PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 16 | Issue 2 Article 8

1-15-1989

California Supreme Court Survey -- A Review of Decisions: May 1988-July 1988

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California Supreme Court Survey
May 1988-July 1988

The California Supreme Court Survey is a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

I. CIVIL PROCEDURE

A. *Neither a constitutional nor statutory right exists to a trial by jury in a de novo proceeding in superior court considering an appeal from a small claims court judgment:* **Crouchman v. Superior Court.**

In *Crouchman v. Superior Court*, 45 Cal. 3d 1167, 755 P.2d 1075, 248 Cal. Rptr. 626 (1988), the supreme court held that there is no right to a jury trial in a de novo proceeding in superior court following a small claims court judgment. Although jury trials had been previously afforded under similar circumstances, the court distinguished the present case, finding that such a right would impede the goals of the small claims structure. *See Maldonado v. Superior Court*, 162 Cal. App. 3d 1259, 209 Cal. Rptr. 199 (1985); *Smith v. Superior Court*, 93 Cal. App. 3d 977, 156 Cal. Rptr. 149 (1979).

Initially, El Dorado Investors (real party in interest) was awarded $1,500 by a small claims trial court. The real party in interest had sued Joseph Crouchman (the defendant) for money due on a rental contract. After judgment, the defendant, pursuant to section 117.10 of the Code of Civil Procedure, sought a trial de novo in the superior court and demanded a jury trial. *See* CAL. CIV. PROC. CODE § 117.10 (West 1982 & Supp. 1989); 2 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§ 243, 247 (3d ed. 1985 & Supp. 1988); 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 35 (3d ed. 1985). After denial by the superior court, the defendant sought a writ of mandamus from the court of appeal forcing the superior court to grant a jury trial. The writ was denied and the denial was affirmed by the supreme court.

The court was meticulous in affirming the court of appeal's decision. The court first outlined the small claims process and pointed out that this forum was created in order to expeditiously and inexpensively handle matters involving small sums of money. *See* CAL. CIV. PROC. CODE § 116.1 (West 1982 & Supp. 1989); 2 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§ 216, 230, 231 (3d ed. 1985 & Supp. 1988); 16 CAL. JUR. 3D *Courts* §§ 141-153 (1983 & Supp. 1988). The court further noted that the means used to achieve this goal must be informal. *See* CAL. R. CT. 155; CAL. CIV. PROC. CODE § 117.10 (West 1982 & Supp. 1989). The court further noted that the desire for a quick and inexpensive process necessarily meant there would be no jury trials at the small claims level. After establishing this foundational premise, the court, eager to maintain consistency throughout the small claims process, relied on three arguments for denying jury trials in small claims proceedings.

First, the court examined the language of the small claims statute and noted the legislative purpose never expressly provided for a jury trial in small claims appeals. The court conceded that the legislature

possessed the power to provide for jury trials but to do so would run contrary to the informal atmosphere of the small claims process. *See* CAL. CIV. PROC. CODE § 117(a) (West 1982 & Supp. 1989); 2 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* § 236 (3d ed. 1985). Moreover, the court stated that small claims appeals are to be governed by the same provisions that govern small claims actions at the trial level. *See* CAL. CIV. PROC. CODE § 904.5 (West 1980); 5 CAL. JUR. 3D *Appellate Review* § 816 (1973 & Supp. 1988). The court determined that the same efficient informal guidelines that govern small claim trials should also be used at de novo proceedings.

After clarifying the language of the small claims statute, the court moved to its second line of reasoning, denying that a small claims defendant had a constitutional right to a jury trial. *See* CAL. CONST. art. I, § 16. In considering the argument that the state constitution affords the right to a jury trial for a small claims appeal, the court established its position by relying on purely historical grounds. While conceding that the language of article I, section 16 seemed all encompassing, the court was quick to explain that the constitutional right to a jury trial pertained only to civil actions at law as they existed when the constitution was first adopted. Proceeding from this premise, the court was unable to find the instant action as one that existed when the state constitution was adopted or as a contemporaneous counterpart. The court viewed the case as a modern proceeding, and as such, determined no right existed.

The final segment of the court's analysis dealt with whether a statutory right to a jury trial existed under the rubric of section 592 of the Code of Civil Procedure. *See* CAL. CIV. PROC. CODE § 592 (West 1976 & Supp. 1989); 2 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* § 247 (3d ed. 1985); 41 CAL. JUR. 3D *Jury* § 5 (1978 & Supp. 1988). The court again considered this statutory question in a historical context. The court agreed that while it seems that section 592 affords the defendant a right to a jury trial, it is important not to expand the statute beyond its historical parameters, established in 1874, when section 592 was adopted. During an elaborate historical discussion, the court concluded that the 1874 amendment did not establish a new concept, but merely perpetuated the denial of juries to actions involving small sums of money. *See* CAL. CIV. PROC. CODE § 592 (West 1976 & Supp. 1989).

The court noted that the small claims court system was established to provide poor plaintiffs with small claims a forum in which to redress wrongs quickly and efficiently. By refusing jury trials, the

court has maintained the expeditious aspect of the small claims process and has preserved the informal spirit of this forum, thereby perpetuating its effectiveness.

JOHN AUGUSTINE SOPUCH III

B. *A civil statute which affects antecedent rights will operate prospectively unless the legislature or the electorate has specifically expressed a contrary intent:* **Evangelatos v. Superior Court.**

In *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629 (1988), the principle issue addressed by the California Supreme Court was whether the Fair Responsibility Act of 1986, commonly known as Proposition 51, was to be applied retroactively or prospectively. In reversing the court of appeal's decision, the court found that neither the legislature nor the electorate had expressed a discernible intent that the statute was to operate retroactively. Therefore, Proposition 51 is only applicable to actions that accrue subsequent to its enactment. *Id.* at 1226-27, 753 P.2d at 611, 246 Cal. Rptr. at 655.

Proposition 51 modified the traditional rule of joint and several liability. *See* CAL. CIV. CODE §§ 1431-1431.5 (West Supp. 1989) (Proposition 51 was approved by the electorate on June 3, 1986.). Under Proposition 51, joint and several liability applies to economic damages, including medical expenses and loss of earnings. However, several liability applies to noneconomic damages, including awards for pain and suffering. Therefore, each defendant is liable only for the portion of the noneconomic damages which are commensurate with their degree of fault. *Id.; see also* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 51-54 (9th ed. 1988).

In reaching its determination that Proposition 51 should not be applied retroactively, the court first examined the general principle of statutory interpretation that unless a contrary intent is expressed, a statute shall operate prospectively. This principle has been accepted by both the United States Supreme Court and the California courts. *See United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) (quoting *Union Pacific R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)); *Aetna Casualty & Sur. Co. v. Industrial Accident Comm'n*, 30 Cal. 2d 388, 393, 182 P.2d 159, 161 (1947); *see also*, 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 495-496 (9th ed. 1988). In *Security Industrial*, the United States Supreme Court stated that a statute which affects antecedent rights should not operate retroactively unless the legislature has specifically expressed a contrary intent. *Security Industrial*, 459 U.S. at 79 (citing *Union*

Pacific, 231 U.S. 190, 199 (1913)). Furthermore, in *DiGenova v. State Board of Education*, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962), the California Supreme Court held that "no statute is to be given retroactive effect unless the Legislature has expressly so declared . . . ." *Id.* at 174, 367 P.2d at 868, 18 Cal. Rptr. at 372.

In addition, the court noted that section 3 of the Civil Code provides that "[n]o part of it [the Civil Code] is retroactive, unless expressly so declared." CAL. CIV. CODE § 3 (West 1982). Section 3 is in accord with other California Codes which also favor a prospective application of statutory amendments. *See, e.g.*, CAL. CIV. PROC. CODE § 3 (West 1982); CAL. LAB. CODE § 4 (West 1971); CAL. PENAL CODE § 3 (West 1984). Furthermore, this rule of statutory construction has been embraced by a vast majority of jurisdictions. *See* 82 C.J.S. *Statutes* § 414 (1953 & Supp. 1988). The court concluded that civil statutes, such as Proposition 51, cannot apply to cases which were filed prior to its enactment unless there is an express retroactive provision or a retroactive intent on the part of the legislature of the electorate that can be derived from extrinsic sources. *Evangelatos*, 44 Cal. 3d at 1209-10, 753 P.2d at 598-99, 246 Cal. Rptr. at 642-43.

The defendants' principal contention was that both the drafters and the electorate intended for Proposition 51 to apply retroactively. The court first found that there was no evidence that the issue of retroactivity was consciously considered during the enactment process. *Id.* at 1211, 753 P.2d at 599-600, 246 Cal. Rptr. at 643. The court then noted that Proposition 51 is similar to the Medical Injury Compensation Reform Act of 1975 (MICRA) which was a significant tort reform initiative in the medical malpractice area. Following the enactment of MICRA, two separate panels of the court of appeal held the statute operative prospectively. *See Bolen v. Woo*, 96 Cal. App. 3d 944, 958-59, 158 Cal. Rptr. 454, 462-63 (1979); *Robinson v. Pediatric Affiliates Medical Group*, 98 Cal. App. 3d 907, 912, 159 Cal. Rptr. 791, 794 (1979). The court concluded, based on the decisions in *Bolen* and *Robinson*, that if the drafters had intended the statute to apply retroactively they would have expressly stated such a provision in the initiative. *Evangelatos*, 44 Cal. 3d at 1211-12, 753 P.2d at 600, 246 Cal. Rptr. at 644.

Furthermore, the court rejected the defendants' contention that the electorate had intended the initiative to operate retroactively. The court concluded that there was no reliable basis from which the intent of the electorate could be ascertained. *Id.* at 1212, 753 P.2d at 601, 246 Cal. Rptr. at 644. The court also rejected the defendants' ar-

gument that the remedial nature of Proposition 51 is evidence that the electorate intended the initiative to operate retroactively. The court reasoned that most statutory changes are enacted to improve a pre-existing situation and, therefore, the defendant's contention was flawed because it would result in nearly every statutory amendment operating retroactively. *Id.* at 1213, 753 P.2d at 601, 246 Cal. Rptr. at 645. This would be in direct conflict with the general principle set forth in section 3 of the Civil Code which favors the presumption that statutes apply prospectively. CAL. CIV. CODE § 3 (West 1982). Therefore, the court held that the defendants' contention that the electorate had intended the initiative to operate retroactively could not be substantiated. *Id.* at 1218, 753 P.2d at 604-05, 246 Cal. Rptr. at 648.

The defendants' next contention was that because Proposition 51 was adopted to address the liability insurance crisis, the court should infer that the electorate intended the statute to operate retroactively. The defendants argued that if the statute is applied prospectively, the primary purpose of the initiative would not immediately be effectuated. The court concluded that the defendant's contention was incorrect because insurance premiums are calculated based upon the damages that the insurance company anticipates it will incur during the period the specific policy is in force. Since Proposition 51 would reduce the amount of damages an insurer would be liable for in tort actions which accrued after the statute was enacted, the class of insured persons and entities would receive an immediate benefit in the form of lower premiums. Furthermore, the court noted that premiums charged prior to the enactment of Proposition 51 were calculated based on the assumption that insurers would incur greater liability under the system of joint and several liability. Thus, the court reasoned that insurance companies would receive a windfall if the statute was applied retroactively. The court refused to infer that the electorate intended the statute to operate retroactively. *Id.* at 1219-21, 753 P.2d at 605-07, 246 Cal. Rptr. at 647-51.

The defendants' final contention was that the weight of authority in California favored a retroactive application of civil statutes. They relied on a line of cases in which a statutory amendment which modified the legal measure of damages was applied retroactively. *See Tulley v. Tranor*, 53 Cal. 274, 279-80 (1878); *see also Stout v. Turney*, 22 Cal. 3d 718, 727, 586 P.2d 1228, 1233, 150 Cal. Rptr. 637, 642 (1978); *Feckenscher v. Gamble*, 12 Cal. 2d 482, 499-500, 85 P.2d 885, 893 (1938). The major flaw in the defendants' argument was that *Tulley* and its progeny address the issue of whether the legislature had the power to apply an amendment retroactively, the statutory interpretation question raised in *Evangelatos*. Therefore, the court concluded that the general principle that statutes operate prospectively unless a con-

trary intent is expressed is unaffected by *Tulley* and its progeny. *Evangelatos*, 44 Cal. 3d at 1224, 753 P.2d at 609, 246 Cal. Rptr. at 653.

Justice Kaufman vigorously dissented, stating that the intent of the electorate was for Proposition 51 to be applied as soon and as broadly as possible; therefore, the statute should be applied retroactively. *Evangelatos*, 44 Cal. 3d at 1227, 1232, 753 P.2d at 617, 620, 246 Cal. Rptr. at 661, 664; *see Fox v. Alexis*, 38 Cal. 3d 621, 629, 699 P.2d 309, 314, 214 Cal. Rptr. 132, 137 (1985); *In re Marriage of Bouquet*, 16 Cal. 3d 583, 587, 546 P.2d 1371, 1373, 28 Cal. Rptr. 427, 429 (1976); *In re Estrada*, 63 Cal. 2d 740, 746, 408 P.2d 948, 952, 48 Cal. Rptr. 172, 176 (1965).

Justice Kaufman contended that two factors, the "history of the times" and the "evils to be remedied" are extremely relevant in determining the electorate's intent as to whether Proposition 51 should be applied retroactively. He noted that the initiative was conceived in response to a "liability crisis" which plagued both private individuals and entities throughout the State of California. He also noted that sixty-two percent of the electorate voted for the initiative. Furthermore, Justice Kaufman stressed that Proposition 51 was designed to remedy the inequitable and unjust system of joint and several liability which was resulting in catastrophic economic consequences and compromised various municipalities' ability to provide essential public services. *Evangelatos*, 44 Cal. 3d at 1231-32, 753 P.2d at 619-20, 246 Cal. Rptr. at 663-64. Justice Kaufman concluded that the electorate voted for immediate relief from the crisis situation which existed and could be effectuated only by a retroactive application of Proposition 51. *Id.* at 1232-33, 753 P.2d at 620, 246 Cal. Rptr. at 664.

Although Justice Kaufman raised some excellent arguments, the intent of the drafters and the electorate cannot be conclusively ascertained as to whether the statute should apply retroactively. The holding in *Evangelatos* should send out a clear message to initiative drafters that if they intend a statute to operate retroactively, a clear and unambiguous statement of such an intent must be embodied in the proposition.

RONALD PAUL SCHRAMM

II. CONSTITUTIONAL LAW

A. *The citizen's constitutional right to initiative is limited when the legislature, acting on an issue of statewide importance, vests authority in city or county officials:* Committee of Seven Thousand v. Superior Court.

In *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988), the supreme court declared invalid an initiative containing enough signatures to qualify for the ballot. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 85 (8th ed. 1974 & Supp. 1984); 38 CAL. JUR. 3D *Initiative and Referendum* § 65 (1977). In response to a proposed imposition of fees and taxes to construct three "transportation corridors," Irvine citizens sought to restrain the city council from such action without prior electorate approval. The nonprofit group supporting the petition asserted a denial of their right to initiative as guaranteed by the California Constitution. *See* CAL. CONST. art. II, § 11; *see also* 38 CAL. JUR. 3D *Initiative and Referendum* §§ 1-2 (1977).

The court construed the initiative power narrowly and held it can be legislatively denied when issues of "statewide" consequence are raised which contradict state law. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 87 (8th ed. 1974 & Supp. 1984). To justify this conclusion, the court addressed whether the initiative conflicted with any state law and whether it involved a matter of statewide import.

As to the first issue, the proposal gave the people the right to veto local government decisions imposing taxes and fees for highway construction. However, section 66484.3 of the Government Code [section 66484.3] expressly gives Orange County city councils the right to raise highway funds through additional taxes and fees. CAL. GOV'T CODE § 66484.3 (West Supp. 1989). The plaintiffs argued that the statute's specific reference to "city council" did not necessarily suggest an intent to preempt the electorate's involvement. However, the court rejected this contention, inferring such a legislative intent. Moreover, the court found that the legislature's use of specific terms, such as "city council," as opposed to a general reference to "local government," reinforced this conclusion. The court considered this interpretation justified in light of the statewide importance of the statute.

The issue thus centered on whether section 66484.3 was, in fact, a statute of statewide import. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 87 (8th ed. 1974 & Supp. 1984). The court, reasoning that even regional interests can constitute "statewide concerns," concluded that freeways and highways are a recognized state concern. *See* CAL. STS. & HIGH. CODE § 300 (West

Supp. 1989). Since cities could not realistically build freeways without involving other municipalities, the court reasoned that the initiative affected not merely local issues, but regional concerns as well.

Noting the statewide importance of the statute and the initiative's contravention of the statute's intent, the court invalidated the initiative. The court expressly emphasized that this result did not violate the home rule guarantee to charter cities, nor the state constitution. *See* 56 AM. JUR. 2D *Municipal, Corporations, Counties & Other Political Subdivisions* § 98 (1971); 45 CAL. JUR. 3D *Municipalities* §§ 99-113 (1978).

The court reasoned that a revocation of the right to initiative could be justified without finding the local government's action to be "administrative." *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 88 (8th ed. 1974 & Supp. 1984); 38 CAL. JUR. 3D *Initiative and Referendum* §§ 3-4 (1977). Prior to *Committee of Seven Thousand*, the legislature could bar an initiative only where the proposed municipal action could be interpreted as administrative. *See Hughes v. City of Lincoln*, 232 Cal. App. 2d 741, 745, 43 Cal. Rptr. 306, 309 (1965).

The court's decision was predictable in light of California's transportation problems. However, the decision is disturbing since the court disregarded the principle that doubts in statutory construction are to be resolved in favor of the right to initiative. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976); *see also* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 68(3) (8th ed. 1974); 38 CAL. JUR. 3D *Initiative and Referendum* § 65 (1977). Faced with two conflicting mandates, one borne of statute and the other borne of the constitution and common law, the court dangerously gave more weight to an admittedly ambiguous statute.

MICHELLE R. ANDERSON

B. *Article V, section 5, subdivision (b) of the California Constitution, which sets forth the procedure for filling vacancies in high-level state offices, establishes that a candidate is not acceptable if either house rejects the nomination:* **Lungren v. Deukmejian.**

In *Lungren v. Deukmejian*, 45 Cal. 3d 727, 755 P.2d 299, 248 Cal. Rptr. 115 (1988), the court held that confirmation of a nominee for State Treasurer under article V, section 5(b) of the California Consti-

tution (section 5(b)), requires acceptance by both state houses, or alternatively, a failure by either or both to act upon the nomination within ninety days of its submittal. Should either house reject the nominee, the nomination is deemed refused and the Governor must put forth another candidate. *See* CAL. CONST. art. V, § 5(b). The court concurred with the respondents (the Attorney General and the Senate) that a more expansive interpretation of the section would "seriously degrade the power and dignity of one house of the Legislature in the confirmation process." *Lungren*, at 738, 755 P.2d at 306, 248 Cal. Rptr. at 122.

Section 5(b) states in pertinent part:

> Whenever there is a vacancy in the office of the . . . Treasurer, . . . the Governor shall nominate a person to fill the vacancy who shall take office upon confirmation by a majority of the membership of the Senate and a majority of the membership of the Assembly [first sentence]. In the event the nominee is *neither confirmed nor refused confirmation* by both the Senate and the Assembly within 90 days of the submission of the nomination, the nominee shall take office as if he or she had been confirmed by a majority of the Senate and Assembly . . . [second sentence].

CAL. CONST. art. V, § 5(b) (1966) (amended 1976) (emphasis added).

On February 25, 1988, the California Legislature voted to confirm the nomination of Congressman Daniel Lungren as State Treasurer. The Senate, however, rejected the nomination. Although Governor Deukmejian held that confirmation by one house was sufficient under section (b) to legitimize Lungren's confirmation, he did not allow Lungren to assume office fearing possible adverse consequences on the sale of state bonds if a legal battle ensued.

Lungren filed an original petition for a writ of mandate with the supreme court, alleging that he had satisfied all the legal requirements under section 5(b) to become State Treasurer. He asserted that if the second sentence was read in light of its "plain meaning," then unless both houses voted to *reject* the nomination, a nominee was deemed confirmed ninety days after his nomination was submitted to the legislature.

The court first addressed respondents' claim that Lungren's status as a Congressman precluded mandate since he did not have a present interest in the office of treasurer. *See* CAL. CONST. art. VII, § 7; *see also McCoy v. Board of Supervisors*, 18 Cal. 2d 193, 196, 114 P.2d 569, 571 (1941). The court agreed with the respondents, holding that even if Lungren resigned as Congressman and the court held in his favor, he did not have a present right to hold the office of treasurer. The court decided to exercise original jurisdiction, however, because of the adverse effect a prolonged dispute might have on the marketability of state bonds; the court also considered it was in the public's interest to have the dispute resolved expeditiously. *See Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 570, 488 P.2d 1, 3, 96 Cal. Rptr. 697, 699 (1971).

In addressing the "plain meaning" issue, the court agreed that if the second sentence was read literally it might lead to the expansive interpretation asserted by Lungren. However, the court held that individual sentences of a statute must be read in context with the other provisions of the statute in order to ascertain their true meaning. *See Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379, 1386-87, 743 P.2d 1323, 1326, 241 Cal. Rptr. 67, 70 (1987).

In discounting Lungren's assertion, the court determined that the first sentence was the main premise of the section (i.e., both houses of the legislature must confirm a nominee) and that the second sentence was a proviso (i.e., a limitation on the operation of the first sentence). The court said the only effect of the second sentence was to prevent the legislature from rejecting a nominee by failing to vote on the nomination within ninety days after its submittal. Therefore, the court held that Lungren's interpretation of the second sentence was unreasonably expansive, for not only would it eviscerate the first sentence, but confirmation by one house would render the rejection by the other house a nullity—a proposition totally inopposite to a bicameral legislature. *See* CAL. CONST. art. IV, § 1; 72 AM. JUR. 2D *States, Territories and Dependencies*, § 40 (1974); 42 CAL. JUR. 3D *Legislature*, § 1 (1978 & Supp. 1988).

The court also relied on legislative history, including a discussion of the twenty-fifth amendment upon which section 5 was based. U.S. CONST. amend. XXV, § 2. Additionally, statements by both opponents and proponents of section 5(b) proved that those who voted on the section believed that "disapproval by either house would result in rejection of the nomination, requiring the governor to submit another nominee to fill the vacancy." *Lungren*, 45 Cal. 3d at 741, 755 P.2d at 308, 248 Cal. Rptr. at 124. The court concluded that only this interpretation, and not Lungren's, was "consistent with the voters' intention in adopting section 5(b). *Id.* at 743, 755 P.2d at 309, 248 Cal. Rptr. at 126.

Lungren is limited to those rare situations where vacancies in the executive branch are filled by nominees appointed by the governor. However, the expeditious manner in which *Lungren* was decided indicates its true importance: the question of who is State Treasurer is resolved and the marketing of California bonds can continue without the threat of legal intervention.

DANIEL RHODES

III. CRIMINAL PROCEDURE

A. *Regardless of a defendant's subsequent actions following a bargained-for guilty plea, the court must allow the defendant to withdraw his plea if it intends not to abide by the sentencing terms of the plea bargain:* **People v. Cruz.**

In *People v. Cruz*, 44 Cal. 3d 1247, 752 P.2d 439, 246 Cal. Rptr. 1 (1988), the California Supreme Court held that a defendant who does not appear for sentencing is entitled to withdraw his bargained-for plea if the court decides not to abide by the sentencing terms of the plea bargain. *See* CAL. PENAL CODE § 1192.5 (West 1982). The court indicated that separate sanctions were available against the nonappearing defendant under sections 1320 and 1320.5 of the Penal Code. CAL. PENAL CODE §§ 1320, 1320.5 (West Supp. 1989). The court reaffirmed its holding in *People v. Johnson*, 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974), where it stated that the legislative intent of Penal Code section 1192.5 was to allow the defendant the ability to change his plea regardless of the defendant's subsequent acts. The court also reaffirmed the First District Court of Appeal's decision in *People v. Morris*, 97 Cal. App. 3d 358, 158 Cal. Rptr. 722 (1979), which followed *Johnson*.

In *Cruz*, the defendant pled guilty under a plea bargain to felony possession of heroin and received a reduced sentence. The defendant was released on bail and failed to appear at the sentencing hearing. At a subsequent sentencing hearing following his apprehension, the trial court indicated that it would not follow the sentencing terms of the prior plea bargain. The court denied the defendant's motion to withdraw his guilty plea and imposed a sentence of two years in the state prison. The court of appeal affirmed pursuant to its earlier decision in *People v. Santos*, 171 Cal. App. 3d 67, 216 Cal. Rptr. 911 (1985) (following failure to appear, defendant not entitled to withdraw plea or have sentencing terms enforced). *See also* 21 CAL. JUR. 3D *Criminal Law* § 2824 (1985 & Supp. 1988).

