SUPREME COURT

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)

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 6

Pages 1373 - 1566

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Court of California

DEATH PENALTY

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VOLUME 6

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.1 PENALTY PHASE STATEMENT OF CASE

A. Trial

On July 6, 1989, the defense requested that the jury be voir dired again prior to the commencement of the penalty trial. This request was denied. (CT 5574.) As to the issue of Lucas' prior conviction, the defense raised all previous objections. (CT 5574.) Lucas was advised of his right to a separate jury trial on the issue of his prior felony conviction. Lucas waived his right to a jury trial and agreed to a court trial on the issue.[1142] The prosecution also waived their right to a jury trial on the issue. (CT 5574.) The judge found

[1142] The 1973 prior was both (a) alleged as a noncapital sentencing enhancement and (b) a penalty phase aggravator. It was in connection with the prior's role as a noncapital sentencing enhancement that Lucas waived the right to jury trial.

beyond a reasonable doubt that Lucas had suffered the prior conviction and found the prior true. (CT 5575.)

On July 10, 1989, the judge pre-instructed the jury and the penalty trial commenced. (CT 5576.) Counsel stipulated that in 1973 Lucas' was convicted of rape in violation of Penal Code § 261. (CT 5576.) This stipulation was the only affirmative aggravating evidence presented by the prosecution.[1143]

The defense presented a number of mitigation witnesses, including psychological expert Alvin Marks. (See § 6.2(B)(4), pp. 1408-15 below, incorporated herein.) An issue was raised concerning whether Dr. Marks had received and considered a social history assembled by the defense and whether Dr. Marks' consideration of the social history should allow the prosecution to present Lucas' Atascadero records in rebuttal. The judge and attorneys met on the issue *in camera*, in the absence of Lucas, who was invited to leave by the judge. During the *in camera* hearing the parties agreed to stipulate to the Atascadero diagnosis of Lucas by Dr. Schumann. (See Volume 7, § 7.3.1(B), pp. 1570-73, incorporated herein.)[1144]

On July 13, 1989, an alternate juror was excused because she overheard a deputy attorney general make a comment about the case.[1145] However, the

---

[1143] Three other incidents were offered in rebuttal (see § 6.2(C), pp. 1426-30 below, incorporated herein) but the jurors were instructed not to consider these as factors in aggravation. (CT 14377.)

[1144] Dr. Schumann diagnosed Lucas as: "an antisocial personality, severe; [sic] alcoholism, habitual excessive drinking, and a sexual deviation, aggressive sexuality, and the prognosis was very guarded." (RTT 13025-26.)

[1145] The overheard comment was to the effect of "I hope they gas him." (continued...)

excused juror was allowed to remain seated with the other jurors for the duration of the trial. The juror was admonished not to tell the other jurors about the comment, or that she had been excused. (CT 5582-83.)

On July 17, 1989, the prosecution presented closing argument. A defense motion for mistrial based on prosecutorial misconduct during argument was denied. (CT 5586-87.) The defense then presented its closing argument. (CT 5586-87.)

The judge then instructed the jury and the jury commenced deliberations. (CT 5586-87.)

B. Deliberations

1. First Note From The Jurors (July 18, 1989)

On Monday, July 17, 1989, the jurors began their penalty phase deliberations. (CT 5587.) On July 18, at 11:15 a.m., the jury sent a note to the judge which read:

> Your Honor, it is the feeling of the jury that a unanimous decision is not possible. In addition, are we going to be able to keep our notes and jury instructions? B.P.,[1146] Junior, 11:15 a.m. 7/18/89. (RTT 13341; CT 24250.)

Out of the presence of the jury, the judge advised the parties that she was going to ask the jury to deliberate further. (RTT 13341.) The defense objected, arguing that the jury's use of the words "not possible" indicated that they were hopelessly deadlocked. (RTT 13342.) The defense also pointed out that the penalty phase was not lengthy (six days) and the jury had already

---

[1145](...continued)
(RTT 13022.)

[1146] To respect the jurors' privacy, only their initials will be used throughout this brief.

deliberated for a full four hours. Furthermore, the jurors already spent days going over the evidence in the case during the guilt phase deliberations. (RTT 13342.)

Also, the defense contended that sending the jury back to deliberate further would pressure the holdouts, whichever side they favored and would be an improper *Allen*[1147] charge. (RTT 13342-43.)

Judge Hammes ruled that, in view of the length and complexity of the case, the complexity of the instructions and the short amount of time that the jury had deliberated, she would send them back for further deliberations. (RTT 13343-44.)

Both the defense and prosecution thought the judge should inquire into whether the jurors felt further deliberations could be helpful and whether or not they were *hopelessly* deadlocked. The judge refused this request, stating that she would only ask them to deliberate further. (RTT 13345.)

2. The Judge's Response To The First Note

The judge responded to the jurors' first note as follows:

> I have received your note and it indicates that you feel at this point that the jury feels that a unanimous decision is not possible. I have taken that under consideration. I certainly respect the note and its import.
>
> The length and complexity of this case, the complexity of the facts and the instructions are such that I would ask that you attempt to deliberate a little further and that each of you examine your opinions in view of the other jurors' opinions, that each of you examine the instructions in light of all of the instructions together, and attempt to make sure that you do

---

[1147] *Allen v. United States* (1896) 164 U.S. 492.

understand each other's opinions fully and completely, and we will resume this afternoon.

I will ask that you attempt once again, if it is possible, and we will certainly respect if you have another note that says you can't do it. And if you can't do it, you can't and certainly no juror should feel pressure. No group of jurors should feel pressure, but we do wish that you would make every attempt, if you can. So I will ask that you come back this afternoon at 1:30. Have a pleasant lunch . . . (RTT 13346-47.)

The jurors continued to deliberate throughout the afternoon of July 18.

3. The Second Note From The Jury (July 19, 1989)

On the morning of July 19th, the court received another note from the jurors, asking about the consequences of deadlock and indicating that the jurors were in disagreement as to whether any further progress was possible from continued deliberations. (CT 5589). The note stated:

At this time, some help from the court would be beneficial, for the following reasons:

1. Some jurors have assumed that if no decision is reached, the life imprisonment penalty is automatic.

What happens in case of a deadlock?

2. Some jurors have made their decisions and feel that we should go home because no further progress is possible.

Some jurors feel that further progress is possible with direction from the court. (CT 24251.)

The defense renewed its motion for mistrial, which was denied. (CT 5589.) The defense then requested a polling of the jurors, which was also denied for the following reasons:

The Court: All right. I am going to deny that request at this stage. We are still in a very short time span for deliberations. Given the complexity and length of the case, and I also do not feel that polling at this time is called for as long as

> there are jurors that feel further progress is possible, with direction from the court. I think . . . that the court should give the minimal direction that's being asked for and should send them back to deliberate further. (RTT 13418.)

Judge Hammes ruled, over defense objection, that she would read the "appropriate code section out of the Penal Code" (Penal Code § 190.4(b), paragraph 2) to answer the question of whether life imprisonment is automatically imposed if the jury deadlocks. (RTT 13414.)[1148] However, the response was not yet given to the jurors. (CT 5589-91.) Instead, over the defense objection, the judge asked the bailiff to see if the jurors had any further questions. (RTT 13423-24.) The bailiff went into the jury room and inquired as to whether the jurors had additional questions, and if so, to put the questions in writing. (RTT 13425.) The bailiff returned and advised the judge that another note was forthcoming. (RTT 13426-27.)

[1148] Penal Code § 190.4(b) provides:

> If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.
>
> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

4. The Third Note From The Jury (July 19, 1989)

The third juror note again asked about the consequences of deadlock and also about what evidence and factors could be considered:

> 1. What happens in case of deadlock?
> 2. Does aggravating and mitigating circumstances pertain to whole trial or just to penalty phase?
> 3. Are we as jurors limited to the factors of consideration as given by court? (CT 24252; RTT 13427.)

The judge ordered the bailiff to ask the jury foreman to clarify the second question (RTT 13437) and the jurors responded:

> Clerification [sic] for question 2: Does evidence from whole trial pertain to juror decisions during penalty phase or just evidence from penalty phase may be used? (CT 24251; RTT 13438.)[1149]

The court drafted a proposed response and gave it to both parties for their review. (CT 24253-4.)

The defense contended that the response should remind the jurors of their "individual opinion and duty to deliberate" and to render their own individual opinion. (RTT 13448-49.) The defense also argued that the judge should admonish the jurors not to take any cue from the judge. (RTT 13451.) The court denied these requests. (RTT 13452-53.)

The defense stated that they were not waiving their objections, but that they agreed to the foregoing procedure only because their objections and motions for mistrial had been overruled. (RTT 13452-3.)

[1149] The bailiff returned the third note to the jury and the clarification to Question #2 was written on that note. (RTT 13438; CT 24252.)

5. The Court's Response To The Second And Third Notes (July 19, 1989)

In the early afternoon on July 19, the judge gave the jurors the following written response to their questions:

> 1. What happens in case of deadlock? The Penal Code provides that "if the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be."
>
> The issue of what happens next in the event of a deadlock is a matter that should not concern you nor should it enter into your deliberations in any way.
>
> 2. Does evidence from the whole trial pertain to juror decisions during penalty phase or just evidence from penalty phase may be used?
>
> Answer: Evidence of the circumstances of the crimes of which defendant was convicted, and the finding of the special circumstances in the guilt phase may be considered in the penalty phase insofar as such evidence is relevant to factors in aggravation or mitigation. Such evidence may be considered in the penalty phase just as if it had been presented in the penalty phase.
>
> The exception is that no evidence relating to the Garcia and Strang/Fisher cases may be considered by you in the penalty phase.
>
> Please refer to page 17 and 18 of the written instructions for a list of the aggravating and/or mitigating factors.
>
> Please note that the only possible aggravating factors in this case are those that would fall within subsections (a), (b) and (c) of page 17.
>
> You may view factors (a), (b), and (c) as aggravating and/or mitigating. All other specifically enumerated factors listed on pages 17 and 18 must be considered as possible mitigating factors. They cannot be considered as possible aggravating factors. In addition, factor (j) is a "catch-all" mitigating section.
>
> In addition to the specifically enumerated mitigating

factors and the catch-all mitigating section (j), you may for the defendant consider pity, sympathy and mercy and lingering doubt. (See pages 21, 23 and 30 of the written instructions.)

3. Are we as jurors limited to the factors of consideration as given by the court?

Answer: Yes. Please refer to pages 17, 18, 23 and 30 of the written instructions.

As you have been previously instructed, you are to consider each instruction in light of all the other instructions and you are not to single out any particular sentence or any individual point or instruction and ignore the others.

If there is any further question regarding the law or what evidence you may consider in this phase of trial, do not deliberate any further, but bring your questions to the court. (CT 24253-54.)

After sending the written response the judge excused counsel and the jurors resumed deliberations. (RTT 13453-54; CT 5589-90.)[1150]

6. Supplemental Instruction Following Inspection Of The Deliberation Room (July 19-July 20, 1989)

Later that same day, July 19th, the judge called counsel into court, out of the jurors' presence. (RTT 13455; CT 5590.) At that time she stated:

[1150] It is unknown whether the jurors continued to deliberate while awaiting the response to the note. The minute order reads as follows: "EX PARTE: At 9:02 a.m. all jurors are present and retire to continue deliberations. At 9:34 a.m. a note is received from the jury. All counsel are notified to report to Court. At 10:29 a.m. jury break. At 10:43 a.m. jury resumes deliberation." (CT 5589.) The second note was received at 11:27 a.m. and amended by the jury at 11:50 a.m. The jury was excused at 11:59 a.m. for the noon recess and directed to return at 1:30 p.m. "for further instructions from the court." (CT 5589.) At 1:43 p.m. the court convened with counsel, and a discussion ensued as to the court's response to the note. (CT 5589.) At 1:49 p.m. the jury was returned to the jury room to continue deliberations. (CT 5590.)

> I have called you back because . . . some questions arose in my mind with respect to the jury's questions that we dealt with this afternoon, and it seemed to me that their questions were going to the very fundamental basis of what evidence they can consider, which took me by surprise.
>
> And I began to wonder what condition the jury room was in at the time that they were put back into the jury room. So I asked Deputy Ching to tell me what condition the room was left in. (RTT 13455.)

Deputy Ching told her that the guilt phase exhibits (including the Strang/Fisher and Garcia evidence) were all in the file drawers, indicating that they had not been moved. (RTT 13456.) On the basis of the bailiff's observations Judge Hammes concluded that the jurors had not been considering the guilt phase evidence. (RTT 13456-57.) The judge stated that, based on the bailiff's observations of the deliberation room, she was afraid the jurors felt the guilt phase evidence was untouchable in the penalty phase. (RTT 13460.) This conclusion was also based on the judge's own observations of the deliberation room during the guilt trial. (RTT 13456-57.)

The defense objected to the bailiff's observations as an invasion of the jury's province and that the jury should not be disturbed with any further, unsolicited supplemental instructions. (RTT 13458-59.)

The prosecution agreed with the judge's concern that the jury may not have been looking at the guilt phase exhibits. The prosecutor argued that the judge should inform the jury that the exhibits were available for them to view. (RTT 13459.)

The defense objected, contending that this was a critical stage, and the judge would be suggesting to the jury that it should focus on the facts of the crime; to do this a second time within 24 hours would communicate an adversarial posture. (RTT 13462-23.)

After the jury was excused for the day, the defense requested the opportunity to inspect the jury room themselves to corroborate the assertions that were made. (RTT 13473.) This request was denied. (RTT 13473.) The judge asked the bailiff if any of the evidence had been moved. The bailiff responded that, unlike the guilt phase, none of the exhibits had been moved. The judge said that she would take that into consideration. (RTT 13475.)

The next day, the judge gave counsel copies of her proposed response to the jury. The court said, "Deputy Ching caught me this morning and said in emptying the trash cans last night, as he was doing this, looking a little more deeply he noticed that one exhibit had been moved . . . ." (RTT 13476.)

The defense objected to any instructions as to what evidence should be considered. (RTT 13477.) The defense contended that, since an exhibit had been moved, the concerns were no longer present and the jurors should be free from outside influences. (RTT 13478.) The defense also noted that the jurors heard all the guilt phase evidence and deliberated over it for eight days. (RTT 13481.)[1151] According to the defense, the proposed note from the judge would effectively communicate her belief to the jurors. (RTT 13482.) The judge overruled the defense objection. She concluded that her proposed note was completely neutral and was generated as a result of the jury's question, so she would send it in. (RTT 13483.)

The defense also objected on the basis that the note would raise a problem with the Strang/Fisher and Garcia evidence still in the jury room. (RTT 13483.) The judge responded that the note would instruct the jurors not

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[1151] The jurors also received numerous transcripts of the specific guilt phase testimony which they had requested. (See Volume 2, § 2.11.1(B), pp.698-705, incorporated herein.)

to consider that evidence. The defense argued that the note impacts the jurors' subjective reasoning power and emphasize those exhibits which they were not to consider. The judge said that this would be a matter of defense appeal, as it would be impossible to go through and separate all of the individual pieces of evidence relating to Strang/Fisher and Garcia. (RTT 13484.) The defense continued to object, contending that the jurors have an absolute right *not* to look at exhibits they had already seen and considered. (RTT 13485.) The judge ruled that the supplemental instruction would be given to the jurors. (RTT 13487.)

Accordingly, the jurors were given the following written instruction:

> Ladies and Gentlemen:
>
> A matter of clarification. In case there is any question, the jury should understand it has access to the following during deliberations at the Penalty Phase:
>
> Jury Instructions, Jurors' Notes, Exhibits, and Verdict Forms from the Penalty Phase.[1152]
>
> Jury Instructions, Jurors' Notes, and Exhibits from the Guilt Phase. (Except: The Jury must exclude from consideration those Guilt Phase Instructions, Notes and Exhibits relating to the Garcia and Strang/Fisher cases.)
>
> The jury may also request from the court: 1) answers to legal questions, and 2) transcripts of testimony as needed. (CT 24265.)

7. Proceedings Regarding Discharge Of Juror D.O. (July 21-July 24, 1989)

On Friday, July 21, 1989, Juror D.O. telephoned the court and said that he was ill. (RTT 13489.) Therefore, no deliberations were held that day.

[1152] The guilt phase jury instructions were relevant because the jurors were required to consider any guilt phase instruction that was not in conflict with the penalty phase instructions. (CT 14537; see also RTT 13486.)

However, the following two notes were received by the court from the jury:

> We the jurors feel that Mr. D.O. for the last 2 days threatened not to show up. Mr. D.O feels that we should stop deliberating and go home. All the jurors do not feel this way. In that last night he said he would not show up and today he is not here, we feel he has purposely elected not to appear. [B.]P. (RTT 13489; CT 24255.)

and

> Mr. D.O. has throughout our deliberations been reading his book. We do not feel he has participated in the deliberations to the same extent as the other jurors. It was mentioned to Mr. D.O. during deliberations that he was not participating. His response was that he is even though he's reading his book. [B.]P. (RTT 13489; CT 24256.)

The notes were signed by the foreperson, B.P. The defense moved for a mistrial based on these notes. The judge denied the mistrial motion, stating:

> The issue is if he or she is discharging his duties and that is the question.
>
> The immediate thing is that I will not grant a mistrial based on this note. I think this note is suggesting quite clearly that there may be a juror who is not discharging his duty.
>
> Now, the question is how we handle it from there. Since I am going to deny any motion for mistrial based on these notes, the question is how do we go from here. (RTT 13495.)

On the following Monday, July 24, 1989, the jury foreman was questioned by the judge and counsel concerning Juror D.O.'s refusal to deliberate. (RTT 13517-37.) Juror D.O. was then questioned by the court and counsel. (RTT 13527-37.) Juror D.O. was dismissed based on the judge's finding that he had failed to discharge his duty to deliberate under Penal Code § 1089, and that he had perpetrated a fraud on the court. (RTT 13543; 13552-54; CT 5593.)

8. Juror L.G.'s Visit To San Quentin (July 24, 1989)

On July 24, 1989,[1153] an additional juror note was received alleging that, during the break in deliberations, Juror L.G. had visited someone in San Quentin Prison.[1154] The foreperson, Juror B.P., stated that Juror L.G. had visited someone in San Quentin and told the other jurors about the visitation procedures and his feelings about prisons in general. (RTT 13524-25.) The defense declined to examine B.P. further on the subject and no further inquiry was conducted as to Juror L.G.'s visit to San Quentin. (RTT 13525; 13527.)

9. Extrinsic Evidence Regarding 1973 Rape

On the morning of July 24, 1989, Juror C.D. (RTT 13560-62) and Juror L.G. (RTT 13565-69) were questioned by the judge concerning the 1973 rape victim. (RTT 13571; CT 5594.) This inquiry was prompted by a note from Juror C.D. stating that Juror L.G. had allegedly given the other jurors information about the rape victim. (RTT 13505; CT 24257; see n. 1154, above.) The inquiry revealed that it was actually Juror D.O. who revealed the

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[1153] The note was erroneously dated July 23, 1989. (CT 24257.)

[1154] This note also alleged that Juror L.G. had given the other jurors information about the 1973 rape victim that had not been revealed at trial. (RTT 13505; CT 24257.) The note stated:

> Your Honor:
>
> I feel I should tell you that L.G. visited someone in San Quentin Prison during the break after the guilt phase of the trial. He also told us some information about the rape victim that I believe did not come from the trial.
>
> [Juror] C.D.

information about the rape victim. (RTT 13524-25; 13527-30.)[1155] The court then questioned the remaining jurors as to any information they may have received about the 1973 rape victim. After the inquiry, the judge ruled that deliberations should go forward. (RTT 13616.)

10. Substitution Of Alternate Juror T.W. For Juror D.O.

Alternate Juror T.W. replaced Juror D.O. (RTT 13624-26; CT 5594.) The judge instructed Juror T.W. as to the guilt phase verdicts, and that the Garcia and Strang/Fisher verdicts were not to be considered for any purpose. (RTT 13624-25.) Thereafter, all jurors were instructed to begin deliberations anew. (RTT 13627.)

11. Notes Regarding The Death Of Juror P.W.'s Father (July 24-July 25, 1989)

During the penalty deliberations two notes were sent stating that the father of one of the jurors had died. However, the notes were treated as scheduling matters which had become moot in light of previous scheduling rulings. Consequently, defense counsel was never informed about the notes. (See Volume 7, § 7.7.6(A), pp. 1712-14, incorporated herein.)

12. Jurors' Requests For Atascadero Diagnosis; Testimony Of Dr. Marks And Lucas' Mother

On July 31, 1989, the jury requested and received (at 1:34 p.m.) the

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[1155] The jury foreman informed the court that it was Juror D.O., not L.G., who related the information about the 1973 rape victim. Apparently the rape victim, a domestic worker, had been employed by some of D.O.'s acquaintances. (RTT 13524; 13528-30.) However, Juror C.D. said that it was L.G. who related the information about the rape victim. (RTT 13561.) When questioned, L.G. told the court that it was D.O. who had related the information about the rape victim having been employed as a domestic worker. (RTT 13566.)

transcript of the stipulation of Dr. Schumann's diagnosis of Lucas at Atascadero. (RTT 13025-26; CT 24263.) The jurors also requested and received additional transcripts for two witnesses, Dr. Marks and Patricia Katezenmaier. (CT 5582.)

C. Verdict; New Trial And Modification Motions

On August 1, 1989, the jury did not deliberate because one of the jurors was ill. (CT 5599.)

On August 2, 1989, at 10:34 a.m., the jury returned a verdict of death. (CT 5600; 14861.)

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

On September 19, 1989, the defense motions for a new trial and for modification of the verdict were denied. (CT 5604.) Judge Hammes concluded that the aggravating factors substantially outweighed the mitigating factors and that the verdict of death was warranted. She entered a judgment of death. (CT 5604.)

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

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.2 PENALTY PHASE STATEMENT OF FACTS

A. Prosecution Evidence: Case In Chief

The prosecution presented a set of court documents marked as People's Exhibit 271 and a stipulation that on August 16, 1973, David Allen Lucas, was convicted of the crime of forcible rape in violation of Penal Code § 261, and that Lucas was armed with a knife in the commission of the offense. (RTT 12597.)[1156] This prior conviction was offered under aggravating factor (c) (prior felony conviction) and factor (b) (prior violent criminal conduct). (See § 6.6.1(A), p. 1559-60 below, incorporated herein.)

B. Defense Evidence

1. Family And Background

Patricia Lucas-Katzenmaier, David Lucas' mother, testified that she and her husband Clarence, who was in the Navy, were living in the Philippines when David was born. Two years later they returned to California. (RTT 13043-44.)

All of the Lucas children were baptized, went to Catechism and Confirmation. David became an altar boy in the Our Lady of Grace Catholic Church. (RTT 13045-46.)

When he was young, David had problems with bed-wetting. (RTT

[1156] It was stipulated that the documents contained in Exhibit 271 were true and accurate copies from the 1973 court file and that the individual named in Exhibit 271 was the same David Allen Lucas named in the instant proceedings. (RTT 12597.) Judge Hammes admonished the jurors that the stipulated matters were given to them as proven facts. The prosecution then rested. (RTT 12597-98.)

13044.) When David wet his bed his father, Clarence, scolded and spanked him. (RTT 13044-45.) David suffered from asthma from an early age. (RTT 13044.) He had medicine for the asthma, but sometimes it got so bad David had to go to the hospital. (RTT 13044.) David was allergic to grass pollen and would get sick from mowing the lawn. Still, his father forced him mow it. (RTT 13046-47.)

Clarence had a fiery temper which he readily exhibited around David and the other children. (RTT 13045.) At times Clarence would pull the plugs out of the television; sometimes he pulled the phone out of the wall. (RTT 13045.) At times, Clarence used profanity, and sometimes he punched holes in the walls with his fists. (RTT 13045; 13049.)

David loved playing Little League baseball. (RTT 13047.) David's mother went to the games as often as she could, but his father never attended. (RTT 13047.) Clarence went hunting and fishing during the weekends, and a lot of the family's money went toward the boat and the fishing equipment. (RTT 13047.) Clarence took his friends fishing, but did not take the kids with him. (RTT 13048.)

When David was five years old, his mother worked nights while Clarence stayed home with the children. (RTT 12653; 13048.)[1157]

When David was around 15-years-old, his mother and father separated. (RTT 13048.) However, Clarence would not let her go to court for the divorce. (RTT 13048.) David took his mother aside and asked her to give his dad another chance. (RTT 13049.) She agreed. (RTT 13049.)[1158]

[1157] She did not like to leave her kids with babysitters. (RTT 13048.)

[1158] Eventually, however, she left Clarence for good. (RTT 13049.)

In 1974, David was sent to Atascadero State Hospital as a result of his 1973 rape conviction. (RTT 12756; 12764.) His mother visited him at Atascadero as much as she could. (RTT 13049.)

After his arrest in 1984 for the charges in the present case, David's mother telephoned and visited him at the jail as much as possible. (RTT 13049-50.) David often gave his mother advice. (RTT 13050.) David's mother considered her three children her three best friends. (RTT 13050.) She asked the jury to spare her son's life. (RTT 13050.) She testified that she loved David, that he was a good person and that she believed he was innocent. (RTT 13050.)

Cathy Lucas McEvoy was one year older than her brother, David Lucas. (RTT 12658.)[1159] David would have asthma attacks and could hardly breathe at times. (RTT 12660.) When they were very young, she and David shared a room. (RTT 12658.)[1160] She and David were best friends, and as they grew up she talked with David about "everything." (RTT 12662-64.)[1161]

Their father Clarence worked from around 7 a.m. until 5 p.m. (RTT 12659.) Their mother worked in the evenings, and during this time they were alone with their father. (RTT 12659.) Clarence did not let the children speak

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[1159] The defense introduced Exhibit 735, a photograph of Cathy and David taken when they were four and five years-old (RTT 12659-60); and Exhibit 736, a photograph of the three Lucas children with their grandparents taken sometime later than Exhibit 735. (RTT 12663.) They also introduced Exhibit 737, a photo of David and Cathy at their mother's wedding when she remarried. (RTT 12669.)

[1160] It was about the time when she was in first grade and David was in kindergarten. (RTT 12568.)

[1161] On cross-examination, Cathy testified that during their childhood years, she and David sometimes got into arguments. (RTT 12672-73.)

at the dinner table, and he would hit them, closed-fisted, if they did. (RTT 12661.) The children had to finish everything on their dinner plates. (RTT 12661.) One time at dinner, Cathy became sick to her stomach and vomited salad onto her plate. Clarence forced her to eat it, in front of the other children. (RTT 12661.)

Clarence was a very cold man. He used to pick on Cathy when she was younger. When David got older, Clarence started picking on him more. (RTT 12660.) Not only did their father hit them with his fists, but sometimes he used a belt or a telephone cord. (RTT 12662.) If they cried, Clarence got angrier. (RTT 12662.) When David was 16 or 17 years-old, Clarence chased him with a two-by-four board. David had enough, and told his father that if he hit him, he would hit back. (RTT 12662.) The abuse continued until their parents separated. (RTT 12662.)

When neighborhood bullies picked on Cathy, David stuck up for her. (RTT 12663.) One time some boys tried to force Cathy to take her clothes off. (RTT 12663-64.) David came to her defense and shoved the boys while Cathy ran way. (RTT 12664.)

Cathy married Jim Graves in 1972. (RTT 12664; 12718-19.) David was very close to Cathy and her husband. (RTT 12664-65.) If the Graves were low on food, David would bring bags of groceries. (RTT 12665-66.) The Graves had two children, Trisha and Timmy. (RTT 12665.) David was very good with children. If the children needed something, he helped and provided what they needed. David took Timmy fishing and paid for Trisha's modeling school. (RTT 12666.) David talked to Trisha if she got out of hand. When Trisha did not want to go to school, David told her that she should go and make something of herself. (RTT 12666.) David loved

Cathy's children as well as the other children in the family. (RTT 12666.)

In 1973, while David was in custody, Cathy visited David, talked to him on the phone and wrote letters to him. (RTT 12664-65.)

When David started his carpet cleaning business, he asked Cathy and her husband to go into business with him. (RTT 12666-67.) Cathy was pregnant at the time and didn't want to spend too many hours away from her child. (RTT 12667.) Cathy saw David build the company from a few dollars into a successful business. (RTT 12667.)

Cathy and David remained close; he was her best friend. If she had a problem, she could call David and he would be there to help. (RTT 12667.) David was very caring to everybody. (RTT 12668.)

David had a daughter, Christina, with a woman named Donna Ellis. (RTT 12643; 12666.) He took care of Christina and played with her often. (RTT 12666.)

David married a woman named Shannon who had a son named Wesley. (RTT 12668.) David was good to Wesley. (RTT 12643-44; 12668.) One day while they were at Cathy's house, Shannon swatted Wesley hard and David told Shannon not to hit Wesley. (RTT 12668.) It was as if Wesley was his own child. (RTT 12668.)

After David's arrest in 1984, Cathy visited him in jail and wrote to him. Cathy talked to David on the phone every day. (RTT 12669-70.) Cathy was aware that David had been convicted of special circumstances murder and attempted murder. (RTT 12670.) Cathy asked the jury to save her brother; execution would hurt her children and family. (RTT 12670.) Cathy did not believe that David was guilty of the crimes of which he was convicted. (RTT 12673.) Cathy testified that she loved her brother very much and would do

almost anything to help him. She stated that her testimony was the truth. (RTT 12673-74.)

Cathy's first husband, Jim Graves, observed David interact with Cathy and their children. (RTT 12718-19.) His children, Tim and Trisha, were fond of David. (RTT 12719.) They always talked about the things they did with him. For example, David got Tim his first fishing pole, and took him on fishing trips. (RTT 12719.) Tim talked about the fishing trips and the times he went to David's house and played games with David. (RTT 12719-20.)

Jim Graves remembered that David had barbeques and social gatherings which David organized himself. When Jim Graves and Cathy had arguments, David helped Graves get his feelings straight. (RTT 12720.) David was like a good friend to Graves; he lent an ear, listened to what he had to say, and helped him out. (RTT 12720.) David also helped Graves work on his cars. (RTT 12721.) Graves was aware of David's convictions and heard some of the details of the crimes. Even so, he wanted David's life to be spared. (RTT 17721.)

Mark McEvoy first met David around 1981, at Cathy's house. (RTT 12641.) They socialized at family "get-togethers" and elsewhere. (RTT 12641-42.) Sometimes David helped McEvoy with projects, such as working on McEvoy's truck. (RTT 12642-43.) They also went to baseball games together. (RTT 12643.) In terms of business, McEvoy considered David someone with a lot of initiative. (RTT 12643)

Mark McEvoy's step-daughter, Trisha, got along very well with David. (RTT 23642.) David and Trisha talked to each other a lot, and Trisha looked up to David. (RTT 12642.) David was a very good influence on Trisha; she listened to him and took his advice. (RTT 12642; 12646.) David

demonstrated concern for other people. (RTT 12644; 12646.)

Mark McEvoy was aware of David's convictions. (RTT 12644-45; 12647.) Nevertheless, Mark felt David was a human being worth saving; his death would only be compounding tragedy upon tragedy. (RTT 12648.) Mark felt that David could do constructive things within the prison system. (RTT 12648.) Furthermore, David's family would be devastated if David were sentenced to death. (RTT 12645.)

Candy Graves married Jim Graves in 1980. (RTT 12722.) She noticed David acted like a gentleman and was always polite. If she walked into the room, David would give his chair to her. On one occasion, David babysat Candy's daughter and Trisha. When her daughter got home she was very excited; she had a really good time. David played games and talked with the children and treated them like they were real people, instead of little kids. (RTT 12723.) Candy's step-son Timmy talked many times about the things he and David did together. (RTT 12724.) Candy Graves trusted David with her kids. (RTT 12723.)

Candy knew the details of David's convictions. (RTT 12724-26.) Candy did not feel David should be given the death penalty. (RTT 12726.) She asked the jury to give David life in prison. (RTT 12724-25.)[1162]

12 year-old Timmy Graves thought that David was a good uncle. (RTT 12727; 12729.) David did nice things for him, like taking him fishing and for car rides. David played games and watched television with him. David was fun to be with and made his laugh. Timmy Graves thought the appropriate punishment for his uncle would be life in prison. (RTT 12727-28.)

[1162] Since David's arrest in December 1984, Candy wrote him letters and sent him cards. She also spoke with him on the phone. (RTT 12724.)

16 year-old Trisha Graves remembered that her uncle David did a lot of things for her. (RTT 12771-73.) He paid for her modeling school and was always there to talk about her problems. (RTT 12772.) Every year, when she wanted something special for her birthday, David was always the one to get her that special thing. (RTT 12772.) When she was a small child her parents were going through a divorce. She and her brother were eating cereal to survive. David found out that they did not have any food or money, and he bought them groceries. (RTT 12772.)

She used to spend the night at David's house with David and his wife and their children, Christina and Tiffany. (RTT 12772-73.) Trisha loved her uncle David very much and thought he was innocent. She wanted the jury to let him live. (RTT 12773-74.)

David's younger[1163] brother Donald thought their father treated David very poorly. He saw their father hit and abuse David on numerous occasions. When his father hit David, it scared Donald, and he hid behind the furniture. (RTT 12740-41.) Donald never heard their father give David praise. (RTT 12744.) If something was spilled at the dinner table, Clarence would react with violence. Spilled milk was "sudden death" – their father would punch them very, very hard, with closed-fists. (RTT 12742; 12744.) No elbows were allowed on the table and there was no talking at the table. No television or radio was permitted during dinner. (RTT 12742.) Clarence was much harder on David than any of the other children; David got the worst of it. (RTT 12742.) Clarence warned them that if they told their mother about being hit they would get worse treatment the next day. (RTT 12743.) The abuse never occurred in front of their mother; it happened while she was at

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[1163] Donald was about six years younger than David. (RTT 12740.)

work. Their mother had no idea what was going on at home. (RTT 12742.)

As far as Donald could remember, Clarence was not a father to him. (RTT 12745-46.) David was more of a father to Donald, and was also a good friend. (RTT 12742.) He spent a great deal of time with David while growing up. (RTT 12742; 12745-46.) Donald was involved in Little League and David helped him with practice on many occasions. Donald was trying to be a better pitcher, and David worked with him. (RTT 12741.) Donald also went fishing with David many times. (RTT 12741.)

Once there was a fire at their house. Clarence was cleaning the garage with gasoline and the hot water heater ignited the gasoline. The whole garage was engulfed in flames. Donald was caught in the middle, so David jumped in and pulled Donald out. (RTT 12741-42.)

Donald trusted David with his children. If there was a birthday for one of the children David would make sure that he was there, even if he had to work that day. (RTT 12743-44.)

When Donald was unemployed there were a number of times when David helped him get groceries for his family. (RTT 12744.) Donald remembered a time when things were really bad at home; he was unemployed, the rent was not being paid and there were no groceries or food. David gave him a job at Miller's Carpet Care. (RTT 12743.) Later, when David started his own company, David hired Donald. (RTT 12743.) There was a period of time when David took Donald and his family into his home. (RTT 12744.) David often advised Donald about preparing for the future. David always helped Donald with his problems at home. To Donald, David had the most "civil head" of anyone he knew. (RTT 12745.) Donald asked David for help with his problems before asking anybody else. David was a big help to

Donald and to everyone else in the family. David also helped people outside the family. (RTT 12744.)

