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.	)

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 REPLY BRIEF

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APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

Appellant contends that the torture murder special circumstance finding is invalid because the trial court, following erroneous language in a CALJIC Use Note, eliminated from the torture special circumstance instruction any requirement

that the jury find that appellant *inflicted* torture on the decedent while concurrently harboring the intent to torture. (Appellant's Supplemental Brief ("A.S.B."), pp. 2-16.)

Respondent agrees that this constituted constitutional error (Supplemental Respondent's Brief ("S.R.B."), pp. 1-9), and thus, the only disputed issue is whether this error was harmless beyond a reasonable doubt (*ibid.*). However, because the jury made no finding that appellant inflicted great bodily injury on the decedent while harboring the intent to torture, the error simply cannot be deemed harmless.

The error originated with the passage of Proposition 115 by the voters in 1990. This initiative replaced a former requirement of a finding of infliction of *extreme physical pain* with a requirement of a finding of infliction of *great bodily injury*. The initiative did not change the requirement that the defendant actually *inflict* the injury. The parties here agree that the jury in this case was not instructed that to find the torture special circumstance true, the jury must find beyond a reasonable doubt that appellant committed a particular act that inflicted great bodily injury while concurrently harboring the intent to torture.

Respondent first argues the error was harmless beyond a reasonable doubt because of some introductory, general instructional language about finding that the killing "involved"

torture. (S.R.B. 3-5.) However, this does not cure the error, because a finding that the killing "involved" torture does not constitute or substitute for a finding that torture was *inflicted*, or that it was inflicted intentionally by the defendant. Particularly where the actual cause of death was Michelle Jannings' conduct in administering drugs to her son, and where Michelle Jennings must be viewed as responsible for withholding nourishment from Arthur, the generic language that the killing "involved" torture does not provide a constitutionally sufficient substitute for an actual jury finding.

Similarly, respondent points to the prosecutor's argument to the jury as a cure for the instructional error. (S.R.B. 5, fn. 3.) But this argument, too, allowed for a finding of the torture special circumstance without a finding that the defendant actually inflicted great bodily injury with the intent of torturing the decedent.

Respondent's second line of argument is that there was manifest evidence that some torturous acts occurred, and therefore no prejudice could have arisen from the error in failing to instruct that it was necessary to find the defendant inflicted torture with intent to torture. (S.R.B. 6-9.)

This argument is fatally flawed. The primary flaw in it is its failure to take account of the secondary error in the court

instructions, i.e., the failure to require a unanimous jury finding on a *particular* act of torture. (See A.S.B. 15-16, citing Apprendi v. New Jersey (2000) 530 U.S. 466, and other cases.)[1]

By far the most likely act the jury focused on - the act that came closest by far to matching anyone's sense of what constitutes "torturing" another person - was the evidence that appellant held the child victim's hand over a stove flame, causing a serious burn injury, as a form of punishment. Yet this injury occurred some weeks if not months prior to Arthur's death, and was all but fully healed by the time of death. (R.T. 2579, et. seq.) There is no reason to assume that the jury *unanimously* relied on that act as the basis for the torture special circumstance, but even if it did, the finding is invalid because the act is too attenuated from the death. It is well beyond the "outer limits" of the requisite nexus between torture and death. (People v. Chatman (2006) 38 Cal.4th 344, 394; People v. Bemore (2000) 22 Cal.4th 809, 843.)

Supposing for the sake of argument that the jury might have based its finding on some other act or acts discussed by respondent - bruises, an injury to the child's eye, head lacerations - the error cannot be deemed harmless beyond a

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[1] Respondent does not discuss the problem of the lack of a unanimity instruction at all in his brief.

reasonable doubt for at least two reasons: First, in most or all of these instances, again, the act occurred long enough before the time of death that there was no sufficient nexus between the act and the death. Second, as to every one of these instances (other than, arguably, the hand-burning incident), there was little if any proof that the injury was inflicted with *intent to torture*. What testimonial evidence there was about these acts - the statements of the two defendants in the joint interview with police - indicated they intended to discipline or control the child, not to torture him.

