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 7

Pages 1567 - 1835

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Court of California

DEATH PENALTY

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VOLUME 7

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.1 PENALTY PHASE STATEMENT OF CASE

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

7.2 PENALTY PHASE STATEMENT OF FACTS

See Volume 6, § 6.2, pp. 1389-1431, incorporated herein.

7.3 ERRORS RELATED TO THE ATASCADERO EVIDENCE

ARGUMENT 7.3.1

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

A. Introduction

During the penalty phase testimony of the defense psychiatrist, Dr. Alvin Marks, it was revealed that Marks received a "social history" of Lucas which trial counsel had not intended Marks to consider. (RTT 12993-94.) In

the midst of the *in camera* hearing regarding the prosecution's right to a copy of the "social history" the judge desired to talk with the attorneys alone without Lucas being present. Lucas was asked to "waive" his presence and he left the hearing. (RTT 13003; CT 5582.) The judge also refused a request to have Lucas' "second chair," Motion and Writ counsel Jeff Steutz, present during the hearing. (RTT 13003.)

During Lucas' absence two matters directly concerning his trial interests were discussed:

1) The potential ineffectiveness of counsel in allowing Marks to review the social history which counsel did not want to open up; and

2) A stipulation allowing the jury to hear and consider a highly prejudicial diagnosis of Lucas by Dr. Schumann, an Atascadero doctor.[1335]

This was fundamental structural error because Lucas was deliberately excluded from a proceeding so that counsel and the judge could talk privately and frankly about counsel's performance. (See *Campbell v. Rice* (9th Cir. 2002) 302 F.3d 892.) Moreover, it was a violation of the trial judge's legal and ethical duties to deliberately deceive the defendant as to the potential ineffectiveness of his own counsel and remove from him consideration of matters which could and, in fact, did adversely affect his defense.

B. Procedural Background

Dr. Alvin Marks was the only defense penalty expert who provided a mental health diagnosis of Lucas. During Dr. Marks' testimony it was revealed that he had, unbeknownst to defense counsel, reviewed and

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[1335] This stipulation was given to the jurors immediately after the closed hearing from which Lucas was excluded. (See § 7.3.1(B), pp. 1568-71 below, incorporated herein.)

considered a social history of Lucas prepared by the defense. (RTT 12993-95; 13001-02.) Counsel had not intended for Dr. Marks to review this social history because they did not want to allow the social history and the Atascadero records upon which it in part relied to be presented to the jurors. (RTT 12993-95; 13009-10.) Defense counsel informed the judge that: "We were not in a position to make a knowing judgment as to whether to call Dr. Marks because we didn't know that he had this particular document." (RTT 13002.) Judge Hammes responded: "We have got a large problem here, and I think the People [prosecution] can see what the problem is. . . . It's just a dangerous issue." (RTT 13002.) The prosecutor asked: "What's the danger? . . ." (RTT 13002) and the judge immediately announced: "I would like to talk with counsel in chambers alone on the record without Mr. Lucas' presence." (RTT 13003.)

After a short discussion with Lucas, defense counsel stated that, "Mr. Lucas would be prepared . . . to waive his presence," but requested that Mr. Stuetz, Lucas' Motion and Writ counsel "sit in" during the session. (RTT 13003.) The judge denied the request to have Mr. Stuetz present. (RTT 13003.) She then asked Lucas if he was "willing to give up"his "right to be present for a very short conference." Lucas responded, "Yes, your honor." (*Ibid.*)

The conference was then held with the following individuals present: Judge Hammes, defense attorneys Landon and Feldman, prosecutors Williams and Clarke, and the reporter. (RTT 13006-16.) During the conference the judge explained her view that although Landon and Feldman had never before "fouled up" during this trial, as to Dr. Marks they made a "mistake" which could raise "an incompetence question later." (RTT 13006-07.) In particular,

the judge opined that:

> Dr. Marks was, in essence, by mistake, given two pieces of information that the defense would not have given him on a second thought. First was the report – the DSM diagnosis and his report by Dr. Bach. Second is this chronological history by the investigator. (RTT 13006.)

If this "mistake"were to allow the jury to hear damaging evidence which counsel did not want revealed then, in Judge Hammes' view, it might "screw up the case." (RTT 13007.) As a result, the judge excluded the social history. However, the prosecutor was permitted to present evidence contained in the social history through the Atascadero records. (RTT 13008-09.) Accordingly, defense counsel had no recourse but to agree to a stipulation as to the Atascadero diagnosis. (RTT 13017-19.) Shortly after the special private session from which Lucas was excluded, the stipulation was given to the jury. (RTT 13025-26; CT 5582.)[1336]

The jurors asked for a transcript of the stipulation during deliberations and returned its death verdict shortly after receiving that transcript. (See RTT

[1336] The stipulation provided as follows:

> Mr. Williams: The stipulation being that on February 7th, 1974, a licensed physician with the state of California, a doctor – medical doctor, psychiatrist, by the name of R.M. Schumann, S-C-H-U-M-A-N-N, examined in the month of February or diagnosed in the month of February 1974 Mr. David Allen Lucas, the defendant in this action, while at the Atascadero State Hospital that has heretofore been referred to in these proceedings, and diagnosed him as in the DSM-III or in the DSM manual as an antisocial personality, severe; alcoholism, habitual excessive drinking, and a sexual deviation, aggressive sexuality, and the prognosis was very guarded." [Emphasis added.] (RTT 13025-26.)

13025-26; CT 5582.)

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

The right to personal presence is mandated by the Due Process Clause of the federal constitution (14th Amendment),[1337] by the California Constitution (Art. I, § 15), by Penal Code § 977(b) and by Penal Code § 1043. These rights generally extend to any chambers or bench discussions the "bear a reasonably substantial relation to the opportunity to defend. [Citations.]" (*People v. Holt*, *supra*, 15 Cal.4th at 706.) Under the Due Process Clause of the federal constitution "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; see also *Campbell v. Rice*, *supra*, 302 F.3d at 898.)

In the present case the chambers conference from which Lucas was excused substantially related to his opportunity to defend, as a matter of law, because the proceeding related to the ineffectiveness of Lucas' trial counsel. (See *Campbell v. Rice*, *supra*, 302 F.3d 892; cf. *People v. Marsden* (1970) 2 Cal.3d 118.)

Moreover, the secret conference revealed a number of troubling concerns about defense counsel's performance that should have been explored by Lucas, or nonconflicted counsel representing Lucas' interests.

[1337] See *Kentucky v. Stincer* (1987) 482 U.S. 730; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105; *Diaz v. United States* (1912) 223 U.S. 442; *People v. Holt* (1997) 15 Cal.4th 619, 706 [recognizing "fundamental statutory and constitutional . . . right to be present . . ."]; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 274.

First, Dr. Marks received and read a social history and another expert's report containing damaging information which counsel did not want revealed. This raised fundamental concerns regarding the thoroughness and effectiveness of both counsels' penalty phase investigation and their trial preparation. Certainly, the value of any expert diagnosis would have to be examined by counsel in light of what material the expert reviewed. Yet attorneys Landon and Feldman did not appear to know exactly what Marks reviewed. And, of course, this shortcoming also suggested that defense counsel had not adequately prepared for Marks' testimony before putting him on the stand.

Moreover, Judge Hammes' view that counsel had made a mistake that could "screw up the case" would have alerted Lucas and/or nonconflicted counsel of the need for further inquiry.

Second, in light of Judge Hammes' observations, and the statements of counsel at the secret hearing, Lucas would have had a basis for questioning counsel's decision to call Marks at all. From defense counsels' remarks it appeared that they believed they could keep the Atascadero information from the jury if they did not allow Dr. Marks to rely on it:

> Mr. Feldman: But the doctor testified he didn't consider . . . Atascadero . . . . (RTT 13009.)
>
> Mr. Landon: . . . [T]here is a real question of whether or not he actually relied on it. (RTT 13011.)

However, the court rejected the defense position ruling that, even if the Atascadero information was not admissible on cross-examination, it was independently admissible. (RTT 13009.) Hence, there was a reasonable basis to inquire into whether the damaging Atascadero diagnosis was given to the jury as a result of counsels' mistaken belief that the information would be kept

from the jury if Dr. Marks did not rely on it.

In sum, the secret hearing was a proceeding at which Lucas' presence would have been helpful to his defense. Had he been present Lucas would have been alerted to grounds upon which he might have requested additional inquiry into counsels' apparent lack of preparation, replacement of counsel via a *Marsden*[1338] motion and/or a mistrial.

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

"Where a constitutional right to counsel exists, [the Supreme Court's] Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (*Wood v. Georgia* (1981) 450 U.S. 261, 271.) When a trial court is made aware of an attorney's actual or potential conflict of interest, Supreme Court precedent requires that the trial court "either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." (*Holloway v. Arkansas* (1978) 435 U.S. 475, 484.) The trial court's failure to appoint separate counsel or inquire into the attorneys' potential conflict of interest is a violation of the defendant's Sixth Amendment rights. (*Ibid.*; see also *Campbell v. Rice*, *supra*, 302 F.3d at 897.) "[I]f counsel's representation is hampered by a conflict of interest, the integrity of the adversary system is cast in doubt. . . ." (*Campbell v. Rice*, *supra*, 302 F.3d at 898-99.)

Hence, when a proceeding focuses upon the potential ineffectiveness of counsel, counsel's professional and financial interests may conflict with the adversarial interests of the client. As recognized by the prosecutor, any attorney who is accused of ineffectiveness has "an obvious motive" to try to

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[1338] *People v. Marsden* (1970) 2 Cal.3d 118.

protect their own interests. (RTH 35040-41.) In light of this conflict, exclusion of Lucas from this proceeding violated his state and federal rights to due process and effective representation of counsel. (Calif. Const. Art. I, § 15; U.S. Const. 6th and 14th Amendments; *Holloway v. Arkansas*, *supra*; *Campbell v. Rice*, *supra*.)

E. The Judge Violated Her Duty To Protect Lucas' Rights

A trial judge has an affirmative obligation to protect the substantial rights of the accused. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795 ["Simply put, the trial court's duty to conduct judicial business efficiently cannot trump defendant's right[s] . . ."].) Hence, because Judge Hammes subordinated Lucas' rights to the interests of judicial efficiency, Lucas was denied his federal constitutional right to a fair and impartial judge. (See *Tumey v. Ohio* (1927) 273 U.S. 510; *Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141.)

Moreover, Judge Hammes further exhibited her lack of impartiality by excluding Writ and Motion counsel Jeff Stuetz, despite her obvious awareness that attorneys Landon and Feldman would be conflicted during any discussion of their own ineffectiveness. (RTT 13003.)

F. Lucas' Absence Violated The Eighth Amendment

Modern Eighth Amendment jurisprudence requires death penalty proceedings to be reliable. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.) Those reliability concerns are compromised when crucial trial decisions are made behind the defendant's back, by counsel who have professional and financial interests which conflict with the interests of the defendant, and who collude

with the trial court to hide those conflicting interests from the defendant.

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

It is true that the record reflects some evidence of waiver. The judge asked if Lucas would waive his presence and, after a discussion with Lucas, counsel stated on the record that Lucas would waive his presence. (RTT 13003.) The judge asked Lucas if he understood that he had a right to be present for the conference and asked if he was willing to give up that right. Lucas then said "Yes, your honor." (RTT 13003.)

However, any waiver based on such a record should not be upheld for several reasons.

First, the waiver was invalid because it was not in writing as required by Penal Code § 977(b). Second, waiver of personal presence should not be permitted in a capital case. (See *Hopt v. Utah* (1884) 110 U.S. 574; *Lewis v. United States* (1892) 146 U.S. 370; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271; but see *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 671-73; *State v. Morton* (N.J. 1998) 155 N.J. 383 [715 A.2d 228, 254].) Third, a waiver should not be validated when it is deliberately induced by the trial judge for the purpose of preventing the accused from hearing discussions regarding his attorneys' competence. A waiver should never be allowed under such circumstances because, as a matter of law, the ineffectiveness of defense counsel is substantially related to the opportunity to defend. (See generally *Strickland v. Washington* (1984) 466 U.S. 668; *People v. Marsden* (1970) 2 Cal.3d 118.) Fourth, the court never told Lucas what he was waiving; a waiver of any substantial right must be knowing and intelligent. (See *Johnson v. Zerbst* (1938) 304 U.S. 358, 364; see also Volume 2, § 2.11.1(I)(1), p. 714, incorporated herein.) Hence, as a matter of law, a waiver is not valid when it

is obtained for the purpose of discussing counsels' ineffectiveness "behind the defendant's back."

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

Reversal is automatic if the defendant's absence constitutes a structural error which permeates "the entire conduct of the trial from beginning to end" or "affect[s] the framework within which the trial proceeds. . . ." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.)

In the present case, the proceeding from which Lucas was excluded had a crucial bearing on the entire penalty trial, from beginning to end. This is so because the defense strategy at trial relied heavily on the testimony of Dr. Marks, the only mental health expert called by the defense. And, in particular, the defense penalty strategy was committed to not revealing Lucas' social history and Atascadero records.

In sum, Lucas' exclusion from the in chambers proceeding where the consequences of counsels' errors were discussed was structural error, because those errors undermined the defense strategy, and because Lucas clearly had a right to participate, and an active role to play, in such a proceeding. (See *Campbell v. Rice*, *supra*, 302 F.3d at 898-99.)

I. The Error Was Prejudicial Under Harmless-Error Analysis

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1339]

[1339] See § 7.5.1(J)(3)(a), pp. 1619-22 below, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

the prosecution cannot meet its burden of demonstrating that the error was harmless. Here the prosecution cannot meet this burden because Lucas was purposefully excluded from a crucial hearing concerning potentially prejudicial mistakes made by his attorneys.

Accordingly, the judgment should be reversed.

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.3 ERRORS RELATED TO THE ATASCADERO EVIDENCE

ARGUMENT 7.3.2

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

A. Introduction

In rebuttal of the defense expert – who testified that Lucas had an unspecified personality disorder – the prosecutor sought to introduce the diagnosis from Atascadero of Dr. Schumann that found Lucas had "antisocial personality, severe"[1340] with "a very guarded prognosis." The parties agreed to present this evidence by stipulation and the judge admonished the jury: "That's a stipulated matter." This admonition, by failing to differentiate between the fact of the diagnosis and its content, unconstitutionally implied that Dr. Schumann's conclusions must be taken as a fact. This error violated the Eighth Amendment by discrediting the mental health mitigation offered by the defense and by unduly emphasizing and corroborating the highly prejudicial conclusions of Dr. Schumann.

B. Procedural Background

The jury was given the following stipulation at the penalty trial:

> Mr. Williams: The stipulation being that on February 7th, 1974, a licensed physician with the state of California, a doctor – medical doctor, psychiatrist, by the name of R.M. Schumann, S-C-H-U-M-A-N-N, examined in the month of February or

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[1340] The diagnosis used the term "antisocial personality, severe." However, the jurors were informed that one with a diagnosis of antisocial personality was formerly called a "psychopath" or "sociopath." (RTT 13032.)

> diagnosed in the month of February 1974 Mr. David Allen Lucas, the defendant in this action, while at the Atascadero state hospital that has heretofore been referred to in these proceedings, and diagnosed him as in the DSM-III or in the DSM manual as an antisocial personality, severe; alcoholism, habitual excessive drinking, and a sexual deviation, aggressive sexuality, and the prognosis was very guarded." (RTT 13025-26.)

After the stipulation was stated by the prosecutor and expressly accepted by defense counsel (RTT 13026), the judge admonished the jury as follows:

> "Again, ladies and gentlemen, that's a stipulated matter, now. It's not a matter that you have to decide. It's given to you as a fact." (RTT 13026.)[1341]

During deliberations the jury asked to hear the stipulation again, whereupon the transcript of the stipulation and the judge's admonition were sent into the jury room. The jury returned its verdict of death shortly after receiving the stipulation.[1342]

C. Legal Analysis

The problem with the judge's post-stipulation admonition was a failure to recognize the crucial distinction between a stipulation of a fact as opposed to a stipulation of evidence. The former conclusively assumes the truth of the

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[1341] The judge's post-stipulation admonition was reinforced by a subsequent jury instruction providing: ". . . [I]f the attorneys have stipulated or agreed to a fact, you must regard that fact as conclusively proved." (CT 14359.)

[1342] The jurors received the stipulation at 1:30 in the afternoon and returned the death verdict at 10:30 on the next morning of deliberations. (CT 5598-5600.)

matter asserted, while the latter leaves the truth determination to the jury. (See *United States v. Lambert* (8th Cir. 1979) 604 F.2d 594, 595; *United States v. Hellman* (5th Cir. 1977) 560 F.2d 1235, 1236.) In other words, the parties who stipulate to evidence as opposed to fact "do not accept the admissibility or factual accuracy of the stipulated [evidence]: '[W]hen evidence is offered by way of stipulation, there is no agreement as to the facts which the evidence seeks to establish . . . The agreement is to . . . the evidence . . . not what the facts are.' [Citations.]" [Emphasis added.] (Imwinkelried, Giannelli, Gillian, Lederer, *Courtroom Criminal Evidence* § 3104, p. 1147 (Lexis, 3rd ed. 1998); see e.g., *Ballard v. State Bar* (1983) 35 Cal.3d 274, 282 ["petitioner stipulated to the testimony that [the witness] would give but did not stipulate to the truth of her testimony . . ."]; *People v. Adams* (1993) 6 Cal.4th 570, 580, fn. 17 [evidentiary stipulations are not an admission that an allegation is true].)

Hence, when a stipulation is received, the fundamental distinction between stipulation of fact versus stipulation of evidence should be clearly explained to the jury. (See e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 622 fn. 18 [stipulated testimony but jury clearly informed that the facts testified to "are not contested"]; cf. 9th Circuit Model Instructions Criminal No. 2.3 and No. 2.4.) Otherwise, there is a danger that the stipulation will unconstitutionally direct the jury not to consider an essential factual issue which remains contested. (See generally, *People v. Figueroa* (1986) 41 Cal.3d 714 [directed verdict on any essential issue violates the federal constitution]; see also *In re Winship* (1970) 397 U.S. 358 [jury must decide every essential factual issue]; *Neder v. United States* (1999) 527 U.S. 1 [failure to instruct on contested element is reversible]; *Ring v. Arizona* (2002) 534 U.S. 1103 [jury must determine factual issues upon which death sentence

is predicated]; see also § 7.8.2, pp. 1777-1830 below, incorporated herein.)

In the present case, immediately following the stipulation, the judge admonished: ". . . that's a stipulated matter . . . it's not a matter that you have to decide. It's given to you as a fact." (RTT 13026.) In this context, the judge's reference to "that's a stipulated matter . . ." implied that Dr. Schumann's conclusions should be accepted as a fact. Yet, in fact, the truthfulness and accuracy of the diagnosis was a disputed issue for the jury to resolve. Indeed, Dr. Marks expressly disagreed with Dr. Schumann's diagnosis, testifying that the factors which would support Dr. Schumann's diagnosis were not present. (RTT 13031.)

In sum, Dr. Schumann's diagnosis pigeon-holed Lucas as having a "severe antisocial personality with sexual deviation, aggressive sexuality" and a "very guarded prognosis." In this context, the judge's erroneous direction to accept the diagnosis as an uncontested fact was prejudicial error.[1343]

D. The Error Violated The Federal Constitution

Because the stipulation allowed the jury to consider evidence without confrontation of the witness in court by counsel, its admission violated Lucas' rights to due process, trial by jury, confrontation and counsel. (See generally *Davis v. Alaska* (1974) 415 U.S. 308; *Francis v. Franklin* (1985) 471 U.S. 307; *Carella v. California* (1989) 491 U.S. 263; *In re Winship* (1970) 397 U.S. 358; *People v. Figueroa* (1986) 41 Cal.3d 714.) Moreover, the error also violated the Cruel and Unusual Punishment Clause of the federal constitution (8th and 14th Amendments) which require heightened reliability in any

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[1343] The view that Dr. Schumann's conclusion must be accepted as fact was reinforced by defense counsel's penalty argument which failed to contest Dr. Schumann's diagnosis. (RTT 13283- 13313.)

determination that death is the appropriate sentence. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

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

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

E. The Prosecution Cannot Meet Its Burden Of Demonstrating That The Error Was Harmless Beyond A Reasonable Doubt

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1344] the prosecution cannot meet its burden of demonstrating that the error was harmless.

The Schumann diagnosis was extremely inflammatory evidence. (See Volume 2, § 2.9.2(D), pp. 547-48, n. 436, incorporated herein; see also §

[1344] See § 7.5.1(J)(3)(a), pp. 1619-22 below, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

7.6.9, pp. 1666-68 below, incorporated herein.) The jurors specifically asked for the stipulation regarding Dr. Schumann during their deliberations, and returned the death verdict shortly after receiving the transcript of the stipulation. (See § 7.3.2(B), pp. 1580, n. 1342 above, incorporated herein.) Hence, because the penalty deliberations were closely balanced, the death judgment should be reversed under both the state and federal standards of prejudice. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.)

Accordingly, the penalty judgment should be reversed.

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.4 PROSECUTORIAL MISCONDUCT IN PENALTY ARGUMENT

ARGUMENT 7.4.1

THE PROSECUTOR IMPROPERLY RELIED ON BIBLICAL LAW AND A "GOOD VERSUS EVIL" PARADIGM FOR THE SENTENCING DECISION

A. Introduction

The prosecutor's penalty argument had a single theme: The penalty determination is a "battle between good and evil" and since Lucas committed the ultimate act of evil, a verdict of death must be returned. This theme was founded upon religious doctrine and conveyed by transparent biblical terminology and scripture. This argument, which went largely uncorrected by the judge – despite objection by the defense – was improper and prejudicial for two reasons. First, the prosecutor improperly invoked a higher religious law and implied that the jurors could justify their vote for death on that law. Second, apart from the religious connections, the prosecutor's "good versus evil" paradigm misstated the jurors' function in violation of the Eighth Amendment.

B. Proceedings Below

The defense requested a penalty phase instruction which would have informed the jury that it must not view the penalty deliberations as a balance of good versus bad. (CT 14463.)[1345] This request was denied by Judge Hammes. (CT 14463.)

[1345] The request cited *People v. Belmontes* (1988) 45 Cal.3d 744, 804, which relied on *People v. Brown* (1985) 40 Cal.3d 512, 542 n. 13.

In his penalty argument the prosecutor's primary theory was "the battle between good versus evil." The argument began and ended with a biblical mandate – "the candle of the wicked shall be put out" – and in between, the prosecutor used religious references to justify the death penalty, and to urge the jurors to side with good rather than evil by executing Lucas:

> The candle of the wicked shall be put out. Ladies and gentlemen, by your verdicts of guilty you have determined that these vile, cold-blooded, savage and brutal murders committed by Mr. Lucas indeed make him a wicked person. Your decision now will be to decide whether or not the candle of life within Mr. Lucas shall be put out. (RTT 13266.)
>
> . . .
>
> Mr. Lucas will ask for mercy, ladies and gentlemen. His lawyers will beg for mercy from you, but we all know that mercy is not an earthly gift. It is a divine gift, and only God can grant mercy.
>
> Your duty, ladies and gentlemen, is to dispense justice, and after you have done so, then Mr. Lucas will seek his mercy from God, and God will consider whether mercy is appropriate. (RTT 13273.)
>
> . . .
>
> Within the story of life, ladies and gentlemen, is the battle between good and evil. There are times when we have to enter into the battle of good and evil. Sometimes it is not pleasant, but sometimes we have to do that. And as sworn jurors, you have agreed to do that. And one of those times is now for you to enter into this battle between good and evil.
>
> Capital punishment has been with us for thousands of years, as Moses laid it down, as the punishment for premeditated murder, and we have had it ever since because it is a just penalty when someone commits the ultimate act of evil.
>
> We know now by your verdicts that Mr. Lucas has indeed committed the ultimate act of evil in murders.
>
> You are going to hear, I am sure, that the death penalty is inhumane; it is immoral. I say to you, ladies and gentlemen, it is – that notion is historical and logical nonsense. For in the battle between good and evil there are times when we must,

> when we must get into that battle and do what is right and what is just and sometimes that requires that we impose the death penalty, and it is proper and just in this case.
>
> However, it can never be just for the purpose or the reason that someone fails to get into that battle, because if you fail to get into that battle and deal with it and do what is just, if you fail, then justice is not done.
>
> You may be told that the battle will be won by giving Mr. Lucas life without possibility of parole, and I say no, no, ladies and gentlemen, no. The appropriate penalty is death, because his lawyers will ask you for life." (RT 13277-78.)
>
> . . .
>
> Ladies and gentlemen, justice cries for the ultimate penalty; the ultimate penalty of death for Mr. Lucas. He is a person with a depraved sense of pleasure; his meanness, his cold, deliberate murders of two women, an innocent child, and the attempt [sic] murder of Jodie Robertson. No one is going to try to tell you that your task is a pleasant one; no one. But you must get into the battle between good and evil and take care of that problem.
>
> This case cries for the penalty of death, and the candle of the wicked shall be put out. (RT 13278.)

The defense objected to this "good versus evil" argument and to the other religious references as a violation of the Eighth Amendment and an improper invocation of "religious passion." (RTT 13278-80.)[1346]/[1347] The

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[1346] The prosecutor asserted that the defense objection was "tardy" because it came at the end of his argument. (RTT 13282.) However, the defense did not interrupt the argument based on counsels' understanding that Judge Hammes preferred such objections to be made at the end of argument. (RTT 13279; see e.g., RTT 11701 ["And . . . I want to reemphasize I do not like people interrupting other people's closing arguments."]; RTT 11702 [". . . I think most things, again, can be cured after the argument . . ."]; RTT 11729 ["And, again, I would ask that we show restraint. If at all possible, not interrupt in argument until there is a break because we will be having frequent breaks every hour."]; RTT 10996 ["And just so that it's kind of clear what my

(continued...)

trial court sustained the objection to the prosecutor's assertion that "only God could grant mercy" (RTT 13273) and agreed to give a "curative instruction." (RTT 13281, 13283.)[1348] However, the rest of the prosecutor's argument did not give Judge Hammes "concern," and she did not specifically limit the

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[1346](...continued)
policy will be on closing argument . . . I am extremely reticent to stop any counsel during argument . . . My feeling is that closing arguments are sacrosanct, and they should be the – the attorney should be free to talk."].)

This approach has been recognized by the United States Supreme Court as appropriate. (*United States v. Young* (1985) 470 U.S. 1, 13-14 ["[I]nterruptions of arguments . . . are matters to be approached cautiously. At the very least, a bench conference might have been convened out of the hearing of the jury once defense counsel closed, and an appropriate instruction given."].)

[1347] The defense objected as follows:

> Mr. Landon: – our position is based on violations of what we believe to be the Eighth Amendment to the United States Constitution. Our position is that it was error for Mr. Williams to be arguing good versus evil . . . is objectionable and is a violation of the Eighth Amendment.
>
> The argument that Moses sanctioned the death penalty is not only out of context, but violates the Eighth Amendment's responsibility and duty not to allow for an appeal to religious passion.
>
> To tell the jury that it is only God who can show mercy and that it would be inappropriate for anyone other than God to do so, not only is improper argument, but flies in the face of the jury instruction that specifically sanctions the use of mercy in these proceedings. (RTT 13279-80.)

[1348] The admonition was as follows: "We will begin with defense argument in just a moment. Before we do, I want to advise you that the law does specifically provide that the jury may consider mercy for the defendant in considering his sentence." (RTT 13283.)

jurors' consideration of religious law or the prosecutor's "good versus evil" paradigm for the penalty deliberations. (RTT 13281.)

C. Prosecution Reliance On Higher Religious Authority Is Improper

It cannot be emphasized "too strongly that to ask the jury to consider biblical teachings when deliberating is patent misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 836 n. 6.) "[B]iblical law has no proper role in the sentencing process." (*People v. Roybal* (1998) 19 Cal.4th 481, 520; see also *People v. Freeman* (1994) 8 Cal.4th 450, 515; *People v. Wash* (1993) 6 Cal.4th 215, 260-261.) It violates the Eighth Amendment to invoke "higher" law to support the death penalty because:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. . . . It must channel the sentencer's discretion by "clear and objective standards" that provide [fn. omitted] "specific and detailed guidance," [fn. omitted] and that "make rationally reviewable the process for imposing a sentence of death." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [citations omitted]; see also *Lewis v. Jeffers* (1980) 497 U.S. 764, 75-76.)

Juror reliance on a "higher authority" such as the Bible violates the principles enunciated by *Godfrey*. (*Jones v. Kemp* (N.D. Ga. 1989) 706 F.Supp. 1534, 1599; cited in *People v. Sandoval* (1992) 4 Cal.4th 155, 193.) In sum, prosecutorial misconduct "involving the invocation of purported religious law in support of the imposition of the penalty of death implicates both California law and the United States Constitution." (*People v. Wash*, *supra*, 6 Cal.4th at 276; see also *Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 776 [stating that prosecutorial invocation of a 'higher law or extra-judicial authority' in argument to jury violates the Eighth Amendment]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [holding that capital sentencing

statutes must 'channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death']; accord, *Chandler v. Florida* (1981) 449 U.S. 560, 574 ["Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law"].) "The Biblical concepts of vengeance invoked by the prosecution here do not recognize such a refined approach." (*Sandoval v. Calderon, supra*, 241 F.3d at 776.)

D. The Religious Theme In The Present Case Unconstitutionally Called For Imposition Of Death Upon Lucas

In the present case the religious theme that permeated the prosecution's argument was the "battle between good and evil."[1349] The prosecutor started and ended with the biblical mandate (from Proverbs 24:20) that: "The candle of the wicked shall be put out." (RTT 13266, 13278.) This obviously was meant to imply that the Bible calls for the execution of wicked or evil persons and "to assuage the jury's sense of personal responsibility." (*People v. Welch* (1999) 20 Cal.4th 701, 761.)[1350]

[1349] The juxtaposition of good and evil occurs throughout the Bible. (See e.g., 3 John 1:11 [Beloved, do not imitate what is evil, but what is good. The one who does good is of God; the one who does evil has not seen God]; Amos 5:14 [Seek good and not evil, that you may live; And thus may the LORD God of hosts be with you, Just as you have said!]; Proverbs 15:3 [The eyes of the LORD are in every place, Watching the evil and the good]; Proverbs 11:27 [He who diligently seeks good seeks favor, But he who seeks evil, evil will come to him].)

And, the "eternal battle" where good and evil have great conflict is the theme of Revelation 16:13-21.

[1350] The passage quoted by the prosecutor came from the King James (continued...)

After establishing that the Bible calls for execution of wicked or evil persons, it was an easy jump for the prosecutor to imply that the Bible required the execution of Lucas because he committed the "ultimate acts of evil" (RTT 13277) and is "a wicked person." (RTT 13266.)

This strategy improperly invoked religion and the Bible to encourage and to justify the imposition of a death sentence upon Lucas.[1351] This violated the federal constitution in three ways.

First, "the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict." (*Sandoval v. Calderon*, *supra*, 241 F.3d at 776.)

Second, "[a]rgument involving religious authority . . . undercuts the jury's own sense of responsibility for imposing the death sentence." (*Id.* at 777; see *Caldwell v. Mississippi* (1985) 472 U.S. 320.) "A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process." (*Sandoval v. Calderon*, *supra*, 241 F.3d at 777.)

[1350](...continued)
version of Proverbs 24:20 – "For there shall be no reward to the evil [man]; the candle of the wicked shall be put out." Similar language also appears in Job 21:17 ["How oft is the candle of the wicked put out!"]; Proverbs 13:9 [The light of the righteous rejoiceth: but the lamp of the wicked shall be put out.]; and Proverbs 21:4 [Haughty eyes and a proud heart, The lamp of the wicked, is sin].

[1351] Significantly, the prosecutor was not responding to a religious argument by the defense. (*People v. Hill* (1998) 17 Cal.4th 800, 837.)

Third, execution of a criminal defendant based on religious law or principles violates the Establishment Clause of the First Amendment of the federal constitution. (*Ibid.*)

E. Apart From Its Religious Approach, The Prosecutor's "Good Versus Evil" Argument Misconstrued The Nature Of The Penalty Determination

The penalty determination is not a simple contest between good and evil. It is a fundamental premise of Eighth Amendment jurisprudence and of California's death penalty statute that all special circumstance murder is "bad" or "evil." (See generally *Gregg v. Georgia* (1976) 428 U.S. 153.) Hence, the jurors do not properly exercise their discretion to decide which special circumstance murders warrant death if they impose death, in whole or part, based on the simple fact that the crime and/or the offender are "bad" or "evil." "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238 (conc. Opn. of White, J.); accord, *Godfrey v. Georgia, supra*; *Lewis v. Jeffers*, *supra*.) "It would be rare indeed to find mitigating evidence which could redeem [the] offender or excuse his conduct in the abstract." (*People v. Brown* (1985) 40 Cal.3d 512, 541, n.13.) Thus, it is a misstatement of the law to characterize the penalty determination in terms of good and evil:

> [T]he statute requires *at a minimum* that [the defendant] suffer the penalty of life imprisonment without parole. It permits the jury to decide only whether he should instead incur the law's single more severe penalty – extinction of life itself. [Citation.] It follows that the weighing of aggravating and mitigating circumstances must occur within the context of *those two punishments*; the balance is not between good and bad but

between life and death. [Emphasis in original.] (*Ibid.*; *People v. Williams* (1988) 45 Cal.3d 1268, 1325-26.)[1352]

In the present case, the dominant theme of the prosecutor's argument was contrary to the above principles. His argument urged that to win the battle of "good versus evil," the jurors must vote to execute Lucas. This theme misconstrued the jurors' function by suggesting that Lucas could not be given a life sentence unless they found that his crimes were not evil. Such argument was clearly improper and unconstitutional.[1353]

F. The Improper Argument Warrants Reversal Of The Death Judgment

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Here, because the prosecutor's errors during argument were substantial and the penalty

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[1352] In *Williams* the prosecutor had criticized those morally scrupled jurors who had been excused because they could not impose the death penalty, stating that they did not want to "impose themselves in the battle between good and evil." (*People v. Williams*, *supra*, 45 Cal.3d at 1325-26.) The Court made the following observation: "Although the prosecutor's comments amount to an unfair and unkind criticism of those prospective jurors who expressed an unalterable moral opposition to the death penalty and were accordingly excused, defendant fail[ed] to show that they constitute serious misconduct." (*Ibid.*) However, the Court did not reach the issue due to a lack of objection at trial.

