further, because the error arbitrarily violated Lucas' state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, 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.)

D. The Error Was Prejudicial

In the present case several crucial aspects of the prosecution's case were predicated upon direct evidence. For example, Johnny Massingale's confession to the Jacobs murders was direct evidence. Similarly, the jurors could have concluded that the expert's handwriting comparison testimony regarding the Love Insurance note was direct evidence as to whether Lucas authored the note. Additionally, the Santiago attempted murder count was primarily predicated upon direct evidence: her identification of Lucas, his house, and his car.

Finally, the error was especially prejudicial in the present case because the trial court rejected the defense request to argue that the identification testimony in the Santiago charges should be evaluated under the circumstantial evidence instructions. (RTT 11422-23; CT 14523.)

In sum, the error was prejudicial because it undermined the presumption of innocence by permitting the jury to find Lucas guilty based upon direct evidence for which two reasonable interpretations existed. This violated Lucas' state (Art. I, sections 1, 7, 15 and 16) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury which require the prosecution to prove every essential element beyond a reasonable doubt. (See *United States v. Gaudin* (1995) 515 U.S. 506; *In re Winship* (1970) 397 U.S. 358.) Accordingly, the error was a structural violation and the judgment should be reversed. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.11 DELIBERATION ISSUES

ARGUMENT 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

A. Introduction

When a deliberating jury asks for specific trial testimony the procedures used to convey the testimony to the jury are critically important. By asking for the testimony the jurors have identified matters which could influence their ultimate verdict. Hence, it is imperative for the trial judge to closely supervise the procedure and assure both that the requested testimony is fully considered and that no undue emphasis or other prejudice results from the procedure.

However, in the present case, the judge erroneously and prejudicially abdicated her duty to supervise by simply sending redacted transcripts into the jury room in lieu of having the testimony read to the jurors. Furthermore, the judge failed to give the jurors any special directions or cautionary instructions regarding their use of the transcripts. Therefore, the judgment should be reversed.

B. Procedural Background

Prior to the commencement of deliberations the judge informed counsel that in response to a jury request to rehear testimony[481] she would propose the following procedure:

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[481] The jury was given a list of witnesses (Court Exhibit 30). (RTT 11464:8-22.)

> The Court: If they come back and should want to have testimony, [the court reporter] has indicated that she could get them in the transcripts and cull out those portions of the transcripts that would contain our jury room conferences. So we could just have that run off and give it into the jury room upon their request.
>
> My suggestion would be that rather than calling all counsel and the defendant back here every time there is a request such as that, that we call you immediately and tell you which portions are being asked, and there we tell you that we're going to prepare that and give it into the jury room and which pages particularly we're going to be giving so that if they ask for a certain witness' entire testimony, for instance, then we just ship it in.
>
> If they ask for something unusual like part of a testimony or anything that's less than the full testimony of so and so, John Doe, then I think it would be appropriate to call you all in and then you can discuss it whether that's appropriate to give them portions or not anything unusual.
>
> What do you think? (RTT 12177:9-28.)

Defense counsel initially did not specifically agree or object to the proposal. Mr. Feldman suggested using a conference call system but the judge rejected that (RTT 12178:10-19) and further rejected his request that the judge "communicate" with counsel before responding to the jury's request:

> Mr. Feldman: You would communicate with us anyway, though, . . .
>
> The Court: No. What I would do is call your offices. If you're not there, I just leave a message. That's – or have [the court clerk] leave a message and say 'The entirety of Mr. So and So's testimony has been requested. We're supplying it and these are the pages.' That's what I would intend to do. (RTT 12178:20-27.)

The District Attorney agreed to this procedure (RTT 12178), but defense counsel continued to express reservations about the proposal. (RTT 12179:9-20; 12180-82.) The session ended with the district attorney, but not

defense counsel, agreeing. (RTT 12182:3-6.)

The judge broached the issue again shortly after the guilt phase deliberations commenced, announcing:

> . . . [I]f the jury comes back and says 'we want to see the testimony, the direct examination of witness John Doe,' the plan is that I will go ahead and have [the reporter] do the transcript of the entire [testimony] of John Doe and send it in and call you immediately. Agreed? (RTT 12226.)

The district attorney agreed with this proposal but the defense stated its preference to have the reporter read the testimony. Defense counsel expressed the concern that by sending in the bare transcript "there is no assurance that everything will get done as the court and counsel intended [it] be done, and if the reporter reads it, then the defense is comfortable that it will all get done." (RTT 12226:11-23.) The court firmly denied the defense request:

> . . . [I] am not going to make them sit there and listen to stuff they have not asked for because I have seen fit to do it. That I won't do. This is now the jury's prerogative. They said they want certain portions of the testimony. I will give them all of that person's testimony and then they can pick out what it is that they want to do. I don't think it's fair any other way. (RTT 12227:9-15.)

However, the court did give the reporter the option of reading the testimony to the jury if that would be faster than creating a redacted transcript. (RTT 12227:18-22.)

The court further ruled that the jury would be supplied with one copy of the transcript and "then they can have one person read it, if they want, out loud to everybody." (RTT 12227.)

On June 12, 1989, shortly after the commencement of jury deliberations, the jury requested a transcript of the testimony of prosecution handwriting comparison experts David Oleksow and John Harris. (RTT

12232.)[482] In accordance with her prior ruling, the trial judge ordered that the reporter prepare the entire transcript of the two witnesses, "absent the in limine discussions," "and then just hand them the transcripts." (RTT 12233.) Thereafter, the judge reaffirmed her ruling that the transcripts would be sent into the jurors rather than be read by the reporter. (RTT 12336.)

Subsequently, the jury requested and presumably received[483] additional transcripts as follows:

June 15, 1989, the jury requested and presumably received the testimony of Michelle Tortorelli (1/24/89); John Simms (1/25/89, 4/25/89, 5/22/89); James Bailey (1/25/89, 1/26/89). (CT 5559.)[484]

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[482] This testimony concerned the most crucial issue in the Jacobs case: the comparison of the Lucas printing with the printing on the Love Insurance note.

[483] There is no actual record of how or when (or if) the requested transcripts were given to the jurors. The first juror request, for Oleksow and Harris testimony, was discussed on the record with the judge ruling that they would "send the transcripts in" after they were prepared and redacted by the reporter. (RTT 12236.)

As to the other guilt trial jury requests for testimony, there was no on-the-record discussion. The minute orders reflect receipt of the note and then state: "Requested transcripts are to be sent to the jury. . ." (CT 5559; 5560) or "transcripts will be sent into the jury." (CT 5560.) However, except for a corrected page (CT 5561) there is nothing recording or memorializing the actual transmission of the transcripts to the jury.

[484] The testimony of Michelle Tortorelli concerned her work as a program coordinator for New Horizons residence housing, which was affiliated with the Salvation Army, where Lucas resided for a time in 1979 and the house rules for residents. (RTT 1954-66.) This testimony was relevant to the issue of opportunity in Jacobs. It was also relevant to the Massingale third party guilty defense theory since Massingale also stayed at the Salvation Army and could have obtained Lucas' clothing containing the

(continued...)

June 16, 1989, the jury requested, and presumably received, the following testimony: Margaret Harris (1/3/89); Frederick Edwards (1/4/89); Edward Fairhurst (1/4/89); David Daywood (4/19/89); Leigh Emmerson (1/23/89, 1/24/89); Pat Stewart (1/17/89, 1/19/89); John Torres (1/19/89, 1/23/89); Fran Van Herreweghe (1/24/89).[485] (CT 5560.) On June 19, 1989,

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[484](...continued)
Love Insurance note there. (See § 2.4.2(C)(3), pp. 342-44 above, incorporated herein.)

