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## California Supreme Court Survey - A Review of Decisions: October 1991-December 1991

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# California Supreme Court Survey

## October 1991-December 1991

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

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## I. CRIMINAL PROCEDURE

*Probation can be modified for a nonwillful failure to pay full restitution, when the payment schedule was based upon the probationer's ability to pay: People v. Cookson.*

In *People v. Cookson*,<sup>1</sup> the California Supreme Court determined that California Penal Code section 1203.2<sup>2</sup> allows a modification of probation when the defendant made a bona fide effort to pay restitution, but based upon his financial inability, failed to satisfy the required amount by the end of his original probation.<sup>3</sup> The court held that the trial court had jurisdiction to reexamine the terms of probation because financial inability constituted a change in circumstance.<sup>4</sup> Furthermore, the court held that while revocation of probation was not allowed for a nonwillful failure to pay restitution, modification was acceptable and permissible prior to the occurrence of an actual violation.<sup>5</sup> Therefore, the supreme court affirmed the judgments of the trial court and the court of appeal.<sup>6</sup>

1. 54 Cal. 3d 1091, 820 P.2d 278, 2 Cal. Rptr. 2d 176 (1991). Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Arabian, Baxter and George concurred. Justice Kennard joined Justice Mosk in his dissenting opinion.

2. California Penal Code section 1203.2(a) states in pertinent part:

[T]he court may revoke and terminate such probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses. However, probation shall not be revoked for failure of a person to make restitution . . . as a condition of probation unless the court determines that the defendant has willfully failed to pay and has the ability to pay.

CAL. PENAL CODE § 1203.2(a) (West Supp. 1991). Furthermore, California Penal Code section 1203.2(b) states in pertinent part that "the court . . . may modify, revoke, or terminate the probation of the probationer upon the grounds set forth in subdivision (a) if the interests of justice so require." CAL. PENAL CODE § 1203.2(b) (West Supp. 1991). See generally 22 CAL. JUR. 3D *Criminal Law* § 3477 (1985) (discussing the court's ability to modify probation).

3. *Cookson*, 54 Cal. 3d at 1093-94, 820 P.2d at 280-81, 2 Cal. Rptr. 2d at 178. The defendant, Cookson, was placed on three years' probation and required to pay the victim \$12,000 in restitution. The probation officer based the monthly payments on the defendant's ability to pay, first at \$100 per month and then at \$135 per month. After the three-year period, Cookson had paid only a portion of the full restitution. Therefore, the day before the scheduled end of probation, the probation officer requested an extension of probation to guarantee further payment. *Id.* For a general discussion of the court's ability to order restitution payments to a victim, see 22 CAL. JUR. 3D *Criminal Law* § 3447 (1985 & Supp. 1991).

4. *Cookson*, 54 Cal. 3d at 1095, 820 P.2d at 281, 2 Cal. Rptr. 2d at 179.

5. *Id.* at 1097-98, 820 P.2d at 283, 2 Cal. Rptr. 2d at 181.

6. *Id.* at 1100, 820 P.2d at 285, 2 Cal. Rptr. 2d at 183. The trial court granted an

Initially, the supreme court stressed that a change in circumstance was required before a court had jurisdiction to modify probation.<sup>7</sup> The supreme court explicitly determined that basing the payment schedule on the defendant's ability to pay caused only a portion of the restitution to be paid and, therefore, resulted in a change in circumstance.<sup>8</sup> The court then disposed of the defendant's contention that the court could neither revoke nor modify probation due to a nonwillful failure to pay restitution.<sup>9</sup> The court relied on *Bearden v. Georgia*,<sup>10</sup> which held that while willful nonpayment justifies imprisonment, nonwillful nonpayment requires other punishment.<sup>11</sup> The supreme court concluded that due to the similarity between *Bearden* and California Penal Code section 1203.2(a),<sup>12</sup> the legislature intended to codify *Bearden* and, consequently, an extension or other modification is allowed for nonwillful failure to pay restitution.<sup>13</sup> Additionally, the court disposed of the defendant's claim that probation may be modified only when a violation occurs.<sup>14</sup> Based on case

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extension of two years and determined that the defendant's failure to pay the full amount of restitution, notwithstanding his bona fide effort, constituted a violation of the terms of probation. The court of appeal affirmed and concluded that California Penal Code section 1203.2 allowed for a modification in this case. *Id.*

This is the first time the court has interpreted the application of California Penal Code section 1203.2 to a nonwillful failure to pay restitution.

7. *Id.* at 1095, 820 P.2d at 281, 2 Cal. Rptr. 2d at 179. See *In re Clark*, 51 Cal. 2d 838, 840, 337 P.2d 67, 68 (1959) ("An order modifying the terms of probation based upon the same facts as the original order granting probation is in excess of the jurisdiction of the court, for the reason that there is no factual basis to support it.") (citing *In re Bine*, 47 Cal. 2d 814, 818, 306 P.2d 445, 447 (1957)). See generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1643 (2d ed. 1989) (stating that modification requires the appearance of new facts).

8. *Cookson*, 54 Cal. 3d at 1095, 820 P.2d at 281, 2 Cal. Rptr. 2d at 179.

The dissent argued that no change in circumstance occurred. Justice Mosk stressed that the defendant's financial status was ascertainable at trial and the court's mere failure to consider this is not a change in circumstance. *Id.* at 1100, 820 P.2d at 285, 2 Cal. Rptr. 2d at 183 (Mosk, J., dissenting).

9. *Id.* at 1095-96, 820 P.2d at 281, 2 Cal. Rptr. 2d at 179. The defendant relied on *People v. Ryan*, 203 Cal. App. 3d 189, 249 Cal. Rptr. 750 (1988). In *Ryan*, the court stated that "[t]he period of probation may not be extended for failure to make full restitution to the victim unless said failure is willful and the defendant has the ability to pay." *Id.* at 199, 249 Cal. Rptr. at 757.

10. 461 U.S. 660 (1983). See generally David Hays, Comment, *Constitutional Law—Imprisoning Indigents for Failure to Pay Fine*—*Bearden v. Georgia*, 30 N.Y.L. SCH. L. REV. 111 (1985).

11. *Bearden*, 461 U.S. at 668. The Court reasoned that "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-73 (citations omitted).

12. See *supra* note 2 for statutory text.

13. *Cookson*, 54 Cal. 3d at 1097, 820 P.2d at 282, 2 Cal. Rptr. 2d at 180. See generally 21 AM. JUR. 2D *Criminal Law* § 572 (1981 & Supp. 1991) (discussing restitution and the defendant's ability to pay).

14. *Cookson*, 54 Cal. 3d at 1098, 820 P.2d at 283, 2 Cal. Rptr. 2d at 181. The defendant relied on *In re Stallings*, 5 Cal. App. 3d 322, 85 Cal. Rptr. 96 (1970), where the court

law<sup>15</sup> and the language of Penal Code sections 1203.3<sup>16</sup> and 1203.2(b),<sup>17</sup> which both allow for modification and revocation prior to a violation, the court determined that the defendant's claim was without merit.<sup>18</sup> Finally, the court rejected both the defendant's equal protection and due process arguments because they were not properly raised in the court of appeal.<sup>19</sup>

The supreme court has recognized the importance of restitution in punishing and deterring future illegal activity as well as its benefit to the overall rehabilitative process.<sup>20</sup> Moreover, the court reaffirmed the trial court's power to modify the terms of probation before an ac-

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held that "[t]he trial court lacked the authority to extend the period of probation without a finding that the petitioner had violated a condition of probation." *Id.* at 333, 85 Cal. Rptr. at 102 (citations omitted).

15. See *In re Peeler*, 266 Cal. App. 2d 483, 490, 72 Cal. Rptr. 254, 259-60 (1968) (holding that neither the relevant California Penal Code sections nor case law prevents the court from modifying probation); *People v. Miller*, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967) (holding that a court has the authority to increase restitution when new victims are discovered during the course of the original probation). See generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1694 (2d ed. 1989) (recognizing the court's broad power to impose new conditions).

16. California Penal Code section 1203.3 states in pertinent part, "The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." CAL. PENAL CODE § 1203.3 (West Supp. 1991) (emphasis added).

17. See *supra* note 2 for statutory text.

18. *Cookson*, 54 Cal. 3d at 1098, 820 P.2d at 283, 2 Cal. Rptr. 2d at 181. The court, therefore, disapproved of *Stallings*, 5 Cal. App. 3d 322, 85 Cal. Rptr. 96, to the extent that it was inconsistent with this holding. *Cookson*, 54 Cal. 3d at 1100, 820 P.2d at 284, 2 Cal. Rptr. 2d at 182. The court also noted that its holding promotes the underlying purposes of probation pronounced in California Penal Code section 1203.1:

The court may impose and require any or all of [the following] terms of imprisonment, fine, and conditions, and other reasonable condition, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law . . . and generally and specifically for the reformation and rehabilitation of the probationer.

CAL. PENAL CODE § 1203.1 (West Supp. 1991). See generally 22 CAL. JUR. 3D *Criminal Law* § 3442 (1985 & Supp. 1991) (discussing the terms and conditions of probation in general); 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1622 (2d ed. 1989 & Supp. 1991) (discussing the nature and purpose of probation).

19. *Cookson*, 54 Cal. 3d at 1100, 820 P.2d at 284, 2 Cal. Rptr. 2d at 182.

20. *Id.* at 1097, 820 P.2d at 282-83, 2 Cal. Rptr. 2d at 180-81. See *People v. Richards* 17 Cal. 3d 614, 620, 552 P.2d 97, 100-01, 131 Cal. Rptr. 537, 540-41 (1976) (stating that restitution "may serve the salutary purpose of making a criminal understand that he has harmed not merely society in the abstract but also individual human beings, and that he has a responsibility to make them whole"). See generally Douglas Laycock, Essay, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989); Thomas M. Kelly, Note, *Where Offenders Pay for Their Crimes: Victim Restitution and its Constitutionality*, 59 NOTRE DAME L. REV. 685 (1984); and Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984).

tual violation occurs.<sup>21</sup> This should allow corrective measures to be taken before a violation results in revocation of probation and incarceration. Generally, the supreme court has given trial courts the ability to fashion and reevaluate probationary schemes to best suit each individual and the underlying goals of restitution.

CHAD JEFFERY FISCHER

## II. DEATH PENALTY LAW

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

### I. INTRODUCTION

Between July and December 1991, the California Supreme Court rendered opinions in twelve death penalty cases.<sup>1</sup> By deciding only twelve cases, however, the court did little to decrease its backlog of automatic death penalty appeals.<sup>2</sup> The Lucas court continued its tra-

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21. *Cookson*, 54 Cal. 3d at 1098, 820 P.2d at 283, 2 Cal. Rptr. 2d at 181.

1. This survey addresses the following cases, decided between July 11, 1991 and December 31, 1991, listed alphabetically by defendants: *People v. Ashmus*, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 112 (1991), *petition for cert. filed* (U.S. May 26, 1992) (No. 91-8387); *People v. Bacigalupo*, 1 Cal. 4th 103, 820 P.2d 559, 2 Cal. Rptr. 2d 335 (1991), *petition for cert. filed* (U.S. May 29, 1992) (No. 91-8445); *People v. Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81 (1991), *petition for cert. filed* (U.S. June 25, 1992) (No. 92-5007); *People v. Edwards*, 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991), *petition for cert. filed* (U.S. May 21, 1992) (No. 91-8405); *People v. Fierro*, 1 Cal. 4th 173, 821 P.2d 1302, 3 Cal. Rptr. 2d 426 (1991), *petition for cert. filed* (U.S. June 18, 1992) (No. 91-8714); *People v. Fuentes*, 54 Cal. 3d 707, 286 Cal. Rptr. 792, 818 P.2d 75 (1991); *People v. Mickey*, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801 (1991), *petition for cert. filed*, 60 U.S.L.W. 3816 (U.S. May 19, 1992) (No. 91-1860); *People v. Mickle*, 54 Cal. 3d 140, 814 P.2d 290, 284 Cal. Rptr. 511 (1991), *cert. denied*, 112 S. Ct. 1679 (1992); *People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991), *cert. denied*, 112 S. Ct. 3040 (1992); *People v. Price*, 1 Cal. 4th 324, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991), *petition for cert. filed* (U.S. June 15, 1992) (No. 91-8611); *People v. Sully*, 53 Cal. 3d 1195, 812 P.2d 163, 283 Cal. Rptr. 144 (1991), *cert. denied*, 112 S.Ct. 1494 (1992); *People v. Webster*, 54 Cal. 3d 411, 814 P.2d 1273, 285 Cal. Rptr. 31 (1991), *cert. denied*, 112 S. Ct. 1772 (1992) [hereinafter, subsequent histories will be omitted].

2. Every year, between 35 and 40 new death penalty verdicts are appealed to the supreme court. Currently, it takes approximately six years for a death penalty verdict to reach the supreme court. Philip Hager, *Justices Will Recruit Death Row Lawyers; Counsel: State High Court Takes Over Job to Break Backlog of Inmates Who Need Attorneys for Their Appeals*, L.A. Times, Mar. 26, 1992, at A3.

For a discussion of the automatic appeals since 1989 see Christina Katris, Kurt M. Langkow, & Arthur S. Moreau III, *California Supreme Court Survey — Death Penalty Law — Survey VII*, 19 PEPP. L. REV. 787 (1992); Denise R. Harrington, *California Supreme Court Survey — Death Penalty Law — Survey VI*, 18 PEPP. L. REV. 1138 (1991); Cori L. MacDonnell, *California Supreme Court Survey — Death Penalty Law*

dition of affirming death penalty cases, finding very few errors, and using the harmless error doctrine extensively.<sup>3</sup> During this time period, the court reversed the death penalty only once.<sup>4</sup>

In *People v. Edwards*,<sup>5</sup> the California Supreme Court reconsidered the admissibility of victim impact evidence in light of the United States Supreme Court's decision in *Payne v. Tennessee*,<sup>6</sup> which held that a state's admission of such evidence in a capital case does not violate the Eighth Amendment.<sup>7</sup> This topic is discussed in greater detail in section V(D).<sup>8</sup>

The defendants in the cases surveyed made a variety of creative arguments. Recognizing the seriousness of its task, the supreme court scrutinized each contention. As a result, the surveyed cases, like most death penalty cases, tend to be long and tedious. This survey provides a concise review and analysis of the most prevalent and important issues raised on appeal. For ease of understanding and quick reference, this survey is divided into the following sections: Jury Issues,<sup>9</sup> Guilty Phase Issues,<sup>10</sup> Special Circumstances Issues,<sup>11</sup> and Penalty Phase Issues.<sup>12</sup>

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— *Survey V*, 18 PEPP. L. REV. 716 (1991); Stathy Panopolous & Robert J. Mills, *California Supreme Court Survey — Death Penalty Law — Survey IV*, 17 PEPP. L. REV. 1095 (1990); James D. McGinley, *California Supreme Court Survey — Death Penalty Law — Survey III*, 17 PEPP. L. REV. 537 (1990); John A. Mayers & Susan S. Seemiller, *California Supreme Court Survey — Death Penalty Law — Survey II*, 16 PEPP. L. REV. 1165 (1989); Howard S. Fallman & Charles Eskridge, III, *California Supreme Court Survey — Death Penalty Law — Survey I*, 16 PEPP. L. REV. 451 (1989) [hereinafter *Death Penalty Law VII, VI, V, IV, III, II, I*, respectively].

3. Under the harmless error doctrine, the court focuses "on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *People v. Dyer*, 45 Cal. 3d 26, 47, 753 P.2d 1, 11, 246 Cal. Rptr. 209, 220 (1988), cert. denied, 488 U.S. 954 (1988). See generally 9 B. Witkin, CALIFORNIA PROCEDURE, *Appeal* § 324 (3d ed. 1985 & Supp. 1992) (discussing harmless error); 6 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Reversible Error* §§ 3279-3280 (2d ed. 1989) (examining the history of harmless error).

4. *People v. Fuentes*, 54 Cal. 3d 707, 818 P.2d 75, 286 Cal. Rptr. 792 (1991). See *infra* notes 20-28 and accompanying text for a discussion of the error requiring reversal. This continues the court's high rate of affirmance; in the 50 cases the supreme court has considered since mid-1990 it has upheld the death sentences in 48. *State High Court Limits Judges on Death Sentences; Justices Deny Review in Case Reversing Judge Schatz*, THE RECORDER, Mar. 27, 1992, at 1.

5. 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991).

6. 111 S.Ct. 2597 (1991).

7. *Id.* at 2609.

8. See *infra* notes 128-160 and accompanying text.

9. See *infra* notes 13-41 and accompanying text.

10. See *infra* notes 42-87 and accompanying text.

11. See *infra* notes 88-96 and accompanying text.

12. See *infra* notes 97-196 and accompanying text.



## II. JURY ISSUES

Seven of the twelve cases alleged errors concerning jury selection and composition, raising issues of *Wheeler* and *Witherspoon-Witt* error, as well as other miscellaneous contentions.<sup>13</sup> The court reversed one case on *Wheeler* error,<sup>14</sup> but otherwise found no error, harmless error, or that the defendant had waived his claim.<sup>15</sup>

### A. *Wheeler* Error

The *Wheeler* court held that peremptory challenges used to exclude jurors belonging to an identifiable group (racial, religious, ethnic, or similar) based on a presumed group bias is an unconstitutional deprivation of a defendant's right to "trial by jury drawn from a representative cross-section of the community."<sup>16</sup> Once a moving party makes a timely objection and establishes a prima facie showing that an opponent has used peremptory challenges for a discriminatory purpose,<sup>17</sup> the burden shifts to the opposing party to present a neutral explanation.<sup>18</sup> Thereafter, the trial court has an obligation to make a sincere and reasoned attempt to discern whether the proffered reasons for exclusion are genuine.<sup>19</sup>

Of the twelve cases surveyed, the only reversal occurred in *People v. Fuentes*.<sup>20</sup> In *Fuentes*, the supreme court held that the trial court did not satisfy its *Wheeler* obligation to evaluate the prosecutor's proffered race-neutral reasons for excluding potential black jurors.<sup>21</sup> Specifically, the prosecutor peremptorily challenged nineteen potential jurors, fourteen of whom were black.<sup>22</sup> When voir dire concluded, the trial judge instructed the prosecutor to justify his challenges of black jurors.<sup>23</sup> The supreme court reasoned that by so

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13. *People v. Ashmus*, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 112 (1991); *People v. Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81 (1991); *People v. Edwards*, 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991); *People v. Fuentes*, 54 Cal. 3d 707, 583 P.2d 75, 286 Cal. Rptr. 792 (1991); *People v. Mickey*, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801 (1991); *People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991); *People v. Price*, 1 Cal. 4th 324, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991).

14. *Fuentes*, 54 Cal. 3d 707, 583 P.2d 75, 286 Cal. Rptr. 792. See *infra* notes 20-28.

15. See *infra* notes 29-40 and accompanying text.

16. *People v. Wheeler*, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978). See also U.S. CONST. amend. VI; CAL. CONST. art. I, § 16.

17. To establish a prima facie case, the moving party must fulfill three requirements: (1) produce a complete record of the circumstances during voir dire; (2) establish that the persons excluded are members of a cognizable group; and (3) show a strong likelihood that the persons are being excluded because of group association. *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

18. *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

19. *People v. Fuentes*, 54 Cal. 3d 707, 718, 818 P.2d 75, 81, 286 Cal. Rptr. 792, 798.

20. 54 Cal. 3d 707, 818 P.2d 75, 286 Cal. Rptr. 792 (1991).

21. *Id.* at 718, 818 P.2d at 81, 286 Cal. Rptr. at 798.

22. *Id.* at 711, 818 P.2d at 76-77, 286 Cal. Rptr. at 793-94.

23. *Id.* at 715, 818 P.2d at 79, 286 Cal. Rptr. at 796.

instructing, the trial judge had implicitly found a prima facie case of improper exclusion on the basis of race.<sup>24</sup>

Upon demand, the prosecutor offered several reasons for his exclusion of black jurors. Although the trial court made some effort to review the prosecutor's reasons, it failed to ascertain the particular reasons for excluding each challenged juror.<sup>25</sup> Instead, the trial court observed that although some of the proffered reasons were "very spurious," three acceptable challenges prompted exclusion.<sup>26</sup> The supreme court disagreed with this abstract, non-individualized method of review, holding that a "truly 'reasoned attempt' to evaluate the prosecutor's explanations requires the court to address the challenged jurors *individually* to determine whether any one of them had been improperly excluded."<sup>27</sup> Failing to conduct individual inquiries as to the validity of each particular challenge, the trial court denied the defendant his right to a jury drawn from a representative cross-section of the community; hence, the death penalty was reversed.<sup>28</sup>

Several other defendants alleged a deprivation of their right to a representative jury.<sup>29</sup> However, because their claims were not based on *Wheeler* error, they will be discussed in section II(C), *infra*.<sup>30</sup>

### B. *Witherspoon-Witt Error*

*Witherspoon-Witt* error occurs when a court dismisses a juror because of his or her objections to the death penalty without a finding that the juror could not impartially apply the law.<sup>31</sup> Four cases al-

24. *Id.* at 716, 818 P.2d at 79, 286 Cal. Rptr. at 796. When the trial court inquires about the prosecutor's justifications, the court has made at least an implied finding of a prima facie showing. *Id.* at 716, 818 P.2d at 80, 286 Cal. Rptr. at 797 (citing *People v. Johnson*, 47 Cal. 3d 1194, 767 P.2d 1047, 255 Cal. Rptr. 569 (1989)).

25. *Id.* at 718, 818 P.2d at 81, 286 Cal. Rptr. at 798.

26. *Id.* at 720, 818 P.2d at 82, 286 Cal. Rptr. at 799.

27. *Id.* at 720, 818 P.2d at 82-83, 286 Cal. Rptr. at 799-800 (emphasis added).

28. *Id.* at 721, 818 P.2d at 83, 286 Cal. Rptr. at 800.

29. *People v. Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81 (1991); *People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991).

30. See *infra* notes 34-41 and accompanying text.

31. *Wainwright v. Witt*, 469 U.S. 412, 425-26 (1985). *Witherspoon v. Illinois*, 391 U.S. 510 (1968), held that excluding a juror who voices objections to the death penalty does not violate a defendant's constitutional right to an impartial jury if the juror makes it unmistakably clear that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial." *Id.* at 522 n.21. *Witt* eased the standard by holding that a juror could properly be excluded if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*,

leged *Witherspoon-Witt* error and the court rejected the claim in each case.<sup>32</sup> The court found that the challenged jurors held views that would prevent or substantially impair their performance as jurors; thus, they were properly excused.<sup>33</sup>

### C. Miscellaneous Jury Issues

In six cases, the defendants raised jury issues other than *Wheeler* or *Witherspoon-Witt* error.<sup>34</sup> Alleged trial court errors included the following: Denial of separate guilt and penalty phase juries,<sup>35</sup> excusal

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469 U.S. at 424. The California Supreme Court adopted the *Witherspoon-Witt* standard in *People v. Ghent*, 43 Cal. 3d 739, 767, 739 P.2d 1250, 1268, 239 Cal. Rptr. 82, 100 (1987).

