CALIFORNIA DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

CAPITAL CASE COMPENDIUM

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PREFACE

This Capital Case Compendium was compiled by Deputy Attorney General Robin Urbanski and Supervising Deputy Attorney General Holly Wilkens.[1]

The Compendium contains case updates pertaining to decisions issued through February 26, 2017.

The organization of the Compendium follows the chronological order of a capital prosecution.

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[1] Special appreciation is owed to Deputy Attorneys General Theodore Cropley, Ronald Jakob and Michael Murphy, Legal Assistant Monica Seda, and Legal Secretary Stephen McGee for their assistance in preparing the Compendium.

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Chapter One
DEATH PENALTY FRAMEWORK

I. GENERAL OVERVIEW [§ 1.10]

Article I, section 27, of the California Constitution validates the death penalty as a permissible type of punishment under the California Constitution. (***People v. Frierson*** (1979) 25 Cal.3d 142, 186.)

The framework of a California death-penalty prosecution as it exists today was established in 1957 with the enactment of Penal Code section 190.1. Section 190.1 provided for a separate penalty phase in a death-penalty trial, at which evidence might be presented of the circumstances of the offense, the defendant's background and history, and any facts in aggravation or mitigation of the punishment. The determination of the penalty of life imprisonment or death was within the discretion of the trier of fact. There were no specific guidelines, and every person found guilty of first degree murder was punishable by life imprisonment or death. (Stats. 1957, ch. 1968, pp. 3509-3510.) In ***McGautha v. California*** (1971) 402 U.S. 183, 207 [91 S.Ct. 1454, 28 L.Ed.2d 711], the Court upheld the California procedure against a claim that giving untrammeled discretion to the jury at the penalty phase violated the United States Constitution.

In ***People v. Anderson*** (1972) 6 Cal.3d 628, 656, decided February 18, 1972, the California Supreme Court held that capital punishment is cruel or unusual within the meaning of California Constitution, article I, section 6 (now Art. I, § 17). By an initiative enacted November 7, 1972, the California electorate added California Constitution, article I, section 27, which overruled *Anderson*, and specified that the death penalty itself did not violate the California Constitution. Meanwhile, in ***Furman v. Georgia*** (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], decided June 19, 1972, the United States Supreme Court held that death judgments imposed under statutes which allowed untrammeled jury discretion violated the Eighth Amendment.

In response to *Furman*, the California Legislature enacted a narrowly-drawn death penalty statute which mandated the death penalty for first degree murders committed under certain special circumstances, usually requiring deliberation and premeditation, personal commission by the defendant, and some additional aggravating factor. (Stats. 1973, ch. 719, pp. 1297-1302.) On July 2, 1976, the United States Supreme Court decided a group of five capital cases from other states. In ***Gregg v. Georgia*** (1976) 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 859], ***Proffitt v. Florida*** (1976) 428 U.S. 242 [96 S.Ct. 2960, 49 L.Ed.2d 913], and ***Jurek v. Texas*** (1976) 428 U.S. 262 [96 S.Ct. 2950, 49 L.Ed.2d 929], the court upheld statutes which provided for guided discretion in sentencing. In ***Woodson v. North Carolina*** (1976) 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944], and ***Roberts v. Louisiana*** (1976) 428 U.S. 325 [96 S.Ct. 3001, 49 L.Ed.2d 974], the court held that statutes providing mandatory death sentences for specified offenses violated the Eighth Amendment. Relying on those cases, the

California Supreme Court held the California mandatory statute violated the Eighth Amendment. (***Rockwell v. Superior Court*** (1976) 18 Cal.3d 420, 445.)

A. 1977 LAW [§ 1.11]

California's first statute providing for guided discretion in imposing the death penalty was enacted by urgency legislation effective August 11, 1977. (Stats. 1977, ch. 316, pp. 1256-1266.) The 1977 law was similar to the 1973 statute in providing narrowly-drawn special circumstances to establish death-penalty eligibility. Significant changes included the addition of specific factors to be considered and taken into account by the trier of fact in determining the penalty and the requirement for the trial judge to entertain an automatic motion for modification of the penalty after every death-penalty verdict.

B. 1978 LAW [§ 1.12]

The 1977 statute was amended effective November 7, 1978, by an initiative measure: Proposition 7, the "Briggs Initiative." The 1978 law maintained the basic framework of the 1977 statute but expanded the special circumstances and other provisions for death-penalty eligibility. It also provided more specific guidance for determining penalty and the automatic motion for modification. The vast majority of persons now under sentence of death in California were tried and sentenced under this statute.

C. PROPOSITION 115 (6/6/90) [§ 1.13]

Proposition 115 effected significant changes to the California death-penalty statutes, although maintaining the same basic framework. The reach of death penalty eligibility was expanded in several ways: e.g., the definition of first degree felony-murder was expanded to include murders committed in the commission of five additional felonies; the felony-murder special circumstances were expanded to include all first degree felony-murders; and the *mens rea* required for felony-murder accomplices to be subject to special circumstance findings was extended to include major participants who act with reckless indifference to life. (***Raven v. Deukmejian*** (1990) 52 Cal.3d 336.)

D. PROPOSITION 196 (3/26/96) [§ 1.14]

Proposition 196 (Cal. Const., art. II, § 10(a)) amended Penal Code section 190.2 to expand the number of special circumstances by: (1) adding carjacking, as defined by Penal Code section 215, to the list of felony-murder special circumstances; (2) providing a special circumstance where the victim was a juror in any court and was intentionally killed in retaliation for, or to prevent the performance of, the victim's official duties; and

(3) providing a special circumstance where the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death.

E. PROPOSITION 18 (3/8/00) [§ 1.15]

Proposition 18 changed the lying-in-wait special circumstance from "while lying in wait" to "by means of lying-in-wait" (Pen. Code, § 190.2(a)(15)), and added Penal Code section 190.2, subdivision (a)(17)(M), which provides that for the special circumstances of kidnapping-felony-murder (Pen. Code, § 190.2(a)(17)(B)) and arson felony-murder (Pen. Code, § 190.2(a)(17)(H)) proof of intent to kill and proof of the elements of the felony are all that is required to prove the special circumstance, even if the felony was committed primarily or solely for the purpose of facilitating the murder.

F. PROPOSITION 21 (3/8/00) [§ 1.16]

Proposition 21 added Penal Code section 190.2, subdivision (22), which provides a special circumstance when the defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang (Pen. Code, § 186.22) and the murder was carried out to further the activities of the criminal street gang.

G. PROPOSITION 66 (11/8/16) [§ 1.17]

Proposition 66 ("the Death Penalty Reform and Savings Act") addresses delay in capital cases at the appellate level (See, Pen. Code §§ 190.6, subd. (d), 1239.1); modifies some of the rules governing the initiation and adjudication of habeas corpus proceedings arising from capital judgments (See, Pen. Code §§ 1509, 1509.1); modifies provisions regarding the housing of condemned inmates and provides work requirements and deduction of restitution fines from wages (See, Pen. Code §§ 2700.1, 3600); addresses ability and procedures for carrying out death judgments (See, Pen. Code §§ 1227, 3604, 3604.1, 3604.3); and provides for modifications to qualify California for the expedited provisions for federal habeas corpus review in capital cases (See, Gov't Code §§ 68660.5, 68661, 68661.1, 68662, 68664, 68665). On December 20, 2016, the California Supreme Court issued an order staying the implementation of all provisions of Proposition 66, and an order to show cause on February 1, 2017 in ***Briggs v. Brown***, case number 238309, challenging the constitutionality of Proposition 66.

Chapter Two
CHARGING

I. PROSECUTORIAL DISCRETION [§ 2.10]

A. CONSTITUTIONALITY [§ 2.11]

The existence of prosecutorial discretion in charging capital offenses does not violate the Eighth Amendment. (***Proffitt v. Florida*** (1976) 428 U.S. 242, 254 [96 S.Ct. 2960, 49 L.Ed.2d 913]; ***Gregg v. Georgia*** (1976) 428 U.S. 153, 199 [96 S.Ct. 2909, 49 L.Ed.2d 859]; ***People v. Vines*** (2011) 51 Cal.4th 830, 889; ***People v. Gutierrez*** (2009) 45 Cal.4th 789, 833; ***People v. Keenan*** (1988) 46 Cal.3d 478, 505.)

Prosecutorial discretion to select those death eligible cases in which the death penalty will actually be sought does not result in an arbitrary and capricious capital punishment system or violate equal protection or due process guarantees. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 957; ***People v. Vines*** (2011) 51 Cal.4th 830, 890.)

The exercise of prosecutorial discretion to seek capital punishment for eligible cases within a particular county does not violate equal protection. (***People v. Vines*** (2011) 51 Cal.4th 830, 890; ***People v. Bennett*** (2009) 45 Cal.4th 577, 629.)

Nothing in the United States Supreme Court's decision in ***Bush v. Gore*** (2000) 531 U.S. 98 [148 L.Ed.2d 388, 121 S.Ct. 525], warrants the California Supreme Court revisiting its prior holdings rejecting challenges to the constitutionality of prosecutorial discretion in seeking the death penalty. (***People v. Vines*** (2011) 51 Cal.4th 830, 890.)

California's practice of charging by information after a preliminary hearing (and without grand-jury oversight) does not violate a defendant's constitutional rights under the Fifth, Eighth, or Fourteenth Amendment against an arbitrary and capricious capital punishment system or cruel or unusual punishment, or entitlement to equal protection and due process. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 663.)

The prosecutor's discretionary authority to decide in which capital-eligible cases to seek the death penalty does not violate the constitutional principle of separation of powers because the ultimate sentencing power remains in the judicial branch. (***People v. Tafoya*** (2007) 42 Cal.4th 147, 198; ***People v. Arias*** (1996) 13 Cal.4th 92, 189-190; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 152.)

The reasoning of cases upholding prosecutorial discretion in deciding to seek the death penalty "applies with equal force to the exercise of prosecutorial discretion to seek the death penalty under section 4500 [assault by a life prisoner with malice aforethought]." (***People v. Landry*** (2016) 2 Cal.5th 52, 115.)

B. BURDEN OF PROOF [§ 2.12]

Without "exceptionally clear" proof, a court cannot infer the prosecution abused its discretion in pursuing the death penalty in a particular case. (***McClesky v. Kemp*** (1987) 481 U.S. 279, 297 [107 S.Ct. 1756, 95 L.Ed.2d 262]; ***People v. Box*** (2000) 23 Cal.4th 1153, 1218-1219, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129], and *People v. Martinez* (2010) 47 Cal.4th 911, 948 & fn. 10.)

"Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." (***Gregg v. Georgia*** (1976) 428 U.S. 153, 225 [96 S.Ct. 2909, 49 L.Ed.2d 859] [White, J., concurring].)

In the pretrial setting, there is no presumption of vindictiveness when the prosecution increases charges or the potential penalty. Rather, the defendant must prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do. (***People v. Jurado*** (2006) 38 Cal.4th 72, 98, citing ***United States v. Goodwin*** (1982) 457 U.S. 368, 381-382 [102 S.Ct. 2485, 73 L.Ed.2d 74]; ***People v. Michaels*** (2002) 28 Cal.4th 486, 515 [same].)

Absent a showing of invidious discrimination or vindictive prosecution, neither the prosecution's internal standard for a capital charging decision, nor the accuracy of the factual predicate for a capital charging decision, is subject to scrutiny or review. This is because the Constitutional prohibition against "the arbitrary and capricious exaction of the death penalty" is satisfied by the narrowing circumstances in California's death penalty statute. (***People v. Lucas*** (1995) 12 Cal.4th 415, 478.)

The filing of an amended complaint 12 days after the defendant's arrest, alleging special circumstances for the first time, was not vindictive. "Deciding whether to charge a special circumstance is obviously a major decision, one not to be rushed." (***People v. Edwards*** (1991) 54 Cal.3d 787, 828-829.)

C. DISCOVERY [§ 2.13]

While discovery related to a claim of discriminatory prosecution is not provided for in Penal Code section 1054.1, which sets forth the prosecutor's discovery obligations, or in any other statute, the California Supreme Court, and the United States Supreme Court have left open the question as to whether the source of the discovery right it recognized in ***United States v. Armstrong*** (1996) 517 U.S. 456, 463 [116 S.Ct. 1480, 134 L.Ed.2d 687], was based on the Constitution or the inherent discovery power of the federal district court. The California Supreme Court assumed a defendant has a right to a *Murgia* (see ***Murgia v. Municipal Court*** (1975) 15 Cal.3d 286) discovery motion. (***People v. Montes*** (2014) 58 Cal.4th 809, 829.)

The burden for obtaining discovery requires the moving party to "describe the requested information with at least some degree of specificity" and "to offer some evidence of both discriminatory effect and discriminatory intent." (***People v. Montes*** (2014) 58 Cal.4th 809, 829-830, internal quotation marks & citations omitted.)

Without deciding whether statistics relating exclusively to the prosecuting authority, standing alone, are sufficient to establish a prima facie claim of discriminatory intent in a capital charging case, the California Supreme Court found that the statistical report relied upon by the defendant in his motion for discovery was "fundamentally flawed and failed to show discriminatory effect, let alone discriminatory intent." Those flaws included failing "to take into account the case characteristics of the homicides, which was a crucial factor for a district attorney's capital charging decisions" and therefore "whatever benefit defendant's study gained by focusing on the charging authority was negated by the failure to address the homicide case characteristics." (***People v. Montes*** (2014) 58 Cal.4th 809, 830-831.)

A defendant is not entitled to discovery regarding charging practices in order to bring a selective prosecution claim unless the defendant submits relevant evidence that similarly situated persons are treated differently; and raw statistics regarding race and death-eligible charges are insufficient as it "says nothing about charges brought against *similarly situated defendants*." (***United States v. Bass*** (2002) 536 U.S. 862, 864 [122 S.Ct. 2389, 153 L.Ed.2d 769].)

A purely statistical showing that does not describe or analyze factors or circumstances of any case, other than race of the victim and sentence does not entitle a defendant to obtain discovery of the prosecution's charging practices. (***In re Seaton*** (2004) 34 Cal.4th 193, 202-203.)

D. EFFECT OF PRIOR DETERMINATIONS ON SPECIAL-CIRCUMSTANCE ALLEGATIONS [§ 2.14]

The prosecutor is not precluded from filing an information charging a special circumstance which was omitted by the magistrate from the order of commitment. (***People v. San Nicolas*** (2004) 34 Cal.4th 614, 653.)

The two-dismissal bar in Penal Code section 1387 applies to special circumstances. (***People v. Trujeque*** (2015) 61 Cal.4th 227, 255; ***Ramos v. Superior Court*** (1982) 32 Cal.3d 26.)

E. PROPER CONSIDERATIONS [§ 2.15]

The prosecution may consider that the charges against the accused including other serious violent crimes against different victims in deciding whether to seek the death penalty. (***People v. Arias*** (1996) 13 Cal.4th 92, 132.)

F. SEEKING DEATH AFTER PLEA ATTEMPT [§ 2.16]

The prosecutor's amendment of a complaint to add a special-circumstance allegation after the defendant's attempt to plead guilty to the murder without the special-circumstance allegation was not shown to be vindictive, as the defendant had notice before the plea that the prosecution was considering filing special-circumstance allegations. (***People v. Michaels*** (2002) 28 Cal.4th 486, 515.)

G. SEEKING DEATH AFTER PREDECESSOR DECIDED NOT TO SEEK DEATH [§ 2.17]

The district attorney was free to change the decision made by his predecessor not to seek the death penalty, and that decision does not raise 'a presumption of vindictiveness.' A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." (***People v. Grimes*** (2016) 1 Cal.5th 698, 736 [internal quotation marks and citations omitted.)

H. SEEKING DEATH ON RETRIAL [§ 2.18]

An inference of vindictive prosecution is not raised by the prosecution seeking the death penalty in a retrial, where it sought death penalty in the initial trial, such that the defendant is not facing a more severe sentence than he faced in the first trial. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 731.)

I. FORFEITURE [§ 2.19]

A defendant may not complain for the first time on appeal about the alleged vindictive charging of a special circumstance. (***People v. Maury*** (2003) 30 Cal.4th 342, 438-439; ***People v. Edwards*** (1991) 54 Cal.3d 787, 826-827.)

Claims of prosecutorial misconduct and violation of procedural due process in the charging decision are forfeited by failing to allege these grounds in the trial court. (***People v. Maury*** (2003) 30 Cal.4th 342, 439; ***People v. Lucas*** (1995) 12 Cal.4th 415, 476-477; [defendant forfeited any claim he was deprived of procedural due process in the capital charging decision for failure to move to dismiss or strike the special circumstance allegations on that basis].)

II. CHARGING JUVENILES [§ 2.20]

A. EXECUTION OF JUVENILE OFFENDERS PRECLUDED [§ 2.21]

The death penalty may not be imposed on an individual who was under 18 at the time the crime was committed. (***Roper v. Simmons*** (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]; see also ***Thompson v. Oklahoma*** (1988) 487 U.S. 815 [108 S.Ct. 2687, 101 L.Ed.2d 702] [imposition of death penalty on boy 15 at the time of murder violates Eighth Amendment]; Pen. Code, § 190.5(a).)

B. LIMITS ON LWOP SENTENCES FOR JUVENILE OFFENDERS [§ 2.22]

"[M]andatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" (***Miller v. Alabama*** (2012) 132 S.Ct. 2455, 2460 [183 L.Ed.2d 407].)

Effective June 6, 1990, with passage of Proposition 115, a term of life without parole may be imposed on a person who was 16 or 17 years old at the time of the crime. (Pen. Code, § 190.5(b).) If defendant is under 16, i.e., age 14 or 15, punishment under Welfare and Institutions Code section 602, subdivision (b), the maximum term is 25 years to life with possibility of parole. (***In re Nunez*** (2009) 173 Cal.App.4th 709, 727; ***People v. Demirdjian*** (2006) 144 Cal.App.4th 10, 17.) Penal Code section 190.5(b), properly construed, confers discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of special circumstance murder to life without parole or to 25 years to life, with no presumption in favor of life without parole. (***People v. Gutierrez*** (2014) 58 Cal.4th 1354, 1360.)

C. BURDEN OF PROOF OF AGE ON DEFENDANT [§ 2.23]

Age is not an element of the offense. Consequently, a defendant who claims to be less than 18 years old has the burden of proof to show his/her age. The allocation of the burden of proof to the defendant to show age does not offend the Constitution. (***People v. Marquez*** (1992) 1 Cal.4th 553, 579-581; Pen. Code, § 190.5(a) [burden of proof as to age at time of commission of capital offense is on the defendant].)

III. CHARGING MURDER [§ 2.30]

"A valid accusatory pleading need not specify by number the statute under which the accused is being charged." (***People v. Jones*** (2013) 57 Cal.4th 899, 968, internal quotation marks omitted; Pen. Code, § 952 ["In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has

committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused."].)

A pleading charging a defendant with first degree murder in terms of malice aforethought and premeditation "adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory." (***People v. Abel*** (2012) 53 Cal.4th 891, 937; ***People v. Moore*** (2011) 51 Cal.4th 386, 412; ***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 141.)

A charging document that states the offense in the language of the statute defining murder (Pen. Code, § 187), charges an offense that includes murder of the first degree and murder in the second degree. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 89, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

"The trial court did not lack jurisdiction to try defendant for first degree murder because the information charged him with malice murder under section 187 rather than deliberate and premeditated or felony murder under section 189. Defendant received adequate notice that he faced first degree murder charges and special circumstance allegations of burglary, kidnap, and kidnap for robbery because of the evidence presented at the preliminary hearing." (***People v. Johnson*** (2015) 61 Cal.4th 734, 774-775.)

Felony-murder and premeditated murder are not separate or distinct crimes, but rather different varieties of the same crime, and need not be separately pled. (***People v. Abel*** (2012) 53 Cal.4th 891, 937; ***People v. Moore*** (2011) 51 Cal.4th 386, 412; ***People v. Wilson*** (2008) 43 Cal.4th 1, 21.)

Nothing in ***Apprendi v. New Jersey*** (2000) 530 U.S. 466, 476 [120 S.Ct. 2348, 147 L.Ed.2d 435], or its progeny "create new notice requirements for alternative theories of substantive offenses such as a theory of first degree murder." Instead, *Apprendi* and its progeny address the Sixth Amendment right to a jury determination of facts used in sentencing a defendant beyond the elements of a charged offense. (***People v. Abel*** (2012) 53 Cal.4th 891, 938; ***People v. Moore*** (2011) 51 Cal.4th 386, 413 [same].)

The prosecution is not required to specify a theory of murder in an accusatory pleading. Adequate notice is provided at the preliminary hearing or indictment proceedings. (***People v. Kelly*** (2007) 42 Cal.4th 763, 791; ***People v. Silva*** (2001) 25 Cal.4th 345, 367-368; ***People v. Diaz*** (1992) 3 Cal.4th 495, 557.)

Felony-murder is properly charged even though the statute of limitations expired on the underlying felony. (***People v. Morris*** (1988) 46 Cal.3d 1, 14-18, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

There is no requirement that the State charge the underlying special-circumstance felony as a separate offense. The special-circumstance felony may be charged in the

murder count. (***People v. Mickey*** (1991) 54 Cal.3d 612, 677, fn. 12; ***People v. Morris*** (1988) 46 Cal.3d 1, 18.)

A defendant need not be specifically charged with first degree murder before the prosecution can allege special circumstances. (***People v. Buckley*** (1986) 185 Cal.App.3d 512, 521; ***Allen v. Superior Court*** (1980) 113 Cal.App.3d 42, 46-47, disapproved on different grounds in ***People v. Superior Court (Engert)*** (1982) 31 Cal.3d 797, 806, fn. 8.)

Special-circumstance allegations are not applicable to conspiracy to commit murder. (***People v. Hernandez*** (2003) 30 Cal.4th 835, 864-870, disapproved on other grounds, *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.)

IV. CAPITAL NON-MURDER OFFENSES [§ 2.40]

There are five non-murder capital offenses under California law: (1) fatal assault by a life prisoner (Pen. Code, § 4500); (2) fatal train-wrecking (Pen. Code, § 219); (3) perjury that procures conviction and execution of an innocent person (Pen. Code, § 128); (4) sabotage (Mil. & Vet. Code, § 1672); and (5) treason (Pen. Code, § 37).

A. FATAL ASSAULT BY A LIFE PRISONER (Pen. Code §4500) CIRCUMSTANCES [§ 2.41]

"Section 4500 is a death eligibility statute as opposed to a death selection statute. (See ***Tuilaepa v. California*** (1994) 512 U.S. 967, 971–972 [129 L.Ed.2d 750, 114 S.Ct. 2630].) A defendant convicted of the offense defined by section 4500 becomes eligible for the death penalty or its alternative, life without the possibility of parole." (***People v. Landry*** (2016) 2 Cal.5th 52, 106.)

"It would be inconsistent with the legislative purpose of these statutes to construe section 1170.1(c) to preclude the application of section 4500 to inmates who have not yet begun serving an imposed and pending life sentence because they are still serving a determinate sentence." (***People v. Landry*** (2016) 2 Cal.5th 52, 105.)

V. CHARGING SPECIAL CIRCUMSTANCES [§ 2.50]

Cross-Reference: § 7.30, Special circumstances

A. ADDING SPECIAL CIRCUMSTANCES [§ 2.51]

A complaint or information can generally be amended to add special circumstance charges. (***People v. Horning*** (2004) 34 Cal.4th 871, 895.)

Under state law, the trial court has discretion to permit the prosecutor to add a special circumstance allegation to a complaint before allowing the defendant to plead guilty to a murder charge which did not have a special circumstance alleged. (***People v. Michaels*** (2002) 28 Cal.4th 486, 513-514.)

A special-circumstance allegation may be added for the first time to the information where evidence of the special circumstance was presented at the preliminary hearing and the accused had due notice of the charge. (***Talamantez v. Superior Court*** (1981) 122 Cal.App.3d 629, 634-636.)

B. CHARGING MULTIPLE SPECIAL CIRCUMSTANCES [§ 2.52]

Where special circumstances are applicable to more than one charged murder, the special circumstances may be alleged as to each murder to which they apply. (***Harris v. Pulley*** (9th Cir. 1982) 692 F.2d 1189, 1203, reversed in part on different grounds in *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29]; but see Ch. 9, § III, O, *infra*, *re* multiple murder special circumstance, and Ch. 9, § III, AA, *infra*, *re* witness killing special circumstance.

§ 2.52.1 Charging More than One Murder Special Circumstance

Multiple felony-murder special circumstances (kidnapping and unlawful penetration with a foreign object) were properly alleged. (***People v. Morgan*** (2007) 42 Cal.4th 593, 623.)

§ 2.52.2 Charging the Multiple Murder Special

Since there must be more than one murder to allege the special circumstance of multiple murder, the allegation of two special circumstances for a double murder creates the risk of an improperly imposed death penalty. The appropriate charging papers should allege one multiple-murder special circumstance separate from the individual murder counts. (***People v. Riccardi*** (2012) 54 Cal.4th 758, 839, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Diaz*** (1992) 3 Cal.4th 495, 565.)

"[T]he settled rule [is] that … 'the jury's consideration of duplicative multiple-murder special circumstances is harmless where … the jury knows the number of murders on which the special circumstances are based.'" (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 43-44.)

§ 2.52.3 Charging Out-of-County Murders (Pen. Code § 790(b))

If a defendant is charged with a multiple murder special circumstance, "the jurisdiction for any charged murder, and for any crimes properly joinable with that murder, shall be in any county that has jurisdiction pursuant to subdivision (a) for one or more of the murders charged in a single complaint or indictment *as long as* the charged murders are 'connected together in their commission,' as that phrase is used in Section 954, and subject to a hearing in the jurisdiction where the prosecution is attempting to consolidate the charged murders." (Pen. Code, § 790(b), emphasis added.) There is no requirement that the murders also be part of a "common plan or scheme." (***Alcala v. Superior Court*** (2008) 43 Cal.4th 1205, 1216-1217.)

§ 2.52.4 Charging Prior Murder Special

A prior murder special circumstance may be alleged and found for each prior first or second degree murder conviction. (***People v. Danks*** (2004) 32 Cal.4th 269, 314-315.)

"When a murder committed by a juvenile results in an adult criminal conviction, there is no legal proscription against the use of that conviction as a special circumstance if the defendant murders a second victim after reaching the age of majority." (***People v. Salazar*** (2016) 63 Cal.4th 214, 228.)

§ 2.52.5 Charging Witness Killing Special

Penal Code section 190.2, subdivision (a)(10), defines as a special circumstance (i) the intentional killing of a victim to prevent his testimony in any criminal proceeding (when the killing was not committed during the commission, or attempted commission of the crime to which he was a witness) or (ii) the intentional killing of a victim who was a witness to a crime in retaliation for that witness's testimony in any criminal proceeding. This section addresses two separate situations in which a witness-related killing will be a special circumstance. Even if the evidence supports both theories under Penal Code section 190.2, subdivision (a)(10), the People may not charge two separate special circumstances. However, evidence supporting alternative theories may be presented to the jury. (***People v. Allen*** (1986) 42 Cal.3d 1222, 1273.)

Double charging of a witness-killing special circumstance can be harmless error. (***People v. Beardslee*** (1991) 53 Cal.3d 68, 116-117; ***People v. Allen*** (1986) 42 Cal.3d 1222, 1281-1283.)

C. THEORY OF SPECIAL CIRCUMSTANCE NOT REQUIRED [§ 2.53]

There was no statutory error in an information which alleged the murder was committed while the defendant "was engaged in the commission of rape ... within the meaning of section 190(a)(17)." The rape special circumstance was satisfactorily charged and was not misleading, despite the failure to specify attempted rape, the theory upon which the prosecutor based his argument to the jury. Because defense counsel said he was neither surprised nor prejudiced by the pleading and argument, defendant's constitutional right to notice of the charges was not compromised. (***People v. Cain*** (1995) 10 Cal.4th 1, 41-42.)

D. TECHNICAL ERROR IN PLEADING SPECIAL CIRCUMSTANCES [§ 2.54]

Technical error in pleading a special circumstance was not grounds for reversing the special circumstance where the defendant did not object and was on notice as to the true nature of the special circumstance. (***People v. Allen*** (1986) 42 Cal.3d 1222, 1274.)

Technical error is not prejudicial if the defendant is not misled. (***People v. Bloyd*** (1987) 43 Cal.3d 333, 361-362.)

Chapter Three
PROCEEDINGS BEFORE TRIAL

I. APPOINTMENT OF COUNSEL [§ 3.10]

The right to counsel only attaches when judicial proceedings have commenced, which occurs when a complaint or indictment is filed. (***People v. Cook*** (2007) 40 Cal.4th 1334, 1352.)

Where two counts of murder, but no multiple-murder special circumstance, are charged at the initial arraignment, Penal Code section 987, subdivision (d) (requiring counsel on arraignment in capital cases), was not applicable. There was no error in permitting the defendant to waive counsel at arraignment where there was no evidence that the prosecutor manipulated the pleadings to deny the defendant's unwaivable right to counsel. (***People v. Mayfield*** (1993) 5 Cal.4th 142, 173-174, rev'd on other grounds, ***Mayfield v. Woodford*** (9th Cir. 2001) 270 F.3d 915, 933.)

The public defender's refusal to attend a lineup cannot be equated with denial of a defendant's right to counsel. (***People v. Hart*** (1999) 20 Cal.4th 546, 625.)

A. DEFENDANT'S CHOICE [§ 3.11]

"[E]ven in cases involving the defendant's constitutional right to *retain* counsel of his own choosing, that right can be forced to yield if the court determines the appointment at issue will result in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case. A trial court has wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar. The court has, moreover, an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." (***People v. Alexander*** (2010) 49 Cal.4th 846, 871-872, internal quotation marks & citations omitted.)

§ 3.11.1 Non-Indigent

The right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment. (***United States v. Gonzalez-Lopez*** (2006) 548 U.S. 140, 144 [126 S.Ct. 2557, 2561, 165 L.Ed.2d 409]; ***Wheat v. United States*** (1988) 486 U.S. 153, 159 [108 S.Ct. 1692, 100 L.Ed.2d 140].)

However, "the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (***Wheat v. United States*** (1988) 486 U.S. 153, 159 [108 S.Ct. 1692, 100 L.Ed.2d 140], citing ***Morris v. Slappy*** (1983) 461 U.S. 1, 13-14 [103 S.Ct. 1610, 75 L.Ed.2d 610].)

Erroneous deprivation of the right to counsel is structural error and not subject to harmless-error review. (***United States v. Gonzalez-Lopez*** (2006) 548 U.S. 140, 148-150 [126 S.Ct. 2557, 2564-2565, 165 L.Ed.2d 409].)

A defendant whose request for substitution of retained counsel is granted cannot complain on appeal that his request should have been denied. The defendant's only contention on appeal under such circumstances would be that the defendant was denied effective assistance of counsel. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 423-424.)

The duty to ensure that counsel is competent and qualified to represent a defendant does not apply to retained counsel. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 424.)

§ 3.11.2 Indigent

Neither the federal nor state Constitution requires the right of counsel of choice be extended to defendants who require counsel be appointed for them. (***People v. Alexander*** (2010) 49 Cal.4th 846, 871; ***Wheat v. United States*** (1988) 486 U.S. 153, 159 [108 S.Ct. 1692, 100 L.Ed.2d 140] ["A defendant may not insist on representation by an attorney he cannot afford."].)

The appointment of counsel for indigent defendants rests within the sound discretion of the trial court; it may not be restricted by a fixed court policy. Abuse of discretion is not demonstrated simply by the failure to appoint counsel whom the defendant has requested and who is willing to undertake the appointment. (***People v. Horton*** (1995) 11 Cal.4th 1068, 1098.)

Notwithstanding the absence of a constitutional right to appointment of counsel of choice, a trial court may abuse its discretion in refusing to appoint an attorney with whom the defendant has a long-standing relationship. "In deciding whether a particular attorney should be appointed to represent an indigent defendant, a trial court considers subjective factors such as a defendant's preference for, and trust and confidence in, that attorney, as well as objective factors such as the attorney's special familiarity with the case and any efficiencies of time and expense the attorney's appointment would create." (***People v. Alexander*** (2010) 49 Cal.4th 846, 871.)

While a trial court must take into account the existence of a preexisting relationship between the defendant and an attorney willing to accept appointment, it need not appoint that attorney where there are countervailing considerations of comparable weight. (***People v. Sapp*** (2003) 31 Cal.4th 240, 256.)

B. HYBRID REPRESENTATION [§ 3.12]

Hybrid representation includes arrangements involving the presence of both a self-represented defendant and a defense attorney, i.e., stand-by counsel, advisory counsel, or co-counsel. A defendant has no right to "hybrid representation" as the Sixth Amendment right to counsel and the right to represent oneself are mutually exclusive rights. A trial

court, however, has discretion "to permit the sharing of responsibility between a defendant and a defense attorney when the interests of justice support such an arrangement." (***People v. Moore*** (2011) 51 Cal.4th 1104, 1119-1120; see also ***People v. Williams*** (2013) 58 Cal.4th 197, 255 [rights to self-representation and representation by counsel are mutually exclusive]; ***People v. D'Arcy*** (2010) 48 Cal.4th 257, 282 [no form of hybrid representation is in any sense constitutionally guaranteed]; ***People v. Barnett*** (1998) 17 Cal.4th 1044, 1106 [defendant has no right to both be represented by counsel and to also participate in the presentation of his own case]; ***People v. Clark*** (1992) 3 Cal.4th 41, 97 [same], abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704.)

"Whether a professionally represented defendant may participate in the presentation of the case is a matter within the sound discretion of the trial judge." (***People v. Kirkpatrick*** (1994) 7 Cal.4th 988, 1004, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Such an arrangement is "generally undesirable." (***People v. Phillips*** (2000) 22 Cal.4th 226, 243, fn. 3; ***People v. Barnett*** (1998) 17 Cal.4th 1044, 1106.)

Permitting a defendant to participate in the presentation of the case may be authorized "only upon a "substantial" showing that it will "promote justice and judicial efficiency in the particular case." (***People v. Barnett*** (1998) 17 Cal.4th 1044, 1106, quoting ***People v. Kirkpatrick*** (1994) 7 Cal.4th 988, 1004, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A defendant who elects self-representation "'does not have a constitutional right to choreograph special appearances by counsel.'" (***People v. Blair*** (2005) 36 Cal.4th 686, 723 overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919-920, quoting ***McKaskle v. Wiggins*** (1984) 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122.)

§ 3.12.1 Advisory Counsel

Advisory counsel is an arrangement in which "the attorney actively assists the defendant in preparing the defense case by performing tasks and providing advice pursuant to the defendant's requests, but does not participate on behalf of the defense in court proceedings." (***People v. Moore*** (2011) 51 Cal.4th 1104, 1120, fn. 7.)

A defendant who is representing himself does not have a constitutional right to advisory counsel, or other forms of "hybrid" representation. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1119-1120; ***People v. Clark*** (1992) 3 Cal.4th 41, 111, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704.)

When a defendant chooses self-representation, he or she retains primary control over the conduct of the case, and consequently the role of advisory counsel is limited. The court retains authority to exercise its judgment regarding the extent to which such advisory counsel may participate. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1368.)

A self-represented defendant has no constitutional right to the appointment of advisory counsel; however, when such counsel is appointed, the defendant is entitled to expect professionally competent assistance within the narrow scope of an advisory counsel's proper role, including assistance unaffected by a conflict of interest. (***People v. Lawley*** (2002) 27 Cal.4th 102, 145.)

Because a self-represented defendant has the power to make tactical decisions, a defendant claiming ineffective assistance of advisory counsel must show, in addition to the lack of a reasonable tactical choice for the alleged deficient performance, that the alleged deficient performance was not the result of the defendant's own decision. (***People v. Michaels*** (2002) 28 Cal.4th 486, 526.)

§ 3.12.2 Defendant as Co-Counsel

Co-counsel is an arrangement in which the "attorney shares responsibilities with the defendant and actively participates in both the preparation of the defense case and its presentation to a degree acceptable to both the defendant and the attorney and permitted by the court." (***People v. Moore*** (2011) 51 Cal.4th 1104, 1119-1120, fn. 7.)

An arrangement whereby the criminal defendant is both represented by counsel and participates in the presentation of his own case is "generally undesirable." (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 282.)

A defendant who is representing himself does not have a constitutional right to co-counsel, or other forms of "hybrid" representation. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1119-1120; ***People v. D'Arcy*** (2010) 48 Cal.4th 257, 282.)

Even though a criminal defendant who chooses professional representation waives tactical control, and counsel is at all times in charge of the case and has responsibility for providing constitutionally effective assistance, the trial court *may* nonetheless permit the accused a limited role as co-counsel, upon a substantial showing of good cause, and entirely subject to counsel's consent. Even if granted a limited role as co-counsel, "'*professional counsel retains complete control over the nature of the defendant's participation, and of all tactical and procedural decisions*.'" (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 282, quoting ***People v. Hamilton*** (1989) 48 Cal.3d 1142, 1164, fn. 14, italics in original.)

Where a defendant is afforded "co-counsel" status, the trial court is not required to provide warnings regarding self-representation since professional counsel retains control over case. (***People v. Jones*** (1991) 53 Cal.3d 1115, 1138-1139.)

A defendant failed to make any compelling showing that the appointment of co-counsel instead of advisory counsel was justified where all of the reasons defendant proffered for why he needed the assistance of co-counsel – and not merely advisory counsel – were circumstances related to his choice to represent himself (e.g., potential problems relating to adequacy of jail law library facilities, the complexity of case,

defendant being less articulate than counsel, the desire to ensure presentation of the defense in an orderly manner and counsel to question him should he chose to testify). The defendant was warned of the possible difficulties he would face before he made that choice, and the trial court was not required to appoint co-counsel because of potential problems which were tied to defendant's choice to represent himself. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1120.)

A trial court does not have a heightened obligation to grant a request for co-counsel simply because the defendant is agreeable to some partial waiver of his *Faretta* right. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1121, fn. 8.)

§ 3.12.3 Standby Counsel

"Standby counsel" is an arrangement "'in which the attorney *takes no active role in the defense*, but attends the proceedings so as to be familiar with case in the event that the defendant gives up or loses his or her right to self-representation.'" (***People v. Williams*** (2013) 58 Cal.4th 197, 255 (emphasis in original), quoting ***People v. Moore*** (2011) 51 Cal.4th 1104, 1119-1120, fn. 7.)

A defendant who is representing himself does not have a constitutional right to standby counsel, or other forms of "hybrid" representation – as the right to an attorney and to represent oneself are mutually exclusive. (***People v. Williams*** (2013) 58 Cal.4th 197, 255; ***People v. Moore*** (2011) 51 Cal.4th 1104, 1119-1120.)

The defendant's claim of excessive interference with self-representation rights by standby counsel was rejected where counsel was never introduced to the jury, sat apart from the defendant, and was never consulted in the jury's presence. (***People v. Gallego*** (1990) 52 Cal.3d 115, 163.)

Even assuming a conflict of interest existed with standby counsel, "[b]ecause defendant had no Sixth Amendment right to *any* counsel while he was proceeding in propria persona, he certainly had no Sixth Amendment right to assertedly 'conflict-free' standby counsel." (***People v. Williams*** (2013) 58 Cal.4th 197, 255, emphasis in original.)

C. SECOND (*Keenan*) COUNSEL [§ 3.13]

In a capital case, the trial court has discretion to appropriate funds for appointment of a second attorney. (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1180, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Verdugo*** (2010) 50 Cal.4th 263, 278; ***Keenan v. Superior Court*** (1982) 31 Cal.3d 424, 430.)

"'[T]he statutory right to appointment of counsel is qualified.'" (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1180, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, quoting ***People v. Roldan*** (2005) 35 Cal.4th 646, 686.)

"The appointment of a second counsel in a capital case is not an absolute right protected by either the state or the federal Constitution." (***People v. Cunningham*** (2015) 61 Cal.4th 609, 788, quoting ***People v. Williams*** (2006) 40 Cal.4th 287, 300, internal quotation marks omitted; ***People v. Verdugo*** (2010) 50 Cal.4th 263, 278 [same]; ***People v. Lancaster*** (2007) 41 Cal.4th 50, 71 [same].)

"[N]o sua sponte duty to appoint additional counsel can be derived from a statutory provision granting only discretionary authority to the trial court to do so upon a written request and supporting affidavit by primary counsel." (***People v. Cunningham*** (2015) 61 Cal.4th 609, 789.)

Section 987 regarding appointment of second counsel does not apply to a defendant who is representing himself. Accordingly, a defendant who is proceeding in propria persona is not "the first attorney appointed" for purposes of section 987 despite the circumstance that by choosing self-representation, the defendant takes on the duties that would otherwise fall on his or her attorney. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1122.)

§ 3.13.1 Required Showing for Appointment of Second Attorney Necessary

Appointment of second counsel is expressly authorized by Penal Code section 987, subdivision (d) (see Stats. 1984, ch. 1109, § 4, pp. 3735-3736), but requires a request from the first attorney, and the initial burden is on the defendant to present a specific factual showing as to why the appointment of a second attorney is necessary to a defense against the capital charges. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 789; ***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1180 ["specific factual showing of 'genuine need' for the appointment of second counsel"], disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Verdugo*** (2010) 50 Cal.4th 263, 278.)

A request for *Keenan* counsel must be supported by an affidavit setting forth in detail why a second attorney should be appointed. The affidavit is confidential. The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that an appointment is necessary to provide the defendant with effective representation. (***People v. Williams*** (2006) 40 Cal.4th 287, 300.)

The trial court correctly dismissed defense counsel's justification for appointment of second counsel as conclusory where it simply stated the case was "complex." (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1180, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

An abstract assertion regarding the burden on counsel cannot substitute for a showing of genuine need. (***People v. Verdugo*** (2010) 50 Cal.4th 263, 278; ***People v. Staten*** (2000) 24 Cal.4th 434, 447.)

While the demands of pretrial preparation in a complex case weigh in favor of appointing an additional attorney, it remains the defendant's burden to make a specific showing of necessity. (***People v. Lancaster*** (2007) 41 Cal.4th 50, 71.)

It was within the trial court's discretion to conclude that appointment of second counsel was not an appropriate solution to counsel's lack of experience and inability to prepare for trial because of conflicting obligations, and to instead replace counsel. Finding an effective advocate for the defendant was required, as opposed to ensuring defendant was represented by counsel he preferred. (***People v. Lancaster*** (2007) 41 Cal.4th 50, 72.)

Penal Code section 1095 (authorizing argument by additional counsel in a capital case) does not authorize *appointment* of additional counsel in a capital case. (***People v. Padilla*** (1995) 11 Cal.4th 891, 928, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; ***People v. Jackson*** (1980) 28 Cal.3d 264, 285-287, disapproved on other grounds, *People v. Cromer* (2001) 24 Cal.4th 889, 901; compare, Penal Code section 987, subdivision (d), authorizing appointment of second counsel in capital cases.)

There is no right to second counsel to prepare a *Marsden* motion. (***People v. Douglas*** (1990) 50 Cal.3d 468, 521, overruled on other grounds as stated, *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

Cross-Reference:

§ 5.24.1, *re* Appointment of independent counsel

§ 3.13.2 IAC for Failing to Request Second Counsel

It was not ineffective assistance of counsel for failing to request appointment of second (*Keenan*) counsel because the record on appeal does not demonstrate that counsel performed below constitutional levels and does not reflect that but for the failure to request appointment of second counsel, a more favorable verdict would have been reasonably probable. (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1304; see also ***People v. Webster*** (1991) 54 Cal.3d 411, 437.)

§ 3.13.3 Discretion to Vacate / Revoke Appointment of Second Counsel

Where the court appointed second counsel *ex parte*, following an objection by the prosecutor based upon grounds of which the trial court was unaware at the time of the appointment, the trial court has discretionary power to vacate the appointment. (***People***

v. Daniels (1991) 52 Cal.3d 815, 846-847, rev'd on other grounds, ***Daniels v. Woodford*** (9th Cir. 2005) 428 F.3d 1181.)

§ 3.13.4 Confidentiality of Application for Second Counsel

A request for funds for counsel and the application for counsel are to remain confidential and are privileged. (See Penal Code, § 987(d).) The application is analogous to an application for investigators and experts under Penal Code section 987.9. (***Keenan v. Superior Court*** (1982) 31 Cal.3d 424, 428, fn. 5.)

§ 3.13.5 Equal Protection

There is no denial of equal protection from non-applicability of Section 987 to a defendant proceeding in propria persona. Those defendants who assert the right to self-representation are not similarly situated to those who choose appointed counsel with respect to appointment of co-counsel. A defendant who chooses to assert his or her *Faretta* right has no constitutional right whatsoever to have the assistance of an attorney. The implication that it would be no different for two attorneys to work together on a case than it would be for a defendant and an attorney to work together is incorrect. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1123.)

§ 3.13.6 Record Must be Made of Reasons for Denial of Application for Second Counsel

When a trial court denies a request for second counsel, it must state the reasons for the denial on the record. (Pen. Code, § 987(d).)

§ 3.13.7 Forfeiture

Failure to argue below that inexperience of retained counsel was a sufficient reason for appointment of second counsel forecloses making that argument on appeal. (***People v. Verdugo*** (2010) 50 Cal.4th 263, 279.)

§ 3.13.8 Appeal

When a trial court abuses its discretion in denying a request for appointment of a second attorney in a capital case or in revoking an appointment of second counsel, any error must be assessed under the state-law standard enunciated in ***People v. Watson*** (1956) 46 Cal.2d 818, 836 (whether it is reasonably probable the defendant would have achieved a more favorable result absent the error), since appointment of second counsel is a statutory right as opposed to a right under either the state or federal Constitution.

(***People v. Williams*** (2006) 40 Cal.4th 287, 300; ***People v. Clark*** (1993) 5 Cal.4th 950, 997, fn. 22, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The fact that a second judge appointed *Keenan* counsel after a different judge denied the request does not mean the first judge abused his discretion. The record does not disclose the basis for the subsequent request, and, in any event, the subsequent appointment obviates any possible prejudice from the prior denial of second counsel. (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1180-1181, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

D. THIRD COUNSEL [§ 3.14]

The California Supreme Court rejected the defendant's complaint on appeal that the midtrial appointment of a third attorney to facilitate communication between the defendant and his female deputy public defenders was an "unauthorized experiment" that violated his constitutional rights. Noting that a "discretionary action will not be set aside on appeal so long as there exists a reasonable or even fairly debatable justification, under the law, for the action taken," the court concluded the trial court did not abuse its discretion by appointing a third lawyer to further ensure the adequacy of representation, especially when his existing attorneys and the defendant himself unequivocally supported the arrangement. (***People v. Clark*** (2011) 52 Cal.4th 856, 920, internal quotation marks omitted.)

II. BAIL [§ 3.20]

"The nature of the offense charged, not the punishment actually faced, controls the availability of bail." Accordingly, where a special circumstance is charged, bail may be denied. (***In re Bright*** (1993) 13 Cal.App.4th 1664, 1671-1672; ***In re Freeman*** (1980) 102 Cal.App.3d 838, 840.)

For purposes of bail, a murder with a special-circumstance allegation is a "capital offense" even where the defendant has no exposure to the death penalty. (***Maniscalco v. Superior Court*** (1993) 19 Cal.App.4th 60, 62-63.)

No abuse of discretion was shown in the trial court's refusal to release the defendant from custody to assist in locating two defense witnesses. (***People v. Barnett*** (1998) 17 Cal.4th 1044, 1092-1094.)

Any request for pretrial release from custody must be heard in a fully adversarial proceeding in which the prosecutor has notice of the grounds for the request and an opportunity to present evidence and argument. (***People v. Barnett*** (1998) 17 Cal.4th 1044, 1094.)

III. CONDITIONAL EXAMINATION OF WITNESS [§ 3.30]

"Section 1335, subdivision (a) allows a capital defendant to have a witness conditionally examined provided the request meets the chapter's provisions. Section 1336, subdivision (a) provides that a trial court may order a conditional exam of a 'material witness for the defendant' if that witness 'is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, or is a person 65 years of age or older.' The statutory language is clear; the court has broad discretion to either grant or deny a capital defendant's request for a conditional examination of a witness." (***People v. Williams*** (2016) 1 Cal.5th 1166, 1201, citing ***People v. Jurado*** (2006) 38 Cal.4th 72, 114 [statutory scheme vests trial court with broad discretion to determine whether conditional examination of witness is warranted].)

Conditional examination of a witness is not permitted for reasons of illness, dependency, age, or impending departure from the state (Pen. Code, § 1336(a)), but is permitted if the witness's life is in jeopardy (Pen. Code, § 1335(a)). (***People v. Jurado*** (2006) 38 Cal.4th 72, 112-113, disapproving *Dalton v. Superior Court* (1993) 19 Cal.App.4th 1506.)

Conditional examination is admissible at trial if the witness is unavailable at trial. (***People v. Jurado*** (2006) 38 Cal.4th 72, 115.)

The trial court properly exercised discretion in denying a defense request for conditional examination of two witnesses. While both met the age requirement for a conditional examination, the jury heard "substantially similar testimony from family members and other witnesses about both defendant's abusive upbringing and his capacity to act compassionately." (***People v. Williams*** (2016) 1 Cal.5th 1166, 1201.)

IV. CONTINUANCE [§ 3.40]

A criminal trial may only be continued for good cause (Pen. Code, § 1050(e)) and the trial court has broad discretion regarding a request for continuance. (***People v. Garcia*** (2011) 52 Cal.4th 706, 758.)

"'The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked.'" (***People v. Peoples*** (2016) [2016 WL 423751, at *18], quoting ***People v. Beames*** (2007) 40 Cal.4th 907, 920.)

There is no mechanical test for deciding when a denial of a continuance is so arbitrary as to violate due process. Instead, the answer must be found in the circumstances present in each case, particularly the reasons presented at the time the request is denied. (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 288; ***People v. Mungia*** (2008) 44 Cal.4th 1101, 1118; ***People v. Beames*** (2007) 40 Cal.4th 907, 921.)

Delay for the defendant's benefit constitutes good cause to continue the trial over his or her objection. Delay attributable to the fault of the prosecution, on the other hand, does not constitute good cause for a continuance. (***People v. Lomax*** (2010) 49 Cal.4th 530, 554.)

While the denial of a continuance can be so arbitrary as to constitute a denial of due process, not every denial of a request for more time violates due process – even if the denial results in the requesting party failing to offer evidence. The trial court cannot exercise its discretion in a manner that deprives a defendant or defense counsel of a "reasonable opportunity" to prepare. An "expressed general need for counsel to go over the evidence and 'fine tune' himself before beginning the trial was not particularly compelling." (***People v. Fuiava*** (2012) 53 Cal.4th 622, 650.)

One factor to consider regarding whether to grant a continuance is whether a continuance would be useful. Where there was little to indicate that the basis for the continuance request (health prognosis of counsel) would be "resolved in the near future," the trial court did not abuse its discretion "by declining to wait for more information." (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1118-1119.)

"A midtrial continuance may be granted only for good cause. 'A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence.'" (***People v. Winbush*** (2017) 2 Cal.5th 402, 470, quoting ***People v. Jenkins*** (2000) 22 Cal.4th 900, 1037 and citing § 1050, subd. (e).)

In order to secure a continuance in the midst of trial, a defendant must show, among other things, diligent attempts to secure the attendance of witnesses. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1036.)

Because counsel did not base his request on the day of trial for a three-day continuance on the grounds he was unprepared in specific areas, the trial court cannot be faulted for failing to grant a continuance on those grounds. (***People v. Fuiava*** (2012) 53 Cal.4th 622, 651.)

A. CONTINUANCE OVER DEFENDANT'S OBJECTIONS [§ 3.41]

If counsel seeks reasonable time to prepare a defendant's case, and delay is for the benefit of the defendant, then a continuance over the objection of the defendant is justified. (***People v. Lomax*** (2010) 49 Cal.4th 530, 556.)

While defense counsel ordinarily has authority to waive the client's statutory speedy trial rights, even over the client's objections, appointed defense counsel lacks the authority to waive the client's statutory speedy trial rights when the client personally objects to the continuance and the *sole* reason for the continuance is defense counsel's obligation to another client. (***People v. Lomax*** (2010) 49 Cal.4th 530, 553.)

The inherent tension between the right to a speedy trial and the right to competent, adequately prepared counsel is not, in itself, an impermissible infringement on the rights of the accused, including the right to a fair trial. (***People v. Frye*** (1998) 18 Cal.4th 894, 939, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

B. FORFEITURE [§ 3.42]

The defendant did not forfeit claims of constitutional error from the denial of a continuance based on the failure to raise constitutional grounds below. (***People v. Garcia*** (2011) 52 Cal.4th 706, 756, fn. 27.)

C. APPEAL [§ 3.43]

The party challenging the ruling on a continuance bears the burden of establishing an abuse of discretion. (***People v. Fuiava*** (2012) 53 Cal.4th 622, 650; ***People v. Beames*** (2007) 40 Cal.4th 907, 920.)

Challenges to an order denying a continuance rarely have merit or result in the reversal of a judgment on appeal. (***People v. Garcia*** (2011) 52 Cal.4th 706, 758.)

V. DELAYED PROSECUTION [§ 3.50]

"The statute of limitations is usually considered the primary guarantee against overly stale criminal charges, but the right of due process provides additional protection, safeguarding a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence." (***People v. Abel*** (2012) 53 Cal.4th 891, 908, internal citation omitted.)

A defendant seeking to dismiss a charge based on a denial of due process and the right to a fair trial under the state and federal Constitutions on the ground of delay in prosecution that occurs before the accused is arrested or the complaint is filed must first demonstrate prejudice arising from the delay. Prejudice to a defendant from pre-charging delay is not presumed. If the defendant establishes prejudice, the prosecution may offer justification for the delay. The court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. If the defendant fails to satisfy the initial burden of showing prejudice resulting from pre-charging delay, then the prosecution is not required to show justification for the delay, and the court is not obligated to balance the harm from that delay against the justification. (***People v. Abel*** (2012) 53 Cal.4th 891, 908-911.)

"[U]nder California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. However, whether the delay was negligent or purposeful is relevant to the balancing

process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." (***People v. Cordova*** (2015) 62 Cal.4th 104, 120, internal quotation marks & citations omitted; see also ***People v. Abel*** (2012) 53 Cal.4th 891, 909 [same].)

In general, delay caused by the conduct of the defendant constitutes good cause to deny a defendant's motion to dismiss. (***People v. Lomax*** (2010) 49 Cal.4th 530, 554.)

Delay in charging the defendant was fully justified as it was investigative and nothing else. (***People v. Cordova*** (2015) 62 Cal.4th 104, 120; ***People v. Nelson*** (2008) 43 Cal.4th 1242, 1256.)

The court rejected the defendant's claim of prejudice from delay in charging as "[i]t is inevitable that over the years potential witnesses will die or otherwise become unavailable. But the claimed prejudice is speculative. No reason exists to believe any of these witnesses would have supplied exonerating, rather than incriminating, evidence, or any evidence at all. Defendant was able to, and did, present evidence in his defense, including evidence suggesting [another person] might have committed the crime." (***People v. Cordova*** (2015) 62 Cal.4th 104, 120.)

Difficulty in allocating scarce investigative resources, as opposed to clearly intentional or negligent conduct, provides a valid justification for delay. A court may not find negligence based on second guessing the allocation of resources or how law enforcement agencies could have investigated a given case. (***People v. Abel*** (2012) 53 Cal.4th 891, 909; ***People v. Nelson*** (2008) 43 Cal.4th 1242, 1256-1257.)

The court rejected the defendant's claim that the delay between the crime and the cold-case DNA match violated his state and federal rights to due process and a fair trial, was unjustified, and prejudiced his defense. The defendant failed to show either prejudice or unjustified delay, and he did not deny that the state prosecuted him in a reasonably prompt manner. (***People v. Cordova*** (2015) 62 Cal.4th 104, 118-119; ***People v. Nelson*** (2008) 43 Cal.4th 1242, 1248-1249 [same].)

The defendant's motion to dismiss for pre-charging delay was properly denied based on his failure to show prejudice from the loss of three types of evidence (audio tapes of hypnosis sessions, records of the defendant's eyeglass prescription at time of murder, and swabs from presumptive blood testing on the defendant's jacket) during the 12 years of delay in charging him with murder. (***People v. Alexander*** (2010) 49 Cal.4th 846, 874-876.)

VI. DISCOVERY [§ 3.60]

A. CONSTITUTIONALLY MANDATED DISCLOSURES [§ 3.61]

"The trial judge, not the prosecutor, is the arbiter of admissibility, and the prosecutor's *Brady* disclosure obligations cannot turn on the prosecutor's view of whether or how defense counsel might employ particular items of evidence at trial. It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. It is the criminal trial, as distinct from the prosecutor's private deliberations' that is the chosen forum for ascertaining the truth about criminal accusations. To the extent the prosecutor is uncertain about the materiality of a piece of evidence, the prudent prosecutor will resolve doubtful questions in favor of disclosure." (***In re Miranda*** (2008) 43 Cal.4th 541, 577, internal quotation marks & citations omitted.)

The California Supreme Court has declined to recognize a Sixth Amendment violation when a defendant is denied discovery that results in a significant impairment of his ability to investigate and cross-examine a witness, noting there is no "'adequate justification for taking such a long step in a direction the United States Supreme Court has not gone.'" (***People v. Clark*** (2011) 52 Cal.4th 856, 982.)

"[D]iscovery in criminal cases is sometimes compelled by constitutional guarantees to ensure an accused receives a fair trial." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1095, citing e.g., ***People v. Superior Court*** (*Johnson*) (2015) 61 Cal.4th 696 "[requiring disclosure of potentially impeaching material contained in a law enforcement officer's personnel file]"; ***People v. Gonzalez*** (2006) 38 Cal.4th 932 "[requiring disclosure of the prosecution's rebuttal witnesses at the penalty phase of a capital trial]"; ***Alvarado v. Superior Court*** (2000) 23 Cal.4th 1121 "[requiring disclosure of the identities of crucial prosecution witnesses]".)

Penal Code Section 1054 "does not require a court to order one codefendant to provide discovery to another codefendant" and "the trial court's failure to order such discovery did not violate defendant's state or federal constitutional rights." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1091.)

B. RECIPROCAL DISCOVERY – PROPOSITION 115 [§ 3.62]

California Constitution, article I, section 30, subdivision (c), enacted by Proposition 115, mandates reciprocal discovery in criminal cases. Reciprocal discovery does not conflict with the privilege against self-incrimination, violate due process, nor violate the right to counsel. (***Izazaga v. Superior Court*** (1991) 54 Cal.3d 356, 365-382.)

Reciprocal discovery provisions of Proposition 115 apply to cases pending when the proposition was enacted on June 6, 1990 (***Tapia v. Superior Court*** (1991) 53 Cal.3d

282, 300), even if the crime was committed prior to its passage. (***People v. Richardson*** (2008) 43 Cal.4th 959, 997-1000.)

The prosecution must disclose the names and addresses of persons the prosecutor intends to call as witnesses at trial in its case-in-chief and on rebuttal. (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 956.)

§ 3.62.1 Penalty-Phase Discovery

Defendants are required by Penal Code section 1054.3 to disclose to the prosecution the identity and statements of defense witnesses. (***In re Littlefield*** (1993) 5 Cal.4th 122, 135-136.)

Reciprocal discovery provisions contemplate both guilt and penalty-phase disclosure which ordinarily would occur at least 30 days prior to trial on *guilt* issues. However, trial courts possess discretion to defer penalty-phase discovery by the prosecution until the guilt phase has concluded. (***People v. Superior Court (Mitchell)*** (1993) 5 Cal.4th 1229, 1239.)

Rebuttal evidence is not subject to the notice requirement of Penal Code section 190.3. This does not mean that the prosecutor never has to provide discovery of its intended penalty phase rebuttal evidence. The reciprocal discovery provisions of section 1054 coexist with the section 190.3 notice provision, and the court must give effect to both. (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 955.)

Reciprocal discovery is available with respect to penalty-phase evidence. A prosecutor cannot sandbag the defense by compelling disclosure of witnesses the defense intends to call, and then in effect redefine the meaning of "intends" when it comes time to disclose rebuttal witnesses. A disclosure by the defense of witnesses pursuant to section 1054.3 triggers a defendant's right to discover rebuttal witnesses under section 1054.1 because of the requirement of reciprocity. (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 956-957.)

A defense counsel's tactical decision not to present character and background evidence because of the risk of damaging rebuttal evidence must be informed. This requirement presupposes that the information necessary to an informed decision will be available to defense counsel. Denial of discovery of potential rebuttal evidence thwarts defense counsel's ability to present an intelligent defense and make an informed decision whether to present mitigating evidence. (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 959-960.)

C. MENTAL EXAMINATIONS [§ 3.63]

Proposition 115 abrogated prior case law (see *People v. McPeters* (1992) 2 Cal.4th 1148; *People v. Danis* (1973) 31 Cal.App.3d 782) holding that there is a right to a mental examination of the defendant by an expert retained by the prosecution anytime the

defendant places his mental state in issue. (***Verdin v. Superior Court*** (2008) 43 Cal.4th 1096, 1109, 1114, superseded by statute as stated in *People v. Banks* (2014) 59 Cal.4th 1113, 1193.) Effective January 1, 2010, Penal Code section 1054.3, subdivision (b) was amended to provide the requisite statutory authority for courts to order a defendant to submit to a mental examination by a prosecution's expert. (***People v. Clark*** (2011) 52 Cal.4th 856, 939, fn. 23, citing Stats. 2009, ch. 297, § 1.) In trials that predate the amendment to the Penal Code, the holding in *Verdin* applies. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1193, overruled on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.) This is because the opinion in *Verdin* does not declare a new rule of law, and therefore applies retroactively to trials that occurred prior to the court's opinion. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 927; ***People v. Clark*** (2011) 52 Cal.4th 856, 939.) Accordingly, there is no statutory authorization for ordering a mental examination of the defendant by a prosecution expert between June 6, 1990 (the effective date of Proposition 115) and January 1, 2011.

The issue of whether a court properly could order a defendant to submit to a mental examination by a prosecution expert for use at the sanity phase as opposed to the guilt phase of trial prior to the amendment of Penal Code section 1054.3 remains an open question. (***People v. Clark*** (2011) 52 Cal.4th 856, 972; ***Verdin v. Superior Court*** (2008) 43 Cal.4th 1096, 1107, fn. 4 [leaving open the question whether a statutory basis for a court's mental examination order might exist in cases involving a plea of NGI], superseded by statute on another ground as stated in *People v. Banks* (2014) 59 Cal.4th 1113, 1193.)

"[N]othing in the *Danis* rule [see ***People v. Danis*** (1973) 31 Cal.App.3d 782, (inherent authority of courts to order discovery in form of mental examination of defendant by expert retained by prosecution where defendant relies on mental defense absent authorizing statute)], now codified in section 1054.3, subdivision (b), implicates the situation of witnesses, who are not parties and do not choose to place their mental condition at issue as defendants may." (***People v. Gonzales*** (2011) 51 Cal.4th 894, 929.)

§ 3.63.1 Constitutionality of Mental Examination of Defendant

Where a defendant gives notice, under reciprocal discovery duties (as required by Penal Code section 1054.3(b)), of his intent to present a mental-state defense, the defendant is "obligated to submit to examination by prosecution-retained experts. However, he retains the 'unfettered choice' whether to actually present such a defense at trial. If he decides to abandon the defense, any self-incriminating results of the examinations cannot be introduced or otherwise used against him. On the other hand, by electing to present it, he will waive his privilege against self-incrimination to the extent necessary to support his claim and allow fair rebuttal." (***Maldanaldo v. Superior Court*** (2012) 53 Cal.4th 1112, 1132-1133.)

"The very purpose of mental examinations ordered by the court under section 1054.3(b)(1) is to provide *the prosecution* with a fair opportunity to rebut mental state evidence the defense has already indicated it intends to present. It is not analogous to confidential consultations between the defendant and his or her attorney, from which prosecutors must be excluded. As we long ago made clear, such examinations do not violate a represented defendant's right to counsel so long as counsel is notified in advance of examination appointments and their purpose, and has the opportunity to consult with the client before they occur." (***Maldanaldo v. Superior Court*** (2012) 53 Cal.4th 1112, 1142, emphasis in original.)

"It is settled that a defendant who makes an affirmative showing of his or her mental condition by way of expert testimony waives his or her Fifth and Sixth Amendment rights to object to examination by a prosecution expert." (***People v. Gonzales*** (2011) 51 Cal.4th 894, 929.)

§ 3.63.2 Protective Orders re Mental Examination of Defendant

The trial court may issue "appropriate protective orders against improper use, both direct and derivative, of evidence derived from the examinations." A condition of obtaining pretrial assurances against improper use is sufficiently disclosing to the court and prosecution "the details of [the] anticipated mental-state defense" so that the resolution of any privilege issues is fully-informed. Alternatively, the defense can raise privilege arguments at trial after it has presented its mental-state defense and prior to the prosecution commencing its rebuttal case – which is when the trial court will be "in the best possible position to determine whether particular rebuttal evidence proffered by the prosecution exceeds the scope of the defendant's Fifth Amendment waiver." (***Maldanaldo v. Superior Court*** (2012) 53 Cal.4th 1112, 1138.)

§ 3.63.3 Limiting Instruction

It is unclear whether a defendant would be entitled to a limiting instruction to consider any statements by the defendant during a mental examination by prosecution experts only for purposes of evaluating the experts' opinions and not for the truth of the statements, when the examination by the prosecution's experts was conducted in the presence of defense counsel. (***People v. Clark*** (2011) 52 Cal.4th 856, 942.)

Even where a limiting instruction is normally required regarding a defendant's statements during a court ordered examination by the prosecution's mental health expert(s), it might have been inappropriate to give such an instruction where "the experts' testimony about defendant's statements to them during the mental examinations was duplicative of defendant's testimony in his own behalf, which *was* presented for its truth." Accordingly, a limiting instruction was not required. (***People v. Clark*** (2011) 52 Cal.4th 856, 942, emphasis in original.)

§ 3.63.4 Forfeiture

Objection to the qualifications of an expert does not preserve a *Verdin* claim [unlawful to compel defendant to speak with *any* prosecution expert] for appeal. (***People v. Banks*** (2014) 59 Cal.4th 1113,1193, overruled on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 928.)

While there was a valid argument at the time of trial that the court was not authorized to order the defendant to submit to a mental examination by the prosecution's experts, the claim was forfeited on appeal because the defendant failed to challenge the trial court's examination order below. (***People v. Clark*** (2011) 52 Cal.4th 856, 940.)

Fairness requires barring a claim of error on appeal predicated on the trial court ordering a mental examination of the defendant as part of reciprocal discovery where the defendant did not argue below that the prosecutor's request for a mental examination was precluded by the discovery statutes in effect at the time because, had the defendant done so, it was likely the court would have appointed an expert pursuant to Evidence Code section 730. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 928.)

The defendant's stipulation below to the effect that he refused to be interviewed by one of the prosecution's experts forfeited his claim of error on appeal relating to error in admitting evidence of the defendant's refusal. (***People v. Clark*** (2011) 52 Cal.4th 856, 941.)

Where he failed to request a limiting instruction below, the defendant forfeits any complaint on appeal regarding the court's failure to instruct that any statements he made to the prosecution's experts could only be considered in evaluating the experts' opinions and not for the statements' truth. (***People v. Clark*** (2011) 52 Cal.4th 856, 942.)

§ 3.63.5 Appeal

There is no constitutional impediment to a court ordering a defendant who has placed his or her mental status in issue to submit to a mental examination by a prosecution expert. Accordingly, errors in the guilt phase relating to ordering a mental examination or admission of evidence of the defendant's refusal to participate in the examination where the defendant has placed mental status in issue is assessed under the standard for state law error, i.e., whether there is a reasonable probability that the outcome of the trial would have been more favorable to the defendant had the court not ordered the defendant to submit to examination by the prosecution's expert(s). (***People v. Clark*** (2011) 52 Cal.4th 856, 940.) Errors occurring in the penalty phase of a capital trial are assessed by the higher "reasonable possibility standard." (***People v. Clark*** (2011) 52 Cal.4th 856, 941 & fn. 24, citing ***People v. Wallace*** (2008) 44 Cal.4th 1032, 1087-1088.)

There was no possible prejudice from the trial court's erroneous authorization for the defendant to submit to a psychiatric evaluation by the prosecution's expert because

the expert did not rely on defendant's refusal to participate for his opinions. The brutality of the defendant's crimes upon a particularly vulnerable victim weighs heavily in favor of aggravation such that it is not reasonably possible that the jury would have returned an LWOP verdict if the trial court had not allowed the prosecution's expert to testify regarding the defendant's refusal to cooperate with the court's ordered psychiatric examination. (***People v. Wallace*** (2008) 44 Cal.4th 1032, 1087-1088.)

The trial court's error in mistakenly ordering the defendant to submit to a mental examination by prosecution experts that was not authorized by the applicable discovery statute was not prejudicial where the alternate source of Evidence Code section 730 would have allowed such mental examination. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 928.)

The defendant was not prejudiced by an erroneous order for examination by the prosecution's mental health expert where the defendant refused to be examined, the prosecution presented a strong case in rebuttal to undermine the defense experts, and the record does not show that the prosecutor's expert found any significance in the defendant's refusal to be examined. (***People v. Clark*** (2011) 52 Cal.4th 856, 941.)

D. NON-DISCLOSURE ORDERS [§ 3.64]

A nondisclosure order to protect the identifies of certain witnesses did not violate a defendant's constitutional rights where the "defendant had been given several methods of investigating the witnesses, had interviewed the 'vast majority' of witnesses five days before trial began, never sought to modify the order even though the trial court had invited such a request if counsel determined that further disclosure was necessary, never requested a continuance before beginning cross-examination, and had effectively cross-examined witnesses he characterized on appeal as 'crucial' to the case against him." (***People v. Valdez*** (2012) 55 Cal.4th 82, 110-116.)

Nondisclosure orders to protect the identity of certain witnesses provided adequate avenues of investigation to the defense and did not violate the defendant's rights to confrontation and to a fair trial under the Sixth and Fourteenth Amendments. The adequacy of those avenues was reflected by the record showing that those witnesses were effectively cross-examined, the defense had an intimate familiarity with the witnesses, the defense never expressed surprise as to a witness's identity and failed to seek a continuance to investigate any witness further, and the defendant made statements demonstrating the "defense knew what witnesses to expect and had discussed these witnesses with defendant." (***People v. Maciel*** (2013) 57 Cal.4th 482, 506-508.)

Nondisclosure orders to protect certain witnesses identifying information did not violate the defendant's right to effective assistance of counsel as the order "'only minimally inhibited communication between defendant and his counsel.'" (***People v. Maciel*** (2013) 57 Cal.4th 482, 509, quoting ***People v. Valdez*** (2012) 55 Cal.4th 82, 116.)

Defense counsel sought the current location of a key witness, and the prosecution objected out of concern it could cause the witness to again flee the jurisdiction. The defense accepted a compromise suggested by the court of the witness being made available for an interview in the defense attorney's office. "Because defense counsel accepted the trial court's compromise, the court did not abuse its discretion when it declined to order disclosure of [the witness's current location]." There was no statutory or constitutional error. \And the ruling did not deny defendant's right to effective assistance of counsel since "defense counsel's decision to accept the trial court's compromise appears on this record to be a reasonable tactical decision that did not fall below prevailing professional norms." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1105-1106.)

E. REMEDIES / SANCTIONS FOR DISCOVERY VIOLATIONS [§ 3.65]

The burden is on the defendant to show prejudice from failure to timely comply with any discovery order and that a continuance could not have cured that harm. Accordingly, where the defendant sought no continuance, and made no showing that his defense would have been different had he been provided timely discovery of evidence, the trial court did not abuse its discretion by declining to exclude evidence on that basis. (***People v. McKinnon*** (2011) 52 Cal.4th 610, 668-669.)

Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with Penal Code section 1054.1, a trial court "may make any order necessary to enforce the provisions" of the statute, "including, but not limited to, immediate disclosure, … continuance of the matter, or any other lawful order." The court may also "advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5(b).) A violation of section 1054.1 is subject to the harmless-error standard set forth in ***People v. Watson*** (1956) 46 Cal.2d 818, 836 (whether there is a reasonable probability the defendant would have achieved a more favorable outcome absent the error). (***People v. Verdugo*** (2010) 50 Cal.4th 263, 280.)

Absent wrongful failure to timely disclose evidence by the prosecution, a defendant's subsequent discovery of material that might have proved useful in cross-examination is not grounds for excluding otherwise admissible prior testimony at trial. (***People v. Jurado*** (2006) 38 Cal.4th 72, 115.)

The trial court did not err in denying a motion for mistrial based on delayed disclosure of criminalist notes showing the presence of intact sperm on a vaginal slide. Although the strength of the defense's opening statement was undermined by an expert witness altering his opinion as to the presence of intact sperm on the slide, the criminalist notes were not admitted into evidence, and the expert's changed observation was not due to prosecutorial misconduct but instead attributable to the expert viewing the slide under

different lighting the day before he was scheduled to testify. (***People v. Williams*** (2016) 1 Cal.5th 1166, 1182-1187.)

§ 3.65.1 Instructions *re* Discovery Violation

The trial court's special instruction was not deficient for failing to direct the jury that evidence of a discovery violation was insufficient to prove his guilt because the special instruction did not permit any direct inference leading from the discovery violation to defendant's guilt (cf. ***People v. Bell*** (2004) 118 Cal.App.4th 249, 256 [where court did not limit inferences jury could draw from discovery violation, jury may have believed it could find defendant guilty solely based on failure to comply with discovery statute]). The instruction was "congruent with the new CALCRIM No. 306, which provides in part, 'In evaluating the weight and significance of [the untimely disclosed] evidence, you may consider the effect, if any, of that late disclosure.'" Moreover, there could be no concern that the special instruction permitted the jury to draw an adverse inference against the defendant based on a discovery violation committed solely by his attorneys since the defendant had represented himself years before trial and any discovery violation was his responsibility as opposed to an error by counsel. (***People v. Riggs*** (2008) 44 Cal.4th 248, 305-311.)

VII. FOREIGN NATIONAL [§ 3.70]

A. VIOLATION OF VIENNA CONVENTION ON CONSULAR RELATIONS [§ 3.71]

The Vienna Convention on Consular Relations provides that when a national of one country is detained by authorities in another, the authorities must notify the consulate of his country without delay if the detainee requests notification. Without deciding whether the Vienna Convention creates judicially enforceable rights, the United States Supreme Court held that suppression of a defendant's statement is not an appropriate remedy for a violation of the convention. (***Sanchez-Llamas v. Oregon*** (2006) 548 U.S. 331 [126 S.Ct. 2669, 2677-2690, 165 L.Ed.2d 557].)

The California Supreme Court has assumed for purposes of reviewing claims asserting a denial of consular notification rights that a defendant has individually enforceable rights under Article 36 of the Vienna Convention. (***In re Martinez*** (2009) 46 Cal.4th 945, 957, fn. 3; ***People v. Cook*** (2006) 39 Cal.4th 566, 600.)

It is incumbent upon a defendant to demonstrate prejudice from the failure of authorities to notify a defendant of his right to consular notification. Where a defendant shows what assistance the consulate claims it would have provided, he must also show that he did not obtain that same assistance from other sources. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 711.)

"'The violation of the right to consular notification ... is at best remotely connected to the gathering of evidence. Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate informed of their arrest or detention – not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.'" (***People v. Enraca*** (2012) 53 Cal.4th 735, 756-757, quoting ***Sanchez–Llamas v. Oregon*** (2006) 548 U.S. 331, 349 [126 S.Ct. 2669, 165 L.Ed.2d 557], italics in original.)

The trial court properly found no prejudice from a consular notification violation where "[d]efendant made his confession while he was being booked, within a few hours of his arrest and several weeks after the murders" because even if the "consulate would have provided a lawyer for defendant and [] the consular officers and counsel would have advised defendant to remain silent, there was no showing that this would have occurred before defendant was booked." (***People v. Enraca*** (2012) 53 Cal.4th 735, 758.)

VIII. INVESTIGATIVE / ANCILLARY FUNDS (Pen. Code § 987.9) [§ 3.80]

An indigent defendant has a constitutional and statutory right to ancillary services reasonably necessary to prepare a defense. It is the defendant's burden to demonstrate the need for the requested services (Pen. Code, § 987.9). The trial court should view the motion for assistance with "considerable liberality, but it should also order the requested services only upon a showing they are reasonably necessary." (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1255, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Guerra*** (2006) 37 Cal.4th 1067, 1085, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

A trial court's consideration of requests for ancillary defense services (investigators, experts, and others for preparation of defense), shall be guided by the need to provide a complete and full defense. (***People v. Williams*** (2006) 40 Cal.4th 287, 303-304.)

Penal Code section 987.9 commits to the sound discretion of the trial court the determination of the reasonableness of an application for funds for ancillary services. A high standard must be applied to such discretionary decisions in capital cases. (***People v. Box*** (2000) 23 Cal.4th 1153, 1184, overruled on other grounds, *People v. Martinez* (2010) 47 Cal.4th 911, 948 & fn. 10; ***People v. Alvarez*** (1996) 14 Cal.4th 155, 234; see also ***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1255 [abuse-of-discretion standard applies on appeal to trial court's order regarding ancillary services], disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

A. CONDITIONING FUNDS ON ADMISSIBILITY RULING [§ 3.81]

A Penal Code section 987.9 judge can condition approval of funds on the likelihood of the admissibility of evidence sought to be obtained with the funds. "There is no point in spending money to obtain inadmissible evidence." (***People v. Clark*** (2016) 63 Cal.4th 522, 631, internal quotation marks & citation omitted.)

It was not a denial of due process or the right to present a defense for the trial court to condition funding an expert witness on eyewitness identification on the defense obtaining a ruling allowing expert testimony on the subject. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 995.)

The court properly denied funds requested for a defense jury selection expert since there was no showing of reasonable necessity. (***People v. Box*** (2000) 23 Cal.4th 1153, 1184, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129], and *People v. Martinez* (2010) 47 Cal.4th 911, 948 & fn. 10; ***People v. Mattson*** (1990) 50 Cal.3d 826, 847-848 [same].)

The trial court did not abuse its discretion in denying funds to retain a polygraph expert to administer a polygraph to the defendant where defendant failed to show a likelihood the polygraph would be admissible. (***People v. Clark*** (2016) 63 Cal.4th 522, 631.)

B. CONFIDENTIALITY OF § 987.9 FUNDING [§ 3.82]

The confidentiality provisions of Penal Code section 987.9 were designed to prevent the prosecution from learning of the application for funds and anticipating the accused's defense. (***People v. Anderson*** (1987) 43 Cal.3d 1104, 1132, abrogated on other grounds by Pen. Code, § 190.2(d); see ***People v. Mil*** (2012) 53 Cal.4th 400, 408-409.)

Permitting the prosecutor to ask a defense expert how much he was paid does not violate section 987.9. (***People v. Berryman*** (1993) 6 Cal.4th 1048, 1071, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Where the judge who heard the Penal Code section 987.9 request discussed the matter with several judges, including the trial judge, it was error not to disqualify those additional judges from presiding over the trial. However, reversal was not required since the prosecution did not learn of the application through any of the judges, and there was no showing that the trial judge's knowledge otherwise prejudiced the defendant. (***People v. Anderson*** (1987) 43 Cal.3d 1104, 1133-1134, abrogated on other grounds by Pen. Code, § 190.2(d); see ***People v. Mil*** (2012) 53 Cal.4th 400, 408-409.)

C. INEFFECTIVE ASSISTANCE OF COUNSEL & FAILING TO REQUEST 987.9 FUNDS [§ 3.83]

A failure to request investigative funds pursuant to section 987.9 is one indication that defense trial counsel failed to investigate possible defenses. (***People v. Williams*** (2006) 40 Cal.4th 287, 304; ***In re Jones*** (1996) 13 Cal.4th 552, 565.)

D. NO § 987.9 FUNDS UNLESS DEATH PENALTY BEING SOUGHT [§ 3.84]

Penal Code section 987.9 is inapplicable in a case in which the death penalty is not being sought, even though the offense charged is statutorily punishable by death. When a defendant is not required to prepare for a penalty phase and no longer risks capital punishment, his case is not a "capital case" within the meaning of Penal Code section 987.9 as construed in light of death-penalty legislation. (***Corenevsky v. Superior Court*** (1984) 36 Cal.3d 307, 317-318; ***Williams v. Superior Court*** (1983) 34 Cal.3d 584, 587; ***Sand v. Superior Court*** (1983) 34 Cal.3d 567, 572.) Where the prosecution elects not to seek the death penalty, a defendant would still be entitled to assistance pursuant to Penal Code section 987, subsection (a). (See ***Sand v. Superior Court*** (1983) 34 Cal.3d 567, 575, fn. 3].)

When the district attorney files a complaint alleging a charge of murder and special circumstances, "the district attorney has effectively – albeit impliedly – 'elected' to seek the death penalty, an 'election' in force unless and until the district attorney stipulates otherwise." (***Gardner v. Contra Costa County Superior Court*** (2010) 185 Cal.App.4th 1003, 1012.)

The purpose of section 987.9 is to provide for ancillary funds for the preparation or presentation of the defense in a capital case and such defense necessarily includes the preliminary hearing. (***Gardner v. Contra Costa County Superior Court*** (2010) 185 Cal.App.4th 1003, 1014.)

"Early investigation is key for both sides, including defense investigation into mitigating factors. Capital defense often includes an attempt to convince the district attorney to forgo the death penalty, often accomplished by presenting mitigation evidence as early as possible – a strategy, not incidentally, recognized by objective standards for defense representation in capital cases." (***Gardner v. Contra Costa County Superior Court*** (2010) 185 Cal.App.4th 1003, 1015-1016.)

E. DENIED / DELAYED FUNDING [§ 3.85]

The defendant's right to present a defense, to due process, and to a reliable capital trial were not denied based on delays in paying experts or in the reduction of his request for funding of ancillary services. The trial court did not abuse its discretion in denying

the defendant's request for funding to "reinterview every witness" when the only justification for the request was that "it's a death penalty case." It is the defendant's burden to demonstrate the need for a requested service. (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1255-1256, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Delays in paying for services, while "undoubtedly stressful for trial counsel" did not result in a denial of the effective assistance of counsel. "[T]he trial court worked with defense counsel to press the conflicts administrator to secure funding to pay counsel so the trial could proceed uninterrupted." The record does not "demonstrate that the temporary delay in payment affected counsel's performance or divided their loyalties, or that it otherwise impaired [defendant's] constitutional rights." (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1254-1255, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

F. FORFEITURE / WAIVER *RE* DENIAL § 987.9 FUNDS [§ 3.86]

If a defendant fails to request 987.9 funds to conduct a survey on the impact of pretrial publicity and does not join his co-defendant's motion, he forfeits any challenge on appeal to the trial court's denial of 987.9 funding for a survey. (***People v. Sanders*** (1995) 11 Cal.4th 475, 507.)

IX. MENTAL RETARDATION / INTELLECTUAL DISABILITY [§ 3.90]

While case law uses the term "mentally retarded," the accepted term is now "intellectually disabled." (See ***People v. Boyce*** (2014) 59 Cal.4th 672, 717, fn. 24; see also ***Hall v. Florida*** (2014) ___ U.S. ___ [134 S.Ct. 1986, 1990, 188 L.Ed.2d 1007] [noting that Rosa's Law, Pub. L. No. 111-256 (Oct. 5, 2010), mandates use of the phrase "intellectual disability" in place of "mental retardation" in all federal enactments and regulations].)

Execution of the mentally retarded violates the Eighth Amendment. (***Atkins v. Virginia*** (2002) 536 U.S. 304, 317 [122 S.Ct. 2242, 153 L.Ed.2d 335].)

There is no constitutional requirement for a jury determination on the issue of mental retardation. (***Schriro v. Smith*** (2005) 546 U.S. 6 [126 S.Ct. 7, 163 L.Ed.2d 6]; ***People v. Jackson*** (2009) 45 Cal.4th 662, 679.)

The trial court did not violate the holding in ***Atkins v. Virginia*** (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335], when it proceeded to trial in the absence of guidance from the Legislature on how to implement the holding, and did not abuse its discretion in denying a continuance to permit the defendant to investigate "adaptive functioning" and to await Legislative action defining mental retardation. (***People v. Jackson*** (2009) 45 Cal.4th 662, 678.)

A. PRE-CONVICTION [§ 3.91]

The Legislature enacted Penal Code section 1376, effective January 1, 2004, which defines "mentally retarded" and sets forth procedures for determining a claim of mental retardation in a death-penalty case, in response to ***Atkins v. Virginia*** (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335].

A defendant bears the burden of proof to establish mental retardation by a preponderance of the evidence and may request that the court hear the claim of mental retardation prior to trial or that the jury decide the question following a guilty verdict and special-circumstance finding. (Pen. Code, § 1376(b); ***In re Hawthorne*** (2005) 35 Cal.4th 40, 45, & fn. 3, 50.)

Mental retardation is defined as "the condition of significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (Pen. Code, § 1376(a); ***In re Hawthorne*** (2005) 35 Cal.4th 40, 44, 47.)

California's definition of mental retardation is derived from the two standard clinical definitions referenced by the United States Supreme Court in ***Atkins v. Virginia*** (2002) 536 U.S. 304, 309, fn. 3 [122 S.Ct. 2242, 153 L.Ed.2d 335]. (***In re Hawthorne*** (2005) 35 Cal.4th 40, 47.)

The hearing entails the court deciding "only" the question of mental retardation. (***In re Hawthorne*** (2005) 35 Cal.4th 40, 50, citing Pen. Code, § 1376(b)(2).)

The court "shall not be bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider all evidence bearing on the issue of mental retardation." (***In re Hawthorne*** (2005) 35 Cal.4th 40, 50.)

I.Q. tests are not dispositive. "[T]he California Legislature has chosen not to include a numerical IQ score as part of the definition of 'mentally retarded.'" (***In re Hawthorne*** (2005) 35 Cal.4th 40, 48-49.)

Mental retardation is a "question of fact." Mental retardation is "not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on consideration of all the relevant evidence." (***In re Hawthorne*** (2005) 35 Cal.4th 40, 48-49.)

Penal Code section 1376 does not dictate primary reliance on the Full Scale IQ score of a Wechsler intelligence test. The statute itself makes no reference to one or another clinical test of intelligence, any more than it refers to a particular score as the cutoff point for mental retardation. (***People v. Superior Court (Vidal)*** (2007) 40 Cal.4th 999, 1012.)

The question of how to measure intellectual functioning in determining mental retardation within the meaning of Penal Code section 1376, subdivision (a), is one of fact

to be resolved in each case based on the evidence. (***People v. Superior Court (Vidal)*** (2007) 40 Cal.4th 999, 1014.)

The trial court did not commit legal error in giving less weight to the defendant's full scale IQ (generally above range) and greater weight to other evidence of significantly impaired intellectually functioning. The trial court was not required to find the defendant not mentally retarded because his full scale IQ had been above the range considered to show mental retardation. (***People v. Superior Court (Vidal)*** (2007) 40 Cal.4th 999, 1014.)

Where the defendant did not receive a jury determination pre-trial on his mental retardation claim because the statutory requirement of Penal Code section 1376 had yet to be enacted, it is not a denial of due process to decline to permit a jury determination on the mental retardation claim prior to a penalty phase retrial. (***People v. Jackson*** (2009) 45 Cal.4th 662, 680.)

§ 3.91.1 Appeal

The People have the right to appeal (pursuant to Pen. Code, § 1238(a)(8)) a trial court's pre-trial determination finding a defendant mentally retarded. (***People v. Superior Court (Vidal)*** (2007) 40 Cal.4th 999, 1009-1010.)

B. POST-CONVICTION [§ 3.92]

Post-conviction claims of mental retardation should follow a similar approach as set forth in Penal Code section 1376 "as closely as logic and practicality permit." (***In re Hawthorne*** (2005) 35 Cal.4th 40, 45.)

C. OTHER DEFICITS [§ 3.93]

An antisocial personality disorder is not analogous to mental retardation or juvenile status for purposes of imposition of the death penalty. There is no objective evidence that society views as inappropriate the execution of death-eligible individuals who have an antisocial personality disorder, their disorder does not diminish their personal culpability, and "the justifications for the death penalty – retribution and deterrence – may be served by application of the law to such individuals. Moreover, their ability to charm and manipulate others, to deny responsibility, and to provide excuses for their conduct, enhances rather than diminishes their capacity to avoid wrongful conviction and execution." (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1345.)

X. NOTICE OF EVIDENCE IN AGGRAVATION (Pen. Code § 190.3) [§ 3.100]

A. PURPOSE OF NOTICE [§ 3.101]

The purpose of a notice of evidence in aggravation "is to advise the accused of the evidence against him so that he may have a reasonable opportunity to prepare a defense at the penalty phase." (***People v. Whalen*** (2013) 56 Cal.4th 1, 73, internal quotation marks & citations omitted, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17; ***People v. Wilson*** (2005) 36 Cal.4th 309, 349 [same].)

B. SUFFICIENCY OF NOTICE [§ 3.102]

Notice of other violent crimes or prior felony convictions is sufficient if it gives a defendant a "reasonable opportunity" to prepare a defense. The prosecution is "not prevented from introducing all the circumstances of a duly noticed incident or transaction simply because each and every circumstantial fact was not recited therein." (***People v. Whalen*** (2013) 56 Cal.4th 1, 73, internal quotation marks & citations omitted, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17.)

Informing the defense of the nature of evidence the prosecution intended to produce and the intent to produce witnesses not yet identified was sufficient compliance with Penal Code section 190.3. (***People v. Stitely*** (2005) 35 Cal.4th 514, 562-563; ***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1153.)

Notice that the prosecution will present evidence relating to a prior crime or conviction is sufficient to alert defense counsel that evidence regarding uncharged crimes or other misconduct committed as part of the same incident or course of conduct as the prior crime or conviction may be offered. (***People v. Farnam*** (2002) 28 Cal.4th 107, 175; ***People v. Jenkins*** (2000) 22 Cal.4th 900, 1029.)

Penal Code section 190.3 does not entitle the defense to a summation of the prosecution witnesses' expected testimony. (***People v. Whalen*** (2013) 56 Cal.4th 1, 74, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17; ***People v. McDowell*** (2012) 54 Cal.4th 395, 421; ***People v. Scott*** (1997) 15 Cal.4th 1188, 1219; ***People v. Roberts*** (1992) 2 Cal.4th 271, 330.)

The prosecution is not "required to give notice of aggravating evidence about which she was either unaware or which she did not elicit." (***People v. Collins*** (2010) 49 Cal.4th 175, 223.)

It is not necessary to provide notice that witnesses who testified at the guilt phase will testify in the penalty phase. (***People v. Wilson*** (2005) 36 Cal.4th 309, 350.)

There is no requirement that a notice in aggravation state that circumstances of the crime included premeditation and deliberation. (***People v. Williams*** (2006) 40 Cal.4th 287, 305.)

§ 3.102.1 Prosecutor's Argument

The prosecution is not required to give notice "about the precise way he or she will characterize or argue a noticed incident during closing argument." (***People v. Williams*** (2013) 56 Cal.4th 630, 690.)

Argument based on the evidence does not itself constitute evidence for which notice is required under section 190.3. (***People v. Champion*** (1995) 9 Cal.4th 879, 942, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860; ***People v. Johnson*** (1992) 3 Cal.4th 1183, 1248.)

§ 3.102.2 Codefendants

Penal Code section 190.3 "contemplates that the prosecution will give notice of the aggravating evidence it will present, but omits any mention of a codefendant's obligation to provide notice of penalty phase evidence." Mitigation evidence offered by a co-defendant was not introduced by the prosecution in aggravation of the defendant's penalty, and the jury was admonished not to consider the co-defendant mitigation evidence as evidence in aggravation against the defendant. Accordingly, the defendant was not compelled to defend against aggravating evidence without proper notice. (***People v. Coffman & Marlow*** (2004) 34 Cal.4th 1, 113.)

§ 3.102.3 Timeliness

The defense generally must receive notice of aggravating evidence "prior to trial," which has been defined to mean either before the case is called to trial or before the start of jury selection. In either event, notice given later in time does not require exclusion of the evidence where it is newly discovered, and the delay is not unreasonable, unexcused, or prejudicial. (***People v. Stitely*** (2005) 35 Cal.4th 514, 562.)

The phrase "prior to trial" in the context of providing the defense with notice of evidence in aggravation has been construed to mean "before the cause is called for trial or as soon thereafter as the prosecution learns of the existence of the evidence." (***People v. Wilson*** (2005) 36 Cal.4th 309, 356.)

The phrase "called for trial" in the context of providing timely notice of evidence in aggravation has never been explained precisely, but where the prosecution provided notice after the date on which the case was called for trial and the date on which the jury was sworn, the notice did not satisfy the statute. (***People v. Salcido*** (2008) 44 Cal.4th 93, 158.)

Notice of evidence in aggravation prior to commencement of jury selection is generally considered timely. The purpose of the notice provision is satisfied if the defendant has a reasonable chance to defend against the charge. (***People v. Jurado*** (2006) 38 Cal.4th 72, 136.)

If the prosecutor's delay in affording notice of aggravating evidence is unreasonable or unexcused, or the delay would prejudice the defense, the evidence must be excluded. In the absence of prejudice to the defendant, notice given promptly after the prosecution actually learns of the evidence is adequate. (***People v. Chatman*** (2006) 38 Cal.4th 344, 396.)

Notice after jury selection commenced, but as soon as the prosecution was aware of evidence, was sufficient to comply with notice requirements. (***People v. Young*** (2005) 34 Cal.4th 1149, 1209.)

No error occurred where the prosecution gave the defense notice of new aggravating evidence after trial began, since the evidence – an escape attempt – did not occur until the guilt phase had begun. (***People v. Caro*** (1988) 46 Cal.3d 1035, 1058-1059, abrogated on other grounds, *People v. Whitt* (1990) 51 Cal.3d 620, 657, fn. 29.)

A claim that notice of victim-impact testimony was not provided within a reasonable period of time before trial was meritless where the record contained no indication of any adverse effect on the defense. (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1235, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

The prosecution is not required "to identify among the noticed incidents of other criminal activity which incidents it would actually present evidence concerning, or which amongst many potential witnesses listed it would actually call to testify." (***People v. Whalen*** (2013) 56 Cal.4th 1, 74, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17.)

§ 3.102.4 Notice of Victim-Impact Evidence

It was sufficient that the prosecution disclosed the identity of the victim-impact witnesses, and the defendant was not entitled to a summation of the witnesses' expected testimony. (***People v. Williams*** (2013) 56 Cal.4th 165, 196.)

"[D]efense counsel could not have failed to understand that the prosecutor intended to call the victim's family members to testify to their relationships with her and the effect of her death on them. This was sufficient to afford the defense an opportunity to prepare a defense. No further specification of what the evidence would be was required." (***People v. Tully*** (2012) 54 Cal.4th 952, 1033.)

Where a notice in aggravation did not include victim-impact evidence, the prosecution failed to provide adequate notice pursuant to section 190.3. The error was harmless, however, where the defense had sufficient time to prepare (two weeks) and

never requested a continuance, thereby supporting the inference that the defense devised a plan how to best confront the victim-impact evidence effectively. (***People v. Roldan*** (2005) 35 Cal.4th 646, 733-734, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 3.102.5 Notice Not Required for Rebuttal Evidence

The prosecution is to give the defendant notice of evidence to be presented in aggravation at the penalty phase. However, evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation at the penalty phase. (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 955; ***People v. Coffman & Marlow*** (2004) 34 Cal.4th 1, 109; Pen. Code, § 190.3.)

While rebuttal evidence is not subject to the notice requirement of section 190.3, this does not mean that the prosecutor never has to provide discovery of its intended penalty-phase rebuttal evidence. The reciprocal discovery provisions of section 1054 coexist with the 190.3 notice provision and the court must give effect to both. (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 955.)

§ 3.102.6 Written Notice Preferable

Notice of evidence in aggravation under Penal Code section 190.3 need not be in writing, although written notice is preferable and should be the norm. (***People v. Wilson*** (2005) 36 Cal.4th 309, 349; ***People v. Turner*** (1990) 50 Cal.3d 668, 708, fn. 24; ***People v. Miranda*** (1987) 44 Cal.3d 57, 97, overruled on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

C. REMEDIES [§ 3.103]

"'In the absence of any indication that the delay in notice had in some fashion affected the manner in which defense counsel handled the prior proceedings, the appropriate remedy for a violation would ordinarily be to grant a continuance as needed to allow defendant to develop a response.'" (***People v. Chatman*** (2006) 38 Cal.4th 344, 396, quoting ***People v. Carrera*** (1989) 49 Cal.3d 291, 334.)

D. FORFEITURE / WAIVER [§ 3.104]

A failure to object to the notice in aggravation on the ground that it was not provided within a reasonable period of time before trial forfeits any claim on appeal that the timing left the defense an insufficient opportunity to prepare for victim-impact testimony. (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1235, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

A claim of lack of notice that other crime evidence in aggravation (prior conviction for assault with a deadly weapon) would be characterized in the prosecutor's penalty phase argument as murder was forfeited due to failure to object on those specific grounds. (***People v. Williams*** (2013) 56 Cal.4th 630, 689.)

E. HARMLESS ERROR [§ 3.105]

It is not necessary to reach the issue of whether the notice of aggravating evidence was timely when the defendant suffered no prejudice. (***People v. Hinton*** (2006) 37 Cal.4th 839, 899-900; ***People v. Wilson*** (2005) 36 Cal.4th 309, 357.)

Ordinarily, unless the untimely notice adversely affected earlier proceedings, the failure to seek a continuance precludes any showing of prejudice attributable to delay in giving notice of aggravating evidence. (***People v. Benavides*** (2005) 35 Cal.4th 69, 106-107; ***People v. Williams*** (1997) 16 Cal.4th 153, 241; ***People v. Medina*** (1995) 11 Cal.4th 694, 771.)

Where the trial court excluded much of the proposed aggravating evidence for lack of adequate notice, the defendant was not prejudiced by any failure to give adequate notice. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1324-1326.)

The prosecutor was allowed to reopen his case-in-chief to introduce evidence about a prior robbery which was not the subject of prior notice. Although it was error to admit the evidence in the case-in-chief, it was harmless because it was properly admissible as rebuttal. (***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1071.)

Lack of official notice was not prejudicial under the reasonable possibility test where there was actual, though unofficial, notice given. (***People v. Taylor*** (1990) 52 Cal.3d 719, 737; see also ***People v. Hinton*** (2006) 37 Cal.4th 839, 899-900 [no prejudice where prosecutor provided defense discovery regarding prior murder, alleged the crime as a special circumstance, and had off-the-record discussions with defense counsel prior to and during guilt phase regarding his intent to introduce evidence of prior murder in event of penalty phase].)

The insufficiency in the prosecution's notice was cured by subsequently providing materials "fairly soon" after the notice that identified the assault in question, and providing details including date, names, and specific information, and the defense investigator had interviewed the victim obviating any need for a continuance. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1359.)

XI. PLEAS [§ 3.110]

A. GUILTY PLEA / CONSENT OF COUNSEL [§ 3.111]

Pursuant to Penal Code section 1018, no guilty plea to a felony punishable by death shall be received without consent of the defendant's counsel. (***People v. Mai***

(2013) 57 Cal.4th 986, 1055; ***People v. Massie*** (1985) 40 Cal.3d 620, 622; ***People v. Chadd*** (1981) 28 Cal.3d 739, 746.)

A guilty plea, even with counsel's consent, was unacceptable where the plea was taken before *Chadd* and counsel was unaware of his obligation to exercise his independent judgment on the matter and simply followed the defendant's wishes. (***People v. Massie*** (1985) 40 Cal.3d 620, 624-625.)

"Although defendant did not seek to enter a guilty plea in order to effectuate a state-assisted suicide, the record demonstrates that she nonetheless sought to waive her right to present a defense in order to prevent the presentation of evidence regarding an accomplice – evidence that her counsel believed would mitigate her culpability for the murder. Had defense counsel capitulated to defendant's desire to plead guilty unconditionally despite the information she had conveyed to him implicating another person in the murder, defendant's plea would have cast doubt on potentially critical mitigating evidence. A guilty plea entered under such circumstances might very well lead to the erroneous imposition of the death penalty – precisely the outcome section 1018 is intended to prevent. (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1301.)

§ 3.111.1 Concessions Not Amounting to Guilty Plea

Trial counsel's decision to not contest, and even expressly concede, guilt on one or more charges at the penalty phase is not a guilty plea requiring *Boykin*/*Tahl* waivers from defendant. (***People v. Cain*** (1995) 10 Cal.4th 1, 30.)

No admonitions are required where the defense decides not to contest one or more murder charges at the guilt phase of a capital trial because it does not amount to a guilty plea. (***People v. Cook*** (2006) 39 Cal.4th 566, 590-591.)

Defense counsel's concession in the guilt phase closing argument that the defendant killed one victim did not amount to entry of a plea of guilty on the defendant's behalf. (***People v. Memro*** (1995) 11 Cal.4th 786, 858, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

The defendant's submission on the preliminary hearing transcript for the guilt and special circumstance phases of trial was not a "slow plea" where defense counsel extensively cross-examined the witnesses at the preliminary hearing, presented additional witnesses at the trial, challenged admissibility of some of the preliminary hearing evidence, and challenged the sufficiency of the evidence to support a conviction. (***People v. Sanchez*** (1995) 12 Cal.4th 1, 28-29, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Stipulating to a bench trial for the guilt phase was not tantamount to a guilty plea because although the defendant gave up his right to a jury trial, he was advised and personally waived that right but did not give up the right to confront and cross-examine witnesses or to remain silent. Instead, he enjoyed a full court trial during which he

exercised his rights, guilt was not conceded, the prosecution proved every element of every crime through the testimony of witnesses, and the defense attempted to raise reasonable doubt. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 766.)

§ 3.111.2 Advisements

A valid waiver of the right to trial by jury in a capital case must include a knowing waiver of the right to a jury trial on special-circumstance allegations. (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1074-1075; ***People v. Wrest*** (1992) 3 Cal.4th 1088, 1103.)

Use of a prior murder conviction to establish a special circumstance is a collateral consequence of which the defendant need not be advised prior to the court's accepting his plea to the prior murder. (***People v. Gurule*** (2002) 28 Cal.4th 557, 635.)

§ 3.111.3 Trial Court's Role

There is no express duty on the part of the trial court to ensure counsel's consent to a defendant's proffered guilty plea is not unreasonably withheld. (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1301.)

The trial court is not required to give consent to a non-jury trial, nor can the trial judge overrule the consent of the defendant and the prosecution. (***People v. Scott*** (1997) 15 Cal.4th 1188, 1209.)

A trial court is not required to inquire into the factual basis for an unconditional guilty plea in a capital case. (***People v. Fairbank*** (1997) 16 Cal.4th 1223, 1245-1246.)

B. DOUBLE JEOPARDY PLEA [§ 3.112]

The constitutional guarantee against double jeopardy is inapplicable where (1) evidence of prior criminal activity is introduced in a subsequent trial as aggravating factor evidence in the penalty phase, and (2) evidence of prior criminal activity was introduced in the penalty phase of a capital trial and the defendant is later prosecuted for that prior criminal activity. (***People v. Medina*** (1995) 11 Cal.4th 694, 765, 772.)

Double jeopardy does not apply where "details of misconduct which has already resulted in conviction or punishment, or in dismissal pursuant to a plea bargain" are subsequently presented on the issue of appropriate punishment for a subsequent offense. (***People v. Williams*** (2013) 56 Cal.4th 630, 685.)

While double jeopardy principles apply to capital sentencing proceedings "that have the hallmarks of the trial on guilt or innocence (***Bullington v. Missouri*** (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270]), double jeopardy principles do not bar retrial of an aggravated sentencing allegation if the first trial did not produce an express or implied acquittal on the allegation. (***People v. Anderson*** (2009) 47 Cal.4th 92,

111, citing ***Sattazahn v. Pennsylvania*** (2003) 537 U.S. 101, 106-110 [123 S.Ct. 732, 154 L.Ed.2d 588].)

A guilty plea in a capital case against the advice of counsel is invalid under Penal Code section 1018 and cannot support a claim of double jeopardy under the state and federal Constitutions to prevent trial after reversal of the invalid plea. (***People v. Massie*** (1998) 19 Cal.4th 550, 563-565.)

An exception to traditional double-jeopardy analysis applies when the prosecution is unable to proceed on the more serious charge at the outset because a fact necessary to sustain that charge – here, the victim's death – had not yet occurred. (***People v. Scott*** (1997) 15 Cal.4th 1188, 1201.)

A claim of former jeopardy must be affirmatively pleaded in order to preserve that claim for appeal. (***People v. Holloway*** (2004) 33 Cal.4th 96, 155, fn. 18; ***People v. Memro*** (1995) 11 Cal.4th 786, 821, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

A prior-murder special-circumstance was set aside because the prior conviction's constitutional deficiency was apparent from the record: the defendant was placed once in jeopardy at the adjudicatory juvenile hearing and, once again, when he was prosecuted for the same offense in adult court where he pleaded guilty. (***People v. Trujeque*** (2015) 61 Cal.4th 227, 252-253.)

C. INSANITY PLEA [§ 3.113]

"If the trial court has no doubt about a defendant's present competence, and if the experts who have examined the defendant are unanimous in finding him or her sane at the time of the crime, a trial court may freely accept a defendant's withdrawal of an insanity plea. [Citations.] No *Boykin-Tahl* advisements [***Boykin v. Alabama*** (1969) 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274]; ***In re Tahl*** (1969) 1 Cal.3d 122] concerning the rights being relinquished are required. In the absence of doubt about a defendant's competence, a trial court has no sua sponte duty to inquire further into the reasoning behind the defendant's decision." (***People v. Gamache*** (2010) 48 Cal.4th 347, 376-377.)

XII. RECUSAL [§ 3.120]

Recusal motions brought in a potential capital case are not entitled to any greater scrutiny on appeal. The abuse of discretion standard is proper for recusal motions in both capital and non-capital cases. (***Hollywood v. Superior Court*** (2008) 43 Cal.4th 721, 728-729.)

"[A] motion to recuse a prosecutor may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial. [Penal Code section 1424] provides a two-part test: (1) whether there is a conflict of interest, and (2) whether the conflict is so severe as to disqualify the

district attorney from acting. Recusal under section 1424 requires a showing of a real, not merely apparent, potential for unfair treatment, and further requires that that potential rise to the level of a likelihood of unfairness. Although the statute refers to a fair trial, [the California Supreme Court has] recognized that many of the prosecutor's critical discretionary choices are made before or after trial and [has] hence interpreted section 1424 as requiring recusal on a showing of a conflict of interest so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings. If a defendant seeks to recuse an entire office, the record must demonstrate that the conduct of any deputy district attorney assigned to the case, or of the office as a whole, would likely be influenced by the personal interest of the district attorney or an employee." (***People v. Bryant*** (2014) 60 Cal.4th 335, 373, internal citations & quotation marks omitted.)

"Recusal is justified only when the prosecutor has 'an interest in the case extraneous to [his or her] official function.'" (***People v. Bryant*** (2014) 60 Cal.4th 335, 376.)

"Recusal is not a mechanism to punish past prosecutorial misconduct. Instead, it is employed if necessary to ensure that future proceedings will be fair. '[S]ection 1424 does not exist as a free-form vehicle through which to express judicial condemnation of distasteful, or even improper, prosecutorial actions.'" (***People v. Bryant*** (2014) 60 Cal.4th 335, 375, quoting ***Hollywood v. Superior Court*** (2008) 43 Cal.4th 721, 735.)

Recusal motions are not disciplinary proceedings against a prosecutor. In some cases a prosecutor may have committed misconduct but is not subject to recusal because the misconduct does not impair the defendant's right to a fair proceeding, and in other cases the prosecutor may not have committed misconduct but recusal is nevertheless appropriate because through no fault of the prosecutor, the defendant's rights are jeopardized absent recusal. (***Hollywood v. Superior Court*** (2008) 43 Cal.4th 721, 731.)

The Legislature has closely defined the limits for recusing prosecutors, and it is not a remedy simply because actions of the prosecutor appear to be, or are, improper. (***Hollywood v. Superior Court*** (2008) 43 Cal.4th 721, 735; ***Haraguchi v. Superior Court*** (2008) 43 Cal.4th 706, 719.)

"Even if specific prosecutors had engaged in misconduct, this behavior standing alone would not necessarily evince a likelihood that other prosecutors would exceed the bounds of proper advocacy. 'Our cases upholding recusal have generally identified a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice, should the two diverge.'" (***People v. Bryant*** (2014) 60 Cal.4th 335, 375, quoting ***People v. Superior Court (Humberto S.)*** (2008) 43 Cal.4th 737, 754.)

"Section 1424's recusal standards are prophylactic in nature and 'serve[] to prevent potential constitutional [due process] violations from occurring.' [Citation.] If recusal was properly denied under section 1424, *ipso facto* no due process violation occurred." (***People v. Gamache*** (2010) 48 Cal.4th 347, 366.)

"[T]he happenstance of a relative [of the District Attorney] having some distant connection to a tragic event" is not, in the abstract, "the sort of connection that might cast doubt on a prosecution's ability to act fairly and evenhandedly." (***People v. Trinh*** (2014) 59 Cal.4th 216, 230.)

A prosecutor's pursuit of an independent writing career does not alone create a conflict of interest with the public interest and disqualify her from future prosecutions, absent proof her writings create a material conflict in a particular case. (***Haraguchi v. Superior Court*** (2008) 43 Cal.4th 706, 717.)

The trial court did not abuse its discretion in denying recusal of the prosecutor where substantial evidence supported findings that the prosecutor, without any pecuniary benefit and in an effort to facilitate the capture of the defendant, provided files on the defendant's case to a screenwriter/producer making a movie about the case and consulted with filmmakers during production – all of which was before the defendant's apprehension. (***Hollywood v. Superior Court*** (2008) 43 Cal.4th 721, 733-734.)

Where the district attorney was recused from a capital case after the defendant's public defender was elected district attorney, it was proper for the trial court to modify the recusal order to permit the district attorney's office to provide logistical support to the Attorney General and allow the deputy DA who had handled case to consult with the Attorney General. (***People v. Clark*** (1993) 5 Cal.4th 950, 999-1000, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A disabling conflict does not exist simply because the district attorney and the defendant were adversaries in other legal proceedings, even where the defendant previously prevailed. (***People v. Millwee*** (1998) 18 Cal.4th 96, 123.)

Reversal of a conviction for *Wheeler* error (see ***People v. Wheeler*** (1978) 22 Cal.3d 258, 276-278) by the trial prosecutor does not require the trial prosecutor be recused from handling the retrial. (***People v. Turner*** (1994) 8 Cal.4th 137, 162-163, abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

Grounds for recusal not raised in the trial court are waived for appeal. (***People v. Turner*** (1994) 8 Cal.4th 137, 163, abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

XIII. SELF-REPRESENTATION [§ 3.130]

The Sixth Amendment right to self-representation recognized in ***Faretta v. California*** (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562], exists at both the guilt and penalty phases. "[T]he autonomy of the interest motivating the decision in *Faretta* – the principle that for the state to 'force a lawyer on a defendant' would impinge on '"that respect for the individual which is the lifeblood of the law"' (*Faretta*, *supra*, 422 U.S. at p. 834) – applies at a capital penalty trial as well as in a trial of guilt. [Citation]. This is true even when self-representation at the penalty phase permits the defendant to preclude

any investigation and presentation of mitigating evidence. [Citations.] A defendant convicted of a capital crime may legitimately choose a strategy aimed at obtaining a sentence of death rather than one of life imprisonment without the possibility of parole, for some individuals may rationally prefer the former to the latter." (***People v. Taylor*** (2009) 47 Cal.4th 850, 865-866, internal quotation marks omitted.)

Nothing in ***Indiana v. Edwards*** (2008) 554 U.S. 164 (128 S.Ct. 2379, 171 L.Ed.2d 345), permitting states to limit the right of self-representation, undermines "the autonomy interests underlying *Faretta* applying with equal force at the penalty phase of a capital trial as at the guilt phase." (***People v. Mickel*** (2016) 2 Cal.5th 181, 210.)

Penal Code section 686.1, requiring that defendants in capital cases be represented by counsel during all stages of the preliminary and trial proceedings, "predates the high court's decision in *Faretta* and may only be applied where *Faretta* is not implicated." Accordingly, section 686.1 does not apply in the penalty phase of a capital trial which is "merely another stage in a unitary capital trial and the Sixth Amendment right to counsel and corresponding right to self-representation is not vitiated during the penalty phase." (***People v. Mickel*** (2016) 2 Cal.5th 181, 209.)

It is an open question whether there is a Sixth Amendment right to self-representation during a section 190.4(e) proceeding (automatic motion to modify death sentence). Regardless of whether such right exists, a trial court has discretion to permit self-representation in a 190.4(e) hearing. Penal Code section 686.1's requirement of representation by counsel does not apply to a section 190.4(e) hearing. (***People v. Burgener*** (2016) 1 Cal.5th 461, 474-475.)

Cross-Reference:

§ 15.10, *re* Motion to modify punishment

A trial court has a duty to advise a defendant of the dangers and disadvantages of self-representation. (***People v. Lancaster*** (2007) 41 Cal.4th 50, 68.)

A defendant's motion to represent himself does not trigger a duty to conduct a *Marsden* hearing or to suggest substitution of counsel as an alternative. (***People v. Clark*** (1992) 3 Cal.4th 41, 105, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704.)

The right of self-representation is not absolute. "It is settled that the *Faretta* right may be waived by failure to make a timely request to act as one's own counsel [citation], or by abandonment or acquiescence in representation by counsel [citation]. The court may deny a request for self-representation that is equivocal, made in passing anger or frustration, or intended to delay or disrupt the proceedings." (***People v. Butler*** (2009) 47 Cal.4th 814, 825.)

The defendant's right to self-representation may be revoked where the defendant refuses to participate in his defense or where his actions are an attempt to inject error into the case or pressure the trial court into reconsidering earlier rulings adverse to him. Courts are not required to engage in game playing with defendants who present Hobson's choices. (***People v. Clark*** (1992) 3 Cal.4th 41, 114-116, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704; see also ***People v. Welch*** (1999) 20 Cal.4th 701, 734 [trial court may terminate self-representation where defendant engages in "serious and obstructionist misconduct"].)

Defense counsel should refrain from formally opposing a client's motion for self-representation. However, without formally opposing the motion, defense counsel can advise the client of the risks and disadvantages of self-representation, provide the trial court, upon request, with relevant non-privileged information and pertinent legal authority, and correct misstatements of fact by the client. (***People v. Kirkpatrick*** (1994) 7 Cal.4th 988, 1010, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A. MOTION MUST BE UNEQUIVOCAL [§ 3.131]

Unlike the right to representation by counsel, the right to self-representation is waived unless a defendant articulately and unmistakably demands to proceed pro se. An insincere request, or one made under the cloud of emotion, may be denied. (***People v. Boyce*** (2014) 59 Cal.4th 672, 703; ***People v. Danks*** (2004) 32 Cal.4th 269, 295.)

A motion for self-representation "made out of temporary whim, or out of annoyance or frustration, is not unequivocal." (***People v. Stanley*** (2006) 39 Cal.4th 913, 932.)

A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied. (***People v. Butler*** (2009) 47 Cal.4th 814, 825; ***People v. Valdez*** (2004) 32 Cal.4th 73, 99.)

Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. (***People v. Boyce*** (2014) 59 Cal.4th 672, 703; ***People v. Valdez*** (2004) 32 Cal.4th 73, 99; ***People v. Barnett*** (1998) 17 Cal.4th 1044, 1087; ***People v. Marshall*** (1997) 15 Cal.4th 1, 23.)

"'[A]waiver of counsel which is made conditional by a defendant cannot be effective unless the condition is accepted by the court.'" (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 284, quoting ***People v. Carter*** (1967) 66 Cal.2d 666, 670.)

A request for self-representation "if" the defendant's *Marsden* motion was denied, coupled with a lack of assertion of the right after the trial court explained the hazards, did not constitute an unequivocal assertion. (***People v. Hines*** (1997) 15 Cal.4th 997, 1028-

1029; see also ***People v. Valdez*** (2004) 32 Cal.4th 73, 99 [defendant's single reference to right of self-representation immediately following court's denial of *Marsden* motion viewed as an "impulsive response," not an unequivocal request to represent himself].)

B. MOTION MUST BE TIMELY [§ 3.132]

A *Faretta* motion which is ***not*** timely made is addressed to the sound discretion of the trial court. In assessing an untimely motion the court considers factors such as the quality of counsel's representation, defendant's prior proclivity to substitute counsel, reasons for the request, the length and stage of proceedings, and the disruption or delay if the motion is granted. (***People v. Lynch*** (2010) 50 Cal.4th 693, 722 & fn. 10, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.)

For purposes of *Faretta*, timeliness is not based on a fixed or arbitrary point of time but instead rests with the totality of the circumstances at the time the motion is made. Accordingly, it is proper to consider not only the time between the motion and the scheduled trial date, but also factors such as whether trial counsel is ready to proceed to trial, the number of witnesses and reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether there have been earlier opportunities for the defendant to assert the right of self-representation. (***People v. Lynch*** (2010) 50 Cal.4th 693, 724, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.)

The California Supreme Court "'has never establish[ed] a hard and fast rule that any motion made before trial – no matter how soon before – was timely.'" A denial of a motion for self-representation three weeks before trial commenced has been upheld. (***People v. Jackson*** (2009) 45 Cal.4th 662, 689, citing ***People v. Clark*** (1992) 3 Cal.4th 41, 99, 101, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704.)

While "*Faretta* applies in capital cases, nothing in *Faretta* or its progeny either expressly or implicitly precludes consideration of factors other than the number of weeks between the self-representation motion and the trial in determining timeliness in [a] more complex and serious scenario" than the grand theft charge that was the subject of the trial in *Faretta*. The high court's statement regarding the defendant's motion being "weeks before trial" implies its recognition that "a motion that interferes with the orderly process of a trial may be denied." (***People v. Lynch*** (2010) 50 Cal.4th 693, 724-725, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.)

Ninth Circuit authority that a self-representation motion is timely per se if made before impanelment of the jury absent showing the motion is a tactic to secure delay is not the law in California. The law in California is that granting a motion for self-representation is within the trial court's discretion "once a defendant has chosen to proceed to trial represented by counsel." The trial court did not abuse its discretion in denying a self-representation request made after one full day of voir dire and at the "tail

end of jury instruction" as granting the request would "disrupt the orderly presentation of the case" and in all likelihood reopen voir dire to query on their thoughts and feelings regarding the defendant being pro se. (***People v. Jackson*** (2009) 45 Cal.4th 662, 689-690.)

A mid-trial grant of a motion for self-representation can be conditioned on the defendant's representation he will not require a continuance to proceed. (***People v. Jenkins*** (2000) 22 Cal.4th 900, 1039, citing ***People v. Clark*** (1992) 3 Cal.4th 41, 110, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704.)

The trial court erred in failing to permit the defendant in a capital case to represent himself under a request made five months before trial. (***People v. Joseph*** (1983) 34 Cal.3d 936, 945.)

A post-penalty verdict motion for self-representation may be denied as untimely if it would result in a significant delay which would compromise the orderly and expeditious administration of justice. (***People v. Mayfield*** (1997) 14 Cal.4th 668, 810, abrogated on other grounds, *People v. Scott* (2015) 61 Cal.4th 363, 390.)

A request for self-representation after the jury was selected was not timely. The trial court did not abuse its discretion in denying the request even though the defendant claimed defense counsel had deceived him. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1319-1322.; see also ***People v. Valdez*** (2004) 32 Cal.4th 73, 102-103 [*Faretta* motion made moments before jury selection commenced untimely].)

While nearly four years of pre-trial delay was not attributable to the defendant, that did not relieve the defendant of any responsibility for timely invoking his right to self-representation. The court did not abuse its discretion in denying a self-representation motion where months of delay would be incurred for the defendant to prepare to represent himself, and beyond announcing he should be in charge because his "life was on the line," the defendant provided no explanation for having waited nearly four years to seek self-representation. (***People v. Lynch*** (2010) 50 Cal.4th 693, 727-728, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.)

C. ADVISEMENT *RE* SELF-REPRESENTATION [§ 3.133]

A trial court has a duty to advise a defendant of the dangers and disadvantages of self-representation. (***People v. Lancaster*** (2007) 41 Cal.4th 50, 68.)

An advisement was adequate where the defendant was warned "that defending against capital charges is a complex process involving extremely high stakes and technical rules defendant would be expected to follow despite his likely unfamiliarity with them, and that defendant's inability might be hampered by his incarceration and lack of training" and the record shows the defendant understood the possibility of a penalty

phase that might result in a sentence of death when he waived his right to counsel. (***People v. Riggs*** (2008) 44 Cal.4th 248, 278.)

The standard for a valid waiver of counsel in a capital case is the same as a non-capital case, i.e., "'whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case.'" Even assuming that advisement that awareness of the possibility of a penalty phase is required, the record showed the defendant was aware of that possibility when he waived his right to trial. (***People v. Riggs*** (2008) 44 Cal.4th 248, 276.)

"There is no prescribed script or admonition that trial courts must use in warning a defendant of the disadvantages of self-representation. But, in whatever way the trial court chooses to explain the perils of self-representation, the record as a whole must establish that the defendant understood the dangers and disadvantages of waiving the right to counsel, including the risks and intricacies of the case." (***People v. Mickel*** (2016) 2 Cal.5th 181, 211-212 [internal quotation marks and citations omitted].

It is not necessary for a court to advise a defendant of the substantive aspects of a capital case (e.g., fact that guilt-and penalty-phase defenses might in some cases be in conflict, the differences in burden of proof in the guilt and penalty phases, and that some evidence might be admissible at the penalty phase that would not be admissible in the guilt phase) in order to determine whether a defendant has been made aware of the pitfalls of self-representation and can make a knowing and intelligent waiver of his/her right to counsel. (***People v. Riggs*** (2008) 44 Cal.4th 248, 277.)

The requirements for a valid waiver of the right to counsel are: (1) a determination that the accused is competent to waive the right, i.e., that he or she has the mental capacity to understand the nature and object of the proceedings against him or her; and (2) a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion. (***People v. Jackson*** (2009) 45 Cal.4th 662, 689; ***People v. Dent*** (2003) 30 Cal.4th 213, 218; ***People v. Lawley*** (2002) 27 Cal.4th 102, 139; ***People v. Koontz*** (2002) 27 Cal.4th 1041, 1069.)

A trial court cannot discharge its duty to ensure a defendant actually understands the significance and consequences of the decision to waive counsel by merely informing the defendant that self-representation means that the defendant will not be represented by counsel. "Such a construct [untenably] 'conflates [defendant]'s determination to proceed pro se, with his understanding of the challenges of doing so.'" (***People v. Burgener*** (2009) 46 Cal.4th 231, 243, quoting ***United States v. Crawford*** (8th Cir. 2007) 487 F.3d 1101, 1106.)

The trial court did not err "in failing to obtain an updated *Faretta* waiver after the People filed their section 190.3 notice" as the defendant's *Faretta* waiver was knowing and voluntary because "the record supports the conclusion the defendant was fully aware

that the People sought the death penalty before the trial court granted defendant's motion for self-representation." (***People v. Mickel*** (2016) 2 Cal.5th 181, 210.)

D. IMPROPER / PROPER BASIS FOR DENIAL [§ 3.134]

"The defendant has the right to present no defense and to take the stand and both confess guilt and request imposition of the death penalty." Accordingly, a defendant's announced intention to seek a death verdict does not compel the denial of a motion for self-representation or require the revocation of the right of self-representation. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1364-1365, 1371-1372.)

The right to self-representation may be asserted by any defendant, including a defendant in a capital case, who is competent to stand trial, and one's technical legal knowledge as such is irrelevant to whether the right is being knowingly and voluntarily exercised. (***People v. Halvorsen*** (2007) 42 Cal.4th 379, 433.)

There is no authority to deny a capital defendant the right of self-representation because the defendant poses a real or perceived threat or harbors an ulterior motive (gain privileges attendant with self-representation in order to escape). (***People v. Superior Court (George)*** (1994) 24 Cal.App.4th 350, 354.)

In asserting a right to self-representation, the defendant's proclivity to substitute counsel is a legitimate factor for the trial court to consider. (***People v. Lancaster*** (2007) 41 Cal.4th 50, 69.)

It is an open question whether Penal Code section 1018 permits a capital defendant to discharge his attorney, elect self-representation, and then plead guilty. (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1298, fn. 4.)

Restrictions on in-custody in propria persona privileges are not justification for depriving inmates of their right to self-representation. Even when a defendant's ability to prepare is restricted, in custody inmates still have a right to self-representation. "The *effectiveness* of a self-represented defendant's preparation is ordinarily irrelevant" as *Faretta* gives a defendant "the right to make a thoroughly disadvantageous decision to act as their own counsel, so long as they are fully advised and cognizant of the risks and consequence of their choice. [Citations.] Those risks may include custodial limitations on the ability to prepare a defense in jail." (***People v. Butler*** (2009) 47 Cal.4th 814, 828, emphasis in original.)

E. COMPETENCY TO WAIVE COUNSEL [§ 3.135]

In ***Indiana v. Edwards*** (2008) 554 U.S. 164 [128 S.Ct. 2379, 171 L.Ed.2d 345], the United States Supreme Court did not hold that due process mandates a higher standard of mental competence for self-representation than for trial with counsel. The Court held only that states may, without running afoul of *Faretta*, impose a higher standard, and the high court's decision in *Edwards* did not alter the principle that the

federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing, and intelligent. Accordingly, the trial court did not err by concluding, in the absence of a different California standard, that the court's finding that the defendant was competent to stand trial compelled a further finding he was competent to represent himself. (***People v. Taylor*** (2009) 47 Cal.4th 850, 867.)

"Because California law provides no statutory or constitutional right of self-representation, [the denial of self-representation] does not violate a state right. Consistent with long established California law, … trial courts may deny self-representation in those cases where [***Indiana v. Edwards*** (2008) 554 U.S. 164 {128 S.Ct. 2379, 171 L.Ed.2d 345}] permits such denial." (***People v. Johnson*** (2012) 53 Cal.4th 519, 528.)

Nothing in ***Indiana v. Edwards*** (2008) 554 U.S. 164 (128 S.Ct. 2379, 171 L.Ed.2d 345) permitting states to limit the right of self-representation undermines "the autonomy interests underlying *Faretta* applying with equal force at the penalty phase of a capital trial as at the guilt phase." (***People v. Mickel*** (2016) 2 Cal.5th 181, 210.)

"[T]he standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (***People v. Johnson*** (2012) 53 Cal.4th 519, 530.)

Trial courts must apply the standard for exercising discretion to deny self-representation cautiously. "Criminal defendants still generally have a Sixth Amendment right to represent themselves. Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly. A court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides. Rather, it may deny self-representation only in those situations where [***Indiana v. Edwards*** (2008) 554 U.S. 164 (128 S.Ct. 2379, 171 L.Ed.2d 345)] permits it." (***People v. Johnson*** (2012) 53 Cal.4th 519, 528, 531.)

"A trial court need not routinely inquire into the mental competency of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental competence." (***People v. Johnson*** (2012) 53 Cal.4th 519, 528, 530.)

When a trial court "doubts the defendant's mental competence for self representation, it may order a psychological or psychiatric examination to inquire into that question. To minimize the risk of improperly denying self-representation to a competent defendant, trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation, though the judge's own observations of the defendant's in-court behavior will also provide key support for an incompetence

finding and should be expressly placed on the record." (***People v. Johnson*** (2012) 53 Cal.4th 519, 528, 530-531, internal quotation marks omitted.)

The determination of whether to deny self-representation due to mental incompetence is made by the court, not a jury; and it is based on all the information available to the court. (***People v. Johnson*** (2012) 53 Cal.4th 519, 528, 533.)

Where the court already heard the testimony of three court-appointed experts in an earlier hearing regarding the defendant's competency to stand trial, it was not necessary to appoint an expert to assess the defendant's competency to represent himself before revoking the defendant's self-representation status. (***People v. Johnson*** (2012) 53 Cal.4th 519, 528, 532.)

A defendant's refusal to be examined by experts "does not, and cannot, deprive the court of discretion to deny self-representation due to defendant's mental incompetence." (***People v. Johnson*** (2012) 53 Cal.4th 519, 528, 532.)

After determining the defendant is competent to waive the right to counsel, a trial court must obtain a knowing and voluntary waiver before granting a self-representation motion; and in doing so, must indulge in every reasonable inference against a waiver of the right to counsel. (***People v. Stanley*** (2006) 39 Cal.4th 913, 933.)

Where a doubt is declared as to the defendant's competency requiring that criminal proceedings be suspended, the trial court does not err by declining to address defendant's *Faretta* motion until the competency issue is resolved. (***People v. Dunkle*** (2005) 36 Cal.4th 861, 909, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1108.)

Defendant's claim that he did not make a knowing and intelligent waiver of the right to counsel was belied by a record which included lengthy cautions about the dangers of self-representation. (***People v. Elliott*** (2012) 53 Cal.4th 535, 591-593; ***People v. Pinholster*** (1992) 1 Cal.4th 865, 928-929, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459; ***People v. Gallego*** (1990) 52 Cal.3d 115, 161.)

F. COMPETENCY TO SURRENDER *FARETTA* RIGHTS [§ 3.136]

The trial court did not err in failing to question the defendant or order a new psychiatric examination to determine whether a renewed request for counsel resulted from a mental defect because there was no substantial evidence that the defendant was mentally incapable of surrendering his *Faretta* rights. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1006.)

G. SELF-REPRESENTATION IN MENTAL COMPETENCY PROCEEDINGS [§ 3.137]

Self-representation in a competency proceeding is improper. The trial court erred by allowing the defendant to represent himself during mental competency proceedings after the court declared a doubt as to his mental competency pursuant to Penal Code section 1368. The presence of "mere advisory counsel" did not suffice. (***People v. Lightsey*** (2012) 54 Cal.4th 668, 690, 692.)

The statutory requirement that a defendant be represented by counsel during mental competency proceedings does not violate a defendant's constitutional right to self-representation. (***People v. Lightsey*** (2012) 54 Cal.4th 668, 694-696.)

The appropriate remedy for failure to appoint counsel to represent a defendant during mental competency proceedings is a limited reversal and remand for a retrospective mental competency determination. (***People v. Lightsey*** (2012) 54 Cal.4th 668, 702-709.)

"Before conducting a retrospective competency hearing, the trial court must determine whether such a hearing will be feasible…. Feasibility in this context means the availability of sufficient evidence to reliably determine the defendant's mental competence when tried earlier." (***People v. Lightsey*** (2012) 54 Cal.4th 668, 710, internal quotation marks & citations omitted; ***People v. Ary*** (2011) 51 Cal.4th 510, 520 [same].)

H. REVOKING / TERMINATING SELF-REPRESENTATION [§ 3.138]

"The trial court may terminate self-representation for a defendant who deliberately engages in serious obstructionist misconduct." Self-representation is "not a license to abuse the dignity of the courtroom." (***Faretta v. California*** (1975) 422 U.S. 806, 835, fn. 46 [95 S.Ct. 2525, 45 L.Ed.2d 562]; see also ***People v. Butler*** (2009) 47 Cal.4th 814, 825; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1002.)

"[A] trial court may terminate the propria persona status of a defendant who engages in deliberate dilatory or obstructive behavior that threatens to subvert the core concept of a trial or to compromise the court's ability to conduct a fair trial, but [ ] that termination of the right of self-representation is a severe sanction and must not be imposed lightly." (***People v. Becerra*** (2016) 63 Cal.4th 511, 518, internal quotation marks & citations omitted; ***People v. Carson*** (2005) 35 Cal.4th 1, 7, 10 [same].)

The erroneous revocation of the right of self-representation is reversible per se error. (***People v. Becerra*** (2016) 63 Cal.4th 511, 520; ***People v. Butler*** (2009) 47 Cal.4th 814, 824-825.)

"[W]hen terminating self-representation, the trial court must preserve a chronology of relevant events for possible appellate review and document its decision

with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial." (***People v. Becerra*** (2016) 63 Cal.4th 511, 519, internal quotation marks & citations omitted.)

"When determining whether termination is necessary and appropriate, the trial court should consider several factors in addition to the nature of the misconduct and its impact on the trial proceedings, including: (1) the availability and suitability of alternative sanctions, (2) whether the defendant has been warned that particular misconduct will result in termination of in propria persona status, and (3) whether the defendant has intentionally sought to disrupt and delay his trial. A record of the basis for terminating a defendant's *Faretta* rights should include the precise misconduct on which the trial court based the decision to terminate. The court should also explain how the misconduct threatened to impair the core integrity of the trial. Did the court also rely on antecedent misconduct and, if so, what and why? Did any of the misconduct occur while the defendant was represented by counsel? If so, what is the relation to the defendant's self-representation? Additionally, was the defendant warned such misconduct might forfeit his *Faretta* rights? Were other sanctions available? If so, why were they inadequate?" (***People v. Becerra*** (2016) 63 Cal.4th 511, 518, internal quotation marks & citations omitted.)

"[C]onsidering all the circumstances, especially defendant's failure to articulate a compelling reason for revoking his *Faretta* waiver and the likely delay and disruption that continuing a joint trial after the jury was empanelled would cause, the trial court did not abuse its discretion in denying the revocation request." (***People v. Lawrence*** (2009) 46 Cal.4th 186, 188.)

A waiver or abandonment of the *Faretta* right to self-representation may be inferred from a defendant's conduct. (***McKaskle v. Wiggins*** (1984) 465 U.S. 168, 182-183 [104 S.Ct. 944, 79 L.Ed.2d 122]; ***People v. D'Arcy*** (2010) 48 Cal.4th 257, 284-285; ***People v. Dunkle*** (2005) 36 Cal.4th 861, 909-910, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"By conceding that he was in over his head and acquiescing to the revocation of his *Faretta* status, defendant did not unmistakably demand to continue in propria persona. Defendant has therefore forfeited" his claim the trial court erroneously revoked his right of self-representation. (***People v. Williams*** (2013) 58 Cal.4th 197, 254.)

The trial court's termination of the defendant's right to self-representation before the preliminary hearing based on defendant being "dilatory" and "stalling" was not supported by the record, and constituted reversible per se error. (***People v. Becerra*** (2016) 63 Cal.4th 511, 514.)

I. IN PROPRIA PERSONA JAIL PRIVILEGES [§ 3.139]

Once a defendant has been granted in propria persona privileges, those privileges will not thereafter be restricted or terminated except for cause. Except in emergency

situations, those privileges may be restricted only after notice and a hearing. Accordingly, those restrictions that result from disciplinary sanctions should follow only after a disciplinary hearing, and nonpunitive restrictions based on institutional security should follow only after a classification hearing. While the restriction of privileges affects a court order, due process does not require that disciplinary or classification hearings be held in court as long as provision is made for court review of the matter and the defendant to appear and be heard at the time of such review on the Sheriff's application for modification of the court's order granting in pro per privileges. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1125-1126.)

Both federal and state constitutional provisions concerning the assistance of counsel for criminal defendants include the right to access "reasonably necessary defense services." Depriving a self-represented defendant of "all means of presenting a defense" violates the Sixth Amendment right to self-representation. While a self-represented defendant "cannot be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense … the Sixth Amendment requires only that a self-represented defendant's access to the resources necessary to present a defense be reasonable under all the circumstances. In assessing the reasonableness of the access provided under all the circumstances, institutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to the defendant to prepare his or her defense." (***People v. Moore*** (2011) 51 Cal.4th 1104, 1124-1124, internal citations & quotation marks omitted; ***People v. Butler*** (2009) 47 Cal.4th 814, 826 [while it is settled that "self-represented inmates cannot be deprived of all means of preparing a defense, the Constitution does not require *personal* access to legal resources. The provision of advisory counsel and reasonably necessary investigative assistance sufficiently protects the Sixth Amendment rights of pro per inmates"].)

The trial court did not abuse its discretion in declining to order in propria persona privileges at jail reinstated, as the self-represented defendant's access to resources provided to present his defense was reasonable under all the circumstances, where the defendant was found in possession of a sharpened rod that had been removed from a typewriter the defendant had been using at the jail's law library. The defendant had been warned before exercising his right to self-representation that if he violated the jail's policies, he could lose his privileges. Moreover, a legal runner could provide him with legal materials during regular visiting hours. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1124-1125.)

J. RESTRAINTS / SECURITY [§ 3.140]

An in propria persona defendant may be physically restrained for security purposes. (***People v. Butler*** (2009) 47 Cal.4th 814, 826, fn. 5; ***People v. Jenkins*** (2000) 22 Cal.4th 900, 1042-1043.)

K. APPEAL [§ 3.141]

"[A] *Faretta* waiver is reviewed *de novo*," and the court determines the validity of that waiver by "examin[ing] the record as a whole to see whether the defendant actually understood the consequences and import of the decision to waive counsel, and whether the waiver was freely made." (***People v. Mickel*** (2016) 2 Cal.5th 181, 212.)

On appeal, the court examines de novo the whole record, not merely the transcript of the *Faretta* motion itself, to determine the validity of the defendant's waiver of the right to counsel. (***People v. Koontz*** (2002) 27 Cal.4th 1041, 1070.)

When a defendant's mid-trial motion for self-representation is granted, he may not be heard to complain on appeal that the motion should not have been granted. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1367.)

A claim of *Faretta* error is cognizable on appeal after a guilty plea. (***People v. Marlow*** (2004) 34 Cal.4th 131, 146-147.)

The erroneous denial of a *Faretta* motion, or the erroneous revocation of in propria persona status, is reversible per se. (***People v. Butler*** (2009) 47 Cal.4th 814, 824.)

In discussing whether a defective *Faretta* waiver is reversible per se, the California Supreme Court noted the United States Supreme Court "has stated somewhat cryptically that the right to be represented by counsel, "as with most constitutional rights, [is] subject to harmless-error analysis ... unless the deprivation, by its very nature, cannot be harmless. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).'" (***People v. Burgener*** (2009) 46 Cal.4th 231, 244, quoting ***Rushen v. Spain*** (1983) 464 U.S. 114, 119, fn. 2 [104 S.Ct. 453, 78 L.Ed.2d 267] (*per curiam*).)

XIV. SEVERANCE / CONSOLIDATION [§ 3.150]

A. COUNTS [§ 3.151]

The law prefers consolidation of charges because it ordinarily promotes efficiency. The defendant bears the burden to make a "clear showing of prejudice" to prevent consolidation of properly joined charges. (***People v. Trujeque*** (2015) 61 Cal.4th 227, 259; ***People v. Thomas*** (2011) 52 Cal.4th 336, 349-350; ***Alcala v. Superior Court*** (2008) 43 Cal.4th 1205, 1220; ***People v. Geier*** (2007) 41 Cal.4th 555, 578, overruled on other grounds as recognized by *People v. Seumanu* (2015) 61 Cal.4th 1293, 1320.)

§ 3.151.1 Penal Code, § 790(b)

Penal Code section 790, subdivision (b), allows "a single joint trial of intercounty murder charges accompanied by a multiple-murder special-circumstance allegation so long as one substantive condition is met: 'the charged murders are "connected together

in their commission," as that phrase is used in Section 954.'" There is no requirement that the murders also be part of a "common plan or scheme." (***Alcala v. Superior Court*** (2008) 43 Cal.4th 1205, 1216-1217.)

Notwithstanding a contrary suggestion in ***Williams v. Superior Court*** (1984) 36 Cal.3d 441, 454, enactment of Penal Code section 790, subdivision (b), makes it clear that a heightened degree of scrutiny is not required for severance in capital cases. (***Alcala v. Superior Court*** (2008) 43 Cal.4th 1205, 1217, fn. 19; compare ***People v. McKinnon*** (2011) 52 Cal.4th 610, 632 ["a higher degree of scrutiny" of the issue of joinder required where the joinder itself gave rise to the special circumstance allegation (multiple murder, Penal Code, § 190.2(a)(3))].)

§ 3.151.2 Penal Code, § 954

Section 954 does not impose on trial courts a sua sponte duty of severance (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 29; ***People v. Rogers*** (2006) 39 Cal.4th 826, 851), nor does the California or United States Constitution. (***People v. Maury*** (2003) 30 Cal.4th 342, 391.

Where charged offenses are properly joined, a party seeking severance must make a stronger showing of potential prejudice than that under Evidence Code section 352, i.e., the standard required to exclude other-crimes evidence in a severed trial. Rather the prejudice analysis is made in the context of the traditional four factors: "'(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a stronger case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charge converts the matter into a capital case." (***Alcala v. Superior Court*** (2008) 43 Cal.4th 1205, 1220-1221, quoting ***People v. Mendoza*** (2000) 24 Cal.4th 130, 161; see also ***People v. Jackson*** (2016) 1 Cal.5th 269, 299; ***People v. Trujeque*** (2015) 61 Cal.4th 227, 229; ***People v. Johnson*** (2015) 61 Cal.4th 734, 750-751; ***People v. Hartsch*** (2010) 49 Cal.4th 472, 493.)

In determining whether the trial court abused its discretion in denying a severance motion, the record before the trial court at the time it ruled on the motion is examined. (***People v. Scott*** (2015) 61 Cal.4th 363, 395-396; ***People v. McKinnon*** (2011) 52 Cal.4th 610, 630; ***Alcala v. Superior Court*** (2008) 43 Cal.4th 1205, 1220.)

Even if the pretrial ruling was correct when made, the judgment will be reversed on appeal if the defendant shows joinder resulted in gross unfairness that amounted to a denial of due process. (***People v. Scott*** (2015) 61 Cal.4th 363, 396; ***People v. McKinnon*** (2011) 52 Cal.4th 610, 632 [pretrial ruling correct when made "can be reversed on appeal only if joinder was so grossly unfair as to deny due process"].)

"The severance provisions of section 954 reflect 'an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding

constitutional guaranty of due process to ensure defendants a fair trial.'" (***People v. Hawkins*** (1995) 10 Cal.4th 920, 940 (overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89), quoting ***People v. Bean*** (1988) 46 Cal.3d 919, 935; ***United States v. Lane*** (1986) 474 U.S. 438, 446, fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814] ["Improper joinder does not, in itself, violate the Constitution" but rather "rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"].)