The same is true of respondent's claim that "starvation" might have been the torturous act to support a finding of harmless error (S.R.B. 7): there was too little evidence that this was done with intent to torture the child.[2] Moreover, starvation is not an act; it is a failure to act, a failure to supply nourishment. (See argument "XXI," *infra*.)

In sum, the constitutional error in the court's failure to instruct the jury that they had to find appellant inflicted torture on the victim was not harmless beyond a reasonable doubt, because (1) there was nothing in the instructions that told the jury they had to find a torturous act by the defendant, done with

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[2] This fact stands independently of the several other fatal flaws, which have been thoroughly argued in appellant's previous briefs, in the theory that the death judgment can be based on the idea that appellant deliberately starved the child with intent to torture him.

intent to torture, that was causally related to the death; and, (2) contrary to what respondent claims, the evidence was far from overwhelming or undisputed that appellant committed a torturous act, with intent to torture, which had the requisite nexus to the death. Moreover, the prejudice is particularly clear when viewed in conjunction with argument "XXI," *infra*, because of the likelihood that the jury found the special circumstance true based on starvation, a non-act, a passive withholding of nourishment.

In sum, the special circumstance finding was most likely returned without the jury understanding the need to find an actus reus beyond a reasonable doubt, and without ever finding one to have been proven. Accordingly, the constitutional error was not harmless beyond a reasonable doubt, and the special circumstance finding and death judgment must be reversed.

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. Overview

At the time that this Supplemental Reply Brief is being drafted, the country is awash in controversy regarding the

definition of torture, relating to the current administration's interrogation techniques used on non-citizen detainees. As noted in the *New York Times* Op-Ed column of Frank Rich on October 14, 2007, entitled "*The 'Good Germans' Among Us*," "it all depends on what the meaning of 'torture' is." The International Convention Against Torture, to which the United States subscribes, defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . .." (Art. 1). That definition is clearly more broad than California Penal Code section 206.

At the same time, the Human Rights Watch notes that "[i]nternational law also prohibits mistreatment that does not meet the definition of torture, either because less severe physical or mental pain is inflicted, or because the necessary purpose of the ill-treatment is not present," noting that "[e]xamples of such prohibited mistreatment include . . . being deprived of sleep, food or drink." See www.hrw.org, "*What is Torture*". In the eyes of the world, starvation is condemned conduct, but not necessarily as "torture" even under the more broad definition of international law. Given this readily apparent lack of generally accepted definition, when the jury in this case asked "can starvation be construed as extreme physical pain under legal definition of torture?", the trial court had a

duty to answer by reference to the operative definition of torture and the prosecution's burden of proof as to the elements of that definition. The decision of the court to leave that crucial determination to the jury's unconstrained and unguided discretion was clearly error. (People v. Hudson (2006) 38 Cal.4th 1002, 1012 ["Even in the absence of a request, a trial court must instruct on general principles of law that are . . . necessary to the jury's understanding of the case," and "[t]hat obligation comes into play when a statutory term 'does not have a plain, unambiguous meaning,' has a 'particular and restricted meaning' [citation], or has a technical meaning peculiar to the law or an area of law [citation] "].

B. The Error Was Not Waived

Respondent argues waiver (S.R.B. 10), but that is not supported by the record. The record reflects that the court received the jury's critical question #9 about starvation as torture on April 19, 1999, at 11:25 a.m.; the court called counsel to chambers and they conferred until 11:55 when they recessed for lunch; and the court gave the challenged instruction after lunch at 1:40 p.m. (2 C.T. 471.) The record does not reflect the content of the trial court's in chambers discussion with trial counsel prior to sending the instruction to the jury that is the subject of this claim. The record does not reflect

either an objection by trial counsel to the instruction or any affirmative tactical reason in favor of the instruction. Under these circumstances, the propriety of the instruction must be reviewed on its merits pursuant to Penal Code section 1259.