See generally Stanton D. Krauss, *The Witherspoon Doctrine at Witt's End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1 (1986); Barbara J. Whisler, *Sixth Amendment—Death Qualification of the Jury: Process Is Permissible Where Defendant Does Not Face Death Penalty: Buchanan v. Kentucky*, 78 CRIM. L. & CRIMINOLOGY 954 (1988); James M. Carr, Note, *At Witt's End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 STAN. L. REV. 427 (1987).

32. *People v. Ashmus*, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 112 (1991); *Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81; *People v. Mickey*, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801 (1991); *People v. Price*, 1 Cal. 4th 324, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991).

33. *Ashmus*, 54 Cal. 3d at 964, 820 P.2d at 229-30, 2 Cal. Rptr. 2d at 127-28. Prospective juror Sullivan stated that because of his feelings about the death penalty, he would apply a standard of guilt higher than beyond a reasonable doubt. *Id.* at 964, 820 P.2d at 229, 2 Cal. Rptr. 2d at 127. Prospective juror Griffin stated that "[m]y decision is not going to be the death penalty." *Id.* Prospective juror Van Giesen stated that she would not be responsible for taking another's life. *Id.* In *Breaux*, all three excluded jurors stated that they did not think they could vote for the death penalty. *Breaux*, 1 Cal. 4th at 97 n.8, 820 P.2d at 601 n.8, 3 Cal. Rptr. 2d at 310 n.8.

In *Mickey*, each excluded juror made it unmistakably clear that they would not vote for the death penalty. *Mickey*, 54 Cal. 3d at 680, 818 P.2d at 119, 286 Cal. Rptr. at 836. In *Price*, an excluded witness stated that she would be unable to vote for the death penalty even if the evidence indicated it was the proper punishment. *Price*, 1 Cal. 4th at 402, 821 P.2d at 651, 3 Cal. Rptr. 2d at 147.

34. *Ashmus*, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 112; *Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81; *People v. Edwards*, 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991); *Mickey*, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801; *People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991); *Price*, 1 Cal. 4th 324, 821 P.2d 610, 3 Cal. Rptr. 2d 106.

35. *Nicolaus*, 54 Cal. 3d at 571, 817 P.2d at 902, 286 Cal. Rptr. at 637; *Mickey*, 54 Cal. 3d at 662, 818 P.2d at 107, 286 Cal. Rptr. at 824. California Penal Codes section 190.4(c) states:

If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider . . . the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

CAL. PENAL CODE § 190.4(c) (West 1988 & Supp. 1991).

In *Nicolaus*, the defendant argued that the trial court deprived him of his constitutional right to a representative jury by refusing to impanel separate guilt and penalty phase juries. The supreme court held that because the defendant did not show "good

of jurors for personal hardship,<sup>36</sup> excusal of jurors for financial hardship,<sup>37</sup> denial of motion to quash the jury venire,<sup>38</sup> refusal to exclude jurors because of their views favoring capital punishment,<sup>39</sup> and lim-

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cause" for deviating from the clear legislative mandate of section 190.4(c), there was no error. *Nicolaus*, 54 Cal. 3d at 573-74, 817 P.2d at 904, 286 Cal. Rptr. at 639.

In *Mickey*, the defendant argued that because the prosecutor excluded "guilt phase includables" (those persons who would automatically vote against the death penalty at the penalty phase, but who could be fair and impartial at the guilt phase, *Hovey v. Superior Court*, 28 Cal. 3d 1, 17 n.36, 616 P.2d 1301, 1308 n.36, 168 Cal. Rptr. 128, 135 n.36 (1980)), the prosecution was required to impanel a new penalty phase jury. The court had rejected such an argument in *Hovey*, and accordingly found no deprivation of the defendant's right to a fair and impartial jury. *Mickey*, 54 Cal. 3d at 663, 818 P.2d at 107-08, 286 Cal. Rptr. at 824-25.

The *Ashmus* court also addressed the question of "guilt phase includables." There, the court held that exclusion of "guilt phase includables" does not offend the right to a representative jury under either the United States or California Constitution. *Ashmus*, 54 Cal. 3d at 956-57, 820 P.2d at 224, 2 Cal. Rptr. 2d at 123 (citing *People v. Fields*, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983); *People v. Guzman*, 45 Cal. 3d 915, 755 P.2d 917, 248 Cal. Rptr. 467 (1988)). See also *Lockhart v. McCree*, 476 U.S. 162 (1986).

36. *Mickey*, 54 Cal. 3d at 663, 818 P.2d at 108, 286 Cal. Rptr. at 825. The court held that the claim was waived, and in any event, the trial court did not abuse its discretion by excusing jurors for undue personal hardship. Accordingly, the defendant's right to a representative jury was not violated. *Id.* at 664-65, 818 P.2d at 109, 286 Cal. Rptr. at 826. See also CAL. CODE CIV. PROC. § 204(b) (West Supp. 1992) (stating that "[a]n eligible person may be excused from jury service only for an undue hardship").

37. *Nicolaus*, 54 Cal. 3d at 571, 817 P.2d at 902, 286 Cal. Rptr. at 637 (holding that excluding jurors because of financial hardship did not violate the defendant's right to a jury selected from a representative cross section of society and that poor people do not constitute an identifiable class that, if excluded, would violate the defendant's rights).

38. In *Breaux*, the defendant moved to quash the jury venire because of underrepresentation of Hispanics. He contended that the trial court's denial of his motion deprived him of his right to trial by a jury drawn from a representative cross-section of the community, as guaranteed by the Sixth Amendment. In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group allegedly excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Breaux*, 1 Cal. 4th at 297, 821 P.2d at 592, 3 Cal. Rptr. 2d at 89 (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). The court held that defendant failed to satisfy the third requirement because he presented no evidence as to the cause of a statistical disparity in Hispanic representation. *Id.* at 298, 821 P.2d at 592, 3 Cal. Rptr. 2d at 89.

39. In *Ashmus*, the court held that by not exhausting his peremptory challenges at trial, the defendant did not preserve the claim of error. *Ashmus*, 54 Cal. 3d at 964, 820 P.2d at 230, 2 Cal. Rptr. 2d at 138 (citing *People v. Coleman*, 46 Cal. 3d 749, 770, 759 P.2d 1260, 1273, 251 Cal. Rptr. 83, 96 (1988) (holding that in order to preserve a claim of error relating to the denial of a challenge for cause, the defendant must usually exhaust his peremptory challenges)).

In *People v. Price*, 1 Cal. 4th 324, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991), the court rejected the defendant's claim that the trial court erred by denying challenges to de-

iting defendants' examination of potential jurors during voir dire.<sup>40</sup> In each case, the court found either that the claim was waived or there was no error.<sup>41</sup>

### III. GUILT PHASE ISSUES

#### A. *Miranda* Issues

In six of the surveyed cases,<sup>42</sup> the defendants asserted claims based upon violations of *Miranda v. Arizona*.<sup>43</sup> In each instance, the court found that the defendants had knowingly and voluntarily waived their rights,<sup>44</sup> or that the statements were not made during a custodial interrogation.<sup>45</sup>

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fense jurors. The court found that the defendant could not have been prejudiced because the defense had sufficient peremptory challenges remaining to remove each of the jurors unsuccessfully challenged for cause. *Id.* at 401, 821 P.2d at 651, 3 Cal. Rptr. 2d at 147 (citing *People v. Morris*, 53 Cal. 3d 152, 184, 807 P.2d 949, 965, 279 Cal. Rptr. 720, 736 (1991)).

In *Mickey*, the trial court denied the defendant's challenge of prospective juror Perez. The supreme court assumed error but reasoned that any such error was harmless because Perez did not sit on the jury. *Mickey*, 54 Cal. 3d at 682-83, 818 P.2d at 121, 286 Cal. Rptr. at 838.

In *People v. Edwards*, 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991), the supreme court found no prejudicial error when the trial court denied eleven defense challenges for cause. Furthermore the court reasoned that any potential error would have been harmless because none of the eleven prospective jurors sat on the jury, and the defendant had ten peremptories left when the final jury was impaneled. *Id.* at 830, 819 P.2d at 463, 1 Cal. Rptr. 2d at 723.

40. *Ashmus*, 54 Cal. 3d at 959, 820 P.2d at 226, 2 Cal. Rptr. 2d at 124 (holding that the trial court did not abuse its discretion in limiting voir dire).

41. See *supra* notes 35-40 and accompanying text.

42. *Ashmus*, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 112; *Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81; *Edwards*, 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696; *Mickey*, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801; *People v. Mickle*, 54 Cal. 3d 140, 814 P.2d 290, 284 Cal. Rptr. 511 (1991); *People v. Sully*, 53 Cal. 3d 1195, 812 P.2d 163, 283 Cal. Rptr. 144 (1991).

43. 384 U.S. 436 (1966). When people are placed in custody, *Miranda* requires that the police inform them that (1) they have a right to remain silent, (2) anything they say can be used against them in a court of law, (3) they have the right to an attorney, and (4) if they cannot afford an attorney one will be appointed for them. *Id.* at 487-88 n.57. See generally 5 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2679 (2d ed. 1989 & Supp. 1992).

44. *Ashmus*, 54 Cal. 3d at 968, 820 P.2d at 232, 2 Cal. Rptr. 2d at 130 (holding that the defendant's statement was properly admitted because he had waived his *Miranda* rights); *Breaux*, 1 Cal. 4th at 299-301, 821 P.2d at 594-95, 3 Cal. Rptr. 2d at 90-91 (stating that the defendant's morphine injections at the hospital did not prohibit a knowing and voluntary waiver); *Mickle*, 54 Cal. 3d at 169-71, 814 P.2d at 304-05, 284 Cal. Rptr. at 525-26 (reasoning that the defendant's single waiver was sufficient for four interviews because there was no change in circumstances requiring readvisement of his *Miranda* rights); *Sully*, 53 Cal. 3d at 1232-34, 812 P.2d at 185-86, 283 Cal. Rptr. at 166 (noting that on two separate occasions, Sully, an ex-police officer, waived his *Miranda* rights and proceeded to answer questions; hence, no error or harmless error was found).

45. *Edwards*, 54 Cal. 3d at 814-15, 819 P.2d at 452-54, 1 Cal. Rptr. 2d at 712-14 (reasoning that there was no custodial interrogation when Edwards spontaneously volunteered a confession to a police officer); *Mickey*, 54 Cal. 3d at 641-53, 818 P.2d at 93-101, 286 Cal. Rptr. at 810-18 (finding that several voluntary statements made by the accused

### B. Evidentiary Issues

In three of the cases, the defendants argued that the verdict was not supported by sufficient evidence.<sup>46</sup> The court, however, rejected the claim each time.<sup>47</sup> The defendants also raised a variety of other evidentiary objections, including improper introduction of prior offenses,<sup>48</sup> introduction of privileged communications,<sup>49</sup> introduction of the defendant's hostility towards religion,<sup>50</sup> improper admission of

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during transportation from Japan to the United States were not made while under custodial interrogation).

46. *Edwards*, 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696; *People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991); *People v. Webster*, 54 Cal. 3d 411, 814 P.2d 1273, 285 Cal. Rptr. 31 (1991). "In reviewing the sufficiency of the evidence, [the reviewing court] must draw all inferences in support of the verdict that can reasonably be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *Edwards*, 54 Cal. 3d at 813, 819 P.2d at 452, 1 Cal. Rptr. 2d at 712 (citing *People v. Miranda*, 44 Cal. 3d 57, 86, 744 P.2d 1127, 1144, 241 Cal. Rptr. 594, 611 (1987)). See generally B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE APPEAL §§ 683-685 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law* §§ 3248-3268 (West 1985 & Supp. 1988).

47. *Edwards*, 54 Cal. 3d at 813-14, 819 P.2d at 452, 1 Cal. Rptr. 2d at 712 (evidence sufficient to support finding of premeditation and deliberation); *Nicolaus*, 54 Cal. 3d at 575-77, 817 P.2d at 905-06, 286 Cal. Rptr. at 640-41 (same); *Webster*, 54 Cal. 3d at 439-40, 814 P.2d at 1288, 285 Cal. Rptr. at 46 (evidence of robbery sufficient to support special circumstance of murder during commission of robbery). In *Webster* the court stated that the "[i]mmediate presence" element of robbery is satisfied if the stolen property is within the victim's reach, inspection, observation, or control, such that she could, if not overcome by violence or fear, retain her possession of it. *Id.* Even though the car was several hundred feet away, the court held that it was stolen from the victim's "immediate presence." *Id.*

48. *Mickle*, 54 Cal. 3d at 171-73, 814 P.2d at 305-07, 284 Cal. Rptr. at 527-28 (stating that the trial court did not abuse its discretion by admitting the defendant's prior felony conviction for impeachment purposes); *Sully*, 53 Cal. 3d at 1224-26, 812 P.2d at 179-81, 283 Cal. Rptr. at 160-61 (finding admission of prior crimes evidence was either not error or harmless); *Webster*, 54 Cal. 3d at 445, 814 P.2d at 1292, 285 Cal. Rptr. at 50 (no error).

49. *Mickey*, 54 Cal. 3d at 654-55, 818 P.2d at 102-03, 286 Cal. Rptr. at 819-20. The supreme court reasoned in *Mickey* that the trial court properly admitted letters that the defendant had sent to his wife because the defendant did not intend non-disclosure. See *People v. Gomez*, 134 Cal. App. 3d 874, 185 Cal. Rptr. 155 (1982). Nor did the defendant have a reasonable expectation of privacy. See *North v. Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972). The defendant believed that Japanese and/or U.S. officials intercepted and read his mail; thus the marital communications privilege did not apply. *Mickey*, 54 Cal. 3d at 654-55, 818 P.2d at 102-03, 286 Cal. Rptr. at 819-20.

50. *Nicolaus*, 54 Cal. 3d at 577-78, 817 P.2d at 906-07, 286 Cal. Rptr. at 641-42 (reasoning that evidence of the defendant's hostility towards religion was relevant to show motive because the victim was very involved with her church and the defendant had written about his "war against Christianity"). The supreme court also concluded that the trial court did not abuse its discretion by finding the evidence more probative than prejudicial. *Id.*

photographs,<sup>51</sup> *Kelly-Frye* error,<sup>52</sup> and search and seizure errors.<sup>53</sup> In each case, the court found no error, harmless error, or that the claim was waived.<sup>54</sup>

### C. Prosecutorial Misconduct

In general, prosecutorial misconduct occurs when the prosecutor employs deceptive methods to persuade the court or the jury.<sup>55</sup> In seven of the cases surveyed,<sup>56</sup> defendants alleged misconduct during

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51. *People v. Ashmus*, 54 Cal. 3d 932, 973-74, 820 P.2d 214, 236, 2 Cal. Rptr. 2d 112, 134 (1991) (reasoning that the photographs of the victim were relevant to show malice and not unduly prejudicial; hence, no error); *People v. Fierro*, 1 Cal. 4th 173, 222-23, 821 P.2d 1302, 1324, 3 Cal. Rptr. 2d 426, 448 (1991) (stating that photographs of the victim's body were properly admitted because they were relevant and not unduly prejudicial); *Mickey*, 54 Cal. 3d at 655-56, 818 P.2d at 103, 286 Cal. Rptr. at 820 (same).

52. The *Kelly-Frye* rule defines the required foundation for admitting expert testimony on the application of a new scientific technique. The admissibility of such evidence requires (1) testimony by a person who is properly qualified as an expert on the subject as to the general acceptance of the scientific technique, and (2) testimony as to the use of correct scientific procedures in the particular case. *Ashmus*, 54 Cal. 3d at 970, 820 P.2d at 234, 2 Cal. Rptr. 2d at 132 (citing *People v. Kelly* 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976); *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)).

In *Ashmus*, the court found no *Kelly-Frye* error because the People showed that electrophoretic analysis of dried semen stains was generally accepted by the scientific community and that correct scientific procedures were used in this case. *Id.* at 971, 820 P.2d at 235, 2 Cal. Rptr. 2d at 133. The high court also upheld the trial court's admission of an expert's electrophoretic analysis of dried bloodstains in *Fierro* because the scientific community accepted such procedure, see *People v. Morris*, 53 Cal. 3d 152, 807 P.2d 949, 279 Cal. Rptr. 720 (1991), and the scientist used correct scientific procedures when analyzing the blood. *Fierro*, 1 Cal. 4th at 214-15, 821 P.2d at 442-43, 3 Cal. Rptr. 2d at 1318-19.

53. *People v. Bacigalupo*, 1 Cal. 4th 103, 122-23, 820 P.2d 559, 567, 2 Cal. Rptr. 2d 335, 343 (1991) (reasoning that exigent circumstances validated the warrantless arrest because the police had probable cause to believe that the defendant was the killer, and there was a strong likelihood that the defendant would flee the country; therefore, evidence seized pursuant to the arrest was admissible); *Fierro*, 1 Cal. 4th at 217, 821 P.2d at 1320, 3 Cal. Rptr. 2d at 444 (reasoning that warrantless search of a purse was valid because the owner consented); *Nicolaus*, 54 Cal. 3d at 574-75, 817 P.2d at 904-05, 286 Cal. Rptr. at 639-40 (finding that evidence was properly admitted because it was obtained pursuant to a valid search warrant; finding the officer justified in reading letters that in plain view); *People v. Webster*, 54 Cal. 3d 411, 431, 814 P.2d 1273, 1282, 285 Cal. Rptr. 31, 40 (1991) (holding seizure of wallet in plain view valid).

54. See *supra* notes 48-53 and accompanying text. See also *People v. Price*, 1 Cal. 4th 324, 433-41, 821 P.2d 610, 672-78, 3 Cal. Rptr. 2d 106, 168-74 (1991). In *Price*, the defendant raised numerous evidentiary objections, but in each instance the court found either no error or that any error was harmless. The court noted that in such a lengthy trial, errors are bound to occur, but an error must be prejudicial to warrant reversal. *Id.*

55. *Id.* at 447, 821 P.2d at 682, 3 Cal. Rptr. 2d at 178. "[T]he defendant need not show that the prosecutor acted in bad faith or with appreciation for the wrongfulness of the conduct, nor is a claim of prosecutorial misconduct defeated by a showing of a prosecutor's subjective good faith." *Id.* (citing *People v. Bolton*, 23 Cal. 3d 208, 214, 589 P.2d 396, 398-99, 152 Cal. Rptr. 141, 143-44 (1979)).

56. *Ashmus*, 54 Cal. 3d at 975-76, 820 P.2d at 237-38, 2 Cal. Rptr. 2d at 135-36; *Bacigalupo*, 1 Cal. 4th at 130, 820 P.2d at 572, 2 Cal. Rptr. 2d at 348; *People v. Breaux*, 1 Cal.

jury selection,<sup>57</sup> opening remarks,<sup>58</sup> presentation of evidence,<sup>59</sup> and closing arguments.<sup>60</sup> In every instance the court found in favor of the People, determining either that the defendant did not suffer prejudice, or that the defendant had waived his claim.<sup>61</sup>

#### D. Ineffective Assistance of Counsel

Three of the twelve cases surveyed involved ineffective assistance of counsel claims.<sup>62</sup> According to *People v. Marsden*,<sup>63</sup> the trial court must give the defendant every opportunity to fully explain his reasons for wanting substitute counsel.<sup>64</sup> Additionally, pursuant to

4th 281, 305-06, 821 P.2d 585, 597-98, 3 Cal. Rptr. 2d 81, 93-94 (1991); *Fierro*, 1 Cal. 4th at 207-13, 821 P.2d at 1313-18, 3 Cal. Rptr. 2d at 437-42; *People v. Mickey*, 54 Cal. 3d 612, 667, 818 P.2d 84, 110-11, 286 Cal. Rptr. 801, 827-28 (1991); *Price*, 1 Cal. 4th at 447-62, 821 P.2d at 682-92, 3 Cal. Rptr. 2d at 178-88; *People v. Sully*, 53 Cal. 3d 1195, 1234-35, 812 P.2d 163, 186-87, 283 Cal. Rptr. 144, 167-68 (1991). See also *infra* notes 161-162 and accompanying text for a discussion of prosecutorial misconduct during the penalty phase.

57. *Fierro*, 1 Cal. 4th at 207-10, 821 P.2d at 1313-15, 3 Cal. Rptr. 2d at 437-39 (stating that the defendant waived objection to various comments regarding adversarial process and the right to remain silent, or error was non-prejudicial); *Price*, 1 Cal. 4th at 447-51, 821 P.2d at 682-84, 3 Cal. Rptr. 2d at 178-80 (finding that the defense counsel's statements suggesting improper motives were not prejudicial).

58. *Mickey*, 54 Cal. 3d at 667, 818 P.2d at 110-11, 286 Cal. Rptr. at 827-28 (reasoning that the defendant waived, for lack of timeliness, any objection to the prosecutor's opening remarks about a witness that did not actually testify).

59. *Price*, 1 Cal. 4th at 451-60, 821 P.2d at 684-91, 3 Cal. Rptr. 2d at 180-87 (finding harmless the prosecutor's alleged misconduct, including numerous comments during the lengthy trial regarding the character of the defendant and defense counsel that revealed inadmissible evidence).

60. *E.g.*, *Sully*, 53 Cal. 3d at 1235-36, 812 P.2d at 186-87, 283 Cal. Rptr. at 167-68. In all seven of the cases, the defendants alleged prosecutorial misconduct during closing arguments, ranging from commenting on the credibility of witnesses to arguing facts outside the record. For a complete list of cases that alleged prosecutorial misconduct see *supra* note 56.

61. See *supra* notes 56-60 and accompanying text. Generally, "[t]o preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." *Price*, 1 Cal. 4th at 447, 821 P.2d at 682, 3 Cal. Rptr. 2d at 178 (citing *People v. Wharton* 53 Cal. 3d 522, 591, 809 P.2d 290, 333, 280 Cal. Rptr. 631, 674 (1991)).

62. *People v. Breaux*, 1 Cal. 4th 281, 306-07, 821 P.2d 585, 599, 3 Cal. Rptr. 2d 81, 95 (1991); *People v. Fierro*, 1 Cal. 4th 173, 204-07, 821 P.2d 1302, 1311-13, 3 Cal. Rptr. 2d 426, 435-37 (1991); *People v. Webster*, 54 Cal. 3d 411, 432-36, 814 P.2d 1273, 1283-86, 285 Cal. Rptr. 31, 41-44 (1991).