Moreover, there is no indication that the "good versus evil" comments were part of a pervasive theme in *Williams*, as they were in the present case.

[1353] Nor did the defense invite the misconduct by arguing religious principles in favor of the defense. (See *People v. Hill*, *supra*, 17 Cal.4th at 837; compare *People v. Sandoval*, *supra*, 4 Cal.4th at 193-94.)

deliberations were closely balanced,[1354] the prosecution cannot meet its burden of demonstrating that the improper argument was harmless beyond a reasonable doubt.

Moreover, the defense requested a penalty instruction which could have limited the prejudice by admonishing the jurors that they must not view the penalty deliberations as a balance of good versus evil. (See § 7.6.5, pp. 1652-54 below, incorporated herein.)[1355] Without this instruction the jurors were free to rely upon the religious laws and "good versus evil" paradigm urged by the prosecutor. Nothing in the instructions was to the contrary, and the judge's "curative" instruction conspicuously failed to preclude the jurors from relying upon the religious law and the "good versus evil" paradigm advanced by the prosecutor.[1356] As argued by the defense:

> This is a crucial instruction, your Honor, and the reason why is without this instruction, the prosecutors are permitted to argue good versus evil . . . and [that is] not permitted under the United States Supreme Court decisions. (RTT 12465.)

Accordingly, the death judgment should be reversed.

[1354] See § 7.5.1(J)(3)(a), pp. 1619-22 below, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

[1355] This instruction would have addressed the concern that the "aggravating-versus-mitigating" comparison included in the instructions could reasonably have been viewed by the jurors as calling for a comparison of good versus bad or evil, and mandating a death sentence unless there was as much "good" about the defendant and his crimes as there was "bad."

[1356] See CT 14275 [anything said by the attorneys concerning the law may not be followed if it "conflicts" with the court's instructions].)

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.4 PROSECUTORIAL MISCONDUCT IN PENALTY ARGUMENT

ARGUMENT 7.4.2

THE PROSECUTOR'S ARGUMENT IMPROPERLY MINIMIZED THE JURORS' ROLE IN DETERMINING THE PUNISHMENT; URGED THAT THE JURORS WERE DUTY BOUND TO RETURN A DEATH SENTENCE AND ENCOURAGED THE JURORS TO DISREGARD OR DISCOUNT THE MITIGATING EVIDENCE

A. Introduction

The prosecutor argued: "If Mr. Lucas does not deserve the death penalty in this case, we should abolish it as a measure of punishment in the state of California." (RTT 13275.)[1357]

This remark violated the Eighth and Fourteenth Amendments by (1) minimizing the jurors' role in deciding the appropriate punishment; (2) implying that the jurors were duty-bound to reach a particular result; and (3) encouraging the jurors to disregard or discount the mitigating evidence.

B. Minimizing The Jurors' Role

In *Caldwell v. Mississippi* (1985) 472 U.S. 320, the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Caldwell v. Mississippi*, 472 U.S. at 328-29; see also

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[1357] Defense counsel objected to this remark at the close of the prosecution's argument in light of Judge Hammes' policy against interrupting counsel's arguments. (See § 7.4.1(B), pp. 1587-88 above, incorporated herein.)

Johnson v. Mississippi (1988) 486 U.S. 578, 587; *People v. Milner* (1988) 45 Cal.3d 227, 257.) When the prosecutor induces the sentencing jury to shift or deflect its sense of responsibility, there is reason "to fear substantial unreliability as well as bias in favor of death sentences." (*Id.* at 330.) In other words, *Caldwell* prohibits comments "'that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" (*Romano v. Oklahoma* (1994) 512 U.S. 1, 9, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 184 n.15.)

In the present case, the prosecutor's comment suggested to the jury that the authors of the California death penalty law had preordained that a case like this one should result in the death penalty. Hence, the jurors were unconstitutionally relieved of the ultimate responsibility for imposition of the death verdict in this case.

C. Implying A Duty To Reach A Particular Result

By suggesting that the death penalty law preordained a sentence of death for David Lucas, the prosecutor improperly argued that the jurors had a duty to reach a particular result. (See *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224-25; see also *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, 1545; *State v. Stewart* (N.J. Super. Ct. 1978) 162 N.J. Super. 96 [392 A.2d 234, 238-39].)

D. Encouraging Jurors To Disregard Or Discount Mitigating Evidence

The prosecutor's comment necessarily assumed that Lucas' mitigating evidence should be disregarded or discounted. This assumption was further reinforced by additional prosecutorial misconduct which trivialized the mitigating evidence. (See § 7.4.3, pp. 1597-1600 below, incorporated herein.)

The result was argument which encouraged the jurors to disregard or discount the mitigating evidence, in clear violation of the Eighth Amendment. (*Lockett v. Ohio* (1978) 438 U.S. 586.)

E. The Error Was Prejudicial

In *Caldwell,* the death penalty was reversed because the Supreme Court could not say that the prosecutor's improper argument "had no effect on the sentencing decision." (*Caldwell*, 472 U.S. at 341.) "[A] prosecutor's argument which diminishes the seriousness of the jury's penalty determination is extremely prejudicial." (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1324 [counsel's argument that execution would free defendant from his mental illness, like *Caldwell* error, effectively relieved the jury of any doubt about sentencing defendant to death].)

In the present case the error was similarly prejudicial. Because the error was substantial and the penalty deliberations were closely balanced,[1358] the prosecution cannot meet its burden of demonstrating that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein [any substantial error at penalty is prejudicial under the *Chapman* standard].)

[1358] See § 7.5.1(J)(3)(a), pp. 1619-22 below, 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: NON-PRIOR CONVICTION ISSUES

7.4 PROSECUTORIAL MISCONDUCT IN PENALTY ARGUMENT

ARGUMENT 7.4.3

THE PROSECUTOR IMPROPERLY ENCOURAGED THE JURY TO DISREGARD AND/OR DISCOUNT THE MITIGATING EVIDENCE BY EXPRESSLY MISLEADING THE JURY AS TO THE APPROPRIATE BASES FOR JUDGMENT, AND BY APPEALING TO PASSION (AND PURPORTED EXTRA-RECORD FACTS) IN ORDER TO TRIVIALIZE MITIGATING EVIDENCE

The prosecutor made an inflammatory remark to arouse the passions of the jury that "His [Lucas'] friends came in and said he was a good guy. . . . Ted Bundy was a good guy when he wasn't murdering people." (RTT 13272.)[1359] This argument was erroneous. (See *People v. Benson* (1990) 52 Cal.3d 754, 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"].)

This remark was misconduct because it was calculated to prejudice the jury against Lucas[1360] and because it utilized evidence outside of the record to trivialize Lucas' mitigating evidence.

At the penalty trial the defense presented evidence of the positive

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[1359] Defense counsel objected but the trial court found no error. (RTT 13279-13281.) As with the earlier objections, defense counsel objected at the close of the prosecutor's argument, so as not to interrupt. (See § 7.4.1(B), pp. 1587-88, n.1346 above, incorporated herein.) Moreover, the objection allowed sufficient time for a curative admonition or instruction, thus meeting the requirements of *People v. Green*, *supra*, 27 Cal.3d 1, 27. (RTT 1329-13281.)

[1360] Evidence which serves primarily to arouse the passions of the jurors must be excluded. (*People v. Love* (1960) 53 Cal.2d 843, 857, fn.3.)

aspects of David Lucas' background and character. Numerous witnesses testified regarding Lucas' acts of kindness and concern for others, especially children. These witnesses also expressed their love for Lucas and the loss they would feel if he were executed. However, the prosecution undermined this crucial mitigating evidence by implying that any person convicted of murder, including someone like Ted Bundy, would also have similar positive character attributes.

This argument was improperly founded on an evidentiary assumption which was not proven at trial: that even the most notorious murders would be able to present positive evidence akin to that produced by Lucas. Because this evidentiary assumption was beyond the scope of the evidence presented at trial, the prosecutor's argument was misconduct. (*People v. Benson*, *supra*, 52 Cal.3d at 794-95.)

Hence, the prosecutor's argument was clearly erroneous – and if credited, would have led the jury to believe it should disregard or discount the entire defense case (good character evidence, harsh and abusive upbringing, inherent human worth as reflected by the large number of people who care for him, etc.). This is a form of *Lockett* error, which violated the Eighth Amendment.

In *Lockett*, the Supreme Court held that the sentencer may "not be precluded from considering, as a mitigating factor, <u>any aspect of a defendant's character or record</u> . . . ." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605; emphasis in original.) Precluding such consideration "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and

Fourteenth Amendments." (*Ibid.*) Since *Lockett*, the Supreme Court has repeatedly reaffirmed that the constitutional mandate of individualized capital sentencing requires that the jury hear, listen and give full consideration to all mitigating evidence introduced during the penalty phase. (*Sumner v. Shuman* (1987) 483 U.S. 66, 73-74; see also *McKoy v. North Carolina* (1990) 494 U.S. 433; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Songer v. Wainwright* (1985) 469 U.S. 1133, 1139-41; *Skipper v. South Carolina*, *supra*, 476 U.S. at 8; cf., *People v. Easley*, *supra*, 34 Cal.3d at 876 [death penalty defendants are constitutionally entitled to have the sentencer take into account any "'sympathy factor' raised by the evidence before it"]; *Eddings v. Oklahoma* (1983) 455 U.S. 104, 115 (plur. opn.). The high court's opinion in *Mills v. Maryland* (1988) 486 U.S. 367, summarized the requirement:

> It is beyond dispute that in a capital case, "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" The corollary that 'the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence"' is equally 'well established.' (*Id.* at 374-75, citations omitted.)

Further, it is irrelevant whether the "barrier" to consideration of all mitigation evidence is the statutory language, an evidentiary ruling, an instructional error or ambiguity, misleading prosecutorial argument, or the sentencer's misunderstanding; any such barrier is constitutionally impermissible. (*Id.* at 375.)

This misconduct was prejudicial and the death 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 Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1361] the prosecution cannot meet its burden of demonstrating that the error was harmless.[1362]

Therefore, the judgment should be reversed.

[1361] See § 7.5.1(J)(3)(a), pp. 1619-22 below, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

[1362] The prejudicial impact of the error was exacerbated by other portions of the argument which reinforced the prosecutor's contention that Lucas' mitigating evidence should be discounted or disregarded:

> What is the just punishment? What is just for Mr. Lucas? You must base your decision upon what Mr. Lucas did, not who he is or what family he comes from or any sympathy for his family. The question is what did he do. (RTT 13273.)

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.4 PROSECUTORIAL MISCONDUCT IN PENALTY ARGUMENT

ARGUMENT 7.4.4

BOTH INDIVIDUALLY AND CUMULATIVELY THE PROSECUTOR'S MISCONDUCT WAS PREJUDICIAL

The prosecutorial misconduct set forth in the preceding arguments implicated both California law and the United States Constitution because it minimized the jurors' sense of responsibility, urged consideration of religious principles, improperly encouraged the jury to disregard relevant mitigating evidence, and argued inflammatory facts not in evidence to trivialize Lucas' mitigating evidence. (See *Caldwell v. Mississippi*, *supra*, *Johnson v. Mississippi*, *supra*; *Lockett v. Ohio*, *supra*, *People v. Freeman*, *supra*.)

Even if these misconduct claims are not held to be individually prejudicial, when considered cumulatively they warrant reversal of the death judgment. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial: the combined (aggregate) prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone]; *Delzell v. Day* (1950) 36 Cal.2d 349, 351; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180; *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520.)

7 PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.5 PENALTY PHASE: JUROR ISSUES

ARGUMENT 7.5.1

THE PENALTY JURY WAS NOT IMPARTIAL BECAUSE A JUROR WAS SUBSTANTIALLY LEANING IN FAVOR OF DEATH

A. Introduction

By her own admission during voir dire, Juror S.B.[1363] was predisposed to vote for death in a case where young children had been harmed. While the juror stated that she could consider mitigating evidence, she candidly admitted that she would find it hard to be "open-minded" and would have to be "convinced" that Lucas deserved a life sentence. Judge Hammes erroneously denied a defense challenge for cause to this juror.

The death judgment should be reversed despite the fact the defense had peremptory challenges remaining which it did not use to excuse Juror S.B. California's rule that peremptory challenges must be exhausted to appeal the improper seating of a biased juror unconstitutionally forces the defense to forfeit one legal right to exercise another right.

Further, society's interest in a reliable and impartial death sentencing process precludes a finding of waiver when a death verdict is founded upon the vote of a biased juror.

[1363] To respect the jurors' privacy, only their initials will be used throughout this brief.

B. Proceedings Below

1. Because This Case Involved Child Victims, Juror S.B. Was Substantially Leaning In Favor Of The Death Penalty

To Juror S.B., infliction of "bodily harm to a small child" was among the "worst" crimes imaginable. (RTH 33735.)[1364] Therefore, she candidly admitted that she "probably would find it hard to [deliberate] open-mindedly, if [Lucas] had been found guilty." (RTH 33749.) She would "need to be convinced in some way that he deserved a life sentence rather than death." (RTH 33749-50.) In other words, she would be "substantially leaning" in favor of death:

> Mr. Landon: So that even though these types of crimes fit your definition of a heinous crime . . . [y]ou feel that you could go into a penalty phase with basically an open mind in weighing the penalties that are available?
>
> Juror S.B.: I would probably have to be – it would have

[1364] Mr. Landon: You were asked how you feel about the death penalty, and you said in your questionnaire that you support it; is that right?

Juror S.B.: Yes.

Mr. Landon: And can you tell us what your feelings are about it from the standpoint of what you feel the purpose is?

Juror S.B.: The purpose of the death penalty?

Mr. Landon: Yes, uh-huh.

Juror S.B.: I have never thought of it in that respect, but it's the ultimate penance for someone committing a heinous crime.

Mr. Landon: Okay. And what is your definition of a heinous crime?

Juror S.B.: Well, I would have to say bodily harm to a small child would be the worse [sic].

Mr. Landon: Okay. So certainly the murder of a child would fit your definition of a heinous crime?

Juror S.B.: Right. (RTH 33734:19-33735:9.)

to be proven to me then, I am afraid.

Mr. Landon: Proven what?

Juror S.B.: That a life sentence was – should be voted.

Mr. Landon: So, in other words, at that point in time you would be substantially leaning in favor of a death sentence. Is that what you're saying?

Juror S.B.: Yes. But I would listen, I really would. That's all I can say. It's truthful. (RTH 33736:15-33737:2.)

2. Disposition Of The Juror

In light of her admitted bias the defense moved to dismiss Juror S.B. for cause as follows:

Mr. Landon: Defense would exercise a challenge for cause against Mrs. S.B.

Your Honor, the basis is a composite of her statements in the questionnaire, as well as her discussion with us here in court.

With respect to . . . her statement in the questionnaire, it was clear that she supports the death penalty. And then with respect to the question that dealt with whether she felt there were circumstances which she felt the death penalty should always be imposed, she referred to heinous crime.

And we then asked her for her definition of what heinous crime was, and she said . . . basically physical harm to children. (RTH 33754: 3-16.)

The judge questioned whether leaning in favor of the death penalty was a basis for qualification:

Well, I can't buy that. I can't buy that, because they would be leaning toward the death penalty at the end of the guilt phase, that, therefore, they are unqualified.

So what is it additionally that is going to tell me that this person is unqualified?

I don't have anything here with this lady. The same as with Mr. Greeson. They have indicated to you quite openly that, "Yes, I would be leaning. This is the kind of crime that is severe. It is the kind of crime that would tell me that I think the

death penalty maybe should be imposed, unless I see something on the other side that's going to sway me the other way."

Is that a disqualification? Is that really a disqualification, under our law, that they would say, "You know, I am leaning now because I have heard the most severe aggravating factor and I haven't heard the mitigating factors yet. So, depending on what I hear in mitigation, I might change my mind."

Is that disqualification under the law? (RTH 33757:6-24.)

Defense counsel responded that "this juror has self-disclosed that she does not characterize herself as being open-minded." (RTH 33758.) ". . . [T]hat was her spontaneous, self-disclosed position." (RTH 33759.) In response to the judge's allegation that the juror had been "led . . . down the garden path into a prejudgement" the defense stated:

Mr. Landon: Well, your honor, the only this I can say is that we start without having really suggested anything to them. The questionnaire was given to them to give us responses to particular things without even asking them questions orally. They had a questionnaire that asked certain questions and they responded to it.

The Court: Uh-huh.

Mr. Landon: . . . we haven't led them down anything. They gave us answers to certain questions.

Asking her to define what she meant by heinous is not really leading her. She defined it. She told us what she meant. So, again, she wasn't led. She then gave us factors that are in her mind.

And so when we get down to it, if we are really looking for judges who can be impartial across the board, then this is a woman who has indicated a particular position with respect to certain types of crimes. Those crimes just happen to be the crimes in this case.

The Court: Uh-huh.

Mr. Landon: If there was another homicide case in which, let's say, the victims were adults, then I don't think we would be talking about this because she has not categorized

adults as being victims of murder that she would be bothered with to the point that she would be with children.

So she created the category and she has indicated what her bias is going in; that's not something we have created. And so, as a result of that, she was the one who has, in effect, stated that, as a judge, she would go in with a prejudgement. (RTH 33759:24-33760-25.)

In the final analysis, the judge flatly rejected the defense contention that "substantial leaning in favor of death" is a basis for exclusion and denied the challenge:

> I can't find substantial impairment from that.
>
> Now, that is a basic disagreement between the defense and the court at this point on what the frame of mind of a juror has to be at the close of the guilt phase, and we just have to work with that and recognize that we just disagree – the court disagrees with that proposition. (RTH 33761:26-33762:3.)[1365]

On December 1, 1988, the defense filed a written motion for reconsideration of, inter alia, the rulings as to Juror S.B. (CT 4532-81; 4544-46.) The motion for reconsideration was denied. (RTH 35541.)

The defense used 15 of its 26 peremptory challenges[1366] during selection of the regular jurors. (RTH 36177-78.)

The defense used all six of its peremptory challenges[1367] during

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[1365] After the judge's ruling, at the request of the defense, the juror was asked what emotional qualities "might respond" to "change [her] mind" and allow her to consider anything but death in Lucas' case. The juror responded: "Oh, dear. Maybe I am not thinking – I can't think of the proper words, but compassion. I think I have compassion." (RTH 33764-65.)

[1366] Each side was given 26 peremptory challenges. (RTH 24426-28.)

[1367] The prosecution and defense were each given six peremptory (continued...)

selection of the alternates. (RTH 36570.)[1368]

C. California Law Requires Excusal Of Penalty Phase Jurors Who Are Substantially Leaning In Favor Of Either Side

It is well settled under California law that neither side should bear the burden of proof at the penalty phase of a capital trial. "[I]n the determination of penalty, unlike the determination of guilt, there is no burden of proof." (*People v. Hayes* (1990) 52 Cal.3d 577, 643; see also *People v. Lucas* (1995) 12 Cal.4th 415, 439.) "[N]either death nor life is presumptively appropriate or inappropriate under any set of circumstances . . . ." (*People v. Lucas*, *supra*.)

Accordingly, impanelment of a juror who is "substantially leaning" in either direction would be in violation of California law. Such a juror, therefore, should be excused for cause.[1369] (See *People v. Boyette* (2002) 29 Cal.4th 381, 417-18 [juror who would "have to be convinced" before returning a life sentence should have been excused].)

D. Fundamental Principles Of Due Process Require Death Penalty Jurors To Be Impartial

It is a fundamental notion of due process that a trier of fact be unbiased, impartial and open-minded. Even if it is not fixed, prejudgment undermines the fundamental fairness of the process both in appearance and actual practice.

[1367](...continued)
challenges for the alternates. (RTH 26345.)

[1368] There were six alternate jurors, two of whom were seated in the audience during the trial proceedings. (RTH 35208.)

[1369] The need to excuse such a juror is especially critical in light of California's failure to require any instruction on the burden of proof. (See § 7.6.6, pp. 1655-58 below, incorporated herein.)

(See generally *Morgan v. Illinois* (1992) 504 U.S. 719; *People v. Cash* (2002) 28 Cal.4th 703.) For example, the fairness of the trial is compromised by a juror's premature discussion, deliberation and/or formation of opinions about the case before the jury has heard all of the evidence, arguments of counsel and jury instructions. (See *In re Hitchings* (1993) 6 Cal.4th 97, 118, fn 6.) A juror's premature formation of an opinion skews the burden of proof in violation of the defendant's federal constitutional rights to trial by jury and due process. (U.S. Const. 6th and 14th Amendments; *Patton v. Yount* (1984) 467 U.S. 1025, 1035 ["fixed opinion" prior to trial renders juror disqualified]; *McDonough Power Equip. v. Greenwood* (1984) 464 U.S. 548, 552; *Winebrenner v. United States* (8th Cir. 1945) 147 F.2d 322, 328.)

The constitutional deprivation is especially acute when the juror expresses his or her opinion. (See *Delaney v. United States* (1st Cir. 1952) 199 F.2d 107, 113; *People v. Purvis* (1963) 60 Cal.2d 323, 340, fn. 14 ["The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. . . "]; *People v. Brown* (1976) 61 Cal.App.3d 476 [expression of an opinion as to the guilt of the defendant before hearing all the evidence was prejudicial misconduct].)

Moreover, it also violates due process to give the prosecution an unfair advantage over the defense. (See *Wardius v. Oregon* (1973) 412 U.S. 470.)

In sum, if a penalty trial juror substantially favors the prosecution at the outset, then the prosecution has been given an unfair advantage and the resulting death verdict violates the Due Process Clause of the federal constitution.

E. The Accused's Right To An Impartial Trial By Jury Requires Excusal Of Jurors Who Are Substantially Leaning In Favor Of Death

When a juror is substantially leaning in favor of one side or the other they are not impartial and unbiased, and should be excused. (See *People v. Boyette, supra*, 29 Cal.4th 417-18.) Such a juror does not have "that quality of indifference which, along with impartiality, is the hallmark of an unbiased juror." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 982.)

The denial by the trial court of a challenge for cause to a juror who demonstrates actual bias toward the defendant deprives the defendant of his state and federal constitutional rights to trial by an impartial jury. (*People* v. *Ranney* (1931) 213 Cal. 70.) [1370] "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution." (*People* v. *Elliot* (1960) 54 Cal.2d 498, 504, quoting from *Lombardi* v. *California S. R. Co.* (1899) 124 Cal. 311, 317.) "The theory of the law is that a juror who has formed an opinion cannot be impartial." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722 [quoting *Reynolds v. United States* (1879) 98 U.S. 145, 155]; see also *People v. Thompson* (1980)

[1370] In fact, the judge has a sua sponte duty to excuse such jurors. "The duty to examine prospective jurors and to select a fair and impartial jury is a duty imposed on the court." (*People* v. *Mattson* (1990) 50 Cal.3d 826, 845.) "The trial court's duty to select a fair and impartial jury impliedly includes the duty to excuse a juror for cause when voir dire indicates that the juror cannot be fair and impartial. The trial court's duty to excuse such jurors is not obviated by the absence of a challenge by a party." (*People* v. *Jimenez* (1992) 11 Cal.App.4th 1611, 1621; see also, *Frazier v. United States* (1948) 335 U.S. 497, 511 ["in each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality"].)

27 Cal.3d 303, 317 [evidence or knowledge of other crimes "breeds a tendency to condemn . . ."].)

The Sixth and Fourteenth Amendment requirements that a defendant be tried by a fair and impartial jury dictates that a capital jury be comprised of members who will *not* automatically vote for the death penalty, but will fairly and genuinely consider the mitigating evidence presented. (*Morgan* v. *Illinois*, *supra*, 504 U.S. 719; accord, *Ross* v. *Oklahoma* (1988) 487 U.S. 81, 85.) This same requirement similarly mandates that jury members hold no biases or prejudices against the defendant or in favor of a particular sentencing verdict. "A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. [Citations.]" (*People* v. *Nessler* (1997) 16 Cal.4th 561, 578; see also, *Glasser* v. *United States* (1942) 315 U.S. 60.)

F. The Eighth Amendment Requires Death Penalty Jurors To Be Impartial

The Eighth Amendment mandates that the death penalty be imposed by a process that is reliable and free from arbitrariness. (See *Sawyer v. Smith* (1990) 497 U.S. 227, 235; *Sochor v. Florida* (1992) 504 U.S. 527, 532-36; *Gregg v. Georgia* (1976) 428 U.S. 153, 204.) This constitutional mandate is violated when a penalty juror is not impartial prior to the sentencing hearing. (*Witherspoon v. Illinois* (1968) 391 U.S. 510; *Davis v. Georgia* (1976) 429 U.S. 122; *Wainwright v. Witt* (1985) 469 U.S. 412; *Morgan v. Illinois*, *supra*, 504 U.S. 719.)

G. The Defendant Cannot Waive The Right To A Reliable, Unbiased And Impartial Sentencing Determination In A Capital Trial

This Court has held that a defendant who does not use all peremptory challenges waives any error resulting from the judge's failure to excuse a

biased juror. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 487.) However, the cases which have so held did not consider the question of whether the Eighth Amendment of the federal constitution prohibits a finding of waiver in a capital case in which a biased juror has been allowed to vote in favor of imposing death. Hence, this Court's previous decisions are not dispositive of the argument advanced in the present case. (See *People v. Dillon* (1983) 34 Cal.3d 441, 473-74 [cases are not authority for matters not considered].)

Of course, it is generally true that the beneficiary of a legal right may waive that right. (See Civil Code § 3513; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) However, a capital trial is a proceeding to which special considerations apply in light of society's interest in assuring that the death penalty is imposed pursuant to a fair and reliable process. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

Hence, while waiver of an accused's legal rights may be permissible in noncapital cases, in the capital context waiver which undermines the reliability of the sentencing process may violate the Eighth Amendment.[1371]

[1371] For example, it is questionable whether the accused's personal presence may be waived in a capital case. (See *Hopt v. Utah* (1884) 110 U.S. 574; *Lewis v. United States* (1892) 146 U.S. 370; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271; but see *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 671-73; *State v. Morton* (N.J. 1998) 155 N.J. 383 [715 A.2d 228, 254].)

Similarly, waiver of mitigating evidence at the penalty trial is disfavored. Even if the defendant instructs counsel to offer no evidence in mitigation and asks the court for a death sentence, petitioner's "wishes alone

(continued...)

In the case of a juror who is biased in favor of death, the Eighth Amendment should not permit waiver by the accused. Imposition of a death sentence by such a juror undermines the apparent and actual reliability of that sentence. (See *Morgan v. Illinois*, *supra*, 504 U.S. 719; see also *Ross v. Oklahoma*, *supra*, 487 U.S. 81; cf., *People v. Boyette*, *supra*, 29 Cal.4th 381.) Further, even if a capital defendant could waive his right to an impartial jury, such a waiver would have to be knowing and personal, and could not be accomplished by counsel's action or inaction. "[I]f counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the client,' *[Taylor v. Illinois* (1988) 484 U.S. 400, 417 n. 24], then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury." (*Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463.)

In sum, the failure of the defense to exhaust its peremptories should not waive the judge's error in failing to excuse Juror S.B.. Accordingly, the penalty judgment should be reversed.

[1371](...continued)
cannot support or justify his death penalty; his sentence must be in accordance with constitutionally sufficient standards of state law." (*Langford v. Day* (9th Cir. 1997) 110 F.3d 1380, 1391; see also *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 838-41 [defendant's instruction not to call particular witnesses at penalty phase did not excuse counsel's failure to investigate and present potentially compelling evidence]; *Johnson v. Singletary* (11th Cir. 1998) 162 F.3d 630, 641 ["It is well-established in our circuit that counsel has a continuing responsibility to represent and advise a noncooperative client, particularly when counsel knows or has reason to know that his client is mentally unstable."].)

H. Requiring The Defense To Exercise All Peremptories, To Preserve The Error For Review, Unconstitutionally Forced The Defense To Make A Choice Of Rights

Current California law imposes a Hobson's choice upon the defense: Either forego the right to decide whether or not to exercise a peremptory challenge or forego the right to appeal the erroneous failure to excuse a biased juror for cause. (See *People v. Hillhouse*, *supra*, 27 Cal.4th at 487; see also *People v. Weaver* (2001) 26 Cal.4th 876, 911.) Each of these competing rights is substantial and well recognized. To predicate one on the forbearance of the other amounts to judicially sanctioned extortion leaving the defense no choice but to "voluntarily" waive a substantial right. This dilemma is illustrated by the following advice offered in the California Attorneys For Criminal Justice/California Public Defenders Association Death Penalty Defense Manual (2001 Supplement), *Jury Issues*, § VII, p. 15-16:

> "Although this rule [requiring exhaustion of peremptories] may tempt counsel to use up all available peremptory challenges in order to preserve what is perceived to be a 'winning' appellate issue, counsel must weigh heavily in the balance what effect this strategy may have in shaping the final jury composition."

The right to decide when to utilize a peremptory challenge and when to accept the panel as constituted is a fundamental legal right of a litigant. (See Code of Civ. Proc. § 231(d)-(e); see also *California Criminal Law Procedure and Practice* § 28.1 (3rd ed. 1996, Continuing Education of the Bar.)

Similarly, the right to appeal a judge's erroneous failure to excuse a biased juror for cause is also well established. The right to an impartial trial by jury is guaranteed by state law (Calif. Const. Art. I, sections 1, 7, 15, 16

and 17) and the federal constitution (6th and 14th Amendments; *Morgan v. Illinois*, *supra*.) The right to appeal is guaranteed by state law (see California Constitution, Article VI, § 11) and the Due Process Clause (14th Amendment) of the federal constitution. (See *Cole v. Arkansas* (1948) 333 U.S. 196, 201.)

Accordingly, the Hobson's choice presented by California law violates the federal constitution by requiring the defense to forego one constitutionally protected right in order to vindicate another. (See *Simmons v. United States* (1968) 390 U.S. 377, 394 ["we find it intolerable that one constitutional right should have to be surrendered in order to assert another"]; see also *In re Ali* (1966) 230 Cal.App.2d 585, 591 [petitioner "placed in the unenviable position of having to waive either or both of two constitutional rights: his right to counsel or his right to trial by jury as guaranteed by the California Constitution]; *United States v. Davis* (9th Cir. 1973) 482 F.2d 893, 913.)[1372]

I. Arbitrary Denial Of A State Created Right Violates The Due Process Clause Of The Federal Constitution

As discussed above, in a capital trial California law is supposed to be neutral, with "no preference" for one penalty or the other. (See § 7.5.1(C)-(F), pp. 1607-10 above, incorporated herein.) Therefore, when the judge refused to excuse a juror who was admittedly and substantially favoring death, she arbitrarily violated Lucas' state created rights in violation of the federal constitution. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also

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[1372] The element of coerced choice described by *Simmons* is also present where the defendant is required to choose between a statutory right and a constitutional right. (See *Hunt v. Mitchell* (6th Cir. 2001) 261 F.3d 575, 582 [improper to require defendant to choose between waiver of statutory right to speedy trial and constitutional rights implicated by lack of adequate time to prepare for trial].)

People v. Sutton (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

J. The Judgment Should Be Reversed

1. The Error Was Structural

In determining whether an error is subject to harmless-error analysis, the reviewing court must determine whether the error is a "classic trial" error or a "structural error." Classic trial errors, such as the improper admission of evidence, are errors "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*United States* v. *Annigoni* (9th Cir. 1996) 96 F.3d 1132, 1143 quoting *Arizona* v. *Fulminante* (1991) 499 U.S. 279, 308-309.) Structural errors, in contrast, are "defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards, and affect the framework in which the trial proceeds, rather than simply in the trial process itself." (*United States* v. *Annigoni*, *supra*, 96 F.3d at 1141 [Internal quotation marks and citations omitted].)

> "When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. . . . [W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained. [Citations.]"

(*Vasquez* v. *Hillery* (1986) 474 U.S. 254, 263.)

> The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. See, *United States* v. *Allsup,* 566 F.2d 68, 71 (9th Cir. 1977). Like

> a judge who is biased, see *Tumey v. Ohio*, 273 U.S. 510, 535 . . ., the presence of a biased juror introduces a structural defect not subject to harmless-error analysis.

(*Dyer* v. *Calderon* (9th Cir. 1998) 151 F.3d 970, 973, n.2.)

"A biased adjudicator is one of the few structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." (*In re Carpenter* (1995) 9 Cal.4th 634, 654 [quotation and citations omitted].) Imposition of a penalty by a jury that is not impartial defies harmless-error analysis. (See *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630, 634; *United States v. Iribe-Perez* (10th Cir. 1997) 129 F.3d 1167, 1169 [trial by jurors who were biased by the fact that they erroneously heard that the defendant pled guilty to the crimes charged "implicates constitutional rights of such magnitude that the error is not susceptible to harmless error review"].)

Since a biased juror who should have been excluded by the trial court sat in judgment of Lucas, the verdict of death should be reversed.

2. Alternatively, The State Bears The Burden To Demonstrate Harmless Error Beyond A Reasonable Doubt

Assuming arguendo the error was not reversible per se, the judgment should still be reversed under the federal harmless-error standard.

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.)

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* (1985) 472 U.S. 320, 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 any 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 such an error affected even a single juror's highly normative penalty determination. (Ibid.)

Moreover, harmless-error review must include the requirement of heightened reliability in capital proceedings. (*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), which means that 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 harmless beyond a "reasonable doubt" test [*Chapman v. California* (1967) 386 U.S. 18, 24] applied to federal constitutional error. (*Id.* at 990.)

3. The State Cannot Meet Its Burden Of Demonstrating That The Error Was Harmless

a. The Penalty Deliberations Were Closely Balanced

The penalty phase was 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. On 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 § 7.7.1, pp. 1669-77 below, incorporated herein.) This obviously demonstrates a closely balanced case. (See 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]; *People v. Gainer* (1977) 19 Cal.3d 835, 856, fn. 20.)