Respondent cites People v. Bohana (2000) 84 Cal.App.4th 360, 373, with the excerpted quote - "where, as here, appellant consents to the trial court's responses to jury questions during deliberations, any claim of error with respect thereto is waived." (S.R.B. 10.) However, Bohana held that a defendant who had expressly rejected the trial court's offer to instruct on involuntary manslaughter for tactical reasons at the time of initial jury instructions could not assert error in the trial court's response to a mid-deliberation question that did not apprise the jury of lesser offenses. Bohana entailed a classic "invited error" scenario as discussed in People v. Barton (1995) 12 Cal.4th 186, 198.

Here, the record is silent as to defense counsels' response, if any, to the trial court's starvation instruction. Trial counsel never rejected any prior offer by the trial court to instruct the jury that starvation was not as sufficient a matter of law to establish torture. That issue simply did not arise, and a silent record is inadequate as a matter of California law to establish waiver of an otherwise constitutionally required instruction. (People v. Bradford (1997) Cal.4th 1005, 1007).

Moreover, Bohana reached its conclusion that the instructional claim had been waived by reference to Penal Code section 1138, which provides in pertinent part that when the jury "desire[s] to be informed on any point of the law arising from the case, they must require the officer [bailiff] to conduct them into court" and "[u]pon being brought into court, the information required must be given in the presence of or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." Clearly, section 1138 is a procedural statute only, and does not purport to govern the content of judicial responses to jury requests for additional instructions or information.

There is ample case law that a defendant's failure to object to the procedure employed by the trial court after a jury request for further instruction does waive any issue regarding procedural irregularity, e.g., where the trial court consults counsel by telephone, and then instructs the jury without defense counsel being present per the telephonic agreement. However, no case holds that a failure to make a procedural objection waives appellate rights as to the content of an instruction.

Mere silence by defense counsel can no more waive a defect in a jury instruction given during deliberations then it can waive a defect in a jury instruction given prior to deliberations. Penal Code section 1259 expressly states that

"[t]he appellate court may also review any instruction given, refused, or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were effected thereby" (emphasis supplied). Section 1259 does not distinguish between instructions given prior to the deliberations versus instructions given during deliberations.

There is no case law addressing the interplay between sections 1138 and 1259. However, the obvious reconciliation of any apparent tension between the two is that section 1138 governs only the procedure by which a trial court must respond to any type of question by a jury, whether related to jury instructions or the read-back of evidence, or any other point of jury interest, while section 1259 governs appellate review of the content of the any and all jury instructions that affect a defendant's rights.

People v. Ross (2007) 155 Cal.App.4th 1043, reversed a conviction because of the trial court's failure to adequately respond to a jury request for further instruction regarding the definition of "mutual combat" in a prosecution for aggravated assault. Respondent argued that the issue had been waived because trial counsel did not request any particular additional language. The Court of Appeal rejected the waiver argument because based on "the court's failure to elaborate on the instruction after the jury expressly asked the court for a 'legal

definition' of mutual combat" (slip opn. at p. 30). Ross cited People v. Gonzalez (1990) 51 Cal.3d 1179, 1212, for the proposition that Penal Code section 1138 "cast upon the court a 'mandatory duty' to 'clear up' the jury's understanding." (*Ibid.*) Gonzalez confirmed that section 1138 "imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury" (51 Cal.3d at p. 1212), citing People v. Gavin (1971) 21 Cal.App.3d 408. These cases emphasize the statutory duty imposed by section 1138 on the court to respond to jury questions, which is entirely consistent with the policy underlying section 1259 that erroneous instructions that affect a defendant's substantial rights are reviewable on appeal notwithstanding a lack of objection.

