The Lucas Court and the Penalty Phase of the Capital Trial: The Original Understanding

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TABLE OF CONTENTS

INTRODUCTION ........................................................................................................... 523

I. THE EVOLUTION OF THE PENALTY PHASE OF THE CAPITAL TRIAL IN CALIFORNIA ................................................................. 527
   A. The Historical Background ............................................................................. 527
   B. The 1973 Legislation ..................................................................................... 531
   C. The 1977 Legislation ..................................................................................... 533
   D. The 1978 Death Penalty Initiative ............................................................... 536
   E. A Summary of the Changes in the Penalty Phase Proceedings Wrought by the 1978 Initiative ....................................................... 540
      1. The Aggravating and Mitigating Factors .................................................... 540
      2. The Penalty Phase Procedures ................................................................... 541
      3. The Procedures Governing Hung Juries ..................................................... 541
      4. The Automatic Modification Procedure ................................................... 542

II. THE RECURRING PENALTY PHASE ISSUES .................................................. 542
   A. Introduction .................................................................................................... 542
   B. The Recurring Issues .................................................................................... 546
      1. The Anti-Inflation Rules ............................................................................. 546
         a. The Bird Court ....................................................................................... 547
         b. The Lucas Court ................................................................................... 551
         c. The Status of the Law ........................................................................... 557
      2. Ramos Error ............................................................................................... 559
         a. The Bird Court ....................................................................................... 559
         b. The Lucas Court ................................................................................... 561
         c. The Status of the Law ........................................................................... 562
      3. Robertson Error ........................................................................................ 562
         a. The Bird Court ....................................................................................... 562

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521
b. The Lucas Court .................................................. 566
  c. The Status of the Law ........................................... 567
4. Boyd Error .......................................................... 568
  a. The Bird Court .................................................. 568
  b. The Lucas Court ................................................ 568
  c. The Status of the Law ......................................... 569
5. The Failure to Delete Unsupported Factors ......................... 569
  a. The Argument ................................................... 569
  b. The Lucas Court ................................................ 574
  c. A Proposal ...................................................... 578
  d. The Status of the Law ......................................... 580
  a. Introduction .................................................... 580
  b. The Bird Court .................................................. 581
  c. The Lucas Court ................................................ 590
  d. The Status of the Law ......................................... 596
7. The Failure to Instruct on the Proper Use of Mitigating Evidence
   (The Unadorned Factor (k) and Factor (j)) ....................... 598
  a. Introduction .................................................... 598
  b. The Bird Court .................................................. 600
  c. The Lucas Court ................................................ 603
  d. The Status of the Law ......................................... 609
8. The Anti-Sympathy Instruction at the Penalty Phase .................... 611
  a. Introduction .................................................... 611
  b. The Bird Court .................................................. 611
  c. The Lucas Court ................................................ 613
  d. The Status of the Law ......................................... 620
9. Penalty Phase Error and The Lucas Court .................................. 620
III. PENALTY PHASE JURY INSTRUCTIONS ................................. 627
  A. Introduction .................................................... 627
  B. An Analysis of The Factor (k), Factor (j), and Mandatory-Sentencing-
     Formula Instructions ........................................... 630
     1. The Interpretation of Jury Instructions: The Traditional Rule ... 631
     2. The Cure Techniques .......................................... 633
        a. The Juror's Oath ........................................... 634
        b. The Juror's Courtroom Experience ......................... 634
        c. The Instruction on Jury Instructions ..................... 635
        d. The Context: The Medium is Part of the Message ......... 635
        e. The Timing of the Charge .................................. 636
        f. The Written Instructions Are Given to the Jury .......... 637
        g. The Arguments of Counsel Conflict with the Instructions .. 637
        h. The Rule Governing Conflicting Jury Instructions .......... 640
        i. The Primacy of the Court's Jury Instructions ............. 641
        j. Policy and the Adversary System .......................... 644
        k. The Case Law ................................................ 645
        l. Conclusion ................................................... 661
  C. The Anti-Sympathy Instruction .................................... 662
     1. Analysis ..................................................... 662
     2. Conclusion ................................................... 668
IV. CONCLUSION .................................................................. 669
APPENDIX ...................................................................... 674
INTRODUCTION

This is the third in a series of articles on capital punishment in California. This article focuses on the development of the law applicable to the penalty phase of capital trials. Part I chronicles the creation of the “penalty phase” as a separate component of the capital trial in California, and the adoption of the statutory provisions governing that segment of the trial in the 1977 death penalty legislation and the 1978 death penalty initiative.

Inasmuch as the only amendments to the 1977 Legislation were made by the 1978 Initiative and the 1978 Initiative has not been amended since its adoption by the voters of California, the task of elaborating penalty phase law has been undertaken exclusively by the courts of California. The job initially fell on the shoulders of the California Supreme Court under Chief Justice Rose Bird, for it was during the Bird court’s tenure that the 1977 Legislation and the 1978 Initiative became effective. After the Bird court’s tenure

1. The first article is Poulos, Capital Punishment, The Legal Process, and the Emergence of the Lucas Court in California, 23 U.C. DAVIS L. REV. 157 (1990) [hereinafter Poulos, Capital Punishment]. That article traces the history of the capital punishment controversy in California through the retention election of 1986, the decline of the Bird court, and the emergence of the Lucas court. It also identifies differences in the way the two courts have handled automatic appeals under two statutes, the 1977 Legislation and the 1978 Initiative. It analyzes how this change was produced and the voting behavior of each of the justices of the Lucas court. The article ends by assessing the question of whether the Deukmejian appointees have produced this change illegitimately or by the permissible application of the relevant legal principles in a way quite different from the way they were applied by the Bird court.

2. Part of this task, of course, was also discharged by the various Courts of Appeal in California. When the defendant is prosecuted for first degree murder and a special circumstance is alleged and found true, and the sentencing authority imposes a sentence of less than death, the appeal is to the appropriate division of the Court of Appeal. Since this article is concerned only with the Supreme Court of California, the doctrine elaborated by the Courts of Appeal is not considered in this article.

3. The first automatic appeal to be decided by the California Supreme Court under the 1977 Legislation was People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979). Teron was decided on January 11, 1979. Id. The first automatic appeal
lapsed, the task was taken up by the Lucas court. This article examines the work of the first year of the Lucas court with respect to the law of the penalty phase of the capital trial, and compares the Lucas court's development of that doctrine with the doctrine developed the Bird court.

Part II examines nine separate penalty phase issues that have been faced by both courts. With two exceptions, the specific law articulated by both courts is discussed along with a comparison of the way the two courts handled each issue. Given the penchant of judges and the Committee on Standard Jury instructions to repeat the language of statutes in jury charges, nearly all of the early death penalty cases tried under these two statutes contained substantially similar, if not identical, jury instructions. The cases in which death verdicts were returned found their way to the California Supreme Court on automatic appeal having tendered a more or less standard version of instructional issues at the penalty trial. Insofar as the 1977 Legislation and the 1978 Initiative shared this common ground, the issues were the same under both statutes. Two standard instructions repeatedly appear in the penalty phase of the early trials decided under the 1978 Initiative was People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (Ramos I), cert. granted, 459 U.S. 821 (1982) rev'd sub. nom. California v. Ramos, 463 U.S. 992 (1983), decision after remand, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984) (Ramos II), cert. denied, 471 U.S. 1119 (1985). Ramos I was decided on January 25, 1982. Id.

4. For a discussion of the events leading up to the campaign to deny Chief Justice Bird and Justices Reynoso and Grodin further terms in office, the retention election campaign and its aftermath, see Poulos, Capital Punishment, supra note 1.

5. See infra text accompanying notes 129-36 for a listing of these nine issues.

6. Issues five and nine (the failure of the trial court to delete from the penalty phase instructions aggravating and mitigating factors enumerated in the statute which are not supported by the evidence, and the standard of reversibility for penalty phase error) are treated differently by the two courts. Although issue five was briefed in several of the automatic appeals pending before the Bird court, the court never addressed that issue. That issue was thus first addressed by the Lucas court. Because of the issue's importance, discussion of it is nevertheless included in this article. But since there is no Bird court doctrine on this question, a comparison of the views of the two courts is impossible. See infra notes 265-303 and accompanying text. With respect to issue nine (the standard of reversibility for penalty phase error) the Lucas court affirmed a number of death judgments with penalty phase errors but never clearly announced the standard governing the reversibility of that error during its first year. The discussion of that issue therefore does not compare the Bird court doctrine with the Lucas court doctrine, for the Lucas court has yet to articulate what "doctrine" governs the issue. See infra notes 554-91 and accompanying text.

7. The original instructions for the 1978 Initiative are contained in California Jury Instructions: CALIFORNIA STANDARD JURY INSTRUCTIONS (CRIMINAL), CALJIC No. 8.84, 8.84.1-2 (Committee on Standard Jury Instructions) (4th ed. 1979 & Supp. 1987) [hereinafter STANDARD JURY INSTRUCTIONS (1979)]. These instructions do little more than repeat the language of the statute. They were routinely given in capital cases under the 1978 Initiative. Consequently, insofar as they contained errors, the errors existed in every case.

8. For example, the factor (k) and factor (j) instructions considered infra notes 399-492 and accompanying text.
under both the 1977 Legislation and the 1978 Initiative. These are the anti-sympathy instruction and the factor (k) instruction.9 Factor (k) in the 1978 Initiative is identical to factor (j) in the 1977 Legislation, and the instructional issue under each is the same. The 1978 Initiative also contained a highly controversial provision which was repeated verbatim in a standard jury instruction. This is the Initiative's mandatory sentencing formula instruction.

The errors inherent in each of these instructions were repeated in a large number of the early trials resulting in reversals in a correspondingly large number of automatic appeals. Seizing on two plurality opinions from the Bird court era and a combination of the various concurring and dissenting opinions in California v. Brown, the Lucas court has used the arguments of counsel to “cure” the error in each of these instructions. Thus, although juries were instructed in the flawed language of these instructions, the Lucas court affirmed the judgment of death in each case in which these instructional issues were considered during its first term. The etiology of this “cure technique” and an analysis and criticism of its use are presented in Part III of this article.

During its first year, which began March 26, 1987 and ended March 25, 1988,10 the Lucas court decided sixteen automatic appeals.11 Three of the sixteen were reversed on grounds having noth-

9. See infra notes 399-414, 493-553 and accompanying text.
ing to do with the law of capital punishment in California. Of the remaining thirteen cases, the court reversed one death judgment for penalty phase error and affirmed twelve involving penalty phase issues raised under either the 1977 Death Penalty Legislation, or the 1978 Death Penalty Initiative. Since a rehearing was granted in one of these cases, People v. Bell, that case has been excluded from this study. Of course, none of these decisions was written on an entirely clean slate. Nearly a decade of death penalty litigation under both the 1977 Legislation and the 1978 Initiative provided a decisional environment and precedent for the Lucas court’s work in its initial year. These twelve penalty phase cases (with Bell excluded), together with the penalty phase precedent of the Bird court, provide the raw material for this study.

This article has two goals: To analyze and discuss the law governing the penalty assessment process; and to critically evaluate and compare the penalty phase doctrine as articulated by the Bird and Lucas courts.


12. First, Hendricks I was reversed for sanity phase error. Hendricks I, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987). Since a valid sanity phase determination is a condition precedent to a valid penalty phase proceeding, both the sanity and the penalty “judgments” were reversed. Id. In the second case, the entire judgment was reversed because of Wheeler error in the jury selection process. Snow, 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987). In the third case, the entire judgment was reversed because the trial court failed to adjudicate the defendant’s competency to stand trial. Hale, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988).

13. The one reversal on death penalty grounds was in Anderson for Ramos error (the reading of the Briggs instruction mandated by the 1978 Initiative). See infra notes 205-12 and accompanying text. The twelve affirmances were in Ghent, 43 Cal. 3d at 739, 739 P.2d at 1250, 239 Cal. Rptr. at 82; Anderson, 43 Cal. 3d at 1104, 742 P.2d at 1306, 240 Cal. Rptr. at 585, reversed for Ramos error; see infra notes 205-12 and accompanying text; Gates, 43 Cal. 3d at 1168, 743 P.2d at 301, 240 Cal. Rptr. at 666; Miranda, 44 Cal. 3d at 57, 744 P.2d at 1127, 241 Cal. Rptr. at 594; Bell, 44 Cal. 3d at 137, 745 P.2d at 573, 241 Cal. Rptr. at 890; Howard, 44 Cal. 3d at 375, 749 P.2d at 279, 243 Cal. Rptr. at 842; Kimble, 44 Cal. 3d at 480, 749 P.2d at 803, 244 Cal. Rptr. at 148; Howay, 44 Cal. 3d at 543, 749 P.2d at 776, 244 Cal. Rptr. at 121; Ruiz, 44 Cal. 3d at 589, 749 P.2d at 854, 244 Cal. Rptr. at 200; Hendricks II, 44 Cal. 3d at 635, 749 P.2d at 836, 244 Cal. Rptr. at 181; Melton, 44 Cal. 3d at 713, 750 P.2d at 741, 244 Cal. Rptr. at 867; Williams, 44 Cal. 3d at 883, 751 P.2d at 395, 245 Cal. Rptr. at 336; and Wade, 44 Cal. 3d at 975, 750 P.2d at 795, 244 Cal. Rptr. at 905.

14. The order of decision of these thirteen cases appears at supra note 11. The affirmance in Bell was later vacated by the granting of a rehearing on January 28, 1988.

I. THE EVOLUTION OF THE PENALTY PHASE OF THE CAPITAL TRIAL IN CALIFORNIA LAW

A. The Historical Background

When California adopted its first penal statutes in 1850, murder was defined as a single offense punishable by a mandatory sentence of death. The mandatory punishment of death was retained for the crime of murder in the first degree until 1874. In that year, California adopted an innovation Tennessee had enacted in 1838: mandatory capital punishment for first degree murder was abolished, and in its place the sentencing authority, whether judge or jury, was given unfettered discretion to choose between the penalty of death and a term of imprisonment.

In 1957, capital trials were bifurcated:21 the sentencing portion of
the capital trial was severed from the guilt determination process. The accused's guilt or innocence of the capital offense (first degree murder in our present inquiry) was determined first. If the jury convicted of first degree murder, there was a subsequent penalty proceeding before the same jury (unless certain specified situations occurred) to determine the punishment. These two portions of the capital trial were commonly referred to as the "guilt phase" and the "penalty phase."

Although definitions of the degrees of murder changed from time to time, the basic structure of the law governing the death penalty for first degree murder remained constant until 1972. Prior to 1972, eligibility for the death penalty was determined by the substantive law of first degree murder in the guilt phase, then the death penalty was imposed through the exercise of virtually unfettered discretion by the sentencing authority at the penalty phase.

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the Model Penal Code's capital sentencing provision:

Systems providing for jury discretion with respect to capital punishment confront an inescapable dilemma if the jury is required to impose sentence at the same time that it renders a verdict on guilt. Such information as prior criminal record of the accused may be important to choice of punishment yet highly prejudicial to determination of guilt. Either sentencing must be based on less than all the evidence relevant to that issue, or otherwise inadmissible evidence must be allowed in the trial on the ground that it contributes to an informed assessment of sentence. Contemporaneous decision of both questions forces a choice between a solution that detracts from the rationality of the sentencing decision and one that threatens the fairness of the determination of guilt. Either choice is undesirable, and the second alternative may well be unconstitutional. Trial lawyers understandably have little confidence in the intermediate solution of admitting such evidence and trusting an instruction to limit its consideration to sentencing rather than guilt.


22. Act approved July 8, 1957, ch. 1968, 1957 Cal. Stat. 3509 (relating to punishment for offenses for which the penalty is death or imprisonment for life and codified as former California Penal Code § 190.1). Except for the short period of time in which California operated under a mandatory capital punishment statute (see infra text accompanying notes 42-59), since 1957 California has continuously decided the question of the imposition of the death penalty in a bifurcated trial. The two portions of the bifurcated capital trial are known as the "guilt" and "penalty" phases. If the defendant also enters a plea of "not guilty by reason of insanity," then the capital trial is trifurcated by the addition of a "sanity" plea. The sanity issue is resolved in a separate proceeding which follows the guilt phase and precedes the penalty phase of the capital trial. CAL. PENAL CODE §§ 190.1(c), 1026 (West 1988 & Supp. 1990).

23. For example, the same year that mandatory capital punishment for first degree murder was abolished, the legislature changed the definition of that offense to include homicide committed during the perpetration or attempt to perpetrate the felony of mayhem within the first degree felony-murder rule. 1873-1874 AMENDMENTS TO THE CODES OF CALIFORNIA 314 (Bancroft & Co. 1874).

24. Because the sentencing decision was discretionary with the sentencing authority, the decision regarding capital punishment was unfettered by substantive or procedural constraints on the sentencing authorities. See McGautha v. California, 402 U.S. 183 (1971).

25. E.g., id.
California's death penalty law for murder in the first degree changed dramatically on February 18, 1972.26 On that day the California Supreme Court, in People v. Anderson, held that capital punishment was invalid per se under the California Constitution.27 Four months and a few days later, in Furman v. Georgia, the Supreme Court of the United States held that unguided jury discretion in capital cases violated the cruel and unusual punishments clause of the eighth amendment as made applicable to the states by the due process clause of the fourteenth amendment.28

The process of restoring capital punishment in California began immediately after the Anderson opinion was announced. A proposed initiative amendment to article I, section 6 of the California Constitution, which would expressly authorize capital punishment and thus overrule Anderson, began circulating within weeks.29 The initiative qualified for the ballot on June 28, 1972 as Proposition 17.30 It was approved by 67 percent of those voting in the general election on 26. The evolution of this change is traced in Poulos, Capital Punishment, supra note 1, at 169-72.

27. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), cert. denied, 406 U.S. 958 (1972). In Anderson, Chief Justice Wright wrote for a nearly unanimous court:

We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its process. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members. . . .

Insofar as Penal Code sections 190 and 190.1 purport to authorize the imposition of the death penalty, they are, accordingly, unconstitutional.

Id. at 656-57, 493 P.2d at 899, 100 Cal. Rptr. at 171.

28. 408 U.S. 238 (1972). Anderson was decided on February 18, 1972, and Furman was decided on June 29, 1972.

29. See People v. Superior Court, 31 Cal. 3d 797, 808, 647 P.2d 76, 82, 183 Cal. Rptr. 800, 806 (1982).

30. Proposition 17 read as follows:

Proposed Amendment To Article I

Section 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

November 7, 1972. With the passage of Proposition 17, the death penalty was no longer unconstitutional per se under the California Constitution.

Having removed the impediment created by the California Constitution, the California Legislature turned its attention to drafting a death penalty statute which would comply with the cruel and unusual punishments clause of the eighth amendment as interpreted in *Furman*. *Furman* was unequivocal on only two points: Unguided discretion to impose capital punishment upon conviction of a capital offense violates the eighth amendment's cruel and unusual punishments clause; and the federal Constitution, unlike the California Constitution as interpreted by the *Anderson* court, does not make capital punishment *per se* invalid. Capital punishment could thus be restored in California, so long as the sentencing authority was not given unfettered discretion to choose between life and death. The unresolved question, however, was whether any discretion could be conferred on the sentencing authority after *Furman*.

Two very different interpretations of *Furman* emerged in the legislative halls of the states wishing to restore capital punishment. One view emphasized that the discretion conferred by the pre-*Furman* death penalty legislation was virtually unfettered. According to this view, the unguided nature of the discretion was the constitutional flaw. Individualized capital sentencing would be constitutionally permissible so long as a way could be found to guide the sentencing authorities' discretion by appropriate legal standards. These states looked to the American Law Institute's Model Penal Code for guidance and patterned their new death penalty legislation on Section 210.6 of the Model Code. Between June 29, 1972, the date *Furman* was announced, and July 2, 1976, the date the Supreme Court of the United States first addressed the constitutionality of the death penalty legislation enacted in response to *Furman*, twelve states enacted legislation patterned on Model Penal Code section 210.6. California was not one of these states.

33. The concurring opinions of Justices Brennan (Furman v. Georgia, 408 U.S. 238, 257-306 (1972)) and Marshall (id. at 314-74) concluded that capital punishment was per se unconstitutional under the cruel and unusual punishments clause. The three remaining opinions supporting the Court's terse *per curiam* opinion reached different conclusions. See id. 408 U.S. at 240-57 (Douglas, J., concurring); id. at 306-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring).
34. See Poulos, *Capital Punishment, supra* note 1, at 171-72.
35. *Id*. at 172.
36. *Id*.
37. *Id*.
The National Association of Attorneys General and a majority of the state legislatures adopted a different view. They focused on the existence of any discretion to impose capital punishment on some but not all who were convicted of a given capital offense. Under their analysis of Furman, “a mandatory death penalty for specified offenses” was the “alternative considered most preferred as best with- 
standing constitutional attack.” Individualized sentencing for capital murder, first begun in Tennessee in 1838, would have to be abandoned, for it was dependent upon a measure of discretion. According to the majority’s analysis, the cruel and unusual punishments clause embargoed all discretion in capital sentencing. Following this second view of Furman, twenty-two states reverted to the common law model: everyone convicted of a capital offense would be automatically sentenced to death.

B. The 1973 Legislation

Following the interpretation of Furman which prevailed in most of the states, California enacted a mandatory capital punishment statute in 1973. Because the punishment of death was automatically imposed upon conviction of the capital murder offense under the new statute, the penalty phase of the capital trial was abolished. Although important changes were also made in the substantive law governing liability for the death penalty, those changes are not relevant to the present inquiry.

In 1976, while prosecutions under the 1973 mandatory death penalty statute were working their way up to the California Supreme Court, the United States Supreme Court decided the constitutionality of the death penalty legislation enacted in response to Furman in Georgia, Florida, Texas, North Carolina and Louisiana.

38. Id.
40. See supra note 19 and accompanying text.
41. Poulos, Capital Punishment, supra note 1, at 172.
43. Id. § 3, at 1298.
44. These changes are extensively discussed in Poulos, The Lucas Court, supra note 1, at 342-46.
45. See, e.g., Salzman, A Personal Perspective, 7 CALIF. J. 288 (1976); Significant Court Actions, 7 CALIF. J. 284 (1976).
The Georgia, Florida, and Texas statutes followed the minority view identified above. They retained individualized capital sentencing, but guided the sentencing authorities’ discretion by consideration of both aggravating and mitigating circumstances. These statutes were upheld. North Carolina and Louisiana, on the other hand, followed the majority reading of Furman and had enacted mandatory death penalty legislation. The Supreme Court invalidated these mandatory statutes on the ground that the eighth amendment’s cruel and unusual punishments clause requires individualized capital sentencing in which factors mitigating both the crime and the personal turpitude of the offender are taken into account.

Shortly after the Supreme Court filed its opinions in the 1976 cases, the California Supreme Court pondered the question of the constitutionality of California’s 1973 mandatory death penalty legis-

51. See supra text accompanying notes 35-37.
52. Although the Texas statute differed materially from the statutes enacted in Georgia and Florida, the Court treated the Texas statute as though it expressly provided for a sufficient measure of individualized capital sentencing to pass muster under the cruel and unusual punishments clause of the Eighth Amendment. Jurek, 428 U.S. at 272-73. In a subsequent case the Court held that, on request, Texas juries must be instructed to give effect to mitigating evidence not relevant to the three statutory issues in determining whether a defendant should be sentenced to death. Penry v. Lynaugh, 109 S. Ct. 2934, 2947-52 (1989) (5 to 4 decision).
54. See supra text accompanying notes 38-41.
55. See Poulos, The Supreme Court, supra note 19, at 200-26 (discussing the mandatory capital punishment legislation enacted in North Carolina, Louisiana and the other twenty states that adopted mandatory capital punishment in response to Furman).
56. Roberts v. Louisiana, 428 U.S. 325 (1976). The Court stated that a statute must provide a “meaningful opportunity for consideration of mitigating factors presented by circumstances of the particular crime or by the attributes of the individual offender.” Id. at 333-34. In Woodson v. North Carolina, the Court held that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” Woodson, 428 U.S. 280, 304 (1976) (citation omitted).

Three reasons were articulated for the Court’s holdings in Roberts and Woodson that mandatory capital punishment was unconstitutional: (1) mandatory capital punishment exceeded the limits imposed by contemporary standards of decency; (2) mandatory capital punishment did not resolve the question of unbridled sentencing discretion, but simply “papered over” the problem; and, (3) mandatory capital punishment eschewed individualized sentencing where factors mitigating both the crime and the personal turpitude of the offender could be taken into account in assessing the penalty. See Poulos, The Supreme Court, supra note 19, at 226-34 (discussing Woodson and Roberts and their impact on mandatory capital punishment statutes). Nevertheless, the principal reason for invalidating mandatory capital punishment schemes is “the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures.” Sumner v. Shuman, 483 U.S. 66, 85 (1987). See Poulos, The Supreme Court, supra note 19, at 232-34.
lation. The court framed the issue as follows:

Our inquiry is therefore directed to whether the "sentencing authority" is given the opportunity to consider mitigating as well as aggravating factors and whether it has sufficient guidance as to what mitigating factors should be considered, in deciding whether to impose the death penalty. It follows that we must also determine whether the defendant is afforded adequate opportunity to present to the sentencing authority evidence on and argument regarding these mitigating factors and their relevance to the appropriate penalty.57

Rejecting the Attorney General's suggestion that the mandatory death penalty legislation be amended by judicial decision to meet the requirements of the eighth amendment,58 the court concluded that because sections 190 through 190.3 fail to provide for consideration of evidence of mitigating circumstances as to the offense or in the personal characteristics of the defendant, and afford no specific detailed guidelines as to the relevance of such evidence in determining whether death is an appropriate punishment, they permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.59

C. The 1977 Legislation

The California Legislature enacted death penalty legislation in 1977 specifically designed to comply with the 1976 decisions of the Supreme Court of the United States.60 Borrowing the "special circumstance" device used for the first time in the 1973 mandatory death penalty statute,61 the legislators made liability for the death penalty dependent upon a conviction of murder in the first degree coupled with a finding of the truth of at least one of the enumerated...

58. Id. at 438-45, 556 P.2d at 1112-16, 134 Cal. Rptr. at 661-65. Even the concurring opinion of Justice Clark, which was joined by Justice McComb, rejected the Attorney General's submission:
As Justice Holmes observed, hard cases tend to make bad law. Because our Legislature so clearly intended to enact a constitutional death penalty statute, and because its failure to do so was so clearly caused by the Furman Court's failure to provide intelligible guidelines for legislation, one is tempted to accept the Attorney General's frank invitation to save the law by rewriting it under the guise of interpretation. However, the courts must not, in this case or any other, act as a super-legislature.
Id. at 448-49, 556 P.2d at 1118, 134 Cal. Rptr. at 667.
59. Id. at 445, 556 P.2d at 1116, 134 Cal. Rptr. at 665.
61. See Poulos, The Lucas Court, supra note 1, for an extended discussion of the development of the special circumstance device to define liability for the death penalty, the theory of the special circumstance, and a discussion of the law of selected special circumstances through March 25, 1988.
special circumstances. The penalty phase of the capital trial introduced into California law in 1957 had been repealed by the 1973 mandatory death penalty statutes. The 1977 Legislation restored the penalty phase as a pivotal feature of capital trials. The state achieved conformity with the United States Supreme Court’s 1976 death penalty decisions by narrowing the class of first degree murderers eligible for the death penalty through the use of the special circumstance and by creating sentencing standards for use by the sentencing authority at the penalty phase. Although the statute fails to identify which of these standards aggravate and which mitigate the imposition of the death penalty, they are collectively known as the “factors” or “circumstances” in aggravation and mitigation. When an individual factor is referred to by the courts, it is mentioned without identifying whether it aggravates or mitigates the penalty. These aggravating and mitigating factors, together with

63. Act of July 8, 1957, ch. 1968, 1957 Cal. Stat. 3508 (codified as former CAL. PENAL CODE § 190.1) (amended section 190 of, and added section 190.1 to, the Penal Code, relating to punishment for offenses for which the penalty is death or imprisonment for life); see supra note 21 and accompanying text.
64. Act of Sept. 24, 1973, ch. 719, § 3, 1973 Cal. Stat. 1297-98 (1973 mandatory death penalty legislation). The penalty phase, being entirely superfluous in a mandatory death penalty scheme, was repealed. The “special circumstance phase” replaced the penalty phase of the capital trial. Id. § 4, at 1298-99. The purpose for routinely litigating the “truth” of the charged special circumstances in a separate proceeding which followed the determination of guilt of first degree murder is not apparent to me. Furthermore, neither the legislative history nor the case law discussing this point articulates a reason for using this procedure.
67. In Jackson, the defendant argued that the capital sentencing procedure was unconstitutional under the eighth amendment because the statute failed to specify which of the listed factors are aggravating and which are mitigating. Jackson at 316, 618 P.2d at 176, 168 Cal. Rptr. at 630. This argument was rejected on the following ground: “We believe,” wrote Justice Richardson for a plurality of the court, “that the aggravating or mitigating nature of these various factors should be self-evident to any reasonable person within the context of each particular case.” Id. Justice Newman concurred in this part of the plurality opinion. Id. at 318-19, 618 P.2d at 177-78, 168 Cal. Rptr. at 631-32 (Newman, J., concurring). Chief Justice Bird dissented on this point and others. Id. at 352-53, 618 P.2d at 186-87, 168 Cal. Rptr. at 640-41.
69. See, e.g., infra notes 265-303 and accompanying text.
the special circumstances, are nearly identical to the aggravating and mitigating factors enumerated in the Florida statute upheld by the United States Supreme Court in *Proffitt v. Florida*, one of the cases decided by the Supreme Court in 1976 which guided the California Legislature's drafting of the 1977 Legislation.

The 1977 Legislation enumerates ten aggravating and mitigating factors: (a) the circumstances of the crime of which the defendant was convicted and the special circumstances found to be true; (b) the defendant's prior violent criminal activity; (c) the defendant's "extreme mental or emotional disturbance" during the offense; (d) the victim's consent to, or participation in, the conduct causing death; (e) defendant's reasonable belief of moral justification or extenuation; (f) duress or domination of defendant by another person; (g) impairment of defendant's mental capacity by mental disease or intoxication; (h) defendant's age at the time of the crime; (i) defendant's relatively minor participation as an accomplice; and (j) "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

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70. Any special circumstance found to be true at the guilt or special circumstance phase of the trial, should a special circumstance phase be required, can be considered as an aggravating factor in the sentencing phase. Former CAL. PENAL CODE 190.3(a) (West 1979).


72. See supra notes 45-56 and accompanying text.

73. "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." Former CAL. PENAL CODE § 190.3(a) (West 1979).

74. "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Id. § 190.3(b).

75. "(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Id. § 190.3(c).

76. "(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act." Id. § 190.3(d).

77. "(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct." Id. § 190.3(e).

78. "(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person." Id. § 190.3(f).

79. "(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease, or the effects of intoxication." Id. § 190.3(g).

80. "(h) The age of the defendant at the time of the crime." Id. § 190.3(h).

81. "(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Id. § 190.3(i).

82. Id. § 190.3 (j).
The statute also specifies how these factors are to be used by the sentencing authority to arrive at its decision:

After having heard and received all of the evidence, 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 determine whether the penalty shall be death or life imprisonment without the possibility of parole.83

In sum, the 1977 Legislation repealed the mandatory sentence of death, used the “special circumstance” device borrowed from the 1973 statute to define liability for the death penalty, and restored the penalty phase of the capital trial. Individualized capital sentencing from pre-Furman law, used in California between 1874 and 1973,84 was reinstated, but the sentencing authority’s life or death decision was now guided by the adoption of aggravating and mitigating factors.

D. The 1978 Death Penalty Initiative

Almost immediately, the opponents of the 1977 Legislation abandoned the legislative halls and took to the streets. Their purpose was to repeal the 1977 statute, which was regarded as “weak” death penalty legislation, and to replace it with a “stronger” statute enacted by the People through the initiative process.85 State Senator John V.

83. Id.
84. See supra notes 18-20, 42-44 and accompanying text.
85. A glimpse of the process of compromise that produced the 1977 Legislation is provided by Cynthia Roberts in the California Journal:

In this year’s controversy over reinstitution of capital punishment, Republican Senator George Deukmejian could have maneuvered almost any bill he wanted through the Senate. The key question, as always, was whether he could get anything from the Assembly Criminal Justice Committee—even though there was a majority waiting on the Assembly floor to vote for a death-penalty measure.

As it turned out, the committee passed a weak capital punishment measure out of political necessity. The alternative would have been a strong bill written on the floor. And the committee won an agreement from Deukmejian not to accept any amendments that would stiffen the bill. This meant that even if Governor Brown’s anticipated veto were overridden, California would have a relatively weak law.

It is only under extraordinary circumstances, such as with the death penalty, that the committee can’t take the heat and must allow a bill to survive that it would rather kill. The key vote for Deukmejian’s bill was cast by Democrat Frank Vicencia, who said he was doing so because of political realities and not because he favors capital punishment. Negotiations on the substance of the measure were conducted by Majority Leader Howard Berman, another death-penalty opponent and Speaker Leo McCarthy’s main man on the committee. If the issue had not been so political, with Democrats fearing the consequences of a strong death-penalty measure on the ballot next year, the bill would have died. The committee, from a liberal viewpoint, did the next best thing. It made sure that the bill sent to the floor was the weakest bill obtainable.

Roberts, “Court Of Last Resort”: The Assembly’s Graveyard for Law-Enforcement Leg-

536
Briggs, the sponsor of the death penalty initiative, claimed that the California citizenry wants a tough, effective death-penalty law to protect the state's families from ruthless killers. But every attempt to enact such a law has been thwarted by the powerful anti-capital punishment members of the Legislature. The current law was drafted in such a way as to make it as weak and ineffective as possible, but this initiative would give Californians the toughest death-penalty law in the country.

The 1978 death penalty initiative qualified for the ballot on June 27, 1978 as Proposition 7. It was approved by 72 per cent of the voters at the general election held on Tuesday, November 7, 1978. Except for crimes committed before its effective date, the 1978 Initiative currently governs capital punishment in California. Despite Senator Briggs' hyperbole, the 1978 Initiative produced only a few important changes in the law governing the penalty phase of the capital trial. The Initiative maintains the basic structure of capital punishment law established in the 1977 Legislation without change. Death eligibility remains dependent upon conviction of first degree murder and a finding of the truth of at least one of the enu-
merated special circumstances. Once death eligibility is established in this manner, the sentence is determined in the familiar penalty phase of the trial through the consideration of aggravating and mitigating factors. Like its predecessor, the 1978 Initiative has been found to comply with the High Court’s eighth amendment jurisprudence.

The 1978 Initiative made only two changes in the aggravating and mitigating factors. Evidence of “any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence” was made admissible during the penalty phase, and a new factor (c) was added: “The presence or absence of any prior felony conviction.” In addition, factor (g) in the 1977 Legislation was amended as factor (h) in the Initiative to expressly include a mental “defect.” Other than the addition of factor (c), the addition to factor (h) (formerly factor (g)), and the new alphabetic designations, no other changes were made in the aggravating or mitigating factors.

The 1978 Initiative also made two significant changes in the penalty phase procedures. First, the Initiative mandated a jury instruction that was to be read to every sentencing jury:

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

This instruction became known as “the Briggs instruction.”

A second and equally important change altered the process by

93. Id. at 190.3.
96. The addition of new factor (c) means, of course, that there are now eleven factors enumerated in the statute. All factors following the inserted factor (c) were simply given new alphabetic designations. Thus the enumerated aggravating and mitigating factors in the 1977 Legislation ended with factor (j). Factor (j) is carried forward into the new legislation precisely as it was defined in the 1977 Legislation, but it is now designated as factor (k).
97. Id. § 190.3(c).
98. Id. § 190.3(h). Factor (h) now reads as follows: “Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.” Id. (emphasis added). Only “defect” was added by the initiative.
99. Id. § 190.3.
100. See infra text beginning at note 191.
which the sentencing authority makes the penalty phase decision. The 1977 legislation provided that "[a]fter having heard and received all of the evidence, 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 determine whether the penalty shall be death or life imprisonment without the possibility of parole." The corresponding provision in the 1978 Initiative specifies a far different process:

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 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.

Changes were also made in the procedures governing the retrial of the penalty issue in cases where the jury could not unanimously agree on a penalty verdict. Under the 1977 legislation, if the jury was unable to reach a unanimous verdict on the penalty, the court was required to dismiss the jury and impose the punishment of life imprisonment without possibility of parole. The prosecution was thus permitted only one attempt at a death verdict. The 1978 Initiative altered those procedures. If the penalty jury cannot unanimously agree on a penalty verdict, the trial court must dismiss that jury, and impanel a new jury "to try the issue as to what the penalty shall be." If the second jury also fails to unanimously agree, the Initiative confers discretion on the court to either order another new jury or to impose the punishment of life without possibility of parole. Thus the prosecution is entitled under the Initiative to at least two attempts at a death verdict, with more than two permitted in the discretion of the trial court.

A final change affected the language governing the automatic application for modification of a death verdict. Under the 1977 Legislation, if the penalty jury returned a verdict of death, the trial court was automatically required to make "an independent determination as to whether the weight of the evidence supports the jury's finding

102. CAL. PENAL CODE § 190.3 (West 1988) (emphasis added).
104. CAL. PENAL CODE § 190.4(b) (West 1988).
105. Id.
and verdicts.”

The Initiative’s provision omits reference to the “independent determination” requirement and focuses the inquiry on “whether the jury’s findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.” Although the Initiative’s language suggests an important change, the California Supreme Court subsequently construed the provision to impose the duty on the trial court to make its own independent determination of the propriety of the death penalty by assessing the credibility of the witnesses, determining the probative force of the testimony, and weighing the evidence in the light of the applicable law. Thus, despite the change in the wording of the statute, the court interpreted this provision as codifying existing law.

E. A Summary of the Changes in the Penalty Phase Proceedings Wrought by the 1978 Initiative

Before moving into the next section of this article, a summary of the relevant differences in the penalty phase of the capital trial between the 1977 Legislation and the 1978 Initiative should prove to be helpful.

1. The Aggravating and Mitigating Factors

The 1978 Initiative added one aggravating factor to the list of aggravating and mitigating factors which guide the sentencing author-

107. CAL. PENAL CODE § 190.4(e) (West 1988). This subdivision provides, in essence, that after a verdict imposing the death penalty, the defendant shall be deemed to have applied for modification of the verdict under section 1181, subdivision 7.
In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury’s findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

Id. As written, the sentence preceding the quoted portion of subsection (e) refers to an application for modification under “Subdivision 7 of Section 11.” In People v. Rodriguez, 42 Cal. 3d 730, 792 n.25, 726 P.2d 113, 154 n.25, 230 Cal. Rptr. 667, 708 n.25 (1986), the court wrote,
Section 11, however, deals only with military court martials and with the power to punish for contempt, and contains no subdivision 7. Section 1181, subdivision 7, deals with modification of verdicts, was referred to by a similar provision in the 1977 version of section 190.4, subdivision (e)(now repealed), and is specified in the penultimate sentence of present section 190.4, subdivision (e). Accordingly, we conclude that the reference to section 11 was an inadvertent error and construe it as a reference to section 1181.

Id.
109. Id.
ity at the penalty phase of the capital trial: a prior felony conviction whether or not that conviction involved a crime of violence. This new factor is now known as factor (c). In addition, the “diminished capacity” factor carried over from the 1977 Legislation (factor (g) in the 1977 Legislation) was amended to make clear that mental defects could be taken into account along with mental diseases. After the insertion of new factor (c), all of the factors following that new factor were simply given new alphabetic designations. There are now eleven aggravating and mitigating factors enumerated in the Initiative’s provision — factors (a) through (k) — rather than the ten under the 1977 Legislation. No other changes were made in the aggravating and mitigating factors.

2. The Penalty Phase Procedures

The 1978 Initiative incorporates an instruction on the Governor’s commutation power and specifies that it must be read to the jury (the Briggs instruction). No similar instruction was required by the 1977 Legislation. Under the Initiative, the death penalty is purportedly made mandatory on a finding that the aggravating circumstances outweigh the mitigating circumstances. Conversely, if the sentencing authority determines that the mitigating circumstances outweigh the aggravating circumstances, the initiative purports to mandate a sentence of life without possibility of parole. Under the 1977 Legislation, the jury retained discretion over the appropriate penalty even when the aggravating circumstances outweighed the mitigating circumstances.

3. The Procedures Governing Hung Juries

If the penalty phase jury fails to unanimously reach a verdict, then the 1977 Legislation required the trial court to dismiss the jury and impose the sentence of life without possibility of parole. Under the 1978 Initiative, if the initial jury cannot unanimously agree on the penalty, there must be a retrial of the penalty issue by a second jury. If the second jury likewise cannot unanimously agree on a penalty verdict, then the statute confers discretion on the court to either

110. See supra notes 95-97 and accompanying text.
111. See supra note 98 and accompanying text.
112. See supra notes 95-98 and accompanying text.
113. See supra notes 99-100 and accompanying text.
114. See supra notes 101-202 and accompanying text.
impanel another jury or to sentence the defendant to life without possibility of parole.\textsuperscript{116}

4. The Automatic Modification Procedure

The 1978 Initiative appears to change the judge's role in resolving the automatic request for modification of the penalty once a verdict of death is returned. Under the 1977 Legislation and antecedent law,\textsuperscript{117} the trial judge was required to make an independent determination of the motion based on the applicable law and upon the judge's own evaluation of the credibility of the witnesses and the weight of the evidence. The 1978 Initiative appears to abandon independent review by the judge. Instead, the judge is simply required to review the propriety of the jury's determination of the penalty issue in much the same manner as an appellate court would review the jury's verdict of guilt. Nevertheless, the California Supreme Court held that the change in wording in the 1978 Initiative did not change the law. The trial judge is still required to independently evaluate the evidence at the automatic motion for modification of the death penalty verdict.\textsuperscript{117}

The next section of this article analyzes how the Bird and Lucas courts have interpreted the two California death penalty statutes, the 1977 Legislation and the 1978 Initiative, on the major penalty phase issues considered by both courts.

