S072161

THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS POTTS, Defendant and Appellant.	Kings County Superior Court No. 97CM2167

APPELLANT POTTS' OPENING BRIEF

Appeal from the Judgment of the Superior
Court of the State of California for
Kings County

HONORABLE LOUIS BISSIG, JUDGE

Michael P. Goldstein
Cal. State Bar No. 60358
P.O. Box 30192
Oakland, CA 94604
(510) 910-7220
mpgoldstein@earthlink.net

Attorney for Appellant

DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS J. POTTS, Defendant and Appellant.	)	No. S055856 Kings County Superior Court No. 97CM2167

APPELLANT POTTS'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.) The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

On October 21, 1997, the Kings County District Attorney filed an information, Case No. 97CM2167, charging Thomas Potts with four felonies. (CT 1: 13.) The case was tried on an amended information filed June 1, 1998.

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That pleading specified the following charges:

- Count I, malice murder of Fred Jenks, on or about August 4, 1997 (in violation of section[1] 187, subd., (a)), with the special circumstances of robbery-murder (§ 190.2, subd., (a)(17)) and multiple murder (§ 190.2, subd. (a)(3)), along with an allegation that the victim was at least 65 years of age (§ 667.9, subd. (a));
- Count II, the same charge and allegations (including a duplicative multiple-murder allegation), regarding Shirley Jenks;
- Count III, robbery of Fred and Shirley Jenks on the same date (§ 211); and
- Count IV, an unrelated grand theft (§ 487, subd. (a)), the taking, on or about July 1, 1997, of a ring belonging to Viola Bettencourt.

The amended information also charged, under the Three Strikes Laws (§§ 667, subds. (d) and (e), 1170.12), that appellant had suffered a robbery conviction in 1975 and another in 1985. (CT 1: 196–198.)

Soon after his appointment, appellant's attorney successfully moved for interim authorization to spend up to $3000 in investigator's fees, with the understanding that more funds would be requested later, when the case reached superior court. (Augmented Record of Clerk's Transcript on Appeal 2: 392–394.) The funds were never spent,[2] and the record contains no additional requests.

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[1]References are to the Penal Code, unless otherwise specified.

[2]The trial-court file contains a January 12, 2005, Clerk's Declaration re: Request for Documents, paragraph 1 of which indicates that county records showed no submissions requesting payment were made.

As this information is being provided for background but pertains directly to no appellate issue, appellant has not moved to augment the record.

King's County contracts with a small group of attorneys to provide all needed indigent-defense services for an annual flat fee. (See 1/18/05 CT[3] 192–225, 255.) Appellant's attorney moved for the appointment, as second counsel, of an attorney who was not on the panel. The trial court denied the motion without prejudice to a request for appointment of a panel member, or a renewed request specifying the need to expend extra funds for the particular attorney. (CT 1: 17–26, 57–67, 69–71.) No further papers were filed, and the attorney tried the case alone. Two deputy district attorneys prosecuted the case together.

Jury selection, a collaborative process in which virtually all excusals for hardship or cause were by stipulation, occupied the four-day period beginning June 2, 1998. (CT 2: 448–449; 9: 1693–1695, 2606–2610; see RT 2: 359–4: 1015) The trial itself began June 8, after denial of a Fresno television station's request to broadcast the proceedings. (CT 9: 2611–2613, 2618–2621.) The prosecution presented its case in chief in five court days, resting on June 15. (CT 9: 2618–2621, 2626– 2629, 2630–2632, 2633–2635, 2639–2640, 2643–2644.) That same day, the defense rested, after briefly recalling five of the prosecution's witnesses, and the prosecution presented a short rebuttal case. (CT 9: 2644–2645.)

The case was submitted to the jury June 17, 1998. (CT 9: 2648.) The next day it returned guilty verdicts as charged on all four counts (i.e., two counts of first-degree murder, first-degree robbery, and grand theft), found true the special circumstances alleged (robbery murder, multiple murder), and found the elderly-victim enhancements true. (CT 9: 2649–2651; 10:

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[3]This is a one-volume Clerk's Transcript labeled "Supplemental Augmented Record of Clerk's Transcript on Appeal Re: Appellants Motion to Correct, Complete and Settle the Record on Appeal per Hearing of January 18, 2005."

2710–2715.) The penalty phase began the following day and concluded on June 23, after less than two days of proceedings in front of the jury. (CT 10: 2716–2718, 2875–2875, 2881–2882.) The jury began deliberating mid-afternoon of that day and returned with death verdicts on both murder counts about 24 hours later. (CT 10: 2881–2884.) The allegations of prior offenses (two robberies) were submitted to the court, jury trial being waived, and found to be true. (CT 10: 2882; RT 12: 2492–2501.)

The court denied the automatic motion for modification of the verdict on July 23, 1998. (CT 10: 2924–2927.) After reviewing a probation report, it sentenced appellant to death on Counts I and II and a term of 25 years to life on Count IV (grand theft) because of appellant's prior strikes, staying a similar term on Count III (robbery) under § 654 because the crime was a factor in determining the death sentences. It also imposed one-year terms, each doubled under the Three-Strikes Laws, for the two elderly-victim enhancements, for a total four-year determinate sentence. (CT 10: 2928–2936.) The sentence also included a $10,000 restitution fine, pursuant to § 1202.4. (CT 10: 2929.)

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STATEMENT OF FACTS

Guilt Phase Testimony

Introduction[4]

The severely injured bodies of Shirley and Fred Jenks, reported to be 72 and 73 years old, respectively (RT 6: 1397–1398, 1440), were found in a bloody scene in their Hanford home on August 5, 1997. No one saw or heard what happened to the Jenkses, nor did anyone inculpate himself or herself. Any hypothesis as to who killed them, why, and how, had to be inferred from the circumstances. Even the day they died was uncertain, although it had been very recent.

Appellant, a 48-year-old African-American man, had worked for Fred Jenks as a handyman and house cleaner, on an occasional, on-call basis. (RT 7: 1530, 1534.) Sometimes he rode his bike to the Jenks residence, but more often Fred would pick him up. (RT 7: 1534–1535.) (Appellant did not own a car; he got around by bicycle or walking. (RT 7: 1556.)) The evidence on which the prosecution relied to identify him as the perpetrator of the killings included appellant's having pawned two of the two hundred items of jewelry taken from the house, and the presence on his glasses—after police handling of them—of minute specks of blood consistent with Fred's DNA profile. Many of the victims' wounds could have been made by a common tool called a roofer's hatchet. Appellant owned one and, as a handyman, often had it with him in a duffel bag that he carried. There was also evidence of a watch found at the scene and

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[4]Most of the facts summarized briefly in this introduction are presented in more detail later, and record citations appear at those points. Citations appear here if the information is not repeated later.

footprints made by Nike shoes. Appellant's ex-girlfriend testified that the watch was like one that he owned and that sometimes fell from his wrist, and that he had owned Nike shoes recently. She supplied other testimony providing a motive (poverty) and suggesting that a few of appellant's clothes were missing.

Police scouring of the Jenks residence, appellant's apartment, and the bicycle which he used for transportation produced no fingerprint or biological evidence of appellant's having been at the scene, nor traces of blood on his possessions (other than the glasses). The bloody footprints at the scene were not preserved, and there was no evidence that the shoes that made them were appellant's size.

As to what had happened, the prosecution theory was that appellant, short of funds because of alcohol and gambling addictions, went to the home to rob and kill his employers. Besides the hatchet blows, the Jenkses suffered knife wounds. Despite a crime scene and bodies which showed frenzied attacks, the prosecution hypothesized a complicated scenario involving a cool, deliberate shifting from one weapon to another.

Nothing in the circumstances tended to exclude an alternate theory. There was indirect evidence (at the guilt phase, direct at penalty) of appellant's mental illness. If the perpetrator was appellant, he may have shown up seeking work to ameliorate his financial straits, been rebuffed in a manner he experienced as provocative (there was evidence from which it could be inferred that Fred may have offered him three or four dollars), flown into a rage, and taken valuables afterwards.

The Crime Scene and the Bodies

Fred Jenks's body was discovered in the entryway near the front door of the couple's home around 7:00 p.m., Tuesday, August 5, 1997. (RT 5: 1080, 1089–1092.) The door was closed but not locked. (RT 5: 1081–1082.) All windows and all other doors were locked, and there was no sign of forced entry. (RT 5: 1173–1174.) Shirley's body was in the master bedroom, lying on her back on the bed, her legs off the edge and her feet on the floor. (RT 5: 1105, 1111.) Both victims were in night clothes. (RT 5: 1050; Ex. 3.)

Near Fred's body were eyeglasses, a pair of flip-flops, much blood, some hair and a bone fragment or tooth, and a pin for securing a watch band to a watch. (RT 5: 1189–1195, 1208.) The pin fit a watch found under the body, to which the band was attached on only one side. (RT 6: 1247–1248, 1294.) Fred's watch was on his wrist. (RT 5: 1196, RT 6: 1247.) There was considerable blood spattering on the floor and the walls on both sides of the hallway, and even a few small drops on the ceiling. (RT 5: 1193–1194, RT 6: 1256–1266; Exs. 23–32.) Partially sticking out of the pocket of Fred's robe, which was next to the body, were three or four dollar bills. (RT 5: 1195–1197; Ex. 3.)

Per the pathologist who later examined the body, there were numerous contusions, bruises, abrasions, lacerations, and stab wounds, many inflicted with considerable force. (RT 6: 1398, 1411–1412.) There were 28 wounds to the top and back of the head alone. (RT 6: 1398, 1400–1401.)

The pathologist concluded that a narrow-bladed hatchet with a hammer head opposite the blade, like that used by a roofer or lather, caused many of the wounds. He cited the force required to produce some of the

injuries,[5] the presence of both a stab component and an incised component on some of the cuts,[6] and the presence of blunt-force injuries, including a round one that appeared to have a crosshatch pattern common to such tools. (RT 6: 1399, 1401–1413, 1427–1429.) A roofer or lather's hatchet is a common tool in construction work: "there's lots of them out there." (RT 6: 1456.) Investigators were already interested in a hatchet before the pathologist examined the bodies, but he was not asked whether he was told this prior to arriving at his opinion. (See RT 10: 2098, 2101, 2146–2147.)

There were also nine stab wounds, apparently from a knife, in the area of the left shoulder blade. (RT 6: 1409, 1415.) A paring knife found in the kitchen sink, with blood on it, was consistent with the size of these, although a longer knife may have been needed to penetrate as deeply as the wounds did. (RT 7: 1452; see also 6: 1253; 7: 1506.) The prosecution's theory that the perpetrator started with a smaller knife, then switched to a longer one, was "[p]ossibly" true (RT 7: 1453), as the witness was "not certain" that the smaller knife had a long enough blade to inflict all of the wounds (RT 7: 1452).

A low quantity of blood in the chest cavity showed that Fred was nearly dead from the head wounds when he received the stab wounds to the back. (RT 6: 1415–1416, 1424–1425.) One or more of the head wounds may (or may not) have been enough to kill him instantly. They would have certainly rendered him unconscious. (RT 6: 1420–1421.)

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[5]A heavy-bladed knife can also produce them. (RT 6: 1404.)

[6]A knife can produce this combination if it is used to stab but there is also a movement across the surface of the skin as it is pulled out. A hatchet blade can produce it if the corner goes in (producing a "stab" wound) while the sharpened edge creates an incision. (RT 6: 1401–1402.)

There were bloody shoeprints on the floor near the body. (RT 5: 1198; Ex. 17.) Nike brand shoes may have made the prints. (Compare RT 6: 1243–1244, 1248–1249, 1267–1269 with Exs. 12, 17, 35–38 and RT 8: 1799.) Lead investigator Darryl Walker stated that all shoe prints found at the scene were from one pair of shoes (RT 6: 1250), but there was no evidence that the prints were preserved or examined by a criminalist. No attempt to determine their size had been made. (RT 6: 1310.)

Blood had been tracked into the kitchen (5: 1194), which was immediately off the entryway (RT 5: 1164). Footprints also went down the hall towards the back of the house, where the master bedroom and a bathroom were. (RT 5: 1199–1200, 1243.)

In the master bedroom, a dresser and the nightstands appeared to have been ransacked, and there were empty jewelry boxes nearby. (RT 6: 1270–1274.) A few jewelry items were on the floor, but it appeared that at least 200 pieces of jewelry were missing. (RT 6: 1309–1310; see also RT 10: 2141–2144.) A boning or filet knife was retrieved from the room. (RT 6: 1342–1343.) In a somewhat gross typing system, blood on its handle was consistent with both Shirley's and appellant's, along with that of 18 percent of the general population. (RT 7: 1486, 1509, 1516.) The quantity of blood on the blade was too small to type using the local criminalist's typing technology. (RT 7: 1509.) Although the prosecution theory of the crime required the knife to have been used on Fred as well, and the prosecution had sent other evidence to an out-of-state laboratory for a DNA typing process that permits working with very small samples (RT 8: 1674–1675, 1731), it provided no evidence that it had done so with the filet knife.

Shirley's body had also been assaulted furiously. It had four chop wounds to the head, causing deep fractures. (RT 7: 1441–1442,

1446–1447.) When she was near death, or shortly after death, she received seven stab wounds to the chest, apparently from a knife. Two of these penetrated the heart. (RT 7: 1442, 1445–1448.)

After death, in all likelihood, two more incisions were made, which produced very little bleeding. These were slashing wounds high across the throat, practically from ear to ear. They were not deep enough to cut the carotid sheath, though one did enter the larynx. (RT 5: 1107; 7: 1442, 1445, 1448.) All of Shirley's stabbing and slashing wounds could have been caused by the filet knife found in the bedroom. (RT 7: 1451–1452, 1463.) Most of the stab wounds could also have been caused by the paring knife, although the witness thought that three were too deep. (RT 7: 1464.)

Other Parts of the House

A cutlery drawer in the kitchen was open and appeared to have a drop of blood in it. (RT 6: 1251–1252.) Next to it was a sink, in which—besides the paring knife—were a knife sharpener and a dishrag. All had apparent bloodstains, and there were droplets of blood in the sink. (RT 6: 1253–1255, 7: 1507–1508.) The paring knife later tested positive for blood, and blood on the sharpener was consistent with Fred's. (RT 7: 1506, 1510.) As will be explained later, the prosecution theory required the paring knife to have *not* been used on Shirley. While the quantity of blood on it was insufficient to type using the method available locally (RT 7: 1507), there was no evidence that the item was sent out for the more sensitive DNA testing.

In a room in the Jenks house used as an office, a lockable file cabinet was damaged. (RT 5: 1201.) In an open center desk drawer there was $113 in cash. (RT 5: 1200–1201; 6: 1307.) On the counter in one of the bathrooms was some water-diluted blood, not yet fully dry. (RT 5: 1200.) Other rooms appeared undisturbed. (RT 1199–1200, 1206.)

One of the Jenkses' cars was in the garage. Its door was open, and the battery was dead, as if the open door had drained it. (RT 5: 1171, 1207.)

Time of Death

Counsel for both sides concluded that the homicides occurred Monday, August 4, the prosecutor saying it was early evening, the defense attorney saying between 1:00 and 6:00 p.m. (RT 11: 2381–2382, 2433–2434.) Fred was seen outside the house between noon and 2:00 on that day. (RT 10: 2202–2203.) Monday's newspaper, which was generally delivered sometime between 4:00 and 6:00 p.m., was still on the front porch when the bodies were discovered, and a delivery person received no response when ringing the doorbell Tuesday morning. (RT 5: 1070–1075, 1094, 1098, 1171–1172, 1240.)

Autopsies were performed on the victims' bodies on Wednesday, August 6, 24 hours after discovery of the bodies. (RT 6: 1348, 1395–1396.) A number of unknowns made it impossible to pinpoint the time of death, but the Monday afternoon/early-evening scenario was within the pathologist's range of Sunday night through sometime Tuesday. (RT 6: 1348 1417–1420, 1430.) Beans in Shirley's stomach suggested that she had had a noon or evening meal the day of her death. The pathologist believed that she died two to four hours later. (RT 7: 1456–1458, 1465.)

Evidence Said to Tie Appellant to the Jenks Offenses

Ownership of a Roofer's Hatchet

About six months before the crimes, appellant had been seen by a police officer riding a bicycle and carrying a duffel bag. In it was a hatchet with a square blunt edge, maybe 3/4" wide, opposite the blade. (RT 5: 1115–1117.) (Cf. the round, 1 1/4" bruise on Fred Jenks's body that made the pathologist think of a roofer's hatchet. (RT 6: 1429.)) Appellant said

he used it for construction work. (RT 5: 1118.) A month later a sheriff's deputy also stopped appellant and looked in his gym bag. In it were some pawn receipts and the tool. (RT 7: 1467–1472.) Diana Williams, appellant's ex-girlfriend, who was familiar with the tool, thought the hammer head was smooth, not crosshatched. (RT 7: 1546–1548, 1576.)

At 3:00 a.m., Wednesday, August 6, a few hours after the bodies were found, investigators visited appellant at his apartment and asked him, among other things, whether he had previously been stopped while in possession of a hatchet. He said that he had. When asked to show it to the officers, he said that he did not have it. He thought he had lost it, perhaps in a recent move.[7] Officers looked for the hatchet in the apartment. They found an empty blue duffel bag, but no hatchet. (RT 10: 2098–2012.)

Eyeglasses; DNA

When appellant was arrested August 8, he was wearing eyeglasses. Walker, the lead investigator, removed them and saw what looked like a rust spot or blood droplet at the top of the right lens, where it was secured to the frame. (RT 5: 1149, 1154; 6: 1276–1278.) Originally he said that he seized them to examine them for trace evidence (RT 6: 1277, 1313), which would explain his noticing a pinhead-sized speck on dark-tinted lenses (RT 6: 1314). But on cross-examination, after a seeming slip where he mentioned that he was about to return them to appellant but stopped for a moment to look at them and then saw the speck, he revised his statement and said that he took them so that he could examine appellant's eyes. (RT 6: 1313–1314.)

[7]Diana Williams testified that appellant had moved to the apartment "a couple of weeks" before his arrest. (RT 7: 1532.) But she said he used the hatchet to hammer something to the wall there. (RT 7: 1549.)

A DNA technician later examined the glasses carefully and did see four apparent blood spots. However, they were on the frames, not either lens, and at the bottoms, not the top. (RT 8: 1687–1690.) After a presumptive test showed them to be blood, Polymerase Chain Reaction tests for DNA typing were performed. (RT 8: 1685–1686; 1691–1692.)

A swabbing of the glasses showed a DNA mixture that could be explained partially as including material from appellant, whose sloughed-off skin cells could have been on his glasses. At least one other person, however, would be required to account for all the markers that showed up. Fred Jenks's profile would explain the remaining markers. (RT 8: 1703–1710, 1719, 1748, 1766–1769, 1773–1774, 1776, 1782; Ex. 71.) Fred was not the only potential "contributor," but the numbers were low. An expert, Ranajit Chakraborty, testified as to the number of people in various populations who were likely to have had the genetic profile required to explain the mixture. According to his calculations, one person in 1.78 million Caucasians, in 2.26 million African-Americans, or in 1.82 million Hispanics could be expected to have a profile that would provide the markers that appellant did not have. (RT 9: 2000–2001.)

Scratches

On August 8, after his arrest, appellant was found to have a scratch on his left shoulder, near the neck, and another one on the outside of his right upper arm. They were not fresh, but beyond that their ages could not be determined. (RT 7: 1622–1623, 1627.) In the opinion of the nurse who saw them, they were not deep enough to have had any bleeding. (RT 7: 1628.) When interrogating him during the night of August 5–6, officers observed appellant's arms and hands and saw no cuts or scratches. (RT 10: 2098, 2104–2106.)

Jewelry

Appellant pawned a jade pendant and a diamond ring at Hanford Jewelry and Loan on Tuesday, August 5, at 1:50 p.m. (RT 8: 1809–1810, 1812–1815, 1819–1822, 1828, 1839–1841, 1844–1845, 1848–1852, 1860–1862.) The pendant matched an earring found in the Jenkses' bedroom, and Shirley's sister identified both items as belonging to Shirley. (RT 8: 1815–1817, 1835–1836; 10: 2114–2120.)

The sister testified that Shirley owned a lot of jewelry, including a number of evidently quite-valuable items that were not recovered. (RT 10: 2123–2125; see also 5: 1309–1310 [Walker concludes at least 200 items were missing from containers at scene].) The two recovered items were not tested for DNA or fingerprints, to see who, other than appellant, might have handled them. (RT 8: 1830–1831.)

These were not the only recent instances of appellant's pawning possibly stolen property. Appellant had also recently pawned a woman's ring with multiple diamonds on it (in addition to the one that was the subject of Count IV, the grand theft charge in this case), and VCRs and appliances, all of unknown origin. (RT 10: 2144–2146, 2159.) No evidence was presented of these having been acquired during assaultive crimes.

The prosecution presented evidence suggesting the use to which the proceeds of the August 5 pawn were put. According to Investigator Walker, Oscar Galloway told him[8] that on that day he gave appellant a ride downtown. Appellant left the car for a little while with a blue duffel bag, then returned. Then, at appellant's request, Galloway drove to a casino,

[8]This hearsay evidence was admitted, over objection, because Galloway, ill and medicated, could not remember what he told Walker. (RT 10: 2211–2215.)

where the two briefly played the slot machines. Walker testified that Galloway said that appellant forgot the bag in the back of the car and retrieved it the following day. According to Walker, Galloway thought it did not look as fully packed as it did when appellant left the car with it the day before. (RT 10: 2236–2238; see also 2207–2212.)

Evidence Supplied by Diana Williams

Besides casting doubt on appellant's view that he must have lost his hatchet in his recent move, ex-girlfriend Diana Williams tied several items of crime-scene evidence to appellant and supplied a motive.

According to Williams, appellant normally wore a watch, but one of the pins for securing the band came loose twice in her presence. On Wednesday, August 6, she noticed that appellant was missing his watch. The one found under Fred Jenks's body was, she said, appellant's. (RT 7: 1541–1544, 1552.)

Williams also said that appellant owned a pair of tennis shoes, which she gave him after her son outgrew them. They had "Nike" written in the middle part of the sole. (The suggestion of "Nike" in the prints at the scene was at the heel (RT 5: 1244.)) The last time she saw him wear them was two to four weeks before his arrest.[9] (RT 7: 1544–1546, 1568, 1573–1574.) Her son Quentin, who was 16 at the time of trial, agreed that she had given appellant his shoes. He too, said that "Nike" was written in the arch, and he was positive that Nike's check-mark-like logo was also on the sole. (RT 7: 1605–1607.)

Williams cleaned out appellant's apartment after his arrest, and she did not see the Nikes, the hatchet, a pair of jeans which he wore frequently, a particular T-shirt, or the watch. (RT 7: 1549–1551, 1582.) However, she

[9]Officers who visited appellant at his apartment 3:00 a.m., Wednesday, August 6 found no Nikes in a search of his unit. (RT 10: 2098, 2102–2103.)

was unable to say whether or not he wore the T-shirt and jeans during the time between the homicides and his arrest. (RT 7: 1581–1582.)

Williams testified that, on Friday, August 1, she received appellant's SSI check, for which she was the payee, and gave appellant the cash proceeds. (RT 7: 1535–1536.) They were to go grocery shopping together on Monday, but when the time came, he said he had lost all his money at a casino. (RT 7: 1536–1538.) Similarly, the owner of a Hanford liquor store testified that appellant had an account there, had paid off his balances as required at the first of June and July, but had charged about $140 in July and did not pay it off August 1. He called that day and said that he would be in Monday or Tuesday, but he did not show up. (RT 9: 2054–2058.)

Williams further testified that, after the murders, probably on Wednesday, appellant was at her apartment watching a newscast with her boy, Quentin, while she was nearby in the kitchen. The Jenkses, the people whom he worked for, were mentioned. Williams thought something was said on the newscast about a hatchet, which was not the case, as the police had decided not to release that information yet. (RT 7: 1552; 10: 2189–2190, 2239.) But Quentin asked Thomas twice if he did not formerly have a hatchet, or what had happened to his hatchet. Williams thought that, rather than answering, appellant avoided the question. (RT 7: 1552–1554.) Quentin corroborated his mother on this, saying that he asked three times, and that appellant ignored him. (He knew that the newscast did not mention the hatchet and testified that the question came spontaneously, out of the blue.) (RT 7: 1595–1602; 10: 2189–2190, 2239.) His mother asked appellant why he was not answering. Appellant went into the kitchen and said he did not want to discuss the subject in the apartment because someone might have placed a "bug" in their wall. (RT 7: 1602.)

Williams might have benefitted financially from appellant's arrest. She had gotten to know him about a year before the crimes took place, and for five months in 1996, she lived in the same apartment with him. She had arrived in Hanford a year before that and supported herself and her son on her earnings from two to three hours a day of in-home care for the elderly. (RT 7: 1526–1528, 1578.) For reasons that were not made clear at trial,[10] appellant received a monthly check from Social Security in the $600 range. When Williams moved out into her own apartment, she became a joint payee on the check, which came to her, and which she could cash by herself. (RT 7: 1529, 1531, 1535–1536.)

Appellant's Cooperation With Police

As noted previously, the bodies were found about 7:00 p.m. on a Tuesday night. Eight hours later, at 3:00 a.m. Wednesday, investigators woke appellant to interview him. (RT 10: 2098.) He invited them in, answered some basic questions, and agreed to go voluntarily to the police station to talk more. He was cooperative at the police station, and there he gave his consent to a search of his apartment. (RT 10: 2098, 2104–2106.)

Two days later, Friday afternoon, Walker visited him again. Appellant invited him to come in and sit down and later left voluntarily with him. (RT 10: 2147–2149.) Later that day Walker placed him under arrest. (RT 6: 1276.)

Evidentiary Gaps

The case was basically presented to the jury in the posture of one where the defense rests after the close of the prosecution case, putting the prosecution to its proof. After the prosecution rested, the defense did recall

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[10]The defense agreed to a prosecution motion in limine to prevent witnesses from testifying that he was on disability because of a mental problem. (RT 2: 326–330.)

five prosecution witnesses: Darryl Walker, another officer, a criminalist, and Diana and Quentin Williams. The evidence elicited from them related to matters regarding which they had already testified and was largely material that could have been elicited on cross-examination. (See RT 10: 2131–2200.) Some of it has been included in what has already been recounted. In this section, appellant summarizes evidence elicited during both the prosecution and defense cases that tended to show gaps in the prosecution case.

Directly or indirectly, counsel for both parties suggested that the perpetrator had spent a long time in the Jenks house. (See 11: 2398 [prosecutor: perpetrator had all the time he needed to look for valuables and wash up], 2434 [defense: at 6:00 p.m. in August, when it will still be light for hours, perpetrator could not leave the house in bloody clothes]; see also 5: 1203, 1206 [evidence that intruder had eaten snack food while waiting to leave].) Many items found at the crime scene were tested for fingerprints. (RT 6: 1370–1375, 8: 1879, 1881.) A state Department of Justice fingerprint expert spent four hours there and collected 20 to 30 latent prints. These included many bloody prints lifted from the drain board in the bathroom, where the perpetrator was thought to have washed up. (RT 8: 1883, 1883–1885; see also 5: 1058.) Many more items were collected and brought to the laboratory to be processed for latent prints as well.[11] (RT 8: 1888–1889.) No prints belonging to appellant were found. (RT 8: 1881, 1886.)

[11]The witness later estimated that he was able to lift 15 to 20 usable prints from the scene and, later still, that this was the total that applied to all the prints, those lifted at the scene and those from items taken back to the lab. (RT 8: 1898, 1902, 1904.)

The expert was not asked to try to identify the prints other than looking for a match for appellant, the victims, or two other named individuals. This was the case even though he had unidentified prints and a computer database which he could have searched for matches. (RT 8: 1895–1897.)

The search for prints at the scene seemed to have been cut short. For example, the expert did not check the car in the garage for prints (RT 8: 1897–1898), although its door was found open (RT 5: 1207). Similarly, the room used as an office in the Jenks house was considered not to have good surfaces for picking up prints because the wood was very dark and "not conducive to the black powder," as if latent prints are not also picked up using white powder. (RT 8: 1898.) The watch found at the scene was apparently not tested for prints. (RT 6: 1370.)

The prosecution provided no evidence of hair, skin cells, fibers, or bodily fluid residues that it could connect with appellant.[12]

A consensual search of appellant's apartment the night of August 5–6 was aimed at recovering anything that might have had signs of blood on it. None of his clothing did, nor did the blue duffel bag, although officers examined it closely for that purpose.[13] (RT 10: 2098, 2104–2110.) An extremely intensive search August 13, pursuant to a warrant, produced no women's jewelry, no clothing that gave any indication of involvement in

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[12]In the penalty phase, it was revealed that hair and fibers were recovered from Shirley's body, but they were not linked to appellant. (RT 13: 2689.)

[13]The prosecution argued that the hatchet and bloody clothes might have been in the back of Oscar Galloway's car during this search, since Walker's version of Galloway's statement had appellant having left the bag there overnight. (RT 11: 2410–2411.) This contention ignored the testimony about the bag being examined during the search.

the crime, no indications of blood around any of the drains, none of the cutlery that Clarence Washington thought was missing, and nothing pertaining to the Jenkses' bank accounts.[14] (RT 10: 2133–2139, 2149–2154.)

Appellant's bicycle was seized in the belief that the Department of Justice laboratory could find blood traces even if it had been washed down, as was appellant's blue duffel bag, but no evidence of blood on either was produced. (RT 10: 2135–2138.) A senior criminalist at the laboratory had, in fact, tried very hard to find blood on the bicycle. (RT 10: 2194–2196; cf. 8: 1688, 1793 [technicians know to take apart eyeglasses, because blood traces can remain where lens meets frame].)

As noted previously, no attempt was made to see if third persons had handled the ring and pendant that appellant pawned after the thefts. (RT 8: 1830–1831.)

Bettencourt Theft

Count IV was an unrelated charge of grand theft. Eighty-six-year-old Viola Bettencourt testified that appellant cleaned house for her on Thursdays for a period of time during, she thought, the summer of 1997. (RT 7: 1634, 1640–1644, 1648–51.) A day after he was there to clean, she noticed that a ring was missing. As of 30 years earlier, it was valued at $1250.[15] (RT 7: 1637, 1644–1646, 1657: see also 9: 2038–2040.) Bettencourt had it in her possession the day before appellant cleaned. (RT 7: 1645.) It was the most valuable of several rings and watches that she

[14] Detectives were interested in the last category of items because ATM cards and financial information were in the home office area that had been ransacked. (RT 10: 2152.)

[15] A jeweler testified that he had recently reappraised it, thought he might have concluded that it was currently worth around $3500, but could not really remember. (RT 7: 1657–1658; see also 9: 2041–2043.)

kept in a plastic container on top of her dresser. (RT 7: 1638–1639.) Nothing else was missing. (RT 7: 1644, 1646.)

When appellant came to work the following week, she accused him of stealing the ring. (RT 7: 1647.) He denied it, saying that he did not do things like that, turned away, and did his cleaning work. (RT 7: 1647, 1652.) He did not get angry, and she was not afraid in his presence when he stayed to clean the house. (RT 7: 1652.) She did not call him to clean after that. (RT 7: 1648, 1652.)

Appellant pawned the ring at the California Pawnshop in Hanford June 26, 1997, a Thursday. (RT 8: 1863–1864; 9: 2044–2053.)

Penalty Phase Testimony

Additional Pathology Testimony Regarding Shirley Jenks

Georgeanne Green, a Sexual Assault Response Team Nurse, examined Shirley Jenks's body. Using a magnifying instrument called a colposcope and a dye that stains injured or roughened tissues, she saw microscopic injuries. These were small abrasions and tears exterior to the vaginal opening. They can be produced, with or without pain, when a woman who is not aroused and actively cooperating is entered sexually. (RT 12: 2588–2598; see also RT 13: 2666, 2672.) She described the microscopic injuries as consistent with forced intercourse but could not say that there was a sexual assault.[16] (RT 12: 2598, 2599.)

Thomas Bennett, the Associate State Medical Examiner—of Montana—was brought in to interpret photographs from the examination.

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[16]A relative testified that the Jenkses were "[l]ike love birds." (RT 13: 2707.) They were found in night clothes (RT 5: 1050; Ex. 3), although they were killed early evening at the latest, and quite possibly before 6:00 (RT 11: 2381–2382, 2433–2434; 5: 1094, 1098, 1171–1172). They normally went to bed between 8:00 and 9:30. (RT 12: 2610.)

(RT 13: 2647–2652.) Twenty transcribed pages of questioning about his qualifications disclosed things like honors conferred on him as an undergraduate, but no special expertise in sexual assault or post-mortem examination for such assaults. (RT 13: 2647–2668.) He had received some kind of training in the use of a colposcope. (RT 13: 2667.)

In the photos of Shirley Jenks's vaginal area, he saw two abraded areas, each about the size of a dime, and two small tears in the tissue, all an inch or so inside the outer plane of the genital tissue. His opinion seemed to go farther than Green's: the tissue damage was caused by something—a finger, penis, or some object—forcibly penetrating at least an inch past the outer plane. (RT 13: 2678–2686.) The absence of semen was not unusual. (RT 13: 2673.) The time of injury could have been anywhere between two hours before death and a few minutes after death. (RT 13: 2687.) Unlike Green, the actual specialist in sexual assault, he was willing to say that, if the woman was conscious, she would have felt pain from the small tears. (RT 13: 2687–2688; cf. 12: 2594 [Green: it depends on the circumstances].)

Dr. Bennett testified on cross-examination that it is possible to examine a male to determine whether he had engaged in forcible sexual activity, and that he had reviewed reports of such an examination in this case. (RT 13: 2690.)

Victim-Impact Testimony

Clarence Washington

Clarence Washington, husband of the Jenks's daughter Debra Washington, testified about the impact of the killings on his wife and himself. He described in detail the unusually close relationships between Debra and her mother, himself and Fred, and the two couples as couples. (RT 12: 2601–2604, 2606–2608, 2623–2624, 2632–2636.) Debra and her

mother spoke on the telephone at least once, sometimes three times a day. (RT 12: 2624.)

The news of the killings precipitated a nervous breakdown in Debra, from which she had not recovered as of the time of trial, 10 months later. (See RT 11: 2502.) She was admitted to a psychiatric facility within hours of receiving news of what had happened, spent three weeks there, and was re-hospitalized two more times after brief discharges. As of the time of trial, she was heavily medicated on Thorazine and at least nine other drugs. (RT 12: 2611, 2613, 2626, 2627, 2635.) As a result, she was unable to attend to basic self-care. She slept a great deal and had no will to live. (RT 12: 2627, 2630–2631.) She had been getting better, and her medication had been reduced, but her condition worsened considerably a few weeks before the trial. (RT 12: 2628.)

Washington himself was affected directly and as his wife's caregiver. After learning of foul play involving the Jenkses, he went to Hanford from his Sacramento home to try to learn more. He was asked to go through the crime scene to assist detectives, which was difficult. (RT 12: 2604, 2612, 2615, 2617–2618, 2622.) The loss itself left a huge void for him. (RT 12: 2635, 2638.) As of the time of trial, Washington was on four psychoactive medications. (RT 12: 2626, 2635–2636.) He had done therapy with other relatives of murder victims and was in other groups, and both he and his wife were receiving trauma therapy. (RT 12: 2626–2629.)

Washington had recently tried going back to work for four weeks, taking a 4:00-a.m.-to-noon shift, so he could care for Debra when she was awake, but it did not work out. His attention span was poor, and he worried about her being home alone, particularly since she showed what he considered signs of suicidality. Other than the four weeks, he had been off work since the crimes. (RT 12: 2627–2628, 2631.)

Appellant and Washington were cousins. (RT 12: 2604–2605.) Appellant helped Washington move a piece of furniture into the Jenkses home. Some time after that, the older couple started arranging for appellant to help with the odd jobs around the house that Washington had helped with during a period when he and Debra lived there. The Jenkses had high praise for appellant's work, were happy to see him, and liked him a lot. (RT 12: 2636–2637.)

Billie Lou Hazelum

Billie Lou Hazelum, Shirley Jenks's sister, also testified. (RT 13: 2698.) She described her close relationship with her sister,[17] Shirley's jolly personality and charm and her being loved by "everybody,"[18] the closeness of her relationship with her husband of 47 years,[19] and a few other humanizing facts about the couple.[20]

Hazelum still alternated between disbelief that the murders had happened and frequent intrusive thoughts about the way the Jenkses had died. The experience was inexpressibly difficult. She went to pains to avoid reminders of the events. (RT 13: 2704–2705, 2708.) Another loss for Hazelum was her relationship with her niece, Debbie Washington. They, too, had been very close, but Hazelum resembled Shirley, and Debbie could not bear to look at her. (RT 13: 2708–2709.)

Shirley's November birthday was a very sad occasion after her death, and Christmas had been "very, very, very sad," a time when no one in the family celebrated. (RT 13: 2706.)

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[17]RT 13: 2699–2700.

[18]RT 13: 2705, 2707.

[19]RT 13: 2701, 2707.

[20]RT 13: 2701–2702.

Prior Offenses

Documentary evidence showed that appellant was convicted of unarmed robberies in Kings County in 1975 and Sacramento in 1985, of perjury because of inaccurate testimony in the later robbery trial that his first robbery conviction was a result of a guilty plea, and auto theft in 1967, 1972, and 1984. (RT 11: 2524–2530, 2534–2537; Exs. 84–89, 91–92.) There was also evidence of two unadjudicated crimes, both rapes, within nine months of each other in 1979 and 1980.

The first such allegation was of a 1979 assault on Carol LaRue Tonge. (RT 12: 2519, 2567.) Tonge testified that at age 16 she moved to Los Angeles with a boyfriend. (RT 12: 2540–2541.) She went to a bus stop to catch a bus and go job hunting at restaurants but accepted a ride from appellant. (RT 12: 2542–2544.) He took her to several places to get applications, starting with one where he worked. As they went around, they drank beer together. (RT 12: 2545–2547.) By what was probably late afternoon, perhaps after running some of his own errands, he took her to his apartment. She did not want to go up, felt it was time to go home, and had already had several previous requests to be taken home put off with assurances that he just had a few more things to do. (RT 12: 2547–2549.) Maybe she went into his yard because she was afraid to sit in the car and agreed to go up to the apartment because a dog bit her when she was on the stairway. (RT 12: 2549–2550.) After entering, she testified, appellant put a straight razor to her throat and demanded that she remove her pants. She complied, then submitted to his order to lie on the floor while he had intercourse with her. (RT 12: 2551–2556.) He ignored her pleas to stop, and he may have threatened to kill her. (RT 12: 2556–2557.) After a while he tried, she said, to insert his penis into her anus, but she successfully resisted. He eventually permitted her to use the bathroom. (RT 12:

2557–2558.) She escaped from the second-floor apartment through the bathroom window, dropping to asphalt pavement below. (RT 12: 2559–2562.)

As she looked for help, appellant pulled up in his car, offering to take her home. She tried to grab her purse from the car, and he tried unsuccessfully to pull her in. (RT 12: 2563–2564.)

Tonge reported the crime and attended some court proceedings but left the state and refused to return to complete the prosecution. (RT 12: 2565–2566.) Appellant nonetheless pleaded guilty to statutory rape, receiving a suspended two-year sentence, with probation that included a year's time in county jail. (Ex. 2826.)

Diane Hill testified that appellant raped her nine months later. (RT 12: 2576; see also 2567 and Ex. 90.) She knew appellant through his wife, who was her baby-sitter and the daughter of good friends of hers. (RT 12: 2573.) He came to her house one night, drunk. (RT 12: 2574, 2576–2577, 2585–2586.) Her husband was in jail at the time, and her two-year-old and baby were sleeping. (RT 12: 2575, 2578.) She was going to offer appellant coffee so he could sober up and get home without getting arrested for drunk driving. (RT 12: 2577–2578.) She could not remember details of the rape, but she remembered that she yelled and fought him, he choked her, and he raped her, continuing until her two-year-old walked in. (RT 12: 2578–2581.) After her child returned to bed, he raped her again, at least once, and told her not to tell anyone about it. (RT 12: 2582–2583.)

She did not report the attack because she was afraid that her husband would kill appellant and be incarcerated again, and because she did not want to hurt appellant's wife and baby. (RT 12: 2583–2584.) It was not clear how the prosecution discovered the incident. (Cf. RT 12: 2584.)

Defense Mitigation Testimony

Dr. Norberto Tuason

Psychiatrist Norberto Tuason had seen appellant less than four months before the murders at a mental health center in Hanford. Appellant had came in on April 18, 1997, complaining of hearing voices. He had been seen by someone else at the facility three years previously because of the same problem. He had, however, stopped coming in for medication and visits, because the voices went away. When Tuason saw him, he said that the voices had started bothering him again two years earlier. (RT 13: 2718–2720.) He also complained that someone was after him and wanted to cause harm to him. (RT 13: 2720–2721.) Appellant also stated that he had sleep problems. (RT 13: 2771.)

After a full psychiatric assessment, Tuason confirmed the previous diagnosis, which was chronic paranoid schizophrenia. He concluded that appellant was still symptomatic. (RT 13: 2721; see also 2793–2796.) He also found appellant very limited in his speech and with a history that suggested subnormal intelligence. (RT 13: 2769–2770, 2794, 2802–2803.) He exhibited only fair insight. (RT 13: 2770–2771.) The psychiatrist had concerns about appellant's drinking, which he thought appellant was minimizing (i.e., downplaying its extent). (RT 13: 2774, 2776, 2800.) In response to a hypothetical question on cross-examination, the doctor said he would be very concerned about a schizophrenic's using $140 worth of alcohol in July, the month preceding the offenses, as appellant had. (RT 9: 2057.) It could exacerbate the symptoms very quickly. (RT 13: 2777.)

Paranoid schizophrenia is a very serious mental disorder. Tuason prescribed the anti-psychotic drug Zyprexa and recommended a follow-up appointment. (RT 13: 2723; see also 2797.) Appellant returned June 19, as directed, and reported that the voices were gone. (RT 13: 2723–2724.)

Symptoms of this disease can return in a day or two if the patient goes off medication, and paranoid schizophrenics are notorious for doing so. (RT 13: 2724–2725.) Tuason had recommended a further follow-up two months later (RT 13: 2788), but this would have been after appellant's August 8 arrest. Records showed that a social worker saw him in jail August 10 in response to a crisis call requesting evaluation for suicidality, found him off his medication, but reported that he denied hallucinations, suicidal ideation, and homicidal thoughts. (RT 13: 2789–2790.) He was not exhibiting bizarre behavior during the interview. (RT 13: 2791.)

Cross-examination established that, at the initial assessment, the psychiatrist also considered alcohol dependence as a possible source of some or all of appellant's symptoms, and there are other possible causes for hallucinations as well. (RT 13: 2767–2768, 2785; see also 2774–2776, 2777–2778.) However, he stood by his diagnosis of paranoid schizophrenia. (RT 13: 2793, 2797–2798.) Appellant appeared neat, knew where he was, had normal motor behavior, etc. (RT 13: 2769–2772.) He appeared capable of knowing right from wrong and did not appear dangerous at the time. (RT 13: 2773–2774, 2786.)

Lula McCowan

Appellant's mother, Lula McCowan, also testified.[21] (RT 13: 2805.) Appellant was born in 1948. (RT 13: 2805.) McCowan was with his father only until he was two years old. For the next 12 years she was a single parent, and then she remarried. (RT 13: 2806.) She supported appellant and his sister. Single parenthood was less common in the 1950's, and it was difficult. (RT 13: 2806–2807.) She did domestic work and worked in factories and for dry cleaners. She did "some of everything that was legal

[21] The reporter's transcript spells Mrs. McCowan's first name "Tula" (RT 13: 2804), but her name is Lula.

to raise my children." (RT 13: 2807.) Appellant was born in Hanford, but she took him to Los Angeles when he was about two and one-half, and she lived in different places all over Los Angeles. (RT 13: 2807.)

Appellant was a good son and, until he was 16, a good boy generally. But she was overly protective, kept the children in a great deal, would not let them associate with other children because she was working, and might have been too strict with appellant. (RT 13: 2808.) At age 16 he started getting into trouble. When he could get out, he would go joyriding with his friends, and things like that. (RT 13: 2808.) He was always caught because he did not really know how to do those things. (RT 13: 2808–2809.) But he remained, and remains, a quiet, easygoing person. (RT 13: 2809.) He loved his family a lot. He loved his father and could not understand why his father was not there. He also loved his stepfather and, through all his serious trouble with the law, he remained loving towards his mother and the rest of the family, i.e., his sister, his son, and his ex-wife. (RT 13: 2809–2810.) She had a hard time raising him and was going through a lot of trouble with the current prosecution, but she still loved him. (RT 13: 2811.) As of the trial he had a good relationship with his son, to whom he was kind, loving, and compassionate. He always tried to protect his sister and always showed concern about his mother's welfare. (RT 13: 2810.)

She eventually brought him back to Kings County at his request. This was because, as he put it, in Los Angeles "you don't have to look for trouble; trouble will find you." (RT 13: 2811.) He promised his stepfather that, in a small town, he would be able to stay out of trouble. (RT 13: 2811.) And he had cousins in Hanford whom he loved and wanted to be around. (RT 13: 2811.)

McCowan knew in her heart that her son was not the kind of person who would have killed the Jenkses. She would know it if he did it. She

hated what had happened, for the people who had to go through it and for the family, but it was not something her son could do. He has a record, she said, but he has a kind heart and still has things to add to others' lives, including that of his son. (RT 13: 2811–2813.) She also testified that, while on trial, he was reading the Bible and praying. (RT 13: 2813.)

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ARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

The murder mystery is not solely the province of fiction. Sometimes it occurs in real life.

No one knows exactly what happened inside Fred and Shirley Jenks's house when they died in early August, 1997, except, perhaps, whoever killed them. What was clear was that they died in a passionate frenzy of hatchet blows and stab wounds, and that afterwards the perpetrator or perpetrators found and took some jewelry. As described previously, the prosecution introduced forensic evidence which tended to support an inference that appellant Thomas Potts was involved. Testimonial evidence—most introduced by the prosecution—described him as a man who consumed very large quantities of alcohol, relied on a friend to manage the SSI check which was his main livelihood, believed that the friend's apartment was "bugged," heard voices in his head, and made his way around town on his bicycle, with a hatchet in his duffel bag. From the forensic evidence and evidence of his poverty, the prosecution hypothesized that such a person coolly conceived and carried out a plan to kill those who supplemented his income, in order to obtain a one-time bit of relief from his financial straits, albeit while eliminating one of his two sources of income.

The killings of Fred and Shirley Jenks eventually created a tripartite mystery. First, who killed the couple? Second, under what circumstances and in what mental state? And third, how could a jury—with huge gaps in its ability to reconstruct what happened—have possibly concluded, beyond a reasonable doubt, that a scene that suggested an eruption of furious rage, apparently perpetrated by a man with serious psychological deficits, was the locus of coldly calculated robbery-murders, as opposed to unplanned attacks followed by an opportunist theft?

The record contains an arguably satisfactory answer to the first question, as the prosecution marshaled a certain amount of circumstantial evidence implicating appellant as the perpetrator. It contains no answer whatsoever regarding the second question, whether the homicides were first or second-degree murder (assuming they were murder), and, in fact, the evidence was insufficient to sustain a conviction of the greater offense.

Yet the record redundantly answers the third question: how a jury could have determined the crimes to be the first-degree murders which the prosecution hypothesized. One series of errors eviscerated the reasonable-doubt standard. At the beginning of voir dire, the trial court emphatically showed every prospective juror its concern that he or she might hesitate to convict appellant based on the circumstantial case about to be presented, thereby lending its considerable authority to the cause of the prosecution. In doing so, the court used an extended example of fact-finding in a circumstantial case that lowered the burden of proof to considerably less than the reasonable-doubt standard. And, as if these were not enough, one of the prosecutors, with the acquiescence of the trial court and appellant's attorney, implored the jurors not to return a verdict of acquittal if they believed appellant was guilty, just because a reasonable doubt remained.[22] She also was permitted to "explain" that a mere belief in guilt, as long as it was likely to be stable, was sufficient because it amounted to the "abiding conviction" referred to in the instruction on reasonable-doubt, fully exploiting and actualizing what otherwise is just a potential weak point in

[22]After appellant's attorney pointed out that one could believe a defendant was probably guilty yet still be duty-bound to acquit, the prosecutor was permitted to respond,"But in your consideration of reasonable doubt don't ever come back and tell a prosecutor, "Gosh, you know, we believed he was guilty, but—." (RT 11: 2448.)

the revised CALJIC reasonable-doubt instruction.[23] There was also an instruction that possession of recently-stolen property—along with slight corroboration—was sufficient to prove robbery, when in fact evidence of possession plus corroboration tends in logic to prove theft but gives no assistance whatever in distinguishing theft from robbery. The error could be a mere technicality in other circumstances. But under an evidentiary picture that made the after-acquired intent question critical (to the robbery charge, the degree of the murder, and the robbery-murder special-circumstance), and the just-described scenario of a series of assaults on the reasonable-doubt standard, it was one more serious action lowering the prosecution's burden of proof.

Similarly, there was cluster of errors that telegraphed to the jury a judicial concern that a guilty man not be freed unnecessarily. Two have already-been mentioned: the directing of jurors' attention to appellant's possession of recently-stolen property and stating its near-sufficiency to prove robbery, and the extemporaneous and extended discourse on the value of a circumstantial case for guilt. The impression of a judicial bias was reinforced by an instruction inviting the jury to consider what could have been an entirely innocent statement by appellant as false and to see it as showing consciousness of guilt. Again, in other cases, such an instruction can be a useful guide to the jury, but with the particular evidentiary picture here and delivery by a judge who gave the appearance of wanting the jurors not to be too hard on the prosecution, the instruction itself had an argumentative impact and it did reinforce the impression of a particular leaning by the most influential figure in the courtroom.

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[23]"If you believe he's guilty today and you'll believe he's guilty next week then that's that abiding conviction that's going to stay with you. (RT 11: 2448.)

Yet another group of errors converged on the issues crucial to determining whether there was first-degree robbery murder. In an astounding but—again, in other circumstances perhaps a merely technical error—appellant's chances to have the issues before the jury accurately decided were eliminated by an instruction that was meant to convey the rule that if intent to take property arose only after completion of an assault, the crime is theft rather than robbery. For the instruction actually said that the question was whether the intent to steal arose "at the time that the act of taking the property occurred" or later: it identified the embezzlement/theft distinction, not the theft/robbery distinction. And then there was the previously-mentioned problem with telling the jury that possession of stolen property, with slight corroboration of a robbery charge, can prove robbery itself (versus just theft). The question of the degree of the murder itself was framed as whether the jurors could agree on a doubt as to first-degree, rather than whether they could agree that first-degree murder was proved beyond a doubt. In addition, this state goes with a minority of jurisdictions in requiring acquittal of first-degree murder before a verdict of guilt of murder in the second degree can be returned. This Court has already acknowledged that the rule will sometimes have a coercive impact but not encountered a case where it mattered. Here, however, coercion on the matter of degree again was part of a cluster of mutually-enhancing actions that seriously biased the determination of whether the homicides were death-eligible murders.

As appellant shows in Argument II, below, there was also a question as to whether appellant was the perpetrator at all. But an extremely unreliable double-hearsay report was admitted, in clear violation of the Confrontation Clause as interpreted in *Crawford v. Washington* (2004) 541 U.S. 36, which gave the prosecution an argument for filling one of several

gaps in its identity case. This, combined with the first two groups of errors identified above (those weakening the reasonable-doubt standard and those demonstrating an apparent bias in favor of the prosecution), also undermine confidence in the jury's determination that appellant was even the perpetrator.

The mystery of the verdicts, therefore, is easily solved. With multiple assaults on the reasonable-doubt standard, the trial court effectively urging the jurors not to be too hard on the prosecution, and both bias and actual misdirection introduced in instructions on determining the degree of murder, the first-degree verdicts almost make sense. But for the same reasons, they cannot stand.

Were the guilt verdicts valid, the death sentence would have to be overturned because of a number of serious errors affecting the penalty determination, beginning with the excusals of a number of potential jurors merely for having beliefs that could make them "uncomfortable" voting for a death penalty, in rulings that were squarely in conflict with decisions of this Court and the United States Supreme Court and which alone invalidate the penalty verdicts.

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I. THERE WAS INSUFFICIENT EVIDENCE TO CONCLUDE, BEYOND A REASONABLE DOUBT, THAT THE MURDERS WERE PREMEDITATED OR MOTIVATED BY A PRE-EXISTING INTENT TO STEAL

This Court "must, in the absence of substantial evidence to support the verdict of first degree murder, reduce the conviction to second degree murder. [Citations.]" (*People v. Anderson* (1968) 70 Cal.2d 15, 23.)

At appellant's trial, the prosecution presented *evidence* on the identity issue, but only a *theory* of how and why the homicides took place. The litigants' focus on identity downplayed the Achilles' heel of the prosecution's capital-murder case: the degree of the offenses. This was a question which the jury needed to face regardless of what counsel said about it. The problem was the absence of any good reason for concluding that appellant had either mental state that would elevate the offenses to first degree—an intent to steal formed prior to attacking the Jenkses—which would have made them robbery-murders—or premeditation and deliberation. He might have; he might not have. There was simply an evidentiary void on the issue.

The only part of the circumstantial picture that was even suggestive of the prosecution theory was appellant's need for funds, but this could not have proved that theory beyond a reasonable doubt for two reasons. First, poverty is such poor evidence of a motive for theft, much less robbery and murder, that it is not even admissible on that issue. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1076.) Second, the whole interaction may not have started as a crime at all; it could just as easily have been a discussion over whether the Jenkses would help appellant voluntarily that degenerated terribly, producing a rageful attack, followed by opportunistic theft of jewelry. But the prosecution needed to show pre-existing, not after-acquired, intent to prevail on its felony-murder basis for fixing the degree of

murder, as well as the robbery charge and robbery-murder special circumstance. And, having relied alternatively on a willful-deliberate-premeditated basis for a first-degree finding, it needed to show that as well, for a verdict to withstand review.

There is no way that this Court can know whether the homicides in this case were "the result of 'preconceived design' as opposed to 'an explosion of violence.' [Citation.]" (*People v. Anderson*, *supra*, 70 Cal.2d 15, 28.) The jurors, having no credibility issues to resolve, were—in this case—in no better position to know than this Court is. (Cf. *People v. Stewart* (2004) 33 Cal.4th 425, 451 [usual deference to trial judge regarding challenges for cause is inappropriate when trial court had no opportunity to view venireperson's demeanor].) And if no one viewing the evidence can know into which category the killings fell, rational jurors could not have concluded beyond a reasonable doubt that they were the result of either "preconceived design" or murder for robbery. The verdicts on Counts I and II must be reduced to murder of the second degree.

A. Failure of Proof on Either Premeditation and Deliberation or Pre-Existing Intent to Steal Would Require Reduction of the Verdicts to Second-Degree Murder

1. A Verdict May Be Upheld Only if Rational Jurors Could Have Found Every Element of the Charge Proved Beyond a Reasonable Doubt

a. The Federal Constitution Permits Conviction Only on Evidence That Would Satisfy a Reasonable Juror

A defendant is entitled to acquittal of a murder charge if the jury, considering all the evidence, entertains a reasonable doubt about whether or not the defendant harbored malice, or any other necessary mental state. (*Davis v. United States* (1895) 160 U.S. 469, 492–493.) "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near

certainty. The trier must therefore have reasonably rejected all that undermines confidence." (*People v. Hall* (1964) 62 Cal.2d 104, 112; accord, *People v. Thompson* (1980) 27 Cal.3d 303, 324; *People v. Brigham* (1979) 25 Cal.3d 283, 291; *People v. Reyes* (1974) 12 Cal.3d 486, 500; *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1372.) There is, for "the factfinder[,] the need to reach a subjective state of near certitude of the guilt of the accused." (*Jackson v. Virginia* (1979) 443 U.S. 307, 315.)

"[A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt . . . ." (*Jackson v. Virginia*, *supra*, 443 U.S. 307, 317.) When this happens, due process requires reversal of the judgment. (*Id.* at pp. 317–318.) Upon review, to preserve "the factfinder's role as weigher of the evidence[,] . . . all of the evidence is to be considered in the light most favorable to the prosecution." (*Id.* at p. 319, emphasis omitted.) This means that the trier of fact is the one "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." (*Ibid.*) But it must do these things "fairly." (*Ibid.*) The reviewing court respects the province of the jury to fulfil these functions by assuming that the jury resolved all conflicts in a manner that supports the verdict. (*Walters v. Maas* (9th Cir. 1995) 45 F.3d 1355, 1358.) The relevant question, then, is whether, after thus "viewing the *evidence* in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," not whether the reviewing court would so find. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319, first emphasis added.) This Court applies what it has described as an "identical" standard under the California Constitution.[24]

[24]Like the High Court, this one emphasizes that "a reviewing court (continued...)

(*People v. Young* (2005) 34 Cal.4th 1149, 1175.) In announcing the *Jackson* test, the United States Supreme Court explicitly rejected a standard that would permit merely "a modicum" of evidence to uphold a verdict, since "it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320.) For evidence to meet the constitutional standard, it "must be substantial, that is, evidence that reasonably inspires confidence and is of solid value." (*People v. Marshall* (1997) 15 Cal.4th 1, 34, internal quotation marks omitted.) The reviewing court must base its decision upon the whole record, not limit its appraisal to evidence supporting respondent. (*People v. Johnson* (1980) 26 Cal.3d 557, 577–578; see also *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319.) Moreover, this Court's natural reluctance to question a jury's verdict should be tempered by the fact that, in this case, the jury was misinformed in several ways about the reasonable-doubt standard, as well as influenced by other errors discussed in succeeding sections of this brief.

Sufficiency-of-the-evidence claims regarding special-circumstance findings are subject to the same rules as those regarding other elements of the prosecution case. (*People v. Morris* (1988) 46 Cal.3d 1, 19.) Since those findings are required to establish guilt of an offense punishable by

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[24](...continued)
resolves neither credibility issues nor evidentiary conflicts." (*People v. Young*, *supra*, 34 Cal.4th at p. 1181.) However, California law may go farther than federal in indulging inferences. Rather than following the High Court's reference to not second-guessing inferences which the trier of fact might have reasonably drawn "from basic facts to ultimate ones" (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320), this Court will presume in support of the judgment "the existence of *every* fact the trier could reasonably deduce from the evidence." (*People v. Young*, *supra*, 34 Cal.4th at p. 1175, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576, emphasis added.)

heightened sentences, this result is compelled by the federal Due Process clause. (U.S. Const., 14th Amend.; see *Ring v. Arizona* (2002) 536 U.S. 584, 602.)

b. Speculation May Not Support a Verdict

A reasonable inference "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Coddington* (2000) 23 Cal.4th 529, 599, quoting *People v. Morris*, *supra*, 46 Cal.3d 1, 21; see also *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1277, 1279; *Walters v. Maas* (9th Cir. 1995) 45 F.3d 1355, 1358.) This is the rule even in civil cases. (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 389.) "A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." (*People v. Coddington*, *supra*, 23 Cal.4th at p. 599, ellipsis in original.)

c. In a Circumstantial Case, This Court Must Decide Whether Jurors Could Rationally Exclude All Hypotheses Consistent With a More Favorable Verdict

In a case based on circumstantial evidence, this Court "must decide whether the circumstances reasonably justify [the jury's] findings," but its "opinion that the circumstances also might reasonably be reconciled with a contrary finding does not render the evidence insubstantial." (*People v. Panah* (2005) 35 Cal.4th 395, 487–488, quoting *People v. Earp* (1999) 20 Cal.4th 826, 887–888, internal quotation marks omitted.) This is a reference to the rule that, where circumstantial evidence is relied on for proof of guilt, the jury may not convict unless it finds that the circumstantial evidence was irreconcilable with any conclusion other than guilt. (See *People v. Bean* (1988) 46 Cal.3d 919, 932–933; see also CALCRIM 224; CALJIC No. 2.01.) That rule is but an application, to a circumstantial case,

of the combined effect of the presumption of innocence and the reasonable-doubt standard. (*People v. Hatchett* (1944) 63 Cal.App.2d 144, 154–155, cited with approval in *People v. Bender* (1945) 27 Cal.2d 164, 175–176.) So the rule that reversal is not required merely because the *reviewing court* thinks that the circumstances also might reasonably reconciled with a contrary finding merely reiterates that the reviewing court does not disturb reasonable findings of a jury with which it might disagree. (*People v. Bean*, *supra*, 46 Cal.3d at p. 933.) It does not absolve this Court from determining whether *jurors* could rationally have excluded all hypotheses inconsistent with guilt. (*Id.* at pp. 932–933; *United States v. Bautista-Avila* (9th Cir. 1993) 6 F.3d 1360, 1363.) Neither *People v. Panah* nor the cases it cites state otherwise. Rather, the line of cases of which *Panah* is a part goes back to *People v. Bean*, which, as just noted, recognizes a reviewing court's duty to determine if jurors could have rationally excluded every hypothesis inconsistent with guilt.[25] (46 Cal.3d at pp. 932–933.)

Continuing, "[a]n appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Panah*, *supra*, 35 Cal.4th 395, 488, quoting *People v. Maury* (2003) 30 Cal.4th 342, 396, alteration in original.) However, "a 'reasonable' inference is one that is supported by a chain of logic, rather than . . . mere speculation dressed up as evidence." (*Juan H. v. Allen*, *supra*, 408 F.3d 1262, 1277 [rejecting claim that false statements to police reflected consciousness of guilt, when other motivations were also possible].) Morever, in a criminal case, there is a subtlety that *Panah's* concise statement of the rule could obscure. When a fact is essential to a chain of

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[25]See *People v. Panah*, *supra*, 35 Cal.4th at pp. 487–488; *People v. Earp*, *supra*, 20 Cal.4th at pp. 887–888; *People v. Proctor* (1992) 4 Cal.4th 499, 528–529; *People v. Perez* (1992) 2 Cal.4th 1117, 1124.

circumstances that establish guilt, that fact itself must be proved beyond a reasonable doubt. (*People v. Watson* (1956) 46 Cal.2d 818, 830–831.) Thus, in positing inferences that the jury might have drawn from the evidence, a reviewing Court still must determine whether, given all the evidence, a rational juror could have regarded such an inference as being true beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. 307, 319; *People v. Young*, *supra*, 34 Cal.4th 1149, 1175.)

In this regard, even to support a verdict in a civil case,

> [a] finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities.

(*Rees v. Smith* (1937) 9 Cal.2d 324, 328, quoting 23 C.J. § 1750, p. 18; *Bank of America v. Giant Inland Empire R.V. Center, Inc.* (2000) 78 Cal.4th 1267, 1279.)

2. A Premeditation/Deliberation Theory Requires Evidence that Excludes the Possibility of a Rash, Unconsidered Attack

In the context of determining the degree of a murder, *premeditated* means it must have been "considered beforehand." (*People v. Jurado* (2006) 38 Cal.4th 72, 118.) To have been deliberate, it must have taken place "as a result of careful thought and weighing of considerations for and against the proposed course of action." (*Ibid.*) Moreover, according to

> [n]umerous decisions[,] . . . [a] killing is deliberate . . . if the killer acted "as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, [especially] according to a preconceived design."[26] (*People v. Bender* . . . [, *supra*,] 27 Cal.2d 164,

[26]More recent formulations include the concept of "careful thought and (continued...)

183; *People v. Caldwell* (1955) 43 Cal.2d 864, 869; *People v. Anderson* . . . [, *supra*,] 70 Cal.2d 15, 26.)

(*People v. Velasquez* (1980) 26 Cal.3d 425, 435, emphasis omitted; see also *People v. Honeycutt* (1946) 29 Cal.2d 52, 61.) It must have "occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Jurado*, *supra*, 38 Cal.4th 72, 118, quoting *People v. Stitely* (2005) 35 Cal.4th 514, 543.)

In an attempt to provide consistency in reviewing courts' determinations of whether first-degree murder convictions should be reduced to murder of the second degree, this Court, in *People v. Anderson*, *supra*, 70 Cal.2d 15, distilled the results of its precedents into an analytical framework that focused on three types of evidence: facts showing planning or acts of preparation, "facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim," and "facts about the nature of the killing from which the jury could infer that the *manner* of the killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' . . . ." (70 Cal.2d at p. 27.) The Court observed that first-degree verdicts typically were sustained when there was evidence

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[26](...continued)
weighing of considerations for and against the proposed course of action" without the "cooly and steadily" language. (E.g., *People v. Jurado*, *supra*, 38 Cal.4th at p. 118.) The concept's inclusion of the act's being carried out "cooly and steadily" is still good law. The more abbreviated statement is adopted from CALJIC 8.20, in a series of decisions that neither analyzed that statement nor criticized the more expanded form. (See *Jurado*, *supra*, 38 Cal.4th at p. 118, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 767, citing *People v. Perez*, *supra*, 2 Cal.4th 117, 1123, citing *People v. Lucero* (1988) 44 Cal.3d 1006, 1021, citing *People v. Goldbach* (1972) 27 Cal.App.3d 563, 569 [CALJIC No. 8.20 is adequate for jury to understand impact of diminished capacity on premeditation and deliberation].)

of all three types, or when there was very strong evidence of planning, or when evidence of motive was combined with evidence from one of the other categories in a manner that "would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation] . . . ." (*Ibid.*) The *Anderson* framework is a set of guidelines, not a rigid formula. (*People v. Jurado*, *supra*, 38 Cal.4th 72, 118–119; *People v. Perez*, *supra*, 2 Cal.4th 117, 1125.)

3. A Robbery-Murder Theory Requires Evidence that Excludes the Possibility of After-Acquired Intent to Steal

While proposing only one factual scenario, appellant's prosecutors advanced both premeditation/deliberation and robbery-murder theories of first-degree murder. (RT 11: 2391, 2412–2413, 2464; see also 11: 2465.) To support a first-degree murder conviction on a robbery-murder theory, there must be sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that the act of force was motivated by the intent to steal, rather than the intent arising after the use of force against the victim. (*People v. Marshall*, *supra*, 15 Cal.4th 34, 37.) Similarly, the crime of robbery, of which appellant was also convicted, requires the defendant to have formed the intent to steal either before or during, rather than after the application of force to the victim, and to have applied the force for the purpose of accomplishing the taking. (*People v. Bolden* (2002) 29 Cal.4th 51 5, 556.)

Finally, a true finding on a robbery-murder special circumstance requires that the defendant had an independent purpose to rob and that the lethal assault was carried out to advance that purpose. In other words, an

intent to steal formed after the assault will not support a special circumstance finding, either. (*People v. Green* (1980) 27 Cal.3d 1, 54, 61.)

4. Insufficiency on One of Two Alternative Theories Presented to the Jury Requires Reversal When the Jury Could Have Convicted on That Theory

When a case is presented to a jury on alternative factual theories, and the evidence of one is insufficient, the verdict can generally be upheld because of the likelihood that the jury, too, rejected the insufficient theory. However, where the record discloses a reasonable probability that one or more jurors could have relied on the insufficient theory, reversal is required. (*People v. Guiton* (1993) 4 Cal.4th 1116.)