Donald understood that David had been convicted, but he did not believe that David was guilty. He asked the jury for life imprisonment for his brother. (RTT 12744-45.) If the jury voted to kill him, he would not have a brother and his children would not have an uncle. (RTT 72745.)

Kurt Andrewson first met David Lucas around the time they were in the 4th grade. (RTT 12599.) In junior high school they became good friends and visited each other's homes. (RTT 12599; 12602.)

Andrewson knew David's mother and father, Pat and Clarence Lucas. Andrewson never saw Clarence express any affection or warmth toward David. (RTT 12600.) It seemed to Andrewson that David's father saved his most aggressive behavior for David. (RTT 12600.) David always seemed to be starving for attention from his father, but he never got it. (RTT 12600-01.)[1164] David's father was always barking at David and the other family members. (RTT 12600.) Andrewson never saw the family engaged in any nice conversation; it was always tense. (RTT 12600.) He could hear yelling in the Lucas house. (RTT 12602.) Andrewson noticed injuries on David, indicating he had been beaten. (RTT 12600.)

David had a paper route and asked Andrewson to help him with it. (RTT 12602; 12610; 12666.) Andrewson helped David deliver the papers and collect money. (RTT 12602.) In return, David bought sodas and gave him a

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[1164] On the weekends, David's father was either working on his boat or out hunting or fishing; it was all he ever did. (RTT 12601.) He took David with him once or twice. David was so excited; it was one of the few occasions that his father did something with him. (RTT 12601.) Usually he did not take David with him. (RTT 12601.)

little money. (RTT 12602.) They became close friends. When they were older David and Andrewson went on double dates together. (RTT 12602.) As the years went by, Andrewson stayed in contact with David and saw him from time to time. (RTT 12602.)

Andrewson was busy going to college and working, but whenever he had a chance he visited David and his mother. (RTT 12603.) When Andrewson got married, David was his "best man" at the wedding. (RTT 12603.)

Andrewson was aware that David was convicted of rape in 1973. During the rape trial Andrewson testified that he was with David at the time David was accused of committing the rape. (RTT 12603-05.) In spite of his testimony, David was convicted of the rape charge. (RTT 12606.)

Andrewson observed that David interacted well with children. (RTT 12605.) When David's niece Trisha was born, David was very protective of her and looked out for her. (RTT 12605.) David was a loving and affectionate uncle. (RTT 12605.)

Andrewson was aware that David had been convicted of the Jacobs and Swanke murders, and he thought that life in prison would be an appropriate punishment for David. (RTT 12606.)

Martin Lantry met David Lucas in grammar school, and they became friends. (RTT 12608-09.) Lantry lived about three blocks away from the Lucas' on Cowles Mountain, and he saw David on a regular basis. (RTT 12608-09.)[1165]

[1165] Lantry testified that there was a massive drug problem in their neighborhood. (RTT 12611.) There were problems with the bullies in the neighborhood and there were a lot of threats of violence. (RTT 12611.)
(continued...)

Lantry and David did a lot of things together, such as playing softball, fishing and going to the movies. (RTT 12609.) Lantry used to visit the Lucas household, and knew David's father, mother, brother, and sister. (RTT 12609.) Lantry thought David's father treated David very poorly; he never really saw any positive interaction between the two, and Clarence never showed any warmth or affection toward David. (RTT 12610.) He never had any nice words for his son. (RTT 12610.) Lantry felt that David's father had a world of his own. (RTT 12610.)

Lantry heard that David had been convicted of three counts of murder, and an attempted murder. (RTT 12611.) He also knew that David had been convicted of rape in 1973. (RTT 12611-12.) Nevertheless, Lantry wanted David to live. (RTT 12612.) He would feel a loss for himself and for David's family if David was executed. (RTT 12612.)

Corrine Douthit met David Lucas when she was 12 years old. They were childhood friends and frequently spoke with each other on the phone. David was very easy to talk to and she very seldom saw him angry. (RTT 12651-52.) David visited her at her parent's home on several occasions. (RTT 12651.) Douthit observed that there was no parental supervision in David's house when his mother was working. (RTT 12653.) David was more or less on his own. (RTT 12652.) David did not seem to have a sense of direction in life. (RTT 12653.) David's sister Cathy always spoke positively about her brother. (RTT 12653.) David told Douthit that there were problems with his father, Clarence. (RTT 12651-52.) She heard that when David's

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[1165](...continued)
Lantry testified that virtually everyone who grew up in the neighborhood had gone to jail; he knew of six people who were in jail who had lived within a three block area. (RTT 12611.)

parents separated, his father Clarence came to the house and abused David's mother. (RTT 12652.)

The last time Douthit saw David was around 1975 at Kurt Andrewson's wedding. They talked with each other for a few minutes. (RTT 12653-55.) She had not seen David since. (RTT 12655.) She was not aware that David had been convicted of forcible rape with the use of a knife in 1973. (RTT 12656.) She was aware that David had been convicted in the present case and she was aware of some of the details of the crimes. (RTT 12654; 12655.) Douthit told the jury that she would feel a sense of loss in the event David was executed, and asked that he be sentenced to life in prison. (RTT 12654.)

Linda Neumayer-McKay was acquainted with the Lucas family; they lived across the street from each other on Cowles Mountain. (RTT 12638.) She grew up with Cathy Lucas; they were best friends. (RTT 12638.)[1166] David was Cathy's younger brother, and he would tag along. (RTT 12639.)

In 1973, Neumayer-McKay was aware that David had been convicted of rape. She sent a letter to the probation department on David's behalf. (RTT 12639.) She felt that David was a terrific person to be with and a very nice guy. David was like a brother to her and she felt he was not the kind of boy who would commit a rape. (RTT 12639-40.) She thought David treated his girlfriends like gold and that he would do anything for them. (RTT 12640.)

Lloyd Gerber was the district manager for the Evening Tribune newspaper. (RTT 12613.) In the late 1960's, he was involved in the circulation and distribution of newspapers and hired paper boys to deliver the

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[1166] She attended Cathy's wedding. (RTT 12639.)

papers. (RTT 12613.) Paper boys were usually selected based on recommendations by their friends. Gerber extensively interviewed the boys and their families to make sure that he was getting the best quality boy for the route. There was a lot of competition for the positions, so Gerber could afford to be selective. He only selected the boys who were the best workers. (RTT 12614.)

David was a paper boy for Gerber for about two years. David was a very good worker and was highly recommended by his friends. Gerber never had any problems with David. (RTT 12614.)

Sue Herrin first met David in 1981 through his sister Cathy McEvoy. Herrin saw David occasionally, and in the summer of 1982 they started dating. (RTT 12731-32.) Herrin, David, and her daughter Christina would go out and do things together. (12732-33.) Herrin was going through some problems with her ex-husband and would talk to David about her problems. She felt confident that she could rely on David to help her through her problems. (RTT 12733.) She never had any concern for her daughter or herself while they were dating. (RTT 12733.)[1167]

Herrin was aware of the charges of which David was convicted. (RTT 12734.) She asked the jury to give David life in prison. If David got the death penalty she would be losing a very good, dear friend. (RTT 12734.)[1168]

15 year-old Christina Jones, Sue Herrin's daughter, spent many hours

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[1167] A the time Herrin was dating David she was not aware that he had been convicted of rape in 1973. (RTT 12734-35.)

[1168] Herrin stayed in contact with David while he was in custody, writing to him and visiting him on weekends when she could. She had received phone calls from him from the jail. (RTT 12733.) Herrin also testified that she did not believe in the death penalty. (RTT 12736.)

with David and he was always nice to her. She cared about David and considered him to be a friend. Christina wanted him to live. (RTT 8709; 12737-38.)

Leo Fadden first became acquainted with David Lucas in 1978 when they both worked at Miller's Carpet Care. David was a good worker at Miller's Carpet and was a reliable employee. David did the difficult jobs with very good result. David did his share of the work. Fadden had always known David to be a good worker, a hard worker. (RTT 12729-30.)[1169]

Mitchell Hoehn came to San Diego from Minnesota in 1982. He was about 22 years old at the time, out of work and looking for a job. (RTT 12616.) David gave him a job at CMC and taught him carpet cleaning. (RTT 12616-17.) Whenever Hoehn had problems at work, David would back him up. (RTT 12618.) At one point Hoehn needed a place to stay, and David let him move in with him. (RTT 12617.) Hoehn was aware that David had done the same for several other people at the company. (RTT 12617-18.) Hoehn attended many barbecues at David's home. (RTT 12619.) David usually bought all the food and prepared it himself. (RTT 12619.) Hoehn also knew David to be kind to his nieces and nephews. (RTT 12619.)

Hoehn also knew Bill Johnson, another CMC employee. One Christmas Johnson was short of money, so David loaned him two or three-hundred dollars for his family. (RTT 12618.)

Another employee, Dennis Adair, was not very good at making sales, so David let Adair work around his house or wash his car to earn money. (RTT 12618-19.) It was Hoehn's opinion that David was very soft-hearted.

[1169] In 1979, Fadden, and Martin Lantry and Lucas got together and formed a carpet cleaning business called DML Systems. (RTT 12730.)

(RTT 12619.)

Hoehn worked for David until 1985. He returned to Minnesota after David's arrest; business at CMC declined after the arrest. (RTT 12617.) He considered David the moving force behind CMC. (RTT 12617.)

Hoehn was aware that David had been convicted of the murders and attempted murder but did not believe that David committed the crimes. (RTT 12620-21.) Hoehn felt that David should be sentenced to life without parole. (RTT 12620-21.) If David died he would definitely lose a friend. (RTT 12620.)

Vicky and Bill Johnson lived in St. Louis, Missouri. Vicky Johnson recalled when Bill was unemployed and David offered Bill a job at CMC. Consequently, Bill moved out to San Diego. (RTT 12622-23.) During the summer of 1984 Vicky and their son James moved to San Diego. (RTT 12623-24.) David got along great with James. (RTT 12624-25.)

One time James became very ill and had a high temperature. He needed medication but they did not have the money to pay for it. (RTT 12624.) David gave them the money for the medication; the Johnsons did not even ask. (RTT 12624.)

The Johnsons were having a difficult time paying rent, and they were concerned about safety in their home. (RTT 12625.) They looked for another place to rent, and even stayed in a motel for a week. (RTT 12625.) David let them move into his house and let them pay a rent that Vicky considered "cheap." (RTT 12625.)[1170] Shannon Lucas and Wesley were also living at the

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[1170] The Johnsons were living in David's house when he was arrested and stayed in touch with him while he was in jail. (RTT 12627.)

house. (RTT 12625.)[1171] David related to Wesley very well and showed concern for him. (RTT 12626.) David wanted Shannon to take better care of Wesley. (RTT 12626.) David played with Wesley and James and cared for them. (RTT 12626.) David was so concerned that the children might get burned that they were not allowed in the kitchen. (RTT 12626.) David provided food and clothing and paid the doctor bills for the children. (RTT 12626.)

To Vicky, David was like a father; whenever they needed help he was there for them. (RTT 12627.) She considered David a considerate, warm, loving and thoughtful individual. She thought he had a lot of initiative and it showed in his business. She respected David. (RTT 12628.)

Although David had been convicted of three charges of murder and an attempted murder, Vicky Johnson felt he should live. (RTT 12628; 12629-30.)[1172] She would feel a loss and it would upset her family if he were given the death penalty. (RTT 12629.)

2. Attorney Gilham

Attorney George Anthony Gilham represented David Lucas in the 1973 rape case. (RTT 12704.) Gilham believed that David was not guilty of the rape charge. (RTT 12705.)

Gilham also believed that David should be sentenced to life in prison

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[1171] Vicky Johnson testified that when things were going well Shannon was there. But, if Shannon didn't get her way, she would leave. (RTT 12629.)

[1172] Johnson was aware that the crimes were "very brutal killings" involving the throat-slashing of women and a three year-old boy, but that did not change her opinion of David or the sentence he should receive. (RTT 12629-30.)

in the present case. David was a hard working individual who could be a benefit to society if he were to receive a life sentence. (RTT 12706.) Gilham remembered the details of the crimes of which David was found guilty, but Gilham still believed that he should be given life without parole. (RTT 12707-08.)

Taking into account David as an individual, the positive side of David's life, his character, and family, and weighing it against the crimes, Gilham believed his life should be spared. (RTT 12716-17)

3. Atascadero Testimony Of Loyal Tallchief

In 1974, Loyal Tallchief was a psychiatric technician and unit supervisor at Atascadero State Hospital. (RTT 12753-54; 12812.)[1173] Tallchief believed that David was committed to Atascadero sometime in early 1974 as a result of having been convicted of forcible rape of a woman with use of a knife. (RTT 12756.) David was incarcerated at Atascadero for 18 to 20 months. (RTT 12764.) Tallchief was David's advisor for the first six months of David's stay; Tallchief remembered David. (RTT 12754; 12766.)[1174] David did not present any behavioral problems. (RTT 12754-55; 12765.) While David was there, he gained insight into his relationship with his father and self-esteem. (RTT 12765.) David got along well with staff and

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[1173] Tallchief testified that in 1974 he had one year of training as a psychiatric technician student and had gone to six months of training at the National Institute of Mental Heath Training. (RTT 12818.) He was not a clinician. (RTT 12818.)

[1174] While Tallchief testified that he remembered David and that he had testified as to what he had recollection of, he did admit reviewing records in the defense's possession to refresh his memory as to the time David was committed, and the time he was released. (RTT 12765-66.) The court then ordered the defense to release these records. (RTT 12766.)

the inmates, and David was elected to the Inmate Council, an organization of inmates which operated as a liaison between inmates and staff. (RTT 12754-55.)[1175] Eventually, David became Ward Chairman, an individual who acts as the mayor of the ward government. (RTT 12755.)

In April of 1974, there was a family interview at Atascadero. David's mother, brother and sister were interviewed, but David's father failed to attend. (RTT 12825.) David indicated there had been problems with his father in the past. (RTT 12825.)

Tallchief testified that in 1974, Atascadero had a lot of inmates who were MDSOs; rapists, child molesters, and murderers. (RTT 12756; 12759.)[1176] There were other inmates who were found not guilty by reason of insanity or other inmates who were found incompetent to stand trial. (RTT 12759.) The age of the inmates at Atascadero ranged from 18 to 70 years. (RTT 12761.) David was committed under a Youth Authority commitment. (RTT 12759.) At the time Atascadero had about 1300 or 1400 patients, approximately 40 of whom were Youth Authority commitments. (RTT 12761; 12767.) David was one of the youngest inmates. (RTT 12767.)

Tallchief testified that at the time Atascadero suffered from a shortage of clinical staff; most of the treatment was done by psychiatric technicians. (RTT 12767-68.)[1177]

[1175] David was elected to the council by the other inmates. (RTT 12755.)

[1176] Tallchief explained that a MDSO was a person that had committed a sexual crime. (RTT 12757.)

[1177] Tallchief testified that conditions had improved at Atascadero since 1974. There was increased staffing, especially clinical staff, and there was a (continued...)

When David was first committed to Atascadero he had been considered a danger; but that danger was later considered to have been reduced. (RTT 12765.) After serving his term, David was released by the Youth Authority to his mother in San Diego. (RTT 12764.)

4. Dr. Marks

Dr. Alvin Marks, a clinical and forensic psychologist, met with David Lucas for clinical interviews and psychological tests on three occasions. (RTT 12775-78; 12828.)[1178] Marks had contact with David's family and interviewed David's brother and sister to obtain data. (RTT 12778; 12785.) Marks had historical data on David spanning from David's birth until 1985. (RTT 12778.)[1179] Marks only used the psychological tests and clinical interviews of Lucas, his brother and his sister, to arrive at his diagnosis. (RTT 13028.) Marks was of the opinion that David had a "personality disorder." (RTT 12780.)[1180] Marks defined the term "personality disorder" as being a

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[1177](...continued)
beautification program at the facility. (RTT 12819.)

[1178] Marks saw David twice in June, 1985, and once in 1987. (RTT 12827-28.)

[1179] The historical information came from a combination of sources, including a chronological report by an investigator and conversations with David and his family. (RTT 12831; 13029.) The chronological report was not provided to the prosecution in discovery and Marks did not have it with him in court. (RTT 12831.) He also did not have any historical information for the 20 month period in 1974 and 1975 when David was in Atascadero. (RTT 13026.)

[1180] Marks classified the disorder as "personality not otherwise specified" using the DSM-III . Marks testified that there had been changes in diagnoses in the DSM and that earlier versions of the DSM would have
(continued...)

maladaptive pattern of behavior where personality traits are so inflexible that they constantly work against the afflicted person. According to Marks, antisocial personality produces maladaptive behavior. (RTT 12781.)[1181] Marks defined maladaptive behavior as behavior that is "destructive to oneself, others, or to society." (RTT 12829.)[1182]

In conducting his evaluation Marks considered the fact that before he was one year-old David fell out of his stroller and hit his head on the concrete. Marks was also aware that as a child David had asthma, a severe thumb-sucking problem, and was a bed-wetter. (RTT 12782.) When he was 15 or 16 years old David was in a car accident and again sustained some head injuries. (RTT 12782; 12791.)

Marks felt that David's family was severely dysfunctional. (RTT

[1180](...continued)
classified David's disorder as "inadequate personality" and "mixed personality disorder." (RTT 12779-80.) On cross-examination Marks testified that he was aware of the factors that support a diagnosis of antisocial personality in the DSM, but it was his opinion that those factors were not present in David. (RTT 13031.)

[1181] However, Marks testified that a personality disorder does not mean that all the personality traits are negative or pathological; an individual with good traits can use those good traits to do positive things in the right environment. (RTT 12793; 12794.)

[1182] During the testimony of Dr. Marks a stipulation was read to the jury: on February 7, 1974, Dr. R.M. Schumann, a medical doctor-psychiatrist licensed with the State of California, examined and diagnosed David while at the Atascadero State Hospital. Using criteria contained in the DSM Manual, Schumann diagnosed David as an "antisocial personality, severe; alcoholism, habitual excessive drinking, and a sexual deviation, aggressive sexuality, and the prognosis was very guarded." (RTT 13025-13026.)

12782-83.)[1183] Marks described a dysfunctional family as one in which everyone is working at cross-purposes instead of nurturing, loving and developing in a normal fashion. (RTT 12783.) People in such a situation develop a kind of mental disability because of so much dysfunction. (RTT 12783.)

One of the significant things in the early stages of David's life was that he was exposed to a very brutal, iron-handed "workaholic" father who ruled the house. David's mother was absent a good amount of the time, particularly at night; the three children and their father ate dinner without their mother. The children were not allowed to talk or express emotion. If the children did something wrong there were severe consequences. (RTT 12784.) The dysfunction was intensified as to David because he was singled-out for the worst abuse. (RTT 12784.)[1184] David's father had "total contempt . . . for women." David's father denigrated women. (RTT 12786.) For example, on at least one occasion David's father committed spousal rape of his wife; David picked up on this behavior. (RTT 12786.) David modeled his father and became a "workaholic" like Clarence. (RTT 12785-87.)

Because David had such a tyrannical father, he began to fear men and understand the abuse of power. (RTT 12785.) Marks thought it was significant that David and his sister felt they were each other's best friend.

[1183] At this point the prosecution objected on hearsay grounds. The defense stated that the testimony was being offered as foundation for his diagnosis. The court admonished the jury that when the histories were given it was hearsay, but it was being offered as foundation for Marks' diagnosis. (RTT 12783.)

[1184] Marks noted that David's brother and sister still felt guilt about David taking the brunt of the brutality. (RTT 12784.)

However, Marks felt David had ambivalent feelings about women: he both loved them and hated them. (RTT 12785.) David was in pursuit of the perfect woman. (RTT 12785.)

David also had a great deal of sensitivity. He became an altar boy at the Catholic Church. He loved animals and children. (RTT 12786.)[1185] David baptized animals and tried to prevent other children from hurting them. (RTT 12787.) He was easily nauseated, and sensitive. However, David could not express his feelings. (RTT 12786.) The expression of emotion was absolutely forbidden by his father. In fact, David would be physically punished for doing so. (RTT 12786.)[1186]

David was raised in the Cowles Mountain neighborhood, an area where drug use was prevalent. In the 9th grade, David began experimenting with marijuana, cocaine and speed. There was also a good deal of alcohol abuse. David's drug use continued through 1984 or 1985. (RTT 12788.) Additionally, David had difficulty in school; he did fairly well in mathematics but had a great deal of difficulty in language arts. (RTT 12832.)[1187]

When he was around 16 years old, David got his girlfriend pregnant; she had an abortion. This devastated David. (RTT 12787; 12831-32.) He felt that she had taken the life of his child. David told Dr. Marks that from that

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[1185] Dr. Marks testified that he did not think David would hurt a child "99% of the time." (RTT 13034.)

[1186] Dr. Marks testified that David's brother and sister were the same way. They both had great difficulty expressing emotion. (RTT 12786.)

[1187] David also experienced some difficulty with a female teacher over an "incident." (RTT 12832.) Marks was unaware of the nature of the incident. (RTT 12832.)

instant on, he hated women. (RTT 12787; 13032.)[1188] After the abortion, David felt a great rage, part of which was directed toward women. (RTT 12787.) The rest of David's rage was directed at his father. (RTT 13033.) Dr. Marks felt that David was normally able to control his rage. (RTT 13033.) However, Dr. Marks also believed, with medical certainty, that David was incapable on certain occasions of controlling his rage toward women. (RTT 13035.)

Dr. Marks was aware of David's prior rape conviction, and his commitment to Atascadero.[1189] David was one of the youngest people in Atascadero, and he was surrounded by a number of men who were a great deal older than himself. Marks felt that this fact had an impact on his clinical analysis of David, as it was part of the same pattern. David was able to get along with men, even though he was highly fearful of them, particularly in an institutional setting. (RTT 12790.)

Dr. Marks also discussed the fact that after Atascadero, David had a child, and the woman left with the child. (RTT 12787.) So again, David was deprived. (RTT 12787.) David then married Shannon, whose son Wesley,

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[1188] Marks testified that this is what David believed; Marks felt that it had been triggered earlier. (RTT 13035.) Marks thought that some of the traumatic experiences that occurred before that event impacted David, including the abuse by his father. (RTT 13037.)

[1189] Although Dr. Marks had not seen David's Atascadero records (RTT 12830), he had reviewed a "chronological report by an investigator" which included references to David's experiences at Atascadero. (RTT 12831.) However, the defense had not intended for him to see this chronology nor had they intended to open the door to admission of the Atascadero records. The judge ruled that the Atascadero records were admissible but the chronology was not. Ultimately this issue was resolved with the reading of the stipulation regarding Dr. Schumann's diagnosis. (RTT 13025-26.)

had been subjected to some physical abuse from the mother. (RTT 12787-88.) Shannon hit the child, and David objected to that. (RTT 12788.) David wanted to take Wesley and raise him as his own son, but the marriage went bad and Shannon and Wesley disappeared. (RTT 12787.) According to Dr. Marks, David had a conflict about women – searching for the perfect one, wanting children and a family, yet not being able to achieve that. (RTT 12788.) David was filled with rage and anger. He did a good job of containing it because he was able to function well in his business. (RTT 12788.)[1190] There was a pattern of a great fear of men, a love/hate relationship with women and a very distrusting attitude toward authority, man or woman. This was David's personality disorder. (RTT 12788.) David's history caused his personality disorder, locking him into it. (RTT 12794.)

In addition to the personality disorder, David's early head injuries were significant. (RTT 12791-92.) Dr. Marks performed neurological testing on David and found some evidence of brain damage. (RTT 12792.) Marks also reviewed a report prepared by psychiatrist Dr. Gale Winston Bach that showed some evidence of brain damage. (RTT 12792-93; 12832.)[1191]

Dr. Marks considered David's kindness to others: David sent his niece through modeling school; he had helped his brother Don when he was jobless and downtrodden; David got Don a job. David helped everyone in the family

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[1190] Concerning David's success in business, David obviously had motivation to work, and would have to be able to get along with both customers and employees in addition to selling himself. He also had to be concerned about others, and he had to conform within guidelines of acceptable behavior appropriate for a businessman. (RTT 12789; 12793.)

[1191] Marks testified that Dr. Bach was one of the foremost neuropsychologists in the country. (RTT 12792.)

when he could. Most significantly, at age 15, it was David who went to his mother and asked her to give his father another chance. (RTT 12789-90.)

David's psychological testing showed empathy for children and animals, but a great difficulty in expressing certain emotions around adults. (RTT 12787.)[1192] Although it was difficult for David to show feelings, this did not make him devoid of emotion. (RTT 12793.) Dr. Marks believed that David felt deep remorse, but he found it extremely difficult to express such feelings. (RTT 12794; 12836.)

However, Dr. Marks testified that over the past five years David had shown more emotion than he had in his previous 29 years. (RTT 12836.) When Dr. Marks saw David in 1987, David felt very badly about the fact that he had difficulty in seeing enough of his family. (RTT 12836.) David's predicament was worsened by the death of Shannon, whom David said he still loved. (RTT 12836; 13032.) There was turmoil in their relationship, but David was remorseful over Shannon's death. (RTT 13037-38.) Dr. Marks felt David showed considerable remorse for his situation. (RTT 12836.) This remorse had always been with David but it was not until after he had been incarcerated that he was able to express it to others. (RTT 12836-37.) During the 1985 interview, David expressed remorse for the family of the victims in the case, but he did not tell Marks that he committed any of the crimes. (RTT 13038-39.)[1193]

According to Dr. Marks, David had a continuing distrust of authority,

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[1192] That is, David was not able to express certain emotions without great difficulty around adults. (RTT 13034.)

[1193] Dr. Marks did not know if David felt any remorse for the victims themselves. (RTT 12837.)

i.e., any force, body or person who had some control over his life. (RTT 12834-35.) David's distrust for authority stemmed directly from his father. (RTT 13036.) While a jail environment would be an authority situation, Dr. Marks expected that David would conform and work with the situation; he could accept authority while incarcerated. (RTT 12835; 13037.)

5. Prison Conditions

Louis Nelson[1194] was a retired warden of San Quentin prison who testified about his experiences at San Quentin through 1974. (RTT 12677.) Nelson testified that, after a period of time, inmates serving life terms without possibility of parole ("lifers"), provided a positive benefit to the institution. (RTT 12688.) Nelson testified that in general, a man going to prison is very scared. He does not know what is going to happen to him. After a suitable period of acclimation, the inmate usually settles down. The longer the inmate stays, the more he settles down. Many of the work assignments are held by

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[1194] Nelson, who was retired, testified as to his experience in the prison system. In 1940 he trained at the U.S. training center at McNeill Island, Washington, for service in the federal prison system, and was transferred to Alcatraz in February 1941. He served there until 1944, when he went into the Navy. He returned to Alcatraz in 1946 and served there until November 1948. After successfully passing the exam for service in the California prison system, he was appointed as a Lieutenant at the California Vocational Institution in Lancaster. He was promoted to Captain in 1950, and then transferred to San Quentin. He served one year and some months, and then transferred back to Lancaster to close up the institution and aid in its transfer to a new institution in Tracy. He served there until 1955, when he accepted appointment as Associate Warden of Custody at San Quentin. He remained Associate Warden, second in command of prison, for 9 years. In 1964 he was transferred to the central office in Sacramento as assistant chief of program services. He stayed a year, then went to the facility in Vacaville, where he remained until 1967. He then returned to San Quentin, serving as warden from 1967 to 1974. (RTT 12677-79.)

long-term inmates, whose service often equals that of the staff. (RTT 12689-90.) If prisoners had a job skill that they developed on the outside, they could use that job skill to do productive work within the institution. (RTT 12690.)

The main industry at San Quentin was the furniture factory, which provided furniture to state and county public agencies. (RTT 12692-93.) In addition to working in the factories, lifers made recordings for the blind or translated books into Braille. (RTT 12694.) By doing so, the lifers were providing some benefit to society. (RTT 12694.)

Each institution usually has a group of lifers who meet to discuss their problems and their feelings. (RTT 12693-94.) These discussions were essentially therapy or group counseling. (RTT 12694.) A lifer might help a potentially violent younger person, or a person coming in with a shorter sentence, teaching them not to be violent in prison. (RTT 12691.)

San Quentin has a stone and concrete wall surrounding the entire institution. There are armed posts along the walls, some of which are reinforced with barbed wire. (RTT 12695-96.) The armed posts have guards armed with rifles, shotguns and automatic weapons. (RTT 12696-97.) To Nelson's knowledge, San Quentin is the only institution in California with floodlights comparable to the lights that light the perimeter of a baseball stadium at night. It is classified as a maximum security institution. (RTT 12695-96.) The walls of the cell blocks have catwalks allowing the patrolling of cell blocks by armed officers, day and night. (RTT 12697.) The cells at San Quentin are not open on the wall of the building, and do not have windows. (RTT 12698.) The cells are like a building within a building. There are two rows of cells, back to back, with a service corridor in the center for the plumbing and electricity. They range from three cells high to five cells

high. (RTT 12698.) The cells are truly Spartan: they are approximately five feet across, around ten feet deep, and about eight feet high. They contain basic furnishings: a combination washbowl and commode, a small table that folds against the wall and a shelf at the back for the prisoner's belongings. (RTT 12698.)

Nelson testified that if a person performed well in an institution and he returned for another sentence, he would generally be expected to perform well again. (RTT 12699; 12703.)[1195]

Craig Haney, a professor of psychology at U.C. Santa Cruz, testified as to issues concerning the sentence of life without possibility of parole (LWOP).[1196] (RTT 12928; 12942.)

Based on a classification system used by the Department of Corrections, Haney testified that at the time there were only three prisons in

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[1195] Nelson based this belief on his 31 years experience within the corrections establishment. (RTT 12699.) Nelson admitted on cross-examination that his experience with San Quentin was only up to 1974. (RTT 12700.)

[1196] Haney had 16-17 years of experience studying inmates in prison populations and prison environments. Most of his research involved going to penal institutions, evaluating the conditions, interviewing inmates and the people working there. Haney worked as a consultant to the California Legislature on the effects of prison conditions, and performed evaluations of proposed prison legislation. He was a consultant for the U.S. Department of Justice, the Santa Clara County board of supervisors (on the effects of incarceration at the Santa Clara county jail), the California Senate Office of Research (evaluating overcrowding in CYA facilities) and the California Legislative Joint Committee (on prison construction and operations). Haney taught an undergraduate and a graduate course on institutional analysis which examined how institutions affect people, and how people react to and adjust to institutional conditions. Haney also had a JD degree. (RTT 12928-12930; 12940-12942.)

the entire state to which a person sentenced to LWOP could be sent. (RTT 12942-43.) Because of the length of the sentence, a prisoner with LWOP can only be sent to the highest security-level prisons, what the Department of Corrections call "Level Four" prisons. (RTT 12943.) At the time there were only three Level Four prisons in operation: Folsom, Tehachapi and a new prison at Corcoran. (RTT 12943.)[1197] Level Four prisons are the highest security prisons in the state, and places where the issue of security is the most significant. (RTT 12943.)

Haney described Level Four prisons as the place that matched the common perception of prison. The prisons are surrounded by walls, there are a certain number of specified gun towers on the perimeter of the prison or wall area. (RTT 12943.) There are a variety of special security procedures that are used to screen people who enter the prison, including a series of gates, security checkpoints, and metal detectors through which all who enter the prison must pass. (RTT 12944.) The security inside the prison matches the outside security. (RTT 12944.) There are gun towers, observation points, and areas where inmates are under surveillance at all times. (RTT 12944.) Level Four prisons also have gun towers or armed guards on positions inside the cellblocks, designed such that inmates are never out of "gun cover," even while in the cellblock. (RTT 12944.) The old Level Four prisons in San Quentin and Folsom have walkways on the sides of the walls in the cellblocks,

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[1197] Haney testified that there was an additional Level Four prison scheduled to open some time in the next year in Crescent City in the northern part of California. (RTT 12943.)

where armed guards would walk with rifles. (RTT 12944.)[1198] The new Level Fours have balconies protected by glass, overlooking the cellblock areas so as to afford the guards a view into the inmates' cells. (RTT 12944.) There are windows in the glass so guards can fire into the cellblock area if necessary. (RTT 12944.) There are special procedures used inside the cellblock areas so as to highly regulate door and inmate movement. (RTT 12945.)

Haney described the living conditions of inmates sentenced to LWOP: life inside the cells was dominated by the immediate living conditions, especially the size of the cell. (RTT 12946.) In some Level Four prisons the cells are about 50 square feet in area. The newer institutions had slightly larger cells consisting of 65 to 67 square feet. (RTT 12946.)[1199] Inmates must keep all of their personal possessions within that area. (RTT 12946.) In addition to the inmate's personal possessions, the cell also has a bunk, toilet, and sink, all contained in roughly the area of a king-sized bed. (RTT 12946.) Additionally, virtually all Level Four inmates are "double celled;" there are two inmates in a cell designed to house one. (RTT 12946-47.) Haney testified that the California prison system is quite overcrowded, at all levels, thus necessitating the double-celling. (RTT 12947.)

Each prison has a daily routine, varying slightly from prison to prison. Typically inmates are awakened early in the morning. (RTT 12947.) They go to a mess hall-type area to eat, each unit going to eat at a particular, regulated time. (RTT 12947.) Inmates also have work assignments in the institution,

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[1198] San Quentin, which used to be a Level Four, was not a prison where Level Four inmates were currently being sent. (RTT 12945.)

[1199] Haney noted that a king-sized bed was roughly 50 square feet in dimension. (RTT 12946.)

and may engage in certain activities if their security status permits. All of the activity is carefully regulated, with inmates needing permission to engage in the activity. (RTT 12948.) An inmate must have a certain security designation within a cellblock in order to be out of the cellblock area. The inmate is closely monitored while out of the area. (RTT 12948.) Gates regulate who enters and exits the cellblocks, and guards at the gates check the status of people going through the gates. (RTT 12948.) An inmate who has a job is permitted to leave the cellblock during a particular period of time. (RTT 12948.) Movement and motion within the institution is very carefully regulated; inmates can only be in designated areas where they have permission to be. (RTT 12948.) Inside Level Four institutions an inmate's status is constantly checked. As an inmate moves through the institution, he will be checked regularly as to who they are and where he is supposed to be. (RTT 12948.)

Work takes up the majority of the inmates' time. (RTT 12949.) Some of the work is essential for the maintenance of the institution. A prison is like a small city and there are things that need to be done in order to keep the city functioning; food preparation, clean-up, plumbing, etc. (RTT 12949.) Most prisons depend upon inmate labor to do these things. (RTT 12949.) There are industries within most prisons; within the Level Four institutions in California, various products are made which are then sold within the state system. (RTT 12949.) Many state institutions, such as schools, use furniture that was made in a prison in the state. (RTT 12949-50.) Some of the prison industries involve the making of clothing; the clothing is then reissued to other state agencies. In California inmate work has been heavily emphasized. The amount of available work for inmates has increased, and there is an

emphasis on involving inmates in prison industries, or some other sort of work within the institution. (RTT 12950.)

There is a "prison society" within the institution. (RTT 1291-52.) Prison is an environment where, despite the high level of security, intense surveillance and restrictions of movement, inmates still find meaningful ways of contributing to the prison and the lives of the people involved. Inmates contribute by changing. Work is a significant vehicle for this type of improvement. (RTT 12952.) They can make a personal contribution or go through a period of personal change, which in the long run makes a difference to the larger society. (RTT 12952-53.) Often the most significant way an inmates can make a difference is assisting other inmates. Particularly, older inmates can counsel younger inmates. It is very common for the older inmates – experienced in prison life and the adjustment – to help the younger inmates avoid trouble and conflict. (RTT 12953.)