II. THE RECURRING PENALTY PHASE ISSUES

A. Introduction

Except for the five year period between the Wright court's 1972 holding in \textit{Anderson}\textsuperscript{118} and the restoration of capital punishment in 1977 (following the California experiment with mandatory capital punishment),\textsuperscript{119} penalty trials have been used in capital cases in California since they were adopted in 1957.\textsuperscript{120} Although there are common elements in the penalty phases of the capital trials on both sides of this hiatus,\textsuperscript{121} the penalty trials under the 1977 Legislation and

\begin{footnotes}
\item[115] \textit{See supra} notes 103-05 and accompanying text.
\item[117] \textit{See supra} notes 106-09 and accompanying text.
\item[118] \textit{People v. Anderson}, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (the death penalty violates the cruel or unusual punishments clause of article I, section 6 of the California Constitution). \textit{See supra} notes 27-32 and accompanying text.
\item[119] \textit{See supra} text accompanying notes 42-59.
\item[120] \textit{See supra} text accompanying notes 21-22.
\item[121] For example, the following principles are equally applicable to the old and new penalty phase trials:
\item Under \textit{pre-Anderson} law, neither evidence nor argument regarding the deterrent effect
\end{footnotes}
the 1978 Initiative differ substantially from their mutual ancestor. The critical distinction, of course, was produced by Furman. The sentencing decision was committed to the jury’s unfettered discretion before Anderson and Furman. Under the two post-Anderson-Furman penalty phase statutes, discretion is guided or limited by articulated aggravating and mitigating factors.122

Both the 1977 Legislation and the 1978 Initiative became effective during the Bird court’s tenure. The task of weaving penalty phase doctrine into a rational, consistent body of law therefore initially fell on the shoulders of that court. From January 11, 1979, when the first automatic appeal was decided under the 1977 Legislation,123 to January 2, 1987, the last day of business for the Bird court, the court decided seventy-one automatic appeals.124

Given the penchant of judges and the Committee on Standard Jury Instructions to repeat the language of statutes in charges to juries, nearly all of the early death penalty cases tried under these two statutes contained substantially similar, if not identical, jury instructions.125 The cases in which death verdicts were returned ulti-

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122. See supra text accompanying notes 60-109.
123. The first automatic appeal to be decided under either statute was People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979). Teron arose under the 1977 Legislation, and was decided on January 11, 1979. Id.
125. The original instructions for the 1978 initiative are contained in Standard Jury Instructions (1979), supra note 7, as instructions 8.84, 8.84.1, and 8.84.2 at 334-38. These instructions do little more than repeat the language of the statute. They were routinely given in capital cases under the 1978 initiative. Insofar as they contained errors, this meant that the errors existed in every case.
mately found their way to the California Supreme Court on automatic appeal tendering a more or less standard version of instructional issues at the penalty trial. Insofar as the 1977 Legislation and the 1978 Initiative shared common ground, the instructional issues were common to both statutes. Clustered around the 1978 Initiative were several controversial instructions unique to the sentencing process of that statute.

Of necessity, then, the Bird court found itself deciding a variety of common penalty phase issues presented in a host of cases. The decision in any one case could, and sometimes did, compel the same result in a number of cases pending before the court. As one would expect, these issues continued to be presented to the Lucas court during the first year of its tenure, and they will continue to plague the court for some time to come, until all cases containing these standardized errors have been decided.

An additional issue festered in several cases briefed in the Bird court. This is the question of whether the trial court should delete penalty phase instructions governing aggravating and mitigating factors that are unsupported by the evidence. This issue was left undecided when the Bird court's tenure ended. Eight of the sixteen death cases decided in the Lucas court's first term included this issue. Because it also pertains to the fundamental distinction between the penalty and guilt phases of the capital trial, that issue deserves analysis here. Except for that unresolved issue, this article will first examine the Bird court's resolution of each of the recurring penalty phase issues. The focus will then shift to the Lucas court's handling of these same issues in its first year. Finally, when it appears appropriate to do so, the doctrine articulated by the two courts will be compared.

Nine recurring issues emerged in penalty phase reviews:

1. The standard instructions permitted the inflation of the aggravating factors by the use of multiple or overlapping special

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126. For example, the factor (k) instructions considered infra text accompanying notes 399-414.

127. The Carlos intent-to-kill rule provides a ready example. Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). Carlos error appeared in nineteen of the automatic appeals decided by the Bird court. Poulos, The Lucas Court, supra note 1, at 408-11. It compelled a reversal of the death judgment in fifteen cases. Id. at 409. Furthermore, the Carlos rule was applicable to at least one of the special circumstance findings in nearly one-half of the sixteen automatic appeals decided by the Lucas court during its first year. Id. at 412.

128. Of course, the common issues I discuss in this paper are selective. I sought a comparison between the Bird and Lucas courts. I looked for issues that had been resolved by both courts, issues that went to the heart of capital litigation, and issues that resurfaced in a sufficient number of cases to give a reliable impression as to how the courts were handling the question.
circumstances. This problem arises in prosecutions under both the 1977 Legislation and the 1978 Initiative. It has resulted in two distinct anti-inflation rules.

2. The standard instructions permitted the jury to take the Governor's power to commute a sentence of life without parole into account in the penalty assessment process via the Briggs instruction mandated by the 1978 Initiative (Ramos error). This issue is confined to post-1978 Initiative cases.

3. The failure of the trial court to instruct the jury that an uncharged crime must be proved beyond a reasonable doubt before it can be used as an aggravating factor (Robertson error). Robertson error can arise in prosecutions under both of the death penalty statutes.

4. The standard instructions permitted the use by the prosecution of aggravating evidence that was not limited to the factors enumerated in the 1978 Initiative (Boyd error). This issue is confined to prosecutions under the 1978 Initiative.

5. The failure of the trial court to delete from the penalty phase instructions aggravating and mitigating factors enumerated in the statute which are not supported by the evidence. This issue can arise in prosecutions under both the 1977 Legislation and the 1978 Initiative.

6. The failure to instruct the jury that, despite the language of the 1978 Initiative, the jury retains discretion over the sentencing decision (the Initiative's mandatory sentencing


131. Of course, it would be possible for a trial judge to give a similar instruction in a prosecution under the 1977 Legislation, but the instruction was not mandated by the statute at that time.

132. People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982) (plurality opinion); see also, e.g., Rodriguez, 42 Cal. 3d at 730, 726 P.2d at 113, 230 Cal. Rptr. at 667; People v. Phillips, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985) (plurality opinion); People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985) (plurality opinion); id. at 295, 710 P.2d at 892, 221 Cal. Rptr. at 825 (Broussard, J., concurring and dissenting).

formula instruction). This issue is, of course, confined to the 1978 Initiative.

7. The failure to instruct the jury on the proper use of mitigating defense evidence. Under the 1977 Legislation this form of instructional error is known as the unadorned factor (j) error. Under the 1978 Initiative, it is known as the unadorned factor (k) error.

8. The use of an anti-sympathy instruction, which is also frequently referred to as a “no-sympathy” instruction, at the penalty phase. This instructional error can arise in prosecutions under both statutes.

9. The standard of reversibility for penalty phase error, regardless of whether the prosecution is under the 1977 Legislation or the 1978 Initiative.

Except for the last two errors, each of these instructional issues arises either because the error was embedded in the standard jury instructions or because the standard instructions did not include the necessary instruction. These issues will be discussed in the order in which they are listed.

B. The Recurring Issues

1. The Anti-Inflation Rules

Special circumstances found to be true at the earlier stage of the trial may be considered aggravating factors in the sentencing process at the penalty phase under factor (a) in both the 1977 Legislation and the 1978 Initiative. If multiple or overlapping special circum-


135. See People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983); see also, e.g., Allen, 42 Cal. 3d at 1222, 729 P.2d at 115, 232 Cal. Rptr. 849; Rodriguez, 42 Cal. 3d at 730, 726 P.2d at 113, 230 Cal. Rptr. at 667; Davenport, 41 Cal.3d at 247, 710 P.2d at 861, 221 Cal. Rptr. at 794 (plurality opinion); id. at 295, 710 P.2d at 892, 221 Cal. Rptr. at 825 (Broussard, J., concurring and dissenting).

136. See Easley, 34 Cal. 3d at 858, 671 P.2d at 813, 196 Cal. Rptr. 309; see also, e.g., People v. Leach, 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985); Brown, 40 Cal. 3d at 512, 709 P.2d at 440, 220 Cal. Rptr. at 637; People v. Montiel, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985); People v. Lanphear, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984).

137. Factor (a) is identical in both death penalty statutes. It reads as follows: “The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.” CAL. PENAL CODE § 190.3(a) (West 1988); former CAL. PENAL CODE § 190.3(a) (West 1979).
stances were erroneously found to be true at the earlier stage, the standard instructions nonetheless permitted each of these erroneous findings to be used as an aggravating factor by the penalty jury. This inflation of aggravating factors weights the scales in favor of a death verdict.

a. The Bird Court

The inflation question was first considered by the Bird court in People v. Harris.138 Harris was convicted of two first degree murders. Three special circumstances were found to be true in connection with each murder: felony-murder-robbery, felony-murder-burglary, and multiple-murder, for a total of six special circumstances affecting his penalty. The Harris case presented both types of inflation:139 (1) the charging of multiple special circumstances on facts supporting a single special circumstance; and, (2) the use of overlapping special circumstances when the defendant has engaged in a single course of criminal conduct which can be segmented into a series of separate crimes and charged as a series of special circumstances.

i. The Harris Single-Charge Rule

The cruder of the two types of inflation typically occurs in a multiple murder prosecution in which each murder is used as an allegation supporting a special circumstance for the other murder. What should be one special circumstance thus is alleged as two. The prosecution made these illogical allegations in Harris, and the jury found

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139. I do not mean to suggest that there are not other ways of inflating the aggravating factors at the penalty phase of the trial. One of the most obvious "other ways" of achieving inflation is to allow the jury to consider the first degree murder which qualified the defendant for special circumstance consideration under both factor (a) (the circumstances of the crime of which defendant was convicted in the present proceeding) and factor (b) (the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence). This too is improper. People v. Melton, 44 Cal. 3d 713, 764, 750 P.2d 741, 771-72, 244 Cal. Rptr. 867, 898, cert. denied, 488 U.S. 934 (1988); see Rodriguez, 42 Cal. 3d at 787, 726 P.2d at 150, 230 Cal. Rptr. at 704. On the other hand, the Melton court rejected a contention that it was an improper inflation for the jury to consider prior violent felony convictions under both factor (b) and factor (c) (the presence or absence of any prior felony conviction) on the ground that the single conviction substantiates two concerns: the commission of a felony and violent behavior. Melton, 44 Cal.3d at 764, 750 P.2d at 771-72, 244 Cal. Rptr. at 898.
both multiple-murder allegations to be true.\textsuperscript{140} The \textit{Harris} plurality held that this was error of federal constitutional significance.\textsuperscript{141}

Since there must be more than one murder to allege this special circumstance at all, alleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty, a result also inconsistent with the constitutional requirement that the capital sentencing procedure guide and focus the jury's objective consideration of the particularized circumstances of the offense and the individual offender.

In our view, the appropriate charging papers would allege one "multiple murder" special circumstance separate from the individual murder counts. This procedure would properly guide the jury's objective consideration of the circumstances of the crime without hampering the prosecution's ability to seek what it considers to be the appropriate punishment.\textsuperscript{142}

"Finding no legitimate state purpose, and recognizing the danger of prejudice," a majority of the Bird court adhered to the plurality opinion in \textit{Harris} and condemned the practice of charging more than one multiple-murder special circumstance in a single information.\textsuperscript{143} The court also applied this rule to multiple allegations of the prior-murder-conviction special circumstance.\textsuperscript{144} Because this rule means that there is only one multiple-murder or prior-murder-conviction special circumstance regardless of the number of murders committed by the defendant, and regardless of the number of prior murder convictions, this aspect of \textit{Harris} is conveniently called the Single-Charge Rule.

\textit{ii. The Harris Overlapping-Felony Rule}

The second type of inflation, the segmentation of a single indivisible course of conduct into various separate special circumstances, presents a more sophisticated issue. Harris and his companions trav-

\begin{itemize}
  \item \textsuperscript{140} \textit{Harris}, 36 Cal. 3d at 43, 679 P.2d at 435, 201 Cal. Rptr. at 784.
  \item \textsuperscript{141} Justice Broussard wrote the plurality opinion. He was joined by Chief Justice Bird and by Justice Reynoso. \textit{Id.} Nevertheless, Justice Kaus, who dissented from the plurality's view that Harris had made out a prima facie case of "fair cross-section" jury discrimination, agreed "that there was error at the penalty phase. Therefore, if the disposition were up to me, I would have to struggle with the issue of prejudice." \textit{Id.} at 75, 679 P.2d at 457, 201 Cal. Rptr. at 806-807 (Kaus, J., dissenting). The plurality found two types of penalty phase error: inflation of the special circumstances and refusal to admit poetry written by the defendant in his own hand as evidence in mitigation at the penalty phase. Though Justice Kaus did not specify the nature of the penalty phase error, it is fair to assume that he meant both. Thus the \textit{Harris} rule commanded the votes of a majority of the court. The other three justices who wrote separately did not mention the penalty phase error.
  \item \textsuperscript{142} \textit{Id.} at 67, 679 P.2d at 452, 201 Cal. Rptr. at 801 (citation omitted).
  \item \textsuperscript{144} \textit{Allen}, 42 Cal. 3d at 1274, 729 P.2d at 147, 232 Cal. Rptr. at 881 (two of three prior-murder-conviction special circumstances set aside).
\end{itemize}
eled to Long Beach, California, for the purpose of robbing a couple who managed an apartment building in which one of the accused had lived. In the course of carrying out their plan, they broke into the managers’ apartment, robbed and then killed both victims.\textsuperscript{145} In addition to the two multiple-murder special circumstances discussed above, the information charged four additional special circumstances (two for each murder): felony-murder-robbery and felony-murder-burglary.

The \textit{Harris} plurality held “that the federal Constitution and California statutory laws prohibit the cumulative use of special circumstance allegations in this case” at the penalty phase as separate aggravating factors.\textsuperscript{146} Regarding the robbery and burglary special circumstances, Justice Broussard wrote that they are necessarily overlapping because they both describe virtually the same conduct. The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the high court’s mandate that the state “tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”\textsuperscript{147}

In addition, the \textit{Harris} court found that the “principles underlying California’s prohibition of double punishment” also support limiting the use of overlapping special circumstances as aggravating factors at the penalty phase,\textsuperscript{148} and a remedy was then fashioned for handling overlapping special circumstances.\textsuperscript{149} However the \textit{Harris} plu-

\begin{enumerate}
\item \textit{Harris}, 36 Cal. 3d at 43-44, 679 P.2d at 435-36, 201 Cal. Rptr. at 784-85.
\item \textit{Id.} at 62, 679 P.2d at 448, 201 Cal. Rptr. at 797.
\item \textit{Id.} at 63, 679 P.2d at 449, 201 Cal. Rptr. at 798 (citing \textit{Godfrey v. Georgia}, U.S. 420, 428 (1980)).
\item \textit{Id.} at 64-65, 679 P.2d at 450, 201 Cal. Rptr. at 799.
\item The procedure outlined by the \textit{Harris} plurality was as follows:
\begin{enumerate}
\item We conclude that the appropriate procedure would be to allow the prosecution to charge those special circumstances supported by the evidence, and for the jury to determine in the guilt phase which special circumstances may have been committed.
\item Assuming that overlapping special circumstances charged are found to be true, the doctrine of “merger” and the prohibition against multiple punishment should then operate in the penalty phase to prevent the improper cumulation of special circumstances to avoid the risk that a jury may give undue weight to the mere number of special circumstances found to be true. To avoid that risk, in those cases involving a single act or an indivisible course of conduct with one principal criminal objective, the jury should be instructed that although it found several special circumstances to be true, for purposes of determining the penalty to be imposed, the multiple special circumstances should be considered as one. In addition, the prosecution should be barred from referring to those multiple special circumstance findings which have been merged in the penalty phase. Such a procedure is necessary because of the dual nature of special circumstance allegations provided by California’s death penalty law coupled
\end{enumerate}
\end{enumerate}
rality was never joined by a majority of the justices of the Bird court, for this issue was never again confronted during that court's tenure. Because this rule prevents the use of multiple felony-murder special circumstances as more than one aggravating factor, it is conveniently called the *Harris* Overlapping-Felony Rule.

Finally, in *People v. Allen*, the Bird court addressed a related form of inflation: the use of alternate theories of a special circumstance to support two special circumstance findings.\(^{150}\) The witness-killing special circumstance can be committed in two ways: by the intentional killing of a victim either to prevent the victim's testimony in any criminal proceeding, or in retaliation for the victim's testimony as a witness in any criminal proceeding.\(^{151}\) The court held that even though the evidence supports both theories of the witness-killing special circumstance, only one special circumstance may be found true. The holding was grounded in the "probable intent" of the legislative body in enacting this special circumstance.\(^{152}\)

The *Allen* analysis appears to be correct on principle. It is analogous to a finding of first degree murder on one of several alternative theories. The prosecution is entitled, for example, to pursue separate theories of first degree murder, and to argue those separate theories to the jury.\(^{153}\) But only one verdict of guilt of first degree murder is permissible for each victim, even though the jury may find that all of the theories of first degree murder have been proven beyond a reasonable doubt.\(^{154}\) This analogy is apt authority for the *Allen* interpretation of the witness-murder special circumstance.

Under this rule only one witness-murder special circumstance may be properly found for each victim, regardless of the number of theories supporting this special circumstance. Since the *Allen* rule makes a single special circumstance appropriate, it is a variant of the Single Charge Rule.

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* Id. at 66-67, 679 P.2d at 451-52, 201 Cal. Rptr. at 800-01.
* 153. For example, the prosecution could produce evidence that a particular murder was (1) willful, deliberate, and premeditated, (2) committed by means of an explosive, and (3) committed during the perpetration of both robbery (4) and burglary. If the trial court in *Decaillet*, 41 Cal. 2d 708, 263 P.2d 441 (1953); *Sutic*, 41 Cal. 2d 145-57, 64 Cal. Rptr. 52 (1953); People v. Gilliam, 39 Cal. 2d 235, 246 P.2d 31 (1952).
b. The Lucas Court

i. The Single-Charge Rule

The Lucas court has followed the *Harris* rule insofar as it embargoes the use of more than one multiple-murder special circumstance for two or more murders. The leading case its first term was *People v. Williams*. The opinion reads much like the plurality opinion in *Harris*. It is worth quoting at length:

> No purpose of the state is served in the consideration of more than one multiple-murder special circumstance inasmuch as the culpability factor which this special circumstance finding reflects is that the defendant has committed more than one murder. This factor is present regardless of the number of murders in excess of the one of which the defendant is convicted. Although the jury may properly consider that number as an aggravating factor, when multiple murder is identified as a special circumstance the potential impact may be greater. First, as a special circumstance, multiple murder is singled out as a factor which the state identifies as having particular relevance to the penalty decision. In addition, and of potentially greater significance, the multiple-murder special-circumstance findings could have an unwarranted impact on the jury's selection of the appropriate penalty if the jury is influenced by the sheer number of special circumstances which in some cases increase in geometric proportion to the number of victims. Thus, consideration of more than one multiple-murder special circumstance serves neither the legislative purpose of identifying those murderers whose crimes make them eligible for the death penalty, nor the overriding constitutionally mandated purpose of channeling or focusing the discretion of the jury so as to avoid arbitrary and capricious imposition of the death penalty.

> Therefore, failure to instruct the jury at the penalty phase to consider only one multiple-murder special circumstance was also error.

However, the court went on to conclude that this error was harmless, considered both alone and in the context of the other "numerous trial errors and defects identified in the majority opinion." Nevertheless, the reasoning used in *Williams* is the reasoning which supports the entire Single-Charge Rule. Although violations of the Rule due to multiple findings of the prior-murder-conviction special circumstance and the witness-murder special circumstance...
were not encountered by the Lucas court during its first year, presumably the court will apply the Single-Charge Rule to multiple allegations of the prior-murder-conviction special circumstance and to any single special circumstance which can be violated by alternate theories, such as the witness-murder special circumstance.

ii. The Overlapping-Felony Rule

However, the second anti-inflation rule recognized by the Harris plurality, the Overlapping-Felony Rule, has not been followed by the Lucas court. In People v. Melton the defendant was convicted of one count of first degree murder, one count of burglary, and one count of robbery. With respect to the murder, the jury found "true" both felony-murder-robbery and felony-murder-burglary special circumstances. Invoking the Overlapping-Felony Rule, the defendant claimed that the multiple use of his intent to steal, a critical element in both robbery and burglary, required a reversal of the death judgment. Indeed, the People conceded that defendant's claim fell squarely within the Overlapping-Felony Rule announced by the Harris plurality: "the robbery and burglary special circumstances are necessarily overlapping because they describe virtually the same conduct."

Despite the People's concession, the Lucas court rejected the procedures suggested by the Harris plurality for dealing with overlapping felony-murder special circumstances. Two suggestions were made in Harris. First, "the jury should be instructed that although it found several special circumstances to be true, for purposes of determining the penalty to be imposed, the multiple special circumstances should be considered as one." Second, "the prosecution should be barred from referring to those multiple special circumstance findings which have been merged in the penalty phase." These suggested procedures demonstrate that the crux of the concern with overlapping felony-murder special circumstances is the potential prejudice resulting from unfairly increasing their number. Special circumstances play a critical role in the capital adjudication process, and the fear is that a jury will be unduly influenced by the fact that the defendant has committed a number of these "special circumstances." In other words, the concern is that the jury will regard the defendant

findings were made in People v. Hendricks, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) (Hendricks I), but the Single-Charge Rule was not addressed.


162. Id. at 765, 750 P.2d 772, 244 Cal. Rptr. at 899.


164. Id.
as more culpable than it should because death eligibility was earned more than once.

The critical question is when should multiple special circumstance findings be considered by the sentencing jury and when should they not. The *Harris* plurality concluded that the test is "when the defendant's conduct is artificially inflated by the multiple charging of overlapping special circumstances based on an indivisible course of conduct having one principal criminal purpose."165 In the context of the burglary and robbery in *Harris*, the *mens rea* of an intent-to-steal made *Harris* guilty of both robbery and burglary. This single culpable mental state was then inflated into two separate special circumstances resulting in unfairness to the defendant. According to Melton (and by the concession of the Attorney General), exactly the same unfairness happened in his case.

Justice Eagleson, writing for the majority in *Melton*, took an entirely different view. Instead of focusing on the common element of the burglary and robbery — the defendant's *mens rea*, intent-to-steal — Justice Eagleson focused on the difference in the defendant's conduct, that is, on the difference in the *actus reus* between the crimes (special circumstances) of robbery and burglary.

Insofar as the *Harris* plurality was suggesting that the penalty jury may not consider, in any form, the existence of *more than one felony* leading to the capital murder, we find its reasoning unpersuasive. Section 190.3, subdivision (a), directs the jury to consider generally "the circumstances" of the capital crime. Even if the additional phrase "and the existence of any special circumstances [previously] found to be true" was missing, the sentencing jury would be statutorily entitled to evaluate all the conduct which led to the capital conviction.

In our view, it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable, and thus more deserving of death, if he not only robbed the victim but committed an additional and separate felonious act, burglary, in order to facilitate the robbery and murder. Robbery involves an assaultive invasion of personal integrity; burglary a separate invasion of the sanctity of the home. Society may deem the violation of each of these distinct interests separately relevant to the seriousness of a capital crime.166

Having thus rejected the constitutional concerns raised by the *Harris* plurality, Justice Eagleson then turned to the argument that statutory law supported the *Harris* overlapping special circumstance rule. He concluded that section 190.3 cannot be read in harmony

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165.  *Id.* at 62, 679 P.2d at 449, 201 Cal. Rptr. at 798.
with section 654, and that in the context of a death penalty case section 190.3 prevails. In a critical passage in the opinion, Justice Eagleson explained the Melton court's view of the role of special circumstances at the penalty phase:

[T]he death penalty statutes provide an integrated scheme of 'special circumstances' in which the single appropriate punishment for the most serious offense - a first degree murder - is expressly influenced by just such 'indivisible' acts and offenses. These 'special circumstances' render a first degree murderer eligible for death or life without parole, and their 'existence,' as well as all the 'circumstances' of the capital crime, must be taken into account under section 190.3, subdivision (a), when the actual penalty is chosen.

With this passage the focus of the opinion subtly changes. The court shifts its emphasis from the importance of allowing the jury to consider all of the defendant's conduct, including conduct that involves distinguishing the actus reus of the crimes of robbery and burglary under the "circumstances" provision of 190.3 (a), to the characterization of the conduct as a special circumstance, and the propriety of allowing the jury to take those characterizations into account. At this point, the plurality opinion in Harris has been completely cast aside.

However, the interests the rule sought to vindicate (eliminating unfair inflation of the aggravating factors at the penalty trial) survive, and the difficulty of accommodating those interests continues to plague the Melton court even after it puts to rest the Harris Overlapping-Felony Rule. A few sentences further on in the opinion, Justice Eagleson wrote,

Of course the robbery and the burglary may not each be weighed in the penalty determination more than once for exactly the same purpose. The literal language of subdivision (a) presents a theoretical problem in this respect, since it tells the penalty jury to consider the "circumstances" of the capital crime and any attendant statutory "special circumstances." Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any "circumstances" which were also "special circumstances." On defendant's request, the trial court should admonish the jury not to do so.

In other words, no error was committed when the jury was allowed to consider both the felony-murder (robbery) and the felony-murder (burglary) special circumstances, but it would be error for the jury to also consider those two "specials" again as "circumstances of the capital crime," to use Justice Eagleson's phrase. Thus, under the Melton rule the concern for inflation is not with the double counting of the two felony-murder special circumstances, but with the multiplication of the two "specials" by considering them once as "special

167. Id. at 768, 750 P.2d at 774, 244 Cal. Rptr. at 900-01.
168. Id. (emphasis added).
169. Id. at 768-89, 750 P.2d at 774, 244 Cal. Rptr. at 901.
circumstances” and again as “circumstances of the crime.” Of course, this danger lurks in every capital case. Accordingly, under Melton, an instruction should be given at the penalty phase of every capital trial that the jury should not consider any special circumstance found true as a “circumstance of the capital crime.”

The defunct Harris Overlapping-Felony Rule and the Melton Anti-Inflation Rule produce different results. Under the Overlapping-Felony Rule, the jury was permitted to consider only one special circumstance — a single felony-murder special circumstance under the facts of the Harris case. An instruction was required telling the jury that only one special circumstance could be considered. However, the defendant’s conduct classified as a burglary and that classified as a robbery could be considered by the jury under the “circumstances” provision of 190.3(a).170 Under Melton, the conduct constituting the burglary and the robbery is properly considered by the jury, but upon request of the defendant, the jury should be instructed that it cannot double count the special circumstances found true at the guilt phase as both a special circumstance and a “circumstance of the capital crime.”

My first quarrel with Melton concerns the allocation of the burden of instructing the jury not to double count the special circumstances found true under the two clauses of 190.3(a). Justice Eagleson simply states that “[o]n defendant’s request, the trial court should admonish the jury not to do so.”171 He gives no rationale for allocating the burden to the defendant to request this instruction, and I can think of none. Valid reasons for placing the burden on the defendant to request particular instructions of course exist. For example when the instruction is dependent upon a particular set of facts and there are tactical judgments about the use of the instruction which should be left to the defense under the adversary system. But the instruction sanctioned by Melton is not fact specific. The risk of double counting a special circumstance, once as a special circumstance and again as a circumstance of the crime, exists in all penalty trials, for it is a condition precedent of every penalty trial that at least one special circumstance be found true. Moreover, I cannot think of a single tactical reason that might counsel the defense to omit the instruction from the jury charge.

Furthermore, allocating to the defense the burden of requesting

171. Melton, 44 Cal. 3d at 768, 750 P.2d at 774, 244 Cal. Rptr. at 901.
the instruction is inconsistent with the instructional requirements for reducing the risk of inflating aggravating factors in other comparable situations. Elsewhere in *Melton*, Justice Eagleson recognized that the language of section 190.3, subsections (a) and (b) \textsuperscript{172} "literally construed . . . allows the jury to count the violent circumstances of the current crime as aggravating factors under both subdivisions (a) and (b) . . . . Instructions in future cases should explain that the violent crimes described in subdivision (b) do not include the circumstances of the capital offense itself." \textsuperscript{173} Since the bare language of the two clauses of section 190.3(a) allows the jury to double count the special circumstances in precisely the same way, the court should have likewise held that the jury instructions in future cases should explain that double counting is also prohibited under factor (a). There is no reason to treat the prohibited double counting under factors (a) and (b) any differently than the prohibited double counting under the two clauses of factor (a) with respect to the duty of the trial judge to accurately inform the jury of the law guiding their decision in the penalty phase of the capital trial.

Justice Eagleson's placement of the burden on the defense to request the instruction prohibiting double counting under subsection (a) is also inconsistent with his opinion for the court in *People v. Williams*. \textsuperscript{174} *Williams* presented the question of the duplicative use of the multiple-murder special circumstance. \textsuperscript{175} After condemning the use of more than one multiple-murder special circumstance, Justice Eagleson wrote for the majority that "failure to instruct the jury at the penalty phase to consider only one multiple-murder special circumstance was also error." \textsuperscript{176} The purpose served by avoiding the multiple use of the multiple-murder special circumstance is the same in both cases: the avoidance of inflating the aggravating circumstances at the penalty phase. Therefore, the judge should be required to include the instruction against double counting under factor (a) in

\[172.\] The pertinent provisions read as follows:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

\textit{Cal. Penal Code} § 190.3(a), (b) (West 1988).

\[173.\] *Melton*, 44 Cal. 3d at 763, 750 P.2d at 771, 244 Cal. Rptr. at 897.


\[175.\] \textit{Id.}

\[176.\] *Id.* at 950, 751 P.2d at 440, 245 Cal. Rptr. at 382; \textit{see} Poulos, \textit{Capital Punishment, supra} note 1, at 172.
every case. 177

Lacking any rationale for the departure from the settled law requiring the trial judge to instruct the jury to refrain from inflating the aggravating factors, Melton's statement that the defense must request the instruction should be disapproved. 178 The error is, after all, in the judge's instruction to the jury. The bare language of the statute does not accurately inform the jury of the law's requirements when accuracy is demanded.

My second quarrel with Melton is the assumption upon which both that case and Harris are founded. Each assumes that the felony-murder special circumstance provisions of both the 1977 Legislation and the 1978 Initiative define a group of separate special circumstances. They assume, for example, there is a separate burglary special circumstance, a separate robbery special circumstance, a separate rape special circumstance, etc. Neither the Bird court nor the Lucas court has ever considered whether this assumption is correct. In my view, it is not. This analysis concerns the law of the felony-murder special circumstance. My discussion of the substantive law of the felony-murder special circumstances appears in a separate article. 179 That discussion will not be repeated here.

c. The Status of the Law

The Bird court recognized two rules which were designed to avoid the inflation of the aggravating factors in the penalty assessment process. The Single-Charge Rule prevents the multiplication of special circumstances under factor (a) by eliminating multiple special circumstance findings when there is a single special circumstance which can be supported by multiple factual allegations or by alternate theories. The multiple factual allegations branch of the rule is implicated when the single special circumstance exists with a given

177. Indeed, there is more reason for requiring that the "no double counting under subsection (a) instruction" be included as part of the standard jury instructions in every case than there is for the multiple-murder special circumstance discussed in Williams. The Williams instruction is required only when more than one multiple-murder special circumstance is erroneously submitted to the jury, whereas the Melton instruction is relevant in every case, for in every case at least one special circumstance will be found true, and thus there is the risk that the special circumstance will be double counted in every case.

178. A benefit of the Melton approach is that it would eliminate one potential source of error that undoubtedly appears in a number of the automatic appeals now pending in the court. That this would be an illegitimate reason for shifting the burden to the defense should need no discussion.

179. Poulos, The Lucas Court, supra note 1, at 400-62.
set of facts, and the case presents several sets of facts that would support the requisite findings. This occurs, for example, when the defendant commits two or more murders, or when the defendant has been previously convicted of murder. In this situation, the Single-Charge Rule means that only one special circumstance should be found to be true, and only this single charge can be considered under factor (a).

The alternate theories branch of the Single-Charge Rule prevents multiple special circumstance findings when the special circumstance can be demonstrated under more than one theory. An example is the witness-murder special circumstance. The circumstance can be created by an intentional murder either to prevent the victim from testifying or in retaliation for having testified in criminal proceedings. Though there are many special circumstance acts which can be committed in alternate ways, this aspect of the Single-Charge Rule has only been encountered in connection with the witness-murder special circumstance. On principle, however, it should be equally applicable to any special circumstance which may be proven by alternate theories. The Single-Charge Rule also prevents the use of such multiple special circumstance findings as multiple aggravating factors in the penalty assessment process under factor (a).

Both aspects of the Single-Charge Rule were supported by a majority of the justices of the Bird court. The Lucas court has applied the first branch of the Rule, and there is no reason to suspect that it will not apply the second branch as well. The Single-Charge Rule thus appears to be the settled law of the state.

The second anti-inflation rule was the *Harris* Overlapping-Felony

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180. The Single-Charge Rule thus reflects an interpretation of the substantive law of the particular special circumstance, such as the multiple-murder and the prior-murder-conviction special circumstances. For a discussion of this aspect of the substantive law of the special circumstances, see *id.*

181. This part of the Single-Charge Rule reflects a penalty phase consideration.

182. This branch of the rule also reflects an interpretation of the substantive law of the particular special circumstance, such as the witness-murder special circumstance. For a discussion of this aspect of the substantive law of special circumstances, see Poulos, *The Lucas Court*, note 1, at 430-34.

183. *Cal. Penal Code* § 190.2(10) (West 1988); see *supra* notes 150-52 and accompanying text.

184. For example, the following special circumstances can be committed by alternate theories: the two "bomb" special circumstances (*id.* at (4) and (6)), the arrest or escape (*id.* at (5)), the peace officer (*id.* at (7)), the federal law enforcement officer (*id.* at (8)), the witness-murder (*id.* at (10)), the prosecutor (*id.* at (11)), the judge (*id.* at (12)), the federal official (*id.* at (13)), and the race-color-religion-nationality-or-country-of-origin (*id.* at (16)) special circumstances in the 1978 Initiative. In my view, the same analysis applies to the felony-murder special circumstance enumerated in subsection (17). *See* Poulos, *The Lucas Court*, *supra* note 1, at 430-34.

185. This part of the Single-Charge Rule reflects a penalty phase consideration.

186. *See* *supra* notes 140-44 and accompanying text.

187. *See* *supra* notes 155-60 and accompanying text.
Rule. This rule prevented the use of the same course of conduct, or the same culpable mental state, to support more than one felony-murder special circumstance.188 This rule never met with the approval of a majority of the Bird court justices, and the Lucas court has refused to follow it.189 I have analyzed the Bird and Lucas court cases, and I have proposed a solution to the problem of overlapping felony-murder special circumstance in an article on the special circumstances.190 That discussion has not been repeated in this article.

2. Ramos Error

a. The Bird Court

One of the changes wrought by the 1978 Initiative was the mandate that the Briggs instruction be read to the sentencing jury at the penalty phase of the capital trial.191 The instruction was invalidated on federal constitutional grounds by the Bird court in People v. Ramos (I).192 The Attorney General's petition for writ of certiorari was granted, and Ramos (I)'s holding that the Briggs instruction violated the federal constitution was reversed by a closely divided Supreme Court of the United States in California v. Ramos.193 In People v. Ramos (II), the California Supreme Court's decision after the United States Supreme Court reversed and remanded Ramos I, the Bird court again invalidated the instruction on constitutional grounds.194 But this time the instruction was invalidated under the due process clause of the California Constitution:195

Thus, upon analysis, it becomes clear that the Briggs Instruction in real-

188. See supra notes 145-49 and accompanying text.
189. See supra text following note 149.
190. See Poulos, The Lucas Court, supra note 1, at 420-25.
191. The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California. CAL. PENAL CODE § 190.3 (West 1988). This statutory requirement was implemented in STANDARD JURY INSTRUCTIONS (1979), supra note 7, CALJIC No. 8.84.2.
195. There are two due process clauses in the California Constitution: CAL. CONST., art. I, §§ 7, 15. Both were invoked in Ramos II, 37 Cal. 3d at 153, 689 P.2d at 439, 207 Cal. Rptr. at 809.
ity serves no legitimate purpose. By drawing the jury’s attention to the Governor’s commutation power, the instruction invites the jury to second-guess a future Governor’s exercise of his constitutional authority and to impose a harsher sentence than it might otherwise impose simply out of fear that the Governor and the parole authorities will make a mistake and will release the defendant while he is still dangerous. To permit a jury to act in this fashion is inconsistent with a defendant’s right under the California Constitution to have the commutation decision made by the Governor and undermines the fairness of the jury’s determination.

Accordingly, we conclude that the Briggs Instruction violates the due process clause of the California Constitution both because it is misleading and because it invites the jury to consider speculative and impermissible factors in reaching its decision. If this case reaches the penalty phase on remand, the instruction should not be given.196

Justice Lucas dissented alone. After chastising the majority for not disposing of the state constitutional argument in Ramos I,197 he wrote,

The majority now reiterates its Ramos I analysis to the effect that the Briggs Instruction denied the accused due process because it is “misleading” and invites the jury to “speculate” regarding future exercise of the commutation power. Both points are convincingly refuted by the high court’s contrary analysis in California v. Ramos and by the dissent in Ramos II.198

Only two additional penalty trials were reversed under Ramos II for Briggs Instruction error during the tenure of the Bird court.199 In the first of those cases, People v. Montiel, Justice Lucas authored the majority opinion;200 but in the later case, People v. Myers, he concurred in the reversal of the death penalty only under the compulsion of Ramos II.201 Justice Lucas’ opinion in Myers was quite terse.

I concur in the majority’s affirmance of the guilt and special circumstance

197. Justice Lucas wrote in dissent:

Nearly three years ago “a majority of this court ruled that the Briggs Instruction was invalid under the federal Constitution, despite Justice Richardson’s admonition, in dissent, that no case had ever suggested any constitutional infirmity in informing the jurors regarding the Governor’s commutation power. The case was reviewed by the United States Supreme Court where, as the dissent had predicted, the majority’s holding was firmly discredited. In the meantime, of course, this case (and dozens of other automatic appeals raising the same issue) sat in abeyance, gathering dust.

Today, the majority attempts to resurrect its prior holding by relying upon the state Constitution, an issue left open in Ramos I. In other words, by reason of the majority’s initial refusal to confront the independent state ground issue, the parties have wasted about three years which could have been spent retrying this case and all other affected cases.

Id. at 160, 689 P.2d 445, 207 Cal. Rptr. at 814-15 (citations omitted).
198. Id.
201. Myers, 43 Cal. 3d at 277, 729 P.2d at 715, 233 Cal. Rptr. at 280.
findings. I also concur in the reversal of the death penalty, but only under compulsion of Ramos. I prefer to withhold discussion of the Brown issue pending the United State Supreme Court's decision in that case.²⁰²

Justice Panelli, who was not a member of the court when Montiel was written, joined Justice Lucas' opinion in Myers. In one other case, People v. Davenport, the rationale of Ramos II was applied to the prosecutor's penalty phase argument, but Justice Lucas did not participate in that opinion, and Justice Panelli had not yet joined the court.²⁰³

As articulated by the Bird court, Ramos error invokes a virtual per se reversal rule. It is not subject to harmless error analysis.²⁰⁴

b. The Lucas Court

Justice Lucas' "compelled" concurrence in Myers signaled to some court watchers that his acceptance of Ramos II was based on nothing more than the lack of sufficient votes to overrule that case. Since Justice Panelli apparently agreed with his position, he needed only two more votes to reconsider and reverse Ramos II. The aftermath of the retention election produced three justices who were thought to side with Justice Richardson's dissent in Ramos and Justice Lucas' dissent in Ramos II.²⁰⁵

The prediction that Ramos II would be overruled by the Lucas court was proved wrong in People v. Anderson,²⁰⁶ the third death penalty case decided by the new court. The judgment of death was reversed in Anderson for Ramos II error in an opinion authored for the majority by Justice Mosk.²⁰⁷ Chief Justice Lucas agreed with the reversal of the death judgment in a separate concurring opinion.²⁰⁸ The Davenport gloss on Ramos error, that a prosecutor's argument about the Governor's commutation compels reversal for the same

²⁰². Id. (citations omitted).
²⁰⁴. Montiel, 39 Cal. 3d at 928, 705 P.2d at 1258, 218 Cal. Rptr. at 582-83. But see Myers, 43 Cal. 3d at 272, 729 P.2d at 712, 233 Cal. Rptr. at 277 (plurality opinion). The opinion is signed by only two justices, and it does not resolve the issue of the standard of reversibility applicable to Ramos error.
²⁰⁶. See supra note 197.
²⁰⁸. Id. at 1150-51, 742 P.2d at 1333-34, 240 Cal. Rptr. at 613.
²⁰⁹. Id. at 1151, 742 P.2d 1334, 240 Cal. Rptr. at 613.
reasons that a reversal is compelled by the judge’s instruction on the commutation power, has also been followed by the Lucas court, though no error was found in the two cases considering this issue during the first year of the court’s tenure. The Lucas court has also followed the precedent which holds that Ramos error invokes a per se rule of reversibility.

c. The Status of the Law

With the Lucas court’s adherence to Ramos II, and its per se reversibility rule, this appears to be a settled area of California death penalty law.

3. Robertson Error

a. The Bird Court

The 1977 death penalty statute allows the sentencing authority to consider “[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.” The 1978 Initiative contains the same provision, though the word “expressed” appearing in the 1977 statute is changed to “express” in the 1978 Initiative. These provisions allow the prosecution to introduce evidence of uncharged “crimes” involving the requisite use or threat to use force or violence. Under California’s pre-Furman

212. In Anderson, the Court said, “when a court charges the jury in accordance with this instruction, it commits serious error and necessarily subjects the defendant to prejudice.” Anderson, 43 Cal. 3d at 1151, 742 P.2d at 1333, 240 Cal. Rptr. at 613. The Attorney General invited the Court to use harmless error analysis for Ramos error, but in a footnote the Court rejected the invitation:

We adhere to the holding of Montiel . . . which was authored by then Associate Justice Lucas and signed by four other members of this court—and accordingly decline to follow what the Attorney General assumes to be the contrary “holding” of Myers, a plurality opinion signed by only two members of the court.

Id. at 1151, n.11, 742 P.2d at 1333 n.11, 240 Cal. Rptr. at 613 n.11.
213. Former CAL. PENAL CODE § 190.3(b) (West 1979).
214. CAL. PENAL CODE § 190.3(b) (West 1988).

Our requirement for reasonable doubt instructions on proof of uncharged crimes at the penalty phase necessarily implies that the trial court will not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a “rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” In our opinion, the prosecution failed to
(i.e., pre-Anderson) death penalty statute, evidence of uncharged crimes was also admissible at the penalty trial.\(^1\) In that event, however, the defendant was entitled to an instruction informing the jury that it could consider other uncharged crimes evidence only if the crimes were proved beyond a reasonable doubt.\(^2\) Furthermore, the trial court was under a \textit{sua sponte} duty to so instruct the jury.\(^3\)

Essentially the same issue was presented to the Bird court under the “criminal activity” provision of the 1977 statute\(^4\) in \textit{People v. Robertson}.\(^5\) The court rejected the Attorney General’s argument that prior law was abrogated by the statute’s failure to expressly incorporate the reasonable-doubt rule.\(^6\) The plurality opinion held that the trial judge erred in failing to instruct the jury \textit{sua sponte} that in determining whether the defendant should live or die, the jury could not properly consider evidence of “other crimes” as an aggravating factor unless it first found that these crimes had been proved beyond a reasonable doubt. Justice Broussard concurred in the judgment in an opinion that criticized the plurality opinion as being overbroad, at least with respect to the 1977 statute.\(^7\)


\(^1\) \textit{E.g.}, Comment, \textit{The California Penalty Trial}, 52 CAL. L. REV. 386, 394-98 (1964).


\(^3\) \textit{Id.}

\(^4\) \textit{Id.}

\(^5\) \textit{See supra} note 74.


\(^7\) Nothing in the 1977 legislation or its legislative history, however, purports to overturn or reject the numerous judicial decisions recognizing the applicability of the reasonable doubt standard in this special context, and the rationale for our adoption of the reasonable doubt standard—the overriding importance of “other crimes” evidence to the jury’s life-or-death determination... applies equally to the penalty determination under the 1977 death penalty statute. Under these circumstances, we conclude that the 1977 statute cannot be interpreted to repeal this line of authority \textit{sub silentio}.

