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Number S081148
(Superior Court Number FVI-04195)

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. MARTIN CARL JENNINGS, Defendant/Appellant.	S081148 SUPREME COURT FILED JUN 22 2007 Frederick K. Ohlrich Clerk DEPUTY

On Automatic Appeal from a Judgment of Death
Rendered in the Superior Court of the County of San Bernardino

Hon. Rufus L. Yent, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

GREGORY MARSHALL (77306)
P.O. Box 996
Palo Cedro, CA 96073
(530) 549-4836

Attorney for Appellant

DEATH PENALTY

Number S081148
(Superior Court Number FVI-04195)

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff/Respondent,	)
v.	)
MARTIN CARL JENNINGS,	)
Defendant/Appellant.	)

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TABLE OF CONTENTS

///

///

TABLE OF AUTHORITIES

CASES

STATUTES

///

JURY INSTRUCTIONS

OTHER AUTHORITIES

///

Number S081148

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APPELLANT'S SUPPLEMENTAL BRIEF

Appellant proffers the following three supplemental arguments in this automatic appeal. The arguments are enumerated "XX," "XXI," and "XXII," for ease of reference, in that the arguments in the original opening brief were enumerated "I" through "XIX."

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XX. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND A JURY VERDICT ON EACH ELEMENT OF THE TORTURE SPECIAL CIRCUMSTANCE BY THE TRIAL COURT'S FAILURE TO INSTRUCT THAT THE JURY MUST FIND THAT APPELLANT COMMITTED SOME ACT CONSTITUTING THE INFLICTION OF TORTURE

A. Summary of Facts

The torture murder special circumstance finding is invalid because the trial court eliminated from the torture special circumstance instruction any requirement that the jury find that appellant inflicted any torture on the decedent. This fatal omission is directly attributable to the Use Note accompanying CALJIC 8.81.18, which states that "[t]orture murders committed on or before June 5, 1990 will require proof and instruction on element number 3"; "[h]owever, for crimes committed after that date, delete element number 3." Element number 3 requires proof of an act of torture -- "[t]he defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration."

The Use Note reflects a fundamental misunderstanding of the import of Proposition 115, passed on June 5, 1990. The two aspects of that Initiative that related to torture were (1) the enactment of a substantive crime of torture with a life sentence, Penal Code section 206; and (2) the elimination from Penal Code section 190.2(a)(18) of the sentence, "[f]or the purpose of this

section torture requires proof of the infliction of extreme physical pain no matter how long its duration."

Unfortunately, CALJIC responded to this amendment by Initiative with the directive that no finding was required that the defendant actually inflicted anything torturous on the decedent, thereby eliminating an indispensable element of the special circumstance. What CALJIC should have done in response to the amendment was to modify element number 3 of its instruction to delete the requirement of proof of "infliction of extreme physical pain" and substitute "infliction of great bodily injury" in harmony with the simultaneously enacted crime of torture. Instead of effecting that substitution, CALJIC eliminated any requirement at all of proof of any infliction of any torturous act.

The jury instruction conference in this case demonstrates that the court and counsel deferred to the erroneous CALJIC Use Note without any independent discussion or consideration. When the court and counsel arrived at CALJIC 8.81.18 in the course of the on the record conference, defense counsel reiterated their objections that the trial testimony showed only an intent to discipline or an intent to punish for misconduct, but no evidence of sadistic intent, 12 RT 3015-3015, which would not support a torture instruction. The prosecutor reiterated his request for the instruction. The following colloquy occurred:

The Court: It looks like if you look at the use note, element number 3 needs to be deleted.

Mr. Nacsin [Counsel for Co-Defendant Michelle Jennings]: That's I think after 1990. Doesn't it say something like that?

The Court: Yes.

Mr. Hess [Prosecutor]: I think I made a note somewhere else which I've since gone back.

The Court: That's your reading also, Mr. Hess, it should be that way?

Mr. Hess: That sounds as to what I found - yes. So the third one goes out.

The Court: So it's just elements 1 and 2. So the court will give 8.81.18 but strike the third element.

(12 RT 3015.)

The transcript shows that the court modified CALJIC 8.81.18 by blacking out the word "extortion" in element 2 of the special circumstance, and blacking out the entire third element. The jury was thus instructed that

To find that the Special Circumstance, referred to these instructions as murder involving the infliction for torture, is true, each of the following facts must be proved:
1. The murder was intentional; and

2. The defendant intended to inflict extreme cruel physical pain and suffering upon a human being for the purpose of ~~extortion~~, persuasion or for any sadistic purpose.

3. ~~The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration~~. Awareness of the pain by the deceased is not a necessary element of torture.

(2 CT 562.)

When the parties discussed the torture instruction as a lesser offense, 12 RT 3030, referring to CALJIC 9.90, the court and counsel agreed that there was no evidence of any "revenge" or "extortion" motivation, and that language was removed from the both the Penal Code section 206 lesser included torture instruction, 2 CT 527, and from the torture special circumstance as well. The lesser included offense torture instruction included the modification of the actus reus effected by Proposition 115:

In order to prove this crime, each of the following elements must be proved:

1. A person inflicted great bodily injury upon the person of another; and

2. The person inflicting the injury did so with specific intent to cause cruel or extreme pain and suffering for the purpose of persuasion or for any sadistic purpose.

(2 CT 527.)

That first element - "a person inflicted great bodily injury upon the person of another" - should have replaced element 3 of the torture special circumstance in accordance with the intent of Proposition 115, but CALJIC did not incorporate that change, and instead directed that the entire infliction of torture element be deleted.