B. The Evidence of Appellant's Mental State Was Insufficient to Support the Verdicts

The prosecution's evidence went to the identity of the perpetrator of the Jenks homicides and the means of their commission—the watch, the DNA evidence, the purported Nike footprints, appellant's possession and then apparent lack of possession of a hatchet consistent with one of the weapons apparently used. From these the prosecutors could, and did, appropriately argue for an inference that the number and locations of the wounds "show the express intent to kill. Whoever wielded this ax[27] and whoever wielded that knife wanted Fred Jenks dead." (RT 11: 2388; see also 2389, 2464.) In contrast, no evidence was introduced, and precious little was said in argument, regarding inferences to be drawn about either

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[27]The prosecutors repeatedly called the presumed weapon an ax. As the trial court pointed out, an item offered by them as an example of what it probably looked like was a hatchet. (RT 5: 1038; see also 1035, 1040, as well as RT 7: 1402, 1403, 1404, 1406 [pathologist's descriptions of wounds as consistent with those a hatchet would cause].) The tool appellant owned was variously described as being about eight to 14 or 16 inches long. (RT 5: 1117; 7: 1473, 1547.)

the timing of the formation of an intent to steal or premeditation and deliberation. The prosecution did assert three bases for first-degree murder, all of which are analyzed below. Two go together: the prosecution argued that appellant pre-planned robbery-murders, making the homicides both felony murder and willful, deliberate, and premeditated murders. There was also an unfounded claim that the perpetrator switched to a longer knife, sharpening it before using it, when neither the hatchet blows nor the stab wounds from the paring knife's 4-1/4" blade were causing death fast enough, and that appellant had time to premeditate during these actions.

1. The Prosecution Failed to Deliver on Its Claim that the Evidence Would Show Appellant Planned a Robbery and the Killings

In his opening statement, the lead prosecutor asserted that appellant came to the Jenks home early on the evening that they died. Further,

> The defendant did not come there to work and earn money, we will prove to you he came there to take it. And when he came to their home that night, he took out an axe that he carries in his gym bag, he took that axe and he struck Fred Jenks . . . .

(RT 5: 1050.) In his summation, he made explicit the theory that the purpose of the hatchet attacks from the beginning was to kill the Jenkses so he could take their property and leave no witnesses. (RT 11: 2388, 2391, 2411–2413.) However, as with other flat assertions about the sequence of events when the Jenkses died, the statements about appellant's intentions and when he picked up his hatchet turned out to be nothing but speculation about what happened, not a prediction about what the evidence would show or a summary of what it did show.

The best that can be said about the prosecution's speculative scenario is that it was consistent with the evidence. But it was not even particularly suggested by it, much less confirmed as the only reasonable hypothesis.

Indeed, after putting on their proof, the prosecutors did not even try to support this theory—in 70 transcribed pages of summation—although they did assert it as if they had proved it. At the close of his initial summation, the lead prosecutor recapitulated what he thought was the series of events at the house. (RT 11: 2411–2413.) At the end of that, he pointed out that appellant pawned some of the jewelry shortly after the crimes, then claimed, "But he went over there because he desperately needed money, he knew they—they had what he needed, he killed them to get that property, he was not going to leave any witnesses." (RT 11: 2412–2413.) And that was all he had to say about it.

The second prosecutor's closing summation alluded to the issues that would support a first-degree verdict even less. She focused mostly on whether the evidence identified appellant as the perpetrator (RT 11: 2445–2463), said a little about intent to kill and premeditation (RT 11: 2463–2464), and mentioned robbery-murder only in the context of telling the jurors that the prosecution wanted them to sign the robbery-murder special-circumstance verdict form (RT 11: 2465).

Theoretically, of course, the prosecutors might have had something to work with, despite the tactical choice to gloss over the issue of when the intent to steal was formed or the nature of the intent to kill. However, they had nothing. No testimonial or physical evidence pointed to the planning of robbery-murder or preparations for it. Appellant's presence in the home and the eventual theft could have had some tendency to prove he arrived with an intent to steal, if he and the Jenkses had been strangers. But they were not, so it was anybody's guess why he went over initially. Similarly, having a hatchet with him during the encounter could have had some inferential value under other circumstances. However, the prosecution's evidence showed that appellant, a handyman, frequently or routinely carried

the tool with him in his gym bag. (RT 5: 1115–1118; 7: 1467–1472, 1530; see also RT 5: 1050 [prosecutor so states].) Thus, as to the first of the three factors typically used to evaluate premeditation and deliberation—the one which can sustain a case by itself if the evidence is strong enough (*People v. Anderson, supra,* 70 Cal.2d 15, 27)—there was an evidentiary void in the planning category. The situation as to motive and manner was no better.

The only thing that the prosecution provided in support of its hypothetical scenario was illusory evidence of motive, mostly through all-purpose witness Diana Williams, who testified that appellant needed money around the time of the killings. (RT 7: 1528–1530, 1535–1538 [he could not buy groceries with her because he had lost his money gambling]; see also RT 9: 2057 [liquor-store proprietor: appellant's tab was three days overdue].) But this in itself has so little probative value on whether a person committed a crime of taking that the trial court would have been required to exclude it, had appellant's attorney objected. (*People v. Koontz, supra,* 27 Cal.4th 1041, 1076; *People v. Hogan* (1982) 31 Cal.3d 815, 854; *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101–102.) After all, large numbers of people are in financial straits at one time or another, and the vast majority find other ways of coping than committing robbery-murder: putting off creditors further, borrowing from friends and employers, getting help from charitable or county agencies, taking on work, panhandling, and tightening their belts. Even the fraction willing to commit crimes generally prefer less drastic, dangerous, and harmful offenses, like shoplifting from grocers. Moreover, "lack of money gives a person an interest in having more. But so does desire for money, without poverty. . . . [A]lmost everyone, poor or not, has a motive to get more money. And most people, rich or poor, do not steal to get it." (*United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108–1109.) Presumably because even fewer rob or

kill to get it, the rule excluding evidence of poverty is widely adhered to with regard to "the graver crimes, particularly those of violence." (II Wigmore, *Evidence* § 392, p. 431 (Chadbourne rev. 1979).)

Even much of the evidence in this case is congruent with the observations underlying the rule. The prosecution showed appellant to have an entirely different modus operandi in the Bettencourt jewelry theft. (See RT 7: 1634–1647.) Not only was it a non-violent theft, but appellant was calm and non-aggressive when accused of it. (RT 7: 1647, 1651–1652.) Appellant had also recently pawned another woman's ring with multiple diamonds on it, and VCRs and appliances, all of unknown origin. (RT 10: 2144–2146, 2159.) But no other robbery victims had come forward, nor were there bodies all over Hanford.

As to appellant in particular, Williams's testimony included nothing about desperation and nothing from which it could be inferred that appellant had a robbery plan. Indeed, her description of his accompanying her to the grocery store even though his plan to buy his own food had fallen through, as well as of her watching a movie with him at his apartment and his watching television with her and her son at hers a few days later, all suggested at least one relationship that would keep appellant from going hungry. (RT 7: 1536, 1539–1541, 1544.) They also presented him as going about his business in a normal frame of mind.

People v. Anderson's survey of precedent disclosed that the motive question, for murder, is often related to the prior relationship between the killer and the victim, or the prior conduct of one towards the other. (70 Cal.2d at p. 27.) The rational starting point for piecing together what would happen in an encounter between people with a pre-existing employer-employee relationship is to presume that neither is about to murder the other. Thus, if appellant was the perpetrator, it was actually more likely

that he visited the Jenkses to ask for an advance against his next job or to ask if he could do some work for them the next day, than to take out a hatchet and kill and rob them. Indeed, the non-criminal theory was the only one that explained Fred's having three or four dollar bills with him, though he was dressed in a nightshirt and had a robe with him.[28] (RT 5: 1050, 1195–1197; 11: 2381–2382; Ex. 13.) Fred may have offered appellant a few dollars, and the gap between that small handout and the requested opportunity to earn something more substantial may have pushed him over some kind of edge. In any event, whatever created the "explosion of violence" (*People v. Anderson*, *supra*, 70 Cal.2d 15, 28) that followed the request for work or an advance, the idea to ameliorate financial problems by grabbing some jewelry could clearly have arisen after the fatal assaults. (See *People v. Green*, *supra*, 27 Cal.3d 1, 54, 61.) As the lead prosecutor pointed out, the location of the weapon that was apparently used last against Shirley Jenks tended to show that the jewelry was taken after the attacks, as it was found under jewelry boxes that had been tossed aside.[29] (RT 11: 2399.)

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[28]The clothing could seem to suggest that the perpetrator arrived later than the hours for a normal visit. However, the parties agreed that the circumstantial evidence pointed to the killings having occurred quite early in the evening, perhaps before 6:00, the Jenkses having dressed for bed early. (RT 5: 1050; 11: 2381–2382, 2432.)

[29]There is a third scenario: that the idea of robbing the Jenkses arose after appellant's arrival at the house and failure to persuade the couple to help him, but before the completion of the fatal assaults. This would be robbery. (*People v. Bolden*, *supra*, 29 Cal.4th 51 5, 556.) The prosecution did not argue this theory, presumably because the last thing it needed was for the jurors to carefully consider when the intent to steal arose and how well the prosecution eliminated the after-acquired intent possibility. In any event, this hypothesis was not proved to the exclusion of the after-acquired intent hypothesis; both are reasonable.

Moreover, appellant's resources at the time were a meager $600 SSI check and whatever he obtained from his on-call handyman/housecleaner job with the Jenkses. (RT 7: 1529–1530.) The prosecution theory posited appellant cooly deciding in advance to do a horrendous act—using, nonetheless, a particularly crude weapon that would make the killings difficult, and a gruesome experience even for himself. Murdering other people puts one at great risk. Doing so in a manner—*Anderson's* third factor—that has to take awhile and lead to shouts, screams, and covering the perpetrator with blood[30] heightens the risk considerably. These were not facts "from which the jury could infer that the *manner* of the killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' . . . ." (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27.) And the whole effect would be to eliminate one of appellant's two sources of income, for a very short-term fix to his financial problems.[31] If the design was "a result of careful thought" (*People v. Jurado*, *supra*, 38 Cal.4th at p. 118), it was unbelievably faulty.

The perpetrator opened the center desk drawer in the room used as an office but failed to see a total of $113 in cash, clipped to ATM withdrawal slips, in several different parts of the drawer. (RT 6: 1307.)

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[30]See RT 5: 1193–1194, 1256–1266, and Exhibits 23–32 regarding the blood spattering on the walls and ceiling near Fred, the large quantity of blood on the floor, and the multiplicity of the wounds, as well as RT 5: 1194, 1198–1200, 1243, and Exhibit 17 regarding bloody hand and shoe prints.

[31]As it turned out, Shirley had many jewelry items in boxes in her closet. Appellant could have known that, but, again, it is not a particularly reasonable hypothesis, given that—even in cleaning one's own house—one does not usually spend time in the closets. Moreover, appellant, who had recently pawned Viola Bettencourt's $3500, 29-diamond ring for $125 (RT 7: 1658; 8: 1852–1853), must have known that he could neither pawn large amounts of ladies' jewelry at once, nor get much for the two items that he did ultimately pawn for $15 and $35. (RT 8: 1850–1851.)

Again, this was hardly suggestive of crimes carried out in a "particular and exacting" manner. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27.)

Finally, the prosecution case tended to show that appellant pawned the two pieces of jewelry in his small[32] hometown, in his own name, the day after the theft. (RT 8: 1809–1810, 1812–1815, 1819–1822, 1828, 1839–1841, 1848–1852, 1860–1862; 10: 2114–2120; see also RT 11: 2381–2382, 2412 [prosecutor's argument on timing].) If a criminal jury were permitted to engage in guesswork, the best guess would be that this was a further impulsive act by a still-cloudy consciousness, not the final step in a carefully-considered plan.

Appellant does not maintain that there can be no murder conviction when there is a body but no direct testimony about what happened. *Jackson v. Virginia* is itself instructive. There, too, authorities were confronted with a body, a means of killing, and evidence of who was the perpetrator, but there the circumstances were sufficient to permit a rational factfinder to convict of first-degree murder. The defendant challenged premeditation and intent to kill, based on claims of intoxication and self-defense. (443 U.S. 307, 309–311, 324–325.) The forensic evidence contradicted those claims: the victim was shot, twice, at close range, and only after the defendant had "first fired several shots into the ground and then reloaded his gun." (*Id.* at p 325.) The self-defense claim was based on a story that the female victim undressed and then came after him with a knife (after he had fired the warning shots) when he refused her sexual advances. The inherent improbability of this narrative was heightened by testimony that

[32]Hanford's population was about 40,000, a fact which jurors undoubtedy knew. (See <http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US06&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-7> [viewed December 20, 2007].)

the defendant had earlier told someone he was going to have sex with her. Moreover, there was evidence of his "calculated behavior both before and after the killing." (*Ibid.*) Under these circumstances, a rational trier of fact could have found first-degree murder. (*Id.* at p. 326.)

Similarly, in *People v. Stewart* (2004) 33 Cal.4th 425, this Court noted not only "strong evidence of identity and motive," but also "strong evidence concerning the mental elements of the crimes."[33] (*Id.* at p. 460.) The motive evidence—far from being a simple need for money—involved the defendant's "alienation, anger, and despondency over the role played by . . . [the victims] in causing him to be sent back to prison." (*Ibid.*) Hours before the shootings, referring to what they had done, he made oblique threats. (*Ibid.*) As to the mental elements, this Court noted "[t]he close range and placement of the shots; the selection of the early morning of the Fourth of July (when gunshots . . . might be masked . . . by firecrackers or other 'celebratory' gunshots [that were in fact heard around the same time]) as the date for the crimes; the apparent effort to rid the crime scene of bullet cartridges; the killing of the dog (possibly to silence it); and the attempt to burn the house and the evidence it contained . . . ." (*Ibid.*) There is nothing analogous in the current record.

On the other hand, in *Juan H. v. Allen*, *supra*, 408 F.3d 1262, the court reviewed evidence of motive, conduct at the scene of the crime, flight, and false alibi relied on by a California court to uphold a verdict. (*Id.* at p. 1276.) Each of these, however, was subject to multiple interpretations, some more probable than the one consistent with guilt, and thus would not permit a reasonable factfinder to find guilty knowledge and intent. (*Id.* at

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[33]The context for examining the strength of the case was different—a harmlessness/prejudice analysis regarding an asserted error. The Court's attention to all elements of the case that had to be proven remains instructive.

pp. 1277–1278.) For example, to conclude that the defendant's giving of a false alibi to police "reflected consciousness of guilt is bare conjecture," given that admitting his presence at the scene would have been against his interests even if he was not guilty. (*Id.* at p. 1277.)

Similarly, *People v. Anderson*, *supra*, 70 Cal.2d 15, was the case which developed the guidelines which this Court uses for analyzing whether the evidence supports a finding of premeditation and deliberation. This Court has succinctly summarized its holding, reducing a first-degree murder conviction:

> In *Anderson*, the defendant killed the 10-year-old daughter of a family with whom he was living, in a brutal assault in which numerous cuts were inflicted all over the child's body. There were no eyewitnesses to the crime, the defendant did not testify or confess, and there was no explanation of what led up to the murder although there was evidence of the defendant's subsequent efforts to conceal the crime. On this record, our court concluded that the evidence was insufficient to demonstrate that the murder was premeditated or deliberate, and we reduced the conviction from first to second degree murder.

(*People v. Robertson* (1982) 33 Cal.3d 21, 49.) The *Anderson* court emphasized the long-standing rule that the brutality of a killing or the infliction of multiple wounds does not in itself suffice to show premeditation or deliberation. (*Ibid.*; see also *People v. Memro* (1985) 38 Cal.3d 658, 695; *People v. Velasquez* (1980) 26 Cal.3d 425, 435–436 [evidence of defendants' careful planning of robbery and lack of efforts to conceal identity could not be cumulated with other evidence to show premeditation and deliberation], disapproved on another ground in *People v. Guzman* (1988) 45 Cal.3d 915, 954; *People v Rowland* (1982) 134 Cal.App.3d 1, quoted with approval in *People v. Memro*, *supra*, 38 Cal.3d at p. 695.)

While appellant's case is on all fours with none of these on the facts, the degree of mystery—and hence reasonable doubt as a matter of law—about what occurred puts the case in the category of *Juan H.* and *Anderson*, not *Jackson* and *Stewart*, and the verdicts cannot stand on the basis of the prosecution's prior-plan scenario.

2. The Evidence That a Second Knife Was Used at Some Point Did Not Support Findings of Premeditation and Deliberation Because the Instrument Was Only Used for Post-Mortem Disfigurement

The prosecution also hypothesized that appellant first struck each victim several hatchet blows, then took a paring knife from the kitchen but, after several blows, found it too short to finish Fred off quickly, then sharpened the filet knife and used it on both victims. (RT 11: 2411–2412; see also 2464 and RT 7: 1452–1453.) "[Y]ou don't have to form the intent before you walk in the house. While he's sharpening the knife . . . that's time to reflect and think about it." (RT 11: 2464; see also RT 11: 2391.) This incomplete alternate scenario[34] powerfully suggests a deliberate manner of the killings, or at least that it became deliberate at some point. But at best it suggested, as the prosecutor said, that there was *time* to reflect, not that it happened.

More significantly, this aspect of the prosecution narrative was also grossly lacking in evidentiary support, unlike an alternate scenario, which is discussed below. The pathologist, to be sure, concluded, because of a paucity of bleeding from the knife wounds, that both victims were mortally wounded by the hatchet blows before being stabbed with a knife. (RT

[34]Incomplete in that it supplies no answer as to when and why the decision to kill was made, if it was not part of the supposed advance plan emphasized by the prosecution.

5: 1415–1416, 1424; 7: 1442, 1445–1448.) But this in itself showed only that death was not coming fast enough for the assailant. A desire to halt thrashing, crying out, moaning—whatever terrible things were happening—is still consistent with an impulsive attack.

It was the image of sharpening the filet knife and using it when the paring knife could not penetrate far enough that seemed to give the prosecution something to work with. But an image is all that it was. The prosecution's expert testified that the paring knife, i.e., the shorter one, was consistent with the size of the wounds that penetrated Fred Jenks's lungs. (RT 7: 1452.) However, the prosecution's theory that the perpetrator started with a smaller knife, then switched to a longer one, was "possibly" true (RT 7: 1453), as the witness was "not certain" that the smaller one had a long enough blade to inflict all of Fred's wounds (RT 7: 1452).[35] Similarly, most of Shirley's stab wounds could have been caused by the paring knife, although the witness thought that three were too deep. (RT 7: 1464.) But there was a notable absence of testimony about measurements of the actual depths of the wounds, the lengths of the blades, or the degree to which a forceful blow compresses the rib cage and the soft

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[35]In the same line of questioning, the prosecutor obtained more definitive answers by shifting to leading questions, which he propounded to his witness without objection:

> Q. . . . Fred Jenks was a big man, was he not?
> A. Yes, sir.
> Q. And actually to penetrate into the body you needed a longer blade, would you not?
> A. Yes, sir.
> Q. A longer blade such as the knife in 51A [the filet knife]?
> A. Yes, sir.

(RT 7: 1452–1453.)

tissue outside of it. Moreover, the paring knife—a large one which could clearly do real damage with its blade of over four inches' length—is of unusual design, one where the blade thickens gradually into the handle, in a seamless transition. (Ex. 48A.) Thus, part of the handle, too, could penetrate a wound opened by the blade, under the force of a stabbing motion, and the length of the blade does not define how far a blow can penetrate.

Any link in a chain of inferences used to prove premeditation and deliberation had to have itself been proved true beyond a reasonable doubt. (*People v. Watson*, *supra*, 46 Cal.2d 818, 830–831.) Thus the prosecutors' speculation about the killer stopping, sharpening the filet knife, and using it to hasten death has to meet the *Winship* standard if it is to be a basis for upholding first-degree murder verdicts on a premeditation-and-deliberation basis. Besides the sketchiness and noncommittal nature of the pathologist's testimony, there were other reasons why it could not be found to be the only reasonable hypothesis. First, the filet knife, to be useful as a stabbing instrument, needed only its pointed tip, not a keenly-honed edge. No one searching a drawer full of kitchen knives to hasten a death would look at what is now Exhibit 51A and say, "I can't stab a person with this without sharpening it." It is hard to imagine that scene with any kitchen knife; the perpetrator could have selected another if the filet knife did not look effective; and, finally, the knife that was used has a slim blade that tapers to an unusually pointed tip, certainly more so than the paring knife. (Ex. 51A; see also Ex. 48A & Ex. 3, a videotape, at 20:40.)

Second, a killer who could take the time to calmly choose a longer knife and sharpen it would not have been one who was too frantic about the pace of a victim's expiration to have let the wounds that had already nearly killed the victims (see RT 5: 1415–1416, 1424; 7: 1442, 1445–1448) do

their work. The prosecution scenario hypothesized a killer with two entirely inconsistent states of mind.

Third, the whole scenario was inconsistent with another fact. The pathologist concluded that Fred was "probably . . ., if not already dead, almost dead," from the head wounds when the stabbing *began*. (RT 6: 1416.) So the need to hasten death further after making a number of not-quite-deep-enough stab wounds with the paring knife was a figment of the prosecutors' imaginations.

There was yet a fourth problem with this theory. If the assailant was stabbing Fred with the paring knife, dropped it in the sink, and switched to the filet knife to finally finish him off, clearly the filet knife would have been used on Fred as well as Shirley, and the paring knife would have been used only on Fred (whom, as the prosecution argued, the assailant clearly encountered first). Yet the prosecution provided no evidence to prove that either of these propositions was true. The filet knife had blood consistent with Shirley's on the handle, and a quantity of blood on the blade too small to type using older technology. (RT 7: 1486, 1609, 1616.) Similarly, the quantity of blood on the paring knife was insufficient for typing using the locally-available test. (RT 7: 1507.) But the DNA process used for typing the speck on the eyeglasses has the advantage of working with very small samples, since the DNA is replicated ("amplified") a million-fold. (RT 8: 1674–1675, 1731.) Yet there was no evidence of DNA testing on either weapon. Either the prosecution did not want to check the validity of its own speculative scenario, or the results belied it.

Why, then, were the paring knife and a sharpener found in the kitchen sink, both with blood on them, while the filet knife had been left in the bedroom? Certainly a jury could reasonably accept the prosecutors' theory that the attacker left the paring knife in the sink after using it, found

the filet knife in the kitchen drawer (which was found open by police), and sharpened it, although the absence of any testimony that it appeared to have been recently sharpened is troubling. But rather than a totally useless honing of the edge, when the point would do the penetrating, it is far more likely that, if it happened, the sharpening was part of a grisly activity that took place after both victims were dead. For the pathologist testified that the assailant disfigured Shirley's dead body with two fairly shallow incisions made almost from ear to ear through the skin of her throat. (RT 7: 1445, 1448; see also 5: 1107 and Ex. 3.)

Certainly the sick act of finding an instrument that—unlike a paring knife—could be sharpened and used to create these post-mortem cuts[36] could have hurt appellant at the penalty phase. However, the *necessity* of the sharpened filet knife for that act virtually destroys the prosecution's attempt to create a premeditation/deliberation scenario with a portrayal of appellant taking the time to sharpen it *unnecessarily* to create deeper wounds. It also explains why there was evidence of Shirley's blood, but not Fred's, on the filet knife (RT 7: 1509–1511), and the prosecution's failure to identify the blood on the paring knife, which was probably used on both victims when the stabbings took place.

Acts of preparation for making a slicing incision—particularly when one was made—are not "evidence that reasonably inspires confidence and is of solid value" of careful preparation for stabbing. (*People v. Marshall* (1997) 15 Cal.4th 1, 34, internal quotation marks omitted.)

Analyzing the evidence at this level of detail risks giving the appearance of inviting this Court to second-guess the jury, but that is not appellant's intention. Moreover, to prevail here, he need not show that his

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[36]A prosecution witness testified that the filet knife was designed to be sharpened, and the paring knife was not. (RT 5: 1252, 1270.)

view of the evidence is compelling. He need only show that jurors who rationally analyzed the evidence could not have reasonably found this non-first-degree scenario unreasonable. (*Jackson v. Virginia*, *supra*, 443 U.S. 307; *People v. Bean*, *supra*, 46 Cal.3d 919, 932–933; *People v. Watson*, *supra*, 46 Cal.2d 818, 830–831.) So the point is that the two-knives-to-kill theory, as an alternate way of showing premeditation and deliberation, was gross and unreasonable speculation. It was a theory that jurors could not have rationally found to have eliminated the possibility that the murders were rash, furious, spontaneous assaults. (*People v. Jurado*, *supra*, 38 Cal.4th 72, 118.) This is because of the vague and equivocal nature of the pathologist's testimony, Fred's being dead or nearly so when the stabbing began, the internal inconsistency of a view that had the assailant too impatient to let expiring victims die from their several mortal wounds and yet calm and patient enough to select and sharpen another weapon, the failure to either provide—or give an explanation for not providing—the DNA evidence that the scenario would have produced, and the substitution of a theory about a senseless sharpening of the second knife for a theory consistent with the evidence.

In sum, if the only way to cure the lack of evidentiary foundation for a claim that appellant pre-planned a robbery-murder (or a robbery from which murder resulted) was the idea that, in any event, premeditation and deliberation both took place during the pre-mortem sharpening of a second knife, this, too, was too slender a reed on which to support a case of death-eligible murder.

Appellant's prevailing on this issue does not require this Court's agreement with appellant's view of which scenario was more likely. For appellant did not have to establish at trial when his intent to steal arose or his lack of premeditation and deliberation, and he does not have to now.

The point is that the prosecution's circumstantial case came nowhere near eliminating every reasonable hypothesis other than a pre-existing intent to steal and kill or a sort of spontaneous premeditation during the attacks. Thus it could not have convinced a rational juror, beyond a reasonable doubt, of robbery, first-degree murder on either basis, or a robbery-murder special circumstance. (*Jackson v. Virginia*, *supra*, 443 U.S. 307; *People v. Bean*, *supra*, 46 Cal.3d 919, 932–933; *People v. Ledesma* (2006) 39 Cal.4th 641, 715.) Upholding the verdicts here would be accepting conclusions based on "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work," which is not acceptable. (*People v. Coddington*, *supra*, 23 Cal.4th 529, 599; see also *Juan H. v. Allen*, *supra*, 408 F.3d 1262, 1277.)

A reviewing court is understandably hesitant to conclude that the product of a jury's deliberations was unreasonable. However, as later sections of this brief show, there were errors, particularly in the trial court's attempts to expand on the statutory definition of reasonable doubt, that influenced those deliberations and help explain the result. And the evidence *was* insufficient.

C. The Judgment Must Be Reversed

As Chief Justice Traynor wrote for this Court,

"To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." (*People v. Hall*, *supra*, 62 Cal.2d 104, 112.) That did not happen here. In saying that appellant decided in advance to rob and kill the Jenkses to ease his financial woes, the prosecutors were making up a story. In saying that he sharpened a knife to finish off the Jenkses and that he premeditated and deliberated while doing so, the prosecutors were even more obviously making up a story. These

stories are no more compelled by the evidence than alternative stories, such as that appellant met with the Jenkses, seeking help when he was in difficult straits, and that something about the way they treated him produced a rash and terrible rage. No one has a story suggesting that these were justifiable actions, but the one that points to the serious crime of murder in the second degree, instead of murder in the first degree, could not reasonably have been rejected.

For a great many crimes, the identity of the perpetrator is never known, and no one is punished. For others, what happened is not known sufficiently to permit exacting the *maximum* punishment. This is such a case. The best that can be said is that the evidence was not wholly inconsistent with guilt of first-degree murder. But this is far from sufficient. In the United States of America, we do not execute people based on someone's best guess as to whether what a person did was a capital offense or a lesser one, even when the horror of the crimes makes us want to—at least not when we are living up to our ideals. Here the first-degree murder verdicts could have been based on nothing else, and they must be vacated. The same is true of the robbery count, and the robbery-murder special circumstance.

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II. IN EXTEMPORANEOUS PRE-INSTRUCTIONS CONCERNING REASONABLE DOUBT IN A CIRCUMSTANTIAL CASE, THE TRIAL COURT IMPERMISSIBLY LENT ITS AUTHORITY TO THE PROSECUTION'S CAUSE AND GROSSLY DILUTED THAT PARTY'S BURDEN OF PROOF

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.
>
> (*In re Winship* (1970) 397 U.S. 358, 364).

The trial court's first opportunity to instruct the jurors about the law in appellant's case was during voir dire, when it examined them about their ability to follow it. It used this first opening to caution them emphatically against demanding too much of the prosecution in a circumstantial case. This was a potent gesture. Going out of its way to address this topic—while saying nothing, for example, about the need to acquit a defendant whom jurors believe committed horrible crimes, if a reasonable doubt remains—conveyed as much meaning as certain serious errors in the content of the court's statements. By effectively expressing its particular concern that a guilty man not be freed unnecessarily, the court violated the evenhandedness which due process demands. (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242.) Moreover, the statements themselves diluted the burden of proof, in further violation of appellant's state and federal due process rights. This alone renders the convictions invalid and helps explain the verdicts. (*Cage v. Louisiana* (1990) 498 U.S. 39.)

A. The Trial Court Pre-Instructed the Jurors, Using a Homely and Inapt Metaphor for Sufficient Circumstantial Proof

A few minutes before the start of voir dire, the prosecution expressed concern that some potential jurors would hold it to a higher standard because the case was a capital one. The trial court responded that it already

intended to address that issue, using a standard script that it had. It would also address the question of whether circumstantial evidence was sufficient to convict.[37] (RT 3: 523–524.)

When each group of prospective jurors came in, the court's routine was to ask whether (a) they could be unbiased; (b) knowledge of attorneys, victims, witnesses, or other jurors could be a problem; (c) they could decide the case based on the evidence and on the law as given to them; (d) they could determine the credibility of all witnesses based on the same standards; and (e) they could keep an open mind until the case was submitted to them. (RT 3: 538–547, 686–692; 4: 799–805, 899–903.) The wording of the principles which the jurors were asked if they could apply was generally[38] formal, and it was very similar in each of the four iterations before different panels.

Then, with one panel, the court made a point of letting jurors know that, while there are specific instructions about circumstantial evidence that would be given later, "circumstantial evidence can support a jury verdict and is perfectly acceptable as evidence in a capital case or any other case." (RT 3: 549.) Continuing, it explained,

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[37]Appellant's counsel did not ask to see the "script," nor did he object during the instructions themselves. Errors in instructing a jury, however, including explanations of the law by a trial court conducting voir dire, are preserved for review without objection, if they affect a defendant's substantial rights. (*People v. Dunkle* (2005) 36 Cal.4th 861, 928–929 [rejecting respondent's forfeiture contention]; *People v. Hinton* (2006) 37 Cal.4th 839, 861; *People v. [Glen] Johnson* (2004) 119 Cal.App.4th 976, 984; *People v. [Danny] Johnson* (2004) 115 Cal.App.4th 1169; cf. *People v. Carter* (2005) 36 Cal.4th 1215, 1253.)

[38]An exception was the court's inquiry into whether potential jurors could reject the testimony of witnesses with whom they were acquainted. On this topic, as with the one at issue here, the court seemed to extemporize more. (Cf., e.g., RT 3: 687–688 with RT 4: 801–802.)

> There's nothing different about a capital case with regard to the consideration of circumstantial evidence. Some people have some questions about that, and I want to disabuse you of that misconception.

(*Ibid.*) Similar comments were made to each of the other three panels, although on this topic there was considerably more informality and variability in the wording. (RT 3: 693–696; 4: 805–806, 808, 904, 906.) Then, with each group, the judge emphasized a common-sense approach to the use of circumstantial evidence, and, with one panel,[39] he used language suggesting that what he was about to say could be a more useful guide than the highly technical instructions that would come later:

> I think a lot of jurors are confused about circumstantial evidence and think that it's a more complicated concept than it really is. The instructions on circumstantial evidence are very—are somewhat complex and I will read those to you at the appropriate time, but let me at this time just generally tell you . . . .

(RT 3: 694.) He described, via example, what circumstantial evidence is and how to evaluate it:

> If a—if you've—have baked a pie or your spouse has baked a pie and you've told your child that that pie is for the company that you're planning to be entertaining that evening and they're not to get into it. And the pie is left on the kitchen counter, and then an hour later you come back into the room and there's a—it's obvious that someone has taken a scoop out of the edge of that pie, and then you go confront your nine-year-old and the nine-year-old has raspberry residue on his or her lower lip, you don't need any other evidence in a case like that *to conclude that your child got into the pie.* That's circumstantial evidence, yes, the fact that someone got into the pie and that the child has evidence of having recently consumed raspberry pie, but it is perfectly good evidence and

[39]Jurors A-79, A-89, and A-48 heard these remarks. (See RT 3: 724, 741, 767.)

would support an inference, a reasonable inference that in fact your child has disobeyed your instructions.[40]

(RT 3: 549–550, emphasis added.) With the other panels, too, the court did not limit itself to saying that the evidence would support an inference of the child's offense, but asserted that a conclusion to that effect would be appropriate. (RT 3: 695 ["I don't think any of you would have much trouble deciding what happened"];[41] 4: 807–808 ["Now, that's all circumstantial evidence, but I don't think any of you would have a problem figuring out what happened to that pie"],[42] 905 ["Now, that's circumstantial evidence, sure, but I think most moms or dads would arrive at a conclusion *beyond any reasonable doubt*" (emphasis added)][43].)

Next the judge stated that—while specific instructions regarding how to treat the evidence would be read at the end of trial, he wanted the jurors to understand from the beginning that the same rules apply in this case as in any other trial. (RT 3: 550; see also 3: 696; 4: 807, 905–906.) Then[44] he made it specific, in addition to the point about circumstantial evidence: sometimes people think that the burden of proof should be higher in a capital case, but it's beyond a reasonable doubt, as in any other case, such

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[40]Jurors A-8, A-13, A-16, and A-41 were in the group that was so instructed. (See RT 3: 581, 586, 593, 642.)

[41]Jurors A-79, A-89, and A-48 heard this version of the instruction. (See RT 3: 724, 741, 767.)

[42]Jurors B-28, B-4, and B-48, heard this version of the instruction. (See RT 4: 798, 834, 856.

[43]Jurors B-105 and B-78 heard this version of the instruction. (See RT 4: 955, 982.)

[44]Sometimes the court made this statement earlier in its discourse.

as a petty theft. (RT 4: 904; see also 3: 550–551, 693, 694, 696, 4: 806, 808, 906.)

It appears—from reading the transcript aloud at a normal pace—that the court spent about three and one-half minutes, with each panel, "disabus[ing]" (RT 3: 549; 4: 808) jurors of misconceptions about the evidentiary burden that might hurt the prosecution. It then went back to the normal explanations of such issues as the structure of a capital trial, weighing aggravation and mitigation, etc. As with the matters that preceded the circumstantial-evidence/burden-of-proof discourse, the court did so much more briefly and formalistically, drawing in part on pattern jury instructions. (See RT 3: 551–554, 696–698; RT 4: 808–811, 906–908; cf. CALJIC No. 8.88.) There was no mention, in this context,[45] of the presumption of innocence. And the court did not set forth the burden of proof and reasonable-doubt standard affirmatively, in a stand-alone fashion, during this phase of the instructions.[46] Rather, every time that the subject was mentioned by the court, the context was that of simply *naming* the burden that the court was emphasizing was the same in every criminal case. (RT 3: 550–551, 694; 4: 806, 904.)

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[45]On June 2 and 3, 1998, the court formally pre-instructed all the jurors summoned, in two groups. Here the standard instructions on the presumption of innocence were included. (RT 2: 368–369, 436–437.) The topics that were given special attention by being integrated into the court's voir dire of smaller groups were addressed two days later, for each group. (See RT 2: 380, 449, and portions of the record cited in the text, above.)

[46]See previous footnote. Again, the earlier instructional package covered these topics. (RT 2: 368–369, 436–437.) It did not include the instructions applying the reasonable-doubt doctrine to facts sought to be proved circumstantially.

B. Extraordinary Judicial Emphasis on Countering a Bias That Could Hurt the Prosecution Introduced the Opposite Bias into the Proceedings

The Due Process Clauses prohibit a judicial tilt towards the prosecution in criminal proceedings. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Marshall v. Jerrico, Inc.*, *supra*, 446 U.S. 238, 242; *People v. Moore* (1954) 43 Cal.2d 517, 526; *People v. Mahoney* (1927) 201 Cal. 618, 627; see also *Quercia v. United States* (1933) 289 U.S. 466, 470; *Cool v. United States* (1972) 109 U.S. 100, 103, fn. 4; *Bihn v. United States* (1946) 328 U.S. 633, 637; *People v. Brown* (1993) 6 Cal.4th 322, 332.) Here, the trial court interrupted its rote reading of brief pattern pre-instructions with an extensive and obviously personally-prepared commentary on the validity of a circumstantial case, i.e., the kind about to be presented by the prosecution. None of the other potential biases and misconceptions that jurors can bring to a criminal or capital trial received such attention. Even if his actual statements had been impeccable, the trial judge is a figure whose "lightest word or intimation is received with deference, and may prove controlling." (*Quercia v. United States*, *supra*, 239 U.S. 466, 470, quoting *Starr v. United States* (1894) 153 U.S. 614, 626; *Sanguinetti v. Moore Dry Dock Co.* (1951) 36 Cal.2d 812, 819, also quoting *Starr*.) Thus he erred when he dramatically telegraphed to the jurors his concern that they might short-change the prosecution. This gross breach of impartiality at the point where jurors were first introduced to the proceedings invalidated their subsequent verdicts.

1. Due Process Requires That a Court Maintain Strict Neutrality Between the Parties in the Presence of the Jury

A defendant is entitled to impartiality from the bench under the state and federal Due Process Clauses. (*People v. Brown*, *supra*, 6 Cal.4th 322,

332.) This applies to the giving of instructions and to comments on the evidence. "There should be absolute impartiality as between the People and the defendant in the matter of instructions . . . ." (*People v. Moore*, *supra*, 43 Cal.2d 517, 526, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310; see also *People v. Hughes* (2002) 27 Cal.4th 287, 347, fn. 11 [entertaining instructional challenge under *Moore*]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223–1224 [accepting premise that instructions endorsing one side's theory are error]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1218 [comment on evidence].) "The rules of law relating to [an issue at trial] should not . . . [be] stated exclusively from the point of view of the prosecution." (*People v. Hatchett*, *supra*, 63 Cal.App.2d at p. 158.) When a judge significantly intervenes in the trial sua sponte, he or she must do so in an "evenhanded" fashion. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1244; cf. *Wardius v. Oregon* (1973) 412 U.S. 470, 475–476 & fn. 6 [state's procedures may not favor prosecution].) Such interventions, even when appropriate in the abstract, "must be done in a manner that gives no indication of the court's inclination for or against either party." (*People v. Campbell* (1958) 162 Cal.App.2d 776, 787.) Further, "Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.'" (*People v. Sturm*, *supra*, 37 Cal. 4th at p. 1237, quoting *People v. Zammora* (1944) 66 Cal.App.2d 166, 210; see also *People v. Mahoney*, *supra*, 201 Cal. 618, 627.) A trial judge may not "convey[] to the jury the message that the court [is] allied with the prosecution." (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1240.) Intervening on behalf of the prosecution, when the action is not balanced by similar treatment of the defense, conveys the prohibited message. (*Id.* at pp. 1241–1242.) "Because the trial court's

views would necessarily have undue weight with the jury, implying the trial court approves of some portion of a litigant's case is improper." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 799.)

2. The Pre-Instructions Showed Special Solicitude for the Prosecution

The trial court's singling out its concern that jurors might have trouble with a circumstantial case violated all of the above precepts. There are many potential biases with which potential jurors can enter a courtroom, not the least of which are a presumption of guilt—that if the police and prosecutor concluded that the defendant was the perpetrator, he or she probably is[47]—as well as a notion that defense attorneys are generally more partisan and less ethical than deputy district attorneys.[48] And, as mentioned previously, surely, if there were potential jurors who, convinced beyond a reasonable doubt of guilt, would nevertheless acquit because the evidence that convinced them was circumstantial,[49] there were at least as many who would have difficulty setting free a person they believed to be a murderer

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[47]Mogill, *Some Reflections on the Relationship Between the Jury System, Truth, and Charles Ives* (1987) 4 Cooley L.Rev. 610; Schwab, *Interview with Edward Bennett Williams* (1985) 12(2) Litigation 28, 34.

[48]See Slovenko, *Attitudes on Legal Representation of Accused Persons* (1964) 2 Am. Crim. L.Q. 101, 104.

[49]The trial court's concern seems misplaced for reasons in addition to the inherent improbability of this proposition. CALJIC No. 2.00 does, and did, define *circumstantial evidence* and state that a fact may be proved by either direct or circumstantial evidence and that neither is entitled to greater weight than the other. (See fn. 51, p. 71, below, and RT 11: 2335–2336.) Jurors are generally presumed to be willing and able to follow standard instructions. (*People v. Smith* (2007) 40 Cal.4th 483, 517.) Specifically, this Court generally trusts jurors to apply logic to the general principles upon which they are instructed, without detailed and potentially argumentative elaboration by trial judges. (See, e.g., *People v. Earp* (1999) 20 Cal.4th 826, 886–887.)

because the prosecution had not met its burden.[50] The court below addressed none of these issues. (Cf. RT 2: 368–369, 436–437 [brief recitation of presumption-of-innocence rule two days earlier, as part of formal pre-instruction package].) With the vast majority of those that it did cover, it contented itself with a simple statement of the problem and asking the potential jurors if it would pose difficulties for them. (See, e.g., RT 3: 542 [prejudice concerning witnesses with whom panelists acquainted; willingness to reject the testimony of an acquaintance who might be encountered later], 543 [following the law regardless of personal opinion], 543–544 [ignoring anything heard outside the courtroom about the case], 544 [evaluating officers' testimony like that of any other witness].) In this context, if there was a need to preemptively deal with possible bias about a capital case built solely on circumstantial evidence, the proper treatment would have been to (a) cover the subject in the same manner, using, for example, CALJIC No. 2.00,[51] and (b) balance it with either a statement that there is a special rule for evaluating circumstantial evidence because it does pose certain challenges, or with a reading of the actual rule requiring circumstantial proof to exclude reasonable hypotheses inconsistent with guilt (e.g., CALJIC No. 2.01). Additionally, some attention to explaining the presumption of innocence and the reasonable-doubt standard—besides having been highly appropriate in any event—would have alleviated any

[50]See 3 Singer & Maloney, Trials and Deliberations: Inside the Jury Room (1992) § 25.01.

[51]". . . Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. [¶]. . . It is not necessary that facts be proved by direct evidence. They may also be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other."

impression that the court was concerned that a guilty man might go free because the case was circumstantial. As with the other subjects covered by the court, if the prosecutors felt a need to follow up with an individual juror on the burden-of-proof issue, because of statements on the juror's questionnaire, they could have done so.

Instead, the "don't-let-the-circumstantial-nature-of-this-case-get-in-your-way" homily stood alone. It did so in several ways. One was its sheer length—a discourse of over three minutes compared to the summary treatment each of the other important issues received. Another was its not being balanced by any countervailing concern for interests of the defense. A third was its home-spun, extemporaneous quality. While the same points were covered each time, in fact there was no "script": the wording varied significantly with each panel, and to some extent the order did as well. (Compare RT 3: 549–551, with RT 3: 693–696 and 4: 805–808, 904–906.) This was not the case with the remaining portions of the judge's voir dire, which were either identical to each other[52] or virtually so.[53] Clearly the type of contact made with the jurors when extemporizing would have been of a different quality than when reading instructions or briefly presenting matters that the court could recite by rote. This further emphasized the judge's personal interest in bringing home his perspective on circumstantial evidence in this case.

Finally, the illustration which the court employed was specifically from the prosecution's point of view. In *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, a conviction was reversed, in part because of an unbalanced instruction, which—like the pilfered-pie illustration at issue

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[52]RT 3: 551–554, 696–698; 4: 808–811, 906–908.

[53]RT 3: 538–547, 686–692; 4: 799–805, 899–903.

here—used hypothetical facts to explain the difference between direct and circumstantial evidence. Rather than drawing on a neutral illustration, such as a person's entering a room with a wet umbrella, as support for an inference that it is raining outside, the trial court had used a hypothetical which showed how guilt of an offense was proved.[54] The instruction was fatally flawed because the illustration assumed guilt and did not, evenhandedly, show how circumstantial evidence might point towards innocence. (*Id.* at p. 46; see also *Cool v. United States*, *supra*, 409 U.S. 100, 103, fn. 4 [reversible error to instruct that jury may convict on the basis of accomplice testimony without saying that it may acquit on such a basis].) Here, the same was true of the trial court's "raspberry-pie" illustration, but its pernicious nature was amplified by the context.

Thus, out of all the possible misconceptions and biases that can impact a capital murder trial, the court below conveyed to the jurors the powerful impression that the only thing it had a grave concern about was that the prosecution would be given short shrift because its case was circumstantial. In doing so, it fell far short of evenhandedness in sua sponte interventions in the trial (*People v. Sturm*, *supra*, 37 Cal.4th 1218, 1244) and conveyed the impression that the court was allied with the prosecution's cause (*id.* at 1240; *People v. Carpenter* (1997) 15 Cal.4th 312, 353). It also violated those principles' application to the giving of instructions, where "absolute impartiality" between the parties is required (*People v. Moore*, *supra,* 43 Cal.2d 517, 526), including refraining from endorsing one side's theory (*People v. Jackson*, *supra*, 13 Cal.4th 1164, 1223–1224) or stating applicable rules "exclusively from the point of view

[54]CALCRIM No. 223 also uses the question of whether it is raining outside to illustrate the difference between direct and circumstantial evidence.

of the prosecution" (*People v. Hatchett*, *supra*, 63 Cal.App.2d 144, 158; accord, *People v. Moore*, *supra,* 43 Cal.2d 517, 526).

Because of the enormous influence a trial court's evident leanings can have on a jury, the impact—particularly during the jurors' first few minutes of exposure to the trial—may well have been disastrous. (*Quercia v. United States*, *supra*, 239 U.S. 466, 470; *People v. Sturm*, supra, 37 Cal. 4th 1218, 1237; *People v. Mahoney*, *supra*, 201 Cal. 618, 627.)

> Our courts have on many occasions pointed out the duty of a trial judge before a jury, both in criminal and civil cases, not to do anything which would lead the jury to believe that the judge was of the opinion that one party should receive the verdict, nor to appear to throw his judicial weight on one side or the other. [Citations.] These cases reiterate the fact that jurors are eager to find and quick to follow any supposed hint of the judge as to how they should decide the case.

People v. Cole (1952) 113 Cal.App.2d 253, 261.)

Nearly a century ago, the Court of Appeal encountered a case where the trial court had gone out of its way to disabuse jurors of the notion that a circumstantial case was particularly likely to lead to an erroneous conviction, after the defense attorney had so argued. The instruction was less objectionable than the comments at issue here, in that it was provoked by an attorney's argument, and it was shorter and inserted amidst numerous other instructions in the final charge. Yet it was self-evident to the Court of Appeal that the instruction was argumentative and should not have been given. (*People v. Wilson* (1913) 23 Cal. App. 513, 522–523.) Surely the same was true here.

3. The Court's Remarks Also Amounted to a Biased Comment on the Evidence

As noted above, the requirement of evenhandedness applies to a judge's comments on the evidence at trial. The right to make such comments is a

> powerful judicial tool [which] may sometimes invade the accused's countervailing right to independent jury determination of the facts . . . . Hence, . . . judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, . . . expressly or impliedly direct a verdict . . . .

(*People v. Slaughter*, *supra*, 27 Cal.4th 1187, 1218, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 766.)

Besides showing special solicitude for the prosecution in general, as explained above, the remarks at issue here violated this precept as well. For they were not only instructions on how to evaluate the evidence, but they amounted to a form of comment upon that evidence, albeit in general terms.[55]

Here, any thinking juror would recognize that the trial court was only going out of its way to expound upon the value of a circumstantial case because the jury was about to hear one. Thus, while the court was not commenting on a specific item of evidence, it was actually commenting even more powerfully on the entire evidentiary picture about to be presented. As noted previously, "implying the trial court approves of some portion of a litigant's case is improper." (*Cassim v. Allstate Ins. Co.*, *supra*,

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[55]Comment on the evidence can occur prior to the presentation of the evidence. In *Slaughter* itself, this Court applied the principles regarding such comment to remarks, made during jury selection, regarding what the court expected the evidence to show. (*People v. Slaughter*, *supra*, 27 Cal.4th at p. 1218.)

33 Cal.4th 780, 799.) Moreover, the unfortunate similarity between the speck of pie residue on the hypothetical child's lip and the speck of blood on the real defendant's glasses—a similarity that became clear a few days later, during the prosecution's opening statement[56]—made the comment's applicability to the evidence even more direct. Parenthetically, the use of examples paralleling the facts of the case being tried is itself disfavored, because of its suggestiveness. (*United States v. Gaggi* (2nd Cir. 1987) 811 F.2d 47, 62; see also *United States v. Abushi* (9th Cir. 1982) 682 F.2d 1289, 1300; *People v. Hommel* (N.Y. 1977) 41 N.Y.2d 427, 361 N.E.2d 1020 [reversible error to give hypothetical with similar facts to illustrate a legally sufficient case].) Here it also helped make the remarks into what jurors could understand to be a comment on the evidence. As such, it was not one that was "nonargumentative[] and scrupulously fair," (*People v. Slaughter*, *supra*, 27 Cal.4th 1187, 1218), for the reasons described under the previous subheading.

Thus, whether viewed as simply a prejudicially prosecution-oriented instruction or as violating the prohibition on biased comments on the evidence, the court's remarks impermissibly lent its authority to the prosecution's cause.

C. The "Raspberry-pie" Example Trivialized the Prosecution's Burden of Proving its Case Beyond a Reasonable Doubt

Even if the circumstantial-evidence discourse had been balanced by an equally careful three- or four-minute instruction on, e.g., the common tendency to assume that a person on trial is likely to be guilty, the reasons for putting aside that belief, and some guidance as to how to do so, the

[56]See RT 3: 549–550, 694–695 (June 3 voir dire); 4: 807–808, 905 (June 4 voir dire); 5: 1064–1065 (June 8 opening statement).

content of the court's explanations regarding circumstantial evidence would have still introduced prejudicial error into the trial.

Preliminarily, the trial court may have conceived of its pie example as merely an illustration of what circumstantial evidence is (see, e.g., RT 3: 549), although this is by no means clear. Objectively, however, the overall discourse was about the burden of proof. The context was disabusing jurors of the notion that circumstantial evidence may be insufficient to convict or in some way of less value for that purpose. (See, e.g., RT 3: 549.) Moreover, the example itself was not about inferring some *unspecified* level of probability of the truth of a proposition from the existence of a fact, which is what an uncomplicated illustration of circumstantial evidence would have been. (Cf. *United States v. Dove*, *supra*, 916 F.2d 41, 46.) Rather, it was about "conclud[ing]" that a proscribed act had been committed. (RT 3: 550.) Finally, as part of the same discussion, the court below explicitly referred to the burden of proof, emphasizing that in a capital case it is the same as in any other. (E.g., RT 3: 550–551.) In sum, the court was not only explaining what circumstantial evidence is, but instructing about its use in meeting the prosecution's burden of proof. Therefore the principles for analyzing such instructions apply here.

1. The Trial Court's Duty Was to Educate the Jurors About an Extremely High Standard of Proof

Under the state and federal due process clauses, a jury must be instructed that the state may not obtain a criminal conviction without proving each element of the offense beyond a reasonable doubt. (*In re Winship*, *supra*, 397 U.S. 358, 364; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) This is an extremely high standard of proof. As former Chief Justice Traynor wrote for this Court, "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier

must therefore have reasonably rejected all that undermines confidence." (*People v. Hall* (1964) 62 Cal.2d 104, 112; accord, *People v. Thompson* (1980) 27 Cal.3d 303, 324; *People v. Brigham* (1979) 25 Cal.3d 283, 291; *People v. Reyes* (1974) 12 Cal.3d 486, 500; *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1372.) There is, for "the factfinder[,] the need to reach a subjective state of near certitude of the guilt of the accused." (*Jackson v. Virginia* (1979) 443 U.S. 307, 315.) The state may not adjudge a person guilty of a crime "without convincing a proper factfinder of his guilt with utmost certainty." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Until relatively recently, California juries were instructed in terms that were intended to convey that they had to be in a state of "subjective certitude." (*Victor v. Nebraska* (1994) 511 U.S. 1, 12.) Specifically, the instruction required "the highest level of certitude" achievable in determining facts in the real world (as opposed to deciding the truth of logical propositions). (*Id.* at p. 11.) The language conveying these principles ("moral certainty") was dropped shortly before appellant's trial only because it had become archaic and could mislead, not because the concept of what amounts to proof beyond a reasonable doubt had changed. (See *People v. Brown* (2004) 33 Cal.4th 382, 392, citing *Victor v. Nebraska*, *supra*, 511 U.S. at p. 16, and *People v. Freeman* (1994) 8 Cal.4th 450, 504.)

For a very long time, appellate courts have strongly and repeatedly urged trial courts to resist any impulse to elaborate on the statutory instruction regarding the burden of proof because of the high risk of introducing confusion and error. (*People v. [Glen] Johnson*, *supra*, 119 Cal.App.4th 976, 986; *People v. Garcia* (1975) 54 Cal.App.3d 61, 63–66 [collecting cases]; see also *United States v. Nolasco* (9th Cir. 1991) 926 F.2d 869, 871–872.) Indeed, in venturing into this territory, the court below entered a minefield which had been well marked for over a century.

"[M]ost of the instructions of courts on the old subject of reasonable doubt turn out to be erroneous, when they ambitiously step outside of well-established bounds." (*People v. Lenon* (1889) 79 Cal. 625, 629.)

Instructions which dilute the burden to less than the reasonable-doubt standard violate due process. (*Cage v. Louisiana*, *supra*, 498 U.S. 39.) Among these are instructions which compare the prosecution's burden to some form of decision-making in life outside of court, even in the making of important decisions. (*People v. Brannon*, *supra*, 47 Cal. 96; *People v. [Glen] Johnson*, *supra*, 119 Cal.App.4th 976; *People v. [Danny] Johnson*, *supra*, 115 Cal.App.4th 1169; see also *United States v. Jaramillo-Suarez* (9th Cir. 1991) 950 F.2d 1378, 1386 [many important decisions, like marriage and buying a home, involve uncertainty and risk-taking "and are wholly unlike the decisions jurors ought to make"]; but see *Ramirez v. Hatcher* (9th Cir. 1998) 136 F.3d 1209, 1213–1214.)

The giving of a proper reasonable doubt instruction does not save an instructional package which includes explanations which dilute that standard. (*Cage v. Louisiana*, *supra*, 498 U.S. 39; *People v. Serrato* (1973) 9 Cal.3d 753, 767; *People v. Garcia*, *supra*, 54 Cal.App.3d 61, 70.) An instruction is infirm under the 14th Amendment if there is a reasonable likelihood that a juror could understand it to permit a lower standard of proof than that contemplated by *In re Winship*. (*Victor v. Nebraska*, *supra*, 511 U.S. 1, 6.) This standard requires "more than speculation" that an instruction could somehow have been interpreted as requiring less than proof beyond a reasonable doubt, but it does not require that such an understanding be "more likely than not." (*Boyde v. California* (1990) 494 U.S. 370, 380; see also *Victor v. Nebraska*, *supra*, 511 U.S. at p. 6 [citing the discussion of *Boyde* in *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & n. 4].) An instruction which lowers the burden of proof is not subject to

harmless-error analysis; reversal is required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

The application of the presumption of innocence and the reasonable-doubt standard to a circumstantial case poses distinct issues which are not self-evident to lay jurors. Special instructions are therefore required.

> To the legally trained mind the doctrine of reasonable doubt has a scope much broader than would be easily understood by inexperienced jurors. The rule under which circumstantial evidence is to be weighed is not one which would be suggested to the lay mind by instructions that doubts are to be resolved in favor of the accused.

(*People v. Hatchett*, *supra*, 63 Cal.App.2d 144, 155.) The rule to which *Hatchett* referred is that, where circumstantial evidence is substantially relied on for proof of guilt, the trial court must sua sponte instruct both that a reasonable interpretation of the evidence pointing towards innocence must be adopted and that a conviction could not be had unless the circumstantial evidence was irreconcilable with any conclusion other than guilt. (*Id.* at pp. 152–154; see *People v. Yrigoyen* (1955) 45 Cal.2d 46; *People v. Bender* (1945) 27 Cal.2d 164, 174–177; see CALCRIM 224; CALJIC No. 2.01.) This is the law in a large number of jurisdictions.[57] (Annot., Modern Status of Rule Regarding Necessity of Instruction on Circumstantial Evidence in

[57]A split among jurisdictions illustrates how challenging the whole area is, even without trial-court experimentation. Some appellate courts believe that it is less confusing to leave the jurors to apply the basic reasonable-doubt standard to any kind of evidence placed before it, rather than elaborate its particular application to facts proved only through circumstantial evidence. (*United States v. Becker* (2nd Cir. 1933) 62 F.2d 1007, 1010; accord, *Holland v. United States* (1954) 348 U.S. 121, 139–140.) This is not a substantive criticism of the instruction. (See *McMillan v. Gomez* (9th Cir. 1994) 19 F.3d 465, 469 [CALJIC No. 2.01 is "ample and exact"]; see also *id.* at p. 468.)

Criminal Trial—State Cases (1967) 36 A.L.R.4th 1046, and later cases (2008 supp.) p. 67.)

2. The Trial Court's Equating the Pie-Tasting Determination to the Jury's Task Lowered the Prosecution's Burden in Multiple Ways

For such a simple analogy, the trial court's misguided attempt to elaborate on what constitutes a sufficient circumstantial case undermined the burden of proof in an impressively multifaceted fashion. First, it reinforced the common misconception that the jurors' task was to determine what had actually happened in the case before them, as opposed to whether the prosecution had made a sufficient case for appellant's guilt. (Cf. *Mitchell v. United States* (1999) 526 U.S. 314, 330.) Second, it compared the jurors' duty to decision-making in ordinary life, an expository maneuver that this Court recognized long ago steers a jury in the wrong direction. (*People v. Brannon* (1873) 47 Cal. 96.) Finally, it treated the alluded-to, but unexplained, rules for analyzing a circumstantial case as irrelevant technicalities. (Cf. *People v. Bender*, *supra*, 27 Cal.2d 174–176.)

a. The Court Effectively Told the Jury to Determine What Happened, but its Task Was to Determine Whether the State Had Met its Burden

First, in life outside of criminal court, when facts are disputed, the question is, "What really happened?" Jurors naturally bring this conception with them to court.[58] Indeed, a cliche about trials is that they are a "search for the truth." Some cliches are true, but not this one. "[T]he question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its

[58]See 3 Singer & Maloney, Trials and Deliberations: Inside the Jury Room (1992) § 25.01; Kassin & Wrightsman, The American Jury on Trial: Psychological Perspectives (1988) 110.

burden . . . ." (*Mitchell v. United States*, *supra*, 526 U.S. 314, 330.) The issue is framed this way, using the presumption of innocence and the reasonable-doubt standard, because of the relative gravity of the consequences of erroneous convictions, versus erroneous acquittals, given our society's values. (*In re Winship*, *supra*, 397 U.S. 358, 363–364; see also *id.* at pp. 371–372 (conc. opn. of Harlan, J.))

Thus, if the trial court had a duty to disabuse jurors of any misconceptions and educate them as to trial practice, it surely applied to their natural belief that their task was to determine what happened to cause the deaths of the Jenkses. The court needed them to grasp that their duty was, rather, to determine if the prosecution could muster evidence that showed, beyond a reasonable doubt, that its theory about what happened must be true. (*Mitchell v. States*, *supra*, 526 U.S. at p. 330; *Jackson v. Virginia*, *supra*, 443 U.S. 307.) Unfortunately, the raspberry-pie explanation did the opposite: it reinforced the popular misconceptions. Time after time the court spoke not of whether a case against the child with access to the pie was proven, but of the other question, i.e., of whether the child actually "committed the act[]." (*Mitchell v. United States*, *supra*, 526 U.S. at p. 330.) "[Y]ou don't need any other evidence . . . to conclude that your child got into the pie." (RT 3: 550.) "I don't think any of you would have much trouble deciding what happened . . . ." (RT 3: 695.) ". . . I don't think any of you would have a problem figuring out what happened to that pie." (RT 4: 807–808.) Of the four groups of potential jurors who underwent voir dire, only one heard the expression *reasonable doubt* in this context.[59] But even there, there was no suggestion of a presumption of

[59]"I don't think you'd have any trouble figuring out what happened to that pie. Now, that's circumstantial evidence, sure, but I think most moms or (continued...)

innocence which had to be overcome by the prosecution. And the question was again one of "figuring out what happened to that pie." (RT 4: 905.) Thus for the jurors in that group, the error was exaggerated by the explicit equating of the two different types of inquiry.

Speaking of a presumption of innocence would, it is true, have seemed ludicrous; nothing like that applies when trying to decide questions of historical fact in everyday life. And this is the problem. By providing an example drawn from such decision-making, the trial court took the jurors' natural misconception about the questions before them and authoritatively reinforced it, precisely in the context of explaining how they were to make their decision. This alone made the act of providing the analogy into a grave error.

b. This Court Proscribes References to Everyday Life to Illustrate Finding Facts Beyond a Reasonable Doubt Because Such Examples Necessarily Lower the Burden of Proof

People v. Brannon, *supra*, 47 Cal. 96 reversed a murder conviction because "[t]he jury were told that it was their duty to convict if they should 'be satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the important affairs of life.'" (*Id.* at p. 97.) Despite the "moral certainty" language and whatever other instructions were given on reasonable doubt, the reference to the important affairs of life implicitly invoked a preponderance-of-the-evidence standard and steered jurors away from their duty to compare and consider the evidence. (*Ibid.*)

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[59](...continued)
dads would arrive at a conclusion beyond any reasonable doubt . . . that that child was the one who got into that pie." (RT 4: 905.)

The 1873 *Brannon* holding retains its vitality. Two 2004 cases in the Courts of Appeal, both called *People v. Johnson*, applied *Brannon* to trial judges' attempts, like that of the court below, to prevent jurors from going overboard in applying the reasonable-doubt standard. In both, as here, the trial court erred by amplifying on the standard during voir dire. In the first, the judge distinguished a reasonable doubt from a mere possible doubt with the example that we plan our lives around the assumption that we will be alive in the future—"We take vacations; we get on airplanes. We do all these things because we have a belief beyond a reasonable doubt that we will be here . . . ." (*People v. [Danny] Johnson*, *supra*, 115 Cal.App.4th 1169, 1171.) Reversal was required under *Brannon*:

> We are not prepared to say that people planning vacations or scheduling flights engage in a deliberative process to the depth required of jurors or that such people finalize their plans only after persuading themselves that they have an abiding conviction of the wisdom of the endeavor. Nor can we say that people make such decisions while aware of the concept of "beyond a reasonable doubt." Accordingly, per *Brannon*, the trial court's attempt to explain reasonable doubt had the effect of lowering the prosecution's burden of proof.

(*Id.* at p. 1171.)

In the second case, the trial court elicited from prospective jurors examples of their making important decisions in their lives without being able to eliminate every possible doubt. (*People v. [Glen] Johnson*, *supra*, 119 Cal.App.4th 976, 979–982.) Although the court repeatedly referred to the reasonable-doubt standard during voir dire and gave CALJIC No. 2.90 at the close of the case, the use of examples that equated the standard to everyday decision-making in a juror's life lowered the burden of proof and was "structural error," reversible per se. (*Id.* at pp. 985–986.)

Here the trial court similarly chose an example from everyday life to illustrate how to reach a decision based on circumstantial evidence. The example was absolutely not one in which a person would analyze the evidence as a criminal-trial juror must. Rather, as explained above, it explicitly reinforced the everyday-life criterion of making a reasonable decision about "what happened."

That effect was heightened by the use of not just an everyday illustration, but a truly trivial one. Deciding whether to reprimand a young child for a minor transgression is—on the scale of situations where finding of historical facts is used to determine culpability—about as far as one can get from a situation where criminal due-process standards would apply. As every parent knows, parents necessarily make these decisions on the fly. Consequently, and as everyone who once was a child knows, they sometimes make mistakes in the attribution of blame, more often than the criminal process—with its qualitatively severer consequences—could tolerate.

Any capacity jurors might have had to recognize the difference for themselves,[60] was wiped out by the court's use of petty theft or shoplifting as an example, when telling jurors in the same discussion, that the standards applicable to a capital case are no different from those used in any other. (RT 3: 693; 4: 806, 904.) The taking of some pie *was* a petty theft.

Moreover, as the example was presented, the missing bit of pie and the smear on the lip allowed fact-finding without a neutral fact-finder, an adversarial procedure, or even an opportunity for the child to hear the accusation and respond. These elements of the vignette further placed it out of the context of the criminal fact-finding to which it was the court's duty to

[60]Appellant is not suggesting that jurors would have taken it upon themselves to insert caveats in the court's instruction in any event.

orient the jurors. They situated it firmly in the context of the kind of fact-finding to which they were already acclimated, which they needed to set aside, further illustrating the wisdom of *Brannon's* conclusion that trial courts may not compare jury decision-making to decision-making even in weighty matters of everyday life. (*People v. Brannon*, *supra*, 47 Cal. 96, 97.)

c. The Trial Court's Lesson on How to Evaluate a Circumstantial Case Omitted the Most Crucial Concepts Required to Be Contained in Such an Exposition

As noted previously, California, like many other jurisdictions, requires that the jurors be told both that a reasonable interpretation of the evidence pointing towards innocence must be adopted and that a conviction could not be had unless the circumstantial evidence was irreconcilable with any rational conclusion other than guilt. (*People v. Yrigoyen*, *supra*, 45 Cal.2d 46; *People v. Bender*, *supra*, 27 Cal.2d 164, 174–177.) These rules are but an application of the principle that reasonable doubts must be ruled out, an application not obvious to jurors unless they are specifically instructed about it. (*People v. Hatchett*, *supra*, 63 Cal.App.2d 144, 154–155, cited with approval in *People v. Bender*, 27 Cal.2d 164, 175–176.) Appellant contends that instructions on them are, therefore, required by due process. (U.S. Const., 14th Amend; but see *Holland v. United States*, *supra*, 348 U.S. 121, 139–140 [in its supervisory role, directing federal courts to simply instruct on reasonable doubt].) In any event, failure to provide appellant the protections of state law itself violates due process (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), as well has his right to equal protection of the laws (U.S. Const., 14th Amend.).

As noted previously, the trial court did not state any principles for analyzing circumstantial evidence, other than those it crafted itself, in its

pre-instructions. Indeed, the court explicitly suggested to one panel that jurors tended to think that circumstantial evidence "is a more complicated concept than it really is," that the court's "complex" instructions on the issue would come later, and that what they needed to know now—i.e., what they really needed to know—was what the pie example illustrated. (RT 3: 694.) This message was less explicit with the other panels. However, it certainly was implicit, as each group was also given the customized explanation of "what I want you at the beginning to understand" (RT 3: 550) and told that more would come later. (RT 3: 548–549, 550; 4: 807, 808, 905–906.)

Emphasizing in its pre-instructions what it felt the jurors *most needed* to know about evaluating a circumstantial case, while omitting what they are *legally required* to know in order to apply the reasonable-doubt standard to such a case, was a third way in which the court's remarks were error.

D. The Errors Require Reversal of the Entire Judgment

As a violation of due process, the trial court's showing special solicitude for the prosecution's interest in convicting and its biased comment on the evidence require reversal of any affected verdict unless respondent can demonstrate, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) This requires a showing that the error was not one which "might have contributed to" jurors voting the way they did. (*Id.* at p. 23.) Respondent's burden is to show that the error is not one "which possibly influenced the jury adversely . . . ." (*Ibid.* at p. 23.) Thus, the *Chapman* question is whether the "verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis omitted.)