\textit{Id.} at 54, 655 P.2d at 298, 188 Cal. Rptr. at 96 (plurality opinion).

\(^1\) Justice Broussard summarized his views as follows:

In my view, the \textit{Stanworth} language is imprecise and overbroad, at least as to cases tried under the 1977 statute. Under the relevant statutory language and decisions of this court, a reasonable doubt instruction should be required only when evidence of other crimes is introduced or referred to as an aggravating factor pursuant to former Penal Code section 190.3, subdivision (b). When such evidence is introduced and used only for other purposes, a defendant is
Mosk dissented to the reasonable-doubt rule portion of the plurality opinion. His dissent was joined by Justices Richardson and Reynoso.223

The issue surfaced again three years later in People v. Phillips.224 Again the issue was resolved in a plurality opinion holding that the reasonable doubt instruction for evidence of "other crimes" should have been given sua sponte by the trial court.225 Interestingly, Justice Reynoso wrote the lead opinion in Phillips.226 Justice Mosk concurred only in the disposition of the case,227 and Justice Feinerman dissented alone.228 Justice Kaus229 concurred in the relevant portions of the plurality opinion, and Chief Justice Bird dissented on the ground that the plurality opinion did not go far enough.230 Justice Lucas did not participate in Phillips. A petition for rehearing was denied on February 20, 1986, with Justices Mosk, Lucas, and Panelli voting to grant the rehearing.231

Nevertheless, the Robertson reasonable-doubt rule had been tacitly reaffirmed in People v. Boyd,232 which was decided six months before Phillips. Thus it appears that the division on the Phillips court was primarily over whether the error required a reversal of the death judgment.233 This analysis apparently was confirmed a few pages later in the same official reports volume with the Davenport opinion, where the judgment of death was reversed partly because of Robertson error.234 Although Davenport was also a plurality opinion (authored by Justice Reynoso, and joined by Justice Grodin and Justice Kaus), in a separate concurring opinion Justice Broussard spe-

not entitled to a reasonable doubt instruction, but may be entitled to an instruction limiting the use of that evidence to the purpose for which it was admitted.

Id. at 60, 655 P.2d at 303, 188 Cal. Rptr. at 101.
223. Id. at 63-64, 655 P.2d at 305-06, 188 Cal. Rptr. at 103-04.
225. Id. at 83-84, 711 P.2d at 459, 222 Cal. Rptr. at 163 (plurality opinion).
226. Id. The Reynoso opinion was joined by Justice Broussard, and retired Justice Kaus.
227. Id. at 91, 711 P.2d at 464, 222 Cal. Rptr. at 169 (Mosk J., concurring).
228. Id. at 89-91, 711 P.2d at 463, 222 Cal. Rptr. at 167 (Feinerman J., dissenting). Justice Feinerman, the Presiding Justice, Court of Appeal, Second District, Division Five, was assigned by the Chairperson of the Judicial Council to hear the Phillips case.
229. Id. at 84-85, 711 P.2d at 459-60, 222 Cal. Rptr. at 164 (Kaus, J., concurring).
230. Id. at 85-89, 711 P.2d at 460-63, 222 Cal. Rptr. at 164-67 (Bird, C.J., dissenting).
231. Id. at 29, 711 P.2d at 423, 222 Cal. Rptr. at 127.
233. Compare Phillips, 41 Cal. 3d at 84-85, 711 P.2d at 459-60, 222 Cal. Rptr. at 164 (Kaus J., concurring) with Phillips, 41 Cal. 3d at 89-91, 711 P.2d at 463, 222 Cal. Rptr. at 167 (Feinerman J., dissenting).
cifically agreed with that portion of the plurality opinion finding *Robertson* error. Justice Mosk reiterated his *Robertson* dissent, and Chief Justice Bird wrote an opinion on an entirely different issue. Thus the *Robertson* reasonable-doubt rule finally commanded a majority of votes on the Bird court.

The last Bird court case to consider the *Robertson* reasonable-doubt rule was *People v. Rodriguez*, but only to hold the rule inapplicable. As “other violent crimes” in aggravation of penalty, the prosecutor agreed to rely solely on guilt-phase evidence of three uncharged robberies. The jury was instructed in accordance with *Robertson* not to consider these three crimes in aggravation unless it found them true beyond a reasonable doubt. However, in his closing argument, the prosecutor referred to an incident in which the defendant had supposedly reached for a shotgun in his back seat when stopped by a police officer. The prosecutor argued that this was additional evidence of appellant’s lawlessness. On appeal, defendant claimed that the prosecutor’s remarks breached the agreement on “other crimes” evidence, and that the resulting prejudice was magnified by the fact that the jury received no “reasonable doubt” instruction related to this event. Rejecting this argument, Justice Grodin wrote for the majority:

In *Robertson* . . . we affirmed that where uncharged crimes are to be weighed, as such, in aggravation of penalty, a reasonable doubt factfinding standard is “vital” to proper consideration of this special category of aggravating evidence. . . . Implicit is the notion that the People may not obtain the death penalty on the basis of uncharged criminal activity proved by a standard less stringent than would be required to convict the defendant of the uncharged crime.

However, when evidence or argument about defendant’s past acts is offered merely to rebut a good-character defense, it is irrelevant whether the bad conduct in issue contained all, or any, of the elements of a criminal offense. The evidence is offered not for its criminal character but for its antisocial character. In upholding the prosecutor’s reference to the shotgun incident, we do not and need not decide what violent felonies or misdemeanors, if any, were committed. Nor was the jury required to make any such determination. Hence, the “reasonable-doubt” standard which applies specially to proof of crimes is inapplicable.

Justices Reynoso, Panelli and Lucas signed the opinion authored by
Justice Grodin.241 Justice Mosk, joined by Chief Justice Bird and Justice Broussard, dissented on an entirely unrelated point.242

On the day the Bird court ended, the Robertson rule was the law of the land. However, after the retention election, only two of the four justices remaining on the court had taken stands directly on the rule itself. These two were Justices Mosk and Broussard. Justice Broussard, who was not one of the rule’s most ardent supporters, had invoked it in Davenport and Phillips probably primarily because the issue was presented in situations fitting his Robertson concurring opinion. Justice Mosk generally adhered to his Robertson dissent. Justices Lucas and Panelli had only participated in Rodriguez. Although the latter two had joined the Grodin opinion, the narrow holding of that case would allow the new court to reconsider the Robertson reasonable-doubt rule without undue embarrassment. As the Lucas court emerged from the retention election, the future of the Robertson rule was certainly far from clear.

b. The Lucas Court

Again the predictions that the Lucas court would overrule all of the important Bird court precedent proved to be incorrect. The question of Robertson error was first presented to the Lucas court in People v. Gates.243 In a single sentence the court upheld the defendant’s Robertson claim: “Defendant correctly asserts that the court erred in failing to instruct sua sponte that the jury could not consider the other-crimes evidence unless the commission of such crimes had been proven beyond a reasonable doubt.”244 However, the court quickly added in the next sentence that “the error, however, is harmless.”245

The Robertson reasonable-doubt rule reappeared in People v. Miranda,246 and the Lucas court handled the issue in precisely the same way it was treated in Gates. The court sustained the defendant’s claim, but found “that the error was harmless.”247

The last case to consider the Robertson rule during the first term

241. Id. at 730, 726 P.2d at 113, 230 Cal. Rptr. at 667.
242. Id. at 795, 726 P.2d at 155, 230 Cal. Rptr. at 710.
244. Id. at 1202, 743 P.2d at 322-23, 240 Cal. Rptr. at 688 (citation omitted). The Court relied on Davenport and Robertson.
245. Id.
247. The complete statement is as follows: “Defendant correctly contends that the trial court erred in failing to instruct the jury that it could not consider the Hosey murder as an aggravating factor unless it found beyond a reasonable doubt that defendant committed the crime. We determine, however, that the error was harmless.” Id. at 97, 744 P.2d at 1151, 241 Cal. Rptr. at 619 (citations omitted).
of the Lucas court was Williams. The case presented an interesting twist. The evidence of uncharged "criminal activity" was introduced during the direct examination of the defendant by his own lawyer. The evidence was offered to bolster a tendered diminished capacity defense. The trial court had not given the Robertson reasonable-doubt instruction and this was urged as error on appeal. Relying on the Broussard opinion in Robertson, the court rejected the defendant's claim:

The exception anticipated by Justice Broussard in Robertson is present here. The evidence of uncharged crimes was introduced by and relied on by defendant at all three phases of the trial - guilt, sanity, and penalty. . . . In these circumstances it cannot reasonably be said that the prosecution must prove their commission. Defendant has no burden under the reasonable-doubt standard. Although the jury might have considered the evidence of other crimes for a purpose other than mitigation the court had no obligation to instruct the jury here that this evidence, introduced by defendant, could not be considered an aggravating factor unless proved beyond a reasonable doubt, but could be considered in mitigation under a lesser standard. . . . Defendant asked the jury to believe that he had committed the prior offenses. He may not now be heard to complain that they did.

c. The Status of the Law

The Lucas court has adhered to the Robertson rule as it was applied by the Bird court. The reasonable-doubt instruction is required when the prosecution introduces evidence of uncharged crimes in aggravation of the penalty under section 190.3 (b). These were the holdings in Robertson, Phillips, Davenport, Gates and Miranda. When the evidence is offered for any other purpose, whether by the prosecution or the defense, there is no sua sponte duty on the trial court to give a reasonable-doubt instruction. That is the meaning, broadly put, of Rodriguez and Williams.

249. Although on appeal the defendant's lawyer claimed that the defense was coerced into introducing the evidence as a result of an erroneous in limine ruling on the admissibility of the evidence if offered by the prosecution to rebut the diminished capacity defense, the opinion concludes that it was actually offered as part of the diminished capacity defense. Id. at 912-13, 751 P.2d at 413-15, 245 Cal. Rptr. at 355-56.
250. Id. at 958-59, 751 P.2d at 446, 245 Cal. Rptr. at 387-88.
251. These cases, of course, do not address the issue of whether an instruction should be given on request. When the evidence is offered by the prosecution, I suspect that it should, but a discussion of that question is well beyond the scope of this paper.
4. Boyd Error

a. The Bird Court

In prosecutions under the 1977 Legislation, the People's evidence is not limited to matters relevant to the specified aggravating or mitigating factors. Principally because of the differences in both the language and structure of the 1978 Initiative, and the process established by that statute to assess the penalty, the prosecution's case for aggravation is limited to evidence relevant to the factors enumerated in section 190.3, exclusive of factor (k). This was the holding in People v. Boyd. Factor (k) is excluded from the prosecution's case because that factor encompasses only extenuating circumstances and circumstances offered as a basis for a sentence less than death. Of course, the defense can offer evidence under factor (k); and if that is the defense's choice, then the prosecution can introduce appropriate rebuttal evidence to meet the defense case. Thus, evidence that relates to the defendant's character, background, history, and mental condition, but which does not bear upon any of the other specific factors enumerated in the statute, cannot be introduced by the prosecution in its case-in-chief. Though Boyd resolved an important and unsettled question, the issue did not arise again in the Bird court.

b. The Lucas Court

In People v. Howard, the defendant claimed that the prosecution violated the Boyd rule by introducing evidence which did no more than show defendant’s propensity to commit violent acts in its penalty case-in-chief. The court rejected the argument on several grounds: the evidence was primarily introduced under factor (b) as “other crimes evidence;” it was argued as such by both the prosecution and the defense; the trial court gave the Robertson instruction;

254. Id.
255. Id.
256. Id.
257. In Boyd, the inadmissible prosecution evidence consisted of testimony from defendant's former probation and parole officers describing defendant's failure in various rehabilitative and disciplinary programs, and his reputation for violence in the community. The prosecution also presented evidence of numerous threats of violence, some of which violated no penal statute and thus did not constitute evidence of "criminal activity" admissible under factor (b). Id. at 772, 700 P.2d 782, 789-90, 215 Cal. Rptr. 1, 8.
259. Id. at 437-38, 749 P.2d at 317-18, 243 Cal. Rptr. at 880-81.

568
no objection was made to the evidence on the ground asserted on appeal; and the defendant offered no distinction between evidence admissible under factor (b) "and the evidence assertedly admitted under a mistaken interpretation of factor (k)."260 A related claim, though more tenuously based upon Boyd, was rejected in Williams.261

Finally, in People v. Hovey, defendant argued that the court erred in refusing a proposed instruction which would have precluded the sentencing jury from considering as an aggravating factor any evidence not included in the statutory list read to the jury.262 However, because the prosecution in Hovey was under the 1977 statute, the court held that the instruction was properly refused under Boyd and People v. Murtishaw.263

c. The Status of the Law

There is nothing in Howard, Williams, or Hovey indicating that the Lucas court will stray from the Boyd rule as articulated by the Bird court.264

5. The Failure to Delete Unsupported Factors

a. The Argument

Although this issue appeared in the arguments of several cases briefed in the Bird court, it was never addressed by the court before its tenure lapsed. Consequently, there is no basis for comparing the reaction of the two courts on this issue. However, the Lucas court is not writing on an entirely clean slate. Even though there is no prior relevant penalty phase law in California,265 the argument that the trial judge must delete the factors not supported by the evidence stems from familiar principles.

It has long been recognized in California that the trial judge must

260. Id. at 438, 749 P.2d at 318, 243 Cal. Rptr. at 881.
263. Id.
264. This statement should be read quite literally for I am only speaking of the law of the Boyd rule, and not its application in any of these cases.
265. This is, of course, obvious. Under California's pre-Furman (pre-Anderson) death penalty statute, there was no list of aggravating or mitigating circumstances which guided or restricted the sentencing authority's decision. The absence of this guidance was the major federal constitutional flaw of the pre-Furman statute.
refrain from instructing the jury on principles of law which are not pertinent to the issues in the case. Issues become pertinent in a criminal case when they are raised by the evidence. Hence instructions should always be supported by sufficient evidence to submit the issue to the jury. Two vices are associated with instructing a jury on an issue not raised by the evidence. First, reading the instruction to the jury suggests that the issue is supported by the evidence. Second, the unsupported instruction distracts the jury's attention from the real issues in the case, and may thus confuse the jurors. In People v. Roe, the California Supreme Court summarized this body of law as follows:

The error of inapplicable instructions rests in the fact that they pertain to points not “pertinent to the issue,” and contain matters of law for the jury's consideration not “necessary for their information,” and, therefore, instead of enlightening, tend to confuse and mislead the jury. This is so because such instructions, in effect, either create a false issue or constitute a misstatement of the real issue, thereby distracting the attention of the jury from and befogging the real issue.

There may be, of course, exceptional cases in which an inapplicable instruction will not operate to the prejudice of a defendant in a criminal case, but when it is clear, as it seems to us in the instant case, that such instructions are well calculated to mislead a jury, and in all likelihood affected their conclusion to the prejudice of the defendant upon the only issue in the case, the giving thereof, even though correct in principle, constitutes error equally as grave as would be the giving of instructions fundamentally wrong.

This is the body of law supporting the argument that factors enumerated in section 190.3 which are unsupported by the evidence should not be read to the jury. The argument is clear enough. In most capital cases not all of the aggravating or mitigating factors will find support in the evidence. With respect to the unsupported factors, they “create a false issue or constitute a misstatement of the real issue” in precisely the same way as does an unsupported instruc-

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267. For example, in Satchell, the court said:

The trial court's duty in a criminal case to instruct on the general principles of law relevant to the issues raised by the evidence . . . includes a correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.

People v. Satchell, 6 Cal. 3d 28, 33 n. 10, 489 P.2d 1361, 1364 n.10, 98 Cal. Rptr. 33, 36 n.10 (1971) (citations omitted).

268. All of the other instructions presumably will relate to the evidence in the case, so that the mere giving of the instruction suggests that it too has evidentiary support. Roe, 189 Cal. at 559, 209 P. at 565.

269. Roe, 189 Cal. at 559, 209 P. at 565.

270. The court specifically recognized that “[s]everal of the statutory mitigating factors are particularly unlikely to be present in a given case.” People v. Davenport, 41 Cal. 3d 247, 289, 710 P.2d 861, 888, 221 Cal. Rptr. 794, 821 (1985).
tion at the guilt phase. But an unsupported instruction at the penalty phase may have an even more devastating effect than it does at the trial of guilt. After listening to the judge enumerate a series of factors which are unsupported by the evidence, the jury will undoubtedly search for a reason for the instruction. What might the jurors conclude?

To answer this question, let us turn to the facts of a hypothetical case and the wording of several of the factors enumerated in section 190.3. Two factors are illustrative: factor “(c) The presence or absence of any prior felony conviction” and factor “(e) Whether or not the victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act.” These two factors exemplify the structure and wording of most of the factors specified in section 190.3. The “presence or absence” formula appears in the two most common forms of aggravation: the “criminal activity” aggravating circumstance specified in factor (b), and the prior felony conviction aggravating circumstance specified in factor (c). The “whether or not” formula is used in six apparently mitigating circumstances specified in factors (d), (e), (f), (g), (h), and (j). The three remaining factors (the circumstances of the crime and the special circumstances found true (factor (a)); age (factor (i)); and the ubiquitous factor (k)), are worded differently.

Two of the formulaic factors are established as mitigating circumstances by the absence of evidence: the prior felony conviction factor (factor (c)), and the “criminal activity” factor (factor (b)). Each is worded in terms of the “presence or absence” of its respective circumstance. Evidentiary support indicates an aggravating factor; the absence of evidentiary support indicates a mitigating factor. Their structure is dichotomous with each branch having sentencing significance. This is the lesson necessarily learned by the jury as they struggle with these two factors.

What then of the other factors? Six more are worded in a strikingly similar way: “whether or not” a given situation exists. The structure of these factors is also dichotomous. The presence of evidence indicates a mitigating factor. But what does the absence of

271. Id.
272. Indeed, the assumption underlying this entire body of law is that the jury will pay attention to these unsupported instructions and will try to fit them into the deliberations. This is how the “false issues” are created, and this is how the “real issues” are “misstated”—how the jury is mislead and confused. See supra note 149.
273. CAL PENAL CODE § 190.3 (West 1988).
274. Id.
evidence indicate? Unless the jury is specifically told that the absence of evidence supporting one of these mitigating factors does not indicate the presence of an aggravating factor, then the risk is quite high that the jury will conclude that the absence of evidence of these "whether or not" factors indicates that these factors ARE to be counted as factors in aggravation. That is the lesson taught by the two "presence or absence" factors which are undoubtedly the most common factors aside from factor (a) (the circumstances of the crime and the special circumstances found true).

Finally, there is some indirect empirical evidence that jurors probably do conclude that the absence of evidence of one of these "whether or not" mitigating factors constitutes an aggravating factor. This evidence is found in the fact that prosecutors have concluded, presumably after studying the statute, that the absence of evidentiary support for a mitigating factor indicates the presence of an aggravating factor and they have argued this interpretation of the law to the jury. The court has consistently held that this is an incorrect construction of the statute, and thus the prosecutor may not argue to the jury that the absence of a mitigating factor constitutes an aggravating factor. However, the argument here is that when the jurors listen to an instruction which includes factors unsupported by the evidence and apply that instruction to the sentencing decision, then the jurors may well reach the same improper construction of the statute as the prosecutors who argued that the absence of mitigating evidence establishes an aggravating circumstance.

An example may prove helpful. Let us assume simplified facts

275. E.g., People v. Ghent, 43 Cal. 3d 739, 781-82, 739 P.2d 1250, 1278-79, 239 Cal. Rptr. 82, 110-111 (1987) (Broussard, J., dissenting), cert. denied, 485 U.S. 929 (1988); Davenport, 41 Cal. 3d at 288-90, 710 P.2d at 886, 221 Cal. Rptr. at 821. In his Ghent dissent Justice Broussard wrote:

We have seen appeals in which the prosecutor put great emphasis upon the argument that absence of evidence of a mitigating factor rendered it aggravating. Prosecutors have even listed the factor on charts or blackboards, and tallied the score: nine to two in favor of aggravation, or whatever the count happened to be. Such tactics present a serious danger that the jurors will take into their deliberation a misleading impression that the case before them is not an ordinary murder (as horrible as such may be) but a particularly aggravated murder, one for which the statute especially prescribes the death penalty. That kind of misimpression is likely to affect the verdict. The danger is particularly great if the judge or prosecutor has given the jurors the incorrect impression that they have an absolute duty to return the death penalty if aggravating factors outweigh mitigating factors.

Ghent, 43 Cal. 3d at 781, 739 P.2d at 1278, 239 Cal. Rptr. at 110.

taken from the *Rodriguez* case. The defendant is driving a stolen car, when he is stopped by a California Highway Patrol officer. He is accompanied by a female companion. After alighting from the car the defendant overpowers the officer and handcuffs him with the officer's own handcuffs. As the officer pleads for his life, the defendant takes the officer's service revolver and shoots the officer in the head, killing him instantly. The defendant is ultimately arrested and his female companion is the star witness for the prosecution. Largely based on her testimony, the defendant is convicted of first degree murder, and the charged peace-officer-murder special circumstance is found true. At the penalty phase of the trial the prosecution introduces evidence that the "stolen" automobile defendant was driving was acquired by robbery perpetrated by the defendant the week before. No further evidence is introduced at the penalty trial by either the prosecution or the defense. There is thus no evidence with respect to factors (c) and (e), quoted above.

The sentencing jury would understand that factors (a) and (b) were applicable and should be placed in the sentencing scale. Factor (a) (the circumstances of the crime and the special circumstances found true) applies because that factor is always present at the penalty phase. The jury would also understand that the evidence of other criminal activity, the robbery to acquire the car, would be an aggravating circumstance under factor (b). But what about factors (c) and (e)? As we have seen, factor (c) is worded in such a way that the presence of any prior felony conviction is an aggravating factor and the absence of such a conviction is a mitigating factor. The absence of evidence relevant to factor (c) would tell the jury to count factor (c) as a mitigating circumstance. How would the jury react to the absence of evidence supporting factor (e)? Given the importance of the absence of evidence of a prior felony conviction under factor (c), and the similarity in the wording of the two factors, the jury could easily conclude that it was instructed on factor (e) for the same purpose. This would, perhaps, be especially true when the victim participation mitigating circumstance ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act") is so positively refuted by the evidence. The police officer begged for his life, and the defendant responded by executing him with his own revolver. Arguably, it is more than reasonably probable, it is nearly certain, that the jury

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277. 42 Cal. 3d at 730, 726 P.2d at 113, 230 Cal. Rptr. at 667.
278. *See supra* text following note 272.
would count factor (e) as an aggravating circumstance in this hypothetical case. However, it is beyond argument that it would be error of the gravest magnitude for the jury to do so. In short, the long recognized rule in California that courts must refrain from instructing the jury on principles of law which are not supported by the evidence not only applies, but has special importance in the penalty phase, because of the way the factors enumerated in section 190.3 are worded. At best, the instruction on factors not supported by the evidence will “[distract] the attention of the jury from and [befog] the real issue.” At worst, it will cause a jury to believe that the absence of evidentiary support for the mitigating factors indicates the presence of aggravating factors. This alone may be sufficient to wrongfully tip the scales in favor of death.

This substantial risk is eliminated by simply adhering to the principle that jurors should only be instructed on issues raised by the evidence. This practice would eliminate the danger that jurors misunderstand that the absence of evidence supporting the factor simply indicates that the factor is not to be considered in the sentencing decision one way or the other. It would also eliminate the difficult semantic problem continually faced by the court in determining whether the prosecutor’s argument is simply commenting on the absence of a mitigating circumstance (which is permissible) or arguing that the absence of a mitigating factor is in fact an aggravating factor.

b. The Lucas Court

Given the simplicity of the proposed solution to this very troubling problem, it is surprising that the Lucas court received the argument with so little enthusiasm. The issue was first encountered and first

279. People v. Roe, 189 Cal. 548, 559, 209 P. 560, 565 (1922); see supra notes 266-69 and accompanying text.

280. The judge would always instruct, of course, on the two “presence or absence” factors (factors (b) & (c)) in the 1978 Initiative for they are present in every case. As to the other attributes of the instruction which should be given in the case, see infra text accompanying notes 300-03.


282. People v. Davenport, 41 Cal. 3d 247, 288-90, 710 P.2d 861, 888, 221 Cal. Rptr. 794, 821 (1985). For a recent version of this dispute compare the majority opinion in Ghent, 43 Cal. 3d at 775-76, 739 P.2d at 1273-74, 239 Cal. Rptr. at 106 (finding that the argument amounted only to an argument that the mitigating circumstance of age was not present) with Justice Broussard’s concurring opinion in Ghent, 43 Cal. 3d at 781-82, 739 P.2d at 1278, 239 Cal. Rptr. at 110-111 (finding that the prosecutor argued that the absence of the mitigating factor of age constituted an aggravating factor).
rejected in *People v. Ghent.* Chief Justice Lucas, who wrote for the majority, made short work of the argument:

As is apparently customary in capital cases, the trial court instructed the penalty phase jury by reading the entire statutory list of aggravating and mitigating factors without deleting those factors which were assertedly inapplicable under the evidence. The instruction, however, was preceded by the admonition to consider these factors only "if applicable" to the case. Trial counsel made no objection to the foregoing instructions. Defendant now contends that because certain mitigating factors were clearly inapplicable... reference to these factors should have been deleted. He argues that such a reference may have served to confuse the jury by injecting irrelevant issues into its penalty determination.

The problem with defendant's analysis is that deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant. We believe that the jury is capable of deciding for itself which factors are "applicable" in a particular case. The present instruction is adequate for that purpose.

This response trivializes the argument. The issue is not whether the jury is capable of deciding which factors are applicable and which are not, but whether the jury should do so, and if it should, whether it is capable of correctly applying the law when all that is read is the unadorned language of the statute. In fairness, I do not know how this issue was argued to the court, but the court's rejection of the issue in *Ghent* is wholly inadequate. It fails to resolve the issue in even a sensible way.

With respect to the court's reliance upon the fact that the jury was told to apply the factors "if applicable," I trust that the court would find it insufficient for the trial judge to hand the book of standard jury instructions to the jury and tell them to apply all of the instructions on the penalty phase contained in the book "if applicable." The objections to this procedure are obvious. It is the judge's task to instruct the jurors on the applicable law. It is a fundamental precept of our system that the jurors must follow the rules laid down rather than decide for themselves what rules they shall follow.

This is especially true when federal constitutional principles require that the sentencing jury be guided by the rule of law. More importantly, the simple statement that "[y]ou shall consider, take into account and be guided by the following factors, if applicable." is wonderfully ambiguous. The jury is not told the criterion

283. 43 Cal. 3d at 739, 739 P.2d at 1250, 239 Cal. Rptr. at 82.
284. Id. at 776-77, 739 P.2d at 1274-75, 239 Cal. Rptr. at 107.
285. See infra notes 592-600 and accompanying text.
287. STANDARD JURY INSTRUCTIONS (1979), supra note 7, CALJIC No. 8.84.1 (superseded by CALJIC No. 8.85 (Committee on Standard Jury Instructions) (West 5th
of "applicability." Applicable on the law or the facts? Even if the jury ultimately understands that the phrase means applicable to the facts of the case, the problem remains. The jury could easily believe that the "presence or absence" and the "whether or not" factors are always applicable "on the facts of the case," because the absence of evidence indicates the presence of either aggravation or mitigation, depending on the factor. The "if applicable" admonition thus leaves the jury completely free to commit two types of error: (1) It permits the jury to select the applicable law; and (2) it wholly fails to inform the jury that the absence of evidence indicates mitigation for some,\textsuperscript{288} but not all, of the factors.\textsuperscript{289}

Finally, the professed concern that a defendant may be deprived of a mitigating factor if inapplicable factors are deleted makes no sense at all.\textsuperscript{280} This argument assumes either that mitigating factors can exist that are not related to the evidence in the case or that errors will be made in the process of tailoring the instructions to fit the evidence. However, mitigating factors are tethered to the evidence in the case,\textsuperscript{281} and there does not seem to be a reason to treat the risk of error in the tailoring process for the mitigating factors differently from any other instruction that might favor the defense. The process relies on the adversary system to delete the instructions that are harmful and retain the instructions that are beneficial. Mistakes may be made in individual cases, but the attempt to avoid this type of risk by giving the jury all of the instructions authorized by the law, though not called for by the facts of the case, is neither sensible nor effective. The \textit{Ghent} analysis thus provides no substantial reason for rejecting the deletion argument.

What of the later Lucas court cases during its first year? The issue surfaced again three months later in \textit{Miranda}.\textsuperscript{282} Writing for the court in that case, Justice Panelli offered an additional rationale for rejecting the deletion argument:

Defendant contends that the trial court had the \textit{sua sponte} duty to delete the irrelevant mitigating factors. We rejected an identical contention in [\textit{People v. Ghent}]. We believe the jury's knowledge of the full range of factors provides a framework for the exercise of its discretion and can assist the jury in placing the particular defendant's conduct in perspective. Moreover, as is apparent from the statutory language, it is for the jury to determine which of the listed factors are applicable or "relevant" to the particu-
The trial court did not err in reading the complete list of statutory factors to the jury.\textsuperscript{293}

The \textit{Miranda} and \textit{Ghent} rationales were subsequently repeated in \textit{People v. Kimble,}\textsuperscript{294} \textit{People v. Ruiz,}\textsuperscript{295} \textit{People v. Melton,}\textsuperscript{296} \textit{People v. Williams,}\textsuperscript{297} and \textit{People v. Wade.}\textsuperscript{298}

There is obvious substance to the argument that an instruction on all of the factors enumerated in section 190.3 calls the attention of the jury to the range of factors considered in all capital sentencing and thereby assists the jury in weighing the relative culpability of the defendant and the heinousness of his or her offense. As Justice

\hspace{1em} \textit{Id.} at 104-105, 744 P.2d at 1156-57, 242 Cal. Rptr. at 624 (citations omitted).

\hspace{1em} 44 Cal. 3d 480, 516, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 171-72 (opinion by Lucas, C.J.), \textit{cert. denied}, 488 U.S. 871 (1988). "We have also rejected defendant's claim that the court should have deleted assertedly "inapplicable" factors from former CALJIC No. 8.88.1." \textit{Id.} (citation omitted).

\hspace{1em} 44 Cal. 3d 589, 619, 749 P.2d 854, 870, 244 Cal. Rptr. 200, 216 (opinion by Lucas, C.J., relying principally on \textit{Ghent} and not mentioning the \textit{Miranda} rationale), \textit{cert. denied}, 488 U.S. 871 (1988).

\hspace{1em} 44 Cal. 3d 713, 770-71, 750 P.2d 741, 775-76, 244 Cal. Rptr. 867, 902 (opinion by Eagleson, J. relying on \textit{Davenport, Miranda and Ghent}), \textit{cert. denied}, 488 U.S. 934 (1988).


\hspace{1em} 44 Cal. 3d 975, 998-99, 750 P.2d 794, 808, 244 Cal. Rptr. 905, 919 (opinion by Lucas, C.J., relying on \textit{Ghent, cert. denied}, 488 U.S. 900 (1988). It was also repeated in a later case, but because a rehearing was granted in that case, the decision is no longer precedent for the rule under discussion. \textit{See People v. Bell, 44 Cal. 3d 137, 167-68, 745 P.2d 573, 591, 244 Cal. Rptr. 890, 908 (1987) (opinion by Mosk, J.), reh'g granted, Jan. 28, 1988, aff'd on rehearing, 49 Cal. 3d 502, 778 P.2d 129, 262 Cal. Rptr. 1 (1989); cert. denied, 110 S. Ct. 2576 (1990); see also supra notes 11-15 and accompanying text. Nevertheless, since it discloses Justice Mosk's thinking on this issue, that portion of \textit{Bell} is worth quoting:

\hspace{1em} First, the instruction clearly states that the jury is to consider only such factors as are applicable to the case. Second, each mitigating factor is relevant to the jury's consideration in the sense that the Legislature has identified it as a proper subject of consideration in the selection of an appropriate penalty. Thus, by hearing in its entirety the list of mitigating factors the jury receives not merely a collection of circumstances that may or may not be applicable to the case, but is also helped to recognize and evaluate other mitigating factors relevant to the sentencing decision.

\hspace{1em} Defendant complains, however, that the reading of the entire list of factors allowed the prosecutor to discuss each factor that was \textit{not} applicable to the case and to present the absence of such mitigating factor as an aggravating factor. . . . [The prosecutor] never expressly characterized the absence of a mitigating factor as a factor in aggravation, and it is unlikely the jury would have interpreted his brief comments about the inapplicable mitigating factors in that manner. Thus, there was no error in the reading of former CALJIC No. 8.88.1 or in the prosecutor's comments on the mitigating factors included in that response.

\textit{Id.} Both the argument and the disposition miss the point.
Eagleson wrote for the court in *Williams*:

An instruction which directs the jury's attention to the factors that the state considers particularly relevant assists the jury in selecting the appropriate penalty by narrowing or channeling the focus of the jury's discretion. The instruction helps the jury to determine the appropriate penalty in light of all the factors which the state considers relevant. The instruction thereby lessens the possibility that the penalty of death may be imposed arbitrarily or capriciously.\(^{299}\)

However in both *Melton* and *Williams* Justice Eagleson's opinion for the court recognized the impropriety of an instruction permitting the jury to conclude that the absence of a mitigating circumstance constitutes an aggravating factor.\(^{300}\) Because there is no indication in any of these cases that the argument to the court was based upon the substantial risk inherent in reading the unadorned language of the statute to the jury as an instruction, these cases do not resolve the question now under discussion.

c. A Proposal

The cases recognize two purposes for reading the entire list of factors enumerated in section 190.3 to the jury. First, of course, is the typical role of the jury instruction. Reading the entire list allows the jury to find the facts and apply the law in much the same manner as in the guilt phase of the trial. Here the deletion argument has its greatest force: the risk is that the sentencing jury, in performing essentially the same task presented to it at the guilt phase, will erroneously find the absence of mitigating factors to be factors in aggravation. As noted above, however, the court has yet to face this argument, for apparently, it has not been made to the court nor has it been recognized independently by the court in the course of its analysis of the issue. This fact-finding-law-applying process invokes the traditional "law function" of the instruction.

The second function of the instruction is peculiar to the sentencing phase of the capital trial. The instruction, by example, "assists the jury in selecting the appropriate penalty by narrowing or channeling the focus of the jury's discretion. The instruction helps the jury to

\(^{299}\) *Williams*, 44 Cal. 3d at 959-60, 751 P.2d at 447, 245 Cal. Rptr. at 388.

\(^{300}\) In *Melton*, Justice Eagleson, wrote, So long as the absence of a particular factor is not considered a factor in aggravation . . ., the jury is entitled to know that the crime lacks a certain factor which, in the state's view, would make it a candidate for more lenient treatment than other offenses of the same general character. *Melton*, 44 Cal. 3d at 770, 750 P.2d 741, 775-76, 244 Cal. Rptr. 867, 902. In *Williams*, he wrote: "We agree with defendant that the absence of any of the statutory mitigating factors should not be considered aggravating . . ., but no instruction was given here that might suggest to the jury that it should look at the absence of mitigating factors from that perspective." *Williams*, 44 Cal. 3d at 959-60, 751 P.2d at 447, 245 Cal. Rptr. at 388.
determine the appropriate penalty in light of all the factors which
the state considers relevant.\footnote{Williams, 44 Cal. 3d at 959-60, 751 P.2d at 447, 245 Cal. Rptr. at 388.} Because this function can only be
performed by reading the entire list of factors to the jury, the court’s
repeated holding that the trial court has no sua sponte duty to delete
factors unsupported by the record should also be understood to mean
that the court should not do so even on request.

However, the issue cannot rest here. The tension between the two
recognized goals for reading the entire list of factors to the jury can
easily be reconciled by changing and amplifying the instructions.\footnote{The instructions given to the sentencing jury under contemporary practice are
few. (See CALJIC Nos. 8.84, 8.84.1 (1989 New), 8.85, 8.87 (1989 Revision)), 8.88
(1989 Revision). It would not unduly burden the jury to be accurately informed of the
reason for the list of factors. STANDARD JURY INSTRUCTIONS (1988), supra note 287,
CALJIC Nos. 8.84-88.} If the list of factors provides two forms of guidance to the jury, then
the jury should be informed expressly of both reasons for the instruc-
tion. The guidance “by example” function should be clearly ex-
plained. Though that is one of the rationales for reading the entire
list to the jury, a juror could not possibly understand this purpose
from the instruction now given. The jury must be told.

The elimination of the risk that the jury will incorrectly conclude
that the lack of evidence supporting a mitigating factor indicates the
presence of an aggravating factor is only slightly more complicated.
The jury should be clearly informed of this function as well. The
statutory “whether or not” language should be abandoned as a jury
instruction. In its place the court should require that the jury be
clearly informed of the unique importance of a lack of evidence for
factors (b) and (c). The jury should then be told that if it finds that
factors (d), (e), (f), (g), (h) and (j) are not supported by the evi-
dence, that lack of evidence does not establish the existence of ag-
gravitating circumstances in the case. The instructions on factors (a),
(i), and (k)\footnote{The statutory language describing factor (k), of course, cannot be given under
current law. See infra text accompanying notes 399-492.} need not be changed in this regard. Instructions
modeled in this way will preserve both reasons for reading the list of
factors enumerated in section 190.3 while at the same time preserv-
ing the integrity of the capital sentencing process and the role of the
trial court as the oracle of the law.

\footnote{301. Williams, 44 Cal. 3d at 959-60, 751 P.2d at 447, 245 Cal. Rptr. at 388.}
\footnote{302. The instructions given to the sentencing jury under contemporary practice are
few. (See CALJIC Nos. 8.84, 8.84.1 (1989 New), 8.85, 8.87 (1989 Revision)), 8.88
(1989 Revision). It would not unduly burden the jury to be accurately informed of the
reason for the list of factors. STANDARD JURY INSTRUCTIONS (1988), supra note 287,
CALJIC Nos. 8.84-88.}
\footnote{303. The statutory language describing factor (k), of course, cannot be given under
current law. See infra text accompanying notes 399-492.}
d. The Status of the Law

As the law stands at the close of the first year of the Lucas court's tenure, March 25, 1988, the court simply permits the penalty phase jury to be instructed in accordance with the bare language of the statute. The court should embargo the use of the statutory language and modify the instructions as indicated above so that both of the law's goals for jury instructions at the penalty phase can be fulfilled. By providing the jury with the law it can fulfill both the fact-finder-law-applier and the "sentencer" roles.

6. The 1978 Mandatory-Sentencing-Formula Instruction

a. Introduction

The 1978 Initiative defines the sentencing process in capital cases in the following terms:

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 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. 304

Any doubt that the phrases italicised were intended to require a sentence of death in the event that aggravating circumstances outweigh the mitigating circumstances should have been dispelled by the Legislative Analyst's "Analysis" of the initiative measure appearing in the 1978 Ballot Pamphlet. "Finally," wrote the Legislative Analyst, "the proposition would make the death sentence mandatory if the judge or jury determines that the aggravating circumstances surrounding the crime outweigh the mitigating circumstances. If aggravating circumstances are found not to outweigh mitigating circumstances, the proposition would require a life sentence without the possibility of parole." 305 This evidence indicates that the voters intended to remove all sentencing discretion from the jury once the jury concludes either that the aggravating factors outweigh the mitigating factors, or that the reverse is true. The voters intended, in other words, to mandate a verdict of death when the aggravating circumstances outweigh the mitigating circumstances. 306

304. CAL. PENAL CODE § 190.3 (West 1988) (emphasis added).
305. 1978 OFFICIAL BALLOT PAMPHLET 32.
306. See infra notes 313-16 and accompanying text.
b. The Bird Court

Based upon this understanding of the statute, Albert Greenwood Brown, Jr., the defendant in People v. Brown, contended that this mandatory process violates the eighth amendment because it withdraws constitutionally compelled sentencing discretion from the jury. In essence, he argued that Lockett and its progeny required that the jury remain free to reject a verdict of death, even if it concluded that the aggravating circumstances outweighed the mitigating circumstances.307 Agreeing with the defendant that the statute would be unconstitutional “if it required jurors to render a death verdict on the basis of some arithmetical formula, or if it forced them to impose death on any basis other than their own judgment that such a verdict was appropriate under the facts and circumstances of the individual case,” the court nevertheless found that section 190.3 “need not, and should not, be so interpreted.”308 The court’s language is important enough to quote at length.

[T]he reference to “weighing” and the use of the word “shall” in the 1978 law need not be interpreted to limit impermissibly the scope of the jury’s ultimate discretion. In this context, the word “weighing” is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary “scale,” or the arbitrary assignment of “weights” to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor “k” as we have interpreted it. By directing that the jury “shall” impose the death penalty if it finds that aggravating factors “outweigh” mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the “weighing” process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.309

This construction of the 1978 law honors the plain language of section 190.3. It also explains the most likely “constitutional” intent of the drafters and avoids the constitutional difficulties of a finding that the statute permits “mandatory” death penalties. We conclude that the 1978 law is not invalid on grounds that it withdraws constitutionally compelled sentencing discretion from the jury.310

308. Id. at 540, 709 P.2d at 455-56, 220 Cal. Rptr. at 652-53. It is interesting to note that the court did not even refer to the Legislative Analyst’s Analysis in the ballot pamphlet, quoted supra text at note 305.
309. Id. at 541, 709 P.2d at 456, 220 Cal. Rptr. at 653 (footnotes omitted).
310. Id. at 544, 709 P.2d at 458-59, 220 Cal. Rptr. at 655-56.
Brown is the most disingenuous opinion written by the Bird court. Although few would doubt that the legislative body intended to enact a constitutionally valid statute, the evidence indicates that the voters intended to mandate the death penalty when the aggravating circumstances outweigh the mitigating circumstances. The court should have enforced the statute as it was written and intended, and it should have resolved the claim that the Initiative's mandatory capital sentencing formula is unconstitutional.\footnote{311}

In construing an initiative measure, the California courts have often referred to the analysis and arguments in the voters' pamphlet as an aid to ascertaining the intention of the framers and the electorate.\footnote{312} In the analysis printed in the Official Ballot Pamphlet for the November 1978 election, the Legislative Analyst explained that the Initiative makes the death penalty “mandatory if the judge or jury determines that the aggravating circumstances surrounding the crime outweigh the mitigating circumstances.”\footnote{313} In view of the Legislative Analyst's statement, it is significant that none of the arguments printed in the Ballot Pamphlet mentioned that the Initiative mandates the death penalty when the aggravating factors outweigh the mitigating factors. Apparently those who argued in favor and against the adoption of the Initiative in the Official Ballot Pamphlet thought this feature was too clearly specified in the language of the Initiative to warrant argument. They also apparently believed that it was constitutionally permissible to provide for a mandatory death sentence under these circumstances, for that was not mentioned as well. Yet in the face of the clear, unambiguous language of the Initiative mandating a death sentence under these circumstances, and although all of the evidence indicates that the voters intended to mandate a death sentence under these circumstances, the Brown court rewrote the Initiative to suit its own preferences.