B. The Trial Court's Error

The trial court dutifully followed the CALJIC Use Note that erroneously caused him to jettison the key element of the special circumstance that the prosecution must prove that the defendant actually inflicted great bodily injury, in addition to having the intent to torture. The prosecutor and defense counsel generally concurred in the court's decision, although their comments at the time do not reflect any independent thought as to the court's decision. Unfortunately, there were not any independent sources extant at the time of trial to assist the court and counsel in fashioning a correct instruction. The commentary regarding the Prop 115 amendment to the torture special circumstance was singularly opaque - "Under Proposition 115, the prosecution need not prove the infliction of extreme physical pain in order to obtain a death sentence." 22 Pacific Law Journal 1010, 1015-1016 (1991). There was no suggestion as to what the prosecution did need to prove instead.

An independent analysis would have led to the conclusion that Court reached in People v. Crittenden (1994) 9 Cal.4th 83, 140, fn. 14, stating that "Proposition 115, passed by the California electorate on June 6, 1990, amended section 190.2, subdivision (a)(18) (torture special circumstance), to delete the requirement proof that the defendant inflicted extreme physical pain on the victim" (emphasis in original). This Court recognized that the Initiative did not in any way delete the entire actus reus element of the special circumstance, and remove any requirement of proof of the actual infliction of torture from a special circumstance whose only distinctive feature was that "the murder involved the infliction of torture." Rather, the Initiative only deleted the prior statutory language component that the prosecution must prove that the defendant inflicted extreme pain, and permitted a true finding upon proof that the defendant inflicted great bodily injury with intent to inflict extreme pain. In other words, the Initiative expanded the reach of the special circumstances to apply to those defendants who intended to inflict extreme pain, but somehow bungled the implementation of that felonious intent and only inflicted great bodily injury.

Clearly, the torture murder special circumstance has always contained and continues to contain an element that the defendant did something to the victim, i.e., an actus reus, that involved

infliction of at least great bodily injury as set forth in Penal Code section 206. "Thus, the torture-murder special circumstance 'requires proof of first degree murder, [citation], proof the defendant intended to kill and to torture the victim [citation], *and the infliction of an extremely painful act upon a living victim*.' " (People v. Leach (1985) 41 Cal.3d 92, 110 (emphasis supplied).) It is axiomatic that the trial court has a "sua sponte duty to instruct on the elements of the special circumstance" (People v. Williams (1997) 16 Cal.4th 635, 689). The trial court's failure to instruct on an essential element of the special circumstance allegation violated appellant's Fifth, Sixth and Fourteenth Amendment rights to due process, a fair trial, and a jury verdict beyond a reasonable doubt as to each element of the charge. (In re Winship (1970) 397 U.S. 358.)

Williams reviewed the effect the 1990 amendment on torture special circumstance with respect to the intent element and "conclude[d] that for an intentional murder to involve 'the infliction of torture' under Section 190.2, subdivision (a)(18), as amended by Proposition 115, the requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion or for any other sadistic purpose." Nothing in the text or supporting argument contained in the ballot materials accompanying Proposition 115 in

1990 suggested in any way that the amendment was intended to eliminate the actus reus component of torture murder.

Of course, even if that total elimination had been the intention, it would have been flagrantly unconstitutional, because it would have permitted a special circumstance finding solely upon proof that someone (not necessarily a defendant) committed an intentional murder, and that the defendant harbored an intent to inflict extreme pain on a decedent, without any accompanying conduct by the defendant. In other words, the special circumstance would depend solely on proof of evil thoughts by the defendant without any concomitant action by the defendant.

The trial court's error in relying on the defective CALJIC instruction is particularly apparent by reference to CALCRIM 733, the updated instruction regarding the torture murder special circumstance, which reads:

> 733 - Special Circumstances: Murder With Torture, Pen. Code, § 190.2(a)(18)
>
> The defendant is charged with the special circumstance of murder involving the infliction of torture.
>
> To prove that this special circumstance is true, the People must prove that:
>
> 1. The defendant intended to kill _____ <insert name of decedent>;

2. The defendant also intended to inflict extreme physical pain and suffering on _____ <insert name of decedent> while that person was still alive;

3. The defendant intended to inflict such pain and suffering on _____ <insert name of decedent> for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;

AND

[4. The defendant did an act involving the infliction of extreme physical pain and suffering on _____ <insert name of decedent>.]

[4. The defendant in fact inflicted extreme physical pain on _____ <insert name of decedent>.]

There is no requirement that the person killed be aware of the pain.

The CALCRIM Bench Note contains the follows directive as to which version of element 4 to give based on the date of the charged offense:

In element 4, always give alternative 4A unless the homicide occurred prior to June 6, 1990. (People v. Davenport (1985) 41 Cal.3d 247, 271 [221 Cal.Rptr. 794, 710 P.2d 861].) If the homicide occurred prior to June 6, 1990, give alternative 4B. For homicides after that date, alternative 4B should not be given. (People v. Crittenden (1994) 9 Cal.4th 83, 140, fn. 14 [36 Cal.Rptr.2d 474, 885 P.2d 887].)

The CALCRIM instruction clearly requires that the jury must be instructed to find that "the defendant did an act involving the infliction of extreme pain and suffering on [the decedent]." On one hand, there appears to be an inconsistency between this instruction and the language of Penal Code section 206 that the defendant need only inflict great bodily injury on the decedent to qualify as a torture special circumstance. On the other hand, the CALCRIM instruction clearly retains the essential requirement that the jury must find that the defendant inflicted something on the decedent, rather than merely harboring an intent to inflict pain, regardless of whether any act occurred in conjunction with that intent.

C. The Error Is Preserved for Review And Was Not Invited

The error is preserved for review notwithstanding defense counsel's failure to object because, as discussed in detail in part "D" of this argument, the instructional error affected appellant's substantial rights. (See Pen. Code, § 1259.)