Prison is a closed society; because one's behavior is very carefully monitored and observed. (RTT 12953-54.) This is particularly true in Level Four prisons where inmates are under constant surveillance both in and out of their cells. There are stringent rules and regulations which inmates must follow; if not, they are punished. Punishment takes a number of different forms in the California system, depending on the seriousness of the infraction. Sometimes discipline involves denying the inmates the opportunity to take advantage of various things which exist inside the institution. Visiting and access to recreational facilities can be restricted. In extreme cases the inmate is taken to "security housing units." These are disciplinary segregation units where inmates are kept in virtual isolation. Visits are greatly restricted, they are not allowed to work, and they are not allowed out to engage in any other

activities. (RTT 12954.) They are placed in "suspended animation" essentially. (RTT 12954.) The period of time an inmate spends in a security housing unit can be quite lengthy; months or years at a time. (RTT 12954-55.)

A large body of literature exists that attempts to understand how people adjust to prison life and the inherent periods of incarceration. (RTT 12955.) In addition, the Department of Corrections regularly studies to determine how certain kinds of people will adjust to prison. (RTT 12955-56) They study the classification system to help determine which types of individuals will do well in which institutions. In addition to being familiar with this literature, Haney has participated in interviews, and examined data from several states, though most data was from the California Department of Corrections. Regarding adjustment factors, after California, Haney was most familiar with the Texas system.

There are a series of factors that contribute to the adjustment process, but most people agree that age is the most important. Studies over the last 10-15 years have concluded that 30 appears to be a very critical age concerning adjustment to prison life. (RTT 12956.) Whether it's knowledge, education, wisdom or a recognition of one's physical limitations, there is general consensus that older inmates, especially those over 30, make more positive adjustments to prison environments. (RTT 12957-58.)

A person's work record is an extremely important issue, especially in a system like California's, which places a heavy emphasis on work and providing work opportunities. A good work record is a very strong predictor of positive adjustment to prison life. (RTT 12958-59.)

The nature of the offense for which the person was convicted may have a bearing on their adjustment. It is regarded as a negative predictor of

adjustment to prison if an inmate was involved in the kind of activity outside prison that might likely occur inside prison, i.e. gang activity, assaulting a police officer, etc. (RTT 12959.) If the criminal activity is the kind not likely to occur inside the institution, a positive adjustment would be predicted. (RTT 12959-60.)

Prior institutional adjustment has a bearing on adjustment; if someone has adjusted well before, usually they will adjust positively again. (RTT 12960.) Usually, past prison performance is the best predictor of a person's future adjustment. (RTT 12961.)

Social relationships outside the prison also have a bearing on how a person adjusts inside; prisoners who maintain relationships away from the prison tend to function better inside. (RTT 12962.) Inmates who have relationships with friends and family have access to different perspectives, sources of love and support, and a stronger motivation to behave. (RTT 12962-63.)

People with longer sentences tend to make better adjustments; they have an investment in their environment due to the amount of time they will be inside. They tend to view the prison as their home, and thus are not as tolerant of those who would worsen their living conditions. From a correctional perspective those sentenced to life are often regarded as the most desirable inmates to deal with as they have the largest investment of time in the prison, and thus the greatest interest in having things run well. (RTT 12977.)

An average prison day for someone with a life-sentence is as follows: they get up early, have breakfast, and then possibly do some work to pass the time. A midday meal is typical, usually a bag lunch. Sometimes inmates will

go to a cafeteria where they eat lunch in groups and are able to socially interact with others. Meals are usually 20 to 30 minutes long. (RTT 12978.)

After lunch most inmates return to their work assignments and work through the afternoon. (RTT 12979.) The work assignment is determined by what work is available and what skills the inmate might have. (RTT 12979-80.) In some prisons there are long waiting lists for the more desirable jobs. The less desirable jobs are assigned to any inmate who wants to work. (RTT 12980.)

Exercise facilities vary from prison to prison with prisoner usage limited to specific times. All prisons have a "prison yard" into which inmates are allowed during certain times of the day. Inmates may exercise, jog, walk in the yard. Most prisons have some form of team sports, although inmate participation limited to specific times. (RTT 12981.)

Holidays are popular visiting times at prisons. Visits are controlled per inmate, both in length and number. The capacity of the prison becomes an issue during the holidays, and visits may be limited by the number of visitors and the physical space available. (RTT 12982.)

In a number of institutions conjugal visitation has been suspended because of overcrowding and difficulties regulating the visits. California has a conjugal visitation program, with visits allowed only between spouses. (RTT 12982.) Getting married in prison would satisfy the spousal requirement. An inmate who requests a conjugal visit is put on a list and, depending on the number of people in the prison, the wait is typically several months. (RTT 12983.)

Lockdown occurs when there is a fight or confrontation between inmates. (RTT 12983-84.) Usually the entire institution is locked down,

depending on the location of the confrontation and the prison official's view of the event. A prison may be locked down for weeks, or even months; lockdowns remain until prison officials sort out the cause of the confrontation. If there is concern that gang activity caused the fight the institution may be locked down for several months while officials decipher what took place and the likelihood of any recurring violence. During this time everybody in the prison or a particular cellblock may be locked up, regardless of their involvement in the violence. (RTT 12984.) Some Level Four institutions have lockdown situations quite regularly; in 1985 Folsom was locked down more than it was unlocked, with the inmates confined to their cells practically 24 hours a day, including meal times. (RTT 12983.)

There is practically no privacy in prison. Level Four institutions have barred cell doors; anyone can look directly into the cell. A cell is constantly under surveillance; there are guards on the gun walks or observation balconies able to look into a cell at any time. At no point can an inmate prevent people from watching him, even while going to the toilet. (RTT 12985.)

An inmate is always subject to search of his person. (RTT 12985-86.) It is routine policy in Level Four institutions for an inmate to be strip-searched going to and coming from visits; his clothes are removed and his body cavities searched completely. Cells are always open to search, and possessions can be examined in the cell or removed and then returned. Privacy is a very significant issue in prisons, issue with the most immediate and influential impact on the inmates. Unescapable surveillance and complete submission are, for most inmates, two of the hardest adjustments to make. (RTT 12986.)

Inmates are required to follow the rules at all times. They must obey all instructions and all regulations. (RTT 12986.) An inmate who does not

follow the rules can be "written up." Violations include: not leaving the cell, presence in a restricted area, unauthorized possessions, etc. (RTT 12986-87.) A series of minor violations can add up to a major violation. Consequences take the form of loss of privileges; in extreme cases an inmate can be locked in solitary confinement. An inmate in solitary confinement is not allowed out of the cell except for, on average, one hour for exercise every other day; they are not allowed to work or converse with other inmates. (*Ibid.*)

Inmates placed in "disciplinary segregation" are restrained by chains on both the hands and either the ankles or waist; they are searched every time they leave their cell. The inmate must strip before leaving the cell, then the chains are attached through the bars, and again when the inmate leaves the cell. (RTT 12987.) Inside the institution inmates can be searched at any time. An officer can demand submission to a strip-search without immediate justification or reason; it is not an uncommon occurrence. (*Ibid.*)

The institution may search cells. There is a security squad that randomly searches cells at any time. An inmate does not have to have been involved in suspicious behavior, or under suspicion: the searches are random and on a regular basis, particularly in Level Four prisons. (RTT 12988.) Inmates are searched when they participate in recreation activities, leaving and returning. (RTT 12988-89.) In this environment, all privacy is forfeited. (*Ibid.*)

C. Prosecution Rebuttal Evidence

1. Laura Stewart Testimony

Laura Stewart, David Lucas' neighbor, never spoke with him but during the course of living next-door heard David speak to other people. (RTT 13076-77.) Stewart knew David was married to Shannon Lucas and

was familiar with Shannon's voice. (RTT 13077.) The Lucas' lived next door to Stewart for over a year. (RTT 13077.) Shannon did not always stay at the house. (RTT 13080.)

In Stewart's opinion, the Lucas' had a violent, tumultuous relationship. (RTT 13078; 13082.) The Lucas' would constantly be fighting outside in the yard. Stewart would be awakened in the morning by fighting, screeching cars, sheriffs and paramedics. (RTT 13078.)

Stewart recalled one instance; Shannon had David's truck. Stewart was awakened by yelling and screeching tires up and down the street. (RTT 13079; 13081-82.) Stewart heard David say, "Get the chain." (RTT 13079.) There was arguing and profanity between David and Shannon, and David was saying, "I'm going to get her. I'm going to get her." (RTT 13079-82.) Shannon came partly into the driveway and ran the truck into a pole. (RTT 13079.) David opened the truck door and pulled Shannon out by her hair. (RTT 13079.) Shannon was saying, "Don't hit me. Don't hit me." (RTT 13079.) Shannon was taken away, into custody. (RTT 13082.)

Stewart testified that this was not an isolated incident; there was often fighting. (RTT 13080.) Stewart saw David hit Shannon a couple of times. (RTT 13078.)

There was a time when Shannon came to the Stewart's house to use the phone. Stewart thought that Shannon had been hit – her face was very red and her hair was a "mess." (RTT 13080.)

2. <u>"Pruno" Incident</u>

On December 15, 1986, Deputy Sheriff Scott Kleinhesselink was conducting a search of David Lucas' jail cell and found a large plastic trash bag which allegedly contained "pruno" – a homemade alcoholic beverage.

(RTT 13112.)[1200] Possession of "pruno" was a "major" violation of jail rules. (RTT 13114; 13125-26.)[1201] The substance found in Lucas' cell had not been tested to determine whether it was an alcoholic beverage, and it was not preserved. (RTT 13121-22.)

In January 1987, Deputy Sheriff Michael Barletta was assigned to the Central Detention Facility. (RTT 13123) David Lucas was housed with another inmate at the time. (RTT 13126; 13131.) Barletta was conducting searches for contraband, and ordered Lucas and the other inmate to exit the cell during the search. (RTT 13132.) Barletta saw the other inmate dip a cup into something and take a drink. (RTT 13133.) Barletta conducted a search of Lucas' cell (RTT 13132.) Barletta found a plastic bag allegedly containing "pruno" in Lucas' cell. (RTT 13124; 13125.) Barletta seized the bag and two cups that allegedly contained "pruno." (RTT 13134.) As Barletta was leaving the cell, Lucas said, "You ruined our party." (RTT 13141.) After he wrote a report documenting the incident, he showed the bag to his sergeant; then the bag was thrown away. (RTT 13125.) The contents were not preserved or tested. (RTT 13133.) Barletta testified that it was a "major" violation of jail rules for an inmate to possess "pruno." (RTT 13125-26.) A "major" violation of a jail rule usually resulted in the loss of a privilege for two weeks. (RTT 13126; 13130.) Lucas was punished for having the "pruno," and received three days of discipline. (RTT 13127; 13130-31.)

[1200] According to Kleinhesselink, "pruno" was made of a fruit substance with sugar and yeast, usually from bread. (RTT 13113.) The jail provided all of the ingredients to make "pruno." (RTT 13115.)

[1201] Kleinhesselink had worked in the jail from 1983 to 1987 and had found inmates in possession of "pruno" approximately 20 to 25 times. (RTT 13114-15.)

On September 5, 1985, a search was conducted of David's jail cell by Deputy Robinson and "pruno" was discovered. (RTT 13142.) On April 4, 1988, David's cell was searched by Deputy Seitz and "pruno" was found in Lucas' possession and he was again punished. (RTT 13143.)

3. Possession Of A Broomstick

On February 23, 1989, Deputy Sheriff Mark Profeta searched Lucas' jail cell.[1202] It was morning, and Lucas had gone to court. (RTT 13146.) The inmates were sent out and the deputies checked the cells. (RTT 13146.) When Profeta entered Lucas' cell he found a broomstick leaning against the bars and the wall. (RTT 13146; 13156.) It was around five feet long and one end looked like it had been burned. The burnt end was tapered to a point, but was not sharp. (RTT 13146.) Profeta removed the stick, made a report and then disposed of it. (RTT 13147.)[1203] Inmates were not allowed to have sharpened broomsticks, as it was a security risk for other inmates and the staff. (RTT 13147-48.) It was a "major" violation, and Lucas' privileges were restricted as a result. (RTT 13148.)

On cross-examination Profeta testified that there was a television set in the tank that was located on a table directly outside of the cells in the day room area. (RTT 13150; 13152.) The inmates were allowed to watch television while they were in their cells. (RTT 13152-53.) The defense offered photograph, Exhibit 738E, which depicted a person holding a stick

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[1202] Lucas was not sharing the cell with anyone at that time. (RTT 13147.)

[1203] Profeta testified that he did not preserve the stick nor draw or photograph it. (RTT 13154-55.) He did not receive any court order to preserve the stick. (RTT 13155.)

and using it to do something to the television set. (RTT 13161.)[1204]

D. Defense Surrebuttal Evidence

In January 1989, Sonny Lee was housed with David Lucas in Tank 5F in the central jail.[1205] Lee was shown Exhibit 738C and testified that cell 3 was where the broomstick was standing. (RTT 13242-43.) Lucas was housed in cell 3, the cell next to Lee's. (RTT 13243.) There was a touch-tone television in tank 5F. (RTT 13243.)

Lee testified that the inmates in Tank 5F were locked in their cells most of the day. (RTT 13244.) When Lee came to Tank 5F the inmates were using a broomstick to adjust the volume of the television. (RTT 13244.)[1206] They also used the stick to change the channel. (RTT 13245.) The television could only be adjusted from cell 3. (RTT 13245.)

Lee testified that when both he and Lucas came to Tank 5F there already was a stick in the tank. (RTT 13245.) One end of the stick was burned. (RTT 13245.) Lucas used the stick to adjust the television from the cell, as it was the only way it could be adjusted. (RTT 13246.) Lee testified that Exhibit 738E demonstrated how the stick could be used. (RTT 13246.)

Lee recalled the incident in which Lucas had been written-up for

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[1204] On redirect, Profeta testified that the stick he seized did not look like the stick depicted in Exhibits 738D or E. (RTT 13171.)

[1205] On cross-examination Lee admitted that he had been convicted of receiving stolen property, escape, and car theft, but denied that he had used aliases. (RTT 13247-49.) Lee testified that when he asserted his rights to remain silent, the deputies would beat the alias names out of him. (RTT 13248.)

[1206] Lee testified it wasn't actually a broomstick, but rather an attachment that went to a broomstick or squeegee. The inmates referred to it as a broomstick. (RTT 13245.)

possession of the stick. (RTT 13246.) After the stick had been taken away, Lee requested another, along with the usual maintenance supplies for the tank. (RTT 13246.) Lee received a new stick to use with the television. (RTT 13247.)

Peter Bunn, a licensed private investigator, testified that he went to Tank 5F in the San Diego jail and took the photographs contained in Exhibits 738A-E. (RTT 13260-62.) When he entered the tank the stick depicted in the photographs was already in the tank. (RTT 13262.) Bunn used the stick to determine whether he could reach the television from cells 3, 4, or 5. (RTT 13263.) In cell 3, Bunn's assistant, James McCarthy, was able to successfully use the stick against the television. (RTT 13263.) McCarthy attempted to use the stick from cell 4 and cell 2 but he was unable to reach the television set. (RTT 13263-65.)

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.3 1973 RAPE CONVICTION: VOIR DIRE

ARGUMENT 6.3.1

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

A. Introduction

Prior to voir dire all parties were aware that the prosecution intended to offer Lucas' 1973 rape conviction as a factor in aggravation. However, despite repeated requests by counsel, the trial judge precluded the defense from asking prospective jurors whether the prior rape conviction would cause them to automatically vote for death without considering the mitigating evidence. The judge precluded such an inquiry at both the death qualification voir dire and the general voir dire.

As a result, it is "impossible . . . to determine from the record whether any of the individuals who were ultimately seated held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed [rape in addition to] the murder[s] charged in this case." (*People v. Cash* (2002) 28 Cal.4th 703, 723.)

For this reason, the death sentence should be reversed.

B. Procedural Background

Early in the death qualification voir dire, defense counsel asked the following question of a prospective juror who seemed uncertain whether he would favor death based solely on the conviction of the defendant at the guilt phase:

> Q: Now we're in a penalty phase and you hear evidence from a woman who you believe; you're certain this woman is telling the truth who says, "That man, Mr. Lucas, raped me." And you further learn that that man, Mr. Lucas, who this woman says raped her, went to prison as a result of it. (RTH 27388:27-27389:4.)

The prosecutor objected to the question. (RTH 27389:5-12.) The defense responded that the question went to the issue of juror bias, and a potential challenge for cause.[1207] The defense argued that the huge aggravating impact of a conviction for rape was demonstrated by the fact that a number of potential jurors stated, on their questionnaires, that the death penalty should "always be imposed" for the crime of rape.[1208]

After extensive argument on the issue, the judge ultimately ruled in favor of the prosecution and precluded any question as to the impact of the prior rape on the jurors' deliberations at the penalty phase. (RTH 27394-27672.)

> The Court: . . . And so I am going to draw the line there. I think that that is the line that is to be drawn. You can't ask specific factors in mitigation and aggravation and how they would feel about those factors presented to them. That's beyond the proper scope of *Hovey* voir dire, and so I will limit

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[1207] Defense counsel further contended that if a juror stated "in all cases of rape I would impose the death penalty," the juror should be challenged for cause. Defense counsel also noted that on some of the juror questionnaires rape was specifically listed as an offense to which the death penalty should apply. (RTH 27394-95; 27654-55.)

[1208] In fact, 14 jurors so responded in their questionnaire. (See § 6.4.1(A), pp. 1442-44 below, incorporated herein.)

that. (RTH 27671:1-27672:20.)[1209]

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

A person accused of a capital crime is entitled to explore the potential bias or prejudice of his prospective penalty jury in order to protect his Sixth and Eighth Amendment rights to a fair, impartial, reliable, and individualized sentencing determination. (See *Morgan v. Illinois* (1992) 504 U.S. 719; *Turner v. Murray* (1986) 476 U.S. 28; *People v. Lucas* (1995) 12 Cal.4th 415; *People v. Champion* (1995) 9 Cal.5th 879, 908; *People v. Bittaker* (1989) 48

[1209] The judge also ruled the prior rape could not be mentioned at the general voir dire; but that general questions about the juror's feelings about rape could be asked:

> The Court: . . .You can't hypothesize them into the penalty phase and give them specifics of aggravating and mitigating factors and ask how they feel. But on a peremptory type question, which I think is properly done at general voir dire, you, again, can't ask them specifics. But I think you can certainly explore their feelings on things that you think may come up in those aggravating and mitigating circumstances.
>
> You can certainly explore how strongly they feel about rape and whether that's ever touched their lives and whether they would be very, very, very prejudiced against somebody who did such a thing. That will give you an indication that that's the person who will take that one aggravating factor and vote death and that's it, and I think that's a peremptory challenge. (RTH 27684:5-18; see also RTH 32841 [the 1973 prior is not "permissible either as peremptory or nonperemptory question].)

Cal.3d 1046, 1082-87.)[1210]

The foremost concern of the Eighth Amendment and its California counterpart is that "capital sentencing must have guarantees of reliability, and must be carried out by jurors who would view all of the relevant characteristics of the crime and the criminal, and take their task as a serious one." (*Sawyer v. Smith* (1990) 497 U.S. 227, 235 [emphasis added].) The required reliability and individualization is attained only when "the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228; see also CALJIC 8.88 (1989 Revision) ["You shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances"].)

In *Morgan v. Illinois*, *supra*, 504 U.S. 719, the Supreme Court applied these principles to overturn a death sentence on the ground that defense counsel had been impermissibly prohibited from asking the prospective jurors the following question: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (504 U.S. at 723.)

In so ruling, the Court set forth the broader principle:

[1210] "In a state such as California that in capital cases provides for a sentencing verdict by a jury, 'the due process clause of the Fourteenth Amendment of the federal constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial.' [Citations to *Morgan*]. California's Constitution provides an identical guarantee." [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 853.)

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence. (*Id.*, at 729.)

The Court then turned to the question of whether, on voir dire, the Court must inquire into the prospective jurors' views on capital punishment. The Court emphasized that "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." (*Id.* at 729.) The Court also stressed that "we have not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." (*Id.* at 730.) The Court concluded:

> We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so. (*Id.* at 734 [emphasis in original].)

Accordingly, the voir dire should serve to identify and excuse jurors who cannot fairly weigh mitigation and aggravation in making a sentencing decision. (See *Wainwright v. Witt* (1983) 469 U.S. 412, 424; *People v. Hovey*

(1980) 28 Cal.3d 1, 80.) It follows, therefore, that "either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 720-21; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) In other words, it is essential that the prospective jurors be "informed of facts or circumstances likely to be present in the case being tried." (*People v. Cash*, *supra*, 28 Cal.4th at 720.)

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

In the present case the trial judge violated the principles set forth above. As in *Cash*, the defense in the present case was foreclosed from specifically questioning the prospective jurors about a prior conviction which was to be presented in aggravation at the penalty trial. And, as in *Cash*, the judge's ruling applied to both death qualification and general voir dire. (See § 6.3.1(B), pp. 1432, n. 1209 above, incorporated herein.)[1211]

Hence, the trial court committed error which violated Lucas' state (Art.

[1211] Precluding voir dire as to the impact of case-specific prior convictions during general voir dire is actually a separate error. (See *People v. Ranney* (1931) 213 Cal. 70 [reversible error to refuse voir dire question: whether the fact that defendant had been twice convicted of a felony would bias or prejudice jurors to the extent that they would be unable fairly to weigh the evidence given by the defendant].) These cases retain their vitality in the wake of Proposition 115. (See *People v. Chapman* (1993) 15 Cal.App.4th 136 [citing *Ranney*, court in a noncapital case holds that it was reversible Sixth Amendment error for the trial court to refuse to undertake any examination concerning any bias jurors might feel toward defendant due to a prior felony conviction admitted pursuant to Penal Code § 12021].)

I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) rights to due process and fair trial by jury. (See *Morgan v. Illinois* (1992) 504 U.S. 719.) The error also violated the Eighth Amendment of the federal constitution by impermissibly reducing the reliability of the death sentence and failing to assure that the sentencing jurors considered the mitigating evidence in violation of the Eighth Amendment right to a reliable, fair, impartial and individualized sentencing trial. (See *Morgan v. Illinois*, *supra*; *Turner v. Calderon* (9th Cir. 2002) 281 F.3d 851; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Penry v. Johnson* (2001) 532 U.S. 782; *Lockett v. Ohio* (1978) 438 U.S. 586.)

Furthermore, because the error violated Lucas' state created rights to a fair and impartial jury and adequate voir dire, his right to due process under the Fourteenth Amendment to the United States Constitution was violated. (*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 Death Sentence Should Be Reversed

In *Cash* the death sentence was overturned for the following reasons:

"Here, the trial court's ruling prohibited defendant's trial attorney from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if the defendant had previously committed another murder. Because in this case defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. In prohibiting voir dire on prior

murder, a fact likely to be of great significance to prospective jurors, the trial court erred." (*People v. Cash,* 28 Cal.4th at 721.) As a result, it is "impossible . . . to determine from the record whether any of the individuals who were ultimately seated held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed [a prior murder in addition to] the murder[s] charged in this case." (*Id.* at 723.)

In the present case, it is similarly impossible to determine whether any of the sentencing jurors held the disqualifying view that the death penalty should be invariably imposed on any defendant who committed a forcible rape by use of a knife, in addition to the charged murders.[1212]

Accordingly, as in *Cash*, the death judgment in the present case should be reversed.

[1212] The trial judge did rule that the defense could conduct general voir dire inquiries about the jurors' feelings about rape in general. (RTH 27684; 32841.) However, such inquiries could not have cured the error because they would not have elicited "the prospective jurors' responses to the facts and circumstances of the case. . . ." (*Cash*, 28 Cal.4th at 722 [citing *People v. Cunningham* (2001) 25 Cal.4th 926, 974].) Certainly, such an inquiry would likely have revealed that most, if not all prospective jurors believed rape to be a serious, repulsive crime. However, it would not have revealed whether, as the defense was entitled to know, any such prospective juror believed that a defendant who had committed a rape in addition to the charged murders should invariably and automatically be sentenced to death.

Moreover, by requiring the defense to reveal the prior rape before all the jurors during general voir dire, Judge Hammes forced the defense into a Hobson's choice between vindicating the right to a fair sentencing jury, and poisoning the guilt trial with the revelation of a highly prejudicial prior conviction. (See generally Volume 7, § 7.5.1(H), pp. 1615-16, incorporated herein [exercise of one constitutional right must not be predicated on the waiver of another]; *People v. Alcala* (1984) 36 Cal.3d 604, 631 [recognizing the prejudicial impact of prior convictions and the inability of limiting or curative instructions to dispel the prejudice]; *People v. Thompson* (1980) 27 Cal.3d 303, 314 [same].)

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALLY

6.4.1 OVERVIEW

A. Nature Of The Prior Conviction

The only aggravating evidence presented by the prosecution at the penalty trial was Lucas' 1973 conviction for rape with use of a knife. By its very nature this prior conviction was highly inflammatory and prejudicial. Judge Hammes' assessment of the prior is typical of how the jurors likely viewed the prior conviction: "As a factor in aggravation, [Lucas' prior] conviction weighed heavily with the court, for it proved that Mr. Lucas had used force and violence with a deadly weapon on a woman in the past. A prior conviction by jury did not change him. It may well have taught him that rape leaves a live witness; a dead victim can't testify." (RTT 13661-62.)

Further, the prior conviction was for rape, an especially heinous crime in the view of most people.[1213] In fact, some fourteen potential jurors believed that the death penalty "should always be imposed" for the crime of rape.[1214]

Hence, the prior conviction was especially powerful aggravation, and

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[1213] Indeed, prior to the Supreme Court's ban on death sentences in rape cases, people were, as a matter of course, executed for the commission of rape. (See e.g., *People v. Chessman* (1951) 38 Cal.2d 166.)

[1214] Question Number 118 on the jury questionnaire given to prospective jurors asked: "Are there any crimes for which you feel the death penalty should always be imposed? If so, what crimes?" A total of fourteen prospective juror responded that the death penalty should always be imposed for the crime of rape. (CT 18157; 18257; 18382; 18507; 18832; 19282; 20007; 20457; 20907; 21833; 21933; 22158; 22782; 23307.)

as the prosecutor argued the jurors were authorized to consider it under both factors (b) and (c).[1215] The prosecutor relied upon this aggravating evidence both in his opening statement (RTT 12594) and in final argument to the jury. (RTT 13268-70; 13273-74.) The prosecutor also used the prior conviction as a means of impeaching, on cross-examination, many of Lucas' mitigation witnesses. (See, e.g., RTT 12603-05; 12611-12; 12639; 12656; 12665; 12734-35; 12790.)

Moreover, the prior conviction was especially prejudicial to Lucas because it undermined his primary defense theory of lingering doubt. The jurors were free to rely on the prior conviction as evidence of criminal propensity to negate the lingering doubt the defense was attempting to foster concerning the current charges.

Furthermore, the prior conviction and commitment allowed the jury to conclude that Lucas would be a future danger because he continued to commit violent crimes notwithstanding the prior conviction and imprisonment.

Finally, the prejudice was especially high in the present case because the defense was precluded from inquiring on voir dire to determine what impact the rape conviction could have on the jurors' ability to fairly consider penalty. (See § 6.3.1, pp. 1432-39 above, incorporated herein.)

In sum, the 1973 prior conviction was powerful aggravating evidence

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[1215] "Now, we have presented to you in Exhibit 271 . . . the certified documents indicating the prior felony conviction that Mr. Lucas sustained in 1973 for the forcible rape with the use of a knife. [¶] "The defense has stipulated to that fact, that it is indeed a valid conviction. This, I submit to you, those two factors, the stipulation by counsel and the documents themselves, prove beyond a reasonable doubt that factors "b" and "c" do indeed exist." (RTT 13268; see also, RTT 13269-70, 13273, 13274; CT 14381-83 [jury instructions]; see also, RTT 12477-78; 12491.)

which, given the close balance of the penalty deliberations (see Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein) undoubtedly "weighed heavily" in the jurors' decision to return a death verdict.

B. The Defense Motion To Strike

The defense made a Motion To Strike the prior conviction based on claims that both trial counsel and appellate counsel had been ineffective. (CT 7745-81.)[1216] Judge Hammes originally refused to hear the motion, ruling that she was procedurally barred from doing so. However, the Court of Appeal, in a published decision,[1217] ordered Judge Hammes to entertain the Motion To Strike which she did, after first denying a defense request that she recuse herself for purposes of the motion.

1. Ineffective Assistance Of 1973 Trial And Appellate Counsel

a. Trial Counsel: Attorney Gilham

At the hearing on the Motion to Strike the defense presented evidence that Lucas' 1973 trial counsel, G. Anthony Gilham, was trying his first felony case. And, the record reflected this inexperience. Gilham failed to perform

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[1216] In the arguments that follow, Lucas contends, inter alia, that Judge Hammes erroneously denied the Motion to Strike because his 1973 trial counsel and/or appellate counsel were constitutionally ineffective. However, because these claims are being reviewed on direct appeal, they are limited by the arguments and evidence presented below, at the Motion to Strike, and such arguments do not reflect all of the bases upon which the 1973 counsel were ineffective. Additional claims and evidence in this regard will be presented in Lucas' habeas corpus petition.

[1217] *Lucas v. Superior Court* (1988) 201 Cal.App.3d 149. Notwithstanding *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 966, which overruled *Lucas v. Superior Court*, *supra*, as to noncapital cases, the *Lucas* decision is law of the case in the present case. (See *Kowis v. Howard* (1992) 3 Cal. 4th 888, 894.)

many of the most rudimentary duties of trial counsel, such as examining the photo spread, and the procedures related to the spread for suggestiveness. Gilham was not aware that an identification could be challenged based on suggestive photo lineup procedures. Nor did Gilham make a *Ballard*[1218] motion for a psychiatric examination of the alleged victim, Teresa Briseno, despite the fact he believed Briseno was mentally unstable. And, the record is riddled with other deficiencies in Gilham's representation of David Lucas. (See § 6.4.6(I), pp. 1510-19 below, incorporated herein.)

However, there is one omission by Gilham which on the face of the appellate record, unquestionably devastated the defense. Gilham's failure to discover and present at trial a witness who would have completely undermined the prosecution's theory of the case. The witness, a friend of the alleged victim, had a telephone conversation with the alleged victim, Briseno, at a time which made it impossible for Lucas to have committed the offense. This omission satisfied both prongs of the *Strickland* [*Strickland v. Washington* (1984) 466 U.S. 668] test for ineffective assistance of counsel; therefore, the Motion To Strike should have been granted.

The prosecution contended that the abduction – which lasted at least 45 minutes – took place between 9:30 p.m. and 10:30 p.m.[1219] Yet the undiscovered witness, Alejandrina Casas, would have testified that she talked on the telephone with Briseno from 10:00 p.m. to 10:05 p.m. and at that time

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[1218] *Ballard v. Superior Court* (1966) 64 Cal.2d 159.

[1219] The prosecution argued for this time frame because numerous witnesses testified that they saw Lucas and/or Briseno at various times after 10:30 p.m. (See § 6.4.3(B)(1), (2) and (3), pp. 1460-63 below, incorporated herein.)

Briseno was not being abducted, and gave no indication of having just been raped. Hence, if Casas had been believed by the jurors, they could not have convicted Lucas under the prosecution's theory. And, the jury had no reason to disbelieve Casas. She was a friend of the victim, and thus had no bias in favor of Lucas. Additionally, she was "positive" of the time because she had just looked at the clock. Thus, Gilham's failure to discover Casas, who was mentioned in the police reports and could have been easily located, constituted ineffective assistance of counsel. (This issue is addressed more fully in § 6.4.6(I), pp. 1510-19 below, incorporated herein.)

b. Appellate Counsel: Attorney Arm

Appellate counsel Fred Arm was also extremely inexperienced; the Lucas case was one of his first appeals. As with attorney Gilham, Arm's inexperience manifested itself throughout his representation of Lucas. Arm made a number of crucial omissions. For example, he never reviewed the trial court's file and exhibits, he failed to review and preserve crucial juror notes inquiring about the evidence and he failed to secure a transcript of trial counsel's arguments to the jury.

Yet, Arm's most glaring mistake was allowing the person who paid his retainer, Lucas' mother, to "orchestrate" the appeal and make crucial appellate decisions. This gave Arm an actual conflict of interest which adversely affected his representation of David Lucas. For example, because Mrs. Lucas did not want to "hurt" trial attorney Gilham, Arm did not challenge Gilham's effectiveness. As a result, Arm was precluded from raising numerous potentially meritorious issues which could have obtained appellate relief for Lucas. And, because Mrs. Lucas did not want to expend any additional funds, Arm completely abandoned David Lucas after the appellate decision was

filed. Hence, Arm failed to file either a Petition for Rehearing or a Petition for Hearing, despite the existence of potentially meritorious claims which could have been raised in those petitions. (Arm's conflict of interest and ineffective assistance are addressed more fully below. See § 6.4.6, pp. 1498-30, incorporated herein.)

In sum, because Arm's conflicted loyalty to Mrs. Lucas rather than David Lucas adversely affected Arm's performance, the Motion to Strike should have been granted.

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALLY

6.4.2 PROCEEDINGS BELOW

A. The Motion To Strike

The only aggravation presented by the prosecution at the penalty trial was a 1973 conviction for rape in violation of Penal Code § 261.[1220] (CT 1263-66; 1697-1700; 6842-45.) Prior to trial the defense filed a Motion To Strike the prior conviction on the basis that Lucas' trial and appellate counsel were ineffective. (CT 7745-81; Exhibits lodged in support, CT 7799-8250.) However, Judge Hammes refused to hear this motion on procedural grounds. She also commented that she did not think the motion was meritorious based on the pleadings she had seen. (CT 5119; RTH 20280; 20361-64.)

The defense filed a Petition For A Writ Of Mandate with the Fourth District Court of Appeal seeking to reverse the trial court's decision. (D007578.) On April 29, 1988, the Court of Appeal reversed Judge Hammes and directed the trial court to "entertain the motion to strike." (*Lucas v. Superior Court* (1988) 201 Cal.App.3d 149, 151.) This Court denied the prosecution's Petition for Review and Judge Hammes set the matter for hearing. (RTH 27665.)

On September 15, 1988, the defense filed a limited challenge for cause, pursuant to Code of Civil Procedure 170.1(a)(6) and the Fourteenth Amendment to the U.S. Constitution, requesting Judge Hammes disqualify herself from the Motion to Strike proceedings, based on the allegation that the

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[1220] The prosecution presented no evidence concerning the alleged incident underlying the conviction – but only the fact of the conviction.

judge had prejudged the issue. (CT 13443-54.) However, the judge struck the disqualification statement as untimely. (CT 13476-88 [transcript excerpts CT 13489-501].)

On November 16, 1988, the hearing on the Motion to Strike the prior conviction commenced. (CT 15626; RTH 34771.) For purposes of the hearing, Judge Hammes took judicial notice of the file in San Diego Superior Court case number CR 29369. (CT 15626; RTH 34792-95.)

On November 22, 1988, the judge denied the Motion to Strike, ruling that the 1973 prior conviction would remain in full force and effect for purposes of aggravation at the penalty trial. (CT 15635; RTH 35168-82.)