The testimony of John Simms concerned his examination of the hair evidence collected at the Jacobs scene as well as samples collected from Lucas, Massingale, and Oberle (RTT 2100-41; 2143-75; 2180-99; 8667-77; 8679-81; 10734-46) and work with boots and bootprints. (RTT 8677-79; 8689-92.)

The testimony of James Bailey concerned his examination of the hair evidence collected at the Jacobs scene as well as samples collected from Lucas (RTT 2200; 2253).

[485] The testimony of Margaret Harris concerned Suzanne Jacobs' typical daily habits, the maroon sports car (MG) she saw in the Jacobs' driveway the morning of the murders, the discovery of the Jacobs' bodies and the bloody footprints in the house. (RTT 172-245.)

The testimony of Frederick Edwards concerned the Jacobs crime scene, specifically the bloody footprints and their appearance, and his route through the house. (RTT 261-274.)

The testimony of Edward Fairhurst concerned the bloody footprints, his route through the Jacobs crime scene, and whether his boots had the type of sole that matched the bloody prints. (RTT 246-260.)

The testimony of David Daywood concerned whether he had used vibram soles when he resoled Fairhurst's boots in April, 1979. (RTT 8173-8178.)

The testimony of Leigh Emmerson concerned the examination of Jacobs crime scene latent prints, examination and description of the print on the Love Insurance note, and departmental policy concerning preserving prints which had been treated with ninhydrin. (RTT 1796-1861.)

(continued...)

a corrected copy of a page from the transcript of Frederick Edwards was sent to the jury and counsel was notified. (CT 5561.)

On June 20, 1989, the jury requested, and presumably received, the following additional testimony: (CT 5562; Exhibit 32): Walter Hartman (4/25/89); Donald Lucas (4/25/89); Steven Katzenmaier (4/25/89); Pat Katzenmaier (4/27/89); Suzanne Herrin (4/25/89); Catherine McEvoy (4/27/89); Mark McEvoy (4/27/89); David Katsuyama (1/11/89, 1/12/89, 3/8/89, 3/13/89, 4/10/89); Charles Geiberger (2/22/89, 4/5/89); Howard Robin (3/1/89); Robert Bucklin (4/5/89); Craig Henderson (3/2/89, 3/8/89); Thomas Streed (2/1/89, 2/2/89, 2/7/89, 5/1/89); Cyril Wecht (5/8/89).[486]

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[485](...continued)

The testimony of Pat Stewart concerned the collection of evidence and latent prints, collection and treatment of the Love Insurance note and print found on it, the bloody footprints, and photographs taken at the Jacobs crime scene. (RTT 1260-1594.)

The testimony of John Torres concerned the examination and comparison of the latent prints found at the Jacobs crime scene. (RTT 1628-1793.)

The testimony of Fran VanHerreweghe concerned the safety boots ordered for Lucas and his employee attendance records while he was working at Precision Metal [the records reflected that Lucas was absent on 5/3/79 and 5/4/79]. (RTT 1914-1946.)

[486] The testimony of Walter Hartman concerned his attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8696-8705.)

The testimony of Donald Lucas concerned his attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8649-8657.)

The testimony of Steven Katzenmaier concerned Patricia Lucas' purple MG Midget (Jacobs case) and his attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8631-8647.)

The testimony of Pat Katzenmaier concerned her purple MG Midget (Jacobs case) and her attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8900-8912.)

(continued...)

[486](...continued)

The testimony of Suzanne Herrin concerned her attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8709-8740.)

The testimony of Catherine McEvoy concerned her attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8862-72; 8883-93.)

The testimony of Mark McEvoy concerned his attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8916-31.)

The testimony of David Katsuyama concerned the autopsies of Suzanne and Colin Jacobs (RTT 940-1032; 1070-96; 4852-53); the autopsy of Anne Swanke (RTT 4852-85; 4887-4995); and the similarities of wounds in the different victims. (RTT 7176-99.)

The testimony of Charles Geiberger concerned his ER treatment of Jodie Santiago and description of her injuries and amnesia (RTT 3679-3729; 7054-55); and the similarities of wounds in the different victims. (RTT 7055-79.)

The testimony of Howard Robin concerned the autopsy of Gayle Garcia. (RTT 4487-4545.)

The testimony of Robert Bucklin concerned the autopsy of Rhonda Strang and Amber Fisher (RTT 6979-7001); and the similarities of wounds in the different victims. (RTT 7001-45.)

The testimony of Craig Henderson concerned his role in the investigations of the Santiago, Strang/Fisher, and Swanke cases; specifically the location and condition of Swanke's body and crime scene (RTT 4700-23; 4731-32; 4744-65; 4833-39); the showing of the choke chain found around Swanke's neck to Shannon Lucas (RTT 4732; 4828-33); that he had a photo taken of Lucas at the time of his arrest because he noted healing scratch marks on Lucas' face (RTT 4739); contact with Frank Clark and Richard Leyva (RTT 4765-66; 4825-28; 4839-42; 11233); his contact with Loren Linker when he served the search warrant at CMC (RTT 11233-39; 11246-53); and the number of throat-wound cases he had worked on in his career. (RTT 11228-33.)

The testimony of Thomas Streed concerned the bloody knife smears on Gayle Garcia's pants and his attempt to duplicate same (RTT 2790-96; 2843-44; 2850; 2983-86); description of the scene of the Garcia murder and location of evidentiary items found there (RTT 2790-2827; 2835-43; 2851-52; 2973-83; 2986-94;interviews will Bill Greene and Annette Goff (RTT 2844-

(continued...)

On July 31, 1989 during the penalty deliberations, the jury requested and received the following additional testimony: Dr. Marks (7/11/89; 7/12/89; 7/13/89); Pat Katzenmaier (7/13/89).[487] The jury also requested the stipulation which was read into the record on July 13, 1989 concerning Lucas' diagnoses by Dr. Schumann while at Atascadero in 1974 (RTT 13025-26; CT 5582.) The transcripts and stipulation were transmitted to the jury by the bailiff.[488]/[489]

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[486](...continued)
50; 2852-53; 2971-73); contact and interview with Emmett Stapleton wherein Stapleton identified Lucas as the person who had come to his house to ask about a rental unit. (RTT 9099-9103.)

The testimony of Cyril Wecht concerned the comparison and similarities/differences of wounds in the different victims and blood alcohol content in Suzanne Jacobs case. (RTT 9369-9458.)

[487] The testimony of Dr. Marks concerned his examination of Lucas, Lucas' childhood, and Lucas' psychological profile. (RTT 12775-12794; 12827-37; 13026-39.)

The testimony of Pat Katzenmaier (Lucas' mother) concerned Lucas' childhood and request that his life be spared. (RTT 13043-50.)

[488] The only record of these proceedings is the following minute order notation (CT 5598):

> "9:53 am The Jury calls and the bailiff checks; a note is brought back; and it is marked part of COURT'S EXHIBIT 32/7-31-89; and the clerk makes calls to the attorneys.
> 10:24 am The Jury takes a break
> 10:42 am The Jury is back in.
> 11:50 am The Jury is excused for lunch.
> 11:55 am Conference call, attorneys stipulate to transcripts asked for in the note received this morning; copies will be forthcoming in the afternoon; all attorneys will sign a yellow legal sheet with the stipulation (Attorneys Landon and Feldman have signed so far); and at 12:02 the call concludes.

(continued...)