Additionally, the error was not invited. That doctrine applies only when the record demonstrates that counsel had a deliberate tactical purpose in requesting or not requesting an instruction. As this court has stated, for the invited error doctrine to apply, "it must be clear from the record that

defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. However, the existence of some conceivable tactical purpose will not support a finding that defense counsel invited an error in instructions. The record must reflect that counsel had a deliberate tactical purpose." (People v. Bunyard (1988) 45 Cal.3d 1189, 1234; see also, in accord: People v. Valdez (2004) 43 Cal.4th 73, 115; People v. Maurer (1995) 32 Cal.App.4th 1121, 1127-28; People v. Viramontes (2001) 93 Cal.App.4th 1256, 1264; People v. Smith (1992) 9 Cal.App.4th 196, 207, fn. 20.)

Here, as already noted previously in this argument, all defense counsel did was to generally concur in the court's decision about the instruction, without evidencing any independent thought or tactical decision in the matter. Under the cases above, this is clearly an insufficient showing to support a finding of invited error.

D. The Requirement of Reversal

Where the trial court fails to instruct the jury on an element of a crime of a crime or a special circumstance, reversal is required unless the prosecution can demonstrate that the error

was harmless beyond a reasonable doubt. (Neder v. United States (1999) 528 U.S. 1, 8.) If the actual findings by the jury demonstrate that the omitted element was fact adjudicated by the jury, a harmless error finding is permissible. (People v. Flood (1998) 18 Cal.4th 470.)

No such harmless error finding is permissible in this case because the jury made no finding that appellant inflicted great bodily injury on the decedent while harboring the intent to torture. Appellant was not charged with the substantive crime of torture, Penal Code section 206. A guilty verdict on a separate charge of torture would have cured the error from the omission in the torture special circumstance. The jury was instructed on torture as a lesser included offense of murder, and on first degree murder by torture, but the jury made no findings under those instructions.

The record affirmatively demonstrates that the jury did not rely on torture murder as the basis for the first degree murder verdict. The jury was instructed on three separate bases for finding first degree murder, premeditated and deliberate, poison, and torture. 2 CT 523-526. At one point in the instruction conference the prosecutor confirmed that "there is [sic] three ways to reach first degree murder," enumerating torture murder, poison murder, and also murder with premeditation and deliberation. 12 RT 3036.

By far the most likely route taken by the jury was murder by poison. The only elements were that the murder was "perpetrated by means of poison" and that "[t]he word 'poison' means any substance introduced into the body by any means which by its chemical action is capable of causing death." 2 CT 525. The expert pathologist testified that the sleeping pills given to the decedent were sufficient to cause death. That was a no brainer.

Moreover, it is abundantly clear that the jury did not rely on torture murder to return a first degree murder verdict, because if they had, they would have asked the question whether starvation could constitute extreme physical pain in the context of the first degree murder instruction, not afterward in the context of the special circumstance instruction. The jury clearly reached its first degree murder conviction via poison, or perhaps premeditation, turned its attention to the special circumstances allegations, eliminated the poison special circumstance based on the trial court's response to its question, and then returned a true finding on the torture special circumstance based on the court's response to its additional question. The only inference from this course of events is that the jury turned to the torture element of the torture special circumstance as its last point of debate, after returning the first degree murder verdict on some other basis that did not entail that debate.

In addition, not only was the jury not instructed that it had to find beyond a reasonable doubt as to the torture special circumstance that appellant inflicted great bodily injury in conjunction with the intent to inflict extreme physical pain, the jury was not instructed that it had to find unanimously beyond a reasonable doubt that appellant committed a particular act. The prosecutor argued to the jury that appellant and Michelle Jennings committed multiple bad acts on Arthur, but the trial court never instructed that the jury had to agree unanimously as to one particular act beyond a reasonable doubt to find the torture special circumstance true. The final jury question strongly suggested that the jury focused on some type of continuing conduct involving the withholding of food as the basis for the true finding on the torture special circumstance. The failure to require unanimity was an independent violation of appellant's federal constitutional right to a jury trial on each element of the charge. (Apprendi v. New Jersey (2000) 530 U.S. 466; see also People v. Beardslee (1991) 53 Cal.3d 68, 93 [" 'A unanimity instruction is required . . . if the jurors could . . . disagree which act a defendant committed and yet convict him of the crime charged' "]; People v. Diedrich (1982) 31 Cal.3d 263, 280-282.)

The prosecutor argued to the jury that there were several acts that could constitute torture, all of which happened at

different times over the course of the three months that Arthur lived with the Jennings. The prosecutor argued that appellant held Arthur's hand on the burner of the stove sometime in late December or January. 12 RT 3054. The prosecutor argued that Arthur was observed by Miss Morris with bandages on his face and "eyes blood red in the white areas." *Ibid*. The prosecutor argued that Michelle Jennings' punch on February 3 was "an extremely violent attack on that child." 12 RT 305. The prosecutor also argued that appellant hit Arthur with a shovel in the back of the head shortly before he died. 12 RT 3060. Nothing in the jury instructions required a unanimous finding beyond a reasonable doubt that the murder involved a particular act that was accompanied by the intent to inflict extreme pain. Under these circumstances, the failure to instruct was prejudicial.

Accordingly, the judgment must be reversed.

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XXI. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND A JURY FINDING ON ALL ELEMENTS OF THE TORTURE SPECIAL CIRCUMSTANCE BY THE TRIAL COURT'S ERRONEOUS RESPONSE TO THE JURY'S MID-DELIBERATION QUESTION "CAN STARVATION BE CONSTRUED AS EXTREME PHYSICAL PAIN UNDER LEGAL DEFINITION OF TORTURE?"

A. Summary and Overview

On April 19, 1999, after deliberating for 11 days, the jury asked a final question to the court: "can starvation be construed as extreme physical pain under legal definition of torture?" After a short unreported conference with counsel, 2 CT 471, the trial court instructed the jury as follows:

> Only if the required mental state for the lesser offense of torture or the Special Circumstance - Murder Involving Infliction of Torture is proved. See California Jury Instruction 9.90 and 8.81.18. Then it is up to the jury and each of you to decide whether or not starvation may constitute extreme physical pain under the law.
>
> (12 RT 3212.)