Third, the jurors asked for re-instruction on crucial penalty phase issues. This further reflects that the decision was close. (See *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [request for additional instructions]; *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].)

Fourth, the jurors asked to review substantial portions of the penalty

phase evidence – a further indicia of close balance. (*People v. Markus*, *supra*; *People v. Filson*, *supra*; *People v. Mathews*, *supra*; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 973 [jury request for review of exhibits, readback of testimony or clarification of instructions]; see also *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,[1373] the length of the deliberations was 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 (3 ½ days) and divided deliberations].)

b. The Instructions Did Not Preclude The Jurors From Putting The Burden On Lucas During The Penalty Deliberations

The jury instructions did not in any way suggest to Juror S.B. that she must be open-minded going into the penalty deliberations, or that she must not

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[1373] See Volume 6, § 6.4.6(M), pp. 1525-30, incorporated herein.

require Lucas to prove he should be given a life sentence instead of death. The defense requested an instruction that might have helped in this matter but it was rejected. (See § 7.6.6, pp. 1655-58 below, incorporated herein.)

c. The Error Was Substantial

As discussed above, when a death verdict has been returned by a biased juror a substantial error has been committed. Hence, because the deliberations were closely balanced, and because the instructions could not and did not mitigate the error, the death judgment should be reversed.

7 PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.5 PENALTY PHASE: JUROR ISSUES

ARGUMENT 7.5.2

THE JURORS WERE IMPROPERLY ALLOWED TO MAKE UP THEIR MINDS AS TO PENALTY BEFORE HEARING THE EVIDENCE, ARGUMENTS AND INSTRUCTIONS

A. The Judge's Admonition Permitted Premature Consideration By Implication

During the guilt trial the jury was admonished not to form or express any opinion "on the case until the matter is finally submitted to you." (e.g., RT 11290.) However, after the guilt verdicts were returned on June 21, 1989 the jurors were not warned against forming opinions as to penalty before commencement of the penalty deliberations. Immediately after receiving the guilt verdicts the judge gave the following explanation and admonition:

> . . . as you know, this does not end your service. We want to thank you for your hard work up to now. This has been a long and complex case, and you have taken a long, hard, conscientious look at the evidence as evidenced by the time that you have taken in your deliberations. You are not done as to your service, as you know. We have to schedule the second phase of trial, and we have now to decide what time is involved.
>
> . . . I want to thank you again, and I want to admonish you strongly, including our alternates. The alternates are still of great service to us. All of you are still full participants in this trial, and you must remember the admonition that you are not to discuss anything concerning the case whatsoever with anybody, not even the persons with whom you live at home. You are not to conduct any investigations of any kind concerning the case. You are not to subject yourselves to any news reports of any kind on the radio, television, or in the newspapers, and then we will need your services again on July the 10th. (RT 12320-21.)

By implication this admonition allowed the jurors to think about the penalty question and to form opinions about it. This was a reasonable interpretation of the admonition, since the prohibition against forming opinions was included in the guilt phase admonition but not in the penalty phase admonition.[1374] Hence, the jurors had a 19 day period between the guilt and penalty trials during which to form opinions about Lucas' penalty.

It was not until the commencement of the penalty trial on July 10, 1989, that the judge admonished the jurors not to form or express opinions about penalty. (RTT 2593-94.)

B. Allowing Premature Consideration Of Penalty Violated The State And Federal Constitutions

The denial of a fair and impartial jury at the penalty phase of a capital trial violates the defendant's federal constitutional rights (6th, 8th and 14th Amendments) to due process, fair trial by jury and verdict reliability. (See § 7.5.1(D), pp. 1607-09 above, incorporated herein.)

A juror's premature formulation of an opinion may skew the trial in favor of death over life. (See e.g., § 7.5.1(D), pp. 1607-10 above, incorporated herein.) Such skewing violates the defendant's constitutional rights to trial by jury and due process. (Calif. Const., Art I § 15 & 16; U.S. Const. 6th and 14th Amendments.) (See *Winebrenner v. United States* (8th Cir. 1945) 147 F.2d 322, 328; *Herring v. New York* (1975) 422 U.S. 853, 858.) This problem is all the more acute when the juror expresses his or her opinion. (See *People v. Purvis* (1963) 60 Cal.2d 323, 340, fn. 14 ["The

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[1374] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See Volume 2, § 2.3.4.1(A), p. 231-32, n. 243, incorporated herein.

influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man . . ."]; see also *Delaney v. United States* (1st Cir. 1952) 199 F.2d 107, 113; *People v. Brown* (1976) 61 Cal.App.3d 476 [expression of an opinion as to the guilt of the defendant before hearing all the evidence was prejudicial misconduct].)

C. The Error Was Structural

Because the error fundamentally undermined the reliability of the penalty trial it should be reversible per se as structural error. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

D. Alternatively, The Prosecution Cannot Meet Its Burden Of Demonstrating Beyond A Reasonable Doubt That The Error Was Harmless

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1375] the prosecution cannot meet its burden of demonstrating that the error was harmless.

The premature consideration of penalty was especially prejudicial to Lucas because the jurors did not hear the mitigating evidence until the latter portion of the penalty trial. The circumstances of the offenses, upon which the

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[1375] See § 7.5.1(J)(3)(a), pp. 1619-22 above, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

prosecution relied heavily in arguing for aggravation at the penalty trial, were fully known to the jurors before the penalty trial commenced. However, it was not until the defense began presenting its penalty evidence that the jurors heard the mitigating evidence, including evidence of Lucas' redeeming qualities and his difficult and abusive childhood. (See e.g.,Volume 6, § 6.2(B)(1), (2) and (3), pp. 1389-1408, incorporated herein.) Thus, the jurors' premature consideration of penalty was extremely prejudicial to Lucas because he did not have impartial and open-minded jurors at his penalty trial.

Moreover, the jury instructions did not preclude the jury from putting the burden on Lucas during the penalty deliberations. (See § 7.6.6, pp. 1655-58 below, incorporated herein.)

Therefore, the judgment should be reversed.

7 PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.5 PENALTY PHASE: JUROR ISSUES

ARGUMENT 7.5.3

FAILURE TO RE-VOIR DIRE THE JURORS PRIOR TO THE PENALTY TRIAL AND TO GIVE AN ADEQUATE CAUTIONARY INSTRUCTION WAS PREJUDICIAL ERROR

A. Proceedings Below

Because the jurors acquitted on Garcia and hung 11 to 1 in favor of guilt on Strang/Fisher, the defense asked for impanelment of a new jury or for re-voir dire of the jurors before the penalty trial. (RTT 12381.) These requests were denied. (RTT 12381; 12388.)[1376]

[1376] The judge instructed the jurors to disregard the Garcia and Strang/Fisher evidence as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during the guilt phase of this trial, insofar as such evidence is relevant to factors in aggravation or mitigation, EXCEPT, you may not consider any evidence produced at the guilt phase with respect to the victims Gayle Garcia, Rhonda Strang and Amber Fisher. (CT 14373.)
>
> 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

(continued...)

The judge's ruling was error due to the unique fact that the jury would be asked at penalty to disregard extensive inflammatory evidence which it had already heard and upon which 11 jurors had concluded that Lucas committed the Strang/Fisher murders.

B. Re-Voir Dire Is Permissible Under Evidence Code § 1089

Under California law a new penalty jury should be empaneled if there is "good cause" akin to that which justified discharge under Penal Code § 1089 and § 1023. (See generally *People v. Gates* (1987) 43 Cal.3d 1168, 1199.) Obviously, if the jurors cannot properly perform their functions they should not be allowed to hand down a death verdict.

Moreover, the heightened reliability requirements for capital trials under the Eighth Amendment should require even closer scrutiny of penalty jurors. (See *Kyles v. Whitley* (1995) 514 U.S. 419; see also Volume 2, § 2.9.13(H), pp. 629-30, incorporated herein.)

[1376](...continued)
phase. (CT 14401, Answer to Juror Question # 2.)

> Ladies and Gentlemen:
>
> A Matter of Clarification. In case there is any question, the jury should understand that it has access to the following during deliberations at the Penalty Phase:
>
> Jury Instructions, Jurors' Notes, Exhibits, and Verdict Forms from the Penalty Phase.
>
> Jury Instruction, 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.) (CT 14403, ¶ 1-3.)

C. Re-Voir Dire Was Necessary In The Present Case

This Court has rejected new jury and/or re-voir dire requests based solely on speculation. (See e.g., *People v. Ainsworth* (1988) 45 Cal.3d 984, 1029.) And, this Court has specifically concluded that acquittal of a charge at the guilt trial is not "good cause" to empanel a new jury. (*People v. Bonillas* (1989) 48 Cal.3d 757, 786.)

However, in the present case the circumstances reasonably raised a concern as to the jurors' ability to fairly perform their duties at sentencing. Here, all five incidents and seven victims were inextricably tied together by the prosecution evidence at the guilt trial. In fact, for this reason, the judge had no choice but to leave all the exhibits together, with the jury during, penalty phase deliberations – including exhibits concerning the excluded Garcia and Strang/Fisher incidents. (See § 7.7.7, pp. 1717-22 below, incorporated herein.) Hence, it would have been especially difficult for the jurors to disregard those two incidents and three victims at sentencing.

Although the jurors acquitted on the Garcia charges, they were 11 to 1 in favor of conviction on Strang/Fisher. Thus, 11 jurors were required to totally disregard the brutal murder of a woman and young girl which they themselves had concluded were committed by Lucas beyond a reasonable doubt. The possibility, if not probability, that one or more of these 11 jurors could not avoid considering the excluded offenses provided good cause for inquiry into the issue. (See e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 985; *People v. Davis* (1995) 10 Cal.4th 463, 547 [duty to inquire].)

D. The Error Violated Lucas' Federal Constitutional Rights

Judge Hammes' denial of the defense request to re-voir dire the jurors violated California law as well as the Sixth and Eighth Amendments of the

federal constitution. 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 rights to a fair, impartial, reliable and individualized trial by jury and 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 Cal.3d 1046, 1082-87.)

Lucas' fate was decided by a jury that included 11 jurors who had voted to find him guilty of the Strang/Fisher murders. It was highly questionable whether these jurors could set aside their strong feelings of frustration over the verdict and their own abiding belief that Lucas "got away" with an additional murder of a woman and three year-old child.

Hence, jurors convinced that Lucas had improperly escaped punishment for the Strang/Fisher murders were likely deeply prejudiced against Lucas. Their presence on the jury in the penalty phase, without additional voir dire, skewed the result and denied Lucas his state and federal constitutional rights to an impartial jury and a reliable penalty determination. (See *Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [Sixth Amendment right to a jury trial]; *Irvin v. Dowd* (1961) 366 U.S. 717, 72 [due process right under Fifth and Fourteenth Amendments to trial by an impartial jury]; *People v. Ashmus* (1991) 54 Cal.3d 932, 956-57, *cert. denied* (1992) 506 U.S. 841 [right under Art. I, § 16 of California Constitution to trial by an impartial jury]; *People v. Crittenden* (1994) 9 Cal.4th 83, 121, *cert. denied* 1995) 516 U.S. 849 [due process right to impartial jury under California Constitution Art. I, sections 7 and 15; right to a reliable penalty determination under the Eighth and Fourteenth Amendments to the U.S. Constitution and Art. I,

sections 7, 15, and 17 of the California Constitution].)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

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

E. The Error Was Prejudicial

At the penalty trial, 11 jurors already had formed the judgment that Lucas committed the Strang/Fisher murders. Courts have recognized that jurors do not easily forget their earlier judgments of guilt. "A juror who has made up his mind that a defendant has committed an offense cannot be depended upon to be sufficiently open-minded in another case involving similar charges when the trials are held near in time." (*Government of the Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554 [right to impartial jury violated where some of the jurors in murder trial also sat on a jury that

convicted the same defendant of possession of an unlicenced weapon].) "The theory of the law is that a juror who has formed an opinion cannot be impartial." (*Reynolds v. United States* (1879) 98 U.S. 145, 155; see also *Irvin v. Dowd* (1961) 366 U.S. 717, 722.)

This Court has also recognized that jurors' opinions from the guilt phase may influence their decision in the penalty phase. Use of a single jury for the guilt and penalty phases is permissible in part because it will "guarantee that the penalty phase jury is aware of lingering doubts that may have survived the guilt phase deliberations." (*People v. Nicolaus* (1991) 54 Cal.3d 551, 557, *cert. denied* (1992) 505 U.S. 1224; see also *Lockhart v. McCree* (1986) 476 U.S. 162, 181.) In other words, even if jurors found the defendant guilty beyond a reasonable doubt, doubts may still affect their penalty vote. In this case, however, the converse is true. The 11 jurors who could not convince the lone holdout that Lucas was guilty of the Strang/Fisher murders would be doubly likely to press for death at the penalty phase.

As this Court has noted, evidence or knowledge of the defendant's other crimes "breeds a tendency to condemn, not because [the defendant] is believed to be guilty of the present charge, but because he has escaped unpunished from other offenses." (*People v. Thompson* (1980) 27 Cal.3d 303, 317 [quotations omitted].) Here, the potential bias was even greater. In the eyes of 11 jurors, the defendant escaped unpunished from two other capital murders.[1377]

F. The Instructions Did Not Cure The Prejudice

The judge's instructions did not adequately assure that the 11 jurors

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[1377] The court never informed the jurors that Lucas could be retried on the Strang/Fisher counts.

who voted for guilt in Strang/Fisher would set aside their conclusions that Lucas had committed the Strang/Fisher murders.[1378]

First, the jurors received conflicting instructions as to whether they could consider Strang/Fisher. It is true that the judge gave one instruction stating that the evidence could not be considered. However, the instruction on factor (b) suggested that Strang/Fisher could be considered as follows:

> You shall consider, take into account, and be guided by the following factors, if applicable:
>
> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant was convicted or acquitted in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (CT 14373.)

In the view of 11 jurors, Strang/Fisher was "criminal activity by the defendant, other than the crimes for which [he] was convicted or acquitted in the present proceedings . . . ." Hence, under the express terms of this instruction, Strang/Fisher could be considered. Therefore, because it cannot be determined which conflicting instruction the jury followed (*Francis v. Franklin* (1985) 471 U.S. 307, 322) the instructions did not cure the error.

Second, the jurors were only instructed to ignore evidence, instructions and exhibits.[1379] As this Court has observed, however, "[i]t is not simply a finding of facts which resolves the penalty decision, but . . . the jury's moral assessment of those facts as they reflect on whether defendant should be put to death." (*People v. Brown* (1985) 40 Cal.3d 512, 540; see also *People v.*

[1378] The jurors were instructed not to consider the Garcia and Strang/Fisher evidence, "instructions," "notes" and "exhibits." (CT 14373; 14401; 14403.)

[1379] See § 7.5.3(A), pp. 1626-35 above, incorporated herein.

Rodriguez (1986) 42 Cal.3d 730, 779 ["the sentencing function is inherently moral and normative, not factual"].) Here, the jurors may have been told to ignore "evidence" and "instructions" but they were never admonished to disregard their impressions of Lucas' overall guilt or moral culpability – or to avoid their desire for retribution.[1380] On the contrary, the trial court told the jury it was "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (RTT 13334-35; CT 14398.) The narrow admonition to ignore "evidence" and "instructions" was clearly inadequate, particularly in contrast to the jurors' ability to take into account moral values and the defendant's character, background and history. (See Penal Code § 190.3)

Third, it is questionable whether any admonition which could overcome the bias at work here. "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*United States v. Bruton* (1968) 391 U.S. 123, 135.) Some jurors may have tried intellectually to set aside their judgment, reached after serious reflection and despite extended debate, that the defendant had committed the Strang/Fisher crimes beyond a reasonable doubt and to a moral certainty. However, when the emotional impact of that judgment and the temptation to make Lucas pay for the Strang/Fisher crimes during the penalty phase were so enormous, it is simply unrealistic to presume that jurors followed the trial court's limited

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[1380] The term "charges" would have been preferable to "evidence." Charges is broader and encompasses all aspects of each criminal episode in its entirety. The instructions the court actually gave, however, were limited to "evidence."

instructions.

Although the trial court sensed the potential for prejudice and told the jurors not to consider evidence relating to the Strang/Fisher counts, in the end, Lucas was sentenced to death by 11 jurors who believed, beyond a reasonable doubt, that he had gone unpunished for two other capital murders. Hence, Lucas was deprived of an impartial jury and a reliable penalty determination.

G. The Penalty Judgement Should Be Reversed

"A biased adjudicator is one of the few structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." (*In re Carpenter* (1995) 9 Cal.4th 634, 654 [quotation and citations omitted], *cert. denied* (1995) 516 U.S. 981.) Imposition of a penalty by a jury that is not impartial defies harmless-error analysis. (See *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630, 634; *United States v. Iribe-Perez* (10th Cir. 1997) 129 F.3d 1167, 1169 [trial by jurors who were biased by the fact that they erroneously heard that the defendant pled guilty to the crimes charged "implicates constitutional rights of such magnitude that the error is not susceptible to harmless review error"].) Where it appears substantially likely that a juror is actually biased, the verdict must be set aside because the error is a "structural defect," *In re Carpenter*, *supra*, 9 Cal.4th at 654-55, one which affects the "framework within which the trial proceeds," rendering the trial "fundamentally unfair." (*Neder v. United States* (1999) 527 U.S. 1, 8 [citations omitted].)

Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also

Sullivan v. Louisiana (1993) 508 U.S. 275 .)

Moreover, such an error in the penalty phase context "must be deemed to have been prejudicial." (*People v. Robertson* (1982) 33 Cal.3d 21, 54, quoting *People v. Hamilton* (1963) 60 Cal.3d 105, 135-37.) This prejudice requires reversal. (*Id.* at 54-55; see also *People v. Holloway* (1990) 50 Cal.3d 1098, 1112 [a conviction cannot stand where even one juror is not impartial].) Here, as in *Robertson*, "we cannot gamble a life on the possibility that the evidence concerning [the Strang/Fisher murders] did not sway a single juror toward the death penalty." (33 Cal.3d at 55.)

Finally, for all the reasons stated, the errors were not harmless beyond a reasonable doubt, as required by *Chapman v. California* (1967) 386 U.S. 18, 24.[1381]

[1381] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.1

THE LINGERING DOUBT INSTRUCTION UNDERMINED A CRUCIAL PENALTY PHASE DEFENSE THEORY

A. Introduction

A primary defense theory at the penalty trial was lingering doubt that Lucas committed the offenses for which he was convicted. In fact, most of the defense argument to the jury at the penalty trial focused on the elements of doubt as to each of the convictions. (RTT 13283-13313.) However, the lingering doubt instruction undermined the defense theory because it failed to: (1) require consideration of lingering doubt; (2) apply lingering doubt to each individual charge; (3) instruct that lingering doubt was a mitigating factor; and (4) define lingering doubt.

B. Procedural Background

The jurors were instructed on lingering doubt as follows:

> Despite your determination in the first phase of this trial that the evidence proved Mr. Lucas' guilt of multiple counts beyond a reasonable doubt, you may consider any lingering doubts you may have about the defendant's guilt in your determination of the appropriate penalty. (CT 14380.)[1382]

[1382] The version requested by the defense was as follows:

> In your deliberations at this stage of the trial, you are permitted to consider the effect of lingering doubt in this case as a mitigating factor. (CT 14411.)

C. California Law Recognizes Lingering Doubt As A Mitigating Factor

Lingering doubt about the defendant's guilt is a powerful mitigating factor under California law. (*People v. Cox* (1991) 53 Cal.3d 618, 675-79; *People v. Thompson* (1988) 45 Cal.3d 86, 134; see also *Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 722; Stephen P. Garvey, *Essay: Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538, 1563 (1998).)[1383] The lingering doubt instruction is especially important when there is affirmative evidence that someone else committed any of the charged crimes. (See generally *People v. Medina* (1995) 11 Cal.4th 694, 774.)[1384]

D. Because The Instruction Was Permissive, The Jurors Were Not Required To Consider Lingering Doubt

The instruction informed the jurors, over defense objection,[1385] that they "may consider . . . " their lingering doubts about Lucas' guilt. (CT 14380 [emphasis added].) Hence, the jurors were free to not consider lingering

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[1383] The federal constitution does not require jury consideration of lingering doubt. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-74 fn. 6; *People v. Hawkins* (1995) 10 Cal.4th 920, 966-67.)

[1384] A capital defendant may argue lingering doubt without forfeiting the right to have the jury instructed on all other applicable sentencing factors. (*People v. Marshall* (1996) 13 Cal.4th 799, 858 fn. 13.)

[1385] Even though the defense proposed instruction was drafted as permissive (CT 14411), during the instruction conference the defense asked that the jury be instructed that "they must consider lingering doubt, if they have it, as a mitigating factor. . . ." (RTT 12360.)

Moreover, the permissive language in the proposed instruction did not waive the error. (See Penal Code § 1259; see also Volume 2, § 2.8.3(D), pp. 517-18, n. 418, incorporated herein.)

doubt at all. This was error under California law and the federal constitution, which require that the relevant mitigating evidence "shall be" taken into account. (See e.g., Penal Code § 190.3; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [barriers to consideration of relevant mitigating evidence create a risk that is "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374-75 [it is well established that "the sentencer may not . . . be precluded from considering 'any relevant mitigating evidence'"].) This is not to say that the jurors were obligated to credit the lingering doubt evidence, that obviously was a matter for the jurors. However, it should not be within the province of the jury to completely ignore lingering doubt without having first evaluated it as a potential mitigating factor.

E. Failure Of The Instruction To Require Consideration Of Each Offense Individually

The instruction given in the present case was misleading because it implied that lingering doubt should be applied to the convictions as a whole, rather than to each individual conviction.[1386] Thus, if a juror had a lingering doubt about Jacobs but not Swanke under the instruction given, the juror could reasonably have concluded that the lingering doubt was not to be considered.

Nor did the arguments of counsel convey a different interpretation. Although counsel discussed each conviction individually, they never specifically argued that lingering doubt as to one offense could be considered

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[1386] Neither the absence of such language in the instruction requested by the defense nor the lack of a defense objection waived the error. (See Penal Code § 1259; see also Volume 2, § 2.8.3(D), pp. 517-18, n. 418, incorporated herein.)

even if there was no lingering doubt as to the others. (RTT 13286; 13302-04; 13311.)

Accordingly, the instruction given in the present case should have been revised to require consideration of lingering doubt as to each individual conviction. For example, the following instruction was given in *People v. Cain* (1996) 10 Cal.4th 1, 64-66:

> If you have any lingering doubt concerning the guilt of the defendant as to [any of] the charge(s) of which he/she was found guilty, or if you have any lingering doubt concerning the truthfulness of [any of] the special circumstances allegation(s) found to be true, you may[1387] consider that lingering doubt as a mitigating factor or circumstance.
>
> Lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of the jurors a reasonable doubt.

F. The Instruction Failed To State That Lingering Doubt Was A Mitigating Factor

An essential element of any lingering doubt instruction is an explanation that lingering doubt is a mitigating factor. (See e.g., *People v. Arias* (1996) 13 Cal.4th 92, 182-83 [". . . for the jury to consider in mitigation any lingering doubt . . ." (Emphasis added.)]; *People v. Cain*, *supra*, 10 Cal.4th 1, 64-66 [". . . you may consider . . . lingering doubt as a mitigating factor or circumstance" (Emphasis added.]; *People .v Kaurish* (1990) 52 Cal.3d 648, 705 fn. 8 [jurors "could consider lingering doubt of defendant's guilt to be a factor in mitigation"].) The instruction in the present case

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[1387] But see § 7.6.1(D), pp. 1637-38 above, incorporated herein [jurors "must" consider lingering doubt].

erroneously failed to convey the mitigating nature of lingering doubt.[1388]

G. The Instruction Failed To Define Lingering Doubt

Typically, lingering doubt instructions define the term so it is clear to the jurors. (See instructions given in other cases cited in the proceeding section.) This is so because without definition there is no assurance that the jurors would understand the precise legal meaning of the term. (See e.g., *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [jurors cannot be expected to understand the meaning of technical legal terms].)

In the present case, for example, because there was no definition, the jurors could have understood lingering doubt to relate to whether they had any remaining doubt that the prosecution had proven Lucas guilty beyond a reasonable doubt. The jurors could quite reasonably[1389] have interpreted this to require a consideration of whether they were still convinced that Lucas was guilty under the proof beyond a reasonable doubt standard. In so doing, the jurors would not have truly considered lingering doubt, which relates to "that state of mind between beyond a reasonable doubt and beyond all possible doubt." (See *People v. Snow* (2003) 30 Cal.4th 43, 124; see also *People v. Arias* (1996) 13 Cal.4th 92, 183.)[1390]

H. The Arguments Of Counsel Did Not Cure The Error

Trial counsel attempted to clarify and expand upon the lingering doubt

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[1388] The instruction requested by the defense included such language as well as a handwritten modification. (CT 14411.)

[1389] See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.

[1390] Neither the absence of such language in the instruction requested by the defense nor the lack of a defense objection waived the error. (See Penal Code § 1259; see also Volume 2, § 2.8.3(D), pp. 517-18, n. 418, incorporated herein.)

instruction during argument. (RTT 13286; 13302-04; 13311.) However, this did not cure the error. Although this Court has held that the arguments of counsel may be considered in evaluating ambiguous instructions (see e.g., *People v. Brown* (1988) 45 Cal.3d 1247, 1256), the lingering doubt instruction in the present case was not simply ambiguous; it was clearly insufficient in failing to define crucial matters which the sentencing jury was required to consider. Moreover, the record demonstrated that, notwithstanding the arguments of counsel, the jurors still did not understand counsel's lingering doubt argument to permit consideration of the guilt phase evidence.[1391] Hence, the arguments did not 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].)[1392]

I. The Error Violated The Federal Constitution

Even though lingering doubt is not a federally mandated mitigating factor (see *Franklin v. Lynaugh* (1988) 487 U.S. 164), it is a relevant factor under California law. Therefore, the instructional error violated the Due Process Clause of the Fourteenth Amendment to the United States

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[1391] During deliberations the jurors sent out a note inquiring as to whether or not they could consider the guilt phase evidence. (See Volume 6, § 6.1(B)(3), pp. 1377-79, incorporated herein.)

[1392] 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.]

Constitution by arbitrarily denying Lucas' state created right to full and proper juror consideration of lingering doubt (*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), as well as the Eighth and Fourteenth Amendment prohibition again barriers to a capital sentencer's consideration of relevant mitigating evidence. (*Lockett v. Ohio, supra,* 438 U.S. at 604; *Mills v. Maryland, supra,* 486 U.S. at 387.)

J. The Error Was Prejudicial Under Both The State And Federal Standards Of Prejudice

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1393] the prosecution cannot meet its burden of demonstrating that the error was harmless.

Here, lingering doubt was the primary defense theory at trial. Therefore inadequate instruction on that theory was not harmless beyond a reasonable doubt. As a result, the penalty judgment should be reversed.

[1393] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.2

BECAUSE THE INSTRUCTIONS ONLY PERMITTED CONSIDERATION OF MITIGATING EVIDENCE "THAT THE DEFENDANT OFFERS," IMPORTANT MITIGATING EVIDENCE WAS NOT CONSIDERED

A. Introduction

The crucial "catch-all" mitigating factor was defined for the jurors as follows:

> . . . (j)[1394] any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character background or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial . . ." [Emphasis added.] (CT 14267 [Pre-Penalty Phase]; RTT 12591; CT 14374 [Final Penalty Phase].)[1395]

[1394] This instruction was based on CALJIC 8.85 factor (k) (CALJIC 5th ed. 1988). Pursuant to stipulation of the parties, Judge Hammes omitted factor (i), "the age of the defendant at the time of the crime," hence, the change in lettering sequence of the factors. (RTT 12373.)

[1395] The current CALJIC instruction places the "that the defendant offers" language in brackets:

> . . . (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is

(continued...)

However, the phrase "that the defendant offers" improperly limited the jurors' consideration of this mitigating factor to the defense evidence. The Eighth Amendment requires the jury to consider any and all mitigation, not just that which appears from the defense evidence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Easley* (1983) 34 Cal.3d 858, 876.). Hence, the instruction violated the federal constitution and, as will be shown below, was substantially prejudicial to Lucas.

B. The Prosecution Evidence Included Factors Which The Jurors Could Have Found To Be Mitigating

The prosecution evidence included substantial mitigating evidence as to Lucas' kindness to others, business successes and drug/alcohol problems.

Prosecution evidence of kindness to others included: Lucas employed Adler (RTT 3423-3430; 3454-57); Lucas let Adler live at his house (RTT 3423-3430); Lucas gave the Johnsons a place to stay at his house (RTT 3437-3442); Lucas let Greg Esry live at his house. (RTT 3464-70).

Prosecution evidence of Lucas' business initiative, acumen and responsibility included: Lucas and Clark started their own carpet company in 1982 (RTT 3731-37); Clark testified that business was going well and growing under Lucas' management (RTT 3737-52; 3770-75); Lucas did marketing for the carpet company (RTT 3811-15); Lucas was responsible for making business decisions at the carpet company (RTT 4236-40). John

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[1395](...continued)
on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle]." [Emphasis added.]

Storms testified that he considered Lucas a good account; he always paid and never bounced checks. (RTT 7114-17.)

Prosecution evidence of Lucas' drug and alcohol use included: Frank Clark testified that Lucas smoked marijuana in 1981 (RTT 3766-70); Clark and Lucas bought cocaine from the Strangs (RTT 3775-79); Lucas drank beer and took crystal methamphetamine on November 19, 1984 (RTT 3795-3801; 4279-93; 4319-21); both Clark and Lucas were using crystal methamphetamine in the summer and fall of 1984. (RTT 3795-3801.)

C. The Error Violated The Federal Constitution

The error violated the Eighth Amendment requirement discussed above. (See *Lockett v. Ohio*, *supra*; see also § 7.6.2(A), pp. 1643-45 above, incorporated herein.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

D. A New Penalty Trial Should Be Ordered

1. <u>The Error Was Structural</u>

The Eighth Amendment requirement that the jury consider <u>all</u>

mitigating evidence is so fundamental that it undermines the entire structure of the penalty trial and, therefore, the error should be reversible per se. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

2. If Not Structural, The Prosecution Cannot Demonstrate Beyond A Reasonable Doubt That The Error Was Harmless

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1396] the prosecution cannot meet its burden of demonstrating that the error was harmless.

Moreover, in a supplemental instruction (response to Question 3 of the jury's third note (7/19/89)), the judge specifically limited the jurors to consideration of the aggravating and mitigating factors listed in the instructions. (CT 24253-54.) Hence, the jurors were duty bound to unconstitutionally limit their consideration of mitigating to matters offered by the defense.

Accordingly, the penalty judgment should be reversed.

[1396] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.3

THE INSTRUCTIONS UNCONSTITUTIONALLY PRECLUDED THE JURY FROM CONSIDERING LUCAS' GOOD BEHAVIOR AT TRIAL AS MITIGATION

A. The Instructions Erroneously Precluded Consideration Of Lucas' In-Court Demeanor

The jurors were expressly instructed not to consider "reactions to the evidence" as follows:[1397]

> Reactions to evidence introduced during the trial, if any, by the judge, court personnel, attorneys, defendant, or any spectator do not constitute evidence and cannot be considered. If you have observed any such courtroom reactions, it is your duty to disregard the observations. (CT 14279.)

This instruction was reversible error because it precluded the jury from considering mitigating evidence based on Lucas' good conduct and demeanor at trial.[1398]

Moreover, the irrelevance of Lucas' demeanor was reinforced by the

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[1397] This instruction was only given at the guilt phase. However, it was also applicable to the penalty trial because it did not conflict with any of the specific penalty instructions. (See CT 14357.)

[1398] The absence of a defense objection does not preclude appellate review of this error. The failure of the defense to object to an instructional error does not preclude appellate review of that error if the substantial rights of the defendant were affected. (Penal Code § 1259; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; Volume 2, § 2.8.3(D), pp. 517-18, n. 418, incorporated herein.)

specific instructions on mitigation and aggravation. Those instructions, taken as a whole, clearly precluded consideration of Lucas' demeanor because mitigation was specifically limited to matters offered by the defense.[1399]

Further, in a supplemental instruction (response to Question 3 of the jury's third note (7/19/89)), the judge specifically limited the jurors to consideration of the aggravating and mitigating factors listed in the instructions. (CT 24253-54.) Hence, the jurors were duty bound to unconstitutionally limit their consideration of mitigating to matters offered by the defense.

B. The Error Violated State Law And The Federal Constitution

It is well established that the accused's behavior during trial may be considered by the sentencing jurors. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 808 [jurors may properly consider courtroom behavior of defendant under Penal Code § 190.3(k)]; see also *People v. Lanphear* (1984)36 Cal.3d 163, 167 [If a mitigating circumstance or an aspect of the defendant's background or his character called to the attention of the jury by the evidence or its observation of the defendant arouses sympathy or compassion such as to persuade the jury that death is not the appropriate penalty, the jury may act in response thereto and opt instead for life without possibility of parole (emphasis added)]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1226 fn. 26.)

Accordingly, because the instructions precluded juror consideration of Lucas' good behavior during trial, they violated the Eighth Amendment. (See *Lockett v. Ohio* (1978) 438 U.S. 586; see also *McKoy v. North Carolina*

[1399] (See Volume 2, § 2.3.4.1(A), p. 231-32, n. 243, incorporated herein.)

(1990) 494 U.S. 444; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Sumner v. Shuman* (1987) 483 U.S. 66, 76; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Songer v. Wainwright* (1985) 469 U.S. 1133, 1139-41; *Skipper v. South Carolina, supra*, 476 U.S. at 8; cf. *People v. Easley, supra*, 34 Cal.3d at 876 [death penalty defendants are constitutionally entitled to have the sentencer take into account any "'sympathy factor' raised by the evidence before it"].)

C. The Error Was Prejudicial

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1400] the prosecution cannot meet its burden of demonstrating that the error was harmless.