B. The 1973 Trial (*People v. Lucas*, CR 29369): Procedural History

On June 11, 1973, in the Municipal Court for the San Diego Judicial District, a preliminary hearing was held pursuant to a complaint filed against David Lucas. (CT 7801-49.) The complaint alleged, inter alia, that Lucas raped, assaulted and kidnapped Teresa Briseno on May 27, 1973. (CT 7803-04; 7820.)

Briseno testified at the preliminary hearing, and Lucas was bound over by the Municipal Court. (CT 7848.) Briseno testified that Lucas kidnapped and raped her during a course of conduct that lasted at least 45 minutes. This course of conduct began around 10:00 to 10:30 p.m. on May 27, 1973 and ended around 11:00 to 11:15 p.m. (CT 7820; 7834-35; 7837.)[1221]

Lucas was held to answer, and on June 15, 1973, an information was filed in San Diego Superior Court (Case Number CR 29369). Count One

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[1221] However, in light of the evidence presented at trial, the prosecution argued at trial that the rape happened between 9:30 to 10:30 p.m. (See § 6.4.3(C), pp. 1467-72 below, incorporated herein.)

alleged that "on or about" May 27, 1973, David Lucas raped Teresa Briseno in violation of Penal Code § 261, with great bodily injury in violation of Penal Code § 264, and while armed with a knife with a blade longer than five inches in violation of Penal Code § 12022. Count Two alleged that "on or about" May 27, 1973, Lucas assaulted Briseno with a deadly weapon in violation of Penal Code § 245(a). Count Three alleged that "on or about" May 27, 1973, Briseno was kidnapped in violation of Penal Code § 207. (CT 7297-98.)

On June 15, 1973, Lucas was arraigned on the charges and pled not guilty to all counts. (CT 7311.) His attorney was G. Anthony Gilham. (*Ibid.*)

On August 8, 1973, twelve jurors and two alternates were selected and the trial commenced. (CT 7313; 7380.)[1222] The presentation of evidence commenced on August 9, 1973 and ended on August 13, 1973. (CT 7382; 7160.) During trial one of the alternate jurors substituted for a juror who was ill. (CT 7516.) There is no record in either the Clerk's or the Reporter's Transcript, of a jury instruction conference. (CT 7317-18.) [1223] However, at the Motion to Strike, trial attorney Gilham remembered attending such a conference. (RTH 34858-59.)

On August 13, 1973, immediately after both sides had rested, Juror Siefert, who eventually became the foreperson (CT 7207), stated that he "had some doubts last week about some things, and [he] wrote down some questions." (CT 7161.) Judge Welsh asked the juror to submit a note with his

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[1222] The record of the 1973 proceedings, both Clerk's and Reporter's Transcript, appears as part of the Clerk's Transcript in the present proceedings. (See CT 7291-7330 [1973 clerk's transcript], and CT 7089-7290; 7374-7529; 7644 [1973 reporter's transcript].)

[1223] Nor was there a settled statement as to the content of any such jury instruction conference.

questions. (*Ibid.*) Court was then adjourned for the lunch recess. (CT 7317.) Prior to reconvening that afternoon, Judge Welsh and counsel had an unreported chambers conference from 1:50 to 2:11 p.m., presumably to discuss Juror Siefert's note. (CT 7317.)[1224] Immediately thereafter court convened, and the judge informed Juror Siefert, inter alia, as follows:

> Mr. Siefert, I have reviewed your two-page note with counsel, and I should like to advise you that since the evidence is closed, we cannot now move on into providing additional evidence. (CT 7163:6-9.)

Counsel then commenced arguments, which concluded the same afternoon. (CT 7164.)

Although the arguments of counsel were never transcribed and have since been destroyed, based on the post-verdict motions, it can be reasonably inferred that the prosecutor's theory at trial was that the incident began around 9:15 p.m. or 9:30 p.m., and ended around 10:30 p.m. (CT 7230; Exhibit 761, p. 1; see also § 6.4.3(C), pp. 1467-72 below, incorporated herein.)

After argument, the judge gave the jury most of the instructions before recessing for the day. (CT 7166-82.) The next morning, August 14, 1973, the judge finished the instructions and the jurors began deliberating. (CT 7186-90; 7318.) The jurors deliberated the balance of that day and all day on August 15, 1973. (CT 7318-19.)[1225]

[1224] There was no transcript of this conference, nor any settled statement as to what occurred.

[1225] At the time the jurors were instructed, the alternate was present and apparently left the courtroom with the other jurors after instruction. (CT 7186; 7190.) Later that day, when the court reassembled to explain an instruction, the alternate was present with the jurors. (CT 7202.) The alternate was also

(continued...)

On August 14, 1973, defense attorney Gilham informed the court that Lucas had successfully passed a polygraph examination. (In Limine Exhibit 762.) However, the judge denied Gilham's request to lodge the polygraph results with the court. (CT 7095; 7191-93; 7318.) (See also § 6.5.1, pp. 1545-52 below, incorporated herein.)

On August 17, 1973, the jurors sent out a note indicating that they were going to begin voting. This note also had a question about the kidnapping charge, which the judge answered in writing. (CT 7197-98.)

Subsequently, the court received another note asking for a copy of the information.[1226] With the approval of both parties, the judge sent the following response to the note, along with a copy of the Information:

> Everything you need is on the verdict forms, but the Information is enclosed for your review. (CT 7201.)

Later that day the jurors sent out another note inquiring about the great bodily injury enhancement to Count 1. Judge Welsh answered the jurors' questions in open court. (CT 7202-05.) At the end of this session the judge asked the jury foreman if he felt the jurors were making progress, and if he felt it was worthwhile to continue deliberations the following morning. The

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[1225](...continued)
present the following morning. (CT 7207.)

[1226] This note read as follows:

> To: Judge Welsh
> The verdict forms refer to "the Information."
> May we have a copy of the "Information" or is everything we need to know about the charges repeated in the "Verdict" forms?
>
> J.R. Siefert, foreman, 8-15-73. (CT 7199-200.)

foreman responded affirmatively. The judge asked the jurors as a whole if anyone disagreed with the foreman's assessment. No juror expressed any disagreement. The judge then admonished the jury and sent them home for the evening. (CT 7205-06.)

On August 16, 1973, after approximately 12 hours of deliberation spanning three days (CT 7318-20), the verdicts were announced. (CT 7207; 7209-10.) Lucas was found guilty of forcible rape (Penal Code § 261) while armed with a deadly weapon. (CT 7210-11; 7299; 7301; 7320.) The jury found Lucas not guilty of the Penal Code § 264 enhancement allegation of infliction of great bodily injury during the commission of the rape. (CT 7300; 7320.) The jury also found Lucas guilty of assault with a deadly weapon (Penal Code § 245(a)) as alleged in Count Two. (CT 7211-12; 7320.)[1227] The jury could not reach a verdict as to Count Three, the kidnapping charge, and the prosecution moved to dismiss it in the interest of justice. (CT 7214; 7320.)

On September 4, 1973, the defense filed a motion for a new trial on the basis that the evidence was insufficient to support the verdict and that the verdict was contrary to the evidence. (Penal Code § 1181.) (CT 7303-06.) On September 28, 1973, the court denied the motion for a new trial and certified Lucas for hearing and examination to determine if he was a Mentally Disordered Sex Offender ("MDSO"). (CT 7235-38; 7323.)

Meanwhile, on October 15, 1973, Gilham filed a *coram nobis* petition based on the testimony of Alejandrina Casas Valenzuelas, whose testimony

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[1227] This conviction was excluded from the penalty trial (see RTT 12389; 12597; 13083-84; 13251; Trial Exhibit 271) and is not at issue in the present argument.

as to a 10:00 to 10:05 p.m. conversation with the victim, Teresa Briseno, contradicted Briseno's trial testimony, as to the time of the alleged abduction and rape. (CT 7254-61.)[1228] In connection with the *coram nobis* petition, Lucas – who passed an earlier polygraph test (see § 6.4.3(B)(5), p. 1464 below, incorporated herein) – offered to take another polygraph to be conducted by an operator designated by the District Attorney's Office. (CT 7249; 7328.) The court directed Lucas and the victim to submit to the tests and asked the prosecutor to arrange for the tests. (CT 7249-50; 7327.)

On October 24, 1973, after a two-day hearing, Judge Robert O. Staniforth found that Lucas was not an MDSO and reinstated criminal proceedings in the matter. (CT 7325-26; 7355.)

On November 5, 1973, the court convened to hear the results of the polygraph tests. (CT 7270.) However, the prosecution did not comply with the judge's requests that Lucas and the victim be polygraphed. The court concluded that it did not have the power to order the tests to be taken. (CT 7270-71.) The *coram nobis* petition, which was essentially considered a second new trial motion (RTH 35173), was then denied. (CT 7271-78; 7328.)

Judge Welsh then addressed sentencing and the recommendations of the probation officer that Lucas be committed to the California Youth Authority ("CYA"). (CT 7279; 7307.) The defense argued against a CYA commitment because it was an indeterminate sentence. (CT 7279.) The prosecution argued that CYA would best benefit Lucas, based on the psychiatrists' diagnosis of anti-social personality. (CT 7281.) The District

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[1228] At trial Briseno's testimony indicated that the abduction and rape occurred between approximately 9:30 and 11:00 p.m. (See § 6.4.3(C), pp. 1467-72 below, incorporated herein.)

Attorney mistakenly argued that the CYA commitment would reduce both the rape and assault convictions to misdemeanors.[1229] Neither defense counsel nor the court corrected the District Attorney's misstatement, and the court committed Lucas to the CYA. (CT 7283; 7309; 7328.) At this point Gilham moved to be relieved as counsel of record and attorney Fred Arm was substituted. (CT 7284; 7328; In Limine Exhibit 769.) Attorney Arm made a *Ballard* motion to have the victim examined by a psychiatrist. (CT 7284-85.) The court denied the motion as untimely. (CT 7285; 7328.)

C. Appeal

On November 6, 1973, Attorney Arm filed a notice of appeal for Lucas. (CT 7310.)

On December 12, 1973 the Court of Appeal filed the appellate record. (In Limine Exhibit 765.)

On January 21, 1974, Arm filed an augmentation request for, inter alia, the opening and closing arguments of counsel. (In Limine Exhibit 770.) No reasons were given as to why the requested augmentation was needed. (*Ibid.*) On January 28, 1974, the augmentation request was denied for failure to show "materiality or relevancy." (In Limine Exhibit 771.)

On January 31, 1974, Arm filed a second augmentation request. (In Limine Exhibit 772.) The request asked for the transcript of the *coram nobis* proceeding because it included the testimony of a witness that established the victim was at home at the time of the alleged abduction and rape. The request

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[1229] "Normally I don't submit commitment to the Youth Authority in matters such as this, because the other benefit to be gained by such a commitment is that it reduces the charges for which the defendant was convicted to misdemeanors. Both counts are felonies. . . .The commitment reduces the offenses to misdemeanors." (CT 7281-82.)

also asserted that "[t]his evidence was not available and was not known to the appellant at the time of the trial." (*Ibid.*) The renewed request for transcripts of the opening statements and closing arguments simply stated that appellate counsel did not know what was said by trial counsel during the opening statements and closing arguments. (*Ibid.*)

On February 7, 1974, the augmentation request for the *coram nobis* proceedings was granted. (See CT 7244.) The request for the opening and closing statements was denied. (RTH 34777-78.)

On April 19, 1974, Appellant's Opening Brief was filed in the Fourth District Court of Appeal. (Crim. No. 6638.) (CT 7351-72; 7392-94.)

Two arguments were raised, with the following captions:

> I. THE EVIDENCE PRESENTED IN THE LOWER COURT WAS INHERENTLY IMPROBABLE AND THEREBY WAS INSUFFICIENT TO SUPPORT THE GUILTY VERDICT
>
> II. THE COURT ERRONEOUSLY DENIED THE DEFENDANT'S REQUEST TO SUBMIT THE VICTIM AND THE DEFENDANT TO A LIE DETECTOR TEST AND THE CONCURRENCE FOR SAID TEST WITHHELD BY THE DISTRICT ATTORNEY AS A BASIS FOR THE DENIAL OF DEFENDANT'S MOTION FOR A NEW TRIAL IS VIOLATIVE OF THE DOCTRINE OF THE SEPARATION OF POWERS

Even though Argument I was captioned as a Sufficiency-Of-Evidence claim, the body of the argument relied primarily on the *coram nobis* testimony of Alejandrina Casas Valenzuelas (Casas). (In Limine Exhibit 751, pp. 9-12.) And, the relief sought was a remand for a new trial. (*Id.* at p. 12.) Argument I contended, in effect, that the trial court abused its discretion in failing to grant a new trial on the basis of Casas' testimony. However, because of the inept and misleading argument caption, the Court of Appeal addressed the

claim as a pure Sufficiency-Of-Evidence argument without discussing the *coram nobis* testimony. The Court of Appeal concluded that the evidence "substantially supports the verdict and allows a reasonable trier of fact to find the prosecution met its burden of proof." (CT 10398.)

The judgment was affirmed on appeal. There was no Petition for Rehearing in the Court of Appeal or Petition for Hearing in this Court. (RTH 34802.)[1230]

[1230] At the time of Lucas' appeal from his 1973 conviction a request for review by the California Supreme Court was called a "Petition for Hearing."

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALLY

6.4.3 STATEMENT OF FACTS

A. Prosecution Evidence At 1973 Trial

In May of 1973, Teresa Briseno, a 21 year-old Mexican national, lived with the Cook family in San Diego. In return for room and board, Briseno did household chores. She also worked for other residents of the area. (CT 7447-48.)[1231]

On Memorial Day weekend, May 26 and 27, 1973, Mr. and Mrs. Cook and their daughter Candy went on a trip. (CT 7448; 7542-43.) Candy left a key to the house with 16-year-old Linda Kilbourn who lived across the street. (CT 7542-43.) During the weekend Briseno stayed at the Cooks' house. However, she spent Saturday night with her boyfriend at a motel. (CT 7448-50; 7486; 7536.) Also present at the Cooks' house that weekend were three boys, David Cline, David Carroll and David Lucas, whom Linda Kilbourn had let into the house to have a party. (CT 7450; 7542-43.) The boys were at the Cooks' house Saturday and Sunday. (CT 7450-51; 7551-52.) Briseno did not know the boys and did not have any contact with them. (CT 7452.)[1232]

On Sunday night Briseno and her girlfriend[1233] returned from dinner

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[1231] Ms. Briseno spoke very little English and testified at trial through an interpreter. (CT 7446; 7456; 7483-84.)

[1232] Also present at the Cooks' house at various times during the weekend were the Cooks' son, Jeff, and the Cooks' neighbors Linda Kilbourn and Debbie Modica. (CT 7542-43.)

[1233] This girlfriend was later identified during the *coram nobis* hearing (continued...)

around 7:00 or 7:30 p.m., and the three boys were still there. (CT 7453.)[1234] Casas asked the boys to leave but they remained until 8:30 or 9:00, after Casas had left. (CT 7454.)

According to Briseno, one of the three boys, whom she identified as Lucas, returned to the Cook house at approximately 9:30 p.m., and said he had left his jacket. (CT 7454.) He was drunk. (CT 7456.)

Briseno testified that Lucas grabbed her from behind and put a small kitchen knife to her throat. (CT 7458.) She was taken into a bedroom and told not to yell. (CT 7460.) He then obtained a larger knife from the kitchen and took her outside. (CT 7461.) He held the knife to her and forced her into the Cooks' Datsun. He had difficulty starting the car. (CT 7463.) Eventually he was able to start the car. He drove for several blocks and then stopped and asked Briseno how to turn on the lights. (CT 7465.) He then began driving up a dirt road to the top of a mountain. (CT 7466.) Briseno was then forced out of the car and ordered to take off her clothes; she complied but he tore off her brassiere. He took off his clothes, got on top of her and had sexual intercourse with her. (CT 7467-69.)

After intercourse was completed, she struggled with her assailant for the knife. During the struggle she was cut on the fingers and neck.

[1233](...continued)
as Alejandrina Casas Valenzuelas ("Casas"). (See § 6.4.3(B)(6), pp. 1464-66 below, incorporated herein.)

[1234] On cross-examination, Briseno testified that she was angry with her boyfriend, Pedro, the day she was raped. (CT 7491.) They had quarreled at the motel the previous evening. (CT 7449; 7485.) She further stated that she ended the relationship that evening because her boyfriend was seeing another woman. (CT 7449; 7492; 7535-37.)

Ultimately, she obtained the knife and threw it away. Lucas asked her for forgiveness but also indicated through gestures for her not to talk. (CT 7470; 7482; 7505.) He then drove her home, obtained the key to the Cooks' house from the neighbor (Linda Kilbourn) and let her in the house. (CT 7472.) According to Briseno it was around 11:00 p.m. (See § 6.4.3(C)(1) and (4), pp. 1467; 1468-70 below, incorporated herein.) According to Linda Kilbourn when Lucas came to her house and asked for the key it was between10:30 and 10:45 p.m. (CT 7545-47.)[1235]

Approximately 10 to 20 minutes after being returned to the Cooks' house,[1236] Briseno called Julie Marino. Briseno asked Marino to pick her up, stating something bad had happened. (CT 7390; 7528-30; 7540.) This call, according to Marino and Briseno, was made around 11:15 p.m. (CT 7386-87; 7500-01.) While Briseno was waiting for Marino to arrive, three neighbor girls (Linda and Laurie Kilbourn and Debbie Modica) came to the Cooks' house to retrieve some records. (CT 7544; 7547-48 .)[1237] Briseno did not mention anything about being raped. (CT 7474.)

[1235] Linda originally testified that it was exactly 10:30 p.m. because Debbie Modica looked at the clock when Lucas arrived, and told her that it was 10:30 p.m. (CT 7546-47.) However, according to Officer Murphy, Linda told him that it was 10:30 to 11:00; although she "favored closer to10:30." (CT 7143.) At trial Linda testified that she told Officer Murphy 10:30 to 10:45 p.m. (CT 7547.) Debbie Modica, testifying for the defense, said it was "about 10:30." (CT 7556.) Laurie Kilbourn, also testifying for the defense, agreed that it was "about 10:30." (CT 7568.)

[1236] Briseno testified that it was 10-20 minutes. (See § 6.4.3(C)(1) and(4), pp. 1467; 1468-70 below, incorporated herein.) On the night of the attack she told Marino that she had waited about 20 minutes before calling. (CT 7401.)

[1237] Laurie Kilbourn and Debbie Modica were defense witnesses.

Marino arrived to pick Briseno up at approximately 11:35 p.m. (CT 7400.) Marino noticed wounds on Briseno's hands and neck. (CT 7390-91.)[1238] Briseno informed Marino, who spoke Spanish, that she had been raped, but that she had waited about 20 minutes to call Marino. (CT 7400-01.) Specifically, Briseno told Marino that a "hippie" had put a knife to her throat and taken her in a car to a mountain where he ripped her clothes off and raped her. She told Marino that her assailant threatened to kill her if she told, and that he had taken her back to the Cook residence after the rape. (CT 7400.) Mrs. Marino then took Briseno to her house in Alpine where she stayed the next several days. Briseno took a bath and Marino saw scratches on her buttocks and breasts. (CT 7402; 7405.)

Briseno was hesitant to contact the police because of her immigration status. (CT 7401; 7482.) However, Mrs. Cook contacted the police two days after the assault. (CT 7411.)[1239]

Officer Gary Murphy of the San Diego Police Department interviewed Briseno on the day she reported the attack. He accompanied Briseno to the peak of Cowles Mountain. (CT 7418.) At the peak Murphy found a serrated kitchen knife in a bush on the side of the dirt road. (CT 7421; 7424.) However, the knife tested negative for blood or fingerprints. (CT 7432.)[1240] Murphy also found Briseno's brassiere on the opposite side of the road. (CT 7424.)

[1238] To Marino, Briseno appeared to be frightened. (CT 7401.)

[1239] Briseno did not think the report she gave to the police would result in Lucas spending time in jail. (CT 7534.) She also testified that Lucas had not been very rough on her. (CT 7535.)

[1240] Briseno testified that her attacker did not wear gloves. (CT 7524.)

On June 5, 1973, Murphy showed a photo spread to Briseno.[1241] Briseno picked Lucas out as her assailant. (CT 7433-34.) On cross-examination, attorney Gilham elicited the fact that the other photos in the spread came from the Sex Crimes Detail of the Police Department. (CT 7435.)[1242]

Murphy examined the undercarriage of the Cooks' 280Z and found no sign of debris or vegetation that might indicate that it had been driven on a dirt road.[1243] Nor was there any blood in the car. (CT 7438-39.)

B. Defense Evidence At 1973 Trial

1. Alibi Evidence

Curt Andrewson[1244] testified that on Sunday, May 27 he received a telephone call at his house from Lucas asking for a ride. (CT 7110-11.) Andrewson received the call between 10:15 and 10:30 p.m. (CT 7111.) Andrewson drove from his house to the Navajo Shopping Center and met Lucas there at approximately 10:40 p.m. They talked for a few minutes and

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[1241] The photo spread did not contain photographs of Carroll or Cline, or Steven Hopkins, a friend of the Cook family, who arrived at the house around 10:30 p.m. on the evening of the attack. (CT 7436.)

[1242] It was not clear from the record whether Lucas' photo also came from the Sex Crimes Detail. (See RTH 35097-106; but see RTH 35171 [court rules that a "fair reading" of the transcript does not reveal that Gilham was referring to the source of Lucas' photo].)

[1243] Briseno testified that the car hit rocks and holes and bounced while going up and down the dirt road. (CT 7466.) When Murphy drove up the road the undercarriage of his car scraped the road. (CT 7419; 7438; 7442.)

[1244] Andrewson's first name was also spelled with a "K" throughout the record. However, at Lucas' trial in 1989, Andrewson spelled his name for the court reporter as "C-u-r-t." (RTT 10404.)

then drove back to Andrewson's house, arriving at 11:00 p.m. (CT 7111.)[1245]/[1246]

David Cline testified that he was with David Lucas on Sunday evening from approximately 10:30 p.m. until 10:50 or 10:55 p.m. At approximately 10:30 p.m. Cline left the Navajo Shopping Center with Curt Andrewson. (CT 7109.)[1247]

Prosecution witness Linda Kilbourn also provided evidence favorable to Lucas by testifying that he came to her residence asking for the key to the Cooks' house between 10:30 and 10:45 p.m. (CT 7546-47.)[1248] Debbie Modica and Laurie Kilbourn also provided evidence contradicting Briseno's testimony by testifying that Lucas came to Kilbourn's house around 10:30 p.m. (CT 7556; 7568-69.)

2. Testimony That Briseno Was At The Cook Residence Between 10:30 And 11:00 p.m.

Prosecution witness Linda Kilbourn testified that she saw Briseno at the Cook residence between 10:30 and 10:45 p.m.[1249] She spoke with Briseno and was within one foot of her. Kilbourn saw no injury on Briseno's neck.

[1245] When he arrived home Andrewson looked at the clock because he had to work the next day and he wanted to see what time it was. (CT 7111.)

[1246] Andrewson noticed that Lucas had some scratches on his elbow and tailbone. (CT 7111-12.) Lucas spent the balance of the night at Andrewson's home. (CT 7115; 7125.)

[1247] Cline observed a scrape on Lucas' elbow and the fact that that his pants legs were dirty. (CT 7106.) Lucas did not appear to be nervous. (CT 7108.)

[1248] See § 6.4.3(B)(2), pp. 1461-62 below, incorporated herein.

[1249] See § 6.4.3(A), pp. 1456 above, incorporated herein.

(CT 7549.) Debbie Modica testified that she, Linda Kilbourn and Laurie Kilbourn saw Briseno when she answered the door at the Cooks' house, between 10:40 and 10:45 p.m. (CT 7558; 7563.) Modica was standing within two feet of Briseno but did not look at her. (CT 7558.) She glanced at her face and thought she looked "mad." (CT 7565-66; see also CT 7571 [testimony of Laurie Kilbourn].)

Steven Hopkins, a friend of the Cook family, testified that he arrived at the Cooks' house between 10:25 and 10:30 p.m. (CT 7577-79; 7584.)[1250] Briseno was at the Cooks' house when Hopkins arrived, and he had a brief conversation with her. Hopkins then went into the bathroom. Briseno let the dog out and as she passed by the bathroom she said, "Goodnight." (CT 7582.) She walked down the hall, but Hopkins was not sure whether she went into the bedroom. He then went to bed.[1251] He did not hear a telephone call being made nor the front door opening. (CT 7582-83.)

Jeff Cook arrived at the Cook residence between 10:50 and 11:00 p.m. Hopkins was asleep in one of the bedrooms. (CT 7602.) He did not see Briseno, but he heard footsteps in her bedroom that sounded like hers. Her bedroom light was on. (CT 7603.)

3. Testimony Of David Lucas

Lucas admitted being present at the Cook residence on Saturday and Sunday. (CT 7118.) On Sunday, he arrived at the Cook house at approximately 12:30 p.m. with David Carroll and David Cline. (CT 7121.)

[1250] The record erroneously states at CT 7577 that this was May 29. It was actually May 27. (CT 7587.)

[1251] In his interview with Gilham's investigator, Hopkins said it was exactly10:37 p.m. when he went to bed. (See In Limine Exhibit 759B, p. 17.)

They drove the Cooks' 280Z to the store once during the afternoon to purchase cigarettes, but that was the only time that he drove the car. (CT 7121.) Lucas testified that Carroll "got the keys from somewhere." (CT 7121.)[1252]

At 9:00 p.m. on Sunday evening Lucas left the Cooks' house with Carroll and attempted to hitch a ride home. (CT 7122-23.) He was unable to get a ride so he started to walk back to Cline's house. On the way back, he slipped and fell while walking down a steep hill. (CT 7124; 7128.) Lucas was carrying his jacket at the time. (CT 7124.) No one was at Cline's house so he walked to Linda Kilbourn's house to try to call a friend for a ride. (CT 7124.)

On the way to Kilbourn's house he saw Briseno sitting on the front lawn of the Cook residence. She said that she was locked out, so Lucas went to the neighbor's house and asked Linda Kilbourn for the keys. (CT 7124.)[1253] Lucas then went back to Cline's house. (CT 7125.) Lucas then called a friend, Curt Andrewson, somewhere around 10:30 p.m. and asked him to pick him up. (CT 7125-27.) He met Andrewson at the Navajo Shopping Center around 10:45 p.m. (CT 7127.)

Lucas denied raping Briseno. (CT 7124.)

4. Defense Theory That Hopkins Committed The Offense

It was a defense theory that Hopkins abducted and raped Briseno

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[1252] Lucas further testified that after they got back, he had no idea what happened to the keys to the car. (CT 7121-22.) He did not see from where Carroll got the keys. (CT 7135.) Officer Murphy testified that Carroll told him that Lucas knew where the keys were. (CT 7145.)

[1253] Lucas estimated that this was at about 10:15 p.m. (CT 7127.)

between 10:00 and 11:00 p.m. (CT 7148.) However, Briseno testified that Hopkins was not the person who raped her. (CT 7150.)[1254]

5. Lucas' Successful Polygraph

On August 13, 1973, Attorney Gilham referred Lucas to Marion Brandenberger for a polygraph test. Lucas passed the polygraph test. (RTH 34869; 34871; In Limine Exhibit 762.) Gilham tried to lodge the polygraph results with the court after the commencement of deliberations, but the request was denied. (CT 7095; 7191-93; 7318.) Gilham did not try to litigate or contest the law concerning the admissibility of the polygraph results. (RTH 34872.) After trial, Lucas agreed to take another polygraph test under the direction of the prosecutor, pursuant to the judge's suggestion that both Lucas and the victim take polygraphs. However, the prosecutor declined to do so. (See CT 7270-71.)

6. *Coram Nobis* Testimony Of Briseno's Friend Alejandrina Casas

a. Phone Call With Briseno At 10:00 p.m. On Sunday Night

At the *coram nobis* hearing, Lucas presented the testimony of Alejandrina Casas Valenzuela ("Casas"). She was a friend of Briseno's and

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[1254] At the preliminary hearing in the present case Lucas' 1973 trial attorney, Anthony Gilham, indicated that Briseno had originally identified Hopkins:

> Mr. Gilham: Your Honor, I was faced with a situation like this, ironically enough with this same defendant, ten years ago, the victim in the case had identified another individual, a young man by the name of Steve Hopkins, who was a friend of the Cook's [sic] family where this maid worked for. She identified Steve Hopkins in a photo lineup or some type of lineup first, and then after the police contacted her, within a few days she identified Mr. Lucas. (PHT (73093) 1475.)

was with her on the evening of May 27. (CT 7254.) Casas recalled seeing Lucas at the Cook residence on Sunday evening. She asked him for a ride home but he did not have transportation. (CT 7256.) At approximately 9:25 p.m., she got a ride from someone else. (CT 7256; 7263.) Before she left, Briseno told Casas that she was afraid that something might happen. (CT 7259.) As a consequence, Casas called Briseno when she got home at 10:00 p.m. and talked with her for approximately five minutes. (CT 7259.) Briseno seemed calm and did not display any signs of fear or distress. (CT 7260.) Casas was "positive" that it was 10:00 p.m. when she made the call to Briseno because she was in a hurry, and looked at the clock in her kitchen. (CT 7259.)

The day after the alleged attack, Monday May 28, Casas received a telephone call from Briseno. Briseno was hysterical and crying. She said that she had been raped by the man whom she (Casas) had told to leave the previous night. Casas talked to only one man the previous night, and identified Lucas as that man. (CT 7262.)[1255]

b. Briseno's Request That Casas Not Tell Anyone About The Phone Call

Casas denied having a conversation with Briseno about the Sunday 10:00 p.m. phone call. (CT 7261.) However, prior to her testimony, Casas told both Gilham's investigator and Lucas' sister that Briseno told her "not to

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[1255] This testimony appears to have been objectionable hearsay, but Gilham did not object. (See § 6.4.6(I)(3), pp.1512-13 below, incorporated herein [contending that the failure to object was ineffective assistance of counsel].) Apparently he was expecting the witness to testify consistently with her statement to Gilham's investigator regarding Briseno not wanting Casas to tell anyone about the call. (See § 6.4.3(B)(6)(b), pp. 1465-66 below, incorporated herein.)

ever tell anyone of the [10:00 Sunday] telephone conversation." (CT 7267.) Gilham did not offer the testimony of his investigator or Lucas' sister into evidence.

7. Ruling Of Judge Welsh Denying A New Trial

Judge Welsh did not address the defense evidence and argument in denying the new trial request. Instead, he simply stated that, even though he originally did not believe Briseno when she testified, he later accepted her story in part because he did not believe some of the juvenile defense witnesses. When Gilham first told him about Casas' testimony the judge's original doubt was rekindled, and he ordered the prosecutor to have both Lucas and Briseno polygraphed. However, the judge denied the new trial request based on Casas' testimony as to Briseno's hearsay statement that her attacker was Lucas. (CT 7272-73.)

Hence, the judge never acknowledged the essential fact that Casas' testimony undermined the 9:30 to 10:30 p.m. theory upon which the prosecution relied, and upon which the jury could very well have founded its verdict. The fact that the judge did not believe the defense alibi witnesses for 10:30 p.m. on that evening did not mean that the jurors had the same disbelief. In fact, the jurors did not have to consider the alibi witnesses if they relied on the prosecution theory that the abduction had ended by 10:30 p.m.[1256] In this context, Casas' testimony was absolutely critical because if she was to be believed – the judge found her credible – then the crime could not possibly

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[1256] Moreover, in addition to the alibi witnesses (Andrewson and Cline), there were four other witnesses (Linda Kilbourn, Laurie Kilbourn, Modica and Hopkins) who said that Briseno was at the Cooks' house between 10:30 and 11:00 – including a prosecution witness (Linda Kilbourn) and a hostile witness whom the defense believed was the culprit (Steve Hopkins).

have taken place between 9:30 and 10:30 p.m. as alleged by the prosecution.

C. The Prosecution Changed Its Theory As To When The Offense Occurred

At trial the prosecution made a crucial, last-minute change to its theory as to when the offense happened. In so doing the prosecution undercut the defense evidence, including Lucas' alibi witnesses. On appeal, the prosecution again changed its timing theory, this time undercutting the impact of Lucas' *coram nobis* evidence. The following discussion summarizes how the prosecution theory changed from proceeding to proceeding.

1. Prosecution Timing Theory: Preliminary Hearing (10:00-10:30 p.m to 11:00-11:15 p.m.)

At the preliminary hearing the prosecution put on the testimony of Briseno, who said that the abduction began somewhere between 10:00 and 10:30 p.m. and ended between 11:00 and 11:15 p.m. (CT 7528.)[1257] Briseno did not look at her watch when the abduction began, and was not sure of the time. (CT 7528; 7837.) She did look at the clock when she returned, consistently testifying at the preliminary hearing that she returned between 11:00 and 11:15 p.m. (CT 7528-30.) No testimony or argument to the contrary was presented. Based on Briseno's testimony, the magistrate held Lucas to answer on the Briseno charges. (CT 7348.)

2. Prosecution Timing Theory: Opening Statement (10:00 to 11:00 p.m.)

There is no transcript of the opening statement but, based on the

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[1257] In a subsequent answer Briseno said: "I returned, yes, about 11:10 or 11:15 [p.m.]. I am not sure." (CT 7528.) Thereafter she twice reaffirmed that it was 11:00, 11:10 or 11:15 p.m. (CT 7528-29.)

prosecutor's fresh complaint argument (see § 6.4.3(C)(3), p. 1468 below), it may be reasonably inferred that the prosecution's theory in the opening statement was 10:00 to 11:00 p.m. This inference is also supported by the manner in which the prosecutor tried to impeach Linda Kilbourn's initial testimony that she saw Lucas at "exactly" 10:30 p.m. (See § 6.4.3(C)(4), pp. 1468-70 below, incorporated herein.)

3. Prosecution Timing Theory: Fresh Complaint Argument (10:00 to 11:00 p.m.)

Shortly after commencing its case in chief, the prosecution sought admission of the hearsay statements made by Briseno to Marino during the 11:15 p.m. telephone call. Arguing that the phone call from Briseno to Marino was made as a "fresh complaint," the prosecutor stated:

> MR. LEHMAN: In this case, your honor, I think the proof will show that the rape occurred sometime between 10:00 and 11:00 p.m. on Sunday the 27th; that the victim returned to the residence at about 11:00; and immediately thereafter, give or take five or ten minutes, made the telephone call. And that is the conversation that I am now seeking to elicit on that exception. [Emphasis added.] (CT 7387:23-7388:3.)

Defense counsel, in apparent reliance upon Briseno's preliminary hearing testimony and the above representation of the prosecutor, indicated that he had "no reason to believe . . . that the alleged rape took place . . . at another time." (CT 7388.) Accordingly, the judge found that the hearsay was admissible as a "report" (fresh complaint). (CT 7388.)

4. Prosecution Timing Evidence At Trial (9:30-11:00 p.m.)

As to the commencement of the attack Briseno changed the early estimate from 10:00 to about 9:30 p.m., but was still not sure about that

time.[1258]

As to when she was returned, Briseno no longer testified that it could be as late as 11:15 p.m., instead maintaining that it was around 11:00 or a little (5 minutes) before.[1259] She was "positive" that the time was "[m]ore or less around 11:00." (CT 7499.)