Finally, it would be flagrantly anomalous if a defendant's right to appellate review of a particularly critical jury instruction given during the crucible of deliberations could be waived by silence while a defendant's right to appellate review of instructions given en masse prior to deliberations could not be waived under section 1259. The state and federal case law recognizes the particular importance of jury instructions given during deliberations, because those instructions necessarily reflect the focal points on which the jury's actual decision turns. (See People v. Butler (1975) 47 Cal.App.3d 273, 283-284, [rejecting a waiver claim because section 1138 is primarily

concerned with the right of the jury to have access to the evidence and to proper instructions for its deliberations]; People v. Thompkins (1987) 195 Cal.App.3d 244. Thompkins reversed a murder conviction because of the trial court's refusal to answer a jury question during deliberation regarding the relationship between premeditation and heat of passion. The Court of Appeal noted that "after five-minute chamber conference with counsel which was not reported, the judge responded to the inquiry . . ." (195 Cal.App.3d at p. 251, fn. 4). The Court of Appeal commented that "[a]lthough we have no way of knowing what went on in the five-minute meeting, the entire 11-minute interval does not suggest an exhaustive study of the legal issue presented by the jury's instructions" and "[o]f course trial counsel's failure to object to an error in jury instructions does not preclude the defendant from raising the issue on appeal," citing Penal Code section 1259 and People v. Harris (1981) 28 Cal.3d 935, 956. Bollenbach v. United States (1946) 326 U.S. 607, 612, confirmed that "[p]articularly in a criminal trial, the judge's last word is apt to be the decisive word" and "[i]f it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge."

Bollenbach has been followed in, e.g., Arroyo v. Jones (2nd Cir. 1982) 685 F.2d 35, 39, concluding that mid-deliberation

instructions "enjoy special prominence in the minds of jurors" because they are "freshest in their minds," "isolated from the other instructions they have heard," "received by the jurors with heightened alertness," and "generally have been given in response to a question from the jury." Under these circumstances, the trial court's instruction is reviewable upon appeal because it was highly critical to the jury's true finding on the single special circumstance that permitted the imposition of the death penalty.

C. The Instruction Was Erroneous

Respondent's initial argument is that "[s]urely, no one would suggest that starving someone held as a prisoner is not an act of torture" (S.R.B. 10, fn. 7 (emphasis in original)). That is true but irrelevant. The Geneva Convention does in fact prohibit killing, torturing, injuring, or causing suffering to the prisoners of war, but the purpose of the Geneva Convention is to ensure generally humane treatment of enemy civilians and prisoners of war, not to identify the most heinous conduct that warrants the most severe punishment in a criminal justice context. Because its purpose is to protect people, not punish them, it is understandable that the range of prohibited conduct

is far more broad than in the California Penal Code. Respondent's generic reference to prisoners of war does not in any way demonstrate that starvation constitutes torture as a matter of law under the California Penal Code.

Respondent next argues that "[a]ppellant had an affirmative duty as Arthur's parent to provide his 5-year-old child with food" (S.R.B. 11), coupled with a cite to People v. Burden (1977) 72 Cal.App.3d 603, 616, which cites numerous cases concluding that parents may be convicted of second degree murder for withholding food and liquid from infant children. The general principles of murder do not require the infliction of great bodily injury, as does the statutory definition of the torture special circumstance. Thus, respondent's citation to case law regarding the withholding of nourishment as a basis for a murder conviction sheds no light on the propriety of the instructions as to the special circumstance.

Next, respondent asserts that "defense counsel concede[ed] during closing argument that appellant was withholding food as a form of punishment" (S.R.B. 11), and defense counsel did acknowledge to the jury that "[o]f course the child was terrible malnourished, and they were withholding food as a form of punishment." (12 R.T. 3096-3097.) However, the crux of both defenses was that, notwithstanding the various types of child abuse involved, neither had any intent to kill Arthur.

Defense counsel's acknowledgment that both appellant and Michelle withheld food as a form of punishment is very different from any kind of concession of torture. The parental practice of sending a child to bed without any dinner as a punishment for some particular misdeed is long settled in the popular culture, and while not particularly encouraged in this day and age, has never been viewed as torturous.