Moreover, Lucas' behavior was exemplary during the trial. (See e.g., RTT 13298.) The court never directed any reprimand or adverse comment toward Lucas regarding his behavior.

In sum, because Lucas' in-court behavior was important mitigating evidence which the instructions unconstitutionally precluded the jury from considering, the penalty judgment should be reversed

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[1400] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.4

INSTRUCTIONAL USE OF THE TERM "EXPERT" TO DESCRIBE CERTAIN PENALTY PHASE WITNESSES WAS ERROR

The same expert witness instruction given at the guilt trial was also given at the penalty trial. (CT 14369.)[1401] This instruction was erroneous and prejudicial. (See Volume 2, § 2.9.6, pp. 570-73, incorporated herein.)

At the penalty trial this instruction was especially prejudicial to Lucas because of the damaging stipulation the defense was forced to make regarding Dr. Schumann's Atascadero diagnosis of Lucas. (See § 7.3.2, pp. 1578-83 above, incorporated herein.) The instruction effectively informed the jury that

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[1401] The following instruction was given at the penalty trial:

EXPERT TESTIMONY

> A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates.
>
> A duly qualified expert may give an opinion on questions in controversy at trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.
>
> You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

(CT 14369.)

the judge believed Dr. Schumann was a "duly qualified expert" who had "special knowledge, skill, experience, training or education. . . ." This, in turn, increased the stature of Dr. Schumann's prejudicial testimony in the eyes of the jury.

Thus, the error violated the Eighth Amendment by compromising the reliability of the sentencing verdict. An unreliable verdict of conviction for any criminal offense violates the federal constitution. Verdict reliability 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.)

Moreover, in a capital case the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability in any determination that death is the appropriate sentence. (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.)

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1402] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1402] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.5

THE JURY INSTRUCTIONS, AS LIKELY CONSTRUED BY THE JURY IN LIGHT OF THE PROSECUTOR'S ARGUMENT, UNCONSTITUTIONALLY CHARACTERIZED THE PENALTY DECISION AS A CHOICE BETWEEN GOOD AND BAD

It is a fundamental premise of Eighth Amendment jurisprudence that the jurors' consideration of penalty go beyond the question of "good and evil" or "good and bad." The very premise of California's death penalty statute is that every special circumstance murder is extraordinarily bad; and accordingly, the minimum sentence for such an offense is life imprisonment without possibility of parole. Hence, jurors do not properly exercise their discretion to decide which special circumstance murders warrant death if they impose death based on a finding that, on balance, there is more bad than good about the defendant and his crime. That is not a conclusion that can properly serve as a basis for distinguishing who should be sentenced to die and who should be given a life imprisonment sentence, since it's a conclusion that will apply in almost every special circumstance murder case.

At the penalty trial, the jury was instructed to reach its sentencing verdict by balancing "aggravating circumstances versus mitigating circumstances. (See CT 14373-74; 14386; 14390; 14398-99.) However, no definition of "aggravating" or "mitigating" was provided. Hence, reasonable jurors could have construed these terms as equivalent to morally bad and morally good which called for a balancing of evil or bad versus good. In light of the misleading closing argument of the prosecuting attorney, who expressly

described the sentencing decision as a choice between good and evil – and argued that Lucas' life should be extinguished because he and his acts were "wicked" (see § 7.4.1(B), pp. 1584-88 above, incorporated herein) – it is reasonably probable that the jury would have adopted this unconstitutional "good" versus "bad" view of the mandated balancing test. (See *Boyd v. California*, *supra*, 494 U.S. at 380 [to find constitutional error based on an ambiguous instruction, there must be a reasonable likelihood that the challenged instruction was applied in unconstitutional fashion by the jury].)

The defense requested an instruction which would have informed the jury that it must not view the penalty deliberations as a balance of good versus bad (CT 14463), and thus helped keep the jury's focus on the actual issue, i.e., choosing the appropriate sentence by balancing reasons for imposing death against reasons for imposing life imprisonment.[1403] The requested instruction, which cited *People v. Belmontes* (1988) 45 Cal.3d 744, 804, was clearly a correct statement of law. Hence, the request was erroneously denied by Judge Hammes. (CT 14463.)

The denial of this instruction, in combination with the prosecutor's improper argument, violated Lucas' federal constitutional rights by making it likely that the jurors would believe that they were to return a verdict of death if they concluded that there was more "bad" than "good" about Lucas and his crimes – a conclusion which simply does not provide a basis for distinguishing one capital murderer (or one capital murder) from another.

[1403] The requested instruction provided as follows:

> The weighing of mitigating and aggravating factors is not a weighing or balancing between good and bad, but between life and death. (CT 14463.)

(See generally *Godfrey v. Georgia* (1980) 446 U.S. 420, 427; see also § 7.4.1(E), pp. 1591-92 above, incorporated herein.)

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

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1404] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1404] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.6

BY FAILING TO INSTRUCT THE JURY THAT NEITHER PARTY HAD THE BURDEN OF PROOF AT PENALTY THE JUDGE FAILED TO ASSURE JUROR IMPARTIALITY

A. Proceedings Below

The judge generally followed the CALJIC model instructions at penalty which contained no explanation of the burden of proof as to penalty.[1405] Both the defense and prosecution requested instructions which would have informed the jury as to the neutral standard applicable to the penalty determination.[1406]

However, the judge erroneously refused to give any instruction on the

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[1405] The proof beyond a reasonable doubt burden was included in the penalty instructions but it was specifically limited to proof of uncharged violent criminal conduct under "factor (c)." (CT 14385.)

[1406] The defense requested the following instruction:

> SELECTION OF PENALTY – NEUTRALITY OF THE LAW
>
> You are hereby instructed that the law has no preference for one penalty over the other. (CT 14437.)

The prosecution requested the following instruction:

> IMPARTIALITY
>
> At the commencement of your deliberations, the laws of the state of California express no preference as to which punishment, death or life imprisonment without the possibility of parole, is appropriate. (CT 14814.)

subject.

B. Under California Law Neither Party Has The Burden Of Proof At Penalty

This Court has consistently stated that "[u]nlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden of proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1053.) Accordingly, "'neither the prosecution nor the defense has the burden of proof' during the penalty phase. [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 767.)

C. The Judge Was Obligated To Instruct On The Burden

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) Moreover, "a trial court must instruct sua sponte on those general principles of law which are ' . . . closely and openly connected with the facts before the court, and which are necessary for a jury's understanding of the case.'" (*People v. Crawford* (1982) 131 Cal.App.3d 591, 596, citation omitted; *People v. Sedeno* (1974) 10 Cal.3d 703, 715.) This duty of the judge specifically includes instructing on the burden of proof. (Evidence Code § 502.)[1407]

[1407] Evidence Code § 502 provides:

> The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a (continued...)

D. Failure To Instruct On The Burden Of Proof Violated Lucas' State And Federal Constitutional Rights

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[1408] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards.

Moreover, because the failure to instruct arbitrarily deprived Lucas of his state created right under California law, including Evidence Code § 500 - 502, to a jury verdict based on the legally applicable burden of proof, the error

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[1407](...continued)
preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

[1408] See, e.g., *People v. Dunkle*, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

violated the Due Process Clause of the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Penalty Judgment Should Be Reversed

The failure to properly explain the burden of proof to the jury infects the entire proceeding to which the burden applies. Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

Alternatively, under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1409] the prosecution cannot meet its burden of demonstrating that the error was harmless.

Moreover, in the present case at least one juror came into the trial substantially leaning toward death as the appropriate penalty. (See § 7.5.1, pp. 1602-23 above, incorporated herein.) The failure to instruct that neither party had the burden allowed this juror to rely on her bias in favor of death throughout the penalty phase deliberations and, in effect, impose the burden of proof on Lucas. Thus, the penalty judgment should be reversed.

[1409] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.7

THE JUDGE ERRONEOUSLY REFUSED THE DEFENSE REQUEST FOR AN INSTRUCTION PERMITTING JUROR CONSIDERATION OF SYMPATHY FOR LUCAS' FAMILY

A. Proceedings Below

Because Lucas' trial postdated *Booth v. Maryland* (1987) 482 U.S. 496 and predated *Payne v. Tennessee* (1991) 501 U.S. 808, the jury was not permitted to consider sympathy for the victims' families.

On the other hand, the jury should have been permitted to consider the impact Lucas' execution would have on his friends and family. Indeed, this potential impact was a major defense theory at penalty; numerous friends and family members described how Lucas' execution would adversely affect them.

Accordingly, the defense requested a penalty phase instruction that would have expressly informed the jurors that, while sympathy for the victims or their families could not be considered, sympathy for Lucas and his family could. (CT 14415.)[1410]

[1410] The requested instruction read as follows:

> In deciding which of the two penalties to impose, death in the gas chamber or life without the possibility of parole, you are instructed that you must not consider the feelings of the victims or their families and friends, nor may you consider any sympathetic feeling you may have for them. You may, however, consider any feelings of sympathy you may have for the defendant and his family. (CT 14415.)

The judge agreed to instruct the jurors not to consider sympathy for the victims or their families, but deleted the requested language explaining that sympathy for Lucas' family could be considered. (CT 14378.)[1411] The stated reason was that the instruction "would influence the jury" and was "[n]ot required by the case law." (CT 14415.)

B. The Federal Constitution Requires That The Jurors Be Permitted To Consider The Impact Of The Defendant's Execution On His Friends And Family

Denial of a special instruction on sympathy for Lucas' friends and family was error for two reasons: (1) sympathy for Lucas' friends and family should be a mitigating factor under the Eighth Amendment; (2) without a special instruction the jury would not have understood that such sympathy could be relied upon to illuminate and demonstrate mitigating qualities about Lucas' own background and character.

C. Sympathy For The Defendant's Friends And Family Should Be A Mitigating Factor Under The Eighth Amendment

The trial court's error in refusing the requested instruction violated the Sixth, Eighth and Fourteenth Amendments. The United States Supreme Court law has uniformly held that a defendant must be permitted to introduce mitigating evidence on any aspect of his life and character: "[I]n capital cases the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character . . . that the defendant proffers as a basis

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[1411] The court instructed as follows:

> You may feel sympathy for the victims and their families in this case, but the law requires that you cannot consider this sympathy in your determination of the appropriate penalty for the defendant. (CT 14378.)

for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4.) Similarly, "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character . . . ." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 [state must allow "the jury to consider all relevant mitigating evidence"]; see also *Tuilaepa v. California* (1994) 512 U.S. 967 [same].)

"[I]f the jury is to give a 'reasoned moral response' to the defendant's background [and] character," furthermore, "full consideration of evidence that mitigates against the death penalty is essential . . . ." (*Penry v. Johnson* (2001) 532 U.S. 782, 788 [original emphasis].) As this Court has recognized, the Eighth Amendment demands that courts take "a broad view of relevancy in the sentencing phase of a death penalty case . . . ." (*People v. Stanley* (1995) 10 Cal.4th 764, 839 [citing, inter alia, *Gregg v. Georgia* (1976) 428 U.S. 153, 204].) (Cf. *Payne v. Tennessee* (1991) 501 U.S. 808, 826-827 ["Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality"].) Evidence is deemed mitigating, accordingly, as long as it is capable of giving rise to an inference that ". . . might serve as a basis for a sentence less than death." (*Skipper v. South Carolina*, *supra*, 476 U.S. at 4-5.)

Sympathy for the defendant's friends and family should be a factor. (See generally, R. King and K. Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings* (1999) 26 Fla.St.U.L.Rev. 1119.) Therefore, notwithstanding *People v. Ochoa* (1998) 19 Cal.4th 353, 454, the

jurors should be permitted to consider such evidence as mitigating.

Moreover, because "execution-impact" on Lucas' family and friends was a defense theory, the defense had the right to specific instruction on that theory. (*Soule v. General Motors Corp.* (94) 8 Cal.4th 548; see also Volume 3, § 3.6.4(E), pp. 962-64, and Volume 2, § 2.8.2(B), pp. 509-11, incorporated herein [exclusion of defense theory violates federal constitutional right to present a defense].)

D. Because The Requested Instruction Embodied A Key Defense Theory At The Penalty Trial It Should Have Been Given

Even if sympathy for Lucas' friends and family was not an independent mitigating factor, such sympathy was still relevant to illuminate and establish mitigating aspects of Lucas' own background and character. However, as reasonably understood by the jurors (see *Estelle v. McGuire, supra*) the jurors would not have understood the relevance of such sympathy.[1412]

In the present case there was a particular danger that the jurors would be confused concerning the permissibility of considering the impact of Lucas' execution on his family and friends. This was so because the jurors were instructed not to consider sympathy for the victims' family. (CT 14378.) Moreover, the prosecutor emphatically admonished the jurors that "sympathy for [Lucas'] . . . family and friends . . . is not a consideration that you may take into account in deciding the penalty." (RTT 13272; see also 13273.)

E. The Error Was Prejudicial

Under both the federal and state standards of prejudice, the prosecution

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[1412] In *People v. Ochoa, supra,* 19 Cal.4th at 454 this Court indicated that a defendant has a right to illuminate positive aspects of his background and character by presenting evidence of how his execution would affect his friends and family.

must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1413] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1413] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.8

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

In response to a juror question submitted during the penalty deliberations the judge instructed in such a way that the jurors' consideration of mitigation was limited to the factors specified in the instructions (CT 24253-54):

> 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.)

This instruction violated the Eighth Amendment which requires that the jurors be free to consider any mitigating factor, not just those listed in the instructions. If the jurors discerned some evidence-based (or courtroom-observation-based) mitigation but couldn't fit it under any of the specific instructional factors, they nonetheless should have been able to rely upon it as the basis for not imposing a death sentence. (See § 7.6.2(C), p. 1645 above,

and § 7.6.3(B), pp. 1648-49 above, incorporated herein.)

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1414] the prosecution cannot meet its burden of demonstrating that the error was harmless.

Here, lingering doubt was the primary defense theory at trial. Therefore, inadequate instruction on that theory was not harmless beyond a reasonable doubt. As a result, the penalty judgment should be reversed.

[1414] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.6 PENALTY PHASE INSTRUCTIONS

ARGUMENT 7.6.9

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

The judge refused the following instruction requested by the defense:

> Possible belief or predictions about a defendant's future dangerousness is not a statutory listed factor in aggravation, and may not be considered by you for any purpose. (CT 14447.)

Refusal of this instruction was prejudicial error because it erroneously allowed the jurors to consider evidence of future dangerousness in the Atascadero diagnosis of Lucas given to the jury by stipulation. That stipulation provided as follows:

> Mr. Williams: The stipulation being that on February 7th, 1974, a licensed physician with the state of California, a doctor – medical doctor, psychiatrist, by the name of R.M. Schumann, S-C-H-U-M-A-N-N, examined in the month of February or diagnosed in the month of February 1974 Mr. David Allen Lucas, the defendant in this action, while at the Atascadero state hospital that has heretofore been referred to in these proceedings, and diagnosed him as in the DSM-III or in the DSM manual as an antisocial personality, severe; alcoholism, habitual excessive drinking, and a sexual deviation, aggressive sexuality, and the prognosis was very guarded." [Emphasis added.] (RTT 13025-26.)

Because the "very guarded" prognosis was, in effect, an expert prediction of future dangerousness, the jury should not have been allowed to rely on it for that purpose. (See *People v. Silva* (1988) 45 Cal.3d 604, 639;

see also *People v. Murtishaw* (1981) 29 Cal.3d 733, 773 [predictions of future dangerousness are beyond the scope of the death penalty statute].) Accordingly, the requested limiting instruction was erroneously denied.

And, because the error allowed the jury to consider unreliable evidence not authorized by the statute it violated the Eighth Amendment of the federal constitution. The Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

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

The error was especially prejudicial to the defense because the jurors were likely to have relied heavily on the expert's prediction that Lucas would be dangerous in the future. Many studies involving mock and real jurors indicate that future dangerousness is a factor on which the penalty decision hinges. (See Constanzo & Constanzo, *Life or Death Decision: An Analysis*

of Capital Jury Decision Making Under The Special Issues Sentencing Framework, 18 Law and Human Behavior 151, 154 (1992); Constanzo & Constanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 Law and Human Behavior 185 (1992); Eisenberg & Wells, *Deadly Confusion: Jury Instructions in Capital Cases*, 79 Cornell Law Rev. 1 (1992).)

In fact, future dangerousness is on the minds of most jurors in most cases. (See John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell Law Rev. 397 (2001).) This is true regardless of whether the prosecutor argues future dangerousness explicitly. (*Ibid.*)

Moreover, in the present case the jurors expressly asked to have the prejudicial stipulation sent into the jury room during deliberations, and reached their death verdict shortly after receiving the stipulation.

Hence, the error was substantial, and because the penalty deliberations were closely balanced,[1415] the death judgment should be reversed because the prosecution cannot meet its burden under the state and federal standards of proving the error was harmless beyond a reasonable doubt. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.)

[1415] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.1

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

A. Introduction

On the second day of their deliberations the jurors sent out a note stating that "a unanimous decision is not possible." (CT 24250.) Without conducting any inquiry, Judge Hammes declined to accept the jurors' assessment and ordered them to continue deliberating with the assurance that she would order a mistrial if they remained deadlocked. (CT 24251.) The next morning the jurors sent out another note which stated that some jurors believed that "no further progress is possible" and other jurors "feel that further progress is possible with direction from the court." (CT 24251.) Thereafter, several notes went back and forth between the judge and jurors, one juror was replaced with an alternate, and eventually a verdict of death was returned.

Judge Hammes impermissibly coerced the jury by: 1) failing to inquire into the probability of agreement; 2) referring to the length of the trial; 3) advising the jurors that a deadlock would result in a new trial before a new jury; 4) failing to remind the jurors to follow their individual consciences; and 5) following surreptitious inspections of the deliberation room, instructing the jurors to consider the guilt phase exhibits. Therefore, the penalty judgment must be reversed.

B. Procedural Background

See Volume 6, § 6.1(B), pp. 1375-88, incorporated herein.

C. Legal Principles

After a jury reports that it is deadlocked, the determination as to whether or not there is a reasonable probability of agreement rests in the sound discretion of the trial court. (*People v. Miller* (1990) 50 Cal.3d 954, 994.) However, the trial court must exercise its power, without coercion of the jury, to avoid displacing the jury's independent judgment in favor of consideration of compromise and expediency. (*People v. Sheldon* (1989) 48 Cal.3d 935; *People v. Proctor* (1992) 4 Cal.4th 499, 539.)

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

1. Instructing Jury To Continue Without Inquiry

The first note that the jury sent to the judge, dated July 18, 1989, read "Your Honor, it is the feeling of the jury that a unanimous decision is not possible. . . ." (CT 24250.) In this note, the jurors indicated that they were hopelessly deadlocked. In such a situation the judge had a duty to determine whether there was a reasonable probability the jurors could agree on a verdict without being coerced into doing so. (*People v. Proctor* (1992) 4 Cal.4th 499, 538; see also *People v. Duran* (1983) 140 Cal.App.3d 485, 501 [trial court "may, and indeed it should, question individual jurors as to the probability of agreement"].) However, in the present case the judge refused to conduct any inquiry.

2. Improper Reference To The Length Of The Trial

In the present case, the judge addressed the jury by referring to the length of the case: "The length and complexity of this case . . . are such that

I would ask you to deliberate a little further. . . ." (RTT 13346-47.) Referring to the trial in terms of time or money is one of the three prohibited parts of an *Allen*[1416] charge. (*People v. Gainer* (1977) 19 Cal.3d 835, 851 n.16.)[1417]

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

In the second and third notes, the jury again indicated that some jurors felt no further progress was possible. The jury also asked, "What happens in case of deadlock?" (CT 24251.)

Judge Hammes responded by quoting from § 190.4(b) of the Penal Code:

> 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. [Emphasis added.] (CT 24253.)

Informing a deadlocked jury that a new jury would be impaneled if a verdict is not reached is the type of statement that was explicitly prohibited in *Gainer*. "We therefore hold it is error for a trial court to give an instruction which . . . states or implies that if the jury fails to agree the case will necessarily be retried. [Footnote omitted.] We adopt the foregoing as a judicially declared rule of criminal procedure." (*Id.* at 852.)

[1416] *Allen v. United States* (1896) 164 U.S. 492.

[1417] See also § 7.7.12, pp. 1765-67 below, incorporated herein.

Therefore, the judge's answer to the jury's inquiry in the present case was improper.[1418]

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

In addition to making the above *Allen* charge errors, Judge Hammes also erred by refusing the defense request that the jurors be reminded of their duty to ultimately follow their individual consciences and to not take any cue from the judge herself. The court instructed:

> . . . I would ask 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 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 [sic] 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. (Emphasis added). (RTT 13346-7.)

The trial court in asking that those jurors in the minority re-examine their views, did not sufficiently counterbalance this charge with a word of caution that no juror "should yield a conscientious conviction" in order to achieve unanimity. (*United States v. Bonam* (9th Cir. 1985) 772 F.2d 1449, 1450.)

For example, in *Lowenfield v. Phelps* (1988) 484 U.S. 231, the Court

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[1418] "That the reference [to a retrial] here did not link the notion of expense to a prospective retrial is immaterial, for the link is obvious and will naturally be inferred by the jurors once the subject is introduced." (*People v. Barraza* (1979) 23 Cal.3d 675, 685.)

allowed an instruction that read:

> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong *but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.* (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 235 [emphasis added].)

Numerous courts have been critical of *Allen* instructions. The primary reason for judicial disfavor of an *Allen* charge such as that delivered in this case is its potentially coercive effect upon those members of a jury holding to a minority position at the time of the instruction. (*United States v. Fioravanti* (3d Cir. 1969) 412 F.2d 407, 416-17 (Cert. denied, (1969) 396 U.S. 837); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va.L.Rev. 123, 126 (1967).) It is contended that the *Allen* charge persuades minority jury members to alter their individually held views not on the basis of evidence and law, but on the basis of majority opinion. (*United Stated v. Beattie* (9th Cir. 1980) 613 F.2d 762, 764; *United States v. Wauneka* (9th Cir. 1988). 842 F.2d 1083, 1088.)

The timing of the instruction is also crucial. When dealing with a deadlocked jury, the coerciveness of any instructions given will be heightened if the judge gives new and unfamiliar instructions at the time of deadlock rather than simply repeating the part of the original jury instructions dealing with the jury's duty to deliberate with an open mind. (See e.g. *Romine v.*

Georgia (1988) 484 U.S. 1048, 1050.) The Court stressed the importance of a balanced charge to the majority and minority jurors: "When a trial court gives an *Allen* charge, it 'is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party." (*United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268.) A trial court's failure to give such a cautionary instruction weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated. [Citation.]" (*Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, 981, fn. 5.)

Rodriguez v. Marshall (9th Cir. 1997) 125 F.3d 739 upheld the judicial inquiry during deadlocked deliberations where the court on four separate occasions reminded the jurors not to surrender their sincerely held beliefs under pressure from the majority. (*Id.* at 751.) A trial court's failure to give such a cautionary instruction weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated. (See *Jiminez v. Myers*, *supra,* 40 F.3d 976; see also *United States v. Bonam*, *supra*, 772 F.2d at 1450; *United States v. Mason*, *supra*, 658 F.2d at 1268.)

Quite recently the Ninth Circuit Court of Appeals again reversed a conviction for multiple sex crimes because it found that the jury had received an improperly coercive *Allen* charge. (*Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359.) The effect of this charge on the minority jurors was memorably described as follows: "It requires no imagination to comprehend that these events may have altered the minority jurors' views of the deliberations. . . . In effect, the minority jurors were told that they had two choices: give in to the majority position, or manage the same coup pulled off by Juror # 8 in Twelve Angry Men."

In California courts this instruction has also been criticized. *People v. Gainer* (1977) 19 Cal.3d 835 disapproved the *Allen* instruction since it tended to coerce a subjugation of minority to majority opinion. The California Supreme Court has approved the *Allen* charge when it has been accompanied by supplemental instructions reminding jurors not to surrender their convictions simply because a majority of jurors has taken a different view of the case. (See *People v. Sheldon* (1989) 48 Cal.3d 935, 959 [where the *Allen* instruction contained the caveat "you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision"]; and *People v. Keenan* (1988) 46 Cal. 3d 478, 529 [where the court also specifically advised as follows: "Of course, by pointing out to you the desirability of your reaching a verdict, I am not suggesting to any of you that you surrender your honest convictions as to what the evidence in this case has disclosed and of the weight and effect of the evidence in the case"].)

In the present case the statement that "no group of jurors should feel pressure . . ." was woefully inadequate to convey the crucial requirement that no juror abandon his or her individual conscience. (See e.g., *Jimenez v. Myers* (9th Cir. 1993) 12 F.3d 1474; see also *United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268.)[1419]

[1419] Moreover, in the present case this error was magnified by improperly informing the jury that the case would be retried in the event of a deadlock. This further coerced the minority to abandon their views because they could simply be replaced by a new jury if they maintained their position and forced a deadlock. Hence, the overall message was this: The minority position was hopeless and would needlessly waste money by forcing retrials until a death sentence was obtained.

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

The judge also committed errors during the penalty deliberations in responding to the jurors' inquiry concerning whether the guilt phase evidence should be considered and errors calculated to encourage a death verdict. (See § 7.7.2, pp. 1678-90 below, herein.) These errors, when combined with the errors discussed in the present argument, made the process all the more coercive.

E. The Errors Violated The State And Federal Constitution

The above described errors violated Lucas' state (Art. I, sections 7, 15 and 16) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury.

The Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability in any determination that death is the appropriate sentence. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (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.)

Finally, because the error arbitrarily violated Lucas' state created right to independent jury judgment, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19

Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Coercion Of The Jury Was Structural Error

Improper coercion of the jury during a death penalty sentencing trial fundamentally undermines the fairness and reliability of the verdict and therefore, should result in reversal per se as structural error. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

G. Alternatively, The Prosecution Cannot Demonstrate Beyond A Reasonable Doubt That The Errors Were Harmless

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the errors were harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the errors were substantial and the penalty deliberations were closely balanced,[1420] the prosecution cannot meet its burden of demonstrating that the errors were harmless.

[1420] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.2

THE JUDGE ENGAGED IN JURY-TAMPERING BY ORDERING THE BAILIFF TO INSPECT THE DELIBERATION ROOM DURING RECESSES, AND BY GIVING A SPECIAL SUPPLEMENTAL INSTRUCTION IN LIGHT OF WHAT THE BAILIFF LEARNED

A. Introduction

The privacy of jury deliberations is a hallmark of the state and federal constitutional rights to trial by jury. Any breach of this privacy is considered a grievous violation. In the present case, such a violation occurred when the trial judge covertly monitored the jury's deliberations and then prejudicially altered the course of the deliberations with a biased supplemental instruction.

B. Any Intrusion Into Jury Privacy During Deliberation Violates Fundamental Constitutional And Statutory Safeguards

"[P]rivate, confidential deliberations outside of the presence of all nonjurors are an essential feature of the right to an impartial jury trial guaranteed by the Sixth Amendment." (*People v. Oliver* (1987) 196 Cal.App.3d 423, 429.) "As a general rule, no one – including the judge presiding at a trial – has a 'right to know' how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror. The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." (*United States v. Thomas* (1997) 116 F.3d 606, 618; see also *United States v. Antar* (1994) 38 F.3d 1348, 1367 (Rosenn, J., concurring) ["We must bear in mind that the confidentiality of the thought processes of jurors, their privileged exchange of views, and the freedom to be candid in their

deliberations are the soul of the jury system"].) The right of private, confidential deliberations "goes to the very substance of trial by jury." (*People v. Bruneman* (1935) 4 Cal.App.2d 75, 81.)[1421]

Accordingly, the jurors' deliberations must be "free from outside attempts at intimidation." (*Williams v. Florida* (1970) 399 U.S. 78, 100.) "[I]t is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." (*Remmer v. United States* (1956) 350 U.S. 377, 382.) ". . . [T]he law requires that all deliberations by a jury must be conducted in the utmost privacy." (*Babson v. United States* (9th Cir. 1964) 330 F.2d 662, 665-66, citations omitted; see also *Tanner v. United States*, *supra* 483 U.S. at 120-21 [disapproving post-verdict scrutiny as endangering private deliberations].)[1422]

C. In The Present Case The Judge Improperly Invaded The Jurors' Privacy

The judge in the present case invaded the jurors' privacy by examining

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[1421] The importance of jury secrecy also finds expression in the Penal Code:

> "Every person who, by any means whatsoever, willfully and knowingly, and without knowledge and consent of the jury, records, or attempts to record, all or part of the proceedings of any trial jury while it is deliberating or voting, or listens to or observes, or attempts to listen to or observe, the proceedings of any trial jury of which he is not a member while such jury is deliberating or voting is guilty of a misdemeanor." (Penal Code § 167; see also Penal Code § 1128.)

[1422] Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment and Article I, § 16 of the California Constitution. (*People v. Oliver* (1987) 196 Cal.App.3d 423, 429; *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596.)

the deliberation room during recesses to ascertain what evidence the jurors were considering.

After the jurors twice indicated difficulty in reaching a penalty verdict, the trial judge asked[1423] the jury to submit any specific questions it might have. (RTT 13346-47.) The jury submitted two notes which, inter alia, suggested juror confusion over whether the guilt phase evidence could be considered as to penalty. (RTT 13427; 13438; CT 14400.) After discussion with counsel the judge completed a written response which was given to the jurors. (RTT 13427-53; CT 14401-02.) The full text of the written response is set forth above at Volume 6, § 6.1(B)(5), pp. 1380-81, incorporated herein. In the part most relevant to the present argument, the note to the jury set forth the following question and answer:

> 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. (CT 24253.)

Thus, the jury was clearly told that it could consider guilt phase evidence during its penalty phase deliberations.

However, after the written response was given to the jurors, the judge – without notice to the parties – directed the bailiff to examine the jurors' deliberation room while they were in recess to glean information about the

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[1423] Through the bailiff. (RTT 13423-25; CT 5589.)

deliberations. (RTT 13455-56.) The bailiff informed the judge that the guilt phase exhibits were "put . . . away" and that it did not appear that the jurors had looked at them.[1424] (RTT 13456; 13465.) The judge concluded from the bailiff's report, and her own observations of the jury room during the guilt phase deliberations, that the jurors had not looked at the guilt exhibits during its penalty deliberations. (RTT 13456-57.)

The judge's concern that the deliberating jurors weren't devoting time to reviewing the guilt phase exhibits was reinforced by two subsequent reports of the bailiff. One report was made later that afternoon. During that report the judge asked, "Was there any evidence out on the tables or anywhere?" (RTT 13475.) The bailiff responded: "Nothing similar to the guilt phase." (RTT 13475.) Yet another report was made the following morning when the bailiff, who had been ordered by the judge to empty the trash and "clean up" the jury room (RTT 13479), informed the judge that while emptying the trash cans he had noticed that one exhibit had been moved by the jurors from the anteroom to the jury room. (RTT 13476.)

In sum, the judge and bailiff erroneously invaded the privacy and sanctity of the jurors deliberations by examining the deliberation room to ascertain what evidence the jurors were considering.[1425]

[1424] The bailiff did not testify. His observations were conveyed by the judge. (RTT 13455-56.)

[1425] The defense objected to the deliberation room examination and special instruction predicated on the bailiff's observations. (RTT 13468-84.)

D. The Judge Improperly Used The Knowledge Gleaned From The Jury Room Intrusion To Influence The Course Of The Deliberations

In light of the above deliberation room observations, a special supplemental instruction was given, over defense objection,[1426] which informed the jurors, inter alia, that both the penalty and guilt exhibits could be examined and considered in penalty deliberations. (RTT 13476-87; CT 14403.)[1427]

Hence, the intrusion in the present case was especially prejudicial. It

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[1426] See RTT 13468-84.

[1427] This instruction read:

"Ladies and Gentlemen:

A Matter of Clarification. In case there is any question, the jury should understand that it has access to the following during deliberations at the Penalty Phase:

Jury Instructions, Jurors' Notes, Exhibits, and Verdict Forms from the Penalty Phase.

Jury Instructions, Jurors' Notes, and Exhibits from the Guilt Phase. (Except: The Jury must exclude from considering [sic] 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.

Thank you.

Laura Hammes
Judge" (CT 14403.)

caused the trial judge to give an additional supplemental instruction which changed the course of the deliberations by again telling the jury it could consider guilt phase evidence and by emphasizing the guilt phase exhibits, many of which were highly inflammatory and prejudicial to Lucas.

Prior to the intrusion, the parties had settled on a course of action – sending in the first note – which, without singling out or emphasizing the exhibits, told the jury it could consider guilt phase evidence. However, the deliberation room inspection caused the judge to give an additional instruction which specifically referred to the exhibits.

There was no legitimate need for such a supplemental instruction. The judge had already told the jury it could consider the guilt phase evidence. Further, given that the jury had deliberated over the guilt phase evidence for over eight days (RTT 13481), the fact that they were not again reviewing those exhibits did not mean they were ignoring the guilt phase evidence. Nevertheless, Judge Hammes was apparently concerned that the jury, which was potentially deadlocked, had not spent enough time looking at the guilt phase exhibits. The jury, having already been instructed on the relevance of the guilt phase evidence concerning the crimes, was not likely to have missed the message.

This additional instruction was erroneous and highly prejudicial to the defense for two reasons.

First, it repeated the recently given instruction that consideration of guilt phase evidence was proper and did so in a way that emphasized the physical exhibits.

An instruction that is one-sided or unbalanced violates the defendant's federal constitutional rights under the 6th and 14th Amendments to due

process and a fair, impartial trial by jury. (See *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony]; *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Quercia v. United States* (1933) 289 U.S. 466, 470; see also generally *Wardius v. Oregon* (1973) 412 U.S. 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537.)

"Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation] . . . [the instructions] should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory'. . . nor overemphasize the importance of certain evidence or certain parts of the case." (*United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *United States v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45; *State v. Pecora* (Mont. 1980) 190 Mont. 115 [619 P.2d 173, 175].)