This testimony was based on the fact that Briseno called Mrs. Marino about 10-15 minutes[1260] after Briseno returned to the house, and because Briseno's watch "said 11:15" when she made the call. (CT 7500-01.) Mrs. Marino corroborated Briseno's testimony that the call was made around 11:15 p.m. (CT 7287.)[1261] This testimony was in turn corroborated by the fact that Marino picked Briseno up about 20 minutes after the call, at 11:35 p.m. (CT 7400.)

[1258] The prosecutor asked Briseno "about what time" Lucas came to the Cooks' house, shortly before the attack. She responded: "About 9:30, more or less. I am not sure." (CT 7456.) When asked on cross-examination about her preliminary hearing testimony that the attacker returned at 10:00 or 10:30 Briseno responded, "Yes, but I wasn't sure . . . I have never been positive about the time." (CT 7499.) Later on cross-examination she was again asked when the attacker arrived and she responded, "Perhaps it was 10:30 or 10:00. I don't know." (CT 7527.)

[1259] Briseno testified: "It was before 11:00 or 11:00." (CT 7527.) "It was about five to 11:00. When I called Mrs. Marino it was 11:10 or 11:15." (CT 7530.) "When I got to the house it wasn't 11:00 yet because I waited [about 10 minutes] before I called Mrs. Marino. (CT 7531.)

[1260] Briseno thought that her watch might have been set ahead by 5 or 10 minutes, but she was not sure. (CT 7500.)

[1261] At one point Briseno said, "I don't know how long I waited." (CT 7500:25-26.) However, she then reaffirmed that it was 10 to 15 minutes. (CT 7501.) When Marino picked Briseno up, Briseno told Marino that she had waited 20 minutes. (CT 7401.)

After Briseno's testimony, the prosecutor apparently continued to adhere to his 10:00 to 11:00 p.m. theory as evidenced by his handling of prosecution witness Linda Kilbourn. Linda initially testified it was "exactly" 10:30 when Lucas asked her for the key to the Cooks' house. (CT 7546-47.) The prosecutor sought to impeach Linda on this point. He asked her about an alleged statement to Officer Murphy that it was somewhere between 10:30 and 11:00 p.m. when she saw Lucas. (CT 7545-46.) Kilbourn acknowledged that she may have said 10:30 to 10:45 but not 10:30 to 11:00. (CT 7547.) This point was sufficiently crucial to the prosecutor that he recalled Officer Murphy to testify that Linda had said 10:30 to 11:00 p.m. (CT 7141-43.)[1262]

5. Prosecution Timing Theory: Closing Argument (9:15/9:30 to 10:30 p.m.)

There is no transcript of the closing arguments. (See § 6.4.6(J)(2), pp. 1519-20 below, incorporated herein.) However, it can be reasonably inferred that the prosecutor changed his timing theory from the earlier 10:00 to 11:00 p.m. version to a new theory of 9:15 or 9:30 to 10:30 p.m. Such an inference is reasonable because:

a. The prosecution's own witness (Linda Kilbourn), as well as numerous defense witnesses, provided evidence that Briseno was at the Cooks' between 10:30 to 11:00. (See § 6.4.3(B)(2), pp. 1461-62 above, incorporated herein.)

b. Lucas' witnesses, as well as his own testimony, provided additional evidence that Lucas called Curt Andrewson around 10:30 p.m., that Lucas

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[1262] Two other witnesses who were with Linda Kilbourn testified that it was about 10:30 p.m. (See § 6.4.3(B)(2), pp. 1461-62 above, incorporated herein.)

was with David Cline from 10:30 to 10:50, and with Curt Andrewson for the rest of the night. (See § 6.4.3(B)(1) and (3), pp. 1460-63 above, incorporated herein.)

Hence, it would have been much easier for the prosecutor to argue that Briseno was mistaken about being returned at around 11:00 p.m. rather than argue that his own witness (Linda Kilbourn), as well as all the defense witnesses, were wrong about seeing Briseno and Lucas between 10:30 and 11:00.

And, the post-verdict statements of both counsel demonstrate that the 9:30 to 10:30 theory was the one which was ultimately presented to the jurors. Both the prosecution and defense made explicit post-verdict statements to this effect. (CT 7230.)[1263]

The prosecutor expressly stated his trial theory as follows: ". . . no one saw the defendant between 9:15 and 10:30 when this crime was committed." [Emphasis added.] (CT 7230.)

Further, in his *coram nobis* petition attorney Gilham alleged:

> The facts upon which the prosecution based its case were, inter alia:
>
> 1. That between the hours of 9:30 p.m. and 10:30 p.m., the accused could not account for his whereabouts other than that he may have been hitchhiking home;
>
> 2. That TERESA BRISENO was raped sometime between 9:30 p.m. and 10:30 p.m.
>
> 3. That TERESA BRISENO was taken to Cowles Mountain during that period of time and that she was returned to the Cook residence at about 10:30 p.m., as evidenced by her testimony that Mr. LUCAS went across the street at that time to

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[1263] In fact, attorney Gilham mistakenly assumed that Briseno had so testified at trial. (CT 7304 [written new trial motion]; CT 7224-25 [new trial oral argument]; In Limine Exhibit 761, ¶ 3, pp. 1-2; *coram nobis* Petition].)

obtain the keys to the house and let her in. [Emphasis added.] (Exhibit 761, pp. 1-2.)

The judge also relied on the prosecution's 9:15 to 10:30 p.m. theory by denying the new trial motion in part because of "the unexplained absence of the defendant" [i.e., from 9:15 to 10:30]. (CT 7236.)

In sum, even without an actual transcript of the arguments of counsel, it is reasonable to conclude that in his closing argument, the prosecutor contended that the abduction occurred between 9:30 and 10:30 p.m.

6. The Prosecution's Theory On Appeal (9:30-11:00 p.m.)

On appeal the prosecution shifted back to its earlier theory that the abduction ended at approximately 11:00 p.m. (CT 7342.) In support of the 11:00 ending time the respondent's brief cited the corroborating testimony of Marino as to her receipt of the telephone call from Briseno at 11:15 p.m. (CT 7342.) However, the respondent's brief omitted any reference to the fact that the prosecution's own witness, Linda Kilbourn, testified that she saw Lucas at about 10:30, and Briseno at the Cooks' house shortly thereafter. Nor did the respondent's brief discuss the numerous other witnesses who saw Briseno and Lucas between 10:30 and 11:00 p.m.

7. Court Of Appeal Timing Determination (9:30-11:00 p.m.)

In its written decision the Court of Appeal determined that the abduction began around 9:30 and ended around 11:00 p.m. (CT 10396-97.) However, as did the respondent, the Court of Appeal omitted any discussion of the six different witnesses who testified that they saw Lucas and/or Briseno at the Cooks' residence between 10:30 and 11:00 p.m. (*Ibid.*)

D. Evidence Presented At The Motion To Strike The 1973 Prior Conviction

1. Trial Counsel: G. Anthony Gilham

a. Overview

G. Anthony Gilham, Lucas' trial attorney on the 1973 charge, had not handled any felony cases prior to taking the Lucas case. (RTH 34849-50.) As a result, Gilham made a number of mistakes and omissions during trial which appear to have been the result of his inexperience.[1264]

[1264] 1. He may not have learned until trial that the alleged victim, Briseno, identified Lucas from a photo spread. (RTH 34852-53.)

2. Gilham did not seek to suppress the photo spread because he was unaware of the law that allows an identification to be suppressed based on suggestive identification procedures. (RTH 34854-55.)

3. Gilham's cross-examination of the investigating officer disclosed the fact that the photo spread from which Lucas had been identified was constructed with photos from the Sex Crimes Detail. (CT 7435.)

4. Gilham did not become aware of *Ballard v. Superior Court* (1966) 64 Cal.2d 159 [giving defense the right to obtain psychiatric examination of complaining witness in sex case] until shortly before trial. He did not make a *Ballard* motion. (RTH 34851-52.)

5. Gilham did not learn until trial that Briseno had a boyfriend. (RTH 34885-86.) Nor was Gilham aware before trial that Briseno had sexual intercourse with her boyfriend the night before the alleged rape and that Briseno terminated the relationship due to her anger about the intercourse. (RTH 34885-86.)

6. Gilham requested CALJIC 2.62 [DEFENDANT TESTIFYING – WHEN AN ADVERSE INFERENCE MAY BE DRAWN] (RTH 34858-59) which the attorney expert, Lou Katz, said was "foolhardy." (RTH 34947.)

7. Gilham did not submit any points and authorities with his original motion for a new trial, which Lou Katz said was contrary to standard practice. (RTH 34989.)

8. At sentencing Gilham failed to do any legal research and was unaware that the rape conviction could not be reduced to a misdemeanor after (continued...)

b. Gilham's Failure To Present The Testimony Of Alejandrina Casas To The Jurors

Even though the police reports clearly suggested that Alejandrina Casas could be a material witness, and even though Casas could have been easily located (In Limine Exhibit 768, p. 4), the defense did not interview her before trial. (In Limine Exhibit 759B.) Gilham did not learn about Casas' testimony until after the new trial motion had been denied. Upon learning about Casas' testimony, Gilham filed a *coram nobis* petition. (RTH 34864-67; 34883.)

2. Appellate Counsel: Fred Arm

a. Preparation And Argument Of The Appeal

Fred H. Arm was Lucas' appellate attorney for the 1973 case. (CT 15626; RTH 34774.)[1265] In 1972, Arm was primarily self-employed and took indigent criminal defendant's cases. In 1973, David Lucas' mother retained

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[1264](...continued)
a CYA commitment. Gilham acquiesced in the prosecution's argument that a commitment to the Youth Authority would constitute misdemeanor treatment. Gilham believed that was a correct statement of the law. (RTH 34890; 34895.)

9. Gilham failed to make a Penal Code § 1385 motion to dismiss the rape charge so that sentence could be imposed on the assault. (RTH 34889-90; 34895.) This would have furthered the judge's apparent lenient intent by allowing the assault to be reduced to a misdemeanor. (RTH 34895.)

10. Gilham failed to present the testimony of Alejandrina Casas to the jurors. (See § 6.4.6(I)(1), pp. 1511-12 below, incorporated herein.)

11. At the *coram nobis* hearing Gilham elicited inadmissible hearsay evidence from Casas, upon which the trial judge relied to deny a new trial. (See § 6.4.6(I)(3), pp. 1512-13 below, incorporated herein.)

[1265] At the time of the hearing, Arm had been in practice 16 years. (RTH 34772.) The defense was precluded from bringing in any evidence concerning a California State Bar investigation of Arm for a series of crimes of moral turpitude. (RTH 34995-98; 35040-43.)

Arm to work on the appeal of David's 1973 rape conviction. (RTH 34773-74.) Arm received $1,500.00 from Mrs. Lucas to do the appeal. (RTH 35030; 35053.)[1266] At the time Arm was doing personal injury and criminal cases with the law firm Millsberg and Dickstein but had only handled two or three criminal appellate matters. (RTH 34773-5.) The Lucas appeal was the only serious felony he had ever handled, other than a narcotics sales case. (RTH 34775.)

Arm considered that he was retained by Mrs. Lucas. (RTH 34786; 34802.) She "orchestrated" what went on with the appeal, and she made the decisions. David Lucas, who was only 19 years old at the time, went along with what ever his mother decided. (See § 6.4.6(F), pp.1503, n. 1288 below, incorporated herein.)

Arm was shown time sheets[1267] which reflected his contacts, interviews

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[1266] Arm believed that there had been a retainer agreement but did not see one in the file. (RTH 35001.)

[1267] Arm testified that the appeal was for a flat fee of $1500.00, and the case was not being handled on an hourly basis, so he did not necessarily "write everything down." (RTH 35006; 35051.) His hourly record keeping was not as scrupulous as it would be if he were being paid hourly. (RTH 35051-52.) Arm's time sheets indicated that the last contact he had with David Lucas was on November 12, 1974, but Arm testified that he may have had other contacts and not written them down. (RTH 35005-6.) Arm could not recall how many times he visited Lucas in jail, but believed it was more than twice, although there was nothing in his file documenting the visits. (RTH 35006-7.) Arm also acknowledged that during the pendency of the appeal he never wrote to David Lucas, but believed that he did speak with him. (RTH 35008.) He was sure there were conversations with both Lucas and his mother that were not reflected in the time sheets. (RTH 35045.) But in the absence of any record, he would have to say he thought there were, but could not be sure. (RTH 35046.)

and research done on the case [Defendant's Exhibit 767]. (RTH 34999-35000.)[1268] Both in terms of the number of contacts and length of the contacts, Arm had far more contact with Mrs. Lucas than David Lucas. (See § 6.4.6(F), pp. 1503-06 below, incorporated herein.)

On December 13, 1973, Arm informed Mrs. Lucas by letter that "[m]y investigators have informed me that something of significant importance in your son's case has been discovered, but further investigation must be done." (In Limine Exhibit 759B.) The letter asked Mrs. Lucas for an additional $300.00 to do the investigation. (*Ibid.*) However, according to Arm's accounting statement these additional funds were not paid. (In Limine Exhibit 767.)

During the course of the appeal, Arm deferred to Mrs. Lucas' decision not to challenge trial attorney Gilham's effectiveness, or to do anything that might "hurt" Gilham. Arm did not discuss this decision with Lucas. (See § 6.4.6(F), pp. 1503-06 below, incorporated herein.)[1269] Arm believed there was

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[1268] Arm's time sheets indicated the following:

On September 5, 1973 he appeared in court. (RTH 35014.)

On September 11, 1973 Arm had a telephone conversation with Mrs. Lucas. (RTH 35014.)

On September 28, 1973 he again appeared in court. (RTH 35014.)

On November 6, 1973, Arm prepared a motion and had another phone conversation with Mrs. Lucas. (RTH 35014-5.)

On November 9, 1973, Arm had a 0.4 hour conference with David Lucas. (RTH 35015.)

On November 12, 1973, Arm had another 0.4 hour conference with David. He also received a telephone call from the Court of Appeal and Mrs. Lucas. (RTH 35016-17.)

[1269] Arm testified that he told Lucas about his mother's decision and (continued...)

a potentially meritorious ineffectiveness claim against Gilham and that it was "stupid" to not raise this claim. Nevertheless, he abided by Mrs. Lucas' decision and did not raise any claims that would have required challenging Gilham's effectiveness. (See CT 7351-72; 7392-94; see also § 6.4.6(J), pp. 1519-22 below, incorporated herein.)

Arm's work on writing the brief occurred between April 4 and April 15, 1974. (RTH 35017.) The brief was filed on April 19, 1974. (CT 7351.)

The Attorney General filed a response to the opening brief (CT 7331-7348), but Arm did not file a reply brief. (RTH 34791-92.)[1270] The Respondent's Brief failed to discuss, or even acknowledge, the *coram nobis* testimony of Casas upon which Arm had relied in the opening brief. (CT 7342.)

The Court of Appeal affirmed Lucas' conviction, also without discussing the appellate claim based on Casas' testimony. Arm did not file a petition for rehearing in the Court of Appeal or hearing in the California Supreme Court because he was only retained for the appeal, and Mrs. Lucas

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[1269](...continued)
Lucas said that was fine with him. (RTH 35051.) However, Arm admitted that he did not actually discuss the matter with Lucas. (RTH 35050-51; see also § 6.4.6(H)(3), pp. 1508-10 below, incorporated herein.) Moreover, both Lucas and attorney Landon testified that Arm did not talk to Lucas about his mother's decision at all. (*Ibid.*) This testimony is corroborated by Arm's time sheets, which show no contacts with Lucas during the period when such contact would have occurred. (See n. 1301, below.) However, Arm did not record every contact on his time sheets. (RTH 35045-46.)

[1270] The court took judicial notice of a certified copy of the court docket from the Fourth District Court of Appeal in case number 4 CR 6638 (CR 29369) [In Limine Exhibit 765] which indicated that no reply brief was filed. (RTH 34903.)

did not want to expend any further funds. (RTH 34802.)

b. Failure To Obtain Transcripts Of The Opening Statements And Closing Arguments

Arm could not recall if he asked Mrs. Lucas for the money to purchase the transcripts on appeal. (RTH 35053.) His arrangement was $1,500.00 to do the appeal, with any costs to be borne by the client. (RTH 35053.) If the client did not have the money, the client would not get the work. (RTH 35053.) Arm could not recall whether there was money in the trust account for the purpose of purchasing documents to augment the record. (RTH 35029.) Arm never obtained the transcripts. Arm twice requested augmentation of the record to include opening statements and closing arguments of counsel. However, neither request specified why the transcripts were needed and both were denied by the Court of Appeal. (RTH 34777-78; 34797; see also § 6.4.6(J)(2), pp. 1519-20 below, incorporated herein.)

c. Rough Draft Arguments Omitted From Appellant's Opening Brief

Arm raised two arguments in the Appellant's Opening Brief [Defendant's Exhibit 757]. (RTH 34796-802; see § 6.4.6(I), pp. 1510-19 below, incorporated herein.)

Arm's rough draft of the opening brief contained additional arguments including an ineffective counsel claim based on Gilham's failure to make a *Ballard* motion, and a claim related to the failure to fix the exact time of the offense based on *People v. McCullough* (1940) 38 Cal.App.2d 387. (In Limine Exhibit 758.) However, these claims were not presented to the Court of Appeal, presumably because they could have "hurt" Gilham. (See § 6.4.6(F), pp. 1503-06 below, incorporated herein.)

d. Appellate Investigation

Arm consulted with Gilham[1271] but could not recall whether he consulted with any other attorneys to discuss the legal arguments in the case. (RTH 34789.)

Arm did not believe that he looked at the trial exhibits, and could not recall whether he had reviewed the court file. (RTH 34783.) Arm had a "vague recollection" of looking at some photographs, but was not sure whether he had looked at the photo spread used in the trial. (RTH 34787-8.) At the time Arm was working on the appeal he was familiar with cases that involved legal attacks on improper identifications made by improper photographic lineups. However, he had no notes regarding the propriety of the photo spread that was shown to Briseno. (RTH 35017-19.) Arm did not include any argument regarding the photo spread in the opening brief. (RTH 34788.)

e. Treatment Of Casas' Coram Nobis Testimony

Arm was aware of potential ineffective assistance of counsel claims which could have been raised regarding Gilham's failure to present the testimony of Alejandrina Casas which contradicted the prosecution's theory

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[1271] Arm testified that he had reviewed the trial record when he had discussions with Gilham on October 2, 1973 and on several other occasions. (RTH 35032-33.) The first conference lasted less than 25 minutes. He also had a six-minute telephone conversation with Gilham on October 4, 1973. (RTH 35033-34.) He had a 12 minute phone call with Gilham on October 11, 1973 (RTH 35034), and a 20-minute phone call with Gilham on October 17, 1973. (RTH 35035.) Arm stated that he had other conversations with Gilham. (RTH 35035.) Arm had no independent recollection of when he and Gilham discussed the case or how often they discussed it, only that it was a "continual saga." (RTH 35035-36.)

of the case. (RTH 35021-25; 35048-49.)[1272] Arm relied on Casas' testimony in the opening brief to argue that a new trial should have been ordered. (In Limine Exhibit 757.) However, he did not raise an ineffectiveness argument based on Gilham's failure to present Casas' testimony to the jury. (*Ibid.*)

3. Louis S. Katz

a. Katz' Qualifications And Experience

The defense called Louis Katz as a criminal defense attorney expert. (PT 300 (11/17/88) 34928.)[1273] Katz had handled between 40 and 50 sex offense cases and more than ten rape cases. (RTH 34928.) Katz had also represented criminal defendants on appeal. (RTH 34929.) He attended meetings of other criminal defense attorneys and had been president of the California Attorneys For Criminal Justice, the largest criminal defense organization in the state. As a lecturer, Katz also attended various professional continuing education seminars. He also prepared publications for various organizations. (RTH 34935.) He stayed abreast of the law and publications as they were available to him, and he also taught. (RTH 34935-36.) Katz' articles and lectures specifically outlined what evidence to

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[1272] According to the prosecutor, Gilham "was aware of the existence of the witness, her connection with the victim, of her presence at the victim's house, of the date of the crime at all times. He made no efforts via discovery to ascertain her full name or her address or telephone number. He could have located her at any time with due diligence. At no time before or during the trial did he request such assistance from the district attorney or the court. Information was available; it was not requested." (RTH 35023.)

[1273] Katz obtained a J.D. from Hastings College of Law in 1953. He had been practicing criminal law since 1954. (RTH 34928.) Katz had handled numerous trials and appeals. (RTH 34929.) He was presently teaching a course entitled "Lawyering Skills" at a local law school. (RTH 34929; In Limine Exhibit 766.)

investigate and which questions to ask officers, including a script involving photographic lineups. (RTH 34962.)

b. Katz' Opinion Regarding Attorney Gilham

Based on his review of the record in Lucas' 1973 trial, Katz concluded that Gilham did not provide the assistance that a diligent defense counsel would under the circumstances, and that his representation was ineffective assistance of counsel. (RTH 34964-65.)[1274]

c. Katz' Opinion Regarding Appellate Attorney Arm

Katz also testified concerning appellate counsel Arm's performance. Based on his experience and the standards in the defense community, Katz testified that an appellate attorney has an obligation, regardless of financial sacrifice, to make every effort to provide an adequate record and present any issue which is relevant to an adequate and vigorous representation of the client. (RTH 34972-73.) If the court refused to order augmentation of the record, the attorney should either pay for it himself or request funds from the appellate court to do so. (RTH 34973.)[1275]

[1274] Katz acknowledged that Gilham had made many objections at the trial and that there were motions made in the case. (RTH 34985.) Gilham also called several witnesses and there were motions filed after trial. (RTH 34987.) However, Katz concluded that Gilham was incompetent, based inter alia, on the following: failure to make a *Ballard* motion; failure to consider potentially suggestive lineup procedures; "foolhardy" request of CALJIC 2.62 and ignorance of the applicable sentencing law. (RTH 34943-63.)

[1275] Because Lucas was indigent he could have obtained full service appellate representation by court appointment. Appellate Defenders was in existence in 1973 and offered its services to individuals for the purpose of assisting in pursuing appellate action. (RTH 34978.) Appellate Defenders wrote a letter offering their services in every criminal case where an appeal

(continued...)

A diligent appellate counsel would have gone to the trial court, looked at the exhibits, examined the photographic lineups and the physical evidence that was presented in the case. (RTH 34974-5.)

Based on a review of the case on appeal, it was Katz' opinion that, in terms of contemporary community standards, Arm did not comport himself as a reasonably diligent defense attorney. (RTH 34979.)

[1275](...continued)
was pending. (RTH 34978.) The defense made an offer of proof that Arm had received such a letter and had not followed up on it. (RTH 34978.)

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALLY

ARGUMENT 6.4.4

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

A. Introduction

In response to the defense Motion to Strike the 1973 rape conviction Judge Hammes, on her own motion, ruled that such a challenge could not be made and, in so ruling, expressed her view that the claim was frivolous. Hence, after Lucas obtained a ruling from the Court of Appeal allowing him to go forward with the Motion to Strike, the defense moved for a limited disqualification of Judge Hammes due to her prejudgment of the question. Her refusal to disqualify herself was prejudicial error.

B. Procedural Background

Originally the prosecution did not question Lucas' right to bring the motion. However, on her own motion, Judge Hammes questioned the right of Lucas to present evidence on the motion challenging the 1973 conviction, and whether the trial court had jurisdiction to entertain the motion. The defense presented briefing on the issue (CT 11589-95), but the prosecution declined to file a specific response.

On February 11, 1988, the judge ruled that she was not authorized to

entertain the Motion to Strike. (RTH 20280-93.)[1276]

On February 16, Judge Hammes made additional comments suggesting that she had prejudged the substantive issue raised by the motion without considering any evidence or argument that may have been presented:

> On the habeas on the 1973 case, I am – I hope it's clear that I am very much desirous of having that taken up to the 4th District or wherever, and I don't want to entrap you into thinking that if you file it back in here, that I haven't made up my mind on those issues. I read all of the points and authorities that you submitted and I spent considerable time going over the transcript, and it was my opinion that none of the issues raised showed incompetency either of Mr. Gilham or of Mr. Arm, so I will say that right out.
>
> I don't want to entrap you into thinking you come back here and I may find for you. I have already reviewed it and I don't find it, at least on the paper work. (RTH 20361; 20364, emphasis added.)

Prosecutor Clarke then asked what materials the judge reviewed in making her determination and she replied:

> . . . I did everything that was possible on the papers given me. I read all the papers and I read all the transcripts and I made those decisions. (RTH 20364.)

Thereafter, Lucas filed a Petition for Writ of Mandate in the 4th District Court of Appeal (D007578) challenging the judge's refusal to hear the issue. That petition was granted on April 29, 1988 in a published opinion. (*Lucas v. Superior Court* (1988) 201 Cal.App.3d 149.) The prosecution filed a Petition for Review, which was denied on August 11, 1988, and the remittitur was issued on August 16. (CT 13470.)

[1276] In so ruling, the judge attempted to distinguish a long line of cases that clearly held that a defendant was entitled to present evidence at a motion to dismiss a prior conviction. (RTH 20280-93.)

This first in-court discussion of the issue was held on September 7, 1988. At that time, the prosecutor urged a quick resolution of the motion, based on the judge's earlier "ruling" that the motion was without merit:

> Just if the court ends up allowing questions about the '73 rape, I think that would put a premium on litigating the validity of the prior. The remittitur has issued, and as we indicated to you previously, we think you have already ruled, based on [the motion] that you denied. [Emphasis added.] (RTH 27665.)

Judge Hammes set a hearing date of September 30, 1988, but indicated a possible reluctance to hear the motion without an offer of proof:

> "Well, I am sure I am going to need an offer of proof and argument from [the defense]." (RTH 27665.)

On September 15, 1988 the defense filed a Limited Challenge For Cause of Judge Hammes. (Code of Civil Procedure § 170.1(a)(6).) (CT 13443-49.)

On September 23, 1988 Judge Hammes issued a written order striking the disqualification statement because it was untimely and legally insufficient. (CT 13476-88.)

Ultimately, an evidentiary hearing was held before Judge Hammes who ruled that the 1973 prior conviction could be admitted as aggravation at the penalty trial. (RTH 35168-82; CT 15635.)

C. The Disqualification Motion Was Timely

Judge Hammes ruled that the disqualification statement was untimely because it was filed on September 15, 1988. This ruling was based on the failure of the defense to raise the issue prior to issuance of the remittitur on August 16, 1988. (See CT 13478-81.) However, before the remittitur was issued the opinion was not final and, therefore, the entire question of whether

there would be a hearing was in doubt. (See generally California Rules of Court, Rule 25(a).) Moreover, because the matter was still in the appellate courts, it is questionable whether the trial court had jurisdiction to hear or rule on matters relating to the motion. (See generally, *Auto Equity Sales Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

Therefore, since the disqualification motion was filed only 30 days after the trial court regained jurisdiction over the matter, Judge Hammes erred in ruling that it was untimely. Moreover, because this was a capital case and because the 1973 prior conviction was crucial evidence, the heightened reliability requirements of the Eighth Amendment militated in favor of allowing the disqualification motion to be heard. (See e.g., *Beck v. Alabama* (1980) 447 U.S. 625; see also Volume 2, § 2.9.13(H)(1), p. 629-30, incorporated herein.)

D. The Disqualification Statement Was Legally Sufficient

1. Disqualification Should Be Granted If There Is An Appearance Of Bias Or Prejudgment

It is axiomatic that basic fairness requires a trial judge to have an open mind prior to the litigation of any substantial issue. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-05 [due process requires an unbiased judge]; see also *Withrow v. Larkin* (1975) 421 U.S. 35, 46 [due process requires a "fair trial in a fair tribunal," before a judge with no actual bias against the defendant or interest in the outcome of this particular case]; *Duncan v. Louisiana* (1968) 391 U.S. 145, 156 [Sixth Amendment serves as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"].)

Due process under the Fourteenth Amendment to the United States

Constitution requires a fair and impartial trier of fact. (*Tumey v. Ohio* (1972) 273 U.S. 510, 522, 523; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Murchison* (1955) 349 U.S. 133, 136.) Not only must trial judges be fair and impartial, they must also "satisfy the appearance of justice." (*Offutt v. United States* (1954) 358 U.S. 11, 14.)

These principles have consistently been embraced by this Court. Above all, a judge must remain impartial. (*Cooper v. Superior Court* (1961) 55 Cal.2d 291, 301.) Public confidence in the judiciary requires judicial impartiality. (*People v. Thomas* (1972) 8 Cal.3d 518, 520.) There should be no appearance of bias. (See *People v. Rhodes* (1974) 12 Cal.3d 180, 185; see also *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 193 fn. 10.) The Legislature embraced the constitutional right to a fair and impartial judge when it adopted Code of Civil Procedure sections 170, et. seq.

2. It Appears That Judge Hammes Had Prejudged The Issue

In the present case it appears that Judge Hammes did not have an open mind about the 1973 prior conviction. She candidly told defense counsel that, in effect, she had already made up her mind on the merits of the issue. (See e.g., § 6.4.4(B), pp. 1483-85 above, incorporated herein.) Accordingly, Judge Hammes should have recused herself.

E. The Failure Of Judge Hammes To Disqualify Herself Violated The Federal Constitution

Because Judge Hammes appeared to have prejudged the issue of whether the prior was admissible, her failure to recuse herself violated the Due Process and Trial By Jury Clauses of the Sixth and Fourteenth Amendments of the federal constitution. (*Tumey v. Ohio* (1972) 273 U.S. 510, 522, 523; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Murchison* (1955) 349 U.S.

133, 136; *Offutt v. United States* (1954) 358 U.S. 11, 14; *Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141.)

Moreover, because the judge may not have been totally fair and objective, the reliability of the ruling and the death sentence to which it contributed was compromised in violation of the Eighth and Fourteenth Amendment.[1277]

F. The 1973 Prior Conviction Should Have Been Excluded

Denial of a fair and impartial judge is structural error and is reversible per se. (See *Rose v. Clark* (1986) 478 U.S. 570, 578 and n. 6.) Therefore, the 1973 prior conviction was erroneously admitted into evidence.

G. The Failure To Exclude The Prior Conviction Was Prejudicial

The error was prejudicial under both the state and federal standards of harmless error because the penalty trial was closely balanced,[1278] and the 1973 prior rape conviction was highly inflammatory evidence. (See § 6.4.1(A), pp. 1442-44 above, incorporated herein.)

In sum, the judgment of death should be reversed.

[1277] See generally, *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; see also Volume 2, § 2.9.13(H)(1), p. 629-30, incorporated herein.

[1278] 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.]

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALLY

ARGUMENT 6.4.5

TRIAL COUNSEL IN THE 1973 PROCEEDINGS PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO PRESENT A KEY WITNESS WHO WOULD HAVE COMPLETELY UNDERMINED THE PROSECUTION'S THEORY OF THE CASE

A. Proceedings Below

Lucas was charged with a course of criminal conduct which would have taken at least 45 minutes to complete. The charged conduct allegedly involved the victim's abduction from the Cooks' residence to a mountain top where she was raped. Thereafter, the was returned to the Cooks' residence. Even though the alleged victim testified that she was returned to the Cooks' around 11:00 p.m., the prosecution contended that Lucas committed this course of conduct between approximately 9:30 and 10:30 p.m. Other than the testimony of the alleged victim and Lucas' own testimony, there was no evidence presented as to his whereabouts between 9:15 and 10:30 p.m.

In this context the testimony of Alejandrina Casas Valenzuela ("Casas") was critical to the defense because she was talking on the telephone with the alleged victim, Teresa Briseno, from 10:00 to 10:05 p.m. During this telephone call Briseno gave no indication of having just been raped, and was clearly at the Cooks' residence. Thus, assuming Casas' testimony was truthful and accurate – and there was no reason to assume otherwise; she was Briseno's friend and was "positive" about the time – then her testimony would have completely undermined the prosecution's case by establishing that Lucas

could not have committed the rape during the time span the prosecution claimed.

Moreover, Casas also told Gilham's investigator and Lucas' sister that Briseno did not want Casas to reveal the 10:00 p.m. phone call. This would have further undermined the prosecution's case by providing evidence that Briseno was trying to hide something. In the totality of her testimony (including at the preliminary hearing and at trial), not once did Briseno mention the 10:00 p.m. call with Casas.

In sum, the failure of trial attorney Gilham to present Casas' evidence at trial was an inexcusable blunder which was devastatingly prejudicial to the defense.

B. Right To Effective Counsel: Failure To Investigate And Present Key Evidence

Both the Sixth Amendment to the United States Constitution and article I, § 15 of the California Constitution guarantee a criminal defendant effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "Specifically, a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate." (*In re Cordero* (1988) 46 Cal.3d 161, 249.)

This means that, before embarking upon any defense, counsel has a "'duty to investigate carefully all defenses of fact and of law that may be available to the defendant . . . .'" (*In re Williams* (1969) 1 Cal.3d 168, 175; *People v. Mozingo* (1983) 34 Cal.3d 926, 934; see also *Williams v. Taylor* (2000) 529 U.S. 362 [tactical decision to rely on defendant's cooperation with the authorities did not excuse the failure to thoroughly investigate the

defendant's background for mitigating evidence].) It follows, *a fortiori*, that in deciding to rely upon a single particular defense to the charges all potentially relevant avenues of investigation as to that defense should be fully and exhaustively investigated. (See *People v. Frierson* (1979) 25 Cal.3d 142, 164.) Indeed, "'investigation and preparation are the keys to effective representation.'" (*Rummel v. Estelle* (5th Cir. 1979) 590 F.2d 103, 104 [quoting ABA Projects on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, 224 (App. Draft 1971).)

Accordingly, failure to investigate and present key witnesses needed to support the defense theory constitutes ineffective assistance of counsel. (See e.g., *Lord v. Wood* (9th Cir. 1999) 184 F.3d 1083, 1096 and cases cited therein; *Brown v. Myers* (9th Cir. 1998) 137 F.3d 1154.) Even if the prosecution has presented direct evidence tending to incriminate the accused, the failure by counsel to present key defense theory witnesses may be a prejudicial omission. (See e.g., *Wilson v. Cowan* (6th Cir. 1978) 578 F.2d 166, 168 [new trial ordered for counsel's inadequate failure to call alibi witness, despite the fact that the two victims had identified the defendant at a lineup and at trial].)

C. Ineffective Assistance Of Counsel: Standard

The standard for consideration of ineffective counsel claims was established in *Strickland v. Washington* (1984) 466 U.S. 668, 687. To make a claim of ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness . . . under prevailing professional norms" and there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to

the defendant. (*Strickland v. Washington*, *supra*, at 687.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.*, at 694.)

To establish entitlement to relief on a claim of ineffective assistance of counsel, the burden of proving ineffective assistance of counsel falls on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) When an ineffective assistance of counsel claim is raised on appeal, there is a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."' (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1215, quoting *Strickland v. Washington*, *supra*, at 689.) "Where the record shows that the omission or error resulted from an informed tactical choice within the range of reasonable competence . . . the conviction should be affirmed." (*Ibid.*)

D. In The Present Case Both Prongs Of *Strickland* Were Met

1. Prong One Of *Strickland* Was Met

The defense did not interview Casas until after the jurors returned their verdict and the motion for a new trial had already been denied. (In Limine Exhibit 759B; CT 34865-66.)[1279] There was no conceivable justification for failing to interview Casas prior to trial and to present her testimony to the jury.[1280] (See generally *People v. Pope* (1979) 23 Cal.3d 412, 425-27 [if there

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[1279] Apparently the defense first learned of Casas' testimony when the prosecutor spoke with her in the hall during the new trial motion. (In Limine Exhibit 761, p. 3.)