C. The Defendant's Right To Personal Presence At Trial Is Grounded Upon Fundamental Constitutional Rights

The Due Process and Confrontation Clauses of the federal constitution (Sixth and Fourteenth Amendments) guarantee a criminal defendant's right to be present "at every stage of his trial where his absence might frustrate the fairness of the proceedings." (*Faretta v. California* (1975) 422 U.S. 806, 819 n. 15; see also *United States v. Gagnon* (1985) 470 U.S. 522, 526-27; *Illinois v. Allen* (1970) 397 U.S. 337, 338; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-06; *Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1108; *United States v. Frazin* (9th Cir. 1986) 780 F.2d 1461, 1469; *Badger v. Cardwell* (9th Cir. 1978) 587 F.2d 968, 970; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 273.) Furthermore, because a readback of testimony is no less important than the original taking of the testimony,[490] all of the salutary rights associated with the testimony (e.g., Due Process, Compulsory Process, Confrontation,

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[488](...continued)
12:03 pm The Court stands in recess.
1:34 pm The Jury is in, please note at 1:30 pm attorneys Landon and Feldman appear to give the Court the copies of the requested transcript; it is marked Court's Exhibit 36; and the bailiff takes in the other copy to the jury as requested."

[489] On July 31, 1989 the attorneys signed the following stipulation:

> The defense and prosecution hereby stipulate that the transcripts provided herewith as requested by the jury may be provided to the jury per their request of 7/31/89. [Signed: Steven Feldman, Alex Landon, George Clarke] (Court's Trial Exhibit 36.)

[490] In fact, a readback may be more important than the original taking of the testimony because the readback presumably is limited to those portions upon which the jurors themselves have chosen to focus.

Trial By Jury and Representation Of Counsel Clauses of the Sixth and Fourteenth Amendments) are implicated by readback procedures which fail to assure fair, accurate and complete recitation of the testimony. (See *People v. Frye* (1998) 18 Cal.4th 894, 1007; see also generally *Davis v. Alaska* (1974) 415 U.S. 308, 318; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Strickland v. Washington* (1984) 466 U.S. 668.)

D. The Absence Of Defense Counsel From A Critical Stage Of The Trial Violates The Accused's Constitutional Rights

A criminal defendant's right to counsel is guaranteed by the Sixth and Fourteenth Amendments to the federal constitution. (See *Perry v. Leeke* (1989) 488 U.S. 272, 278-79; *Penson v. Ohio* (1988) 488 U.S. 75, 88; *United States v. Cronic* (1984) 466 U.S. 648, 659 [the right to counsel applies to every critical stage].) "[A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134; see also *King v. Superior Court* (2003) 107 Cal. App. 4th 929.) The foregoing constitutional principles are violated when defense counsel is absent from any proceeding where testimony is received by the jurors.

E. Private Reading Of Testimony In The Deliberation Room Violates The Federal Constitution's Public Trial Guarantee

See § 2.11.2, pp. 725-30 below, incorporated herein.

F. The Reading Of Testimony Is A Critical Stage Of The Trial

A stage of the proceedings is considered a critical one if the absence may have affected the substantial rights of the defendant. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1137; see also *United States v. Wade* (1967) 388 U.S. 218, 224-26.)

The cases which have specifically considered the propriety of procedures relating to a jury's request for a readback of instructions or testimony have consistently recognized the crucial importance of such a reading.[491] For example, in a Tenth Circuit case involving the readback of instructions the court observed:

> No harm may come of it, it is true but on the other hand, a mistake in the reading of a shorthand symbol which defense counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or a phrase, and many other events which might readily occur, would result in irremediable prejudice to defendant. (*Little v. United States* (10th Cir. 1934) 73 F.2d 861, 864; see also *State v. Beal* (N.M. 1944) 48 N.M. 84 [146 P.2d 175, 181].)

Even when the evidence requested by the jury is a tape recording which can be mechanically replayed, the proceeding is still considered an important part of the trial "because it involves the crucial jury function of reviewing the evidence" (*United States v. Kupau* (9th Cir. 1986) 781 F.2d 740, 743.)[492] Similarly, the absence of the defendant from the replaying of a tape of the jury instructions has been held to violate a defendant's right to due process and

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[491] For example, the following cases have expressly recognized that a readback of testimony should be conducted in open court with all parties and counsel present: *Commonwealth v. Peterman* (Pa. 1968) 430 Pa. 627 [244 A.2d 723, 726]; *State v. Antwine* (Kan. App. 1980) 4 Kan.App.2d 389 [607 P.2d 519, 529]; *State v.Gammill* (Kan. App. 1978) 2 Kan.App.2d 627 [585 P.2d 1074, 1078]; *Kokas v. Commonwealth* (Ky. 1922) 194 Ky. 44 [237 S.W. 1090, 1092]; *Jackson v. Commonwealth* (Va. 1870) 60 Va. 656, cited at 50 A.L.R. 2d 203.

[492] Even though *Kupau* analyzed the issue under Fed. Rule of Criminal Proc. 43, the reasoning also applies to the constitutional bases for the right to presence.

confrontation. (*Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271.)

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

In addition to the other federal constitutional rights discussed above, the procedure used in the present case violated Lucas' federal constitutional rights to the presence and supervision of critical proceedings by the trial judge. "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve [jurors] . . . but it is a trial by a jury of twelve [jurors], in the presence and under the superintendence of a judge . . . . This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion." (*Capital Traction Co. v. Hof* (1899) 174 U.S. 1, 13.)

Hence, because the Sixth Amendment right to trial by jury extends to proceedings during jury deliberation, absence of the judge during such proceedings violates the federal constitution. "A judge's absence during a criminal trial, including court proceedings after a jury begins deliberations, is error of constitutional magnitude. [Citing *Peri v. State* (Fla. Dist. Ct. App. 1983) 426 So.2d 1021, 1023-24.] The presence of a judge is at the 'very core' of the constitutional guarantee of trial by an impartial jury. [Citation.]" (*Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1119.)

Moreover, due to the importance of the rights involved, Penal Code § 1138 also obliges the trial court to supervise and control a readback of testimony or a re-instruction of the jury. (See *People v. Litteral* (1978) 79 Cal.App.3d 790, 794.) Penal Code § 1138, by its terms, requires that the jury be "brought into court" and that the requested information be given in court

"in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."[493] Where, as in the present case, the trial court fails to adequately supervise the reading of the trial testimony by the jury by conducting the readback in open court in the presence of, or after notice to the parties, it has not fulfilled the statutory mandate of Penal Code § 1138.

Hence, trial courts must be actively involved in selecting the testimony and in supervising the way in which the readback is conducted. (See *People v. Litteral*, *supra*, 79 Cal.App.3d at 794; see also *Riley v. Deeds*, *supra*, 56 F.3d 1117.)[494] The testimony which is read back must be responsive to the jury's request. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1123; *People v. Cooks* (1983) 141Cal.App.3d 224.) The testimony must be repeated accurately (*People v. Aikens* (N.Y. 1983) 465 N.Y.S.2d 480) and in such a

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[493] Penal Code § 1138 provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

[494] In *Riley*, the Ninth Circuit reversed a conviction without a showing of prejudice where the trial court delegated the responsibility for a readback. The trial judge was away from the courthouse when the deliberating jury asked for a readback of the victim's direct testimony. Unable to locate the judge, the law clerk convened the jury. With the defendant, his counsel and the prosecutor present, the court reporter read back the testimony as requested. On appeal, the defense did not argue that the testimony chosen for the readback had been inappropriate in any way. The Ninth Circuit, however, reversed the conviction without a showing of prejudice because the error was structural.

way that no undue emphasis is placed on any portion of the readback. In addition, the testimony selected should also present a balanced view of the evidence. (*Fisher v. Roe* (9th Cir. 2001) 263 F.3d 906; *United States v. Hernandez* (9th Cir. 1994) 27 F.3d 1403.)[495]

In sum, trial courts are under an affirmative duty to ensure the fairness of any readback ordered. In *Fisher v. Roe*, *supra*, 263 F.3d at 917 the Ninth Circuit stated:

> Moreover, we have reversed convictions and said that a trial judge abuses his discretion if he fails to take measures to present a balanced view of testimony when a jury requests a readback.