63. 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970).

64. *Id.* at 124, 465 P.2d at 48, 84 Cal. Rptr. at 160. See generally RONALD M. GEORGE, CALIFORNIA CRIMINAL TRIAL JUDGES' BENCHBOOK at 48.4-5 (1988) (noting that a judge's refusal to appoint substitute defense counsel without allowing the defendant an opportunity to "relate specific grounds" for substitution is reversible error); B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE *Trial* § 368 (1963 & Supp. 1985).



*Faretta v. California*,<sup>65</sup> a defendant may waive his right to counsel and proceed pro se, provided his waiver is knowing and voluntary.<sup>66</sup> Two defendants asserted that the trial court improperly considered their requests for substitute counsel<sup>67</sup> and one defendant claimed error based on *Faretta*.<sup>68</sup> The supreme court decided both of these issues in favor of the People.<sup>69</sup>

### E. Instructional Error

In eight of the twelve cases reviewed, the defendants advanced a variety of guilt phase instructional errors.<sup>70</sup> The defendants alleged that the trial court gave erroneous instructions on the following issues: consciousness of guilt,<sup>71</sup> accomplice,<sup>72</sup> lesser-included offenses,<sup>73</sup>

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65. 422 U.S. 806 (1975).

66. *Id.* at 819-21.

67. In *People v. Fierro*, 1 Cal. 4th 173, 821 P.2d 1302, 3 Cal. Rptr. 2d 426 (1991), the defendant stated that he did not "trust" counsel and that he was not "comfortable" with counsel. *Id.* at 205-06, 821 P.2d at 1312-13, 3 Cal. Rptr. 2d at 436-37. After three separate in camera hearings, the trial court properly determined that these general statements were not sufficient to prove ineffective assistance of counsel. *Id.* at 204-07, 821 P.2d at 1311-13, 3 Cal. Rptr. 2d at 435-37.

In *People v. Webster*, 54 Cal. 3d 411, 814 P.2d 1273, 285 Cal. Rptr. 31 (1991), the defendant claimed that appointed counsel improperly handled pretrial writs. The trial court considered the defendant's claims, but determined there was no indication that the appointed attorney substantially impaired the defendant's right to effective assistance; thus, replacement was not necessary. *Id.* at 434-36, 814 P.2d at 1284-86, 285 Cal. Rptr. at 42-44 (1991).

68. In *Webster*, the defendant never hinted that he wished to proceed without counsel and the trial court was under no sua sponte duty to question the defendant's silence. *Webster* at 432-36, 814 P.2d at 1283-86, 285 Cal. Rptr. at 41-44. Furthermore, the defendant was not entitled to a mistrial when the court appointed new counsel for the penalty phase because deprivation of effective assistance only occurs when defense counsel is replaced exclusively for closing arguments. *Id.* at 454-55, 814 P.2d at 1298-99, 285 Cal. Rptr. at 56-57.

69. See *supra* notes 67-68 and accompanying text.

70. *People v. Ashmus*, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 112 (1991); *People v. Bacigalupo*, 1 Cal. 4th 103, 820 P.2d 559, 2 Cal. Rptr. 2d 335 (1991); *People v. Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81 (1991); *People v. Mickey*, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801 (1991); *People v. Mickle*, 54 Cal. 3d 140, 814 P.2d 290, 284 Cal. Rptr. 511 (1991); *People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991); *People v. Price*, 1 Cal. 4th 324, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991); *People v. Sully*, 53 Cal. 3d 1195, 812 P.2d 163, 283 Cal. Rptr. 144 (1991).

71. In *Ashmus* the judge instructed the jury as follows:

If you find that before this trial the defendant made willfully false or deliberately misleading statements concerning the charge upon which he is now being tried, you may consider such statements as a circumstance tending to prove consciousness of guilt but i[t] i[s] not suffic[i]ent of itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for your determination.

*Ashmus*, 54 Cal. 3d at 976-77, 820 P.2d at 238, 2 Cal. Rptr. 2d at 136. The supreme court conceded that this instruction "defines a permissive inference—to the effect that if the defendant lied about the crime, it may be inferred that he himself believed he was responsible therefore." *Id.* at 977, 820 P.2d at 238, 2 Cal. Rptr. 2d at 136. However, the supreme court determined that any error was harmless because "[a] permissive inference violates the Due Process Clause only if the suggested conclusion is not one that

flight,<sup>74</sup> admission by defendant,<sup>75</sup> defendant's failure to testify,<sup>76</sup> testimony of an informer,<sup>77</sup> diminished capacity,<sup>78</sup> attempt,<sup>79</sup> and immu-

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reason and common sense justify in light of the proven facts before the jury.' " *Id.* at 977, 820 P.2d at 238, 2 Cal. Rptr. 2d at 136 (quoting *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985)).

In *Breaux*, the court instructed the jury pursuant to CALJIC Nos. 2.03 and 2.06 which allow the jury to determine what significance, if any, to place on evidence of consciousness of guilt. *Breaux*, 1 Cal. 4th at 303-04, 821 P.2d at 597, 3 Cal. Rptr. 2d at 93. See CALJIC Nos. 2.03 & 2.06 (5th ed. 1988). The supreme court determined that the two instructions properly informed the jury about consciousness of guilt and that the instructions did not address the defendant's mental state at the time of the crime. Therefore, no error occurred. *Id.* at 303-05, 821 P.2d at 597, 3 Cal. Rptr. 2d at 93.

In *Mickey*, the trial judge instructed the jury pursuant to CALJIC No. 2.03, which states: "If you find that before this trial the defendant made *false* or deliberately misleading statements." *Mickey*, 54 Cal. 3d at 671, 818 P.2d at 114, 286 Cal. Rptr. at 831 (emphasis added). The supreme court determined that inserting the word "wilfully" before "false" would make the instruction more accurate by excluding from consideration mistaken remarks, but that in this case a reasonable juror could not have misconstrued the instruction. *Id.*

72. *Price*, 1 Cal. 4th at 443, 821 P.2d at 679, 3 Cal. Rptr. 2d at 175 (finding the instruction defining an accomplice was proper); *Sully*, 53 Cal. 3d at 1227, 812 P.2d at 181, 283 Cal. Rptr. at 162 (failing to give the accomplice instruction about a witness did not prejudice the defendant).

73. *Bacigalupo*, 1 Cal. 4th at 127, 820 P.2d at 570, 2 Cal. Rptr. 2d at 346 (finding no proof in the record that would require the judge, sua sponte, to give an instruction on a lesser-included offense); *Mickey*, 54 Cal. 3d at 672-73, 818 P.2d at 114-15, 286 Cal. Rptr. at 831-32 (holding that the standard instruction on lesser-included offenses does not violate the federal or state constitution); *Nicolaus*, 54 Cal. 3d at 530, 817 P.2d at 908, 286 Cal. Rptr. at 643 (holding that the standard jury instruction does not lead to error); *Price*, 1 Cal. 4th at 464, 821 P.2d at 693-94, 3 Cal. Rptr. 2d at 189-90 (reasoning that the trial court's failure to give an instruction on manslaughter was harmless error because the jury found the defendant guilty of felonious murder based on special circumstances).

74. *Bacigalupo*, 1 Cal. 4th at 127-28, 820 P.2d at 570-71, 2 Cal. Rptr. 2d at 346-47 (finding no error because the instruction regarding flight was neither argumentative nor biased); *Nicolaus*, 54 Cal. 3d at 578-80, 817 P.2d at 907-08, 286 Cal. Rptr. at 642-43 (reasoning that no prejudice occurred because the standard instruction regarding flight does not "permit the jury to draw irrational and irrelevant inferences about [the defendant's] state of mind at the time of the crime").

75. *Bacigalupo*, 1 Cal. 4th at 128-29, 820 P.2d at 571, 2 Cal. Rptr. 2d at 347 (finding no error because the instruction did not order the jury to mistrust the defendant's statements).

76. *Mickey*, 54 Cal. 3d at 673-74, 818 P.2d at 115, 286 Cal. Rptr. at 832 (holding that the standard instruction concerning a defendant's failure to testify does not lead to an improper or inadequate understanding of the pertinent law by a reasonable juror).

77. *Id.* at 674-75, 818 P.2d at 115-16, 286 Cal. Rptr. at 832-33 (holding that the trial court's failure to instruct on informant testimony, without a formal request, was not error).

78. *Id.* at 675-77, 818 P.2d at 116-17, 286 Cal. Rptr. at 833-34 (holding that failure to instruct on diminished capacity and voluntary intoxication was erroneous, but that errors were harmless beyond a reasonable doubt).

79. *People v. Mickle*, 54 Cal. 3d 140, 174-75, 814 P.2d 290, 308, 284 Cal. Rptr. 511,

nity.<sup>80</sup> The court resolved all instructional issues in favor of the People, finding either no error or harmless error.<sup>81</sup>

#### F. Miscellaneous Guilt Phase Issues

Although the court confronted several other alleged guilt phase errors, this section examines only the most prominent. In three cases,<sup>82</sup> the defendants alleged that the trial court erroneously denied motions for change of venue.<sup>83</sup> In four cases, the defendants claimed that their absence from the proceedings constituted prejudicial error.<sup>84</sup> Additionally, two defendants challenged the court's order to have them shackled during the proceedings.<sup>85</sup> Finally, one defendant alleged errors during his competency hearing.<sup>86</sup> Each of these issues was resolved in favor of the People.<sup>87</sup>

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529 (1991) (determining that the trial court's failure to instruct sua sponte on attempt was harmless error).

80. *People v. Price*, 1 Cal. 4th 324, 445, 821 P.2d 610, 680-81, 3 Cal. Rptr. 2d 106, 176-77 (1991) (finding harmless an instruction that allowed the jury to consider immaturity when determining the credibility of a prosecution witness).

81. See *supra* notes 71-80 and accompanying text.

82. *People v. Edwards*, 54 Cal. 3d 787, 806-09, 819 P.2d 436, 447-49, 1 Cal. Rptr. 2d 696, 707-09 (1991); *Price*, 1 Cal. 4th at 390-94, 821 P.2d at 643-46, 3 Cal. Rptr. 2d at 139-42; *People v. Sully*, 53 Cal. 3d 1195, 1236-37, 812 P.2d 163, 187-89, 283 Cal. Rptr. 144, 168-69 (1991).

83. In deciding a motion for change of venue, the court considers the following factors: "(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim." *Sully*, 53 Cal. 3d at 1236-37, 812 P.2d at 188, 283 Cal. Rptr. at 168-69 (citations omitted). Examining these five factors, the court determined that in all three cases the trial court properly denied the motions for change of venue. See, e.g., *Edwards*, 54 Cal. 3d at 806-09, 819 P.2d at 447-49, 1 Cal. Rptr. 2d at 707-09.

84. *People v. Breaux*, 1 Cal. 4th 281, 307, 821 P.2d 585, 599, 3 Cal. Rptr. 2d 81, 95 (1991) (noting that a defendant has a constitutional right to waive his right to be present during the proceedings); *Edwards*, 54 Cal. 3d at 809-11, 819 P.2d at 449-50, 1 Cal. Rptr. 2d at 709-10 (reaffirming the constitutionality of a defendant's ability to waive his right to be present during the proceedings and specifically determining that Edwards' waiver was knowing and intelligent); *Price*, 1 Cal. 4th at 404-06, 821 P.2d at 653-54, 3 Cal. Rptr. 2d at 149-50 (finding that the defendant waived his right to be present); *Sully*, 53 Cal. 3d at 1237-40, 812 P.2d at 189-91, 283 Cal. Rptr. at 169. After the defendant in *Sully* exploded in anger at the close of the guilt phase, stating that he would continue to disrupt the proceeding, he voluntarily stated that he would not attend the penalty phase. *Id.* Therefore, the supreme court concluded that the trial court properly permitted the defendant's absence from the penalty phase. Furthermore, having told the jury the defendant's choice was voluntary, the trial court had no obligation to instruct the jury, sua sponte, to disregard the defendant's absence.

85. *People v. Fierro*, 1 Cal. 4th 173, 218-20, 821 P.2d 1302, 1321-22, 3 Cal. Rptr. 2d 426, 445-46 (1991) (holding that shackling a defendant at a preliminary hearing requires a lesser showing than that required at trial since the jury is not present); *Price*, 1 Cal. 4th at 402-04, 821 P.2d at 652-53, 3 Cal. Rptr. 2d at 148-49 (finding that the record fully supported the trial court's decision to shackle the defendant).

86. *People v. Mickle*, 54 Cal. 3d 140, 180-85, 814 P.2d 290, 312-15, 284 Cal. Rptr. 511, 533-36 (1991) (considering the alleged errors during the competency phase as part of the appeal from the death judgment and concluding that no reversal was required).

87. See *supra* notes 82-86 and accompanying text.

## IV. SPECIAL CIRCUMSTANCE ISSUES

In California, the death penalty may be imposed only if the defendant is convicted of first degree murder and the jury finds one of the statutorily defined special circumstances.<sup>88</sup> In five of the cases surveyed, the defendants asserted error during the special circumstances phase of the trial.<sup>89</sup> Two defendants asserted that the lying in wait special circumstance<sup>90</sup> was improperly established;<sup>91</sup> two claimed discriminatory or vindictive prosecution;<sup>92</sup> and one defendant argued that the trial court erred by denying his motion for separate guilt and

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88. See CAL. PENAL CODE § 190.2(a) (West 1988 & Supp. 1991); see also 2 B. WITKIN, CALIFORNIA CRIMES *Punishment for Crime* § 1026C (Supp. 1985). The most common special circumstance is multiple murder. Other commonly found special circumstances include murder-robbery, murder-arson, murder-burglary, and murder-rape. See generally John W. Poulos, *The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances*, 30 SANTA CLARA L. REV. 333 (1990) (discussing the application of special circumstances).

89. *People v. Ashmus*, 54 Cal. 3d 932, 978-81, 820 P.2d 214, 239-41, 2 Cal. Rptr. 2d 112, 137-39 (1991); *People v. Edwards*, 54 Cal. 3d 787, 821-29, 819 P.2d 436, 457-62, 1 Cal. Rptr. 2d 696, 717-22 (1991); *Fierro*, 1 Cal. 4th at 227-30, 821 P.2d at 1326-29, 3 Cal. Rptr. 2d at 450-53; *People v. Mickey*, 54 Cal. 3d 612, 677-79, 818 P.2d 84, 117-18, 286 Cal. Rptr. 801, 834-35 (1991) (determining that two special circumstance findings were erroneous, but holding that any error was harmless because two other special circumstances were properly found); *People v. Webster*, 54 Cal. 3d 411, 448-49, 814 P.2d 1273, 1293-95, 285 Cal. Rptr. 31, 51-53 (1991).

90. In *People v. Morales*, the supreme court set out the standards for the lying in wait special circumstance. 48 Cal. 3d 527, 557, 770 P.2d 244, 260-61, 257 Cal. Rptr. 64, 80 (1989), *cert. denied*, 493 U.S. 984 (1989). The court defined lying in wait as

[a]n intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance.

*Id.* at 557, 770 P.2d at 260-61, 257 Cal. Rptr. at 80.

91. *Edwards*, 54 Cal. 3d at 821-26, 819 P.2d at 457-61, 1 Cal. Rptr. 2d at 717-21 (applying the *Morales* standard and rejecting the defendant's claims that instructional error occurred, that the lying in wait special circumstance is unconstitutional, and that the evidence was not sufficient to support the claim); *Webster*, 54 Cal. 3d at 448-49, 814 P.2d at 1293-95, 285 Cal. Rptr. at 51-52 (rejecting the defendant's claim of instructional error when the trial court told the jury that only a wanton and reckless intent to produce injury was necessary).

92. *Ashmus*, 54 Cal. 3d at 978-80, 820 P.2d at 239-40, 2 Cal. Rptr. 2d at 137-38 (holding that the trial court did not abuse its discretion in denying the defendant access to the People's capital prosecution policies and practices when he sought evidence that the prosecutor's policies were arbitrary, capricious or discriminatory in determining whether to charge a special circumstance); *Edwards*, 54 Cal. 3d at 826-29, 819 P.2d at 461-62, 1 Cal. Rptr. 2d at 721-22 (reasoning that the prosecutor did not act vindictively, capriciously, or discriminatorily in amending the complaint to charge a special circumstance because the execution of a 12-year-old girl is particularly aggravated).

special circumstance trials.<sup>93</sup> Finally, in two instances the defendants claimed instructional error.<sup>94</sup> While none of the allegations led to reversal, the defendants did prevail on individual contentions<sup>95</sup> and the lying in wait special circumstance merited three dissenting opinions.<sup>96</sup>

## V. PENALTY PHASE ISSUES

### A. *Boyd Error*

In weighing aggravating and mitigating factors, the jury may only consider those aggravating factors which are specifically listed in California Penal Code section 190.3.<sup>97</sup> *Boyd* error occurs when the jury weighs factors not enumerated in section 190.3.<sup>98</sup>

In *People v. Sully*,<sup>99</sup> the defendant argued that the trial court erred

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93. *Fierro*, 1 Cal. 4th at 228-30, 821 P.2d at 1330-31, 3 Cal. Rptr. 2d at 454-55 (holding that the trial court properly denied the defendant's motion because it simply requested separate juries and not separate trials).

94. *Ashmus*, 54 Cal. 3d at 980-81, 820 P.2d at 240-41, 2 Cal. Rptr. 2d at 138-39 (determining that the instruction at issue was clear, unambiguous and adequate); *Fierro*, 1 Cal. 4th at 227-28, 821 P.2d at 1329-30, 3 Cal. Rptr. 2d at 453-54 (finding no reasonable possibility that the instruction would mislead a reasonable juror).

95. See *supra* note 89.

96. In three separate opinions, Justices Mosk and Broussard claimed that *People v. Morales*, 48 Cal. 3d 527, 557, 770 P.2d 244, 260-61, 257 Cal. Rptr. 64, 80 (1989), improperly defined the lying in wait special circumstance by only requiring a concealment of purpose. *Edwards*, 54 Cal. 3d at 850, 819 P.2d at 447, 1 Cal. Rptr. 2d at 737 (Mosk, J., concurring and dissenting); *People v. Webster*, 54 Cal. 3d 411, 462-63, 814 P.2d 1273, 1302-04, 285 Cal. Rptr. 31, 60-62 (Mosk, J., concurring and dissenting); *Id.* at 463-68, 814 P.2d at 1304-07, 285 Cal. Rptr. at 62-65 (Broussard, J., concurring and dissenting). Both argue that the lying in wait special circumstance requires *actual watching and physical concealment*, and not mere concealment of purpose. *Id.* at 461, 814 P.2d at 1302, 285 Cal. Rptr. at 60 (Mosk, J., concurring and dissenting). Justice Mosk argued that in its present form, the lying in wait special circumstance simply proves premeditation and, therefore, encompasses all first degree murders; consequently, the current lying in wait special circumstance is unconstitutional because it does not help the court single out the defendant that actually deserves the death penalty. *Id.* (Mosk, J., concurring and dissenting).

97. *People v. Boyd*, 38 Cal. 3d 762, 775-76, 700 P.2d 782, 791-92, 215 Cal. Rptr. 1, 10-11 (1985). The factors that the jury may consider are the following:

- (a) The circumstances of the crime;
- (b) other violent criminal activity;
- (c) prior felony convictions;
- (d) extreme mental or emotional disturbance;
- (e) victim participation or consent;
- (f) reasonable belief in moral justification or extenuation;
- (g) extreme duress or substantial domination;
- (h) impairment through mental disease or defect or through intoxication;
- (i) age;
- (j) status as an accomplice and minor participant; and
- (k) any other extenuating fact.

*People v. Bacigalupo*, 1 Cal. 4th 103, 151-53, 820 P.2d 559, 587-88, 2 Cal. Rptr. 2d 335, 363-64 (1991) (Mosk, J., concurring). See also CAL. PENAL CODE § 190.3 (West 1988 & Supp. 1991).

98. *Boyd*, 38 Cal. 3d at 775, 700 P.2d at 791, 215 Cal. Rptr. at 10. "Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation." *Id.* at 774, 700 P.2d at 790-91, 215 Cal. Rptr. at 9.

99. 53 Cal. 3d 1195, 812 P.2d 163, 283 Cal. Rptr. 144 (1991).

by failing to instruct the jury that it could only consider the aggravating factors enumerated in section 190.3.<sup>100</sup> The court rejected this argument, reasoning that since the trial court instructed the jury to make its penalty determination "in light of the statutory factors," and because the prosecutor did not urge the jury to consider anything other than the statutory factors, there was no basis to infer that the jury considered anything but the aggravating factors.<sup>101</sup>

Although *Boyd* generally prohibits evidence of aggravating factors not specified in section 190.3, the prosecution may admit such evidence to rebut a defendant's presentation of mitigating evidence.<sup>102</sup> In *People v. Bacigalupo*,<sup>103</sup> the defense presented mitigating evidence of the defendant's kind and sensitive nature.<sup>104</sup> The supreme court upheld the prosecution's introduction of rebuttal evidence tending to show the defendant's violent nature.<sup>105</sup> In *People v. Fierro*,<sup>106</sup> the court upheld prosecution evidence of the defendant's gang activities to rebut defense evidence of the defendant's participation in socially useful activities.<sup>107</sup> In *People v. Nicolaus*,<sup>108</sup> the court determined that the prosecution properly introduced evidence of the defendant's hatred of the victim's "stripe of Christianity" to rebut the defendant's statement that he never intended to kill her.<sup>109</sup> Finally, in *People v.*

100. *Id.* at 1241, 812 P.2d at 191-92, 283 Cal. Rptr. at 172-73.

101. *Id.* at 1242, 812 P.2d at 192, 283 Cal. Rptr. at 173.

102. *People v. Nicolaus*, 54 Cal. 3d 551, 581, 817 P.2d 893, 909, 286 Cal. Rptr. 628, 644 (1991). "Once the defense has presented evidence of circumstances admissible under [section 190.3] factor (k) . . . prosecution rebuttal evidence would be admissible as evidence tending to disprove any disputed fact that is of consequence to the determination of the action." *Id.* (quoting *People v. Boyd*, 38 Cal. 3d 762, 776, 700 P.2d 782, 792, 215 Cal. Rptr. 1, 11 (1985)). See CAL. EVID. CODE § 210 (West 1966 & Supp. 1992).

103. 1 Cal. 4th 103, 820 P.2d 559, 2 Cal. Rptr. 2d 335 (1991).

104. *Id.* at 140, 820 P.2d at 580, 2 Cal. Rptr. 2d at 355 (holding that counsel for the defense may offer any aspect of a defendant's character as a mitigating factor). See CAL. PENAL CODE § 190.3(k) (West 1988 & Supp. 1991). See generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1608 (2d ed. 1989 & Supp. 1992).