[1280] The defense investigator interviewed virtually every other material witness. (See In Limine Exhibit 759B.) Hence, there was no reason to not (continued...)

"simply could be no satisfactory explanation" for counsel's action, relief may be granted on direct appeal].) As summarized by the prosecutor in his answer to the *coram nobis* petition:

> Plaintiff at all times knew of the existence of Alejandrina Casas V. [hereinafter referred to as "witness"]. Teresa Briseno [hereinafter referred to as "victim"] made the statement to Officer Murphy of the San Diego Police Department as follows, referring to events of Sunday, May 17, 1973:
>
> > ". . . From approximately 8:30 p.m. to 10:00 p.m. I sat in the kitchen talking with Alejandrina. Then Alejandrina was going to leave and she told everybody that she was leaving and that they would have to leave also. . . ."
>
> [The defense] was aware of the existence of the witness, her connection with the victim, and of her presence in the victim's house on the date of the crime at all times. He made no efforts, via discovery, to ascertain her full name or her address or telephone number. He could have located her at any time with due diligence. At no time before or during the trial did he request such assistance from the District Attorney or the court. The information was available. It was not requested. [Emphasis added.] (In Limine Exhibit 768, p. 4:13-28.)[1281]

Hence, Prong One of *Strickland* was satisfied. (See e.g., cases cited above, § 6.4.5(B), pp. 1490-91, incorporated herein.)

[1280](...continued)
interview Casas, who was clearly indicated in the police reports as a potentially material witness.

[1281] Judge Hammes, in denying the motion to strike the 1973 prior, failed to suggest any reason why Gilham should not have contacted Casas before trial. (RTH 35173.)

2. Prong Two Of *Strickland* Was Met

a. Casas' Testimony Undermined The Prosecution's Theory Of The Case

Casas' testimony would have been incredibly powerful defense evidence. If Briseno was at the Cooks' residence, calmly talking with Briseno from 10:00 to 10:05, then the prosecution's theory that the abduction happened between 9:30 and 10:30 could not have been true. Further, multiple witnesses saw Briseno and/or Lucas at the Cooks' residence between 10:30 and 10:45, including prosecution witness Laurie Kilbourn. This testimony would have made it very difficult for the jury to credit Briseno's abduction and rape story.

The prosecution never contended at any point, from the preliminary hearing through the appeal, that the entire abduction took less than 45 minutes. This is consistent with Briseno's testimony which indicated her belief that the total time was no less than 45 minutes. (See e.g., CT 7528.) This estimate was corroborated by Briseno's estimates at the preliminary hearing: they were in the house for 5 minutes (CT 7837); they were in the car, before starting the engine, for about 10 minutes (CT 7838); they drove in the car for 10 or 15 minutes (CT 7825) and they were stopped at the top of the mountain for 15 to 20 minutes. (CT 7838-39.)[1282] Allowing another 10 minutes to drive back to the Cook house, the total time – using Briseno's

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[1282] The distance was 1.7 miles on the paved road and .6 miles on the dirt road. However, the dirt road was extremely steep, rough and rocky. (CT 7418-19.) When Officer Murphy drove it he had to come to a near-stop in places, and at times the undercarriage of his vehicle scraped the ground. (CT 7442.) Thus, Briseno's estimate of 10 to 15 minutes to make the entire drive from the Cooks' house to the top of the mountain was not unreasonable.

lower estimates – was 50 to 60 minutes.

In sum, Briseno's overall time estimates, her incremental time estimates and the physical circumstances of the alleged events are all consistent with the parties' assumption that the duration of the abduction was no less than 45 minutes. Thus, Casas' testimony would have defeated the prosecution's theory that the abduction occurred between 9:30 and 10:30 p.m.

b. Casas' Testimony Would Have Undermined Briseno's Credibility

Briseno never mentioned the 10:00 p.m. call from Casas in any of her testimony. Nor did she mention it in her statement to the police. (See In Limine Exhibit 768, p. 4.) This suggests that Briseno did not want the call to be revealed, thus implying that she was trying to hide something. (See e.g., CALJIC 2.06 [suppression of evidence may indicate a consciousness of guilt].)[1283] And, this implication was specifically bolstered by the allegation that Briseno told Casas "not to ever tell anyone of the telephone call." (CT 7267.)[1284]

In sum, not only was Casas' testimony inconsistent with the

[1283] Certainly if the abduction had ended within 15 to 20 minutes before the call, or started within 15 to 20 minutes after the call, it would have been logical for Briseno to use the call as a reference point for the commencement of the abduction in the same manner that she used the telephone call with Marino – which was made 10-20 minutes after her return – as a reference point in her testimony about when the abduction ended. (See CT 7390; 7401; 7528-30; 7540.)

[1284] According to attorney Gilham this statement was made by Casas to his investigator and Lucas' sister. However, Gilham did not offer these witnesses as impeachment of Casas when she denied that Briseno talked with her about the 10:00 call. (CT 7267-68.) Reasonably diligent counsel would have done so.

prosecution's theory, it also severely undermined the credibility of the key prosecution witness, Briseno.

c. The Deliberations Were Closely Balanced

As described above, Casas' testimony would have decimated the prosecution's case by (1) undermining its theory of the case, and (2) undermining the credibility of the prosecuting witness. The loss of this evidence in the present case was especially prejudicial because the evidence was closely balanced. For example, at the close of the evidence one juror informed the court that he had "some doubts . . . about some things" and he submitted two pages of questions about the evidence which were never answered. (CT 7161-63.) Moreover, the jurors deliberated for about 12 hours over a three day period and submitted several notes during deliberations. (See § 6.4.2(B), pp. 1447-53 above, incorporated herein.) The juror inquiries and the length of the deliberations indicate a close evidentiary balance. (See *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852; see also *People v. Woodard* (1979) 23 Cal.3d 329, 341.) Had Casas' testimony been presented, it is reasonably probable that Lucas would not have been convicted.

Finally, Lucas did pass a polygraph test. According to the examiner Lucas' denial that he abducted and raped Briseno was truthful. (See In Limine Exhibit 762.) Further, Lucas offered to take a second test with the prosecution's polygrapher, but the prosecutor refused. (CT 7249-50; 7270-71; 7328.) While the polygraph was not before the trial court, this Court should consider it in reviewing the denial of the Motion to Strike because the 1973 prior conviction was important aggravating evidence upon which the jurors likely relied in reaching its verdict of death. (See § 6.4.1(A), pp. 1442-44 above, incorporated herein.)

E. Conclusion: The Prior Conviction Should Have Been Stricken

This case is a textbook example of ineffective assistance of counsel that overwhelmingly satisfies both prongs of *Strickland.* Without reasonable justification or excuse, attorney Gilham failed to present credible testimony that undermined both the prosecution's theory of the case and the credibility of the key prosecution witness. Accordingly, Judge Hammes erroneously denied the Motion to Strike by ruling that Gilham provided effective assistance of counsel.[1285]

F. Juror Consideration Of The 1973 Prior Rape Conviction Was Prejudicial

The error was prejudicial because the penalty trial was closely balanced and the 1973 prior rape conviction was highly inflammatory. (See § 6.4.1(A), pp. 1442-44 above, incorporated herein.)

Therefore the death judgement should be reversed.

[1285] The judge offered no reasonable justification or excuse for Gilham's failure to present Casas' testimony at trial. And, she erroneously concluded that:

> Even had the jury taken almost to the minute every witnesses' testimony on timing most favorable to Mr. Lucas, including Miss Casas' testimony, if available, there was still sufficient time unaccounted for when Miss Briseno would have been alone for the rape to have been completed. (RTH 35173:17-22.)

This was a blatant misstatement of the evidence because both the prosecution and defense witnesses saw Lucas and Briseno about 10:30 p.m. which allowed too little time for the abduction to have occurred after the end of the phone call at 10:05. (See § 6.4.5(D)(2)(a), pp. 1494-95 above, incorporated herein.)

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALLY

ARGUMENT 6.4.6

BECAUSE APPELLATE COUNSEL RELIED ON MRS. LUCAS TO "ORCHESTRATE" AND PAY FOR THE APPEAL, HE DID NOT GIVE HIS UNDIVIDED LOYALTY TO DAVID LUCAS

A. Introduction: Overview Of Appellate Attorney Arm's Conflict

Attorney Fred Arm was retained by David Lucas' mother to handle David's appeal of his 1973 conviction for rape. However, Arm's arrangement with Mrs. Lucas created an actual conflict of interest which adversely affected his representation of David by allowing Mrs. Lucas to "orchestrate" the appeal in two ways:

First, Arm considered Mrs. Lucas, not David Lucas, to be his employer. Thus, Mrs. Lucas was given the discretion to make important decisions about the appeal, such as whether or not to raise certain claims.

Second, Mrs. Lucas was required to pay additional funds to obtain certain additional services such as investigation, transcription of portions of the record not provided by the court, and filing of post-affirmance petitions. If Mrs. Lucas did not pay the additional funds then the services would not be provided. In fact, Mrs. Lucas never paid any additional funds and important services were not provided.

For these reasons, Arm had an actual conflict of interest which precluded him from giving David Lucas his undivided loyalty. This actual conflict adversely affected Arm's performance in several critical areas, including his failure to: investigate newly discovered evidence, perfect the

appellate record, raise potentially meritorious claims on appeal, file a potentially meritorious Petition for Rehearing in the appellate court and file a potentially meritorious Petition for Hearing in this Court.

B. A Conflict Of Interest By Appellate Counsel Violates The Federal Constitution

When a constitutional right to counsel exists, the Sixth Amendment requires that the representation be free from conflicts of interest. (*Wood v. Georgia* (1981) 450 U.S. 261, 271; *Glasser v. United States* (1942) 315 U.S. 60, 70.) Hence, because there is a constitutional right to effective representation of appellate counsel,[1286] the constitution requires that appellate counsel give the client undivided loyalty. (See e.g. *People v. Lang* (1974) 11 Cal.3d 134 [improper for appellate counsel to argue against the client's interest]; see also *Holloway v. Arkansas* (1978) 435 U.S. 475.)

This Court recently summarized the nature of attorney conflicts: "Conflicts of interest . . . [broadly] embrace all factual settings in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. [¶] Although most conflicts of interest seen in criminal litigation arise out of a

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[1286] A convicted state defendant has no federal constitutional right to appeal. However, "it is undisputed that once appellate review is provided, due process requires that it remain unfettered." (*Castle v. United States* (5th Cir. 1968) 399 F.2d 642, 650; see also *Evitts v. Lucey* (1985) 469 U.S. 387, 396 [right to counsel]; *Douglas v. California* (1963) 372 U.S. 353; *Griffin v. Illinois* (1956) 351 U.S. 12.) "[T]he proceedings in the appellate tribunal are to be regarded as part of the process of law under which [the defendant] is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment." (*Frank v. Magnum* (1915) 237 U.S. 309, 327; see also *Cole v. Arkansas* (1948) 333 U.S. 196, 201-202.)

lawyer's dual representation of co-defendants, the constitutional principle is not narrowly confined to instances of that type. Thus, a conflict may exist whenever counsel is so situated that the caliber of his services may be substantially diluted." [Internal citations and quotation marks omitted.] (*People v. Hardy* (1992) 2 Cal.4th 86, 135-136.) "A claim that counsel's loyalty was divided by virtue of his own conflicting interests is a claim of such a conflict." (*People v. Mayfield* (1993) 5 Cal.4th 142, 206; see also *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 146 [attorney owes client high duty of care, good faith and fidelity].)

From a Sixth Amendment perspective, the fundamental problem with a conflict of interest is that it causes the adversarial system to break down by causing a "breach [of] the attorney's duty of loyalty to his client, perhaps the most basic of counsel's duties." (*Strickland v. Washington, supra,* 466 U.S. at 692.) Thus when a defendant's attorney does not give undivided loyalty to his client, a basic foundation of a fair adversarial proceeding is removed; the defendant does not have the type of counsel the Sixth Amendment requires. (*Holloway v. Arkansas, supra*, 435 U.S. at 490; see also *Guzman v. Sabourin* (S.D. N.Y. 2000) 124 F.Supp.2d 828, 838 ["[r]epresentation by conflicted counsel is tantamount to no representation at all . . ."].)

C. An Unconstitutional Conflict Results When An Attorney's Loyalty Is Divided Between The Client And A Third Person

An unconstitutional conflict may result when the retainer for a defendant's attorney is paid by a third party. (See generally *Wood v. Georgia*, *supra*, 450 U.S. at 271.) An attorney must pursue the client's interests "single-mindedly." (*Id.* at 272.) "'Since a lawyer must always be free to exercise his professional judgment without regard to the interests or

motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom' [quoting A.B.A. Model Code of Professional Responsibility, EC 5-23 (1980)]." (*Id.* at 271, n. 17.)

Thus, if the attorney's performance is adversely influenced by a third person who paid the retainer, an unconstitutional conflict is created. "Lawyers must ensure that their loyalties are reserved solely for the client when someone other than the attorney's client is paying for the client's representation. This means that a lawyer may not do anything, or promise anything, that might impair the attorney's ability to zealously represent the client with undivided loyalty." *(California Criminal Law Procedure and Practice* (3rd ed. Continuing Education of the Bar, 1996; see also State Bar Formal Opinion No. 1975-35; Cal. Rules of Prof. Cond. 3-310(E).)

D. A Financial Conflict Between The Attorney And Client Violates The Federal Constitution

"[A]n attorney's duty runs to the client, not to the attorney's pocket. [Citations.]" (*Phillips v. Seely* (1974) 43 Cal.App.3d 104 117; see also *People v. Knight* (1987) 194 Cal.App.3d 337, 348; *People v. Barboza* (1981) 29 Cal.3d 375.) Hence, an attorney is duty-bound to avoid allowing his or her personal financial considerations to adversely affect the client's interest:

> Once an attorney has been assigned to represent a client, he is bound to do so to the best of his abilities under the circumstances despite the not uncommon difficulty of that task, particularly in the context of criminal trials. (See Rule 6-101(1), Rules Prof. Conduct of State Bar.) . . . Any other course would be contrary to the attorney's obligation "faithfully to discharge the duties of an attorney at law to the best of his knowledge and ability." (Bus. & Prof. Code § 6067.)

(*People v. McKenzie* (1983) 34 Cal.3d 616, 631.) Hence, a retainer agreement may violate the Sixth Amendment right to conflict-free counsel if it unreasonably forces the attorney "to choose between his own pocketbook and the best interests of his client, the accused." (*People v. Corona* (1978) 80 Cal.App.3d 684, 720; see also *Glasser v. U.S.* (1942) 315 U.S. 60; *Castillo v. Estelle* (5th Cir. 1974) 504 F.2d 1243.)

E. The Rules Of Professional Responsibility Require Special Safeguards When An Attorney's Fee Is Paid By A Third Person

Rule 5-102(B) of the Rules of Professional Conduct of the California State Bar provides:

> A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

American Bar Association Code of Professional Responsibility, Canon 5 states:

> A lawyer should exercise independent professional judgment on behalf of a client.

Ethical Considerations under Canon 5 (EC 5-1) provide:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients nor the desires of third persons should be permitted to dilute his loyalty to his client.

American Bar Association Code of Professional Responsibility, Disciplinary Rule 5-107 deals specifically with the acceptance of legal fees from persons other than a client:

> DR 5-107 Avoiding Influence by Others Than the Client.

> (A) Except with the consent of his client after full disclosure a lawyer shall not:
>
> > (1) Accept compensation for his legal services from one other than his client.
>
> (B) A lawyer shall not permit a person who recommends, employs or pays him to render legal services to another to direct or regulate his professional judgment in rendering such legal services.

The American Bar Association Standards Relating to the Prosecution Function and the Defense Function, Defense Function Standard 3.5(c), is particularly relevant in this regard:

> In accepting payment of fees by one person for the defense of another a lawyer should be careful to determine that he will not be confronted with a conflict of loyalty since his entire loyalty is due the accused. When the fee is paid or guaranteed by a person other than the accused, there should be an explicit understanding that the lawyer's entire loyalty is to the accused who is his client and that the person who pays the fee has no control of the case. [Emphasis added.]

(See also State Bar Committee on Prof. Responsibility and Conduct, opn. No. 1970-22; L.A. Co. Bar Assn. Committee on Legal Ethics, informal opn. No. 1964-1.)

F. Arm Considered Mrs. Lucas To Be His Employer And Deferred To Her Wishes

After David Lucas' conviction for rape, his mother (hereinafter, "Mrs. Lucas") reached an agreement with attorney Fred Arm to "do the appeal" for $1,500.00. (RTH 34774; 35053; In Limine Exhibit 767.)[1287]

[1287] David Lucas was indigent and could have qualified for (continued...)

In the present case attorney Arm could not find any written fee agreement for the Lucas case. (RTH 35001-02.) Arm did remember that his agreement with Mrs. Lucas provided that any costs were to be paid by Mrs. Lucas above and beyond the $1,500.00 retainer; if she did not pay the money, David would not get the work. (RTH 35053.)

In Arm's view, it was "Mrs. Lucas who retained me. . . ." (RTH 34786; 34802.) Thus, Mrs. Lucas "orchestrated what [went] on" with the appeal. (RTH 35051.)[1288]

Mrs. Lucas' role as the employer and "orchestrator" was reflected in Arm's "ongoing" and "continued" discussions with Mrs. Lucas regarding the appeal. (RTH 35045.) According to Arm's time sheets,[1289] he conferred with Mrs. Lucas on at least 11 separate occasions.[1290] The total time devoted by

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[1287](...continued)
representation by Appellate Defenders, Inc. (RTH 34978; In Limine Exhibit 764.) Lucas' mother borrowed the money to pay his trial attorney. (*Ibid.*) The trial judge in the present proceedings precluded testimony regarding the source of the funds for the appellate attorney retainer. (RTH 34776-77.)

[1288] According to Arm, David had "no mind of his own" and did not have "the mental acumen to comprehend what was going on." (RTH 35055.) He was "totally out to lunch" in Arm's view. (RTH 35055; see also RTH 35051 [Lucas, who was only 19 years old, more or less would go along with whatever his mother said].)

[1289] See also RTH 35013-17 re: time sheets.

[1290] One reference is to a telephone call with "Lucas" dated October 29, 1973 for .4 hours. (Exhibit 767.) Since the contacts with David Lucas were styled "conf w/David" and the contacts with Mrs. Lucas were styled "TC Mrs. Lucas" it is reasonable to infer that the October 29, 1973 telephone call was with Mrs. Lucas. If this contact is included, there were a total of 11 contacts with Mrs. Lucas.

Arm to the conferences with Mrs. Lucas was 9.4 hours. (In Limine Exhibit 767.) By contrast, the time sheets showed a mere four contacts with David Lucas, totaling 2.5 hours. (In Limine Exhibit 767.)[1291] Arm thought that there were other conferences with Mrs. Lucas and/or David Lucas which were not reflected in his time sheets but he was not sure. (RTH 35007; 35045-46.)

In preparing the appeal, Arm discussed the opening brief "primarily with Mrs. Lucas." (RTH 35051.) And, he deferred to her decisions even when he disagreed with them. For example, Mrs. Lucas informed Arm that she did not want him to raise any arguments that would "hurt" attorney Gilham. (RTH 34786.) In particular, Mrs. Lucas decided that raising such as issue "wouldn't be a good idea." (RTH 35051; 35062.) She did not want "to attack Mr. Gilham as having done anything wrong." (RTH 35005; 35051; see also 34786-87.) According to attorney Landon:

> During a conversation with the Lucas attorneys, Mr. Arm indicted [sic] that he did not raise the ineffective assistance of counsel issue in the appeal at the direct request of Mrs. Lucas. He talked with her about the ineffective assistance of counsel claim, and she did not want to hurt attorney Tony Gilham.
>
> Even though Mr. Arm believed that not raising the ineffective assistance of counsel claim was "stupid," he indicated he did not recall ever consulting with David Lucas concerning the possible ineffective assistance of counsel claim issue. He never wrote to Mr. Lucas during the pendency of the appeal, nor did he talk to him. Mr. Arm did not obtain any waiver from Mr. Lucas regarding any failure to raise an ineffective assistance of counsel claim against Mr. Gilham. (In Limine Exhibit 319, ¶¶ 2 and 3.)

Arm deferred to Mrs. Lucas' decision and did not challenge Gilham's

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[1291] There were no notes or memos in Arm's file as to the substance of the four contacts with David. (RTH 35007.)

performance at trial even though Arm had already drafted an ineffectiveness argument[1292] which Arm thought was "the strongest issue in the appeal." (RTH 35062.) Arm thought it was "stupid" not to challenge Gilham's ineffectiveness, but he nevertheless abided by Mrs. Lucas' decision. (RTH 35061-62.)[1293]/[1294]

In sum, the record is clear that Arm considered Mrs. Lucas to be his employer. As expressed by defense counsel at the Motion to Strike: "[h]e represented Mrs. Lucas, not the defendant." (RTH 35135-36; see also RTH 35119.)

G. Under The Retainer Arrangement, David Lucas Would Forfeit Substantial Appellate Rights Unless Mrs. Lucas Made Supplemental Payments To Arm

The retainer arrangement between Arm and Mrs. Lucas had an inherent financial conflict of interest; the $1,500.00 retainer only covered the appeal. Any other services, even if necessary to perfect David Lucas' legal rights, would not be provided unless Mrs. Lucas provided additional funds. Thus, the retainer arrangement furthered Mrs. Lucas' control over the appeal. Not

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[1292] The draft argument was based on Gilham's failure to make a *Ballard* (*Ballard v. Superior Court* (1966) 64 Cal.2d 159) motion.

[1293] There is some conflict in the record as to whether David Lucas was ever informed about his mother's decision not to "hurt" Gilham. (See § 6.4.6(H)(3), pp. 1508-10 below, incorporated herein.)

[1294] Arm also deleted from the opening brief an unfinished argument related to the prosecutor's change of theory regarding the timing of the offense and the requirement of election. (In Limine Exhibit 758, Argument IV; CT 35037-39; 35126-27.) Because Gilham did not raise this issue below, it too would likely have been the basis for a claim of ineffective assistance of counsel. (See § 6.4.6(I)(4), pp. 1513-15 below, incorporated herein.)

only was the retainer paid by Mrs. Lucas, but she also had control over any additional sums to be paid to attorney Arm for investigation, transcripts, etc.

In addition, the arrangement put Arm's financial interests in conflict with David Lucas' appellate rights for two reasons. First, if Mrs. Lucas decided not to pay for a particular additional service, Arm would have to decide between paying for the service himself (with his own time and/or money) or not doing it. In fact, in every case, Arm chose to not provide the additional service. Second, because Lucas was indigent (In Limine Exhibit 764) he could have obtained full service appellate representation by court appointment. (See RTH 34978.) This would have assured that all of David's appellate rights would be vindicated, even if his mother did not pay any funds. Arm had major financial incentive to not make such a recommendation to Lucas and his mother, because Arm would then be forced to return his $1,500.00 retainer fee.

H. David Lucas Did Not Waive Arm's Conflict

1. Under The Federal Constitution A Purported Waiver Of A Fundamental Right Is Not Valid Unless, On The Face Of The Record, It Is Knowing And Intelligent

While conflict-free representation can be waived, any waiver of such a fundamental right must be knowing, voluntary and intelligent. (*Johnson v. Zerbst, supra,* 304 U.S. at 464.) The defendant must be aware of the nature of the right and the direct consequences of waiving it. (*See, e.g., Henderson v. Morgan* (1976) 426 U.S. 637, 645, fn. 13; *Von Moltke v. Gillies* (1948) 332 U.S. 708, 723-724.) Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. (*Glasser v. United States, supra,* 315 U.S. at 70; *Johnson v. Zerbst, supra,* 304 U.S. at 464.)

Any waiver of a constitutional right to counsel, including facts to show

the waiver is intelligent and understanding, must appear on the face of the record; otherwise, there is no waiver. (*Carnley v. Cochran, supra*, 369 U.S. at 516-517; *Johnson v. Zerbst, supra,* 304 U.S. at 464-465; *see also Boykin v. Alabama* (1969) 395 U.S. 238, 242.) Any doubts are necessarily resolved in favor of protecting the constitutional guarantee of counsel. (*Michigan v. Jackson* (1985) 475 U.S. 625, 633.)

2. Under State Law And "The Rules Of Professional Responsibility" A Waiver Of A Conflict Must Be In Writing To Be Valid

Rule 5-102(B) of the Rules of Professional Conduct of the California State Bar provides:

> A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

(See also California Rules of Professional Conduct (3-310(E)-(F)) [the attorney must obtain the client's informed written consent before beginning representation when the fee has been paid by a third party]; see also *Maxwell v. Superior Court* (1982) 30 Cal.3d 606.)

3. There Was Neither Written Consent Nor Knowing And Intelligent Waiver In The Present Case

In the present case, Arm did not merely receive the fee from Mrs. Lucas, he actually considered her his employer and allowed her to "orchestrate" the appeal. (See § 6.4.6(F), pp. 1503-06 above, incorporated herein.) It is doubtful that such an arrangement could ever be lawfully consented to by the client when, as in the present case, it allows a third person to make decisions which adversely impact the best interests of the client. While *Maxwell v. Superior Court, supra*, 30 Cal.3d at 619 allowed a client with retained counsel to waive a conflict, it did not involve the waiver of

actual potentially meritorious claims as in the present case.

However, even if Lucas could have legally consented to Arm's arrangement with Mrs. Lucas, there is absolutely no evidence of a knowing and intelligent waiver; Arm did not provide a written retainer agreement or any other documentation purporting to be a waiver of the conflict. Moreover, the record suggests that Arm did not even talk to David about his mother's crucial decision to not challenge attorney Gilham's effectiveness. Both David Lucas and attorney Landon – based on pre-hearing conversations – testified that Arm never communicated with David about the decision. (RTH 35057; 35062.)[1295] And, even if Arm did talk to David about his mother's decision,

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[1295] There is a conflict in the record as to whether or not Arm even mentioned Mrs. Lucas' decisions to David Lucas. Arm told Alex Landon and Lucas' other capital trial attorneys that he never consulted with Lucas about withdrawing the ineffective counsel claim. He also told Landon that he never wrote to or talked with Lucas subsequent to obtaining the record in December, 1973. (CT 35061-62; In Limine Exhibit 319.) According to Landon:

> Even though Mr. Arm believed that not raising the ineffective assistance of counsel claim was "stupid," he indicated he did not recall ever consulting with David Lucas concerning the possible ineffective assistance of counsel claim issue. He never wrote to Mr. Lucas during the pendency of the appeal, nor did he talk to him. Mr. Arm did not obtain any waiver from Mr. Lucas regarding any failure to raise an ineffective assistance of counsel claim against Mr. Gilham. (In Limine Exhibit 319, ¶ 3.)

However, at the hearing Arm testified that he meant that there was no "technical discussion" with Lucas about not raising the claim. (CT 35050.) David "simply ratified the discussion with Mrs. Lucas." (CT 35050.) Arm testified that he told David about his mother's view and David said, "Sure, that's fine." (RTH 35051.) However, even if this was true, Arm admitted that

(continued...)

there was no meaningful discussion sufficient to assure a knowing and intelligent waiver. (See RTH 25055.) In fact, Arm admitted that he and David did not actually discuss the matter of whether to raise ineffectiveness of counsel; David, who always "went along with" his mother's decisions, "simply ratified" the decision to forego potentially meritorious appellate claims. (RTH 35050-51.) Hence, Arm failed to obtain a knowing and intelligent waiver of the conflict. (Compare *Maxwell v. Superior Court, supra*, 30 Cal.3d at 611-12 [conflict waiver upheld where judge "carefully" determined that defendant understood each disclosure provision in the retainer agreement].)

Indeed, the trial judge expressly found that Arm had not obtained a waiver of the ineffectiveness claim from David Lucas. (RTH 35176.)

I. Arm's Loyalty To Mrs. Lucas Adversely Affected His Representation Of David Lucas

Arm's allegiance to Mrs. Lucas had a major impact on his

[1295](...continued)
the matter was not actually "discussed" with David. Arm testified that David "ratified" Mrs. Lucas' decision, and that David too did not want to hurt Gilham. (RTH 34786.) However, Arm did not actually discuss the ineffectiveness issue with David "in the classical sense." (RTH 35054.) "Mr. Lucas at the time was only 19 and very unsophisticated. And he more or less would go along with whatever his mother said. So when [Arm] told him about it, he said 'sure.'" (RTH 35051.) In other words, the issue "was not discussed with David Lucas. He simply ratified the discussion with Mrs. Lucas. . . . There was no technical discussion with David." (RTH 35005.)

Moreover, David Lucas testified that Arm never contacted him about not raising ineffectiveness issues. (RTH 35057.) Additionally, attorney Alex Landon testified that Arm told Landon, and Lucas' other attorneys that he did not obtain any waiver from David "regarding any failure to raise an ineffective assistance of counsel claim against Mr. Gilham." (RTH 35062.)

representation of David Lucas in the most critical area of appellate practice: presentation of potentially meritorious claims to the Court of Appeal. No duty of appellate counsel is more fundamental. (See *People v. Lang* (1974) 11 Cal.3d 134; *Smith v. Robbins* (2000) 528 U.S. 259.)

By his own admission, Arm considered himself bound by Mrs. Lucas' admonition not to raise any claim that challenged the effectiveness of trial attorney Gilham. This severely limited Arm's representation of David Lucas; Gilham made a number of major mistakes upon which potentially meritorious appellate issues could have been founded.

Among the ineffective assistance of counsel claims that Arm could have raised were the following:

1. Failure To Present Alejandrina Casas' Testimony To The Jurors[1296]

In light of the timing issues discussed above (see § 6.4.3(C), pp. 1467-72 above, incorporated herein), Alejandrina Casas' testimony was absolutely crucial defense evidence. Her testimony that she was talking with Briseno between 10:00 and 10:05 p.m. would have derailed the prosecution's attempt to sidestep the defense evidence by altering its theory as to when the offense occurred. (See § 6.4.5(D)(2)(a), pp. 1494-95 above, incorporated herein.) There was no reasonable tactical basis for not presenting such crucial testimony at trial. Thus, Gilham's ineffectiveness in this regard was

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[1296] Note, in the present argument this issue is raised solely in the context of ineffectiveness of appellate counsel: i.e., Arm's conflict precluded him from raising Gilham's ineffectiveness as an issue on appeal. Earlier in this brief Gilham's failure to present Casas' testimony is directly challenged as ineffectiveness of trial counsel. (See § 6.4.5, pp. 1489-97 above, incorporated herein.)

cognizable on appeal. (Cf., *People v. Pope*, *supra*.) However, in light of his conflict, Arm could not and did not raise this issue.

2. Failure To Offer Casas' Prior Inconsistent Statement Regarding Briseno's Request Not To Reveal The 10:00 P.M. Call

Alejandrina Casas testified at the *coram nobis* hearing that she talked with Briseno on the telephone from 10:00 to 10:05 p.m. on the night of the alleged attack. (CT 7259-60.) This testimony undermined the prosecution theory that the abduction happened between 9:30 and 10:30 that evening. (See § 6.4.5(D)(2)(a), pp. 1494-95 above, incorporated herein.)

Casas told Gilham's investigator and Lucas' sister that Briseno told her not to tell anyone about the 10:00 call. (CT 7267.) However, during her *coram nobis* testimony, Casas denied discussing the 10:00 call with Briseno. (CT 7261.)

Thus, Gilham was ineffective for failing to offer the testimony of his investigator and Lucas' sister as prior inconsistent statements. (See generally Evidence Code § 1235.) Gilham's failure to offer this evidence was especially prejudicial because Judge Welsh had been impressed by the offer of proof on this issue, and was expecting testimony on it. (See CT 7272-73.)

Because there was no reasonable tactical basis for not presenting such crucial testimony at trial, Gilham's ineffectiveness in this regard was cognizable on appeal. (Cf., *People v. Pope*, *supra*.) However, in light of his conflict, Arm could not and did not raise this issue.

3. Casas' Inadmissible Hearsay That Briseno Said Lucas Was The Assailant Should Have Been Stricken

Gilham was also ineffective because he elicited from Casas an inadmissible hearsay statement upon which Judge Welsh relied to deny a new

trial. (See § 6.4.3(B)(6)(a) and (7), pp. 1464-69 above, incorporated herein.) To the extent that this testimony surprised Gilham, he should have moved to strike it. Casas' testimony as to Briseno's statement identifying Lucas as the culprit was inadmissible hearsay because the statement was made the day after the alleged attack and, therefore, was not a "fresh complaint." (See *In re Cindy L.* (1997) 17 Cal.4th 15, 23; *People v. Brown* (1994) 8 Cal.4th 746, 757.) Hence, Gilham was ineffective for eliciting this statement and/or failing to move that it be stricken. The ineffectiveness was prejudicial in light of the judge's reliance on the statement.

Because there was no reasonable tactical basis for not presenting such crucial testimony at trial, Gilham's ineffectiveness in this regard was cognizable on appeal. (Cf., *People v. Pope*, *supra*.) However, due to his conflict, Arm could not and did not raise this issue.

4. Failure To Object To The Prosecution's Last-Minute Change Of Theory

Gilham failed to object to the prosecution's belated change of theory as to the timing of the abduction. This change in theory was a variance from the preliminary hearing evidence, which undercut the defense case, including Lucas' alibi witnesses. (See § 6.4.5(D)(2)(a), pp. 1494-95 above, incorporated herein.) Accordingly, Gilham should have objected to the prosecution's change of theory, and requested that the court either grant a mistrial or limit the prosecution to the evidentiary theory presented at the preliminary hearing. (See generally, *People v. McCullough* (1940) 38 Cal.App.2d 387.)

The Sixth Amendment guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges, in order to

permit adequate preparation of a defense.[1297] (See *Cole v. Arkansas* (1948) 333 U.S. 196; see also *Gray v. Raines* (9th Cir. 1981) 662 F.2d 569, 571 ["A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to "his day in court" – are basic in our system of jurisprudence. . . ." (quoting *In re Oliver* (1948) 333 U.S. 257, 273].) The error in the instant case violated this fundamental constitutional principle. A trial cannot be fair unless the nature of the charges against the accused is made known to him or her in an adequate, timely fashion. (See *Strickland v. Washington* (1984) 466 U.S. 668, 685 [a fair trial is "one in which evidence subject to *adversarial testing* is presented to an impartial tribunal *for resolution of issues defined in advance of the proceeding*"] (emphasis added).)

"Moreover, the right to counsel is directly implicated. That right is next to meaningless unless counsel knows and has a satisfactory opportunity to respond to the charges against which he or she must defend." (*Sheppard v. Rees* (9th Cir.) 909 F.2d 1234, 1237.)