The California Supreme Court does "not apply a heightened standard in assessing severance issues in capital cases." (***People v. Landry*** (2016) 2 Cal.5th 52, 79, citing ***People v. Trujeque*** (2015) 61 Cal.4th 227, 260.)

It is proper to join crimes of murder and rape because both are assault crimes against the person, and are of the same class of crimes within the meaning of Penal Code section 954. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 439.)

§ 3.151.2.1 Cross-Admissibility

"'Notwithstanding section 954, a trial court may not grant severance, where the statutory requirements for joinder are met, solely on the ground that evidence in the joined cases is not cross-admissible.'" (***Alcala v. Superior Court*** (2008) 43 Cal.4th 1205, 1217, quoting ***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1129, fn. 10 (overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), interpreting Pen. Code, § 954.1.)

A "'lack of cross-admissibility is not dispositive of whether the court abused its discretion in denying severance.'" (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 30, quoting ***People v. Myles*** (2012) 53 Cal.4th 1181, 1201.)

While the California Supreme Court has held "that cross-admissibility ordinarily dispels any inference of prejudice, [it] has never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (***People v. McKinnon*** (2011) 52 Cal.4th 610, 630, internal quotation marks omitted; ***People v. Johnson*** (2015) 61 Cal.4th 734, 751 [the absence of cross-admissibility alone does not demonstrate prejudice]; ***People v. Scott*** (2011) 52 Cal.4th 452, 472 [same]; ***People v. Stitely*** (2005) 35 Cal.4th 514, 531-532 [same].)

§ 3.151.2.2 Admissibility of § 1101(b) Evidence in Context of Severance

"In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance. [¶] A greater degree of similarity is required in order to prove the existence of a common design or plan.… [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather

than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.… [¶] The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature. [Fn. omitted.] Other-crimes evidence is admissible to prove the defendant's identity as the perpetrator of another alleged offense on the basis of similarity "when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses. The inference of identity, moreover, need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together." (***People v. Vines*** (2011) 51 Cal.4th 830, 856-857, internal quotations & citations omitted.)

The trial court did not abuse its discretion in denying a severance motion because the crimes would have been cross-admissible in separate trials to establish a common modus operandi. The evidence established that over a few months, someone began attacking women, and with one exception all four victims were African-American; all were prostitutes likely lured to their deaths by a perpetrator using the same ruse; all were either choked or strangled; three of the victims' bodies were found in dumpsters and the fourth "was rolled in a blanket and discarded on the area between the sidewalk and the street, like garbage." (***People v. Jones*** (2013) 57 Cal.4th 899, 926.)

"[T]o prove identity through other uncharged acts, the similarities between the charged and uncharged offenses must be so unusual and distinctive to be akin to a signature." Considering the gender, race, age, and appearance of all of the "targeted victims," the absence of an apparent motive, the shared characteristics of the wounds and the "general rarity of throat-slashing homicides" combined with fact the neck wounds were virtually the only offensive wounds present on each victim constituted "a pattern so unusual and distinctive as to support an inference that the same person committed all of the killings and that such evidence was therefore relevant on the issue of identity." As the evidence would have been cross-admissible at separate trials, any inference of prejudice from joinder was dispelled. (***People v. Lucas*** (2014) 60 Cal.4th 153, 215-216, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

§ 3.151.2.3 Capital Charges

The "joinder of a death penalty case with noncapital charges does not by itself establish prejudice." (***People v. Marshall*** (1997) 15 Cal.4th 1, 28; ***People v. Lucky*** (1988) 45 Cal.3d 259, 277-278.)

While the defendant was correct that "a higher degree of scrutiny" of the issue of joinder was required because the joinder itself gave rise to the special circumstance allegation (multiple murder, Pen. Code, § 190.2(a)(3)), the record failed to disclose any abuse of discretion in denying the motion to sever where the court heard the extensive argument of counsel on the issue and carefully scrutinized the evidence. (***People v. McKinnon*** (2011) 52 Cal.4th 610, 632.)

Where one of five murder charges carries its own death-qualifying special circumstance allegation (murder during commission of kidnapping) and each of four other murder charges also allege several special-circumstance allegations, the case does not present a situation where the prosecution is converting a matter into a capital case, as all five matters already are capital cases. (***Alcala v. Superior Court*** (2008) 43 Cal.4th 1205, 1228-1229, comparing ***Williams v. Superior Court*** (1984) 36 Cal.3d 441, 454 [a case where joinder itself gave rise to special-circumstances allegation of multiple murder].)

§ 3.151.2.4 Continuing Course of Conduct

Offenses committed at different times and places against different victims are "connected together in their commission" when they are linked by a "common element of substantial importance." Crimes committed in a "close time frame" (here, over the course of three days) can be a "continuing course of criminal conduct." (***People v. Mendoza*** (2000) 24 Cal.4th 130, 160.)

"[T]he murder of separate victims on separate days in separate counties is not a single act or even a 'course of conduct' [citation] requiring a single prosecution." (***People v. Marlow*** (2004) 34 Cal.4th 131, 143-144; ***People v. Carpenter*** (1999) 21 Cal.4th 1016, 1038.)

§ 3.151.2.5 Defendant's Testimony / Stipulation

The fact that the defendant wishes to testify as to some counts, but not others, does not require severance. (***People v. Thomas*** (2012) 53 Cal.4th 771, 800; ***People v. Sandoval*** (1992) 4 Cal.4th 155, 173-174.)

The California Supreme Court has considered, but not adopted, a theory of prejudice recognized by the federal courts in interpreting the federal rule of procedure regarding severance (Rule 14(a) of the Federal Rules of Criminal Procedure (18 U.S.C.), and has assumed without deciding that the type of prejudice recognized by the federal courts could justify a trial court's decision to sever otherwise properly joined charges under California law. "Although federal courts have interpreted their rule to permit severance when a defendant can show prejudice because he or she wishes to testify to one charge but to remain silent on another, they recognize that severance is not mandatory every time a defendant wishes to testify to one charge but to remain silent on another. If

that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant. Under the two-part test devised by the federal courts, severance is required when a defendant demonstrates that he has both (1) important testimony to give concerning some counts and (2) a strong need to refrain from testifying with regard to other counts. To satisfy the second part of the test, the defendant must demonstrate that his or her testimony on the counts about which he or she did not wish to testify was essential to the prosecution's meeting its burden of proof on those charges." (***People v. Landry*** (2016) 2 Cal.5th 52, 80 [internal quotation marks and citations omitted].)

For purposes of a severance motion, facts are disputed when the defendant enters a plea of not guilty or denies an allegation, and those facts remain disputed until resolved. While a defendant may seek to limit the admissibility of other crimes evidence by stipulating to certain issues, the general rule is that the prosecution cannot be compelled to accept a stipulation in a criminal case if the effect of that stipulation would be to deprive the case of its persuasiveness and forcefulness. (***People v. Scott*** (2011) 52 Cal.4th 452, 471.)

§ 3.151.2.6 Prosecutorial "Vindictiveness"

A defendant fails to show a basis for relief due to "prosecutorial vindictiveness" based on the prosecutor's seeking to consolidate two preexisting cases after the defendant successfully obtained an order on appeal for a speedy trial because the proposed consolidation did not expose the defendant to additional charges or an increased sentence. (***People v. Lucas*** (2014) 60 Cal.4th 153, 220, disapproved on another ground in ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 53, fn. 19.)

B. DEFENDANTS – Penal Code, § 1098 [§ 3.152]

"There is a statutory preference for joint trials of jointly charged defendants." (***People v. Masters*** (2016) 62 Cal.4th 1019, 1048, citing Pen. Code, § 1098; ***People v. Homick*** (2012) 55 Cal.4th 816, 848; ***People v. Coffman & Marlow*** (2004) 34 Cal.4th 1, 40.)

"[T]he guiding principles a trial court should follow" when exercising discretion in ruling on a severance motion are that "[t]he court should separate the trial of codefendants in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1079 [internal quotation marks and citations omitted].)

"[S]everance may be called for when 'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from

making a reliable judgment about guilt or innocence.'" (***People v. Masters*** (2016) 62 Cal.4th 1019, 1048, quoting ***People v. Homick*** (2012) 55 Cal.4th 816, 848.)

Joint trials are preferred because they "promote economy and efficiency" and "serve the interest of justice by avoiding the scandal and inequity of inconsistent verdicts." Less drastic measures than severance, such as a limiting instruction, may be sufficient to cure any risk of prejudice. The high court declined "to adopt a bright-line rule, mandating severance whenever codefendants have conflicting defenses." (***Zafiro v. United States*** (1993) 506 U.S. 534, 537, 539 [113 S.Ct. 933, 122 L.Ed.2d 317] [ruling on a claim of improper denial of severance under rules 8(b) and 14 of the Federal Rules of Criminal Procedure].)

"Severance motions in capital cases should generally receive heighted scrutiny for potential prejudice." The trial judge "undoubtedly knew this was a capital case, and her assessment that the inconsistencies between the anticipated defenses were routine and commonplace was not an abuse of discretion." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1082.)

Conducting joint trials of defendants eligible for the death penalty with those who are not eligible for the death penalty does not violate the right to due process, impartial jury, fair trial, or a reliable death verdict for a death-eligible defendant. (***People v. Tafoya*** (2007) 42 Cal.4th 147, 163-164.)

The trial court did not err in denying severance on the ground that joint penalty trials are "inherently skewed" against male defendants and in favor of female codefendants due to "misplaced chivalry" by lay jurors. The defendant's "generalized assumptions about cultural stereotypes and gender biases in criminal cases" were inadequate, and there were bases in the evidence for the outcome of death for the defendant and a hung jury leading to an LWOP for his female codefendant. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1311.)

The California Supreme Court has questioned whether defendants could mandate severance through their own misconduct in a case where the defendant cites in support of a severance motion the fact that one defendant engaged in a courtroom brawl in front of jury. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 998.)

There was no abuse of discretion or gross unfairness in denying a severance motion where "both defendants denied committing the crimes, faced essentially the same charges and allegations, bore equal criminal responsibility, and relied on a defense of mistaken identity" and there was "no indication either defendant would have given exonerating testimony at a separate trial." (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 998.)

"Severance is not required simply because one defendant in a trial points the finger of blame at another. Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that the defenses are irreconcilable, and the jury will unjustifiably infer that this conflict *alone* demonstrates

that both are guilty. When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance." (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1172, internal quotation marks & citations omitted; emphasis in original, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Homick*** (2012) 55 Cal.4th 816, 850 [same];***People v. Souza*** (2012) 54 Cal.4th 90, 111; ***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 150; ***People v. Carasi*** (2008) 44 Cal.4th 1263, 1297-1298; ***People v. Coffman & Marlow*** (2004) 34 Cal.4th 1, 41-42.)

The trial court properly denied severance because while "[t]he expected defenses were indeed conflicting" they did not conflict "in any manner in which the jury would necessarily conclude both defendants were guilty, or – given the copious evidence of a conspiracy – that acceptance of one party's defense necessarily meant the other was guilty." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1080.)

Severance was not required to prevent the co-defendant from acting as a "second prosecutor." The co-defendant's evidence tending to incriminate the defendant "did not lessen the prosecution's burden, or result in gross unfairness amounting to a denial of due process. … [B]ecause there was sufficient independent evidence of guilt, the conflict between defendants did not lead by itself to the [defendant's] conviction, and therefore severance was not required." (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 153.)

The constitutional requirement of individualized sentencing in capital cases does not require a separate penalty trial or separate juries at the penalty phase for codefendants. (***People v. Taylor*** (2001) 26 Cal.4th 1155, 1173; ***People v. Ervin*** (2000) 22 Cal.4th 48, 69.)

However, a trial court should be "very cautious" about using a single jury in consecutive severed penalty-phase trials for codefendants. (***People v. Cleveland*** (2004) 32 Cal.4th 704, 759.)

The use of separate juries for jointly tried defendants is an alternative to outright severance. The use of dual juries rests in the discretion of the trial court. Denial of severance and impanelment of dual juries will not serve as a basis for reversal of the judgment absent "identifiable prejudice" or "gross unfairness," such that it deprived the defendant of a fair trial or due process. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1287.)

Denial of a severance motion is reviewed for whether the trial court abused its discretion, based upon the facts as they appeared at the time of the ruling. (***People v. Montes*** (2014) 58 Cal.4th 809, 834; ***People v. Coffman & Marlow*** (2004) 34 Cal.4th 1, 41; ***People v. Alvarez*** (1996) 14 Cal.4th 155, 189.)

It is not necessary to decide if the defendants' statements created conflicting defenses in reviewing a challenge to the denial of a severance motion where those proffered statements were found to be unreliable and inadmissible. Under those circumstances, it was not the denial of severance that precluded the defendant from using

the evidence he sought to admit – it was the trial court's evidentiary rulings. Accordingly, the severance motion was properly denied because the record does not disclose conflicting defenses independent of the excluded statements. (***People v. Masters*** (2016) 62 Cal.4th 1019, 1049.)

"[R]eversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder resulted in gross unfairness amounting to a denial of due process." (***People v. Masters*** (2016) 62 Cal.4th 1019, 1048; ***People v. Homick*** (2012) 55 Cal.4th 816, 848 [same].)

C. FORFEITURE [§ 3.153]

Defendant's failure to request severance forfeits the issue on appeal. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 438; ***People v. Maury*** (2003) 30 Cal.4th 342, 392; ***People v. Hawkins*** (1995) 10 Cal.4th 920, 940, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

Failure of defendant to join in codefendant's severance motion, or move for joinder, operates as a forfeiture of the issue on appeal. (***People v. Marlow*** (2004) 34 Cal.4th 131, 143; ***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1048; ***People v. Miranda*** (1987) 44 Cal.3d 57, 77-78, overruled on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

Similarly, where the defendant does not object to a codefendant's severance motion, he forfeits any claim that severance was error. (***People v. Cleveland*** (2004) 32 Cal.4th 704, 757 [penalty phase].)

Even where a defendant joins his codefendant's pretrial motions, "which presumably included the severance motion," the defendant may not challenge denial of the severance motion where he never gave the trial court any explanation why the joinder would prejudice him. (***People v. Champion*** (1995) 9 Cal.4th 879, 906, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860.)

XV. SHACKLES, RESTRAINTS, AND COURTROOM SECURITY MEASURES [§ 3.160]

Cross-Reference:

§ 8.243, *re* Protective courtroom seating

"[A] 'trial court has broad power to maintain courtroom security and orderly proceedings.'" (***People v. Stevens*** (2009) 47 Cal.4th 625, 632.)

Physical restraints must be justified by a showing of manifest necessity. (***People v. Williams*** (2015) 61 Cal.4th 1244, 1259; ***People v. Foster*** (2011) 50 Cal.4th 1301, 1321; ***People v. Medina*** (1995) 11 Cal.4th 694, 730.)

"The Fifth and Fourteenth Amendments to the federal Constitution bar the use of visible restraints 'unless the trial court has found that the restraints are justified by a state interest specific to the particular trial.'" (***People v. Gamache*** (2010) 48 Cal.4th 347, 367, quoting ***People v. Stevens*** (2009) 47 Cal.4th 625, 633.)

"In deciding whether restraints are justified, the trial court may 'take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.' (*Deck v. Missouri* [2005] 544 U.S. [622,] 629 [161 L.Ed.2d 953, 125 S.Ct. 2007].) These factors include evidence establishing that a defendant poses a safety risk, a flight risk, or is likely to disrupt the proceedings or otherwise engage in nonconforming behavior. [Citations]. If the record establishes restraints are necessary, a trial court should select the least obtrusive method that will be effective under the circumstances." (***People v. Gamache*** (2010) 48 Cal.4th 347, 367; ***People v. Stevens*** (2009) 47 Cal.4th 625, 633; ***People v. Duran*** (1976) 16 Cal.3d 282, 291.)

Although a defendant's record of violence or the fact he is a capital defendant cannot, standing alone, justify shackling, defendant's fistfights while in custody pending trial together with his extensive criminal history support the trial court's shackling order. The California Supreme Court has never limited shackling to instances of courtroom disruption or attempted escape. (***People v. Hawkins*** (1995) 10 Cal.4th 920, 944, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

The "requirement that the record establish a threat of violence, escape, or disruption is framed in the disjunctive. Where the record establishes a threat of escape, a defendant cannot plead no threat of violence or disruption, and vice versa; the banks he has not robbed do not excuse the banks he has. If any threat in one of these categories is established, a trial court is entitled to take appropriate measures, consistent with the requirement that it choose the least obtrusive restraints necessary." (***People v. Gamache*** (2010) 48 Cal.4th 347, 370.)

"[I]nformation regarding violence or other nonconforming behavior supporting a decision to impose physical restraints must appear as a matter of record. When the objectionable conduct has occurred outside the courtroom, sufficient evidence of that conduct must be presented on the record so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for physical restraints; the court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others. However, we have held that a formal hearing is not required, so long as the court makes its own determination about the need for restraints based on facts shown to it, and does not simply defer to the recommendation of law enforcement." (***People v. Lomax*** (2010) 49 Cal.4th 530, 562, internal quotation marks & citations omitted; ***People v. Stevens***

(2009) 47 Cal.4th 625, 642 ["The court may not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis."]; ***People v. Hill*** (1998) 17 Cal.4th 800, 841 [trial court, not law enforcement personnel that must make decision to physically restrain an accused in the courtroom].)

A "'trial court's decision to physically restrain a defendant cannot be based on rumor or innuendo. However, a formal evidentiary hearing is not required.'" (***People v. Williams*** (2015) 61 Cal.4th 1244, 1259, quoting ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1032.)

The requirement of manifest need "is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." (***People v. Williams*** (2015) 61 Cal.4th 1244, 1259.)

The showing of necessity must appear as a matter of record and may be satisfied by evidence that the defendant plans to engage in violent or disruptive behavior in court, or that he plans to escape from the courtroom. (***People v. Combs*** (2004) 34 Cal.4th 821, 837.)

Because the use of physical restraints while outside of court and not in the jury's presence could have no effect on a defendant's ability to receive a fair trial, decisions regarding security for transporting the defendant are clearly within the discretion of the law-enforcement personnel in charge of out-of-court activities. (***People v. Hill*** (1998) 17 Cal.4th 800, 841, fn. 7.)

An in propria persona defendant may be physically restrained for security purposes. (***People v. Butler*** (2009) 47 Cal.4th 814, 826, fn. 5; ***People v. Jenkins*** (2000) 22 Cal.4th 900, 1042-1043.)

"Defendant cites no authority for the proposition that, even when the need for shackling is manifest, the restraints must be removed if they cause discomfort or abrade the skin. In any event, the record here shows only minor injuries, healing without complication. No due process violation can be conjured from this scenario." (***People v. Smith*** (2015) 61 Cal.4th 18, 45.)

A. USE OF RESTRAINTS DURING PRELIMINARY HEARING [§ 3.161]

Shackling during a preliminary hearing must be justified by a showing of necessity. However, shackling at preliminary hearing was harmless where the defendant could not show deprivation of a fair trial or other prejudice. (***People v. Fierro*** (1991) 1 Cal.4th 173, 219-220, disapproved on other grounds by *People v. Thomas* (2012) 54 Cal.4th 908, 941, and *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 205.)

B. USE OF RESTRAINTS DURING JURY VIEW [§ 3.162]

Use of restraints at a jury view does not require the same showing of necessity as the use of restraints in courtroom. The court may exercise discretion on basis of previous conduct of the defendant or other manifest circumstances. The court should explain its reasons. (***People v. Roberts*** (1992) 2 Cal.4th 271, 306-307.)

It was not error to have defendants shackled during a jury view of the crime scene. (***People v. Hardy*** (1992) 2 Cal.4th 86, 180.)

C. USE OF RESTRAINTS DURING PENALTY PHASE [§ 3.163]

The risk of substantial prejudice from the jury's view of shackles during the penalty phase is diminished because guilt has already been determined. (***People v. Slaughter*** (2002) 27 Cal.4th 1187, 1214, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

A single juror's brief view of the defendant in chains outside the courthouse did not require removal of the juror. (***People v. Ochoa*** (1998) 19 Cal.4th 353, 417.)

D. STUN BELTS [§ 3.164]

The same general legal principles apply to a trial court ordering a defendant to wear a stun belt as a security measure, as when it orders the use of traditional types of physical restraints during a criminal trial. Accordingly, "(1) there must be a showing of a manifest need for the stun belt; (2) the defendant's threatening or violent conduct must be established as a matter of record; and (3) it is the function of the court to initiate whatever procedures it deems necessary to make a determination on the record that the stun belt is necessary. (***People v. Jackson*** (2014) 58 Cal.4th 724, 738-739; ***People v. Virgil*** (2011) 61 Cal.4th 1210, 1269-1271; ***People v. Howard*** (2010) 51 Cal.4th 15, 28; see also ***People v. Gamache*** (2010) 48 Cal.4th 347, 367; ***People v. Mar*** (2002) 28 Cal.4th 1201, 1205.)

The California Supreme Court has urged "great caution in approving the use" of a stun belt based on the potential for accidental activation and noted that "requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that may impair a defendant's capacity to concentrate on the events of the trial, interfere with the defendant's ability to assist his or her counsel, and adversely affect his or her demeanor in the presence of the jury." (***People v. Mar*** (2002) 28 Cal.4th 1201, 1205.) Trial courts "should check on a defendant's medical status and history to ensure the defendant is free from any medical conditions that would render the use of the device unduly dangerous." (*Id*. at p. 1206.) Finally, in the context of the trial court's need to impose the least restrictive security measure to satisfy the court's legitimate security concerns, the use of the stun belt should not be approved as an alternative to

more traditional physical restraints if the features of the stun-belt device render it more onerous than necessary to satisfy the court's security needs. (*Id*.)

The guidelines enunciated in ***People v. Mar*** (2002) 28 Cal.4th 1201, 1205 (see above) are provided to guide "*future* trials." Accordingly, the "trial court was not required to foresee and discuss each of the concerns detailed in that opinion." (***People v. Simon*** (2016) 1 Cal.5th 98, 118, emphasis in original, internal quotation marks omitted; ***People v. Lomax*** (2010) 49 Cal.4th 530, 562 [same]; see also ***People v. Virgil*** (2011) 51 Cal.4th 1210, 1269-1270; ***People v. Gamache*** (2010) 48 Cal.4th 347, 367, fn. 7.)

The "trial court's findings and analysis were sufficient to show a manifest need for [use of a] stun belt" where the record showed that the "trial court based its decision on [the defendant's] violent behavior in custody and his potential danger to others in the courtroom. In particular, the court's decision was based on [the defendant's] fight with another inmate; the discovery, on two different occasions, of shanks in [the defendant's] cell; the discovery of feces and cleaning products, which [the defendant] had stored in a container for possible use as an explosive; and [the defendant's] threat against a corrections deputy." (***People v. Simon*** (2016) 1 Cal.5th 98, 116.)

Where the record shows manifest need for restraint, and the trial was four years before the California Supreme Court identified potential psychological consequences from the use of the REACT stun belt, and therefore the trial court only addressed one of those risks – the defendant's fear the device would accidentally be activated — the trial court did not abuse its discretion in ruling the use of the stun belt was appropriate. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 871-872.)

The erroneous use of a stun belt does not constitute structural error and is appropriately subject to harmless-error analysis. (***People v. Jackson*** (2014) 58 Cal.4th 724, 748; ***People v. Howard*** (2010) 51 Cal.4th 15, 30, fn. 6.)

It is an open question whether state law error in ordering the use of a stun belt implicates a defendant's federal constitutional rights. However, a determination that the record affirmatively dispels any inference of prejudice, leaving no reasonable possibility the defendant would have received a more favorable verdict absent being required to wear the stun belt, also satisfies the federal "reasonable doubt" standard of ***Chapman v. California*** (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 725]. (***People v. Jackson*** (2014) 58 Cal.4th 724, 748; ***People v. Howard*** (2010) 51 Cal.4th 15, 30, fn. 6.)

Reversal based on the erroneous use of a stun belt is "unwarranted when the record on appeal is devoid of evidence that the unjustified use of shackles or a stun belt had any adverse effect." (***People v. Jackson*** (2014) 58 Cal.4th 724, 740-741.)

No prejudice resulted from the defendant being erroneously ordered to wear a stun belt where the record showed the belt had no appreciable effect on the defendant, even by his own account. (***People v. Howard*** (2010) 51 Cal.4th 15, 30.)

Where the defendant did not testify, concerns about psychological impact from the use of the belt discussed in ***People v. Mar*** (2002) 28 Cal.4th 1201, have no application to

his claim on appeal where the "record contains no suggestion the forced wearing of the belt played any role in that decision so as to inhibit his defense." (***People v. Jackson*** (2014) 58 Cal.4th 724, 744; see also ***People v. Virgil*** (2011) 51 Cal.4th 1210, 1269-1271.)

"[D]efendant's current claim of prejudicial psychological impact is inconsistent with his complete failure to mention the stun belt or its effects in any of his various motions for a mistrial, a new guilt trial, and a new penalty trial. [Citation omitted.] … [A]ny contention that the belt may have caused defendant to exhibit a negative demeanor is highly dubious given defense counsel's on-the-record arguments that the jurors should be specially instructed that their in-court observations of defendant could be considered in mitigation." (***People v. Jackson*** (2014) 58 Cal.4th 724, 747.)

Where there is "no evidence in the record that the jurors saw the stun belt at any time … there is no basis for finding that visibility of the belt may have biased the jurors' perception of [the defendant's] character." (***People v. Jackson*** (2014) 58 Cal.4th 724,744.)

E. METAL DETECTORS / GUARDS [§ 3.165]

Security measures that are not inherently prejudicial, such as the use of metal detectors, or stationing security or law enforcement personnel within the courtroom, do not need to be justified by a showing of extraordinary need like that required for physical restraint of a defendant. (***People v. Stevens*** (2009) 47 Cal.4th 625, 633-634.) The presence of a uniformed deputy near a testifying defendant is consistent with the decorum of courtroom proceedings and not inherently prejudicial provided the deputy maintains a respectful distance and does not engage in any behavior that distracts from, or appears to be a comment, upon the defendant's testimony. However, in ordering such a procedure, the trial court must exercise its discretion on a case-by-case basis to determine whether the procedure is appropriate and may not defer to law enforcement officers or defer to a generic policy. The court should state the reasons for stationing a guard at or near the witness stand, and explain why the need for the procedure outweighs potential prejudice to the defendant. There is no sua sponte duty to give a cautionary instruction, but such instruction should be considered, upon request, either at the time of the defendant's testimony or in closing instructions, to disregard security measures related to the defendant's custodial status. (***People v. Hernandez*** (2011) 51 Cal.4th 733, 742-743.)

A deputy being positioned at the witness stand near a testifying defendant is not "inherently prejudicial" and does not require a showing of manifest need. However, the decision to position the deputy cannot be a generic policy and instead must reflect an exercise of discretion by the court based on case-specific reasons. (***People v. Winbush*** (2017) 2 Cal.5th 402, 461; ***People v. Stevens*** (2009) 47 Cal.4th 625, 632.

Use of a metal detector at the courtroom door does not focus adverse attention on the defendant's character; the trial court's decision to employ a metal detector is

reviewed for an abuse of discretion; the trial court need not hold a contested evidentiary hearing to make its determination, but may rely on the representations of the prosecutor. (***People v. Ayala*** (2000) 23 Cal.4th 225, 252-253.)

"The presence of security guards in the courtroom 'is seen by jurors as ordinary and expected.'" (***People v. Stevens*** (2009) 47 Cal.4th 625, 635.) "A deputy's presence at the witness stand during a defendant's testimony is not inherently prejudicial." (*Id*. at p. 638.)

F. FORFEITURE [§ 3.166]

A defendant who fails to object to restraints forfeits any claim on appeal that the trial court abused its discretion in ordering physical restraints without manifest necessity. (***People v. Williams*** (2015) 61 Cal.4th 1244, 1259; ***People v. Foster*** (2010) 50 Cal.4th 1301, 1321.)

It cannot be assumed from a silent record that the jury viewed defendant's restraints. (***People v. Medina*** (1995) 11 Cal.4th 694, 732; see also ***People v. Ward*** (2005) 36 Cal.4th 186, 206 [where record failed to show that any juror saw him in leg braces, no error in court's failing to instruct sua sponte that jury should disregard restraints]; ***People v. Tuilaepa*** (1992) 4 Cal.4th 569, 583-584 [where record did not establish jury could see restraints, failure to make record forfeits shackling claim].)

A defendant may not claim prejudice from the jury's observation of his shackling where the trial court proposed two methods of shackling and the defendant chose the method (ankle cuff with chain) which was more likely to be visible to the jury over a more cumbersome and uncomfortable, yet less visible method (leg brace). (***People v. Seaton*** (2001) 26 Cal.4th 598, 652.)

G. ADMONITIONS *RE* RESTRAINTS [§ 3.167]

Absent an indication in the record that the jury was aware of physical restraints, or a request from the defendant for an instruction on them, the trial court has no sua sponte duty to instruct the jury regarding restraints. (***People v. Lightsey*** (2012) 54 Cal.4th 668, 721.)

The trial court did not commit reversible error by failing to sua sponte instruct the jury to disregard the defendant's physical restraints where there is no evidence in the record that prospective jurors who were ultimately seated on the jury could see his leg restraints. (***People v. McWhorter*** (2009) 47 Cal.4th 318, 375-376.)

Where restraints are concealed from the jury's view, no instruction to ignore restraints should be given. (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1080, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Livaditis*** (1992) 2 Cal.4th 759, 775.)

H. PREJUDICE [§ 3.168]

Where there is no evidence that the jury viewed unjustified or unadmonished shackling, any error in the trial court's order for shackles is harmless. (***People v. Foster*** (2010) 50 Cal.4th 1301, 1322; ***People v. Anderson*** (2001) 25 Cal.4th 543, 596.)

Where defendant was shackled unjustifiably during a portion of the voir dire, and the record failed to demonstrate the restraints were visible to the jury, any error, even if restraints were "glimpsed during that portion of voir dire by one or more of the prospective jurors who actually sat on the jury," was harmless beyond a reasonable doubt. (***People v. Ervine*** (2009) 47 Cal.4th 745, 771-772.)

Where the trial court abuses its discretion by stationing a deputy at the witness stand during a defendant's testimony based on a generic policy, instead of a case specific basis, the appropriate standard for determining prejudice is the *Watson* harmless-error standard. (***People v. Hernandez*** (2011) 51 Cal.4th 733, 745, citing ***People v. Watson*** (1956) 46 Cal.2d 818, 837).

XVI. TESTING SPECIAL CIRCUMSTANCES [§ 3.170]

A. GENERALLY [§ 3.171]

Under Penal Code section 871, a magistrate may dismiss or strike a special circumstance allegation if the evidence presented at the preliminary hearing does not provide "sufficient cause to believe that the defendant is guilty" of the charged allegation. (***People v. San Nicolas*** (2004) 34 Cal.4th 614, 653; ***Ramos v. Superior Court*** (1982) 32 Cal.3d 26, 34; Pen. Code, § 872(a).)

"The term sufficient cause in section 872, subdivision (a), is generally equivalent to 'reasonable and probable cause' in section 995, subdivision (a)(2)(B), i.e., such a state of facts as would cause a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of guilt of the accused." (***People v. San Nicolas*** (2004) 34 Cal.4th 614, 654, quoting ***People v. Williams*** (1988) 44 Cal.3d 883, 924, internal quotation marks omitted.)

A dismissal under this section is also an order terminating an action under Penal Code section 1387. (***Ramos v. Superior Court*** (1982) 32 Cal.3d 26, 36-37.)

The adequacy of a special circumstance allegation may be tested under Penal Code section 995. (***Ramos v. Superior Court*** (1982) 32 Cal.3d 26, 34; ***Ghent v. Superior Court*** (1979) 90 Cal.App.3d 944, 954.)

The prosecutor is not precluded from filing an information charging a special circumstance which was stricken by the magistrate from the order of commitment. (***People v. San Nicolas*** (2004) 34 Cal.4th 614, 653.)

The two-dismissal bar in Penal Code section 1387 applies to special circumstances. (***Ramos v. Superior Court*** (1982) 32 Cal.3d 26.)

The California Supreme Court has repeatedly rejected the contention that special circumstance allegations must be dismissed if the charged homicide is subject to the Three Strikes Law (Pen. Code, §§ 667, 1170.12). The Three Strikes Law does not preclude imposition of a death sentence for defendants who are convicted of first degree murder with special circumstances and who have incurred one or more prior violent or serious felony convictions. (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 300; ***People v. DePriest*** (2007) 42 Cal.4th 1, 61; ***People v. Hughes*** (2002) 27 Cal.4th 287, 405-406.)

B. CHALLENGING PRIOR-MURDER SPECIAL CIRCUMSTANCE [§ 3.172]

The defendant may challenge the constitutionality of a prior murder special circumstance by pretrial motion to strike and is entitled to an evidentiary hearing. The defendant has the burden to prove invalidity by a preponderance of the evidence. (***People v. Horton*** (1995) 11 Cal.4th 1068, 1139-1140; ***Curl v. Superior Court*** (1990) 51 Cal.3d 1292, 1296.)

The decision in ***Custis v. United States*** (1994) 511 U.S. 485 [114 S.Ct. 1732, 128 L.Ed.2d 517], does not compel or justify modification of California law governing collateral attack in a capital proceeding on a prior murder conviction alleged as a special circumstance. (***People v. Horton*** (1995) 11 Cal.4th 1068, 1134.)

A motion to strike a prior conviction is distinguishable from a petition for writ of habeas corpus in that the motion to strike "does not seek to vacate or extinguish the underlying conviction, which would in turn trigger procedural bars. The purpose of a motion to strike is to challenge only the present effect of the prior conviction.… In the capital context, a defendant almost invariably will face much graver consequences from the use of the prior conviction, as a predicate for a special-circumstance finding, than he or she faced in the earlier criminal proceeding; it is because of those grave consequences, of course, that a defendant has been accorded special procedural protections and assistance in a capital case. In many instances, it may be unfair – and inconsistent with the special need for reliability – to deprive a defendant of the right to demonstrate the invalidity of the prior conviction in the subsequent capital prosecution simply because in the prior proceeding, when much less may have been at stake and the defendant may not have been accorded the same procedural protections, defendant did not prevail on the issue." (***People v. Trujeque*** (2015) 61 Cal.4th 227, 252, internal quotation marks & citations omitted; see also ***People v. Horton*** (1995) 11 Cal.4th 1068, 1138.)

XVII. VENUE [§ 3.180]

The Sixth Amendment right to vicinage was not incorporated by the Fourteenth Amendment against the states. (***People v. Gutierrez*** (2002) 28 Cal.4th 1083, 1119.)

A. VENUE BASED ON MULTIPLE-MURDER SPECIAL-CIRCUMSTANCE ALLEGATION – Penal Code, § 790(b) [§ 3.181]

Penal Code section 790, subdivision (b), "allows a single joint trial of intercounty murder charges accompanied by a multiple-murder special-circumstance allegation as long as one substantive condition is met: 'the charged murders are "connected together in their commission," as that phrase is used in Section 954.'" (***People v. Alcala*** (2008) 43 Cal.4th 1205, 1216, 1224.)

There was a common element of substantial importance in the commission of 5 murders supporting a single joint trial pursuant to Penal Code section 790, subdivision (b) where all 5 homicide victims were young and single Caucasian females suffering blunt-force facial trauma; the body of each victim was unclothed or partially nude from waist down; all were apparently sexually motivated assaults; and all 5 homicides occurred within a 19-month period. (***People v. Alcala*** (2008) 43 Cal.4th 1205, 1216, 1224.)

There is no authority compelling murders committed in different counties to be tried together. Prior to the statutory amendment to Penal Code section 790, there was no authority even permitting it. (***People v. Carpenter*** (1999) 21 Cal.4th 1016, 1039.)

B. CHANGE-OF-VENUE MOTIONS [§ 3.182]

The matter of venue is a question of law for the court, not a question of fact for the jury in cases tried subsequent to the decision in *People v. Posey* (2004) 32 Cal.4th 193, 215. In cases tried before *Posey*, venue is a question of fact for the jury to decide. (***People v. Clark*** (2016) 63 Cal.4th 522, 553-554; ***People v. Carrington*** (2009) 47 Cal.4th 145, 184, fn. 6 [the absence of a right to a jury trial on the facts supporting venue is applied prospectively only].)

Regardless of whether the question of venue is resolved by the jury in a pre-*Posey* case or by the trial court post-*Posey* "the burden of proof for proper venue remains unchanged – it rests with the prosecutor and must be proved by a preponderance of the evidence. [Citation.] Either direct or circumstantial evidence may suffice. [Citation]." (***People v. Clark*** (2016) 63 Cal.4th 522, 554.)

The test for granting a motion for change of venue or reviewing the order denying the motion is the same in capital cases as in other cases. (***People v. Massie*** (1998) 19 Cal.4th 550, 577-578; ***People v. Webb*** (1993) 6 Cal.4th 494, 514; ***People v.***

Cummings (1993) 4 Cal.4th 1233, 1275-1278; ***People v. Harris*** (1981) 28 Cal.3d 935, 948.)

The standards for considering a motion to change venue also apply to consideration of a motion for an intra-county transfer. (***People v. Navarette*** (2003) 30 Cal.4th 458, 484.)

§ 3.182.1 Timing of Motions

Where a motion for change of venue was filed less than 10 days before trial, after the jury had been sworn, the motion was evaluated first under Penal Code section 1089 and Code of Civil Procedure section 233, i.e., whether there is good cause to dismiss the jury due to bias caused by pre-trial publicity. Only where the already sworn jury has been shown to be unable to discharge its duty does the court then consider whether there is a reasonable likelihood that no fair or impartial jury can be had in that venue. (***People v. Riggs*** (2008) 44 Cal.4th 248, 278-279.)

When a defendant's motion for a change of venue is made before the penalty-phase retrial, the guilt and special-circumstances issues are no longer before the jury, and therefore "the sole consideration" is "whether the publicity preceding the penalty retrial had predisposed potential jurors toward choosing a death sentence over a sentence of life imprisonment without possibility of parole." (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1321, fn. 17.)

§ 3.182.2 Factors to Consider

A change of venue must be granted when the defendant shows a reasonable likelihood that a fair trial cannot be had, in light of the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1045; ***People v. Vieira*** (2005) 35 Cal.4th 264, 278.)

"The same factors apply to a motion for a second change of venue, except that 'the fact that venue has already been changed once affects the analysis.'" (***People v. Davis*** (2009) 46 Cal.4th 539, 578, quoting ***People v. Cooper*** (1991) 53 Cal.3d 771, 805.)

§ 3.182.3 Nature & Gravity of Offense

The first factor of the analysis in a venue determination – the nature and gravity of the offense – weighs in favor of a change of venue in most capital cases and is not a dispositive factor. The denial of a change of venue has been upheld on numerous occasions in capital cases involving multiple murders. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1045 [13 murder counts]; ***People v. Farley*** (2009) 46 Cal.4th 1053, 1083, citing,

e.g., ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1395, 1397 [6 murder counts]; ***People v. Ramirez*** (2006) 39 Cal.4th 398, 407, 434-435 [13 murder counts].)

"[T]he disturbing facts inherent in most capital murder cases standing alone do not require a change of venue." (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1076-1077.)

While prospective jurors would likely sympathize with the fate of a young girl abducted from a shopping center and murdered, "this sympathy stems from the nature of the crime and not the locale of the trial." (***People v. McCurdy*** (2014) 59 Cal.4th 1063,1077, citing ***People v. Davis*** (2009) 46 Cal.4th 539, 578.)

§ 3.182.4 Nature & Extent of News Coverage

"When pretrial publicity is in issue it makes especially good sense to primarily rely on the judgment of the trial court because the judge sits in the locale and may base the evaluation on the judge's own perception of the depth and extent of news stories that might influence a juror." (***People v. Harris*** (2013) 57 Cal.4th 804, 825, quoting ***People v. Famalaro*** (2011) 52 Cal.4th 1, 24, quoting ***Skilling v. United States*** (2010) 561 U.S. 358, 386 [130 S.Ct. 2896, 2918, 177 L.Ed.2d 619], internal quotation marks omitted.)

It is well settled that pretrial publicity itself – even pervasive, adverse publicity – does not invariably lead to an unfair trial. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1216; see also ***People v. Farley*** (2009) 46 Cal.4th 1053, 1084 [discussing "extraordinary cases" reviewed in *People v. Prince* wherein high court presumed prejudice from pretrial publicity].)

"'The relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant.'" (***People v. Suff*** (2014) 58 Cal.4th 1013, 1049, quoting ***People v. Famalaro*** (2011) 52 Cal.4th 1, 31; ***People v. Rountree*** (2013) 56 Cal.4th 823, 840 [same].)

"'Media coverage is not biased or inflammatory simply because it recounts the inherently disturbing circumstances of the case.'" (***People v. Suff*** (2014) 58 Cal.4th 1013, 1048, quoting ***People v. Harris*** (2013) 57 Cal.4th 804, 826.)

"Although press coverage need not be inflammatory to justify a change of venue, something more than sensational facts has been present in cases in which a change of venue was required." (***People v. Suff*** (2014) 58 Cal.4th 1013, 1048, internal quotation marks & citations omitted [distinguishing ***Daniels v. Woodford*** (9th Cir. 2005) 428 F.3d 1181, 1210-1212].)

"Although the heavy media coverage (factor two) weighed *in favor of* a change of venue, this factor did not necessarily *require* a change of venue." (***People v. Famalaro*** (2011) 52 Cal.4th 1, 23, emphasis in original.)

The passage of time diminishes the potential prejudice from pretrial publicity. (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1077; ***People v. Harris*** (2013) 57 Cal.4th 804, 827; ***People v. Lewis*** (2008) 43 Cal.4th 415, 449, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

It is reasonable to infer memories of prospective jurors who read or watched reports would have "dimmed by the passage of time" where stories about a defendant appeared when he was arrested but the trial did not take place until almost three years later. (***People v. Famalaro*** (2011) 52 Cal.4th 1, 22.)

There is no requirement that jurors be totally ignorant of the facts of a case, so long as they can lay aside their impressions and render an impartial verdict. (***People v. Lewis*** (2008) 43 Cal.4th 415, 450, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

"Although most of the jurors selected to serve had some familiarity with the facts of the case, 'the circumstance that most of the actual jurors have prior knowledge of a case does not necessarily require a change of venue." (***People v. Suff*** (2014) 58 Cal.4th 1013, 1049, citing ***People v. Davis*** (2009) 46 Cal.4th 539, 580 [all 12 jurors with prior knowledge of the case]; ***People v. Ramirez*** (2006) 39 Cal.4th 398, 434 [11 jurors with prior knowledge of the case]; ***People v. Bonin*** (1988) 46 Cal.3d 659, 678, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [10 jurors exposed to media coverage of the case]; ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1396-1397 [8 jurors with prior knowledge of the case].)

The court acknowledged that "there was substantial pretrial publicity, given that 72 percent of the participants in defendant's telephonic survey recognized his case. Moreover, of those who recognized his case, 55 percent said defendant was definitely or probably guilty of murder and 45 percent said he should receive the death penalty. But we have upheld a trial court's denial of venue change motions in cases involving greater or comparable recognition and prejudice as measured by such surveys." (***People v. Harris*** (2013) 57 Cal.4th 804, 825-826, citing ***People v. Famalaro*** (2011) 52 Cal.4th 1, 19 [83 percent surveyed heard of case; of those, 70 percent said the defendant was definitely or probably guilty of murder, and 72 percent said should receive death penalty]; ***People v. Rountree*** (2013) 56 Cal.4th 823, 836 [81 percent surveyed recognized case; of those, 46 percent said the defendant was definitely or probably guilty]; ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1396 [85 percent surveyed had heard of case; of those, 58 percent believed the defendant was probably or definitely guilty]; ***People v. Ramirez*** (2006) 39 Cal.4th 398, 433 [94 percent surveyed heard of case; of those, 52 percent believed the defendant was responsible for the charged crimes]; ***People v. Coffman & Marlow*** (2004) 34 Cal.4th 1, 45 [71 percent surveyed recognized case; of those, over 80 percent said the defendants were definitely or probably guilty].)

Courts may rely on jurors' assurances of impartiality, absent a showing that pretrial publicity was so persuasive and damaging that prejudice had to be presumed.

(***People v. Rountree*** (2013) 56 Cal.4th 823, 841; ***People v. Lewis*** (2008) 43 Cal.4th 415, 450, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

"Although the jurors' assurances of impartiality are not dispositive, neither are [courts] free to ignore them." (***People v. Smith*** (2015) 61 Cal.4th 18, 43, internal quotation marks & citations omitted.)

The trial court must distinguish between mere familiarity with the defendant or the crime and an actual predisposition against the defendant. (***People v. Rountree*** (2013) 56 Cal.4th 823, 840; ***People v. Prince*** (2007) 40 Cal.4th 1179, 1215.)

Given that an episode of *America's Most Wanted* was broadcast nationally, "'a change of venue would not be expected to dilute its prejudicial effect.'" (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1078, quoting ***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1127.)

Publicity regarding two marches relating to the case did not compel a change of venue where on neither occasion was there any "inflammatory call for vengeance" against the particular defendants in the case. (***People v. Rountree*** (2013) 56 Cal.4th 823, 838.)

The defendant's right to a fair trial was not denied based on media coverage of the homicides involved in the O.J. Simpson case. None of that publicity mentioned the defendant's case, and the defendant's case was only superficially similar to the Simpson case. The "infamy surrounding the O.J. Simpson case" involved circumstances that were not present in the defendant's case, e.g., the defendant was not a celebrity, did not have a long history of physically assaulting his victim, and fled under completely different circumstances. (***People v. Riccardi*** (2012) 54 Cal.4th 758, 835, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

§ 3.182.5 Size of Community

Where there is a large and diverse pool of jurors, it is hard to sustain the suggestion that 12 impartial individuals could not be empanelled. (***Skilling v. United States*** (2010) 561 U.S. 358, 381 [130 S.Ct. 2896, 177 L.Ed.2d 619].)

The size of the community weighed strongly against a change of venue where venue was in one of the most populous counties in the United States. Orange County was a major metropolitan area at the time of trial, with a population of two and a half million. (***People v. Famalaro*** (2011) 52 Cal.4th 1, 23.)

While "a major crime is likely to be embedded in the public consciousness more deeply and for a longer time" in a "small rural community" in comparison to "a populous urban area," the "critical factor is whether the size of the population was sufficient to dilute the adverse publicity." (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1078.)

The California Supreme Court has found reversible error based on the denial of change of venue motions in capital cases involving counties of comparable size to a population of 116,312, and it has also affirmed the denial of such motions in capital cases with comparable populations. (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1078-1079, citing capital cases and county populations where reversible error found and where trial court's denial of change of venue upheld on appeal.)

"Defendant's contention that the dispersal of this large population [1,357,000] through much of [Riverside] county, resulting in only two cities with populations greater than 100,000 and perhaps a sense of small-town life in many areas of the county, does not alter our conclusion [that the size of the community did not weigh in favor of a change of venue]." (***People v. Suff*** (2014) 58 Cal.4th 1013, 1045.)

The size of the community did not support a change of venue where the county (Kern) was 648,400, and ranked 14th out of 58 counties in size. The denial of change of venue has been upheld in capital cases in smaller counties. (***People v. Harris*** (2013) 57 Cal.4th 804, 828, citing, e.g., ***People v. Vieira*** (2005) 35 Cal.4th 264, 280-283[Stanislaus County, population 370,000]; ***People v. Weaver*** (2001) 26 Cal.4th 876, 905[Kern County, population exceeding 450,000]; ***People v. Hayes*** (1999) 21 Cal.4th 1211, 1250-1251 [Santa Cruz County, population under 200,000].)

While Shasta County's population of about 168,000 was "another factor weighing slightly in favor of defendant's motion" it was not determinative. "A change of venue is not required for every capital case arising in a sparsely populated county." (***People v. Smith*** (2015) 61 Cal.4th 18, 40.)

§ 3.182.6 Defendant's Status in Community

The "community status of the defendant, meaning whether the defendant had any prominence in the community before the crimes – did not weigh heavily for or against a change of venue. Defendant was not well known before his arrest. Because defendant had lived in [the] County for only six months before the crimes occurred, he may have been perceived as an outsider by the community. But defendant also had no previous criminal record and was not a member of a racial or ethnic group that could be subject to discrimination." (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1079, internal citations omitted.)

The "community status of the defendant – did not weigh heavily for or against a change of venue. There is no evidence that defendant or his family was well known before defendant's arrest for the murder; he grew up in Orange County, had no criminal record, and was not associated with any group (such as a disfavored racial minority or juvenile street gang) towards which the community was 'likely to be hostile.'" (***People v. Famalaro*** (2011) 52 Cal.4th 1, 23.)

The fact that the defendants "were outsiders from Missouri" weighed "somewhat in favor of a change of venue. But they were both White and were a man and a woman.

Hence, they were not outsiders in any ethnic, racial, or gender sense." They were not members "of any racial or ethnic group that could be subject to discrimination." (***People v. Rountree*** (2013) 56 Cal.4th 823, 838, internal quotation marks omitted.)

"Although defendant's photograph was published several times in the newspaper, and one article did refer to his race, the coverage did not emphasize his race or refer to him in a racially inflammatory manner. Moreover, any possible racial prejudice presumably would follow the case to any other venue." (***People v. Harris*** (2013) 57 Cal.4th 804, 829, internal citations omitted.)

§ 3.182.7 Victim's Popularity / Prominence in Community

"'Prospective jurors would sympathize with the girls' fate' no matter where the trial was held and this sympathy stems from the nature of the crime, 'not the locale of the trial.'" (***People v. Davis*** (2009) 46 Cal.4th 539, 578.)

The victim "came to the public's attention only because she was a murder victim." "Any features of the case that gave the victim prominence in the wake of the crimes would inevitably have become apparent no matter in which venue defendant was tried." (***People v. Harris*** (2013) 57 Cal.4th 804, 829.)

"The victim became well known after her disappearance, with dozens of her pictures appearing in major Southern California newspapers, and local news stations broadcasting video clips of her, and her parents becoming known locally as the media chronicled their search for their daughter, and their grief upon learning of her death. However, there was no evidence that the victim was 'from an extended family with long and extensive ties to the community,' or that the jury pool in Orange County was comprised of persons who personally knew her. The aspects which caused the victim and her family to come to the attention of the public were aspects that would follow the case to any county to which venue was changed: her sudden and unexplained disappearance after being stranded on a freeway late at night with a flat tire, and the subsequent discovery of her naked body stored inside a freezer inside a rental truck parked at the defendant's home in Arizona." (***People v. Famalaro*** (2011) 52 Cal.4th 1, 23-24.)

§ 3.182.8 Post-Jury Selection Change-of-Venue Motion

Questionnaires of prospective jurors regarding pretrial publicity revealed 81% of prospective jurors had prior knowledge of the case, and approximately half formed the opinion that the defendant was guilty and/or should receive the death penalty if convicted. Of the original pool of 1,200 prospective jurors, 475 jurors remained after the hardship eliminations. Of those, 110 had prejudged the defendant's guilt and/or penalty of death and were unable to set that opinion aside. All of these jurors were eliminated

early on and only 16 of these 110 prospective jurors were questioned during jury selection. Two prospective jurors who failed to disclose they were long time friends and wanted to surreptitiously discuss the case over the telephone were nearly seated, and some prospective jurors believed other panelists were trying to give answers that would result in their selection as jurors. However, "none of the problematic *prospective* jurors survived the selection process. The trial court properly excused all of the biased prospective jurors for cause; on appeal, defendant does not identify a single prospective juror as to whom the court erroneously denied a defense challenge for cause. The huge number of prospective jurors initially summoned (1,200) ensured that an ample number of unbiased prospective jurors remained after the biased ones had been excused." While prospective jurors comments about wanting to "fry" the defendant were inappropriate, as was the conduct of those concealing their friendship, the trial court responded appropriately by giving the parties additional peremptory challenges and carefully questioning prospective jurors. These measures were sufficient to ensure a fair selection process. (***People v. Famalaro*** (2011) 52 Cal.4th 1, 24-31, emphasis in original.)

C. APPEAL [§ 3.183]

To demonstrate the trial court erroneously denied a change of venue motion on appeal, the defendant must show that "it was reasonably likely a fair trial could not be had at the time the motion was made" and that this error was prejudicial, "i.e. it is reasonably likely a fair trial was not in fact had." The former is sustained where supported by substantial evidence and the latter is independently reviewed. (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1077.)

"'On appeal from the denial of a change of venue, we accept the trial court's factual findings where supported by substantial evidence, but we review independently the court's ultimate determination whether it was reasonably likely the defendant could receive a fair trial in the county.'" (***People v. Suff*** (2014) 58 Cal.4th 1013, 1044, quoting ***People v. Rountree*** (2013) 56 Cal.4th 823, 837.)

§ 3.183.1 Forfeiture

When a trial court initially denies a change of venue motion without prejudice, a defendant must renew the motion after voir dire to preserve the issue for appeal. (***People v. Johnson*** (2015) 60 Cal.4th 966, 982; ***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1076.)

It suggests the defendant believed the jury was fair and impartial where the defendant does not exhaust his peremptory challenges and does not object to the seated jury's composition. (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1080.)

In reviewing a motion for change of venue after voir dire, the fact that defense counsel did not exhaust peremptory challenges was decisive in determining the jury

actually selected was fair. (***People v. Dennis*** (1998) 17 Cal.4th 468, 524; ***People v. Sanders*** (1995) 11 Cal.4th 475, 507; ***People v. Daniels*** (1991) 52 Cal.3d 815, 853-854, rev'd on other grounds, ***Daniels v. Woodford*** (9th Cir. 2005) 428 F.3d 1181.)

The granting of a change of venue before the penalty phase of a capital trial did not show that the trial court erred in denying the change of venue motion brought before trial. The granting of the subsequent motion was not an indication the trial court only belatedly recognized the potential prejudice from publicity. Rather, there had been intensive additional publicity through the guilt phase that changed the showing by the defendant in support of the subsequent change of venue motion. (***People v. Proctor*** (1992) 4 Cal.4th 499, 523-528.)

In determining whether the defendant was prejudiced from the denial of a change of venue, "'[t]he relevant question is not whether the community remembered the case but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant.'" (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1080, quoting ***People v. Famalaro*** (2011) 52 Cal.4th 1, 31.)

In determining whether the defendant was actually prejudiced by the denial of a change of venue, in assessing whether pretrial publicity had a prejudicial effect on the jury, the reviewing court examines the voir dire of jurors. (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1080.)

Any knowledge that alternate jurors may have had regarding the case at the time of voir dire could not have prejudiced the defendant when none of those alternate jurors participated in either the guilt or penalty verdict. (***People v. Johnson*** (2015) 60 Cal.4th 966, 983.)

"The extraordinary cases in which prejudice has been presumed involve circumstances in which 'the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings.'" (***People v. Suff*** (2014) 58 Cal.4th 1013, 1049, quoting ***Murphy v. Florida*** (1975) 421 U.S. 794, 799 [95 S.Ct. 2031, 44 L.Ed.2d 589].)

D. SELECTION OF LOCATION TO TRANSFER CASE AFTER MOTION GRANTED [§ 3.184]

"[A]bsent an agreement as to the new venue, the parties have a right to an evidentiary hearing to determine where the case should be transferred." (***People v. Davis*** (2009) 46 Cal.4th 539, 574.)

The selection of a new venue is reviewed for an abuse of discretion. (***People v. Davis*** (2009) 46 Cal.4th 539, 574.)

"Factors to be considered in exercising discretion in deciding where to transfer a case include the presence or absence of prejudicial publicity in the successor county, and pretrial publicity less than that which would require a change of venue from that county

may 'still be large enough to persuade a court not to transfer to that county." (***People v. Davis*** (2009) 46 Cal.4th 539, 574.)

"Even in capital cases, considerations of relative hardship, and the conservation of judicial resources and public funds, are important factors in deciding between various possible venue sites. Such considerations may include choosing a new venue site near the original venue site for the convenience of witnesses, attorneys, and interested residents of the original venue site." (***People v. Davis*** (2009) 46 Cal.4th 539, 574, internal quotation marks omitted, quoting ***People v. Cooper*** (1991) 53 Cal.3d 771, 805.)

"Because it is impossible to control heightened media attention in any new venue, it is also virtually impossible to prevent the knowledge and prejudgment rates for potential jurors living in a new venue from increasing after the change of venue has occurred. Thus, when evaluating a county under consideration as the site for the trial of a high-publicity case, the ability of potential jurors in that county to disregard the information they have learned from the media, and to set aside opinions they have formed based on that information, is significant, because it bears on the likelihood the defendant will be able to receive a fair trial there." (***People v. Davis*** (2009) 46 Cal.4th 539, 575-576.)

XVIII. VOLUNTARINESS OF CONFESSIONS [§ 3.190]

"Reference to the death penalty does not necessarily render a statement involuntary. A confession will not be invalidated simply because the possibility of a death sentence was discussed beforehand. A constitutional violation has been found in this context only where officers threaten a vulnerable or frightened suspect with the death penalty, promise leniency in exchange for the suspect's cooperation, and extract incriminating information as a direct result of such express or implied threats and promises." (***People v. Williams*** (2010) 49 Cal.4th 405, 443, internal quotation marks omitted.)

Chapter Four
JURY SELECTION

I. FAIR CROSS-SECTION [§ 4.10]

The right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment and by article I, section 16 of the California Constitution. (***People v. Ramos*** (1997) 15 Cal.4th 1133, 1154; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1194.)

The right to a jury drawn from a fair cross-section of the community does not include the right to a jury that reflects the racial composition of the community. (***People v. Winbush*** (2017) 2 Cal.5th 402, 447; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 119-120.)

The relevant "community" for cross-section purposes is the judicial district in which the case is tried. (***People v. Horton*** (1995) 11 Cal.4th 1068, 1088.)

A. PRIMA FACIE CASE [§ 4.11]

To establish a prima facie violation of the fair cross-section requirement, defendant must show: (1) that the group excluded was "distinctive"; (2) representation of this group in venires is not fair and reasonable in relation to the group's size in the community; and (3) under-representation is due to systematic exclusion. (***Duren v. Missouri*** (1979) 439 U.S. 357, 364 [99 S.Ct. 664, 58 L.Ed.2d 579, 587]; ***People v. Cunningham*** (2015) 61 Cal.4th 609, 776; ***People v. Anderson*** (2001) 25 Cal.4th 543, 566; ***People v. Ramos*** (1997) 15 Cal.4th 1133, 1154; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1088; ***People v. Breaux*** (1991) 1 Cal.4th 281, 297-298.)

The legal inquiry regarding a fair cross-section is the same whether the challenge concerns a petit jury or a grand jury. (***People v. Burney*** (2009) 47 Cal.4th 203, 225, 227 [rejecting Sixth Amendment underrepresentation challenge to Orange County grand jury pool]; ***People v. Garcia*** (2011) 52 Cal.4th 706, 724-725 [rejecting underrepresentation challenge to Los Angeles County grand jury pool]; but see ***People v. Houston*** (2012) 54 Cal.4th 1186, 1208; ***People v. Carrington*** (2009) 47 Cal.4th 145, 178-179 [neither United States nor California Supreme Court have held that the Sixth Amendment right to a jury drawn from a fair cross-section applies to a grand jury].)

§ 4.11.1 Non-Distinctive Groups

The defendant failed to show that hearing-impaired persons constitute a distinctive group for fair cross-section purposes. (***People v. Fauber*** (1992) 2 Cal.4th 792, 817.)

Young persons are not a cognizable group for purposes of an equal-protection challenge to a petit jury. (***People v. Lucas*** (2014) 60 Cal.4th 153, 256, disapproved on

other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19; ***People v. Lewis*** (2008) 43 Cal.4th 415, 482, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

Exclusion of ex-felons and resident aliens did not deprive defendant of a representative jury. (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1252; ***People v. Beeler*** (1995) 9 Cal.4th 953, 998 [resident aliens], abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705; ***People v. Pride*** (1992) 3 Cal.4th 195, 227.)

Persons of low income are not a cognizable class. (***People v. Tafoya*** (2007) 42 Cal.4th 147, 169.)

The California Supreme Court has declined to resolve the question of whether a category composed of older persons is a distinctive group for purposes of fair cross-section analysis, or whether members of a particular age group constitute a distinctive group based on experiencing certain historical events in common. (***People v. Carrington*** (2009) 47 Cal.4th 145, 178; see ***People v. McCoy*** (1995) 40 Cal.App.4th 778, 783-787 [defendant failed to establish persons 70 years and older are a distinctive group].)

§ 4.11.2 Underrepresentation

"The United States Supreme Court 'has not yet spoken definitively on either the means by which disparity may be measured or the constitutional limit of permissible disparity.'" (***People v. Garcia*** (2011) 52 Cal.4th 706, 737.)

The United States Supreme Court found that purposeful discrimination based on race alone cannot be proved by showing that an identifiable group in a community is underrepresented by as much as 10%. (***Swain v. Alabama*** (1965) 380 U.S. 202, 208-209 85 S.Ct. 824, 830, 13 L.Ed.2d 759], overruled on other grounds by *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

The California Supreme Court has found that a range of absolute disparity between 2.7 and 4.3 percent and of comparative disparity between 23.5 and 37.4 percent as "generally within the tolerance accepted by federal reviewing courts." (***People v. Ramos*** (1997) 15 Cal.4th 1133, 1156.)

§ 4.11.3 Systematic Exclusion

The third prong for establishing a prima facie violation of the fair cross-section requirement (under-representation due to systematic exclusion) obliges the "defendant to show the state selected the jury pool in a constitutionally impermissible manner that was the probable cause of the disparity." (***People v. Ochoa*** (2001) 26 Cal.4th 398, 427, abrogated on another point as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

Statistical evidence of a disparity alone does not demonstrate that underrepresentation was due to systematic exclusion. A defendant must also show that the disparity is the result of an improper feature of the jury selection process. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 652; ***People v. Burney*** (2009) 47 Cal.4th 203, 226; ***People v. Burgener*** (2003) 29 Cal.4th 833, 857.)

Statistical disparity alone will not establish under-representation due to systematic exclusion. (***People v. Burney*** (2009) 47 Cal.4th 203, 226; ***People v. Anderson*** (2001) 25 Cal.4th 543, 566; ***People v. Massie*** (1998) 19 Cal.4th 550, 580; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1088; ***People v. Howard*** (1992) 1 Cal.4th 1132, 1160.)

When the selection criteria are neutral with respect to race, ethnicity, sex, and religion, the defendant must identify some aspect of the manner in which those criteria are being applied that is (1) the probable cause of the disparity, and (2) constitutionally impermissible. (***People v. Burgener*** (2003) 29 Cal.4th 833, 858; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1194.)

The California Supreme Court is skeptical that any correlation between hardship excusals and cognizable classes would state a prima facie case of systematic exclusion. (***People v. Carpenter*** (1999) 21 Cal.4th 1016, 1035.)

"'So long as the state uses criteria that are neutral with respect to the underrepresented group, the state's failure to adopt other measures to increase the group's representation cannot satisfy Duren's third prong.'" (***People v. Cunningham*** (2015) 61 Cal.4th 609, 7787; ***People v. Burgener*** (2003) 29 Cal.4th 833, 857-858.)

B. BURDEN OF PROOF UPON PRIMA FACIE SHOWING [§ 4.12]

If the defendant establishes a prime facie case of a fair cross-section violation, the burden shifts to the prosecutor to provide: (1) a more precise statistical showing that no constitutionally significant disparity exists; or (2) a compelling justification for the procedure that has resulted in the disparity. (***People v. Burney*** (2009) 47 Cal.4th 203, 226; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1194; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1088.)

C. DISCOVERY REQUESTS [§ 4.13]

When a defendant seeks discovery of information necessary to make a prima facie showing, he must make a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as a result of systematic exclusion. Upon making such a showing, a court must make a reasonable effort to accommodate relevant requests for information designed to verify the existence of underrepresentation and document its nature and extent. (***People v. Lucas*** (2014)

60 Cal.4th 153, 255, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1194.)

Simply comparing general population data concerning a cognizable group with the number of persons from that group who appeared for jury service is "problematic because general population data does not identify how many in the class are actually qualified for jury service" and does not necessarily show a group of the population is underrepresented in a jury pool. (***People v. Lucas*** (2014) 60 Cal.4th 153, 256, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

Data regarding Black and Hispanic population of judicial district is irrelevant in light of trial court's unchallenged finding there was no "systematic exclusion," i.e., that the procedures employed by the jury commissioner and the bases for excusing those group members whose excusal was the probable cause of the disparity were constitutionally permissible. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1279-1280.)

D. USE OF VOTER-REGISTRATION LISTS / DMV RECORDS [§ 4.14]

Use of voter-registration lists and DMV records of licensed drivers and identification card holders to create a master list shall be considered inclusive of a representative cross-section of the population where it is properly nonduplicative. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 652-53; ***People v. Burgener*** (2003) 29 Cal.4th 833, 857.)

"'[T]he failure of a particular group to register to vote in proportion to its share of the population cannot constitute improper exclusion attributable to the state.'" (***People v. Cunningham*** (2015) 61 Cal.4th 609, 653, quoting ***People v. Ochoa*** (2001) 26 Cal.4th 398, 427, abrogated on another point as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

Race-neutral procedures for using voter-registration lists for county's master jury list overcomes a motion to quash. (***People v. Sanders*** (1990) 51 Cal.3d 471, 496.)

E. RACE-CONSCIOUS ASSIGNMENTS OF PROSPECTIVE JURORS [§ 4.15]

The California Supreme Court prohibits, as an exercise of supervisory power, making race-conscious assignments of prospective jurors from the jury assembly room to the courtroom. While such assignments may increase minority representation in the venire for a particular jury, they may have the effect of reducing the minority representation on venires in other courtrooms. (***People v. Burgener*** (2003) 29 Cal.4th 833, 861.)

F. DEATH-QUALIFIED JURY [§ 4.16]

Exclusion of death-penalty opponents does not violate the fair cross-section requirement or the defendant's right to an impartial jury. (***People v. Avena*** (1996) 13 Cal.4th 394, 412; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1198.)

Systematic exclusion by prosecution peremptory challenges of potential jurors who merely have reservations about the death penalty does not deprive the defendant of a representative jury at the guilt phase. (***People v. Turner*** (1984) 37 Cal.3d 302, 315, overruled on other grounds, *People v. Anderson* (1987) 43 Cal.3d 1104, 1115; ***People v. Zimmerman*** (1984) 36 Cal.3d 154, 161.)

Selection of a ***Witherspoon v. Illinois*** (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] death-qualified jury does not violate the constitutional right to a jury drawn from a representative cross-section of the community. (***Lockhart v. McCree*** (1986) 476 U.S. 162, 176-177 [106 S.Ct. 1758, 90 L.Ed.2d 137]; ***People v. Mendoza*** (2016) 62 Cal.4th 856, 913-914; ***People v. Lenart*** (2004) 32 Cal.4th 1107, 1120; ***People v. Fields*** (1983) 35 Cal.3d 329, 342-354.)

Cross-Reference:
§ 4.50, *re* Challenge for cause
§ 4.60, *re* Peremptory challenges

G. IDENTIFYING INFORMATION / PROSPECTIVE JURORS [§ 4.17]

A trial court does not violate a defendant's state and federal constitutional rights to be presumed innocent, for a fair and public trial, a reliable guilt and penalty verdict, or freedom from cruel and unusual punishment by ordering prospective and seated jurors be referred to only by number where there is reasonable grounds for concern about possible unlawful interference with jurors' performance of their duties. A prosecutor's informing the court that two witnesses had been threatened and one had been offered a bribe constituted sufficient basis for concern. Any interference with the defendant's right to conduct voir dire was minimized because the jurors were not entirely anonymous – counsel had access to their names. The court's explanation that numbers were being used to protect jurors' privacy in light of media interest in the case minimized the possibility of prejudice to defendant. (***People v. Thomas*** (2012) 53 Cal.4th 771, 786-788.)

Cross-Reference: § 16.60, *re* Jury-protection orders

H. FORFEITURE [§ 4.18]

Failure to raise an objection in the trial court based on a non-representative cross-section forfeits the claim on appeal. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 440 [composition of master jury list].)

II. SELECTION METHODS [§ 4.20]

A. FORFEITURE [§ 4.21]

A defendant is generally precluded from raising any defects in the preliminary jury screening process procedure on appeal when the defendant acquiesced in the procedure. (***People v. Eubanks*** (2011) 53 Cal.4th 110, 126, citing ***People v. Ervin*** (2000) 22 Cal.4th 48, 73.)

Defendant forfeited her claims on appeal that the jury commissioner failed to maintain a more complete record regarding the selection, qualification, and assignment of prospective jurors by failing to raise those issues in the trial court. (***People v. Eubanks*** (2011) 53 Cal.4th 110, 127-128.)

Defendant forfeited any challenge to the language of the summons notices and composition of the venire or jury panel, and any deviations in the prescreening of jurors from the exceptions to eligibility set forth in Code of Civil Procedure section 203, by failing to raise those issues in the trial court. (***People v. Eubanks*** (2011) 53 Cal.4th 110, 129.)

Failure to object to a method of jury selection which does not comply with the Code of Civil Procedure sections on jury selection (§§ 191, 194, 197) constitutes a forfeiture of any claim of error on appeal. (***People v. Benavides*** (2005) 35 Cal.4th 69, 88; ***People v. Seaton*** (2001) 26 Cal.4th 598, 638; ***People v. Osband*** (1996) 13 Cal.4th 622, 670.)

Failure to object to the jury selection procedure before the jury is sworn forfeits the claim. (***People v. Mayfield*** (1997) 14 Cal.4th 668, 728, abrogated on other grounds, *People v. Scott* (2015) 61 Cal.4th 363, 390.)

Failure to make a vicinage objection forfeits the claim on appeal. (***People v. Danielson*** (1992) 3 Cal.4th 691, 703-704, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

A claim of constitutional deprivation in the jury selection process must be preserved in the trial court or it is forfeited. (***People v. Howard*** (1992) 1 Cal.4th 1132, 1157; ***People v. Mickey*** (1991) 54 Cal.3d 612, 663.)

B. RANDOM-SELECTION REQUIREMENT [§ 4.22]

There is no violation of the principle of random selection where the trial judge selects the first 21 prospective jurors from the venire by virtue of who comes through the door first. The California Supreme Court does not endorse this method of selection, however. (***People v. Wright*** (1990) 52 Cal.3d 367, 393-395, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

A stipulation that the first 12 jurors seated in the box for general voir dire come from lists submitted by the parties did not constitute a material departure from principle of random selection. (***People v. Visciotti*** (1992) 2 Cal.4th 1, 40-44.)

There was no error from use of "struck jury" method[2] of selection where the defendant requested its use. (***People v. Ashmus*** (1991) 54 Cal.3d 932, 955, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117; ***People v. Wright*** (1990) 52 Cal.3d 367, 397-398, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459 [while "struck jury" method of selection may carry potential for prejudice, none found here].)

C. FEES & HARDSHIP [§ 4.23]

Granting of hardship exceptions to jurors did not deprive defendant of a fair jury. (***People v. Kraft*** (2000) 23 Cal.4th 978, 1067; ***People v. Bolin*** (1998) 18 Cal.4th 297, 316, fn. 3.)

Rule 2.1008 of the California Rules of Court, enumerating those specific grounds upon which the jury commissioner may issue hardship excusals during voir dire, does not limit a trial court's authority to grant hardship excusals during voir dire. (***People v. Tate*** (2010) 49 Cal.4th 635, 665, fn. 18.)

The record supported the trial court's finding that full-time students would face undue hardship under the circumstances of the particular case (capital trial taking two months to complete during critical period of fall school terms). (***People v. Tate*** (2010) 49 Cal.4th 635, 665 & fn. 18.)

Court's refusal to pay juror fees in excess of standard fees did not deprive defendant of a fair jury. (***People v. Carpenter*** (1997) 15 Cal.4th 312, 352, abrogated by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1097; ***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1216.)

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[2] The "struck jury" method entails the trial judge tendering a list of qualified potential jurors and each party exercising challenges against the names on the list. If there are more than 12 jurors remaining on the list after the exercise of challenges, then the judge decides which 12 will constitute the jury. (***People v. Wright*** (1990) 52 Cal.3d 367, 396, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

The trial court did not prevent defendant from developing a correlation between hardship excusals and cognizable classes (e.g., race or gender) by rejecting a defense questionnaire to the venire concerning hardship. The relevant group was those jurors excused for hardship, not those who stated on the questionnaire it would be hard to serve on the jury. (***People v. Carpenter*** (1997) 15 Cal.4th 312, 352, abrogated by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1097.)

§ 4.23.1 Forfeiture

Defendant forfeited claim on appeal relating to deviations in the prescreening from the exceptions for eligibility set forth in Code of Civil Procedure section 203 due to failure to object below. (***People v. Eubanks*** (2011) 53 Cal.4th 110, 129.)

On appeal, to raise the issue of improper excusal for hardship or that removal for hardship violated defendant's constitutional right to a jury drawn from a fair cross-section of the community, the defense must make a contemporaneous and specific objection to the excusal. (***People v. Champion*** (1995) 9 Cal.4th 879, 906-907, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860; ***People v. Mickey*** (1991) 54 Cal.3d 612, 664 [claim of improper excusal for hardship forfeited for failure to object in trial court].)

III. VOIR DIRE [§ 4.30]

A. GENERALLY [§ 4.31]

"[P]art of the guarantee of a defendant's right to an impartial jury is adequate voir dire to identify unqualified jurors." (***Morgan v. Illinois*** (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492].)

The right to voir dire, like the right to peremptory challenges, is not a constitutional right but a means to achieve the end of an impartial jury. (***People v. Robinson*** (2005) 37 Cal.4th 592, 613.)

The federal Constitution "does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (***People v. Whalen*** (2013) 56 Cal.4th 1, 30, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17, quoting ***Morgan v. Illinois*** (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492], internal quotation marks omitted; ***People v. Avila*** (2006) 38 Cal.4th 491, 536, [same]; ***People v. Cleveland*** (2004) 32 Cal.4th 704, 737 [same].)

"The conduct of voir dire is an art, not a science, so there is no single way to voir dire a juror." (***People v. Whalen*** (2013) 56 Cal.4th 1, 30, internal quotation marks omitted, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17; ***People v. Cleveland*** (2004) 32 Cal.4th 704, 737 [same].)

The trial court has a duty to restrict voir dire within reasonable bounds to expedite the trial. (***People v. Avila*** (2006) 38 Cal.4th 491, 536.)

The California Supreme Court has repeatedly reminded trial courts in capital cases to "'closely follow the language and formulae for voir dire recommended by the Judicial Council in the Standards [of Judicial Administration] to ensure that all appropriate areas of inquiry are covered in an appropriate manner. Failure to use the recommended language may be a factor to be considered in determining whether a voir dire was adequate, but the entire voir dire must be considered in making that judgment.'" (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1046, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, quoting ***People v. Holt*** (1997) 15 Cal.4th 619, 661; ***People v. Bolden*** (2002) 29 Cal.4th 515, 538 [same].)

A trial court "possesse[s] discretion to conduct oral voir dire as necessary and to allow attorney participation and questioning as appropriate." (***People v. Robinson*** (2006) 37 Cal.4th 592, 614; ***People v. Carter*** (2005) 36 Cal.4th 1215, 1250 [manner of conducting voir dire not basis for reversal unless it makes resulting trial fundamentally unfair].)

While cautioning against "overreliance on leading questions to the exclusion of more open-ended questions because the authority of the trial judge may cause a prospective juror to give what he or she perceives to be a 'correct' answer rather than a considered statement of his or her true views" the California Supreme Court has recognized that when jurors are being asked to "express themselves using legal terms and concepts that may be entirely new to them," "prompting the prospective juror with leading questions may be the only way for the court to obtain a clear answer." (***People v. Whalen*** (2013) 56 Cal.4th 1, 34, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17.)

B. INDIVIDUAL SEQUESTERED (*Hovey*) VOIR DIRE [§ 4.32]

The amendment of Code of Civil Procedure section 223 in Proposition 115 in 1990 abrogated the constitutional requirement of individual sequestered voir dire during the death-qualifying portion of jury selection in a capital case (see ***Hovey v. Superior Court*** (1980) 28 Cal.3d 1), and made sequestered voir dire a matter for the trial court's discretion. (***People v. Chism*** (2014) 58 Cal.4th 1266, 1286; ***People v. McKinnon*** (2011) 52 Cal.4th 610, 633; ***People v. Taylor*** (2010) 48 Cal.4th 574, 604.

Code of Civil Procedure section 223, as added by Proposition 115, does not violate equal protection, Fifth and Fourteenth Amendment rights to due process, the Sixth Amendment right to trial by an impartial jury, or the Eighth Amendment right to reliable guilt and penalty verdicts. (***People v. Chism*** (2014) 58 Cal.4th 1266, 1286; ***People v. Taylor*** (2010) 48 Cal.4th 574, 604.)

The denial of a motion for individual sequestered voir dire is reviewed under an abuse of discretion standard. (***People v. Sanchez*** (2016) 63 Cal.4th 411, 433.)

A trial court's denial of a motion for individual sequestered voir dire does not fall outside the bounds of reason where the defendant offered "only generalized grounds for conducting individual voir dire, not specific to his case." (***People v. Burney*** (2009) 47 Cal.4th 203, 241.)

A trial court abuses its discretion regarding the question of whether individualized sequestered voir dire should take place "when the questioning is not reasonably sufficient to test prospective jurors for bias or partiality." (***People v. McKinnon*** (2011) 52 Cal.4th 610, 633.)

C. GROUP VOIR DIRE [§ 4.33]

Where practicable, the trial court must conduct voir dire in the presence of other jurors in all criminal cases, including death-penalty cases. (***People v. Salazar*** (2016) 63 Cal.4th 214, 233 & fn. 10; ***People v. Jurado*** (2006) 38 Cal.4th 72, 100; Code Civ. Proc., § 223.)

Case law has suggested that group voir dire may be determined to be impracticable under Code of Civil Procedure section 223, when, in a given case, it is shown to result in actual, rather than merely potential, bias. But the possibility that prospective jurors may have been answering questions in a manner they believed the trial court wanted to hear identifies, at most, potential, rather than actual, bias and is not a basis for reversing a judgment. (***People v. Lewis*** (2008) 43 Cal.4th 415, 494-495, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

The trial court did not abuse its discretion or violate defendant's constitutional rights in denying a motion for individual voir dire and finding group voir dire "practicable." Concern regarding a "herd instinct" did not require a departure from usual practice of questioning jurors in a large group. Moreover, lengthy questionnaires had been completed by prospective jurors on their own time, and the trial court conducted individualized voir dire when further inquiry into a questionnaire response was required or requested by a prospective juror who wished to discuss sensitive issues privately. (***People v. Taylor*** (2010) 48 Cal.4th 574, 606-607.)

Questioning jurors in small groups of 16 to 18 about views on death penalty was not an abuse of discretion. The trial court did conduct individual sequestered voir dire on several occasions at the request of either the prosecutor or defense counsel when a prospective juror expressed concerns regarding the death penalty. (***People v. Tafoya*** (2007) 42 Cal.4th 147, 168.)

The trial court did not err in denying a defense motion to exclude the entire jury venire based on a prospective juror, who was a correctional officer, commenting during group voir dire about his personal experience at the California Youth Authority. Specifically, the correctional officer observed, "I know what it is like in there. And I know that it is a lot easier than these people know ... it is not as bad as what these people think it is." The trial court instructed the panel that the prospective juror's

experience was in a facility for minors and therefore far different than those for adults, and he had no experience with persons serving a sentence of life without possibility of parole. (***People v. Edwards*** (2013) 57 Cal.4th 658, 699-702.)

D. PUBLIC VOIR DIRE [§ 4.34]

Voir dire is part of the trial and subject to the press's and public's right to open proceedings. (***Press-Enterprise Co. v. Superior Court*** (1984) 464 U.S. 501, 508-509 [104 S.Ct. 819, 78 L.Ed.2d 629]; ***Ukiah Daily Journal v. Superior Court*** (1985) 165 Cal.App.3d 788, 791.)

Jury voir dire must be conducted in open court. However, a defendant may not complain about the exclusion of the press or public where he has objected to the presence of the press and public. (***People v. Edwards*** (1991) 54 Cal.3d 787, 812-813.)

E. QUESTIONNAIRES [§ 4.35]

Requiring a written questionnaire is a matter within the trial court's discretion. (***People v. Tafoya*** (2007) 42 Cal.4th 147, 168.)

"[T]he court has considerable discretion in determining the scope of voir dire, and this discretion extends to the wording of the questionnaire. Where the court exercises its discretion to exclude certain questions from the questionnaire, [the reviewing court] will affirm unless the voir dire was so inadequate that the resulting trial was fundamentally unfair." (***People v. Leon*** (2015) 61 Cal.4th 569, 718, internal citations & quotation marks omitted.)

"Prospective jurors may be dismissed based on written questionnaire responses alone if the responses leave no doubt that their views on capital punishment would prevent or substantially impair the performance of their duties in accordance with the court's instructions and the jurors' oath." (***People v. Leon*** (2015) 61 Cal.4th 569, 723, citing ***People v. Wilson*** (2008) 44 Cal.4th 758, 787, 80 ["prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law."].)

In excusing a juror based solely on the responses to the questionnaire, "[t]he juror's written answers need not, however, dispel 'all possible or theoretical doubt' regarding the juror's fitness to serve." (***People v. Jones*** (2013) 57 Cal.4th 899, 915, quoting ***People v. McKinnon*** (2011) 52 Cal.4th 610, 647.)

"[I]f a juror's questionnaire responses are inconsistent and do not clearly reveal an inability to serve, the court may not grant a cause challenge without further questioning to clarify the juror's views." (***People v. Leon*** (2015) 61 Cal.4th 569, 723, citing ***People v. Riccardi*** (2012) 54 Cal.4th 758, 782, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

On excusing prospective jurors solely on the basis of questionnaires, the California Supreme Court has cautioned that the legitimate pursuit of laudatory efficiency should not be transformed into an arbitrary pursuit of speed for its own sake. But that was not the case, where, as indicated by both the trial court and counsel, the reason for using the questionnaires to exclude obviously *Witt*-impaired prospective jurors was not to gain speed for its own sake but instead so as to spend more time with the remaining jurors at voir dire. (***People v. Thompson*** (2010) 49 Cal.4th 79, 96-97.)

There is no requirement that jurors fill out questionnaires in presence of other jurors. (***People v. Stewart*** (2004) 33 Cal.4th 425, 456.)

Where the defendant "neither objected to the questionnaire used, nor proposed any modifications or additional questionnaire inquiries," he forfeited any "claim that the questionnaire or its contents were inadequate to root out any pro-death penalty bias on the part of the prospective jurors." (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1149.)

The California Supreme Court could not discern how jury impartiality would be affected by use of a procedure that allowed jurors to take home questionnaires to complete, after being admonished that an answer has the same effect of an answer given under oath and that the questionnaires should be filled out personally and not discussed with anyone. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 667; ***People v. Douglas*** (1990) 50 Cal.3d 468, 522-523 [no prejudicial error occurred where jurors given voir dire questions in advance], overruled on other grounds as stated, *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

Refusal to include a question on multiple murder in a questionnaire was not error where trial court never ruled or otherwise suggested prospective jurors could not be asked the question during general voir dire. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1287.)

A question in questionnaire that asked whether a juror "might find it very difficult to vote to impose the death penalty" did not directly address the pertinent constitutional issue since a juror could find it very difficult to impose the death penalty and yet not be "substantially impaired." (***People v. Riccardi*** (2012) 54 Cal.4th 758, 779, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

The following questions in the juror questionnaire "called for responses that could adequately inform the trial court whether a prospective juror was substantially impaired within the meaning of [*Wainwright v.*] *Witt* [(1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]": "'(C) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence of any of the aggravating and mitigating factors … regarding the facts of the crime and the background and character of the defendant? ¶ (D) Assume for the sake of this question only that the jury

has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of life imprisonment without the possibility of parole and automatically vote for a penalty of death, without considering any of the evidence, or any of the aggravating and mitigating factors … regarding the facts of the crime and the background and character of the defendant? ¶ (E) If your answer to either question C) or question D) was yes, would you change your answer if you are instructed and ordered by the court that you must consider and weigh the evidence and the above-mentioned aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of penalty? ¶(F) Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?'" (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 861-862, 865.)

F. SCOPE OF VOIR DIRE [§ 4.36]

The trial court has "considerable" discretion in determining the scope of voir dire. (***People v. Leon*** (2015) 61 Cal.4th 569, 718; ***People v. Butler*** (2009) 46 Cal.4th 847, 859; ***People v. Williams*** (2006) 40 Cal.4th 287, 307 [broad discretion], citing Code Civ. Proc., § 223).

In ***People v. Williams*** (1981) 29 Cal.3d 392 (superseded by Code of Civil Procedure section 223), the California Supreme Court authorized the use of voir dire to assist in the exercise of peremptory challenges.

§ 4.36.1 Scope of Inquiry / Death Qualification Voir Dire

"Trial courts must of course be evenhanded in their questions to prospective jurors [during the 'death-qualification' portion of voir dire], and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors." (***People v. Whalen*** (2013) 56 Cal.4th 1, 30, internal quotation marks omitted, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17; ***People v. Clark*** (2011) 52 Cal.4th 856, 903 [same].)

The trial court has the duty to know and follow proper procedure and to devote sufficient time and effort to death-qualifying voir dire, such that the court and counsel have sufficient information regarding the prospective juror's state of mind to permit a reliable determination of whether the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties. (***People v. Stitely*** (2005) 35 Cal.4th 514, 539.)

Nonetheless, the trial court has "considerable discretion" over the number and nature of questions on voir dire about the death penalty. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1286; ***People v. Stitely*** (2005) 35 Cal.4th 514, 540.)

"Death-qualification voir dire must avoid two extremes. It must not be so abstract that it fails to identify jurors whose death penalty views would prevent or substantially impair their performance as jurors. Likewise, it must not be so specific as to require prejudgment based on a summary of potential evidence. The court may not categorically prohibit inquiry into a subject likely to be of great significance to prospective jurors in deciding penalty. However, the court has considerable discretion in determining the scope of voir dire, and this discretion extends to the wording of the questionnaire." (***People v. Leon*** (2015) 61 Cal.4th 569, 718, internal citations & quotation marks omitted; ***People v. Cash*** (2002) 28 Cal.4th 703, 721-722.)

"Parsimony in death qualification voir dire is not commendable." The California Supreme Court's recent decisions "have emphasized the importance of meaningful death-qualifying voir dire. We have reminded trial courts of their duty to know and follow proper procedure, and to devote sufficient time and effort to the process. The expenditure of a few minutes per juror is generally not unduly burdensome in a capital trial that will consume several weeks." (***People v. Leon*** (2015) 61 Cal.4th 569, 720-721, internal citations & quotation marks omitted.)

The court has discretion to refuse to allow defense counsel to question jurors for the purpose of rehabilitation if their answers made their disqualification unmistakably clear. (***People v. Carpenter*** (1997) 15 Cal.4th 312, 355, abrogated by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1097.)

Although trial courts "'should be evenhanded in their questions to prospective jurors during the "death-qualification" portion of the voir dire,'" on appeal "[a] reviewing court should not require a trial court's questioning of each prospective juror in the *Witherspoon-Witt* context [citation] to be similar in each case in which the court has questions, lest the court feel compelled to conduct a needlessly broad voir dire, receiving answers to questions it does not need to ask." (***People v. Whalen*** (2013) 56 Cal.4th 1, 30, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17; ***People v. Martinez*** (2009) 47 Cal.4th 399, 446-447.)

The prosecutor's use of a "pull the switch" metaphor during voir dire was not "so inherently upsetting" as to constitute an abuse of the trial court's discretion for permitting the question and not intervening on its own initiative to disallow it. (***People v. Duenas*** (2012) 55 Cal.4th 1, 15.)

§ 4.36.1.1 Case-Specific Inquiries

"'[T]he defense cannot be categorically denied the opportunity to inform prospective jurors of case-specific factors that could invariably cause them to vote for death at the time they answer questions about their views on capital punishment. By

definition, such an opportunity arises where the trial court instructs all prospective jurors on such case-specific factors before any death-qualification begins. It is logical to assume that when prospective jurors are thereafter asked (orally or in writing) whether they would automatically vote for life or death regardless of the aggravating and mitigating circumstances, they have answered the question with those case-specific factors in mind, and are aware of the factual context in which the exchange occurs.'" (***People v. Leon*** (2015) 61 Cal.4th 569, 719 quoting ***People v. Carasi*** (2008) 44 Cal.4th 1263, 1287.)

While a trial court "cannot bar questioning on any fact in the case 'that could cause some jurors *invariably to vote for the death penalty*, regardless of the strength of the mitigating circumstances' ... the court's refusal to allow inquiry into such facts is improper only if it is 'categorical' and denies *all* 'opportunity' to ascertain juror views about these facts." (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1286-1287, emphasis in original, internal citations omitted.)

The trial court properly precluded the defense from describing the evidence to prospective jurors and asking if they would automatically vote for death under such circumstances. (***People v. Mason*** (1991) 52 Cal.3d 909, 939-940.)

Questions directed to jurors' attitudes toward particular facts of a case are not relevant to the death-qualification process. (***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1217; ***People v. Pinholster*** (1992) 1 Cal.4th 865, 917, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Because the trial court permitted open-ended questions about rape, including questions regarding how jurors felt about it and whether the crime had ever touched their lives, the court did not abuse its discretion in prohibiting specific questions about defendant's rape conviction because it "did not categorically bar questions concerning rape as an aggravating factor." (***People v. Lucas*** (2014) 60 Cal.4th 153, 259, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

The trial court did not erroneously prohibit mention of the commission of additional murders where the defense never sought to "ask globally of all prospective jurors whether fact" that defendant committed murders in addition to the charged murders would affect their ability to consider LWOP and the death penalty. Instead, the trial court "merely cautioned" defense counsel not to recite specific facts. (***People v. Homick*** (2012) 55 Cal.4th 816, 887.)

A trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for LWOP for a defendant convicted of multiple murder would be error. (***People v. Vieira*** (2005) 35 Cal.4th 264, 285.) However, where the prospective jurors were informed that multiple counts of murder were charged and special circumstances of multiple murder alleged before completing the questionnaire, "it is reasonable to believe the jurors had these charges and special circumstances in mind when they completed the

questionnaire" and "were not giving their views on the death penalty in the abstract" and "logically would have reflected on their predisposition to vote for life imprisonment without parole, or death, in the context of [the] case." (***People v. Leon*** (2015) 61 Cal.4th 569, 719-720 [explaining "gravamen of" ***People v. Vieira*** (2005) 35 Cal.4th 264, 285, and ***People v. Carasi*** (2008) 44 Cal.4th 1263, 1286, and concluding court properly exercised discretion in excluding defense's proposed questionnaire questions regarding special circumstance allegations where other questions explored whether jurors could based penalty verdict on aggravating and mitigating evidence and where trial court informed jurors, prior to distributing questionnaires, of the charges and special circumstances defendant faced; procedure did not deprive defendant of *all* opportunity to ascertain jurors' views on case-specific facts].)

In the California Supreme Court's only reversal of a death-penalty judgment based on trial court failure to allow sufficient inquiry in jurors' death penalty attitudes about particular facts, the court "stressed that the court had refused to allow defense counsel to ask prospective jurors about 'a general fact or circumstance ... *that could cause some jurors invariably to vote for the death penalty*, *regardless of the strength of the mitigating circumstances*.' ([*People v.*] *Cash* [(2002)] 28 Cal.4th 703, 721, italics added.)" In *Cash*, the court concluded that the "fact that defendant had previously murdered his grandparents was 'likely to be of great significance to prospective jurors.'" (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1121, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, quoting ***People v. Cash*** (2002) 28 Cal.4th 703, 721.)

It is not improper for the prosecutor to ask whether the fact the defendant was 18 or 19 years old at time of the murder would cause jurors to vote for life without parole. This would also be proper under Proposition 115, because it is directly relevant to whether a juror is subject to challenge for cause. (***People v. Noguera*** (1992) 4 Cal.4th 599, 645.)

"The sole fact as to which the defense unsuccessfully sought additional inquiry – the condition of the adult murder victim's body when found – was not one that could cause a *reasonable* juror – i.e., one whose death penalty attitudes otherwise qualified him or her to sit on a capital jury – *invariably* to vote for death, regardless of the strength of the mitigating evidence. No child victim, prior murder, or sexual implications were involved. Nor would there be evidence [victim] was dismembered while alive." (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1122 & fn. 6, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, citing and comparing ***People v. Box*** (2000) 23 Cal.4th 1153, 1178-1180 [murder of 3-year-old child], overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129], and *People v. Martinez* (2010) 47 Cal.4th 911, 948 & fn. 10; ***People v. Cash*** (2002) 28 Cal.4th 703, 721 [defendant previously murdered his grandparents]; ***People v. Earp*** (1999) 20 Cal.4th 826, 851 [18-month-old girl killed during forcible sexual assault].)

"A normal juror could not fail to be affected by the condition in which [victim's] body was found, as by any brutal circumstance of a criminal homicide. But the fact of

dismemberment, in and of itself, does not appear so potentially inflammatory as to transform an otherwise death qualified juror into one who could not deliberate fairly on the issue of penalty." (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1123, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also ***People v. Tate*** (2010) 49 Cal.4th 635, 659 [a severed finger is not so gruesome, sensational, or inflammatory as to cause an otherwise qualified juror to invariably vote for death penalty].)

The defense is not entitled to inquire regarding particular circumstances of the defendant being close to all three murder victims, one of whom was pregnant, another of whom was the mother of his child, and two of whom were dismembered. Prospective jurors "need not necessarily be informed that a charged homicide involved dismemberment, at least in the absence that the dismemberment occurred while the victim was still alive." (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1152.)

The defense sought to question prospective jurors about whether they could remain fair and impartial upon learning the defendant had lured his own mother, as well as the mother of his young child, into a fatal ambush on Mother's Day. While the majority held that the issue had been forfeited on appeal for failure to object, two justices concluded that the trial court's refusal to question prospective jurors regarding "the matricidal and intrafamilial aspects of the case makes it impossible to determine whether any of the jurors held the disqualifying view that the death penalty 'should be imposed invariably and automatically on any defendant' who had killed his own mother and the mother of his child." (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1324, quoting ***People v. Cash*** (2002) 28 Cal.4th 703, 723.)

§ 4.36.1.2 Demeanor

The demeanor of a juror is an appropriate consideration for the trial court in determining whether to grant a challenge for cause. (***Uttecht v. Brown*** (2007) 551 U.S. 1 [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014]; ***People v. Scott*** (2015) 61 Cal.4th 363, 379; ***People v. Jones*** (2012) 54 Cal.4th 1, 41.)

"By stating its observations of [the prospective juror's] demeanor, the trial court made clear that is had gleaned valuable information that simply does not appear on the record." (***People v. Scott*** (2015) 61 Cal.4th 363, 379, quoting ***People v. Jones*** (2012) 54 Cal.4th 1, 41, internal quotation marks omitted.)

"[I]t appears the trial court's decision [to excuse a prospective juror for cause] relied to some degree upon the [prospective juror's] demeanor, because the court expressed its view that her feelings on the subject were 'real strong." (***People v. Fuiava*** (2012) 53 Cal.4th 622, 660.)

The trial court properly excused a prospective juror because his responses and demeanor (prospective juror appeared as though he might lose control over himself, had difficulty swallowing, was visibly upset and nervous) demonstrated his views on the

death penalty would substantially impair his duties as a juror. "Visible emotion and nervousness are factors a trial court properly may consider in evaluating a juror's demeanor, which is highly relevant to a trial court's ultimate determination." (***People v. Clark*** (2011) 52 Cal.4th 856, 897-898, distinguishing ***Adams v. Texas*** (1980) 448 U.S. 38, 50 [100 S.Ct. 2521, 65 L.Ed.2d 581] ["neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty"].)

A prospective juror's noticeable pauses before answering questions on his or her views in favor of, or against, capital punishment, properly informs the court's determination whether to excuse him or her for cause. (***People v. Solomon*** (2010) 49 Cal.4th 792, 835.)

§ 4.36.1.3 Hypothetical Questions

In determining the juror's willingness to impose the death penalty in an appropriate case, hypothetical questions must necessarily assume the accused is guilty. A claim that such hypotheticals improperly biased the jury toward conviction is meritless. (***People v. Wader*** (1993) 5 Cal.4th 610, 647-648.)

The trial court properly precluded defense counsel from asking hypothetical question during death qualification which previewed the evidence, as such questions raise the danger of indoctrinating the jury on a particular view of the facts. (***People v. Sanders*** (1995) 11 Cal.4th 475, 539.)

The trial court may prohibit voir dire on actual or hypothetical cases not before the jury. (***People v. Fields*** (1983) 35 Cal.3d 329, 357-358.)

The failure to interpose a timely objection on the grounds the prosecutor made misleading comments during voir dire based on hypothetical examples of mitigation evidence forfeits the claim on appeal. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 26.)

§ 4.36.1.4 Lingering Doubt

The trial court did not err in refusing to permit defense counsel's proposed line of voir dire questioning on lingering doubt because of concern it would conflict with the trial court's explanation to the prospective jurors that their task was to determine penalty, not to redetermine guilt. (***People v. Gonzales & Soliz*** (2011) 52 Cal.4th 254, 312.)

§ 4.36.1.5 Views on Life Without Possibility of Parole

The trial court did not abuse its discretion in limiting voir dire where defense counsel did not provide studies evidencing a common, mistaken belief among prospective jurors that life without possibility of parole could result in parole or otherwise "demonstrate the need to subject all prospective jurors to voir dire" on whether they believed that a defendant sentenced to life without possibility of parole is eligible for parole. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1085.)

§ 4.36.1.6 Mitigating Effect

The trial court properly exercised its discretion in excluding the defendant's proposed questions about the mitigating effects of childhood abuse. "Other questions explored whether jurors could base their penalty verdicts on aggravating and mitigating evidence 'regarding the facts of the crime *and the background and character of the defendant*' (italics added). The court could reasonably conclude an additional question on this subject was unnecessary." (***People v. Leon*** (2015) 61 Cal.4th 569, 718.)

The trial court was not required to inform prospective jurors "they must give mitigating effect to a defendant's lack of criminal history." "The absence of prior felony convictions are significant mitigating circumstances in a capital case, where the accused frequently has an extensive criminal past. [Citation.] However, what import, if any, a juror assigns to relevant aggravating and mitigating circumstances is solely for the juror to decide." (***People v. Pearson*** (2013) 56 Cal.4th 393, 413.)

§ 4.36.2 Racial Bias

A capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. (***Turner v. Murray*** (1986) 476 U.S. 28, 36-37 [106 S.Ct. 1683, 90 L.Ed.2d 27].)

Failure of the court to allow questions on racial bias required only reversal of the penalty phase. (***Turner v. Murray*** (1986) 476 U.S. 28, 37 [106 S.Ct. 1683, 90 L.Ed.2d 27].)

Even if the interracial nature of defendant's crime required further voir dire, there is no reversible error unless the trial court's voir dire was "so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair." (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1044, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Booker*** (2011) 51 Cal.4th 141, 169.)

A defendant cannot complain of a judge's failure to inquire about racial prejudice unless the defendant specifically requested such an inquiry. (***Turner v. Murray*** (1986) 476 U.S. 28, 37 [106 S.Ct. 1683, 90 L.Ed.2d 27]; ***People v. Booker*** (2011) 51 Cal.4th

141, 168; ***People v. Rogers*** (2009) 46 Cal.4th 1136, 1153 [failure to offer or request specific questions regarding racial bias forfeits issue on appeal].)

A defendant forfeits a claim of error for failing to follow up regarding responses in questionnaires of three jurors containing contradictions or ambiguities on the issue of race where counsel failed to suggest follow-up questions the trial court could have asked or otherwise complain about the adequacy of voir dire. (***People v. Taylor*** (2010) 48 Cal.4th 574, 608.)

The failure to interpose a timely objection on the grounds the prosecutor's voir dire is racially biased forfeits the claim on appeal due to depriving the court of the "opportunity to create a record and correct potential error in the first instance." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 24, internal quotation marks & citations omitted.)

The trial court did not err in failing to inquire regarding racial prejudice in voir dire on its own initiative where other than the "'bare fact of the difference between the races of the defendant and the victims, nothing about the circumstances of this crime suggest race played any role.'" (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1046, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, quoting ***People v. Booker*** (2011) 51 Cal.4th 141, 169.)

Even if the trial court's questioning of prospective jurors regarding race was deficient for failing to clarify three prospective jurors' questionnaire responses, defendant was not denied a fundamentally fair trial in light of the strong indications that the jurors were fair and the defense itself so concluded (i.e., the defense had the opportunity to suggest additional questioning of these specific individuals and apparently lacked the need to do so; the defense did not exhaust its peremptory challenges; and the jury was unable to reach a verdict as to penalty). (***People v. Taylor*** (2010) 48 Cal.4th 574, 609.)

The trial court's conclusions regarding impartiality of jurors is entitled to deference where a questionnaire gave jurors a clear opportunity to disclose views about racial bias that would warrant excusal, and the trial court questioned every juror who served, "observing their responses and demeanor, and thereby gleaning 'valuable information' about their states of mind." (***People v. Taylor*** (2010) 48 Cal.4th 574, 609-610.)

The trial court's inquiry into possible racial bias was sufficient notwithstanding rejecting five questions requested by the defense as either duplicative, seeking information on a collateral issue, or phrased in a biased or non-neutral manner because the court permitted nine other questions on the subject. The court also allowed counsel to submit a list of questions for further examination by the court for each prospective juror, defendant had an opportunity to further explore any potential juror's possible racial bias. (***People v. Harris*** (2013) 57 Cal.4th 804, 831-832.)

§ 4.36.3 Religious Affiliation

Religious affiliation is not a proper basis for exclusion of a potential juror, but that does not necessarily preclude inquiry into such affiliation during voir dire. Membership in a particular religious denomination or sect on a jury questionnaire may alert counsel to potential bias in favor of or against the death penalty that requires further exploration at voir dire. It was not error or prejudicial for the trial court to refuse to include in the questionnaire a question on denominational preference. (***People v. Williams*** (2006) 40 Cal.4th 287, 308.)

In some instances, a trial court may properly excuse a prospective juror for cause based on religious beliefs, particularly "the effect a juror's religious beliefs would have on her or his ability to act." (***People v. Duff*** (2014) 58 Cal.4th 527, 544.)

A juror was not improperly excused because the juror "belonged to any particular religious denomination, or even because he had any particular religious beliefs" but instead "because he made it clear that his beliefs would have substantially impaired the performance of his duties as a juror. Prospective jurors whose beliefs – whether religiously or otherwise based – prevent them from impartially performing the duties of a juror, which includes deciding the case impartially and, ultimately, sitting in judgment, may be excused for cause." (***People v. Rountree*** (2013) 56 Cal.4th 823, 847.)

§ 4.36.4 Reopen Voir Dire

On appeal, a trial court's decision not to reopen voir dire of seated jurors is reviewed for an abuse of discretion. (***People v. Clark*** (2011) 52 Cal.4th 856, 966.)

The trial court had no duty to question jurors regarding midtrial publicity because there was no cause for concern and the defendant's effort to show otherwise rested with speculation. (***People v. Clark*** (2011) 52 Cal.4th 856, 967.)

The defendant complained the court failed to voir dire jurors to determine if any were exposed to improper influences when the court reconvened after a delay in proceedings. The defendant did not move for renewed voir dire, nor present any evidence that any juror was exposed to improper influence or information. Voir dire cannot be reopened based on speculation. There must be good cause shown to reopen voir dire. (***People v. Gray*** (2005) 37 Cal.4th 168, 230.)

A claim that the jury's guilt-phase deliberations were too short (less than 2 hours) did not establish good cause to reopen voir dire to determine whether to impanel a new jury under Penal Code section 190.4, subdivision (c). (***People v. Williams*** (1997) 16 Cal.4th 153, 229.)

G. INSTRUCTIONS DURING VOIR DIRE [§ 4.37]

Defendant's complaint regarding colloquies between the court and prospective jurors regarding penalty phase deliberations that amounted to "de facto instructions" was rejected on appeal as it is "not required that every utterance by the court be so formulaic as to constantly repeat cumbersome phrases or unduly consume time. A party concerned about lack of clarity may certainly interpose an objection." (***People v. Nelson*** (2011) 51 Cal.4th 198, 216.)

Instruction to jury during voir dire that it was to subordinate its personal views and obey the laws of the state was proper. (***People v. Gordon*** (1990) 50 Cal.3d 1223, 1261, overruled on other grounds, *People v. Edwards* (1991) 54 Cal.3d 787, 835; ***People v. Johnson*** (1989) 47 Cal.3d 1194, 1224.) However, there is no sua sponte duty to instruct the jury that it is their "'civic duty' to subordinate their personal views to the law and their oaths." (***People v. Hamilton*** (1989) 48 Cal.3d 1142, 1166.)

§ 4.37.1 Mitigating Circumstances

The trial court did not err during voir dire when it described the jury's penalty phase task as weighing the "good and the bad" and informed the prospective jurors about some, but not all, of the mitigating factors. The court correctly instructed the jury at conclusion of the trial that it could consider all relevant mitigating evidence under section 190.3, factor (k). (***People v. Banks*** (2014) 59 Cal.4th 1113, 1201, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; ***People v. Livaditis*** (1992) 2 Cal.4th 759, 781 [purpose of such comments was not to instruct the jury but to familiarize them with process, and was not error where jury told complete instructions would follow the trial and instructions were complete]; ***People v. Edwards*** (1991) 54 Cal.3d 787, 840-841 [same].)

"As 'extreme' examples of mitigating circumstances, the court described a 75-year-old man who otherwise had led a productive life and a 22-year-old woman who previously had committed a heroic act.… [¶] The court's examples of mitigating circumstances were not legally erroneous, and defendant had the opportunity to educate prospective jurors through his own voir dire questions and comments." (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1094.)

§ 4.37.2 *Caldwell*[3] Error

Cross-Reference:

§ 12.32, *re* Minimizing jury's responsibility (*Caldwell* error)

While it is usually unnecessary and ill-advised to mention the appellate process during voir dire, the mere mention, standing alone, does not necessarily constitute *Caldwell* error (misleading the jury as to its role in the sentencing process in a way that allows it to feel less responsible than it should for the sentencing decision). Where the jury was properly instructed in the penalty phase, there was no reasonable likelihood that the court's mention of appellate review during jury selection reduced the jury's sense of responsibility for its verdict. (***People v. Loy*** (2011) 52 Cal.4th 46, 59-60.)

§ 4.37.3 Sympathy

On appeal, the court found the trial court had not misinstructed regarding proper consideration of sympathy in the penalty phase by stating during voir dire "what we're going to be asking you to do as jurors is to set aside any of those feelings of sympathy or empathy or compassion [regarding friends and family of the defendant and victim who were present in the courtroom] on either side and make an objective decision based solely on the facts and the law that I give you." "[T]he record as a whole, including the court's instructions" showed the "jury was not misled into believing it could not consider sympathy in considering penalty." The "statements made at the time of jury selection did not 'create such an indelible impression' that jurors were unable to follow the court's subsequent, specific instructions." (***People v. Myles*** (2012) 53 Cal.4th 1181, 1218-1219.)

H. OATH [§ 4.38]

Prospective jurors must be administered an oath of truthfulness as required by Code of Civil Procedure section 232. (***People v. Houston*** (2012) 54 Cal.4th 1186, 1210.)

The trial court erred in "correcting" the record to indicate prospective jurors were administered the oath of truthfulness because while "record settlement may be based on all available aids, including the memories of the trial judge and attorneys … none of the participants in the record correction proceedings had witnessed the jury commissioner swearing in the prospective jurors, and no court personnel testified at the record correction proceedings." Despite this error no entitlement to relief because it was presumed pursuant to Evidence Code section 664 that the prospective jurors were

[3] ***Caldwell v. Mississippi*** (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231].

properly administered the oath of truthfulness. (***People v. Houston*** (2012) 54 Cal.4th 1186, 1210.)

Prospective jurors should be sworn under Code of Civil Procedure section 232 before filling out jury questionnaires. (***People v. Lewis*** (2001) 25 Cal.4th 610, 630.)

I. WAIVER / FORFEITURE [§ 4.39]

The failure to object to the manner in which voir dire was conducted, or to indicate a need for additional examination forfeits claim on appeal that voir dire was inadequate. (***People v. Foster*** (2010) 50 Cal.4th 1301, 1324; ***People v. Taylor*** (2010) 48 Cal.4th 574, 608.)

Whether a defendant challenges any juror for cause or exercises all of his peremptory challenges is relevant if the defendant is contending on appeal that members of the jury were unacceptable to him. However, where a defendant makes a timely objection to group voir dire and proposes individual voir dire, the defendant has done all that is necessary to raise the trial court's denial of that request on appeal. (***People v. Taylor*** (2010) 48 Cal.4th 574, 606.)

A challenge to juror competence may not be made after trial. Waiver (of vicinage of one juror) compounded by failure to exercise all peremptories. (***People v. Hill*** (1992) 3 Cal.4th 959, 985-986, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

Any claim that the trial court inadequately examined prospective jurors for bias and prejudice is waived by defendant's failure to challenge the jurors for cause or with a peremptory. (***People v. Hart*** (1999) 20 Cal.4th 546, 589.)

Where the defendant "neither objected to the questionnaire used, nor proposed any modifications or additional questionnaire inquiries," he forfeited any "claim that the questionnaire or its contents were inadequate to root out any pro-death penalty bias on the part of the prospective jurors." (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1149.)

"We have held that a defendant generally cannot forfeit a claim that the trial court erred at voir dire when describing to prospective jurors their penalty phase duties, just as other instructional errors cannot usually be forfeited by a defendant's mere failure to object." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1201, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Defendant forfeited any complaint about the trial court's failure to question prospective jurors in private. (***People v. Edwards*** (2013) 57 Cal.4th 658, 702.)

§ 4.39.1 Failure to Exhaust Peremptory Challenges

It is not a prerequisite for preserving a claim of inadequate voir dire that the defendant exercise all peremptory challenges because exercising peremptory challenges

cannot cure the harm occasioned by inadequate voir dire. (***People v. Bolden*** (2002) 29 Cal.4th 515, 537-538.)

A defendant could not have been harmed by restrictions on voir dire where none of the prospective jurors involved in the restrictions sat on the actual jury and the defendant had peremptory challenges remaining and never complained about any of the seated jurors being incompetent or biased. (***People v. Edwards*** (1991) 54 Cal.3d 787, 830.)

The failure to exhaust peremptory challenges is "a strong indication 'that the jurors were fair, and that the defense itself so concluded.'" (***People v. Robinson*** (2005) 37 Cal.4th 592, 619.)

J. HARMLESS ERROR / PREJUDICE [§ 4.40]

"'Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal.'" (***People v. Booker*** (2011) 51 Cal.4th 141, 169, quoting ***People v. Holt*** (1997) 15 Cal.4th 619, 661; see also ***People v. Whalen*** (2013) 56 Cal.4th 1, 31 [same], disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17.)

"[A]s a general matter, it is unlikely that errors… occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors … prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings, before its attention has even begun to focus upon the penalty issue confronting it." (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1094, internal quotations & citations omitted.)

The comments of a prospective juror during group voir could not possibly establish prejudice where a separate jury was impaneled for the second penalty phase trial. (***People v. Edwards*** (2013) 57 Cal.4th 658, 702.)

IV. CHALLENGE FOR CAUSE [§ 4.50]

A. GENERALLY [§ 4.51]

A juror may be discharged for cause if, at any time before or after final submission of the case, the court finds the juror "'unable to perform his or her duty.'" (***People v. Lomax*** (2010) 49 Cal.4th 530, 565, quoting Pen. Code, § 1089.)

B. VIEWS ON DEATH PENALTY [§ 4.52]

The Sixth Amendment right to an impartial jury is protected when the standard utilized for excusing a prospective juror for cause based on his or her views regarding

capital punishment is "whether the [prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (***Wainwright v. Witt*** (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; ***People v. Clark*** (2011) 52 Cal.4th 856, 895.) The *Witt* standard superseded one where it had to be "unmistakably clear" that the prospective juror would "*automatically* vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case." (See ***Witherspoon v. Illinois*** (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776].)

In ***People v. Ghent*** (1987) 43 Cal.3d 739, 767, California adopted the *Witt* standard as the test for determining whether a defendant's right to an impartial jury under article I, section 16 of the state Constitution was violated by an excusal for cause based on a prospective juror's views on capital punishment. (***People v. Thomas*** (2011) 51 Cal.4th 449, 462; ***People v. Moon*** (2005) 37 Cal.4th 1, 13.)

A criminal defendant facing the death penalty has the right to "an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." A state "has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." "[T]o balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." (***Uttecht v. Brown*** (2007) 551 U.S. 1 [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014]; ***People v. Rogers*** (2013) 57 Cal.4th 296, 322-323 [same].)

Case law does not require a prospective juror be automatically excused if he or she expresses personal opposition to the death penalty. Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law. (***Lockhart v. McCree*** (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137]; ***People v. Avila*** (2006) 38 Cal.4th 491, 529.)

The United States and California Supreme Courts "have cautioned that mere personal opposition to capital punishment is an insufficient basis on which to justify dismissal of a juror during jury selection." In evaluating a challenge for cause based on death penalty views, "[t]he critical issue is whether a life-leaning prospective juror—that is, one generally (but not invariably) favoring life in prison instead of the death penalty as an appropriate punishment—can set aside his or her personal views about capital punishment and follow the law as the trial judge instructs." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1064-1065.)

"To determine if a prospective juror is excusable for cause without compromising a defendant's constitutional rights, we inquire whether the prospective juror's views on the death penalty would prevent or substantially impair the performance of the juror's duties in accordance with the court's instructions and his or her oath." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 863 [internal quotation marks and citations omitted].)

"Many prospective jurors as the high court has noted, '"simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear' these prospective jurors may not know how they will react when faced with imposing the death sentence, or may be unable to articulate or may wish to hide their true feelings."'" (***People v. Duenas*** (2012) 55 Cal.4th 1, 12, quoting ***Uttecht v. Brown*** (2007) 551 U.S. 1, 7, 127 S.Ct. 2218, 167 L.Ed.2d 1014], quoting ***Wainwright v. Witt*** (1985) 469 U.S. 412, 424-415 [105 S.Ct. 844, 83 L.Ed.2d 841].)

"In light of the inherent ambiguities associated with the death qualification of juries, two rules have emerged. First, a prospective juror's bias against the death penalty, or the juror's inability to set aside his or her personal views and follow the law, need not be demonstrated with unmistakable clarity. Instead, after examining the available evidence, which typically includes the juror's written responses in a jury questionnaire and answers during voir dire, the trial court need only be left with a definite impression that the prospective juror is unable or unwilling to faithfully and impartially follow the law. ¶Second, in assessing a prospective juror's true state of mind, the trial court occupies a superior position vis-à-vis an appellate court, for the former court is able to consider and evaluate a juror's demeanor during voir dire. … Accordingly, the trial court's ruling regarding the juror's true state of mind is entitled to deference on appeal if supported by substantial evidence." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1066 [internal quotation marks and citations omitted].)

"'"There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." [Citation.]'" (***People v. Vines*** (2011) 51 Cal.4th 830, 853.)

A juror who indicated there was a "slim" but "unlikely" possibility she could consider the death penalty adequately supports an excusal for cause. "[T]he *Witt* standard does not require a prospective juror's inability or unwillingness to fulfill her duties as a juror be proved to an unreasonably high degree. Instead, the evidence must simply show the juror's views substantially impair the performance of her duties as a juror." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1072 [internal quotation marks and citations omitted].)

"[T]he mere theoretical possibility that a prospective juror might be able to reach a verdict of death in some case does not necessarily render the dismissal of the juror an abuse of discretion. Excusal for cause is not limited to a juror who zealously opposes or supports the death penalty in every case." (***People v. Winbush*** (2017) 2 Cal.5th 402, 430-31 [internal quotation marks and citations omitted].)

The determinant is "'whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*.' (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 [citations].)" (***People v. Cash*** (2002) 28 Cal.4th 703, 719-720.)

Excusing jurors for cause who could not consider imposing the death penalty does not violate a defendant's right to a jury trial, to due process, equal protection, or to be free from cruel and unusual punishment. (***People v. Sandoval*** (2015) 62 Cal.4th 394, 412-413.)

Excusing jurors who would automatically vote for death or for life does not violate a defendant's constitutional right to an impartial jury, even assuming that empirical studies adequately establish that death qualification produces more conviction prone juries. (***Lockhart v. McCree*** (1986) 476 U.S. 162, 176-177 [106 S.Ct. 1758, 90 L.Ed.2d 137]; ***People v. Mendoza*** (2016) 62 Cal.4th 856, 913; ***People v. Sandoval*** (2015) 62 Cal.4th 394, 412-413; ***People v. Chism*** (2014) 58 Cal.4th 1266, 1286 [declining to reconsider issue as to state Constitution]; ***People v. Taylor*** (2010) 48 Cal.4th 574, 602.)

Death qualification does not violate a defendant's right to a jury selected from a representative cross-section of the community as the process is "'carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and the sentencing phases of a capital trial.'" (***People v. Taylor*** (2010) 48 Cal.4th 574, 603, quoting ***Lockhart v. McCree*** (1986) 476 U.S. 162, 175-176 [106 S.Ct. 1758, 90 L.Ed.2d 137], fn. omitted.)

Death qualification does not skew data courts rely upon for determining evolving standards of decency for Eighth Amendment purposes and is not irrational because it disqualifies individuals based on moral beliefs when the penalty phase determination is "inherently moral and normative." Disqualified jurors are properly excused for cause based on their "'inability to temporarily set aside their own beliefs in deference to the rule of law'" as opposed to their personal or moral beliefs about the death penalty. (***People v. Taylor*** (2010) 48 Cal.4th 574, 603-604 quoting ***Lockhart v. McCree*** (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137.) A juror who would automatically vote for the death penalty in every case will fail to follow his or her duty. Defense counsel is entitled to ask whether the juror will vote for death in every case. (***Morgan v. Illinois*** (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492].)

The *Witt* standard also applies to someone excusable for bias in favor of the death penalty. (***People v. Danielson*** (1992) 3 Cal.4th 691, 712-713, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

The trial court has wide discretion to determine the qualifications of jurors. (***People v. Carpenter*** (1997) 15 Cal.4th 312, 358, abrogated by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1097.)

A trial court has "an obligation to resolve the uncertainties" in a juror's written responses to a questionnaire "and to orally examine [the juror] in person to the extent necessary to permit a reliable determination of whether he was disaqualified under *Witt*." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 866.)

A trial court is not compelled to accept the stipulation of the parties to excuse a potential juror for cause. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 668-669.)

"Before granting a challenge for cause, the court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair performance as a capital juror. Trial courts must therefore make a conscientious attempt to determine a prospective juror's views regarding capital punishment to ensure that any juror excused from jury service meets the constitutional standard." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 863 [internal quotation marks and citations omitted].)

§ 4.52.1 Voir Dire

Trial courts should "be evenhanded in their questions to prospective jurors and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors. But the court has broad discretion over the number and nature of questions about the death penalty." A trial court's "occasional use of leading questions when attempting to rehabilitate 'death-leaning' jurors" does not suggest a lack of impartiality. (***People v. Mills*** (2010) 48 Cal.4th 158, 189-190, internal quotation marks & citations omitted.)

Voir dire by the trial court, which only asked jurors if their views on the death penalty would prevent them from imposing a sentence of death, did not predispose the jury in favor of imposing the death penalty. (***People v. Champion*** (1995) 9 Cal.4th 879, 980-909, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860.)

"[T]he goal of voir dire is not to 'salvage' problematic jurors, but rather to find 12 fair-minded jurors who will impartially evaluate the case." (***People v. Hoyos*** (2007) 41 Cal.4th 872, 907, fn. 19, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641.)

The California Supreme Court has "repeatedly cautioned that death-qualification voir dire must not be so abstract that it fails to identify jurors whose death penalty views would prevent or substantially impair their performance as jurors but also must not be so specific as to require prejudgment based on a summary of potential [aggravating and mitigating] evidence." (***People v. Winbush*** (2017) 2 Cal.5th 402, 431 [internal quotation marks and citations omitted].)

§ 4.52.2 Penalty Retrial

On penalty retrial, it was proper for the prosecutor to remind prospective jurors that guilt of capital murder had already been determined, and that the proper penalty was the only remaining issue. (***People v. Montiel*** (1993) 5 Cal.4th 877, 912, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

The trial court properly denied a motion to inform jurors at a penalty retrial that retrial resulted from a hung jury, and not from appellate reversal of the death penalty. (***People v. Wash*** (1993) 6 Cal.4th 215, 252-254.)

§ 4.52.3 Pretrial Publicity

The trial court cannot as a general matter disregard a juror's own assurances of his or her impartiality based on a cynical view of human propensity for self-justification. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1215.)

The category of cases in which prejudice has been presumed from adverse pretrial publicity in the face of juror attestation that they can be impartial is extremely narrow and the few cases where the United States Supreme Court has presumed prejudice can only be termed as extraordinary. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1216.)

A prosecutor has standing to assert a *Bittaker* challenge (***People v. Bittaker*** (1989) 48 Cal.3d 1046, 1090), i.e., a challenge based on an "individual's inability to set aside what they know or believe concerning the case and decide the issues based on the evidence pursuant to the court's instructions." (***People v. Farley*** (2009) 46 Cal.4th 1053, 1094.)

C. QUESTIONNAIRES [§ 4.53]

"A prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (***People v. Jones*** (2013) 57 Cal.4th 899, 915, internal quotation marks & citations omitted; ***People v. Wilson*** (2008) 44 Cal.4th 758, 787 [same]; ***People v. Avila*** (2006) 38 Cal.4th 491, 531 [same].)

"Prospective jurors may be dismissed based on written questionnaire responses alone if the responses leave no doubt that their views on capital punishment would prevent or substantially impair the performance of their duties in accordance with the court's instructions and the jurors' oath. By contrast, if a juror's questionnaire responses are inconsistent and do not clearly reveal an inability to serve, the court may not grant a cause challenge without further questioning to clarify the juror's views." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 863 [internal quotation marks and citations omitted].)

"In assessing whether the prosecution carried its burden, the question is not whether the record might reasonably have supported a finding that the juror was unwilling to follow instructions pertaining to the death penalty. Rather, a prospective juror may be discharged for cause solely on the basis of written questionnaire responses only if it is 'clear' from those responses that the juror is unable or unwilling to temporarily set aside the juror's beliefs and follow the law. Where a prospective juror's written responses are ambiguous with respect to the individual's willingness or ability to

follow the court's instructions in a potential penalty phase, the record does not support a challenge for cause." (***People v. Zaragoza*** (2016) 1 Cal.5th 21, 38-39, internal citations omitted.)

In discharging a prospective juror for cause based solely on answers to the written questionnaire, the juror's answers are not required to "dispel all possible or theoretical doubt regarding the juror's fitness to serve." (***People v. Jones*** (2013) 57 Cal.4th 899, 915, internal quotation marks & citations omitted; ***People v. McKinnon*** (2011) 52 Cal.4th 610, 647 [same].)

"A prospective juror's conscientious objection to capital punishment is not by itself a sufficient basis for excluding that person from jury service. Although the juror here also stated that her beliefs would make it 'difficult' to vote for execution, as the [California Supreme Court] has explained because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his or her duties as a juror. That is especially true … where the juror affirmed that her personal views would not control her approach to various aspects of the case and that she could set aside her personal feelings and follow the law as instructed by the court." (***People v. Zaragoza*** (2016) 1 Cal.5th 21, 39, internal quotation marks & citations omitted.)

The trial court committed reversable error in failing to orally examine a prospective juror excused for cause based on death penalty views where his written answers to the *Witt* inquiries in the questionnaire "were equivocal and suggested [the prospective juror's] views were not unalterable." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 865 [although prospective juror responded that he "would 'probably' automatically refuse to vote for the death penalty and automically vote for life in prison without possibility of parole regardless of the evidence" he also indicated he "'possibly' would change that answer if the court instructed him to consider the aggravating and mitigating evidence before deciding penalty"; and he also indicated elsewhere in questionnaire "would consider the evidence and was open to voting for either penalty].)

The trial court committed reversible error in failing to follow up in open court during voir dire to determine whether a juror was "excusable as someone who could not face the enormity of the task of judging life or death" where inconsistent answers in her questionnaire were susceptible of two interpretation – only one of which was disqualifiable. (***People v. Riccardi*** (2012) 54 Cal.4th 758, 782, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

A court does not abuse its discretion by permitting counsel to prescreen juror questionnaires and stipulate to juror dismissals. If prospective jurors are formally dismissed pursuant to stipulation rather than cause, the trial court makes no findings, and

the stipulation forfeits any subsequent objection to the omission of that juror from the jury pool. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 24; ***People v. Duff*** (2014) (60 Cal.4th 527, 540; ***People v. Booker*** (2011) 51 Cal.4th 141, 159-161; ***People v. Benavides*** (2005) 35 Cal.4th 69, 88-89; ***People v. Ervin*** (2000) 22 Cal.4th 48, 72-73.)

Even if a prospective juror's questionnaire responses express a willingness to consider the death penalty, an excusal for cause is appropriate if oral questioning establishes that the juror's views on capital punishment would, in fact, substantially impair her ability to return a death sentence. (***People v. Winbush*** (Jan. 26, 2017, S117489) __ Cal.5th ___ [2017 Cal. LEXIS 575, *29].)

D. CHALLENGES [§ 4.54]

§ 4.54.1 General

A defendant who claims the trial court wrongly denied a challenge for cause must demonstrate that his right to a fair and impartial jury was thereby affected by showing that he was deprived of a peremptory challenge he would have used to excuse a juror who sat on his case. (***Ross v. Oklahoma*** (1988) 487 U.S. 81, 86 [108 S.Ct. 2273, 101 L.Ed.2d 80]; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1093; ***People v. Hawkins*** (1995) 10 Cal.4th 920, 939, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 121-122.)

Where a prospective juror did not even serve on the defendant's jury, there is no merit to a claim that the trial court erred in failing to excuse the juror for cause, since the defendant could not possibly have suffered prejudice as a result of the trial court's refusal to excuse the juror for cause. (***People v. Hinton*** (2006) 37 Cal.4th 839, 860.)

Since the defendant removed the prospective juror with a peremptory challenge, the trial court's error in denying a challenge for cause as to that juror did not undermine the defendant's right to an impartial jury. The loss of a peremptory challenge does not violate the right to an impartial jury, and defense counsel's failure to express dissatisfaction with the jury undermines the defendant's assertion of prejudice. (***People v. Boyette*** (2002) 29 Cal.4th 381, 418-419.)

A prospective juror must be able to do more than simply consider imposing the death penalty. The juror must be able to consider imposing the death penalty as a reasonable possibility. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 262, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

§ 4.54.2 Proper Excusals for Cause

The trial court properly excused a juror under *Witt* based on an answer to one question after the juror had heard the judge ask other jurors similar questions. (***Darden v. Wainwright*** (1986) 477 U.S. 168, 175, 178 [106 S.Ct. 2464, 91 L.Ed.2d 144].)

The trial court properly excused a juror for cause where she responded she would always vote against finding special circumstances so as to avoid the death-penalty question and would vote against the death penalty "regardless of the evidence," even though she also indicated that there might be cases where she "could be convinced that the death penalty might be appropriate" and indicated she could weigh the evidence and come to an "appropriate verdict." The juror was unable to articulate any case wherein she would vote for death or any facts that would cause her to impose the death penalty while indicating she could "fairly, impartially decide" whether to impose the death penalty and "would look at the evidence" and "would vote for the death penalty." (***People v. Moon*** (2005) 37 Cal.4th 1, 15.)

"A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried" is subject to challenge for cause whether or not the particular circumstance is alleged in the charging document. (***People v. Kirkpatrick*** (1994) 7 Cal.4th 988, 1005, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of the aggravating or mitigating circumstances, is subject to challenge for cause. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 671.)

The trial court properly excused a prospective juror for cause where, in addition to expressing "equivocal views on the death penalty in general" she "made conflicting or equivocal statements about her ability to vote for a death penalty in a factually appropriate case." (***People v. Nunez*** (2013) 57 Cal.4th 1, 25, internal quotation marks & citation omitted.)

Where substantial evidence supported finding the trial court properly excused the juror in the defendant's case for cause, the court rejected defendant's assertion that he was entitled to relief based on the trial judge's statements during voir dire and the fact that the same trial judge was found to have erroneously excused a prospective juror based on misunderstanding and misapplying the appropriate standard in another case. (***People v. Nunez*** (2013) 57 Cal.4th 1, 24-25.)

The trial court may excuse a juror who would automatically vote against the death penalty in the case before him regardless of his willingness to consider the penalty in another case. (***People v. Fields*** (1983) 35 Cal.3d 329, 357-358.)

"Insufficient command of the English language to allow full understanding of the words employed in instructions and full participation in deliberations clearly renders a juror unable to perform his or her duty within the meaning of Penal Code section 1089." (***People v. Lomax*** (2010) 49 Cal.4th 530, 565, internal quotation marks & citations omitted.)

A juror's views on capital punishment are not the only basis upon which a juror can be excused for cause. Accordingly, whether a juror's expressed inability to perform

the duties of a juror was due to the death of her husband or her general views on the death penalty, the trial court did not err in excusing her for cause given her response affirming an inability to consider a death verdict. (***People v. Jackson*** (2014) 58 Cal.4th 724, 752-753.)

"To the extent defendant suggests that a court may not properly excuse a prospective juror for cause in a capital case for reasons other than his or her unyielding support for, or opposition to, the death penalty, he is wrong. A juror whose personal views on any topic render him unable to follow jury instructions or to fulfill the jurors' oath is unqualified. (See ***People v. Tate*** (2010) 49 Cal.4th 635, 667-672 [a prospective juror's apparent misstatement of her academic credentials on the juror questionnaire called into doubt her general qualifications for jury service].) *Witt* identifies a particular, but not exclusive, ground for doubting a juror's ability to follow instructions. The *Witt* standard comports with 'traditional reasons for excluding jurors and with the circumstances under which such determinations are made…. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts.' (***Wainwright v. Witt*** (1985) 469 U.S. 412, 423 [105 S.Ct. 844, 83 L.Ed.2d 841].) … [T]he court properly could and did conclude that [the prospective juror] harbored views on capital punishment and other issues that, 'would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" (***People v. Clark*** (2011) 52 Cal.4th 856, 901.)

§ 4.54.3 Improper Excusals for Cause

A prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. (***People v. Watkins*** (2012) 55 Cal.4th 999, 1014; ***People v. Stewart*** (2004) 33 Cal.4th 425, 447.)

Where a juror indicates that, for purposes of the trial, he could assume the punishment selected will actually be carried out, that response provides ample evidence of impartiality and capacity to serve. Moreover, there is no conflict or inconsistency between that representation and a juror's statement of fact that the punishment may not necessarily be carried out. (***People v. Hinton*** (2006) 37 Cal.4th 839, 860; ***People v. Kipp*** (1998) 18 Cal.4th 349, 378.)

The court erroneously denied a defense challenge for cause where a juror said he would always vote for the death penalty in cases involving premeditated murder. (***People v. Coleman*** (1988) 46 Cal.3d 749, 767-768.)

A juror's statement that she "would try to leave [her] mind open and listen to everything" and could "really" and "realistically" see herself voting for LWOP is not grounds for exclusion under *Witherspoon* or *Witt*. (***People v. Mason*** (1991) 52 Cal.3d 909, 953-954.)

The trial court erroneously excused a prospective juror for cause where her views on the death penalty were "vague and largely uninformed" and she gave "no conflicting or equivocal statements about her ability to vote for a death penalty in a factually appropriate case." While a court can properly excuse a prospective juror for cause based on substantial impairment for jury service in a capital case where the prospective juror uses equivocal phrases in expressing an inability to follow the death penalty (see ***People v. Guzman*** (1988) 45 Cal.3d 915, 956), it does not follow that "a person is substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications...." (***People v. Pearson*** (2012) 53 Cal.4th 306, 331.)

The trial court erroneously excused a prospective juror for cause where she indicated in voir dire she "was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty" and was "clear in [her] declarations that [she] would attempt to fulfill [her] responsibilities as a juror in accordance with the court's instructions and [her] oath." (***People v. Heard*** (2003) 31 Cal.4th 946, 967.)

The court reversed the death sentence, and accorded no deference to the trial court's ruling, based on erroneous excusals for cause premised on prospective jurors' death penalty views where the record disclosed no basis for the court's finding of incapacity. During oral voir dire the trial court failed to inquire about jurors' ability to set aside their biases and follow the law despite clear statements in the questionnaires expressing the jurors' willingness to do so. (***People v. Leon*** (2015) 61 Cal.4th 569, 724.)

E. APPEAL [§ 4.55]

§ 4.55.1 Forfeiture / Waiver

"Defendant's claims against the general propriety of questioning prospective jurors regarding their views concerning the death penalty, permitting challenges for cause as to persons who would be unable to impose the death penalty in any circumstances, and permitting the exercise of peremptory challenges against persons with apparent reservations concerning the death penalty, are forfeited because they were not raised below." (***People v. Mendoza*** (2016) 62 Cal.4th 856, 913, citing ***People v. Tully*** (2012) 54 Cal.4th 952, 1066; ***People v. Howard*** (2010) 51 Cal.4th 15, 26; ***People v. Jennings*** (2010) 50 Cal.4th 616, 687-688; and ***People v. Gurule*** (2002) 28 Cal.4th 557, 597.)

With respect to a juror excused for cause, a claim that the court did not conduct adequate voir dire to determine whether a prospective juror's death penalty views would substantially impair his ability to serve as a juror in a capital case is forfeited absent objection or otherwise indicating additional voir dire was necessary. (***People v. Scott*** (2015) 61 Cal.4th 363, 379; ***People v. Foster*** (2010) 50 Cal.4th 1301, 1324.)

A claim that the trial court improperly restricted death-qualification voir dire of some prospective jurors is not reviewable when none of those prospective jurors ultimately sat on the jury. (***People v. Ramos*** (1997) 15 Cal.4th 1133, 1157.)

Where the defendant insisted on the use of *Witherspoon* after *Witt* had been decided but before it had been adopted in California, he is estopped from complaining about the application of *Witherspoon* on appeal. (***People v. Pride*** (1992) 3 Cal.4th 195, 228.)

A "failure to object and suggest changes to written and oral questions during death qualification forfeits complaints about their scope and content." (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1288, fn. 14, citing ***People v. Robinson*** (2005) 37 Cal.4th 592, 639.)

Any error occasioned by a trial court's refusal to allow defense counsel to further question prospective jurors who indicated an unwillingness to impose the death penalty is forfeited where defense counsel declined the trial court's subsequent offer to allow questioning of those jurors. (***People v. Horton*** (1995) 11 Cal.4th 1068, 1093.)

Defendant forfeited his claim that answers by a prospective juror to death-qualification voir dire tainted the entire panel when he failed to ask the trial court to dismiss the venire. In any case, the comments did not give prospective jurors information about the case. They only exposed the jurors to one person's opinion on the judicial system, which was not prejudicial. (***People v. Cleveland*** (2004) 32 Cal.4th 704, 736.)

Use of the struck-jury system of jury selection does not permit an exception to the exhaustion of peremptory challenges rule. (***People v. Osband*** (1996) 13 Cal.4th 622, 670.)

Use of "struck jury" system of jury selection does not avoid forfeiture rule. (***People v. Ayala*** (2000) 23 Cal.4th 225, 262.)

§ 4.55.1.1 Failure to Excuse for Cause Claims

To preserve a claim of error based on trial court's failure to excuse a juror for cause, the defendant must challenge the juror for cause. (***People v. Hinton*** (2006) 37 Cal.4th 839, 860; ***People v. Coffman & Marlow*** (2004) 34 Cal.4th 1, 48.)

There is no requirement that a defendant personally waive his right to an impartial jury before the forfeiture rule for challenging the denial of a challenge for cause on appeal can apply in a capital case. (***People v. Lucas*** (2014) 60 Cal.4th 153, 259-260, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

To preserve a claim of error based on the trial court's denial of a challenge for cause, the defendant must show: (1) he used a peremptory to remove the juror in question; (2) he exhausted his peremptories or can justify his failure to do so; and (3) express dissatisfaction with the jury ultimately selected. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 44; ***People v. Harris*** (2013) 57 Cal.4th 804, 839; ***People v. Sousa***

(2012) 54 Cal.4th 90, 130.) However, a defendant's failure to express dissatisfaction with the jury will only serve as a forfeiture in cases where the trial occurred after the decision in ***People v. Crittenden*** (1994) 9 Cal.4th 83, 121 [statement of dissatisfaction with jury required]. (***People v. Sousa*** (2012) 54 Cal.4th 90, 130; ***People v. Bivert*** (2011) 52 Cal.4th 96, 114; ***People v. Virgil*** (2011) 51 Cal.4th 1210, 1239-1240.)

Any language in ***People v. Whalen*** (2013) 55 Cal.4th 1, 51, suggesting a claim that a juror should have been dismissed for cause because he was actually biased on penalty issue is not forfeited for failing to use an available peremptory challenge has been expressly disapproved by the California Supreme Court. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 44, fn. 17.)

Where a defendant peremptorily challenges prospective jurors, he has no claim with respect to those jurors under *Witherspoon* or *Witt* since the exclusion renders a claim of erroneous inclusion moot. (***People v. Mason*** (1991) 52 Cal.3d 909, 954.)

The forfeiture rule applies to a claim of error based on improper denial of a challenge for cause regardless of whether the defendant represented himself. (***People v. Taylor*** (2009) 47 Cal.4th 850, 885.)

Exhausting peremptory challenges in a subsequent proceeding where alternate jurors are selected does not satisfy the requirement for preserving a claim of erroneous denial of challenge for cause on appeal because it has no bearing on the failure to exhaust peremptory challenges and express dissatisfaction with the 12 jurors that included the juror who is the subject of that claim. (***People v. Sousa*** (2012) 54 Cal.4th 90, 130.)

While a forfeited claim of failure to remove jurors for cause can be asserted on appeal under the rubric of ineffective assistance of counsel, the defendant failed to show ineffectiveness based on the record on appeal. "'Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process.'" (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 45, quoting ***People v. Montiel*** (1993) 5 Cal.4th 877, 911.)

§ 4.55.1.2 Erroneous Excusal for Cause Claims

The California Supreme Court has abandoned its no forfeiture rule regarding *Witherspoon*/*Witt* error. "[P]rospectively, counsel (or the defendant, if proceeding pro se) [must] make either a timely objection, or the functional equivalent of an objection (i.e., statement of opposition or disagreement) to the excusal on specific grounds under *Witherspoon*/*Witt* in order to preserve the issue for appeal." (***People v. McKinnon*** (2011) 52 Cal.4th 610, 643; see also, ***People v. Covarrubias*** (2016) 1 Cal.5th 838, 863, fn. 9 [defense not required to object to an excusal for cause in order to preserve a claim of error for appeal where trial predated holding in *People v. McKinnon*].)

A defendant forfeits any claim on appeal involving the subsequent objection to the omission of prospective jurors from the jury pool where the defendant stipulates to the

excusal of those prospective jurors. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 24; ***People v. Duff*** (2014) 58 Cal.4th 527, 540; ***People v. Booker*** (2011) 51 Cal.4th 141, 159-161.)

Where the defendant's counsel joined in the request to excuse a juror for cause, the issue is waived on appeal. (***People v. Hill*** (1992) 3 Cal.4th 959, 1003, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

A defendant who failed to object to the trial court's removal of prospective jurors opposed to the death penalty has forfeited his claim that such removal violated his right to a representative cross-section of the community. (***People v. Davenport*** (1995) 11 Cal.4th 1171, 1205, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

The State's challenge, the defense's failure to object, and the trial court's excusal of a juror for cause all support the conclusion that the interested parties felt that removal of a specific prospective juror was appropriate under the *Witherspoon-Witt* rule." (***Uttecht v. Brown*** (2007) 551 U.S. 1, 18 [127 S.Ct. 2218, 2229, 167 L.Ed.2d 1014].)

§ 4.55.1.3 Questionnaires

A defendant forfeits the right to complain on appeal about a trial court's failure to question prospective jurors on voir dire regarding challenges for cause when defense counsel agreed to the procedure of allowing the trial court to decide challenges for cause based solely upon the questionnaire responses. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 654; ***People v. Cook*** (2007) 40 Cal.4th 1334, 1341.)

The defendant waived any claim relating to an inadequate record from questionnaires to support a challenge for cause because the defendant's trial counsel himself urged the trial court to excuse jurors solely on the basis of their written questionnaires. (***People v. Thompson*** (2010) 49 Cal.4th 79, 96; compare ***People v. Stewart*** (2004) 33 Cal.4th 425, 452 [claim not waived because the record disclosed no indication defendant conceded the propriety of the procedure].)

"[I]nsofar as defendant now claims the wording of the questionnaires was inherently incapable of revealing that a prospective juror was unqualified, his words or conduct during the jury selection proceedings, described above, constituted express agreements or stipulations to the contrary. He therefore has forfeited such a contention." (***People v. McKinnon*** (2011) 52 Cal.4th 610, 637.)

§ 4.55.2 Standard of Review

A trial court's determination regarding juror bias, including substantial impairment based on death penalty views, is reviewed for an abuse of discretion. (***People v. Scott*** (2015) 61 Cal.4th 363, 378.)

The standard of review for a ruling regarding a prospective juror's views on the death penalty is essentially the same as the standard for other claims of bias. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 262, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

A reviewing court reviews the record de novo to determine whether the trial judge had sufficient information regarding the state of mind of the prospective juror who was removed for cause to permit trial court to reliably determine whether the prospective juror's views would prevent or substantially impair the performance of duties in the case before the prospective juror. (***People v. Cook*** (2007) 40 Cal.4th 1334, 1343; ***People v. Stewart*** (2004) 33 Cal.4th 425, 445.)

Whether the contention is that the trial court erred in excluding prospective jurors who exhibited an anti-death bias, or erred in failing to exclude prospective jurors who exhibited a pro-death bias, the same standard applies. (***People v. Maury*** (2003) 30 Cal.4th 342, 376; ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1318.)

In determining on appeal whether the trial court abused its discretion in excusing a juror for cause based on death penalty views, "'[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.'" (***People v. Scott*** (2015) 61 Cal.4th 363, 379-380, quoting ***Uttecht v. Brown*** (2007) 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014.)