Justice Broussard, writing the majority opinion, acknowledged that plea bargaining was a recognized practice in California. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 265A-265P (Supp. 1985); 21 AM. JUR. 2D *Criminal Law* § 504 (1981 & Supp. 1988). Broussard noted that the legislature specifically indicated in section 1192.5 that a defendant, after entering a plea of guilty or nolo contendere, "shall be permitted to withdraw his plea if he desires to do so." *See* CAL. PENAL CODE § 1192.5 (West 1982). He then discussed *Johnson* and its progeny, which interpreted section 1192.5 as clearly indicating the defendant's right to withdraw his plea regardless of his subsequent conduct. *See, e.g., In re Lunceford*, 191 Cal. App. 3d 180,

236 Cal. Rptr 274 (1987); *People v. Rodriguez*, 191 Cal. App. 3d 1566, 237 Cal. Rptr. 137 (1987); *In re Falco*, 176 Cal. App. 3d 1161, 222 Cal. Rptr. 648 (1986); *People v. Haskins*, 171 Cal. App. 3d 344, 214 Cal. Rptr. 685 (1985); *People v. Morris*, 97 Cal. App. 3d 358, 158 Cal. Rptr. 722 (1979).

In *Morris*, the First District Court of Appeal applied *Johnson* where the defendant intentionally failed to appear for his sentencing hearing. The *Morris* court held that section 1192.5 and *Johnson* mandated that the defendant be allowed to withdraw his plea regardless of the defendant's intent or actions, if the trial court subsequently decided not to abide by the terms of the plea bargain.

In *Cruz*, the California Supreme Court specifically overruled *Santos* and its progeny, indicating that those decisions do not correctly follow the legislative mandate in section 1192.5 or the *Johnson* line of cases. Thus, in reversing both the trial and appellate court decisions, the supreme court held that section 1192.5 clearly allows a defendant to withdraw his plea of guilty or nolo contendere, regardless of his subsequent actions, if the trial court intends not to abide by the sentencing terms.

ERNEST F. BATENGA

B. *Disclosure of raw evidentiary materials gathered by a grand jury during a secret watchdog investigation is fundamentally inconsistent with legislative parameters of proper grand jury reporting:* McClatchy Newspapers v. Superior Court.

In *McClatchy Newspapers v. Superior Court*, 44 Cal. 3d 1162, 751 P.2d 1329, 245 Cal. Rptr. 774 (1988), the California Supreme Court held that the Fresno Superior Court acted appropriately when it struck a proposed grand jury report announcing its intended disclosure and subsequently sealed the transcripts, analyses, and summaries of testimony and documentary exhibits. The court found that these steps were not only necessary, but vital in maintaining secrecy, an element "central" to the effective function of the grand jury in California.

The court reiterated three well-established grand jury functions: (1) to consider charges of criminal conduct and determine whether or not to return an indictment, CAL. PENAL CODE § 917 (West 1985); (2) to weigh allegations of misconduct by public officials and determine whether or not to formally request them to be removed from office,

CAL. PENAL CODE § 922 (West 1985); and (3) to investigate and report on local government affairs as a public "watchdog," CAL. PENAL CODE § 919 (West 1985). Grand juries are generally afforded authority to investigate and report on county operations, allegations of willful or corrupt misconduct of public officers, housing, imprisonment of unindicted persons, prison conditions and salaries of county officials, among other subjects. *See* CAL. PENAL CODE §§ 914-927 (West 1985). It was the third enumerated function, that of a public watchdog, that was at-issue in *McClatchy*. The Fresno grand jury conducted an investigation of the county's award of a $1.37 million computer service contract to Systems and Computer Technology Corporation. After questioning 62 witnesses, and gathering voluminous amounts of testimonial and documentary evidence, no indictments were returned. However, upon urging by the district attorney, the grand jury proposed to publicly disclose raw evidence, including testimony transcripts, documents and other findings in their official report. The superior court disallowed the proposed disclosure as violative of Penal Code sections 939.1 and 939.9. CAL. PENAL CODE §§ 939.1, 939.9 (West 1985). These sections provide for the proper procedures to be followed by the grand jury in making their order.

The *McClatchy* court focused its reasoning upon the premise expounded in *People v. Superior Court (1973 Grand Jury)*, 13 Cal. 3d 430, 531 P.2d 761, 119 Cal. Rptr. 193 (1975). In *1973 Grand Jury*, the court held that superior courts are vested with the authority to refuse to file grand jury reports they consider improper. However, this authority is limited in order to afford grand juries the independence and autonomy necessary to be effective. Superior courts must respect this by not imposing its own sentiment upon the grand jury nor suppressing grand jury reports simply "because it considers it ill-advised, insufficiently documented or even libelous." *Id.* at 439, 531 P.2d at 766, 119 Cal. Rptr. at 198. The final report of a grand jury is the method by which it may make its recommendations known to the public at large; but notwithstanding the broad yet carefully defined powers granted by statute, the grand jury has no inherent investigatory powers beyond those statutorily granted. *Id.* at 437, 531 P.2d at 765, 119 Cal. Rptr. at 197. However, superior courts must retain the ability to withhold the publication of a report that goes beyond the scope of appropriate grand jury authority.

The California Legislature has set forth three circumstances where disclosure of raw evidentiary materials may be permissible: (1) to determine whether a witness's testimony is consistent with other testimony heard by the grand jury in perjury cases, CAL. PENAL CODE § 924.2 (West 1985); (2) to make transcripts of grand jury testimony available to the public ten days after the transcript has been delivered to the defendant, CAL. PENAL CODE § 938.1 (West 1986); and (3)

to disclose prior grand jury evidence to a succeeding grand jury, CAL. PENAL CODE § 924.4 (West 1985). However, in *McClatchy*, the court specifically stated: "There is no *explicit* statutory authority for the grand jury to disclose to the public raw, evidentiary materials as part of its final report in a watchdog investigation." *McClatchy* at 1178, 751 P.2d at 1338, 245 Cal. Rptr. at 783. Additionally, the court ratified the Fresno Superior Court's reliance on Penal Code section 939.9 (prohibiting the grand jury from making reports except those based on its own investigation) since disclosure of raw, evidentiary materials does not constitute a "report" based on the investigation; it is merely a "recitation" of evidence. *Id.* at 1180, 751 P.2d at 1334, 245 Cal. Rptr. at 784.

The court noted the historical and modern importance of *secrecy* in grand jury hearings and its manifestations, e.g., the oath that is given, the private and closed nature of the proceedings, and the prohibition of inspection of minutes of the meetings or subpoena of records. The court echoed the United States Supreme Court's policy of protecting grand jury secrecy in order to encourage witnesses to appear voluntarily, to testify fully and frankly, and to assure that persons accused, but eventually exonerated, will not be publicly scorned. *See, e.g., United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). Thus, the court extended the secrecy rationale by sanctioning the maintenance of secrecy after the grand jury investigations have ended. Maintaining secrecy, in both criminal indictment hearings and watchdog investigations, is of vital public interest since "eliciting candid testimony is obviously critical" to grand jury proceedings. *McClatchy*, 44 Cal. 3d at 1175, 751 P.2d at 1336, 245 Cal. Rptr. at 781.

The California Supreme Court rejected various arguments premised on the right of public access, free expression and the public's right to know under the California Constitution. First, the court refuted amicus curiae contentions that the California Public Records Act created a justification for the grand jury's disclosure since judicial agencies, established by article VI of the California Constitution are exempt from the Act. *See* CAL. CONST. art VI; CAL. GOV'T CODE §§ 6250-6265 (West 1980 & Supp. 1989). Although grand juries are *not* specifically enumerated in article VI, the court held that the judicial nature of grand juries and the important public interest in secrecy indicated legislative intent to exempt grand juries from the public access provision of the Act. *McClatchy*, 44 Cal. 3d at 1178, 751 P.2d at

1338, 245 Cal. Rptr. at 783. *See also 1973 Grand Jury*, 13 Cal. 3d 430, 438-39, 531 P.2d 761, 766, 119 Cal. Rptr. 193, 196 (1975).

Second, the court rejected amicus curiae contentions that grand jury reports are protected under the first amendment of the United States Constitution which guarantees freedom of expression. The court stated that "the grand jury is not a private body and its report is not an expression of private citizens' views; rather the grand jury is a governmental body and its official report, carrying the aura of a judicial pronouncement, is authorized only within established legal limits." *McClatchy*, 44 Cal. 3d at 1184, 751 P.2d at 1342, 245 Cal. Rptr. at 787.

Similarly, the court rejected as "unmeritous" the argument that article II, section I, of the California Constitution, creates an implicit right of the public "to know." The section states: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." CAL. CONST. art. II, § 1. The court noted that the people of the State of California have not, to date, asserted their right to compel disclosure of evidence gathered in grand jury proceedings. The court assumes that the reason is because of the policy the court itself discussed.

Superior courts may be assured that they have discretionary authority to refuse to file reports containing information that they feel is beyond the scope of proper reporting. California will continue to follow its prior decisions regarding grand jury secrecy and the Penal Code sections involved are quite clear on the parameters of grand jury investigation. *See* 38 AM. JUR. 2D *Grand Jury* §§ 1-41 (1968 & Supp. 1987); 38 C.J.S. *Grand Jury* §§ 1-47 (1943 & Supp. 1988); 20 CAL. JUR. 3D *Criminal Law* §§ 2656-2694 (1985 & Supp. 1988).

LISA ELANE SLATER

C. *Section 667.6(c) of the Penal Code, which increases the punishment for defendants convicted of certain sex offenses, does not amend section 654's ban against double punishment for multiple offenses based on the "same act or omission":* People v. Siko.

In *People v. Siko*, 45 Cal. 3d 820, 755 P.2d 294, 248 Cal. Rptr. 110 (1988), the court held that section 667.6(c) of the Penal Code (subdivision (c)), enacted to increase the punishment of people convicted of serious sex crimes, does not repeal Penal Code section 654's (section 654) prohibition against double punishment for multiple violations based on the "same act or omission." *See* CAL. PENAL CODE § 654 (West 1988); *see also* CAL. PENAL CODE § 667.6 (West 1988). The

court based its holding on the lack of legislative intent to amend the prohibition of double punishment. The court also found section 654 controlling, since subdivision (c) created no express exception for section 654.

Under subdivision (c), enacted in 1979, a full and consecutive term may be imposed for each violation of the Penal Code pertaining to certain serious sex offenses committed by force or violence "whether or not the crimes were committed during a single transaction." *See* CAL. PENAL CODE § 261(2)-(3) (West 1988) (rape); *see also* CAL. PENAL CODE § 264.1 (West 1988) (rape, sodomy); CAL. PENAL CODE § 286 (West 1988) (sodomy punishment); CAL. PENAL CODE § 288(a)-(b) (West 1988) (lewd and lascivious acts with child under 14); CAL. PENAL CODE § 289 (West 1988) (sodomy). In conflict with subsection (c) is section 654. Originating in 1872, this section prohibits the imposition of consecutive sentences for a single act or omission, even though the act or omission violates many provisions of the Penal Code. *See* 22 CAL. JUR. 3D *Criminal Law* § 3358 (1985 & Supp. 1988).

The defendant, Siko, was a sixteen-year-old boy who raped and sodomized a nine-year-old girl. He was charged with forcible lewd and lascivious conduct with a child under the age of 14 involving sexual conduct (CAL. PENAL CODE § 288(b)); forcible rape (CAL. PENAL CODE § 261(2)); forcible sodomy (CAL. PENAL CODE § 286(c)); and assault with force likely to produce great bodily injury (CAL. PENAL CODE § 245(a)(1)). The defendant was convicted on all four counts, receiving sentences of three years for the assault charge pursuant to subdivision (c), and six years for each of the three sexual offenses. Conceding that the three sexually-related convictions were appropriate, Siko contended that since he had committed only two criminal acts, the three consecutive sentences violated section 654's ban against multiple punishment. *See* 21 AM. JUR. 2D *Criminal Law* § 551 (1981 & Supp. 1988).

The court agreed with the defendant that the lewd and lascivious conduct for which he had been convicted consisted of the rape and sodomy, and that he had been sentenced for three violations of the Penal Code even though he had committed only two criminal acts. To determine whether the sentences were valid, the court first had to determine whether section 654 or subsection (c) was controlling. The court first noted that, since 1962, section 654 had been interpreted as allowing multiple *convictions* stemming from a single act or omission but banning multiple *punishment* for those convictions. *See People v. Pearson*, 42 Cal. 3d 351, 359-61, 721 P.2d 595, 599-601, 228 Cal. Rptr.

509, 514-16 (1986); *People v. McFarland*, 58 Cal. 2d 748, 762-63, 376 P.2d 449, 455-56, 26 Cal. Rptr. 473, 479-80 (1962). The court stated:

> [I]f a person rapes a thirteen-year-old, he can be convicted of both rape and lewd conduct with a child on the basis of that single act, but he cannot be punished for both offenses; execution of the sentence for one of the offenses [under 654] must be stayed.

Siko, 45 Cal. 3d at 823, 755 P.2d at 296, 248 Cal. Rptr. at 112 (citation omitted).

The court next examined the legislative history of subsection (c) to resolve whether, by adopting the subsection, the legislature had repealed, either expressly or by implication, the prohibition of section 654 against multiple punishment for the same act. As the court failed to find in subsection (c) an express intent to repeal the prohibition of double punishment, it concluded that the requisite intent must be implied. *See* 73 AM. JUR. 2D *Statutes* §§ 300-302 (1974 & Supp. 1988); 58 CAL. JUR. 3D *Statutes* §§ 100-109 (1980). However, the court believed that repeal by implication was disfavored generally, especially where section 654 had been a staunch legal principle for over a century; if the legislature had intended to overrule the century-old ban against multiple punishment, subsection (c) would have been explicit. *See People v. Greer*, 30 Cal. 2d 589, 603, 184 P.2d 512, 520 (1947).

Finally, the court discredited the State's theory that consecutive sentencing for the same act was valid, absent express language to the contrary. Rules of statutory construction presume that unless another statute expressly exempts itself, section 654 governs in every applicable case. *See People v. Milan*, 9 Cal. 3d 185, 196-197, 507 P.2d 956, 963, 107 Cal. Rptr. 68, 75 (1973) (section 654 bans multiple punishment in many situations, not only when the criminal is subject to it).

This opinion illustrates a major function of the state supreme court: the determination of a statute's meaning by statutory construction and findings of legislative intent. Here, the court effectively limits subdivision (c)'s power to impose multiple punishments for convictions arising out of applicable sex offenses. To circumvent section 654, the State will now have to establish sufficient independent facts for each Penal Code violation arising out of a single act or omission if it is to secure multiple convictions and punishments for those violations.

DANIEL RHODES

IV. DEATH PENALTY

This section provides an analysis of the California Supreme Court's automatic review of cases imposing the death penalty. Rather than a case-by-case approach, this section focuses on the key issues under review by the court and notes trends and shifts in the court's rationale.

I. INTRODUCTION

Between April and June, 1988, the California Supreme Court decided nineteen death penalty cases.[1] Of these, the court reversed only two death sentences.[2] In contrast, during the tenure of Chief Justice Rose Bird, the court upheld the death penalty in only four of sixty-eight decisions.[3] The Lucas court's interpretation and application of the harmless error rule is of particular note.

In *People v. Dyer*,[4] Chief Justice Lucas stated:

1. People v. Ainsworth, 45 Cal. 3d 984, 755 P.2d 1017, 248 Cal. Rptr. 568 (1988), *cert. denied*, 57 U.S.L.W. 3487 (1989); People v. Babbitt, 45 Cal. 3d 660, 755 P.2d 253, 248 Cal. Rptr. 69 (1988), *cert. denied*, 57 U.S.L.W. 3471 (1989); People v. Belmontes, 45 Cal. 3d 744, 755 P.2d 310, 248 Cal. Rptr. 126 (1988), *cert. denied*, 57 U.S.L.W. 3471 (1989); People v. Dyer, 45 Cal. 3d 26, 753 P.2d 1, 246 Cal. Rptr. 209, *cert. denied*, 109 S. Ct. 330 (1988); People v. Grant, 45 Cal. 3d 829, 755 P.2d 894, 248 Cal. Rptr. 444 (1988), *cert. denied*, 57 U.S.L.W. 3487 (1989); People v. Guzman, 45 Cal. 3d 915, 755 P.2d 917, 248 Cal. Rptr. 467 (1988), *cert. denied*, 57 U.S.L.W. 3487 (1989); People v. Hamilton, 45 Cal. 3d 351, 753 P.2d 1109, 247 Cal. Rptr. 31 (1988), *cert. denied*, 57 U.S.L.W. 3485 (1989); People v. Heishman, 45 Cal. 3d 147, 753 P.2d 629, 246 Cal. Rptr. 673, *cert. denied*, 109 S. Ct. 380 (1988); People v. Lucky, 45 Cal. 3d 259, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988), *cert. denied*, 57 U.S.L.W. 3471 (1989); People v. Milner, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988); People v. Odle, 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137, *cert. denied*, 109 S. Ct. 275 (1988); People v. Poggi, 45 Cal. 3d 306, 752 P.2d 1082, 246 Cal. Rptr. 886 (1988); People v. Rich, 45 Cal. 3d 1036, 755 P.2d 960, 248 Cal. Rptr. 510 (1988), *cert. denied*, 57 U.S.L.W. 3487 (1989); People v. Robbins, 45 Cal. 3d 867, 755 P.2d 355, 248 Cal. Rptr. 172 (1988), *cert. denied*, 57 U.S.L.W. 3471 (1989); People v. Silva, 45 Cal. 3d 604, 754 P.2d 1070, 247 Cal. Rptr. 573 (1988), *cert. denied*, 57 U.S.L.W. 3453 (1989); People v. Siripongs, 45 Cal. 3d 548, 754 P.2d 1306, 247 Cal. Rptr. 729 (1988), *cert. denied*, 57 U.S.L.W. 3453 (1989); People v. Thompson, 45 Cal. 3d 86, 753 P.2d 37, 246 Cal. Rptr. 245 (1988), *cert. denied*, 109 S. Ct. 404 (1989); People v. Warren, 45 Cal. 3d 471, 754 P.2d 218, 247 Cal. Rptr. 172 (1988); People v. Williams, 44 Cal. 3d 1127, 751 P.2d 901, 245 Cal. Rptr. 635, *cert. denied*, 109 S. Ct. 514 (1988) [hereinafter subsequent history omitted].

2. People v. Milner, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988); People v. Warren, 45 Cal. 3d 471, 754 P.2d 218, 247 Cal. Rptr. 172 (1988).

3. Rose Elizabeth Bird was Chief Justice from March 26, 1977, until January 5, 1987. The four cases which affirmed the death penalty during her tenure are People v. Allen, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986); People v. Fields, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983); People v. Harris, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981); People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1981). In 1986, the California electorate removed Chief Justice Bird and Justices Grodin and Reynoso from the bench.

4. 45 Cal. 3d 26, 753 P.2d 1, 246 Cal. Rptr. 209 (1988).

> [T]he harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, [citation], and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.[5]

The Bird court rarely found any error in capital cases, particularly instructional error, to be harmless.[6] The Lucas court, on the other hand, applies a harmless error analysis pursuant to *Chapman v. California*[7] and *Rose v. Clark*,[8] allowing the court to affirm the death penalty in most instances.[9] In *People v. Odle*,[10] Chief Justice Lucas stated that "under provisions of the California Constitution . . . reversal is required only if prejudice results from the error."[11] Chief Justice Lucas recently stated: "We believe we have made substantially accurate law in the death penalty field."[12]

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5. *Id.* at 47, 753 P.2d at 11, 246 Cal. Rptr. at 220 (citing Delaware v. Arsdall, 475 U.S. 673, 681 (1986)). *See also* TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

6. *See* Erler & Vincent, *The California Supreme Court and the Death Penalty*, 2 BENCHMARK 143 (1986) (critique of the Bird Court's approach to harmless error in capital cases); Note, *California Supreme Court Survey: Death Penalty*, 13 PEPPERDINE L. REV. 1127-52 (1986) (survey of twelve death penalty cases under the Bird court all reversed for error).

7. 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). *See also* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[W]e have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

8. 478 U.S. 570, 578 (1986) ("We have emphasized . . . that while there are some errors to which *Chapman* does not apply, they are the exception and not the rule.").

9. *See, e.g.*, People v. Odle, 45 Cal. 3d 386, 410-16, 754 P.2d 184, 197-201, 247 Cal. Rptr. 137, 150-55 (1988). *See* TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740 (1987); Note, *Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U.L. REV. 1095, 1107-13 (1980); *see generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 193-197, 739-769 (1963 & Supp. 1985). 22 CAL. JUR. 3D *Criminal Law* §§ 3769-3778 (1985 & Supp. 1988).

10. 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137 (1988).

11. *Id.* at 415, 754 P.2d at 200, 247 Cal. Rptr. at 154. Chief Justice Lucas stated the test of prejudice pursuant to People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 255 (1956), is:

> whether it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error . . . . The *Watson* test conforms to and satisfies the command of article VI, section 13, of the California Constitution that '[n]o judgment shall be set aside, or new trial granted, *in any cause*, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'

Odle, 45 Cal. 3d at 415, 754 P.2d at 200-01, 247 Cal. Rptr. at 154 (emphasis added).

12. L.A. Times, Oct. 5, 1988, § 1, at 1, col. 2 (response at press conference while emphasizing that no capital decision of the Lucas court had been overruled by the United States Supreme Court).

II. GUILT-PHASE ISSUES

Of the nineteen death penalty cases decided between April and June, 1988, the California Supreme Court unanimously resolved every guilt-phase issue against the defendant. The facts of these cases were particularly egregious, and the evidence against the various defendants was overwhelming.[13] The issues raised by the defendants included denial of various pre-trial motions;[14] denial of a representative or impartial jury;[15] denial of a vicinage jury;[16] im-

13. For example, in People v. Odle, 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137 (1988), the defendant, on parole after being convicted of armed robbery and auto theft, bludgeoned his girlfriend with a tire iron in the presence of a friend. Because the victim survived the initial attack, the defendant then repeatedly stabbed her in the chest. Two days later, after stealing a pickup truck to flee to the Sierra Nevada foothills, the defendant shot and killed one of two officers attempting to arrest him. In People v. Silva, 45 Cal. 3d 604, 754 P.2d 1070, 247 Cal. Rptr. 573 (1988), the defendant and two accomplices abducted a young couple returning to college. The defendant shot the young man between 32 and 64 times with a machine gun, and then instructed an accomplice to chop the body into at least 10 pieces for disposal. All three men raped the young woman, two of them repeatedly, over a period of five days. The defendant then disposed of the woman's body after shooting her in the head. Both accomplices testified against the defendant, both bodies were recovered, and all of the murder weapons were admitted into evidence at trial. In People v. Rich, 45 Cal. 3d 1036, 755 P.2d 960, 248 Cal. Rptr. 510 (1988), the defendant was convicted of four counts of first degree murder, as well as seventeen other counts, including kidnapping, rape, and numerous sex crimes, all of which occurred within the same three-month period. After having led the police to two of the bodies he had "discovered," he failed a polygraph test. He then confessed numerous times in detail to the police and his friends.

14. People v. Ainsworth, 45 Cal. 3d 984, 1000-03, 755 P.2d 1017, 1026-28, 248 Cal. Rptr. 568, 577-79 (1988); People v. Lucky, 45 Cal. 3d 259, 275-78, 753 P.2d 1052, 1061-63, 247 Cal. Rptr. 1, 10-12 (1988); People v. Odle, 45 Cal. 3d 386, 401-04, 754 P.2d 184, 191-93, 247 Cal. Rptr. 137, 144-46 (1988) (motion to sever murder counts following consolidation pursuant to CAL. PENAL CODE § 954 (West 1988)); People v. Poggi, 45 Cal. 3d 306, 320-22, 753 P.2d 1082, 1090-92, 246 Cal. Rptr. 886, 894-96 (1988); People v. Rich, 45 Cal. 3d 1036, 1074-76, 755 P.2d 960, 983-85, 248 Cal. Rptr. 510, 534-35 (1988) (motion to change venue). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 21-22 (1963 & Supp. 1985); 20 CAL. JUR. 3D *Criminal Law* §§ 2344-2347 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.04(4) (Supp. 1988).