(See e.g., *United States v. Hernandez*, *supra*, 27 F.3d 1403, 1409 [district court abused its discretion where it allowed jury to re-read transcript of critical testimony without admonishing jury that it must weigh all evidence and not rely solely on the transcripts].)

In the present case the jury was erroneously permitted to read the trial transcripts privately in the deliberation room. This error was especially egregious because there is no record of how the readback was conducted. We don't know:

1) Whether the jurors read the transcripts aloud or silently to themselves?

2) If they were read silently did all jurors do so?

3) If some jurors read the transcripts silently on an individual basis, what did the other jurors do while the jurors read?

4) If the other jurors deliberated, did the reading juror attempt to listen

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[495] The better practice is to include both the direct and the cross-examination. (*See, e.g., State v. Wilson* (N.J. 2002) 165 N.J. 657 [762 A.2d 647].)

to and/or participate in those deliberations?

5) Which transcripts, if any, were read?

6) What portions of the transcripts were read (e.g., only direct or portion thereof; only cross or portion thereof; entire transcript)?

7) Did the juror who read the transcripts aloud – if this was done – place any undue emphasis on certain portions of the transcript?

8) Did the juror who read the transcripts aloud do so fully and correctly?

Accordingly, Judge Hammes' failure to properly supervise the readback proceedings violated Lucas' federal constitutional rights and was a violation of the judge's duties under Penal Code § 1138.

Further, because Lucas was arbitrarily denied his state created rights under Penal Code § 1138, 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.)

H. A Readback Proceeding Is No Less Critical If The Reading Is Done By A Juror Instead Of The Reporter

In the present case the testimony was not read by the reporter. Instead, over defense objection, the judge ordered the reporter to send a redacted copy of the transcript into the deliberation room under the apparent assumption that one of the jurors would read the testimony aloud to the other jurors. (RTT 12227.) Such a procedure presents an even greater danger of prejudice and is no less a critical stage of the proceeding than if the reporter had done the reading. The concerns that the testimony will be misread, that important matters may be omitted, and that voice inflections and emphasis, either

intentional or unintentional, will prejudicially impact the jury are present regardless of who the reader is. Moreover, when the jury is given free reign to conduct the readback proceeding in any manner it wishes, there is no supervision or control and the danger of undue emphasis is inherent. (See *United States v. Sacco* (9th Cir. 1989) 869 F.2d 499, 502 ["in the privacy of the jury room, a jury, unsupervised by the judge, might repeatedly replay crucial moments of testimony before reaching a guilty verdict."]; see also, *United States v. Hernandez, supra*, 27 F.3d at 1408 [to avoid the possibility of undue emphasis, the preferred method of rehearing testimony is in open court, under the supervision of the court, with the defendant and attorneys present.]; see also, *United States v. Binder* (9th Cir. 1985) 769 F.2d 595, 600 ["Undue emphasis of particular testimony should not be permitted."].)

In the present case the judge completely abdicated her duty in this regard. She simply left everything up to the jury. (See RTT 12227 [ruling that the jury would be supplied with one copy of the transcript and "they can have one person read it, if they want, out loud to everybody."][496] Thus, we have no idea how the readback was conducted. (See § 2.11.1(G), pp. 710-14 above, incorporated herein.)

I. Neither Counsel Nor Lucas Waived The Rights Involved

The record contains neither an express nor implied waiver of the right to have the testimony read to the jury in the presence of the judge, counsel and

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[496] Due to the judge's lack of supervision the record does not reflect whether the jury actually received all of the testimony it desired. In the case of witnesses Fairhurst and Henderson there was additional testimony on dates not included in the jury's request. (Fairhurst, June 7, 1989 [RTT 11742-45]; Henderson, May 27, 1989 [RTT 10953-54]; May 30, 1989 [RTT 11224-39; 11246-53].) Presumably the testimony for the omitted dates was not given to the jury, but we don't really know.

the defendant.

1. There Was No Waiver By Counsel

When the judge announced that she would be sending transcripts into the jury room trial counsel expressed concern about this procedure and argued that the reporter should read the testimony to the jurors. (RT 12226.) However, the trial court made it clear, in no uncertain terms, that she would not allow any procedure except the one which she proposed. (See RTT 12227.)

Accordingly, the acquiescence of counsel and the defendant in this procedure, after denial of the request for a different procedure, did not constitute a waiver of rights. Counsel is not required to make futile objections. (*People v. Bain* (1971) 5 Cal.3d 839, 849, fn. 1; *Douglas v. Alabama* (1965) 380 U.S. 415, 422 ["No legitimate state interest would have been served by requiring repetition of a patently futile objection, . . . in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair"]; see also 9 Witkin, *Cal. Procedure* (4th ed. 1997), Appeal, § 387 at pp. 437-38].) Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue. (*People v. Diaz* (1951) 105 Cal.App.2d 690, 696; see also *People v. Woods* (1991) 226 Cal.App.3d 1037, 1052.)

2. Lucas Did Not Waive His Rights

Early United States Supreme Court cases held that the right to presence in capital cases is so fundamental that such presence cannot be waived by the defendant. (See, *Diaz v. United States* (1912) 223 U.S. 442, 455; *Hopt v. Utah* (1884) 110 U.S. 574, 579; accord, *Near v. Cunningham* (3d Cir. 1963) 313 F.2d 929, 931.) More recently, commentators have interpreted dictum in *Illinois v. Allen* (1970) 397 U.S. 337, as authorizing a limited exception to the

no-waiver rule for defendants who willfully disrupt their trials. (See, *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1257.) However, this exception is inapplicable in the present case as there is no evidence that Lucas disrupted the trial.[497]

However, even if the right can be waived in a capital case, *Illinois v. Allen, supra,* supports retention of the knowing-and-voluntary waiver standard in right-to-presence cases. *Allen* authorized waiver where the defendant "has been warned by the judge that he will be removed if he continues his disruptive behavior [and] he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Illinois v. Allen*, *supra*, 397 U.S. at 343.) Moreover, *Allen* cited *Johnson v. Zerbst* (1938) 304 U.S. 458, which established the knowing-and-voluntary waiver standard. Similarly, the court's conclusion in *Drope v. Missouri* (1975) 420 U.S. 162, that there had been insufficient inquiry to afford a basis for deciding the waiver issue, was based on cases applying the knowing-and-voluntary standard for waiver. (Id. at 182 [citing *Westbrook v. Arizona* (1966) 384 U.S. 150]; see also, *Gardner v. Florida* (1977) 430 U.S. 349, 361 [applying knowing-and-intelligent waiver standard in similar context].)

Additionally, as set forth above, the right to personal presence is distinct and separate from the right to representation of counsel at any readback proceeding. Even if the right to personal presence could be waived by implication, it is well established that any waiver of the right to counsel

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[497] Some more recent federal circuit cases have held that capital defendants can waive the right to personal presence. (*Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662; *Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486.)

must comport with the knowing, voluntary and intelligent waiver requirements set forth by the U.S. Supreme Court. "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" (*Johnson v. Zerpst*, *supra*, 304 U.S. at 464.) This Court has adopted the same view, stating in *In re Smiley* (1967) 66 Cal.2d 606, 624: "There is no reason why at this late date we should tolerate silent records on the question of waiver of counsel, or permit the People to undertake belated speculations as to the defendant's knowledge in an effort to justify a finding of 'implied' waiver in such cases." "Because of the policy against implied waivers of such important rights as the right to counsel, reviewing courts look to the record to insure that a waiver of counsel was knowing and intelligent. Appellate courts look in the record for a colloquy between trial court and defendant that demonstrates such knowledge and intelligence." (*Savage v. Estelle* (9th Cir. 1988) 924 F.2d 1459, 1466; see also *In re Lopez* (1970) 2 Cal.3d 141, 147 [neither the defendant's failure to request court-appointed counsel nor his plea of guilty constitute an implied waiver of the right to counsel].)