An erroneous instruction on reasonable doubt is federal constitutional error and is per se reversible. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) As noted previously, the giving of a proper reasonable-doubt instruction does not save an instructional set which includes explanations of the standard which dilute it. (*Cage v. Louisiana*, *supra*, 498 U.S. 39; *People v. Serrato*, *supra*, 9 Cal.3d 753, 767; *People v. Garcia*, *supra*, 54 Cal.App.3d 61, 70; *People v. Johnson*, *supra*, 119 Cal.App.4th 976, 984–985.) Furthermore, as explained in Argument IV, below, the explanation of reasonable doubt given to the jurors at the end of the guilt phase was itself infirm and, in any event, did not contradict the notions conveyed by the court's raspberry-pie remarks.[61]

1. The Lowering of the Standard of Proof Requires Complete Reversal of the Judgment

Under these standards, all the guilt verdicts and, with them, the special-circumstances findings and death verdicts, must be reversed. Because the raspberry-pie example lowered the prosecution's burden below the reasonable-doubt standard in multiple ways, a harmlessness/prejudice analysis does not apply. There being no jury verdict, arrived at through

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[61]The instruction was the 1994 revision of CALJIC No. 2.90, which eliminated archaic language about "moral certainty" without providing a modern replacement. (CT 9: 2667; see *People v. Light* (1996) 44 Cal.App.4th 879, 888.) This Court has held that, in the usual case, the revised instruction is sufficient. (*People v. Brown*, *supra*, 33 Cal.4th 382, 392.) Relying on dicta in *Victor v. Nebraska* (1994) 511 U.S. 1, 14–15, *Brown* upheld language explaining *reasonable doubt* by stating only that a juror must be convinced of the defendant's guilt and expect that conviction to abide (without stating *how* convinced). In appellant's trial, however, such an instruction was entirely incapable of curing the impressions which the raspberry-pie example created about the degree of conviction required. The parent could expect his or her belief in the child's guilt to abide, even though the belief was acquired using means that did not require the reasonable-doubt standard to be met and was based on evidence that, if thoroughly tested, might not have met that standard.

application of a valid reasonable-doubt test to uphold, an appellate court cannot create such a verdict by speculating on what a jury applying that test would have done. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

2. The Court's Showing Sympathy for the Prosecution's Cause Cannot Be Shown Harmless

If the court's remarks had not diluted the reasonable-doubt standard, there would still have been the dual due-process violations of a visible siding with the prosecution's interests and an argumentative comment on the evidence. Had the errors been limited to these, respondent would have the right to try to demonstrate harmlessness under *Chapman*. It would, however, be unable to do so.

a. Absent Error, Jurors Could Have Doubted Whether the Homicides Were First-Degree Murder

As explained in the argument preceding this one, the evidence on whether the homicides were murder of the first degree was remarkably weak. The evidence consisted of bodies of people clearly killed in a frenzied manner and some circumstances pointing to appellant as the perpetrator. The prosecution hypothesized an interesting scenario regarding appellant's shortage of funds and a calculated plan to hatchet-murder the Jenkses to obtain enough jewelry that, when pawned, could tide him over for a few days. That scenario was consistent with the evidence but not particularly suggested by it, and certainly not required by it. With the crudeness of the weapon; the golden-goose-killing irrationality of a plan to kill one's employers for a small, one-time only haul; the gross absence of mental clarity of a killer-robber who would leave $113 in cash in a drawer he went through, then pawn some of the loot under his own name, in the same small town, the day after the killings; and the prosecution's own evidence of an entirely different modus operandi in the Bettencourt jewelry

theft, the prosecution's theory had nothing to recommend it over other speculative attempts to explain the tragedy. In particular, appellant could have gone to the Jenkses' desperately seeking work, a loan, or an advance against the earnings from his next job; been rebuffed; flown into a rage; attacked with the tool he always carried; and—still in a passionate state as it took far longer for movement and terrible cries or moans to stop than movies teach us—switched to a knife. Looking for jewelry and other valuables could easily have been an afterthought, in which case the crime was not a felony murder. (*People v. Ledesma* (2006) 39 Cal.4th 641, 715.)

b. Jurors Could Have Doubted Whether Appellant Committed the Homicides

Even the identity case regarding the Jenks crimes was not open-and-shut. What the police did not find was as noteworthy as what they did, given that the attacks were anything but methodical. Investigators found no trace at the scene of appellant's hair, skin cells under the victims' nails, fingerprints, semen, or saliva; they found little of the stolen jewelry; and there was no sign of blood on appellant's belongings (other than his glasses—but see below) or in his apartment. (See pp. 18–20, above.) During the penalty phase, it came out that hair and some kind of fibers were found on Shirley Jenks's body (RT 13: 2689), but no testimony tied them to appellant. If her nightgown or the bedding was tested for body fluids that might be linked to the perpetrator, no evidence of that fact was introduced. Appellant's hatchet had a 3/4" square head opposite the blade, without a cross-hatched pattern; the weapon used on Fred Jenks left a 1 1/4" round bruise and appeared to have a crosshatch pattern. (RT 5: 1117; 7: 1576; 6: 1399, 1427–1428.) The footprint evidence was linked to appellant only by his and the perpetrator's both wearing a very popular *brand* of sneakers, not

by a comparable size or model. Detective Darryl Walker, the lead investigator on the case, had not tried to determine the shoe size, and, strangely, stated that he could not recall whether he had directed anyone else to do so. (RT 6: 1310.) If the word "Nike" was in the footprints—which is by no means clear from the exhibits—it was in the heel portion of the shoe. (RT 5: 1244; 11: 2395–2396; Exs. 12, 17, 35–38; see also RT 8: 1799 [note from juror who could not see "Nike" when exhibit was projected in the courtroom].) However, both Diana and Quentin Williams testified that the word "Nike" was in the center, i.e., the instep portion, of the sole of appellant's Nike sneakers, which had previously belonged to Quentin. (RT 7: 1544–1545, 1568–1569, 1605–1607.) No officer or criminalist verified that the pin in the watch found at the scene actually did tend to come loose. Nor was there evidence of tests for fingerprints or sloughed-off skin cells on the watch. (Cf. RT 8: 1712–1713 [evidence of appellant's DNA on his glasses was unsurprising because sloughed-off cells adhere to personal items].) The evidence tending to show that appellant often wore Nikes, the identification of the watch left at the scene, and claims that some of appellant's clothes were missing post-arrest all came from the uncorroborated testimony of an ex-girlfriend (see pp. 15–?, above) a single mother who herself was clearly among the working poor and who could keep appellant's SSI check if he was out of the picture (RT 7: 1526–1529, 1531, 1535–1536, 1578).

The most damaging evidence was probably the blood speck on the frame of appellant's glasses, where it met the lens. But a juror could easily have harbored a reasonable doubt about this item of evidence if he or she was aware of (a) the thinness of the remainder of the case against appellant, (b) the occasional tendency of some subset of law-enforcement officers to

beef up cases against people they believe are guilty,[62] (c) the strangeness of Darrell Walker's account of noticing a pinhead-sized speck of blood, on dark-tinted lenses, when he was going to return them to appellant but "stopped for a moment and I looked at the glasses" (RT 6: 1313), (d) his switching from saying he took the glasses to examine them for evidence to acknowledging that he took them so he could examine appellant's eyes when—on cross-examination—he slipped and mentioned being about to return them to appellant at one point (compare RT 5: 1277, 1313, with RT 6: 1313–1314; and (e) the discrepancy between his statement about seeing a blood droplet at the top edge of a glass lens and DNA analyst Lisa Grossweiler's testimony that blood was found only on the frame, at the bottom (RT 8: 1687–1690).

There was also, of course, appellant's pawning of a pendant and ring. (RT 8: 1809–1810, 1812–1815, 1819–1822, 1828, 1839–1841, 1848–1852, 1860–1862.) As they were but two of many pieces of jewelry missing from Shirley Jenks's collection (RT 5: 1309–1310; 10: 2118, 2141–2144), and nothing else was recovered in intensive searches of appellant's belongings, they could have been given to him by a person who (a) knew about the Jenks jewelry collection from appellant and (b) hoped to pin the crimes on him. (See *People v. Najera* (2008) 43 Cal.4th 1132, 1138 [""""The real criminal . . . may have artfully placed the article in the possession . . . of an

[62]The trial took place three years after Mark Fuhrman, who pleaded guilty to perjury during the O.J. Simpson trial, was accused of planting a glove that did not fit Simpson at Simpson's estate. Appellant was tried a month after Los Angeles's police chief created a task force to investigate evidence of Ramparts Division officers' framing of suspects. (See RT 11: 2471; *Excerpts From the Ruling on the Fuhrman Tapes*, N.Y. York Times (Sept. 1, 1995), p. A16; *Frontline: Rampart Scandal Timeline* <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html> [as of Nov. 30, 2007].)

innocent person"""].) The same scenario would explain the apparent use of a weapon that would be associated with appellant.

There was circumstantial evidence tending to show that an informant turned the investigation towards appellant extremely early. He was interviewed at 3:00 a.m. Wednesday, i.e., eight hours after the bodies were found. (RT 10: 2098.) During that interview, which took place before the autopsies on the victims' bodies that supposedly disclosed the likely type of weapon, investigators asked him about his hatchet. (RT 10: 2098, 2101, 2146–2147.) Similarly, when investigators examined pawn slips on Thursday, they proceeded by looking for items appellant had pawned (as opposed to having identified stolen jewelry and working backwards to see who pawned it). (RT 8: 1837.) No explanation for this early focus was before the jury. None other than the informant theory leaps to mind, since, for example, there were no witnesses who testified about seeing appellant approach the house at a time when the crimes could have happened. Similarly there was no testimony that appellant made incriminating statements (even the "Where's your hatchet?" conversation was later), which, of course would have been presented if possible. So the possibility of a tipster with a nefarious motive does come to mind.

Finally, the completeness of the investigation was questionable because of its early focus on appellant. The expert examining the many fingerprints taken at the scene was asked to look for matches for appellant and the Jenkses but not to run his unmatched prints against an available computerized database. (RT 8: 1895–1897.) As noted earlier, for some reason neither the car found in the garage with its door open and battery dead, nor the home office which the perpetrator had gone through, were tested for prints. (RT 5: 1207; RT 8: 1897–1898.)

Clearly a conclusion that appellant may have been set up was not compelled by the evidence, but the question here is whether it can be ruled out as irrational. (*Neder v. United States* (1999) 527 U.S. 1, 19 [for harmlessness of constitutional error, test is "whether the record contains evidence that could rationally lead to a contrary finding" to that which resulted in verdict] (opn. of Rehnquist, C.J., for the Court).) A doubt based on this possibility would not be irrational, which means that significant error cannot be ruled out as contributing to a juror's ultimate vote. (*Ibid.*)

It is important to keep in mind where we are in the analysis at this point. Appellant is here only assuming arguendo that a harmlessness analysis is applicable at all, as if the trial court's error supported the prosecution but did not also weaken the reasonable-doubt standard. In that context, he is showing why identity was an issue only because the far more obvious case that the type of homicide was very seriously in question leads to reducing the judgment to guilt of second-degree murder, while the possibility of a juror's having a doubt on the identity issue would not permit even a second-degree judgment to remain.

c. Jurors Could Have Doubted Whether the Bettencourt Theft Was Proved

In the context just described, the evidence on the count charging theft of Viola Bettencourt's ring also had its problems. Bettencourt, 86 years old,[63] had difficulty understanding the prosecutor's questions[64] and was unsure of her in-court identification of appellant as the man who

[63]RT 7: 1634.

[64]RT 7: 1634, 1637, 1640, 1641, 1649.

cleaned her house,[65] of how often he had come[66] (only a year earlier), and of whether the events had actually taken place the previous summer or another time.[67] She had owned, and frequently worn, the ring for 30 years. (RT 7: 1637, 1645–1646, 1656–1657.) Yet both she and an appraiser, following a prosecutor's lead, identified a photograph of a different ring as showing the ring in question. They were later recalled to correct themselves and identify a photograph of—presumably—the correct one. (Cf. RT 7: 1634, 1657 with RT 8: 1826–1827; 9: 2038–2043.) Moreover, although Bettencourt suspected appellant at the time and confronted him, she did not report the apparent theft until at least six weeks later, after appellant's arrest, which no doubt was well publicized in Hanford. (RT 5: 1276; 7: 1647; 8: 1827; 9: 2069–2072; see also CT 2: 447A-13–447A-26 [requests by the *Hanford Sentinel* and four Fresno television stations for camera coverage of appellant's arraignment].)

d. Each Guilty Verdict Must Be Reversed

Under these circumstances, none of the verdicts was "surely unattributable to the error" (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279), whether that error is conceived of as a visible alliance with the prosecution, which could influence jurors to be especially open to the case that judge seemed to sympathize with, or conceived of as an argumentative comment on the evidence. Beginning the trial by emphasizing to prospective jurors—at length—the court's own concern for finding a jury that would not hold the prosecution to too high a standard could only imply a concern that a man guilty of heinous crimes might go free. This was not a

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[65]RT 7: 1640.

[66]RT 7: 1641, 1648.

[67]RT 7: 1648–1649.

minor, technical defect. Nor was it only a judge's "lightest word or intimation," which itself "is received with deference, and may prove controlling." (*Quercia v. United States*, *supra*, 239 U.S. 466, 470; *Sanguinetti v. Moore Dry Dock Co.*, *supra*,) 36 Cal.2d 812, 819; see also *People v. Sturm*, supra, 37 Cal. 4th 1218, 1237.) In terms of the psychology of the jurors, it was a massive intervention—even if not intentional—on the side of the prosecution. "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Mahoney*, *supra*, 201 Cal. 618, 626–627 [explaining why allying with prosecution could not be held harmless under "miscarriage-of-justice" constitutional provision].)

If appellant was the perpetrator of these offenses, the evidence purporting to demonstrate that fact was strangely weak, compared to what ought to have been available. (See discussion at pp. 90–94, above.) Such evidence may or may not have satisfied 12 jurors viewing it without inappropriate judicial influence. The problem is that this Court can never know. Surely the trial court's sensitizing the jury to its one-sided concern that they might give the defense too much slack, holding the prosecution to too high a burden, "might have contributed to" jurors voting the way they did. (*Chapman v. California*, *supra*, 386 U.S. 18, 23.) That being the case, this Court cannot know, beyond a doubt, that "the verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279, emphasis omitted.) It must therefore reverse. (*Chapman*, *supra*, 386 U.S. at p 24.)

Even if it could be known that the court's stress on the validity of the anticipated prosecution case contributed to no juror's decision on the identity issue, there would remain the error's impact on the determination of what offense was committed. It seems incontrovertible that any belief that

the prosecution's first-degree-murder scenario was probably true, as well as a decision to vote as if it was shown true beyond a doubt, could have been "possibly influenced" by a sense of what the judge thought was appropriate. (*Chapman v. California*, *supra*, 386 U.S. 18, 23.) Certainly the possibility cannot be excluded, by this Court, beyond a reasonable doubt, which is what affirmance would require. (*Id.* at p. 24.)

3. Conclusion

In sum, the weakening of the reasonable-doubt standard, a "structural error," requires reversal of the entire judgment.

> [I]n . . . a dispute about . . . some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. . . . [A]ll the factfinder can acquire is a belief of what *probably* happened. . . . [A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have for the correctness of factual conclusions for a particular type of adjudication.

(*In re Winship*, *supra*, 397 U.S. 358, 370 (conc. opn. of Harlan, J.).) The standard of proof for determining whether a child deserves a reprimand is not the same as that for determining whether a person is guilty of murder. The conflation of the two by appellant's trial judge invalidates his convictions.

Were this not the case, the same result would be required by applying the appropriate harmlessness analysis, regarding the trial court's weighing in on the prosecution's side, to the jury's deliberations on the identity issue in all four counts. And, were neither of the preceding statements true, the effect of the error on the enormously disputable mental-state findings would require reduction of the murder counts to murder of the second degree (unless the prosecution opted to retry the case) and reversal of the judgment on the robbery count. Indeed, even if the errors were not of

constitutional dimension, there is "a *reasonable chance*, more than an *abstract possibility*," that they "affected the verdict[s]" on all four counts. (*College Hospital, Inc.*, v. *Superior Court* (1994) 8 Cal.4th 704, 715 [explaining the reasonable-probability test of *People v. Watson*, *supra*, 46 Cal.2d 818, 836]; accord, *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th 780, 800–801.)

The judgment must be reversed.

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III. A PROSECUTOR WAS PERMITTED TO ARGUE THAT THE JURY SHOULD NOT ACQUIT A GUILTY DEFENDANT JUST BECAUSE THE REASONABLE-DOUBT STANDARD WAS NOT MET AND IMPLY THAT THE JURY WOULD BE ACCOUNTABLE TO THE PROSECUTORS

The "raspberry-pie" lecture that opened the trial did not stand alone in its capacity to sway jurors to give the prosecution the benefit of the doubt on the degree of the murders, as well as the identity of the perpetrator. The prosecution itself closed the guilt phase by urging the jurors not to let the reasonable-doubt standard get in the way of convicting a guilty man, while suggesting that any decision to acquit would have to be explained to the prosecutors. The remarks were fatally improper.

A. The Prosecutor Argued That, If Jurors Believed Appellant Was Guilty and Expected to Feel the Same Way a Week Later, the Reasonable-doubt Standard Should Not Bar a Guilty Verdict

Early in his guilt-phase summation, defense counsel read the reasonable-doubt instruction to the jury and spent some time emphasizing the reasonable-doubt standard of proof. He acknowledged that a mere possible doubt did not entitle his client to acquittal, and then added, in a strange and erroneous concession, "It doesn't mean that the People are held to a burden of proving Mr. Potts guilty to a moral certainty, to any kind of certainty." (RT 11: 2420.) (Cf. *Jackson v. Virginia* (1979) 443 U.S. 307, 315 ["the factfinder . . . must reach a subjective state of near certitude of the guilt of the accused"]; *In re Winship* (1970) 397 U.S. 358, 364 ["utmost certainty" is required]; *People v. Hall* (1964) 62 Cal.2d 104, 112 ["the trier of fact must be reasonably persuaded to a near certainty"].) In any event, he continued by briefly discussing the preponderance-of-evidence and clear-and-convincing-evidence standards (RT 11: 2420–2421), concluding,

> And then beyond that burden is the burden that the People bear in this case, beyond a reasonable doubt. If you go back into that jury room and you say to yourself, you know, I think Thomas probably did it, you have to enter a verdict of not guilty because that's not good enough. If you go back into that jury room and you tell yourself and your colleagues agree, you know, I'm pretty sure he did it, you have to enter verdicts of not guilty because the law says you've got to be more than pretty sure.

(RT 11: 2421.) Gayle Helart, the deputy district attorney who delivered the rebuttal responded directly to these remarks, in a seriously misleading manner:

> Defense tried to do this, I don't know, hierarchy of reasonable doubt, and boy, when the defense does the hierarchy it just sounds like preponderance is way down here, and clear and convincing is kind of here, and beyond a reasonable doubt is clear up here, high as Mt. Everest. That's sort of what the inference is, kind of like a bar chart or something. Well, you know, we could do a bar chart the other way, and let's start with beyond a reasonable doubt right down here, and then you could go beyond a shadow of a doubt right there, and beyond any doubt right here, and absolutely certain up here, and then way up here is one hundred percent certain. So you see that that's not really very helpful. You can kind of manipulate bar charts any way you want to and that's not helpful.

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(RT 11: 2447–2448.) There was no objection, however, and for now appellant leaves it to habeas counsel to litigate the effect of these remarks.[68] They do, however, provide important context for what followed.

The prosecutor continued, moving on to defense counsel's statement that a juror was bound to vote for acquittal if he or she believed that Mr. Potts was guilty, without being convinced beyond a reasonable doubt:

> But in your consideration of reasonable doubt don't ever come back and tell a prosecutor, "Gosh, you know, we believed he was guilty, but—." Don't do that. If you believe he's guilty today and you'll believe he's guilty next week then that's that abiding conviction that's going to stay with you.

(RT 11: 2448.) In doing this, she reinforced and took further a theme her colleague, Michael Reinhart, had introduced in his opening summation:

> [The instructions] get rather complicated and convoluted, but at the core of them, they're really based on common sense. And if you're back there and you find yourself going against your common sense, you say something like, well, we know he's guilty, but the instructions say this, so does that mean that we have to find him not guilty? If you find yourself going against your common sense, going off on places where you really don't think common sense tells you you should be going, stop.

(RT 11: 2380.) This too was improper, because, as explained in Argument II.C, pages 76 et seq., above, the requirement of releasing an apparently-

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[68]This argument could have been interpreted either of two ways, but both were invalid statements of the law. Jurors could understand the prosecutor to actually be saying that there are significant gradations of certainty above the beyond-a-reasonable-doubt standard, which is not true, since, as noted above, "utmost certainty" is required. (*In re Winship*, *supra*, 397 U.S. 358, 364.) A more benign interpretation—that any hierarchy is manipulative and misleading—was also wrong, because defense counsel's comparisons with the other standards of proof were accurate and helpful. Where a prosecutor's language is ambiguous but produces a reasonable likelihood of being understood by the jury in a manner that would mislead, there is error. (*People v. Hill* (1998) 17 Cal.4th 800, 832)

guilty defendant because the proof failed to meet the reasonable-doubt standard runs contrary to common sense. And, more fundamentally, it, too, suggested that something was wrong if the jury felt bound to do that.[69]

B. The Remark Was Serious Misconduct

The analysis of the remark in rebuttal is not complex. "[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]" (*People v. Hill, supra*, 17 Cal.4th 800, 829–830, quoting *People v. Marshall* (1996) 13 Cal.4th 799, 831.) There can be no doubt as to the implied conclusion of Ms. Helart's sentence which began, "Gosh, you know, we believed he was guilty, but—." Clearly, it was "but we were not convinced beyond a reasonable doubt." Nor is there doubt that the jury understood this. Even on its own, this is the clear implication. But beyond that, the deputy district attorney was responding point-by-point to defense counsel's discussion of reasonable doubt, and trial counsel had emphasized the opposite—and true—principle: that a belief in guilt was not enough to permit conviction. (RT 11: 2421, quoted on p. 100, above.) To argue the opposite, and to claim that any belief that would persist a week was sufficient, was to implore the jury to disregard the reasonable-doubt standard, if necessary, for the sake of avoiding setting a guilty criminal free.

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[69]Any argument for prejudice from this error alone would be weakened by what Mr. Reinhart said next, which was that the jurors should ask the judge for clarification if they felt bound by the instructions to do something which ran against their common sense. (RT 11: 2380–2381.) Given, however, the unlikelihood that a trial judge would dare to do more than reread the pattern instruction on reasonable doubt when asked for clarification, the remark seems disingenuous. In any event, appellant's claim here is based on Ms. Helart's rebuttal argument, the effect of which was stronger in the context of what lead prosecutor Reinhart had set up.

Astonishingly, neither defense counsel nor the trial court intervened. Presumably, both were—tragically—inattentive at that point. The reasons why this Court can and should reach the prosecutorial and judicial error regardless of defense counsel's own error—a failure to object—will be presented shortly. What is crucial here is that the jury was by well now aware that opposing counsel and the court would intervene if an attorney was out of line. The lack of such intervention when the deputy district attorney said, "Don't do that," meaning "Don't acquit because you just *believe* he's guilty," could only have signaled that her remarks were appropriate. From the jurors' standpoint, this stance was congruent with the court's opening the trial with its "raspberry-pie" discourse, which conveyed a similar message. In any event, the unchallenged statement from the prosecutor alone stated that it was permissible to disregard "the law on proving a criminal defendant's guilt beyond a reasonable doubt, a concept that lies at the heart of this nation's system of justice . . . ." (*People v. Morales* (2001) 25 Cal.4th 34, 50 (conc. & dis. opn. of Kennard, J.).) Appellant's federal due process and jury trial rights were violated, at the most serious level. (*Cage v. Louisiana* (1990) 498 U.S. 39; *Sullivan v. Louisiana* (1993) 508 U.S. 275.) And without a reliable underlying conviction, the resulting death sentence cannot be reliable. (U.S. Const., 8th Amend.; *Beck v. Alabama* (1980) 447 U.S. 625, 637)

Appellant notes in passing that the effect was heightened further by suggesting that jurors would be accountable to the prosecution after they reached their verdict. ("Don't ever come back and tell a prosecutor . . . ." (RT 11: 2448.) This, too, was significant error.[70] However, there was,

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[70]The issue rarely arises, but see *Sheppard v. State* (Miss. 2000) 777 So.2d 659, ¶¶ 9–10 (argument suggesting that jury would be accountable to the (continued...)

again, no objection, and—beyond its impact on the power of the other error—appellant leaves this point for his habeas corpus petition.

C. Trial Counsel's Missing the Error Does Not Deprive This Court of the Power to Correct It

Under the general rule, appellant's attorney's failure to object to the prosecutor's imploring the jury not to let reasonable doubt get in the way would forfeit appellant's right to appellate review of the issue. This is because, typically, objections afford the trial court "'an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury.'" (*People v. Green* (1980) 27 Cal.3d 1, 27, citations omitted.) While there are good policy reasons in support of a general requirement that errors be raised in the trial court (see *People v. Vera* (1997) 15 Cal.4th 269, 275–76), that requirement is not rigorously enforced at the price of justice. Here, if respondent seeks to have this Court uphold a death verdict because of the forfeiture doctrine—where the conviction was rendered by a jury essentially told to treat reasonable doubt as a technicality—it will be asking the Court to consider its own hands tied in the face of alarming unfairness and unreliability in the proceedings below. They are not so tied. If the doctrine applies here, three exceptions do as well, as does another basis for reaching the merits.

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[70](...continued)
prosecution and could be required to justify a not-guilty verdict was reversible error). See also *People v. Freeman* (1994) 8 Cal.4th 450, 517 (even addressing jurors by name during argument is to "be condemned"); Annotation, Prejudicial Effect of Counsel's Addressing Individually or by Name Particular Juror During Argument (1957) 55 A.L.R.2d 1198, § 2[a] (reason for rule: attempts to establish extra rapport with jurors can introduce extraneous considerations into deliberations); *State v. Boyd* (N.C. 1984) 319 S.E.2d 189, 197 (argument suggesting accountability to victim, witnesses, or community is improper).

1. Three Exceptions to the Forfeiture Policy Apply

First, a defendant may raise the deprivation of fundamental constitutional rights for the first time on appeal. (*People v. Vera*, *supra*, 15 Cal.4th 269, 276.) Nothing could be more fundamental than the reasonable-doubt standard.

Second, an appellate court may appropriately consider a question, raised for the first time on appeal, if it presents a pure question of law on undisputed facts. (*People v. Hines* (1997) 15 Cal.4th 997, 1061.) The instant claim presents such a question.

Third, since "objection is an idle act when it is reasonably probable that no such cure will follow," no forfeiture occurs if the effect of misconduct on the jury could not be erased by admonition. (*People v. Green*, *supra*, 27 Cal.3d at p. 28.) The general rule, of course, is that juries can be expected to obey judges' instructions. But there are some bells that cannot be unrung. (See, e.g., *Bruton v. United States* (1968) 391 U.S. 123, 129 [codefendant's statement implicating defendant cannot "be wiped from the brains of the jurors"]; *Jackson v. Denno* (1964) 378 U.S. 368, 388–389 [admonitions cannot prevent jurors' use, perhaps unconscious, of involuntary confessions]; *People v. Aranda* (1965) 63 Cal.2d 518, 525–529 [codefendants' confessions]; see also *Adkins v. Brett* (1920) 184 Cal. 252, 258–259; Evid. Code § 352.) Here the state's representative, most often taken to be both a highly objective professional and a representative of the institutions that citizens rely on to protect them from the crime that they so often fear, effectively urged jurors not to release into their small town again a man they believe to be guilty of terrible murders just because the reasonable-doubt standard was not met. There can be no confidence that, among twelve jurors, none would wonder, "Do I go with the D.A. or the judge on this one?" and be strongly—even if subconsciously (see *Jackson v.*

Denno, *supra*, 378 U.S. 368, 388–389)—influenced by the prosecutor's point of view.

2. Absent Exceptions, the Court Should Still Reach the Merits Via Discretionary Waiver of the Court's Preservation Policy

If none of the exceptions to the forfeiture policy applied, this Court should still reach the merits. There are two bases for doing so. The most direct lies in the fact that the forfeiture rule is judicially created. An appellate court, therefore, has discretion to consider claims for which a party's *right* to review has been forfeited. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6. See also *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1 (conc. opn. of Mosk, J.) [constitutional right to correction of miscarriage of justice prevails over judicially-created waiver rules].) Even if the claim were not properly preserved, this Court should remedy the error. The most obvious reasons for this are the facts that a citizen's life is at stake, and, with it, the state's own interest in a fair and reliable penalty verdict (*People v. Koontz* (2002) 27 Cal.4th 1041, 1074) and appellant's constitutional right to the same (U.S. Const., 8th Amend.).

But there is another reason why the Court should exercise its discretion in favor of reaching the merits. What was violated here was not an arcane principle or a complicated evidentiary question, where a fully-functioning adversary process would understandably be necessary to produce an appropriate outcome. If Deputy District Attorney Helart had thought about what she was saying, she never would have said what she said, unless she was willing to grossly breach law and ethics to obtain a conviction. If the trial court had been on the job, it would have surely fulfilled its *sua sponte* duty to intervene. (See *People v. McKenzie* (1983) 34 Cal.3d 616, 626–627.) The same, of course, was true of attorney

Hultgren. And it was surely even the ethical obligation of Ms. Helart's colleague, Deputy District Attorney Reinhart, to intervene. (Cf. *People v. Morrison* (2004) 34 Cal.4th 698, 716 [duty of prosecutor to correct false or misleading testimony of his or her witnesses]; RT 11: 2313–2314 [prosecutors candidly express to the court their disagreement with each other on proper use of verdict forms].) Appellant was the victim of major lapses on the part of three officers of the court and the court itself. To hold that, of the two adversarial parties, *he* loses and the other wins in this situation—perhaps loses his life—because one of those four people was his representative, is grossly unfair. The offender was not his representative, and two of the three players—all representative of the state—who failed to intervene were not, either. It may be unfortunate that what happened in under a minute requires this Court to order a new trial, but to use Mr. Hultgren's omission as a basis for not doing so, in these circumstances, would be an abdication of this Court's role of protecting the individual from the occasional lurches of the machinery of justice.

D. Reversal Is Required

The trial court and counsel's acquiescence in the prosecutor's remarks made them equivalent to a jury instruction. An instruction which lowers the burden of proof is not subject to harmless-error analysis. Such analysis requires a reviewing court to consider whether error might have led to an otherwise-valid jury verdict, but when the jury is permitted to apply the wrong standard, there is no such verdict to uphold. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) Appellant acknowledges that respondent could try to show that something else in the proceedings could be known, with the *Chapman* level of certainty, to have nullified the effect of the prosecutor's argument. If respondent cannot do so, however, we are back to the *Sullivan* situation; i.e., the possibility of the jury's operating under

the wrong standard leaves no verdict which could be upheld by a standard analysis of, e.g., the evidentiary picture before the jury and whether error might have affected their analysis of it. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 279–281.)

Nothing in these proceedings cured the error. The most obvious attempt at a cure would have been immediate and forceful trial-court intervention but, as already noted, instead the message given to the jury was that of trial-court acquiescence. Nothing in the other arguments of counsel could have cured the error, which came in the final guilt-phase summation in any event. What is left is the inclusion of CALJIC No. 2.90 among the many instructions read to the jury. However, as noted in Argument II, above, the giving of a proper reasonable doubt instruction does not save an instructional package which includes explanations which dilute that standard. (*Cage v. Louisiana*, *supra*, 498 U.S. 39; *People v. Serrato* (1973) 9 Cal.3d 753, 767; *People v. Garcia* (1975) 54 Cal.App.3d 61, 70.) Surely this principle applies in a situation equivalent to the giving of an infirm instruction—the court's acquiescence in an attorney's infirm explanation of the most cardinal principle of the criminal law.

Reversal is required if "a reasonable juror could have interpreted" the uncorrected argument "to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." (*Cage v. Louisiana*, *supra*, 498 U.S. at p. 41.) Here, such an interpretation was not only possible. The jury's most likely understanding of the prosecutor's unopposed urging—to let any belief in guilt that would be expected to abide be enough to convict—was that it had permission to convict in that situation.

Moreover, as explained more fully in the next argument, the formal instruction regarding reasonable doubt actually played into the prosecutor's

hands, rather than ameliorating the effect of her error. It explained the reasonable-doubt standard by saying that the jurors' being convinced of the truth of the charge had to abide, without saying how strong that conviction had to be.[71] Thus it reinforced Ms. Helart's claim that "[i]f you believe he's guilty today and you'll believe he's guilty next week[,] then that's that abiding conviction that's going to stay with you," and that this would suffice for a guilty verdict. (RT 11: 2448.) This instruction and the prosecutor's interpretation complemented each other.

Thus the guilty verdicts on all counts were rendered by jurors who "could have interpreted" what they were told about the law (*Cage v. Louisiana*, *supra*, 498 U.S. at p. 41) to permit conviction upon a substandard level of proof. Those verdicts must therefore be reversed.

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[71]"Reasonable doubt . . . is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (CT 9: 2667.)

IV. CALJIC NO. 2.90 DOES NOT ADEQUATELY DEFINE *REASONABLE DOUBT*, AND ANY POSSIBILITY FOR ITS BEING CORRECTLY UNDERSTOOD WAS UNDERMINED BY PROSECUTORIAL ARGUMENT

The trial court instructed appellant's jury, pursuant to CALJIC No. 2.90, in part as follows:

> Reasonable doubt . . . is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(CT 9: 2667.) The last clause of the pattern instruction formerly stated that there has to be "an abiding conviction, to a moral certainty, of the truth of the charge." In *Victor v. Nebraska* (1994) 511 U.S. 1, 13–16, the Supreme Court criticized the "moral certainty" language and expressed concern that, as its meaning evolves, it could in the future suggest less than the "near certitude" required. (*Id.* at p. 15.) In dicta in *People v. Freeman* (1994) 8 Cal.4th 450, 504, this Court then suggested that the phrase could be safely deleted, a suggestion accepted in the version of CALJIC No. 2.90 given to appellant's jury. The result, however, is an instruction that merely tells the jurors that they need to expect to remain convinced of the truth of the charge for a prolonged period ("abiding conviction"), without telling them *how* convinced they must be.

In *People v. Brown* (2004) 33 Cal. 4th 382, this Court summarily rejected a contention that the revised instruction was insufficient, relying on dicta in *Victor v. Nebraska*. (*Id.* at p. 392.) The contentions made here were irrelevant to the issue decided by *Victor v. Nebraska*, as well as to that considered in *People v. Freeman*, *supra*, both of which dealt with *attacks* on instructions containing the former "moral certainty" language. Moreover, the positions put forth here were not developed in the *Brown*

briefing or addressed in this Court's opinion in that case. Appellant therefore seeks plenary consideration of his claim.

In addition, this case presents a new factual context, in which a deputy district attorney explicitly argued—using the language of the instruction—that *any* belief in guilt which could be expected to abide was sufficient. Under these unusual circumstances, any capacity that a jury in another case might have had to understand the instruction correctly was fatally undermined.

A. The Revised Instruction Defines *Reasonable Doubt* In Terms Applicable to the Clear-and-Convincing-Evidence Standard

One problem with CALJIC No. 2.90, as revised, is that instructing the jurors that they must feel an abiding conviction of the truth of the charge is indistinguishable from the clear and convincing evidence standard. A conviction is simply a "strong persuasion or belief," and *abiding* means "continuing, enduring." (Webster's Third New International Dictionary (1976 ed.), pp. 499, 3.) But clear and convincing evidence is that which is so strong and enduring "as to leave no substantial doubt" and "to command the unhesitating consent of every reasonable mind." (*Lillian F. v. Superior Court* (1984) 160 CalApp.3d 314, 320. See also *People v. Brigham* (1979) 25 Cal.3d 283, 291["a strong and convincing belief . . . is something short of having been 'reasonably persuaded to a near certainty'"].) Indeed, other jurisdictions define clear and convincing evidence in their standard pattern instructions in terms such as that which creates a "firm belief or

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conviction," which are hardly distinguishable from California's "abiding conviction." (See, e.g., U.S. Fifth Circuit District Judges Assoc., Pattern Jury Instructions (1994) Inst. 2.14, p. 18; Federal Criminal Jury Instructions (2d ed. 1991) No. 70.02; Virginia Model Jury Instructions—Civil (Rep. ed. 1993) No. 3.110.) At least one state, and the United States Supreme Court, have used the expression "abiding conviction" in defining clear and convincing evidence. (N.M. Stats. Ann.—Uniform Jury Instructions, No. 13–1009; *Colorado v. New Mexico* (1984) 467 U.S. 310, 316.)

B. The Instruction Tells Jurors That They Must Expect to be Convinced for a Long Time, Without Saying *How* Convinced They Must Be

Language first defining the clear-and-convincing standard, then explaining that *beyond a reasonable doubt* expresses a higher standard, would have made the instruction adequate. So would have use of a phrase such as "reasonably persuaded to a near certainty." (See *People v. Brigham*, *supra*, 25 Cal.3d 238, 291.) Telling the jurors that they needed to be convinced, without telling them *how* convinced, was not enough, even if the unspecified level of conviction must abide.

The problem is accentuated by the structure of the instruction. Both the former and current versions began with a firm statement of the burden of proof: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt." (CALJIC No. 2.90 (5th ed. 1988), CALJIC No. 2.90 (6th ed. 1996).) Perhaps it would be sufficient to end the instruction there, without attempting to define *reasonable doubt*.

Both versions, however, continued with a definition, in the form of a hedge, although in the revised version the italicized language is deleted: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, *and depending on moral evidence,* is open to some possible or imaginary doubt." (*Ibid.*, italics added.) Then the former version circled back to emphasize the weight of the burden. "It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty,* of the truth of the charge." (CALJIC No. 2.90 (5th ed. 1988), italics added.) The new version circles back as well but, by omitting the italicized language, it stops short of completing the circle. As explained already, telling the jurors that they have to expect to remain convinced that the charge is true, without telling them *how* convinced, is inadequate.

As *Victor v. Nebraska*, *supra*, 511 U.S. 1, explained in detail, the archaic terms *moral evidence* and *moral certainty* had become problematic. But the problem was that language which once meant that the jury must be as certain as one can be, when relying on other than direct observation, might no longer communicate the "near certitude" required. (*Id.* at p. 15.) The solution, especially in an instruction which in its middle section may seem to back off from a strong statement of the burden of proof, is not to give up on saying anything about certainty. It is to update the language. Since appellant's jury received an instruction that conveyed the concept in neither the traditional language nor an update, the instruction was insufficient.

C. The Prosecution Exploited the Gap in the Instruction, Ensuring that it Would Be Understood in the Manner Described Here

As discussed, and quoted,[72] more fully in the previous claim, one of the deputy district attorneys, in her closing summation, sought to defuse the reasonable-doubt issue. She concluded that portion of her argument with the following statement: "If you believe he's guilty today and you'll believe he's guilty next week[,] then that's that abiding conviction that's going to stay with you." (RT 11: 2448.) In so doing, she fully exploited the instruction's inadequacy.[73] While the claim that an expectation of continuing to believe in guilt a week later equals an *abiding* conviction is debatable, her main point was an emphasis on the literal meaning of the instruction. It tells the jurors that a guilty verdict requires proof beyond a reasonable doubt. It tells them what reasonable doubt is not. And then, in the only explanation of what reasonable doubt *is*, it tells them that they must be convinced of guilt, in a way that will abide. This is what the prosecutor emphasized.

If the instruction were susceptible of both a valid and an invalid interpretation, the prosecutor hammered home the point that a particular degree of belief in guilt was not what was required, as long as it was strong enough so that a juror could expect it to persist. Surely even a juror in a civil trial can be convinced that he or she knows what happened, with the requisite level of confidence required in that context, and yet expect the conviction to persist. A belief that, with no reason to reconsider, one's

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[72]See page 101 above.

[73]Appellant is not claiming bad faith in the prosecutor's emphasizing the plain meaning of a jury instruction. Even in the preceding misconduct claim, the prosecutor's good or bad faith is irrelevant. (*People v. Crew* (2003) 31 Cal. 4th 822, 839.

conclusions will not change, can arise in all kinds of circumstances—including those of daily life—that are well short of providing proof beyond a reasonable doubt.

D. The Instruction's Biased Language Implying the Inevitability of a Conviction Was Prejudicial in the Circumstances of this Case

There is another problem with the pattern instruction. It stated that appellant was "presumed to be innocent until the contrary is proved . . . ."[74] (CALJIC No. 2.90; RT 11: 2345.) *Until* implies that what follows will happen. There is no use of the term that involves an occurrence that may or may not take place.[75] Other jurisdictions employ language which expresses what is actually meant, such as "unless," or "unless and until."[76] Other versions are even clearer and more emphatic on the point, as is appropriate

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[74]The instruction read,

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

(RT 11: 2345.) The remainder of the instruction defined *reasonable doubt.*

[75]The applicable definitions in *Webster's Third New International Dictionary* (1993) are "up to the time that" or "till such time as" (the example for this definition: "the game continued [until] it got dark") and "before the time that" (with the example, "often years pass by [until] the new ruler is found"). (*Id.* at p. 2513.)

[76]E.g., ICJI (Idaho) No. 1501 ("unless"); OUJIC (2nd Ed.) No. 1 (same); State v. Hutchinson (Tenn. 1994) 898 SW2d 161 (same); CJI (New York) (1st Ed. 1983) No. 3.05, ¶ 2, sent.2 ("unless and until"); KRS 532.025 (Kentucky) (same); CJI (Washington D.C.) (4th Ed.) 1.03 (same); UCrJI (Oregon) No. 1006 (same); 1st Circuit Model Instructions Criminal No. 1.01 (same); 8th Circuit Model Instructions Criminal No. 1.01 (same).

when trying to teach jurors a new concept like the meaning of a presumption:

> The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt.

(Leonard B. Sand, et al., 1 Modern Federal Jury Instructions, § 4.01; Form 4-1 (1994).) Similarly, the Seventh Circuit's pattern instruction explains that the presumption of innocence

> continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty is guilty as charged.

(Seventh Circuit Pattern Jury Instructions (Criminal Cases) No. 2.03, reprinted in Sand, et al., *supra*, vol. *, p. 7-22.)

Hearing appellant's judge use language that, taken literally, would mean that conviction was inevitable, further added to the *gestalt* of a courtroom in which the emphasis appeared to be on avoiding releasing a guilty man, in ways explained not only in the preceding arguments, but in several that follow as well.

The use of "until" in CALJIC No. 2.90 was challenged in the abstract in *People v. Lewis* (2001) 25 Cal.4th 610. This Court concluded "there is no reasonable likelihood that the jury in defendant's case would understand the instruction to mean that to convict defendant, the state could sustain its burden without proving his guilt beyond a reasonable doubt." (*Id.* at p. 652.) In reaching this conclusion, the Court cited the remainder of the instruction, which does indeed provide some clarification. (*Ibid.*; see fn. 74, p. 115, above.) Appellant understands that the instruction refers to

the possibility of a verdict of not guilty, that it at least seeks to identify the circumstances requiring such a verdict, and that the use of the word *until* does not refer in any direct way to a lower standard of proof. His contention is not, therefore, precisely the one rejected in *Lewis*. Put differently, *Lewis* rejected a contention that the instruction weakens the prosecution's burden, which, if true, would have made the error reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) Appellant's contention is that the language is surely erroneous, though for other reasons, that—in the cumulative impact of it and other errors—appellant sustained the due process violation of an unfair trial (U.S. Const. 14th Amend.; Cal. Const., art. I., §§ 7, 15), and that the result is subject to *Chapman* harmless-error analysis.

Lewis came closer to appellant's contention when it also asserted, "there is no reasonable likelihood that the jury understood the disputed language to mean it should view defendant's guilt as a foregone conclusion." (25 Cal.4th at p. 652.) It is unfortunate that the *Lewis* opinion did not acknowledge that the instruction nonetheless does imply that proposition (whether a reasonable juror would draw that conclusion or not), fails to say what it means to say, and requires revision. If the shoe were on the other foot, certainly no court would tolerate a version of the instruction that read, "It will be your duty to acquit when the prosecution fails to meet its burden," even absent a reasonable likelihood that a jury would believe it was truly being told that it should consider a failure of proof to be a foregone conclusion. Here, the prosecution-tilted version caused a trial—already filled with too many apparent indicia of a trial judge's belief that justice meant reducing barriers to conviction—to include one more, perhaps subtler, message along those lines. Admittedly, no juror would consciously say, "This means we are expected to convict," given the additional language

in the pattern instruction noted in *Lewis*. But the atmospherics of the trial had to have been affected by the use of a term that meant exactly that. In other cases it would not have been prejudicial; in this one, it was, as Argument XVI explains in greater detail.[77]

E. Reversal Is Required

An inadequate instruction on reasonable doubt is federal constitutional error and is per se reversible. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) Because, by its own terms and as emphasized by the prosecution, any state of being convinced that can be expected to abide (i.e., one that would be produced by clear and convincing evidence) was sufficient, use of the instruction brings the case within the *Sullivan* rule. All the guilt verdicts and special-circumstances findings must be reversed.

Even if the subliminal implications of the use of the word *until* do not fall within this rule, the error is one of a series that cumulatively cannot be held harmless.

[77]If the Court decides otherwise, it should at least remedy the *Lewis* oversight and recommend that the language be corrected, for any trial in which CALJIC, which is still published and updated, may be used. (CALCRIM No. 220 contains no reference at all to the duration of the presumption.)

V. THE TRIAL COURT EXPLAINED TO THE JURY HOW THE PROSECUTION COULD MEET ITS BURDEN OF PROVING ROBBERY IN TERMS THAT FURTHER UNDERMINED THE REASONABLE DOUBT STANDARD

The erosion of the reasonable-doubt standard continued in another jury instruction. The trial court instructed appellant's jury, pursuant to CALJIC No. 2.15, that if he consciously possessed recently stolen property and there was any "slight" corroboration of the inference that he committed robbery and grand theft, it could find him guilty of those crimes. (RT 11: 2338–2339.)[78] The evidentiary basis for the instruction was appellant's having pawned a diamond ring and a jade pendant belonging to Mrs. Jenks. (See RT 11: 2267; see also portions of record cited at p. 14, above, specifying the jewelry.) Unlike other versions of the "slight corroboration" doctrine (e.g., CALCRIM No. 236), the instruction did not add that the totality of the evidence must meet the reasonable-doubt standard. Rather, in a gross confusion of the role of an appellate court's review for evidentiary sufficiency—in which the slight corroboration rule may be appropriate—with the role of the jury, it effectively told the jury that *it could convict* based on possession and only slight other evidence. This

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[78]"If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of robbery and grand theft. Before guilt may be inferred[,] there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt.

"As corroboration you may consider the attributes of possession, time, place, and manner that the defendant had—that the defendant had an opportunity to commit the crime charged, the defendant's conduct, a false account of how he acquired possession of the stolen property, and any other evidence which tends to connect the defendant with the crime charged." (RT 11: 2338–2339.)

particularized application of the general instructions on reasonable doubt eviscerated them.

Viewed through another lens, the instruction offered the jury a permissive inference, one that did not meet constitutional standards of rationality because there could easily be slight corroboration of the hypothesis that a possessor was the actual thief when he or she was not. Finally, the trial court's adaptation of the instruction specified that guilt of the charged offenses, robbery (Count III) and grand theft (Count IV), could be found from the specified combination of evidence, without clarifying that corroborated possession evidence could in itself be seen as tending to prove only some crime of theft of unspecified degree. Thus it gave the jury a way of handling the robbery-versus-theft question that relieved it of its duty to determine whether the prosecution proved that an intent to steal was formed before completion of the fatal assaults.

Under other circumstances, general instructions on the reasonable doubt standard might cure the infirmity. Here, however, the instruction was part of an overall pattern which weakened that standard. Moreover, this was a case in which the evidence of robbery, as opposed to theft, was entirely equivocal, and the trial court's adaptation of the instruction failed to take that into account. These errors, therefore, rendered the robbery and robbery-murder special circumstances verdicts invalid. Because the first-degree murder convictions could also have been based on a robbery-murder theory,[79] with the robbery element having been permitted by the invalid instruction, they, too must be reversed.

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[79]The lead prosecutor successfully urged that the instruction be worded so that the jury would understand it to apply to its felony-murder determination. (RT 11: 2266.)

A. It Is Reversible Error to Dilute the Reasonable-Doubt Standard; Moreover, if the Jury Is Invited to Apply an Inference to Assist it in Finding that Standard Met, the Conclusion Must More Likely than Not Flow from the Predicate Fact

The reasonable-doubt standard, though so familiar to this Court that it can be taken for granted, is an extremely high burden. Its nature, and the federal constitutional prohibitions on lowering it in any way, were set forth in detail at pages 77–80, above, in the discussion of the trial court's "raspberry-pie" pre-instruction. In brief, the state and federal due process clauses require a jury to be instructed that the state may not obtain a criminal conviction without proving each element of the offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." (*People v. Hall* (1964) 62 Cal.2d 104, 112; see also *In re Winship*, *supra*, 397 U.S. at p. 364 [state must "convinc[e] a proper factfinder of [a defendant's] guilt with utmost certainty"]; *Jackson v. Virginia* (1979) 443 U.S. 307, 315.) Instructions which dilute the burden to less than the reasonable-doubt standard violate due process. (*Cage v. Louisiana* (1990) 498 U.S. 39.) Such error is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

If a group of instructions includes explanations which water down the reasonable doubt standard, the inclusion of an appropriate instruction as well does not vitiate the error. (*Cage v. Louisiana*, *supra*, 498 U.S. 39; *People v. Serrato* (1973) 9 Cal.3d 753, 767; *People v. Garcia* (1975) 54 Cal.App.3d 61, 70.) An instruction is infirm if there is a reasonable likelihood that a juror could understand it to permit a lower standard of

proof than that contemplated by *In re Winship*. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) A reasonable likelihood does not mean "more likely than not"; it only means that there must be "more than speculation" that an instruction could have been understood to lower the prosecution's burden. (*Boyde v. California* (1990) 494 U.S. 370, 380; see also *Victor v. Nebraska*, *supra*, 511 U.S. at p. 6 [citing the discussion of *Boyde* in *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & n. 4].)

When an instruction offers a jury a permissive inference ("if you find one fact true, you may infer another from it"), federal due process demands a rational connection between the fact proved and the one which the jury is told it may infer. (U.S. Const., 14th Amend.; *People v. Castro*, *supra*, 38 Cal.3d 301, 313, and cases cited.) This means "there must be 'substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' (*Leary v. United States* (1969) 395 U.S. 6, 36 . . . .)" (*People v. Holt* 15 Cal.4th 619, 677 [discussing standard applicable to CALJIC No. 2.15]; see also *Ulster County Court v. Allen* (1979) 442 U.S. 140, 165–167, and fn. 28, quoting *Leary v. United States*, *supra*, 395 U.S. 6, 36; *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316.)

B. Instructing that Only "Slight" Evidence Other than Possession Meets the Prosecution's Burden Substitutes a Standard Far Lower than that Required by *In re Winship*

1. The Instruction Shortcuts the Reasonable-Doubt Determination

Starting from a naive, i.e., fresh, perspective, CALJIC No. 2.15's formula that the jury could conclude that appellant was guilty of robbery from evidence of possession of recently stolen property plus slight corroboration of the robbery charge is startling.

> As we long ago observed, there may be an innocent explanation for the circumstance of possession. "'The real criminal . . . may have artfully placed the article in the possession or on the premises of an innocent person, the better to conceal his own guilt; or it may have . . . or otherwise have come lawfully into [the defendant's] possession.'" (*People v. Chambers* (1861) 18 Cal. 382, 383, overruled on other grounds in *People v. McFarland* (1962) 58 Cal.2d 748, 758 . . . ; see also *People v. Holt* (1997) 15 Cal.4th 619, 677 . . . [an inference of guilt based solely on possession of recently stolen property would be "unwarranted"].)

(*People v. Najera* (2008) 43 Cal.4th 1132, 1138, first ellipsis in original.) The instruction is often used in cases charging conscious possession of stolen property. This means that there can also often be a *less* than "innocent explanation for the circumstance of possession" which still does not make the defendant the thief, much less a robber.

So if—without more—there can be either an innocent explanation for possession or one that involves guilty knowledge without participation in the taking, it is inconceivable that adding "slight" corroboration of the charged offense could automatically permit "the factfinder . . . to reach a subjective state of near certitude of the guilt of the accused." (*Jackson v. Virginia*, *supra*, 443 U.S. 307, 315.) Put differently, it is grossly wrong to state that, in every case where the two prerequisites (possession and slight corroboration) are met, the circumstantial evidence is irreconcilable with any conclusion other than guilt. Yet this is what would be required. (*People v. Yrigoyen* (1955) 45 Cal.2d 46; *People v. Bender* (1945) 27 Cal.2d 164, 174–177.)

Barnes v. United States (1973) 412 U.S. 837 is instructive. There, the High Court sustained an instruction permitting a jury to infer, in a prosecution for knowing possession of stolen property, the element of

knowledge of the property's having been stolen from unexplained possession of recently stolen property. (*Id.* at pp. 845–846.) It is a huge leap, however, to move from such an inference to inference of guilt of all the elements of theft, much less of robbery. Moreover, the instruction at issue in *Barnes* told the jury to consider the evidence "in the light of the surrounding circumstances shown by the evidence" before drawing the inference. (*Id.* at pp. 839–840.) The Court noted that the instruction was given at the trial court's discretion (*id.* at p. 845, fn. 8) and rested its holding on the way the evidence justified it under the particular circumstances of that case: "The evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence" (*id.* at p. 845). Inferring guilty knowledge from possession of others' property and inferring all the elements of robbery from that circumstance are not in the same ballpark.

Barnes was litigated and decided under the High Court's permissive-inference jurisprudence, which is discussed separately below, but it illustrates the circumstances in which unexplained possession could meet the prosecution's burden of proving an element of some offense,[80] circumstances far removed from those present here.

In *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, the trial judge specifically instructed that an element that it thought—and said—could be proved by "slight evidence" still had to be shown beyond a reasonable

[80]The two issues are closely related. *Barnes* implicitly recognized that giving the jury such a permissive inference is telling it what can satisfy the reasonable-doubt standard, in that the Court concluded its analysis of the permissive-inference claim with the statement that possession of the checks was sufficient evidence to satisfy the prosecution's burden on knowledge. (412 U.S. at pp. 845–846.)

doubt. The Fifth Circuit reversed because "[t]he 'slight evidence' reference can only be seen as suffocating the 'reasonable doubt' reference." (*Id.* at p. 500.) Here there was not even an attempt to clarify; there was only the bare statement that possession plus any slight corroboration would suffice for a finding of guilt.

It is easy to generate hypothetical situations illustrating the point that evidence of those two factors does not automatically meet due process standards for proving even theft. In appellant's case, there is the one pointed to in *People v. Najera*, *supra*, 43 Cal.4th 1132, 1138 and *People v. Chambers*, *supra*,18 Cal. 382, 383: that the actual perpetrator may have arranged for appellant to be in possession of some of the jewelry, knowing that he would implicate himself because of his occasional habit of pawning stolen goods. In another situation, if a bicycle was stolen from someone's front porch and found in the possession of someone who lived nearby, the instruction would advise the jury that it could convict the possessor on that basis alone. For, as the instruction points out (see fn. 78, p. 119, above), an example of corroboration would be opportunity to commit the crime. Anyone in the neighborhood would in fact have that opportunity, and anyone could have taken the bike and given or sold it to the defendant. Yet the instruction gives the prosecution a free ride by telling the jury that it can find the defendant to be the thief with no additional evidence.

In some of these situations, the evidence might be sufficient to permit a rational jury to exclude the hypotheses consistent with innocence. Even when this is true, however, it is the jury who should weigh all the evidence, reject the other-perpetrator theory, and decide if the charged crime has been proven beyond a reasonable doubt. Relieving appellant's jury of that burden with a purported legal rule that says "guilt may be inferred" upon a finding of possession plus slight corroboration undermined

the reasonable-doubt standard and violated the jury-trial right as well. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16.)[81]

2. The Instruction, as Adapted to Appellant's Case, Wiped Out the Distinction Between Theft and Robbery

The instruction read to appellant's jury stated what was required if appellant was to be found guilty of robbery or grand theft (as charged in Count IV, the Bellencourt offense). In the previous section, appellant showed that even permitting a simple theft conviction on the basis of possession plus slight corroboration of theft can defeat the *Winship* requirement of a jury's beyond-a-reasonable-doubt finding. In appellant's case, crucial distinctions in not only the degree of the taking offense involving the Jenks jewelry, but the degree of murder and the existence of a special circumstance, depended upon whether or not the intent to take was formed before or during the assaults, versus after. As to this question, the gap between proof beyond a reasonable doubt and that supplied by

[81]The brief opening portion of the instruction, which states that possession alone is not enough to prove robbery and grand theft, theoretically benefitted appellant. However, as this Court has recently held, it was redundant for that purpose, as standard circumstantial-evidence instructions, which were given in this case (RT 11: 2346–2347), adequately cover the subject. (*People v. Najera* (2008) 43 Cal.4th 1132, 1138.) Clearly a jury that understood the reasonable-doubt standard and the use of circumstantial evidence in meeting it would never have imagined that appellant's pawning the jewelry plus, e.g., the mere opportunity to steal it could have alone proved that he was the one who did so. Therefore the beneficial effect of the instruction was entirely hypothetical. In form the instruction was partially protective, but its actual effect was only to draw the jury away from applying "common sense and experience" (*Barnes v. United States* (1973) 412 U.S. 837, 845 [dealing with inferences from possession of stolen property]) and apply the apparent exceptional rule that the remainder of the instruction gave.

possession plus any slight corroboration of the robbery charge was even larger.

If the instruction were valid in a theft case, in a robbery case something like the following would have to be added: "You may not infer from the defendant's conscious possession of the stolen property that the improper acquisition of the property was [e]ffected through robbery rather than theft." (FORECITE California (3rd ed., 2002), F 2.15a.) Stating the reverse—that robbery *could* be sufficiently proved by circumstances that say nothing about force or fear (much less their temporal relation to the taking) relieved the prosecution of its burden on a critical element of the offense.

3. Related Discussions of the Instruction Did Not Reach the Instant Contention

The Court of Appeal upheld the instruction against related, but different challenges in *People v. Anderson* (1989) 210 Cal.App.3d 414. However, it used broad language characterizing the instruction as accurately stating the law and relied on an older case from this Court in doing so. Both cases, therefore, are discussed here.

The *Anderson* defendant complained of 1984 revisions to the instruction that he said reduced the prosecution's burden of proof, and it is noteworthy that in fact the prior version was much less objectionable. However, the litigant conceded the point argued here, the "slight-corroboration" doctrine. (*People v. Anderson*, *supra*, 210 Cal. App.3d at p. 430.) Thus statements in *Anderson* about the instruction being an accurate statement of the law (e.g., *id.* at p. 431) are simply dicta.

In rejecting another challenge to the instruction, the court relied on *People v. McFarland* (1962) 58 Cal.3d 748, and characterized the instruction as "accurately synopsiz[ing] the thrust of the holding" in that

case. (*People v. Anderson*, *supra*, 210 Cal.App. 3d at p. 426.) But *McFarland* was primarily a rejection of a challenge to the sufficiency of the evidence to convict. In it this Court did restate the rule that "[p]ossession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt." (58 Cal.2d at p. 754.) But there is a qualitative difference between the function of a jury determining whether it is convinced beyond a reasonable doubt and the function of a reviewing court determining whether any reasonable jury *could* be so convinced, which is what the language in *McFarland* was actually addressing. The CALJIC committee was unjustified in equating a watered-down[82] sufficiency-to-withstand-review standard with a rule inviting jurors to shortcut their own evaluation of the evidence.

Anderson also interpreted *McFarland* as approving instructions that included only a slight-corroboration requirement. (*People v. Anderson*, *supra*, 210 Cal.App.3d at p. 426, citing *People v. McFarland*, *supra*, 58 Cal.2d at pp. 758–759.) The entire *McFarland* instruction, however—like that in *Barnes v. United States*, *supra*, 412 U.S. 837, 839–840, but unlike the one read to appellant's jury—had considerable language emphasizing that possession was "a circumstance to be considered in connection with other evidence in determining the question of innocence or guilt" and stating that specified corroborating conduct (failure to explain possession or a false account of possession) was a circumstance that "*tends to* show . . . guilt." (*People v. McFarland*, *supra*, 58 Cal.2d at pp. 758–759.) Thus the

[82]The instruction speaks of slight corroboration in general; *McFarland* qualified it by "in the form of statements or conduct of the defendant tending to show his guilt." (58 Cal.2d at p. 754.) Opportunity to commit the offense—one of the CALJIC No. 2.15 examples—would not fit.

McFarland jury was still charged to make its own determination in the light of all the evidence. Moreover, while it was a strange thing to tell a jury, the *McFarland* instruction's version of the slight-corroboration doctrine was the correct one: "The corroboration of the possession of stolen property need only be slight in order to *sustain* a conviction." (*Id.* at p. 759, emphasis added.) *McFarland's* only endorsement of what the instruction said about the *jury's* inferences applied to language different from that of CALJIC 2.15. And it was as follows: "If it be assumed that any part of the instruction might have been construed to mean that such possession could permit an inference of guilt, this . . . was a correct statement of the law applicable where, as here, in addition to a showing of possession . . . , it appears that the accused, upon questioning by the police, remained silent under circumstances justifying the conclusion that his silence indicated consciousness of guilt." (*Ibid.*) This is a far narrower statement than approval of telling the jury that any slight corroboration will do, or using language that fails to remind the jurors to determine guilt or innocence by considering the circumstances identified in the instruction "in connection with other evidence." (*Id.* at p. 758.)

It is worth noting that the comparable CALCRIM instruction, No. 376, concludes with the following language: "Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." Like clarifying language in *McFarland* (and *Barnes*), this transforms the instruction from one permitting conviction once possession and slight corroboration are found, to one explaining the relationship between a permissive inference and the reasonable-doubt standard.

C. Under Controlling Precedent, the Instruction Sets Out an Irrational Permissive Inference

As explained on page 122, above, federal due process requires that before a jury may be told that it may infer a conclusion from a preliminary fact, the conclusion must "more likely than not flow from" the fact proved. (*Ulster County Court v. Allen*, *supra*, 442 U.S. 140, 165–167, and fn. 28.) Indeed, there must be "substantial assurance" that it does so. (*People v. Holt*, *supra*, 15 Cal.4th at p. 677, quoting *Leary v. United States*, *supra*, 395 U.S. at p 36.) Viewed through this lens, the instruction was also infirm, and for the same reasons. Appellant's possession of the jewelry he pawned, combined with *any* slight corroboration of the robbery charge, robbery element of the murder charge, and robbery-murder special circumstance, did not alone make it more likely than not that he was even the thief. The prosecution case did not make appellant the only Jenks acquaintance who might have been granted entry to the house (creating an opportunity to steal) or the only one with a motive. Moreover, the instruction did not require excluding the various ways in which appellant may have obtained possession of the ring and pendant other than by stealing them himself. Assuming arguendo that other evidence might have permitted the jury to come to such a conclusion, the instruction—unlike others upheld in other cases discussed earlier—did not refer the jury to such other evidence. It simply said that "guilt may be inferred" on the basis of possession and slight corroboration alone.

Appellant may have stolen the jewelry months previously, which would explain his having so little of it, and, either by unfortunate happenstance or in a misguided attempt to avoid being caught with evidence that could implicate him in the killings, sold it shortly after they took place.

Finally, possession and slight corroboration of the robbery charge—corroboration which could have gone to the identity issue (e.g., not answering "where's your hatchet?") and not the after-acquired-intent question—certainly did not more likely than not establish guilt of robbery. The permissive inference was not a rational one within due process standards.

The appellant in *People v. Johnson* (1993) 6 Cal.4th 1 challenged the giving of CALJIC No. 2.15 in his case as involving an irrational "permissive presumption." The contention was summarily rejected on the basis that *all* the evidence of the charged offense (burglary) was sufficient to permit the inference of guilt. (*Id.* at p. 38, citing evidence summarized at 36–37, emphasis added.) It appears from the short discussion in the opinion that this method of analysis was sufficient to meet the *Johnson* appellant's contention that "the evidence [had to be] 'sufficient for a rational juror to find the inferred fact beyond a reasonable doubt . . . ." (*Id.* at p. 37.) Applying the *Johnson* opinion's analysis here, however, would not meet appellant's claim, which hinges not on the sufficiency of the evidence nor an instruction authorizing the jury to consider all the evidence (the factors relied on by the *Johnson* court), but the instruction's authorizing an inference of the ultimate fact of guilt based on possession and any slight corroboration. The United States Supreme Court has held that the existence of additional evidence is beside the point, because the jury may not have relied on it:

> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. . . . The fact that the reviewing court may view the evidence [proving an element] as overwhelming is then simply irrelevant. . . . [It is improper t]o allow a reviewing court to perform the jury's function of evaluating the

> evidence . . ., when the jury never may have performed that function . . . .

(*Connecticut v. Johnson* (1983) 460 U.S. 73, 85–86 (plur. opn.).)

A challenge similar to that in *People v. Johnson* was rejected in the same manner in *People v. Holt*, *supra*, where the Court held that "[t]he corroborating evidence here was sufficient to permit the jury to find the inferred fact . . . beyond a reasonable doubt. (15 Cal.4th at p. 677.) Again, under the instant claim, the question is not the sufficiency of the evidence to permit such an inference. Moreover, this Court cannot know what corroborating evidence appellant's each member of appellant's jury credited. What it does know is that the jury was given a different, and far easier, method of analysis than whether all the potential corroborating evidence, plus possession, proved guilt beyond a reasonable doubt—possession and slight corroboration supposedly could.

The *Holt* opinion went on to point out that the charge to the jury should be considered as a whole, which included instructions on the need to find true all the elements of each charged offense. It noted the assertedly protective aspect of the particular instruction at issue and concluded,

> We see no possibility that giving the jury the additional admonition that it could not rely solely on evidence that defendant possessed recently stolen property would be understood by the jury as suggesting that it need not find all of the statutory elements of burglary and robbery had been proven beyond a reasonable doubt.

(15 Cal.4th at p. 677.) This observation fails to appreciate the fact that part of the instruction *tells* the jury—indeed, most of it is devoted to telling the jury—that possession plus slight corroboration are enough to convict on theft-related charges. It leaves out the common-sense principle, applied frequently in construing contracts and statutes, that the particular (how to find guilt of robbery) controls over the general (need to find elements of

offenses true), which is certainly what a jury would expect as well. (See *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 300 [general instructions on how to determine guilt do not cure giving of an erroneous permissive-inference instruction]; see also *National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 386 [construing contract—particular controls over the general]; *Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1246 [statutory construction—same].) Finally, the opinion does not acknowledge the rule that the giving of a proper reasonable doubt instruction does not save an instructional package which includes explanations which eviscerate that standard. (*Cage v. Louisiana*, *supra*, 498 U.S. 39; *People v. Serrato*, *supra*, 9 Cal.3d 753, 767; *People v. Garcia*, *supra*, 54 Cal.App.3d 61, 70.)

In *People v. Yeoman* (2003) 31 Cal.4th 93, this Court rejected a contention that CALJIC No. 2.15 violated due-process limitations on permissive inferences. Applying a formulation of the applicable standard used in *Francis v. Franklin* (1985) 471 U.S. 307, 314–315, the Court explained, "[r]eason and common sense also justified the conclusion that defendant's conscious possession of recently stolen property tended to show he was guilty of robbery (see CALJIC No. 2.15), in view of" the specific corroborating evidence in that case. (31 Cal.4th at p. 131.) The problem, however, is that the instruction does not say that the named factors could be treated as "tend[ing] to show" guilt; it says that they "warrant an inference of guilt," in a context that clearly means that they suffice for a guilty finding. As to that context, the instruction states that possession alone is not sufficient to permit an inference of guilt. And yet possession alone does have a tendency to show guilt; the problem is that its probative value is not sufficient in itself to establish such guilt. (See *People v. Holt*, *supra*, 15 Cal.4th 619, 677 [reference to "*unwarranted* inferences of guilt based solely

on possession"], emphasis added.) Stating what *does* warrant an inference of guilt was to state what sufficed.[83]

Here there was no substantial assurance that guilt of robbery—or, rather, a showing, beyond a reasonable doubt, of guilt of robbery—flowed from a showing of possession of two of the items of missing jewelry and nothing more than slight corroboration of the robbery charge. The same is true of the charge of theft of a ring from Viola Bettencourt. Any presence of greater than slight corroboration is irrelevant, given that the factfinder was told that it did not need to evaluate the sufficiency of that evidence. (*Connecticut v. Johnson*, *supra*, 460 U.S. 73, 85–86.) The instruction was error when viewed through the permissive-inference lens as well.