15. In Lockhart v. McCree, 476 U.S. 162 (1986), the United States Supreme Court rejected the contention that exclusion of jurors unalterably opposed to the death penalty denied the defendant a representative and impartial jury. The California Supreme Court had previously denied this contention. *See* People v. Anderson, 38 Cal. 3d 58, 60, 694 P.2d 1149, 1151, 210 Cal. Rptr. 777, 779 (1985); People v. Fields, 35 Cal. 3d 329, 342-53, 673 P.2d 680, 686-95, 197 Cal. Rptr. 803, 810-18 (1983); Hovey v. Superior Court, 28 Cal. 3d 1, 68, 616 P.2d 1301, 1346, 168 Cal. Rptr. 128, 173 (1980). The supreme court has refused to reexamine this holding on numerous occasions. *See* People v. Ainsworth, 45 Cal. 3d 984, 1007, 755 P.2d 1017, 1030-31, 248 Cal. Rptr. 568, 581 (1988); People v. Babbitt, 45 Cal. 3d 660, 679, 755 P.2d 253, 261, 248 Cal. Rptr. 69, 77 (1988); People v. Grant, 45 Cal. 3d 829, 848, 755 P.2d 894, 904, 248 Cal. Rptr. 444, 453 (1988); People v. Guzman, 45 Cal. 3d 915, 948-49, 755 P.2d 917, 936-37, 248 Cal. Rptr. 467, 487 (1988); People v. Thompson, 45 Cal. 3d 86, 120-21, 753 P.2d 37, 58, 246 Cal. Rptr. 245,

proper restrictions upon defense voir dire;[17] improper use of peremptory challenges by the prosecution attorney;[18] juror misconduct;[19] improper substitution of alternate jurors;[20] admissibility[21] and suffi-

266-67 (1988); People v. Warren, 45 Cal. 3d 471, 754 P.2d 218, 247 Cal. Rptr. 172 (1988). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 331, 398-405, 412 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law*, §§ 2998, 3004, 3009, 3020 (1985 & Supp. 1988); 22 CAL. JUR. 3D *Criminal Law*, § 3345 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE §§ 81.01(1), 87.05(1)(b) (Supp. 1988).

16. In People v. Guzman, 45 Cal. 3d 915, 755 P.2d 917, 248 Cal. Rptr. 467 (1988), the defendant argued that granting his attorney's motion for change of venue over his own objections denied him of a vicinage jury, which he contended was a fundamental right that could not be waived. *Id.* at 933, 755 P.2d at 926-27, 248 Cal. Rptr. at 477. "Venue refers to the location where the trial is held, whereas vicinage refers to the area from which the jury pool is drawn." *Id.* at 934, 755 P.2d at 927, 248 Cal. Rptr. at 477. *See generally* Kershen, *Vicinage*, 29 OKLA L. REV. 801 (1976). In People v. Jones, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973), the court concluded that the vicinage requirement of the federal sixth amendment was binding upon the states through the fourteenth amendment. *Id.* at 551, 510 P.2d at 709, 108 Cal. Rptr. at 349. The court had previously concluded that the California Constitution incorporated the vicinage right. People v. Powell, 87 Cal. 348, 25 P. 481 (1891). In *Guzman*, the court held that the vicinage right is *not* a personal one, but "belongs to the community as well as to the accused. . . . Absent a showing that there is a reasonable likelihood of an unfair trial, a community retains the right to try its own crimes." *Guzman*, 45 Cal. 3d at 936-37, 755 P.2d at 929, 248 Cal. Rptr. at 479. Therefore, like venue, the court held that waiver of vicinage need not be personally made by the defendant to be a valid waiver. *Id.* at 938-39, 755 P.2d at 930, 248 Cal. Rptr. at 480. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 68, 75 (1963 & Supp. 1985); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.04(4) (Supp. 1988).

17. People v. Odle, 45 Cal. 3d 386, 407-08, 754 P.2d 184, 195-96, 247 Cal. Rptr. 137, 149 (1988) (25-minute limit imposed by the court as a scheduling tool but not enforced); People v. Rich, 45 Cal. 3d 1036, 1104-05, 755 P.2d 960, 1003-04, 248 Cal. Rptr. 510, 554-55 (1988) (court curtailed questioning about either the state of the law or conclusion regarding the merits of the case). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 410-415 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law*, §§ 2997-2998 (1985); 22 CAL. JUR. 3D *Criminal Law*, pt. 1, § 3345 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.05(1)(b), (c) (Supp. 1988).

18. People v. Ainsworth, 45 Cal. 3d 984, 1004-07, 755 P.2d 1017, 1028-30, 248 Cal. Rptr. 568, 579-81 (1988) (co-defendants forced to agree in the exercise of joint peremptory challenges); People v. Dyer, 45 Cal. 3d 26, 58, 753 P.2d 1, 18-19, 246 Cal. Rptr. 209, 227 (1988) (use of peremptory challenges to remove those with qualms about the death penalty). *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 422-423 (1963 & Supp. 1985); *see also* 21 CAL. JUR. 3D *Criminal Law* §§ 3017-3023 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.05(1)(b) (Supp. 1988).

19. People v. Dyer, 45 Cal. 3d 26, 58-59, 753 P.2d 1, 19-20, 246 Cal. Rptr. 209, 227-28 (1988) (juror did not disclose during voir dire that her brother was accidentally shot and killed on a hunting trip); People v. Guzman, 45 Cal. 3d 915, 948, 755 P.2d 917, 936, 248 Cal. Rptr. 467, 486-87 (1988) (jurors note-taking and cautionary instructions); People v. Siripongs, 45 Cal. 3d 548, 570-73, 754 P.2d 1306, 318-20, 247 Cal. Rptr. 729, 741-43 (1988) (juror's mother relayed response from her own attorney to answer her daughter's question regarding the defense resting its case); People v. Thompson, 45 Cal. 3d 86, 119-20, 753 P.2d 37, 57-58, 246 Cal. Rptr. 245, 265-66 (1988) (jurors taking notes at trial pursuant to Penal Code section 1137 and not given cautionary instruction regarding distraction and reliance thereon). *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 517-524 (1963 & Supp. 1985).

20. People v. Odle, 45 Cal. 3d 386, 404-06, 754 P.2d 184, 193-94, 247 Cal. Rptr. 137, 146-47 (1988) (both parties stipulated to the necessary replacement of a juror after deliberations began, and instruction was given pursuant to Penal Code section 1089 to be-

ciency[22] of evidence; error in jury instructions;[23] ineffective assist-

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gin deliberation anew); *see generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 424-426 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law* § 3026 (1985 & Supp. 1988).

21. People v. Ainsworth, 45 Cal. 3d 984, 1007-15, 755 P.2d 1017, 1031-36, 248 Cal. Rptr. 568, 581-87 (1988) (court allowed introduction of co-defendant's extrajudicial statements and testimony regarding rape, despite defendant's objections pursuant to Evidence Code section 352); People v. Babbitt, 45 Cal. 3d 660, 679-89, 755 P.2d 253, 261-68, 248 Cal. Rptr. 69, 77-84 (1988) (court excluded evidence offered by defendant to prove state of mind, asserting diminished capacity and insanity due to post-traumatic stress disorder); People v. Belmontes, 45 Cal. 3d 744, 777-79, 755 P.2d 310, 326-27, 248 Cal. Rptr. 126, 143-44 (1988) (prosecutor introduced prior incriminating statements made by an accomplice of the defendant and his girlfriend pursuant to Evidence Code sections 791(a) & 1236); People v. Dyer, 45 Cal. 3d 26, 54-58, 753 P.2d 1, 16-18, 246 Cal. Rptr. 209, 224-27 (1988) (prosecutor used evidence of three prior felony convictions to demonstrate defendant's prior use of force and violence); People v. Guzman, 45 Cal. 3d 915, 939-41, 755 P.2d 917, 930-32, 248 Cal. Rptr. 467, 480-82 (1988) (prosecutor introduced testimony of District Attorney on why defendant's accomplice received total immunity in exchange for her testimony); People v. Heishman, 45 Cal. 3d 147, 171-72, 753 P.2d 629, 645-46, 246 Cal. Rptr. 673, 689-90 (1988) (prosecutor introduced rape victim's initial statement under spontaneous-declaration exception to hearsay pursuant to Evidence Code section 1240); People v. Milner, 45 Cal. 3d 227, 238-40, 753 P.2d 669, 676-77, 246 Cal. Rptr. 713, 721-22 (1988) (pursuant to Evidence Code section 352, court excluded videotapes of an interview defendant underwent while hypnotized by psychiatrist); People v. Poggi, 45 Cal. 3d 306, 322-24, 753 P.2d 1082, 1092-93, 246 Cal. Rptr. 886, 896-97 (1988) (prosecutor introduced photographs and serological evidence); People v. Rich, 45 Cal. 3d 1036, 1076-81, 755 P.2d 960, 985-88, 248 Cal. Rptr. 510, 535-39 (1988) (court overruled defendant's suppression motion regarding extrajudicial confessions and searches of his person and property); People v. Robbins, 45 Cal. 3d 867, 878-81, 755 P.2d 355, 361-64, 248 Cal. Rptr. 172, 177-79 (1988) (prosecutor introduced, pursuant to Evidence Code section 1101, evidence of defendant's other crimes to prove lewd intent and intent to kill); People v. Siripongs, 45 Cal. 3d 548, 573-75, 754 P.2d 1306, 1320-21, 247 Cal. Rptr. 729, 743-44 (1988) (court admitted defendant's statement to police officer, tape recording, and transcript of defendant's telephone conversation while at police station); People v. Thompson, 45 Cal. 3d 86, 101-11, 114-16, 753 P.2d 37, 45-52, 54-55, 246 Cal. Rptr. 245, 253-60, 62-64 (1988) (prosecutor introduced (1) statement by murdered victim to prove state of mind pursuant to Evidence Code section 1250; (2) statement by defendant prior to the robbery-murder of a planned trip to Asia as financial motive for the robbery pursuant to Evidence Code section 1101; and (3) nine photos of the victim taken when alive, when discovered by the police, and during the autopsy over objections pursuant to Evidence Code section 352); People v. Warren, 45 Cal. 3d 471, 484-86, 754 P.2d 218, 226-27, 247 Cal. Rptr. 172, 180-81 (1988) (prosecutor introduced evidence that witnesses were reluctant to testify, and had been told not to testify by family). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 431-442 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law* §§ 3129-3175 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 83.04 (Supp. 1988).

22. People v. Ainsworth, 45 Cal. 3d 984, 1015-16, 755 P.2d 1017, 1036-37, 248 Cal. Rptr. 568, 587-88 (1988); People v. Grant, 45 Cal. 3d 829, 841-42, 755 P.2d 894, 900-01, 248 Cal. Rptr. 444, 451 (1988); People v. Poggi, 45 Cal. 3d 306, 324-26, 753 P.2d 1082, 1093-94, 246 Cal. Rptr. 886, 897-98 (1988); People v. Rich, 45 Cal. 3d 1036, 1081-1082, 755 P.2d 960, 988-89, 248 Cal. Rptr. 510, 539 (1988); People v. Silva, 45 Cal. 3d 604, 625, 754 P.2d 1070, 1080-81, 247 Cal. Rptr. 573, 584 (1988). *See generally* B. WITKIN, CALIFORNIA

ance of counsel;[24] conflict of interest;[25] and defendant's right to be

CRIMINAL PROCEDURE §§ 683-685 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law* §§ 3248-3268 (1985 & Supp. 1988).

23. People v. Ainsworth, 45 Cal. 3d 984, 1016-19, 755 P.2d 1017, 1037-39, 248 Cal. Rptr. 568, 588-89 (1988) (instructions on proximate cause, unanimous agreement of jurors on actus reus, and elements of robbery); People v. Babbitt, 45 Cal. 3d 660, 689-96, 755 P.2d 253, 268-73, 248 Cal. Rptr. 69, 84-89 (1988) (defendant asserted that an instruction on "presumption of consciousness . . . creates a mandatory, rebuttable presumption that the jury would have understood as shifting to defendant the burden of proving unconsciousness"); People v. Belmontes, 45 Cal. 3d 744, 781-91, 793, 755 P.2d 310, 329-37, 248 Cal. Rptr. 126, 146-54 (1988) (conflicting instructions given on evaluation of accomplice testimony, defendant's failure to deny or explain certain evidence, conspiracy instructions, and refusal to instruct on lesser-related offenses); People v. Dyer, 45 Cal. 3d 26, 59-65, 753 P.2d 1, 20-24, 246 Cal. Rptr. 209, 228-32 (1988) (ambiguous instruction regarding necessity that jury find an accomplice intended to participate in criminal act as mandated by People v. Beeman, 35 Cal. 3d 547, 674 P.2d 1318, 199 Cal. Rptr. 60 (1984)); People v. Grant, 45 Cal. 3d 829, 846-47, 755 P.2d 894, 903-04, 248 Cal. Rptr. 444, 451-55 (1988) (defendant alleged incomplete instruction given on malice and diminished capacity); People v. Heishman, 45 Cal. 3d 147, 163-67, 753 P.2d 629, 638-42, 246 Cal. Rptr. 673, 683-86 (1988) (seven alleged errors including the omission of the word "not" from one instruction); People v. Odle, 45 Cal. 3d 386, 408-09, 754 P.2d 184, 196, 247 Cal. Rptr. 137, 149 (1988) (conflict in instructions on whether accomplice testimony must be corroborated); People v. Rich, 45 Cal. 3d 1036, 1109-13, 755 P.2d 960, 1006-10, 248 Cal. Rptr. 510, 557-60 (1988) (instructions on malice and provocation); People v. Robbins, 45 Cal. 3d 867, 881-83, 755 P.2d 355, 363-64, 248 Cal. Rptr. 172, 179-81 (1988) (instruction on defendant's failure to disclose witnesses and interview evidence); People v. Silva, 45 Cal. 3d 604, 626-29, 754 P.2d 1070, 1081-83, 247 Cal. Rptr. 573, 584-86 (1988) (*Beeman* error, and instructions on accomplices, flight, and general intent); People v. Thompson, 45 Cal. 3d 86, 118-19, 753 P.2d 37, 56-57, 246 Cal. Rptr. 245, 264-65 (1988) (defendant argued that court should sua sponte give instruction regarding inherent lack of credibility of jailhouse informants); People v. Williams, 44 Cal. 3d 1127, 1144-45, 751 P.2d 901, 912-13, 245 Cal. Rptr. 635, 647 (1988) (instructions on flight, and failure to instruct sua sponte to view informant testimony with distrust). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 468-495 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law* §§ 3049-3103 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.05(1)(e) (Supp. 1988).

24. The defendants often argued that trial error was the result of ineffective counsel. People v. Babbitt, 45 Cal. 3d 660, 707, 755 P.2d 253, 280-81, 248 Cal. Rptr. 69, 96-97 (1988) (failure to object to alleged improper statements of prosecutor); People v. Dyer, 45 Cal. 3d 26, 52-54, 67-68, 753 P.2d 1, 15-16, 25, 246 Cal. Rptr. 209, 223-24, 233-34 (1988) (counsel failed to investigate two potential defense witnesses prior to trial, and to object to alleged improper statements of prosecutor at trial); People v. Lucky, 45 Cal. 3d 259, 278-83, 753 P.2d 1052, 1063-66, 247 Cal. Rptr. 1, 12-15 (1988) (removal of dual representation overburdened remaining counsel); People v. Milner, 45 Cal. 3d 227, 237-38, 753 P.2d 669, 676, 246 Cal. Rptr. 713, 720-21 (1988) (motion to suppress defendant's incriminating statements was not renewed by defendant's attorney); People v. Rich, 45 Cal. 3d 1036, 1096-1103, 755 P.2d 960, 998-1003, 248 Cal. Rptr. 510, 549-54 (1988) (sixteen asserted instances, including a stipulation to polygraph results, disclosure of parts of suppressed confession, and adequacy of attorney's argument); People v. Williams, 44 Cal. 3d 1127, 1142-43, 751 P.2d 901, 911, 245 Cal. Rptr. 635, 645 (1988) (counsel failed to assert a diminished capacity defense). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 356-379 (1963 & Supp. 1985); 19 CAL. JUR. 3D *Criminal Law* §§ 2169-2175 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE §§ 87.04(3), 87.06(3) (Supp. 1988).

25. People v. Belmontes, 45 Cal. 3d 744, 774-77, 755 P.2d 310, 324-26, 248 Cal. Rptr. 126, 141-43 (1988) (motion to recuse made by co-defendant because defendant's counsel previously had represented the other on a prior murder charge that was dismissed); People v. Lucky, 45 Cal. 3d 259, 280-83, 753 P.2d 1052, 1064-66, 247 Cal. Rptr. 1, 13-15

present at various stages of the proceedings,[26] among others.[27]

The court reached one of four conclusions in resolving these issues: the defendant failed to preserve his objection at trial; the trial court committed no error; assuming error, there was no prejudice; or error actually occurred, but without prejudice.[28]

III. SPECIAL CIRCUMSTANCE ISSUES

The court was also unanimous in affirming the finding of at least one special circumstance[29] against each defendant. The asserted er-

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(1988) (conflict between defendant and counsel about the defendant testifying at trial, and general uncooperative behavior at trial); People v. Rich, 45 Cal. 3d 1036, 1082-83, 755 P.2d 960, 989, 248 Cal. Rptr. 510, 530-40 (1988) (District Attorney, retained as special prosecutor after election defeat, shared office space with defendant's co-counsel in landlord-tenant relationship with defendant's knowledge and approval). *See generally* 21 CAL. JUR. 3D *Criminal Law* §§ 2179-2181 (1985 & Supp. 1988).

26. People v. Ainsworth, 45 Cal. 3d 984, 1019-21, 755 P.2d 1017, 1039-40, 248 Cal. Rptr. 568, 590-91 (1988) (defendant and counsel waived presence at rereading of testimony to jury after the start of deliberations); People v. Grant, 45 Cal. 3d 829, 845-46, 755 P.2d 894, 907-08, 248 Cal. Rptr. 444, 458 (1988) (defendant voluntarily waived presence at any stage allowable so long as court deemed him adequately represented by counsel); People v. Odle, 45 Cal. 3d 386, 406-07, 754 P.2d 184, 194-95, 247 Cal. Rptr. 137, 147-48 (1988) (defendant waived right to be present during requested rereadings of testimony by the jury after the deliberations had started). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 388-392 (1963 & Supp. 1985); 19 CAL. JUR. 3D *Criminal Law* §§ 2095-2109 (1985 & Supp. 1988).

27. See *infra* notes 99-103 and accompanying text for a discussion of prosecutorial misconduct. Other alleged trial errors included: (1) *Miranda* violations and self-incrimination, People v. Grant, 45 Cal. 3d 829, 842-43, 755 P.2d 894, 901-02, 248 Cal. Rptr. 444, 451-52 (1988) (shackling of the defendant at trial and during interviews); People v. Milner, 45 Cal. 3d 227, 236-38, 753 P.2d 669, 675-76, 246 Cal. Rptr. 713, 719-21 (1988); People v. Rich, 45 Cal. 3d 1036, 1099-1100, 755 P.2d 960, 100, 248 Cal. Rptr. 510, 551 (1988); People v. Silva, 45 Cal. 3d 604, 629-30, 754 P.2d 1070, 1083-84, 247 Cal. Rptr. 573, 586-87 (1988); People v. Williams, 44 Cal. 3d 1127, 1138-42, 751 P.2d 901, 908-11, 245 Cal. Rptr. 635, 642-45 (1988); (2) narrative testimony by defendant and prosecutor's comment thereon, People v. Guzman, 45 Cal. 3d 915, 941-48, 755 P.2d 917, 932-36, 248 Cal. Rptr. 467, 482-86 (1988); (3) prosecutor's compliance with discovery requests, People v. Robbins, 45 Cal. 3d 867, 883-85, 755 P.2d 355, 364-66, 248 Cal. Rptr. 172, 181-82 (1988); (4) denial of defendant's motion for continuance, People v. Grant, 45 Cal. 3d 829, 844-45, 755 P.2d 894, 902, 248 Cal. Rptr. 444, 452-53 (1988); (5) validity of the arrest warrant, admission of the defendant's extrajudicial statements, and curtailment of impeachment of witness for the prosecution, People v. Belmontes, 45 Cal. 3d 744, 766-74, 779-81, 755 P.2d 310, 319-24, 327-29, 247 Cal. Rptr. 126, 135-81, 144-46 (1988).

28. *See supra* notes 4-12 and accompanying text.

29. Section 190(a) states that:

> [e]very person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, 190.5.

CAL. PENAL CODE § 190(a) (West 1988 & Supp. 1989). Section 190.1 provides for separate phases to determine the defendant's guilt and special circumstances, and the truth

rors in this phase included findings of "excessive" multiple-murders;[30] *Carlos* error;[31] improper finding of a special circumstance;[32] "overlap" of special circumstances;[33] admissibility and suffi-

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of the special circumstances. CAL. PENAL CODE § 190.1 (West 1988). Section 190.2(a) states that with the finding of any one of 19 listed special circumstances, the penalty for first degree murder will be death or life imprisonment without possibility of parole. CAL. PENAL CODE § 190.2(a) (West 1988). Section 190.3 regulates the penal phase of the trial, which authorized the admission into evidence "any matter relevant to aggravation, mitigation, and sentence," including certain enumerated factors. CAL. PENAL CODE § 190.3 (West 1988). Section 190.3 concludes:

> [a]fter having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Id. See generally 2 B. WITKIN, CALIFORNIA CRIMES §§ 1026-1047 (1963 & Supp. 1985); 22 CAL. JUR. 3D *Criminal Law* §§ 3341, 3343 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.05(2)(b) (Supp. 1988).

30. Section 190.2(a)(3) states: "The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree." CAL. PENAL CODE § 190.2(a)(3) (West 1988). In the determination of special circumstances, the jurors sometimes improperly found the existence of multiple-murder as to *each* victim, instead of one multiple-murder encompassing all victims. *See* People v. Dyer, 45 Cal. 3d 26, 69, 753 P.2d 1, 26, 246 Cal. Rptr. 209, 234 (1988); People v. Odle, 45 Cal. 3d 386, 409-10, 754 P.2d 184, 196-97, 247 Cal. Rptr. 137, 150 (1988); People v. Rich, 45 Cal. 3d 1036, 1113-14, 755 P.2d 960, 1010, 248 Cal. Rptr. 510, 560-61 (1988); People v. Warren, 45 Cal. 3d 471, 489, 754 P.2d 218, 729, 247 Cal. Rptr. 172, 189 (1988); People v. Williams, 44 Cal. 3d 1127, 1146, 751 P.2d 901, 913, 245 Cal. Rptr. 635, 647 (1988).

31. In Carlos v. Superior Court, 35 Cal. 3d 131, 153-54, 672 P.2d 862, 877, 197 Cal. Rptr. 79, 98-99 (1983), the court held that a finding of felony-murder special circumstance is not valid unless the court instructs on intent to kill. *Carlos* was overruled in People v. Anderson, 43 Cal. 3d 1104, 1147, 742 P.2d 1306, 1331, 240 Cal. Rptr. 585, 610-11 (1987), where the court held that the instruction is unnecessary unless there is evidence that the defendant may have been a mere accomplice, rather than the actual killer. *Id.* at 1138-39, 742 P.2d at 1325-26, 240 Cal. Rptr. at 604-05. The court has refused to reconsider this position. *See* People v. Babbitt, 45 Cal. 3d 660, 708, 755 P.2d 253, 281, 248 Cal. Rptr. 69, 97 (1988); People v. Belmontes, 45 Cal. 3d 744, 793-94, 755 P.2d 310, 337-38, 248 Cal. Rptr. 126, 154 (1988); People v. Guzman, 45 Cal. 3d 915, 949, 755 P.2d 917, 937, 248 Cal. Rptr. 467, 487 (1988); People v. Hamilton, 45 Cal. 3d 351, 363-64, 753 P.2d 1109, 1117, 247 Cal. Rptr. 31, 38 (1988); People v. Milner, 45 Cal. 3d 227, 252-53, 753 P.2d 669, 685-86, 246 Cal. Rptr. 713, 730 (1988); People v. Poggi, 45 Cal. 3d 306, 326-27, 753 P.2d 1082, 1094, 246 Cal. Rptr. 886, 898-99 (1988); People v. Robbins, 45 Cal. 3d 867, 885, 755 P.2d 355, 366, 248 Cal. Rptr. 172, 182 (1988); People v. Siripongs, 45 Cal. 3d 548, 575-76, 754 P.2d 1306, 1321-22, 247 Cal. Rptr. 729, 745 (1988); People v. Thompson, 45 Cal. 3d 86, 117, 753 P.2d 37, 55-56, 246 Cal. Rptr. 245, 264-65 (1988); People v. Warren, 45 Cal. 3d 471, 486-88, 754 P.2d 218, 227-29, 247 Cal. Rptr. 172, 181-82 (1988); People v. Williams, 44 Cal. 3d 1127, 1145-46, 751 P.2d 901, 913, 245 Cal. Rptr. 635, 647 (1988).