Nor is there any record that Lucas was fully informed of his right to counsel, which is a necessary predicate to a finding of implied waiver. (See, *In re Johnson* (1965) 62 Cal.2d 325, 333; see also, *People v. Doane* (1988) 200 Cal.App.3d 852, 859 [waiver of defendant's right to counsel was not implied from mere participation in his defense; there must be an explicit waiver of his right to counsel and advisement of the consequences of his decision to represent himself].)

Moreover, under state law presence cannot be waived without a written waiver which was not obtained in the present case. (Penal Code § 977.)

Arbitrary denial of this right violated the Due Process Clause of the federal 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.)

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

1. The Denial Of Counsel Was Reversible Error

a. Under The Federal Constitution The Denial Of Counsel Was Reversible Error Per Se

Under the federal constitution the denial of counsel at a critical stage of the trial is reversible per se. When a criminal defendant is denied counsel at a critical stage of the proceedings it constitutes a structural error which makes the trial presumptively unfair and requires automatic reversal. (See *United States v. Cronic* (1984) 466 U.S. 648, 659; see also *Frazer v. United States* (9th Cir. 1994) 18 F.3d 778, 781-82; *Johnson v. United States* (1997) 520 U.S. 461, 469.) "*Cronic* and its progeny . . . stand for the proposition that the actual or constructive denial of counsel at a critical stage of a criminal trial constitutes prejudice per se and thus invalidates a defendant's conviction." (*Curtis v. Duval* (1st Cir. 1997) 124 F.3d 1, 4; see also *Perry v. Leeke* (1989) 488 U.S. 272, 278-79; *Penson v. Ohio* (1988) 488 U.S. 75, 88.)

This applies to denials of counsel for even portions of a critical stage, as long as they are important to the trial. (See *Geders v. United States* (1976) 425 U.S. 80, 88-90 [overnight recess]; *Herring v. New York*, *supra*, 422 U.S. 853 [closing argument]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-13 [nullifying counsel's ability to determine point in defense case when a single witness (defendant) would testify] [cases cited in *Perry v. Leeke*, *supra*, 488

U.S. at 280].) This follows from the long-established law that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." (*Powell v. Alabama* (1932) 287 U.S. 45, 69.) Without it, the right to counsel is denied.

b. The Absence Of Counsel Raised A Presumption Of Prejudice Under California Law

Under California law, denial of counsel at a critical stage of the proceedings raises a presumption of prejudice. (*People v. Horton* (1995) 11 Cal.4th 1068, 1135-37.) "Only the most compelling showing to the contrary will overcome the presumption." (*Id.* at 1137.) Hence, the denial of counsel should be reversible under the California standard.

2. Absence Of The Judge Should Be Reversible Error Per Se

Because the absence of the judge from the crucial readback proceedings undermined the entire structure of the trial it should be reversible error per se. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Riley v. Deeds*, *supra*.)

3. The Absence Of Lucas Was Reversible Error

a. How Much Influence The "Readback" Had Upon The Jury Is Impossible To Determine

When an unsupervised readback of testimony is undertaken by the jury special standard-of-review problems are presented because:

> [h]ow much influence the reading of the testimony . . . may have had upon the minds of the jury . . . is impossible to determine. (*Jackson v. Commonwealth* (Va. 1870) 60 Va. 656, cited at 50 A.L.R. 2d 203.)

For example, without knowing how the readback was conducted there is a danger that the reader may have given undue emphasis to certain portions

of the transcript. (See e.g., *People v. Aikens* (NY 1983) 465 N.Y.S.2d 480.) Or, the testimony selected may not have been balanced. (See *Fisher v. Roe*, *supra*, 263 F.3d 906.) The reading of testimony to the jury is more than a "ministerial action" and the defendant's constitutional rights may be prejudicially implicated by "[a]n inadvertent omission of a part of [the] testimony, a mistake in the reading . . . or an inappropriate emphasis of voice. . . ." (*Harris v. United States* (D.C. App. 1985) 489 A.2d 464, 468.)

Moreover, there isn't even a way to know whether all the jurors participated in the readback. Since the jurors were not precluded from reading the transcripts silently to themselves, some may have read them and others may not have. And, if this occurred the deliberations could have been further compromised if some jurors deliberated while others did not.

In sum, in the present case there simply is no way of assuring that the readback procedure was fair, accurate and complete.

b. The Error Was Structural And Reversible Per Se

Because an unsupervised readback of testimony compromises the most fundamental elements of the entire trial process, and because the impact of the error cannot normally be evaluated on the record, the error was structural and should be reversible per se. As one court observed long ago:

> In [the defendant's] absence, there can be no trial. The law provides for his presence. And every step taken in his absence is void and vitiates the whole proceeding. On this point all authorities agree. And no question can be raised, as to the extent of the injury done to the prisoner, or whether any injury resulted from his not being present. [Emphasis added.] (*Jackson v. Commonwealth*, *supra*.)
>
> . . .
>
> In the situation that resulted from the action of the trial court in permitting, after the submission of the case, the reading of

> evidence to the jury, we can only speculate as to its effect upon the jury and verdict; and obviously, in a case in which the punishment inflicted by the verdict is the severest known to the law, resort should not be had to speculation, in order to determine whether the verdict was superinduced by an error of the trial court. In the face of so grave an error as that committed by the trial court in this case, the appellate court should not stop to weigh probabilities, or try to discover from the record whether it was prejudicial to the accused, but must assume that the error amounted to such an invasion of appellant's constitutional rights as to deprive him of a fair and impartial trial. [Emphasis added.] (*Kokas v. Commonwealth* (Ky. 1922) 194 Ky. 44 [237 S.W. 1090, 1093].)
>
> . . .
>
> . . . [R]eading evidence taken by deposition, although it was done after the jury had retired, is a part of the trial as much as any other. In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed. [Emphasis added.] (*People v. Kohler* (1855) 5 Cal. 72; see also *In re Dennis* (1959) 51 Cal.2d 666, 672; *Glee v. State* (Fla. Dist. Ct. App. 1994) 639 So.2d 1092, 1093 [if trial judge leave courtroom during readback of testimony to jury, there is reversible error per se].)

c. *If Harmless-Error Analysis Is Employed There Should Be A Heavy Burden On The Prosecution To Prove The Error Harmless*

Some courts have purported to evaluate errors relating to the defendant's absence from a "readback" to the jury, under the harmless-error standards. (See, *Ware v. United States* (7th Cir. 1967) 376 F.2d 717, 718-19, for a comparison of the per se and harmless error cases among the various federal districts.) However, to effectively understand and apply such a standard it is necessary to analyze the factual context of the cases rather than the general description of the standard. (I.e., "reasonable possibility of

prejudice" vs. "proof beyond a reasonable doubt of lack of prejudice." (See, *Ware*, *supra*, at 719, fn. 6, where the court opines that there is "little difference" between these standards.)

Regardless of what standard is used, the important principle is that the burden is upon the prosecution, and it is a "heavy" one. (See, *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271; see also *Chapman v. California* (1967) 386 U.S. 18 [prosecution has burden of proving harmless beyond a reasonable doubt].)

d. The Courts Have Considered Several Specific Criteria In Determining Whether The Prosecution Has Met Its Burden Of Establishing Harmless Error

As stated in the preceding section it is necessary to consider specific factual contexts to understand and apply the standard of review in "readback" cases. Such an analysis reveals several different criteria which the courts have considered, individually or cumulatively, in determining whether the prosecution has met its burden to establish harmless error.

i. Was Counsel Present During The Reading?