"[T]he qualifications of [prospective] jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal." (***Uttecht v. Brown*** (2007) 551 U.S. 1 [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014]; ***People v. Jones*** (2003) 29 Cal.4th 1229, 1246.)

It is within the broad discretion of the trial court to determine whether a prospective juror will be "unable to faithfully and impartially apply the law in the case." Where a prospective juror gives "conflicting or confusing answers regarding his or her impartiality or capacity to serve, ... the trial court must weigh the juror's responses in deciding whether to remove the juror for cause." The trial court's determination of the factual question is binding on appeal if supported by substantial evidence. (***People v. Moon*** (2005) 37 Cal.4th 1, 14.) If the statements are consistent, then the trial court's ruling will be upheld if supported by substantial evidence. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 262, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; ***People v. Horning*** (2004) 34 Cal.4th 871, 896-897.)

Where the juror gives conflicting or equivocal responses to questions regarding his views on the death penalty, the trial court is in the best position to evaluate the juror's responses, and its determination as to his true state of mind is binding on the appellate courts. (***Wainwright v. Witt*** (1985) 469 U.S. 412, 428-430 [105 S.Ct. 844, 83 L.Ed.2d 841]; ***People v. McDowell*** (2012) 54 Cal.4th 395, 418; ***People v. Carasi*** (2008) 44 Cal.4th 1263, 1290; ***People v. Harris*** (2005) 37 Cal.4th 310, 329.)

The defendant's reliance on statements by prospective jurors that would support keeping them as jurors does not compel a finding of erroneous exclusion for cause where the record supports the trial court's findings that the prospective juror's views would substantially impair his ability to perform his duties. The question on appeal "'is whether the evidence supports the actual rulings, not whether it would have supported different rulings.'" (***People v. McDowell*** (2012) 54 Cal.4th 395, 418.)

§ 4.55.2.1 Deference on Appeal

"'[W]e pay due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors. Voir dire sometimes fails to elicit an unmistakably clear answer from the juror, and there will be times 'when the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (***People v. Moon*** (2005) 37 Cal.4th 1, 14, quoting ***Wainwright v. Witt*** (1985) 469 U.S. 412, 426 [105 S.Ct. 844, 83 L.Ed.2d 841]; ***People v. Harris*** (2005) 37 Cal.4th 310, 331.)

Nothing in the holding in ***Gray v. Mississippi*** (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 662], undermines the requirement in *Wainwright v. Witt* that "deference be paid to the trial judge who sees and hears the jurors." (***People v. Moon*** (2005) 37 Cal.4th 1, 14-15.)

When a juror is removed for cause based in part on the demeanor of the juror, deference to the trial court by reviewing courts is appropriate because the trial court is in a position to assess the demeanor of the venire, and of the individuals who compose it, a critical factor in assessing the attitude and qualifications of potential jurors. (***Uttecht v. Brown*** (2007) 551 U.S. 1 [127 S.Ct. 2218, 2229, 167 L.Ed.2d 1014]; ***People v. McDowell*** (2012) 54 Cal.4th 395, 418.)

"The trial court is in the best position to determine the potential juror's true state of mind because it observes firsthand the prospective juror's demeanor and verbal responses." (***People v. Clark*** (2011) 52 Cal.4th 856, 895.)

In order for a prospective juror's answers to be considered "conflicting" it is not necessary for the prospective juror to make "an unequivocal statement that directly contradicts his statement that he could vote for death." A trial court is not deprived of its "discretion to find, after considering the prospective juror's answers, demeanor, and tone, that his feelings about the death penalty would substantially impair the performance of his duties as a juror." (***People v. Duenas*** (2012) 55 Cal.4th 1, 12.)

"Because prospective jurors 'may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings, [citation]' 'deference must be paid to the trial judge who sees and hears the juror' and must determine whether the 'prospective juror would be unable to faithfully

and impartially apply the law.'" (***People v. Thomas*** (2011) 51 Cal.4th 449, 462, quoting ***Wainwright v. Witt*** (1985) 469 U.S. 412, 425-426 [105 S.Ct. 844, 83 L.Ed.2d 841].)

"On appeal, [the reviewing court] independently review[s] a trial court's for cause dismissals that were based solely on written questionnaire responses." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 863; ***People v. Cunningham*** (2015) 61 Cal.4th 609, 781 ["A trial court's ruling on a challenge for cause based solely on a juror's responses on a written questionnaire is subject to de novo review."]; ***People v. Avila*** (2006) 38 Cal.4th 491, 529 [Deference on appeal is not warranted when trial court's ruling on motion to exclude for cause is based solely on the cold record of the prospective juror's answers to a written questionnaire – the same information available on appeal.].)

"[T]he trial court's determination as to a prospective juror's true state of mind is entitled to deference on appeal. We have recognized that the trial court is in the unique position of assessing demeanor, tone, and credibility firsthand – factors of critical importance in assessing the attitude and qualifications of potential jurors. However, this deference is not appropriate when the trial court decides cause challenges based on ambiguous written responses alone, without oral questioning. In such cases, the trial court's determination is informed by the same written record available to reviewing courts." (***People v. Leon*** (2015) 61 Cal.4th 569, 724, internal citation & quotation marks omitted.)

"'[A] trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record' [citation], and … [h]ad the trial court conducted a follow-up examination of each prospective juror and thereafter determined (in light of the questionnaire responses, oral responses, and its own assessment of demeanor and credibility) that the prospective juror's views would substantially impair the performance of his or her duties as a juror in this case, the court's determination would have been entitled to deference.'" (***People v. Watkins*** (2012) 55 Cal.4th 999, 1017, quoting ***People v. Stewart*** (2004) 33 Cal.4th 425, 451.)

§ 4.55.2.2 Demeanor

Despite a lack of clarity in the record on appeal, deference must be paid to the trial court who sees and hears the juror. A trial court's finding concerning a prospective juror's state of mind "'is based upon determinations of demeanor and credibility that are peculiarly within a trial court's province. Such determinations are entitled to deference ... on direct review.'" (***People v. Schmeck*** (2005) 37 Cal.4th 240, 263, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637, quoting ***Wainwright v. Witt*** (1985) 469 U.S. 412, 425-426 [105 S.Ct. 844, 83 L.Ed.2d 841]; accord ***People v. Thomas*** (2011) 51 Cal.4th 449, 469 [case presented a close call, as evidenced by the trial court's initial denial of the prosecutor's challenge for cause, but the trial court's final ruling is entitled to deference].)

"'In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of the prospective juror's state of mind, and such evaluation is binding on appellate courts.'" (***People v. Thomas*** (2011) 51 Cal.4th 449, 462-463, quoting ***People v. Fudge*** (1994) 7 Cal.4th 1075, 1094.)

"[E]ven when the precise wording of a single question, and the answer given, do not compel a conclusion of substantial impairment, 'the need to defer to the trial court remains because so much may turn on a potential juror's demeanor.'" (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1236.)

There is no requirement that the trial court expressly state its reliance on a juror's demeanor before the trial court's determination on a challenge can be accorded deference on appeal. (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1236.)

§ 4.55.3 Harmless Error

Errors involving an improper failure to grant defendant's challenge for cause is tested under the "reasonable possibility" standard, which is akin to the *Chapman* reasonable-doubt standard. (***People v. Ashmus*** (1991) 54 Cal.3d 932, 965, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

In order to obtain relief based on the erroneous denial of a challenge for cause, the defendant must show that the "'court's rulings affected his right to a fair and impartial jury.'" (***People v. Clark*** (2011) 52 Cal.4th 856, 895, quoting ***People v. Mills*** (2010) 48 Cal.4th 158, 187.)

Error in failing to excuse a juror for cause was not prejudicial where the defense used all its peremptories, but the jury actually picked was fairly composed. (***Ross v. Oklahoma*** (1988) 487 U.S. 81, 86-91 [108 S.Ct. 2273, 101 L.Ed.2d 80]; ***People v. Yeoman*** (2003) 31 Cal.4th 93, 114.)

Where all three jurors challenged by defendant on death-qualification grounds were later removed by peremptory challenges, and the defendant had peremptory challenges remaining, there was no prejudice from denial of challenges for cause. The fact that the "struck system" of jury selection was used made no difference. (***People v. Johnson*** (1992) 3 Cal.4th 1183, 1211-1212.)

Failure of the defense to use all of its peremptory challenges renders any claim based on failure to excuse a juror for cause moot. (***People v. Danielson*** (1992) 3 Cal.4th 691, 714, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; ***People v. Raley*** (1992) 2 Cal.4th 870, 904-905.)

Where no prospective juror challenged for cause actually served on the jury, there is no basis to conclude on appeal that the empaneled jury was anything but impartial.

(***People v. Davis*** (2009) 46 Cal.4th 539, 582; ***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1314.)

§ 4.55.3.1 Restricted Death-Qualification Voir Dire

Error in restricting death-qualification voir dire does not require reversal if the defense was permitted to use general voir dire to further explore the prospective jurors' responses to facts and circumstances of the case or if the record otherwise establishes that none of the jurors had views about the circumstances of the case which would disqualify them. (***People v. Cash*** (2002) 28 Cal.4th 703, 722.)

In order to demonstrate error by the trial court in declining to allow an appropriate death-qualification question, the defense must seek to ask the omitted question during general voir dire. (***People v. Vieira*** (2005) 35 Cal.4th 264, 286.)

In order to demonstrate prejudice from a trial court's erroneous restriction of voir dire, the defendant must explain what additional inquiry was necessary for an intelligent exercise of peremptory challenges in light of the responses to questions the court did permit. (***People v. Ramos*** (1997) 15 Cal.4th 1133, 1158.)

§ 4.55.4 Erroneous Exclusion for Cause

Erroneously excluding a juror for cause *based on his views on imposition of the death penalty* requires the reversal of the death sentence, even where the prosecutor was wrongly forced to use peremptory challenges on properly excludable jurors, and even where the prosecutor had peremptories remaining. (***Gray v. Mississippi*** (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622]; ***Davis v. Georgia*** (1976) 429 U.S. 122, 123 [97 S.Ct. 399, 50 L.Ed.2d 339]; ***People v. Covarrubias*** (2016) 1 Cal.5th 838, 866; ***People v. Zaragoza*** (2016) 1 Cal.5th 21, 41; ***People v. Leon*** (2015) 61 Cal.4th 569, 724-725; ***People v. Pearson*** (2012) 53 Cal.4th 306, 333; ***People v. Whalen*** (2013) 56 Cal.4th 1, 26, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17.) However, the erroneous exclusion of a juror for cause based on his death penalty views does not require reversal of the guilt judgment or special circumstances findings. (***People v. Pearson*** (2012) 53 Cal.4th 306, 333; ***People v. Clark*** (2011) 52 Cal.4th 856, 895; ***People v. Tate*** (2010) 49 Cal.4th 635, 672.)

V. PEREMPTORY CHALLENGES [§ 4.60]

"Peremptory challenges are intended to promote a fair and impartial jury, but they are not a right of direct constitutional magnitude." (***People v. Webster*** (1991) 54 Cal.3d 411, 438, citing ***Ross v. Oklahoma*** (1988) 487 U.S. 81, 88-89 [108 S.Ct. 2273, 101 L.Ed.2d 80, 90].)

There is a presumption that peremptory challenges are properly exercised. A challenger must rebut the presumption of constitutionality before the other party is required to state reasons for exercising peremptories. (***People v. Crittenden*** (1994) 9 Cal.4th 83, 114; ***People v. Clair*** (1992) 2 Cal.4th 629, 652.)

The trial court's jury selection method of calling prospective jurors in groups of 18 and requiring the parties to exercise challenges for both cause and peremptory challenges before a new group was called did not violate the defendant's right of peremptory challenge. "[A]lthough knowledge of the composition of the entire panel can be relevant to the exercise of a peremptory challenge against an individual juror, the fact that a particular procedure used might have made exercising initial peremptory challenges less informed does not in itself require reversal." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 867-868 [internal quotation marks and citations omitted].)

A. NUMBER OF PEREMPTORY CHALLENGES [§ 4.61]

In a retrial, the defendant was not entitled to greater number of peremptory challenges because, at time of his first trial, Code of Civil Procedure section 1070 provided for 26 peremptory challenges in a capital case, but subsequently enacted Code of Civil Procedure section 231(a) entitled him to 20 peremptory challenges in a capital case. Laws governing the conduct of trials are prospective in application when applied to a trial occurring after the effective date of the statute, regardless of when the underlying crime was committed. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 663-664.)

Code of Civil Procedure section 231, subdivision (a), does not entitle each defendant in a multi-defendant capital case to 20 individual peremptory challenges. (***People v. Lewis*** (2008) 43 Cal.4th 415, 493, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.) Likewise, under the former rules, Code of Civil Procedure sections 1070 and 1070.5, the 26 challenges allotted to the defense were to be exercised jointly, not individually. (***People v. Hardy*** (1992) 2 Cal.4th 86, 129.)

The requirement of joint use of peremptory challenges in multi-defendant cases does not violate due process, equal protection, the right to an impartial jury, or the right to a reliable determination of penalty. (***People v. Pinholster*** (1992) 1 Cal.4th 865, 911, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

"To establish a constitutional entitlement to additional peremptory challenges, defendant must at least show that he is likely to receive an unfair trial before a biased jury if the request is denied." (***People v. DePriest*** (2007) 42 Cal.4th 1, 23; see also ***People v. Ledesma*** (2006) 39 Cal.4th 641, 665.)

The defendant was not deprived of a state-created liberty interest in 20 peremptory challenges (see Code of Civil Procedure, § 231) because he was required to use peremptory challenges to cure "error" in the court refusing to remove a prospective juror for cause. (***People v. Clark*** (2011) 52 Cal.4th 856, 902, citing ***People v. Weaver*** (2001) 26 Cal.4th 876, 913, and ***People v. Gordon*** (1990) 50 Cal.3d 1223, 1248, fn. 4 [use of

peremptory challenge to cure "error" in denying challenge for cause does not violate right to fair and impartial jury, citing ***Ross v. Oklahoma*** (1988) 487 U.S. 81, 85-88 [108 S.Ct. 2273, 101 L.Ed.2d 80], overruled on other grounds, *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

§ 4.61.1 Waiver / Forfeiture

Counsel's agreement to the allocation of peremptory challenges in multi-defendant case constitutes a waiver by the defense as to the allocation of the challenges. There is no requirement of a personal waiver by the defendant. (***People v. Webster*** (1991) 54 Cal.3d 411, 439.)

B. EXERCISE OF PEREMPTORY CHALLENGES BASED ON RACE OR GROUP BIAS (*Batson* / *Wheeler*) [§ 4.62]

§ 4.62.1 Generally

The United States Supreme Court, in ***Batson v. Kentucky*** (1986) 476 U.S. 79, 93-94 [106 S.Ct. 1712, 90 L.Ed.2d 69], established three steps to guide a trial court's constitutional review of peremptory strikes. "First, the defendant must make out a prima facie case by 'showing that the totality of the relevant facts give rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, 'if a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (***People v. Blacksher*** (2011) 52 Cal.4th 769, 801, quoting ***Johnson v. California*** (2005) 545 U.S. 162 [125 S.Ct. 2410, 2416, 162 L.Ed.2d 129, 138].)

Batson and its progeny hold that exercising peremptory challenges solely on the basis of a prospective juror's race offends the Fourteenth Amendment's guaranty of the equal protection of the laws. (***Miller-El v. Dretke*** (2005) 545 U.S. 231, 241 [125 S.Ct. 2317, 162 L.Ed.2d 196]; ***United States v. Martinez-Salazar*** (2000) 528 U.S. 304, 315 [120 S.Ct. 774, 145 L.Ed.2d 792]; ***J.E.B. v. Alabama ex rel. T.B.*** (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89].)

Wheeler holds that exercising peremptory challenges solely on the basis of race violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under Article I, section 16, of the California Constitution. (***People v. Huggins*** (2006) 38 Cal.4th 175, 226; ***People v. Wheeler*** (1978) 22 Cal.3d 258, 276-277, overruled on other grounds by *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

It is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the moving party to demonstrate impermissible discrimination. (***People v. Duff*** (2014) 58 Cal.4th 527, 545, citing ***Purkett v. Elem*** (1995) 514 U.S. 765, 768-769 [115 S.Ct. 1769, 131 L.Ed.2d 834].)

"The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (***People v. Winbush*** (2017) 2 Cal.5th 402, 434 [internal quotation marks and citations omitted].)

Excluding even a single juror for impermissible reasons under *Batson*/*Wheeler* requires reversal. (***People v. Huggins*** (2006) 38 Cal.4th 175, 227; ***People v. Silva*** (2001) 25 Cal.4th 345, 386.)

Improper use of peremptory challenges on the basis of race does not require "systematic" discrimination and is not negated simply because both sides have dismissed minority jurors or because the final jury is "representative." (***People v. Arias*** (1996) 13 Cal.4th 92, 136-137.)

A white defendant cannot claim he was deprived of a fair jury under the Sixth Amendment right to impartial jury where the prosecutor used peremptory challenges to exclude Black jurors. (***Holland v. Illinois*** (1990) 493 U.S. 474 [110 S.Ct. 803, 107 L.Ed.2d 905].) However, under the Equal Protection Clause of the Fourteenth Amendment, a defendant has a constitutional claim where peremptory challenges are used by the prosecution to exclude prospective jurors based on race. (***Powers v. Ohio*** (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411].)

Purposeful racial discrimination in the selection of grand jurors in violation of equal protection requires reversal without a showing of prejudice. (***Vasquez v. Hillary*** (1986) 474 U.S. 254, 260-264 [106 S.Ct. 617, 88 L.Ed.2d 598].)

§ 4.62.1.1 Impact of *Johnson v. California*

A party will establish a prima facie case of racial discrimination with respect to the use of peremptory challenges if the totality of the relevant facts "'gives rise to an inference of discriminatory purpose.'" (***Johnson v. California*** (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129].) *Johnson* reversed the California Supreme Court's decision in ***People v. Johnson*** (2003) 30 Cal.4th 1302, 1318, holding that a prima facie case was established where it was "more likely than not" that purposeful discrimination had occurred. (***People v. Thomas*** (2012) 53 Cal.4th 771, 794.)

In cases where a trial predated the Supreme Court's decision in ***Johnson v. California*** (2005) 545 U.S. 162, and "it is not clear from the record whether the trial court analyzed the *Batson*/*Wheeler* motion with [*Batson*'s] low threshold [of reasonable inference"] in mind" the reviewing court will independently determine whether the record demonstrates a prima facie case of racial discrimination. (***People v. Scott*** (2015) 61 Cal.4th 363, 384; ***People v. Thomas*** (2012) 53 Cal.4th 771, 794.)

In cases where the trial court necessarily relied upon the holding in *Wheeler* and pronouncements by the California Supreme Court that the standard enunciated in *Wheeler* ("strong likelihood") were essentially the same as the *Batson* standard ("reasonable inference"), reversal is not automatic as the reviewing court can review the record and apply the standard in *Johnson* to resolve the legal question of "whether the record supports an inference that the prosecutor excused a juror on the basis of race." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 73, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 4.62.2 Cognizable Groups

The use of a peremptory challenge to strike prospective jurors based on religious affiliation violates defendant's right to equal protection under the California Constitution. But the United States Supreme Court has not similarly extended the *Batson* rule to religious groups. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 266, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

African-American women constitute a cognizable group for purposes of an improper exercise of peremptory challenge based on a discriminatory purpose. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 70-71, fn. 4, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Young*** (2005) 34 Cal.4th 1149, 1173.)

"Whether 'Asians' can or do constitute a cognizable group is an unsettled issue. [The California Supreme Court has] previously observed, however, that 'it is at least questionable whether the generic description Asian ... can constitute a 'cognizable group.'" (***People v. Burney*** (2009) 47 Cal.4th 203, 227.)

"Spanish surnamed" sufficiently describes the cognizable class Hispanic only where no one knows at the time of the challenge whether the prospective juror is Hispanic. Where the record indicates the juror twice stated she was not Hispanic, the prosecutor's peremptory challenge to remove her was not based on race within the meaning of the defendant's *Wheeler* challenge. (***People v. Gutierrez*** (2002) 28 Cal.4th 1083, 1123.)

While the California Supreme Court has held that Hispanic-surnamed jurors are a cognizable class even if it is not known at the time of the challenge whether an individual is Hispanic, the prosecutor's description of prospective jurors in question "as 'Caucasian' weakens any inference of group bias that can be drawn from [the prosecutor's] exercise of peremptory challenges." (***People v. Davis*** (2009) 46 Cal.4th 539, 584.)

§ 4.62.3 Timely Motion

"A motion attacking the use of a peremptory challenge on the basis of group bias must be timely raised." (***People v. Roldan*** (2005) 35 Cal.4th 646, 701, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The motion is timely if made before jury impanelment is completed, which does not occur until the alternates are selected and sworn. (***People v. Scott*** (2015) 61 Cal.4th 363, 384-384; ***People v. McDermott*** (2002) 28 Cal.4th 946, 969.)

A *Batson*/*Wheeler* claim should be raised in a motion to quash or dismiss the jury venire, not a motion for mistrial. (***People v. Williams*** (1997) 16 Cal.4th 635, 662, fn. 9.)

A *Batson*/*Wheeler* motion brought after the jury is sworn could be deemed a mistrial motion, which operates to waive any double-jeopardy defense. (***People v. Jurado*** (2006) 38 Cal.4th 72, 108.)

§ 4.62.4 Prima Facie Showing (First Stage)

"A prima facie case of racial discrimination in the use of peremptory challenges is established if the totality of the relevant facts 'gives rise to an inference of discriminatory purpose.'" (***People v. Scott*** (2015) 61 Cal.4th 363, 382, quoting ***Johnson v. California*** (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129, 137]; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 801.)

A prima facie case is established when a defendant produces "'evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" "An inference is a logical conclusion based on a set of facts." (***People v. Lancaster*** (2007) 41 Cal.4th 50, 74, quoting and citing ***Johnson v. California*** (2005) 545 U.S. 162, 168, fn. 4, 170 [125 S.Ct. 2410, 162 L.Ed.2d 129, 137].)

The proof of a prima facie case may depend upon all relevant evidence in a trial court record, including a "pattern" of striking jurors of a specific race and "'the prosecutor's questions and statements during voir dire examination.'" (***People v. Bell*** (2007) 40 Cal.4th 582, 597, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13, quoting ***Batson v. Kentucky*** (1986) 476 U.S. 79, 96-97 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

While acknowledging that the existence of a prima facie showing at the first stage of *Batson* "depends on consideration of the entire record of voir dire at the time the motion was made" the California Supreme Court has mentioned "certain types of evidence may prove particularly relevant" and "[a]mong these are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the

identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong." (***People v. Scott*** (2015) 61 Cal.4th 363, 384.)

In determining whether or not there is a prima facie showing at the first stage of *Batson*, the court may "consider, as part of the overall relevant circumstances, nondiscriminatory reasons clearly established in the record that necessarily dispel any inference of bias" as distinguished from where the record "simply … suggests grounds for valid challenge." (***People v. Sanchez*** (2016) 63 Cal.4th 411, 435 & fn. 5.)

While the defendant need not be a member of the excluded group, it is significant if the defendant is; and it is also significant, if, in addition, his victims are members of the group to which the majority of the remaining jurors belong. (***People v. Clark*** (2011) 52 Cal.4th 856, 906; ***People v. Davis*** (2009) 46 Cal.4th 539, 583.)

The trial court has no sua sponte duty to reexamine rulings on previous *Wheeler*/*Batson* motions once it has determined a prima facie case of discrimination has been made as to one juror. (***People v. Williams*** (2006) 40 Cal.4th 287, 311.)

A defendant's showing that the prosecutor had exercised a peremptory challenge against an African-American in an unrelated case involving an African-American defendant was relevant to a prima facie showing, but was not very probative in light of the isolated nature of the prior conduct. (***People v. Crittenden*** (1994) 9 Cal.4th 83, 119.)

§ 4.62.4.1 Circumstances Refuting Discriminatory Motive

"Where, "after extensive questioning, the prosecutor successfully rehabilitated two African-American jurors … staving off defense challenges for cause" … '[t]he prosecutor's desire to keep African-American jurors on the jury tended to show that the prosecutor was motivated by the jurors' individual views instead of their race.'" (***People v. Streeter*** (2012) 54 Cal.4th 205, 225, quoting ***People v. Hartsch*** (2010) 49 Cal.4th 472, 487.)

The prosecutor's effort to rehabilitate an African-American juror by engaging in questioning obviously designed to elicit answers that would make her not subject to a challenge for cause evidences the prosecutor wanted that juror on the jury and is probative on the question of whether a prima facie case existed, as well as the third-stage *Wheeler*/*Batson* inquiry (whether purposeful discrimination occurred). (***People v. Jones*** (2011) 51 Cal.4th 346, 362.)

The trial court did not err in finding an absence of a prima facie showing, where the prosecutor repeatedly passed without challenging female jurors. The prosecution's pattern of excusals and acceptances during the peremptory challenge process does not reveal an obvious discrimination towards female jurors and is "patently inconsistent with any such inference." (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1294-1295.)

The prosecutor's acceptance of the jury with one African-American juror and one African-American alternate juror, as well as his desire to have three African-American jurors on the jury who were excused for hardship or cause, combined with only 3 African-American prospective jurors being challenged out of the prosecution's 22 total peremptory challenges, "strongly suggests that race was not a motive" in the prosecutor's challenges. (***People v. Lenix*** (2008) 44 Cal.4th 602, 629.)

Circumstances demonstrating a lack of discriminatory purpose include the prosecutor not challenging several other African-American jurors and the fact that six African-Americans ultimately served on the jury. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 801.)

The prosecutor accepting the jury five times with up to four African-American prospective jurors seated in the jury box, while not conclusive, is an indication of the prosecutor's good faith and an appropriate consideration for the trial court in ruling on a *Wheeler* objection. (***People v. Streeter*** (2012) 54 Cal.4th 205, 224.)

The prosecutor's acceptance of a jury containing three African-American jurors is an indication of the prosecutor's good faith in exercising peremptory challenges. (***People v. Huggins*** (2006) 38 Cal.4th 175, 236.)

The presence of minority jurors on the panel is an indication of a prosecutor's good faith in exercising his or her peremptories. (***People v. Lewis*** (2008) 43 Cal.4th 415, 480, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

Although the prosecutor ultimately excused four of five African-American jurors called to the jury box, there was no discernible pattern from which to infer discrimination. The prosecutor passed without challenging African-American prospective jurors during several rounds of peremptory challenges before finally excusing them. The prosecutor also repeatedly passed without challenging a prospective female African-American juror who ultimately served as a juror in the guilt phase. (***People v. Clark*** (2011) 52 Cal.4th 856, 906.)

"[T]he ultimate composition of the predominantly female jury, along with the relatively modest number of prosecution strikes used against women throughout jury selection, makes it difficult to infer purposeful discrimination under *Wheeler*/*Batson*." (***People v. Garcia*** (2011) 52 Cal.4th 706, 748.)

The circumstance that a peremptory challenge was exercised against a juror who was not subject to exclusion for cause "certainly did not support an inference that the exercise of a peremptory challenge against her was motivated by group bias." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 70, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 4.62.4.2 Numbers / Percentages

"'As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion.'" (***People v. Bell*** (2007) 40 Cal.4th 582, 598, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13, quoting ***People v. Harvey*** (1984) 163 Cal.App.3d 90, 111.)

Where the prosecutor exercised peremptory challenges as to all three of the African-American prospective jurors available to challenge, the "circumstances certainly justify the trial court's finding of a prima facie case" and "warrant close scrutiny of the prosecutor's reasons" by the trial court. (***People v. Melendez*** (2016) 2 Cal.5th 1, 15.)

Improper discrimination was not suggested where, before accepting the panel, the prosecutor exercised a total of 15.4 percent of her challenges (2 out of 13) against African-American prospective jurors. One African-American sat on the jury – representing 8.3 percent of the jury, which was approximately the same percentage of African-Americans on the venire, and one African-American sat as an alternate. "While not conclusive, the fact that the jury included an African-American is an indication of good faith by the prosecutor in exercising peremptories." While "not persuaded [by the statistics] that a disproportionate number of African-Americans were excluded from the jury… because even a lone race-based challenge is unconstitutional, we [nevertheless] bear in mind those statistics while examining the prosecutor's explanation for challenging [two African-American prospective jurors]." (***People v. Chism*** (2014) 58 Cal.4th 1266, 1315-1316 [omitting internal quotes & citations].)

At the time of the motion, "four of the 12 prospective jurors on panel – exactly one-third – were black. Given the small sample size at issue, the trial court reasonably refused to infer a discriminatory intent on the basis of these statistics." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1147, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"Defendant's statistical analysis does not raise an inference of racial discrimination. The numbers are subject to a variety of interpretations, by one of which Whites were actually underrepresented on the panel as compared to African-Americans." (***People v. Hartsch*** (2010) 49 Cal.4th 472, 487-488.)

"Standing alone, defendant's statistics do not raise an inference of discrimination. Notably, African-Americans comprised 5 percent of the jury pool but represented nearly 10 percent of the selected jury." (***People v. Clark*** (2011) 52 Cal.4th 856, 905.)

The statistics regarding the exercise of peremptory challenges were "not particularly troubling where the prosecutor exercised peremptory challenges of 60 percent of African-American prospective jurors called into the box – three out of five – and a little less than a third of the non-African-American jurors called in the box – 19 out of 62. The prosecutor challenged African-American jurors at a rate that was only slightly higher than their percentage on the jury. One less challenge would have resulted

in a challenge rate lower than their percentage on the jury. (***People v. Jones*** (2011) 51 Cal.4th 346, 362.)

There was no prima facie showing where the only stated bases for disputing the peremptory challenges were (1) four of the first five peremptory challenges were against African-Americans, and (2) a small minority of the panel members were African-American. (***People v. Farnam*** (2002) 28 Cal.4th 107, 136-137.)

A prima facie showing of group bias was not made where the only basis was that one of two African-American jurors excused would not have been subject to excusal for cause, particularly in view of the circumstance that the other African-American juror had been repeatedly passed without challenge by the prosecutor from the beginning of voir dire and ultimately served on the jury. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 69-70, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The defense failed to show the prosecution struck most or all members of an identified group or used a disproportionate number of challenges against the group where the prosecutor had excused two African-American female jurors. Two African-Americans remained on the panel, and the defense had exercised one of its challenges against an African-American juror. The defendant offered no circumstances relevant to his claim of discriminatory intent and "made no attempt to argue that the excused jurors were not, apart from their race, as 'heterogeneous as the community as a whole' or that the prosecution engaged them in desultory voir dire." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 801-802.)

§ 4.62.4.3 Desultory Voir Dire

A party's failure to engage in meaningful voir dire on a topic the party says is important can suggest the stated reason for the exercise of a peremptory challenge is pretextual. (***People v. Lewis*** (2008) 43 Cal.4th 415, 476, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919, citing ***Miller-El v. Dretke*** (2005) 545 U.S. 231, 250 fn. 8 [125 S.Ct. 2317, 162 L.Ed.2d 196].)

While "[u]nder certain circumstances perfunctory voir dire can be indicative of hidden bias," where the prosecutor's sole question focused on the prospective juror's ambivalence about the death penalty, which that juror confirmed, the inquiry did "not constitute 'powerful circumstantial evidence that the challenge was exercised upon a prohibited race basis.'" Notably, before oral voir dire, the prosecutor had the benefit of the prospective juror completing a 14-page questionnaire containing 38 questions with subparts. "Under these circumstances, [the California Supreme Court] places little weight on the prosecutor's failure to more thoroughly question a prospective juror before exercising a peremptory challenge." (***People v. Edwards*** (2013) 57 Cal.4th 658, 698-699, internal quotation marks & citations omitted.)

Where the prosecutor questions a prospective juror only briefly on a relevant subject, "it is of little significance … where the prosecutor had a detailed jury

questionnaire to review and heard the attorneys for both defendants question [the prospective juror] at some length." (***People v. Melendez*** (2016) 2 Cal.5th 1, 19, citing ***People v. Dement*** (2011) 53 Cal.4th 1, 20-21; ***People v. Taylor*** (2010) 48 Cal.4th 574, 615-616.)

The fact that a prosecutor asked few questions before excusing a juror is of "limited significance" in a case in which the prosecutor reviewed the jurors' questionnaires and was able to observe their responses and demeanor during extensive individual questioning by the court and later during group voir dire. (***People v. Clark*** (2011) 52 Cal.4th 856, 906-907; ***People v. Taylor*** (2010) 48 Cal.4th 574, 615-616.)

§ 4.62.4.4 Circumstances Where Prosecutor Is Asked for Reasons Notwithstanding Trial Court Finding No Prima Facie Showing

Where the trial court finds no prima facie case of discrimination, invites the prosecutor to state reasons, the prosecutor does so, and then the trial court credits those reasons in an alternative ruling, the United States Supreme Court has not indicated whether an appellate court reviews the trial court's first-stage ruling finding no prima facie case, or instead, reviews the third-stage alternative ruling that there was no purposeful discrimination. The California Supreme Court acknowledged its lack of consistency on the issue, and has now clarified: "where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson*/*Wheeler* motion with a review of the first-stage ruling." (***People v. Scott*** (2015) 61 Cal.4th 363, 386-387, 391.)

§ 4.62.5 Prosecutor's Reasons for Exercising Peremptory Challenge (Second Stage)

A prosecutor asked to explain his conduct must provide a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 102, internal quotation marks & citations omitted.)

A prosecutor is not obligated to state his reasons for challenging any prospective juror where the trial court concludes that the defendant had not made a prima facie case of discrimination. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1147 [holding that even where trial court allows prosecutor to state reasons and then passes upon those reasons, first stage determination will be reviewed on appeal], overruled on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; ***People v. Carasi*** (2008) 44 Cal.4th 1263, 1292.)

"Once the trial court concludes that the defendant has produced evidence raising an inference of discrimination, the court should not speculate as to the prosecutor's reasons – it should inquire of the prosecutor." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 73, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, citing ***Johnson v. California*** (2005) 545 U.S. 162 [125 S.Ct. 2410, 2417, 162 L.Ed.2d 129].)

When the trial court determines the defendant has made a prima facie showing that a particular prospective juror has been challenged because of group bias, it need not ask the prosecution to justify its challenges to other prospective jurors of the same group for which the *Batson*/*Wheeler* motion has been denied. (***People v. Avila*** (2006) 38 Cal.4th 491, 549, disapproving to the extent inconsistent, *People v. McGee* (2002) 104 Cal.App.4th 559.)

"There is nothing suspect about any reluctance the prosecutor may have had to state his reasons" in response to the trial court indicating, after finding no prima facie case had been made, that the prosecutor was permitted, but not required, to state his reasons for the challenges on the record. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1148 [holding that even where trial court allows prosecutor to state reasons and then passes upon those reasons, first stage determination will be reviewed on appeal], overruled on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"[T]he absence of a reason that is apparent on the record does not, in the context of all the other circumstances, suggest that the reason was race." "Even if the struck African–American jurors had nothing in common with each other besides their race, that circumstance does not, in itself, create an inference that they were excused because of their race where, as here, obvious bases for the prosecutor's decision to excuse many of the jurors appear in the record." (***People v. Thomas*** (2012) 53 Cal.4th 771, 795.)

Except in rare cases where the prosecutor's explanation will entail confidential communications or reveal trial strategy, it is error under state law to permit the prosecutor to give his or her reasons for the disputed peremptory challenge in an *ex parte*, *in camera* hearing. (***People v. Silva*** (2001) 25 Cal.4th 345, 384; ***People v. Ayala*** (2000) 24 Cal.4th 243, 262.)

"Although the prosecutor must present a comprehensible reason, 'the second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices. [Citation.]" (***Rice v. Collins*** (2006) 546 U.S. 333 [126 S.Ct. 969, 973-974, 163 L.Ed.2d 824].)

The reviewing court is not obligated to consider the persuasiveness of the prosecutor's reasons where it finds that the defendant failed to meet the standard imposed by *Batson*. It is not until the third step of the process that the persuasiveness of the prosecutor's reasons becomes relevant, i.e., when the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.

(***People v. Cornwell*** (2005) 37 Cal.4th 50, 67, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The prosecutor's reasons need not be sufficient to justify a challenge for cause, and even a trivial, arbitrary, or idiosyncratic reason, if it is genuine and neutral, is sufficient justification for exercising a peremptory challenge. Peremptory challenges may be based on hunches, gestures, or facial expressions. (***People v. Duff*** (2014) 58 Cal.4th 527, 547; ***People v. Jones*** (2013) 57 Cal.4th 899, 917; ***People v. Jones*** (2011) 51 Cal.4th 346, 360; ***People v. Lenix*** (2008) 44 Cal.4th 602, 613; see also ***Purkett v. Elem*** (1995) 514 U.S. 765 [115 S.Ct. 1769, 131 L.Ed.2d 834, 839-840].)

"A peremptory challenge is not a challenge for cause but may be exercised whenever a legitimate reason appears for a party to worry whether that juror will be impartial." The circumstance where a juror hesitates over whether he would favor one side over another provides a valid reason for the use of a peremptory challenge. (***People v. Jones*** (2011) 51 Cal.4th 346, 367.)

"Although this is not a conclusive factor, we have stated that 'the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'" (***People v. Williams*** (2013) 56 Cal.4th 630, 659, quoting ***People v. Snow*** (1987) 44 Cal.3d 216, 225; ***People v. Hartsch*** (2010) 49 Cal.4th 472, 487 [same].)

The fact that at the time of the motion, "the jury's racial composition exactly matched the venire's and … the fact that half of the jurors ultimately seated were black, a higher ration than in the venire" is a "significant indication of the prosecution's good faith in exercising peremptories." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1149, internal quotation marks omitted, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

The trial court's determination that the prosecutor's statement of nondiscriminatory reasons for dismissing five African-American jurors were sincere, and no purposeful discrimination was established was supported by the record where none of the seated jurors "expressed views so starkly similar to those of the excused prospective jurors as to expose, on the face of a cold record, any pretext in the prosecutor's stated reasons for excusals" and where the defendant pointed to "no disparate or trick questioning by the prosecutor, designed to create pretexts for retaining nonminority panelists while excusing those belonging to a minority racial group." (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1118, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, citing ***Miller-El v. Dretke*** (2005) 545 U.S. 231, 260-263, 265 [125 S.Ct. 2317, 162 L.Ed.2d 196].)

In reviewing the record it is "clear that the prosecutor was looking without regard to race, for sober-minded jurors who led orderly lives and could impose the death penalty if the evidence warranted it. The prospective jurors, including Latinos and African-

Americans, whom he accepted were of that type, and those he rejected were lacking in the essentially pro-death-penalty qualities he was seeking." (***People v. Huggins*** (2006) 38 Cal.4th 175, 236.)

The credibility of the prosecutor's justifications for exercising a peremptory challenge "'can be measured by how reasonable, or how improbable, the explanations are, and by whether the proffered rationale has some basis in accepted trial strategy.'" (***People v. Schmeck*** (2005) 37 Cal.4th 240, 271, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637, quoting ***Miller-El v. Dretke*** (2005) 545 U.S. 231 [125 S.Ct. 2317, 2342, 162 L.Ed.2d 196].)

It does not matter whether it was reasonable for the prosecutor to doubt the desirability of prospective jurors for reasons that are neutral for *Batson*/*Wheeler* purposes. Considerations such as whether the prospective jurors were born in Berkeley or linked to dilapidated automobiles are not so closely connected with a protected group so as to be surrogates for membership in the protected group and thus arguably impermissible considerations. (***People v. Huggins*** (2006) 38 Cal.4th 175, 231, fn. 14.)

An advocate may legitimately be concerned about a potential juror who does not answer questions. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1019.)

"A concern with a juror's ability to understand the proceedings and anticipated testimony is another proper basis for a challenge." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 106; ***People v. Turner*** (1994) 8 Cal.4th 137, 169 [same], abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

"While [the] reason might not be sufficient in isolation to support a challenge, the absence of any significant questioning by defense counsel is relevant and may legitimately support a prosecutor's feeling that the panelist would favor the defense." (***People v. Winbush*** (2017) 2 Cal.5th 402, 437.)

While the court and the parties were never made aware of the prosecutor's possible error in excusing the prospective juror, where the record presented "the possibility that the prosecutor mistook [the juror who was the subject of the *Batson*/*Wheeler* motion] for another prospective juror, … also an African-American woman, who happened to have the same last name" the California Supreme Court concluded, based on a review of the entire record, "that this act of mistaken identity is the most probable explanation of the events disclosed in the record and that there was no violation of *Batson*/*Wheeler*." (***People v. Williams*** (2013) 56 Cal.4th 630, 659; ***People v. Williams*** (1997) 16 Cal.4th 153, 188-189 [mistake in excusing prospective juror can be genuine race-neutral reason.)

§ 4.62.5.1 Death Penalty Views

"A juror's reluctance to impose the death penalty has long been considered a legitimate, race-neutral basis for excusal in a capital case," (***People v. Winbush*** (2017) 2 Cal.5th 402, 436.)

A juror's reservations regarding the death penalty is a valid race-neutral reason for the exercise of a peremptory challenge. (***People v. Booker*** (2011) 51 Cal.4th 141, 167; ***People v. Lomax*** (2010) 49 Cal.4th 530, 572; ***People v. Davenport*** (1995) 11 Cal.4th 1171, 1202 [peremptory challenge against a death-penalty skeptic – i.e., a prospective juror who is not excusable for cause under *Witherspoon* but expresses reservations about the death penalty – is not improper], abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

"[E]ven when jurors have expressed neutrality on the death penalty, neither the prosecutor nor the trial court is required to take the jurors' answers at face value. [Citation.] If other statements or attitudes of the juror suggests that the juror has reservations or scruples about imposing the death penalty, this demonstrated reluctance is a race-neutral reason that can justify a peremptory challenge, even if it would not be sufficient to support a challenge for cause." (***People v. Lomax*** (2010) 49 Cal.4th 530, 572, internal quotation marks omitted.)

A prospective juror's "expressed preference for leniency constituted a neutral basis for the prosecutor to doubt his ability to return a verdict of death." (***People v. Johnson*** (2015) 61 Cal.4th 734, 756.)

Peremptory challenges may be used to exclude jurors based on their attitudes toward capital punishment. (***People v. Mendoza*** (2016) 62 Cal.4th 856, 913 [defendant's constitutional rights not violated by prosecutor excusing prospective juror based on reservations about death penalty]; ***People v. Salcido*** (2008) 44 Cal.4th 93, 144 [skepticism about death penalty permissible basis for prosecutor's exercise of peremptory challenge]; ***People v. Ledesma*** (2006) 39 Cal.4th 641, 678.)

A juror conditioning imposition of the death penalty on multiple murders, describing his feelings concerning the death penalty as neutral, and expressing an opinion that life in prison without parole was the harshest sentence was a sufficient race-neutral basis for exercising a peremptory challenge. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 678.)

A prospective juror's statement in responding to the questionnaire that he was "only moderately" in favor of death penalty and believed a life sentence to be a more severe penalty supports a race-neutral reason for exercising a peremptory challenge. Another prospective juror's "ambivalent feelings" toward the death penalty and discomfort with the role of deciding whether to impose a death sentence supports a race-neutral basis for a peremptory challenge of that prospective juror. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 802.)

"Obvious race-neutral grounds" for peremptory challenges include the fact that a prospective juror "voiced strong opposition towards the death penalty" or considered life imprisonment a more severe penalty than death or had a criminal record. (***People v. Davis*** (2009) 46 Cal.4th 539, 584.)

A juror's equivocal response about an ability to impose the death penalty is relevant to a challenge for cause, but does not undercut the race-neutral basis for a prosecutor's decision to excuse the prospective juror peremptorily. (***People v. Johnson*** (2015) 61 Cal.4th 734, 757; ***People v. Hoyos*** (2007) 41 Cal.4th 872, 902, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641; ***People v. Catlin*** (2001) 26 Cal.4th 81, 118.)

§ 4.62.5.2 Jurors' Age / Attire

"A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge.… [I]t is not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older, more permanent resident to impose a substantial penalty. Likewise, a slovenly appearance can reveal characteristics that are legitimately undesirable to the prosecution." (***People v. Lomax*** (2010) 49 Cal.4th 530, 575, citations omitted.)

The prosecutor's wariness of the "young and rootless" could be seen as race-neutral, for she used a peremptory strike on a white male juror with the same characteristics. (***Rice v. Collins*** (2006) 546 U.S. 333 [126 S.Ct. 969, 975, 163 L.Ed.2d 824].)

The prosecutor's combined concern with the prospective juror's "limited life experience" and intellectual capacity constituted race-neutral explanations for a peremptory challenge. (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 108-109.)

§ 4.62.5.3 Criminal Justice Contacts/Opinions

"A juror's prior arrest is an accepted race-neutral reason for peremptory challenge." (***People v. Winbush*** (2017) 2 Cal.5th 402, 436.)

A juror's negative experience with the criminal justice system or a criminal conviction constitute valid, race-neutral reasons for a prosecutor to dismiss a potential juror from the jury. (***People v. Melendez*** (2016) 2 Cal.4th 1, 18; ***People v. Lomax*** (2010) 49 Cal.4th 530, 575; accord, ***People v. Garcia*** (2011) 52 Cal.4th 706, 749 [negative contacts with criminal justice system].)

A prospective juror's "recent domestic violence conviction – unquestionably constituted a valid, race-neutral ground for the challenge." (***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1321, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.)

The arrest of a juror or a close relative is an accepted race-neutral reason for exercising a peremptory challenge. (***People v. Riccardi*** (2012) 54 Cal.4th 758, 795, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Even if the defendant's argument is factually correct that more African-Americans would have relatives in prison than members of other groups, that would "not establish that criterion is not race neutral." Instead, that "circumstance is only relevant to the inquiry as to whether the reasons were sincere and not merely pretextual." (***People v. Melendez*** (2016) 2 Cal.5th 1, 18.)

"Skepticism about the fairness of the criminal justice system to indigents and racial minorities has also been recognized as a valid race-neutral ground for excusing a juror." (***People v. Winbush People v. Winbush*** (2017) 2 Cal.5th 402, 439.)

"When a prospective juror's hostility to law enforcement and the criminal justice system is not sufficient to support a dismissal for cause, it may well justify a prosecutor's peremptory challenge." (***People v. Winbush*** (2017) 2 Cal.5th 402, 441.)

§ 4.62.5.4 Occupation / Education / Affiliations

A prospective juror's background as a psychology major supported a race-neutral reason for a peremptory challenge by the prosecutor because the prospective juror "posed the danger of having her own specialized knowledge influence her decisionmaking regarding the significance of the claims of defendant's mental illness." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 802.)

A prospective juror's "educational background, interest and experience in the field of psychology was a race-neutral reason justifying his excusal." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 110.)

A prospective juror's educational background (psychology courses) or experience in counseling or social services (master's degree in theology and helping homeless obtain social service benefits) are race-neutral reasons for a prosecutor to challenge prospective jurors. (***People v. Clark*** (2011) 52 Cal.4th 856, 907.)

The prosecutor reasonably could have believed that given the prospective juror's profession (administrative law judge), she "might consciously or unconsciously exert undue influence during the deliberative process, or that fellow jurors would ascribe to her a special legal expertise." (***People v. Clark*** (2011) 52 Cal.4th 856, 907.)

The prosecutor's apprehension about the prospective juror's connection to the Job Corps, which defendant had at one time attended, appeared to be legitimate concern unrelated to race. (***People v. Jones*** (2013) 57 Cal.4th 899, 917.)

A prosecutor's genuine subjective distrust of the fairness of a juror based on affiliations with certain organizations can be sufficient to support the peremptory challenge of a juror. (***People v. Jones*** (2013) 57 Cal.4th 899, 917.)

§ 4.62.5.5 Prior Jury Experience

"Prior service on a deadlocked jury is an accepted neutral reason for excusing a prospective juror." (***People v. Johnson*** (2015) 61 Cal.4th 734, 757-758; ***People v. Winbush*** (2017) 2 Cal.5th 402, 438-39 ["[M]any cases have held service on a hung jury to be an appropriate, race-neutral reason for excusing a juror, and this reason alone" can justify excusal."])

Concern over a potential juror who had been responsible for a failure to reach a verdict in another case, who felt harassed by other jurors during those deliberations and who indicated she learned from that experience to avoid being swayed by the views of others, is a non-discriminatory reason for excusing a prospective juror. (***People v. Garcia*** (2011) 52 Cal.4th 706, 749.)

§ 4.62.5.6 Inattentiveness

A prospective juror's "failure to disclose information in response to the jury questionnaire and her later claim of forgetfulness in explanation supply a factual basis for the prosecutor's concern that she was not paying enough attention to the process and to her responsibilities. A genuine concern that a prospective juror is not forthcoming or is not paying sufficient attention to the proceedings is a race-neutral basis for a peremptory challenge." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 114.)

§ 4.62.6 Evaluating Prosecutor's Reasons (Third Stage)

The third step in a *Batson* analysis "involves evaluating 'the persuasiveness of the justification proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.' [Citation.]" (***Rice v. Collins*** (2006) 546 U.S. 333 [126 S.Ct. 969, 974, 163 L.Ed.2d 824].)

When the trial court finds a prima facie case, then the reviewing court "must determine whether the trial court correctly ruled that the defense did not demonstrate discriminatory purpose at the third stage. The prosecutor's justification does not have to support a challenge for cause, and even a trivial reason, if genuine and race neutral, is sufficient. The inquiry is focused on whether the proffered neutral reasons are subjectively genuine, not on how objectively reasonable they are. The reasons need only be sincere and nondiscriminatory. [The reviewing cour considers] the trial court's determination with restraint, presume[s] the prosecutor has exercised the challenges in a constitutional manner, and defer[s] to the trial court's ability to distinguish genuine reasons from sham excuses. When the trial court makes a sincere and reasoned effort to evaluate the prosecutor's reasons, the reviewing court defers to its conclusions on appeal, and examines only whether substantial evidence supports them." (***People v. Melendez***

(2016) 2 Cal.5th 1, 15-16, citing ***People v. O'Malley*** (2016) 62 cal.4th 944, 975; ***People v. Lenix*** (2008) 44 Cal.4th 602, 613.)

Reasons for exercising a peremptory challenge should be viewed in combination, as a party may decide to exercise a peremptory challenge for a variety of reasons, with no single characteristic being dispositive. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 678.)

The proper inquiry regarding a prosecutor's reasons for excusing a prospective juror is not whether the reviewing court finds the challenged prospective jurors similarly situated to those who were accepted, but whether the record shows that the party making the peremptory challenge honestly believed the juror not to be similarly situated in legitimate respects. If the stated reason does not hold up, its pretextual significance does not fade because an appellate court can imagine a reason that might not have been shown as false. (***People v. Huggins*** (2006) 38 Cal.4th 175, 233.)

A third-stage inquiry is deferential and examines "only whether substantial evidence supports [the trial court's] conclusions. The identical standard applies to a comparative juror analysis." The reviewing court presumes "that a prosecutor uses peremptory challenges in a constitutional manner and give[s] great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. As long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (***People v. Johnson*** (2015) 61 Cal.4th 734, 755, internal quotation marks & citations omitted.)

"The critical question in determining whether a prisoner has proved purposeful discrimination at a third-stage inquiry is the persuasiveness of a prosecutor's justification for his peremptory strike. At this stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. In the typical peremptory challenge inquiry the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue and the best evidence will often be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within in a trial judge's province." (***People v. Riccardi*** (2012) 54 Cal.4th 758, 787, internal quotation marks & citations omitted, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

When the prosecutor's stated reasons are either unsupported by the record or inherently implausible, or both, more is required of the trial court than a finding that the prosecutor's reasons appear sufficient. (***People v. Silva*** (2001) 25 Cal.4th 345, 386.)

"'The proper focus of a *Batson*/*Wheeler* inquiry … is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons.'" (***People v. Jones*** (2013) 57 Cal.4th 899, 917, quoting ***People v. Reynoso*** (2003) 31 Cal.4th 903, 924.)

The denial of the defendant's *Batson*/*Wheeler* motion after defense counsel declined the court's invitation to comment on the prosecutor's explanation did not constitute a failure to make a sincere and reasoned attempt to evaluate the prosecutor's credibility. Defense counsel's declining to comment on the prosecutor's explanation suggests he found the prosecutor's explanation credible. (***People v. Jones*** (2011) 51 Cal.4th 346, 361.)

"All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. A reason that makes no sense is nonetheless sincere and legitimate as long as it does not deny equal protection." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 102, internal quotation marks & citations omitted.)

"In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 102, quoting ***People v. Lenix*** (2008) 44 Cal.4th 602, 613, fn. omitted, quoting ***Miller–El v. Cockrell*** (2003) 537 U.S. 322, 339, 123 S.Ct. 1029, 154 L.Ed.2d 931, internal quotation marks & citations omitted; ***People v. Jones*** (2011) 51 Cal.4th 346, 360 [same].)

The trial court properly relied on "casewide factors" in crediting the prosecutor's explanations including the fact that "the same prosecutor had tried this case previously; the court was not aware of the prosecutor ever deliberately misleading the court about a matter of importance in that trial; the prosecutor did not use all of his peremptory challenges during that trial, and one juror who identified herself as Mexican–American actually sat as a juror in that trial." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 115-116.)

An honest mistake of fact is "quite plausible" where a prosecutor keeping track of dozens of prospective jurors, thousands of pages of jury questionnaires, and days of voir dire, had to make challenges without the luxury of checking facts as appellate attorneys and reviewing courts are able to do. An isolated mistake or misstatement does not, standing alone, compel the conclusion the prosecutor's reason was insincere. (***People v. Jones*** (2011) 51 Cal.4th 346, 366.)

Where the trial court indicated in evaluating the prosecutor's reasons "'I'm going to assume that the lawyers are upfront with me – [¶] ... [¶] – until they prove that they can't be trusted. And so, therefore, you get the benefit of the doubt...,'" the reviewing court concluded that based on the record, the trial court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecution and its conclusions were entitled to deference. (***People v. Williams*** (2013) 58 Cal.4th 197, 283.)

The defendant asserted the trial court's evaluation of the prosecutor's proffered reasons was not entitled to deference because the trial court itself was biased against African-American women based on its comment "'I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is.'" The California Supreme Court rejected the assertion and accorded deference to the trial court's rulings on the *Batson*/*Wheeler* motion since the comment was isolated and made in specific response to a question from trial counsel, the court expressly noted its ruling was not influenced by the observation, and the record as a whole did not support the assertion the trial court was biased against African-American women. (***People v. Williams*** (2013) 56 Cal.4th 630, 652.)

It is not necessary to decide "whether the policies of certain organizations are liberal or not; the prosecutor's subjective distrust of jurors affiliated with such organizations – if genuine – is sufficient to support the juror challenge." Accordingly, on appeal, the court deferred to the trial judge's assessment as to whether the prosecutor's expressed concerns were subjectively genuine. (***People v. Jones*** (2013) 57 Cal.4th 899, 917.)

A significant indication of a prosecutor's good faith in exercising peremptory challenges includes the jury's racial composition at the time of the motion matching the venire, and the ratio of the jury actually seated exceeding the racial composition of the venire. (***People v. Banks*** (2015) 59 Cal.4th 1113, 1149.)

Although not conclusive, it is an indication of good faith in exercising peremptory challenges that the jury included a member of the group purportedly being discriminated against. (***People v. Johnson*** (2015) 61 Cal.4th 734, 760.)

The trial court is not required to explain on the record its ruling. If the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. (***People v. Vines*** (2011) 51 Cal.4th 830, 849-850.)

On appeal, the defendant relied on statistics, i.e. "African-Americans comprised only about 6 percent of the panel, the prosecutor used 30 percent of his peremptory challenges against them, excusing 100 percent of the African-American panelists called into the jury box," to challenge the validity of the prosecutor's race neutral explanations. "By the third step, the court has already found that exclusion of jurors from a particular group requires explanation. The question at the third step is not whether the defendant can plausibly urge systematic exclusion, but whether any particular panelist was, in fact, excused due to group bias. While statistical facts may retain some relevance at *Batson*'s third step as part of the universe of evidence bearing on the plausibility of asserted justifications for a strike, no case has suggested such facts alone could be sufficient to establish pretext." (***People v. Winbush*** (2017) 2 Cal.5th 402, 446-47 [internal citations omitted].)

§ 4.62.6.1 Demeanor

A judge's "firsthand observations" are of "even greater importance" in evaluating a race-neutral reason based on the demeanor of a prospective juror. (***Snyder v. Louisiana*** (2008) 552 U.S. 472, 477 [128 S.Ct. 1203, 170 L.Ed.2d 175].)

Where an explanation for a peremptory challenge is based on the demeanor of a prospective juror, a judge should take into account, among other things, any observations the judge was able to make during voir dire. However, nothing in *Batson* or *Snyder* requires that a demeanor-based explanation must be rejected if the judge either did not observe, or does not recall, the prospective juror's demeanor. (***Thaler v. Haynes*** (2010) 559 U.S. 43, 47-49 [130 S.Ct. 1171, 175 L.Ed.2d 1003] (per curiam); see also ***People v. Williams*** (2013) 56 Cal.4th 630, 657-658 [reviewing court does not discount trial court's ability to assess prosecutor's credibility even absent trial court's recollection of the prospective juror's demeanor].)

"Appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record." (***People v. Scott*** (2015) 61 Cal.4th 363, 378-379, quoting ***People v. Jones*** (2012) 54 Cal.4th 1, 41, internal quotation marks omitted.)

Substantial evidence supporting the trial court's determination that the prosecutor properly exercised peremptory challenges included the fact that "the trial court had the opportunity to see the demeanor of all of the relevant jurors, and it stated on the record that the challenged jurors had demonstrated more reluctance to impose the death penalty than other jurors whom the prosecution did not challenge." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1150, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

§ 4.62.7 Comparative Analysis

The United States Supreme Court has concluded that a comparative analysis may be a useful tool in proving purposeful discrimination. (***People v. Lewis*** (2008) 43 Cal.4th 415, 472, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919, citing ***Miller-El v. Dretke*** (2005) 545 U.S. 231, 241 [125 S.Ct. 2317, 162 L.Ed.2d 196]; ***Snyder v. Louisiana*** (2008) 552 U.S. 472, 483-484 [128 S.Ct. 1203, 170 L.Ed.2d 175].)

"The rationale for comparative juror analysis is that a side-by-side comparison of a prospective juror struck by the prosecutor with a prospective juror accepted by the prosecutor may provide relevant circumstantial evidence of purposeful discrimination by the prosecutor." (***People v. Winbush*** (2017) 2 Cal.5th 402, 442 [internal quotation marks and citations omitted]; ***People v. Huggins*** (2006) 38 Cal.4th 175, 233, citing ***Miller-El v. Dretke*** (2005) 545 U.S. 231, 241-252 [125 S.Ct. 2317, 162 L.Ed.2d 196].)

Both ***Snyder v. Louisiana*** (2008) 552 U.S. 472 [128 S.Ct. 1203, 170 L.Ed.2d 175], and ***Miller-El v. Dretke*** (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196], "demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive on the issue of intentional discrimination." (***People v. Lenix*** (2008) 44 Cal.4th 602, 622; ***People v. Cruz*** (2008) 44 Cal.4th 636, 658.)

"'In order for a comparison to be probative, jurors need not be identical in all respects (***Miller-El v. Dretke*** (2005) 545 U.S. 231, 247, fn. 6 [162 L. Ed. 2d 196, 125 S. Ct. 2317]), but they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge.'" (***People v. Melendez*** (2016) 2 Cal.5th 1, 18, quoting ***People v. DeHoyos*** (2013) 57 Cal.4th 79, 107.)

"Pretext is established …when the compared jurors have expressed a substantially similar combination of responses, in all material respects, to the jurors excused. Although jurors need not be completely identical for a comparison to be probative, they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge." (***People v. Winbush*** (2017) 2 Cal.5th 402, 443 [internal quotation marks and citations omitted].)

§ 4.62.7.1 Comparative Analysis on Appeal

Following the high court's decision in ***Miller-El v. Dretke*** (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196], the California Supreme Court declined to engage in comparative juror analysis as an initial matter on appeal. Following the high court's decision in ***Snyder v. Louisiana*** (2008) 552 U.S. 472 [128 S.Ct. 1203, 170 L.Ed.2d 175], the California Supreme Court assumed, without deciding, that it must undertake comparative juror analysis for the first time on appeal under the same circumstances as in *Snyder*. (***People v. Salcido*** (2008) 44 Cal.4th 93, 141.) The California Supreme Court has now held that "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (***People v. Lenix*** (2008) 44 Cal.4th 602, 622; ***People v. Cruz*** (2008) 44 Cal.4th 636, 638.)

The California Supreme Court has concluded that the two United States Supreme Court cases in which the high court conducted comparative juror analysis for the first time on appeal (***Snyder v. Louisiana*** (2008) 552 U.S. 472 [128 S.Ct. 1203, 170 L.Ed.2d 175], and ***Miller-El v. Dretke*** (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196]) "stand for the unremarkable principle that reviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent." (***People v. Lenix*** (2008) 44 Cal.4th 602, 607; ***People v. Cruz*** (2008) 44 Cal.4th 636, 658.)

"[A] defendant may engage in 'comparative juror analysis'; that is, may compare the responses of the challenged jurors with those of similar unchallenged jurors who were not members of the challenged jurors' racial group. Such analysis is not necessarily

dispositive, but it is one form of relevant circumstantial evidence." (***People v. Melendez*** (2016) 2 Cal.5th 1, 15.)

In undertaking comparative analysis on appeal, "'[t]he reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment.'" (***People v. Cruz*** (2008) 44 Cal.4th 636, 659, quoting ***People v. Lenix*** (2008) 44 Cal.4th 602, 624.)

For purposes of comparative analysis, the responses to questionnaires by prospective jurors "who never made it into the jury box are irrelevant because they do not prove that the prosecutor would have accepted such jurors." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1149, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"[C]omparative juror analysis on a cold appellate record has inherent limitations. In addition to the difficulty of assessing tone, expression and gesture from the written transcript of voir dire, we attempt to keep in mind the fluid character of the jury selection process and the complexity of the balance involved. Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 103, internal quotation marks & citations omitted.)

When a comparative juror argument is made for the first time on appeal and the prosecutor was not asked to explain reasons for challenging other jurors that are the subject of comparison on appeal, "the reviewing court must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable … [and] consider such evidence in light of the deference due to the trial court's ultimate finding of no discriminatory purpose." (***People v. Melendez*** (2016) 2 Cal.5th 1, 15, citing ***People v. O'Malley*** (2016) 62 Cal.4th 944, 975–976.)

"'One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges.'" (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 106-107, quoting ***People v. Jones*** (2011) 51 Cal.4th 346, 365.)

"In order for a comparison to be probative, jurors need not be identical in all respects (*Miller–El v. Dretke* (2005) 545 U.S. 231, 247, fn. 6, 125 S.Ct. 2317, 162 L.Ed.2d 196), but they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 106-107.)

If a prosecutor's proffered reason for striking a Black panelist applied just as well to an otherwise-similar non-Black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step. (***People v. Lewis***

(2008) 43 Cal.4th 415, 472, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

While both the trial court and the reviewing court examine only those reasons actually given by the prosecutor in judging why a prosecutor exercised a particular challenge, that does not mean that the reviewing court cannot consider reasons not stated on the record for the prosecutor having accepted *other* jurors. "[N]o authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why *other* jurors were *not* challenged." (***People v. Jones*** (2011) 51 Cal.4th 346, 365.)

The timing and use of peremptory challenges are subjects of trial strategy and in terms of refuting inferences being drawn by the defense through comparative analysis on appeal. The record demonstrated the prosecutor likely assumed the defense had its own reservations concerning prospective jurors and would excuse them. Consequently, it would not have been unreasonable to accept those jurors before the defense exhausted its own peremptory challenges in an effort to conserve the prosecution's peremptory challenges for "maximum usefulness." Mere delay in dismissing prospective jurors is not reliable evidence in determining whether the prosecutor properly exercised a peremptory challenge. (***People v. Riccardi*** (2012) 54 Cal.4th 758, 790, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

§ 4.62.7.2 Compare: First Stage *Batson* / *Wheeler* Analysis

Comparative juror analysis has little or no use where a group bias analysis does not hinge on the prosecution's actual proffered rationales for peremptory challenges. Moreover, ***Miller-El v. Dretke*** (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196], does not mandate comparative analysis when a *Batson*/*Wheeler* motion was denied after the trial court concluded defendant had not made a prima facie showing of discriminatory exercise of peremptory challenges. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1019.)

A trial court's denial of a *Batson*/*Wheeler* claim, without making a prima facie finding, is reviewed with "considerable deference" because such a motion calls upon the trial court's personal observations. If the record suggests grounds upon which the prosecutor might have reasonably challenged the jurors in question, the reviewing court affirms. (***People v. Cleveland*** (2004) 32 Cal.4th 704, 732-733; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 117.)

While it is proper for the trial court to examine the responses of other jurors in considering whether the defendant has made a prima facie case of a *Wheeler* violation, "such an examination for the first time on appeal is unreliable." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 71, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also ***People v. Carasi*** (2008) 44 Cal.4th 1263, 1295.)

§ 4.62.8 Remedies

While the United States Supreme Court has not expressed any view as to whether it would be more appropriate to discharge the venire or disallow the discriminatory challenges and resume selection with improperly challenged jurors reinstated on the venire, the California Supreme Court has held that "if a jury 'has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges,' the trial court 'must dismiss the jurors thus far selected' and 'quash any remaining venire.'" (***People v. Mata*** (2013) 57 Cal.4th 178, 182-183, quoting ***People v. Wheeler*** (1978) 22 Cal.3d 258, 282, and citing ***Batson v. Kentucky*** (1986) 476 U.S. 79, 99 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

Following the granting of a *Batson*/*Wheeler* motion, defense counsel can consent to an alternative remedy of reseating the improperly discharged juror, as opposed to dismissing the entire venire. (***People v. Mata*** (2013) 57 Cal.4th 178, 187-188.)

Where the trial court found defense counsel had been exercising peremptory challenges to strike White males from the jury in order to provoke a mistrial and obtain a fresh venire, the remedy of a mistrial and dismissal of the voir dire would only serve to reward the improper challenges and postpone the trial. Accordingly, under such circumstances, the trial court should have the discretion, with the consent of the complaining party, to order alternatives short of outright dismissal of the remaining venire, including sanctions against counsel and reseating any improperly discharged jurors who remain available to serve. (***People v. Willis*** (2002) 27 Cal.4th 811, 821.)

§ 4.62.9 Standards of Review

On appeal, the court reviews the denial of a *Wheeler* motion, without a finding of a prima facie case, in light of the entire record of voir dire. (***People v. Young*** (2005) 34 Cal.4th 1149, 1172, fn. 7; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 116.)

The trial court's ruling is reviewed deferentially with consideration given to whether substantial evidence supports the trial court's conclusions. (***People v. Avila*** (2006) 38 Cal.4th 491, 551.)

Where it is unclear whether the court applied the disapproved "strong likelihood" standard in finding no prima facie case of group bias, instead of applying the correct "reasonable inference" standard, the reviewing court independently reviews the record to determine whether the defendant's showing met the "reasonable inference" standard. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 801; ***People v. Howard*** (2008) 42 Cal.4th 1000, 1017; ***People v. Bell*** (2007) 40 Cal.4th 582, 597, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

It is the defendant's burden to show that the prosecutor's justifications for exercising peremptories were a pretext for invidious racial discrimination, not merely to

show that one or more nondiscriminatory reasons are unsupported by the record. (***People v. Duff*** (2014) 58 Cal.4th 527, 548.)

The record did not provide any indication of a discernible racial pattern to the prosecutor's questioning since the racial identity of each prospective juror was not in the record. Also, while "the prosecutor questioned some prospective jurors at greater length than [the prospective juror at issue], he also engaged in perfunctory questioning of other prospective jurors, and at times declined to ask any questions at all." (***People v. Edwards*** (2013) 57 Cal.4th 658, 699.)

When a trial court erroneously denies a *Batson*/*Wheeler* motion at the first stage, the appropriate remedy is to remand the matter in order for the trial court to undertake the second and third stage analysis required under *Batson*/*Wheeler*. If, upon remand, the trial court finds that due to the passage of time, or other reasons, it cannot make a reliable determination, or if it finds the prosecutor exercised peremptory challenges improperly, then the matter should be set for a new trial. (***People v. Johnson*** (2006) 38 Cal.4th 1096, 1103-1104.)

§ 4.62.10 Waiver / Forfeiture

A *Batson*/*Wheeler* claim is forfeited if not raised by a timely objection in the trial court because the trial court is deprived of the opportunity to create a record and "correct potential error in the first instance." (***People v. Lewis*** (2008) 43 Cal.4th 415, 481, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919; ***People v. Morrison*** (2004) 34 Cal.4th 698, 709-710; ***People v. Bolin*** (1998) 18 Cal.4th 297, 316.)

An objection at trial referencing only *Wheeler* is sufficient to preserve a *Batson* claim being raised for the first time on appeal because the claims are so closely related. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 66, fn. 3, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The failure to clearly articulate the *Batson*/*Wheeler* objection to a prospective juror forfeited the claim on appeal. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 786 [defendant failed to provide a factual basis for objection or make any record as to what cognizable class a prospective juror allegedly belonged to, and the individual was never identified as African-American during voir dire and self-identified as "Caucasian" and "Danish" in his jury questionnaire].)

Defense counsel's failure to object to the trial court's proposed alternative remedy of reseating the improperly discharged juror, operated as an implied waiver to the defendant's right to quash the entire venire and implied consent to the alternative remedy. (***People v. Mata*** (2013) 57 Cal.4th 178, 188.)

Where the defendant suggests for the first time on appeal that the cognizable group was African-American women (as opposed to African-Americans), the claim is

forfeited on appeal. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 70-71, fn. 4, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The defendant forfeited his *Wheeler* claim when he abandoned his *Wheeler* motion in the trial court prior to a prima facie finding and accepted the jury. (***People v. Fudge*** (1994) 7 Cal.4th 1075, 1096-1097.)

Chapter Five
TRIAL ISSUES – GENERAL

I. DEFENDANT [§ 5.10]

A. COMPETENCY TO STAND TRIAL [§ 5.11]

A defendant is mentally incompetent if as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (***People v. Mendoza*** (2016) 62 Cal.4th 856, 871; ***People v. Lightsey*** (2012) 54 Cal.4th 668, 690; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 797; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1047; Pen. Code, § 1367(a).)

A doubt as to the existence of a mental disorder or developmental disability that does not implicate a defendant's competency to stand trial is not sufficient to trigger the trial court's obligation to suspend criminal proceedings. (***People v. Romero*** (2008) 44 Cal.4th 386, 420.)

A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence by the party contending he or she is incompetent. (Pen. Code, § 1369(f); ***Medina v. California*** (1992) 505 U.S. 437 [112 S.Ct. 2572, 120 L.Ed.2d 353]; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 797; ***People v. Medina*** (1990) 51 Cal.3d 870, 881-885; Cal. Rules of Court, rule 4.130(e)(2).)

The presumption of competence to stand trial does not violate due process. (***Medina v. California*** (1992) 505 U.S. 437 [112 S.Ct. 2572, 120 L.Ed.2d 353]; ***People v. Ary*** (2011) 51 Cal.4th 510, 518 ["the law is settled that placing on a criminal defendant the burden of proving incompetence to stand trial does not offend the federal Constitution's due process clause."].)

A trial court's duty to conduct a competency hearing may arise at any time prior to judgment. (***People v. Rogers*** (2006) 39 Cal.4th 826, 847.)

> *Cross-Reference*:
>
> § 3.135, *re* Competency to waive counsel
>
> § 5.21.4, *re* Appointment of independent counsel

The trial court did not err in appointing an attorney to represent the defendant's position during a competency hearing where the defendant claimed he was competent and his trial attorneys claimed he was not. (***People v. Stanley*** (1995) 10 Cal.4th 764, 803-807.)

In ***People v. Bolden*** (1979) 99 Cal.App.3d 375, a disagreement between counsel and the defendant over the issue of mental competency was resolved by allowing the defendant to testify to his own competence while defense counsel presented a psychiatrist who testified to the contrary. The compromise in *Bolden* was "uniquely tailored to the presentation of evidence at a competency trial" and is not "mandatory under any circumstance." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 854.)

An attorney's impression of his client's mental state did not reveal any confidential communications with his client, and it was not protected by the attorney-client privilege. (***People v. Perry*** (2006) 38 Cal.4th 302, 316.)

"Counsel is not ineffective for failing to raise the issue of competence where there may be some evidence raising a doubt, but that evidence is not substantial." (***People v. Mickel*** (2016) 2 Cal.5th 181, 200.)

A person with significant brain damage may nonetheless be competent to stand trial. (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1415-1416.)

A defendant's right not to be tried while mentally incompetent was protected notwithstanding the trial court's failure to appoint the director of the regional center for the developmentally disabled pursuant to Penal Code section 1369, subdivision (a), to evaluate a developmentally disabled capital defendant because the defendant was evaluated by doctors who possessed the relevant qualifications and whose testimony provided a basis for the trial court finding the defendant competent to stand trial. (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1391.)

Nothing in ***Ford v. Wainwright*** (1986) 477 U.S. 399 [106 S.Ct. 2595, 91 L.Ed.2d 335] forecloses waiving a hearing on mental competency. *Ford* relates to sanity to be executed, not competency to stand trial. (***People v. Taylor*** (2009) 47 Cal.4th 850, 863-864, fn. 5.)

The trial court could constitutionally undertake to resolve the question of mental competence without an evidentiary hearing notwithstanding differences in the reports of the two experts evaluating the defendant's competency. There was no evidence before the trial court of psychosis or any severe thought disorder, and neither expert opined that the defendant would be unable to assist counsel because of a mental illness. While the defendant clearly had a history of conflict with his attorneys, the court could reasonably conclude, without contradiction from either psychologist's report, that such conflicts were attributable to difficult aspects of the defendant's personality rather than to a diagnosed mental illness. (***People v. Taylor*** (2009) 47 Cal.4th 850, 863-864.)

The trial court's reliance on a single report regarding mental competency was not an abuse of discretion where the parties agreed to submit the issue of mental competency based on the content of the report of a third expert who was appointed after the two experts appointed to evaluate mental competency reached different conclusions. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 798.)

It is not per se unconstitutional or a statutory violation for a court to resolve the issue of mental competency on the basis of psychiatric reports where the defendant is entitled to a hearing pursuant to section 1368. Where defense counsel, for understandable reasons, elected to waive available hearing procedures, i.e., right to jury trial, right to present oral testimony and to confront and cross-examine witnesses, the defendant nevertheless received the hearing provided for by section 1368, as he presented evidence and received an independent judicial determination on his competence to stand trial based on the stipulated record. (***People v. McPeters*** (1992) 2 Cal.4th 1148, 1169, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

While Penal Code section 1369, subdivision (a) provides for the appointment of two mental health experts whenever the court is informed by the defendant or his counsel that the defendant is not seeking a finding of incompetence, the defendant's assignment of error based on the failure to appoint a second expert fails where neither the defendant nor his counsel ever expressly informed the court the defendant was not seeking a finding of incompetence. (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 282.)

§ 5.11.1 Admissible Evidence

Evidence of the defendant's behavior and interactions with court personnel and his attorneys was relevant to rebut a mental health expert's opinion that the defendant's psychotic symptoms and paranoia from pending legal proceedings interfered with his ability to rationally assist his counsel. (***People v. Clark*** (2011) 52 Cal.4th 856, 892-893.)

Evidence that the defendant had entered an insanity plea against his counsel's advice was relevant in a competency proceeding because it tended to show he was capable of intelligently participating in his defense. (***People v. Clark*** (2011) 52 Cal.4th 856, 893.)

§ 5.11.2 Limitations on Admissibility of Defendant's Statements to 1369 Mental Health Experts

Neither the statements of a defendant to mental health experts appointed pursuant to Penal Code section 1369, and mental health experts retained by the prosecution, nor the fruits of such statements, may be used in a trial of the issue of guilt, under either a plea of not guilty, or not guilty by reason of insanity. (***People v. Jablonski*** (2006) 37 Cal.4th 774, 802, 804.)

The judicially declared rule of immunity for all statements and any fruits of the mental competency examination supplants the Fifth Amendment privilege that would otherwise apply to competency examinations. (***People v. Jablonski*** (2006) 37 Cal.4th 774, 802-803.)

A defendant's statements to a mental health expert during a court-initiated mental competency examination cannot be used to prove the prosecution's case-in-chief as to either guilt or penalty, and it may ***not*** be used for purposes of impeachment should the defendant testify at trial. (***People v. Pokovich*** (2006) 39 Cal.4th 1240, 1249, 1253.)

Once an expert witness is called to testify, neither the attorney-client privilege or work-product doctrine applies to matters relied on or considered in the formation of the expert's opinion. The prosecution can cross-examine the expert concerning an otherwise privileged report if it was considered by the expert in formulating her opinion. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 695.)

§ 5.11.3 Medication

Nothing in ***Riggins v. Nevada*** (1992) 504 U.S. 127 [112 S.Ct. 1810, 118 L.Ed.2d 479] requires a trial court, upon becoming aware that the defendant was being medicated, to sua sponte determine whether or not the defendant was receiving medication voluntarily, and whether or not that medication had exposed the defendant to side effects. *Riggins* imposes a duty to inquire only in situations where a defendant has moved to terminate the involuntary administration of medication. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1361.)

There is no authority supporting a claim that a competent defendant's voluntary ingestion of medication provided by the state denied the defendant due process. (***People v. Jones*** (1997) 15 Cal.4th 119, 153, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The defendant's claim that he was not "present" as required by Penal Code section 977, subdivision (b), and adversely impacted by the trial court allowing voir dire to proceed when he was severely impaired by his medication was rejected due to the absence of any "substantial evidence his medication had a palpable effect on him." (***People v. Gurule*** (2002) 28 Cal.4th 557, 599.)

A due process claim based on administration of antipsychotic drugs during trial (***Riggins v. Nevada*** (1992) 504 U.S. 127 [112 S.Ct. 1810, 118 L.Ed.2d 479]) may not be raised for the first time on appeal. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1361; ***People v. Jones*** (1997) 15 Cal.4th 119, 152-153, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Under certain circumstances, the involuntary administration of antipsychotic medications to make a criminal defendant competent to stand trial is permissible under the federal Constitution provided that the trial court finds such medication is medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, necessary to significantly further important governmental trial-related interests. (***Sell v. United States*** (2003) 539 U.S. 166, 180-181, 186 [123 S.Ct. 2174, 156 L.Ed.2d 197].)

Where a defendant is not being medicated involuntary, the trial court need not make findings comparable to those required by ***Sell v. United States*** (2003) 539 U.S. 166 [123 S.Ct. 2174, 156 L.Ed.2d 197]. (***People v. Dunkle*** (2005) 36 Cal.4th 861, 891-892, disapproved on other grounds by ***People v. Doolin*** (2009) 45 Cal.4th 390.)

Questions concerning possible over-medication were insufficient to raise a "reasonable doubt" as to present competency. (***People v. Danielson*** (1992) 3 Cal.4th 691, 726-728, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

§ 5.11.4 Substantial Evidence of Mental Incompetency

A trial court is required to conduct a competence hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence. (***People v. Mai*** (2013) 57 Cal.4th 986, 1032; ***People v. Koontz*** (2002) 27 Cal.4th 1041, 1063; ***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1110; ***People v. Howard*** (1992) 1 Cal.4th 1132, 1163; Pen. Code, § 1368.)

A reasonable doubt as to mental competency sufficient to mandate a full mental competency hearing exists if at least one expert who is competent to render an opinion, and who has had a sufficient opportunity to conduct an examination, testifies under oath with particularity that, because of mental illness, the accused is incapable of understanding the proceedings or assisting in his or her defense. (***People v. Mai*** (2013) 57 Cal.4th 986, 1032-1033; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1047.)

"'Evidence of incompetency to stand trial may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations.' [Citations omitted.] But to be entitled to a competency hearing, 'a defendant must exhibit more than bizarre behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his or her defense counsel. [Citations].'" (***People v. Lewis*** (2008) 43 Cal.4th 415, 524, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

"Substantial evidence of incompetence exists when a qualified mental health expert who has examined the defendant states under oath, and 'with particularity,' a professional opinion that because of mental illness, the defendant is incapable of understanding the purpose or nature of the criminal proceedings against him, or of cooperating with counsel." (***People v. Mai*** (2013) 57 Cal.4th 986, 1032-1033; ***People v. Lewis*** (2008) 43 Cal.4th 415, 525, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

"Counsel's assertion of a belief in a client's incompetence is entitled to some weight. But unless the court itself has declared a doubt as to the defendant's competence, and has asked for counsel's opinion on the subject, counsel's assertion that his or her client is or may be incompetent does not, in the absence of substantial evidence to that

effect, require the court to hold a competency hearing." (***People v. Mai*** (2013) 57 Cal.4th 986, 1032-1033; ***People v. Lewis*** (2008) 43 Cal.4th 415, 525, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919; ***People v. Howard*** (1992) 1 Cal.4th 1132, 1164; ***People v. Harris*** (1989) 47 Cal.3d 1047, 1070-1077.)

Although trial counsel's failure to seek a competency hearing is not determinative, it is significant because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings. (***People v. Rogers*** (2006) 39 Cal.4th 826, 848.)

Before evidence can be considered as raising a substantial doubt about a defendant's competence, it must be reasonable for the reviewing court to conclude that such evidence "was in fact part of the record presented or otherwise made available to the trial court." A trial court cannot be required "to evaluate a defendant's competence based on evidence not before it at the time of its decision." "[S]cattered references" in the record that were "brief and indirect" to a report prepared by a doctor that was before a New Hampshire court in the defendant's unsuccessful effort to avoid extradition where the record does not show that that any party presented the report or "expressly conveyed the substance of the evaluation to the court" was not substantial evidence to raise a doubt regarding mental competency. (***People v. Mickel*** (2016) 2 Cal.5th 181, 195-197.)

More is required to raise a doubt of competence than the defendant's mere bizarre actions or statements, with little reference to his ability to assist in his own defense. (***People v. Koontz*** (2002) 27 Cal.4th 1041, 1064, 1073; ***People v. Marshall*** (1997) 15 Cal.4th 1, 33; ***People v. Medina*** (1995) 11 Cal.4th 694, 735.)

"[D]isruptive conduct and courtroom outbursts by the defendant do not necessarily demonstrate a present inability to understand the proceedings or assist in the defense." (***People v. Mai*** (2013) 57 Cal.4th 986, 1033.)

"[D]efendant's disruptive courtroom behavior – throwing apples and saying 'This is shit' – was evidence that he was angry and upset, and perhaps that he was wished to interrupt the proceedings, but it was not evidence sufficient to require the trial court to conduct a mental competency hearing." (***People v. Elliott*** (2012) 53 Cal.4th 535, 583; ***People v. Medina*** (1995) 11 Cal.4th 694, 735 ["[d]efendant's cursing and disruptive actions displayed an unwillingness to assist in his defense, but did not necessarily bear on his competence to do so ..."].)

"[D]efendant's decisions to wear jail clothing and eyeglasses after the jury had returned the guilt phase verdicts do not call his mental competence into question. At most, they reveal his correct understanding that his guilt was no longer at issue during the penalty phase." (***People v. Elliott*** (2012) 53 Cal.4th 535, 588.)

A judge's appointment of an expert to assist counsel on whether to enter an NGI plea and to opine on competency does not constitute an expression of doubt which triggers the need for a competency hearing. (***People v. Visciotti*** (1992) 2 Cal.4th 1, 35-36.)

"[T]he trial judge's decision not to order a competency hearing is entitled to great deference, because the trial court is in the best position to observe the defendant during trial. An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper." (***People v. Mai*** (2013) 57 Cal.4th 986, 1033, internal quotation marks & citations omitted.)

If the trial court finds that the defendant's lack of cooperation stems from an unwillingness rather than an inability, no competency hearing is required. (***People v. Lewis*** (2008) 43 Cal.4th 415, 526, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

No competency hearing is required where "the record contains no substantial evidence of defendant's incompetence" and instead "suggests counsel had a difficult client whose own calculated acts had resulted in his severe conditions of confinement, and whose frustration with the terms of his custody contributed to his anger, emotional volatility, distrust of counsel, and frequent lack of cooperation with them." (***People v. Mai*** (2013) 57 Cal.4th 986, 1033-1034.)

Given that communications with counsel broke down after strongly encouraging him to enter into a plea agreement, the court could reasonably conclude that "the lapse in communication was caused by unwelcome legal advice, not mental illness." (***People v. Clark*** (2011) 52 Cal.4th 856, 914.)

The trial court did not have a duty to order a mental-competency hearing because the defendant wished to plead guilty where the dispute between counsel and the defendant over the plea was one of tactics, and nothing in the record showed the trial court believed the defendant's desire to plead guilty was unreasonable. (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1303.)

The trial court's belief that the defendant was so preoccupied with guilty feelings that he would likely sabotage his own defense does not constitute a reflection of doubt regarding mental competency to stand trial. (***People v. Halvorsen*** (2007) 42 Cal.4th 379, 407.)

A "defendant's preference for receiving the death penalty does not invariably demonstrate incompetence." (***People v. Lewis*** (2008) 43 Cal.4th 415, 526, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919; ***People v. Grant*** (1988) 45 Cal.3d 829, 859; ***People v. Guzman*** (1988) 45 Cal.3d 915, 963-964, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

Actual suicide attempts or suicidal ideation, in combination with other factors, may constitute substantial evidence raising a bona fide doubt regarding a defendant's competency to stand trial. However, the defendant's suicidal tendencies did not constitute substantial evidence of mental incompetence where they were not accompanied by bizarre behavior, the testimony of a mental health professional regarding competence,

or any indication of an inability to understand the proceedings or to assist counsel. (***People v. Rogers*** (2006) 39 Cal.4th 826, 848.)

Expert testimony regarding the defendant's inability to tolerate stressful situations and related difficulty testifying on his own behalf was not substantial evidence of incompetence. (***People v. Frye*** (1998) 18 Cal.4th 894, 952, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A defense psychiatrist's opinion, which was reached without an opportunity to examine the defendant, and was "rather brief" without elaboration or details was not substantial evidence of incompetence. (***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1111.)

Defense expert testimony in competency proceedings was "not compelling." "[E]xpert testimony is only as reliable as its bases [citation], and here they were suspect." (***People v. Marks*** (2003) 31 Cal.4th 197, 219.)

An emotional reaction to the stress of the penalty phase of trial, reflecting a difference of opinion over a strategic decision whether the defendant should be absent from further proceedings, was not a sufficient basis for the trial court declaring there was "bona fide doubt" as to the mental competency of defendant. (***People v. Rundle*** (2008) 43 Cal.4th 76, 180, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A defense psychiatrist's statement that he felt the defendant had brain damage, but was not sure and wanted to conduct a competency evaluation and get a psychological evaluation before arriving at an opinion, was not substantial evidence of incompetence (particularly in view of the fact that after the psychiatrist did meet with the defendant, no further opinion of incompetence was offered). (***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1111.)

The trial court's refusal to consider letters from defendant's family and friends in deciding the automatic motion to modify the verdict (Pen. Code § 190.4(e)) did not deny defendant due process for failing to consider the letters as additional evidence of defendant's mental incompetence to stand trial. While letters relating that defendant was "'crazy' or 'very confused and disturbed' might be revealing in terms of the "extent of concern among defendant's family or friends, they convey little about defendant's competence to stand trial. Such letters did not speak to defendant's ability to understand the proceedings or assist in his defense. At best, these letters reflect generalized concerns that defendant suffers from depression or a psychosis, but they do not show that defendant was, as a result of his mental illness unable to understand the nature and purpose of the criminal proceedings against him or conduct his defense." (***People v. Mickel*** (2016) 2 Cal.5th 181, 203.)

§ 5.11.5 Instructions

A jury instruction which included the statutory definition of incompetency adequately met the requirements of ***Dusky v. United States*** (1960) 362 U.S. 402 [80 S.Ct. 788, 4 L.Ed.2d 824]. (***People v. Stanley*** (1995) 10 Cal.4th 764, 816.)

The *Spencer* rule (***In re Spencer*** (1965) 63 Cal.2d 400) has no application when an expert appointed by the court to assist the defense testifies. Accordingly, no limiting instruction need be given to the effect that a defendant's admissions to an expert appointed by the court to examine the defendant and to report to the court regarding the defendant's mental state can only be considered by the jury as the basis for the expert's opinion. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 697-699.)

§ 5.11.6 Number of Peremptory Challenges

Notwithstanding underlying capital charges, parties in a 1368 proceeding are entitled only to the number of peremptory challenges provided for in a civil trial. (***People v. Stanley*** (1995) 10 Cal.4th 764, 807.)

§ 5.11.7 Second Competency Hearing

Where a competency hearing has already been held and the defendant found competent to stand trial, a trial court need not suspend proceedings to conduct a second competency hearing unless there is a substantial change of circumstances or new evidence which casts serious doubt on the validity of the earlier finding. (***People v. Mendoza*** (2016) 62 Cal.4th 856, 884; ***People v. Taylor*** (2009) 47 Cal.4th 850, 864; ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1415; ***People v. Medina*** (1995) 11 Cal.4th 694, 734; ***People v. Kelly*** (1992) 1 Cal.4th 495, 542.)

"When a competency hearing has already been held, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state. [¶] At the same time of course, even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (***People v. Mendoza*** (2016) 62 Cal.4th 856, 884-885, internal quotation marks & citations omitted.)

The verdict of competency following a competency determination is viewed as a "baseline that absent a preliminary showing of substantially changed circumstances, eliminated the need to start the process anew." The fact that a defense expert disagrees with the prior determination on the issue of competency is not the same as a substantial change in circumstances, and is not a basis to conduct another competency determination before a second penalty phase. (***People v. Huggins*** (2006) 38 Cal.4th 175, 220.)

Assignment of a new judge for trial after a competency finding did not require the new judge to make an independent assessment of competency instead of determining whether there was a substantial change of circumstances or new evidence casting doubt on the validity of the earlier finding. (***People v. Jones*** (1997) 15 Cal.4th 119, 151, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The defendant's confusion regarding his plea of not guilty by reason of insanity and use of "bizarre verbiage" did not constitute substantial evidence of a change in circumstances requiring a second mental competency hearing. "The legal subtleties implicated by [his pleas of not guilty and not guilty by reason of insanity] would confuse most laypersons." At times the defendant rambled in his statements to the court, but he was direct and fairly eloquent at other times. His "predilection to use 'bizarre verbiage' was nothing new to the court, as documented in the defendant's medical records." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 851.)

The defendant's attempts to defend himself at the guilt phase may have been, as he now says, "disturbingly inept," but they were not of a character to cast serious doubt on the trial court's finding that he knew what he was charged with and the nature of the trial in which he took full part and thus did not serve as a basis for requiring that the trial court conduct a second competency hearing. (***People v. Taylor*** (2009) 47 Cal.4th 850, 864.)

The appearance of sleepiness or drowsiness during court proceedings did not constitute "a substantial change of circumstances" or "new evidence" of incompetence. (***People v. Jones*** (1997) 15 Cal.4th 119, 151, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

§ 5.11.8 Appeal / Forfeiture

In reviewing a competency finding, a reviewing court views the record in the light most favorable to the verdict, and the verdict is upheld if it is supported by substantial evidence. (***People v. Johnson*** (2012) 53 Cal.4th 519, 531; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 797.)

The defendant's failure to object below to the court's reliance on an expert's report on the ground that it did not provide substantial evidence of competency because it only established that the defendant was willing to cooperate with his attorney as opposed to establishing he was able to assist counsel in a rationale manner, deprived the prosecution of the opportunity to rebut the defense objections with evidence supporting the presumption of competency. Since the burden of proof in the competency proceeding was on the defendant as the proponent of incompetency (see Pen. Code, § 1367), the forfeiture rule applies and the defendant cannot raise any claims on appeal based on an abuse of discretion for relying on allegedly insufficient reports. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 797.)

Where the defendant failed to advance the constitutional arguments below that are being advanced on appeal regarding the admission of evidence at the competency

hearing, those arguments are not forfeited on appeal to the extent that: (1) no action by the defendant was required to preserve it; or (2) the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omissions, insofar as wrong for the reasons actually presented to the court, had the additional legal consequences of violating the Constitution. (***People v. Clark*** (2011) 52 Cal.4th 856, 889, fn. 7.)

A determination of mental competency is jurisdictional and cannot be waived by counsel. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 851, fn. 41.)

Defense counsel declared a doubt as to the defendant's mental competency prior to sentencing in his capital trial. The court stayed the proceedings and appointed two experts to evaluate the defendant. Both experts could not examine the defendant because he refused to leave his cell. Although the trial court did not expressly find an absence of substantial new evidence regarding competence, it expressly noted the defendant's noncooperation with court-appointed doctors, and was therefore aware that the defense had no new evidence regarding the defendant's competence. While the trial court did not expressly reinstate the proceedings, it invited argument on whether sentencing could proceed and provided counsel with the law directly relevant to the issue. Accordingly, the court's actions in proceeding with sentencing revealed it could not be reasonably interpreted as anything other than the trial court reinstating the proceedings. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 849-851.)

B. DEFENDANT'S PRESENCE [§ 5.12]

A defendant has federal and state constitutional rights to be present at any critical stage of the criminal proceedings. (***People v. Mendoza*** (2016) 62 Cal.4th 856, 898.)

The constitutional right to presence exists at proceedings critical to the trial's outcome and where the defendant's presence would contribute to the fairness of the procedure. There is no constitutional entitlement to be present at proceedings at which the defendant's "presence bears no reasonable, substantial relation to his opportunity to defend the charges against him." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 799, quoting ***People v. Butler*** (2009) 46 Cal.4th 847, 861.)

It is the defendant's burden to demonstrate that his absence prejudiced his case or denied him a fair trial. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 799; ***People v. Cole*** (2004) 33 Cal.4th 1158, 1231; ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1357.)

"[T]he federal constitutional right to counsel arises at critical stages of the prosecution or when necessary to assure a meaningful defense. Likewise, a federal constitutional right to be present in court exists where necessary to protect the defendant's opportunity for effective cross-examination, or to allow him to participate at a critical stage and enhance the fairness of the proceeding. Such protections usually do not cover in camera discussions on matters bearing no reasonable, substantial relation to

the defense of the charge." (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1299, citations omitted.)

"Proceedings held in chambers and outside the presence of a party are generally disfavored. Nevertheless, as a general rule, a trial court has discretion to conduct a proceeding in a defendant's absence to protect an overriding interest that favors confidentiality." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1098; see also, ***People v. Carasi*** (2008) 44 Cal.4th 1263, 1299 citing, e.g., ***People v. Gurule*** (2002) 28 Cal.4th 557, 593-594 [privileged attorney-client information]; ***People v. Lawley*** (2002) 27 Cal.4th 102, 159 [identity of confidential informant]; ***People v. Ayala*** (2000) 24 Cal.4th 243, 261 [trial strategy]; ***People v. Webb*** (1993) 6 Cal.4th 494, 516 [privileged psychotherapy records].)

§ 5.12.1 Bench Discussions / Chambers Conferences

There is an obvious difference when both the defendant and his attorney are excluded from legal discussions. (***People v. Kelly*** (2007) 42 Cal.4th 763, 782; ***People v. Ayala*** (2000) 24 Cal.4th 243, 259-269 [excluding defense counsel and defendant from hearing on reasons for exercising peremptory challenges harmless error].)

Under the California Constitution, a defendant has no right to be present at discussions that occur outside the jury's presence, whether in chambers or at the bench, concerning questions of law or other matters that do not bear a reasonably substantial relation to the fullness of his or her opportunity to defend against the charges. Thus, a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding. The defendant did not have a constitutional or statutory right to be personally present during the in-chambers discussion regarding how to respond to the jury's question concerning whether "'starvation [can] be construed as extreme physical pain under [the] *legal definition* of torture.' (Italics added.)" (***People v. Jennings*** (2010) 50 Cal.4th 616, 682, citation omitted; ***People v. Kelly*** (2007) 42 Cal.4th 763, 782 [defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because a defendant's presence would not contribute to the fairness of the proceedings; ***People v. Perry*** (2006) 38 Cal.4th 302, 312 [same].)

The defendant's absence from more than 180 unreported side bench conferences did not deny the defendant any rights, constitutional or otherwise, to be present at the particular discussions between the court and counsel. (***People v. Clark*** (2011) 52 Cal.4th 856, 1003.)

The defendant's absence from in-chambers discussions, where hardship excusals were stipulated to, did not violate his Sixth Amendment rights. (***People v. Rogers*** (2006) 39 Cal.4th 826, 855-856.)

A defendant does not have a right to be present at a conference on the competency of a child witness. (***Kentucky v. Stincer*** (1987) 482 U.S. 730 [107 S.Ct. 2658, 96 L.Ed.2d 631].)

"The mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." (***United States v. Gagnon*** (1985) 470 U.S. 522, 526 [105 S.Ct. 1482, 84 L.Ed.2d 486], internal quotation marks omitted.)

The defendant had no right to be present at a bench conference involving discussions between the court and counsel regarding threats against a prosecution witness. (***People v. Harris*** (2008) 43 Cal.4th 1269, 1306-1307.)

The "defendant was absent when a juror was replaced during the penalty phase deliberations but defendant had been present at the prior proceeding where the parties agreed to excuse that particular juror if the deliberations had not concluded in time. The next day, in defendant's presence, the juror was replaced with an alternate, and defendant voiced no objection. Given these circumstances, defendant fails to explain why his presence was required." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 800.)

The Supreme Court assumed without deciding that a defendant has a right to be present at a conference on whether to remove a juror. (***Rushen v. Spain*** (1983) 464 U.S. 114, 118, fn. 2 [104 S.Ct. 453, 78 L.Ed.2d 267].)

Ex parte proceedings are permissible when justified by compelling reasons. The California Supreme Court acknowledged that a defendant may have been correct that the court could have addressed the prosecution's concerns for witness safety in the presence of defense counsel by identifying witnesses by number instead of by name. (***People v. Vargas*** (2012) 55 Cal.4th 82, 125.)

A defendant does not have a right to be present at routine procedural discussions on matters that do not affect the outcome of a trial, such as when to resume proceedings after a recess. There was no error in excluding the defendant from a bench conference to determine whether spectators should be excluded from the courtroom, because it was a routine procedural matter for which the defendant's presence was not required. (***People v. Perry*** (2006) 38 Cal.4th 302, 312-314.)

Discussion of guilt phase jury instructions in not a critical stage of the proceedings requiring the defendant's presence. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 800, citing ***People v. Butler*** (2009) 46 Cal.4th 847, 865; ***People v. Riel*** (2000) 22 Cal.4th 1153, 1195–1196; ***People v. Waidla*** (2000) 22 Cal.4th 690, 742-744.)

The defendant failed to show that his absence from the proceedings when the parties discussed penalty phase instructions and defense counsel withdrew the defendant's request for allocution affected his ability to defend against the charges or otherwise prejudiced him. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 800.)

§ 5.12.2 Readbacks

The re-reading of testimony is not a critical stage of the proceedings. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 917; ***People v. Lucas*** (2014) 60 Cal.4th 153, 299, disapproved on another ground in ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 53, fn. 19; ***People v. Butler*** (2009) 46 Cal.4th 847, 865.)

Reading back testimony ordinarily is not an event that bears a substantial relationship to the defendant's opportunity to defend. (***People v. Ayala*** (2000) 23 Cal.4th 225, 288; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1121.)

Counsel may waive the defendant's right to be present for a read-back of testimony. (***People v. Pride*** (1992) 3 Cal.4th 195, 251.)

Failure to have the defendant present for a read-back of testimony without a waiver of presence is a statutory violation, and reversible error only if it is reasonably probable the defendant would have received a more favorable trial outcome absent the error. (***People v. Avila*** (2006) 38 Cal.4th 491, 598.)

It does not deny a defendant's state and federal constitutional rights to counsel when testimony is read back in the absence of defense counsel. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 918; ***People v. Lucas*** (2014) 60 Cal.4th 153, 300, disapproved on another ground in ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 53, fn. 19.)

It does not violate statutory rights under section 1138 or Sixth Amendment right to an impartial jury where the judge did not supervise the readback of testimony. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 918; ***People v. Lucas*** (2014) 60 Cal.4th 153, 300-301, disapproved on another ground in ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 53, fn. 19.)

§ 5.12.3 Jury View

The federal constitutional right to be present at those stages of a trial where the absence of the defendant might detract from the fairness of the proceedings does not compel the presence of the defendant at a jury view. (***People v. Moon*** (2005) 37 Cal.4th 1, 20.)

§ 5.12.4 Voir Dire

"'[N]either the state nor the federal Constitution, nor the statutory requirement that a defendant be present at "all ... proceedings" (§ 977, subd (b)(1)), provides a criminal defendant with the right to be personally present in chambers or at bench discussions outside the jury's presence on questions of law or other matters as to which his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him.' In circumstances analogous to this case, we have rejected the claim that a defendant's absence from sidebar or chambers conferences during which prospective

jurors were questioned violated the defendant's right to be present." (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1051, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, quoting ***People v. Harris*** (2008) 43 Cal.4th 1269, 1306, fn. omitted.)

The presence of the defendant at bench conferences including sidebars during voir dire resulting in dismissal of prospective jurors for cause did not bear a substantial relationship to the defendant's opportunity to defend himself. The defendant's presence during discussions of sensitive issues such as a prospective juror's childhood abuse could have undermined the confidence and cooperation necessary to encourage candor. (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1235-1236.)

As a general rule, the questioning of prospective jurors should be conducted in open court, with sidebar conferences reserved for particularly sensitive or prejudicial topics. In the instant case, the defendant's absence from the brief bench conferences during jury selection imposed no more than a de minimis infringement of the public trial guarantee, and these brief episodes of questioning and argument at the bench did not deprive the defendant of his right to a public trial. (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1238.)

In discussing whether the defendant would be present for initial meetings with prospective jurors where additional security would be necessary because the proceedings would be in the juror's lounge, "the trial court was too quick to declare that defendant would be subjected to physical restraints if he chose to be present" and failed to "make the required specific findings of manifest need for restraints. [Citations.] It is reasonable to conclude that defendant's decision to be absent was influenced, in part by the prospect of being shackled. The court should also have secured a written waiver, as required by [Penal Code, § 977(b)(1)]." However, the defendant failed to show prejudice from his absence from the jury screening discussions. (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1252.)

§ 5.12.5 Waiver of Constitutional Right to Presence

As long as the waiver is voluntary, knowing, and intelligent, a capital defendant can waive his state and federal constitutional right to presence. (***People v. Mendoza*** (2016) 62 Cal.4th 856, 898; ***People v. Romero*** (2008) 44 Cal.4th 386, 418 [a competent capital defendant may waive his right to be present at various phases of the trial]; ***People v. Huggins*** (2006) 38 Cal.4th 175, 204 [the trial court does not commit reversible error and the Fifth and Sixth Amendments are not violated by acceding to a capital defendant's wish not to be present]; ***People v. Moon*** (2005) 37 Cal.4th 1, 20 [even in a capital case, a defendant can validly waive the constitutional right to be present at critical stages of trial, and such waivers are valid as a matter of state constitutional law.)

There is no sua sponte duty to admonish a defendant regarding the importance of his or her presence, and there is no special duty by a court to conduct a more searching

substantive inquiry regarding defendant's understanding of waiver of presence. (***People v. Moon*** (2005) 37 Cal.4th 1, 21.)

The defendant was represented by counsel and chose to absent himself from the proceedings. A waiver of the state and federal constitutional right to be present during a jury view of the crime scene was voluntary, knowing, and intelligent in the absence of anything suggesting otherwise. (***People v. Moon*** (2005) 37 Cal.4th 1, 21.)

Where the defendant complains on appeal of his absence from a sidebar wherein his attorney agreed to the procedure for replacing a juror with the first alternate and to an additional peremptory challenge, but raised no objection to the procedure at the time, and failed to explain on appeal what his "useful input" to his counsel might have been or what different procedure he might have urged if present, then "[a]t most, defendant's absence from this tactical discussion deprived him of 'a mere "shadow" benefit' and does not amount to a constitutional or statutory violation." (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1237.)

§ 5.12.6 Statutory Limits on Waiving Presence (Pen. Code §§ 977, 1043)

A capital defendant's right to waive his presence at trial is severely limited by statute (Pen. Code, § 977). (***People v. Moon*** (2005) 37 Cal.4th 1, 21; ***People v. Weaver*** (2001) 26 Cal.4th 876, 910.)

A defendant does not have a right to be personally present pursuant to Penal Code sections 977 and 1043, even in the absence of a written waiver, where he does not have such a right under article I, section 15 of the California Constitution. (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1342.)

The failure to comply with Penal Code sections 977 and 1043 and failure to obtain a valid jury trial waiver of those statutory rights is subject to the harmless error standard for statutory error, i.e., the *Watson* standard, "whether it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error." (***People v. Mendoza*** (2016) 62 Cal.4th 856, 901-902, internal quotation marks & citations omitted.)

Trial court erred in permitting the defendant to be absent during the playing of a 911 recording and taking testimony from two witnesses. "'[A] capital defendant generally must be present during trial when evidence taken.'" (***People v. Mendoza*** (2016) 62 Cal.4th 856, 898, quoting ***People v. Rundle*** (2008) 43 Cal.4th 76, 134, and citing Pen. Code, § 977(b)(1).)

Although a defendant may waive his constitutional right to be present during trial, permitting a non-disruptive capital defendant to be absent during the taking of testimony was error under Penal Code sections 977 and 1043. (***People v. Young*** (2005) 34 Cal.4th 1149, 1214.)

Notwithstanding defendant's waiver of his constitutional right to be present during his mother's testimony, his absence constituted statutory error because his presence was required by Penal Code section 977, subdivision (b)(1). (***People v. Rundle*** (2008) 43 Cal.4th 76, 135, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Penal Code sections 977 and 1043 do not create a liberty interest for a capital defendant. To the contrary, the statutes deprive a capital defendant of his or her ability to voluntarily waive the right to be present, and require him or her to remain in the courtroom. (***People v. Rundle*** (2008) 43 Cal.4th 76, 136-137, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 5.12.7 Waiver by Misconduct

"'[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.'" (***People v. Banks*** (2014) 59 Cal.4th 1113, 1180, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3, quoting ***Illinois v. Allen*** (1970) 397 U.S. 337 [90 S.Ct. 1057, 25 L.Ed.2d 353, 343].)

Specific warnings that are required before excluding a defendant from trial in the face of "typical types of misconduct" (e.g., verbal disruptions or foul language) are not necessary where a defendant engages in "egregious" and "purposeful defilement of the courtroom" (defendant "flung a plastic bag full of fecal matter and urine at the court" and then "spat on the trial judge from approximately 12 feet away") as the defendant could not "seriously claim that he lacked 'full knowledge and appreciation' that his extreme misconduct would likely result in his exclusion from the courtroom." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1181, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

A disruptive defendant waives his right to be present at trial. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1180, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; ***People v. Medina*** (1995) 11 Cal.4th 694, 738.)

"[A] trial court does not commit constitutional error when it opts to exclude a defendant from the courtroom in response to 'extreme and aggravated' conduct, even when options such as shackling are also available." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1181, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

The trial court is not required to affirmatively inquire whether a defendant who has been excluded for misconduct wishes to return to court and is willing to conduct

himself properly. "It is a defendant's duty to 'reclaim' his right to be present at trial by moving to do so and by demonstrating a willingness 'to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.'" (***People v. Banks*** (2014) 59 Cal.4th 1113, 1181, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3, quoting ***Illinois v. Allen*** (1970) 397 U.S. 337, 343 [90 S.Ct. 1057, 25 L.Ed.2d 353, 343].)

The trial court could have found the defendant disruptive and excluded him from the proceedings pursuant to Penal Code section 1043 at his first oral outburst. However, the trial court was not required to remove the defendant immediately the first time he disrupted the proceedings. (***People v. Huggins*** (2006) 38 Cal.4th 175, 202-203.)

§ 5.12.8 Instruction *re* Absence of Defendant

The trial court has no sua sponte obligation to instruct the jury regarding a defendant's absence from trial. (***People v. Medina*** (1995) 11 Cal.4th 694, 740.)

§ 5.12.9 Harmless Error

A defendant's absence from the taking of testimony without a valid waiver does not constitute structural error requiring reversal. Rather, the statutory violation is subject to the *Watson* state law harmless error standard of whether it reasonably probable the outcome would have been more favorable to the defendant absent the error. The federal constitutional violation from defendant's right to presence being violated "is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in ***Chapman v. California*** (1967) 386 U.S. 18, 23 [17 L.Ed.3d 705, 87 S.Ct. 824]." (***People v. Mendoza*** (2016) 62 Cal.4th 856, 900-902, internal quotation marks & citations omitted.)

C. HEARING IMPAIRMENT [§ 5.13]

The record did not support the defendant's claim that his hearing impairment prevented him from hearing and participating in his trial and pretrial proceedings or that any lack of hearing adversely affected his opportunity to defend against the charges. (***People v. Freeman*** (1994) 8 Cal.4th 450, 478-480.)

D. MISCONDUCT [§ 5.14]

The defendant telephoned jurors from jail and struck one of his two defense attorneys, knocking her to the ground and causing jurors to react in alarm. Afterwards, the defendant unsuccessfully moved to voir dire the jurors on whether they could remain impartial. A defendant may not complain on appeal about the possible effect on jurors of his own misbehavior after the jury had been sworn. (***People v. Huggins*** (2006) 38 Cal.4th 175, 201.)

Restrictions on a pretrial jail detainee's use of the telephone to contact her attorney based on misuse of those privileges to attempt to solicit the murder of a witness was proper "given her criminal behavior in jail that abused those privileges." (***People v. Rodriguez*** (2014) 58 Cal.4th 587, 621.)

A "blanket restriction" of defendant's phone access was justified for at least the limited period of time until the court conducted a hearing and addressed the "grave and highly unusual circumstances" that caused the prosecutor to make the initial request to restrict phone access based on initial evidence the defendant was using the jail phone to arrange the murder of a witness. (***People v. Clark*** (2016) 63 Cal.4th 522, 550.)

E. NON-ENGLISH SPEAKING [§ 5.15]

The California Constitution affords a defendant who does not understand English the right to an interpreter throughout the criminal proceedings. (Cal. Const., art. I, § 14.)

A non-English speaking defendant's right to an interpreter has underpinnings in numerous state and federal constitutional rights including rights to due process, to confrontation, to effective assistance of counsel, and to be present at trial. (***People v. Romero*** (2008) 44 Cal.4th 386, 410.)

The state constitutional entitlement to an interpreter (Cal. Const., art. I, § 14) can only be waived by a personal waiver that is intelligent and voluntary. (***People v. Aguilar*** (1984) 35 Cal.3d 785, 790.)

F. JAIL CLOTHING [§ 5.16]

Defense counsel may a waive defendant's right to appear before the jury in civilian clothing instead of jail garb. (***In re Avena*** (1996) 12 Cal.4th 694, 731.)

Where the record discloses that the defendant declined the trial court's offer to appear in civilian clothing before the jury hearing the competency trial, the defendant may have had a tactical reason for wearing prison attire and the trial court cannot be faulted for failing, sua sponte, to admonish the jury to ignore the clothing. (***People v. Medina*** (1995) 11 Cal.4th 694, 732.)

Because the rule that a defendant may not be compelled to attend trial in jail attire is premised on the notion that doing so might subvert the presumption of innocence, the defendant's appearance in jail attire at the penalty phase was not prejudicial, as the presumption of innocence had already been rebutted in the guilt phase. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1363.)

G. DEFENDANT'S RIGHT TO TESTIFY [§ 5.17]

"As long as the trial court's restrictions on a defendant's right to testify are not 'arbitrary or disproportionate to the purposes they are designed to serve,' a court may limit a defendant's testimony pursuant to a rule of evidence if 'the interests served by [the] rule justify the limitation imposed on the defendant's constitutional right to testify.'" (***People v. Mickel*** (2016) 2 Cal.5th 181, 218-219, quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 56 [97 L. Ed. 2d 37, 107 S. Ct. 2704.)

Trial court did not abuse its discretion in excluding defendant's "liberty defense" to first degree murder charges for killing a police officer based on acting "in defense of liberties that the defendant believed were being infringed by the government." The evidence was properly excluded as "[t]here was no basis in law to convict the defendant of a lesser offense or exclude him from criminal liability altogether" based on his "political opinions regarding the government's infringement on personal liberties including his right to bear arms and it would have confused the jury as to why defendant's beliefs were relevant to the elements of first degree murder and would have misled the jury as to the relevance of defendant's personal beliefs." (***People v. Mickel*** (2016) 2 Cal.5th 181, 219-220.)

A trial court has no duty to advise a defendant of his right to testify or obtain an explicit waiver on the record unless the court is aware of a conflict with counsel. (***People v. Enraca*** (2012) 53 Cal.4th 735, 762.)

II. DEFENSE COUNSEL [§ 5.20]

A capital defendant is not entitled to the courtroom presence of both appointed counsel at all times. (***People v. Benavides*** (2005) 35 Cal.4th 69, 86.)

A. CONFLICT OF INTEREST [§ 5.21]

"A trial court has inherent authority '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' (Code Civ. Proc., § 128(a)(5).) This power 'authorizes a trial court ... to discharge an attorney who has a conflict of interest.'" (***People v. Suff*** (2014) 58 Cal.4th 1013, 1038, quoting ***People v. Noriega*** (2010) 48 Cal.4th 517, 524.)

Removal of a defense attorney because of a potential conflict of interest does not violate a defendant's right to counsel under Article I, section 15 of the state Constitution. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1039, citing ***People v. Noriega*** (2010) 48 Cal.4th 517, 524.)

A defendant's Sixth Amendment right to counsel is not violated by replacement of defense counsel due to a potential conflict of interest unless the defendant shows

deficient performance and prejudice. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1040, citing ***People v. Noriega*** (2010) 48 Cal.4th 517, 522-523.)

A conflict of interest means "a division of loyalties that affected counsel's performance." (***Holloway v. Arkansas*** (1978) 435 U.S. 475, 482 [98 S.Ct. 1173, 55 L.Ed.2d 426].)

Not every conflict or disagreement between a defendant and counsel implicates the Sixth Amendment. (***Morris v. Slappy*** (1983) 461 U.S. 1, 13-14 [103 S.Ct. 1610, 75 L.Ed.2d 610].)

Prejudice is not presumed from an actual conflict of interest. (***People v. Friend*** (2009) 47 Cal.4th 1, 46; ***People v. Rundle*** (2008) 43 Cal.4th 76, 168-176, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The fact that the defendant's attorney declares a conflict is not dispositive of its existence. While the Supreme Court has observed that counsel is in the best position professionally and ethically to determine when a conflict exists, it has also recognized it is the trial court that determines whether a counsel's representations regarding a conflict are adequate. (***People v. Clark*** (2011) 52 Cal.4th 856, 983-984.)

§ 5.21.1 Duty to Inquire

When a court knows or reasonably should know that a particular conflict exists, it should inquire into the conflict regardless of whether the defendant or defense counsel objects. (***Mickens v. Taylor*** (2002) 535 U.S. 162, 168 [122 S.Ct. 1237, 152 L.Ed.2d 291]; ***Cuyler v. Sullivan*** (1980) 446 U.S. 335, 347 [100 S.Ct. 1708, 64 L.Ed.2d 333]; ***People v. Martinez*** (2009) 47 Cal.4th 399, 422.)

The duty to inquire about a conflict of interest is "not triggered merely because of 'a vague, unspecified possibility of conflict.'" (***Mickens v. Taylor*** (2002) 535 U.S. 162, 169 [122 S.Ct. 1237, 152 L.Ed.2d 291]; ***People v. Martinez*** (2009) 47 Cal.4th 399, 422.)

A trial court does not have a duty to initiate a hearing "whenever the court receives any indication, even one made by a third party, that appointed counsel has failed to communicate adequately with the defendant – a complaint that, by itself, ordinarily is not a sufficient basis to require a court to grant even the defendant's own request to substitute counsel." (***People v. Martinez*** (2009) 47 Cal.4th 399, 422.)

The trial court is not required to inquire into every claim of conflict of interest of defense counsel no matter how suspect and unfounded. The defendant's unsworn eleventh-hour assertion that his attorney advised him to engage in criminal flight was inherently incredible. The defendant had given extensive sworn testimony that included discussions of his consultation with counsel and his reason for fleeing, but he omitted any accusation that his attorney advised him to flee and instead only mentioned it after the guilt and penalty phase verdicts had been returned. Under these circumstances, the trial court was "not obligated to credit, investigate, or act upon defendant's last minute effort

to blame his flight on his counsel, rather than on his own consciousness of guilt." (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1191, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

While a trial court is "required to perform some inquiry once it knows or reasonably should know of a particular conflict of interest, the court may decline to pursue the matter if, in its view, the potential for conflict is too slight." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 75, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"It would be inappropriate to recognize a third party's authority to require the court to conduct a *Marsden* inquiry, because the defendant's right to mount a defense in the manner that he or she, under the direction of defense counsel, deems best requires that counsel's independence from third party influence be protected. The court must exercise circumspection in taking actions that may interfere with an existing attorney-client relationship, and must remain 'on [its] guard neither to infringe upon the defendant's right to counsel of his choice, nor to compromise the independence of the bar.' [Citation]. We would risk encouraging interference with the attorney-client relationship were we to hold that a trial court must conduct a *Marsden* hearing when a third party complains concerning the representation received by a defendant." (***People v. Martinez*** (2009) 47 Cal.4th 399, 419-420.)

Letters from the defendant's sister were not an adequate basis to trigger a *Marsden* inquiry. "The constitutional right to counsel is personal to the defendant and ordinarily cannot be asserted vicariously." (***People v. Martinez*** (2009) 47 Cal.4th 399, 419.)

There was no duty to inquire, absent objection, where defense counsel represented three defendants charged and tried separately for murder, the defenses were consistent, and there was no indication counsel provided less than a vigorous defense. (***Cuyler v. Sullivan*** (1980) 446 U.S. 335, 346-347 [100 S.Ct. 1708 64 L.Ed.2d 333].)

A trial court may place "substantial weight on counsel's assertion that no conflict of interest exists." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 76, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

When a defendant claims a trial court's inquiry into a conflict was inadequate, absent a demonstration of prejudice, the reviewing court will not remand to the trial court for further inquiry. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1072.)

§ 5.21.2 Prosecutor's Involvement in Proceedings

It is not improper for a prosecutor to seek a determination before trial whether a conflict of interest existed, rather than waiting for a defense challenge to a conviction after trial. (***People v. Harris*** (2005) 37 Cal.4th 310, 342.)

The trial court did not abuse its discretion in allowing the prosecutor to participate in proceedings related to the defendant seeking to remove his counsel and disqualify the

public defender's office. An analogy to *Marsden* proceedings [***People v. Marsden*** (1970) 2 Cal.3d 118] was inapt because the concerns underlying the defendant's motion involved the public defender's office's relationship with individuals *other than* the defendant and required no disclosure of privileged information. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1040.)

§ 5.21.3 Disqualification of an Entire Public Defender's Office

"In light of the extraordinary number of witnesses and deputy public defenders relevant to the disqualification motion, the trial court's finding that the potential conflict of interest was 'staggering,' and the early stage in the proceedings at which disqualification was sought, we find no abuse of discretion in the trial court's action in disqualifying the entire office and not appointing separate counsel to cross examine the numerous witnesses who had previously been represented by that office. For the same reasons, we conclude that the trial court did not abuse its discretion in rejecting defendant's offer to waive the conflict." (***People v. Suff*** (2014) 58 Cal.4th 1013, 1039.)

While the trial court did not have the benefit of the decision in ***In re Charlisse C.*** (2008) 45 Cal.4th 145, 159, regarding consideration of alternatives to disqualification, the court nevertheless inquired regarding measures the public defender's office could take and considered whether defense counsel would become privy to confidences held by others in that office. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1039.)

Where a deputy public defender had not personally represented a prosecution witness who was previously represented by her office, and had not obtained information developed by another deputy public defender during that attorney-client relationship, notwithstanding her declaring a conflict, there was no showing of an actual or potential conflict under those circumstances. (***People v. Clark*** (2011) 52 Cal.4th 856, 984.)

A deputy public defender, "'as an officer of the court, was in the best position to assess whether a conflict of interest existed or was likely to arise'" and the court was entitled to rely on the representation of defense counsel that he had not represented, and did not possess any confidential information relating to, prosecution witnesses, and no conflict existed. (***People v. Williams*** (2015) 61 Cal.4th 1244, 1283, quoting ***People v. Clark*** (1993) 5 Cal.4th 950, 1001, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 5.21.4 Appointment of Independent Counsel

Cross-Reference: § 5.24, *re Marsden* motion

Courts need not appoint independent counsel every time a possible conflict arises. (***People v. Carpenter*** (1997) 15 Cal.4th 312, 375, abrogated by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1097.)

While independent counsel can be appointed when defense counsel and the defendant disagree over the defendant's mental competency (***People v. Stanley*** (1995) 10 Cal.4th 764, 806), appointment of independent counsel is not mandated. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 853.)

While the prosecutor reluctantly suggested an independent counsel be appointed for a new trial motion, the trial court recognized that option but declined to exercise it. Absent showing how this purported conflict prejudicially affected defense counsel's presentation of the new trial motion, there was no basis to remand the matter for inquiry with the defendant represented by new counsel. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1071-1072.)

§ 5.21.5 Examples of Insufficient Evidence of Conflict

A trial court is not required to conclude that an irreconcilable conflict exists if the defendant has not made a sustained good faith-effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness. (***People v. Barnett*** (1998) 17 Cal.4th 1044, 1086.)

The defendant's "mental problems involving women, specifically, his feelings of paranoia and distrust engendered by having two female attorneys in control of his case" and a report from the defendant's psychologist warning counsel that the "dynamics of such representation" placed counsel in potential danger, did not entitle the defendant to new counsel or to decline representation by a female attorney. (***People v. Clark*** (2011) 52 Cal.4th 856, 913.)

No showing of an actual conflict of interest was made where the defendant's attorney affirmatively stated she did not personally represent the witness that was the subject of the assertion of a conflict, and nothing in the record suggested that the defendant's attorney was in possession of information obtained during that attorney-client relationship. (***People v. Clark*** (2011) 52 Cal.4th 856, 984.)

A conflict may arise if a former client is a witness in a new case, but if the attorney possesses no confidential information from the former client/witness, courts

have routinely held that no actual or potential conflict of interest exists. (***People v. Cox*** (2003) 30 Cal.4th 916, 949, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

An irreconcilable conflict of interest (requiring appointment of new defense counsel) cannot be claimed merely because the defendant could not veto defense counsel's reasonable tactical decisions. (***People v. Memro*** (1995) 11 Cal.4th 786, 858, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

The pendency of a State Bar disciplinary proceeding did not establish a conflict of interest in light of the facts of record and, in any case, any conflict of interest was waived. (***People v. Sanchez*** (1995) 12 Cal.4th 1, 45-47, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

While the defendant's filing of a pro se malpractice law suit against his lawyer may create an actual conflict of interest, it did not do so where counsel did not believe the suit would inhibit representation, and the court's familiarity with representation by counsel confirmed the quality of counsel's reputation. The frivolous nature of the lawsuit justified denial of the motion to substitute. (***People v. Barnett*** (1998) 17 Cal.4th 1044, 1110; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1106; ***People v. Hardy*** (1992) 2 Cal.4th 86, 132-138.)

The appointment of defense counsel by the trial court and payment of defense counsel's fee by the State of California did not create a conflict of interest. (***People v. Hines*** (1997) 15 Cal.4th 997, 1029.)

The theoretical conflict that exists between an attorney's personal fiscal interest and his client's interests in any pro bono or underfunded appointment case is insufficient to establish an actual conflict of interest. (***Williams v. Calderon*** (9th Cir. 1995) 52 F.3d 1465, 1473.)

No conflict was created where an attorney was first appointed to give the trial court an opinion regarding whether the public defender's office's request for a continuance was reasonable. (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1126.)

During the defendant's first penalty trial, his counsel was used as an unwitting conduit by the defendant's relatives who hid drugs in the lining of clothes counsel was asked to deliver to the defendant in jail. Since counsel had no involvement in the incident that would require him to be called as a witness, the court concluded there was no conflict in his representing the defendant. During trial, the family members involved in the incident did not testify. The defendant complained on appeal that a conflict of interest still existed due to a remote possibility that counsel could be prosecuted for the incident which could have caused him to represent the defendant less vigorously. The defendant's claim was rejected as any reasonable attorney would have advised against him testifying and would not have called the family members involved in the drug-smuggling incident to testify in the penalty retrial because the attempt at drug-smuggling

would have impaired both the defendant's character and the witnesses' credibility. (***People v. Gonzales & Soliz*** (2011) 52 Cal.4th 254, 308-311.)

While the California Supreme Court agreed with "defendant's assertion that death penalty trials are stressful under the best of circumstances," it found no basis in the record to conclude that the attorney's "loyalty to defendant, or his efforts on defendant's behalf, were compromised by his own interest in protecting his health." The attorney was designated lead counsel "if his health permits," and before the attorney assumed the responsibilities of lead counsel the court was informed that the attorney's blood pressure was no longer fluctuating and his physician had advised him he could resume trial work. During the defense case in the penalty phase when the attorney subsequently informed the court on two occasions that his physician was concerned about new fluctuations in his blood pressure, his request for a brief continuance was granted on each occasion. When trial resumed after the continuances, the attorney made no further mention of any medical concerns. (***People v. Clark*** (2011) 52 Cal.4th 856, 991-992.)

An actual conflict would have arisen if the prosecutor elected to present any evidence relating to an altercation because of the public defender's office's representation relating to that matter. During the period between the sanity and penalty phases, before the prosecutor elected not to present any evidence regarding that altercation, there was no active representation of the defendant by deputy public defenders. Accordingly, defendant could not show that his counsel "*actively* represented conflicting interests." (***People v. Clark*** (2011) 52 Cal.4th 856, 976-978.)

§ 5.21.6 No Prejudice

Even assuming a conflict of interest based on the public defender's office representing a prosecution witness which precluded defense trial counsel from impeaching the witness with a prior arrest, there was no prejudice to the defendant because defense counsel was able to impeach the witness with numerous other similar criminal convictions and there was no reasonable probability of different result if the witness had been impeached with one additional criminal conviction. (***People v. Friend*** (2009) 47 Cal.4th 1, 46-47.)

Even assuming error in failing to appoint independent counsel where the defendant and his counsel disagreed over the issue of mental competency to stand trial, the defendant failed to show prejudice where nothing in the record demonstrated the defendant's refusal to participate in the competency proceeding was uniquely tied to his defense counsel; and it is speculative to assume the defendant would have cooperated with new counsel and allowed the doctors to evaluate him; or that the results of any competency evaluation would have been favorable to the defendant. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 854.)

§ 5.21.7 Standard on Appeal

"Generally, a trial court's decision to disqualify an attorney is subject to review for an abuse of discretion." (***People v. Suff*** (2014) 58 Cal.4th 1013, 1038.)

"In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance* – as opposed to a mere theoretical division of loyalties.'" (***People v. Doolin*** (2009) 45 Cal.4th 390, 417, quoting ***Mickens v. Taylor*** (2002) 535 U.S. 162, 161 [122 S.Ct. 1237, 152 L.Ed.2d 291].)

The reason that it is necessary to demonstrate that the conflict adversely affected counsel's performance in order to obtain reversal is because the conflict-of-interest doctrine is the product of enforcement of the Sixth Amendment right to counsel, and denial of that right does not ordinarily require reversal of a conviction absent showing it is reasonably probable that ineffective representation affected the outcome. (***Mickens v. Taylor*** (2002) 535 U.S. 162, 166 [122 S.Ct. 1237, 152 L.Ed.2d 291].)

§ 5.21.8 Waivers / Forfeiture

Where a trial court perceives a possible conflict of interest, cases require the court address the issue with "considerable care." (***People v. Mai*** (2013) 57 Cal.4th 986, 1010.)

Although the trial court may refuse to accept a waiver, the right to conflict-free counsel can be waived in capital cases. (***People v. McDermott*** (2002) 28 Cal.4th 946, 990.)

"[W]aiver of a possible attorney conflict of interest is not invalid simply because all conceivable ramifications of the potential conflict were not explored or explained, and the waiver does not extend only to those matters discussed on the record." (***People v. Mai*** (2013) 57 Cal.4th 986, 1011.)

"[W]here no actual conflict has materialized at the time the waiver [of any conflict of interest] is taken, it may simply be impossible to foresee future developments that could have a genuine effect on counsel's loyalty and zeal; on the other hand, sources of conflict that are merely speculative and conjectural need not be addressed." (***People v. Mai*** (2013) 57 Cal.4th 986, 1011.)

Where there is no express evidence of a conflict, the trial court is not required to obtain waivers whenever a defense counsel rests without putting on a defense. (***People v. Burton*** (1989) 48 Cal.3d 843, 858; ***People v. Frierson*** (1985) 39 Cal.3d 803, 818, fn. 8.) This holding is not inconsistent with the holding in ***People v. Chadd*** (1981) 28 Cal.3d 739, which held a plea of guilty requires concurrence of the defendant and counsel. (***People v. Frierson*** (1985) 39 Cal.3d 803, 817, fn. 7.)

No particular form of waiver is required to waive a possible conflict of interest. (***People v. Clark*** (1992) 3 Cal.4th 41, 140, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704.)

B. CONTROL OF DEFENSE [§ 5.22]

When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant. (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1320.)

"Capital defendants are permitted to waive 'the most crucial of rights,' including the right to counsel, to a jury trial, to offer a guilt phase defense, and to be present during various stages of trial. [Citation.] And counsel, as 'captain of the ship,' maintains complete control of defense tactics and strategies, except that the defendant retains a few 'fundamental' personal rights." (***People v. Cook*** (2007) 40 Cal.4th 1334, 1343.)

"Even in capital cases, the scope of counsel's authority 'extends to matters such as deciding what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or reject, what motions to make, and most other strategic and tactical determinations." (***People v. Lucas*** (2014) 60 Cal.4th 153, 259-260, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19, quoting ***People v. McKenzie*** (1983) 34 Cal.3d 616, 631.)

A defendant's personal waiver is not required when an attorney decides whether to challenge a judge. "By choosing professional representation, the accused surrenders all but a handful of fundamental personal rights to counsel's complete control of defense strategies and tactics including deciding whether to challenge a judge." (***People v. Johnson*** (2015) 60 Cal.4th 966, 979, internal quotation marks omitted.)

"'A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense.' [Citation.] An exception to this general rule is that defense counsel's traditional authority to control the conduct of the case does not include the authority to withhold the presentation of any defense at the guilt phase if the defendant openly and unequivocally expresses his desire to present a defense and if there exists some credible evidence to support it. [Citations.] Counsel, however, is not obligated to present a defense that lacks "credible evidentiary support.' [Citation.]" (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 287.)

Defense counsel's traditional power to control the conduct of a case does not include the authority to withhold the presentation of any defense at the guilt phase over the express objection of the defendant. (***People v. Frierson*** (1985) 39 Cal.3d 803, 815.)

Where the defendant's desired defense is unsupported by credible evidence, counsel's presentation of an alternative defense did not violate the defendant's right to make "fundamental" decisions about the defense. (***People v. Jones*** (1991) 53 Cal.3d 1115, 1138-1139.)

Defense counsel is entitled to voir dire prospective jurors in the manner he feels best for his client (revealing defendant's prior convictions), at least until the defendant makes his objection known. (***People v. Freeman*** (1994) 8 Cal.4th 450, 485.)

Where there is no explicit disagreement by the defendant, trial counsel's decision to not contest, and even expressly concede, guilt on one or more charges at the penalty phase does not obligate the trial court to inquire whether the defendant agrees with trial counsel's decision. (***People v. Cain*** (1995) 10 Cal.4th 1, 30.)

A claim that the defense attorney was incompetent for calling the defendant as a witness was rejected because defense counsel have no power to prevent their clients from testifying, and it could not be determined from the record on appeal whether the defense attorney advised the defendant to testify. (***People v. Lucas*** (1995) 12 Cal.4th 415, 444.)

When the defendant has indicated to defense counsel that he will testify, revealing that the defendant will testify in his own behalf during opening statement is an appropriate tactical decision; even if it made it more difficult for the defendant to reconsider his decision, it did not unfairly coerce him to testify or deprive him of his right to decide whether to testify. (***People v. Hines*** (1997) 15 Cal.4th 997, 1032.)

§ 5.22.1 Guilty Pleas

A defendant's right to plead guilty in a capital case is "one of several exceptions to the general rule recognizing 'the need to respect a defendant's personal choice on the most "fundamental" decisions in a criminal case.'" Penal Code section 1018 provides that a guilty plea to a capital offense cannot be received "'without the consent of the defendant's counsel.'" (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1298, quoting ***People v. Chadd*** (1981) 28 Cal.3d 739, 746.)

The trial court does not have an express duty to ensure that defense trial counsel does not unreasonably withhold consent to a defendant pleading guilty to a capital offense. (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1301.)

C. INEFFECTIVE ASSISTANCE OF COUNSEL [§ 5.23]

> The ineffective-assistance-of-counsel cases that are included in the Capital Case Compendium relate specifically to issues that arise only in the context of a capital case. Discussions and holdings in capital cases that relate to more general principles of ineffective-assistance-of-counsel claims and holdings that have equal application to non-capital cases can be found in the manuals of the Attorney General's Office relating to federal and state habeas practice.

General discussion of ineffective assistance of counsel in a capital case: ***In re Champion*** (2014) 58 Cal.4th 965, 1007; ***People v. Bolin*** (1998) 18 Cal.4th 297, 333; ***In re Jones*** (1996) 13 Cal.4th 552, 561; ***In re Avena*** (1996) 12 Cal.4th 694, 721-722; ***People v. Lucas*** (1995) 12 Cal.4th 415, 436-437; ***People v. Ledesma*** (1987) 43 Cal.3d 171, 215-218.

Claimed inadequacy of counsel in a capital case for failing to investigate possible mental defenses: ***In re Scott*** (2003) 29 Cal.4th 783, 824-826; ***People v. Deere*** (1991) 53 Cal.3d 705, 713-714; ***People v. Bloyd*** (1987) 43 Cal.3d 333, 363-364; ***People v. Mozingo*** (1983) 34 Cal.3d 926.

A defendant cannot raise ineffective assistance of counsel at the guilt phase in a second appeal where only the penalty was at issue. (***People v. Deere*** (1991) 53 Cal.3d 705, 713.)

Lack of capital trial experience does not in and of itself establish incompetency. (***People v. Wright*** (1990) 52 Cal.3d 367, 412, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

It is not necessarily incompetence for defense counsel to concede the defendant's guilt of burglary and murder under a felony-murder theory, in light of the defendant's taped admissions to the police, while arguing against the special circumstance. (***People v. Cain*** (1995) 10 Cal.4th 1, 30-31; see also ***People v. Lucas*** (1995) 12 Cal.4th 415, 446-447.)

Defense counsel was not incompetent for revealing the defendant's prior convictions during voir dire where counsel expressed a tactical reason for preventing the priors from being presented for the first time in the penalty phase. (***People v. Freeman*** (1994) 8 Cal.4th 450, 484.)

"[E]ven though the peace office special circumstance was crucial to defendant's eligibility for the death penalty, counsel were not compelled to pursue an 'illegal stop'

strategy regardless of its chances of success." (***People v. Mai*** (2013) 57 Cal.4th 986, 1016.)

A defendant's Sixth Amendment right to effective assistance of counsel was not denied based on restrictions on use of jail phone to contact counsel where no showing that defendant was unable to provide input to counsel during personal visits from trial counsel, or any indication of any area where the defense investigation was inadequate because of a lack of telephone communication with defense counsel during the period jail phone restrictions were in place. (***People v. Clark*** (2016) 63 Cal.4th 522, 550.)

§ 5.23.1 Abandonment

The trial court did not abuse its discretion when it refused to replace the defendant's attorneys. On the record, there was no abandonment of the defendant as the defendant's attorney was under an ethical obligation to seek permission to withdraw based on having an attorney-client relationship with a witness against the defendant. Once that conflict was resolved, the defendant's counsel immediately resumed an active role as lead counsel. (***People v. Clark*** (2011) 52 Cal.4th 856, 978.)

§ 5.23.2 Appeal

An assertion of ineffective assistance of counsel is more appropriately addressed in a petition for writ of habeas corpus, and where it cannot be said that there could be no satisfactory explanation for counsel's conduct, the claim of ineffective assistance of counsel will be denied. (***People v. Clark*** (2011) 52 Cal.4th 856, 991-992 citing ***People v. Mendoza Tello*** (1997) 15 Cal.4th 264, 266-267.)

D. *MARSDEN* MOTION [§ 5.24]

"Defendants in capital cases often express dissatisfaction with their appointed counsel, affording us ample opportunity to address the contours of the rule set forth in [*People v.*] *Marsden* [(1970)] 2 Cal.3d 118[, 123-125]. The rule is well settled. When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation or that the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would substantially impair the defendant's right to effective assistance of

counsel." (***People v. Vines*** (2011) 51 Cal.4th 830, 878, internal quotation marks & citations omitted.)

"Although a formal motion is not required, the trial court's duty to conduct an inquiry into the reasons the defendant believes his or her attorney is incompetent arises only when the defendant (or in some instances counsel) provides '"at least some clear indication"' that the defendant wishes to substitute counsel. [Citations]. Because defendant made no assertion whatsoever regarding dissatisfaction with counsel, the trial court's duty under *Marsden* was not triggered." (***People v. Martinez*** (2009) 47 Cal.4th 399, 418.)

"Once a defendant is afforded an opportunity to state his or her reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge. The court does not abuse its discretion in denying a *Marsden* motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel. [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (***People v. Clark*** (2011) 52 Cal.4th 856, 912, internal quotation marks omitted.)

"It is well settled that a court must promptly consider a motion for substitution of counsel when the right to effective assistance would be substantially impaired if his request were ignored." (***People v. Clark*** (2011) 52 Cal.4th 856, 916, internal quotation marks omitted.)

The trial court erred when it brushed aside the defendant's initial requests for substitution of counsel in the belief that the question of the defendant's competence to stand trial first had to be resolved. However, the error was not prejudicial. While the trial court initially refused to conduct a *Marsden* hearing, it did so before holding the competency hearing. Additionally, after finding the defendant competent it appointed new counsel, so any delay in conducting the *Marsden* hearing did not prejudice the defendant. (***People v. Taylor*** (2010) 48 Cal.4th 574, 600.)

A request for appointment of independent counsel to assist in bringing a *Marsden* motion is not the functional equivalent of a pending *Marsden* motion. Accordingly, the trial court did not err in proceeding with trial where no *Marsden* motion was pending. (***People v. Clark*** (2011) 52 Cal.4th 856, 916.)

The trial court is not required to conduct a *Marsden* hearing on its own motion. "[A]ny obligation that may rest upon the court to uphold a proper standard of representation by appointed counsel [citations] is circumscribed and must be understood in light of the countervailing duty of the court to respect the inviolability of the attorney-client relationship and to permit the defendant to present his or her defense in the manner

deemed appropriate by counsel in consultation with the defendant." (***People v. Martinez*** (2009) 47 Cal.4th 399, 421.)

The standard for considering a *Marsden* motion is not lessened for a motion made after the guilt phase. (***People v. Memro*** (1995) 11 Cal.4th 786, 859, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

When defendant makes a *Marsden* motion, defense counsel is required to respond truthfully to defendant's allegations and is not required to concede inadequate representation. (***People v. Horton*** (1995) 11 Cal.4th 1068, 1123.)

Inquiring of counsel is necessary for the trial court to evaluate the defendant's request and for appellate review, and in responding, defense counsel is not arguing against the defendant. (***People v. Panah*** (2005) 35 Cal.4th 395, 432.)

A *Marsden* hearing is "'an informal hearing wherein the trial court ascertains the nature of the defendant's allegations ... and decides whether the allegations have sufficient substance to warrant substitution of counsel.'" There is no requirement of a "full-blown adversarial hearing." A tactical disagreement, by itself, is insufficient to compel discharge of appointed counsel. Once the defendant chooses to be represented by professional counsel, the "'counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.'" (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1320.)

The mere allegation by a defendant that he or she does not trust defense counsel, without more, is insufficient to compel the trial court to replace the attorney. Any other conclusion gives veto power over appointment of counsel. (***People v. Abilez*** (2007) 41 Cal.4th 472, 489.)

Where the defendant contended he had not been kept informed of defense strategy at the guilt phase, the trial court was entitled to accept defense counsel's assertion to the contrary. (***People v. Myles*** (2012) 53 Cal.4th 1181, 1207; ***People v. Clark*** (2011) 52 Cal.4th 856, 912.)

The fact that the superior court made a different determination on the existence of an irreconcilable conflict (and relieved counsel) than was made by the magistrate in municipal court does not demonstrate the magistrate's decision was erroneous. (***People v. Barnett*** (1998) 17 Cal.4th 1044, 1086.)

The defendant had a full and fair hearing, and since he declined to elaborate on his complaints about counsel, the trial court had no duty to inquire further. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1004.)

§ 5.24.1 Appointment of Independent Counsel

"A trial court is not required to appoint separate counsel to press a *Marsden* claim for a defendant [citations] but a trial court has discretion to make such an appointment."

(***People v. Clark*** (2011) 52 Cal.4th 856, 917; ***People v. Hines*** (1997) 15 Cal.4th 997, 1025 [a defendant has no state or federal constitutional right to appointment of a separate attorney to represent him in making a *Marsden* motion].)

Defense counsel and the courts should abandon reliance on appointing independent counsel for the purpose of evaluating a defendant's assertions of incompetency of counsel and deciding a defendant's new trial or plea withdrawal motion. (***People v. Sanchez*** (2011) 53 Cal.4th 80, 89.)

The California Supreme Court has "warned that appointment of independent counsel for the purposes of a *Marsden* motion could 'cause unnecessary delay, and may damage the attorney-client relationship in those cases in which the trial court ultimately concludes that the motion should be denied.'" (***People v. Clark*** (2011) 52 Cal.4th 856, 917.)

The trial court did not abuse its discretion in granting defendant's "*insistent and repeated pleas* for independent counsel" with defense counsel's assent, after thoughtful consideration "just to make sure every possible point" that could legally be raised would be included in defendant's *Marsden* motion. (***People v. Clark*** (2011) 52 Cal.4th 856, 917.)