D. All the Verdicts Must Be Set Aside

The giving of an instruction which dilutes the reasonable-doubt standard is reversible per se. This is because a harmlessness inquiry depends upon the likely effect of trial error upon a jury's decision that guilt was proven beyond a reasonable doubt, and there is no such decision where the prosecution's burden was described erroneously. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) Offering the jury an irrational permissive inference is treated the same way, evidently for the same reason, under the recognition that the effect was to relieve the prosecution of its burden. (*Leary v. United States*, *supra*, 395 U.S. 6, 53.)

Appellant is not, however, stating that, in every case where CALJIC No. 2.15 has been given, the verdicts are invalid. Certainly where there is no issue of theft versus robbery, or where a trial court did not adapt the

[83]According to this Court, the words mean that even apart from the context. The Court routinely holds that an instruction referring to whether a death sentence is "warranted" advises the jury to consider whether death is "appropriate." (See *People v. Arias* (1996) 13 Cal.4th 92, 171.) So CALJIC No. 2.15 explains when a finding of guilt is appropriate.

instruction so as to collapse the distinction, the problems may not rise to the structural error of actually diluting the burden of proof. There may be other situations, particularly those that lacked this trial's other errors weakening the reasonable-doubt standard,[84] where there is no reasonable likelihood that a juror could have understood the instruction to permit a lesser standard of proof than the Constitution requires. (See *Victor v. Nebraska*, *supra*, 511 U.S. 1, 6.) But here the need for the jury to focus on the distinction between theft and robbery and an evidentiary picture raising a real question about that issue, the general muddling of the prosecution's burden, and judicial expressions aimed at letting the jury know of the court's own concern not to demand too much, the instruction's inherent infirmities were given full rein, and the error was indeed structural.

Were a harmlessness analysis to apply here, the only way to uphold verdicts of a jury told that it need not examine the entire evidentiary picture to find whether robbery was proven would be for this Court to hold that, under all the evidence, no rational juror who did so could have been left with a doubt as to whether it was appellant who attacked the Jenkses, and whether he did so with an intent to steal. (*Neder v. United States* (1999) 527 U.S. 1, 19.) Moreover, this Court would have to find its own conclusion to that effect to be true beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) As the extended discussions on the

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[84]These were the raspberry-pie and "a-circumstantial-case-is fine" remarks, the prosecutor's imploring jurors not to acquit a man they believed was guilty because of a reasonable doubt, her equating a "belie[f]" in guilt that would abide for a week to the requisite level of certainty, trial counsel's and the trial court's acquiescence in these remarks, appellant's own attorney's saying that reasonable doubt "doesn't mean that the People are held to a burden of proving Mr. Potts guilty to a moral certainty, to any kind of certainty," and the implications of presuming appellant innocent only "until" the anticipated proof of guilt.

weakness of the circumstantial case on identity (pp. 90–94, above) and the virtual absence of evidence excluding after-acquired intent to steal (pp. 45–55, above) make clear, such a finding would be unfounded.

The verdicts on Counts III (robbery) and IV (Bellencourt theft), and the finding on the robbery-murder special-circumstance must be reversed. Since the first-degree murder verdicts on Counts I and II could have been based on the prosecution's robbery-murder theory, they must be reversed as well, along with the multiple-murder finding.[85] (See *People v. Guiton* (1993) 4 Cal.4th 1116 [regarding reversibility when jury had alternative factual bases for finding guilt].)

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[85]The version of the instruction used here was purposely worded to avoid specifying Counts III and IV, so that the jury would understand it to apply to the robbery-murder theory of first-degree murder and the robbery-murder special circumstance. (RT 11: 2264–2266.)

VI. A DRAFTING ERROR IN THE INSTRUCTION ON THE EFFECT OF AFTER-ACQUIRED INTENT ON A ROBBERY CHARGE MISLED THE JURY ON A CRUCIAL ELEMENT OF DEATH-ELIGIBLE MURDER

The prosecution, obviously aware that the evidence raised an issue of when the intent to steal Shirley Jenks's jewelry arose, requested that the jury be instructed with CALJIC No. 9.40.2, which was and is titled "Robbery—After-Acquired Intent." (CT 9: 2689; CT 9: 2642C.) The court gave the instruction. (CT 9: 2674.) However, it alerts the jury to the wrong issue. A correct instruction would explain that there is only theft, not robbery, unless the intent to steal arose before or during the act of force against the victim. (*People v. Bolden* (2002) 29 Cal.4th 51 5, 556.) The pattern instruction, however, requires only the arising such intent "before or at the time that the act of taking the property occurred,"[86] a temporal element distinguishing theft from embezzlement (wrongfully appropriate property lawfully in one's possession), not robbery from theft. (See *People v. Green* (1980) 27 Cal.3d 1, 54.) The drafting error misinstructed appellant's jury on a crucial issue in the case, in violation of appellant's Sixth, Eighth, and Fourteenth Amendment rights to trial by jury, due process, and reliability in the determination of guilt of a capital offense, along with parallel state constitutional rights. Under the particular circumstances of this case, the error was prejudicial. Since prosecution failure to prove that intent to steal arose before or during the assaultive

[86]"To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his or her property before or at one—or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed." (RT 11: 2358–2359; see also CT 9: 2674.)

conduct would have ruled out its felony-murder theory of first-degree murder, all verdicts pertaining to Counts I through III must be reversed.

A. Where the Evidence Permits a Doubt as to Whether an Intent to Steal Arose Before the Act of Force Was Completed, the Court Must Instruct, Correctly, on After-Acquired Intent

1. To Determine Whether a Crime Was Robbery or Theft, the Jury Must Understand Its Need to Determine When the Intent to Steal Arose

A taking is a theft, not robbery, if the perpetrator developed an intent to steal after acting forcibly upon the victim, rather than before or during that act. (*People v. Bolden*, *supra*, 29 Cal.4th 51 5, 556.) Indeed, force must have been applied for the purpose of accomplishing the taking. (*Ibid.*) Similarly, a reasonable doubt regarding after-acquired intent negates both the robbery element of a felony-murder allegation based on robbery, as well as a robbery-murder special circumstance. (*People v. Marshall* (1997) 15 Cal.4th 1, 37 [felony murder]; *People v. Green*, *supra*, 27 Cal.3d 1, 52, 53–54 [special circumstance].)

2. The Court Was Constitutionally Required to Instruct Correctly on the Point

This Court has held that there is no sua sponte duty to instruct on after-acquired intent. (*People v. Webster* (1991) 54 Cal.3d 411, 443; accord, *People v. Valdez* (2004) 32 Cal.4th 73, 111.) Appellant disagrees, but the point is irrelevant to this appeal. The trial court did attempt to instruct on after-acquired intent, as explained above. Therefore, the applicable principle is that it is error to give misleading instructions. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Put differently, if a court "does choose to instruct [on an issue], it must do so correctly." (*Ibid.*; accord, *People v. Cummings* (1993) 4 C4th 1233, 1337.)

Furthermore, as noted above, the prosecution requested an instruction purporting to cover that topic, and appellant's counsel knew it would be given (see RT 11: 2299–2300) and briefly raised the issue in argument to the jury (RT 11: 2441–2442). The problem, of course, was that counsel for both sides—like the trial court—assumed that the CALJIC instruction covered that subject. Because of the possibility that respondent will nevertheless claim that a death sentence given by a jury misinstructed on this crucial point should stand because the defendant's attorney did not specifically join in the prosecution request, appellant states his disagreement on the sua sponte question in a footnote.[87]

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[87]"A trial court must instruct on its own initiative . . . on those principles of law 'commonly or closely and openly' connected with the facts of the case. [Citation.]" (*People v. Davis* (2005) 36 Cal.4th 510, 570, italics omitted; U.S. Const., 14th Amend.) In contrast, it need give a pinpoint instruction, which ". . . 'relate[s] particular facts to a legal issue in the case or "pinpoint[s]" the crux of a defendant's case, such as mistaken identification or alibi'. . ." (*People v. Ward* (2005) 36 Cal.4th 186, 214, alterations in original), only upon request. (*People v. Webster*, *supra*, 54 Cal.3d at p. 443.) This Court's decision finding no duty to instruct sua sponte on after-acquired intent was premised on this rule. (*Ibid.*) However, the *Webster* opinion made no attempt to justify the other premise required to support its conclusion: that an instruction on after-acquired intent *would be* a pinpoint instruction.

If the evidentiary picture before the jury would permit a doubt based on the time of acquisition of the intent to steal, an instruction on theft as a lesser-included offense of robbery is required. (E.g., *People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1056.) Yet there would be no point in instructing on theft if the jury were left unclear on the distinction between theft and robbery in that situation. In the instant case, as the sufficiency-of-the-evidence argument (pp. 45–55, above) explains, there was, to say the least, a question about when the intent to steal arose: all that the jury knew for sure was that homicides and theft occurred in the Jenks house, probably on the same occasion. The pertinence of the question of when intent arose to the theft/robbery distinction, then, was a "principle[] of law 'commonly or closely and openly' connected with the facts of the case. [Citation.]" (*People v. Davis*, *supra*, 36 Cal.4th at p. 570, italics omitted.)

(continued...)

Failure to instruct correctly on the elements of an offense is constitutional error. A criminal defendant has jury trial and due-process rights to have a jury determine every material issue presented by the evidence, including whether he or she is guilty of a lesser offense than that charged. In a death-penalty case, Eighth-Amendment rights to a reliable verdict are also implicated. (U.S. Const., 6th, 8th, & 14th Amends.; Cal.

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[87](...continued)

This Court has held that the CALJIC instructions on robbery (No. 9.40), the version of the felony-murder instruction given here (No. 8.21), and a general instruction that certain crimes require a union of the act and specific intent specified in the definitions of those crimes given in other instructions (No. 3.31), taken together, do adequately cover the issue. (*People v. Valdez* (2004) 32 Cal.4th 73, 111–112; *People v. Hughes* (2002) 27 Cal.4th 287, 359–360; see RT 11: 2357–2358, 2351, 2346, respectively.) Appellant submits that a group of attorneys, flow-charting the interplay of the logic of these three instructions and alert to the need to watch for subtleties in their interaction, might, after discussion, deduce that they needed to exclude after-acquired intent. Lay people, however, could just as readily understand that an act that began with an application of force and ended with a decision to steal and a taking was a robbery, absent an instruction that confronts this issue and explains that the possibility that the intent to steal arose after the use of force needs to be excluded. Hence the need for a sua sponte after-acquired-intent instruction.

Const., art. I, §§ 7, 15, 16; *Beck v. Alabama* (1980) 447 U.S. 625; *People v. Sedeno* (1974) 10 Cal.3d 703, 720, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 165.) Effectuation of these rights requires the jury to be given instructions which would permit it to decide the lesser-offense issue. (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 720.) Lesser offenses aside, the jury must be given instructions on the charged offense which are complete enough to permit it to reliably decide guilt or innocence. (*Kelly v. South Carolina* (2002) 534 U.S. 246, 256; *People v. Sanchez* (1950) 35 Cal.2d 522, 528.)

B. The Instruction Covers Only a Freak Situation, Not the One Presented by the Evidence Here

There is an Emperor's-New-Clothes aspect to this instructional error. It is so gross and so plain, and has apparently been unchallenged for so long, that it is hard to believe one's eyes. The instruction, quoted in full at page 137, footnote 86, above tells the jury twice that the temporal aspect of the intent-to-steal element of robbery relates to "the time that the act of taking the property occurred," i.e., when "the property was taken from the . . . from the immediate presence of the victim." (RT 11: 2358–2359.) The real issue, of course, is whether force or fear was applied for the purpose of accomplishing a taking, or if theft was an opportunistic afterthought after an assault was completed. Thus the timing question is whether the intent to steal arose before completion of the assault, not whether it had arisen by the

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time the property was appropriated. (*People v. Green*, *supra*, 27 Cal.3d at p. 53.)

CALCRIM No. 1600 expresses this rule:

> The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

The CALJIC version, in contrast, only exonerates the rare (or entirely hypothetical) person who assaults someone, takes their property for an innocent purpose or intending to return it, and later decides to keep it. Its bizarre language seems to relate to some of the reasoning in *People v. Green*, *supra*, the case in which California adopted the after-acquired intent rule. In *Green* the Court drew an analogy to larceny, in which "the defendant must have intended to steal the property at the time he took it . . . ." (27 Cal.3d at p. 54.) If the intent to wrongly appropriate the property arises after one innocently acquires possession, the offense is not larceny, but "embezzlement or a lesser offense." (*Ibid.*) But CALJIC No. 9.40.2 applies this condition not to distinguishing larceny from "embezzlement or a lesser offense," but to distinguishing robbery from theft.

Appellant's jury was gravely misinstructed.

C. The Error Cannot be Shown to Have Failed to Contribute to the Murder and Robbery Verdicts

As explained previously, such error is constitutional. This does not mean that it would be prejudicial in every case, but it was in this one. In another case there might be, for example, overwhelming direct evidence that property was taken during the application of force or fear (such as testimony of a robbery victim or other witness, or an admission by the defendant); uncontroverted evidence of a pre-existing plan to steal; special

verdicts (in a murder trial) specifying a finding of willful, deliberate, and premeditated murder (rendering a robbery-murder theory superfluous); or arguments of both counsel carefully highlighting the correct rule and explaining its relationship to the definition of robbery itself.

Here, however, the Court is dealing with verdicts of a jury given only a red herring to follow, when considering the question of the time of acquisition of the intent to steal. They would be valid only if no rational juror who knew the true issue could have retained a doubt as to whether appellant attacked the Jenkses with an intent to steal. (*Neder v. United States* (1999) 527 U.S. 1, 19.) Moreover, this Court would have to find its own conclusion to that effect to be true beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Such a finding would be unfounded, as an earlier in-depth discussion on the virtual absence of evidence provided by the prosecution to meet its burden of excluding after-acquired intent to steal makes clear. (See pp. 45–55, above, or the summary on p. 89.) Moreover, here the error was combined with the further blurring of the theft/robbery distinction in the trial court's adaptation of the instruction that possession of stolen property plus slight corroboration of a robbery charge could prove robbery (Argument V, above). In *this* trial, respondent cannot show harmlessness.

Even if the error were only a state-law violation, there is "a *reasonable chance*, more than an *abstract possibility*," that affirmatively diverting the jurors from deciding if they could conclusively determine that the intent to steal arose before or during the assaults "affected the verdict[s]" on the Jenks counts. (*College Hospital, Inc.*, v. *Superior Court* (1994) 8 Cal.4th 704, 715 [explaining the reasonable-probability test of *People v. Watson*, *supra*, 46 Cal.2d 818, 836]; accord, *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800–801.)

All verdicts and findings except that pertaining to the Bettencourt theft must be reversed.

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VII. FIRST-DEGREE MURDER VERDICTS WERE ENCOURAGED BY AN INSTRUCTION WHICH TENDED TO PLACE THE BURDEN OF RAISING A DOUBT AS TO DEGREE ON APPELLANT AND A COMPLEMENTARY ONE REQUIRING UNANIMOUS ACQUITTAL OF FIRST-DEGREE MURDER BEFORE A SECOND-DEGREE VERDICT COULD BE RETURNED

A further explanation for the jury's finding of first degree on the murder counts lies in two instructions specifically aimed at guiding it in determining the degree of the offense. The first, instead of affirmatively setting forth the prosecution's burden of proving, beyond a reasonable doubt, the elements that would make a murder one of the first degree, required the jury to infer the applicable principle from an inverted statement of the rule. The formula implied that a doubt had to be created somehow to *reduce* the offense *from* that of murder in the first degree. The second told the jury that it could only return a second-degree verdict after unanimous agreement that guilt of first-degree murder had not been shown. As will be shown below, this Court has already recognized, albeit in a different procedural context, that such an instruction has a tendency to coerce minority jurors to vote for the greater offense in order to avoid a mistrial. Under settled constitutional principles that have not yet been brought to this Court's attention on this question, such a tendency invalidates the subsequent verdicts, at least in the circumstances of this case.

Each instruction had elements reinforcing the erroneous impact of the other.

A. In Capital Cases, States May Not Employ Procedural Rules Which Heighten the Risk of Jury Error

"[T]he Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death." (*Murray v. Giarratano* (1989) 492 U.S. 1, 8.)

The United States Supreme Court has repeatedly emphasized that heightened reliability is required in capital cases, and that courts must be vigilant in ensuring procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731–732; *Ford v. Wainwright* (1986) 477 U.S. 399, 414.) This includes the determination that a capital offense was committed at all. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.) Any heightening of a requirement for accuracy is, of course, relative to something else. That "something else" is the already stringent set of requirements imposed by the Due Process Clause of the Fourteenth Amendment in any criminal case. (*Gilmore v. Taylor* (1993) 508 U.S. 333. 342.) More concretely, the trial procedures chosen by a state may not "create[] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," including a risk created by making an erroneous determination of guilt of a capital crime more likely. (*Beck v. Alabama, supra*, 447 U.S. 625, 638 fn. 13, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605.) "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*, quoting *Lockett v. Ohio, supra*, 438 U.S. at p. 605.) This standard is quite strict, prohibiting "rules that *diminish* the reliability of the guilt determination" or a procedure which "*enhances the risk* of an unwarranted conviction" of a capital offense. (*Id.* at p. 638, emphasis added.) Perfection is not possible, but states are prohibited from affirmatively creating greater risk of error. (*Lockett v. Ohio, supra*, 438

U.S. at p. 605.) In sum, the Supreme Court has insisted that capital defendant must be "afforded process that will guarantee, as much as is humanly possible," that a death sentence not be "imposed out of . . . mistake." (*Eddings v. Oklahoma*, 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).)

B. Declining to Affirmatively Tell the Jury of the Prosecution's Burden of Proof on the Matter of Degree, in Favor of Naming the Circumstance in Which the Jury Should Reduce the Degree to Second, Shifted the Burden of Proof and Was Biased

Using CALJIC No. 8.71, the trial court attempted to set forth the burden of proof regarding the determination of the degree of any murder found to have been committed. However, the pattern instruction failed to cover that territory.

1. The Jury Should Have Been Informed that a Murder Is of the Second Degree Unless the Elements Making it One of the First Degree Have Been Shown Beyond a Reasonable Doubt

The rule that should have been conveyed is that, in order to obtain a verdict of first-degree murder (as opposed to murder in the second degree), the prosecution had the burden of proving, beyond a reasonable doubt, that the crime was of that degree. This follows from the prosecution's duty to prove the truth of every element of the charged offense beyond a reasonable doubt. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Rowland* (1992) 4 Cal.4th 238, 269; *People v. Dewberry* (1959) 51 Cal.2d 548, 557–558; see also § 1097.) Just as the default situation, until the burden of proof regarding guilt of an offense is met, is that the defendant is not guilty, the default in the case of degrees must be that the defendant guilty of a crime divided into degrees is guilty of the lesser degree unless and until sufficient proof of the

greater degree persuades the jury beyond a reasonable doubt. In recognition of this principle, section 1157 provides that, if the fact-finder fails to determine the degree of an offense, "the degree . . . shall be deemed to be of the lesser degree."

CALCRIM No. 521 also effectuates that precept. It begins by telling the jury that, if it finds that the defendant has committed murder, it must determine the degree; instructs that the defendant is guilty of first-degree murder if the prosecution has proven specified elements pertaining to the theory at issue; states, "All other murders are of the second degree," and concludes,

> The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the people have not met this burden, you must find the defendant not guilty of first degree murder.

These are the principles under which appellant's jury should have been instructed, but it was not.

2. CALJIC No. 8.71 Shifted the Burden of Proof

Appellant's jury was never affirmatively told that, if it found appellant guilty of murder, it could return a first-degree verdict only if it unanimously found that the elements of murder in that degree had been proven beyond a reasonable doubt. It was given only CALJIC No. 8.71's negative statement of this principle, which treats a first-degree finding as the default verdict and states the circumstance under which a jury should deviate from it. In CALJIC's typically prolix and confusing style, the instruction consists of a single 79-word sentence, containing three complete clauses, two of which were compound:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the

> first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree as well as a verdict of not guilty of murder in the first degree.

(CT 9: 2671; see also RT 11: 2352.) What this boiled down to—for anyone with enough of a legal mind to understand it—was that if the jurors found murder but unanimously had a doubt as to its being of the first degree, the crime was of the second degree.

While the instruction had some language benefitting appellant, it failed to state the requirements for a first-degree verdict. Its primary effect was to foreshadow the acquittal-first rule, soon to be stated in CALJIC No. 17.10 (see Part C, below): that second-degree murder could only be found after first-degree murder was unanimously ruled out. Because it did so in the context of explaining how to determine the degree, however, an unintended consequence was to shift the burden of proof. Rather than the prosecution having to eliminate every reasonable doubt that the crime was of the first degree, the instruction stated, in effect, that the jury had to *find* a doubt in order to *make* the crime of the second degree. That implied that the default finding was first-degree murder. And if the jury had to be convinced of a doubt to reduce the charge, the further implication was that the defendant was the party to do the convincing, by raising one.

3. The Burden-Shifting Implications Were Buttressed by the Language Referring to a Unanimous Finding, Rather than Stating a Rule of Law Which Each Juror Had to Follow

There was a related but different problematic effect created by the inclusion of the unanimity requirement in an instruction intended primarily to state law, not procedure. The majority of the instructions provided to appellant's jury simply stated applicable rules of law (or principles for evaluating evidence). "Homicide is the killing of one human being by

another, either lawfully or unlawfully." (CT 9: 2668–2669 [CALJIC No. 8.00].) Or, "Do not assume to be true any insinuation suggested by a question asked a witness." (CT 9: 2661 [CALJIC No. 1.02].) Some used the second-person pronoun, but in a way that could be interpreted as singular, consistent with each juror's duty to arrive at an individual judgment. "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, . . . [etc.], it is murder of the first degree." (CT 9: 2670 [CALJIC No. 8.20].)

In contrast, CALJIC No. 8.71 told the jury as a whole that *it* would have to give appellant the benefit of the doubt as to degree if *it* unanimously agreed it had such a doubt. This was true but, without more, it was also grossly misleading. Equally true, more important, and yet omitted, was that an individual juror with such a doubt was obligated to give appellant the benefit of any doubt and vote to acquit of first-degree murder, regardless of what his or her colleagues decided. The instruction stated a need for a collective finding rather than appellant's right to each juror's individual judgment. While there was no need to reiterate each juror's duty every time a new legal principle was explained, none should have been encapsulated in a misleading statement that applied it only under conditions of unanimity.

An instruction regarding the prosecution's burden of proof is infirm if there is a reasonable likelihood that a juror could understand it to permit a lower standard of proof than that contemplated by *In re Winship*. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) This standard requires "more than speculation" that an instruction could somehow have been interpreted as requiring less than proof beyond a reasonable doubt, but it does not require that such an understanding be "more likely than not." (*Boyde v. California* (1990) 494 U.S. 370, 380; see also *Victor v. Nebraska*, *supra*, 511 U.S. at p. 6 [citing the discussion of *Boyde* in *Estelle v. McGuire* (1991) 502 U.S.

62, 72 & n. 4].) Clearly there was a reasonable likelihood that jurors understood the instruction to mean that the starting point, if there was murder at all, was first-degree murder and that only a unanimous jury could cause a retreat from that finding.

4. The Instruction Was a Biased Formulation

Even without the burden-shifting implications, the instruction violated this Court's decades-old admonition that applicable "rules of law . . . should not [be] stated exclusively from the viewpoint of the prosecution." (*People v. Moore* (1954) 43 Cal.2d 517, 526, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158.) *Moore* and *Hatchett* found violations of this principle, which is clearly rooted in due process, in instructions which

> [did] not incorrectly state the law, but [which] stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [the obverse of what they stated], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows.

(*Ibid.*, still quoting *People v. Hatchett.*) The biased formulation of CALJIC No. 8.71 was in itself a violation of due process and the Eighth Amendment.

5. The Instruction Violated Due Process and the Eighth Amendment

There were, therefore, three related defects in the instruction: the direct tendency to shift the burden of proof by stating how a second-degree verdict would be reached, rather than what was required to produce a first-degree verdict, the reinforcement of this tendency by wrapping the principle involved in a restated unanimity requirement instead of presenting a straightforward statement of the rule itself, and the usual biases inherent in

stating a rule from the point of view of the prosecution. Separately, and certainly together, they violated the federal due process requirement that the state place on the prosecution the burden of proving every element of an offense beyond a reasonable doubt. Even if they did not, they most certainly created such a risk of confusing that issue that they violated the Eighth Amendment's requirement of heightened reliability at each stage of a proceeding that can produce a death verdict.

The prejudicial impact of the error will be explained after a related error is analyzed.

C. Forbidding the Jury to Return a Second-degree Murder Verdict Unless it Could Unanimously Acquit Appellant of First-degree Murder Created an Unacceptable Risk of Coercing Jurors with Doubts Regarding Premeditation, Deliberation, and Pre-existing Intent to Steal

Appellant's jury was also told directly that it could return a second-degree verdict only after unanimous agreement that guilt of first-degree murder had not been shown. As this Court has observed in a related context, the "acquittal-first" directive can give a minority juror—convinced of guilt of murder but with doubts about the greater degree—the coercive pressure of an all-or-nothing choice. The juror must take responsibility for a complete mistrial or go along with the majority so that the matter can come to a conclusion. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1077, fn. 7.)

The trial court instructed appellant's jury that the crime of second-degree murder was lesser to that of first-degree murder, and that grand and petty theft were lesser to robbery. (RT 11: 2363.) Then it instructed, in the language of CALJIC No. 17.10, that "the Court cannot accept a guilty

verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime."[88] (RT 11: 2363; CT 9: 2676.)

Challenges to such instructions have been summarily rejected by this Court, without discussion of the claim presented here,[89] but the Court has also acknowledged that the acquittal-first rule is not required by law. (See *People v. Fields* (1996) 13 Cal.4th 289, 304.) Because the Eighth Amendment tolerates no procedures enhancing the risk of an unreliable finding of guilt of a capital offense (*Beck v. Alabama*, *supra*, 447 U.S. 625, 637), and because there are other means—well-tested in many other jurisdictions—to guard the interests which the instruction seeks to protect, the giving of the instruction was error. It was prejudicial because, clearly, a rational juror could have doubted that any element elevating either murder to the first degree was proven.

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[88]The entire instruction read:

> Thus, you are to determine whether the defendant is guilty or not guilty of the crimes charged in Counts I, II, III, and IV or of any lesser crimes. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the Court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime.

(RT 11: 2363.)

[89]See Section C.3 of this argument, beginning at page 167, below.

1. The Acquittal-First Rule Was Adopted to Protect Defendants From a Different Problem, Which Other Jurisdictions Handle By Other Means

a. This Court Was Not Faced with the Effect on the Jury When it Adopted the Current Rule

The acquittal-first rule was developed, in 1982, in a procedural setting where neither constitutional issues nor concerns about the impact on jury deliberations were before this Court; its gaze was understandably elsewhere. In *Stone v. Superior Court* (1982) 31 Cal.3d 503, the Court announced a prospective rule regarding "partial verdicts," i.e., verdicts which dispose of those charges, in a lesser/greater-offense hierarchy, on which a jury can agree, when there are others on which they disagree. It refined it in *People v. Kurtzman* (1988) 46 Cal3d 322. The *Stone* court fashioned the rule to solve a double-jeopardy problem, and issues, like those raised here, of the effect on the deliberative process were not addressed. Moreover, both *Stone* and *Kurtzman* were non-capital cases. In *Stone*, the Court held that a jury which agrees on a not-guilty verdict on a greater offense but cannot reach agreement on a lesser charge must be given the opportunity to render a partial verdict of acquittal of the greater charge. This prevents the defendant from again being placed in jeopardy on a charge on which 12 jurors found the evidence in the first trial insufficient. (31 Cal.3d at pp. 516–519.)

The *Stone* Court then set forth a procedure which has consequences not recognized then and which are being challenged here. Explicitly recognizing that it was crafting a judicially-created rule of procedure (*Stone*, *supra*, 31 Cal.3d at p. 519, fn. 9; see also *People v. Fields*, *supra*, 13 Cal.4th at p. 304), the Court "suggest[ed]" two means of providing the required partial-verdict opportunity. The trial court could supply verdict forms for guilty and not-guilty verdicts for each offense, while instructing

that the jury should use the lesser-offense forms only if it acquits of the greater offense. (31 Cal.3d at p. 519.) Alternatively, the court could wait to see whether inability to reach a verdict arises. If so, "the court should then inquire whether the jury has been able to eliminate any offense." (*Ibid.*) If such inquiry revealed a hopeless deadlock on the lesser offense but readiness to acquit of the greater, the court was to enter a not-guilty verdict on the greater offense. (*Id.* at pp. 519–520.)

Kurtzman dealt with the reverse situation, where the jury was having difficulty agreeing on a verdict on the greater offense, and held that a jury should not be prevented from *considering* lesser offenses before agreeing on the greater, even though they could not *return a verdict* on a lesser offense without acquitting of the greater. (*People v. Kurtzman*, *supra*, 46 Cal.3d at p. 329.) The reason was the need to refrain from unnecessarily influencing the deliberations by exerting control over their sequence. (46 Cal.3d at pp. 331, 332.) *Kurtzman* rejected an invitation to return to pre-*Stone* law, noting that it was unclear what pre-*Stone* law was and finding that purported juror "discomfort" in the *Stone* order of verdicts, without more, to be an insufficient basis for changing the rule. (46 Cal.3d at p. 331–333.) It noted, with numerous citations, considerable disagreement among various jurisdictions as to how to handle the problem but refrained from entering the debate, "as our rule . . . seems adequate to protect both the defendant's interest in not improperly restricting the jury's deliberations and the People's interest in requiring the jury to grapple with the prospect of defendant's guilt of the greatest offense charged." (*Id.* at pp. 333–334, quotation on 334.)

b. The *Stone-Kurtzman* Rule Is One Solution Out of Several

As *Kurtzman* acknowledged, the rule crafted in *Stone* and *Kurtzman* is by no means the only way of handling the issues which it addresses. The Nevada Supreme Court has classified the methods employed in this country:

> A "transition" instruction guides jurors in proceeding from the consideration of a primary charged offense to the consideration of a lesser-included offense. Other jurisdictions are split on the appropriate form of a transition instruction. There are four different approaches. The first approach is to give an "acquittal first" instruction, requiring unanimous agreement on acquittal as to the primary charged offense before the jurors may proceed to deliberations on the lesser-included offense. . . . The second approach is to give a modified "acquittal first" instruction, permitting the jurors to consider both the greater and lesser offenses in whichever order they choose, but requiring that they unanimously acquit the defendant of the charged offense before returning a verdict on a lesser-included offense.[90] The third approach is to instruct the jurors that they may consider a lesser-included offense if they have reasonably tried, but failed, to reach a verdict on the primary charge. . . . The fourth . . . [or] "optional approach" permits the defendant to choose between the "acquittal first" and the "unable to agree" instructions. However, if the defendant does not affirmatively choose one of those instructions, the trial court may properly use either transition instruction.

(*Green v. State* (Nev. 2003) 80 P.3d 93, 95.) Apparently the third alternative is the most common. "[T]he weight of authority supports giving [a reasonable-efforts] instruction, at least when the defendant requests it."[91]

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[90]The court cited California and Alaska authorities as examples.

[91]Those jurisdictions which give the defendant a choice emphasize that which side is advantaged by an acquittal-first instruction depends on the tactical situation in the trial. In some situations the defendant might receive

(continued...)

(Pattern Jury Instructions for the Tenth Circuit (2005) Comment to Criminal Instruction No. 1.33, quoted in (O'Malley, Grenig, & Lee, 1A Federal Jury Practice and Instructions (6th ed. 2008) p. 898.) The utility of alternative approaches is discussed in section C.2.c, page 163, below, as well as in the footnote on this page. Here the point is that the acquittal-first rule is not the only procedure available, meaning that it can be jettisoned if it creates unique problems, which the next section of this argument shows that it does.

2. The Unnecessarily Increased Risk of an Erroneous Verdict Under an Acquittal-First Instruction Renders it Unacceptable, Particularly in a Capital Case

a. An Acquittal-First Rule Will Coerce Some Juries

As noted above, this Court has already recognized that instructions under *Stone* and *Kurtzman* carry a risk of a coercive impact. "'If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the

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[91](...continued)
a full acquittal instead of a conviction on a lesser charge. In others, there might be an unjustified conviction of a greater charge to avoid setting a defendant who is clearly guilty of something free. "Since 'the worst that can happen to the Government under the less rigorous instruction is his [defendant's] readier conviction for a lesser rather than a greater crime,' and uncertainties in the enforcement of a penal code should be resolved against the harsher punishment, . . . if the defendant seasonably expresses a preference for the alternative instruction, the district court should give that form of instruction." (*Catches v. United States* (8th Cir. 1978) 582 F.2d 453, 459, citation omitted; bracketed expression in original; accord, *Jones v. United States* (D.C. App. 1993) 620 A.2d 249, 652.)

Other jurisdictions favor a uniform rule and, because of the jury-coercion potential of any acquittal-first instruction, require a reasonable-efforts instruction regardless of the defendant's preference. (E.g., *State v. Labanowski* (Wash. 1991) 816 P.2d 26, 35.)

defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge.'"[92] (*People v. Berryman*, *supra*, 6 Cal.4th 1048, 1077, fn. 7, quoting Judge Friendly's opinion for the court in *United States v. Tsanas* (2d Cir. 1978) 572 F.2d 340, 346, cert. den. 435 U.S. 995.)

Put differently, there is a risk of the defendant "being convicted on the greater charge just because the jury wishes to avoid a mistrial . . . ." (*United States v. Tsanas*, *supra*, 572 F.2d at p. 346; see also *Jones v. United States*, *supra*, 620 A.2d 249, 252 ["faced with a choice between a conviction on the greater offense and no conviction at all, jurors who might have preferred to convict only on a lesser offense may go along with . . .a majority"]; cf. *Lindsey v. State* (Ala. Crim. App. 1983) 456 So.2d 383, 388 [early declaration of a mistrial, where jury split 11-1 in a capital case, was preferable to instructing jury to deliberate further under an acquittal-first instruction, which could have been coercive].)

The Ninth Circuit has observed that allowing the option of a reasonable-efforts instruction derives support from the same considerations that require the giving of lesser-included-offense instructions in the first place in an appropriate case. "Such an instruction [on lesser charges] 'ensures that the jury will accord the defendant the full benefit of the

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[92]The context of this observation explains why it did not doom the instruction at the time. The Court was merely explaining, in dictum, why it might be difficult to determine whether any error was prejudicial in a particular case, because of the varying tactical situations in which, as noted above (p. 156, fn. 91), an acquittal-first instruction will sometimes favor one party, sometimes the other. (*People v. Berryman*, *supra*, 6 Cal.4th 1048, 1077, fn. 7.) Moreover, this Court's prior consideration of the issue, like that of most courts that have addressed it, focused on balancing the interests of the prosecution and the defense generally, without reference to the Eighth Amendment mandate that states avoid exposing capital defendants to a risk of an unreliable result. (See *People v. Kurtzman*, *supra*, 46 Cal.3d at p. 344.)

reasonable-doubt standard.' *Beck v. Alabama*, 447 U.S. 625, 634 . . . (1980)." (*United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, 1470.) The court in *Jackson* noted that *Keeble v. United States* (1973) 412 U.S. 205 required the giving of instructions on lesser offenses because defendant "should not be exposed to the substantial risk that the jury's practice will diverge from theory," which says it should acquit of the charged offense even if that means setting the defendant free if not every element is proven beyond a reasonable doubt. (*Ibid.*, quoting 412 U.S. at pp. 212–213.) Parenthetically, "[t]he Court in *Beck* [*v. Alabama*, *supra*]," too, "recognized that the jury's role in the criminal process is essentially unreviewable and not always rational." (*Spaziano v. Florida* (1984) 468 U.S. 447, 455.) The risk that *Keeble* sought to avoid—that "the jury is likely to resolve its doubts in favor of conviction" where the defendant is clearly guilty of *something* even if an element of the charged offense is in doubt—is also created in that situation by a rule that requires a mistrial if not all agree on the greater offense. (*United States v. Jackson*, *supra*, 726 F.2d at p. 1470, quoting 412 U.S. at pp. 212–213.) The Arizona Supreme Court, in an opinion abandoning the acquittal-first rule because of coercion concerns, pointed out that minority jurors could fear that hanging the jury could actually "permit a guilty person to go free" at some point. (*State v. LeBlanc* (Ariz. 1996) 924 P.2d 441, 442.)

Even if a juror understands that the only issue is a retrial, by the time appellants' jurors would have encountered that concern, they would likely have been aware of the abstract issues of taxpayer expense and scarce courtroom time. Worse, a mistrial over the possibly-technical-seeming issue of degree of the offense would

- turn the weeks their colleagues had given up for the trial into a waste;

- force more fellow citizens to not only give up time, but see a gruesome videotape and photographic exhibits and hear testimony that was alternately horrifying or remarkably tedious (in the case of the extensive DNA and chain-of-custody testimony); and
- make witnesses like the neighbors who discovered Fred Jenks's body in a pool of blood,[93] the now grievously ill and apparently dying man who had purportedly taken appellant to a casino,[94] and Shirley Jenks's grieving sister[95] come back in to testify.

Such dynamics caused the Louisiana Supreme Court to reverse a death sentence in *State v. Williams* (La. 1980) 392 So.2d 619, albeit in a different situation. The jurors had not been informed that an inability to agree unanimously on penalty would end the proceedings with a sentence of life without parole. This permitted them to think that a new trial would be required, a belief that "reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings." (*Id.* at p. 634.) Creating that possibility undermined the reliability required of a death-sentencing determination, and the court reversed. (*Id.* at pp. 634–635.) The same result should obtain here.

New Jersey law gives rise to a situation analogous to the degree-determination duty of California jurors, and that state's Supreme Court has

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[93]See the testimony of Susan Jennings (RT 5: 1078 et seq., 1086 et seq.)

[94]See the testimony of Oscar Galloway. (RT 10: 2207 et seq.)

[95]At the guilt phase, Billie Lou Hazelum identified some of her sister's pawned jewelry. (RT 10: 2113 et seq.)

adopted a rule like Louisiana's, for the same reason. In that jurisdiction there are different kinds of murder, some of which are death eligible, while some are not. In order to avoid coercing the minority, in a divided jury, into returning a verdict on a death-eligible form of murder, a trial court must tell the jury that failure to agree on the death-eligible offense will result in a verdict on the non-death-eligible one. As to the sequence of deliberations, first the jury is to decide if a murder was committed at all, then turn to the issue of whether it was, e.g., committed personally, which would make it a capital offense. The theory is that if murder is proved but not all the elements of the death-eligible form are, then the lesser verdict should be accepted. Significantly, this reasoning is based on the qualitative difference between capital cases and all others, in a state which allows an acquittal-first instruction in all other lesser-offense contexts. (*State v. Brown* (N.J. 1994) 651 A.2d 19, 32–39; see also *State v. Josephs* (N.J. 2002) 803 A.2d 1074, 1098–1105; *State v. Feaster* (N.J. 1998) 716 A.2d 395, 410–417.)

Admittedly, authorities like those cited above, including the California cases, have to rely more on imagining the likely impact of the alternatives on juries than on actual knowledge. This is true, however, of virtually all evidentiary, procedural, and instructional rules adopted to protect litigation outcomes from juror error. We do not *know* that jurors would fail to evaluate hearsay testimony with a very large grain of salt, or that evidence that seems to have a prejudicial effect outweighing its probative value would in fact prejudice the jury. In the area at hand there is, however, empirical evidence that in general a significant number of minority jurors eventually go along with the majority because they want to avoid a hung jury. (*State v. Allen* (Ore.1986) 717 P.2d 1178, 1180–1181.) In one study about 16% fit that category, about 7% changed their votes for

other reasons, and about 16% stuck to their guns. (*Ibid.*) Whatever dynamics create this effect, some are unavoidable. But this Court, like the Oregon Supreme Court, which adopted a reasonable-efforts instruction in *Allen*, should at least avoid heightening the effect through the acquittal-first rule.

b. This Court Has Already Acknowledged the Coercive Risk, Without Having Reached the Implications of That Fact

Appellant introduced this section by pointing out the acknowledgment in *People v. Berryman* that in some situations minority jurors will "throw in the sponge" under an acquittal-first rule. In observing how it might be difficult to determine whether an erroneous instruction was prejudicial, *Berryman* explained in detail how an acquittal-first instruction could advantage either side, depending on the state of deliberations, concluding that, "in the abstract, an acquittal-first instruction appears capable of either helping or harming either the People or the defendant." (*People v. Berryman*, *supra*, 6 Cal.4th at p. 1077, fn. 7.) But that it is capable of "harming . . . the defendant" by creating a risk of a dissenter's caving in to pressure to not create a mistrial makes it unacceptable under the Eighth Amendment. (See *Beck v. Alabama*, *supra*, 447 U.S. 625, 638 & fn. 13; *Lockett v. Ohio*, *supra*, 438 U.S. 586, 605.) The class of criminal defendants is not a collective entity. The fact that other defendants might theoretically avoid any conviction at all—at least until there is a retrial—under an acquittal-first rule does not help the defendant who effectively lost the safeguard of jury unanimity because the dynamics of his or her jury created the "throw-in-the-sponge" effect. Someone who gets caught in a downpour after trusting a forecast of a 10% chance of rain is no less soaked just because the forecast was accurate. In any event, the United

States Supreme Court confronted a similar situation in *Beck v. Alabama*, *supra*. "In any particular case, " the Court acknowledged, the extraneous influences on a jury (caused, there, by failing to instruct on lesser offenses) "may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." (477 U.S. at p. 643.)

Indeed, the very term used by the High Court in describing what the Eighth Amendment prohibits, an increased "risk" of error (e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625, 638), implies not certainty that every defendant will be affected, but a probabilistic assessment that some will be. This is what is not tolerated under the Eighth Amendment. It is also what this Court, like so many others, has recognized to be a result of the acquittal-first rule.

c. There Are Other Means for Protecting the Interests Recognized by *Stone* and *Kurtzman*

(1) Alternatives for Protecting the Prosecution's Interests

The United States Supreme Court's precedents banning enhancing the risk of unreliability in capital proceedings do not include the qualifier "unnecessarily," but it is worth noting that there are less burdensome alternatives for meeting the policy goals to which this Court was attuned when it first faced the issue of transition instructions. The original issue, it will be recalled, was the need to get on the record for a defendant a jury's determination—if it existed—that the prosecution failed to prove the greater crime. (*Stone v. Superior Court*, *supra*, 31 Cal.3d at pp. 516–519.). Different circumstances later led the Court to also recognize "the defendant's interest in not improperly restricting the jury's deliberations

and the People's interest in requiring the jury to grapple with the prospect of defendant's guilt of the greatest offense charged." (*People v. Kurtzman*, *supra*, 46 Cal.3d at p. 334.) But the national debate which the *Kurtzman* court had no need to enter (*ibid.*) discloses that these interests can be accommodated without the acquittal-first rule.

Arizona experimented for a time with a rule like California's—barring returning a verdict on a lesser-included offense before unanimity on acquittal of the greater charge—but abandoned it in *State v. LeBlanc*, *supra*, 924 P.2d 441. Addressing the prosecutorial interest which the *Kurtzman* court recognized, it observed, "because [a reasonable-efforts] instruction would mandate that the jury give diligent consideration to the most serious crime first, the state's interest in a full and fair adjudication of the charged offense is adequately protected." (*Id.* at p. 443.) It rejected an argument to the contrary, noting that jurors are presumed to follow instructions, that experience shows that "they possess both common sense and a strong desire to properly perform their duties," and that modern theory emphasizes treating jurors as "responsible adults" and not "attempting to micromanage their discussions and deliberations." (*Ibid.*)

California is not so far from this approach, in related areas like special circumstances and enhancements. It has no difficulty trusting juries to first determine whether a defendant is guilty of murder, then to consider the truth of special-circumstances allegations. If *Stone's* approach were required to ensure that the jury would give the prosecution a fair shake in considering its most serious charges rather than compromising on a lesser form of the offense, a jury would be told it could not return a murder verdict at all if it was unable to agree whether the special circumstances were proved. Such a rule would be considered ludicrous, but it is exactly what we require on the matter of degree.

From this perspective, the consider-the-greater-offense-first sequence has nothing to recommend it over an opposite rule, one like the New Jersey approach mentioned previously (p. 160, above). California juries could just as well be told to consider whether the least elements of murder (an unlawful intentional killing, with malice) have been shown. If a jury finds that they have, then it could go on to consider whether facts elevating the degree of the offense to first have been proven, just as the final determination is whether special circumstances accompany a first-degree murder. Surely a jury could be trusted to follow this instruction, which deprives the prosecution of nothing that it should have under a system that presumes a defendant innocent. Appellant is not calling for this procedure; the point is simply that the acquittal-first rule, rejected for years in numerous jurisdictions,[96] is not required to get juries to give serious consideration to the charged offense. The current sequence is a solution adopted for the double-jeopardy problem, which was before the Court when it adopted the sequence, and it has nothing to recommend it over approaches that lack the risk of coercing minority jurors.

(2) Alternatives for Handling the Double-Jeopardy Issue

As to the double-jeopardy or related statutory issues which motivated this Court to adopt the acquittal-first rule, a problem could theoretically arise if a jury given a reasonable-efforts instruction returns a verdict of guilt on a lesser included offense. If the jury is silent on the greater offense, federal constitutional law requires treating the verdict as an implied acquittal of the greater, and the defendant may not be retried on that

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[96]See *People v. Kurtzman*, *supra*, 46 Cal.3d at pp. 333–334; Annotation, When Should Jury's Deliberation Proceed from Charged Offense to Lesser-Included Offense (1995) 26 ALR5th 603, and later cases (2008 supp.) p. 38.

charge. (*People v. Fields*, *supra*,13 Cal.4th 289, 300, citing *Green v. United States* (1957) 355 U.S. 184.) The doctrine does not apply, however, if it is known that the jury was deadlocked on the greater charge. (*Id.* at p. 302.) Thus the implied-acquittal issue can be avoided by the use of a verdict form requiring a jury which returned a guilty verdict on a lesser offense to also state whether it had found the defendant not guilty of the greater charge or was unable to agree.[97] (Ettinger, In Search of a Reasoned Approach to the Lesser Included Offense (1984) 50 Brooklyn L.Rev. 191, 224.)

Appellant is advocating more for abandonment of the acquittal-first rule than for a particular instruction among those adopted by other states. As the Court re-examines the problem, it may benefit from the particularly thoughtful analyses in *Green v. State*, *supra*, 80 P.3d 93 and *State v. Labanowski*, *supra*, 816 P.2d 26, 33–35, as well as the survey in Annotation, *supra*, 26 ALR5th 603.

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[97]Section 1023, which implements double-jeopardy protections, could also theoretically present a problem if the acquittal-first rule is abandoned. That provision, as interpreted by this Court, prevents retrial on the greater charge if a guilty verdict on the lesser is received by the court and recorded, and the jury is discharged. (*People v. Fields*, *supra*, 13 Cal.4th at pp. 305, 310–311.) However, this Court has already held that, where it is known that the jury is deadlocked on the greater charge, the prosecution's interests can be preserved by giving it the option—prior to recording the verdict and discharging the jury—to move for a mistrial and again seek conviction on the charged offense, or to move for dismissal of the greater offense and accept the verdict on the lesser. (*Id.* at p. 311.) In this scenario, the prosecution reaps the legitimate benefits of an acquittal-first rule. Even a prosecutor who has over-charged gets to have his or her cake and eat it, too, since there is no down-side risk of an unjustified complete acquittal.

3. This Court Has Yet to Analyze the Contention Presented Here

Challenges to the acquittal-first rule itself appear to have reached this Court periodically, but it has dismissed them summarily. The situation is one where by now respondent could collect authorities with broad language about constitutional challenges to the rule having been rejected and needing no reconsideration, yet fail to come up with a case actually analyzing such a challenge. Thus, in *People v. Jurado* (2006) 38 Cal.4th 72, it was stated that the Court has "repeatedly rejected" the contention that such an instruction "violated federal constitutional rights to due process and to a fair and reliable jury consideration of lesser included offenses in a capital case." (*Id.* at 125.) To the extent that any such challenges had ever been discussed on their merits, *Jurado* generally referred to contentions that the language of instructions literally left the jury with the impression that they could not even deliberate on (i.e., consider) lesser offenses before reaching a verdict of acquittal on a greater offense, in violation of *Kurtzman*.[98, 99]

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[98]There was one exception, *People v. Mickey* (1991) 54 Cal.3d 612, but it, too, is inapposite here. It summarily rejected a claim that an acquittal-first instruction somehow interfered with consideration of evidence on an element of the greater offense. (*Id.* at pp. 672–673.)

[99]*Jurado* relied on *People v. Nakahara* (2003) 30 Cal.4th 705, 715 (summary denial of claim that instructions violated constitutional right "to full consideration of all lesser offenses," for reasons not specified in opinion, because "we have frequently rejected this and similar contentions"). The following summary includes each case cited in the *Nakahara* opinion or its predecessors: *People v. Riel* (2000) 22 Cal.4th 1153, 1200–1201 (rejecting claim that instruction given ordered jury not to *consider* lessers before reaching verdict on charged offense); *People v. Dennis* (1998) 17 Cal.4th 468, 535–537 (same); *People v. Fields*, *supra*, 13 Cal.4th 289, 308–311 (dealing with consequences of guilty verdict on lesser received by jury deadlocked on greater offense, in violation of acquittal-first rule); *People v. Berryman*, *supra*, 6 Cal.4th 1048, 1076–1077 (instructions did not preclude consideration of (continued...)

In any event, the nature of the challenge in *Jurado* was not stated and may have been different from that here. A court's use of broad language in rejecting a challenge on one basis is not, of course, an implicit rejection of all future challenges on unanticipated bases. "[A]n appellate court's opinion is not authority for propositions the court did not consider or on questions it never decided." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.)

D. Each Instruction Exacerbated the Problem Created by the Other

In addition to the individual infirmities of the two instructions challenged here, each one actually heightened the problem created by the other. As explained above, CALJIC No. 8.71 inverted a positive statement of the correct rule regarding determining the degree of a murder, effectively telling the jury that it had to make a collective finding that a doubt existed in order to rule out first-degree murder, as if first-degree were the default verdict if there was a murder at all. CALJIC No. 17.10 put unnecessary pressure on any jurors with doubts as to the degree by telling them that there could be no verdict at all if they could not see their way to voting with the majority.

CALJIC No. 8.71 fit right into No. 17.10's coercive slant, for it told the jury as a whole that *it* would have to give appellant the benefit of the doubt as to degree if it unanimously agreed it had such a doubt. (See text of the instruction at p. 148, above.) Where it should have been one of the instructions that could ameliorate the coercive effect of the acquittal-first rule, by stating that a juror with a doubt as to degree could not vote for a

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[99](...continued)
lessers before acquitting on greater offense); *People v. Adcox* (1988) 47 Cal.3d 207, 241–242 (same).

first-degree verdict,[100] instead it reinforced it with an incomplete—and therefore misleading— statement of the circumstance that would occasion appellant's receiving the benefit of any doubt as to degree. Minority jurors, as well as those who would dissuade them from their stance, were told that the doubts of those who harbored them would affect the degree determination only in the unlikely event that they could win over all of their colleagues. Again, the push was to go along with the majority so there could be a verdict of *some* kind against a defendant whom all agreed was guilty of murder.

The picture is, unfortunately, symmetrical: CALJIC No. 17.10 also incidentally exacerbated the basic problem with No. 8.71. Its statement of the acquittal-first rule, considered in light of No. 8.71's focus on seeing if a doubt could be found to exist, rather on determining if the prosecution had met its burden of proof beyond a reasonable doubt, reinforced the impression that if murder was proven, the default finding was of murder in the first degree. For it stated directly that a second-degree verdict could be returned only if first-degree was unanimously rejected. Unlike, say, the use of a reasonable-efforts instruction to effectuate the prosecution's interest in having the jury see if it could reach a verdict on the greater charge, the acquittal-first rule made the greater charge the starting point, which could be retreated from (to a second-degree verdict) only if a unanimous jury decided such a retreat was appropriate.

The damage done by each instruction was, therefore, considerably intensified by the other.

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[100]The court did give CALJIC No. 17.40, a general statement that the parties were entitled to the individual opinion of each juror, which was not to be changed solely to go along with a majority. (RT 11: 2468–2469.)

E. The Instructional Errors Were Prejudicial

Individually and together, the errors introduced by use of CALJIC Nos. 8.71 and 17.10 were prejudicial.

1. Use of CALJIC No. 8.71 Requires Reversal

Appellant submits that the use of CALJIC No. 8.71, because of its effect on the reliability of the verdict and its tendency to shift the burden of proof—alone and as No. 17.10 reinforced a burden-shifting interpretation of it for the jury—created error which is reversible per se. Reversal on the two murder counts to which it applied is therefore required.[101] Even if the Court only concludes that the instruction should be disfavored but does automatically reach the level of a constitutional violation in and of itself, it did so here.

In other cases there might not be a reasonable likelihood of the instruction being understood to shift the burden (see *Victor v. Nebraska* (1994) 511 U.S. 1, 6), given the general instructions on the prosecution's burden, despite the dangerously clear burden-shifting implications. Here, however, the trial court exercised its option, under *People v. Stone*, *supra*, 31 Cal.3d at p. 519, to directly instruct on the acquittal-first rule at the beginning of deliberations, in a manner which—as explained above—reinforces the burden-shifting interpretation of CALJIC No. 8.71. And it did so in the context of all the other instructions and other actions which eroded the reasonable-doubt standard: the special emphasis on the

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[101]An infirm instruction regarding the prosecution's burden of proof is not subject to harmless-error analysis. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) If the instruction were not a *Winship* violation, because of its violation of the Eighth Amendment reliability requirement, it would still compel reversal without further analysis. (See *Beck v. Alabama*, *supra*, 477 U.S. 625, 645–646 [reversing without a prejudice analysis]; see also *People v. Berryman*, *supra*, 6 Cal.4th 1048, 1077, fn. 7 [impossibility of determining effect in a particular case].)

validity of a circumstantial case, the use of the infirm raspberry-pie example to illustrate that point, the attorneys' comments on reasonable doubt, the misleading instructions on how to determine if a robbery took place, and various actions giving the appearance of a judicial bias.

The more general due-process error of a prosecution-tilted instruction, if it stood alone, would be analyzed under *Chapman v. California* (1967) 386 U.S. 18, but there is not a record from which respondent can demonstrate beyond a reasonable doubt that no juror was affected. Rather, as explained in Argument I, above, this is absolutely not a case where it could be said that no rational juror could have doubted the existence of an essential element of first-degree murder.

2. Use of CALJIC No. 17.10 Requires Reversal

Similarly, the use of the potentially coercive acquittal-first instruction—again, alone and as intensified by No 8.71's fatally incomplete statement of who must give the defendant any doubt as to degree (i.e., only a unanimous jury)—must be treated as reversible per se, at least under the unique circumstances of this case, as described under the previous heading.[102]

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[102]The instructional error was one affecting the structural integrity of the deliberative process. (See *Arizona v. Fulminante* (1991) 499 U S 279, 309–310, *People v. Cahill* (1993) 5 Ca1.4th 478, 493, 501–502) Indeed, it was close to the prototypical example of such an error, a biased fact-finder, as it did introduce a bias into any minority juror's deliberative process. Moreover, it shares with other "structural" errors a lack of susceptibility to harmless-error analysis. As noted previously, "the jury's role in the criminal process is essentially unreviewable" in general (*Spaziano v. Florida*, *supra*, 468 U.S. 447, 455), and the effect of an acquittal-first instruction on a particular jury is unknowable (*People v. Berryman*, *supra*, 6 Cal.4th at p. 1077, fn. 7; see also *People v. Kurtzman* (1988) 46 Cal.3d 322, 336, fn. 14 [evidence on how transition instruction affected deliberations in a particular case is inadmissible]). In addition, as with CALJIC No. 8.71, viewing the instruction (continued...)

Again, if the Court only disapproves the instruction because of a potentially coercive effect that may not be great enough to amount to error in every case, it should still reverse here. All the circumstances noted three paragraphs above apply to understanding the pro-prosecution context in the instruction added further pressure on minority jurors. Certainly nothing in the instructional package negated the acquittal-first rule. It was one which the prosecution restated three times in argument. (RT 11: 2466.) Finally, as explained previously, the factors which, in the abstract, could create pressure to avoid putting others through the material and psychic costs of a retrial were certainly present at a high level here. It would be respondent's burden to show the giving of the instruction to have been harmless beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. 18), i.e., to show that the error was not one which "might have contributed to" jurors voting the way they did (*id.* at p. 23), one "which possibly influenced the jury adversely . . ." (*ibid.*). This Court has explained in detail why the impact of instructional error in this area cannot be known, so it is a burden which respondent cannot meet.[103] The first-degree murder judgments must be

[102](...continued)
through the lens of its introduction of unreliability into the proceedings also means that the verdicts that permitted a death sentence cannot stand. (U.S. Const., 8th Amend.; *Beck v. Alabama*, *supra*, 477 U.S. 625, 645–646 [reversal without harmlessness analysis for guilt-phase unreliability in a death case].)

[103]After explaining how error could advantage either side, depending on the state of deliberations, this Court concluded, "[I]n the abstract, an acquittal-first instruction appears capable of either helping or harming either the People or the defendant. In any given case, however, it will likely be a matter of pure conjecture whether the instruction had any effect, whom it affected, and what the effect was." (*People v. Berryman*, *supra*, 6 Cal.4th at p. 1077, fn. 7.) The Court later characterized this discussion as "suggesting inherent difficulty in demonstrating prejudice from *Stone/Kurtzman* instructional error." (*People v. Fields*, *supra*, 13 Cal.4th 289, 309, fn. 7.) This is a fair characterization of
(continued...)

reversed because of the acquittal-first instruction as well. Moreover, since even under the Due Process Clause of the Fourteenth Amendment the acquittal-first pressure should not be applied in any criminal case, the verdict of robbery (as opposed to theft) on Count III must also be reversed.

3. The Combined Impact of the Two Instructions Requires Reversal

Appellant has explained how the particular wording of the acquittal-first instruction reinforced the burden-shifting implications of the instruction on how to determine the degree of murder. He has also explained how the latter instruction strengthened the coercive impact of the former. These contentions went to the issue of whether each instruction, in the context of the entire instructional package, introduced error into the proceedings.

In a different way, the two instructions were synergistic in their prejudicial impact, as well. One tended to mislead the jury as to how to determine the matter of degree; the other tended to coerce minority jurors with doubts on that issue. Even if both errors were susceptible to a harmlessness analysis, and neither alone were deemed prejudicial, together, and in the climate created by other judicial and prosecutorial actions at this trial, they put too much weight on the prosecution's side of the scale, and the first-degree murder verdicts cannot stand.

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[103](...continued)
Berryman's emphasis, but the sword cuts both ways. Demonstrating harmlessness, which is what would be required here, is no more possible than demonstrating prejudice.

VIII. THE GIVING OF A BIASED CONSCIOUSNESS-OF-GUILT INSTRUCTION, ON A FLIMSY FACTUAL BASIS, WAS PREJUDICIAL ERROR[104]

Appellant told investigators who asked to see his hatchet that he had lost it, apparently in a recent move. Diana Williams testified that she had seen it since. Because of these facts, the trial court instructed appellant's jury, in the language of CALJIC No. 2.03, that if it found that appellant made a willfully false statement regarding the crimes at issue, the statement could be considered a circumstance tending to prove consciousness of guilt.[105] (RT 11: 2337.) The instruction was biased and argumentative. Contrary to established principles, it singled out the credibility of a single person, there being no comparable instruction on the trial testimony of the witnesses testifying against appellant. Moreover, nothing in it pointed to appellant's cooperation with authorities the various times they wanted to interview him and search his apartment, as a circumstance tending to prove the state of mind of one who has nothing to hide. In addition, the only basis which the prosecution offered for giving the instruction was exceedingly flimsy, so its effect was to add weight to evidence which intrinsically lacked it. Finally, because an innocent person could also give an evasive or

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[104]This argument raises a claim that, at the highest level of abstraction, can be said to have been rejected by this Court. However, it is not a "generic" claim presented primarily to preserve it for federal review. (Cf. *People v. Schmeck* (2005) 37 Cal.4th 240, 303–304.) Appellant vigorously advocates its reconsideration, based on additional reasoning and the particular circumstances of this case.

[105]"If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." (RT 11: 2337.)

false answer to homicide detectives who awakened him at 3:00 a.m. to ask, among other things, about a possible murder weapon, the permissive inference encouraged by the instruction failed federal constitutional standards regarding the required degree of confidence in the rationality of the inference. In each of these ways, in the circumstances of this trial, it prejudicially violated appellant's rights to due process and to a reliable determination of guilt in a capital case. (U.S. Const., 8th & 14th Amends.) In conjunction with other errors, at least, it was prejudicial.

A. It Is Error to Give Biased, Argumentative, or Even Inapplicable Instructions

"There should be absolute impartiality as between the People and the defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526–527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.)

This principle bars, among other things, argumentative instructions. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) Argumentative instructions are those that "'. . . invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*Ibid.*, quoting *People v. Mickey* (1991) 54 Cal.3d 612, 697.) The vice of typical argumentative instructions is that they present the jury with partisan comment on evidence wrapped up in a statement of a correct principle of law. (See generally *People v. Wright* (1988) 45 Cal.3d 1126, 1135.) Even if they are neutrally phrased (by referring to the presence or absence of evidence on an issue), instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870 [proposed instruction listing factors jury "may consider"]) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative. Argumentative instructions

unfairly "singl[e] out and bring[] into prominence before the jury certain isolated facts . . . , thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Similarly, "[i]t is improper . . . for the court to single out a particular witness in an instruction, since by so doing the court charge becomes a comment on how the evidence should be considered, rather than a general instruction on a [party's] theory. [Citations.]" (*People v. Harris* (1989) 47 Cal.3d 1047, 1099.)

Even inapplicable instructions should not be given. "[A] trial judge should be diligent in refraining from burdening the jury and the record with inapplicable instructions . . . ." (*People v. Sanchez* (1947) 30 Cal.2d 560, 673.) The giving of an instruction which is a correct statement of law but is inapplicable under the facts is error, although it is generally harmless because it is likely to be understood by the jury as mere surplusage. (*People v. Prettyman* (1996) 14 Cal.4th 248, 280; *People v. Rowland* (1992) 4 Cal.4th 238, 282.)

Finally, if a jury is to be instructed that it may infer one fact, such as a defendant's consciousness of guilt, from another, such as his making of a false statement, federal due process demands a rational connection between the fact proved and the one to be inferred. (U.S. Const., 14th Amend.; see *People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a connection that is logical or reasonable; the conclusion must "more likely than not flow from" the fact proved. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 165–167, and fn. 28, quoting *Leary v. United States* (1969) 395 U.S. 6, 36.)

B. The Instruction Is Argumentative in General and Was Particularly So in the Circumstances in Which it Was Given

1. The Instruction Was Inapplicable

The trial court gave the instruction at issue because of an asserted conflict in the evidence as to when appellant last possessed his hatchet. (RT 11: 2262–2263.) According to an investigator,

> [W]e asked him . . . could we see the hatchet? And then he said he didn't have it, he thought that he lost it. We then went on to ask him where it could have been lost or how it could have been lost? He told us that he recently had moved from one apartment in the complex to another apartment in the complex and he must have lost it in the move.

(RT 10: 2101–2102.) Diana Williams, however, testified that she saw appellant use it to hammer speaker wire to the wall of his new apartment. (RT 7: 1549.)

Preliminarily, the instruction was not really applicable to these facts, although admittedly they were not far from the margin. For the jury to conclude that appellant made a willfully false statement concerning the crimes for which he was being tried, i.e., the preliminary fact from which the instruction permits an inference of consciousness of guilt, would have been highly speculative. (See *People v. Coddington* (2000) 23 Cal.4th 529, 599 [reasonable inference "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work"].) The testimony was that he said he "thought" he had lost the tool, and that, if so, it "must have" been in the move. (RT 10: 2101–2102.) To call appellant's unsure statement of belief that it was lost, and his guess as to why, a willfully false statement requires either pure conjecture, or else a frame of reference in which it is already known that the presumed-innocent defendant is guilty. For in the normal life of an innocent person, this is

something about which one could easily have made an honest mistake. As any of us who has ever experienced the frustration of misplacing something knows, we often do not know when or how we did it. The jury did not hear appellant make the statement, see his demeanor, or hear how he would have responded to a challenge based on Wiliams's claim. To assume he was lying a juror would have had to have done just that: make an assumption. (Cf. *People v. Louis* (1984) 159 Cal.App.3d 156, 160 ["the giving of CALJIC No. 2.03 is justified when there is evidence that a defendant fabricated a story to explain his conduct"], disapproved on a different ground in *People v. Mickey* (1991) 54 Cal.3d 612, 672.)

As noted above, it is error to give an inapplicable instruction. (*People v. Prettyman*, *supra*, 14 Cal.4th 248, 280; *People v. Rowland*, *supra*, 4 Cal.4th 238, 282.) The cited cases also note that usually it is harmless error, as the jury will recognize that an abstract statement of law that does not apply to the case at hand is surplusage. (*Ibid.*) Here, however, the instruction's near miss on applicability was one of the factors that made it argumentative. It elevated a lightweight and entirely equivocal piece of evidence, which the prosecution did nonetheless highlight in argument (RT 11: 2385–2386), to something which the trial court, too, deemed worthy of serious consideration as a possible willful falsehood showing consciousness of guilt.

2. Applied Evenhandedly, This Court's Precedents Dictate a Finding of Error in the Giving of the Instruction in Any Case

a. Basic Principles Regarding Argumentative Instructions Prohibit Highlighting a Defendant's Purportedly False Statements

This Court's precedents distinguish between proper pinpoint instructions, to which a defendant has a right upon request, and

argumentative instructions. Those precedents compel a finding of error, even upon looking at the instruction in the abstract, before taking into account how the circumstances of this trial rendered it particularly prosecution-oriented.

The problem of making such a distinction has arisen frequently, both in the context of refusals of proffered defense instructions and the giving of instructions such as CALJIC No. 2.03. *People v. Sears* (1970) 2 Cal.3d 180, 190, reaffirmed a *defendant's* common-law right to a pinpoint instruction explaining the pertinence of evidence to an issue before the jury. This Court noted, "Ordinarily, the relevance and materiality of circumstantial evidence is apparent to the trier of fact, but this is not always true, and the courts of this state have often approved instructions pointing out the relevance of certain kinds of evidence to a specific issue." (*Ibid.*) The opinion gave as illustrations cases far removed from that presented here. It cited *People v. Moore* (1954) 43 Cal.2d 517, which held that a defendant was entitled to a requested instruction explaining the relationship of evidence—if credited—of pre-existing threats to a self-defense claim. (*Id.* at pp. 528–529.) The other example *Sears* used was *People v. Garcia* (1935) 2 Cal.2d 673, approving of an instruction explaining the uses and abuses of evidence about motive or lack thereof, given its circumstantial value but lack of status as an element of an offense. (*Id.* at p. 683.) More recently, in rejecting a defense claim of entitlement to a pinpoint instruction, this Court again emphasized that pinpointing a defense theory was appropriate "only when the point of the instruction would not be readily apparent to the jury from the remaining instructions." (*People v. Bolden* (2002) 29 Cal.4th 515, 558–559.)