Many of the dangers inherent in a "readback" procedure can be neutralized by the presence of counsel who can serve to protect the defendant against many of the potential adverse influences. Hence the courts have relied upon this factor to find harmless error. (E.g., *Ware v. United States*, *supra*, 376 F.2d 717.) However, even the presence of counsel might fail to fully compensate for the defendant's absence when the testimony being read is particularly relevant to the defendant:

> . . . a defendant if present can better contribute towards his defense on matters concerning trial testimony relevant to him. He is more likely to understand such material and be able to make suggestions to his attorney. Also, a defendant, under such

> circumstances, is entitled to be seen by the jury, and the jury, in turn, has a right to view his demeanor – especially where, as here, the jury has expressed a particular interest in a certain portion of the trial testimony relevant to defendant. [Original emphasis.] (*Ware v. United States*, *supra*, 376 F.2d at 721 (Dis. Opinion).)

ii. Does The Testimony Concern Matters Which Are Inconsequential To The Defendant, Or Are Uncontested?

While the jurors' request for the testimony obviously illustrates its interest therein, in some cases the courts have been able to determine that the testimony concerns matters which are of no consequence to the defendant (e.g., *Walker v. United States* (D.C. Cir. 1963) 322 F.2d 434, 436 – requested testimony concerned co-defendants), or which are uncontested (e.g., *People v. Nunez* (1983) 144 Cal.App.3d 697, 702 – brief readback of testimony regarding phone calls whose existence and content the defendant had never denied or contested).

iii. Was The Prosecution's Evidence Overwhelming As To All Elements Of Guilt?

Obviously there are cases which may objectively be described as containing "overwhelming" evidence in support of all elements of the prosecution's case. In such cases the reading of testimony to the jury in the absence of counsel and defendant has been found to be harmless error. (E.g., *People v. Brew* (1984) 161 Cal.App.3d 1102, 1106-07 – robbery suspect arrested with proceeds of robbery on his person was identified by all three victims who corroborated each other.)

iv. Did The Court Adequately Instruct The Jury Concerning The Readback?

An additional criterion which has been considered, in conjunction with others, is whether the trial court employed satisfactory safeguards to reduce the dangers inherent in the "readback" procedure. In the present case no instruction whatsoever was given. (See § 2.11.1(B), pp. 700-07 above, incorporated herein.)

v. Was The Defendant On Trial For His Life?

As with many other constitutional rights, the right to personal presence at a "readback" of testimony is judged by an especially strict standard in capital cases:

> . . . in a case in which the punishment inflicted by the verdict is the severest known to the law, resort should not be had to speculation, in order to determine whether the verdict was superinduced by an error. . . . (*Kokas v. Commonwealth*, *supra*, 194 Ky. 44 [237 S.W. at 1093]; see also, *People v. Kohler*, *supra*.)

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

In the present case each of the criteria to be considered in the harmless error evaluation resulting from the defendant's absence favor reversal:

1. Counsel was not present when the transcripts were read by the jurors.

2. The requested testimony was lengthy, substantial and crucial to factual matters particularly relevant to both guilt and penalty.

3. The testimony was conducive to misunderstanding due to unexplained gestures. For example, prosecution handwriting expert John Harris' testimony for January 26, 1989 was requested by the jurors. In that

testimony Harris indicated which slips of paper were used to create an enlargement of some of the numbers contained on Trial Exhibits 110 and 111. (RTT 2275 ["witness so indicated on the exhibits"].)

4. The prosecution's evidence cannot fairly be characterized as overwhelming as to all the charged elements and was, in fact, closely balanced on a number of issues including the Jacobs case to which much of the requested testimony related. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.)

5. The court failed to give the jury any admonishment whatsoever, and the reading was conducted in the jury room rather than open court; and

6. This case is capital.

In sum, all of the factors commonly considered in "readback" cases involving the defendant's absence point to reversal. Further, given the complete absence of a record as to what the jury did with the transcripts and as to how (and by whom) the readbacks were conducted, there is no way to demonstrate that the violations of Lucas' constitutional rights were harmless. Accordingly, the guilt and penalty judgments should be reversed.

2 JACOBS CASE

2.11 DELIBERATION ISSUES

ARGUMENT 2.11.2

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

A. Introduction

Because the "readback" of testimony was not conducted in open court Lucas' state and federal constitutional rights to a "public trial" were violated.[498]

Lucas had a constitutional right to have the testimony read back to the jury in open court pursuant to his right to a public trial. By requiring the jurors to conduct their own, unsupervised readback in the jury room Judge Hammes abridged Lucas' right to a public trial. Because of this error the judgment should be reversed.

B. Procedural Background

See § 2.11.1(B), pp. 700-07 above, incorporated herein.

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

The right to public trial is deeply rooted in the common law, is "universally regarded by state and federal courts as basic and substantial," and has "long been regarded as a fundamental right of the defendant in a criminal prosecution." (*State v. Lawrence* (Iowa 1969) 167 N.W.2d 912, 913, and

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[498] "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ." (U.S. Const. 6th Amendment.) ¶ "The defendant in a criminal case has the right to a . . . public trial. . . ." (Calif. Const. art. 1 § 15.)

authorities cited therein.) Modern courts recognize that an open trial is not "merely a safeguard against unfair conviction . . ." but acts as "'a check on judicial conduct and tends to improve the performance of both parties and the judiciary.'" (*Rovinsky v. McKaskle* (5th Cir. 1984) 722 F.2d 197, 201-02; *United States v. Chagra* (5th Cir. 1983) 701 F.2d 354, 363.)

"The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England." (*Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 508.)

Because of this fundamental impact of public trial upon "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system," the closure of any criminal proceeding "must be rare and only for cause shown that outweighs the value of openness. [Footnote omitted.]" (*Press-Enterprise*, *supra*, at 508-09.) Moreover, the right to a public trial "may be overcome only by an overriding [state] interest" (*Press-Enterprise*, *supra*, at 521) and "no state interest, however compelling, can sustain the exclusion of press and public from part of a trial, absent findings of necessity articulated in the record." (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 200.)

This constitutional guarantee applies to the "entire trial from the impaneling of the jury to the rendering of its verdict." (*State v. Lawrence*, *supra*, 167 N.W.2d at 915.) Absent waiver or a satisfactory determination of necessity, a criminal trial must be "public in all respects" (*People v. Hartman* (1984) 103 Cal. 242, 245) and "at all times." (*People v. Frutos* (1984) 158 Cal.App.3d 979, 987.)

From these principles it follows, and has been consistently held, that "exclusion of the public from a part of the trial" may violate the public trial guarantee. (*State v. Lawrence*, *supra*, 167 N.W.2d at 915 [instruction of jury];

see also, *United States v. Chagra* (5th Cir. 1983) 701 F.2d 354 [pretrial motion to reduce bail]; *United States v. Sorrentino* (3d Cir. 1949) 175 F.2d 721 [jury selection].) And while there appear to be few cases which have directly considered application of the right to public trial vis-à-vis jury deliberations (but see, *Walker v. United States*, *supra*, 322 F.2d at 438 (dis. op.)), it has been firmly held that a proceeding which "is held as a part of the trial and after the jury has been sequestered, falls within the constitutional guarantee and must be conducted as a public trial." (*U.S. Ex. Rel. Bennett v. Rundle*, *supra*, 419 F.2d at 606.)

In sum, absent a strong showing of necessity articulated upon the record, or waiver – neither of which occurred in the present case – it must be concluded that the public trial guarantee applies to proceedings after the jury has begun deliberations, such as the reading back of testimonial evidence.