§ 5.24.2 Irreconcilable Breakdown

"Tactical disagreements between the defendant and his attorney do not constitute an irreconcilable conflict unless they portend a complete breakdown in the attorney-client relationship." (***People v. Clark*** (2011) 52 Cal.4th 856, 912, internal quotation marks omitted.)

"A trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel." (***People v. Myles*** (2013) 53 Cal.4th 1181, 1207, internal quotation marks omitted; ***People v. Clark*** (2011) 52 Cal.4th 856, 913 [same].)

Heated words alone do not require substitution of counsel without a showing of an irreconcilable conflict. The mere lack of trust in, or inability to get along with, counsel is not sufficient grounds for substitution. (***People v. Taylor*** (2010) 48 Cal.4th 574, 600.)

"[D]efendant's proclamation during an angry tirade that he did not want 'these bitches' for his attorneys strongly suggests that any breakdown in his relationship with counsel was attributable to his own attitude and refusal to cooperate." (***People v. Clark*** (2011) 52 Cal.4th 856, 913.)

E. MOTION TO WITHDRAW [§ 5.25]

Withdrawal of counsel is addressed to the trial court's discretion. (***People v. Sapp*** (2003) 31 Cal.4th 240, 256.)

The trial court did not abuse its discretion in denying defense counsel's motion to withdraw where although the defendant failed to heed counsel's advice and spoke to the media, such action did not demonstrate distrust or dissatisfaction with counsel or that the defendant's right to counsel was jeopardized by continuing the representation. (***People v. Sanchez*** (1995) 12 Cal.4th 1, 36-37, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

F. REMOVAL / SUBSTITUTION OF APPOINTED COUNSEL [§ 5.26]

A trial court may remove appointed counsel in order to "prevent substantial impairment of court proceedings" and "when counsel, without good cause, does not become ready for trial." (***People v. Avila*** (2009) 46 Cal.4th 680, 695, internal quotation marks omitted, citing Pen. Code, § 987.05.)

The removal of appointed counsel does not implicate the concerns regarding interference with the right of counsel of choice that arise with retained counsel. (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1119, 1122.)

The trial court did not abuse its discretion in replacing lead counsel after concluding that her continued involvement would interfere with the timely commencement of the penalty phase where counsel informed the court that she could not proceed with the defendant's case "for a significant amount of time, if at all" in light of her need for surgery and cancer treatment. (***People v. Clark*** (2011) 52 Cal.4th 856, 993.)

In reviewing the denial of a mistrial motion predicated on a denial of the Sixth Amendment right to counsel because a third counsel was appointed lead counsel for the penalty phase after lead counsel underwent surgery and treatment for cancer, the California Supreme Court expressed "no opinion as to whether the trial court had the authority to designate which of defendant's two attorneys would serve as lead counsel at the penalty phase." (***People v. Clark*** (2011) 52 Cal.4th 856, 991, fn. 39.)

A defendant's complaint that counsel rarely visited him does not justify substitution of counsel. (***People v. Myles*** (2012) 53 Cal.4th 1181, 1208, citing ***People v. Hart*** (1999) 20 Cal.4th 546, 604.)

"[T]he number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence." (***People v. Streeter*** (2012) 54 Cal.4th 205, 230, internal quotation marks & citations omitted.)

G. REMOVAL / SUBSTITUTION OF RETAINED COUNSEL [§ 5.27]

When a defendant makes a timely motion to discharge his retained attorney and obtain appointed counsel, unlike when a defendant seeks to substitute one appointed

counsel for another, he is not required to demonstrate inadequate representation by his retained attorney, or to identify an irreconcilable conflict between them. The right to discharge a retained attorney is, however, not absolute. The trial court has discretion to deny such a motion if discharge will result in significant prejudice to the defendant, or if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice." (***People v. Maciel*** (2013) 57 Cal.4th 482, 512, internal quotation marks & citations omitted.)

"Although a defendant seeking to discharge his retained attorney is not required to demonstrate inadequate representation or an irreconcilable conflict, this does not mean that the trial court cannot properly consider the absence of such circumstances in deciding whether discharging counsel would result in disruption of the orderly processes of justice." (***People v. Maciel*** (2013) 57 Cal.4th 482, 513.)

The trial court properly exercised its discretion in denying a motion to remove retained counsel as relieving counsel would have resulted in the "disruption of the orderly process of justice" under the circumstances. Significant delays would be required if retained counsel were removed since the case had been pending for two years at the time of the motion, and substitute counsel would be required to study the records in each former codefendant's trial in addition to the record in the defendant's case. The trial had already begun, and the defendant did not have any substitute counsel in mind and was instead asking the court to appoint counsel. Moreover, there was no abandonment, inadequate representation, or actual conflict of interest. (***People v. Maciel*** (2013) 57 Cal.4th 482, 512-513.)

III. JUDGE [§ 5.30]

A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 951; ***People v. Cox*** (1991) 53 Cal.3d 618, 700, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see Pen. Code, § 1044; Evid. Code, § 765.)

The trial court has no sua sponte duty to exclude evidence, remedy misconduct, or instruct the jury on specific evidentiary limitations. (***People v. Montiel*** (1993) 5 Cal.4th 877, 918, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

A. COMMENTS / QUESTIONS [§ 5.31]

A trial court may comment on the evidence. (Cal. Const., art. VI, § 10.)

A trial court's comments on the evidence must be "'accurate, temperate, non-argumentative, and scrupulously fair.'" (***People v. Sturm*** (2006) 37 Cal.4th 1218, 1232, quoting ***People v. Rodriguez*** (1986) 42 Cal.3d 730, 766.)

The requirement of accurate, temperate, non-argumentative, and scrupulously fair comments by a trial court applies equally to voir dire. (***People v. Sturm*** (2006) 37 Cal.4th 1218, 1232; ***People v. Slaughter*** (2002) 27 Cal.4th 1187, 1217-1218, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

A trial judge should be "'careful not to throw the weight of his judicial position into a case, either for or against the defendant.'" (***People v. Sturm*** (2006) 37 Cal.4th 1218, 1237, quoting ***People v. Mahoney*** (1927) 201 Cal. 618, 627.)

Trial judges should be "'exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.'" (***People v. Sturm*** (2006) 37 Cal.4th 1218, 1237, quoting ***People v. Zammora*** (1944) 66 Cal.App.2d 166, 210.)

"A trial judge may not vouch for the credibility of a witness. Although it is understandable that the judge would offer kind words to a sympathetic witness, the court's comments improperly vouched for [the witness] by suggesting that her testimony was true." However, no bias was demonstrated where the record showed the court experienced a momentary lapse of judgment as a result of moving testimony, quickly corrected its error, and properly instructed the jury its comments were improper and inappropriate. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1206, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Evidence Code section 775 confers on the trial judge the power, discretion, and duty to examine witnesses in order to fairly aid in eliciting truth, prevent misunderstanding, clarify testimony, cover omissions, allow a witness his right of explanation, or elicit facts material to a just determination. Constraints on questioning are the same limitations on the court's role as commentator: temperate, nonargumentative, and scrupulously fair. (***People v. Hawkins*** (1995) 10 Cal.4th 920, 948, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

"A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citation; Evid. Code, § 775.] The court may not, however, assume the role of either the prosecution or the defense. [Citation.] The court's questioning must be '"temperate, nonargumentative, and scrupulously fair"' [citation], and it must not convey to the jury the court's opinion of the witness's credibility." (***People v. Cook*** (2006) 39 Cal.4th 566, 597.)

While the California Supreme Court would "not endorse all of the trial court's questioning" and would find some of it inappropriate, the defendant was not prejudiced because there was no reasonable probability of a different guilt verdict. (***People v. Harris*** (2005) 37 Cal.4th 310, 350-351.)

"While it is ordinarily better practice for the trial court to let trial counsel develop the case, a trial court properly may undertake the examination of witnesses when it appears that relevant and material testimony will not be elicited by counsel." (***People v.***

Guerra (2006) 37 Cal.4th 1067, 1125, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

B. COURTROOM SECURITY [§ 5.32]

> *Cross-Reference*:
>
> § 3.160, *re* Shackles, restraints, and courtroom security measures

"[A] 'trial court has broad power to maintain courtroom security and orderly proceedings.'" (***People v. Stevens*** (2009) 47 Cal.4th 625, 632.)

Security measures that are not inherently prejudicial, such as use of metal detectors, or stationing security or law enforcement personnel within courtroom, do not need to be justified by a showing of extraordinary need like that required for physical restraint of a defendant. (***People v. Stevens*** (2009) 47 Cal.4th 625, 633-634.) The court must exercise its discretion on a case-by-case basis in determining whether to place a uniformed deputy near a testifying defendant and may not defer to law enforcement officers or defer to a generic policy. The court should state the reasons for stationing a guard at or near the witness stand, and explain why the need for the procedure outweighs potential prejudice to the defendant. There is no sua sponte duty to give a cautionary instruction, but such instruction should be considered, upon request, either at the time of the defendant's testimony or in closing instructions, to disregard security measures related to the defendant's custodial status. (***People v. Hernandez*** (2011) 51 Cal.4th 733, 742-743.)

"The court may not defer decision making authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis." (***People v. Stevens*** (2009) 47 Cal.4th 625, 642.)

Use of a metal detector at the courtroom door does not require a contested evidentiary hearing to make its determination, and the trial court may rely on the representations of the prosecutor. (***People v. Ayala*** (2000) 23 Cal.4th 225, 252-253.)

Neither due process nor any other constitutional right of a defendant mandates a hearing on the necessity for courtroom security measures. (***People v. Hayes*** (1999) 21 Cal.4th 1211, 1268.)

C. EX PARTE COMMUNICATION [§ 5.33]

Cross-Reference: § 5.42, *re* Coercion / Deadlock

"[A] trial court should not entertain, let alone initiate, communications with individual jurors except in open court, with prior notification to counsel. The prohibition against ex parte communications is designed to ensure that the defendant has an adequate opportunity to evaluate the propriety of a proposed judicial response in order to pose an objection." (***People v. Clark*** (2011) 52 Cal.4th 856, 987, internal quotation marks & citations omitted; ***People v. Avila*** (2006) 38 Cal.4th 491, 613 ["Ordinary procedure would require that the trial judge afford the parties an opportunity to be apprised of any [communication from the jury] and to have the opportunity to make timely objection to any action by the court or jury which might be deemed irregular."].)

Not every communication between the judge and the jury constitutes a critical stage of the trial. A trial court may properly engage in ex parte communications for the purposes of scheduling, administrative matters, or emergencies that do not deal with substantive matters. (***People v. Clark*** (2011) 52 Cal.4th 856, 987, internal quotation marks omitted, quoting ***People v. Seaton*** (2001) 26 Cal.4th 598, 696, and Cal. Code Jud. Ethics, canon 3B(7)(d).)

"Because of the potential for confusion and mischief, we reiterate that trial courts in capital cases should meticulously comply with Penal Code section 190.9 and place all proceedings on the record." (***In re Freeman*** (2006) 38 Cal.4th 630, 648-649, fn. 9.)

A statutory or constitutional violation occurs only where the court actually provides the jury with instructions or evidence during deliberations without first consulting counsel. (***People v. Avila*** (2006) 38 Cal.4th 491, 613.)

Ex parte communications are evaluated for prejudice under ***Chapman v. California*** (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (***People v. Jennings*** (1991) 53 Cal.3d 334, 383-384.)

The judge's ex parte communications with the jury after it had reported a deadlock on penalty were clearly improper, but did not coerce the deadlock or affect the legal necessity for a mistrial. (***People v. Wash*** (1993) 6 Cal.4th 215, 249-250.)

Correct legal advice, though given ex parte, was not prejudicial. (***People v. Jennings*** (1991) 53 Cal.3d 334, 384-385.)

A mid-trial sidebar conference between the judge and a juror about potential financial hardship on the juror's part was an improper ex parte communication between the juror and the court, but was harmless beyond a reasonable doubt. (***People v. Wright*** (1990) 52 Cal.3d 367, 402-403, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

The trial court's providing the jury with an exhibit without first notifying counsel was error, but waived when counsel, upon notification, did not object to lack of notice or the court's actions. (***People v. Price*** (1991) 1 Cal.4th 324, 414.)

Where the judge entertained an ex parte conversation with the juror about his employment and wrote a letter to the employer stressing the need for the juror's participation, there was no prejudice to the defendant even though there may have been a technically improper contact. (***People v. Pride*** (1992) 3 Cal.4th 195, 263.)

The trial court did not err when the judge simply picked up a ringing telephone and took a message from a juror for administrative purposes. However, where the judge initiated contact with another juror after she left word with a temporary court clerk indicating she had a scheduling conflict, the judge violated the defendant's rights to personal presence and counsel at a critical stage of the proceedings. However, the error was harmless beyond a reasonable doubt. (***People v. Clark*** (2011) 52 Cal.4th 856, 988.)

D. FRIVOLOUS COURTROOM ATMOSPHERE [§ 5.34]

"Although a jury trial, especially for a capital offense, is a serious matter, well-conceived judicial humor can be a welcome relief during a long, tense trial. Obviously, however, the court should refrain from joking remarks that the jury might interpret as denigrating a particular party or his attorney." (***People v. Valdez*** (2012) 55 Cal.4th 82, 156, internal quotation marks & citations omitted; ***People v. Abel*** (2012) 53 Cal.4th 891, 913 [same].)

During the guilt phase, at several points, the trial court used "monikers" to refer to the defendants, counsel, and the jurors. While the judge's remarks were not condoned by the California Supreme Court, it found the remarks to be "relatively brief and mild," and the isolated instances fell "short of the intemperate or biased judicial conduct that warrants reversal" as the "trial as a whole was conducted with appropriate solemnity." (***People v. Valdez*** (2012) 55 Cal.4th 82, 156, internal quotation marks & citations omitted.)

An attempt at humor by a trial court is "always a risky venture during a trial for a capital offense." (***People v. Sturm*** (2006) 37 Cal.4th 1218, 1238.)

A claim that attempts to inject humor into the trial proceedings violated the defendant's right to a fair trial was waived by failure to object. (***People v. Freeman*** (1994) 8 Cal.4th 450, 511.)

E. JUDICIAL BIAS / DISQUALIFICATION [§ 5.35]

Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), provides "an explicit ground for judicial disqualification" based on "a public perception of partiality, that is, the appearance of bias." (***People v. Freeman*** (2010) 47 Cal.4th 993; ***People v. Cowan*** (2010) 50 Cal.4th 401, 456.)

A claim of judicial bias requires a determination whether a judge officiously and unnecessarily usurped the duties of the prosecutor and created the impression he was allying himself with the prosecution. (***People v. Clark*** (1992) 3 Cal.4th 41, 143, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704.)

"'Defendant may not go to trial before a judge and gamble on a favorable result, and then assert for the first time on appeal that the judge was biased.'" (***People v. Johnson*** (2015) 60 Cal.4th 966, 978-979; ***People v. Rodriguez*** (2014) 58 Cal.4th 587, 626.)

A party must seek the disqualification of a judge at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. The issue cannot be raised for the first time on appeal. The defendant is also foreclosed from complaining the alleged bias affected subsequent rulings. (***People v. Johnson*** (2015) 60 Cal.4th 966, 978-980; Code Civ. Proc., § 170.3(d).)

While "a defendant who objected to a judge's participation in the proceedings and merely failed to pursue the statutory appellate remedy under Code of Civil Procedure section 170.3" was permitted to raise "a narrow due process claim" on appeal (see ***People v. Freeman*** (2010) 47 Cal.4th 993, 999-1000; ***People v. Chatman*** (2006) 38 Cal.4th 344, 362-363), a defendant may not "play fast and loose with the administration of justice" by "argu[ing] on appeal that [the trial judge] was biased when, at the outset and after full disclosure, he agreed the judge was not biased." (***People v. Johnson*** (2015) 60 Cal.4th 966, 979, internal quotation marks & citations omitted.)

A decision to challenge a particular judge is inherently tactical and "[t]here are, no doubt, an infinite number of reasons why counsel would not avail themselves of the opportunity to disqualify a judge. The failure to do so is within the competence of counsel, and does not show ineffective counsel." The defendant's personal waiver is not required. (***People v. Johnson*** (2015) 60 Cal.4th 966, 979-980, quoting ***People v. Scott*** (1997)15 Cal.4th 1188, 1213, internal quotation marks omitted.)

Where the defendant had a statutory remedy to challenge the judge but forfeited that remedy by failing to pursue it, the defendant cannot then "fall back on the narrower due process protection without making the heightened showing of a probability, rather than the mere appearance, of actual bias to prevail." (***People v. Freeman*** (2010) 47 Cal.4th 993, 1006.)

"'[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist "'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'"'" (***People v. Cowan*** (2010) 50 Cal.4th 401, 456, quoting ***Caperton v. A. T. Massey Coal Co.*** (2009) 556 U.S. 868, 877 [129 S.Ct. 2252, 2259, 173 L.Ed.2d 1208].)

The United States Supreme Court has "made it abundantly clear that the due process clause should not be routinely invoked as a ground for judicial disqualification. Rather, it is the exceptional case presenting extreme facts where a due process violation will be found. ([*Caperton v. A. T. Massey Coal Co.* (2009)] 556 U.S. [868,] ___ [129 S.Ct. [2252] 2267 [173 L.Ed.2d 1208]].) Less extreme cases – including those that involve the mere appearance, but not the probability, of bias – should be resolved under more expansive disqualification statutes and codes of judicial conduct. (*Ibid*.)" (***People v. Freeman*** (2010) 47 Cal.4th 993, 1005.)

Only the most extreme facts would justify disqualification based on the due process clause. (***People v. Cowan*** (2010) 50 Cal.4th 401, 456-457, citing ***Caperton v. A. T. Massey Coal Co.*** (2009) 556 U.S. 868, 886 [129 S.Ct. 2252, 2259, 173 L.Ed.2d 1208].)

"A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion." (***Williams v. Pennsylvania*** (2016) ___ U.S. ___, ___ [136 S.Ct. 1899, 1907].)

The decision whether to authorize the death penalty "amounts to significant, personal involvement in a critical trial decision" as the decision "whether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make." Accordingly, an appellate justice's authorizing the death penalty in his former capacity as a prosecutor was a "critical choice in the adversary process" and his failure to recuse himself from the a subsequent appeal involving the defendant presents "an unconstitutional risk of bias" and the failure to recuse "constitutes structural error even if the judge in question did not cast a deciding vote." (***Williams v. Pennsylvania*** (2016) ___ U.S. ___, ___ [136 S.Ct. 1899, 1907, 1909].)

The trial court has a duty to control the proceedings. (Pen. Code, § 1044). A trial court's numerous rulings against a party – even when erroneous – do not establish a charge of judicial bias, especially when they are subject to review. On appeal, a defendant's due process right to a an impartial judge under the state and federal Constitutions requires a showing of judicial misconduct or bias so prejudicial that it deprived the defendant of a fair trial, as opposed to a perfect trial. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1111-1112, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Due process was not denied where the defendant was tried before a judge who had previously disqualified himself based on an appearance of bias – his friendship with a judge whom the defendant was rumored to have been stalking – but who later was reassigned to the defendant's case after the stalking rumors proved unfounded. (***People v. Freeman*** (2010) 47 Cal.4th 993, 997, 1000-1006.)

The defendant's federal due process right and statutory right (Code of Civil Procedure, § 170.3(a)(1)) to an impartial judge, were not violated when the original trial judge continued to preside over a brief period of the trial after learning his close friends were both upcoming witnesses and relatives of one of the victims. (***People v. Cowan*** (2010) 50 Cal.4th 401, 456-457.)

Simply commenting on aspects of the evidence out of the presence of the jury "falls far short of 'betraying a bias against defense counsel.'" (***People v. Harris*** (2005) 37 Cal.4th 310, 347.)

"In the setting of a protracted trial ... the court's momentary and isolated expression of irritation with defense counsel did not indicate bias or suggest to the jury that the court was 'allying itself with the prosecution.'" (***People v. Bell*** (2007) 40 Cal.4th 582, 605, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

"In curbing vague questions about unknown persons, the court did not ally itself with the prosecution but rather exercised reasonable control of the trial to avoid irrelevant or unduly prolonged testimony." (***People v. Harris*** (2005) 37 Cal.4th 310, 347.)

"[T]he court's skepticism as to the reasons for defendant's pretrial absence" did not demonstrate bias "toward any facet of defendant's guilt phase case, in which defendant did not assert any mental-health based defenses." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1175, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

The trial court's comments that the defendant was feigning mental incompetence and used outbursts and other tactics to manipulate and delay proceedings did not suggest the court prejudged the issue or could not be fair; rather the trial court's observations were supported by the record including expert testimony. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 994.)

Potential bias and prejudice must clearly be established by an objective standard. Courts must apply statutes authorizing disqualification of a judge due to bias "with restraint." (***People v. Chatman*** (2006) 38 Cal.4th 344, 363.)

The reviewing court presumes the honesty and integrity of those serving as judges. (***People v. Chatman*** (2006) 38 Cal.4th 344, 364.)

"That the trial court would have permitted an even more extensive inquiry had there been an allegation that the killing was racially motivated is not evidence of judicial bias." (***People v. Elliott*** (2012) 53 Cal.4th 535, 572-573.)

The fact the judge's daughter had been the victim of a knife-point robbery at a photography store many years earlier did not disqualify him from a case involving the stabbing death of an employee at a drive-through photo shop. "Judges, like all human beings, have widely varying experiences and backgrounds. Except perhaps in extreme circumstances, those not directly related to the case or the parties do not disqualify them." (***People v. Chatman*** (2006) 38 Cal.4th 344, 364.)

Although an order denying a motion to disqualify a judge pursuant to Code of Civil Procedure section 170.3, subdivision (d), is not reviewable on appeal, section 170.3, subdivision (d), does not bar review (on appeal from a final judgment) of nonstatutory claims that a final judgment is unconstitutionally invalid because of judicial bias. (No bias found in this case.) (***People v. Brown*** (1993) 6 Cal.4th 322, 335.)

F. JUDICIAL HOSTILITY / MISCONDUCT [§ 5.36]

A "trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 824, internal quotation marks omitted; ***People v. McWhorter*** (2009) 47 Cal.4th 318, 373; ***People v. Sturm*** (2006) 37 Cal.4th 1218, 1232.)

"[A] trial court commits misconduct if it persists in making discourteous and disparaging remarks to a defendant's counsel and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense." A solitary, fleeting and ambiguous comment does not constitute judicial misconduct. (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1320-1321.)

"[I]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior." A reviewing court's role is "not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather [its role is to] determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 824, internal quotation marks & citations omitted; ***People v. McWhorter*** (2009) 47 Cal.4th 318, 373.)

To the extent the trial court's comments to defense counsel were "a reflection of frustration and irritation at counsel's repeated efforts to elicit inadmissible hearsay, they were not improper. Such manifestations of friction between court and counsel, while not desirable, are virtually inevitable in a long trial." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 825, internal quotation marks omitted.)

The court's comments (which included possible sarcasm) in addressing defense counsel's repeated efforts to elicit inadmissible evidence did not amount to judicial misconduct. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 826.)

A trial court commits misconduct if it "'persists in making discourteous and disparaging remarks to … witnesses and utters frequent comments from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge.'" (***People v. Sturm*** (2006) 37 Cal.4th 1218, 1238, quoting ***People v. Boyette*** (2002) 29 Cal.4th 381, 460.)

"'It is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty or ethics of the attorneys in a trial .... When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client.'" (***People v. Sturm*** (2006) 37 Cal.4th 1218, 1240, quoting ***People v. Fatone*** (1985) 165 Cal.App.3d 1164, 1174-1175.)

Although "understandably frustrated by counsel's repeated attempts to make the jurors feel guilty about the prospect of imposing a death sentence," the court "overstepped the bounds of propriety" when it accused counsel of "unethical and unlawful conduct in front of the jury" when it "admonished counsel to 'sit down and formulate your thoughts to keep them ethical and lawful arguments' even though the prosecutor had not objected and even though defense counsel had made virtually identical remarks before the same trial judge, without objection, during her closing argument in the first penalty phase trial." The isolated inappropriate comments, however, did not rise to the level of prejudicial judicial misconduct. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1203-1204, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

The trial court did not engage in misconduct during a jury view by asking the attorneys questions, eliciting stipulations from the attorneys, and answering questions posed by jurors. (***People v. Mayfield*** (1997) 14 Cal.4th 668, 740, abrogated on other grounds, *People v. Scott* (2015) 61 Cal.4th 363, 390.)

An example of prejudicial judicial misconduct resulting in reversal of a capital case: ***People v. Sturm*** (2006) 37 Cal.4th 1218, 1233-1244.

It was error for the trial court to note that deliberations on the special-circumstance verdict should be commenced and concluded the same day, but the comment was not objected to and was harmless in light of ***People v. Anderson*** (1987) 43 Cal.3d 1104. (***People v. Anderson*** (1990) 52 Cal.3d 453, 469.)

The trial judge's comments to newspapers about court procedures in general and a previous case in particular did not constitute judicial misconduct. (***People v. Hardy*** (1992) 2 Cal.4th 86, 176.)

There is no due process requirement for notice that the judge intends to comment on the evidence. Comments in this case came within a permissible range. (***People v. Proctor*** (1992) 4 Cal.4th 499, 539-543.)

§ 5.36.1 Forfeiture / Invited Error

A party must seek the disqualification of a judge at the earliest practicable opportunity after discovery of the facts constituting grounds for disqualification. Having failed to do so, any claim of bias is forfeited on appeal, and the defendant cannot complain that any alleged bias affected subsequent rulings. (***People v. Johnson*** (2015) 60 Cal.4th 966, 978; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 994; Code Civ. Proc., § 170.3(d).)

A claim that the trial court treated counsel differently and made disparaging remarks to defense counsel, thereby improperly aligning itself with the prosecution and denying the defendant his constitutional rights to due process and a fair trial is forfeited where the defendant raises no objection below on these grounds, and did not ask for a jury admonition to address the alleged intemperance of the court toward defense counsel. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 825.)

"As a general rule, a specific and timely objection to judicial misconduct is required to preserve the claim for appellate review. Although defendant argues he may be excused from this general rule because an objection would have been futile, the circumstances in no way suggest an objection and request to have the jury admonished would have found an unsympathetic jurist." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1320, internal quotation marks & citations omitted.)

A claim of judicial hostility requires an objection in the trial court to provide the court an opportunity to dispel any misunderstanding with appropriate admonitions. (***People v. Snow*** (2003) 30 Cal.4th 43, 78; ***People v. Boyette*** (2002) 29 Cal.4th 381, 459; ***People v. Fudge*** (1994) 7 Cal.4th 1075, 1107-1109; ***People v. Wright*** (1990) 52 Cal.3d 367, 411, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Comments or statements by a trial court (other than instructions to the jury) must be objected to at trial or they are forfeited on appeal. (***People v. Hawkins*** (1995) 10 Cal.4th 920, 945, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89; ***People v. Wader*** (1993) 5 Cal.4th 610, 646-647; ***People v. Anderson*** (1990) 52 Cal.3d 453, 468.)

The trial court's informing the jury of the Supreme Court's prior reversal of the special circumstance and penalty determination was not objected to and thus forfeited on appeal. (***People v. Anderson*** (1990) 52 Cal.3d 453, 468.)

There is invited error where the defense requested the jury be informed of the prior history of the case, i.e., the fact that the death sentence and special circumstances had been reversed on appeal. (***People v. Whitt*** (1990) 51 Cal.3d 620, 639-640, abrogated on other grounds, *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

Where the trial-court record showed that any attempt by defense counsel to object to the trial court's numerous sua sponte objections and derogatory comments would have been futile and counterproductive to his client, the issue of judicial misconduct was

sufficiently preserved on appeal despite the absence of specific objections to several of the incidents being cited on appeal. (***People v. Sturm*** (2006) 37 Cal.4th 1218, 1237.)

"A claim of pervasive judicial bias does not necessarily require an objection to be preserved because such an objection may be futile, but '[a]s a general rule,' isolated 'judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial.'" (***People v. Banks*** (2014) 59 Cal.4th 1113, 1177, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3, quoting ***People v. Sturm*** (2006) 37 Cal.4th 1218, 1237.)

G. JUDICIAL SUBSTITUTION [§ 5.37]

Penal Code section 1053 which provides for the substitution of a new judge when the original judge in a criminal trial is unable to proceed is constitutional. (***People v. Cowan*** (2010) 50 Cal.4th 401, 459.)

Due process is not violated where trial judge is ill and, without consent of the defendant, a substitute judge concludes instructing the jury and presides over deliberations while the judge is ill. (***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1210-1221, abrogated on other grounds, *In re Steele* (2004) 32 Cal.4th 682, 690.)

Mid-trial substitution of the trial judge was not a denial of the jury-trial right under the federal or state Constitutions. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1172; ***People v. Espinoza*** (1992) 3 Cal.4th 806, 828-829.)

No statute or rule imposes a requirement upon a substitute judge to certify his or her familiarity with the record. (***People v. Cowan*** (2010) 50 Cal.4th 401, 460.)

The defendant forfeits challenge to substitution of the judge by failing to object below. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1172; ***People v. Halvorsen*** (2007) 42 Cal.4th 379, 429.)

Even assuming the trial judge's business trip did not amount to an inability to proceed within the meaning of Penal Code section 1053, any error was harmless beyond any reasonable doubt where another judge presided over the guilt phase deliberations for a half a day, made no evidentiary or instructional rulings that would have required familiarity with the particulars of the defendant's case, and did not err in granting motion to strike two verdicts without prejudice. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1172.)

Improper substitution of a judge, unlike a biased adjudicator, does not constitute structural error. (***People v. Halvorsen*** (2007) 42 Cal.4th 379, 429.)

H. USE OF A REFEREE [§ 5.38]

Counsel may stipulate to the trial of a capital case by a court commissioner, or other temporary judge, without an express waiver by the defendant. (***In re Horton*** (1991) 54 Cal.3d 82, 95-96.)

IV. JURY [§ 5.40]

A. BIFURCATION – GUILT & PENALTY [§ 5.41]

Cross-Reference: § 10.35, *re* Unitary jury

"Section 190.2, subdivision (c), provides that, absent good cause, the same jury decides guilt and penalty at a capital trial. Good cause to discharge the guilt phase jury and to impanel a new one must be based on facts that appear in the record as a demonstrable reality showing the jury's inability to perform its function." (***People v. Clark*** (2011) 52 Cal.4th 856, 966, internal citations & quotation marks omitted.)

Mere delay in commencing the penalty phase, without more, is an insufficient basis for impaneling a new jury. (***People v. Clark*** (2011) 52 Cal.4th 856, 980.)

To establish good cause for separate juries more is required than mere speculation that the use of a single jury would result in prejudice. The desire of defense counsel to voir dire the guilt phase differently than the penalty phase is not good cause for deviating from the legislative mandate for a unitary jury for both phases of a capital trial. (***People v. Bivert*** (2011) 52 Cal.4th 96, 108-109.)

A defendant who successfully moves for separate juries waives a claim that separate juries violated Penal Code section 190.4, subdivision (c). (***People v. Carpenter*** (1997) 15 Cal.4th 312, 370, abrogated by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1097.)

Where the trial court granted a defense request for separate guilt and penalty-phase juries, the court properly acted within its discretion in selecting the penalty-phase jury first and permitting the penalty-phase jury to sit through the guilt phase; the presence of the penalty-phase jury at the guilt phase did not create an unacceptable risk that the guilt-phase jury would be predisposed toward conviction or would have a diminished sense of responsibility. (***People v. Carpenter*** (1997) 15 Cal.4th 312, 370-371, 397, abrogated by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1097.)

The trial court did not err in denying a request to impanel a second jury based on midtrial publicity as there was no cause for concern, and the defendant's effort to show otherwise rested with speculation. (***People v. Clark*** (2011) 52 Cal.4th 856, 967.)

On appeal, a trial court's decision not to impanel a second jury is reviewed for an abuse of discretion. (***People v. Clark*** (2011) 52 Cal.4th 856, 966.)

B. COERCION / DEADLOCK [§ 5.42]

> *Cross-Reference*: § 10.31, *re* Coercion

When a trial court intervenes in response to reports of an impasse in deliberations, "such interventions must be limited and undertaken with the utmost respect for the sanctity of the deliberative process." (***People v. Nelson*** (2016) 1 Cal.5th 513, 569.)

When the jury reports itself to be at an impasse in deliberation, "current California Rules of Court, rule 2.1036(a), adopted in 2007, states that where an impasse has been reported, 'the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask if the jury has specific concerns which, if resolved, might assist the jury in reaching a verdict.' Rule 2.1036(b) states, '[i]f the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] (1) Give additional instructions; [¶] (2) Clarify previous instructions; [¶] (3) Permit attorneys to make additional closing arguments; or [¶] (4) Employ any combination of these measures.'" (***People v. Nelson*** (2016) 1 Cal.5th 513, 569.)

Jurors can be asked to continue deliberating when, in the exercise of its discretion, the trial court finds a reasonable probability they will be able to reach agreement. (***People v. Valdez*** (2012) 55 Cal.4th 82, 159, citing Pen. Code, § 1140; ***People v. Howard*** (2008) 42 Cal.4th 1000, 1029 [same].)

"A court is not bound to take as final the statement of the jurors that they cannot agree upon a verdict." (***People v. Valdez*** (2012) 55 Cal.4th 82, 159, internal quotation marks & citations omitted.)

When a jury reports it is unable to reach a verdict, whether there is a reasonable probability of agreement rests in the trial court's discretion. The court's exercise of its power to order continued deliberations must be done without coercion so as to avoid displacing the jury's independent judgment in favor of compromise and expediency. (***People v. Lucas*** (2014) 60 Cal.4th 153, 327-328, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19; ***People v. Pride*** (1992) 3 Cal.4th 195, 265; ***People v. Breaux*** (1991) 1 Cal.4th 281, 319-320; ***People v. Price*** (1991) 1 Cal.4th 324, 467.)

"Coercion occurs where the trial court, by insisting on further deliberations, expresses an opinion that a verdict should be reached. Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of compromise and expediency, the court may direct further deliberations upon

its reasonable conclusion that such direction would be perceived as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered." (***People v. Peoples*** (2016) 62 Cal.4th 718, 783, internal quotation marks & citations omitted.)

"None of the factors defendant cites – the length of deliberation, the absence of questions about the law, the jurors' statements about their inability to reach a verdict – removed the trial court's discretion to require further deliberation. Nor was it unreasonable for the court to conclude that, in light of the fact the trial itself had taken two months, the jurors should put in a little more time than the 16½ hours it had deliberated. The record shows no abuse of discretion." (***People v. Valdez*** (2012) 55 Cal.4th 82, 160.)

There was no coercion where the court made a limited inquiry into whether the juror had refused to deliberate and whether he was willing to continue to deliberate following a report that the juror had refused to do so. (***People v. Haskett*** (1990) 52 Cal.3d 210, 237-238.)

"While the trial court has a duty to avoid coercing the jury to reach a verdict, inquiry as to the possibility of agreement is not a prerequisite to denial of a motion for a mistrial. Thus, the trial court does not abuse its discretion merely by declining to poll the jury as to the likelihood of reaching a unanimous verdict." (***People v. Peoples*** (2016) 62 Cal.4th 718, 782, internal quotation marks & citations omitted.)

The trial court does not coerce jurors on a deadlocked jury simply by inquiring into the numerical division of their votes, when it is careful not to inquire whether the votes favor life or death. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1030; see also ***People v. Price*** (1991) 1 Cal.4th 324, 467 [where jury claims to be deadlocked, the trial court may inquire about the numerical division of the jury].)

A jury verdict was not coerced simply because the trial court was aware of the numerical split of the jury at the time a jury was replaced. The foreman volunteered the numerical split without any inquiry or prompting by the court; and California does not follow the federal rule of procedure (***Brasfield v. United States*** (1926) 272 U.S. 448, 450 [47 S.Ct. 135, 71 L.Ed. 345] [under Court's supervisory power over federal cases, and not as a matter of constitutional law, Court found reversible error where federal court inquired into numerical division of a deadlocked jury as such an inquiry tends to be coercive]). The jury was instructed that the juror was not removed due to her inability to vote for the death penalty and to begin deliberations anew. The jury is presumed to have followed the court's instructions. (***People v. Homick*** (2012) 55 Cal.4th 816, 901; ***People v. Valdez*** (2012) 55 Cal.4th 82, 160-161; ***People v. Breaux*** (1991) 1 Cal.4th 281, 319 [rejecting *Brasfield*'s rule of procedure for federal courts and upholding practice of inquiring into numerical division of jury that has declared itself deadlocked, without finding out how many jurors are for conviction and how many for acquittal].)

Denial of a mistrial upon finding out that a unanimous verdict is being hampered by a single holdout juror is not inherently coercive. (***People v. Bell*** (2007) 40 Cal.4th 582, 617, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13, distinguishing ***People v. Sheldon*** (1989) 48 Cal.3d 935, 959 [recognizing potential for coercion once judge learns unanimous judgment being hampered by single holdout juror].)

Even assuming the trial court's reference to "the minority and majority as distinct groups" was error (see ***People v. Gainer*** (1977) 19 Cal.3d 835, 845 [reversible error due to discriminatory admonition directed solely to minority jurors to rethink their views in light of majority's views], it was harmless given that the trial court's instructions "did not exert pressure on or in any way encourage jurors in the minority to abandon their independent judgment and acquiesce in a verdict simply because the majority had reached a verdict" and instead "told jurors that 'this is not a matter of compromise,' that they 'should not compromise just for the purpose of reaching a verdict,' that defendants were 'entitled to the individual opinion of each juror,' that 'each of you must decide the case for yourself,' and that they should 'not decide any question in a particular way because a majority of the [jurors], or any of them, favor such a decision'" (***People v. Valdez*** (2012) 55 Cal.4th 82, 164.)

C. REMOVAL / SUBSTITUTION OF JUROR [§ 5.43]

Cross-Reference: § 10.33, *re* Substitution of jurors

"The trial court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty. ([Pen. Code,] § 1089.) When a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*. If the trial court has good cause to doubt a juror's ability to perform his or her duties, the court's failure to conduct a hearing may constitute an abuse of discretion on review. Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events that occur during jury deliberations and are reported by fellow panelists." (***People v. Lomax*** (2010) 49 Cal.4th 530, 588, internal citations & quotation marks omitted.)

"The trial court's authority to discharge a juror includes the authority to conduct an appropriate investigation concerning whether there is good cause to do so, and the authority to take 'less drastic steps [than discharge] where appropriate to deter any misconduct or misunderstanding it has reason to suspect.'" (***People v. Alexander*** (2010) 49 Cal.4th 846, 926, quoting ***People v. Keenan*** (1988) 46 Cal.3d 478, 533.)

A juror's inability to perform the functions of a juror must appear in the record as a demonstrable reality and will not be presumed. (***People v. Lomax*** (2010) 49 Cal.4th 530, 590.)

The trial court retains discretion about what procedures to employ, including conducting a hearing or detailed inquiry, when determining whether to discharge a juror. (***People v. Cowan*** (2010) 50 Cal.4th 401, 506; ***People v. Martinez*** (2010) 47 Cal.4th 911, 942, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

An accused has a constitutional right to a trial by an impartial jury. An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence before it. (***Smith v. Phillips*** (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78]; ***Irvin v. Dowd*** (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751]; ***In re Hamilton*** (1999) 20 Cal.4th 273, 294.)

"'[I]t is virtually impossible to shelter jurors from every contact or influence that might theoretically affect their vote.'" (***People v. Ledesma*** (2006) 39 Cal.4th 641, 683, quoting ***Smith v. Phillips*** (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78].)

§ 5.43.1 Duty to Inquire / Hearing

The decision of whether to investigate the possibility of juror bias, incompetence, or misconduct, as well as the decision to retain or discharge a juror, rests within the sound discretion of the trial court. A hearing is required only where the court possesses information which, if proven true, would constitute good cause to doubt a juror's ability to perform his duties. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 461.)

A trial court is not required to investigate any and all new information about a juror during trial. A hearing is only required where the court possesses information which, if proven true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case. (***People v. Cowan*** (2010) 50 Cal.4th 401, 506; ***People v. Ray*** (1996) 13 Cal.4th 313, 343.)

"The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defendant objects to such an inquiry." (***People v. Cowan*** (2010) 50 Cal.4th 401, 506.)

A trial court who receives allegations that a juror would refuse to impose the death penalty under any circumstances is obligated to investigate. (***People v. Watson*** (2008) 43 Cal.4th 652, 696.)

"'A trial court's inquiry into possible grounds for discharge of a deliberating juror should be "as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations.'" (***People v. Maciel*** (2013)

57 Cal.4th 481, 547, quoting ***People v. Thompson*** (2010) 49 Cal.4th 79, 137; ***People v. Alexander*** (2010) 49 Cal.4th 846, 926 [same]; ***People v. Lomax*** (2010) 49 Cal.4th 530, 592 [same]; ***People v. Russell*** (2010) 50 Cal.4th 1228, 1251 [same]; ***People v. Barnwell*** (2007) 41 Cal.4th 1038, 1054 [same].)

"'[T]he inquiry [into possible grounds for discharge of a deliberating juror] should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists.' [Citation.] Nonetheless, the need to protect sanctity of the deliberations does not mean that any inquiry into the deliberation process violates the defendant's constitutional or statutory rights: 'secrecy *may* give way to reasonable inquiry by the court when it receives an allegation that a deliberating juror has committed misconduct.' [Citation.]" (***People v. Alexander*** (2010) 49 Cal.4th 846, 927.)

The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 461.)

A defendant is not entitled to an evidentiary hearing as a matter of right; rather, a trial court has discretion to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. An evidentiary hearing should only be held when the court concludes an evidentiary hearing is necessary to resolve material disputed factual issues. It is ordinarily not an abuse of discretion to decline to conduct an evidentiary hearing when evidence supporting a claim is hearsay. A trial court does not abuse its discretion in denying a motion for a new trial on juror misconduct when the evidence in support consists of unsworn hearsay. (***People v. Dykes*** (2009) 46 Cal.4th 731, 810.)

"An evidentiary hearing should not be used as a 'fishing expedition' to search for possible [jury] misconduct." (***People v. Schmeck*** (2005) 37 Cal.4th 240, 295, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

A hearing is required only when the defense evidence demonstrates a "strong possibility that prejudicial misconduct has occurred," and generally a hearing is unnecessary unless there is a material conflict in the evidence presented by the parties. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 295, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; ***People v. Hardy*** (1992) 2 Cal.4th 86, 174.)

Where the trial court has no basis for doubting the jurors' ability or willingness to follow its instructions, further inquiry is not required as a result of the jury posing a question during deliberations about whether there had ever been a reduction of a sentence of life without possibility of parole. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 737.)

The defendant was not deprived of his rights to a fair and reliable penalty trial and an impartial jury when the trial court refused a mid-penalty-trial defense request to

question jurors individually regarding whether they felt they had sufficient recall of the guilt and sanity phase evidence. While the defendant may be correct that the inquiry would have required little additional court time, the issue on appeal is whether there was a showing of good cause to question the jurors in the manner requested. Asking jurors to assess their own memory recall is problematic, and there was no need to conduct such an inquiry where jurors' memories could be restored by referring to their notes, requesting read-backs of testimony, and relying on counsel's review of the guilt and sanity phase evidence during closing arguments. (***People v. Clark*** (2011) 52 Cal.4th 856, 998.)

The trial court did not err in denying a defense request to question the jury regarding publicity during trial. There was nothing in the news coverage that was innately prejudicial to the defendant. The only news item concerning the defendant in any respect was an article reporting that the victim's family members danced at her grave site after the guilty verdicts. (***People v. Clark*** (2011) 52 Cal.4th 856, 968.)

The trial court did not err in failing to question jurors individually to determine whether the defendant's misconduct prejudiced him (throwing one apple at judge and two at jurors, missing the judge but striking two jurors). "Because a defendant is not allowed to profit from his own misconduct, a defendant 'may not complain on appeal about the possible effect on jurors of his own misbehavior after the jury has been sworn.'" It was sufficient that following the misconduct, the trial court asked jurors whether they felt able to continue. (***People v. Elliott*** (2012) 53 Cal.4th 535, 583.)

§ 5.43.2 Limitations Regarding Admissibility of Evidence

Evidence Code section 1150, subdivision (a), allows evidence of matters that may have influenced a verdict improperly to be admissible to show the effect of the statement, conduct, or condition or event upon a juror, but the statute distinguishes between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of individual jurors, which can neither be corroborated or disproved. The only improper influences that can be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration. (***People v. Smith*** (2007) 40 Cal.4th 483, 523.)

Jury testimony concerning its deliberative process is inadmissible to impeach a verdict. (***Tanner v. United States*** (1987) 483 U.S. 107, 115 [107 S.Ct. 2739, 97 L.Ed.2d 90]; Evid. Code, § 1150; ***People v. Tafoya*** (2007) 42 Cal.4th 147, 195; ***People v. Steele*** (2002) 27 Cal.4th 1230, 1260-1261.)

Purported statements by jurors concerning the effect on them regarding the possibility of the defendant's release and probability of execution constitute an indication of juror mental processes and are therefore inadmissible pursuant to Evidence Code section 1150, subdivision (a). (***People v. Dykes*** (2009) 46 Cal.4th 731, 811.)

§ 5.43.3 Bias

"'A sitting juror's actual bias, which would have supported a challenge for cause, renders him "unable to perform his duty" and thus subject to discharge and substitution ….' [Citation.] Specifically, in the death penalty context, we have explained that '[a] juror may be disqualified for bias, and thus discharged, from a capital case if his views on capital punishment "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"'" (***People v. Lomax*** (2010) 49 Cal.4th 530, 589.)

A juror does not need to admit a bias in order for the court to find that it exists. "[T]rial courts are frequently confronted with conflicting evidence on the question whether a deliberating juror has exhibited a disqualifying bias. Often, the identified juror will deny it and other jurors will testify to examples of how he or she has revealed it. In such circumstances, the trial court must weigh the credibility of those testifying and draw upon its own observations of the jurors throughout the proceedings. [An appellate court defers] to factual determinations based on these assessments." (***People v. Lomax*** (2010) 49 Cal.4th 530, 590, internal quotation marks & citations omitted.)

"Bias is often intertwined with a refusal to deliberate." (***People v. Lomax*** (2010) 49 Cal.4th 530, 589.)

§ 5.43.4 Illness / Physical Condition

Trial courts may remove any juror who "'becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty....'" (***People v. Duff*** (2014) 58 Cal.4th 527, 560, quoting § 1089.)

The trial court had ample reason to discharge a juror during the penalty phase who had a high-risk pregnancy, requested to be removed from the case indicating she was feeling a "high amount of stress" from the case that she believed to be detrimental to the health of her unborn child and herself, was experiencing pain, had to suspend her jury service for three days earlier in the penalty phase after experiencing hemorrhaging causing her doctor to order her on bed rest, and had a previous pregnancy end in miscarriage when she was under stress. (***People v. Nunez*** (2013) 57 Cal.4th 1, 56-57.)

§ 5.43.5 Misconduct

Cross-Reference: § 10.32, *re* Jury misconduct

"A juror's unauthorized contact with a witness is improper. However, contact between a juror and a witness or between a juror and the defendant's family may be

nonprejudicial if the contact was de minimis or if there is no showing that the contact related to the trial. Further, a juror's receipt of information about a party or the case that was not part of the evidence received at trial is also misconduct that raises a presumption of prejudice, even if that receipt was passive or involuntary." (***People v. Cowan*** (2010) 50 Cal.4th 401, 507, internal quotation marks & citations omitted.)

Questions from jurors to the court during the taking of evidence do not constitute juror misconduct by virtue of "premature deliberation." (***People v. Anderson*** (1990) 52 Cal.3d 453, 481.)

It is not improper for jurors to submit written questions to the court concerning evidence and for the court to pass the questions to counsel, giving them discretion whether to ask them. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1305-1307.)

Speculation concerning punishment is an inevitable feature of the jury system. (***People v. Dykes*** (2009) 46 Cal.4th 731, 812.)

The defendant's contention that the jurors may have been making insulting remarks in an effort to drive two jurors off the jury or "were threatening them in some credible way" was speculation because the trial court's questioning of the two jurors revealed no suggestion of such actions by the other jurors. Because there was no indication of misconduct by the other jurors, the trial court acted within its discretion in limiting its inquiry to questioning of the two jurors, which the court performed quite thoroughly. (***People v. Thompson*** (2010) 49 Cal.4th 79, 137.)

§ 5.43.6 Juror's Consideration of Extraneous Material

Consideration of extraneous material by a juror is misconduct and creates a presumption of prejudice that may be rebutted by a showing of no prejudice. (***People v. Jackson*** (2016) 1 Cal.5th 269, 332; ***People v. Williams*** (2006) 40 Cal.4th 287, 333.)

It is serious and willful misconduct for a juror to read outside material on the case and express opinions on the case. Under Penal Code section 1089, the trial court has the discretion to remove such an offending juror. (***People v. Daniels*** (1991) 52 Cal.3d 815, 863-866 (reversed on other grounds, ***Daniels v. Woodford*** (9th Cir. 2005) 428 F.3d 1181), disapproving contrary dicta in *People v. Hamilton* (1963) 60 Cal.2d 105, 126; see also ***People v. Jenkins*** (2000) 22 Cal.4th 900, 1048-1049 [trial court properly dismissed jurors for reading/listening to news accounts about case].)

When misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Juror bias may be demonstrated in two ways: (1) if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror (likely bias), or (2) looking at the nature of the misconduct and the surrounding

circumstances, it is substantially likely the juror was actually biased against the defendant (actual bias). The judgment must be set aside if the court finds prejudice under either test. Juror misconduct raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted. (***People v. Jackson*** (2016) 1 Cal.5th 269, 332; ***People v. Thomas*** (2012) 53 Cal.4th 771, 819; ***People v. Williams*** (2006) 40 Cal.4th 287, 333-334; ***In re Lucas*** (2004) 33 Cal.4th 682, 696-697; ***In re Carpenter*** (1995) 9 Cal.4th 634, 653.)

The jury's inadvertent access to never admitted evidence which was erroneously introduced into the jury room was trial error. It is not structural error. The situation is no different than if the same evidence had been proffered at trial and the trial court erroneously overruled a valid objection to that evidence. Since the jury's consideration of the evidence was not misconduct, it is not subject to a presumption of prejudice. The presumption only extends to cases that involve the inadvertent receipt of outside information, and not to those where the court itself inadvertently furnished extrinsic information. (***People v. Gamache*** (2010) 48 Cal.4th 347, 397-398.)

It is not juror misconduct for jurors to review a transcript improperly submitted to them. Any error is evaluated as if it were improper admission of evidence. (***People v. Clair*** (1992) 2 Cal.4th 629, 668; ***People v. Cooper*** (1991) 53 Cal.3d 771, 835-836.)

"Although inadvertent exposure to out of-court information is not blameworthy conduct, as might be suggested by the term 'misconduct,' it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (***People v. Thomas*** (2012) 53 Cal.4th 771, 819, internal citation & quotation marks omitted.)

"[E]ven assuming that defendant's outbursts occurring in the courtroom during jury selection constituted the receipt of information from an 'outside' source … a defendant may not be heard to complain when, as here, such prejudice as he may have suffered resulted from his own voluntary act." (***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1347, internal quotation marks & citations omitted, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.)

It is not misconduct for a prospective juror to read a newspaper article about an unrelated capital case. Even if there were misconduct, a presumption of prejudice can be easily dispelled inasmuch as other prospective jurors were told to disregard the information. (***People v. Hardy*** (1992) 2 Cal.4th 86, 176; ***People v. Pinholster*** (1992) 1 Cal.4th 865, 923-925, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

It was misconduct for jurors to read a newspaper article about the prosecutor. However, the presumption of prejudice was overcome by the court's admonishment to disregard the article, and by the innocuous nature of the article. (***People v. Pinholster***

(1992) 1 Cal.4th 865, 926-927, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Reading aloud from the Bible or circulating biblical passages during jury deliberations is misconduct. (***People v. Williams*** (2006) 40 Cal.4th 287, 333; ***People v. Danks*** (2004) 32 Cal.4th 269, 308.)

Erroneous statements as to the law during deliberation were misconduct requiring reversal. (***In re Stankewitz*** (1985) 40 Cal.3d 391.)

A juror was not exposed to extraneous facts where "there was no actual back and forth 'discussion' or 'conversation' between Juror [] and her husband in violation of [Penal Code] section 1122. The evidence supports the court's implicit finding that Juror [] did not commit misconduct by 'venting' to her husband. In this regard, [the Juror's] expression of her confusion to her husband regarding an unspecified reaction by an unspecified person that differed from what she would have done, while unwise," did not amount to misconduct. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1195.)

§ 5.43.7 Juror Concealment

"A prospective juror's misstatement or concealment on voir dire of a material fact by itself undermines the selection and empanelment of unbiased jurors, and thus the Sixth Amendment right to an impartial jury, and constitutes misconduct." (***People v. Tate*** (2010) 49 Cal.4th 635, 672.)

A juror's concealment or failure to disclose material information on voir dire may result in the juror's later discharge. (***People v. Wilson*** (2008) 44 Cal.4th 758, 822-823.)

Intentional concealment on voir dire of material information, as well as discussing the case with a friend while sitting as a juror, constituted juror misconduct and raised a presumption of prejudice which was unrebutted by evidence at the evidentiary hearing. (***In re Hitchings*** (1993) 6 Cal.4th 97, 123.)

The trial court did not err in denying a motion to discharge a juror who came forward after jury selection to disclose a relationship with an individual identified during voir dire as a potential witness in the case. The trial court was "in a position to observe" the juror's demeanor and found no evidence of disqualifying bias. Nothing in the juror's conduct in contacting the court "right after voir dire and before opening statements" or subsequent voir dire on the subject revealed actual bias. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1211.)

Unintentional failure by a juror to disclose a prior business relationship with the victim's husband does not require removal unless it would constitute good cause for the court to find the juror unable to perform his duty. (***People v. McPeters*** (1992) 2 Cal.4th 1148, 1175, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

The fact that it was the juror who came forward with the new information supports the conclusion his failure to mention the information earlier was inadvertent and he was attempting to perform his duties in good faith. (***People v. Ray*** (1996) 13 Cal.4th 313, 344.)

§ 5.43.8 Juror's Post-Verdict Concealment / Lying

Although improper, a juror's post-verdict lying to cover up misconduct "'does not show bias *during the trial, deliberations, and verdict*.'" (***People v. Bennett*** (2009) 45 Cal.4th 577, 626, quoting ***In re Carpenter*** (1995) 9 Cal.4th 634, 657.)

A juror's knowledge of a prior death sentence rendered against the defendant, her failure to report learning of the prior death sentence, her discussion of that prior death sentence with nonjurors, and her lying about it when confronted after trial did not necessarily show actual bias during trial, deliberations, and verdict. (***In re Carpenter*** (1995) 9 Cal.4th 634, 655-657.)

§ 5.43.9 Juror Experimentation

"Not every jury experiment constitutes misconduct. Improper experiments are those that allow the jury to discover *new* evidence by delving into areas not examined during trial. The distinction between proper and improper jury conduct turns on this difference. The jury may weigh and evaluate the evidence it has received. It is entitled to scrutinize that evidence, subjecting it to careful consideration by testing all reasonable inferences. It may reexamine the evidence in a slightly different context as long as that evaluation is within the "'scope and purview of the evidence.'" [Citation.] What the jury cannot do is conduct a new investigation going beyond the evidence admitted." (***People v. Collins*** (2010) 49 Cal.4th 175, 249.)

A juror's use of his computer was "simply his own permissible thinking about the evidence received, and was not an experiment resulting in the acquisition of any new facts." (***People v. Collins*** (2010) 49 Cal.4th 175, 252.)

Jurors conducted a demonstration to evaluate alternatives that could have produced the downward trajectory of the victim's wound. All of the factual assumptions explored by the demonstration were well within the evidence before the jury. Accordingly, the jury's demonstration in the deliberation room was simply a more critical examination of the evidence admitted and did not constitute impermissible experimentation. (***People v. Collins*** (2010) 49 Cal.4th 175, 252.)

§ 5.43.10 Jurors' Own Expertise / Experiences

Jurors' views of the evidence are necessarily informed by their life experiences. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1195; ***In re Malone*** (1996) 12 Cal.4th 935,

963; see also ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1414 [jurors may rely on own experience in evaluating testimony of a witness]; ***In re Lucas*** (2004) 33 Cal.4th 682, 696 [jurors may properly bring their individual backgrounds and experiences to bear on the deliberative process].)

"A juror's application of his or her everyday life experience to the evaluation of evidence is not misconduct." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1195; ***People v. Allen & Johnson*** (2011) 53 Cal.4th 60, 76-77; ***People v. Steele*** (2002) 27 Cal.4th 1230, 1265-1266.)

"'Not all comments by all jurors at all times will be logical, or even rational, or strictly speaking, correct. But such comments cannot impeach a unanimous verdict; a jury verdict is not so fragile. "The introduction of much of what might strictly be labeled 'extraneous law' cannot be deemed misconduct.... Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require ... [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citation.] Moreover, under that 'standard' few verdicts would be proof against challenge." [Citations.]'" (***People v. Schmeck*** (2005) 37 Cal.4th 240, 307-308, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637, quoting ***People v. Riel*** (2000) 22 Cal.4th 1153, 1219.)

The fact a juror has specialized knowledge of a technical area is not misconduct; however, a juror's discussion of her specialized knowledge from outside sources is misconduct. A presumption of prejudice is rebutted where externally derived information was substantially the same as the evidence and argument presented during trial. (***In re Malone*** (1996) 12 Cal.4th 935, 963-964.)

§ 5.43.11 Failure to Deliberate / Forming Opinion or Discussing Outside Presence of Entire Jury

"Jurors must be admonished not to form an opinion concerning the case or to discuss it with anyone before it is submitted to them. ([Pen. Code,] § 1122.) Once the case has been submitted to the jurors for decision, they may not deliberate except when all are together. ([Pen. Code,] § 1128.) Although the deliberation process of course includes thinking, defendant has failed to cite any authority suggesting that jurors must be directed not to think about the case except during deliberations. A juror participates in the deliberative process by participating in discussions with fellow jurors by listening to their views and by expressing his or her own views." (***People v. Collins*** (2010) 49 Cal.4th 175, 253, internal quotation marks & case citations omitted.)

"Jurors are allowed to reflect about the case during the trial and at home. [Citation.] In fact, it is unrealistic to expect them not to do so." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1195, citing ***People v. Ledesma*** (2006) 39 Cal.4th 641, 729-730; see also ***People v. Collins*** (2010) 49 Cal.4th 175, 253 [same].)

Although jurors must not deliberate until all 12 are together in the jury room, case law has characterized jury "deliberation" as the collective process of all 12, as distinguished from the solitary ruminations of individual jurors. For a jury to ponder the case outside the jury room is not misconduct. Nor is it misconduct for a juror to reduce his or her thoughts to writing, and then consult those notes during deliberations, as long as the notes are the product of the juror's own thought processes and the evidence, rather than the product of extraneous influences. Permitting jurors to record ideas they wish to share in deliberations is consistent with the requirement and promise that all jurors will actively and fully participate in those deliberations. (***People v. Collins*** (2010) 49 Cal.4th 175, 254-255.)

No misconduct occurred where a juror considered the prosecution's opening statement and made comments to her husband reflecting a lack of understanding and confusion because she thought she would react differently. The comment did not show the juror prejudged the case as it did not suggest the juror would not, or did not, listen to the evidence at trial, or was unwilling to fairly deliberate when it was time to do so. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1195.)

Where court was alerted by a note from the jury foreperson that he had received two e-mails from someone on the jury (but could not tell which juror and deleted the e-mails) venting about being offended by comments made during deliberations, the trial court was within its discretion in not inquiring beyond questioning the jury foreperson. "[T]he questioning of the jury foreperson did not reveal any 'exchange' of e-mails between jurors. The foreperson alone merely received two e-mails, which complained to him about things said during deliberations. At most this was an attempt to have a conversation outside the deliberation room, but the foreperson did not reply and could not even identify the senders. The foreperson mentioned his receipt of the e-mails to the whole jury when deliberations continued. No one admitted sending the e-mails and there was no discussion of them. A concern regarding the appropriateness of sending the e-mails was expressed and the court's input was sought. The questioning conducted by the court, thus, uncovered no evidence of any discussion or deliberations, electronic or otherwise, occurring outside the presence of the entire jury that constituted misconduct." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1213-1214.)

§ 5.43.12 Refusal to Deliberate

A juror who actually refuses to deliberate is subject to discharge by the court. "'A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is he or she will not participate in discussions with fellow jurors by listening to their views and expressing his or her own views. Examples of refusals to deliberate

would include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jurors.'" (***People v. Lomax*** (2010) 49 Cal.4th 530, 589; ***People v. Wilson*** (2008) 43 Cal.4th 1, 25-26; ***People v. Watson*** (2008) 43 Cal.4th 652, 695.)

"On the other hand, '[t]he circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge.'" (***People v. Alexander*** (2010) 49 Cal.4th 846, 926, quoting ***People v. Cleveland*** (2001) 25 Cal.4th 466, 485; ***In re Bolden*** (2009) 46 Cal.4th 216, 229 [same].)

In an opinion reversing a capital case because of the erroneous removal of a juror during the guilt phase deliberations, the California Supreme Court "remind[ed] trial courts that the removal of a seated juror for failing to deliberate is a serious matter that implicates a defendant's state and federal constitutional right to a unanimous decision by the jury. [Citation.] Although a trial judge has discretion to remove a juror for a failure to deliberate, the exercise of that discretion should be undertaken with great care." (***People v. Armstrong*** (2016) 1 Cal.5th 432, 454, internal citations omitted.)

A refusal to deliberate includes refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1411.)

"A juror's prejudgment of the case without hearing the evidence constitutes good cause to doubt his or her ability to perform the juror's duty and justifies discharge from the jury." (***People v. Clark*** (2011) 52 Cal.4th 856, 971.)

"[I]t is not prejudging for a juror to form an opinion about the proper verdict before deliberations begin, provided that the juror's opinion is based on the evidence presented at trial and not on extrinsic matters." (***In re Bolden*** (2009) 46 Cal.4th 216, 226, citing ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1412.)

§ 5.43.13 Refusal / Failure to Follow Instructions

"'A juror who violates his or her oath and the trial court's instructions is guilty of misconduct.'" (***People v. Williams*** (2015) 61 Cal.4th 1244, 1262, quoting ***People v. Linton*** (2013) 56 Cal.4th 1146, 1194.)

"'The court may discharge a juror for good cause (see § 1089), which includes a failure to follow the court's instructions.'" (***People v. Williams*** (2015) 61 Cal.4th 1244, 1262, quoting ***People v. Allen & Johnson*** (2011) 53 Cal.4th 60, 69.)

"A judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case cannot be counted on to follow instructions in the future" and is unable to perform her duty as a juror." There was good cause to dismiss a juror for misconduct based on violating the court's admonition not to discuss the case with anyone outside the jury room when she told a close friend that the jury would return a verdict the next morning, the nature of that verdict, and related that she was uneasy with that verdict. (***People v. Nunez*** (2013) 57 Cal.4th 1, 55, internal quotation marks & citations omitted.)

"A deliberating juror's refusal to follow the law set forth in the instructions also constitutes a failure to perform the juror's duties, and is grounds for discharge." (***People v. Alexander*** (2010) 49 Cal.4th 846, 926.)

"'A juror who refuses to follow the court's instructions is "unable to perform" his or her duty within the meaning of Penal Code section 1089.'" (***People v. Wilson*** (2008) 43 Cal.4th 1, 25.)

Defendant's assertion that the length of deliberations evidenced the jury did not follow instruction to begin deliberations anew rejected as "the brevity of the deliberations proves nothing. The newly constituted jury was not required to deliberate for the same length of time as the original jury, nor was it required to review the same evidence. When … there are no indications to the contrary, [the reviewing court] assume[s] that the jurors followed the trial court's instructions and started afresh." (***People v. Williams*** (2015) 61 Cal.4th 1244, 1280, internal quotation marks & citations omitted.)

§ 5.43.14 Sleeping / Cell Phones / Alcohol

"Sleeping during trial constitutes good cause for the dismissal of a juror. 'When the trial court receives notices that such cause may exist it has an affirmative obligation to investigate. Both the scope of any investigation and the ultimate decision whether to discharge a given juror are committed to the sound discretion of the trial court.'" (***People v. Williams*** (2015) 61 Cal.4th 1244, 1277, internal citations omitted, quoting ***People v. Bonilla*** (2007) 41 Cal.4th 313, 350.)

"A verdict will not be set aside in the absence of some showing or some reasonable ground to suspect that the consumption of alcohol actually affected the jurors' capacity to perform their duties. Nevertheless, the consumption of alcoholic beverages by jurors, whether in the presentation of evidence or during deliberations, should be discouraged." (***People v. Cox*** (1991) 53 Cal.3d 618, 695, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also ***People v. Allen*** (1986) 42 Cal.3d 1222, 1255-1257; ***People v. Burgener*** (1986) 41 Cal.3d 505, 516-522, overruled on other grounds, *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

"[T]he mere suggestion of juror 'inattention' does not require a formal hearing disrupting the trial of a case." (***People v. Williams*** (2013) 58 Cal.4th 197, 289, internal quotation marks & citations omitted, citing ***People v. Espinoza*** (1992) 3 Cal.4th 806, 821 [defense counsel's speculation that a juror might have been sleeping insufficient to

apprise the trial court that good cause might exist to discharge the juror, and therefore, trial court not obligated to conduct further inquiry].)

"We have observed that although implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, not a single case has been brought to our attention which granted a new trial on that ground. Many of the reported cases involve contradicted allegations that one or more jurors slept through part of a trial. Perhaps recognizing the soporific effect of many trials when viewed from a layman's perspective, these cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial." (***People v. Williams*** (2013) 58 Cal.4th 197, 290, internal quotations & citations omitted; ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1349 [same].)

It was not juror misconduct to allow a juror to have a cellular telephone in the jury room, because the court granted permission for the phone. However, phones are not to be allowed in jury room. (***People v. Fauber*** (1992) 2 Cal.4th 792, 837.)

A trial court does not abuse its discretion if it discharges a juror who falls asleep during trial. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 458.)

§ 5.43.15 Emotional Reactions

The trial court had good cause to discharge a juror who indicated she "felt distressed, was losing sleep, could not focus, and was incapable of thinking or making a decision." (***People v. Maciel*** (2013) 57 Cal.4th 481, 547.)

The trial court did not err in excusing a holdout juror following an 11-1 impasse in the guilt phase where the trial court reasonably found the holdout juror's emotional reaction to the deliberations had led to the juror's own misconduct by discussing her claim of intimidation by other jurors with her husband. (***People v. Bell*** (2007) 40 Cal.4th 582, 619, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

A crank call caused a juror concern because she believed that the defendant had access to jurors' phone numbers. The trial court assured the juror that the defendant did not have access to her phone number, and she indicated she was confident she could be fair and impartial. The court's denial of the request to discharge the juror was upheld. (***People v. Jablonski*** (2006) 37 Cal.4th 774, 807.)

The court did not abuse its discretion in denying a request to discharge a juror who had appeared to the court clerk to be displeased when notified regarding the date the jury was scheduled to return for the penalty phase closing argument, and indicated it would be difficult if she did not return to work for the new school year. The court inquired, and on numerous occasions the juror indicated she would not be distracted or feel pressure to reach a verdict, or lose focus because of her job. The court had the benefit of observing

the juror's demeanor in being persuaded she could perform her duties. (***People v. Bennett*** (2009) 45 Cal.4th 577, 621.)

The court did not err in denying a request to discharge a juror where the court's inquiry established the juror was concerned over stating in open court that he felt a death sentence was appropriate. Such anxiety was understandable given the consequences of the juror's vote, and there was no evidence the juror was unable to perform his duty since he subsequently indicated that, while difficult, he could fulfill his duty by verbally affirming his concurrence in the jury's penalty determination. (***People v. Bennett*** (2009) 45 Cal.4th 577, 623.)

There was no error, where after two weeks of penalty deliberations, with two jurors seeking to be excused, the trial court excused one juror based on family vacation plans while retaining the other. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1030.)

§ 5.43.16 Instructions / Admonitions / Administering Oath

There is no sua sponte duty to give the so-called *Collins* instruction to disregard past deliberations (***People v. Collins*** (1976) 17 Cal.3d 687) where an alternate juror joins the panel before penalty-phase deliberations begin. (***People v. Nunez*** (2013) 57 Cal.4th 1, 59-60; ***People v. Cunningham*** (2001) 25 Cal.4th 926, 1030.)

Where a juror is replaced at the penalty phase, the jury does not begin guilt phase deliberations anew. "'At the penalty phase, a defendant's guilt is "conclusively presumed as a matter of law.'" (***People v. Maciel*** (2013) 57 Cal.4th 481, 548, quoting ***People v. Streeter*** (2012) 54 Cal.4th 205, 265.)

When the jury has already begun penalty phase deliberations and a juror is discharged and an alternate juror is substituted, the jury must be instructed to set aside its previous deliberations and begin its deliberations anew. (***People v. Nunez*** (2013) 57 Cal.4th 1, 60.)

A jury is presumed to have followed a court's instructions to begin deliberations anew following substitution of a juror, and a defendant's speculation to the contrary is not a persuasive basis to conclude otherwise. The presumption is "supported by the actual, deliberative conduct of the reconstituted jury" where the jury "requested a readback and asked the court for clarification of instructions." (***People v. Williams*** (2015) 61 Cal.4th 1244, 1279-1280.)

"'[T]he brevity of the deliberations proves nothing'" in terms of whether a newly constituted jury began deliberations anew. "'The newly constituted jury was not required to deliberate for the same length of time as the original jury, nor was it required to review the same evidence.'" (***People v. Williams*** (2015) 61 Cal.4th 1244, 1280, quoting ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1413.)

When a trial court errs in failing to instruct the penalty phase jury to begin deliberations anew, the reviewing court assesses prejudice by applying the state law error test for penalty phase error, i.e., whether there is a "reasonable possibility" the error affected the jury's penalty verdict. (***People v. Nunez*** (2013) 57 Cal.4th 1, 60.)

The trial court did not prejudicially err in failing to instruct the penalty phase jury to begin deliberations anew. The trial court explained when a juror was replaced that each juror must "participate fully in the deliberations" which implied deliberations must begin anew. Moreover, the *Collins* instruction to disregard past deliberations (***People v. Collins*** (1976) 17 Cal.3d 687) "plays a more limited role at the penalty phase of trial than at the guilt phase." Accordingly, given "the language of the instruction given, and the normative context of the penalty phase deliberations" there was no reasonable possibility the outcome of the penalty phase was affected by the trial court's failure to instruct the jury to set aside its prior deliberations when the court replaced two jurors with alternates during the penalty phase deliberations. (***People v. Nunez*** (2013) 57 Cal.4th 1, 60-61.)

Trial court erred in failing to administer the oath described in Code of Civil Procedure section 232, subdivision (b), to three alternate jurors when they were selected to replace sitting jurors during the trial (one during the guilt phase and two during the penalty phase). However, there was no prejudice as the oath was administered to the jurors selected to decide the case in the presence of the alternates, and the alternate jurors were administered an oath requiring them to "act as an alternate juror in the case now pending before this court by listening to the evidence and instructions of this court, and ... act as a trial juror when called upon to do so." Accordingly, these alternate jurors knew that "to act as a trial juror when called upon to do so" meant they must (as required by CCP § 232(b)) "try the cause now pending before this court and a true verdict render according only to the evidence presented to you and to the instructions of the court." (***People v. Nunez*** (2013) 57 Cal.4th 1, 52.)

§ 5.43.17 Juror Notebooks

The trial court did not err in refusing a request to preserve a page from a juror's notebook. The California Supreme Court has never had occasion to consider whether juror notes are discoverable, and has expressed "no view on when, if ever, a juror's personal notes may be discoverable." (***People v. Clark*** (2011) 52 Cal.4th 856, 971, & fn. 35.)

§ 5.43.18 Forfeiture

Failure to raise the issue of juror misconduct and seek relief from the trial court on that basis forfeits the issue on appeal. (***People v. Dykes*** (2009) 46 Cal.4th 731, 808, fn. 22.)

Failure to move to discharge a juror after the juror disclosed familiarity with a potential witness forfeited the issue of whether the juror was subject to a challenge for cause. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1212.)

Where the trial court investigated third party contact with jurors, questioned jurors, invited counsel to question jurors, and admonished jurors, the defendant's claim on appeal that third party contacts tainted the jury and violated the defendant's constitutional rights was forfeited because defense counsel did not propose additional questions, object to any juror's continued service, or request a mistrial on grounds of juror misconduct. (***People v. Foster*** (2010) 50 Cal.4th 1301, 1341.)

A claim that the trial court violated the defendant's right to an impartial jury by failing to discharge a juror was forfeited by failing to seek the juror's discharge in the trial court. (***People v. Holloway*** (2004) 33 Cal.4th 96, 124.)

A claim that the substitution of a juror after a partial verdict was improper was waived by the defendant's failure to object at the time of the substitution. (***People v. Cunningham*** (2001) 25 Cal.4th 926, 1029; ***People v. Fudge*** (1994) 7 Cal.4th 1075, 1100-1101.)

The defense did not invite any error regarding his complaint on appeal that the trial court improperly intruded upon the deliberative process and coerced a guilty verdict where defense counsel initially indicated it would be appropriate to inquire of the jury, and then agreed with the trial court's alternative suggestion of questioning the foreperson about the basis, and then after that inquiry defense counsel asked that jury continue its deliberations undisturbed. (***People v. Russell*** (2010) 50 Cal.4th 1228, 1270-1248-1249.)

Where it was brought to the attention of the court and counsel that a spectator believed a juror had been sleeping during testimony, and defense counsel not only failed to object, but expressly waived any defect by affirmatively requesting the procedure followed by the trial court (admonition to jury), any claim of juror misconduct is forfeited on appeal. (***People v. Williams*** (2013) 58 Cal.4th 197, 289.)

§ 5.43.19 Appeal / Prejudice

"[T]he basis for a juror's disqualification must appear on the record as a demonstrable reality. This standard involves a more comprehensive and less deferential review than simply determining whether any substantial evidence in the record supports the trial court's decision. It must appear that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. However, in applying the demonstrable reality test," the appellate court does not "reweigh the evidence. The inquiry is whether the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (***People v. Lomax*** (2010) 49 Cal.4th 530, 589, internal quotation marks & citations omitted; ***People v. Barnwell*** (2007) 41 Cal.4th 1038, 1052 [the standard on appeal for removal of a juror pursuant to Penal Code section 1089 is the "more stringent demonstrable reality standard," i.e., "the

juror's inability to perform as a juror must be shown as a demonstrable reality"].) This demonstrable reality standard does not, however, entail independently reweighing the evidence or any more compelling proof than that which could satisfy a reasonable jurist. (***People v. Duff*** (2014) 58 Cal.4th 527, 560; ***People v. Barnwell*** (2007) 41 Cal.4th 1038, 1052-1053.)

A reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1194; ***People v. Schmeck*** (2005) 37 Cal.4th 240, 294, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

The California Supreme Court has "long recognized that, except when bias is apparent from the record, the trial judge is in the best position to assess the juror's state of mind during questioning." (***People v. Clark*** (2011) 52 Cal.4th 856, 971.)

A judge may reasonably conclude that a juror who has violated the instruction to refrain from discussing the case cannot be counted on to follow instructions in the future. (***People v. Daniels*** (1991) 52 Cal.3d 815, 864, reversed on other grounds, *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181.)

The effect of juror misconduct from receipt of information from extraneous sources can be non-prejudicial and is judged based upon a review of the entire record. (***People v. Williams*** (2006) 40 Cal.4th 287, 333.)

A juror's knowledge of a death sentence rendered in a prior case against the defendant, even if evidence of the death sentence is barred by the trial court under Evidence Code section 352, is not "inherently prejudicial" and must be evaluated in light of the strength of the evidence of guilt. (***In re Carpenter*** (1995) 9 Cal.4th 634, 655.)

§ 5.43.20 Presumption of Prejudice

Misconduct by a juror raises a rebuttable presumption of prejudice but a verdict will be set aside "only where there is a substantial likelihood of juror bias." Such bias will be found only "if the misconduct is inherently and substantially likely to have influenced the jury;" or, even if the misconduct is not inherently prejudicial, bias will be found if, "after a review of the totality of the circumstances, a substantial likelihood of bias arose." The determination of the existence of prejudice is a mixed question of law and fact, where the trial court's credibility determinations and factual findings will be accepted on appeal when supported by substantial evidence. (***People v. Bennett*** (2009) 45 Cal.4th 577, 626.)

The jury's inadvertent access to never admitted evidence which was erroneously introduced into the jury room was trial error. It is not structural error. The situation is no different than if the same evidence had been proffered at trial and the trial court erroneously overruled a valid objection to that evidence. Since the jury's consideration of the evidence was not misconduct, it is not subject to a presumption of prejudice. The

presumption only extends to cases that involve the inadvertent receipt of outside information, and not to those where the court itself inadvertently furnished extrinsic information. (***People v. Gamache*** (2010) 48 Cal.4th 347, 397-398.)

A trial court's failure to investigate the possibility of jury misconduct does not require reversal unless the record shows that the defendant was prejudiced. (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1409.)

Jurors' knowledge that the defendant was previously convicted and is being retried is not presumed to be incurably prejudicial. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 683.)

D. DUAL JURIES FOR JOINTLY TRIED DEFENDANTS [§ 5.44]

It is proper to use dual juries to jointly try codefendants as an alternative to outright severance. (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1085; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1207-1209; ***People v. Cummings*** (1993) 4 Cal.4th 1233, 1288; ***People v. Harris*** (1989) 47 Cal.3d 1047, 1070-1077.)

"[T]he decision to use dual juries is largely a discretionary one." "[W]hen the trial court's denial of severance and impanelment of dual juries is urged as error on appeal the error is not a basis for reversal of the judgment in the absence of identifiable prejudice or gross unfairness such as to deprive the defendant of a fair trial or due process of law." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1085-1086.)

E. RECONVENING JURY [§ 5.45]

Where further proceedings are to take place, the jury has not been discharged, and has not yet reentered the world freed of the admonitions and obligations shielding their thought processes from outside influences (admonition not to discuss case or read anything about case), the jury remains within the control of the court and the court can reconvene the jury to complete its verdict. (***People v. Gray*** (2005) 37 Cal.4th 168, 199.)

Any error in the verdict (here, failure to specify the degree of the murder convictions) may be corrected by reconvening the jury, as long as the jurors have not lost their character as jurors by, for example, being discharged or receiving information inadmissible in the relevant phase of the proceeding. (***People v. Cain*** (1995) 10 Cal.4th 1, 54-55.)

F. SEQUESTRATION [§ 5.46]

A court is not required to sequester a jury simply because it is a capital case. This is a matter that rests in the discretion of the court. (See Pen. Code, §§ 1121, 1128; ***People***

v. Morales (1989) 48 Cal.3d 527, 563, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

V. INTERPRETERS [§ 5.50]

"In criminal proceedings, interpreters may perform three interrelated but distinct roles: (1) as a 'witness interpreter,' to enable questioning of witnesses who do not speak English; (2) as a 'proceedings interpreter,' to assist a non-English speaking defendant to understand the exchanges at trial among attorneys, witnesses, and the court; and (3) as a 'defense interpreter,' to enable a non-English-speaking defendant to communicate with the defendant's English-speaking attorney." (***People v. Romero*** (2008) 44 Cal.4th 386, 410; see also ***People v. Aguilar*** (1984) 35 Cal.3d 785, 790.)

The California Constitution affords a defendant who does not understand English the right to an interpreter throughout the criminal proceedings. (Cal. Const., art. I, § 14.)

A non-English speaking defendant's right to an interpreter has underpinnings in numerous state and federal constitutional rights including rights to due process, to confrontation, to effective assistance of counsel, and to be present at trial. (***People v. Romero*** (2008) 44 Cal.4th 386, 410.)

The state constitutional entitlement to an interpreter (Cal. Const., art. I, § 14) can only be waived by a personal waiver that is intelligent and voluntary. (***People v. Aguilar*** (1984) 35 Cal.3d 785, 790.)

VI. PROSECUTOR [§ 5.60]

A defendant's constitutional rights are not violated by the prosecution referring to itself as "the People." (***People v. Thomas*** (2012) 53 Cal.4th 771, 816; ***People v. Whisenhunt*** (2008) 44 Cal.4th 174, 223; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1068.)

A. MISCONDUCT / ERROR [§ 5.61]

"A prosecutor's conduct violates the *Fourteenth Amendment to the federal Constitution* when it infects the trial with such unfairness as to make the conviction a denial of due process. Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair. Generally, a claim of prosecutorial misconduct is not cognizable on appeal unless the defendant made a timely objection and requested an admonition. In order to be entitled to relief under state law, defendant must show that the challenged conduct raised a reasonable likelihood of a more favorable verdict. In order to be entitled to relief under federal law, defendant must show that the challenged conduct was not harmless beyond a reasonable doubt." (***People v. Blacksher*** (2011)

52 Cal.4th 769, 828, fn. 35, emphasis added, internal quotation marks & citations omitted; ***People v. Clark*** (2011) 52 Cal.4th 856, 960 [same].)

Bad faith is not necessary for a showing of prosecutorial misconduct, which would more aptly be described as prosecutorial error. (***People v. Hill*** (1998) 17 Cal.4th 800, 823 & fn. 1.)

Vigorous representation is not misconduct. (***People v. Valencia*** (2008) 43 Cal.4th 268, 301.)

"When evidence is admitted without objection, it is difficult 'to fault the prosecutor for simply referring to [statements] that had been admitted by the court.'" (***People v. Blacksher*** (2011) 52 Cal.4th 769, 828, quoting ***People v. Schmeck*** (2005) 37 Cal.4th 240, 301.)

Where defense objections have been overruled, a subsequent challenge on appeal involving the prosecution's reliance on a chart, involves the propriety of the use of the chart in the context of judicial error as opposed to prosecutorial misconduct. (***People v. Riggs*** (2008) 44 Cal.4th 248, 325, fn. 40.)

The prosecutor's statement to jury that he was obligated to ensure people received fair trials, and to seek justice, etc., was not a distortion of the process but a correct description of the prosecutorial function. (***People v. Fierro*** (1991) 1 Cal.4th 173, 207-208, disapproved on other grounds by *People v. Thomas* (2012) 54 Cal.4th 908, 941, and *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 205.)

The prosecutor has a wide-ranging right to discuss the case in closing argument, fully stating his views as to what the evidence shows and what conclusions are proper. Opposing counsel may not complain on appeal if the reasoning is faulty or conclusions illogical. (***People v. Thomas*** (1992) 2 Cal.4th 489, 526.)

"Crimes of violence and intimidation are almost always upsetting. Discussing the manner in which they are committed is fair comment. There is no requirement that crimes of violence be described dispassionately or with philosophic detachment." (***People v. Leon*** (2015) 61 Cal.4th 569,734-735.)

Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. (***People v. Hill*** (1998) 17 Cal.4th 800, 823.)

The prosecutor misstated the law in telling jurors that they, as individuals, could subjectively define the reasonable-person standard. "The 'reasonable person' standard is a hypothetical individual who is intended to represent a sort of 'average' citizen." If in arguing what a "reasonable person" would do the prosecutor asks jurors whether any of them would have acted in a particular manner it encourages jurors to impose their own subjective judgment in place of applying an objective standard. Accordingly, such comments misstate the law and constitute misconduct. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 702-703.)

The defendant complained of prosecutorial misconduct based on the prosecution's direct examination of a witness because the trial court sustained 34 defense objections, admonished the prosecution 10 times, ordered a response stricken 5 times, and held 9 sidebar discussions. In response, the California Supreme Court noted the "critical inquiry on appeal is not how many times the prosecutor erred but whether the prosecutor's error rendered the trial fundamentally unfair or constituted reprehensible methods to attempt to persuade the jury." (***People v. Hinton*** (2006) 37 Cal.4th 839, 864.)

It was clearly misconduct for the prosecutor to refer to an unplayed portion of a tape recorded statement by the defendant. However, there was no objection, and an admonishment would have cured any possible prejudice. (***People v. Kaurish*** (1990) 52 Cal.3d 648, 683.)

"'Harsh and vivid attacks on the credibility of opposing witnesses are permissible, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie.'" (***People v. Valencia*** (2008) 43 Cal.4th 268, 305; see also ***People v. Huggins*** (2006) 38 Cal.4th 175, 253.)

Where nothing in the prosecutor's remarks can be construed as coercion or intimidation, reminding a witness of the gravity of the proceedings is not misconduct. (***People v. Box*** (2000) 23 Cal.4th 1153, 1207, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129], and *People v. Martinez* (2010) 47 Cal.4th 911, 948 & fn. 10.)

It is not misconduct for the prosecutor to elicit evidence that the defendant threatened a witness; such evidence shows consciousness of guilt. (***People v. Pinholster*** (1992) 1 Cal.4th 865, 945, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

It is not misconduct to comment on the defendant's financial situation in the context of a motive to commit robbery or theft, when evidence of the defendant's poverty refutes the defense's contention that the defendant did not commit the offense because he did not need the money. (***People v. Harris*** (2005) 37 Cal.4th 310, 345.)

The prosecutor's comments, "I'm an old war horse. I've been through a lot of these. That choked me up when I saw that testimony," were improper statements of personal belief not based on facts in evidence. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 704.)

"The prosecutor's invitation that the jurors examine the firearm was a request that they consider the evidence presented at trial, not that they produce new evidence through an experiment. Thus, there was no impropriety in his remarks." (***People v. Redd*** (2010) 48 Cal.4th 691, 742.)

Nothing supports defendant's complaint about the prosecutor "cradling" one of the victim's two young children in an "ostentatious way" in the courtroom. While the prosecutor showed through testimony, photographs, and videotape evidence that the child was one of two young children whom the murder victim would never be able to see grow

up, thus depriving him of the challenges and joys of parenthood, there was nothing the jury could not have discerned from seeing the child in person that it could not otherwise have inferred from the evidence. (***People v. Garcia*** (2011) 52 Cal.4th 706, 755.)

§ 5.61.1 Comments / Visual Aids *re* Beyond a Reasonable Doubt Standard

The California Supreme Court has "cautioned prosecutors against using diagrams or visual aids to elucidate the concept of proof beyond a reasonable doubt" (see, e.g., ***People v. Medina*** (1995) 11 Cal.4th 694, 744-745 [cautioning against "attempt to reduce concept of guilt beyond a reasonable doubt to a mere line on a graph or chart"]), recognizing the "inherent difficulty and peril" involved, but has "stopped short" "of categorically disapproving the use of reasonable doubt analogies or diagrams in argument." "The use of an iconic image like the shape of California or the Statue of Liberty, unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt. These types of images necessarily draw on the jurors' own knowledge rather than evidence presented at trial. They are immediately recognizable and irrefutable. Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion." While "jurors may rely on common knowledge and experience in evaluating the evidence [citation omitted] they may not go beyond the record to supply facts that have not been proved. [Footnote omitted]. Facts supporting proof of each required element must be found in the evidence or the People's burden of proof is unmet. It is thus misleading to analogize a jury's task to solving a picture puzzle depicting an actual and familiar object to the evidence." "Counsel trying to clarify the jury's task by relating it to a more common experience must not imply that the task is less rigorous than the law requires. By presenting a hypothetical whose answer involves a single empirical fact, the prosecutor risked misleading the jury by oversimplifying and trivializing the deliberative process." (***People v. Centeno*** (2014) 60 Cal.4th 659, 662, 667-671.)

§ 5.61.2 Comment on Defendant's Courtroom Demeanor

A comment during the guilt phase of a capital trial on a defendant's courtroom demeanor is improper. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 840; ***People v. Boyette*** (2002) 29 Cal.4th 381, 434.)

A prosecutor was entitled to comment in sanity phase closing argument on the defendant's inappropriate laughter during the trial that the jury witnessed, particularly where the defendant's demeanor was a significant issue in determining his sanity after having been cited by a defense expert as a symptom relevant to his diagnosis of mental illness and raised by defense counsel in closing argument. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 840.)

When a defendant's character is placed in issue as a mitigating factor in the penalty phase of trial, it is "proper for the jury to draw inferences on that issue from their observations of the defendant in the courtroom, and therefore, proper for the prosecutor to base a closing argument on such observations." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 840, internal quotation marks omitted.)

§ 5.61.3 Comment on Defendant's Invocation of *Miranda* Rights (*Doyle* Error)

While *Miranda* warnings do not expressly assure that silence will carry no penalty, it is fundamentally unfair and a deprivation of due process to use an arrested person's silence to impeach any explanation that is subsequently offered by that person at trial. (***Doyle v. Ohio*** (1976) 426 U.S. 610, 618 [96 S.Ct. 2240, 49 L.Ed.2d 91]; ***People v. Clark*** (2011) 52 Cal.4th 856, 959.)

"[A] *Doyle* violation does not occur unless the prosecutor is *permitted* to use a defendant's postarrest silence against him at trial, and an objection and appropriate instruction to the jury ordinarily ensures that the defendant's silence will not be used for an impermissible purpose." (***People v. Clark*** (2011) 52 Cal.4th 856, 959, citing ***Greer v. Miller*** (1987) 483 U.S. 756, 764-765 [107 S.Ct. 3102, 97 L.Ed.2d 618].)

The prosecutor's argument about an alibi witness keeping an alibi a secret while her husband was in jail was plainly directed at whether the defendant's wife was a believable alibi witness, and not intended for the jury to draw negative inferences from the defendant's silence. "Mere witnesses, of course, have no constitutional right to remain silent." Accordingly, there was no *Doyle* error. (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1334.)

Doyle error was harmless because the "problem with defendant's trial testimony was not that the jury heard that he once invoked his *Miranda* rights, but that he repeatedly provided in the other interviews untrue accounts of his involvement in the murders. Indeed, defendant's invocation of his *Miranda* rights was both cumulative of – and inferior to – the other evidence indicating that he had fabricated the account he eventually provided during police interviews, and reiterated at trial. For that reason, and because the prosecutor never again mentioned the invocation during trial or closing argument [citation], we conclude that these two fleeting references could not have affected the jury's verdicts in this case." (***People v. Hinton*** (2006) 37 Cal.4th 839, 868.)

§ 5.61.4 Comment on Defendant's Silence (*Griffin* Error)

While a prosecutor may not comment upon the defendant's failure to testify indirectly or directly (***Griffin v. California*** (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]), the prosecutor may comment on the state of the evidence, or the failure

of the defense to introduce material evidence or call logical witnesses. The defendant's car being parked close to the crime scene at the time of the crime constituted material inculpatory evidence, and it was fair for the prosecutor to draw the jury's attention to the failure of the defense to call witnesses who might logically explain the presence of the vehicle. The defendant was not the only person who could explain the vehicle's location – a defense witness who testified he was with the defendant most of the day in question, the defendant's employer, or the person who lent the vehicle to the defendant, all were persons who might be expected to know why the vehicle was parked where it was, and the circumstance they did not testify concerning that point was a fair subject for comment for the prosecutor. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 90-91, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

There is no impermissible comment where the comment is on the defendant's silence prior to trial, unless the privilege is otherwise implicated. (***People v. Clair*** (1992) 2 Cal.4th 629, 662.)

Griffin error may be committed where the codefendant's counsel comments on a defendant's silence. However, a comment that would require reversal if made by a prosecutor may be harmless, or even not error, if made by the codefendant's counsel. (***People v. Hardy*** (1992) 2 Cal.4th 86, 157-161.)

"The trial court's utterance in front of the jury—'You are resting without calling your client?'—was unquestionably imprudent. We may surmise the court merely wished to impress upon defense counsel that the trial had reached the point of no return for defendant's decision whether or not to testify. But by expressing surprise at defendant's silence, the court's comment—which we assume was audible to the jury—may have inadvertently communicated to the jury that it should (or may) consider defendant's silence as evidence of her guilt. Such a message would have trenched on defendant's constitutional right to remain silent." However, "any *Griffin* error flowing from the trial court's comment was harmless beyond a reasonable doubt." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1118.)

Evidence that the defendant invoked his right to remain silent may properly be used by the prosecution to rebut a defendant's claim that his silence was evidence of his insanity. (***People v. Jones*** (1997) 15 Cal.4th 119, 172-174, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

It was not a comment upon the defendant's failure to testify where the prosecutor argued: "That is the evidence in this case. The evidence in this case is not contradicted by any other evidence in this case. It is very clear. It is proof beyond a reasonable doubt that the defendant committed those crimes that he is charged with." Rather, the prosecutor's statement that the evidence was uncontradicted simply reflected his view that the exculpatory evidence was not true. (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1333-1334.)

In closing penalty argument, the prosecutor argued "Is there any sign of remorse here? I'd submit there is none…" The defendant alleged this argument constituted improper comment on his silence in violation of ***Griffin v. California*** (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]. The California Supreme Court rejected the assignment of misconduct as "the prosecutor simply 'noted the lack of evidence and did not refer to defendant's silence' and that 'a prosecutor is entitled during closing argument to highlight a defendant's lack of remorse, and doing so does not necessarily violate *Griffin*.'" (***People v. Johnson*** (2015) 61 Cal.4th 734, 782, quoting ***People v. Brady*** (2010) 50 Cal.4th 547, 585.)

The prosecutor's question about whether DNA evidence was available for independent testing did not constitute improper comment on the defendant's failure to testify in violation of ***Griffin v. California*** (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]. (***People v. Bennett*** (2009) 45 Cal.4th 577, 596.)

The "reasonable likelihood" standard of ***Estelle v. McGuire*** (1991) 502 U.S. 62 [112 S.Ct. 475, 116 L.Ed.2d 385], is now used in California to review claims of prosecutorial misconduct in argument. In this context, the question was whether there was a reasonable likelihood comments could have been understood to refer to the defendant's failure to testify. (***People v. Clair*** (1992) 2 Cal.4th 629, 662-663; see also ***People v. Cain*** (1995) 10 Cal.4th 1, 48; ***People v. Memro*** (1995) 11 Cal.4th 786, 874, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

Griffin error was harmless beyond a reasonable doubt in a case where overwhelming evidence, including admissions to numerous persons, supports conviction. (***People v. Hardy*** (1992) 2 Cal.4th 86, 153-154.)

Failure to object on the ground of *Griffin* error forfeits the claim. (***People v. Lewis*** (2009) 46 Cal.4th 1255, 1304; ***People v. Medina*** (1995) 11 Cal.4th 694, 756.)

§ 5.61.5 Comment *re* Defense Counsel / Defense Strategy

"[O]ur decisions make clear that 'harsh and colorful attacks on the credibility of opposing witnesses are permissible. [Citations.]'" (***People v. Clark*** (2011) 52 Cal.4th 856, 962.)

"A prosecutor is not permitted to make false or unsubstantiated accusations that counsel is fabricating a defense or deceiving the jury. [Citation.] However, an 'argumentative reminder' that defense counsel selected expert witnesses whose opinions were favorable to defendant's case is not an insinuation of deceit. [Citation].)" (***People v. Clark*** (2011) 52 Cal.4th 856, 961.)

"The thrust of the prosecutor's argument was to dissuade the jury from being dazzled or impressed by the "dramatic" midtrial arrival of a third defense attorney and the

results of his recently retained expert witnesses. We conclude the complained-of remarks were little more than a reminder to the jury to consider the substance of the experts' testimony rather than the spectacle surrounding its presentation, and thus amounted to fair comment on the defense mental-state evidence." (***People v. Clark*** (2011) 52 Cal.4th 856, 961-962.)

A prosecutor is not prohibited from challenging an inference raised by a question merely because defense counsel thereby may be cast in a poor light for having posed the question. The prosecutor's statement that "it bothered me that he asked that question" did not add anything to the prosecutor's commentary upon the evidence that was not implicit in his observation that defense counsel's question seemed to raise an unfair inference. (***People v. Redd*** (2010) 48 Cal.4th 691, 738.)

The prosecutor committed misconduct by improperly arguing that defense counsel did not believe in his client's innocence when she stated in closing argument that she "'knows [defendant] is the shooter. And he is hedging his bets by making all this conversation about this wadding because *he knows that you know* [*defendant*] *is the shooter*.' (Italics added)." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1337.)

The prosecutor committed misconduct when she improperly argued that defense counsel presented a "sham" defense as the argument improperly implied that counsel was personally dishonest. "An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum, it is never excusable." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1337-1338, internal quotation marks & citations omitted.)

It is improper for a prosecutor to argue that defense counsel does not believe in his client's case. Proper argument is focused on evidence adduced at trial, as opposed to the integrity of defense counsel. Comments on failure to call logical witnesses is proper. (***People v. Chatman*** (2006) 38 Cal.4th 344, 385.)

"The prosecutor's comments did not cast aspersions on defense counsel or imply that he was dishonest. Indeed, the prosecutor's comments did not even reference defense counsel, but instead focused on defendant's changing story." (***People v. Williams*** (2016) 1 Cal.5th 1166, 1189.)

To state that an experienced defense counsel will attempt to "twist" and "poke" at the prosecution's case does not amount to a personal attack on counsel's integrity. (***People v. Medina*** (1995) 11 Cal.4th 694, 759.)

In addressing a claim of misconduct that is based on the denigration of opposing counsel, the court views the prosecutor's comments in relation to the remarks of defense counsel, and inquires whether the former constitutes a fair response to the latter. (***People v. Frye*** (1998) 18 Cal.4th 894, 978, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A prosecutor's suggestion or insinuation that defense counsel fabricated the defense is misconduct only when there is no evidence to support the claim. (***People v.***

Rundle (2008) 43 Cal.4th 76, 163, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

It is misconduct to accuse opposing counsel of lying and to state that defense counsel's credibility was damaged because he was not candid with the jury. (***People v. Jones*** (1997) 15 Cal.4th 119, 168, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The prosecutor did not "improperly denigrate[] defense counsel when, in closing argument, he said 'I tip my hat to the job the defense did in this case when they had no evidence that went their way. [¶] Trying to make chicken salad out of you know what, okay?'" "as "it was clear the prosecutor's comment was aimed solely at the persuasive force of defense counsel's closing argument, and not at counsel personally." (***People v. Charles*** (2015) 61 Cal.4th 308, 328-329.)

There was no misconduct where the prosecutor argued that defense counsel had "created" a "preposterous" defense involving a nonexistent "phantom killer," and said that counsel "wants you to start guessing about a phantom killer." The prosecutor did not accuse defense counsel of factual fabrication or deceit; he merely argued, as he was allowed to do, that there was no evidence for counsel's theory. The prosecutor's language was strong, but well within bounds the California Supreme Court has previously recognized as permissible. (***People v. Tate*** (2010) 49 Cal.4th 635, 692-693.)

The prosecutor is entitled to wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. Comments concerning defense counsel's speculation did not amount to a personal attack on his integrity. Instead the comments served to focus the jury upon the evidence rather than distracting it from its task. (***People v. Redd*** (2010) 48 Cal.4th 691, 735.)

If a reasonable likelihood exists that a jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1303.)

§ 5.61.6 Comment *re* Experts

"'[H]arsh and colorful attacks on the credibility of opposing witnesses are permissible.'" (***People v. Clark*** (2011) 52 Cal.4th 856, 962.)

"[A]n 'argumentative reminder' that defense counsel selected expert witnesses whose opinions were favorable to defendant's case is not an insinuation of deceit." (***People v. Clark*** (2011) 52 Cal.4th 856, 961.)

Comment suggesting that a paid witness may be biased is permissible argument. (***People v. Cook*** (2006) 39 Cal.4th 566, 613.)

The prosecutor committed misconduct [during sanity phase closing argument] by suggesting he did not call any experts at the sanity phase because it would have wasted the jury's time. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 838.)

The prosecutor did not impermissibly malign the credibility of a defense expert by commenting during closing argument that the "doctor looked ridiculous and didn't make any sense." The challenged remarks were prefaced by explaining that the doctor's opinion was based in part on information provided by the defendant, which the prosecutor argued was untrustworthy. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 839.)

It is not misconduct to elicit testimony from a defense psychiatrist on cross-examination that he had testified differently in other cases as to the effects of alcohol and PCP, and to call him a liar in argument. (***People v. Sandoval*** (1992) 4 Cal.4th 155, 179-180.)

"[I]t is common knowledge that the trial judge, the prosecutor, the prosecution expert witnesses, and even appointed defense counsel were all paid from the public coffers." Accordingly, it is not improper to attempt to impeach a defense expert with the information that the public paid his fee. (***People v. Gray*** (2005) 37 Cal.4th 168, 217.)

§ 5.61.7 Comment Relying on Outside Experience / Personal Beliefs Based on Facts Not in Evidence

While "[p]rosecutors should not purport to rely in jury argument on their outside experience or personal beliefs based on facts not in evidence" it is not misconduct for a prosecutor to simply assert based on the evidence that the defendant was guilty of murder. (***People v. Edwards*** (2013) 57 Cal.4th 658, 742.)

§ 5.61.8 Comment *re* Victim

"'As a general rule, a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim. It is also improper to ask jurors to imagine the victim's thoughts during the last seconds of life.'" (***People v. Leon*** (2015) 61 Cal.4th 569, 735, quoting ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1406-1407, internal citation omitted.)

"We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt. Despite this misstep, however, we find the prosecutor's misconduct in making a few remarks in a much longer closing argument, and an even longer trial, could not have prejudiced defendant, especially given the strong evidence of his guilt." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1344, internal quotation marks & citations omitted; ***People v. Martinez*** (2010) 47 Cal.4th 911, 957, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

Cross-Reference: § 12.13, *re* Comments about victim

It was misconduct for the prosecutor to argue that the victim was her client. "The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1345, internal quotation marks & citations omitted.)

It is clearly improper to ask the jury during closing argument in the guilt phase of a capital trial to imagine the fear that the defendant's victims expressed. However, there was no prejudice where the comment was brief and prosecutor did not return to the point during argument, and evidence of defendant's guilt was overwhelming. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 704.)

It is not proper rebuttal to argue the victim's right to life and safety in response to the defense argument asserting the defendant's right to a fair trial. Misconduct was found harmless. (***People v. Arias*** (1996) 13 Cal.4th 92, 160-161.)

It is misconduct for the prosecutor to ask the jury to do the right thing for the 18-year-old victim, but a brief, isolated comment was harmless, and misconduct was waived by failure to object. (***People v. Medina*** (1995) 11 Cal.4th 694, 759-760.)

The prosecutor's brief and relatively bland references to "victims, their loved ones" and "survivors" in guilt-phase argument were misconduct, but not prejudicial. (***People v. Sanders*** (1995) 11 Cal.4th 475, 527.)

§ 5.61.9 Disclosure of Material Evidence (*Brady*)

"The term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so-called "*Brady* material" – although, strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. Prejudice, in this context, focuses on the materiality of the evidence to the issue of guilt and innocence. Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible, that the absence of the suppressed

evidence made conviction more likely, or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial. A defendant instead must show a "reasonable probability of a different result." (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 164, 175-176, internal quotation marks & citations omitted.)

"'To the extent the prosecutor is uncertain about the materiality of a piece of evidence, "the prudent prosecutor will resolve doubtful questions in favor of disclosure."'" (***In re Miranda*** (2008) 43 Cal.4th 541, 577.)

"In the end, the trial judge, not the prosecutor, is the arbiter of admissibility, and the prosecutor's *Brady* disclosure obligations cannot turn on the prosecutor's view of whether or how defense counsel might employ particular items of evidence at trial. 'It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false.'" (***In re Miranda*** (2008) 43 Cal.4th 541, 577.)

"[T]he prosecution's disclosure obligation turns on the collective effect of all suppressed evidence favorable to the defense, not on the effects of such evidence considered item by item." (***In re Miranda*** (2008) 43 Cal.4th 541, 580.)

The California Supreme Court has left open the question of whether evidence must be admissible in order to constitute "material" evidence requiring disclosure by prosecution. (***In re Miranda*** (2008) 43 Cal.4th 541, 576; see also ***People v. Hoyos*** (2007) 41 Cal.4th 872, 919, fn. 28, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641.)

A letter in which a prisoner described the prosecution witness's alleged confession to an uncharged killing that was the subject of evidence in aggravation presented in the penalty phase of defendant's trial should have been disclosed by the prosecution, as it constituted material evidence within meaning of ***Brady v. Maryland*** (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]. (***In re Miranda*** (2008) 43 Cal.4th 541, 580-581.)

The prosecution must disclose to the defense and jury any inducements made to a prosecution witness and must also correct any false or misleading testimony by a witness relating to any inducements. (***In re Jackson*** (1992) 3 Cal.4th 578, 594, overruled on other grounds, *In re Sassousian* (1995) 9 Cal.4th 535, 545.)

It was not necessary to determine whether the welfare fraud unit of the District Attorney's Office was part of the prosecution team for purposes of *Brady*. Although information regarding a witness's misdemeanor welfare fraud conviction was favorable to the defendant as impeachment evidence, it was not material where the witness was not a primary prosecution witness, and her testimony was not the only evidence linking the defendant to the crimes. (***People v. Clark*** (2011) 52 Cal.4th 856, 982.)

§ 5.61.10 False or Misleading Testimony

Well-established principles of due process preclude the prosecution from presenting evidence it knows is false, and the prosecution must correct any falsity of which it is aware in the evidence it presents. (***People v. Charles*** (2015) 61 Cal.4th 308, 328; ***People v. Richardson*** (2008) 43 Cal.4th 959, 1014; ***People v. Harrison*** (2005) 35 Cal.4th 208, 242.)

Where the prosecutor could not definitely know whether a witness perjured himself and was candid about why he was presenting the testimony notwithstanding doubts about its credibility, the prosecution did not knowingly present, or fail to correct, false testimony. (***People v. Richardson*** (2008) 43 Cal.4th 959, 1014.)

When a prosecutor has doubts as to the truth of a statement it intends to present at trial, then the prosecution must disclose any material evidence that suggests the statement in question is false to the defense, but it may still, notwithstanding doubts, present the statement to the jury. (***People v. Charles*** (2015) 61 Cal.4th 308, 328.)

Failure to correct the testimony of a prosecution witness which the prosecutor knows or should know is false or misleading is reversible error "if there is any reasonable likelihood the false testimony could have affected the judgment of the jury." This standard is generally equated with "harmless beyond a reasonable doubt." (***In re Jackson*** (1992) 3 Cal.4th 578, 594, overruled on other grounds, *In re Sassousian* (1995) 9 Cal.4th 535, 545.)

§ 5.61.11 Inconsistent Prosecutorial Theories

The prosecution's use of irreconcilable theories of guilt or culpability for separately tried co-perpetrators, without a good-faith justification for the inconsistency (such as a significant change in available evidence), is fundamentally unfair. Where one theory is demonstrably false, the co-perpetrator affected by the false theory is entitled to relief if there is a reasonable likelihood that the false theory affected the verdict. (***In re Sakarias*** (2005) 35 Cal.4th 140, 159, 162, 164-165.)

The asserted inconsistencies in prosecutorial theory were not the subject of any proceeding in the trial court, so there are no explanations the prosecutor may have been able to offer in the record on appeal. Additionally, it would be improper to augment the record on appeal by taking judicial notice of the transcripts of the defendant's cohorts' trial. Accordingly, any due process claim of the defendant's must be raised in a petition for writ of habeas corpus and not on appeal. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1143; ***People v. Sakarias*** (2000) 22 Cal.4th 596, 635 [a claim of prosecutorial misconduct based on allegedly inconsistent theories at separate trials of codefendants generally relies on extra-record evidence and should be presented in a petition for writ of habeas corpus rather than on appeal].)

Variations in a prosecutor's emphasis regarding the evidence, where the underlying theory of case was consistent at the trial of defendant and codefendant, does not amount to inconsistent and irreconcilable prosecution theories. (***People v. Richardson*** (2008) 43 Cal.4th 959, 1017, citing ***People v. Sakarias*** (2005) 35 Cal.4th 140, 161, fn. 3.)

It was not inconsistent for the prosecution to contend at both the defendant's and codefendant's trials that the defendant was the actual murderer and the codefendant was an aider and abettor. (***People v. Richardson*** (2008) 43 Cal.4th 959, 1017.)

§ 5.61.12 Interference With Witness

A claim of unconstitutional wrongful interference with a beneficial witness requires establishing three elements: (1) misconduct that is "so egregious and improper as to turn a willing defense witness into an unwilling one"; (2) the misconduct must be a "substantial cause" of the defendant being deprived of the witness's testimony; and (3) the lost testimony must be material and favorable to the defense. (***People v. DePriest*** (2007) 42 Cal.4th 1, 55.)

In order to demonstrate a denial of a defendant's Sixth Amendment right to compel the attendance of witnesses and the Fourteenth Amendment right to due process based on prosecutorial intimidation of a witness, the "[d]efendant bears the burden of demonstrating at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable; that the prosecution engaged in activity that was entirely unnecessary to the proper performance of its duties and of such a character as to transform a defense witness from a willing witness to one who would refuse to testify; and a causal link between that misconduct and his inability to present witnesses on his own behalf." (***People v. Harris*** (2005) 37 Cal.4th 310, 343.)

A prosecutor's decision not to grant immunity to a witness is not misconduct unless it is "egregious, unfair, deceptive, or reprehensible." (***People v. Masters*** (2016) 62 Cal.4th 1019, 1052.)

§ 5.61.13 Name-Calling

A prosecutor is not limited to "Chesterfieldian politeness" in argument and may use "appropriate epithets." (***People v. Gamache*** (2010) 48 Cal.4th 347, 371; ***People v. Wharton*** (1991) 53 Cal.3d 522, 567-568.)

The prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence, to comment on the failure to produce logical evidence, to argue on the basis of inference from the evidence that a defense is fabricated, and to comment on the evidence of prior convictions attributable to defense witnesses. In this case, referring to a defense witness as a "weasel" was not error. (***People v. Pinholster*** (1992) 1 Cal.4th 865, 948, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

The prosecutor's challenged comments calling the defendant a "monster" and an "animal" were warranted by the evidence and within permissible bounds for argument. "There is a wide range of permissible argument at the penalty phase. Argument may include opprobrious epithets warranted by the evidence. Where they are so supported, we have condoned a wide range of epithets to describe the egregious nature of the defendant's conduct." (***People v. Edwards*** (2013) 57 Cal.4th 658, 764-765, internal quotation marks & citations omitted, citing, e.g., ***People v. Farnam*** (2002) 28 Cal.4th 107, 168 [defendant is "monstrous," "cold-blooded," vicious, and a "predator"; evidence is "horrifying" and "more horrifying than your worst nightmare"]; ***People v. Thomas*** (1992) 2 Cal.4th 489, 537 [defendant is "mass murderer, rapist," "perverted murderous cancer," and "walking depraved cancer"]; ***People v. Sully*** (1991) 53 Cal.3d 1195, 1249 [based on facts of crime, defendant is "human monster" and "mutation"].)

Calling the defendant a "liar" was fair comment on the evidence. The comment was based on the defendant's admitted lies to police and to his girlfriend. Contrary to assertions, the "prosecutor never hinted he had special information that defendant was a liar or that defense counsel was complicit in defendant's lies." (***People v. Hinton*** (2006) 37 Cal.4th 839, 871.)

"[T]he prosecutor's comparison of [the defendant's] crimes [all involving adult victims] to the highly publicized and unrelated murders and sexual assaults of children such as Polly Klaas was gratuitous at the guilt phase and therefore improper." (***People v. Jackson*** (2016) 1 Cal.5th 269, 350.)

§ 5.61.14 Overhearing / Intercepting Communication Between Defendant and His Counsel

The United States Supreme Court has rejected "the contention that whenever conversations with counsel are overheard the Sixth Amendment is violated and a new trial must be had. Rather, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." (***People v. Ervine*** (2009) 47 Cal.4th 745, 765, internal quotation marks & citations omitted.)

"[I]n the absence of evidence that confidential information was actually conveyed to the prosecution team, defendant has no claim that his Sixth Amendment rights were violated." (***People v. Ervine*** (2009) 47 Cal.4th 745, 768.)

"No federal constitutional provision … establishes an attorney-client communication privilege. Rather, the Sixth Amendment guarantees a criminal defendant the right to 'assistance of counsel for his defense.' (U.S. Const., 6th Amend.) Confidential communication between a defendant and his lawyer is itself not a separate 'right' that the federal Constitution guarantees, but rather an aspect of ensuring fulfillment of the right to assistance of counsel. [¶] … [¶] To the extent defendant contends interception of the conversation between him and an agent of his attorney

constitutes a 'circumstance of [the] magnitude' of the complete denial of counsel that alone is sufficient to establish a denial of his federal right to counsel, he is mistaken…. [¶] Here,… there was no realistic possibility of injury to defendant or benefit to the state and therefore there was no violation of defendant's Sixth Amendment right to counsel. We conclude that ruling was correct." (***People v. Alexander*** (2010) 49 Cal.4th 846, 887-888.)

"To the extent defendant contends the monitoring and recording of [communication between defendant and his defense team] violated his due process right to a fair trial under the Fifth Amendment to the federal Constitution, … the interception of the call did not make defendant's trial fundamentally unfair. Assuming a due process violation could, in an appropriate case, be grounded on the prosecution's secretly learning defense evidence and strategy beyond that which the discovery statutes may compel the defense to disclose, interception of the call at issue in this case could not have upset the 'balance of forces between the accused and his accuser' to a degree that denied defendant any constitutional right to reciprocity of discovery." (***People v. Alexander*** (2010) 49 Cal.4th 846, 891.)

Where statutory protections for confidential communications with a defendant's attorney are violated (such as Evidence Code sections 952 and 954, Code of Civil Procedure sections 2018.020 and 2018.030, and Penal Code section 2601, subdivision (b)), the defendant must demonstrate a miscarriage of justice (Cal. Const., art. VI, § 13) before he is entitled to relief. (***People v. Ervine*** (2009) 47 Cal.4th 745, 771.)

§ 5.61.15 Opening Statements

A prosecutor's remarks during opening statement are not misconduct unless evidence the prosecutor references is "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted." (***People v. Dykes*** (2009) 46 Cal.4th 731, 762, internal quotation marks omitted.)

§ 5.61.16 Plea Offer

It is not a constitutional violation for a prosecutor to offer benefits in the form of reduced charges, in exchange for a defendant's guilty plea, or to threaten to increase the charges if the defendant does not plead guilty. (***People v. Jurado*** (2006) 38 Cal.4th 72, 98, citing ***Bordenkircher v. Hayes*** (1978) 434 U.S. 357, 365 [98 S.Ct. 663, 54 L.Ed.2d 604].)

§ 5.61.17 Punishment / Possibility of Parole-Pardon

It is improper for a prosecutor to argue that a defendant could be released on parole unless the jury finds the special circumstances allegation to be true. A defendant's

possible punishment is not a proper subject for juror consideration in determining guilt. (***People v. Thomas*** (2011) 51 Cal.4th 449, 486.)

§ 5.61.18 Proffering Inadmissible Evidence

"Although offering evidence the prosecutor knows is inadmissible may be misconduct (***People v. Scott*** (1997) 15 Cal.4th 1188, 1218), the adversarial process generally permits one party to offer evidence, and the other party to object if it wishes, without either party being considered to have committed misconduct." (***People v. Harris*** (2005) 37 Cal.4th 310, 344.)

When the trial court has overruled defense objections, the prosecutor's questions in accordance with the trial court's ruling do not constitute misconduct. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 93-94, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

§ 5.61.19 Prosecutor's Demeanor

"'Juvenile courtroom behavior by a public prosecutor demeans the office.'" The record was unclear "how much the prosecutor laughed" during defendant's testimony, although prosecutor himself admitted "to some chuckling and chortling." Even assuming misconduct, the behavior was found harmless. (***People v. Friend*** (2009) 47 Cal.4th 1, 32.)

§ 5.61.20 Questions

"[C]ourts should carefully scrutinize 'were they lying questions' in context." (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 98, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

"[T]he prosecutor's questions were directed toward obtaining confirmation of relevant facts, and were not a speech to the jury. The circumstance that the prosecutor confronted the witness, challenged the witness's responses, or attempted to control nonresponsive testimony does not render the prosecutor's questions 'argumentative.'" (***People v. Redd*** (2010) 48 Cal.4th 691, 748.)

"A defendant cannot, by testifying to a state of things inconsistent with the evidence presented by the prosecution, thereby limit cross-examination to the precise facts concerning which he testifies. Rather, when a defendant testifies, the prosecutor 'may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.'" (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 100, internal citation omitted, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

§ 5.61.21 Vouching

"A prosecutor may make assurances regarding the apparent honesty or reliability of a witness based on the facts of the record and the inferences reasonably drawn therefrom. But a prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." (***People v. Redd*** (2010) 48 Cal.4th 691, 740, internal quotation marks & citations omitted.)

The prosecutor's comments during opening statement that two witnesses "had changed their lives" appropriately anticipated the witnesses testimony and "there is no reasonable likelihood that the jury would have understood" the comments as "vouching for these witnesses' credibility based on the prosecutor's personal belief." (***People v. Adams*** (2014) 60 Cal.4th 541, 572.)

Where the prosecutor states in argument "I will stake my reputation on it," the defendant was not prejudiced by the comment where the trial court sustained the defense objection to the "guarantee by the district attorney," and the prosecutor later said: "[W]hen I was talking about the CD tape and transcript, you listen to it.... I shouldn't say I sta[k]e my reputation. You be the judge[.] [Y]ou.... [l]isten you ... judge for yourself." (***People v. Nunez*** (2013) 57 Cal.4th 1, 32.)

It is not improper "vouching" to urge a witness's credibility based on facts in the trial record. (***People v. Medina*** (1995) 11 Cal.4th 694, 757.)

It was not improper vouching to read the immunity agreement between the prosecution and one of its witnesses. (***People v. Frye*** (1998) 18 Cal.4th 894, 971, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 5.61.22 Witnesses

"The prosecutor is not required to keep periodic tabs on every material witness in a criminal case." However, "when there is knowledge of a substantial risk that an important witness would flee, the prosecutor is required to take adequate preventative measures to stop the witness from disappearing." (***People v. Friend*** (2009) 47 Cal.4th 1, 68, internal quotation marks omitted.)

§ 5.61.23 Work Product

"[Penal Code s]ection 1054.6 provides that the [work product] privilege applies in criminal cases only to materials or information that are work product as defined in Code of Civil Procedure section 2018.030, subdivision (a). (*People v. Zamudio* (2008) 43 Cal.4th 327, 351–356 [].) That subdivision defines work product as a '*writing* that reflects an attorney's impressions, conclusions, opinions, or legal research or theories.'

(Code Civ. Proc., § 2018.030(a), italics added.)" (***People v. Scott*** (2011) 52 Cal.4th 452, 489.)

"'The prosecutor's questions at issue here merely sought to clarify that, contrary to defense counsel's implication, DNA samples were available for independent testing. As such, the prosecutor's questions did not elicit or attempt to elicit evidence of a "writing" reflecting defense counsel's "impressions, conclusions, opinions, or legal research or theories" and therefore did not violate the work product privilege.' [Citation.] The mere fact that a piece of evidence was given to the defense says nothing about what the defense team did or did not do with the evidence. [R]ejection of defendant's work product claim on the merits necessarily leads to rejection of his constitutional claims." (***People v. Scott*** (2011) 52 Cal.4th 452, 489.)

§ 5.61.24 Forfeiture

Claims of prosecutorial misconduct are ordinarily forfeited unless the defendant interposes a timely objection and asserts misconduct and requests an admonition of the jury unless an admonition would not have cured the harm. (***People v. Clark*** (2011) 52 Cal.4th 856, 960; ***People v. Dykes*** (2009) 46 Cal.4th 731, 774-775 [declining to apply exception to forfeiture rule for pervasive prejudicial misconduct]; ***People v. Prince*** (2007) 40 Cal.4th 1179, 1294; ***People v. Stanley*** (2006) 39 Cal.4th 913, 962; ***People v. Green*** (1980) 27 Cal.3d 1, 27-34, overruled on other grounds, *People v. Martinez* (1999) 20 Cal.4th 225, 241.)

There is no exception to the objection rule for capital cases. (***People v. Clair*** (1992) 2 Cal.4th 629, 662.)

A defendant asserting an excuse for the objection-and-admonition requirement must find support for the exception in the record. The ritual incantation that an exception applies is not enough. (***People v. Panah*** (2005) 35 Cal.4th 395, 462.)

A defendant will be excused from the necessity of objecting or requesting an admonition when either would be futile. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1329; ***People v. Arias*** (1996) 13 Cal.4th 92, 159; ***People v. Noguera*** (1992) 4 Cal.4th 599, 638.)

Failure to request an admonition does not forfeit the issue on appeal if an admonition would not have cured the harm caused by the misconduct or the trial court. (***People v. Barnett*** (2009) 45 Cal.4th 577, 595; ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1333.)

"[L]ogically, the requirement that a defendant also seek a curative instruction to alleviate the effect of improper argument applies only if the court sustains the defense objection as to its impropriety." (***People v. Johnson*** (2015) 61 Cal.4th 734, 781-782, fns. 15, 16.)

Failure to request an admonition does not forfeit the issue on appeal if the trial court immediately overrules the objection to alleged misconduct and as a consequence the defense has no opportunity to make such a request. (***People v. Cole*** (2004) 33 Cal.4th 1158, 1163; ***People v. Hill*** (1998) 17 Cal.4th 800, 820; ***People v. Green*** (1980) 27 Cal.3d 1, 35, fn. 19, overruled on other grounds, *People v. Martinez* (1999) 20 Cal.4th 225, 241.)

An exception to the contemporaneous objection requirement has been recognized in the unusual situation where defense counsel objected to some, but not all, instances of prosecutorial misconduct, and in some instances did not adequately state the grounds for the objection or failed to request an admonition. With few exceptions, the misconduct occurred in front of the jury, and consisted of "a constant barrage" of unethical conduct by the prosecutor, "including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods." The continual misconduct was "coupled with the trial court's failure to rein in" the prosecutor's "excesses" which "created a trial atmosphere so poisonous" that defense counsel was "thrust upon the horns of a dilemma," i.e., to continually object to misconduct and "risk repeatedly provoking the trial court's wrath" which had taken the form of comments from the bench suggesting defense counsel was an obstructionist and was delaying the trial with meritless objections, or to instead forgo objecting and suffer prejudice caused by the prosecution's misconduct. Under these unusual circumstances, any additional attempts to object and request admonishment of the jury would have been futile and counterproductive to the defendant. (***People v. Hill*** (1998) 17 Cal.4th 800, 821.)

Where, at the time of the complained-of remark, defense counsel had not interjected a single objection to the prosecution's closing argument, the case does not present a situation akin to ***People v. Hill*** (1998) 17 Cal.4th 800, 821, where counsel's failure to continually object to numerous instances of misconduct is excused. (***People v. Clark*** (2011) 52 Cal.4th 856, 960.)

No futility of objection was apparent where the "record demonstrates that defense counsel had no hesitation in lodging objections to the prosecutor's closing arguments at either the guilt or sanity phases, and the court sustained many of defendant's objections." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 839.)

The defendant's claim that his Fifth Amendment right to silence was violated when the prosecutor referenced statements during closing argument that he made to a mental health expert during a competency evaluation was forfeited on appeal for failing to object when the prosecutor elicited the statements from the mental health expert in the guilt phase during cross-examination; and because the objection during closing argument was clearly not made on Fifth Amendment grounds. Accordingly, defense objections "failed to inform the court of the Fifth Amendment issue so it could consider the interest at stake and make a fully informed ruling." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 828.)

The forfeiture rule also applies to alleged misconduct committed during jury selection. (***People v. Medina*** (1995) 11 Cal.4th 694, 740.)

The failure to object to prosecutorial misconduct is not excused because of a "close case." (***People v. Cain*** (1995) 10 Cal.4th 1, 48; ***People v. Carrera*** (1989) 49 Cal.3d 291, 321.)

Where defense counsel objected to the prosecutor's comment about the defendant's neat courtroom appearance and the victim's absence, but did not request an admonition, the misconduct claim was not preserved on appeal. (***People v. Montiel*** (1993) 5 Cal.4th 877, 914-915, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

Where the alleged misconduct consists of misleading defense counsel regarding a witness's testimony and failure to timely disclose recently discovered information from the witness, the claim is waived by failing to timely seek appropriate sanctions or a continuance on the ground of unfair surprise. (***People v. Arias*** (1996) 13 Cal.4th 92, 151.)

§ 5.61.25 Harmless Error

Though the prosecutor's conduct occasionally crossed the line of appropriate advocacy, none of the claims of misconduct contributed to the verdict. (***People v. Hardy*** (1992) 2 Cal.4th 86, 172-173.)

"Whatever methods a trial or appellate court might otherwise use to bring to heel a recalcitrant or incorrigible prosecutor, the federal Constitution does not require (and the state Constitution does not permit) the reversal of a criminal conviction unless the misconduct deprived defendant of a fair trial or resulted in a miscarriage of justice." (***People v. Hinton*** (2006) 37 Cal.4th 839, 865.)

Where the trial court sustains the defense objections and admonishes the jury to disregard the improper comments, it is presumed the jury will follow the admonishment and any prejudice is avoided. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 702; ***People v. Hinton*** (2006) 37 Cal.4th 839, 864; ***People v. Michaels*** (2002) 28 Cal.4th 486, 528; ***People v. Jones*** (1997) 15 Cal.4th 119, 168, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Errors or misconduct during voir dire regarding penalty issues reach the jury at a much less critical phase of the proceedings before its attention has been focused on the penalty issue and therefore are, as a general matter, unlikely to unduly influence the penalty verdict. (***People v. Medina*** (1995) 11 Cal.4th 694, 741.)

There was no prejudice from sustained objections to "asked and answered" questions. (***People v. Hinton*** (2006) 37 Cal.4th 839, 864.)

There was no prejudice from "a series of leading questions" on foundational matters. (***People v. Hinton*** (2006) 37 Cal.4th 839, 865.)

Misconduct during sanity phase closing argument was harmless because the defendant was unable to provide any expert testimony supporting his claim of insanity at time of killings; at most, the defense expert testified the defendant "might" have been insane. The jury was instructed to rely on evidence presented in court and not to treat counsel's comments as evidence. Accordingly, the prosecutor's improper remarks had little significance. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 839.)

Even if a prosecutor's argument had misstated the law as to the applicable burden of proof, it could not have prejudiced the defendant in a *court* trial. (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1077.)

VII. SPECTATORS [§ 5.70]

A. MISCONDUCT [§ 5.71]

Misconduct on the part of a spectator is a ground for reversal only if the misconduct is of such a character as to prejudice the defendant or influence the verdict. (***People v. Winbush*** (2017) 2 Cal.5th 402, 463; ***People v. Myles*** (2012) 53 Cal.4th 1181, 1215; ***People v. Panah*** (2005) 35 Cal.4th 395, 451 [grounds for mistrial only if of character to prejudice defendant or influence verdict].)

With respect to spectator misconduct, the question is whether the conduct "'was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged [conduct] is not found inherently prejudicial and if the defendant fails to show prejudice, the inquiry is over.'" (***People v. Hinton*** (2006) 37 Cal.4th 839, 898, citing ***Holbrook v. Flynn*** (1986) 475 U.S. 560, 571 [106 S.Ct. 1340, 89 L.Ed.2d 525].)

A trial court is afforded broad discretion in determining whether the conduct of a spectator is prejudicial. (***People v. Myles*** (2012) 53 Cal.4th 1181, 1215; ***People v. Chatman*** (2006) 38 Cal.4th 344, 369; ***People v. Panah*** (2005) 35 Cal.4th 395, 451.)

The question presented by spectator misconduct is whether what the jury observed is "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." Because a spectator does not wear the same cloak of official authority as a prosecutor, most instances of spectator misconduct will likely be more easily curable than those of a prosecutor. Whether a particular incident is incurably prejudicial requires a nuanced, fact-based analysis. (***People v. Chatman*** (2006) 38 Cal.4th 344, 369.)

The effect on a defendant's fair-trial rights from spectator conduct is an open question in United States Supreme Court jurisprudence, as the high court has never addressed a claim that private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial. Tests evaluating the prejudice of courtroom practices ask whether the practices furthered an essential state interest, which suggests those cases only apply to state-sponsored practices as opposed to spectator conduct. (***Carey v. Musladin*** (2006) 549 U.S. 70 [127 S.Ct. 649, 653-654, 166 L.Ed.2d 482].)

Courts must be vigilant to ensure that the proper legal resolution is untainted by extraneous influence. Anticipatory rulings and directions are appropriate, as are curative admonitions. Courts have the responsibility to manage the reality that the mother of a victim or an accused might act beyond the strictures of accepted legal deportment. (***People v. Chatman*** (2006) 38 Cal.4th 344, 369.)

"Having observed the courtroom proceedings firsthand, the trial judge was in the best position to evaluate the impact of [the spectator's] conduct in front of the jury." (***People v. Myles*** (2012) 53 Cal.4th 1215-1216.)

An outburst by the victim's mother and audible sobbing may have informed the jury of facts outside the record, but the jury was not provided with any information it did not already know or might not readily surmise. Any reasonable juror would know that the crime had caused the victim's family anguish. The outbursts were unrelated to the defendant's guilt or innocence. Prejudice will not be presumed, and it is generally assumed that such errors are cured by admonition, unless the record demonstrates the misconduct resulted in a miscarriage of justice. (***People v. Chatman*** (2006) 38 Cal.4th 344, 368-370.)

At the time the guilt-phase verdict was announced, the victim's mother made a comment to the effect of "Thank you, Jesus. Kill him." Although the victim's mother's opinion would not have been admissible on the question of penalty, the California Supreme Court was "skeptical the jury would have paid any mind to her brief and unsurprising comment." (***People v. Hinton*** (2006) 37 Cal.4th 839, 898.)

"[I]n general, a party promptly should object to audible comments from spectators that have the potential to prejudice the jury, thereby enabling the trial court to correct the problem at the outset." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 87, fn. 8, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

No prejudice is presumed from spectator misconduct; the defendant must affirmatively show prejudice. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 88, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The trial court was within its discretion in denying a motion for mistrial following the anguished mother of the victim screaming incriminating information to the jury as it departed for deliberation. The mother was removed from the courtroom, still screaming. (***People v. Lucero*** (1988) 44 Cal.3d 1006, 1022-1024.)

§ 5.71.1 Forfeiture

Failure to object and request an admonition regarding spectator misconduct forfeits the issue for appeal if the objection and admonition would have cured the misconduct. (***People v. Trinh*** (2014) 59 Cal.4th 216, 250; ***People v. Chatman*** (2006) 38 Cal.4th 344, 368; ***People v. Hill*** (1992) 3 Cal.4th 959, 1000, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

The issue of spectator misconduct was forfeited due to the defendant's failure to object, request an evidentiary hearing to determine if misconduct had occurred, or request a curative admonition. (***People v. Hinton*** (2006) 37 Cal.4th 839, 898.)

§ 5.71.2 Ineffective Assistance of Counsel

Defense counsel's failure to request an evidentiary hearing to investigate an allegation of spectator misconduct was not ineffective assistance of counsel, because the defendant could not have been prejudiced by an alleged comment by the victim's mother at the time the guilt phase verdict was announced ("Thank you, Jesus. Kill him."). (***People v. Hinton*** (2006) 37 Cal.4th 839, 898-899.)

B. UNIFORMED POLICE AS SPECTATORS [§ 5.72]

The trial court did not abuse its discretion in permitting police officers in uniform to attend the trial of defendants accused of murdering a police officer. Exclusion of any group on basis of the members' status would be constitutionally impermissible. The trial court's suggestion that the officers attend in civilian clothes when possible was a sufficient accommodation. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1299-1300.)

C. WITNESSES / EXCLUSION [§ 5.73]

Even assuming an order was in place excluding witnesses, it was not grounds to prohibit a witness from testifying because he was in court prior to the time he was designated as a witness. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1062.)

VIII. SUPPORT PERSONS [§ 5.80]

Penal Code section 868.5 "permits prosecution witnesses in cases involving murder and other enumerated offenses to be attended in court by two support persons, one of whom may accompany the witness to the stand. Absent improper interference by the support person, however, no decision supports the proposition that defendant advances here, that the support person's mere presence infringes his due process and confrontation clause rights." (***People v. Myles*** (2012) 53 Cal.4th 1181, 1214.)

"The presence of a second person at the stand does not require the jury to infer that the support person believes and endorses the witness's testimony, so it does not necessarily bolster the witness's testimony." (***People v. Myles*** (2012) 53 Cal.4th 1181, 1214, internal quotation marks & citations omitted; ***People v. Stevens*** (2009) 47 Cal.4th 625, 641 [same].)

Chapter Six
TRIAL – FIRST DEGREE MURDER

I. ALTERNATIVE THEORIES OF MURDER [§ 6.10]

The Constitution does not require that a capital jury agree upon a specific theory of murder. (***Schad v. Arizona*** (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555] [plurality]; ***People v. Russell*** (2010) 50 Cal.4th 1228, 1256 [same and declining to distinguish *Schad v. Arizona*]; ***People v. Taylor*** (2010) 48 Cal.4th 574, 626.)

While each juror must be convinced beyond a reasonable doubt that the defendant is guilt of murder as that offense is defined by statute, it does not need to unanimously decide the theory of guilt. (***People v. Smith*** (2014) 60 Cal.4th 603, 618.)

The prosecution is not required to specify a theory of murder in the accusatory pleading. Generally, adequate notice is provided at the preliminary hearing or indictment proceedings. (***People v. Kelly*** (2007) 42 Cal.4th 763, 791; ***People v. Diaz*** (1992) 3 Cal.4th 495, 557.)

A unanimity instruction is not required as to whether a murder verdict is based on a theory of premeditated murder or first-degree felony murder. (***People v. Collins*** (2010) 49 Cal.4th 175, 214.)

A. INSUFFICIENCY OF EVIDENCE AS TO ONE THEORY [§ 6.11]

"When a jury is instructed on two theories of first degree murder, a first degree murder verdict will be upheld if there is insufficient evidence as to one of the theories." (***People v. Sandoval*** (2015) 62 Cal.4th 394, 424 [unnecessary to decide if sufficient evidence of murder by means of lying in wait because sufficient evidence of premeditation and deliberation]; ***People v. Johnson*** (1993) 6 Cal.4th 1, 42 [insufficient evidence of rape-murder theory harmless in light of valid alternative theories of premeditated murder and burglary murder presented to jury], abrogated on other grounds, *People v. Rogers* (2006) 39 Cal.4th 826, 879.)

True findings on a torture-murder special circumstance make it unnecessary to determine whether the murder was also premeditated. (***People v. Chatman*** (2006) 38 Cal.4th 344, 389.)

True findings of rape-murder and robbery-murder special circumstances make it unnecessary to decide whether the evidence was sufficient for the jury to also find premeditated murder. (***People v. Kelly*** (2007) 42 Cal.4th 763, 789.)

II. PREMEDITATED MURDER [§ 6.20]

In ***People v. Anderson*** (1968) 70 Cal.2d 15, 26-27, the California Supreme Court "identified three factors commonly present in cases of premeditated murder: (1) Facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as planning activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a motive to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of a pre-existing reflection and careful thought and weighing of considerations rather than mere unconsidered or rash impulse hastily executed; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design to take his victim's life in a particular way for a reason which the jury can reasonably infer from facts of type (1) or (2). As we have cautioned, however, unreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The Anderson analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way. In other words, the *Anderson* guidelines are descriptive, not normative." (***People v. Casares*** (2016) 62 Cal.4th 808, 824, internal quotation marks & citations omitted.)

"In the context of the sufficiency of the evidence to support a finding of premeditated and deliberate murder, [the California Supreme Court has] noted that evidence of a defendant's attempts to conceal the crime by cleaning up the crime scene or telling false stories 'is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.' (*People v. Anderson* (1968) 70 Cal.2d 15, 33 [].) While [the California Supreme Court's] comment in *Anderson* thus warns against using evidence of a defendant's postcrime actions and statements as the sole support for upholding a finding of premeditated and deliberate murder, such postcrime actions and statements can support a finding that defendant committed a murder for which his specific mental state is established by his actions before and during the crime." (***People v. Thompson*** (2010) 49 Cal.4th 79, 113.)

"[T]he sheer number of killings, apparently carried out in the same manner, gives rise to an inescapable inference that most of them were preconceived and deliberate.… [T]he more often one does something, the more likely that something was intended, and even premeditated, rather than accidental or spontaneous. Specifically, the more often one kills, especially under similar circumstances, the more reasonable the inference the killing was intended and premeditated." (***People v. Solomon*** (2010) 49 Cal.4th 792, 815, internal quotation marks omitted.)

"[A] close-range shooting without any provocation or evidence of a struggle, reasonably supports an inference of premeditation and deliberation." (***People v. Thompson*** (2010) 49 Cal.4th 79, 114-115.)

"Ligature strangulation is in its nature a deliberate act." (***People v. Solomon*** (2010) 49 Cal.4th 792, 829, internal quotation marks omitted.)

III. FETAL MURDER [§ 6.30]

Viability is not an element of fetal murder under Penal Code section 187, subdivision (a), but the prosecution must prove that "the fetus has progressed beyond the embryonic stage of seven to eight weeks." (***People v. Taylor*** (2004) 32 Cal.4th 863, 867; ***People v. Davis*** (1994) 7 Cal.4th 797, 810, 815, 818.)

However, the California Supreme Court's opinion in *Davis* that viability is not an element of fetal homicide "creates an unforeseeable judicial enlargement of a criminal statute" and may be applied prospectively only. (***People v. Davis*** (1994) 7 Cal.4th 797, 811-812, 815.)

"In [*People v.*] *Dennis* [(1998) 17 Cal.4th 468] we simply noted the jury was required to find malice as to the fetus in order to convict the defendant of his murder; we did not say how such malice was demonstrated. To the extent *Dennis* assumed that a defendant must have a requisite mental state as to a specific victim, that assumption was unexamined and unnecessary to rejecting the defendant's claim of disproportionate penalty or instructional error." (***People v. Taylor*** (2004) 32 Cal.4th 863, 870.)

Where the defendant walked down the hall of an apartment building firing into closed doors he is liable for murder as to all victims struck by those bullets including a fetus. "[T]here is no principled basis on which to require the defendant to know [a woman] was pregnant to justify an implied malice murder conviction as to her fetus." "[B]y engaging in the conduct he did, defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct." (***People v. Taylor*** (2004) 32 Cal.4th 863, 868, 870.)

Penal Code section 12022.9 (personal injury on a pregnant woman resulting in termination of pregnancy) is a sentence enhancement, not a substantive offense and, therefore, not a lesser included or lesser related offense of a charged fetal murder. (***People v. Dennis*** (1998) 17 Cal.4th 468, 500-502, 504.)

Penal Code section 12022.9 (personal injury on a pregnant woman resulting in termination of pregnancy) increases the punishment for committing an offense that inflicts a singular injury on an expectant mother regardless of fetal viability and does not indicate a legislative determination to reduce the punishment for fetal murder under ***In re Estrada*** (1965) 63 Cal.2d 740. (***People v. Dennis*** (1998) 17 Cal.4th 468, 504.)

There is no crime in California of manslaughter of a fetus. In order for a fetus to become a human being within the meaning of the manslaughter statue, it must be born

alive. Without deciding what evidence is sufficient to establish a fetus was born alive, there was insufficient evidence the fetus was born alive and, therefore, manslaughter instructions were not required. (***People v. Dennis*** (1998) 17 Cal.4th 468, 506-509.)

Exclusion of feticide from manslaughter does not result in an unreliable death eligibility determination, violate equal protection, or result in a disproportionate death penalty where the defendant is charged with a multiple-murder special circumstance in the deaths of a mother and her fetus. (***People v. Dennis*** (1998) 17 Cal.4th 468, 509-512.)

IV. FIRST DEGREE MURDER – LYING-IN-WAIT [§ 6.40]

"Lying-in-wait first degree murder consists of three elements: (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." (***People v. Russell*** (2010) 50 Cal.4th 1228, 1244, internal quotation marks omitted.)

"Lying-in-wait murder" is a means of proving first degree murder. Lying in wait is the functional equivalent of proof of premeditation, deliberation, and intent to kill. "Proof of lying in wait distinguishes those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. This period need not continue for any particular length of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation. Once a sufficient period of watching and waiting is established, together with the other elements of lying-in-wait murder, no further evidence of premeditation and deliberation is required in order to convict the defendant of first degree murder." (***People v. Sandoval*** (2015) 62 Cal.4th 394, 416, internal quotation marks & citations omitted; ***People v. Russell*** (2010) 50 Cal.4th 1228, 1257 [lying in wait and premeditation are simply different means of committing the same crime].)

"The factors of concealing murderous intent, and striking from a position of advantage and surprise, are the hallmark of a murder by lying in wait." (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1183, internal quotation marks & citations omitted, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

The concealment required for first degree murder by lying-in-wait is that which puts the defendant in a position of advantage, from which the fact-finder can infer the lying-in-wait was part of the defendant's plan to take the victim by surprise. Concealment from view is not required. (***People v. Gurule*** (2002) 28 Cal.4th 557, 630; ***People v. Hardy*** (1992) 2 Cal.4th 86, 163; ***People v. Webster*** (1991) 54 Cal.3d 411, 448.)

In terms of the requirement of a "substantial period of watching and waiting," the "precise period of time is not critical" provided the murder "is immediately preceded by lying in wait. The defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking his victim by surprise." (***People v. Russell*** (2010) 50 Cal.4th 1228, 1245, internal quotation marks omitted.)

The waiting and watching period required to support first-degree murder based on a lying-in-wait theory does not need to continue for any particular length of time. The trial court did not err in failing to instruct that the period of waiting and watching must be substantial. (***People v. Russell*** (2010) 50 Cal.4th 1228, 1244.)

Lying-in-wait for first degree murder requires only a "wanton and reckless intent to inflict injury likely to cause death," while the special circumstance requires the defendant to have "intentionally killed" the victim. (***People v. Streeter*** (2012) 54 Cal.4th 205, 246; ***People v. Moon*** (2005) 37 Cal.4th 1, 24, fn. 1.)

There are no elements of premeditated murder that are distinct from lying-in-wait murder, accordingly, since lying-in-wait and premeditated murder are simply different means of committing the same crime, no unanimity as to the theory underlying the jury's guilty verdict is required. (***People v. Russell*** (2010) 50 Cal.4th 1228, 1257.)