105. *Bacigalupo*, 1 Cal. 4th at 140, 820 P.2d at 580, 2 Cal. Rptr. 2d at 356. "When the defense presents mitigating evidence of a defendant's good character, it has put the defendant's character at issue, thus opening the door to prosecution evidence tending to rebut that 'specific asserted aspect of the [defendant's] personality.'" *Id.* (quoting *People v. Rodriguez*, 42 Cal. 3d 730, 792 n.24, 726 P.2d 113, 253-54 n.24, 230 Cal. Rptr. 667, 707-08 n.24 (1986)).

106. 1 Cal. 4th 173, 821 P.2d 1302, 3 Cal. Rptr. 2d 426 (1991).

107. *Id.* at 238, 821 P.2d at 1334, 3 Cal. Rptr. 2d at 458 (1991). "Membership in youth gangs was relevant to the issue of defendant's character and activities as a youth and specifically rebutted the direct testimony of the witness. Accordingly [it] constituted proper rebuttal." *Id.*

108. 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991).

109. *Id.* at 581, 817 P.2d at 909, 286 Cal. Rptr. at 644 (reasoning that the fact that the

*Mickle*,<sup>110</sup> the court found that the defendant had waived his *Boyd* objection.<sup>111</sup>

### B. Factor (b) and Factor (c) Error

During the penalty phase of the trial, the jury balances the aggravating and mitigating factors enunciated in section 190.3 to determine whether the defendant's actions merit the death penalty.<sup>112</sup> Factor (b) allows the court to consider prior criminal conduct involving the use or attempted use of force or violence and factor (c) allows the court to consider the presence or absence of any prior felony convictions.<sup>113</sup>

In *People v. Bacigalupo*,<sup>114</sup> the defendant challenged the trial court's interpretation of factors (b) and (c). However, since the supreme court had previously considered most of the defendant's claims, it simply reaffirmed its position that "an 'acquittal' [does] not include a charge dismissed as part of a plea bargain" under factor (c);<sup>115</sup> factor (b) encompasses criminal activity that occurred anytime during the defendant's lifetime;<sup>116</sup> evidence of aiding and abetting a violent crime is admissible under factor (b);<sup>117</sup> and felonious conduct in another jurisdiction can be considered under factor (c), even if such conduct is considered only a misdemeanor in California.<sup>118</sup> Con-

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defendant hated his wife's "stripe of Christianity" was relevant to show motive for the murder).

110. 54 Cal. 3d 140, 814 P.2d 290, 284 Cal. Rptr. 511 (1991).

111. *Id.* at 186, 814 P.2d at 316, 284 Cal. Rptr. at 537.

112. For a complete list of the aggravating and mitigating factors the court can consider under section 190.3, see *supra* note 97.

113. California Penal Code section 190.3 provides in pertinent part:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (b) [t]he 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 [and] (c) the presence or absence of any prior felony conviction.

CAL. PENAL CODE § 190.3 (West 1988 & Supp. 1991). The court clarified the distinction between the two sections: factor (b) encompasses any violent criminal activity regardless of conviction and factor (c) encompasses any prior felony conviction whether violent or not. *People v. Boyd*, 38 Cal. 3d 762, 773-76, 700 P.2d 782, 791-93, 215 Cal. Rptr. 1, 9-11 (1985).

114. 1 Cal. 4th 103, 820 P.2d 559, 2 Cal. Rptr. 2d 335 (1991).

115. *Id.* at 131, 820 P.2d at 573, 2 Cal. Rptr. 2d at 349. The court had previously rejected a similar claim. See, e.g., *People v. Heishman*, 45 Cal. 3d 147, 193, 753 P.2d 629, 659-60, 246 Cal. Rptr. 673, 703-04, *cert. denied*, 488 U.S. 948 (1988).

116. *Bacigalupo*, 1 Cal. 4th at 134, 820 P.2d at 575, 2 Cal. Rptr. 2d at 351. See, e.g., *People v. Balderas*, 41 Cal. 3d 144, 202, 711 P.2d 480, 514, 222 Cal. Rptr. 184, 217-18 (1985).

117. *Bacigalupo*, 1 Cal. 4th at 136-38, 820 P.2d at 576-77, 2 Cal. Rptr. 2d at 352-53. See, e.g., *People v. Hayes*, 52 Cal. 3d 577, 633, 802 P.2d 376, 410-11, 276 Cal. Rptr. 874, 909 (1990), *cert. denied*, 112 S. Ct. 420 (1991).

118. *Bacigalupo*, 1 Cal. 4th at 138-39, 820 P.2d at 578, 2 Cal. Rptr. 2d at 354-55. "It is not arbitrary or capricious to allow a jury deciding penalty to consider a defendant's

sequently, the court rejected all of the defendant's contentions in *Bacigalupo*.

In *People v. Breaux*,<sup>119</sup> the court examined the applicability of discovery principles to evidence presented under factors (b) and (c).<sup>120</sup> The court determined that the principles of discovery do apply to the penalty phase provided "the relitigation of the 'other crime' . . . is circumscribed by the bounds of relevance and admissibility of evidence that prevails in the original prosecution."<sup>121</sup>

Allegations of factor (b) and factor (c) error arose in four other cases as well,<sup>122</sup> with the supreme court resolving these issues in favor of the People in each instance.<sup>123</sup>

### C. Factor (k)

Under factor (k),<sup>124</sup> the trial court instructs the jury that it may consider "any aspect of a defendant's character or record and any of

willingness to engage in felonious conduct even if that conduct is not felonious in California." *Id.*

119. 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81 (1991).

120. *Id.* at 311 n.10, 821 P.2d at 602 n.10, 3 Cal. Rptr. 2d at 98 n.10.

121. *Id.* In *Breaux*, the supreme court held that the trial court acted within its discretion in limiting discovery to records prior to the battery on the police officer, as opposed to a period of time after the battery. *Id.* However, in his concurring opinion, Justice Mosk pointed out that discovery principles do not draw a line at the time of the conviction and the court should allow discovery of records subsequent to the conviction. *Id.* at 322-23, 821 P.2d at 609-10, 3 Cal. Rptr. 2d at 105-06 (Mosk, J., concurring).

122. *People v. Ashmus*, 54 Cal. 3d 932, 981-85, 820 P.2d 214, 241-43, 2 Cal. Rptr. 2d 112, 139-41 (1991) (holding that only felony convictions entered prior to the perpetration of the capital offense can be considered under factor (c), but reasoning that even though the felony assault presented in this case did not fulfill this requirement, any error was harmless because the jury could consider the assault under factor (b)); *People v. Fierro*, 1 Cal. 4th 173, 249-52, 821 P.2d 1302, 1342-44, 3 Cal. Rptr. 2d 426, 466-68 (1991) (finding that the jury understood it was not supposed to double count defendant's past felony convictions under both factor (b) and (c)); *People v. Price*, 1 Cal. 4th 324, 470-71, 821 P.2d 610, 697-98, 3 Cal. Rptr. 2d 106, 193-94 (1991) (reasoning that the presentation of misdemeanor evidence only led to harmless error because there were no facts to suggest that the court told the jury that it could consider the misdemeanor when determining penalty); *People v. Webster*, 54 Cal. 3d 411, 452-54, 814 P.2d 1273, 1297-98, 285 Cal. Rptr. 31, 55-56 (1991).

In *Webster*, the court noted that factors (b) and (c) may overlap, but both are distinct from factor (a). While factor (c) is limited to criminal conduct which occurred prior to the commission of the capital crime, factor (b) is not. *Id.* The court thus reasoned that the jury could have considered the robbery, which occurred after the murder, under factor (b), and that therefore no prejudice occurred. *Id.*

123. See *supra* note 122.

124. Factor (k) error concerns jury instructions given under California Penal Code section 190.3 (k). Under factor (k), a jury may consider as a mitigating factor "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CAL. PENAL CODE § 190.3(k) (West 1988 & Supp. 1991).



the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>125</sup> In four of the cases surveyed, the defendants alleged that the factor (k) instruction did not adequately inform the jury of its ability to take into account other mitigating factors.<sup>126</sup> Finding that no error had occurred, the supreme court rejected the defendant's claim in all four instances.<sup>127</sup>

#### D. Victim Impact Evidence

In *Booth v. Maryland*<sup>128</sup> and *South Carolina v. Gathers*,<sup>129</sup> the United States Supreme Court established that the presentation of evidence concerning the crime's impact on the victim and the victim's family<sup>130</sup> violates a defendant's Eighth Amendment rights.<sup>131</sup> *Booth* and *Gathers* generally barred admission of victim impact evidence<sup>132</sup> and related prosecution argument during the penalty phase of a capital trial.<sup>133</sup>

Recently, however, the United States Supreme Court overruled both *Booth* and *Gathers* in *Payne v. Tennessee*,<sup>134</sup> holding that the introduction of evidence relating to the victim's personal character or the emotional impact of the crime on the victim's family does not offend the Eighth Amendment.<sup>135</sup> It is important to note that the Court in *Payne* did not mandate the use of victim impact evidence in

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See also 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1608 (2d ed. 1989 & Supp. 1992).

125. CALJIC No. 8.855(k) (5th ed. 1988).

126. *People v. Edwards*, 54 Cal. 3d 787, 841-42, 819 P.2d 436, 471, 1 Cal. Rptr. 2d 696, 731 (1991) (holding that the trial court's factor (k) catch-all instruction was sufficient to instruct the jury on the full range of mitigating evidence); *People v. Nicolaus*, 54 Cal. 3d 551, 586-87, 817 P.2d 893, 912-13, 286 Cal. Rptr. 628, 647-48 (1991) (holding that the factor (k) instruction was sufficient to allow jury to consider extreme mental or emotional disturbance); *People v. Sully*, 53 Cal. 3d 1195, 1244-45, 812 P.2d 163, 193-94, 283 Cal. Rptr. 144, 174-75 (1991) (holding that the factor (k) instruction encompasses any lingering doubt the jury may have about the defendant's guilt and that therefore no special instruction is required); *Webster*, 54 Cal. 3d at 450, 814 P.2d at 1295, 285 Cal. Rptr. at 53 (holding that the jury members would understand that factor (k) instruction allowed them to consider the defendant's character and background).

127. See *supra* note 126 and accompanying text.

128. 482 U.S. 496 (1987).

129. 490 U.S. 805 (1989).

130. *Booth*, 482 U.S. at 502-07; *Gathers*, 490 U.S. at 810-11.

131. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

132. In its broadest definition, victim impact evidence appears to include "(1) the effect of the crime on the victim; (2) the victim's personal characteristics; (3) the emotional impact of the crime on the victim's family (and perhaps others); and (4) the opinions about the crime and the criminal held by family members (and perhaps others)." *People v. Edwards*, 54 Cal. 3d 787, 852, 819 P.2d 436, 478, 1 Cal. Rptr. 2d 696, 738 (1991) (Mosk, J., concurring and dissenting).

133. *Id.* at 833, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725.

134. 111 S. Ct. 2597 (1991).

135. *Id.* at 2609.

capital cases.<sup>136</sup> It merely held that a State's decision to permit the introduction of victim impact evidence would not violate a defendant's Eighth Amendment rights.<sup>137</sup>

In *People v. Edwards*,<sup>138</sup> the prosecution sought to introduce photographs of victims and present argument concerning the impact of the crime on the victim's family.<sup>139</sup> The defendant asserted that, notwithstanding Eighth Amendment considerations, victim impact evidence was inadmissible in California because it did not come within any of the aggravating factors listed in section 190.3.<sup>140</sup> The defendant cited *People v. Gordon*,<sup>141</sup> which held that "the effect of the crime on the victim's family is not relevant to any material circumstance."<sup>142</sup> The California Supreme Court decided that because *Gordon* relied on *Booth* and *Gathers*, it should be reconsidered in light of *Payne*.<sup>143</sup>

The court first noted that prior to *Booth* and *Gathers*, California permitted the admission of victim impact evidence as a circumstance of the crime under factor (a) of section 190.3.<sup>144</sup> The court then observed that two recent California Supreme Court cases had undercut *Gordon's* assumption that the effect of the crime on the victim's family is not relevant to any material circumstance.<sup>145</sup> Concluding that *Gordon's* assumption was no longer valid under *Payne*,<sup>146</sup> the court

136. See *People v. Mickle*, 54 Cal. 3d 140, 200, 814 P.2d 290, 325, 284 Cal. Rptr. 511, 546 (1991) (Mosk, J., concurring).

137. *Id.* (Mosk, J., concurring) "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne*, 111 S. Ct. at 2609.

138. 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991).

139. *Id.* at 832-33, 819 P.2d at 464-65, 1 Cal. Rptr. 2d at 724-25.

140. *Id.* at 833, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725. See *supra* note 97 for the aggravating factors specified in section 190.3.

141. 50 Cal. 3d 1223, 792 P.2d 251, 270 Cal. Rptr. 451 (1990), *cert. denied*, 111 S. Ct. 1123 (1991).

142. *Id.* at 1266-67, 792 P.2d at 277-78, 270 Cal. Rptr. at 477-78.

143. *Edwards*, 54 Cal. 3d at 834, 819 P.2d at 466, 1 Cal. Rptr. 2d at 726.

144. *Id.* (citing *People v. Haskett*, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982)). Factor (a) allows the trier of fact to take into account "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding." CAL. PENAL CODE § 190.3(a) (West 1988 & Supp. 1991).

145. *Edwards*, 54 Cal. 3d at 835, 819 P.2d at 466, 1 Cal. Rptr. 2d at 726. See *People v. Douglas*, 50 Cal. 3d 468, 536, 788 P.2d 640, 680, 268 Cal. Rptr. 126, 166 (1990) (finding no error when the prosecutor argued, "This is a tragedy, not just for the person you killed, but the family and society") and *People v. Benson*, 52 Cal. 3d 754, 795-97, 802 P.2d 330, 827-28, 276 Cal. Rptr. 827, 852-53 (1990) (upholding argument relating to the impact that the defendant's other criminal conduct had upon the victims).

146. *Edwards*, 54 Cal. 3d at 835, 819 P.2d at 466, 1 Cal. Rptr. 2d at 726.

held that factor (a) of section 190.3 allows evidence and argument on the specific harm that the defendant caused, including the impact on the family of the victim.<sup>147</sup> Accordingly, the court determined that the photographs were admissible.<sup>148</sup>

In three other cases, the California Supreme Court, relying on *Payne*, allowed the admission of victim impact evidence as circumstances of the crime under factor (a).<sup>149</sup> In two other cases in which the defendant alleged *Booth* error, the court found that *Booth* concerns were not implicated.<sup>150</sup>

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147. *Id.* Two justices did not agree with this holding. Justice Kennard believed that the photographs were admissible under factor (a) as a circumstance of the crime because the photographs showed what the defendant saw while he committed the crimes. Hence, Justice Kennard did not reach the issue of admissibility of victim impact evidence. *Id.* at 849-50, 819 P.2d at 476-77, 1 Cal. Rptr. 2d at 736-37 (Kennard, J., concurring).

Justice Mosk disagreed with the majority's finding that victim impact evidence was a "circumstance of the crime" under factor (a). He argued that *Gordon* was based on section 190.3 rather than *Booth* and *Gathers*. Hence, the reversal of *Booth* and *Gathers* should not have had an effect on the continuing validity of *Gordon's* holding. Mosk concluded that the photographs in this case were admissible, however, as evidence relevant to a circumstance of the crime, because they revealed the girls themselves. *Id.* at 855, 819 P.2d at 480, 1 Cal. Rptr. 2d at 740 (Mosk, J., concurring and dissenting).

148. *Id.* at 836, 819 P.2d at 467, 1 Cal. Rptr. 2d at 727.

149. In *People v. Ashmus*, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 214 (1991), the court held that comments bearing on the victim's personal characteristics and the emotional impact of the crime on her family were circumstances of the crime under section 190.3. *Id.* at 990-91, 820 P.2d at 247-48, 2 Cal. Rptr. 2d at 145-46 (citing *People v. Benson*, 52 Cal. 3d 754, 795-97, 802 P.2d 330, 355-56, 276 Cal. Rptr. 827, 852-53 (1990)). The court then concluded that, according to *Payne*, the Eighth Amendment did not bar such evidence. *Id.*

In *People v. Fierro*, 1 Cal. 4th 173, 821 P.2d 1302, 3 Cal. Rptr. 2d 426 (1991), the court held that statements regarding the effect of the crime on the victim's wife were not barred by Eighth Amendment, but rather were admissible under section 190.3(a) as one of the circumstances of the crime. *Id.* at 235, 821 P.2d at 1332, 3 Cal. Rptr. 2d at 456.

In dissent, Justice Kennard agreed that, after *Payne*, the Eighth Amendment no longer barred victim impact evidence, but she disagreed with the majority's conclusion that such evidence was admissible in California as a "circumstance of the crime" under section 190.3. Kennard argued that the majority's expansive definition of "circumstances" was contrary to the word's plain meaning as well as its judicial interpretation. *Id.* at 259-62, 821 P.2d at 1348-51, 3 Cal. Rptr. 2d at 472-75 (Kennard, J., concurring and dissenting). Kennard also argued that the majority's dictionary definition of the word ("that which surrounds materially, morally, or logically") was so broad that it would encompass the rest of the factors listed in section 190.3, and hence make their enumeration unnecessary. *Id.* at 263, 821 P.2d at 1351, 3 Cal. Rptr. 2d at 475 (Kennard, J., concurring and dissenting). Kennard concluded that "circumstances of the crime" should include only "those factors and circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." *Id.* at 264, 821 P.2d at 1352, 3 Cal. Rptr. 2d at 476 (Kennard, J., concurring and dissenting).

In *People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991), the court properly admitted statements regarding the effect of the crime on the victim's family. *Id.* at 584-85, 817 P.2d at 911, 286 Cal. Rptr. at 646.

150. In *People v. Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 104 (1991), the supreme court reasoned that the trial court properly admitted a statement by the vic-

In *People v. Bacigalupo*,<sup>151</sup> the defendant asserted that the trial court erroneously excluded a minister's statements describing the potential impact on the defendant's mother if the defendant were sentenced to death.<sup>152</sup> The defendant first recognized that under *Payne*, "impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."<sup>153</sup> He then argued that the impact of the death penalty on a defendant's family was equally relevant to the penalty determination, and admissible as mitigating evidence.<sup>154</sup> Without addressing the issue, the California Supreme Court held that, even if such testimony was relevant mitigating evidence, the trial court committed no error by excluding it because the defendant's mother had already "beg[ged] the jury to spare defendant's life."<sup>155</sup> Thus, the proffered statements would have been cumulative.<sup>156</sup>

The court faced the same issue in *People v. Fierro*.<sup>157</sup> There, the defendant argued that the trial court erred by sustaining the prosecutor's objection to a question designed to elicit evidence concerning the emotional impact of a death sentence on the defendant's family.<sup>158</sup> The supreme court found no prejudicial error because the question was rephrased and subsequently answered.<sup>159</sup> However, the court expressly avoided the issue of whether a defendant has a right to introduce evidence regarding the impact of the death penalty on his family. The court merely "assum[ed] without deciding" that the defendant had such a right, and held that it was not violated.<sup>160</sup>

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tim's mother in application for modification of the verdict because the holding in *Booth* has never applied to such proceedings. *Id.* at 320-21, 821 P.2d at 606, 3 Cal. Rptr. 2d at 104 (citing *People v. Duncan*, 53 Cal. 3d 955, 810 P.2d 131 (1991); *People v. Benson*, 52 Cal. 3d 754, 802 P.2d 330, 276 Cal. Rptr. 827 (1990); *People v. Jennings*, 46 Cal. 3d 963, 760 P.2d 475, 251 Cal. Rptr. 278 (1988)).

Similarly, statements in *People v. Mickle*, 54 Cal. 3d 140, 814 P.2d 290, 284 Cal. Rptr. 511 (1991), concerning the obvious emotional effect of the defendant's prior sexual molestations on the victims, did not implicate *Booth*. *Id.* at 187-88, 814 P.2d at 316-17, 284 Cal. Rptr. at 537-38 (citing *People v. Benson*, 52 Cal. 3d 754, 802 P.2d 330, 276 Cal. Rptr. 827 (1990)). Such statements were admissible as circumstances of the prior crimes bearing on the defendant's culpability. *Id.*

151. 1 Cal. 4th 103, 820 P.2d 559, 2 Cal. Rptr. 2d 335 (1991).

152. *Id.* at 142, 820 P.2d at 580-81, 2 Cal. Rptr. 2d at 356-57.

153. *Id.* (citing *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991)).

154. *Id.*

155. *Id.*

156. *Id.*

157. 1 Cal. 4th 173, 821 P.2d 1302, 3 Cal. Rptr. 2d 426 (1991).

158. *Id.* at 241, 821 P.2d at 1336, 3 Cal. Rptr. 2d at 460.

159. *Id.*

160. *Id.*

The court's holdings in *Bacigalupo* and *Fierro* leave open a very interesting question: Does *Payne*, which allows evidence regarding impact of the murder on the victim's family, also allow evidence regarding impact of the death penalty on the defendant's family?

#### E. Prosecutorial Misconduct

In six of the cases surveyed, the defendants contended that the prosecutor used deceptive methods to persuade the court during the penalty phase.<sup>161</sup> The supreme court found error in a few instances, but for the most part determined that the error was either waived for lack of a timely objection or was harmless.<sup>162</sup>

#### F. Brown Error

*Brown* error stems from the court's concern that section 190.3 of the California Penal Code might mislead the jury about its responsibilities in deciding whether to impose the death penalty.<sup>163</sup> Section 190.3, and former CALJIC 8.84.2, informs the jury that it "shall" impose a sentence of death if it concludes that the aggravating circumstances "outweigh" the mitigating circumstances.<sup>164</sup> A juror might reasonably understand such language to define the penalty determi-

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161. *People v. Ashmus*, 54 Cal. 3d 932, 987-93, 820 P.2d 214, 245-49, 2 Cal. Rptr. 2d 112, 143-47 (1991) (holding that the prosecutor's comments during closing arguments about the defendant's past sexual activity and remorse did not require reversal); *People v. Breaux*, 1 Cal. 4th 281, 312-14, 821 P.2d 585, 603-04, 3 Cal. Rptr. 2d 81, 99-100 (1991) (reasoning that the prosecutor's comments during closing arguments on the defendant's lack of remorse did not relate to his failure to testify and therefore no error occurred); *Fierro*, 1 Cal. 4th at 232-34, 821 P.2d at 1330-31, 3 Cal. Rptr. 2d at 454-55 (finding no indication that the prosecutor improperly questioned witnesses, and concluding that the prosecutor's comments about the jury's responsibilities in giving the death penalty did not lead to reversible error); *People v. Mickle*, 54 Cal. 3d 140, 190-92, 814 P.2d 290, 318-20, 284 Cal. Rptr. 511, 539-41 (1991) (stating that the prosecutor's cross-examination of the defendant was in good faith and otherwise finding no misconduct); *People v. Price*, 1 Cal. 4th 324, 473-85, 821 P.2d 610, 699-707, 3 Cal. Rptr. 2d 106, 195-203 (1991) (finding that although the defendant alleged prosecutorial misconduct at various phases of the lengthy trial, on review, none of the alleged misconduct amounted to reversible error); *People v. Sully*, 53 Cal. 3d 1195, 1248, 812 P.2d 163, 195, 283 Cal. Rptr. 144, 176 (1991) (finding that any objection regarding alleged misconduct during closing arguments was waived). See also *supra* notes 55-61 and accompanying text for a discussion of prosecutorial misconduct during the guilt phase.