These notice requirements are specifically applicable to the alleged time of the offense. "Time specifically affects the defendant's right to notice of the specific charge alleged and his or her ability to adequately prepare a defense. [Citations.]" (*People v. Jeff* (1988) 204 Cal.App.3d 309, 342.) In this regard, "the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript. This is the touchstone of due process

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[1297] The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." This guarantee is applicable to the states through the Due Process Clause of the Fourteenth Amendment. (*In re Oliver* (1948) 333 U.S. 257, 273-74.)

notice to a defendant. [Citations.]" (*Ibid.*)

In the present case, the preliminary hearing gave notice that the prosecution would rely on the theory that the abduction started from 10:00 to 10:30 p.m. and ended from 11:00 to 11:15 p.m. In obvious reliance upon that notice the defense evidence established an alibi for Lucas between 10:30 and 11:00 p.m. However, the prosecutor apparently changed his theory in closing argument to the jury, and circumvented the alibi evidence by arguing that the abduction ended at 10:30. Gilham was ineffective for allowing the prosecutor to make this "11th hour" change. Because there was no reasonable tactical basis for not objecting, Gilham's ineffectiveness was cognizable on appeal. (Cf., *People v. Pope*, *supra*.) However, in light of his conflict, Arm could not and did not raise this issue.

5. Failure To Object To Including The "On Or About" Language From The Information In The Jury Instructions

As discussed above, the defense presented an alibi defense in response to the notice provided by the preliminary hearing evidence, but the prosecutor negated the alibi evidence by changing his theory at the last minute.

In this context, additional error was committed by instructing the jurors using the "on-or-about" language of the information. (CT 7173-74.) Such language, which also appears in CALJIC 4.71, is improper when the defense is alibi. (See *People v. Jones* (1973) 9 Cal.3d 546, 557 [holding that CALJIC 4.71 must not be given when the defense presents alibi evidence].)

Hence, Gilham was ineffective for allowing the judge to instruct in this language. Because there was no reasonable tactical basis for not presenting such crucial testimony at trial, Gilham's ineffectiveness in this regard was cognizable on appeal. (Cf., *People v. Pope*, *supra*.) However, in light of his

conflict, Arm could not and did not raise this issue.

6. Failure to Request Defense Theory Instructions On Alibi

Lucas' primary defense theory was alibi. (RTH 34863-64; CT 7604; 7148.) (See § 6.4.3(B)(1), pp. 1460-61 above, incorporated herein.) He was entitled to an instruction on that theory, upon request. (*People v. Whitson* (1944) 25 Cal.2d 593, 603 [alibi instruction appropriate if requested]; see also *People v. Freeman* (1978) 22 Cal.3d 434 [alibi]; *People v. Hoffmann* (1970) 7 Cal.App.3d 39, 47 [same].) Gilham's failure to request a pinpoint defense instruction on these theories was prejudicial because, without such instruction, the jurors were likely to place the onus on Lucas to prove his alibi and third party guilt defenses. (See e.g., *United States v. Zuniga* (9th Cir. 1993) 6 F.3d 569; *United States v. Hairston* (9th Cir. 1995) 64 F.3d 491.)

For example, in *Commonwealth v. Mikell* (Pa. 1999) 556 Pa. 509 [729 A.2d 566], trial counsel was held to be ineffective for failing to request an alibi instruction when the defense to the charge was alibi. The defendant was entitled to an instruction explaining that "an alibi defense, either standing alone or together with other evidence, may be sufficient to leave in the minds of the jury a reasonable doubt that might not otherwise exist." (729 A.2d at 570.) The court also pointed out that "one of the purposes of an alibi instruction is to ensure that a jury does not interpret the failure to prove the defense as evidence of a defendant's guilt." (*Id.* at 571; see also *Roseboro v. State* (S.C. 1995) 317 S.C. 292 [454 S.E.2d 312, 313] [failure to request alibi instruction was prejudicial ineffective assistance of counsel]; *Riddle v. State* (S.C. 1992) 308 S.C. 361 [418 S.E.2d 308, 309] [failure to request alibi instruction was ineffective assistance of counsel].)

Moreover, the alibi instruction could have offset the prejudice

produced by the prosecution's unfair mid-trial change of theory, and the improper inclusion of "on or about" language in the instructions. (See *e.g., People v. Seabourn* (1992) 9 Cal.App.4th 187, 193-95 [attorney general argues that CALJIC 4.50 (alibi) is sufficient to dispel the mischief of the "on or about" instruction].)

Hence, Gilham was ineffective for not requesting an alibi instruction. Because there was no reasonable tactical basis for not presenting such crucial testimony at trial, Gilham's ineffectiveness in this regard was cognizable on appeal. (Cf., *People v. Pope*, *supra*.) However, in light of his conflict, Arm could not and did not raise this issue.

7. Allowing The Jury To Hear And Consider Evidence That Lucas Was "Stoned On Marijuana"

During the cross-examination of Steve Hopkins the prosecutor elicited testimony that, when Hopkins returned to the Cook house on Sunday night, "the whole house smelled like marijuana." (CT 7589-90; see also CT 7592-93; 7609-10 [Jeff Cook testified that Lucas was "stoned on . . . grass, marijuana"].) This evidence should have been excluded but Gilham failed to object. The evidence was inadmissible because it had minimal, if any, relevance, and it was highly prejudicial. (See e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 904-907 [admission of evidence of narcotics addiction is "catastrophic"]; *People v. Valentine* (1988) 207 Cal.App.3d 697, 705-06 [reversible error to admit evidence of illegal drug use despite limiting instruction].) Accordingly, it was inadmissible under both Evidence Code § 1101 and § 352.

Moreover, no limiting instruction was requested or given,[1298] so the jurors were free to consider the marijuana as criminal propensity or disposition, which in turn could have been relied upon to find Lucas guilty. Gilham's failure to object to this evidence met both prongs of *Strickland*.[1299]

Because there was no reasonable tactical basis for not presenting such crucial testimony at trial, Gilham's ineffectiveness in this regard was cognizable on appeal. (Cf., *People v. Pope*, *supra*.) However, due to his conflict, Arm could not and did not raise this issue.

8. Miscellaneous Other Claims

Arm also failed to raise ineffectiveness claims as to numerous other deficiencies in Gilham's representation which, even if not prejudicial by themselves, were cumulatively prejudicial. (See Volume 7, § 7.9, pp. 1831-34, incorporated herein.)

Because there was no reasonable tactical basis for not presenting such crucial testimony at trial, Gilham's ineffectiveness in this regard was cognizable on appeal. (Cf., *People v. Pope*, *supra*.) However, in light of his conflict, Arm could not and did not raise this issue.

[1298] There was no reasonable strategic reason to allow the evidence. The primary charges were all general intent crimes and no diminished capacity instructions were given. Hence, Lucas' use of marijuana had no strategic benefit to the defense.

[1299] For example, CALJIC 2.50 states, in part:

> Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he or she has a disposition to commit crimes. [Bracket omitted.] (CALJIC 2.50, first sentence (6th ed. 1996).)

J. The Financial Conflict Adversely Affected Arm's Representation Of Lucas

Arm had a financial arrangement that required Mrs. Lucas to pay him additional funds before he would perform certain services. This created an actual financial conflict as to a number of crucial matters and, as a result, Arm's representation of David Lucas was adversely affected.

Due to this conflict, Lucas was totally deprived of legal representation as to the following crucial stages of the appeal:

1. Failure To Investigate

When Arm discovered "something of significant importance" in the case that required additional investigation, he asked Mrs. Lucas for $300 for the investigation fees. (In Limine Exhibit 759B.) However, apparently Mrs. Lucas did not pay the additional fees and the investigation was abandoned. (See In Limine Exhibit 767.)[1300]

2. Failure To Obtain Transcripts Of The Opening And Closing Statements

Because the $1,500.00 retainer did not cover expenses, a transcript of the opening statements and closing arguments was not purchased after augmentation requests were twice denied. This was a critical omission because if the transcripts had been purchased, Arm could have identified specific reasons for augmentation. For example, the prosecution's timing theory in the closing argument could have been used to counter the erroneous assumption of both respondent and the appellate court that the prosecutor's

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[1300] The record does not contain testimony directly addressing whether Arm paid for the investigation from his own funds. However, from his actions with respect to the other matters discussed below, it may be reasonably inferred that the investigation was not done.

theory was consistent with Briseno's testimony. (See § 6.4.7(G)(4), pp. 1537-38 below, incorporated herein.) Similarly, the arguments could have been used to substantiate and challenge the prosecutor's 11th hour change of theory. (See § 6.4.6(I)(4), pp. 1513-15 above, incorporated herein.) Additionally, trial attorney Gilham referred to at least one potential claim of prosecutorial misconduct which could have been raised. According to Gilham, the prosecutor argued that the reason the knife did not have any blood on it when found was that the blood had been licked off by animals. (RTH 34886-88.) This statement was objectionable because it argued facts outside the evidence. (RTH 34958; 35135.)

In sum, the failure to obtain the opening and closing arguments substantially impaired Lucas' appellate rights and precluded Lucas from obtaining a critical portion of the appellate record. (See generally *In re Steven B.* (1979) 25 Cal.3d 1, 7; *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 973.)

3. Failure To File A Petition For Rehearing In The Appellate Court And Petition For Hearing (Review) In This Court

Another graphic example of Arm's conflict adversely affecting his performance was his complete abandonment of the case after the affirmance by the Court of Appeal. Arm neither considered nor filed any post-affirmance petitions even though such petitions were potentially meritorious. (RTH 34802; In Limine Exhibit 765.)

a. Arm Abandoned David Lucas Because Mrs. Lucas "Didn't Wish To Expend Further Funds"

Arm acknowledged that his abandonment of David Lucas was directly due to his allegiance to the person who retained him, Mrs. Lucas:

> I was only retained to write this appeal, and Mrs. Lucas, who had retained me, didn't wish to expend further funds. [Emphasis added.] (RTH 34802.)

In other words, Mrs. Lucas decided not to pursue the matter any further and, as with Mrs. Lucas' other decisions, Arm deferred to her wishes.[1301]/[1302]

b. A Petition For Rehearing Should Have Been Filed And Granted

Because the reviewing court prejudicially misconstrued the facts and Lucas' appellate claim, a petition for rehearing should have been filed. (See § 6.4.7(G), pp. 1535-41 below, incorporated herein.)

c. A Petition For Hearing Was Potentially Meritorious

Two potentially meritorious issues could have been raised by Arm in a Petition for Hearing.

First, the denial of the request to augment the record with the opening statements and closing arguments was based on a misreading of the augmentation rules by the Court of Appeal. This issue was resolved favorably to the defense by this Court in *People v. Gaston* (1978) 20 Cal.3d 476, 482.

[1301] Nor is there any indication in the record that Arm obtained a waiver or substitution of counsel from Lucas. Arm's time sheets show no entries after completion of the opening brief. (In Limine Exhibit 767.) Moreover, based upon Arm's belief that David was "out to lunch," and that Mrs. Lucas' decisions did not need to be formally discussed with David (see § 6.4.6(H)(3), pp. 1508-10 above, incorporated herein), it is reasonable to infer that Arm did not obtain a knowing and intelligent waiver from David.

[1302] Because David Lucas was otherwise indigent (In Limine Exhibit 764), he was eligible for appointment of counsel through Appellate Defenders Inc. (RTH 34790; 34978.) Once Arm had abandoned the case, Lucas had the right to representation of counsel for purposes of rehearing in the Court of Appeal and hearing in this Court.

Second, the Court of Appeal improperly discussed only those facts favorable to the respondent. (See CT 10396-97.) This issue was resolved favorably to the defense by this Court in *People v. Johnson* (1980) 26 Cal.3d 557.

K. Under The Federal "Actual-Conflict" Standard, The 1973 Conviction Is Constitutionally Tainted, And The Motion To Strike The 1973 Conviction And Exclude It From Lucas' Penalty Trial Should Have Been Granted

"[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 349-350; see also *Mickens v. Taylor* (2002) 535 U.S. 162, 172-73.)[1303] This "adverse effect" standard is less stringent than the *Strickland* "reasonable probability" standard because with the former, it is not necessary to show that a more favorable outcome would have resulted. It only requires the minimal showing that the conflict adversely affected the attorney's representation. "[*Cuyler v.*] *Sullivan* requires an inquiry into whether the record shows that counsel 'pulled his punches,' i.e., failed to represent defendant as vigorously as he might have had there been no conflict." (*People v. Easley, supra*, 46 Cal.3d at 725.) Courts do not "indulge in nice calculations as to the amount of prejudice" attributable to a conflict. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 349.)

[1303] This Court in *Hardy* correctly stated the standard as follows: "[W]hen counsel is burdened by an actual conflict of interest, prejudice is presumed; the presumption arises, however, only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." [Internal citations and quotation marks omitted.] (*Hardy, supra,* 2 Cal.4th at 135.)

In the present case, the adverse impact of Arm's actual conflict is demonstrated with regard to several of the most fundamental functions of appellate counsel, including the failure to raise potentially meritorious appellate claims and file potentially meritorious post-affirmance petitions. Hence, the Motion to Strike should have been granted.

L. Striking The 1973 Prior Was Also Required Based On California's Legal Standards And Requirements For Attorney Conflicts

1. State Constitutional Error

The California Constitution imposes a more rigorous conflict of interest standard than the federal Constitution, and does not require proof of an actual conflict. Thus, under the state Constitution, the prior conviction should also have been stricken.

Under the more rigorous state law standard, "a defendant need only demonstrate a *potential* conflict, so long as the record supports an 'informed speculation' that the asserted conflict adversely affected counsel's performance." (*People v. Frye, supra*, 18 Cal.4th at 998; *People v. Mroczko, supra,* 35 Cal.3d at 104-105; *see also, e.g., People v. Singer* (1990) 226 Cal.App.3d 23, 39-40; *People v. Jackson* (1985) 167 Cal.App.3d 829, 831-832.) Proof of an actual conflict is not required. (*People v. Clark* (1993) 5 Cal.4th 950, 995; *People v. Mroczko, supra,* 35 Cal.3d at 105.) The state law standard applies regardless of whether there was an objection below, as long as there are discernible grounds to believe that prejudice occurred. (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1014; *People v. Mroczko, supra,* 35 Cal.3d at 104-105.)

Prejudice in this context does not require the defendant to show a reasonable probability of a different result. It requires only some evidence of

ineffective representation, such as an inquiry into whether the record shows that counsel "pulled his punches," *i.e.*, failed to represent defendant as vigorously as he might have had there been no conflict. (*People v. Clark, supra,* 5 Cal.4th at 995; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1685 [disappr'd o.g. in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123].)

Again, conflicts are not limited to multiple representation. They "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." (*People v. Sanchez* (1995) 12 Cal.4th 1, 45; *People v. Hardy, supra,* 2 Cal.4th at 135-136.)

The California standard is easily met in this case because Arm did not just "pull his punches" – he barely threw any at all.

2. Derivative Federal Constitutional Error

In addition, violation of the state standard is also a violation of the Eighth and Fourteenth Amendments.

First, the California conflict standard provides a state-created legitimate expectation of the standards for attorney conflicts and for judicial protection of the defendant against attorney conflicts. This goes to the heart of a defendant's right to counsel in a capital trial as defined by state law. Such a legitimate state-created expectation rises to the level of Fourteenth Amendment protection. (*Hicks v. Oklahoma, supra,* 447 U.S. at 346.)

Second, given the extremely egregious circumstances in this particular case, the end result rendered the penalty phase fundamentally unfair under the Fourteenth Amendment.

Third, the Eighth Amendment requirement of heightened reliability for imposition of a death sentence (*People v. Horton* (1995) 11 Cal.4th 1068,

1134-1135; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 323) was not met in this case.

M. The Death Sentence Should Be Reversed Due To The Failure To Strike The Prior Rape Conviction

The prior rape conviction was devastating to Lucas at penalty. It is true that the jury had already convicted Lucas of three murders and an attempted murder which themselves provided aggravation upon which the prosecutor substantially relied. But the fact remains that the penalty deliberations were closely balanced. First, the defense theory of lingering doubt presented a very difficult decision for the jury. Even though Lucas had been charged with five separate incidents, he was convicted as to only three of the incidents. In one incident the jury could not reach a verdict and on the other Lucas was acquitted, presumably on the strength of his uncontroverted alibi evidence. Moreover, the evidence as to the counts for which Lucas was convicted, especially Jacobs, was not overwhelming. (See Volume 2, § 2.3.1(I)(2), pp. 209-11, incorporated herein.)

Second, the jurors considered themselves hopelessly deadlocked as to the penalty until the judge declined their request to terminate the deliberations. (See Volume 7, § 7.7.1, pp. 1671-79, incorporated herein.) Thus, the penalty decision was demonstrably a difficult one for this jury. (Cf., *People v. Hernandez* (1988) 47 Cal.3d 315, 352-53 [absence of deadlock, request for re-instruction and request for readback militated against finding prejudice from erroneous instruction]; see also *People v. Gainer* (1977) 19 Cal.3d 835, 856, fn. 20.)

Third, the jurors asked for re-instruction on crucial penalty phase issues. (See *Francis v. Franklin* (1985) 471 U.S. 307, 326 [request for re-

instruction "lends substance" to conclusion that prosecution evidence was "far from overwhelming"]; see also *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [request for additional instructions indicated the case against the defendant was "far from overwhelming"]; *People v. Markus* (1978) 82 Cal.App.3d 477, 480 [request for further instruction indicated jury was giving serious consideration to the defense]; *People v. Mathews* (1994) 25 Cal.App.4th 89, 100 [request for explanation of instruction showed jurors did not reject defense testimony].)

Fourth, the jurors asked to review substantial portions of the penalty phase evidence – a further indication that the deliberations were not "open and shut." (*People v. Markus, supra*; *People v. Filson, supra*; *People v. Mathews, supra*; *People v. Hernandez, supra*; see also, *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 973 [jury request for review of exhibits, readback of testimony or clarification of instructions]; *Osborne v. United States* (8th Cir. 1965) 351 F.2d 111, 118 [request for exhibit and re-instruction].)

Fifth, the length of the deliberations demonstrated the case was close. While the length of the deliberations may not always be significant in a capital case (see e.g., *People v. Taylor* (1990) 52 Cal.3d 719, 732 [6½ hours deliberation did not indicate a close case]), in the present case, where the jury deliberated for approximately 6½ days,[1304] the length of the deliberations was

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[1304] Before declaring itself hopelessly deadlocked the jury deliberated for half a day on July 17, 1989 (CT 5587) and nearly half a day on July 18, 1989. (CT 5588.) Thereafter, it deliberated for another half day on July 19, 1989, and a full day on July 20, 1989, prior to the excusal of Juror D.O. (CT 5588-93.)

After the excusal of Juror D.O. the jury deliberated for half a day on July 24, 1989 (CT 5594); a full day on July 25, 1989 (CT 5595); a full day on

(continued...)

significant. (See *Woodford v. Visciotti* (2002) 537 U.S. 19 [assuming that aggravating factors in death penalty trial were not overwhelming where jury deliberated for a full day and requested additional instructional guidance]; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117 [where the jury deliberated for three days even with weak mitigating evidence, the failure of trial counsel to investigate and present strong mitigating evidence was prejudicial]; *Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 770 [lengthy (3½ days) and divided deliberations].)

In this context, the prior rape conviction played a major role in the ultimate death sentence because it favored the prosecution and prejudiced Lucas in several crucial ways.

First, the 1973 conviction for rape was the only aggravating evidence presented by the prosecution at the penalty trial. By its very nature this prior conviction was highly inflammatory and prejudicial. Judge Hammes' assessment of the prior suggests how the jurors likely viewed the prior conviction: "As a factor in aggravation, [Lucas' prior] conviction weighed heavily with the court, for it proved that Mr. Lucas had used force and violence with a deadly weapon on a woman in the past. A prior conviction by jury did not change him. It may well have taught him that rape leaves a live witness; a dead victim can't testify." [Emphasis added.] (RTT 13661-62.)

Second, the prior conviction was for rape, an especially heinous crime

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[1304](...continued)
July 26, 1989 (CT 5596); close to a full day on July 27, 1989 (CT 5597); a full day on July 31, 1989 (CT 5598) and less than 30 minutes on August 2, 1989. (CT 5600.)

Thus, the jury deliberated a total of approximately 6½ days. (A little less than 2½ days prior to the juror excusal and a little more than 4 days after his excusal.)

in the view of most people.[1305] In fact, some potential jurors expressed the not uncommon opinion that the crime of rape is sufficiently heinous to warrant automatic imposition of the death penalty.[1306] In fact, some 14 potential jurors believed that the death penalty "should always be imposed" for the crime of rape.[1307]

Third, the prior conviction was especially powerful aggravation because the jury could consider it under both sentencing factors (b) and (c). The jury was specifically instructed to allow consideration of the prior conviction as aggravation under both these sentencing factors. (CT 14381-83; see also, RTT 12477-78; 12491.)

Fourth, the prosecutor relied upon this aggravating evidence both in his opening statement to the jury (RTT 12594) and in his final argument. (RTT 13268-70; 13273-74.)[1308]

[1305] See e.g., *People v. Superior Court (Manuel G.)* (2002) 104 Cal.App.4th 915, 934 ["heinous crimes, such as murder, mayhem and rape . . ."]; see also *People v. Williams* (1991) 9 Cal.App.4th 865, 871 ["this heinous offense"].

[1306] Indeed, prior to the Supreme Court's ban on death sentences in rape cases, people were executed for the commission of rape. (See e.g., *People v. Chessman* (1951) 38 Cal.2d 166.)

[1307] Question 118 on the jury questionnaire given to prospective jurors asked: "Are there any crimes for which you feel the death penalty should always be imposed? If so, what crimes?" A total of fourteen prospective juror responded that the death penalty should always be imposed for the crime of rape. (CT 18157; 18257; 18382; 18507; 18832; 19282; 20007; 20457; 20907; 21833; 21933; 22158; 22782; 23307.)

[1308] "Now, we have presented to you in Exhibit 271 . . . the certified documents indicating the prior felony conviction that Mr. Lucas sustained in (continued...)

Fifth, the prosecutor used the prior conviction in an attempt to impeach the mitigation witnesses presented by Lucas. (See, e.g., RTT 12603-05; 12611-12; 12639; 12656; 12665; 12734-35; 12790.)

Sixth, the prior conviction was especially prejudicial to Lucas because it undermined his primary defense theory of lingering doubt. The jurors were free to rely on the prior conviction as evidence of criminal propensity to negate the feelings of lingering doubt as to the current charges, feelings which the defense was attempting to foster.

Seventh, since Lucas ultimately ended up at Atascadero as a result of the prior conviction, those records – including the devastating diagnosis of Dr. Schumann[1309] – were opened up and presented to the jury by admission of the prior conviction. (See Volume 7, § 7.3.2, pp. 1580-85, incorporated herein.)

Eighth, the prior conviction and commitment allowed the jury to conclude that Lucas had failed to benefit from attempted rehabilitation and would be a future danger because he continued to commit violent crimes, notwithstanding the prior attempt to rehabilitate him at Atascadero. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 719.) Future dangerousness is one of the most powerful forms of evidence in the eyes of sentencing jurors. (See

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[1308](...continued)
1973 for the forcible rape with the use of a knife. [¶] "The defense has stipulated to that fact, that it is indeed a valid conviction. This, I submit to you, those two factors, the stipulation by counsel and the documents themselves, prove beyond a reasonable doubt that factors "b" and "c" do indeed exist." (RTT 13268; see also, RTT 13269-70, 13273, 13274.)

[1309] Dr. Schumann, who had examined Lucas at Atascadero, diagnosed him as an "antisocial personality, sever; alcoholism, habitual excessive drinking, and a sexual deviation, aggressive sexuality," and the prognosis was "very guarded." (RTT 13025-26.)

Volume 7, § 7.6.9, pp. 1666-68, incorporated herein.)

Ninth, the prejudice was especially high in the present case because the defense was precluded from inquiring on voir dire to determine what impact the rape conviction might have on the jurors' ability to fairly consider penalty. (See § 6.3.1, pp. 1432-39 above, incorporated herein.)

In sum, the 1973 prior conviction was powerful aggravating evidence which, given the close balance of the penalty deliberations,[1310] must have weighed heavily in the jurors' decision to return a death verdict. Accordingly, because the prosecution cannot demonstrate the error was harmless beyond a reasonable doubt (see § 6.5.1(D), pp. 1551-52 below, incorporated herein [prejudice standards applicable to penalty phase error]), the penalty judgment should be reversed.

[1310] 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.]

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALLY

ARGUMENT 6.4.7

APPELLATE COUNSEL'S FAILURE TO REPRESENT LUCAS FOLLOWING THE APPELLATE DECISION AFFIRMING THE 1973 CONVICTION UNDERMINED LUCAS' FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

As discussed above, in the context of the adverse consequences stemming from attorney Arm's conflict, Lucas' counsel completely abandoned him once the appellate decision was filed because Mrs. Lucas didn't want to expend any more funds. However, even if Arm had not been conflicted, his abandonment of Lucas independently compromised Lucas' constitutional rights. Because the post-affirmance phase of the appellate process is a "crucial stage of the proceedings," Arm's failure to represent Lucas at that stage of the proceedings deprived Lucas of his constitutional rights to representation of counsel and due process. (Calif. Const. Art. I, sections 1, 7, 15, 16 and 17; U.S. Const., 6th and 14th Amendments.)

B. The Evaluation Of The Potential Merit Of Post-Affirmance Petitions Is A Crucial Appellate Function

There can be no dispute that the post-affirmance petition process for rehearing in the appellate court and review in this Court is a "crucial stage" of the appellate proceedings. Such petitions can and do change the result of

the original appellate decision.[1311] Hence, in terms of their potential impact on the ultimate outcome, post-affirmance petitions are no less crucial that the pre-decision proceedings and the constitutional guarantee to representation of counsel and due process necessarily extends to such post-affirmance proceedings.[1312]

Hence, when appellate counsel in a criminal case abandons the client after the decision issues and thus fails to file a potentially meritorious post-affirmance petition, the client has been denied his constitutional rights to due process and representation of counsel at a critical stage of the proceedings. (See e.g., *White v. Schotten* (6th Cir. 2000) 201 F.3d 743, 752-53 [right to counsel on appeal applies to "all phases" including application for reconsideration].)

C. Appellate Counsel Is Obligated To Represent The Client At Least Through The Petition For Rehearing

The extremely short and strict deadlines for the filing of post-affirmance petitions make it essential for appellate counsel to continue representing the client through that process. It would not be humanely possible for a client to find and hire new counsel within the 15 day deadline for filing a rehearing petition. While it is conceivable that the petition for

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[1311] See Criminal Law Practice Series, *Appeals and Writs in Criminal Cases*, § 1.167 (Continuing Education of the Bar, 1982) ["It is very important to request a rehearing if the court of appeal has misstated the facts. Otherwise, the supreme court will refuse to consider this contention. See Cal. Rules of Ct. 29(b)"].

[1312] In this regard, it should be noted that indigent appointments by the Courts of Appeal include petitions for rehearing, review and even certiorari in the United States Supreme Court. And appointments by this Court similarly extend to rehearing petitions.

review deadline could be met, even that would be difficult.

D. David Lucas Was Totally Deprived Of Counsel At The Post-Affirmance Stage Of His Appeal From The 1973 Conviction

Because appellate attorney Arm declined to represent David Lucas at the post-affirmance stage of his appeal (see § 6.4.6(J)(3), pp. 1520-22 above, incorporated herein), Lucas did not have the assistance of any counsel to evaluate the potential merit of a petition for rehearing and review.

E. The Total Absence Of Post-Affirmance Counsel Was Prejudicial Per Se Under The Federal Standard [1313]

The right to counsel on appeal applies to all phases of the appeal, including post-affirmance motions. (See *White v. Schotten*, *supra*, 201 F.3d at 752-53); see generally *Evitts v. Lucey*, *supra*, 469 U.S. at 396.) Hence, because the Petition for Rehearing and Petition for Review phases are critical stages of the appeal, the absence of counsel at those stages should be reversible per se. (See *Johnson v. United States* (1997) 520 U.S. 461, 469.)

"[T]he right to be represented by counsel is among the most fundamental of rights. (*Penson v. Ohio* (1988) 488 U.S. 75, 84.) "[L]awyers in criminal courts are necessities, not luxuries." (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) "As a general matter, it is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.' [Citations.]" (*Penson v. Ohio*, 488 U.S. at 84; see also *Kimmelman v. Morrison* (1986) 477

[1313] Even though the reversal per se rule applies to this claim, it should be noted that the failure to file a rehearing petition was actually prejudicial to Lucas because the appellate court failed to consider the central issue raised on appeal. (See § 6.4.7(G), pp. 1535-41 below, incorporated herein.)

U.S. 365, 377; *United States v. Cronic* (1984) 466 U.S. 648, 654; *Powell v. Alabama* (1932) 287 U.S. 45.) "The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to the appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over." (*Penson v. Ohio*, 488 U.S. at 85; see also *Evitts v. Lucey* (1985) 469 U.S. 387.) Hence, a criminal appellant has the right to representation of counsel throughout the direct appeal process, including the post-affirmance petition stage of the appeal.[1314]

Accordingly, the complete absence of counsel at a critical stage of the appellate process is prejudicial per se. (See *United States v. Cronic* (1984) 466 U.S. 648, 659.)

F. 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.) This presumption of prejudice should extend to the denial of counsel on appeal. (See *Penson v. Ohio*, *supra*, 488 U.S. at 88 ["[T]he fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the

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[1314] The right to counsel is guaranteed at all critical stages of a proceeding where the defendant's substantial rights may be affected. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) Clearly an appellant's substantial rights can be affected at the Petition for Rehearing and Petition for Review stage of the appellate process.

appellate stage [citation] . . ."].)

G. The Presumption Of Prejudice Cannot Be Rebutted Because A Petition For Rehearing Should Have Been Filed And Granted

1. Overview

A Petition for Rehearing was particularly appropriate in this case because the appellate court failed to consider the central issue raised on appeal: whether Casas' testimony warranted the granting of a new trial, in light of the prosecution's theory that the abduction occurred between approximately 9:30 and 10:30 p.m.

Although lack of clarity in the appellate briefing was partly to blame, upon close scrutiny it is apparent that the Court of Appeal misconstrued both the appellate claim and the record. In particular, the appellate decision failed to recognize that there were two alternate evidentiary theories as to the timing of the abduction, upon which the jury could have relied to convict: approximately 10:30 to 11:15 p.m. or approximately 9:30 to 10:30 p.m. (In Limine Exhibit 757, p. 9.)

Because numerous witnesses, both defense and prosecution, provided Lucas with a defense to the 10:30 to 11:15 theory, the appellate brief contended that the testimony of Alejandrina Casas was critical because it provided Lucas with a defense to the 9:30 to 10:30 theory. (In Limine Exhibit 757, p. 10.) No other trial evidence provided such a defense, thus leaving the prosecutor free to argue that Lucas committed the crimes between 9:30 and 10:30 p.m. because "no one but no one saw the defendant between 9:15 and 10:30 at the time the crime was committed." (CT 7230.)

In sum, the appellate brief contended that Casas' testimony was so critical that Judge Welsh abused his discretion by failing to grant a new trial.

(In Limine Exhibit 757, p. 11.)

However, the appellate court omitted any discussion of the 9:30 to 10:30 evidentiary theory, and instead assumed that the jury necessarily found that the abduction ended around 11:00. In light of this omission it is reasonable that the appellate court did not discuss or consider Casas' testimony, because it had no apparent bearing on the reviewing court's assumed theory of conviction. Hence, treating the appellate argument as a simple sufficiency of evidence claim, the Court of Appeal simply recited the evidence which supported the 11:00 theory, and affirmed the judgment without any discussion of the 9:30 to 10:30 theory and Casas' critical impact on that theory.

In sum, because the appellate court had in plain terms "missed the boat," a rehearing petition should have been filed and granted.

2. The Jury Could Have Relied Upon The Prosecution's Theory That The Abduction Occurred From 9:30 To 10:30

Lucas' appellate brief contended that there were two alternative timing theories upon which the jury could have relied: 10:30 to 11:15 p.m.[1315] or 9:30 to 10:30 p.m. (In Limine Exhibit 757, p. 9.) Because there was evidence presented as to each of these alternatives, the jurors may have relied on either one or both (some jurors on one, some the other) in returning its guilty

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[1315] The 10:30 to 11:15 theory was apparently based on a portion of Briseno's preliminary hearing testimony which was read into the trial record. (CT 7528-30.) In reality, however, her preliminary hearing testimony was that the abduction happened from 10:00 to 10:30 through 11:00 to 11:15. (See § 6.4.3(C)(1), p. 1467 above, incorporated herein.) Thus, the appropriate time was 10:00 to 11:15.

verdict.[1316]

3. Casas' Testimony Was Critical Because It Would Have Undermined The 9:30 To 10:30 Theory

After establishing that the jury could have convicted Lucas under the alternate timing theory of 9:30 to 10:30 p.m., the appellate brief went on to argue that the testimony of Casas would have undermined that theory:

> Since 10:00 p.m. was the hour halfway between 9:30 and 10:30 p.m. when the alleged rape had taken place, it is submitted that it would be inherently impossible for the victim to have been at her home receiving a call at 10:00 at night and also be up on Cowles Mountain submitting to an assailant. (In Limine Exhibit 757, p. 10:13-16.)

4. The Appellate Court Erroneously Assumed That The Jury Found The Abduction Ended At 11:00

The appellate court never addressed the Casas evidence because the court erroneously assumed that the jury necessarily resolved the evidence in favor of Briseno's testimony claiming that the abduction ended at 11:00 p.m. Thus the opinion[1317] stated: ". . . Lucas drove [Briseno] back to the Cooks' house. [Briseno] did not have a house key, but Lucas obtained one from a

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[1316] The 9:30 to 10:30 theory was ostensibly based on Briseno's testimony at trial. (In Limine Exhibit 757, p. 9:10-12.) However, this theory actually came from the prosecutor. (See § 6.4.3(C)(5), pp. 1470-72 above, incorporated herein.) Briseno's trial testimony did suggest that the abduction may have begun at 9:30, but she continued to maintain that it ended around 11:00. (See § 6.4.3(C)(4), pp. 1468-70 above, incorporated herein.) However, notwithstanding the brief's misstatement as to the source of the theory, the fact remains that there were two alternative timing theories before the jury.

[1317] The appellate court opinion appears at CT 10395-99.

neighbor. It was about 11 p.m." (CT 10397.) The opinion did acknowledge "certain inconsistencies in the evidence, particularly in the testimony regarding the time of the rape." (CT 10398.) But, the court concluded that those inconsistencies were "resolved against Lucas." (*Ibid.*) Thus the appellate court assumed that the jury resolved the evidence in favor of Briseno's testimony that the abduction ended at about 11:00 p.m. Under this assumption, Casas' testimony that she talked to Briseno from 10:00 to 10:05 would not have warranted a new trial. Yet, alternatively, the jury could have convicted on the prosecution's 9:30 to 10:30 theory. This made Casas' testimony critical. Accordingly, the appellate court's assumption that the jury relied on the 11:00 termination theory was a fatal flaw which should have been highlighted in a rehearing petition.[1318]

5. The Court Of Appeal Misconstrued The Appellate Argument As A Sufficiency Claim Rather Than An Abuse Of Discretion Claim

The appellate court also failed to consider whether Casas' testimony warranted a new trial because it mistakenly considered the appellate argument to be a sufficiency claim, which would not necessitate consideration of Casas' post-verdict testimony, and, indeed, would make that testimony irrelevant. The written decision demonstrates this construction of the claim with the

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[1318] There was no basis in the record to determine which timing theory was utilized to convict. The approximate 11:00 p.m. termination theory was consistent with Briseno's testimony, but inconsistent with most of the other witnesses. On the other hand, the approximate 10:30 p.m. termination theory was consistent with the prosecution's trial theory. In such situations, where two theories are supported by the evidence, the reviewing court may not properly assume that the jury relied on one theory to the exclusion of the other. (See e.g., *People v. Guiton* (1993) 4 Cal.4th 1116.)

following passage:

> Viewing all the evidence in the light most favorable to the respondent, it substantially supports the verdict and allows a reasonable trier of fact to find the prosecution met its burden of proof. (*People v. Reilly*, 3 Cal.3d 421, 425.) (CT 10398.)