Second, the instruction implied that the judge thought the guilt phase exhibits were important and that the deliberating jury, in attempting to determine the appropriate penalty, should spend time looking at them.

Even if judicial comment does not directly express an opinion about the defendant's guilt or the appropriate penalty phase verdict, an instruction that is one-sided or unbalanced violates the California Constitution (Art. I, sections 7, 15, 16 and 17), the California Rules of Evidence (§ 1101) and the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial

comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Quercia v. United States* (1933) 289 U.S. 466, 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537 [judge's comments require a new trial if they show actual bias or the jury "perceived an appearance of advocacy or partiality"]; see also *People v. Gosden* (1936) 6 Cal. 2d 14, 26-27 [judicial comment during instructions is reviewable on appeal without objection below].)

"Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation]. Read as a whole they should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory,' [citation] nor overemphasize the importance of certain evidence or certain parts of the case [citation]." *(United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *U.S. v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45.)

E. The Jury Tampering Violated The Federal Constitution

The judge's actions in the present case violated Lucas' fundamental constitutional right to a fair and impartial trial by jury unfettered by outside influences. (6th and 14th Amendments; see also *Allen v. United States* (1896) 164 U.S. 492; *Williams v. Florida, supra,* 399 U.S. 78; cases cited in § B, above, incorporated herein.)

Moreover, the above described errors violated Lucas' state (Art. I, sections 7, 15 and 16) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury.

The Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability in any determination that death is the appropriate sentence. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (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.)

Further, Lucas' federal constitutional rights to due process, confrontation, compulsory process, and representation of counsel were also violated. (See Argument 7.7.3, below, incorporated herein.)

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

F. The Error Was Structural And Reversible Per Se

By altering the jury's subjective deliberative process based on information obtained from surreptitious monitoring of the jury room the judge committed a structural error. No matter what juror transgressions may be suspected, intrusion into the jury's privacy should not be tolerated and should never be held harmless: "Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two

evils – protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity. Achieving a more perfect system for monitoring the conduct of a jury deliberation room entails an unacceptable breach of the secrecy that is essential to the work of juries in the American system of justice. To open the door to the deliberation room any more widely and provide opportunities for broad-ranging judicial inquisitions into the thought processes of jurors would, in our view, destroy the jury system itself. (*United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, 623.)

Further, the judge's response to what she had improperly learned was far from neutral. No doubt most prosecutors would want a deliberating penalty phase jury to spend its time reviewing gory guilt phase exhibits highlighting the horrors of the capital offense. Yet encouraging a deadlocked penalty phase jury to look at guilt phase exhibits is not a neutral judicial act – at least not after having just told them the day before that they were free to do so.[1428]

Hence, the judge's error was structural and the per se rule of reversal should apply. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

[1428] The instruction, of course, also mentioned the penalty phase exhibits, but the jury, which had never expressed any question about the relevance of the penalty phase evidence, reasonably would have understood that the trial court's purpose in reinstructing them was to convey the appropriateness of reviewing the guilt phase exhibits.

G. If Not Reversible Per Se, The Secret Monitoring Of The Deliberations And The Unwarranted Supplemental Instruction Were Prejudicial To Lucas

1. Standard Of Prejudice: Prosecution Has Burden Of Proving The Errors Were Harmless Beyond A Reasonable Doubt

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the errors were harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.)

2. The Prosecution Cannot Meet Its Burden

Because the errors were substantial and the penalty deliberations were closely balanced (see § 7.5.1(J)(3)(a), pp. 1619-22 above, incorporated herein) the prosecution cannot meet its burden of demonstrating that they were harmless. To prove the errors harmless the prosecution would have to demonstrate that the note sent to the jury in response to the secret monitoring had no prejudicial consequence to appellant. Such a showing cannot be made because there is no record of how the jury responded to the note.

Moreover, to the extent that one can speculate about the impact of the note, the prejudice to Lucas was high. The probable impact of the note, under the circumstances, would have been to convey to the jurors the judge's view that, in attempting to resolve its potential deadlock as to the appropriate sentence, the jurors should consider the guilt phase exhibits. This in turn would have caused the jurors to look at, if not focus upon, the physical exhibits thus placing undue emphasis upon some of the most inflammatory evidence in the case. For example, the photo board (Trial Exhibit 29), which depicted close-up views of all seven throat slashings, was an incredibly

inflammatory and emotionally evocative portrayal.[1429]/[1430] Further, the judge's message to consider such exhibits would also have prejudicially conveyed the judge's own view as to the appropriate sentence. The jurors would have naturally deferred to the trial judge, since "it is [her] words . . . which carry an authority bordering on the irrefutable." (*United States v. Wolfson* (5th Cir. 1978) 573 F.2d 216, 221; *accord, e.g., Quercia v. United States* (1933) 289 U.S. 466, 470.) As Judge Hammes observed, her words were especially influential with these particular jurors: "This jury is really tuned in and they are tuned in to me. Whenever I look at them and say something to them, I am getting a tremendous feedback from them that they are really paying attention to what they can and cannot consider and what they are to do." (RTT 8401.)

On the other hand, the defense theories at the penalty trial were primarily founded on the actual testimony – both guilt and penalty. (E.g., lingering doubt, childhood abuse, good character qualities.) The second supplemental instruction conspicuously relegated the reference to "testimony" to the end and, in contrast to how it treated the exhibits, did not specifically state that both the guilt and penalty testimony was available. Thus, both the timing and linguistic structure of the note tended to emphasize the exhibits rather than the testimony.

Further, by specifically informing the jury that it had "access to" the

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[1429] Moreover, three of the pictures of this photo board, Garcia, Strang and Fisher constituted inadmissible, extrinsic evidence which the jurors were required to somehow disregard. (See § 7.7.7, pp. 1717-22 below, incorporated herein.)

[1430] Additionally, by emphasizing the guilt exhibits the judge undercut the principle defense theory of lingering doubt since the jury had relied on those very exhibits to convict Lucas.

exhibits from both the guilt and penalty trials, and then informing the jury that it could ask for transcripts of testimony without mentioning that this included both guilt and penalty testimony, the note likely misled the jury into believing it could not request transcripts of guilt phase testimony.

Accordingly, the error was not harmless beyond a reasonable doubt and the judgment must be reversed.

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.3

ASSUMING ARGUENDO THAT IT WAS PROPER TO RELY ON THE BAILIFF'S AND JUDGE'S OBSERVATIONS OF THE JURY ROOM, THE RESULTANT FINDING WAS UNFAIR, UNRELIABLE AND UNCONSTITUTIONAL

In the preceding argument it was contended that the judge improperly invaded the jurors' privacy in deciding that there was reason to doubt that the jurors understood they were free to consider the guilt phase exhibits. Assuming arguendo that it is conceptually proper for the judge to conduct such an inquiry, the process utilized in the present case was unfair and unreliable.

The process was unconstitutional because Judge Hammes' determination was based on the extraneous out-of-court observations of the bailiff and herself. Furthermore, the bailiff's observations were conveyed in the form of rank hearsay by the judge. Hence, the defense was denied any opportunity to confront or test the testimony, in violation of the Confrontation and Due Process Clauses of the Sixth and Fourteenth Amendments. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690-91; *Davis v. Alaska* (1974) 415 U.S. 308, 316-17; *Douglas v. Alabama* (1965) 380 U.S. 415, 418; *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273.) Additionally, by refusing defense counsel's request to view the jury room,[1431] Lucas' rights were further violated. The process violated the Sixth and Fourteenth Amendments to the

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[1431] The defense request to inspect the jury room was denied. (RTT 13473.)

federal constitution which guarantee the defense the rights to due process, trial by jury, confrontation, compulsory due process and to present a defense. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Webb v. Texas* 91972) 409 U.S. 95; *Washington v. Texas* (1967) 388 U.S. 14, 17-19.) The right to call witnesses is also expressly guaranteed under the California Constitution. (See *People v. Chavez* (1980) 26 Cal.3d 334, 353.) These fundamental constitutional rights to be heard and to call witnesses apply to motion hearings as well as to the jury trial itself. (See *Holt v. Virginia* (1965) 381 U.S. 131, 136; *Bell v. Burson* (1971) 402 U.S. 535, 541-42.) The right to present evidence is a linchpin of the due process right to a fair hearing. (See *People v. Vickers* (1972) 8 Cal.3d 451, 457-58 [fundamental fairness requires full access to the courts and a meaningful opportunity to be heard].)[1432]

Finally, because the error arbitrarily violated Lucas' state created rights, it violated the Due Process Clause of the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Moreover, the judge's implicit finding that the jurors did not understand that they were free to consider the guilt phase exhibits was unreliable for a variety of reasons. As discussed in the previous argument, such a finding was not supported by the record before Judge Hammes, given that (1) she had just explicitly responded to a question on this issue and told the jurors they could consider the guilt phase evidence, (2) the jurors had spent eight days in guilt phase deliberations and so the fact that they didn't pull out guilt phase exhibits didn't mean they had forgotten or weren't

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[1432] Indeed, without the foregoing protections there isn't even any assurance that the bailiff's purported observations were accurate and truthful.

considering guilt phase evidence, and (3) the jurors had pulled at least one exhibit that may have been from the guilt phase. (RTT 13476.) The finding was also unreliable and unconstitutional because (1) after having perceived a reason for doubt based on the intrusive observations of the bailiff, Judge Hammes then inexplicably refused to allow the bailiff to provide a further piece of information that could have dispelled such doubt (which would have been the case if the exhibit on the table was a guilt phase exhibit);[1433] and (2) she refused to allow defense counsel to view the deliberation room or have the bailiff testify about his observations and be questioned by the defense. (RTT 13476-77.)

In sum, the judge's prejudicial supplemental instruction was based on an unfair and unreliable factual determination. Accordingly, the judgement should be reversed. (See § 7.7.2(G), pp. 1688-90 above, incorporated herein.)

[1433] The judge deliberately remained ignorant on this matter by not asking the bailiff anything about the exhibit:

> Now, yesterday afternoon, as you know, I asked Deputy Ching, "What did you see when the jury went out to – to its break?" And/or – it was their recess, when they came in here. And then he said that he still didn't see anything moved.
>
> It was then this morning, but when he went back in there last night to remove the trash cans, that he happened to be in the anteroom to remove the trash cans. He did see that one thing had been placed into the jury deliberation room. And I said "Don't tell me what it is. That's as far as I want to go," and I revealed it to you. That's all there is. Nothing more. (RTT 13481 [emphasis added].)

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.4

THE SPECIAL SUPPLEMENTAL PENALTY INSTRUCTIONS IMPROPERLY LIMITED THE JURORS' CONSIDERATION OF THE GUILT PHASE EVIDENCE TO "EVIDENCE OF THE CIRCUMSTANCES OF THE CRIMES"

A. Introduction

A crucial concern of the jurors during the penalty deliberations was the extent to which they could consider the guilt phase evidence. Notwithstanding the standard CALJIC instructions and the argument of counsel referring to the guilt phase facts, the jurors were not sure whether they could consider the guilt phase evidence.

The judge's supplemental written instruction addressing the jurors' apparent confusion improperly limited their consideration to: "Evidence of the circumstances of the crimes of which defendant was convicted . . . ." This response precluded the jurors from considering:

1. Guilt phase evidence relevant to lingering doubt; and

2. Guilt phase evidence of mitigation not related to the circumstances of the offense.

Accordingly, the death verdict should be reversed because it was returned in violation of state law and the federal constitution.

B. Procedural Background

Following the presentation of the penalty phase evidence, counsel made their closing arguments to the jurors. The prosecution discussed, inter alia, the circumstances of the offenses while the defense argued, inter alia, that

the jurors should consider lingering doubt about guilt as mitigation. (See RTT 13274; 13302-04; 13309-10.) After the arguments the jurors were instructed that they could consider the guilt phase evidence "as permitted. . . ."[1434] They were also given the standard CALJIC instructions, which said:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during the guilt phase of this trial, insofar as such evidence is relevant to factors in aggravation or mitigation, EXCEPT, you may not consider any evidence produced at the guilt phase with respect to the victims Gayle Garcia, Rhonda Strang and Amber Fisher. (CT 14373, ¶ 1.)

In the concluding instructions the judge told the jury, inter alia:

> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. (CT 14398, ¶ 2.)

The jurors were also governed by the guilt trial admonition that they must not consider any statements of counsel as to the law that conflicted with the judge's instructions. (CT 14275.)[1435]

[1434] The instruction stated:

> You must decide all questions of fact in this phase of trial from the evidence received here, or from the guilt phase as permitted, and not from any other source. (CT 14360, ¶ 1.)

[1435] The guilt phase instructions were to be disregarded only to the extent that they conflicted with the penalty instructions:

> In deciding the question of penalty you must follow the instructions which I am now reading. Any prior instructions

(continued...)

After receiving these instructions and arguments the jurors were unclear about the role of the guilt phase evidence in the penalty determination. They sent out a note asking: "Does evidence from the whole trial pertain to juror decisions during penalty phase or just evidence from penalty phase may be used?" (CT 24253.) The judge answered the jurors' inquiry with the following written supplemental instruction:

> 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. [Emphasis added.] (CT 24253.)

Subsequently, after deciding that the jurors had apparently not looked at the guilt phase exhibits (see § 7.7.2, pp. 1678-90 above, incorporated herein), the judge sent the jurors the following additional written supplemental instruction:

> A matter of clarification. In case there is any question, the jury should understand it has access to the following during

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[1435](...continued)

> you have been given which are in conflict with the instructions I am about to read, are to be disregarded by you. This includes any prior instructions, given formally or informally, at any time during trial, from voir dire through the final guilt phase instructions. (CT 14357, ¶ 4; see also RTT 13486.)

Additionally, the second supplemental instruction given during the penalty deliberations informed the jurors that "it has access to . . . jury instructions . . . from the Guilt Phase." (CT 24265.)

deliberations at the Penalty Phase:

Jury Instructions, Jurors' Notes, Exhibits, and Verdict Forms from the Penalty Phase.

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.)

C. Limiting Consideration Of The Guilt Phase Evidence To The "Circumstances Of The Crimes" Excluded Important Guilt Phase Mitigation

Both California law and the federal constitution require that the jury consider all mitigating evidence which may have been presented at the guilt trial. (See e.g., Penal Code § 190.3; *Lockett v. Ohio* (1978) 438 U.S. 586.) However, by limiting the jurors' consideration of the guilt evidence to the circumstances of the offenses the judge excluded at least two crucial categories of mitigating evidence:

1. Evidence supporting lingering doubt as to Lucas' guilt; and

2. Evidence of positive or otherwise mitigating facets of Lucas' character and background.

This Court itself has concluded that "[e]vidence intended to create a reasonable doubt as to the defendant's guilt is not relevant to the circumstances of the offense. . . ." (*In re Gay* (1998) 19 Cal.4th 771, 814 (emphasis added)), and absent some explicit instruction to the contrary, it is reasonably probable that the jury would have reached the same conclusion. Hence, crucial defense evidence, such as Johnny Massingale's confession and the suggestive identification procedures in the Santiago case were excluded

from the jurors' penalty phase consideration of lingering doubt because such evidence was not a "circumstance of the offense."

Nor did counsel's penalty phase argument cure the prejudice. Here, the jury had already heard the arguments and original penalty phase instructions when it expressed its confusion. Hence, as a matter of established fact, the defense argument on lingering doubt did not clarify the jurors' instructional confusion.

In this context, Judge Hammes' supplemental instruction became the defining admonition by which the jurors were governed. Because the previous argument and instructions left the jurors confused, the supplemental instruction functioned as a de novo explanation of the matter, and must stand alone for purposes of appellate review.[1436]

Accordingly, it must be presumed that the jurors followed the supplemental instruction and did not consider crucial lingering doubt evidence, such as Massingale's confession and the suggestive identification procedures. "Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones."

[1436] Moreover, there is a particular danger of undue emphasis with supplemental instructions. "Supplemental instructions should be carefully framed and tendered to counsel. [Citation.] The last words a jury hears may be those which are best remembered." (O'Malley, Grenig & Lee, *Federal Practice and Instructions* 9:03 [Communication Between Court And Jury] pp. 597-98 (West, 5th ed. 2000); see also *People v. Thompkins* (1987) 195 Cal.App.3d 244, 255; *Powell v. United States* (9th Cir. 1965) 347 F.2d 156, 158, fn 3.)

It is also important that the judge admonish the jurors to not give undue emphasis to the supplemental instruction. (See *Davis v. Erickson* (1960) 53 Cal.2d 860, 863-64; see also United *States v. Meadows* (5th Cir. 1979) 598 F.2d 984, 990.)

(*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v. Hardy* (1992) 2 Cal.4th 86, 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324-25, fn 9.) For the same reasons, it must be presumed that the jurors did not consider guilt phase mitigating evidence such as Lucas' acts of kindness to others, business acumen and drug problems because such evidence was not part of the circumstances of the crimes.

D. The Error Violated State Law And The Federal Constitution

Under California law the jurors must be permitted to consider lingering doubt in making their penalty decision. (See § 7.6.1(C), p. 1637 above, incorporated herein.) Moreover, because lingering doubt was a major defense theory at the penalty trial, withdrawing the evidence supporting that theory from the jurors' consideration violated both state law and the federal constitution. The defendant's right to jury consideration of defense theories and defense evidence is predicated on the Due Process, Jury Trial, Compulsory Process, Confrontation, and Representation of Counsel Clauses of the Sixth and Fourteenth Amendments of the federal constitution. (See generally *Mathews v. United States* (1988) 485 U.S. 58, 63; *People v. Gurule* (2002) 28 Cal.4th 557, 660; *Bennett v. Scroggy* (6th Cir. 1986) 793 F.2d 772, 777-79; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 741; *United States v. Hicks* (4th Cir. 1984) 748 F.2d 854.) Furthermore, improper exclusion of a defense theory and defense evidence in a capital case violates the Eighth and Fourteenth Amendments of the federal constitution. (See generally, *Lockett v. Ohio, supra*; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Beck v. Alabama*

(1980) 447 U.S. 625; *Penry v. Johnson* (2001) 532 U.S. 782.)

Additionally, the error violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas' state created right to juror consideration of all mitigating evidence, including lingering doubt. (*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.)

Finally, by precluding the jurors from considering guilt phase mitigating evidence relating to Lucas' acts of kindness, business acumen and drug problems, the supplemental instruction violated the Eighth Amendment of the federal constitution. (See *Lockett v. Ohio*, *supra*; *Skipper v. South Carolina*, *supra*; *Penry v. Johnson*, *supra*.)

E. 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 Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1437] the prosecution cannot meet its burden of demonstrating that the error was harmless.

Moreover, the error was especially prejudicial as to counsel's lingering doubt vis-á-vis Jacobs. (See RTT 13302-04.) The Jacobs case was closely balanced. (See Volume 2, § 2.3.1(I)(2), pp. 209-11, incorporated herein.) Although the jurors convicted Lucas on those counts, they may have had

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[1437] See § 7.5.1(J)(3)(a), pp. 1619-20 above, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

lingering doubt as to his guilt. However, a key ingredient of that lingering doubt would have been Johnny Massingale's confession. (*Ibid.*) Because the judge's final supplemental instruction precluded consideration of such evidence, the instruction was devastatingly prejudicial.

Accordingly, the death judgment should be reversed.

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.5

AFTER RECEIVING NOTICE THAT A JUROR'S FATHER HAD DIED, THE JUDGE ERRONEOUSLY FAILED TO DETERMINE WHETHER THE JUROR COULD CONTINUE TO FULFILL HER DUTIES

A. Procedural Background

On the afternoon of Monday, July 24, 1989 – shortly after deliberations commenced anew with the substituted alternate juror – Juror P.W.[1438] sent out the following note (CT 24259):

> Dear Judge Hammes
>
> Last Saturday my father passed away. My mother and him [sic] were away on vacation and he had a fatal heart attack. I will need to attend his funeral sometime this week.
>
> The details are not clear, because as of yet my mom hasn't returned home yet. I've talked to her and she'll return today. I know the funeral will be sometime this week, as soon as I'm sure I'll let you know.
>
> Thank you
> Juror P.W.

The minutes stated that this note was "re: scheduling." (CT 5594.) Counsel was not notified about the note. (CT 5594.)[1439] An hour after Juror

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[1438] To respect the jurors' privacy, only their initials will be used throughout this brief.

[1439] The judge had indicated that counsel would be notified if juror notes were received. (RTT 13628.)

P.W.'s note was sent out, the jury was excused and ordered to return the next day. (CT 5594.)

The next morning, Tuesday July 25, 1989, at 10:39 a.m., two additional juror notes were received. The minutes stated that these notes were also "re: scheduling." (CT 5595.) One of these notes was from the foreperson and asked that the jury not meet on Friday due to the foreperson's prior commitment and because it "may be good for the jurors to have an extra day off."[1440] The second note asked for the jury to be excused at 3:00 p.m. on Thursday, July 27, because of another juror's prior commitment.[1441]

[1440] The full text of this note was as follows (CT 24260.):

Your Honor:

May I be excused on Friday the 28th of July from jury duty if we are still meeting at that time.

Last week I felt that our deliberations would be at an end by the 28th of July and I told my wife that she could make plans for us to go north for the weekend. Consequently she's made reservations etc. for the coming weekend, and now because of the change in the jury I feel we may still be deliberating. I would appreciate it if I may be excused on Friday and actually by Friday it may be good for the other jurors to have an extra day off.

Thank you
Juror B.P.
7/25/89 9:30 a.m.

[1441] The full text of this note was as follows (CT 24261):

My husband and I have certificates for a balloon ride that we received in December, 1988. These expire this month. [¶] Several weeks ago I arranged to take these flights on July 27.

(continued...)

Following receipt of these two notes, the minutes state that counsel were "notified of the notes." (CT 5595.) The minutes also state that counsel agreed that the jury need not deliberate on Friday, July 28. (CT 5595.) Because this agreement was apparently made outside of court, over the telephone, there is no Reporter's Transcript of the proceeding.

At 11:10 a.m. the foreperson sent out another note (CT 24262) which stated:

> Your Honor:
>
> P. W.'s father's funeral is Friday and she would like to be excused on that day.
>
> Juror B.P.

The minutes state that this note also was "re: scheduling." (CT 5595.) The record does not state whether counsel were telephonically informed of this note. (CT 5595.)

The jury continued to deliberate for the rest of Tuesday, July 25, all of Wednesday, July 26 and on Thursday, July 27 until 2:47 p.m. at which time they were excused until Monday, July 31, 1989. (CT 5595-98.)

[1441](...continued)

> I therefore request a 3 p.m. dismissal on Thursday, July 27.
>
> Thank you.
> Juror S.B.

[This note was also signed by jury foreman B.P.].)

B. When Given Notice That Good Cause To Discharge A Juror May Exist, The Trial Court Has A Sua Sponte Obligation To Determine Whether The Juror Should Be Discharged

"Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty to 'make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." [Emphasis added.] (*People v. Espinoza* (1992) 3 Cal.4th 806, 821; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1029; *People v. Barnett* (1998) 17 Cal.4th 1044, 1117; *People v. Davis* (1995) 10 Cal.4th 463, 547; *People v. Burgener* (1988) 41 Cal.3d 505, 520.) The judge's ruling on the question is reviewed for an abuse of discretion. It is for the judge to decide ". . . what specific procedures to employ. . . ." (*People v. Beeler* (1995) 9 Cal.4th 953, 989 [no obligation to conduct a hearing where judge determined that juror could continue based on the juror's "demeanor" and the absence of a request for discharge]; but see dissenting opinion of Mosk and Kennard and concurring opinion of Baxter.)

However, regardless of what specific procedure the judge chooses, the court is obligated to make an inquiry and determine whether the juror is capable of continuing deliberations. (*People v. Beeler*, *supra*.) Such a determination cannot be made by default. A sound exercise of judicial discretion requires that "all the material facts . . . be both known and considered. . . ." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; see also *People v. Jordan* (1986) 42 Cal.3d 308, 316; *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897-98; *Harris v. Superior Court* (1977) 19 Cal.3d 786, 796; *People v. Giminez* (1975) 14 Cal.3d 68, 72; *People v. Rist* (1976) 16 Cal.3d 211, 219; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65; *Gossman v. Gossman* (1942) 52 Cal.App.2d 184, 195, 9 Witkin, *Cal.*

Procedure, Appeal, § 358, pp. 406-08.) Hence, if a trial judge fails to engage in a "reasoned exercise of judgment," then there is an erroneous failure to exercise judicial discretion. (*People v. Crandell* (1988) 46 Cal.3d 833, 862.)

C. The Death Of A Juror's Parent Is Sufficient Cause To Trigger The Court's Duty To Exercise Its Discretion

This Court has recognized that the death of a juror's parent during deliberations may be good cause to discharge the juror: "The death of a juror's parent constitutes good cause to discharge the juror if it affects the juror's ability to perform his or her duties." [Citations.] (*People v. Cunningham*, *supra*, 25 Cal.4th at 1029.) "The trial court performed its duty to make reasonable inquiry, determining that by reason of her distress over, and need to visit, her dying father, Juror Ne. was unable to fulfill her duties as a juror." (*Ibid.*)

Hence, the death of a juror's parent should trigger the trial judge's duty to engage in a reasoned exercise of discretion to determine whether the death will affect the juror's ability to perform his or her duties. (*People v. Espinoza*, *supra*, 3 Cal.4th at 821.)

D. In The Present Case Judge Hammes Failed To Exercise Any Discretion With Respect To Juror P.W.

In the present case, because the death of Juror P.W.'s father was considered to be a "scheduling matter," Judge Hammes never exercised her discretion to determine Juror P.W.'s ability to continue deliberating. (Cf., *People v. Burgener* (1986) 41 Cal.3d 505, 519-20 [failure to conduct good cause hearing re: juror misconduct was an "abuse of discretion"]; *People v. Pierce* (1979) 24 Cal.3d 199, 209 [failure to conduct inquiry into potential juror misconduct]; *People v. McNeal* (1974) 90 Cal.App.3d 830 [same].)

Because there "is no evidence that [Judge Hammes] engaged in a reasoned exercise of judgment based on an examination of the particular circumstances of this case . . . [t]he failure to exercise discretion was error." (*People v. Crandell*, *supra*, 46 Cal.3d at 862; see also *People v. Bigelow*, *supra*, 37 Cal.3d at 743.)

E. The Judge's Failure To Determine Juror P.W.'s Ability To Deliberate Violated Lucas' Federal Constitutional Rights

"Due process means a jury capable and willing to decide the case *solely* on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217, italics added.) The jury "must stand impartial and indifferent;" its "verdict must be based upon the evidence developed at the trial," and may not be influenced by any other external consideration. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727.) Indeed, at the penalty phase there is a "heightened 'need for reliability in the determination that death is the appropriate punishment' [Citations]" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340), and for "the responsible and reliable exercise of sentencing discretion." (*Id.* at 329.)

In the present case, the events surrounding the death of Juror P.W.'s father were potentially "prejudicial occurrences." (*Smith v. Phillips*, *supra*, 455 U.S. 209, 217; see also *People v. Cunningham*, *supra*.) Hence, Judge Hammes' failure to determine the impact of this prejudicial occurrence violated the Eighth Amendment by failing to assure "the responsible and reliable exercise of sentencing discretion." (*Caldwell v. Mississippi*, *supra*, 472 U.S. at 329.) The trial judge's failure to exercise her discretion unacceptably increased the risk that the jury would not decide the case in a

manner satisfying the heightened need for reliability required by the Eighth Amendment in capital sentencing.

Moreover, to the extent that Juror P.W. may have been impaired in her ability to properly perform her duties as a juror, Lucas' Sixth Amendment right to fair trial by jury was violated. (See *Morgan v. Illinois*, *supra*, 504 U.S. 719.)

F. An Error Which Adversely Impacts A Juror's Ability To Deliberate Fairly Undermines The Structure Of The Trial And Is Reversible Per Se

Because the error impacted the entire sentencing proceeding structural error was committed, and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

G. If Not Structural, The Error Is Reversible Under Both The State And Federal Standards Of Prejudice

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1442] the prosecution cannot meet its burden of demonstrating that the error was harmless.

Moreover, the fact that the juror did not request to be dismissed does

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[1442] See § 7.5.1(J)(3)(a), pp. 1619-20 above, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

not satisfy the prosecution's burden under *Chapman*. The ultimate determination of juror fitness to fairly deliberate must be made by the judge, not the juror. (See e.g., *People v. Crandell*, *supra* [juror discharged even though she agreed to continue serving].)[1443]

[1443] Nor is *People v. Beeler*, *supra*, to the contrary. The majority opinion in *Beeler* relied in part upon the juror's failure to request discharge or to otherwise object, holding that the trial court did not abuse its discretion. Hence, no error was found in *Beeler*.

By contrast, in the present case, the trial judge erred by failing to exercise her discretion at all. *Beeler* did not hold that such an error may be found harmless solely because the juror did not request discharge.

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.6

THE JUDGE'S DISPOSITION OF THE JUROR NOTES REGARDING THE DEATH OF JUROR P.W.'S FATHER, WITHOUT NOTIFYING LUCAS OR HIS COUNSEL OF THE NOTES OR PERMITTING LUCAS TO BE HEARD ON THE MATTER, VIOLATED LUCAS' RIGHTS TO COUNSEL, TO DUE PROCESS, AND TO A FAIR AND RELIABLE CAPITAL SENTENCING PROCEEDING

A. Neither Lucas Nor His Counsel Were Given Notice That The Juror's Father Had Died

During the penalty deliberations Juror P.W. sent out a note informing the judge that P.W.'s father had died and that she would have to attend the funeral sometime later that week.[1444] The clerk's minutes stated that this note concerned "scheduling." Counsel were not notified about this note, apparently because it did not involve any specific scheduling request. (CT 5594.)

[1444] The note read as follows (CT 24259):

> Dear Judge Hammes
>
> Last Saturday my father passed away. My mother and him were away on vacation and he had a fatal heart attack. I will need to attend his funeral sometime this week.
>
> The details are not clear, because as of yet my mom hasn't returned home yet. I've talked to her and she'll return today. I know the funeral will be sometime this week, as soon as I'm sure I'll let you know.
>
> Thank you
> Juror P.W.

The next morning specific scheduling requests from two other jurors were received, asking that the jury be excused at 3:00 p.m. on Thursday, July 27, 1989 and all day on Friday, July 28, 1989.[1445] Neither of these scheduling requests involved Juror P.W. or mentioned the death of her father. (CT 24260-61.)

[1445] The full text of the note dated July 25, 1989 at 9:30 a.m. was as follows (CT 24260):

> Your Honor:
>
> May I be excused on Friday the 28th of July from jury duty if we are still meeting at that time.
>
> Last week I felt that our deliberations would be at an end by the 28th of July and I told my wife that she could make plans for us to go north for the weekend. Consequently she's made reservations etc. for the coming weekend, and now because of the change in the jury I feel we may still be deliberating. I would appreciate it if I may be excused on Friday and actually by Friday it may be good for the other jurors to have an extra day off.
>
> Thank you
> Juror B.P.

The full text of the second note was as follows (CT 24261):

> My husband and I have certificates for a balloon ride that we received in December, 1988. These expire this month.
>
> Several weeks ago I arranged to take these flights on July 27.
>
> I therefore request a 3 p.m. dismissal on Thursday, July 27.
>
> Thank you.
> Juror S.B.

(The second note was also signed by jury foreman B.P.)

The clerk's minutes state that counsel were called after receipt of the two notes on the morning of Wednesday, July 26th, 1989. However, there was no reference in the minutes to any specific topic of discussion other than the scheduling "agreement" to excuse the jury, as requested, on Friday, July 28, 1989. (CT 5595.)

It was not until after the scheduling agreement regarding Friday was made that a second note regarding Juror P.W. was received. This note, which was written by the foreperson, also requested excusal on Friday.[1446] (Apparently the foreperson had not yet been informed of the earlier agreement to excuse the jury on Friday.) Therefore, as to scheduling, this second note was moot and the minutes do not reflect that anyone was called regarding this note.

In sum, a fair reading of the record demonstrates that: (1) counsel were not informed of the first note concerning the death of Juror P.W.'s father, since it was not a specific scheduling request, and (2) counsel were not informed about the second such note because the scheduling request in that note was moot at the time it was received.

B. The Error Violated Lucas' Federal Constitutional Rights To Counsel, To Due Process And To A Fair And Reliable Capital Sentencing Proceeding

A criminal defendant's right to counsel is guaranteed by the Sixth and

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[1446] The full text of that note was as follows (CT 24262):

> Your Honor:
> Juror P.W.'s father's funeral is Friday and she would like to be excused on that day.
>
> Juror B.P.

Fourteenth Amendments to the federal constitution. (See *Perry v. Leeke* (1989) 488 U.S. 272, 278-79; *Penson v. Ohio* (1988) 488 U.S. 75, 88; *United States v. Cronic* (1984) 466 U.S. 648, 659 [the right to counsel applies to every critical stage. . .].) A stage of the proceedings is considered a critical one if the absence may have affected the substantial rights of the defendant. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1137; see also *United States v. Wade* (1967) 388 U.S. 218, 224-26.) Certainly the proceeding concerning Juror P.W. could have affected Lucas' substantial rights; P.W. was a deliberating juror who could have been substantially impaired.

Not only was Lucas denied counsel, he was given no notice and denied any opportunity to be heard (via counsel or in person) — which was a basic violation of due process. Failing to notify either counsel or Lucas on such an issue, or to afford Lucas an opportunity to be heard, undermined Lucas' due process and 8th Amendment right to a fair, reliable sentencing proceeding.

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

C. The Denial Of Counsel In The Present Case Was Constitutional Error Because It Happened At A Crucial Stage Of The Proceedings Which May Have Affected Lucas' Substantial Rights

The denial of counsel during juror deliberations violates the state (Art. I, § 15) and federal (6th and 14th Amendments) constitutions if the absence may have affected the substantial rights of the defendant. (See *Mempa v. Rhay* (1967) 389 U.S. 128, 134; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712; *People v. Horton* (1995) 11 Cal.4th 1068, 1137; *People v. Dagnino* (1978) 80 Cal.App.3d 981, 988.) The assistance of counsel at this stage is crucial due to "the fundamental nature of the right and its relation to a fair trial. . . ." (*People v. Hogan* (1982) 31 Cal.3d 815, 849; see also *Perry v. Leeke* (1989) 488 U.S. 272, 278-79; *Penson v. Ohio* (1988) 488 U.S. 75, 78.)