Insufficiency of evidence of lying-in-wait did not compel reversal of first degree murder verdict even though the jury has been instructed on lying-in-wait as a theory of first degree murder, since there was sufficient evidence of premeditation and deliberation, and no affirmative indication in the record that the first degree murder verdict actually rested on a lying-in-wait theory. (***People v. Nelson*** (2016) 1 Cal.5th 513, 552.)

Cross-Reference:

§ 7.43.2, *re* Lying-in-wait special circumstance compared to first degree murder by lying in wait (Pen. Code, § 189)

V. FIRST DEGREE MURDER – POISON [§ 6.50]

"[I]t is not the case that the elements of the murder-by-poison special circumstance merely repeat the elements that render a homicide a first degree murder when committed by means of poison.… The special circumstance allegation, unlike the definition of first degree murder by poison, requires proof that the defendant intentionally killed the victim. For the purpose of a first degree murder conviction based upon an unlawful killing by means of poison, proof of implied malice would suffice." (***People v. Jennings*** (2010) 50 Cal.4th 616, 639, internal quotation marks omitted.)

Murder by poison constitutes first degree murder whether malice is express or implied. (***People v. Blair*** (2005) 36 Cal.4th 686, 745, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919; ***People v. Catlin*** (2001) 26 Cal.4th 81, 149.)

VI. FIRST DEGREE MURDER – TORTURE [§ 6.60]

"Murder by torture requires: 1) an act or acts causing death that involve a high degree of probability of death, 2) a causal relationship between the torturous act and death, 3) a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain on a person for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose, and 4) commission of the act or acts with such intent. The circumstance that the murder is 'perpetrated by means of ... torture' (§ 189) indicates that a torturous act – that is, one done with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain on a person for a sadistic purpose – must occur before the victim dies. Thus, the perpetrator intends to cause pain and suffering in addition to death, and in the course, or as a result of inflicting pain and suffering, the victim dies." (***People v. Edwards*** (2013) 57 Cal.4th 658, 715-716, internal case quotations & citations omitted.)

"The 'finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death. The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather it is the continuum of sadistic violence that constitutes the torture.'" (***People v. Edwards*** (2013) 57 Cal.4th 658, 716, citation omitted, quoting ***People v. Jennings*** (2010) 50 Cal.4th 616, 643.)

"For purposes of proving murder by torture, the intent to inflict extreme pain may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body. But [the California Supreme Court] also [has] cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an explosion of violence, as with the intent to inflict cruel suffering." (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 293-294, internal quotation marks & citations omitted.)

The requisite torturous intent for an intentional murder involving the "infliction of torture" is "an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. A premeditated intent to inflict prolonged pain is not required." (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 295; ***People v. Elliot*** (2005) 37 Cal.4th 453, 479.)

The prosecution is not required to prove the defendant intended to kill in establishing first degree murder on a theory of torture murder. (***People v. Edwards*** (2013) 57 Cal.4th 658, 716; ***People v. Jennings*** (2010) 50 Cal.4th 616, 643; ***People v. Cook*** (2006) 39 Cal.4th 566, 602.)

The prosecution is not required to prove the victim actually suffered pain in establishing first-degree murder on a theory of torture murder. (***People v. Edwards*** (2013) 57 Cal.4th 658, 716; ***People v. Chatman*** (2006) 38 Cal.4th 344, 389.)

First degree murder by torture does not require that the victim be aware of the pain. (***People v. Cook*** (2006) 39 Cal.4th 566, 602.)

While the prosecution is not required to prove the defendant intended to kill the victim, it must "prove a causal relationship between the torturous acts and the death." (***People v. Jennings*** (2010) 50 Cal.4th 616, 643.)

"If a defendant's acts of torture were a concurrent cause of the victim's death, it is no defense that the conduct of some other person contributed to the death. When the conduct of two or more persons *contributes concurrently as the proximate cause of the death*, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death. To be considered the proximate cause of the victim's death, the defendant's act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical. As long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death." (***People v. Jennings*** (2010) 50 Cal.4th 616, 643, emphasis in original, internal quotation marks & citations omitted.)

"[T]orture murder is listed under section 189 as a distinct type of first degree murder. Consequently, the felony-murder rule has no application to a case tried on a theory of first degree torture murder with a torture special circumstance allegation." (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 295.)

Binding may take place in some instances of torture, but evidence of binding is not required to prove torture. (***People v. Chatman*** (2006) 38 Cal.4th 344, 389-390.)

In determining the sufficiency of the evidence of torture murder, "it is of no legal significance that two individuals who tried to extinguish the flames [] may have prolonged [the victim's] life, thereby unwittingly extended her suffering." (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 294, fn. 21.)

"[W]hether the starvation in this case constituted torture was not a legal determination to be made by the court, but instead was a question of fact for the jury to decide." (***People v. Jennings*** (2010) 50 Cal.4th 616, 685.)

There was sufficient evidence for a jury to conclude the defendant's torture of a child was at least a substantial factor in the child's death where the defendant deliberately administered certain drugs to the child, and directed his wife to do the same, with full knowledge that such conduct endangered the child's life and with conscious disregard for that life. "The jury reasonably could have inferred from [the] evidence that defendant's physical abuse and purposeful starvation of [the child] contributed to the lethal effect of the pills, and therefore was a substantial factor in the child's death." (***People v. Jennings*** (2010) 50 Cal.4th 616, 644.)

Notwithstanding the defendant's insistence that he did nothing to increase the victim's suffering or inflict pain in addition to the pain of death, the evidence of torture murder was sufficient where "by his own admission, defendant told [his victim] she was going to kill herself, and forced her to cut her own wrist. He then cut her wrist himself

and poured whiskey over the wounds several times, despite the obvious pain this caused. He also kicked [the victim] and struck her with the metal bar when she moved her hands away from the fire pit. His claim that he was only trying to ease the way to an inevitable death is undermined by the sadism demonstrated by his conduct." (***People v. Smith*** (2015) 61 Cal.4th 18, 52-53.)

The phrases "extreme and prolonged pain" and "any sadistic purpose" in CALJIC No. 8.24 on torture-murder are not unconstitutionally vague. (***People v. Streeter*** (2012) 54 Cal.4th 205, 250; ***People v. D'Arcy*** (2010) 48 Cal.4th 257, 292-293; ***People v. Whisenhunt*** (2008) 44 Cal.4th 174, 223; ***People v. Cook*** (2006) 39 Cal.4th 566, 602.)

The record does not reflect any confusion by the jury or request for guidance regarding the definition of torture as it relates to the lesser related offense of torture, first degree murder by torture and second degree felony torture, and the distinctions between the intent requirements. The jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 939-940.)

VII. FIRST DEGREE FELONY-MURDER [§ 6.70]

The validity of the felony-murder rule has been upheld by the California Supreme Court. (***People v. Payton*** (1992) 3 Cal.4th 1050, 1062; ***People v. Leach*** (1985) 41 Cal.3d 92, 101; ***People v. Montiel*** (1985) 39 Cal.3d 910, 925; ***People v. Dillon*** (1983) 34 Cal.3d 441, 476, abrogated by statute as stated in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1185-1186 [*re* whether Legislature intended to abrogate common felony-murder rule].)

"The 'substantive statutory definition' of the crime of first degree felony-murder in this state does not include either malice or premeditation. These elements are eliminated by the felony-murder doctrine, and the only criminal intent required is the specific intent to commit the particular felony. Because the felony-murder rule does not raise a presumption of the existence of an element of the crime, it does not violate the due process clause." (***People v. Dillon*** (1983) 34 Cal.3d 441, 475-476, abrogated by statute as stated in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1185-1186 [*re* whether Legislature intended to abrogate common felony-murder rule]; see also ***Carlos v. Superior Court*** (1983) 35 Cal.3d 131, 138.)

The felony-murder rule "does not take into account the relative culpability of the defendant's actions or state of mind. Its application depends only on whether the murder was '*committed in the perpetration of*' the felony. (Pen. Code, § 189, italics added.) …the Legislature has said in effect that the deterrent purpose of the felony-murder rule outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing.... Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder

for any homicide committed in the course thereof." (***People v. Wilkins*** (2013) 56 Cal.4th 333, 346, internal quotation marks & citations omitted.)

Liability for first degree murder under a felony-murder theory does not require an intent to kill, or even implied malice; it only requires specific intent to commit the underlying felony. (***People v. Bryant*** (2013) 56 Cal.4th 959, 965; ***People v. Gonzalez*** (2012) 54 Cal.4th 643, 654; ***People v. Dominguez*** (2006) 39 Cal.4th 1141, 1158-1159.)

Murder of the first degree is committed when the perpetrator intended to commit one of the enumerated felonies in Penal Code section 189. The "'killing need not occur in the midst of the commission of the felony, so long as the felony is not merely incidental to, or an afterthought to, the killing.'" (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1118; ***People v. Prince*** (2007) 40 Cal.4th 1179, 1259; ***People v. Elliot*** (2005) 37 Cal.4th 453, 469, quoting ***People v. Proctor*** (1992) 4 Cal.4th 499, 532.)

Intent to kill is not an element of the felony-murder special circumstance if the defendant is the actual killer. (***People v. Stanley*** (2006) 39 Cal.4th 913, 958.)

Circumstantial evidence may provide sufficient support for a felony-murder conviction. (***People v. Elliot*** (2005) 37 Cal.4th 453, 469.)

Felony-murder does not require a strict causal relationship between the felony and the homicide. The homicide is considered to be part of the perpetration of the felony if the two were part of one continuous transaction. The existence of such a single transaction is a jury question. (***People v. Gutierrez*** (2002) 28 Cal.4th 1083, 1141; ***People v. Sakarias*** (2000) 22 Cal.4th 596, 624.)

There is no requirement that the killing advance or facilitate the underlying felony in order to prove guilt of first-degree-murder under the felony-murder rule. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1118; ***People v. Cavitt*** (2004) 33 Cal.4th 187, 198.)

When the corpus delicti of murder has been shown, the defendant's extrajudicial statements may be admitted to prove the underlying felony for felony-murder even if the felony cannot be proved by evidence other than the defendant's statements. (***People v. Weaver*** (2001) 26 Cal.4th 876, 929.)

Jurors need not unanimously agree on a theory of first degree murder as either felony-murder or murder with premeditation and deliberation. Nothing in *Apprendi* requires a unanimous jury verdict as to the particular theory justifying a finding of first degree murder. (***People v. Moore*** (2011) 51 Cal.4th 386, 413; ***People v. Morgan*** (2007) 42 Cal.4th 593, 617.)

There is no requirement that the jurors be instructed they must agree unanimously on the theory of first degree murder. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 89, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

Concurrent intent to kill and to commit the target felony or felonies does not undermine the basis for a felony-murder conviction. (***People v. Gutierrez*** (2002) 28 Cal.4th 1083, 1141.)

Section 9 of Proposition 115 (enacted June 6, 1990) amends the definition of first degree felony-murder in section 189 of the Penal Code to add murders committed in the perpetration of, or attempt to perpetrate, kidnapping, train wrecking, or acts punishable under Penal Code sections 286 (sodomy), 288a (oral copulation), or 289 (penetration with a foreign object). The amendment to section 189 in conjunction with amendments to Penal Code section 190.2, subdivision (a)(17), makes all types of first degree felony-murders subject to capital punishment. These new provisions of section 189 cannot be applied to murders committed before June 6, 1990. (***Tapia v. Superior Court*** (1991) 53 Cal.3d 282, 297-298.)

A. *IRELAND* RULE NON-APPLICABLE [§ 6.71]

Under the merger rule adopted in *Ireland* (***People v. Ireland*** (1969) 70 Cal.2d 522, 529), the felony-murder rule is not applied in circumstances where the only underlying (or predicate) felony committed by the defendant was assault. An inquiry under *Ireland* must include the purpose underlying the conduct resulting in a homicide, and an independent felonious purpose apart from the intent to inflict bodily injury is sufficient to support application of the felony-murder rule. (***People v. Morgan*** (2007) 42 Cal.4th 593, 618-619.)

The extension of the merger rule to first degree felony murder based on a burglary with intent to assault the murder victim (see ***People v. Wilson*** (1969) 1 Cal.3d 431, 439-441) is overruled (prospective application only). Nothing in Penal Code section 189 supports application of the merger doctrine to first degree felony-murder. Accordingly, the merger doctrine applies only to second degree felony-murder. (***People v. Farley*** (2009) 46 Cal.4th 1053, 1122.)

"To avoid the anomaly of putting a person who merely intends to frighten the victim in a worse legal position than the person who actually intended to shoot at the victim, and the difficult question of whether and how the jury should decide questions of merger," the California Supreme Court reconsidered prior holdings, and has concluded that "[w]hen the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, ... the felony merges with the homicide and cannot be the basis of a felony-murder instruction…. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive." Shooting at an occupied vehicle (Pen. Code, § 246) is assaultive in nature and cannot serve as the underlying felony for purposes of the felony-murder rule. (***People v. Sarun Chun*** (2009) 45 Cal.4th 1172, 1178, 1197-1200.)

A person who kills in the commission of an inherently dangerous felony enumerated in section 189 is guilty of second-degree murder *unless* that inherently dangerous felony is "assaultive in nature." Where the inherently dangerous felony is assaultive in nature the felony-murder rule has no application and the "defendant may not be found guilty of murder without proof of malice." (***People v. Bryant*** (2013) 56 Cal.4th 959, 966.)

B. PROXIMATE CAUSE / TEMPORAL RELATIONSHIP [§ 6.72]

"[T]he felony-murder rule requires both a causal relationship and a temporal relationship between the underlying felony and the act resulting in death. The causal relationship is established by a logical nexus between the felony and the homicidal act, and the temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (***People v. Wilkins*** (2013) 56 Cal.4th 333, 346-347.)

Where the victim of a stabbing stabs an innocent third party (prison guard), proximate cause analysis requires the jury to consider the foreseeability of the harm to the third party. The defendant will be liable if the harm was foreseeable to the third party and it was a natural and probable consequence of the defendant's act. (***People v. Roberts*** (1992) 2 Cal.4th 271, 315-322.)

Voluntary intoxication (while relevant to the question of whether the defendant formed the intent to aid and abet a crime) is irrelevant to deciding whether the intended crime a defendant aided and abetted was reasonably foreseeable in the context of the natural and probable consequences doctrine. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1229.)

When there are concurrent causes of death, if death would not have occurred without the criminal act, such act is a proximate cause of the death if it was a substantial factor contributing to the death, even if the victim's preexisting physical condition was also a substantial factor. (***People v. Catlin*** (2001) 26 Cal.4th 81, 155.)

C. ESCAPE RULE [§ 6.73]

"Felony-murder liability continues throughout the flight of a perpetrator from the scene of a robbery until the perpetrator reaches a place of temporary safety because the robbery and the accidental death, in such a case, are parts of a continuous transaction. Some acts may occur as part of the same transaction as the felony but before the perpetrator attempts to flee. When the killing occurs during flight, however, the escape rule establishes the outer limits of the continuous-transaction theory. Flight following a felony is considered part of the same transaction *as long as the felon has not reached a place of temporary safety*." (***People v. Wilkins*** (2013) 56 Cal.4th 333, 345, italics in original; internal quotation marks & citations omitted.)

D. FIRST DEGREE FELONY-MURDER – CHILD MOLEST [§ 6.74]

The evidence was sufficient to establish first degree felony-murder based on felony child molest (Pen. Code, § 288) and premeditated and deliberate murder. (***People***

v. Memro (1995) 11 Cal.4th 786, 861-862, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

E. FIRST DEGREE FELONY-MURDER – MAYHEM [§ 6.75]

Mayhem felony murder is by statute murder in the first degree. The instructions properly informed the jury that mayhem felony murder requires the specific intent to commit mayhem. The fact that the instruction on the elements of mayhem mentioned only the intent to vex or annoy did not render the instructions confusing or circular. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 938-939.)

"A defendant may intend both to kill his or her victim and to disable or disfigure that individual if the attempt to kill is unsuccessful, and evidence that is sufficient to establish a defendant's intent to kill the victim can also be sufficient to establish the intent to permanently disable or disfigure that victim." (***People v. Manibusan*** (2013) 58 Cal.4th 40, 89, internal quotation marks & citations omitted [noting in fn. 10 on p. 89 majority's disagreement "with Justice Werdegar's concurring and dissenting opinion that, except in rare and exceptional cases, an intent to kill and an intent to cause permanent disability are mutually exclusive, such that evidence sufficient to show the former necessarily precludes a finding of the latter."]; see ***People v. D'Arcy*** (2010) 48 Cal.4th 257, 297 ["the evidence showed that defendant had concurrent intents to maim and murder..." the victim].)

F. FIRST DEGREE FELONY-MURDER – RAPE [§ 6.76]

"In the case of forcible rape, evidence of any circumstance that makes it less plausible that the victim consented to sexual intercourse is relevant." (***People v. Harris*** (2013) 57 Cal.4th 804, 843; ***People v. Guerra*** (2006) 37 Cal.4th 1067, 1114, overruled in part on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151; ***People v. Kipp*** (2001) 26 Cal.4th 1100, 1123-1124.)

There was sufficient evidence of killing during an attempted rape where, although there was no physical evidence of a sexual assault, the jury could infer the defendant harbored the specific intent to have non-consensual intercourse with the victim by force and that his actions went beyond mere preparation because he had an escalating sexual interest in her and the knife wounds on her breasts supported an inference that he attempted to rape her and stabbed her to death when she resisted. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1131-1132, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Proof of even slight acts beyond preparation done in furtherance of the intent to rape will constitute an attempt. An attempted rape does not require some physical conduct of a distinctly and unambiguous sexual nature. (***People v. Guerra*** (2006)

37 Cal.4th 1067, 1132, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Evidence that the murder victim had had sexual intercourse and that she had an antemortem bruise on the inside of her thigh was sufficient evidence to support the rape conviction. (***People v. Berryman*** (1993) 6 Cal.4th 1048, 1082-1086, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; ***People v. Rowland*** (1992) 4 Cal.4th 238, 269-270.)

"Because a murder during the course of a rape involves conduct, or at least an attempt to engage in conduct, proscribed by Penal Code section 261, we conclude that a defendant accused of such a murder is accused of a sexual offense within the meaning of Evidence Code section 1108." (***People v. Story*** (2009) 45 Cal.4th 1282, 1285.)

G. FIRST DEGREE FELONY-MURDER – ROBBERY [§ 6.77]

For underlying felonies of robbery and burglary in which the entry is made for the purpose of theft, the only specific intent that the prosecution must prove is the specific intent to steal the victim's property. (***People v. Pollock*** (2004) 32 Cal.4th 1153, 1175.)

The prosecution's "two beating theory," i.e., that defendant came to house without the intent to steal and administered the first beating, then formulated the intent to steal, and thereafter delivered the fatal beating, was legally and factually sufficient to establish the killing occurred in the course of a robbery. (***People v. Seaton*** (2001) 26 Cal.4th 598, 644.)

There was sufficient evidence of an attempted robbery to support the robbery-murder and robbery-murder special circumstance verdicts. "[T]he line between mere preparation and conduct satisfying the act element of attempt often is difficult to determine; the problem is a question of degree and depends upon the facts and circumstances of a particular case. The act that goes beyond mere preparation need not constitute an element of the target crime and it need not be the ultimate step toward the consummation of the design. Instead, it is sufficient if the conduct is the first or some subsequent act directed towards that end after the preparations are made. In other words, … the act must represent some appreciable fragment of the crime." (***People v. Watkins*** (2012) 55 Cal.4th 999,1021-1025, internal quotation marks & citations omitted.)

H. FIRST DEGREE FELONY-MURDER – TORTURE [§ 6.78]

Torture in violation of Penal Code section 206 was not added to the list of possible predicate felonies to support a felony-murder theory for first degree murder until 1999 (Stats. 1999, ch. 694, § 1, p. 5054.) Accordingly, torture cannot serve as the basis for first degree felony murder prior to the list's amendment. (***People v. Pearson*** (2012) 53 Cal.4th 306, 319.)

VIII. INSTRUCTIONS [§ 6.80]

A. NEW JURY INSTRUCTIONS ADOPTED – CALCRIM [§ 6.81]

The Judicial Council adopted the new CALCRIM instructions on August 26, 2005, to be effective January 1, 2006. On the same date, the Judicial Council also withdrew its endorsement of CALJIC by repealing Judicial Administration Standard 5. Rule 855 of the California Rules of Court implicitly provides the trial court with discretion as to which instructions to use between August 26, 2005, and January 1, 2006. On August 25, 2006, the Judicial Council approved the first set of revisions to the CALCRIM instructions. Notwithstanding the new CALCRIM instructions, the Compendium continues to set forth case law addressing the CALJICs, as there are many pending death-penalty cases in which the CALJICs were used.

"The fact that the commission ultimately drafted the newer CALCRIM instructions, which the Judicial Council subsequently adopted (Cal. Rules of Court, rule 2.1050(e)), does not establish that the prior CALJIC instructions were constitutionally defective. 'Nor did their wording become inadequate to inform the jury of the relevant legal principles or too confusing to be understood by jurors. The Judicial Council's adoption of the CALCRIM instructions simply meant they are now endorsed and viewed as superior.'" (***People v. Lucas*** (2104) 60 Cal.4th 153, 294, disapproved on another ground in ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 53, fn. 19, quoting ***People v. Thomas*** (2007) 150 Cal.App.4th 461, 465-466 ["the trial court probably should have used the CALCRIM, not the CALJIC instructions. However, the use of the CALCRIM instructions was not mandatory, but merely 'strongly encouraged' and 'recommended.' Neither party requested the use of the CALCRIM instructions, or even made mention of them. Had appellant or respondent asked the court to use the CALCRIM instructions, the court probably would have done so. [¶] The Judicial Council's adoption of the CALCRIM instructions did not render any of the CALJIC instructions invalid or 'outdated,' as appellant claims. CALJIC instructions that were legally correct and adequate on December 31, 2005, did not become invalid statements of the law on January 1, 2006"].)

The CALJIC model jury instructions are not insufficient to satisfy the heightened reliability requirement of the Eighth Amendment for capital cases and the Judicial Council's establishing a commission that recommended the instructions be rewritten does not mean those instructions are defective in conveying necessary legal principles to a jury. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 924.)

"The fact that the current CALCRIM instruction includes additional clarifying language to better assist jurors in applying the natural and probable consequences doctrine does not mean that the absence of such language in the version of CALJIC given at defendant's 1998 trial makes the instruction incorrect." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 902 & fn. 16, citing ***People v. Morales*** (2001) 25 Cal.4th 34, 48, fn. 7

["jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles"].)

B. CALJIC No. 3.31.5 [§ 6.82]

CALJIC No. 3.31.5 is not flawed for omitting the requirement of willfulness from its definition of first degree murder, because the instruction required "express malice, deliberation, and premeditation" for the mental state for first degree murder and willfulness does not include any concept that is not contained in express malice. An intent to kill is the functional equivalent of express malice. (***People v. Moon*** (2005) 37 Cal.4th 1, 29.)

The contention that CALJIC No. 3.31.5 may have left the jury with doubt as to the concurrence of act and intent was rejected, as the model jury instruction informed the jury that the charged crimes required "a union of act and intent 'in the mind of the perpetrator' and there was no issue raised by the evidence regarding the concurrence of intent and conduct." (***People v. Richardson*** (2008) 43 Cal.4th 959, 1025-1026.)

CALJIC Nos. 3.31 and 8.21 adequately instruct the jury on the concurrence of act and specific intent required for first degree felony murder, and more specific instructions would be considered pinpoint instructions that must be requested. Moreover, the standard instructions adequately convey that the felony cannot be "incidental" to the murder, that the murder and the felony must be part of a "continuous transaction," and that the intent to commit the felony must be formed before or during the application of force to the victim (***People v. Bennett*** (2009) 45 Cal.4th 577, 597-598; ***People v. Pollock*** (2004) 32 Cal.4th 1153, 1175-1176.)

C. CALJIC No. 8.75 "Acquittal First" Instruction [§ 6.83]

The California Supreme Court has repeatedly rejected the argument that CALJIC No. 8.75 is erroneous because it prevents the jury from fully considering the lesser included offense of second degree murder. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 906.)

D. *DEWBERRY* INSTRUCTION [§ 6.84]

The trial court did not err in failing to give a *Dewberry* instruction (CALJIC No. 8.71), i.e., that if the jury unanimously agreed the defendant committed murder but had a reasonable doubt whether it was of the first or second degree, it should give the defendant the benefit of the doubt and return a verdict of second degree (***People v. Dewberry*** (1959) 51 Cal.2d 548). CALJIC Nos. 8.71 and 8.72 apply the *Dewberry* benefit-of-the-doubt principle to deciding between first and second degree murder and between murder and manslaughter, respectively. While the trial court did not give the

specific application of the *Dewberry* principle to second degree murder, the jury was sufficiently instructed on the principle through CALJIC Nos. 17.10, 8.79, and 4.21. (***People v. Friend*** (2009) 47 Cal.4th 1, 56.)

E. *NATURAL AND PROBABLE CONSEQUENCES INSTRUCTION* [§ 6.85]

It is not necessary to modify standard instructions to incorporate a reasonable person standard in order to guide the jurors in determining what constitutes natural and probable consequences. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 901-902.)

As a matter of law, an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (***People v. Chiu*** (2014) 59 Cal.4th 155, 167.) Instruction of the jury with CALJIC No. 3.02, "when considered together with other instructions given to the jury (e.g., CALJIC Nos. 8.10, 8.11, and 8.20) permitted the jury to convict defendant of premeditated first degree murder as an aider and abettor under the natural and probable consequences doctrine. This was error under *Chiu*. Reversal is not required on this ground, however, because we conclude beyond a reasonable doubt that the record reveals the jury based its verdicts on a legally valid theory." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 902, fn. 26.)

Chapter Seven
TRIAL – SPECIAL CIRCUMSTANCES

I. PROVING SPECIAL CIRCUMSTANCES – GENERALLY [§ 7.10]

A. BURDEN OF PROOF [§ 7.11]

Special circumstances must be proven beyond a reasonable doubt. (Pen. Code, § 190.4(a).)

The special circumstance focuses on the defendant's intention at the time the murder was committed. (***People v. Staten*** (2000) 24 Cal.4th 434, 461.)

B. COURT TRIAL [§ 7.12]

A defendant must specifically waive his right to a jury as to the special circumstances as well as the underlying charges, since Penal Code section 190.4 specifically provides there is a right to a jury trial on the special circumstances. (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1074-1075; ***People v. Diaz*** (1992) 3 Cal.4th 495, 564-565; ***People v. Memro*** (1985) 38 Cal.3d 658, 701-704, disapproved on other grounds, *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

No special procedure is required to waive the right to a jury on special circumstance allegations when the defendant pleads guilty and admits the special circumstances; the requirement is that a valid waiver of the right to a trial by jury expressly cover the special circumstances. (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1074-1075; ***People v. Wrest*** (1992) 3 Cal.4th 1088, 1104-1105.)

C. EVIDENCE [§ 7.13]

§ 7.13.1 Corpus Delicti

Penal Code section 190.41, enacted by Proposition 115, on June 9, 1990, provides that the corpus delicti of a felony-based special circumstance need not be proved independently of a defendant's extrajudicial statement.

The corpus delicti proof requirement for felony-murder special circumstances continues to apply to murders committed prior to the enactment of Proposition 115 on June 9, 1990. (See ***People v. Jablonski*** (2006) 37 Cal.4th 774, 825; ***People v. Musselwhite*** (1998) 17 Cal.4th 1216, 1263, fn. 1; ***People v. Ray*** (1996) 13 Cal.4th 313, 341.)

Application of the corpus delicti rule to a felony-murder special circumstance requires independent proof of the corpus delicti of the underlying felony, but does not

require independent proof that the killing occurred in the commission of the underlying felony. (***People v. Musselwhite*** (1998) 17 Cal.4th 1216, 1264.)

§ 7.13.1.1 Instructions on Corpus Delicti

Conviction for the underlying felony where the corpus delicti instruction was given for the underlying offense renders harmless any failure to instruct on corpus delicti for the special circumstance. (***People v. Jennings*** (1991) 53 Cal.3d 334, 387.)

Instructing the jury that the corpus delicti of a special circumstance was not required was error, but harmless where facts demonstrate a *corpus* and the jury did not rely on statements to find the special circumstance. (***People v. Mickle*** (1991) 54 Cal.3d 140, 179-180.)

§ 7.13.2 Corroboration

When a special circumstance requires proof of a crime other than the charged murder, that crime cannot be proved by the uncorroborated testimony of an accomplice. But when it requires only proof of motive for the murder for which the defendant has already been convicted, the corroboration requirement of Penal Code section 1111 does not apply. (***People v. Avila*** (2006) 38 Cal.4th 491, 570-571.)

When, as in murder for financial gain, the special circumstance requires only proof of the motive of the murder for which the defendant has been convicted, corroboration is not required. (***People v. Hamilton*** (1989) 48 Cal.3d 1142, 1177.)

§ 7.13.3 Sufficiency of Evidence

The inquiry for sufficiency of the evidence is the same for special-circumstance allegations as it is for substantive offenses, i.e., "when evidence that is reasonable, credible, and of solid value is viewed 'in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'" (***People v. Clark*** (2016) 63 Cal.4th 522, 610; ***People v. Johnson*** (2015) 60 Cal.4th 966, 988 [same]; ***People v. Clark*** (2011) 52 Cal.4th 856, 943 [same].)

A special-circumstances finding cannot be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. The jury's finding must be upheld if the circumstances reasonably justify it. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1129, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

D. RETRIAL OF SPECIAL CIRCUMSTANCES [§ 7.14]

Special-circumstance retrials, like penalty-phase retrials, are not unconstitutional per se. (***People v. Turner*** (2004) 34 Cal.4th 406, 422-423.)

E. SPECIFIC INTENT [§ 7.15]

The death penalty cannot be imposed upon a defendant where the defendant did not perform the killing himself, attempt the killing, intend the killing, or even contemplate a life would be taken. (***Enmund v. Florida*** (1982) 458 U.S. 782, 797 [102 S.Ct. 3368, 73 L.Ed.2d 1140].)

The ruling under *Enmund* does not relate to any elements of a crime; rather, it addresses whether the death penalty is appropriate. An appellate or trial court, as well as a jury, may determine whether the criteria in *Enmund* have been met. Thus, a jury is not required to find a capital defendant killed, attempted to kill, or intended the killing under the federal Constitution. (***Cabana v. Bullock*** (1986) 474 U.S. 376, 384-385 [106 S.Ct. 689, 88 L.Ed.2d 704], superseded on other grounds by ***Rose v. Clark*** (1986) 478 U.S. 570, 582 [106 S.Ct. 3101, 92 L.Ed.2d 460], as stated in ***Pope v. Illinois*** (1987) 481 U.S. 497, 503, fn. 7 [107 S.Ct. 1918, 95 L.Ed.2d 439].)

The federal Constitution does not require a specific intent to kill to support imposition of the death penalty based upon a felony-murder. Major participation in a felony committed combined with reckless indifference to human life is sufficient to support the *Enmund* culpability requirement. (***Tison v. Arizona*** (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127]; see Proposition 115 – Pen. Code, § 190.2(d).)

The mental state of "reckless indifference to life" "requires the defendant be '*subjectively* aware that his or her participation in the felony involved a grave risk of death." (***People v. Mil*** (2012) 53 Cal.4th 400, 417, internal quotation marks omitted & italics in original.)

F. TRIAL BIFURCATION ON SPECIAL-CIRCUMSTANCE ALLEGATIONS [§ 7.16]

The California Supreme Court declines to adopt a rule requiring severance of any special circumstance allegation in which the motive for the charged killing is involved in proving the special circumstance. (***People v. Stanley*** (1995) 10 Cal.4th 764, 798.)

If evidence relevant only to a special circumstance is introduced at trial, it should be accompanied by a limiting instruction. When the evidence is highly prejudicial, the court should exclude it at the guilt trial and conduct a separate trial of the special-circumstance allegations. (***People v. Bigelow*** (1984) 37 Cal.3d 731, 748.)

§ 7.16.1 Prior-Murder Special-Circumstance Allegation

A prior-murder special-circumstance allegation must be tried after the defendant has been found guilty. (Pen. Code, § 190.1(a), (b).)

A defendant may waive the bifurcated trial provided for in Penal Code section 190.1, subdivision (b), and have a prior-murder special circumstance determined during the guilt phase. (***People v. Farnam*** (2002) 28 Cal.4th 107, 146.)

The statutory bifurcated-trial provision for a prior-murder special circumstance does not prohibit admission in the guilt phase of evidence of the prior murder if it is otherwise relevant to a material issue and not more prejudicial than probative. (***People v. Steele*** (2002) 27 Cal.4th 1230, 1246.)

§ 7.16.2 *Bigelow* Rule

In ***People v. Bigelow*** (1984) 37 Cal.3d 731, the California Supreme Court "adopted a limiting construction of murder for financial gain where [financial-gain and robbery-murder] special circumstances are charged 'under which the financial gain special circumstance applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant.'" The Court "did not purport to entirely eliminate any possibility of overlapping special circumstances" in *Bigelow*. The sentencing rules derived from Penal Code section 654 do not apply to the death penalty scheme and do not control the application of the *Bigelow* rule. "[P]ost-*Bigelow* cases have explicitly upheld findings of 'multiple special circumstances arising out of the same course of conduct.'" (***People v. Ervine*** (2009) 47 Cal.4th 745, 790.)

"Unlike the overlap between the robbery-murder special circumstance and the financial-gain special circumstance, where the latter is invariably the motive for the former – or the overlap between 'virtually all' felony-murder special circumstances and a broad reading of the avoiding-arrest special circumstance" (***People v. Bigelow*** (1984) 37 Cal.3d 731, 752, fn. 13) – the "special circumstance of murder to avoid arrest may apply even if the victim is not a peace officer [citation] and the special circumstance of murder of a peace officer in the performance of his duties may apply even if the officer was not attempting to effect an arrest. [Citation]" "The special circumstance of murder to avoid arrest protects society's interest in '"the due apprehension of criminals."' [Citation.] The special circumstance of murder of a peace officer protects peace officers, on whom we depend 'to help ensure safe and peaceable communities.' [Citation.] [California] has reasonably deemed the violation of each of these distinct interests to be separately relevant to the seriousness of a capital crime." Accordingly, the special circumstance of murdering a peace officer in the performance of his duties is not necessarily subsumed by the special circumstance of murder to avoid arrest. (***People v. Ervine*** (2009) 47 Cal.4th 745, 791.)

It is "constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable, and thus more deserving of death, if he not only robbed the victim but committed an additional and separate felonious act, burglary, in order to facilitate the robbery and murder. Robbery involves an assaultive invasion of personal integrity; burglary a separate invasion of the sanctity of the home. Society may deem the violation of each of these distinct interests separately relevant to the seriousness of a capital crime." (***People v. Melton*** (1988) 44 Cal.3d 713, 767.)

II. FELONY-MURDER SPECIAL CIRCUMSTANCES [§ 7.20]

Only a strained construction of the language of this section would support a conclusion that section 190.2, subdivision (a)(17), permits only one special-circumstance finding regardless of the number of felonies in which a defendant was engaged at the time of a murder. (***People v. Holt*** (1997) 15 Cal.4th 619, 682.)

Unlike the multiple-murder special circumstance, the felony-murder special circumstance does not rely on the same offense for each special circumstance charged. Therefore, separate special-circumstance findings based on separate underlying felonies do not create a risk of arbitrary imposition of the death penalty based on the number of special circumstances rather than the conduct underlying each. (***People v. Morgan*** (2007) 42 Cal.4th 593, 623.)

A felony-murder special circumstance is proven absent intent to kill, premeditation, or deliberation if there is proof beyond a reasonable doubt that the defendant personally killed the victim in the commission of, and in furtherance of, one of the felonies enumerated in Penal Code section 190.2, subdivision (a)(17). (***People v. Thornton*** (2007) 41 Cal.4th 391, 436.)

A. FELONY-MURDER SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(17)) [§ 7.21]

Premeditation is not an element of the felony-murder special circumstance under the 1978 law. (***People v. Bonillas*** (1989) 48 Cal.3d 757, 780.)

§ 7.21.1 Intent to Kill

Initially, it was held that to impose the death penalty or life imprisonment without possibility of parole where a felony-murder special circumstance is alleged under the 1978 death-penalty law, it must be established that any principal or aider and abettor had the intent to kill. (***Carlos v. Superior Court*** (1983) 35 Cal.3d 131, 153-154, overruled by *People v. Anderson* (1987) 43 Cal.3d 1104.) But the intent-to-kill requirement was subsequently rejected and the decision in *Carlos* overruled. (***People v. Anderson*** (1987) 43 Cal.3d 1104, overruling ***Carlos v. Superior Court*** (1983) 35 Cal.3d 131, 153-154, and

subsequently abrogated as to the requisite intent for aider and abettor liability for felony-murder special circumstances that do not themselves contain an explicit intent to kill requirement by § 190.2(d) which permits liability as an aider and abettor if the defendant was a major participant in the underlying felony and acted with reckless disregard to human life, see ***People v. Mil*** (2012) 53 Cal.4th 400, 408-409.)

The United States Supreme Court has concluded the death penalty may be imposed for felony-murder even without any intent to kill. Major participation in the felony committed combined with reckless indifference to human life is sufficient. (***Tison v. Arizona*** (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127]; see Prop. 115 – Pen. Code, § 190.2(d); ***People v. Diaz*** (1992) 3 Cal.4th 495, 568-569 [no intent to kill required to impose death based on murder by poison].) Accordingly, no intent to kill is required of actual killers for death eligibility under a felony-murder special-circumstance. (***People v. O'Malley*** (2016) 62 Cal.4th 944, 999; ***People v. Contreras*** (2013) 58 Cal.4th 123, 163.) Moreover, no intent to kill is required of aiders and abettors for felony-murder special circumstances that do not themselves contain an explicit intent to kill requirement if the defendant was a major participant in the underlying felony and acted with reckless disregard to human life. (***People v. Banks*** (2015) 61 Cal.4th 788, 803, construing Pen. Code, § 190.2(d).)

§ 7.21.1.1 Retroactivity: *Carlos* / *Anderson* Window

Anderson is retroactively applicable to murders committed *before* the decision in *Carlos*. (***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1053; ***People v. Cooper*** (1991) 53 Cal.3d 771, 840; ***People v. Kaurish*** (1990) 52 Cal.3d 648, 696-697; ***People v. Poggi*** (1988) 45 Cal.3d 306, 326-327.) But *Anderson* does not apply to those crimes committed between the *Carlos* and *Anderson* decisions. (***People v. Musselwhite*** (1998) 17 Cal.4th 1216, 1264-1265; ***People v. Beeler*** (1995) 9 Cal.4th 953, 982, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705; ***People v. Duncan*** (1991) 53 Cal.3d 955, 973, fn. 4.)

For cases decided between 1983 and 1987 (*Carlos*/*Anderson* window), an intent to kill is required for the felony-murder special circumstance. Intent to kill, as required under *Carlos*, was defined as follows: "'For a result to be caused "intentionally," the actor must either desire the result or know, to a substantial certainty, that the result will occur.'" [Citations.]" (***People v. Huggins*** (2006) 38 Cal.4th 175, 211.)

For crimes committed during 1984 through 1987, the *Turner*/*Anderson* window, specific intent to kill is required for a multiple-murder special circumstance. (***People v. Turner*** (1984) 37 Cal.3d 302, overruled *People v. Anderson* (1987) 43 Cal.3d 1104.) However, the jury is not required to find that the defendant intended to kill every victim for cases falling within the *Turner*/*Anderson* window. (***People v. Rogers*** (2006) 39 Cal.4th 826, 892.)

Where *Anderson* was decided the day before prosecution rested, and the murder was committed while *Carlos* was in effect, the robbery-murder special circumstance still required proof of intent to kill. Defense counsel's strategy based on defendant's lack of intent to kill was not affected, and a motion for mistrial was properly denied. (***People v. Wader*** (1993) 5 Cal.4th 610, 639.)

Law of the case does not operate to preclude application of *Anderson*, since the doctrine has no application where there has been a "controlling" change in the law between the first and second appellate decisions. (***People v. Ramos*** (1997) 15 Cal.4th 1133, 1151; ***People v. Whitt*** (1990) 51 Cal.3d 620, 638-639, abrogated on other grounds, *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

§ 7.21.1.2 Consequences of *Carlos* Error

The determination of whether *Carlos* error is harmless depends upon application of the harmless-beyond-a-reasonable-doubt standard, i.e., when the evidence of the defendant's intent to kill is overwhelming and the jury could have had no reasonable doubt on that matter. (***People v. Haley*** (2004) 34 Cal.4th 283, 310.)

Carlos error does not preclude retrial on the special circumstance. (***People v. Balderas*** (1985) 41 Cal.3d 144, 200.)

Carlos error was found prejudicial in all of the following cases: ***People v. Haley*** (2004) 34 Cal.4th 283, 311-312; ***People v. Ratliff*** (1986) 41 Cal.3d 675, 698; ***People v. Hamilton*** (1985) 41 Cal.3d 408, 432; ***People v. Silbertson*** (1985) 41 Cal.3d 296, 305, 307; ***People v. Balderas*** (1985) 41 Cal.3d 144, 199; ***People v. Fuentes*** (1985) 40 Cal.3d 629, 640-641; ***People v. Guerra*** (1985) 40 Cal.3d 377, 387-389; ***People v. Chavez*** (1985) 39 Cal.3d 823, 833; ***People v. Boyd*** (1985) 38 Cal.3d 762, 767-770; ***People v. Hayes*** (1985) 38 Cal.3d 780, 782-783; ***People v. Anderson*** (1985) 38 Cal.3d 58, 61-62; ***People v. Armendariz*** (1984) 37 Cal.3d 573, 578; ***People v. Turner*** (1984) 37 Cal.3d 302, 310-311; ***People v. Ramos*** (1984) 37 Cal.3d 136, 147-150; ***People v. Whitt*** (1984) 36 Cal.3d 724, 729-737.

Failure to instruct on intent to kill for a felony-murder during the *Carlos*/*Anderson* window is federal constitutional error, which may be found harmless when, because of the circumstances and manner in which the defendant killed the victim, the evidence of intent to kill was overwhelming and the jury returning the special-circumstance finding could have had no reasonable doubt that the defendant had the intent to kill. (***People v. Bolden*** (2002) 29 Cal.4th 515, 560.)

There was no *Carlos* error where the jury made a specific finding of intent to kill. (***People v. Berryman*** (1993) 6 Cal.4th 1048, 1089, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; ***People v. Wader*** (1993) 5 Cal.4th 610, 641-642; ***People v. Burgener*** (1986) 41 Cal.3d 505, 536-537, overruled on other grounds, *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

Carlos error was harmless where the jury also found the murder was intentional and involved torture and that the defendant personally used a deadly weapon to accomplish the murder. (***People v. Leach*** (1985) 41 Cal.3d 92, 108-109.)

Carlos error was not prejudicial where the jury found the murder had been intentional and for financial gain. (***People v. Montiel*** (1985) 39 Cal.3d 910, 926-927.)

Carlos error was harmless where the victim was stabbed, beaten, and choked. (***People v. Talamantez*** (1985) 169 Cal.App.3d 443, 467-468.)

Carlos error was harmless under ***People v. Garcia*** (1984) 36 Cal.3d 539, and ***Rose v. Clark*** (1986) 478 U.S. 570 [106 S.Ct. 3101, 92 L.Ed.2d 460], prejudice standards. (***People v. Reynolds*** (1986) 186 Cal.App.3d 988.)

Carlos error was harmless beyond a reasonable doubt where a systematic and prolonged assault with manifestly deadly force on the helpless victim is consistent only with the intent to kill, and evidence to that effect is uncontroverted. (***People v. Cudjo*** (1993) 6 Cal.4th 585, 630.)

Carlos error as to an aider and abettor is harmless. (***People v. Allison*** (1989) 48 Cal.3d 879, 897.)

§ 7.21.1.3 Proposition 115

Section 10 of Proposition 115 amends Penal Code section 190.2, subdivisions (b) and (c). Penal Code section 190.2, subdivision (b), as amended, provides that unless an intent to kill is specifically required under section 190.2, an actual killer need not have any intent to kill at the time of the offense which is the basis of the special circumstance.

Proposition 115 thus confirms the interpretation of the felony-murder and multiple-murder special circumstances in ***People v. Anderson*** (1987) 43 Cal.3d 1104, as to the *actual killer*, and prior-murder special circumstance in ***People v. Hendricks*** (1987) 43 Cal.3d 584, and extends the logic of these cases by explicitly stating that an intent to kill is not an element of any special circumstance involving *actual killers* unless the special circumstance specifically requires the intent to kill. However, Proposition 115 abrogated *People v. Anderson* as to the requisite intent for *aider and abettor liability* for felony-murder special circumstances that do not themselves contain an explicit intent to kill requirement, implemented through Penal Code section 190.2(d) which permits liability as an aider and abettor if the defendant was a major participant in the underlying felony and acted with reckless disregard to human life. (See ***People v. Mil*** (2012) 53 Cal.4th 400, 408-409.)

Penal Code section 190.2, subdivision (c), provides that every person who is not the actual killer who aids and abets in the commission of a first degree murder is subject to the death penalty or life without parole, and provides that one who is not an actual killer who aids and abets a killing must have the intent to kill. The section has been

found to apply retroactively because it is favorable to the defendant. (***Tapia v. Superior Court*** (1991) 53 Cal.3d 282, 301.)

Proposition 115 did not expand the death penalty such as to render it impermissibly vague. (***People v. Morgan*** (2007) 42 Cal.4th 593, 622.)

Proposition 115, which enacted subdivision (d) of Penal Code section 190.2, is not invalid because Proposition 114, which was also on the same ballot, received more votes than Proposition 115. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 43; ***People v. Morgan*** (2007) 42 Cal.4th 593, 621-622; ***Yoshisato v. Superior Court*** (1992) 2 Cal.4th 978, 989-992.)

§ 7.21.2 Felony-Murder Accomplices

Section 10 of Proposition 115 also adds Penal Code section 190.2, subdivision (d). This amendment expands the coverage of the felony-murder special circumstance to accomplices in felony-murders who were major participants in the underlying felony and who displayed a reckless indifference to life. "The text of new section 190.2(d) mirrored the holding of, and was intended to bring state law into conformity with" ***Tison v. Arizona*** (1987) 481 U.S. 137, 158 [107 S.Ct. 1676, 95 L.Ed.2d 127]. (***People v. Banks*** (2015) 61 Cal.4th 788, 798, internal quotation marks omitted.)

The United States Supreme Court has explained that although the two requirements for a non-killer without the intent to kill being eligible for the death penalty, ("major participant" and "reckless indifference for human life") are stated separately, they "'significantly overlap both in this [the *Tison*] case and in general, for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.'" (***People v. Clark*** (2016) 63 Cal.4th 522, 615, quoting ***Tison v. Arizona*** (1987) 481 U.S. 137, 153 [107 S.Ct. 1676, 95 L.Ed.2d 127].)

"The ultimate question pertaining to being a major participant is whether the defendant's participation in criminal activities known to carry a grave risk of death was sufficiently significant to be considered major. Among the relevant factors in determining this question, we set forth the following: What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used?" (***People v. Clark*** (2016) 63 Cal.4th 522, 611, internal quotation marks & citations omitted.)

"[P]articipation in an armed robbery, without more, does not involve 'engaging in criminal activities known to carry a grave risk of death.'" (***People v. Banks*** (2015) 61 Cal.4th 788, 805, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th

363, 391, fn. 3, quoting ***Tison v. Arizona*** (1987) 481 U.S. 137, 157 [107 S.Ct. 1676, 95 L.Ed.2d 127]

During a robbery and murder, [the defendant] was absent from the scene, sitting in a car, and waiting. There was no evidence he saw or heard the shooting, that he could have seen or heard it, that he had any immediate role in instigating it, or that he could have prevented it. "On this record, [the defendant] was, in short, no more than a getaway driver" guilty of felony murder *simpliciter*, and therefore ineligible for the death penalty under the federal constitution and insufficient to sustain a special circumstance allegation under state law. (***People v. Banks*** (2015) 61 Cal.4th 788, 805, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"A major participant need not be the ringleader [citation], but a ringleader is a major participant." (***People v. Williams*** (2015) 61 Cal.4th 1244, 1281.)

The defendant's insistence that his only participation in the murder was supplying the gun without any idea members of the gang he founded would commit a carjacking or kill a resisting victim is contrary to the standard of review and the evidence. Proven facts demonstrated he was a major participant as the ringleader and mastermind behind the gang whose purpose was to commit robbery and carjacking, and he provided gang members with a carjacking tutorial and instructed them that a resisting victim was to be shot. (***People v. Williams*** (2015) 61 Cal.4th 1244, 1281-1282.)

Case-specific factors to consider in determining sufficiency of evidence of reckless indifference to human life in cases involving nonshooter aiders and abettors to commercial armed robbery felony murders include: (1) "knowledge of weapons, and use and number of weapons"; (2) "physical presence at the crime and opportunities to restrain the crime and/or aid the victim"; (3) "duration of the felony"; (4) "defendant's knowledge of cohort's likelihood of killing; (5) "defendant's efforts to minimize the risks of violence during the felony." (***People v. Clark*** (2016) 63 Cal.4th 522, 618-623.)

"[W]hile the fact that a robbery involves a gun is a factor beyond the bare statutory requirements for first degree robbery felony murder, this mere fact, on its own and with nothing more presented, is not sufficient to support a finding of reckless indifference to human life for the felony-murder aider and abettor special circumstance." (***People v. Clark*** (2016) 63 Cal.4th 522, 617, citing ***People v. Banks*** (2015) 61 Cal.4th 788, 809.)

"[A] defendant's good faith but unreasonable belief that he or she was not posing a risk to human life in pursuing the felony does not suffice to foreclose a determination of reckless indifference to human life under *Tison* [*v. Arizona* (1987) 481 U.S. 137, 153 [107 S.Ct. 1676, 95 L.Ed.2d 127]]." (***People v. Clark*** (2016) 63 Cal.4th 522, 622.)

"[W]hile somewhat complicated" CALJIC No. 8.80.1 [on the defendant's requisite mental state as an aider and abettor] was neither impenetrable or unintelligible, and the jury was "not likely to understand the simpler CALJIC No. 8.81.17 [describing the proof required to establish the felony murder special circumstance without mentioning that an

aider and abettor must either intend to kill the victim or act in reckless disregard of her life as explained in CALJIC No. 8.80.1] as negation or displacing CALJIC No. 8.80.1, but rather as supplementing it." "[T]he two instructions, read together, outline respectively the relationship of the murder to the predicate felony (CALJIC No. 8.81.17) and the mental state required for either an actual killer or an aider and abettor in the murder (CALJIC No. 8.80.1). (***People v. Pearson*** (2012) 53 Cal.4th 306, 324.)

The trial court did not err in failing to define the term "actual killer" in CALJIC No. 8.80.1 and failing to instruct on the law of causation. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 931-932.)

B. TRANSFERRED-INTENT DOCTRINE [§ 7.22]

The State may invoke the doctrine of transferred intent in applying the aggravated felony-murder statute that rendered a defendant eligible for the death penalty. Application of the transferred-intent doctrine was upheld in an Ohio case where the defendant set fire to a neighbor's apartment in an attempt to kill a former girlfriend and her new boyfriend and instead killed the neighbor's two-year-old daughter. (***Bradshaw v. Richey*** (2005) 546 U.S. 74 [126 S.Ct. 602, 163 L.Ed.2d 407].)

The doctrine of transferred intent was properly applied to a gang-murder special circumstance because the special circumstance was not dependent upon the identity or occupation of the intended victim. (***People v. Shabazz*** (2006) 38 Cal.4th 55, 64-66.)

C. FELONIOUS PURPOSE [§ 7.23]

"[T]here is no requirement that the prosecution prove an additional or different element that the killing be committed to 'advance' the felony." (***People v. Dement*** (2011) 53 Cal.4th 1, 47, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Dykes*** (2009) 46 Cal.4th 731, 760-761.)

§ 7.23.1 Independent Felonious Purpose Requirement (*Green* / *Thompson*)

Where the special circumstance requires proof that the murder was committed "during the commission of" an underlying felony, that special circumstance is not present if the defendant's intent is to kill, and the related felony is merely incidental to the murder. The murder must advance an independent felonious purpose. (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1326; ***People v. Lindberg*** (2009) 45 Cal.4th 1, 27-28; ***People v. Stanley*** (2006) 39 Cal.4th 913, 956-957; ***People v. Clark*** (1990) 50 Cal.3d 583, 608; ***People v. Thompson*** (1980) 27 Cal.3d 303, 322, overruled on other grounds as stated in *People v. Scott* (2011) 52 Cal.4th 452, 470; ***People v. Green*** (1980) 27 Cal.3d 1, 61, overruled on other grounds, *People v. Martinez* (1999) 20 Cal.4th 225, 241.)

A jury deciding the truth of a felony-murder special circumstance is not required to assign a hierarchy to the defendant's motives in order to determine which of multiple concurrent intents was "primary," but instead the jury need only determine whether the commission of the underlying felony was or was not merely incidental to the murder. (***People v. Jackson*** (2016) 1 Cal.5th 269, 345; ***People v. Dement*** (2011) 53 Cal.4th 1, 47, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Bolden*** (2002) 29 Cal.4th 515, 558.)

The court need not "discern various mental states in too fine of a fashion," as a concurrent intent to kill and commit an independent felony is sufficient to support a felony murder special circumstance. (***People v. Abilez*** (2007) 41 Cal.4th 472, 511.)

§ 7.23.1.1 Not Applicable to Arson or Kidnapping

Proposition 18 (effective March 3, 2000) amended the felony-murder special circumstance to remove the independent-felonious-purpose requirement where the underlying felony is kidnapping or arson, provided "there is a specific intent to kill."

§ 7.23.1.2 Examples of Independent Felonious Purpose

Evidence that defendant had either a sexual interest in his victim or a desire to humiliate him, was substantial evidence that the defendant's commission of oral copulation was not merely incidental to the murder. (***People v. Dement*** (2011) 53 Cal.4th 1, 48, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Violation of Penal Code section 289 (unlawful penetration with a foreign object) "does not 'merge' with a resulting homicide within the meaning of the *Ireland* doctrine because unlawful penetration with a foreign objection has an independent felonious purpose, namely to sexually arouse, gratify or abuse." (***People v. Morgan*** (2007) 42 Cal.4th 593, 619.)

Setting a fire to drive occupants out of the house to shoot at least one of them establishes an independent purpose for a felony-murder special circumstance, since the fire was not intended to kill. (***People v. Clark*** (1990) 50 Cal.3d 583, 608.)

Where evidence suggests the defendant intended to kill, then rob the victim, robbery was not merely incidental to the murder and supplies the basis for a robbery special circumstance. (***People v. Zapien*** (1993) 4 Cal.4th 929, 984-985.)

§ 7.23.2 Continuous-Transaction Requirement and Timing of the Murder / Underlying Felony

"The felony-murder special circumstance applies to a murder committed while the defendant was engaged in, or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit various enumerated felonies. A strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the defendant intended to commit the felony at the time he killed the victim and that the killing and the felony were part of one continuous transaction." (***People v. Dykes*** (2009) 46 Cal.4th 731, 761, fn. 5, internal quotation marks & citations omitted; ***People v. Booker*** (2011) 51 Cal.4th 141, 175.) The existence of such a single transaction is a jury question. (***People v. Sakarias*** (2000) 22 Cal.4th 596, 624.)

The language of the 1978 law's felony-murder special circumstance, although somewhat different from that of the 1977 law, does not limit the time period during which the murders must be committed. Under both laws, for the purposes of the felony-murder special circumstance, a robbery continues until the defendant reaches a temporary place of safety and a rape continues until the defendant no longer maintains control over the victim. (***People v. Thompson*** (1990) 50 Cal.3d 134, 176, overruled on other grounds, *People v. Cahill* (1993) 5 Cal.4th 478, 509-510; ***People v. Guzman*** (1988) 45 Cal.3d 915, 949-952, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; ***People v. Fields*** (1983) 35 Cal.3d 329, 365-368.)

§ 7.23.3 Jury Instructions

While "special circumstances are sui generis – neither a crime, an enhancement, nor a sentencing factor." However, as to jury instructions, courts cannot extend a defendant "less protection with regard to the elements of a special circumstance than for the elements of a criminal charge." (***People v. Friend*** (2009) 47 Cal.4th 1, 71, internal quotation marks & citations omitted.)

The requirement of *Green* and *Thompson* that the murder advance an independent felonious purpose does not constitute an "element" of the felony-murder special circumstance on which the jury must be instructed in all cases regardless of whether the evidence supports such an instruction. The jury only need be instructed on the independent-felonious-purpose requirement where the evidence suggests the defendant may have intended to murder the victim without having an independent intent to commit the felony that forms the basis of the special-circumstance allegation. Where there was only speculation supporting the theory the underlying felony was merely incidental to the murder, there is no duty to instruct sua sponte on these requirements. This can be so even where the prosecutor relied on such a speculative theory. (***People v. Navarette*** (2003) 30 Cal.4th 458, 505; ***People v. Kimble*** (1988) 44 Cal.3d 480, 499-503.)

Where the trial took place before *Green*, it was not reversible per se to fail to instruct that a special circumstance based on a killing during the commission of an enumerated felony exists only if the killing was to advance the independent felonious purpose. Where the evidence was overwhelming that the underlying felony was not merely incidental, the error was harmless. (***People v. Williams*** (1988) 44 Cal.3d 883, 928.)

No sua sponte instruction is required defining the meaning of the "in the commission of …" language. (***People v. Guzman*** (1988) 45 Cal.3d 915, 952, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

CALJIC No. 8.81.17, paragraph 2, is a qualifying clause and does not purport to add an additional element to the felony-murder (robbery) special circumstance and explains to the jury than in order for the robbery-murder special circumstance to apply, the murder must be committed while the defendant was engaged in robbery or attempted robbery (or immediate flight after commission of the robbery), and not the other way around, that is to say not if the defendant intended to commit murder and only incidentally committed the robbery while doing so. (***People v. Stanley*** (2006) 39 Cal.4th 913, 956.)

A trial court is not required to instruct sua sponte with the second optional paragraph of the robbery-murder special-circumstance instruction (CALJIC No. 8.81.17) when the evidence does not support an inference that the defendant might have intended to murder the victim without having an independent intent to commit the specified felony. (***People v. Wilson*** (2008) 43 Cal.4th 1, 18.)

It would be error to instruct with CALJIC No. 8.81.17 and modify it to list the elements in the disjunctive. (***People v. Harris*** (2015) 57 Cal.4th 804, 854.)

A trial court is obligated to instruct sua sponte on independent felonious purpose where evidence is presented from which the jury could infer the defendant entered the victim's residence for the sole purpose of killing her and the burglary was merely incidental to the murder. (***People v. Riccardi*** (2012) 54 Cal.4th 758, 838, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

§ 7.23.4 Instructional Error Subject to Harmless Error Analysis

Instructional error for failure to instruct on independent felonious purpose is subject to harmless error analysis. (***People v. Clark*** (1990) 50 Cal.3d 583, 609.)

D. *IRELAND* RULE [§ 7.24]

The California Supreme Court has applied the *Ireland* merger rule (***People v. Ireland*** (1969) 70 Cal.2d 522, 529) to felony-murder special-circumstance murder.

(***People v. Sanders*** (1990) 51 Cal.3d 471, 509-510, 517; ***People v. Garrison*** (1989) 47 Cal.3d 746, 778-779, 789.) However, nothing in Penal Code section 189 supports application of the merger doctrine to first-degree felony murder. Accordingly, the merger doctrine applies only to second-degree felony murder. (***People v. Farley*** (2009) 46 Cal.4th 1053, 1122.) The decision in *People v. Farley* that the merger doctrine does not apply to first-degree felony murder is not applied retroactively. (***People v. Foster*** (2010) 50 Cal.4th 1301, 1349, fn. 22.)

Even in cases where the merger doctrine applies to first-degree felony murder, there is no merger of the mayhem special circumstance. "'The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony.' [Citation.] Although defendant contends 'the felony-murder rule cannot be much of a deterrent to a person who has decided to assault a child with intent to maim,' the medical testimony here was that [the victim] could have survived had she been given prompt medical care, though the scalding would have scarred her for life. This mayhem need not have resulted in a murder. Thus, the merger doctrine has no logical application in this case." (***People v. Gonzales*** (2011) 51 Cal.4th 894, 942-943.)

Cross-Reference: § 6.71, *re* ***Ireland*** rule not applicable

E. STATUTE OF LIMITATIONS [§ 7.25]

A felony-murder prosecution and felony-murder special circumstance are permitted notwithstanding expiration of the statute of limitations for the underlying felony because the prosecution is for the murder, not the felony. (***People v. Gurule*** (2002) 28 Cal.4th 557, 638.)

III. SPECIAL CIRCUMSTANCES [§ 7.30]

A. ELEMENTS OF SPECIAL CIRCUMSTANCES [§ 7.31]

Penal Code § 190.2 subdivision	Special Circumstance	Requisite Intent Actual Killer	Requisite Intent Aider & Abettor	Other Requirements
(a)(1)	Financial Gain	Intent to Kill	Intent to Kill	Victim's death is essential prerequisite to financial gain
(a)(2)	Prior Murder	No Intent to Kill Required	Unavailable Based on Aider & Abettor Liability	Offense committed in another jurisdiction must be punishable in California as 1st or 2nd degree murder
(a)(3)	Multiple Murder	Intent to Kill Only Required as to those Murders Committed between 1/17/85 and 11/12/87 (*Turner*/*Anderson* window)	Same	At least one conviction for 1st degree murder necessary; all others may be either 1st or 2nd degree
(a)(4)	Concealed Explosive	No Intent to Kill	Intent to Kill	Defendant must know or reasonably should have known acts created great risk of death to one or more human beings
(a)(5)	Avoiding or Preventing Arrest	No Intent to Kill	Intent to Kill	Arrest must be imminent

Penal Code § 190.2 subdivision	Special Circumstance	Requisite Intent Actual Killer	Requisite Intent Aider & Abettor	Other Requirements
(a)(5)	Perfecting/ Attempting Escape from Lawful Custody	No Intent to Kill	Intent to Kill	Killing must be motivated by goal of escaping and occur before reaches a place of temporary safety
(a)(6)	Destructive Device	No Intent to Kill	Intent to Kill	Device must be mailed or delivered; defendant must know or reasonably should have known acts created great risk of death to one or more human beings
(a)(7)	Peace Officer	Intent to Kill	Intent to Kill	Officer defined in numerous Penal Code sections (see § 830 *et seq*.) and killed in performance of duties and defendant must have known or should have known peace officer engaged in duties or officer or former officer killed in retaliation

Penal Code § 190.2 subdivision	Special Circumstance	Requisite Intent Actual Killer	Requisite Intent Aider & Abettor	Other Requirements
(a)(8)	Federal Law Enforcement Officer	Intent to Kill	Intent to Kill	Officer killed in performance of duties and defendant must have known or reasonably should have known was federal officer engaged in duties or officer was killed in retaliation for performing duties
(a)(9)	Firefighter	Intent to Kill	Intent to Kill	Firefighter as defined in Penal Code, § 245.1 killing in performance of duties and defendant must have known or reasonably should have known was firefighter engaged in duties
(a)(10)	Witness to Crime	Intent to Kill	Intent to Kill	Witness killed to prevent testimony or in retaliation for testimony in criminal proceeding; or after June 5, 1990 in a juvenile proceeding; Victim must have witnessed crime that was prior to an separate from the killing

Penal Code § 190.2 subdivision	Special Circumstance	Requisite Intent Actual Killer	Requisite Intent Aider & Abettor	Other Requirements
(a)(11)	Prosecutor (state or federal)	Intent to Kill	Intent to Kill	Victim killed in retaliation for official duties or to prevent performance of official duties
(a)(12)	Judge (local, state, or federal)	Intent to Kill	Intent to Kill	Victim killed in retaliation for official duties or to prevent performance of official duties
(a)(13)	Public Official (local, state, or federal)	Intent to Kill	Intent to Kill	Victim killed in retaliation for official duties, or to prevent performance of official duties
(a)(14)	Heinous, Atrocious, or Cruel	Do Not Charge	Do Not Charge	Struck down by California Supreme Court
(a)(15)	Lying in Wait	Intent to Kill	Intent to Kill	Distinguished from lying in wait theory of 1st degree murder by requirement of intent to kill
(a)(16)	Status of Victim/Hate	Intent to Kill	Intent to Kill	Applies to killing because of victim's race, color, religion, nationality, or country of origin

Penal Code § 190.2 subdivision	Special Circumstance	Requisite Intent Actual Killer	Requisite Intent Aider & Abettor	Other Requirements
(a)(17)	FELONY-MURDER	No Intent to Kill Exception for	No Intent to Kill if Major Participant in	Does not apply where felony merely incidental to murder with exceptions of arson and kidnapping where intent to kill and committed after March 2, 2000
(A)	Robbery	Murders Committed	Felony and Reckless Indifference to human life	
(B)	Kidnapping	Between 12/12/83 and 11/12/87 – *Carlos*/*Anderson* window		
(C)	Rape			
(D)	Sodomy			
(E)	Lewd & Lascivious			
(F)	Oral Copulation			
(G)	Burglary			
(H)	Arson			
(I)	Train Wrecking			
(J)	Mayhem			
(K)	Rape by Instrument			
(L)	Carjacking			

Penal Code § 190.2 subdivision	Special Circumstance	Requisite Intent Actual Killer	Requisite Intent Aider & Abettor	Other Requirements
(a)(18)	Torture	Intent to Kill	Intent to Kill	Distinguishable from torture theory of first degree murder by absence of requirement of causal connection between act of torture and death and requirements of intent to kill and torture
(a)(19)	Poison	Intent to Kill		Distinguished from first degree murder by intent to kill requirement
(a)(20)	Juror	Intent to Kill	Intent to Kill	Murder must be committed after March 26, 1996 & victim must be juror in any local, state or federal case & killed in retaliation for, or to prevent, performance of official duties
(a)(21)	Drive by Shooting	Intent to Kill	Intent to Kill	Murder must be committed after March 26, 1996 & perpetrated by discharge of firearm from motor vehicle

Penal Code § 190.2 subdivision	Special Circumstance	Requisite Intent Actual Killer	Requisite Intent Aider & Abettor	Other Requirements
(a)(22)	Criminal Street Gang Activity	Intent to Kill	Intent to Kill	Murder must be committed after March 7, 2000 & further criminal street gang activities as defined by Penal Code § 186.22

B. ARSON (Pen. Code § 190.2(a)(17)(H)) [§ 7.32]

Where evidence showed the victim was placed in the trunk of a car, shot several times, and then the car was set on fire, there was insufficient evidence to support the arson-murder special circumstance since there was no evidence the car was being used for dwelling purposes. The arson special circumstance only applies to arson of an inhabited structure or inhabited property within the meaning of Penal Code section 451, and inhabited is defined by that section as "currently being used for dwelling purposes whether occupied or not." (***People v. Dubose*** (2014) 59 Cal.4th 177, 195.)

C. MURDER TO AVOID ARREST OR TO PERFECT AN ESCAPE – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(5)) [§ 7.33]

The special circumstance of murder to avoid arrest only applies where arrest is imminent. (***People v. Coleman*** (1989) 48 Cal.3d 112, 145; ***People v. Bigelow*** (1984) 37 Cal.3d 731, 754.)

Where defendants were detained by a police officer under circumstances which would lead them and any objective observer to believe that an arrest was highly likely, the arrest was, or appeared to be, "imminent" for the purpose of the special circumstance of murder to avoid arrest. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1300-1301.)

"Imminent" arrest is not an element of the avoiding-arrest special circumstance defined in section 190.2, subdivision (a)(5). Accordingly, instruction on statutory elements was sufficient. (***People v. Vorise*** (1999) 72 Cal.App.4th 312, 321; ***People v. Cummings*** (1993) 4 Cal.4th 1233, 1303.)

The murder-to-avoid-arrest special circumstance is supported by substantial evidence where "evidence was sufficient to establish that defendant would have been subject to a lawful arrest if [the officer he shot] had discovered his loaded, concealed weapon during the course of [being detained by that officer]." (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1083.)

To subject a defendant to the special circumstance of murder to perfect an escape, the killing must not only be motivated by the goal of escaping custody, but must take place before the defendant has departed the confines of the prison facility and reached a place of temporary safety outside the confines of the prison. Upon reaching a place of temporary safety, the escape is perfected within the meaning of the statute, and the special circumstance is not applicable. (***People v. Bigelow*** (1984) 37 Cal.3d 731, 754.)

The special circumstance of murdering a peace officer in the performance of his duties does not necessarily subsume the special circumstance of murder to avoid arrest. (***People v. Ervine*** (2009) 47 Cal.4th 745, 791-192.)

D. BURGLARY – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(17)(G)) [§ 7.34]

Neither the felony-murder rule nor the burglary-murder special circumstance apply to a burglary committed for the sole purpose of assaulting or killing the homicide victim. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 463; ***People v. Seaton*** (2001) 26 Cal.4th 598, 646.)

Sufficient evidence supports a burglary-murder special circumstance where "the evidence suggested no motive, spontaneous or otherwise, for defendant to attack and kill [his victim who came home and interrupted burglary], other than to facilitate his theft. That defendant might have planned the burglary better did not negate or even vitiate the force of the inferences the jury could reasonably draw; poor planning was not inconsistent with what the guilt phase jury knew of defendant's mental state and lifestyle [heroin addict without money to pay his electric bill]." (***People v. Moore*** (2011) 51 Cal.4th 386, 408.)

"A rational juror reasonably could find that a purely social visit to a friend's house did not spontaneously lead to the attempted rape, robbery, and brutal murder of the hostess. The circumstance that [the victim] may have willingly invited defendants into her house is of no consequence. [Citation.]" Burglary requires only an entry with the requisite intent, and that entry need not be accomplished by force. (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 164, 167-168.)

Substantial evidence supports a burglary special circumstance based on the defendant's entry into the victim's home with the intent to commit theft where the bedroom where the victim's body was found "had been ransacked, including dresser drawers that were open and the contents of a purse strewn on the floor" and pieces of jewelry she owned were never seen again. (***People v. Edwards*** (2013) 57 Cal.4th 658, 719.)

Burglary felony-murder and burglary felony-murder special-circumstance instructions erroneously permitted the jury to find defendant guilty based on entry into the victim's residence with an intent to kill. The error was harmless, however, because other findings (verdicts for robbery, burglary and true finding on robbery-felony murder special-circumstance allegations) left no doubt the jury made the findings necessary for burglary premised on entry with an intent to steal or commit a robbery. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 881-883.)

E. CARJACKING (Pen. Code § 190.2(a)(17)(L)) [§ 7.35]

There is sufficient evidence to support a special circumstance finding that a murder occurred in the commission of a robbery or attempted carjacking based on an inference from the evidence that the defendant entered the house not merely to kill the victim, but to take the victim's property, including her car. Where the defendant killed

another person, and at the time of the killing, took substantial property from him, "a jury ordinarily may reasonably infer that the defendant killed the victim to accomplish the taking and thus committed the offense of robbery." (***People v. Nelson*** (2011) 51 Cal.4th 198, 212.)

The requirement of taking a car from the victim's presence was satisfied notwithstanding circumstances being other than a "classic carjacking such as when the perpetrator approaches a car stopped at a red light and, at gunpoint, forces the driver and any passengers out, then drives away." The victim was "particularly vulnerable when defendant knocked on her door intending to take her car, and she answered it." "The nature of the taking – entering a private home to obtain car keys inside that home in order to use a car in the garage as a getaway – raised a very serious potential for harm to the victim (here, fatal harm), the perpetrator (defendant crashed the car), and the public at large (a high-speed chase is very dangerous)." (***People v. Johnson*** (2015) 60 Cal.4th 966, 990-992.)

For the carjacking special circumstance to apply, it cannot be "merely incidental" to the murder (***People v. Green*** (1980) 27 Cal.3d 1, overruled on other grounds, *People v. Martinez* (1999) 20 Cal.4th 225, 241). A reasonable jury could have concluded that the defendant's intent to take the car was his "primary – or at least concurrent – motivation, and that he killed to facilitate the stealing, and in this case the carjacking" where the defendant walked from where he had crashed his vehicle, gained entry to a home with a car inside the garage, and took the car in an effort to escape from the authorities. (***People v. Johnson*** (2015) 60 Cal.4th 966, 988-989, internal quotation marks & citations omitted.)

F. DESTRUCTIVE DEVICE, BOMB, OR EXPLOSIVE MAILED OR DELIVERED (Pen. Code § 190.2(a)(6)) [§ 7.36]

Use of gasoline and ensuing vapors to set a fire resulting in a death is not sufficient for a finding of the special circumstance of murder by destructive device, bomb, or explosive mailed or delivered, because gasoline is not a destructive device, bomb, or explosive. (***People v. Clark*** (1990) 50 Cal.3d 583, 599.)

Beyond not qualifying as a destructive device, bomb, or explosive, the use of gasoline in a house was not a mailing or delivery as required by Penal Code section 190.2, subdivision (a)(6). (***People v. Clark*** (1990) 50 Cal.3d 583, 599.)

The lying-in-wait special circumstance does not duplicate the special circumstance of murder by explosive devices. (***People v. Edwards*** (1991) 54 Cal.3d 787, 823-824.)

G. FINANCIAL GAIN – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(1)) [§ 7.37]

The financial-gain special circumstance is not constitutionally vague or overbroad. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1309-1310; ***People v. Crew*** (2003) 31 Cal.4th 822, 852.)

§ 7.37.1 *Bigelow* Rule: Victim's Death as "Essential Prerequisite" for Financial Gain

This special circumstance applies only when the victim's death is an essential prerequisite to the financial gain sought by the defendant. (***People v. Michaels*** (2002) 28 Cal.4th 486, 519; ***People v. Mickey*** (1991) 54 Cal.3d 612, 678-679; ***People v. Howard*** (1988) 44 Cal.3d 375, 409-410; ***People v. Bigelow*** (1984) 37 Cal.3d 731, 751.)

The purpose of requiring that the victim's death be an essential prerequisite to the financial gain sought by the defendant (*Bigelow* rule) is to prevent overlap between the financial-gain special circumstance and other special-circumstance murders which may result in financial gain (e.g., robbery felony-murder), i.e., to minimize the application of multiple special circumstances arising out of the same conduct. However, the requirement that death be an essential prerequisite to financial gain is not intended to restrict construction of "for financial gain" when overlap with other special circumstances is not a concern. Accordingly, if there is no concern with overlap, then the court need not instruct the jury regarding the requirement that death be an essential prerequisite to the financial gain being sought. (***People v. Crew*** (2003) 31 Cal.4th 822, 850; ***People v. Howard*** (1988) 44 Cal.3d 375, 409-410.)

No formal agreement is required to establish the financial-gain special circumstance. Even if there is an agreement (e.g., in a hired hit-man situation), the fact it might have been fulfilled by less than the victim's murder does not defeat the special circumstance. "The relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain." (***People v. Howard*** (1988) 44 Cal.3d 375, 409.)

§ 7.37.2 Nature of "Financial Gain"

Financial gain does not need to be the exclusive or primary motive in order for the special circumstance to apply. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1308; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1229; ***People v. Noguera*** (1992) 4 Cal.4th 599, 634-637.)

Proof of actual pecuniary benefit to the defendant from the victim's death is neither necessary nor sufficient to establish the financial-gain special circumstance.

(***People v. Carasi*** (2008) 44 Cal.4th 1263, 1308; ***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1025.)

The special circumstance applies to an intentional murder carried out for the financial gain of a third person, even if the defendant neither gets, nor expects to get, any financial gain personally. (***People v. Michaels*** (2002) 28 Cal.4th 486, 519-520; ***People v. Padilla*** (1995) 11 Cal.4th 891, 932-933, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Financial gain is not limited to receiving money or other objects of substantial monetary value. (***People v. Hernandez*** (2003) 30 Cal.4th 835, 863-864 [obtained drugs to satisfy an addiction]; ***People v. Padilla*** (1995) 11 Cal.4th 891, 934 [paid hit man with a relatively small amount of narcotics], overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; ***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1025 [killed to avoid a debt].)

Gaining control of money which defendant was paying victim, under court order, for support of their minor child, was a financial benefit that satisfies the financial-gain requirement. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1309.)

§ 7.37.3 Jury Instructions

CALJIC No. 8.81.1 (Special Circumstance – Murder for Financial Gain) properly defines "financial gain," and CALJIC No. 2.51 (motive not element of crime charged and need not be proven) does not permit a jury to dispense with finding that murder was carried out for financial gain. (***People v. Noguera*** (1992) 4 Cal.4th 599, 634-637.)

H. GANG MURDER – SPECIAL CIRCUMSTANCE (Prop. 21) (Pen. Code § 190.2(a)(22)) [§ 7.38]

The doctrine of transferred intent (i.e., a defendant is equally liable if he shoots with the intent to kill a certain person, but hits a bystander instead) applies to the gang-murder special circumstance. Unlike some other special circumstances, the gang-murder special circumstance does not depend upon the identity or occupation of the victim. The underlying purpose of the special circumstance, i.e., to curtail gang-related activity, strongly supports application of the transferred-intent doctrine. Moreover, the special circumstance is directed against murderers who kill as a part of any gang-related activity, not simply those murderers who kill their intended targets. (***People v. Shabazz*** (2006) 38 Cal.4th 55, 64-66.)

I. HEINOUS, ATROCIOUS, AND CRUEL MURDER – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(14)) [§ 7.39]

Penal Code section 190.2, subdivision (a)(14), providing as a special circumstance that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, is unconstitutionally vague and violates due process. (***People v. Sanders*** (1990) 51 Cal.3d 471, 520; ***People v. Silva*** (1988) 45 Cal.3d 604, 631; ***People v. Wade*** (1988) 44 Cal.3d 975, 993; ***People v. Superior Court (Engert)*** (1982) 31 Cal.3d 797, 806.)

J. JUDGE OR PROSECUTOR – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(11), (12)) [§ 7.40]

The killing of a judge or prosecutor must be intentional to support a special-circumstance finding. (Pen. Code, § 190.2(a)(11).)

K. KIDNAPPING – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(17)(B)) [§ 7.41]

A kidnap special circumstance can be based on either simple kidnapping or aggravated kidnapping, but the proper definition of simple kidnapping differs depending on the date the kidnapping took place. Prior to ***People v. Martinez*** (1999) 20 Cal.4th 225, 237, the law defining simple kidnapping required the victim be moved "a substantial distance, that is, a distance more than slight or trivial." (See ***People v. Caudillo*** (1978) 21 Cal.3d 562, 572 ["[n]either the incidental nature of the movement, the defendant's motivation to escape detection, nor the possible enhancement of danger to the victim resulting from the movement is a factor to be considered in the determination of substantiality of movement for the offense of [simple] kidnaping."].) For crimes committed after *Caudillo* was overruled, the definition of simple kidnapping is much broader and the jury considers the totality of the circumstances in determining whether the movement was substantial, i.e., "'whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes.'" (***People v. Johnson*** (2015) 61 Cal.4th 734, 771-772, quoting ***People v. Martinez*** (1999) 20 Cal.4th 225, 237.)

Where a jury was properly instructed with a legally correct theory to support the kidnapping special circumstance, i.e., aggravated kidnapping, but also erroneously instructed on simple kidnapping, the kidnapping special circumstance finding must be set aside because it is not possible to determine the theory on which the jury's verdict rests. (***People v. Johnson*** (2015) 61 Cal.4th 734, 774.)

The prosecution must prove the killing during the kidnapping was intentional or the defendant intended to aid in the killing. (***People v. Bigelow*** (1984) 37 Cal.3d 731, 755-756.)

The prosecution need not prove the kidnapping occurred under *both* Penal Code section 207 *and* Penal Code section 209 for the kidnapping special circumstance. It need only prove the kidnapping met the requirements of section 207 or section 209. (***People v. Alcala*** (1992) 4 Cal.4th 742, 801; ***People v. Bigelow*** (1984) 37 Cal.3d 731, 755-756.)

The holding in ***People v. Bigelow*** (1984) 37 Cal.3d 731, 755-756, was not abrogated by Proposition 114, which retained language referencing kidnapping by Penal Code sections "207 and 209." (***Yoshisato v. Superior Court*** (1992) 2 Cal.4th 978.) The drafting problem with respect to the reference to sections "207 and 209" was corrected by Proposition 115, which expressly codifies *Bigelow*. (***People v. Alcala*** (1992) 4 Cal.4th 742, 802.)

A kidnapping for robbery continues so long as the kidnap victim is detained by the defendant, even though the robbery has been completed. Therefore, a murder committed while the victim is still detained is committed "while the defendant was engaged" in the kidnap for the purpose of this special circumstance. (***People v. Silva*** (1988) 45 Cal.3d 604, 632.)

"'The crime of kidnapping continues until such time as the kidnapper releases or otherwise disposes of the victim and [the defendant] has reached a place of temporary safety.'" Where the victim was still being detained at the time of the murder, the victim was killed while the defendant was engaged in the commission of the kidnapping. (***People v. Burney*** (2009) 47 Cal.4th 203, 233.)

Notwithstanding the prosecutor's argument to the jury that the defendant formed an intent to kill prior to kidnapping his victims, the evidence would support a jury finding that the kidnapping was not simply incidental to the planned murder under *People v. Green* (1980) 27 Cal.3d 1. (***People v. Raley*** (1992) 2 Cal.4th 870, 902-903.)

The evidence supported the inference that the defendant had a purpose for the kidnapping apart from the murder, and thus, the kidnapping was not merely incidental to the murder. The evidence also supported an inference that the murder was committed to facilitate the kidnapping. (***People v. Barnett*** (1998) 17 Cal.4th 1044, 1158-1159.)

Kidnapping requires a live victim; movement of the body after death does not constitute kidnapping. Moreover, the movement of a dying victim was found not to substantially increase the risk of harm which is required for kidnapping for robbery. (***People v. Hillhouse*** (2002) 27 Cal.4th 469, 498.)

In determining the sufficiency of the evidence for the kidnapping special circumstance the "relevant inquiry is whether it would be irrational for a jury to conclude that defendant intended to kidnap [the victim] for some reason (such as to instill fear) that was in addition to and independent of his intent to murder her." (***People v. Brents*** (2012) 53 Cal.4th 535, 611.)

It was error to alter CALJIC No. 8.81.17 to require a finding that the murder was committed "to carry out or advance the commission of" an assault on the victim "or to facilitate the escape therefrom or to avoid detection." In order to obtain a kidnapping special circumstance, *Green* requires the prosecution to prove that the victim was *kidnapped* with an independent felonious purpose and therefore the *kidnapping* was not merely incidental to the murder. There is no requirement that the jury find that the *murder* was motivated in some way by the defendant's initial assault on the victim as the standard instruction was altered to provide. (***People v. Brents*** (2012) 53 Cal.4th 535, 612.)

Where the evidence could support an inference that a defendant's only purpose in kidnapping the victim was to kill and therefore the defendant lacked an independent purpose to kidnap, an erroneous instruction as to the independent felonious purpose requirement was not harmless beyond a reasonable doubt. (***People v. Brents*** (2012) 53 Cal.4th 535, 614.)

It was error to instruct with CALCRIM No. 703 ["Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder (Pen. Code, § 190.2)"] where the only special circumstance alleged was section 190.2, subdivision (a)(17)(M), kidnapping with intent to kill which requires the prosecution prove intent to kill. CALCRIM No. 703 includes language telling the jury that the People could prove either intent to kill or reckless indifference to human life if defendant was a major participant in the crime. CALCRIM No. 731 pertaining specifically to intent to kill kidnapping includes all of the requirements for the special circumstance, alleviating any need for giving CALCRIM No. 703 where no other special circumstance is alleged that can be satisfied by proving the defendant acted with reckless indifference as a major participant. The same concern would arise if instructing with CALJIC No. 8.81 for the same reason. (***People v. Odom*** (2016) 244 Cal.App.4th 237, 256-257, fn. 14.)

L. LEWD ACT WITH CHILD – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(17)(E) [§ 7.42]

The Eighth Amendment does not require that a person who is the actual killer during the commission of a lewd and lascivious act on a child under the age of 14 intend to kill or act with reckless indifference to human life in order to sustain a true finding for the lewd-and-lascivious-act-special circumstance. In any event, "it is hard to imagine how the *actual killer*, who kills while committing a lewd and lascivious act on a child under the age of 14, can kill accidentally." (***People v. Loy*** (2011) 52 Cal.4th 46, 60, 77-78.)

The special circumstance of felony-murder in the course of lewd act on a child can be based on the same conduct underlying the felony-murder-rape and felony-murder-sodomy special circumstances. (***People v. Benavides*** (2005) 35 Cal.4th 69, 99.)

M. LYING-IN-WAIT – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(15)) [§ 7.43]

§ 7.43.1 Generally

The lying-in-wait special circumstance "requires an 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." (***People v. Casares*** (2016) 62 Cal.4th 808, 827, internal quotation marks & citations omitted; ***People v. Johnson*** (2016) 62 Cal.4th 600, 629-630 [same]; ***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1073 [same]; ***People v. Moon*** (2005) 37 Cal.4th 1, 22 [same].)

The pre-2000 version of the lying-in-wait special circumstance is not unconstitutionally vague. (***People v. Cage*** (2015) 62 Cal.4th 256, 281; ***People v. Livingston*** (2012) 53 Cal.4th 1145, 1174.)

The change following the passage of Proposition 18 in the definition of the lying-in-wait special-circumstance from a killing *while* lying in wait to a killing *by means of* lying-in-wait, mirroring the language of the first degree murder statute (effective March 8, 2000) did not render the lying-in-wait special circumstance unconstitutionally vague. While the voters expanded the class of cases in which the special circumstance could be found true by conforming the temporal connection between the killing and the lying in wait required for the special circumstance to that required for lying-in-wait first degree murder, the revised special circumstance "adequately distinguishes itself from other murders and does so in terms that are not so vague as to permit arbitrary determinations regarding the truth of the special circumstance allegations." (***People v. Johnson*** (2016) 62 Cal.4th 600, 635-636.)

Even if the lying-in-wait special circumstance had been amended to be identical to lying-in-wait first degree murder, it would not be unconstitutionally vague. "Like the murderer who poisons his victim, the murderer who kills by lying in wait acts surreptitiously, concealing himself or his purpose and making a surprise attack on his victim from a position of advantage, thereby denying the victim any chance of escape, aid, or self-defense. It is no surprise that a murder committed by lying in wait historically has been viewed as a particularly heinous and repugnant crime. That a crime historically has been considered more reprehensible than other murders provides "a rational basis for distinguishing those murderers who deserve to be considered for the death penalty from those who do not." (***People v. Johnson*** (2016) 62 Cal.4th 600, 636-637, internal quotation marks & citations omitted.)

The lying-in-wait special circumstance is not unconstitutional as applied to an aider and abettor because the Eighth Amendment is not offended by a scenario where the defendant, with the intent that the victim would be killed, drove the victim to another location on the pretext of buying drugs, and led him into an alley where two cohorts were

waiting to execute him. After the defendant walked with the victim halfway down the alley, the two cohorts approached from behind and from that position of advantage, carried out a surprise attack by shooting the victim in the back of the head. (***People v. Johnson*** (2016) 62 Cal.4th 600, 637.)

The corpus delicti rule does not apply to the lying-in-wait special circumstance. (***People v. Morales*** (1989) 48 Cal.3d 527, 559, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

§ 7.43.2 Lying-in-Wait Special Circumstance Compared to First Degree Murder by Lying in Wait (Pen. Code § 189)

The lying-in-wait special circumstance (Pen. Code, § 190.2(a)(15)) contains more stringent requirements than those required for a lying-in-wait first-degree-murder conviction (Pen. Code, § 189). Accordingly, if the evidence supports the special circumstance, it necessarily supports the theory of first degree murder. (***People v. Cage*** (2015) 62 Cal.4th 256, 278; ***People v. Moon*** (2005) 37 Cal.4th 1, 22.)

Murder by lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death, whereas the lying-in-wait special circumstance requires "'an 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 attack, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (***People v. Cage*** (2015) 62 Cal.4th 256, 278; ***People v. Moon*** (2005) 37 Cal.4th 1, 24, fn. 1, quoting ***People v. Gutierrez*** (2002) 28 Cal.4th 1083, 1148-1149.)

"Prior to the passage of Proposition 18 on March 8, 2000, the lying-in-wait special circumstance required that the killing be committed "while" lying in wait, whereas first degree murder by lying in wait required the killing be "immediately preceded" by the period of lying in wait. Proposition 18 changed the word "while" to "by means of," so that the special circumstance would conform to lying-in-wait first degree murder and essentially eliminate the immediacy requirement that case law had placed on the special circumstance. However, the special circumstance still requires a specific intent to kill, whereas first degree murder by lying in wait does not. Therefore, as amended, the special circumstance is not constitutionally vague. (***People v. Superior Court (Bradway)*** (2003) 105 Cal.App.4th 297, 307, 309.)

There is a meaningful distinction between the lying-in-wait special circumstance and premeditated, deliberate murder committed by means of lying in wait; and the lying-in-wait special circumstance meaningfully distinguishes between death eligible and non-death eligible defendants. (***People v. Streeter*** (2012) 54 Cal.4th 205, 253.)

§ 7.43.3 Concealment of Purpose

The element of concealment of purpose is met by showing that the defendant's "true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." (***People v. Casares*** (2016) 62 Cal.4th 808, 827, internal quotation marks & citations omitted; ***People v. Moon*** (2005) 37 Cal.4th 1, 22 [same].)

The concealment element may manifest itself either by an ambush or by the creation of a situation where the victim is taken unaware even though he sees his murderer. (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1074; ***People v. Morales*** (1989) 48 Cal.3d 527, 555, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459; see ***People v. Hillhouse*** (2002) 27 Cal.4th 469, 500.)

The defendant's own testimony established concealment of purpose because he made no effort to reveal himself inside the victim's home when she entered, but instead remained out of her view in another part of the home, waited and watched for an opportune moment to attack her. When the victim later saw him and inquired what had happened, he remained silent, further concealing his purpose. The victim could not have anticipated the defendant's deadly intentions when he suddenly pushed her down the stairs and then strangled her. (***People v. Moon*** (2005) 37 Cal.4th 1, 22-23.)

Sufficient evidence demonstrated "that defendant concealed his true intent and purpose even though he did not conceal his presence at [victim's] door. Defendant hid his shotgun in a laundry basket containing his and [the victim's daughter's] clothes and took the laundry basket with him up to [the victim's] door. A jury could rationally deduce from these facts that defendant planned and undertook a deliberate subterfuge aimed at making his presence appear to be an innocuous offer to return [the daughter's] clothes or request to do laundry so that [the victim] would open the door and admit him. The ruse disguised his intent to kill." (***People v. Cage*** (2015) 62 Cal.4th 256, 279.)

§ 7.43.4 Substantial Period of Watching & Waiting

The purpose of the "watching and waiting" requirement is "to distinguish between those cases in which a defendant acts insidiously from those in which he acts out of rash impulse." (***People v. Casares*** (2016) 62 Cal.4th 808, 827, internal quotation marks & citations omitted; ***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1073 [same].)

The California Supreme Court has "never placed a fixed time limit" for satisfying the requirement of a substantial period of watching and waiting. "Indeed, the opposite is true, for [the Court has] previously explained that the precise period of time is also not critical." (***People v. Cage*** (2015) 62 Cal.4th 256, 279, internal quotation marks & citations omitted.)

No particular period of time is required for a lying-in-wait special circumstance. Rather, the period of time must be "substantial." A few minutes can suffice. (***People v.***

Mendoza (2011) 52 Cal.4th 1056, 1073 & fn. 6; ***People v. Moon*** (2005) 37 Cal.4th 1, 23.)

This watching and waiting "need not continue for any particular length of time provided its duration is such as to show a state of mind equivalent to premeditation or deliberation." (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1073 [same].)

"[A]lthough the first degree murder formulation refers to 'by means of' lying in wait and the pre-2000 definition of the special circumstance referred to 'while" lying in wait, such difference did not change 'the principle that for a murder conviction and for a special circumstance finding the lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.'" (***People v. Mendoza*** (2011) 52 Cal.4th 1056,1073, fn. 6, quoting ***People v. Stevens*** (2007) 41 Cal.4th 182, 202, fn. 11; see also ***People v. Casares*** (2016) 62 Cal.4th 808, 827[same]; ***People v. Cage*** (2015) 62 Cal.4th 256, 279 [same].)

"The killer need not view his intended victim the entire period of waiting and watching. The purpose of the 'watchful waiting' requirement … is satisfied … despite the circumstance that the victims were out of defendant's sight for a few moments. If the jury accepted the prosecutor's 'ruse' theory, it could reasonably have concluded that nothing occurred during that interval to indicate either an abandonment of the plan, an alteration in defendant's purpose, or a dawning awareness of that purpose on the victim's part." (***People v. Casares*** (2016) 62 Cal.4th 808, 828.)

The jury need not accept the defendant's self-assessment of the amount of time spent watching and waiting for the victim where the evidence supported a reasonable inference the amount of time was more than the defendant testified. (***People v. Moon*** (2005) 37 Cal.4th 1, 24.)

The defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking the victim by surprise. (***People v. Lewis*** (2008) 43 Cal.4th 415, 510, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919; ***People v. Hillhouse*** (2002) 27 Cal.4th 469, 501.)

§ 7.43.5 Nature of Surprise Attack

"Although [the officer] was certainly aware of defendant's physical presence, the evidence reflected that defendant managed to conceal his murderous purpose so well that he took the officer completely by surprise when he fired the single deadly shot at close range. From this evidence, a rational jury could infer that defendant did not kill out of rash impulse, but rather in a purposeful manner that required stealth and maneuvering to gain a position of advantage over the unsuspecting officer." The defendant's claim that the officer was not unsuspecting nor attacked from a position of advantage is refuted by the evidence. "[T]he police who responded to the shooting found [the fallen officer] with his gun secured in its holster and his baton still attached to his belt. From this evidence, a rational jury could conclude that defendant took [the officer] completely by surprise."

(***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1074, & fn. 8; see also ***People v. Russell*** (2010) 50 Cal.4th 1228, 1245 [defendant "shot at the officers from a position of advantage before the officers had time to even draw their weapons"].)

The special circumstance of "while lying-in-wait" does not require that the defendant strike his blow from the place of concealment. (***People v. Michaels*** (2002) 28 Cal.4th 486, 517.)

There is no requirement of "luring" the victim for lying in wait. (***People v. Superior Court (Jurado)*** (1992) 4 Cal.App.4th 1217, 1228-1229.)

Physical concealment before the attack is not required. It is sufficient if the defendant's true intent and purpose were concealed by the defendant's actions or conduct. (***People v. Johnson*** (2016) 62 Cal.4th 600, 632.)

§ 7.43.6 Sufficiency of the Evidence

The evidence was sufficient to support the lying-in-wait special circumstance where the defendant drove the victim to another location on the pretext of buying drugs and led him to a deserted alleyway where his two cohorts were waiting. After the defendant and his victim were halfway down the alley, the cohorts approached from behind, and from that position of advantage, shot the victim in the head. Such evidence is "classic lying-in-wait special-circumstance murder." (***People v. Johnson*** (2016) 62 Cal.4th 600, 631.)

The evidence was sufficient to support the lying-in-wait special circumstance where the defendant was in a position of advantage given that the victim would not have perceived danger merely from discovering the defendant inside her home [as they knew each other] and where he waited until she was more vulnerable, i.e., positioned at top of stairs, before rushing and pushing her down the stairs. (***People v. Moon*** (2005) 37 Cal.4th 1, 24.)

The evidence was sufficient to support the lying-in-wait special circumstance where the defendant lured the victim to a motel room on the pretext of ordering a pizza, overpowered him on his arrival, carefully bound him with a clothesline, gagged him, and left him either dead or to drown in a bathtub full of water. (***People v. Sims*** (1993) 5 Cal.4th 405, 433.)

The evidence was sufficient to support the finding of a lying-in-wait special circumstance based on the defendant's watchful waiting from a position of advantage in the backseat while the car was driven to a more isolated area, and his sudden surprise attack on the victim from behind without warning. (***People v. Morales*** (1989) 48 Cal.3d 527, 555, 557, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Although the evidence of watching and waiting was not overwhelming, it was sufficient, where "the evidence did not establish the specific length of time that defendant

waited for [the victim] to open the front door, but nothing in the trial record suggests it happened instantaneously upon defendant's arrival at the house. A rational jury could infer that there was some period of watching and waiting at the door. Similarly, although the record does not establish the precise amount of time after [the victim] opened the door that defendant spent interacting with her before he pulled out the shotgun and shot her, [one of her] neighbors, testified [the victim's] dog barked briefly around 10:30 or 10:45 p.m. and that shots were fired several minutes later. Such testimony could support an inference that defendant conversed with [the victim] for a few minutes before removing the gun from the basket and shooting her. During such time defendant could have reflected on his intentions, such that his subsequent actions in taking the shotgun out of its hiding place and shooting [the victim] and then proceeding upstairs to [the other victim's] room were not the product of a rash impulse." (***People v. Cage*** (2015) 62 Cal.4th 256, 279-280, fn. omitted.)

The evidence was insufficient to support the lying-in-wait special circumstance because there was no factual basis for inferring a distinct period of watchful waiting where no evidence had been presented to show that the defendant "arrived before the victims or waited in ambush for their arrival." (***People v. Nelson*** (2016) 1 Cal.5th 513, 551.)

§ 7.43.6.1 Aiding and Abetting Liability

A lying-in-wait special circumstance can apply to a defendant who, intending that the victim would be killed, aids and abets an intentional murder committed by means of lying in wait. (***People v. Johnson*** (2016) 62 Cal.4th 600, 637.)

§ 7.43.7 Jury Instructions

CALJIC No. 8.25 on lying in wait has been repeatedly approved. (***People v. Cage*** (2015) 62 Cal.4th 256, 280; ***People v. Russell*** (2010) 50 Cal.4th 1228, 1244; ***People v. Moon*** (2005) 37 Cal.4th 1, 23.)

CALJIC No. 8.81.15.1 on the lying-in-wait special circumstance is impliedly approved. (***People v. Moon*** (2005) 37 Cal.4th 1, 23.)

The lying-in-wait special-circumstance instruction (CALJIC No. 8.81.15) is constitutional. (***People v. Casares*** (2016) 62 Cal.4th 256, 281; ***People v. Cage*** (2015) 62 Cal.4th 256, 281; ***People v. Bonilla*** (2007) 41 Cal.4th 313, 332-333 ; ***People v. Stevens*** (2007) 41 Cal.4th 182, 203-204.)

CALJIC No. 8.81.15 does not erroneously permit a jury to return a true finding on a lying-in-wait special circumstance based on non-lethal intent. To the contrary, it requires "an *intentional* killing and an uninterrupted connection between the *lethal acts* and the period of lying in wait" such that a reasonable jury would have believed a nonlethal act and intent would satisfy the "requirements of concealment of purpose and

watchful waiting to act." (***People v. Casares*** (2016) 62 Cal.4th 808, 833, internal quotation marks & citations omitted, italics in original]; ***People v. Streeter*** (2012) 54 Cal.4th 205, 251 [same].)

Because the California Supreme Court has approved the language of CALJIC No. 8.81.15 (1989 rev.) as generally stating the requirements for the lying-in-wait special circumstance, it is therefore incumbent upon the defendant to request a more detailed instruction. (***People v. Casares*** (2016) 62 Cal.4th 808, 832; see also ***People v. Sims*** (1993) 5 Cal.4th 405, 433-434 [1983 version of CALJIC No. 8.81.15 accurately sets forth requirements for lying-in-wait special-circumstance].)

The trial court need not instruct the jury under CALJIC No. 17.01 that it must unanimously agree which acts constitute lying-in-wait. (***People v. Edwards*** (1991) 54 Cal.3d 787, 824.)

"CALJIC No. 8.81.15 is not by its length or terms 'impossible to understand and apply.' It is not internally inconsistent in its treatment of the temporal element of lying in wait, which properly references the concepts of premeditation and deliberation." It does not "conflict with other instructions. And, the use of the same language in both CALJIC No. 8.81.15 and CALJIC No. 8.25 concerning the period of time necessary for lying in wait is appropriate. The difference between lying-in-wait murder and the lying-in-wait special circumstance does not touch on this durational element of lying in wait. The difference lies in the required mental states and, at the time of defendant's crimes, in the requirement of the special circumstance that the defendant intentionally killed the victim 'while' lying in wait." (***People v. Cage*** (2015) 62 Cal.4th 256, 281, regarding lying-in-wait special circumstance set forth in Pen. Code, § 190.2, former subd. (a)(15), as amended by Stats. 1995, ch. 478, § 2, p. 3564.)

N. MAYHEM – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(17)(J)) [§ 7.44]

While evidence showing no more than an indiscriminate attack on a victim will not support a mayhem felony-murder conviction, the jury had more than enough evidence of a specific intent to maim. The victim "suffered discrete injuries over an extended period of time, including a serious burn wound on her head, multiple bruises, scars, abrasions, and lacerations all over her body, subdural and subarachnoid hematomas, and the severe scalding that ultimately caused her death." While there was no evidence that defendant actually inflicted the fatal scalding, "powerful direct and circumstantial evidence supported the conclusion that she at least aided and abetted [her husband] in inflicting the terminal injury." (***People v. Gonzales*** (2011) 51 Cal.4th 894, 941.)

At defense counsel's request, the court modified CALJIC No. 8.81.17 regarding the mayhem-murder special circumstance, and added the element of specific intent to commit mayhem. "Over the prosecutor's objections and with defense counsel's agreement, the court also imported a version of the third paragraph of CALJIC No. 8.80,

explaining the intent requirements should the jury find that defendant was an actual killer, on the one hand, or an aider and abettor, on the other." The California Supreme Court rejected the defendant's complaint the instruction was "hopelessly complicated," noting it was "approved by defense counsel and comprehensible by the jury." (***People v. Gonzales*** (2011) 51 Cal.4th 894, 940.)

O. MULTIPLE MURDER – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(3)) [§ 7.45]

The multiple-murder special circumstance is not arbitrary, unfair, or irrational, and performs the narrowing required under the Eighth Amendment. (***People v. Thomas*** (2012) 53 Cal.4th 771, 818; ***People v. Boyette*** (2002) 29 Cal.4th 381, 440.)

Regardless of the number of murders charged in an information, it is error to charge more than one special circumstance alleging multiple murders. However, such double counting has been consistently found harmless because it does not result in the jury considering any inadmissible evidence. (***People v. McWhorter*** (2009) 47 Cal.4th 318, 377.)

Under the now-discredited holding in *Carlos v. Superior Court*, it had been held that two first-degree felony-murder convictions could not be used to justify a finding under the multiple-murder special circumstance of intent to kill. (***People v. Turner*** (1984) 37 Cal.3d 302, 328-329.) On reconsideration of the "intent to kill" issue in light of intervening United States Supreme Court decisions, a reconstituted California Supreme Court overruled both *Carlos* and *Turner*. Thus, the actual killer need not have the intent to kill to face punishment under this special circumstance. (***People v. Anderson*** (1987) 43 Cal.3d 1104, 1115.)

When "intent to kill" was required, failure to instruct on intent to kill for the actual killer was harmless where the court instructed the jury that if any of the three codefendants were not the actual killer, they had to "intentionally aid" the actual killer to be liable for the special circumstance. (***People v. Hardy*** (1992) 2 Cal.4th 86, 192.) *Carlos* error was harmless where although the prosecution pursued both burglary-murder and premeditated-murder theories, evidence of the intentional murder of both victims was overwhelming. (***People v. Johnson*** (1993) 6 Cal.4th 1, 45-47, abrogated on other grounds, *People v. Rogers* (2006) 39 Cal.4th 826, 879.)

For crimes committed during 1984 through 1987, the *Turner*/*Anderson* window, specific intent to kill is required for a multiple-murder special circumstance. (***People v. Turner*** (1984) 37 Cal.3d 302, overruled *People v. Anderson* (1987) 43 Cal.3d 1104.) However, there is no requirement of intent to kill as to both murders for cases falling within the *Turner*/*Anderson* window. (***People v. Rogers*** (2006) 39 Cal.4th 826, 892.)

The multiple-murder special circumstance is not subject to being dismissed under Penal Code section 995 just because at the time of the preliminary examination the defendant had not yet "in this proceeding been convicted of more than one offense of

murder…." The question for the magistrate at the preliminary hearing is whether there is probable cause to believe the jury will be able to make that finding in deliberations. (***People v. Anderson*** (1987) 43 Cal.3d 1104, 1148-1149.)

The multiple-murder special circumstance is satisfied by a finding of multiple murder in the first *or* second degree. Thus, it cannot require a finding that each of the multiple murders was in the first degree. (***People v. Miller*** (1990) 50 Cal.3d 954, 995.)

The second degree felony murder rule "is based on statute, specifically section 188's definition of implied malice, and hence is constitutionally valid." (***People v. Sarun Chun*** (2009) 45 Cal.4th 1172, 1178, 1183.)

A multiple-murder special-circumstance allegation requires a jury finding unless waived, even if the jury returns guilty verdicts on multiple counts of murder. However, the failure to submit the allegation for a jury finding was harmless beyond a reasonable doubt in light of the multiple-murder verdicts and death verdict. (***People v. Marshall*** (1996) 13 Cal.4th 799, 849-852.)

The doctrine of transferred intent may be used to support use of the multiple-murder special circumstance. (***People v. Arreola*** (1986) 186 Cal.App.3d 1570, 1576.)

Killing a mother and her unborn fetus may be charged under the multiple-murder special circumstance. (***People v. Bunyard*** (1988) 45 Cal.3d 1189, 1237-1238, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1191; see also ***People v. Dennis*** (1998) 17 Cal.4th 468, 510-513 [application of multiple murder special circumstance to murders of pregnant woman and fetus do not constitute disproportionate penalty in violation of state and federal Constitutions].)

§ 7.45.1 Jury Instructions

"When there is evidence from which a jury could base its convictions for multiple counts of murder on the theory that the defendant was guilty as an aider and abettor, and not as the actual perpetrator, the trial court must instruct the jury that to find true a multiple-murder special-circumstance allegation as to that defendant, it must find that the defendant intended to kill the murder victims." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 928 citing Penal Code, § 190.2(b)-(c)); ***People v. Nunez*** (2013) 57 Cal.4th 1, 45 [same].)

Erroneous instruction on the intent to kill element of a special circumstance does not require reversal if the error was harmless beyond a reasonable doubt. This standard may be met where it can be determined the "jury necessarily found an intent to kill under other properly given instructions, or when evidence of defendant's intent to kill is overwhelming and the jury could have had no reasonable doubt that the defendant had the intent to kill." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 929 [internal quotation marks and citations omitted].)

P. ORAL COPULATION – SPECIAL CIRCUMSTANCE (Pen. Code, § 190.2(a)(17)(F)) [§ 7.46]

The standard jury instruction correctly informed the jury that "'any contact, however slight, between the mouth of one person and the sexual organ of another person constitutes oral copulation. Penetration of the mouth or sexual organ is not required. Proof of ejaculation is not required." (***People v. Dement*** (2011) 53 Cal.4th 1, 41-42, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Q. PEACE-OFFICER KILLING – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(7)) [§ 7.47]

"The special circumstance of murder of a peace officer protects peace officers on whom we depend 'to help ensure safe and peaceable communities.'" (***People v. Ervine*** (2009) 47 Cal.4th 745, 791, quoting ***People v. Brown*** (2004) 33 Cal.4th 382, 400.)

The peace-officer-killing special circumstance "serves 'to afford special protection to officers who risk their lives to protect the community.'" (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1080, quoting ***People v. Jenkins*** (2000) 22 Cal.4th 900, 1021.)

The intentional-killing-of-a-peace-officer special circumstance is constitutional. A defendant may be given the death penalty for killing a person he reasonably should have known was a peace officer engaged in the performance of official duty. (***People v. Thomas*** (2012) 53 Cal.4th 771, 817; ***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1224, abrogated on other grounds, *In re Steele* (2004) 32 Cal.4th 682, 690; ***People v. Brown*** (1988) 46 Cal.3d 432, 444; ***People v. Rodriguez*** (1986) 42 Cal.3d 730, 780-783.)

The peace officer special circumstance is not unconstitutionally vague simply because "peace officer" has been defined to include categories of individuals whose status as a peace officer might not be apparent to the ordinary person. The "reasonably should have known" element "would prevent a true finding on the special circumstance if the victim's status would not have been apparent to a reasonable person." (***People v. Thomas*** (2012) 53 Cal.4th 771, 817.)

As used in the peace officer special circumstance, the phrase "engaged in the course of the performance of his or her duties" means that the officer must have been acting lawfully at the time. (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1080; ***People v. Mayfield*** (1997) 14 Cal.4th 668, 791, abrogated on other grounds, *People v. Scott* (2015) 61 Cal.4th 363, 390.)

Defendant's subjective understanding that the officer's conduct was lawful is not an element of proof. (***People v. Thomas*** (2012) 53 Cal.4th 771, 818; ***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1080; ***People v. Jenkins*** (2000) 22 Cal.4th 900, 1021.)

"[L]imiting the [peace officer] special circumstance to situations in which the defendant subjectively believed that the officer was acting lawfully 'would be

inconsistent with the purpose of the special circumstance to afford special protection to officers who risk their lives to protect the community, and obviously would undermine the deterrent effect of the special circumstance.'" (***People v. Thomas*** (2012) 53 Cal.4th 771, 818, quoting ***People v. Jenkins*** (2000) 22 Cal.4th 900, 1021.)

Where a peace officer special circumstance has been found true, the presumptions an appellate court makes in support of the judgment as to the existence of every fact the trier could reasonably deduce from the evidence, "are aided by the presumption, applicable to police officers except in the case of a warrantless arrest, that official duty was regularly performed." (***People v. Mai*** (2013) 57 Cal.4th 986, 1039, abrogated on other grounds, *People v. Scott* (2015) 61 Cal.4th 363, 390.)

A peace officer serving a warrant which is valid on its face is lawfully engaged in his duties, even if subsequent facts reveal the warrant should not have issued. The warrant's validity is not a jury issue. Whether the warrant was properly served is a jury issue. (***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1217-1218, 1223, abrogated by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 690.)

Failure to instruct the jury that to find this special circumstance true they must find the defendant knew or should have known the victim was a peace officer was error. However, it is amenable to a harmless-error analysis. Under the circumstances, the error was harmless. (***People v. Odle*** (1988) 45 Cal.3d 386, 410-416, rev'd on other grounds, *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, and abrogated on other grounds as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 256.)

Instruction that a city police officer was a peace officer did not remove an element from the jury's consideration. (***People v. Brown*** (1988) 46 Cal.3d 432, 443.)

R. POISON – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(19)) [§ 7.48]

The murder-by-poison special circumstance was upheld as constitutional even though the same elements as first degree murder by means of poison are repeated along with the requirement of specific intent to kill. (***People v. Catlin*** (2001) 26 Cal.4th 81, 158.)

The murder-by-poison special circumstance requires an intent to kill, which is not required for first degree murder by poison. (***People v. Catlin*** (2001) 26 Cal.4th 81, 154.)

CALJIC No. 8.81.19 correctly describes the intent element of the murder-by-poison special circumstance. (***People v. Catlin*** (2001) 26 Cal.4th 81, 154.)

The lying-in-wait special circumstance does not duplicate the special circumstance of murder by explosive devices and murder by poison. (***People v. Edwards*** (1991) 54 Cal.3d 787, 823-824.)

S. PRIOR MURDER – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(2)) [§ 7.49]

§ 7.49.1 Generally

The fact a defendant was previously convicted of murder in the first or second degree establishes the existence of the prior-murder special circumstance. (***People v. Andrews*** (1989) 49 Cal.3d 200, 222; Pen. Code, § 190.2(a)(2).)

A prior-murder special circumstance may be alleged and found for each prior first- or second-degree-murder conviction. (***People v. Danks*** (2004) 32 Cal.4th 269, 314-315.)

Intent to kill is not a requirement of the prior-murder special circumstance under the 1978 law. (***People v. Gurule*** (2002) 28 Cal.4th 557, 633-634; ***People v. Wharton*** (1991) 53 Cal.3d 522, 585-586; ***People v. Hendricks*** (1987) 43 Cal.3d 584, 596.)

The order in which defendant is convicted of the homicides is immaterial because a defendant is eligible for the death penalty under the prior-murder special-circumstance if convicted of first-degree murder in a subsequent trial after already being convicted of murder in a prior proceeding. (***People v. Johnson*** (2016) 62 Cal.4th 600, 642.)

The commission of a "prior murder" *after* the murder for which the defendant is on trial is immaterial. In order for the "prior murder" circumstance to be applicable, the defendant must have been convicted of the murder before the present trial. There is no violation of the ex post facto or due process clauses from a prior-murder special circumstance being based on a murder that occurred after the murder(s) that are the basis of the murder charges in the capital case. (***People v. Rogers*** (2013) 57 Cal.4th 296, 343-344; ***People v. Hinton*** (2006) 37 Cal.4th 839, 879; ***People v. Gurule*** (2002) 28 Cal.4th 557, 635-637; ***People v. Hendricks*** (1987) 43 Cal.3d 584, 595-596; see ***People v. Johnson*** (2016) 62 Cal.4th 600, 642 [declining to reconsider constitutional challenges to prior-murder special with citation to *People v. Rogers* and *People v. Gurule*].)

The statute defining a prior murder special circumstance does not require that the defendant's conviction be final, i.e., affirmed on appeal. (***People v. Rogers*** (2013) 57 Cal.4th 296, 345.)

Where defendant committed a prior murder when he was 17 years old and was tried and convicted as an adult, the Eighth Amendment ban on imposing the death penalty for crimes committed by juveniles does not apply and the conviction can be the basis for a prior-murder special circumstance. (***People v. Salazar*** (2016) 63 Cal.4th 214, 225.)

§ 7.49.2 Pre-Trial Challenges to Constitutionality of Prior Murder Conviction

The defendant may challenge the constitutionality of a prior-murder special circumstance by a pretrial motion to strike and is entitled to an evidentiary hearing. The defendant has the burden to prove invalidity by a preponderance of the evidence. (***Curl v. Superior Court*** (1990) 51 Cal.3d 1292, 1296.)

The established "procedural bars" that would apply in a habeas corpus proceeding seeking to vacate the prior conviction do not necessarily apply to a motion to strike a prior murder conviction which is the basis for a prior-murder special circumstance. (***People v. Horton*** (1995) 11 Cal.4th 1068, 1138.)

The decision in ***Custis v. United States*** (1994) 511 U.S. 485 [114 S.Ct. 1732, 128 L.Ed.2d 517], does not compel or justify modification of California law governing collateral attack *in a capital proceeding* on a prior murder conviction alleged as a special circumstance. (***People v. Horton*** (1995) 11 Cal.4th 1068, 1134.)

Use of a prior murder conviction to establish the special circumstance is a collateral consequence of which the defendant need not be advised prior to accepting his plea to the prior murder. (***People v. Gurule*** (2002) 28 Cal.4th 557, 635.)

§ 7.49.3 Jury Instructions

There is no sua sponte obligation to instruct on the limited admissibility of the prior murder conviction. (***People v. Hinton*** (2006) 37 Cal.4th 839, 875-876.)

Failure to request a limiting instruction regarding a prior murder conviction was not ineffective assistance of counsel, because counsel may have deemed it unwise to call further attention to the conviction, and the instructions given were adequate to guide the jury's use of the prior conviction. (***People v. Hinton*** (2006) 37 Cal.4th 839, 878.)

Instruction with CALJIC No. 2.50.1, informing jurors in the guilt phase that other crimes evidence may be proved by a preponderance of the evidence, did not diminish the People's burden to prove the defendant guilty beyond a reasonable doubt, including the truth of the prior-murder-conviction special-circumstance allegation. (***People v. Rogers*** (2013) 57 Cal.4th 296, 338.)

§ 7.49.4 Separate Proceeding to Determine Truth of Prior Murder

Penal Code section 190.1, subdivision (b), provides that the truth of a prior-murder special-circumstance allegation shall be determined in a separate proceeding following a finding of first degree murder by the trier of fact. A right to a separate proceeding to

determine the truth of a prior-murder special circumstance is a statutory right, and is not a constitutional right. (***People v. Hinton*** (2006) 37 Cal.4th 839, 874.)

The defendant "may not be *forced* to undergo a unitary trial of the separate issues of the defendant's guilt of first degree murder and the truth of a prior-murder special circumstance, since such evidence may have an inflammatory effect on jurors who are asked to determine a defendant's guilt or innocence on a current charge of murder." (***People v. Hinton*** (2006) 37 Cal.4th 839, 873.)

However, defendants may waive the statutory right to have the truth of a prior-murder special circumstance determined in a separate proceeding following a finding of first degree murder by the trier of fact "'if they believe it is in their best interests to do so.'" (***People v. Hinton*** (2006) 37 Cal.4th 839, 873, quoting ***People v. Farnam*** (2002) 28 Cal.4th 107, 146.)

Even assuming the right to a separate proceeding to determine the truth of a prior murder special circumstance is a fundamental right, it can be waived by counsel alone, unless the trial court is aware of an express conflict between counsel and the defendant. "In our view, the weighing of the possible prejudice of presenting the prior murder conviction at the guilt phase against the possible prejudice of the jury's hearing of it for the first time thereafter [citation] is a quintessential question of evidentiary strategy and thus, at least in the absence of an express conflict that comes to the attention of the trial judge, certainly within the attorney's 'general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters.'" (***People v. Hinton*** (2006) 37 Cal.4th 839, 874, quoting ***In re Horton*** (1991) 54 Cal.3d 82, 94.)

There is no ineffective assistance of counsel where defense counsel's waiver of a separate proceeding is based on "a reasoned, deliberate strategy (1) to weed out prospective jurors who would automatically vote for death based on defendant's prior murder conviction, (2) to be candid and forthright with the jury about the crimes ... defendant *did* commit, and (3) to minimize thereby the weight the jury would accord the prior conviction as impeachment during the guilt phase and as an aggravating factor during the penalty phase." (***People v. Hinton*** (2006) 37 Cal.4th 839, 877, emphasis added.)

§ 7.49.5 Use of Murder Conviction From Another Jurisdiction

An offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree for purposes of the prior-murder special circumstance. The purpose of the provision is to limit use of foreign convictions to those which include all the elements of the offense of murder in California. (***People v. Trevino*** (2001) 26 Cal.4th 237, 243-244; ***People v. Andrews*** (1989) 49 Cal.3d 200, 222-223.)

The analysis of a foreign murder conviction under section 190.2, subdivision (a)(2), includes both the elements of the crime of murder under which the defendant was charged, as well as the facts shown in the defendant's indictment including any uncontested facts and circumstances of the offense in the record. Accordingly, where an indictment showed the defendant's victim was robbed and killed on the same day, the court could infer the robbery and killing occurred during the course of a continuous transaction and would therefore be punishable as first degree felony murder in California based on the uncontested facts and circumstances of the offense indicated in the indictment. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1117.)

The analysis of a foreign murder conviction for purposes of determining whether it qualifies as a prior murder under the first degree felony-murder rule does not require finding that the killing advance or facilitate the felony. The requirement articulated in *People v. Green* (1980) 27 Cal.3d 1, 59-62, that the murder cannot be "incidental" to the felony, pertains to the sufficiency of a felony murder special circumstance, not liability for first degree murder under the felony-murder rule. There is no such requirement regarding the felony-murder rule. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1118.)

The fact the defendant might not have been tried as an adult for murder if the out-of-state murder had been in California is of no import. The special circumstance applies if prosecution *would* have been possible. (***People v. Andrews*** (1989) 49 Cal.3d 200, 222-223.)

A conviction in another jurisdiction may be deemed a conviction of first or second degree murder for purposes of California's prior-murder special circumstance if the offense involved *conduct* that satisfies all the elements of the offense of murder under California law, whether or not the defendant, when he committed that offense, was old enough to be tried as an adult in California. (***People v. Trevino*** (2001) 26 Cal.4th 237, 244.)

California law provides that "an order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, *nor shall a proceeding in the juvenile court be deemed a criminal proceeding*." (***People v. Weidert*** (1985) 39 Cal.3d 836, 844, quoting Welf. & Inst. Code, § 203, italics in statute added [interpreting statute for purposes of witness killing special circumstance]; see also ***People v. Lewis*** (2001) 26 Cal.4th 334, 378 [juvenile adjudication of murder is not a "conviction" and therefore inadmissible as a prior felony conviction under 190.3(c), although admissible under 190.3(b)].

Mitigating factors such as imperfect self-defense or voluntary intoxication are not elements of the offense of murder in this State, so the fact that imperfect self-defense or the defense of involuntary intoxication was not available in the other jurisdiction does not preclude a murder conviction from that state from supporting a prior-murder special circumstance. (***People v. Martinez*** (2003) 31 Cal.4th 673, 684-685.)

T. KILLING VICTIM BECAUSE OF RACE, COLOR, OR RELIGION – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(16)) [§ 7.50]

"By its terms, this provision provides an enhanced penalty for first degree murder committed because of prohibited bias motivation and is not directed at free expression protected by the First Amendment." (***People v. Lindberg*** (2009) 45 Cal.4th 1, 37, citing, e.g., ***Wisconsin v. Mitchell*** (1993) 508 U.S. 476, 485-490 [113 S.Ct. 2194, 124 L.Ed.2d 436] [enhancement statute is properly directed at conduct committed because of prohibited bias motivation and does not punish free speech in violation of the First Amendment]; ***In re M.S.*** (1995) 10 Cal.4th 698, 725 [§ 422.7, one of California's hate-crime statutes, properly sanctions bias-motivated conduct and does not implicate a defendant's First Amendment rights].)

A state penalty-enhancement statute which attaches greater punishment to bias motivated crimes does not violate the First Amendment (non-capital case). (***Wisconsin v. Mitchell*** (1993) 508 U.S. 476 [113 S.Ct. 2194, 124 L.Ed.2d 436].)

U. RAPE – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(17)(C)) [§ 7.51]

The rape-murder special circumstance requires that the rape not be merely incidental to the murder, but does not require that the intent to kill arise after the rape or attempt to rape. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1133, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

The rape-murder special circumstance applies equally to a murder committed while engaged in the commission of, or attempted commission of a rape. "An attempt to commit rape has two elements: the specific intent to commit rape and a direct but ineffectual act done towards its commission. [Citation.] The act must be a direct movement beyond preparation that would have accomplished the crime of rape if not frustrated by extraneous circumstances. [Citation.] An actual element of the offense, however, need not be proven. [Citation.] [¶] Intent to commit rape is intent to commit the act against the will of the complainant. [Citations.] A defendant's specific intent to commit a crime may be inferred from all of the facts and circumstances disclosed by the evidence. [Citations.]" (***People v. Scott*** (2011) 52 Cal.4th 452, 488, internal quotation marks omitted.)

The trial court erred in admitting evidence of the defendant's preoffense sexual activity within two weeks of the charged crimes. The inference of sexual frustration as a motive for rape was highly speculative and the evidence was irrelevant and had no tendency in reason to prove the charge of attempted rape or the rape-murder-special-circumstance allegation. The error was harmless, however, in light of the substantial

evidence of the defendant's sexual interest in the victim prior to the events that led to her death. (***People v. Clark*** (2011) 52 Cal.4th 856, 924.)

§ 7.51.1 Sufficiency of Evidence of Rape-Murder

While the California Supreme Court has held that the unclothed state of a murder victim is, by itself, insufficient to prove that a rape or attempted rape has occurred, other circumstances, considered in conjunction with the victim's near total nudity can support a jury's verdict. The victim being bound after the defendants forcibly undressed her support an inference of planning to do something to her that would be facilitated by her being unclothed, and in which she would not be a willing participant. The presence of sperm in the bedroom that could have been deposited by the defendant, hairs deposited on the victim's chest, and the bottle wedged between her legs near her genitals "can be viewed as evidence of a sexual component of defendants' actions." (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 164.)

While there is no direct evidence establishing which of the defendants performed which act against the victim (except for one defendant's testimony that he had nothing to do with what happened to the victim – testimony the jury clearly rejected), the jury properly relied on circumstantial evidence and reasonable inferences in determining whether both defendants were guilty of attempting to rape the victim and intentionally killing her while engaged in the commission of that crime. (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 164.)

Evidence that the victim had sexual intercourse and that she had an ante-mortem bruise on the inside of her thigh was sufficient to support the rape special circumstance. For purposes of the felony-murder-rape special circumstance, it is not necessary that the defendant commit the murder and rape virtually simultaneously. "By its very terms, the special circumstance extends to murder during the 'immediate flight after' rape." (***People v. Rowland*** (1992) 4 Cal.4th 238, 272; see ***People v. Berryman*** (1993) 6 Cal.4th 1048, 1090-1091, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The fact that the victim was found nude, and the manager of the apartment building across the street saw a man through a window walking around a person the jury could reasonably infer was the victim, combined with the defendant's pattern of raping women he lured to his home under similar circumstances was ample evidence supporting an intention to rape the victim when he killed her. (***People v. Kelly*** (2007) 42 Cal.4th 763, 789.)

There was sufficient evidence of forcible rape where the evidence supported a reasonable inference the victim would not have willingly agreed to sexual relations with a relative stranger on a cold night, on the ground, near a highway exit. (***People v. Rundle*** (2008) 43 Cal.4th 76, 139, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A victim being found partially or wholly unclothed is not by itself sufficient to prove a rape or an attempted rape. However, such a fact is one of the relevant circumstances. Where there is a combination of nudity and the presence of physical restraint, there is stronger evidence that a forcible rape or attempted rape occurred than if the body is simply unclothed. (***People v. Rundle*** (2008) 43 Cal.4th 76, 139, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The jury could reasonably infer that the absence of signs of a struggle – such as trauma to the body or damage to victim's clothing – was the result of her surrender to the defendant's demands in the hopes of surviving her ordeal, rather than proof she was a willing participant or was dead when she was undressed. (***People v. Rundle*** (2008) 43 Cal.4th 76, 139, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

It is more likely, when a victim is discovered a relatively short time after the crime, that the victim's body will show evidence of a sexual assault – such as trauma to the body or sexual organs, or the presence of the perpetrator's bodily fluids. The absence of such evidence in such a case may be strong evidence the defendant did not have, or did not intend to have, sexual contact with the victim. By contrast, the absence of such evidence is inconclusive and does not tend to eliminate a sexual assault, depending on the nature of the crime scene or when the body is found in an advanced state of decomposition. (***People v. Rundle*** (2008) 43 Cal.4th 76, 139, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 7.51.1.1 Attempted Rape Sufficient

"[E]vidence of seminal traces, or penetration or trauma to the genitals, is not required to establish an *attempted* rape." (***People v. Clark*** (2011) 52 Cal.4th 856, 951, emphasis in original; ***People v. Scott*** (2011) 52 Cal.4th 452, 488 [attempted rape does not require penetration]; ***People v. DePriest*** (2007) 42 Cal.4th 1, 48 ["attempted rape does not necessarily require a physical sexual assault or other sexually 'unambiguous contact'"]; ***People v. Hart*** (1999) 20 Cal.4th 546, 610 [the prosecution is not required to establish the completion of the underlying felony in order to establish the special circumstances of rape and sodomy].)

"[T]here is no requirement that the prosecution establish *why* an attempted rape was unsuccessful." (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 163-164 & fn. 21, emphasis in original.)

§ 7.51.1.2 Victim Need Not Be Alive

"Intercourse after death does not necessarily negate the felony-murder rule or the rape-murder special-circumstance finding, as postmortem intercourse could constitute an attempt to commit rape, provided it was part of a continuous transaction and the intent to

commit rape was formed prior to the murder." (***People v. Booker*** (2011) 51 Cal.4th 141, 175; ***People v. Lewis*** (2009) 46 Cal.4th 1255, 1299 [where defendant intends to have forcible sexual intercourse but fails to accomplish that purpose while the victim is alive, a felony-murder special circumstance is not negated by intercourse after death]; ***People v. Huggins*** (2006) 38 Cal.4th 175, 218 [person who attempts to rape a live victim, kills the victim in the attempt, then has intercourse with the body, has committed only attempted rape, not actual rape, but is guilty of felony-murder]; ***People v. San Nicolas*** (2004) 34 Cal.4th 614, 661 [after intent to rape is established, the special circumstance is applicable regardless of whether actual penetration occurred before or after death]; ***People v. Hart*** (1999) 20 Cal.4th 546, 611 [when an individual attempts to rape or sodomize a victim, reasonably or mistakenly believing the victim is alive, the perpetrator is guilty of having attempted the underlying felony].)

The trial court properly admitted expert testimony from a pathologist, including an opinion that the victim had been raped and sodomized before her death. The challenged opinion fell within the education, training and experience of the veteran forensic pathologist with extensive experience and familiarity with rape murder cases. (***People v. Jones*** (2012) 54 Cal.4th 1, 57-59.)

V. ROBBERY – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(17)(A)) [§ 7.52]

Cross-Reference:

§ 7.20, *re* Felony-murder special circumstances

§ 7.52.1 Statute of Limitations

The robbery-murder special circumstance is not barred by the expiration of the statute of limitations for robbery. (***People v. Gurule*** (2002) 28 Cal.4th 557, 638; ***People v. Morris*** (1988) 46 Cal.3d 1, 18.)

§ 7.52.2 Independent Intent to Commit Robbery

The special circumstance that the murder was committed during the commission of a robbery cannot stand if the defendant's intent is to kill, and the related robbery is merely incidental to the murder (i.e., an afterthought or an attempt to conceal). The murder must advance an independent felonious purpose to commit a robbery. (***People v. Clark*** (2011) 52 Cal.4th 856, 947; ***People v. Lindberg*** (2009) 45 Cal.4th 1, 27-28; compare ***People v. Zapien*** (1993) 4 Cal.4th 929, 984-985.)

The requirement of *Green* and *Thompson* that the murder advance an independent felonious purpose does not constitute an "element" of the felony-murder special circumstance on which the jury must be instructed in all cases regardless of whether the evidence supports such an instruction. The jury only need be instructed on the independent-felonious-purpose requirement where the evidence suggests the defendant may have intended to murder the victim without having an independent intent to commit a robbery. Where there was only speculation supporting the theory that the robbery was merely incidental to the murder, there is no duty to instruct sua sponte on the independent-felonious-purpose requirement. This is so even if the prosecutor relied on the speculative theory. (***People v. Navarette*** (2003) 30 Cal.4th 458, 505; ***People v. Kimble*** (1988) 44 Cal.3d 480, 499-503.)

That the defendant may not have succeeded in taking the victim's property until after death does not undermine the special circumstance finding. "Nor does evidence that defendant harbored concurrent intents to rape *and* kill render the robbery merely incidental to the murder." (***People v. Clark*** (2011) 52 Cal.4th 856, 947, emphasis in original; accord, ***People v. Davis*** (2009) 46 Cal.4th 539, 606.)

"Where a defendant begins a sexual assault, aware that the victim has property and takes it, the jury may infer the defendant intended to commit both rape and robbery. [Citations.] Or it may infer that the force used for the sexual offense was also force for robbery. [Citations.]" (***People v. Clark*** (2011) 52 Cal.4th 856, 946, internal quotation marks omitted.)

Defendant's reliance on the prosecutor's theory of the case to show insufficient evidence "fails because theories suggested by the prosecutor are not the sole theories the jury may consider in making its determination of guilt." (***People v. Clark*** (2011) 52 Cal.4th 856, 947, citing ***People v. Perez*** (1992) 2 Cal.4th 1117, 1126.)

The only intent required for the robbery-murder special circumstance is finding the intent to commit the robbery before or during the killing. If the intent to steal arose after the victim was assaulted, the robbery element of stealing by force or fear is absent. (***People v. Lindberg*** (2009) 45 Cal.4th 1, 27-28; ***People v. Huggins*** (2006) 38 Cal.4th 175, 215; ***People v. Morris*** (1988) 46 Cal.3d 1, 19.)

A trial court is not required to instruct sua sponte with the second optional paragraph of the robbery-murder special-circumstance instruction (CALJIC No. 8.81.17) when the evidence does not support an inference that the defendant might have intended to murder the victim without having an independent intent to commit the specified felony. (***People v. Wilson*** (2008) 43 Cal.4th 1, 18.)

§ 7.52.3 Sufficiency of Evidence of Robbery-Murder

"[W]hen one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (***People v.***

Letner & Tobin (2010) 50 Cal.4th 99, 164, 166, internal quotation marks omitted; ***People v. Kelly*** (2007) 42 Cal.4th 763, 788 [same].)

While the "absence of evidence of motive may tend to show a defendant is not guilty, motive itself is not a necessary element of robbery." (***People v. Clark*** (2011) 52 Cal.4th 856, 946.)

Although there have been cases where a defendant's unemployment or financial status is relevant and admissible evidence in proving a robbery charge, it was not permissible to admit evidence of the defendant's poverty where there was no basis for admitting such evidence for the limited purpose of rebutting an assertion that the defendant did not commit the charged offenses because he did not need the money. Instead, here, the evidence was improperly admitted before the defendant testified in his own behalf, and there was no evidence that the defendant had suddenly come into possession of a greater than usual sum of money after the crimes. However, the error in admitting the evidence was not prejudicial because the defendant's employment status and limited income was subsequently admitted for proper purposes through the defendant's testimony, and in later rebuttal to support expert testimony that the defendant had an antisocial personality disorder. (***People v. Clark*** (2011) 52 Cal.4th 856, 929-930.)

The jury reasonably could find that the defendants committed a robbery and intentional murder while engaged in a robbery based on their being in possession of the victim's car, shortly after she was violently murdered. (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 164, 166.)

There was sufficient evidence of the robbery-murder special circumstance where an employee of a bar was found repeatedly stabbed next to a floor safe hidden in the back room of the bar, the contents of her purse were strewn about the floor, she was attacked after the bar closed, and the lid to the bar's floor safe was not in place when the police arrived at the crime scene. (***People v. Elliot*** (2005) 37 Cal.4th 453, 470.)

The robbery special circumstance was upheld where defendant forced the victim to write a check, had the check cashed, and several hours later killed the victim. (***People v. Fields*** (1983) 35 Cal.3d 329, 363-368.)

"Where a person is left dead or dying in 'relative proximity' to property that was taken, and such property is later found in a defendant's possession, the jury is entitled to infer that the victim was robbed and that the defendant committed the crime. [Citations.] Such facts *support* a robbery conviction. They do not prevent or undermine it." (***People v. DePriest*** (2007) 42 Cal.4th 1, 47.)

The pattern of the defendant befriending women at a fitness center, luring them to his home, and raping and robbing them shows that his acquiring property from women he befriended was not a mere afterthought and instead at least a concurrent motivation. (***People v. Kelly*** (2007) 42 Cal.4th 763, 785, 788-789.)

The defendant's possession of the underwear of the victims he had stabbed to death constituted sufficient evidence to support the true finding of the robbery special circumstance. (***People v. Robertson*** (1982) 33 Cal.3d 21, 52.)

"If the other elements are satisfied, the crime of robbery is complete without regard to the value of the property taken." (***People v. Clark*** (2011) 52 Cal.4th 856, 943, internal quotation marks omitted.)

While the jury's finding the defendant not guilty of burglary means the jury necessarily concluded the defendant did not enter the victim's apartment with a larcenous intent, that does not foreclose the jury having concluded that once defendant realized he was alone with the victim, he seized the opportunity to rob her. A reasonable juror could have concluded the defendant decided to steal the victim's belongings before killing her and that stealing was not an afterthought based on the amount of time it took the defendant to arm himself, attack and kill the victim, and then attempt to clean up. (***People v. Harris*** (2013) 57 Cal.4th 804, 851.)

§ 7.52.3.1 By "Force or Fear"

A victim of robbery may be unconscious or even dead when property is taken, as long as the defendant uses force against the victim to take the property. (***People v. Abilez*** (2007) 41 Cal.4th 472, 507.)

"'When a killer's ***only*** assaultive conduct occurs *before* forming the intent to steal, a robbery has not occurred, because there is no union of act and larcenous intent.'" (***People v. Carrington*** (2009) 47 Cal.4th 145, 186, emphasis in original, quoting ***People v. Seaton*** (2001) 26 Cal.4th 598, 644.)

§ 7.52.3.2 "From Person or Immediate Presence"

The zone of immediate presence includes the area within which the victim could reasonably be expected to exercise some physical control over his or her property. (***People v. Abilez*** (2007) 41 Cal.4th 472, 507.)

The jury could reasonably find that at least some of the victim's property (e.g., car keys) were on her person or in her immediate presence when force or fear was used to take her property. (***People v. Kelly*** (2007) 42 Cal.4th 763, 788.)

While it is not possible to rob someone who is already dead when the defendant first arrives on scene, the defendant can rob a living person by killing that person and then taking his property. (***People v. Abilez*** (2007) 41 Cal.4th 472, 507-508.)

§ 7.52.4 Conclusion of Robbery / Temporary Place of Safety

For purposes of the robbery-murder special circumstance, a robbery continues until the defendant reaches a temporary place of safety. (***People v. Thompson*** (1990) 50 Cal.3d 134, 176, overruled on other grounds, *People v. Cahill* (1993) 5 Cal.4th 478, 509-510; ***People v. Fields*** (1983) 35 Cal.3d 329, 365-368.)

The defendant had not reached a place of temporary safety because he kidnapped the victim and kept the victim with him after the robbery, thus placing himself in continuous jeopardy. (***People v. Stankewitz*** (1990) 51 Cal.3d 72, 101; ***People v. Fields*** (1983) 35 Cal.3d 329, 363-368.)

W. SODOMY – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(17)(D)) [§ 7.53]

Sufficient evidence supported sodomy special circumstance including evidence that the victim was alive at time of penetration. (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1323-1324.)

When an individual attempts to rape or sodomize a victim, reasonably or mistakenly believing the victim is alive, the perpetrator is guilty of having attempted the underlying felony. (***People v. Hart*** (1999) 20 Cal.4th 546, 611.)

Evidence of hatred and anger toward the mother was a sufficient basis from which to infer the intent to humiliate and injure her by sodomizing before killing her. Nothing suggested the defendant's forcible sodomy of his mother was merely incidental to murder. (***People v. Abilez*** (2007) 41 Cal.4th 472, 511-512.)

The trial court properly admitted expert testimony from a pathologist, including an opinion that the victim had been raped and sodomized before her death. The challenged opinion fell within the education, training and experience of the veteran forensic pathologist with extensive experience and familiarity with rape murder cases. (***People v. Jones*** (2012) 54 Cal.4th 1, 57-59.)

X. TORTURE – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(18)) [§ 7.54]

§ 7.54.1 Generally

The torture-murder special circumstance sufficiently channels and limits the jury's sentencing discretion, and meaningfully narrows the group of persons subject to the death penalty. (***People v. Smith*** (2015) 61 Cal.4th 18, 53 ["settled view on the constitutional sufficiency of the torture special-circumstance not undermined]; ***People v. Streeter*** (2012) 54 Cal.4th 205, 250; ***People v. Barnett*** (1998) 17 Cal.4th 1044, 1162.)

The intent to torture "is a state of mind which, unless established by the *defendant's own statements* (or by another witness's description of a defendant's behavior in committing the offenses), must be proved by the *circumstances surrounding the commission of the offense*, which include *the nature and severity of the victim's wounds*." (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1137, emphasis in original, internal citations omitted; ***People v. Smith*** (2015) 61 Cal.4th 18, 52 [same].)

"Unlike first degree murder by torture, [a torture-murder] special circumstance does not require that the acts constituting the torture cause the death. Rather, some proximity in time [and] space between the murder and torture will suffice. Whatever the outer limits of the torture-murder special circumstance might be in this regard, the proximity requirement is satisfied when the acts of torture also were a cause of death." (***People v. Jennings*** (2010) 50 Cal.4th 616, 648, internal citations & quotation marks omitted; ***People v. Bemore*** (2000) 22 Cal.4th 809, 843-844; ***People v. Barnett*** (1998) 17 Cal.4th 1044, 1161-1162.)

On June 9, 1990, Proposition 115 amended Penal Code section 190.2, subdivision (a)(18), and deleted language relating to the infliction of extreme physical pain in the special circumstance. This amendment did not change the intent requirement for the torture-murder special circumstance. "Consistent with decisions interpreting Penal Code section 190.2, subdivision (a)(18), prior to its 1990 amendment, we conclude that for an intentional murder to involve 'the infliction of torture' under Penal Code section 190.2, subdivision (a)(18), as amended by Proposition 115, the requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (***People v. Elliot*** (2005) 37 Cal.4th 453, 477-479.)

The torture special circumstance does not require premeditated and deliberate intent to torture or that the victim subjectively experienced pain. "'Distilled, the statutory language requires intent to kill, intent to torture, and infliction of an extremely painful act upon a living victim.'" (***People v. Edwards*** (2013) 57 Cal.4th 658, 718, quoting ***People v. Bemore*** (2000) 22 Cal.4th 809, 839.)

A torture special circumstance cannot be found true on an aiding-and-abetting theory absent finding the defendant intended to inflict extreme pain and suffering on the victim and intended to kill. (***People v. Pearson*** (2012) 53 Cal.4th 306, 321-323.)

The evidence supporting a torture special circumstance (that murder was intentional and involved infliction of torture) of a four-year-old child was overwhelming where the "injuries were such that an intent to inflict extreme and prolonged pain for a sadistic purpose was obvious." (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1274.)

§ 7.54.2 Distinguish From First Degree Murder by Torture (Pen. Code § 189)

Cross-Reference: § 6.60, *re* First degree murder – torture

The special circumstance is distinguished from murder by torture under Penal Code section 189, because under Penal Code section 190.2, subdivision (a)(18), the defendant must have acted with the intent to kill. (***People v. Edwards*** (2013) 57 Cal.4th 658, 718; ***People v. Cole*** (2004) 33 Cal.4th 1158, 1227-1228; ***People v. Davenport*** (1985) 41 Cal.3d 247, 271, superseded by statute on other grounds as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140.)

The torture-murder special circumstance, unlike first degree torture-murder, does not require a causal relationship between the acts of torture and the death. Therefore, the prosecution is not required to prove that the acts of torture were the cause of the victim's death in order to establish the special circumstance. (***People v. Edwards*** (2013) 57 Cal.4th 658, 718; ***People v. Chatman*** (2006) 38 Cal.4th 344, 392, 394; ***People v. Bemore*** (2000) 22 Cal.4th 809, 842-843; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 141-142.)