D. The Public Trial Guarantee Applied To The Proceedings Held In The Present Case

The readback proceedings in the present case, which concerned the disposition and representation of important evidence to the jury, were no less worthy of the public trial guarantee than the various types of proceedings to which the right has already been applied. (E.g., pretrial bail hearing, suppression of evidence motion, rendition of instructions, etc.) In fact, the public trial guarantee is particularly applicable to the proceedings at issue here because they concerned "matters advanced for consideration of the triers of fact. . . ." (*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 206), and bore a relationship to "the merits of the charge [and] the outcome of the prosecution. . . ." (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 201.)

Additionally, in the case of the readback, the concerns about the potential for undue emphasis during the reading provide a rationale for

openness analogous to that which is applicable to a jury instruction proceeding:

> Publicity may also be said to discourage undue emphasis by the court when charging the jury. When instructing the jury as to the law applicable to a given case, overemphasis by repetition or voice inflection could, of course, materially affect jury consideration of the matter, and such undue emphasis would not be reflected by the printed copy of the instructions later available to the public. (*State v. Lawrence*, *supra*, 167 N.W.2d at 914.)

In sum, the public trial guarantee was clearly applicable to the closed proceedings held in the present case.

E. The Error Violated The Federal Constitution

Further, because Lucas was arbitrarily denied his state created right to a public trial under Article I, § 15 of the California Constitution, 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.)

F. There Was No Waiver Or Satisfactory Showing Of Necessity

As to all of the readback proceedings at issue here, there was neither a waiver nor an adequate showing of necessity sufficient to justify exclusion of the public from the proceedings and judicial actions.

1. Waiver

It has been held that the right to public trial need not be expressly waived by the defendant. (*People v. Hines* (1964) 61 Cal.2d 164, 172.) Hence, waiver may be inferred without any personal acknowledgment from the defendant, when the defendant fails to object to the closure or to counsel's acquiescence therein. (E.g., *People v. Moreland* (1970) 5 Cal.App.3d 588,

595 – co-defendant's counsel moved for closure during testimony but Moreland refused the court's invitation to object; *Martineau v. Perrin* (1st Cir. 1979) 601 F.2d 1196 – defendant's attorney informed defendant that he had discovered the courtroom doors were locked and defendant didn't object even though attorney stated that he could do so.)

However, the situation is qualitatively different in the present case because Judge Hammes emphatically stated that she would not vary from her set procedure of sending the transcripts into the jury room even though counsel had requested that the testimony be read by the reporter. (RTT 12177-78; 12226-27.) This ruling necessarily foreclosed reading the testimony in open court and, hence, such a request by defense counsel or Lucas would have been futile. (See *People v. Bain* (1971) 5 Cal.3d 839, 849, fn. 1; see also *Douglas v. Alabama* (1965) 380 U.S. 415, 422; *People v. Diaz* (1951) 105 Cal.App.2d 690 696; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1052.)

Moreover, in the present case, Lucas was never informed of his right to a public readback of the testimony. To be effective, a waiver of a public trial must be "intentional and meaningful" (Annot. 61 L.Ed.2d 1018, 1030) and the waiver of such a constitutional right is "not lightly inferred." (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 200.) Plainly stated, one cannot knowledgeably and intentionally waive a matter about which he has no knowledge. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

2. There Was No Showing Of Necessity

There certainly was no reason why all of the proceedings and judicial actions at issue here could not have been conducted in open court. Of course, while the jury could properly have been excluded from the court and counsel's discussions of the jury's notes to the court, the readback could and should

have been conducted and resolved in open court rather than by private proceeding and communication to the jury. (See Penal Code § 1138.)

In any event, even if there had been some compelling necessity for closure of the proceedings, the record fails to contain the required articulation of such necessity. (*Press-Enterprise*, *supra*, 464 U.S. at 510.)

G. The Denial Of The Right To Public Trial Requires Reversal

It is widely recognized that a violation of the right to a public trial is "inherently prejudicial" and requires reversal per se. (*Public Trials*, annot., 61 L.Ed.2d 1018, 1026-27.)

> . . . the right is both primary and instrumental: not merely a method to assure that nothing untoward is done clandestinely but a guarantee against the very conduct of private hearings ... Even absent a showing of prejudice, infringement of the right to a public trial exacts reversal as the remedy. (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 202; see also, *People v. Byrnes* (1948) 84 Cal.App.2d 72, 79.)

Accordingly, Lucas' convictions and sentence of death must be set aside.

2 JACOBS CASE

2.11 DELIBERATION ISSUES

ARGUMENT 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

A. Introduction

In the preceding arguments Lucas demonstrated that trial transcripts should not have been sent into the deliberation room in response to juror requests for readback of testimony. However, even if such a procedure were constitutionally permissible, transcripts should not have been submitted unless accompanied by a strong and complete admonition concerning the jury's use and consideration of the transcripts.

In the present case, numerous transcripts of selected testimony were given to the jury during their deliberations (at both the guilt and penalty trials) without any instruction as to the use of such transcripts. Because this procedure was fraught with the danger of undue influence and other prejudices, the judge's failure to admonish the jurors regarding their use of the transcripts was reversible error.

B. Legal Principles

The judge bears the ultimate responsibility, under California law and the federal constitution, to control and supervise any readback of testimony to the jurors during deliberations. (Penal Code § 1138; 6th and 14th Amendments; see also § 2.11.1, pp. 700-26 above, incorporated herein.) Elsewhere it is argued that this responsibility cannot be properly met by

allowing the jurors to read back testimony to themselves. (*Ibid.*)

However, even if such a procedure were conceptually proper, the jurors should first be admonished regarding the mechanics of the readback before being given the transcripts. As in the analogous situation where written instructions are given to the jurors to review on their own in the jury room, there is inherent uncertainty:

> If, for example, written copies of the instructions are given to each juror, a divergence in literacy and reading comprehension may well leave some jurors uninstructed. On the other hand, if the foreman is directed to read the instructions to the other jurors, defendant is deprived of the opportunity to witness the manner in which the foreman intones the instructions. A judge is obligated to act in an impartial and unbiased manner in delivering instructions. He may not sneeringly describe the defendant's defense or make editorial comments while reading the instructions. A jury foreman is under no such constraint once the case has been submitted.

(*State v. Norris* (Kan. App. 1985) 10 Kan.App.2d 397 [699 P.2d 585, 588].)

Moreover, as with individual written instructions, submitting transcripts of only a portion of the testimony is conducive to "overemphasis of isolated parts. . . ." (*United States v. Schilleci* (5th Cir. 1977) 545 F.2d 519, 526.) The concerns regarding submission of a transcript to the jury in response to a request for a readback of testimony were summarized in *United States v. Rodgers* (6th Cir. 1997) 109 F.3d 1138: "This court has recognized 'two inherent dangers' in allowing a jury to read a transcript of a witness's testimony during its deliberations. [Citation.] First, the jury may accord 'undue emphasis' to the testimony; second, the jury may apprehend the testimony 'out of context.' [Citation.] These dangers are 'escalated' if the jury makes the request after reporting an inability to arrive at a verdict. [Citation.]"

Hence, it is imperative that the jury be admonished to "weigh all the evidence and not give undue focus to any one portion of the trial." (*United States v. Hernandez* (9th Cir. 1994) 27 F.3d 1403, 1408; see also *United States v. Lujan* (9th Cir. 1991) 936 F.2d 406, 412.)

"Whenever a district court grants a jury's request to review some of the testimonial evidence presented at trial, there exists a real danger that the jury will emphasize this evidence over the other evidence. Therefore . . . if a district court chooses to give a deliberating jury transcribed testimony, or chooses to re-read testimony to a deliberating jury, the . . . court must give an instruction cautioning the jury on the proper use of that testimony." (*United States v. Rodgers* (6th Cir. 1997) 109 F.3d 1138, 1144-45; see also *United States v. Epley* (6th Cir. 1995) 52 F.3d 571, 578-79; *United States v. Sandoval* (9th Cir. 1993) 990 F.2d 481, 486-87 [no abuse of discretion to allow readback where court cautioned jurors about giving full consideration to entirety of testimony, and offered to have additional portions, or entire testimony, read if jurors requested]; *Mullins v. State* (Ala. Crim. App. 1977) 344 So.2d 539, 542 [court avoided undue emphasis of testimony]; *Evans v. State* (Ga. App. 1978) 148 Ga.App. 422 [251 S.E.2d 325, 327] [court cautioned jury that undue emphasis on the reread testimony was improper].)