However, the reviewing court's construction of the claim as a sufficiency argument was erroneous. It is true that the claim was titled as a sufficiency claim.[1319] However, the body of the argument made it clear that the real claim was abuse of discretion by the trial court in not granting a new trial. After discussing the evidence, including Casas' *coram nobis* testimony, the brief contended:

> When considering these aforementioned factors, the court below abused its discretion in not granting the defendant a new trial based on the evidence of ALEXANDRINA VALENZUELAS establishing the 10:00 p.m. hour and the inherent improbability that the defendant had committed the crime. [Emphasis added.] (In Limine Exhibit 757, p. 11.)

While the argument went on to cite sufficiency of evidence authority, the brief again contended that a new trial should have been granted by the trial court:

> Considering these standards, it is submitted that in the instant case, the testimony of TERESA BRISENO must be considered improbable, incredible and incongruous with the evidence so as to require a reversal of the order denying the defendant's motion for a new trial. [Emphasis added.] (In Limine Exhibit 757, p. 12:9-12.)

Further, the relief requested at the end of the argument, was for the judgment

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[1319] The title was a follows: "I. THE EVIDENCE PRESENTED IN THE LOWER COURT WAS INHERENTLY IMPROBABLE AND THEREBY WAS INSUFFICIENT TO SUPPORT THE GUILTY VERDICT."

to "be reversed and remanded for a new trial." (In Limine Exhibit 757, p. 12:25.) This language, too, was consistent with an abuse of discretion argument, the relief for which would be a new trial. By contrast, the relief for a successful sufficiency argument would be reversal and dismissal, since the charges could not be retried. (See *Burks v. United States* (1978) 437 U.S. 1.)

In sum, despite its misleading title, the body of the argument was sufficient to alert the appellate court that an abuse of discretion argument was being made.[1320] Accordingly, because the reviewing court misconstrued the argument as a sufficiency claim, a Petition for Rehearing should have been granted.

6. Conclusion: The Presumption Of Prejudice Cannot Be Overcome

In sum, Arm's post-affirmance abandonment of David Lucas was prejudicial as to the Petition for Rehearing. Arm should have filed a rehearing petition and the appellate court should have granted it. This appellate decision is a classic example of why rehearing petitions are available under the California Rules of Court. The decision misconstrued both the record and the appellate claim. And, as a result, the reviewing court never resolved the central issue raised on appeal – whether belated discovery of a witness who would have undermined the prosecution's theory of the case warrants a new trial.

For these reasons, the presumption of prejudice from the absence of

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[1320] "A reviewing court is empowered to decide a case on any proper points or theories, whether urged by counsel or not [citations], and will exercise that authority under fair procedure in an appropriate case. [Citations.]" (*Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal. App. 3d 800, 811.)

post-affirmance counsel cannot be rebutted, and the 1973 prior conviction should have been stricken.

H. The Death Judgment Should Be Reversed Due To The Denial Of The Motion To Strike

See § 6.4.6(M), pp. 1525-30 above, incorporated herein.

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.4 1973 RAPE CONVICTION: CHALLENGE TO CONSTITUTIONALLY

ARGUMENT 6.4.8

APPELLATE COUNSEL'S FAILURE TO RAISE THE CASAS ISSUE ON APPEAL WAS CONSTITUTIONALLY INEFFECTIVE

Apart from the conflict considerations, Arm was independently ineffective for failing to raise the ineffectiveness claims based on Gilham's failure to present the testimony of Casas at trial. As discussed above, Arm's conflict prevented him from raising any substantive ineffective assistance of counsel claims. (See § 6.4.6(I), pp. 1510-19 above, incorporated herein.) However, it also was alleged, in support of the Motion to Strike, that Arm was ineffective for failing to raise, inter alia, the failure to present Casas' testimony. (CT 7770-71.) Furthermore, because there was no reasonable justification for not presenting Casas' testimony, and because the prejudice in failing to do so is apparent from the appellate record, it was a potentially meritorious appellate claim.

Accordingly, Arm's failure to raise this claim on appeal was ineffective assistance of counsel (see *People v. Lang* (1974) 11 Cal.3d 134), and Judge Hammes erroneously denied the Motion to Strike as to this claim.

And, the failure to strike the prior rape conviction was prejudicial error. (See § 6.4.6(M), pp. 1525-30 above, incorporated herein.)

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.5 1973 RAPE CONVICTION: EXCLUSION OF DEFENSE EVIDENCE AT THE PENALTY TRIAL

ARGUMENT 6.5.1

EXCLUSION OF LUCAS' SUCCESSFUL POLYGRAPH TEST AS TO CRUCIAL AGGRAVATING EVIDENCE VIOLATED THE FEDERAL CONSTITUTION

A. Introduction

As discussed above, the prior rape played a central role throughout the penalty phase process and was instrumental in the imposition of the death verdict upon Lucas. (See § 6.4.6(M), pp. 1525-30 above, incorporated herein.)

However, the jury did not hear the important mitigating fact that Lucas had taken and passed a polygraph test regarding the 1973 rape. (CT 7710; see also, In Limine Exhibit 762.) The defense contended that the polygraph evidence was admissible as mitigating evidence under the Eighth Amendment to the United States Constitution, which requires that the defendant be permitted to present as a mitigating factor any aspect of his character or record. (RTH 18913-16; CT 5093; 7711-12.) Lucas' polygraph test was conducted while the jurors were still deliberating in the 1973 rape trial. (CT 7095; 7191-93; 7318.) Lucas' attempt to lodge the results with the court was denied. (*Ibid.*) Later, after the conviction, the judge wanted both Lucas and the victim to take polygraphs. (CT 7249-50; 7327.) Lucas agreed to this additional polygraph, but the prosecutor refused to allow the victim to be polygraphed. (CT 7270-71.)

The defense argued that the polygraph evidence was relevant to

mitigation under two defense theories. One, the fact that the defendant passed the polygraph test was relevant to attack the conviction itself. (See RTH 18914.) Two, the fact that Lucas cooperated with the prosecutor's request for a polygraph was itself mitigating because it showed Lucas' willingness to cooperate. (See, e.g., CT 7712-13.)[1321] However, Judge Hammes ruled that the polygraph evidence could not be admitted, concluding that the issue was controlled by *People v. Thornton* (1974) 11 Cal.3d 738, which held that offers to take polygraphs are not admissible. (RTH 19215-16.)[1322] The judge also ruled that there was no foundation for the reliability of the polygraph. (RTT 12484.)[1323] This ruling was error.

[1321] The polygraph evidence was mitigating in three ways: (1) the polygraph results corroborated Lucas' denial of guilt; (2) the prosecutor's refusal to comply with the court ordered polygraphing raised an inference against the prosecution per Evidence Code sections 412 and 413; and (3) Lucas' willingness to take the polygraph showed a willingness to cooperate and a "consciousness of innocence." (Cf., *People v. Sears* (1970) 2 Cal.3d 180, 189 [jury should be instructed on request that, inter alia, lack of furtiveness may be considered in determining the issue of premeditation/deliberation]; *Standen v. Whitley* (9th Cir. 1993) 994 F.2d 1417, 1425-26 [court relied, in part, upon the defendant's failure to flee or otherwise demonstrate a consciousness of guilt as evidence that the defendant was not guilty]; *State v. Pettway* (Conn. App. 1995) 39 Conn.App. 63 [664 A2d 1125, 1134] [trial court gave consciousness of innocence instruction even though not obligated to do so].)

[1322] The judge's exclusion of the polygraph evidence was also encompassed by her ruling generally precluding the defense from offering any evidence to show that Lucas did not commit the 1973 prior on the basis that such evidence would have improperly opened up the prior to "relitigation." (RTT 12495; 12500; see § 6.5.2, pp. 1551-58 below, incorporated herein.)

[1323] The judge also found that no federal due process rights were implicated by prohibiting the introduction of the polygraph. (RTH 19216; CT 5096-97.)

B. Lucas Had A Constitutional Right To Present Polygraph Test Evidence As Mitigation And To Explain Or Deny Aggravating Evidence

One of the fundamental underpinnings of Eighth Amendment jurisprudence is that the sentencer must be allowed to consider any aspect of the defendant's character or record that is proffered by the defendant as a basis for a sentence less than death. (*Buchanan v. Angelone* (1998) 522 U.S. 269; see also *Lockett v. Ohio* (1978) 438 U.S. 586; *People v. Brown* (1985) 40 Cal.3d 512, 540 ["The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty."].) If there is one principle consistently recognized in United States Supreme Court death penalty cases, it is that a death penalty scheme must allow particularized consideration of relevant aspects of the character and record of each convicted defendant, before the penalty of death may be imposed. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Jurek v. Texas* (1976) 428 U.S. 262, 271, 276; *Roberts v. Louisiana* (1976) 428 U.S. 325, 333.) For purposes of Eighth Amendment analysis, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. (*Roberts v. Louisiana* (1977) 431 U.S. 633, 637.)

An equally well-established principle emanates from *Gardner v. Florida* (1977) 430 U.S. 349, 362, in which a plurality of the Supreme Court concluded that the defendant's due process rights were violated because his "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Nine years later, in *Skipper v. South Carolina* (1986) 476 U.S. 1, all nine justices cited *Gardner*, with

approval, as establishing the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' [Citations.]" (*Skipper*, 476 U.S. at 5, fn. 1.)

Additionally, the courts have consistently ruled that traditional rules of admissibility, for purposes of guilt trials, should not be used to exclude evidence relevant to mitigation at the penalty trial. (See *Green v. Georgia* (1979) 442 U.S. 95, 97; *Gregg v. Georgia* (1976) 428 U.S. 153, 204; *People v. Harris* (1984) 36 Cal.3d 36, 68-70.)

In sum, what is essential is that the jury have before it all possible relevant information concerning the individual whose fate it must determine. (*Barefoot v. Estelle* (1983) 463 U.S. 880.)

The U.S. Supreme Court has held, in the context of a noncapital case, that a statute such as Evidence Code § 351.1 may constitutionally preclude the presentation of polygraph evidence. (*United States v. Scheffer* (1998) 523 U.S. 303.) However, "under controlling United States Supreme Court authority, relaxed standards govern the admission of mitigating evidence during the penalty phase of a death penalty trial. [Citations.]" (*Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434, 1439; see also *Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197.) Hence, if the state seeks to exclude relevant evidence because of doubts about reliability, such exclusion violates the principles of *Lockett* and *Eddings* by interfering with the jury's ability to weigh mitigating factors. (*Rupe*, 93 F.3d at 1439.) "Wholly unreliable evidence" may be excluded such as astrology or other evidence of no demonstrated scientific validity. (*Rupe*, 93 F.3d at 1440.) However, polygraph testing is not so unreliable as to warrant exclusion (*Rupe v. Wood, supra,* 93 F.3d at 1439); nor

is a defendant's willingness, during the pendency of a rape trial, to comply with the prosecution's request to submit to such testing.[1324]

Finally, denial of the California constitutional right to present relevant evidence (Art. I, § 28(d)) independently violated the Due Process Clause of the federal constitution. (See *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.)

C. The Polygraph Evidence Should Have Been Admitted

Application of the above principles to the circumstances of the present case demonstrates that Judge Hammes erred in permitting the prosecution to offer the prior rape conviction as a factor in aggravation without permitting Lucas to challenge and mitigate that aggravating factor with the polygraph evidence.

The prior rape conviction was especially powerful and prejudicial aggravation. (See § 6.4.6(M), pp. 1525-30 above, incorporated herein.) Yet, any lingering doubt as to whether Lucas actually committed that rape could have dramatically changed the underlying balance. (See e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 858, n. 13 [jurors instructed that they may consider lingering doubt].) Hence, because the successful polygraph, Lucas' willingness to submit to such testing and the prosecution's failure to comply with the court ordered polygraphing (Evidence Code § 412 and § 413) may have raised some amount of lingering doubt regarding the reliability of the prior conviction, it should have been admitted.

[1324] This Court is currently considering the admissibility of polygraph results in *People v. Wilkinson* (review granted 12/11/2002, S111028) 102 Cal.App.4th 72.

D. Standards Of Prejudice

The test for prejudice from federal constitutional errors is familiar: reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at 24; see generally *Yates v. Evatt* (1991) 500 U.S. 391, 402-406.) "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at 279.)

In the capital penalty context, the *Chapman* standard for harmlessness can only be met if the State can show no reasonable juror could have struck a different balance between aggravating and mitigating factors without the error, i.e., there is no reasonable possibility that the error would have had any effect on the penalty decision-making of the jurors. (See, e.g., *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *State v. Lee* (La. 1988) 524 So.2d 1176, 1191-1192.) As noted above, *Chapman* requires an inquiry into whether there is a reasonable possibility the jury's actual verdict was affected by the error; *Chapman* does not permit inquiry into what an appellate court might believe a hypothetical jury, unaffected by the error, would have done. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at 279-281; *Satterwhite v. Texas*, *supra*, 486 U.S. at 258-259.)

Moreover, the penalty determination is a personal and moral one, and it is exceedingly difficult to determine what factors might affect individual jurors in that personal decision. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044; *State v. Hightower* (1996) 146 N.J. 239 [680 A.2d 649,

662]; see *Clemons v. Mississippi* (1990) 494 U.S. 738, 754 [recognizing that harmless-error analysis of capital penalty error will in some cases be "extremely speculative or impossible"]; *Caldwell v. Mississippi*, *supra*, 472 U.S. at 330 [intangibles considered by jury in capital jury sentencing are rarely discernible from appellate record].) As a result, any error that could have an effect on a rational juror's penalty determination--keeping in mind the very broad and subjective nature of that determination--will almost certainly be prejudicial under *Chapman*, due to the difficulty of demonstrating that there is no reasonable possibility that the error affected even a single juror's highly normative penalty determination. (Ibid.)

Further, in capital proceedings, harmless-error review must include the requirement of heightened reliability. (*People v. Horton*, *supra*, 11 Cal.4th at 1134-35 [citing *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) Thus, all bona fide doubts should be resolved in favor of the accused because "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Balfour v. State* (Miss. 1992) 598 So.2d 731, 739.)

In applying the state standard of prejudice, this Court has observed that the jurors penalty decision is "normative and moral" (see *People v. Holt* (1997) 15 Cal.4th 619, 684), and is "inherently subjective" (see *People v. Lucas* (1995) 12 Cal.4th 415, 494), meaning any substantial error may be prejudicial. (See e.g., *People v. Robertson* (1982) 33 Cal.3d 21, 54 ["any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial."].) Therefore, under California law, the error is reviewed under the "reasonable possibility" standard. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Under this standard, the court ". . .

must ascertain how a hypothetical 'reasonable juror' would have . . . been affected" by the error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 984.) This test has been held to be "the same in substance and effect" as the [*Chapman*] harmless beyond a "reasonable doubt" test applied to federal constitutional error. (*Id.* at 990.)

E. The Prosecution Cannot Meet Its Burden Of Demonstrating That The Error Was Harmless Beyond A Reasonable Doubt

The penalty phase in this case was closely balanced. (See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein.) The prior rape conviction "weighed heavily" with Judge Hammes and, undoubtedly, similarly affected the jurors. (See § 6.4.1(A), pp. 1440-42 above, incorporated herein.) It was also prejudicial to Lucas in a number of other ways. (See § 6.4.6(M), pp. 1525-30 above, incorporated herein.) Moreover, exclusion of Lucas' proffered polygraph evidence deprived the defense of affirmative evidence that Lucas had cooperated with the prosecution and evidence that could have challenged and/or mitigated the prior rape conviction which was a crucial component of the prosecution's penalty phase case. Furthermore, the fact that the prosecutor refused to comply with the judge's polygraph order would have warranted an adverse inference against the prosecution pursuant to Evidence Code sections 412 and 413. Therefore the penalty judgment should be reversed.

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.5 1973 RAPE CONVICTION: EXCLUSION OF DEFENSE EVIDENCE AT THE PENALTY TRIAL

ARGUMENT 6.5.2

THE JUDGE ERRONEOUSLY PRECLUDED THE DEFENSE FROM INFORMING THE JURORS ABOUT THE FACT THAT CASAS' TESTIMONY WAS NOT PRESENTED AT THE TRIAL ON THE 1973 RAPE CHARGE

A. Introduction

The prosecution presented Lucas' 1973 rape conviction to the jury by way of stipulation. (RTT 12597-98; Trial Exhibit 271.) The defense sought to introduce specific evidence that Lucas did not actually commit the rape for which he was convicted, including Lucas' alibi witnesses, his successful polygraph, his 1973 trial attorney's belief in Lucas' innocence, his own failure to provide Lucas with effective assistance at trial, and the fact that exculpatory evidence was discovered by Lucas' trial attorney after the trial. (RTT12349; 12483-84; 12499.) Judge Hammes ruled that none of the proffered evidence would be admitted, except for counsel's belief that Lucas was innocent.

This ruling violated Lucas' fundamental constitutional rights by denying him an opportunity to explain and refute crucial aggravating evidence presented by the prosecution.

B. Proceedings Below

Prior to commencement of trial, the parties litigated the question of whether the prosecution would be permitted to present evidence as to the specific facts underlying the conviction. (RTH 26262-300; CT 7782-86; 10370-74.) The judge ruled that the prosecution could present "the facts of

the rape from beginning to end, including the evidence of transportation to a remote spot." (RTH 26296.) In so ruling, the judge contemplated that the jurors would use the 1973 conviction to bolster any guilt verdicts it might return, noting that "the factual basis for [the] rape conviction is important for the jury to understand . . . especially where [the] . . . circumstances are similar to the crimes charged at the guilt phase." (RTH 26297.)[1325] Ultimately, however, the prosecution opted not to present specific evidence and instead relied only on the conviction of rape with the knife enhancement. (See RTT 10312; 12485-88; 12597.)

Meanwhile, the defense contended that it should be permitted to present specific evidence regarding the 1973 conviction, on the issue of whether Lucas actually committed that offense. The proposed defense evidence was the following: Lucas' successful polygraph (RT 12483-84), Lucas' alibi evidence (RTT 12484-85), and the testimony of trial attorney Gilham that he believed Lucas was innocent, that he was ineffective at Lucas' trial and that he discovered evidence favorable to Lucas after the trial. (RTT 12499-501.)[1326] The judge denied all these requests except that attorney Gilham would be allowed to testify that he thought Lucas was innocent. (RTT

[1325] The judge's view that the 1973 rape could be viewed by the jury as similar to the guilt phase crimes is suggested by her comment that the ruling was tentative "depending on how the whole trial develops" and that she might limit consideration of the rape to Swanke and Santiago (which also involved asportation of the victim). (RTH 26297.)

[1326] The defense sought to do this through the testimony of trial attorney Gilham. (RTT 12499.) In making the offer of proof, defense counsel said he thought the newly discovered evidence was provided by Briseno's "boyfriend," but this obviously was in reference to her "girlfriend," Alejandrina Casas.

12495; 12705; 12710-13.)[1327]

C. When The Prosecution Seeks To Use A Prior Conviction As Aggravation Under Factor (b) The Defense Should Be Allowed To Present Evidence Contesting Whether The Defendant Committed The Alleged Offense

It is well established that when the prosecution seeks to prove aggravation under Penal Code § 190.3(b), the alleged violent criminal offense must be proven beyond a reasonable doubt. (*People v. Jennings* (1991) 53 Cal.3d 334, 389, n. 14; *People v. Robertson* (1982) 33 Cal.3d 21, 53, 60.) Factor (b) requires a jury determination as to the underlying facts of the offense because, unlike factor (c) which allows aggravation based on the very existence of a conviction, factor (b) requires a finding of the "presence or absence of criminal activity" involving actual or threatened force or violence. (See generally *People v. Wheeler* (1992) 4 Cal.4th 284.)

In other words, the jurors must determine whether certain events occurred, a determination which requires them to consider matters of historical fact. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 975-76].)

It is true that when the prosecution relies on a prior conviction for Factor (b) aggravation, no further evidence need be presented (*People v. Ray* (1996) 13 Cal.4th 313, 329-30), and a *Robertson* beyond-reasonable-doubt instruction need not be given. (*People v. Wright* (1990) 52 Cal.3d 367, 437.)[1328] However, this does not mean that the conviction itself is all that is

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[1327] Notwithstanding the judge's ruling, the prosecutor agreed to allow Curt Andrewson to testify that he was with Lucas at the time the rape was committed. (RTT 12585-86; 12603-05.)

[1328] In fact, the Court has never directly considered and resolved this (continued...)

permitted or required under factor (b). Under factor (b) it is not the fact of the conviction that is probative, but rather the conduct which gave rise to the conviction. (*People v. Melton*, *supra*, 44 Cal.3d at 754; see also *People v. Ray*, *supra*, 13 Cal.4th at 350 [prosecution may introduce factor (b) evidence even if the defense offers to stipulate to the conviction].) For example, the prosecution is permitted to go beyond the conviction and introduce evidence as to all of the circumstances surrounding the factor (b) criminal activity. (*People v. Melton* (1988) 44 Cal.3d 713, 754-55; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1184-85.)

Accordingly, because it is the conduct and not the conviction that is at issue, the defense should be permitted to offer evidence relevant to whether the defendant actually committed the conduct. The defendant's right to present relevant evidence on a material issue of fact is a fundamental element of the rights to due process, to present a defense, to trial by jury and to compulsory process guaranteed under the Sixth and Fourteenth Amendments of the United States Constitution. (See generally *Webb v. Texas* (1972) 409 U.S. 95, 98; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Washington v. Texas* (1967) 388 U.S. 14, 19.) The right to call witnesses is also expressly guaranteed under the California Constitution. (See *People v. Chavez* (1980) 26 Cal.3d 334, 353.)

Moreover, in the case of newly discovered exculpatory evidence, a conviction offered as the basis for factor (b) aggravation is especially vulnerable to challenge because the conviction was returned by a jury which

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[1328](...continued)
issue. *Wright* relied on *People v. Gates* (1987) 43 Cal.3d 1168, 1202, but that case simply held that a *Robertson* error is harmless when applied to prior conviction.

never considered the newly discovered evidence. Unless the defense is allowed to present such evidence to the sentencing jury, the defendant will have been denied his Eighth Amendment right to challenge the aggravating evidence. (See § D, below.)

Further, even if the prosecutor had not been relying upon the prior conviction as evidence of factor (b) aggravation, Lucas would have been entitled to mitigate or challenge the conviction's aggravating significance under factor (c) by challenging its reliability. Indeed, persuading the jury that Lucas had been wrongfully convicted could convert the conviction from an aggravating factor into a mitigating factor. Lucas' wrongful conviction and incarceration for a crime he did not commit would clearly have provided a basis for sympathy and compassion.

D. The Eighth Amendment Requires That A Capital Defendant Be Given An Opportunity To Explain Or Deny The Prosecution's Aggravating Evidence

One of the fundamental underpinnings of Eighth Amendment jurisprudence is that the sentencer must be allowed to consider any aspect of the defendant's character or record that is proffered by the defendant as a basis for a sentence less than death. (*Buchanan v. Angelone* (1998) 522 U.S. 269; see also *Lockett v. Ohio* (1978) 438 U.S. 586; *People v. Brown* (1985) 40 Cal.3d 512, 540 ["The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty."].) If there is one principle consistently recognized in the United States Supreme Court death penalty cases, it is that a death penalty scheme must allow particularized consideration of relevant aspects of the character and record of each convicted defendant before the penalty of death may be imposed. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 303;

Jurek v. Texas (1976) 428 U.S. 262, 271, 276; *Roberts v. Louisiana* (1976) 428 U.S. 325, 333.) For purposes of Eighth Amendment analysis, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. (*Roberts v. Louisiana* (1977) 431 U.S. 633, 637.)

An equally well-established principle emanates from *Gardner v. Florida* (1977) 430 U.S. 349, 362, in which a plurality of the Supreme Court concluded that the defendant's due process rights were violated because his "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Nine years later, in *Skipper v. South Carolina* (1986) 476 U.S. 1, all nine justices cited *Gardner*, with approval, as establishing the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' [Citations.]" (*Skipper*, 476 U.S. at 5, fn. 1.)

Moreover, the error also violated the Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility, and sentence 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.)

Furthermore, verdict reliability in criminal cases is also required by the Due Process Clause (5th and 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.)

Precluding defense evidence relevant to whether the defendant actually committed the alleged factor (b) conduct violates these principles by reducing the reliability of the jurors' determination as to the factor (b) conduct and the penalty to be imposed.

Finally, the Equal Protection and Due Process Clauses of the federal constitution (14th Amendment) require that the defense, like the prosecution, be permitted to go beyond the conviction and present specific evidence relevant to the factor (b) allegation. Procedures which unfairly favor the prosecution violate the federal constitution. For example, in *Wardius v. Oregon* (1973) 412 U.S. 470, 475, fn. 6, the Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State" interfering with the right to a fair trial violate the defendant's due process rights under the Fourteenth Amendment. (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]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77; *Washington v. Texas* (1967) 388 U.S. 14, 22 [state would violate Due Process Clause if it precluded category of defense witnesses, such as accomplices, from testifying on the basis that they are unworthy of belief]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [defendants must be afforded right to counsel in order to defend against charges prosecuted by state's attorneys]; *People v. Birks* (1998) 19 Cal.4th 108; *Shortridge v. State* (Iowa 1991) 478 N.W.2d 613, 615.) The Due Process Clause "speak[s] to the balance of forces between the accused and his accuser." (*Wardius, supra*, 412 U.S. at 474; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372 [accord].) Therefore, "in 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. (*Id.* at 474.)

E. Evidence That Lucas Did Not Commit The 1973 Rape Should Have Been Allowed

The reliability of Lucas' 1973 rape conviction is suspect. Although it is true that the jury convicted Lucas, they did so without considering testimony that undermined both the prosecution's theory of the case and the credibility of the prosecuting witness. (See § 6.4.5(D)(2), pp. 1494-96 above, incorporated herein.) Such testimony was critically important to the reliability of the conviction; yet the jury which sentenced Lucas to death was never aware of it. Hence, Judge Hammes unconstitutionally denied Lucas an opportunity to deny and explain aggravating evidence which undoubtedly weighed heavily with the sentencing jury.

F. The Penalty Judgment Should Be Reversed

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See § 6.5.1(D), pp. 1548-50 above, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced (see Volume 7, §7.5.1(J)(3)(a), pp. 1619-22, incorporated herein) the prosecution cannot meet its burden of demonstrating that the error was harmless.

Here the prosecution cannot meet its burden because the 1973 prior conviction was extremely prejudicial evidence. (See § 6.4.6(M), pp. 1525-30 above, incorporated herein.)

Therefore, the judgment should be reversed.

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.6 1973 PRIOR CONVICTION: INSTRUCTIONS

ARGUMENT 6.6.1

THE JUDGE IMPROPERLY PERMITTED THE JURORS TO RELY ON THE CURRENT GUILT PHASE CONVICTIONS IN DECIDING WHETHER LUCAS' GUILT OF THE 1973 RAPE WAS PROVEN BEYOND A REASONABLE DOUBT

A. Proceedings Below

The prosecution offered Lucas' 1973 prior rape conviction under both factor (b) [prior violent criminal activity] and factor (c) [prior felony conviction]. However, before the jurors could consider the prior rape under factor (b) they first had to find beyond a reasonable doubt that Lucas was guilty of that crime. In this regard, the defense offered Curt Andrewson who testified that Lucas was with him at the time the rape was allegedly committed. (RTT 12603-05.) The defense also presented the sworn testimony of Lucas' trial attorney, G. Anthony Gilham, who expressed his belief that Lucas did not commit the rape. (RTT 12704-05.)

The jurors were instructed on the elements of the rape charge and on the requirement that Lucas' guilt of the prior rape be proven beyond a reasonable doubt. (CT 14381-85.) However, no penalty phase instructions were given that precluded consideration of the guilt phase convictions in deciding Lucas' guilt as to the prior rape. Additionally, the jurors were authorized to utilize "other counts' evidence" via the guilt phase instructions (CT 14307-10) which were applicable to penalty.[1329]

[1329] Reasonable jurors would have concluded under the instructions (continued...)

B. The Factor (b) Determination Must Be Made Without Consideration Of The Guilt Phase Convictions

The jurors should not normally consider the guilt phase convictions when deciding whether other crimes evidence offered under factor (b) have been proven beyond a reasonable doubt.[1330] In fact, it can be reasonably argued that a new jury should be impaneled to make the factor (b) determination. As noted by Justices Marshall and Brennan, dissenting from the denial of certiorari in *Williams v. Lynaugh* (1987) 484 U.S. 935:

> [I]f a defendant has a right to have a jury find that he committed a crime before it uses evidence of that crime to sentence him to die, he has a right that the jury that makes the determination be impartial. A jury that already has concluded unanimously that the defendant is a first-degree murderer cannot plausibly be expected to evaluate charges of other criminal conduct without bias and prejudice.

Moreover, as recognized by this Court, "[a]t least two other

[1329](...continued)
given at the guilt phase were applicable to penalty except to the extent that they conflicted with the penalty instructions. (RTT 13486; CT 14357, ¶ 4; 13486.)

[1330] If there is signatory similarity between the guilt convictions and the factor (b) allegation then presumably the guilt convictions could be considered under Evidence Code § 1101(b). In the present case there was no such connection. The prosecution offered no evidence as to the prior except the fact of the conviction (rape) and the use of a knife enhancement. Hence, there was no basis upon which to allow consideration of the other offenses under § 1101(b).

Moreover, even where such cross-consideration is permissible, it could only properly be done under correct limiting and cautionary instructions. (See e.g., CALJIC 2.50.) In the present case the cross-admissibility instructions, which allowed the jurors to rely on the "other offenses" to find that Lucas committed the rape, were defective in several ways.

jurisdictions have concluded that due process precludes a 'guilt' jury from hearing 'other crimes' evidence at the penalty phase." (*People v. Balderas* (1985) 41 Cal.3d 144, 204, citing *State v. Bartholomew* (Wash. 1982) 98 Wn.2d 173 [654 P.2d 1170, 1184], remanded 463 U.S. 1203, opn. after remand 101 Wn.2d 631 [683 P.2d 1079]; *State v. McCormick* (Ind. 1979) 272 Ind. 272 [397 N.E.2d 276, 279-81]; see also *People v. Williams* (1997) 16 Cal.4th 153, 239.)[1331]

It follows, *a fortiori*, that unless there is some basis for cross-admissibility of the guilt and factor (b) crimes under Evidence Code § 1101(b), at a minimum the trial judge should assure that the jurors are admonished to never consider the guilt convictions in making the factor (b) determination.[1332]

In the present case the guilt convictions were clearly not cross-admissible with the factor (b) rape allegation. Indeed, nothing was offered as to the prior rape except the facts of the convictions, thus there was no evidentiary basis for allowing cross-admissibility under § 1101(b). Nevertheless, because the cross-admissibility instructions given at the guilt phase could have been reasonably interpreted to allow the guilt phase convictions to be considered to prove the prior (see Volume 2, § 2.3.4.3, pp. 253-60, incorporated herein), there is no assurance that the jurors did not do so.

[1331] Nevertheless, this Court has held that this concern does not necessitate impanelment of a second jury to decide the prior conduct issues. (See *People v. Williams*, *supra*, 16 Cal.4th at 239.)

[1332] For example, the trial judge should admonish the jurors not to consider the guilt phase convictions in deciding whether the defendant committed the alleged "Factor (b)" crime.

C. In The Present Case The Instructions Erroneously Allowed The Jurors To Rely On The Guilt Convictions In Making The Factor (b) Determination

In the present case, not only was such an admonition not given, but the jurors were expressly authorized to consider guilt phase convictions by virtue of the other offenses instruction. This error violated Lucas' federal constitutional rights.

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.)

Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) Because admission of other crimes evidence undermines fundamental fairness it "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citations omitted; see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.) Hence, the jurors' improper consideration of such evidence violated Lucas' federal constitutional due process rights under the Fourteenth Amendment. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; see also *State v. Hawk* (Tenn. Crim. App. 1985) 688 S.W.2d 467, 474.)

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 sentencing determination 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.)

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.)

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.) Given the closeness of the evidence and the impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be

reversed.

D. The Error Was Prejudicial

The erroneous juror consideration of the highly inflammatory 1973 rape conviction was devastatingly prejudicial to Lucas at the penalty trial for a number of reasons. (See § 6.4.6(M), pp. 1525-30 above, incorporated herein.) Therefore, because the penalty deliberation were closely balanced (see Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein) the death judgment should be reversed.

PENALTY PHASE: 1973 PRIOR CONVICTION ISSUES

6.6 1973 PRIOR CONVICTION: INSTRUCTIONS

ARGUMENT 6.6.2

THE FACTOR (B) INSTRUCTION FAILED TO REQUIRE THE JURORS TO FIND BEYOND A REASONABLE DOUBT THAT LUCAS COMMITTED THE 1973 RAPE

The 1973 rape conviction was offered under factor (c) as established by the defense stipulation that Lucas was, in fact, convicted. (See CT 5576.)

However, the prosecution also offered the 1973 rape as violent criminal conduct under factor (b). In this regard, the jury was required to find beyond a reasonable doubt that Lucas actually committed the rape – notwithstanding the stipulated conviction. (*People v. Robertson* (1982) 33 Cal.3d 21, 53, 60; see also *People v. Jennings* (1991) 53 Cal.3d 334, 389, n. 14.) And this was a contested material issue in light of the alibi testimony of Curt Andrewson (RTT 12603-05) and the testimony of trial attorney Gilham that he did not believe Lucas committed the rape.

The jury instructions failed to instruct the jurors on this requirement. Instead, the jurors were told:

> Evidence has been introduced for the purpose of showing that the defendant has been convicted of the crime of forcible rape while armed with a deadly weapon prior to the offenses of murder in the first degree of which he has been found guilty in this case.
>
> Before you may consider such alleged crime as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant was in fact convicted of such prior crime. (CT 14381.)

It is true that the jurors were correctly instructed in another instruction

(CT14385) but inconsistent instructions are insufficient to assure proper juror understanding of the law because there is no way of knowing upon which instruction the jurors relied. (See *Francis v. Franklin* (1985) 471 U.S. 307, 322.)

Nor did the argument of counsel cure the error. (See *Kelly v. South Carolina* (2002) 534 U.S. 246 [argument of counsel was insufficient to cure ambiguity as to meaning of life imprisonment].)[1333]

The erroneous juror consideration of the highly inflammatory 1973 rape conviction was devastatingly prejudicial to Lucas at the penalty trial for a number of reasons. (See § 6.4.6(M), pp. 1525-30 above, incorporated herein.) Therefore, because the penalty deliberation were closely balanced[1334] the death judgment should be reversed.

[1333] See also *People v. Miller* (1996) 46 Cal.App.4th 412, 423 fn. 4]: "While we have no trouble utilizing the argument of counsel to help clear up ambiguities in instructions given, there is no authority which permits us to use argument as a substitute for instructions that should have been given. Logically, this is so, because the jury is informed that there are three components to the trial–evidence presented by both sides, arguments by the attorneys and instructions on the law given by the judge." [Emphasis in original.]

[1334] 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.].