Sears contained broad language which seemed to permit instructions which could be argumentative, so this Court clarified its reach in *People v.*

Wright (1988) 45 Cal.3d 1126. *Wright* explained that a defendant was entitled to an instruction that did not pinpoint "specific evidence as such, but the *theory* of the defendant's case." (*Id.* at p. 1137, quoting *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.) Put differently, the distinction is "between an instruction that pinpoints the crux of the defense and one that improperly implies certain conclusions from specified evidence . . . ." (*Ibid.*)

Against this backdrop, there is no need for an instruction that the way evidence of a lie regarding the crime may be used is to infer consciousness of guilt. This is the "ordinar[y]" situation, where "the relevance and materiality of circumstantial evidence is apparent to the trier of fact," not one like the relationship of a defendant's receipt of threats from the victim to the reasonableness issue in a self-defense claim. (*People v. Sears*, *supra*, 2 Cal.3d at p. 190.) From the perspective of the tests articulated in *Wright*, the instruction did not explain some non-obvious relevance and propriety of the theory propounded by the prosecution regarding the purportedly false statement. Rather, it highlighted the evidence itself. Parenthetically, this characteristic of the instruction was lessened, but not to a material degree, by the fact that it referred to appellant's possible false statement as an abstract category without naming the statement at issue, but the prosecution was soon to identify the statement in argument. (RT 11: 2385–2386.) This is no different from the situation in *People v. Harris*, *supra*, where an instruction that referred to "any witness" who might have been intoxicated during the events described in testimony violated the rule against singling out a particular witness, since there was evidence of only one witness's intoxication. (47 Cal.3d at p. 1099.)

Applying the language of *post-Wright* cases produces the same result. Even if they are neutrally phrased (e.g., by referring to the presence or absence of evidence on an issue) instructions which "ask the jury to consider the impact of specific evidence," such as one listing factors the jury "may consider" are argumentative. (*People v. Daniels*, *supra*, 52 Cal.3d 815, 870.) So are those that "imply a conclusion to be drawn from the evidence." (*People v. Nieto Benitez*, *supra*, 4 Cal.4th 91, 105, fn. 9.) Here, out of all the evidence, inculpatory and exculpatory, presented at this trial, the false-statement instruction invited the jury to consider the impact of a possible false statement by appellant and certainly implied the conclusion which the court seemed to think was to be drawn from it, if believed. Thus it "singl[ed] out and [brought] into prominence before the jury certain isolated facts . . . , thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin*, *supra*, 170 Cal. 657, 672.)

b. Precedents Upholding Other Attacks on CALJIC No. 2.03 Do Not Dispose of the Instant Contention

This Court has rejected facial attacks on CALJIC No. 2.03 many times. In doing so, it has provided two rationales, neither of which addresses the point made above.

(1) The Argumentative Portion of the Instruction Is Not Required Simply Because Another Part Limits Its Reach

CALJIC No. 2.03 was challenged, in *People v. Kelly* (1992) 1 Cal.4th 495, shortly after *People v. Wright*, *supra*, 45 Cal.3d 1126, defined what is argumentative. In *Kelly*, the Court observed that the instruction tells the jury that the evidence of a false statement is not alone sufficient to prove

guilt. (*Id.* at p. 431.) From this fact the Court concluded, "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*Id.* at pp. 531–532.) The holding has occasionally been adhered to in subsequent cases. (E.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; cf. *People v. Page* (2008) 44 Cal.4th 1, 50 [instruction is not duplicative of general circumstantial-evidence instruction, because of its cautionary component].)

Kelly was decided when this Court was under enormous political pressure regarding death-penalty cases and during which, according to many commentators, it inevitably responded to that pressure.[106] With all due respect, its rationale for upholding the giving of CALJIC 2.03 is specious. *Kelly* cited *People v. Green* (1980) 27 Cal.3d 1, 40, in support of its observation about the cautionary part of the instruction. *Green*, however, accurately describes what *Kelly* did not:

> . . . . CALJIC No. 2.03 . . . *states* that the jury may consider as evidence tending to prove consciousness of guilt any false or deliberately misleading statements the defendant made prior

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[106]E.g., *People v. Morris* (1991) 53 Cal.3d 152, 236 (dis. opn. of Mosk, J.) ("principled application of harmless-error analysis is often a difficult task. . . . Regrettably, in order to salvage judgments of death that have been tainted by error, this court has often failed in this task in recent years"); Champagne, *Political Parties and Judicial Elections* (2001) 34 Loyola L.A. L.Rev. 1411, 1420 [quoting former Justice Kaus on the subliminal influence of the political climate]; Kamin, *Harmless Error and the Rights/Remedies Split* (2002) 88 Va. L.Rev. 1, 62–70; Culver, *The Transformation of the California Supreme Court: 1977–1997* (1998) 61 Alb. L.Rev. 1461, 1463–1464; Kelso, *A Tribute to Retiring Chief Justice Malcolm M. Lucas* (1996) 27 Pac. L.J. 1401 & fn. 6; Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique* (1991) 26 U.S.F. L.Rev. 41, 84–85, 89–90; Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 Loy. L.A. L.Rev. 237, 238, 295 (1989).

> to trial concerning the crimes charged against him; *the instruction adds* that such evidence is not sufficient in itself to prove guilt, however, and its weight and significance remain for the jury to determine.

(*Id.* at p. 40, emphasis added.) In other words, the instruction is not structured as a cautionary statement which must be balanced, in some way, out of fairness to the prosecution. It states the pro-prosecution point, then soft-pedals it a bit. Indeed, the idea that a jury that did not hear instructions singling out an allegedly false statement would need to be told that such a statement does not in itself satisfy the reasonable-doubt test on all elements of all offenses is difficult to take seriously.[107,108] Nor, if such an instruction were given, would there be any danger of the jury assuming that it meant that the evidence could not be considered at all, *Kelly's* concern notwithstanding. Nothing in *Kelly* successfully refutes the facts that the instruction, on its face, is *aimed at* telling the jury that the evidence is good for the purpose of showing consciousness of guilt; that the point is obvious

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[107]*People v. Page*, *supra*, reiterated this aspect of *Kelly*, in a different context, stating that a false statement in that case might otherwise have been thought by the jury to have fully established guilt. (44 Cal.4th at p. 50.) Consider, however, a juror who, without being cautioned, somehow would have considered the false statement conclusive on the ultimate facts and was told, "that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." (CALJIC No. 2.03.) This is not the kind of cautionary instruction that seeks to educate a juror about a certain type of evidence being less reliable than it might first appear to be; it only says that more is required. Such a juror—still considering the "weight and significance" of the evidence sufficient in his or her own mind—would only have needed a scintilla of other evidence to abide by the court's instruction. Such evidence will exist in every case. So if a real need for an effective cautionary instruction existed, CALJIC No. 2.03 would not fill it.

[108]In this case, the parties and the trial court thought that the caveat in the instruction rendered it "a sua sponte." (RT 11: 2262–2263.) The belief was erroneous. (*People v. Najera* (2008) 43 Cal. 1132, 1139.)

without the instruction (cf. *People v. Bolden*, *supra*, 29 Cal.4th 515, 558–559); and that, therefore, the effect is the argumentative one of "invit[ing] the jury to draw inferences favorable to one of the parties from specified items of evidence" (*People v. Michaels*, *supra*, 28 Cal.4th 486, 539, quotation marks omitted).

(2) Cases Upholding the Instruction Against Analogies to Rejection of Defense Instructions Do Not Resolve Appellant's Claim

More recently, a number of appellants have cited *People v. Mincey* (1992) 2 Cal.4th 408, 437, arguing that a defense pinpoint instruction rejected there was materially indistinguishable from the consciousness-of-guilt instruction. (See *People v. Page*, *supra*, 44 Cal.4th 1, 50–51; *People v. Bonilla* (2007) 41 Cal.45h 313, 330, and *People v. Nakahara* (2003) 30 Cal.4th 705, 713.) In response, this Court distinguished *Mincey*, on the basis that the consciousness-of-guilt instruction addresses the law applicable to the evidence, not a particular party's version of the facts, while the defense instruction in *Mincey* described the predicate facts in argumentative language. Appellant reiterates the appellants' contention in these cases, adding only that the characterizations of the facts that might have been found[109] were not in the least favorable to the *Mincey* defendant, but only permitted the jury to find an element of a special circumstance missing without holding the defendant's conduct excusable. The *Mincey* opinion itself stated not that the problem was the language used, but that use of the instruction at all would "have the court invite the jury to infer the existence of his version of the facts . . . ." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437.) If that instruction did, so does this one.

[109]I.e., that the defendant's conduct was "misguided, irrational and totally unjustifiable." (*People v. Mincey*, *supra*, 2 Cal.4th at p 437.)

Similarly, *People v. Michaels* (2002) 28 Cal.4th 486, found that a proposed instruction that the jury could consider the impact of a history of sexual abuse among family members on his own psychological state—besides being improperly worded to assume the truth of the abuse allegations—"constituted claims properly presented in argument, not instructions." (*Id.* at p. 539.) This was because they "invite[d] the jury to draw inferences favorable to one of the parties from specified items of evidence." (*Ibid.*, quotation marks omitted.) Nothing in that analysis is inapplicable to CALJIC No. 2.03.

Defense pinpoint instructions should be refused when their point is "readily apparent" already (*People v. Bolden*, *supra*, 29 Cal.4th 515, 559), or because stating the defense view of the evidence and the legal consequence of that view "emphasize[s] to the jury" the defense theory and version of the facts (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437). That being the case, CALJIC No. 2.03 should also not be upheld simply because it "properly advised the jury of inferences that could rationally be drawn from the evidence" (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 128). Since it was advice the jury surely did not need, again the effect was to emphasize a party's theory.

Trial procedures that irrationally distinguish between parties, to the defendant's detriment, deprive the defendant of his due process right to a fair trial. (U.S. Const., 14th Amend.; *Wardius v. Oregon* (1973) 412 U.S. 470, 475; see also *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510.) An arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (U.S. Const., 14th Amend.; see *Lindsay v. Normet* (1972) 405 U.S. 56, 77).

To insure fairness and equal treatment, this Court should reconsider those cases that have found CALJIC No. 2.03 to be non-argumentative, at

least on its face, by distinguishing cases like *Mincey*. Even if the Court does not do so, however, the line of cases discussed under this subheading does not address the fact that under this Court's general test for argumentativeness, the instruction fails, as explained on pages 179–181, above.

3. In the Circumstances of This Case, the Instruction Was Particularly Argumentative

Even if the instruction were not facially flawed, it definitely had a pro-prosecution slant in the context of appellant's trial. As between appellant and others who provided evidence and who, depending on their roles and motives in helping build a case against appellant, could also have had things to hide, it singled out the person who was on trial. And in terms of scrutinizing his behavior, it directed attention to a situation where he might not have been forthright, while treating as unworthy of judicial comment his cooperation with a 3:00 a.m. interview and request to search his apartment, as well as with a later interview request, all of which could have permitted inferences negating a consciousness of guilt.

a. The Instruction Singled Out Appellant

It was fundamentally unfair for the trial court, with all its authority, to bolster the forthcoming prosecution argument with its own comment on the possibility of a false statement by appellant, and its being motivated by consciousness of guilt, in a manner that singled him out among all those who in one way or another provided evidence in the case.[110]

[110]The instruction was, of course, a standard one, and appellant is not claiming that the trial judge was improperly motivated. Rather, he is focusing on the objective effect of the instruction from the perspective of a juror in this case.

People v. Moore, *supra*, 43 Cal.2d 517, 526–527, was quoted above for the principle that "[t]here should be absolute impartiality . . . in the matter of instructions . . . ." The sentence concludes with the statement, "including the phraseology employed in the statement of familiar principles." In *Moore* one of the errors that led to reversal was a quite subtle violation of this rule. The trial court had given the prosecution's requested instructions on self-defense, which stated the law correctly. However, they phrased the governing law in terms of when self-defense would not have been shown, rather than stating the same rules in positive terms. (*Ibid.*) The problem here was much more blatant than whether a rule was phrased positively or negatively.

As noted previously, "[i]t is improper . . . for the court to single out a particular witness in an instruction, since by so doing the court charge becomes a comment on how the evidence should be considered, rather than a general instruction on a [party's] theory. [Citations.]" (*People v. Harris* , *supra*, 47 Cal.3d 1047, 1099.) As also noted above, *in Harris*, the witness was not named; the instruction, far more neutral than that involved here, referred to "any witness" who may have been intoxicated during the events at issue. There was, however, only one such witness. (*Id.* at p. 1098.) If that was enough to make the instruction infirm, then it was certainly wrong at appellant's trial to single out—directly—the one person most likely to be thought to have a bias affecting his credibility in any event.

Part of this Court's analysis in *Harris* rested on the fact that the general pattern jury instructions on evaluating witness credibility "were adequate to alert the jury to the manner in which the reliability of evidence should be assessed." (*Id.* at p. 47 Cal.3d at p. 1099.) Here it was just as unnecessary to single out appellant or emphasize this one factor. The general CALJIC instruction on witness credibility appropriately includes

the existence or nonexistence of any fact testified to by the witness in a non-exclusive list of eight factors that may be considered when evaluating testimony.[111] That instruction was given in this trial, followed by a standard instruction on considering discrepancies between the versions of a fact given by different witnesses.[112] If the court was somehow concerned that a

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[111]The trial court read CALJIC Nos. 2.20, as follows:

> In determining the believability of a witness, you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness including, but not limited to, any of the following:
>
> The extent of the opportunity or ability of a witness to see or hear or otherwise become aware of any matter about which the witness testified; the ability of the witness to remember or to communicate any matter about which the witness testified; the character and quality of that testimony; the demeanor and manner of the witness while testifying; the existence or nonexistence of a bias, interest or other motive; *the existence or nonexistence of any fact testified to by the witness*; the attitude of the witness towards this action or toward the giving of testimony; and a statement previously made by the witness that is consistent or inconsistent with his or her testimony.

(RT 11: 2339–2340, emphasis added.)

[112]CALJIC No. 2.21.1, as follows

> Discrepancies in a witness' testimony, or between a witness' testimony and that of other witnesses, if there were any, do not necessarily mean that any witness should be discredited. Failure of recollection is common, innocent misrecollection is not uncommon. Two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to an important factor or only to something trivial should be considered by you.

(RT 11: 2340.)

juror would take these instructions so technically as to exclude the common-sense proposition that an *out-of-court* lie by appellant might mean he was hiding participation in the crime,[113] it could have adapted the instruction to apply to "a witness, or—to the extent applicable—to any person whose out-of-court statement has been reported to you in testimony." But in fact any such concern would have been misplaced; no juror who somehow was confident that the statement was a lie would have failed to draw the inference later encouraged (see RT 2384–2385) by the prosecution, even if an instruction had not given them specific, explicit permission to do so. (See *People v. Earp* (1999) 20 Cal.4th 826, 887 [harmless to refuse defense pinpoint instruction that was obvious application, to defense theory, of general principles on which jury had been instructed].)

b. The Instruction Ignored Behavior by Appellant Which Would Have Supported an Opposite Inference

Investigators went to appellant's apartment at 3:00 a.m. the night after the Jenks's bodies were found. He invited them in, although he looked as though he had been sleeping, answered some basic questions, and agreed to go voluntarily to the police station to talk more. He was cooperative at the police station, and there he gave his consent to a search of his apartment. (RT 10: 2098, 2104–2106.) It was evident that he was questioned about the crime, because it was during this interview that the

[113]The unlikelihood of so construing the instruction is highlighted by the opinion in *People v. Kipp* (1998) 18 Cal.4th 349, 375, where a discussion of CALJIC No. 2.03 is mistitled "Willfully False Testimony," even though the instruction speaks only of a defendant's out-of-court statements. As the *Kipp* heading indicates, in contexts where the distinction between in-court and out-of-court statements is unimportant, the mind focuses on their commonality as verbal statements that are evidence.

statement about the missing hatchet was made. Two days later, Friday afternoon, the lead detective visited appellant again. Appellant invited him to come in and sit down. Later the detective asked appellant to leave with him, which appellant did, and the two spent "some time" together. (RT 10: 2147–2149.)

This behavior was as at least as meaningful as the statement about the hatchet. It was not, of course, incontrovertible proof that appellant had nothing to hide, any more than proof of even an intentional false statement about a tool that a homicide investigator was interested in would have been incontrovertible proof of consciousness of guilt. (See *People v. Williams* (1988) 44 Cal.3d 1127, 1143, fn. 9 [noting four-link chain of inferences from action claimed to show consciousness of guilt to actual guilt].) But the evidence was of similar character, and the court should have drawn attention to all of it or none, not just that which favored the prosecution. (See *People v. Wharton* (1991) 53 Cal.3d 522, 571 [instruction proposed by defendant "improperly singled out one factor, favorable to defendant, and improperly elevated it over other factors that the jury should also consider"].) The disparity was heightened by a circumstance mentioned previously: while the preliminary fact of appellant's cooperation with authorities was undeniable, the evidence tending to show the preliminary fact for the instruction given—an intentional false statement—was not even sufficient to permit a conclusion that such a statement was made. Yet from a juror's perspective, what the court was saying was that the latter was the evidence worthy of attention, while the former was not. From this angle, too, the instruction was argumentative.

C. The Instruction Invited an Irrational Permissive Inference, at Least in the Circumstances of This Case

For purposes of the United States Supreme Court's due-process jurisprudence, CALJIC No. 2.03 offers the jury a permissive inference ("if you find one fact true, you may infer another from it"). (*People v. Ashmus* (1991) 54 Cal.3d 932, 977.) Federal due process demands a rational connection between the fact proved and the one which the jury is told it may infer. (U.S. Const., 14th Amend.; *People v. Castro*, *supra*, 38 Cal.3d 301, 313, and cases cited.) This means that the conclusion must "more likely than not flow from" the fact proved. (*Ulster County Court v. Allen*, *supra*, 442 U.S. 140, 165–167, and fn. 28, quoting *Leary v. United States*, *supra*, 395 U.S. 6, 36; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Supreme Court has required "'. . . substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend'"].) This test is applied to judge the inference not in the abstract, but as it operates under the facts of each specific case. (*Ulster County Court*, *supra*, 442 U.S. at pp. 157, 162–163.)

In *People v. Williams*, *supra*, 44 Cal.3d 1127, this Court quoted *United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1049, for the observation that the probative value of acts introduced to show consciousness of guilt as circumstantial evidence of guilt depends on the fact-finder's degree of confidence in four inferences: that the action was as characterized (e.g., it actually was flight, or a false statement); that the action was taken because of consciousness of guilt, rather than, e.g., fear of prosecution; that the consciousness of guilt related to guilt of the crime charged; and that such consciousness was based on actual guilt. (*Id.* at p. 1143, fn. 9.) Here, as explained on page 177, above, even the first inference

was not more likely than not, i.e., that appellant made an intentional false statement, as opposed to expressing the everyday failure of one who misplaces something to know when or how.

The second inference in the chain was also weak. Appellant had been awakened at 3:00 a.m. by homicide investigators who clearly were interested in a very serious matter. All kinds of fears, therefore, other than fears of self-incrimination regarding a crime of which he was actually guilty, could have motivated evasiveness regarding an object that seemed to be of special interest to them as an instrumentality of a crime. Again, being evaluated not after the fact of conviction, but while appellant was being presumed innocent and thus in the context of what it would mean if *anyone* lied in that situation, it cannot "be said with substantial assurance" that it "was more likely than not" that, if he lied, it was because he considered himself guilty of the Jenks murders. (*Ulster County Court*, *supra*, 442 U.S. at p. 166, fn. 28, quoting *Leary v. United States*, *supra*, 395 U.S. at p. 36.)

The likelihood that appellant's statement showed consciousness of guilt was the product of two fractions (and thus less than either): the already-less-than-half probability that he intentionally lied about how he lost something, and the similarly weak probability that any lie was motivated by consciousness of guilt rather than another fear.[114] (See *People*

[114]Appellant is aware that the instruction, taken literally, only relates to the second inference, since it invites the consciousness-of-guilt conclusion only if the jury believes that there was an intentional false statement concerning the crime. Here, however, the overlap with the argumentative *quality* of the instruction cannot be ignored, even if this Court does not conclude that the degree of argumentativeness amounted to error. For it did invite a particular conclusion, one which depended on drawing one inference (willful false statement) from the bare facts (a statement inconsistent with Williams's testimony) and a second (consciousness of guilt) from the first inference.

(continued...)

v. Prince (2007) 40 Cal.4th 1179, 1228 [explaining the product rule for determining the probability of multiple events occurring together].) It was not more likely than not that appellant's statement showed consciousness of guilt of these crimes. Giving an instruction permitting such an inference, therefore, violated appellant's state and federal due process rights.[115]

D. Combined With Other Guilt-Phase Errors, the Instructional Error Was Prejudicial

The instructional error here was a serious violation of appellant's federal rights to due process and an especially reliable determination of guilt in a capital trial. Respondent's burden is to demonstrate harmlessness beyond a reasonable doubt, if the error is to be held harmless. (*Chapman v. California* (1967) 386 U.S. 18.

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[114](...continued)

The overall logical operation would have been irrational under the more-likely-than-not test. While these things cannot be truly quantified, even 70% confidence that appellant intentionally lied, multiplied by a 70% chance that any lie was motivated by consciousness of guilt, rather than fear of trouble with the authorities, would have led to only a 49% chance that the evidence showed consciousness of guilt.

If only a single probability were to be considered, it should be noted that appellant has also contended that his response in the middle-of-the-night interrogation, even if false and intentionally so, did not more likely than not show a consciousness of guilt.

[115]*People v. Stitely* (2005) 35 Cal.4th 514 held summarily, "[I]nsofar as the jury believed defendant lied about the charged crimes, the instruction did not generate an irrational inference of consciousness of guilt. (*People v. Holt* [1997] 15 Cal.4th 619, 678.)" (*Id.* at p. 555.) This discussion does not suggest that the *Stitely* appellant invoked the federal test of whether the inference was rational under the facts of the case. The defendant in *Holt* explicitly "conceded that false statements may reflect consciousness of guilt," contending only that the wording of the instruction could have permitted the inference to extend to crimes which the jury was not otherwise convinced had been committed at all. (15 Cal.4th at p. 678.)

As explained in the argument regarding the "raspberry pie" instruction, at pages 90–94, above, a rational juror could have entertained a doubt that appellant was the perpetrator of the Jenks crimes, given the amount of expected forensic evidence that was missing, the prosecution's reliance on a single witness—with an evident economic motive and possibly other biases—to link appellant to most of its physical evidence, and the ease of fabricating the blood-speck evidence. Other than the consciousness-of-guilt issue, none, if any, of the evidentiary points made by counsel for either party in their summations was singled out for comment during the instructions. The instruction, though routine and well-known to counsel and to this Court, could only create for naive jurors the impression that he trial court saw the purportedly false statement as worthy of the special attention which it received, even if part of the attention being called for was to determine whether the statement was false.

The linear nature of an appellate opinion requires that the likely impact of an error upon a juror's deliberations be considered in isolation, at least until a cumulative-error claim is reached. But a preview of such a claim is pertinent here. For the jury, events at trial may occur linearly, but they produce a *gestalt* that determines how it sees the case. Here the most powerful impact of the false-statement instruction, even more than on the jury's evaluation of this one item of evidence, was its synergy with other judicial actions that seemed to indicate encouragement to hold appellant accountable for the crimes charged against him. The complete package included the extensive exhortation to consider a circumstantial case sufficient, the pointing to possession of recently stolen property as nearly sufficient to make such a case, *and* the special effort to mention a statement that could show consciousness of guilt. To paraphrase a well-known television commercial:

- "Raspberry-pie" lecture—$100
- "Stolen property is practically enough evidence for robbery"—$80
- "Check out the purportedly false statement"—$40
- Overall judicial tilt towards a finding of conviction—Priceless!!

The error here heightened the impact of the others, producing a situation that violated the Due Process Clauses and appellant's right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15), even if no single error did. Nothing in the record permits respondent to show that the verdict in its favor was "surely unattributable" to that situation. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) The entire judgment must be reversed.

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IX. ADMISSION OF AN UN-CROSS-EXAMINED OUT-OF-COURT STATEMENT, IN VIOLATION OF THE HEARSAY RULE AND THE CONFRONTATION CLAUSE, PREJUDICED BOTH THE GUILT AND THE PENALTY VERDICTS

Mortally ill with several diseases, heavily medicated, apparently suffering emotionally from the stress of his condition, and having made a conscious and intentional decision to "block everything" from his mind but his health,[116] Oscar Galloway remembered giving someone, whom he thought looked like appellant,[117] a ride to the Palace Casino twice, but he had no idea what month either event took place, and he remembered nothing else about the one that interested the prosecution. (RT 10: 2211–2215.) Investigator Walker interviewed Galloway August 9, 1997, without taking notes, and he wrote a report at some point within the next six days. (RT 10: 2217–2220, 2228–2229.) He was permitted, over statutory and constitutional objections, to read the report to the jury. (RT 10: 2221–2224 [hearsay-rule objection], 2234 [federal Confrontation-Clause objection], 2231–2232 [ruling].)

According to Walker's report, Galloway told him that four days earlier, on Tuesday, August 5, appellant wanted to go downtown and to The Palace to play the slot machines. (RT 10: 2237.) He had with him a blue duffel bag, which he took with him when he left the car when they stopped downtown. (*Ibid.*) When appellant returned, they want to the casino briefly and played the slot machines. (*Ibid.*) The next day appellant came to Galloway's house and asked if he had left his duffel bag in Galloway's car. (*Ibid.*) It was there. (RT 10: 2237–2238.) To Galloway, it did not appear "as packed" as it had the day before. (RT 10: 2238.)

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[116]RT 10: 2207–2212; quotation: 2211.

[117]RT 10: 2208, 2215–2216.

The prosecution later argued to the jury that the statement closed a possible gap in its case. The prosecution's concern was that one might wonder, if appellant was the assailant, why an early-morning search of appellant's apartment on Wednesday, 24 to 30 hours after the apparent time of a murder, produced nothing—hatchet, bloody clothing, or jewelry—related to the crime. (RT 10: 2408–2409.) Its answer was that two items of jewelry were pawned in a downtown pawnshop on the Tuesday afternoon, when Walker's report said Galloway said he had taken appellant downtown, and that other things were probably in the duffel bag which was in the car overnight, not at the apartment that was the subject of the search.[118] (RT 10: 2410–2411.) In its penalty-phase argument, the prosecution referred to the testimony again, arguing that "according to Mr. Galloway, . . . [going] off to the casino gambling," showed appellant's callousness. (RT 13: 2854.)

Admission of the statement violated the Sixth Amendment to the United States Constitution and the Evidence Code.

A. Under *Crawford v. Washington*, Admission of the Hearsay Statement Was Prohibited by the Confrontation Clause

"[T]estimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant ha[d] a prior opportunity for cross-examination. (*Crawford* . . . [*v. Washington* [(2004)] 541 U.S. [36,]

[118]There was an inconsistency in this argument, as the search itself had produced a blue duffel bag. (RT 10: 2102.) While there was other prosecution testimony concerning appellant's owning a blue gym or duffel bag (RT 7: 1573; see also 5: 1116, 7: 1469), there was none indicating that he used two different blue bags. The prosecutor could have as easily asked Diana Williams, who claimed close familiarity with appellant's personal property (RT 7: 1544; see also 1541, 1546, 1549–1551), whether he owned two as the question which was asked: "Did Thomas have a duffel bag." (RT 7: 1573.)

. . . 59.)" (*People v. Geier* (2007) 41 Cal.4th 555, 597.) "[H]earsay statements are testimonial when made in the course of police interrogation and 'the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' (*Davis v. Washington* (2006) 547 U.S. __, __ [. . . 126 S.Ct. 2266, 2273–2274].)" (*People v. Ledesma* (2006) 39 Cal.4th 641, 709.) The *Crawford* rule applies to cases pending on appeal when *Crawford* was decided. (*United States v. Weiland* (9th Cir. 2005) 420 F.3d 1062, 1076, fn. 12, citing *Griffith v. Kentucky* (1987) 479 U.S. 314, 328; *People v. Song* (2004) 124 Cal.App.4th 973, 982, also citing *Griffith*.)

Under these rules, the Galloway statement was testimonial. (*Davis v. Washington*, *supra*, 126 S.Ct. 2266.) As the statement was made out of court and without an opportunity for cross-examination, its admission was a violation of the Sixth Amendment. (*Crawford v. Washington*, *supra*, 541 U.S. 36.)

B. The Foundational Requirements of Evidence Code § 1237 Were Not Met

There was no dispute that the statement was hearsay. It was offered, and received, under Evidence Code section 1237's exception for past recollection recorded. (RT 10: 2220, 2224, 2231–2232.)

"Several foundation requirements are imposed for the offer of past recollection recorded, designed to preclude the use of self-serving hearsay that has no guarantee of trustworthiness." (3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 182, p. 245.) Two are pertinent here. The record must have been made by the witness, under that person's direction, or "by some other person for the purpose of recording the witness' statement at the time it was made." (Evid. Code § 1237, subd.

(a)(2).) And the witness must "testif[y] that the statement he made was a true statement of such fact." (Evid. Code § 1237, subd. (a)(3).

The report was clearly not made by Galloway nor under his direction. Nor was it made for the purpose of recording the statement at the time it was made. (Evid. Code § 1237, subd. (a)(2).) Significantly, while the court below went through the various requirements of the statute when making its ruling, the court found, with regard to this requirement, only "that the statement was made for the purpose of recording the witness' statement, that was Mr. Walker's purpose, certainly, in making the record." (RT 10: 2231.) In other words, there was no finding that the record was made for that purpose "at the time [the witness's statement] was made." (Evid. Code § 1237, subd. (a)(2).) And it was not. Walker did not even take notes at the time the statement was made. Asked when he did prepare the report, which was dated August 15th, he said, "I want to say it was the same day [as the interview], August 9th, and that I probably went back in and corrected it on the 15th, that's why [the word-processing-software] adjusted the date." (RT 10: 2219–2220.) Even if he were more sure that the original report was prepared sometime August 9th, and even if there were no issue of how much his later corrections changed it, there could be no claim that the record was made at the time that the statement was made.[119]

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[119]Because Galloway's statement was not contemporaneously recorded, the prosecution actually had an unacknowledged double-hearsay problem. The report was a written, out-of-court statement by *Walker*, recording *his* past recollection of a certain fact. The fact which Walker's hearsay report conveyed was that *Galloway* had made an oral, out-of-court statement outlining events he said occurred involving him and appellant. While, if the subject of the Walker report were itself admissible, an argument could be made for admitting his report under section 1237, none could have been made (continued...)

Moreover, Galloway did not credibly testify "that the statement he made was a true statement." (Evid. Code § 1237, subd. (a)(3).) As a foundation for his unavailability, he testified that he did not have "a good recollection of the first week of August of last year," for the reasons related to his medical condition described on page 196, above. (RT 10: 2211; see also pp. 2212–2215.) He confirmed this when asked again, in different words. (RT 10: 2212.) Then he was asked a leading question:

> Q. But when you spoke to Investigator Walker, you told him the truth?
>
> A. Yes. Yes.

(RT 10: 2212.) We all like to think we tell the truth all the time.[120] However, the June 15th, 1998, testimony of a man who could not remember what happened August 5th, 1997, that he told the truth four days later, when he was not under oath, not cross-examined, may or may not have been subtly led or pressured by the officer trying to build a case against a person the officer thought was a murderer, and may or may not have liked appellant back then, could not satisfy the reliability interests served by the strict requirements of section 1237. (See 3 Witkin, California Evidence, *supra*, Presentation at Trial, § 182, p. 245.) The plain fact is, his testimony established that he did not and could not know whether he told Walker the truth in every detail.

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[119](...continued)
to justify admitting the Galloway statement that was the subject of the Walker statement. It was just hearsay; even if Walker were prepared to testify from memory instead of reading his report, he could not have testified as to what Galloway said out of court..

[120]This was Galloway's position. He testified, "When I want to go, I just got up and left; when somebody asked me something, I just answer whatever was in my mind then." (RT 10: 2212.)

People v. Cummings (1993) 4 Cal.4th 1233 represents the outer limit of what can meet the requirement that the witness testify that he told the truth at the time. The statement at issue was a detective's record of an informant's report of an admission by the defendant. The informant, who had been undergoing drug detoxification, could not recall the specifics of the admission or of the conversation with the detective, but he testified that he recalled speaking while the events were fresh in his mind and that he told the truth. He was able to give accurate details regarding the situation in which he heard the admission. (*Id.* at p. 1293.) In deciding the case, this Court distinguished *People v. Simmons* (1981) 123 Cal.App.3d 677. *Simmons* concerned a medically amnesiac witness who could do no more than authenticate his signature on the transcription of his statement and testify that, to the best of his knowledge he had no reason to lie when the statement was prepared. The Court of Appeal had held that the witness could not provide the support for the reliability of the statement which the statute requires. (*Id.* at pp. 682–683.) The *Cummings* opinion noted that, in *Cummings*, the trial court made clear its understanding that the issue was the reliability of the informant's testimony that his statement was true, and that the informant's corroborated testimony about the circumstances of what he witnessed and his recollection that he told the truth, while the events were fresh in his mind, was sufficient to distinguish the case from the *Simmons* witness's failure to recall either any events in the statement or any of the circumstances surrounding it. Thus the trial court's conclusion was supportable. (4 Cal.4th at p. 1294.)

The situation here matched that in *Simmons*, not *Cummings*. The trial court made no detailed analysis of the credibility of Galloway's bald claim that he told the truth (see RT 10: 2231), no testimony showing that he recalled the circumstances of the conversation was elicited, and the

corroborating circumstances relied on in *Cummings* were absent here. Like the *Simmons* witness, the only evidence on the issue was that Galloway's condition prevented him as much from testifying about his interaction with Walker as it did his interaction with appellant. If a pro forma statement of a fact outside the witness's current knowledge could satisfy the statutory requirement of testimony that the prior statement was truthful, the requirement could not serve its purpose.

For this reason, as well as the lack of a contemporaneous recording and the violation of the black-letter requirements of *Crawford v. Washington*, admission of the statement was error.

C. The Error Prejudiced Both the Guilt and the Penalty Deliberations

1. The Prosecutor Used the Evidence to Explain an Important Gap in His Identity Case

Constitutional violations like the confrontation-clause infringement involved here require reversal of any affected verdict unless respondent can demonstrate, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) This requires a showing that the error was not one which "might have contributed to" jurors voting the way they did. (*Id.* at p. 23.) Respondent's burden is to show that the error is not one "which possibly influenced the jury adversely . . . ." (*Ibid.* at p. 23.) Thus, the *Chapman* question is whether the "verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis omitted.) As to the impact of an error on the penalty judgment, the test would be the same even if it were not of constitutional proportions. (*People v. Guerra* (2006) 37 Cal. 4th 1067, 1144–1145 [California's *Brown* test for state-law error's effect on penalty is equivalent to the *Chapman* standard].)

Here a rational juror could have had a reasonable doubt as to the identity of the perpetrator of the Jenks crimes, which, as the late Chief Justice Rehnquist explained, is another way of framing the *Chapman* test. (*Neder v. United States* (1999) 527 U.S. 1, 19.) The reasons why the case was suggestive but not conclusive as a matter of law are set forth in detail at pages 90–94, above. In this context, the improper testimony could have been used by one or more jurors in exactly the manner the prosecution suggested they use it: to explain the absence of jewelry, bloody clothing or shoes, or a hatchet among appellant's belongings, because the duffel that was supposedly in Galloway's car at the time of the search contained them. (RT 10: 2410–2411.) It cannot be said that the guilty verdict "was surely unattributable" to reasoning which the prosecution thought could contribute to it. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.)

Even if the error were only a state-law violation, there is "a *reasonable chance*, more than an *abstract possibility*," that its apparent elimination of one of the problems with the prosecution case "affected the verdict[s]" on the Jenks counts. (*College Hospital, Inc.*, v. *Superior Court* (1994) 8 Cal.4th 704, 715 [explaining the reasonable-probability test of *People v. Watson*, *supra*, 46 Cal.2d 818, 836]; accord, *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800–801.)

2. Under an Appropriate Standard, Respondent Cannot Meet Its Burden of Showing No Contribution to the Penalty Verdict

The penalty verdict cannot be known to have been unaffected by the prosecution's use of the statement to show appellant's alleged callousness. Because there can be confusion over the appropriate way to analyze this question, appellant first addresses the harmlessness standard.

a. Harmlessness Review Must be Concerned with the Potential Impact of an Error on Jurors' Unknowable Subjective Processes, Not with the Relative Strengths of Aggravation and Mitigation

Former Chief Justice Roger Traynor insisted that

> an appellate court cannot possibly determine what errors influenced a jury to impose the death penalty. Any error, unless it related only to the proof of some fact otherwise indisputably established, might have tipped the scales against the defendant. Hence, an error in the penalty phase of a capital case usually compels reversal.

(Traynor, The Riddle of Harmless Error (1970) p. 73 (Traynor).) Appellant would concede that errors that were unquestionably trivial or that were cured in a manner that was indubitably effective could also be held harmless. Any analysis, however, that depends on a reviewing court's weighing of the strength of the aggravating and mitigating evidence, or, similarly, on comparing the pro-death impact of a substantial error to other evidence already before the jury, is improper. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; see also *People v. Hines*, *supra*, 61 Cal.2d 164, 169 [any substantial error pertaining to penalty meets *Watson* standard for error].)

There are several reasons for this. The harmlessness analysis must be conducted with due regard for these factors: appellant's right to have his fate decided by a jury not influenced by error, not an appellate court hypothesizing such a jury;[121] the inability of a reviewer of the record to observe witnesses' demeanor[122] and the limited capacity of such a person to

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[121] *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Satterwhite v. Texas* (1988) 486 U.S. 249, 263 (conc. opn. of Marshall, J.)

[122] *People v. Stewart* (2004) 33 Cal.4th 425, 451.

develop a "'feel' for the emotional environment of the courtroom";[123] the inherent unknowability of what goes into the subjective weighing with which jurors are charged when deciding penalty,[124] their being permitted to rely on mercy or sympathy[125] and required to exercise their own normative judgment as to the significance of each fact they find,[126] and, as a consequence, the surprise life verdicts that juries sometimes agree on in highly aggravated cases;[127] the principle that reversal is required if one juror might have decided differently if not influenced by error;[128] and the

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[123]*People v. Keene* (Ill. 1995) 660 N.E.2d 901, 913; see also *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330, 340, fn. 7; *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1024–1025.

[124]*Deck v. Missouri* (2005) 544 U.S. 622, __, [61 L. Ed. 2d 953, 965; 125 S. Ct. 2007, 2014] [factors are "are often unquantifiable and elusive"]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258; *People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. Hamilton*, *supra*, 60 Cal.2d 105, 136–137; *People v. Hines* (1964) 61 Cal.2d 164, 169, disapproved on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40.

[125]*People v. Caro* (1988) 46 Cal.3d 1035, 1067; *People v. Easley* (1983) 34 Cal.3d 858, 875–880.

[126]*People v. Rodriguez* (1986) 42 Cal.3d 730, 779.

[127]*McCleskey v. Kemp* (1987) 481 U.S. 279, 311; McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should it Be?: An Assessment of United States and Louisiana Supreme Court Case Law* (1999) 59 La. L.Rev. 1105, 1142–1144 (McCord); see also California LWOP cases cited at page 362, footnote 227, below.

[128]*Wiggins v. Smith* (2003) 539 U.S. 510, 537; *In re Lucas* (2004) 33 Cal.4th 682, 734.

deep concern for reliability required in both the making[129] and the review[130] of a state's decision to execute one of its citizens.

Under these circumstances, as appellant explains in more depth in the Appendix,[131] under both state and federal law, the harmlessness inquiry must depend not on this Court's reweighing the cases for aggravation and mitigation, but simply on whether the error resulted in the admission of evidence "which possibly influenced the jury adversely . . . ." (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California*, *supra*, 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [in death cases, state-law test is equivalent to *Chapman*].) This means that it "might have contributed to" the result (*Chapman*, *supra*, 386 U.S. at p. 24) or "might have affected [the] capital sentencing jury." (*Satterwhite v. Texas*, *supra*, 486 U.S. 249, 258.) To determine whether error could have "influenced," "contributed to," or "affected" a juror's decision, a court first "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to" the question decided. (*Neder v. United States*, *supra*, 527 U.S. 1, 19.) In a death case, because of the room for sympathy, mercy, and other subjective factors, this is almost always such a possibility. And it is respondent who bears the burden of showing otherwise, beyond a

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[129]*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 329, fn. 2.

[130]*California v. Ramos* (1983) 463 U.S. 992, 998–999; *Zant v. Stephens* (1983) 462 U.S. 862, 885.

[131]The Appendix also explains why *People v. Hamilton*, *supra*, 60 Cal.2d 105, 136–137, and *People v. Hines*, *supra*, 61 Cal.2d 164, 169, which set forth the test advocated here but pre-date the 1978 death penalty statute, are still viable. The analysis is condensed here to avoid unduly interrupting the flow of the Galloway hearsay claim. However, if the outcome of this appeal hinges on the Court's leaning towards a harmlessness standard other than the one set forth here, the Appendix should be considered an integral part of the penalty-phase claims.

reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) Any substantial error, therefore, can affect the penalty-phase outcome, unless it only further proved a conclusively-established fact or was nullified by curative action. (*People v. Hamilton*, *supra*, 60 Cal.2d 105, 136–137 [substantial error must normally be held prejudicial]; *People v. Roldan* (2005) 35 Cal. 4th 646, 734, 739 [exception where other action nullified error]; Traynor, The Riddle of Harmless Error, *supra*, p. 73 [exception where error proved fact otherwise established].) Otherwise there is a "realistic . . . possibility" that it affected the outcome, i.e., one that can be envisioned without hypothesizing juror caprice (*People v. Brown* (1988) 46 Cal.3d 432, 448), and reversal is required. As appellant demonstrates in the Appendix, the "reasonable possibility" test of *People v. Brown* (1988) 46 Cal.3d 432, did not purport to change the any-substantial-error standard; it restated a perspective for determining whether error is substantial, as opposed to trivial. It did so to handle situations where the newly-enacted list of factors that a penalty jury weighs, along with effective instructions, would have excluded consideration of erroneous testimony or argument. (See pp. 370-374, below.)

The approach appellant advocates is not altogether foreign to this Court in recent times. Thus, in *People v. Sturm* (2006) 37 Cal.4th 1218, the Court found substantial error to be reversible simply on the basis of the likely impactfulness of the errors and the Court's inability to find that a death sentence was a foregone conclusion. (*Id.* at pp. 1243–1244.) In doing so, it implicitly rejected a dissenting opinion's suggestion that it should not "remove[] . . . the aggravating nature of the capital crimes from the prejudice analysis" and should weigh the aggravating and mitigating circumstances. (See *id.* at pp. 1245, 1247 (dis. opn. of Baxter, J.).)

b. If the Court Were to Assess the Strength of the Case for Life in Appellant's Trial, It Would Have to Conclude that a Unanimous Death Verdict Was Not Inevitable

Should the Court nevertheless undertake to measure the probabilities of a different outcome, the result of such an analysis in appellant's case must be that a unanimous death verdict was not inevitable. If there is such a thing as a case where the outcome at the penalty trial was so foreordained that no error could have helped enable it,[132] and where the subsequent appeal is therefore a useless exercise, this case is not it.

There was, of course, evidence in support of the death verdicts. The Jenks crimes were shocking in their brutality and apparent betrayal of trust. The depravity of appellant's disfigurement of Shirley Jenkses' body—both the cuts on the throat and whatever may have been done to her sexually—could rationally be considered aggravating. However, it could also have been viewed as further evidence of a man possessed by a sick mind. (*People v. Hines*, *supra*, 61 Cal.2d 164, 169.) Appellant had a prior record which was neither insignificant nor extensive: in an 18-year period ending 12 years before the current offenses, he had been found guilty of two robberies—during neither of which was he armed—three auto thefts, and testifying falsely that a 10-year-old robbery conviction was the result of one of his guilty pleas. (RT 11: 2524–2530, 2534–2537; Exs. 84–89, 91–92.) More damaging was the testimony alleging rapes in 1979 and 1980.

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[132]But see *People v. Caro* (1988) 46 Cal.3d 1035, 1067 (jury understands its power to extend mercy, even without specific instruction to that effect); *People v. Easley* (1983) 34 Cal.3d 858, 875–880 (sympathy for the defendant is an appropriate part of the weighing process); *id.* at pp. 877–878 (jury may not be precluded from considering as mitigation any aspect of defendant's character or record proffered by defendant as basis for sentence less than death), quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, and *Lockett v. Ohio* (1978) 438 U.S. 586, 604.

Nevertheless, "the record contains evidence that could rationally lead to a contrary finding," i.e., one different from that rendered by a jury exposed to prejudicial and inadmissible testimony. (*Neder v. United States*, *supra*, 527 U.S. 1, 19.)

Any canvass of the evidence should focus on that which could have lead to a life verdict, since the issue is whether such a verdict was possible absent error. (*Neder v. United States*, *supra*.) The opposite approach—viewing the evidence in the light most favorable to the verdict—derives from, and is appropriate to, analyses of a claim that there was not enough evidence to *support* the verdict. This is because, in that situation, the question is whether a rational factfinder could have reached the conclusion which it *did* reach. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Perez* (1992) 2 Cal.4th 1117, 1124; *Walters v. Maas* (9th Cir. 1995) 45 F.3d 1355, 1358.) Here the question is whether a rational sentencer could have reached the opposite conclusion.

The defense mitigation case was bare-bones, but there was nonetheless certainly enough in it to support a life verdict.

Dr. Norberto Tuason, a psychiatrist from the county mental health clinic, testified that appellant suffered from chronic paranoid schizophrenia.[133] (RT 13: 2271, 2801.) He stated more than once that this

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[133]The prosecution sought to challenge the diagnosis, but only on cross-examination, and the psychiatrist did not retreat from it. (RT 13: 2767–2803.) Another clinician had diagnosed appellant with the same condition three years earlier. (RT 13: 2720–2721.) Moreover, the jury knew that appellant was receiving an SSI check. (RT 7: 1529.) Since he was doing odd jobs and relying on a bicycle for transportation, it probably did not assume that he had retired at age 49. (See RT 12: 2537; 13: 2805.) Although the defense neglected to introduce the longer history of mental illness that led to appellant's receipt of disability benefits (see RT 2: 326–327), it would not be too hard for a juror to put two and two together and realize that at times

(continued...)

was a very serious disorder, and that when he saw appellant in mid-April, 1997, three and one-half months before the offenses, appellant was hearing voices and believed that someone was after him, wanting to cause harm to him. (RT 13: 2719, 2721, 2723, 2797–2799.) While medication cleared up appellant's psychotic symptoms as of a June 19 followup visit (RT 13: 2723–2724), people with this disease tend to stop taking their medications, in which case the symptoms can recur quickly (RT 13: 2724–2725). Moreover, the degree of alcohol use suggested by appellant's $140 July tab at a liquor store could exacerbate his symptoms very quickly and would be a cause of great concern. (RT 13: 2777.) As of August 10, a few days after the homicides, appellant was "medically noncompliant," i.e., not taking his medications. (RT 13: 2789.)

Appellant's mother was the other defense witness. From ages two to fourteen, appellant and a sister were raised by a single working mother, during a period, the 1950's, when the vast majority of their peers would have had intact families. (RT 13: 2806.) She did domestic work, factory work, worked for cleaners, and "did some of everything that was legal," and it was a "difficult" time for her. (RT 13: 2807; see also 2811.) During the same period, i.e., from when appellant was aged two and one-half to fourteen, the family moved from Hanford to Los Angeles, where they lived "in various places all over" the city. (RT 13: 2807.) This information gives rise to several likely inferences. First, during the developmentally crucial

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[133](...continued)
appellant must have been low functioning, given the Tuason and earlier diagnoses and the fact (RT 7: 1529) that a third person (Diana Williams) was given power to receive and cash the check.

More to the point, perhaps, the case is not in posture where this Court would be evaluating the expert's credibility, as long as a rational juror could have accepted it.

first three years of life, there was probably severe discord in the home at first, followed by the disruption of loss of the father. Second, no matter what she said, a mother struggling with time, energy, and money, having to move around to different jobs and different residences, probably had significant deficits in her mothering capacity, a likelihood corroborated by appellant's mental illness and criminality. (Those she acknowledged were limited: "I think I was an overly protective mother." She made the children stay in the house quite a bit and greatly limited appellant's associations with other children. And "maybe I was too strict on him." (RT 13: 2808.)) Third, all the moves meant the various disruptions in changes of schools, neighborhoods, and—to the extent he was permitted to have them—friends, again at times when anything other than stability is hard. Fourth, the appearance of a stepfather during early adolescence, another critical developmental time, likely relieved some pressures but created a need for difficult adjustments. (Even Mrs. McCowan whom, it will be remembered, minimized her own deficits and—if appellant was, in fact, guilty of any violent crimes—his criminality, said, "In the beginning it [sic] was a little jealousy . . . ." (RT 13: 2809.))

Mrs. McCowan testified that appellant was a good boy until he was 16, when he started going out and getting into trouble, doing things like joyriding, and that he was always caught. (RT 13: 2808.) Again, counsel left the jurors to fill in between the lines, but some may have been sophisticated enough to know that getting into trouble is a sign of a troubled child, and that recidivism and increasingly serious conduct likely reflected institutional failure of the juvenile and adult just systems to support him, rather than make things worse.[134]

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[134]At at least one point, appellant was clearly hammered by authorities. (continued...)

But appellant himself wanted to break his patterns. "At some point in time," as trial counsel put it in his question, appellant returned to Hanford, asking his mother to take him there. (RT 13: 2811.)

> He kept asking me, he said he wanted to come here because in Los Angeles you didn't have—you don't have to look for trouble, trouble will find you, and he promised my husband that he would stay out of trouble, and he said if I go up there, it's a small town, I believe I will—I'll be able to stay out of trouble. And he also has some cousins here and he loved his cousins. He wanted to be around them.

(RT 13: 2811.)

The family knew appellant as quiet, easygoing, and loving, which means that whatever else he was, he did have those sides to him. (RT 13: 2809.) Specifically, he was kind, loving, and compassionate towards his son. He loved his sister and was protective of her, as he was his mother, whose welfare he was always concerned about. (RT 13: 2810; see also 2812.) He was brought up religious, and during the time of trial he was reading his Bible and praying. (RT 13: 2813.) One of the prosecution's victim-impact witnesses, Clarence Washington, testified that the Jenkses "really liked [appellant] a lot." (RT 12: 2637.) "[T]hey always had such high praise of him all the time, you know, Tom came over and he did such excellent this and he does this well and they seemed happy to see him." (RT 12: 2637.)

Finally, given the weaknesses in the case for either premeditation or robbery (as opposed to theft), and the strange gaps even in the identification

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[134](...continued)
He was charged with two counts of perjury for his incorrect testimony that a robbery conviction 10 years earlier resulted from a guilty plea (Count I) and not a trial (Count II). (Ex. 88.)

case, some jurors may have had some lingering doubt about appellant's guilt of capital murder. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 706.)

In sum, the crime could be viewed as heinous, and appellant had a prior record that was not negligible, but it was not extreme, either.[135] On the other hand, he had at best a difficult upbringing; he suffered from serious mental illness, a fact reconfirmed shortly before the offenses; he manifested a great deal of humanity in his family relations; he had sought to remove himself from an environment which encouraged his criminality; the Jenkses appreciated his reliable work; and there was a basis for lingering doubt. If, therefore, the relevant question *were* whether a death sentence was inevitable despite error that could affect a juror's penalty choice (but see Part C.2.a of this argument, beginning on p. 204, above), the answer would have to be "no."

c. The Prosecution Relied on the Walker/Galloway Hearsay in Seeking the Death Penalty

The prosecution had stressed how little appellant actually gained—$50 in pawn—from two murders. (RT 10: 2467.) Added to this image of senselessness was a related point also urged by the prosecution, this one practically at the close of its penalty-phase argument. It portrayed appellant as taking these terrible crimes casually, having coffee with Diana Williams the next morning and then going "off to the casino gambling." (RT 13: 2854.) The only evidence in support of this statement was the Walker report about Galloway's purported statement. Moreover, while the remainder of the prosecution evidence would have left jurors with the impression that appellant was so desperate for money that he could not buy

[135]Its gravity within this range depended, of course, on whether the testimony regarding unadjudicated rape allegations was believed.

food, the testimony admitted in error replaced that image by one of a man willing to kill two people to fund a brief visit (see RT 10: 2237) to the slot machines. This was hardly so insubstantial—given the unknowability of the determinants of each juror's subjective feeling about penalty and the other factors scaling appellate harmlessness finding back to the question of substantiality vel non of the error—that respondent could meet its burden of showing harmlessness. (*Chapman v. California*, *supra*, 386 U.S. 18; *People v. Brown*, *supra*, 46 Cal.3d 432.) The United States Supreme Court has been unwilling to find harmlessness in circumstances where the prosecutor relied heavily on evidence erroneously admitted, finding that fact alone enough to demonstrate the fatal significance of the error in the context of the trial. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586, 590 & fn. 8; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.) The same principle applies here.

The error was not insubstantial; it was not cured; it did not prove a fact that was already conclusively established by other evidence. If the guilt verdicts could stand, the penalty verdicts would have to be reversed.

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X. THE ELDERLY-VICTIM ENHANCEMENTS ARE INVALID

Appellant's sentence included a one-year enhancement on each of counts I and II, which was then doubled, apparently because of appellant's strike priors, for a total four-year determinate term of imprisonment. (CT 10: 2928–2929.) Each enhancement was imposed "for the special allegation of committing a violent assault on a person over the age of 65." (CT 10: 2928; see also 2929.) There is no such enhancement. There is an elderly-victim enhancement, but it only pertains to enumerated crimes, and murder is not among them. Moreover, there was little evidence that either victim was over age 65, only a multiple-level hearsay report from unnamed declarants and an pathologist's opinion that did not even purport to meet the reasonable-doubt standard.

A. The Sentence Enhancements Were Unauthorized by Statute

The Amended Information charged that Counts I and II, the alleged murders, were in violation of section 667.9(a), in that victims were aged 65 or over. (CT 1: 196–197.) The jury found the allegations true. (CT 9: 2650.) The court cited section 667.9, subd. (a), in imposing sentence. (CT 10: 2928–2929.) It provides,

> Any person who commits one or more of the crimes specified in subdivision (c) against a person who is 65 years of age or older . . . and that . . . condition is known or reasonably should be known to the person committing the crime, shall receive a one-year enhancement for each violation.[136]

[136]At the time of the offenses, the provision also contained a reference to section 667, which the Legislature deleted, explaining that it was "surplusage." (Stats. 1999, ch. 569, § 2(a).)

Subdivision (c) lists 11 crimes to which subdivision (a) applies; homicides are not among them.[137] The prosecution could have charged one enhancement on the robbery count, but it did not, and there was no jury finding on that count. The enhancements that appellant did receive were thus unauthorized by statute and must be struck.

B. There Was Insufficient Evidence of the Victims' Ages

Even if the enhancements were authorized, there was insufficient evidence for a rational factfinder to find them true beyond a reasonable doubt. The prosecution failed to introduce the Jenkses' birth certificates. Rather, it relied on the following testimony of Armand Dollinger, the pathologist who examined their bodies:

> Q. . . . What age did [Fred Jenks] appear?
>
> A. He was reported to be 73 years of age.
>
> Q. And did he appear—
>
> A. He appeared to be that age, yes, sir.

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[137]"Subdivisions (a) and (b) apply to the following crimes:
"(1) Mayhem, in violation of Section 203 or 205.
"(2) Kidnapping, in violation of Section 207, 209, or 209.5.
"(3) Robbery, in violation of Section 211.
"(4) Carjacking, in violation of Section 215.
"(5) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.
"(6) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262.
"(7) Rape, spousal rape, or sexual penetration in concert, in violation of Section 264.1.
"(8) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.
"(9) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.
"(10) Sexual penetration, in violation of subdivision (a) of Section 289.
"(11) Burglary of the first degree, as defined in Section 460, in violation of Section 459."

. . .

Q. And did [Shirley Jenks] appear to be a certain age or within an age group?

A. She appeared to be within the age range that was stated, 72 years.

(RT 6: 1397–1398; 7: 1440.) This was far from an expression of "a subjective state of near certitude" (*Jackson v. Virginia* (1979) 443 U.S. 307, 315) in the witness's mind, so it was surely not a basis for jurors to reach such a state.

There was, in addition to the witness's opinion, the hearsay which he was reporting from an unnamed declarant. Presumably the pathologist only spoke to an investigating officer, who might have gotten the report from the neighbors who called police (see RT 5: 1078–1083), who would have gotten it from the Jenkses, who would have learned it from their respective parents. Apart from the incompetence of the (unobjected-to) evidence, it surely did not even meet the civil substantial-evidence test: that it "must be substantial, that is, evidence that reasonably inspires confidence and is of solid value." (*People v. Marshall* (1997) 15 Cal.4th 1, 34, internal quotation marks omitted.)

This report of practically no worth, even added to the conclusory and not particularly strong opinion of the pathologist (who, of course, could have had his perceptions influenced by his expectations), could not have convinced rational jurors who were paying attention to the reasonable-doubt test on this question. Birth certificates are what should have been presented.[138]

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[138]Dr. Dollinger had entered the same information on the decedents' death certificates, which were introduced. (Exs. 60, 61.) While this may or may not have resolved any admissibility issues, it did not render his opinion (continued...)

Even if the enhancements were provided for in the Penal Code, the absence of sufficient evidence of the predicate fact requires the striking of the true findings and the portion of appellant's sentence attributable to them.

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[138](...continued)
more certain or the multiple hearsay more persuasive.

XI. APPELLANT'S INABILITY TO PAY THE RESTITUTION FINE REQUIRES ITS REDUCTION TO THE STATUTORY MINIMUM

Appellant's sentence includes a $10,000 restitution fine. (CT 10: 2929.) Contrary to statute and to appellant's rights to substantive and procedural due process, equal protection of the laws, and to not be subjected to an excessive fine (U.S. Const, 8th and 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17), it was imposed without regard to his ability to pay. While an equal-protection analysis would permit taking ability to pay into account at either the point of setting the fine or the point of collecting it, neither has happened in appellant's case. Collection, in fact, imposes severe hardship, and the fine should be reduced to the statutory minimum of $200.

The procedural background is unusual. The trial court initially imposed the $10,000 fine without making any findings or stating any reasons. (RT 13: 2920; see also CT 10: 2929.) Appellant was an indigent for whom the court had appointed counsel. (Augmented Record of Clerk's Transcript on Appeal 1: 62–63.) The court had reviewed the probation report, which recommended imposition of a restitution fine of $10,000, pursuant to section 1202.4 of the Penal Code. (CT 10: 2921; see RT 13: 2907–2909.) The report made the following statement, regarding ability to pay:

> The defendant will be imprisoned for an extended period of time. Therefore, it is your officer's opinion, during the time he is imprisoned he is capable of earnings, therefore, capable of paying for the fines as ordered by the Court.

(CT 10: 2919.) On February 27, 2007, the same court heard on the merits a motion to reduce the restitution fine to the statutory minimum of $200. As explained in more detail below, the motion and accompanying exhibits demonstrated that condemned prisoners are not permitted to work, that

appellant had no other resources beyond small gifts placed on his books by his mother and his appellate attorney, that any prisoner with a restitution-fine obligation loses 55% of any monies received as gifts to a deduction that goes towards paying the fine,[139] and that the fine imposed a severe hardship in an environment where the meeting of basic needs requires some funds for commissary purchases (under a regime intended to encourage non-condemned prisoners to work and to maintain their eligibility to do so[140]).

After hearing argument, the trial court denied the motion from the bench. (2/27/07 RT[141] 6.) Without explicitly addressing the District Attorney's jurisdictional challenge,[142] it ruled on the merits. In doing so, it cited the losses appellant had been found to have caused to his victims and their survivors and held that, by seizing a percentage, rather than the entirety, of any gifts sent to appellant, the state was taking his ability to pay into account (2/27/07 RT 6.)

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[139]See Cal. Code Regs., tit. 15, § 3097(e), -(f); see also Pen. Code § 2085.5, subds. (a), (c). The trial court apparently thought that the amount was currently 44%, later to rise to 55%, but the date for the 55% deduction rate had already passed, per the cited regulation. (2/27/07 RT 6.)

[140]A purpose of the San Quentin Operational Procedure governing inmate possession of property is "[t]o allow property in conformance to the CDC Work-Incentive Program." (Attachments to Motion to Appellant's Motion [sic] to Augment the Record on Appeal Filed February 4, 2009, page 70. This document, hereafter referred to as "Attachments," became part of the record pursuant to an order of this Court filed March 18, 2009.)

[141]This is a transcript of the proceedings of February 27, 2007. It became part of the appellate record pursuant to an order of this Court filed March 18, 2009.

[142]See Attachments, page 70.

This was error. A standard based on a state-wide percentage deduction, which fails to take into account a defendant's *individual* circumstances, misses the mark.

Appellant filed a notice of appeal from the trial court's order in propria persona. On July 12, 2007, the Court of Appeal, Fifth Appellate District, dismissed the appeal for failure to show that it was taken from an appealable order. (See online docket entries for No. F052838 at <http:// appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id= 676305&doc_no= F052838>.) The court did not explain further.[143]

Appellant filed a petition for review in this Court, No. S155393, seeking in the alternative review on the merits or a retransfer to the Court of Appeal with an order that it hear the appeal. This Court denied the petition on September 19, 2007. On February 4, 2009, appellant filed a motion to augment the record in the instant appeal with the documents and reporter's transcript from the motion to modify the fine, so that appellant could finally

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[143]The Court of Appeal evidently determined that it could not intervene in a case pending on appeal in this Court. First, as a letter on the issue of appealability filed with the Court on June 22, 2007, pointed out, on its face the trial court's order fell squarely within one of the statutory bases for appealability, as it was an "order made after judgment, affecting the substantial rights of the party." (Pen. Code § 1237, subd. (b).) So clearly there was some extrinsic obstacle. As to this, the Court of Appeal's concern about which appellate court should hear the matter is reflected in an unusual docket entry (May 16, 2007), reflecting the filing of a declaration received from the superior-court clerk to the following effect: "per Supreme Court, appeal re: post judgment motion should be filed at the 5th DCA." Relying only on the face of the entry, it is inconceivable that such a declaration would have been filed unless the Court of Appeal had sought guidance on this issue through that circuitous route. In fact, Supervising Deputy Clerk Barbara Torres of the superior court confirmed in a telephone call from appellant's counsel that the Court of Appeal requested that she inquire and file a declaration. The Court of Appeal did not state its reasons for rejecting the guidance which it sought, but it must have conducted an independent legal analysis.

obtain review of the trial court's ultimate decision. No opposition was filed, and the Court granted the motion to augment on March 18, 2009.

A. Appellant Lacks the Ability to Pay a Substantial Fine

The following facts were before the trial court and are taken, verbatim (other than renumbering of footnotes), from appellant's points and authorities in support of the motion to modify the fine. (Attachments, pp. 5–8. References to exhibits are to exhibits to the motion to modify, which also appear in the Attachments filed in this Court.) Although the District Attorney opposed the motion to modify, he disputed none of these facts. (Attachments, pp. 69–71.) Nor did the trial court question them in its ruling. (2/27/07 RT 6.)

In reality, there was no work program for any death-row inmate when Mr. Potts arrived at San Quentin, nor has there been since.[144] (Ex. A [Potts Declaration], ¶ 3.) His sole source of funds is small, irregular gifts from his mother and sister, who are both of very limited means, and his attorney. (Ex. A., ¶ 3.) Since his arrival, this support has averaged $39 per month, of which Mr. Potts has received $27 per month.[145] More to the

[144]There is a speculative possibility that this may change sometime in the future, with the construction of a new condemned housing complex. An opportunity to work is not, however, something that could be expected at the time of sentencing, that exists now, or that can be known to be available to Mr. Potts in the future. [Since the hearing on the motion to modify, appellant himself and appellate counsel have separately learned that a handful of inmates have jobs on their tiers. The availability of a privilege so rare that neither appellant nor a capital appellate attorney had heard of it for years does not change the overall situation regarding appellant's resources or his prospects.]

[145]The unadjusted average is $46 sent, $33 dollars received. The figures used above are based on subtracting three, atypical, larger gifts (one sent soon after his arrival and two placed on the books soon after Christmas of 2003 and 2004) sent during the eight-year period. (See Ex. C.) The two later ones were sent by the undersigned attorney, under circumstances which he does not (continued...)

point, however, is the most recent 12-month average, which takes into account increases in the deduction for the fine (which began at 20% plus a 2% fee and is now double that) and a small decline in what he is being sent. Over the past year, these irregular gifts have averaged $35 per month, of which Mr. Potts received less than $20. If he is sent the same amounts beginning January 1, when the deduction rate goes up again, he will receive less than $16 per month out of the $35 sent. (See Exs. B [trust account statements], and C [spreadsheet consolidating data from Ex. B].)

Mr. Potts needs these small gifts—not just the 45% of each that will be left over after deductions starting next month—to support a minimal level of subsistence. As his declaration explains in depressing detail, the prison diet is insufficient, unhealthy, and relied on only by those prisoners with no means to supplement it from the prison commissary, which is made available for that purpose. While the undersigned attorney was surprised and a bit skeptical when he first learned of this situation from other inmate clients, it is apparently not unusual. A survival manual for prisoners by two criminology professors warns bluntly that, in the typical American prison, "Many days the food is prepared, served, and thrown out, with only a small number of [inmates] daring a taste. Fear of food poisoning generally beats out hunger." (Ross & Richards, Behind Bars: Surviving Prison (2002), p. 91 (Behind Bars).) "Generally, if you can afford to buy food through commissary . . . , the dining hall is to be avoided." (*Id.* at p. 93.) It advises, " . . . limit your exposure to food poisoning by skipping cafeteria meals that appear risky and supplement your diet with commissary food, vitamins, and a lot of liquids . . . ." (*Id.* at p. 100.)

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[145](...continued)
expect to be repeated.

Because of the food situation, the book explains, "it costs money to live in prison. Most estimates suggest that you need about $100 a month to go to commissary . . . ." (Behind Bars, *supra*, at p. 97.) The importance of commissary privileges is well recognized. (See, e.g., *Beard v. Banks* (2006) __ U.S. __, __, 165 L. Ed. 2d 697, 703; 126 S. Ct. 2572, 2576.) It is highlighted by the fact that, in scaled disciplinary regimes, "commissary is the first privilege that is taken away from you." (Behind Bars, *supra*, at p. 97; see also *Beard v. Banks*, *supra*, 165 L.Ed.2d at p. 703.)

The nationwide situation described above is no better in California. We spend $2.45 per day, on each inmate's meals. (Pringle, *Jail Food Can Be a Hard Sell*, L.A. Times (Jan. 8, 2005), p. A1.) This amounts to $.81 per meal, or $17.15 per week. This sum, unchanged since 1989, was 74% of the national average in the year 2000. ("Institutional Giants" <http://www.rimag.com/archives/2001/10b/sr-noncommercial-giants.asp> [as of Sept. 25, 2006].) Unless every other state has also declined to increase its spending as costs increase, we have fallen even further behind in the ensuing six years.