When Juror P.W.'s father died, the jurors were at a critical point in their penalty phase deliberations. The jurors were obviously having difficulty reaching an agreement and, earlier had declared themselves hopelessly deadlocked. (See Volume 6, § 6.1(B)(1), pp. 1375-76, incorporated herein.) One juror had been discharged for misconduct and an alternate had just been sworn in. The jury had been instructed to begin deliberations anew. (See Volume 6, § 6.1(B)(1), pp. 1375-76, incorporated herein.)

Under these circumstances Juror P.W.'s ability to fulfill her duties as a juror was a crucial issue which may have affected Lucas' substantial rights. (See generally *Morgan v. Illinois*, *supra*; *Caldwell v. Mississippi*, *supra*; *Smith v. Phillips*, *supra*.) Hence, the failure to notify counsel about the death of Juror P.W.'s father violated Lucas' state (Art. I, § 15) and federal (6th and 14th Amendments) constitutional rights to counsel. A criminal defendant's right to counsel is guaranteed by the Sixth and Fourteenth Amendments to the federal constitution. (See *Perry v. Leeke*, *supra*, 488 U.S. at 278-79; *Penson*

v. Ohio, supra, 488 U.S. at 88; *United States v. Cronic* (1984) 466 U.S. 648, 659 [the right to counsel applies to every critical stage. . .].)

D. Under The Federal Constitution The Denial Of Counsel Was Reversible Error Per Se

Under the federal constitution the denial of counsel at a critical stage of the trial is reversible per se. When a criminal defendant is denied counsel at a critical stage of the proceedings it constitutes a structural error which makes the trial presumptively unfair, and requires automatic reversal. (See *United States v. Cronic* (1984) 466 U.S. 648, 659; see also *Frazer v. United States* (9th Cir. 1994) 18 F.3d 778, 781-82; *Johnson v. United States* (1997) 520 U.S. 461, 469.) "*Cronic* and its progeny . . . stand for the proposition that the actual or constructive denial of counsel at a critical stage of a criminal trial constitutes prejudice per se and thus invalidates a defendant's conviction." (*Curtis v. Duval* (1st Cir. 1997) 124 F.3d 1, 4; see also *Perry v. Leeke, supra*, 488 U.S. at 278-79; *Penson v. Ohio, supra*, 488 U.S. at 88.)

This applies to denials of counsel for portions of a critical stage, as long as they are important to the trial. (See *Geders v. United States* (1976) 425 U.S. 80, 88-90 [overnight recess]; *Herring v. New York, supra*, 422 U.S. 853 [closing argument]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-13 [nullifying counsel's ability to determine point in defense case when defendant would testify] [cases cited in *Perry v. Leeke, supra*, 488 U.S. at 280].) This follows from the long established law that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." (*Powell v. Alabama* (1932) 287 U.S. 45, 69.) Without it, the right to counsel is denied.

E. Under The State Constitution The Denial Of Counsel Raised A Presumption Of Prejudice Which Cannot Be Rebutted

California cases have held that the denial of counsel during deliberations is presumed to be prejudicial if the defendant's substantial rights are affected. (*People v. Horton*, *supra*, 11 Cal.3d 1068, 1135-37.) "Only the most compelling showing to the contrary will overcome the presumption." (*Id.* at 1137) In the present case, such a compelling showing cannot be made because the record does not show how her father's death impacted Juror P.W.

Furthermore, the due process and Eighth Amendment reliability violations were also prejudicial. Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1447] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1447] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.7

THE PRESENCE OF INADMISSIBLE PREJUDICIAL EVIDENCE IN THE JURY ROOM THROUGHOUT THE PENALTY DELIBERATIONS CREATED A PRESUMPTION OF PREJUDICE WHICH WAS NOT REBUTTED

A. Procedural Background

Because the jury acquitted on the Garcia count, and could not reach a verdict on the Strang/Fisher charges, the judge ruled that the jurors could not consider the evidence from those charges at the penalty trial. (RTT 13441.) Accordingly, the jury was instructed not to consider those charges. (CT 14373; 14401; 14403.)

However, at the outset of penalty deliberations, no effort was made to redact or remove any of the Garcia or Strang/Fisher exhibits. Hence, all of the guilt phase exhibits which had been sent into the jury room during the guilt trial remained there throughout the penalty trial. (RTT 13457.)

After receipt of the jurors' penalty phase note concerning whether the guilt phase evidence could be considered at penalty, the defense voiced its concern that the province of the jury not be invaded. (RTT 13458.) In light of these concerns the defense opposed removing the Garcia and Strang/Fisher exhibits at that time. (RTT 13458-59.)

However, once the judge decided to specifically instruct the jurors concerning consideration of the guilt phase exhibits, the defense voiced its concern about undue emphasis of the Garcia and Strang/Fisher evidence. (RTT 13483-84.) Nonetheless, the judge foreclosed any redaction or removal

of the exhibits by ruling:

> The fact of the matter is there is no question in my mind that this would be a matter of defense appeal, and the – both sides, I think, have admitted the fact that it would be literally impossible to go through there and separate out all the little pieces that relate to Garcia and Strang/Fisher.
>
> The best that I can do under the circumstances, and I think the appropriate thing to do is to – advising them of the things they have access to remind them that they do not have access to consideration of any of those things that relate to any of those two cases, and I think that is sufficient and I think it's important that that be done. (RTT 13484:24-13485:7.)

Accordingly, during the entire penalty deliberations, and at the time the jurors ultimately voted to impose a sentence of death, the jurors had in their possession inflammatory extraneous evidence.

B. The Juror Consideration Of Extrinsic Evidence Violated The Federal Constitution

Juror consideration of extrinsic evidence violated Lucas' federal constitutional rights to due process, trial by jury, confrontation, and representation of counsel and verdict reliability as guaranteed by the Sixth, Eighth and 14th Amendments.

The Supreme Court has held that a defendant has a right to trial by an impartial jury and that, "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-73; see also *Parker v. Gladden* (1966) 385 U.S. 363, 364-65; *Marshall v. United States* (1959) 360 U.S. 310; *People v. Karis* (1988) 46

Cal.3d 612; *Marino v. Vasquez* (9th Cir. 1987) 812 F.2d 499; cf., *Tanner v. United States* (1987) 483 U.S. 107 [juror consideration of extraneous evidence may impeach the verdict].) To safeguard a defendant's constitutional rights, the exposure of a jury to extrinsic information has been "deemed presumptively prejudicial." (*Remmer v. United States* (1954) 347 U.S. 227, 229; see also *People v. Zapien* (1993) 4 Cal.4th 929, 944; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108.)

Furthermore, the jurors' consideration of extrinsic evidence violated Lucas' due process rights, which are guaranteed by the Fourteenth Amendment of the federal constitution. "Due process means a jury capable and willing to decide the case *solely* on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217, italics added.) At the penalty phase, as well as the guilt phase of a capital trial, the jury "must stand impartial and indifferent;" its "verdict must be based upon the evidence developed at the trial," and may not be influenced by any other external consideration. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727.)

Moreover, the error also undermined the reliability of the penalty verdict in violation of the Eighth Amendment. At the penalty phase of a capital trial there is a "heightened 'need for reliability in the determination that death is the appropriate punishment' [Citations]" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340), and for "the responsible and reliable exercise of sentencing discretion." (*Id.* at 329; *Beck v. Alabama* (1980) 447 U.S. 625, 627-46.)

Finally, because the error arbitrarily denied Lucas' state created right

to a fair, impartial and unfettered trial by jury, it violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. United States* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. Juror Exposure To Extrinsic Evidence Creates A Presumption Of Prejudice

"Juror consideration of extraneous evidence "creates a presumption of prejudice." (*People v. Mincey* (1992) 2 Cal.4th 408, 467; see also *People v. Hogan* (1982) 31 Cal.3d 815, 846; *People v. Boyd* (1979) 95 Cal.App.3d 577, 586; *People v. Kitt* (1978) 83 Cal.App.3d 834, 849-851.) This presumption of prejudice may be rebutted only by "proof that no prejudice actually resulted. [Citation.]" (*People v. Honeycutt* (1977) 20 Cal.3d 150, 156.) Unless the presumption of prejudice is rebutted, the accused is entitled to a new trial regardless of the probability that a more favorable verdict would have resulted absent the error. (*People v. Pierce* (1979) 24 Cal.3d 199, 206-207.) Therefore, the determinative issue is whether there is evidence which rebuts the presumption that a new trial is necessary. To make this determination the reviewing court should consider (1) whether the evidence was inherently <u>not</u> prejudicial and (2) whether the limiting instruction was sufficient to rebut the presumption. (*People v. Hogan*, *supra*, 31 Cal.3d at 846.)

D. The Presumption Of Prejudice Was Not Rebutted In The Present Case

Judge Hammes assumed that an instruction to not consider the inadmissible evidence would be sufficient. However, the instruction did not rebut the presumption of prejudice for several reasons.

First, it has been generally recognized that even a full and forceful admonition may, in some circumstances, be inadequate "to overcome the substantial danger of undue prejudice . . . ." (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.) For example, the following cases have held admonitions to be insufficient: *United States v. Figueroa* (2nd Cir. 1980) 618 F.2d 934, 943; *United States v. Schiff* (2nd Cir. 1979) 612 F.2d 73, 82; *People v. Gibson* (1976) 56 Cal.App.3d 119, 129 [other crimes evidence]; *People v. Matteson* (1964) 61 Cal.2d 466, 469-7; *People v. Johnson* (1964) 229 Cal.App.2d 162, 170 [opinion of police officer that defendant was guilty]; *People v. Roof* (1963) 216 Cal.App.2d 222, 225 [prior charge]; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 ["ex-convict"]; *People v. Figuieredo* (1955) 130 Cal.App.2d 498, 505-06 [defendant "did time"]; *People v. Hardy* (1948) 33 Cal.2d 52, 61-62; *People v. Wagner* (1975) 13 Cal.3d 612.)

Here, the jurors were given the impossible task of reviewing and considering all the exhibits, while blocking the Garcia and Strang/Fisher exhibits from their minds. For example, one exhibit was a chart showing close-up photos of the throat slashing suffered by each victim. (Trial Exhibit 29.) Other inflammatory exhibits included an anatomical chart of the neck and throat with plastic overlays for Rhonda Strang, Amber Fisher and Gayle Garcia (Trial Exhibits 30, 30A, 30B and 30C); Gayle Garcia's pants (Trial Exhibit 132); color blowup photos of her pants and the wipe mark stain on them (Exhibits 669; 670A-H; 671-679); a diagram of Rhonda Strang's residence with plastic overlays depicting the bodies of Strang and Fisher (Trial Exhibits 182 and 182A). It was not humanly possible for the jurors to look at these exhibits and not be influenced by the pictures of the three victims, including one young child.[1448]

[1448] At least one juror had verbalized the decisive impact that a child-
(continued...)

Second, the admonition referred only to the evidence in Garcia and Strang/Fisher. (CT 14266, 14373.) This did not preclude the jurors from considering their conclusions about Lucas' guilt in Strang/Fisher. (See § 7.5.3(F), pp. 1631-34 above, incorporated herein.)

Third, in the present case, Judge Hammes gave a special supplemental instruction calculated to encourage the jurors to examine and consider the guilt phase exhibits. (See § 7.7.2, pp. 1678-90 above, incorporated herein.)

In sum, the presumption of prejudice has not been rebutted in the present case, and the judgement should be reversed.

E. Even Without The Presumption Of Prejudice The Judgment Should Be Reversed

Even without considering the presumption of prejudice, the death sentence should be reversed. Because the error here violated the federal constitution, it requires reversal unless the prosecution shows it to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1449] the prosecution cannot meet its burden of demonstrating that the error was harmless.

Accordingly, the penalty judgment should be reversed.

[1448](...continued)
victim would have on her sentencing verdict. (See § 7.5.1(B)(1), pp. 1603-04 above, incorporated herein [Juror S.B.].)

[1449] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.8

THE JUDGE IMPROPERLY ALLOWED THE JURORS TO READ SELECTED TRIAL TRANSCRIPTS IN THE JURY ROOM

A. Introduction

When a deliberating jury asks for specific trial testimony, the procedures used to convey the testimony to the jury are critically important. By asking for the testimony the jurors have identified matters which could influence their ultimate verdict. Hence, it is imperative for the trial judge to closely supervise the procedure and assure both that the requested testimony is fully considered and that no undue emphasis or other prejudice results from the procedure.

However, in the present case, the judge erroneously and prejudicially abdicated her duty to supervise by simply sending redacted transcripts into the jury room, in lieu of having the testimony read to the jurors. Furthermore, the judge failed to give the jurors any special directions or cautionary instructions regarding their use of the transcripts. Therefore, the judgment should be reversed.

B. Procedural Background

Prior to the commencement of deliberations the judge informed counsel that, in response to a jury request to rehear testimony,[1450] she would propose the following procedure:

[1450] The jury was given a list of witnesses (Court Exhibit 30). (RTT 11464:8-22.)

> The Court: If they come back and should want to have testimony, [the court reporter] has indicated that she could get them in the transcripts and cull out those portions of the transcripts that would contain our jury room conferences. So we could just have that run off and give it into the jury room upon their request.
>
> My suggestion would be that rather than calling all counsel and the defendant back here every time there is a request such as that, that we call you immediately and tell you which portions are being asked, and there we tell you that we're going to prepare that and give it into the jury room and which pages particularly we're going to be giving so that if they ask for a certain witness' entire testimony, for instance, then we just ship it in.
>
> If they ask for something unusual like part of a testimony or anything that's less than the full testimony of so and so, John Doe, then I think it would be appropriate to call you all in and then you can discuss it whether that's appropriate to give them portions or not anything unusual.
>
> What do you think? (RTT 12177:9-28.)

Defense counsel initially did not specifically agree or object to the proposal. Mr. Feldman suggested using a conference call system, but the judge rejected that (RTT 12178:10-19) and further rejected his request that the judge "communicate" with counsel before responding to the jury's request:

> Mr. Feldman: You would communicate with us anyway, though, . . .
>
> The Court: No. What I would do is call your offices. If you're not there, I just leave a message. That's – or have [the court clerk] leave a message and say 'The entirety of Mr. So and So's testimony has been requested. We're supplying it and these are the pages.' That's what I would intend to do. (RTT 12178:20-27.)

The prosecutor agreed to this procedure (RTT 12178), but defense counsel continued to express reservations about the proposal. (RTT 12179:9-20; 12180-82.) The session ended with the prosecutor, but not the defense,

agreeing to the judge's proposed procedure. (RTT 12182:3-6.)

The judge broached the issue again shortly after the guilt phase deliberations commenced, announcing:

> . . . [I]f the jury comes back and says 'we want to see the testimony, the direct examination of witness John Doe,' the plan is that I will go ahead and have [the reporter] do the transcript of the entire [testimony] of John Doe and send it in and call you immediately. Agreed? (RTT 12226.)

The prosecutor agreed with this proposal, but the defense stated its preference to have the reporter read the testimony. Defense counsel expressed the concern that by sending in the bare transcript "there is no assurance that everything will get done as the court and counsel intended [it] be done, and if the reporter reads it, then the defense is comfortable that it will all get done." (RTT 12226:11-23.) The court firmly denied the defense request:

> . . . [I] am not going to make them sit there and listen to stuff they have not asked for because I have seen fit to do it. That I won't do. This is now the jury's prerogative. They said they want certain portions of the testimony. I will give them all of that person's testimony and then they can pick out what it is that they want to do. I don't think it's fair any other way. (RTT 12227:9-15.)

However, the court did give the reporter the option of reading the testimony to the jury if that would be faster than creating a redacted transcript. (RTT 12227:18-22.)

The court further ruled that the jury would be supplied with one copy of the transcript and "then they can have one person read it, if they want, out loud to everybody." (RTT 12227.)

On June 12, 1989, shortly after the commencement of jury deliberations, the jury requested a transcript of the testimony of prosecution

handwriting comparison experts David Oleksow and John Harris. (RTT 12232.)[1451] In accordance with her prior ruling, the trial judge ordered that the reporter prepare the entire transcript of the two witnesses, "absent the in limine discussions . . . and then just hand them the transcripts." (RTT 12233.) Thereafter, the judge reaffirmed her ruling that the transcripts would be sent into the jury room and would not be read aloud to the jurors. (RTT 12336.)

Subsequently, the jury requested and presumably received[1452] additional transcripts as follows:

June 15, 1989, the jury requested and presumably received the testimony of Michelle Tortorelli (1/24/89); John Simms (1/25/89, 4/25/89, 5/22/89); James Bailey (1/25/89, 1/26/89). (CT 5559.)[1453]

[1451] This testimony concerned the most crucial issue in the Jacobs case: the comparison of the Lucas printing with the printing on the Love Insurance note.

[1452] There is no actual record of how, or when, (or if) the requested transcripts were given to the jurors. The first juror request, for Oleksow and Harris testimony, was discussed on the record, with the judge ruling that they would "send the transcripts in" after they were prepared and redacted by the reporter. (RTT 12236.)

As to the other guilt trial jury requests for testimony, there was no discussion on the record. The minute orders reflect receipt of the note and then state: "Requested transcripts are to be sent to the jury. . ." (CT 5559; 5560) or "transcripts will be sent into the jury." (CT 5560.) However, except for a corrected page (CT 5561), there is nothing recording or memorializing the actual transmission of the transcripts to the jury.

[1453] The testimony of Michelle Tortorelli concerned her work as a program coordinator for New Horizons residence housing, which was affiliated with the Salvation Army where Lucas resided for a time in 1979 and the house rules for residents. (RTT 1954-66.) This testimony was relevant to the issue of opportunity in Jacobs. It was also relevant to the Massingale third

(continued...)

June 16, 1989, the jury requested, and presumably received, the following testimony: Margaret Harris (1/3/89); Frederick Edwards (1/4/89); Edward Fairhurst (1/4/89); David Daywood (4/19/89); Leigh Emmerson (1/23/89, 1/24/89); Pat Stewart (1/17/89, 1/19/89); John Torres (1/19/89, 1/23/89); Fran Van Herreweghe (1/24/89).[1454] (CT 5560.) On June 19, 1989,

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[1453](...continued)
party guilt defense theory, since Massingale also stayed at the Salvation Army and could have obtained Lucas' clothing containing the Love Insurance note there. (See Volume 2, § 2.4.2(C)(3), pp. 342-44, incorporated herein.)

The testimony of John Simms concerned his examination of the hair evidence collected at the Jacobs scene, as well as samples collected from Lucas, Massingale, and Oberle (RTT 2100-41; 2143-75; 2180-99; 8667-77; 8679-81; 10734-46) and work with boots and bootprints. (RTT 8677-79; 8689-92.)

The testimony of James Bailey concerned his examination of the hair evidence collected at the Jacobs scene, as well as samples collected from Lucas. (RTT 2200; 2253.)

[1454] The testimony of Margaret Harris concerned Suzanne Jacobs' daily habits, the maroon sports car (MG) she saw in the Jacobs' driveway the morning of the murders, the discovery of the Jacobs' bodies, and the bloody footprints in the house. (RTT 172-245.)

The testimony of Frederick Edwards concerned the Jacobs crime scene, specifically the bloody footprints and their appearance, and his route through the house. (RTT 261-274.)

The testimony of Edward Fairhurst concerned the bloody footprints, his route through the Jacobs crime scene, and whether his boots had the type of sole that matched the bloody prints. (RTT 246-260.)

The testimony of David Daywood concerned whether he had used vibram soles when he resoled Fairhurst's boots in April, 1979. (RTT 8173-8178.)

The testimony of Leigh Emmerson concerned the examination of Jacobs crime scene latent prints, examination and description of the print on the Love Insurance note, and departmental policy concerning preserving prints which had been treated with ninhydrin. (RTT 1796-1861.)

(continued...)

a corrected copy of a page from the transcript of Frederick Edwards was sent to the jury and counsel was notified. (CT 5561.)

On June 20, 1989, the jury requested, and presumably received, the following additional testimony: (CT 5562; Exhibit 32): Walter Hartman (4/25/89); Donald Lucas (4/25/89); Steven Katzenmaier (4/25/89); Pat Katzenmaier (4/27/89); Suzanne Herrin (4/25/89); Catherine McEvoy (4/27/89); Mark McEvoy (4/27/89); David Katsuyama (1/11/89, 1/12/89, 3/8/89, 3/13/89, 4/10/89); Charles Geiberger (2/22/89, 4/5/89); Howard Robin (3/1/89); Robert Bucklin (4/5/89); Craig Henderson (3/2/89, 3/8/89); Thomas Streed (2/1/89, 2/2/89, 2/7/89, 5/1/89); Cyril Wecht (5/8/89).[1455]

[1454](...continued)

The testimony of Pat Stewart concerned the collection of evidence and latent prints, collection and treatment of the Love Insurance note and print found on it, the bloody footprints, and photographs taken at the Jacobs crime scene. (RTT 1260-1594.)

The testimony of John Torres concerned the examination and comparison of the latent prints found at the Jacobs crime scene. (RTT 1628-1793.)

The testimony of Fran VanHerreweghe concerned the safety boots ordered for Lucas, and his employee attendance records while he was working at Precision Metal [the records reflected that Lucas was absent on 5/3/79 and 5/4/79]. (RTT 1914-1946.)

[1455] The testimony of Walter Hartman concerned his attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8696-8705.)

The testimony of Donald Lucas concerned his attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8649-8657.)

The testimony of Steven Katzenmaier concerned Patricia Lucas' purple MG Midget (Jacobs case) and Steven's attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8631-8647.)

The testimony of Pat Katzenmaier concerned her purple MG Midget (Jacobs case) and her attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8900-8912.)

(continued...)

[1455](...continued)

The testimony of Suzanne Herrin concerned her attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8709-8740.)

The testimony of Catherine McEvoy concerned her attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8862-72; 8883-93.)

The testimony of Mark McEvoy concerned his attendance at the birthday party for Trisha Graves (alibi in Garcia case). (RTT 8916-31.)

The testimony of David Katsuyama concerned the autopsies of Suzanne and Colin Jacobs (RTT 940-1032; 1070-96; 4852-53); the autopsy of Anne Swanke (RTT 4852-85; 4887-4995); and comparison of the wounds in the different victims. (RTT 7176-99.)

The testimony of Charles Geiberger concerned his emergency room treatment of Jodie Santiago, and description of her injuries and amnesia (RTT 3679-3729; 7054-55); and the comparison of Santiago's wounds with those of the other victims. (RTT 7055-79.)

The testimony of Howard Robin concerned the autopsy of Gayle Garcia. (RTT 4487-4545.)

The testimony of Robert Bucklin concerned the autopsy of Rhonda Strang and Amber Fisher (RTT 6979-7001); and the similarities of wounds in the different victims. (RTT 7001-45.)

The testimony of Craig Henderson concerned his role in the investigations of the Santiago, Strang/Fisher, and Swanke cases; specifically the location and condition of the crime scene and Swanke's body (RTT 4700-23; 4731-32; 4744-65; 4833-39); showing the dog chain found around Swanke's neck to Shannon Lucas (RTT 4732; 4828-33); that he had a photo taken of Lucas at the time of his arrest because he noted healing scratch marks on Lucas' face (RTT 4739); contact with Frank Clark and Richard Leyva (RTT 4765-66; 4825-28; 4839-42; 11233); his contact with Loren Linker when he served the search warrant at CMC (RTT 11233-39; 11246-53); and the number of throat-wound cases he had worked on in his career. (RTT 11228-33.)

The testimony of Thomas Streed concerned the bloody knife smears on Gayle Garcia's pants and his attempt to duplicate the smears (RTT 2790-96; 2843-44; 2850; 2983-86); description of the scene of the Garcia murder and location of evidentiary items found there (RTT 2790-2827; 2835-43; 2851-52; 2973-83; 2986-94; interviews with Bill Greene and Annette Goff (RTT 2844-

(continued...)

On July 31, 1989, during the penalty deliberations, the jury requested and received the following additional testimony: Dr. Marks (7/11/89; 7/12/89; 7/13/89); Pat Katzenmaier (7/13/89).[1456] The jury also requested the stipulation which was read into the record on July 13, 1989, concerning Lucas' diagnoses by Dr. Schumann while at Atascadero in 1974. (RTT 13025-26; CT 5582.) The transcripts and stipulation were transmitted to the jury by the bailiff.[1457]/[1458]

[1455](...continued)
50; 2852-53; 2971-73); contact and interview with Emmett Stapleton wherein Stapleton identified Lucas as the person who had come to his house to ask about a rental unit. (RTT 9099-9103.)

The testimony of Cyril Wecht concerned the comparison and similarities/differences of wounds in the different victims and the blood alcohol content in Suzanne Jacobs' case. (RTT 9369-9458.)

[1456] The testimony of Dr. Marks concerned his examination of Lucas, Lucas' childhood, and Lucas' psychological profile. (RTT 12775-12794; 12827-37; 13026-39.)

The testimony of Pat Katzenmaier, Lucas' mother, concerned Lucas' childhood and request that his life be spared. (RTT 13043-50.)

[1457] The only record of these proceedings is the following minute order notation (CT 5598):

> "9:53 am The Jury calls and the bailiff checks; a note is brought back; and it is marked part of COURT'S EXHIBIT 32/7-31-89; and the clerk makes calls to the attorneys.
> 10:24 am The Jury takes a break
> 10:42 am The Jury is back in.
> 11:50 am The Jury is excused for lunch.
> 11:55 am Conference call, attorneys stipulate to transcripts asked for in the note received this morning; copies will be forthcoming in the afternoon; all attorneys will sign a yellow legal sheet with the stipulation (Attorneys Landon and Feldman
>
> (continued...)

C. The Defendant's Right To Personal Presence At Trial Is Grounded Upon Fundamental Constitutional Rights

The Due Process and Confrontation Clauses of the federal constitution (Sixth and Fourteenth Amendments) guarantee a criminal defendant's right to be present "at every stage of his trial where his absence might frustrate the fairness of the proceedings." (*Faretta v. California* (1975) 422 U.S. 806, 819 n. 15; see also *United States v. Gagnon* (1985) 470 U.S. 522, 526-27; *Illinois v. Allen* (1970) 397 U.S. 337, 338; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-06; *Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1108; *United States v. Frazin* (9th Cir. 1986) 780 F.2d 1461, 1469; *Badger v. Cardwell* (9th Cir. 1978) 587 F.2d 968, 970; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 273.) Furthermore, because a readback of testimony is no less important than the original taking of the testimony,[1459] all of the salutary rights

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[1457](...continued)
have signed so far); and at 12:02 the call concludes.
12:03 pm The Court stands in recess.
1:34 pm The Jury is in, please note at 1:30 pm attorneys Landon and Feldman appear to give the Court the copies of the requested transcript; it is marked Court's Exhibit 36; and the bailiff takes in the other copy to the jury as requested."

[1458] On July 31, 1989 the attorneys signed the following stipulation:

> The defense and prosecution hereby stipulate that the transcripts provided herewith as requested by the jury may be provided to the jury per their request of 7/31/89. [Signed: Steven Feldman, Alex Landon, George Clarke] (Court's Trial Exhibit 36.)

[1459] In fact, a readback may be more important than the original taking of the testimony, because the readback presumably is limited to those portions
(continued...)

associated with the testimony (e.g., Due Process, Compulsory Process, Confrontation, Trial By Jury and Representation Of Counsel Clauses of the Sixth and Fourteenth Amendments) are implicated by readback procedures which fail to assure fair, accurate and complete recitation of the testimony. (See *People v. Frye* (1998) 18 Cal.4th 894, 1007; see also generally *Davis v. Alaska* (1974) 415 U.S. 308, 318; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Strickland v. Washington* (1984) 466 U.S. 668.)

D. The Absence Of Defense Counsel From A Critical Stage Of The Trial Violates The Accused's Constitutional Rights

A criminal defendant's right to counsel is guaranteed by the Sixth and Fourteenth Amendments to the federal constitution. (See *Perry v. Leeke* (1989) 488 U.S. 272, 278-79; *Penson v. Ohio* (1988) 488 U.S. 75, 88; *United States v. Cronic* (1984) 466 U.S. 648, 659 [the right to counsel applies to every critical stage].) "[A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134; see also *King v. Superior Court* (2003) 107 Cal. App. 4th 929.) The foregoing constitutional principles are violated when defense counsel is absent from any proceeding where testimony is received by the jurors.

E. Private Reading Of Testimony In The Deliberation Room Violates The Federal Constitution's Public Trial Guarantee

See Volume 2, § 2.11.2, pp. 725-30, incorporated herein.

F. The Reading Of Testimony Is A Critical Stage Of The Trial

A stage of the proceedings is considered a critical one if the absence

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[1459](...continued)
upon which the jurors themselves have chosen to focus.

may have affected the substantial rights of the defendant. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1137; see also *United States v. Wade* (1967) 388 U.S. 218, 224-26.)

The cases which have specifically considered the propriety of procedures relating to a jury's request for a readback of instructions or testimony have consistently recognized the crucial importance of such a reading.[1460] For example, in a Tenth Circuit case involving the readback of instructions, the court observed:

> No harm may come of it, it is true but on the other hand, a mistake in the reading of a shorthand symbol which defense counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or a phrase, and many other events which might readily occur, would result in irremediable prejudice to defendant. (*Little v. United States* (10th Cir. 1934) 73 F.2d 861, 864; see also *State v. Beal* (N.M. 1944) 48 N.M. 84 [146 P.2d 175, 181].)

Even when the evidence requested by the jury is a tape recording which can be mechanically replayed, the proceeding is still considered an important part of the trial "because it involves the crucial jury function of reviewing the

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[1460] For example, the following cases have expressly recognized that a readback of testimony should be conducted in open court with all parties and counsel present: *Commonwealth v. Peterman* (Pa. 1968) 430 Pa. 627 [244 A.2d 723, 726]; *State v. Antwine* (Kan. App. 1980) 4 Kan. App.2d 389 [607 P.2d 519, 529]; *State v.Gammill* (Kan. App. 1978) 2 Kan.App.2d 627 [585 P.2d 1074, 1078]; *Kokas v. Commonwealth* (Ky. 1922) 194 Ky. 44 [237 S.W. 1090, 1092]; *Jackson v. Commonwealth* (Va. 1870) 60 Va. 656, cited at 50 A.L.R.2d 203.

evidence." (*United States v. Kupau* (9th Cir. 1986) 781 F.2d 740, 743.)[1461] Similarly, the absence of the defendant from the replaying of a tape of the jury instructions has been held to violate a defendant's right to due process and confrontation. (*Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271.)

G. Allowing The Jurors To Read The Transcripts Without Supervision Or Instruction And In The Absence Of The Judge Violated State Law And The Federal Constitution

The procedure used in the present case also violated Lucas' federal constitutional rights to the presence and supervision of a judge at all crucial stages of the trial. This right was violated because the jurors were allowed to read the transcripts of the trial testimony without supervision or instruction and in the absence of the judge. "Trial by jury, in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve [jurors] . . . but it is a trial by a jury of twelve [jurors], in the presence and under the superintendence of a judge . . . . This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion." (*Capital Traction Co. v. Hof* (1899) 174 U.S. 1, 13.)

Hence, because the Sixth Amendment right to trial by jury extends to proceedings during jury deliberation, absence of the judge during such proceedings violates the federal constitution. "A judge's absence during a criminal trial, including court proceedings after a jury begins deliberations, is error of constitutional magnitude. [Citing *Peri v. State* (Fla. Dist. Ct. App. 1983) 426 So.2d 1021, 1023-24.] The presence of a judge is at the 'very core'

[1461] Even though *Kupau* analyzed the issue under Fed. Rule of Criminal Proc. 43, the reasoning also applies to the constitutional bases for the right to presence.

of the constitutional guarantee of trial by an impartial jury. [Citation.]" (*Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1119.)

Moreover, due to the importance of the rights involved, Penal Code § 1138 also obliges the trial court to supervise and control a readback of testimony, or a re-instruction of the jury. (See *People v. Litteral* (1978) 79 Cal.App.3d 790, 794.) Penal Code § 1138, by its terms, requires that the jury be "brought into court" and that the requested information be given in court "in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."[1462] Where, as in the present case, the trial judge fails to adequately supervise the readback of the trial testimony to the jury, it has not fulfilled the statutory mandate of Penal Code § 1138.

Thus, trial courts must be actively involved in selecting the testimony and in supervising the way in which the readback is conducted. (See *People v. Litteral*, *supra*, 79 Cal.App.3d at 794; see also *Riley v. Deeds*, *supra*, 56 F.3d 1117.)[1463] The testimony which is read back must be responsive to the

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[1462] Penal Code § 1138 provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

[1463] In *Riley*, the Ninth Circuit reversed a conviction without a showing of prejudice where the trial court delegated the responsibility for a readback. The trial judge was away from the courthouse when the deliberating jury (continued...)

jury's request. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1123; *People v. Cooks* (1983) 141Cal.App.3d 224.) The testimony must be repeated accurately (*People v. Aikens* (N.Y. 1983) 465 N.Y.S.2d 480) and in such a way that no undue emphasis is placed on any portion of the readback. In addition, the testimony selected should also present a balanced view of the evidence. (*Fisher v. Roe* (9th Cir. 2001) 263 F.3d 906; *United States v. Hernandez* (9th Cir. 1994) 27 F.3d 1403.)[1464]

In sum, trial courts are under an affirmative duty to ensure the fairness of any readback ordered. In *Fisher v. Roe*, *supra*, 263 F.3d at 917 the Ninth Circuit stated:

> Moreover, we have reversed convictions and said that a trial judge abuses his discretion if he fails to take measures to present a balanced view of testimony when a jury requests a readback.

(*See, e.g., United States v. Hernandez*, *supra*, 27 F.3d 1403, 1409 [district court abused its discretion when it allowed jury to read transcript of critical testimony without admonishing jury that it must weigh all evidence, and not rely solely on the transcripts].)