162. See *supra* note 161 and accompanying text.

163. See *Death Penalty Law III*, *supra* note 2 at 557 (citing *People v. Brown*, 40 Cal. 3d 512, 538-44, 709 P.2d 440, 453-59, 220 Cal. Rptr. 637, 650-56 (1985), *rev'd on other grounds sub nom.* *California v. Brown*, 479 U.S. 538 (1987)).

164. Section 190.3 provides that "the trier of fact shall . . . impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." CAL. PENAL CODE § 190.3 (West 1988 & Supp. 1991).

Former CALJIC No. 8.84.2 states, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." CALJIC No. 8.84.2 (4th ed. 1979), amended by CALJIC 8.84.2 (Supp. 1987) (emphasis added).

nation as simply a finding of facts or a mere mechanical counting of factors.<sup>165</sup> The *Brown* court stated that the jury must perform a mental balancing process, but not one which calls for a mere mechanical counting of aggravating and mitigating factors on each side of an "imaginary scale."<sup>166</sup> Rather than applying an arithmetic formula, *Brown* requires jurors to make a moral assessment of the facts as they relate to the appropriateness of the death penalty.<sup>167</sup> *Brown* error occurs if an instruction misleads jurors as to the scope of their sentencing discretion.<sup>168</sup>

In *People v. Webster*,<sup>169</sup> the defendant argued that the court erred by instructing the jury, pursuant to California Penal Code section 190.3 (former CALJIC 8.84.2), that it "shall" impose the death penalty if it determines that the aggravating circumstances 'outweigh' those in mitigation.<sup>170</sup> But the court found no error because the trial court also instructed the jury that the mere counting of opposing factors was wrong, and that the particular weight of the aggravating and mitigating factors was not determined by their relative number, but by their relative convincing force on the ultimate question of punishment.<sup>171</sup> Thus, the court concluded that the instructions could not have misled the jury about its discretion to impose the appropriate penalty.<sup>172</sup>

In *People v. Mickey*,<sup>173</sup> the trial court instructed the jury pursuant to the potentially misleading language in section 190.3. However, the supreme court held that no *Brown* error occurred because both the prosecutor and the defense counsel made it clear in their summations that the jurors were required to make a moral assessment of the de-

165. *People v. Mickey*, 54 Cal. 3d 612, 699, 818 P.2d 84, 132, 286 Cal. Rptr. 801, 849 (1991).

166. *Brown*, 40 Cal. 3d at 541, 709 P.2d at 456, 220 Cal. Rptr. at 653.

167. *Id.* The *Brown* court stated,

"By directing that the jury 'shall' impose the death penalty if it finds that aggravating circumstances '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 circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case."

*Id.*

168. *Id.* at 540-44, 709 P.2d at 455-59, 220 Cal. Rptr. at 652-56.

169. 54 Cal. 3d 411, 814 P.2d 1273, 285 Cal. Rptr. 31 (1991).

170. *Id.* at 451, 814 P.2d at 1295-96, 285 Cal. Rptr. at 53-54. For the text of former CALJIC 8.84.2, see *supra* note 164.

171. *Webster*, 54 Cal. 3d at 451, 814 P.2d at 1296, 285 Cal. Rptr. at 54.

172. *Id.*

173. 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801 (1991).

defendant and his crimes in determining the appropriate penalty.<sup>174</sup>

The other four death penalty appeals that alleged *Brown* error<sup>175</sup> challenged the modified version of CALJIC 8.84.2.<sup>176</sup> All four cases challenged the instructions on the same grounds: the meaning, connotation and effect of the words “simply,” “substantial,” and “warranted.”

### 1. Use of the word “simply”

As modified, CALJIC 8.84.2 instructs the jury to “*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.”<sup>177</sup> In two of the four cases that disputed the validity of modified CALJIC 8.84.2, the defendant argued that use of the word “simply” trivialized the enormity of the jury’s task and undermined its sense of responsibility about its role. The court consistently rejected this contention, noting that prior cases had rejected that precise argument as well.<sup>178</sup>

### 2. Use of the words “substantial” and “warranted”

The modified version of CALJIC 8.84.2 also states that “[t]o return a judgment of death, each of you must be persuaded that the aggravating evidence and circumstances are so *substantial* in comparison with the mitigating circumstances, that it *warrants* death instead of life without parole.”<sup>179</sup> In three of the four cases, the defendant argued that the word “substantial” was so vague that it failed to inform

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174. *Id.* at 700, 818 P.2d at 132, 286 Cal. Rptr. at 849.

175. *People v. Breaux*, 1 Cal. 4th 281, 821 P.2d 585, 3 Cal. Rptr. 2d 81 (1991); *People v. Edwards*, 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991); *People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893, 286 Cal. Rptr. 628 (1991); *People v. Sully*, 53 Cal. 3d 1195, 812 P.2d 163, 283 Cal. Rptr. 144 (1991).

176. The modified version of CALJIC 8.84.2 provides, in pertinent part:

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

In weighing the various circumstances, you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances, that it warrants death instead of life without parole.

CALJIC No. 8.84.2 (4th ed. 1979 & Supp. 1987).

177. *See supra* note 176.

178. *Nicolaus*, 54 Cal. 3d at 590, 817 P.2d at 915, 286 Cal. Rptr. at 650; *Sully*, 53 Cal. 3d at 1243, 812 P.2d at 193, 283 Cal. Rptr. at 174. *See also Edwards*, 54 Cal. 3d at 841, 819 P.2d at 471, 1 Cal. Rptr. 2d at 731 (citations omitted) (upholding the validity of modified CALJIC 8.84.2 in its entirety).

179. CALJIC No. 8.84.2 (4th ed. 1979 & Supp. 1987) (emphasis added).

the jurors of the required findings in order to impose death. Three of the defendants also contended that the word "warrants" imposed too low a standard for the imposition of death, and directed the jury's attention away from the crucial question of whether the death penalty is "appropriate." The court rejected the arguments in each case.<sup>180</sup>

### G. Cumulative Prejudice

The supreme court must determine whether the cumulative effect of trial errors, though individually harmless, should result in a total reversal.<sup>181</sup> In seven cases the court examined whether cumulative prejudice required reversal of the death penalty. The court rejected the argument in each case.<sup>182</sup>

### H. Proportionality Review

There are two types of proportionality review: intercase and intracase. The supreme court reaffirmed its unwillingness to practice intercase review, which examines the defendant's case in relation to similar cases.<sup>183</sup> But in two cases, the court did engage in intracase

180. *People v. Breaux*, 1 Cal. 4th 281, 315-16, 821 P.2d 585, 605, 3 Cal. Rptr. 2d 81, 101 (1991) (holding that use of the word "substantial" was not error and finding the contention regarding the word "warranted" to be spurious); *Nicolaus*, 54 Cal. 3d at 591, 817 P.2d at 915, 286 Cal. Rptr. at 650; *Sully*, 53 Cal. 3d at 1243-44, 812 P.2d at 193, 283 Cal. Rptr. at 174 (holding that the charge to the jury, considered as a whole, adequately conveyed the seriousness of its task and the legally appropriate manner of performing it).

181. *People v. Brown*, 46 Cal. 3d 432, 446-48, 758 P.2d 1135, 1144-45, 250 Cal. Rptr. 604, 613-15 (1988) (discussing the application of cumulative prejudice). See generally B. JEFFERSON, CALIFORNIA EVIDENCE LAW § 22.1 (1985); 6 B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Reversible Error* § 756 (1963 & Supp. 1985); 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 359 (3d ed. 1985); 5 AM. JUR. 2D *Appeal & Error* § 789 (1962 & Supp. 1988); 5 CAL. JUR. 3D *Appellate Review* § 554 (1973).

182. *People v. Ashmus*, 54 Cal. 3d 932, 1006, 820 P.2d 214, 258, 2 Cal. Rptr. 2d 112, 156 (1991) (finding that the errors were infrequent and minimally significant and could not have resulted in the defendant's detriment); *People v. Bacigalupo*, 1 Cal. 4th 103, 148-49, 820 P.2d 559, 585, 2 Cal. Rptr. 2d 335, 361 (1991) (holding that the few errors that did occur were clearly harmless); *Edwards*, 54 Cal. 3d at 846, 819 P.2d at 474, 1 Cal. Rptr. 2d at 734 (determining that the few errors that the court found do not merit reversal); *People v. Mickey*, 54 Cal. 3d 612, 706, 818 P.2d 84, 136, 286 Cal. Rptr. 801, 853 (1991) (finding that the evidence clearly supported the conviction); *People v. Mickle*, 54 Cal. 3d 140, 197, 814 P.2d 290, 323, 284 Cal. Rptr. 511, 544 (1991) (stating that the errors did not undermine the validity of the verdict); *People v. Price*, 1 Cal. 4th 324, 491, 821 P.2d 610, 711, 3 Cal. Rptr. 2d 106, 207 (1991) (finding that since no errors were prejudicial, no reversal was required); *Sully*, 53 Cal. 3d at 1249, 812 P.2d at 197-98, 283 Cal. Rptr. at 178-79 (concluding after a complete review of the record that the cumulative impact of all errors is not sufficient for reversal).

183. *E.g.*, *People v. Hayes*, 52 Cal. 3d 577, 645, 802 P.2d 376, 419, 276 Cal. Rptr. 874,



review, that is, it examined whether the death penalty was disproportionate to the defendant's personal culpability.<sup>184</sup> In both cases the supreme court held that based upon the underlying facts, the death penalty was not disproportionate.<sup>185</sup>

### I. Automatic Motion for Modification of Verdict

In every death penalty case, the trial court must automatically consider whether to modify the verdict.<sup>186</sup> The court makes this determination by weighing the mitigating and aggravating circumstances, ultimately deciding whether the jury's finding was "contrary to law or the evidence presented."<sup>187</sup> In seven of the cases surveyed, the supreme court rejected the claim that the trial court improperly considered the motion for modification.<sup>188</sup>

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917 (1990). Furthermore, the Eighth Amendment does not require intercase review. *Pulley v. Harris*, 465 U.S. 37, 51-54 (1984). See also, U.S. CONST. amend. VIII.

184. *E.g.*, *People v. Dillon*, 34 Cal. 3d 441, 478-89, 668 P.2d 697, 719-27, 194 Cal. Rptr. 390, 412-20 (1983). See also CAL. CONST. art. I, § 17 (allowing the court to review the death penalty under intracase review).

185. *Bacigalupo*, 1 Cal. 4th at 151-52, 820 P.2d at 586-87, 2 Cal. Rptr. 2d at 362-63 (reasoning that as the defendant had served two previous prison terms, the death penalty was not a disproportionate sentence for the double murder/robbery); *People v. Fierro*, 1 Cal. 4th 173, 253-54, 821 P.2d 1302, 1344-45, 3 Cal. Rptr. 2d 426, 468-69 (1991) (reasoning that the death penalty was not disproportionate to the defendant's culpability because the defendant shot the victim once and then straddled the victim and shot again). See generally Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719 (1988).

186. Section 190.4(e) requires, *inter alia*, that "[i]n every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict." *Id.* See generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1618 (2d ed. 1989 & Supp. 1991); 22 CAL. JUR. 3d *Criminal Law* § 3347 (1985); *Death Penalty Law III*, *supra* note 2 at 547-48.

187. CAL. PENAL CODE § 190.4(e) (West Supp. 1991). California Penal Code section 1385(a) states that "[t]he judge or magistrate may, either on his or her own motion . . . and in furtherance of justice, order an action to be dismissed." *Id.* See also CAL. PENAL CODE § 1181(7) (West 1988) (allowing a judge to modify a verdict "by imposing [a] lesser punishment without granting or ordering a new trial").

188. *People v. Ashmus*, 54 Cal. 3d 932, 1006-09, 820 P.2d 214, 258-60, 2 Cal. Rptr. 2d 112, 156-58 (1991) (finding that the trial court properly considered aggravating and mitigating factors and victim impact evidence); *Bacigalupo*, 1 Cal. 4th at 149-50, 820 P.2d at 585-86, 2 Cal. Rptr. 2d at 362-63 (reasoning that the trial court did not rely on statements by the victim's family or a probation report in denying the automatic motion for modification and consequently no error occurred); *People v. Edwards*, 54 Cal. 3d 787, 846-48, 819 P.2d 436, 474-76, 1 Cal. Rptr. 2d 696, 734-36 (1991) (stating that the trial court properly examined aggravating and mitigating evidence in its decision); *Fierro*, 1 Cal. 4th at 252-53, 821 P.2d at 3134, 3 Cal. Rptr. 2d at 468 (finding that the trial court properly considered aggravating circumstances under factors (b) and (c) and determining that even though the trial court improperly examined probation reports, they could not have affected its ruling); *People v. Mickey*, 54 Cal. 3d 612, 703-05, 818 P.2d 84, 135-36, 286 Cal. Rptr. 801, 852-53 (1991) (stating that the trial judge properly reweighed evidence of aggravating and mitigating circumstances and determining that the weight of the evidence supported the verdict); *People v. Price*, 1 Cal. 4th 324, 490-91, 821 P.2d 610, 710-11, 3 Cal. Rptr. 2d 106, 206-07 (1991) (finding that the presentence report did

*J. Constitutionality of the Death Penalty Act of 1978*

Six of the defendants alleged that the death penalty was unconstitutional.<sup>189</sup> The supreme court refused to revisit the issue and rejected the claim in each instance.<sup>190</sup>

*K. Miscellaneous Penalty Phase Contentions*

This section addresses additional penalty phase errors raised on appeal. One of the defendants claimed *Davenport* error,<sup>191</sup> which occurs when the absence of mitigating evidence is presented as an aggravating factor.<sup>192</sup> Three of the defendants claimed that the court improperly allowed the jury to consider age as an aggravating or mitigating factor pursuant to factor (i).<sup>193</sup> Finally, in *People v. Mickle*,<sup>194</sup>

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not influence the trial court's examination of the motion for modification); *People v. Sully*, 53 Cal. 3d 1195, 1249-50, 812 P.2d 163, 197-98, 283 Cal. Rptr. 144, 178-79 (1991) (determining that the trial court properly examined aggravating and mitigating factors and stating that even though the trial court should not have considered a probation report, any possible error was harmless).

189. *Ashmus*, 54 Cal. 3d at 1009-10, 820 P.2d at 260, 2 Cal. Rptr. 2d at 158; *Bacigalupo*, 1 Cal. 4th at 146-48, 820 P.2d at 583-85, 2 Cal. Rptr. 2d at 359-61; *Edwards*, 54 Cal. 3d at 848, 819 P.2d at 476, 1 Cal. Rptr. 2d at 736; *Fierro*, 1 Cal. 4th at 255, 821 P.2d at 1345-46, 3 Cal. Rptr. 2d at 469-70; *People v. Nicolaus*, 54 Cal. 3d 551, 589, 817 P.2d 893, 914, 286 Cal. Rptr. 628, 649 (1991); *Sully*, 53 Cal. 3d at 1250-51, 812 P.2d at 198, 283 Cal. Rptr. at 179.

190. *E.g.*, *Sully*, 53 Cal. 3d at 1250-51, 812 P.2d at 198, 283 Cal. Rptr. at 179. The court had previously determined that

the 1978 death penalty statute . . . does not require: (1) written findings as to the aggravating factors found by the jury; (2) proof beyond a reasonable doubt of the aggravating factors; (3) jury unanimity on the aggravating factors; (4) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt; (5) a finding that death is the appropriate punishment beyond a reasonable doubt; (6) a "procedure to enable the reviewing court to evaluate meaningfully the sentencer's decision."

*Id.* (citations omitted).

191. *See People v. Davenport*, 41 Cal. 3d 247, 288-89, 710 P.2d 861, 888, 221 Cal. Rptr. 794, 821 (1985).

192. *Bacigalupo*, 1 Cal. 4th at 143-45, 820 P.2d at 581-82, 2 Cal. Rptr. 2d at 357-58 (determining that the prosecutor used the framework of section 190.3 for her closing argument and consequently did not argue lack of mitigating evidence as an aggravating factor).

193. "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (i) The age of the defendant at the time of the crime." CAL. PENAL CODE § 190.3(i) (West 1988 & Supp. 1991). The court has stated:

In our view, the word "age" in statutory sentencing factor (i) is used as a metonym for age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case.

*People v. Lucky*, 45 Cal. 3d 259, 302, 753 P.2d 1052, 1080, 247 Cal. Rptr. 1, 28-29 (1988).

*People v. Edwards*, 54 Cal. 3d 787, 844, 819 P.2d 436, 473, 1 Cal. Rptr. 2d 696, 733

the defendant complained about the examination of an expert witness concerning the expert's personal viewpoint on the appropriateness of the death penalty.<sup>195</sup> Finding no reversible error in this case, the supreme court nonetheless stated that "[i]n future cases, trial courts should preclude examination of an expert witness on the appropriateness of death in a particular case."<sup>196</sup> The supreme court resolved all alleged penalty phase errors in favor of the People.

## VI. CONCLUSION

As this survey goes to print, the death penalty has once again surged to the forefront of California law and politics. The controversy over Robert Alton Harris' execution<sup>197</sup> on April 21, 1992, has resurrected age old philosophical and moral questions about the appropriateness of the death penalty. Although the press and media often portray the death penalty as a divisive, controversial issue, a recent poll shows that eighty percent of California adults favor the ultimate sanction, while only fourteen percent oppose it.<sup>198</sup> A sharp increase of death penalty supporters in the 1970s,<sup>199</sup> along with the passage of the 1978 California Death Penalty Act and the current widespread support of the death penalty,<sup>200</sup> seem to reflect the public's growing concern about the senseless, indiscriminate, brutal, and heinous murders that continue to plague society.

Unfortunately, the number of convicted murderers on death row

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(1991) (finding that it is the jury's responsibility to determine whether age is a mitigating or an aggravating factor); *People v. Nicolaus*, 54 Cal. 3d 551, 587-88, 817 P.2d 893, 913, 286 Cal. Rptr. 628, 648 (1991) (determining that the prosecutor's comment that the death penalty would not "deprive [the defendant] of a long or potentially productive life as it would a young man" was clearly erroneous, but produced no prejudice to the defendant); *People v. Sully*, 53 Cal. 3d 1195, 1247, 812 P.2d 163, 195, 283 Cal. Rptr. 144, 176 (1991) (stating that age is not only a mitigating factor).

194. 54 Cal. 3d 140, 814 P.2d 290, 284 Cal. Rptr. 511 (1991).

195. *Id.* at 194-97, 814 P.2d at 321-23, 284 Cal. Rptr. at 542-44.

196. *Id.* at 196, 814 P.2d at 322-23, 284 Cal. Rptr. at 543-44. Two expert witnesses in *Mickle* testified on the appropriateness of the death penalty. Since the two witnesses had different viewpoints, the jury heard both sides of the argument, so any error was harmless. *Id.* at 196, 814 P.2d at 323, 285 Cal. Rptr. at 544.

197. Scott Armstrong, *Capital Punishment Is on the Rise; California on Verge of an Execution*, CHRISTIAN SCI. MONITOR, March 25, 1992, at 1.

198. *Poll Shows Californians Widely Favor Executions*, Reuters, Apr. 2, 1992, available in LEXIS, Nexis library, CURRNT file.

199. *Id.*

200. *Id.* Resurging support for the death penalty is not unique to California. In fact, polls have shown that three out of four Americans favor capital punishment. Armstrong, *supra* note 197 at 1.

Recently, Arizona carried out its first death penalty in 29 years, and Delaware executed its first prisoner in 46 years. James Bone, *America Gears for Wave of Executions*, TIMES, Mar. 28, 1992, at Overseas News. Since the United States Supreme Court reinstated the death penalty in 1976, over 2500 convicted murderers have found their way to death row. *Id.* With their avenues of appeal diminishing, the pace of executions will increase. *Id.*

continues to rise. Although more than three hundred convicts currently sit on death row,<sup>201</sup> Robert Alton Harris was the first put to death in California in over a quarter of a century.<sup>202</sup> Harris had been on death row for thirteen years, with his case making the United States Supreme Court four times.<sup>203</sup> Some see this as a "glaring example of the 'abuse of the appeals process,'"<sup>204</sup> while others argue that no safeguard is too much when a defendant's life is at stake.<sup>205</sup> Considering the United States Supreme Court's recent restriction on habeas petitions,<sup>206</sup> along with the Lucas court's continuing use of the harmless error doctrine, Harris' execution might have been the first of many to follow.

Of the twelve cases surveyed, only one was reversed. This is consistent with the Lucas court's tradition of affirming the vast majority of death penalty cases. Since Lucas became Chief Justice, the California Supreme Court has upheld 119 of 148 death penalties, just over eighty percent.<sup>207</sup> The Lucas court continues to use its harmless error policy to uphold the death penalty in cases where errors were inconsequential to the verdict.

However, the numbers problem still remains. Each year, the court is unable to decide the number of capital cases appealed; thus, the backlog continues to grow. The court has failed to devise a method of review that can simultaneously satisfy the concerns of judicial efficiency and the defendant's due process rights. The only solution seems to be an expansion of the state judiciary to hear the increasing number of death penalty appeals. Until then, the court will be forced to devote significant time and resources to the ever-growing pool of death penalty cases.

MARCO A. COSENTINO  
CHAD JEFFERY FISCHER

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201. Armstrong, *supra* note 197 at 1.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. See *McCleskey v. Zant*, 111 S. Ct. 1454 (1991).