The word “shall” was cut from the statute and left on the courtroom floor.\footnote{314} The prescribed consequences when aggravating circumstances outweigh the mitigating circumstances (or when the converse is true) are ignored; and seizing on the only remaining operative word, “outweigh,” the court spoke of “a metaphor for a

\footnote{311. On March 5, 1990, the United States Supreme Court held that a jury instruction using the Initiative's mandatory-sentencing formula is constitutionally permissible under the eighth amendment. Boyde v. California, 110 S. Ct. 1190 (1990).}
\footnote{312. E.g., Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983); Carter v. Commission On Qualifications, 14 Cal. 3d 179, 93 P.2d 140 (1975).}
\footnote{313. 1978 OFFICIAL BALLOT PAMPHLET 32.}
\footnote{314. The phrase “shall impose the death penalty” according to the Bird court means “the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.” Brown, 40 Cal. 3d at 541, 709 P.2d at 456, 220 Cal. Rptr. at 653.}
process which by nature is incapable of precise description.’’

Under this metaphorical description of the sentencing process — a process which hangs on a single word, stripped from context and standing alone — the aggravating circumstances can outweigh the mitigating circumstances, and yet a juror is free to select life without parole over death.

The court clearly has the authority to interpret an initiative measure to avoid possible constitutional infirmity. However, there are limits on the court’s power to save a statute by interpreting it. The necessary condition for invoking this power is that the initiative measure must be ambiguous in the sense that it must be fairly and reasonably “susceptible of two constructions,” one of which is a constitutional interpretation and one which is not. When the statutory language is not ambiguous, the court is limited “to measuring [the initiative’s] language against guiding constitutional principles.”

Although the Initiative is unambiguous, the court apparently invoked its power to “interpret” statutes and rewrote the Initiative, without mentioning the Legislative Analyst’s statement in the Ballot Pamphlet as evidence of the voters actual intent. The end result is a capital sentencing scheme which clearly passes constitutional muster. Yet the court’s statement that its “construction of the 1978

315. *Id.*
316. According to the court, “to return a death judgment, the jury must be persuaded that the ‘bad’ evidence is so substantial in comparison with the ‘good’ that it warrants death *instead of life without parole.*” *Id.* at 542 n.13, 709 P.2d at 457 n.13, 220 Cal. Rptr. at 653 n.13. This means that even if there is no mitigating evidence in the case, and considerable aggravation, each juror is still free to chose life without parole instead of death.
317. Chief Justice Bird did not join the court’s opinion in *Brown,* *Id.* at 547, 709 P.2d at 461, 220 Cal. Rptr. at 658. The Chief Justice voiced her reservations about the court’s remaking of statutes so they will pass constitutional muster in her separate opinion in *People v. Davenport,* 41 Cal. 3d 247, 290, 710 P.2d 861, 889, 221 Cal. Rptr. 794, 822 (1985).
320. Instead, acting as though there is no evidence of the voters actual intention, the *Brown* court asserts that its “construction” of the Initiative “explains the most likely ‘constitutional’ intent of the drafters.” *Brown,* 40 Cal. 3d at 544, 709 P.2d at 458, 220 Cal. Rptr. at 655.
321. The court does not overtly identify that it is interpreting the statute to avoid its unconstitutionality. *Id.*
322. *See, e.g.*, *Boyde v. California,* 110 S. Ct. 1190 (1990); *California v. Brown,*
law honors the plain language of section 190.3” is certainly less than candid. However, the fault of the opinion runs far deeper than a lapse of candor. Hidden in a footnote, is the following statement:

We acknowledge that the language of the statute, and in particular the words “shall impose a sentence of death,” leave room for some confusion as to the jury’s role. Indeed, such confusion is occasionally reflected in records before this court. For that reason, trial courts in future death penalty trials - in addition to the instruction called for by Easley - should instruct the jury as to the scope of its discretion and responsibility in accordance with the principles set forth in this opinion.

If I understand the first sentence of this quotation correctly, the court has at least warned us that its statement that its interpretation “honors the plain language of section 190.3” is pure hyperbole. However, candor requires more than this — more than a statement that the statutory language “leave[s] room for some confusion.”

In Brown, the court acknowledges that the following instruction conforms to its interpretation of the statute:

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical weighing 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 has such a substantial impact that it warrants death instead of life without parole.

Now let us look at the standard jury instruction, which tracks the language of the statute, and compare it with the “conforming” instruction. This instruction was apparently given in Brown.


323. Brown, 40 Cal. 3d at 544, 709 P.2d at 455, 220 Cal. Rptr. at 655.

324. Id. at 544 n.17, 709 P.2d at 459 n.17, 220 Cal. Rptr. at 656 n.17 (emphasis added).

325. Id. at 545 n.19, 709 P.2d at 459 n.19, 220 Cal. Rptr. at 656 n.19. This language, with bracketed words to conform the instruction to alternate situations, appears in the current version of the standard concluding jury instruction at the penalty phase of the trial. STANDARD JURY INSTRUCTIONS (1988), supra note 287, CALJIC No. 8.88.2 (1989 Revision) (superseding CALJIC No. 8.84.2 (1986 Revision)).

326. Although the court does not identify the text of the critical instruction, all of the indications are that the standard jury instructions were read to the jury in Brown. The opinion tells us that CALJIC No. 1.00, the standard “no sympathy” instruction, and CALJIC No. 8.84.1, the standard instruction listing the factors enumerated in section 190.3, including unadorned factor (k), were read to the jury. Brown, 40 Cal. 3d at 536, 545, 709 P.2d at 452, 459, 220 Cal. Rptr. at 649, 656. Furthermore, in dissent, then Justice Lucas complained that “[a]ppeals are presently pending in our court involving approximately 170 judgments of death, most of which were rendered on the basis of
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.327

Although I am constantly amazed by the liberties taken with the language in our popular culture, every language, even English, does have a central core of meaning without which we cannot communicate. I simply do not believe that the sophisticated concepts contained in the “conforming” instruction are conveyed by the two sentences of the standard instruction. Nor do I believe that the court’s statement that the difference between the wording of these two instructions “leave[s] room for some confusion as to the jury’s role”328 adequately describes the difference in the concepts communicated by these two instructions. In my view, the standard instruction wholly fails to communicate the concepts that the court assumed to be necessary to save the statute from constitutional vulnerability under the eighth amendment. Simply put, the standard jury instruction (CALJIC No. 8.84.2) as it was then written failed to accurately inform the jury of the sentencing procedures it must follow. Unless the error in the instruction was “cured” by established, “neutral,”329 techniques, the court should have found that the giving of this instruction was error per se.330

Indeed, there is precedent in California for finding that this instruction is erroneous per se. In People v. Green,331 a prosecution under California’s pre-Furman (i.e., pre-Anderson) death penalty statute, the trial court gave the following instruction:

The discretion which the law invests in you is not an arbitrary one and is to be employed only when you are satisfied that the lighter punishment should be imposed. If you find the defendant guilty of first degree murder
and do not find extenuating facts or circumstances to lighten the punish-
ment it is your duty to find a verdict of murder in the first degree and fix
the penalty at death.332

There were two parallel and inconsistent lines of authority in Cali-
fornia at the time this instruction was challenged in Green. One line
of authority, which began with the court’s decision in People v. Welch,333 interpreted Penal Code section 190 to mean that the jury
should fix the penalty for first degree murder at death, unless the
jury found sufficient extenuating facts or circumstances to warrant
the lesser punishment.334 The other line of authority was based upon
the holding in People v. Leary335 that the statute “confided the
power to affix the punishment within these two alternatives to the
absolute discretion of the jury.”336 Finding that the proper construc-
tion of the statute had been announced in Leary, Green overruled
Welch and its progeny.337 The court then found that the instruction
was per se erroneous and compelled a reversal of the judgment of
death.338

The Brown instruction suffers from essentially the same defect.
The Green instruction tells the jury to impose the death sentence if
“you do not find extenuating facts or circumstances to lighten the
punishment,”339 whereas the Brown instruction tells the sentencing
jury that it has no discretion to withhold capital punishment unless it
finds that mitigating circumstances outweigh aggravating circum-
stances.340 The identical defect is that under both of these death pen-
alty statutes (as the Initiative is interpreted in Brown) the sentencing
jury retains discretion to withhold a death verdict even if there is no
mitigation “to lighten the punishment,” and even if the aggravating
circumstances outweigh the mitigating circumstances. Under its in-
terpretation of the Initiative, the Brown court should have found that
the standard sentencing instruction is per se invalid under People v.
Green. Instead, the court said that the mandatory-sentencing-
formula instruction is facially defective in the sense that it does not
clearly inform the jury of the law’s requirements.341

However, since Brown was reversed because the anti-sympathy in-

332. Id. at 217-18, 302 P.2d at 313.
333. 49 Cal. 174 (1874).
334. Green, 47 Cal. 2d at 221-29, 302 P.2d at 315-21.
335. 105 Cal. 486, 39 P. 24 (1895).
336. Id. at 496, 39 P. at 26; see Green, 47 Cal. 2d at 229-31, 302 P.2d at 320-22.
337. Green, at 231-32, 302 P.2d at 322.
338. Id. at 236, 302 P.2d at 325.
339. See supra text accompanying note 332.
340. “If you conclude that the aggravating circumstances outweigh the mitigating
circumstances, you shall impose a sentence of death.” STANDARD JURY INSTRUCTIONS
(1979), supra note 7, CALJIC No. 8.84.2 (superseded by STANDARD JURY INSTRUCTIONS
(1988), supra note 287, CALJIC No. 8.88 (1989 Revision); see supra note 327.
341. See supra notes 307-27 and accompanying text.
struction was read to the jury at the penalty phase (Lanphear/Easley error), the court did not decide the question of the error inherent in the reading of the mandatory-sentencing-formula instruction (CALJIC No. 8.84.2) to the penalty jury. Nevertheless, the footnote quoted above, contained the following additional statement:

We pass no judgment here upon the validity of death penalty verdicts previously rendered without benefit of . . . the instruction we now require. Each such prior case must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant’s prejudice about the scope of its sentencing discretion under the 1978 law.

The last sentence is woefully ambiguous. It could mean nothing more than that the critical jury instruction must be examined in each case, for not all judges instruct the jury in the parlance of the standard jury instructions, and even when they do so, supplemental instructions could be given which adequately inform the jury of its constitutionally mandated role. It could also mean that the critical instructions must be examined in the context of all of the other instructions given in the case. That too would reflect the settled law on the interpretation of jury instructions. Finally, the court’s reference to “context” may have meant nothing more than the usual way in which prejudice to the defendant is assessed when erroneous instructions are read to the jury. However, something more may have been intended. Furthermore, the court did not hold that the giving of the unadorned standard instruction alone was error per se. We must turn to the later cases of the Bird court to find out precisely what the Brown majority had in mind.

Mandatory-sentencing-formula instructional error contributed to the reversal of the death judgments in Davenport and People v.

342. The no-sympathy instruction is discussed infra notes 493-553 and accompanying text.
344. See infra text accompanying notes 616-23 for a discussion of this topic.
345. See infra text accompanying notes 554-91 for a discussion of prejudicial error resulting from erroneous penalty phase instructions.
346. Brown was reaffirmed in People v. Rodriguez, 42 Cal. 3d 730, 779, 726 P.2d 113, 144, 220 Cal. Rptr. 667, 698 (1986). However, the instructional issue was not presented in that case. Id. at 779 n.16, 726 P.2d at 144 n.16, 230 Cal. Rptr. at 698 n.16.
347. People v. Davenport, 41 Cal. 3d 247, 284-87, 710 P.2d 861, 884-87, 221 Cal. Rptr. 794, 817-20 (1985). The Brown error was coupled with Lanphear/Easley error (factor (k) error), and Robertson error (failure to instruct the jury that other uncharged crimes must be proved beyond a reasonable doubt), and the Court found that their combined effect compelled reversal of the judgment of death. Id.
Nothing in either case suggests that the court was applying other than settled doctrine, especially in Burgener. The only instruction read to the Burgener jury on the sentencing process was couched in the unadorned language of section 190.3: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of death." Writing for the plurality, Justice Grodin stated:

The jury . . . was never informed by court or by counsel, that it had sole discretion to determine the appropriate penalty for defendant under all the relevant circumstances. Indeed, the prosecutor's explanation of the sentencing scheme reinforced the supposition that the law limited the jury to a mechanical comparison of "aggravating" against "mitigating" circumstances, while emphasizing the complete absence of the later. Under these circumstances, the court's unamplified instruction that the jury "shall impose death if aggravating circumstances "outweigh[ed]" mitigating circumstances amounted to a directed verdict of death. The references to the prosecutor's argument and the lack of evidence of mitigating circumstances appear to be relevant to the question of prejudice, while the "unamplified instruction" establishes that error was committed.

However, Justice Grodin's plurality opinion in Allen establishes that he had something quite different in mind. Without citing authority other than his own majority opinion in Brown, he relies upon the arguments of the prosecutor to cure the error found in the then existing version of CALJIC No. 8.84.2. Brown, according to Justice Grodin, was concerned with two types of error with the standard jury instruction: (1) "the jury might be confused about the nature of the weighing process" and (2) "the unadorned instruction's phrase, 'the trier of fact . . . shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances,' could mislead the jury as to the ultimate question it was called on to answer in determining which sentence to impose." Without indicating that he understood the implications of his action and its break with existing authority, Justice Grodin then looked to the prosecutor's arguments with respect to both types of

349. Id. at 541, 714 P.2d at 1275, 224 Cal. Rptr. at 136. Although I cannot tell from the report whether the instruction given in this case was the original version of CALJIC No. 8.84.2, it really makes no difference for the court quotes the language of the instruction in Burgener, and that language is precisely the same as old CALJIC No. 8.84.2. See supra notes 327 and 340.
350. Justices Lucas and Panelli did not participate in Burgener.
351. Burgener, 41 Cal. 3d at 542-43, 714 P.2d at 1275-76, 224 Cal. Rptr. at 137 (emphasis added).
353. Id. at 1277, 729 P.2d at 149, 232 Cal. Rptr. at 883.
354. Id.
error inherent in this instruction.

Concerning the "weighing" error, he wrote, "All of this discloses that the prosecutor did nothing to mislead the jury about its weighing discretion and that he in fact left it with the understanding that the value to be assigned to the aggravating and mitigating factors was a matter to be decided by each individual juror." With respect to the second error in the instruction, the mandatory nature of the sentencing process, he had this to say:

The crucial question is whether, having heard the statutory instruction, and having heard the prosecutor's emphasis on that instruction, the jury may have been misled as to its sole responsibility and authority to determine what penalty is appropriate. The record shows that, viewed in context, the instruction and the prosecutor's remark could not reasonably have so misled the jury.

We now have an answer, of course, to what Justice Grodin meant in Brown by "context." The argument of the prosecutor may cure an error in a jury instruction because the argument of counsel is part of the "context" in which the flawed instruction is uttered by the trial judge. This process of curing flawed jury instructions by looking to the argument of counsel is discussed at some length below. For now, I will simply finish the story of the Initiative's mandatory-sentencing-formula instruction in the Bird court. Justice Grodin's plurality opinion, which was joined only by Justice Mosk, ultimately affirmed the entire judgment.

Justice Panelli wrote a two sentence opinion concurring in the judgment: "Although I do not necessarily agree with the majority's analysis concerning the standard of review for penalty phase error, I fully agree that in the instant case the asserted errors, by any standard, were harmless. For this reason I concur in the majority's judgment." Justice Lucas concurred in this opinion.

Justice Broussard filed a vigorous dissent in Allen, but it was focused entirely on the way the Allen rule was applied to the facts of the case. Examining the prosecutor's argument, Justice Broussard concluded:

[It] boils down to two assertions: Because the aggravating evidence out-

355. Id. at 1278, 729 P.2d at 150, 232 Cal. Rptr. at 884.
356. Id. at 1279, 729 P.2d 115, 150-51, 232 Cal. Rptr. 849, 884-85 (footnote omitted).
357. See supra text accompanying notes 343-46.
358. See infra text accompanying notes 624-772.
359. Allen, 42 Cal. 3d at 1288, 729 P.2d at 157, 232 Cal. Rptr. at 891.
360. Id.
361. Id.
weighs the mitigating, it is your duty as jurors to return a verdict of death. And do not feel guilty about doing your duty, because defendant deserves that penalty. Nowhere is there anything to suggest that the jury could, consistently with its duty, return a life verdict on the ground that despite the relative weights of the factors death was not the appropriate penalty. He concluded that the jury was not properly made aware of its responsibility to make the basic normative decision whether death was the appropriate penalty. "The failure to so advise the jury is substantial and reversible error." Chief Justice Bird and Justice Reynoso joined Justice Broussard's dissent.

The Bird court's final confrontation with the Initiative's mandatory-sentencing-formula instruction was in People v. Myers. Again Justice Grodin wrote a plurality opinion joined only by Justice Mosk. Applying the same "context" analysis that he used in Allen, but this time looking to the argument of defense counsel as well, "we think," Justice Grodin wrote with respect to the "weighing" process, "it is unlikely that the jury was misled into believing that the instruction called for a 'mechanical' 'counting' of the relevant aggravating and mitigating factors." However, finding that the prosecutor's argument erroneously explained "the nature of the ultimate question," Myers was reversed for combined mandatory-sentencing-formula instructional error and Ramos error.

Justice Lucas wrote a terse opinion, joined by Justice Panelli, concurring in the "majority's" [sic] affirmance of the guilt and special circumstances finding. He also concurred in the reversal of the judgment of death, but only for Ramos error. Chief Justice Bird, joined by Justice Reynoso, dissented from the affirmance of the judgment of guilt and the special circumstances finding on an unrelated ground. Finally, Justice Broussard wrote separately to agree with nearly everything the Chief Justice wrote in her dissent.

A few days later, the tenure of the Bird court ended.

c. The Lucas Court

Within weeks of the demise of the Bird court, the Supreme Court of the United States filed its opinion in California v. Brown. The issue in California v. Brown was whether the court had correctly

362. Id. at 1289, 729 P.2d at 158, 232 Cal. Rptr. at 892.
363. Id.
364. Id.
366. Id. at 276, 729 P.2d at 715, 233 Cal. Rptr. at 280.
367. Id. at 275, 729 P.2d at 714, 233 Cal. Rptr. at 279.
368. Id. at 275-76, 729 P.2d at 714-15, 233 Cal. Rptr. at 279-80.
369. Id. at 277, 729 P.2d at 715, 233 Cal. Rptr. at 280.
370. Id. at 277-94, 729 P.2d at 715-28, 233 Cal. Rptr. 281-93.
371. Id. at 295, 729 P.2d at 728, 233 Cal. Rptr. at 293.
grounded error in giving the anti-sympathy instruction at the penalty phase (Lanphear/Easley error) on the Lockett principle. Since Justice Grodin's opinion did not also reverse the death judgment because of the mandatory-sentencing-formula instructional error, that question was not before the Supreme Court of the United States. Nevertheless, Justice O'Connor's opinion in California v. Brown appears to rely heavily on Justice Grodin's discussion of this type of error in Brown. Though Justice O'Connor cites no authority for this proposition, she writes: "On remand, the California Supreme Court should determine whether the jury instructions, taken as a whole, and considered in combination with the prosecutor's closing argument, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the respondent."

The Lucas court quickly focused on this phrase from Justice O'Connor's opinion and interpreted support for the same approach in the dissenting opinions of Justices Brennan and Blackmun. The court used this "holistic approach," at least in part, to affirm all of the death judgments reviewed by the court for Lanphear/Easley er-

373. See supra notes 307-08 and accompanying text.
374. The State's petition for certiorari presented two questions. The first was the Lanphear/Easley error issue. The second was Brown error. This second question was worded as follows:

Whether the Eight Amendment requires that a trier of fact be given discretion not to impose the death penalty because it believes the penalty is inappropriate even though it has found aggravating factors outweigh mitigating factors when state law mandates the trier of fact shall return a punishment of death when it determines the aggravating factors outweigh the mitigating factors.


Justice Rehnquist, acting as the Circuit Justice, expressed "no view on whether this Court would be likely to grant certiorari on this issue [presented in Question 2], which was not relied upon by the California Supreme Court as an alternative basis for invalidating Brown's death sentence." California v. Brown, 475 U.S. 1301, 1306 n.3 (Rehnquist, Circuit Justice 1986). The subsequent grant of certiorari was limited to Question 1. 476 U.S. 1157 (1986).

376. The court did so in the first death penalty affirmance of its tenure, People v. Ghent, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987), cert. denied, 485 U.S. 929 (1988). In Ghent, Chief Justice Lucas wrote,

A majority of the justices of the United States Supreme Court, upon reviewing our Brown decision, stressed the necessity of analyzing the record in each case to determine whether the jury instructions, taken as a whole, and read in conjunction with the prosecutor's arguments, adequately informed the jury of its responsibility to consider all of the mitigating evidence in the case.

Id. at 777, 739 P.2d at 1275, 239 Cal. Rptr. at 107.
ror. However, the Lucas court was content to apply the similar Grodin analysis, as it was used in Allen, to review all mandatory-sentencing-formula instructional error during its first year.

The unadorned Brown instruction (old CALJIC No. 8.84.2) first came before the Lucas court in People v. Miranda. After reciting the law articulated in Brown, Justice Panelli (who wrote the majority opinion) employed Justice Grodin’s Brown/Allen analysis. Looking to the arguments of both the prosecutor and defense counsel, he found that collectively they cured the error of the unadorned mandatory-sentencing-formula instruction. Because Miranda typifies this approach in the hands of the Lucas court, it is worth quoting the three short dispositive paragraphs from the opinion.

The prosecutor in the instant case emphasized to the jury that it was the ultimate decisionmaker. He stated, “You will be told if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. In a sense, it’s mechanical. Let’s face it, we all know it isn’t. At this stage, if you wish, you can say no, I’m not going to do that. I’m not going to look at the factors in aggravation and see if they outweigh the factors in mitigation . . . . No one will criticize you later if you do that. Your conscience is what determines now.”

The defense counsel similarly informed the jury that “. . . no one can compel your decision regardless of which one you come to . . . . It’s not the mere addition of factors. Any one weight attached to any mitigative factor can outweigh any several, so don’t let any preponderation or mere addition of numbers . . . cause you to make your mind up on that . . . .”

In light of the arguments made by both the prosecutor and defense counsel, and in the absence of any indication that the jury was affirmatively misled, we believe the jury was sufficiently informed of the scope of its

377. See infra notes 512-53 and accompanying text.
378. 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. at 594 (1987), cert. denied, 486 U.S. 1038, reh’g denied, 487 U.S. 1246 (1988). In Gates, which was decided before Miranda, the trial court altered the standard instruction by substituting the word “may” for “shall.” However, after the jury requested an explanation of the instruction, the court engaged in a conflicting and highly ambiguous dialogue with the jury. Despite this performance by the trial court, the court found that the jury was adequately instructed. People v. Gates, 43 Cal. 3d 1168, 1203-1206, 743 P.2d at 301, 324-25, 240 Cal. Rptr. 666, 689-91 (1987), cert. denied, 486 U.S. 1027 (1988). Justice Mosk, joined by Justice Broussard, filed a vigorous dissent on the Brown instruction. Id. at 1214-15, 743 P.2d at 331-32, 240 Cal. Rptr. at 696-97.

379. The question of the role affirmative evidence that the jury was misled should play in the determination of instructional error is considered infra text accompanying notes 620-22. However, it is not apparent that the Lucas court changes its analysis in any way when there is evidence that the jury has been affirmatively misled. In Kimble, a case decided under the 1977 statute, the jury asked the judge the following question:

“According to our printed instructions, special circumstances found to be true in Counts I and II of the information fix the penalty as either life imprisonment without the possibility of parole or death. [Are] there any further criteria that can be used to determine one penalty as opposed to the other or is it simply the matter of our personal choice?”

People v. Kimble, 44 Cal. 3d 480, 506, 749 P.2d 803, 819, 244 Cal. Rptr. 148, 165, cert. denied, 485 U.S. 871 (1988). Over defense counsel’s objection, the court responded:

“It is not a matter of your personal choice. At the time that you were sworn you were sworn to follow the law as I read it to you. This takes it out of the province of its being your personal choice. . . . You are to follow the law,
sentencing discretion. Accordingly, we find no prejudice to defendant.380

The judgment of death was affirmed.381

Miranda is the first time that a clear majority of the California Supreme Court upheld a judgment of death challenged for Brown mandatory-sentencing-formula instructional error. Aside from Brown,382 the Bird court considered this standardized form of error in four cases: Davenport, Burgener, Myers and Allen. The Brown mandatory-sentencing-formula instructional error contributed to the reversal of the death judgment in the first three cases.383 The only affirmation by the Bird court in the face of Brown error was in Allen. However, Allen was decided by a plurality opinion written by Justice Grodin, and signed only by Justice Mosk.384 Justice Panelli wrote an

regardless of what your personal choice may be. I again will emphasize there [are] no further criteria other than the instructions that have previously been given to you, and I will read the instructions again to you.”

Id. at 506-507, 749 P.2d at 819, 244 Cal. Rptr. at 165. After re-reading the instructions, the court concluded:

"Ladies and gentlemen of the jury, I read the guidelines that are set forth by law. You are to use those guidelines and reach your decision. There [are] no further criteria that I can give you, and you are not to simply make it a matter of your personal choice. The choice must be according to the law that I have given to you. Regardless of what your personal choice in any given situation might be, that's not your duty. Your duty is not to follow your personal choice, but you are to follow what the law states that you must do, and that is what I have read to you in your instructions. Thank you.”

Id. at 507, 749 P.2d at 819-20, 244 Cal. Rptr. at 165.

After further deliberation, the jury returned a verdict of death. Invoking the “holistic” standard, the cure technique first applied in Ghent, derived from Justice O'Connor's concurring opinion and the dissents of Justice Brennan and Blackmun in California v. Brown, the court looked to the arguments of both the prosecutor and defense counsel (id. at 508-509, 749 P.2d at 820-21, 244 Cal. Rptr. at 166-67) and concluded:

[1] the court's response to the 'personal choice' question would not mislead a reasonable jury. We believe a reasonable juror would have understood he remained free to decide whether certain factors existed, to determine how the aggravating and mitigating factors should be weighed, and to determine what the sentence should be. We therefore conclude the jury was not misled about the scope of its sentencing discretion.

Id. at 509, 749 P.2d at 821, 244 Cal. Rptr. at 166-67. Justice Broussard filed a dissent urging reversal of the judgment of death for Brown error. Id. at 526-30, 749 P.2d at 833-35, 244 Cal. Rptr. at 179-81.

380. Miranda, 44 Cal. 3d at 104, 744 P.2d at 1156, 241 Cal. Rptr. at 623-24 (footnote added by author).

381. Id. at 123, 744 P.2d at 1169, 241 Cal. Rptr. at 637.

382. Ironically, Brown mandatory-sentencing-formula instructional error did not figure into the reversal of People v. Brown. See supra text accompanying notes 341-46.

383. See supra text accompanying notes 347-68.

We acknowledge that People v. Myers contains some language which might
support defendant's position. . . .

. . . .

Myers appears to be factually distinguishable. There, the prosecutor admonished the jury that, because of the mandatory phraseology of the instruction, it would be improper in deciding penalty to "shade the factors or the weight to give to the various factors" in order to reach a particular penalty. Such argument was misleading, for a reasonable juror might have construed it as meaning that he or she could not assign different weights or values to the various aggravating and mitigating factors.

Moreover, Myers was perhaps unduly critical of the prosecutor's reliance upon the mandatory language of the standard instruction. . . .

. . . .

Thus, we see no impropriety in a prosecutor urging that the jurors "follow the law" and base their penalty decision on a weighing of the applicable factors, so long as it is understood that inherent in the weighing process itself is the determination of "appropriateness" that, as Myers explained, is so essential. As previously noted, the jury in the present case fully understood that it could assign whatever weight it deemed appropriate to the various aggravating and mitigating factors, and that its penalty decision should be based on all the evidence in the case. Therefore, viewing the record as a whole, we cannot conclude the prosecutor derailed the jury from a proper understanding of its duty to determine appropriateness of death through the weighing process.

Id. at 653-55, 749 P.2d at 846-47, 244 Cal. Rptr. at 192-93.

Taken at face value this discussion means that the second prong of the Brown rule has been abolished without the court even bothering to tell us so. It also tells us that a flawed jury instruction can be "cured" by anything the prosecutor says as long as it does not "derail" the jury. But, of course, the jury was never on the "right track" because the court's instruction failed to properly inform the jury concerning the sentencing process, and that is why the court is looking at the prosecutor's argument in the first place.

This argument was too much even for Justice Mosk who has not seemed to be overly sensitive to this issue. Justice Mosk wrote in dissent:

I dissent, however, from the affirmance of the judgment as to penalty. In their discussion the majority have devised a novel means to satisfy the constitutional requirement of heightened reliability for a sentence of death: no matter how misleading the instructions and the arguments of counsel may be, the prosecutor will be deemed able to "cure" the harm if his statements to the jurors are correct in some respect, and a reviewing court will stamp its approval on the ultimate result — even if the prosecutor himself is responsible in large part for misleading the jurors, and even if the result of his erroneous argument is death. I cannot subscribe to such an unprincipled "rule," even when it is applied to the case of one of society's malefactors. The grim satisfaction of eliminating one repetitive criminal is not worth the damage to the fair and orderly administration of justice.

Id. at 656, 749 P.2d at 847-48, 244 Cal. Rptr. at 193-94.

Justice Mosk then examines the arguments at considerably more length than does the majority opinion and concludes that the prosecutor's arguments, coupled with the court's instructions, violate Brown, and Caldwell v. Mississippi, 472 U.S. 320 (1985). Justice Broussard joined Justice Mosk's dissent.

389. People v. Melton, 44 Cal. 3d 713, 761-62, 750 P.2d 741, 769-70, 244 Cal. Rptr. 867, 895-97, cert. denied, 488 U.S. 934 (1988). Melton, which was decided after Hendricks II, purports to apply both prongs of the Brown test, indicating that Hendricks II did not affect the formal Brown rule. Id. However, in Melton, similar ambiguous arguments which could have been directed to the "weighing" process rather than the second prong, the appropriateness of the death sentence once the "weighing" is done, are held
and Wade to find that the Initiative’s mandatory-sentencing-formula instructional error was “cured” by the arguments of counsel. In each case, despite the facial error in this critical penalty phase instruction, the judgment of death was affirmed.

**d. The Status of the Law**

Miranda exemplified the way the Lucas court would handle all Brown mandatory-sentencing-formula instructional error during its first year. After stating the law from Brown, the court would canvass the arguments of the prosecutor and defense counsel, quote one or more suitable phrases snatched out of context from the arguments, and conclude that the court was confident that the jury correctly understood its task. Finding the instructional error “cured,” and finding no other error in the case, the death judgment would be affirmed. This ritual was repeated in Howard, Hendricks II, Melton, and Wade.

At the close of the first year of the Lucas court’s tenure, the mandatory-sentencing-formula instruction remained facially flawed, but the court employed the Cure Technique, first used by Justice Grodin and joined only by Justice Mosk, in Allen and Myers, to “cure” this instructional error in each case in which it was encountered. As it was used by Justices Grodin and Mosk in Allen and Myers, the Cure Technique appeared to be neutrally employed. This instructional error was found to be “cured” by the arguments of sufficient to “cure” the error in the standard instructions. See id.

People v. Wade, 44 Cal. 3d 975, 999, 750 P.2d 794, 808, 244 Cal. Rptr. 905, 919, cert. denied, 488 U.S. 900 (1988). During the course of his opinion for the majority, Chief Justice Lucas wrote:

For the reasons previously discussed, we conclude that nothing in the prosecutor’s argument in this case could have misled the jury regarding the scope of its penalty determination or responsibilities. The jurors were carefully told that the weight to be given a particular sentencing factor was a matter for their own individual judgment. Although the prosecutor did tell the jury that “whatever outweighs the other [i.e., aggravating versus mitigating circumstances] is what directs your judgment,” a review of the record as a whole convinces us that no reasonable jury would have understood this statement as divesting it of authority to determine the appropriate penalty in this case.

Citations to these cases are set forth supra note 13.

The citations to these cases are set forth supra note 13.

My reasons for calling this process a ritual appear supra note 387.
In the hands of the Lucas court, the Cure Technique was employed to "cure" this instructional error in every case encountered during its first year even though the arguments of counsel at times exacerbated the instruction's flaws. According to Justice Mosk, who was joined by Justice Broussard, the Deukmejian appointees do not always neutrally apply the Cure Technique:

In their discussion the majority have devised a novel means to satisfy the constitutional requirement of heightened reliability for a sentence of death: no matter how misleading the instructions and the arguments of counsel may be, the prosecutor will be deemed able to "cure" the harm if his statements to the jurors are correct in some respect, and a reviewing court will stamp its approval on the ultimate result - even if the prosecutor himself is responsible in large part for misleading the jurors, and even if the result of his erroneous argument is death.

At the close of the first year, there was no indication that the Lucas court would abandon the Cure Technique and return to the traditional method of analyzing jury instructions for error. Nevertheless, well after the first year ended, in Boyde v. California, a closely divided United States Supreme Court held that the 1978 Initiative's mandatory-sentencing-formula is constitutionally permissible under the eighth amendment. Boyde v. California thus undermines the California Supreme Court's assumption in Brown that the Initiative's sentencing formula would violate the federal constitution "if it forced [jurors] to impose death on any basis other than their own judgment that such a verdict was appropriate under the facts and circumstances of the individual case." Whether the Lucas court will revise the interpretation of the Initiative's sentencing formula and approve a mandatory-sentencing-formula instruction based upon Boyde v. California and the wording of the Initiative remains to be decided.

394. See supra notes 352-71 and accompanying text.
395. Hendricks II, 44 Cal. 3d at 656, 749 P.2d at 847-48, 244 Cal. Rptr. at 193 (Mosk J., joined by Broussard J., dissenting).
396. The Cure Technique, as a method of analyzing jury instructions, is discussed at a later point in this article. See infra text beginning with note 592.
397. 110 S.Ct. 1190 (1990) (5 to 4 decision).
7. The Failure to Instruct on the Proper Use of Mitigating Evidence (The Unadorned Factor (k) and Factor (j) Instructions)

a. Introduction

On July 3, 1978, nearly a year after the 1977 death penalty legislation became effective\(^{399}\) and six days after the 1978 Initiative qualified for the ballot,\(^{400}\) Chief Justice Warren Burger delivered a prophetic opinion for a plurality of the High Court in *Lockett v. Ohio*.\(^{401}\) He wrote:

that the Eighth and Fourteenth Amendments require that the sentencer . . . 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.\(^{402}\)

Three and a half years later, on January 19, 1982, a majority of the Supreme Court of the United States embraced the *Lockett* principle in *Eddings v. Oklahoma*.\(^{403}\) Since *Eddings*, the *Lockett* principle has been one of the foundation stones upon which the constitutional jurisprudence of capital punishment is based.\(^{404}\)

Unfortunately, none of the factors enumerated in either the 1977 Legislation or the 1978 Initiative explicitly permit the sentencing jury to consider mitigating evidence with respect to any aspect of the defendant's character or record offered by the defendant as a basis for a sentence less than death. Specific aspects of the defendant's character,\(^{405}\) record,\(^{406}\) and the crime committed\(^{407}\) are to be taken

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399. See supra note 88.
400. See supra text accompanying note 87.
402. Id. at 604.
403. 455 U.S. 104 (1982).
405. E.g., factors (b)(evidence of criminal activity involving force or violence or the threat thereof) and (i) (defendant's age at the time of the crime). These factors appear in both the 1977 Legislation and the 1978 Initiative. See supra text accompanying notes 74, 80, 95-98.
406. Factor (c) in the 1978 Initiative specifically provides for consideration for the "presence or absence of any prior felony conviction." Cal. Penal Code § 190.3(c) (West 1988). The 1977 Legislation did not contain a similar provision. See supra text accompanying notes 73-82, 95-98.
407. E.g., factors (a) (the circumstances of the crime and the special circumstances found true), (d) (defendant committed the offense while under the influence of extreme mental or emotional disturbance), (e) (victim participation in or consent to
into account, but there is no general provision expressly complying with the *Lockett* principle. Indeed, the only open-ended provision is factor (k) in the 1978 Initiative and factor (j) in the 1977 statute. They read identically: “Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.”408

Furthermore, with only two exceptions (factors (b) and (c)),409 all of the other factors focus on the defendant at the time the capital crime is committed, and relate those factors to the commission of the capital offense. In this milieu, the focus of both factor (k) and factor (j) on extenuating the “gravity of the crime,” although the mitigating evidence “is not a legal excuse for the crime,” emphasizes the nature of the mitigating evidence — it must relate to the defendant’s commission of the capital crime — as well as the time of its existence, that is, when the crime is committed.410 However, under the *Lockett* principle neither constraint on the mitigating evidence offered by the defendant appeared to be constitutionally permissible under the law as it then stood.411 Though the exact parameters of

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409. With respect to the 1978 Initiative, factor (b) is the defendant’s record for prior criminal activity, and factor (c) is the defendant’s felony record. *Cal. Penal Code* § 190.3 (West 1988). The 1977 Legislation did not use the prior felony record. See supra text accompanying notes 73-82.

410. See, e.g., *People v. Robertson*, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982) (the prosecutor’s argument so interpreted factor (k)).

411. *Skipper v. South Carolina*, 476 U.S. 1 (1986). In *Skipper* the Court held that the exclusion of evidence from the sentencing hearing concerning petitioner’s good behavior while he was in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment under the *Lockett* principle. *Id.* Justice Powell concurred in the judgment in the ground that the majority opinion swept too broadly. In his opinion, a state could exclude evidence of a defendant’s good behavior in jail following his arrest (“as long as the evidence is not offered to rebut testimony or argument such as that tendered by the prosecution” in *Skipper* because “[s]uch evidence has no bearing at all on the ‘circumstances of the offense,’ since it concerns the defendant’s behavior after the crime has been committed.”) Nor does it, wrote Justice Powell, “say anything necessarily relevant about a defendant’s ‘character or record,’ as that phrase was used in *Lockett* and *Eddings.*” *Id.* at 11-12. However, Justice Powell’s opinion was joined only by Chief Justice Burger and Justice (now Chief Justice) Rehnquist. *Id.* at 9. In *Boyde v. California*, 100 S. Ct. 1190 (1990) the United States Supreme Court held, “There is not a reasonable likelihood that the jurors in petitioner’s case un-
the state’s power to define the “relevance” of mitigating evidence to the sentencing decision are yet to be determined, the limitations imposed by factors (k) and (j) were apparently too restrictive. Nevertheless, the language of factor (k) was copied directly into the standard jury instruction on the aggravating and mitigating circumstances enumerated in the statute as CALJIC No. 8.84.1.

b. The Bird Court

The Bird court first considered the impact of the Lockett principle on factor (k), and the standard instruction which simply repeated its language, in People v. Easley. Factor (k) was only tangentially involved in Easley for that case’s essential concern was with a no-sympathy instruction. Nevertheless, the Attorney General argued that the giving of the “no sympathy” instruction could not be constitutional error because the court had also read factor (k) to the jury. This argument was met with the response that “CALJIC No. 8.84.1 not only failed to cure the trial court’s erroneous no-sympathy instruction, but that it was itself constitutionally defective.” Though noting that “there is some force to amicus’ argument that the wording of the instruction in question is potentially confusing,” the court found that it was unnecessary to decide this issue because the challenged instruction told the jury that it must not be influenced by sympathy or pity for the defendant. Moreover, in an important dictum, the court said:

In order to avoid potential misunderstanding in the future, trial courts - in instructing on the factor embodied in section 190.3, subdivision (k) - should inform the jury that it may consider as a mitigating factor “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime” and any other “aspect of the defendant’s character or record . . . that the defendant proffers as a basis for a sen-

412. Compare the plurality opinion of Justice White in Franklin v. Lynaugh, 487 U.S. 164, 164-83 (1988) (the state has power to channel and limit mitigating circumstances), with the dissenting opinion of Justice Stevens in Franklin, id. at 189-200 (the state may only require that the mitigating evidence be relevant to the circumstance of the crime and the character and record of the defendant—the jury must be able to decide within those limits), and with the opinion of Justice O’Connor, concurring in the judgment in Franklin, id. at 183-88 (intimating that there may be a middle position between those of Justices White and Stevens).

413. See infra text accompanying notes 415-81.

414. STANDARD JURY INSTRUCTIONS (1988), supra note 287, CALJIC No. 8.84.2 (1989 Revision) (superseding CALJIC No. 8.84.2 (1986 Revision)).


416. The California law pertaining to the no-sympathy instruction is discussed infra text accompanying notes 493-553.

417. Easley, 34 Cal. 3d at 877, 671 P.2d at 825, 196 Cal. Rptr. at 320.


419. Easley, 34 Cal. 3d at 878, 671 P.2d at 826, 196 Cal. Rptr. at 322.
sentence less than death.420

The issue of the constitutionality of factor (k) itself was squarely presented to the court in People v. Brown.421 In Brown, section 190.3 of the 1978 Initiative was attacked on the ground that it violates the Lockett principle.422 The court upheld factor (k) by interpreting that factor to permit the jury to consider all mitigating evidence required under Lockett and its progeny.423 Though the court also mentioned the problem with reading the unadorned language of factor (k) to the jury (i.e. the language without the addition suggested in Easley), the focus of that opinion was primarily on other penalty phase instructions.424

It was not until the plurality opinion in People v. Davenport that the standard instruction, which is cast in the statutory language of factor (k) unadorned by the Easley language,425 was expressly found to violate the Lockett principle.426 Because Justice Broussard agreed

420. Id. at 878 n.10, 671 P.2d at 826 n.10, 196 Cal. Rptr. at 322 n.10 (citation omitted).


422. Id. at 539, 709 P.2d at 453-55, 220 Cal. Rptr. at 651-52. The argument was made that the mandatory-sentencing-formula instruction violated the federal constitution. This argument has previously been discussed. See supra notes 304-98 and accompanying text.


424. Id. at 537, 709 P.2d at 453, 220 Cal. Rptr. at 650. In Brown, Justice Grodin wrote for the majority:

Our prior cases also reject the People's argument that such an instruction is vitiated by the standard admonition (CALJIC No. 8.84.1) to consider "any . . . circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." As we suggested in Easley and Lanphear, this ambiguous standard instruction, at least when combined with an anti-sympathy warning, is calculated to divert the jury from its constitutional duty to consider "any [sympathetic] aspect of the defendant's character or record," whether or not related to the offense for which he is on trial, in deciding the appropriate penalty."

Id. at 536-37, 709 P.2d at 453, 220 Cal. Rptr. at 650 (emphasis added) (citations omitted).

425. The court refers to an instruction given in the language of either factor (k) or factor (j) as an "unadorned" factor (k) or factor (j) instruction. This means, of course, that the instructions have not been "adorned" or modified with the language suggested in Easley. I have followed this practice. Throughout this article I have referred to these instructions that have not been modified by the Easley language as "unadorned" instructions.