The California Appellate Project is an agency which contracts with the Supreme Court to provide training and assistance to attorneys appointed to handle appeals from judgments of death. In material orienting attorneys to the needs of their clients, it notes that, when a client requests outside support, "[h]e or she is requesting items that help to compensate for a shockingly bad diet, poor hygiene supplies, and inadequate clothing." (California Appellate Project, The CAP Prison Resource Book, sec. 2.1.) Mr. Potts's declaration speaks to his hygienic needs as well:

> I cannot meet my needs for deodorant, toothpaste, soap, denture-cleansing tablets, shampoo, and shaving cream without making [commissary] purchases. The state issues tooth powder, but not enough, and I run out. It issues two

> bars of soap a month, but I must use this for washing up in my cell, for showers, for washing my clothes, and to clean my cell, and it runs out quickly. When I can buy shampoo, I use that for washing my clothes. We are permitted to buy up to six bars of soap a month, and many people do. Many of us are allergic to the soap, however. I am, and I break out in an itchy rash. When I can, I buy baby oil from the canteen to sooth the itching. We were formerly given powdered soap to clean our cells with, but we are no longer given any cleaning supplies. We can buy soap and rags. We are expected to use soap to shave with, or to buy shaving cream.

(Ex. A, ¶ 4.)

Exhibit D provides some corroboration of this picture. It is San Quentin's current "Matrix," listing items which an inmate is allowed to possess. The second column indicates what a condemned inmate who is classified Grade A, Mr. Potts's status, is permitted to possess. The fifth column shows whether the item is available from the canteen ("canteen"), through a "special purchase" from an approved outside vendor by the inmate[146] ("SP"), or through a quarterly package which an outsider may order from an vendor ("QP"), as opposed to being state-issued (no entry in the column). State-issued clothing consists of two pairs of trousers, a belt, three shirts, three pairs of boxer shorts, three pairs of socks, three T-shirts, and a jacket and cap. (Exhibit D, p. 2.) If an inmate wants more socks, underwear, a handkerchief, a pair of pajamas, thongs for the shower, an extra pair of shoes, or sunglasses, someone must purchase them for him. (*Id.* at pp. 2–3, 5.) As noted previously, tooth powder and some soap are issued, but all other non-durable personal care items are available only at the canteen or via a quarterly package. This includes shampoo, conditioner, hair grooming products, soap, deodorant, shaving supplies, antacids, toothpaste, a hair brush, vitamins, skin lotion, talcum powder, and

[146]See Exhibit E, page 15, paragraph D.

miscellaneous items that one would purchase at a drug store. (*Id.* at pp. 3–4.) Writing supplies and stamps must be purchased if one is to maintain contact with the outside world. (*Id.* at p. 6.)

The list of items available from the canteen provides further corroboration of the need for some funds. Well-fed inmates would not need to be given the opportunity to purchase Ramen; rice; rice and beans; refried beans; peanut butter; dry milk; breakfast cereals; various condiments; heatable pouches of beef, stew, chili, chicken, seafood, and corn; and a device to heat them.[147] (See Exhibit F.) Presumably coffee, tea, and soda are offered because that is the only way to obtain them on death row. (*Ibid.*) A reminder of what life is like without access to a drug store is provided by the opportunities to purchase writing supplies; shampoo; hair grooming products, along with brushes and combs; toothpaste, floss, toothbrushes, and mouthwash; lotions and sun screen; deodorants; talcum powder; cotton swabs; wash cloths; shaving cream and after-shave; soap; various commonly-used over-the-counter medications; ear plugs; laundry soap; and birthday, holiday, and "Missing You" greeting cards. (*Ibid.*)

If an inmate wants to pass the time by watching television, listening to a radio, or listening to a cassette or tape player, he may purchase a total of two of such items. (*Id.* at p. 1.) When one no longer functions, he may buy a new one or pay for shipping and repairs. (Ex. E [excerpts from San Quentin Operational Procedure No. 0-0215], p. 17.) Mr. Potts wears glasses. He can only get new ones by paying for them. (Ex. D, p. 5; see also Ex. B, trust account deduction dated 9/26/2000.) Note that a modest $100 for any of these purposes would wipe out six months' worth of after-

[147]The "stinger" listed in the third column of Exhibit F is an electric immersion heater.

restitution-fine gifts. If an item sent to him violates the frequently-changing rules regarding what an inmate may possess, the prison returns it at his expense. (Ex. E, p. 20, XVII.C; see also Ex. B, trust account deductions dated 9/16/99, 5/8/00, 1/20/04.)[148]

B. The Fine Violated Statutory Criteria

At the time of defendant's sentencing, section 1202.4, subdivision (c), provided,

> A defendant's inability to pay shall not be considered a[149] reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two hundred-dollar ($200) or one hundred-dollar ($100) minimum.

(Stats.1997, c. 527 (S.B.150), § 4.) Subdivision (d) of the same section provided, and provides,

> In setting the amount of the fine pursuant to subdivision (b) in excess of the two hundred-dollar ($200) or one hundred-dollar ($100) minimum, the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay . . . .

In another death-penalty case, *People v. Vieira* (2005) 35 Cal. 4th 264, this Court recognized the clear meaning of the statute, i.e., that ability to pay must be taken into account. The Court affirmed the conviction and death sentence but remanded the case to the trial court because the latter had not taken into account the defendant's ability to pay in imposing a restitution fine. (*Id.* at pp. 305–306.)

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[148]This is the end of material copied from the points and authorities upon which the trial court ruled.

[149]The current version of the statute is identical, except that the words "compelling and extraordinary" have been inserted here.

The county probation department is an arm of the trial court. (*People v. Villarreal* (1977) 65 Cal. App. 3d 938, 945.) Its error was thus imputable to the court itself. By failing to conduct an adequate investigation of defendant's ability to pay, and by affirmatively misleading the court, it lead the court to sentence him in violation of the statute.

The violation was not rectified when the court heard the motion to reduce the fine. Noting that "not the entire amount of his resources and income is being seized, but a percentage," the court held, "The defendant's ability to pay is taken into consideration by the Department of Corrections when it makes its deductions and makes payments toward that restitution liability." (2/27/07 RT 6.) This reasoning strips the criterion of ability to pay of all meaning. The 55% deduction applies to all prisoners. (Cal. Code Regs., tit. 15, § 3097(e), -(f); see also Pen. Code § 2085.5, subds. (a), (c).) But *appellant's* ability to pay depends on *his* resources and needs. Neither the Department of Corrections and Rehabilitation nor the trial court took those into account.

The only remaining question is how much the fine should be. In *People v. Vieira*, *supra*, when this Court ordered the trial court to re-evaluate a condemned defendant's fine after considering his ability to pay, the court further ordered, "If the People choose not to contest the matter on remand, defendant's restitution fine shall be reduced to the statutory minimum." (35 Cal. 4th 264, 306.) This language suggests that if a defendant prevails in showing inability to pay, the fine should be the minimum, regardless of such factors as the seriousness of the offense.[150] Notably, this holding apparently was based on a record lacking the information provided here concerning the deprivations caused by a fine

[150]The *Vieira* defendant was guilty of four counts of capital murder. (35 Cal.4th at p. 273.)

exceeding the ability to pay; for all the *Vieira* court may have known, such a fine may simply be uncollectable and cause no hardship whatsoever. Here, a fortiori, the fine should be reduced to the minimum.

People v. Vieira, supra, 35 Cal. 4th 264, 306, is also instructive in its narrow focus on the defendant's actual ability to pay with the property and income which he or she may have at the time of sentencing. The Supreme court could have taken a laissez-faire attitude, assuming that no harm was done by permitting an uncollectible restitution fine to remain on the books. With such a procedure, portions of the fine could be collected whenever the defendant received small gifts that could be confiscated or received such a change in circumstances that he later had an ongoing ability to pay. This Court did not adopt such a stance in *Vieira*, and it certainly should not now, given the additional information in the record before the trial court on the effects of doing so.

C. The Fine Violated the Excessive Fines Clauses

"The Eighth Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' The provision is applicable to the States through the Fourteenth Amendment." (*Roper v. Simmons* (2005) 543 U.S. 551, 560.) Further, "the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. . . . By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." (*Ibid.*)

"The California Constitution contains similar protections. Article I, section 17, prohibits 'cruel or unusual punishment' and 'excessive fines' . . . ." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal. 4th 707, 728.) The standard under both the state and federal Excessive Fines Clause is "proportionality," which is determined by "four

considerations: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*Ibid.*)

While section 1202.4, subdivision (d), also requires a sentencing court to take into account not only ability to pay, but the seriousness of the offense, among other factors, under both the statute and the respective constitutions, the entire sentence imposed on appellant should also be borne in mind. (Cf. *Walsh v. Kirby* (1974) 13 Cal.3d 95 [due-process analysis of excessiveness of cumulative penalties for ongoing course of conduct].) The court sentenced appellant to death for the offenses of which he was convicted. This was the primary punishment for the offenses, and it was sufficient punishment. In terms of punishing the defendant for the seriousness of the conduct, the restitution fine was surely icing on the cake, to use a somewhat inapt metaphor. And in this context, it was excessive, given his inability to pay.

There is little case law applying the broad standards of the Excessive Fines Clauses. (See *United States v. Bajakajian* (1998) 524 U.S. 321, 327 ["This court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause"].) In a marginal case, that could pose some difficulty. However, if the prohibition on excessive fines has any meaning at all, it surely prohibits a fine that prevents a human being from buying toothpaste or supplementing a substandard diet. A government which imposes such a fine is not "respect[ing] the dignity of all persons." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 560.)

The result under the Excessive Fines Clauses is the same as under the statute. The fine should be reduced to the minimum.

D. The Fine Violated the Due Process Clauses

Confiscatory statutory penalties imposed without regard to a person's ability to pay violate the right to *substantive* due process of law. (U.S. Const, 8th and 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17; *Hale v. Morgan* (1978) 22 Cal. 3d 388; *City and County of San Francisco v. Sainez* (2000) 77 Cal. App. 4th 1302, 1310 et seq.; see generally *TXO Prod. Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 456–454.) This Court has strongly suggested that the same is true of punitive damage awards in civil actions. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 116–118.) Criminal fines are indistinguishable from statutory penalties and punitive damage awards, in this regard.

Sentences based on materially false information violate the state and federal constitutional protections for *procedural* due process. (*United States v. Tucker* (1972) 404 U.S. 443, 447; *Townsend v. Burke* (1948) 334 U.S. 736, 741; *People v. Arbuckle* (1978) 22 Cal.3d 749, 754–755; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719.) "A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process." (*United States v. Weston* (9th Cir. 1971) 448 F.2d 626, 634.) Here, if the only record were that of the initial proceedings and the judicially-noticeable fact of San Quentin's providing no work for condemned inmates, the probation officer's erroneous statement concerning one of the controlling facts underlying the trial court's decision violated this obvious prerequisite of procedural due process and would require a remand for resentencing.

Finally, failure to apply a protection set out in state law is itself a federal due process violation. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

The $10,000 restitution fine, in its excessiveness, therefore violates appellant's substantive due process rights. Its imposition, based on materially incorrect data provided to the trial court without the minimal investigation of a telephone call to San Quentin, violated his rights to procedural due process, as would a cavalier approach to his statutory rights.

E. Failure to Consider Ability to Pay at Either the Point of Imposition of the Fine or the Point of its Collection Violates the Equal Protection Clauses

Persons similarly situated are entitled to equal treatment under the state and federal Equal Protection Clauses. (*City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 439; *People v. Guzman* (2005) 35 Cal. 4th 577, 584.) Other than restitution fines under section 1202.4, California *collects* no other fine or judgment without regard to a person's ability to pay. Thus, if the statutory command to take into account the fundamental circumstance of ability to pay at the point of the fine's *imposition* is followed, equal treatment is possible, at least if this ameliorative provision of the statute is broadly construed. If the command is not followed, or followed narrowly, the gross deprivations imposed to secure payment of a debt by those in Mr. Potts's position are unconstitutionally discriminatory.

For purposes of collection of a fine, appellant is similarly situated to any other person on whom a fine has been imposed or, for that matter, any other judgment debtor. (See Pen. Code § 1214 [restitution fine collectable in the manner provided for the enforcement of money judgments generally].) Pursuant to court order, he owes a sum of money to another party, and processes exist to collect it. He has, of course, been convicted of two counts of murder. But, as noted above, his death sentence punishes him fully for that crime. A restitution fine can add a reduction in creature comforts, if the convicted person has such comforts to begin with. Nothing

in the law says, or could say,[151] that everyone subject to a restitution fine because of criminal conduct should be further punished by deprivations so severe that they are inconsistent with the maintenance of human dignity. Thus, the criminality of which appellant has been convicted does not distinguish his case. In the present context, he is similarly situated to other judgment debtors.

Others who owe money are not so deprived. Any amount that a judgment debtor can show is necessary for his or her support is exempt from garnishment, and 75% of a person's disposable earnings are exempt without any showing whatsoever. (Code Civ. Proc. §§ 706.050, 706.051; 15 U.S.C. § 1673(a).) Directly deposited welfare and social security benefits are exempt from execution. (Code Civ. Proc. § 704.080.) So are ordinary personal effects. (Code Civ. Proc. § 704.020.) A debtor may even keep $6075 worth of jewelry, heirlooms, and works of art. (Code Civ. Proc. § 704.040.) Even an inmate's trust account is exempt from levy in the amount of $1225, other than in the restitution-fine situation.[152] (Code Civ. Proc. § 704.090, subd. (a).)

When a state seeks to recoup from a citizen expenditures made on the citizen's behalf for appointed counsel in criminal proceedings, it may not "strip[] from indigent defendants the array of protective exemptions . . . [which the state] has erected for other civil judgment debtors." (*James v.*

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[151]See Argument C, pages 229–230, above.

[152]Only $300 is exempt from levy for a restitution fine. (Code Civ. Proc. § 704.090, subd. (b).) Unlike all other exemptions, this one is not subject to automatic adjustments for inflation. (*Ibid.*; see also Code Civ. Proc. § 703.150.) Moreover, it has been held to apply only to funds that somehow make it into the trust account without having been subject to the restitution-fine deduction. "The statute . . . does not apply to trust account deposits or give an inmate the unfettered right to deposit or 'build up' his or her account to the exemption amount." (*In re Betts* (1998) 62 Cal. App. 4th 821, 823.)

Strange (1972) 407 U.S. 128, 135.) Such treatment "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." (*Id.* at p. 142; cf. *Fuller v. Oregon.* (1974) 417 U.S. 40 [recoupment statute containing the usual exemptions, plus one for "manifest hardship," was constitutional].) The same is true here, absent effective compliance with the statutory command that ability to pay be considered.

Even among the narrower class of those who have committed crimes, a failure to take into account inability to pay here would unconstitutionally discriminate between those who are incarcerated and those who are not. This is because, for one who is out of custody, who is fined, and who is chronically unable to pay, the fine is uncollectible, unless instalments are set up which are small enough to enable the defendant to pay after all. Imposing some other hardship in its place is unacceptable on equal-protection grounds. (*Tate v. Short* (1971) 401 U.S. 395 [outlawing practice of incarceration as way of "working off" a fine for those unable to pay]; *Williams v. Illinois* (1970) 399 U.S. 235; *In re Antazo* (1970) 3 Cal. 3d 100.) Clearly, for someone in that situation, the ability-to-pay calculus would not involve the court inquiring into what one *could* pay if one gave up toothpaste for part of the month, cut down on laundering one's clothes, and reduced one's food budget to the $17.15 per week—the value of the state-issued food for inmates. Appellant should be treated like any other defendant who, absent such extreme privations, is unable to pay the fine; he is one of the relatively small number from whom it should simply be seen as uncollectible.

Failing to apply the ability-to-pay provision of section 1202.4 to appellant was a violation of equal protection, as would be a sentence based

on "consider[ing]" that factor[153] without making lack of such ability determinative. Either invidiously discriminates between debtors for whom there is no justification, under any equal-protection level of scrutiny, for this level of disparate treatment.

F. The Fine Should be Reduced to the Minimum

The various statutory and constitutional reasons for remitting the restitution fine to the $200 minimum have been set forth above. The most salient fact is that appellant did not, and does not, have either income or assets from which to pay a large fine. The state is collecting it by confiscating a large portion—since 2007 more than half—of whatever small gifts others send to him in the hope of ameliorating his somewhat dismal situation. For the foregoing reasons, the restitution fine should be reduced to the minimum and the Department of Corrections and Rehabilitation ordered to return to appellant all sums that have been collected pursuant to the unlawfully-imposed order, i.e., in excess of the $200 statutory minimum.

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[153]Section 1202.4, subdivision (d).

XII. THE TRIAL COURT IMPROPERLY EXCUSED JURORS FOR BEING DEATH-SCRUPLED

Under familiar constitutional principles, jurors in California may be excused because of their views on the death penalty only if they would not be willing to consider both penalty options during their deliberations. Rather than clearly adhering to this rule, the trial court excused some prospective jurors from appellant's trial because they would be uncomfortable voting for a death penalty. It excused others who expressed doubt that they could follow the law, but only after misinforming them that the law contained objective criteria which could compel a vote for death that they may not personally find appropriate. Exclusion of one juror on a basis broader than constitutionally permitted requires penalty reversal without a harmlessness analysis; here there were seven.

A. Trial Courts Must Ascertain Whether Jurors Who Disagree with Use of the Death Penalty or Would Have Difficulty Imposing it Are Nevertheless Able to Consider Imposing it in Some Circumstances

Any notion that jurors who would have difficulty imposing a death sentence should not sit on a capital jury is wrong. Rather, a trial judge must discover, among such jurors, which could nonetheless consider both sentencing alternatives under the facts of the case and the statutory directive as to what matters are pertinent, and which could not. Only members of the second group may be excused for cause.

"[A] criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment . . . ." (*Uttecht v. Brown* (2007) __ U.S. __, __, 127 S.Ct. 2218, 2224.) "Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty," a jury "cannot speak for the community," which includes a large group of people who feel that

way. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 520.) Excluding such persons goes past the legitimate aim of obtaining "a jury capable of imposing the death penalty," to producing one "uncommonly willing to condemn a man to die." (*Id.* at pp. 520–521.) Improper exclusion of death-scrupled jurors violates the Fourteenth Amendment Due Process Clause and the right to an impartial jury guaranteed by the Sixth Amendment. (*Id.* at pp. 518, 523.)

The appropriate task of trial courts, therefore, is that "of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." (*Wainwright v. Witt* (1985) 469 U.S. 412, 421.) For "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; see also *People v. Stewart* (2004) 33 Cal.4th 425, 446.) This reasoning prevents exclusion, without more information, of a prospective juror "who has 'a fixed opinion against' or who does not 'believe in' capital punishment." (*Boulden v. Holman* (1969) 394 U.S. 478, 484.) As Chief Justice George, writing for a unanimous Court, reiterated a few years ago, even a juror with views that "would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or . . . [who holds] views [which] would make it very difficult for the juror ever to impose the death penalty" may not be excluded on that basis alone. (*People v. Stewart*, *supra*, 33 Cal.4th 425, 447, discussing *People v. Kaurish* (1990) 52 Cal.3d 689.) Absent an actual

inability to consider both sentences, such a juror "is entitled—indeed, duty bound—to sit . . . ." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

In California the distinction between death-scrupled jurors who should be seated and those who should not is straightforward: the question is whether the person can consider both sentencing options or would automatically vote for one or the other. This was the test under the seminal federal case:

> The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out.

(*Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 522, fn. 21; see also p. 516, fn. 9 [issue is whether person "would automatically vote against" a death sentence or would merely "'reserve it for the direst cases'"].) The High Court later explained, however, that this phrasing was used in a context where jurors had unlimited discretion as to penalty. Where that was no longer the case, the question was "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 424; see also *Uttecht v. Brown*, *supra*, __ U.S. at p. __, 127 S.Ct. at p. 2222 [explaining relationship of *Witherspoon* holding to jurors' unlimited discretion].)

The federal test, by forbidding excusal of a juror for biases short of those that would substantially impair the juror's applying state law, is deeply interwoven with that law, as this Court recognized in *People v.*

Stewart, *supra*, 33 Cal.4th 425. As the Court pointed out, all that California law requires is willingness and ability to "follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Id.* at p. 447.) Further, "the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted." (*Ibid.*) The result is that difficulty in ever imposing the death penalty—the standard applied by the *Stewart* trial court—"is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties' . . . under *Witt* [*v. Wainwright*], *supra*, 469 U.S. 412." (*Ibid.*, bracketed pronoun in original.) Indeed, in our state we are basically back to the *Witherspoon* situation, where automatically refusing to vote for, or be able to consider, death is the only disqualifying situation. (Cf. *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 520 [approving only exclusion of jurors who "would not even consider returning a verdict of death"] with *People v. Cunningham* (2001) 25 Cal.4th 926, 975 [juror excludable if "unable to conscientiously consider all of the sentencing alternatives"] and *People v. Jones* (2003) 29 Cal.4th 1229, 1246 [same].) Thus this Court has stated, "A juror is subject to exclusion for cause if she 'would invariably vote either for or against the death penalty . . . , without regard to the strength of aggravating and mitigating circumstances . . . .' (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.)" (*People v. Ochoa* (2001) 26 Cal.4th 398, 431, second ellipsis in original.)

The prosecution bears the burden of demonstrating that a death-scrupled juror is unqualified. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 445, citing *Wainright v. Witt*, *supra*, 469 U.S. at p. 424.) "Before granting a

challenge for cause . . . over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties . . . ."[154] (*People v. Stewart*, *supra*, 33 Cal.4th 425, 445, citations and quotations marks omitted.) Disqualification may not be based solely on information from a juror which raises a possibility of excludable bias but is not enough to exclude the possibility that, in "brief follow-up questioning, [the juror would] persuasively demonstrate an ability to put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence." (*Id.* at p. 447; see also pp. 448–449.) This would include a self-diagnosis of substantial impairment, without follow-up voir dire. (*Id.* at p. 452.)

In general, this Court will defer to a trial court's determination regarding the "true state of mind" of a juror who "has made statements that

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[154]Appellant sets forth this quotation from *Stewart* because it is such a clear and succinct statement of the law. The opinion, however, cautiously limited its language to the situation before it, which included objections to those dismissals for cause which were challenged on appeal. (See 33 Cal.4th at pp. 444–445.) Here, of 30 excusals for cause, trial counsel objected only to the removal of Christine Wilson. (RT 3: 515–518, 572, 620, 632, 657, 668, 682–684, 706, 766; 4: 812–813, 843, 890, 895–896, 943, 949.)

The *Stewart* qualification as to excusal "over . . . objection" would be necessary if objection were required to preserve a claim of error, but "failure to object does not forfeit a *Witt/Witherspoon* claim on appeal." (*People v. Hoyos* (2007) 41 Cal.4th 872, 904, fn. 16.) That rule was established by the United States Supreme Court, in summary reversals of two state cases holding to the contrary. (See *People v. Velasquez* (1980) 26 Cal.3d 425, 443, vac. sub. nom. *California v. Velasquez* (1980) 448 U.S. 903, reaff'd in *People v. Velasquez* (1980) 28 Cal.3d 461, discussing *Wigglesworth v. Ohio* (1971) 403 U.S. 947 and *Harris v. Texas* (1971) 403 U.S. 947.)

are conflicting or ambiguous."[155] (*People v. Cunningham*, *supra*, 25 Cal.4th 926, 975.) However, deference to the trial court is inappropriate when the determination has been made on the basis of questionnaire answers alone. For in that situation, this Court has "the exact same information" that the trial court did. (*People v. Stewart*, *supra*, 33 Cal.4th 425, 451.)

B. The Trial Court Excused Seven Jurors Without Sufficient Justification

1. Helen Donnell Was Excused Because of a Combination of Mere Opposition to the Death Penalty and an Equivocal Indication of Possible Ineligibility

The trial court solicited a stipulation to the "hardship" excusal of prospective juror Helen Donnell, based on her declaration alone, and counsel acquiesced. The court stated no reasons, simply including her in a group of jurors whom it was proposing to excuse for hardship. (RT 2: 501–502.) Ms. Donnell's entire hardship declaration read, "I was told that if you have a Felony on your record, that by law, a person cannot serve on any jury trial. I am also against the death penalty." (CT 6: 1736.)

Under the applicable constitutional principles discussed above, being "against" the death penalty is not in itself a basis for exclusion. (*Boulden v. Holman*, *supra*, 394 U.S. 478, 484.)

The wrinkle here is that, in accepting the procedural shortcut initiated by Donnell (who did not even purport to state a hardship), the trial court did not state which of the bases upon which she sought to be excused it was accepting, so it might have been thinking she was ineligible because

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[155]For this reason, appellant is not challenging the exclusion of Christine Wilson although, as noted above, trial counsel objected. Although at points she said she could consider both penalties, her statements were conflicting, and the trial court explicitly relied in part on observations of her demeanor and body language. (See RT 3: 752–767.)

of her reference to a felony record. The woman was clearly a death-scrupled juror, whose unnecessary exclusion would have violated *Witherspoon/Witt*. Therefore the requirement of sufficient information to determine her excludability (*People v. Stewart*, *supra*, 33 Cal.4th 425, 445) would apply even if the trial court's ruling was based her statement about a felony record. If this were not the case, the *Witherspoon/Witt* requirements for avoiding bias in jury selection could be evaded pretextually, based on collateral facts that may or may not be true about the juror.

In general, convicted felons are not permitted to serve as jurors, subject to an exception which will be discussed shortly. (Code Civ. Proc. § 203, subd. (a)(5).) Donnell did not, however, state that she was a felon. All she said was, "I was told that, that if you have a Felony on your record," jury service is prohibited. Even if a representation that she had a felony on her record were considered implied, which it should not be,[156] she gave absolutely no indication that she had a felony conviction, as opposed to a felony arrest, "on [her] record." Nor did she provide any evidence that she was among those lay people who truly know the difference between a felony and a misdemeanor.

In addition, even if Donnell had been convicted of a felony, she may well have had her civil rights restored, which would include the right to serve on a jury.[157] As in *People v. Stewart*, *supra*, Donnell's "bare written

[156]Given the delicacy of the trial court's task and the tendency of citizens to try to evade jury service, particularly in longer or more notorious trials, such a non-committal statement by a person not before the court surely required a follow-up question.

[157]She would, after a three- or five-year period following release from a penal institution (depending on when the conviction took place), have had the right to apply to a court—with the assistance of appointed counsel if necessary—for a certificate of rehabilitation. The grant of such a certificate (continued...)

response was not . . . sufficient to establish a basis" for disqualification. (33 Cal.4th at p. 449.) Rather, "clarifying follow-up examination" was required (*ibid.*), to determine whether she had a felony conviction at all and, if so, whether or not her rights had been restored. Her brief written statement provided insufficient bases for excluding her for hardship, cause, or ineligibility.

2. Paul Silveira Was Excused on the Basis of a Religious Belief Without Exploration of How it Would Affect His Performance as a Juror

The trial court excused Paul Silveira through the same procedural shortcut that it employed with Helen Donnell. Silveira submitted a hardship declaration which stated, in its entirety,

> Because of my religen I have no right choosing the life of a nother person. Meaning death or life in peresen. I would like to please be relest from Juror Duty I deeply belive in my religen
>
> I am also illiterete

(CT 6: 1723, errors in original.) The court acknowledged that Silveira had not stated hardship (RT 2: 453) but said, ". . . I don't know if it's worthwile spending the time to put him through a questionnaire" (RT 2: 452). The basis for the excusal was Silveira's "seeking to be excused because of

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[157](...continued)
is an automatic application for a full pardon, and a pardon restores a person's civil and political rights. (Pen. Code §§ 4852.01 et seq.) Indeed, "[t]he overall goal of the statute [providing for these procedures is] the restoration of" such rights "to ex-felons who have proved their rehabilitation." (*People v. Lockwood* (1998) 66 Cal.App.4th 222, 230.) The restoration of such rights includes the right to serve on a jury. (Code Civ. Proc. § 203, subd. (a)(5); see also *United States v. Horodner* (9th Cir. 1996) 91 F.3d 1317, 1319, fn. 2.) Moreover, in at least one county, even the more limited certificate of rehabilitation is understood to reinstate jury-service eligibility. (See <http://www.slocourts. ca.gov/court/jury/qual.cfm>, as of April 28, 2008.)

religious considerations"; nothing was said about the literacy issue. (RT 2: 452; see also 453.) Although the court wanted to do follow-up questioning of some jurors who were claiming hardship, it proposed excusing Silveira on the basis of his written request alone, and counsel acquiesced. (RT 2: 452–453.) This was error.

People v. Stewart, *supra*, 33 Cal.4th 425, and *Darden v. Wainwright* (1986) 477 U.S. 168, are squarely controlling. One of the potential jurors who was erroneously excused in *Stewart* had expressed opposition to the death penalty in these terms: "I do not believe a person should take a person's life. I do believe in life without parole." (*Id.* at p. 448.) Silveira's statement differed in but one inconsequential respect. Rather than, like the *Stewart* venireperson, emphasizing the strength of his belief by stating his support for the alternate penalty, he did so by stating that he deeply believed in his religion, the source of his moral belief. The statement was entirely equivalent to the inadequate one in *Stewart*.

Being called upon to violate religious beliefs is not, without more, a basis for excusal. In *Darden v. Wainwright*, *supra*, 477 U.S. 168, an affirmative answer to the following question was insufficient for exclusion: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable[,] without violating your own principles[,] to vote to recommend a death penalty[,] regardless of the facts." (*Id.* at p. 178.) The answer did not alone "compel the conclusion that [the prospective juror] could not under any circumstances recommend the death penalty." (*Ibid.*) Exclusion of the venireperson was permissible, but only because the trial court had given added explanations that what was being looked for was actual unwillingness to give a recommendation that the law required. (*Id.* at pp. 176–178.) *Darden* did not elaborate, but the High Court's analysis only makes sense if

it was based on the proposition that under some circumstances, including a sense of civic duty, people are willing to do what their religion teaches them they should not. (See *People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) As with *Witherspoon*, *Witt*, and other cases on the subject, the Court continued to require that trial courts pay attention to such possibilities and rule them out before excluding a death-scrupled juror.

Silveira's request had a certain compelling nature to it, but only in tending to show an apparent heart-felt *desire* to be excused, not in resolving the question of whether the man could nonetheless perform a juror's duties. To answer that one, as with the *Stewart* juror, "clarifying follow-up examination . . ., . . . during which the court would be able to further explain the role of jurors in the judicial system, examine the prospective juror's demeanor, and make an assessment of that person's ability to weigh a death penalty decision" would have been required. (33 Cal.4th at p. 448.) Without that, what the court below knew was that Silveira really did not want to serve, and that he had provided "a *preliminary* indication" that he "*might* prove, upon further examination, to be subject to a challenge for cause . . . ." (*Ibid.*)

This Court, in its unanimous opinion in *Stewart*, went out of its way to express skepticism about the use of brief questionnaire responses, without voir dire, in resolving cause challenges. (33 Cal. 4th at pp. 449–450.) Strangely, after excusing Silveira (RT 2: 456), the trial court spent considerable time questioning other potential jurors to make sure that what they had written about family illness, surgeries, limits on what employers would pay for jury duty, etc., would actually preclude service without substantial hardship. (RT 2: 456–475.) Its failure to similarly ascertain the entire picture with Silveira resulted in serious constitutional error. (Cf. *People v. Heard* (2003) 31 Cal.4th 946, 968 [strongly

admonishing trial courts to spend the few extra minutes that it takes to avoid per se reversible error in death-qualifying a jury].)

3. Jennifer Montoya Was Excused Because Voting for Death Could Make Her Uncomfortable

Jennifer Montoya was an 18-year-old college student, a Catholic who "sometimes" attended services. (CT 8: 2202, 2205, 2207.) Her questionnaire indicated a strong pro-death stance, connected to her religious views (CT 8: 2215–2217), but after learning more about the law and the jurors' task, and giving the matter further thought, she ended up showing what the court thought was enough bias *against* a death sentence to render her excludable. (RT 4: 887–890.) The court's decision was flawed in two respects. First, its focus slipped from whether she could consider both penalties to whether doing so could cause her "to be in a position where you might have to do something that you're uncomfortable with." (RT 4: 890.) Second, it did elicit statements that she had doubts whether she could follow the law (RT 4: 889), but it did so after failing to inform her about the degree to which California law incorporates a juror's personal beliefs and values into the juror's penalty decision, leaving the impression that the law could require a vote for death that she might not subjectively support. (E.g., RT 4: 885.) In any event, it did not rely on those statements—it excused her to avoid putting her in an "uncomfortable" situation.

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a. Montoya's Questionnaire and Voir Dire Showed Openness to Either Penalty

Montoya's questionnaire and an extensive voir dire created a lengthy record, and appellant restates it here before analyzing the trial court's decision.

Montoya wrote, in her questionnaire, that she did not think that her religious beliefs would influence her in the case and that she would try to set them aside, but she underscored *try*. (CT 8: 2207.) She supported the death penalty because "anyone who murders another person deserves to die also. 'An eye for an eye'." (CT 8: 2215.) Moreover, if given life without parole, a defendant could escape and kill others in the process. (*Ibid.*) Also, "The death penalty would put some ease on the victims['] family members[,] knowing that they won't kill again." (*Ibid.*) Imposing the death penalty serves the purpose of preventing the person from killing again, while life without the possibility of parole serves "no purpose." (CT 8: 2216.) She indicated that she had no religious or philosophical beliefs or opinions which might affect her penalty decision. (*Ibid.*) She could personally vote for the death penalty if she found it to be the appropriate punishment in the case but would not automatically vote for either penalty. (CT 8: 2217.)

In voir dire the court followed up on her answer about setting aside her religious beliefs. In doing so, it stated that a juror who could not make an independent decision, based on the evidence and the law, without violating "the tenets of his or her religion," would have a right to be excused. (RT 4: 883.) The court applied this principle, but it was a misstatement of the law, as explained above, pages 244 et seq., above, in the discussion of Paul Silveira. (*Darden v. Wainwright*, *supra*, 477 U.S. 168, 176–178.) Moreover, this was the first of many instances where the

court spoke to Montoya simply of following the law, as if the law could in some circumstances require a vote for death. Asked if she could "promise" that she could make her "decisions . . . based upon the law," Montoya candidly admitted the limits to her ability to predict her future conduct,

> I can try. I don't know if I can definitely do it, but I can try, but, you know, I can't—I'll—I can't really promise you that I will because my beliefs might get in the way. . . . I don't know.

(RT 4: 883–884.) To foreshadow the analysis of this voir dire, below, it should be noted that the court did not, at this point either, clarify the proper role of personal beliefs (in assigning moral weight to the pertinent facts) and distinguish it from their improper role (in excluding one penalty or the other from consideration, regardless of strength of the aggravating and mitigating factors). As the trial court asked further questions, Montoya explained that she was no longer so fixed in her support of the death penalty:

> . . . Well, after hearing what you had said earlier about the death penalty and the life imprisonment?
>
> Q. Right?
>
> A. I think I can—I can—depending on the—like you say, depending on the facts or the evidence or whatever, I could be swayed off of what I wrote. Because I thought about that while you were saying that, so . . .
>
> Q. Okay. And would you be able to follow the law and apply those legal standards and focus on the legal considerations that you're required to look at in making the decision between life without possibility of parole and death if the case gets to a penalty phase?
>
> A. Yeah.
>
> Q. You can do that?
>
> A. Uh-huh.

(RT 4: 884, ellipsis in original.) The court then explained that it was concerned about her questionnaire answer that she would "try" to set aside her personal beliefs. (RT 4: 885.) (Her complete answer was less equivocal.[158]) The court explained that, to serve, she would need to be able to exercise her independent discretion and judgment, in accordance with the court's instructions, adding that not everyone can be a juror in a capital case. It then stated,

> We don't expect you to violate your own personal religious tenets by participating, but we do expect you to honestly tell us whether you can serve on this trial without a violation, and if not, then we'll excuse you.

(RT 4: 885.) It next asked if she could "be guided by the facts of the case and the law and not be guided by what you perceive to be your religious views." (*Ibid.*) Ms. Montoya sought to clarify what was being asked of her and asked, "See, how I'm understanding it, like you're trying to ask me if my religious views will get in the way; is that what you're trying to say?" (RT 4: 885–886.) The court confirmed this understanding: "Right." (RT 4: 886.) It noted that some religions prohibit the taking of another life by any means, and that others prohibit jury service. It then repeated the need to be able to make decisions independently, "based on the legal standards and not a religious philosophy that might be your own or something that you—that you feel that you're obliged to follow that's outside of this trial." (*Ibid.*)

Montoya responded,

> See, I—I don't believe taking another life is [—] like what you said. It's—I don't know what the word I'm looking for is, but how you say about no—under any circumstances,

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[158]"25. How might your religious or philosophical beliefs influence you, if you serve as a juror on this case?"

"I don't think my beleifs [sic] would influence me on this case. I'll *try* to set them aside[.]"

> 'cause we do prayers every day on abortion—on children under abortion, we pray for all the aborted children because they don't have a choice or whatnot. So I—I'm not really understanding. I mean it—

(RT 4: 887.) After this, the court went back to her questionnaire answers noting that she "believe[d] in" the death penalty "because anyone who murders anyone deserves to die also; an eye for an eye." (*Ibid.*) It asked if that was the way she feels, and she said, "Yes." It noted that she said she could personally vote for the death penalty, if appropriate and asked, "[I]s that your answer?," to which she responded, "Uh-huh." (*Ibid.*) It pointed out that she wrote that she could vote for either penalty, after considering all the evidence and the court's instructions on the law. (RT 4: 887–888.) It asked if she still felt that way, and she answered, "Yes." (RT 4: 888.)

So at this point the court knew that Montoya began with a Old-Testament-based bias towards death, remembered that her church opposed the intentional taking of life under any circumstances, but believed at all times that she could consider both penalties and vote for either. This should have been the end of the matter.[159] After Montoya reaffirmed that she could vote for either penalty, however, the colloquy continued:

> Q. Okay. Do you feel that you can do that without violating your religious tenets or your religious beliefs?
>
> A. Yeah. I think I can. But I can't say yes because I'm not sure.
>
> Q. You're not sure about what your church—

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[159]See *Gray v. Mississippi* (1987) 481 U.S. 648, 653 & fn. 5, 659, where the High Court agreed with a lower court that a venireperson was "clearly qualified to be seated as a juror." That determination had been made in *Gray v. State* (1985) 472 So.2d 409, 422, which explained that, during a "lengthy and confusing" voir dire, with "responses [which] were at times equivocal, . . . [n]onetheless she positively stated several times that she could vote for the death penalty should the circumstances warrant it."

A. Because whatever comes up.[160]

Q. You're not sure about what your church's position is or you are not sure about your own personal position?

A. I'm not sure about my own personal position right now.

Q. Sounds like maybe you're re-evaluating your own belief in the death penalty?

A. Uh-huh.

Q. And whether you could participate in a death verdict; is that right?

A. Uh-huh.

Q. Well, I mean that's personally—

A. Because I'm not sure. I wasn't understanding what you were asking.

(RT 4: 888.) Finally, the court asked if she had some doubts as to whether she would be able to participate in a death verdict, and she said, "Yeah, I think there are some doubts." (RT 4: 889.) Then the court again implied that the law could require a vote for death, rather than asking if she could consider both penalties and vote for death *if she felt it was appropriate*:

Q. Okay. Do those doubts rise to the level that you cannot assure me that you'd be able to strictly follow the law? And—and vote for death?"

A. Strictly, no, yeah.

Q. You don't think you could assure me of that at this juncture?

A. . . . I don't think so.

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[160]This addition to the previous answer, while at first sight a bit cryptic, appears to be a statement that how Montoya would vote would depend on the facts of the case. Such a qualification was, of course, entirely appropriate.

(*Ibid.*) The court confirmed that she had some doubts that she could follow the law, then asked the attorneys if they had any questions. When neither did, the following took place:

> THE COURT: Do you wish to stipulate that she be excused? Or you want to talk about it?
>
> MR. HULTGREN: No, that's fine.
>
> THE COURT: All right, I'm going to excuse [you], Miss Montoya. I don't want to violate your religious convictions or cause you to be in a position where you might have to do something that you're uncomfortable with. And I very much appreciate your time and your patience and your conscientious participation in this process. At this time we will excuse you, thank you very much.

(RT 4: 890.)

b. The Trial Court Used the Wrong Standard and Failed to Elicit Information Pertaining to the Correct Standard

(1) The Court Decided to Excuse Montoya to Keep Her from Being Made Uncomfortable

As the previous summary shows, rather than consistently focusing on whether her beliefs would prevent Montoya from considering the death penalty in fulfilling her civic duty, or just make her uncomfortable in doing so, the court consistently stated that she would not be placed in the latter position: "We don't expect you to violate your own personal religious tenets by participating . . . ." (RT 4: 885) "[If you cannot . . . serve on this trial without [such] a violation, . . . then we'll excuse you." (*Ibid.*) If a juror that did not feel that she could make a decision based on the law and the facts without violating "the tenets of his or her religion," the juror had a right to be excused. (RT 4: 883.) Even after getting affirmative, unequivocal answers to questions about whether she could consider both

penalties in the light of the evidence presented and the court's instructions (RT 4: 887–888), the court pressed on: "Do you feel that you can do that without violating your religious tenets or your religious beliefs?" (RT 4: 888.) Finally, the court stated in the clearest possible terms its reason for excusing her: "I'm going to excuse [you], Miss Montoya. I don't want to violate your religious convictions or cause you to be in a position where you might have to do something that you're uncomfortable with." (RT 4: 890.)

This was not an application of the general standard, whether the venireperson's beliefs would prevent her from, or substantially impair her in, performing her duties under state law, i.e., to consider both penalties in accordance with her personal view of the weight of those facts which fall within statutory aggravating and mitigating factors. (*People v. Stewart*, *supra*, 33 Cal.4th 425, 447; *People v. Cunningham*, *supra*, 25 Cal.4th 926, 975.)

Beyond ignoring the correct standard, the trial court applied the wrong one. Its desire to avoid putting a juror into a morally uncomfortable position may be understandable, but it was unauthorized because of society's paramount interest in obtaining a fair and representative jury. (*Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 520.) The trial court's view (a) assumes that the law of excusals for cause revolves around the interests of the juror, rather than those of the parties and the justice system, and (b) fails to recognize that many people affiliated with religious congregations have no discomfort whatsoever in even totally rejecting some of the tenets of their religions. In fact it is well known that many members of the Catholic Church, i.e., the one with which Montoya was affiliated, reject their church's stance on such issues as birth control, divorce, abortion, and the death penalty itself.

As explained previously, in *Darden v. Wainwright*, *supra*, 477 U.S. 168, a prospective juror was asked, "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts." (*Id.* at p. 178.) This is what appellant's trial judge thought was the issue for Montoya. But in *Darden*, an affirmative answer did not alone "compel the conclusion that [the prospective juror] could not under any circumstances recommend the death penalty." (*Ibid.*; see also *Gray v. Mississippi*, *supra*, as discussed in fn. 159 on p. 250, above.)

The disposition of this claim is also controlled by *People v. Stewart*, *supra*, 33 Cal.4th 425, the precise holding of which was that establishing that it would be "very difficult" to impose a death sentence was an insufficient basis for excusal. (*Id.* at pp. 442–443, 446, 447.) For the court below also phrased its explanation about excusing Montoya in terms of avoiding putting her "in a position where you might have to do something that you're uncomfortable with." (RT 4: 890.) If anything, this is a lower standard than "very difficult."

Stewart was emphatic on a distinction that applies here. There may be information establishing the existence of beliefs or feelings that could make it hard to vote for death. If so, it is a justification for followup questioning to determine whether or not the prospective juror could do so nonetheless, if she felt it was appropriate. This is not the same as being, without more, justification for excusing the juror. (33 Cal.4th at p. 447; see also pp. 448–449.) Here, therefore, the trial court's line of questioning was a starting point, not an ending point. For example, Montoya recalled her church's opposition to deliberate killing by noting, "we pray for all the aborted children." (RT 4: 887.) She did not say she protested at abortion

clinics or tried to withhold the portion of her tax dollars that paid for abortions (or for capital prosecutions, for that matter). Rather, she prayed for the children's souls. Defense attorneys regularly tell stories of jurors who say they voted to put a man to death and intended to pray for his soul. Nothing in this record precludes the possibility that Montoya could have been such a juror.

(2) Montoya Did Not Make an Informed Statement That She Could Not Follow the Law

Respondent might contend that, even if excusal was improper on the "discomfort" ground stated by the court, it was justified because the prospective juror could not assure the court that she could "strictly follow the law . . . and vote for death." (RT 4: 889.) Such an argument, if intended as a suggestion that the trial court actually applied a correct standard, should not be entertained by this Court. As a general matter, appellate tribunals "cannot indulge in a presumption which contradicts an express recital in the record" regarding a trial court's basis for its decision. (*U.S. Elevator v. Associated Intern. Ins.* (1989) 15 Cal.App.3d 636, 648; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal § 349, p. 395.) In particular, they will not assume that a trial court will use a stated legitimate reason "to mask a hidden unconstitutional agenda." (*People v. Huston* (1989) 210 Cal.App.3d 192, 223.) It is even less logical or appropriate to assume that it a court will state unconstitutional reasons on the record, while hiding its legitimate ones.

Typically, however, an appellant may not obtain reversal of a judgment for a trial court's correct action taken for a legally erroneous reason. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 340, p. 382.) However, there is no record from which this Court, substituting itself for the

trial court, can make "a reliable determination"[161] that the prosecution met its burden[162] of establishing that Montoya would not even consider whether the balance of aggravating and mitigating circumstances called for a death sentence. In remarks already summarized (p. 250, above), Montoya repeatedly confirmed questionnaire answers stating that she could vote for either penalty.

Only a context-free assessment of her answer to the question about following the law and voting for death can provide any support at all for a contention that appellate fact-finding to the contrary is appropriate. When Montoya spoke (RT 4: 889), she had been misled into believing that in some circumstances the law could require a vote for death that felt unjustified to her. In some jurisdictions this may be the case, but not in California. (Cf. *Adams v. Texas* (1980) 448 U.S. 38, 50 [Texas jurors had to answer factual questions, knowing affirmative answers will mandate a death sentence in very broad circumstances] with *People v. Samayoa* (1997) 15 Cal.4th 795, 853 ["neither death nor life is presumptively appropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror"]; see also *People v. Fierro* (1991) 1 Cal.4th 173, 247 [contrasting erroneous view that "the law" could require a death sentence with each juror's responsibility "to individually consider and assign moral weight to the evidence"].) When the court spoke of following the law, it should have added that to follow the law only means actually considering both penalties[163] and—in doing

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[161]*People v. Stewart*, *supra*, 33 Cal.4th 425, 445.

[162]*People v. Stewart*, *supra*, 33 Cal.4th at p. 445, citing *Wainright v. Witt*, *supra*, 469 U.S. 412, 424.

[163]*People v. Stewart*, *supra*, 33 Cal.4th 425, 447; *People v.* (continued...)

so—focusing on the considerations which the statute makes relevant.[164] Rather than requiring a vote for penalty that seems inappropriate, the law contemplates that each juror will bring the sum total of all their moral values, from whatever source, to the task of deciding the weight to give the aggravating and mitigating factors and determining which penalty is appropriate.[165] Presumably, setting out these principles is part of what this Court had in mind in *Stewart* when it mentioned the use of voir dire to "to further explain the role of jurors in the judicial system," as part of determining a person's capacity to serve. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 448.)

The court twice phrased the question in terms of whether Montoya would exercise her own judgment based on the law, independent of what she might think that the expectations of her church would be. (RT 4: 883, 886.)[166] There were other references to, e.g., "exercis[ing] your own

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[163](...continued)
Cunningham, *supra*, 25 Cal.4th 926, 975.

[164]*People v. Boyd* (1985) 38 Cal.3d 762, 773.

[165]"[A] juror . . . is entirely free to assign whatever moral or sympathetic value that juror deems appropriate to each and all of the relevant factors. . . . California's 1978 death penalty law does not require any juror to vote for the death penalty . . . unless [that juror is convinced] that death is the appropriate penalty under all the circumstances. . . . [T]he task that the jury performs . . . is essentially normative." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 470, citations and quotation marks omitted, bracketed expression in original.)

[166]The first time, Montoya answered that she would try to do so but could make no promises because her beliefs "might get in the way." (RT 4: 883–884.) The court did not follow up in any way, much less explain the difference between the way her personal beliefs could inform her evaluation of the moral weight of the evidence, on the one hand, and relying on outside
(continued...)

independent discretion and judgment." (RT 4: 885.) These all emphasized independently evaluating the evidence, in accordance with the law as given in the court's instructions. So far, so good. As noted above, however, each such statement failed to add that California law gives a decisive role to a juror's personal evaluation of the moral weight of such broad issues as the circumstances of the crime and anything that might be deemed mitigating.[167] (§ 190.3; *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 470.) Indeed, the court specifically contrasted "be[ing] guided by the facts of the case and the law" with being "guided by what you perceive to be your religious views." (RT 4: 885.) In doing so, it deviated far from the question of whether doctrines of her faith—given her personal relationship to them—could prevent her from considering both penalties. Moreover, rather than explaining that her views—whatever their source—actually could appropriately guide her evaluation of the moral weight of the aggravating and mitigating evidence presented, it implied the contrary by contrasting her personal views with the law, as improper versus proper

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[166](...continued)
authority to make her choice, on the other. The court's second reference to its concern came in the middle of a lengthy explanation, and it did not seek Montoya's own answer to the question. (RT 4: 886.)

[167]See RT 4: 883 ("decisions have to be made based upon their evaluation of the evidence, and in doing that they have to follow the legal principles that they're instructed upon"); *ibid.* ("your actual deliberations and decisions are going to be the product of your own evaluation of the evidence and are going to be based upon the law"); 884 ("follow the law and apply those legal standards and focus on the legal considerations that you're required to look at"); 885 ("in accordance with the legal standards that you're instructed upon"); *ibid.* ("be guided by the facts of the case and the law and not guided by what you perceive to be your religious views"); 886 ("your evaluation has to be based upon the legal standards and not a religious philosophy"); 889 ("strictly follow the law . . . and vote for death"); *ibid.* ("follow the law").

guides to action. Similarly, it sought assurances that any decision would be "based on the legal standards and not a religious philosophy that might be your own or something that you—that you feel that you're obliged to follow that's outside of this trial." (RT 4: 886.) Again, it was fine to require her to exclude externally imposed norms, but not "a religious philosophy that might be your own."

These statements so consistently[168] misinformed Montoya as to what the law could require as to render meaningless her saying "I don't think so" when asked if she could assure the court that she could "strictly follow the law . . . and vote for death." (RT 4: 889; cf. *People v. Heard*, *supra*, 31 Cal.4th 946, 964 [response to a question, given without benefit of trial court's explanation of governing legal principles, could not support excusal].) Indeed, the question itself made it sound as if California were a state that could require a vote for death under certain circumstances. As in *People v. Stewart*, the interchange provided only "a *preliminary* indication that" the prospective juror "*might* prove, upon further examination, to be subject to a challenge for cause." (33 Cal.4th at p. 448.) A trial judge focused on the relevant question—whether she could consider both penalties and vote for either that she felt appropriate, after considering those facts which the law makes relevant and giving each what she felt was the appropriate moral weight (*People v. Cunningham*, *supra*, 25 Cal.4th 926,

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[168]Neither the court's opening remarks to the panel of which Montoya was a part (RT 4: 810–811) nor the explanatory material in the jury questionnaire (CT 8: 2215) contained enough detail about the penalty determination to contradict the impression conveyed in the specific remarks to Montoya. In fact, in the opening remarks, too, the court stated, "The point I'm trying to emphasize at this juncture is that the determination of which of the two possible penalties to be imposed must be a determination that's based upon the facts of the case and the law." (RT 4: 811.) Again, there was no mention of the role of the juror's own moral compass.

975; *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 470)—could have easily determined whether Montoya would be impaired, in a substantial way. This statement assumes, of course, that something had happened by this point to cast doubt on Montoya's fresh reaffirmations that she could consider both penalties, a baseless assumption. In any event, this judge was focused elsewhere. The record he did make involves a juror who wrote and three times said in court that she could vote for either penalty,[169] and who two other times backed off of any prior inclination for either penalty because her decision would depend on the facts and what she learned about the law.[170]

Under these circumstances, there is no basis for this Court to make a finding which the trial court never made, i.e., that these statements qualifying her could not be believed. (See *Gray v. Mississippi*, *supra*, 481 U.S. 648, 653 & fn. 5, 659, and *Gray v. State*, *supra*, 472 So.2d 409, 422.) As noted above, this entire portion of the analysis assumes arguendo the propriety of ignoring what Judge Bissig said was his actual basis for excusing her—a belief that she should not be placed in the position of placing her civic duties above her beliefs—when in fact he was constitutionally required to consider only a question he failed to reach, i.e., whether she was willing and able to do so. (*Lockhart v. McCree*, *supra*, 476 U.S. 162, 176; *People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) The court erred in excusing Montoya.

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[169]CT 8: 2217; RT 4: 884, 887, 888.

[170]RT 4: 884 ("depending on the facts or the evidence or whatever"), 888 (reference to "whatever comes up").

4. Most of Mike Sisco's Answers Indicated Openness to Both Penalties, and the One That Showed Hesitation Was an Uninformed Response to a Misleading Question

Like Montoya, Mike Sisco was excused for hesitating when asked if he could follow a law that apparently could require a vote for death.

The trial court opened its questioning of Sisco by probing whether he was biased against law enforcement, but Sisco indicated both a nuanced view regarding some officers being prejudiced[171] and others deserving of his respect, as well as an understanding of his obligation to be aware of and set aside any bias. The court seemed satisfied and moved on to the next subject. (RT 3: 701–705.) This had to do with death-qualification. In response to a questionnaire item about how his religious views might influence him as a juror, he had written that he believed in giving "every brother and sister another chance in life." (RT 3: 705; see also CT 6: 10.) So the voir dire continued with the court asking Sisco if he understood that, if the case reached a penalty stage, he would be required to make a decision on death or life without parole, "and so there wouldn't be a second chance if we got to that phase of the trial." (RT 3: 705.) When Sisco said he did, the following took place:

> Q. Would you be able to follow those instructions and apply that law even though inconsistent with your personal philosophy?
>
> A. I don't think so.
>
> Q. In the questions concerning the death penalty deliberations you were asked if you were selected as a juror in this case could you personally vote for the death penalty if you determine that to be the appropriate punishment in view of the facts and the Court's instructions? The question then

[171]Sisco was evidently Native American. (See CT 6: 1558; see also 1554, 1555.)

was could you personally vote for the death penalty? You indicated no. Was that the answer you intended to give? Is that the way you feel?

A. No.

(RT 3: 705–706.) The court then sought a stipulation for Sisco's excusal, explaining that the court and counsel respected his beliefs but that they would make him unsuitable for service on a death-penalty jury. Counsel acquiesced. (RT 3: 706.)

In his questionnaire, Sisco had written three times that he thought that the death penalty was appropriate in some cases. (CT 6: 1566–1567, Questions 52, 57, 58.) He had also offered a rationale for its use, in response to a question about the purpose he thought the death penalty served. (CT 6: 1567.) He did, as the court later noted, check "no" when asked if he could personally vote for death, but went on, in the next question, to say that he would not automatically vote for either penalty. (CT 6: 1568.) Nothing in the court's brief voir dire on this issue established the contrary.

As to whether he could personally vote for death, as quoted above, Sisco denied in his voir dire that he had intended to write that he could not, and that that was how he currently felt. Yet inexplicably, the court ended its questioning when Sisco answered "No" to the questions on that subject, despite the fact that the answer negated a disqualifying bias. (RT 3: 706.)

The only basis for concern, then, was Sisco's "I don't think so," when asked if he could "follow those instructions and apply that law" that would leave the defendant without a "second chance." (RT 3: 705–706.) There was, however, no antecedent to the pronouns *those* and *that* in the

preceding sentence.[172] In other words, as with Montoya, the court provided no explanation about California's guided discretion system, which leaves so much up to the individual juror, and Sisco was left to believe that the law could *require* him to make a choice that would give the defendant no second chance, i.e., a choice for death, which he felt was inappropriate.

Even if the juror had been fully informed, it is doubtful whether his "I don't think so," without further questioning, was sufficient to meet the demand for information which *Stewart*, following *Witherspoon*, *Witt*, and their progeny, require in order to avoid unnecessary excusals of jurors who could set their beliefs aside and give genuine consideration to both penalties. But it was surely insufficient in the circumstances of this case, where the juror had never been told what it was he would actually be asked to do.[173] Any doubts he had that he could do it were therefore meaningless.

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[172]The previous question, which was the first related to death-qualifying the juror was as follows:

> Q. Okay. In question number 25 you had indicated about religious beliefs that you believe that, "I believe that it is my belief that we give every brother and sister another chance in life. There's always a second chance in a person." That is your personal belief and you certainly have a right to entertain that belief if you're chosen for this jury; however, if the case does get to a death penalty determination, you're going to be required to make a decision as to whether the defendant should be released—I'm sorry—you're going to be required to make a decision as to whether the defendant should be executed or given life in prison without the possibility of parole, and so there wouldn't be a second chance if we got to that phase of the trial. Do you understand that?

(RT 3: 705.) Sisco replied "Uh-huh," and the question about following "those instructions" and applying "that law" followed immediately. (*Ibid.*)

[173]The court's introductory remarks to this panel explained that there would be a weighing of "certain" aggravating and mitigating factors in order

(continued...)

This was a voir dire that failed to establish that the prospective juror was "irrevocably committed, before the trial ha[d] begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and it thus failed to justify his exclusion. (*Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 522, fn. 21.)

5. Vicki Brannon Was Excused Despite Near-Ideal Attitudes Towards the Penalty Determination

Vicki Brannon was also excused for cause based on her questionnaire alone, with the acquiescence of counsel. (RT 4: 796, 812–813.) She had answered Question 52, regarding her general feelings and opinions about the death penalty, "I think it depends on the circumstances of each case. If it was a grusome [sic] crime and is provin [sic] without a doubt then yes I believe the death penalty should be imposed." (CT 7: 1807.) The next question asked the same regarding life without possibility of parole, and she replied, "Same as above except that if it wasn't gruesome or circumstances are different there are no 'special circumstances' proven the life without parole should be imposed." (*Ibid.*) Question 54 asked the purpose she believed the death penalty served. She responded, "I'm not sure that it serves a purpose either way but, it's a punishment for the crime committed." (CT 7: 1808.) She checked a blank saying that she could personally vote for death and another stating that she would not automatically vote for either penalty. (CT 7: 1809.)

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[173](...continued)
to determine the penalty, but nothing was explained about the breadth and generality of some of the factors, or each juror's need to determine, based on his or her values, the moral weight to assign the evidence pertaining to each factor. (RT 3: 697–698.) Sisco heard nothing else on the subject. Like other jurors whose questionnaire answers were deemed to call for individual voir dire, he was examined alone. (See RT 3: 701.)

Brannon's excusal is so inexplicable that it prompts one to review the rest of her questionnaire for some other problem with bias, pretrial publicity, or the like, but there is none. (CT 6: 1790–CT 7: 1813.) All that could have possibly concerned the court were her opinion that, to deserve the death penalty, the crime had to be gruesome and proven beyond a doubt and her lay view that these were the pertinent "special circumstances." But jurors are often educated during voir dire as to what the law is and asked if they could follow it, as opposed to the views they arrived with. Certainly that happened a number of times with appellant's jurors.[174] As to Brannon's "beyond a doubt" phrase, this Court has already stated that following up questionnaire responses with individual voir dire permits a court to "probe[], among other issues, whether each prospective juror could undertake the decision . . . [regarding penalty] if he or she were personally satisfied beyond a reasonable doubt concerning defendant's guilt." (*People v. Stewart*, *supra*, 33 Cal.4th 425, 449; see also RT 4: 919–920 [court

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[174]For example, the trial court explained to a potential juror who thought that if appellant was charged, he was probably guilty,

> Bias or predisposition is part of the way the human mind works. We all have biases, we all have certain predisposed or preconceived notions, and they're part of everyday life. They're necessary, in fact, for—for day-to-day decision-making, we couldn't function as human beings if we didn't have certain sets of presumptions and expectations that we rely upon.
>
> But in a jury trial, where a person's guilt or innocence is under consideration, jurors are expected to identify and recognize their biases, and then to the extent necessary for a fair trial and for a fair consideration of the evidence, they're required to set aside those biases, even though that might have been the way they would be inclined to view the case.

(RT 3: 569–570.) The court asked that juror more than once if she thought she could do that. (RT 3: 568–569, 570–571.)

ascertained that a venireperson who favored death if the person was guilty "without a doubt" could accept the legal standard of proof].) Similarly, the trial court could have been informed Brannon that the law recognizes other circumstances than the brutality of the crime, such as a defendant's past criminal history, as aggravating circumstances, and asked her if she could consider them and then give them the weight she felt they deserved. Moreover, the Jenks homicides would fit anyone's definition of *gruesome*. There was, therefore, simply was no basis for concern that even Brannon's initial opinions would have rendered her unable to consider both penalties in this case, much less conclusive proof of that proposition.

Brannon's views stated in the questionnaire gave no sign of rigidity or extremism. Nothing she wrote permitted—without more—a conclusion beyond that she thought the death penalty should be reserved for extreme cases. Such a position is not even one that needs to be set aside; it is entirely proper under California law. (See *People v. Velasquez*, *supra*, 26 Cal.3d 425, 439 [views of juror who would consider death penalty only in a "heinous" case were congruent with the 1977 statutory framework, which provided for the penalty only in exceptional murders, rather than an indication of *Witherspoon* excludability].) Excusing her because of her written answers, without voir dire, was improper. (*Witherspoon v. Illinois*, *supra*, 391 U.S. 510; *People v. Stewart*, *supra*, 33 Cal.4th 425.)

6. Richard Hathaway Was Misled into Stating that He Could Not Follow the Law

Richard Hathaway came to court as a strong proponent of the death penalty, writing in his questionnaire that anyone found guilty of special-circumstances murder should get death and that the alternative punishment was a waste of tax money and served no useful purpose. (CT 7: 2071–2072.) However, between that time and his individual voir dire, he

had thought about whether "I can put somebody to death" and realized that he simply did not know. "I've never been put in that position so I don't know." (RT 4: 940; see also 939.) Pressed further, he added, "I have to be honest about it. I can't say that I can; I can't say that I can't. I don't know. I mean if it came to that or whatever, I just don't know." (RT 4: 940.) The court moved briefly to another subject, then returned to the issue, explaining that the penalty is not simply left to the jurors' unguided discretion. (RT 4: 941.) It noted that evidence in aggravation and mitigation would be introduced. (RT 4: 941–942.) But then it stumbled into the same error that it made with Jennifer Montoya, i.e., stating that the law could compel a decision one way or the other:

> [Y]ou'll be required to make a decision that's going to be based upon certain listed criteria and you'll have to look to those criteria in making your decision. Do you think that even guided by those—let's say you've reviewed all those elements and you're convinced that it is a case where, *in fairness and consideration of those objective criteria, the only real rational decision to make is a death penalty decision*, are you saying you're not sure you could join in that decision because of your personal views?

(RT 4: 942, emphasis added.) The court had said the same thing to the entire panel a short time earlier, in terms that even more clearly implied that the sentence was a conclusion compelled by a syllogism in which the facts and law were the premises.[175] For the third time (see RT 4: 939, 940), Hathaway said he simply could not know in advance:

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[175]"That decision has to be based upon some consideration of these objective criteria that you'll be instructed on. The important thing that I need to find out is whether you'll be able to follow those instructions and make a decision that is consistent with the facts of the case and the law, and a decision whether it be death or life without parole is one which is guided by those objective legal criteria and factual findings." (RT 4: 908–909.)

A. What I'm saying is I don't know that I can do that because I haven't been put in that situation before so—

Q. Right, and I understand that, but I'm asking you to search your conscience and tell me whether you could—you feel you could do that or not do that?

A. I don't think I could.

Q. Okay.

A. Honestly.

(RT 4: 942.) The court then sought and obtained counsel's acquiescence in excusing the prospective juror. (RT 4: 943.)

As with Montoya, the "I don't think I could" response was to the wrong question. The idea that the criteria of section 190.3 are "objective" and, together with a particular evidentiary picture, can compel one penalty decision as the only "rational" one shares nothing with California's death-penalty scheme. It conflicts directly with this Court's teaching that "neither death nor life is presumptively appropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror." (*People v. Samayoa*, *supra*, 15 Cal.4th 795, 853.) It ignores the highly *subjective* nature of the weighing process,[176] as well as the fact that jurors may temper their decisions with sympathy and mercy.[177] Thus Hathaway's concession still left the trial court with no information indicating that the man could not do what the law requires, which is look at the circumstances and honestly consider both penalties. If he had said "no" to a question about that duty, or when asked

[176]See *People v. Clark* (1992) 3 Cal.4th 41, 166 ("The subjective assignment of weights is the very means by which the jury arives at its qualitative and normative decision"); *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 470 (jury's task is "essentially normative" one of applying "its own moral standards" to the evidence).

[177]*People v. DePriest* (2007) 42 Cal.4th 1, 59.

if he could vote to impose a death penalty that he felt was appropriate, the situation would be different, at least if the court had followed up by ascertaining that he could not set aside his personal reluctance and fulfil his duty.[178] But neither question was asked.

Rather, as the above quotation from the voir dire shows, even after being misinformed that the law could force him into finding death called for, Hathaway was reluctant to predict his actual response to a situation he had never been in before. And this is all he said before the infirm portion of the voir dire as well. (RT 4: 939, 940.) As the trial court said at that point, "Well, very few people have been in that position." (RT 4: 940.) And—whether they know it or not—the truth of the matter is that few are able to know what they will do when confronted with the responsibility for the life of a living human being sitting a few feet away from them. Hathaway's only problem was that he was conscious of this fact. Moreover, even his earlier answers had to have been contaminated by a misconception that California is a state where the law can require a vote for death under some circumstances. Like Montoya, he used a questionnaire form, and was present for a group voir dire, that gave too little detail to contradict such a misconception. Indeed, as noted above,[179] the misconception was clearly introduced during the group voir dire. (CT 7: 1720–1721; RT 4: 907–909.)

Richard Hathaway's exclusion, too, was based on insufficient information to establish whether he could do the only job he would be

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[178]The court routinely asked pro-death jurors if they could set aside their views and consider either penalty, under the standards set forth in the court's instructions. (E.g., RT 4: 827, 837–838, 877,

[179]See footnote 175, page 267, above.

called on to do, under the *Witherspoon/Witt* line of cases, and his exclusion was error. (*People v. Stewart*, *supra*, 33 Cal.4th 425, 445.)

7. Ruth Sanchez Was Excluded Because She Did Not Know Whether She Could Do Something California Law Does Not Require

Ruth Sanchez was in the same group as Richard Hathaway, which means that she, too, heard that "a decision whether it be death or life without parole is one which is guided by those objective legal criteria and factual findings that you've made." (RT 4: 909.) With this background, and because of a statement on her questionnaire that she would find "decid[ing] on a person's fate . . . very draining" (CT 8: 2327), the court asked if she could make that decision "in accordance with . . . the rules of law." (RT 4: 947.) Sanchez replied, "I don't know. I can't honestly say I can." (*Ibid.*) She added that she was studying the tenets of Jehovah's Witnesses, who did not believe in taking another's life, and was considering joining that church, but did not know if she would. (RT 4: 947–948.) After ascertaining that she was not currently under religious constraint not to serve on a jury, the court returned to the question of returning a death verdict:

> [Y]our decision on which penalty to impose has to be one which is based on the law and a consideration of those enumerated criteria that you will be instructed about, the things you can consider about the defendant's background and character, and about the circumstances of the offense and other relevant considerations, those have to be taken into mind. But if all of those circumstances and factors pointed toward death being the appropriate disposition rather than life without parole, *would you be able to follow the law and impose that death penalty without violating your own conscience*?
>
> A. I can't honestly answer that with a yes or no because I'm not—right now at this point I don't think I

could—I could send anyone to death, but I don't know. I'd have—I really don't know.