The court then had the response typed onto the jury question and returned it to the jury. They returned verdicts later that afternoon including a true finding as to the torture special circumstance with respect to appellant, but were unable to reach a verdict on the torture special circumstance with respect to Michelle Jennings.

Both the trial court's procedure and the substantive response reflect a fundamental failure to adequately address what was clearly a critical juncture in the case. The jury had been deliberating long and assiduously from all indications, asking for the readbacks of various testimony, and for clarification about points of law. See 2 CT 454-470. The trial court should have recognized that a jury question posed in the midst of deliberations requires the utmost attention and care because it necessarily focuses on a what the jury views as a critical issue. The United States Supreme Court has long emphasized that there is a "duty of special care" involved "in replying to a written request for further light on a vital issue by a jury." (Bollenbach v. United States (1947) 326 U.S. 607, 612), particularly in capital cases (see, e.g. Shafer v. South Carolina (2001) 532 U.S. 36, 53 ["The jurors sought further instruction," but the court's response "did nothing to ensure that the jury was not misled"]).

California law is equally emphatic that a mid-deliberation question must be given particular attention:

> We pause at this juncture to express concern lest this opinion be interpreted as a bad case of appellate pontification induced by a virulent strain of ivory towerism. Each member of this panel has served as a superior court judge and we are sensitive to the significant burdens of that office. We are aware that while a jury is deliberating, a trial judge is occupied with numerous other

> important tasks. It is rarely convenient to "drop everything" to respond to juror questions, especially if the response requires supplemental research on a question of law.
>
> But from our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions. And if jury instructions are important in general, there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations. We recognize that formulating a response to such questions often requires consultation with counsel and significant independent legal research. In purely cost-benefit terms, however, a trial judge should view any such effort as time well spent.
>
> People v. Thompkins (1987) 195 Cal.App.3d 244, 251-253 (emphasis supplied).

The trial court in this case fielded a mid-deliberation question from the jury on which the validity of the entire penalty proceedings depended, a question that raised substantial legal and factual issues that were in no way contemplated much less addressed by CALJIC. However, rather than engaging in any considered reflection or independent research, the trial court responded after a very brief conference with in effect a non-instruction that told the jury in effect, "you be the judge," i.e., "it is up to the jury and each of you to decide whether or not starvation may constitute extreme physical pain under the law." (12 RT 3212.) The cursoriness of the court's

consideration and the vacuousness of the court's response virtually guaranteed a miscarriage of justice as described in Thompkins, *supra*.

B. The Trial Court's Errors

Simple reflection confirms that torture involves two objective components, actions by the accused and consequence to the victim, accompanied by the mens rea of intent to inflict extreme physical pain. When the jury asked its fundamental question, the trial court should have considered the two related questions, what acts are involved in causing starvation, and what are the consequences to the victim. Consideration of those questions would have highlighted the strong argument that starvation does not fall with the Penal Code section 190.2(a)(18) as a matter of law, but in any case would have highlighted the need to instruct the jury that the prosecution had to prove beyond a reasonable doubt that the acts resulting in starvation were capable of causing extreme physical pain. The trial court considered neither.

The impromptu jury instruction was erroneous for three reasons: (1) starvation as a matter of law does not constitute the type of externally-inflicted injury that is required by the torture special circumstance; (2) starvation as a matter of law

does not produce the type of extreme physical pain that is required by the torture special circumstance; and (3) as a factual matter the jury had to be instructed that starvation could be considered torture only if the prosecution proved beyond a reasonable doubt that the acts constituting starvation were capable of causing extreme physical pain.

1. The acts causing starvation cannot as a matter of law constitute torture because of the absence of any externally inflicted injury

Starvation is by definition a withholding of nourishment from the victim, not the affirmative infliction of an injury. Of course, starving another human being to death may be unspeakably reprehensible and cruel, but it is not the type of reprehensible or cruel injury encompassed within a constitutional definition of torture or the torture special circumstance.

Torture under California law as currently defined in Penal Code section 206 requires the commission of an act that has an affirmative injurious physical repercussion on the victim that qualifies as great bodily injury. Starvation, in contrast, by definition involves a deprivation, i.e., the defendant not doing something to the victim, i.e., not providing food.

A defendant's conduct in intentionally starving someone to death could certainly be called "heinous, atrocious, and cruel" in common parlance, but that overarching description of

reprehensible behavior is not sufficiently specific to constitute a valid special circumstance. (Maynard v. Cartwright (1988) 486 U.S. 356; People v. Chatman (2006) 38 Cal.4th 344, 394.) The torture special circumstance is not an open-ended repository for all types of cruel and inhumane behavior.

Chatman rejected a void for vagueness challenge to the pre-1990 torture special circumstance in which the appellant argued that the torture special circumstance was "no more precise" then the "heinous, atrocious and cruel" aggravating factor held unconstitutional in Maynard. This Court responded, "unlike the vaguely worded aggravating circumstances of 'especially heinous, atrocious, or cruel' (Maynard, *supra*, 486 U.S. 356), the torture special circumstance involved here has been construed narrowly by this court and its constitutionality has been upheld." *Ibid.* The narrow construction necessarily to preserve the constitutional validity of the torture special circumstance precludes its application to the very different context of starvation.