After referring to Easley, Lockett, and Eddings, Justice Reynoso wrote for the plurality:

Clearly, if the jury must be permitted to give independent mitigating weight to any evidence of character or background on which an accused bases his plea
with the plurality's finding of factor (k) error, there was now a holding that the standard jury instruction had to be altered as suggested in *Easley* in order to pass constitutional muster\(^4\) and to comply with the *Brown* interpretation of factor (k).\(^4\) The *Davenport* holding was followed in both of the Bird court's subsequent opinions disposing of the factor (k) issue, *Rodriguez*\(^4\) and *Allen*.\(^4\) Though all of the Bird court cases dealt specifically with factor (k) of the 1978 Initiative, these holdings should be equally applicable to factor (j) in the 1977 Legislation since the two provisions are exactly the same.\(^4\)

for a life sentence, the jury must be so informed. The commands of *Lockett* and *Eddings* are not satisfied if mitigating evidence is admitted without proper instructions as to how to weigh that evidence. *Easley* therefore ordered a prospective cure for the instruction's deficiency. . . .

. . . . . The standard instruction in CALJIC No. 8.84.2 (4th ed. 1979) by telling the jurors to be guided by the factors enumerated in 8.84.1, created a strong inference that the statutory list was an exclusive one. The jury might reasonably have concluded that the relevance of appellant's proffered evidence in mitigation was limited by the unduly narrow factor (k). The prosecutor in fact argued — erroneously, in light of *Lockett* and *Eddings* — that the circumstances of appellant's background could be considered mitigating factors only if they related to the crime itself. The standard instruction given by the court did nothing to correct the misimpression thus created; instead they reinforced it. Appellant's entire penalty phase effort was, however, to evoke sympathy for himself by presenting to the jurors evidence that he was not only deprived of basic familial love and support but was in fact raised in a physically and emotionally abusive setting. Thus, the *Easley* error in 8.84.1 alone may have had a significant impact on the jury's penalty determination.

Id. (Citation omitted).

427. *Id.* at 295, 710 P.2d at 892, 221 Cal. Rptr. at 825 (Broussard, J., concurring and dissenting). In addition, Chief Justice Bird's dissenting opinion establishes that the Chief Justice agreed with the majority that the factor (k) instruction was constitutionally flawed. *Id.* at 290, 710 P.2d at 889, 221 Cal. Rptr. at 822 (Bird, C.J., dissenting).

428. Though neither the plurality opinion in California v. *Brown*, 479 U.S. 538, 539-43 (1987), nor the opinion of Justice O'Connor concurring in the judgment, *id.* at 544-46, mention the factor (k) argument made by the Attorney General in an attempt to save the "no sympathy" instruction, the dissenting opinion of Justice Brennan, who was joined by Justices Marshall and Stevens, essentially adopts the analysis of the factor (k) instruction appearing in *Easley* and its progeny. *Id.* at 555-60.


430. *People v. Allen*, 42 Cal. 3d 1222, 1276, 729 P.2d 115, 148-49, 232 Cal. Rptr. 849, 882-83 (1986)(plurality opinion with respect to the penalty phase error by Grodin, J., joined by Mosk, J.); *id.* at 1288, 729 P.2d at 157, 232 Cal. Rptr. at 891 (Panelli, J., joined by Lucas, J., concurring in the judgment). Justice Panelli wrote: "Although I do not necessarily agree with the majority's [sic] analysis concerning the standard of review for penalty phase error, I fully agree that in the instant case the asserted errors, by any standard, were harmless. For this reason I concur in the majority's [sic] judgment." *Id.* Justice Broussard, joined by Bird, C.J., and Reynoso, J., concurred in the affirmance of the judgment of guilt and the finding of three of eleven special circumstances, but dissented from the affirmance of the penalty. *Id.* at 1288-89, 729 P.2d at 157-58, 232 Cal. Rptr. at 891-92. Thus, there was no majority opinion in *Allen* on the factor (k) instruction.

431. *Compare* former CAL. PENAL CODE § 190.3(j) (West 1979), *with* CAL. PENAL
Indeed, as we shall see, the Lucas court has so held.432

c. The Lucas Court

The Lucas court did not distinguish itself in 1987 with the way it disposed of the erroneous standard jury instruction on factor (k) (the original CALJIC No. 8.84.1 instruction) or the identical provision in the 1977 statute, factor (j). The issue first appeared in Ghent.433 In the Ghent prosecution under the 1977 statute, the trial court instructed the jury in accordance with the bare language of factor (j).434 The defendant claimed, of course, that this was error of federal constitutional magnitude. As the court phrased the defendant’s claim, he contended “that instructions based merely upon the ‘catch-all’ provision of the 1977 law (‘any other circumstance which extenuates the gravity of the crime’) are constitutionally inadequate.”435 Without referring to Easley, Davenport, Rodriguez, or Allen, which dealt with the factor (k) penalty phase instructions, Chief Justice Lucas first concluded that the 1977 law was valid on its face.436 To reach this conclusion he relied on Brown437 and People v. Frierson (Frierson I).438 Having thus answered an argument not made by appellant, Chief Justice Lucas then misconceived the law used to determine the constitutional validity of a challenged jury instruction:439

A majority of the justices of the United States Supreme Court, upon reviewing our Brown decision, stressed the necessity of analyzing the record in each case to determine whether the jury instructions, taken as a whole, and read in conjunction with the prosecutor’s arguments, adequately informed the jury of its responsibility to consider all of the mitigating evidence in the case. We have undertaken such a review, and we conclude that there exists “no legitimate basis” for believing that the jury was misled regarding its sentencing responsibilities.440

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432. See infra notes 471-80.
434. Id. at 777, 739 P.2d at 1275, 239 Cal. Rptr. at 107.
435. Id.
436. Id.
439. See infra text beginning with note 592 for a discussion of the method used by the Lucas court to sustain the unadorned factor (k) (1978 Initiative) and factor (j) (1977 Legislation) instructions.
The court then reviewed the prosecutor's arguments, and the trial court's instruction to the jury that "pity and sympathy for the Defendant would be proper considerations if you should find them to be warranted in these circumstances," to conclude "that the jury could not have been misled regarding the scope of its penalty discretion."441 This analysis is exactly the same as the Cure Technique used to "cure" the facial flaws in the Initiative's mandatory-sentencing-formula instruction.442 The only distinction is that this variant of the "Cure Technique" purports to be a requirement under the dissenting and concurring opinions in the High Court's opinion in California v. Brown.443

As the first death penalty affirmation for the Lucas court, Ghent has important symbolic significance. However, the methodology used by Chief Justice Lucas to sustain the factor (j) instruction was not only symbolic. As we shall see, it signaled a substantive change in the way the court analyzes all penalty phase jury instructions.444 In later cases the court would apply the Cure Technique to cure the facial error in the Initiative's mandatory-death-sentence instruction445 and a variant of the essentially identical Ghent analysis to "cure" the error in the facially flawed unadorned factor (k) and factor (j) instructions, among other techniques.446 A discussion of this critical change, a change that has permitted the court to affirm death judgments which would have been reversed by the Bird court, appears below.447 Suffice it to say here that this technique enables the court to avoid the impact of the prior California Supreme Court holdings that the standard factor (k) instruction was erroneous on its face.448 Apparently the court is conceding that under Easley, Davenport, Rodriguez, or Allen, the instruction is facially invalid, but that invalidity is "cured" by a combination of the "sympathy" instruction given by the court and the arguments of counsel.

In Gates, the court again rejected the defendant's argument that the trial court erred by instructing the jury with the unadorned factor (k) language.449 The court's opinion, authored by Justice Panelli did not even bother to cite Ghent. Resting the opinion on no cited authority, the court rejected the argument in a short paragraph:

441. Id. at 777-78, 739 P.2d at 1275-76, 239 Cal. Rptr. at 107-108.
442. See supra notes 307-37 and accompanying text.
443. See supra notes 372-77 and accompanying text.
444. The later cases employed either the Cure Technique or the Ghent variant to sustain every penalty phase instruction encountered in the Lucas court's first term.
445. This technique has already been discussed. See supra notes 307-37 and accompanying text.
446. See supra notes 372-91 and accompanying text.
447. See infra text beginning with note 592.
448. See supra notes 421-30 and accompanying text.
We do not believe that simply because this phrase [the addition mandated by the Bird Court in Easley] was not included, the jury was left with the impression it could not consider the defense evidence presented concerning defendant's background and character. Indeed, the jury was specifically instructed to "consider all of the evidence which has been received during any part of the trial in this case." It would defy all logic and reason to conclude that the jury which heard seven witnesses testify concerning the defendant's background and character, was directed to consider "all of the evidence," and heard defense counsel argue this evidence at length, would somehow have concluded that it could not consider this testimony in its penalty determination. Jurors are not without common sense; the jury necessarily must have considered this defense evidence in its penalty decision.

With all due respect to Justice Panelli, his argument completely misses the point. Every penalty phase jury hearing a case under either the 1977 statute or the 1978 Initiative has undoubtedly been told to consider all of the evidence in the case in making the penalty decision. Indeed, the standard jury instruction (CALJIC No. 8.84.1) was given in every factor (k) case, insofar as I can tell, decided by the court during its first year. The instruction reads as follows:

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: . . .

The instruction continues with the factors enumerated in Penal Code section 190.3. In the standard concluding instruction at the penalty phase the jury is further told, "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." The issue is not, as Justice Panelli would have us believe, whether the jury was instructed to consider "all of the evidence," but how the sentencing jury was to consider all of that evidence. Or to put the matter another way, the error of the instructions is that they tell the jury to consider all of the evidence only with respect to the specific factors listed in the instructions. In this way the factor (k) instruction, along with all of the other penalty instructions, fails to comply with the Lockett principle according to the prior opinions of

450. Id. at 1200, 743 P.2d 301, 322, 240 Cal. Rptr. 666, 687 (emphasis in original).
451. STANDARD JURY INSTRUCTIONS (1988), supra note 287, CALJIC No. 8.84.1 (1989 Revision) (superseding CALJIC No. 8.84.2 (1986 Revision)).
452. Id. CALJIC No. 8.88 (1989 Revision) (superseding CALJIC 8.84.2 (1986 Revision)).
the court. However, even if we assume that an instruction to consider "all of the evidence" somehow also tells the jury the purpose for which that evidence is to be considered, at best the "all evidence" instruction conflicts with the factor (k) instruction. Also it is the long standing rule in criminal cases that an erroneous instruction cannot, of course, be cured by a conflicting instruction to the contrary. Furthermore, when the challenged instruction implicates federal constitutional values, the Supreme Court of the United States employs the same rule. In speaking of a jury instruction challenged for Sandstrom error the Court said: "Nothing in [the] specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." Despite his Gates opinion, Justice Panelli did address the problem with the factor (k) instruction in his opinion for the majority in People v. Miranda. Adhering to at least some of the prior precedent, and largely applying the traditional legal analysis of jury instructions, the opinion quoted with approval Brown's reaffirmance of "the importance of an Easley clarifying instruction in order to inform the jury that it may reject death on the basis of any relevant evidence or observation." Nevertheless, relying upon Brown for this point as well, the court held "the failure of trial courts prior to Easley to give the clarifying instruction does not necessarily invalidate a death pen-

453. Standard Jury Instructions (1979), supra note 7, CALJIC No. 8.84.2 (1986 Revision).
455. E.g., People v. Vaughn, 71 Cal.2d 406, 455 P.2d 122, 78 Cal. Rptr. 186 (1969). In Vaughn, Justice Tobriner explained this rule as follows:

The People suggest that the trial court's instruction that the law provides no standards for determining the appropriate penalty cures this error. Although the instruction on standards and the instruction on sympathy are plainly inconsistent, the jury might resolve that inconsistency by concluding that the restriction on sympathy served as an exception to their otherwise unlimited discretion; hence the instruction forbidding the named consideration must cause confusion.

We need not decide, however, whether the erroneous instruction as to pity and sympathy constituted "substantial error" requiring reversal . . . since we have already concluded that the penalty trial must be reversed on Witherspoon grounds.

Id. at 422, 455 P.2d at 131, 78 Cal. Rptr. at 195.
459. Id. at 102, 744 P.2d at 1155, 241 Cal. Rptr. at 622. The instruction "required" by Easley is quoted supra text accompanying note 420.
The court then held that the error did not prejudice the defendant. The Ghent analysis, sometimes with the Gates approach apparently thrown in for good measure, was applied in Hovey, Ruiz, Hendricks II, Melton and Wade. In a fourth line of cases, the court has employed the Cure Technique, which was developed for curing the error inherent in the Initiative's mandatory-death-sentence instruction, to cure the error in the factor (k) or factor (j) instructions. This technique was employed in Howard and in Kim-
ble. These cases do not cite or rely upon Ghent and the various concurring and dissenting opinions in California v. Brown. Instead, they rely only on the cases employing the Cure Technique.

If Bell is excluded from the count on the ground that a rehearing was granted in that case, eleven of the cases decided by the Lucas court the first year resolved issues on penalty phase jury instructions. In ten of these cases, the unadorned factor (k) or factor (j) instructions were given. The Ghent analysis, which relies on the various concurring and dissenting opinions in California v. Brown, was applied in six of these cases. In two cases, Kimble and Howard, the court applied the Cure Technique to hold that the defects in the unadorned factor (j) and factor (k) instructions were cured by the arguments of counsel. In Gates, the court applied a third analysis. In subsequent cases, whenever the Gates analysis was used, it was always coupled with one of the other cure techniques. The last method used to resolve issues in these same instructions is the more traditional method found in Miranda. But Miranda stands alone, with a finding of factor (k) error and a conclusion that the error was not prejudicial, as a dim reminder of past doctrine.

In each of these cases, with the single exception of Miranda, the
Lucas court found no factor (k) error,\textsuperscript{479} although none of the Bird court cases were overruled on this point.\textsuperscript{480} Nevertheless, except for \textit{Gates}, it is abundantly clear that those cases have been quietly “put to rest” by the use of either the \textit{Ghent} “cure” technique or the Grodin Cure Technique (which was borrowed from the law pertaining to the mandatory-death-sentence instruction). Although the reason for the court’s use of four different methods for assessing the error in the unadorned factor (k) and factor (j) instructions is not apparent, the court affirmed the judgment of death in each of the cases.

d. The Status of the Law

The Lucas court has not overruled the Bird court cases holding that the Initiative’s unadorned factor (k) instruction and the equivalent unadorned factor (j) instruction for the 1977 Legislation are facially flawed.\textsuperscript{481} However, except for the inconsistent \textit{Gates}\textsuperscript{482} and \textit{Miranda}\textsuperscript{483} cases, the court has employed a cure technique by treating the arguments of counsel as though they were supplemental jury instructions. Though the court has used two versions of this method, the \textit{Ghent} analysis and the Cure Technique, they are distinguishable only by the authority on which they rely.

The origins of the Cure Technique, which is usually employed to cure the error in the Initiative’s mandatory-sentencing-formula instruction,\textsuperscript{484} are Justice Grodin’s opinions in \textit{Brown}, \textit{Allen} and \textit{Myers}.\textsuperscript{485} The court attributes the ancestry of the identical \textit{Ghent} method to the concurring and dissenting opinions in \textit{California v. Brown}.\textsuperscript{486} In the \textit{Ghent} analysis, the court uses language taken from

\begin{itemize}
  \item \textsuperscript{479} See \textit{supra} notes 433-43, 449-52, 462-70.
  \item \textsuperscript{480} See \textit{supra} notes 425-31.
  \item \textsuperscript{481} See \textit{supra} notes 425-30 and accompanying text.
  \item \textsuperscript{482} See \textit{supra} notes 449-53 and accompanying text.
  \item \textsuperscript{483} See \textit{supra} notes 458-61 and accompanying text.
  \item \textsuperscript{484} See \textit{supra} notes 352-91 and accompanying text.
  \item \textsuperscript{485} See \textit{supra} notes 341-46, 352-59, 365-71 and accompanying text.
  \item \textsuperscript{486} As noted above, the first case to consider the unadorned factor (k) or factor (j) instructions was \textit{Ghent}. In that case, Chief Justice Lucas described the basis for the factor (k) and the factor (j) “cure” technique as follows:
    A majority of the justices of the United States Supreme Court, upon reviewing our \textit{Brown} decision, stressed the necessity of analyzing the record in each case to determine whether the jury instructions, taken as a whole, and read in conjunction with the prosecutor’s arguments, adequately informed the jury of its responsibility to consider all of the mitigating evidence in the case. We have undertaken such a review, and we conclude that there exists “no legitimate basis” for believing that the jury was misled regarding its sentencing
\end{itemize}
Justice O'Connor's opinion as the springboard for the use of the cure technique for these instructions. However, the genealogy of the two methods may not be as different as the court's citations might suggest. The pertinent language from Justice O'Connor's opinion is not obviously taken from any previously existing precedent from the Supreme Court of the United States. Although it appears to have sprung fully formed from Justice O'Connor's pen, there is considerable reason to believe that she was heavily influenced by Justice Grodin's opinion for the Supreme Court of California in the same case. This means, of course, that the two rules are grounded in the same source: Justice Grodin's opinion in People v. Brown. Apparently conceived by the same parent, they not only share common ancestry, but they are identical twins. At the close of the first year, there was no indication that the Lucas court would abandon the use of either or both of the "cure" techniques and return to the traditional method of analyzing jury instructions for error. A discussion of the Ghent method, along with its identical twin, the Cure Technique, appears at a later point in this article.

Nearly two years after the close of the first year of the Lucas court, in Boyde v. California, a closely divided United States Supreme Court held that the use of the unadorned factor (k) instruction does not violate the eighth amendment. Boyde v. California thus undermines the Bird court's holding in Davenport that the unadorned factor (k) instruction violates the Lockett principle. Nevertheless, Easley's recognition that the unadorned factor (k) instruction is "potentially confusing" and that the instruction should therefore be augmented by the language suggested in that opinion arguably is grounded in state law, not federal constitutional law. Because Boyde v. California does not speak to the state law issue, and because the instruction "recommended" by Easley has been routinely given in capital trials since that decision was announced, the Lucas court will undoubtedly continue to employ the cure techniques

responsibilities.


The second case to employ this analysis, with the citation to authority, was the Chief Justice's opinion in Kimble. See supra note 468.

487. See infra notes 773-86 and accompanying text.

488. See infra note 787 and accompanying text.

489. See infra text beginning at note 679.

490. 110 S. Ct. 1190 (1990) (5 to 4 decision). Boyde v. California was decided on March 5, 1990. Id.

491. People v. Davenport, 41 Cal. 3d 247, 282-84, 710 P.2d 861, 883-85, 221 Cal. Rptr. 794, 816-818 (1985) (plurality opinion); id. at 295, 710 P.2d at 892, 221 Cal. Rptr. at 825-26 (Broussard, J., concurring and dissenting); see supra notes 425-31 and accompanying text.

492. See People v. Easley, 34 Cal. 3d 858, 877-79, 671 P.2d 813, 824-26, 196 Cal. Rptr. 309, 320-22 (1983); see supra notes 415-20 and accompanying text.

610
to assess instructional error created by the use of the unadorned fac-
factor (k) instruction in pre-
Easley trials, as long as it appears in the
cases. Furthermore, given the obvious superiority of the instruction
suggested in Easley over the unadorned factor (k) instruction, it is
highly unlikely that the Lucas court will abandon the Easley instruc-
tion in favor of the unadorned factor (k) instruction, despite the
High Court’s opinion in Boyde v. California.

8. The Anti-Sympathy Instruction at the Penalty
Phase

a. Introduction

In a consistent line of cases extending back for several decades,
the California Supreme Court has held that in the penalty phase of a
capital trial the jury may properly consider sympathy or pity for the
defendant in determining whether to show mercy and spare the de-
fendant from execution. These same cases also hold that it is error
to advise the jury to the contrary.

b. The Bird Court

When the death penalty was finally restored in California, it was
this line of authority, coupled with the Lockett principle, that the
Bird court applied to invalidate “no sympathy” arguments by prose-
cutors, and “no sympathy” instructions at the penalty phase of
capital trials. The leading case is Easley; the most controversial

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493. E.g., People v. Bandhauer, 1 Cal. 3d 609, 463 P.2d 408, 83 Cal. Rptr. 184
(1970) (Bandhauer II); People v. Vaughn, 71 Cal. 2d 406, 455 P.2d 122, 78 Cal. Rptr.
186 (1969); People v. Anderson, 64 Cal. 2d 633, 414 P.2d 366, 51 Cal. Rptr. 238 (1966);
494. See supra note 493.
495. See infra text accompanying notes 401-04.
496. People v. Robertson, 33 Cal. 3d 21, 56-59, 655 P.2d 279, 300-302, 188 Cal.
Rptr. 77, 98-101 (1982), cert. denied, 110 S. Ct. 216, reh’g denied, 110 S. Ct. 525
(1989).
497. The “no sympathy” instruction given in most, if not all of the cases, is
CALJIC No. 1, which reads as follows: “As jurors, you must not be influenced by pity
for a defendant or by prejudice against him. You must not be swayed by mere sentiment,
conjecture, sympathy, passion, prejudice, public opinion or public feeling.” See People v.
Easley, 34 Cal. 3d 858, 875, 671 P.2d 813, 823, 196 Cal. Rptr. 309, 319. This instruction
is appropriate for the guilt phase, but not the penalty phase of a capital trial. See supra
note 493.
498. See infra notes 501-11.
499. Easley, 34 Cal. 3d at 875-880, 671 P.2d at 823-27, 196 Cal. Rptr. at 319-23
(1983). It was in Easley that the court directed trial courts to alter the factor (k) in-
struction to comply with the Lockett principle. See supra note 420.
is Brown.\textsuperscript{500} Between Easley and Brown, the court reversed two death judgments because the trial court read a "no sympathy" instruction to the penalty phase jury — People v. Lanphear,\textsuperscript{501} and People v. Montiel.\textsuperscript{502} In the last of those two cases, the court gave a terse summary of this body of law (which is frequently referred to as Lanphear/Easley error) as it stood on the eve of the Brown decision:

In both [Easley and Lanphear] this court held that giving the instructions constituted error because to do so denied the defendant the right to have the jury consider any relevant "sympathy factor" in his behalf. Nor was the problem cured by the instructions regarding mitigating factors. In Lanphear, the majority expressly concluded that retrial was constitutionally mandated because of the potential ambiguity engendered by the instruction. Retrial therefore is required here.\textsuperscript{503}

Because the trial court read the standard "no sympathy" instruction to the jury in Brown, the court reversed the death judgment, just as it had in Easley, Lanphear, and Montiel, finding federal constitutional error under the Lockett principle.\textsuperscript{504} The Attorney General filed a petition for certiorari in the Supreme Court of the United States. The petition was granted for Brown on June 2, 1986.\textsuperscript{505} While Brown was pending in the High Court, the Bird court reversed the judgments of death in Leach\textsuperscript{506} and Wade\textsuperscript{507} for Lanphear/Easley error.

Wade was decided on January 2, 1987. It was one of the last of the death penalty cases decided by the Bird court. With respect to the anti-sympathy instruction issue, the court wrote:

The trial court instructed the jury at the penalty phase that "As jurors, you must not be influenced by pity for a defendant or by prejudice against him. You must not be swayed by mere sentiment, conjecture, sympathy,

\begin{itemize}
\item \textsuperscript{501} 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984) (sole ground for reversal).
\item \textsuperscript{502} 39 Cal. 3d 910, 928, 705 P.2d 1248, 1258-59, 218 Cal. Rptr. 572, 583 (1985) (the embargoed instruction was only one of the grounds for reversal of the death judgment).
\item \textsuperscript{503} Id. (citation omitted).
\item \textsuperscript{504} Brown, 40 Cal. 3d at 536-37, 709 P.2d at 452-53, 220 Cal. Rptr. at 649-50.
\item \textsuperscript{506} People v. Leach, 41 Cal. 3d 92, 110-11, 710 P.2d 893, 904, 221 Cal. Rptr. 826, 837 (1985) (plurality opinion — sole ground for reversal). Justice Broussard concurred in the antisympathy instruction error but would also reverse for Ramos II error. Id. at 114-15, 710 P.2d at 906, 221 Cal. Rptr. at 839 (Broussard, J., concurring separately).
\item \textsuperscript{507} People v. Wade, 43 Cal. 3d 366, 384-85, 729 P.2d 239, 250, 233 Cal. Rptr. 48, 59 (1987) (opinion by the court), reh'g granted, Mar. 26, 1987, vacated, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988), reh'g denied and modified, May 19, 1988, cert. denied, 488 U.S. 900 (1988). Rehearing was granted in Wade as one of the first official acts of the newly constructed California Supreme Court. See supra note 10.
\end{itemize}
passion, prejudice, public opinion, or public feeling.” (CALJIC No. 1.00)
The giving of the foregoing instruction was error under People v. Brown,
People v. Lanphear, and People v. Easley. Moreover, the error was not
harmless.508

Justice Lucas filed a concurring and dissenting opinion.

As for the majority's reversal of the death penalty in this case, I have previ-
ously noted my position that “any error in cautioning the penalty jury not
to be swayed by 'sympathy' for the defendant is, at worst, harmless.”
Indeed, the very foundation on which the majority's reversal is based has
been substantially shaken by the recent grant of certiorari in Brown.508

Justice Panelli concurred in the Lucas opinion.510 Justice Mosk
wrote a short concurring and dissenting opinion agreeing with Jus-
tice Lucas and stating, “I would affirm the judgment in its en-
tirety.”511 The tenure of the Bird court ended a few days later with
three of the four members of the court (Justices Mosk, Lucas and
Panelli) dissenting to the reversal of death penalty judgments for
Lanphear/Easley error.

c. The Lucas Court

On January 27, 1987, after the Bird court’s tenure ended, but
before the Lucas court was organized,512 the Supreme Court of the
United States filed its opinion in California v. Brown.513 As one
of its first official acts, on March 26, 1987, the newly formed Lucas
court granted the Attorney General’s petition for rehearing in Peo-
ple v. Wade.514 The obvious purpose for granting the rehearing was
to revise the Bird court’s Wade ruling on the principles announced
by the High Court in Brown.

Writing for a closely divided Court,515 Chief Justice Rehnquist's
opinion in *California v. Brown* concluded that reading the standard California "no sympathy" instruction to the jury at the penalty phase of a capital trial violated neither the *Lockett* nor the *Gregg* principles. The majority reached this conclusion by a two step analysis. First, applying settled principles used for interpreting jury instructions attacked on constitutional grounds, the majority found that a "reasonable juror" would interpret the challenged instruction's phrase "mere . . . sympathy" to mean sympathy "totally divorced from the evidence adduced during the penalty phase." Second, they held that "[a]n instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution." Simply put, the Bird court's holding in *Easley* and its progeny that the reading of the "no sympathy" instruction to the penalty jury violated the *Lockett* principle was wrong. None of the cases decided by the Lucas court between the High Court's opinion in *Brown* and the second opinion in *Wade* directly confronted the question of the status of *Lanphear*/*Easley* error in California after *Brown*. The "no sympathy" instruction was only tangentially involved in five cases.

In *Gates* the standard "no sympathy" instruction was read to the jury at the guilt phase, but that instruction was not repeated in the penalty phase of the trial. On automatic appeal defendant argued

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479 U.S. at 541 (citations omitted).

479 U.S. at 542.

479 U.S. at 543.

479 U.S. at 543.

See infra text accompanying notes 522-3.  
See infra text accompanying notes 522-53.  
See infra text accompanying notes 522-53.

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that the trial judge committed prejudicial error by failing to instruct, sua sponte, that the guilt phase "no sympathy" instruction did not apply in the penalty phase. The court rejected the argument on the grounds that it was not convinced either that the jury thought that the guilt phase "no sympathy" instruction was applicable to the penalty phase or "that there was a prejudicial carryover effect from the guilt phase no-sympathy instruction." 523

Essentially the same argument made and rejected in Gates was again rejected in People v. Melton. 524 A variant of the Gates-Melton argument was rejected in Miranda, which held that the trial court did not err in failing affirmatively to instruct the jury at the penalty phase that sympathy was an appropriate factor for its consideration

523. Id. Defendant actually argued that the court prejudicially erred at the penalty phase by failing to instruct that the credibility instructions (CALJIC Nos. 2.20, 2.21, 2.22) continued to apply and that the no-sympathy instruction (CALJIC No. 1) did not. The result, according to defendant, was either that the jury thought none of the guilt phase instructions applied and had no standards to guide them on assessing witness credibility, or that they thought all of the guilt phase instructions applied, including the no-sympathy admonition. The court responded as follows:

We are not convinced that either scenario necessarily occurred. The language of the no-sympathy instruction specifically referred to deciding a defendant's guilty or innocence and would not be necessarily understood as applying to the penalty phase. The witness credibility instructions, by contrast, were not specifically limited to the issue of guilt or innocence.

Id.

The actual language of the instruction indicates that the reed upon which this distinction is based is slim indeed. The only mention of guilt or innocence in this standard instruction is the following: "Whether a defendant is to be found guilty or not guilty depends upon both the facts and the law." STANDARD JURY INSTRUCTIONS (1988), supra note 287, CALJIC No. 1. Later in the instruction the jury is told,

[Y]ou must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

Id. Although further discussion of this issue is beyond the scope of this article, it is worth noting that Gates does not decide that the instruction suggested by the defendant should not be given.

524. People v. Melton, 44 Cal. 3d 713, 758-60, 750 P.2d 741, 767-69, 244 Cal. Rptr. 867, 894-95, cert. denied, 488 U.S. 934 (1988). The disposition of the issue was more elaborate in Melton. Relying on Justice O'Connor's concurring opinion in Brown, the Melton Court believed that the following analysis was required:

[Where] the jury was cautioned against sympathy and also received an unadorned factor (k) instruction, the penalty phase instructions and arguments must be examined as a whole to determine whether the jury was "adequately informed . . . of its responsibilities to consider all of the mitigating evidence introduced by the [defendant]."

Id. at 759-60, 750 P.2d at 768, 244 Cal. Rptr. at 895 (citation omitted).
in assessing the penalty.\textsuperscript{525} This argument was again confronted by the court in \textit{Ruiz}.\textsuperscript{526} It was again rejected. However, the second rejection relied on the court's holding in \textit{Miranda}.\textsuperscript{527}

Finally, in \textit{People v. Howard} defendant claimed that the judge's questions of six of the jurors during sequestered voir dire amounted to \textit{Lanphear/Easley} error.\textsuperscript{528} Specifically, the judge phrased the questions in such a way as to indicate that the jurors should "put aside" feelings of "sympathy."\textsuperscript{529} "Although this argument may have been tenable under former cases," wrote Chief Justice Lucas for the majority, "it no longer has merit in light of intervening authority. The United States Supreme Court, reviewing our opinion in \textit{Brown}, recently held that such an instruction is not, in and of itself, error."\textsuperscript{530} After reviewing the High Court's majority opinion, Chief Justice Lucas quoted from the concurring opinion of Justice O'Connor:

\begin{quote}
"At the same time, the jury instructions — taken as a whole — must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime." The key inquiry then is to ascertain whether jurors have been "misled into believing that mitigating evidence about a defendant's background or character . . . must be ignored."\textsuperscript{531}
\end{quote}

Employing this analysis, Chief Justice Lucas then concluded that the jury was not misled.\textsuperscript{532}

Slightly over a month later the Lucas court filed its long awaited decision in \textit{Wade}.\textsuperscript{533} The \textit{Wade} penalty jury had been charged with both the standard "no sympathy" instruction and the unadorned factor (\textit{k}) instruction.\textsuperscript{534} Again writing for the majority, Chief Justice Lucas disposed of the \textit{Lanphear/Easley} error by invoking the now

\textsuperscript{527} Id. at 624-25, 749 P.2d at 873, 244 Cal. Rptr. at 219.
\textsuperscript{529} Id. at 432, 749 P.2d at 313, 243 Cal. Rptr. at 877.
\textsuperscript{530} Id. (citations omitted)
\textsuperscript{531} Id. at 432-33, 749 P.2d at 314, 243 Cal. Rptr. at 877 (citations omitted).
\textsuperscript{532} Id. The opinion gives four reasons: (1) the court's statements during voir dire were in question form; (2) although properly told not to consider sympathy during the guilt phase, the jury was instructed at defendant's request that the law does not forbid the jury from being influenced by pity for the defendant at the penalty phase; (3) mitigating circumstances were defined in an instruction as "circumstances which do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability"; and (4) the court interpreted "pity" as being synonymous with "sympathy." Id. at 433-34, 749 P.2d at 314, 243 Cal. Rptr. at 877-78.
\textsuperscript{534} Id. at 995, 750 P.2d at 805-06, 244 Cal. Rptr. at 916-17.
familiar Ghent analysis used for factor (k) error. In other words, the Ghent analysis was used to "cure" both the anti-sympathy instruction and the factor (k) instruction. With respect to the anti-sympathy instruction (Lanphear/Easley error), the court explained the applicable law in a single paragraph:

In Brown and Easley, we disapproved a "no sympathy" instruction similar to the one given here, and we directed further clarifying instructions be given in future cases to better explain to the jury the scope of its sentencing discretion. As for previously tried cases in which a "no sympathy" instruction was given, the guidelines set forth in the United States Supreme Court's decision in Brown require us to review the record in each case to determine whether the jury instructions, taken as a whole, and read in conjunction with the jury arguments, adequately informed the jury of its responsibility to consider all of the mitigating evidence in the case.

Two aspects of the record enabled the court to "conclude that there exists 'no legitimate basis' for believing that the jury was misled by the 'no sympathy' instruction." First, the court cited the instruction informing the jury to consider all of the evidence in the case in determining the penalty to be imposed. Second, the court looked to the arguments of both the prosecutor and defense counsel to determine how the jury must have understood the court's instructions. "In light of the respective jury arguments," wrote Chief Justice Lucas, "it is inconceivable that the jury failed to understand that it was permitted to consider sympathy, background or character evidence in deciding the appropriate penalty." In short, the court found that there was no error in instructing the jury at the penalty phase, and thus there was no consideration of the impact of the error on the trial.

The court's reliance on the all-of-the-evidence instruction is as flawed here as it was when it first appeared in Gates. The rule the

535. As noted above, the court has applied two versions of this analysis to resolve the factor (k) and factor (l) instructional error encountered this year: The Ghent analysis, which relies on the opinions in California v. Brown; and the Cure Technique, which is based on Justice Grodin's plurality opinions in Brown, Allen and Meyers. This is the same analysis. See supra text accompanying notes 342-68, 372-77.

536. The instructions in Easley were not "similar to the one given here," but exactly the same. See People v. Easley, 34 Cal. 3d 858, 875, 671 P.2d 813, 823, 196 Cal. Rptr. 309, 319 (1983).

537. Wade, 44 Cal. 3d at 995-96, 750 P.2d at 806, 244 Cal. Rptr. at 917 (emphasis added) (citation omitted) (note inserted by author).

538. Id. at 996, 750 P.2d at 806, 244 Cal. Rptr. at 917 (citation omitted).

539. Id.

540. Id. at 996-97, 750 P.2d at 806-87, 244 Cal. Rptr. at 917-18.

541. Id. at 997, 750 P.2d at 807, 244 Cal. Rptr. at 918.

542. See supra text accompanying notes 449-57.
Lucas court devides from the various opinions in *California v. Brown* is simply wrong, both in its conception and how it is applied. However, those issues are discussed later in this article.\(^{543}\)

The *Wade* court's treatment of *Easley*'s rule prohibiting the use of an anti-sympathy instruction at the penalty phase is more than mildly interesting. Though the majority opinion in *California v. Brown* unquestionably held that the giving of the standard "no sympathy" instruction is permissible under the eighth amendment, the Lucas court does not treat the High Court's opinion in *Brown* as undercutting the rule embargoing the use of an anti-sympathy instruction at the penalty phase. In announcing that the rule applicable to cases decided before *Easley* and *Brown* prevented the use of the "no sympathy" instruction at the penalty phase, the court seems to tacitly recognize that the standard guilt phase "no sympathy" instruction should not be given at the penalty phase of the capital trial. In other words, though the giving of that instruction is not federal constitutional error, the rule still holds that the anti-sympathy instruction should not be given in cases tried after *Easley* and *Brown*.\(^{544}\) "As for previously tried cases"\(^{545}\) in which the instruction was given, the rule the court believes was announced in *California v. Brown* applies. This rule, of course, is Ghent's now familiar "cure" analysis.

Insofar as the *Easley/Brown* embargo on the use of an anti-sympathy instruction is grounded in the constitutional jurisprudence of the eighth amendment, the majority opinion in *California v. Brown* removed that support. If the "clarifying instructions" were supported by nothing else, they cannot govern penalty trials after the decisions in *Easley* and *Brown*. However, these instructions have deeper roots in California law, roots going back to a time before the eighth amendment applied to the jurisprudence of death in California. Well before the *Furman* revolution, the California Supreme Court consistently held that it was error for the court to read a "no sympathy" instruction to the penalty phase jury.\(^{546}\) Furthermore, the court created other procedures for the fair determination of the penalty at the sentencing phase of the capital trial.\(^{547}\) These cases were not based upon federal constitutional doctrine, but upon the inherent power of the court to fashion rules for the just administration of the awesome

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\(^{543}\) See infra text accompanying notes 624-796.

\(^{544}\) *Wade*, 44 Cal. 3d at 995-96, 750 P.2d at 805-06, 244 Cal. Rptr. at 916-17.

\(^{545}\) Id. at 995-96, 750 P.2d at 806, 244 Cal. Rptr. at 917.

\(^{546}\) See supra note 493 and accompanying text.

power of the state to define and punish crime — a power that extends so far back into the history of the Anglo-American common law that it is one of the reasons for the very existence of courts.\textsuperscript{548} Because the common law basis for the embargo on the use of an anti-sympathy instruction was unscathed by the opinions in \textit{California v. Brown}, the court is apparently confirming that the standard "no sympathy" instruction should not be given in cases tried after the day \textit{Easley} was decided.

However there is a troubling aspect to the \textit{Wade} decision. As we have seen, the no-sympathy instruction rule at issue in \textit{Wade} was based in part on the court's common law power that was in existence long before the decision in \textit{Easley}.\textsuperscript{549} Under this rule, the trial court erred by reading the instruction to the penalty jury in \textit{Wade}.\textsuperscript{550} The court should have faced this issue and should have ruled on the reversibility of that error.\textsuperscript{551} Instead, the court applied the "cure" technique to find that there was no instructional error in the case. However in doing so, it applied doctrine that it attributed to the High Court's decision in \textit{Brown}.\textsuperscript{552} Assuming that the "cure" rule is actually required by the various concurring and dissenting opinions in \textit{California v. Brown}, that rule only cures the federal error in the instruction. What of the state error? Will the court apply the identical Cure Technique to the state error once it is addressed?

Several additional questions are left hanging as a result of the decision in \textit{Wade}. Is either variety of the cure analysis, the \textit{Ghent} or Grodin versions, applicable to cases decided after \textit{Easley} in which a no-sympathy instruction is given? If so, why did the court draw a distinction between pre-\textit{Easley} and post-\textit{Easley} cases? Will the court adhere to the prior state law, find that there is error in the post-\textit{Easley} use of a no-sympathy instruction, and assess the reversibility of that error?

\textsuperscript{548} See, e.g., M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 190-92, 212 (1936).
\textsuperscript{549} See supra text accompanying notes 493-94.
\textsuperscript{550} See cases cited supra note 493. For example, in \textit{Bandhauer II} the court held that the giving of substantially similar, if not identical, "no sympathy" instruction was not only error, but that it required a reversal of the death judgment when it was considered in conjunction with the other instructions. People v. Bandhauer, 1 Cal. 3d 609, 618-19, 463 P.2d 408, 416, 83 Cal. Rptr. 184, 192 (1970).
\textsuperscript{551} Given the court's seeming commitment to applying the \textit{Easley} and \textit{Brown} embargo on the use of the anti-sympathy instruction at the penalty phase of capital trials, the court should have more clearly reaffirmed the local California rule against the use of that instruction.
\textsuperscript{552} See supra notes 372-77 and accompanying text.
Because *Wade* was the first and only automatic appeal to confront the validity of the no-sympathy instruction during the first year of the Lucas court's tenure, the answer to these questions must await further decisions. *Wade* was filed on March 24, 1988. The first year of the Lucas court's tenure ended the next day.

d. The Status of the Law

The United States Supreme Court has held that the giving of the no-sympathy instruction at the penalty phase of the capital trial does not violate the federal constitution. The Lucas court seems to be adhering to the *Easley-Brown* Rule that a no-sympathy instruction should not be given at the penalty phase of the capital trial. With respect to cases decided before *Easley*, the court employs the *Ghent* cure analysis to determine whether the jury was erroneously instructed under the federal constitution. It remains to be seen (1) whether the cure analysis will be applied to the state error in giving this instruction, (2) whether the cure analysis will apply to post-*Easley* no-sympathy instruction error, and (3) what standard of reversibility may be applied if the court finds instructional error. Quite obviously, the court's decision in *Wade* raises more questions than it answers. One of those questions concerns the test of the reversibility of penalty phase error. It is to that general issue that we now turn.

9. Penalty Phase Error and the Lucas Court

In the not so distant past, many courts routinely reversed judgments for nearly any type of error. Today it is generally agreed that the focus of all error analysis must be on the underlying fairness of the trial process and the result it produces rather than on the virtually inevitable presence of error in the case. This focus recognizes that the central purpose of the guilt phase of a criminal trial is to decide the question of the defendant's guilt or innocence. Furthermore, such an approach discourages the litigants from abusing the judicial process by infusing error into the record, and it promotes respect for both the law and the judicial process. Nevertheless, all too easy affirmance, all too ready reversal is also inimical to the judicial process. Again, nothing is gained from such an extreme, and much is lost. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

556. R. Traynor, *supra* note 554, at 50.
557. Id.
558. Id.

Like all too easy affirmance, all too ready reversal is also inimical to the judicial process. Again, nothing is gained from such an extreme, and much is lost. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.
less, certain types of error either necessarily render the criminal trial fundamentally unfair or are so inherently impossible to analyze on the appellate record that they automatically compel a reversal of the judgment below.

Although at first glance these automatically reversible errors appear to be exceptions to the general rule that reversible error analysis must focus on the error’s impact on the trial’s outcome, they are not truly exceptions. The judgment has been made that each of these errors either axiomatically taints the trial’s fundamental fairness and the judgment it produces or makes it impossible to assess the impact of the error on the outcome of the trial. In other words, neither a case-by-case analysis nor a study of the evidence in the individual case need be made, for each of these errors always produces fundamental unfairness whenever any one of them is present or makes assessment impossible on the appellate record.

However, most error is not of the type that inevitably produces a fundamentally unfair trial or defies analysis on the record. How should common trial error be treated by reviewing courts? Should the question of reversibility be decided by the court’s untethered discretion, or should the court’s assessment of the impact of the error be guided by articulated standards? Chief Justice Traynor saw no conundrum here:

There remains the large task of articulating what should be the limitations on an appellate court’s discretion to determine whether or not an error is harmless. As far back as 1932, Newman Baker took note of the capriciousness of appellate decisions in the absence of any guidelines for the evaluation of error. More recently, Kenneth Davis, in his study *Discretionary Justice*, concludes that

“If all decisions involving justice to individual parties were lined up on a scale, with those governed by precise rules at the extreme left, those involving unfettered discretion at the extreme right, and those based on various mixtures of rules, principles, standards, and discretion in the middle, where on the scale might be the most serious and most frequent injustice?... I

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559. *E.g., Clark*, 478 U.S. at 577.
561. *See, e.g.*, Clark, 478 U.S. at 578-79.
562. *See supra* notes 559-60.
563. Clark, 478 U.S. at 578-79.
think the greatest and the most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made."°

There is obvious need of guidelines to control appellate discretion in the evaluation of error.°

In short, standards are needed for the guidance of reviewing courts in the assessment of error on appeal for the same reason that rules, principles, and standards restrain the acts of all government officials, and the public at large: the rule of law and the legal process require no less. Our system of law requires judges to officially operate under articulated, externalized standards, not the unarticulated personal views of a majority of the judges reviewing a particular case. The articulated standard is the heart of the law of reversible error.