207. Phillip Carrizosa, *As the Justices Move Right, Death Law Gets Tougher*, L.A. DAILY J., Apr. 16, 1992, at 1.

### III. EDUCATION LAW

*The common law of contracts applies to transactions made pursuant to the Naylor Act: City of Moorpark v. Moorpark Unified School District.*

In *City of Moorpark v. Moorpark Unified School District*,<sup>1</sup> the California Supreme Court rendered its premier interpretation of the Naylor Act (the Act),<sup>2</sup> which governs the sale of certain surplus school property. The court held that although the Act creates requirements not found in the common law of contracts, it does not supplant the common law, but merely adds to it.<sup>3</sup> Thus, sales executed pursuant to the Naylor Act are governed by common law principles.<sup>4</sup>

The Naylor Act was passed in order to make surplus school property available to local communities at less than fair market value, while assuring that local school districts recover at least the cost of acquiring the property.<sup>5</sup> According to the Act, a school district that wishes to dispose of surplus school property, as described in California Education Code section 39391,<sup>6</sup> must first offer to sell or lease the

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1. 54 Cal. 3d 921, 819 P.2d 854, 1 Cal. Rptr. 2d 896 (1991). Chief Justice Lucas delivered the unanimous opinion of the court, in which Justices Mosk, Panelli, Kennard, Arabian, Baxter, and George concurred.

The Moorpark School District (the District) notified the City of Moorpark (the City) of its desire to sell, lease or exchange surplus school property. The City offered the District an amount equivalent to 25% of the property's fair market value, which is the minimum price set by the Naylor Act (the Act). The District refused to sell unless the City agreed to hold hearings to allow for development of an adjacent parcel of land. After a period of negotiations, the District offered to sell the subject property for its fair market value. The city refused, claiming that the Act required the District to sell the subject property at the reduced price.

The trial court issued a writ of mandate, ordering the District to sell the property at 25% of its fair market value. The Court of Appeal agreed, holding that the Act, not common law, governs the sale of surplus school property, and that the District's notice of its intent to sell, lease, or exchange all or a portion of the site was an offer, under section 39394 of the California Education Code, which the City accepted, creating a binding contract.

2. CAL. EDUC. CODE §§ 39390-39404 (West Supp. 1992).

3. *City of Moorpark*, 54 Cal. 3d at 930, 819 P.2d at 860, 1 Cal. Rptr. 2d at 901.

4. *Id.* at 931, 819 P.2d at 860, 1 Cal. Rptr. 2d at 902.

5. *Id.* at 923-24, 819 P.2d at 856, 1 Cal. Rptr. 2d at 897. The legislative intent of the Naylor Act is expressed in California Education Code section 39390, which states:

The Legislature is concerned that school playgrounds, playing fields and recreational real property will be lost for such uses by the surrounding communities even where those communities in their planning process have assumed that such properties would be permanently available for recreational purposes. It is the intent of the Legislature in enacting this article to allow school districts to recover their investment in such surplus property while making it possible for other agencies of government to acquire the property and keep it available for playground, playing field or other outdoor recreational and open-space purposes.

CAL. EDUC. CODE § 39390 (West Supp. 1992).

6. California Education Code section 39391 provides:

land to a variety of public agencies<sup>7</sup> at a price not to exceed the district's cost of acquisition.<sup>8</sup> Under limited circumstances, however, a school district may sell a portion of a school site for fair market value.<sup>9</sup> The Act sets the minimum price of the land at twenty-five percent of its fair market value or an amount related to bond

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This article shall apply to any school site owned by a school district, which the governing board determines to sell or lease, and with respect to which the following conditions exist:

(a) Either the whole or a portion of the school site consists of land which is used for school playground, playing field, or other outdoor recreational purposes and open-space land particularly suited for recreational purposes.

(b) The land described in subdivision (a) has been used for one or more of the purposes specified therein for at least eight years immediately preceding the date of the governing board's determination to sell or lease the school site.

(c) No other available publicly owned land in the vicinity of the school site is adequate to meet the existing and foreseeable needs of the community for playground, playing field, or other outdoor recreational and open-space purposes, as determined by the governing body of the public agency which proposes to purchase or lease land from the school district, pursuant to Section 39397.

CAL. EDUC. CODE § 39391 (West Supp 1992).

"Application of the Act does not hinge on a school district's determination that a site is or is not surplus property. If the criteria of section 39391 are met, the Act applies." *City of Moorpark*, 54 Cal. 3d at 925 n.2, 819 P.2d at 857 n.2, 1 Cal. Rptr. 2d at 898 n.2.

7. California Education Code section 39394 provides, in pertinent part:

[T]he governing board, prior to selling or leasing any school site containing land described in Section 39391, . . . shall first offer to sell or lease that portion of the school site consisting of land described in Section 39391, . . . to the following public agencies in accordance with the following priorities:

(a) First, to any city within which the land may be situated.

(b) Second, to any park or recreation district within which the land may be situated.

(c) Third, to any regional park authority having jurisdiction within the area in which the land is situated.

(d) Fourth, to any county within which the land may be situated.

The governing board shall have discretion to determine whether the offer shall be an offer to sell or an offer to lease . . . .

CAL. EDUC. CODE § 39394 (West Supp. 1992).

8. *City of Moorpark*, 54 Cal. 3d at 924, 819 P.2d at 856, 1 Cal. Rptr 2d at 897. California Education Code section 39396 states, in pertinent part:

(a) Except as otherwise provided in subdivision (b) or (e), the price at which land described in Section 39391 . . . is sold pursuant to this article shall not exceed the school district's cost of acquisition . . . . In no event shall the price be less than 25 percent of the fair market value of the land . . . or less than the amount necessary to retire the share of local bonded indebtedness plus the amount of the original cost of the approved state aid applications on the property . . . .

(b) A school district that offers a portion of a school site for sale may offer such portion of property for sale at its fair market value, provided the school district offers an equivalent size alternative portion of that school site for school playground, playing field, or other recreational and open-space purposes.

CAL. EDUC. CODE § 39396 (West Supp. 1992).

9. See CAL. EDUC. CODE 39396 (b) (West Supp. 1992), *supra* note 8.

indebtedness.<sup>10</sup>

The court of appeal concluded that the Act, and not the common law of contracts, governs sales of surplus school property, and that the District's notice of its intent to sell the property constituted an offer under the Act, which the City accepted at the statutorily proscribed price.<sup>11</sup> The supreme court disagreed, seemingly repulsed by the implication that the Act transformed the District's mere expression of its desire to sell into a legal offer which empowered the City to accept and create a contract.<sup>12</sup>

The supreme court first acknowledged that statutes generally do not supplant the common law unless it appears that the legislature intended to occupy the field.<sup>13</sup> While recognizing that the Act purports to compel school districts to offer surplus school property to public agencies, the court held that the legislature intended merely

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10. See CAL. EDUC. CODE § 39396 (a) (West Supp. 1992), *supra* note 8.

11. *City of Moorpark*, 54 Cal. 3d at 926-27, 819 P.2d at 857-58, 1 Cal. Rptr. 2d at 899. The court of appeal rejected the District's argument that its notice could not be treated as an offer because of its lack of specificity of price and other information. Instead, the court concluded that the notice substantially complied with the requirements of the Act, and because the District did not exempt the site from the Act or retain a portion of the site pursuant to the Act, the City was free to accept the offer and create a contract. The court also dismissed the District's subsequent attempt to exempt the site from the Act as "an effort to halt . . . [the] City's lawsuit and to thwart . . . [the] City's acceptance of its offer to sell the property at a surplus price." *Id.*

12. *Id.* at 928, 819 P.2d at 858, 1 Cal. Rptr. 2d at 900.

"[The Act] does not contemplate, as the Court of Appeal seemed to hold, that once a district makes a broad proposal to offer to sell, lease, or exchange all or a portion of a site for fair market value, a responding public agency unilaterally may then decide that there shall be a transaction in the form of a sale of a certain portion of the property for less than fair market value."

*Id.*

13. *Id.* at 927, 819 P.2d at 858, 1 Cal. Rptr. 2d at 899 (citing *I.E. Assocs. v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 702 P.2d 596, 216 Cal. Rptr. 438 (1985)). See Mark S. Burton, *California Supreme Court Survey*, 13 PEPP. L. REV. 555 (1986) (discussing *I.E. Assocs.*) See also *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *Estate of Hering*, 108 Cal. App. 3d 88, 166 Cal. Rptr. 298 (1980); *Gray v. Sutherland*, 124 Cal. App. 2d 280, 268 P.2d 754 (1954); *Guardianship of Reynolds*, 60 Cal. App. 2d 669, 141 P.2d 498 (1943) *Estate of Elizalde*, 182 Cal. 427, 188 P. 560 (1920). See generally 15A AM. JUR. 2D *Common Law* § 18 (1976) ("[T]o effect a change or abrogation by statute of common-law fundamentals, the legislature's intention must be clearly apparent or unmistakable. The rules of the common law are not to be changed by doubtful implication."); 15A C.J.S. *Common Law* § 12 (1967 & Supp. 1991) ("The common law is not to be considered altered, changed, or repealed by statute unless the legislative intent to do so is plainly or clearly manifested, and any such alteration or repeal will not be considered effected to a greater extent than the unmistakable import of the language used."); 58 CAL. JUR. 3D *Statutes* § 5 (1980 & Supp. 1991) ("[S]tatutes will not be interpreted to alter the common law otherwise than as they may expressly provide; rather, they are presumed to state the common-law rules absent express declarations to the contrary, and they should be construed so as to avoid conflict with common-law rules, if reasonably possible."); 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 761 (3d ed. 1985) (citing cases); 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 50.05 (5th ed. 1992).

to supplement, not to supplant, the common law of contracts.<sup>14</sup>

In support of its holding, the supreme court cited various provisions of the Act which grant school districts considerable flexibility in negotiating contracts for the sale of surplus property. Such a bequest of contractual freedom seems to run counter to a legislative intent to "occupy the field," which is the required finding for a determination that a statute supplants common law.<sup>15</sup>

For example, section 39394 gives a district discretion to determine "whether the offer shall be an offer to sell or an offer to lease."<sup>16</sup> The court aptly noted that, in this case, the District's broad proposal to offer to sell, lease or exchange the subject property was neither an offer to sell, nor an offer to lease.<sup>17</sup> Additionally, no provision of the Act dictates whether such a broad proposal is an offer to sell or an offer to lease. The nature of the offer is left to the discretion of the school district.<sup>18</sup>

The court also focused on section 39402, which permits districts to "enter into other forms of agreement concerning the disposition of [section 39391] property."<sup>19</sup> Section 39402 specifically authorizes a

14. *City of Moorpark*, 54 Cal. 3d at 930, 819 P.2d at 860, 1 Cal. Rptr. 2d at 901. The supreme court disapproved of the court of appeal's piecemeal method of determining legislative intent. In determining that the Act supplants the common law, the court of appeal relied on section 39390, *supra* note 5, which defines the legislative intent, and section 39394, *supra* note 7, which compels the district to offer surplus property for sale to the City once it decides to sell, and the Act's price setting mechanism in section 39396, *supra* note 8. *Id.* at 927, 819 P.2d at 858, 1 Cal. Rptr. 2d at 899-900. The supreme court determined that "[t]he court of appeal improperly focused on the foregoing statutes rather than construing those statutes with reference to the Act as a whole so that all sections of the Act may be harmonized and given effect." *Id.* at 928, 819 P.2d at 858, 1 Cal. Rptr. 2d at 900 (citing *Moore v. Panish*, 32 Cal. 3d 535, 652 P.2d 32, 186 Cal. Rptr. 475 (1982)).

15. See *supra* note 13.

16. *City of Moorpark*, 54 Cal. 3d at 927, 819 P.2d 858, 1 Cal. Rptr. 2d at 900.

17. *Id.* at 923, 819 P.2d at 858, 1 Cal. Rptr. 2d at 900. The court reasoned that "[p]roperly construed, the Act does not mandate a particular type of transaction and therefore does not by itself render District's statement that it 'proposes to sell, lease or exchange all or a portion' of the site sufficiently definite to constitute an offer." *Id.* at 929, 819 P.2d at 859, 1 Cal. Rptr. 2d at 900. The court also observed that "if [the city] had indicated that it wished to lease the site, the trial court would have been faced with the impossible task of divining the length of the lease." *Id.*

18. See CAL. EDUC. CODE § 39394(d), *supra* note 7.

19. Section 39402 provides:

A school district . . . may, as an alternative to sale or lease of the land . . . , enter into other forms of agreement concerning the disposition of such property with any entity enumerated in Section 39394, . . . , including, but not limited to: an agreement to lease . . . all or part of the school site for a specified term, with an option to purchase such properties at the end of the term; an agreement granting . . . a permanent open-space easement for recreational use



district to enter into an agreement requiring a purchaser with zoning power (such as a city) to rezone any portion of the property that the district retains.<sup>20</sup> Accordingly, if a public entity with zoning power responded to a district's proposal to sell, lease or exchange a surplus site, negotiations would likely be necessary to determine the extent of rezoning.<sup>21</sup> Once again, the extent of rezoning is not determined by the Act, but by negotiations between a district and a public agency.<sup>22</sup> Furthermore, the court briefly noted that the terms of the Act give the district a limited right to negotiate price in circumstances in which the Act allows the district to recover full market value for the subject property.<sup>23</sup>

After examining the above provisions, the court reasoned that "[t]he variety and the nature of the options available to school districts *implicitly require* that districts have the ability, *recognized under the common law of contracts*, to make initial, nonbinding overtures to various public agencies and to engage in a period of negotiations."<sup>24</sup> The court concluded that the flexibility granted to school districts evinces a legislative intent to merely add requirements to the common law, not to remove the entire contract process from application of common law principles.<sup>25</sup>

Accordingly, the District's proposal did not automatically consti-

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over a portion of the leased site; and, if the lessee or a grantee under such an agreement is an entity having zoning powers, an agreement requiring such entity to rezone any portion of the property retained by the school district in accordance with conditions specified in the agreement.

CAL. EDUC. CODE § 39402 (West Supp. 1992).

20. See *supra* note 19.

21. *City of Moorpark*, 54 Cal. 3d at 928, 819 P.2d at 859, 1 Cal. Rptr. 2d at 900. The court observed that the instant action was such a case. "The District informed City that it could not consider disposing of the lower field area unless City held hearings to allow for development of the entire upper parcel." *Id.* See also Tracy Kaplan, *Battle Over Site of Old High School Mirrors Tensions in Moorpark*, L.A. TIMES (Valley ed.), May 22, 1989, Metro Section, at 6 (stating that the school district requested rezoning of property for residential or commercial use in order to generate sufficient income to construct new schools).

22. See *supra* note 19 and accompanying text.

23. See CAL. EDUC. CODE § 39396 (b), *supra* note 8. The court stated:

Pursuant to subdivision (b) of section 39396, . . . a district may offer a portion of a site at fair market value as long as the district offers an alternative portion for playground-type use . . . . The Court of Appeal failed to consider the possibility that [the] District was attempting to determine whether any public agency was interested in the property at fair market value as a prelude to making an offer that would conform to this subdivision.

*City of Moorpark*, 54 Cal. 3d at 929, 819 P.2d at 859, 1 Cal. Rptr. at 900.

24. *City of Moorpark*, 54 Cal. 3d at 928, 819 P.2d at 859, 1 Cal. Rptr. 2d at 900 (emphasis added).

25. *Id.* at 930, 819 P.2d at 860, 1 Cal. Rptr. 2d at 901. "In this case, the nature of the statutory regulation of the contract-making process is such that legislative intent appears not to be to supplant the common law but to supplement it by adding requirements not found in the common law . . . . But in doing so, it does not purport to remove the entire contract process from application of common law principles." *Id.* at 929-30, 819 P.2d at 860, 1 Cal. Rptr. 2d at 901.

tute an offer under the Act.<sup>26</sup> Rather, the court found it necessary to analyze the District's actions under common law to determine whether a valid offer had been made.<sup>27</sup> The court quickly and easily determined that a valid offer had not been made under common law, hence no contract had been formed.<sup>28</sup>

Although the Naylor Act is seldom used, at least its proper method of interpretation the Act is now settled. California school districts do not relinquish all power to negotiate the disposition of surplus school property by merely expressing their willingness to make a deal. Accordingly, a district's broad statement of its willingness to consider offers does not empower public entities, such as the City of Moorpark, to compel the sale of such property without any negotiations. School districts do have common law contract-making rights and may, within the requirements of the Naylor Act, tailor contracts to fit their individual needs.

MARCO A. COSENTINO

#### IV. EVIDENCE

*The oral formation of a partnership or joint venture need only be proved by a preponderance of the evidence:*  
**Weiner v. Fleischman.**

In *Weiner v. Fleischman*,<sup>1</sup> the California Supreme Court held that the proper standard of proof<sup>2</sup> in determining the existence of an oral

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26. *Id.* at 929, 819 P.2d at 859, 1 Cal. Rptr. 2d at 900. "The question of what constitutes an offer is beyond the scope of the Act. The Act does not explicitly define an offer nor does it implicitly, by the breadth of its regulation, support the conclusion that the common law of contracts has been supplanted for purposes of determining whether an offer has been made." *Id.* at 930, 819 P.2d at 860, 1 Cal. Rptr. 2d at 901.

27. *Id.* at 930, 819 P.2d at 860, 1 Cal. Rptr. 2d at 901. The flexibility accorded to school districts in the Act reasonably requires the application of common law principles.

28. *Id.* The court first recognized that "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id.* (citing 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 128 (9th ed. 1987)). The court then held that the District's proposal was a mere invitation to others to make offers, and would not justify an understanding that assent by the recipient of the notice is invited and will conclude the bargain. Therefore, no valid offer existed under common law. *Id.*

1. 54 Cal. 3d 476, 816 P.2d 892, 286 Cal. Rptr. 40 (1991). Justice Panelli wrote the opinion for a unanimous court. Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter and George concurred.

2. See CAL. EVID. CODE § 115 (West 1966). The three normal standards of proof are "beyond a reasonable doubt," by "clear and convincing evidence," and by "a preponderance of the evidence." In *Addington v. Texas*, 441 U.S. 418, 423 (1979), which

joint venture or partnership is the ordinary civil standard of “preponderance of the evidence.”<sup>3</sup> Therefore, a jury instruction that required “clear and convincing” evidence of an oral joint venture could be considered reversible error.<sup>4</sup>

Before addressing the plaintiff’s allegations of fraudulent concealment in a securities transaction, the trial court required proof of a fiduciary duty to disclose.<sup>5</sup> The plaintiff claimed that this duty arose out of an oral agreement between the parties to jointly represent a group of stockholders in finding a third-party buyer or, in the alternative, to purchase the stock as a business investment.<sup>6</sup> The trial court asked the jury to decide this issue in a special verdict.<sup>7</sup> The jury instructions provided that the clear and convincing standard of proof would govern.<sup>8</sup>

A preponderance of the evidence is the standard generally used to determine issues of fact in civil cases.<sup>9</sup> Exceptions are provided by

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held that due process requires clear and convincing evidence in commitment proceedings, the United States Supreme Court stated, “The function of a standard of proof . . . is to ‘instruct the factfinder concerning the degree of confidence our society thinks [the factfinder] should have in the correctness of factual conclusions for a particular type of adjudication.’”

3. *Weiner*, 54 Cal. 3d at 490, 816 P.2d at 900, 286 Cal. Rptr. at 48. See generally 7 B. WITKIN, CALIFORNIA PROCEDURE, *Trial* §§ 280-81 (3d ed. 1985 & Supp. 1991); 1 B. WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Presumptions* §§ 156-61 (3d ed. 1986 & Supp. 1991); 31 CAL. JUR. 3D *Evidence* §§ 84-87 (1976); 59 CAL. JUR. 3D *Trial* § 961 (1980).

4. *Weiner*, 54 Cal. 3d at 491, 816 P.2d at 901, 226 Cal. Rptr. at 49. The test for reversible error for improper jury instructions revolves around the likelihood that the jury was misled by the offending instruction. In *LeMons v. Regents of California*, 21 Cal. 3d 869, 876, 582 P.2d 946, 950, 148 Cal. Rptr. 355, 359 (1978), the court enumerated five factors used in this reversible error analysis: 1) degree of conflict over critical issue, 2) jury requests for a rereading of the offending instruction or of related evidence, 3) the closeness of the jury verdict, 4) the emphasis placed on the offending instruction in closing argument and 5) the effect of other attempts to remedy the offending instruction.

5. *Weiner*, 54 Cal. 3d at 483, 816 P.2d at 895, 286 Cal. Rptr. at 43. See *Chiarella v. United States*, 445 U.S. 222 (1980) (holding that an employee of a financial printer has no fiduciary relationship with shareholders of client companies). See generally RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976); 37 AM. JUR. 2D *Fraud* §§ 145-49 (1968 & Supp. 1991); 34 CAL. JUR. 3D *Torts* § 24 (1977 & Supp. 1991); 37 C.J.S. *Fraud* §§ 15-16 (1943 & Supp. 1991); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 697 (9th ed. 1988); Fleming James, Jr. & Oscar S. Gray, *Misrepresentation — Part II*, 37 MD. L. REV. 488, 523-27 (1978).

6. *Weiner*, 54 Cal. 3d at 480, 816 P.2d at 893, 286 Cal. Rptr. at 41.

7. *Id.* at 481, 816 P.2d at 894, 286 Cal. Rptr. at 42.

8. *Id.* “Clear and convincing evidence requires a finding of high probability. Such a test requires that the evidence be so clear as to leave no substantial doubt.” *Lillian F. v. Superior Court (Kretz)*, 160 Cal. App. 3d 314, 320, 206 Cal. Rptr. 603, 606 (1984) (holding that clear and convincing evidence is needed to find lack of capacity to authorize medical treatment). See generally 31 CAL. JUR. 3D *Evidence* § 86 (1976 & Supp. 1991); 1 B. WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Presumptions* §§ 160-62 (3d ed. 1986 & Supp. 1991).

9. *Weiner*, 54 Cal. 3d at 483, 816 P.2d at 895, 286 Cal. Rptr. at 43. See CAL. EVID.

either constitutional, statutory or decisional law.<sup>10</sup> There is no constitutional exception to this general evidentiary burden of proof in instances where the existence of an oral joint venture or partnership is in question.<sup>11</sup> Statutory exceptions are limited to a few areas of the law and are tightly circumscribed.<sup>12</sup> Therefore, any possible support for the application of the clear and convincing standard of proof to oral formation of joint ventures or partnerships must come from decisional law.

The California Supreme Court noted that they "have never held that the existence of an oral joint venture or partnership agreement must be established by 'clear and convincing' evidence."<sup>13</sup> The court distinguished the plaintiff's attempt to find support for a contrary proposition in any of its previous holdings.<sup>14</sup> Turning to the appellate decisions requiring the clear and convincing standard of proof for an oral joint venture or partnership, the court traced the various lines of precedent and found them all fundamentally flawed.<sup>15</sup>

Surveying other jurisdictions, the court found additional support for its holding.<sup>16</sup> The court further noted that like damage to the plaintiff could result "from a finding of an oral contract or an oral authorization of agency," both of which require proof by a preponder-

CODE § 115 (West 1966). See *supra* note 3 for background material on the preponderance of the evidence standard.