[1463](...continued)
asked for a readback of the victim's direct testimony. Unable to locate the judge, the law clerk convened the jury. With the defendant, his counsel and the prosecutor present, the court reporter read back the testimony as requested. On appeal, the defense did not argue that the testimony chosen for the readback had been inappropriate in any way. The Ninth Circuit, however, reversed the conviction without a showing of prejudice because the error was structural.

[1464] The better practice is to include both the direct and the cross-examination. (*See, e.g., State v. Wilson* (N.J. 2002) 165 N.J. 657 [762 A.2d 647].)

In the present case the jury was erroneously permitted to read the trial transcripts privately in the deliberation room. This error was especially egregious because there is no record of how the readback was conducted. It is unknown:

1) Whether the jurors read the transcripts aloud or silently to themselves?

2) If they were read silently, did all jurors do so?

3) If the jurors read the transcripts silently on an individual basis, what did the other jurors do while the one juror read?

4) If the other jurors deliberated, did the reading juror attempt to listen to and/or participate in those deliberations?

5) Which transcripts, if any, were read?

6) What portions of the transcripts were read (e.g., only direct or portion thereof; only cross or portion thereof; entire transcript)?

7) Did the juror who read the transcripts aloud – if this was done – place any undue emphasis on certain portions of the transcript?

8) Did the juror who read the transcripts aloud do so fully and correctly?

Accordingly, Judge Hammes' failure to properly supervise the readback proceedings violated Lucas' federal constitutional rights and was a violation of the judge's duties under Penal Code § 1138.

Further, because Lucas was arbitrarily denied his state created rights under Penal Code § 1138, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

H. A Readback Proceeding Is No Less Critical If The Reading Is Done By A Juror Instead Of The Reporter

In the present case the testimony was not read by the reporter. Instead, over defense objection, the judge ordered the reporter to send a redacted copy of the transcript into the deliberation room under the apparent assumption that one of the jurors would read the testimony aloud to the other jurors. (RTT 12227.) Such a procedure presents a greater danger of prejudice and is no less a critical stage of the proceeding than if the reporter had done the reading. The concerns that the testimony will be misread, that important matters may be omitted, and that voice inflections and emphasis, either intentional or unintentional, will prejudicially impact the jury are present regardless of the reader. Moreover, when the jury is given free reign to conduct the readback proceeding in any manner it wishes, there is no supervision or control, and the danger of undue emphasis is inherent. (See, *United States v. Sacco* (9th Cir. 1989) 869 F.2d 499, 502 ["in the privacy of the jury room, a jury, unsupervised by the judge, might repeatedly replay crucial moments of testimony before reaching a guilty verdict."]; see also, *United States v. Hernandez*, *supra*, 27 F.3d at 1408 [to avoid the possibility of undue emphasis, the preferred method of rehearing testimony is in open court, under the supervision of the court, with the defendant and attorneys present.]; see also, *United States v. Binder* (9th Cir. 1985) 769 F.2d 595, 600 ["Undue emphasis of particular testimony should not be permitted."].)

In the present case the judge completely abdicated her duty in this regard. She simply left everything up to the jury. (See RTT 12227 [ruling that the jury would be supplied with one copy of the transcript and "they can

have one person read it, if they want, out loud to everybody.")[1465] Thus, we have no idea how the readback was conducted. (See Volume 2, § 2.11.1(G), pp. 708-12, incorporated herein.)

I. Neither Counsel Nor Lucas Waived The Rights Involved

The record contains neither an express nor implied waiver of the right to have the testimony read to the jury in the presence of the judge, counsel and the defendant.

1. There Was No Waiver By Counsel

When the judge announced that she would be sending transcripts into the jury room trial counsel expressed concern about this procedure, and argued that the reporter should read the testimony to the jurors. (RT 12226.) However, the trial court made it clear, in no uncertain terms, that she would not allow any procedure except the one which she proposed. (See RTT 12227.)

Accordingly, the acquiescence of counsel and the defendant in this procedure, after denial of the request for a different procedure, did not constitute a waiver of rights. Counsel is not required to make futile objections. (*People v. Bain* (1971) 5 Cal.3d 839, 849, fn. 1; *Douglas v. Alabama* (1965) 380 U.S. 415, 422 ["No legitimate state interest would have been served by requiring repetition of a patently futile objection, . . . in a situation in which repeated objection might well affront the court or prejudice

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[1465] Due to the judge's lack of supervision the record does not reflect whether the jury actually received all of the testimony it desired. In the case of witnesses Fairhurst and Henderson there was additional testimony on dates not included in the jury's request. (Fairhurst, June 7, 1989 [RTT 11742-45]; Henderson, May 27, 1989 [RTT 10953-54]; May 30, 1989 [RTT 11224-39; 11246-53].)

the jury beyond repair"]; see also 9 Witkin, *Cal. Procedure* (4th ed. 1997), Appeal, § 387 at pp. 437-38].) Where a court has made its ruling, counsel must not only submit thereto, but it is his duty to accept the ruling; he is not required to pursue the issue. (*People v. Diaz* (1951) 105 Cal.App.2d 690, 696; see also *People v. Woods* (1991) 226 Cal.App.3d 1037, 1052.)

2. Lucas Did Not Waive His Rights

Early United States Supreme Court cases held that the right to presence in capital cases is so fundamental that such presence cannot be waived. (See, *Diaz v. United States* (1912) 223 U.S. 442, 455; *Hopt v. Utah* (1884) 110 U.S. 574, 579; accord, *Near v. Cunningham* (3d Cir. 1963) 313 F.2d 929, 931.) More recently, commentators have interpreted dictum in *Illinois v. Allen* (1970) 397 U.S. 337, as authorizing a limited exception to the no-waiver rule for defendants who willfully disrupt their trials. (See, *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1257.) However, this exception is inapplicable in the present case as there is no evidence that Lucas disrupted the trial.[1466]

However, even if the right can be waived in a capital case, *Illinois v. Allen, supra,* supports retention of the knowing-and-voluntary waiver standard in right-to-presence cases. *Allen* authorized waiver where the defendant "has been warned by the judge that he will be removed if he continues his disruptive behavior [and] he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Illinois v. Allen, supra,* 397

[1466] Some recent federal circuit cases have held that capital defendants can waive the right to personal presence. (*Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662; *Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486.)

U.S. at 343.) Moreover, *Allen* cited *Johnson v. Zerbst* (1938) 304 U.S. 458, which established the knowing-and-voluntary waiver standard. Similarly, the court's conclusion in *Drope v. Missouri* (1975) 420 U.S. 162, that there had been insufficient inquiry to afford a basis for deciding the waiver issue, was based on cases applying the knowing-and-voluntary standard for waiver. (Id. at 182 [citing *Westbrook v. Arizona* (1966) 384 U.S. 150]; see also, *Gardner v. Florida* (1977) 430 U.S. 349, 361 [applying knowing-and-intelligent waiver standard in similar context].)

Additionally, as set forth above, the right to personal presence is distinct and separate from the right to representation of counsel at any readback proceeding. Even if the right to personal presence could be waived by implication, it is well established that any waiver of the right to counsel must comport with the knowing, voluntary and intelligent waiver requirements set forth by the U.S. Supreme Court. "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" (*Johnson v. Zerpst*, *supra*, 304 U.S. at 464.) This Court has adopted the same view, stating in *In re Smiley* (1967) 66 Cal.2d 606, 624: "There is no reason why at this late date we should tolerate silent records on the question of waiver of counsel, or permit the People to undertake belated speculations as to the defendant's knowledge in an effort to justify a finding of 'implied' waiver in such cases." "Because of the policy against implied waivers of such important rights as the right to counsel, reviewing courts look to the record to insure that a waiver of counsel was knowing and intelligent. Appellate courts look in the record for a colloquy between trial court and defendant that demonstrates such knowledge and

intelligence." (*Savage v. Estelle* (9th Cir. 1988) 924 F.2d 1459, 1466; see also *In re Lopez* (1970) 2 Cal.3d 141, 147 [neither the defendant's failure to request court-appointed counsel nor his plea of guilty constitute an implied waiver of the right to counsel].)

Nor is there any record that Lucas was fully informed of his right to counsel, which is a necessary predicate to a finding of implied waiver. (See, *In re Johnson* (1965) 62 Cal.2d 325, 333; see also, *People v. Doane* (1988) 200 Cal.App.3d 852, 859 [waiver of defendant's right to counsel was not implied from mere participation in his defense; there must be an explicit waiver of his right to counsel and advisement of the consequences of his decision to represent himself].)

Moreover, under state law presence cannot be waived without a written waiver, which was not obtained in the present case. (Penal Code § 977.) Arbitrary denial of this right violated the Due Process Clause of the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

J. The Denial Of Lucas' Rights To Be Personally Present, To Have The Assistance Of Counsel, The Presence Of The Judge, And To Due Process Requires Reversal Of Lucas' Convictions

1. The Denial Of Counsel Was Reversible Error

a. Under The Federal Constitution The Denial Of Counsel Was Reversible Error Per Se

Under the federal constitution the denial of counsel at a critical stage of the trial is reversible per se. When a criminal defendant is denied counsel at a critical stage of the proceedings it constitutes a structural error which makes the trial presumptively unfair, and requires automatic reversal. (See

United States v. Cronic (1984) 466 U.S. 648, 659; see also *Frazer v. United States* (9th Cir. 1994) 18 F.3d 778, 781-82; *Johnson v. United States* (1997) 520 U.S. 461, 469.) "*Cronic* and its progeny . . . stand for the proposition that the actual or constructive denial of counsel at a critical stage of a criminal trial constitutes prejudice per se and thus invalidates a defendant's conviction." (*Curtis v. Duval* (1st Cir. 1997) 124 F.3d 1, 4; see also *Perry v. Leeke* (1989) 488 U.S. 272, 278-79; *Penson v. Ohio* (1988) 488 U.S. 75, 88.)

This applies to denials of counsel for portions of a critical stage, as long as they are important to the trial. (See *Geders v. United States* (1976) 425 U.S. 80, 88-90 [overnight recess]; *Herring v. New York, supra*, 422 U.S. 853 [closing argument]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-13 [nullifying counsel's ability to decide when defendant would testify] [cases cited in *Perry v. Leeke, supra*, 488 U.S. at 280].) This follows the long established law that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." [Emphasis added.] (*Powell v. Alabama* (1932) 287 U.S. 45, 69.) Without it, the right to counsel is denied.

b. The Absence Of Counsel Raised A Presumption Of Prejudice Under California Law

Under California law, denial of counsel at a critical stage of the proceedings raises a presumption of prejudice. (*People v. Horton* (1995) 11 Cal.4th 1068, 1135-37.) "Only the most compelling showing to the contrary will overcome the presumption." (*Id.* at 1137.) Hence, the denial of counsel should be reversible under the California standard.

2. Absence Of The Judge Should Be Reversible Error Per Se

Because the absence of the judge from the crucial readback proceedings undermined the entire structure of the trial, it should be reversible

error per se. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Riley v. Deeds*, *supra*.)

3. The Absence Of Lucas Was Reversible Error

a. The Amount Of Influence The "Readback" Had Upon The Jury Is Impossible To Determine

When an unsupervised readback of testimony is undertaken by the jury special standard-of-review problems are presented because:

> [h]ow much influence the reading of the testimony . . . may have had upon the minds of the jury . . . is impossible to determine. (*Jackson v. Commonwealth* (Va. 1870) 60 Va. 656, cited at 50 A.L.R. 2d 203.)

For example, without knowing how the readback was conducted, there is a danger that the reader may have given undue emphasis to certain portions of the transcript. (See e.g., *People v. Aikens* (NY 1983) 465 N.Y.S.2d 480.) Or, the testimony selected may not have been balanced. (See *Fisher v. Roe*, *supra*, 263 F.3d 906.) The reading of testimony to the jury is more than a "ministerial action" and the defendant's constitutional rights may be prejudicially implicated by "[a]n inadvertent omission of a part of [the] testimony, a mistake in the reading . . . or an inappropriate emphasis of voice. . . ." (*Harris v. United States* (D.C. App. 1985) 489 A.2d 464, 468.)

Moreover, there is no way to tell whether all the jurors participated in the readback. Since the jurors were not precluded from reading the transcripts silently to themselves, it is entirely possible that some jurors read the transcripts while others did not.

In sum, in the present case there is no possible way of assuring that the readback procedure was fair, accurate and complete.

b. The Error Was Structural And Reversible Per Se

Because an unsupervised readback of testimony compromises the most fundamental elements of the entire trial process, and because the impact of the error cannot normally be evaluated on the record, the error was structural and should be reversible per se. As one court observed long ago:

> In [the defendant's] absence, there can be no trial. The law provides for his presence. And every step taken in his absence is void and vitiates the whole proceeding. On this point all authorities agree. And no question can be raised, as to the extent of the injury done to the prisoner, or whether any injury resulted from his not being present. [Emphasis added.] (*Jackson v. Commonwealth*, *supra*.)
>
> . . .
>
> In the situation that resulted from the action of the trial court in permitting, after the submission of the case, the reading of evidence to the jury, we can only speculate as to its effect upon the jury and verdict; and obviously, in a case in which the punishment inflicted by the verdict is the severest known to the law, resort should not be had to speculation, in order to determine whether the verdict was superinduced by an error of the trial court. In the face of so grave an error as that committed by the trial court in this case, the appellate court should not stop to weigh probabilities, or try to discover from the record whether it was prejudicial to the accused, but must assume that the error amounted to such an invasion of appellant's constitutional rights as to deprive him of a fair and impartial trial. [Emphasis added.] (*Kokas v. Commonwealth* (Ky. 1922) 194 Ky. 44 [237 S.W. 1090, 1093].)
>
> . . .
>
> . . . [R]eading evidence taken by deposition, although it was done after the jury had retired, is a part of the trial as much as any other. In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed. [Emphasis added.] (*People v. Kohler* (1855) 5 Cal. 72; see also *In re*

Dennis (1959) 51 Cal.2d 666, 672; *Glee v. State* (Fla. Dist. Ct. App. 1994) 639 So.2d 1092, 1093 [if trial judge leaves courtroom during readback of testimony to jury, there is reversible error per se].)

c. *If Harmless-Error Analysis Is Employed There Should Be A Heavy Burden On The Prosecution To Prove The Error Harmless*

Some courts have purported to evaluate errors relating to the defendant's absence from a "readback" to the jury under the harmless-error standards. (See, *Ware v. United States* (7th Cir. 1967) 376 F.2d 717, 718-19, for a comparison of the per se and harmless error cases among the various federal districts.) However, to effectively understand and apply such a standard it is necessary to analyze the factual context of the cases rather than the general description of the standard. (I.e., "reasonable possibility of prejudice" vs. "proof beyond a reasonable doubt of lack of prejudice." (See, *Ware*, *supra*, at 719, fn. 6, where the court opines that there is "little difference" between these standards.)

Regardless of what standard is used, the important principle is that the burden is upon the prosecution, and it is a "heavy" one. (See *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271; see also *Chapman v. California* (1967) 386 U.S. 18 [prosecution has burden of proving harmless beyond a reasonable doubt].)

d. The Courts Have Considered Several Specific Criteria In Determining Whether The Prosecution Has Met Its Burden Of Establishing Harmless Error

As stated in the preceding section, it is necessary to consider specific factual contexts to understand and apply the standard of review in "readback" cases. Such an analysis reveals several different criteria which the courts have

considered, individually or cumulatively, in determining whether the prosecution has met its burden to establish harmless error.

i. Was Counsel Present During The Reading?

Many of the dangers inherent in a "readback" procedure can be neutralized by the presence of counsel, who can serve to protect the defendant against many of the potential adverse influences. Hence the courts have relied upon this factor to find harmless error. (E.g., *Ware v. United States*, *supra*, 376 F.2d 717.) However, even the presence of counsel might fail to fully compensate for the defendant's absence when the testimony being read is particularly relevant to the defendant:

> . . . a defendant if present can better contribute towards his defense on matters concerning trial testimony relevant to him. He is more likely to understand such material and be able to make suggestions to his attorney. Also, a defendant, under such circumstances, is entitled to be seen by the jury, and the jury, in turn, has a right to view his demeanor – especially where, as here, the jury has expressed a particular interest in a certain portion of the trial testimony relevant to defendant. [Original emphasis.] (*Ware v. United States*, *supra*, 376 F.2d at 721 (Dis. Opinion).)

ii. Does The Testimony Concern Matters Which Are Inconsequential To The Defendant, Or Are Uncontested?

While the jurors' request for the testimony obviously illustrates its interest therein, in some cases the courts have been able to determine that the testimony concerns matters which are of no consequence to the defendant. (E.g., *Walker v. United States* (D.C. Cir. 1963) 322 F.2d 434, 436 [requested testimony concerned co-defendants, or which are uncontested]; *People v. Nunez* (1983) 144 Cal.App.3d 697, 702 [brief readback of testimony

regarding phone calls whose existence and content the defendant had never denied or contested].)

iii. Was The Prosecution's Evidence Overwhelming?

Obviously there are cases which may objectively be described as containing "overwhelming" evidence in support of all elements of the prosecution's case. In such cases the reading of testimony to the jury in the absence of counsel and defendant has been found to be harmless error. (E.g., *People v. Brew* (1984) 161 Cal.App.3d 1102, 1106-07 [robbery suspect arrested with proceeds of robbery on his person was identified by all three victims who corroborated each other].)

iv. Did The Court Adequately Instruct The Jury Concerning The Readback?

An additional criterion which has been considered, in conjunction with others, is whether the trial court employed satisfactory safeguards to reduce the dangers inherent in the "readback" procedure. In the present case no cautionary or limiting instruction was given. (See Volume 2, § 2.11.1(B), pp. 698-705, incorporated herein.)

v. Was The Defendant On Trial For His Life?

As with many other constitutional rights, the right to personal presence at a "readback" of testimony is judged by an especially strict standard in capital cases:

> . . . in a case in which the punishment inflicted by the verdict is the severest known to the law, resort should not be had to speculation, in order to determine whether the verdict was superinduced by an error. . . . (*Kokas v. Commonwealth*, *supra*, 194 Ky. 44 [237 S.W. at 1093]; see also, *People v. Kohler*, *supra*.)

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

In the present case each of the criteria to be considered in the harmless error evaluation resulting from the defendant's absence favor reversal:

1. Counsel was not present when the transcripts were read by the jurors.

2. The requested testimony was lengthy, substantial and crucial to factual matters particularly relevant to both guilt and penalty.

3. The testimony was conducive to misunderstanding due to unexplained gestures. For example, prosecution handwriting expert John Harris' testimony for January 26, 1989, was requested by the jurors. In that testimony Harris indicated which slips of paper were used to create an enlargement of some of the numbers contained on Trial Exhibits 110 and 111. (RTT 2275 ["witness so indicated on the exhibits"].)

4. The prosecution's case for the death penalty cannot fairly be characterized as overwhelming. (See § 7.5.1(J)(3)(a), pp. 1619-22 above, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].)

5. The court failed to give the jury any admonition or explanatory instructions and the reading was conducted in the jury room rather than open court; and

6. This case is capital.

In sum, all of the factors commonly considered in "readback" cases involving the defendant's absence point to reversal. Further, given the complete absence of a record as to what the jury did with the transcripts and

as to how (and by whom) the readbacks were conducted, there is no way to demonstrate that the violations of Lucas' constitutional rights were harmless. Accordingly, the penalty judgment should be reversed.

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.9

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

A. Introduction

Because the "readback" of testimony was not conducted in open court Lucas' state and federal constitutional rights to a "public trial" were violated.[1467]

Lucas had a constitutional right to have the testimony read back to the jury in open court, pursuant to his right to a public trial. By requiring the jurors to conduct their own unsupervised readback in the jury room Judge Hammes abridged Lucas' right to a public trial. Because of this error the judgment should be reversed.

B. Procedural Background

See Volume 2, § 2.11.1(B), pp. 698-705, incorporated herein.

C. The Right To Public Trial Applies To The Entire Trial And The Right Is Violated By Closure Of Any Part Of The Trial, Absent Waiver Or Compelling Necessity

The right to public trial is deeply rooted in the common law, is "universally regarded by state and federal courts as basic and substantial," and has "long been regarded as a fundamental right of the defendant in a criminal prosecution." (*State v. Lawrence* (Iowa 1969) 167 N.W.2d 912, 913, and

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[1467] "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ." (U.S. Const. 6th Amendment.) ¶ "The defendant in a criminal case has the right to a . . . public trial. . . ." (Calif. Const. art. 1 § 15.)

authorities cited therein.) Modern courts recognize that an open trial is not "merely a safeguard against unfair conviction. . . ." but acts as "'a check on judicial conduct and tends to improve the performance of both parties and the judiciary.'" (*Rovinsky v. McKaskle* (5th Cir. 1984) 722 F.2d 197, 201-02; *United States v. Chagra* (5th Cir. 1983) 701 F.2d 354, 363.)

"The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England." (*Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 508.)

Because of this fundamental impact of public trial upon "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system," the closure of any criminal proceeding "must be rare and only for cause shown that outweighs the value of openness. [Footnote omitted.]" (*Press-Enterprise*, *supra*, at 508-09.) Moreover, the right to a public trial "may be overcome only by an overriding [state] interest" (*Press-Enterprise*, *supra*, at 521) and "no state interest, however compelling, can sustain the exclusion of press and public from part of a trial, absent findings of necessity articulated in the record." (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 200.)

This constitutional guarantee applies to the "entire trial from the impaneling of the jury to the rendering of its verdict." (*State v. Lawrence*, *supra*, 167 N.W.2d at 915.) Absent waiver or a satisfactory determination of necessity, a criminal trial must be "public in all respects" (*People v. Hartman* (1984) 103 Cal. 242, 245) and "at all times." (*People v. Frutos* (1984) 158 Cal.App.3d 979, 987.)

From these principles it follows, and has been consistently held, that "exclusion of the public from a part of the trial" may violate the public trial

guarantee. (*State v. Lawrence*, *supra*, 167 N.W.2d at 915 – instruction of jury; see also, *United States v. Chagra* (5th Cir. 1983) 701 F.2d 354 – pretrial motion to reduce bail; *United States v. Sorrentino* (3d Cir. 1949) 175 F.2d 721, – jury selection.) And while there appear to be few cases which have directly considered application of the public trial right to proceedings during jury deliberations (but see, *Walker v. United States*, *supra*, 322 F.2d at 438 (dis. op.)), it has been firmly held that a proceeding which "is held as a part of the trial and after the jury has been sequestered, falls within the constitutional guarantee and must be conducted as a public trial." (*U.S. Ex. Rel. Bennett v. Rundle*, *supra*, 419 F.2d at 606.)

In sum, absent a strong showing of necessity articulated upon the record, or waiver – neither of which occurred in the present case – it must be concluded that the public trial guarantee applies to proceedings after the jury has begun deliberations, such as the reading back of testimonial evidence.

D. The Public Trial Guarantee Applied To The Proceedings Held In The Present Case

The readback proceedings in the present case, which concerned the disposition and representation of important evidence to the jury, were no less worthy of the public trial guarantee than the various types of proceedings to which the right has already been applied. (E.g., pretrial bail hearing, suppression of evidence motion, rendition of instructions, etc.) In fact, the public trial guarantee is particularly applicable to the proceedings at issue here because they concerned "matters advanced for consideration of the triers of fact. . . ." (*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 206), and bore a relationship to "the merits of the charge [and] the outcome of the prosecution. . . ." (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 201.)

Additionally, in the case of a readback of testimony, public proceedings

may reduce the danger of undue emphasis:

> Publicity may also be said to discourage undue emphasis by the court when charging the jury. When instructing the jury as to the law applicable to a given case, overemphasis by repetition or voice inflection could, of course, materially affect jury consideration of the matter, and such undue emphasis would not be reflected by the printed copy of the instructions later available to the public. (*State v. Lawrence*, *supra*, 167 N.W.2d at 914.)

In sum, the public trial guarantee was clearly applicable to the closed proceedings held in the present case.

E. The Error Violated The Federal Constitution

Further, because Lucas was arbitrarily denied his state created right to a public trial under Article I, § 15 of the California Constitution, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. There Was No Waiver Or Satisfactory Showing Of Necessity

As to all of the readback proceedings at issue in the present case, there was neither a waiver nor an adequate showing of necessity sufficient to justify exclusion of the public.

1. Waiver

It has been held that the right to public trial need not be expressly waived by the defendant. (*People v. Hines* (1964) 61 Cal.2d 164, 172.) Hence, waiver may be inferred without any personal acknowledgment from the defendant, when the defendant fails to object to the closure or to counsel's acquiescence therein. (E.g., *People v. Moreland* (1970) 5 Cal.App.3d 588,

595 [co-defendant's counsel moved for closure during testimony]; *Martineau v. Perrin* (1st Cir. 1979) 601 F.2d 1196 [defendant's attorney informed defendant that he had discovered the courtroom doors were locked and defendant did not object]..)

However, the waiver rule should not apply in the present case because Judge Hammes emphatically stated that she would not vary from her set procedure of sending the transcripts into the jury room. (See RTT 12177-78; 12226-27.) This ruling necessarily foreclosed reading the testimony in open court and, hence, such a request by defense counsel or Lucas would have been futile. (See *People v. Bain* (1971) 5 Cal.3d 839, 849, fn. 1; see also *Douglas v. Alabama* (1965) 380 U.S. 415, 422; *People v. Diaz* (1951) 105 Cal.App.2d 690 696; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1052.)

Moreover, in the present case, Lucas was never informed of his right to a public readback of the testimony. To be effective, a waiver of a public trial must be "intentional and meaningful" (Annot. 61 L.Ed.2d 1018, 1030) and the waiver of such a constitutional right is "not lightly inferred." (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 200.) Plainly stated, one cannot knowledgeably and intentionally waive a matter about which he has no knowledge. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

2. <u>There Was No Showing Of Necessity</u>

There certainly was no reason why all of the proceedings and judicial actions at issue in the present case could not have been conducted in open court. There was no compelling necessity for closure of the proceedings. (*Press-Enterprise*, *supra*, 464 U.S. at 510.)

G. The Denial Of The Right To Public Trial Requires Reversal

It is widely recognized that a violation of the right to a public trial is

"inherently prejudicial" and requires reversal per se. (*Public Trials*, annot., 61 L.Ed.2d 1018, 1026-27.)

> . . . the right is both primary and instrumental: not merely a method to assure that nothing untoward is done clandestinely but a guarantee against the very conduct of private hearings . . . Even absent a showing of prejudice, infringement of the right to a public trial exacts reversal as the remedy. (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 202; see also, *People v. Byrnes* (1948) 84 Cal.App.2d 72, 79.)

Accordingly, Lucas' convictions and sentence of death must be set aside.

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.10

THE JUDGE ERRED IN ALLOWING THE JURY TO READ PORTIONS OF THE TESTIMONY DURING DELIBERATIONS WITHOUT ANY INSTRUCTIONS AS TO THE PROPER USE OF THE TRANSCRIPTS

A. Introduction

In the preceding arguments Lucas demonstrated that trial transcripts should not have been sent into the deliberation room in response to juror requests for readback of testimony. However, even if such a procedure were constitutionally permissible, transcripts should not have been submitted unless accompanied by a strong and complete admonition concerning the jury's use and consideration of the transcripts.

In the present case, numerous transcripts of selected testimony were given to the jury during their deliberations (at both the guilt and penalty trials) without any instruction as to the use of such transcripts. Because this procedure was fraught with the danger of undue influence and other prejudices, the judge's failure to admonish the jurors regarding their use of the transcripts was reversible error.

B. Legal Principles

The judge bears the ultimate responsibility, under California law and the federal constitution, to control and supervise any readback of testimony to the jurors during deliberations. (Penal Code § 1138; 6th and 14th Amendments; see also Volume 2, § 2.11.1(G), pp. 708-12, incorporated herein.) Elsewhere it is argued that this responsibility cannot be properly met

by allowing the jurors to read back testimony to themselves. (*Ibid.*)

However, even if such a procedure were conceptually proper, the jurors should first be admonished regarding the mechanics of the readback before being given the transcripts. As in the analogous situation where written instructions are given to the jurors to review on their own in the jury room, there is inherent uncertainty:

> If, for example, written copies of the instructions are given to each juror, a divergence in literacy and reading comprehension may well leave some jurors uninstructed. On the other hand, if the foreman is directed to read the instructions to the other jurors, defendant is deprived of the opportunity to witness the manner in which the foreman intones the instructions. A judge is obligated to act in an impartial and unbiased manner in delivering instructions. He may not sneeringly describe the defendant's defense or make editorial comments while reading the instructions. A jury foreman is under no such constraint once the case has been submitted.

(*State v. Norris* (Kan. App. 1985) 10 Kan.App.2d 397 [699 P.2d 585, 588].)

Moreover, as with individual written instructions, submitting transcripts of only a portion of the testimony is conducive to "overemphasis of isolated parts . . . ." (*United States v. Schilleci* (5th Cir. 1977) 545 F.2d 519, 526.) The concerns regarding submission of a transcript to the jury in response to a request for a readback of testimony were summarized in *United States v. Rodgers* (6th Cir. 1997) 109 F.3d 1138: "This court has recognized 'two inherent dangers' in allowing a jury to read a transcript of a witness's testimony during its deliberations. [Citation.] First, the jury may accord 'undue emphasis' to the testimony; second, the jury may apprehend the testimony 'out of context.' [Citation.] These dangers are 'escalated' if the jury makes the request after reporting an inability to arrive at a verdict.

[Citation.]"

Hence, it is imperative that the jury be admonished to "weigh all the evidence and not give undue focus to any one portion of the trial." (*United States v. Hernandez* (9th Cir. 1994) 27 F.3d 1403, 1408; see also *United States v. Lujan* (9th Cir. 1991) 936 F.2d 406, 412.)

"Whenever a district court grants a jury's request to review some of the testimonial evidence presented at trial, there exists a real danger that the jury will emphasize this evidence over the other evidence. Therefore . . . if a district court chooses to give a deliberating jury transcribed testimony, or chooses to re-read testimony to a deliberating jury, the . . . court must give an instruction cautioning the jury on the proper use of that testimony." (*United States v. Rodgers* (6th Cir. 1997) 109 F.3d 1138, 1144-45; see also *United States v. Epley* (6th Cir. 1995) 52 F.3d 571, 578-79; *United States v. Sandoval* (9th Cir. 1993) 990 F.2d 481, 486-87 [no abuse of discretion to allow readback where court cautioned jurors about giving full consideration to entirety of testimony, and offered to have additional portions, or entire testimony read, if jurors requested]; *Mullins v. State* (Ala. Crim. App. 1977) 344 So.2d 539, 542 [court avoided undue emphasis of testimony]; *Evans v. State* (Ga. App. 1978) 148 Ga.App. 422 [251 S.E.2d 325, 327] [court cautioned jury that undue emphasis on the reread testimony was improper].)

C. The Failure To Give Any Cautionary Instructions In The Present Case Violated Lucas' Federal Constitutional Rights

In the present case no instructions whatsoever were given to the jury regarding its use of the transcripts which were sent into the jury room during deliberations. Numerous transcripts of crucial testimony were simply handed over to the jury without any guidance or supervision as to their use. (See

Volume 2, § 2.11.1(B), pp. 700-07, incorporated herein.) This failure violated Lucas' state and federal constitutional rights to fair trial by jury, due process, compulsory process, effective assistance of counsel and verdict reliability. (California Constitution, Art. I, sections 1, 7, 15, 16 and 17; U.S. Const. 6th, 8th and 14th Amendments.)

Further, because Lucas was arbitrarily denied his state created rights under California law, including Penal Code § 1138, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

D. The Error Was Prejudicial

Because the effect of the error was to undermine the fairness and reliability of the entire penalty trial, it should be reversible per se as structural error. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Alternatively, since the prosecution cannot demonstrate beyond a reasonable doubt that the error was harmless, the sentence should be reversed. (*Chapman v. California* (1967) 386 U.S. 18.) Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1468] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1468] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.11

THE JUDGE IMPROPERLY FAILED TO GIVE CRUCIAL SUPPLEMENTAL INSTRUCTIONS ORALLY

A. Introduction

During the penalty trial the jurors announced that they were deadlocked, but the judge instructed them to keep trying. (See Volume 6, § 6.1(B)(2), pp. 1376-77, incorporated herein.) The jurors then sent out a note containing questions as to several important aspects of the deliberations. This note read:

> 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; RT 13427.)

After lengthy discussions with counsel, the judge gave the jury written instructions addressing its questions. (CT 24253-54.) However, the judge improperly failed to give these instruction to the jury orally. Because oral instructions are necessary to assure that all jurors are fully instructed, the death judgment should be reversed.

B. Procedural Background

See Volume 6, § 6.1(B), pp. 1375-88, incorporated herein.

C. The Error Violated The Federal Constitution

The error violated Lucas' state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jurors fully understand the

law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

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

D. Failure To Orally Instruct The Jury Is Reversible Error

By responding to this note and instructing the jury in writing rather than orally, the court committed structural error.

People of Terr. Of Guam v. Marquez (9th Cir. 1992) 963 F.2d 1311, 1315, held that where the court gave written instructions to the jury in lieu of a reading in open court, structural error was committed which compelled automatic reversal. (*Id.* At 1316.) Similarly, in *State v. Norris* (Kan. App. 1985) 10 Kan.App.2d 397, 401 [699 P.2d 585], the court stated that "oral instruction is vital to the fulfillment of the court's duty to instruct the jury. Instruction of the jury is one of the most fundamental duties of the court and

it is only through their oral delivery that the court can be assured that each member of the jury has actually received all of the instructions." (*State v. Norris* (Kan. App. 1985) 10 Kan.App.2d 397, 401 [699 P.2d 585]; see also, *United States v. Noble* (3rd Cir. 1946) 155 Fed.2d 315; *State v. Iosefa* (Haw. Ct. App. 1994) 77 Haw. 177 [880 P.2d 1224]; *Purdy v. State* (Ind. 1977) 267 Ind. 282 [369 N.E.2d 633]; *State v. Lamb* (N.D. 1996) 541 NW2d 457.)