When the trier of fact is a jury, it is possible for an appellate court to review the record, apply the appropriate standard of reversibility, and arrive at its appraisal of the effect of the error on the outcome of the trial only because the jury employs the familiar techniques of legal analysis in reaching its verdict.° It is because the jury employs these familiar legal techniques, and because appellate judges are experts in the methods of the law, that the causal connection between the error and the verdict can be assessed with an acceptable degree of confidence. By analyzing the totality of the circumstances at the trial, everything in the record relevant to the error in question,° and how this error might have influenced a jury employing familiar legal techniques in reaching its verdict,° a reviewing court can produce a reasoned application of the harmless error standard which meets the law's requirements.

Of course, the problem of the reversibility of error also applies to the penalty phase of capital trials. However, the challenge of fairly assessing the impact of error on the jury's penalty determination is even more complex than the quandary presented to a reviewing court

566. R. TRAYNOR, supra note 554, at 15.
567. There is, of course, an empirical basis for this supposition. The jury is instructed on the legal techniques for evaluating evidence, the process it should follow in reaching its verdict, and similar legal methods. See infra notes 592-94 and accompanying text. Whether the jury actually employs these techniques is not the question, for the law presumes that the jury employs this analysis in deciding cases. See infra notes 661-62 and accompanying text, discussing the presumption that jurors follow the instructions given by the trial judge.
568. It is here, of course, that the arguments of counsel may be crucial in making the appropriate determination of the impact of the error on reasonable jurors.
569. The reason for the objective standard of the "reasonable jury" is the same as it is for the use of an objective standard in determining the validity of jury instructions. See infra text accompanying notes 618-19.
by the claim of guilt phase error. The capital sentencing decision differs dramatically from the fact-finding-law-applying process of the guilt phase of the trial. The death penalty decision "cannot be prescribed by a rule of law as judges normally understand such rules, but rather [it] is ultimately understood only as an expression of the community's outrage — its sense that an individual has lost his moral entitlement to live."\footnote{Spaziano v. Florida, 468 U.S. 447, 468-69 (1984) (Stevens, J., dissenting).} Judges simply have no expertise, no professional learning, relevant to the capital sentencing decision.

Deciding upon the appropriate sentence for a person who has been convicted of a crime is the routine work of judges. By reason of this experience, as well as their training, judges presumably perform this function well. But, precisely because the death penalty is unique, the normal presumption that a judge is the appropriate sentencing authority does not apply in the capital context. The decision whether or not an individual must die is not one that has traditionally been entrusted to judges. This tradition, which has marked a sharp distinction between the usual evaluations of judicial competence with respect to capital and non[-]capital sentencing, not only eliminates the general presumption that judicial sentencing is appropriate in the capital context, but also in itself provides reason to question whether assigning this role to governmental officials and not juries is consistent with the community's moral sense.\footnote{Spaziano, 468 U.S. at 476 (Stevens, J., dissenting).}

When the judge's lack of professional expertise is coupled with a jury exercising its considerable discretion on essentially a moral, not legal, issue expressing the community's outrage, it seems virtually impossible for an appellate court to accurately assess the impact of an error on the sentencing decision. With the guilt phase decision the judge and the jury operate within the common denominator of the law and the evidence in the case. Given these common bonds and the judge's expertise, the judge is competent to assess the impact of the error on the reasonable jury seeking conscientiously to apply the law to the facts found in accordance with the court's instructions. However, with the penalty decision the principal link between the judge and the jury comes from the judge's experience as a member of the jury's community. Shorn of professional expertise, the judge's assessment of the impact of error on the jury's penalty determination lacks the fundamental attributes of a judicial decision. The question concerns neither the law nor the application of the law to the facts dis-
closed in the appellate record.

The uniqueness of the penalty determination process in a capital case and the judge's lack of expertise mean that reviewing courts cannot assess the causal link between penalty phase error and the death verdict with sufficient accuracy to warrant reliance upon that assessment, especially when the consequence of error means the death of a fellow human being. Thus, it is crucial that a reviewing court operate under a clearly articulated standard for determining the reversibility of penalty phase error, and that the standard take into account the inherent difficulty of an accurate, reliable legal assessment of the impact of the error on the judgment of death. However, as we shall see, except for the reversal in Anderson for Ramos error, the Lucas court failed to articulate clearly the standard under which it found all penalty phase error harmless its first year.

Of the sixteen automatic appeals decided during the first year of the Lucas court, four were reversed and twelve were affirmed. The three reversals had nothing to do with the law of capital punishment, though, of course, a death judgment was imposed in each of the three. One case was reversed for a penalty phase error, one for a Wheeler error committed during the jury selection process, and the third for erroneous failure to adjudicate the defendant's competency to stand trial. People v. Anderson, was the only reversal for error peculiar to capital cases. As mandated by the 1978 death penalty initiative, the trial court read the Briggs instruction to the jury. Following Ramos and People v. Montiel, the Lucas court reversed the death judgment. "[W]hen a court charges the jury in accordance with this instruction," wrote Justice Mosk for the majority, "it commits serious error and necessarily subjects the defendant to prejudice. Ramos error thus invokes a virtual per se reversal rule. The court adhered to this rule and reversed the judgment of death in Anderson.

The Lucas court also found or assumed the existence of penalty phase error in eleven of the twelve cases in which the death judgment was affirmed. The only case in which there was an affir-

572. See supra text accompanying notes 11-14.
577. See supra text accompanying notes 11-14.
580. Anderson, 43 Cal. 3d at 1151, 742 P.2d at 1333, 240 Cal. Rptr. at 613.
581. Id.
582. The cases are listed in the order in which they were decided. The error found
ance of the judgment of death without a finding of some type of penalty phase error was People v. Bell.\textsuperscript{883} A rehearing was subsequently granted in Bell.\textsuperscript{884} With the exception of instances in which federal constitutional error was urged,\textsuperscript{885} in none of these eleven cases did the Lucas court majority clearly identify\textsuperscript{886} the standard in each of these cases is identified infra Appendix A. The cases are Ghent, Gates, Miranda, Howard, Kimble, Hovey, Ruiz, Hendricks II, Melton, Williams, and Wade.


584. Id.

585. In Ghent the prosecutor made reference to the impact of the victim's death upon her family, a reference the court called:

\begin{quote}
[\textit{A}rguably inappropriate under the recent decision in \textit{Booth v. Maryland} . . . which bars admission of victims' impact statements at the penalty phase of capital cases. Although \textit{Booth} is factually distinguishable, in any event an examination of the prosecutor's remarks leads us to conclude beyond a reasonable doubt that they had no effect on the verdict.
\end{quote}

People v. Ghent, 43 Cal. 3d 739, 771-72, 739 P.2d 1250, 1271, 239 Cal. Rptr. 82, 103-04 (1987), cert. denied, 485 U.S. 929 (1988). After reciting the prosecutor's argument, the court continued:

\begin{quote}
The prosecutor's remarks were brief and mild, commenting upon the obvious loss resulting from Mrs. Bert's death. Unlike \textit{Booth}, where the jury was given lengthy and specific details regarding the \textit{actual impact} on the victim's family, here the prejudicial effect of the prosecutor's comments was undoubtedly minimal or nonexistent.
\end{quote}

\textit{Id.} Although the court does not cite the \textit{Chapman} rule, its conclusions indicate that the "finding" is designed to comply with \textit{Chapman}.

In \textit{Miranda} essentially the same claim was made. The prosecutor referred to the effect that defendant's crime would have on the victim's family, and defendant claimed that the argument violated \textit{Booth v. Maryland}. After reciting the prosecutor's argument, the court said:

\begin{quote}
Unlike \textit{Booth}, where the evidence specifically detailed the impact of the crime on the victim's family, these remarks did no more than refer to the obvious and non-specific fact that Gary Black's murder would affect his family as well as Chandler and Gonzalez. Although prosecutors in the future should refrain from commenting on the impact of the murder on the victims, the prosecutor's comments here were harmless beyond a reasonable doubt.
\end{quote}


The same claim and the same disposition was made in Hovey. The prosecutor's argument was specifically identified, and \textit{Booth} was distinguished. Chief Justice Lucas wrote for a majority of the court:

\begin{quote}
Moreover, these remarks did not focus on the effect on the family but instead simply distinguished defendant's treatment of his victims from the treatment they received from their loving families. Accordingly, assuming \textit{Booth} would apply to prosecutorial argument of this kind, we conclude that the error was harmless beyond a reasonable doubt.
\end{quote}

People v. Hovey, 44 Cal. 3d 543, 577, 749 P.2d 776, 795, 244 Cal. Rptr. 121, 141, cert. denied, 488 U.S. 871 (1988).

586. For the reasons indicated in the following note, the occasional citation to
under which the errors unique to the penalty phase of capital trials were found to be harmless. In the last two cases to affirm death judgments during the Lucas court's first year, Williams and Wade, the court's citation to the plurality opinion in Allen suggests that the court may adopt the standard employed by the plurality in that case. However, the naked citation does not clearly establish that the Allen standard will govern penalty phase errors in future cases. That remains to be seen. Even if the reference to Allen in Williams and Wade was meant to establish the Allen standard as the standard for assessing the reversibility of penalty phase error, that still means that nine of the eleven cases in which penalty phase error was either found or assumed to exist were affirmed without the court identifying the standard it employed to find these errors to be harmless.

The failure of the Lucas court to clearly identify the standard under which it found these penalty phase errors harmless and under which it affirmed these death judgments produced a self-inflicted wound which may have injured the court as an institution, the rule of law, and the judicial process in California. The law governing reversible error in the highest reviewing court in a state is a truly rare species of law. It is a standard created by the court for the governance of its own conduct which has the force of law. Unless a standard is selected, clearly articulated, and carefully justified, the consumers of justice in the state will be rightfully suspicious of the court's actions. The rule of law and the judicial process as we know it today require the court to fetter its discretion, externalize its choice, and impartially apply the standard to the penalty assessment process for all of the reasons that it is required to do so for guilt determinations, and for all of the reasons which make the capital penalty assessment process unique.

A state supreme court should epitomize the rule of law, symbolize the orderly process of the law, and stand above all for impartial justice under law. Sending people to their deaths without complying with articulated rules demeans the law and the legal process. A finding that penalty phase error is harmless without announcing the standard which limits the justices' discretion and externalizes their choice means that these decisions lack the fundamental attributes of legal decision-making. Instead, those decisions appear to be the products of unfettered discretion. The justices do not speak then with the majesty and the authority of the law by which the People have

cases without articulating the standard which is actually being employed by the court does not suffice.

587. See APPENDIX
588. Id.
589. See supra text accompanying notes 564-72.
presumably consented to be governed.\textsuperscript{590}

To loosely paraphrase Chief Justice Traynor, if men can be sent to their deaths under these circumstances, who can enter a courtroom confident that her case will be decided by the ordinary course of the law common to us all? Will justice suffer? Yes. For adherence to the law and its orderly processes is an essential element of justice in California and the Nation.\textsuperscript{591}

III. \textbf{Penalty Phase Jury Instructions}

\textit{A. Introduction}

Jury instructions are the critical link between the rule of law and the right to trial by jury in any criminal trial. In a legal system that purports to operate by prior precedents and fixed rules of law, it would be virtually unthinkable to submit a case to the jury without careful instructions on the law and how to apply it in reaching a verdict.\textsuperscript{592} "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."\textsuperscript{593}

Though instructions are essential for the jury's fact-finding and law-applying functions in every criminal case, the uniqueness of the sentencing jury's task makes it even more important that the jury be instructed at the penalty phase "with entire accuracy."\textsuperscript{594} The first reality is that death is different. In recognition of that fact, the High Court has held that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."\textsuperscript{595} Second, when the jury is the sentenc-
ing authority, the eighth amendment's twin goals of preventing the death penalty from being administered in an arbitrary and unpredictable manner (the Gregg principle) and mandating that the sentencing authority be allowed to consider any relevant mitigating evidence (the Lockett principle) — can only be accomplished by accurate, unambiguous instructions. These instructions must inform the sentencing jury of the factors it must take into account in the sentencing decision, and the process it must employ in extracting this awesome penalty. Finally, the sentencing process so significantly differs from the guilt determination process that clear and unambiguous instructions are needed to ensure that the jury understands the difference between the fact-determination-law-application process of the guilt phase and the weighing-process-discretionary-judgment called for at the penalty phase. Jury instructions given at the sen-


597. A. The Gregg principle:

Justices Stewart, Powell, and Stevens concluded in Gregg that the Georgia sentencing scheme met the concerns of Furman by providing a bifurcated proceeding (Gregg, 428 U.S. at 190-92), instructions on the factors to be considered (Id. at 192-95) and meaningful appellate review of each death sentence (Id. at 195). The joint opinion summarized its holding as follows:

In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id. at 195. The principles have since been embraced by a majority of the Court. E.g., California v. Ramos, 463 U.S. 992, 999-1000 (1983).

B. The Lockett Principle:

Though neither Lockett nor Eddings involved the jury as the sentencing authority, it has since become abundantly clear that the sentencing jury must be accurately instructed on the Lockett principle, that the jury must be told to consider, as a mitigating factor, any aspect of the 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. Nevertheless, in Eddings the Court observed:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf


598. See supra notes 570-71 and accompanying text.
sentencing phase of capital trial should thus comport with both of the eighth amendment principles. Furthermore, the eighth amendment requires that appropriate instructions be given to the sentencing jury so that it can discharge the sentencing function in accordance with that amendment.

With this background in mind, let us return to several of the sentencing phase jury instructions discussed above. Since California v. Ramos and California v. Brown, neither the Briggs instruction nor the no-sympathy instruction, standing alone, raise federal constitutional issues. The no-sympathy instruction is, however, still a viable state issue. The Lucas court has followed Ramos II. Thus, there are no substantial state issues pending on the Briggs instruction. Since the High Court's decision in Boyde v. California, there are no remaining eighth amendment issues with the unadorned factor (k) instruction or with the Initiative's mandatory-sentencing-formula


600. E.g., Goodwin v. Balkcom, 684 F.2d 798-803 (11th Cir. 1982); Spivey v. Zant, 661 F.2d 464, 467-72 (5th Cir. 1981); Washington v. Watkins, 655 F.2d 1346, 1367-77 (5th Cir. 1981); Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 CALIF. L. REV. 317 (1981); see Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986); cf. Beck v. Alabama, 447 U.S. 625 (1980) (failure to instruct jury at guilt phase of a capital trial on lesser included offenses supported by the evidence violated Gregg principle even though it occurred at guilt phase); Gardner v. Florida, 430 U.S. 349 (1977) (capital sentencing procedure permitting the sentencing body to impose the death penalty partially on the basis of confidential information not disclosed to defendant or his counsel violates due process because risk of factual error is too high).

As Justice Reynoso wrote for the plurality in Davenport,

Clearly, if the jury must be permitted to give independent weight to any evidence of character or background on which an accused bases his plea for a life sentence, the jury must be so informed. The commands of Lockett and Eddings are not satisfied if mitigating evidence is admitted without proper instructions as to how to weigh the evidence.

People v. Davenport, 41 Cal. 3d 247, 283, 710 P.2d 861, 884, 221 Cal. Rptr. 794, 817 (1985) (plurality opinion by Justice Reynoso, joined by Justices Grodin and Kaus). Justice Broussard, wrote separately. With reference to the penalty phase error he said:

I concur in the discussion of the dispositive penalty phase issues set out in the plurality opinion of Justice Reynoso. I agree that the penalty judgment was flawed by instructional error: the failure to instruct that uncharged crimes must be proved beyond a reasonable doubt; the failure to direct the jury to consider and weigh defendant's mitigating character and background evidence. . . . I agree that these errors, in combination, were prejudicial and require a new penalty trial.

Id. at 295, 710 P.2d at 892, 221 Cal. Rptr. at 825-26.

601. See supra text accompanying notes 493-553.

602. See supra text accompanying notes 207-12.

603. See supra text accompanying notes 396-98.
Nevertheless, the Bird and Lucas courts consistently treated these two instructions as being erroneous. 605

B. An Analysis of the Factor (k), Factor (j), and Mandatory-Sentencing-Formula Instructions

Since the Initiative’s unadorned factor (k) instruction is precisely the same as the unadorned factor (j) instruction, and since the Lucas court has applied precisely the same law to each instruction, only the factor (k) instructions will be discussed here. The reader should understand, however, that everything written about the factor (k) instruction for the 1978 Initiative is equally applicable to the factor (j) instruction for the 1977 Legislation. Throughout its first year, the Lucas court treated the factor (k) instruction as being ambiguous. This instructional ambiguity has been resolved by looking to the arguments of counsel to “cure” the defects in the instruction. 606

The Lucas court approached the Initiative’s mandatory-sentencing-formula instruction with the same understanding held by the Bird court: a jury instruction which repeats the language of the Initiative’s sentencing provision, what is called here a mandatory-sentencing-formula instruction, is facially defective in the sense that it does not clearly inform the jury of the law’s requirements as interpreted in Brown. 607 Nevertheless, as we have seen above, a majority of the Bird court was never able to agree whether the arguments of counsel could be used to “cure” the error in this instruction, or whether the arguments of counsel were to be considered only with reference to the question of whether the error was prejudicial. 608 Justices Grodin and Mosk subsequently used the arguments of counsel to “cure” the error in the mandatory-sentencing-formula instruction in Allen and Myers, but their views were never embraced by a majority of the Bird court. 609 Despite this history, and without ever discussing the merits of this analysis, the Lucas court quickly concluded that the arguments of counsel were to be consulted to determine whether they “cured” the facial defects in the mandatory-sentencing-formula instruction. 610

The Lucas court thus has applied what I have called the Cure Technique to cure the errors in the mandatory-sentencing-process instruction, and what I have called the Ghent analysis to cure the er-

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604. See supra text accompanying notes 490-92.
605. See supra text accompanying notes 394-98, 493-553.
606. See supra text accompanying notes 433-80.
607. See supra notes 372-91 and accompanying text.
608. See supra text accompanying notes 324, 342-71.
609. See supra notes 352-71 and accompanying text.
610. See supra notes 372-91 and accompanying text.
rors in the factor (k) and factor (j) instructions. Though there is a formal difference in these two methods, (the Cure Technique is based upon the opinions written by Justice Grodin in Brown, Allen and Myers, whereas the Ghent analysis purports to spring from the various concurring and dissenting opinions in California v. Brown as interpreted by Chief Justice Lucas in Ghent, these two methods are otherwise precisely the same. They both look to the arguments of counsel to cure the facial defects in the unadorned factor (k) instruction and the mandatory-sentencing-formula instruction.

The theoretical justification for the use of the arguments of counsel to cure defects in the trial court’s instructions has never been articulated, nor has either Justice Grodin or the Lucas court ever offered a rationale for using the arguments of counsel in this manner. Nevertheless, these methods are based on the notion that a correct statement of the law made by counsel during argument will serve to “cure” an error contained in the judge’s instructions to the jury. Is such a cure technique a permissible method for finding that a penalty phase jury was adequately instructed on the law?

1. The Interpretation of Jury Instructions: The Traditional Rule

When a particular jury instruction is challenged, traditional doctrine provides a simple three level analysis for resolving the issue. The challenged instruction is first examined in isolation from the remainder of the charge. If the instruction is found wanting, the court proceeds to the next level. The instruction is then considered in the context of the entire jury charge, for other instructions might explain the particular infirm language, and thus “cure” the defect. If the other instructions fail to remedy the evil, then the jury charge is erroneous. The analysis then moves to the third stage: the question

611. See infra notes 433-80 and accompanying text.
612. See infra notes 352-68 and accompanying text.
613. See infra notes 433-46 and accompanying text.
614. See infra notes 442-43 and accompanying text.
615. This issue is especially critical since these instructions are intended to convey constitutionally mandated information to the jury. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987); Peek v. Kemp, 784 F.2d 1479, 1488 (11th Cir. 1986); Goodwin v. Balkcom, 684 F.2d 794, 798-803 (11th Cir. 1982); Spivey v. Zant, 661 F.2d 464, 468-72 (5th Cir. 1981), cert. denied, 485 U.S. 1111 (1982); Washington v. Watkins, 655 F.2d 1346, 1373-77 (5th Cir. 1981).
of whether the error requires a reversal of the judgment.\textsuperscript{617}

Three important principles apply to the evaluation of the challenged instruction at the first phase of the inquiry. (1) The court must carefully analyze "the words actually spoken to the jury."\textsuperscript{618} (2) The words must be tested by objective standards. (3) The reviewing court must have a specified degree of confidence that\textsuperscript{619} "reasonable jurors" would have understood the language of the instructions in an erroneous way.\textsuperscript{620}

The first criterion cautions the court to parse and analyze the actual wording of the instruction, not as the instruction appears in the books, but as it was actually read to the jury.

The second requirement, a standard of "reasonable jurors," emphasizes two points. First, the inquiry is not what the jurors actually understood the instruction to mean, for there is typically no proof available of the jurors actual understanding of the instruction. For reasons of policy, we would not want to question jurors as to how each understood the court's instructions, and then attack the verdict on the ground of misinstruction.\textsuperscript{621} This also means, of course, that there need be no indication in the record that the jury actually did misunderstand the instruction in order to find it defective. Second, the objective standard emphasizes that the court should look to our common understanding of the words and phrases used in the jury instructions. The court should not test the words and phrases in the instruction by a lawyer's or a judge's professional understanding, but by how they would likely be understood by the person on the street.

The third criterion cautions that it is the risk of misunderstanding that is the core of our concern with challenged jury instructions. An instruction is invalid if the reviewing court finds that there is a "reasonable likelihood" that "reasonable jurors" would have understood the instructions in an erroneous way.\textsuperscript{622} Or to put the matter in a slightly different way, the instruction is unconstitutional if there is a "reasonable likelihood" that the instructions would be understood in

\textsuperscript{v. Maxwell, 24 Cal. 14 (1864).}

\textsuperscript{617. E.g., Rose v. Clark, 478 U.S. 570, 583-84 (1986) (Sandstrom error is subject to harmless error analysis under Chapman v. California); Sandstrom, 442 U.S. at 526-27.}

\textsuperscript{618. E.g., Brown, 479 U.S. at 541 (the court must focus initially on the specific language challenged); Francis, 471 U.S. at 315 (this analysis "requires careful attention to the words actually spoken to the jury"); Sandstrom, 442 U.S. at 514 (accord).}

\textsuperscript{619. E.g., see Boyd v. California, 110 S. Ct. 1190, 1198 (1990) (and cases cited therein).}

\textsuperscript{620. Id.}

\textsuperscript{621. E.g., 3 STANDARDS FOR CRIMINAL JUSTICE, Standard 15-4.7(a) (2d ed. 1980). "Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined." Id.}

\textsuperscript{622. See Boyd, 110 S. Ct. 1190 (1990).}
an erroneous way by "reasonable jurors."\textsuperscript{623}

Once the instructions are found to be erroneous under this traditional method of analysis, the reviewing court would then assess the reversibility of the instructional error under the appropriate reversibility rule. However, this is not the method the Lucas court employed in finding that there was no instructional error with respect to the factor (k) and the mandatory-sentencing-formula instructions encountered during the first year of its tenure. Instead, the court assumed that these instructions were facially flawed. The court then went on to hold that the errors were cured by the arguments of counsel. Yet, under the traditional analysis, the arguments of counsel cannot be used to determine the meaning of the words spoken to the jury in the court's instructions.

2. The Cure Techniques

Thus, with the sole exception of \textit{Miranda} (with respect to the unadorned factor (k) instruction),\textsuperscript{624} none of the Lucas court cases the first year found error in giving the unadorned factor (k) or the Initiative's mandatory-sentencing-formula instructions to the sentencing jury.\textsuperscript{625} Using the Cure Techniques, the court found that each of these constitutional errors was "cured." Accordingly, the court affirmed every death judgment, despite the fact that under the traditional analysis each death judgment was flawed by instructional error.

We have already seen how this was done. Conceding that both instructions are facially insufficient, and that other instruction cannot cure these defects in a traditional phase two analysis,\textsuperscript{626} the court

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\textsuperscript{623} See also, California v. Brown, 479 U.S. 538, 541 (1987); Francis v. Franklin, 471 U.S. 307, 315-16 (1985). In \textit{Boyle v. California}, the Supreme Court held that the standard for assessing the validity of constitutionally required jury instructions is the standard of "reasonable jurors" rather than how a single "reasonable juror" might have understood the instructions. \textit{Boyle}, 110 S. Ct. at 1198.

\textsuperscript{624} See supra text accompanying notes 458-61.

\textsuperscript{625} See supra text accompanying notes 376-91, 433-80.

\textsuperscript{626} With respect to the factor (k) instruction, the court has occasionally suggested that the "all evidence" instruction "cures" the defect in the factor (k) instruction. This was the analysis used by Justice Panelli in \textit{Gates}. See supra notes 449-52 and accompanying text. Yet for the reasons indicated above, the "all evidence" instruction cannot cure the error inherent in the factor (k) instruction. See supra notes 453-57 and accompanying text. As though conceding the validity of this conclusion, the Lucas court has not relied upon this argument. See supra notes 458-80 and accompanying text. A traditional phase two argument, that an ambiguous instruction can be cured when it is considered in the context of the entire charge, has not been used to cure the flaws in the mandatory-sentencing-formula instruction.
looks to the arguments of counsel, both the prosecution and the defense, to “cure” the instructional error. In other words, the court treats the arguments of counsel in the same way the Supreme Court of the United States, and most of the other courts in the land, treat the remainder of the charge to the jury. “Context” for traditional doctrine means that ambiguous instructions can be clarified by other contemporaneous instructions. “Context” for the Lucas court, and for Justice Grodin as well, has a unique additional dimension: it includes the arguments of counsel. However, before looking at the authority that might justify the court’s using the arguments of counsel to cure instructional error, it might prove helpful to discuss the reasons for advocating a refusal to use the arguments of counsel to “cure” any defect in a jury instruction under any circumstances.

a. The Jurors’ Oath

The jury’s official life begins when each member of the panel takes the following oath of office:628

You and each of you do solemnly swear that you will well and truly try the cause now pending before this court, and a true verdict render therein, according to the evidence and the instructions of the court, so help you God?629

This oath is no mere formality. A verdict rendered by an unsworn “jury” is per se invalid and subject to reversal on that ground alone.630 The oath requires each juror to resolve the case in accordance with the instructions of the court, and having sworn to do so, there is every reason to believe that the jurors look exclusively to the court’s instructions for the law to apply in reaching their verdict. Indeed, a juror violates the oath if the juror listens to the arguments of counsel, gleams a legal rule not contained in the court’s instructions from the arguments, and uses that rule to reach a verdict.

b. The Jurors’ Courtroom Experience

The hour-to-hour experience in the courtroom teaches each juror that the law governing the case comes from the judge on the bench. In nearly countless ways the prosecutor and defense counsel will present conflicting views of the law in the courtroom, and the judge

627. E.g., 1 A. Reid, Branson’s The Law Of Instructions To Juries § 137 (1960 repl. vol.).
629. R. George, California Superior Court Criminal Trial Judges’ Benchbook 243 (1988) (emphasis added). The California Penal Code binds the jury “to receive as law what is laid down as such by the Court.” Cal. Penal Code § 1126 (West 1985). Undoubtedly this code section is the reason why the instruction provision is inserted in the oath.
resolves these disputes by a ruling accepted by both lawyers as the law of the case. Thus, each day in court the jurors see the fundamental distinction between the roles of the lawyers on the one hand and that of the judge on the other. The lawyers are partisan advocates whose views on the law are subordinate to the judge's legal rulings. Conversely, the judge is the impartial oracle of the law whose legal pronouncements are law for everyone in the courtroom.

c. The Instruction on Jury Instructions

The standard jury instructions, which undoubtedly form part of the basic charge in every criminal trial held in this state,\(^{631}\) tell the jury:

As jurors you have two duties to perform. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source. . . . Your other duty is to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict.

It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.\(^ {632}\)

d. The Context: The Medium Is Part of the Message

An argument by counsel is undoubtedly considered by the jury as precisely what it is: oral advocacy designed to persuade the jury to rule in a given way.\(^ {633}\) It is a rare trial indeed in which the arguments of the prosecutor and defense counsel do not clash in a num-

\(^{631}\) See CEB, California Criminal Law: Practice and Procedure §§ 32.5, 32.13, 32.22, 32.27-28 (1986).

\(^{632}\) Standard Jury Instructions (1979), supra note 7, CALJIC No. 1.00 (emphasis added). This version of the instruction was adopted in 1979. Prior versions of this standard instruction contained substantially similar language. In 1958, the instruction, then CALJIC No. 1, provided in pertinent part:

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as juror to follow the law as I shall state it to you. . . . You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me.

California Standard Jury Instructions (Criminal), CALJIC No. 1 (Committee on Standard Jury Instructions) (rev. ed. 1958). In 1970 this instruction, now called CALJIC No. 1.00, read as follows:

It is my duty to instruct you in the law that applies to this case and you must follow the law as I state it to you. . . . In determining whether the defendant is guilty or not guilty, you must be governed solely by the evidence received in this trial and the law as stated to you by the court.

California Standard Jury Instructions (Criminal), CALJIC No. 1.00 (Committee on Standard Jury Instructions) (3rd rev. ed. 1970).

ber of different and highly material respects. Anything said by the lawyers during these arguments is likely to be understood only in the context of the argument as partisan advocacy. Thus, a statement made by either the prosecution or the defense about the law applicable to the case will probably be understood as being little more than a partisan rendition of the law. Furthermore, the lawyer’s statement about the law is embedded within the context of a particular argument, and is urged along with a number of other points. In other words, a statement about the applicable law is part of the advocacy of a given point, and part of the advocacy of the entire cause. There are two points here. First, the statement will most likely be understood as a partisan statement of the law, as part of the lawyer’s advocacy. Second, the specific statement is not very likely to be long remembered. What will be remembered is the lawyer’s ultimate position on given issues.

The portion of the trial devoted to the jury charge is dramatically different from any other segment of the trial. It is the only sustained period of communication between the trial judge and the jury in the entire trial. The judge focuses on the jury, the lawyers sit in silence, and the judge speaks directly to each juror. There is no advocacy here, nor is there a mixture of messages. There is only the giving of the law to the jury by the non-partisan oracle of the law. Furthermore, the instructions appear to be precisely what they are (or should be): impartial, neutral statements about the law that controls the jury’s deliberations. If statements about the law are remembered, they will surely be remembered not from the arguments of counsel, but from the instructions given to the jury by the judge.

e. The Timing of the Charge

In the typical criminal case, the judge charges the jury immediately after the arguments of counsel are concluded. When either the prosecutor or the defense lawyer argues inconsistently with the judge’s later instructions, there is every reason to believe that each juror resolves that conflict by following the instructions given by the judge. After all, that is precisely what has been happening throughout the trial. One of the lawyers will make a legal argument, and the judge will subsequently overrule or contradict that statement by a definitive legal ruling which is accepted by everyone in the courtroom. When the prosecutor or the defense lawyer makes a legal argument to the jury and that legal argument is contradicted by one of the judge’s instructions, it is highly probable that the jury applies what it has learned in the courtroom and accepts the judge’s state-

634. See R. George, supra note 629, at 317.
ment as the definitive legal ruling. When this courtroom learning is coupled with the jurors' sworn duty to follow the judge's instructions, and the specific jury instructions requiring the jurors to "accept and follow the rules of law"635 as the judge states them to the jury, there seems to be little doubt that the jurors will resolve the conflict by following the judge's instructions.

The timing of the charge is important not only for its apparent conflict resolution quality, but because the instructions are the last statements that the jurors hear in the courtroom before the jury retires to deliberate. If the jury remembers statements of controlling principles of law, it is most likely that it will remember them from the judge's instructions.

f. The Written Instructions Are Given to the Jury

In most trials today we do not rely upon the jury to accurately remember everything said during the court's charge to the jury. In California, the jury is entitled to take the written instructions636 into the jury room and consult them during its deliberations.637 Though the judge retains discretion over the question,638 the general, if not universal, practice is to send the written instructions into the jury room for the jury's use during deliberations.639 Quite obviously, when the jury has access to the written instructions governing the law of the trial, it is a compelling inference that the jury will consult these instructions in the situation in which there is an asserted conflict between the recollection of a juror and the official charge, and that the jury will follow the written instructions.

g. The Arguments of Counsel Conflict with the Instructions

At this point we should review the claim made by the Lucas court that the arguments of both the prosecutor and the defense lawyer

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635. Id.
636. The jury instructions read by the court are either standard instructions on preprinted forms or written instructions submitted by the parties and agreed to be included in the charge by the judge. See CEB, CALIFORNIA CRIMINAL LAW: PRACTICE AND PROCEDURE § 32.13 (1986); see also CAL. PENAL CODE § 1127 (West 1985).
638. See supra, note 636.
639. See CEB, CALIFORNIA CRIMINAL LAW: PRACTICE AND PROCEDURE § 33.11 (1986); R. GEORGE, supra note 629, at 317.
"cure" the facial flaws in each of the instructions. The factor (k) instruction tells the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Realizing that this instruction is at best ambiguous and thus deficient on its face, the court looks to the arguments of counsel to cure this defect. If either the prosecutor or the defense counsel have argued that the jury can consider as a mitigating factor any other aspect of the defendant's character or record, though it does not relate to the "gravity of the crime," the court finds that the error is cured. However, these remarks of counsel do not purport to explain the instruction to the jury. They appear only to contradict the language of the court's factor (k) instruction which emphasizes the "crime" rather than the "criminal."

Furthermore, the Initiative's mandatory-sentencing-formula instruction is not ambiguous. It tells the jurors that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death!" Again realizing that the instruction is invalid on its face, the court looks to the arguments of counsel that suggest to the jury that the jury nevertheless retains discretion over the ultimate decision. If the court finds such an expression, it holds that there was no error in the instruction — the flaw has been cured. With respect to the mandatory-sentencing-formula instruction, the remarks of counsel simply and plainly contradict the court's instructions to the jury.

In view of the jurors' oath, what they have learned during the course of the trial about the primacy of the law announced by the judge, the specific instruction that the jurors must apply the law announced by the judge, the difference in the context between the arguments of counsel and the instruction phase of the trial, the timing of the court's instructions with reference to the arguments of counsel, and the circumstance that the jury may consult the actual written instructions given by the court, it is inherently improbable that the jury would resolve any ambiguity or conflict in the instructions (if indeed they actually remember what the lawyers specifically say) in favor of an argument given by the prosecutor or defense counsel.

The court's assumption that jurors resolve these ambiguities (with respect to factor (k)) and these conflicts (with respect to both instructions) by rejecting the judge's instructions in favor of an ar-

640. Standard Jury Instructions (1979), supra note 7, CALJIC No. 8.84.1(k).
641. See supra text accompanying notes 433-80. Miranda is the single exception. See supra notes 458-61 and accompanying text.
642. Standard Jury Instructions (1979), supra note 7, CALJIC No. 8.84.2 (emphasis added).
643. Because the arguments of counsel also appear to conflict with the language of the factor (k) instruction, the "conflicting argument" analysis applies to the factor (k)
argument made by the prosecution or the defense requires justification. However, there is not a word of justification from the Lucas majority, or from Justice Grodin in any of the opinions that employ the Cure Techniques.

The court's assumption that the jurors will reject the trial court's instructions in favor of arguments of counsel is simply wrong, for it ignores the realities of the legal culture in which the conflict takes place. Moreover, it is wrong for other reasons as well.

instruction, as well. Should one find that the instruction is only ambiguous, then this analysis would be correspondingly weakened.

The question of whether the arguments of counsel conflict with the unadorned factor (k) instruction was not addressed in Boyde v. California, 110 S. Ct. 1190 (1990). In the Supreme Court, Boyde argued that the factor (k) instruction is "ambiguous and therefore subject to an erroneous interpretation," Id. at 1198. Boyde also argued "that arguments by the prosecutor immediately before the jury's sentencing deliberations reinforced an impermissible interpretation of factor (k) and made it likely that jurors would arrive at such an understanding." Id. at 1200. In other words, the arguments of counsel complimented and reinforced the language of the factor (k) instruction. The Court then employed the traditional analysis and concluded that "there is not a reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character." Id. at 1198. The Court went on to reject petitioner's contention that the arguments of the prosecutor can be used to impeach the language of the jury instructions. Id. at 1200.

Justice Marshall's dissent, which was joined by Justices Brennan, Blackmun and Stevens (on this issue), took the position that because "the plain meaning of the factor's language" and because the instruction "unambiguously refers to circumstances related to the crime, one cannot reasonably conclude . . . that the jury understood factor (k) to encompass mitigating evidence regarding Boyde's character and background." Id. at 1207-08, 1231. The trial court had a duty imposed by the constitution to instruct the jury on the Lockett principle, and since the factor (k) instruction fails to discharge that duty, the instructions were fatally flawed. Id. Justice Marshall went on to consider the arguments of the prosecutor, not to cure the defect in the factor (k) instruction, but as reinforcing the instruction's "message that evidence unrelated to the crime did not fall within the scope of factor (k)." Id. at 1211.

Though the closely divided Boyde court disposed of the argument that the factor (k) instruction is constitutionally inadequate under the eighth amendment, the state law issues concerning the adequacy of the factor (k) instruction, of course, remain. The state law issue addressed in the remainder of this section is whether the arguments of counsel can be used to cure defects in jury instructions in criminal cases in California.

644. There is no indication in any of the cases applying this "cure" rule that the court has even considered any of these factors. It is true, of course, that in a given case one or more of these factors might not be present. The judge may not have sent the written instructions into the jury room and the jurors' official oath may not include the obligation to decide the case in accordance with the court's instructions, but at least these factors deserve discussion. The court should at least attempt to support its astounding assumption that jurors resolve these conflicts by rejecting the judge's specific, unambiguous instructions in favor of an argument made by either the prosecution or the defense (or both). But there is not a word of this from the Lucas majority.

h. The Rule Governing Conflicting Jury Instructions

Serious error is committed when the trial judge gives conflicting instructions to the jury (i.e., when the trial judge gives both correct and incorrect instructions on the same issue). When it is impossible for the reviewing court to know which of the conflicting rules were followed by the jury in reaching its verdict, the error compels a reversal of the judgment. The same rule is applied by the Supreme Court of the United States when conflicting instructions are given on a rule required by the United States Constitution. In other words, a flaw in an essential instruction cannot be cured by a conflicting or contradictory instruction.

Under this rule, if conflicting arguments of counsel were encased in a jury instruction and read to the jury by the trial court, along with factor (k) and the mandatory-sentencing-formula instructions, reversal would be compelled. It would be impossible for the reviewing court to know which instruction was actually followed by the jury in reaching the death verdict. Did the jury confine the use of the mitigating evidence to extenuating "the gravity of the crime even though it is not a legal excuse for the crime," or did it follow the instruction that the evidence of any other aspect of the defendant's character or record, though it does not relate to the "gravity of the crime," can be considered as a mitigating factor in reaching its sentencing decision? Did the jury follow the mandatory-sentencing-formula instruction and mechanically weigh the aggravating circumstances against the mitigating circumstances and then automatically impose the sentence of death when it concluded that the aggravating circumstances outweighed the mitigating circumstances? Or did the jury understand that the word "weighing" is a metaphor for assigning weights to the various factors, assessing the relative weights of those factors, and that the phrase "shall impose a sentence of death" does not mean what it says in as much as the ultimate decision remains committed to the sound judgment of each juror? The reviewing court cannot know the answer to these questions. If a re-


647. See supra note 645.


649. I am assuming here that the arguments are considered to conflict with the language of the factor (k) instruction. See supra note 643. The arguments of counsel would necessarily conflict with the language of the Initiative's mandatory-sentencing-formula instruction.

650. Standard Jury Instructions (1979), supra note 7, CALJIC No. 8.84.1(k).
versal is required in an ordinary criminal case, then surely a reversal is compelled when the critical uncertainty involves the judgment of death.

Of course, the cure technique used by the Lucas court involves the use of the arguments of counsel rather than the claim that the defects in the factor (k) and the mandatory-sentencing-formula instructions are cured by other jury instructions. However, if we assume that it is permissible to cure an instruction by the arguments of counsel, there would be no reason to treat those arguments differently from a formal jury instruction. If conflicting or contradictory jury instructions on an essential issue constitute reversible error, then under the same rationale conflicting or contradictory arguments of counsel cannot cure the defects in these instructions. The use of counsels' arguments to cure the defects in these instructions is thus wrong on the law, as well as being wrong as a matter of legal culture. However, there are other rules which are also violated by the use of counsels' arguments to cure defects in the jury instructions.

i. The Primacy of the Court's Jury Instructions

There is a fundamental separation of powers in the common law criminal trial as we know it. The trial judge is the oracle of the law, the umpire of the adversary system, and the ultimate guardian of the rights of the accused and the interests of the public in the administration of criminal justice. The role of counsel at the trial is quite different. Although both the prosecutor and defense counsel have obligations to administer criminal justice, they are primarily advocates at the trial.

A number of subsidiary rules flow from this allocation of power at the trial. The law the jury applies in the case must come from the court's instructions, not from the arguments or other statements made by counsel during the trial. Indeed, this rule is codified in

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652. E.g., 1 STANDARDS FOR CRIMINAL JUSTICE, Standards 3-1.1, 4-1.1 (2d ed. 1980).
653. People v. Kiser, 22 Cal. App. 435, 439, 71 P.2d 98, 100 (1937); STANDARD JURY INSTRUCTIONS (1979), CALJIC No. 1.00; see, e.g., 3 STANDARDS FOR CRIMINAL JUSTICE, Standard 15-3.6 (2d ed. 1980).
654. Kiser, 22 Cal. App. at 439, 71 P.2d at 100. Of course, the law applied by the jury may not come from an extra-trial source. Thus, it is grave misconduct for a juror to rely on law obtained outside of the trial process. E.g., In re Stankewitz, 40 Cal. 3d 391,
On a trial for any other offense than libel, questions of law are to be decided by the Court, questions of fact by the jury; and, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the Court.686

Though the trial court generally permits counsel to argue the applicable law to the jury,686 it is improper for counsel to misstate the law to the jury.687 In the event that counsel misstates the law, it is generally held that the error is cured by the court’s subsequent correct jury instructions, even though the court does not admonish the jury at the time.688 California law thus recognizes the overriding importance of the court’s jury instructions both in theory and in practice.