32. People v. Silva, 45 Cal. 3d 604, 630-32, 754 P.2d 1070, 1084-85, 247 Cal. Rptr. 573, 587-88 (1988) (court set aside special circumstance findings of murder for financial gain, heinous murder, and witness-murder, but affirmed kidnapping for robbery felony-murder).

33. People v. Ainsworth, 45 Cal. 3d 984, 1024-25, 755 P.2d 1017, 1042, 248 Cal. Rptr. 568, 593 (1988) (robbery and kidnapping not separately charged regarding felony-mur-

ciency of evidence;[34] and instructional error.[35] The egregious nature of the offenses and the substantial evidence against each defendant allowed the court to affirm the finding of at least one special circumstance, thus preserving the imposition of death as a penalty.

The court stated that "[t]he United States Supreme Court has yet to enunciate the test of reversible error when an element of an offense or special circumstance finding is omitted from instructions to the jury."[36] Therefore, pursuant to *Chapman v. California*,[37] "[t]he question is whether, on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt."[38]

IV. PENALTY PHASE ISSUES

A. Factor (k)

A common error asserted at the penalty phase of the trial pertains to the instructions on matters subject to consideration by the jury.[39] Specifically, the defendants asserted error in the instructions associ-

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der); People v. Guzman, 45 Cal. 3d 915, 953, 755 P.2d 917, 939-40, 248 Cal. Rptr. 467, 490 (1988) (burglary and robbery special circumstances).

34. People v. Ainsworth, 45 Cal. 3d 987, 1024, 755 P.2d 1017, 1040-42, 248 Cal. Rptr. 568, 591-93 (1988); People v. Belmontes, 45 Cal. 3d 744, 795, 755 P.2d 310, 338, 248 Cal. Rptr. 126, 155 (1988); People v. Guzman, 45 Cal. 3d 915, 952-53, 755 P.2d 917, 939-40, 248 Cal. Rptr. 467, 490 (1988); People v. Poggi, 45 Cal. 3d 306, 327-28, 753 P.2d 1082, 1095, 246 Cal. Rptr. 886, 899 (1988); People v. Robbins, 45 Cal. 3d 867, 885-86, 755 P.2d 355, 366, 248 Cal. Rptr. 172, 182-83 (1988).

35. People v. Ainsworth, 45 Cal. 3d 984, 1025-26, 755 P.2d 1017, 1042-43, 248 Cal. Rptr. 568, 593-94 (1988) (robbery and kidnapping special circumstances); People v. Odle, 45 Cal. 3d 386, 410-16, 754 P.2d 184, 197-201, 247 Cal. Rptr. 137, 150-55 (1988) (omission and conflict of instruction regarding murder of a peace officer).

36. People v. Odle, 45 Cal. 3d 386, 411, 754 P.2d 184, 198, 247 Cal. Rptr. 137, 151 (1988).

37. 386 U.S. 18 (1967).

38. People v. Odle, 45 Cal. 3d 386, 414, 754 P.2d 184, 200, 247 Cal. Rptr. 137, 153 (1988) (citing Rose v. Clark, 478 U.S. 570 (1988)).

39. People v. Ainsworth, 45 Cal. 3d 984, 1032-33, 755 P.2d 1017, 1047-48, 248 Cal. Rptr. 568, 598-99 (1988); People v. Babbitt, 45 Cal. 3d 660, 712-13, 755 P.2d 253, 283-85, 248 Cal. Rptr. 69, 100-01 (1988); People v. Grant, 45 Cal. 3d 829, 854-55, 755 P.2d 894, 909-10, 248 Cal. Rptr. 444, 459-60 (1988); People v. Guzman, 45 Cal. 3d 915, 956-58, 755 P.2d 917, 942-43, 248 Cal. Rptr. 467, 492-93 (1988); People v. Hamilton, 45 Cal. 3d 351, 371-72, 753 P.2d 1109, 1122-23, 247 Cal. Rptr. 31, 43-44 (1988); People v. Heishman, 45 Cal. 3d 147, 187-89, 753 P.2d 629, 655-57, 246 Cal. Rptr. 673, 700-01 (1988); People v. Lucky, 45 Cal. 3d 259, 296-99, 753 P.2d 1052, 1076-77, 247 Cal. Rptr. 1, 24-25 (1988); People v. Odle, 45 Cal. 3d 386, 417-19, 754 P.2d 184, 201-03, 247 Cal. Rptr. 137, 155-57 (1988); People v. Poggi, 45 Cal. 3d 306, 346-47, 753 P.2d 1082, 1107, 246 Cal. Rptr. 886, 911-12 (1988); People v. Robbins, 45 Cal. 3d 867, 886-87, 755 P.2d 355, 367, 248 Cal. Rptr. 172, 183-84 (1988); People v. Siripongs, 45 Cal. 3d 548, 580-81, 754 P.2d 1306, 1325, 247 Cal. Rptr. 729, 748 (1988); People v. Williams, 44 Cal. 2d 1127, 1147-48, 751 P.2d 901, 914, 245 Cal. Rptr. 635, 648-49 (1988).

ated with "factor (k)" of section 190.3.[40] In *People v. Easley*,[41] the court held that the unadorned instruction[42] could leave the jury with the misunderstanding that the defendant's mental condition, character evidence, and general background played no part in their sentencing discretion.[43] Such ambiguity would violate the United States Constitution;[44] thus, in all cases after *Easley*, the court has required express instructions to the jury allowing for the consideration of such evidence as related to the specific crime.[45] The court also has held that cases decided prior to *Easley*, where the expanded factor (k) instruction would not have been given, would be decided by looking to

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40. CAL. PENAL CODE § 190.3(k) (West 1988). This section states in relevant part that "[i]n determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *See generally* 22 CAL. JUR. 3D *Criminal Law* §§ 3342-3346 (1985) (discussion of penalty hearing procedure); 2 B. WITKIN, CALIFORNIA CRIMES §§ 1034, 1042 (1963 & Supp. 1985); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE §§ 87.01, 87.02(6), 87.03(3), 87.05(1)(5) (Supp. 1988).

41. 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983).

42. CALIFORNIA APPROVED JURY INSTRUCTIONS (Criminal) No. 8.84.1 (West 1979) [hereinafter CALJIC]. The unmodified version read:

> In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable: . . . (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC No. 8.84.1 (West 1979). The 1986 revision expands factor (k) to read:

> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.].

CALJIC No. 8.84.1 (West Supp. 1987).

43. *Easley*, 34 Cal. 3d at 878 n.10, 671 P.2d at 826 n.10, 196 Cal. Rptr. at 322 n.10.

44. The Supreme Court, in Lockett v. Ohio, 438 U.S. 586 (1978), held:

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (footnote omitted) (emphasis in original); *see also* Eddings v. Oklahoma, 455 U.S. 104, 110-16 (1982).

45. In People v. Poggi, 45 Cal. 3d 306, 753 P.2d 1082, 246 Cal. Rptr. 886 (1988), the court explained:

> [a]lthough we impliedly held in *Easley* that section 190.3(k) was not unconstitutional in itself . . . we nevertheless recognized that when delivered in an instruction the statutory language might mislead the jury as to the scope of its sentencing discretion and responsibility under the federal Constitution. . . . For this reason we directed trial courts thereafter to inform the jury that they may consider in mitigation not only factor (k) but also "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.' "

Id. at 346, 753 P.2d at 1107, 246 Cal. Rptr. at 911 (citing People v. Easley, 34 Cal. 3d at 878 n.10, 671 P.2d at 826 n.10, 196 Cal. Rptr. at 322 n.10).

the entire record to determine whether the jury properly understood the scope of matters subject to consideration.[46]

In the cases under review in this survey, the court upheld no factor (k) challenges. In examining the trial courts' instructions, the court analyzed the prosecutors' arguments, and found that most arguments did not involve removal of mental condition and character evidence from the jury's sentencing discretion. Instead, the prosecutors properly argued that the evidence on these points carried little weight. The court further found that arguments from many of the defense counsels cured any misconceptions created by the instructions and the prosecutors' arguments.[47]

In *People v. Lucky*,[48] the court placed one limitation on the matters which the jury may consider. The court stated that the United States Supreme Court "has recently made clear that an instruction *prohibiting* 'mere' or 'factually untethered' sympathy as a sentencing consideration is constitutionally proper."[49] This being so, "an instruction urging the relevance of such 'untethered' sympathy is not required. . . . Moreover, insofar as an 'ignore consequences' instruction 'can be understood by the jury in the same light as an admonition to disregard sympathy' . . . the Constitution does not forbid it."[50]

Justice Broussard twice dissented from the affirmance of the death penalty because of factor (k) error.[51] While agreeing with the majority in its interpretation of *Easley*, his dissent in *People v. Odle* argued its application to the facts.[52] However, his dissent in *People v. Guz-*

46. People v. Brown, 40 Cal. 3d 512, 544 n.17, 709 P.2d 440, 459 n.17, 220 Cal. Rptr. 637, 656 n.17 (1985), *vacated on other grounds*, California v. Brown, 479 U.S. 538 (1987).

47. See *supra* notes 4-12 and accompanying text for a discussion of harmless error.

48. 45 Cal. 3d 259, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988).

49. *Id.* at 298, 753 P.2d at 1077, 247 Cal. Rptr. at 25 (citing California v. Brown, 479 U.S. 538, 544-45 (1987) (O'Connor, J., concurring)).

50. *Lucky*, 45 Cal. 3d at 298, 753 P.2d at 1077, 247 Cal. Rptr. at 25-26.

51. People v. Guzman, 45 Cal. 3d 915, 755 P.2d 917, 248 Cal. Rptr. 467 (1988); People v. Odle, 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137 (1988).

52. Justice Broussard stated:

> The prosecutor unequivocally and erroneously stated that factor (k) was inapplicable because it related to the circumstances of the crimes and there was nothing mitigating or extenuating about the commission of the crimes. He never retreated from this position . . . . I conclude that the prosecutor's argument in the absence of a clarifying instruction improperly precluded a finding of any mitigating circumstance unless the jury found that the brain surgery and its results affected defendant's capacity at the time of the offenses.
>
> The error is prejudicial in that it probably took from the jury the crucial issue presented by the strong mitigating evidence.

Odle, 45 Cal. 3d at 427, 429, 754 P.2d at 208-09, 210, 247 Cal. Rptr. at 162, 163-64 (footnote omitted) (Broussard, J., dissenting).

man attacked not only the majority's view that the prosecutor cured both the instructional ambiguity and his own improper argument, but also to the conclusion that the defense counsel's argument cured any error.[53] Justice Broussard concluded that a jury would resolve any conflict in interpretation between the prosecutor and defense counsel in favor of the prosecutor.[54]

B. Brown Error

Similar to the way a factor (k) error takes away juror discretion as to matters considered in mitigation, *Brown*[55] error alleges that the jurors were misled about the nature of the weighing process mandated by Penal Code section 190.3.[56] The United States Supreme

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53. Justice Broussard asked: "I can understand how a judicial admonition may cure improper argument, but how can a comment by defense counsel do the job? At best, all defense counsel can do is raise a conflict, leaving the jury with two contradictory interpretations of the law, one correct and one erroneous." *Guzman*, 45 Cal. 3d at 978, 755 P.2d at 957, 248 Cal. Rptr. at 507 (Broussard, J., dissenting).

54. *Id.* at 978-79, 755 P.2d at 957, 248 Cal. Rptr. at 507 (Broussard, J., dissenting). Justice Broussard, quoting an earlier appellate case, stated that:

> [d]efense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige.

Id. at 976, 755 P.2d at 957, 248 Cal. Rptr. at 507 (quoting People v. Talle, 111 Cal. App. 2d 650, 677, 245 P.2d 633, 649 (1952)).

55. People v. Brown, 40 Cal. 3d 512, 538-44, 709 P.2d 440, 453-59, 220 Cal. Rptr. 637, 650-56 (1985), *rev'd on other grounds*, California v. Brown, 479 U.S. 538 (1987). In *Brown*, the court concluded that unadorned instructions pursuant to section 190.3 could mislead the jury in its sentencing discretion because of the "shall" proviso following the factors to be weighed. *Id.* at 541, 709 P.2d at 456, 220 Cal. Rptr. at 653. While the cases decided thereafter were to have clarifications in the instructions, the cases decided prior to *Brown* would be determined individually by examining the record as a whole to determine if the jury was indeed misled. *Id. Brown* error was alleged in People v. Grant, 45 Cal. 3d 829, 856-57, 755 P.2d 894, 910-11, 248 Cal. Rptr. 444, 460-61 (1988); People v. Guzman, 45 Cal. 3d 915, 958-60, 755 P.2d 917, 943-45, 248 Cal. Rptr. 467, 493-95 (1988); People v. Hamilton, 45 Cal. 3d 351, 370-71, 753 P.2d 1109, 1121-22, 247 Cal. Rptr. 31, 43 (1988); People v. Lucky, 45 Cal. 3d 259, 299-301, 753 P.2d 1052, 1078-79, 247 Cal. Rptr. 1, 27-28 (1988); People v. Milner, 45 Cal. 3d 227, 253-58, 753 P.2d 669, 686-89, 246 Cal. Rptr. 713, 730-33 (1988); People v. Odle, 45 Cal. 3d 386, 419-21, 754 P.2d 184, 203-05, 247 Cal. Rptr. 137, 157-58 (1988); People v. Poggi, 45 Cal. 3d 306, 345, 753 P.2d 1082, 1106-07, 246 Cal. Rptr. 886, 910-11 (1988); People v. Robbins, 45 Cal. 3d 867, 889-88, 755 P.2d 355, 367-68, 248 Cal. Rptr. 172, 184 (1988); People v. Silva, 45 Cal. 3d 604, 639-40, 754 P.2d 1070, 1090, 247 Cal. Rptr. 573, 593-94 (1988); People v. Siripongs, 45 Cal. 3d 548, 581-82, 754 P.2d 1306, 1325-56, 247 Cal. Rptr. 729, 749 (1988); People v. Thompson, 45 Cal. 3d 86, 135-37, 753 P.2d 37, 68-69, 246 Cal. Rptr. 245, 276-77 (1988); People v. Williams, 44 Cal. 3d 1127, 1148-49, 751 P.2d 901, 914-15, 245 Cal. Rptr. 635, 649-50 (1988).

56. After listing the factors the jury is to consider in aggravation and mitigation, section 190.3 concludes:

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and *shall impose a sentence of death if the trier of*

Court in *Caldwell v. Mississippi*,[57] stated that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[58] In analyzing instructions pursuant to section 190.3[59] with the mandate of *Caldwell*, the court's concern is that a juror may be misled about the scope of his sentencing discretion "as (i) merely the 'counting' of factors and then (ii) reaching an 'automatic' decision, with no exercise of personal responsibility for deciding, by his own standards, which penalty was appropriate."[60] In other words, the juror is not merely to *count* factors in aggravation and mitigation and

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fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

CAL. PENAL CODE § 190.3 (West 1988) (emphasis added). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 538 (1963 & Supp. 1985); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.05[5][a] (Supp. 1988); White, *Juror Decision Making in the Capital Penalty Trial*, 11 LAW & HUM. BEHAV. J. 113 (1987); Note, *Discretion and the Constitutionality of the New Death Penalty Statute*, 87 HARV. L. REV. 1690 (1974) (constitutionality of new death penalty statutes involving juror discretion).

57. 472 U.S. 320 (1985).

58. *Id.* at 328-29.

59. CALJIC No. 8.84.2 (West 1979). The unmodified version read:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [each] defendant. . . . After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

Id. (emphasis added). The revised version expands the italicized portion:

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

CALJIC No. 8.84.2 (West Supp. 1987).

60. People v. Milner, 45 Cal. 3d 227, 256, 753 P.2d 669, 688, 246 Cal. Rptr. 713, 732 (1988).

conclude that the side with more factors carries greater weight. Instead, these factors should be merely a guide to returning a death sentence after coming "face to face with the question of whether, in the personal moral judgment of each juror, death is the *appropriate punishment in that case*."[61]

The court overturned the death penalty in *People v. Milner*[62] because of an uncured *Brown* error.[63] In his opinion for the unanimous court, Justice Panelli stated that "[i]n the instant case, the prosecutor did not so much shift the jury's responsibility as negate its existence."[64] Although the defense counsel attempted to cure the error, "[i]n essence the jurors were told that the 'awesome responsibility' for the life and death determination did not rest with them."[65] The court affirmed both the guilt and the finding of special circumstances, but overturned the imposition of death as the penalty.[66]

Justices Mosk and Broussard dissented from the affirmance of the death penalty in *People v. Guzman*,[67] because they believed that a *Brown* error occurred.[68] Justice Mosk wrote that the prosecutor "misled the jury as to the nature of the weighing process . . . [and] as to the nature of the ultimate decision they were call on to make."[69] He also argued that the prosecutor's closing argument alone violated

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61. People v. Guzman, 45 Cal. 3d 915, 958, 755 P.2d 917, 943, 248 Cal. Rptr. 467, 494 (1988) (emphasis in original) (citing People v. Allen, 42 Cal. 3d 1222, 1276-77, 729 P.2d 115, 148-49, 232 Cal. Rptr. 849, 882-83 (1986)).

62. 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988).

63. See *supra* notes 4-12 and accompanying text for a discussion of harmless error.

64. *Id.* at 254, 753 P.2d at 687, 246 Cal. Rptr. at 731.

65. *Id.* at 257, 753 P.2d at 688, 246 Cal. Rptr. at 733. The prosecutor's closing argument included the following:

> I submit to you you're not to do or arrive at what you, as individuals, feel is just or true in this particular case, based upon your own standards, because if you do so, you're taking upon each one of you individually a burden that the law does not require. . . . I'll read for you the paragraph, the law which you have sworn to follow. *The law that protects you, as individuals, from the weight of your individual prejudices or feelings, personal feelings, in the case.* The law states, if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. . . . This gives you a chance, as jurors, to interject your own personal feelings. *But when you interject your own personal feelings, when you get to that stage, then I submit to you you're stepping outside of the protection of the law and taking upon your shoulders a weight that you, as jurors, are not required under the law to shoulder in this particular case.*

Id. at 254-55, 753 P.2d at 687, 246 Cal. Rptr. at 731-32 (emphasis added).

66. *Id.* at 257-58, 753 P.2d at 688-89, 246 Cal. Rptr. at 733. The defendant's counsel argued that the prosecutor "asked you to hide behind this law, and I'm not asking you to hide. And I don't think any of you should hide behind the law. You people are the perpetrators of the law. You never hide behind any of our laws." *Id.* at 256, 753 P.2d at 688, 246 Cal. Rptr. at 732.

67. 45 Cal. 3d 915, 755 P.2d 917, 248 Cal. Rptr. 467 (1988).

68. *Id.* at 969, 979, 755 P.2d at 950, 957, 248 Cal. Rptr. at 501, 508 (1988) (Mosk, J., and Broussard, J., dissenting).

69. *Id.* at 972-73, 755 P.2d at 953, 248 Cal. Rptr. at 503 (Mosk, J., dissenting). The prosecutor argued:

the directive in *Caldwell v. Mississippi*.[70] Justice Broussard joined the *Guzman* opinion, independently arguing that *Guzman* and two other recent cases having similar instructions and arguments were decided inconsistently.[71] To avoid such inconsistency in the future, he concluded that when the prosecutor improperly states the nature of the weighing process, "[w]e probably should insist upon some affirmative indication in the record that the jury understood that it must decide appropriateness during the weighing process; we should certainly not affirm when the record affirmatively shows that the jury was advised to the contrary."[72]

> It's never easy for someone to ask for another man's life. *But your burden is lightened in this case because of the law.*
>
> *The way the law is set up, as I'll explain it to you, the weighted process that you go through and the fact that if the aggravating circumstances outweigh the mitigating circumstances, you shall return a verdict of death.*
>
> *It's just that simple. The law lightens your burden in that regard*, in the analysis that you go through. . . . *You simply apply those facts to the law, to reach the determination*; and in doing that the law provides for various factors for you to consider in reaching your determination.

Id. at 971, 755 P.2d at 952, 248 Cal. Rptr. at 502-03 (Mosk, J., dissenting).

70. *Id.* The majority stated that the United States Supreme Court, in Caldwell v. Mississippi, 472 U.S. 320 (1985),

> reversed a death sentence because the prosecutor repeatedly and erroneously informed the jury that it was not the final arbiter of whether death was the appropriate penalty for the defendant. Instead, the prosecutor [in this case] told the jury, a reviewing court would assess the record to make sure death was the appropriate penalty.

Guzman, 45 Cal. 3d at 960 n.12, 755 P.2d at 945 n.12, 248 Cal. Rptr. at 495 n.12. Although the majority concluded this was no error, Justice Mosk concluded that the jury did not have "the appropriate awareness of its 'truly awesome responsibility' " as required pursuant to *Caldwell*. *Id.* at 976, 755 P.2d at 955, 248 Cal. Rptr. at 505 (Mosk, J., dissenting) (quoting *Caldwell*, 472 U.S. at 341).

71. *Guzman*, 45 Cal. 3d at 979-80, 755 P.2d at 957-58, 248 Cal. Rptr. at 508-09 (Broussard, J., dissenting). The three cases are *Guzman*, People v. Hendricks, 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181 (1988), People v. Milner, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988). The court overturned the death penalty in *Milner*, and affirmed it in *Hendricks*. Justice Broussard stated:

> The prosecutors in each of these three cases are saying basically the same thing. They are telling the jurors that they do not have the ultimate responsibility to determine whether the defendant should live or die. The law has taken the sting out of that decision, protected them from that responsibility, lightened their burden. Their role is a limited one. According to the prosecutors' argument, the jurors are finders of fact, who determine what aggravating and mitigating factors exist, place them in a scale, and report how the balance tips.
>
> This argument radically misstates the role of the penalty jury. . . . If there is a principled ground to distinguish the three decisions, it does not appear in our opinions.

Guzman, 45 Cal. 3d at 980-81, 755 P.2d at 958, 248 Cal. Rptr. at 508-09 (Broussard, J., dissenting).

72. *Id.* at 982, 755 P.2d at 959, 248 Cal. Rptr. at 510 (Broussard, J., dissenting).

Justice Mosk wrote separately in *People v. Odle*[73] to express his belief that *Brown* error very nearly occurred, although he concurred with the majority.[74] Even though the prosecutor misled the jury, Justice Mosk concluded that the "defense counsel's argument and the court's other instructions . . . plainly disclosed the proper scope of the jury's sentencing responsibility and discretion and thereby neutralized the prosecutor's comments . . . ."[75]

C. *Ramos Error*

Ramos error[76] brought about the reversal of the death penalty verdict in *People v. Warren*.[77] In *People v. Ramos*,[78] the court held that

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73. 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137 (1988).

74. *Id.* at 424-25, 754 P.2d at 207, 247 Cal. Rptr. at 160 (Mosk, J., concurring).

75. *Id.* at 425, 754 P.2d at 207, 247 Cal. Rptr. at 161 (Mosk, J., concurring). The prosecutor's theme was "[t]he law is that if factors in aggravation outweigh the factors in mitigation you must impose the death penalty. The language is very clear. It says 'shall.' That means must. You have to. No discretion." *Id.* at 420 n.18, 754 P.2d at 2021 n.18, 247 Cal. Rptr. at 157 n.18. Three factors cured this error. First, the prosecutor's own argument retreated somewhat from this position "by telling the jury that its job was to 'decide the appropriate penalty and punishment' for defendant." *Id.* at 421 n.19, 754 P.2d at 204 n.19, 247 Cal. Rptr. at 158 n.19. Second, the court's instruction expanded on the standard CALJIC No. 8.84.2 to include:

> you are not to simply count up the number of circumstances and decide whether there are more of one than the other. The final test is the relative weight of the circumstances not the relative number.
>
> One mitigating circumstance alone can be found by you to balance or outweigh any number of aggravating circumstances.

Id. at 420, 754 P.2d at 204, 247 Cal. Rptr. at 157 (emphasis omitted) (footnote omitted). Finally, the defense counsel's argument clearly stated the jury's correct role:

> The real focus on your deliberation, simply stated, is the death penalty necessary for [defendant]. . . . When your foreperson signs the form to kill [defendant] or fix his sentence at life without possibility of parole, it has to be a decision that each one of you individually believes in.
>
> [Defendant] cannot and must not be executed unless each of you in your own heart, in your own conscience believe it must happen.

Id. at 421, 754 P.2d at 204-05, 247 Cal. Rptr. at 158 (emphasis omitted).

76. *See generally* Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1101-08 (1988); Clary, *Voting for Death: Lingering Doubts About the Constitutionality of Texas' Capital Sentencing Procedure*, 19 ST. MARY'S L.J. 353, 364 (1987); California Supreme Court Survey, *The Briggs Instruction Violates Due Process*, 10 PEPPERDINE L. REV. 167, 212-14 (1982); Note, *Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK L.J. 1095, 1123-25 (1980) ("suggesting that a reviewing authority might suspend the sentence or reduce the punishment also improperly usurps the function of the jury"); Note, *Is the Briggs Instruction Constitutional?*, 5 WHITTIER L. REV. 457 (1983) (addressing the decision in *Ramos*); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.02(6) (Supp. 1988).