Respondent also argues that "[t]he evidence also established that appellant's act of withholding food from Arthur resulted in the infliction of a significant physical injury" (S.R.B. 11), according to Dr. Sheridan. Dr. Sheridan did testify that Arthur was very malnourished and that he was suffering adverse medical consequences as a result. That begs the question of whether the California statutory definition of torture requires "a particular type of violent conduct" (People v. Barrera (1993) 14 Cal.App.4th 1555, 1564), and whether it excludes failures to act, even though they may have adverse medical consequences. Parents who abandon newborn infants in dumpsters certainly cause "significant physical injury" by the abandonment, but that scenario does not call to mind the connotations of torture.

Barrera is well recognized in the case law as containing the most extensive discussion of the specific meaning of torture under California law, see A.S.B., pp. 23-24, but respondent ignores it entirely. In fact, the restrictive definition and

construction of torture is necessary to enable the statute to withstand the constitutional challenge as vague and arbitrary. (See People v. Misa (2006) 140 Cal.App.4th 837 [rejecting a claim that Penal Code section 206 is void for vagueness in light of the constructions provided by, inter alia, People v. Barrera, *supra*, People v. Talamantez (1985) 169 Cal.App.3d 443, and People v. Raley (1992) 2 Cal.4th 870, 899]). Respondent's argument in effect urges this court to expand the definition of torture so broadly as to include starvation, without recognizing that such an expansion would render the statute unconstitutionally vague and overbroad.

Respondent appears to acknowledge that the allegedly torturous acts must be "capable of causing extreme physical pain" in order to qualify as torture under the Ca[illegible]tute. (S.R.B. 11.) However, respondent ar[illegible] "[t]he court and counsel properly determined that [illegible]er the starvation in this case could constitute extreme physical pain, was not a legal determination to be made by the court but a question for the jury to decide" (*ibid.*). The defect with respondent's position is that if the torturous acts must as a matter of law be capable of producing extreme physical pain, then the jury must be instructed that the evidence must establish that fact beyond a reasonable doubt in order to find the special circumstance allegation true. No such instruction was given in this case.

Thus, in this case, when the jury asked its mid-deliberation question whether starvation could constitute torture, the trial court should have responded (1) no, because it does not involve the type of particularly violent injury required by the statute; or (2) even if it does, the law requires that the torturous act be capable of causing extreme physical pain, and the prosecution must prove that before you may return a true finding based on starvation.

The instruction actually given did not impose any of these requirements on the jury, and instead authorized the jury to return a true finding without any unanimous conclusion that the withholding of food was capable of causing extreme physical pain. The record is in fact completely silent on that point.

There are obviously certain types of injuries that do not require expert testimony or other type of independent proof as a predicate for the jury to find that they are capable of causing extreme physical pain. The two most common ones found in the case law upholding torture convictions are knife wounds and beatings with a blunt object. Every potential and actual juror has their own personal experience of suffering a cut of some sort, and knows the considerable pain involved. Every potential and actual juror is similarly aware of the sharp pain accompanying bump in the head from a hard object, whether from bumping into a door jam in the dark, or falling, or via some

other accidental context in the course of ordinary life. In light of this common baseline of experience with respect to cut injuries, and laceration injuries, the jury does not need any additional evidence to evaluate a particular scenario as to whether the defendant's conduct was capable of producing extreme physical pain. The jury, however, should be instructed that the acts must be capable of causing extreme physical pain. No such instruction was given here.

Respondent also argues that "[a]ppellant improperly supports his argument with studies in anecdotal evidence which is not part of the record and was never offered into evidence" (S.R.B. 11, referring to A.S.B. 28-31). However, there is nothing improper in providing secondary source materials to the court to demonstrate that a genuine issue of fact existed as to which the trial court failed to instruct the jury.

This Court has long relied on secondary sources to amplify or supply a factual basis that is otherwise lacking from the trial record. For example, People v. Mar (2002) 28 Cal.4th 1201, 1215, footnote 1, addressed the issue of "under what circumstances a defendant in a criminal trial in California may be required, as a security measure, to wear a remote-controlled electronic 'stun belt'" (*id.*, at p. 1204). Noting that "[t]he trial court record in this case does not contain any facts regarding the physical attributes or function of the stun belt

that defendant was required to wear", the Court relied instead on "numerous legal and nonlegal articles [that] provide a detailed discussion of such stun belts," as did the Court of Appeal. (*Id.*, at p. 1214).