The primacy of jury instructions is not limited to correcting the arguments of counsel on the law, however. For example, it is the duty of the trial court to deter and correct misconduct by either the prosecution or the defense.689 As a general rule, opposing counsel must first object to the alleged misconduct. “The reason for this rule, of course, is that ‘the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury.’”690 Indeed, the reliance on jury instructions to correct errors during the trial is one of the hallmarks of a jury trial. Thus, it is commonly assumed that

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657. E.g., People v. Epps, 122 Cal. App. 3d 691, 706, 176 Cal. Rptr. 332, 341 (1981) (prosecutor misstated law relating to jury deliberations, characterized by court as “singularly inappropriate statement,” but not prejudicial because of the trial court’s instructions); People v. Butler, 104 Cal. App. 3d 868, 878-79, 162 Cal. Rptr. 913, 920 (1980) (prosecutor misstated the law, but the error was not prejudicial); People v. Calpito, 9 Cal. App. 2d 212, 222, 88 Cal. Rptr. 64, 69-70 (1970) (common statement of the rule in the dictum); CEB, PROSECUTORIAL AND JUDICIAL MISCONDUCT § 1.54 (1979 & Supp. 1986); see 1 STANDARDS FOR CRIMINAL JUSTICE, Standard 4-1.1(d) (2d ed. 1980); see also Boyd v. California, 110 S. Ct. 1190, 1200 (1990).
659. E.g., CAL. PENAL CODE § 1044 (West 1985); 1 STANDARDS FOR CRIMINAL JUSTICE, Standard 6-3.5 (2d ed. 1980); see supra note 651.
the court’s instructions cure most of counsels’ errors. 661 Furthermore, this assumption is embodied in the rule which presumes that jurors understand and follow the court’s instructions over the contrary statements or error of counsel. 662

In a nutshell, except for the most extraordinary cases, the court’s instructions are deemed to correct misstatements in the law made by both the prosecutor and defense counsel during argument. 663 But what about the converse proposition that the arguments of counsel cure errors in the court’s instructions? Simply put, this settled body of law embargoes the use of counsels’ arguments to cure instructional error. The fundamental principle here is the primacy of jury instructions, not their accuracy. 664 The jury surely does not know whether the arguments of counsel or the court’s instructions are correct. Nevertheless, the law requires the jury to apply the law as given by the court, 665 the jury is told to do so in the standard jury instructions, 666 and the law presumes that the jury actually understood and applied the court’s instructions. 667 This is true whether the instructions are right or wrong, whether they are accurate or a misstatement of the law. Counsel’s misstatement of the law creates the issue, but it is the primacy of jury instructions as the law of the case that cures the error. This means, of course, that under the primacy principle, the arguments of counsel can never cure errors in the jury instructions. If the court now holds that flaws in the jury instructions are cured by the arguments of counsel, then the court should overrule the primacy principle, and expressly reallocate the power over the law of the case to counsel.


663. See supra note 657.


665. See supra note 653 and accompanying text.

666. STANDARD JURY INSTRUCTIONS (1979), supra note 7, CALJIC No. 1.00.

667. See supra note 661.
j. Policy and the Adversary System

There are additional reasons for not permitting the arguments of counsel to cure faulty jury instructions. If defense counsel's correct statement of the law to the jury is held to correct errors in the court's jury instructions, then it means that counsel can never successfully attack an error in the court's instructions if counsel has correctly argued the law to the jury. In other words, defense counsel would be put to the choice of either abandoning the attack on the court's instructions at the instruction conference or refraining from correctly arguing the issue to the jury. Defense counsel has never been put to this choice before. I can think of no reason for doing so now.

If the Lucas court continues along its current path, then we must recognize that the court has effectuated a fundamental change in the criminal trial as we know it. One of the most important powers of the court, the power to instruct the jury on the law, will have been implicitly conferred on counsel. Counsel can then avoid the tension between the instructions and the argument by “properly” instructing the jury. Because a like power is conferred on the prosecutor, the jury would then resolve the conflict in the law argued by counsel by finding the applicable law as well as the applicable facts. We could not allow the judge to resolve the conflict for that would be nothing more than a return to the primacy of the court’s instructions, and the primacy doctrine ultimately means that the court’s instructions must be both the first and the last word on the law governing the jury’s decision.668

Even if we assume that this fundamental change in the jury trial is within the constitutional power of the court, much statutory669 and case law670 must be invalidated before such a drastic change could be expressly implemented. Though the court certainly has the power to overrule its prior cases, statutes can only be invalidated on constitutional grounds. No constitutional ground has been urged for invalidating California Penal Code section 1126, which binds the jury “to receive as law what is laid down as such by the Court.”671 Furthermore, most of us would agree that a court cannot implicitly do that which it cannot expressly accomplish. The court’s power to act indica-

669. For example, the California Penal Code provides as follows:
On a trial for any other offense then libel, questions of law are to be decided by the Court, questions of fact by the jury; and, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the Court.
CAL. PENAL CODE § 1126 (West 1985).
670. See supra notes 653-62.
rectly cannot be more potent than its power to act directly to accomplish the same goal.

The conversion of counsel’s role from advocate to law giver is not limited to the power to instruct the jury on the law it should apply in reaching its verdict. The judge’s inherent and statutory power to control the trial proceedings is infected as well. If the prosecutor commits misconduct, then there should be no reason for requiring opposing counsel to object, for the judge’s instructions would be no more potent than the law coming from the mouth of the prosecutor. The waiver rule of People v. Green should then be abolished along with the presumption that the jury follows the court’s instructions and a host of other long settled rules.

Such a fundamental change in the allocation of power between the trial court and counsel raises grave policy issues which must be debated and resolved. However, all we have from the Bird court is the dictum in Brown, which was later blindly followed by Justice Grodin’s plurality opinions in Allen and Myers. The Lucas court has been all too willing to simply accept the Grodin Cure Technique as a device to affirm judgments of death. Not a single word of policy and not a single acknowledgement that the court has departed from the traditional method for assessing error in jury instructions is found in any of the Lucas court’s opinions this first year.

Given that the use of the arguments of counsel to cure defects in the court’s instructions seems so devoid of merit, how then have the cases generally resolved this question when it has been raised?

k. The Case Law

Aside from the Lucas court cases employing the Cure Techniques, and Justice Grodin’s lead opinions in Allen and Myers, there are apparently only a few cases in the United States discussing the question of whether the arguments of counsel can be used to cure defects in the court’s instructions to the jury. This alone is of interest. It

672. See supra note 651.
674. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).
675. See supra note 662.
676. See, e.g., supra notes 653-59.
677. See supra notes 307-68 and accompanying text.
678. See supra notes 352-91, 433-80 and accompanying text.
679. At least my research disclosed only a few cases on this topic. They are discussed infra in the text accompanying notes 680-772. Though this issue was not raised or discussed in Boyde v. California, 110 S. Ct. 1190 (1990), the Court’s reasoning in Boyde

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suggests that few courts employ the arguments of counsel to cure defects in jury instructions. Several cases do, however, discuss this issue. The leading cases are *Taylor v. Kentucky*680 and *Carter v. Kentucky*.681

In *Taylor*, the Supreme Court of the United States held that the trial court’s refusal to give the defendant’s “requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial.”682 Before the Supreme Court, the Commonwealth contended “that no additional instructions were required because defense counsel argued the presumption of innocence in both his opening and closing statements.”683 The argument was rejected. “[The] arguments of counsel,” wrote Justice Powell for the majority, “cannot substitute for instructions by the court. . . . It was the duty of the court to safeguard petitioner’s rights, a duty only it could have performed reliably.”684

In *Carter* the Court held that upon the defendant’s request, the fifth and fourteenth amendments imposed a constitutional obligation on a state trial judge to instruct the jury on the defendant’s fifth amendment privilege not to testify, and that the jury may not draw any inference from the exercise of the privilege.685 During the course of his opinion for the majority, Justice Stewart wrote:

> And most certainly, defense counsel’s own argument that the petitioner “doesn’t have to take the stand . . . [and] doesn’t have to do anything” cannot have had the purging effect that an instruction from the judge would have had. “[A]rguments of counsel cannot substitute for instructions by the court.”686

Before Justice Grodin’s dictum in *Brown*,687 only two California cases mentioned the use of the arguments of counsel to cure defects in the court’s jury instructions.688 Both cases rejected the argument. Neither case was mentioned by Justice Grodin in *Brown*. The issue

supports the analysis set forth in this article. See id. at 1200 (per Rehnquist, C.J., majority opinion); id. at 1210-11 (Marshall, J., dissenting).

683. Id. at 488.
684. Id. at 488-89.
685. *Carter*, 450 U.S. at 289, 303, 305.
686. Id. at 304 (quoting *Taylor*, 436 U.S. at 489).
687. As indicated in the foregoing discussion, Justice Grodin’s statements in *Brown* are highly ambiguous. They could be interpreted to mean that the arguments of counsel can be consulted for the purpose of assessing the reversibility of the error on the one hand, or for the purpose of curing the error on the other. This ambiguity was apparently resolved by Justice Grodin’s lead opinions in *Allen* and *Myers* (which was signed only by Justice Mosk) which apparently adopted the latter interpretation. See supra notes 307-68 and accompanying text.
was first faced in a civil action for damages under the Federal Employers' Liability Act. In *Parker v. Atchison, T. & S. F. Ry. Co.*, the defendant contended that an erroneous instruction on causation was cured by the argument of plaintiff's counsel. Speaking for a unanimous court, Justice Hufstedler wrote, "We dismiss at once the defendant's contention that counsel's arguments to the jury can cure an error in the court's instructions. The arguments of counsel are not a substitute for instructions by the court." *Parker* was later followed by the California Supreme Court in *People v. Vann*.

All of the remaining cases that I found were from the federal Circuit Courts of Appeal. Except for dictum to the contrary in a recent opinion by the Eleventh Circuit, these cases all reject the conten-

689. 263 Cal. App. 2d 675, 70 Cal. Rptr. 8 (1968).
690. *Id.* at 680, 70 Cal. Rptr. at 12.
691. *Vann*, 12 Cal. 3d at 227 n.6, 524 P.2d at 829 n.6, 115 Cal. Rptr. at 357 n.6.

In *Vann*, Chief Justice Wright, speaking for a nearly unanimous court (Justice McComb dissented alone without an opinion), wrote:

Although counsel for defendants, in their closing arguments, also advised the jurors that in order to bring in guilty verdicts they were required to find the elements of the crimes beyond a reasonable doubt, this likewise did not cure the error of the court's omission. In its final charge the court made it clear that the jurors were to follow the law as explained by the court, and were not to follow rules of law stated in argument but omitted from the instructions.

*Id.* (citation omitted).

Relying on both *Parker* and *Vann*, Justice Reynoso filed a dissenting opinion on the use of the arguments of counsel to supplement (but not contradict) the trial court's failure to instruct the jury on the specific intent to torture required by the torture-murder special circumstance in *People v. Wade*, 43 Cal. 3d 366, 396 (1987) (advance sheet No. 4, Feb. 10, 1987). In rejecting the claim that the failure to so instruct was reversible error, the per curiam opinion of the majority said:

Although the special circumstance instruction, viewed in isolation, did not, by its express terms, explain that the "infliction of torture" element of the special circumstance included an intent-to-inflict-cruel-pain requirement, we believe that in light of the accompanying torture-murder instructions and the argument of counsel on this point there is no reasonable likelihood that the jury was misled on this issue.

*Id.* at 383. In response, Justice Reynoso wrote:

Nor does the prosecutor's closing argument cure the error of omission in the trial court's instructions. "The arguments of counsel are not a substitute for instructions by the court." It is well settled that it is the court — not counsel — which must explain to the jury the rules of law that apply to the case. . . . The prosecutor, as an advocate, simply cannot fulfill the function of an impartial judge.

*Id.* at 397-98 (citations omitted).

The Attorney General's petition for rehearing was granted in *Wade* on March 26, 1987, the first day of the Lucas court. See supra note 514 and accompanying text. Accordingly, Justice Reynoso's dissenting opinion, which was joined by Chief Justice Bird, was vacated, as was the per curiam opinion of the majority.

tion that the arguments of counsel can cure errors in the court’s instructions. The argument has been rejected in the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits.

suggestion that counsel’s argument can perfect an otherwise faulty jury charge is totally erroneous. Arguments of counsel can never substitute for the instructions given by the court.” 684 F.2d 794, 802-03 n.8 (11th Cir.), cert. denied, 460 U.S. 1098 (1983) (citation omitted). Because Peek was an en banc decision by a closely divided Eleventh Circuit, and because the holding in the panel opinion in Goodwin was not mentioned, the status of the Peek dictum is less than clear. See infra notes 761-72 and accompanying text.

693. United States v. Polowichak, 783 F.2d 410, 417 (4th Cir. 1986) (prosecution for illegal importation of marijuana into the United States); see United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977) (prosecution for sending obscene matter through the mail in violation of 18 U.S.C. § 1461). The Heyman case is ambiguous—it seems to refer to the notion that the arguments of counsel cannot be used to find instructional error to be harmless.

694. Spivey v. Zant, 661 F.2d 464, 472 n.12 (5th Cir. 1981) (failure of the trial court to properly instruct the jury on the use of mitigating factors during the capital sentencing process—the district court improperly relied upon the fact that Spivey’s lawyer “strenuously argued to the jury that it should consider certain mitigating circumstances in determining sentence” to find that the error was cured), cert. denied, 458 U.S. 1111 (1982); Washington v. Watkins, 655 F.2d 1346, 1374 (5th Cir. 1981) (trial court’s failure to instruct the capital sentencing jury on the use of non-statutory mitigating factors under Lockett), cert. denied, 456 U.S. 949 (1982); United States v. Wolfson, 573 F.2d 216, 221 (5th Cir. 1978) (prosecution for aiding in the preparation of fraudulent tax returns); United States v. Nelson, 498 F.2d 1247, 1248-49 (5th Cir. 1974).

In Washington, after quoting from Taylor v. Kentucky, the Court continued:

Only an instruction from the trial court can invest a particular concept—here the jury’s ability to consider nonstatutory mitigating factors—with the authority of the court. Indeed, were a jury to consider nonstatutory mitigating factors despite instructions by the court to the effect that it was duty-bound to consider only the two statutory mitigating circumstances, it would be acting “lawlessly.” “There is an element of capriciousness in making the jurors’ power to avoid the death penalty dependent on their willingness to accept [an] invitation to disregard the trial judge’s instructions.” 655 F.2d at 1375 (citations omitted).

In Wolfson, the Court rejected the argument saying:

The Government contends that the meaning of “forced or distress” sales was clear to the jury, especially since the defendant’s counsel used these words in his closing argument. But Wolfson’s counsel used such language in his closing only because the trial court had already announced its intention to use it in the charge. In any event, we look to the words of the trial court, not defense counsel, in determining if jury instructions are adequate. The burden of giving proper instructions is on the Judge. And it is his words, not the lawyers [sic], which “carry an authority bordering on the irrefutable.” 573 F.2d 216, 221 (citations omitted).

695. United States v. Bernard, 625 F.2d 854, 857 (9th Cir. 1980) (prosecution for conspiracy to manufacture methamphetamine). In Bernard, the court said:

The Government’s theory that the summation arguments of the defendants’ counsel adequately admonished the jury to consider accomplice testimony with caution is unpersuasive. A jury’s response to instructions from the judge is, and should be, quite different from its response to arguments from counsel. Counsel’s argument is neither law nor evidence, and the jury is so instructed.

Id.

696. United States v. Lofton, 776 F.2d 918, 921 (10th Cir. 1985) (prosecution for second degree murder).

697. Goodwin v. Balkcom, 684 F.2d 794, 802-803 n.8 (11th Cir. 1982). But see
Penalty Phase of the Capital Trial
SAN DIEGO LAW REVIEW

To be distinguished from the question of whether the arguments of counsel can cure a defect in the court’s instructions to the jury are claims that an instructional error resulted in the denial of a fair trial in violation of the due process clause of the fourteenth amendment. The Naughten-Kibbe-Whorton trilogy is the genesis of the latter line of authority.

In Cupp v. Naughten,698 a state trial judge included a presumption-of-truthful-testimony instruction in the charge to the jury.699 Also included in the charge were instructions on the state’s burden of proof, a detailed instruction defining reasonable doubt, and an additional instruction on the presumption of innocence.700 Naughten neither took the witness stand nor called any witnesses to testify in his behalf.701 Under these circumstances, he claimed that it was error for the trial judge to give the presumption-of-truthful-testimony instruction. The Oregon Court of Appeals affirmed the conviction, finding that the inclusion of the challenged instruction was not error. The Supreme Court of Oregon denied a petition for review. His state remedies thus exhausted, Naughten sought federal habeas corpus relief in the United States district court asserting that the presumption-of-truthful-testimony instruction implicitly shifted the state’s burden to prove guilt beyond a reasonable doubt and forced him instead to prove his innocence in violation of In re Winship.702 Finding that the giving of the instruction did not deprive Naughten of a federally protected constitutional right, the district court denied relief. The Court of Appeals for the Ninth Circuit reversed, and the Supreme Court granted the State’s petition for certiorari “to consider whether the giving of this instruction in a state criminal trial so offended established notions of due process as to deprive the respondent of a constitutionally fair trial.”703

Naughten’s claim was governed by the following principles:

In determining the effect of this instruction on the validity of respon-

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 Peek v. Kemp, 784 F.2d 1479, 1492 n.13 (11th Cir. 1986) (dictum statement to the contrary — en banc opinion by a closely divided Eleventh Circuit). See infra notes 761-72 and accompanying text.
699. The instruction read as follows: “Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.” Id. at 142.
700. Id. at 142-43.
701. Id. at 142.
702. Id. at 143.
703. Id. at 143-44.
dent's conviction, we accept at the outset the well-established proposition
that a single instruction to a jury may not be judged in artificial isolation,
but must be viewed in the context of the overall charge. While this does not
mean that an instruction by itself may never rise to the level of constitu-
tional error, it does recognize that a judgment of conviction is commonly
the culmination of a trial which includes testimony of witnesses, argument
of counsel, receipt of exhibits in evidence, and instruction of the jury by the
judge. Thus not only is the challenged instruction but one of many such
instructions, but the process of instruction itself is but one of several compo-
nents of the trial which may result in the judgment of conviction.704

Turning to the challenged instruction itself, the Court observed
that "[c]ertainly the instruction by its language neither shifts the
burden of proof nor negates the presumption of innocence accorded
under Oregon law."705 The Court then examined the challenged in-
struction in the context of the entire charge to the jury. "[T]he trial
court gave, not once but twice, explicit instructions affirming the pre-
sumption of innocence and declaring the obligation of the State to
prove guilt beyond a reasonable doubt."706 The trial court also spe-
cifically instructed the jury to consider the manner of the witness,
the nature of the testimony, and any other matter relating to the
witness' possible motivation to speak falsely in evaluating the testi-
mony.707 According to the Court, the jury thus

remained free to exercise its collective judgment to reject what it did not
find trustworthy or plausible. Furthermore, by acknowledging that a witness
could be discredited by his own manner or words, the instruction freed re-
spondent from any undue pressure to take the witness stand himself or to
call witnesses under the belief that only positive testimony could engender
disbelief of the State's witnesses.708

After again emphasizing that the trial court fully and explicitly
charged the jury on the presumption of innocence and the state's
duty to prove guilt beyond a reasonable doubt, the Court held that
the challenged instruction did not deny Naughten a fair trial guar-
anteed by the due process clause:

Whatever tangential undercutting of these clearly stated propositions may,
as a theoretical matter, have resulted from the giving of the instruction on
the presumption of truthfulness is not of constitutional dimension. The giv-
ing of that instruction, whether judged in terms of the reasonable-doubt
requirement of In re Winship, or of an offense against "some principle of
justice so rooted in the traditions and conscience of our people as to be
ranked as fundamental," did not render the conviction constitutionally
invalid.709

Although the Court obliquely and ambiguously suggested that
other components of the trial might be relevant to the constitutional

704. Id. at 146-47 (citations omitted).
705. Id. at 148.
706. Id. at 147.
707. Id. at 149.
708. Id.
709. Id. at 149-50 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))
(citation omitted).

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inquiry, the Court actually applied the traditional analysis for evaluating a constitutional challenge to a jury instruction. The Court first scrutinized the language of the instruction and then evaluated that language in the context of the entire charge to the jury. The Court then concluded that when the instruction was read in conjunction with all of the other instructions given to the jury, the theoretical possibility that the jury misunderstood the full and explicit charge on the presumption of innocence and the state's duty to prove guilt beyond a reasonable doubt was far too tangential to amount to a denial of the right to a fair trial.

Not once did the Naughten Court refer to the arguments of counsel or to any other component of the trial in analyzing the challenged instruction or in reaching its judgment. The Court's reference to other components of the trial was thus obiter dictum. Naughten is included in this analysis because of its use in subsequent cases.

The second case in the trilogy is Henderson v. Kibbe. Kibbe and a codefendant robbed a thoroughly intoxicated man named Stafford, and abandoned him on an unlighted, rural road in the State of New York, partially undressed, and without his coat or glasses. The temperature was near zero, visibility was obscured by blowing snow, and snow banks flanked the roadway. Twenty to thirty minutes later, while Stafford was helplessly sitting in a traffic lane about a quarter mile from the nearest lighted building, he was struck by a speeding pickup truck. The truckdriver testified that while he was exceeding the speed limit by ten miles per hour, the first of two approaching cars flashed its lights, presumably as a warning, but he did not understand the signal. Immediately after the cars passed, the driver saw Stafford sitting in the road with his hands in the air. The driver neither swerved nor braked his vehicle before it hit Stafford. Stafford was pronounced dead on arrival at a local hospital.

Kibbe and his accomplice were convicted of second degree murder under a statute providing that "[a] person is guilty of murder in the second degree" when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." Causation was a major issue at the

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710. See supra text accompanying note 704.
711. See supra text accompanying notes 610-23.
713. Id. at 147.
714. Id. at 148.
trial. Defense counsel argued that it was the negligence of the truck-
driver, rather than Kibbe's acts, that had caused Stafford's death, 
and that the defendant could not have anticipated the fatal accident.
The prosecutor argued that the death was foreseeable and would not 
have occurred but for the conduct of the defendants. The defendants 
were therefore the cause of death. The trial judge read both the in-
dictment and the statutory language to the jury, but he did not in-
struct the jury on the meaning of the statutory requirement that the 
defendant's conduct "thereby cause[d] the death of another per-
son."715 The judge did instruct the jury that "a person acts recklessly 
with respect to a result or to a circumstance described by a statute 
defining an offense when he is aware of and consciously disregards a 
substantial and unjustifiable risk that such result will occur or that 
such circumstance exists."716 Neither the prosecution nor the defense 
requested further instructions on the causation issue.

Though Kibbe did not challenge the sufficiency of the instructions 
to the jury in the Appellate Division of the New York Supreme 
Court, that court affirmed, with one judge dissenting in part on the 
ground that the trial court's charge did not adequately explain the 
issue of causation to the jury.717 In turn, the New York Court of 
Appeals also affirmed the judgment without considering the ade-
quacy of the charge to the jury because that question had not been 
raised in the trial court.718 Having thus exhausted his state court 
remedies, Kibbe sought relief by federal habeas corpus in the United 
States district court. The district court held that Kibbe's attack on 
the sufficiency of the charge failed to raise a question of constitu-
tional dimension, and thus it was not reviewable in a federal habeas 
corpus proceeding.719 The Court of Appeals for the Second Circuit 
reversed on the ground that the failure to instruct on causation vi-
olated the Winship requirement that the state prove every fact neces-
sary to constitute the crime charged, since the jury had not made a 
finding required by the Constitution.720

The Supreme Court granted the state's petition for certiorari 
"[b]ecause the Court of Appeals decision appeared to conflict with 
[the] Court's holding in Cupp v. Naughten."721 Before the Supreme 
Court, Kibbe challenged the failure to instruct on causation on two 
independent grounds: (1) it created a danger that the jurors failed to 
make an essential determination required by Winship; and (2) as-

715. Id. at 149.
716. Id.
717. Id. at 149-50.
718. Id. at 150.
719. Id. at 151.
720. Id.
721. Id. at 152.
assuming that the jury did reach the causation question, it did so without adequate guidance and might have rendered a different verdict under proper instructions. 722

Although the state was required to prove that the defendants’ conduct caused Stafford’s death, the Kibbe Court agreed with the New York Court of Appeals that the evidence was plainly sufficient to prove causation beyond a reasonable doubt. “It is equally clear,” wrote Justice Stevens for seven of the eight justices who participated in the decision, 723 “that the record requires us to conclude that the jury made such a finding.” 724

There can be no question about the fact that the jurors were informed that the case included a causation issue that they had to decide. The element of causation was stressed in the arguments of both counsel. The statutory language, which the trial judge read to the jury, expressly refers to the requirement that defendants’ conduct “cause[d] the death of another person.” The indictment tracks the statutory language; it was read to the jurors and they were given a copy for use during their deliberations. The judge instructed the jury that all elements of the crime must be proved beyond a reasonable doubt. Whether or not the arguments of counsel correctly characterized the law applicable to the causation issue, they surely made it clear to the jury that such an issue had to be decided. It follows that the objection predicated on this Court’s holding in Winship is without merit. 725

Kibbe’s second argument was rejected as well. The Court began by emphasizing that orderly trial procedures generally require that counsels’ views on the instructions be presented to the trial judge in time to enable the court to deliver an accurate charge and to minimize the risk of committing reversible error. 726 However, Kibbe’s lawyer had neither objected to the charge nor tendered an appropriate instruction, and for that reason the New York Court of Appeals had refused to consider the adequacy of the charge to the jury. 727 The strong interest in the finality of judgments and the state’s interest in orderly trial procedures “must be overcome before collateral relief can be justified.” 728 Accordingly, a petitioner’s burden of demonstrating that an erroneous instruction was so prejudicial as to warrant relief on federal collateral attack is more onerous than the showing required to establish plain error on direct appeal from a

722. Id.
723. Justice, now Chief Justice, Rehnquist did not participate in the decision of the case. Id. at 157. Chief Justice Burger wrote an opinion concurring in the judgment. Id.
724. Id. at 153.
725. Id. at 153-54.
726. Id. at 154.
727. Id. at 150.
728. Id. at 154 n.13.
lower federal court judgment:

The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned.'"

In this case, the respondent's burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation — beyond the reading of the statutory language itself — of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law. Since this omission escaped notice on the record until Judge Cardamone filed his dissenting opinion at the intermediate appellate level, the probability that it substantially affected the jury deliberations seems remote.729

The Court then assessed the significance of this error of omission by comparing the instructions which were actually given with the instruction that should have been given.730 Though the Court was unsure of the exact wording of the causation instruction which should have been given,731 an analysis of the opinion by the New York Court of Appeals indicated that "an adequate instruction would have told the jury that if the ultimate harm should have been foreseen as being reasonably related to defendants' conduct, that conduct should be regarded as having caused the death of Stafford."732 In view of the instruction on recklessness actually given in the case,733 the Court concluded that by returning a guilty verdict, the jury necessarily found that Kibbe was aware of and consciously disregarded a substantial and unjustifiable risk that death would occur. Because a person with such a state of mind "must also foresee the ultimate harm that the risk entails," the Court further found that the jury's determination that the respondent acted recklessly necessarily included a determination that the ultimate harm was foreseeable to him.734

Though admitting that an instruction on causation would not have been merely cumulative to the instruction on recklessness because it would have related to an element of the offense not specifically covered in the instructions given, the Court nevertheless believed it was logical to assume that the jurors would have responded to an instruction on causation consistently with their determination of the issues that were comprehensively explained, and that it is equally logical to conclude that such an instruction would not have affected their ver-

729. Id. at 154-55 (quoting Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (emphasis added) (citations omitted)).
730. Id. at 154, 156.
731. This was because Kibbe did not submit a draft instruction on the causation issue to the trial judge, and because the New York court apparently had no previous occasion to construe the causation requirement in the murder statute. Id. at 155.
732. Id. at 155-56.
733. See supra text accompanying note 725.
734. Kibbe, 431 U.S. at 156.
dict.\textsuperscript{735} Accordingly, the Court rejected Kibbe’s argument that the omission of more complete instructions on the causation issue “so infected the entire trial that the resulting conviction violated due process.”\textsuperscript{736} Furthermore, even if the Court were to indulge in the unlikely assumption that the jury might have reached a different verdict pursuant to an additional instruction, “that possibility is too speculative to justify the conclusion that constitutional error was committed.”\textsuperscript{737} Thus, the Court reversed the judgment of the Second Circuit.

The *Kibbe* Court did not rely upon the arguments of counsel to cure the defect in the instructions. It was Kibbe’s second argument that specifically attacked the adequacy of the instructions to guide the jury on the causation issue.\textsuperscript{738} In disposing of this second issue, the Court looked only to the instruction that should have been given, compared that instruction with the instructions that were actually given, and assessed the impact of the difference in light of the jury’s actual findings in the case.

Again, the Court employed a traditional analysis to determine whether this error of omission met the heavy burden imposed upon a petitioner collaterally attacking a state court judgment in federal court. It is common for a court to appraise the effect of an erroneous failure to instruct the jury on an element of an offense by looking to the instructions actually given and to the jury’s findings pursuant to those instructions to determine whether the jury necessarily resolved this issue.\textsuperscript{739} If the jury necessarily resolved the issue adversely to the defendant, then under the traditional analysis the error caused by omitting the instruction did not harm the defendant.\textsuperscript{740} If the omitted instruction did not harm the defendant on direct appeal from the judgment in state court, it would not come close to meeting the heavy burden required for collateral attack on the state court judgment in the federal courts — an error which so infects the entire

\textsuperscript{735} Id. In a footnote, the Court also speculated that it is not unlikely that a complete instruction on the causation issue would actually have been more favorable to the prosecution than the instruction on recklessness which the court actually gave. Id. at 156 n.16.

\textsuperscript{736} Id. at 156-57.

\textsuperscript{737} Id. at 157.

\textsuperscript{738} Id. at 152.

\textsuperscript{739} E.g., People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984); People v. Sedeno, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974).

\textsuperscript{740} See, e.g., Garcia, 36 Cal. 3d at 539, 684 P.2d at 826, 205 Cal. Rptr. at 265; Sedeno, 10 Cal. 3d at 703, 518 P.2d at 913, 112 Cal. Rptr at 1.
trial that the resulting conviction violates due process.\textsuperscript{741} In this respect \textit{Kibbe} is nothing more than an application of generally accepted techniques to assess the impact of the failure of a trial court to give a necessary instruction.

It is true, of course, that the Court did look to the arguments of counsel to resolve \textit{Kibbe}'s first argument. However, that argument focused on whether the omission of an instruction on causation created an unacceptable risk that the jury failed to make an essential factual determination on causation as required by \textit{Winship}.\textsuperscript{742} In other words, the first claim was that the jury may have completely failed to make a finding on causation, not that the finding may have been erroneous because the jury was not properly guided by the instructions.\textsuperscript{743} Thus, the sole question presented in the first argument was the likelihood that the jury had in fact made a finding on causation. In resolving this issue against \textit{Kibbe}, the Court looked to the arguments of counsel, and the instructions actually given to the jury.\textsuperscript{744} The instructions expressly referred to the requirement that the defendants' conduct must have caused the death of another person, and told the jury that all elements of the crime must be proved beyond a reasonable doubt.\textsuperscript{745} In referring to the arguments of counsel, the Court said: "Whether or not the arguments of counsel correctly characterized the law applicable to the causation issue, they surely made it clear to the jury that such an issue had to be decided."\textsuperscript{746}

\textit{Kibbe} thus holds that it is permissible to look to the arguments of counsel, as well as to the jury instructions actually given in a case, to determine whether the jury made a finding on a particular issue. But \textit{Kibbe} implicitly rejects the use of the arguments of counsel to cure an error of omission in jury instructions. That was the issue tendered by the petitioner's second argument, and though the Court used the arguments of counsel to resolve the first contention, the Court carefully refrained from using the arguments of counsel in resolving the second argument.

The final case in the trilogy is \textit{Kentucky v. Whorton}.\textsuperscript{747} Whorton was charged with several armed robberies. At his trial, numerous eyewitnesses identified him as the perpetrator of these robberies. Weapons, stolen money, and other incriminating evidence found in Whorton's automobile were introduced into evidence. He did not

\footnotesize{\textsuperscript{741} \textit{Kibbe}, 431 U.S. at 156-57. \\
\textsuperscript{742} \textit{Id.} at 152. \\
\textsuperscript{743} \textit{Id.} The latter argument is \textit{Kibbe}'s second contention. \\
\textsuperscript{744} \textit{Id.} at 153-54. \\
\textsuperscript{745} \textit{Id.} at 153. \\
\textsuperscript{746} \textit{Id.} at 153-54. \\
\textsuperscript{747} 441 U.S. 786 (1979).}
take the witness stand in his own defense. The only defense presented was alibi testimony by Whorton’s wife and sister that he was elsewhere at the time of the commission of one of the robberies. Defense counsel requested an instruction on the presumption of innocence, but the request was refused by the trial court. The court did instruct the jury that it could return a verdict of guilty only if the jurors found beyond a reasonable doubt that the respondent had committed the acts charged in the indictment with the requisite criminal intent.⁷⁴⁸

On appeal, the Kentucky Supreme Court held that under Taylor v. Kentucky an instruction on the presumption of innocence is constitutionally required in all criminal trials, and that the failure of a trial judge to give the instruction cannot be harmless error.⁷⁴⁹ Accordingly, the judgment was reversed. The Supreme Court granted the Commonwealth’s petition for certiorari to consider whether the Kentucky Supreme Court had correctly interpreted Taylor.⁷⁵⁰

Holding that the Kentucky Supreme Court erred, the Whorton Court said:

the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under Taylor, such a failure must be evaluated in light of the totality of the circumstances — including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors — to determine whether the defendant received a constitutionally fair trial.⁷⁵¹

The instruction on the presumption of innocence was required in Taylor because (1) the trial judge’s instructions were “Spartan,” (2) the prosecutor improperly referred to the indictment and otherwise made remarks of dubious propriety in his argument to the jury, and (3) the evidence against the defendant was weak.⁷⁵²

“[T]he combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner’s status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial.”⁷⁵³

These were the circumstances that compelled the trial court to give the presumption of innocence instruction in Taylor.⁷⁵⁴ The Ken-

⁷⁴⁸. Id. at 787.
⁷⁴⁹. Id. at 786-87 (citing Taylor v. Kentucky, 436 U.S. 478 (1978)).
⁷⁵⁰. Id. at 787.
⁷⁵¹. Id. at 789-90.
⁷⁵². Id. at 788-89.
⁷⁵³. Id. at 789 (quoting Taylor, 436 U.S. at 487-88).
⁷⁵⁴. Id.
tucky Supreme Court thus erred by reading *Taylor* as requiring the instruction in every criminal case. Holding that the Kentucky Supreme Court's inquiry "should have been directed to a determination of whether the failure to give such an instruction in the present case deprived the respondent of due process of law in light of the totality of the circumstances," the judgment was reversed and remanded so that the appropriate inquiry could be made.⁷⁵⁵

The rule in *Whorton* is clear enough. An instruction on the presumption of innocence is not required by the due process clause of the fourteenth amendment in every criminal case. However, the instruction is constitutionally required when it is necessary to protect the defendant's constitutional right to a fair trial. Regardless of what one may think of the wisdom of conditioning the presumption of innocence instruction on a case-by-case analysis of the "totality of the circumstances," it is clear that the arguments of counsel are one of the key factors that trigger the trial court's constitutional duty to instruct the jury on the presumption of innocence. In this respect, the *Whorton* rule may be thought of as a constitutional analog to the obligation of a trial court to instruct the jury on request to disregard prejudicial misconduct committed by counsel during argument. In short, there is nothing in *Whorton* supporting the use of the arguments of counsel to cure errors in the court's instructions to the jury.

The *Naughten-Kibbe-Whorton* trilogy does not sanction the use of the arguments of counsel to cure defects, whether of omission or commission, in the court's jury instructions. At best, *Naughten's* vague statements, which can be read to include the arguments of counsel, are mere dictum, for the Court neither used nor mentioned the arguments of counsel in analyzing the challenged instruction or in reaching its judgment.⁷⁶⁶ The analysis in *Naughten* reaffirms the traditional method of assessing error in a jury instruction. The court first focuses on the specific language of the challenged instruction. If it is found lacking, then the court examines the instruction's language in the context of the entire charge.⁷⁶⁷ The arguments of counsel are regarded as irrelevant to the accuracy of the court's instructions to the jury — they may not be used to cure an error of commission. *Kibbe* teaches that the arguments of counsel also cannot be used to cure an error of omission in the court's instructions. Again the Supreme Court of the United States relied upon the traditional analysis to resolve Kibbe's claim that the trial court's failure to give a specific instruction on causation warranted federal habeas corpus relief on the theory that he was denied the right to a fair trial

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⁷⁵⁵ *Id.* at 790.
⁷⁵⁶ *See supra* notes 738-45.
⁷⁵⁷ *See supra* notes 616-23.
guaranteed by the fourteenth amendment. *Kibbe* implicitly rejects the use of counsels' arguments to cure omissions in the jury charge, and reaffirms the Court's holding in *Naughten*. Finally, *Whorton* stands for the simple rule, recognized in a variety of situations, that the arguments of counsel can trigger a duty on the part of the trial judge to give an instruction under the specific facts and circumstances of the case, including the duty based upon the due process clause of the fourteenth amendment and its guarantee of the right to a fair trial. *Whorton* gives no support to the argument that errors in the trial court's instructions may be cured by the arguments of counsel.

This brings us around to the dictum statement made by a closely divided Eleventh Circuit in its en banc opinion in *Peek v. Kemp* that, had counsels' arguments been transcribed in the case, "we may well have been able to consider them as casting explanatory light on the jury's understanding of the court's sentencing instructions." This dictum appears in that portion of the *en banc* opinion authored by Circuit Judge Anderson. After acknowledging that *Taylor v. Kentucky* held that the arguments of counsel cannot substitute for instructions by the court, Judge Anderson sought to distinguish *Taylor*:

> There is an obvious distinction between a situation where the court gives no instruction, and thus the jury is at a loss as to its role, and one where the ordinary processes of a trial serve to illuminate the instructions which the court has given. Any instruction, no matter how clear, will have little meaning except in context. . . . The trial circumstances allow the jurors to apply the abstract instruction to the case before it. Here, of course, there were numerous instructions on mitigating circumstances, . . . and it would be unrealistic to refuse to consider the context of the guilt/innocence trial and the sentencing hearing, including argument of counsel, in evaluating whether such instructions were properly understood by the jury.

A few lines later the judge cites *Kibbe* as additional support for his dictum statement. Judge Anderson thus relies on the *Naughten-Kibbe-Whorton* trilogy to support his dictum assertion. Admittedly, there is a difference between the case in which no instruction is given to the jury on a critical topic and the case in which some instructions are given, but they are inadequate to fully inform the jury on that

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758. *See supra* notes 738-45.
760. *See supra* notes 738-45 and accompanying text.
761. 784 F.2d 1479, 1492 n.13 (11th Cir. 1986) (en banc).
762. *Id.* at 1481, 1485, 1492 n.13.
763. *Id.* at 1492 n.13 (citations omitted).
topic. It is the distinction between substituting the arguments of counsel for the court’s instructions and supplementing the court’s instructions by the arguments of counsel. The issue is whether this distinction justifies the use of counsels’ arguments to cure the omission in the court’s instruction when the omission is partial but not total. Quite clearly the *Kibbe* Court did not place significance on this distinction, for the issue there was whether an additional (a supplementing) instruction on causation was required, and yet the Court did not rely on the arguments of counsel to supplement the instructions and thus cure the error.\(^7\)\(^6\) Relying on *Naughten*, the only justification offered by Judge Anderson is that “[a]ny instruction, no matter how clear, will have little meaning except in context.”\(^7\)\(^6\) True enough, but this argument puts the cart before the horse. The mere fact that all jury instructions are uttered and undoubtedly understood in a particular trial context does not support a rule that, because the arguments of counsel are part of that context, they can be used to supplement the court’s instructions.\(^7\)\(^6\)

I will not repeat my analysis of *Naughten, Kibbe, Whorton*, and *Taylor*, the only cases upon which Judge Anderson relies for his dictum statement, except to indicate why his reliance on these cases is woefully misplaced. He relies on the Court’s disposition of the first argument made in *Kibbe* for the proposition that the arguments of counsel can be consulted to cure an error by supplementing the court’s instructions. Yet, as we have seen, that very technique was shunned by the *Kibbe* Court in its resolution of the second argument, the only argument relevant to Judge Anderson’s dictum.\(^7\)\(^6\) Furthermore, although the *Naughten* Court spoke in terms of the context in which the instructions are given, that statement was pure *obiter dictum*, because the Court looked only to the language of the challenged instruction and the remainder of the charge to assess the error in that case.\(^7\)\(^6\) Judge Anderson’s dictum also does not find support in *Taylor* or *Whorton*. Both of those cases set forth the circumstances in which a trial judge has a constitutional obligation to give an instruction on the presumption of innocence. Both cases recognize that the arguments of counsel may, in a given case, give rise to a constitutional duty to instruct on the presumption of inno-

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764. See supra text accompanying notes 726-46.
765. Peck, 784 F.2d at 1492 n.13 (citation omitted).
766. Justice Brennan succinctly made the point in *California v. Brown*: “Instructions are commonly given at the end of trial which clarify the significance of evidence and of events at trial, since the jury is not at liberty to assume that everything that occurs at trial is automatically or equally relevant to its deliberations.” 479 U.S. 538, 550 (1987) (Brennan, J., joined by Marshall and Stevens, J.J., dissenting).
767. See supra text accompanying notes 726-46.
768. See supra text accompanying notes 710-12.
cence. 769 However, neither supports the proposition that the arguments of counsel can be used to supplement the court's instructions to the jury. Judge Anderson's mistake apparently results from the question on appeal being necessarily cast in terms of whether the trial court committed error by failing to discharge the constitutional duty imposed by the totality of the circumstances in the case. A careless reading of these cases would permit one to forget that error simply means, in this context, a breach of the trial court's duty, a duty which may arise from the arguments of counsel.

Although Judge Anderson's dictum is thus unsupported by authority, he also asserts that "it would be unrealistic to refuse to consider the context of the guilt/innocence trial and the sentencing hearing, including argument of counsel, in evaluating whether such instructions were properly understood by the jury." 770 He cites neither fact nor authority for this brand of realism. However, for all of the reasons discussed above (the jurors' oath, the instructions informing the jury to take the law as given by the judge, and the other elements of what I have called the legal culture), the more realistic view is that jurors take the law only from the court's instructions. 771 For those same reasons, the jurors should receive the law only from the jury instructions, and appellate courts should refrain from using the arguments of counsel to speculate that the jury actually understood and applied a rule of law upon which they were not instructed by the court. 772

1. Conclusion

Outside of the California cases authored by Justice Grodin and the cases decided during the first year of the Lucas court, I have been unable to find a case holding that the arguments of counsel can be used to cure defects in an erroneous jury instruction. The courts have consistently applied the traditional method of analyzing jury instructions, discussed above. Undoubtedly, all of the reasons that I have grouped under the label of "legal culture" — the jurors' oath,

769. See supra text accompanying notes 747-54.
770. Peek, 784 F.2d at 1492 n.13 (emphasis added).
771. See supra text accompanying notes 627-78. Speaking for a majority of five Justices in Boyde v. California, Chief Justice Rehnquist wrote: "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument ... and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." 110 S. Ct. 1190, 1200 (1990).
772. Boyde, 110 S. Ct. at 1200.
the jurors' courtroom experience, the jury instruction on jury instructions, the allocation of power at the trial, the timing of the jury charge, the giving of the written instructions to the jury, and the simple conflict between the arguments of counsel and the court's instructions — demonstrate that the arguments of counsel cannot be used to cure defects in the jury instructions. Furthermore, an erroneous jury instruction cannot be cured by a conflicting jury instruction. Just because the arguments of counsel conflict with the factor (k) and the mandatory-sentencing-formula instruction, there is no reason to hold that conflicting arguments cure defects when conflicting instructions cannot. Surely the arguments of counsel can have no more impact on a jury than if they were included in a jury instruction and read to the jury. The settled law in California assumes that the judge's jury instructions will prevail over inconsistent statements made by counsel (the primacy of the judge's instructions). Finally, the policy underlining the adversary system should free counsel to argue the law without worrying that their statements will be held to cure errors in the court's instructions that counsel wishes to challenge on appeal after challenging them at the instruction conference.