77. 45 Cal. 3d 471, 754 P.2d 218, 247 Cal. Rptr. 172. The objectionable charge was "[y]ou are instructed that under the State Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole." *Id.* at 489, 754 P.2d at 229, 247 Cal. Rptr. 183; *see* 40 AM. JUR. 2D *Homicide* § 513 (1968 & Supp. 1988); 22 CAL. JUR. 3D *Criminal Law* § 3342 (1985 & Supp. 1988).

78. 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984).

the so-called Briggs instruction,[79] which emphasized the governor's power to commute or modify a life sentence without the possibility of parole, was a violation of "fundamental fairness" because the jury may be influenced by improper consideration.[80] This instruction improperly allowed the jury to speculate and it was "serious error."[81]

In contrast, the court in *People v. Hamilton*[82] held that a similar Briggs instruction given by the trial court[83] was erroneous, but that the error was cured by the subsequent instruction to ignore the possibility of commutation.[84] While the court did not find the residual Briggs instruction free from error, any error was "non-prejudicial" and the jury was not led "to indulge in irrelevant and improper speculation."[85]

Justice Broussard, in his dissent, argued that the Briggs error was prejudicial.[86] He reasoned that the subsequent instructions, rather than curing any error, were confusing and contained errors themselves.[87] Far from elimination prejudice, they only served to emphasize "the commutation power and confused the jury into believing that the power was an important matter."[88]

Further, in *People v. Poggi*,[89] a comment by the prosecutor that "[s]ome Supreme Court decision may come down saying that leaving someone in jail without possibility of parole is a cruel and unjust punishment and these people must be given a parole date,"[90] was held to invite the jury to improperly speculate.[91] However, defense counsel's objection and a curative instruction by the court cured any

79. CALJIC No. 8.84.2 (West 1979). The Briggs instruction reads in full:
> You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

This instruction was subsequently deleted. CALJIC No. 8.84.2 (West Supp. 1987).

80. *Warren*, 45 Cal. 3d at 489, 754 P.2d at 229-30, 247 Cal. Rptr. at 183.

81. *Id.* at 489, 754 P.2d at 230, 246 Cal. Rptr. at 183.

82. 45 Cal. 3d 351, 753 P.2d 1109, 247 Cal. Rptr. 31 (1988).

83. *Id.*, at 373, 753 P.2d at 1123, 247 Cal. Rptr. at 44.

84. *Id.*, at 375, 753 P.2d at 1124-25, 247 Cal. Rptr. at 46.

85. *Id.* *See supra* notes 1-12 and accompanying text regarding harmless error.

86. *Hamilton*, 45 Cal. 3d at 380, 753 P.2d at 1128, 247 Cal. Rptr. at 50.

87. *Id.* at 382-83, 753 P.2d at 1130, 246 Cal. Rptr. at 51.

88. *Id.* at 384-85, 753 P.2d at 1131, 246 Cal. Rptr. at 52.

89. 45 Cal. 3d 306, 753 P.2d 1082, 246 Cal. Rptr. 886 (1988).

90. *Id.* at 336, 753 P.2d at 1101, 246 Cal. Rptr. at 905.

91. *Id.* (*Cf.* People v. Ramos, 37 Cal. 3d 136, 155-59, 689 P.2d 430, 441-44, 207 Cal. Rptr. 800, 811-14 (1984) (holding that even an accurate Briggs instruction would cause improper jury speculation).

possible harm.[92]

Interestingly, in *People v. Thompson*,[93] a kind of reverse *Ramos* issue appears.[94] The defense counsel asked for an instruction which would have told the jury that if they decided on the death sentence it would be carried out, or if they chose life imprisonment without the possibility of parole, the defendant would not be released.[95] The court held that this instruction invited the same kind of improper speculation as did the normal Briggs instruction.[96] Furthermore, it was held that it is as incorrect to instruct the jury that its sentence "will inexorably be carried out" as it is to give the Briggs instruction which suggests that jurors "need not take their responsibility as seriously because the ultimate determination of penalty rests elsewhere."[97] Therefore, it was not error for the judge to refuse to give the requested instruction.[98]

D. Prosecutorial Misconduct

Prosecutorial misconduct[99] was an issue raised, in one form or an-

92. *Poggi*, 45 Cal. 3d at 336, 753 P.2d at 1101, 246 Cal. Rptr. at 905.

93. 45 Cal. 3d 86, 753 P.2d 37, 246 Cal. Rptr. 245 (1988).

94. *Thompson*, 45 Cal. 3d at 129, 753 P.2d at 64, 246 Cal. Rptr. at 272.

95. *Id.*

96. *Id.* at 130-31, 753 P.2d at 64-65, 246 Cal. Rptr. at 273.

97. *Id.*

98. *Id.* at 131, 753 P.2d at 65, 246 Cal. Rptr. at 273-74.

99. *See generally* B.L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 13.2(b) (1988); J. LAWLESS, PROSECUTORIAL MISCONDUCT, *Improper Argument in Murder Cases*, § 9.24 (Supp. 1988); B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crimes* §§ 1206-1206E (Supp. 1985); 75 AM. JUR. 2D *Trial* § 229 (1977 & Supp. 1988); 24A C.J.S. *Criminal Law* § 1902 (1962 & Supp. 1988); 22 CAL. JUR. 3D *Criminal Law* § 3340-3347 (1985 & Supp. 1988). For an overview of death penalty concerns, see *Death Penalty Symposium*, 18 U.C. DAVIS L. REV. 865 (1985).

"Prosecutorial misconduct is cause for reversal only when it is 'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant.' " People v. Milner, 45 Cal. 3d 227, 245, 753 P.2d 669, 680-81, 246 Cal. Rptr. 713, 725 (1988) (quoting People v. Beivelman 70 Cal. 2d 60, 75, 447 P.2d 913, 921, 73 Cal. Rptr. 521, 529 (1968). It is "generally recognized that misconduct of counsel will not afford a basis for reversal unless it appears that the acts complained of influenced the verdict and resulted in substantial prejudice to appellant." 24A C.J.S. *Criminal Law* § 1902(1) at 997 n.40 (1962 & Supp. 1988).

See also Dershowitz, *Forward* to J. LAWLESS, PROSECUTORIAL MISCONDUCT at ix (1985): "As the Supreme Court begins to turn its traffic light from red to yellow and even green, prosecutors will be deterred less often—some might say encouraged—to adopt an 'ends justifies the means' approach." *Id.* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 735 (1972). ("It is unfortunate that the public has come to associate courtroom disruption almost exclusively with the misconduct of defendant and defense attorneys. In my view, the misconduct of the prosecutor and trial judges presents a much more pressing problem. Although it probably occurs no more frequently than defense misconduct, it is far more damaging to the cause of justice."); Singer, *Forensic Misconduct by Federal Prosecutors—and How it Grew*, 20 ALA. L. REV. 227 (1968); Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1985) (discussion of guidelines for prosecutorial sanctions);

other, in all nineteen cases included in this survey. Although raised in the guilt phase of seven[100] of the cases surveyed, the court found no reversible error in any case.[101] Of the two cases overturned by the court,[102] only in *People v. Milner*,[103] did prosecutorial misconduct in the penalty phase play a part in the court's decision to overturn the death penalty verdict.[104] In analyzing these cases, the asserted misconduct encompassed distinct subject matter areas.

E. Failure to Object

Often, the first hurdle that a defendant had to clear in seeking a reversal for prosecutorial misconduct was the defendant's failure to object.[105] The court followed the rule in *People v. Green*[106] that if the defendant failed to object to any error that could have been cured by an instruction from the trial judge, the point was waived.[107] As

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Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946 (1954) (discussing judicial approaches to prosecutor discipline); Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477 (1959) (a possible solution to misconduct would be to end the political nature of the office); Note, *Prosecutorial Misconduct: The Limitations upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U.L. REV. 1095 (1980) (examining conflicts between the prosecutor's role as an officer of the court and as an advocate).

100. People v. Babbitt, 45 Cal. 3d 660, 755 P.2d 253, 248 Cal. Rptr. 69 (1988); People v. Dyer, 45 Cal. 3d 26, 753 P.2d 1, 246 Cal. Rptr. 209 (1988); People v. Guzman, 45 Cal. 3d 915, 755 P.2d 917, 248 Cal. Rptr. 467 (1988); People v. Milner, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988); People v. Rich, 45 Cal. 3d 1036, 755 P.2d 960, 248 Cal. Rptr. 510 (1988); People v. Robbins 45 Cal. 3d 867, 755 P.2d 355, 248 Cal. Rptr. 172 (1988); People v. Warren, 45 Cal. 3d 471, 754 P.2d 218, 247 Cal. Rptr. 172 (1988).

101. *See supra* notes 13-38 and accompanying text (guilt-phase section), the conduct was determined to fall in any of four categories: (1) the defendant failed to preserve his objection at trial; (2) the court's conduct was not error; (3) assuming error, there was no prejudice; (4) error occurred, but there was no prejudice.

102. *Milner*, 45 Cal. 3d at 227, 753 P.2d at 669, 246 Cal. Rptr. at 713; *Warren*, 45 Cal. 3d at 471, 754 P.2d at 218, 247 Cal. Rptr. at 172.

103. 45 Cal. 3d at 227, 753 P.2d at 669, 246 Cal. Rptr. at 713.

104. *Id.*

105. People v. Ainsworth, 45 Cal. 3d 984, 1034, 755 P.2d 1017, 1049, 248 Cal. Rptr. 568, 599 (1988); People v. Dyer, 45 Cal. 3d 26, 81-82, 753 P.2d 1, 34, 246 Cal. Rptr. 209, 242 (1988); People v. Guzman, 45 Cal. 3d 915, 947, 755 P.2d 917, 936, 248 Cal. Rptr. 467, 486 (1988); People v. Lucky, 45 Cal. 3d 259, 293, 753 P.2d 1052, 1073-74, 247 Cal. Rptr. 1, 22 (1988); People v. Milner, 45 Cal. 3d 227, 244-45, 753 P.2d 669, 680-81, 246 Cal. Rptr. 713, 725; People v. Poggi, 45 Cal. 3d 306, 335, 339-40, 753 P.2d, 1082, 1100, 1103, 246 Cal. Rptr. 888, 904, 907-08 (1988); People v. Rich, 45 Cal. 3d 1036, 1089, 755 P.2d 960, 993, 248 Cal. Rptr. 510, 544 (1988); People v. Silva, 45 Cal. 3d 604, 638, 754 P.2d 1070, 1089, 247 Cal. Rptr. 573, 593 (1988); People v. Thompson, 45 Cal. 3d 86, 114, 124, 753 P.2d 37, 53, 61, 246 Cal. Rptr. 245, 262, 269 (1988); *see* 21 CAL. JUR. 3D *Criminal Law* § 2950.

106. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).

107. *See supra* note 7 and accompanying text; *see also* B.L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 13.2(b) (1988).

Justice Panelli stated in his majority opinion in *People v. Poggi*,[108] "[s]imply to object or make an assignment of misconduct without seeking a curative admonition is not enough."[109] Further, the court stated the purpose for the rule was to allow the trial court to "correct the abuse and thus, if possible, prevent by suitable instruction the harmful effect upon the mind of the jury."[110] The burden then falls upon the defendant to show that "any harm threatened by the comment in question was incurable"[111] in order for a court of appeal to reach the "merits of the complaint."[112] Also, pursuant to the California case, *People v. Miranda*,[113] the court held that the test from *Green* applied in the penalty phase as well as in the guilt phase of the trial.[114] In the cases included in this survey, none met the test enunciated in *Green* for appellate review when the defendant had failed to preserve the point through a timely objection.[115]

F. Alleged Ineffectiveness of Counsel

An issue closely allied with the failure to object to prosecutorial misconduct was that of ineffective assistance of counsel.[116] In addressing this issue, the court, citing *People v. Pope*,[117] placed the burden on the defendant to prove that the assistance of counsel was in fact ineffective, and that with more effective counsel, a different result was more "reasonably probable,"[118] or that there were no plausible tactical reasons for not objecting.[119] In applying this test, the

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108. 45 Cal. 3d 306, 753 P.2d 1082, 246 Cal. Rptr. 886 (1988).

109. *Id.* at 335, 753 P.2d at 1100, 246 Cal. Rptr. at 904.

110. *Id.* (quoting People v. Green, 27 Cal. 3d 1, 27, 609 P.2d 468, 483, 164 Cal. Rptr. 1, 16).

111. *Poggi*, 45 Cal. 3d at 335, 753 P.2d at 1100, 246 Cal. Rptr. at 904.

112. *Id.*

113. 44 Cal. 3d 57, 108 n.30, 744 P.2d 1127, 1159 n.30, 241 Cal. Rptr. 594, 626 n.30 (1987).

114. People v. Lucky, 45 Cal. 3d 259, 293, 753 P.2d 1052, 1073, 247 Cal. Rptr. 1, 22 (1988); Poggi, 45 Cal. 3d at 335, 753 P.2d at 1100, 246 Cal. Rptr. at 904.

115. *See supra* note 7 and accompanying text.

116. This issue is also linked with failure to present mitigating evidence. *See infra* notes 168-190 and accompanying text.

117. 23 Cal. 3d 412, 425, 590 P.2d 859, 867, 152 Cal. Rptr. 732, 739 (1979); *see* 2 A.L.R. 4TH 1.

118. People v. Babbit, 45 Cal. 3d 660, 707, 755 P.2d 253, 280, 248 Cal. Rptr. 69, 96-97 (1988); *Lucky*, 45 Cal. 3d at 293, 753 P.2d at 1073, 247 Cal. Rptr. at 22; People v. Milner, 45 Cal. 3d 227, 245, 753 P.2d 669, 681, 246 Cal. Rptr. 713, 725 (1988); *Poggi*, 45 Cal. 3d at 347, 753 P.2d at 1108, 246 Cal. Rptr. at 912; People v. Rich, 45 Cal. 3d 1036, 1096, 755 P.2d 960, 998, 248 Cal. Rptr. 510, 549 (1988). *See* Comment, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544 (1983) (risk of burden of proof shifted to the defendant); Note, *A New Standard for Ineffectiveness of Counsel Claims: Commonwealth v. Pierce*, 61 TEMP. L.Q. 515 (1988) ("defendant seeking relief under a claim of ineffective assistance of counsel must prove the likelihood that counsel's alleged ineffectiveness prejudiced the outcome of the case."). *Id.* at 515.

119. *See Babbit*, 45 Cal. 3d at 707, 755 P.2d at 280, 248 Cal. Rptr. at 97; *Milner*, 45

court reached one of three conclusions: first, after examining the record, there was a possible tactical purpose for failing to object;[120] or second, because counsel was not asked to explain his failure to object, there was a possibility of a "rational tactical purpose"[121] for the failure to object;[122] or third, the asserted misconduct did not rise to prejudicial error and an objection would have been futile.[123]

The decisions of the court in this area have put defense counsel in the position of having to object to every perceived instance of prosecutorial misconduct in order to preserve the point for appeal. The difficulty for defense counsel is that undue emphasis may be placed on the comment by the very fact of his objection. Counsel must weigh this danger against the very real risk that his failure to object means the point is waived.[124]

G. *Alleged Improper Argument Concerning Aggravating and Mitigating Factors*

In presenting aggravating and mitigating factors to the jury pursuant to Penal Code section 190.3,[125] it is improper for the prosecutor to argue that the "mere absence of a mitigating factor itself constitute[s] aggravation . . . ."[126] In *People v. Ainsworth*, the court held that

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Cal. 3d at 245, 753 P.2d at 681, 246 Cal. Rptr. at 725; *Poggi*, 45 Cal. 3d at 347, 753 P.2d at 1108, 246 Cal. Rptr. at 912; *Rich*, 45 Cal. 3d at 1096-97, 755 P.2d at 998, 248 Cal. Rptr. at 549; (citing People v. Fosselman, 33 Cal. 3d 572, 584, 659 P.2d 1144, 1151, 189 Cal. Rptr. 855, 862 (1988). *See also* Denton, *Recent Developments in Criminal Law Practice: The Effective Assistance of Counsel*, CALIFORNIA CONTINUING EDUCATION FOR THE BAR § 5.7, at 78-79, (Feb. 1988) (court will give high deference to tactical decisions for not presenting mitigating evidence).

120. *Milner*, 45 Cal. 3d at 245, 753 P.2d at 681, 246 Cal. Rptr. at 725. ("Defense counsel would . . . have been well within the bounds of reasonable competence had he chosen to ignore the statements rather than draw attention to them with an objection." *Id. See also Lucky*, 45 Cal. 3d at 293, 753 P.2d at 1073, 247 Cal. Rptr. at 22.

121. *Fosselman*, 33 Cal. 3d at 581, 659 P.2d at 1149, 189 Cal. Rptr. at 860.

122. *Poggi*, 45 Cal. 3d at 347, 753 P.2d at 1108, 246 Cal. Rptr. at 912; *Rich*, 45 Cal. 3d at 1097, 755 P.2d at 998, 248 Cal. Rptr. at 547.

123. *Babbit*, 45 Cal. 3d at 707, 755 P.2d at 280, 248 Cal. Rptr. at 97; People v. Dyer, 45 Cal. 3d 26, 67-68, 753 P.2d 1, 25, 246 Cal. Rptr. 209, 224 (1988).

124. B.L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 13.2(b)-(b)(1 (pitfalls of the decision to object and possible remedies); Note, *Prosecutorial Misconduct: The Limitations upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U.L. REV. 1095, 1129-31 (1980) ("[a]lthough these factors weigh against objecting too frequently, the defense takes a great risk by remaining silent. . . . Accordingly, upon failure to enter an appropriate objection, defense counsel assumes the significant burden of proving to the appellate court that the error resulted in a substantial injustice or an unfair trial." *Id.* at 1131).

125. CAL. PENAL CODE § 190.3 (West 1988).

126. People v. Ainsworth, 45 Cal. 3d 984, 1034, 755 P.2d at 1017, 1048, 248 Cal. Rptr.

although the prosecutor's argument "contravened the spirit, if not the letter" of the law, the argument was not prejudicial.[127] *Ainsworth* was tried under the 1977 statute, and the court made the distinction that the jury had much more latitude under the 1977 jury instructions to opt for a penalty of life imprisonment without the possibility of parole.[128] This, coupled with "overwhelming 'other crimes' evidence,"[129] prevented the improper argument from having a "significant impact" on the jury's decision.[130] Thus, "those considerations compel a conclusion that the prosecutor's comments could not have been prejudicial under any applicable standard."[131]

While it is improper to argue that the absence of a mitigating factor constitutes an aggravating factor, it is permissible to argue during the penalty phase that the defendant showed no remorse for his crime.[132] "The concept of remorse for past offenses as a mitigating factor sometimes warranting less severe punishment or condemnation is universal. The prosecutor's argument here merely demonstrated the absence of that particular mitigating factor."[133] The court found that "the prosecutor should be entitled to observe that a particular mitigating circumstance, such as the defendant's remorse for his victim, is lacking from the case"[134] so long as the prosecutor does not "argue that the absence of such mitigating factors is itself an *aggra-*

568, 597 (1988) (citing People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985)). *See generally* 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.05[5][a] (Supp. 1988); Sicola & Shreves, *Jury Consideration of Mitigating Evidence: A Renewed Challenge to the Constitutionality of Texas' Death Penalty Law*, 15 AM. J. CRIM. L. 55 (Fall/Winter 1987-1988); Note, *A Constitutional Analysis of the Texas Death Penalty Statute*, 15 AM. J. CRIM. L. 69 (Fall/Winter 1987-1988); Note, *Magwood v. Smith: The Effect of a Jury's Failure to Consider Mitigating Circumstances in a Death Penalty Case*, 12 LAW AND PYSCH. REV. 151 (Spring 1988); Note, *Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U.L. REV. 1119 (law and order appeals to societal and political considerations).

127. *Ainsworth*, 45 Cal. 3d at 1034, 755 P.2d at 1049, 248 Cal. Rptr. at 599.

128. *Id.* at 1034, 755 P.2d at 1049, 248 Cal. Rptr. at 600.

129. *Id.*

130. *Id.*

131. *Id.* at 1035, 755 P.2d at 1049, 248 Cal. Rptr. at 600.

132. *See, e.g.*, People v. Dyer, 45 Cal. 3d 26, 82-83, 753 P.2d 1, 34-35, 246 Cal. Rptr. 209, 243 (1988), the prosecutor argued: "You don't see a person drooped over the chair with tears running down his face, or somebody who's impoverished who never had a chance in life. He is not there." In People v. Thompson, 45 Cal. 3d 86, 123, 753 P.2d 37, 60, 246 Cal. Rptr. 245, 268 (1988) the prosecutor argued:

> And what remorse have we heard about from Mr. Thompson? . . . Not one thing has been said to indicate that that man has a sign of remorse for what he did. . . . He sunned himself on the beach. He partied, he drank, he smoked dope. He went down to Mexico, went diving for lobster.

See also People v. Belmontes, 45 Cal. 3d at 807, 808, 755 P.2d at 346-47, 248 Cal. Rptr. at 163.

133. *Dyer*, 45 Cal. 3d at 82, 753 P.2d at 35, 246 Cal. Rptr. at 243 (quoting People v. Ghent, 43 Cal. 3d 739, 771, 739 P.2d 1250, 1271, 239 Cal. Rptr. 82, 103 (1987).

134. *Dyer*, 45 Cal. 3d at 82, 753 P.2d at 35, 246 Cal. Rptr. at 243.

vating factor justifying the death penalty."[135] Lack of remorse can also be introduced to "negate evidence in mitigation" introduced by the defense.[136]

Arguing that certain other mitigating factors are not present is a proper prosecutorial argument, so long as the argument is not that the absence of a mitigating factor constitutes aggravation.[137] Further, even a brief argument suggesting that the absence of a mitigating factor rises to the level of aggravating factor is not viewed as reversible misconduct.[138] The court took into consideration the defense counsel's argument urging the jury to consider certain mitigating factors in favor of the defendant and held that the jury was not misled.[139]

H. Alleged Improper Reference to the Victim's Family

Four of the cases in this survey involved allegations of inappropriate remarks during the penalty phase concerning the impact on the victim's family.[140] Such victim impact statements were barred by *Booth v. Maryland*.[141] The majority found that *Booth* was "patently distinguishable" in that it barred the introduction of formal evidence.[142] They held that in each of the four cases the prosecutor's

135. *Id.* (emphasis in original).

136. *Thompson*, 45 Cal. 3d at 124, 753 P.2d at 60, 246 Cal. Rptr. at 269; People v. Heishman, 45 Cal. 3d 147, 190, 753 P.2d 629, 658, 246 Cal. Rptr. 673, 702 (1988) (lack of remorse elicited by the prosecutor on cross-examination of defendant's character witnesses).

137. The prosecutor argued, "we just can't think of any circumstance which would extenuate the gravity of this crime." *Dyer*, 45 Cal. 3d at 83, 753 P.2d at 35, 346 Cal. Rptr. at 244; *cf.* People v. Rodriguez, 42 Cal. 3d 730, 789-90, 726 P.2d 113, 152, 230 Cal. Rptr. 667, 706 (1986).

138. In People v. Rich, 45 Cal. 3d 1036, 755 P.2d 960, 248 Cal. Rptr. 510 (1988), the prosecutor made an argument that the court viewed as "a solitary fleeting statement suggesting that the absence of at least one, and possibly two of the listed factors . . . could be considered as aggravating." *Id.* at 1119, 755 P.2d at 1013, 248 Cal. Rptr. at 564.

139. "In light of the focus of the penalty phase arguments . . . we find no reasonable possibility that the prosecutor's brief mischaracterization of one or two statutory sentencing factors influenced the jury's sentencing decision." *Id.* at 1119-20, 755 P.2d at 1013-14, 248 Cal. Rptr. at 564.

140. People v. Dyer, 45 Cal. 3d 26, 82-83, 753 P.2d 1, 35, 246 Cal. Rptr. 209, 243 (1988); People v. Poggi, 45 Cal. 3d 306, 338-39, 753 P.2d 1082, 1102, 246 Cal. Rptr. 888, 907 (1988); *Rich*, 45 Cal. 3d at 1089-90, 755 P.2d at 993-94, 248 Cal. Rptr. at 544-45; People v. Siripongs, 45 Cal. 3d 548, 579-80, 754 P.2d 1306, 1324-25, 247 Cal. Rptr. 729, 747-48 (1988).