(RT 4: 949, emphasis added.) The court then successfully invited a stipulation for Sanchez's excusal. (*Ibid.*) It then stated its reason: "We don't want you to be in a position where you would be required to do something that might violate your own religious and personal beliefs, however, and so I'm going to excuse you from further participation on this trial." (RT 4: 950.)

This voir dire suffered from the two errors that affected that of Jennifer Montoya, one of which had been repeated with Richard Hathaway. First, everything Sanchez said had meaning only in the context in which it was asked, which was repeated statements that the law provided "objective" criteria, according to which her decision would have to be made, clearly implying that there was no role for her own values and beliefs. (See more extended quotation at fn. 175, p. 267, above; see also RT 4: 909 [contrasting use of "objective criteria" with jurors' "own subjective standards"].) Second, she was never asked whether she could truly consider both penalties and vote for the one she found appropriate, regardless of her beliefs. She was asked if she could do so without violating her conscience, and then excused because of the risk that she might have to do something that would violate her beliefs. As the discussion at page 244, above, of *Darden v. Wainwright*, *supra*, 477 U.S. 168, explains, this was the wrong question and an erroneous basis for exclusion. (See also *Lockhart v. McCree*, *supra*, 476 U.S. 162, 176 [firm belief in injustice of death penalty does not exclude possibility that juror would set aside beliefs in deference to law].)

Actually, even asking whether she could vote for the appropriate penalty regardless of her beliefs would have been akin to assuming a fact

not in evidence. Neither in the voir dire nor in her questionnaire had she expressed a belief in opposition to the death penalty.[180] What she expressed was her sense that the decision would be "draining" and that she did not know how she felt about the capital punishment or what she would do. Her inability to say that she knew she could vote for death was perhaps grounds for seeking more information. But getting the information could only be done by undoing the mistaken impression the court had given about the decision being guided only by objective criteria, explaining the role of a juror's beliefs and values in determining the moral weight of the factors she would be instructed to take into account, and asking whether under those circumstances she could consider both penalties and vote for the one she felt was appropriate, given the facts. Only in this way could the court have "distinguish[ed] between prospective jurors whose . . . [feelings about] capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 421.) Exclusion without the required information, and for the wrong reason, was error.

[180]Sanchez had written, in her questionnaire, that she would not automatically choose either penalty (CT 8: 2337) and that she had concerns about life without parole because of the money spent maintaining lifers and that executions could provide closure to victims' loved ones (CT 8: 2335–2336). But she would want to have "the unconditional guilt" of the defendant proven before imposing death and would find the experience emotionally draining. (CT 8: 2335; see also 2327.) Because of these competing considerations, she felt uncertain as to her general preferences regarding penalty. (CT 8: 2335.)

C. Any One of the Errors Requires Reversal of the Death Judgment

"[U]nder the compulsion of United States Supreme Court cases this error [in excusing death-scrupled jurors] requires reversal of defendant's death sentence, without inquiry into prejudice. (See *Davis v. Georgia* [1976] 429 U.S. 122, 123 . . . .)" *People v. Stewart*, *supra*, 33 Cal.4th 425, 454, some citations omitted.) Exclusion of one such juror, even when the prosecutor has unused peremptory challenges available when the jury is accepted, invalidates the penalty verdict. (*Gray v. Mississippi*, *supra*, 481 U.S. 648.) Appellant's death sentence cannot stand.

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XIII. THE JURY INSTRUCTIONS ERRONEOUSLY IMPLIED THAT THE JURORS COULD DETERMINE FOR THEMSELVES WHAT FACTS MIGHT BE AGGRAVATING

The trial court instructed the jury, in the language of CALJIC No. 8.88, that it was to "consider and take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (RT 13: 2830.) However, it went on to say that "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." (*Ibid.*, emphasis added.) It was error to permit the jury to use "any fact" that fit the definition given for aggravation, for "[u]nder section 190.3, "matters not within the statutory list are not entitled to any weight in the penalty determination." (*People v. Boyd* (1985) 38 Cal.3d 762, 773; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 108–109.) Obtaining a death sentence on a basis other than that authorized by statute violated not only state law, but appellant's state and federal rights to due process and a reliable penalty determination. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.) Because there were facts not among the statutorily enumerated aggravators that jurors might consider aggravation, as defined, the error was prejudicial.

A. The Instruction Was Erroneous

The analysis is straightforward. As noted previously, the jury is to weigh only aggravating factors that are statutorily enumerated. (§ 190.3; *People v. Boyd*, *supra*, 38 Cal.3d 762, 773.) While appellant's jury was told to "consider, take into account, and be guided by" the familiar list of penalty-determination "factors" (RT 13: 2825; see also 2830 and CT 10: 2887–2888), nowhere was there a statement that the enumeration was

exclusive. (See *Boyd*, *supra*, at p. 773 [specifically finding the unadorned "consider, take into account, and be guided by" language to permit consideration of other factors].) Instead, there was only the instruction that the oft-repeated expression *aggravating circumstance* meant "any fact," etc., which increased the "guilt or enormity" of the crime.[181] (RT 13: 2830.) Then the concluding sentences of the instruction simply told jurors to determine penalty by "considering the totality of the aggravating circumstances," so defined, "with the totality of the mitigating circumstances," and to decide whether the comparison warranted a death sentence. (RT 13: 2831.) The instructions therefore violated the state-law ban on non-statutory aggravation. (§ 190.3; *People v. Boyd*, *supra*, 38 Cal.3d 762, 773.)

Moreover, the lawlessness of depriving appellant of his life on a basis not authorized by the controlling legislation would also violate his state and federal Eighth Amendment and due process rights. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15; *Hicks* v. *Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt* v. *Helms* (1983) 459 U.S. 460, 471–472; cf. *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631–633 [judicial expansion of legislated criminal liability "is wholly foreign to the American concept of criminal justice"].)

B. The Error Was Prejudicial

There is nothing in appellant's case that brings it within the limited circumstances where substantial error can be known not to have affected a

[181]The limitation to those considerations which increased the "guilt" of the crime itself would not exclude factors related to the defendant's own character. Any layperson with the acumen to even consider the impact of this language would also notice that the law sets forth the defendant's prior criminality as aggravation, a factor also unrelated to the crime for which the defendant is being sentenced.

penalty verdict. The error was neither insubstantial, rendered inconsequential because non-statutory aggravation could be considered under some other rule, nor cured by other instructions. (See pp. 204 et seq., above.) To the contrary, the jury was mandated to "consider all of the evidence which has been received during any part of the trial" in deciding penalty (RT 13: 2825) and to consider "the totality of the aggravating circumstances" (RT 13: 2831).

Such evidence showed or tended to show that appellant was a compulsive gambler, to the point of losing his food money;[182] that he was an alcoholic who spent a large portion of his disposable income on drink;[183] that he lived off disability but seemed able to work, which jurors might have mistakenly considered illegal or at least found reprehensible;[184] that he was mentally ill, including ill enough to commit this crime;[185] that he betrayed a good mother, or, alternatively, that gross denial and irresponsibility ran in the family;[186] that he associated with Diana Williams and Oscar Galloway—both of whom were evidently poor and whom a juror, depending on how the witnesses came across—could have seen as some kind of low-lifes or as good people whom appellant deceived;[187] and perhaps anything that a juror found bizarre or frightening about appellant's

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[182]RT 7: 1535–1538.

[183]RT 9: 2056–2057; 13: 2767–2768, 2772, 2776.

[184]RT 6: 1329; 7: 1530, 1533.

[185]RT 13: 2719–2725.

[186]RT 13: 2806–2813.

[187]RT 7: 1527–1529; 10: 2209.

appearance.[188] Such matters were not only among "any facts" presented by the evidence, but the alcohol dependence and mental illness were mentioned by the prosecutor in closing argument, though not urged specifically as aggravation. (See RT : 2839–2840, 2850.)

To a mind trained in California death-penalty law, such factors are very clearly irrelevant to the penalty decision or, in some cases, should be considered mitigating. (See, e.g., *People v. Smith* (2005) 35 Cal. 4th 334, 354 [evidence of mental illness cannot be considered aggravating].) But they are not so irrational as aggravation so as to be excluded by every unguided juror. Indeed, those facts showing poor choices and irresponsibility could have legitimately entered into a judge's sentencing decision, were the matter at issue the punishment for a non-capital crime. (See *People v. Whitten* (1994) 22 Cal. App. 4th 1761, 1765–1766.) Under these circumstances, respondent cannot meet its burden of proving that the error was not one which "might have contributed to" jurors voting the way they did nor one "which possibly influenced the jury adversely . . . ." (*Chapman v. California* (1967) 386 U.S. 18, 23); or "that [the error in question] had no effect on the sentencing decision . . . ." (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 341.)[189] The penalty judgment must be reversed.

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[188]For example, appellant anticipates that his habeas corpus petition will show that jail-prescribed antipsychotic medication caused his weight to balloon drastically.

[189] An analysis under these standards would apply even were the error purely one of state law, since the *Brown* test is now considered equivalent to that of *Chapman*. (*People v. Guerra* (2006) 37 Cal. 4th 1067, 1144–1145.)

XIV. THE COURT'S FAILURE TO INSTRUCT ON THE PROPER USE OF VICTIM IMPACT EVIDENCE WAS PREJUDICIAL ERROR

The trial court gave the standard CALJIC instructions on determining penalty. These say nothing about the appropriate use or misuse of victim impact evidence. In an instructional vacuum, appellant's jury could only assume that the purpose of the testimony is to show how the particular consequences of the crime rendered it more death-worthy. It would also seem that the mitigation and aggravation cases were a contest over which side most deserved the jury's sympathy. Neither of these, however, was the purpose for which the testimony was admitted. This Court has explained that such evidence is relevant because—in the context of what could be a mitigation case that focuses the penalty phase on humanizing the defendant—it is appropriate to remind the jury that neither the victims nor the crime were mere abstractions. An additional difficulty was presented by the emotionally compelling nature of the testimony. Under basic principles regarding a court's sua sponte instructional duty to make sure that the jury understands the issues before it and regarding when a cautionary or limiting instruction is needed, the trial court should have explained that:

- the sole purpose of the testimony was to avoid any danger that the jury would lose track of the seriousness of the offenses in the face of the mitigation case;
- that the jury was not to treat any specific consequences of the murders that appellant could not have reasonably foreseen as tending to show that this was an aggravated case of death-eligible murder;
- that the jury was to place its focus on appellant and determine, from all the evidence, the appropriate punishment for him,

and that it was not being asked to weigh sympathy for the victims or their survivors against sympathy for appellant;

- and that any strong emotions evoked by the victim-impact evidence were to be set aside, in favor of a rational weighing of factors for life without parole and for death.

The failure to deliver such an instruction deprived the state and appellant of its interest in, and his right to, a fair, reliable, and rational penalty determination, and it also deprived appellant of his rights to a fair trial on penalty before a properly instructed jury. (U.S. Const., 6th, 8th, & 14th Amends.)

A. A Court Must Instruct the Jury on Principles Necessary for Understanding its Task and Should Provide a Limiting Instruction When Evidence Received for One Purpose May Be Used by the Jury for Another

The need for an instruction on the proper use, and avoiding the improper use, of victim-impact evidence in this case arose from the intersection of two black-letter rules. One deals with when a limiting instruction is appropriate, the other with when a trial court has a duty to instruct on a matter sua sponte. As to a limiting instruction,

> Some evidence may be relevant for one purpose and inadmissible for another purpose, either because it is irrelevant or because some rule excludes it for that other purpose. It may be admitted, but only for the proper purpose, and under instructions of the court so limiting it.

(1 Witkin, Cal. Evid. 4th (2000) Circum. Evid, § 30, p. 360.)

The limiting instruction is a complement to the trial court's power to exclude unduly prejudicial evidence, now codified in Evidence Code section 352. Both rules deal with the dilemma created when evidence is offered for a legitimate purpose but may be misused by the jury for another purpose. Exclusion is the more drastic remedy, and, within limits, is discretionary. A limiting instruction is the fallback solution. (*Adkins v.*

Brett (1920) 184 Cal. 252, 258–259; accord, *People v. Sweeney* (1960) 55 Cal.2d 27, 42–43; see also *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 544.) A limiting instruction is mandatory on request. (Ev. Code § 355.) Its importance is such that, even if an infirm instruction is requested, the trial court has a duty to craft and deliver a correct one. (*People v. Falsetta* (1999) 21 Cal.4th 903, 924; see also *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1318.)

Here, of course, there was no request. However,

> [i]t is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.

(*People v. Breverman* (1998) 19 Cal.4th 142, 154, quotation marks and citation omitted.)

B. Not Only Was the Victim-Impact Testimony Susceptible of Misuse, but the Jury Had No Way of Knowing How to Use It

Victim-impact testimony has, under current law, a less-than-obvious legitimate use, as well as a universally recognized potential for tremendous misuse. Without a specific instruction on how to use it, the jury was far more likely to misuse it than use it appropriately. The trial court therefore had a duty to instruct on how to use the testimony and how not to use it.

Regarding the legitimate use, both this Court and the United States Supreme Court have held that the harm caused by a defendant's criminal acts can be relevant to the sentencing decision. Testimony concerning it may be presented as a reminder that murder is truly a grave crime against both a unique human being and his or her survivors, and it is admitted to counter a perceived risk of reducing the crime or its victim to an

abstraction, while mitigation evidence humanizes the defendant. (*Payne v. Tennessee* (1991) 501 U.S. 808, 820, 822, 825; *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

The trigger for any need for a limiting instruction is the potential for other, illegitimate uses of such testimony by the jury. With victim-impact testimony, such potential is manifest. That potential has been largely responsible for the holdings in which first this Court, then the United States Supreme Court, banned victim-impact evidence; for the divisions in those and other courts when the bans were lifted; and for strong cautionary language in the opinions of both courts permitting admission of such testimony.[190] The controversy over the admission of such testimony has

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[190]See, e.g., *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825 (overruling of *Booth v. Maryland* (1987) 482 U.S. 496 does not remove other safeguards to evidence "so unduly prejudicial that it renders the trial fundamentally unfair"); *id.* at p. 831 (conc. opn. of O'Connor, J.) (citing availability of other means to protect against "[t]he possibility that this evidence may in some cases be unduly inflammatory"); *id.* at p. 836 (conc. opn. of Souter, J.) (victim-impact evidence "can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation"); *id.* at p. 846 (dis. opn. of Marshall, J.) (reference to testimony's prejudicial effect stemming from "its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime"); *id.* at p. 856 (dis. opn. of Stevens, J.) (victim-impact testimony "encourage[s] jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason"); *Booth v. Maryland*, *supra*, 482 U.S. 496, 505 (victim-impact testimony "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime"), overruled in *Payne v. Tennessee*, *supra*, 501 U.S. 808; *id.* at p. 508 (information about "the grief and anger of the family" can only "inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant"); *People v. Love* (1960) 53 Cal.2d 843, 857 (evidence of victim's suffering "served primarily to inflame the passions of the jurors"); *People v. Haskett* (1982) 30 Cal.3d 841, 864 (in using victim-impact considerations raised in argument, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason," nor should the jury be provided with "information . . . that diverts [it] from its

(continued...)

been over its relevance, and whether any probative value outweighs its prejudicial effect. That it has significant potential to divert the jury from the issues before it has never been disputed.

Certainly this Court has not questioned what it has referred to as victim-impact evidence's "potential to inflame the passions of the jury against defendant." (*People v. Gurule* (2002) 28 Cal.4th 557, 624 [describing effect of a brief instance of such testimony].) Here, Clarence Washington gave appalling testimony about his wife's complete psychological disintegration; his consequent loss of his ability to earn a livelihood; and his own emotional trauma and need for medication and treatment. Billie Lou Hazelum's testimony about her severed relationships with both her deceased sister and her niece (Debra Washington) and the effects of the murders on the family, as well as her humanizing of both victims and description of the marriage, added to the emotional impact of this part of the prosecution's case for death.

For an unguided jury, such testimony invited the weighing of the wrong factors, namely the agony of the survivors against the pain a death sentence would inflict on appellant and his family, as well as sympathy for the survivors against sympathy for appellant. This was a contest any criminal defendant is bound to lose.[191] It evoked such an overpowering

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[190](...continued)
proper role or invites an irrational, purely subjective response"); *People v. Edwards*, *supra*, 54 Cal.3d 787, 835–836 (acknowledging the need for "limits on emotional evidence and argument" and quoting both *Payne* and *Haskett*); *People v. Bacigalupo* (1991) 1 Cal.4th 103, 152–154 (conc. opn. of Mosk, J.) (need for clear instructions to minimize the harm caused by victim-impact evidence); *People v. Hovey* (1988) 44 Cal.3d 543, 586 (conc. opn. of Mosk, J.) (references to "devastating impact" of testimony and likelihood of inflaming and diverting jury).

[191]Dubber, *Regulating the Tender Heart When the Axe is Ready to* (continued...)

sense of the enormity of the crimes that the maximum punishment seemed the only reasonable alternative—even though homicides that were not even death-eligible, and some non-criminal sudden deaths, would have had the same awful human consequences,[192] at least for a survivor with Debra Washington's psychic vulnerability. Thus—in another potential misuse of the evidence—it could make it look like the issue was the enormity of the survivors' losses, not the culpability of appellant's conduct. For most people, the evidence would also intensify their anger and encourage an emotional decision, not a rational one. Under a clear and time-honored rule required to give even civil litigants a fair trial in such a situation, if the prejudicial effect is not so great as to require exclusion, then it requires a limiting instruction, at least upon request. (*Adkins v. Brett*, *supra*, 184 Cal. 252, 258–259; Evid. Code § 355.)

"Allowing victim-impact information to be placed before the jury without proper limiting instructions has the clear capacity to taint the

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[191](...continued)
Strike (1993) 41 Buff. L.Rev. 85, 86–87; Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims* (2003) 88 Cornell L.Rev. 343, 372; see also *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 196 (dis. opn. of Handler, J.)

[192]Because of the suddenness and senselessness of the loss, drunk-driving deaths and even heart attacks and strokes in apparently healthy, younger people typically produce the same dramatic effects in survivors as homicides. (See Doka, ed., Living With Grief After Sudden Loss: Suicide/Homicide/ Accident/Heart Attack/Stroke (1996); see also Rando, Treatment of Complicated Mourning (1993) 5–11, 149–183, 503–552.) Moreover, it is evident that, for the survivor, the difference between a second-degree murder, the rare first-degree murder that is not death-eligible, and a death-eligible murder has no meaning whatever. "Clinicians and criminal justice professionals are often staggered by the depth of emotional suffering experienced by survivors" of homicide in general. (Amick-McMullen, et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study* (1989) 2 J. of Traumatic Stress, #1, 21–22.)

integrity of the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) A limiting instruction must be given sua sponte in at least Georgia,[193] New Jersey,[194] Oklahoma,[195] and Tennessee.[196] The use of one is encouraged in Pennsylvania,[197] and the Wyoming Supreme Court has gone out of its way in dictum to suggest the need for one.[198, 199] None of the opinions announcing these rules found the proposition controversial or encountered any counter-arguments to answer.

And here an instruction was required sua sponte not only because of of the potential for misuse, but the fact that—without guidance—the proper use of such testimony is far from obvious. The task before a capital sentencing jury should be quite clear. It is supposed to "assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment," (*Monge v. California* (1998) 524 U.S. 721, 731–732), taking into account whatever it learns about who the defendant is and how he or

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[193]*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842–843.

[194]*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.

[195]*Cargle v. State* (Okla.Crim.App.1995) 909 P.2d 806, 828–829.

[196]*State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892.

[197]*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 158–159; see also *Commonwealth v. Williams* (Pa. 2004) 854 A.2d 440, 447.

[198]*Harlow v. State* (Wyo. 2003) 70 P.3d 179, 198, fn. 4.

[199]See also *United States v. Stitt* (4th Cir. 2001) 250 F.3d 878, 899; *Bivins v. State* (Ind. 1994) 642 N.E.2d 928, 957; and *State v. Taylor* (La. 1996) 669 So.2d 364, 372, each of which mentions the trial court's having given a limiting instruction regarding victim-impact evidence, in the context of holding errors in admitting victim-impact testimony harmless.

she came to reach the point where he or she could kill (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605).

The circumstances of the instant crimes, which victim-impact evidence is deemed to elucidate (*People v. Edwards*, *supra*, 54 Cal.3d 787, 835), were therefore relevant only to the extent that they bore on appellant's individual blameworthiness. Thus, while the weather would be a circumstance of the crime, it would not be pertinent to the penalty determination. "[F]actor[] (a) . . . direct[s] the sentencer's attention to . . . facts about the defendant and the capital crime that might bear on his moral culpability." (*People v. Tuilaepa* (1992) 4 Cal. 4th 569, 595; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 ["punishment should be directly related to the personal culpability of the criminal defendant," so sentence "should reflect a reasoned moral response to the defendant's background, character, and crime"]; *Enmund v. Florida* (1982) 458 U.S. 782, 801; *People v. Beeler* (1995) 9 Cal.4th 953, 991; *People v. Kaurish* (1990) 52 Cal.3d 648, 717 [evaluating circumstances of offense as they aggravated defendant's culpability].) Since the specifics of how this particular crime would affect particular survivors involved facts of which appellant was unaware, the victim-impact testimony had only the marginal probative value regarding culpability which has been mentioned earlier: reminding any juror who needed to be reminded that the crime was a grave one with grave consequences, not an abstract offense against abstract victims. (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 820, 822, 825; *People v. Edwards*, *supra*, 54 Cal.3d 787, 835.)

This angle on the relevance of the testimony was far from obvious, which is why the jury needed to be told about it. It was less obvious, in fact, than the mistaken guesses uninstructed jurors had to have made about allowing the punishment to fit the horrors of not only the crime, but its

aftermath, or balancing sympathy for each "side." The point of admitting such evidence as aggravation is so tenuous that courts in some states have given up trying to articulate it: "[M]any courts have found victim impact is neither an aggravating nor a mitigating circumstance, but simply relevant evidence that the jury may consider in determining an appropriate penalty." (*State v. Humphries* (S.C. 1996) 479 S.E.2d 52, 56; see, e.g., *Alston v. State* (Fla.1998) 723 So.2d 148, 160; see also *State v. Muhammad*, *supra*, 678 A.2d 164, 179 [victim-impact evidence is not aggravation; it assists the jury in deciding the weight to give to mitigation]; *Farina v. State* (Fla. 2001) 801 So.2d 44, 53 [approving instruction that victim-impact evidence is not aggravation but may be considered only as it relates to victim's uniqueness].) Here is the Oklahoma Court of Criminal Appeals's version of the mental gymnastics required where a logical link to a truly disputed issue is so ephemeral: "Evidence supporting an aggravating circumstance is designed to provide guidance to the jury in determining whether the defendant is eligible for the death penalty; victim impact evidence informs the jury why the victim should have lived." (*Cargle v. State*, *supra*, 909 P.2d 806, 828, fn. 15.)

In this state of affairs, appellant's jury, instructed only that it should take into account various factors, including the circumstances of the crime, and—as noted in the previous argument, *anything* that increased the gravity or enormity of the offense—had no way of divining the proper use of the testimony. Under the general principles—including due process—regarding a trial court's duty to instruct the jury on applicable legal issues raised by the evidence, the circumstances triggering the need for a limiting or cautionary instruction, and appellant's Eighth Amendment rights to a reliable penalty determination and an individualized sentence, an instruction was mandatory.

In *People v. Ochoa* (2001) 26 Cal.4th 398, 454, this Court summarily held that there was no error in refusal to give a particular limiting instruction requested in the trial of that case because "[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1 . . . ." Refusal of the same instruction was upheld, on the ground that it was confusing, in *People v. Harris* (2005) 37 Cal. 4th 310, 358–359. However, in neither case did the Court gave any indication that it was asked to or did consider the contentions raised and principles brought to the Court's attention in the present appeal. "[A]n appellate court's opinion is not authority for propositions the court did not consider . . . ." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.) In any event, the version of CALJIC No. 8.84.1 given to appellant's jury[200] did not fulfil the functions of either an instruction explaining how to use the evidence or a limiting instruction. It did not draw attention to the victim-impact evidence or identify its proper and prohibited uses. Rather, it was a very general introduction to the penalty phase instructions. The only part of it that was even marginally relevant to the concerns addressed here was a general admonition to be fair and follow the law. Such an admonition is, in one form or another, given in every trial. (See CALJIC No. 1.00; BAJI No. 1.00.) But "the trial court must instruct on the general principles of law relevant to the issues raised by the

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[200]"You will now be instructed as to all of the law that applies to the penalty phase of this trial . . . .

"You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you[. D]isregard all other instructions given to you in other phases of this trial.

"You must neither be influenced by bias, nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (RT 12: 2512–2513; see also CT 10: 2887.)

evidence." (*People v. Breverman, supra*, 19 Cal.4th 142, 154.) The need for limiting instructions arises when there is a risk that evidence will be used for a purpose other than its proper one.[201] (*People v. Sweeney* (1960) 55 Cal.2d 27, 42–43.) Neither function called for here—informing the jury as to how to use the evidence, nor cautioning it how not to—can be fulfilled without mentioning the evidence at issue. Most of the states noted on page 284, above, as requiring a limiting instruction do so as part of a package of precautionary measures regarding such testimony, such as having the trial court vet it in advance to keep it brief and unemotional. In a trial like appellant's, without any other precautionary measures and the terrible story Clarence Washington told of his wife's psychological destruction, constitutional standards could not possibly be met without a strongly-worded instruction telling the jury how it could and could not use the evidence.

C. The Failure to Give an Appropriate Instruction Was Prejudicial

As a state-law error in a capital trial, the failure to give an instruction explaining the proper use of the victim-impact testimony and cautioning against improper uses requires reversal if it is at least reasonably possible that the error affected the verdict. (See *People v. Brown* (1988) 46 Cal.3d

[201] As acknowledged previously, the general rule is that a cautionary or limiting instruction is mandatory upon request, but that there is no sua sponte duty to give one (absent other circumstances triggering such a duty). The reason for conditioning the duty upon a request is that, in its absence, the party "may be supposed to have waived it as unnecessary for his protection." (*Adkins v. Brett, supra*, 184 Cal. 252, 258, quoting I Wigmore, Evidence at p. 42.) Here, (1) there *were* other circumstances (the need to instruct the jury on applicable legal principles in general), (2) regardless of the attentiveness of trial counsel to the matter, it is manifest that a limiting instruction was not unnecessary, and (3) Fourteenth-Amendment due-process considerations and Eighth-Amendment reliability requirements demand, in the circumstances of this case, a modification to the general approach taken in ordinary civil and criminal cases.

432, 448.) Moreover, the reason why a limiting instruction was required was to permit a fair trial and a reliable and individualized penalty determination. Refusing one thus violated the Fourteenth Amendment right to due process and the Eighth Amendment. It also violated appellant's due-process right to the protections of state law, and to equal protection of those laws. (U.S. Const., 14th Amend.; Evid. Code § 355; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Reversal is therefore required unless the state can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.)

The reasons why an instruction was needed here are the same reasons why its absence could have affected the jury: the victim-impact evidence was likely to arouse the jurors' anger; make them think that only the maximum sentence could respond to crimes that ultimately caused such enormous suffering; invite them to see the question as whether the survivors or appellant were more deserving of their consideration; and generally distract them from focusing on the nature of the offense itself and the offender. The error would be harmless if there were so little victim-impact testimony or it had so little emotional charge that there was no risk of its affecting any juror improperly, but this is manifestly not the case here. As explained above (pp. 204, et seq.), harmlessness review must be conducted in a manner that recognizes, among other things, the open-endedness of jurors' discretion in deciding penalty, the resulting unpredictability of verdicts, and the preservation of the jury-trial right against any temptation for a reviewing court to hypothesize—and thus create—a verdict under circumstances other than those of the actual trial. Any substantial error "might have affected" the jury (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258), therefore, unless it was clearly cumulative or cured. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; see also

People v. Hines (1964) 61 Cal.2d 164, 169 [any substantial error pertaining to penalty met *Watson* standard for error] .) And this is true even under the "reasonable possibility" test of *People v. Brown* (1988) 46 Cal.3d 432, which restated only a perspective for determining whether error is substantial, as opposed to insubstantial or trivial. (See discussion in the Appendix on harmless-error review at pp. 370-374, below.)

Normally, when a limiting instruction is given, this Court is willing to "presume the jury will follow the instruction and hence the testimony will work no prejudice." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120.) The trial court's failure to tell the jury to use the testimony for the limited purpose of remembering the gravity of the crime and for no others was prejudicial under any standard, and the judgment of death must be reversed.

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XV. THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY FOLLOWING A CALJIC-INITIATED ELIMINATION OF THIS COURT'S FORMER UNANIMITY REQUIREMENT FOR CHARGES OF UNADJUDICATED CRIMINALITY

Evidence of crimes for which a defendant is not on trial has a long-recognized potent role in persuading jurors to vote for death, and in theory it has therefore been subject to special reliability safeguards. One of the primary ones, the requirement of a unanimous verdict on the truth of allegations of fact, was not followed here.

The trial court instructed appellant's jury that, in determining penalty, it should consider the presence or absence of criminal activity by appellant, involving the use or threat of force or violence, other than the crimes adjudicated in the current trial. (RT 13: 2825–2826.) Later it called attention to the evidence of sexual assaults against Carol Tonge and Diane Hill, instructing, in the language of CALJIC No. 8.87, on proof of that aggravating circumstance, i.e., the one created by Penal Code section 190.3, factor (b), and explained:

> Before a jury [sic] may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant, Thomas Potts, did, in fact, commit the criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.
>
> It is not necessary that all—for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(RT 13: 2829–2830; see also CT 10: 2889.)

Appellant contends that juror unanimity is required on findings of the existence of aggravating factors in general. (See Argument XVIII.C.3,

below.) However, even if this Court adheres to its view that the California statute does, and may, treat most aggravating circumstances as comprising only the reasons underlying the conclusion on which jurors must be unanimous, the situation is different with factor (b) allegations, for reasons which the Court has not previously addressed.

Other-crimes allegations are qualitatively different—in two key dimensions—from matters such as the circumstances of the crime and the age of the defendant. First, the latter normally involve little fact-finding in comparison to the normative questions regarding what the factors mean to the final decision. But other-crimes allegations require the same kind of fact-finding as the allegations in an ordinary non-capital criminal trial, with the same burden of proof applicable to such allegations. The second difference is in the special impact of other-crimes evidence. For these reasons, arguments for jury unanimity apply with particular force in the context of other-crimes allegations. Appellant's jurors, however, were specifically instructed that they were to determine individually whether factor (b) crimes had been proven, and to individually use or not use the evidence based on their findings. The lead prosecutor relied heavily on the evidence of two rapes in his argument for death

A. This Court Envisioned Juror Unanimity When it Imposed a Reasonable-doubt Requirement

There has been a dramatic but unacknowledged evolution of this Court's jurisprudence on unanimity regarding other crimes. The history of that evolution shows that current law rests on a weak foundation.

1. Prior Law

This Court has consistently required evidence of unadjudicated offenses to be proved beyond a reasonable doubt, going back to well before the 1977 death penalty statute. (*People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. McClellan* (1969) 71 Cal.2d 793, 806.) The rule began with

recognition that other-crimes evidence "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk*, *supra*,63 Cal.2d 443, 450; see also *Robertson*, *supra*, 33 Cal.3d at p. 54 ["adoption of the reasonable doubt standard" in the use of other crimes is based on "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination"]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [even without prosecution reliance in argument, "there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive" in the 'choice between a life sentence and a death sentence'"].) As a result, "in the penalty trial the same safeguards [in proof of other crimes] should be accorded a defendant as those which protect him in the trial in which guilt is established." (*People v. Terry* (1964) 61 Cal.2d 137, 149, fn. 8; accord, *People v. Stanworth*, *supra*, 71 Cal.2d 820, 840.) Among these was the reasonable-doubt standard. (*Ibid.* [both cases]; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 1000 ["undue prejudice is threatened by evidence of violent criminal activity, and sufficient probativeness is assured without a previous conviction only through the requirement of proof beyond a reasonable doubt"].) Requiring it for penalty-phase other-crimes evidence was an exception to the preponderance-of-the evidence standard applicable both to certain guilt-phase uses of such evidence and to proof of other penalty-phase facts. (*Polk*, *supra*, 63 Cal.2d at pp. 450–451; see also *McClellan*, *supra*, 71 Cal.2d at pp. 804–806.)

This special practice of applying "the same safeguards" as are applied in the guilt phase (*People v. Stanworth*, *supra*, 71 Cal.2d at p. 840) to determining guilt of unadjudicated crimes at penalty would necessarily include juror unanimity. And in this Court's pre-*Furman* jurisprudence, there was never a suggestion that trying a fact to a jury under the

reasonable-doubt standard could be divorced from its historic complement[202] of having the jury as a whole decide the issue. On the contrary, when discussing the reasonable-doubt requirement, this Court consistently and clearly contemplated its application by a jury deliberating in an attempt to see if it could unanimously accept the other-crimes allegations. (See *People v. Polk*, *supra*, 63 Cal.2d at pp. 450–451 ["even though at the trial on the issue of guilt *the jury* must only be convinced that it is more probable than not that the defendant committed other crimes before *it* may consider them . . . , at the trial on the issue of penalty *they* must be convinced beyond a reasonable doubt," emphasis added]; see also *People v. Phillips* (1985) 41 Cal. 3d 29, 82–83["the trial court's failure to instruct the jury that *it* could not consider evidence of other criminal activity under former section 190.3, subdivision (b), unless *it* found that such activity had been proven beyond a reasonable doubt"]; *People v. Robertson*, *supra*, 33 Cal.3d at p. 53–54 [accepting contention that "the trial court committed prejudicial error in failing to instruct the jury . . . that . . . *it* could not properly consider the 'other crimes' evidence as aggravating circumstances unless *it* first found that these crimes had been proven beyond a reasonable doubt," emphasis added]; *People v. Stanworth*, *supra*, 71 Cal.2d at p. 840 ["a defendant during the penalty phase of a trial is entitled to an instruction to the effect that *the jury* may consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt," emphasis added]; *id.* at p. 841 ["Instructions on how *the jury* may utilize such evidence, including an instruction that *it* may consider only those crimes proved beyond a reasonable doubt, are therefore vital," emphasis added]; *People v. Terry*, *supra*, 61 Cal.2d at p.

[202]See *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477–478, 490, 496.

149, fn. 8 ["in the penalty trial the same safeguards should be accorded a defendant as those which protect him in the trial in which guilt is established. . . . [D]efendant should not be subject to *a finding of a jury* that he committed prior crimes unless his commission of such prior crimes has been proven beyond a reasonable doubt," emphasis added] (dictum).)

In the foregoing cases, even the consistent references to crimes simply being "proven beyond a reasonable doubt" reflect an understanding that the burden would be met the usual way, by convincing the entire jury. In the context of our jury system, saying that a fact is to be proven, without saying that it need be proven only to the satisfaction of the juror who intends to use it, is to say that it must be proven to the jury. Conveying the permissibility of non-unanimity would have required language like that used in the current CALJIC instruction: "Before *a juror* may consider any of such criminal acts or activity as an aggravating circumstance in this case, *a juror* must first be satisfied beyond a reasonable doubt . . . ." (CALJIC No. 8.87, emphasis added.) But this Court never used such language until it the CALJIC committee came up with an instruction that did not make the need for unanimity plain, and this Court approved it.

2. Evolution of Current Law

Originally, the CALJIC committee responded to this court's initial reasonable-doubt holding with an instruction which—like the opinions cited above—treated unanimity as understood, by a jury that already knew what it meant to prove something to it.[203]

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[203]"Evidence of other crimes alleged to have been committed by the defendant[s] may not be considered as evidence in aggravation unless proved beyond a reasonable doubt. Reasonable doubt is defined as follows: . . . It is that state of the case which . . . leaves *the minds of the jurors* in that condition that *they* cannot say *they* feel an abiding conviction . . . ." (CALJIC No. 8.81 (3rd ed. 1970), emphasis added.) This was the same language used in the general reasonable doubt instruction, which, of course, was addressed to a jury (continued...)

Without explanation, the CALJIC committee took the initiative to drop the reasonable-doubt standard entirely after the 1977 reinstatement of the death penalty.[204] When this Court reaffirmed that standard,[205] the committee evidently produced an instruction—again without explanation—that eliminated prior references to "the jurors," collectively, as the decision-makers.[206]

The new instruction was then challenged for its failure to specify a need for unanimity. This Court summarily rejected the contention, in the first death-penalty case it decided after its reconstitution following the 1986

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[203](...continued)
that had to reach a unanimous verdict. (CALJIC No. 2.90 (3rd ed. 1970).) Nothing in the other penalty instructions would have cast doubt on this interpretation in the jurors' minds. (See CALJIC Nos. 8.80, 8.82–8.83 (3rd ed. 1970).)

[204]See CALJIC Nos. 8.84–8.84.2 (4th ed. 1979).

[205]In *People v. Robertson*, *supra*, 33 Cal.3d 21, 54.

[206]The reasonable-doubt standard was reaffirmed in 1982. (*People v. Robertson*, *supra*, 33 Cal.3d 21, 54.) Appellant has been unable to locate post-*Robertson* pocket parts to the 1979 edition of CALJIC. The next version which he has been able to locate contained the following: ". . . Before you may consider any of such criminal [act[s]] [activity] as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant [_____] did in fact commit such criminal [act[s]] [activity]." (CALJIC No. 8.87 (5th ed. 1988).) The language which had formerly contemplated a group decision (see fn. 203, above) was eliminated. In all probability, this was essentially the post-*Robertson* instruction. The defendant in *People v. Ghent* (1987) 43 Cal.3d 739 received a reasonable-doubt instruction, complained of the lack of a unanimity instruction, but did not complain of a non-unanimity instruction. (*Id.* at p. 773.) It seems likely, therefore, that the 1988 version was the same, or similar, to the version introduced in response to *Robertson*. Moreover, the Use Note and Comment in the 1988 edition cite *Robertson*, along with a 1985 case, on the need for proof beyond a reasonable doubt but do not yet mention the 1987 cases, discussed below, which authorized non-unanimity. (CALJIC No. 8.87 (5th ed. 1988), pp. 414–415.)

retention election. It did so as if it were writing on a clean slate and as if it were the defendant, rather than respondent and the CALJIC committee, that were presenting an innovation:

> [A unanimity] requirement would immerse the jurors in lengthy and complicated discussions of matters wholly collateral to the penalty determination which confronts them. Moreover, we see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proven beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty.

(*People v. Ghent*, *supra*, 43 Cal.3d 739, 773–774.) Shortly afterwards, the Court elaborated somewhat:

> To impose a penalty of death, each juror must evaluate the evidence and then unanimously determine that the aggravating factors outweigh the mitigating factors. There is no requirement that the jury agree on which factors were used to reach the decision. It is therefore unnecessary that the entire jury find the prosecutor met his burden of proof on the "other crimes" evidence before a single juror may consider this evidence.
>
> Moreover, . . . the *Robertson* rule is statutorily based and serves a foundational purpose. Generally, 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.) The CALJIC instruction was then reworded to affirmatively instruct the jurors that theirs was an individual decision, rather than a collective one. It did so by referring to when "a juror" may consider factor (b) aggravation, and an explicit non-unanimity instruction was added. (Compare CALJIC No. 8.87 (5th ed. 1988) with CALJIC No. 8.87 (1989 rev.) (5th ed. 1988).)

Appellant recognizes that this Court has often reaffirmed the holdings of *Ghent* and *Miranda*. (See, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 402.) Their reasoning addresses neither the history of the issue

nor the contentions raised in the discussion that follows, however, and the Court should reconsider whether the innovation initiated by the CALJIC drafters was appropriate, given the ways that this "special class of evidence—evidence of other crimes" (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54, fn. 18) is different from all other evidence in aggravation.

B. Other-crimes Allegations Trigger Normal Criminal Fact-finding Before Normative Weighing Begins

As it had two decades earlier, this Court explicitly recognized the uniquely weighty consequences of "true" findings on unadjudicated-crimes accusations when it reaffirmed the requirement that they be proved beyond a reasonable doubt under the new death-penalty statute. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.) In doing so, it also implicitly recognized the unique nature of the fact-finding involved, since most other factors in aggravation are not even true-or-false questions of fact to which, in the Court's view, a standard of proof *could* apply. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [normative evaluation insusceptible to burden of proof]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777, 779; see also *United States v. Kee* (S.D.N.Y. 2000) 2000 U.S. Dist. LEXIS 8785, *21–22, 2000 WL 863119, *7 [207].)

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[207] In *Kee*, the court explained that if prior criminal acts of violence are being relied on to support the federal aggravating factor of "other serious acts of violence," unanimity and reasonable-doubt requirements apply because the factor itself is the simple aggregation of those acts. It distinguished the factor of future dangerousness, for which prior criminal acts can be used as proof but where the same requirements do not necessarily apply to the underlying criminal acts, because with future dangerousness a number of factors must be "evaluated" to determine if the dangerousness circumstance itself has been proven to the entire jury beyond a reasonable doubt. Like appellant, the *Kee* court was pointing to the difference between agreeing on every element that goes into an aggravating factor in which determining its truth requires some kind of evaluative process, and determining the truth of a factor such as whether or not a defendant committed a crime.

Thus, other-crimes allegations created a trial-within-a-trial in appellant's case, as they usually do. The jurors, albeit individually, had to each decide whether the evidence before it proved two specified criminal actions, beyond a reasonable doubt. The truth of the two rape allegations was not necessarily proved to the requisite degree of certainty for all jurors.[208] The account of neither witness was corroborated in any fashion, except for appellant's plea to having had sex with Carol Tonge when she was underage.[209] Either could have been highly credible or not credible at all, as the record cannot, of course, disclose their demeanors. Tonge was staying with a boyfriend. (RT 12: 2540–2541.) Thus she would have had a motive to fabricate a rape charge, if he had reason to suspect her of having had sex with someone else. She drank beer with appellant, each from their own quart bottle, using an open container in a vehicle, much of the day, and she "might have taken a puff" of marijuana with him. (RT 12: 2544, 2546, 2559 [quotation], 2568, 2569.) Her description of a straight razor held to her throat could have struck some jurors as lurid, even cinematic, and a bit improbable because of the ubiquitousness of safety and electric razors long before 1979. (RT 12: 2551–2552, 2567.) Similarly, some could have questioned whether a man could and would keep the razor at her throat during the entire act of intercourse, which was part of her account. (RT 12:

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[208]Appellate counsel is not loosely accusing either woman of fabricating the charges, and he understands the falsity and destructive consequences of ideas such as that every woman who accepts a ride from a stranger and drinks with him is open to sex, or that one who lets someone into her apartment at night is interested or willing. The point is that, given the state of the evidence, the rape allegations may or may not have been true, a fact which some jurors likely recognized.

[209]Hill said she had received medical attention, which could have provided an opportunity for corroboration. (RT 12: 2583–2584.)

2556.) Although she reported the incident to police, she decided not to cooperate in prosecuting appellant. (RT 12: 2565–2566.)

Hill testified that, alone in her apartment except for sleeping small children, she let appellant in when he showed up one night at 9:00 or 10:00 p.m., to let him sober up because he was drunk (RT 12: 2577–2578, 2586.) There was no explanation of why—given the inappropriateness of appellant, who was married to a friend of hers (RT 12: 2573, 2577, 2584) visiting Hill, whose husband was in jail (RT 12: 2575), at that time and in that state—she felt comfortable doing so. (See RT 12: 2576 [she does not remember why she let him in].) Her account, because it included the rape being interrupted by her two-year-old coming in and needing to be put back to bed, seemed to have left her the opportunity to telephone for help. (RT 12: 2580–2582.) She said, however, that her telephone was not working. (RT 12: 2582.) Hill did not report being attacked to the authorities. (RT 12: 2583–2584.) She also stated that she did not tell appellant's wife. (RT 12: 2584.) Under these circumstances, her appearance at trial was quite a mystery. The lead prosecutor told the jury, "Diane Hill didn't want us to find her, but we did . . . ." (RT 12: 2845–2846.) How did that happen, and what did it mean about the reliability of her account? And where did her having an extremely violent husband, who was incarcerated at least once in the past, fit in? (See RT 12: 2583.)

These are all typical of the kinds of questions that, in every other criminal context, are resolved by unanimous juries. Indeed, had the authorities been able to prosecute the other alleged crimes when they were allegedly committed, the attempt to prove them would have taken place in an ordinary trial, where a unanimous verdict would have been required.[210]

[210]Factor (b) represents a judgment that the lack of previous adjudication of other crimes should not prevent their use at penalty, if they (continued...)

Thus, the questions facing, or that should have faced, appellant's jury are squarely on the fact-based end of the fact-determination/normative-judgment continuum. No normative weighing begins until guilt or innocence of the allegations is decided. Therefore nothing in the nature of the penalty-determination process is inconsistent with deciding the truth of an other-crime charge in the manner in which it would have been decided if tried earlier and separately. Just as—even in a process where every juror does his or her own weighing of multiple factors—jurors can be told not to use a factor (b) allegation at all if not proven beyond a reasonable doubt, they can be told not to use any not proven to the satisfaction of all jurors.

C. The Unreliability of Single-juror Fact-finding and its Elimination of a Need To Deliberate with Other Jurors Are Unacceptable with Evidence Uniquely Likely To Affect a Penalty Verdict

Given the considerable weight of such other-crimes allegations if found true, it is unacceptable to jettison the protection of unanimity, which not only requires an entire jury to be convinced but which necessitates the interactive deliberations needed to produce that result, deliberations which produce much higher-quality decision-making.

1. Unanimity and the Deliberative Process

Even with unanimity requirements intact, in determining the truth of charges of crime,

> progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to

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[210](...continued)
were violent. (See generally *People v. Boyd* (1985) 38 Cal.3d 762, 774.) However, nothing in its text or history shows an intent to make the adjudication dramatically easier, contrary to this Court's historic practice of employing normal guilt-trial safeguards in the penalty-phase use of such evidence.

> inaccurate fact-finding and incorrect application of the common sense of the community to the facts.

(*Ballew v. Georgia* (1978) 435 U.S. 223, 232.) Clearly, with single individuals deciding if guilt of violent crimes has been proved, with no need to even discuss the matter with colleagues, the decline will be precipitous. (See *id.* at pp. 231–239 [canvassing empirical evidence that group decision-making is more accurate—particularly in avoiding convicting the innocent—than individual decision-making and that the deliberations required for a group to make a decision help overcome individual biases]; *McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.) ["Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room "]; *Brown v. Louisiana* (1980) 447 U.S. 323, 333; *Allen v. United States* (1896) 164 U.S. 492, 501.)

Ironically, this Court recognized the capacity of the unanimity requirement to produce the exchange of viewpoints involved in a more complete deliberative process when it decided that unanimity was not required. However, it focused on the downside of deliberating: upholding the unanimity requirement "would immerse the jurors in lengthy and complicated discussions of matters wholly collateral to the penalty determination which confronts them." (*People v. Ghent*, *supra*, 43 Cal.3d 739, 773–774.) Parenthetically, the characterization of whether guilt of other-offenses allegations was proved as "wholly collateral" was aberrational. This view—the linchpin of the Court's rejection of a need for unanimity—was out of step with this Court's otherwise consistent acknowledgment of the likely "overriding importance . . . to the jury's life-or-death determination"[211] and "the particularly damaging impact" which

[211]E.g., *People v. Anderson* (2001) 25 Cal.4th 543, 589; *People v.* (continued...)

other-crimes evidence may have "on the jury's determination whether the defendant should be executed."[212] (See also *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 586 [conviction of a prior felony can be "decisive" on penalty choice].) Certainly appellant's prosecutor, who referred to the alleged rapes repeatedly and went over the Hill and Tonge narratives in detail, did not think that the issue was "collateral." (See RT 12: 2519–2521; 13: 2845–2847, 2848.) And if collective decision-making would be "lengthy and complicated" (*People v. Ghent*, *supra*, 43 Cal.3d at p. 773), how can an individual juror, lacking significant input from those with other points of view, make a reliable decision? And when, exactly, would he or she take the time to do it, if the matter is not on the group's agenda?

As noted above, soon after *Ghent*, this Court added that the (unacknowledged) non-unanimity innovation was also appropriate because whether guilt of a factor (b) crime was proved was "foundational," and "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*, *supra*, 44 Cal.3d 57, 99.) This assertion was as puzzling as the claim that the truth or falsity of factor (b) allegations is collateral. A jury deciding guilt of a criminal charge cannot achieve unanimity on a final verdict without agreement on the truth of each *element* of the offense. (See *Harris v. United States* (2002)536 U.S. 545, 549; *State v. Johnson* (Wis. 2001) 627 N.W.2d 455, 459.) But if whether a factor (b) allegation is true is "foundational" to the question of penalty, the truth of an

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[211](...continued)
Miranda, *supra*, 44 Cal.3d 57, 98; *People v. Robertson*, *supra*, 33 Cal.3d 21, 54.

[212]E.g. *People v. Heishman* (1988) 45 Cal.3d 147, 181; *People v. McClellan*, *supra*, 71 Cal.2d 793, 805; *People v. Polk*, *supra*, 63 Cal.2d 443, 450; *People v. Varnum* (1967) 66 Cal.2d 808, 814.

element of an offense can just as accurately characterized as "foundational" to the ultimate question of guilt. Reliance on a supposed general principle that juries do not have to agree on answers to the constituent questions on which their verdicts rests was misplaced. There is no such principle; at best there are exceptions to the normal requirement of unanimity, such as when jurors need only agree that a penal statute was violated but not as to the "theory" under which the violation occurred. (See, e.g., *People v. Benavides* (2005) 35 Cal. 4th 69, 101.)

The rule requiring the use of the reasonable-doubt standard for factor (b) allegations is supposed to ensure that "the People may not obtain the death penalty on the basis of uncharged criminal activity proved by a standard less stringent than would be required to convict the defendant of the uncharged crime." (*People v. Rodriguez* (1986) 42 Cal. 3d 730, 791–792.) The introduction of single-juror fact-finding after those words were written undermined that principle: one juror's finding of proof beyond a reasonable doubt is far easier to obtain than such a finding established in deliberations by 12 people. The existence, therefore, of the same formal "standard" cannot produce anywhere near an equally stringent and reliable test of a prosecutorial charge, when it need be proved only to one or another juror's satisfaction.

Finally, single-juror beyond-a-reasonable-doubt fact-finding is oxymoronic. If one juror was convinced beyond a reasonable doubt that appellant raped his two accusers, and eleven were unconvinced, it would be impossible to claim that the prosecution met its burden without also claiming that 11 of 12 jurors were being unreasonable. "[T]he rule requiring unanimous verdicts developed in the common law as a *means* to ensure that the government had met its constitutional duty to prove the

defendant's guilt beyond a reasonable doubt." (*Commonwealth v. Hunter* (Mass. 1998) 695 N.E.2d 653, 658, emphasis added.) The means cannot be abandoned without losing the result.

2. Anomalous Nature of Non-Unanimity Rule

Appellant was entitled to a unanimous verdict on the allegations that the murders were committed against persons aged 65 or older, each one of which, if valid enhancements, would have exposed him to but a two-year determinate sentence. (§ 667.9; see *Apprendi v. New Jersey* (2000) 530 U.S. 466.) Similarly, as noted above, if whether he committed rape was being decided in the context of whether to convict him of such offenses and expose him to a term of imprisonment for them, the need for a unanimous verdict would have been clear. Yet the safeguards were drastically diminished where the issue may well have been whether evidence of such offenses provided the final impetus for a death verdict. This differential is unconstitutional. (See *Monge v. California* (1998) 524 U.S. 721, 732 ["we have recognized an acute need for reliability in capital sentencing proceedings"]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [lead opn. of Scalia, J.] ["we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides"]; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 [federal equal protection clause bars disparate extension of jury trial rights to similarly-situated defendants].) Indeed, the current state of the law produces a totally paradoxical situation. Had the prosecution alleged the incidents as criminal counts in the information but been unable to satisfactorily prove them to the jury, the trial court could not have used them in computing the determinate sentence, but individual jurors could still have relied on them to sentence appellant to death.

This Court has rejected this argument in its equal-protection form by pointing out that other-crimes evidence in the penalty phase of a capital trial serves a different purpose than enhancement allegations. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 136.) Ending the analysis there, as *Bacigalupo* did, avoids confronting the sheer irrationality of providing far greater safeguards in contexts where the stakes are much lower. The different purposes could only justify giving a non-capital defendant *fewer* protections than a capital defendant, not greater ones. The *Bacigalupo* observation also omits acknowledgment that the state, in providing those safeguards where it does, implicitly recognizes how unanimity is required to ensure reliability. Appellant recognizes that, by conceptualizing the penalty-determination process as one involving 12 jurors who need to agree only on the outcome, this Court provides a formal justification for omitting the unanimity requirement, a justification inapplicable in the enhancement context. But it is wrong to stop there. The Court must also consider whether there is a need for strict adherence to such a conceptualization, a need that outweighs introducing the unreliability involved in determining other-crimes guilt juror by juror. This is an unreliability that this Court, following constitutional dictates, rejects in every *less* serious context. And there is no need to accept it here: California's overall scheme for deciding penalty would not change or be harmed if jurors were told that they were (individually) barred from considering the other-crimes evidence in their weighing process unless the jury unanimously agreed on guilt of such crimes.[213]

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[213]*Bacigalupo* also addressed a defense contention that Eighth-Amendment reliability requires unanimity on the truth of an other-offense charge before a juror may consider it in aggravation. The Court disposed of the claim as follows:

Although we did not mention the Eighth Amendment when we

(continued...)

Well before the United States Supreme Court developed its modern death-penalty jurisprudence, this Court determined that the procedural safeguards applicable to a trial on guilt of a criminal offense should apply to attempts to show such guilt of unadjudicated offenses during the penalty phase of a capital trial. (*People v. Terry*, *supra*, 61 Cal.2d 137, 149, fn. 8.) This was the basis for imposing the reasonable-doubt standard and numerous other protections that are not required in other sentencing contexts or with other uses of other-crimes evidence. (*People v. Robertson*, *supra*, 33 Cal.3d 21, 54 [reasonable doubt]; *People v. Purvis* (1961) 56 Cal.2d 93, 97–98 [hearsay rule]; *People v. Hamilton*, *supra*, 60 Cal.2d 105, 129–131 [corpus delicti rule]; *People v. Varnum*, *supra*, 66 Cal.2d 808, 815 [accomplice corroboration].) To impose all these and make an exception for unanimity, a bedrock due process requirement—so that evidence of other crimes can produce, for example, three votes for death even if nine people were unconvinced of either the truth of the allegations or that violence was involved—is irrational and deprives appellant and society of the reliability, due process, and equal protection to which both are entitled. (U.S. Const, 8th and 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

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[213](...continued)

> discussed this instruction in *Ghent*[, *supra*, 43 Cal.3d at p. 773], we impliedly rejected the argument defendant makes here when we concluded that the instruction was sufficient "under existing law."

(*People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 135.) It is illogical to assert that use of broad language in rejecting one challenge is an implicit rejection of all future challenges, even those not yet conceived of. What makes sense is, rather, the settled rule that "an appellate court's opinion is not authority for propositions the court did not consider or on questions it never decided." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.) This Court should consider the Eighth Amendment argument made above on its merits.

D. The Sixth Amendment Requires Unanimity Prior to Use of Factor (b) Evidence, and State Precedent to the Contrary Should Be Reconsidered

Failing to require jury unanimity also violates the federal jury-trial right itself, as the United State Supreme Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, make clear. *Ring* concludes:

> 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 [as in *Apprendi*], but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.

(*Ring*, *supra*, 536 U.S. at p. 609; see also *id.* at p. 610 (conc. opn. of Scalia, J.) [characterizing the holding as that "a unanimous jury" must find aggravating factors beyond a reasonable doubt].) The high court's pronouncements clearly establish the need for typical collective jury fact-finding, not an innovative divorce of the jury-trial right from the traditional functioning of a jury.[214] Thus, the Court discussed

> the rule we expressed in *Apprendi* . . . : "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence[, one of which is] that the "truth of every accusation" against a defendant "should afterwards be

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[214]In non-capital cases, departures to the point of allowing a conviction by a 9-3 vote have been permitted. (*Johnson v. Louisiana* (1972) 406 U.S. 356.) But there has never been a suggestion that one juror can fulfil the functions of determining the factual matters that must be submitted to a jury. (Cf. *Burch v. Louisiana* (1979) 441 U.S. 130, 137 [regarding minimal jury-size requirements, "reducing a jury to five persons . . . raised sufficiently substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six"].)

> confirmed *by the unanimous suffrage of twelve of his equals* and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . .

Blakely v. Washington, supra, 542 U.S. 296, 301, emphasis added.)

In *People v. Prieto* (2003) 30 Cal.4th 226, this Court rejected a claim that *Ring* required unanimity on the force/violence aspect of other-offenses aggravation. In doing so, the Court cited its more general discussion of why it saw *Ring* as inapplicable to California penalty-phase deliberations. (*Id.* at p. 265, citing discussion at pp. 262–263.) The Arizona scheme considered in *Ring* required a factual finding of an aggravating factor's existence before a death sentence was authorized, making it effectively an element of a greater offense. This Court held that in California death is already the authorized maximum once a special circumstance has been found. An aggravating factor is simply among the considerations weighed by the sentencer, rather than a single determinant of the sentence. (*Id.* at pp. 262–263.)

It is true that Arizona's scheme was somewhat different from California's. Most of the Arizona factors in aggravation were what are considered special circumstances here. (*Ring v. Arizona, supra*, 536 U.S. at p. 592, fn. 1.) But in Arizona, too, death was formally the authorized statutory maximum after the guilt-phase verdict. (*Id.* at p. 592 ["The State's first-degree murder statute prescribes that the offense 'is punishable by death or life imprisonment'"].) And *Prieto's* reasoning fails to consider that, in California as in Arizona, that authorization is not enough for actual imposition of a death sentence. Here, we have the statutory command that a death sentence is to be imposed only "if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (§ 190.3.) Such a finding is impossible without a finding of the existence of at least one aggravating circumstance. Therefore, until such an aggravating

circumstance has been found, a death sentence is not yet truly authorized, any more than it was after a first-degree murder verdict in Arizona. The question is whether all findings of fact necessary to reach the point of authorizing a discretionary penalty decision concerning a defendant have been made, or whether "the factfinding necessary to put him to death" remains to be completed. (*Ring*, *supra*, at p. 609.)

The opinion in *Prieto* boils down to an attempt to resurrect a state's power to determine the extent of jury-trial rights based on whether it classifies a fact as an element of the offense or a "sentencing factor." *Apprendi v. New Jersey*, rejected the existence of any such power, in a holding confirmed in *Ring*. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 602 [discussing *Apprendi*]; *id.* at pp. 604–605.) "Put simply, if the existence of any fact . . . increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 112 (plur. opn.).) Arizona tried to justify its scheme precisely as this Court did California's in *Prieto*. But the differences between Arizona's and California's law do not prevent the answer from being the same: the formally death-eligible defendant cannot be sentenced to death without an additional finding of fact regarding the existence of aggravation, and the full panoply of rights associated with trial by jury then applies. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 602.)

Were there any doubt about this, it was laid to rest by the High Court's opinion in *Cunningham v. California* (2007) 549 U.S. 270, which rejected this Court's upholding of the aspect of the Determinate Sentencing Law which required a judge to impose the upper term of imprisonment, rather than the middle term, upon the judge's own finding of a fact in aggravation. (See *People v. Black* (2005) 35 Cal. 4th 1238.) "[T]he middle

term prescribed in California's statutes, not the upper term, is the relevant statutory maximum,", i.e., the one authorized by a jury verdict which does not include a beyond-a-reasonable-doubt finding of aggravating circumstances. (*Cunningham v. California*, *supra*, 549 U.S. at pp. 284–285.) "If the jury s verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Id.* at p. 286.) Here the guilt-phase verdicts do not "alone" authorize a death sentence; the sentencer "must find an additional fact"—a circumstance in aggravation, as well as that aggravation outweighs mitigation—before it is permitted to impose a death sentence. *Prieto* was therefore wrong in concluding that death is the authorized maximum, for Sixth Amendment purposes, once a special circumstance has been found. (See *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262–263.)

This Court finds such reasoning unpersuasive with vaguer, more normative "facts," such as whether the circumstances of the crime show an aggravated offense. However, *Ring* and the High Court's related cases cannot be distinguished on that basis when it comes to the determination of whether specific crimes of violence have been proven, which is the prototypical yes-or-no factual question submitted to criminal juries. As noted previously, *Prieto* handled the unanimity-re-other-crimes issue by a simple reference to its general discussion of *Ring's* inapplicability to California's sentencing structure. (30 Cal.4th at p. 265.) The opinion did not consider how other-crimes evidence is distinctive, in the classic nature of the facts to be proven. Nor did it discuss the other way which this Court has long recognized such evidence as *sui generis* among aggravating circumstances in California, its distinctive pro-death force. (See *People v. Polk*, *supra*, 63 Cal.2d 443, 450–451.) Assuming the correctness of the

Court's general view that most of California's sentencing factors are not the type of facts to which the jury-trial right applies under *Ring* and *Apprendi*, facts alleged under factor (b) are different.

E. The Unanimity Requirement Should Be Restored

It is anomalous to provide one of the two primary protections against grave error which a jury trial gives criminal defendants, but not its historic complement. As explained above, this is not what this Court had in mind in 1965 when it established the high burden of proof. (See *People v. Polk*, *supra*, 63 Cal.2d at pp. 450–451; *People v. Stanworth*, *supra*, 71 Cal.2d 820, 840, 841; *People v. Terry*, *supra*, 61 Cal.2d 137, 149, fn. 8.) In any event, since *Ring v. Arizona*, it has been clear that the Sixth Amendment prohibits a state from empowering a lone juror to find a basis for a death sentence in allegations about other crimes, allegations that fellow jurors may have rejected.

Moreover, to apply the requirement to an enhancement finding that adds a year to a prison term, but not to a finding that could 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; accord, *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 586) would, by its inequity, violate the equal-protection clause and, by its irrationality, violate both the due-process and cruel-and-unusual-punishment provisions of the state and federal constitutions. It also fails to provide the reliability required by the Eighth Amendment.

F. The Error was Prejudicial

Respondent could argue harmlessness at either of two levels. There would have been no prejudice to appellant if it could be known that the other-crimes allegations would have surmounted a unanimity barrier. Even

absent such a showing, there would be no prejudice if no juror's verdict could have been affected by considering the rape evidence.

1. The Error Must Be Deemed To Have Affected the Jury's Consideration of the Factor (b) Allegations

As shown above, the error violated the Sixth, Eighth, and Fourteenth Amendments, so *Chapman* would apply to the question of whether the error could have contributed to the penalty verdicts if there were whole-jury findings that could be upheld.[215] However, there were no such findings. This Court can hypothesize whether an error may have contributed to a jury's actual decision, but it cannot create a jury finding by hypothesizing what a jury would have decided if it had been asked to confront the question. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279–281; see also *Burch v. Louisiana*, *supra*, 441 U.S. 130, 140 (conc. opn. of Brennan, J.) [understanding reversal for trial by non-unanimous six-person jury to require new trial]; *State v. Wrestle, Inc.* (La. 1979) 371 So.2d 1165 [*Burch* on remand: no attempt to consider harmlessness]; *Ballew v. Georgia*, *supra*, 435 U.S. 223, 246 (conc. opn. of Brennan, J.) [understanding reversal for trial by fewer than six jurors to require new trial]; *Ballew v. State* (Ga. App. 1978) 145 Ga.App. 829 [so holding on remand; no attempt to consider harmlessness].)

Alternatively, the state of the evidence would have permitted a juror to doubt either of the women's accounts. (See pp. 299–300, above.) A claim that this Court could conclude beyond a doubt that neither of these charges would have failed to surmount a unanimity barrier to their availability for weighing in the jurors' penalty scales would be untenable. (*Chapman v. California* (1967) 386 U.S. 18.) Clearly the prosecution

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[215]If the error were not subject to the *Chapman* test, it would be subject to the equivalent reasonable-possibility standard of *People v. Brown* (1988) 46 Cal.3d 432, 447–448. (See also *People v. Ashmus*, *supra*, 54 Cal.3d 932, 965.)

recognized the importance to it of the non-unanimity doctrine: it's representative highlighted and explained it at the opening of the penalty phase. (RT 12: 2518.)

2. Respondent Cannot Show That No Jurors' Decisions Could Have Been Affected by Unauthorized Use of the Other-Crimes Evidence

Since the non-unanimity instruction was federal constitutional error. it compels reversal unless respondent can show that jurors' use of the other-crimes evidence could not have "possibly influenced [them] adversely." (*Chapman v. California*, *supra*, 386 U.S. 18, 23.). As appellant has explained in a preceding argument, the penalty verdict was not a foregone conclusion.[216] As appellant has also explained,[217] because of the unknow-ability of jurors' subjective weighing processes and other limits of the appellate process, a finding that error could not have contributed to a juror's decision requires the error to have been trivial or to have produced results that were either undeniably duplicative of something the jury legitimately had before it through other means or, conversely, undeniably undone by some other action. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *People v. Brown*, *supra*, 46 Cal.3d 432, 448; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; and other cases cited at pp. 356–376, below.)

Far from being a trivial matter, of course, other-crimes evidence has traditionally been recognized as a powerful influence on juries. (E.g., *People v. Robertson*, *supra*, 33 Cal.3d 21, 54, quoting *People v. Polk*, *supra*, 63 Cal.2d 443, 450.)

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[216]See pages 208 et seq., above.

[217]Pages 204 et seq., above.

Moreover, the United States Supreme Court has found emphasis in a prosecutor's argument alone enough to necessitate rejecting the possibility of penalty-phase harmlessness. (*Clemons v. Mississippi*, *supra*, 494 U.S. 738, 753–754; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 586, 590 & fn. 8; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.) Here, the lead prosecutor spent about 10 percent of his penalty-phase summation going over the details of the rapes, what the experience was like for the victims, and what they showed about appellant. (RT 13: 2845–2847, 2848, 2849. They were part of the theme with which he concluded. (RT 13: 2854 [conclusion: Jenks killings are "a brutal crime, and the defendant has lived the life of brutality, and he's just inflicted a lot of pain throughout. The victims he's left in the wake of his life . . ."].) The importance of the allegations to his case for death was also shown by his decision to bring reluctant witnesses to testify, witnesses who—if they *were* telling the truth—had wanted to put the events behind them 17 or 18 years previously. (See RT 12: 2566; 13: 2845–2846.)

This use of such evidence is one of the reasons that this Court long ago recognized its "particularly damaging impact" on a jury's penalty deliberations. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54; *People v. Polk*, *supra*, 53 Cal.2d at p. 450.) Similarly, the United States Supreme Court has held that, where "the prosecutor . . . planned to use details of the prior crime as powerful evidence that [defendant] was a dangerous man for whom the death penalty would be both appropriate punishment and a necessary means of incapacitation," dealing with the allegation would have been of "high importance to" competent defense counsel. (*Rompilla v. Beard* (2005) 545 U.S. 374, __ 162 L. Ed. 2d 360, 380; 125 S.Ct. 2456, 2470] (conc. opn. of O'Connor, J.) [describing court's holding].)

Here, the prosecutor's use of other-crimes evidence was facilitated by an instruction creating the sole situation in our justice system where a single juror is entrusted to determine if defendant committed a crime. Under section 190.3 and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the jury should have been told to determine those questions and given the proper standards for doing so. Had it been properly instructed, it presumably would have sifted the evidence on each incident and perhaps found itself with no crimes of force or violence to weigh in the scales as the prosecution urged them to do. There was a reasonable possibility that the jurors' normative weighing of the evidence before them was affected by erroneously considering what the prosecutor himself obviously considered to be some of the most powerful evidence in his arsenal. This Court cannot exclude any reasonable doubts as to whether the outcome was so affected. The death judgment must therefore be reversed.