10. *Weiner*, 54 Cal. 3d at 483, 816 P.2d at 896, 286 Cal. Rptr. at 44. See CAL. EVID. CODE § 160 (West 1966).

11. *Weiner*, 54 Cal. 3d at 483, 816 P.2d at 896, 286 Cal. Rptr. at 44.

12. *Id.* at 483-84, 488-89, 816 P.2d at 896, 899-900, 286 Cal. Rptr. at 44, 47-48. See CAL. CIV. CODE § 3294 (West Supp. 1991); CAL. PROB. CODE § 15207 (West 1991).

13. *Weiner*, 54 Cal. 3d at 484, 816 P.2d at 896, 286 Cal. Rptr. at 44 (emphasis added).

14. *Id.* at 484-86, 816 P.2d at 896-97, 286 Cal. Rptr. at 44-45. In an attempt to equate "clear proof" and "clear and convincing evidence, the plaintiff cited *Cameron v. Crocker-Citizens National Bank*, 19 Cal. App. 3d 940, 562 P.2d 316, 97 Cal. Rptr. 269 (1971) (holding that the standard of proof for an oral contract to make a will is clear and convincing evidence) and *Liodas v. Sahadi*, 19 Cal. 3d 278, 562 P.2d 316, 137 Cal. Rptr. 635 (1977) (holding that the standard of proof for fraud is preponderance of the evidence). The court remained unpersuaded.

15. The court noted that the previous appellate decisions either (i) misconstrued the language cited as precedent in the seminal case of *Welch v. Abbot*, 185 Cal. 731, 742, 198 P. 626, 631 (1929), which held that an oral agreement of partnership must be established by "clear proof," or (ii) miscited case law. *Weiner*, 54 Cal. 3d at 485-86, 816 P.2d at 897, 286 Cal. Rptr. at 45.

16. *Weiner*, 54 Cal. 3d at 486-87, 816 P.2d at 898, 286 Cal. Rptr. at 46. Twenty-four states use a preponderance of the evidence as their standard of proof for an oral joint venture or partnership: Alabama, Arizona, Arkansas, Delaware, Florida, Illinois, Iowa, Louisiana, Michigan, Montana, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas and Washington. Five states use the clear and convincing standard: Alaska, Missouri, Nebraska, New Jersey, and Tennessee.

ance of the evidence.<sup>17</sup> Finally, the court found no policy reason to support a higher standard of proof when addressing issues of partnership formation.<sup>18</sup>

In spite of any peculiar difficulties which might arise out of an oral agreement creating a joint venture or partnership agreement, the court chose not to elevate the standard of proof for this type of agreement above that required for any other oral contract.<sup>19</sup> Given the court's recent holding in *Liodas v. Sahadi*,<sup>20</sup> the court seems intent on limiting the use of the clear and convincing standard of proof in civil cases to areas where it has traditionally been recognized.<sup>21</sup>

ARTHUR S. MOREAU III

## V. INSURANCE LAW

*Construction undertaken for reasons other than to protect against a risk excluded by an all-risk homeowner's policy gives rise to coverage under the policy if third party negligence in executing the project damages the property:*  
*State Farm Fire & Casualty Company v. Von Der Lieth.*

In *State Farm Fire & Casualty Company v. Von Der Lieth*,<sup>1</sup> the California Supreme Court unanimously<sup>2</sup> ruled that dicta from the court's decision in *Garvey v. State Farm Fire & Casualty Company*,<sup>3</sup>

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17. *Id.* at 488, 816 P.2d at 899, 286 Cal. Rptr. at 47.

18. *Id.* at 487-88, 816 P.2d at 898-99, 286 Cal. Rptr. at 46-47. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (holding that a claim of misrepresentation in a securities transaction need only be proved by a preponderance of the evidence). In *Herman & MacLean*, the court stated that the clear and convincing standard is used "where particularly important individual interests or rights are at stake" and the preponderance of evidence standard is the fairest standard in that it allows the parties to "share the risk of error in a roughly equal fashion." *Id.* at 390 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

19. *Weiner*, 54 Cal. 3d at 488, 816 P.2d at 899, 286 Cal. Rptr. at 47.

20. 19 Cal. 3d 278, 286, 562 P.2d 316, 320, 137 Cal. Rptr. 635, 639-40 (1977), (holding that the proper standard of proof for fraud is preponderance of the evidence).

21. These areas include oral agreements to make wills, claims that property transferred in a deed absolute is actually a mortgage security interest, and claims that certain property is subject to trust. *Weiner*, 54 Cal. 3d at 488-89, 816 P.2d at 899-900, 286 Cal. Rptr. at 47-48. Even fraud, where a conviction can result in onerous damages to the guilty party, is not one of the "areas of the law in which courts, because of historical and pervasive legal protection or skepticism, have traditionally required the 'clear and convincing evidence' burden of proof." *Id.* at 489, 816 P.2d at 900, 286 Cal. Rptr. at 48.

1. 54 Cal. 3d 1123, 820 P.2d 285, 2 Cal. Rptr. 2d 183 (1991).

2. Chief Justice Lucas wrote the opinion in which Associate Justices Mosk, Panelli, Kennard, Arabian, Baxter, and George concurred.

3. 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989). See generally Mark A. Clayton, *California Supreme Court Survey*, 17 PEPP. L. REV. 284 (1989). The facts in *Garvey* are analogous to this case. In footnote 7 of its opinion, the *Garvey* court raised, but did not decide, whether courts should distinguish between types of third-party negligence in determining whether a loss is covered. The court stated:

suggesting recovery under an all-risk homeowner's insurance policy<sup>4</sup> might be denied where construction improvements are undertaken solely for the purpose of protecting against an excluded risk, did not apply where evidence indicated construction was undertaken for other reasons.<sup>5</sup>

This case concerned landslide damage to an insured couple's home.<sup>6</sup> The insureds held an all-risk homeowner's insurance policy<sup>7</sup> with State Farm. After filing a claim, they were paid \$14,075.71 to cover the physical damage to their home.<sup>8</sup> The insureds, however, demanded the policy limit of \$231,000 on the grounds that the entire mesa<sup>9</sup> supporting the house required stabilization to remedy the sliding.<sup>10</sup>

State Farm filed for declaratory judgment, asking whether earth movement damage was excluded under the policy. State Farm maintained such damage was excluded, and thus they would not be liable for stabilization costs.<sup>11</sup> The insureds cross-claimed seeking a ruling that the damage was covered.<sup>12</sup> At trial the parties advanced several

For example, if construction is undertaken on the insured premises for the sole purpose of protecting against the operation of a specifically excluded risk under the homeowner's policy, and that improvement subsequently fails to serve its purpose because it was negligently designed or constructed, the damage to the structure should arguably not be covered. On the other hand, ordinary negligence that contributes to property loss, but does not involve acts undertaken to protect against an excluded risk, may give rise to coverage under an all-risk policy.

*Garvey*, 48 Cal. 3d at 408 n.7, 770 P.2d at 712 n.7, 257 Cal. Rptr. at 300 n.7.

State Farm argued that the situation referred to in the *Garvey* footnote applied to the *Lieth* facts, and that the insurance policy should therefore not cover the third-party negligence. *Lieth*, 54 Cal. 3d at 1130-31, 820 P.2d at 1158-59, 2 Cal. Rptr. 2d at 186-87.

4. See generally 17A AM. JUR. 2D *Contracts* §§ 2, 501, 505, 683 (1991) (general background on all-risk insurance policies); Jay M. Zitter, Annotation, *Property Damage Resulting From Inadequate or Improper Design or Construction of Dwelling as Within Coverage of "All-Risks" Homeowner's Insurance Policy*, 41 A.L.R. 4TH 1095 (1985 & Supp. 1991); Robert A. Brazener, Annotation, *Coverage Under All Risks Insurance*, 88 A.L.R. 2D 1122 (1963 & Supp. 1991).

5. *Lieth*, 54 Cal. 3d at 1135, 820 P.2d at 293, 2 Cal. Rptr. 2d at 191.

6. The insureds lived in the Big Rock Mesa area of Malibu, California. *Lieth*, 54 Cal. 3d at 1126, 820 P.2d at 287, 2 Cal. Rptr. 2d at 185.

7. *Id.* at 1127, 820 P.2d at 287-88, 2 Cal. Rptr. 2d at 185-86.

8. *Id.*

9. A mesa is a small, high plateau or tableland with steep sides, and is especially susceptible to landsliding when the groundwater level rises. Gail Diane Cox, *On the Edge; Bad Days at Big Rock: A Search for Legal Fault*, NAT'L L. J., Jan. 26, 1987, at 1.

10. *Lieth*, 54 Cal. 3d at 1127, 820 P.2d at 287-88, 2 Cal. Rptr. 2d at 185-86.

11. *Id.*

12. *Id.* The cross-claim also alleged bad faith, breach of contract, and intentional and negligent infliction of emotional distress. *Id.*

causes for the sliding, among them that earth movement was due to rising groundwater levels and third-party negligence.<sup>13</sup>

The trial jury found third-party negligence was the efficient proximate cause of the sliding, and was covered under the insurance.<sup>14</sup> The court of appeal reversed the trial court on the grounds that earth movement caused by rising ground water was the proximate cause and was excluded under the policy.<sup>15</sup> Alternatively, relying on footnote seven of the *Garvey* opinion, the court reasoned that since the negligence of the third parties was not distinct from the excluded risk, the insureds could not recover.<sup>16</sup>

The supreme court unanimously reversed the court of appeal on both grounds.<sup>17</sup> The court held that the jury properly found third-party negligence was the efficient proximate cause and was covered under the State Farm policy.<sup>18</sup> The court emphasized that once the court decides the efficient proximate cause, coverage of the loss is de-

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13. *Id.* at 1127-28, 820 P.2d at 288-89, 2 Cal. Rptr. 2d at 186-87.

Third-party negligence was attributed to several entities including (1) the State of California, for removing a supporting "toe" of the mesa in the 1930s to build a section of the Pacific Coast Highway; (2) the developer, for failing to protect against landslide activation; (3) the homeowners association, which failed to maintain a pumping system, and homeowners who failed to maintain their septic tank systems, both of which contributed to the rise in groundwater; and (4) the County, for negligently approving the project and failing to implement a dewatering plan recommended by the city engineer. *Id.*

14. *Id.* at 1129, 820 P.2d at 289, 2 Cal. Rptr. 2d at 187.

15. *Id.* Water damage was excluded under the policy, and the court of appeal partially relied upon this in reaching its decision. However, the supreme court determined that this did not preclude recovery because the policy exclusion contemplated damage only from natural water below ground, and not the artificially high level of water precipitated by the development. *Id.* at 1133, 820 P.2d at 292, 2 Cal. Rptr. 2d at 190.

16. *Id.* at 1130, 820 P.2d at 289, 2 Cal. Rptr. 2d at 187-88. See *supra* note 3 for the relevant portion of *Garvey* footnote seven. The supreme court determined that this broad reading of footnote seven was erroneous. See *infra* notes 22-24 and accompanying text for the court's reasoning.

17. *Lieth*, 54 Cal. 3d at 1133, 820 P.2d at 290, 2 Cal. Rptr. 2d at 188.

18. *Id.* at 1135, 820 P.2d at 292, 2 Cal. Rptr. 2d at 189. Causation is generally a question of fact. *Id.* at 1131, 820 P.2d at 291, 2 Cal. Rptr. 2d at 189; *Garvey*, 48 Cal. 3d at 412, 770 P.2d at 714, 257 Cal. Rptr. at 302; 44 AM. JUR. 2D *Insurance* § 2041 (1982 & Supp. 1991). However, the judge improperly instructed the jury that an efficient proximate cause is the "triggering" cause or the one that sets the others in motion, as stated in *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963). The *Garvey* court modified this test for efficient proximate cause, known as the *Sabella* test, to mean "predominant" cause, because of the confusion in applying the original *Sabella* test in the lower courts. See Mark A. Clayton, *California Supreme Court Survey*, 17 PEPP. L. REV. 284 (1989); Jeff Katofsky, *Subsiding Away: Can California Homeowners Recover from their Insurer for Subsidence Damages to Their Homes?*, 20 PAC. L.J. 783 (1989); Jeff Katofsky, *Subsiding Away II: Will the Effects of Garvey v. State Farm Slip and Slide?*, 21 PAC. L.J. 731 (1990). The supreme court, however, determined that the erroneous instruction did not prejudice State Farm because the revised test is actually broader, and it was not reasonably probable that the trial court would have reached a different result. *Lieth*, 54 Cal. 3d at 1132-33, 820 P.2d at 291, 2 Cal. Rptr. 2d at 189.

terminated by whether the predominant cause is covered or excluded by the policy, with coverage being denied where a covered risk is merely a remote cause.<sup>19</sup> Since third-party negligence was the proximate cause and covered under the policy,<sup>20</sup> the insureds could recover for the damage caused by the negligence.<sup>21</sup>

The court also stated that footnote seven in *Garvey*, which the court of appeal used to support its alternative ground, did not apply to the facts of this case.<sup>22</sup> Unlike the example contained in the footnote, the negligent conduct was not undertaken solely to prevent an excluded occurrence (i.e., earth movement). The negligence was in planning, approving, and building the Rock Mesa district which was done to make a profit, provide waste disposal, and produce revenue.<sup>23</sup> Thus, even though earth movement, an excluded occurrence, was the result and the ultimate cause of the damage, third-party negligence was the predominant cause, and was covered under the policy. The court cited with approval an appellate and a district court decision to illustrate its rationale.<sup>24</sup>

The court construed the applicability of the *Garvey* footnote narrowly. The determining factor was evidence indicating the projects were undertaken for reasons other than protecting against an excluded occurrence. Where such a literal approach is taken, policy-

19. *Lieth*, 54 Cal. 3d at 1131, 820 P.2d at 290-91, 2 Cal. Rptr. 2d at 188-89; *Garvey*, 48 Cal. 3d at 413, 770 P.2d at 715, 257 Cal. Rptr. at 303. See also 39 CAL. JUR. 3D *Insurance Contracts* §§ 243-44 (1977 & Supp. 1991); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 700A (9th ed. 1987 & Supp. 1991). All sources cited involve the interpretation of sections 530 and 532 of the California Insurance Code and the policyholder's reasonable expectations under the *Sabella* test.

20. The court reaffirmed *Garvey* which stated that in an all-risk homeowner's policy, the policy covers all risks not specifically excluded. *Lieth*, 54 Cal. 3d at 1131, 820 P.2d at 290-91, 2 Cal. Rptr. 2d at 188-89; *Garvey*, 48 Cal. 3d at 408, 770 P.2d at 711-12, 257 Cal. Rptr. at 299-300. Since third-party negligence is a "risk of physical loss," and the policy did not exclude risk of physical loss, third-party negligence was a covered occurrence. *Id.*

21. The court remanded to the court of appeal the issue of whether State Farm owed an obligation to pay for stabilization costs. *Lieth*, 54 Cal. 3d at 1135, 820 P.2d at 293, 2 Cal. Rptr. 2d at 191.

22. *Id.* at 1134, 820 P.2d at 292, 2 Cal. Rptr. 2d at 190. See *supra* note 3 for the pertinent text of footnote seven.

23. *Lieth*, 54 Cal. 3d at 1135, 820 P.2d at 293, 2 Cal. Rptr. 2d at 191.

24. *Id.* *Davis v. United Servs. Auto. Ass'n*, 223 Cal. App. 3d 1322, 273 Cal. Rptr. 224 (1990) (holding that insurance policy covered property loss caused by excluded risk of house settling due to construction negligence in failing to properly prepare soil because grading and foundation were other reasons for construction); *Winans v. State Farm Fire & Casualty Co.*, 743 F. Supp. 733 (S.D. Cal. 1990) (holding that negligent construction resulting in earth settlement is a separate occurrence and not subject to "earth movement" exclusion under all-risk homeowner's policy).



holders can easily cite reasons other than protection of the excluded coverage for undertaking such projects. It remains to be seen whether the court will subject such reasons to stricter scrutiny.

Still, insurers may arguably deny coverage where improvements are undertaken with the sole intent of protecting against an excluded loss. The court did not retract the sentiments that the *Garvey* court expressed in footnote seven. However, such a case has not yet arisen.

As a result of *Lieth*, insurance premiums for homeowner's property insurance may increase once insurers realize their increased liability.<sup>25</sup> Insurance industry attorneys anticipate an increase in related lawsuits.<sup>26</sup> Insurers may also implement clauses excluding this type of coverage—where huge but relatively unexpected liability can result.

*Lieth* clarified the law where property damage insurance coverage depends on a number of dependent causes, some included and some excluded under a policy. It also indicated that if footnote seven of the *Garvey* opinion is to be applied at all, it must be applied to the specific situation in which work is undertaken solely to protect against an excluded risk. At least insurers can now spare themselves the litigation costs of trying to broaden applicability of the *Garvey* footnote.

ADAM L. JOHNSON

## VI. LABOR LAW

*Section 4656 of the Labor Code does not authorize an award of compensation for renewed temporary total disability more than five years after the original injury:*  
**Nickelsberg v. Workers' Compensation Appeals Board.**

### I. INTRODUCTION

In *Nickelsberg v. Workers' Compensation Appeals Board*,<sup>1</sup> the California Supreme Court addressed the issue of whether the amendment to section 4656 of the California Labor Code<sup>2</sup> (hereinafter all statutory references are to the California Labor Code unless otherwise indicated) authorized a workers' compensation judge<sup>3</sup> to make

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25. Philip Hager, *Liability in Negligence Cases Widened*, L.A. TIMES, Dec. 17, 1991, at D3.

26. *Id.*

1. 54 Cal. 3d 288, 814 P.2d 1328, 285 Cal. Rptr. 86 (1991). Justice Panelli wrote the majority opinion with Justices Lucas, Arabian and Baxter concurring. Justice Broussard wrote a separate dissenting opinion in which Justices Mosk and Kennard joined.

2. CAL. LAB. CODE § 4656 (West 1989). See *infra* notes 7-9 and accompanying text for the provisions of section 4656 before and after the amendment.

3. For an overview of Workers' Compensation Law in California, see generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 1, 16, 18 (9th ed.

an award for renewed temporary total disability<sup>4</sup> which occurred more than five years after a job-related injury.<sup>5</sup> The court concluded that the amendment to section 4656 does not confer such authority upon a workers' compensation judge.<sup>6</sup>

In 1977, section 4656 provided that compensation for a temporary partial or total disability could not continue for "more than 240 compensable weeks within a period of five years from the date of the injury."<sup>7</sup> In 1978, section 4656 was amended.<sup>8</sup> The amended section stated that compensation for temporary *partial* disability could not exceed "240 compensable weeks within a period of five years . . ."<sup>9</sup> However, amended section 4656 did not provide any time limitation regarding compensation for a temporary *total* disability for injuries occurring after January 1, 1979.<sup>10</sup> Existing sections 5804 and 5410 each provided that an award by a workers' compensation judge could not be altered beyond a five-year period.<sup>11</sup> Therefore, following the amendment of section 4656, it was unclear whether a workers' compensation judge could make an additional award for renewed temporary total disability which occurs more than five years after the original job-related injury.<sup>12</sup>

In *Nickelsberg*, Dieter Nickelsberg incurred back and leg injuries in 1976 and 1979 while employed as a truck driver for the Los Angeles Unified School District. Nickelsberg was temporarily totally disabled from January 6, 1979 through June 8, 1981 and was classified as being approximately sixty-six percent permanently disabled. A

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1987 & Supp. 1991); 65 CAL. JUR. 3D *Work Injury Compensation* §§ 1, 21 (1981 & Supp. 1991). See also Richard A. Bancroft, *Some Procedural Aspects of the California Workers' Compensation Law*, 40 CAL. L. REV. 378 (1952) (discussing the history of workers' compensation and the authority and jurisdiction of the Workers' Compensation Appeals Board).

4. For a discussion of the classification of a disability, see generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 263, 270-273 (9th ed. 1987 & Supp. 1991) and 65 CAL. JUR. 3D *Work Injury Compensation* §§ 129-131 (1981).

5. *Nickelsberg*, 54 Cal. 3d at 291, 814 P.2d at 1330, 285 Cal. Rptr. at 88.

6. *Id.*

7. *Id.* at 292, 814 P.2d at 1330-31, 285 Cal. Rptr. at 88-89. See 1959 Cal. Stat. 3279, ch. 1189, § 12.

8. *Nickelsberg*, 54 Cal. 3d at 292, 814 P.2d at 1331, 285 Cal. Rptr. at 89. See 1978 Cal. Stat. 2913, ch. 937, § 1.

9. CAL. LAB. CODE § 4656 (West 1989).

10. *Id.* For a discussion of the length of payments for temporary disability, see generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 435 (1987); 65 CAL. JUR. 3D *Work Injury Compensation* § 145 (1981); 82 AM. JUR. 2D *Workers' Compensation* § 382 (1981 & Supp. 1991).

11. See *infra* notes 22-23 for statutory text.

12. *Nickelsberg*, 54 Cal. 3d at 291, 814 P.2d at 1330, 285 Cal. Rptr. at 88.

workers' compensation judge ordered the school district to indemnify Nickelsberg for (1) the period of time he was temporarily totally disabled (2) for his permanent disability, and (3) for future medical expenses related to the injury.<sup>13</sup>

In July 1987, Nickelsberg underwent back surgery which was related to his previous job-related injury. As a result of the former workers' compensation decision, the school district paid Nickelsberg's medical expenses. However, the school district did not compensate Nickelsberg for the temporary total disability which he suffered as a result of the back surgery. On February 8, 1988, Nickelsberg filed this workers' compensation action seeking an alteration of his former award which would indemnify Nickelsberg for the period during which he was temporarily totally disabled.<sup>14</sup> A workers' compensation judge granted the award and the school district appealed to the Workers' Compensation Appeals Board<sup>15</sup> (WCAB). The WCAB reversed, finding that the workers' compensation judge did not have jurisdiction to make the award.<sup>16</sup> The court of appeal affirmed.<sup>17</sup> Granting review, the supreme court held that section 4656 does not authorize the award of compensation for renewed temporary total disability occurring more than five years after the original injury.<sup>18</sup>

## II. TREATMENT

### A. *Majority Opinion*

The California Supreme Court began its analysis by differentiating between an award for medical expenses and an award for temporary disability. The court noted that medical expenses are awarded to facilitate the recovery of a worker, while an award for temporary disability serves to compensate a worker for lost income.<sup>19</sup> Thus, the court stated that an award of medical expenses would not necessarily result in an award for temporary total disability which resulted from the medical services.<sup>20</sup>

The supreme court then interpreted the legislature's intent in amending section 4656. The court stated that the purpose of the amendment is to allow workers who suffer a temporary total disability to receive payments for as long as they are continuously dis-

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13. *Id.* at 291, 814 P.2d at 1330, 285 Cal. Rptr. at 88.