The torture-murder special circumstance is not unconstitutionally vague and adequately distinguishes between death-eligible torture-murderers and other torture-murderers. (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1251.)

§ 7.54.3 Evidence of Torture

The California Supreme Court has cautioned against giving undue weight to the severity of a victim's wounds as "severe injuries may also be consistent with the desire to kill, the heat of passion, or an explosion of violence." (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1137.)

"[S]omeone who sets a person on fire with gasoline clearly intends to inflict extreme and prolonged pain on that person. Moreover, after defendant set [his victim] on fire, he fled from the scene and failed to aid in rescue attempts. Such evidence, together with the resulting condition of [his victim's] body and her painful, prolonged death 10 days later permitted an inference that defendant set [the victim] on fire with the intent to inflict extreme pain for the purpose of revenge." (***People v. Streeter*** (2012) 54 Cal.4th 205, 245-246, internal quotation marks & citations omitted.)

Torture-murder special circumstances have been upheld where "evidence has shown that the defendant deliberately inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering." (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1137-1138.)

Sufficient evidence supported the torture-murder special circumstance where the defendant "methodically poured" hot oil on multiple portions of the victim's body. (***People v. Whisenhunt*** (2008) 44 Cal.4th 174, 201.)

Sufficient evidence supported the torture-murder special circumstance where the defendant kicked and beat the victim with a stick for a long period while the victim lay unresisting in the street. (***People v. Cook*** (2006) 39 Cal.4th 566, 602-603.)

The torture-murder special circumstance was not supported by sufficient evidence where there was no evidence the defendant was angry or had other motive to inflict "pain in addition to the pain of death" or evidence the defendant "deliberately inflicted nonfatal wounds to the victim in an attempt to increase her suffering." (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1137-1138.)

All the circumstances surrounding the killing can be considered in determining whether the victim was tortured. "Consistent with this general rule, acts following the alleged torture can shed light on a defendant's earlier intent." (***People v. Elliot*** (2005) 37 Cal.4th 453, 474 [finding no error from trial court's refusal to instruct jury that it could not consider anything other than the victim's pre-mortem wounds in deciding whether victim was tortured and concluding proposed instruction misstated the law]; ***People v. Cole*** (2004) 33 Cal.4th 1158, 1214 [finding defendant's statements following an attack on his wife to be probative of an intent to torture].)

The nature of the victim's wounds and other circumstances of the killing adequately supported the special-circumstance finding where the victim sustained 81 pre-mortem stab and slash wounds, only 3 wounds were potentially fatal, and some wounds suggested a meticulous, controlled approach (eyelids split by knife, but eyeballs unharmed), and evidence suggesting the victim (evening bartender responsible for closing) may have been tortured in an effort to reveal the combination to the bar's safe (floor safe's lid was not in place when officers arrived at crime scene). (***People v. Elliot*** (2005) 37 Cal.4th 453, 466-469; see also ***People v. Davenport*** (1995) 11 Cal.4th 1171, 1219 [evidence of vicious beating and knife wounds endured by the victim while alive and struggling would support a finding of torture], abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

The fact that evidence shows a violent struggle occurred at some point during the attack does not necessarily mean that all of the victim's wounds were inflicted during a fight as opposed to torture. "[T]he fact that a struggle may have occurred is not inherently inconsistent with a murder by torture. Indeed, it would be expected that someone would resist being tortured, and put up a struggle. The existence *vel non* of evidence of a struggle is simply another circumstance for the trier of fact to consider in deciding whether a victim was tortured." (***People v. Elliot*** (2005) 37 Cal.4th 453, 468.)

The California Supreme Court has "never held that a failure to bind or gag a victim necessarily precludes a finding that the victim was tortured." Evidence as to whether a "victim was or was not restrained is merely another consideration for the finder

of fact to take into account in determining whether a defendant committed murder by torture." (***People v. Elliot*** (2005) 37 Cal.4th 453, 468, fn. 4.)

The prosecutor's argument asking the jury to consider the victim's awareness of pain was directly relevant to the disputed issue of torture-murder even though awareness of pain is not an element of the torture-murder special circumstance. However, the prosecutor's rhetorical questions such as, "When is it going to end? Am I going to die? Is this it? And if I'm going to die, why doesn't he just cut my throat? Why doesn't he knock me out? That doesn't happen," might have moved from appropriate argument regarding torture to an improper attempt to invoke sympathy. (***People v. Chatman*** (2006) 38 Cal.4th 344, 388-389.)

The defendant's pre-offense statement, that if he committed another robbery he would kill the victim to avoid being identified, constituted strong evidence of intent to kill, but not evidence from which a reasonable trier of fact could infer the victim was beaten for a sadistic purpose. Moreover, while the killing was "brutal and savage," and there were defensive wounds to the victim's hands, and minor wounds to the arms and shoulders, nothing in the nature of the victim's injuries suggested infliction of any attempt to torture as opposed to kill the victim. (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1137.)

The trial court properly exercised its discretion in admitting a tape recording of the victim's screams during the ambulance ride to the hospital. The ambulance tape was highly relevant to issues relating to torture murder and the torture-murder special circumstance. (***People v. Streeter*** (2012) 54 Cal.4th 205, 264.)

§ 7.54.4 Jury Instructions

A jury instruction which included the term "sadistic purpose" is not unconstitutionally vague. The instruction given (CALJIC No. 8.81.18) has been approved as a correct statement of the law. (***People v. Smith*** (2015) 61 Cal.4th 18, 53 & fn. 15; ***People v. Streeter*** (2012) 54 Cal.4th 205, 250; ***People v. Whisenhunt*** (2008) 44 Cal.4th 174, 223; ***People v. Raley*** (1992) 2 Cal.4th 870, 898-902.)

Where an instruction required the jury to find that the murder was intentional and "involved the infliction of torture," the instruction necessarily implies an "intent to torture." Further, the failure to instruct on intent to torture was harmless because there was no reasonable likelihood the jury understood the instructions as not requiring intent to torture, particularly in light of the other instructions given and where the prosecutor's arguments stressed the intent element. (***People v. Proctor*** (1992) 4 Cal.4th 499, 533-535; ***People v. Mincey*** (1992) 2 Cal.4th 408, 456; compare ***People v. Pensinger*** (1991) 52 Cal.3d 1210, 1254-1255 [failure to instruct that the special circumstance required proof of intent to inflict torture requires reversal where there is no overwhelming evidence to establish the intent to torture and neither counsel discussed intent in their arguments to the jury]; see also ***People v. Morales*** (1989) 48 Cal.3d 527, 562 [although

jury not instructed on proof of intent for special circumstance, jury necessarily found an intent to cause extreme pain when it found murder was premeditated and deliberate and the victim was aware of extreme pain], overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

There was no error in refusing to instruct that the torture special circumstance requires the jury to find that defendant "harbored a premeditated intent to inflict prolonged pain." (***People v. Elliot*** (2005) 37 Cal.4th 453, 477-479.)

Where the defendant was charged with first degree murder by torture, and was not charged with a separate substantive offense of torture, or the torture special circumstance, the trial court has no duty to instruct on either the crime of torture or the torture special circumstance. (***People v. Hoyos*** (2007) 41 Cal.4th 872, 915, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641.)

An instruction on torture-murder special-circumstance referencing "a defendant" as opposed to "the defendant" was erroneous in failing to convey the requirement that each defendant individually intended to kill the victim. (See ***People v. Davenport*** (1985) 41 Cal.3d 247, 271 [torture-murder special circumstance requires proof of intent to kill and to torture the victim].) However, the error was harmless under any standard given the substantial evidence of the defendant's intent and the absence of any indication in the record that jurors were confused by the instruction. The jury's finding regarding the other elements of the torture instruction precluded the possibility that it would not have found intent to torture. (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1216-1220, disapproved on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Wilson*** (2008) 44 Cal.4th 758, 802-804 [same].)

Providing the jury with an erroneous instruction requiring a finding of infliction of pain upon a living victim, when that requirement was eliminated in 1990 by Proposition 115, does not entitle the defendant to relief since "the required finding of an additional but unnecessary 'element' could redound only to defendant's benefit." (***People v. Streeter*** (2012) 54 Cal.4th 205, 250.)

Y. UNLAWFUL PENETRATION WITH A FOREIGN OBJECT – SPECIAL CIRCUMSTANCE (Prop. 15 – 1990) (Pen. Code § 190.2(a)(17)) [§ 7.55]

Enactment of the unlawful-penetration special circumstance did not render the California death penalty unconstitutionally broad. (***People v. Morgan*** (2007) 42 Cal.4th 593, 622.)

Z. WITNESS KILLING – SPECIAL CIRCUMSTANCE (Pen. Code § 190.2(a)(10)) [§ 7.56]

§ 7.56.1 Generally

There are three elements of the witness-killing special circumstance: (1) a victim who has witnessed a crime prior to and separate from the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed. (***People v. Clark*** (2011) 52 Cal.4th 856, 952; ***People v. San Nicolas*** (2004) 34 Cal.4th 614, 654.)

Penal Code section 190.2, subdivision (a)(10), addresses two separate situations in which a witness-related killing will be a special circumstance. The special circumstance applies to (i) the intentional killing of a victim to *prevent* his testimony in any criminal proceeding (when the killing was not committed during the commission or attempted commission of the crime to which he was a witness), or (ii) the intentional killing of a victim who was a witness to a crime in *retaliation* for that witness's testimony in any criminal proceeding. (***People v. Allen*** (1986) 42 Cal.3d 1222, 1273.)

Even if the evidence supports both theories under Penal Code section 190.2, subdivision (a)(10), the People may not charge and have the jury find two special circumstances. However, evidence supporting alternative theories may be presented to the jury. (***People v. Allen*** (1986) 42 Cal.3d 1222, 1273.)

The witness-killing special circumstance is not unconstitutional because it applies only to witnesses in criminal, as opposed to juvenile, proceedings, and applies only to killings to prevent testimony as opposed to preventing a crime report or arrest, or to killings in retaliation for testimony. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 724.)

The witness-killing special circumstance adequately narrows the class of offenders subject to the death penalty and is not unconstitutionally vague. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 725-726.)

§ 7.56.2 Victim Must Be Witness to Prior, Separate Criminal Transaction

Penal Code section 190.2, subdivision (a)(10), does not apply where the victim is killed to prevent the victim from witnessing the crime, because the statute clearly requires the victim to actually witness a crime. (***People v. Garrison*** (1989) 47 Cal.3d 746, 792.)

A witness-murder special-circumstance finding must fail if the killing was committed during the commission or attempted commission of the crime to which the victim was a witness, or if the witness-killing was part of one continuous criminal transaction. In determining whether the crimes are part of one continuous transaction, the time lag between the witnessed crime and the killing does not matter so much as whether the defendant shows a common criminal intent toward all the victims upon the initiation

of the first criminal act. (***People v. Clark*** (2011) 52 Cal.4th 856, 953-954; ***People v. San Nicolas*** (2004) 34 Cal.4th 614, 655; ***People v. Benson*** (1990) 52 Cal.3d 754, 784-785; ***People v. Silva*** (1988) 45 Cal.3d 604, 631.)

Sufficient evidence showed the defendant did not initially harbor a common criminal intent as to both of his victims where the evidence showed the defendant drove two girls to a location with intention of getting one of the girls alone and engaging in sexual intercourse. Nothing in the record suggests the defendant considered any criminal conduct toward the witness/victim until she interfered with his plans for his other victim. (***People v. Clark*** (2011) 52 Cal.4th 856, 954.)

After the defendant had killed his wife, he initiated a second criminal transaction, when he noticed that his wife's niece had seen him covered in blood, and he decided to kill her. (***People v. San Nicolas*** (2004) 34 Cal.4th 614, 656.)

§ 7.56.3 Defendant's Intent

The witness-killing special circumstance requires a willful, deliberate, and premeditated killing; and it is the accused's subjective intent that is crucial to establishing the special circumstance. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 707.)

The witness-killing special circumstance applies even where defendant harbors other motives to kill the victim besides presenting the witness's testimony. (***People v. Clark*** (2011) 52 Cal.4th 856, 954; ***People v. San Nicolas*** (2004) 34 Cal.4th 614, 656; ***People v. Stanley*** (1995) 10 Cal.4th 764, 800-801; ***People v. Sanders*** (1990) 51 Cal.3d 471, 519-520.)

§ 7.56.4 Nature of Criminal Proceedings

The witness-killing special circumstance is applicable if the defendant *believes* the victim will be a witness in a criminal prosecution, whether or not such a proceeding is pending or about to be initiated. (***People v. Jenkins*** (2000) 22 Cal.4th 900, 1018; ***People v. Weidert*** (1985) 39 Cal.3d 836, 853-855.)

The witness-killing special circumstance unambiguously applies to "any criminal proceeding," which includes witnesses killed to prevent, or in retaliation for, their testimony at hearings to obtain search warrants (Pen. Code, § 1526(b)). (***People v. Silverbrand*** (1990) 220 Cal.App.3d 1621, 1630.)

§ 7.56.4.1 Juvenile Proceedings

The 1978 special circumstance only applies to the killing of witnesses in criminal proceedings and thus does not apply to witnesses in a juvenile proceeding. (***People v. Weidert*** (1985) 39 Cal.3d 836, 843-844.) A special circumstance, however, can be

charged for the intentional killing of a witness in a juvenile proceeding committed after June 9, 1990. (Prop. 115, amending Pen. Code, § 190.2(a)(10).)

§ 7.56.5 Nature of Testimony of Witness

To support the retaliatory witness-killing special circumstance, it is only necessary to show the witness was killed for the act of testifying, regardless of the content of the testimony. (***People v. Bolter*** (2001) 90 Cal.App.4th 240, 244.)

Neither the language of the witness-killing special circumstance nor past decisions of the California Supreme Court require that the witness be an "eyewitness." (***People v. Clark*** (2016) 63 Cal.4th 522, 628; ***People v. San Nicolas*** (2004) 34 Cal.4th 614, 656; ***People v. Jones*** (1996) 13 Cal.4th 535, 550.)

AA. WITNESS KILLING – JUVENILE PROCEEDING [§ 7.57]

Section 10 of Proposition 115 amended Penal Code section 190.2, subdivision (a)(10), on June 6, 1990, so that the special circumstance for the killing of a witness includes a witness in a juvenile proceeding under sections 602 or 707 of the Welfare and Institutions Code. This amendment abrogates the California Supreme Court decision in ***People v. Weidert*** (1985) 39 Cal.3d 836, where the court held that this special circumstance did not include the intentional killing of a witness in a juvenile proceeding which is not a criminal proceeding. This amendment does not apply to acts committed before June 6, 1990, since it makes more burdensome the punishment for a crime after its commission.

IV. JURY FINDINGS [§ 7.60]

A jury finding on a special circumstance is not a special verdict within the meaning of Penal Code sections 1150-1152. (***People v. Burgener*** (1986) 41 Cal.3d 505, 537, overruled on other grounds, *People v. Reyes* (1998) 19 Cal.4th 743, 756; ***People v. Davenport*** (1985) 41 Cal.3d 247, 273-275, superseded by statute on other grounds as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140.)

Where the jury found defendant guilty of murder and attempted rape, but could not make a finding on the special circumstance of murder in the commission of a rape or attempted rape, retrial of the special circumstance under Penal Code section 190.4, subdivision (a), does not constitute double jeopardy, even though the judge did not instruct the jury that the defendant had already been convicted of attempted rape. (***People v. Ghent*** (1987) 43 Cal.3d 739, 760.)

A jury finding on a special circumstance may not be broader than the allegation of the special circumstance in the information. (***People v. Valencia*** (1980) 112 Cal.App.3d 939.)

Special jury findings on special-circumstance issues such as intent, personal killing, "in the commission of," etc., are not unauthorized "special verdicts" under Penal Code section 1150. (***People v. Neely*** (1993) 6 Cal.4th 877, 898; ***People v. Daniels*** (1991) 52 Cal.3d 815, 872, reversed on other grounds, *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181; ***People v. Miranda*** (1987) 44 Cal.3d 57, 89-90, overruled on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; ***People v. Davenport*** (1985) 41 Cal.3d 247, 273-275, superseded by statute on other grounds as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140; ***People v. Phillips*** (1985) 41 Cal.3d 29, 59.)

A. EXPRESS SPECIAL JURY FINDINGS NOT REQUIRED [§ 7.61]

Where the jury findings at the guilt phase imply a finding that the defendant actually killed or intended to kill, the California Supreme Court may determine that those implied findings are supported by the evidence, and may adopt them as their own. (***People v. Siripongs*** (1988) 45 Cal.3d 548, 586.)

The jury is not required to make any special findings regarding the special circumstances beyond "what the statutory language calls for: a finding of the truth or lack of truth of each circumstance, not the facts upon which the finding is based." (***People v. Kaurish*** (1990) 52 Cal.3d 648, 697; ***People v. Belmontes*** (1988) 45 Cal.3d 744, 792, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, and *People v. Cortez* (2016) 63 Cal.4th 101, 118; ***People v. Ghent*** (1987) 43 Cal.3d 739, 762-763; ***People v. Davenport*** (1985) 41 Cal.3d 247, 275, superseded by statute on other grounds as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140.)

V. POWER TO STRIKE [§ 7.70]

A. CRIME COMMITTED PRIOR TO JUNE 6, 1990 – POWER TO STRIKE SPECIAL CIRCUMSTANCES UNDER PENAL CODE, § 1385 [§ 7.71]

The trial court has the power to dismiss a special-circumstance finding pursuant to Penal Code section 1385 in order to modify a sentence of life without the possibility of parole to a sentence of life with the possibility of parole. (***People v. Williams*** (1981) 30 Cal.3d 470, 490, superseded by statute as stated in *People v. Mendoza* (2011) 52 Cal.4th 1056, 1077, fn. 11; but see Prop. 115 – Pen. Code, § 1385.1.)

However, the court has expressly declined to rule on the question whether Penal Code section 1385 empowers the judge to strike the specials after the jury has returned a verdict of death. (***People v. Fierro*** (1991) 1 Cal.4th 173, 255, disapproved on other grounds by *People v. Thomas* (2012) 54 Cal.4th 908, 941, and *People v. Letner & Tobin*

(2010) 50 Cal.4th 99, 205; ***People v. Heishman*** (1988) 45 Cal.3d 147, 204, abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190; ***People v. Williams*** (1981) 30 Cal.3d 470, 490, fn. 11, superseded by statute as stated in *People v. Mendoza* (2011) 52 Cal.4th 1056, 1077, fn. 11.)

Dismissal of special circumstances under Penal Code section 1385 mandates a statement of reasons to permit appellate review of the possible abuse of the court's discretion. (***People v. Harris*** (1991) 227 Cal.App.3d 1223, 1228-1229.)

While the trial court may strike special circumstances under Penal Code section 1385, it has no authority to enter an order limiting the ultimate punishment while leaving the special circumstances intact. (***People v. Superior Court (Bridgette)*** (1987) 189 Cal.App.3d 1649, 1652.)

B. CRIMES COMMITTED AFTER JUNE 6, 1990 (Prop. 115) – NO POWER TO STRIKE SPECIAL CIRCUMSTANCES [§ 7.72]

Section 26 of Proposition 115 adds section 1385.1 to the Penal Code. It provides that, notwithstanding Penal Code section 1385 or any provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by plea or found by a jury or a court.

The trial court had no authority to strike the lying-in-wait special circumstance. (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1077, citing Pen. Code, § 1385.1, and ***People v. Lewis*** (2004) 33 Cal.4th 214, 228.)

The People may seek review and correction of a trial court's erroneous striking of a special circumstance in a defendant's automatic appeal under the authority of Penal Code section 1252. (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1077.)

Chapter Eight
TRIAL – PRESENTING EVIDENCE

I. ACCOMPLICES [§ 8.10]

The testimony of an accomplice must be corroborated by other evidence that tends to connect the defendant to the evidence. An accomplice is someone who is liable for the prosecution for the identical offense as the one charged against the defendant on trial wherein the testimony from an accomplice is given. If there is evidence from which the jury could find the witness is an accomplice, the trial court is required to instruct on accomplice testimony. (***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1352, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.)

An agreement for testimony between the prosecution and an accomplice, conditioned upon the full and truthful testimony of the accomplice, does not violate due process. (***People v. Riel*** (2000) 22 Cal.4th 1153, 1179; ***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1219-1220.)

A grant of immunity subject to the condition the accomplice testify substantially in conformity with an earlier statement given to police, or that the testimony result in the defendant's conviction, renders the testimony tainted beyond redemption and its admission denies the defendant a fair trial. (***People v. Avila*** (2006) 38 Cal.4th 491, 594-595.)

It is the defendant's burden to prove, by a preponderance of the evidence, that the witness was an accomplice. (CALJIC No. 3.19; ***People v. Frye*** (1998) 18 Cal.4th 894, 967-969, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1114; ***People v. Fauber*** (1992) 2 Cal.4th 792, 833-834.)

The fact a witness was at the scene of the crime and had intimate knowledge of the crime, without more, merely means he was an eyewitness and not necessarily an accomplice. (***People v. Lewis*** (2001) 26 Cal.4th 334, 369.)

An accessory is not an accomplice. (***People v. Boyer*** (2006) 38 Cal.4th 412, 467; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1114.)

Accomplice testimony cannot be corroborated by testimony of other accomplices or the accomplice himself. (***People v. Whalen*** (2013) 56 Cal.4th 1, 55, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17; ***People v. Davis*** (2005) 36 Cal.4th 510, 543.)

Corroborating evidence may be slight and entirely circumstantial. (***People v. Whalen*** (2013) 56 Cal.4th 1, 55, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1; ***People v. Lewis*** (2001) 26 Cal.4th 334, 370.)

The usual problem with accomplice testimony, that it is self-interested and calculated, is not present in an out-of-court statement that is sufficiently reliable to be

allowed in evidence, and thus the trial court was not required to instruct the jury to view the statement with caution and to require corroboration. (***People v. Brown*** (2003) 31 Cal.4th 518, 555-556 [declaration against penal interest].)

> *Cross-Reference*: § 11.12, *re* Accomplice testimony

II. CIRCUMSTANTIAL EVIDENCE [§ 8.20]

Evidence of the defendant's indebtedness and relative poverty may be admitted, without undue prejudice where the defendant was of limited means, in order to eliminate other possible explanations for a defendant's sudden wealth after a theft offense. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 96, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1024.)

"'If a man is notoriously broke and cannot buy a pack of cigarettes Tuesday, that night a laundromat is burglarized, and on Wednesday the man buys a carton of cigarettes and a $40 bottle of scotch, all with quarters, the man's financial circumstances have obvious and significant probative value.'" (***People v. Cornwell*** (2005) 37 Cal.4th 50, 97 (overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), quoting ***United States v. Mitchell*** (9th Cir. 1999) 172 F.3d 1104, 1108.)

III. CONSCIOUSNESS OF GUILT [§ 8.30]

Even when the defendant concedes some aspect of the criminal charge, the prosecution is entitled to bolster its case by presenting evidence of consciousness of guilt. (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1160, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"An attempt to fabricate evidence may manifest a defendant's consciousness of guilt, but only if the attempt was made by the defendant or by another with the defendant's knowledge or authorization." (***People v. Nelson*** (2011) 51 Cal.4th 198, 213-214.)

The defendant's refusal to remove his sunglasses after being ordered to do so in order for a witness to better identify him was admissible as evidence of consciousness of guilt. (***People v. Ramirez*** (2006) 39 Cal.4th 398,456.)

"Evidence of a planned escape permits an inference of consciousness of guilt, even if the escape was not actually attempted." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 38.)

IV. DEMONSTRATIVE EVIDENCE [§ 8.40]

"As a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even it is grim. Photographs and other graphic evidence are not rendered irrelevant or inadmissible simply because they duplicate testimony, depict uncontested facts, or trigger an offer to stipulate." (***People v. Thomas*** (2012) 53 Cal.4th 771, 806, internal citations & quotation marks omitted.)

A. ARTISTIC RENDERINGS OF CRIME SCENES [§ 8.41]

The requirements for admissibility of artists renderings of a crime scenes are analogous to those for videos of crime scenes, i.e., the trial court must determine whether it is a reasonable representation of what it is alleged to portray and whether its use would assist jurors in determining the facts or serve to mislead jurors. There is no abuse of discretion where the "prosecution establishes that the drawings accurately depicted the scenes observed by the witnesses in relevant respects, and the trial court could reasonably conclude that the drawings would assist the jurors in understanding the testimony." (***People v. Thomas*** (2012) 53 Cal.4th 771, 804.)

Artist renderings are not testimonial hearsay and do not implicate the right of confrontation because the exhibits are admitted solely for the purpose of illustrating the witnesses' testimony, not to prove the truth of the matter asserted. (***People v. Thomas*** (2012) 53 Cal.4th 771, 803.)

B. COMPUTER-GENERATED EVIDENCE [§ 8.42]

"Animation is merely used to illustrate an expert's testimony while simulations contain scientific or physical principles requiring validation. Animations do not draw conclusions; they attempt to recreate a scene or process, thus they are treated like demonstrative aids. Computer simulations are created by entering data into computer models which analyze the data and reach a conclusion. In other words, a computer animation is demonstrative evidence offered to help a jury understand expert testimony or other substantive evidence; a computer simulation, by contrast, is itself substantive evidence. [¶] Courts have compared computer animations to classic forms of demonstrative evidence such as charts or diagrams that illustrate expert testimony." (***People v. Duenas*** (2012) 55 Cal.4th 1, 20, internal quotation marks & citations omitted.)

"A computer animation is admissible if it is a fair and accurate representation of the evidence to which it relates….A computer simulation, by contrast, is admissible only after a preliminary showing that any new scientific technique used to develop the simulation has gained general acceptance in the relevant scientific community. (***People v. Duenas*** (2012) 55 Cal.4th 1, 20-21, internal quotation marks & citations omitted.)

A trial court's decision to admit computer animation evidence is reviewed for abuse of discretion. (***People v. Duenas*** (2012) 55 Cal.4th 1, 21.)

C. MANNEQUINS [§ 8.43]

Use of life-size mannequins to illustrate the coroner's testimony regarding the wounds and trajectories of bullets was proper. (***People v. Thomas*** (2012) 53 Cal.4th 771, 805-806.)

The trial court did not err in permitting the use of a mannequin "described in the record as a 'foam doll' about 38 inches tall, [which] was briefly grasped by the [medical] examiner during his testimony to show how [a four-year-old victim] must have been grabbed from behind." The defense claim that "deployment of the mannequin" was "an improper appeal to the jurors' emotions" was rejected as "unfounded." (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1271.)

It was proper to use a mannequin to demonstrate the path of bullets through the victim, where it was relevant to a hotly disputed question of whether one bullet had been fired from inside a car. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1292.)

The use of a mannequin was proper to illustrate an execution-style killing, which was relevant to intent to kill and identity. (***People v. Medina*** (1995) 11 Cal.4th 694, 754.)

Use of a styrofoam head and a probe to show a shotgun-blast trajectory was not unduly prejudicial. (***People v. Jackson*** (1996) 13 Cal.4th 1164, 1217.)

D. PHOTOGRAPHS [§ 8.44]

A trial court's decision to admit photographs into evidence will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by undue prejudicial effect. (***People v. Peoples*** (2016) 62 Cal.4th 718, 748; ***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1351, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.)

"[P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses and do not have to forgo use of photographic evidence merely because the defendant agrees with a witness or stipulates to a fact. The jury is entitled to see the physical details of the crime scene and the injuries defendant inflicted on his victims." (***People v. Cage*** (2015) 62 Cal.4th 256, 283, internal quotation marks & citations omitted.)

The prosecution is "not obligated to 'accept antiseptic stipulations in lieu of photographic evidence.'" (***People v. Blacksher*** (2011) 52 Cal.4th 769, 827, quoting ***People v. Loker*** (2008) 44 Cal.4th 691, 705.)

"The photographs at issue here are gruesome because the charged offenses were gruesome, but they did no more than accurately portray the shocking nature of the crimes. The jury can, and must, be shielded from depictions that sensationalize the alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors." (***People v. Streeter*** (2012) 54 Cal.4th 205, 238, internal quotation marks & citations omitted; ***People v. Ramirez*** (2006) 39 Cal.4th 398, 454 [same].)

Photographs were properly admitted where they were relevant to the prosecution's case and none were "so gruesome as to have impermissibly swayed the jury." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 827, internal quotation marks omitted.)

The trial court did not abuse its discretion by admitting photographs of the dog that performed scent trailing connecting the defendant to the crime. "[T]he images were relevant to understanding [the dog's] working conditions. The jurors could see the type of harness she wore, her body language while tracking, and examples of how she would alert [her handler] that she had found the source of the scent she was following. This evidence was relevant to the jurors' assessment of [the handler's] credibility and their overall determination of [the dog's] reliability." (***People v. Jackson*** (2016) 1 Cal.5th 269, 330.)

Even where a photograph of the victim is improperly admitted during the guilt phase, reversal is not warranted unless it is reasonably probable that the outcome would have been more favorable to the defendant had the photograph been excluded. (***People v. Wash*** (1993) 6 Cal.4th 215, 246-247; ***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1230; ***People v. Anderson*** (1990) 52 Cal.3d 453, 474-475.)

§ 8.44.1 Photos of Murder Victim

"[P]hotographs of murder victims are relevant to help prove how the charged crime occurred," and prosecutors are "not limited to details provided by testimony of live witnesses." (***People v. Booker*** (2011) 51 Cal.4th 141, 170-171; ***People v. Gurule*** (2002) 28 Cal.4th 557, 625 ["[P]rosecutors ... are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case."].)

Photographs were properly admitted to corroborate eyewitness identification of the victim and to illustrate forensic expert testimony. "Each photo was properly admitted. All evidence is to be considered as a whole. The mere fact that four properly admitted photographs were mounted on a single board does not approach the threshold for a section 352 exclusion." (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1248.)

Where the probative value of photographs extends beyond the defense offer to stipulate as to certain facts suggested by the photographs, the prosecution cannot be compelled to stipulate. "Despite the graphic nature of some of these photographs, the prosecution may present a persuasive and forceful case, and except as limited by

Evidence Code section 352, is not required to sanitize its evidence." (***People v. Booker*** (2011) 51 Cal.4th 141, 171.)

Photographs highlighting attacks to victims' throats tended to prove intent to kill; the photographs also supported the prosecution argument that the same person committed the crimes; photographs depicting nearly identical states of undress were probative in proving the required mental state. (***People v. Booker*** (2011) 51 Cal.4th 141, 171.)

The trial court did not abuse its discretion in admitting a photograph of the victim's "dead body depict[ing] the full extent of her burns and support[ing] the prosecution's assertion that she was doused with gasoline and then set on fire. Considered in combination with the autopsy evidence showing that [the victim] was alive when she was set on fire, the photograph was probative of both premeditation and torture." (***People v. Brents*** (2012) 53 Cal.4th 535, 617.)

Photographs of the death scene and from the autopsy were properly admitted and were "highly relevant to the circumstances of the crime and the prosecution's theories of lying in wait and premeditated and deliberate murder." (***People v. Cage*** (2015) 62 Cal.4th 256, 283-284.)

Photographs of the burn victim were relevant to show an intent to inflict extreme pain and how, when, and where victim was tortured and murdered. (***People v. Streeter*** (2012) 54 Cal.4th 205, 237-238; ***People v. D'Arcy*** (2010) 48 Cal.4th 257, 298-299; ***People v. Whisenhunt*** (2008) 44 Cal.4th 173, 211-212; ***People v. Brasure*** (2008) 42 Cal.4th 1037, 1054.)

Autopsy photos were properly admitted where they were the only evidence showing the nature and placement of fatal wounds, and a photo illustrating a wound indicating the victim was in a defensive position just before being shot was relevant to the issue of malice and intent to kill. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 827.)

A videotape of a crime scene showing the victim's body in a bathtub with the face submerged in water; then a deputy coroner lifting the body from the bathtub, examining the pillowcase over the head, and cutting the pillowcase to reveal the face, a gag in the mouth, and a sock covering the mouth was properly admitted as relevant to show malice, intent to kill, and that the killing was deliberate and premeditated. (***People v. Sims*** (1993) 5 Cal.4th 405, 451-452.)

§ 8.44.2 Video Reenactments of Crime-Scene Conditions

In determining the admissibility of a videotape, "'a trial court must determine whether: (1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them.'" (***People v. Jones*** (2011) 51 Cal.4th 346, 375, quoting ***People v. Gonzalez*** (2006) 38 Cal.4th 932, 952.)

The trial court properly excluded a videotape proffered for purposes of showing lighting conditions at the time of the crime because the lighting conditions in the video were not sufficiently similar to the lighting conditions on the night of the crime. (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 952.)

With respect to the defendant's complaint that rulings regarding admissibility of videotapes seemingly favored the prosecution, "the fact that trial court rulings discussed on appeal generally favor the prosecution merely reflects the realities of appellate review in criminal cases, not the supposed pro-prosecution proclivities of this or any other court." (***People v. Jones*** (2011) 51 Cal.4th 346, 375-376.)

§ 8.44.3 Photos of Victim While Alive

"'Courts should be cautious in the guilt phase about admitting photographs of murder victims while alive, given the risk that the photograph will merely generate sympathy for the victims. [Citation]. But the possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant. [Citation.]'" (***People v. Suff*** (2014) 58 Cal.4th 1013, 1072, quoting ***People v. Rogers*** (2009) 46 Cal.4th 1136, 1163; ***People v. Harris*** (2005) 37 Cal.4th 310, 331.)

Where the photograph of the victim alive bears on a material issue, the photo is properly admissible. (***People v. Osband*** (1996) 13 Cal.4th 622, 677 [identification of the victim by witnesses who testify to statements or actions by the victim]; ***People v. Cooper*** (1991) 53 Cal.3d 771, 821 [demonstrating the relative physical size of the victims to establish that one person alone could have killed all four victims].)

Photos of victims while alive were properly admitted where two of the three victims in the case were similar in appearance to two of the witnesses, all four had been girlfriends of the defendant, and one victim and one witness had the same first name; thus, admission of the photos met the prosecutor's concern that jurors "'might lose track of who these individuals are'" and to help witnesses "'identify the people they saw in this case.'" (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1163.)

The trial court did not abuse its discretion in admitting into evidence a photo of the victim while alive in her work clothes for purposes of witnesses identifying the victim, even where the prosecution rejected the defense's offer to stipulate to the identity of the victim. Given that the jury was already aware the victim was a nurse, the picture was not particularly prejudicial because she was wearing her work clothes. (***People v. Tully*** (2012) 54 Cal.4th 952, 1020.)

A photo board consisting of "neutral and unremarkable" photos depicting the victims in life was admissible during the guilt phase to assist jurors in keeping track of 13 murder charges and the "extensive array of evidence associated with the crimes." "To the extent the photo board portraying the victims in their daily lives tended to deprive defendant of any perceived advantage he might have gained as a result of jurors' mental images of drug-addicted prostitutes, such alleged detriment is not "undue prejudice"

within the meaning of Evidence Code section 352, as this effect cannot be characterized as evoking an emotional bias against defendant." (***People v. Suff*** (2014) 58 Cal.4th 1013, 1073.)

A silent 40-second videotape of the victim at a child's birthday party two weeks before her death showing her wearing jewelry (none of the victim's jewelry was ever recovered), was relevant to show the victim owned jewelry that was allegedly stolen during the course of the murders. The videotape was not made inadmissible because the prosecution could have established the same relevant fact through other means. The videotape, although taken during a child's birthday party, did not engender an emotional reaction and was "neutral and unremarkable." (***People v. Harris*** (2005) 37 Cal.4th 310, 332.)

A photograph showing the victim to be attractive, well-dressed, and wearing expensive jewelry when alive was relevant to motives of anger, jealousy, and robbery. (***People v. Zapien*** (1993) 4 Cal.4th 929, 983.)

E. WITNESS REENACTMENTS OF CRIME [§ 8.45]

Witness reenactments consisting of witnesses showing the position of the shooter (standing over officer, straddling his legs; standing over officer aiming gun toward his head; how shooter walked around officer) did not violate the defendant's constitutional right to due process and a fair trial and were not unduly prejudicial within the meaning of Evidence Code section 352. "The trial court could reasonably conclude that the demonstrations would be helpful to the jury in understanding the witnesses' testimony. The demonstrations were not misleading because they did not purport to reproduce the conditions under which the witnesses viewed the scene; they purported only to show the positions of the persons observed by the witnesses." (***People v. Thomas*** (2012) 53 Cal.4th 771, 807-808.)

"Although the use of an actual gun in [witness demonstrations of the shooting] had the potential for increasing their emotional impact, the prosecutor made clear that the gun was not loaded and the demonstrations were otherwise conducted in a manner that "did not pose an intolerable risk of negatively affecting the fairness and reliability of the proceedings." (***People v. Thomas*** (2012) 53 Cal.4th 771, 808, internal citations & quotation marks omitted.)

F. FORFEITURE [§ 8.46]

The defendant's written motion making a general objection to "*any* 'bloody photos of the victims' as prejudicial and inflammatory" was "insufficient to preserve the issue on appeal because it did not identify any particular autopsy photograph, making it impossible for the court to 'determine the evidentiary question in its appropriate context.'" (***People v. Blacksher*** (2011) 52 Cal.4th 769, 827.)

The defendant forfeited his claim on appeal that the juxtaposition of autopsy photos with pictures of the victim in life was more prejudicial than probative because he did not object at the time the photographs were used in questioning witnesses. (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1247.)

G. UNDUE PREJUDICE [§ 8.47]

An assertion that the jury's observations of the victim's mother becoming upset during the coroner's testimony or a witness becoming emotional during his own testimony may have aggravated the emotional impact of the photographs and other demonstrative evidenced was rejected, as "victim photographs and other graphic items of evidence in murder cases always are disturbing. Nevertheless, absent evidence to the contrary, [the reviewing court] may assume that the jurors were able to face their duty calmly and undismayed." (***People v. Thomas*** (2012) 53 Cal.4th 771, 807, internal citations & quotation marks omitted.)

V. EVIDENTIARY RULINGS [§ 8.50]

"'[T]he Confrontation Clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (***People v. Schmeck*** (2005) 37 Cal.4th 240, 278, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637, quoting ***Pennsylvania v. Ritchie*** (1987) 480 U.S. 39, 53 [107 S.Ct. 989, 94 L.Ed.2d 40].)

"A trial court has broad discretion in determining relevancy, but it cannot admit evidence that is irrelevant or inadmissible under constitutional or state law." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 819.)

The application of the ordinary rules of evidence generally does not impermissibly infringe upon a capital defendant's constitutional rights. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1229.)

California's ordinary rules of evidence do not give rise to a constitutional violation at the guilt phase of a capital trial when excluding inadmissible hearsay evidence. The United States Supreme Court's opinion in *Green v. Georgia* (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct. 2150, regarding a denial of due process based on excluding "highly relevant" and reliable hearsay evidence in mitigation, applies to the penalty phase, not the guilt phase of a capital trial. (***People v. Williams*** (2016) 1 Cal.5th 1166, 1190.)

A. ADEQUATE OFFER OF PROOF [§ 8.51]

"Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 820, citing Evidence Code, § 1200(b).)

B. SCOPE OF EXAMINATION [§ 8.52]

The trial court properly declined to make an advance ruling on the scope of cross-examination if the defendant testified about one murder incident but not the other. (***People v. Sandoval*** (1992) 4 Cal.4th 155, 178-178.)

Where the defendant did not testify, the issue whether the trial court's refusal to bar in advance the use of evidence of unadjudicated South Carolina crimes on cross-examination is not preserved for review on appeal. (***People v. Sims*** (1993) 5 Cal.4th 405, 454-456.)

A witness may be cross-examined on any matter within the scope of direct examination. The jury is entitled to know the context in which statements covered on direct examination were made. (***People v. Harris*** (2005) 37 Cal.4th 310, 335.)

"The trial court retains wide latitude to restrict repetitive, prejudicial, confusing, or marginally relevant cross-examination. Unless the defendant can show that the prohibited cross-examination would have created a significantly different impression of the witness's credibility, the trial court's exercise of discretion to restrict cross-examination does not violate the constitutional right of confrontation." (***People v. Sanchez*** (2016) 63 Cal.4th 411, 450-451.)

Restricting cross-examination to protect the rights of a codefendant does not violate the Fifth or Sixth Amendments when the restriction does not materially affect the defense or when the probative value of the excluded evidence is slight. (***People v. Lewis*** (2008) 43 Cal.4th 415, 459, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

C. TIMELY-AND-SPECIFIC-OBJECTION REQUIREMENT [§ 8.53]

A verdict may not be set aside for erroneous admission of evidence (even if prejudicial) absent a timely and specific objection. This is true for capital cases too. (***People v. Cain*** (1995) 10 Cal.4th 1, 28; ***People v. Green*** (1980) 27 Cal.3d 1, 22, fn. 8, overruled on other grounds, *People v. Martinez* (1999) 20 Cal.4th 225, 241.)

The exception to the forfeiture rule (for lack of timely objection) in ***People v. Frank*** (1985) 38 Cal.3d 711 [technical insufficiency in the form of a defense objection will be disregarded in a capital case and the objection will be recognized on appeal], was

not signed by a majority, and though never disapproved, it has never been cited except to distinguish it. (***People v. Jones*** (2003) 29 Cal.4th 1229, 1256.)

While no particular form of objection is required, it must be made in such a way as to alert the trial judge to the nature of the evidence and the basis for exclusion and give the prosecutor an opportunity to establish its admissibility. (***People v. Boyette*** (2002) 29 Cal.4th 381, 424; ***People v. Williams*** (1988) 44 Cal.3d 883, 906.)

Pursuant to Evidence Code section 353, subdivision (a), an objection or motion to strike must be both timely and specific as to its ground. A "placeholder" objection stating general or incorrect grounds even if revised later in a motion to strike is insufficient to preserve the issue for appeal. (***People v. Demetrulias*** (2006) 39 Cal.4th 1, 22.)

A motion in limine *may* serve to preserve an objection if it satisfies Evidence Code section 353; if it does not satisfy section 353, an objection must be made. (***People v. Morris*** (1991) 53 Cal.3d 152, 190, overruled on other grounds, *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Failure to pursue a ruling has the same effect as a failure to object. (***People v. Kaurish*** (1990) 52 Cal.3d 648, 680.)

While the trial court may exercise authority under Evidence Code section 352 without objection by trial counsel, the failure to do so cannot be urged on appeal as error. (***People v. Cain*** (1995) 10 Cal.4th 1, 28.)

Where the defendant did not join in his co-defendant's hearsay objection, he nevertheless can pursue the issue on appeal under the doctrine of futility of objection where the defendant had "no reasonable basis to present additional information that might have altered the trial court's ruling or to object that the ruling would have caused him unique prejudice." (***People v. Chism*** (2014) 58 Cal.4th 1266, 1291.)

A hearsay objection was not required because the request for a limiting instruction served the same purpose as a hearsay objection, and placed the defendant on notice that his statements to the expert were to be considered only for the limited purpose of showing the information the doctor relied upon in forming an opinion. (***People v. Elliot*** (2005) 37 Cal.4th 453, 481-482.)

D. UNDUE PREJUDICE (Evid. Code § 352) [§ 8.54]

"Evidence is substantially more prejudicial than probative if, broadly stated, it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome." (***People v. Clark*** (2011) 52 Cal.4th 856, 893, internal quotation marks & citations omitted.)

Neither the prosecutor nor the trial court is required to accept a defense stipulation in order to avoid the admission of evidence being challenged as unduly prejudicial.

(***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1100 [defendant offered to stipulate that whoever abducted victim did so with intent to molest in effort to render evidence of defendant's incestuous conduct unnecessarily cumulative].)

The fact that the prosecutor might rely on other testimony and evidence did not diminish the probative value or require exclusion pursuant to section 352 of evidence proffered as a prosecutor is not required "'to present its case in the manner preferred by the defense.'" (***People v. Clark*** (2011) 52 Cal.4th 856, 894, quoting ***People v. Salcido*** (2008) 44 Cal.4th 93, 150.)

While detectives were exonerated of accusations of fabricating evidence in a different case, the defendant contended evidence of those accusations would have established the motivation for the defendant fabricating evidence. Even assuming the evidence was relevant, the trial court reasonably excluded it under section 352. "This is especially so considering that the detectives had been exonerated of fabricating evidence by the time defendant's trial began and the prosecution would then have been entitled to bring that point to the attention of the jury. The result would have been a lengthy evidentiary detour into a matter that was only marginally relevant and might well have confused the jury." (***People v. Verdugo*** (2010) 50 Cal.4th 263, 290-291.)

VI. EXPERT WITNESSES [§ 8.60]

Experts may testify even if jurors are not wholly ignorant about the subject of testimony. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1222.)

Expert opinion testimony may encompass ultimate issues within a case. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1227.)

A prosecutor may bring in facts beyond those introduced in the testimony of an expert witness on direct examination in order to explore the grounds and reliability of the expert's opinion. (***People v. Lancaster*** (2007) 41 Cal.4th 50, 105.)

In cross-examining an expert witness, a party may question the witness "'more extensively and searchingly than a lay witness, and the prosecution is entitled to attempt to discredit the expert's opinion.'" (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1325.)

Where "the defense relied heavily on expert testimony to explain the inconsistencies in the defendant's statements…. [I]t was proper to allow the prosecution to rebut that testimony with [an expert's] opinion that the foundation for the defense experts' conclusions was unreliable." (***People v. Gonzales*** (2011) 51 Cal.4th 894, 931.)

The prosecutor's cross examination was proper notwithstanding a defense complaint that the witness had not been called as an expert. Defense counsel went beyond mere lay opinion (about observations of defendant) and asked questions that were clearly directed toward medical expertise (prior diagnosis and clinical impressions) which permitted the prosecutor to ask on cross-examination whether the expert witness

remained confident in the accuracy of her conclusions. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 836.)

Pathologist expert testimony, including an opinion about whether the victim was raped and sodomized before she died, was properly admitted. The challenged opinion fell within the education, training, and experience of the veteran forensic pathologist with extensive experience and familiarity with rape/murder cases and was a proper subject for expert testimony. (***People v. Jones*** (2012) 54 Cal.4th 1, 57-59.)

Expert testimony on sexual homicides was properly admitted. (***People v. Jones*** (2013) 57 Cal.4th 899, 944-954.)

A. BATTERED WOMEN'S SYNDROME [§ 8.61]

The trial court did not err in admitting expert testimony on Battered Women's Syndrome to explain why the defendant's wife (who testified against him) did not undertake to prevent him from or report him for killing the victim. (***People v. Riggs*** (2008) 44 Cal.4th 248, 292-294.)

"The defense experts testified that a battered woman may take responsibility for acts of abuse perpetrated by the battering spouse. Certainly it was proper for the prosecutor to counter this testimony with expert opinion that an abused child may also grow up to be an abuser." Moreover, the trial court instructed the jury regarding the limited purpose of the evidence. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 937.)

VII. EYEWITNESS IDENTIFICATION [§ 8.70]

Expert testimony on the psychological factors affecting eyewitness identification is often unnecessary, and therefore a trial court's ruling regulating its use is rarely disturbed on appeal. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 995.)

VIII. GANG-RELATED EVIDENCE [§ 8.80]

"In general, the People are entitled to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent. Even where gang membership is relevant, however, because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it. On the other hand, because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." (***People v. McKinnon*** (2011) 52 Cal.4th 610, 655, internal quotation marks & citations omitted.)

"Trial courts should carefully scrutinize evidence of a defendant's gang membership because such evidence 'creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged.'"

(***People v. Melendez*** (2016) 2 Cal.5th 1, 28-29, quoting ***People v. Carter*** (2003) 30 Cal.4th 1166, 1194.)

Where a reasonable inference from the evidence suggested that retaliation and escalation of a gang-related confrontation to a deadly level were likely, the evidence supported a reasonable trier of fact concluding that the shooting of the victim was a reasonably foreseeable consequence of a gang assault. (***People v. Medina*** (2009) 46 Cal.4th 913, 922-923.)

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court." (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 945-946, internal quotation & citations omitted.)

Evidence that special precautions had been taken to protect witnesses who were former gang members who agreed to testify against the defendant, a former friend and fellow gang member, was properly introduced as "[t]heir willingness to do so despite a legitimate basis for concern about their safety enhanced their credibility." (***People v. Adams*** (2014) 60 Cal.4th 541, 572.)

The defendant moved to exclude evidence of his gang membership, including his nickname ("Point Blank"). On appeal, the California Supreme Court concluded that while the nickname was relevant on the issue of identification it was of minimal probative value since it was cumulative to other evidence of identity. However, the nickname was relevant and extremely probative of mental state issues regarding the defendant's intent when he shot the victim (seven shots to face at close range) and significant to the words of a gloating rap song the defendant sang after the shooting. Even assuming the nickname implied either gang membership or prior criminal activity, the trial court carefully scrutinized the evidence and did not abuse its discretion in concluding its prejudicial effect did not outweigh the probative value. (***People v. Lee*** (2011) 51 Cal.4th 620, 642-644.)

"[T]he gang evidence was a relatively minor component of the prosecution's case, and was not unduly inflammatory. It did not emphasize the general violent nature of gang activity or suggest that defendant's gang membership predisposed him to violent crimes, but instead focused narrowly on the prosecution's theory for why defendant might have had a specific reason to kill [the victim]. Under these circumstances, … no error occurred in the admission about evidence of a gang-related motive for [the victim's] murder." (***People v. McKinnon*** (2011) 52 Cal.4th 610, 656.)

A. EXPERT TESTIMONY [§ 8.81]

"'It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.'" (***People v. Gonzalez*** (2006) 38 Cal.4th 932, 945.)

A trial court would not abuse its discretion in admitting gang expert testimony to the effect that "in his experience, witnesses at a gang-related shooting in a public place such as a restaurant often claim that they did not see anything because they had been in the bathroom." (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1034-1035.)

"Although gang evidence standing alone cannot prove a defendant is an aider and abettor to a crime. [The detective's] expert testimony strengthened inferences arising from other evidence specific to defendant's role in the crime at issue." (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1055.)

IX. HYPNOSIS [§ 8.90]

Evidence Code section 795 "allows the admission of testimony of a witness who has been hypnotized if certain conditions are satisfied." Case law "permits a witness who was hypnotized before January 1, 1985, when section 795 became effective, … to testify about prehypnotic memories that are found to have been recalled and related to others before the witness was hypnotized." The additional requirements section 795 has imposed are not applied retroactively when the witness was hypnotized before its effective date. (***People v. Alexander*** (2010) 49 Cal.4th 846, 879; ***People v. Alcala*** (1992) 4 Cal.4th 742, 773, fn. 10 [section 795 sets forth conditions which, if met, permit a trial court to determine that the testimony of a previously hypnotized witness is not rendered inadmissible by the fact that the witness has previously undergone hypnosis for the purpose of recalling events which are the subject of the witness's testimony].)

The California Supreme Court's decision in ***People v. Shirley*** (1982) 31 Cal.3d 18, 66 "prohibited the admission of all future testimony by a witness who had been hypnotized. Section 795's enactment two years later tempered *Shirley*'s effect by allowing some witnesses who had been hypnotized to testify under certain conditions. [Citation.] It is the holding of *Shirley*, not section 795, that is the basis for excluding a previously hypnotized witness's testimony, a situation somewhat akin to the operation of the hearsay rule and the statutory exceptions to that rule." (***People v. Alexander*** (2010) 49 Cal.4th 846, 881, internal citations & quotation marks omitted.)

"When a witness actually has not been hypnotized in any meaningful way, despite attempts to do so, the concerns expressed in [***People v. Shirley*** (1982) 31 Cal.3d 18, 66] regarding reliability of the witness's testimony, namely, introduction of false memories and the tendency for the witness to develop unjustified confidence in recollections, are not at issue. The reliability of such a witness is that of any other witness, and the ensuing testimony similarly would be subject to a credibility attack based on circumstances surrounding the witness's recollections." (***People v. Alexander*** (2010) 49 Cal.4th 846, 881-882.)

X. JURY VIEW [§ 8.100]

The trial court properly exercised its discretion in denying a request for a jury view of the murder scene, as testimonial evidence adequately informed the jury as to the lighting conditions at the time the defendant shot and killed two police officers, and a jury view conducted at a different time of night and a different time of year with very different lighting conditions would not assist the jury in determining whether or not the defendant aimed at the silhouettes of the officers he admitted to being able to see before firing on the officers. (***People v. Russell*** (2010) 50 Cal.4th 1228, 1270-1247.)

XI. MOTIVE [§ 8.110]

"Evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. Such third party culpability evidence is subject to exclusion under Evidence Code section 352." (***People v. Hartsch*** (2010) 49 Cal.4th 472, 496, internal quotation marks & citations omitted.)

Evidence of the defendant's parole status and awareness of consequences he faced if was arrested while carrying a gun was highly probative of his mental state and motive at the time he shot a police officer. (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1092.)

Evidence concerning the defendant's association in the drug trade with a disreputable person with a reputation for violence was relevant to show motive for killing the victims, i.e., self-preservation. Testimony suggested the defendant feared one of the victims would "snitch him off" to a violent individual. (***People v. Garceau*** (1993) 6 Cal.4th 140, 177, overruled on other grounds as stated in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

"[E]vidence of a defendant's poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice." (***People v. Harris*** (2005) 37 Cal.4th 310, 345, quoting ***People v. Wilson*** (1992) 3 Cal.4th 926, 939.) However, "evidence of a defendant's poverty may be admissible to refute a contention that he did not commit the offense because he did not need the money." (***People v. Harris*** (2005) 37 Cal.4th 310, 345.)

Evidence that the defendant used crack cocaine was not admissible as generalized evidence he used drugs, because evidence of an accused's narcotics addiction is inadmissible where it tends only remotely or to an insignificant degree to prove a material fact in the case. However, evidence that the defendant used money stolen from a store to buy and use drugs was allowed in order to show motive for robbery. (***People v. Chatman*** (2006) 38 Cal.4th 344, 371.)

Evidence of other crimes is cross-admissible to prove motive. (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1129, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Testimony that a defendant's stepdaughter had accused him of sexually molesting her was admissible in a capital murder trial because it was offered to prove he was aware of her accusations and to explain his motive for killing her. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 697.)

Evidence of sexual images possessed by a defendant has been held admissible to provide a defendant's intent. (See ***People v. Memro*** (1995) 11 Cal.4th 786, 865 [magazines and photos possessed by defendant containing sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult evidenced sexual attraction to young boys and intention to act on that attraction], abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18; ***People v. Clark*** (1992) 3 Cal.4th 41, 129, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704.)

The court did not reach the issue of whether a court erroneously admitted into evidence a pornographic magazine in the defendant's possession where the adult model on the cover merely looked similar to the child victim, the defendant took no steps to conceal or destroy image, and the image was one of hundreds of models in defendant's extensive pornography collection. The defendant was not prejudiced by any error in the face of overwhelming physical evidence demonstrating that he molested and killed the six-year-old victim. (***People v. Page*** (2008) 44 Cal.4th 1, 46.)

The defendant's possession of adult-oriented magazines and videotape rentals was relevant evidence "because there was a rational connection between his possession of this material and his intent and motive when he abducted [the 8-year-old girl]." (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1071, 1102.)

It was harmless error to admit the testimony of a witness that shortly before the murder, the defendant watched "a violent film with content vaguely similar to the circumstances of the murder." (***People v. Elliot*** (2005) 37 Cal.4th 453, 472-473.)

XII. POLYGRAPH [§ 8.120]

"Evidence Code section 351.1, subdivision (a), addresses the admission of polygraph-related evidence and states in pertinent part: '[T]he results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, … unless all parties stipulate to the admission of such results.' By extension, Evidence Code section 351.1 also prohibits any reference to the willingness or unwillingness to take a polygraph examination." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1120.)

XIII. PRIOR TESTIMONY [§ 8.130]

The Sixth Amendment right to confront the prosecution's witnesses is not absolute. An exception exists when a witness is unavailable, and in a previous court proceeding against the same defendant, the witness gave testimony and was subject to cross-examination. Such statements are not made inadmissible by the hearsay rule if the cross-examination was made with a similar interest and motive. (***People v. Harris*** (2005) 37 Cal.4th 310, 332; Evid. Code, § 1291(a)(2).)

"[A] defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars. [Citation]. The 'motives need not be identical, only similar.'" (***People v. Harris*** (2005) 37 Cal.4th 310, 333.)

"'[W]hen a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless of whether subsequent circumstances bring into question the accuracy or completeness of the earlier testimony.'" (***People v. Harris*** (2005) 37 Cal.4th 310, 333, quoting ***People v. Wilson*** (2005) 36 Cal.4th 309, 343.)

The fact that the witness had some initial difficulty understanding the questions posed or remembering some of her previous statements during her preliminary hearing testimony did not render the defendant's cross-examination opportunity meaningless. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 805.)

Cross-Reference:

§ 8.190, *re* Scientific evidence

§ 8.210, *re* Statements

A. WAIVER [§ 8.131]

Failure to object below to the admissibility of the preliminary hearing testimony of the unavailable witness forfeited any claim on appeal that the prior testimony was inadmissible. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 805.)

Where the defendant only objected to deletions of portions of the attempted-murder victim's preliminary-hearing testimony, as opposed to admission of the testimony

per se, he failed to preserve a challenge to the admissibility of the preliminary-hearing testimony. (***People v. Harris*** (2005) 37 Cal.4th 310, 332.)

XIV. PRIVILEGES [§ 8.140]

A. ATTORNEY-CLIENT PRIVILEGE [§ 8.141]

"A person becomes a client when he consults an attorney to retain him or secure legal services or advice. The transmission of information between lawyer and client in the course of that relationship is 'confidential' and protected only if it occurs 'by a means which, so far as the client is aware, *discloses the information to no third persons other than those who are present to further the interest of the client in the consultation* or those to whom disclosure *is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*.' Moreover, the client can later forfeit, or waive, the privilege as to any confidential communication otherwise protected thereunder if he "has disclosed a significant part of the communication or has consented to disclosure made by anyone." (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1302-1303, citations omitted, citing Evid. Code, §§ 912(a), 951, ***People v. Barnett*** (1998) 17 Cal.4th 1044, 1124, and ***People v. Gionis*** (1995) 9 Cal.4th 1196, 1207.)

Penal Code section 958 constitutes an exception to the attorney-client privilege regarding communications relevant to an issue of breach of duty arising out of the attorney-client relationship, as opposed to a waiver of the privilege. The prosecution is not permitted to use otherwise privileged attorney-client information disclosed in habeas proceedings adjudicating claims of ineffective assistance of counsel in subsequent retrials. To hold otherwise, would give the prosecution a gratuitous advantage and would be contrary to the purposes for having the attorney-client and work product privileges, e.g., to encourage frank communications between client and counsel and vigorous investigation of possible defenses. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 691-694.)

The prosecutor's question about whether DNA evidence was available for independent testing did not violate the defendant's attorney-client privilege nor improperly shift the burden of proof to the defendant. (***People v. Bennett*** (2009) 45 Cal.4th 577, 596.)

The defendant could not transform documents in his cell into documents covered by the attorney-client privilege merely because he intended to show the documents to his lawyer or to the investigator working on his lawyer's behalf. The intent to show a document to a lawyer does not transform a document into one covered by the attorney-client privilege. The rule requires the transmittal of the privileged information. (***People v. Gutierrez*** (2009) 45 Cal.4th 789, 817, citing Evid. Code, § 950.)

B. PSYCHOTHERAPIST [§ 8.142]

A psychotherapist who warns a potential victim pursuant to Evidence Code section 1024 may testify to the substance of the warning and the patient's statements which triggered the warning. (***People v. Wharton*** (1991) 53 Cal.3d 522, 563; ***People v. Clark*** (1990) 50 Cal.3d 583, 618-620.)

Where a defense psychiatrist was appointed under Evidence Code section 1017, communications with the defendant were protected by two distinct privileges: the psychotherapist-patient privilege and the attorney-client privilege. The former privilege was waived when a mental defense was tendered at trial; the latter privilege was waived when the defense called the psychiatrist to testify at a suppression-motion hearing and the basis of the testimony was statements made by defendant. (***People v. Clark*** (1993) 5 Cal.4th 950, 1004-1008, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

C. SELF-INCRIMINATION [§ 8.143]

It is doubtful that a trial court has inherent authority to grant immunity. The power to grant immunity is conferred by statute to the executive branch of state government. (***People v. Masters*** (2016) 62 Cal.4th 1019, 1050-1051, citing Pen. Code, § 1324; ***People v. Stewart*** (2004) 33 Cal.4th 425, 468.)

"'[P]rosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant.'" (***People v. Masters*** (2016) 62 Cal.4th 1019, 1051, quoting ***People v. Williams*** (2008) 43 Cal.4th 584, 622 and citing ***People v. Samuels*** (2005) 36 Cal.4th 96, 127-128 ["prosecutor did not commit misconduct by not granting immunity to a nonessential defense witness who asserted her right against self-incrimination and refused to testify"].)

A witness "may not make a blanket assertion of the privilege against self-incrimination," and "a witness's say-so does not itself establish the hazard of incrimination. It is for the court to say whether his silence is justified." The trial court "must make a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded. Although the witness may have a valid claim to the privilege with respect to some questions, the scope of that privilege may not extend to all relevant questions. The witness may be totally excused only if the court finds that he could legitimately refuse to answer essentially all relevant questions. This has long been the rule in California in both criminal and civil proceedings. (***People v. Trujeque*** (2015) 61 Cal.4th 227, 267-268, internal quotation marks & citations omitted.)

"A nonparty witness may elect to waive his or her privilege against self-incrimination." (***People v. Williams*** (2008) 43 Cal.4th 584, 615.)

The trial court does not err, nor deprive a defendant of the right to present a defense, by refusing the defendant's request to force a prospective defense witness to invoke her Fifth Amendment rights in front of the jury. (***People v. Holloway*** (2004) 33 Cal.4th 96, 130, citing Evid. Code, § 913; ***People v. Mincey*** (1992) 2 Cal.4th 408, 440-442 [no error in refusing defense request].)

A defendant has no standing to raise any claims involving an alleged violation of a witness's Fifth Amendment privilege. Issues must be limited to whether the circumstances of the witness' testimony violated the *defendant's* constitutional rights. (***People v. Clark*** (2016) 63 Cal.4th 522, 580.)

The California Supreme Court did "not consider the novel question whether an attorney may validly invoke the privilege against self-incrimination on behalf of a codefendant, where the codefendant has been declared unfit to stand trial, in the face of a criminal defendant's constitutional right to compulsory process and to present a defense" because of the failure to preserve the issue below by failing to object at the time the co-defendant's attorney "asserted the privilege and by failing to identify the substance, purpose, and relevance of [the co-defendant's] live testimony." (***People v. Zaragoza*** (2016) 1 Cal.5th 21, 48-49.)

D. SPOUSAL [§ 8.144]

The trial court has no duty to advise a witness of the spousal privilege. (***People v. McWhorter*** (2009) 47 Cal.4th 318, 374.)

The witness is the holder of the spousal privilege and "once [the witness] decide[s] to testify at any point in defendant's criminal proceedings, the privilege is waived for the entirety of the proceedings." (***People v. McWhorter*** (2009) 47 Cal.4th 318, 375.)

Since the spousal privilege is personal to the spouse seeking to avoid testifying, the witness, not the defendant, was the holder of the privilege. Accordingly, the defendant lacked standing to raise the claim. However, nothing precluded defense counsel from directly informing the witness of the spousal privilege. (***People v. McWhorter*** (2009) 47 Cal.4th 318, 374.)

E. WORK PRODUCT [§ 8.145]

The work-product privilege applies only to materials or information defined as work product in Code of Civil Procedure section 2018.030, subdivision (a). (***People v. Bennett*** (2009) 45 Cal.4th 577, 595, citing Pen. Code, § 1054.6; ***People v. Zamudio*** (2008) 43 Cal.4th 327, 351-356.)

The prosecutor's question regarding whether DNA samples were available for independent testing did not violate the work-product privilege because the question did not attempt to elicit evidence of a "'writing' reflecting defense counsel's 'impressions,

conclusions, opinions, or legal research or theories.'" (***People v. Bennett*** (2009) 45 Cal.4th 577, 595.)

XV. PROFILER EVIDENCE [§ 8.150]

Notwithstanding the ability of jurors to review the evidence before them and draw commonsense inferences, jurors may still be aided by the testimony of a person with extensive training in crime-scene analysis, where certain features in the charged crimes are comparatively rare and therefore, in the expert's opinion, suggest the crimes were committed by the same person. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1223.)

"[P]rofile evidence does not describe a category of always-excluded evidence; rather, the evidence ordinarily is inadmissible 'only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative.' ... '[P]rofile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt.'" (***People v. Prince*** (2007) 40 Cal.4th 1179, 1226, internal citation omitted.)

XVI. ORDER OF PROOF [§ 8.160]

"The order of proof in a criminal case rests in the sound discretion of the trial court." The court's concern for the safety of a witness amply supported its denial a defense motion to change the order of proof among the codefendants. (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1087 [internal quotation marks and citations omitted].)

XVII. OTHER CRIMES / BAD ACTS EVIDENCE [§ 8.170]

"Evidence of defendant's commission of other crimes, civil wrongs or bad acts is not admissible to show bad character or predisposition to criminality, but may be admitted to prove some material fact at issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. [Citations.] Because evidence of a defendant's commission of other crimes, wrongs, or bad acts may be highly inflammatory, its admissibility should be scrutinized with great care." (***People v. Cage*** (2015) 62 Cal.4th 256, 273, internal quotation marks & citations omitted.)

"In cases in which the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense by evidence he had committed uncharged offenses, admissibility "depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity. A somewhat lesser degree of similarity is required to show a common plan or scheme and still less similarity is required to show intent. Where other crimes or bad conduct evidence is admitted to show motive, an intermediate fact which may be probative of such ultimate issues as intent, identity, or commission of the criminal act itself, the other crimes or conduct evidence may be dissimilar to the charged offenses provided there is a direct relationship

or nexus between it and the current alleged crimes." (***People v. Cage*** (2015) 62 Cal.4th 256, 273-274, internal quotation marks & citations omitted.)

Evidence of the defendant's prior abuse and threats toward his estranged wife and her family "were important evidence of defendant's motive" even though motive "was not an ultimate fact put at issue by the charges or the defense in this case, [it] was probative of the material issues of identity and intent, as well as premeditation and deliberation." The California Supreme Court reasoned that the "evidence reflected that defendant retaliated when thwarted. A logical inference from the evidence of the prior assaultive incidents would be that defendant carried out his threats by committing the charged crimes, intending them as retribution for [his estranged wife] leaving him and taking his son. A direct relationship or nexus, thus, existed between the prior incidents and the charged crimes." (***People v. Cage*** (2015) 62 Cal.4th 256, 274.)

Evidence of uncharged sexual offenses against other victims was properly admitted pursuant to Evidence Code Section 1108 to show defendant raped and murdered his victim. (***People v. Williams*** (2016) 1 Cal.5th 1166, 1196-1197.)

XVIII. REOPENING EVIDENCE [§ 8.180]

The trial court has broad discretion in deciding whether to reopen a criminal matter to permit introduction of additional evidence. (***People v. Jones*** (2012) 54 Cal.4th 1, 66.)

Four factors are considered in determining whether a trial court abused its discretion in acting on a motion to reopen evidence: (1) the stage of the proceedings when the motion is made; (2) the defendant's diligence, or lack thereof, in presenting the new evidence; (3) the prospect the new evidence would be accorded undue emphasis by the jury; and (4) the significance of the new evidence. (***People v. Homic*** (2012) 55 Cal.4th 816, 881.)

XIX. SCIENTIFIC EVIDENCE [§ 8.190]

"Evidence obtained by use of a new scientific technique is admissible only if the proponent of the evidence establishes at a hearing (sometimes called a first prong *Kelly* hearing) that the relevant scientific community generally accepts the technique as reliable. However, proof of such acceptance is not necessary if a published appellate opinion affirms a trial court ruling admitting evidence obtained through use of that technique, at least until new evidence is admitted showing the scientific community has changed its attitude." (***People v. Cordova*** (2015) 62 Cal.4th 104, 127.)

"Because our scientific understanding and our understanding of what constitutes 'science' is constantly evolving, the term 'new scientific technique' resists formal definition. [¶] Instead, courts rely on two principles to determine when the test applies. First, *Kelly*/*Frye* only applies to that limited class of expert testimony which is based, in

whole or part, on a technique, process, or theory which is new to science and, even more so, the law. To be new, a technique must be meaningfully distinct from existing techniques. Unintentional departures resulting from a careless attempt to follow an otherwise accepted procedure do not implicate *Kelly*. Second, a *Kelly* hearing may be warranted when the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury. [¶] Appellate courts review de novo the determination that a technique is subject to *Kelly*." (***People v. Jackson*** (2016) 1 Cal.5th 269, 316, internal quotation marks & citations omitted.)

Kelly requires as a foundational matter that the expert testifying regarding the reliability of a new scientific technique be a properly qualified expert. (***People v. McWhorter*** (2009) 47 Cal.4th 318, 365.)

A. BLOOD EVIDENCE [§ 8.191]

California courts have allowed the admission of the results of presumptive tests for blood for decades. (***People v. Alexander*** (2010) 49 Cal.4th 846, 904.)

Electrophoresis is generally accepted in the scientific community and, once a scientific procedure such as electrophoresis testing of bloodstains has become generally accepted, mere variations in technique and procedure go to the weight of the evidence, not its admissibility. (***People v. Cook*** (2007) 40 Cal.4th 1334, 1345.)

Electrophoretic blood testing meets *Kelly*/*Frye*. (***People v. Fierro*** (1991) 1 Cal.4th 173, 214, disapproved on other grounds by *People v. Thomas* (2012) 54 Cal.4th 908, 941, and *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 205; ***People v. Cooper*** (1991) 53 Cal.3d 771, 812-813; ***People v. Morris*** (1991) 53 Cal.3d 152, 206, overruled on other grounds, *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

The *Kelly*/*Frye* rule is inapplicable to blood-spatter evidence. (***People v. Hoyos*** (2007) 41 Cal.4th 872, 910, fn. 21, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641; ***People v. Clark*** (1993) 5 Cal.4th 950, 1018, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

ABO-secretor evidence is admissible. (***People v. Gallego*** (1990) 52 Cal.3d 115, 177.)

B. DNA EVIDENCE [§ 8.192]

"'Forensic DNA analysis is a comparison of a person's genetic structure with crime scene samples to determine whether the person's structure matches that of the crime scene sample such that the person could have donated the sample.'" (***People v. Cordova*** (2015) 62 Cal.4th 104, 127, quoting ***People v. Nelson*** (2008) 43 Cal.4th 1242, 1257-1258.)

The basic methodology behind modern DNA testing is discussed in general in ***People v. Venegas*** (1998) 18 Cal.4th 47, 57-63. The exact methods have evolved over the years and are discussed in ***People v. Cordova*** (2015) 62 Cal.4th 104, 127-130.)

Use of the "Identifiler kit" as opposed to an earlier kit, to conduct DNA analysis did not involve use of a new scientific technique within the meaning of *Kelly*. "[T]he Identifiler is merely another in a series of improved ways to apply long-accepted science." (***People v. Cordova*** (2015) 62 Cal.4th 104, 127.)

"[O]nce analysis and comparison result in the declaration of a 'match,' the DNA profile of the matched samples is compared to the DNA profiles of other available DNA samples in a relevant population database or databases in order to determine the statistical probability of finding the matched DNA profile in a person selected at random from the population or populations to which the perpetrator of the crime might have belonged." (***People v. Soto*** (1999) 21 Cal.4th 512, 518.)

Where a suspect's sample is compared to a crime scene sample, the use of the "product rule" to calculate the statistical relevance of a match is a matter of general acceptance within the relevant scientific community and meets *Kelly*'s standard for admissibility. (***People v. Soto*** (1999) 21 Cal.4th 512, 541.)

Use of the "product rule" in a "cold hit" or "trawl" case (match discovered by searching database of previously obtained samples) is not an application of a new scientific technique subject to *Kelly* or a "*Kelly*-like" test. The only issue regarding the use of the "product rule" is the legal question of whether the evidence is relevant. (***People v. Nelson*** (2008) 43 Cal.4th 1242, 1265.)

Statistics derived from the "product rule" are relevant and admissible evidence in a "cold hit" case. (***People v. Nelson*** (2008) 43 Cal.4th 1242, 1267.)

"There is no categorical prohibition on source attribution – expression by an otherwise qualified expert of an opinion that the quantitative and qualitative correspondence between an evidentiary sample and a known sample from a defendant establishes identity to a reasonable scientific certainty. Indeed, … when the odds are as astronomical as those here, and except for identical twins or close relatives, it might be appropriate for the expert to testify that, to a reasonable scientific certainty, the evidence sample and the defendant's sample came from the same person. Even the high court has recognized that it is now often possible to determine whether a biological tissue matches a suspect with near certainty. Permitting an expert to give this opinion, if indeed it is his or her opinion, does not leave defendants without recourse if they wish to challenge it. They can cross-examine the expert regarding the basis of the opinion or present their own evidence, or both. (***People v. Cordova*** (2015) 62 Cal.4th 104, 130-131, internal quotation marks & citations omitted.)

When the racial identity of the perpetrator is unknown, testimony of a range of ethnic or racial genetic profile frequencies is permitted; however, the data cannot be presented in a manner that assumes the race of the perpetrator is the same as the race of

the defendant. (***People v. Jones*** (2013) 57 Cal.4th 899, 942; ***People v. Wilson*** (2006) 38 Cal.4th 1237, 1250.)

The California Supreme Court concluded there was no violation of the Confrontation Clause where DNA results were admitted in a trial for murder involving forcible rape, through the testimony of an expert who did not personally perform the tests, because the observations of the non-testifying technician were a contemporaneous recording of observable events rather than documentation of past events, and thus not testimony. (***People v. Geier*** (2007) 41 Cal.4th 555, 607.) However, the California Supreme Court has since concluded that *People v. Geier* was overruled by *Melendez-Diaz v. Massachusetts* (2008) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314] [admitting certificate that substance tested was cocaine violated defendant's Confrontation rights]. (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1320; see also ***People v. Barba*** (2013) 215 Cal.App.4th 712, 740-743 [discussion of continuing viability of *People v. Geier* following *Melendez-Diaz v. Massachusetts*].)

Cross-Reference:

§ 8.211, *re* ***Crawford*** / right of confrontation

C. DOG-TRAILING EVIDENCE [§ 8.193]

A *Kelly* hearing is not required before admitting dog trailing evidence. Dog-trailing is "using a dog to find a particular individual by following a trail of their scent (sometimes incorrectly referred to as 'tracking')." (***People v. Jackson*** (2016) 1 Cal.5th 269, 316-317.)

"Evidence grounded in the ability of particular dogs to perform scent trailing on command has been admissible in California since 1978, so long as a proper foundation is laid. There is no reason to deviate from that precedent here." (***People v. Jackson*** (2016) 1 Cal.5th 269, 320, internal citations omitted.)

"[T]railing evidence is not so foreign to everyday experience that it would be unusually difficult for jurors to evaluate. Jurors are capable of understanding and evaluating testimony about a particular dog's sensory perceptions, its training, its reliability, the experience and technique of its handler, and its performance in scent trailing, such as performed in this case. (See [*People v.*] *Craig* [(1978)] 86 Cal.App.3d [905,] 915 ['Therefore, rather than attempt to identify certain specific criteria as being indicative of the ability of dogs, in general, to trail a human, we choose to require each particular dog's ability and reliability be shown on a case-by-case basis. We are not merely assuming a well-trained dog can trail a human; we say that this ability is a fact which, like other facts, may be proven by expert testimony.'].) [¶] It is also unlikely that

a juror would believe that dogs are scientifically infallible, a risk that *Kelly* was intended to address. (***People v. Jackson*** (2016) 1 Cal.5th 269, 317.)

D. EXPERIMENTAL EVIDENCE [§ 8.194]

"Experimental evidence is admissible only when the party offering it proves (1) that it is relevant; (2) that it was conducted under conditions substantially similar to the original occurrence tested; (3) that presenting the evidence of the experiment will not consume undue time, confuse the issues, or mislead the trier of fact; and (4) that the expert testifying about the experiment is qualified to do so." (***People v. Lucas*** (2014) 60 Cal.4th 152, 228, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19; ***People v. Turner*** (1994) 8 Cal.4th 137, 198 [same], abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

E. FINGERPRINT EVIDENCE [§ 8.195]

Chemical and laser process for photographing a fingerprint from the murder scene was not subject to the *Kelly*/*Frye* test. (***People v. Webb*** (1993) 6 Cal.4th 494, 524.)

The trial court did not abuse its discretion in permitting an expert to testify to the use of a vacuum metal deposition device to discover and preserve fingerprints on plastic garbage bags in which the victim's body was found. (***People v. Jones*** (2013) 57 Cal.4th 957-960.)

F. HAIR EVIDENCE [§ 8.196]

Hair comparison is not a "new" form of evidence and did not have to meet *Kelly*/*Frye*. (***People v. Pride*** (1992) 3 Cal.4th 195, 238-239.)

Hair-comparison evidence has been routinely admitted in California for many years. (***People v. Huggins*** (2006) 38 Cal.4th 175, 200.)

G. EXPERT OPINION EVIDENCE [§ 8.197]

Where the trial court held a *Kelly*/*Frye* hearing only to determine whether the inheritability of Antisocial Personality Disorder is an established scientific theory or process, the trial court erred in subsequently striking the expert's entire diagnosis of antisocial personality disorder, "a well-recognized form of mental illness included in the then-current edition of the Diagnostic and Statistical Manual of Mental Disorders, the leading treatise on psychological conditions. We have recognized that such testimony is routinely presented in capital cases." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1191, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

H. SHOEPRINT EVIDENCE [§ 8.198]

The reliability of an overlay technique to compare shoe prints need not be debated under *Kelly*, because such a procedure merely involves "'isolat[ing] physical evidence whose existence, appearance, nature and meaning are obvious to the senses of a layperson.'" (***People v. DePriest*** (2007) 42 Cal.4th 1, 40.)

I. SEMEN EVIDENCE [§ 8.199]

Electrophoretic testing of dried semen stains meets *Kelly*/*Frye*. (***People v. Wash*** (1993) 6 Cal.4th 215, 241-243; ***People v. Ashmus*** (1991) 54 Cal.3d 932, 970-971, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

"GM" testing of dried semen stains and statistical probability obtained therefrom were properly admitted. (***People v. Pride*** (1992) 3 Cal.4th 195, 241-242.)

J. WAIVER / FORFEITURE [§ 8.200]

Objection to scientific evidence under *Kelly*/*Frye* must be raised in the trial court. (***People v. Kaurish*** (1990) 52 Cal.3d 648, 688.)

Failure to make a *Kelly*/*Frye* objection does not preserve an issue on the admissibility of scientific evidence for appeal. (***People v. Diaz*** (1992) 3 Cal.4th 495, 527-528.)

XX. STATEMENTS [§ 8.210]

A. *CRAWFORD* / RIGHT OF CONFRONTATION [§ 8.211]

Cross-Reference: § 8.130, *re* Prior testimony

The Sixth Amendment's Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (***Crawford v. Washington*** (2004) 541 U.S. 36, 53-54 [124 S.Ct. 1354, 158 L.Ed.2d 177].)

"'[N]ot all those questioned by the police are witnesses' for purposes of the *Sixth Amendment* and not all '"interrogations by law enforcement officers" [citation], are subject to the *Confrontation Clause*.'" (***People v. Blacksher*** (2011) 52 Cal.4th 769, 808,

811, quoting ***Michigan v. Bryant*** (2011) 562 U.S. 344, 355 [131 S.Ct. 1143, 179 L.Ed.2d 93].)

"[I]f a statement is not offered for its truth, or is nontestimonial in character, the *confrontation clause* is not a bar to admission. Thus, the touchstone questions are whether a statement is hearsay offered against a criminal defendant, whether the statement is otherwise admissible under a hearsay exception, and if so, whether the statement is testimonial." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 808, 813, emphasis added; ***People v. Clark*** (2011) 52 Cal.4th 856, 1000 ["Because the victim's out-of-court statement was not testimonial, it's admission did not violate the confrontation clause rights"]; ***People v. D'Arcy*** (2010) 48 Cal.4th 257, 291-292.)

"'[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.' [citation omitted] – that is to say, unless the statements are given in the course of an interrogation or other conversation whose '"primary purpose … is to establish or prove past events potentially relevant to later criminal prosecution"' [citation omitted]. Under this test, 'statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.'" However, the United States Supreme Court has declined to adopt a categorical rule placing statements to persons who are not law enforcement officers outside of the Sixth Amendment. "'In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "create an out-of-court substitute for trial testimony."'" (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1213-1214, quoting ***Ohio v. Clark*** (2015) 576 U.S. ___ [135 S.Ct. 2173, 2179-2180, 2183, 192 L.Ed.2d 306].)

In order to determine the primary purpose with which a statement is given or obtained by a police officer, a number of factors are considered. "The court must objectively evaluate the circumstances of the encounter along with the statements and actions of the parties. In this latter regard, 'the relevant inquiry is not the subjective or actual purpose of the individuals involved in the particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions' in the given situation." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 808, 813, quoting ***Michigan v. Bryant*** (2011) 562 U.S. 344, 360 [131 S.Ct. 1143, 1156, 179 L.Ed.2d 93].)

To determine whether a hearsay statement may not qualify as testimonial, the court should consider objectively without benefit of hindsight whether an "ongoing emergency" existed or appeared to exist; the medical condition of the declarant; the informality of the statement and the circumstances of its acquisition. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 808, 814-815, citing ***Michigan v. Bryant*** (2011) 562 U.S. 344, 358 [131 S.Ct. 1143, 1157-1160, 179 L.Ed.2d 93].)

Statements to an officer from a woman who was a "distraught mother and grandmother" were non-testimonial when made under chaotic conditions, while "greatly upset" throughout the encounter with officer. It was objectively reasonable for the officer

to believe an armed shooter remained at large and presented an emergency situation (officer arrived within four minutes of 911 call, and during 10- to 15-minute conversation with officer, victims' bodies still inside home, shooter had fled scene and was presumed to be armed with firearm/murder weapon and his motive and whereabouts were unknown). (***People v. Blacksher*** (2011) 52 Cal.4th 769, 808, 816-818.)

Admission of hearsay statements from an unavailable witness consisting of descriptions of two people who entered and exited a liquor store where the clerk was shot to death did not violate the defendant's Sixth Amendment right to confrontation because the statements were non-testimonial and for the purpose of dealing with an ongoing emergency. The statements were made by a person who appeared to be very nervous and shaken up who was outside of a store where a shooting had recently occurred and who was the first person contacted by the first officer to arrive on the scene. The officer reasonably believed the suspects, at least one of whom was presumably still armed, remained at large and posed an immediate threat to responding officers and the public. (***People v. Chism*** (2014) 58 Cal.4th 1266, 1289.)

It remains an open question whether statements to someone other than law enforcement personnel can ever qualify as testimonial. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 808, 816, citing ***Michigan v. Bryant*** (2011) 562 U.S. 344, 357, fn. 3 [131 S.Ct. 1143, fn. 3, 179 L.Ed.2d 93].)

"[T]he *confrontation clause* does not prohibit the prosecution from impeaching the former testimony of its own unavailable witnesses with their inconsistent statements, provided those statements are admitted only for impeachment purposes. However, under Evidence Code section 1202, the prosecution may not offer for their truth the inconsistent statements of a declarant who does not testify at trial." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 808, emphasis added.)

§ 8.211.1 Autopsy Reports

"It is clear that the admission of autopsy photographs, and competent testimony based on such photographs, does not violate the confrontation clause." (***People v. Leon*** (2015) 61 Cal.4th 569, 732.)

"It is also clear that testimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay. A testifying expert can be cross-examined about these opinions. The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence. In that case, out-of-court statements in the report are being offered for their truth. Admission of this hearsay violates the confrontation clause if the report was created with sufficient formality and with the primary purpose of supporting a criminal prosecution." (***People v. Leon*** (2015) 61 Cal.4th 569, 732, citing ***People v. Dungo*** (2012) 55 Cal.4th 608, 619.)

"With regard to autopsy reports in particular, a majority of this court has distinguished between statements that set forth anatomical and physiological observations and those that relate the pathologist's conclusions as to cause of death. The *Dungo* majority concluded that statements of the first type, which merely record objective facts about a body' condition, are not sufficiently formal or litigation related to be testimonial under the high court's precedents. Accordingly, *Dungo* found no confrontation clause violation when a testifying pathologist expressed forensic opinions based on the medical observations in a nontestifying pathologist's autopsy report." (***People v. Leon*** (2015) 61 Cal.4th 569, 732, citing ***People v. Edwards*** (2013) 57 Cal.4th 658, 706-707; ***People v. Dungo*** (2012) 55 Cal.4th 608, 619, internal citations omitted.)

Assuming the court erred in admitting the autopsy report when the pathologist's demise rendered him unavailable, denying defendant his opportunity to cross-examine the pathologist who prepared the report, it was harmless beyond a reasonable doubt as the cause of the victim's death was undisputed. (***People v. Leon*** (2015) 61 Cal.4th 569, 733.)

§ 8.211.2 Dying Declarations

While the United States Supreme Court has left open the question of whether the Sixth Amendment incorporates exceptions to the Confrontation Clause, such as dying declarations, the California Supreme Court, without considering whether the statements at issue were testimonial in nature, concluded that admission of statements under the dying declaration hearsay exception does not violate the Sixth Amendment right to confrontation. (***People v. Johnson*** (2015) 61 Cal.4th 734, 762; ***People v. D'Arcy*** (2010) 48 Cal.4th 257, 291-292.)

Admission of dying declarations does not deny a defendant his right to due process or a reliable verdict under the Eighth Amendment. (***People v. Johnson*** (2015) 61 Cal.4th 734, 763.)

Evidence Code section 1242, codifying the dying declaration exception to the hearsay rule, has specific indicia of reliability built into the statute. (***People v. Johnson*** (2015) 61 Cal.4th 734, 763.)

§ 8.211.3 Forfeiture by Wrongdoing

The Confrontation Clause is violated if the application of the exception to the hearsay rule in Penal Code section 1370 (permitting admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify and the prior statements are deemed trustworthy) does not satisfy the common-law forfeiture-by-wrongdoing doctrine which requires that the defendant have engaged in wrongdoing that was intended to or designed to keep a witness from testifying. (***Giles v. California*** (2008) 554 U.S. 353, 361-362 [128 S.Ct. 2678, 171 L.Ed.2d 488].)

The California Supreme Court did not reach the question of whether admission of the victim's declaration in support of a temporary restraining order was admissible under the forfeiture by wrongdoing doctrine because any error in admitting the declaration was harmless beyond a reasonable doubt. (***People v. Streeter*** (2012) 54 Cal.4th 205, 240.)

§ 8.211.4 Forfeiture

Since the *Crawford* rule is "flatly inconsistent with prior governing precedent" a defendant in a case tried before *Crawford* cannot forfeit a *Crawford* challenge by failing to raise a Confrontation Clause objection at trial. Acknowledging that its approach to forfeiture of *Crawford* claims has been less than consistent, the California Supreme Court expressly rejected any suggestion that counsel may be faulted for failing to object on *Crawford* grounds in any case tried before *Crawford* was decided. The relevant inquiry for determining forfeiture is not whether a *Crawford* challenge relies on the same legal and factual standards as challenges on hearsay or other state law grounds because "a *Crawford* objection requires a court to consider whether statements are testimonial, and if so, whether a witness was unavailable and the defendant had a prior opportunity for cross-examination," which invokes different legal standards than hearsay objections which require consideration of whether the foundational requirements for particular hearsay have been met. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1215-1216, disapproving *People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1214, *People v. Lopez* (2013) 56 Cal.4th 1028, 1065, *People v. Riccardi* (2012) 54 Cal.4th 758, 801, fn. 21, and *People v. Dement* (2011) 53 Cal.4th 1, 22-23; and see also ***People v. Banks*** (2014) 59 Cal.4th 1113, 1167, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3, quoting ***People v. Harris*** (2013) 57 Cal.4th 804, 840 ["Because *Crawford* 'was a dramatic departure from prior confrontation clause case law,' a defendant's failure to raise a *Crawford* claim in a pre-*Crawford* trial 'is excusable because defense counsel could not reasonably have been expected to anticipate this change in the law.'"].)

The defendant was not excused from the contemporaneous objection requirement because some of *Crawford*'s progeny postdated his trial, including ***Melendez-Diaz v. Massachusetts*** (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314], the first high court opinion involving forensic testing. Since, by the time of defendant's trial, numerous published appellate opinions had applied *Crawford* to questions about the admission of forensic evidence, the defendant could have easily objected on confrontation grounds. Accordingly, his claim on appeal was forfeited. (***People v. Cordova*** (2015) 62 Cal.4th 104, 135.)

B. DEFENDANT'S STATEMENTS [§ 8.212]

> *Cross-Reference*: § 11.19, *re* Defendant's statements

The defendant was not allowed to place hearsay conversations with her counsel regarding legal strategy before the jury. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 929.)

The trial court properly excluded a hand written document entitled last will and testament of the defendant recovered from the defendant's living room that the defense sought to admit at trial as a spontaneous statement, or evidence of his state of mind or for a non-hearsay purpose. Moreover, the defendant was not prejudiced by the exclusion of the statements in the document. "[The d]efendant presented all of this evidence – without contradiction – during his testimony at trial. In particular, the jury was aware that the defendant contemplated suicide in the hours *following* the shooting, even going so far as to prepare a handwritten will, and that the defendant felt remorse *after* the shooting and wished he could have traded places with the fallen officer. The jury nonetheless believed that even though the defendant came to regret his actions, the defendant did what he wanted to do *at the time of the shooting*." (***People v. Ervine*** (2009) 47 Cal.4th 745, 778-780, emphasis in original.)

§ 8.212.1 Corpus Delicti

"In any criminal prosecution, the corpus delicti must be established by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant. The elements of the corpus delicti are (1) the injury, loss or harm, and (2) the criminal agency that has caused the injury, loss or harm. Proof of corpus delicti need not be beyond a reasonable doubt; a slight or prima facie showing is sufficient. The identity of the perpetrator is not an element of the corpus delicti." (***People v. Crew*** (2003) 31 Cal.4th 822, 836-837, internal quotation marks & citations omitted.)

Effective June 6, 1990, the corpus delicti rule does not apply to any felony-based special circumstance. (***People v. Jablonski*** (2006) 37 Cal.4th 774, 825-826; Pen. Code, § 190.41; ***People v. Combs*** (2004) 34 Cal.4th 821, 852, fn. 5 [corpus delicti rule does not apply to proof of the underlying felony for purposes of felony-murder or the robbery-murder special circumstance]; ***People v. Weaver*** (2001) 26 Cal.4th 876, 929-932 [the fact the corpus delicti rule does not apply to determine the degree of murder in a capital case did not violate Eighth Amendment].)

§ 8.212.2 Relevance

A generic threat is admissible where other evidence brings the actual victim within the scope of the threat. (***People v. Crew*** (2003) 31 Cal.4th 822, 842.)

Evidence that the defendant was in possession of a handgun the day before the murder and threatened to kill any policeman who got in his way was relevant to the motive for shooting the police officer, intent, and deliberation and premeditation. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1289.)

A defendant's use of racial epithets in describing the victim during police interviews was properly admitted as it was relevant to motive and, therefore, premeditation and deliberation, not unduly prejudicial, and did not violate the defendant's right under the First Amendment not to be punished for his speech. (***People v. Quartermain*** (1997) 16 Cal.4th 600, 628-629.)

Where the defendant had raped another victim after the charged murders were committed, the victim's testimony that he had threatened to kill her and said he had killed before was relevant to the ultimate question of guilt. (***People v. Johnson*** (1993) 6 Cal.4th 1, 33-34, abrogated on other grounds, *People v. Rogers* (2006) 39 Cal.4th 826, 879.)

A false denial by the defendant is relevant evidence of consciousness of guilt even if there also exists a possible alternative basis for the false denial that would not incriminate the defendant. (***People v. Hughes*** (2002) 27 Cal.4th 287, 335.)

The videotape of the defendant's interview by a local television news reporter shortly after discovery of the victims' bodies was properly admitted as showing consciousness of guilt. (***People v. Cain*** (1995) 10 Cal.4th 1, 31-33.)

The videotape of an edited version of the "America's Most Wanted" television program showing the reenactment of the murder was relevant and properly admitted to give context to the defendant's statement that he saw the episode, and "agreed to some degree, with what was depicted in it." (***People v. Riggs*** (2008) 44 Cal.4th 248, 289-291.)

§ 8.212.3 Secretly Tape-Recorded Conversations

Where the defendant was in jail on other charges but had not been arrested on capital charges, it was not a violation of his Sixth Amendment rights when the defendant's girlfriend, at police request, taped phone conversations with the defendant about the murders. (***People v. Webb*** (1993) 6 Cal.4th 494, 527.)

There was no Fifth or Sixth Amendment violation based on tape-recording a conversation between codefendants while they were being transported to court. (***People v. Champion*** (1995) 9 Cal.4th 879, 911, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860.)

§ 8.212.4 Form & Presentation of Defendant's Statements at Trial

Permitting a deputy sheriff, who had acted as a courtroom bailiff before the decision was made to call him as a witness, to testify to incriminating admissions he overheard the defendant make did not deny due process or a fair and impartial trial. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1290.)

Failure to tape-record the defendant's in-custody statement does not violate due process. (***People v. Holt*** (1997) 15 Cal.4th 619, 663-665.)

§ 8.212.5 Admission of Defendant's Exculpatory Statements

A capital defendant has no federal constitutional right to the admission of evidence lacking in trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination. (***People v. Jurado*** (2006) 38 Cal.4th 72, 130.)

The defendant could not rely on the hearsay exception for statements against penal interest to admit statements he made in letters written from jail. The defendant was not "unavailable" within the meaning of Evidence Code section 1230. If the out-of-court statement is that of the party himself, he may not create "unavailability" by invoking the privilege not to testify. The content of the letters was exculpatory and was not against penal interest. (***People v. Elliot*** (2005) 37 Cal.4th 453, 483.)

C. VICTIM'S STATEMENTS [§ 8.213]

Evidence of a murder victim's fear of the defendant is admissible when the victim's state of mind is relevant to an element of the offense. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1114, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

The victim's statements about preferences in sexual partners was properly admitted as "state of mind" evidence, where the issue of consent was in issue by a charge of forcible rape and the rape special circumstance. (***People v. Geier*** (2007) 41 Cal.4th 555, 585-587, overruled on other grounds as recognized by *People v. Seumanu* (2015) 61 Cal.4th 1293, 1320.)

"It has long been recognized that when, as in this case, a witness's silence is presented as inconsistent with his or her later testimony, a statement made at the earliest opportunity after the silence that is consistent with the witness's later testimony may be admissible as a prior consistent statement under section 791(b)." Accordingly, the victim's diary entry and statement to her teacher were properly admitted as prior

consistent statements. (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1067, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

D. CODEFENDANT'S STATEMENTS [§ 8.214]

Law governing admission in a joint trial of codefendant's out-of-court statements. (See ***People v. Gamache*** (2010) 48 Cal.4th 347, 379; ***People v. Burney*** (2009) 47 Cal.4th 203, 239-240; ***People v. Lewis*** (2008) 43 Cal.4th 415, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

The statements of a co-defendant are admissible against a defendant as a statement against interest. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 933, fn. 22.)

E. SPONTANEOUS STATEMENTS [§ 8.215]

The trial court properly concluded a statement was spontaneous within the meaning of Evidence Code section 1240, where the individual was hysterical when she spoke to the police officer, and statements were made when "under the dominion of nervous excitement caused by the event, so that her utterances were spontaneous and unreflecting." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 810.)

The trial court properly concluded a person's statements were admissible as spontaneous utterances made while under the nervous excitement caused by the event where that person saw the defendant enter and leave her room, and then, shortly thereafter, she heard her daughter's exclamation followed by a gunshot; and after emerging from her room traumatized from finding her daughter and grandson lying on the floor mortally wounded. "There are many ways someone can acquire the personal knowledge required to support a conclusion that the person perceived an event." The issue of whether a person actually saw the defendant fire the shots goes to the weight of statements admitted pursuant to Evidence Code section 1240, as opposed to their admissibility. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 810-811.)

The trial court did not err in refusing a proposed defense instruction regarding determination of whether statements were in fact spontaneous. The determination of whether an exception to the hearsay rule is satisfied is a determination for the court, not the jury. Whether the person making the statement had personal knowledge of the facts contained in her statement was an issue for the jury, but whether the statement was spontaneous was not a "fact in issue in the action" such that it would be prejudicial to the parties to have the judge inform the jury how the court determined the preliminary fact establishing the admissibility of the statement. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 834-835, citing Evid. Code, § 405(b).

Whether a statement is admissible as an exception to the hearsay rule pursuant to Evidence Code section 1240 as a spontaneous utterance, and the determination of [w]hether the statement was made before there was 'time to contrive and misrepresent' is

informed by a number of factors, including the passage of time between the startling occurrence and the statement, whether the statement was a response to questioning, and the declarant's emotional state and physical condition." (***People v. Clark*** (2011) 52 Cal.4th 856, 925.)

F. STATEMENTS AGAINST INTEREST (Evid. Code § 1230) [§ 8.216]

"To demonstrate that an out-of-court declaration is admissible as a declaration against interest, the proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (***People v. Grimes*** (2016) 1 Cal.5th 698, 711 [internal quotation marks and citations omitted].)

"In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (***People v. Grimes*** (2016) 1 Cal.5th 698, 711 [internal quotation marks and citations omitted]; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 933[same].)

"[T]he nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant. Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.'" (***People v. Grimes*** (2016) 1 Cal.5th 698, 716.)

Death judgment reversed due to parsing of cohort's confession in admitting statement against penal interest pursuant to Evidence Code section 1230 because the additional statements by the confessing cohort could have countered testimony that defendant enjoyed the victim's death and the prosecutor's argument that defendant stood by watching as the victim was killed. (***People v. Grimes*** (2016) 1 Cal.5th 698, 720-723.)

XXI. THIRD-PARTY CULPABILITY [§ 8.220]

"[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it

is substantially more prejudicial than probative under Evidence Code section 352." (***People v. Elliott*** (2012) 53 Cal.4th 535, 580, internal quotation marks omitted; ***People v. McWhorter*** (2009) 47 Cal.4th 318, 367-368 [same].)

"For evidence of an uncharged offense to be admissible to establish the third party's identity as the perpetrator of the charged crimes, the pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature. [Citations.] A large number of common marks may, when viewed in combination, establish the required distinctive pattern." (***People v. Elliott*** (2012) 53 Cal.4th 535, 581, internal quotation marks omitted.)

Third-party evidence is admissible if it is capable of raising a reasonable doubt as to the defendant's guilt. Such evidence need not show "substantial proof of a probability" that the third person committed the act. "At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's culpability." (***People v. Vines*** (2011) 51 Cal.4th 830, 860; ***People v. Harris*** (2005) 37 Cal.4th 310, 340.)

Evidence that another person possessed mere motive or opportunity to commit the crime, without more, will not suffice to raise a reasonable doubt concerning a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. (***People v. Gutierrez*** (2009) 45 Cal.4th 789, 824; ***People v. DePriest*** (2007) 42 Cal.4th 1, 43; ***People v. Avila*** (2006) 38 Cal.4th 491, 578; ***People v. Hall*** (1986) 41 Cal.3d 826, 834.)

In assessing third-party culpability evidence, the trial court should simply treat the evidence like any other evidence; if relevant it is admissible (Evid. Code, § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1242.)

The trial court did not abuse its discretion in excluding third-party culpability evidence where no direct or circumstantial evidence placed third parties inside the victims' home at any time. The fact a surviving victim was subsequently murdered by two men in Chicago 15 months later in the course of dealing drugs did not demonstrate involvement in the killings or disprove the prosecution's theory that the defendant shot the victim. (***People v. Harris*** (2005) 37 Cal.4th 310, 340.)

The trial court properly refused the defendant's proffer of evidence that his wife witnessed and experienced child abuse in her own family as circumstantial evidence of third-party liability, and the defendant's constitutional right to present a defense was not implicated by the court's evidentiary ruling. (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1257-1258.)

Any exclusion of third-party culpability evidence does not violate a defendant's federal constitutional right to present evidence. (***People v. Clark*** (2016) 63 Cal.4th 522, 597, fn. 54.)

XXII. VICTIM-IMPACT IN GUILT PHASE (IMPROPER) [§ 8.230]

Where the defendant complained of improper victim-impact evidence during the guilt phase, the "testimony of witnesses describing [a relative's] screams upon finding the bodies, as well as his subsequent crying and hysteria, was relevant to explain the inconsistencies between [that person's] trial testimony and his initial interview with investigating officers at the scene." The testimony of [the defendant's estranged wife] regarding her family's receipt of the telephone call regarding the deaths of [her mother and brother] and their breaking the news to [the estranged wife] helped provide context and was part of the timeline of events from [the estranged wife's] leaving defendant to her return to her mother's home after the murders." (***People v. Cage*** (2015) 62 Cal.4th 256, 282.)

A defendant forfeits a claim of improper victim-impact evidence during the guilt phase of trial by failing to make a contemporaneous objection on those grounds. (***People v. Cage*** (2015) 62 Cal.4th 256, 282; ***People v. Tully*** (2012) 54 Cal.4th 952, 1014.)

No prejudicial error resulted from the admission of testimony describing a relative's screams and subsequent hysteria after finding bodies, as the evidence overwhelmingly established the defendant was the person who shot the victims. "The facts of the shootings were largely undisputed. And the jurors reasonably would expect that immediate family members would experience horror and distress in seeing and hearing about the killings." (***People v. Cage*** (2015) 62 Cal.4th 256, 282.)

No grounds for reversible misconduct existed from brief exchanges where the prosecutor asked a guilt phase witness whether the description of the coldness in the victim's bedroom referred only to the temperature or also the witness's feelings; and whether the witness experienced flashbacks from what she found in the bedroom. (***People v. Tully*** (2012) 54 Cal.4th 952, 1014.)

The only relevance of questions directed to the victim's daughter in the guilt phase about her relationship with her mother was not impermissible victim-impact evidence as the questions "were also relevant to show – contrary to the implication of defendant's statement to the police – that [the victim] was a modest woman who led a quiet life." (***People v. Tully*** (2012) 54 Cal.4th 952, 1015.)

XXIII. WITNESSES [§ 8.240]

"To have a material witness who has committed no crime taken into custody, for the sole purpose of ensuring the witness's appearance at a trial, is a measure so drastic that it should be used sparingly." (***People v. Sanchez*** (2016) 63 Cal.4th 411, 447, internal citations & quotation marks omitted.)

A. EVIDENCE OF FEAR OF TESTIFYING [§ 8.241]

A jury may consider evidence of bias, interest, or other motive affecting a witness's credibility. (Code Civ. Proc., § 780(f)). Evidence that the witness is afraid to testify or fears retaliation from testifying is admissible. An explanation of the fear is likewise relevant to the jury's assessment of the witness's credibility, and its admission is within the discretion of the trial court. There is no requirement that the threats be by the defendant personally or that the witness's fear of retaliation be directly linked to the defendant. (***People v. Chism*** (2014) 58 Cal.4th 1266, 1291-1292; ***People v. Williams*** (2013) 58 Cal.4th 197, 270; ***People v. McKinnon*** (2011) 52 Cal.4th 610, 668; ***People v. Guerra*** (2006) 37 Cal.4th 1067, 1141-1142, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

It is unnecessary for the witness to directly link the fear of testifying to intimidation by the defendant in order for the evidence to be admissible for purposes of assisting the jury in assessing that witness's credibility. (***People v. Adams*** (2014) 60 Cal.4th 541, 570; ***People v. Williams*** (2013 58 Cal.4th 197, 210.)

"Evidence that a witness is afraid to testify or fears of retaliation for testifying" is relevant to credibility and admissible. (***People v. Chism*** (2014) 58 Cal.4th 1266, 1291; ***People v. Abel*** (2012) 53 Cal.4th 891, 925; ***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1084-1085; ***In re Freeman*** (2006) 38 Cal.4th 630, 649-650; ***People v. Gonzalez*** (2006) 38 Cal.4th 932, 946.)

Evidence of the basis for the fear is likewise relevant to credibility and within the trial court's discretion to admit. (***People v. Chism*** (2014) 58 Cal.4th 1266, 1291; ***People v. Abel*** (2012) 53 Cal.4th 891, 925; ***People v. Gray*** (2005) 37 Cal.4th 168, 220; ***People v. Burgener*** (2003) 29 Cal.4th 833, 869.)

Evidence of a third-party threat may bear upon the credibility of a witness regardless of whether the threat is linked to the defendant. (***People v. Abel*** (2012) 53 Cal.4th 891, 925; ***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1084.)

Evidence that special precautions had been taken to protect witnesses who were former gang members who agreed to testify against the defendant, a former friend and fellow gang member, was properly introduced as "[t]heir willingness to do so despite a legitimate basis for concern about their safety enhanced their credibility." (***People v. Adams*** (2014) 60 Cal.4th 541, 572.)

Inconsistent testimony is not a prerequisite to the admission of evidence of a third party's threat or a witness's fear. (***People v. Valdez*** (2012) 55 Cal.4th 82, 135-136; ***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1086.)

Admission of evidence of the basis for a witness being frightened to testify was not improper based on a three-year delay between that incident and the witness's testimony. (***People v. Chism*** (2014) 58 Cal.4th 1266, 1292.)

Absent a request, the trial court has no duty to give a limiting instruction to a jury to only consider evidence of a witness's fear of testifying for purposes of assessing the witness's credibility where the evidence was more than minimally relevant to the legitimate purpose of supporting the credibility of the witness and was not a dominant part of the evidence against the defendant. (***People v. Valdez*** (2012) 55 Cal.4th 82, 139.)

B. COMPETENCY [§ 8.242]

A trial court's ruling on the competency of a witness is upheld in the absence of a clear abuse of discretion. The trial court did not abuse its discretion in admitting the preliminary hearing testimony of a child because an expert affirmed the child "was not incapable of understanding his duty to tell the truth, or unable to understand questions and express himself in an understandable way." While the doctor declined to state a definite opinion on whether the child's memories were accurate, and his testimony was "less than direct" on whether the child was able to distinguish truth from falsehood, the trial court concluded the expert's views reflected more on the child's credibility than his "'fundamental ability to distinguish truth from fiction.'" (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1263-1264.)

C. PROTECTIVE COURTROOM SEATING [§ 8.243]

At the prosecution's request, the trial court provided "protective courtroom seating" for a juvenile witness who had expressed "great fear" of his parents (co-defendants charged with the capital murder of their niece). The seating arrangement resulted in the child witness being "seated at an angle, not directly facing the defendants" during the preliminary hearing. The podium for counsel, however, allowed eye contact with the witness during questioning, and the witness was free to look around the courtroom and make eye contact with the defendants. While the trial court made no factual findings as to the need to shield the child witness at the preliminary hearing from the defendant's gaze, the seating arrangement for the child witness was fully justified by the record given the extensive findings made by the trial court regarding the child being traumatized if made to testify at trial (and noting that the defense did not dispute the vulnerability of the young witness at the time of the preliminary hearing or trial). The "defendant's confrontation rights were not violated when the videotape was introduced at trial. The seating arrangement at the preliminary hearing satisfied the central concerns of the confrontation clause: 'physical presence, oath, cross examination, and observation of demeanor by the trier of fact.'" (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1266-1268, quoting ***Maryland v. Craig*** (1990) 497 U.S. 836, 846 [110 S.Ct. 3157, 111 L.Ed.2d 666].)

D. IMMUNITY [§ 8.244]

It is doubtful that a trial court has the inherent authority to grant immunity. The power to grant immunity is conferred by statute to the executive branch of state government. (***People v. Masters*** (2016) 62 Cal.4th 1019, 1050-1051, citing Pen. Code, § 1324; ***People v. Stewart*** (2004) 33 Cal.4th 425, 468.)

"'[P]rosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant.'" (***People v. Masters*** (2016) 62 Cal.4th 1019, 1051 quoting ***People v. Williams*** (2008) 43 Cal.4th 584, 622, and citing ***People v. Samuels*** (2005) 36 Cal.4th 96, 127-128 ["prosecutor did not commit misconduct by not granting immunity to a nonessential defense witness who asserted her right against self-incrimination and refused to testify"].)

Even assuming that a trial court has the inherent authority to grant immunity, that authority has been recognized only when the defendant makes a showing that a defense witness should be afforded immunity in order to provide clearly exculpatory testimony. (***People v. Williams*** (2008) 43 Cal.4th 584, 622.)

A witness is "unavailable" for purposes of the exception to the Confrontation Clause if the witness appropriately invokes the privilege against self-incrimination without any necessity of the prosecution demonstrating they made a good-faith effort to persuade the witness to testify, either through discussion, or a grant of immunity. (***People v. Williams*** (2008) 43 Cal.4th 584, 623.)

It is well established that a trial court does not err in denying a request to have a witness invoke the privilege against self-incrimination in front of the jury. (***People v. Williams*** (2008) 43 Cal.4th 584, 630, citing Evid. Code, § 913(a) [trier of fact should not draw any inferences concerning witness credibility or any other matter at issue from a witness's invocation of the privilege].)

"Although any plea agreement or grant of immunity involves a certain amount of compulsion, it is valid so long as it only requires full and truthful testimony." (***People v. Clark*** (2016) 63 Cal.4th 522, 581.)

While "the separate prosecution or nonprosecution of coparticipants, and the reasons therefore, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses." While CALJIC No. 2.11.5 should have been clarified or omitted, it did not amount to error since the jury was further instructed with CALJIC No. 2.20 providing the criteria for assessing witness credibility, and considering the instructions as a whole a reasonable juror would have understood it could consider a grant of immunity in assessing a witness's testimony. (***People v. O'Malley*** (2016) 62 Cal.4th 944, 986, internal quotation marks & citations omitted.)

E. IMPEACHMENT [§ 8.245]

"[T]he use of a constitutionally invalid prior conviction to impeach testimonial credibility is improper." (***People v. Trujeque*** (2015) 61 Cal.4th 227, 279.)

Trial courts are allowed broad latitude under Evidence Code section 352 for excluding impeachment evidence in an individual case. Trial courts are empowered to "'prevent trial courts from degenerating into nitpicking wars of attrition over collateral credibility issues.'" (***People v. Harris*** (2008) 43 Cal.4th 1269, 1291.)

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352.... [¶] … When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify. [Citations]. Additional considerations apply when the proffered impeachment evidence is misconduct other than a prior conviction. This is because such misconduct generally is less probative of immoral character or dishonesty and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude. [Citation.] … [C]ourts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value. [Citation]." (***People v. Clark*** (2011) 52 Cal.4th 856, 931-932, internal quotation marks omitted.)

"[M]ental illness or emotional instability of a witness can be relevant on the issue of credibility … if such illness affects the witness's ability to perceive, recall or describe the events in question." (***People v. Verdugo*** (2010) 50 Cal.4th 263, 292.)

"Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility, the fact that a witness declined an offer for financial gain in exchange for his silence is likewise relevant in evaluating his or her credibility." (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1141-1142, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

The trial court did not abuse its discretion in excluding proof of the criminal charges against [the lead homicide task force detective] because presenting the evidence would have required an undue consumption of time as "[p]roof of the charges was complicated by the death of the percipient witness, and the value of the impeachment evidence was low, given that all of [the detective's] testimony could be corroborated." Moreover, evidence of the detective's unexplained termination from the police department was properly excluded as irrelevant. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1066.)

F. PROSECUTOR / DEFENSE ATTORNEY [§ 8.246]

"Only in extraordinary circumstances should an attorney in an action be called as a witness, and before the attorney is called, defendant has an obligation to demonstrate that there is no other source for the evidence he seeks." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1186, internal quotation marks & citation omitted.)

The trial court did not err in refusing defense request to call trial prosecutor as a witness as there were other sources for the evidence defendant sought. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1186-1187.)

G. UNAVAILABILITY [§ 8.247]

The Confrontation Clause is violated if the application of the exception to the hearsay rule in Penal Code section 1370 (permitting admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify and the prior statements are deemed trustworthy) does not satisfy the common law forfeiture by wrongdoing doctrine which requires that the defendant have engaged in wrongdoing that was intended to or designed to keep a witness from testifying. (***Giles v. California*** (2008) 554 U.S. 353, 361-362 [128 S.Ct. 2678, 171 L.Ed.2d 488].)

"It could be argued that the erroneous release of a witness on his or her own recognizance is really not a failure of prosecutorial diligence but more accurately trial court error. This would be especially true if the trial court granted the release notwithstanding the prosecutor's opposition. But even if so characterized, it would make no difference for confrontation clause purposes whether the error that led to a material witness being unavailable was attributable to the court or to the prosecution – in either case such error, if proven to be prejudicial, could result in a reversal of a judgment against a defendant." (***People v. Bunyard*** (2009) 45 Cal.4th 836, 849, fn. 5.)

The standard of review that should be employed to determine whether there has been reasonable diligence when a material witness has been released on his or her own recognizance and then becomes unavailable is an independent review in the sense that the reviewing court independently applies an "objective, constitutionally based legal test" to certain facts while also giving due deference to the trial court's determination of a witness's flight risk. The trial court's determination of a witness's flight risk will be second-guessed only when it is clear from the record that it was objectively unreasonable. (***People v. Bunyard*** (2009) 45 Cal.4th 836, 851.)

While the defense did not challenge the trial court's ruling on appeal that an eight year-old child was unavailable because of the trauma he would suffer from testifying against his parents in their capital trials, the defendant complained on appeal that he was denied a meaningful opportunity to cross-examine the child during his preliminary hearing testimony because the child was placed in foster homes and defense counsel was

unable to interview him or gain information about his mental condition. The claim was rejected as the trial court made it clear that any subsequently developed evidence reflecting on the child's credibility could be introduced at trial, and the notion the child's credibility could have been undermined at the preliminary hearing by cross-examining him about psychological issues was unpersuasive given that "an eight-year-old child's grasp of such issues is necessarily limited. [The child] had plainly been through a traumatic experience, and counsel was free to explore the effects of that experience on his memory." (***People v. Gonzales*** (2012) 54 Cal.4th 1234, 1257-1258.)

"When the trial court errs in releasing a material witness from custody, which results in the witness becoming unavailable for testimony, and the prosecution supports that release, the prosecution may be held to have not exercised reasonable diligence." Substantial evidence supported the trial court's findings the prosecution reasonably believed the witness was cooperative, and believed it would have no difficulty obtaining her trial testimony. (***People v. Sanchez*** (2016) 63 Cal.4th 411, 446-447, internal citations & quotation marks omitted.)

Chapter Nine
TRIAL – JURY INSTRUCTIONS (GUILT PHASE)

I. GENERALLY [§ 9.10]

There is no due process violation from instructional error unless the ailing instruction so infected the entire trial that the resulting conviction violated due process. The instruction must be viewed in the context of the overall charge. If the charge as a whole is ambiguous, then the question is whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that violates the Constitution. (***People v. Huggins*** (2006) 38 Cal.4th 175, 192.)

"'[A] commonsense understanding of the instruction in light of all that has taken place at the trial is likely to prevail over technical hairsplitting.'" (***People v. Huggins*** (2006) 38 Cal.4th 175, 193, quoting ***Boyde v. California*** (1990) 494 U.S. 370, 381 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

A trial court does not err in refusing to give duplicative instructions. (***People v. Friend*** (2009) 47 Cal.4th 1, 50.)

A. ARGUMENTATIVE [§ 9.11]

There is no entitlement to argumentative instructions at the guilt phase. (***People v. Moon*** (2005) 37 Cal.4th 1, 31; ***People v. Mincey*** (1992) 2 Cal.4th 408, 437.)

However, when a defendant proposes an argumentative instruction on factors relevant to identification, the trial court should not deny the instruction outright, but should tailor the instruction to conform to the requirements of ***People v. Wright*** (1988) 45 Cal.3d 1126, 1138-1144. (***People v. Fudge*** (1994) 7 Cal.4th 1075, 1110.)

B. PINPOINT INSTRUCTIONS [§ 9.12]

Pinpoint instructions "relate particular facts to legal issues in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi. They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." No error in failing to instruct sua sponte regarding third-party culpability. (***People v. Gutierrez*** (2009) 45 Cal.4th 789, 824, internal quotation marks & citations omitted.)

"Although … a trial court may be required in appropriate circumstances to give a requested jury instruction that pinpoints a defense theory of the case, … the court need not give a pinpoint instruction if it is argumentative, merely duplicates other instructions, or is not supported by substantial evidence." (***People v. Williams*** (2016) 1 Cal.5th 1166, 1193 [internal quotation marks and citations omitted].)

"[I]n appropriate situations, a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case, but the court need not give a pinpoint instruction that merely duplicates other instructions." (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1112.)

A trial court properly refused to instruct with a defense instruction that is an incorrect statement of law, argumentative, duplicative, or potentially confusing, or if it is unsupported by substantial evidence. (***People v. Moon*** (2005) 37 Cal.4th 1, 30.)

A trial court is not obligated to instruct the jury with an instruction based on language from ***People v. Anderson*** (1968) 70 Cal.2d 15, guiding appellate courts regarding the sufficiency of the evidence of premeditation and deliberation. Such instructions are incorrect statements of the law to the extent the instruction purports to limit the jury's consideration of evidence of premeditation and deliberation. (***People v. Moon*** (2005) 37 Cal.4th 1, 30-31; ***People v. Gurule*** (2002) 28 Cal.4th 557, 659.)

The trial court properly refused a pinpoint instruction that states "the brutality of a killing cannot by itself establish that the killer acted with deliberation and premeditation," because in a general way, the concepts are incorporated in the pattern instructions on premeditated murder in CALJIC No. 8.20. (***People v. Moon*** (2005) 37 Cal.4th 1, 31.)

The trial court properly refused a pinpoint instruction that "deliberate and premeditated murder requires substantially more reflection, that is, more understanding and comprehension of the character of the act than the mere amount of thought necessary to form the intention to kill," because the proposed instruction is duplicative of CALJIC No. 8.20. Moreover, the reference to "substantially more reflexive" in the instruction was objectionable as argumentative. (***People v. Moon*** (2005) 37 Cal.4th 1, 31.)

CALJIC No. 2.03 (consciousness of guilt from willfully false or misleading statements) is not an improper pinpoint instruction. (***People v. Richardson*** (2008) 43 Cal.4th 959, 1019.)

C. WRITTEN INSTRUCTIONS [§ 9.13]

The California Supreme Court recommends that juries in capital cases be provided with written instructions so as to cure any inadvertent errors that may occur when the instructions are read aloud. (***People v. Huggins*** (2006) 38 Cal.4th 175, 190, fn. 3; ***People v. Seaton*** (2001) 26 Cal.4th 598, 673; see also ***People v. Box*** (2000) 23 Cal.4th 1153, 1212 [misreading instructions is at most harmless error when the written instructions received by the jury are correct], overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129], and *People v. Martinez* (2010) 47 Cal.4th 911, 948 & fn. 10.)

"The risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact the trial court misspoke." The California Supreme Court has often held that it assumes the jury

followed written instructions when erroneous oral instructions are supplemented by correct written ones, particularly when the jury is instructed that the written version is controlling. (***People v. Grimes*** (2016) 1 Cal.5th 698, 729 [internal quotation marks and citations omitted.)

When the jury receives an instruction in both spoken and written forms, and the two versions vary, the court assumes the jury was guided by the written version of the instruction. (***People v. Jurado*** (2006) 38 Cal.4th 72, 123.)

II. ACCOMPLICES [§ 9.20]

"[D]efendant's proposed special instruction did not pinpoint a specific defense theory not covered by CALJIC No. 3.18, but merely provided a lengthier and more detailed expression of the law concerning accomplice testimony. Furthermore, the trial court's additions to CALJIC No. 3.18 adequately addressed defense counsel's concern that the instruction indicate the reasons the jury should view accomplice testimony with special caution. Because the instruction given was correct and adequate, the trial court did not err in refusing defendant's requested special instruction." (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1112.)

Where an individual did not testify and his out-of-court statements were not made under questioning by police or other suspect circumstances, the trial court was not obligated by Penal Code section 1111 to instruct the jury regarding the requirement of corroboration of accomplice testimony based on that individual's statements. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1229.)

III. BURDEN OF PROOF [§ 9.30]

Standard jury instructions CALJIC Nos. 1.00 (Respective Duties of Judge and Jury), 2.01 (Sufficiency of Circumstantial Evidence – Generally), 2.21.1 (Discrepancies in Testimony), 2.21.2 (Witness Willfully False), 2.22 (Weighing Conflicting Testimony), 2.27 (Sufficiency of Testimony of One Witness), 2.51 (Motive), 2.52 (Flight After Crime), and 8.83 (Special Circumstances – Sufficiency of Circumstantial Evidence – Generally) did not individually or collectively undermine or lessen the prosecution's burden of proof beyond a reasonable doubt. (***People v. Cage*** (2015) 62 Cal.4th 256, 286; ***People v. Moore*** (2011) 51 Cal.4th 386, 414 [CALJIC Nos. 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, and 8.83 do not unconstitutionally lessen burden of proof]; ***People v. McKinnon*** (2011) 52 Cal.4th 610, 677-678 [CALJIC Nos. 2.02, 2.03, 2.21.2, 2.22, 2.27, 2.51, and 8.20 do not unconstitutionally lessen burden of proof]; see also ***People v. Vines*** (2011) 51 Cal.4th 830, 885; ***People v. Brasure*** (2008) 42 Cal.4th 1037, 1058-1059.)

The distinctions between the standard jury instruction on direct evidence (CALJIC No. 2.00) and circumstantial evidence (CALJIC No. 2.01) does not diminish the reasonable doubt instruction with respect to consideration of direct evidence.

"Differentiating between direct and circumstantial evidence does not undermine the reasonable doubt standard or presumption of innocence for the simple reason that direct evidence and circumstantial evidence are different. 'Circumstantial evidence involves a two-step process – first, the parties present evidence and, second, the jury decides which reasonable inference or inferences, if any, to draw from the evidence – but direct evidence stands on its own. So as to direct evidence no need ever arises to decide if an opposing inference suggests innocence.'" (***People v. Livingston*** (2012) 53 Cal.4th 1145, 1166.)

Instructing the jury with CALJIC No. 2.50.1, informing jurors in the guilt phase that other crimes evidence may be proved by a preponderance of the evidence, did not diminish the People's burden to prove the defendant guilty beyond a reasonable doubt, including the truth of the prior-murder-conviction special-circumstance allegation. (***People v. Rogers*** (2013) 57 Cal.4th 296, 338.)

A. REASONABLE-DOUBT INSTRUCTION – CALJIC No. 2.90 [§ 9.31]

CALJIC No. 2.90 adequately defines reasonable doubt. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 911-912; ***People v. Lucas*** (2014) 60 Cal.4th 153, 294-296, disapproved on another ground in ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 53, fn. 19.)

CALJIC No. 2.90 correctly defines reasonable doubt. (***People v. Turner*** (1994) 8 Cal.4th 137, 203, abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

CALJIC No. 2.90 on the presumption of innocence and reasonable doubt satisfies due process. (***People v. Rundle*** (2008) 43 Cal.4th 76, 155, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Rogers*** (2006) 39 Cal.4th 826, 889.)

The California reasonable doubt instruction in former Penal Code section 1096 does not violate the due process clause. (***Victor v. Nebraska*** (1994) 511 U.S. 1 [114 S.Ct. 1239, 127 L.Ed.2d 583]; ***People v. Ray*** (1996) 13 Cal.4th 313, 347; ***People v. Medina*** (1995) 11 Cal.4th 694, 762; ***People v. Horton*** (1995) 11 Cal.4th 1068, 1120.)

Trial courts may safely delete the phrases "and depending upon moral evidence" and "to a moral certainty" from CALJIC No. 2.90, but should not otherwise modify the standard instruction. (***People v. Freeman*** (1994) 8 Cal.4th 450, 504.)

The California Legislature amended Penal Code section 1096 to delete the phrases "and depending upon moral evidence" and "to a moral certainty" from the definition of reasonable doubt. (Stats. 1995, ch. 46, § 1 (eff. 7/3/95); see ***People v. Ray*** (1996) 13 Cal.4th 313, 347, fn. 17.)

B. OTHER CALJIC INSTRUCTIONS [§ 9.32]

CALJIC No. 2.01 does not reduce the prosecution's burden of proof. (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 295-296.)

CALJIC Nos. 2.01 and 2.02 (sufficiency of circumstantial evidence to prove specific intent), 2.21.2 (willfully false witness), 2.22 (weighing conflicting testimony), 2.51 (motive), and 2.27 (sufficiency of testimony of one witness), do not lessen or shift the prosecution's burden of proof. (***People v. Rogers*** (2006) 39 Cal.4th 826, 889.)

The California Supreme Court has repeatedly rejected the contention that the standard instructions on circumstantial evidence, which use the phrase "appears to you to be reasonable," undermine the constitutional requirements of proof beyond a reasonable doubt. (***People v. Nelson*** (2011) 51 Cal.4th 198, 216; ***People v. Hughes*** (2002) 27 Cal.4th 287, 346-347 [circumstantial evidence instructions, CALJIC Nos. 2.01 (proof of charged offense), 2.02 (proof of required mental state), 8.83 (proof of special circumstances), and 8.83.1 (proof of required mental state for special circumstances), which refer to an interpretation of the evidence that "appears to you to be reasonable," do not dilute the prosecution's burden of proof beyond a reasonable doubt].)

Giving CALJIC Nos. 2.02 and 2.09 together does not erode the reasonable-doubt standard of proof. (***People v. Carey*** (2007) 41 Cal.4th 109, 129.)

While CALJIC No. 2.11.5 should have been clarified or omitted where a prosecution witness had been granted immunity, giving the instruction did not amount to error since the jury was further instructed with CALJIC No. 2.20, providing the criteria for assessing witness credibility. Considering the instructions as a whole, a reasonable juror would have understood that while "the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses." (***People v. O'Malley*** (2016) 62 Cal.4th 944, 986, internal citations & quotation marks omitted.)

The trial court properly rejected a modification requested by defense of CALJIC No. 2.11.5 as it conflated the actions of the Department of Corrections in allegedly giving lenient treatment with those of the district attorney's office and "could have only confused the jury and possibly eviscerated the instruction." (***People v. Landry*** (2016) 2 Cal.5th 52, 101.)

CALJIC No. 2.51 (motive) does not unconstitutionally permit the jury to determine guilt based solely on motive, shift the burden to the defendant to show the absence of motive, or reduce the prosecutor's burden of proof. (***People v. Charles*** (2015) 61 Cal.4th 308, 329; ***People v. Sattiewhite*** (2014) 59 Cal.4th 446, 474.)

"CALJIC No. 2.51 did not improperly allow the jury to determine guilt based on motive alone. The instruction did not improperly shift the burden of proof to defendant to show absence of motive to establish his innocence. The juxtaposition of CALJIC

No. 2.51 and CALJIC No. 2.52, the latter of which expressly instructed the jury that evidence of flight is not by itself sufficient to establish guilt, would not have caused the jury to believe motive by itself was sufficient. The instruction did not impermissibly reduce the prosecution's burden of proof and violate defendant's constitutional rights." (***People v. Cage*** (2015) 62 Cal.4th 256, 284-285, internal quotation marks & citations omitted.)

CALJIC Nos. 1.00 and 2.51 do not misinform the jury that its duty is merely to decide whether the defendant is guilty or innocent as opposed to guilty beyond a reasonable doubt. (***People v. Carey*** (2007) 41 Cal.4th 109, 130.)

The California Supreme Court has repeatedly upheld CALJIC No. 2.21.2. (***People v. Martinez*** (2009) 47 Cal.4th 399, 448.)

CALJIC No. 2.21.2 does not lower the beyond-a-reasonable-doubt standard. (***People v. Carey*** (2007) 41 Cal.4th 109, 130-131.)

CALJIC No. 2.22 does not effectively replace the beyond-a-reasonable-doubt standard with a preponderance-of-the-evidence standard. (***People v. Carey*** (2007) 41 Cal.4th 109, 131.)

CALJIC No. 2.27 does not erroneously suggest to the jury that both the prosecution and the defense have the burden to prove facts. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 912; ***People v. Carey*** (2007) 41 Cal.4th 109, 131.)

When accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof, instruction with CALJIC Nos. 2.01, 2.02, 2.21.1, 2.21.2, 2.27, 2.51, 8.83, and 8.83.1 is unobjectionable. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1026.)

The burden of proof beyond a reasonable doubt is not reduced by instruction with the following standard jury instructions: CALJIC Nos. 2.90, 2.01, 2.02, 8.83, 8.83.1, 1.00, 2.51, 2.21.1, 2.21.2, 2.22, 2.27, and 8.20. (***People v. Friend*** (2009) 47 Cal.4th 1, 53.)

Instruction with CALJIC Nos. 2.01 and 8.83.1 does not create an impermissible mandatory conclusive presumption of guilt, nor permit the jury to determine guilt based on something less than proof beyond a reasonable doubt. (***People v. Wilson*** (2008) 43 Cal.4th 1, 23.)

IV. CIRCUMSTANTIAL EVIDENCE [§ 9.40]

The trial court did not err in giving CALJIC No. 2.01 where physical evidence was a substantial part of the prosecution case. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1112-1114.)

A "trial court is required to give CALJIC No. 2.01 on its own motion when the prosecution relies substantially on circumstantial evidence to prove guilt. [Citations.]

Conversely, the instruction need not be given when circumstantial evidence is merely incidental to and corroborative of direct evidence, due to the danger of misleading and confusing the jury where the inculpatory evidence consists wholly or largely of direct evidence of the crime." There is, however, no sua sponte obligation to instruct where the incriminating evidence, although substantial, complemented, and was merely corroborative of, the defendant's admissions. (***People v. McKinnon*** (2011) 52 Cal.4th 610, 676, internal citations & quotation marks omitted.)

Challenge to CALJIC No. 2.50.1 (other crimes evidence proven by preponderance) was waived because defense counsel requested the instruction. Facts showing commission of other crimes to establish knowledge or intent are mere "evidentiary facts" and need not be proved beyond a reasonable doubt as long as the jury is convinced beyond a reasonable doubt of the "ultimate fact" of the defendant's knowledge or intent. (***People v. Medina*** (1995) 11 Cal.4th 694, 763.)

Even where mental state is the principal issue, the California Supreme Court has rejected the notion that consciousness of guilt instructions call for impermissible inferences about mental state, or are otherwise inappropriate. (***People v. Tate*** (2010) 49 Cal.4th 635, 699.)

"[T]he federal Constitution does not require trial courts to instruct on the evaluation of circumstantial evidence when, as here, the jury is properly instructed on the reasonable doubt standard. (*Holland v. United States* (1954) 348 U.S. 121, 140 [99 L.Ed. 150, 75 S.Ct. 127]; see also *Victor v. Nebraska* (1994) 511 U.S. 1, 7-17 [127 L.Ed.2d 583, 114 S.Ct. 1239]….)" (***People v. McKinnon*** (2011) 52 Cal.4th 610, 677.)

V. CONSCIOUSNESS OF GUILT [§ 9.50]

CALJIC Nos. 2.04, 2.05, and 2.06 regarding consciousness of guilt do not permit improper inferences, are not impermissibly argumentative, and are not constitutionally infirm. (***People v. Charles*** (2015) 61 Cal.4th 308, 329-330; ***People v. Lopez*** (2013) 56 Cal.4th 1028, 1075, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

CALJIC Nos. 2.03, 2.06, and 2.52 are not impermissibly argumentative or misleading, were supported by the evidence, and did not violate the defendant's constitutional rights. (***People v. Jurado*** (2006) 38 Cal.4th 72, 125-126.)

Prior decisions rejecting claims that instruction on consciousness of guilt with CALJIC Nos. 2.03, 2.04, and 2.52 violates rights to due process, equal protection, fair jury trial, and reliable determination of guilt, special-circumstance and penalty-phase determinations, e.g., ***People v. Hughes*** (2002) 27 Cal.4th 287, 348, ***People v. Boyette*** (2002) 29 Cal.4th 381, 438-439, are based on sound reasoning. (***People v. Morgan*** (2007) 42 Cal.4th 593, 621.)

It is not improper to give a cautionary instruction on consciousness of guilt when the defendant admits some or all of the charged conduct, and merely disputes its criminal implications. It may be evidence tending to prove the accused knew he or she committed a crime. (***People v. Thornton*** (2007) 41 Cal.4th 391, 439.)

"The fact that a defendant initially denies involvement and later makes admissions certainly supports a conclusion that the earlier statement was a lie made to avoid detection or culpability." (***People v. Carrington*** (2009 47 Cal.4th 145, 188.)

Inconsistent statements concerning intent support the conclusion that an earlier statement was a lie made to avoid detection or culpability. (***People v. Russell*** (2010) 50 Cal.4th 1228, 1256.)

The defendant "argues that in cases in which a defendant has admitted his identity as the perpetrator of a crime, the instructions 'invite the jury to use evidence whose only rational use is to determine the identity of a perpetrator for an irrational purpose – as evidence that other elements of the crime [had] been established.' [¶] We have rejected this argument in prior decisions, and defendant proffers no persuasive basis for reconsideration. [Citations.] Contrary to defendant's claims, the instructions do not suggest that evidence of a defendant's consciousness of guilt serves to support an inference of the existence of a particular mental state or degree of culpability." (***People v. Martinez*** (2009) 47 Cal.4th 399, 449-450.)

The "need for consciousness of guilt instructions does not change just because identity is in issue." Instead, the jury logically decides first whether the person who fled was the defendant, and then if so, the jury uses CALJIC No. 2.06 for purposes of determining how much weight to accord to the flight in resolving other issues bearing on guilt. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1170, fn. 19, internal quotation marks & citations omitted.)

A defendant's due process and fair trial rights were not violated by instruction with CALJIC No. 2.06 where the victim's body parts that could have been used to identify her were found in a room to which the jury could reasonably infer from the evidence that only the defendant had keys, and the defendant's fingerprints were found on the inside of latex gloves that were inside other gloves stained with the victim's blood. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1170.)

The cautionary nature of CALJIC Nos. 2.03 and 2.06 on consciousness of guilt benefits the defense by admonishing the jury to be circumspect about evidence that might otherwise be considered decisively inculpatory. (***People v. Thornton*** (2007) 41 Cal.4th 391, 438.)

"[I]f, as defendant asserts, the consciousness of guilt evidence was not relevant to the special circumstance allegations, then the jury would have disregarded the instructions. Consequently, there is no reasonable likelihood the that the jury applied the consciousness of guilt instructions in a manner that violates the Constitution." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 933 [internal citation omitted].)

A. CALJIC No. 2.03 (False / Deliberately Misleading Statements) [§ 9.51]

The defendant was not denied due process or other rights under either the state or federal constitution based on an instruction on consciousness of guilt. CALJIC No. 2.03 is not "unfairly partisan and argumentative" and does not permit the jury to draw irrational inferences about a defendant's state of mind. By cautioning the jury that the evidence of consciousness of guilt is not sufficient to establish guilt, the instruction clearly implies that such evidence is "not the equivalent of a confession and is to be evaluated with reason and common sense." (***People v. Moore*** (2011) 51 Cal.4th 386, 414, internal quotation marks omitted.)

CALJIC No. 2.03 is not an improper pinpoint instruction. (***People v. Richardson*** (2008) 43 Cal.4th 959, 1019.)

CALJIC No. 2.03 has been repeatedly upheld when the evidence supports giving the instruction. (***People v. Stitely*** (2005) 35 Cal.4th 514, 555; ***People v. Arias*** (1996) 13 Cal.4th 92, 141.)

CALJIC No. 2.03 (false or deliberately misleading statements) was properly given where the defendant had initially attempted to divert suspicion from himself to another, and where his claim at trial was that he had not intended to kill the victim when he fired the gun at her. (***People v. Wader*** (1993) 5 Cal.4th 610, 643-644.)

CALJIC No. 2.03 was properly given in a case where the defendant denied involvement, then subsequently confessed. The fact the defendant made the admission after initially denying involvement supports a conclusion that earlier statements were made to avoid detection or culpability. "Even where a defendant confesses, his or her state of mind or other details of a crime may remain in dispute. The fact that a defendant initially denied culpability and later made admissions are relevant facts, which must be weighed in light of the evidence." (***People v. Carrington*** (2009) 47 Cal.4th 145, 188.)

The jury could not have been misled by CALJIC No. 2.03 into improper inferences regarding the defendant's specific intent at the time the crimes were committed. (***People v. Cain*** (1995) 10 Cal.4th 1, 34.)

B. CALJIC No. 2.04 (False Testimony / Fabricated Evidence) [§ 9.52]

"CALJIC No. 2.04 does not require judicial proceedings to actually be in progress when the attempt to procure false testimony or to fabricate false evidence is made. It is sufficient that the jury could reasonably infer from the incident that defendant expected his brother to be a witness in the event of a trial, or that defendant sought to fabricate evidence in anticipation of trial." (***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1139.)

C. CALJIC No. 2.06 (Attempt to Suppress Evidence) [§ 9.53]

Circumstantial evidence is sufficient to support the trial court's instruction pursuant to CALJIC No. 2.06 (attempt to suppress evidence). (***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1139-1140.)

D. CALJIC No. 2.52 (Flight) [§ 9.54]

"In general, a flight instruction is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt. Flight requires neither the physical act of running nor the reaching of a far-away haven. Flight manifestly does require, however, a purpose to avoid being observed or arrested. Mere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt, but the circumstances of departure from the crime scene may sometimes do so." (***People v. Cage*** (2015) 62 Cal.4th 256, 285, internal quotation marks & citations omitted; ***People v. Abilez*** (2007) 41 Cal.4th 472, 522 [same].)

The flight instruction does not impermissibly direct the jury to draw only one inference, nor unconstitutionally lessen the prosecution's burden of proof. (***People v. Cage*** (2015) 62 Cal.4th 256, 286; ***People v. Howard*** (2008) 42 Cal.4th 1000, 1021.)

"The evidentiary basis for the flight instruction requires sufficient, not uncontradicted, evidence." (***People v. Richardson*** (2008) 43 Cal.4th 959, 1020.)

While Penal Code section 1127c requires a trial court to instruct on flight when the prosecution is relying on such evidence to show guilt, no statute requires instruction when the defendant is relying on evidence of flight by third parties. Third-party flight is also not a general principle of law requiring sua sponte instruction. Accordingly, the trial court did not err in failing to sua sponte modify the flight instruction to include "third-party" flight. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1222-1223.)

It was proper to instruct the jury on the defendant's flight as evidence of consciousness of guilt, even though the flight was not immediately after the crime or immediately after being accused of the crime, and even though the identity of the perpetrator of the crime was unresolved at the time of the defendant's flight. (***People v. Turner*** (1994) 8 Cal.4th 137, 201, abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

While the "defendant's theory of the case was that he was guilty of only second degree murder, he pleaded not guilty to the charges, thereby putting in issue 'all the elements of the offenses.'" Accordingly, there was no error in instructing the jury with CALJIC No. 2.52 on flight, even though the defendant admitted killing his victims. (***People v. Moon*** (2005) 37 Cal.4th 1, 28.)

The defendant's awareness of criminal charges is not a prerequisite to instructing on flight. (***People v. Pearson*** (2012) 53 Cal.4th 535, 584; ***People v. Abilez*** (2007) 41 Cal.4th 472, 523.)

"Even though defendant returned to his apartment after the killings, where he was arrested the next morning, he was observed by a neighbor to start running from the scene of the crimes only when an alarm sounded. Contrary to defendant's argument, the 'circumstances' of his departure from the scene provided sufficient evidence of flight to warrant the flight instruction." (***People v. Cage*** (2015) 62 Cal.4th 256, 285, internal quotation marks & citations omitted.)

"[N]othing in the standard flight instruction requires that it be proved a defendant 'lived' in the area where his or her crimes were committed before an inference of guilt may properly be drawn from facts evidencing 'flight.'" (***People v. McWhorter*** (2009) 47 Cal.4th 318, 376.)

The trial court properly instructed on flight regardless of the fact that neither the defendant's identity nor consciousness of guilt was at issue in his trial because of his pretrial admission that he shot the victim, as well as the fact the defense did not present any evidence in his defense during the guilt phase. The fact that the defendant pled not guilty placed all elements of the offense in issue. Even where a defendant concedes guilt of a criminal homicide, the "prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent." The prosecution is required to prove guilt beyond a reasonable doubt and is entitled to "bolster" its case by presenting evidence of consciousness of guilt even where guilt of a criminal homicide has been conceded. (***People v. Burney*** (2009) 47 Cal.4th 203, 245, internal citations & quotation marks omitted.)

The flight instruction was properly given where the defendant remained home for days after the victim's disappearance, but did not return home after the victim's body was discovered in a vacant garage across from his room. The jury could reasonably conclude the defendant fled when suspicion had focused on him. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1021.)

VI. OTHER STANDARD CALJIC INSTRUCTIONS [§ 9.60]

A. CALJIC No. 2.15 (Possession of Stolen Property) [§ 9.61]

It is error to instruct a jury with CALJIC No. 2.15 (permissive cautionary instruction generally favorable to defendants that allows a jury to infer guilt of a theft-related crime from the fact that a defendant is found in possession of recently stolen property when such evidence is accompanied by slight corroboration of other inculpatory circumstances tending to show guilt) as to charges involving non-theft-related crimes (murder). Erroneous instruction with CALJIC No. 2.15 is subject to the harmless error test enunciated in ***People v. Watson*** (1956) 46 Cal.2d 818, 836, i.e., whether it is

reasonably probable the defendant would have enjoyed a more favorable result had the instruction not been given. (***People v. Rogers*** (2013) 57 Cal.4th 296, 336.)

B. CALJIC No. 3.32 (Mental Disease / Defect) [§ 9.62]

The trial court did not err in instructing on the presumption of sanity in the guilt phase and refusing a defense pinpoint instruction regarding his mental defense. The requested defense pinpoint instruction would have impermissibly resurrected the defense of diminished capacity by requiring the jury to presume the defendant's mental illness negated the mental state required for first degree murder if it was not convinced that he did not act under the influence of that mental illness. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 831.)