> If, for example, written copies of the instructions are given to each juror, a divergence in literacy and reading comprehension may well leave some jurors uninstructed. On the other hand, if the foreman is directed to read the instructions to the other jurors, defendant is deprived of the opportunity to witness the manner in which the foreman intones the instructions. A judge is obligated to act in an impartial and unbiased manner in delivering instructions. He may not sneeringly describe the defendant's defense or make editorial comments while reading the instructions. A jury foreman is under no such constraint once the case has been submitted. (*State v. Norris* (1985) 10 Kan.App.2d 397, 401.) Moreover, any such error is exacerbated where the court failed to affirmatively instruct the jury to read the written instructions before deliberating. (*Ibid.*) Without such an instruction there is no assurance that the instructions were read and that the verdict was based on application of the law to the evidence. (*Ibid.*)

In the present case crucial supplemental instructions were given only in written form.[1469] Even though the original penalty trial instructions were given orally, the structural integrity of the process is compromised when any important instructions are not given orally. The same dangers and concerns discussed above apply with equal if not greater force to the present case. The

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[1469] For the text of the written instructions, see Volume 6, § 6.1(B)(5) and (6), pp. 1380-84, incorporated herein.

supplemental instruction at issue was given to a deadlocked jury in the penalty phase of a capital case. Clearly the instruction conveyed crucial, perhaps pivotal, information to the jury which went to the fundamental essence of the trial – the jury determination as to whether Lucas would be sentenced to die. Under these circumstances the error was structural and the judgment should be reversed. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275 [misinstruction on the meaning of proof beyond a reasonable doubt is a structural error requiring per se reversal]; see also *Arizona v. Fulminante* (1991) 499 U.S. 279.)

Alternatively, since the prosecution cannot demonstrate beyond a reasonable doubt that the error was harmless, the sentence should be reversed. (*Chapman v. California* (1967) 386 U.S. 18.) Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1470] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1470] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.12

JURORS' CONSIDERATION OF THE CONSEQUENCES OF DEADLOCK WAS MISCONDUCT

A. Procedural Background

After several hours of deliberation at the penalty phase, the jurors sent out a note declaring that they were hopelessly deadlocked. (RTT 13341-42; CT 24250.) Judge Hammes instructed the jurors that they must continue to deliberate and attempt to reach a verdict. (RTT 13346-47.)

Thereafter, the jurors – who had apparently discussed and considered the consequences of not reaching a verdict – sent the judge two notes regarding this issue. (CT 24251-52.)

The defense contended that the juror discussion of the consequences of deadlock was misconduct. (RTT 13416; CT 5589.) However, the judge refused to rule that juror misconduct had occurred, and failed to conduct any inquiry. (RTT 13419.) Instead, she erroneously sent the jurors a note explaining the statutory deadlock procedure, while admonishing them not to consider that procedure. (See Volume 6, § 6.1(B)(5), pp. 1380-81, incorporated herein.)

B. Juror Consideration Of Extrinsic Matters Is Misconduct Which Raises A Presumption Of Prejudice

Because the consequences of deadlock is an extrinsic consideration, the jurors' consideration of those consequences – as indicated by their notes – was misconduct violating Lucas' Sixth Amendment jury trial rights. The Supreme Court has held that a defendant has a right to trial by an impartial jury and

that, "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-73; see also *Parker v. Gladden* (1966) 385 U.S. 363, 364-65; *Marshall v. United States* (1959) 360 U.S. 310; *People v. Karis* (1988) 46 Cal.3d 612; *Marino v. Vasquez* (9th Cir. 1987) 812 F.2d 499; cf., *Tanner v. United States* (1987) 483 U.S. 107 [juror consideration of extraneous evidence may impeach the verdict].) To safeguard a defendant's constitutional rights, the exposure of a jury to extrinsic information has been deemed "presumptively prejudicial." (*Remmer v. United States* (1954) 347 U.S. 227, 229; see also *People v. Zapien* (1993) 4 Cal.4th 929, 944; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108.)

C. The Presumption Of Prejudice Was Not Rebutted In The Present Case Because The Judge Failed To Fulfill Her Duty To Inquire

When put on notice of potential juror misconduct the trial judge has a duty to inquire. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985; *People v. Davis* (1995) 10 Cal.4th 463, 547.) However, in the present case the trial judge refused the defense request to inquire. Hence, the presumption cannot be overcome and the death sentence should be reversed. (Compare, *People v. Jenkins*, *supra* [trial court conducted sufficient inquiry].)

Moreover, the error also violated the Eighth and Fourteenth Amendments by compromising the reliability of the death verdict. In a capital case the Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability

in any determination that death is the appropriate sentence. (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.) That reliability was undermined by the jury's consideration of an entirely irrelevant factor in reaching its penalty determination.

Accordingly, the penalty judgment should be reversed.

D. The Error Was Prejudicial Under Harmless-Error Analysis

Alternatively, since the prosecution cannot demonstrate beyond a reasonable doubt that the error was harmless, the sentence should be reversed. (*Chapman v. California* (1967) 386 U.S. 18.) Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1471] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1471] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.13

THE JUDGE ERRONEOUSLY INSTRUCTED THE JURORS ON THE STATUTORY PROCEDURES WHICH WOULD BE FOLLOWED IF THEY FAILED TO REACH A VERDICT

A. The Trial Judge Erred

In response to the jurors' note regarding the consequences of deadlock the judge sent the jurors the following written response:

> 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 should 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. (CT 14401.)

This response was erroneous. If the jury asks the court what will happen if it cannot agree on penalty, the court should not instruct on the statutorily mandated procedures and possibility of subsequent retrials in the event of a deadlock. To do so is unduly confusing, and provides an irrelevant and entirely improper incentive for jurors – particularly any "holdout" jurors – to alter their votes. (*People v. Belmontes* (1988) 45 Cal.3d 744, 813-14; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193-94.)

B. The Error Violated The Federal Constitution

Because the consequences of deadlock is an extrinsic consideration, the

jurors' consideration of those consequences – as indicated by their notes – was misconduct violating Lucas' Sixth Amendment jury trial rights. The Supreme Court has held that a defendant has a right to trial by an impartial jury and that, "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-73; see also *Parker v. Gladden* (1966) 385 U.S. 363, 364-65; *Marshall v. United States* (1959) 360 U.S. 310; *People v. Karis* (1988) 46 Cal.3d 612; *Marino v. Vasquez* (9th Cir. 1987) 812 F.2d 499; cf., *Tanner v. United States* (1987) 483 U.S. 107 [juror consideration of extraneous evidence may impeach the verdict].) To safeguard a defendant's constitutional rights, the exposure of a jury to extrinsic information has been "deemed presumptively prejudicial." (*Remmer v. United States* (1954) 347 U.S. 227, 229; see also *People v. Zapien* (1993) 4 Cal.4th 929, 944; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108.)

C. The Presumption Of Prejudice Was Not Rebutted In The Present Case Because The Judge Failed To Fulfill Her Duty To Inquire

See § 7.7.12(C), pp. 1766-67, incorporated herein.

D. The Error Was Prejudicial Under Harmless-Error Analysis

See § 7.7.12(D), p. 1767, incorporated herein.

PENALTY PHASE: NON-PRIOR CONVICTION ISSUES

7.7 PENALTY PHASE: DELIBERATION ISSUES

ARGUMENT 7.7.14

THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON

The judge left the jurors entirely on their own regarding the foreperson by merely instructing:

> You shall now retire and select one of your number to act as foreperson. He or she will preside over your deliberations. (CT 14399.)

As a result, the foreperson was permitted to exercise undue influence over the other jurors, thus undermining the fairness and reliability of the guilt and penalty deliberations. Therefore, guilt and penalty judgments should be reversed.

It is axiomatic that all 12 jurors should have equal standing in the deliberation process. However, by requiring the jury to select one juror as the "foreperson," the judge creates a danger that the foreperson will have undue influence over the deliberations. Hence, a clear admonition regarding the foreperson's duties should be given. (See Volume 2, § 2.11.4, pp. 736-40, incorporated herein.)

Moreover, the jurors should also be specifically instructed that the foreperson's vote carries no greater weight than the vote of any other juror. (*State v. Mak* (Wash. 1986) 105 Wn.2d 692, 753 [718 P.2d 407].) As the elected leader of the group, the foreperson may naturally have more influence than the other jurors. Some experts have concluded that as a general rule the

chairperson of a committee tends to be "more powerful." (See e.g., *United States v. Abell* (D.C. 1982) 552 F.Supp. 316, 321.) "Given the available evidence. . .in general, one would expect the foreperson to have some more influence than any other member of the [grand] jury; which is not to say that [in] each and every instance that will occur. But on the average [the foreperson] is more likely to have more influence than anyone else." (*Ibid.*, see also *United States v. Snell* (5th Cir. 1998) 152 F.3d 345, 346 ["the foreperson's position as jury foreman may have increased his ability to influence jury deliberations"]; *United States v. Estrada* (8th Cir. 1995) 45 F.3d 1215, 1226 [potential influence of improper statement upon the jury's deliberations "was particularly strong because [the person making the statement] was the foreman"]; *United States v. Delaney* (8th Cir. 1984) 732 F.2d 639, 643 [same].)

In sum, the lack of instruction on the foreperson's duties and powers failed to assure that the deliberations were full, fair and free of undue influence. This violated Lucas' state (Cal. Const. Art I, sections 1, 7, 15, 16 and 17) and federal (6th, 8th and 14th Amendment) constitutional rights to due process, fair trial by jury and verdict reliability. The Sixth Amendment right to trial by an "impartial jury" is "fundamental to the American scheme of justice . . ." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) This right, and/or the Due Process Clause (14th Amendment) is abridged if any juror has been subjected to undue influence during deliberations. (See e.g., *United States v. Scheffer* (1998) 523 U.S. 303, 314 [per se rule of exclusion is permissible for evidence that "is likely to influence the jury unduly . . ."]; *Smith v. Phillips* (1982) 455 U.S. 209, 217 ["Due process means a jury capable and willing to decide the case solely on the evidence before it . . ."];

Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643 [prosecution's comment, not violating specific constitutional provision, violates due process if it unfairly influenced the jury]; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363 [right to fair and impartial trial by jury uninfluenced by news accounts]; *Hopt v. Utah* (1884) 110 U.S. 574, 583 [accused has the right to "the judgment of the jury upon the facts, uninfluenced by any direction from the court as to the weight of evidence"].)

Moreover, the Cruel and Unusual Punishment Clause of the federal constitution (8th and 14th Amendments) requires heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

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.)

Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

Alternatively, since the prosecution cannot demonstrate beyond a reasonable doubt that the error was harmless, the sentence should be reversed.

(*Chapman v. California* (1967) 386 U.S. 18.) Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1472] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1472] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.8 CONSTITUTIONAL CHALLENGES TO THE DEATH JUDGMENT

ARGUMENT 7.8.1

THE STATE MAY NOT EXECUTE AN ACCUSED WHOM IT HAS NOT AFFORDED FAIR AND RELIABLE PROCEDURAL PROTECTION

In capital cases, our fundamental respect for humanity manifested in the Eighth Amendment requires, inter alia, that the procedures employed to determine who lives and who dies reflect a heightened reliability sufficient to produce confidence that the ultimate decision is just. (*Woodson v. North Carolina* (1976) 428 U.S. 280. As the plurality opinion of Justices Stewart, Powell, and Stevens, explained:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted).

The Supreme Court has adhered to *Woodson* and applied its reasoning in many later cases. (E.g., *Lankford v. Idaho* (1991) 500 U.S. 110 [sentencing in part based upon information contained in a presentence report which was not disclosed to petitioner or to his counsel and to which petitioner had no opportunity to respond required reversal of death sentence]; *Craig v. North Carolina* (1987) 484 U.S. 887; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Maxwell v. Florida* (1986) 479 U.S. 972 [Justice Marshall, dissenting, opined

that the Eighth Amendment's requirement of heightened reliability entitled habeas petitioner to access to his case file to ensure that his claim of inadequate assistance of counsel was fully and fairly resolved]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [death sentence vacated where the prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the state supreme court]; *Cabana v. Bullock* (1986) 474 U.S. 376; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plurality opinion) and *Gardner v. Florida* (1977) 430 U.S. 349, 358-359 (opinion announcing judgment); *Ford v. Wainwright* (1986) 477 U.S. 399 [procedure for determining whether condemned was mentally incompetent to be executed criticized on Eighth Amendment grounds].); *Spaziano v. Florida* (1984) 468 U.S. 447, 456 [fact-finding procedures in capital cases must reflect a heightened standard of reliability].)

In *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 431, this Court held that the trial court abused its discretion when it denied defendant's request for the appointment of second counsel in a complex capital case. The Court recognized the fact that a defendant is facing a possible death sentence entitles him to the benefit of procedural protections not afforded those not facing death.

> The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. (*Gardner v. Florida* (1977) 430 U.S. 349, 357; *Gregg v. Georgia* (1976) 428 U.S. 153, 187.) Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (*United States v. See* (9th Cir. 1974) 505 F.2d 845, 853, fn. 13; *Powell v. Alabama* (1932) 287 U.S. 45, 71.)

(*Keenan v. Superior Court*, *supra*, 31 Cal.3d at 430-31.)

In effect, the Eighth Amendment stands as a silent sentinel to protect the capitally accused from procedures and judicial rulings that tilt the playing field against him, thereby calling into question the reliability of any potential determination that death is the appropriate punishment. In the present case Lucas was not given a fair opportunity to defend, in light of the many errors throughout the trial which violated the due process and reliability requirements of the federal constitution. (See e.g.,Volume 2, § 2.9.13(H), pp. 629-30, incorporated herein.) These violations of Lucas' substantial rights profoundly tilted the playing field against him rendering the resultant death sentence unfair and unreliable in violation of the Eighth Amendment.

Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

Alternatively, since the prosecution cannot demonstrate beyond a reasonable doubt that the error was harmless, the sentence should be reversed. (*Chapman v. California* (1967) 386 U.S. 18.) Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Volume 6, § 6.5.1(D), pp. 1548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberations were closely balanced,[1473] the prosecution cannot meet its burden of demonstrating that the error was harmless.

[1473] See § 7.5.1(J)(3)(a), pp. 1619-20 above, 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: NON-PRIOR CONVICTION ISSUES

7.8 CONSTITUTIONAL CHALLENGES TO THE DEATH JUDGMENT

ARGUMENT 7.8.2

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT LUCAS' TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have expanded the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed

at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the state will kill dominates the entire process of applying the penalty of death.

A. Lucas' Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in § 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 465.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the Jacobs murders in 1979 the statute contained 26 special circumstances[1474] purporting to narrow the category of

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[1474]This figure does not include the "heinous, atrocious, or cruel" (continued...)

first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527,

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[1474](...continued)
special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow, and is now thirty-three.

557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of § 190.2 with Penal Code § 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under § 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[1475] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and

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[1475]The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of § 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in § 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at 52, n. 14.)

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[1476]

[1476] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that § 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, (continued...)

B. Lucas' Death Penalty Is Invalid Because Penal Code § 190.3(a) As Applied Allows Arbitrary And Capricious Imposition of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[1477] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the

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[1476](...continued)
appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes, and, like those schemes, is unconstitutional.

[1477] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also, CALJIC No. 8.88 (6th ed. 1996), par. 3.

crime defendant sought to conceal evidence,[1478] or had a "hatred of religion,"[1479] or threatened witnesses after his arrest,[1480] or disposed of the victim's body in a manner that precluded its recovery.[1481]

The purpose of § 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[1482] or because the defendant killed with a single execution-

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[1478] *People v. Walker* (1988) 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

[1479] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S. Ct. 3040 (1992).

[1480] *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[1481] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35, *cert. den.* 496 U.S. 931 (1990).

[1482] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] (continued...)

style wound.[1483]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[1484] or because the defendant killed the victim without any motive at all.[1485]

c. Because the defendant killed the victim in cold blood[1486] or because the defendant killed the victim during a savage frenzy.[1487]

d. Because the defendant engaged in a cover-up to conceal his

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[1482](...continued)
S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[1483] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[1484] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[1485] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[1486] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[1487] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

crime[1488] or because the defendant did not engage in a cover-up and so must have been proud of it.[1489]

e. Because the defendant made the victim endure the terror of anticipating a violent death[1490] or because the defendant killed instantly without any warning.[1491]

f. Because the victim had children[1492] or because the victim had not yet had a chance to have children.[1493]

g. Because the victim struggled prior to death[1494] or because the

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[1488] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[1489] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[1490] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[1491] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[1492] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[1493] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[1494] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

victim did not struggle.[1495]

h. Because the defendant had a prior relationship with the victim[1496] or because the victim was a complete stranger to the defendant.[1497]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[1498]

[1495] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[1496] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[1497] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[1498] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711

(continued...)

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[1499]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[1500]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning

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[1498](...continued)
P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[1499] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[1500] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

or in the middle of the day.[1501]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[1502]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[1503]

[1501] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[1502] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

[1503] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

In practice, § 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Trial On Each Element Of A Capital Crime; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale

that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Lucas' Death Verdict Was Not Premised On Findings Beyond A Reasonable Doubt By A Unanimous Jury That One Or More Aggravating Factors Existed And That These Factors Outweighed Mitigating Factors; His Constitutional Rights To Jury Determination Beyond A Reasonable Doubt Of All Facts Essential To The Imposition Of A Death Penalty Was Thereby Violated

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, that they outweigh mitigating factors, or that death is the appropriate sentence." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [hereinafter *Apprendi*] and *Ring v. Arizona* (2002) 536 U.S. 584.

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts

supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at 478.) In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment.

While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the state bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

a. In The Wake Of Ring, Any Aggravating Factor Necessary To The Imposition Of Death Must Be Found True Beyond A Reasonable Doubt

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[1504] Only California and

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[1504] (See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev.
(continued...)

four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[1505] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.)

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne*

[1504](...continued)
Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(i) (1992).)

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[1505] See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

(1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.) This Court acknowledged that fact-finding is part of a sentencing jury's responsibility; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[1506] These factual determinations are essential prerequisites

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[1506] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore, "even though *Ring* (continued...)

to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[1507]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see § 190.2(a)), *Apprendi* does not apply. This holding is based on a truncated view of California law. As § 190, subd. (a),[1508] indicates, the maximum penalty for *any* first degree murder conviction is death.

Ring specifically rejected Arizona's identical contention. Just as when a defendant was convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 602-603.) Section 190 provides that the

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[1506](...continued)
expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460.)

[1507] This Court has held that despite the "shall impose" language of § 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

[1508] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death, and that which penalty is to be applied "shall be determined as in Sections 190.1, 190.2, 190.3, 190.4 and 190.5." Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (§ 190.2), and death is not an available option unless the jury makes the further factual findings required by § 190.3, i.e., that one or more aggravating circumstances exist and that the aggravating circumstance(s) outweigh the mitigating circumstances.[1509]

In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed: "The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence." (*Ring*, *supra*, 536 U.S. 606, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539.)

The fact that under the Eighth Amendment, "death is different" cannot be used as a justification for permitting states to relax procedural protections

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[1509] The fallacy of the *Anderson* Court's reasoning in this regard is highlighted by the fact that by the same rationale, § 190 itself provides a maximum penalty of death; therefore, once the jury has returned a verdict of first degree murder, the finding of any alleged special circumstance does not increase the maximum penalty and would not need to be found true beyond a reasonable doubt by a unanimous jury. *Ring* requires that the factual findings required by both sections 190.2 and 190.3 be subject to the same rigorous standard.

provided by the Sixth and Fourteenth Amendments when proving an aggravating factor necessary to a capital sentence. (*Ring*, *supra*, 536 U.S. at 609.) No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in both its severity and its finality"].)[1510] As the high court stated in *Ring*, *supra*, 536 U.S. at 609:

> Capital defendants, no less than noncapital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

b. Ochoa and Walton

Before *Ring* was decided, this Court rejected the application of *Apprendi* to the penalty phase of a capital trial. *(People v. Ochoa* (2001) 26 Cal.4th 398, 453.) In *Ochoa*, the appellant requested a California jury instruction, CALJIC No. 8.87, on the basis that it did not require the jury to find beyond a reasonable doubt that the evidence established the attempted, threatened, or actual use of force or violence in order to find an aggravating

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[1510] In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly found the *Santosky v. Kramer* (1982) 455 U.S. 745, 755, rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at 732 (emphasis added).)

factor under § 190.3(b). This Court found that *Apprendi* did not require a jury to find beyond a reasonable doubt the applicability of a specific § 190.3 factor in aggravation:

> *Apprendi* itself excluded from its scope state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. The *Apprendi* court cited as an example the sentencing scheme described in *Walton v. Arizona*,[1511] whose holding compels rejection of defendant's instant claim. Arizona law provided that convicted first degree murderers were subject to a hearing in which the trial court decided whether to sentence the defendant to death or life imprisonment. A finding of first degree murder in Arizona was thus the functional equivalent of a finding of first degree murder with a § 190.2 special circumstance in California; both events narrowed the possible range of sentences to death or life imprisonment. *Walton* held there was no constitutional right to a jury determination that death was the appropriate penalty. As the *Apprendi* court explained, a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further Apprendi bar to a death sentence. . . . As we observed in *People v. Anderson*, once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death. Therefore, a penalty determination of death does not result in a sentence that exceeds the statutory maximum prescribed for the offense of first degree murder with a special circumstance. . . . Accordingly, *Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder.

[1511] *Walton v. Arizona* (1990) 497 U.S. 639

(26 Cal.4th at 453-454 (citations omitted) (emphasis added).)

This contention was specifically rejected by the high court in *Ring*, which held *Apprendi* fully applicable to all factual findings prerequisite to a death judgment whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial: "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense'. . ." (*Ring*, 536 U.S. at 609, quoting *Apprendi*, 530 U.S. at 494, n. 19.) In *Ring*, *Walton* was specifically overruled.

In light of *Ring*, this Court's holdings, made in reliance on *Walton*, that there is no need for any jury determination of the presence of an aggravating factor, or that such factors outweigh mitigating factors, because the jury's role as factfinder is complete upon the finding of a special circumstance, are no longer tenable. California's statute requires that the "trier of fact" find one or more aggravating factors, and that these factors outweigh mitigating factors, before it may even consider whether or not to impose death.

c. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility

that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty which would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[1512] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra.*)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Particularly given the "acute need for reliability in capital sentencing

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[1512] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

proceedings" (*Monge v. California*, *supra,* 524 U.S. at 732;[1513] *accord*, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California noncapital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less

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[1513]The *Monge* court developed this point at some length, explaining as follows:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida* 430 U.S. 349, 358 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland v. Washington,* 466 U.S. 668, 704, (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

(*Monge v. California*, *supra*, 524 U.S. at 731-732.)

(*Ring*, 536 U.S. at 609).[1514]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[1515] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at 726; *Strickland v. Washington*, 466 U.S. at 686-687; *Bullington v.*

[1514] Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[1515] The first sentence of Article 1, § 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

Missouri (1981) 451 U.S. 430, 439.) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

This Court has also rejected the need for unanimity on the ground that "[g]enerally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." *(People v. Miranda* (1987) 44 Cal.3d 57, 99 (emphasis added).) But unanimity is not limited to final verdicts. For example, it is not enough that California jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281-282.)

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small

> degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Richardson*, *supra*, 526 U.S. at 819 (emphasis added).)

These reasons are doubly true when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* makes clear that the foundational findings prerequisite to the sentencing decision in a California capital case are precisely the types of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

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

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose sentence without the firm belief that whatever considerations underlie their sentencing decisions have been at least proved to be more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to base "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co., supra*, 59 U.S. (18 How.) at 276-277 [due process determination informed by historical settled usages].)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or

between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

Finally, Evidence Code § 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In <u>any</u> capital case, <u>any</u> aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of § 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decisionmaker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty.

Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana, supra.*) That should be the result here, too.

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

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra.*) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[1516] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the

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[1516] See, e.g., *People v. Dunkle*, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at 543; *Gregg v. Georgia*, *supra*, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 .) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of such a provision does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are elsewhere considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of

habeas corpus, and is required to allege with particularity the circumstances constituting the state's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 269.)[1517] The same reasoning applies to the far graver decision to put someone to death. (See also, *People v. Martin* (1986) 42 Cal.3d 437, 449-450 (statement of reasons essential to meaningful appellate review).)

In a noncapital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded noncapital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at 994.) Since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence

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[1517] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, § 2280 et seq.

imposed. In *Mills v. Maryland*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at 383, n. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[1518]

[1518] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g)
(continued...)

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code § 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code § 190.3, the finding of an aggravating circumstance (or circumstances) and finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

5. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law

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[1518](...continued)
(1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at 52, n. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See § 7.8.2(A), pp. 1777-83 above, incorporated herein.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary

and capricious sentencing (see § 7.8.2(B), pp. 1783-90 above, incorporated herein). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia, supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2248, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. at 821, 830-31; *Enmund v. Florida* (1982) 458 U.S. 782, 796 n. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242,

259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[1519]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one

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[1519] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

eligible for death as set out in § 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment. Categories of crimes that warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other nonintentional killings, and single-victim homicides. (See Article VI, § 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most heinous crimes."[1520]) Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case

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[1520] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev.1, 30 (1995).)

review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

6. The Prosecution May Not Rely In The Penalty Phase On Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For The Prosecutor To Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As A Factor In Aggravation Unless Found To Be True Beyond A Reasonable Doubt By A Unanimous Jury

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in § 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United State Supreme Court recent's decisions in *Ring v. Arizona*, *supra,* and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged

criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

7. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Impermissibly Acted As Barriers To Consideration Of Mitigation By Lucas' Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)), and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

8. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to

aggravate the sentence upon the basis of nonexistent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 310; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, nonexistent factors and did so believing that the state – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

D. The California Statute Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Noncapital Defendants

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its

prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E. 2d 662, 668.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The state cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the People of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to noncapital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) Its reasons were a more detailed presentation of the rationale that has also justified the refusal to require any burden of proof in the penalty phase of a capital trial, or unanimity as to the

aggravating factors that justify a sentence of death, or written findings by the jury as to the factors supporting a sentence of death: death sentences are moral and normative expressions of community standards. See section C of this Argument, *ante*. Appellant will therefore examine the justifications proffered by the *Allen* court, and show that they do not suffice to support denying persons sentenced to death procedural protections afforded other convicted felons.

At the time of appellant's sentence on September 19, 1989, California required inter-case proportionality review for noncapital cases. (Former Pen. Code § 1170, subd. (f).)[1521] The Legislature thus provided a substantial benefit

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[1521] At the time of appellant's sentence in this case, Penal Code § 1170, subdivision (f) provided as follows:

> (f)(1) Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in comparison with the sentences imposed in similar cases. If the Board of Prison Terms determines that the sentence is disparate, the board shall notify the judge, the district attorney, the defense attorney, the defendant, and the Judicial Council. The notification shall include a statement of the reasons for finding the sentence disparate.
>
> Within 120 days of receipt of this information, the sentencing court shall schedule a hearing and may recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if the defendant had not been sentenced previously, provided the new sentence is no greater than the initial sentence. In resentencing under this subdivision the court shall apply the sentencing rules of the Judicial Council and shall consider the information provided by the Board of Prison Terms.

(continued...)

for all prisoners sentenced under the Determinate Sentencing Law (DSL): a comprehensive and detailed disparate sentence review. (See *In re Martin* (1986) 42 Cal.3d 437, 442-444, for details of how the system worked while in practice). In appellant's case, such a review might well be the difference between life and death. Persons sentenced to death, however, are unique among convicted felons in that they are not provided this review, despite the extreme and irrevocable nature of their sentence. Such a distinction is irrational.

In *People v. Allen*, *supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws.

(1) The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards

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[1521](...continued)

(f)(2) The review under this section shall concern the decision to deny probation and the sentencing decisions enumerated in paragraphs (2), (3), and (4) of subdivision (a) of Section 1170.3 and apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons convicted of similar crimes so as to eliminate disparity of sentences and to promote uniformity of sentencing.

(g) Prior to sentencing pursuant to this chapter, the court may request information from the Board of Prison Terms concerning the sentences in this state of other persons convicted of similar crimes under similar circumstances.

This language was removed by an amendment (Stats 1992 ch 695 §§ 10 (SB 97)), which took effect on September 14, 1992.

in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright*, *supra*; *Atkins v. Virginia*, *supra*.) Juries, like trial courts and counsel, are not immune from error. They may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the state cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See § 190.4;

People v. Rodriguez (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claims was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "[T]he 'range' of possible punishments narrows to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. [Citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 340, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at 605 [plur. opn]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v.*

Stephens, *supra*, 462 U.S. at 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at 994; *Monge v. California*, *supra*, 524 U.S. at 732.)[1522] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the state to apply its disparate review procedures to capital sentencing.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to noncapital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*,

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[1522] The *Monge* court developed this point at some length:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

(*Monge v. California*, *supra*, 524 U.S. at 731-732.)

at 1287.) This perceived distinction between the two sentencing contexts is insufficient to support the challenged classification. The distinction drawn by the *Allen* majority between capital and noncapital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare § 190.3, subds. (a) through (j) with California Rules of Court, rules 421 and 423.) One may reasonably presume that it is because "nonquantifiable factors" permeate all sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees each and every person that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case.

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra.*)[1523] California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in noncapital cases. (Cal. R. Ct. 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) To provide greater protection to noncapital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra.*)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra.*) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should

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[1523] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than noncapital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (*Ring*, *supra*, 536 U.S. 609.)

be applied by this Court when a fundamental interest is affected.

E. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.

org].)[1524]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [dis. opn. of Field, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at 101; *Atkins v. Virginia*, *supra*, 536 U.S. at 315-317.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used

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[1524] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at 315.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

7.9 CUMULATIVE ERROR: THE CUMULATIVE EFFECT OF THE ERRORS WARRANTS REVERSAL OF THE DEATH JUDGMENT

A. Introduction

The arguments below address the cumulative effect of the errors identified throughout this brief. The term "cumulative" refers to all the errors identified in the Jacobs briefing (Volume 2) as well as the errors in the Santiago (Volume 3), Swanke (Volume 4), Strang/Fisher (Volume 5), and penalty (Volumes 6 and 7) briefing, all of which could have affected the penalty verdict by virtue of the ruling allowing cross-admissibility of all the charges.

B. The Errors Cumulatively Violated The Federal Constitution

State law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

Furthermore, the numerous state law and federal constitutional errors identified throughout this brief precluded the jurors' verdict from meeting the heightened reliability requirements constitutionally mandated in a capital proceeding, and deprived Lucas of his rights to due process, fair trial by jury, confrontation, compulsory process, representation of counsel and the right to present a defense, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S.

776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

C. The Errors Were Cumulatively Prejudicial

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

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

In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, Lucas has identified numerous errors that occurred during the

guilt and penalty phases of his trial. Each of these errors individually, and all the more clearly when considered cumulatively, deprived Lucas of due process, of a fair trial, of the right to compulsory process and to confront the evidence against him, of a fair and impartial jury, of the right to present a defense, of the right to representation of counsel, and of fair and reliable guilt and penalty determinations in violation of Lucas' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself, is sufficiently prejudicial to warrant reversal of the guilt and/or death judgment. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

In sum, should this Court find multiple errors within any Arguments advanced in the foregoing briefing, then they should be viewed cumulatively as well as individually, and the penalty judgment should be reversed based on the cumulative errors, under any standard of prejudice. (E.g., *People v. Buffum* (1953) 40 Cal.2d 709, 726 [state law]; *People v. Sims* (1958) 165 Cal.App.2d 108, 116 [same]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 17 [*Chapman* standard]; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963, and cases cited [same]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438 [*Strickland* standard]; *Mak v. Blodgett* (9th Cit. 1992) 970 F.2d 614, 622 [same]; see also, e.g., *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1681; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Phillips* (1985) 41 Cal.3d 29, 83; *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.)

Moreover, "the death penalty is qualitatively different from all other

punishments and [thus] the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 [citing *Ford v. Wainwright* (1986) 477 U.S. 399, 411]; *Zant v. Stephens* (1983) 462 U.S. 862, 885; and *Gardner v. Florida* (1977) 430 U.S. 349, 358].) That is also so because of the reality that "death is different," and the recognized need for heightened reliability in the capital sentencing context. (*People v. Horton* (1995) 11 Cal.4th 1068, 1134-35; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586.)

Thus, this Court should consider the penalty phase errors cumulatively in conjunction with all guilt phase errors, which may have affected penalty phase toward the same end. Such consideration includes, but is not limited to, considering the effect of any and all guilt phase errors with respect to their prejudice at penalty phase as well as guilt phase. "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; see generally Goodpaster, "*The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases*" (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled "Guilt Phase Defenses And Their Penalty Phase Effects"].)

This Court should also assess the combined effect of the errors, because the jury's consideration of all the penalty factors resulted in a single general verdict of death. Multiple errors, each of which may have been harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett, supra,* 970 F.2d at 622.)

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Lucas' conviction for first degree murder and the special circumstance finding be reversed, and that Lucas' death sentence be set aside.

Dated: August ____, 2003

_____

THOMAS LUNDY
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DAVID ALLEN LUCAS

PROOF OF SERVICE

I DECLARE THAT:

I am a resident of Sonoma County and employed in the County of Sonoma, State of California.

I am over the age of eighteen and not a party to the within action. My business address is: 2500 Vallejo Street, #105, Santa Rosa, California 95405. On August ____, 2003, I served the within: **APPELLANT'S OPENING BRIEF** on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon, fully prepaid, in the United States mail, at Santa Rosa, California, addressed as follows:

San Diego County Superior Court Clerk
For Delivery To Judge Laura Hammes
220 W. Broadway
San Diego, CA 92101

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David Lucas E-32301 3-E-110
NOT SERVED PER HIS WRITTEN REQUEST (RULE 37)

_____
Thomas Lundy

I declare under penalty of perjury that the foregoing is true and correct and executed on August ____, 2003, at Santa Rosa, California.

_____
Gay Farrer