Counsel for appellant recognizes that there are other operative definitions of torture used in various contexts, some of which may very well encompass the withholding of life's necessities. For example, David Linden, Professor of Neuroscience at the Johns Hopkins School of Medicine has recently written that "[t]hroughout history it has been known that sleep

deprivation is an ideal form of torture" because "[i]t leaves no physical trace" and causes no pain, but rather mood alteration, lack of mental focus, hallucinations and clumsiness. (The Accidental Brain, Harvard University Press, Cambridge, Mass. (2007), pp. 184 - 187.) Notwithstanding Prof. Linden's historically accurate characterization, sleep deprivation simply does not fall with the California definition of torture because it does not involve the infliction of any injury. Starvation does not qualify either, for substantially similar reasons.

Penal Code sections 206 and 190.2(a)(18) entail a very specific definition of torture that is not coextensive with that used elsewhere, such as the Geneva Convention and medical literature. The case law construing the California statute has recognized its very specific focus.

People v. Jung (1999) 71 Cal.App.4th 1036, 1046 (Armstrong J., dissenting) noted that "torture is a newly codified crime in California, created on June 5, 1990, when the California electorate passed Proposition 115 in response to the facts in People v. Singleton (1980) 112 Cal.App.3rd 418 . . .." Jung cited People v. Barrera (1993) 14 Cal.App.4th 1555 for its discussion of Penal Code Section 206 against challenges of vagueness and overbreadth. Barrerra concluded that " 'torture' has a long standing, judicially recognized meaning," consisting of both an intent to cause pain and suffering in addition to "a

particular type of violent conduct causing significant personal injury." (14 Cal.App.4th at 1564.) Thus, not all conduct that results in illness or injury constitutes torture; rather, torture requires a "particular type of violent conduct."

Jung reviewed numerous cases finding sufficient evidence of torture by this Court and by the various courts of appeal, and, common to all, "in each case, the victim, if he or she survived the assault at all, suffered substantial, debilitating injuries: broken bones, punctured internal organs, multiple stab wounds, and gun shot wounds." (71 Cal.App.4th at 1046.) Thus, torture as defined by section 206 necessarily involves the active infliction of traumatic injuries via the application of some kind of external force to the victim. Starvation is an entirely different type of conduct, reprehensible as it may be.

The operative definition of the act of torture applicable to this special circumstance is "the infliction of great bodily injury," as set forth in Penal Code section 206. The phrase "great bodily injury" has in turn been described as a "significant or substantial physical injury" in Penal Code section 12022.7. Cases upholding findings of torture and/or great bodily injury all rely on evidence of a traumatic and externally inflicted wound. People v. Misa (2006) 140 Cal.App.4th 837, 843, affirmed a conviction of torture where the defendant cracked open the victim's skull with a golf club and

then taunted the victim for an extended period, and cited the following cases as demonstrating sufficient evidence of torture: People v. Pensinger (1991) 52 Cal.3d 1210, 1239 [278 Cal. Rptr. 640, 805 P.2d 899] [evidence that the defendant broke the five-month-old victim's ribs and cut her with a knife after she continued to cry, slammed her head against a rock and stepped on her back was sufficient to support intent to torture for purposes of torture murder]; People v. Mincey (1992) 2 Cal.4th 408, 428 [requisite intent may be inferred from evidence that the defendant beat the five-year-old victim repeatedly over a period of 24 to 48 hours and caused hundreds of injuries, including swelling of the brain]; People v. Proctor (1992) 4 Cal.4th 499, 531-532 [evidence that the defendant dragged a knife across the victim's body slowly and deliberately permits an inference that he intended to cause the victim pain or fear sufficient to support a conviction for torture murder]; and People v. Baker (2002) 98 Cal.App.4th 1217, 1224 [scarring and disfigurement from the defendant pouring gasoline over the victim's head and lighting her on fire sufficient as evidence of intent]. All involved an externally inflicted injury.

Counsel has found no case upholding either a great bodily injury allegation or a torture conviction based on a passive act of depriving a victim of a necessity of life. What the case law does reveal is a recognition that "the sad chronicle of human

history is replete with nonviolent murders," such as "termination of medical treatment" or "withholding food and drink from an invalid." (People v. Dixie (1979) 98 Cal.App.3d 852, 855.) Dixie concluded that "violence is not an element of murder," and that "[i]t is apparent that murder may be committed without committing an assault with a deadly weapon or by means of force likely to produce great bodily injury." (*Ibid.*) In contrast, torture may not be committed without "a particular type of violent conduct causing significant personal injury." (Barrera, *supra*, 14 Cal.App. at 1564.)

The only case suggesting a contrary result is People v. Lewis (2004) 120 Cal.App.4th 882, 888, affirming a torture conviction in which the defendants employed an aluminum bat and "attacked [the victim] for nearly two hours, causing fractured ribs, a collapsed lung, a broken femur and patella, and a concussion." In addressing a question of first impression as to whether assault was a lesser offense within the crime of torture, the Court of Appeal stated in dicta that "[t]he statutory definition of torture does not require a direct use of touching, physical force, or violence, but instead is satisfied if the defendant, directly or indirectly, inflicts great bodily injury on the victim" such that "a defendant may commit torture without necessarily committing a battery." (*Ibid.*) Appellant suggests that this language is incompatible with the settled jurisprudence

of this state that torture entails "a particular type of violent conduct causing significant personal injury" (Barrera, *supra*).

Some crimes may be committed "indirectly," e.g., felony child endangerment "can be committed by both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect" (People v. Felton (2004) 122 Cal.App.4th 260, 269), but not torture.

2. The acts causing starvation cannot as a matter of law constitute torture because of the incapacity to cause extreme physical pain

Inherent in the California definition of torture is the requirement that the acts alleged as torturous have the capacity to cause extreme physical pain. The extreme physical pain does not have to be experienced by the victim, because it is settled that "awareness of pain by the deceased is not a necessary element of torture" (CALJIC 8.81.18), because Penal Code section 206 requires only the infliction of great bodily injury, not "extreme physical pain" as was required before Proposition 115. In other words, the definition of torture was constructed to apply to a would-be torturer who had the requisite intent to inflict extreme physical pain, but bungled the implementation and merely inflicted great bodily injury. However, nothing in Proposition 115 suggests that the torturous acts do not have to carry the capacity to cause extreme physical pain.