VII. EYEWITNESS IDENTIFICATION [§ 9.70]

There is no sua sponte duty to instruct with CALJIC Nos. 2.91 (prosecution's burden to prove identity based on eyewitness testimony) or 2.92 (factors to be considered in evaluating eyewitness testimony). (***People v. Cook*** (2006) 39 Cal.4th 566, 599; ***People v. Rogers*** (2006) 39 Cal.4th 826, 906.)

VIII. FELONY-MURDER [§ 9.80]

Where CALJIC No. 8.21 (5th ed. 1988) on felony-murder was given, and the trial court used both phrases intended under the use note to be alternative choices depending on when death occurred, there was no reasonable likelihood the jury would parse the instruction so as to erroneously conclude that the prosecution need not prove the defendant's intent to commit the underlying felony. (***People v. Kelly*** (2007) 42 Cal.4th 763, 790-791.)

IX. FETAL VIABILITY [§ 9.90]

For cases prior to the decision in *Davis*, CALJIC No. 8.10, "while not a model of clarity," correctly suggests the standard for viability, i.e., a *probability* that the fetus will survive if born at that particular point in time. (***People v. Davis*** (1994) 7 Cal.4th 797, 814, 815.)

X. JUROR "SNITCH" (ANTI-JUROR NULLIFICATION) INSTRUCTION [§ 9.100]

CALJIC No. 17.41.1, the "'so-called antijury nullification instruction'" or "'Juror Snitch' instruction" providing that it is the obligation of jurors to immediately advise the court if any juror refuses to deliberate or expresses an intention to disregard the law or

decide the case based on any improper basis, does not violate a defendant's right to a fair trial or due process. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1170-1171, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; ***People v. Chism*** (2014) 58 Cal.4th 1266, 1309 [although disapproved for future trials in ***People v. Engleman*** (2002) 28 Cal.4th 436, use of the instruction "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict"]; ***People v. Maciel*** (2013) 57 Cal.4th 482, 548 [same].)

XI. LESSER INCLUDED OFFENSES [§ 9.110]

A. GENERALLY [§ 9.111]

In a capital case, the due process clause compels the giving of instructions on lesser included offenses where warranted by the evidence. (***Beck v. Alabama*** (1980) 447 U.S. 625, 637 [100 S.Ct. 2382, 65 L.Ed.2d 392]; see also ***Schad v. Arizona*** (1991) 501 U.S. 624, 648 [111 S.Ct. 2491, 115 L.Ed.2d 555]; ***Hopper v. Evans*** (1982) 456 U.S. 605, 611-612 [102 S.Ct. 2049, 72 L.Ed.2d 367]; ***People v. Foster*** (2010) 50 Cal.4th 1301, 1343; ***People v. Redd*** (2010) 48 Cal.4th 691, 733; ***People v. Moon*** (2005) 37 Cal.4th 1, 27.) Where there is no substantial evidence supporting instruction on a lesser included offense, *Beck v. Alabama* is not implicated. (***People v. Duff*** (2014) 58 Cal.4th 527, 562 [insufficient evidence to require instruction on voluntary manslaughter]; ***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1327-1328; ***People v. Romero*** (2008) 44 Cal.4th 386, 404 [insufficient evidence to require instruction on second degree murder as an LIO].)

California similarly requires a court to instruct sua sponte on lesser included offenses if the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. (***People v. Foster*** (2010) 50 Cal.4th 1301, 1343; ***People v. Gutierrez*** (2009) 45 Cal.4th 789, 826; ***People v. Moon*** (2005) 37 Cal.4th 1, 25.)

However, "due process requires that a lesser included offense instruction be given only when the evidence warrants it." (***People v. Gray*** (2005) 37 Cal.4th 168, 219, quoting ***People v. Kaurish*** (1990) 52 Cal.3d 648, 696.) "[T]he existence of any evidence, no matter how weak will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is substantial evidence to merit consideration by the jury. Substantial evidence in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense but not the greater offense was committed." (***People v. Romero*** (2008) 44 Cal.4th 386, 403, internal quotation marks & citations omitted.)

Beck v. Alabama was concerned with the "all-or-nothing choice" between conviction of the capital offense and innocence. *Beck* does not compel a particular lesser included offense as long as the lesser included offense given was supported by the evidence. (***Schad v. Arizona*** (1991) 501 U.S. 624, 647-648 [111 S.Ct. 2491, 115 L.Ed.2d 555].)

The rule of *Beck v. Alabama* is inapplicable where the statute of limitations has run on the lesser included offense. Unless the defendant waives the statute, such instructions may be refused. (***Spaziano v. Florida*** (1984) 468 U.S. 447, 454-457 [104 S.Ct. 3154, 82 L.Ed.2d 340], overruled on other grounds, *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 623, 193 L.Ed.2d 504].)

Beck v. Alabama does not require instructions on lesser related offenses where there are no lesser included offenses under state law. (***Hopkins v. Reeves*** (1988) 524 U.S. 88 [118 S.Ct. 1895, 141 L.Ed.2d 76].)

There is no federal constitutional right to compel the giving of lesser-related-offense instructions. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1161, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; ***People v. Foster*** (2010) 50 Cal.4th 1301, 1344; ***People v. Rundle*** (2008) 43 Cal.4th 76, 148, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The duty to instruct sua sponte on lesser included offenses of charged offenses does not extend to instructions on lesser included offenses of uncharged offenses which are relevant only to felony-murder. (***People v. Combs*** (2004) 34 Cal.4th 821, 856; ***People v. Cash*** (2002) 28 Cal.4th 703, 736-738; ***People v. Silva*** (2001) 25 Cal.4th 345, 371.)

A burglary special circumstance is not an element of the crime of murder. Rather, it functions similar to a sentencing enhancement to increase the penalty for murder and is irrelevant to the determination under the statutory elements test of whether a burglary charge is a lesser included offense of a murder charge. (***People v. Boswell*** (2016) 4 Cal.App.5th 55, 59-60.)

B. SUBSTANTIAL EVIDENCE OF LESSER INCLUDED OFFENSE [§ 9.112]

The trial court is required to instruct sua sponte on lesser included offenses only if the evidence that the defendant is guilty of the lesser included offense is substantial enough to merit consideration by the jury. Substantial evidence in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (***People v. DePriest*** (2007) 42 Cal.4th 1, 50; ***People v. Huggins*** (2006) 38 Cal.4th 175, 215.)

"Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense." (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1169; ***People v. Mendoza*** (2000) 24 Cal.4th 130, 174; ***People v. Wilson*** (1992) 3 Cal.4th 926, 940-941.)

The trial court did not err by instructing on second degree murder over the defendant's objection where there was substantial evidence from which the jury could

conclude the murder was not premeditated and deliberate. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1345.)

Where the theory of the case and the evidence would support either the prosecution theory of first degree felony-murder or the defense that someone else committed killings, there is no need to give second-degree-murder instructions. (***People v. Morris*** (1991) 53 Cal.3d 152, 211, overruled on other grounds, *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Second-degree-murder and voluntary-manslaughter instructions were properly refused where the evidence showed the victim was killed in the course of a burglary or robbery, and there was no substantial evidence which would have supported the defendant's conviction of second degree murder or manslaughter. (***People v. Neely*** (1993) 6 Cal.4th 877, 897.)

Where evidence indisputably showed that the object of the conspiracy was a premeditated murder, lesser-included-offense instructions are not required. (***People v. Padilla*** (1995) 11 Cal.4th 891, 920, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Where there was no evidence that the defendant intended merely to injure the victim and no evidence the killing was other than felony-murder (the jury's finding that the killing was committed while the defendant was engaged in the commission or attempted commission of burglary, sodomy, and robbery precluded the jury from finding that the murder was of the second degree because the jury's finding necessarily amounted to murder of the first degree), the trial court did not err in failing to instruct on second degree murder as a lesser included offense. (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1328-1329.)

"[V]oluntary manslaughter may also apply where a defendant 'acting with conscious disregard for life and knowing that the conduct endangers the life of another *unintentionally* but unlawfully kills in a sudden quarrel or heat of passion.' [Citation.] … '[T]he presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter.'" (***People v. Blacksher*** (2011) 52 Cal.4th 769, 832-833, emphasis in original.)

Refusal of voluntary manslaughter instructions was not erroneous where the event which supposedly created the heat of passion occurred three days prior to the killing. (***People v. Pride*** (1992) 3 Cal.4th 195, 250.)

The trial court did not err in failing to instruct on voluntary manslaughter because evidence that "defendant once lost his temper in an unrelated incident did not constitute substantial evidence that he lost his control on the evening in question. 'Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense.'" (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1169.)

Felony child-endangerment is not a necessarily a lesser included offense of torture-murder, since a torture-murder may be committed on an adult. (***People v. Mincey*** (1992) 2 Cal.4th 408, 452.)

C. INVITED ERROR [§ 9.113]

Beck v. Alabama does not prohibit a defendant from choosing to forgo lesser-included-offense instructions for strategic reasons. (***People v. Beames*** (2007) 40 Cal.4th 907, 930; ***People v. Hardy*** (1992) 2 Cal.4th 86, 184-185.)

If defense counsel affirmatively requests to forgo lesser-included-offense instructions for strategic reasons, the defendant forfeits the issue on appeal under the doctrine of invited error. (***People v. Gray*** (2005) 37 Cal.4th 168, 219, fn. 13; ***People v. Duncan*** (1991) 53 Cal.3d 955, 969-970; ***People v. Cooper*** (1991) 53 Cal.3d 771, 827.)

The invited-error doctrine will not be ignored because of the mere fact defense counsel did not discuss the possible merits of the express tactical decision by the defense in resisting second-degree-murder and involuntary-manslaughter instructions. (***People v. Beames*** (2007) 40 Cal.4th 907, 928.)

Where the record shows no tactical reason for the defense attorney requesting or acquiescing in an instruction, the invited-error doctrine does not apply. (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1330; ***People v. Moon*** (2005) 37 Cal.4th 1, 28.)

Neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser included offense. Even absent a request, and even over the parties' objections, regardless of their trial strategies, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence that the defendant is guilty of the lesser offense. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1265.)

D. HARMLESS ERROR [§ 9.114]

"'Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.'" (***People v. Chatman*** (2006) 38 Cal.4th 344, 371, quoting ***People v. Lewis*** (2001) 25 Cal.4th 610, 646; ***People v. Elliot*** (2005) 37 Cal.4th 453, 475.)

There was no prejudicial error in failing to give the voluntary-manslaughter instruction where the jury's finding on a special circumstance shows the defendant killed the victim in the perpetration of burglary. (***People v. Lewis*** (2001) 25 Cal.4th 610, 646; ***People v. Price*** (1991) 1 Cal.4th 324, 464.)

It was not prejudicial error to refuse the voluntary-manslaughter instruction where the defense theory was that the defendant was not the killer or he did not have the intent

to kill, and the jury determined the defendant was the actual killer and he had the intent to kill. (***People v. Mincey*** (1992) 2 Cal.4th 408, 438.)

The defendant was not prejudiced where the trial court erroneously instructed the jury that an intent to kill is a necessary element of voluntary manslaughter since there was no evidence supporting a manslaughter theory, let alone any theory of unintentional murder. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 832-833.)

E. *KURTZMAN* INSTRUCTION – CALJIC No. 17.10 [§ 9.115]

CALJIC No. 17.10 is the so-called *Kurtzman* instruction. *People v. Kurtzman* (1988) 46 Cal.3d 322, 334, "established that the jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but that it must acquit the defendant of the greater offense before returning a verdict on the lesser offense." A court "retains discretion to dispense with instructing the jury pursuant to *Kurtzman* until such time as a jury deadlock arises." (***People v. Clark*** (2016) 63 Cal.4th 522, 608, internal quotation marks & citations omitted.)

XII. LESSER RELATED OFFENSES [§ 9.120]

In ***People v. Birks*** (1998) 19 Cal.4th 108, the California Supreme Court overruled its holding in *People v. Geiger* (1984) 35 Cal.3d 510, that a defendant's unilateral request for a related-offense instruction must be honored over the prosecution's objection. The *Birks* rule does not violate the federal Constitution. (***People v. Nelson*** (2011) 51 Cal.4th 198, 215.)

XIII. POLICE INFORMANTS [§ 9.130]

There is no sua sponte duty to instruct a jury the testimony of police informants should be viewed with distrust. (***People v. Turner*** (1994) 8 Cal.4th 137, 201-202, abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555; ***People v. Mickey*** (1991) 54 Cal.3d 612, 674-675; ***People v. Morales*** (1989) 48 Cal.3d 527, 553, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459; ***People v. Hovey*** (1988) 44 Cal.3d 543, 565-566, abrogated by Prop. 115 and CCP § 223 on other grounds, as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 634.)

XIV. PREMEDITATION [§ 9.140]

Instructions on premeditation and deliberation taken from ***People v. Anderson*** (1968) 70 Cal.2d 15, are not required because *Anderson* was intended as a framework to aid appellate review. (***People v. Steele*** (2002) 27 Cal.4th 1230, 1254.)

CALJIC No. 8.20 adequately expresses the need for joint operation of act and intent for premeditated and deliberate murder. (***People v. Rogers*** (2006) 39 Cal.4th 826, 873; ***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1142-1143.)

CALJIC No. 8.20 defining premeditation does not suggest a defendant must absolutely preclude the possibility of premeditation rather than merely raising a reasonable doubt. (***People v. Landry*** (2016) 2 Cal.5th 52, 95; ***People v. Jurado*** (2006) 38 Cal.4th 72, 127.)

It is not error to instruct the jury on first degree premeditated and felony-murder, even if the information only charged malice murder under Penal Code section 187, and not felony murder under section 189, as the defendant was on notice of the felony-murder theory based on charges of burglary-and robbery-murder special circumstances. (***People v. Carey*** (2007) 41 Cal.4th 109, 132.)

XV. SPECIAL-CIRCUMSTANCE INSTRUCTIONS [§ 9.150]

Cross-Reference: Ch. 7, *re* Special circumstances

When the trial court fails to instruct the jury on an element of a special-circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in ***Chapman v. California*** (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (***People v. Mil*** (2012) 53 Cal.4th 400, 409; ***People v. Jones*** (2003) 30 Cal.4th 1084, 1119; ***People v. Williams*** (1997) 16 Cal.4th 635, 689.)

It would be error to instruct with CALJIC No. 8.81.17 and modify it to list the elements in the disjunctive. (***People v. Harris*** (2015) 57 Cal.4th 804, 854.)

A claim on appeal that a jury instruction omitted an element of a special circumstance cannot be forfeited by failing to object to the instruction that was given. (***People v. Mil*** (2012) 53 Cal.4th 400, 409.)

XVI. PUNISHMENT [§ 9.160]

The jury should be instructed not to consider punishment during the guilt phase, but failure to do so can be harmless error. (***People v. Robertson*** (1982) 33 Cal.3d 21, 36-37.)

XVII. WAIVER / FORFEITURE [§ 9.170]

Absent seeking "amplification or explanation" below, a defendant is precluded from seeking relief on appeal based on a claim that an instruction would have been in

conflict with or confused with another instruction. (***People v. Moon*** (2005) 37 Cal.4th 1, 29.)

"A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (***People v. Landry*** (2016) 2 Cal.5th 52, 99-100 [internal quotation marks and citations omitted].)

A. INVITED ERROR [§ 9.171]

The doctrine of invited error does not apply unless the record reflects defense counsel made a tactical decision not to request an instruction. (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1331.)

The trial court stated, "pursuant to a joint stipulation or at least the lack of opposition I assume both attorneys are jointly requesting I give these instructions," and defense counsel responded, "That's correct." No invited error was found, because defense counsel might have only acquiesced in the instruction. The invited-error doctrine does not preclude appellate review if the record fails to show a tactical reason for requesting or acquiescing in the instruction. Given the absence of any tactical reason for acquiescing, the People's assertion of the invited-error doctrine was rejected. (***People v. Moon*** (2005) 37 Cal.4th 1, 28.)

Chapter Ten
PENALTY PHASE ISSUES – GENERAL

I. DEFENDANT'S PRESENCE – PENALTY PHASE [§ 10.10]

> *Cross-Reference*: § 5.12, *re* Defendant's presence

A capital defendant can waive his state and federal constitutional rights to presence during the penalty phase of a capital trial. (***People v. Brown*** (2014) 59 Cal.4th 86, 118.)

Statutes require that "'a capital defendant generally must be present during trial when evidence is taken.'" This is because the exception in section 1043, subdivision (b)(2), that permits a defendant to subsequently be voluntarily absent from a felony trial once it has commenced does not apply to capital cases. (***People v. Mendoza*** (2016) 62 Cal.4th 856, 898, citing Pen. Code. §§ 977(b)(1), & 1043, quoting ***People v. Rundle*** (2008) 43 Cal.4th 76, 134, disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The trial court committed statutory error in allowing defendant to voluntarily absent himself during his mother's penalty phase testimony. (***People v. Rundle*** (2008) 43 Cal.4th 76, 193, disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Defendant waived his right to be present at the penalty phase of the trial by disruptive behavior and repeatedly and expressly waiving his right to be present. (***People v. Sully*** (1991) 53 Cal.3d 1195, 1237-1240.)

There was no prejudicial error from the trial court's refusal to allow defendant to be absent from the taking of evidence during the penalty phase, even though defendant refused to "dress out" and the jury viewed waist chains. (***People v. Pride*** (1992) 3 Cal.4th 195, 253.)

A codefendant's illness, which prevented his presence at the penalty phase of the trial, did not impact the other two defendants. No objection was lodged by the others, and the jury was told not to consider absence. (***People v. Hardy*** (1992) 2 Cal.4th 86, 197.)

II. DEFENSE COUNSEL – PENALTY PHASE [§ 10.20]

A. CONFLICT OF INTEREST [§ 10.21]

> *Cross-Reference*: § 5.21, *re* Conflict of interest

No conflict of interest existed where deputy public defender representing defendant did not have any confidential information regarding prosecution penalty-phase witnesses notwithstanding those individuals having been represented by the public defender's office. (***People v. Williams*** (2015) 61 Cal.4th 1244, 1283-1284.)

B. INEFFECTIVE ASSISTANCE OF COUNSEL [§ 10.22]

> The ineffective-assistance-of-counsel cases that are included in the Capital Case Compendium relate specifically to issues that arise only in the context of a capital case. Discussions and holdings in capital cases that relate to more general principles of ineffective-assistance-of-counsel claims and holdings that have equal application to non-capital cases can be found in the manuals of the Attorney General's Office relating to federal and state habeas practice.

§ 10.22.1 Generally

"'An ineffective assistance claim has two components: A defendant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.'" (***In re Welch*** (2015) 61 Cal.4th 489, 514, quoting ***Wiggins v. Smith*** (2003) 539 U.S. 510, 521 [123 S.Ct. 2527, 156 L.Ed.2d 471], citing ***Strickland v. Washington*** (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

To obtain relief on a claim of ineffective assistance of counsel, a defendant "must prove that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. (***In re Crew*** (2011) 52 Cal.4th 126, 150 [ ].)" (***In re Champion*** (2014) 58 Cal.4th 965, 1007, internal quotation marks omitted.)

A court does not need to resolve whether defense counsel's penalty phase investigation was deficient "'if it is easier to dispose of an ineffectiveness claim on the

ground of lack of sufficient prejudice.'" (***In re Welch*** (2015) 61 Cal.4th 489, 516, quoting ***Strickland v. Washington*** (1984) 466 U.S. 668, 697 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

"Usually, ineffective assistance of counsel claims are properly decided in a habeas corpus proceeding rather than on appeal. For this reason, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal would not bar an ineffective assistance claim on habeas corpus." (***People v. Carrasco*** (2014) 59 Cal.4th 924, 980-981, internal quotation marks & citations omitted, quoting ***People v. Tello*** (1997) 15 Cal.4th 264, 266-267.)

"It is undeniable that trial judges are particularly well suited to *observe courtroom performance* and to rule on the adequacy of counsel in criminal cases tried before them. Thus, in appropriate circumstances ["when the court's own observation of the trial would supply a basis for the court to act expeditiously on the motion"] justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so." (***People v. Carrasco*** (2014) 59 Cal.4th 924, 981, internal quotation marks & citations omitted; emphasis in original.)

Where the resolution of a defendant's post-trial ineffective assistance of counsel claim "rest[s] primarily upon matters other than what the trial court could have observed during trial, [ ] the [trial] court would have acted well within its discretion, and saved considerable resources, had it concluded the claim [in defendant's new trial motion] should be litigated in a habeas corpus proceeding." (***People v. Carrasco*** (2014) 59 Cal.4th 924, 981, internal quotation marks & citations omitted.)

When a claim of ineffective assistance of counsel is raised on direct appeal, and "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim on appeal must be rejected." (***People v. Carrasco*** (2014) 59 Cal.4th 924, 982, internal quotation marks & citations omitted.)

§ 10.22.2 Argument

Defense counsel's closing penalty-phase argument was not ineffective because the defendant was not prejudiced given the overwhelming evidence in aggravation. (***Smith v. Spisak*** (2010) 558 U.S. 139, 148-155 [130 S.Ct. 676, 684-688, 175 L.Ed.2d 595].)

The length of a closing penalty phase argument is not a sound measure of its quality. (***People v. Lewis*** (2001) 25 Cal.4th 610, 675.)

The fact a different penalty phase argument could have been made from same facts does not establish ineffective assistance of counsel. (***People v. Coddington*** (2000)

23 Cal.4th 529, 655, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; ***People v. Mincey*** (1992) 2 Cal.4th 408, 471.)

Defendant was not prejudiced by defense counsel telling the jury that if they voted for the death penalty, "… particularly with the new Supreme Court we have …," defendant would probably get it. (***People v. Wrest*** (1992) 3 Cal.4th 1088, 1113-1114.)

Defense counsel's argument: "Ladies and Gentlemen, is there really any one of you who doesn't think that my client is crazy? [¶] Really? Is there any one of you who sits there and who honestly can say that they don't think Mr. Welch is crazy? In previously rejecting Welch's claim that this line of argument by his attorney constituted ineffective assistance of counsel, we said: Read in context, ... the use of that resonant colloquial term appears to have been an attempt to move beyond legalisms to appeal to the jury's likely perception that there was something psychologically quite wrong with Welch." (***In re Welch*** (2015) 61 Cal.4th 489, 520, internal quotation marks & citations omitted, quoting ***People v. Welch*** (2000) 20 Cal.4th 701, 764, & fn. 10.)

§ 10.22.3 Concessions

Defense counsel's revelation to the jury that defendant had previously been sentenced to death in another case was a tactical decision. (***People v. Kelly*** (1992) 1 Cal.4th 495, 547-548.)

Defense counsel was not ineffective in arguing that the jury would not hear counsel ask for mercy or sympathy for his client because everyone's sympathy, including counsel's, was with the victim. "Closing argument is as much an art as a science, particularly when counsel is faced with the delicate and difficult task of convincing a jury to exercise leniency toward an individual who has admitted brutal crimes. Counsel must establish as much credibility with the jurors as possible if his effort to persuade them is to succeed. [Citation.] … counsel may well have thought that asking for sympathy or speaking favorably about defendant would merely alienate the jurors. Instead, counsel's apparent strategy was to align themselves with the jurors, winning their trust by expressing some of the same emotions they were likely feeling." (***People v. Fairbank*** (1997) 16 Cal.4th 1223, 1251.)

Indicating that the defense would not challenge the guilt-phase verdict is not a concession of guilt, and even if it were, the importance of maintaining credibility with the jury refutes any claim that making such a concession amounts to IAC. (***People v. Davenport*** (1995) 11 Cal.4th 1171, 1237, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

§ 10.22.4 Defendant's Background

At the time of this defendant's trial (mid-1980s), it would have been "atypical" for a penalty-phase defense to include a lengthy presentation of a broad range of witnesses

describing in detail various aspects of the defendant's background. (***In re Andrews*** (2002) 28 Cal.4th 1234, 1256.)

"The high court has made clear that under some circumstances, failure to introduce mitigating evidence of child abuse or other disadvantages is prejudicial." (***In re Welch*** (2015) 61 Cal.4th 489, 517, and cases cited therein.)

§ 10.22.5 Family Background

In determining whether counsel was ineffective for failing to present evidence of the defendant's background, a defendant's family background "'is of no consequence in and of itself.'" "[I]t 'is material if, and to the extent that, it relates to the background of defendant himself.'" (***In re Crew*** (2011) 52 Cal.4th 126, 152, quoting ***People v. Rowland*** (1992) 4 Cal.4th 238, 279.)

"To decide whether [the defendant] was prejudiced by his trial counsel's failure to discover and present the evidence [of his background, the reviewing court] must determine whether that evidence, when considered in light of the aggravating and mitigating evidence presented at the penalty phase of [the defendant's] capital trial, is of such significance that it undermines our confidence in the outcome of the penalty phase of that trial." (***In re Crew*** (2011) 52 Cal.4th 126, 153; see also ***In re Lucas*** (2004) 33 Cal.4th 682, 733.)

§ 10.22.6 Investigation – Duty

"'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.' (*Strickland v. Washington* (1984) 466 U.S. 668, 691 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Thus, a defendant can hinder counsel's investigation not only through affirmative statements, but also by remaining silent or failing to disclose pertinent information to counsel. (*In re Andrews* (2002) 28 Cal.4th 1234, 1255 [].) Whether a defendant's statements or nondisclosures have hindered trial counsel's investigation depends upon the circumstances of each case. (See *In re Lucas* (2004) 33 Cal.4th 682, 729 [].)" (***In re Crew*** (2011) 52 Cal.4th 126, 148-149.)

No ineffective assistance of counsel for failing to present mitigating evidence where defendant told the judge he did not want evidence in mitigation presented, refused to allow defense counsel to present mitigating evidence including interrupting counsel as he tried to proffer evidence in mitigation. (***Schriro v. Landrigan*** (2007) 550 U.S. 465, 480-481.)

"[C]ounsel must properly investigate the case in mitigation and advise his client regarding its relative merits and significance. After having been advised by counsel, if a competent defendant decides for nontactical reasons to present no mitigating evidence, he cannot later label counsel ineffective for honoring defendant's own wishes." (***People v. Brown*** (2014) 59 Cal.4th 86, 112.)

"[T]o conduct a reasonably competent investigation, defense counsel in a capital case must often explain to family members that "negative" information about the defendant's childhood is often a crucial part of the defense's penalty presentation in a capital case, and therefore the family should not withhold such information." (***In re Champion*** (2014) 58 Cal.4th 965, 996.)

Defense counsel's performance found deficient where inexperienced counsel initially appointed as standby counsel appointed to represent defendant one month before penalty phase failed to "even take the first step of interviewing witnesses or requesting records." Moreover, in comparing the extensive mitigation evidence of troubled childhood, learning difficulties, heroic military service (active participation in two major engagements), post-war trauma and substance abuse and mental impairment with the evidence in aggravation, the high court concluded the defendant had been prejudiced by counsel's deficient performance. (***Porter v. McCollum*** (2009) 558 U.S. 30, 40-43 [130 S.Ct. 447, 175 L.Ed.2d 398] (per curiam).)

Defendant not prejudiced by failure to present additional mitigating evidence. (***Wong v. Belmontes*** (2009) 558 U.S. 15, 20-27 [130 S.Ct. 383, 175 L.Ed.2d 328] (per curiam).)

Defense counsel's decision not to pursue more information from the defendant's background after obtaining substantial information was within the range of professionally reasonable judgments. (***Bobby v. Van Hook*** (2009) 558 U.S. 4, 9-12 [130 S.Ct. 13, 175 L.Ed.2d 255 (per curiam).)

Defense counsels' decision not to expand their investigation of petitioner's life history for mitigating evidence for the penalty phase of petitioner's 1989 murder trial beyond the presentence investigation report and department of social services records fell short of the prevailing professional standards in capital cases. (***Wiggins v. Smith*** (2003) 539 U.S. 510, 524-525, 534 [123 S.Ct. 2527, 156 L.Ed.2d 471].)

Nothing in the record supports a conclusion that evidence of memory loss and disassociation should have alerted counsel to a need for neurological testing for organic brain damage. (***People v. Beeler*** (1995) 9 Cal.4th 953, 1007, abrogated on another ground in *People v. Pearson* (2013) 56 Cal.4th 393, 462.)

Defendant's ineffective assistance of counsel claim, premised on trial counsel's failure to present evidence of his organic brain damage at his motion for a new trial, fails because the record on appeal does not support his claim that he has organic brain damage. (***People v. Beeler*** (1995) 9 Cal.4th 953, 1008-1010, abrogated on other grounds as recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705.)

Counsel was not deficient for not investigating post-traumatic stress disorder at penalty phase where none of four psychiatric reports indicated defendant was suffering from PTSD. (***People v. Payton*** (1992) 3 Cal.4th 1050, 1075.)

§ 10.22.6.1 ABA Guidelines

The United States Supreme Court has noted that "[t]he ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" (***Wiggins v. Smith*** (2003) 539 U.S. 510, 524 [123 S.Ct. 2527, 156 L.Ed.2d 471], citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(C), at p. 93 (1989).) However, the high court subsequently observed: "Beyond the general requirement of reasonableness, 'specific guidelines are not appropriate.' [*Strickland v. Washington* (1984) 466 U.S. 668,] 688, 104 S.Ct. 2052 [80 L.Ed.2d 674]. 'No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions ....' *Id*., at 688-689, 104 S.Ct. 2052 [80 L.Ed.2d 674]. *Strickland* itself rejected the notion that the same investigation will be required in every case. *Id*., at 691, 104 S.Ct. 2052 [80 L.Ed.2d 674] ('[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary' (emphasis added)). It is '[r]are' that constitutionally competent representation will require "any one technique or approach." [*Harrington v.*] *Richter* [2011] 562 U.S. [86, 89], 131 S.Ct. [770] 779 [178 L.Ed.2d 624, 643]. The Court of Appeals erred in attributing strict rules to this Court's recent case law." (***Cullen v. Pinholster*** (2011) 563 U.S. 170, 195-196 [131 S.Ct. 1388, 1406-1407].)

"[T]he commentary to American Bar Association's (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, guideline 10.5, which states in a section entitled "Counsel's Duties Respecting Uncooperative Clients," "It is ineffective assistance for counsel to simply acquiesce to such wishes [to be executed], which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision." (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. ed., Feb. 2003), guideline 10.5, Relationship with the Client, p. 71.) … are far from binding precedent." "In context, the statement that it is 'ineffective assistance of counsel to *simply acquiesce*' in a client's desire to seek the death penalty" is consistent with California Supreme Court authority. "The commentary to the guideline at issue does nothing more than advise counsel of the duty to ensure the client is making a competent informed decision. …part of that duty involves investigating the case in mitigation and discussing the evidence with the defendant. If counsel suspects a preference for the death penalty results from a temporary condition or a mental health issue, counsel should examine the matter further." (***People v. Brown*** (2014) 59 Cal.4th 86, 112, 113-114.)

§ 10.22.7 Jury Waiver

Counsel was not inadequate for waiving the right to jury at the penalty phase. (***People v. Deere*** (1985) 41 Cal.3d 353, 360, overruled on other grounds, *People v. Bloom* (1989) 48 Cal.3d 1193, 1228, rev'd on other grounds, ***Bloom v. Calderon*** (9th Cir. 1997) 132 F.3d 1267.)

§ 10.22.8 Mitigation Evidence

"[C]ounsel must properly investigate the case in mitigation and advise his client regarding its relative merits and significance. After having been advised by counsel, if a competent defendant decides for nontactical reasons to present no mitigating evidence, he cannot later label counsel ineffective for honoring defendant's own wishes." (***People v. Brown*** (2014) 59 Cal.4th 86, 112.)

Counsel and the court are not obligated to "ensure [a] defendant receive[s] a penalty defense whether he want[s] one or not." (***People v. Mai*** (2013) 57 Cal.4th 986, 1023.)

Where defendant testified in the penalty phase that he preferred death and asked jury to impose death sentence, his "counsel's conduct in arguing for death" did not entitle him to automatic reversal of the death judgment without being required to prove prejudice under the second prong of *Strickland*, as his counsel was not totally absent or prevented from assisting the defendant during a critical stage of trial. (***People v. Brown*** (2014) 59 Cal.4th 86, 115, citing ***Bell v. Cone*** (2002) 535 U.S. 685, 696-697 [122 S.Ct. 1843, 152 L.Ed.2d 914]; and ***United States v. Cronic*** (1984) 466 U.S. 648, 696-697 [104 S.Ct. 2039, 80 L.Ed.2d 657] ["When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete."] ["the process loses its character as a confrontation between adversaries...."].)

While additional mitigating evidence that defendant lived in a violent neighborhood might have evoked sympathy, it was not a basis for finding prejudice where "there was no compelling connection between that evidence and the crimes of this case [gang-conducted robbery-murders]." (***In re Champion*** (2014) 58 Cal.4th 965, 1011, internal quotation marks omitted.)

Defense counsel inquired about his client's background and childhood, and explained the scope of mitigating evidence, and there was nothing in the defendant's statements to his trial counsel that would have led a reasonable attorney to suspect childhood sexual abuse. Moreover, in an interview with a psychiatrist retained by the defense, the defendant said he "grew up in a normal home under normal circumstances." Under these circumstances, the defendant hindered his trial counsel's investigation. (***In re Crew*** (2011) 52 Cal.4th 126, 148-149.)

Defendant was not denied his right to counsel where defense counsel refused to provide defendant with the names of mitigation witnesses, because defendant wanted no mitigating evidence presented and indicated he would attempt to get the witnesses to not cooperate when he learned their identity. (***People v. Memro*** (1995) 11 Cal.4th 786, 876, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

Where the "appellate record does not disclose what mitigating evidence was available that was not presented, or what reasons defense counsel may have had for not presenting it" the court "will not assume" counsel was ineffective for not presenting mitigating evidence. (***People v. Cudjo*** (1993) 6 Cal.4th 585, 634; ***People v. Wrest*** (1992) 3 Cal.4th 1088, 1116 [claim of ineffectiveness for failure to present mitigating evidence was unsupported by record since appellate court could not infer anything without engaging in speculation about the "existence, availability, or probative force, or the probable consequences of" using such evidence at trial].)

§ 10.22.9 Objection – Duty

Defense counsel's failure to object to the prosecutor's Biblical references in closing argument may have been tactical, particularly in light of defense counsel's use of the Biblical proscription against killing ("thou shalt not kill") during his argument. (***People v. Slaughter*** (2002) 27 Cal.4th 1187, 1210, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

§ 10.22.10 Opening Statement

At a penalty-phase retrial, reasonably competent counsel could have decided to defer opening statement until after the prosecution case. (***People v. Davenport*** (1995) 11 Cal.4th 1171, 1237, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

The amount of detail in an opening statement is a matter of trial tactics and strategy which will not be second-guessed on appeal. (***People v. Davenport*** (1995) 11 Cal.4th 1171, 1237-1238, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

§ 10.22.11 Other Convictions

A defendant's motion to strike on the ground of constitutionally inadequate assistance of his counsel in his prior rape case which was used as evidence in aggravation during the penalty phase was correctly rejected by the trial court since the testimony of the witness defendant claimed his counsel was deficient for failing to present "would not have impeached the prosecution's version of events and would have only solidified the victim's identification of defendant as her assailant." (***People v. Lucas*** (2014) 60 Cal.4th

153, 306, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

§ 10.22.12 Prejudice

To establish prejudice from deficient representation in the penalty phase of a capital trial, a defendant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.] A defendant 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case.' [Citation] Rather, he must show 'a probability sufficient to undermine confidence in the outcome.' [Citation]." (***In re Welch*** (2015) 61 Cal.4th 489, 517, quoting ***Strickland v. Washington*** (1984) 466 U.S. 668, 693-694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

In assessing prejudice from failure to present mitigating evidence during the penalty phase, the court "must compare the evidence actually presented during the penalty phase with the evidence that likely would have been presented if counsel had further investigated" mitigating evidence." In making that comparison between mitigating and aggravating evidence, "[e]vidence of violence while in custody can be particularly significant to capital juries." (***In re Welch*** (2015) 61 Cal.4th 489, 518-519.)

"[T]he difficulty Welch likely faced at the penalty phase was not the jury's disbelief that he was mentally ill, but rather the jury's skepticism that his mental illness sufficiently mitigated his culpability for the six murders so as to warrant a life sentence." (***In re Welch*** (2015) 61 Cal.4th 489, 520.)

Ultimately, the resolution of the prejudice issue depends on the "quality" of the proffered mitigating evidence as compared to the relative strength of the aggravating evidence properly considered by the jury. (***In re Avena*** (1996) 12 Cal.4th 694, 735.)

Prejudice need not be affirmatively shown where defense counsel's performance did not subject the prosecutor's case to meaningful adversarial testing. However, despite the broad language, defendants have been relieved of the obligation to show prejudice only where defense counsel was either totally absent or was prevented from assisting the defendant at a critical stage. (***In re Visciotti*** (1996) 14 Cal.4th 325, 353.)

Although defense counsel should have conducted a reasonable investigation of defendant's childhood, defendant failed to demonstrate the existence of a reasonable probability that counsel's failure to do so affected the penalty determination. (***In re Jackson*** (1992) 3 Cal.4th 578, 615, overruled on other grounds, *In re Sassousian* (1995) 9 Cal.4th 535, 545, fn. 6.)

The omission of mitigating evidence which trial counsel failed to present might well have established prejudice for IAC claim, but fails to do so in light of "substantial impeachment and potentially devastating rebuttal" which was available to the prosecutor. (***In re Ross*** (1995) 10 Cal.4th 184, 205.)

No prejudice from defense trial counsel's failure to present additional evidence in mitigation where "new" evidence was largely duplicative of evidence presented at trial, of questionable mitigating value, and would have opened the door to evidence in rebuttal relating to substance abuse, mental illness, and criminal conduct that could have led jury to conclude defendant was beyond rehabilitation. (***Cullen v. Pinholster*** (2011) 563 U.S. 170, 198-199 [131 S.Ct. 1388, 1408-1409].)

§ 10.22.13 *Strickland* Expert Opinions

The declaration of an attorney expert regarding the question of "whether a reasonably competent attorney would have presented, at the penalty phase of petitioner's capital trial, the evidence that habeas corpus counsel presented at the post-trial reference hearing" was of "relatively little value for two reasons. First, [the attorney expert] was not present during and did not read the testimony of the witnesses at the reference hearing, nor did he read all of the transcripts of the trials of petitioner and [cohort], thereby limiting his ability to determine what evidence a reasonably competent attorney would have presented at trial. Second, although [the attorney expert] gave helpful testimony on the type of investigation that was customarily conducted more than 30 years ago, when petitioner's trial occurred, the question of which evidence a reasonably competent trial counsel should have presented is primarily a question of law for [the] court to decide." (***In re Champion*** (2014) 58 Cal.4th 965, 998.)

C. SUBSTITUTION [§ 10.23]

Defense is not entitled to new penalty trial where trial counsel falls ill and new counsel is substituted prior to the start of the penalty phase. (***People v. Webster*** (1991) 54 Cal.3d 411, 454-455.)

"When, after trial, a defendant asks the trial court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel, the court must conduct a hearing to explore the reasons underlying the request. If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a 'colorable claim' of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial." (***People v. Diaz*** (1992) 3 Cal.4th 495, 573-574, internal quotations & citations omitted.)

Where juror's father died during penalty deliberations, no inquiry of jury was mandatory where juror gave no indication she sought to be discharged or felt coerced to reach a verdict, and nothing suggests remainder of the jury felt compelled to reach a verdict to accommodate the other juror. (***People v. Lucas*** (2014) 60 Cal.4th 153, 331-

332, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

III. JURY – PENALTY PHASE [§ 10.30]

A. COERCION [§ 10.31]

Cross-Reference: § 5.42, *re* Coercion / Deadlock

The trial court "went considerably beyond any permissible intervention and took action that undermined the sanctity of jury deliberations and invaded the jurors' mental processes" when "[b]ased solely on the reported impasse, the court subjected the jurors to a detailed questionnaire that asked them to report on the thoughts and conduct of their fellow jurors—specifically, whether the jurors were refusing to deliberate, whether they were basing their position on anything other than the evidence and jury instructions, and whether they were expressing views about the inappropriateness of the death penalty or life without parole based on anything other than evidence and law. It was clear to the jury that the purpose of this inquiry was to solve the problem of the jury's deadlock, and the inquiry therefore communicated to holdout jurors that their deliberative processes would be reported by fellow jurors and scrutinized by the court. This was improper." (***People v. Nelson*** (2016) 1 Cal.5th 513, 569-570.)

There was more than a remote possibility of distorting the deliberative process with the court's questionnaire and follow-up questioning in response to the jury declaring an impasse since "[i]t was clear that the point of the questionnaire was to expose the conduct and thought processes of the holdout jurors, not jurors in general," thereby creating a reasonable possibility jurors would be discouraged from taking the minority position based on the inquiry into the jurors' views. (***People v. Nelson*** (2016) 1 Cal.5th 513.)

"Although the court's statement that 21.5 hours of deliberations was a 'drop in the bucket,' when read in isolation, could be construed as an inducement to reach a verdict, the court's complete remarks do not suggest that the court crossed the line from encouragement to coercion. Similarly, the trial court's passing remark that [penalty phase] deliberations could continue until the end of the month was not unreasonable given that the court had previously informed jurors that their service could be required until the end of June. Further, the trial court permitted the jury flexibility over the schedule of deliberations. The record shows the trial court was willing to accommodate a wide range of personal commitments on the part of the jury." (***People v. Peoples*** (2016) 62 Cal.4th 718, 783.)

The record supports the trial court's determination that the jurors had not reached impasse in their penalty phase deliberations where each successive ballot taken revealed changes in the votes. (***People v. Harris*** (2005) 37 Cal.4th 310, 364-365.)

The trial court did not coerce a death verdict or abuse its discretion when it offered to recess the trial and truncate ongoing deliberations rather than discharge a juror who was advised, during penalty-phase deliberations, that his father had died and the juror had a plane flight that afternoon to leave town for the weekend to be with his family. (***People v. Beeler*** (1995) 9 Cal.4th 953, 986-990, abrogation on other grounds as recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705.)

There was no coercion when the judge asked the penalty-phase jury to continue to deliberate when it reported deadlock after three days, and the trial had taken about five months. (***People v. Sandoval*** (1992) 4 Cal.4th 155, 194-197.)

B. JURY MISCONDUCT [§ 10.32]

Cross-Reference: § 5.43.5, *re* Misconduct

"To the extent that the jurors' statements concerned how they were affected by what other jurors said about their personal experiences … they are inadmissible under Evidence Code section 1150, subdivision (a), as indication of juror mental processes." (***People v. Peoples*** (2016) 62 Cal.4th 718, 777, internal quotation marks & citations omitted.)

§ 10.32.1 Jurors' Personal Experiences

"[J]urors' discussions of their personal experiences with drugs, … while certainly a proper subject of expert testimony, this subject has become a subject of common knowledge among laypersons and jurors cannot be expected to shed their background and experiences at the door of the deliberation room." (***People v. Peoples*** (2016) 62 Cal.4th 718, 777, internal quotation marks & citations omitted.)

§ 10.32.2 Possible Release / Probable Execution

"[S]tatements of jurors regarding their estimation of the probability of an execution come within the ambit of knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience which jurors necessarily bring to their deliberations." (***People v. Peoples*** (2016) 62 Cal.4th 718, 777, internal quotation marks & citations omitted.)

There was no juror misconduct during the penalty phase when jurors briefly discussed the possibility defendant would be released despite an LWOP verdict. The possibility that at some time in the future a person might be released, perhaps because of a change in the law, is a matter of common knowledge appreciated by every juror who must choose between a sentence of death or LWOP. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 307, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

"[J]urors in capital case did not commit misconduct by discussing briefly the possibility of parole during the course of penalty phase deliberations that otherwise properly focused on the facts of the case and the aggravating and mitigating circumstances." (***People v. Yeoman*** (2003) 31 Cal.4th 93, 163, citing ***People v. Mendoza*** (2000) 24 Cal.4th 130, 195.)

§ 10.32.3 Religious Beliefs

The fact the jurors expressed their religious beliefs or held hands and prayed during penalty-phase deliberations does not show the jurors supplanted the law or instructions with their own religious views and beliefs. (***People v. Lewis*** (2001) 26 Cal.4th 334, 390.)

It is not misconduct that "jurors ... consider their religious beliefs during penalty deliberations." (***People v. Danks*** (2004) 32 Cal.4th 269, 308-309.)

Reading biblical passages (if misconduct), passing those passages around during deliberations, and seeking a pastor's view on the death penalty was found non-prejudicial. (***People v. Danks*** (2004) 32 Cal.4th 269, 304-310.)

Use of a Bible in the jury room constituted jury misconduct and raised a presumption of prejudice, rebuttable when there is no substantial likelihood that the vote of one or more of the jurors was influenced by exposure to the improper material. (***People v. Mincey*** (1992) 2 Cal.4th 408, 467.)

C. SUBSTITUTION OF JURORS [§ 10.33]

Cross-Reference:

§ 5.43, *re* Removal / substitution of jurors

The removal of a juror for good cause and the substitution of an alternate at the penalty phase prior to the commencement of deliberations do not require a retrial of the guilt phase, a reweighing of the evidence received at the earlier phase of the proceedings, or instructions on lingering doubt. (***People v. Brown*** (2003) 31 Cal.4th 518, 572.)

The penalty phase was reversed where the trial court dismissed the only African-American juror and lone hold-out against a death verdict, because the inability to perform duties was not shown as a demonstrable reality. The juror did not rely upon facts not in evidence; rather, he relied upon his life experiences as an African-American man to make the inherently normative and moral decisions about whether to impose the death penalty. (***People v. Wilson*** (2008) 44 Cal.4th 758, 830.)

The seating of alternate jurors after the guilt phase does not render the penalty-phase jury different than the guilt-phase jury within the meaning of Penal Code section 190.4, subdivision (d). (***People v. Alvarez*** (1996) 14 Cal.4th 155, 242-243.)

Upon removal of a juror and substitution of an alternate after the guilt phase, the trial court properly instructed the jury that the alternate must accept that the guilt-phase verdicts and findings establish defendant's guilt and the truth of the special circumstances beyond a reasonable doubt. Such instruction did not prevent consideration of the guilt-phase evidence in assessing the circumstances of the crime or the existence of lingering doubt. (***People v. Cain*** (1995) 10 Cal.4th 1, 64-67.)

D. WAIVER OF JURY TRIAL [§ 10.34]

Defendant may waive jury trial for a penalty retrial, even though the guilt and penalty phases were heard by a jury. (***People v. Hovarter*** (2008) 44 Cal.4th 983, 1027.)

There is no state-law right to waive a penalty-phase jury over the prosecutor's objection, and defendant fails to present any reason why such a one-sided waiver was compelled under the federal Constitution. (***People v. Turner*** (2004) 34 Cal.4th 406, 419; ***People v. Memro*** (1995) 11 Cal.4th 786, 875, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

E. UNITARY JURY [§ 10.35]

In a capital case, the jury that decides guilt is required to decide the penalty unless for good cause shown the court discharges that jury, in which case a new jury shall be drawn. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 732, citing Pen. Code, § 190.4(c).)

A defendant is not entitled to separate guilt and penalty-phase juries. There is a longstanding statutory preference for a unitary jury in a capital case which is set forth in Penal Code, section 190.4, subdivision (c), and is consistent with constitutional principles. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 106, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Osband*** (1996) 13 Cal.4th 622, 668-669.)

Use of a single jury to determine both guilt and penalty does not constitute a denial of due process of law or violate a defendant's right to a fair trial and a reliable guilt and penalty determination. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1281.)

Both the United States Supreme Court and California Supreme Court have repeatedly rejected the claim that a defendant is entitled to separate guilt and penalty phase juries "because jurors who survive the jury selection process in death penalty cases are more likely to convict a defendant." (***People v. Martinez*** (2016) 62 Cal.4th 856, 915, internal quotation marks & citations omitted.)

Desire to voir dire jurors in a different way is not good cause for deviating from the "clear legislative mandate" for a unitary jury to determine both guilt and penalty. (***People v. Catlin*** (2001) 26 Cal.4th 81, 113-115; ***People v. Rowland*** (1992) 4 Cal.4th 238, 267-269.)

The 1978 law is not unconstitutional because the jury that determines guilt may also consider the defendant's other violent activities. (Pen. Code, § 190.3(b); ***People v. Mendoza*** (2016) 62 Cal.4th 856, 915; ***People v. Prince*** (2007) 40 Cal.4th 1179, 1282 & fn. 25; ***People v. Allen*** (1986) 42 Cal.3d 1222, 1284.)

Separate juries for guilt and penalty phases are not constitutionally required even where death-eligibility is based on a prior-murder special circumstance. (***People v. Catlin*** (2001) 26 Cal.4th 81, 113-114; ***People v. Ray*** (1996) 13 Cal.4th 313, 357-358.)

Psychological testimony that guilt-phase jurors would be less able to give defendant a fair penalty trial than a newly selected jury was generally applicable to any capital case involving proof of other crimes in the penalty phase and, thus, was insufficient to demonstrate good cause and did not demonstrate prejudice to defendant. (***People v. Kraft*** (2000) 23 Cal.4th 978, 1069-1070.)

A trial court's decision to deny a defense request to impanel a separate jury for the penalty phase is reviewed for an abuse of discretion. (***People v. Kraft*** (2000) 23 Cal.4th 978, 1069; ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1352-1355; ***People v. Lucas*** (1995) 12 Cal.4th 415, 482-483.)

Where capital and non-capital defendants are joined in one trial, the death-qualification of the jury does not violate the "cross-section" requirement as to the non-capital defendant. (***Buchanan v. Kentucky*** (1987) 483 U.S. 402, 414-421 [107 S.Ct. 2906, 97 L.Ed.2d 336].)

Even assuming that guilt-and penalty-phase strategies are in tension with one another, and that there is a decision by counsel to present inconsistent defenses, more is required to show good cause for not proceeding with a unitary jury for both phases of a capital trial. Accordingly, the trial court did not abuse its discretion in denying a request to empanel a second jury for the penalty phase where defendant contended the jury that had heard the guilt phase (challenging DNA evidence) would not believe a penalty-phase strategy based on defendant having admitted his guilt to family and attorneys early on, felt remorse, and wanted to plead guilty, but was talked out of it by his attorneys. (***People v. Bennett*** (2009) 45 Cal.4th 577, 599-600.)

IV. PENALTY RETRIAL [§10.40]

"Following a hung jury, the trial court must conduct a retrial. Following a second hung jury, however, 'the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.' (§ 190.4, subd. (b).)" (***People v. Trinh*** (2014) 59 Cal.4th 216, 236, internal quotation marks & citations omitted.)

"[T]he statute neither mandates that the trial court set out the reasons for its exercise of discretion nor compels the court to rely on any particular considerations in choosing between a life sentence and another retrial." (***People v. Trinh*** (2014) 59 Cal.4th 216, 236.)

In granting a penalty retrial pursuant to section 190.4(b), "'a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.'" (***People v. Charles*** (2015) 61 Cal.4th 308, 333, quoting ***People v. McDowell*** (2012) 54 Cal.4th 395, 430; see also ***People v. Trinh*** (2014) 59 Cal.4th 216, 236.)

Court did not abuse its discretion in granting a fourth penalty trial where two of the penalty trials were granted as a matter of discretion pursuant to section 190.4 (b). "The court carefully laid out the factors that guided its exercise of discretion, considered each one and determined, on balance, a retrial was warranted. The factors it considered were both weighty and relevant to the exercise of its discretion: whether, for example, evidence of the circumstances of the crime supported imposition of the death penalty, the numerical breakdown of jurors voting for and against the death penalty, the absence of defense evidence of more than a single factor in mitigation, and the absence of prejudice to defendant. In short, the trial court found a jury would be warranted in returning a death verdict for this horrendous crime as to which defendant offered little in the way of mitigation and as to which the overwhelming number of prior jurors had voted for death." (***People v. Charles*** (2015) 61 Cal.4th 308, 332-333.)

The California Supreme Court has expressly declined to address whether a court could properly grant a fourth penalty trial under section 190.4 (b) where three previous trials resulted in deadlocked juries. (***People v. Charles*** (2015) 61 Cal.4th 308, 332, fn. 10.)

Standards set forth in Penal Code section 1387 have no application to the exercise of discretion under section 190.4 regarding penalty phase retrials. (***People v. Charles*** (2015) 61 Cal.4th 308, 334.)

In a penalty retrial, a jury may properly consider pursuant to section 190.3, factor (a) evidence of the circumstances of the offense "including evidence that may create a lingering doubt as to the defendant's guilt of the offense." (***People v. Hamilton*** (2009) 45 Cal.4th 863, 912.)

"The fact of a first jury's deadlock, or its numerical vote, is irrelevant to the issues before the jury on a penalty retrial." (***People v. Hawkins*** (1995) 10 Cal.4th 920, 967-968, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89, citing ***People v. Thompson*** (1990) 50 Cal.3d 134, 178.)

A. CONSTITUTIONALITY [§ 10.41]

Penalty-phase only retrials are not unconstitutional per se. (***People v. Peoples*** (2016) 62 Cal.4th 718, 751; ***People v. Gurule*** (2002) 28 Cal.4th 557, 645-646; ***People v. Davenport*** (1995) 11 Cal.4th 1171, 1192-1194, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

The California Supreme Court has repeatedly rejected claims that a penalty phase retrial violates a defendant's Sixth Amendment right to a fair trial and Eighth Amendment rights to "heightened reliability" in a capital case and to be free from cruel and unusual punishment. (***People v. Peoples*** (2016) 62 Cal.4th 718, 751.)

"[T]he fact that California stands 'among the "handful" of states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or "evolving standards of decency that mark the progress of a maturing society." [Citation.]' Further, … a penalty retrial following jury deadlock does not violate the constitutional proscription against double jeopardy or cruel and unusual punishment." (***People v. Jackson*** (2016) 1 Cal.5th 269, 256, internal citations omitted].)

It does not offend the Eighth Amendment to conduct a penalty phase retrial after the jury is unable to reach a verdict in the first penalty trial. (***People v. Sandoval*** (2015) 62 Cal.4th 394, 432)

Penalty retrials permitted by Penal Code section 190.4, subdivision (b), do not violate equal protection of due process. (***People v. Trinh*** (2014) 59 Cal.4th 216, 239.)

A second penalty retrial after lengthy delays does not constitute cruel and unusual punishment. (***People v. McDowell*** (2012) 54 Cal.4th 395, 411-412.)

B. DOUBLE JEOPARDY [§ 10.42]

A double-jeopardy claim premised on an allegedly erroneous penalty-phase mistrial declaration is waived if not affirmatively pleaded before the penalty-phase retrial. (***People v. Gurule*** (2002) 28 Cal.4th 557, 646.)

C. IMPACT OF FIRST PENALTY PHASE ON PENALTY PHASE RETRIAL [§ 10.43]

The fact and reasons for reversal of the penalty-phase judgment on appeal are not proper matters for the retrial jury to consider. Any possible pressure the retrial jury might feel to conform its verdict to the previous death verdict can be resolved by excluding any reference to the prior verdict during the retrial. (***People v. Burgener*** (2003) 29 Cal.4th 833, 866-867.)

Errors during the first penalty phase which ended in a hung jury and mistrial do not warrant reversal of a subsequent death verdict and judgment which resulted from a second penalty phase wherein the error did not occur. (***People v. Slaughter*** (2002) 27 Cal.4th 1187, 1207, 1212, 1218, 1220, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

Chapter Eleven
PENALTY PHASE – EVIDENCE

I. PROSECUTION EVIDENCE [§ 11.10]

A. GENERALLY [§ 11.11]

Cross-Reference:

§ 11.25, *re* Non-statutory aggravating factors evidence prohibited

"'Aggravating evidence must pertain to the circumstances of the capital offense (§ 190.3, factor (a)), other violent criminal conduct by the defendant (*id*., factor (b)) or prior felony convictions (*id*., factor (c)); only these three factors, and the experiential or moral implications of the defendant's age (*id*., factor (i)), are properly considered in aggravation of penalty. [Citations.] Evidence offered as rebuttal to defense evidence in mitigation, however, … need not relate to any specific aggravating factor. [Citations.]'" (***People v. Nelson*** (2011) 51 Cal.4th 198, 222-223.)

Under the 1978 death-penalty law, the prosecution may not present evidence that bears on non-statutory aggravating matters. The prosecution may only present evidence bearing on the factors enumerated in Penal Code section 190.3, subdivisions (a)-(j). (***People v. Boyd*** (1985) 38 Cal.3d 762, 772-780.) The rule enunciated in ***People v. Boyd*** (1985) 38 Cal.3d 762, 772-780 does not apply to evidence presented at the guilt phase or by the defense. (***People v. Riel*** (2000) 22 Cal.4th 1153, 1207.)

"Once the defense has presented evidence of circumstances admissible under factor (k) of Penal Code section 190.3, prosecution rebuttal evidence would be admissible as evidence tending to disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)" (***People v. Sanchez*** (2016) 63 Cal.4th 411, 473, internal quotation marks omitted.)

§ 11.11.1 Collateral Estoppel

Principles of collateral estoppel and res judicata do not apply where evidence is being presenting in the penalty phase under factor (b) of a crime for which the defendant was convicted of a lesser offense because the defendant is not on trial for the past offense, nor subject to conviction or punishment for the past offense. (***People v. Johnson*** (2015) 60 Cal.4th 966, 995-996.)

The court reached the merits of the trial court's denial of a motion to exclude the defendant's confession regarding the commission of a crime being admitted as evidence

in aggravation under factor (b) declining to decide whether the defendant was collaterally estopped from litigating admissibility issues that were litigated and resolved adversely to him in the trial for the crime that is the subject of the factor (b) evidence in aggravation. (***People v. Farnam*** (2002) 28 Cal.4th 107, 178.)

§ 11.11.2 Double Jeopardy

Double-jeopardy provisions of the state and federal Constitutions do not limit evidence that may be presented on penalty retrial. Thus, evidence of which the prosecution was unaware at the first trial may be used at the penalty retrial. (***People v. Robertson*** (1989) 48 Cal.3d 18, 46.)

Double jeopardy does not apply where evidence is being presented in the penalty phase under factor (b) of a crime for which the defendant was convicted of a lesser offense because the defendant is not on trial for the past offense, nor subject to conviction or punishment for the past offense. (***People v. Johnson*** (2015) 60 Cal.4th 966, 995-996.)

§ 11.11.3 Exclusionary Rule

The California Supreme Court assumed for purposes of argument that Fourth Amendment could be invoked to attempt to exclude evidence which the prosecution wishes to present solely at a capital-sentencing procedure. (***People v. Huggins*** (2006) 38 Cal.4th 175, 241, citing ***United States v. Ryan*** (10th Cir. 2001) 236 F.3d 1268, 1271 [ordinarily exclusionary rule does not bar introduction of fruits-of-illegal-searches-and-seizures evidence during sentencing proceeding]; see also ***People v. McKinnon*** (2011) 52 Cal.4th 610, 684 [rejecting search seizure claim relating to penalty phase evidence based on an absence of prejudice without reaching merits of issue].)

B. ACCOMPLICE TESTIMONY [§ 11.12]

Cross-Reference: § 8.10, *re* Accomplices

Rules relating to accomplice testimony are applicable in the penalty phase. (***People v. McDermott*** (2002) 28 Cal.4th 946, 1000-1001; ***People v. McClellan*** (1969) 71 Cal.2d 793, 805-806.)

Accomplice testimony may be considered at the penalty phase if corroborated. (***People v. McDermott*** (2002) 28 Cal.4th 946, 1000-1001; ***People v. Hamilton*** (1989) 48 Cal.3d 1142, 1180.)

C. CIRCUMSTANCES OF THE CRIME [§ 11.13]

Cross-Reference:

§ 11.17, *re* Defendant's lack of remorse

§ 11.30, *re* Victim-impact evidence

"The trial court's discretion to exclude [circumstances of the crime] evidence at the penalty phase is more circumscribed than it is in the guilt phase." (***People v. Eubanks*** 2011) 53 Cal.4th 110, 146-147; ***People v. Box*** (2000) 23 Cal.4th 1153, 1201 [same], overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

The question whether evidence is unduly inflammatory and thus excludable in the trial court's discretion is closer under factor (b) than factor (a), because the penalty jury must decide whether the factor (b) crime actually occurred beyond a reasonable doubt, a decision already made by the jury at the guilt phase on factor (a) evidence. (***People v. Box*** (2000) 23 Cal.4th 1153, 1201, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

Evidence that bears directly on the defendant's state of mind contemporaneous with the capital murder is relevant under factor (a) as circumstances of the crime. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1154, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

"Whether a defendant murdered without remorse 'bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed. [Citation.]' [Citations.] 'Evidence that reflects directly on the defendant's state of mind contemporaneous with the capital murder is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime. [Citations.]' [Citation.] It bears repeating that it is evidence of the defendant's state of mind *at the time of the murder* that is admissible under factor (a). … [*P*]*ostcrime* evidence of remorselessness, for example, does not fit within any statutory sentencing factor, and thus should not be urged as aggravating. [Citations.]" (***People v. Nelson*** (2011) 51 Cal.4th 198, 224.)

Defendant's culpable mental state may be considered as a circumstance of the crime under factor (a). Even where verdict is based on felony-murder theory, the jury can consider apparent premeditation by defendant as a circumstance of the crime. (***People v. Dykes*** (2009) 46 Cal.4th 731, 802, fn. 18.)

A jury's consideration of the circumstances of the crime under factor (a) is an individualized function, not a comparative function. (***People v. Jenkins*** (2000) 22 Cal.4th 900, 1052.)

The manner in which the elements of first degree murder were established (e.g., method of killing or extensive planning) can be considered aggravating under factor (a). (***People v. Coddington*** (2000) 23 Cal.4th 529, 640, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Evidence that defendant was paroled from a manslaughter conviction only six days before the charged crime is admissible in the context of circumstances of the present crime to show incarceration failed to change defendant's violent character. (***People v. Johnson*** (1992) 3 Cal.4th 1183, 1243.)

The presence of another person besides the murder victim rendered the shooting more culpable even if defendant did not see the other person. (***People v. Ochoa*** (2001) 26 Cal.4th 398, 461, abrogated on another point as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

Assuming, without deciding, whether the Confrontation Clause applies to the penalty phase of a capital trial, statements by the victim's daughter (who was deceased by time of penalty phase) to her grandmother relating what she overheard two men say before she heard gunshots were not made for the primary purpose of creating evidence to prosecute the defendant and therefore were not testimonial and properly admitted as evidence of the circumstances of the crime. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1232-1233.)

Without resolving the issue of the admissibility of rap lyrics as evidence of defendant's state of mind, the California Supreme Court found admission of the lyrics in the penalty phase to be harmless beyond a reasonable doubt as the crimes were "particularly distressing" and the jury was aware that the defendant repeatedly used juveniles as agents to commit violent offenses. In light of the aggravating evidence, "it strains credulity to suggest that the jury was improperly influenced by learning of the defendant's foray into music publishing. Moreover, the prosecutor did not refer to the lyrics in her penalty phase argument." (***People v. Nelson*** (2011) 51 Cal.4th 198, 224.)

D. DEFENDANT'S BACKGROUND / CHARACTER [§ 11.14]

"Evidence of a defendant's background, character, or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible." (***People v. Nelson*** (2011) 51 Cal.4th 198, 222; ***People v. Hawthorne*** (2009) 46 Cal.4th 67, 92, abrogated as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

Evidence that defendant read pornographic magazines was properly admitted to rebut evidence portraying defendant as a "studious, artistic intellectual." Courts should exercise great caution in allowing evidence of a defendant's private reading matter, but in view of the broad scope of character evidence permissible in a capital case, admission here was not an abuse of discretion. (***People v. Hovey*** (1988) 44 Cal.3d 543, 575-576.)

E. DEFENDANT'S ESCAPE FOLLOWING CRIMES [§ 11.15]

Evidence that defendant eluded authorities for five days after the shooting "while multijurisdictional law enforcement personnel conducted a massive but futile ground and air search" was properly admitted to show "that despite a major manhunt, defendant had the presence of mind after the shooting to elude capture and slip out of the area. This suggests advance planning and, rather than remorse, a cool determination to avoid the consequences of his actions. It also tends to negate a possible defense claim that the shooting was a spur-of-the-moment affair by a momentarily deranged individual." (***People v. Edwards*** (1991) 54 Cal.3d 787, 832.)

F. DEFENDANT'S GANG AFFILIATION [§ 11.16]

Cross-Reference: § 8.80, *re* Gang-related evidence

Membership in a prison gang is protected under the First Amendment. Absent some connection between gang membership and aggravating circumstances, it is error to admit evidence of the bare fact of gang membership in the penalty phase. (***Dawson v. Delaware*** (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309].)

Nothing bars evidence of gang affiliation directly relevant to a material issue. (***People v. Gurule*** (2002) 28 Cal.4th 557, 653-654; ***People v. Tuilaepa*** (1992) 4 Cal.4th 569, 588; cf. ***Dawson v. Delaware*** (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309, 315-319].)

Where defendant puts his good character in issue, the prosecution may counter this evidence with cross-examination or evidence concerning defendant's gang affiliation. (***People v. Roberts*** (1992) 2 Cal.4th 271, 335; ***People v. Fierro*** (1991) 1 Cal.4th 173, 236-238, disapproved on other grounds by *People v. Thomas* (2012) 54 Cal.4th 908, 941, and *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 205.)

Questions concerning defendant's gang affiliation were proper during penalty phase where defense counsel said defendant's present connection with gangs was just an "association." (***People v. Sandoval*** (1992) 4 Cal.4th 155, 188-189.)

G. DEFENDANT'S LACK OF REMORSE [§ 11.17]

Under the 1978 law, "[w]hether a defendant murdered without remorse 'bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed. [Citation.]' [Citations.] 'Evidence that reflects directly on the defendant's state of mind contemporaneous with the capital murder is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime. [Citations.]'

[Citation.] It bears repeating that it is evidence of the defendant's state of mind *at the time of the murder* that is admissible under factor (a). … [*P*]*ostcrime* evidence of remorselessness, for example, does not fit within any statutory sentencing factor, and thus should not be urged as aggravating. [Citations.]" (***People v. Nelson*** (2011) 51 Cal.4th 198, 224.)

"Conduct or statements demonstrating a lack of remorse made at the scene of the crime or while fleeing from it may be considered in aggravation as a circumstance of the murder under Pen. Code, § 190.3, factor (a). On the other hand, *postcrime* evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (***People v. Collins*** (2010) 49 Cal.4th 175, 227, internal citations & quotation marks omitted.)

A prosecutor is entitled to develop evidence of lack of remorse through cross-examination of a defense penalty phase expert. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 94, abrogated as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

H. DEFENDANT'S MENTAL ILLNESS [§ 11.18]

Evidence of mental illness under factors (d) and (k) can only be considered mitigating and cannot be introduced by the prosecution in its case-in-chief. However, if such evidence also relates to an aggravating factor (such as the circumstances of the crime), it is properly admitted as part of the prosecution's case-in-chief. (***People v. Smith*** (2005) 35 Cal.4th 334, 354-355.)

I. DEFENDANT'S STATEMENTS [§ 11.19]

Cross-Reference: § 8.212, *re* Defendant's statements

Where a psychiatrist examines defendant on court appointment to determine mental competence, *Miranda* applies to defendant's statements. Proper warnings and waivers are required before the statements may be admitted. (***Estelle v. Smith*** (1981) 451 U.S. 454, 466-469 [101 S.Ct. 1866, 68 L.Ed.2d 359].)

The harmless-error standard of *Chapman v. California* applies to any error in the admission of evidence in violation of *Estelle v. Smith*. This is so even to the extent it implicates the Sixth Amendment rights of *Estelle*, since the outcome is merely a matter of the erroneous admission of evidence. (***Satterwhite v. Texas*** (1988) 486 U.S. 249 [108 S.Ct. 1792, 100 L.Ed.2d 284]; ***Estelle v. Smith*** (1981) 451 U.S. 454, 466-469 [101 S.Ct. 1866, 68 L.Ed.2d 359]; ***Chapman v. California*** (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Estelle v. Smith does not apply where defendant requests a psychiatric examination via his plea of not guilty by reason of insanity and then presents psychiatric evidence at the penalty phase. If the defendant puts his state of mind in issue at the guilt, sanity, or penalty phase of the trial, the prosecution may rebut the evidence with the report of the requested examination without violating a defendant's Fifth or Sixth Amendment rights. (***Buchanan v. Kentucky*** (1987) 483 U.S. 402, 421-426 [107 S.Ct. 2906, 97 L.Ed.2d 336]; ***People v. Poggi*** (1988) 45 Cal.3d 306, 330.)

Estelle v. Smith does not apply where defendant consults with a doctor for his own benefit at the behest of counsel. (***People v. Haskett*** (1990) 52 Cal.3d 210, 243.)

J. DEMONSTRATIVE EVIDENCE [§ 11.20]

Cross-Reference: § 8.40, *re* Demonstrative evidence

§ 11.20.1 Photographs- Generally

Photographs supporting aggravation of the crime for penalty purposes are admissible. (***People v. Moon*** (2005) 37 Cal.4th 1, 35; ***People v. Raley*** (1992) 2 Cal.4th 870, 914; ***People v. Benson*** (1990) 52 Cal.3d 754, 786.)

The trial court's admission of "bloody and graphic" photographs of victims from the autopsy in the penalty phase that were excluded in guilt phase pursuant to Evidence Code section 352 was proper. The trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial in the penalty phase is "'more circumscribed'" than in the guilt phase. "[T]he jury had already found defendant guilty of the two murders, so there was no risk the jurors would react so emotionally to the pictures that they might convict an innocent man. Guilt having been established, the jury was left with the decision whether defendant deserved to live or die for his crimes." (***People v. Moon*** (2005) 37 Cal.4th 1, 34-35.)

The trial court did not abuse its discretion, nor deprive defendant of due process and a reliable capital sentencing determination by admitting a photograph of the victim with her eyes open, showing burn marks on her eyeballs. The photograph was relevant as it assisted jury in understanding testimony of pathologist, and it "not unduly prejudicial simply because it demonstrated manner in which defendant committed the crime." (***People v. Jackson*** (2014) 58 Cal.4th 724, 758.)

Photographs documenting the treatment of a victim who had been tortured at length, doused with gasoline and burned, and the body left exposed to elements and wildlife for several days, simply showed what had been done to the victim, and any revulsion induced by the photos was attributable to the acts done – not to the photographs. Accordingly, admission of the photos did not render the trial unfair or the

penalty determination unreliable, and the prosecution was not required to seek stipulations or otherwise sanitize the methods of presenting its case. (***People v. Brasure*** (2008) 42 Cal.4th 1037, 1054.)

§ 11.20.2 Crime-Scene & Autopsy Photos

Admission of videotape of crime scene and crime scene photographs in penalty phase was not unduly prejudicial within meaning of Evidence Code section 352, and did not violate defendant's federal constitutional rights under the Fifth, Sixth, Eighth, or Fourteenth Amendments. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 789-790.)

The trial court's admission of "bloody and graphic" photographs of victims from autopsy in the penalty phase was proper, as the photographs demonstrated the real life consequences of defendant's crimes and pointedly made clear the circumstances of the offenses, the only aggravating factor on which the People relied. (***People v. Moon*** (2005) 37 Cal.4th 1, 34-35.)

Photographs of a victim may properly be admitted to corroborate testimony of an expert witness. (***People v. Stanley*** (1995) 10 Cal.4th 764, 838; ***People v. Kaurish*** (1990) 52 Cal.3d 648, 684.)

§ 11.20.3 Photographs of Victim While Alive

Photos of the victim alive are generally admissible in the penalty phase. A photo of victims while alive constitutes a "circumstance of the offense" which portrays the victims as defendant saw them at the time of the killing. (***People v. Anderson*** (2001) 25 Cal.4th 543, 594; ***People v. Lucero*** (2000) 23 Cal.4th 692, 714; ***People v. Carpenter*** (1997) 15 Cal.4th 312, 401, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1191; ***People v. Edwards*** (1991) 54 Cal.3d 787, 832.)

Photos of the victim while alive and with family members are proper victim-impact evidence. (***People v. Scott*** (2015) 61 Cal.4th 363, 402; ***People v. Edwards*** (2013) 57 Cal.4th 658, 755.)

§ 11.20.4 Photographs of Victims From Prior Crimes

Photographs of a prior-murder victim were relevant to show that the prior criminal activity involved force or violence, and to aid the pathologist in explaining the number and nature of wounds; and photographs were not impermissibly cumulative or inflammatory. (***People v. Farnam*** (2002) 28 Cal.4th 107, 185.)

Photograph showing the injuries to the victim of a prior rape to which defendant had pled guilty was particularly relevant to show the extreme violence to the victim under factor (b) of section 190.3. (***People v. Wader*** (1993) 5 Cal.4th 610, 655-656.)

Photographs showing the crime scene and autopsies of defendant's prior-murder victims were probative of circumstances of those crimes, especially the deliberate and calculated manner of the killings, and were relevant in establishing aggravation. (***People v. Sims*** (1993) 5 Cal.4th 405, 461.)

K. FUTURE DANGEROUSNESS [§ 11.21]

Cross-Reference:

§ 12.26, *re* Future dangerousness

§ 13.15, *re* Future dangerousness

§ 11.21.1 Generally

"A prediction that a defendant will be dangerous in the future based on evidence admitted under factors (a)-(c) is not itself a fact or an aggravating factor. It is an inference drawn from aggravating evidence, and is properly argued by a prosecutor and considered by a jury in making its penalty determination." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 53.)

Evidence of future dangerousness may be introduced in rebuttal when defendant himself has raised the issue of performance in prison and offered evidence that in a prison environment he would be law-abiding. (***People v. Mattson*** (1990) 50 Cal.3d 826, 878; ***People v. Malone*** (1988) 47 Cal.3d 1, 31.)

While "defense counsel did not necessarily open the door to questions about future dangerousness by merely asking whether any medication existed to treat defendant's condition," he opened the door to the prosecutor eliciting testimony about defendant's future dangerousness in prison once defense counsel asked what type of medication would be made available to defendant, because "the clear implication of this testimony was that defendant's behavior could be controlled in prison." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1186, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

§ 11.21.2 Expert Testimony

The United States Supreme Court has concluded that the prosecution may properly put on psychiatric testimony forecasting future dangerousness without violating the United States Constitution. (***Ake v. Oklahoma*** (1985) 470 U.S. 68, 83-86 [105 S.Ct. 1087, 84 L.Ed.2d 53].) Accordingly, "the introduction of such evidence does not violate a defendant's Eighth Amendment right to a reliable penalty phase determination."

However, the law is settled in California that expert testimony "that a capital defendant will pose a danger in the future if his life is spared is inadmissible." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1185, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

In contrast to proper prosecutorial argument predicting future dangerousness based on inferences from the evidence, "there is a significant difference between an inference which a juror may or may not draw and a direct expression of expert opinion" and proper prosecutorial argument predicting future dangerousness based on inferences from the evidence. "The expert's authority and experience may persuade the jurors to a conclusion they would not reach on their own." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 54.)

Defendant's statements to a court-appointed psychiatrist which are offered to show "future dangerousness" constituted a violation of the Sixth Amendment where there was no notice to his attorney regarding the examination. (***Powell v. Texas*** (1989) 492 U.S. 680 [109 S.Ct. 3146, 106 L.Ed.2d 551]; ***Satterwhite v. Texas*** (1988) 486 U.S. 249 [108 S.Ct. 1792, 100 L.Ed.2d 284]; ***Estelle v. Smith*** (1981) 451 U.S. 454, 469-471 [101 S.Ct. 1866, 68 L.Ed.2d 359].)

"While the prosecution is prohibited from offering expert testimony predicting future dangerousness in its case-in-chief, it may explore the issue on cross-examination or in rebuttal if defendant offers expert testimony predicting good prison behavior in the future. Defendant raised the issue when he elicited testimony that ADHD prisoners treated with medication and counseling exhibited 'a greater degree of safety' than was otherwise expected of them. Having chosen to raise this subject, the defense could not reasonably insulate it from cross-examination." (***People v. Winbush*** (2017) 2 Cal.5th 402, 478-79 [internal quotation marks and citations omitted].)

Where the defense presents psychiatric evidence that the defendant will not be dangerous in the future, the prosecution is entitled to cross-examine on the issue even if the effect is to demonstrate future dangerousness. (***People v. Jones*** (2003) 29 Cal.4th 1229, 1260.)

A prosecutor can properly explore on cross-examination the basis for an expert's prediction that a capital defendant will pose no future danger if sentenced to life without parole. (***People v. Avila*** (2006) 38 Cal.4th 491, 610.)

L. INFORMANTS [§ 11.22]

Admission of uncorroborated informant testimony at the penalty phase does not unconstitutionally undermine reliability of the penalty determination. (***People v. Payton*** (1992) 3 Cal.4th 1050, 1063.)

M. JUVENILE ACTIVITY [§ 11.23]

§ 11.23.1 Factor (b) Evidence

Cross-Reference:

§ 11.26.2, *re* Criminal activity involving force & violence (factor (b) – (Pen. Code, § 190.3(b))

Evidence of violent juvenile misconduct that would have been a crime if committed as an adult is admissible under factor (b) as evidence in aggravation. (***People v. Salazar*** (2016) 63 Cal.4th 214, 225; ***People v. Bivert*** (2011) 52 Cal.4th 96, 114; ***People v. Lee*** (2011) 51 Cal.4th 620, 649; ***People v. Bramit*** (2009) 46 Cal.4th 1221, 1239; ***People v. Lewis*** (2001) 26 Cal.4th 334, 378-379.)

Use of juvenile misconduct as aggravating evidence does not violate a defendant's constitutional rights. (***People v. Jones*** (2013) 57 Cal.4th 899, 977; ***People v. Bivert*** (2011) 52 Cal.4th 96, 114; ***People v. Lee*** (2011) 51 Cal.4th 620, 649.)

The Supreme Court's decision prohibiting execution of persons under 18 years of age at the time of their capital offenses (***Roper v. Simmons*** (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1) "concerned the Eighth Amendment standard for imposing punishment, not the admissibility of evidence [and] "'says nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a juvenile.'" Similarly, nothing in the Supreme Court's extension of *Roper v. Simmons* in *Miller v. Alabama* (2012) 567 U.S. ___ [183 L. Ed. 2d 407, 132 S. Ct. 2455] to sentences of life imprisonment without parole, alters the admissibility of such evidence. "[E]vidence of forceful or violent conduct is nevertheless relevant to penalty phase questions about character and future dangerousness. [Citation.] Arguments about the offender's youth and immaturity go to the weight of the evidence, not its admissibility" (***People v. Winbush*** (2017) 2 Cal.5th 402, 473; ***People v. Lee*** (2011) 51 Cal.4th 620, 649; ***People v. Bramit*** (2009) 46 Cal.4th 1221, 1239.)

§ 11.23.2 Inadmissible Factor (c) Evidence

In the penalty phase of a capital trial, juvenile adjudications are not prior felony convictions within the meaning of Penal Code section 190.3, factor (c), and therefore are inadmissible in the prosecution's aggravation case-in-chief. (***People v. Lewis*** (2008)

43 Cal.4th 415, 530, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

§ 11.23.3 Properly Admitted Evidence in Aggravation

Where defendant was under 18 and prosecuted for violent crime (rape) as an adult and sentenced to Youth Authority, and that conviction was expunged under Welfare and Institutions Code section 1772, the conviction remained admissible in the penalty phase pursuant to Penal Code section 190.3, subdivision (c), as well as admissible under subdivision (b) as proof that the defendant had committed other violent activity. (***People v. Pride*** (1992) 3 Cal.4th 195, 256-257.)

A lewd act with a child (Pen. Code, § 288(a)) forcibly committed by defendant while a juvenile may be introduced under Penal Code section 190.3, subdivision (b), where the jury, instructed on the elements of the offense, is told it must find the offense beyond a reasonable doubt and that it must find express or implied use of force or violence or the threat of force or violence. (***People v. Raley*** (1992) 2 Cal.4th 870, 907-908.)

Misconduct as a juvenile is admissible to rebut evidence in mitigation. (***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1071-1074.)

§ 11.23.4 Forfeiture

Any error in the admission of evidence concerning a defendant's violent juvenile conduct is forfeited by failing to object at trial. (***People v. Avena*** (1996) 13 Cal.4th 394, 426.)

N. NATURE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE [§ 11.24]

Cross-Reference:

§ 11.57.2,	*re* Nature of life imprisonment without possibility of parole
§ 11.75,	*re* LWOP conditions
§ 13.12.5,	*re* Definition of LWOP

"[E]vidence concerning conditions of confinement for a person serving a sentence of life without possibility of parole is not relevant to the penalty determination because it

has no bearing on the defendant's character, culpability, or the circumstances of the offense under the federal Constitution or section 190.3, factor (k). More importantly, describing future conditions of confinement for a person serving a sentence of life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do." (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1086, internal quotation marks & citations omitted; ***People v. Martinez*** (2010) 47 Cal.4th 911, 963; ***People v. Thompson*** (1988) 45 Cal.3d 86, 138-139.)

Evidence of prison security measures will not be relevant in every capital case and "day in the life" evidence, i.e., generic accounts of daily routines of life prisoners is inadmissible in a penalty phase. However, when the prosecution raises future dangerousness as part of its case in aggravation suggesting the defendant would be a dangerous life prisoner, it is a violation of a defendant's due process right to exclude admission of defendant's relevant evidence in rebuttal to the prosecution's prediction of future dangerousness. "[S]ecurity measures aimed at restraining a defendant from acting on the violent impulses demonstrated by the aggravating evidence, or preventing him from inflicting harm, are relevant when the prosecution suggests that the defendant's violent conduct will continue in custody." The trial court committed reversible error by excluding defense evidence informing the jury about security measures imposed on life prisoners and the defendant's limited chances to inflict harm in prison which significantly enhanced the prosecution's case in aggravation. "The evidence of defendant's violence in jail and his persistence in making escape attempts was dramatic and compelling. The jury's concern about his future dangerousness was reflected in its note to the court asking whether his jail conduct could be considered. Furthermore, defendant's showing in mitigation was substantial." (***People v. Smith*** (2015) 61 Cal.4th 18, 56-60.)

"Expert testimony on prison security need not involve undue speculation about specific measures that might or might not be imposed by penal authorities in the future. Testimony explaining security policies followed in California prisons with respect to prisoners sentenced to life without parole, from an expert familiar with the penal system, is sufficiently reliable to be considered in connection with inferences of future dangerousness drawn from a defendant's past violent conduct in custody." (***People v. Smith*** (2015) 61 Cal.4th 18, 59.)

Where a defendant presents evidence in rebuttal of evidence in aggravation regarding limited chances to inflict harm in prison, "the prosecution is of course free to explore the extent of that limitation on cross-examination, and to counter with evidence that life prisoners have opportunities for violence." (***People v. Smith*** (2015) 61 Cal.4th 18, 58.)

O. NON-STATUTORY AGGRAVATING FACTORS EVIDENCE PROHIBITED [§ 11.25]

A death sentence may be imposed based upon a consideration of non-statutory as well as statutory aggravating circumstances under the United States Constitution. (***Barclay v. Florida*** (1983) 463 U.S. 939, 947 [103 S.Ct. 3418, 77 L.Ed.2d 1134].) However, under the 1978 California death-penalty law, the prosecution may only present evidence that relates to statutory factors enumerated in Penal Code section 190.3, subdivisions (a)-(k). (***People v. Boyd*** (1985) 38 Cal.3d 762, 772-780.) The rule enunciated in ***People v. Boyd*** (1985) 38 Cal.3d 762, 772-780, does not apply to evidence presented at the guilt phase or by the defense. (***People v. Riel*** (2000) 22 Cal.4th 1153, 1207.)

Prior probation violation does not fit any statutory category of aggravating evidence; reference to it was not admissible, but harmless. (***People v. Kaurish*** (1990) 52 Cal.3d 648, 700.)

Introduction of non-statutory aggravating evidence is not, by itself, reversible error; there must be an independent showing of prejudice. (***People v. Wright*** (1990) 52 Cal.3d 367, 425-429, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Prosecution evidence not relating to any specified statutory aggravating factor was improperly admitted, but the error was harmless in light of all the other evidence presented. (***People v. Lucky*** (1988) 45 Cal.3d 259, 302-303.)

P. OTHER-CRIMES EVIDENCE [§ 11.26]

§ 11.26.1 Generally

A defendant's criminal history is part of his or her background and can properly be considered in aggravation. (***People v. Carey*** (2007) 41 Cal.4th 109, 135.)

Prior criminal activity may be admitted both as violent criminal activity under Penal Code section 190.3, subdivision (b), and as a prior felony conviction under Penal Code section 190.3, subdivision (c). (***People v. Kelly*** (1992) 1 Cal.4th 495, 549; ***People v. Fierro*** (1991) 1 Cal.4th 173, 230, disapproved on other grounds by *People v. Thomas* (2012) 54 Cal.4th 908, 941, and *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 205; ***People v. Price*** (1991) 1 Cal.4th 324, 472.)

The sentencer in a capital proceeding is entitled to know about other incidents involving the use or threat of violence for which the defendant is shown to be criminally liable beyond a reasonable doubt, whether he participated as an actual perpetrator or in some other capacity. As long as penalty jurors are not materially misled about the nature and degree of the defendant's individual culpability, the prosecution may rely solely on a

judgment of conviction to establish the defendant's involvement in a joint crime of violence. (***People v. Ray*** (1996) 13 Cal.4th 313, 351.)

Penal Code section 1203.4 does not bar consideration of prior conduct. It is the defendant's conduct, not the conviction, that is at issue. (***People v. Douglas*** (1990) 50 Cal.3d 468, 529, overruled on other grounds as stated, *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

Preliminary-hearing testimony is generally admissible to show prior crimes at the penalty phase. (***People v. Valencia*** (2008) 43 Cal.4th 268, 293.)

Penal Code section 190.3 does not create a blanket prohibition against admitting evidence in the penalty phase of criminal activity that does not involve violence. Evidence of non-violent criminal activity that was properly admitted in the guilt phase, and is admitted in a penalty retrial as tending to prove the defendant's guilt – which is relevant to rebut the potentially mitigating factor of lingering doubt – is "not presented as evidence in aggravation per se" in the penalty phase. (***People v. Clark*** (2016) 63 Cal.4th 522, 633.)

§ 11.26.2 Criminal Activity Involving Force & Violence (Factor (b)) – (Pen. Code § 190.3(b))

Cross-Reference:

§ 11.23.1,	*re* Factor (b) evidence
§ 13.55,	*re* Factor (b) – criminal activity involving force or violence

§ 11.26.2.1 Generally

Under Penal Code section 190.3, subdivision (b), a jury may hear facts surrounding prior criminal activity involving force or violence. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1135; ***People v. Jurado*** (2006) 38 Cal.4th 72, 135; ***People v. Zapien*** (1993) 4 Cal.4th 929, 987; ***People v. Mickle*** (1991) 54 Cal.3d 140, 187; ***People v. Melton*** (1988) 44 Cal.3d 713, 754.)

"Factor (b) evidence "must violate a penal statute and must be directed against a person or persons, not against property." (***People v. Winbush*** (2017) 2 Cal.5th 402, 473.)

Factor (b) evidence must demonstrate the commission of an actual crime, specifically, a violation of the Penal Code. (***People v. Jurado*** (2006) 38 Cal.4th 72, 136.)

Evidence of other violent crimes is admissible regardless of when committed or whether they led to criminal charges or conviction. (***People v. Lewis & Oliver*** (2006)

39 Cal.4th 970, 1052.) However, Penal Code section 190.3, subdivision (b), does not permit use of evidence of criminal activity of which the defendant has been acquitted. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1052; ***People v. Monterroso*** (2004) 34 Cal.4th 743, 777.)

Section 190.3, subdivision (b), does not require that the specific crime inherently involve force or violence, only that the actual criminal activity be violent. (***People v. Prieto*** (2003) 30 Cal.4th 226, 267; see also ***People v. Boyde*** (1988) 46 Cal.3d 212, 249-250 [evidence of conspiracy to escape properly admitted where conspiracy involved possible use of gun to subdue a guard], overruled on other grounds, *People v. Johnson* (2016) 62 Cal.4th 600, 648.)

There is no requirement under state or federal law that the jury unanimously agree on the aggravating circumstances that support the death penalty, since aggravating circumstances are not elements of an offense. (***People v. Jackson*** (2009) 45 Cal.4th 662, 701; ***People v. Hoyos*** (2007) 41 Cal.4th 872, 926, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641; ***People v. Stanley*** (2006) 39 Cal.4th 913, 963.) However, penalty-phase instructions must make clear that an individual juror may consider other violent crimes in aggravation only if the juror is satisfied beyond a reasonable doubt that defendant committed those crimes. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1052.)

Section 190.3, factor (b), applies to misdemeanor violent activity as well as felony activity. Even assuming that factor (b) can be interpreted to exclude certain violent activity as too minor, domestic violence incidents "such as hitting or throwing plates" would not qualify as part of any such exception. "The testimony demonstrated a course of conduct of domestic violence that defendant engaged in against both his former wives. The seriousness of each of the acts, i.e., their potential injurious effect, varied, but the course of conduct taken as a whole was relevant to showing 'defendant's propensity for violence.'" (***People v. Bunyard*** (2009) 45 Cal.4th 836, 857, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1191.)

Where the defendant has been convicted of a crime from another jurisdiction involving the use or threat of force or violence, the prosecution can rely on that conviction for purposes of establishing the presence of criminal activity for purposes of factor (b) under the 1977 death penalty law. It is of no consequence that the convictions did not occur until after the capital crimes were committed for purposes of admissibility as factor (b) evidence. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1138-1139.)

Penal Code section 190.3, factor (b), expressly permits proof of violent crimes regardless of whether it led to a prosecution or conviction. (***People v. Thornton*** (2007) 41 Cal.4th 391, 464.)

"[A] defendant is not entitled to prevent admission of the '"sordid details"' of criminal conduct under section 190.3, factor (b) '"by stipulating to any resulting conviction or to a sanitized version of the facts surrounding the offense."'" (***People v.***

Clark (2011) 52 Cal.4th 856, 1000, quoting ***People v. Cunningham*** (2001) 25 Cal.4th 926, 1017.)

"The proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on [the defendant's] character, rather than on the labels to be assigned to those crimes." (***People v. Collins*** (2010) 49 Cal.4th 175, 219, internal quotation marks omitted.)

Evidence of a defendant's aiding and abetting of a violent criminal offense is admissible under factor (b). Evidence of the codefendant's conduct under such a situation is relevant to place defendant's conduct in context. (***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 137, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5].)

"Neither remoteness nor the expiration of the statutory limitations period bars admission of a defendant's prior unadjudicated criminal activity for purposes of section 190.3, factor (b)." (***People v. Landry*** (2016) 2 Cal.5th 52, 119 [internal quotation marks and citations omitted].)

Defendant must object to introduction of factor (b) evidence to preserve the issue for appeal on either statutory or constitutional grounds. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1052.)

§ 11.26.2.2 Notice Requirement

Cross-Reference:

§ 3.100, *re* Notice of evidence in aggravation (Pen. Code, § 190.3)

The probative value of evidence of other crimes admitted under factor (b) lies in the defendant's conduct that gave rise to the offense. Accordingly, the prosecution's notice that evidence will be presented regarding a specific violent crime or crimes should alert counsel that evidence of all crimes committed during the same course of conduct may be offered, and substantially complies with the notice requirement of Penal Code section 190.3. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1146-1147, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

§ 11.26.2.3 Preliminary Inquiry (*Phillips* Hearing)

Under some circumstances, it is advisable for the trial court to conduct a preliminary inquiry out of the presence of the jury to determine whether there is sufficient

evidence of each element of the proposed prior offense to allow its introduction into evidence. (***People v. Fauber*** (1992) 2 Cal.4th 792, 849; ***People v. Phillips*** (1985) 41 Cal.3d 29, 72, fn. 25.) However, a preliminary inquiry is not a prerequisite to admission of unadjudicated criminal-conduct evidence. (***People v. Melendez*** (2016) 2 Cal.5th 1, 32-33; ***People v. Young*** (2005) 34 Cal.4th 1149, 1209.)

At a preliminary inquiry, the prosecution need not prove the violent criminal conduct beyond a reasonable doubt; evidence that would allow a rational trier of fact to make a determination beyond a reasonable doubt as to such criminal activity is sufficient. (***People v. Ochoa*** (1998) 19 Cal.4th 353, 449.)

§ 11.26.2.4 Timing of Factor (b) Crimes

Factor (b) permits the jury to consider evidence of defendant's use or attempted use of force or violence occurring at anytime during the defendant's life. Accordingly, evidence of violent criminal activity is admissible even if prosecution of the crime would be time-barred. (***People v. Jurado*** (2006) 38 Cal.4th 72, 135.)

When reasonable steps are taken to assure a fair and impartial penalty trial, i.e., notice of evidence to be introduced, opportunity to confront available witnesses, and requirement of proof beyond a reasonable doubt, then the remoteness of prior violent conduct affects its weight, not its admissibility, in the penalty phase of a capital trial. (***People v. Huggins*** (2006) 38 Cal.4th 175, 246.)

Unlike prior felony convictions, evidence of violent conduct is admissible even if it occurred after the capital crime. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1052; ***People v. Avena*** (1996) 13 Cal.4th 394, 426-428.)

§ 11.26.2.5 Location of Factor (b) Crimes

Conviction for a criminal offense involving violent conduct in another state is admissible under Penal Code section 190.3, subdivision (b), even if the conduct would not give rise to a criminal conviction in California. (***People v. Pensinger*** (1991) 52 Cal.3d 1210, 1260.)

§ 11.26.2.6 Context & Effects of Factor (b) Crimes Admissible

When evidence of other crimes is admissible under factor (b), then "'evidence of the surrounding circumstances is admissible to give context to the episode, even though the surrounding circumstances include other criminal activity that would not be admissible by itself.'" (***People v. Thomas*** (2011) 51 Cal.4th 449, 505, quoting ***People v. Wallace*** (2008) 44 Cal.4th 1032, 1081.)

"Victim impact evidence relating to factor (b) crimes, like evidence regarding other circumstances of that criminal activity, serves to fully illuminate their seriousness, thereby assisting the penalty phase jury in its assessment of the character and record of the defendant." (***People v. Johnson*** (2016) 62 Cal.4th 600, 647, internal quotation marks & citations omitted.)

Threats made while in custody immediately after an otherwise admissible violent criminal incident are admissible under factor (b). (***People v. Kipp*** (2001) 26 Cal.4th 1100, 1134; see also ***People v. Montiel*** (1993) 5 Cal.4th 877, 915-917 [threats made during violent resistance to arrest admissible to demonstrate aggravated nature of conduct], disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

The trial court did not err in permitting the prosecution to introduce evidence from which the jury could conclude defendant committed a greater offense (ADW) than that to which he pled guilty in a prior proceeding (battery). (***People v. Jones*** (1998) 17 Cal.4th 279, 312.)

The evidence concerning defendant's fights with other inmates was properly admitted into evidence as aggravating evidence. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1136.)

Where officer testified that defendant threw food tray at her, and that food splattered all over her, the jury had sufficient evidence from which to conclude that the defendant had committed an assault or a battery, and, therefore, the jury could consider the testimony as aggravating evidence under factor (b). (***People v. Moore*** (2011) 51 Cal.4th 1104, 1136.)

§ 11.26.2.7 Presentation of Evidence

Where evidence of other violent criminal activity was presented for a limited purpose at the guilt phase, the prosecution need not re-present that evidence at the penalty phase in order to argue it, or for the jury to consider it, as constituting other violent criminal activity. (***People v. Carpenter*** (1999) 21 Cal.4th 1016, 1059-1060.)

The trial court properly took judicial notice that defendant had pled guilty to a misdemeanor offense for the limited purpose of the issue of identity of the person involved in an incident that the prosecutor offered as factor (b) evidence. The guilty plea was not inadmissible hearsay, as it fell within an exception to the hearsay rule for the admission of a party (Evid. Code, § 1220). (***People v. Lee*** (2011) 51 Cal.4th 620, 650-651.)

A prior felony conviction for a violent crime can be relied upon by the prosecution to establish criminal activity under section 190.3, factors (b) *and* (c). (***People v. Homick*** (2012) 55 Cal.4th 816, 889.)

The court assumed that an extrajudicial statement repudiated under oath is legally insufficient, standing alone, to establish violent criminal conduct beyond a reasonable doubt. (***People v. Montiel*** (1993) 5 Cal.4th 877, 929, disapproved on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

A dying declaration by a victim of an uncharged out-of-state murder is admissible where there is evidence sufficient to establish the preliminary fact of the victim's sense of immediately impending death. (***People v. Sims*** (1993) 5 Cal.4th 405, 457-459.)

An in-court identification by a victim of a prior violent crime is not unfair, even though evidence of a previous photographic identification by the witness is no longer available due to inadvertence of the People, where the defendant has the opportunity to cross examine pertinent witnesses to expose the potential for error in the lineup method, and it appears the in-court identification is based on the victim's personal observation rather than on the previous lineup. (***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1162.)

It is proper to admit the testimony of a second victim of a prior kidnap even though another victim also testified. (***People v. Rowland*** (1992) 4 Cal.4th 238, 272-273.)

§ 11.26.2.8 Examples of Factor (b) Evidence

Where defendant engaged in a fight with another inmate on a basketball court and no evidence is offered suggesting the defendant's participation in the fight was legally justified, the incident is admissible as evidence in aggravation under Penal Code section 190.3, subdivision (b). (***People v. Jackson*** (2014) 58 Cal.4th 724, 760; ***People v. Moore*** (2011) 51 Cal.4th 1104, 1136 [where scene of jailhouse scuffle "as witnessed does not suggest defendant may have been acting in self-defense, and defendant presents no evidence in mitigation, a finding of criminal assault justified"].)

Defendant's participation in a prison melee among rival gangs was admissible and it was a matter for the jury to decide whether defendant's participation was legally justified and whether violent criminal activity had been proven. (***People v. Jackson*** (2014) 58 Cal.4th 724, 760-761.)

Defendant's telephonic threats to his wife and her boyfriend in violation of Penal Code section 653m were properly admitted as Factor (b) evidence. (***People v. Johnson*** (2015) 61 Cal.4th 734, 775-776.)

Conviction of misdemeanor burglary is not admissible in aggravation, but where the burglary involved actual or threatened violence, the circumstances of the crime are independently admissible as evidence in aggravation under factor (b) of section 190.3. (***People v. Montiel*** (1993) 5 Cal.4th 877, 936, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

Solicitation to commit murder (Pen. Code, § 653(f)) involves the implied threat of violence and is thus admissible under factor (b). (***People v. Douglas*** (1990) 50 Cal.3d

468, 531, overruled on other grounds as stated, *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

Evidence of a defendant's nonviolent escapes was inadmissible as an aggravating factor under section 190.3, factor (b). (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1334-1335.)

Defendant's inability to immediately act on or carry out threats is immaterial in order to establish defendant violated Penal Code section 71 by threatening school officers who had detained him. (***People v. Harris*** (2008) 43 Cal.4th 1269, 1311.)

"Possession of an item that is not otherwise prohibited might be considered criminal when the person in possession has the intent to commit a battery *and has the present ability to do so*, that is, when he or she has committed an assault under section 240." (***People v. Moore*** (2011) 51 Cal.4th 1104, 1137-1138, emphasis in original.)

§ 11.26.2.9 Implied Threat of Force

Penal Code section 190.3, subdivision (b), applies to crimes which involve the implied threat of force as well as the express use of force. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1127; ***People v. Michaels*** (2002) 28 Cal.4th 486, 535; ***People v. Clair*** (1992) 2 Cal.4th 629, 677.)

"Although evidence of attempted escape alone is not admissible under section 190.3, factor (b)" it is sufficient where the evidence indicates that not only did the defendant plan to escape at night by taking a deputy hostage and threatening him with a shank, he was observed with a shank, and a weapon was found in his cell. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 49.)

Arson in a detention facility involved a threat to use force or violence against a person under section 190.3, factor (b). (***People v. Lewis*** (2001) 26 Cal.4th 334, 392.)

The court assumed that evidence of a defendant's refusal to obey the orders of a corrections officer did not demonstrate criminal activity involving the use or attempted use of force or violence, or express or implied threat to use force or violence directed at any person, and concluded any error in admitting the evidence was harmless because the guard acknowledged in his testimony no direct threat was posed by the defendant's conduct, the prosecutor made no mention of the incident in closing argument, and the properly admitted evidence of the circumstances of the crime and other incidents in prison left no reasonable possibility that presentation of the nonviolent incident affected the verdict. (***People v. Jackson*** (2014) 58 Cal.4th 724, 761.)

Where a correctional officer testified defendant assumed a threatening stance after being ordered to move from his bed after contraband was found in his cell, and the officer viewed that stance as combative, the jury did not have to accept the defense characterization of the conduct as passive activity constituting a failure to comply with an order, and instead could reasonably infer the defendant obstructed the officer in the

official performance of his duties by conduct that included an implied threat of violence. (***People v. Lightsey*** (2012) 54 Cal.4th 668, 728.)

§ 11.26.2.10 Weapon Possession

"Possession of a firearm is not, in every circumstance, an act committed with actual or implied force or violence. The factual circumstances surrounding the possession, however, may indicate an implied threat of violence. In a series of cases [the California Supreme Court has] held that the possession of a weapon in a custodial setting – where possession of any weapon is illegal – involves an implied threat of violence even when there is no evidence the defendant used or displayed it in a provocative or threatening manner. Even in a *noncustodial* setting, illegal possession of potentially dangerous weapons may show an implied intention to put the weapons to unlawful use, rendering the evidence admissible pursuant to section 190.3 factor (b)." (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1127, emphasis in original, internal citations & quotation marks omitted; ***People v. Dykes*** (2009) 46 Cal.4th 731, 776-777 [weapon possession in custody admissible under factor (b) where defendant did not use or display weapon with overt threats).

Evidence defendant possessed a loaded firearm (handgun under pillow) while in constructive custody (under parole supervision) properly admitted under factor (b) since the criminal character of possession of a loaded firearm at a time when subject to parole searches was sufficient to permit jury to consider the possession as an implied threat of violence. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1127.)

A defendant's explanation that he intended to use a shank only to defend himself and had an otherwise spotless disciplinary record does not affect the admissibility of defendant's knowing possession of a potentially dangerous weapon as evidence in aggravation admitted under factor (b). (***People v. Edwards*** (2013) 57 Cal.4th 658, 754.)

Possession of a single-edge razor blade while in custody is admissible under section 190.3, subdivision (b). (***People v. Pollock*** (2004) 32 Cal.4th 1153, 1178.)

Possession of a contraband razor in jail is a violent offense for purposes of factor (b). (***People v. Butler*** (2009) 46 Cal.4th 847, 872; ***People v. Wallace*** (2008) 44 Cal.4th 1032, 1082; ***People v. Thornton*** (2007) 41 Cal.4th 391, 465-466.)

Evidence that defendant (a prisoner) possessed a piece of metal was properly admitted under factor (b) as possession of a weapon. (***People v. Roberts*** (1992) 2 Cal.4th 271, 332.)

"Although the exact utility of the constructions with paper clips and staples was somewhat unclear, the sharpened toothbrushes were unquestionably weapons that qualified for admission under section 190.3, factor (b)." Possession of a sharpened plastic toothbrush alone, without the addition of or modifications made of metal,

constitutes criminal activity within the meaning of factor (b). (***People v. Mills*** (2010) 48 Cal.4th 158, 208.)

A defendant who arms himself after escaping from custody can be presumed to be in possession of the gun to assist in his continued flight. Possession under those circumstances amounts to substantial evidence of an implied threat of violence. (***People v. Jackson*** (1996) 13 Cal.4th 1164, 1235-1236.)

"The criminal character of defendant's possession of a loaded firearm, at a time when he was subject to parole searches in Arizona, is sufficient to permit a jury to view his possession as an implied threat of violence. [Citation.] … Defense counsel was free to argue to the jury (and indeed did argue) that defendant possessed the gun for the purpose of self-protection, not for criminal violence." (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1127.)

Non-custodial possession of a weapon may be admissible as an implied threat to use force or violence if possession of the weapon is illegal or there was evidence that defendant had used the weapon or a similar weapon to commit a crime. (***People v. Michaels*** (2002) 28 Cal.4th 486, 536.)

Possession of sawed-off firearms and silencer materials carries an implied threat of violence because their obvious purpose is to harm human beings. (***People v. Quartermain*** (1997) 16 Cal.4th 600, 631.)

Unlawful possession of a potentially dangerous weapon involves an implied threat of violence and is admissible under factor (b) even where there is no evidence the defendant used or displayed the weapon in a threatening manner. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 50.)

When the evidence permits an inference that defendant possessed a dangerous weapon with the purpose of using it to avoid apprehension or successfully escape the scene of a crime, the fact defendant chose not to use the weapon as planned could not negate the implied threat of violence. (***People v. Smithey*** (1999) 20 Cal.4th 936, 992.)

Evidence was sufficient for the jury to find the defendant in possession of a shank that had been found on top of the conduit just above and outside the bars of his cell, where a deputy testified it would be difficult for anyone outside of the cell to reach the conduit, and that anyone attempting to do so would be in plain view of the cameras monitoring the tier, whereas a person inside the cell could reach the shank with only his fingers being visible; and that the cell areas are searched before a new inmate is placed in a cell. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1136-1137.)

Evidence that defendant attempted to escape twice and possessed weapons three times was admissible based on evidence showing it would be impossible to escape without confrontation with a guard and thus entailed an "implied threat to use force or violence." (***People v. Mason*** (1991) 52 Cal.3d 909, 954-957.)

§ 11.26.2.11 Acquittal / Dismissal

Penal Code section 190.3, subdivision (b), does not permit use of evidence of criminal activity of which the defendant has been prosecuted and acquitted. (***People v. Johnson*** (2015) 60 Cal.4th 966, 995; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1052; ***People v. Anderson*** (2000) 25 Cal.4th 543, 584.)

The limitation in section 190.3 concerning criminal activity for which the defendant was prosecuted and "acquitted" is strictly construed to refer only to a "'determination on the merits of the truth or falsity of the charge.'" (***People v. Johnson*** (2015) 60 Cal.4th 966, 995, quoting ***People v. Stitely*** (2005) 35 Cal.4th 514, 563; ***People v. Monterroso*** (2004) 34 Cal.4th 743, 777.)

Notwithstanding the doctrine of implied acquittal (a defendant's conviction of a lesser degree or lesser included offense of that charged constitutes an implied acquittal of the greater offense), "'a dismissal, whether or not pursuant to a plea agreement, is not the equivalent of, and does not constitute, an acquittal pursuant to section 190.3'" and does not prevent their being proved at the penalty phase of a capital-murder trial. (***People v. Johnson*** (2015) 60 Cal.4th 966, 995, quoting ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1375; ***People v. Valencia*** (2008) 43 Cal.4th 268, 294; ***People v. Koontz*** (2002) 27 Cal.4th 1041, 1087.)

Double jeopardy and speedy trial protections, and principles of collateral estoppel and res judicata do not apply where evidence is being presented in the penalty phase under factor (b) of a crime for which the defendant was convicted of a lesser offense because the defendant is not on trial for the past offense, nor subject to conviction or punishment for the past offense. (***People v. Johnson*** (2015) 60 Cal.4th 966, 995-996; ***People v. Visciotti*** (1992) 2 Cal.4th 1, 71; ***People v. Danielson*** (1992) 3 Cal.4th 691, 720, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; ***People v. Melton*** (1988) 44 Cal.3d 713, 756, fn. 17.)

A defendant's federal constitutional rights to a fair trial, due process, and a reliable penalty determination are not violated by admitting relevant admissible evidence to show that the underlying conduct for which defendant was convicted constituted a more serious offense than the crime for which he was convicted. "'The capital sentencing jury must have the most detailed relevant information about the individual offender.'" The process was "fair to both sides" where "the prosecution presented its evidence, and defendant was permitted to, and did, present his side of the matter." (***People v. Johnson*** (2015) 60 Cal.4th 966, 995, quoting ***People v. Melton*** (1988) 44 Cal.3d 713, 756, fn. 17.)

A court does not err in providing penalty phase jury with instructions of the elements of greater crime than for which defendant was convicted when prosecution presents evidence of the underlying facts and seeks to show defendant committed a more serious offense than the one for which he was convicted. (***People v. Johnson*** (2015) 60 Cal.4th 966, 996.)

Dismissal of parole or a probation-revocation charge, even on the "merits," is not an acquittal under Penal Code section 190.3. (***People v. Arias*** (1996) 13 Cal.4th 92, 164.)

The use of dismissed charges as a circumstance in aggravation does not violate an implicit term of a plea bargain when used at a capital penalty hearing. ***People v. Harvey*** (1977) 25 Cal.3d 754, does not preclude consideration by the jury of prior violent acts which underlay charges previously dismissed pursuant to a plea bargain. (***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1157; ***People v. Garceau*** (1993) 6 Cal.4th 140, 199, overruled on other grounds as stated in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

What constitutes an acquittal in another state for purposes of Penal Code section 190.3 does not depend on the other state's law. (***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 133-134, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5].)

Grand jury failure to indict is not equivalent to an "acquittal." (***People v. Stitely*** (2005) 35 Cal.4th 514, 563.)

Although Penal Code section 190.3's bar on the use of evidence of acquitted offenses extends to lesser included offenses, the bar does not extend to lesser included offenses of which the defendant was convicted. The penalty-phase evidence was limited to facts on which the jury could reasonably have reached the lesser verdict. (***People v. Cain*** (1995) 10 Cal.4th 1, 71.)

Even if defendant was "acquitted" of the gun-use enhancement, the trial court did not err in admitting evidence of the robbery which included evidence that defendant held a hat over his hand and said he had a gun. Defendant's threat with a possibly nonexistent gun was a relevant circumstance of the robbery. (***People v. Lewis*** (2001) 25 Cal.4th 610, 657-659.)

Introducing the facts of a prior manslaughter conviction which tend to show malice does not violate the section 190.3 provision barring evidence when there is a prior acquittal, because defendant was never charged with or acquitted of murder during his manslaughter trial. (***People v. Johnson*** (1992) 3 Cal.4th 1183, 1240-1241; ***People v. Danielson*** (1992) 3 Cal.4th 691, 720, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

Kellett v. Superior Court (1966) 63 Cal.2d 822 (precluding subsequent prosecution in a separate proceeding where an act or course of criminal conduct either resulted in an acquittal or conviction and sentence entered under one penal statute when conduct can be punished only once under Penal Code section 654) does not apply to proof of prior violent conduct in the penalty phase. (***People v. Jones*** (1998) 17 Cal.4th 279, 313.)

§ 11.26.2.12 Burden of Proof

Before a juror can consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. There is no requirement that the jury as a whole unanimously find the existence of the other criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235; ***People v. Foster*** (2010) 50 Cal.4th 1301, 1364; ***People v. Huggins*** (2006) 38 Cal.4th 175, 239.)

§ 11.26.2.13 Double Jeopardy

The presentation of evidence of past criminal conduct in the penalty phase "'does not place the defendant in jeopardy with respect to the past offenses. He is not on trial for the past offense, is not subject to conviction or punishment for the past offense, and may not claim either speedy trial or double jeopardy protection against introduction of such evidence.'" (***People v. Johnson*** (2015) 60 Cal.4th 966, 995, quoting ***People v. Visciotti*** (1992) 2 Cal.4th 1, 71.)

Double jeopardy does not apply where evidence is being presented in the penalty phase under factor (b) of a crime for which the defendant was convicted of a lesser offense because the defendant is not on trial for the past offense, nor subject to conviction or punishment for the past offense. (***People v. Johnson*** (2015) 60 Cal.4th 966, 995-996.)

§ 11.26.2.14 Impact on Decision to Testify

Forcing a defendant to choose between either testifying and denying an uncharged crime, thereby resulting in the loss of the privilege against compelled self-incrimination for a future trial on the uncharged crime, or remaining silent and thereby leaving evidence of guilt unrebutted, does not violate his or her constitutional rights. (***People v. Rundle*** (2008) 43 Cal.4th 76, 186, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Avena*** (1996) 13 Cal.4th 394, 429; ***People v. Wader*** (1993) 5 Cal.4th 610, 657; ***People v. Sims*** (1993) 5 Cal.4th 405, 460-461.)

§ 11.26.2.15 Corpus Delicti

The corpus delicti rule applies to unadjudicated crimes offered in aggravation at the penalty phase. (***People v. Valencia*** (2008) 43 Cal.4th 268, 296.)

"[A]s to each unadjudicated crime at the penalty phase of a capital trial, the prosecution need only establish, independently of the defendant's statements, the corpus delicti of a crime admissible in aggravation under factor (b) ... once that corpus delicti is established, the defendant's extrajudicial statements may then be considered for their value to strengthen the case on all issues.'" (***People v. Valencia*** (2008) 43 Cal.4th 268, 296-297.)

The identity of the perpetrator is not part of the corpus delicti; identity may be established by the defendant's words alone. (***People v. Valencia*** (2008) 43 Cal.4th 268, 297.)

Notwithstanding Proposition 8, the trial court must instruct the jury that a defendant's extrajudicial statements cannot be the sole proof of the crime that occurred (corpus delicti rule). (***People v. Valencia*** (2008) 43 Cal.4th 268, 298.)

§ 11.26.2.16 Lost Records

There is no obligation on law enforcement to preserve "potentially useful evidence" in unrelated prior cases for possible use in defending at future capital trials. Unavailability of police reports and court records relating to a rape committed 15 years earlier did not prevent defendant from adequately defending against evidence of rape presented as evidence in aggravation. There was no violation of any duty to preserve potentially useful evidence, because the records were destroyed in the normal course of business. (***People v. Tafoya*** (2007) 42 Cal.4th 147, 187.)

§ 11.26.2.17 Remoteness

The remoteness of prior offenses is not a proper ground for exclusion under section 190.3, as remoteness affects the weight, not the admissibility, of the offense. (***People v. Landry*** (2016) 2 Cal.5th 52, 119; ***People v. Tafoya*** (2007) 42 Cal.4th 147, 186; ***People v. Anderson*** (2001) 25 Cal.4th 543, 585; ***People v. Medina*** (1995) 11 Cal.4th 694, 772.)

Although the statute of limitations bars prosecution for other crimes, the unadjudicated conduct still may be considered as aggravating evidence. (***People v. Williams*** (1997) 16 Cal.4th 153, 233; ***People v. Medina*** (1995) 11 Cal.4th 694, 772.)

Absent demonstrable prejudice, the admission of violent criminal activity as evidence in aggravation is not unconstitutional regardless of the remoteness in time of that activity. (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1182, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The mere passage of time between the prior violent activity and the present capital trial did not significantly diminish defendant's ability to challenge evidence of the prior violent activity and did not violate his right to due process or a reliable sentencing determination. (***People v. Koontz*** (2002) 27 Cal.4th 1041, 1088; ***People v. Kraft*** (2000) 23 Cal.4th 978, 1070.)

Despite a substantial passage of time, the penalty-phase trier of fact is capable of determining whether the defendant had the capacity to appreciate the wrongfulness of his juvenile criminal conduct (Pen. Code, § 26). (***People v. Lewis*** (2001) 26 Cal.4th 334, 378-380.)

§ 11.26.2.18 Undue Prejudice (Evid. Code § 352)

While a trial court has power under Evidence Code section 352 to control the manner in which evidence of past criminal conduct is offered, it does not have discretion to exclude all evidence related to the statutory sentencing factor (Pen. Code, § 190.3, factor (b)). (***People v. Cunningham*** (2001) 25 Cal.4th 926, 1017; ***People v. Anderson*** (2001) 25 Cal.4th 543, 586; ***People v. Kraft*** (2000) 23 Cal.4th 978, 1070; ***People v. Ochoa*** (1998) 19 Cal.4th 353, 451.)

Evidence expressly made admissible by factor (b) of section 190.3 is not excludable under Evidence Code section 352. (***People v. Sanders*** (1995) 11 Cal.4th 475, 542-543; ***People v. Freeman*** (1994) 8 Cal.4th 450, 512; ***People v. Zapien*** (1993) 4 Cal.4th 929, 987.)

§ 11.26.3 Prior Felony Convictions (Factor (c)) (Pen. Code § 190.3(c))

Cross-Reference:

§ 13.56, *re* Factor (c) – prior felony convictions

Under section 190.3, factor (c), only the fact of the conviction is admissible, not the underlying facts of the crime. Evidence of the facts of criminal activity, whether or not accompanied by a conviction, is admissible under section 190.3, factor (b), but only if the activity involves force or violence. (***People v. Riggs*** (2008) 44 Cal.4th 248, 316; ***People v. Livaditis*** (1992) 2 Cal.4th 759, 776.)

"A misdemeanor conviction may not be introduced in aggravation." (***People v. Streeter*** (2012) 54 Cal.4th 205, 267; ***People v. Osband*** (1996) 13 Cal.4th 622, 735; ***People v. Montiel*** (1993) 5 Cal.4th 877, 936, disapproved on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

A juvenile conviction can be used as an aggravating circumstance under factor (c). (***People v. Salazar*** (2016) 63 Cal.4th 214, 225, fn. 2.)

§ 11.26.3.1 Conviction Must Be "Prior to" Commission of Capital Crimes

Prior felony convictions that are admitted under Penal Code section 190.3, subdivision (c), must have occurred before commission of the capital crime. (***People v. Thomas*** (2012) 53 Cal.4th 771, 820; ***People v. Hinton*** (2006) 37 Cal.4th 839, 910; ***People v. Carter*** (2005) 36 Cal.4th 1215, 1271.)

Error in admitting evidence of convictions under Penal Code section 190.3, subdivision (c) found harmless as the prosecutor's argument and the instructions concerning factor (c) could not have prejudiced defendant because it was "inconceivable the jury could have found the[] convictions qualified as aggravating evidence under factor (c) but would not have made such a finding under factor (b)." (***People v. Hinton*** (2006) 37 Cal.4th 839, 910; ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1374 [same]; ***People v. Ashmus*** (1991) 54 Cal.3d 932, 983-984, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

§ 11.26.3.2 Nature of Prior Conviction

Evidence of a prior conviction based on a no-contest plea is admissible. (***People v. Lewis*** (1990) 50 Cal.3d 262, 279.)

An out-of-state conviction for a felony is admissible under Penal Code section 190.3, subdivision (c), even if the crime would only constitute a misdemeanor in California. (***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 139, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5].)

It was error to admit a 1967 felony conviction for possession of marijuana, since the crime was no longer a felony at the time of the capital trial. Admission was not prejudicial. (***People v. Price*** (1991) 1 Cal.4th 324, 471.)

Remoteness does not bar admission of defendant's prior felony convictions under section 190.3, factor (c). (***People v. Medina*** (1995) 11 Cal.4th 694, 772.)

Erroneous admission of a misdemeanor conviction under section 190.3, factor (c) was not prejudicial because jury could properly consider the underlying conduct under factor (b) and the prosecutor and defense counsel only referred, correctly, to a prior felony conviction as the section 190.3, factor (c) evidence. (***People v. Streeter*** (2012) 54 Cal.4th 205, 267.)

Cross-Reference: § 11.23.1, *re* Factor (b) evidence

§ 11.26.3.3 Evidence of the Prior Conviction

The trial court may not use Evidence Code section 352 to prohibit introduction of a prior conviction under Penal Code section 190.3, subdivision (c). However, it may limit the prosecution to documentary evidence to prove the prior felony. (***People v. Raley*** (1992) 2 Cal.4th 870, 910; ***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 140, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5].)

The rule of ***People v. Guerrero*** (1988) 44 Cal.3d 343, which limits proof of priors for enhancements under Penal Code sections 667 and 1192.7, is inapplicable in a capital case. There is no violation of equal protection, since the defendants are situated differently. (***People v. Johnson*** (1992) 3 Cal.4th 1183, 1242-1243.)

The jury may consider the date of commission for prior felony convictions, since the purpose of factor (c) evidence in aggravation is to demonstrate that a capital defendant was undeterred by prior successful felony prosecutions. (***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 140, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5].)

"The question of the constitutional validity of a prior conviction does not fall within the framework set forth in *Apprendi* and *Ring* for those issues of fact to which the Sixth Amendment requires a jury trial and proof beyond a reasonable doubt." Accordingly, neither *Apprendi* or *Ring* supersede or implicitly overrule prior holding that a defendant is not entitled to a jury trial on the constitutional validity of a prior conviction and that the burden of proof for the invalidity of a prior conviction is on the defendant by a preponderance of the evidence. (***People v. Curl*** (2009) 46 Cal.4th 339, 350.)

§ 11.26.3.4 Burden of Proof

As a matter of state law, juries should be instructed with the beyond a reasonable doubt standard of proof regarding evidence of the fact of a criminal conviction admitted under 190.3 factor (c). Any error in failing to instruct that the burden of proof for factor (c) evidence is beyond a reasonable doubt is harmless error unless it is reasonably possible the omission affected the verdict. (***People v. Williams*** (2010) 49 Cal.4th 405, 459.)

§ 11.26.3.5 Forfeiture

Defendant's failure to object to or request a limiting instruction regarding introduction of a subsequent conviction under Penal Code section 190.3, subdivision (c), constitutes a forfeiture. (***People v. Ashmus*** (1991) 54 Cal.3d 932, 983, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117; ***People v. Webster*** (1991) 54 Cal.3d 411, 453-454.)

Q. PRIOR TESTIMONY – EVIDENCE CODE § 1291 [§ 11.27]

Cross-Reference: § 8.130, *re* Prior testimony

The trial court properly admitted prior testimony from a 1975 rape preliminary hearing where the witness was unavailable. (***People v. Wharton*** (1991) 53 Cal.3d 522, 589-590.)

Where the parties submitted the question of availability of the witness to the court (due to illness or infirmity), defendant may not later complain about the trial court's ruling on availability. (***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1065.)

R. SCOPE OF CROSS-EXAMINATION OF DEFENSE WITNESSES [§ 11.28]

Cross-examination of a defense witness on the issue of modification of the death sentence is improper, but was not prejudicial in this case. (***People v. Ramirez*** (1990) 50 Cal.3d 1158, 1191-1194.)

§ 11.28.1 Bias

A witness's personal philosophical opposition to the death penalty is relevant to their credibility and a proper subject for cross-examination. (***People v. Bennett*** (2009) 45 Cal.4th 577, 606.)

§ 11.28.2 Character / Reputation

The scope of evidence a prosecutor presents to rebut a defendant's evidence of good character must be specific "and relate directly to a particular incident or character trait defendant offers in his own behalf." If a defendant's mitigating evidence "pertains solely to difficulties he has encountered in his life and not his good character, the prosecutor is precluded from introducing on rebuttal bad character evidence regarding the defendant." (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1230-1231, internal quotations & citations omitted.)

The fact the defendant's mother testified as to aspects of his character for mitigation purposes does not open the door to broad-ranging cross-examination by the prosecutor as to acts of misconduct. (***People v. Ramirez*** (1990) 50 Cal.3d 1158, 1193.)

Penalty-phase cross-examination of defense witnesses is not limited by the "Have you heard" method of Evidence Code section 1102. (***People v. Payton*** (1992) 3 Cal.4th 1050, 1067.)

Where defense witnesses testified to the effect that defendant was a good influence in jail, it was proper to allow the prosecutor to ask the witnesses about defendant's gambling and extracting money from other inmates for such things as telephone privileges. So long as the questions were asked in good faith, such an inquiry is proper impeachment; it is not necessary to come within section 190.3. (***People v. Payton*** (1992) 3 Cal.4th 1050, 1066-1067.)

§ 11.28.3 Expert Witness

Cross-examination of a mental-state expert with a study which was not relied upon by the expert was misconduct. However, an objection and admonition would have cured any harm. (***People v. Visciotti*** (1992) 2 Cal.4th 1, 80-81.)

It was proper for the prosecutor, in cross-examining a defense psychiatrist, to use a scholarly work with which the witness was familiar. (***People v. Clark*** (1993) 5 Cal.4th 950, 1012, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The prosecutor must ask questions in good faith or be prepared to prove the fact by other means. However, the defense must object at the time, or a claim of misconduct is waived. (***People v. Price*** (1991) 1 Cal.4th 324, 481.)

§ 11.28.4 Defendant

Even if the presence of tattoos was irrelevant to defendant's current professed Christian beliefs, defendant was not prejudiced, because his own penalty-phase testimony "painted himself as being from the proverbial 'wrong side of the tracks,' and the jury would not have been inflamed by learning that defendant had tattoos, even vulgar ones." (***People v. Friend*** (2009) 47 Cal.4th 1, 88.)

The prosecutor is entitled to cross-examine defendant on his religious beliefs (here, a hatred toward Christianity) where it appears that part of the motive for the crime was related to defendant's religious beliefs. (***People v. Nicolaus*** (1991) 54 Cal.3d 551, 581.)

§ 11.28.5 Prior Inconsistent Statements

Defense witnesses may be cross-examined with inconsistent prior statements and any matter within the scope of direct. (***People v. Price*** (1991) 1 Cal.4th 324, 474.)

§ 11.28.6 Forfeiture

Defendant may not complain about introduction of nonviolent criminal activity (drugs) where the defendant introduced the activity in an attempt to establish an excuse. (***People v. Visciotti*** (1992) 2 Cal.4th 1, 72.)

Defendant must object to the introduction of other-violent-crimes evidence (Pen. Code, § 190.3(b)) to preserve the issue for appeal. (***People v. Catlin*** (2001) 26 Cal.4th 81, 172; ***People v. McPeters*** (1992) 2 Cal.4th 1148, 1188, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106; ***People v. Visciotti*** (1992) 2 Cal.4th 1, 71; ***People v. Ashmus*** (1991) 54 Cal.3d 932, 985,

abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

S. STIPULATIONS [§ 11.29]

"At least where the defense proposal does not constitute an offer to admit completely an element of a charged crime, the general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." Accordingly, trial court did not err in admitting letters in penalty phase retrial to show a conspiracy to commit murder because the defense offer did not amount to a stipulation to an element of the offense. (***People v. Clark*** (2016) 63 Cal.4th 522, 631-632, internal quotation marks omitted.)

Defense counsel may stipulate in the penalty phase to the fact that defendant had committed other offenses, without a personal waiver by defendant. (***People v. Sanders*** (1995) 11 Cal.4th 475, 542; ***People v. Cooper*** (1991) 53 Cal.3d 771, 841-842.)

The prosecutor is not required to accept defendant's offer to stipulate that defense would not present evidence in mitigation if prosecutor would agree not to present victim-impact evidence. (***People v. Dykes*** (2009) 46 Cal.4th 731, 785; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1230 [defendant's stipulations were not an adequate substitute for the victim's testimony].)

Notwithstanding a defense offer to stipulate to the fact of past felony convictions, the prosecution is entitled to prove up the particular conduct underlying those convictions because it properly bears on defendant's character and is properly before the jury in its consideration of penalty. (***People v. Stanley*** (1995) 10 Cal.4th 764, 818-819; ***People v. Johnson*** (1993) 6 Cal.4th 1, 51, abrogated on other grounds, *People v. Rogers* (2006) 39 Cal.4th 826, 879; ***People v. Kelly*** (1992) 1 Cal.4th 495, 541; ***People v. Melton*** (1988) 44 Cal.3d 713, 75.)

T. VICTIM-IMPACT EVIDENCE [§ 11.30]

Cross-Reference:

§ 12.28, *re* Impact on victim's family

§ 11.20.1, *re* Photographs – Generally

The Eighth Amendment erects no per se bar prohibiting a capital jury from considering victim-impact evidence relating to a victim's personal characteristics and impact of the murder on the family, and does not preclude a prosecutor from arguing such

evidence. (***Payne v. Tennessee*** (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720], overruling *Booth* and *Gathers* [inadmissibility of victim-impact evidence].)

Victim-impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." The evidence, however, cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (***Payne v. Tennessee*** (1991) 501 U.S. 808, 825, 829 [111 S.Ct. 2597, 115 L.Ed.2d 720].)

"'Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case.'" (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 45, quoting ***People v. Pollock*** (2004) 32 Cal.4th 1153, 1180.)

The prosecution is not constrained to victim-impact evidence providing "no more than a quick glimpse into the victim's life. The People are entitled to present a complete life history of the murder victim from early childhood to death." (***People v. Williams*** (2015) 61 Cal.4th 1244, 1286, internal quotation marks & citations omitted.)

In California, Penal Code section 190.3, subdivision (a), permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (***People v. Edwards*** (1991) 54 Cal.3d 787, 833-836; see also ***People v. Brown*** (2004) 33 Cal.4th 382, 398; ***People v. Taylor*** (2001) 26 Cal.4th 1155, 1171; ***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1063.)

The prosecution has a "legitimate interest" in rebutting defense mitigating evidence "by introducing aggravating evidence of the harm caused by the crime, 'reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (***People v. Prince*** (2007) 40 Cal.4th 1179, 1286, quoting ***Payne v. Tennessee*** (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].)

Victim-impact evidence need not be conditioned on rebutting defendant's mitigating evidence. "Victim-impact evidence is relevant to the penalty determination because such evidence provides the jury with an idea who the victim was and of the impact of his or her death on family and close friends. The relevance of the evidence does not depend on the strength or weakness of the prosecution's case in aggravation." (***People v. Dykes*** (2009) 46 Cal.4th 731, 786.)

"Unless it invites a purely irrational response, evidence of the effect of a capital murder on the loved ones of and the community is relevant and admissible under section

190.3, factor (a) as a circumstance of the crime." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 46, internal quotation marks omitted; ***People v. Scott*** (2011) 52 Cal.4th 452, 494; ***People v. Brady*** (2010) 50 Cal.4th 547, 574; ***People v. Burney*** (2009) 47 Cal.4th 203, 258.)

There are limits on the permissible "emotional evidence and argument," and "'[t]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason.'" (***People v. Robinson*** (2005) 37 Cal.4th 592, 650-651.)

While a trial court must ensure that victim-impact evidence is presented "within reasonable bounds, it may not exclude *all* such evidence." (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1081, emphasis in original.)

"[J]urors may in considering the impact of the defendant's crimes, 'exercise sympathy for the defendant's murder victims and ... their bereaved family members.'" (***People v. Zamudio*** (2008) 43 Cal.4th 327, 369.)

The Eighth Amendment does not compel admission of a victim's views regarding the proper punishment, as such views have no bearing on the defendant's character or record or circumstances of the offense. (***People v. Lancaster*** (2007) 41 Cal.4th 50, 97.)

A defendant is denied due process when the death sentence is imposed, in part, on the basis of information the defendant had no opportunity to explain or deny because the information was contained in a presentence report, portions of which were not disclosed to, or requested by, counsel. (***Gardner v. Florida*** (1977) 430 U.S. 349, 362 [97 S.Ct. 1197, 51 L.Ed.2d 393] [plur. opn.].)

A trial court considering a motion to modify the verdict (Pen. Code, § 190.4) should consider only that victim-impact evidence that was before the jury, and therefore any statements from victim's relatives that was not presented to the jury should not be considered in ruling on the motion. (***People v. Abel*** (2012) 53 Cal.4th 891, 940.)

Defendant's claim that "family members who observe the guilt phase of trial may not testify as victim impact witnesses" rejected since it "would severely curtail family members' statutory right to attend trial and the scope of permissible victim impact evidence. Preserving a fair trial for the defendant does not require such an extreme limitation on the court's discretion and the universe of victim impact evidence." (***People v. Winbush*** (2017) 2 Cal.5th 402, 463-64.)

§ 11.30.1 Retroactive Application

Application of *Payne v. Tennessee* to permit victim-impact evidence in a trial for a capital murder which occurred before the *Payne* decision does not violate the constitutional proscription against ex post facto laws or due process. (***People v. Hamilton*** (2009) 45 Cal.4th 863, 926; ***People v. Brown*** (2004) 33 Cal.4th 382, 394-395.)

§ 11.30.2 Limitations on Admissibility

While victim-impact evidence is generally admissible under California law as a circumstance of the crime under factor (a), "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (***People v. Harris*** (2005) 37 Cal.4th 310, 351, internal citations & quotation marks omitted.)

"The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (***People v. Hamilton*** (2009) 45 Cal.4th 863, 927, citing ***Payne v. Tennessee*** (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].)

"[T]he callous and unprovoked nature of the murders understandably triggered an emotional reaction in the persons who testified and those observing in the courtroom, but this did not render the testimony unduly inflammatory or prejudicial." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 47, citing ***People v. Jurado*** (2006) 38 Cal.4th 72, 132 [jurors in tears at break does not support conclusion so overwhelmed by emotion could not make rational penalty determination].)

§ 11.30.3 Videotapes / Photos

Trial courts "must take care" in admitting videotaped victim-impact evidence because "the medium itself may assist in creating an undue emotional impact upon the jury ...." (***People v. Garcia*** (2011) 52 Cal.4th 706, 752-753, internal quotation marks omitted.)

"[B]ecause background music in victim impact presentations provides no relevant information and is potentially prejudicial, it is never permitted. Music in such presentations is permissible only when it is relevant to the jury's penalty decision." Accordingly, the trial court abused its discretion in allowing the prosecutor to present photos – that were already admitted into evidence that otherwise could have been properly shown to the jury during argument – "with music designed to amplify their emotional impact." (***People v. Sandoval*** (2015) 62 Cal.4th 394, 442.)

Courts must exercise great caution in permitting the prosecution to present victim impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1289.)

In exercising great caution in permitting the prosecution to permit victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim, the trial court

must monitor juror reactions to ensure the proceedings do not become injected with a legally impermissible level of emotion. (***People v. Zamudio*** (2008) 43 Cal.4th 327, 367.)

"[T]wo audio features caught the trial court's attention – the echo effect accompanying the phrase "until death do us part" in the [victim's] wedding ceremony, and the "hero/villain" song that played during the photo montage at the end of the videotape. Though more dramatic than factual, these features seem fairly unobtrusive in context, and do not fundamentally alter the subdued tone of the presentation. In any event, … any error was clearly harmless," as "there was no reasonable possibility these portions of the videotape affected the penalty determination." (***People v. Garcia*** (2011) 52 Cal.4th 706, 754, internal quotation marks omitted.)

"While the juxtaposition of confessions with images of the murdered victim may have been evocative, the videotape contained no irrelevant or inflammatory material that could have diverted the jury's attention from its proper role or invited an irrational, purely subjective response. Moreover, because defense counsel were the last to present arguments, they were free to comment on the prosecutor's presentation or offer rebuttal." (***People v. Winbush*** (2017) 2 Cal.5th 402, 466-67 [internal quotation marks and citations omitted].)

The trial court did not abuse its discretion in admitting a 14-minute victim-impact video where the trial court excluded the audio portion including music, and directed the person narrating the video to be "'very objective as to what the scene shows'" and to refrain from "'inappropriate' comments that might arouse emotions. (***People v. Zamudio*** (2008) 43 Cal.4th 327, 366-367.)

Videotape of a dormitory dedication honoring the victim properly admitted as victim-impact evidence. (***People v. Williams*** (2015) 61 Cal.4th 1244, 1286.)

Videotape properly admitted where video included the victim's boyfriend expressing his guilt flowing from fact that he quarreled with the victim, causing her to leave their car and attempt to walk home – events which led to her death. His expression of guilt fell within the scope of permissible victim impact evidence because it "showed the impact of the crime on one of the principal survivors." The admission of the videotape did not deprive defendant of his right to cross-examine the witnesses against him because the victim's boyfriend testified and defense counsel expressly declined to cross-examine him. (***People v. Mills*** (2010) 48 Cal.4th 158, 212.)

A photograph of a surviving, paralyzed victim was properly admitted as evidence of defendant's other violent crimes and as the circumstances of uncharged crimes, including the direct impact on the victims under factor (b) and was not technically "victim-impact" evidence. (***People v. Nelson*** (2011) 51 Cal.4th 198, 221.)

An autopsy photograph of an embryo was properly admitted as victim-impact evidence where victim was approximately one-month pregnant at time of her death. Moreover, the photo was not unduly prejudicial within the meaning of Evidence Code section 352, as it demonstrated the basis for the pathologist's opinion concerning the

victim's pregnancy and was evidence of the specific harm caused by the defendant. (***People v. Jackson*** (2014) 58 Cal.4th 724, 754-757.)

Trial court did not abuse its discretion in admitting tape recording of victim's screams during the ambulance ride to the hospital as victim-impact evidence to "show the immediate impact of the crime on the victim and on the children who witnessed their mother or aunt burning and in pain." (***People v. Streeter*** (2012) 54 Cal.4th 205, 264.)

§ 11.30.3.1 Adult Victims in Childhood

It was not error to admit a victim-impact video containing photos of adult victims as children and teenagers, because the video did not emphasize any particular period of their lives and instead reviewed all of their lives. (***People v. Zamudio*** (2008) 43 Cal.4th 327, 367.)

Admission of photos including childhood photographs of adult victims to illustrate victim-impact testimony not improper. (***People v. Cage*** (2015) 62 Cal.4th 256, 289; ***People v. Kopatz*** (2015) 61 Cal.4th 62, 91; ***People v. Suff*** (2014) 58 Cal.4th 1013, 1086; ***People v. Nelson*** (2011) 51 Cal.4th 198, 219.)

§ 11.30.3.2 Funeral / Gravesites

Six-minute edited videotape highlighting officer's memorial and funeral services proper victim-impact evidence. (***People v. Brady*** (2010) 50 Cal.4th 547, 579.)

Still photographs or photographs in a video of the victim's grave marker or grave site are properly admitted as circumstances of the crime. (***People v. Zamudio*** (2008) 43 Cal.4th 327, 367, citing ***People v. Kelly*** (2007) 42 Cal.4th 763, 797 [videotape ending with view of victim's grave marker]; ***People v. Harris*** (2005) 37 Cal.4th 310, 352 [photograph of victim's gravesite].)

Four photographs of the victim's children "simply show[ing] the boys, who are smiling broadly in one photograph, writing and leaving notes at a grave" were not unduly emotional or inflammatory. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1076.)

The condition of the victim's body is relevant to penalty, and the brief description of what the mother and the grandmother of the victim saw at the mortuary was far less graphic and disturbing than routine autopsy photographs that have previously been allowed as proof of the condition of the victim's body. The photograph of the victim's gravesite was further evidence relating to the victim's death and the effect upon her family, and was properly admitted. (***People v. Harris*** (2005) 37 Cal.4th 310, 351-352.)

§ 11.30.3.3 Home Movies / Family Celebrations / Holidays

A videotape depicting the victim about two years younger than at time of his death at age 20, singing and dancing, was relevant victim-impact evidence showing what the victim was like. The "videotape is of 'home movie' quality, without added music, narration or visual techniques, or staged or contrived elements; it is not a tribute or eulogy, and there is nothing particularly dramatic or emotional about the performances." The trial court did not abuse its discretion in admitting the videotape into evidence as it "contained 'nothing inflammatory that would divert the jury from [its] proper function,' and nothing in the record suggests the jury in fact reacted emotionally to the playing of the videotape." (***People v. Vines*** (2011) 51 Cal.4th 830, 887-888.).)

A four-minute, edited videotape, depicting the deceased police officer celebrating Christmas with his family two days before his murder depicted "a rather ordinary event – a family holiday celebration. It is a brief 'home movie' that depicted real events [and] was not enhanced by narration, background music, or visual techniques designed to generate emotion; and it did not convey outrage or call for vengeance or sympathy." The video humanized the officer and provided "some sense of the loss suffered by his family, and it supplemented but did not duplicate their testimony." (***People v. Brady*** (2010) 50 Cal.4th 547, 579.)

There is no bright-line rule regarding the admissibility of videotape recordings of a victim. An eight-minute videotape without audio depicting the preparations for, and enjoyment of, a family trip to Disneyland, with unemotional commentary during playing of the tape was properly admitted victim-impact evidence. The videotape does not "constitute a memorial or tribute, or eulogy; it does not contain staged or contrived elements, music, visual techniques designed to generate emotion, or background narration; it does not convey any sense of outrage or call for vengeance or sympathy; it lasts only eight minutes and is entirely devoid of drama; and it is factual and depicts real events ... and was not objectionable." (***People v. Dykes*** (2009) 46 Cal.4th 731, 785.)

§ 11.30.4 911 Tapes

The trial court properly admitted a 911 tape that showed the immediate impact and harm caused by defendant's criminal conduct on the surviving victim. Tape was not cumulative of other evidence because although surviving victim testified about commission of crimes in guilt phase and about the longer-term impact of the crimes during her guilt phase testimony, "only the tape conveyed the more immediate impact of the crimes on her. Although the 911 tape 'would naturally have tended to arouse emotion and evoke strong feelings of sympathy for [surviving victim's] condition, it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response.'" The jury was admonished "not to let any emotion response subvert their reasoned evaluation of the evidence," and nothing suggested that instruction was not

followed, and the fact the jury did not ask to hear the 911 tape during deliberations reflects that it did not place undue emphasis on the tape. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 102-103, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; see ***People v. Roybal*** (1998) 19 Cal.4th 481, 515-517 [husband's 911 tape after discovery of wife's body admissible as relevant to guilt-phase issues].)

Cross-Reference: § 11.20.1, *re* Photographs – Generally

§ 11.30.5 Admissible Victim-Impact Evidence

"The People are entitled to present a complete history of the murder victim's life and may also present testimony from loved ones who, sometimes vividly, describe the impact of their loss." (***People v. Winbush*** (2017) 2 Cal.5th 402, 465.)

The trial court did not abuse its discretion in admitting evidence that the victim's daughter died two years after her father's murder, and that the victim's son had a relatively mild form of autism. The evidence showed the effect of the murder on the victim's wife who testified to the difficulty of dealing with their daughter's death without her husband. The jury could also draw the reasonable inference that it was difficult for her to deal with her son's disability without the assistance of her husband. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1232.)

"Contrary to defendant's assertion, the circumstance that [the victim's] mother cried during her testimony does not render that testimony inflammatory. Her tears reflected a normal human response to the loss of a child, a response that the jury would reasonably expect a mother to experience. [¶] In addition, the photographs of family events and other aspects of the victims' lives, including the family's postdeath observance of [the victim's] 19th birthday, were 'relevant to humanize the victim[s] and provide some sense of the loss suffered by [their] famil[ies] and society.'" (***People v. Verdugo*** (2010) 50 Cal.4th 263, 298.)

The prosecution is entitled to present a "complete life history of the victim from early childhood to death." Testimony about the victim's "childhood incidents and activities that she shared with her family showed her uniqueness and explained why her family continued to be affected by her death." (***People v. Kopatz*** (2015) 61 Cal.4th 62, 91; see also ***People v. Garcia*** (2011) 52 Cal.4th 706, 751-752; ***People v. Virgil*** (2011) 51 Cal.4th 1210, 1274-1275.)