Appellant has cited those secondary authorities not to establish facts on appeal, but rather to demonstrate that a factual issue exists which the torture special circumstance jury instructions should have considered. Had the trial court conducted basic research in response to the jury's question, it would have found the same source of information and likely respond to the jury's question in a very different way.

Respondent concludes with the factual assertion that "[t]he jury was entitled to use its common sense to find that being deprived of sufficient food for two months could cause extreme physical pain" (S.R.B. 11), but that begs the question of whether the prosecutor satisfied his evidentiary burden and whether the jury was properly instructed as to that burden. The instruction given entirely omitted any reference to the factual issue in question or the prosecutor's burden as to that factual issue.

The prosecutor's only argument to the jury on this point was not based on any actual evidentiary materials in the record. The prosecutor argued to the jury - "starvation. Is that painful? They did it in concentration camps." (12 R.T. 3056.) The prosecutor's apparent premise was that whatever in a

concentration camp was necessarily capable of inflicting extreme physical pain within the meaning of Penal Code section 206, but that is a flawed position. Terrible things happened in concentration camps that did not involve the infliction of extreme physical pain, among which was separating family members with opportunity to communicate.

Appellant is not arguing, as respondent implicitly but incorrectly suggests, that the starvation must have "actually caused Arthur to feel extreme physical pain" in order to constitute torture (S.R.B. 12, citing People v. Chatman, *supra*, 38 Cal.4th 344, 389). Rather, appellant expressly recognized at the outset of this argument that the amendment to the torture murder special circumstance and the enactment of Penal Code section 206 itself do not require that the victim experience extreme physical pain. Appellant does insist that the torturous acts must be proven capable of causing extreme physical pain.

Respondent argues that the trial court was not obligated to instruct the jury that the prosecution has to prove beyond a reasonable doubt that the acts of starvation were capable of causing extreme physical pain because "[t]he jury was properly instructed on the prosecution's burden of proof by CALJIC 2.90" (S.R.B. 13). A general instruction of proof beyond a reasonable doubt is constitutionally adequate only where the trial court also enumerates the specific factual points that must be proven

beyond a reasonable doubt. It is not the burden of proof standing alone that was erroneous omitted from the mid-deliberation answer, but rather the failure at that or any other point to inform the jury of the prosecution's obligation to prove that acts proffered to satisfy the torture special circumstance had to be capable of causing extreme physical pain.

D. The Requirement of Reversal

Finally, respondent argues that no prejudice occurred because the jury likely asked this question while it was considering the truth of the torture special circumstance as to Michelle, not appellant. (S.R.B. 14.) That response cannot satisfy the harmless beyond a reasonable doubt standard for several reasons.

First, the question on its face applies to both defendants at a time when the jury was ostensibly deliberating the truth of the special circumstance as to both defendants. The jury had previously requested a clarification as to the poison special circumstance, which they subsequently found not true.

Second, respondent's speculation lacks logical coherence. Under respondent's view, the jury likely convicted appellant of the torture special circumstance based on evidence that he not only [was] "starving him, but by burning, beating, shaking and

smothering him." (S.R.B. 14.) In contrast, there was only one incident of physical abuse of use directly linked to Michelle. Therefore, according to respondent, the jury was likely considering whether the starvation would have provided a basis for the finding the torture special circumstance true as to Michelle. The flaw in respondent's speculation is that the trial court gave the jury the green light to use starvation as a basis for the torture special circumstance as to Michelle, but the jury hung as to whether it was true as to Michelle. If the jury was looking for a basis to find the special circumstance true as to Michelle, then the jury would have returned the special circumstance verdict against Michelle when the trial court confirmed the starvation basis. The actual trial proceedings do not comport with respondent's explanatory effort.