By way of example, suppose some sadistic killer was enamored of the concept "tickled to death," incorrectly believed that prolonged tickling would become extremely painful, and engaged in prolonged tickling prior to execution. That defendant would not be eligible for a torture special circumstance because of the physical incapacity of tickling to cause extreme physical pain. (It would also fail because of the absence of any great bodily injury).

The trial court in this case was therefore obligated to consider whether starvation could cause extreme physical pain as a necessary part of a valid response to the jury's question. Starvation, in contrast to, say, being cut by a knife, is an experience well outside the range of the judiciary and the public alike. However, there are four obvious sources of accounts of the effects of starvation on humans, which the trial court could have turned to for guidance: (1) medical research; (2) accounts of wilderness survival; (3) accounts of war survival; and (4) observations of individuals involved in hunger strikes.

All of these sources convey a wide range of physiological and psychological symptoms caused by starvation, but none have documented "extreme pain."

The best known medical research was conducted at the University of Minnesota in 1944 under the auspices of the War Department to help the millions of starving European refugees

during postwar rehabilitation. The research was performed on 36 volunteer conscientious objectors, who were given starvation level sustenance comparable to that in war-torn Europe for six months during which their physical and mental responses were documented. The most common reactions were anemia, fatigue, apathy, extreme weakness, irritability, neurological deficits, and lower extremity edema. Pain was not reported as a symptom, much less extreme physical pain. The participants were warned of discomfort and reported food obsessions and some hunger pain, but nothing that could be categorized as acute or extreme pain. (See Kalm and Semba, "They Starved So That Others Be Better Fed; Remembering Ancel Keys and the Minnesota Experiment," 135 Journal of Nutrition 1347 - 1352 (2005).)

There are also accounts of individuals stranded in inhospitable wilderness conditions who starved for some weeks or months before rescue. For example, Zimmerman, et. al., 127 Annals of Internal Medicine 405 - 409 (1997), includes a case history of a medical student/mountain climber who was stranded in a Himalayan blizzard without food for 42 days. The symptoms reported were apathy, food obsessions, nausea, and stupor. The only "terribly painful" part of the ordeal was attributable to the climber's frostbitten feet, not to the lack of food.

A more systematic study of children actually suffering starvation was made in the Warsaw Ghetto of Poland during World

War II. Jewish physicians banded together in the face of disaster to document the effects of starvation on children, for the potential benefit of future generations. Their records and observations have been widely recognized and reported. (See, e.g., Winick, ed., "Hunger Diseases Studies by the Jewish Physicians in the Warsaw Ghetto," Wiley and Sons (1979).) The clinical aspects of starvation stunted growth, edema, delayed sexual maturation, and anomalies of the immune system. The primary psychological symptoms were apathy and reduced mental functioning. There was no mention of pain.

Finally, there is also literature about prisoners who engage in hunger strikes, where the fasting prisoners are generally removed to hospitals for observation and treatment. In one recent review of 41 hunger strikers in a Turkish prison in 2000 - 2002, the primary mental effects were confusion/stupor, generalized muscle weakness, memory loss, and reduced mental functioning. There is no record of physical pain. In fact, there were specific findings of reduced sensitivity to pain, attributable to the production of opioids. (See Basoglu, et. al., "Neurological Complication of Prolonged Hunger Strike", 13 European Journal of Neurology 1089 - 1097 (2005).)

That last observation has also been made in studies of palliative care in terminally ill patients, in which care providers withheld food and water in accordance with the

patient's wishes. (See Van der Riet, et. al., "Nutrition and Hydration at the End of Life: Pilot Study of a Palliative Care Experience," 14 Journal of Law and Medicine 182 - 198 (2006) ["when the body is in a state of starvation, there is an 'increased production of opioid peptides or endorphins' and therefore, less pain may be experienced by patients", p. 187, quoting from McCaulay, "Dehydration in the Terminally Ill Patient," 16 Nursing Standard 33 (2001)].)

These or other similar references would have been readily available to the court, but no effort was made. Appellant's argument here is that the jury should have been precluded from considering the acts causing starvation as the torturous acts under Penal Code section 190.2(a)(18), and that this Court must reverse that finding, because one or more jurors may have rested their verdict on the starvation theory.

Alternatively, if the Court finds that the legal question cannot be dispositively resolved on this record, then the special circumstance finding must be reversed for failure to correctly instruct on the prosecution's burden.

3. The trial court's impromptu instruction failed to inform the jury that the prosecution had to prove beyond a reasonable doubt that the acts of starvation were capable of causing extreme physical pain

The trial court's impromptu instruction incorporated by reference the prosecution's burden of proof as to the mens rea of

the torture special circumstance, but made no reference to the prosecution's burden of proof as to the actus reus. Rather, the instruction conferred complete and unfettered discretion on the jury to make this all-important decision without any reference to the prosecution's burden of proof.

In many cases, the acts alleged to be torturous are so associated with extreme physical pain within the common experience of all jurors that no instruction is necessary, particularly in stabbing cases. All jurors, attorneys, and judges have personally experienced knife cuts (mostly minor) in the course of cooking, camping, or other routine activities. There is no doubt that any knife cut sends a sharp and unmistakable message of extreme pain through the specific neurological pathway through which pain signals pass – "the dedicated system of sensory cells and their axions that project into the spinal chord, and ultimately to the brain". (Linden, *supra*, at 100.) It turns out that hunger and thirst signals are transmitted to the brain by an entirely different non-pain network emanating from the hypothalamus part of the brain (Linden, at p. 15).