141. 107 S. Ct. 2529 (1987); *see* 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.03[3] (Supp. 1988); Comment, *Constitutional Law, Cruel and Unusual Punishment—Eighth Amendment Prohibits Introduction of Victim Impact Evidence at Sentencing of Capital Murder Trial*, 19 RUTGERS L.J. 1159 (1988); Comment, *Another View*, 19 RUTGERS L.J. 1175 (1988).

142. *Dyer*, 45 Cal. 3d at 83, 753 P.2d at 35, 246 Cal. Rptr. at 244; *Poggi*, 45 Cal. 3d at

comments were not introductions of formal evidence, but were instead, "brief" comments that did not prejudice the defendant.[143]

Justice Mosk, in his concurring opinions in *People v. Siripongs*[144] and *People v. Rich*[145] would place some limits on the majority's interpretation of *Booth*. While finding that the majority position of upholding the penalty decision was correct, he would not go so far as to approve of the prosecutor's argument.[146] He found no basis in *Booth* for the majority to distinguish between the "introduction of formal evidence" and the prosecutor's argument.[147] Citing Justice Powell, Justice Mosk stated, "the purpose of excluding discussion of the grief of the families . . . is so as not to 'inflame the jury.' It should be obvious that a jury can be inflamed by calculated argument as well as by witness testimony."[148]

I. Alleged Improper Comment on the Defendant's Future Dangerousness

In the cases where alleged improper comment on the defendant's future dangerousness[149] was raised, the court held that it was not improper for the prosecutor, during the penalty phase closing argument, to raise the possibility of the defendant's potential for future dangerousness.[150] The defendants relied on *People v. Murtishaw*,[151]

339, 753 P.2d at 1102, 246 Cal. Rptr. at 907; *Siripongs*, 45 Cal. 2d at 580, 754 P.2d at 1324-25, 248 Cal. Rptr. at 748 (quoting People v. Miranda, 44 Cal. 3d 57, 112-13, 744 P.2d 1127, 1162, 241 Cal. Rptr. 594, 629 (1987), *cert. denied*, 108 S. Ct. 2026 (1988).

143. *Dyer*, 45 Cal. 3d at 83, 753 P.2d at 35, 246 Cal. Rptr. at 244; *Poggi*, 45 Cal. 3d at 339, 753 P.2d at 1102, 246 Cal. Rptr. at 907; *Rich*, 45 Cal. 3d at 1090, 755 P.2d at 994, 248 Cal. Rptr. at 544; *Siripongs*, 45 Cal. 3d at 580, 754 P.2d at 1325, 247 Cal. Rptr. at 748; *see* People v. Ghent, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987); *Miranda*, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594.

144. 45 Cal. 3d at 586, 754 P.2d at 1329, 247 Cal. Rptr. at 752.

145. 45 Cal. 3d at 1124, 755 P.2d at 1017, 248 Cal. Rptr. at 567-68.

146. *Siripongs*, 45 Cal. 3d at 586, 754 P.2d at 1329, 247 Cal. Rptr. at 752.

147. *Id.* at 587, 754 P.2d at 1329, 247 Cal. Rptr. at 752-53.

148. *Rich*, 45 Cal. 3d at 1124-25, 755 P.2d at 1017, 248 Cal. Rptr. at 568 (citing Maryland v. Booth, 107 S. Ct. 2529 (1987)). *See* People v. Levitt, 156 Cal. App. 500, 203 Cal. Rptr. 276 (1984).

149. *See generally* 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE §§ 87.03[3], 87.05[5] (Supp. 1988); Stier, *Privilege, Empiricism in Legal Dialogue: Death and Dangerousness*, 21 U.C. DAVIS L. REV. 271 (1988).

150. People v. Dyer, 45 Cal. 3d 26, 81, 753 P.2d 1, 34, 246 Cal. Rptr. 209, 242 (1988); People v. Heishman, 45 Cal. 3d 147, 197-98, 753 P.2d 629, 663, 246 Cal. Rptr. 673, 707 (1988); People v. Poggi, 45 Cal. 3d 306, 337, 753 P.2d 1082, 1101, 246 Cal. Rptr. 886, 905 (1988); *Rich*, 45 Cal. 3d at 1123, 755 P.2d at 1016, 248 Cal. Rptr. at 566-67; People v. Silva, 45 Cal. 3d 604, 639, 754 P.2d 1070, 1089-90, 247 Cal. Rptr. 573, 593 (1988); People v. Thompson, 45 Cal. 3d 86, 124-25, 753 P.2d 37, 60-61, 246 Cal. Rptr. 245, 269 (1988).

151. 29 Cal. 3d 733, 773, 631 P.2d 446, 175 Cal. Rptr. 738, (1981). *See Dyer*, 45 Cal. 3d at 81, 753 P.3d at 34, 246 Cal. Rptr. at 242; *Heishman*, 45 Cal. 3d at 198, 753 P.2d at 663, 246 Cal. Rptr. at 707; *Poggi*, 45 Cal. 3d at 337, 753 P.2d at 1101, 246 Cal. Rptr. at 905; *Silva*, 45 Cal. 3d at 639, 754 P.2d at 1090, 247 Cal. Rptr. at 593; *Thompson*, 45 Cal. 3d at 125, 753 P.2d at 60-61, 246 Cal. Rptr. at 269.

where the court held that "[i]n view of the unreliability of that forecast . . . the probative value of that testimony is far outweighed by its prejudicial impact."[152] The court, however, pointed out that their ruling in *Murtishaw* had concerned the introduction of expert testimony of dangerousness.[153] The court held that a prosecutor's argument did not present the same kind of potential for unfair impact on the jury.[154] In addition, the prosecutor's comments can be justified if made in rebuttal to the "defendant's own evidence and argument."[155]

Finally, the court held that references to future dangerousness were not limited to "actual violence while in custody."[156] So long as the argument was based on evidence that had been properly admitted, the comment was permissible.[157] The argument was held to be proper and nothing more than "vigorous argument."[158]

J. Alleged Improper Comment on the Defendant's Failure to Testify

In this survey, there were four allegations of improper comment by the prosecutor on the defendant's testimony or choice not to testify

152. *Dyer*, 45 Cal. 3d at 81, 753 P.2d at 34, 246 Cal. Rptr. at 242 (quoting People v. Murtishaw, 29 Cal. 3d 733, 773, 631 P.2d 446, 470, 175 Cal. Rptr. 738, 762 (1981), *cert. denied*, 455 U.S. 922 (1981)).

153. *Dyer*, 45 Cal. 3d at 81, 753 P.2d at 34, 246 Cal. Rptr. at 243; *Heishman*, 45 Cal. 3d at 198, 753 P.2d at 663, 246 Cal. Rptr. at 707; *Poggi*, 45 Cal. 3d at 337, 753 P.2d at 1101, 246 Cal. Rptr. at 906; *Silva*, 45 Cal. 3d at 639, 754 P.2d at 1089-90, 247 Cal. Rptr. at 593; *Thompson*, 45 Cal. 3d at 125, 753 P.2d at 61, 246 Cal. Rptr. at 269.

154. *Dyer*, 45 Cal. 3d at 81, 753 P.2d at 34, 246 Cal. Rptr. at 243 (citing People v. Miranda, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987)); *Thompson*, 45 Cal. 3d at 125, 753 P.2d at 61, 246 Cal. Rptr. at 269-70. Justice Arguelles would also allow expert testimony if it did not include a firm prediction of future dangerousness. 45 Cal. 3d at 125, 753 P.2d at 61, 246 Cal. Rptr. at 269 (citing *Murtishaw*, 29 Cal. 3d at 767, 631 P.2d at 466, 175 Cal. Rptr. at 758). Further, the court stated that it found "no constitutional impediment to consideration of such testimony, whether expert or lay." *Thompson*, 45 Cal. 3d at 125, 753 P.2d at 61, 246 Cal. Rptr. at 269 (citing Barefoot v. Estelle, 463 U.S. 880, 896-906 (1983)). *But see Poggi*, 45 Cal. 3d at 337, 753 P.2d at 1097, 246 Cal. Rptr. at 902; *Silva*, 45 Cal. 3d at 639, 754 P.2d at 1089-90, 247 Cal. Rptr. at 593; Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1101-07 (1985).

155. *Silva*, 45 Cal. 3d at 639, 754 P.2d at 1090, 247 Cal. Rptr. at 593 (citing People v. Boyd, 38 Cal. 3d 762, 776, 700 P.2d 782, 792, 215 Cal. Rptr. 1, 11 (1985) (the court held similar evidence used in rebuttal was admissible).

156. *Rich*, 45 Cal. 3d at 1123, 755 P.2d at 1016, 248 Cal. Rptr. at 567

157. *Heishman*, 45 Cal. 3d at 198, 753 P.2d at 663, 246 Cal. Rptr. at 707; *Rich*, 45 Cal. 3d at 1123, 755 P.2d at 1016, 248 Cal. Rptr. at 567 (citing People v. Davenport, 41 Cal. 3d 247, 288, 710 P.2d 861, 887-88, 221 Cal. Rptr. 794, 821 (1985)).

158. *Rich*, 45 Cal. 3d at 1123, 755 P.2d at 1016, 248 Cal. Rptr. at 567 (citing People v. Fosselman, 33 Cal. 3d 572, 580, 659 P.2d 1144, 1148-49, 189 Cal. Rptr. 855, 859-601 (1983)).

at all.[159] All occurred during the guilt phase of the trial. When read in context, the comments of the prosecutors did not infringe on either the defendant's right to testify even against the advice of counsel,[160] or on the defendant's right to refuse to testify.[161] The cases also shared the defect of the defendant's failure to object to any curable error.[162] A fourth case, *People v. Belmontes*,[163] raised an issue of possible error under *Doyle v. Ohio*[164] when the prosecutor cross-examined the defendant on his "post-arrest silence."[165] Although the court found a potential for error, any possible error was cured by the defense counsel's objection and subsequent admonition by the judge.[166] Also, any error was held "harmless beyond a reasonable doubt."[167]

K. Failure to Present Mitigating Evidence

Two cases involved the defense counsel's acquiescence in the defendant's wish not to present mitigating evidence.[168] In each case, the defendant claimed reversal was required under *People v. Deere*[169]

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159. People v. Belmontes, 45 Cal. 3d 744, 785-87, 755 P.2d 310, 332-33, 248 Cal. Rptr. 126, 148-49 (1988); People v. Guzman, 45 Cal. 3d 915, 946-48, 755 P.2d 917, 935-36, 248 Cal. Rptr. 467, 486 (1988); *Rich*, 45 Cal. 3d at 1089, 755 P.2d at 993, 248 Cal. Rptr. at 544; People v. Thompson, 45 Cal. 3d 86, 112-13, 753 P.2d 37, 52-53, 246 Cal. Rptr. 245, 260-62 (1988).

160. *Guzman*, 45 Cal. 3d at 947, 755 P.2d at 935, 248 Cal. Rptr. at 486; *Thompson*, 45 Cal. 3d at 113-14, 753 P.2d at 52-53, 246 Cal. Rptr. at 260-61.

161. *Rich*, 45 Cal. 3d at 1089, 755 P.2d at 993, 248 Cal. Rptr. at 544.

162. *Guzman*, 45 Cal. 3d at 967, 755 P.2d at 947-48, 248 Cal. Rptr. at 486; *Rich*, 45 Cal. 3d at 1089, 755 P.2d at 993, 248 Cal. Rptr. at 544; *Thompson*, 45 Cal. 3d at 114, 753 P.2d at 53, 246 Cal. Rptr. at 262.

163. 45 Cal. 3d 744, 755 P.2d 310, 248 Cal. Rptr. 126 (1988).

164. 742 U.S. 320 (1985).

165. People v. Belmontes, 45 Cal. 3d 744, 785, 755 P.2d 370, 331, 248 Cal. Rptr. 126, 148 (1988).

166. *Id.* at 785, 755 P.2d at 332, 248 Cal. Rptr. at 148.

167. *Id.* at 787, 755 P.2d at 333, 248 Cal. Rptr. at 149 (citing Greer v. Miller, 107 S. Ct. 3102 (1987)); *see* Chapman v. California, 386 U.S. 18 (1967); *cf.* People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980). *See also* notes 1-12 *supra* and accompanying text.

168. People v. Guzman, 45 Cal. 3d 915, 960-61, 755 P.2d 917, 945, 248 Cal. Rptr. 467, 495-96 (1988); People v. Williams, 44 Cal. 3d at 1127, 1149-54, 751 P.2d 901, 915-18, 245 Cal. Rptr. 635, 650-53 (1988). *See* 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE §§ 87.03[3], 87.05[5][a] (1988).

169. 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985). *See* Denton, *Recent Developments in Criminal Law Practices: The Ineffective Assistance of Counsel*, CALIFORNIA CONTINUING EDUCATION FOR THE BAR § 5.7, at 78-79 (Feb. 1988) (the court will not question tactical reasons for not presenting mitigating evidence); Carter, *Maintaining Systematic Integrity in Capital Cases: The Use of Court-appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95 (Fall 1987); Comment, *Mitigating Evidence After Deere*, 24 CAL. W.L. REV. 303 (1987-1988) (analyzing whether a defendant proceeding *in propria persona* will be required to present mitigating evidence during the penalty phase of a capital case); Comment, *People v. Deere: Mitigating Evidence in Capital Sentencing: Defense Opportunity or Obligation?*, 9 CRIM. JUST. J. 349 (1988) (arguing that a clash between a defendant's right to

and *People v. Burgener*.[170] *Deere* and *Burgener* shared this common element of defense counsel's acquiescence to the defendant's desire not to present mitigating evidence.[171] However, in *Deere* and *Burgener*, unlike *Guzman* and *Williams*, the defendant also asked for the death penalty.[172] The court in *Deere* overturned the decision for two reasons: first, the withholding of "potentially crucial information" made the decision unreliable;[173] and second, the failure to present mitigating evidence denied the defendant his right to effective assistance of counsel.[174] In *Burgener*, the court overturned the death penalty on the grounds that a "judgment of death imposed in such circumstances constitutes a miscarriage of justice."[175]

In *Williams*, the court distinguished *Deere/Burgener* stating "*Burgener* itself suggests, the extent to which such 'error' may result in an 'unreliable' sentencing decision depends largely on the instructions and arguments about the scope of the jury's inquiry and discretion."[176] Here, the court held that the prosecutor had done an "excellent job of explaining" the jury's duty.[177] Second, as in *Burgener*, "failure to present available mitigating character evidence may leave the defendant without any mitigating circumstances"[178] and result in "directed verdict of death."[179] By telling the jury they could consider certain "statutory factors" in mitigation, the prosecutor cured any error in this area. Finally, in both *Deere* and *Burgener*, the defendant had asked for death, unlike the defendant in *Williams*.[180]

Looking next at the claim of ineffective assistance of counsel, the

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conduct their case as they desire and the state's interest in a "reliable verdict" put counsel in a position of having to decide between an ethical duty to represent the client's wishes and a duty to present mitigating evidence); Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987) (arguing for requiring counsel to present mitigating evidence).

170. 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986).

171. *Deere*, 41 Cal. 3d at 360-61, 710 P.2d at 929, 222 Cal. Rptr. at 17-18; *Burgener*, 41 Cal. 3d at 540-41, 714 P.2d at 1274, 224 Cal Rptr. at 136-37.

172. *Deere*, 41 Cal. 3d at 361-63, 710 P.2d at 929-30, 222 Cal. Rptr. at 18-19; *Burgener*, 41 Cal. 3d at 541, 741 P.2d at 1274-75, 224 Cal. Rptr. at 136.

173. *Deere*, 41 Cal. 3d at 364, 710 P.2d at 931, 222 Cal. Rptr. at 20).

174. *Id.* at 364-66, 710 P.2d at 931-32, 222 Cal. Rptr. at 20-21.

175. *Burgener*, 41 Cal. 3d at 542, 714 P.2d at 1275, 224 Cal. Rptr. at 542 (quoting *Deere*, 41 Cal. 3d at 368, 710 P.2d at 934, 222 Cal. Rptr. at 23).

176. *Williams*, 44 Cal. 3d at 1152, 751 P.2d at 917, 245 Cal. Rptr. at 651.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

court again distinguished *Deere* and *Burgener*.[181] The court noted that neither decision discussed the general rule that prejudice must be proved before a judgment can be reversed for the type of alleged 'unreasonable' attorney conduct involved here.[182] The court stated, "[w]e cannot, and will not, predicate reversal of a judgment on mere speculation that some undisclosed testimony may have altered the result."[183]

In holding that no *Deere/Burgener* error had occurred in *Guzman*, the court did not reach as far as it did in *Williams*.[184] The court found that although the defense counsel had acquiesced in defendant's desire not to present third-party testimony, the defendant had presented mitigating evidence in his own testimony at the penalty phase.[185]

In dissenting to the affirmance of the death penalty in *Williams*, Justice Mosk found that no error was harmless.[186] The fact that the defendant did not ask for the death penalty should not have been the determining factor; rather, the "complete absence of evidence in mitigation" is the deciding factor.[187] Holding otherwise goes against the principle of *Lockett v. Ohio*[188] that "the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor."[189] "[T]he fact that the verdict of death in each of those cases [*Deere* and *Burgener*] may have been *more* unreliable than the verdict here is immaterial: the verdict of death in this case remains constitutionally unreliable."[190]

L. Cumulative Error

In *People v. Lucky*,[191] the court identified three errors that nonetheless were found to be harmless.[192] The defendant charged that

181. *Williams*, 44 Cal. 3d at 1153, 751 P.2d at 918, 245 Cal. Rptr. at 652.
182. *Id.*
183. *Id.* at 1154, 751 P.2d at 918, 245 Cal. Rptr. at 652-53.
184. People v. Guzman, 45 Cal. 3d 915, 960-61, 755 P.2d 917, 945, 248 Cal. Rptr. 467, 495-96 (1988).
185. *Guzman*, 45 Cal. 3d at 961, 755 P.2d at 945, 248 Cal. Rptr. at 496.
186. *Williams*, 44 Cal. 3d at 1160, 751 P.2d at 922, 245 Cal. Rptr. at 657 (Mosk, J., dissenting).
187. *Williams*, 44 Cal. 3d at 1161, 751 P.2d at 923, 245 Cal. Rptr. at 657 (Mosk, J., dissenting).
188. 438 U.S. 586 (1978).
189. *Williams*, 44 Cal. 3d at 1159, 751 P.2d at 922, 245 Cal. Rptr. at 656 (Mosk, J., dissenting) (citing Lockett v. Ohio, 438 U.S. 586 (1978)).
190. *Williams*, 44 Cal. 3d at 1160, 751 P.2d at 923, 245 Cal. Rptr. at 657 (Mosk, J., dissenting) (emphasis in original).
191. 45 Cal. 3d 259, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988).
192. "(1) the prosecutor's 'life sentence' and 'escape' reference, (2) the 'double charging' of multiple-murder special circumstances, and (3) admission of the Ryder testimony as to nonstatutory aggravating factors." *Lucky*, 45 Cal. 3d at 303, 753 P.2d at 1081, 247 Cal. Rptr. at 29.

even if no single error was enough for reversal, when added together the cumulative effect was prejudicial.[193] The court, however, was not prepared to accept this premise.[194] Given the weight of the evidence, the nature of the crime, and the jury's proper understanding of its duty, the court was not "persuaded that the cumulative effect of the errors identified could have affected the verdict."[195]

Justice Broussard, concurring in the guilt phase, but dissenting in the penalty phase, would have allowed for such cumulative effect. He reasoned there was enough of a possibility that had there been no error, the verdict would have been different. This was enough to warrant reversal.[196] In his dissent in *People v. Silva*,[197] Justice Broussard argued for reversal along the same lines. In this case, there were excessive charges of special circumstances, repeated argument on these special circumstances, and admission into evidence of the defendant's threat to kill a police officer. Justice Broussard found that these errors were not harmless and that the "combined effect . . . was to tip the jury's decision in favor of death."[198]

Although prior California Supreme Court decisions[199] and decisions in other jurisdictions recognized that the cumulation of minor errors could prejudice the jury's decision,[200] Justice Broussard was

193. *Lucky*, 45 Cal. 3d at 303, 753 P.2d at 1081, 247 Cal. Rptr. at 29; *see generally*, B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Reversible Error* § 756 (1963 & Supp. 1985); B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 359 (3d ed. 1985); 5 AM. JUR. 2D *Appeal and Error* § 789 (1962 & Supp. 1988).

194. *Lucky*, 45 Cal. 3d at 303, 753 P.2d at 1081, 247 Cal. Rptr. at 29.

195. *Id.* at 304, 753 P.2d at 1086, 247 Cal. Rptr. at 30.

196. *Id.* at 304-05, 753 P.2d at 1081-82, 247 Cal. Rptr. at 30 (Broussard, J., dissenting).

197. 45 Cal. 3d 604, 643, 745 P.2d 1070, 1092, 247 Cal. Rptr. 573, 596 (1988) (Broussard, J., dissenting).

198. *Silva*, 45 Cal. 3d at 648, 754 P.2d at 1096, 247 Cal. Rptr. at 599 (Broussard, J., dissenting).

199. People v. Lucky, 41 Cal. 3d 315, 710 P.2d 959, 221 Cal. Rptr. 880 (1985) (opinion by Broussard, J.) (each error had a small but real possibility of affecting the jury's verdict); People v. Holt, 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984) (in the absence of cumulative errors, there is more likely a favorable result to the defendant); People v. Hamilton, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963) (cumulative effects of errors misled the jury); People v. Terry, 57 Cal. 2d 538, 370 P.2d 985, 21 Cal. Rptr. 185 (1962) (cumulative effect of errors denied defendant a fair trial); People v. Buffum, 40 Cal. 2d 709, 256 P.2d 317 (1953) (cumulative effect required reversal).

200. Harris v. Housewright, 697 F.2d 202 (8th Cir. 1982) (no single error sufficient, but cumulative effect was ineffective assistance of counsel); United States *ex rel.* Lewis v. Lane, 656 F. Supp. 181 (C.D. Ill. 1987) (cumulative effect of defense counsel errors violated sixth amendment rights). "In some instances a single error may result in a determination that counsel's performance constituted ineffective assistance. In other instances the cumulative effect of a combination of errors may cause a finding of ineffective assistance." *Project: Fifteenth Annual Review of Criminal Procedure: United*

alone in supporting this position in *Lucky*. It appears that an error, standing alone, must be prejudicial to require reversal. The cumulative effect of otherwise harmless errors, in light of the entire record, is not sufficient to warrant overturning the verdict.[201]

M. Jailhouse Informant

Jailhouse informant testimony[202] is admissible at the penalty phase and does not require sua sponte instructions to view the testimony with distrust.[203] There is also no sixth amendment violation if the informant acts as a "mere listening post."[204] Further, the defendant has the burden to establish that there was governmental action "beyond their merely listening, that was designed deliberately to elicit incriminating remarks."[205]

Justice Mosk, dissenting from the affirmance of the death penalty

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States Supreme Court and Courts of Appeals 1984-1985, III Trial, 74 GEO. L.J. 751, 762 (1986) (footnotes omitted); *see also* Annotation, *Postretirement Out-Of-Court Communications Between Jurors and Trial Judge as Grounds For New Trial or Reversal in Criminal Case*, 43 A.L.R. 4TH 410, § 2(b) (1986) (the error plus any other error may have a cumulative effect); Annotation, *Propriety and Prejudicial Effect of Prosecutor's Argument to Jury Indicating That He Has Additional Evidence of Defendant's Guilt Which He Did Not Deem Necessary to Present*, 90 A.L.R. 3D 646, § 8 (1979 & Supp. 1988) (cumulative effect of prosecutor's remarks); Annotation, *Propriety and Prejudicial Effect of Prosecutor's Argument Giving Jury Impression that Defense Counsel Believes Accused Guilty*, 89 A.L.R. 3D 263, § 8 (1979) (cumulative effect of leading to improper Briggs-type speculation).

201. *Lucky*, 44 Cal. 3d at 303-04, 753 P.2d at 1081, 247 Cal. Rptr. at 647; *see* 5 AM. JUR. 2D *Appeal and Error* § 789 (1962 & Supp. 1988) ("At least one court has rejected the rule as to cumulative minor error, holding that each claim of error must stand or fall on its own merits.").

202. At the time this survey was prepared, due to an informant's report on the ease with which jailhouse informants can fabricate so-called confessions, the Los Angeles County Sheriff's Department was conducting an investigation into the validity of all such information over the last 10 years. L.A. Times, Oct. 29, 1988 at 1, col. 5.

203. People v. Thompson, 45 Cal. 3d 86, 118-19, 753 P.2d 37, 56-57, 246 Cal. Rptr. 245, 264-65 (1988) (citing People v. Hovey, 44 Cal. 3d 543, 565-66, 749 P.2d 776, 787-88, 244 Cal. Rptr. 121, 133 (1988)).