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XVI. THE CUMULATIVE EFFECT OF THE CHALLENGED ACTIONS OF THE TRIAL COURT, PROSECUTOR, AND DEFENSE ATTORNEY—WHETHER ERROR OR NOT—WAS TO DEPRIVE APPELLANT OF A FAIR TRIAL AND A RELIABLY-DETERMINED DEATH SENTENCE

This Court recognizes that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal. 4th 800, 845.) This recognition is constitutionally required under the Due Process Clause of the Fourteenth Amendment and under the Eighth Amendment requirements of fairness, reliability, non-arbitrariness, and effective appellate review. "'"[E]rrors 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."' [Citations.]" (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883.) "In cases where 'there are a number of errors at trial, "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.' [Citation.]" (*Ibid.*)

Some defendants invite this Court to apply these principles in a manner that presupposes that "a cumulative-error claim" depends on the extent to which this Court sustains individual points of error. (See, e.g., *People v. Hernandez* (2003) 30 Cal. 4th 835, 877.) There is, however, no basis for assuming that appellant's right to review is limited in that manner. Appellant is entitled to reversal if his trial was unfair or its result unreliable. (U.S. Const., 8th & 14th Amends.) In this context, actions below as to which the claim of error is *not* sustained, whether because of the scope of a trial judge's discretion or for other reasons, must still be considered in evaluating a cumulative-prejudice contention, if they ended up contributing

to a process which overall was unfair or had a result which cannot be relied on.

That was the case here.

A. Appellant's Entitlement to Reversal in the Absence of a Reliable and Fundamentally Fair Proceeding Is Not Dependent on the Existence of Cognizable Error

This Court has long acknowledged its duty "to make an examination of the complete record of the proceedings . . . to the end that it be ascertained whether defendant was given a fair trial . . . . (*People v. Stanworth* (1969) 71 Cal.2d 820, 833 . . . .; *People v. Bob* (1946) 29 Cal.2d 321, 328 . . . .; *People v. Perry* (1939) 14 Cal.2d 387, 392 . . . .; *People v. Figueroa* (1911) 160 Cal. 80, 81 . . . .)" (*People v. Easley* (1983) 34 Cal. 3d 858, 863–864, first ellipsis in original, quotation marks omitted.) The primary purpose of appellate review is to ensure the fairness of the proceedings below and, in a death case, the reliability of the outcome. (See *Neder v. United States* (1999) 527 U.S. 1, 18; *California v. Ramos*, *supra*, 463 U.S. 992, 998–999; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885; *In re Andrew B.* (1995) 40 Cal. App. 4th 825, 863–864 (conc. & dis. opn. of Sills, P.J.).) The harmless-error rule exists because "[a] defendant is entitled to a fair trial but not a perfect one." (*Lutwak v. United States* (1953) 344 U.S. 604, 619.) If the issue is fairness, the principle cuts both ways: the result of a trial that was unfair overall cannot be upheld because of the absence of demonstrable procedural imperfections.

Put differently, after a trial in which no ruling so exceeded the trial judge's power as to amount to error, but where the cumulative effects of those rulings and other occurrences at trial prevented the trial from being fair, the judgment cannot stand. For due process guarantees fundamental fairness, and the Eighth Amendment guarantees a penalty proceeding such

that its outcome can be relied on. (*Spencer v. Texas* (1967) 385 U.S. 554, 563; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 639 (conc. opn. of Stevens, J.); *Monge v. California* (1998) 524 U.S. 721, 732.) Nothing in due-process or Eighth-Amendment jurisprudence depends on there being a judge or prosecutor who can be *blamed* for actions that made the trial ultimately unfair or undermine confidence in the outcome. (Cf. *People v. Crew* (2003) 31 Cal. 4th 822, 839 [prosecutorial error is examined for its effect on the defendant, regardless of prosecutor's good or bad faith].) When a trial judge makes a series of rulings, each within the bounds of his or her discretion, but which together render the proceedings unfair or the outcome unreliable, reversal is required. (See *Kinsella v. United States ex. rel Singleton* (1960) 361 U.S. 234, 246 ["Due process . . . deals neither with power nor with jurisdiction, but with their exercise"]; cf. *Lisenba v. California* (1941) 314 U.S. 219, 236 [acts which conform to state law may still deprive a person of a fundamentally fair trial].) Thus, in *Taylor v. Kentucky* (1978) 436 U.S. 478, the court held that various circumstances, none necessarily an error in itself, resulted in denial of fundamental fairness and required reversal under the Due Process Clause. (*Id.* at pp. 487–488, 490.)

Moreover, this Court has long recognized that a *single* ruling—a discretionary denial of a motion to sever—can be defensible when made and yet require reversal because the outcome, as the trial actually unfolded, was a denial of due process. (See, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127;[218] cf. *Pointer v. United States* (1894) 151 U.S. 396, 403–404 [severance should be

[218]The cited cases refer to "gross unfairness." However, under the reviewing court's duty to ensure the fairness and reliability of capital verdicts (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884–885), reversal is required if the death judgment was obtained unfairly—period.

granted mid-trial if developments show unfairness of original ruling].) The cited cases apply the principle to a severance or joinder ruling, and the rule they state mentions only that situation. However, they supply no reason to consider joinder/severance problems to be *sui generis*. And there is no reason why due process and—in capital cases—the Eighth Amendment, could permit the upholding of a judgment based on a trial that was unfair and unreliable for other reasons. On the contrary, the line of decisions culminating in *Mendoza* originates with *People v. Chambers* (1964) 231 Cal.App.2d 23.[219] In *Chambers* a series of trial court actions, including joinder and many others (see *id.* at pp. 27–28), were unremediable, either because there was no error or because the right to review was forfeited. The court nevertheless concluded,

> In reviewing this conviction, we find ourselves in an unusual situation, characterized by a paucity of error technically available for appellate review, but emphatically demanding defendant's retrial under better circumstances. Our examination of the record convinces us that defendant was tried and convicted under conditions which deprived him of a fair trial and denied him due process of law.

(231 Cal.App.2d at p. 27.) The judgment was reversed on due process grounds. (*Id.* at p. 28.) Thus the foundation for the rule cited by this Court in *Mendoza* and *Arias* is the principle that the ultimate test of whether a trial was fair is simply whether it was fair, not whether the judge's decisions were justifiable at the time they were made.

The proceedings in this Court are not an evaluation of the trial judge's performance. The ultimate issues are, rather, whether the trial itself

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[219]To trace the line of cases, see *People v. Mendoza*, *supra*, 24 Cal.4th 130, 162; *People v. Arias*, *supra*, 13 Cal.4th 92, 127; *People v. Johnson* (1988) 47 Cal.3d 576, 590; *People v. Turner* (1984) 37 Cal.3d 302, 313; *People v. Bean* (1988) 46 Cal.3d 919, 940; *People v. Simms* (1970) 10 Cal.App.3d 299, 308–309; *People v. Burns* (1969) 270 Cal.App.2d 238, 252.

vindicated appellant's right to a fair trial and whether it met society's constitutionally-based imperative that proceedings that may lead to an execution be reliable. (See *Neder v. United States* (1999) 527 U.S. 1, 18; *California v. Ramos* (1983) 463 U.S. 992, 998–999.) This Court, therefore—if it has not found reversible error already—must consider whether all the challenged actions in appellant's trial, taken together, amounted to an undermining of that right or a violation of that imperative. The duty to do so exists irrespective of which such actions individually were legal error, which of them could be upheld as lawful exercises of discretion, and which the Court holds it need not reach at all because of preservation problems.

This Court has observed, "The Legislature of California has taken extraordinary precaution to safeguard the rights of those upon whom the death penalty is imposed by the trial court . . . ." (*People v. Bob*, *supra*, 29 Cal. 2d 321, 328.) In part because of "this declared policy," this Court held that, in capital cases, it should "take a liberal view of the technical rules applicable to criminal cases generally [citation] and examine the record with the view of determining whether or not in the light of all that transpired at the trial of the case a miscarriage of justice has resulted." (*Ibid.*) It is such an examination of "all that transpired at the trial" which appellant seeks here.

B. Not Only Did Prejudicial Actions Taken at Appellant's Trial Have a Cumulative Effect, But Many Strengthened the Effects of Each Other

A review of the challenged actions will show that each could have, in some measure, helped produce either the guilt or the death verdict, and that their combination certainly cannot be held harmless. Moreover, the various rulings and other actions likely had synergistic effects that have not been discussed previously in this brief.

1. The Guilt-Phase Actions of Which Appellant Complains Created an Unfair Process and Unreliable Outcome

The discussion of each claim of error in the preceding sections of this brief includes an explanation of how the challenged action was prejudicial, i.e., contributed to unfairness and unreliability in the trial. Here appellant incorporates by reference those explanations, while noting again that in this context whether the actions were in fact erroneous does not matter—only whether their impact could have been problematic. Similarly, he incorporates his prior discussions of respondent's high burden of showing harmlessness and the difficulty of doing so in appellant's case.

Appellant has complained of the following actions which could have had an impact on jurors' evaluation of the evidence of guilt:

- the trial court's singling out for emphasis, at the opening of trial, the sufficiency of a circumstantial case (Argument II.B) ;
- its use of the "raspberry-pie" caper as an example of a sufficient circumstantial case which—understood in a certain way—would have tended to dilute the burden of proof (II.C.2);[220]
- a prosecutor's urging the jury not to acquit and have to tell her and her colleague, "we believed he was guilty, but . . ." (III);
- her explaining that believing then that appellant was guilty and that believing it "next week" would be a sufficient abiding conviction, combined with the court and counsel's silence in the face of this argument, which equated a stable belief with the degree of certainty required (IV.C);

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[220] Appellant recognizes that the Court will reach this cumulative-impact argument only if it rejects appellant's claim that the pre-instruction definitely diluted the burden of proof. Thus the claim is restated here not in its original form, but with wording reflecting how the Court might have seen the conduct at issue if it ruled that the conduct was not error.

- the giving of the revised pattern reasonable-doubt instruction, which was fully susceptible to the prosecutor's interpretation of reasonable doubt (IV.A, IV.B);
- a statement that a defendant is presumed innocent "until" proven guilty, i.e., use of a term involving only an expected event (IV.D);
- the defense attorney's own remark that the prosecution did not have to prove appellant's guilt "to any kind of certainty" (see III.A[221]);
- the instruction that possession of recently stolen property, along with slight corroboration, was sufficient to prove guilt of robbery (V);
- the instruction that it was enough to prove robbery if the intent to steal arose by the time of the taking, rather than by the time of the application of force to the victim (VI);
- an instruction on determining the degree of murder that was stated from the prosecution's point of view and which seemed to place the burden of raising a doubt as to the a default first-degree finding on appellant (VII.B);
- the coercive pressure on any minority jurors with doubts about first-degree murder of the acquittal-first rule, which unnecessarily gave them a choice of causing a mistrial or going along with a first-degree verdict (VII.C);
- the various ways that the consciousness-of-guilt instruction singled out evidence permitting a pro-prosecution inference and ignored similar inferences that could have favored appellant (VIII); and

[221]As a free-standing claim, this would fall under the rubric of ineffective assistance of counsel, and appellant is raising no such claims in this appeal. In an overall evaluation of whether the trial was constitutionally fair and reliable, however, the remark is clearly significant.

- the prosecution's use of the Walker-Galloway double-hearsay testimony to explain the absence of jewelry, bloody clothing or shoes, or a hatchet among appellant's belongings (IX).

As noted previously, three of these actions synergistically suggested to jurors a judicial concern with not letting a guilty man go free: the circumstantial-evidence/"raspberry-pie" discourses, the directing of jurors' attention to possession of recently-stolen property and stating its near-sufficiency to prove robbery, and the invitation to consider the statement regarding loss of the hatchet false and to see it as showing consciousness of guilt.

Similarly, there was a series of actions, each of which chipped away at the reasonable-doubt standard. Even if none alone seems to have violated *In re Winship*, they certainly did together. The raspberry-pie and "a-circumstantial-case-is fine" remarks, the prosecutor's imploring jurors not to acquit a man they believed was guilty because of a reasonable doubt, her equating a "belie[f]" in guilt that would abide for a week to the requisite level of certainty, trial counsel's and the trial court's acquiescence in these remarks, a reasonable-doubt instruction which actually supported the prosecutor's argument that it was enough to *believe* appellant defendant guilty if the belief was strong enough to predictably abide, appellant's own attorney's saying that reasonable doubt "doesn't mean that the People are held to a burden of proving Mr. Potts guilty to a moral certainty, to any kind of certainty," the implications of presuming appellant innocent only "until" the anticipated proof of guilt, and the admonition that possession of stolen property was practically enough to prove robbery—most of these had a synergistic impact on each other, and they all had a cumulative and unacceptable effect on the prosecution's burden of prove.

There was another group of related and mutually-supportive errors, those which went directly to the critical question of first-degree robbery murder. These were the misinstruction on what kind of after-acquired intent would negate robbery; the statement—again—that possession of recently stolen property could basically prove robbery; the framing of the question of degree as being whether the jurors could agree on a doubt as to first-degree, rather than whether they could agree that first-degree murder was proved beyond a doubt; and the acquittal-first rule regarding verdicts on lesser offenses, which this Court has acknowledged risks a coercive impact.

Thus the guilt phase of the trial included instructions that to jurors would look like particular judicial concern to not lean over backwards in favor of the defendant and to notice a fact favoring the prosecution, a group of actions which together weakened the reasonable-doubt standard, and another set of instructions interfering with the fact-finder's capacity to focus on the robbery-theft distinction. These undermine any confidence that an appropriate decision regarding the degree of murder was made.

Moreover, the first two groups of actions (apparent bias in favor of prosecution, weakening of reasonable-doubt standard)—again in mutually-reinforcing fashion—combined with the Walker report of the Galloway statement, created an unacceptable risk of a finding that appellant was the perpetrator, by one or more jurors who could not have made a decision to that effect based on the information, standards, and attitude which the law requires.

Together, then, these actions produced a trial that met neither due-process standards of fundamental fairness in establishing guilt of a crime, nor the heightened-reliability requirements for one that made appellant death-eligible. The entire judgment must be reversed.

2. Trial-Court Decisions, Cumulatively, Undermined the Reliability of the Penalty-Determination Process

The penalty determination could have been affected by the Walker-Galloway hearsay testimony used to characterize appellant as blithely going off to play the slot machines with the proceeds of his pawning of jewelry the day after the crimes (Argument IX); the ease with which jurors were permitted to use the unadjudicated allegations of rape in determining penalty (XV); the instruction to consider "any fact, condition, or event" increasing appellant's guilt as aggravation (XIII); the lack of any guidance whatsoever on how to use victim-impact evidence, in the face of its emotionality, its apparently self-evident uses being illegitimate, and its one legitimate use being obscure (XIV); and those aspects of the death-penalty framework which this Court has sustained but which appellant has challenged primarily for purposes of preserving the issue (XVIII).

On first glance, it might appear that these particular issues belong in a cumulative-impact analysis only if there was error, but, even with them, Eighth- and Fourteenth-Amendment considerations counsel to the contrary. If investigator Walker's later-prepared record of Galloway's out-of-court statement were admissible despite hearsay and Confrontation-Clause problems, it brought in a certain degree of unreliability which—even if not in itself either error or prejudicial—did not stand alone. If the Court reaffirms its shift to a position that the reasonable-doubt standard on unadjudicated crimes can be met without unanimity, there remains the lessened reliability which the procedure introduced into *this* trial. For the single-juror fact-finding rule cannot be based on a claim that there is no diminution in reliability; only that the degree of that diminution is not fatal, in the abstract. Similarly, if the Court were to hold that the risk of jurors' applying the over-expansive definition of *aggravation* does not rise to a

fatal level, there still remains some undeniable level of risk. Finally, the lack of guidance on how to use victim-impact evidence, even if it did not rise to the level of error, certainly raises some discomfort as to reliability when the jurors were presented with the strange and evocative circumstance of a survivor who totally fell apart, a discomfort which cumulates with the other issues, whether they are individually seen as errors or problematic without rising to the level of error.

Appellant previously surveyed this Court's acknowledgments of the difficulty in finding errors that might have affected a penalty determination harmless. (See pp. 204 et seq., above; see also pp. 359, et seq., below.) The same sensitivity to the role of jurors unknowable subjective processes and the need to avoid substituting a reviewing court's judgment for that of the sentencing jury applies in the current context, whether the matters at issue have been held to be individually harmless errors or not error at all. The fact remains that unreliable but damaging double-hearsay that the prosecution used to argue appellant's callousness; testimony about two rapes—either of which could have failed to be persuasive enough to secure juror unanimity; and the opportunity to use appellant's gambling and alcohol problems, mental illness, working while on disability, and associations against him were all added to the mix when deliberations on appellant's fate took place. Together they created a situation where the result fails to meet Eighth Amendment standards of reliability, and the penalty judgment must be reversed even if the guilt verdicts can stand.

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XVII. APPELLANT'S JURY SHOULD HAVE BEEN REQUIRED TO AGREE THAT HE COMMITTED EITHER WILLFUL, DELIBERATE, AND PREMEDITATED MURDER OR FELONY MURDER

The trial court instructed appellant's jury that it did not need to agree on a "theory" of first-degree murder among those advanced by the prosecution. (CT 9: 2671, using CALJIC No. 8.74.) Thus appellant may have been found guilty by a jury which was not persuaded in its entirety either that he premeditated the homicides or that he committed felony murder. This Court has held that unanimity on what happened to constitute first-degree murder is not required. (E.g., *People v. Carpenter* (1997 15 Cal.4th 312, 394–395; see also *Schad v. Arizona* (1991) 501 U.S. 624.) Appellant urges it to reconsider.

Appellant has explained, in Argument XV.C (pp. 301 et seq., above) the necessity, if there is to be a reliable determination of facts beyond a reasonable doubt, of both the deliberative process required by unanimity, as well as unanimity itself. Appellant's rights to a jury trial, due process, and a fair and reliable determination of guilt of a capital offense are violated when guilt can be determined with perhaps only one juror believing that a particular set of elements of an offense was proved, or for that matter, with the jury being split down the middle. (U.S. Const., 6th, 8th, & 14th Amends.) When different factual scenarios define offenses that have different elements, it is only a matter of semantics for the legislature—or, in the case of a judicially-created doctrine like the felony-murder rule—the courts, to label them the same crime and thus say that the jury need only agree on whether the defendant committed the crime.

Appellant should only be subject to punishment for an offense, defined by a single set of elements, that the state can prove to a unanimous jury that he committed. The murder verdicts should be reversed.

XVIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital-sentencing scheme violate the United States Constitution. This Court has rejected arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it deems routine challenges to California's punishment scheme will be held "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303–304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, or should respondent contend that they are insufficiently presented to give it or this Court notice of the claims being made, appellant requests the right to present supplemental briefing.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6; see also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may

be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional, in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on section 190.2, the "special circumstances" portion of the statute, but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [" the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would"].)

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 find 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 condemn a fellow human to death.

A. Section 190.2 Is Impermissibly Broad

To meet constitutional muster, 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. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) This principle requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses charged against appellant, section 190.2 contained twenty-one special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842–843.) Appellant urges the Court to reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme 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 United States Constitution.

B. The Broad Application of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." 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.

In this case, the lead prosecutor argued that the murder was just for money, not for a motive like vengeance. (RT 13: 2843.) Under factor (a), he could have, under different facts, just as easily argued that the crime was not committed by a needy defendant seeking money, but one so arrogant and evil as to take it upon himself to avenge a perceived wrong. Similarly, he argued that the deaths were painful, caused by a weapon that would be neither clean nor quick (RT 13: 2843), while in another case he could have argued that a cool, efficient, execution-style shot to the head was reason for a death sentence. He argued that appellant was a career offender. (RT 13: 2848.) With someone else, he could have argued that the defendant was not a sociopath who, once into a life of crime and the penal system, could not stop himself from getting into situations with progressively more risk of mortal violence, but a person who knew how to live a lawful life, yet made a willing choice to commit murder. The prosecutor relied on factor (a) in enumerating several other alleged circumstances of the crime. (RT 13: 2851–2854.)

This Court never has applied any limiting construction to factor (a). (See *People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the

concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to impose death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle or meaningfully guided discretion, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987–988 [factor (a) survived facial challenge at time of decision].) Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.) He urges the Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (See *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard,

appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (See RT 13: 2825–2831.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478; *Blakely v. Washington* (2004) 542 U.S. 296, 303–305; *Ring v. Arizona* (2002) 536 U.S. 584, 604; and *Cunningham v. California* (2007) 549 U.S. 270, __, 127 S.Ct. 856, 864–865, 871, require any fact that is used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (RT 13: 2825–2831; see CALJIC No. 8.88.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

This Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). It has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty-phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider

its holding in *Prieto*, for the reasons stated here and in the discussion of *Prieto* at pages 309 et seq., above, so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty-phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

Note: While this claim is one that the Court has rejected in the past, appellant presents arguments supporting it which he believes the Court has not previously addressed.

The Evidence Code sets out a common-sense scheme regarding the burden of proof in any case. Section 502 requires the court to instruct, "on all proper occasions," as to which party bears the burden of proof on each issue and the degree of proof required. Section 500 provides that each party has the burden as to each fact essential to the claim for relief or defense that it is asserting. In a capital case, the prosecution's demand for the death sentence is a claim for relief. While the defendant seeks to avoid that

penalty, he would have no need to if the prosecution were not seeking it. He is in the same position as a civil defendant seeking to avoid a particular penalty, and the prosecution is in the position comparable to a civil plaintiff.

Moreover, since section 520 provides that a party claiming that a person is guilty of a crime or wrongdoing has the burden of proof on that issue, it is in keeping with the statutory framework to require that if the claim is that the wrongdoing is such as to justify the ultimate penalty, the prosecution should bear the burden of proving that claim as well.

Finally, section 550 provides that the burden of producing evidence as to a fact is on the party against whom a finding on that fact would be required in the absence of further evidence, and that the burden is initially on the party with the burden of proof as to that fact. The code assumes that there is such a party. Indeed, how could there not be? Imagine the prototypical situation for understanding and allocating the burden of proof, i.e., a failure of either side to introduce evidence. Here that situation would have to be a penalty retrial, before a jury given the guilt verdicts from the original trial but no evidence, even as to the circumstances of the crime. It is inconceivable that even the Evidence Code, much less due process or the Eighth Amendment, would permit a death verdict in such a circumstance. Clearly the prosecution must have a burden of proof.

Moreover, because the Evidence Code creates a legitimate state expectation, as to the way a criminal prosecution will be decided, appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors

outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence, in the absence of proof to the contrary.

CALJIC Nos. 8.85 and 8.88, the instructions given here (CT 10: 2887–2888, 2890), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, while somewhat contradictorily stating that the CALJIC instructions "are adequate to impress the jurors with the high degree of certainty a juror should have before imposing the death penalty." (*People v. Williams* (1988) 44 Cal.3d 883, 960; see also *People v. Hayes* (1990) 52 Cal.3d 577, 643.) So the Court has actually aligned itself with appellant's point of view: that even as to the sentencing choice itself, not to mention underlying factual determinations, levels of certainty can be required even though the question is not about historical facts. If that is the case, so can a burden of persuasion be required. This Court also has rejected any instruction on the presumption of life, but it did so in a case where, unlike here, no authority was cited. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) In *People v. Lenart* (2004) 32 Cal.4th 1135–1136, the Court rejected some of the arguments made here for allocating a burden of persuasion to the prosecution. Appellant is entitled to jury instructions that comport with the Evidence Code and the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Assuming that it was permissible not to have any burden of proof, then the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams*, *supra*, 44 Cal.3d 883, 960 [upholding jury

instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation—to appellant—of a nonexistent burden of proof. Permitting such a risk violates the Eighth Amendment.

3. Appellant's Death Verdict was Not Premised on Unanimous Jury Findings

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance that the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232–241 [decision-making by juries saller than six is constitutionally unreliable] (lead opn. of Blackmun, J., representing views of eight members of the Court on this point); *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) 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.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.) Appellant asserts that *Prieto* was incorrectly decided, for the reasons stated at pages 309 et seq., above, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find any particular set of aggravating factors true also violates the Equal Protection Clause of the Fourteenth Amendment. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could 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 of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating

circumstances that it warrants death instead of life without parole." (CALJIC 8.88; CT 10: 2830.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316 & fn. 14.) Appellant asks this Court to reconsider that holding.

5. The Instructions Failed to Inform the Jury that the Central Determination is Whether Death is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (See CT 10: 2830.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) The only dictionary definitions of the verb *warrant* that conceivably apply to the situation before a sentencing jury are to authorize something or give sufficient ground to justify it. (*Webster's Third New Int'l Dictionary* (1993) p. 2578, col. 1, definitions 5 & 7.) So jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus there

could be circumstances *permitting* a death sentence, i.e., in which one is "warranted," yet in which death is not the appropriate punishment. By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.[222]

6. The Instructions Failed to Inform the Jurors that if They Determined that Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California*, *supra*, 494 U.S. at p. 377.) Yet, CALJIC No. 8.88 does not address this principle, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense

[222]Appellant submits that, even if the Court finds no prejudicial likelihood of jury confusion on this point, it should disapprove the use of this inapt language in future cases.

theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526–529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013–1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life-without-parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon*, *supra*, 412 U.S. at pp. 473–474.)

7. The Instructions Failed to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___ 127 S.Ct. 1706, 1712–1724; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit him of any charge or special circumstance. It was told that unanimity was not required to prove factor (b) allegations. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442–443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial. It requires reversal of appellant's death sentence, since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to

have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require that the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Instructions Used Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (CT 10: 2888; see § 190.3, factors (d) and (g); CALJIC No. 8.85(d) and (g)), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Appellant's jurors should have been free to determine for themselves if his paranoid schizophrenia was significant enough to be mitigating. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The Court has rejected this argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

2. The Instructions Failed to Delete Inapplicable Sentencing Factors

Most of the sentencing factors set forth in CALJIC No. 8.85 as potential mitigation were inapplicable to appellant's case. (CALJIC 8.85(e), (f), (g), (i), and (j).) The trial court nevertheless included those factors in the jury instructions. (CT 10: 2888.) Enumerating so many examples of mitigation—without even stating that they were examples—overshadowed the catch-all factor (k), making it seem like an afterthought. They are poor examples, reflecting the pro-death bias of the 1988 initiative which this Court has had to modify in several reflects, in that they represent very unusual and extreme mitigating circumstances, some of which are even inconsistent with first-degree murder, and thus mis-educated the jury as to what valid mitigation looks like. Moreover, since five of the seven specific mitigating factors were inapplicable, reading them unavoidably

created the impression that the vast majority of what the law considers mitigation did not apply to appellant. It therefore also risked confusing the jury into thinking that the absence of so much potential mitigation was aggravating, and nothing in the instructions except for a couple of references to using factors that were "applicable" came even close to suggesting otherwise.

The failure to omit inapplicable factors thus confused the jury, hindered its appropriate consideration of what mitigation the evidence did disclose, and prevented the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's rights under the Sixth, Eighth, and Fourteenth Amendments.

Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions, in accordance with general California practice which insists on taking care to avoid confusing jurors with inapplicable instructions.[223]

3. The Instructions Failed to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (CT 10: 2888.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85—factors (d), (e), (f), (g),

[223]Appellant submits that, even if the Court finds no prejudicial likelihood of jury confusion on this point, it should disapprove this practice in future cases.

(h), and (j)—were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288–289). The same result is required by due process and the requirement of fairness, rationality, and reliability in determining the propriety of a death sentence. (U.S. Const., 8th and 14th Amends.) Appellant's 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. This error and the previous one compounded each other. If inapplicable factors had not been left in, there would have been far fewer factors to misinterpret. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent, non-statutory, or irrational aggravating factors, precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230–236.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

Appellant asks this Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators. Even if there was no error, it should insist on the better practice.

4. The Instructions Failed to Inform the Jury That Lingering Doubt Could Be Considered a Mitigating Factor

The instructions failed to inform the jury that it could consider lingering doubt as to appellant's guilt of a capital offense as a mitigating factor in determining the appropriate punishment. This Court has held that evidence and argument about lingering doubt can be presented as a mitigating circumstance (*People v. Gay* (2008) 42 Cal.4th 1195, 1218; *People v. Terry* (1964) 61 Cal.2d, 137, 145–147), but nonetheless has also held that a lingering doubt instruction is not required by state or federal law, and that the concept is sufficiently covered in CALJIC No. 8.85. (*People v. Zamudio* (2008) 43 Cal.4th 327, 370; *People v. Cox* (1991) 53 Cal.3d 618, 675–679.) A court must instruct on those principles of law openly and closely connected with the facts of a case, even without a request. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; see also *Kelly v. South Carolina* (2002) 534 U.S. 246.) Without being told, the jury could not know that it could consider lingering doubt. The trial court's failure to give an instruction on lingering doubt violated appellant's federal constitutional rights to due process, equal protection, the full consideration of his mitigating evidence, and a reliable and non-arbitrary penalty determination. (U.S. Const., 8th and 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [right to present mitigation]; *Mills v. Maryland*, *supra*, 486 U.S. at pp. 383–384 [requirement of heightened reliability in capital sentencing].) Appellant asks the Court to reconsider its previous decisions.

5. The Instructions Failed to Inform the Jury Not to Consider the Deterrent Effect or the Cost of the Death Penalty

The instructions failed to inform that jury not to consider the deterrent or non–deterrent effect of the death penalty or the monetary cost

to the state of executing a defendant or maintaining him in prison for life without the possibility of parole. Such factors are wholly irrelevant to a defendant's deathworthiness and risk an arbitrary, capricious, and unreliable capital-sentencing decision in violation of the Eighth and Fourteenth Amendments. This Court has held that a trial court does not err in refusing to give such an instruction where "'neither party raise[s] the issue of either the cost or the deterrent effect of the death penalty . . . . [Citation omitted].'" (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 371.) The assumption that considerations of deterrence and cost may affect a jury's penalty determination only when the issues are directly raised by the parties is mistaken. Appellant asks the Court to reconsider its prior decisions.

F. The Absence of Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

The California capital sentencing scheme 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* (1991) 1 Cal.4th 173, 253.) 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, noted 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, has become just such a sentencing scheme.

The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner

or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its abstaining from inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates the Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. The Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider its ruling.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms and Violates International Law

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v.*

Cook (2006) 39 Cal.4th 566, 618–619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778–779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment; article (6)(2) of the International Covenant on Civil and Political Rights, an authoritative interpretation of which states that the provision must be "read restrictively to mean that the death penalty should be a quite exceptional measure" (Human Rights Committee, General Comment, International Covenant on Civil and Political Rights. Article 6); and the United States Supreme Court's opinion citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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APPENDIX

Respondent's Burden of Showing Harmlessness of Error Which Could Affect Penalty

APPENDIX

RESPONDENT'S BURDEN OF SHOWING HARMLESSNESS OF ERROR WHICH COULD AFFECT PENALTY

As argued more briefly in the body of this brief, harmless-error analysis regarding error claimed to have possibly affected the penalty choice should be conducted by this Court in the manner that it conducted it from 1959 through 1986, rather than by continuing a major unacknowledged change introduced in the late 1980s and sometimes still employed. Former Chief Justice Roger Traynor—who in modern times is most frequently quoted for the proposition that needless reversals erode public confidence in the judiciary[224]—insisted that

> an appellate court cannot possibly determine what errors influenced a jury to impose the death penalty. Any error, unless it related only to the proof of some fact otherwise indisputably established, might have tipped the scales against the defendant. Hence, an error in the penalty phase of a capital case usually compels reversal.

(Traynor, The Riddle of Harmless Error (1970) p. 73 ("Traynor").) Appellant would add that errors that were unquestionably trivial or that were cured in a manner that was indubitably effective could also be held harmless, but no such errors are raised in this brief. As will be shown below, any analysis that depends on the Court's weighing of the strength of the aggravating and mitigating evidence, or, similarly, on comparing the pro-death impact of a substantial error to other evidence already before the jury, is improper.

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[224]See, e.g., *Rose v. Clark* (1986) 478 U.S. 570, 577; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Flood* (1998) 18 Cal.4th 470, 507; *People v. Cahill* (1993) 5 Cal.4th 478, 509.

A. In the Penalty Context, Harmlessness Review Must be Concerned with the Potential Impact of an Error on Jurors' Unknowable Subjective Processes, Not with the Relative Strengths of Aggravation and Mitigation

"As to the issue of guilt, [the harmless error] test is quite clear in its application. . . . But in deciding the effect of the errors on the penalty phase of the trial the problem is not so simple." (*People v. Hamilton* (1963) 60 Cal.2d 105, 136, overruled on another point in *People v. Daniels* (1991) 52 Cal.3d 815, 864, and *People v. Morse* (1964) 60 Cal.2d 631, 637.) Because some of this Court's cases seem to have lost sight of the difference, it is necessary to recapitulate the basic principles underlying appropriate harmless-error review. Where legal phrases alone do not provide "a simple and infallible formula to determine whether in a given case" relief is warranted, "[i]t is necessary to examine the facts in the light of the polic[ies]" underlying the formulae. (*Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 19.)

1. Numerous Factors Constrain Harmlessness Analysis in Death Cases

a. Purpose of Harmless-Error Rule

"[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." (*United States v. Lane* (1986) 474 U.S. 438, 465, quoting Traynor, *supra*, p. 80.) "What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible." (*Chapman v. California*, *supra*, 386 U.S. 18, 22–23.) The "bad" is to use harmlessness analysis simply "as a means of affirming criminal convictions." (*Hays v. Arave* (9th Cir. 1992) 977 F.2d 475, 481, fn. 9.) The "good" is to avoid having to

> set[] aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. . . . [T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction.

(*Chapman v. California*, *supra*, 386 U.S. 18, 22.) Thus, before a 1911 state constitutional amendment requiring, and authorizing, full harmless-error review, "[I]t sometimes became necessary for the Courts of Appeal and for this court to grant new trials to defendants on account of technical errors or omissions . . . ." (*People v. O'Bryan* (1913) 165 Cal. 55, 64.)

b. A Possible Pitfall

An important reason to avoid reversing for errors that could not have affected the outcome is to avoid "eroding the public's confidence in the criminal justice system." (*People v. Cahill*, *supra*, 5 Cal.4th 478, 509; see also *People v. Flood* (1998) 18 Cal.4th 470, 507.) But the judiciary's relationship to public opinion has another side as well: "In times of stress, public excitement, and hysteria, this court, the highest tribunal in the state, must stand as a bulwark in protecting the rights of every citizen within its borders." (*Pierce v. Superior Court* (1934) 1 Cal.2d 759, 772 (conc. & dis. opn. of Langdon, J.) That can be difficult, under "the 'hydraulic pressure' of public opinion that Justice Holmes once described" (*Payne v. Tennessee* (1991) 501 U.S. 808, 867 (dis. opn. of Stevens, J.)):

> One . . . California justice, speaking of his vote in a controversial 1982 decision shortly before his retention election later commented: "I decided the case the way I saw it. But to this day, I don't know to what extent I was subliminally motivated by the thing you could not forget—that it might do you some good politically to vote one way or the other."

(Champagne, *Political Parties and Judicial Elections* (2001) 34 Loyola L.A. L.Rev. 1411, 1420; see also Culver, *The Transformation of the*

California Supreme Court: 1977–1997 (1998) 61 Alb. L.Rev. 1461, 1463–1464.) The difficulty has, in this era, been most prominent in capital cases because we live "in a political culture in which the death penalty has become such a useful 'hot button' issue." (Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and The Impulse to Condemn to Death* (1997) 49 Stan. L.Rev. 1447, 1450.)

Reasonable minds can and sometimes do disagree about whether or not to reverse after finding error. Moreover, "[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." (*Herrera v. Collins* (1993) 506 U.S. 390, 415.) It is conceivable, therefore, that pressures to maintain public confidence, particularly in the late 1980s and the 1990s, may have caused this Court to adopt a mode of harmlessness analysis in capital cases that deviated from a fair application of the underlying principles, as several critics have suggested.[225]

c. Appellate Review and the Jury-Trial Right

The bare principle that judgments should not be reversed for errors that could not have affected the outcome leaves important questions of implementation unanswered. First, how can an appellate court determine

[225]See, e.g., *People v. Morris* (1991) 53 Cal.3d 152, 236 (dis. opn. of Mosk, J.) ("principled application of harmless-error analysis is often a difficult task. . . . Regrettably, in order to salvage judgments of death that have been tainted by error, this court has often failed in this task in recent years"); Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique* (1991) 26 U.S.F. L.Rev. 41, 84–85 (Lucas court's approach to harmlessness of penalty-phase error "repudiated the underpinnings which have been the basis of the California Supreme Court's death penalty jurisprudence since 1957"); *id.* at p. 90 (Lucas and Bird courts both paid "lip service" to "reasonable possibility" harmlessness standard without applying it, as they pursued opposite ideological agendas); Kelso, *A Tribute to Retiring Chief Justice Malcolm M. Lucas* (1996) 27 Pac. L.J. 1401 & fn. 6; Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting* (1996) 36 Santa Clara L.R. 1069, 1077.

what a jury would have decided, absent certain errors, without invading the jury-trial right by deciding for itself what the evidence shows? (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 ["The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered"]; *Rose v. Clark* (1986) 478 U.S. 570, 593 (dis. opn. of Blackmun, J.) ["The Constitution does not allow an appellate court to arrogate to itself a function that the defendant . . . can demand be performed by a jury"]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 263 (conc. opn. of Marshall, J.) ["allowing a court to substitute its judgment of what the sentencer would have done in the absence of constitutional error for an actual judgment of the sentencer untainted by constitutional error" impinges on the reliability of outcome]; Traynor, *supra*, pp. 18, 20–21.) Indeed, concern about the respective roles of finders of fact and appellate courts, not hypertechnicality, was the basis for this Court's pre-1911 belief that courts could find harmlessness only in trivial errors or those where the record showed harmlessness without a weighing of the evidence. (*People v. O'Bryan*, *supra*, 165 Cal. 55, 64; see also *People v. Williams* (1861) 18 Cal. 187, 195.)

Moreover, actually discerning what 12 other people would have done had the trial been different can be "a difficult task in any case." (*Hays v. Arave*, *supra*, 977 F.2d 475, 480; see also *People v. Hill* (1992) 3 Cal.App.4th 16, 35–36.) As will be explained in more detail below, the difficulties are dramatically compounded with jury sentencing in death cases, since the jurors are exercising such broad, essentially unfettered discretion. (*Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258; *People v. Brown* (1988) 46 Cal.3d 432, 447–448.)

It is easy to forget that these competing considerations, along with changes in the political climate, have caused courts—including this one—to

experiment with quite different methods of harmlessness review over time, sometimes without changing the formulas being invoked.[226] A focus on the unique aspects of death verdicts is required in order to ground harmlessness analysis in the correct guiding principles.

d. The Unknowability of Jurors' Penalty Decision-Making

> The validity of the harmless error doctrine is based on the assumption that the effect of the error is determinable. If the effect of the error on the verdict is minimal, the error is harmless. If the effect of the error on the verdict is too speculative, the reliability of the verdict is suspect.

(Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied* (1993) 28 Ga. L.Rev. 125, 149, fn. omitted.)

When the current rules for ascertaining harmlessness were developed, this Court recognized a core fact about error potentially affecting penalty, a fact that received less attention as those rules became familiar formulas. For most civil and criminal juries, "the usual function [is that] of finding whether or not certain events occurred and certain consequences resulted from them." (*People v. Morse*, *supra*, 60 Cal.2d 631, 643.) Even in such a case,

> it is virtually impossible to determine what influenced a particular juror's vote[, as opposed to considering the inherent likelihood of an error's affecting a reasonable juror]; an unlimited number of factors may contribute to such a

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[226]See, regarding California's history, Kessler, *Death and Harmlessness*, *supra*, 26 U.S.F. L.Rev. 41, 46–49 (1911 constitutional amendment ended former presumption of prejudice), 57–65 (shift from no separate review of error affecting penalty, because of unitary trials without aggravation evidence, to reversal for any substantial error affecting penalty phase of bifurcated trials), 67–68 (reasonable possibility standard as gloss on any-substantial-error rule), 74 (same), 81–91 (shift from Bird court's to Lucas court's application of same rules); see generally Traynor, *supra*.

> decision. In order to assess fully the impact of any one factor it would be necessary to analyze the personality of each juror and recreate the entire deliberation process, a virtually impossible task.

(*People v. Hill*, *supra*, 3 Cal.App.4th 16, 35–36 ; see also *Hays v. Arave*, *supra*, 977 F.2d 475, 480.) Nevertheless, determining whether a disputed *factual* proposition could have appeared significantly different to a jury, absent an error, can, depending on the evidentiary picture, be an attainable goal.

In contrast, this Court and others have recognized that in death-penalty cases, any attempt to evaluate harmlessness confronts daunting epistemological difficulties. The problem is in imagining how 12 jurors, told not just to determine facts, but to each rely on their unique moral frameworks in determining what weight to give each fact, would have responded if the circumstances had been different. The absence of requirements for unanimity or an expression of findings regarding anything but the ultimate outcome, along with the lack of any burdens of proof or persuasion, go even further in making it virtually impossible to know what was determinative for each juror. As Chief Justice Lucas wrote in 1988, "For over two decades . . . we have recognized a fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination. Accordingly, we have long applied a more exacting standard of review . . . ." (*People v. Brown*, *supra*, 46 Cal.3d 432, 447; see also *Deck v. Missouri* (2005) 544 U.S. 622, 633 [jury is weighing "considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death"]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, fn. 7 [appellate court "would be relatively incapable of evaluating the 'literally countless factors that [a capital sentencer] consider[s,]' in making what is largely a moral

judgment of the defendant's desert"; bracketed insertions in original]; *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258 ["evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer"]; *id.* at p. 262 (conc. opn. of Marshall, J.) ["Because of the moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer, predicting the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise"]; *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1062 [California jurors' freedom to weigh factors as they wish "makes it difficult for an appellate court that later reviews the jury's sentencing decision to surmise what weight the jury gave to a particular factor"], reversed on other grounds sub nom. *Brown v. Sanders* (2006) 546 U.S. 212; *People v. Robertson* (1982) 33 Cal.3d 21, (conc. opn. of Broussard, J.) 54 [emphasizing "the broad discretion exercised by the jury . . . and the difficulty in ascertaining '[t]he precise point which prompts the [death] penalty in any one juror,'" bracketed modifications in original]; *People v. Hamilton*, *supra*, 60 Cal.2d 105, 136–137; *Blair v. Armontrout* (8th Cir. 1990) 916 F.2d 1310, 1350 (dis. opn. of Heany, C.J.); *State v. Finch* (Wash. 1999) 975 P.2d 967, 1007–1008; Kessler, *Death and Harmlessness*, *supra*, 26 U.S.F. L.Rev. 41, 55–57.)

With some important exceptions, the subjective nature of capital sentencing makes it difficult to determine that all jurors were unimpacted by error, even where the case for death may seem relatively clear-cut. This Court stated the problem starkly over 40 years ago, when it reaffirmed that any substantial error that could affect penalty met even the *Watson* test:

> The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times

> and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> We cannot determine if other evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.
>
> Thus any such substantial error in the penalty trial may have affected the result; it is "reasonably probable" that in the absence of such error "a result more favorable to the appealing party would have been reached."

(*People v. Hines* (1964) 61 Cal.2d 164, 169, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836; *Hines* was disapproved on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40.)

The problem of ascertaining the effect of error is exacerbated by the fact that the possibility of a difference in one juror's vote is enough to throw the verdict into question and entitle an appellant to reversal: "If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another." (*People v. Hamilton, supra*, 60 Cal.2d 105, 137; accord, *In re Lucas* (2004) 33 Cal.4th 682, 734, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 537.)

That these are not just theoretical concerns is borne out at the trial level, in the total unpredictability of jury verdicts. The federal

constitutional rules that all mitigation (1) must be considered and (2) can be given effect by a juror despite disagreement by colleagues

> make the outcomes of penalty phase proceedings unpredictable. This unpredictability is most manifest in cases that have a low to moderate level of aggravating circumstances, but sometimes the outcome can be a surprise even in a seemingly slam-dunk, highly aggravated case . . . .

(McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should it Be?: An Assessment of United States and Louisiana Supreme Court Case Law* (1999) 59 La. L.Rev. 1105, 1142–1143 (McCord); see also *McCleskey v. Kemp* (1987) 481 U.S. 279, 311 [acknowledging "the inherent lack of predictability of jury decisions" in capital sentencing].) After detailing a highly aggravated case which resulted in a life verdict, the same author concludes, "[G]iven the highly subjective nature of a death penalty decision, it can never be clear what might have turned the verdict in the opposite direction had the jury heard—or not heard—it." (McCord, *supra*, 59 La. L.Rev. at p. 1144.) California juries, too, have rejected death in a number of extremely aggravated cases.[227] And—while it is only the

[227]See, e.g., *People v. Rodriguez* (1997) 53 Cal.App.4th 1250 (two killings a month apart: lying-in-wait shooting followed by pursuit to deliver coup de grace, and 2nd-degree murder committed after returning with knife after initial fight); *People v. Scott* (1991) 229 Cal.App.3d 707, 710–711 (planned, execution-style killings of drug dealer and three people who lived with him); *People v. Henderson* (1990) 225 Cal. App. 3d 1129, 1137–1139, 1155 (murder, to obtain funds to travel home, of the couple with whom perpetrators stayed—one with a bullet to forehead while tied up—along with voluntary manslaughter of their one-year-old baby, and second-degree murder of their viable fetus); *People v. Brown* (1985) 169 Cal.App.3d 728, 732–734 (over four-day period, defendant committed four home-invasion robberies, shooting one victim to death; went to another apartment to "find a woman" and pistol-whipped and raped her; and, in order to rape another woman, which he did repeatedly throughout the night, shot her common-law husband in the back, killing him, as he turned to get a shirt so he could give defendant a ride); *People v. Singh* (Cal.App. 2003) 2003 WL 264698 *1–*6, *15 (defendant said (continued...)

unanimous verdicts that show up in the reports—juries undoubtedly hang in such circumstances more frequently than they agree on life.

e. Functional Limits of Appellate Review

The simple unknowability of how a verdict was obtained from every juror constitutes the main reason why harmless-error review cannot be conducted in the normal fashion, but there is an additional problem as well:

> [A]n appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind."

(*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 330, bracketed insertion, in internal quotation, in original.) Put differently, even in the guilt phase, "[a]ssessment of harm [from error] is often a blind exercise, for records cannot convey a 'feel' for the emotional environment of the courtroom. That is why doubt as to the extent of harm is resolved in favor of the defense." (*People v. Keene* (Ill. 1995) 660 N.E.2d 901, 913.)

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[227](...continued)
he would kill pregnant ex-girlfriend because her child-support demands could interfere with his career, then shot her in the head three times—killing her and the fetus—and shot their six-month-old baby in the head three times, then tried to get current girlfriend to give him alibi); *People v. Lopez* (Cal.App. 2003) 2003 WL 22183862 *1 (defendant killed purported witness in trial of member of defendant's gang, along with 15-year-old bystander).

The last two opinions are unpublished, but they are cited "for reasons other than reliance upon" their legal holdings. (*Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, fn. 2; see also *In re I.G.* (2005) 133 Cal. App. 4th 1246, 1255; *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219.)

f. Role of Reliability Requirement

A state's decision to put one of its citizens to death is subject to "extraordinary measures" to avoid its being based on "passion, prejudice, or mistake." (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 329, fn. 2, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).) This Eighth Amendment reliability requirement applies not only to proceedings at trial, but to how the case is reviewed on appeal. "[T]he severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." (*Zant v. Stephens* (1983) 462 U.S. 862, 885.) Harmless-error review undertaken without regard for the extreme limits on a court's capacity to know how a penalty jury would have responded to different evidence, instructions, or argument undermines the reliability requirement. Unless, however, a reviewing court can say that an error "had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

2. The *Chapman* Test Prohibits Speculation on the Relative Strengths of Aggravation and Mitigation in the Jurors' Minds

The concerns set forth above are met by the United States Supreme Court's classic formulations of the beyond-a-reasonable-doubt standard of *Chapman v. California*, none of which invite speculation about how jurors weighed the circumstances before them and would have voted in the absence of the error. Instead, they require a showing that the error was not one which "might have contributed to" jurors voting the way they did. (*Chapman v. California*, *supra*, 386 U.S. 18, 23.) Respondent's burden is to show that the error is not one "which possibly influenced the jury adversely . . . ." (*Id.* at p. 23.) Thus, the *Chapman* question is whether the

"verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.)

What these formulations say is that if the error could have helped a juror make up his or her mind, reversal is required; the degree of likelihood of the same verdict in a hypothetical trial without the error is not the issue. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.) Thus, again, reversal is required in a capital case where "we cannot say that [the error in question] had no effect on the sentencing decision . . . ." (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 341.) The issue is not whether "'an average jury would have found the State's case [for death] sufficient'" absent the error, "but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Chapman* . . . ." (*Satterwhite v. Texas*, *supra*, 486 U.S. 249, 258–259.) Or, again, the question is whether error "might have affected a capital sentencing jury"[228] or, more precisely, a member of that jury.[229]

To determine whether the error "possibly influenced the jury" (*Chapman*, *supra*, 386 U.S. at p. 23), as Chief Justice Rehnquist explained, "a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to" the question at issue. (*Neder v. United States* (1999) 527 U.S. 1, 19.) In the

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[228] *Id.* at p. 258; cf. *Rompilla v. Beard* (2005) __ U.S. __, __ [62 L. Ed. 2d 360, 379; 125 S. Ct. 2456, 2469] (even under *Strickland* prejudice standard and deferential AEDPA review, "although . . . it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. . . .[T]he undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal," citations and quotation marks omitted).

[229] *Wiggins v. Smith*, *supra*, 539 U.S. 510, 537.

capital context, this means, could a rational juror have voted for a life-without-parole verdict?

Chapman, *Sullivan*, and *Neder* were all non-capital cases. "[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* (1983) 463 U.S. 992, 998–999.)

Appellant stresses this point because, in truth, neither the United States Supreme Court nor this Court has been consistent in applying the "might-have-contributed-to-the-result" test. Both have sometimes instead relied on overwhelming evidence of guilt alone as a basis for a finding of harmlessness on guilt verdicts. On penalty this Court (but not the High Court) has similarly concluded that the case was so aggravated that no other result was possible. Neither court has acknowledged that there are actually two approaches. (See Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review* (1994) 82 Cal. L.Rev. 1335; Carter, *Harmless Error in the Penalty Phase*, *supra*, 28 Ga. L.Rev. 125, 135–138; Kessler, *Death and Harmlessness*, *supra*, 26 U.S.F. L.Rev. 41, 48–49; see, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 761–762; *People v. Beardslee* (1991) 53 Cal.3d 68, 112–113; *People v. McLain* (1988) 46 Cal.3d 97, 109.) Parenthetically, former Chief Justice Traynor,[230] the commentators just cited, and others[231] have criticized the "overwhelming evidence" version of the test in general (i.e., even as applied to guilt determinations) as depriving litigants of the jury-trial right, in favor of less reliable appellate fact-finding. In that view, the alternative of

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[230]Traynor, *supra*, pp. 20–23.

[231]E.g., Justice Brennan, with Chief Justice Warren and Justice Marshall, dissenting in *Harrington v. California* (1969) 395 U.S. 250, 255 et seq.

focusing on whether the error could possibly have contributed to the actual jurors' actual decision still avoids needless retrials, still permits considering the state of the untainted evidence—but within an appropriate context—and permits greater consistency in voiding convictions that may have been achieved via constitutional violations.

When it comes to considering whether errors of substance were clearly harmless in the determination of penalty, meticulous observation of the effect-on-the-judgment approach emphasized in *Chapman* and in many other cases is essential. With the unknowability of the jurors' discretionary decision-making processes, the individual nature of each of the 12 necessary votes, the right to have a jury—not an appellate court hypothesizing a jury deliberating after a trial that differed from the actual trial in some substantial way—decide sentence, and the unreliability of making penalty decisions based on a written record, nothing suffices but the *Chapman/Neder* focus on whether a juror (a) could have rationally gone the other way—which is *always* true of a penalty judgment—and (b) could have been pushed over the line for death, or prevented from finding a sufficient case for life, by error.

This approach still leaves room for acknowledging the harmlessness of errors such as insubstantial or trivial ones, or those unquestionably remedied by subsequent rulings or which produced evidence relating "only to the proof of some fact otherwise indisputably established." (Traynor, *supra*, p. 73; see, e.g., *People v. Roldan* (2005) 35 Cal. 4th 646, 734 [untimely aggravation notice harmless where defendant still had time to prepare]; *id.* at p. 739 [no prejudice from erroneous sustaining of objection to general question on mitigation where specific questions on same subject matter were subsequently answered]; *People v. Cotter* (1965) 63 Cal.2d 386, 392–398 [four admissible confessions preceded inadmissible ones].)

Significantly, even though the United States Supreme Court has wavered on how it applies *Chapman* with regard to guilt-phase error, it has never crossed the line identified here in analyzing how error might have affected penalty. It was invited to do so in *Jones v. United States* (1999) 527 U.S. 373, but no justice was willing to take that step. (*Id.* at pp. 402–404 (maj. opn.), 421 (dis. opn. of Ginsberg, J.).) The five-person majority did find harmlessness, but it was because the error had been cured. (*Id.* at pp. 404–405; cf. *id.* at p. 402 [dictum assuming possibility of considering whether jury would have reached same verdict absent error].) Similarly, a five-person majority in *Clemons v. Mississippi* (1990) 494 U.S. 738 remanded to offer the state supreme court a chance to explain its finding of harmlessness in misinstruction on an aggravating factor, in the face of dissents about the propriety of harmlessness review in the circumstances. Even the majority— without summarizing aggravation and mitigation—expressed extreme skepticism that harmlessness could be found on the basis that the jury was unaffected by considering the aggravator, noting simply that the prosecutor had stressed it in argument. The majority was, however, willing to allow for an alternate possibility: that the error was harmless because a properly-instructed jury would have found the aggravator in any event. (*Id.* at pp. 753–754.) Notably, this would have been harmlessness in *fact-finding*, not in weighing.[232] (See also *Johnson v. Mississippi* (1988) 486 U.S. 578, 586; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

In sum, there is no basis in fairness, logic, or High Court precedent for holding harmless federal constitutional error which is claimed to affect

[232]On remand the Mississippi Supreme Court was unwilling to find harmlessness on either basis. It, too, stated simply that, given the prosecutor's arguing the factor, it could not hold that the jury was unaffected by considering the aggravator. (*Clemons v. State* (Miss. 1992) 593 So.2d 1004.)

the penalty determination, where such a holding would require speculating as to how all the jurors viewed the relative cases for life and death, based on the reviewing court's view of aggravation and mitigation. (See *People v. Armstead* (2002) 102 Cal.App.4th 784, 795 [when "it is impossible to know" whether error "contributed to" the verdict, respondent cannot show harmlessness beyond a reasonable doubt].) This Court must use the version of the federal test that asks "not whether, in a trial that occurred without the error, [the same] verdict would surely have been rendered, but whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.)

3. The *Brown* Test, Properly Applied, Is Subject to the Same Constraints

Understood in its context, the "reasonable possibility" test reaffirmed in *People v. Brown*, *supra*, 46 Cal.3d 432 invokes the same principles involved in the federal test. These are: (1) error that could have possibly[233] affected a juror's decision requires reversal, and (2) given that each juror's decision was a normative one, based on multiple, subjectively-evaluated factors, errors that could not have affected such a decision are limited to those which were trivial, only tended to prove a fact otherwise established beyond any doubt, or were nullified by unquestionably efficacious remedial measures.[234]

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[233]Qualifying *possibility* with *reasonable* does not imply some quantitative test of likelihood. It only "exclude[s] the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." (*People v. Brown*, *supra*, 46 Cal.3d 432, 448, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 695.) This is because "[a] defendant has no entitlement to the luck of a lawless decisionmaker . . . ." (*Ibid.*)

[234]This Court considers the *Brown* test equivalent to that of *Chapman*. (*People v. Guerra* (2006) 37 Cal. 4th 1067, 1144–1145.) Because the tests' origins were different, it seems appropriate to show that the equivalency still (continued...)

a. Origin of "Reasonable Possiblity" Test

The "reasonable possibility" language of *Brown* is frequently quoted as if it were a freestanding test of harmlessness, but this is misleading. It evolved as a gloss on the long-standing rule, mentioned above, that "any substantial error" affecting penalty requires reversal, again because of the inability of a reviewing court to know what actually produced each vote for death:

> In determining prejudice and reversible error at the penalty phase, we agree with Justice Broussard's refinement of the traditional test in *People v. Robertson*, *supra*, 33 Cal.3d 21 . . . . The lead opinion [in *Robertson*] abides by the traditional test that "'any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial.' [Citations.]" . . . In his concurring opinion, Justice Broussard suggested that "substantiality" "should imply a careful consideration whether there is any reasonable possibility that an error affected the verdict."

(*People v. Phillips* (1985) 41 Cal.3d 29, 83 (plur. opn.); see also *People v. Allen* (1986) 42 Cal.3d 1222, 1281 (plur. opn.) [reaffirming any-substantial-error test, with substantiality evaluated in light of reasonably possible effect on outcome]; *id.* at p. 1289 (conc. & dis. opn. of Broussard, J) [arguing error was "substantial"].)

Justice Broussard had based his proposal on the observation that the any-substantial-error-rule "was prompted by the fact that the jury at the time [that the rule was announced] was required to decide the question of penalty 'without benefit of guideposts, standards, or applicable criteria,'" while the 1977 statute applied in *Robertson* had "standards to guide jury discretion." (*People v. Robertson*, *supra*, 33 Cal.3d at p. 63 (conc. opn. of Broussard, J.).) On that basis he argued that, although the any-substantial-

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[234](...continued)
holds, even with the possibly new—to this Court—view of *Chapman* which appellant presents here.

error test was still appropriate, the question of a reasonable possibility of an impact on the outcome should inform the consideration of substantiality. This was so because the Court was no longer invariably unable to determine "what seemingly insignificant factor might have tipped the scales" for a juror. (*Ibid.*)

While Justice Broussard did not elaborate, clearly the only post-1977 improvement in a reviewing court's ability to determine the impact of error on the outcome would be where the new guidelines for guiding the jury's discretion would themselves plainly negate the capacity for the error to have any impact. This would be true, for example, where evidence of non-criminal misconduct—not a statutory aggravator—was erroneously admitted, the trial court instructed the jury to disregard it because it was not to be considered under the statute, and the evidence clearly was not so prejudicial that there was a risk of the admonition's being ineffective. There remains, however, a large universe of still-unguided choices in the weighing of circumstances for and against death. The list of criteria in section 190.3 "may indeed serve to structure the process whereby discretion is exercised. But it simply does not even purport to limit that discretion itself." (*People v. Johnson* (1992) 3 Cal. 4th 1183, 1260 (conc. opn. of Mosk, J.).) Within the remaining universe of unguided choices, knowing what "tipped the scales" remains impossible.

b. Reaffirmation in *Brown*

"In the beginning of its tenure, the Lucas Court never cited the 'reasonable possibility' standard, but rather found penalty phase errors harmless under 'any' standard of prejudice." (Kessler, *Death and Harmlessness*, *supra*, 26 U.S.F. L.Rev. 41, 73, fn. omitted.) The Attorney General tried to get the newly-reconstituted Court to diminish the harmlessness standard: "In this and numerous other capital cases, the

Attorney General asks us to retreat from the reasonable-possibility standard and adopt the *Watson* standard . . . ." (*People v. Brown*, *supra*, 46 Cal.3d 432, 447.) In *Brown* the Court rejected this proposal, emphasizing, as noted above, its historical recognition of the "fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination" and the corresponding need for "a more exacting standard of review [of penalty-phase] . . . errors . . . . (See *People v. Hamilton*, *supra*, 60 Cal.2d 105, 136–137, . . . and *People v. Hines*, *supra*, 61 Cal.2d 164, 169 . . . .)" (*Ibid.*) Significantly, the cases cited in *Brown*—i.e., *Hamilton* and *Hines*—were the cases that firmly established the any-substantial-error test, based on a reviewing court's "dark ignorance" (*People v. Hines*, *supra*, 61 Cal.2d. at p. 169) of how each juror reached a decision.[235]

The Attorney General's proposal for a new rule was based on the 1977 and 1978 death penalty statutes' having guidelines for the jury. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) But Justice Broussard's refinement of the any-substantial-error test had already accounted for that change. (*People v. Robertson*, *supra*, 33 Cal.3d 21, 63 (conc. opn. of Broussard, J.).) Chief Justice Lucas's opinion for the *Brown* Court acknowledged "that today's death penalty statutes (more than the former statutes) channel and guide the capital jury's sentencing decision" but emphasized that, constitutionally, "a capital jury must retain and exercise vast discretion different from that possessed by any guilt phase jury."

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[235]The test was a refinement of even earlier holdings in *People v. Terry* (1962) 57 Cal.2d 538, 569, and *People v. Love* (1961) 56 Cal.2d 720, 733, that any error "tending to affect the jury's attitude in fixing the penalty" required reversal, absent extraordinary circumstances, and in *People v. Linden* (1959) 52 Cal.2d 1, 27, that error that "relates to the jury's selection of penalty implicitly . . . invites reversal in every case." (See *People v. Hamilton*, *supra*, 60 Cal.2d 105, 137.)

(*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) When reviewing a jury's factfinding, *Watson* review is "appropriate and workable" because "the reviewing court can determine if the error likely affected the jury's factfinding and hence its guilt-innocence determination." (*Id.* at pp. 447–448.) However, because the penalty jury's "role is not merely to find facts, but also—and most importantly—to render an individualized, *normative* determination about . . . whether [the defendant] should live or die," the Court had to "abide by the reasonable-possibility test" in order to meet Eighth Amendment reliability standards. (*Id.* at p. 448.)

Both the line of opinions culminating in *Brown* and the logic of its reasoning demonstrate that, if the Court was truly "abid[ing]" by that test (46 Cal.3d at p. 448) and not silently modifying it (without drawing a protest from Justice Broussard[236]), the question of whether there is a reasonable possibility that error affected a juror's vote belongs in a certain context: recognition that any substantial error affecting penalty requires penalty reversal. *Hamilton* and *Hines* formalized the any-substantial-error rule because harmlessness of such error could not be determined when the basis for jurors' votes was indeterminate; Justice Broussard noted that the guided-discretion statutes removed enough indeterminacy so that the reasonable-possibility question could be introduced in the context of deciding if the error was in fact substantial; and the *Brown* court stated that it was abiding by Justice Broussard's test and acknowledged that the scope of harmless-error review remained constrained by the "vast discretion" still

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[236]See *People v. Brown*, *supra*, 46 Cal.3d at p. 471 (conc. & dis. opn. of Broussard, J.); see also *id.* at pp. 464, 465 (conc. opn. of Mosk, J.) (explaining *Hamilton*'s continuing vitality and describing reaffirmed reasonable-possibility test as "the strictest meaningful standard" of harmlessness review).

retained by the jury. (46 Cal.3d at p. 447.) Thus *Brown* neither enunciated nor sought to justify a major change in prior law.

Appellant submits that the Court should re-articulate the any-substantial-error part of the formula, as set forth in *People v. Hines*, *supra*, 61 Cal.2d at p. 169. What is more important, however, is that it must remember how, in the many contexts in which various harmless-error standards are applied, error affecting penalty in a capital case is unique. This is so, first, because the usual assessment of probabilities of an error's effect on a jury's factual determinations remains impossible, and, second, because the ultimate question is whether a human being is to be put to death. As noted above, Chief Justice Traynor believed that, under the old law, since any error "might have tipped the scales[,] . . . an error in the penalty phase of a capital case usually compels reversal." (Traynor, *supra*, at p. 73.) The same approach has been advocated post-*Furman*,[237] and this Court in *Brown* emphasized that there has been no qualitative shift in a reviewing court's ability to know what contributed to a penalty verdict. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447, 448.) While something short of an absolutist approach may be appropriate, nothing in the current state of the law justifies a retreat to reweighing aggravation and mitigation, or otherwise guessing how every juror must have viewed the evidence.

The approach appellant advocates is not altogether foreign to this Court in recent times. Thus, in *People v. Sturm* (2006) 37 Cal.4th 1218, the Court found substantial error to be reversible simply on the basis of the likely impactfulness of the errors and the Court's inability to find that a death sentence was a foregone conclusion. (*Id.* at pp. 1243–1244.) In

[237]See, e.g., Carter, *Harmless Error in the Penalty Phase*, *supra*, 28 Ga. L.Rev. 125; *People v. Brown*, *supra*, 46 Cal. 3d 432, 469–470 (conc. opn. of Mosk, J.), quoting Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing* (1987) 54 U.Chi. L.Rev. 740, 754–756.

doing so, it implicitly rejected a dissenting opinion's suggestion that it should not "remove[] . . . the aggravating nature of the capital crimes from the prejudice analysis" but instead should weigh the aggravating and mitigating circumstances. (See *id.* at pp. 1245, 1247 (dis. opn. of Baxter, J.).)

The more cautious approach does not eliminate review for harmlessness; it scales it back to what is appropriate in this setting. As noted above, there is no reasonable possibility that an error relating "only to the proof of some fact otherwise indisputably established" could have contributed to a penalty verdict. (Traynor, *supra*, at p. 73.) As also acknowledged above, in discussing the federal test, the same would be true of errors that were subsequently remedied in an incontrovertibly effective way, such as by allowing wrongly excluded information to reach the jury by another route. (*People v. Roldan*, *supra*, 35 Cal. 4th 646, 739.) It would be true as well of errors that were clearly technical and insubstantial, such that they could not influence any rational person's vote on penalty. (*People v. Brown*, *supra*, 46 Cal.3d 432, 448 [reasonable-possibility test "exclude[s] the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like"].)

But under state law, as under federal, this Court should not assess the evidentiary picture and decide that even error that could assist a juror's eventual decision to vote for death could not have made possible the unanimous death verdict. (See *State v. Finch*, *supra*, 975 P.2d 967, 1007–1008 [unlike the guilt phase, prejudice at penalty "cannot necessarily be overcome by objective and overwhelming evidence"].) In deciding for itself the relative weight of aggravation and mitigation, this Court would effectively arrogate to itself the power to decide whether appellant should be executed, in the face of the jury-trial guarantee, decades of the Court's

own acknowledgment that substantial errors ordinarily compel penalty reversal because of the inability to ascertain that they were harmless, and the requirement of reliability throughout the process.

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Michael P. Goldstein, am the attorney appointed to represent Thomas J. Potts, in this automatic appeal. I conducted a word count of this brief, using the word-processing program used to prepare the brief. On the basis of that count, I certify that this brief is 116,939 words in length, excluding the tables and certificates but including the Appendix.

Dated: April 27, 2009

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Michael P. Goldstein

CERTIFICATE OF SERVICE

Re: People v. Thomas Potts No. S072161

I, MICHAEL P. GOLDSTEIN, certify that I am an active member of the California State Bar, and not a party to the within cause; that my business address is P.O. Box 30192, Oakland, California 94604; and that I served a true copy of the accompanying

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in envelopes addressed respectively as follows:

Brian Alvarez
Deputy Attorney General
Office of the Attorney General
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

Thomas Potts
(appellant, to be served personally
by May 19, 2009)

Kings County Superior Court
1426 South Drive
Hanford, CA 93230

Mr. Michael Reinhart,
Chief Trial Deputy
Office of the District Attorney
1400 W. Lacey Blvd.
Hanford, CA93230

On April 28, 2009 I sealed and deposited each envelope in the United States Mail at Alameda, California, with the postage prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 28, 2009, at Oakland, California.