Similarly, there are certain acts that virtually none of the American populace have experienced but that are so widely reported in popular culture as extremely painful that no

particularly instruction is required, e.g., pulling out fingernails with a pair of pliers.

Other acts possibly causing torture are not known to the general public or to a particular jury as causing extreme pain, and it is for these that both evidence and a jury instruction is required. For example, suppose a murderer confessed to applying great pressure to a particular point on a victim's body with the intent to cause extreme physical pain. The prosecution would have to present some evidence via a pathologist that explained whether or not there was a nerve ending at the designated place that would result in extreme physical pain to the victim, and the jury would be required to find that the act had the capacity to cause extreme physical pain. Otherwise, the act could just as well be entirely irrelevant to the actual infliction of pain, with no more actual causal force than sticking pins in an effigy of an intended victim. Appellant asserts that any constitutional construction of the torture special circumstances requires proof that the allegedly torturous acts have the capacity to produce extreme physical pain; otherwise, a defendant could be subjected to the death penalty for the practice of Voodoo prior to an otherwise painless killing.

For all of these reasons, when the jury asked whether starvation could be "construed as extreme physical pain under the legal definition of torture," the court should have answered with

an emphatic "no," because (1) the acts that caused the starvation were not externally inflicted as required by the torture statute, and (2) there was no evidence whatsoever that the effects of the malnutrition entailed extreme physical pain as required by the torture statute. Alternatively, the trial court should have instructed that a true finding was possible only if the prosecution proved beyond a reasonable doubt that the acts causing starvation had the capacity to cause extreme physical pain.

Instead, the court invited the jury to make an arbitrary and unguided determination whether starvation could constitute extreme physical pain, without benefit of either evidence or instruction. The court's statement that "it is up to the jury and each of you to decided whether or not starvation may constitute extreme physical pain under the law" constituted an abnegation of the duty to ensure that the jury conducted its deliberations within the confines of the law. The jury's subsequent true finding was necessarily an exercise in unfettered and unconstitutional arbitrariness that was condemned in Maynard v. Cartwright, *supra*.

C. The Requirement of Reversal

The jury returned a true finding as to the special circumstance just an hour after receiving the trial court's response to its question (12 RT 3212-3213), and therefore almost

certainly relied on the court's apparent validation of starvation as constituting torture. That is a structural error, because the instruction necessarily entailed an unforeseeable judicial expansion of the reach of the torture special circumstance in violation of appellant's federal constitutional rights of due process and notice. (See Bouie v. City of Columbia (1964) 378 U.S. 347; Clark v. Brown (9th Cir. 2006) 450 F.3d 898 [vacating arson special circumstance because of retroactive application of judicial expansion of statute].) There is no conceivable cure for a mis-instruction of this magnitude.

Alternatively, if the Court undertakes a harmless error review under Chapman v. California (1967) 386 U.S. 18, the special circumstance must be reversed. The prosecutor made an inflammatory appeal to the jury regarding starvation as torture, which would have likely persuaded the jury in the absence of proper instructions regarding the narrow construction of torture. The prosecutor argued:

> Is he [Arthur] gaining weight? No. Is food being withheld? Yeah. Starvation. Is that painful? They did it in concentration camps.
>
> (12 RT 3056 (emphasis supplied).)

That inflammatory reference to concentration camps obscures the tragic historical reality that many kinds of unspeakably cruel conduct occurred in concentration camps that did no involve the infliction of torture as that term is used, not the least of

which was keeping families segregated without means of communicating whether members were dead or alive. The prosecutor's resort to a concentration camp reference in answer to his rhetorical question, "Is that painful?," rather than a reference to evidence in this record, demonstrates how the jury was likely misdirected from a constitutional application of the torture special circumstance.

Obviously, if the trial court had correctly instructed on the actus reus of the torture murder special circumstance in the first place, the jury would likely not have gone off on this tangent because they would have understood that the defendant had to inflict some affirmative injury on the victim to constitute torture. The jury would have realized on its own that the conduct of withholding nourishment was perhaps a contributing cause of death, and certainly reprehensible, and perhaps even sufficient to establish malice, but not cognizable under the torture special circumstance. For these reasons, the special circumstance finding must be reversed.[1]

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[1] The error is, of course, reviewable pursuant to Penal Code section 1259. Additionally, should respondent advance an "invited error" argument, with a claim that defense counsel acquiesced in the instruction, appellant refers to and incorporates his response to a possible invited error argument as to argument "XX" (see People v. Bunyard, and other authorities cited at p., 12, *supra)*.

XXII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE PRESENT BY THE TRIAL COURT'S ERROR IN CONFERRING ABOUT THE APPROPRIATE RESPONSE TO THE JURY'S MID-DELIBERATION QUESTION REGARDING THE TORTURE SPECIAL CIRCUMSTANCE IN HIS ABSENCE

A. Summary of Facts

The bailiff was sworn and guilt phase deliberations began on Wednesday, April 7, 1999. (12 RT 3195.) The court discussed with counsel and the defendants the procedure to be followed in the case of a jury request for readback. (12 RT 3199.) The court outlined an "informal" procedure in which the court reporter would read the desired testimony in the jury room, and the "formal" procedure in which the readback would occur in the courtroom with "everybody present in court." The attorneys opted for the informal procedure, with the proviso that "[t]here will not be any response to a question by the Court until that response is discussed with the attorney for all parties." (12 RT 3200.) Appellant was not asked whether he wanted to be present during subsequent proceedings involving the jury, he never signed a Penal Code section 977 waiver of presence, and never orally waived his presence at any proceedings.

There were a number of jury requests for testimony readbacks that were handled without any proceedings memorialized on the record. (See 2 CT 454-470.) On April 15, the court convened counsel and clients regarding a jury question about the poison

special circumstance. (12 RT 3206.) The record reveals that "the Court and counsel have discussed the answer to this jury question informally in chambers off the record; and I'd like to at this time indicate what I believe is the agreement and see if counsel have any changes or anything to add or subtract from the response." (12 RT 3207.)