204. *Williams*, 44 Cal. 3d at 1141, 751 P.2d at 909-10, 245 Cal. Rptr. at 644.

205. *Id.*; *see* Kuhlman v. Wilson, 477 U.S. 436 (1986); People v. Hovey, 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121 (1988) (cellmate not instructed to inform police); People v. Howard, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988) (cellmate voluntarily contacted police and then was asked to listen); 2 CALIFORNIA CRIMINAL DEFENSE PRACTICE, *Confession and Identification*, § 830.26(1) (Supp. 1988) ("defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed to elicit incriminating remarks."). *But see* White, *Interrogation Without Questions: Rhode Island v. Innes and U.S. v. Henry*, 78 MICH. L. REV. 1209, 1250 n.238 (1980) (suggestion of Justice Stevens made during oral argument in Henry: "If the government is to be prevented from improperly tilting the adversary balance to its own advantage, it should not matter whether the conduct which causes the improper tilt is active or passive."); Note, *Sixth Amendment—Right to Counsel: Limited Post Indictment Use of Jailhouse Informants is Permissible, Kuhlman v. Wilson*, 77 J. CRIM. L. & CRIMINOLOGY 743, 766 (1986) ("[g]iven an appropriate incentive a jailhouse informant, even one that does not participate in explicit interrogation, can act as an equally effective 'nudge' ").

in *People v. Thompson*,[206] found difficulty with admitting uncorroborated evidence of solicitation for murder at the penalty phase.[207] Although the evidence was presented during the guilt phase, it was also referred to at the penalty phase by the prosecutor in his closing argument.[208] The alleged solicitation was evidence that was not properly admitted because it was an "entirely separate offense."[209] The prosecutor admitted it was error, but the majority concluded it was harmless error.[210] Justice Mosk contended that the majority's characterization of the prosecutor's evidence as rebuttal was incorrect since the evidence was introduced at the guilt phase and the prosecutor presented no evidence during the penalty phase.[211] "Thus it would be fatuous to now claim that the tales of potential killings were merely rebuttal to good-character evidence offered by defendant in the penalty phase."[212] The majority of the court, however, gave greater latitude to prosecutorial argument.

N. Allocution

Allocution is the "formality of [the] court's inquiry of [a] prisoner as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction."[213] In *People v. Robbins*,[214] the California Supreme Court upheld the trial court's denial of the defense counsel's request during the penalty phase that the defendant address the jury personally without having to take the stand and undergo cross-examination.[215] The court acknowledged

206. 45 Cal. 3d 86, 144, 753 P.2d 37, 74, 246 Cal. Rptr. 245, 282 (1988) (Mosk, J., dissenting).

207. *Id.* at 144, 753 P.2d at 74, 246 Cal. Rptr. at 282 (Mosk, J., dissenting); *see* CALIFORNIA CRIMINAL LAW, PROCEDURE AND PRACTICE, *Immunity for Testimony* § 25.17 (1986 & Supp. 1988) (instructions requested by the defense as to the credibility of informants); *see generally* 30 AM. JUR. 2D *Evidence* § 1151 (1967); 24A C.J.S.*Criminal Law* § 1883 (1962 & Supp. 1988) (proper appellate review of lower court's judgment concerning credibility of witnesses).

208. 45 Cal. 3d at 145, 753 P.2d at 75, 246 Cal. Rptr. at 283 (Mosk, J., dissenting).

209. *Id.* at 144-45, 753 P.2d at 74, 246 Cal. Rptr. at 283 (Mosk, J., dissenting).

210. *Id.* at 144-45, 753 P.2d at 74-75, 245 Cal. Rptr. at 282-83 (Mosk, J., dissenting).

211. *Id.* at 145, 753 P.2d at 75, 246 Cal. Rptr. at 283 (Mosk, J., dissenting).

212. *Id.*

213. BLACK'S LAW DICTIONARY 70 (5th ed. 1979). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 607 (1963 and Supp. 1985); 21 AM. JUR. 2D *Criminal Law* §§ 531-32 (1981 & Supp. 1988); 96 A.L.R. 2D 1292 (1964); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 832-33 (1968); Comment, *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream?*, 62 TUL. L. REV. 207 (1987).

214. 45 Cal. 3d 867, 755 P.2d 355, 248 Cal. Rptr. 172 (1988).

215. *Id.* at 888-90, 755 P.2d at 368-69, 248 Cal. Rptr. at 184-86.

that no United States Supreme Court case was on point. However, the court cited a Fourth Circuit opinion[216] for the proposition that in a *non*-capital case, "when a defendant effectively communicates his desire to the trial judge to speak to the imposition of sentence, it is a denial of due process not to grant the defendant's request."[217] The court distinguished this decision, because "[t]he sentencing phase of a capital trial, . . . specifically provides for such testimony. . . . Given this, we fail to see the need, much less a constitutional requirement, for a corresponding 'right to address the sentencer without being subject to cross-examination' in capital cases."[218] The court also distinguished a Maryland opinion[219] which upheld the defendant's common law right to address the jury without subjecting himself to cross-examination.[220] Common law does not recognize such a right.[221]

Justice Mosk concurred in the opinion, but wrote separately to emphasize his view of the right to allocution in a capital case. Citing the United States Supreme Court[222] and numerous other state opinions,[223] he queried whether "the defendant [should] be allowed to personally address the jury before it reflects on the appropriate penalty."[224] Justice Mosk concluded that no error occurred in denying the defendant this opportunity, because the current state of the law did not demand it.[225] He indicated that this was an "appropriate sub-

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216. Ashe v. North Carolina, 586 F.2d 334 (4th Cir.) *cert. denied*, 441 U.S. 966 (1978).

217. *Ashe*, 586 F.2d at 336.

218. *Robbins*, 45 Cal. 3d at 889, 755 P.2d at 369, 248 Cal. Rptr. at 185.

219. Harris v. State, 306 Md. 344, 509 A.2d 120 (1986).

220. *Id.* at 352-59, 509 A.2d at 124-27.

221. *Robbins*, 45 Cal. 3d at 890, 755 P.2d at 369, 248 Cal. Rptr. at 186. The court also distinguished *Harris* on the basis that the defendant there made an offer of proof concerning the substance of his requested address to the jury, whereas in *Robbins* there was no such offer. *Robbins*, 45 Cal. 3d at 890, 755 P.2d at 369, 248 Cal. Rptr. at 185-86 (citing *Harris*, 306 Md. at 359, 509 A.2d at 127).

222. Green v. United States, 365 U.S. 301 (1961). Justice Frankfurter wrote of "the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.* at 304.

223. This right was upheld in Mohn v. State, 584 P.2d 40 (Alaska 1978); Sellman v. State, 47 Md. App. 510, 423 A.2d 974 (1981); Tomlinson v. State, 98 N.M. 213, 647 P.2d 415 (1982); and State v. Nicoletti, 471 A.2d 613 (R.I. 1984). It was held discretionary in Patterson v. State, 21 Ala. App. 357, 208 So. 265 (1926); Wilson v. State, 76 Ga. App. 257, 45 S.E.2d 709 (1947); State v. Townley, 149 Minn. 5, 182 N.W. 773 (1921); and State v. Burkhart, 541 S.2d 365 (Tenn. 1976).

224. *Robbins*, 45 Cal. 3d at 891, 755 P.2d at 370, 248 Cal. Rptr. at 186-87 (Mosk, J., concurring).

225. *Id.* at 893, 755 P.2d at 371, 248 Cal. Rptr. at 188 (Mosk, J., concurring). *See* Peter & Pincer, *Mercy and the Death Penalty: The Last Plea*, 10 CRIM. JUST. J. 41 (1987); Sullivan, *The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocation and Constitutional Mitigation*, 15 N.M. L. REV. 41 (1985) (analysis of allocution as it applies to New Mexico).

ject for the Legislature to consider in the future."[226] He also noted that a case was pending before the California Supreme Court where the defendant, in the trial judge's discretion, was allowed to make a personal plea to the jury, even though counsel represented him.[227]

O. Additional Dissents

In *People v. Poggi*,[228] Justice Mosk dissented as to the penalty phase decision because he felt "compelled to conclude that the sentence of death is disproportionate to the defendant's 'personal responsibility and moral guilt.' "[229] Here, the defendant had introduced evidence of sufficient mental deficiency[230] such that Justice Mosk thought "his personal moral culpability is not sufficiently grave as to allow the state to inflict on him the ultimate sanction."[231]

Justice Mosk also dissented in *People v. Heishman*[232] because he believed it was error for the trial judge not to "state his reasons for denying defendant's automatic application for modification of the verdict of death under Penal Code section 190.4 subsection(c)."[233] He noted that the court had previously found this type of the failure to be prejudicial error.[234] Further, Mosk argued that the majority's reliance on *People v. Chi Ko Wong*[235] for finding harmless error was

226. *Robbins*, 45 Cal. 3d at 893, 755 P.2d at 371, 248 Cal. Rptr. at 188 (Mosk, J., concurring).

227. *Id.* (citing People v. Moore, Crim. No. 23721).

228. 45 Cal. 3d 306, 349, 753 P.2d 1082, 1109, 246 Cal. Rptr. 886, 913 (Mosk, J., dissenting).

229. *Id.* at 349, 753 P.2d at 1109, 246 Cal. Rptr. at 913 (Mosk, J., dissenting) (citing Edwards v. Floyd, 458 U.S. 782, 801 (1982)).

230. "But Dr. Stalberg also testified—without contradiction—that Mr. Poggi had the judgment and control of a 12 year old." *Poggi*, 45 Cal. 3d at 349, 753 P.2d at 1109, 246 Cal. Rptr. at 913 (Mosk, J., dissenting).

231. *Id.* (Mosk, J., dissenting).

232. 45 Cal. 3d 147, 205, 753 P.2d 629, 668, 246 P.2d 673, 712 (1988) (Mosk, J., dissenting).

233. *Id.* at 205, 753 P.2d at 668, 246 Cal. Rptr. at 712 (Mosk, J., dissenting). Penal Code section 190.4(c) provides in pertinent part that: "The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes." CAL. PENAL CODE § 190.4(c) (West 1988). Further, section 190.4(e) provides that "[i]n ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating factors . . . [and] [t]he judge shall state on the record the reasons for his findings." *Id.* § 190.4(e).

234. *Heishman*, 45 Cal. 3d at 205, 753 P.2d at 668, 246 Cal. Rptr. at 712 (Mosk, J., dissenting) (citing People v. Rodriguez, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986)).

235. 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976) (involving a juvenile defendant and Juvenile Court law).

misplaced because the issue was not decided.[236] He also concluded that the court cannot "cure" an error by making modification determinations on its own.[237] Since the trial judge had died, Justice Mosk concluded the court must either remand for a new penalty phase or grant a sentence of life imprisonment without the possibility of parole.[238]

V. CONCLUSION

Despite the error asserted at the guilt and special circumstances phase of the trial, the California Supreme Court unanimously upheld the trial decision of guilt and at least one special circumstance. The court undertook a full analysis of the numerous errors alleged by the various defendants, but the court did not find that there was any procedural or constitutional unfairness at trial in any case.

In the penalty phase, errors in instructions alleged in connection with factor (k), *Brown*, and *Ramos* should no longer occur because the CALJIC pattern jury instructions now incorporate the previous decisions of the California Supreme Court. While these issues will continue to confront the court on appeal, present defendants will likely have the benefit of proper instructions.

The Lucas court has granted prosecutors wide latitude in the penalty phase for aggressive argument, and the cases reviewed in this survey overturned a death penalty only when the prosecutor's argument emphasized the instructional ambiguity in *Brown* and *Ramos*. In all instances, the court looked to the totality of the trial, including other instruction and argument by defense counsel, to determine if any possible error was cured. There also existed allegations of ineffective assistance of counsel, but the court would not reverse for failure to object if there were any possible tactical reason supporting the failure to object. The court applied the same reasoning for failure to present mitigating evidence. In addition, the court in no instance found that such failure rendered the verdict unreliable. As to jailhouse informant testimony, cumulation of error, and the right to allocution, while not presently warranting reversal, vigorous dissents leave these areas open to further development.

Overall, in these capital cases, the California Supreme Court seriously reviewed the entire record to determine whether asserted errors rose beyond a harmless nature. Given the egregious nature of the murders, and the substantial weight of evidence against the defendants in these nineteen cases, the court could view the trial as fair

236. *Heishman*, 45 Cal. 3d at 205, 753 P.2d at 668, 246 Cal. Rptr. at 712 (Mosk, J., dissenting).

237. *Id.* at 205-06, 753 P.2d at 668, 246 Cal. Rptr. at 712-13 (Mosk, J., dissenting).

238. *Id.* at 206, 753 P.2d at 668-69, 246 Cal. Rptr. at 713 (Mosk, J., dissenting).

in its totality while deciding that minor flaws in the trial were harmless.

HOWARD S. FALLMAN
CHARLES ESKRIDGE, III

V. EDUCATION

The Education Code confers discretion upon local professional competence commissions to determine the appropriateness of tenured employee dismissals even when an authorized basis for dismissal exists: **Fontana Unified School Dist. v. Burman.**

In *Fontana Unified School District v. Burman*, 45 Cal. 3d 208, 753 P.2d 689, 246 Cal. Rptr. 733 (1988), the court held that local commissions on professional competence, authorized by section 44944 of the Education Code, have the discretion to determine whether dismissal of a permanent tenured employee is warranted even though a statutorily-authorized basis for dismissal exists. *See* CAL. EDUC. CODE § 49444 (West 1978 & Supp. 1989); 56 CAL. JUR. 3D *Schools* §§ 440-442 (1980 & Supp. 1988). The court failed to find any legislative intent requiring the commission adhere to a recommended sanction simply because an authorized basis for that sanction exists. *See* CAL. EDUC. CODE § 44932(a) (West 1978 & Supp. 1989); 56 CAL. JUR. 3D *Schools* §§ 436, 437, 442 (1980 & Supp. 1989).

The Fontana School District (the District) voted to discharge Burman, a fourteen-year tenured teacher, for immoral conduct, dishonesty, evident unfitness for service, and persistent violations of district regulations. Each of these charges was a statutorily-recognized basis for dismissal under section 44932(a) of the Education Code. *See* CAL. EDUC. CODE § 44932(a)(1)-(9) (West 1978 & Supp. 1989). Invoking section 44939, the District immediately suspended Burman without pay and notified her of her inevitable dismissal unless she demanded a hearing. *See id.* §§ 44939, 44944(a); 2 CAL. JUR. 3D *Administrative Law* § 104 (1973 & Supp. 1989); 56 CAL. JUR. 3D *Schools* §§ 388, 436, 438, 440 (1980 & Supp. 1989). A commission was convened, finding Burman guilty only of the dishonesty charge. Although the commission realized this was an authorized basis for dismissal under section 44932(a)(3), Burman's unblemished record dictated leniency. In response to the commission's decision, the District sought a writ of mandamus compelling the commission to impose the recommended sanction of dismissal.

At issue on appeal was whether finding a statutorily-authorized basis for dismissal mandated discharge. See *Midway School Dist. v. Griffeath*, 29 Cal. 2d 13, 172 P.2d 857 (1946). To resolve this issue, the court examined both the statutory framework of the pertinent sections of the Education Code and the specific language of section 49444(c). *See* CAL. EDUC. CODE § 49444(c) (West 1978 & Supp. 1989).

First, the court pointed out the various options available to a district wanting to pursue a disciplinary action against a tenured employee. The court noted that in virtually all cases, a district has a choice whether to initiate disciplinary proceedings. *See id.* § 44934. Moreover, if the district decides to initiate proceedings, it must then decide whether to seek suspension or dismissal. *See* CAL. EDUC. CODE § 44933(a) (West Supp. 1989). The court illustrated that a district could severely limit the commission's discretion by opting for certain courses of action over others. When a district foregoes suspension and seeks only dismissal of a teacher under section 44932(a), the commission may elect to dismiss or not. Here, the commission's decision not to dismiss was upheld by the trial court. The court of appeal reversed, holding that if a statutorily-authorized basis for dismissal exists, then section 44944 mandated discharge.

To resolve the interpretation of section 44944, the supreme court examined the statutory construction. First, the court determined that while section 44932 provides a teacher cannot be dismissed absent certain grounds, a teacher need not be dismissed if one of these grounds is discovered. Further, section 44944 allows the commission to decide whether a teacher should be dismissed, but does not force the commission to dismiss under *any* circumstances. *See* CAL. EDUC. CODE § 44944(c) (West 1978 & Supp. 1989). Accordingly, the commission must be persuaded that the sanction is appropriate before it is imposed.

The court next reasoned that when the legislature amends a statute and fails to change previous judicially-construed portions, the legislature presumably concurs with such interpretation. With respect to immoral or unprofessional conduct, a statutorily-authorized basis for dismissal, the court had previously held that teacher misconduct should be measured against a seven-prong standard before dismissal is warranted. *See Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); 56 CAL. JUR. 3D *Schools* §§ 436-437 (1980 & Supp. 1988). The court presumed that the legislature adopted this standard since the language of section 44932(a)(1) survived two sets of Education Code amendments. In the present case, the court declared that this seven-prong standard was to be applied to dishonesty as well, thus expanding the scope of the commission's discretion to determine the appropriateness of dismissals.

Finally, the court relied on two parts of section 44944(c) to conclude that a commission is empowered to determine the appropriateness of dismissals. First, the court noted that a commission is required to produce a written decision containing findings of fact and conclusions of issues. *See* CAL. EDUC. CODE § 44944(c) (West 1978 & Supp. 1989). The court concluded that this statutory requirement forced the commission to ponder the appropriateness of the sanction, not just resolve whether a statutory basis for dismissal existed.

Additionally, the court compared the procedures involved in dismissing a nontenured and a tenured teacher. The court indicated that the section 44944 language bestowed more discretion on the commission than did the language of section 44948.3(a)-(b) which pertains to dismissal procedures of a nontenured teacher, thus injecting more finality into its decisions. Under section 44948.3, a commission is not convened when a nontenured teacher is threatened with dismissal. *See* CAL. EDUC. CODE § 44948.3(a)-(b) (West Supp. 1989); 56 CAL. JUR. 3D *Schools* §§ 445, 447-448 (1980 & Supp. 1988). The court reasoned that the fact a commission is called when a tenured teacher is subject to dismissal shows the greater import in proceedings involving such an employee. Making an illogical leap, the court concluded that because there is greater emphasis placed on dismissal proceedings involving tenured teachers, section 44944 bestows a discretionary role upon a commission in disciplinary proceedings.

In sum, the court strains to expand the discretionary power of professional competence commissions. By applying tenuous reasoning, the court legitimizes the seven-prong test set forth in *Morrison* whenever a statutorily-authorized basis for dismissal exists. *See Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). By stretching to reach this decision, the court has shown its approval of an alternative decision-making process.

JOHN AUGUSTINE SOPUCH III

VI. ELECTION LAW

A citizen who moves to a temporary residence with no intent to return to the former domicile and fails to secure a new domicile may vote in the former domicile's precinct: **Walters v. Weed.**

In *Walters v. Weed*, 45 Cal. 3d 1, 752 P.2d 443, 246 Cal. Rptr. 5 (1988), the supreme court, harmonizing conflicting statutes, held that

a former domicile is not lost until a new one is secured; persons may, therefore, vote in their former domicile if they temporarily reside elsewhere. Thus, the court confirmed the election of Jane Weed to the Santa Cruz City Council by finding that only 113 university students voted illegally when 182 illegal votes were needed to upset election results.

The contested voters, 472 University of California at Santa Cruz students, lived on campus and were registered to vote there. In the fall of 1983, 193 of these students had moved off-campus. Of these, 113 found suitable housing where they intended to stay and eighty lived in temporary housing, e.g., tents, vans, and friends' houses. Those who found suitable housing and intended to stay off-campus were deemed by the trial, appellate, and supreme courts to have established a new domicile, and were in violation of the Elections Code when they voted in their former on-campus precinct. *See Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 578, 488 P.2d 1, 9, 96 Cal. Rptr. 697, 705 (1971) ("The registrar . . . has the power not to register someone who is not a resident of the jurisdiction."); *see also* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 118 (8th ed. 1974) (analyzing *Jolicoeur*); *see generally* 27 CAL. JUR. 3D *Domicile* § 1 (1987). The supreme court, affirming the trial court, additionally held that the eighty students who did not acquire a new domicile before voter registration had closed were not in violation of the Elections Code when they voted in their former on-campus precinct.

The trial court's holding, that the transitory student votes were not illegal, was premised on section 244 of the Government Code: "A residence cannot be lost until another is gained." CAL. GOV'T CODE § 244(c) (West 1980); *see Fenton v. Board of Directors*, 156 Cal. App. 3d 1107, 1113-14, 203 Cal. Rptr. 388, 393 (1984) (interpreting the word "residence" in the Government Code to mean "domicile"). *See also* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent & Child* §§ 4-6 (8th ed. 1974 & Supp. 1984); 25 AM. JUR. 2D *Domicile* § 16 (1966); 12 CAL. JUR. 3D *Conflict of Laws* § 28 (1974).

The appellate court, however, believed that the students who moved off-campus forfeited their right to vote in the on-campus precinct "regardless of whether they had established new domiciles." *Walters*, 45 Cal. 3d at 6, 752 P.2d at 445, 246 Cal. Rptr. at 7. This holding was premised solely on section 200 of the Elections Code which states that a domicile is a place of fixed habitation "wherein the person has the intention of remaining . . . [and] returning." CAL. ELEC. CODE § 200(b) (West 1977); *see also* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent & Child* §§ 4-6 (8th ed. 1974 & Supp. 1984); 25 AM. JUR. 2D *Elections* §§ 66-69 (1966); 12 CAL. JUR. 3D *Conflict of Laws* § 25 (1974).

Thus, an ambiguity exists between the Elections Code and the Government Code: under the former, one's domicile is lost when there no longer exists the intent to remain or return; under the latter code, a domicile can never be lost until a new one is secured. To harmonize these statutes, the supreme court reminded the court of appeal that sections 200-217 of the Elections Code were enacted as a response to fraudulent voting practices where persons already having new domiciles continue to vote in their former domicile's precinct. Thus, the court concluded that the Elections Code did not address the current issue of persons who had not yet secured a new domicile.

After establishing that one's domicile cannot be lost until another one is acquired, the court addressed the following issue: where should those residing temporarily vote? *See* Annotation, *Residence of Students For Voting Purposes*, 44 A.L.R. 3D 797 (1972). Three precinct options were presented: the future domicile, the temporary residence, and the old domicile. Due to an identification problem, the first option was not considered realistic. The second option was rejected because the court feared it would encourage "precinct shoppers." Although not flawless, the court selected the last option, the old domicile, reasoning that it is the only abode which satisfies section 200 of the Elections Code—even if only in the past.

Additionally, because the first two options do not satisfy the definitional requirement of "domicile," disenfranchisement would occur which is against the policy of the Elections Code. *Otsuka v. Hite*, 64 Cal. 2d 596, 604, 414 P.2d 412, 417, 51 Cal. Rptr. 284, 289 (1966) (election laws should not be construed to disenfranchise a voter if any other interpretation of the law is reasonable); *see also* 28 CAL. JUR. 3D *Elections* §§ 35 at n.33, 41-42 (1986).

Because a new domicile can only be acquired when one moves with the subjective intent of remaining, individuals will not be effectively deterred from falsely asserting that their current residence is not their domicile and returning to their former domicile to vote. *See* CAL. GOV'T CODE § 244(f) (West 1980); 25 AM. JUR. 2D *Elections* § 69 (1966). The result is that persons no longer living in a certain community may continue to affect its politics. *See* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 118(2) (8th ed. 1974). It seems unlikely that this loophole will prompt "carpetbaggers" into moving for the sake of occasional elections. However, as recognized by the dissent, the loophole is attractive to those who may move for legitimate reasons but still wish to maintain a voice in the abandoned domicile's politics. Nevertheless, the supreme court's decision will

keep fraudulent voting to a minimum while simultaneously reconciling the conflicting statutory mandates.

MICHELLE R. ANDERSON

VII. EVIDENCE

A. *Absent a witness's invocation of the privilege against self-incrimination to make himself "unavailable," a prosecutor may comment on defendant's failure to present the witness's corroborating testimony:* People v. Ford.

In *People v. Ford*, 45 Cal. 3d 431, 754 P.2d 168, 247 Cal. Rptr. 121 (1988), the court held that the mere fact a witness may invoke the privilege against self-incrimination is insufficient to render the witness "unavailable"; it is necessary to actually call the witness and have him invoke his privilege. Without such an exercise, the prosecutor may comment on the defendant's failure to call such witnesses who might corroborate defendant's story. The court noted that comment is particularly appropriate when the defendant's alibi testimony is likely perjured. *See, e.g., United States v. Ariza-Ibarra*, 651 F.2d 2 (1st Cir. 1981); *State v. Moore*, 620 S.W. 2d 370 (Mo. 1981).