C. The Failure To Give Any Cautionary Instructions In The Present Case Violated Lucas' Federal Constitutional Rights

In the present case no instructions whatsoever were given to the jury regarding its use of the transcripts which were sent into the jury room during deliberations. Numerous transcripts of crucial testimony were simply handed over to the jury without any guidance or supervision as to their use. (See § 2.11.1(B), pp. 700-07 above, incorporated herein.) This failure violated Lucas' state and federal constitutional rights to fair trial by jury, due process,

compulsory process, effective assistance of counsel and verdict reliability. (Cal. Const. Art I, sections 1, 7, 15, 16 and 17; U.S. Const. 6th, 8th and 14th Amendments.)

Further, because Lucas was arbitrarily denied his state created rights under California law, including Penal Code § 1138, 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.)

D. The Error Was Prejudicial

Because the effect of the error was to undermine the fairness and reliability of the entire penalty trial, it should be reversible per se as structural error. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

The guilt judgment should also be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

2.11 DELIBERATION ISSUES

ARGUMENT 2.11.4

THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON

The judge left the jurors entirely on their own regarding the foreperson by merely instructing:

> You shall now retire and select one of your number to act as foreperson. He or she will preside over your deliberations. (CT 14355.)

As a result, the foreperson was permitted to exercise undue influence over the other jurors thus undermining the fairness and reliability of the guilt and penalty deliberations. Therefore, guilt and penalty judgments should be reversed.

It is axiomatic that all twelve jurors should have equal standing in the deliberations process. However, by requiring the jury to select one juror as the "foreperson," the judge creates a danger that the foreperson will have undue influence over the deliberations. Hence, a clear admonition regarding the foreperson's duties should be given. (See *State v. Mak* (Wash. 1986) 105 Wn.2d 692, 753 [718 P.2d 407]; see also Federal Judicial Center, *Pattern Criminal Jury Instructions No.* 58, ¶ 1 [Selection Of Foreperson; Communication With The Judge; Verdict Forms] (1988); see also *Idaho Criminal Jury Instructions*, ICJI 207 [Presiding Juror] (Idaho Law Foundation, Inc., 1995); *Iowa Criminal Jury Instructions* 100.18 [Duties Of Jurors-Selection Of A Foreman/Forewoman] (Iowa State Bar Association, 1991); *Montana Criminal Jury Instructions*, MCJI 1-006 [Jury Deliberation]

(State Bar of Montana, 1990); Dinse, Berger, & Lane, *Vermont Jury Instructions - Civil & Criminal* 5.09 [Instruction: Foreperson] sent. 3 (Lexis, 1993).)[499]

Moreover, the jurors should also be specifically instructed that the foreperson's vote carries no greater weight than the vote of any other juror. (*State v. Mak, supra*, 105 Wn.2d at 753.) As the elected leader of the group, the foreperson may naturally have more influence than the other jurors. Some experts have concluded that as a general rule the chairperson of a committee tends to be "more powerful." (See e.g., *United States v. Abell* (D.C. 1982) 552 F.Supp. 316, 321.) "Given the available evidence. . .in general, one would expect the foreperson to have some more influence than any other member of the [grand] jury; which is not to say that [in] each and every instance that will occur. But on the average [the foreperson] is more likely to have more influence than anyone else." (*Ibid.*, see also *United States v. Snell* (5th Cir. 1998) 152 F.3d 345, 346 ["the foreperson's position as jury foreman may have increased his ability to influence jury deliberations"]; *United States v. Estrada* (8th Cir. 1995) 45 F.3d 1215, 1226 [potential influence of improper statement upon the jury's deliberations "was particularly strong because [the person making the statement] was the foreman"]; *United States v. Delaney* (8th Cir. 1984) 732 F.2d 639, 643 [same].)

In sum, the lack of instruction on the foreperson's duties and powers failed to assure that the deliberations were full, fair and free of undue

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[499] E.g., "It is the foreman's duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury." (*State v. Mak* (Wash. 1986)105 Wn.2d 692, 753 [718 P.2d 407].)

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.)

Further, because the error arbitrarily denied Lucas his state created rights 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.)

The state law errors discussed in the present argument and throughout this brief cumulatively produced a trial setting that was fundamentally unfair and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (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 .)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'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.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

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.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

2 JACOBS CASE

ARGUMENT 2.12

CUMULATIVE ERROR: JACOBS

A. Introduction

The arguments below address the cumulative effect of the errors identified throughout this brief. The term "cumulative" refers to all the errors identified in the Jacobs briefing (Volume 2) as well as the errors in the Santiago (Volume 3), Swanke (Volume 4) and/or Strang/Fisher briefing (Volume 5), all of which could have affected the Jacobs' verdicts by virtue of the ruling allowing cross-admissibility of all the charges.

B. The Errors Cumulatively Violated The Federal Constitution

State law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

In the present case Lucas' trial on the Jacobs charges was fundamentally unfair because the numerous state law and federal constitutional errors precluded Lucas from adequately defending against the charges and the jurors' verdict from meeting the heightened reliability requirements constitutionally mandated in a capital proceeding, and deprived Lucas of his rights to due process, fair trial by jury, confrontation, compulsory process, representation of counsel and the right to present a defense, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (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; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

C. The Errors Were Cumulatively Prejudicial

The errors were also cumulatively prejudicial. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial: the combined (aggregate) prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone]; *Delzell v. Day* (1950) 36 Cal.2d 349, 351; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180; *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520.)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.) Accordingly, this Court's review of guilt phase errors is not limited to the determination of whether a single error, by itself, constituted prejudice.

In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, Lucas has identified numerous errors that occurred during the guilt and penalty phases of his trial. Each of these errors individually, and all

the more clearly when considered cumulatively, deprived Lucas of due process, of a fair trial, of the right to compulsory process and to confront the evidence against him, of a fair and impartial jury, of the right to present a defense, of the right to representation of counsel, and of fair and reliable guilt and penalty determinations in violation of Lucas' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself, is sufficiently prejudicial to warrant reversal of the guilt and/or death judgment. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

D. The Jacobs Errors Were Prejudicial As To The Santiago And Swanke Convictions

The errors raised in Volume 2 are directly applicable to the Jacobs charges. However, the prejudicial impact of those errors also extended to the Santiago and Swanke charges because of the judge's cross-admissibility ruling which allowed the jurors to rely on Jacobs to convict in Santiago and/or Swanke. Hence, because the Jacobs convictions should be reversed, the Santiago and Swanke charges should also be reversed under both the state (*People v. Watson* (1956) 46 Cal.2d 818) and federal (*Chapman v. California* (1967) 386 U.S. 18) standards.[500]

E. The Swanke And Santiago Errors Were Prejudicial As To Jacobs

Because the Jacobs case was closely balanced and the jurors were allowed to consider the Santiago and Swanke charges to convict on Jacobs, the errors in the Santiago (see Volume 3, pp. 747-1062, incorporated herein) and Swanke (see Volume 4, pp. 1063-1246, incorporated herein) cases were

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[500] See Volume 3, § 3.4.2(E)(1), pp. 906-12 and Volume 4, § 4.3(L), pp. 1144-45, incorporated herein [discussing evidentiary balance in Santiago and Swanke].

prejudicial as to Jacobs.

Moreover, because the errors 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 errors 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.