Neither Justice Grodin nor the Lucas court has offered a theory, a rationale, a single justification, or a precedent (other than its own once the method was adopted) for the use of counsel's arguments to cure jury instruction errors. This method is completely unsupported. It should be abandoned. On the other hand, because both the Bird and Lucas courts have found such instructions to be erroneous, the Lucas court should decide whether these instructional errors require a reversal under the appropriate reversibility rule.

C. The Anti-Sympathy Instruction

1. Analysis

Everything that has been said about the use of the arguments of counsel to cure errors in the factor (k) and mandatory-sentencing-formula instructions is equally applicable to the anti-sympathy instruction with one exception. This exception is derived from the

773. The anti-sympathy language in the standard jury instruction has not changed significantly over the years. In 1958 the instruction, then CALJIC No. 1, used the following language: "The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feelings." CALIFORNIA STANDARD JURY INSTRUCTIONS (CRIMINAL) (Committee on Standard Jury Instructions), CALJIC No. 1 (rev. ed. 1958). By 1970, the introductory language had been slightly changed: "You must not be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feelings." CALIFORNIA STANDARD JURY INSTRUCTIONS (CRIMINAL), CALJIC No. 1.00 (Committee on Standard Jury Instructions) (3rd rev. ed. 1970). In the instruction which was adopted in 1979, the introductory language was again slightly different: "You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." STANDARD JURY INSTRUCTIONS
language of Justice O'Connor's concurring opinion in *California v. Brown*, and, to a lesser extent, from the dissenting opinion of Justice Brennan, which was joined by Justices Marshall and Stevens. As we have seen above, the Lucas court reads the concurring opinion of Justice O'Connor as setting forth the applicable rule governing penalty phase jury instructions, at least when the anti-sympathy and factor (k) instructions are both read to the jury. To properly understand this issue, it is necessary to examine the precise language used by Justice O'Connor in her concurrence:

On remand, the California Supreme Court should determine whether the jury instructions, taken as a whole, and considered in combination with the prosecutor's closing argument, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the respondent. The jury was given instruction 8.84.1 which lists the specific aggravating and mitigating factors the sentencer is to consider in determining punishment. Only one subsection of that instruction even arguably applies to the nonstatutory mitigating factors:

"Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC 8.84.1(k).

The respondent contends that the jury might have understood this instruction as mandating consideration only of mitigating evidence about the circumstances of the crime, and not evidence about the defendant's background and character. Moreover, in his closing remarks, the prosecutor in this case may have suggested to the jury that it must ignore the mitigating evidence about the respondent's background and character. In combination with the instructions, the comments of the prosecutor may create a legitimate basis for finding ambiguity concerning the factors actually considered by the jury.

Because it is open to the California Supreme Court to determine on remand whether the jury was adequately informed of its obligation to consider all of the mitigating evidence introduced by the respondent, I concur in the judgment and opinion of the Court.

Although Justice O'Connor indicates that the prosecutor's arguments should be taken into account in determining whether the jury was adequately informed on the use of mitigating evidence, the opin-

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(1979), *supra* note 7, CALJIC No. 1.00. The instruction was designed to be used only at the guilt phase of a capital trial, and for all other non-capital cases (for the penalty in non-capital cases is not determined by the jury in California). *See, e.g.*, *Use Note, California Standard Jury Instructions (Criminal),* CALJIC No. 1.00, at 3 (Committee on Standard Jury Instructions) (3rd rev. ed. 1970).


775. *Id.* at 547. Chief Justice Lucas' opinion for the court in *Wade* also cites Justice Blackmun's dissent for support of this rule. *People v. Wade*, 44 Cal. 3d 975, 996 (1988). However, I find nothing in Justice Blackmun's dissent that remotely suggests support for the proposition that the arguments of counsel may be used to cure an error in the jury instructions. *See Brown*, 479 U.S. at 561 (Blackmun, J., dissenting).

776. *See supra* notes 512-42.

ion is ambiguous on precisely how the prosecutor’s argument is to be used. The last italicized passage implies that Justice O’Connor has in mind the use of the prosecutor’s argument only to demonstrate the inadequacy of the jury instructions in much the same way as the insufficiency of the instructions may be established by reviewing the evidence introduced at the trial and the arguments of counsel. For example, in a criminal case the trial court is obligated to instruct the jury on every defense theory adequately supported by the evidence so long as it is not inconsistent with the defendant’s theory of defense. To make the latter determination, courts frequently look to the arguments of counsel to ascertain whether the sought instruction was inconsistent with the defense theory. Under Whorton, the arguments of the prosecutor, considered in the light of the other circumstances in the case, may give rise to a constitutional duty on the part of the trial judge to give an instruction to protect the constitutional rights of the defendant. If this is the meaning of Justice O’Connor’s opinion, that the arguments of the prosecutor can only be used as a means of establishing that the trial judge should have given further instructions to the jury, then I have no quarrel with this statement. However, if this is the meaning of Justice O’Connor’s concurring opinion, the opinion certainly does not condone the use of the prosecutor’s argument to cure errors in the jury instructions.

This ambiguity in Justice O’Connor’s concurring opinion is compounded by the posture of the case before the Supreme Court and Justice O’Connor’s reference to the unadorned factor (k) instruction. As indicated above, the California Supreme Court reversed the judgment in Brown solely because the anti-sympathy instruction was read to the penalty jury. The Brown court expressly refused to rule on the claimed error in reading both the factor (k) instruction and the mandatory-sentencing-formula instruction. Although the Attorney General sought review before the High Court of the mandatory-sentencing-formula instruction in question two of the State’s petition, the Court limited its grant of certiorari to the first

780. See supra text accompanying notes 747-54.
781. See supra notes 342, 372-74, 504 and accompanying text.
783. See supra note 373.
question — the validity of the anti-sympathy instruction.\textsuperscript{784} Thus, the validity of the factor (k) instruction was not before the High Court in Brown.

Justice O'Connor's quotation of the factor (k) instruction and her discussion of that instruction in conjunction with the Court's holding on the anti-sympathy instruction is puzzling. Perhaps Justice O'Connor meant simply to alert the California Court that the majority's disposition of the anti-sympathy instruction does not resolve the issue of the constitutional validity of the entire jury charge on remand. In other words, since the majority found no constitutional error in the use of the anti-sympathy instruction, on remand the California Supreme Court would apparently be required to determine the validity of the factor (k) instruction, and perhaps, the mandatory-sentencing-formula instruction as well. Though this may explain Justice O'Connor's reference to the factor (k) instruction, it does little to explain her reference to the arguments of counsel.

Because Justice O'Connor does not explicitly state that the arguments of counsel can be used to cure defects in the court's penalty phase instructions, and because the law does not support the use of counsel's arguments for that purpose, the ambiguity in Justice O'Connor's opinion should be resolved in favor of the interpretation that the arguments of the prosecutor can only be used to establish that the instructions are erroneous, and not to cure errors in the instructions. As we have seen, Whorton provides authority for this use of the prosecutor's arguments; and in other contexts the arguments of defense counsel may be evaluated to determine whether the trial judge was obligated to give an additional instruction to the jury.\textsuperscript{785}

This interpretation is not only consistent with existing law, but it is also the most consistent interpretation of the language of her opinion — specifically, the indication that only the prosecutor's arguments are relevant, and the suggestion that,

in his closing remarks, the prosecutor in this case may have suggested to the jury that it must ignore the mitigating evidence about the respondent's background and character. In combination with the instructions, the comments of the prosecutor may create a "legitimate basis for finding ambiguity concerning the factors actually considered by the" jury.\textsuperscript{786}

Under these circumstances, the theory of Whorton v. Kentucky, coupled with Lockett and Eddings, would require the trial judge to

\textsuperscript{784} See supra note 374.
\textsuperscript{785} See supra notes 747-54.
\textsuperscript{786} Brown, 479 U.S. at 546 (O'Connor, J., concurring).
give additional instructions to protect the defendant’s constitutional rights, as well as the rights of the general public, in the capital sentencing process. If the prosecutor made the argument suggested by Justice O’Connor, and if the required instructions were not given by the trial court, then constitutional error in the jury instructions at the penalty phase would have been established.

However, let us assume that Justice O’Connor found Justice Grodin’s dictum concerning the use of the arguments of counsel, which appeared in the California Supreme Court opinion in the case, to be attractive. Let us further assume that Justice O’Connor set out in her concurring opinion in California v. Brown to establish that the arguments of the prosecutor can, indeed, be used to cure an error in a jury instruction at the penalty phase of a capital trial. Is the Lucas court correct in relying on Justice O’Connor’s opinion for the rule that the arguments of counsel, including the arguments of defense counsel, can be used to cure defects in jury instructions?

The answer must be a resounding no! Quite obviously, one vote on the High Court does not a create a constitutional rule. The majority opinion in California v. Brown does not once mention the use of the arguments of counsel to resolve the validity of the challenged jury instruction at issue in Brown. Precisely the same observation is true of Justice Blackmun’s dissenting opinion. Thus a majority of the Justices did not agree with the analysis used by Justice O’Connor.

Of equal importance, Justice Brennan’s opinion does not support the use of the arguments of counsel to cure errors in the jury instructions even though his dissenting opinion (which was joined by Justices Marshall and Stevens) made reference to the arguments of the prosecutors in various California cases. Justice Brennan identified the issue addressed by his dissent as follows:

A sentencing instruction is invalid if it precludes the sentencer from “considering, as a mitigating factor, any aspect of a defendant’s character or record . . . that the defendant proffers as a basis for a sentence less than death.” Furthermore, an instruction cannot stand if it leaves the jury unclear as to whether it may consider such evidence. “[W]e may not speculate as to whether the [sentencer] actually considered all of the mitigating fac-

787. I am, of course, indulging in pure speculation here. But since I can find no authority to support Justice Grodin’s dictum in Brown ambiguously intimating that the arguments of counsel may be used to cure defective jury instructions, it is possible that Justice O’Connor simply liked the idea expressed by Justice Grodin in the Brown majority. Nevertheless, for the reasons already indicated, I believe that Justice O’Connor probably had the rule of Whorton v. Kentucky in mind when she penned these words.

789. Id. at 561-63 (Blackmun, J., dissenting).
790. This majority of Justices consists of Chief Justice Rehnquist, the author of the majority opinion in California v. Brown; Justices White, Powell, and Scalia who joined that opinion; and Justice Blackmun, who dissented.
tors and found them insufficient to offset the aggravating circumstances," since our case law "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered . . . ."

The issue in this case is whether a jury might reasonably interpret the California jury instruction in either of these two ways. The facial language of the instruction, the manner in which it has been construed in trials in California, and experience with other provisions of the state sentencing scheme all buttress California's interpretation of its own jury instruction. In light of this evidence, there is simply no warrant for this Court to override the state court's assessment of how a jury in California might reasonably interpret the instruction before us.\footnote{792}

Justice Brennan is adhering to the traditional rule that the validity of an instruction is determined by how "reasonable jurors" could interpret the instruction.\footnote{793} But he finds no reason for the Court to reject the California Supreme Court's "assessment of how a jury in California might reasonably interpret the instruction before us." He would thus affirm the judgment for the California Supreme Court's interpretation as "undeniably reasonable."\footnote{794} "Our assessment of the state court's interpretation," wrote Justice Brennan, "need not rest simply on what seems in the abstract the most plausible response to the instruction's plain language. That court's construction is bolstered by experience with how the instruction actually has been interpreted in the state trial system."\footnote{795} Justice Brennan then looks to the arguments of various prosecutors in California capital cases as evidence of how reasonable jurors could have interpreted the antisympathy instruction:

Experience with the antisympathy instruction therefore reveals that it is often construed as precluding consideration of precisely those factors of character and background this Court has decreed must be considered by the sentencer. . . . Even if the interpretation placed upon the instruction by prosecutors is regarded as the product of excessive zeal, rather than dispassionate construction, the state court had ample reason to conclude that an instruction that consistently lends itself to such plausible construction is likely to leave the jury with the impression that they may not consider certain mitigating evidence, or at least with a sense of confusion on this point. Experience with such instructions over the past 17 years thus provides persuasive support for the state court's construction and invalidation of its own jury instruction.\footnote{796}

Justice Brennan's dissent simply does not support the use of the

\footnotesize{794. Brown, 479 U.S. at 548, 551.}
\footnotesize{795. Id. at 551-52.}
\footnotesize{796. Id. at 555.}
arguments of counsel to cure errors in jury instructions. He uses these arguments for a single narrow purpose: they evidence how reasonable jurors could have interpreted the no sympathy instruction (since "reasonable counsel" have made the same mistake). The arguments, in other words, demonstrate the reasonableness of the California Supreme Court's interpretation of the instruction.

Thus, even if one assumes that Justice O'Connor would use the arguments of counsel to cure defects in the jury instructions, that view is held by Justice O'Connor alone. The remaining justices test the validity of jury instructions with the use of the traditional method. Under that traditional method, the arguments of counsel cannot be used to cure defects in the instructions.

2. Conclusion

For the reasons discussed above, the use of the arguments of counsel to cure defects in jury instructions should be rejected. The traditional method of analyzing jury instructions was developed to analyze ordinary jury instructions. Much later it was employed to analyze constitutionally mandated jury instructions as well. Whether the defects in the instructions concern constitutionally mandated information, or are aimed at matters of purely local concern, the same method of analyzing jury instructions is, and should be, employed. Under that analysis, the arguments of counsel cannot be used to cure defects in the anti-sympathy instruction as a matter of state law. The California Supreme Court should refrain from using the arguments of counsel to avoid the remaining question concerning the anti-sympathy instruction: should the court overrule precedent and hold that it is not error to instruct the penalty jury in the language of the anti-sympathy instruction as a matter of the law of the State of California?

Finally, it is important to note that neither Justice Grodin nor the Lucas court has offered a theory, a rationale, or a precedent (other than its fallacious interpretation of the opinions of Justices O'Connor and Brennan in California v. Brown) for the use of counsel's arguments to sustain death verdicts in the face of claims that the sentencing jury was inadequately instructed because the anti-sympathy instruction was read to the jury. The only readily apparent reason for resorting to the use of the arguments of counsel to cure the error of including this instruction in the jury charge is that it has allowed the Lucas court to affirm every death judgment in which the anti-sympathy instructional error is common in the early death penalty cases, the Cure Technique has permitted the court to affirm cases that it might have had to reverse had it applied existing traditional doc-
trine. To hold otherwise would require the court to overrule precedent holding that it is error under California law to instruct the penalty jury with the anti-sympathy instruction, or to find that the instruction was harmless error in each case. For reasons known only to the court, it has employed the Cure Technique instead. It should be beyond argument, however, that a method of analysis adopted for the sole purpose of affirming death judgments is completely impermissible.

IV. Conclusion

In 1957 California became the first state in the nation to divide capital trials into two separate phases: the guilt phase and the penalty phase. All sentencing proceedings were severed from the guilt determination process and placed in a sentencing phase of the trial. If the defendant was found guilty of an offense punishable by death, then the case proceeded to the assessment of the penalty at the penalty phase of the capital trial. The penalty phase remained a prominent feature of California death penalty law until it was repealed in 1973, when California adopted a mandatory death penalty statute in response to Anderson and Furman. Since the death penalty was automatically imposed upon conviction of the capital offense under that statute, there was no need for a separate penalty phase. After the mandatory death penalty statute was invalidated on eighth amendment grounds, the penalty phase was restored by the 1977 Legislation. The 1978 Initiative retained the penalty phase as a critical part of the capital trial, though several important changes were made.

Although the Supreme Court of the United States has never held that capital trials must be bifurcated to comply with the cruel and unusual punishments clause of the eighth amendment, today the
The great distinguishing feature between the penalty phase of pre-
Furman law and the penalty phase of the capital trial under both the
1977 Legislation and the 1978 Initiative is that the assessment of the
penalty is now guided by aggravating and mitigating circumstances,
whereas under the pre-Furman California law the sentencing deci-
sion was committed to the sentencing authority's unguided discre-
tion. This change was required by the cruel and unusual punish-
ments clause of the eighth amendment. With the adoption of the
aggravating and mitigating circumstances theory a new body of pen-
alty phase law began its evolution. It was initially developed in a
series of automatic appeals decided by the Bird court, since the Bird
court had the task of elaborating this new doctrine as both statutes
became effective during its tenure. When the Bird court's tenure en-
ded, the task of developing of penalty phase law was handed to the
Lucas court.

After the votes were counted in the November 1986 retention
election, it was widely anticipated that the California Supreme
Court as reconstructed by Governor George Deukmejian would over-
rule much of the Bird court precedent interpreting the two death
penalty statutes. In a series of briefs filed in the California Su-
preme Court, the Attorney General of California asked the court to
reconsider and overrule "virtually every . . . decision construing the
1977 or 1978 death penalty laws." However, with respect to pen-
alty phase law, the Lucas court turned down the Attorney General's
invitation. The Lucas court has followed the penalty phase law ar-
ticated by the Bird court in the automatic appeals decided during
the first year of its tenure. It has applied the Harris Single-Charge
Rule, the Ramos embargo on the Briggs instruction, and the
cated capital trial. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428
U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Poulos, The Supreme Court,
supra note 19, at 192-99. On the other hand, the two mandatory capital punishment
statutes enacted in North Carolina and Louisiana, like the California mandatory capital
punishment statute, did not provide for a separate penalty proceeding. These statutes
were invalidated. See Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Loui-
siana, 428 U.S. 325 (1976). Although Crampton v. Ohio was not overruled, Woodson
appears to be "squarely contrary" to Crampton. See Woodson v. North Carolina, 428
U.S. at 324 (Rehnquist, J., dissenting).

803. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PEN-
805. See Poulos, Capital Punishment, supra note 1, at 275-76.
806. People v. Anderson, 43 Cal. 3d 1104, 1153, 742 P.2d 1306, 1335, 240 Cal.
807. See supra notes 155-60 and accompanying text.
808. See supra notes 205-12 and accompanying text.
Robertson Reasonable-Doubt Rule. Though the court was not directly confronted with the Boyd Rule, the decisions that first year indicate that the Lucas court will apply that rule in much the same way as it was applied by the Bird court.

Plurality opinions have neither the binding force of precedent nor the respect conferred by the doctrine of stare decisis. The Lucas court was thus free to accept or reject the Bird court's plurality opinions based upon its own conceptions of law and sound public policy. A court's acceptance or rejection of a rule announced in a plurality opinion should proceed with a reasoned analysis of the arguments for and against the rule in question. This is especially true when the plurality opinion has itself failed to give a reasoned analysis of why the rule was adopted. The Lucas court confronted two rules that had been adopted only by a plurality of the Bird court. The court declined to follow the plurality opinion in one case, and readily accepted the plurality's rule in the other.

The Lucas court refused to follow the plurality opinion in Harris, insofar as it created the Harris Overlapping-Felony Rule. According to the analysis presented in a companion article, the court correctly rejected that rule. That article also suggests that another rule should be adopted to prevent the improper inflation of the aggravating circumstances at the penalty phase of the trial by preventing the use of multiple felony-murder special circumstance findings. But the Lucas court's rejection of the Harris Overlapping-Felony Rule is also important for the way in which it was done. In the process of rejecting that rule, the court considered the arguments for and against the plurality's rule, then rejected it upon a reasoned analysis of the issue. In doing so, the court decided the case consistently with the requirement that appellate courts give reasoned opinions supporting their judgments.

The second occasion in which the Lucas court considered a Bird court plurality rule (in this case a plurality of only two justices) resulted in the court adopting the Cure Technique espoused by Justice

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809. See supra notes 243-50 and accompanying text.
810. See supra notes 258-64 and accompanying text.
811. See supra notes 161-79 and accompanying text.
813. Id. at 457-61.
814. See supra notes 161-79 and accompanying text.
815. See Poulos, supra note 1, at 262-322, for a discussion of this requirement in the context of the opinions of the Lucas court decided during the first year of the court's tenure.
Grodin in his *Brown* dictum and in his plurality opinions in *Allen* and *Myers*. Under this rule, the arguments of counsel can be used to "cure" defects in penalty phase jury instructions. When presented with the question of whether it should accept or reject this rule, the Lucas court treated these two plurality opinions as if they established the law of the land. Though the use of the arguments of counsel to cure errors in jury instructions is inconsistent with the established method for interpreting instructions used by the California courts for over a century, the Lucas court adopted the Cure Technique without ever discussing the reasons for and against that rule and without overruling the cases that had established the traditional method for analyzing jury instructions. In short, the Cure Technique was adopted without any reasoned analysis of the issue and without mention that it was supported in *Allen* and *Myers* by only two justices of the Bird court.

Although the court is surely free to pick and choose among plurality opinions without violating fundamental principles of the legal process, the same cannot be said for the adoption of rules that conflict with existing law. The latter process requires that the court overrule prior inconsistent authority and decide the issue with "reasoned elaboration." The court applied the traditional requirement of a "reasoned elaboration" in rejecting the *Harris* Overlapping-Felony rule, but failed to do so when it adopted the Cure Technique. That difference raises the suspicion that the court would have been compelled to reject the plurality's rule if that rule had been subject to reasoned analysis. It also raises the suspicion that the Lucas court may be willing to embrace a rule, unsound as it may be, so long as the rule permits the court to affirm judgments of death whenever it believes that the jury reached the correct result.

The Lucas court should abandon the use of the arguments of counsel to cure errors in penalty phase jury instructions. It should return to the traditional method for analyzing instructions. Under that analysis and the court's own precedent, the factor (k), factor (j), and mandatory-sentencing-formula instructions are erroneous. The court should also resolve the validity of the use of the anti-sympathy instruction at the penalty phase of the trial.

The Lucas court did resolve an important new issue its first year. It held that the aggravating and mitigating factors which are unsup-

816. *See supra* notes 342-68 and accompanying text.
817. *See supra* notes 348-68 and accompanying text.
819. *See supra* notes 369-443.
820. *Id.*
823. *See supra* notes 592-772 and accompanying text.
ported by the evidence need not be deleted from the standard penalty phase jury instruction.\(^{824}\) Although this holding appears to be correct on principle, the court should also find that the penalty phase instructions currently used in capital cases are defective, for they fail to inform the jury of the reasons for reading the entire list of aggravating and mitigating circumstances to the jury. Moreover, they are confusing, for they fail to inform the jury of the two distinct purposes served by these instructions: guiding the jury in its fact-finding-law-applying function and in its sentencing function.\(^{825}\)

The Lucas court’s failure to comply with the fundamental principles of the Anglo-American legal process has not been limited to the court’s adoption of the Cure Technique without a reasoned elaboration as to why that rule should be the law of the land.\(^{826}\) Our system of law also requires judges to officially operate under articulated, externalized standards rather than under unarticulated personal views of a majority of the judges reviewing a particular case. The articulated standard is the heart of the law of reversible error.\(^{827}\) By failing to clearly articulate the standard under which penalty phase error was found to be harmless, the Lucas court appears to have violated one of the most fundamental principles of our legal system: the principle that a court’s judgment must be compelled by the law and not by the personal views of the judges.\(^{828}\) Findings that penalty phase error is harmless without announcing the standard which limits the justices’ discretion and externalizes their choice suggests that these decisions lack the fundamental attributes of legal decision-making: that these are the judgments not of the law, but of individuals.

The court’s failure to articulate the law by which the penalty phase errors were found harmless produced a self-inflicted wound, a wound that may have seriously injured the court as an institution. Whether the effect of this wound will be isolated or whether it will cause an even greater malady will be determined by the court’s decisions in future automatic appeals.

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824. See supra notes 265-300 and accompanying text.
825. See supra notes 301-03 and accompanying text.
826. See Poulos, Capital Punishment, supra note 1, at 262-322, for a discussion of this requirement in the context of the opinions of the Lucas court decided during the first year of the court’s tenure.
827. See supra notes 566-71 and accompanying text.
828. See supra notes 572-91 and accompanying text.
The first death penalty affirmance by the Lucas court came in People v. Ghent 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987) cert. denied, 485 U.S. 929 (1988). Ghent illustrates both the court's failure to articulate a standard and why the simple citation of authority does not suffice. In addition to the Booth error identified above (see supra note 585), the following penalty phase errors were urged as grounds for reversal of the death judgment in Ghent: (1) Prosecutorial misconduct — voir dire references to commutation power: "[W]e hold that any misconduct was, at most, harmless error." Id. at 770, 739 P.2d at 1270, 239 Cal. Rptr. at 102 (Comparing People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985)). Since Davenport was reversed for instructional error, the harmless nature of the prosecutor's argument was not discussed. Thus the court cited no standard for its decision. (2) Prosecutorial misconduct — references to deterrent effect of death penalty:

In prior cases, we held that misconduct was committed by the prosecutor's argument that the death penalty was more effective as a deterrent than imprisonment. . . . Although our prior cases indicate that the subject of the deterrent effect of the death penalty is a speculative subject best avoided in jury arguments, the prosecutor's brief reference to that topic in the present case was undoubtedly harmless and could not have affected the jury's verdict. Moreover, we observe that defense counsel failed to object to the argument or to seek an admonition or instruction on the subject.

Id. Insofar as this constitutes a finding of error and that it is harmless, the court mentions no standard for judging the reversibility of the error. (3) Prosecutorial misconduct — comment on the defendant's exercise of the fifth amendment privilege against self-incrimination:

In any event, we have observed that brief and mild references to a defendant's failure to testify, unaccompanied by any suggestion that an inference of guilt should be drawn therefrom, are uniformly held to be harmless error.

Id. at 771, 739 P.2d at 1270-71, 239 Cal. Rptr. at 103 (citing People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), People v. Vargas, 9 Cal. 3d 470, 509 P.2d 959, 108 Cal. Rptr. 15 (1973)). In Jackson the prosecutor's comment was made at the guilt phase of the trial, and Vargas was not a capital case, but a prosecution for robbery. (4) Prosecution argument that age is an aggravating factor:

The prosecutor's remarks here reasonably may be viewed as merely arguing the inapplicability of a mitigating factor, rather than seeking to penalize defendant by reason of his age. . . .

We recently held that "in the future" prosecutors should refrain from arguing to the jury that the very absence of a mitigating factor would constitute an aggravating one to be weighed against the defendant. The present case, however, was tried before Davenport was decided and, in any event,
our review of the record convinces us that the prosecutor’s arguments regarding defendant’s age and other inapplicable mitigating factors could not have affected the jury’s verdict.

*Id.* at 775-76, 739 P.2d at 1274, 239 Cal. Rptr. at 106 (citing People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985)).

Three penalty phase errors were found in *Gates*, but each was held to be harmless. (1) The failure of the trial court to instruct on *Robertson’s* reasonable doubt requirement: “Defendant correctly asserts that the court erred in failing to instruct sua sponte that the jury could not consider the other-crimes evidence unless the commission of such crimes had been proved beyond a reasonable doubt. . . . The error, however, is harmless.” *Gates*, 43 Cal. 3d at 1202, 743 P.2d at 322-23, 240 Cal. Rptr. at 688. (2) In its charge to the jury the trial court made reference to the possibility of age being an aggravating factor. Although the court found this reference to be erroneous, it was dismissed as harmless: “Since defendant’s age was not a factor one way or the other in this case, and no argument was made regarding it, we find the error an insubstantial one which could not possibly have affected the verdict.” *Id.* at 1207 n.17, 743 P.2d at 326 n.17, 240 Cal. Rptr. at 691 n.17. (3) Prosecutorial misconduct — improper argument of facts not in evidence:

The prosecutor may, however, have overstepped the permissible limits in arguing about defendant’s use of hollow point bullets. . . . Although there was evidence of the severe injuries suffered by the two trash collectors, defendant is correct in stating that there was no evidence presented that they were caused by hollow point bullets. The prosecutor was therefore drawing an improper inference from the injuries sustained by the victims. The error, however, is not of such significance that it could have affected the verdict.

*Id.* at 1212, 743 P.2d at 329, 240 Cal. Rptr. at 694. No standards were cited by the court with reference to each of its findings that these errors were harmless. Finding that the trial court erroneously instructed the jury on the mandatory-sentencing-formula instruction, and further finding that the error was prejudicial, Justice Mosk, joined by Justice Broussard, dissented to the affirmance of the death judgment. *Id.* at 1214, 743 P.2d at 331, 240 Cal. Rptr. at 696 (Mosk, J., joined by Broussard, J., dissenting).

The court found two penalty phase errors in *Miranda*, but again each error was found to be harmless. (1) The trial court failed to instruct the jury on *Robertson’s* reasonable doubt standard:

Defendant correctly contends that the trial court erred in failing to instruct the jury that it could not consider the Husey murder as an aggravating factor unless it found beyond a reasonable doubt that defendant committed the crime. . . . We determine, however, that the error was harmless. . . .
On this record, we conclude that the failure to instruct on the higher standard of proof could not have affected the jury's consideration of the other crimes evidence.

*Miranda*, 44 Cal. 3d at 97-98, 744 P.2d at 1151-52, 241 Cal. Rptr. at 619. (2) The trial court erred in failing sua sponte to modify CALJIC No. 8.84.1 to make clear that section 190.3, subdivisions (b) and (c) applied only to "other crimes:"

We agree that subdivisions (b) and (c) pertain only to criminal activity other than the crimes for which the defendant was convicted in the present proceeding. It would therefore be improper for the jury to consider the underlying crimes as separate and distinct aggravating circumstances under either subdivision. On this record, however, there is absolutely no indication that the jury would have understood that the guilt phase crimes came within subdivision (b) or (c).

*Id.* at 105-06, 744 P.2d at 1157, 241 Cal. Rptr. at 624-25. No standards were discussed with reference to any of these penalty phase errors. Although the court does refer to a standard in connection with defendant's claim that the trial court erred by failing to instruct the jury on the corroboration requirement for an accomplice, that issue is not unique to the penalty phase of the capital trial. *See, id.* at 99-101, 744 P.2d at 1153-54, 241 Cal. Rptr. at 620-21. In disposing of the defendant's claims of federal constitutional error, the court also identifies the standard applicable to that type of error. *See, e.g., id.* at 111, 744 P.2d at 1161, 241 Cal. Rptr. at 628 (prosecutor's argument about defendant's future dangerousness claimed to be error under *Darden v. Wainwright*); *id.* at 112-113, 744 P.2d at 1162, 241 Cal. Rptr. at 629 (*Booth* error); *id* at 114-115, 744 P.2d at 1163-64, 241 Cal. Rptr. at 630-31 (presence of security personnel in violation in *Holbrook v. Flynn*).

In *Howard* the court found or assumed that there were three, and perhaps four, penalty phase errors. (1) Defendant claimed that evidence concerning an incident in which the defendant allegedly intentionally burned a three-and-one-half-year-old boy was erroneously admitted at the penalty phase of the trial. Speaking of the harmless error issue, Chief Justice Lucas wrote: "In light of the other evidence of injuries inflicted by defendant on children as well as adults, any error in admitting the evidence at issue was harmless under any standard.

"People v. Howard, 44 Cal. 3d 375, 427, 749 P.2d 279, 310, 243 Cal. Rptr. 842, 873, *cert. denied*, 488 U.S. 871 (1988). Of course, that would not be true under a test of automatic reversible error or perhaps even under the original Substantial-Error Test of pre-*Anderson* California law. Furthermore, the applicable standard, short of the automatic reversal rule, is never identified. (2) A second contention that evidence of defendant's bad deeds, (this time the possession of handcuff keys while incarcerated in jail), was erroneously admitted at the penalty phase met with this disposition: "We need
not decide the admissibility of this evidence, however, because in view of the overwhelming additional evidence of violent activity, any error in permitting it had no effect on the verdict.” *Id.* at 428, 749 P.2d at 310, 243 Cal. Rptr. at 874. Although this does not constitute a finding of error, the reason for the court's refusal to decide the issue on the merits is the court's conclusion that the error would be harmless. Again, there is no indication of the standard applicable to this type of penalty phase error. (3) The trial judge instructed the jury to reach a just verdict “regardless of what the consequences may be.” The court agreed that it was error to give this instruction at the penalty phase of the trial under *People v. Brown*. Yet the court said,

In the present case, of course, an instruction expressly informing the jury that it could consider “pity” was given. In light of that specific admonition, the concern for misleading the jury expressed in *Brown* was not invoked here and we need not examine the record further to assure the jury was aware of its proper sentencing responsibilities. *Id.* at 443, 749 P.2d at 321, 243 Cal. Rptr. at 884-85. (4) In rejecting the defendant's contention that he had received inadequate notice of penalty phase evidence, the court said, “We therefore conclude that even though the notice was not given until after the guilt phase had terminated, any error which may have occurred was not prejudicial nor was it reasonably possible that the penalty verdict was affected.” *Id.* at 425, 749 P.2d at 308-09, 243 Cal. Rptr. at 872. Though it is unclear whether the court is finding or even assuming the existence of error in connection with this claim, it is clear that the court is finding that any possible error was not prejudicial. It is also unclear whether the court’s statement that it is not “reasonably possible” that the penalty verdict was affected was meant to articulate a standard for determining the reversibility of penalty phase error. The court cites no cases and does not discuss a standard of review. Furthermore, the court does not employ this statement with respect to any of the other penalty phase errors. *Id.*

In *Kimble* the court found two penalty phase errors. (1) Agreeing with the defendant that it was error for the jury to consider two multiple-murder special circumstance findings when only one was proper, the court held that the error was harmless:

The jury, however, was well aware that there were two murder victims, and on the facts of this case, we believe it very unlikely that the jury's deliberations were affected by the existence of two multiple-murder special circumstances rather than only one. . . . Accordingly, we cannot conclude the error affected the penalty verdict.

*People v. Kimble*, 44 Cal. 3d 480, 504, 749 P.2d 803, 818, 244 Cal.
Rptr. 148, 163, cert. denied, 488 U.S. 871 (1988). (2) It was error for the prosecutor to argue that the jury should view the guilt phase crimes as aggravating evidence under both subdivision (a) and (b) of Section 190.3. "Nevertheless," said the court, "we conclude that any error was harmless. . . . [W]e find it inconceivable that the jury would have reached a different verdict in the absence of the improper argument; accordingly, there was no prejudice." Id. at 505-06, 749 P.2d at 819, 244 Cal. Rptr. at 164-65. Despite the fact that Justice Broussard, who was joined by Justice Mosk, partially based his dissent to the affirmance of the death judgment on the prejudicial effect of the second error (see id. at 527, 749 P.2d at 833-34, 244 Cal. Rptr. at 179), the Lucas court did not articulate a standard of reversibility for penalty phase error in Kimble.

 Apparently agreeing that it was error to admit a large photograph of one of the victims at the penalty phase, the court said in Hovey, "any error here was clearly harmless and could not have affected the verdict." People v. Hovey, 44 Cal. 3d 543, 576, 749 P.2d 776, 795, 244 Cal. Rptr. 121, 140, cert. denied, 488 U.S. 871 (1988). The court did not discuss the standard which was applicable to this error.

 Although it is error for the jury to have considered two multiple-murder special circumstance findings when only one was proper, in Ruiz the court held that the error was harmless:

The present case was tried before Harris was decided, however, and any error in failing to anticipate our ruling in that case clearly would be harmless. . . . Moreover, there is little potential impact upon a jury from duplicative multiple-murder special circumstances. Here, the jurors were well aware of the actual number of victims, and nothing in the manner in which this case was tried, or in the penalty phase argument and instructions, affords a basis on which to speculate that the jury may have been influenced by the number of multiple-murder special-circumstance findings.


 In Hendricks II the court assumed that it was error to admit four photographs into evidence at the penalty phase. Nevertheless, the court held that, "even if the court did err in admitting any or all of the four photographs at issue here, we cannot conclude that the error was prejudicial. Viewing the penalty phase as a whole, it seems clear that even if these photographs had not been admitted the outcome would have been the same." People v. Hendricks, 44 Cal.3d 635, 646, 749 P.2d 836, 841, 244 Cal. Rptr. 181, 187 (Hendricks II), cert. denied, 488 U.S. 900 (1988). No standard was articulated by the court for assessing penalty phase error.

 In Melton the court found three penalty phase errors. (1) Agreeing that the trial court should explain to the jury that the violent crimes described in subdivision (b) do not include the circumstances of the capital offense itself, the court found the error to be harmless:
However, we think any ambiguity in the language of the statute or current instructions will rarely have caused prejudice. Absent improper argument, jurors are unlikely to give the circumstances of the current crime greater weight in the penalty determination simply because they appear to be included in two separate categories of statutory “aggravation.” . . . Under these circumstances, there is no realistic possibility that the jury was confused about the mutual exclusivity of subdivisions (a) and (b).

People v. Melton, 44 Cal. 3d 713, 763, 750 P.2d 741, 771, 244 Cal. Rptr. 867, 897, cert. denied, 488 U.S. 934 (1988). (2) Although it is error for the sentencing jury to consider the defendant’s felonious conduct for which he was convicted at the guilt phase as both “circumstances” of the capital crime and as felonies under the felony-murder special circumstances at the penalty phase, the court found the error harmless:

However, the possibility of actual prejudice seems remote, and we are persuaded that it was not realized here. As discussed above, the jury was fully aware of the facts of the DeSousa homicide and could validly consider them in deciding penalty. Exercising common sense, it was unlikely to believe it should “weigh” each special circumstance twice on the penalty ‘scale.’ . . .

We find no grounds for reversal.

Id. at 768-69, 750 P.2d at 774-75, 244 Cal. Rptr. at 901. (3) Although it was error for the trial court to instruct the jury that the absence of a statutory mitigating factor does not necessarily constitute an aggravating factor, the court again concluded that the error was harmless:

Under all the circumstances, however, the jury could not have been misled. The instructions as a whole made clear that aggravating factors were strictly limited by statute, must be proved beyond a reasonable doubt, and should be considered only “if applicable.” . . . In context, we cannot believe the jury was misled by the challenged instruction. We see no basis for reversal of the penalty judgment.

Id. at 769-70, 750 P.2d at 775, 244 Cal. Rptr. at 901-02.

In Williams the court found that the failure to instruct the jury at the penalty phase to consider only one multiple-murder special circumstance was error. The court nevertheless found the error to be harmless:

We see no possibility that this error affected the verdict. The impact, if any, of the error was inconsequential and cannot reasonably be characterized as a constitutional defect in the sentencing process. . . . Because the jury had found six multiple-murder special circumstance allegations true, when there should have been only a single special circumstance allegations true, when there should have been only a single special circumstance, the instruction could, theoretically, have led the jury to base its assessment of defendant’s culpability on the sheer number of special circumstances rather than on the underlying conduct. After consideration of the entire record in this case, we conclude that the possibility that the jury may have based its penalty decision, even in part, on the sheer number of special circumstances it had
found true, rather than on defendant's conduct, is far too remote and speculative to suggest that the jury would have reached a different verdict had it considered the murders as a single special circumstance. . . . We conclude, as we did in People v. Allen, that the error was harmless.

People v. Williams, 44 Cal. 3d 883, 950-51, 751 P.2d 395, 440-41, 245 Cal. Rptr. 336, 382, cert. denied, 488 U.S. 900 (1988). Although the court does cite to the Allen case, and the pages cited to Allen refer to the “substantial error” standard of review for penalty phase error, that reference is too ambiguous to constitute a clear identification of that test as the standard of review for penalty phase error. This is especially true since Allen was a plurality opinion, which was written by Justice Grodin and signed only by Justice Mosk. Justice Panelli, joined by then Justice Lucas, concurred in the affirmance of the judgment of death as follows: “Although I do not necessarily agree with the majority’s analysis concerning the standard of review for penalty phase error, I fully agree that in the instant case the asserted errors, by any standard, were harmless.” People v. Allen, 42 Cal. 3d 1222, 1288, 729 P.2d 115, 157, 232 Cal. Rptr. 849, 891 (1986) (Panelli, J., with Lucas, J., concurring in the judgment). This reference to the standard adopted in a plurality opinion signed only by two justices is thus both ambiguous and too casual to constitute a clear adoption of this standard by the Lucas court, in view of all of the prior rulings that error was harmless without a standard being identified. It may, however, be an indication of what the court may do in the future. Finally, the fact that Justice Kaufman authored an opinion which was apparently aimed at a standard for the reversibility of penalty phase error supports the inference that the court was not adopting the standard articulated by the Allen plurality, but rather the court was citing Allen for its consistent conclusion that multiple multiple-murder special circumstance findings do not compel a reversal. Justice Kaufman’s opinion, which was joined by Justice Broussard, reads as follows:

Notwithstanding the numerous trial errors and defects identified in the majority opinion, I have concluded that on the basis of the entire record there is no reasonable possibility that absent these errors and defects, the jury would have reached determinations more favorable to the defendant. I therefore concur in the judgment affirming the convictions, the special circumstances findings as modified and the penalty of death.

Williams at 974, 751 P.2d at 456, 245 Cal. Rptr. at 398.

Finally, in Wade the court found two penalty phase errors. (1) First, the jury found two special circumstances, a heinous-atrocious-cruel special circumstance and a tortue-murder special circumstance to be true. The court invalidated the heinous-atrocious-cruel special circumstance under Engert. Defendant claimed that because the court invalidated one of the two special circumstances, the death verdict should be set aside. The court rejected this contention as fol-
allows: "In light of our determination to uphold the torture-murder finding, the invalid heinous-murder special circumstance was undoubtedly harmless error." People v. Wade, 44 Cal. 3d 975, 998, 750 P.2d 794, 807, 244 Cal. Rptr. 905, 918 (comparing People v. Allen, 42 Cal. 3d 1222, 1281-82, 729 P.2d 115, 152-53, 232 Cal. Rptr. 849, 886-87 (1986)), cert. denied, 488 U.S. 900 (1988). Although in a subsequent modification of the opinion the court does explain the factual context for its holding, except for the reference to Allen, the court never identifies the standard of error it is using. People v. Wade, Modification of Opinion, dated May 19, 1988, 45 Cal. 3d 648a. The court's reference to Allen in Wade is just as ambiguous as it was in Williams, supra. (2) The jury was also instructed in accordance with CALJIC No. 1.00 "to reach a just verdict, regardless of what the consequences of such verdict may be." The court disposed of this issue as follows:

The instruction has been considered inappropriate at the penalty phase (see People v. Brown, 40 Cal. 3d 512, 538, n.7, 726 P.2d 516, 529, n.7, 230 Cal. Rptr. 834, 847, n.7 (1985)), but it must be deemed harmless where, as here, the record indicates that the jury fully understood the grave consequences of its penalty decision. (See People v. Miranda 44 Cal. 3d 57, 102, n.25, 744 P. 2d 1127, 1158, n.25, 241 Cal. Rptr. 594, 626, n.25 (1987)). In addition, we observe that the instruction does not ask the jury to wholly ignore the consequences of their decision, but simply asks them to reach a "just," verdict regardless of the consequences of such a verdict.

Id. at 998, 750 P.2d at 808, 244 Cal. Rptr. at 919.