Ford and three others were charged with burglary. Two of Ford's accomplices pleaded guilty prior to his trial, but had not yet been sentenced. At his own trial, Ford denied any participation in the crime, testifying that he was elsewhere with two of the accomplices at the time of the burglary. However, Ford failed to call those accomplices as witnesses to corroborate his testimony. The prosecutor commented to the jury on Ford's failure to call his accomplices, which the trial court subsequently deemed prejudicial misconduct and granted Ford's motion for a new trial.

Ford contended that the accomplices were "unavailable" to testify, predicting that they would exercise their privilege against self-incrimination once they were called to the stand. *See* U.S. CONST. amend V. As soon as this privilege was asserted, prosecutorial comment would then be prohibited under the fourteenth amendment. U.S. CONST. amend. XIV; *see* CAL. EVID. CODE § 913(a) (West 1966) [section 913]; *see also Griffin v. California*, 380 U.S. 609 (1965); *People v. Wilkes*, 44 Cal. 2d 679, 284 P.2d 481 (1955); *People v. Klor*, 32 Cal. 2d 658, 197 P.2d 705 (1948).

The court, however, stated that four conditions must be satisfied before the privilege against self-incrimination becomes effective. The holder of the privilege must first be called to testify, and then sworn in by the court. The privilege must actually be asserted by the holder. The court must then determine whether the exercise of the

privilege is justified under the circumstances. *See* U.S. CONST. amend. V; CAL. EVID. CODE § 404 (West 1966); *see also People v. Cornejo*, 92 Cal. App. 3d 637, 155 Cal. Rptr. 238 (1979); *People v. Harris*, 93 Cal. App. 3d 103, 155 Cal. Rptr. 472 (1979). Finally, no stipulation may exist between the parties that the holder will exercise the privilege if called to testify. If these requirements are met, or if the witness cannot be located, the witness is then deemed "unavailable" to testify. *See People v. Frohner*, 65 Cal. App. 3d 94, 135 Cal. Rptr. 153 (1976).

The court held that none of these requirements were met here. The accomplices, as holders of the privilege, were never called by the defendant to testify, and thus never asserted their privilege against self-incrimination. Furthermore, the defendant could not invoke the privilege on behalf of the accomplices. *See People v. Lewis*, 222 Cal. App. 2d 136, 35 Cal. Rptr. 1 (1963). The court added that witnesses do not become "unavailable" simply because they *might* exercise the privilege if called to testify. The two accomplices were therefore "available" to testify regarding the veracity of the defendant's alibi.

The court then found that comment on a defendant's failure to call an "available" and necessary witness was permissible. In support of this conclusion, the court reasoned that the defendant's failure to call collateral witnesses was itself relevant evidence. Such exclusion constitutes an admission that the testimony could not be corroborated. C. MCCORMICK, EVIDENCE § 272 (2d ed. 1984); 2 J. WIGMORE, EVIDENCE § 285 (Chadbourd ed. 1979). Since the California Constitution favors the admissibility of relevant evidence, the court concluded such comment was permissible. *See* CAL. CONST. art. I, § 28(d). In addition, the court noted that neither case law nor section 913 precluded the admissibility of prosecutorial comment. *Cf. People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986) (comment by the court is permissible).

The court added, however, that the judge has the discretion to determine when the circumstances are such that comment is not permissible. This determination should be made out of the presence of the jury. The court recommended that the prosecutor first disclose to the judge and opposing counsel the nature of the comment. This allows the defendant an opportunity either to call those witnesses, or to convince the judge of their "unavailability." The judge may then determine whether comment to the jury is permissible under the circumstances. *See, e.g., State v. Clawans*, 38 N.J. 162, 183 A.2d 77 (1962).

The court's rationale for permitting prosecutorial comment is to prevent perjured testimony. The court reasoned that permitting such comment imposes a burden upon defendants to corroborate their testimony. Absent extenuating circumstances, failure to do so will result in an inference that the testimony is false.

Thus, the court's conclusion that prosecutorial comment is both admissible and relevant evidence is an important step in combating perjury. The court places a burden upon the defendant to corroborate a weak alibi with an "available" witness. Should the defendant elect not to do so, the prosecutor may now portray an apparently solid alibi as sorely lacking truth and substance.

BRYAN HANCE

B. *A jury instruction which outlines specific factors in evidence casting reasonable doubt on eyewitness testimony is permissible when the factors are described in a neutral, nonexplanatory manner:* **People v. Wright.**

In *People v. Wright*, 45 Cal. 3d 1126, 755 P.2d 1049, 248 Cal. Rptr. 600 (1988), the court determined that the trial court properly refused to read to the jury defendant's special instructions regarding the veracity of eyewitness testimony. However, the trial court erred in refusing to read a specific instruction explaining how the jury should analyze each eyewitness's testimony. Nevertheless, the court found this error to be harmless.

During an armed robbery of a wholesale beverage warehouse, three of the eleven employees accosted by the robbers were able to personally identify the defendant, even though he wore a black stocking mask. One witness identified the defendant at trial; another witness positively identified the defendant at a lineup; and the final eyewitness chose the defendant's picture from a photo-spread but could not conclusively identify the defendant at the trial. Based solely on these eyewitnesses' accounts of the crime, the defendant was convicted. *Wright*, 45 Cal. 3d at 1132, 755 P.2d at 1051, 248 Cal. Rptr. at 602.

The defendant's sole contention on appeal was that the trial court erred in not allowing five specially drafted jury instructions to be read to the jury. The defendant's first and fourth jury instructions would have required the trial court to notify the jury that "the prosecutor has the burden of proof on the issue of identity," and that the defendant "need not prove his innocence or another's guilt." *Id.* at 1134, 755 P.2d at 1052-53, 248 Cal. Rptr. at 603.

The court easily dispensed with the defendant's argument that the trial court erred in not allowing these instructions to be read to the

jury. By reading California Jury Instruction (Criminal) (CALJIC) No. 2.91 to the jury, any further instruction which touched on the same matters would merely be duplicative and unnecessary. The court reasoned that any repetitive or duplicative instructions presented to a trial court as special instructions need not be read when the trial court has already read a generalized form instruction on the same topic. *Id.* at 1134, 755 P.2d at 1053, 248 Cal. Rptr. at 603-04. *See People v. Martinez*, 191 Cal. App. 3d 1372, 1378-79, 237 Cal. Rptr. 219, 223 (1987); *People v. McCowan*, 85 Cal. App. 3d 675, 679-80, 149 Cal. Rptr. 611, 613-14 (1978) (prohibition of redundant, duplicative jury instructions).

The defendant next argued that the trial court erroneously rejected his second special jury instruction. This instruction required that "certain specific items of evidence introduced at trial" be listed in order for jury members to analyze such factors when deciding if the defendant, beyond a reasonable doubt, was guilty of the crimes for which he was indicted. *Wright*, 45 Cal. 3d at 1135, 755 P.2d at 1053, 248 Cal. Rptr. at 604.

Rejecting this argument, the court found no error in the trial court's refusal to read the defendant's second special jury instruction. The court reasoned that such an instruction was argumentative. Since CALJIC No. 2.91 (which instructs jurors on "the burden of proof of identification") was read to the jury, any further instruction on this issue would merely be argumentative. *Id.* at 1138, 755 P.2d at 1055, 248 Cal. Rptr. at 606. *See People v. Castellano*, 79 Cal. App. 3d 844, 858, 145 Cal. Rptr. 264, 272 (1978); *People v. McNamara*, 94 Cal. 509, 513, 29 P. 953, 954 (1892) (prohibition of argumentative jury instructions); *see also People v. Gomez*, 24 Cal. App. 3d 486, 490, 100 Cal. Rptr. 896, 898 (1972) (jury instructions can specifically address a defense theory and how to interrelate defense evidence to the prosecution's burden of proof).

The defendant also objected to the trial court's refusal to read his third special jury instruction which described three different means of assessing eyewitness identification testimony. The court held that denying a reading of this instruction was error because California authorities, as well as out-of-state courts allow reading this type of jury instruction to enable jurors to measure eyewitnesses' perception of an event against the prosecution's burden of proof. Although acknowledging trial court error in not reading this instruction, the court emphasized that future instructions of this type must only "focus the jury's attention on the existence of reasonable doubt regard-

ing identification, by listing, in a neutral manner, the relevant factors supported by the evidence." *Wright*, 45 Cal. 3d at 1141, 755 P.2d at 1058, 248 Cal. Rptr. at 608-09. *See United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (original promulgation of this type of jury instruction); Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U.L.Q. 1387, 1402-19 (1983) (collection of various state court decisions regarding this type of jury instruction). *See generally* 75 AM. JUR. 2D *Trial* §§ 854-866 (1974 & Supp. 1988); 21 CAL. JUR. 3D *Criminal Law* §§ 3084-3091 (1985 & Supp. 1988).

Despite the court's determination that the refusal to read the defendant's third special jury instruction was error, it nevertheless found three reasons that the error was not prejudicial. *Wright*, 45 Cal. 3d at 1144, 755 P.2d at 1060, 248 Cal. Rptr. at 611. First, the evidence established that none of the eleven witnesses doubted that the defendant was the culprit and that the defendant's alibi could be discounted by the jury; therefore, the evidence was so overwhelmingly in favor of the prosecution's case that any error in refusing to instruct the jury as to the defendant's third instruction was harmless. Second, the combination of aggressive cross-examination of the three eyewitnesses, defense counsel's closing arguments, and the jury instructions given were sufficient for the jury to question the veracity of the eyewitnesses' accounts of the crime, thus providing a viable substitute for the elements outlined in the defendant's third jury instruction. Third, there was no evidence of jury confusion given the "short period of jury deliberation (less than one day) and the lack of juror requests for clarification." *Id.* at 1144-52, 755 P.2d at 1060-65, 248 Cal. Rptr. at 611-16.

The defendant's final contention was that his fifth special instruction was improperly withheld from the jury. This instruction "would advise the jury that eyewitness identification testimony may be mistaken and 'should be received with caution.' " *Id.* at 1152, 755 P.2d at 1065, 248 Cal. Rptr. at 616. The court reasoned that this instruction was unnecessary since the factors mentioned as to instruction number three were adequate to highlight the problems associated with eyewitness identifications. Furthermore, such an instruction would give jurors the wrong impression by suggesting that the court considered this evidence "suspect," and also would subvert the jury's responsibility as the trier of fact by implying that eyewitness testimony is "often mistaken." Thus, the trial court's refusal to read the fifth special jury instruction was not error. *Id.* at 1154, 755 P.2d at 1067, 248 Cal. Rptr. at 617-18. *See State v. Watson*, 318 S.E.2d 603, 614 (W. Va. 1984) (only other court to address this issue and reject similar jury instruction).

Wright essentially approves of CALJIC No. 2.91 as applied to cases where a prosecution is based entirely on uncorroborated eyewitness testimony. So long as the factors listed in this type of instruction merely focus on facts relevant to a determination of the existence of reasonable doubt regarding the eyewitness's identification in a neutral, nonexplanatory manner, then the instruction should be read to the jury. However, future courts faced with a factual scenario similar to *Wright* should not ignore Justice Mosk's insightful dissent which suggests factors for inclusion in this type of instruction. Furthermore, courts should attempt to explain the effect each individual factor has on analyzing eyewitness identifications since jurors may not comprehend the appropriate application.

PETER BENNETT LANGBORD

VIII. SENTENCING & CORRECTION

The Board of Prison Terms' wide discretion to rescind a prisoner's parole will be affirmed on appeal when there is some supporting evidence in the record: **In re Powell.**

In *In re Powell*, 45 Cal. 3d 894, 755 P.2d 881, 248 Cal. Rptr. 431 (1988), the court held that the Board of Prison Terms (BPT) did not abuse its discretion in rescinding a prisoner's parole when there was "some evidence" in the record to support that decision. The court added that the BPT has wide, though not absolute, discretion in handling parole matters. *See* Falk, *The Supreme Court of California 1971-1972*, 61 CALIF. L. REV. 273, 427-28 (1973); Note, *The California Adult Authority*, 5 U.C. DAVIS L. REV. 360, 368, 376-77 (1972). Such discretion is limited by the prisoner's right to due process; the decision must have a factual basis and not be merely a response to public outrage.

Gregory Powell was convicted in 1967 of first degree murder and sentenced to death for slaying a police officer. *See People v. Powell*, 40 Cal. App. 3d 107, 115 Cal. Rptr. 109 (1974). By 1972, the BPT determined that Powell's behavior had improved and granted him a parole release date. Public outrage was renewed, however, following the 1980 national telecast of the film, *The Onion Field*, which recounted Powell's story. Several doctors subsequently examined Powell after state and local officials expressed concern to the BPT over Powell's upcoming parole. The BPT's decision was based in part upon a report by a Dr. Sutton (the Sutton Report) who examined

Powell's record, including a 1978 letter from a prison guard regarding two alleged incidents of sexual misconduct. The Sutton Report concluded that Powell remained a potential threat to society. Powell then sought and received a writ of habeas corpus.

The court first defined the scope of the BPT's jurisdiction concerning parole matters. The BPT may determine the date of a prisoner's parole or release. *See* CAL. PENAL CODE §§ 5075-5082 (West 1982 & Supp. 1989). In addition, the BPT may revoke a prisoner's parole upon a showing of cause. *See* CAL. PENAL CODE §§ 3041.5, 3041.7 (West 1982 & Supp. 1989); CAL. ADMIN. CODE tit. 15, § 2450 (1988). Such a showing requires the BPT to make a reasonable determination that the parole was "improvidently granted" in light of the facts. Factual circumstances may include a prisoner's history of escape attempts, physical or mental deterioration, or any new evidence indicating that parole should not be granted. *See* CAL. ADMIN. CODE tit. 15, § 2451 (1988). In reaching its decision, the BPT must balance the interests and rights of the individual prisoner with society's interest in safety and the administration of justice. *See In re Fain*, 65 Cal. App. 3d 376, 389, 135 Cal. Rptr. 543, 550 (1976).

The court then considered which of three review standards were applicable in determining whether the BPT abused its discretion in rescinding Powell's parole. Powell contended that the court should apply its "independent judgment" to the facts, as did the trial court. Under this test, a court may find an abuse of discretion when it exercises its own judgment and determines that the weight of the evidence does not support the administrative finding. *See Campbell v. Southern Pac. Co.*, 22 Cal. 3d 51, 60, 583 P.2d 121, 126-27, 148 Cal. Rptr. 596, 601-02 (1978). Powell attempted to analogize his habeas corpus proceeding to an administrative proceeding which, under section 1094.5 of the Code of Civil Procedure, permits the application of either the "independent judgment" or "substantial evidence" standards of review. *See* CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1989). Although the court noted that habeas corpus was permissible in Powell's case, it concluded that Powell's analogy was flawed. The court found that the "independent judgment" standard does not apply to parole rescissions since a prisoner has no vested right to parole. *See, e.g., Bixby v. Pierno*, 4 Cal. 3d 130, 144-46, 481 P.2d 242, 252-54, 93 Cal. Rptr. 234, 244-46 (1971) (discussing the distinction between vested and nonvested rights). Here, Powell has no vested right to parole. *See In re Fain*, 65 Cal. App. 3d at 390, 135 Cal. Rptr. at 551; *see also In re McLain*, 55 Cal. 2d 78, 87, 357 P.2d 1080, 1086, 9 Cal. Rptr. 824, 830 (1960).

The court also declined to adopt the "substantial evidence" standard of review. This test requires the court to accept as true all evi-

dence favoring the party and to disregard any damaging evidence. If such favorable evidence supports the decision as a matter of law, the decision must be affirmed. *See generally* 8 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 265 (3d ed. 1985).

Instead, the court adopted the "some evidence" standard, which requires a court to affirm a prior administrative decision if there is supporting evidence in the record. The court relied on a prior case which held that an abuse of discretion occurs only when an authority acts "without information, fraudulently, or on mere personal caprice." *In re Spence*, 36 Cal. App. 3d 636, 639-40, 111 Cal. Rptr. 782, 784 (1974). The United States Supreme Court has upheld the "some evidence" standard of review in an analogous case. *See Superintendent v. Hill*, 472 U.S. 445 (1985). Thus, the court held that while the BPT may not act "arbitrarily or capriciously," it need only find some evidence to support a rescission of parole. The court added, however, that the "some evidence" standard of review does not necessarily pertain to parole revocations after the prisoner has been released.

In applying the "some evidence" standard of review to Powell's case, the court focused on the Sutton Report which was the basis for the BPT's decision. The court noted that although the opinion testimony contained within the report relied in part on hearsay, such opinion testimony is admissible if the opposing party fails to object. *See* CAL. EVID. CODE § 803 (West 1966); *see also People v. Coleman*, 38 Cal. 3d 69, 90, 695 P.2d 189, 202, 211 Cal. Rptr. 102, 115 (1985).

In addition to the Sutton Report, the court determined that Powell's medical and disciplinary history, symptoms of brain atrophy, and reports by other examining physicians conceding the difficulty associated with predicting a parolee's potential for violence, were sufficient to satisfy the "some evidence" standard of review. Even though some of these medical reports conflicted, the court held that it was within the BPT's discretion to determine the admissibility and weight to be afforded such evidence. *See In re Carroll*, 80 Cal. App. 3d 22, 31, 145 Cal. Rptr. 334, 339 (1978).

The court's decision to adopt a lower standard of review in parole rescission cases gives the BPT greater discretion and weight in its decisions. A finding of merely "some evidence" in support of the BPT's parole rescission is now sufficient to affirm that decision. In the end, more parole decisions will likely be determined at the administrative level, with far less chance for reversal on judicial appeal.

BRYAN HANCE

Suspicions of wrongdoing are enough to commence the statute of limitations; the denial of a class action certificate will not toll the statute, nor will new case law revive a stale claim: **Jolly v. Eli Lilly & Co.**

In *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 751 P.2d 923, 245 Cal. Rptr. 658 (1988), the supreme court unanimously held that in a suit against manufacturers of the drug estrogen diethylstilbestrol (DES), the statute of limitations commences once the plaintiff is aware of an injury and its negligent cause. *Id.* at 1109, 751 P.2d at 926-27, 245 Cal. Rptr. at 661 (citing *Sanchez v. South Hoover Hosp.*, 18 Cal. 3d 93, 99, 553 P.2d 1129, 1133, 132 Cal. Rptr. 657, 661-63 (1976)). Although the plaintiff was unaware of which particular manufacturer was responsible for her injuries, the one-year statute commenced once she knew of the injury and suspected the cause to be DES-related.

In 1972, the plaintiff (whose mother had consumed DES in 1951) was diagnosed as having adenosis, a pre-cancerous condition, which ultimately resulted in major surgery. Suspecting DES as the cause, plaintiff's efforts to locate the manufacturer were nonetheless unsuccessful.

The plaintiff brought suit in 1981, nearly one year after the court's decision in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 611-12, 607 P.2d 924, 936-37, 163 Cal. Rptr. 132, 144-45 (1980) (holding that when the identity of the particular DES manufacturer is unobtainable, all DES manufacturers may be joined and damages will be apportioned by "market share," unless liability is disproved). *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1275 (9th ed. 1988); 63 AM. JUR. 2D *Products Liability* § 167 (1984 & Supp. 1988); 50 CAL. JUR. 3D *Products Liability* §§ 4, 26 (1979 & Supp. 1988); Note, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978); Annotation, *"Concert of Activity," "Alternative Liability," "Enterprise Liability," or Similar Theory as Basis for Imposing Liability Upon One or More Manufacturers of Defective Uniform Product in Absence of Identification of Manufacturer of Precise Unit or Batch Causing Injury*, 22 A.L.R. 4TH 183 (1983); Annotation, *Products Liability: Diethylstilbestrol (DES)*, 2 A.L.R. 4TH 1091 (1980).

The plaintiff delayed suit, believing she would be unsuccessful under *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 84, 150 Cal. Rptr. 730, 735 (1978) (no cause of action is stated unless the particular manufacturer is identified). The plaintiff contended that her suit should not be time-barred since essential facts, such as the meaning of "causation" and "wrongdoing" as redefined under *Sindell*, were not available to her until 1980. *See* CAL. CIV. PROC. CODE § 340(3) (West 1982) (one year statute of limitations for injury from wrongful

act or neglect). However, the court confirmed its continued adherence to the "discovery rule." *See generally* 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 413 (3d ed. 1985 & Supp. 1988); 51 AM. JUR. 2D *Limitation of Actions* §§ 102-06 (1970 & Supp. 1988); 43 CAL. JUR. 3D *Limitation of Actions* § 72 (1978 & Supp. 1988); 10A CALIFORNIA FORMS OF PLEADING & PRACTICE ANNOTATED, *Limitation of Actions* 8 (Supp. 1988).

The court stated that the receipt of essential facts does not commence the statute; rather, the controlling element is plaintiff's *suspicion* that she was wronged. The court determined that neither the plaintiff's ignorance of a tortfeasor's identity nor the existence of unknown "critical facts" will delay the statute from running. The court rationalized this harsh result by noting that "Doe parties" could have been named in a timely action, thus giving the plaintiff three years to discover the defendant's identity. *See generally* L. MASON, CALIFORNIA CIVIL PROCEDURE HANDBOOK § 8.382(7) (1987) [hereinafter MASON]; 1 CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL § 7.19 (1977).

The plaintiff's most significant argument was that *Sindell* itself was a "critical fact" tolling the statute until 1980. Before *Sindell*, only one manufacturer could be a wrongdoer and no causal link could be established to any one manufacturer. However, after *Sindell*, all manufacturers of DES, unless otherwise proved, had committed a tort on the plaintiff; thus, only after *Sindell* could the plaintiff be reasonably expected to have brought a successful action.

The court clarified its "market share" theory by explaining that *Sindell* created neither a "new tort" nor a "new product" of "generic DES." The "mere existence of a contrary precedent . . . [is not] sufficient to toll the statute . . . ." *Jolly*, 44 Cal. 3d at 1116, 751 P.2d at 931, 245 Cal. Rptr. at 666 (quoting *Monroe v. Trustees of the California State College*, 6 Cal. 3d 399, 408 n.5, 491 P.2d 1105, 1110-11 n.5, 99 Cal. Rptr. 129, 134-35 n.5 (1971). The court put forth three supporting reasons for this rule: (1) potential plaintiffs will be motivated to challenge unpopular rulings and will force judges to remain progressive; (2) the rule will protect defendants from having to defend their actions long after evidence and witnesses have vanished; and (3) to hold otherwise would release the floodgates of litigation.

The plaintiff's final argument, that the filing of the class action in *Sindell* tolled the statute for individual plaintiffs from the time of application to denial of certification, likewise was rejected by the court. *See* FED. R. CIV. P. 23 (Once a class action is filed, the action is commenced for all class members.); MASON, *supra* § 6.641. The United

States Supreme Court has held that where certification is denied because of "subtle factors," the statute is tolled until denial of the class certificate. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-53 (1974) (class too numerous to make joinder practicable); *see generally* 51 AM. JUR. 2D *Limitation of Actions* § 268 (1970 & Supp. 1987). The plaintiff asserted that *American Pipe* should be extended to the present case. *See, e.g., Bangert v. Narmco Materials, Inc.*, 163 Cal. App. 3d 207, 212, 209 Cal. Rptr. 438, 441 (1984) (statute tolled when certification denied for lack of insufficient community of interest).

However, the *Sindell* class did not seek damages on behalf of the entire class. Because *Sindell*'s class action did not notify the defendants of all potential plaintiffs, the court believed an extension of *American Pipe* would be unfair. The court explained that *American Pipe* was predicated on an economical litigation policy favoring the tolling of the statute when only "subtle factors" cause certificate denial. The court noted that such a policy is more efficient than the filing of protective motions to intervene or to join should the class be denied. Accordingly, the court rejected plaintiff's argument under *American Pipe* because the denial of the certificate in *Sindell* was not a "subtle factor," as denial was due to the very nature of the action—"mass-tort actions" are rarely granted class action certification.

The impact of this decision could affect approximately one-third of the seventy-five DES cases pending in California. *See Justices Again Brought in Legal Protections for Drug Makers*, L.A. Times, Apr. 8, 1988, at 3, col. 4. Additionally, it may affect many more as the drug was given to three million women from the 1940's to 1971. *See DES*, UPI, Apr. 7, 1988 (NEXUS library, Omnifile) (estimating that 200 to 300 DES cases are currently pending in California). *Jolly* places women in a "catch twenty-two": to file their claim before *Sindell* when recovery chances were nominal, or to file after *Sindell* when the suit is likely to be time-barred. Nevertheless, the decision allows drug manufacturers to allocate more time and resources to research and less to defense of stale actions.

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