14. *Id.* at 292, 814 P.2d at 1330, 285 Cal. Rptr. at 88.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 300-01, 814 P.2d at 1336, 285 Cal. Rptr. at 94.

19. *Id.* at 293-94, 814 P.2d at 1331-32, 285 Cal. Rptr. at 89-90. See generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 249-50, 252 (9th ed. 1987) (discussing the purpose of an award and types of awards).

20. *Nickelsberg*, 54 Cal. 3d at 294, 814 P.2d at 1332, 285 Cal. Rptr. at 90.

abled.<sup>21</sup> Moreover, the court noted that sections 5804<sup>22</sup> and 5410<sup>23</sup> each place a five-year restriction on the ability of a worker to alter his workers' compensation award.<sup>24</sup> Further, the court suggested that in order to facilitate an employer's ability to obtain workers' compensation insurance,<sup>25</sup> there must be a time when an award from a worker's compensation judge becomes final.<sup>26</sup> Therefore, the court concluded that section 4656 does not authorize an award of compensation for renewed temporary total disability occurring more than five years after the original injury.<sup>27</sup>

### B. *Minority Opinion*

Justice Broussard wrote a separate dissenting opinion. Contrary to the majority, Justice Broussard contended that the purpose for amending section 4656 was to authorize compensation for renewed temporary total disability occurring more than five years after an injury.<sup>28</sup> In addition, Broussard argued that an award of future medical expenses impliedly carries with it an award of future temporary total disability costs associated with the treatment.<sup>29</sup> Therefore, Broussard concluded that the workers' compensation judge had the authority to award temporary total disability compensation beyond a five-year period.<sup>30</sup>

## III. CONCLUSION

The California Supreme Court held that the amendment of section

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21. *Id.* at 295-96, 814 P.2d at 1333, 285 Cal. Rptr. at 91 (citations omitted).

22. Section 5804 states in pertinent part: "No award of compensation shall be rescinded, altered, or amended *after five years* from the date of the injury . . ." CAL. LAB. CODE § 5804 (West 1989) (emphasis added).

23. Section 5410 states in pertinent part: "Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation . . . *within five years* after the date of the injury . . ." CAL. LAB. CODE § 5410 (West Supp. 1991) (emphasis added).

24. *Nickelsberg*, 54 Cal. 3d at 298, 814 P.2d at 1334, 285 Cal. Rptr. at 92.

25. See generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 134-35 (9th ed. 1987) (discussing insurance for workers' compensation).

26. *Nickelsberg*, 54 Cal. 3d at 299, 814 P.2d at 1335, 285 Cal. Rptr. at 93.

27. *Id.* at 301, 814 P.2d at 1336, 285 Cal. Rptr. at 94. In addition, the court determined that the plaintiff did not file a timely claim under section 5804 to alter his previous award or under section 5410 for a "new and further disability." *Id.* at 300-02, 814 P.2d at 1336-37, 285 Cal. Rptr. at 94-95.

28. *Id.* at 303, 814 P.2d at 1338, 285 Cal. Rptr. at 96 (citations omitted) (Broussard, J., dissenting).

29. *Id.* at 304, 814 P.2d at 1339, 285 Cal. Rptr. at 97 (Broussard, J., dissenting).

30. *Id.* at 302, 814 P.2d at 1337, 285 Cal. Rptr. at 95 (Broussard, J., dissenting).

4656 does not authorize a workers' compensation judge to award compensation for renewed temporary total disability occurring more than five years after an injury.<sup>31</sup> Although it appears that very few workers will be faced with a situation similar to that of the plaintiff in this case,<sup>32</sup> those few workers that suffer renewed temporary total disability may incur a substantial loss of income. As a result, it is important to note that a party who suffers renewed temporary total disability, resulting from medical treatment for an injury which occurred more than five years previous, may still be able to recover under two theories. First, a worker may contend that the medical treatment constitutes a new injury.<sup>33</sup> Second, where a workers' compensation judge reserves jurisdiction to award temporary total disability compensation beyond five years, an award is arguably proper.<sup>34</sup> However, until these two potential avenues of recovery are ruled upon by the courts, recovery by workers which encounter renewed temporary total disability beyond a five-year period is uncertain.

RICHARD JOHN BERGSTROM III

## VII. TAXATION

*Supermajority voting limitations on the imposition of taxes established by Proposition 13 apply to agencies created without the power to impose property taxes: Rider v. County of San Diego.*

### I. INTRODUCTION

In *Rider v. County of San Diego*<sup>1</sup> the supreme court further interpreted Proposition 13, namely the issues remaining from the case of *Los Angeles County Transportation Commission v. Richmond*<sup>2</sup> and the validity of a taxation scheme enacted to circumvent the supermajority two-thirds voter approval requirement for special taxes imposed by special districts.<sup>3</sup> In *Rider*, a legislatively created

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31. *Id.* at 300-01, 814 P.2d at 1336, 285 Cal. Rptr. at 94.

32. *Id.* at 296, 814 P.2d at 1333, 285 Cal. Rptr. at 91 (citations omitted).

33. *Id.* at 292 n.2, 814 P.2d at 1330 n.2, 285 Cal. Rptr. at 88 n.2. See *Rodgers v. Workers' Compensation Appeals Bd.*, 168 Cal. App. 3d 567, 571-72, 214 Cal. Rptr. 303, 306 (1985) (holding that an injury to an employee in the course of treatment was a new compensable injury).

34. *Nickelsberg*, 54 Cal. 3d at 299 n.8, 814 P.2d at 1335 n.8, 285 Cal. Rptr. at 93 n.8.

1. 1 Cal. 4th 1, 820 P.2d 1000, 2 Cal. Rptr. 2d 490 (1991). Chief Justice Lucas authored the majority opinion, joined by Justices Arabian, Baxter, and George. Justice George also wrote a concurring opinion, in which Justice Panelli joined. Justice Kenard joined in Justice Mosk's dissenting opinion, but did not express a view on the prospective application of the majority's holding.

2. 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).

3. *Rider*, 1 Cal. 4th at 5, 820 P.2d at 1002, 2 Cal. Rptr. 2d at 492; see *Richmond*, 31 Cal. 3d at 208, 643 P.2d at 947, 182 Cal. Rptr. at 330.

Agency<sup>4</sup> was found to be a "special district" under section 4<sup>5</sup> of Proposition 13 even though it lacked the authority to levy a tax on real property.<sup>6</sup> Additionally, the sales tax at issue was construed to constitute a "special tax" due to the highly specific function to which the Agency would direct the revenues.<sup>7</sup>

San Diego County needed to upgrade its justice facilities. In 1986, however, the county failed to secure the voters' two-thirds approval of a proposed sales tax for such facilities section 4 of Proposition 13 required. In the alternative, the state legislature created a "limited purpose special district" charged with adopting a tax ordinance which would impose a supplemental one-half sales tax increase upon simple majority approval of the county's voters. County taxpayers filed suit challenging the Agency's sales tax.<sup>8</sup> The trial court concluded the tax was unconstitutional as a "deliberate and unavailing attempt to circumvent section 4."<sup>9</sup> Under the pretext of being bound to *Richmond*, however, the court of appeal reversed, finding section 4 inapplicable to the Agency because the Agency lacked power to levy a property tax.<sup>10</sup> The supreme court affirmed the court of appeal, finding the tax unconstitutional because it failed to acquire supermajority voter approval.<sup>11</sup>

## II. TREATMENT OF THE CASE

### A. Majority Opinion

#### 1. Special District

In *Richmond*, a sales tax was imposed by the Los Angeles County

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4. The name of the agency was the San Diego County Regional Justice Facility Financing Agency, which the state legislature created by enacting Government Code sections 26250-26285. CAL. GOV'T CODE §§ 26250-26285 (West 1988 & Supp. 1992).

5. Proposition 13 was the 1978 initiative measure through which the voters enacted section 4 of Article XIII of the California Constitution, which provides:

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

CAL. CONST. art. XIII A, § 4. 9 B. WITKIN, CALIFORNIA PROCEDURE *Taxation* § 109 (9th ed. 1989 & Supp. 1991) (voting procedures).

6. *Rider*, 1 Cal. 4th at 9, 820 P.2d at 1005, 2 Cal. Rptr. 2d at 495. See *infra* notes 12-22 and accompanying text for the court's reasoning.

7. *Id.* at 14, 820 P.2d at 1008, 2 Cal. Rptr. 2d at 498. See *infra* notes 23-26 and accompanying text for the court's reasoning.

8. *Id.* at 9, 820 P.2d at 1004-05, 2 Cal. Rptr. 2d at 494-95.

9. *Id.* at 6, 820 P.2d at 1002, 2 Cal. Rptr. 2d at 492.

10. *Id.* at 6, 820 P.2d at 1003, 2 Cal. Rptr. at 493.

11. *Id.* at 14, 820 P.2d at 1009, 2 Cal. Rptr. 2d at 499.

Transportation Commission (LACTC), an agency created in 1976 prior to the adoption of Proposition 13.<sup>12</sup> The supreme court in *Richmond* focused on the issue of whether the LACTC was a “special district” under section 4.<sup>13</sup> Because the agency was formed prior to the passage of Proposition 13 and lacked the power to impose a tax on real property, the court refused to consider the agency a special district.<sup>14</sup>

In the present case, the court of appeal’s decision would expand the *Richmond* rule to the point of giving any local district or agency that lacked power to impose property taxes the ability to implement other tax measures, even if the district or agency was created for the exclusive purpose of circumventing section 4.<sup>15</sup> However, the supreme court found that such a result would be contrary to the intention of the framers of and voters for Proposition 13.<sup>16</sup> The policy that undergirds section 4, restricting the ability of local governments to impose new taxes to replace property tax revenues, would be frustrated if cities and counties could create taxing districts to finance local obligations without acquiring supermajority approval from the voters.<sup>17</sup> Thus, the court ruled that the term “special district” includes “any local taxing agency created to raise funds . . . to replace revenues lost” by Proposition 13.<sup>18</sup>

The supreme court introduced an “essential control” test to identify purposeful circumvention of Proposition 13.<sup>19</sup> This test is designed to determine whether a new taxing agency is formed to re-

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12. *Richmond*, 31 Cal. 3d at 199, 643 P.2d at 942, 182 Cal. Rptr. at 325.

13. *Id.* at 208, 643 P.2d at 947, 182 Cal. Rptr. at 330.

14. After examining the voters’ pamphlet, the *Richmond* court determined that Proposition 13 was aimed at property tax relief, and that section 4 of Proposition 13 was intended to restrict the ability of local governments to impose new taxes to replace property tax revenues lost under that measure. *Id.* at 206, 643 P.2d at 946, 182 Cal. Rptr. at 329. See Ballot Pamp. Proposed Amends. to Cal. Const. with Arguments to Voters, Primary Elec. at 56 (June 6, 1978).

15. *Rider*, 1 Cal. 4th at 10, 820 P.2d at 1006, 2 Cal. Rptr. 2d at 496.

16. *Id.*

17. *Id.* See Rodney T. Smith, *Constitutional Reform Gone Awry: The Apportionment of Property Taxes in California after Proposition 13*, 23 LOY. L.A. L. REV. 829 (1990).

18. *Rider*, 1 Cal. 4th at 11, 820 P.2d at 1006, 2 Cal. Rptr. 2d at 496.

19. *Id.* at 11-12, 820 P.2d at 1006, 2 Cal. Rptr. 2d at 496. The majority stated that courts may “infer” an agency’s intent to circumvent the supermajority requirement when the new agency is “essentially controlled” by one or more city or county. This determination may rest upon several factors,

including the presence or absence of (1) substantial municipal control over agency operations, revenues or expenditures, (2) municipal ownership or control over agency property or facilities, (3) coterminous physical boundaries, (4) common or overlapping governing boards, (5) municipal involvement in the creation or formation of the agency, and (6) agency performance of functions customarily or historically performed by municipalities and financed through levies of property taxes.

*Id.*

place revenues lost by Proposition 13 and whether the agency is controlled by a city or county which otherwise need comply with the supermajority provisions of section 4.<sup>20</sup> Because the Agency was created with its geographic boundaries coterminous with those of the county and with its purpose to levy a sales tax on a mere majority of voter approval,<sup>21</sup> the court found purposeful circumvention of section 4, and hence, the Agency qualified as a special district under that section.<sup>22</sup>

## 2. Special Tax

Section 4 limits the special district's taxing power only with regard to "special taxes."<sup>23</sup> Special taxes under section 4 are "taxes levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes."<sup>24</sup> The Agency claimed their tax was a general tax because it was directed to "the general governmental purposes of the agency."<sup>25</sup> According to the supreme court, however, the Agency's tax was a special tax because the sales tax was specifically earmarked for the construction of justice facilities to the exclusion of any claimed general purposes.<sup>26</sup> Thus, section 4 controlled, thereby requiring, the sales tax to surpass the supermajority voter requirement.

### B. Concurring Opinion

Although the majority disposed of the plaintiffs' claim on constitutional grounds, in his concurrence Justice George argued for a resolution based upon a statutory construction.<sup>27</sup> Under the auspices of judicial restraint,<sup>28</sup> George proposed that the statutory provisions of

20. *Id.*

21. *Id.* at 12, 820 P.2d at 1005, 2 Cal. Rptr. 2d at 495. The county created the Agency because the tax did not achieve the required two-thirds voter approval. Moreover, the court noted that initially the entire County board of supervisors was to serve as the Agency's board of directors until the Legislative Counsel advised against such a nexus. "The final version included only two county supervisors among the seven Agency directors." *Id.* at 9, 820 P.2d at 1005, 2 Cal. Rptr. 2d at 495.

22. *Id.* at 13, 820 P.2d at 1006, 2 Cal. Rptr. 2d at 496.

23. CAL. CONST. art. XIII A, § 4. See *supra* note 5 for constitutional text.

24. *Rider*, 1 Cal. 4th at 14, 820 P.2d at 1008, Cal. Rptr. 2d at 498 (quoting *County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982)).

25. *Id.*, 1 Cal. 4th at 13, 820 P.2d at 1007-08, 2 Cal. Rptr. 2d at 497-98.

26. *Id.* at 14, 820 P.2d at 1008, 2 Cal. Rptr. 2d at 498.

27. *Id.* at 16, 820 P.2d at 1010, 2 Cal. Rptr. 2d at 500 (George, J., concurring).

28. *Id.* (George, J., concurring). See *Ashwander v. Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("Thus, if a case can be decided on either of two



Proposition 62 led to a more straightforward solution than those of Proposition 13.<sup>29</sup> Unlike Proposition 13 which is narrowly applied to the actions of cities, counties and “special districts,” Proposition 62 applies to all “local government[s] or district[s]” which have been defined to include “an agency of the state.”<sup>30</sup> Justice George, moreover, found plaintiffs’ challenge to the constitutionality of Proposition 62 untenable. It would be incongruous, he asserted, to prevent the legislature from making the local entity’s taxing authority contingent on prior voter approval of the tax.<sup>31</sup> Thus, Proposition 62 is constitutionally sound and the sales tax at issue in this case is invalid under a proper statutory analysis.<sup>32</sup>

### C. Dissenting Opinion

In his dissenting opinion, Justice Mosk attacked the majority for what he viewed to be a departure from *stare decisis*.<sup>33</sup> The *Richmond* court decisively held that “special districts,” as used in section 4, refers exclusively to districts which have the power to levy a property tax.<sup>34</sup> Justice Mosk argued that the Agency, here, is not a “special district” within the parameters of section 4 because it does not have the power to levy a property tax.<sup>35</sup> Moreover, Justice Mosk noted that California voters rejected Proposition 36, which contained an interpretation of section 4 requiring any measure increasing taxes

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grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”); *Palermo v. Stockton Theaters* 32 Cal. 2d 53, 66, 195 P.2d 1, 9 (1948) (“It is a well-established principle that this court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case.”).

29. *Rider*, 1 Cal. 4th at 18, 820 P.2d at 1010, 2 Cal. Rptr. 2d at 501 (George, J., concurring).

30. *Id.* (George, J., concurring).

31. *Id.* at 24, 820 P.2d at 1015, 2 Cal. Rptr. 2d at 490 (George, J., concurring). This is in contrast to the reasoning found in *Geiger v. Board of Supervisors* where the court held that any statute requiring voter approval of a local tax is unconstitutional. *Geiger v. Board of Supervisors*, 48 Cal. 2d 836, 313 P.2d 545 (1957). “Any holding that such [sales tax] measures are subject to referendum would be contrary to [the inability of the Legislature to expand the referendum power beyond the scope of the power reserved by the Constitution].” *Id.* at 836-37, 313 P.2d at 547. Justice George believed the *Geiger* court’s respect for the viability of local tax measures and the counties’ need for freedom from continual tax challenges from a small percentage of the electorate was not applicable to a voter-approval requirement preconditioning a local government’s authority to levy such a tax. *Rider*, 1 Cal. 4th at 23, 820 P.2d at 1014, 2 Cal. Rptr. 2d at 504 (George, J., concurring).

32. *Id.* at 24, 820 P.2d at 1015, 2 Cal. Rptr. 2d at 505 (George, J., concurring).

33. *Id.* at 25, 820 P.2d at 1016, 2 Cal. Rptr. 2d at 506 (Mosk, J., dissenting).

34. *Richmond*, 31 Cal. 3d at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328.

35. *Rider*, 1 Cal. 4th at 26-27, 820 P.2d at 1016, 2 Cal. Rptr. 2d at 506-07 (Mosk, J., dissenting). Moreover, Justice Mosk pointed to the language in section 4 which recognizes that special districts may impose special or general taxes, and took issue with the majority opinion which, he believes, renders “special” all taxes levied by a special district. *Id.* at 30, 820 P.2d at 1019, 2 Cal. Rptr. 2d at 509 (Mosk, J., dissenting).

on the taxpayers to achieve supermajority approval; Justice Mosk claimed passage of Proposition 36 would have effected the same result that the majority opinion now advances.<sup>36</sup> Additionally, Justice Mosk found the majority's "essential control" test "unworkable"<sup>37</sup> and the consequences to approximately five thousand nonschool special districts in California to be untoward.<sup>38</sup> Finally, Justice Mosk advised the majority that in the interests of fairness their holding should apply prospectively only.<sup>39</sup>

### III. CONCLUSION

*Rider v. County of San Diego* stands for the proposition that even if a local government pushes the necessary buttons to circumvent the

36. *Id.* at 28, 820 P.2d at 1018, 2 Cal. Rptr. 2d at 508 (Mosk, J., dissenting). Proposition 36 would have repealed and reenacted section 4 in order to close loopholes in the law and require supermajority approval of any measure which effected higher taxes. Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. at 44 (Nov. 6, 1984).

37. *Rider*, 1 Cal. 4th at 28-29, 820 P.2d at 1018, 2 Cal. Rptr. 2d at 508-9 (Mosk, J., dissenting). Justice Mosk took issue with the majority's criteria for locating purposeful circumvention. "[O]verlapping governing boards" is an example which Justice Mosk found applicable to 40% of the more than approximately 5000 nonschool special districts which share governing boards with the board of supervisors or city councils. Moreover, agencies often hold the same geographic boundaries as counties, as is the case with most water districts. *Id.* at 29, 820 P.2d at 1018, 2 Cal. Rptr. 3d at 508 (Mosk, J., dissenting). See Cal. Controller, Ann. Rep. of Fin. Transactions Concerning Special Districts of Cal. at 1-9 (1988-89).

38. *Rider*, 1 Cal. 4th at 31-33, 820 P.2d at 1020, 2 Cal. Rptr. 2d at 510-11 (Mosk, J., dissenting). The extent to which this holding will jeopardize all taxing agencies created since 1978 "cannot be known, but it is safe to say that the financial stability of all districts created since 1978 will be severely damaged." *Id.* at 32, 820 P.2d at 1020, 2 Cal. Rptr. 2d at 510 (Mosk, J., dissenting).

39. *Id.* at 34, 820 P.2d at 1021, 2 Cal. Rptr. 3d at 511 (Mosk, J., dissenting). Justice Mosk reluctantly felt the need to advise the majority that it could refuse to give retroactive effect to a decision when considerations of fairness justify prospective operation, and laments that their silence on "this crucial issue is ominous." *Id.* (Mosk, J., dissenting). See *Forster Shipbldg. Co. v. County of Los Angeles*, 54 Cal. 2d 450, 353 P.2d 736, 6 Cal. Rptr. 24 (1960); see also *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991) (plurality opinion) (holding that if a new rule is applied to the prevailing party, it must be applied retroactively to all other applicants). But see *id.* at 2451 (O'Connor, J., dissenting) (arguing, along with Justices Rehnquist and Kennedy, that the Court frequently denied retroactivity in the interests of fairness). Because the *Rider* holding applies retroactively and contradicts the *Richmond* holding on which the "[l]egislature, local entities, bondholders, taxpayers, contractors and others have relied" for almost ten years, Justice Mosk fears for the very existence of numerous local taxing entities that are essential to government functioning yet were adopted by less than a supermajority vote. *Rider*, 1 Cal. 4th at 31-32, 820 P.2d at 1020, 2 Cal. Rptr. 2d at 510 (Mosk, J., dissenting). Justice Mosk asserted that the majority's holding in *Rider* threatens billions of dollars in obligations created on the premise that *Richmond* was controlling law. *Id.* (Mosk, J., dissenting).

voting requirements of section 4, the intentions of the framers of and voters for Proposition 13 will not be thwarted. Although the competence of the majority's "essential control" test to expose purposeful circumvention of section 4 will be determined in what Justice Mosk fears will be a concomitant flood of litigation, the majority took pains to ensure that the test hinges on reasonable findings of fact and not bright-line and draconian conclusions.

The court's departure from *Richmond*—applying section 4 to not only those districts that operate to replace revenues lost in property taxes, but to districts that operate to replace all revenues lost to Proposition 13—erects a formidable hurdle to local government's ability to raise revenues.<sup>40</sup> Ultimately, the effects of this holding will be wrestled out in courtrooms, ensuring further scrutiny into the questionable constitutional nature of Proposition 13.<sup>41</sup>

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40. See, e.g., Joseph T. Henke & Miles A. Woodlief, *The Effect of Proposition 13 Court Decisions on California Local Government Revenues*, 22 U.S.F. L. REV. 251 (1988).

41. The majority and dissent both recognize the "fundamentally undemocratic" nature of supermajority voter requirements. See *Rider*, 1 Cal. 4th at 7, 820 P.2d at 1003, 2 Cal. Rptr. 2d at 493 (citing *Richmond*, 31 Cal. 3d at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328); see also *id.* at 27, 820 P.2d at 1017, 2 Cal. Rptr. 2d at 507.