On April 19, court convened at 1:41 p.m. in response to the jury question whether starvation could be construed as torture. (12 RT 3211.) The court read the question, and again noted that "we, the court and counsel, has discussed informally in chambers off the record out of the presence of Mr. and Mrs. Jennings the appropriate response, and I believe that the following response has been agreed to by all counsel and the court," which was read into the record. (12 RT 3212.)

The instruction was typed, sent into the jury room, and the jury returned guilty verdicts and a true finding on the torture special circumstance an hour or so later.

The Clerk's Transcript reflects that the informal off the record discussion of the response to the starvation-as-torture question occurred between 11:25 and 11:55 a.m. on April 19 (2 CT 471), with no indication of how much actual time the discussions took within that half hour window. However long they took, appellant was not present.

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B. The Trial Court's Error

A capital defendant has a state and federal constitutional right to be present and every critical phase of the trial proceedings, and that right of presence includes discussions of jury instructions, particularly the all-important mid-deliberation jury questions and responses. The United States Supreme Court has repeatedly affirmed a criminal defendant's right of presence, and without attempting to define the outer parameters has stated that at a minimum a defendant is entitled "to be present from the time the jury is impaneled until its discharge after rendering the verdict." (Shields v. United States (1927) 273 U.S. 583, 589.) More broadly, the Supreme Court has held that the constitutional guarantee applies whenever a defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (Snyder v. Massachusetts (1934) 291 U.S. 91, 105.) Moreover, appellant's right of presence is guaranteed by the California Constitution and statutory provisions, including Penal Code sections 977(b) and 1148.

Fisher v. Roe (9th Cir. 2001) 263 F.3d 906, granted habeas corpus relief where the trial court responded to a jury question for a read-back of testimony in the absence of either the defendant or his counsel. Fisher relied on the above-cited cases for the rule that "a defendant has a right to be present and

participate if his presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge'" (263 F.3d at 914, quoting Snyder, 291 U.S. at 105-106).

Shields reversed a conviction because of an ex parte communication to the jury during deliberations in response to a questions, in the absence of the defendant or his attorney. It follows that if a defendant has a right of presence during the delivery of a mid-deliberation instruction to the jury, he also has a right to be present during the preceding and more important phase in which the content of the answer is determined.

Here, the jury question touched on an area in which appellant could have contributed substantially, by pointing out to counsel and the court that Arthur had never complained of hunger pains, and had never shown symptoms of pain related to hunger, all of which would have likely alerted the court and counsel to the inherent inadequacy of starvation as a basis for the torture special circumstance.

The jury's question was not about some technical aspect of the felony murder rule or other arcane subject matter for which the defendant's present would be superfluous. This was the heart of the case, a question that clearly stumped the court and counsel, and that was addressed (although not answered in an adequate way) without any notice to or consultation with appellant.

C. The Requirement of Reversal

The violation of a defendant's right to be present is subject to harmless error analysis. (Fisher, *supra*, 263 F.3d at 916 – "A defendant's absence from read-back proceedings is properly characterized as trial error, rather than structural error, and is therefore subject to constitutional harmless error review," but "as the beneficiary of an identifiable error, [the state] must be able to affirmatively show that it was harmless.")

The discussion of prejudice is straightforward in this case, because the instruction that emerged from the informal off the record conference in appellant's absence was not an instruction at all, but was in effect a punt back to the jury without any guidance as to the crux of the questions raised. It would be a different prejudice analysis of a defendant was excluded from a jury instruction conference but the result was a picture perfect rendition of the relevant law that appellate counsel could find no fault with. Here, the instruction given was wrong on multiple grounds, and appellant may well have been able to awaken the court and counsel to the important factual and legal issues actually posed if he had been present and participating in the jury conference.

If this Court has any doubt as to whether the State has failed to demonstrate harmless error, reversal is required. (O'Neal v. McAninch (1995) 513 U.S. 432.)

CONCLUSION

For each and all of the reasons discussed in the opening brief and in this brief, the judgment in this case, including especially the judgment of death, must be reversed.

CERTIFICATION OF WORD COUNT

The undersigned counsel hereby certifies under penalty of perjury that the word count of this brief is: 8,811 words.

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Respectfully submitted,

DATE: June 15, 2007

GREGORY MARSHALL
Attorney for Appellant

PROOF OF SERVICE BY MAIL

CASE: People v. Jennings, no. S081148

DATE: June 15, 2007

I am a citizen of the United States and am employed in the County of Shasta, State of California. I am over 18 years of age and not a party to the within action. My business address is P.O. Box 996, Palo Cedro, CA 96073.

On the date stated above I served the following document(s) on the parties indicated, by placing a true copy of each in an envelope, bearing first class postage prepaid, addressed as indicated below, and deposited the same in the U.S. mail at Palo Cedro, California.

DOCUMENT(S): Appellant's Supplemental Brief

ADDRESSEE(S):

Office of the Atty. General
ATTN: KRISTINE A. GUTIERREZ
Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

California Appellate Project
101 Second Street, Ste. 600
San Francisco, CA 94105

Super. Ct., San Bernardino Co.
ATTN: HON. RUFUS L. YENT /
HON. ERIC M. NAKATA
14455 Civic Drive
Victorville, CA 92392

District Attorney's Office
ATTN: GARY ROTH
14455 Civic Drive
Victorville, CA 92392

Eric S. Multhaup
20 Sunnyside Ave., Ste. A
Mill Valley, CA 94941

Martin Carl Jennings

Executed June 15, 2007, at Palo Cedro, California.

I declare under penalty of perjury that the foregoing is true and correct.

GREGORY MARSHALL