This case obviously presents a mercifully infrequent situation in which appellant did inflict a number of injuries on Arthur, but many of those were entirely attenuated from the death itself, which was precipitated by the sleeping pills administered by Michelle. Thus, there is no particular injury inflicted by petitioner that was accompanied by evidence of an intent to kill, or an intent to torture, as opposed to an intent to punish or simply a display of anger. The jury may well have come to the conclusion that a parent who withholds nourishment from a five year old to the point of emaciation must necessarily have an

intent to kill, because that is an eventual and inevitable outcome. The jury likely had justifiable reservations whether the intent to withhold food could satisfy the statutory elements of (a) conduct capable of causing extreme physical pain, and (b) an intent to inflict extreme physical pain. Appellant believes that a properly instructed jury would have been precluded from reaching that conclusion as a matter of law, and that at the least the jury had to be instructed about the component factual issues in order to reach that conclusion in a constitutional manner.

The likelihood of prejudice is increased because the term "starvation" has the same kind of "dangerously vivid quality" that "may mask ambiguity or even inaccuracy" (People v. Ross, *supra*, slip opn. at 18). "Starvation" is a loaded word, and the jury would be all too likely to equate it to torture in the absence of a proper instruction without taking the analytical step of determining whether the prosecution had proved that starvation was capable of causing extreme physical pain. The jury could have improperly found the mens rea element true based on upon the same unexamined leap that if appellant intended to starve Arthur, that must be adequate to demonstrate the intent to inflict extreme physical pain, without resolving the foundational question whether starvation was capable of causing extreme physical pain. Under these circumstances, the trial court's

erroneous instruction cannot be deemed harmless beyond a reasonable doubt. (Neder v. United States (1999) 528 U.S. 1.)

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

Appellant contends that reversible error occurred when the court formulated a response to a jury question on the key point in the deliberations - essentially, whether "starvation" can be considered "torture" - without appellant being present. (A.S.B. 37-41.)

Respondent argues that a defendant has the right to be present only at "critical stages" of the trial, only where the proceeding in question bears a substantial relation to mounting his defense against the charges. (R.S.B. 16-17.) But the proceeding in question here was exactly that. The jury's question involved a factual aspect of the case as to which appellant could have contributed substantially, by pointing out that his son never complained of hunger pains, and never showed symptoms of pain related to hunger.

Respondent argues that the burden is on appellant to demonstrate that his absence prejudiced his case or denied him a fair trial (citing People v. Lucero (2000) 23 Cal.4th 692, and People v. Bradford, *supra*, 15 Cal.4th 1229). This is flatly incorrect. The burden on this question on appeal rests on respondent. (O'Neal v. McAninch (1995) 513 U.S. 432 [115 S.Ct. 992; 130 L.Ed.2d 947]; accord: Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct 824].)

Respondent contends the error was not prejudicial because the proposed text of the answer to the jury's question was read to appellant before it was read to the jury. (R.S.B. 19.) This is insufficient to sustain respondent's burden, however, because the exclusion of the defendant from the proceeding where the court actually formulated the language clearly conveyed to appellant that his input was not desired, and that he had no right to have input.

The unavoidable fact is that the jury's question was about the key factual issue in the case, not some arcane legal question as to which the defendant could have nothing useful to say. The court's decision to formulate the answer to this question - a formulation that turned out to be clearly inadequate - in a court session from which the defendant was excluded, must be declared prejudicial and reversible error.

CONCLUSION

For each and all of the reasons discussed in appellant's opening brief, appellant's supplemental brief, and 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: 6,008 words.

///

Respectfully submitted,

DATE: October 29, 2007

GREGORY MARSHALL
Attorney for Appellant

PROOF OF SERVICE BY MAIL

CASE: People v. Jennings, no. S081148

DATE: October 29, 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 Reply Brief

ADDRESSEE(S):

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Executed October 29, 2007, at Palo Cedro, California.

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

GREGORY MARSHALL