"Testimony regarding the cassette tape of Mexican songs that [the victim] gave her father was also properly admitted. The tape was moving because it demonstrated the close bond between [the victim] and her father, because it included songs about the loss

of a loved one, and because [the victim] presented it to her father shortly before her death. It thus demonstrated the relationship lost as a result of [the victim's] murder, and the impact her death had on her father. These were circumstances of the crime appropriately considered by the jury." (***People v. Verdugo*** (2010) 50 Cal.4th 263, 298-299.)

The State may choose to admit evidence of the specific harm caused by a defendant, to wit, the loss to society and the victim's family of a unique individual. Constitutional limits on victim-impact evidence were not surpassed where various witnesses painted a portrait of the victim as "compassionate, loyal, and extroverted, and made clear that they mourned her loss." (***People v. Huggins*** (2006) 38 Cal.4th 175, 238.)

In the penalty phase of a capital murder trial, the trial court "[o]n the one hand, … should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." Evidence that defendant terminated the life of a healthy 17-week-old fetus that the victim was carrying was part of the harm caused by defendant's crime and a legitimate, although emotional, consideration for the jury in making the penalty determination. (***People v. Jurado*** (2006) 38 Cal.4th 72, 131, internal citations & quotation marks omitted.)

It is not improper victim-impact testimony to reflect on the impact from the brutal manner in which a victim died as the testimony was limited to how the crimes directly affected them and was not "merely their personal opinions about the murders." (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1083-1084, distinguishing ***People v. Robinson*** (2005) 37 Cal.4th 592, 656-658 (Moreno, J. conc. op.) [urging exclusion of victim-impact evidence consisting of "victim's friends and family regarding their imagined reenactments of the crime"].)

Witnesses properly permitted to testify to the financial impact of the murders and the lasting effect of the murders on their emotional and employment lives. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 841.)

It was not an abuse of discretion for the trial court to permit the prosecutor to demonstrate that the murder victim suffered from cerebral palsy, since it goes to the circumstances of the murder under factor (a). (***People v. Clair*** (1992) 2 Cal.4th 629, 671.)

Evidence of charitable donations by the victim was not inadmissible victim-impact evidence. (***People v. Huggins*** (2006) 38 Cal.4th 175, 238.)

The victim-impact witness "testimony and videotaped evidence took no more than three hours to present, compared to the multiple days covered by the defense case in mitigation. The victim impact evidence was not irrelevant or excessive." (***People v. Garcia*** (2011) 52 Cal.4th 706, 752.)

Victim-impact testimony was not unduly inflammatory or emotional and relatively brief and the prosecutor's closing argument about the life history of the victim who escaped communism in Cambodia at the age of 10, came to America to improve her life, was scheduled to graduate from USC, only to be murdered "in the killing fields of Gardena" and being robbed of her dreams "stayed within appropriate boundaries and did not encourage an irrational or emotional response unrelated to the facts of the case." The argument regarding her background and aspirations was mentioned at the end and was relevant to convey the full impact of the crime on her family and the community. (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1274-1275.)

Evidence victim was approximately one-month pregnant remained relevant and admissible notwithstanding defendant's complaints "there was no showing that [victim's] pregnancy was planned or wanted, or that her pregnancy would not have ended in a miscarriage or abortion." "[D]efendant was free to argue these matters to the jury to lessen the impact of the aggravating evidence." (***People v. Jackson*** (2014) 58 Cal.4th 724, 754-756.)

The victim's "emotional testimony, including her description of cleaning up the bloody scene at [victims'] house and retaining of a piece of bone as a memorial … provided a fuller description of the aftermath of defendant's crimes. It was not necessarily inflammatory just because it was emotional. Nor was the testimony gratuitously graphic. Rather, it described part of the impact of the crimes on the witness." (***People v. Cage*** (2015) 62 Cal.4th 256, 290.)

In its proper context, the defendant's estranged wife's description of him as "the devil" was not improper victim impact opinion testimony regarding the crime, the defendant, or appropriate sentence. When the prosecutor followed up by asking if she was telling the jury she felt responsible for their deaths, the witness agreed and explained she felt guilt for having introduced defendant to her family and brought him into her family's home. (***People v. Cage*** (2015) 62 Cal.4th 256, 288.)

The defendant's complaint the victim impact evidence created a risk that the jury's penalty decision would be swayed by improper comparisons between his character and that of his victim and his assertion that the "risk is particularly acute in cross-racial crimes where jurors are likely to empathize with a White victim" was meritless. "Nothing in the victim impact evidence or argument, or elsewhere in the record, even remotely encouraged the jury to consider race in reaching a penalty verdict." (***People v. Winbush*** (2017) 2 Cal.5th 402, 465.)

§ 11.30.5.1 Impact on Friends

Victim-impact evidence is not limited to the testimony of family members. (***People v. Williams*** (2015) 61 Cal.4th 1244, 1285.)

Victim-impact testimony from a close friend or companion properly admitted. (***People v. Pearson*** (2013) 56 Cal.4th 393, 467; ***People v. Pollock*** (2004) 32 Cal.4th 1153, 1183.)

§ 11.30.5.2 Impact on Co-Workers

Victim-impact evidence is not limited to family members, but may include the effects on the victim's friends, coworkers, and the community – including when the victim's coworkers are law enforcement personnel. (***People v. Brady*** (2010) 50 Cal.4th 547, 578.)

Victim-impact testimony regarding reaction of coworkers of slain officer was not unduly prejudicial where the Sheriff "testified that all of the members of his 'very close' and cohesive department, along with their families, were struck with grief at the loss of Deputy Griffith, and that two counselors were brought in to provide them some comfort. The peace officers struggled with the 'abrupt' realization of their own vulnerability, which caused many to have doubts about their abilities. [One deputy], in particular, quit because he wanted "to be able to see his kids grow up." The remaining officers have increased their requests for backup when responding to domestic violence calls. The dispatchers, too, were upset, and the one who sent Deputy Griffith to respond to the call still 'has difficulty dealing with that reality.' [The] Sheriff [] also recalled his own feelings of anger, helplessness, and desire for retribution." (***People v. Ervine*** (2009) 47 Cal.4th 745, 792-793.)

§ 11.30.5.3 Multiple Witnesses

"The trial court may admit 'victim impact testimony from multiple witnesses who were not present at a murder scene and who described circumstances and victim characteristics unknown to the defendant.'" (***People v. Zamudio*** (2008) 43 Cal.4th 327, 364; see also ***People v. Carrington*** (2009) 47 Cal.4th 145, 196.)

Victim-impact evidence is not limited to what can be provided by a single witness. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 47-48; ***People v. McKinnon*** (2011) 52 Cal.4th 610, 690; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 841.)

Testimony of five members of the victim's family was not impermissible cumulative or repetitive. Victim impact evidence is commonly provided by several family members, colleagues, or friends. (***People v. Scott*** (2011) 52 Cal.4th 452, 495.)

Where "[a] total of six witnesses were presented from families and friends of the three murder victims" and the "testimony took place on a single day" and "spans 96 pages of reporter's transcripts" and 12 photographs of one victim or aspects of his life, nine of a second victim, and seven of a third victim were admitted in the penalty phase, "[t]he evidence can scarcely be characterized as 'excessive.'" (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 46.)

There is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members. (***People v. Cage*** (2015) 62 Cal.4th 256, 289-290 ["evidence given by close family members who were intimately familiar with the particular impact of the crimes on [victim's brother] who was intellectually disabled, supplied probative information regarding the gravity of defendant's offenses, which the jury was entitled to consider"]; ***People v. Panah*** (2005) 35 Cal.4th 395, 495.)

§ 11.30.5.4 Non-Eyewitnesses

There is no requirement that victim-impact witnesses must have witnessed the crime or be personally present at the scene or immediately after the killings. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 47-48; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 841; ***People v. Carrington*** (2009) 47 Cal.4th 145, 196 [need have witnessed crime].)

§ 11.30.5.5 Survivors' Difficulties / Mental State

Testimony by victims' grandchildren regarding "personal difficulties" following their murders was properly admitted victim-impact evidence of the emotional trauma suffered by family and close friends of the victims as a result of their death. (***People v. Zamudio*** (2008) 43 Cal.4th 327, 368.)

Evidence of the death of the victim's mother and illness of her father was properly admitted to explain why neither parent was called to testify in the penalty phase. (***People v. Carrington*** (2009) 47 Cal.4th 145, 197.)

Testimony about mental state following the murder of their family member, including having marital problems because of thinking of the torment and everything the victim went through, was "'not dissimilar from, or significantly more emotion-laden than other victim impact testimony that has been held admissible.'" (***People v. Jones*** (2012) 54 Cal.4th 1, 71, quoting ***People v. Jurado*** (2006) 38 Cal.4th 72, 133.)

§ 11.30.6 Foreseeability

Victim-impact testimony is not limited to circumstances known or reasonably foreseeable to the defendant, or properly introduced to prove the charges at the guilt phase of trial. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 47-48; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 841.)

There is no requirement limiting victim-impact evidence to matters within the defendant's knowledge at the time of his crimes. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 47-48; ***People v. Carrington*** (2009) 47 Cal.4th 145, 196-197; ***People v. Pollock*** (2004) 32 Cal.4th 1153, 1183.)

Evidence victim was pregnant properly admitted as victim-impact evidence without regard to whether defendant was aware of pregnancy. (***People v. Jackson*** (2014) 58 Cal.4th 724, 755; ***People v. Jurado*** (2006) 38 Cal.4th 72, 130-131.)

§ 11.30.7 Proximity

Victim-impact evidence is not limited to "the effect of the murder on a family member who was present at the scene during or immediately after the crime." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 47-48.)

Victim-impact evidence is not restricted to the "immediate injurious impact" of the murder. It is "logical to conclude that the psychological and physical effects of a violent murderous assault more than 20 years earlier would endure and were relevant as direct results of the defendant's crimes." (***People v. Hamilton*** (2009) 45 Cal.4th 863, 927.)

§ 11.30.8 Non-Murder Victims

Evidence of the impact of the defendant's conduct on victims other than the murder victim is relevant if related directly to the circumstances of the capital offense. (***People v. Brown*** (2004) 33 Cal.4th 382, 398; ***People v. Taylor*** (2001) 26 Cal.4th 1155, 1172.)

§ 11.30.9 Victims of Factor (b) Crimes

Evidence and prosecutorial argument regarding the impact of a defendant's factor (b) crimes on the victims of that criminal activity is "relevant to the jury's penalty determination, subject to the same limitations on its admissibility that govern victim impact evidence as it relates to the capital crime." (***People v. Johnson*** (2016) 62 Cal.4th 600, 648.)

Penalty phase evidence under factor (b) "may include the impact of the crime on the victim, including the injuries suffered. … such evidence may include the impact of the crime on the victim's friends and family." Trial court did not err in not allowing prosecutor to bring the semicomatose quadriplegic shooting victim requiring intensive care 24 hours a day and incapable of testifying into the courtroom during the penalty phase to enable the jury to see the harm caused by defendant, and instead having the victim's mother testify about her injuries. (***People v. Melendez*** (2016) 2 Cal.5th 1. 30, citing ***People v. Johnson*** (2016) 62 Cal.4th 600, 643-660.)

§ 11.30.10 Inadmissible Evidence

"[I]t is improper for family members to characterize, or offer their opinion about, the crime, the defendant, or the proper verdict." (***People v. Cage*** (2015) 62 Cal.4th 256, 288, citing ***Payne v. Tennessee*** (1991) 501 U.S. 808, 830, fn. 2 [111 S.Ct. 2597, 115 L.Ed.2d 720]; ***People v. Collins*** (2010) 49 Cal.4th 175, 229; ***People v. Pollock*** (2004) 32 Cal.4th 1153, 1180.)

"[I]t was inappropriate for the prosecutor to ask [the] Sheriff [] whether it was 'acceptable' to him 'to allow the system and a jury [to] decide the appropriateness of the level of responsibility for this crime,' inasmuch as the Eighth Amendment, even after *Payne*, still bars the admission of a victim's 'opinions about the crime, the defendant, and the appropriate sentence.' [Citation.] Defendant was not prejudiced by the sheriff's response, however, which expressed his belief that 'society's representatives would hold Mr. Ervine appropriately accountable for his conduct.'" (***People v. Ervine*** (2009) 47 Cal.4th 745, 794.)

"It is improper for a witness to speculate regarding the effect of a murder on a third person's health." (***People v. Suff*** (2014) 58 Cal.4th 1013, 1076; ***People v. Abel*** (2012) 53 Cal.4th 891, 939; ***People v. Brady*** (2010) 50 Cal.4th 547, 577-578; ***People v. Carrington*** (2009) 47 Cal.4th 145, 197.)

Testimony about an incident at the end of the funeral of the victim, where the lid to the casket mistakenly opened as the casket was being loaded into the hearse, and people screamed in horror and fainted, probably should have been excluded because a mistake by funeral home personnel in allowing the casket to be opened in sight of mourners and the resulting impact upon mourners was "too remote from any act by defendant to be relevant to his moral culpability." Any error, however, was harmless beyond a reasonable doubt, as testimony about the incident was very brief (no more than 16 lines of transcript) and was "not significant in light of the emphasis placed in the penalty phase on the effect of the crime itself on the victim's family, the brutality of the murders, and the paucity of significant mitigating circumstances." (***People v. Harris*** (2005) 37 Cal.4th 310, 352.)

§ 11.30.11 Forfeiture

Challenge to victim impact testimony as lengthy and containing irrelevant narratives forfeited on appeal where failed to make a timely objection below notwithstanding defense trial counsel expressing it was difficult to object and interrupt witness's "heart-wrenching" testimony. (***People v. Suff*** (2014) 58 Cal.4th 1013, 1075-1076.)

The failure to object at any time during the victim-impact testimony forfeits the claim on appeal that victim-impact testimony was excessive, improper, inflammatory, and highly prejudicial. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 45-46.)

Failure to object to the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence as violating the Eighth Amendment forfeits the claim on appeal. (***People v. Collins*** (2010) 49 Cal.4th 175, 229, internal citations & quotation marks omitted.)

The defense failed to object to testimony by victim-impact witnesses to the effect that they could not achieve emotional closure until the trial was over and therefore forfeited any argument that the testimony was improper because it suggested the defendant should receive the death penalty. Even if it had been preserved for appeal, and even assuming error in admitting the testimony, the defendant was not prejudiced because "any implication in this testimony that the survivors wished the jury to impose the death penalty was veiled and obscure, and because the testimony was brief and isolated, it could not have caused any prejudice." (***People v. Mills*** (2010) 48 Cal.4th 158, 212.)

II. DEFENSE EVIDENCE [§ 11.40]

The trial court determines the relevancy of mitigating evidence and retains discretion to exclude evidence where probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1145, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

A. GENERALLY [§ 11.41]

The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest case, not be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. However, the mitigating evidence must be relevant. (***Penry v. Lynaugh*** (1989) 492 U.S. 302, 317 [109 S.Ct. 2934, 106 L.Ed.2d 256], abrogated on other grounds, *Atkins v. Virginia* (2002) 536 U.S. 304, 304 [122 S.Ct. 2242, 2243, 153 L.Ed.2d 335]; ***Mills v. Maryland*** (1988) 486 U.S. 367, 375 [108 S.Ct. 1860, 100 L.Ed.2d 384]; ***Hitchcock v. Dugger*** (1987) 481 U.S. 393 [107 S.Ct. 1821, 95 L.Ed.2d 347]; ***Skipper v. South Carolina*** (1986) 476 U.S. 1 [106 S.Ct. 1669, 90 L.Ed.2d 1] [good behavior in prison]; ***Lockett v. Ohio*** (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973] [plur. opn.]; ***People v. Mickey*** (1991) 54 Cal.3d 612, 693; ***People v. Hunter*** (1989) 49 Cal.3d 957, 980.)

"[W]hile the range of constitutionally pertinent mitigation is quite broad [citation omitted], it is not unlimited. Both the United States Supreme Court and [California Supreme Court] have made clear that the trial court retains authority to exclude as irrelevant, evidence that has no logical bearing on the defendant's character, prior record, or the circumstances of the capital offense." (***People v. Carasi*** (2008) 44 Cal.4th 1263,

1313, citing ***Lockett v. Ohio*** (1978) 438 U.S. 586, 604, fn. 12 [98 S.Ct. 2954, 57 L.Ed.2d 973].)

The right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. Trial courts retain authority to exclude evidence that has no bearing on a defendant's character or record or the circumstances of the offense. (***People v. Thornton*** (2007) 41 Cal.4th 391, 454.)

"[T]he [trial] court [has] the authority to exclude, as irrelevant, evidence that does not bear on the defendant's character, record, or circumstances of the offense. [Citation.] '[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally.' [Citation.] Indeed, 'excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.' [Citation.]" (***People v. Harris*** (2005) 37 Cal.4th 310, 353.)

Evidence that is irrelevant or incompetent is inadmissible in a penalty phase. (***People v. Gay*** (2008) 42 Cal.4th 1195, 1220.)

Defendant's testimony is subject to objections by the prosecution. (***People v. Whitt*** (1990) 51 Cal.3d 620, 647, abrogated on other grounds, *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

Nothing in the Penal Code requires a trial court to admit evidence in a penalty phase retrial because it was introduced during the guilt phase. Section 190.4, subdivision (d), provides in pertinent part that "'evidence presented at any prior phase of the trial … shall be considered at any subsequent phase of the trial, *if the trier of fact of the prior phase is the same trier of fact at the subsequent phase*.' (Italics added.) The corollary of this rule is plain – where the trier of fact at a subsequent phase of a trial is not the same as the trier of fact at a previous phase, it is not the case that evidence presented at that prior phase 'shall be considered' at the subsequent phase. The same evidence certainly *may* be considered, but, to be considered, that evidence must be admissible." (***People v. Russell*** (2010) 50 Cal.4th 1228, 1259-1260.)

B. CHARACTER EVIDENCE [§ 11.42]

"'[E]vidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness." (***People v. Charles*** (2015) 61 Cal.4th 308, 335 quoting ***People v.*** Smith (2005) 35 Cal.4th 334, 367.)

Evidence that a defendant is loved by family members is admissible to show his good character. The defendant's constitutional right to present relevant mitigating evidence was not infringed, however, by the trial court reducing the number of photographs from nine to five offered to show that the mother of his child was

communicating regularly with him about his son (sent photographs by mother with notations by her on the photos). (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1272-1273.)

The trial court did not improperly limit evidence pertaining to the details of defendant's employment. Mitigation evidence showed that defendant received a top-security clearance, assisted in search-and-rescue missions, and gathered information about enemy locations. The Secretary of Defense characterized all of the projects defendant worked on as vital to national security, and much of defendant's work remained classified at the time of trial. The precise information gathered was tangential and had no bearing upon defendant's character or the record of the circumstances of the crime. Questions about whether a capital defendant has a constitutional right to obtain and present mitigating evidence even if protected by national security privilege and whether denial of that right precludes the state from seeking evidence was not preserved for appeal due to the failure to object on those grounds below. (***People v. Farley*** (2009) 46 Cal.4th 1053, 1129.)

C. CODEFENDANT'S SENTENCE [§ 11.43]

Cross-Reference:

§ 12.51.7, *re* Relative Culpability

§ 13.23, *re* Relative culpability – codefendant's plea bargain / sentence

"The sentence received by an accomplice is not constitutionally or statutorily relevant as a factor in mitigation. Such information does not bear on the circumstances of the capital crime or on the defendant's own character or record. The fact that a different jury under different evidence, found that a different defendant should not be put to death is no more relevant than a finding that such a defendant should be sentenced to death. Such evidence provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left to speculate on the matter." (***People v. Salazar*** (2016) 63 Cal.4th 214, 252, internal quotation marks & citations omitted, quoting ***People v. Bemore*** (2002) 22 Cal.4th 809, 857.)

"[E]vidence of an accomplice's sentence or of the leniency granted an accomplice is irrelevant at the penalty phase because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition." (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1234, internal quotations & citations omitted; ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 55 [same exact language].)

"'[T]he fact that a different jury under different evidence, found that a different defendant should not be put to death is no more relevant than a finding that such a defendant should be sentenced to death. Such evidence provides nothing more than

incomplete, extraneous, and confusing information to a jury, which is then left to speculate: "Why did that jury do that? What was different in that case? What did that jury know that we do not know?" (Fn. omitted.)' Any attempt to answer these questions is further stymied by the normative nature of a jury's penalty decision under California law." (***People v. Moore*** (2011) 51 Cal.4th 1104, 1141-1142, quoting ***People v. Dyer*** (1988) 45 Cal.3d 26, 70.)

Evidence of a plea bargain offered by the prosecution to a codefendant was properly excluded. (***People v. Cain*** (1995) 10 Cal.4th 1, 62-64.)

D. DEFENDANT'S FAMILY BACKGROUND [§ 11.44]

The background of a defendant's family is material if, and to the extent that, it relates to the background of the defendant himself. (***People v. McDowell*** (2012) 54 Cal.4th 395, 434; ***In re Crew*** (2011) 52 Cal.4th 126, 152; ***People v. Rowland*** (1992) 4 Cal.4th 238, 279.)

The trial court did not abuse its discretion in excluding evidence that the defendant's mother had been repeatedly raped by her bothers as a child because the evidence had "no bearing on his character, record, or the circumstances of the offense." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 51.)

The trial court did not abuse its discretion and the defendant's right to present relevant mitigating evidence was not denied by excluding testimony from defendant's aunt about defendant's father beating defendant's grandfather. The defense never argued that defendant was aware of the particular aspect of abuse or laid any foundation regarding that abuse affecting the defendant. In any event, excluding the aunt's testimony was harmless beyond a reasonable doubt as it would have merely corroborated testimony by other witnesses about defendant's father beating everyone in the family, and the value of any such corroboration was slight given the prosecution did not challenge the defendant's background evidence of physical violence by defendant's father toward family members and the atmosphere of violence in the defendant's household. (***People v. McDowell*** (2012) 54 Cal.4th 395, 434.)

E. DEFENDANT'S FAMILY / EXECUTION IMPACT [§ 11.45]

Notwithstanding admission of victim-impact evidence as evidence in aggravation, the impact of a defendant's execution on his or her family may not be considered as mitigating evidence. (***People v. Charles*** (2015) 61 Cal.4th 308, 334-335; ***People v. Bennett*** (2009) 45 Cal.4th 577, 601-603.)

Evidence of the distress of a defendant's family is not mitigating evidence, but a defendant may offer evidence that he or she is loved by family members, or others, and that these individuals want the defendant to live, and that evidence is relevant because it

constitutes indirect evidence of the defendant's character. (***People v. Demetrulias*** (2006) 39 Cal.4th 1, 32.)

"'Sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation but ... family members may offer testimony on the impact an execution on them if by so doing they illuminate some positive quality of the defendant's background or character.'" (***People v. Romero*** (2008) 44 Cal.4th 386, 425, quoting ***People v. Ochoa*** (1998) 19 Cal.4th 353, 456.)

The defense may elicit testimony from the defendant's family member or close friend stating the witness's opinion that the defendant deserves to live, because such opinion is evidence that indirectly reflects upon the defendant's character. (***People v. Williams*** (2008) 43 Cal.4th 584, 644.)

Specific questions which ask whether defendant's family members would prefer defendant not be executed or believe execution will stigmatize them are not strictly relevant to defendant's character, record, or individual personality. The impact of a death sentence on defendant's family does not have the same relevance to the sentencing decision as the impact of the crime on the victim's family. (***People v. Sanders*** (1995) 11 Cal.4th 475, 545-546.)

Sympathy for the defendant's loved ones and their reaction to a death verdict do not relate to either the circumstances of the capital crime or the character or background of the accused. (***People v. Bemore*** (2000) 22 Cal.4th 809, 856.)

The trial court erred in excluding testimony on relevancy grounds from a church elder that defendant expressed concern regarding his family and how they were handling his plight. Evidence of a defendant's concern about how his family is doing is relevant mitigation evidence because it is indirect evidence of his character. (***People v. Bennett*** (2009) 45 Cal.4th 577, 604.)

The trial court did not abuse its discretion in excluding as irrelevant testimony from defendant's mother that it was hard for her to listen to the testimony of the victim's daughter, and she would "undo" the murder herself if she could. The testimony was not admissible pursuant to Evidence Code section 780 which permits credibility evidence "that has any tendency in reason to prove or disprove the *truthfulness* of [the witness's] testimony" [emphasis added], because the defendant's mother desired to "undo" the murder is not relevant to her truthfulness. (***People v. Bennett*** (2009) 45 Cal.4th 577, 604.)

Cross-Reference: § 12.18, *re* Defendant's family

F. DEFENDANT'S PREFERENCE FOR DEATH SENTENCE [§ 11.46]

"A defendant, of course, has the absolute right to give [testimony inviting the death penalty], even against his counsel's wishes." (***People v. Mai*** (2013) 57 Cal.4th 986, 1023, citing ***People v. Nakahara*** (2003) 30 Cal.4th 705, 719; ***People v. Webb*** (1993) 6 Cal.4th 494, 534–535; ***People v. Guzman*** (1988) 45 Cal.3d 915, 961-963, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; and distinguishing ***People v. Lancaster*** (2007) 41 Cal.4th 50, 58, wherein "the defendant ostensibly offering testimony in mitigation, sought to invoke political and racial considerations beyond his own case.")

The exclusion of relevant testimony by sustaining an objection to the question "Do you want to live?" was harmless beyond a reasonable doubt, since it was impossible to determine how defendant was prejudiced in the absence of an answer or offer of proof, matters which were in the exclusive control of defendant. (***People v. Whitt*** (1990) 51 Cal.3d 620, 647-650, abrogated on other grounds, *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

Any error in permitting defendant to testify he wanted the death penalty was invited and waived for failing to object. (***People v. Memro*** (1995) 11 Cal.4th 786, 878, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

G. DEFENDANT'S REMORSE [§ 11.47]

Cross-Reference:

§ 11.17,	*re* Defendant's lack of remorse
§ 12.30,	*re* Lack of remorse
§ 12.51.8,	*re* Defendant's remorse

The presence of remorse is a proper subject for the jury's consideration in the penalty phase. (***People v. Davis*** (2009) 46 Cal.4th 539, 620; ***People v. Salcido*** (2008) 44 Cal.4th 93, 160.)

Exclusion of the proposed testimony of inmate witness for defense recounting statements of reform made by defendant was proper since the statements were hearsay and did not come within any exception. "[D]efendant's personal 'Death Row' assurances of reform are not inherently reliable. Admission of such statements in the form and for the purpose offered here would effectively permit defendant to address the jury without subjecting himself to cross-examination .... [T]he defendant is entitled to no unique

immunity from examination by the People." (***People v. Whitt*** (1990) 51 Cal.3d 620, 642-644, abrogated on other grounds, *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

H. DEFENDANT'S POETRY & OTHER WRITINGS [§ 11.48]

The defendant's poetry was relevant to establish mitigation in the penalty phase and should have been admitted. (***People v. Harris*** (1984) 36 Cal.3d 36, 68 [plurality opinion], overruled on other grounds in *People v. Melton* (1988) 44 Cal.3d 713, 765-766, fn. 26, and disapproved on other grounds in ***People v. Bell*** (1989) 49 Cal.3d 502, 527, fn. 14.)

Defendant's claim his journal should have been admitted as a "prose poem" was not asserted as a ground for admission at trial and was barred on appeal. (***People v. Edwards*** (1991) 54 Cal.3d 787, 838.)

The trial court properly excluded defendant's letters to the judge about shackling, even though proffered as a demonstration of defendant's capacity for self-expression. The letters were cumulative, since a large volume of defendant's writings was received in evidence. (***People v. Price*** (1991) 1 Cal.4th 324, 486.)

Assuming jail personnel improperly seized defendant's manuscript of his life history, which he prepared for the assistance of his counsel at the penalty phase, and either jail or court personnel lost the manuscript, defendant failed to show he was prejudiced. (***People v. Beeler*** (1995) 9 Cal.4th 953, 992-993, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705.)

I. DETERRENCE, COSTS [§ 11.49]

Evidence concerning whether the death penalty is a deterrent to murder, and evidence of the relative costs of the death penalty versus life without possibility of parole, was properly excluded. (***People v. Thompson*** (1988) 45 Cal.3d 86, 139-140.)

J. DUTY OF DEFENSE COUNSEL TO PRESENT EVIDENCE [§ 11.50]

§ 11.50.1 Ineffective Assistance of Counsel

The trial court and defense counsel were not obligated "to ensure defendant received a penalty defense whether he wanted one or not" (***People v. Mai*** (2013) 57 Cal.4th 986, 1023.)

"[C]ounsel must properly investigate the case in mitigation and advise his client regarding its relative merits and significance. After having been advised by counsel, if a competent defendant decides for nontactical reasons to present no mitigating evidence, he cannot later label counsel ineffective for honoring defendant's own wishes." (***People v.***

Brown (2014) 59 Cal.4th 86, 112, citing ***Schriro v. Landrigan*** (2007) 550 U.S. 465, 475 [127 S.Ct. 1933, 167 L.Ed.2d 836 [if defendant instructs counsel not to offer any mitigating evidence at penalty phase counsel's failure to further investigate could not have been prejudicial under *Strickland*].)

Where the record is silent as to the reason no evidence was presented in mitigation, the court will not assume ineffective assistance of counsel. Legitimate tactical reasons may exist for the failure to present mitigating evidence. (***People v. Diaz*** (1992) 3 Cal.4th 495, 566.)

Defense counsel may properly consider detrimental consequences in deciding whether to present mitigating evidence. (***In re Jackson*** (1992) 3 Cal.4th 578, 614-615, overruled on other grounds, *In re Sassousian* (1995) 9 Cal.4th 535, 545, fn. 6.)

Cross-Reference:
§ 10.22, *re* Ineffective assistance of counsel

§ 11.50.2 Unreliable Penalty Determination

The failure to present any mitigating evidence on behalf of the defendant at the penalty phase of a capital murder trial does not, in and of itself, render a judgment of death constitutionally unreliable. (***People v. Mai*** (2013) 57 Cal.4th 986, 1056; ***People v. Snow*** (2003) 30 Cal.4th 43, 112; ***People v. Miller*** (1990) 50 Cal.3d 954, 1003; ***People v. Williams*** (1988) 44 Cal.3d 1127, 1152.)

The California Supreme Court has "repeatedly rejected the contention that the constitutional reliability of a death judgment is undermined by recognizing the defendant's personal right to testify in favor of the death penalty." (***People v. Mai*** (2013) 57 Cal.4th 986, 1056.)

"[A] verdict is constitutionally reliable when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. Under those conditions, despite a defendant's avowed intent not to present available evidence in mitigation, the state's interest in ensuring a reliable and fair penalty determination has been met." (***People v. Mai*** (2013) 57 Cal.4th 986, 1056, internal quotations & citations omitted; ***People v. Howard*** (1992) 1 Cal.4th 1132, 1186.)

Counsel does not have a duty to present mitigating evidence at the penalty phase over defendant's objection. (***People v. Snow*** (2003) 30 Cal.4th 43, 112.)

Counsel is also not required to present mitigating evidence when, in his judgment, tactical considerations argue against it. (***People v. Williams*** (1988) 44 Cal.3d 1127, 1153, fn. 13.)

The court will not "predicate reversal of a judgment on mere speculation that some undisclosed testimony may have altered the result." (***People v. Williams*** (1988) 44 Cal.3d 1127, 1149-1154.)

§ 11.50.3 Waiver

Defendant can make a knowing and voluntary decision to prevent the presentation of mitigating evidence, which thereafter stops him from claiming error on that basis. (***People v. Howard*** (1992) 1 Cal.4th 1132, 1185-1186; ***People v. Sanders*** (1990) 51 Cal.3d 471, 527.)

There is no statutory or decisional law requiring an on-the-record waiver of the right to present mitigating evidence at the penalty phase. (***People v. Jackson*** (1980) 28 Cal.3d 264, 314, overruled on other grounds, *People v. Cromer* (2001) 24 Cal.4th 889, 901.)

K. EXPERT OPINION TESTIMONY [§ 11.51]

Where trial court held a *Kelly*/*Frye* hearing only to determine whether the inheritability of Antisocial Personality Disorder is an established scientific theory or process, the trial court erred in subsequently striking the expert's entire diagnosis of antisocial personality disorder, "a well-recognized form of mental illness included in the then-current edition of the Diagnostic and Statistical Manual of Mental Disorders, the leading treatise on psychological conditions. [ ] … such testimony is routinely presented in capital cases." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1191, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"When … a mental health expert offers a diagnosis, this opens the door to rebuttal testimony questioning that diagnosis or suggesting an alternative diagnosis. [The California Supreme Court has] never held that cross-examination must be confined to questions about the precise diagnosis an expert offers. Nor do our cases require that prosecutors present alternate diagnoses through rebuttal testimony, instead of cross-examination. Either way, the evidence is permissible as impeachment of the expert's opinion. Finally, it would be anomalous to hold that deficiencies in an expert's qualifications somehow shield her opinions from vigorous testing on cross-examination. Indeed, those deficiencies were themselves an appropriate topic of cross-examination. (Evid. Code, § 721, subd. (a).) (***People v. Winbush*** (2017) 2 Cal.5th 402, 479.)

The trial court did not err in excluding defense expert testimony regarding factors that may have caused defendant to give false confession of sexual interest in, and conduct

toward, his victim where there was a lack of foundation that the defendant's confession was false. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1197-1198.)

The trial court properly restricted testimony from defense expert in penalty phase so that "defendant's self-serving hearsay statements were not admitted in the guise of an explanation of the basis for the [expert's] opinion." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1197-1200.)

The trial court properly sustained the prosecution's hearsay objection to the defense expert "relating case-specific facts about which the expert has no independent knowledge." The defense expert was permitted to "testify about more generalized information to help jurors understand the significance of those case-specific facts" and was permitted "to give an opinion about what those facts may mean." The expert testified to his opinion "that he diagnosed defendant as alcohol dependent, and that he believed this dependence derived from a history of parental alcoholism." Accordingly, there was no reasonable possibility of a different outcome even if the trial court had not sustained the prosecutor's objection. (***People v. Williams*** (2016) 1 Cal.5th 1166, 1200 [internal quotation marks and citations omitted].)

The trial court did not abuse its discretion in excluding expert opinion testimony to the effect that defendant's childhood could have affected his behavior as an adult, as opposed to how defendant's specific childhood experiences influenced the crimes he committed as an adult. "The expert testimony was neither technical nor complex, … and there was no need for a sociological lecture on the nature of the defendant's abusive childhood, as the jury had evidence on that subject from several other witnesses, and the jurors could rely on their common sense to consider whether defendant's abusive childhood could have affected his adult behavior, including his criminal behavior." (***People v. McDowell*** (2012) 54 Cal.4th 395, 427, internal quotation marks & citations omitted.)

L. HEARSAY [§ 11.52]

As long as defendant can demonstrate that it is highly relevant and that substantial reasons exist to assume its reliability, defendant's hearsay evidence in mitigation is admissible at the penalty phase. (***Green v. Georgia*** (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 60 L.Ed.2d 738]; ***People v. Phillips*** (2000) 22 Cal.4th 226, 238.)

"The federal Constitution, however, does not generally create a code of evidence that supersedes a state's evidentiary rules in capital sentencing proceedings. Rather, hearsay evidence during a penalty phase may not be excluded if (1) the excluded testimony is highly relevant to a critical issue in the punishment phase of the trial, and (2) there are substantial reasons to assume the reliability of the evidence." (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1110, internal citations & quotations omitted.)

The due process considerations underlying the decision to permit introduction of highly reliable relevant evidence in ***Green v. Georgia*** (1979) 442 U.S. 95 [99 S.Ct. 2150,

60 L.Ed.2d 738], was not present as to defendant's self-serving hearsay statements to police as circumstances of the crime and his character and background. The fact those statements were introduced in the guilt phase did not require the self-serving hearsay statements that were uncorroborated by physical evidence to be admitted in the penalty phase retrial. (***People v. Russell*** (2010) 50 Cal.4th 1228, 1259.)

The trial court properly excluded unsworn videotaped defense interviews of two unavailable mitigation witnesses. "Much of what [one person] claimed to remember was from when defendant was a small boy, and included recollections based on both her own experience as well as anecdotal and third party hearsay recounts of defendant's childhood. [The other person] failed to identify the time frame in which she knew defendant, and she admitted that her recollections were based on decades-old information or on stories recounted by her husband. Given these factors and the lack of cross-examination available to the prosecution at trial, the trial court acted well within its discretion in finding the evidence unreliable and inadmissible." (***People v. Williams*** (2016) 1 Cal.5th 1166, 1198-1199.)

Defendant's journal, written after the murder, was hearsay and was not sufficiently reliable to compel its admission into evidence. (***People v. Edwards*** (1991) 54 Cal.3d 787, 837-838.)

Defendant's tape-recorded statement to the police was properly excluded as hearsay which was self-serving and unreliable. (***People v. Edwards*** (1991) 54 Cal.3d 787, 838; ***People v. Kaurish*** (1990) 52 Cal.3d 648, 704-705.)

"[W]hen expert opinion is offered, much must be left to the trial court's discretion. An expert may generally base his opinion on any matter known to him, including hearsay not otherwise admissible, which may reasonably be relied upon for that purpose. On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if, under the guise of reasons, the expert's detailed explanation brings before the jury incompetent hearsay evidence. Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. The discretion to exclude hearsay applies to defense, as well as prosecution, expert evidence. The discretion to exclude incompetent hearsay applies to evidence proffered on the issue of lingering doubt." Accordingly, trial court properly restricted testimony from defense expert in penalty phase so that "defendant's self-serving hearsay statements were not admitted in the guise of an explanation of the basis for the [expert's] opinion." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1200, internal quotation marks & citations omitted.)

The report of a defense psychiatrist was properly excluded as hearsay where the psychiatrist, though unavailable, had not testified previously and thus was never subject to cross-examination, the reliability of the report had not been established, and the report was cumulative to findings of other experts who did testify. (***People v. Wright*** (1990) 52 Cal.3d 367, 430, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

"Orphanage records," though highly relevant, were properly excluded on authentication and hearsay grounds, since there was insufficient evidence of their reliability. In addition, the records offered "substantially the same theme" as other evidence presented. (***People v. Gordon*** (1990) 50 Cal.3d 1223, 1264-1265, overruled on other grounds, *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

Exclusion of the proposed testimony of inmate witness for defense recounting statements of reform made by defendant was proper since the statements were hearsay and did not come within any exception. "[D]efendant's personal 'Death Row' assurances of reform are not inherently reliable. Admission of such statements in the form and for the purpose offered here would effectively permit defendant to address the jury without subjecting himself to cross-examination .... [T]he defendant is entitled to no unique immunity from examination by the People." (***People v. Whitt*** (1990) 51 Cal.3d 620, 642-644, abrogated on other grounds, *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

The trial court properly denied defendant's request to admit hearsay documents, including defendant's journals and letters, relied upon by a defense expert in making his evaluation. (***People v. Nicolaus*** (1991) 54 Cal.3d 551, 582-583.)

A claimed exception to the hearsay rule may not be raised for the first time on appeal. An offer of proof must be made at trial and proper foundation laid. (***People v. Livaditis*** (1992) 2 Cal.4th 759, 778.)

M. INADMISSIBLE EVIDENCE [§ 11.53]

Evidence of a plea bargain offer by the prosecution did not bear on defendant's character, prior record, or the circumstances of the offense and, thus, did not constitute mitigating evidence. (***People v. Cook*** (2007) 40 Cal.4th 1334, 1362; ***People v. Zapien*** (1993) 4 Cal.4th 929, 989.)

Evidence that allegedly innocent persons in other cases have been convicted of capital offenses was properly excluded. The request to offer the evidence was made by defendant personally, not joined in by counsel. The attorney representing a criminal defendant has the authority for presentation of the defense. The evidence was not admissible anyway, since it was not directed to defendant's character or record. (***People v. Alcala*** (1992) 4 Cal.4th 742, 807.)

N. INSTITUTIONAL FAILURE [§ 11.54]

"[T]he trial court abused its discretion in prohibiting defendant from presenting evidence that the correctional facilities in which he was housed failed to diagnose and treat his neurological problems." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1183, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Trial court's erroneous exclusion of evidence of institutional failure harmless where there was no offer of proof that any witness would "testify that had [defendant]

received the recommended testing and treatment, he might have turned out to be less violent of an adult" and the only evidence on the subject was to the contrary. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1183, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

O. LACK OF FUTURE DANGEROUSNESS [§ 11.55]

The trial court erred by not permitting the defendant to present evidence that he had adjusted well to jail conditions, thus suggesting he would not be dangerous in the future if he was given life without possibility of parole. (***Skipper v. South Carolina*** (1986) 476 U.S. 1, 8 [106 S.Ct. 1669, 90 L.Ed.2d 1]; ***People v. Lucero*** (1988) 44 Cal.3d 1006, 1026-1029.)

Evidence of good behavior in jail to show lack of future dangerousness was properly admitted. (***Franklin v. Lynaugh*** (1988) 487 U.S. 164, 177 [108 S.Ct. 2320, 101 L.Ed.2d 155].)

Exclusion of evidence that defendant could be expected to adjust well and nonviolently to prison life, as well as evidence related to post-traumatic stress syndrome from defendant's Vietnam experiences, required reversal of the penalty and remand for a new penalty trial. (***People v. Lucero*** (1988) 44 Cal.3d 1006, 1031-1032.)

Erroneous exclusion of expert opinion on lack of future dangerousness was found harmless beyond a reasonable doubt. (***People v. Fudge*** (1994) 7 Cal.4th 1075, 1117-1119.)

"The evidence defendant sought to admit assumed that the specific security measures of daily prison life would remain unchanged throughout his supposed life sentence. It also presupposed that defendant would be housed at a particular facility that had the safety measures depicted in the photographic exhibits. As the trial court recognized, it was not reasonable to assume that these precise conditions would remain static throughout a life sentence, and the court properly limited [the expert witness's] testimony to general descriptions of prison life. [Citations.] The trial court's ruling was narrow and did not otherwise interfere with [the expert witness's] opinions concerning defendant's future dangerousness or his ability to conform to a structured environment." (***People v. Martinez*** (2010) 47 Cal.4th 911, 963, overruled on other grounds, ***Johnson v. California*** (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

A prosecutor is entitled to explore on cross-examination the basis for an expert's prediction that a capital defendant will pose no future danger if sentenced to life without parole. Beyond forfeiting a claim that the prosecutor was impermissibly seeking to elicit evidence of future dangerousness, the questions posed by the prosecutor did not elicit testimony from defendant's expert that defendant would pose a danger in the future. (***People v. Redd*** (2010) 48 Cal.4th 691, 747.)

P. LINGERING DOUBT [§ 11.56]

"A capital defendant has no constitutional right to have the jury consider lingering doubt in choosing the appropriate penalty but evidence of the circumstances of the offense, including evidence that may create a lingering doubt as to the defendant's guilt, is statutorily admissible in the penalty phase of trial as a factor in mitigation under section 190.3." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1198, internal quotations & citations omitted; ***People v. Hamilton*** (2009) 45 Cal.4th 863, 912.)

Evidence of the circumstances of the offense, including creating a lingering doubt as to the defendant's guilt of the offense, is admissible in the penalty phase pursuant to Penal Code section 190.3. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1195, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; ***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1110; ***People v. Thomas*** (2012) 53 Cal.4th 771, 826, 137; ***People v. Gay*** (2008) 42 Cal.4th 1195, 1221 [acknowledging in footnote 5, but leaving unresolved, the apparent "tension" with earlier statement in ***In re Gay*** (1998) 19 Cal.4th 771, 814, that "evidence intended to create a reasonable doubt as to the defendant's guilt is not relevant to the circumstances of the offense or the defendant's character and record."].)

The right to offer evidence to create a lingering doubt as to the defendant's guilt "does not mean a defendant has a right to introduce evidence not otherwise admissible at the penalty phase for the purpose of creating a doubt as to his or her guilt. The test for admissibility is not whether the evidence tends to prove the defendant did not commit the crime, but, whether it relates to the circumstances of the crime or the aggravating or mitigating circumstances. The evidence must not be unreliable, incompetent, irrelevant, lack probative value, or solely attack the legality of the prior adjudication." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1198, internal quotation marks & citations omitted.)

Evidence that is inadmissible to raise reasonable doubt at the guilt phase is inadmissible to raise lingering doubt at the penalty phase. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1198; ***People v. Russell*** (2010) 50 Cal.4th 1228, 1247; ***People v. Stitely*** (2005) 35 Cal.4th 514, 566.)

In assessing prejudice from the erroneous exclusion of evidence in the penalty phase, the California Supreme Court has noted "'that residual doubt is perhaps the most effective strategy to employ at sentencing.' But here, the evidence of defendant's innocence was so weak as to be nearly nonexistent." Accordingly, no prejudice from erroneous exclusion of lingering doubt evidence as to whether defendant was correctly identified by eyewitnesses. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1196, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3, quoting ***People v. Gay*** (2008) 42 Cal.4th 1195, 1227).

Q. NATURE OF PUNISHMENT [§ 11.57]

§ 11.57.1 Execution

The California Supreme Court has consistently held that accounts of executions of others does not aid a jury in making an individualized assessment as to whether the death penalty is appropriate for the particular defendant on trial. (***People v. O'Malley*** (2016) 62 Cal.4th 944, 1007, and cases cited therein.)

"[E]vidence regarding the facilities on death row and the manner of carrying out the death penalty [are] irrelevant to our capital sentencing scheme." (***People v. Lucas*** (1995) 12 Cal.4th 415, 499.)

The trial court properly excluded a former San Quentin chaplain's proposed testimony explaining the psychological impact of an impending execution on prisoners, and that execution in the gas chamber was not instantaneous, but took considerable time, and was mentally and physically painful, since the proposed testimony did not relate to aggravating or mitigating circumstances. (***People v. Daniels*** (1991) 52 Cal.3d 815, 878, reversed on other grounds, *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181.)

§ 11.57.2 Nature of Life Imprisonment Without Possibility of Parole

Cross-Reference:

§ 11.24,	*re* Nature of life imprisonment without possibility of parole
§ 11.75,	*re* LWOP conditions
§ 13.12.5,	*re* Definition of LWOP

"As a general rule, evidence of prison conditions is not admissible at a penalty trial. [The California Supreme Court has] repeatedly held that evidence concerning conditions of confinement for a person serving a sentence of life without possibility of parole is not relevant to the penalty determination because it has no bearing on the defendant's character, culpability, or the circumstances of the offense under either the federal Constitution or section 190.3, factor (k). When, however, the prosecution raises an inference of future dangerous conduct in prison as part of its case in aggravation, the defendant is entitled to respond with evidence that his chances to inflict harm in prison will be limited." (***People v. Clark*** (2016) 63 Cal.4th 522, 637, internal quotation marks & citations omitted, quoting ***People v. Smith*** (2015) 61 Cal.4th 18, 57-58.)

"[E]vidence concerning conditions of confinement for a person serving a sentence of life without possibility of parole is not relevant to the penalty determination because it has no bearing on the defendant's character, culpability, or the circumstances of the offense under the federal Constitution or section 190.3, factor (k). More importantly, describing future conditions of confinement for a person serving a sentence of life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do. The evidence defendant sought to admit assumed that the specific security measures of daily prison life would remain unchanged throughout his supposed life sentence." (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1086, internal quotation marks & citations omitted; ***People v. Martinez*** (2010) 47 Cal.4th 911, 963; ***People v. Thompson*** (1988) 45 Cal.3d 86, 138-139.)

Trial court did not err in excluding testimony of statistics how unlikely it was that a prisoner sentenced to life without possibility of parole would be presented to a Governor for consideration for parole through commutation. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1086-1087.)

Evidence of prison conditions for those sentenced to life without possibility of parole is not constitutionally required or statutorily relevant as a factor in mitigation because it does not relate to the defendant's character, culpability, or the circumstances of the offense. (***People v. Ervine*** (2009) 47 Cal.4th 745, 795; ***People v. Ledesma*** (2006) 39 Cal.4th 641, 735.)

Evidence of the rigors or conditions of confinement that a defendant will experience if sentenced to LWOP is irrelevant to the jury's penalty determination, because it does not relate to the defendant's character, culpability, or the circumstances of the offense. (***People v. Coddington*** (2000) 23 Cal.4th 529, 636, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; ***People v. Quartermain*** (1997) 16 Cal.4th 600, 632.)

"'Describing future conditions of confinement for a person serving a sentence of life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do.'" (***People v. Rundle*** (2008) 43 Cal.4th 76, 187, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

While defendant is correct that the prosecutor raised the issue in closing argument of his dangerousness to people outside the prison in his closing argument in his initial trial and penalty retrial based on defendant ordering the killing of a witness from prison and defendant was entitled to rebut this argument with evidence, his challenge on appeal to excluding evidence about various levels of security in prisons was not preserved for appeal because defense counsel made no offer of proof as to the relevance of the information on the ability of the defendant to harm persons outside the prison, and because "defense counsel affirmatively sought to exclude this subject during cross-examination." (***People v. Clark*** (2016) 63 Cal.4th 522, 638.)

R. OFFER TO STIPULATE [§ 11.58]

The trial court did not abuse its discretion in refusing to instruct the jury that defendant had offered to stipulate to the facts of a rape he committed in order to avoid having the victim testify. (***People v. Jackson*** (1996) 13 Cal.4th 1164, 1230.)

S. POLYGRAPH [§ 11.59]

Evidence Code section 351.1 (exclusion of polygraph evidence) is applicable to the penalty phase. (***People v. Richardson*** (2008) 43 Cal.4th 959, 1033; ***People v. Koontz*** (2002) 27 Cal.4th 1041, 1090.)

Exclusion of polygraph evidence in a capital case does not violate a defendant's constitutional right to present a defense. (***People v. Richardson*** (2008) 43 Cal.4th 959, 1032-1033.)

T. PROSECUTOR AS A WITNESS [§ 11.60]

Trial court did not abuse its discretion in refusing defense request to call the trial prosecutor as a witness in the penalty phase contending he was a necessary percipient witness to police interrogation of the defendant and had retained a psychologist in order to extract a confession from the defendant. The "proposed testimony was either irrelevant or cumulative of other admitted evidence … that was available for the jury's consideration in the penalty phase." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1199.)

U. UNDUE PREJUDICE (Evid. Code § 352) [§ 11.61]

A defense mitigation witness's "personal philosophical opposition to the death penalty" is relevant to his credibility. "The value of giving the jury a full and accurate view of [the witness's] credibility was not substantially outweighed by the probability of a substantial danger of undue prejudice." (***People v. Bennett*** (2009) 45 Cal.4th 577, 606-607, citing Evid. Code, §§ 352, 780(f) [witness for defense was an attorney and member of defendant's church who advised him regarding the legal and religious aspects of going to trial and recommended that the defendant cooperate with his attorneys].)

V. VICTIM'S FAMILIES OPINION REGARDING PENALTY [§ 11.62]

"Believing that members of the victim's family did not wish defendants to receive the death penalty, defendant sought to present their testimony to that effect." Trial court did not err in excluding evidence of those views as they are not relevant regardless of whether offered as evidence in mitigation or in aggravation. (***People v. Rountree*** (2013) 56 Cal.4th 823, 858.)

W. (NEGATIVE) VICTIM-IMPACT [§ 11.63]

"[W]hen the prosecution's evidence simply describes the effect the victim's death has had on his family and friends, a defendant is generally precluded from introducing bad character evidence regarding the victim." There is no "misleading portrayal" of a victim to rebut when the "[t]estimony from the victims' family members was relevant to show how the killings affected *them*, not whether they were *justified* in their feelings due to the victim's good nature and sterling character. Accordingly, the defendant was not entitled to disparage the character of the victims." (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1231, internal quotation marks & citations omitted; emphasis in original.)

The defense sought to present rebuttal evidence to victim-impact evidence that was intended to show that the victim's mother's anguish and grief was attributable to her failure to intercede in the dangerous circumstances in which her daughter was living (the victim had been warned that living with the other victim could get her killed, had actual knowledge of the other victim's drug dealing, and had once used a false driver's license). The evidence was properly excluded because victim-impact evidence was to show "'how the killings affected *them*, not whether they were *justified* in their feelings due to the victims' good nature and sterling character. Accordingly, defendant was not entitled to disparage the character of the victims' in rebuttal." (***People v. Harris*** (2005) 37 Cal.4th 310, 353, emphasis in original, quoting ***People v. Boyette*** (2002) 29 Cal.4th 381, 443-444.)

The trial court did not err in excluding "negative victim impact" evidence defendant offered to counter false impression he claimed had been created. No abuse of discretion and no violation of defendant's constitutional rights to exclude certain additional evidence as collateral, of marginal probative value, and unduly inflammatory under Evidence Code section 352, given both positive and negative evidence admitted at the penalty phase to characterize the murder victim. Since the victim was deceased, her credibility was not at issue, and the proffered evidence "bore no relevance to the testimony of her family members regarding their devastating loss of their loved one." Even assuming error, there is no reasonable possibility the penalty verdict would have been different had defendant presented the excluded evidence. (***People v. Rogers*** (2013) 57 Cal.4th 296, 346-348.)

X. VICTIM'S SEXUAL HISTORY [§ 11.64]

Defendant is not entitled to rebut a prior-prison-rape charge with evidence about his victim's sexual history. (***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1248-1250.)

Y. VICTIM'S STATEMENTS [§ 11.65]

A crime victim's view of the proper punishment for the defendant has no bearing on the defendant's character or record or any circumstance of the offense, and therefore

the admission of those views in the penalty phase is not compelled by the Eighth Amendment. (***People v. Williams*** (2008) 43 Cal.4th 584, 643.)

The trial court properly excluded testimony from the victim's psychotherapist regarding statements the victim made about her feelings toward defendant, as it had no tendency in reason to prove the occurrence of a chain of events triggering a lethal response on defendant's part, a chain of events which was necessary in order to raise the inferences from the evidence that defendant was claiming. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1313.)

III. REBUTTAL EVIDENCE [§ 11.70]

A. GENERALLY [§ 11.71]

Rebuttal evidence is not subject to the notice requirement of section 190.3 and need not relate to any specific aggravating factor under section 190.3. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 92, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; ***In re Ross*** (1995) 10 Cal.4th 184, 206-207.)

On rebuttal, a prosecutor may refer to prior conduct not admitted as evidence in aggravation under section 190.3, if it relates to evidence offered by the defendant in mitigation. A prosecutor may show that the evidence in mitigation offered by the defendant "fails to carry extenuating weight when evaluated in a broader factual context." (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 92, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

The scope of rebuttal evidence is in the discretion of the trial court and will not be disturbed on appeal absent "palpable error." (***People v. Raley*** (1992) 2 Cal.4th 870, 912; ***People v. Mickey*** (1991) 54 Cal.3d 612, 688; ***People v. Kelly*** (1990) 51 Cal.3d 931, 965.)

Once the defense has presented evidence in mitigation under Penal Code section 190.3, subdivision (k), the prosecution may present evidence in rebuttal that is not limited to the factors enumerated in section 190.3, subdivisions (a)-(j). Such evidence would be admissible as evidence tending to disprove any disputed fact that is of consequence to the determination of the action. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 92, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; ***People v. Anderson*** (1990) 52 Cal.3d 453, 475-476; ***People v. Rodriguez*** (1986) 42 Cal.3d 730, 791.)

In ***People v. Carter*** (1957) 48 Cal.2d 737, the California Supreme Court disapproved of the prosecutorial tactic of intentionally withholding crucial evidence properly belonging in the case-in-chief to take unfair advantage of a defendant. However, *Carter* is inapplicable to evidence that does not by itself establish guilt and is not directly probative of the charged crime, but is instead evidence bearing on the credibility of a prosecution witness. (***People v. Friend*** (2009) 47 Cal.4th 1, 44.)

Rebuttal testimony in the penalty phase is admissible to correct misleading impressions created in the defense case. Such evidence need not relate to "deeds or the character" of the defendant. (***People v. Mason*** (1991) 52 Cal.3d 909, 961.)

B. CHARACTER EVIDENCE [§ 11.72]

"Bad character evidence may be introduced as rebuttal evidence if defendant opens the door by offering good character evidence as a mitigating factor." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1197, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

There is nothing constitutionally impermissible about allowing a jury to consider aggravating character evidence if it relates to an aggravating sentencing factor or has some other purpose such as impeachment. (***People v. Smith*** (2005) 35 Cal.4th 334, 356.)

The California Supreme Court has "repeatedly held that impeachment is permissible in the penalty phase when a defense witness offers testimony bearing on the defendant's character." (***People v. Winbush*** (2017) 2 Cal.5th 402, 476.)

"Evidence rebutting character evidence is admissible if it relates to a *particular* character trait defendant has offered in his behalf. The evidence is permissible to undermine the defendant's claim that his good character warrants the jury's exercise of mercy and to present a more balanced picture of that character. The broader the range of the defendant's character evidence, the broader may be the range of the rebuttal evidence, as long as the rebuttal evidence relates to some character trait the defendant has placed into evidence." (***People v. Cordova*** (2015) 62 Cal.4th 104, 141, emphasis in original.)

Where the defense presented specific character evidence that he "treated women well and was not violent toward them" the trial court properly admitted evidence that presented a different picture, specifically including evidence that the defendant said if he had had a gun he would have used it to kill a female prosecutor. (***People v. Cordova*** (2015) 62 Cal.4th 104, 143.)

" Defense counsel elicited testimony from [a deputy] suggesting defendant was no more violent than other inmates. The People were entitled to rebut that suggestion with evidence that, notwithstanding [the deputy's] view, defendant was known to be an especially violent inmate. A defendant has no right to mislead the jury through one-sided character testimony during either the guilt or penalty trial. We do not believe that defendant was entitled to elicit testimony suggesting that he was nonviolent, and at the same time to preclude the People from introducing contrary evidence." (***People v. Winbush*** (2017) 2 Cal.5th 402, 476.)

"Defense counsel asked the witness to describe defendant's character, and the evidence of her good character thereby opened the door to legitimate cross-examination about her bad character. Defendant argues the prosecutor's questioning went beyond the scope of the direct testimony because the witness had not testified as to defendant's

honesty, but addressed only her dependability and reliability." The trial court did not abuse its discretion in permitting the prosecutor to ask the witness if he was aware defendant embezzled money from multiple employers and other acts of dishonesty including seeking leniency from a court by falsely claiming she had a kidney removed and required dialysis. (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1125-1126.)

Testimony of prison guard regarding defendant's attempts to manipulate prison officers was inadmissible bad character evidence as it bore no relation to the defendant's assault against the guard and was instead eliciting testimony about the defendant's general reputation and behavior as an inmate. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1198-1199, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Where defendant introduced evidence he had conquered his drug addiction and converted to Christianity at the time of the offense, it was proper to admit evidence tending to show that after the murder defendant was shoplifting and using drugs. (***People v. Zapien*** (1993) 4 Cal.4th 929, 991.)

Where defendant wore a cross at trial, and testimony gave the impression he was a religious person, it was proper to introduce rebuttal evidence that defendant was not wearing a cross after the crime or at the time of his arrest. (***People v. Clark*** (1993) 5 Cal.4th 950, 1032, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Guilt-phase evidence that defendant suborned the perjury of a guilt-phase witness was properly considered at the penalty phase to rebut mitigating evidence that defendant became a "born again" Christian after committing the murders. (***People v. Espinoza*** (1992) 3 Cal.4th 806, 825-826.)

C. CHILDHOOD / JUVENILE EXPERIENCES [§ 11.73]

The admission of mitigating evidence that a defendant was abused as a child generally does not open the door to admitting evidence of nonviolent childhood criminal acts. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1199, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Prior misconduct by defendant was not admissible to rebut evidence of adverse circumstances experienced by defendant in childhood. (***In re Jackson*** (1992) 3 Cal.4th 578, 613-614, overruled on other grounds, *In re Sassousian* (1995) 9 Cal.4th 535, 545, fn. 6.)

When defendant presents character evidence showing his good qualities in his pre-teen years as mitigation, his acts of misconduct as a teenager and an adult are properly admitted in rebuttal to present a more balanced picture of defendant's character. (***In re Ross*** (1995) 10 Cal.4th 184, 208-209.)

Prior misconduct as a juvenile is admissible to rebut mitigation evidence. (***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1071-1074; see ***People v. Clark*** (1993) 5 Cal.4th 950, 1026-1027, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Evidence of sustained juvenile petitions is admissible as relevant rebuttal to defendant's mitigating character evidence. (***In re Ross*** (1995) 10 Cal.4th 184, 209.)

D. DEFENDANT'S REBUTTAL EVIDENCE [§ 11.74]

Defendant is entitled to present evidence of police misconduct to rebut a prior conviction for battery on a peace officer. The trial court properly limited discovery to a five-year period prior to the conviction for battery. (***People v. Breaux*** (1991) 1 Cal.4th 281, 210-312.)

E. LWOP CONDITIONS [§ 11.75]

Cross-Reference:

§ 11.24,	*re* Nature of life imprisonment without possibility of parole
§ 11.57.2,	*re* Nature of life imprisonment without possibility of parole
§ 13.12.5,	*re* Definition of LWOP

Following admission of defense evidence regarding San Quentin Prison and infliction of the death penalty, the People were properly permitted to present testimony concerning living accommodations and privileges for LWOP prisoners. (***People v. Benson*** (1990) 52 Cal.3d 754, 789-792.)

F. MENTAL CONDITION [§ 11.76]

Where defendant puts his mental condition in issue, it was appropriate for the prosecution to present rebuttal testimony from the jailor that defendant said he was "going to act crazy" in court. (***People v. McPeters*** (1992) 2 Cal.4th 1148, 1190, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

Expert testimony to the effect that psychiatric opinion is generally not reliable was properly admitted. (The issue was waived by the failure to press for a ruling on the objection.) (***People v. Clark*** (1993) 5 Cal.4th 950, 1019, overruled on other grounds,

People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Danielson*** (1992) 3 Cal.4th 691, 728-730, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

G. FORFEITURE [§ 11.77]

Defendant may not complain about introduction of rebuttal evidence without having lodged a specific and timely objection to the evidence in the trial court. (***People v. Mickey*** (1991) 54 Cal.3d 612, 689.)

IV. REOPEN PENALTY PHASE FOR ADDITIONAL EVIDENCE [§ 11.80]

The decision to grant or deny a motion to reopen the penalty phase for additional evidence remains a matter for the trial court's discretion. (***People v. Monterroso*** (2004) 34 Cal.4th 743, 779.)

Chapter Twelve
PENALTY PHASE – ARGUMENT

I. PROSECUTION'S ARGUMENTS [§ 12.10]

A. GENERALLY [§ 12.11]

Cross-Reference: § 5.61, Misconduct / Error

The same standard is applied on appeal to evaluate a claim of prosecutorial misconduct in the penalty phase as in the guilt phase. However, when misconduct has been established, the determination of prejudice is based on deciding whether there is "a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. In conducting this inquiry, [the court does] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1153, internal citations & quotation marks omitted, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

The prosecutor may properly discuss the circumstances of defendant's crime when arguing in favor of the death penalty and may express an opinion on the state of the evidence and relate the People's theory of the case in a comprehensible, story-like manner. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1155, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

"Emotion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument. [Citation.] But emotion need not, indeed, cannot, be entirely excluded from the jury's moral assessment. [Citation.]" (***People v. Gonzales*** (2011) 51 Cal.4th 894, 946, internal quotation marks omitted; ***People v. Jackson*** (2009) 45 Cal.4th 662, 691; ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1418.)

"The general rule against referring to matters outside the record does not apply to matters of common knowledge or illustrations drawn from experience, history, or literature." (***People v. Lucas*** (2014) 60 Cal.4th 153, 313 [remark fair comment on evidence where "anchored to a matter of common knowledge concerning a well-publicized serial killer"], disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

B. BIBLICAL REFERENCES [§ 12.12]

"It is well settled that biblical law has no proper role in the sentencing process. And [the California Supreme Court has] said repeatedly that a prosecutor may not cite the

Bible or religion as a basis to impose the death penalty. Yet, we have also suggested that some biblical reference may be permissible to argue for the benefit of religious jurors who might otherwise fear that the application of the death penalty according to secular law does not contravene biblical doctrine, or that the Bible shows society's historical acceptance of capital punishment." (***People v. Lucas*** (2014) 60 Cal.4th 153, 311-312, internal quotation marks, citations, fn. omitted, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

The California Supreme Court "consistently has found that a prosecutor's reliance on religious authority as justification for imposing capital punishment is improper. [Citations.] The problem with such argument is that it tends to undermine the jurors' sense of responsibility for imposing a death sentence in a particular case, and 'impl[ies] that another, higher law should be applied … displacing the law in the court's instructions.' [Citation.] It is permissible, however, for a prosecutor to invoke religious imagery when arguing that jurors should not reach a penalty verdict in reliance on divine teachings, because such argument reinforces the notion that the penalty decision must be an individual determination under the instructions given by the court. [Citations.] Prosecutors also may point to the Bible as demonstrating 'historical acceptance of capital punishment.' [Citations.]" (***People v. Williams*** (2010) 49 Cal.4th 405, 465-466.)

"[I]t is misconduct for a prosecutor to argue that biblical authority supports imposing the death penalty, because it suggests to the jurors that they may follow an authority other than the legal instructions given by the court. On the other hand, [the California Supreme Court has] suggested it is not impermissible to argue, for the benefit of religious jurors who might fear otherwise, that application of the death penalty according to secular law does not contravene biblical doctrine, or that the Bible shows society's historical acceptance of capital punishment. Because the line between permissible argument and misconduct in this area is difficult to draw, [the California Supreme Court has] often focused on whether, assuming misconduct for purposes of argument only, the defendant was prejudiced." (***People v. Tully*** (2012) 54 Cal.4th 952, 1051, internal quotation marks & citations omitted.)

Where defendant himself invoked religious principles in argument, it is evidence that defendant was not unfairly disadvantaged if the prosecutor's comments went beyond permissible argument relating to the Bible (applying the death penalty according to secular law does not contravene the Bible, and the Bible shows historical acceptance of capital punishment), and there was no prejudice where the prosecutor's biblical comments were "'part of a longer argument that properly focused upon the factors in aggravation and mitigation.'" (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1170, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The California Supreme Court has repeatedly suggested or assumed that the argument that the Bible demands imposition of the death penalty (e.g., citing Genesis, chapter 9, verse 6, for man's duty to impose the death penalty to preserve the sanctity of human life) exceeds the permissible theme that imposing the death penalty in accordance

with secular law does not offend the Bible and the Bible shows historical acceptance of the death penalty. (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1170, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The prosecutor's reference that "only God may grant mercy" was an "obviously improper reference to a higher authority," but it was cured by the court's admonition and the standard penalty instruction listing mercy as a factor to be considered by the jury. (***People v. Lucas*** (2014) 60 Cal.4th 153, 312, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

"[T]he prosecutor's biblical references strayed beyond the bounds of permissible argument based upon religion. Her argument was framed to dispel any concern that religious precepts forbade the penalty of death, but she plainly invoked a religious justification for the death penalty by stating "[t]he Bible unambiguously commands that murderers be put to death." This comment was followed quickly by quotations from scripture that, taken together, suggested that the Bible, far from forbidding capital punishment, actually endorsed capital punishment for murder. These statements could have suggested 'that another, higher law should be applied' during the jury's penalty deliberation [citation], threatening to displace the court's instructions in the minds of jurors. As such, they amount to prosecutorial misconduct." (***People v. Williams*** (2010) 49 Cal.4th 405, 467.)

The prosecutor's biblical argument was only a small part of his presentation; the bulk of the argument focused on why the jury should find the aggravating factors outweighed the mitigating factors; and the prosecutor's argument predated decisions in late 1992 and 1993 which contained the California Supreme Court's "statements clearly condemning prosecutorial reliance on biblical authority in penalty-phase closing arguments." Under these circumstances California Supreme Court was "loath to state definitively that the prosecutor's fleeting references to 'judgment day' amounted to misconduct at all. If it was, it certainly was harmless" under either federal constitutional or state law. (***People v. Huggins*** (2006) 38 Cal.4th 175, 208.)

"[T]he prosecutor's brief allusion to the crucifixion, even assuming misconduct, was not prejudicial." (***People v. Tully*** (2012) 54 Cal.4th 952, 1054.)

C. COMMENTS ABOUT VICTIM [§ 12.13]

The Eighth Amendment erects no per se bar prohibiting a capital jury from considering victim-impact evidence relating to the victim's personal characteristics and impact of the murder on the family, and does not preclude a prosecutor from arguing such evidence. (***Payne v. Tennessee*** (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720].)

"[I]t is proper at the penalty phase for a prosecutor to invite the jurors to put themselves in the place of the victims and imagine their suffering." (***People v. Maciel*** (2013) 57 Cal.4th 482, 542-543, internal quotation marks & citations omitted; ***People v.***

Tully (2012) 54 Cal.4th 952, 1045 [same]; ***People v. Garcia*** (2011) 52 Cal.4th 706, 761 [same]; ***People v. Dykes*** (2009) 46 Cal.4th 731, 794 [same].)

The California Supreme Court has repeatedly ruled "it is not misconduct for a prosecutor to ask the jury to show a defendant the same lack of sympathy the defendant showed the victims." (***People v. Brady*** (2010) 50 Cal.4th 547, 586; ***People v. Benavides*** (2005) 35 Cal.4th 69, 109 [not inappropriate for the prosecution to urge the jury to show the defendant the same degree of mercy he showed his victim].)

"A prosecutor may identify those traits of the victim that made the victim vulnerable to crime when such characteristics are relevant to the charged crimes, and has no duty '"to shield the jury from all favorable inferences about the victim's life or to describe relevant events in artificially drab or clinical terms."'" (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1156, internal quotation marks & citations omitted, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

"The prosecutor argued that the victim was shot by defendant while he 'was either on his knees pleading for mercy or running away in fear from this defendant.'" The evidence showed the victim was kidnapped and held against his will for four hours before being taken to a dark, distant, and secluded location. From these circumstances, it was not unreasonable for the prosecutor to infer that the "victim would know he was about to be killed and would have pleaded for mercy." (***People v. Collins*** (2010) 49 Cal.4th 175, 230-231.)

The prosecutor's argument that victim likely sought mercy before being raped and beaten was a reasonable inference from the evidence before the jury and therefore proper. (***People v. Bennett*** (2009) 45 Cal.4th 577, 617.)

§ 12.13.1 Victim "Letters"

The California Supreme Court does not necessarily condone the particular tactic used by the prosecutor of presenting "letters" orally as a rhetorical device to highlight what the victim's children "could write" about the capital crime. No constitutional error or misconduct occurred because the prosecutor made it clear that the words and thoughts did not actually come from the children and "[t]he 'letters,' which were not particularly artful, contained no information that could not otherwise have been properly conveyed to the jury." (***People v. Garcia*** (2011) 52 Cal.4th 706, 761-762.)

"[T]he court should have curtailed the prosecutor's extended and melodramatic oration couched as a letter to the victim, by sustaining defense counsel's objections and admonishing the jury. Portions of the argument were permissible as expressions of outrage, appeals to empathy, and descriptions of both [the victim] Genny's vulnerability and defendant's conduct. However, the passages urging jurors to personally feel shame for society's failure to protect Genny and other abused children, the assertion that 'we collectively choose to adopt you and to care for you,' and similar invitations to take the role of a protective family for this victim were plainly improper. The prosecutor asked

the jurors, in emotional terms, to go far beyond their role as the arbiters of punishment prescribed by law. He invited them to consider the failure of society at large to protect abused children, and then to join him in assuming the role of a nuclear family for Genny. These purely emotional appeals invited a subjective response from the jurors and tended to divert them from their proper role of rational deliberation on the statutory factors governing the penalty determination." (***People v. Gonzales*** (2011) 51 Cal.4th 894, 952.)

§ 12.13.2 Use of Photographs of Victim

It was not improper for prosecutor to refer to photographs of victims with their families and ask jury to compare those with autopsy photographs during closing penalty phase argument. "[T]he prosecutor's use of [the photos] in argument, assisted the jury in evaluating the consequences of defendant's crimes and they were not the type of "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response." (***People v. Thomas*** (2012) 53 Cal.4th 771, 825, internal quotation marks omitted.)

§ 12.13.3 Harmless Error

The prosecutor's improper remarks urging jurors to personally feel shame for society's failure to protect the victim (Genny) and other abused children and invitations to take on the role of a protective nuclear family for the victim in the case were not prejudicial since "[t]hey were rhetorical flourishes following the prosecutor's initial comments on the defense penalty phase witnesses. The prosecutor then proceeded with a more traditional series of arguments focused on the circumstances of the offense and defendant's character. He methodically went through the statutory aggravating and mitigating factors, and did not return to the objectionable themes of the "letter to Genny." [¶] Second, the circumstances of this murder were almost unimaginably horrible. [¶] Third, the defense at the penalty phase was hobbled by the fact that the adult family members asking the jury to spare defendant's life were themselves complicit in Genny's endangerment…. When a murder is the result of extreme forms of child abuse, mitigating evidence of the kind presented here loses much of its persuasive impact. [¶] For all these reasons, we hold that there is no 'reasonable (i.e., realistic) possibility' that the jury was diverted from returning a life sentence by the improper arguments in the prosecutor's 'letter to Genny.'" (***People v. Gonzales*** (2011) 51 Cal.4th 894, 953-954.)

D. CONDITIONS OF CONFINEMENT [§ 12.14]

The prosecutor argued: "'I suggest to you it's not enough in this case. The defendant will have a life, if you let him have life without parole. He will have a community of people that he deals with. He will have his friends. He will have money to buy things. He will have television. He will have books. He will have visits from his

family.'" While there was some testimony from the defendant's family about having contact with him in person and by phone and sending him money which he used to purchase things, defendant was correct that no evidence was offered of the conditions he would be living in if sentenced to life without possibility of parole. Even assuming the trial court should have sustained the defense objection that the prosecutor's argument was not supported by any evidence, there was no reasonable possibility of a more favorable penalty verdict. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1209.)

Any misconduct based on the prosecutor's argument about the activities that the defendant could participate in while in prison was harmless because the trial court admonished the prosecutor to limit argument to the evidence and not to represent prison conditions that the defendant might encounter and instructed the jury to decide the case based solely on the evidence received during the trial, and the jury is presumed to follow that instruction. (***People v. Maciel*** (2013) 57 Cal.4th 481, 541.)

E. DEFENDANT'S AGE [§ 12.15]

The California Supreme Court has "long held that 'age' as a statutory sentencing factor includes 'any 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. Williams*** (2013) 56 Cal.4th 165, 200, quoting ***People v. Lucky*** (1988) 45 Cal.3d 259, 302.)

"[T]he defendant's age is neither aggravating nor mitigating, but is used in the statute as a metonym for any age-related matter suggested by the evidence or by common experience." (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1185, internal quotation marks omitted, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

While the prosecutor may not argue a defendant's age by itself is a factor in aggravation, the prosecutor may argue a defendant is less deserving of leniency because of his age than a younger man would be. (***People v. Livaditis*** (1992) 2 Cal.4th 759, 785; ***People v. Edwards*** (1991) 54 Cal.3d 787, 839; ***People v. Rodriguez*** (1986) 42 Cal.3d 730, 789.)

The prosecutor properly argued that defendant's age (22) was aggravating factor in this case. United States Supreme Court decisions citing "youth" as a California mitigating factor do not preclude use of age as aggravating factor. (***People v. Hawthorne*** (1992) 4 Cal.4th 43, 77-79, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

F. DEFENDANT'S COURTROOM DEMEANOR [§ 12.16]

"A defendant's courtroom demeanor and behavior are proper subjects for comment during penalty phase argument to the jury." (***People v. Elliott*** (2012) 53 Cal.4th 535, 588.)

Prosecutor's comment during penalty phase argument that the "defendant's emotionless courtroom demeanor showed he had a 'heart of ice'" was proper because the defendant place his character at issue as a mitigating factor and asked for the jury's compassion and sympathy. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 843.)

The defendant's facial expressions during testimony of previous rape victims properly considered by the jury during the penalty phase where defendant put his own character in issue as a mitigating factor. (***People v. Heishman*** (1988) 45 Cal.3d 147, 197, abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

G. DEFENDANT'S SILENCE [§ 12.17]

Cross-Reference:

§ 5.61.4, *re* Comment on defendant's silence (*Griffin* error)

"Defendant contends the prosecutor committed *Griffin* error when he said during [penalty] closing argument: 'He can't even face you, this defendant, who commits these two brutal, senseless murders.' (See *Griffin v. California* (1965) 380 U.S. 609, 613, 615 [14 L.Ed.2d 106, 85 S.Ct. 1229] ….) … [¶] Assuming that the prosecution's statement constituted *Griffin* error, there was no possible prejudice under any standard. When argument resumed after the recess, the prosecutor told the jury: 'When I talked about the defendant's testimony in the guilt phase, … I was not commenting at all on his not testifying in the penalty phase.' Moreover, the court instructed the jury at the close of the penalty phase: 'The defendant elected not to testify in the penalty phase of this trial. It is the constitutional right of the defendant to elect to testify in the guilt phase only, or in the penalty phase only, or in both, or in neither. You're instructed not to consider or discuss the fact that the defendant elected not to testify in the penalty phase. That is a matter that must not in any way affect your verdict as to the penalty.' [The reviewing court] presume[s] it heeded these instructions." (***People v. Verdugo*** (2010) 50 Cal.4th 263, 301-302.)

H. DEFENDANT'S FAMILY [§ 12.18]

Cross-Reference:

§ 11.44, *re* Defendant's family background

§ 11.45, *re* Defendant's family / execution impact

The prosecutor's argument that the jury could consider defendant's background but not his family's was correct. The background of defendant's family is of no consequence in and of itself. (***People v. Rowland*** (1992) 4 Cal.4th 238, 279; see also ***People v. McDowell*** (2012) 54 Cal.4th 395, 434 [background of a defendant's family is material if, and to the extent that, it relates to the background of the defendant himself]; ***In re Crew*** (2011) 52 Cal.4th 126, 152 [same].)

"[A]rgument about the absence of a defendant's family members from trial does not constitute misconduct, but permissible comment on the defendant's failure to call logical witnesses." (***People v. Winbush*** (2017) 2 Cal.5th 402, 482.)

I. DEFENSE COUNSEL [§ 12.19]

Argument about defendant's two trial attorneys doing "the good-guy/bad-guy thing" did not cause any possible prejudice. (***People v. Wallace*** (2008) 44 Cal.4th 1032, 1095.)

Where the prosecutor suggested, in response to defense argument, that it was defense counsel who wanted the jury to speculate and stated "counsel has looked you in the eye unblinkingly and just said straight out, butter wouldn't melt in their mouths, and I want you to think about – " and commented he thought that defense counsel had been in the courtroom during a witness's testimony, the California Supreme Court found that "[t]he remarks in question were fleeting and rather obscure. Even if they constituted misconduct, they do not constitute the type of deceptive and reprehensible methods that require reversal." (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1073, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

The prosecutor's argument that photos were "misleading" and "deceptive" in terms of what could be seen in terms of positioning of witnesses and lighting conditions at the time of the shooting did not constitute an attack on counsel by implying defense counsel had presented false evidence but instead permissible argument that the photographs could not substitute for the perceptions of witnesses who were present during the shooting. (***People v. Gonzales & Soliz*** (2011) 52 Cal.4th 254, 307-308.)

J. DETERRENCE [§ 12.20]

Argument about the deterrent effect of the death penalty is improper. (***People v. Bittaker*** (1989) 48 Cal.3d 1046, 1106, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

It is misconduct for the prosecutor to argue to the jury that the death penalty is a more effective deterrent than imprisonment. (***People v. Purvis*** (1963) 60 Cal.2d 323, 341-342, overruled on other grounds, *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2.)

Arguing a deterrent effect on others is improper. (***People v. Wrest*** (1992) 3 Cal.4th 1088, 1106.)

K. EXAMPLES OF IMPROPER ARGUMENTS [§ 12.21]

It is misconduct in closing argument in the penalty phase to state that jurors are in essence victims of the defendant because they have to decide whether or not somebody lives or dies. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 706.)

It is improper for the prosecutor to argue at the penalty phase the jury may have acted improperly by not convicting defendant of certain charges at the guilt phase. (***People v. Haskett*** (1982) 30 Cal.3d 841, 864-867.)

The rhetorical device of paralipsis ("I'm not going to argue that …") is improper, but it was harmless in this case. (***People v. Wrest*** (1992) 3 Cal.4th 1088, 1107.)

The prosecutor's display of a large photo of the murdered police officer at the penalty phase was improper where it had been ruled inadmissible at the guilt phase. However, there was no reasonable possibility the jury's discretion was affected by the photograph. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1329.)

Admission of illegally seized evidence at the guilt phase was harmless, but constituted prejudicial error at the penalty phase because of the prosecutor's argument at the penalty phase. (***People v. Frank*** (1985) 38 Cal.3d 711, 734-735.)

Argument suggesting the weighing of factors should be mechanical was improper. (***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1039.)

A prosecutor's appeal in closing argument to the jurors' self-interest is improper and thus misconduct because it tends to undermine the jury's impartiality. (***People v. Gray*** (2005) 37 Cal.4th 168, 216.)

Penal Code section 190.3, subdivision (b), does not address the circumstances of the present crime. Therefore, it is error for the prosecutor to argue the facts of the present case as matters in aggravation under that section. However, such error may be harmless. (***People v. Milner*** (1988) 45 Cal.3d 227, 253-258, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13; ***People v. Kimble*** (1988) 44 Cal.3d 480, 504-506.)

L. EXAMPLES OF PROPER ARGUMENTS [§ 12.22]

Argument that witness was biased based on his close ties to the defendant's family and his stance on the death penalty constituted fair comment on the evidence. (***People v. Bennett*** (2009) 45 Cal.4th 577, 617.)

"[T]he prosecutor's references to peace officers as 'the people whose job it is to keep people like us secure' and who are needed 'if we're gonna have a civilized society' were not inflammatory or prejudicial." (***People v. Ervine*** (2009) 47 Cal.4th 745, 808.)

"[T]he prosecutor's remarks that defendant was 'his own Judge, jury, and executioner' and that [the victim] received 'no due process' and did not have the benefit of 'two lawyers comin' into this courtroom with a Judge to make sure everything's right, give you appropriate instructions, have a jury decide it'" was not an improper comment on the defendant's constitutional right to counsel or to a fair trial. "[T]he argument 'did not urge the jury to return a death verdict because defendant exercised his constitutional rights and did not suggest that defendant should be given a greater penalty because he had a trial." (***People v. Ervine*** (2009) 47 Cal.4th 745, 809.)

Characterizing the jury as the "conscience of the community" does not invite jurors to abrogate their personal responsibility to render an appropriate verdict in light of the facts and the law. "Jurors are the conscience of the community: '[A] jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death.' (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519 [20 L.Ed.2d 776, 88 S.Ct. 1770], fn. omitted.) It is not error to tell them so in closing argument.'" (***People v. Gamache*** (2010) 48 Cal.4th 347, 389, quoting ***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1178, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"It is, of course, improper to make arguments to the jury that give it the impression that emotion may reign over reason, and to present irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." The prosecutor's brief comment "'[a] death verdict is the ultimate validation of our community values. Let the punishment fit the crime. A death verdict says we will not tolerate this type of crime'" fell within the bounds of permissible argument and was not an improper appeal to the jury's passion or prejudice. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1209-1210, internal quotation marks & citations omitted.)

The prosecutor's comparison of the jury's oath to that taken by peace officers such as the victim "was mainly to highlight the gravity of the oath, and the prosecutor emphasized that the jurors' duty was to 'do justice.' The comments cannot fairly be read to create an improper alliance between the jurors and the fallen deputy or to suggest that imposing a life sentence would be a violation of their oaths." (***People v. Ervine*** (2009) 47 Cal.4th 745, 807.)

"The prosecutor's argument was not premised on the notion that the present case was worse than any other, or that all similar cases required the death penalty. Instead, it stood on the ground that defendant's case was so suitable for capital punishment that the only justification for not imposing it would be an objection to capital punishment in all cases. This is an entirely proper argument and does not invite comparisons with other specific notorious cases." Trial court restrictions on arguments comparing a defendant's case to other well-known murders have been repeatedly upheld. (***People v. Gonzales*** (2011) 51 Cal.4th 894, 955-956.)

"[A] prosecutor does not err 'by devoting some remarks to a reasoned argument that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance – i.e., punishment – exacted by the state, under controlled circumstances, and on behalf of all its members, in lieu of the right of personal retaliation' because '[r]etribution on behalf of the community is an important purpose of all society's punishments, including the death penalty. [Citations.]' [Citation.] Here, the prosecutor did not solicit 'untethered passions' nor did he 'dissuade jurors from making individual decisions' – instead, he properly argued that 'the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes.'" (***People v. Martinez*** (2010) 47 Cal.4th 911, 965-966, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129]; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 845 [brief statements during penalty phase argument addressing community retribution are permissible]; ***People v. Collins*** (2010) 49 Cal.4th 175, 228 ["not error to argue 'that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance – i.e., punishment – exacted by the state, under controlled circumstances, and on behalf of all its members, in lieu of the right of personal retaliation.'"].)

The prosecutor properly argued, in a case where the special circumstances included the victim was a witness to defendant's crimes and killed for that reason, that "a system in which witnesses are killed or threatened with death cannot function and, therefore, the death penalty is required to deter people like defendant from killing witnesses and compromising the integrity of the system. A prosecutor is entitled to assert that the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes, so long as those comments are not inflammatory, do not seek to invoke untethered passions and do not form the principal basis of his argument." (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1077, internal quotations & citation omitted, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

The prosecutor's penalty phase argument that "defendant ate a 'full breakfast of eggs, coffee, sausage and French toast and finished it off with a cigarette' while the victims bled to death" was a fair comment on the evidence. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 843.)

The prosecutor's closing penalty phase argument was proper where it attributed a statement to the defendant that he never made, to wit: "'They can drop dead. I won't care. I am hungry and I have to have something to eat…'" The "'imagined statements by [defendant] were no more than sarcastic hyperbole identifying what the prosecutor believed to be weakness in the defense explanation of events.'" (***People v. Blacksher*** (2011) 52 Cal.4th 769, 843-844, internal quotation marks omitted.)

The prosecutor did not urge imposition of the death penalty for reasons extraneous to defendant's case by calling defendant the "worst of the worst" with respect to death-eligible murderers. The prosecutor linked his argument to the premeditated, painful, and personal nature of the murders. There was nothing wrong with the prosecutor telling the jury he expected an argument from defense counsel that his client was not the "worst of the worst" in terms of death eligibility, and that death was not warranted. Prior cases suggest such an argument by defense counsel is not uncommon. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1315-1316.)

The prosecutor's comment on the impact of the victim's death on the victim's family was permissible notwithstanding its emotional impact. "[E]motion need not be eliminated from the penalty determination. Although emotion must not reign over reason, it need not, indeed, cannot be excluded from the jury's moral assessment." (***People v. Dykes*** (2009) 46 Cal.4th 731, 790, internal quotation marks omitted.)

Referring to defendant's statements as "lies" is an "acceptable practice so long as the prosecutor argues inferences based on the evidence rather than the prosecutor's personal belief resulting from personal experience or from evidence outside of the record." (***People v. Dykes*** (2009) 46 Cal.4th 731, 773.)

Not improper to argue that three murders warranted a death verdict to void the third murder being a "freebie." (***People v. Rogers*** (2009) 46 Cal.4th 1135, 1174 & fn. 23.)

While is not per se improper to use the "freebie" argument regarding factor (b) crimes, "evidence might in a particular case mislead a jury regarding its proper focus under section 190.3 in reaching a penalty verdict, and a prosecutor should be particularly careful in this regard." Prosecutor's argument did not cross the line into misconduct where "[i]n the context of the entirety of the prosecutor's argument, the jury would likely have understood him to be contending" that when defendant's involvement in a robbery-murder and other factor (b) evidence was considered, "a death verdict was all the more warranted – not that it was the jury's responsibility to impose separate punishment" for the victim of the factor (b) murder. (***People v. Adams*** (2014) 60 Cal.4th 541, 578.)

It was not double counting for the prosecutor to refer to "two special circumstances" as "circumstances" that jurors could consider as aggravating because, in context, it was clear the circumstances of the crime should only be considered once. (***People v. Burney*** (2009) 47 Cal.4th 203, 267.)

Argument that victim was in "wrong place at wrong time" and it "could have been any of us, any of our children, it could be anybody that we know that doesn't deserve it" and commenting "it's really scary what happens out there on the highways" was not improper because the randomness of the crime was a relevant consideration. To the extent the argument referenced generalized fears aroused by random violence, the remarks were not unduly inflammatory. (***People v. Riggs*** (2008) 44 Cal.4th 248, 323.)

The prosecutor's use of a sports analogy to explain the distances (124 yards and 200 yards) at which a prosecution witness saw defendant as the distances from the tee from which golfers can see a one-inch flag at the hole was not misconduct. The prosecutor's use of a sports analogy in rebuttal may have been inspired by the use of a sport's analogy (length of two football fields) in defense counsel's closing argument. "While the exact source for every measurement the prosecutor used in his summation is unclear, defendant does not contest the accuracy of any of the measurements." The prosecutor "displayed poor judgment in inserting himself into closing argument" by stating during closing argument that he personally measured the distances, but when "viewed in context, his statements about personally measuring the distances in effect expressed the permissible argument that he presented to the jury accurate computations about the distances. He did not make the impermissible argument that, because he had personally visited the scene and measured the distances, [the prosecution witness's] testimony must be true." (***People v. Friend*** (2009) 47 Cal.4th 1, 38.)

Where the circumstances of the murders possibly suggested some sexual conduct or motivation (particularly in light of the defendant's criminal history), the prosecutor could point out that fact despite the absence of specific sex-crime charges. (***People v. Navarette*** (2003) 30 Cal.4th 458, 519.)

The prosecutor's references to defendants as gang members were proper since the evidence suggested that the murders were committed by defendants' gang and defendants' membership in the gang was a circumstance of the crime. (***People v. Champion*** (1995) 9 Cal.4th 879, 942-943, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860.)

The prosecutor's comments that this crime was the "worst possible" or the most "incredibly horrible" crime one might commit were fair comment on the evidence. (***People v. Navarette*** (2003) 30 Cal.4th 458, 518; ***People v. Hovey*** (1988) 44 Cal.3d 543, 579.)

The prosecutor was entitled to infer in closing argument that defendant wanted to be sentenced to death, as it was not an unreasonable inference based on the evidence. (***People v. Bennett*** (2009) 45 Cal.4th 577, 618.)

The prosecutor's argument that defense counsel essentially conceded their clients' guilt of robbery murder during their closing argument was not misconduct and did not imply defense counsel had stipulated to guilt of murder. While counsel had not made an express concession, the trial court overruled defendants' objection reasoning that because

counsel had devoted such a relatively brief portion of his closing argument to the robbery murder, the jury could reasonably interpret it as tantamount to a concession, and the jury had been instructed the statements of counsel were not evidence and were not to be regarded as such. (***People v. Gonzales & Soliz*** (2011) 52 Cal.4th 254, 305.)

§ 12.22.1 Opening Statement

"'The function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning.'" Accordingly, prosecutor's comments about anticipated testimony and offering "in advance a possible explanation for their long delay in cooperating with law enforcement, their inconsistent statements to investigators, and any current reluctance to testify" were not improper. (***People v. Adams*** (2014) 60 Cal.4th 541, 569, quoting ***People v. Dennis*** (1998) 17 Cal.4th 468, 518.)

The prosecutor did not commit misconduct by referencing the anticipated testimony of an expert where the trial court did not rule on a relevancy objection until after the prosecutor's opening statement in the penalty phase. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 843.)

It was proper for the prosecutor to use portions of defendant's confession and slides of the crime scene and the victims in the opening statement at the penalty retrial, where the items were later admitted in evidence. (***People v. Wash*** (1993) 6 Cal.4th 215, 256-257.)

M. FACTOR (b) [§ 12.23]

The prosecutor's argument informing the jury it should consider the defendant's criminal history in determining penalty was proper as it was consistent with section 190.3, factor (b). (***People v. McDowell*** (2012) 54 Cal.4th 395, 437.)

N. FACTOR (k) [§ 12.24]

The prosecutor's argument that factor (k) does not apply to anything which occurs after the crime was committed is incorrect; however, in light of rest of the arguments, it was not likely the jury was misled. (***Brown v. Payton*** (2005) 544 U.S. 133 [125 S.Ct. 1432, 1438-1439, 161 L.Ed.2d 334]; ***People v. Payton*** (1992) 3 Cal.4th 1050, 1072-1073.)

The prosecutor's case for aggravation is limited to evidence relevant to factors exclusive of factor (k). However, argument that factor (k) defense evidence did not excuse conduct, but made it worse, was proper. (***People v. Caro*** (1988) 46 Cal.3d 1035, 1062-1063, abrogated on other grounds, *People v. Whitt* (1990) 51 Cal.3d 620, 657,

fn. 29; see also ***People v. Wader*** (1993) 5 Cal.4th 610, 658-659 [court does not decide whether similar argument improper because no objection].)

Factor (k) evidence may not be argued to be a circumstance in aggravation. (***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1033.)

O. FORFEITURE [§ 12.25]

"The same standard applicable to prosecutorial misconduct at the guilt phase is applicable at the penalty phase. [Citation.] A defendant must timely object and request a curative instruction or admonishment. Failure to do so forfeits the claim on appeal unless the admonition would have been ineffective. [Citation.]" (***People v. Martinez*** (2010) 47 Cal.4th 911, 963, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

Defendant's claim that his constitutional rights were violated by defense counsel's argument being postponed until the morning after the prosecutor's argument was forfeited because of his failure to object. (***People v. Verdugo*** (2010) 50 Cal.4th 263, 303.)

Failure to seek a curative instruction after an objection also constitutes a forfeiture of a claim of prosecutorial misconduct. (***People v. Sanders*** (1995) 11 Cal.4th 475, 549; ***People v. Miller*** (1990) 50 Cal.3d 954, 1001.)

Defendant will be excused from the necessity of objecting or requesting an admonition when either would be futile. Failure to request an admonition does not forfeit the issue on appeal if an admonition would not have cured the harm caused by the misconduct or the trial court immediately overrules the objection and the defendant has no opportunity to make such a request. (***People v. Hill*** (1998) 17 Cal.4th 800, 820.)

Objection not required where legal basis for objection involves legal authority not in existence at time of the trial. (***People v. Benson*** (1990) 52 Cal.3d 754, 797.)

Defendant's claim that prosecutor made inconsistent arguments in the guilt and penalty phases was forfeited by failing to object to the penalty phase argument or seek an admonition. (***People v. Nunez*** (2013) 57 Cal.4th 1, 34.)

Defendant forfeited issue of prosecutorial misconduct on appeal for failing to make a timely objection to prosecutor's closing argument on grounds it falsely inferred defendant's sisters would not have confirmed abuse of defendant by their grandmother when prosecution was in possession of defense investigative reports showing defendant's sisters verified abuse of defendant by their grandmother. (***People v. Adams*** (2014) 60 Cal.4th 541, 574-575.)

P. FUTURE DANGEROUSNESS [§ 12.26]

Cross-Reference:

§ 11.21, *re* Future dangerousness

§ 13.15, *re* Future dangerousness

While the prosecutor *may not present expert testimony on future dangerousness as evidence in aggravation*, the "prosecutor may argue from the defendant's past conduct, as indicated in the record, that the defendant will be a danger in prison." (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1179, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also ***People v. Michaels*** (2002) 28 Cal.4th 486, 540-541; ***People v. Davenport*** (1985) 41 Cal.3d 247, 288, superseded by statute on other grounds as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140, and abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

"In this case, the prosecutor did not offer expert testimony concerning defendant's future dangerousness but did, in accordance with our case law (*People v. Ray* (1996) 13 Cal.4th 313, 353 []), argue that defendant's violent behavior towards his wife and towards the sheriff's deputies indicated that prison would not be suitable for him." (***People v. Ervine*** (2009) 47 Cal.4th 745, 797.)

"Prosecutorial argument regarding a capital defendant's future dangerousness is permissible if, as here, it is based on evidence of the defendant's conduct rather than expert opinion. [Citations.] Notwithstanding defendant's argument to the contrary, the violent conduct need not have occurred in a prison setting. [Citations.] [The California Supreme Court has] previously rejected defendant's argument that because future dangerousness is not a listed aggravating factor, a prosecutor can argue that point only to rebut defense argument or evidence. [Citation.]" (***People v. Thomas*** (2011) 52 Cal.4th 336, 364.)

The prosecutor can comment on the potential for future dangerousness. (***People v. Burney*** (2009) 47 Cal.4th 203, 266.)

When supported by the evidence, the prosecutor may argue in the penalty phase of a capital trial that if the defendant is not executed he or she will remain a danger to others. (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1077, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Demetrulias*** (2006) 39 Cal.4th 1, 32-33.)

It is proper to comment on defendant's potential to endanger others in prison, including female prison guards, if sentenced to life imprisonment without possibility of parole. (***People v. Huggins*** (2006) 38 Cal.4th 175, 253; ***People v. Bradford*** (1997) 14 Cal.4th 1005, 1063-1064.)

Evidence of the defendant's crime during the guilt phase and other incidents of violent criminal conduct properly presented as evidence in aggravation during the penalty phase provided a sufficient basis for prosecutor to argue that the defendant would present a danger in prison. The trial court instructed the jurors to disregard the prosecutor's comment that any future act of violence "would be a freebie" and it is assumed the jury followed that instruction and did not allow the isolated remark by the prosecutor to affect its verdict. (***People v. Thomas*** (2012) 53 Cal.4th 771, 822.)

To the extent the prosecutor's argument "that a system in which witnesses are killed or threatened with death cannot function and, therefore, the death penalty is required to deter people like defendant from killing witnesses and compromising the integrity of the system" is construed as a comment on the defendant's future dangerousness, it was permissible argument based on evidence that the defendant "engineered" the victim's murder while in custody. (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1077-1078, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

The prosecutor stated in closing penalty phase argument: "The people who know the defendant know enough about him to fear him, and so should you." "To the extent that the prosecutor's comments stressed defendant's dangerousness, there was no improper argument." "As to the prosecutor's suggestion that *the jury* should fear defendant, this brief comment, even if we assume it was improper, was harmless, as it was not so egregious, deceptive, or reprehensible so as to render his trial unfair." (***People v. Johnson*** (2015) 61 Cal.4th 734, 780-781, emphasis in original.)

Q. HARMLESS ERROR [§ 12.27]

Prosecutorial misconduct during penalty phase argument is subject to the reasonable possibility standard of prejudice (see ***People v. Brown*** (1988) 46 Cal.3d 432, 448) which is the same in substance and effect as the beyond a reasonable doubt standard enunciated in ***Chapman v. California*** (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (***People v. Bennett*** (2009) 45 Cal.4th 577, 605, fn. 13; ***People v. Wallace*** (2008) 44 Cal.4th 1032, 1092.)

Prosecutorial argument should not be given undue weight, inasmuch as jurors are warned in advance it is not evidence and jurors understand argument to be statements of advocates. (***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1224, fn. 21, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

While it is misconduct in closing argument in the penalty phase to state that jurors are in essence victims of the defendant because they have to decide whether or not somebody lives or dies, the defendant was not prejudiced by the misconduct where the trial court immediately chastised the prosecutor and admonished the jury to disregard the comment. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 706.)

The prosecutor's brief comment during voir dire on penalty retrial that defendant had been convicted of personally taking the life of another human being, where the jury's verdict need not have been premised on the conclusion defendant was the actual shooter was harmless as there is no reason to think the three jurors who heard the remark were affected where the defense urged the jury, without objection from the prosecution, to consider the concept of lingering doubt and carefully scrutinize whether the prosecution's theory of the case was supported by any physical evidence. (***People v. Jackson*** (2014) 58 Cal.4th 724, 762-763.)

R. IMPACT ON VICTIM'S FAMILY [§ 12.28]

Cross-Reference: § 11.30, *re* Victim-impact evidence

Victim-impact evidence and argument which relates directly to circumstances of the crime is proper. (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1079, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; ***People v. Brown*** (2004) 33 Cal.4th 382, 400.)

Since the "views of a victim's family as to the appropriate punishment are beyond the scope of constitutionally permissible victim impact testimony" it "follows that a prosecutor may not attribute such views to a victim's family expressly or by implication" during closing argument. Argument asking the jury to "vote for execution out of concern for the feeling of victims' families" is improper. "In considering penalty a jury may properly take into account the impact of the *defendant's conduct*. The concept cannot be stretched [in argument] to include the potential effect the *jury's* decision may have." (***People v. Enraca*** (2012) 53 Cal.4th 735, 765, emphasis in original.)

The immediate effects of a capital crime on the victim's family constitute circumstances of the crime which the prosecutor may elicit and argue at the penalty phase of a capital trial. (***People v. Kirkpatrick*** (1994) 7 Cal.4th 988, 1017, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The argument need not be based on specific testimony of the victim's family, but can urge the jury to draw reasonable inferences concerning the probable impact of the crime on the victim and the victim's family. (***People v. Elliott*** (2012) 53 Cal.4th 535, 590; ***People v. Sanders*** (1995) 11 Cal.4th 475, 550; ***People v. Kirkpatrick*** (1994) 7 Cal.4th 988, 1017, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Argument invoking impact on the victim's family is permissible as long as it is not unduly inflammatory and does not appeal to the jury's emotion, since victim impact is a relevant factor in the penalty determination. The prosecutor's argument that defendant's rough childhood was not much consolation or solace for the victim's mother when she is visiting her daughter's grave "permissibly contrasted the potential mitigating effect of

defendant's past against the significant impact the murder had on [the victim's] family." (***People v. Riggs*** (2008) 44 Cal.4th 248, 324.)

"[J]ust as a prosecutor may ask the jurors to put themselves in the shoes of the victim, a prosecutor may ask the jurors to put themselves in the place of the victim's family to help the jurors consider how the murder affected the victim's relatives." The prosecutor's comments asked the jurors how they would feel if someone they loved died "in a gutter" and "choking on his own blood" like the victim. While prosecutors are "not encourage[d] to use such graphic and dramatic images," the comments were not misconduct because they were brief and did not exceed the bounds of propriety. (***People v. Jackson*** (2009) 45 Cal.4th 662, 690-692.)

The prosecutor's argument concerning impact of the murder on the victim's children was not so inflammatory as to render the sentencing proceeding fundamentally unfair. The evidence was admissible under section 190.3, subdivision (a), as one of the circumstances of the crime. (***People v. Zapien*** (1993) 4 Cal.4th 929, 991-992.)

A call for the jury to remember the victims, made in response to defense argument on the sufficiency of LWOP as punishment, is permissible. (***People v. Cox*** (1991) 53 Cal.3d 618, 687, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Prosecutor did not commit misconduct in closing argument by contrasting the kind of life the defendant might enjoy in prison with the impact of the victim's death on her family. A "prosecutor may argue for imposition of the death penalty as a valid form of community retribution or vengeance, so long as the argument does not seek to invoke untethered passions, or to dissuade jurors from making individual decisions." (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1079, internal quotation marks & citations omitted, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

S. LACK OF MITIGATING EVIDENCE (*DAVENPORT* ERROR) [§ 12.29]

The prosecutor may not argue that the lack of mitigating evidence pertaining to the factors listed in Penal Code section 190.3 renders them aggravating in a given case. (***People v. Lucas*** (1995) 12 Cal.4th 415, 491; ***People v. Champion*** (1995) 9 Cal.4th 879, 939, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860; ***People v. Turner*** (1990) 50 Cal.3d 668, 714; ***People v. Davenport*** (1985) 41 Cal.3d 247, 289-290, superseded by statute on other grounds as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140, and abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; see also ***People v. Panah*** (2005) 35 Cal.4th 395, 496.)

However, where the prosecutor's argument that the absence of a particular mitigating factor should be considered as aggravating was brief and unobjected to, it can be found to be neither misconduct nor prejudicial. (***People v. Lucas*** (1995) 12 Cal.4th 415, 491-493; ***People v. Champion*** (1995) 9 Cal.4th 879, 939-940, overruled on other

grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860; ***People v. Kelly*** (1992) 1 Cal.4th 495, 549.)

Where the prosecutor argues that certain mitigating factors are not present in the case and that the circumstances of the crime serve as aggravation (as well as disproving mitigation), there is no error. (***People v. Panah*** (2005) 35 Cal.4th 395, 496-497; ***People v. Clark*** (1993) 5 Cal.4th 950, 1030-1031, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 144, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5].)

It is proper prosecutorial argument to note the absence of certain mitigating factors. The California Supreme Court has declined to overrule the "distinction between statements that focus upon the absence of mitigating evidence and statements urging the absence of mitigating evidence constitutes an aggravating circumstance" drawn in ***People v. Clark*** (1993) 5 Cal.4th 950, 1030. (***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1348-1349.)

Where argument occurred after *Davenport* was decided, the failure to object on *Davenport* grounds waives the claim on appeal. (***People v. Lucas*** (1995) 12 Cal.4th 415, 491-493; ***People v. Champion*** (1995) 9 Cal.4th 879, 939-940, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860; ***People v. Webb*** (1993) 6 Cal.4th 494, 533.)

While the prosecutor "cannot argue that the jury is not permitted to consider mitigating evidence, it may argue that certain evidence does not in fact mitigate or at least attempt to minimize the mitigating effect of the evidence." (***People v. Valencia*** (2008) 43 Cal.4th 268, 305.)

It is not improper to argue that mitigating factors are not present. (***People v. Rundle*** (2008) 43 Cal.4th 76, 196, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"The prosecution is permitted to question whether a defendant's mitigating evidence should carry much weight. [Citation.] This principle extends to mental health evidence; a prosecutor is entitled to argue, as the prosecutor did here, that notwithstanding any expert testimony about mental illness, the defendant was not in fact significantly impaired during the crimes he committed. [Citation.] The jury had considerable lay testimony it could consider on this question, including [a] description of [the defendant's] actions and [the defendant's] own confession just days later; thus, the prosecutor's closing argument neither rested on matters outside the record, nor implied secret evidence to which only he was privy, nor injected personal opinion." (***People v. Gamache*** (2010) 48 Cal.4th 347, 390.)

T. LACK OF REMORSE [§ 12.30]

"Conduct or statements demonstrating a lack of remorse made at the scene of the crime or while fleeing from it may be considered in aggravation as a circumstance of the murder under section 190.3, factor (a). On the other hand, postcrime evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating. When evidence of postcrime remorselessness has been presented, however, the prosecutor may stress that remorse is not available as a mitigating factor." "There is a subtle but important distinction between the manifestations of a defendant's remorselessness that may be considered as an aggravating factor and those that may be considered only to rebut remorse as a mitigating factor. The court and the parties should be careful not to blur it." (***People v. Enraca*** (2012) 53 Cal.4th 735, 766-766, citations & internal quote marks omitted.)

"'A prosecutor may properly comment on a defendant's lack of remorse, as relevant to the question of whether remorse is present as a mitigating circumstance, so long as the prosecutor does not suggest that lack of remorse is an aggravating factor.'" (***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1358, 281 P.3d 412, 456, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3, quoting ***People v. Blacksher*** (2011) 52 Cal.4th 769, 843; ***People v. Burney*** (2009) 47 Cal.4th 203, 266.)

The prosecutor did not improperly comment on lack of remorse where "the prosecutor made clear he was emphasizing the lack of evidence supporting remorse to show the absence of a mitigating factor, not suggesting lack of remorse constituted an aggravating factor. (***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1358, 281 P.3d 412, 456, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"A prosecutor may not cite a defendant's claim of innocence as evidence that the defendant lacks remorse." (***People v. O'Malley*** (2016) 62 Cal.4th 944, 1011.)

"[T]he prosecution may comment upon a defendant's lack of remorse, as long as in doing so it does not refer to the defendant's failure to testify." (***People v. Whalen*** (2013) 56 Cal.4th 1, 75, disapproved on other grounds, ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 44, fn. 17; ***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1346; ***People v. Boyette*** (2002) 29 Cal.4th 381, 453-454.)

The prosecutor may argue lack of evidence of remorse even when the defense presents no evidence in mitigation as long as the prosecutor does not invite the jury to find lack of remorse as a factor in aggravation or comment on the defendant's failure to testify. (***People v. Lewis*** (2001) 25 Cal.4th 610, 673-674.)

Prosecutor's closing penalty phase argument that evidence of defendant's remorse was non-existent would have been understood by the jury as referring not to defendant's failure to testify, but rather to his statements and conduct during and after the crime which were not remorseful. Alternatively, the jury might have understood the remark as referring to defendant's failure to produce evidence of his remorse from friends and

family." (***People v. Whalen*** (2013) 56 Cal.4th 1, 75, disapproved on other grounds, ***People v. Romero & Self*** (2015) 62 Cal.4th 1, 44, fn. 17.)

"The prosecutor did not comment that defendant had failed to *take the stand* to express remorse; he simply said there was no *evidence* that defendant had *ever* expressed remorse. We have consistently found such penalty phase argument permissible under *Griffin*, even where it faults the defendant for failing to confess guilt and express remorse *during his guilt phase testimony*." (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1174, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

It is permissible to argue in the penalty phase that a defendant's untruthfulness and evasiveness demonstrate a lack of remorse. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 844.)

The defendant's refusal to show any remorse in the context of the murder can be considered by the jury as an aggravating factor but the prosecutor cannot rely on a defendant's claim of innocence to argue lack of remorse or that any lack of remorse that is not related to the crime is an aggravating factor. (***People v. Harris*** (2005) 37 Cal.4th 310, 361.)

§ 12.30.1 Post-Crime Lack of Remorse

Although the prosecutor may not argue the defendant's post-crime lack of remorse is an aggravating factor, the prosecutor may argue that lack of remorse is relevant to the evaluation of mitigating factors. (***People v. Jurado*** (2006) 38 Cal.4th 72, 141.)

The prosecutor did not improperly reference facts outside the record in questioning the sincerity of the defendant's expression of any remorse arguing the defendant only expressed remorse after it became obvious he was suspected of the murder. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1208.)

Defendant's objection to prosecutor's commenting on his in-court demeanor as evidencing a lack of remorse was forfeited by failing to object and request an admonition. Prosecutor's argument: "The only time [defendant] cried [was] when his mother talked about his parents splitting up. You saw the video of Mark Walker's family. You saw the testimony, you heard the testimony of Mark Walker's family. No tear was shed except when you bring up something that is a bad memory for him" was proper as a prosecutor may comment on a defendant's demeanor in penalty phase argument. (***People v. Montes*** (2014) 58 Cal.4th 809, 892.)

§ 12.30.2 Circumstances of the Crime

Defendant's overt lack of remorse at the scene of the crime is a statutory aggravating factor as a circumstance of the crime under Penal Code section 190.3, subdivision (a). Post-crime lack of remorse is not a statutory factor and should not be urged as factor in aggravation. (***People v. Cain*** (1995) 10 Cal.4th 1, 77-78; ***People v.***

Gonzalez (1990) 51 Cal.3d 1179, 1231-1232, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

The manner in which defendant disposed of the victims' bodies was a circumstance of the crime which was properly argued by the prosecutor as aggravating; the argument was not an improper reference to defendant's lack of remorse or failure to testify. (***People v. Lucero*** (2000) 23 Cal.4th 692, 722-723.)

Penal Code section 654 "does not bar a jury in a capital case from considering both robbery-murder and burglary-murder special circumstances, even where the multiple special circumstances were part of the same course of conduct, because each special circumstance involved violation of a distinct interest that society seeks to protect, and a defendant who commits both offenses in the course of a murder may be deemed more culpable than a defendant who commits only one." (***People v. Clark*** (2016) 63 Cal.4th 522, 634, internal quotation marks omitted.)

§ 12.30.3 Forfeiture

Failure to object to argument about the lack of remorse forfeits the issue. (***People v. Gamache*** (2010) 48 Cal.4th 347, 404-405; ***People v. Sims*** (1993) 5 Cal.4th 405, 465; ***People v. Roberts*** (1992) 2 Cal.4th 271, 335-336.)

U. MERCY [§ 12.31]

The California Supreme Court has "repeatedly approved prosecutors arguing that a defendant is not entitled to mercy, and in particular arguing that whether the defendant was merciful during the crimes should affect the jury's decision." (***People v. Gamache*** (2010) 48 Cal.4th 347, 389.)

In penalty phase argument, "[c]onsiderable leeway is given for appeal to the emotions of the jury as long as it relates to relevant considerations." It is not improper to urge the jury to show the defendant the same level of mercy he showed the victim – which was none at all. (***People v. Rountree*** (2013) 56 Cal.4th 823, 859, internal quotation marks & citations omitted; ***People v. Collins*** (2010) 49 Cal.4th 175, 229-230 [same].)

"The prosecutor never told the jury it could not consider mercy. [Fn. omitted.] Nor did the prosecutor tell the jury, contrary to the instructions, that it could not extend sympathy, pity, or compassion to defendant. Rather, he simply told the jury that, on this record, defendant was undeserving of its sympathy, pity, or compassion. This was not error. [Citation.]" (***People v. Ervine*** (2009) 47 Cal.4th 745, 802-803.)

V. MINIMIZING JURY'S RESPONSIBILITY (*CALDWELL* ERROR) [§ 12.32]

"In *Caldwell v. Mississippi* (1985) 472 U.S. 320 [86 L.Ed.2d 231, 105 S.Ct. 2633] (*Caldwell*), the Supreme Court established the rule that 'a death sentence may not rest on a determination made by a sentencer who has been affirmatively misled to believe the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere.'" (***People v. Moon*** (2005) 37 Cal.4th 1, 16, quoting ***People v. Stanley*** (1995) 10 Cal.4th 764, 827.)

"[T]he Supreme Court has recognized that *Caldwell*'s holding may be narrower: 'As JUSTICE O'CONNOR supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling. [Citations.] Accordingly, [the California Supreme Court has] since read *Caldwell* as "relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." [Citation.] Thus, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."' (*Romano v. Oklahoma*, *supra*, 512 U.S. at p. 9; see *id*. at p. 14 (conc. opn. of O'Connor, J.) ["The inaccuracy of the prosecutor's argument in *Caldwell* was essential to my conclusion that the argument was unconstitutional. [Citation.] An accurate description of the jury's role – even one that lessened the jury's sense of responsibility – would have been constitutional."]." Accordingly, *Caldwell* error "occurs when the jury has been 'affirmatively misled … regarding its role in the sentencing process so as to diminish its sense of responsibility.'" (***People v. Murtishaw*** (2011) 51 Cal.4th 574, 592.)

The prosecutor may, without running afoul of *Caldwell*, suggest "'that the moral blame for the crimes and their consequences rests with defendant, not with the jurors.'" (***People v. Hinton*** (2006) 37 Cal.4th 839, 906, quoting ***People v. Clark*** (1993) 5 Cal.4th 950, 1036, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The prosecutor's reference to lethal injection as painless and nonintrusive did not diminish the jury's sense of responsibility for imposing the death penalty, in violation of the Eighth Amendment. The California Supreme Court did not find the reasoning of the federal appellate court in ***Antwine v. Delo*** (8th Cir. 1995) 54 F.3d 1357, to be persuasive. "The *Antwine* court plainly went beyond the *Caldwell* holding. Further, its reasoning is suspect. While jurors may feel relieved that they are not condoning gratuitous suffering, their decision over life and death remains a profound one. That decision is no less profound or burdensome because a less onerous mode of execution is employed." (***People v. Collins*** (2010) 49 Cal.4th 175, 233-234.)

It was not "even remotely possible" that the jury understood that the ultimate responsibility for penalty determination lay elsewhere, because during voir dire both the

prosecutor and defense counsel emphasized the personal responsibility of the jurors in closing argument, and the penalty-phase instructions made no mention of the trial court's ability to modify the verdict or of defendant's right to appeal. "Although the use of the word 'recommend' created the potential for misunderstanding and should be avoided in this context," "considering the totality of the circumstances here, the prosecutor's mere use of the word 'recommend' (in stating that only a unanimous jury can 'recommend' a death sentence) does not require reversal." (***People v. Moon*** (2005) 37 Cal.4th 1, 18, quoting ***People v. Fauber*** (1992) 2 Cal.4th 792, 846-847.)

The prosecutor's argument is to be viewed in context, not isolation, and with consideration given to the instructions by the trial court and defense counsel's argument. (***People v. Hinton*** (2006) 37 Cal.4th 839, 905; ***People v. Young*** (2005) 34 Cal.4th 1149, 1221; ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1238; see also ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1416-1418.)

The mere mention of the appellate process, while ill-advised, does not – standing alone – necessarily constitute reversible *Caldwell* error. (***People v. Moon*** (2005) 37 Cal.4th 1, 18; ***People v. Mendoza*** (2000) 24 Cal.4th 130, 186-187.)

The trial court instructed with respect to understanding instructions that "the jury must 'do it the right way, otherwise we do it again, later on.'" Defendant complained the trial court was referencing the possibility of appellate review of the penalty determination. Although the trial court's remark was "cryptic," when the comment is considered together with closing argument and penalty-phase instructions, "the jury could not reasonably have understood the court to mean the jury's verdict was advisory only." (***People v. Moon*** (2005) 37 Cal.4th 1, 18.)

The prosecutor's remarks concerning "minimum" and "maximum" penalties properly implied that LWOP and death were the only two penalties available in defendant's case. There was no misconduct in this regard, and nothing for defendant to rebut. (***People v. Carasi*** (2008) 44 Cal.4th 1263, 1315.)

"[T]he prosecutor never said anything remotely minimizing the jury's responsibility for its penalty decision. On the contrary, she emphasized to the jury, "You are the people who decide if they crossed that line drawn by society, and that's a heavy responsibility." (***People v. Rountree*** (2013) 56 Cal.4th 823, 859.)

"The prosecutor's argument regarding Locke's theory of the social contract, and his assertion that capital sentencing is exceptional in that the jury – not a set sentencing law – decides on the punishment, did not mislead the jury or diminish its sense of responsibility. On the contrary, read as a whole, the prosecutor's argument emphasized the heavy and exceptional responsibility that society places on a capital jury to determine the appropriate penalty. The prosecutor's argument did not suggest, as defendant argues, that in determining a capital penalty the ancient expectation that a criminal must be punished in kind – eye for eye, death for death – survives. The prosecutor only argued that under the social contract theory, there is still an expectation that punishment should

be commensurate with the crime. The prosecutor further explained that because society and the California Legislature consider first degree murder with special circumstances to be the most serious crime, the potential punishment includes the possibility of the death penalty. The prosecutor argued death was the appropriate penalty for defendant, but acknowledged it was not the only possible punishment. It was not improper for the prosecutor to argue that the jury would be acting as the representative of the community or for society as a whole." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 148-149.)

On appeal the defendant contended the trial court committed *Caldwell* error when it instructed the jury over defense objection: "'During the defense argument reference was made to the death penalty being carried out by lethal gas. Effective the 1st of January, 1993, the law will change allowing the condemned to select between lethal gas or lethal injection.'" The California Supreme Court concluded that "the trial court's instruction regarding the method of execution could not reasonably have misled the jury into believing ultimate responsibility for its penalty decision lay elsewhere. The court truthfully informed the jury that execution by lethal gas was no longer the only option because a new law would enable defendant to elect an alternative method of execution. Nothing about that information suggested responsibility for the jury's life-or-death decision lay anywhere other than with the 12 jurors. Although the instruction communicated to the jury that the method of execution would, to some degree, be defendant's choice, such information is not equivalent to informing the jury that it should consider its role in any way diminished." (***People v. Thompson*** (2016) 1 Cal.5th 1043, 1127-1128.)

§ 12.32.1 Waiver

In all cases tried *before* ***People v. Cleveland*** (2004) 32 Cal.4th 704, became final (see Cal. Rules of Court, rule 29.4), the no-waiver rule enunciated in ***People v. Bittaker*** (1989) 48 Cal.3d 1046, 1104, applies and the defendant will not be required to preserve a claim of *Caldwell* error by interposing a timely objection in the trial court. (***People v. Moon*** (2005) 37 Cal.4th 1, 17-18; accord, ***People v. DeHoyos*** (2013) 57 Cal.4th 79, 148.)

If the defendant was tried *after* ***People v. Cleveland*** (2004) 32 Cal.4th 704, became final (see Cal. Rules of Court, rule 29.4), then any assertion of *Caldwell* error by the prosecution must be properly preserved for appeal by a timely objection in the trial court. (***People v. Moon*** (2005) 37 Cal.4th 1, 17-18; ***People v. Cleveland*** (2004) 32 Cal.4th 704, 762.)

The situation where the jury learns in retrial that defendant had been previously convicted of murder and sentenced to death for that murder, does not constitute *Caldwell* error. (***Romano v. Oklahoma*** (1994) 512 U.S. 1, 8 [114 S.Ct. 2004, 129 L.Ed.2d 1]; ***People v. Ledesma*** (2006) 39 Cal.4th 641, 732-733 [instructions made it clear it was jury's responsibility to determine defendant's penalty based on the evidence presented, not on what jurors in prior proceeding did].)

W. NAME-CALLING [§ 12.33]

The prosecutor is entitled to vigorously argue, and "opprobrious epithets may be employed if reasonably warranted by the evidence." (***People v. Garcia*** (2011) 52 Cal.4th 706, 759-760; ***People v. Dykes*** (2009) 46 Cal.4th 731, 774, internal quotation marks omitted; ***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1173 [where supported by the evidence, prosecution may call the defendant a liar and a sociopath in closing argument], overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Prosecutor's definition of "sociopath" during penalty phase argument which included a comment on a sociopath's effect on society, i.e., the phrase "a disease against society" did not deny the defendant a fair trial and there was no reasonable possibility it influenced the penalty verdict. (***People v. McDowell*** (2012) 54 Cal.4th 395, 439.)

Where warranted by the evidence, the California Supreme Court has "condoned a wide range of epithets to describe the egregious nature of the defendant's conduct." (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1172 (overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), citing ***People v. Farnam*** (2002) 28 Cal.4th 107, 168 [defendant described as "monstrous," "cold-blooded," "vicious," and a "predator"; evidence described as "more horrifying than your worst nightmare"]; ***People v. Thomas*** (1992) 2 Cal.4th 489, 537 ["mass murderer, rapist," "perverted murderous cancer," and "walking depraved cancer"]; ***People v. Sully*** (1991) 53 Cal.3d 1195, 1249 ["human monster" and "mutation"].)

Calling defendant "an insidious little bastard" without "redeeming social value," "without feeling," "without sensitivity," did not rise to the level of misconduct "given the brutal and violent nature of the stabbing murder here." Use of the term "antisocial personality" and "sociopath" in argument was not an improper statement of an expert opinion; rather, it was the use of "language in common currency to describe his interpretation of the evidence." (***People v. Friend*** (2009) 47 Cal.4th 1, 84.)

X. RETRIBUTION [§ 12.34]

The prosecutor legitimately argued during penalty phase that if the jury could not protect society by sentencing the defendant to death, its failure to do so would create an incentive for society to engage in improper self-help to protect itself. (***People v. Huggins*** (2006) 38 Cal.4th 175, 253; ***People v. McDermott*** (2002) 28 Cal.4th 946, 1003.)

Isolated, brief references to "retribution" and "community outrage" during argument, although potentially inflammatory, are not misconduct so long as they do not form the principal basis for advocation of the death penalty. (***People v. Davenport*** (1995) 11 Cal.4th 1171, 1222, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; ***People v. Sanders*** (1995) 11 Cal.4th 475, 550, fn. 33; ***People v. Ghent*** (1987) 43 Cal.3d 739, 771.)

Y. POSSIBILITY OF PARDON – *RAMOS* ERROR [§ 12.35]

The prosecutor's argument concerning the possibility of presidential pardon was *Ramos* error. Instructing the jury that the Governor may commute a sentence of death to a sentence of LWOP, as required by Penal Code section 190.3, violates the due process clause of the California Constitution. (***People v. Ramos*** (1984) 37 Cal.3d 136, 159.) *Ramos* error is generally reversible, but not reversible per se. It is prejudicial if there is a "reasonable possibility the error affected the jury's penalty determination." (***People v. Hill*** (1992) 3 Cal.4th 959, 1010, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.) *Ramos* error in argument was not prejudicial in view of defense argument, the court's instructions, and the fact the argument was ridiculous. (***People v. Hill*** (1992) 3 Cal.4th 959, 1011, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; see ***People v. Wash*** (1993) 6 Cal.4th 215, 264-265.)

It is improper for the prosecution to discuss the Governor's commutation power in closing argument. (***People v. Ghent*** (1987) 43 Cal.3d 739, 769-770.)

Argument that defendant would never be rehabilitated was not *Ramos* error. (***People v. Bittaker*** (1989) 48 Cal.3d 1046, 1110-1111, fn. 35, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

Z. VOIR DIRE RESPONSES [§ 12.36]

It was improper for a prosecutor to use a chart during closing argument that displayed enlarged copies of 12 handwritten responses from juror questionnaires, including some from then-prospective jurors whom were later seated on the jury, addressing the purpose served by the death penalty. The chart improperly offered facts not in evidence. Additionally, jurors could have misconstrued the questionnaires as being from all of the seated jurors and thereby misled into believing a pre-existing unanimity existed regarding the efficacy of the death penalty, which could be akin to jurors discussing the case during trial before it is submitted to them for decision. The prosecutor's use of a chart was harmless error. (***People v. Riggs*** (2008) 44 Cal.4th 248, 325-327.)

It is improper to quote individual jurors' voir dire statements in penalty phase closing argument. (***People v. Freeman*** (1994) 8 Cal.4th 450, 517-518.)

AA. PROSECUTOR'S OPINION / VOUCHING [§ 12.37]

"'A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal

knowledge or belief," [his] comments cannot be characterized as improper vouching.' [Citation.] Here, the prosecutor simply advanced the view [the witness] was credible based on the evidence, which is permissible." (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 39, quoting ***People v. Frye*** (1998) 18 Cal.4th 894, 971.)

The prosecutor did not "vouch" for a law-enforcement witness when she relied upon facts of record (experience of officers) to draw the suggested inference. (***People v. Anderson*** (1990) 52 Cal.3d 453, 479.)

The prosecutor may express in argument during the penalty phase "'a personal opinion that death is the appropriate punishment, provided that opinion is grounded in the facts in evidence.'" (***People v. Rundle*** (2008) 43 Cal.4th 76, 191, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Prosecutors should refrain from expressing personal views which might unduly inflame the jury against the defendant. The prosecutor's statement, "I don't hate him, but I know what the appropriate penalty is for what he did," was found to be properly based on the evidence. (***People v. Ghent*** (1987) 43 Cal.3d 739, 772.)

In responding to defense counsel's oft-repeated contention that the defendant had been coerced by authorities at the instigation of the prosecutor into falsely confessing to a sexual interest in, and conduct with, the victim, the prosecutor argued that defense counsel was trying to paint other people, including the prosecutor, as the "bad guy" trying to make the defendant more culpable. This argument did not amount to improper vouching by implying the prosecutor was the "good guy." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1206-1207.)

BB. PSYCHIATRIC EVIDENCE / REPORTS [§ 12.38]

"Harsh and unbecoming" remarks concerning psychiatric testimony were not misconduct, since they constituted reasonable inferences from evidence. (***People v. Rowland*** (1992) 4 Cal.4th 238, 276-277.)

Even assuming the epithet "charlatan" regarding a defense expert improperly suggested fraud or other unethical conduct, defendant was not prejudiced. (***People v. Friend*** (2009) 47 Cal.4th 1, 84-85.)

It was not misconduct for the prosecutor to refer to a defense psychiatrist as a "liar," since that was one inference which could be drawn from the trial testimony. (***People v. Clark*** (1993) 5 Cal.4th 950, 1017, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

It was not improper for the prosecutor to argue that an expert's opinion was entitled to less weight due to failure to administer certain tests to defendant after the trial court had sustained an objection to the prosecutor's hypothetical question about why the expert did not give certain tests. (***People v. Bennett*** (2009) 45 Cal.4th 577, 615.)

CC. REBUTTAL ARGUMENT [§ 12.39]

It was proper for the prosecutor in rebuttal argument to refer to evidence outside statutory aggravating factors to counter defense evidence and argument. The scope of rebuttal legitimately embraces argument by the prosecutor "suggesting a more balanced picture of the accused's personality." (***People v. Cunningham*** (2001) 25 Cal.4th 926, 1024; ***People v. Noguera*** (1992) 4 Cal.4th 599, 643-644.)

The requirement that such rebuttal argument relate directly to a particular incident or character trait which defendant offers on his own behalf was met where evidence of defendant's good character was rebutted by evidence he had induced a defense witness to testify falsely. (***People v. Noguera*** (1992) 4 Cal.4th 599, 644.)

It was proper for the prosecutor to argue that defendant's claim that he was a "born again" Christian was rebutted by evidence showing defendant suborned the perjury of a guilt-phase witness. (***People v. Espinoza*** (1992) 3 Cal.4th 806, 825-826.)

DD. SYMPATHY FOR DEFENDANT [§ 12.40]

"The prosecution is not guilty of misconduct when it attempts to persuade the jury that the defendant has not presented a case deserving of sympathy or mercy." (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1181.)

Sympathy for defendant's family is not properly considered in mitigation. (***People v. Dykes*** (2009) 46 Cal.4th 731, 792; ***People v. Smithey*** (1999) 20 Cal.4th 936, 1000 [prosecutor's argument properly directed the jury not to consider sympathy for defendant's family and did not preclude the jury from considering the testimony of defendant's family to the extent it might have been relevant to sympathy for defendant].)

II. DEFENSE ARGUMENTS [§ 12.50]

A. GENERALLY [§ 12.51]

"A trial court 'is given great latitude in controlling the duration and limiting the scope of closing' argument. (*Herring v. New York* (1975) 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593.) It 'may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial.' (*Ibid*.; [Penal Code] § 1044 ['It shall be the duty of the judge to ... limit the ... argument of counsel to relevant and material matters'].)" (***People v. Edwards*** (2013) 57 Cal.4th 658, 743; see also ***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1184 [trial court has broad discretion to terminate argument of defense counsel when continuation would be repetitive or redundant].)

"'The right to present closing argument at the penalty phase of a capital trial, while broad in scope, "is not unbounded ...; the trial court retains discretion to impose

reasonable time limits and to ensure that argument does not stray unduly from the mark."'" (***People v. Harris*** (2005) 37 Cal.4th 310, 355, quoting ***People v. Boyette*** (2002) 29 Cal.4th 381, 463.)

The defendant's constitutional rights were not violated when the trial court postponed defense counsel's closing argument until the morning after the prosecutor's closing argument. (***People v. Verdugo*** (2010) 50 Cal.4th 263, 303.)

Trial court acted well within its discretion in sustaining Evidence Code section 352 objection to defense counsel playing a four to five minute video of a television story during closing argument. Defense counsel was limited to describing the television story relating similarities shared by two women who had never met (e.g., same name and date of birth). (***People v. Edwards*** (2013) 57 Cal.4th 658, 744.)

§ 12.51.1 Accounts of Executions

The trial court properly precluded defense counsel from describing an execution, as accounts of executions do not aid the jury in making an individualized assessment of the appropriate punishment. (***People v. Sanders*** (1995) 11 Cal.4th 475, 555-556.)

§ 12.51.2 Lack of Future Dangerousness

Defense can argue lack of future dangerousness from the evidence. (***People v. Harris*** (2005) 37 Cal.4th 310, 358.)

"The defense argued, again in accordance with our case law (*People v. Harris* (2005) 37 Cal.4th 310, 357-358 []), that the murder was an aberration committed because of 'the forces operat[ing] on [defendant] the night that this happened' and his 'lack of criminal history,' and that defendant thus would adjust well to prison. The defense stepped over the line, though, when it *also* pointed out that the People had failed to introduce *evidence* 'that [defendant] would pose any type of management problem in prison,' since we barred the People from introducing just that type of evidence …." (***People v. Ervine*** (2009) 47 Cal.4th 745, 797.)

§ 12.51.3 Impact on Jurors

The trial court properly stopped defense counsel from "arguing that the decision the jurors would make as to penalty would have an 'enormous impact' not only on defendant, but also on his family, his attorneys, and on each juror himself or herself." While defense counsel contended the argument urged the importance of an "individual verdict" of each juror, "the argument improperly sought to engage jurors' sympathies for defendant's family and friends. Such sympathies have no bearing on the individualized nature of the penalty decision." Moreover, the argument improperly addressed a factor in mitigation, i.e., the emotional impact a death verdict would have upon the jurors. The

reaction of jurors "to the penalty imposed would constitute emotional responses 'untethered to the facts of the case.'" (***People v. Harris*** (2005) 37 Cal.4th 310, 355; accord, ***People v. Banks*** (2014) 59 Cal.4th 1113, 1203, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

§ 12.51.4 Conditions of Confinement

Defense counsel is entitled to convey the severity of a sentence of life without parole and impress upon the jury the gravity of the jury's task but a trial court does not abuse its discretion by precluding defense counsel from describing precise measurements and features of cell in which defendant would serve his sentence since the defense proffered no such evidence. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1087.)

§ 12.51.5 Mischaracterizations

It was improper for defense counsel to argue that if any one juror voted for LWOP, defendant would not be executed, because the argument erroneously conveyed that a deadlocked jury would result in a life sentence. (***People v. Harris*** (2005) 37 Cal.4th 310, 356.)

It was improper for defense counsel to reference manner of execution in Utah (firing squad) ostensibly to show seriousness of jurors' role. The argument mischaracterizes the jurors' role in the penalty phase and "engendered an emotional response 'not rooted in the aggravating and mitigating evidence introduced during the penalty phase.'" (***People v. Harris*** (2005) 37 Cal.4th 310, 356-357, quoting ***California v. Brown*** (1986) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934].)

The trial court did not err in sustaining the prosecution's objection to defense argument that a reviewing court would not scrutinize any decision the jury made as to punishment, because the jury was "not only sixteen gods, you are sixteen supreme courts, you are sixteen appellate courts, you are sixteen trial courts. [And] it is difficult, if not impossible, for [reviewing courts] to look down on pieces of paper that have been compiled over the last two months and say, well, this jury got it wrong. They won't do that." The "defendant's comment that a reviewing court would find it 'difficult if not impossible" to effectively review the jury's sentencing decision was inaccurate.'" (***People v. Williams*** (2016) 1 Cal.5th 1166, 1188.)

§ 12.51.6 Protecting Society

It was improper for the defense to argue that an LWOP sentence would protect society, because the jury should not concern itself with protecting society. (***People v. Harris*** (2005) 37 Cal.4th 310, 356.)

§ 12.51.7 Relative Culpability

Cross-Reference:

§ 11.43, *re* Codefendant's sentence

§ 13.23, *re* Relative Culpability – codefendant's plea bargain / sentence

Trial court properly prevented defense counsel from commenting on other cases that were reasonably well known where a sentence of life without possibility of parole was imposed, as defense counsel is not entitled to compare the defendant's crime with other well-known murders or note the penalty imposed in other cases. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1088; ***People v. Virgil*** (2011) 51 Cal.4th 1210, 1285.)

Defense counsel wanted to argue that the decision to seek the death penalty is politically motivated by arguing that celebrities are rarely charged with special circumstances or given the death penalty, and to compare the case with prosecution of O.J. Simpson and the Menendez brothers. The trial court struck an appropriate balance by allowing the defense to argue the death penalty is imposed arbitrarily and capriciously but limited the defense from discussing the outcomes of specific cases. Where "'a factual comparison with other notorious crimes cannot be made without a time-consuming inclusion of all the facts in mitigation and aggravation, the trial court can exercise its discretion to control the scope of oral argument by refusing to allow defense counsel to compare the subject crime to other murders.'" (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1286.)

The prosecutor's brief reference to the famous incident in New York where Kitty Genovese was killed near her home while her neighbors ignored her cries for help was not objected to and did not require the trial court to revisit the limits placed on the defense argument regarding comparisons to cases where celebrities were not charged with special circumstances or where death was not sought. (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1286-1287.)

Trial courts can properly refuse to allow defense counsel to compare the crime of which defendant was convicted to those of other well-known murderers, or to note the penalties imposed in those cases. (***People v. Farley*** (2009) 46 Cal.4th 1053, 1130-1131.)

The trial court did not abuse its discretion in permitting defense counsel to generally contrast the aggravating factors with other well-known cases, but precluding counsel from discussing in detail the facts and results in those other cases. (***People v. Benavides*** (2005) 35 Cal.4th 69, 110; ***People v. Marshall*** (1996) 13 Cal.4th 799, 853-855.)

Defense counsel was not entitled to argue that an accomplice's conviction for manslaughter as a mitigating factor. "The sentence received by an accomplice is not constitutionally or statutorily relevant as a factor in mitigation." (***People v. Salazar*** (2016) 63 Cal.4th 214, 252, internal quotation marks & citations omitted.)

The fact that capital punishment is not available for defendants under the age of 18 is irrelevant to a defendant's individual culpability, and the trial court did not err in precluding defense counsel from arguing that fact. (***People v. Brown*** (2003) 31 Cal.4th 518, 565.)

§ 12.51.8 Defendant's Remorse

A defendant's demeanor may reflect remorse, or otherwise arouse sympathy with the jury (or judge in deciding whether to modify a verdict of death), and therefore can be the subject of favorable comment. (***People v. Valencia*** (2008) 43 Cal.4th 268, 308.)

§ 12.51.9 Sentence Will Be Carried Out

The trial court erred in not allowing defense counsel to argue the finality of a sentence of life imprisonment without possibility of parole. While the trial court is not permitted to instruct that a sentence of life without possibility of parole will be carried out, and instead should "simply admonish the jury to refrain from speculating about matters beyond the evidence and the trial court's instructions," that same distinction has not been extended to the closing penalty phase argument of defense counsel. Defense counsel is permitted to argue that life without possibility of parole is an "unending punishment" as a matter of impressing upon the jury the gravity of task in "choosing between the two harshest punishments available under the law." In this context, defense counsel can "argue that the sentence of life without the possibility of parole means the defendant will not be released from prison – a legally accurate description of the sentence – without reference to the speculative factual possibility that the sentence may not be carried out." (***People v. Sandoval*** (2015) 62 Cal.4th 394, 444-445.)

B. PENAL CODE, § 1095 [§ 12.52]

There is no violation of Penal Code section 1095 where two defense attorneys were both permitted to argue. Penal Code section 1095 does not deprive the trial court of its discretionary power to limit excessively repetitive arguments. (***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1185-1186.)

III. ALLOCUTION [§ 12.60]

There is no right of allocution at the penalty phase of a capital trial. (***People v. Tully*** (2012) 54 Cal.4th 952, 1107; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 800;

People v. Jackson (2009) 45 Cal.4th 662, 698, comparing ***People v. Lucero*** (2000) 23 Cal.4th 692, 717 [repeatedly held no right to allocution in penalty phase of capital trial], with ***People v. Evans*** (2008) 44 Cal.4th 590, 600 [defendant in a non-capital sentencing has a right at sentencing to make a sworn personal statement in mitigation that is subject to cross-examination by the prosecution].)

There is no denial of due process with respect to distinctions between capital and non-capital defendants regarding the right of allocution and "capital defendants may take the stand and testify on [the] issue [of the proper sentence]." (***People v. Tully*** (2012) 54 Cal.4th 952, 1107, ***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1182-1183 [same], disapproved on other grounds, ***People v. Doolin*** (2009) 45 Cal.4th 390.)

A defendant has no right to make a statement to the penalty jury without being subject to cross-examination. (***People v. Lightsey*** (2012) 54 Cal.4th 668, 728; ***People v. Romero*** (2008) 44 Cal.4th 386, 426; ***People v. Cleveland*** (2004) 32 Cal.4th 704, 766.)

If allocution is allowed by a trial court, the prosecutor may properly argue that the defendant's statement was not subject to cross-examination. (***People v. Hunter*** (1989) 49 Cal.3d 957, 989.)

Chapter Thirteen
PENALTY PHASE – INSTRUCTIONS

I. GENERALLY [§ 13.10]

The standard CALJIC penalty-phase instructions are adequate to inform the jurors of their sentencing responsibilities under federal and state constitutional standards. (***People v. Gurule*** (2002) 28 Cal.4th 557, 659.)

The CALJIC model jury instructions are not insufficient to satisfy the heightened reliability requirement of the Eighth Amendment for capital cases and the Judicial Council's establishing a commission that recommended the instructions be rewritten does not mean those instructions are defective in conveying necessary legal principles to a jury. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 924.)

"Because a capital sentencing is a moral and normative process, it is not necessary to give instructions associated with the usual factfinding process." (***People v. Jackson*** (2009) 45 Cal.4th 662, 694, internal quotation marks omitted.)

Cross-Reference: § 5.12, *re* Defendant's presence

A. ARGUMENTATIVE / CONFUSING / DUPLICATIVE INSTRUCTIONS [§ 13.11]

A trial court may refuse a proffered instruction that is an incorrect statement of law, is argumentative, is duplicative, or might confuse the jury. (***People v. Gurule*** (2002) 28 Cal.4th 557, 659.)

B. COMMUTATION / SENTENCE CARRIED OUT [§ 13.12]

§ 13.12.1 Commutation Instruction (*Briggs* Instruction)

Instructing the trier of fact with the *Briggs* instruction, i.e., a sentence of life without parole may be commuted to include the possibility of parole (Pen. Code, § 190.3) as mandated by the 1978 law does not violate the federal Constitution. (***California v. Ramos*** (1983) 463 U.S. 992, 1009 [103 S.Ct. 3446, 77 L.Ed.2d 1171].) However, such an instruction violates the California Constitution. (***People v. Ramos*** (1984) 37 Cal.3d 136, 150-159.)

The California Supreme Court has rejected the contention that when the prosecutor raises the prospect of the defendant's future dangerousness then further

instruction on parole and the Governor's commutation power is constitutionally required. (***People v. Williams*** (2010) 49 Cal.4th 405, 469.)

When the jury in the penalty phase of a capital murder trial does not raise the commutation issue, the trial court has no duty to give an instruction concerning the subject on its own motion, but must do so if the defendant requests one. (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 206.) However, the jury should not be instructed to "assume" the sentence will be carried out, and instead, "if an instruction on this subject is given, it should simply admonish the jury to refrain from speculating on matters beyond the evidence and the trial court's instructions." (***People v. Sandoval*** (2015) 62 Cal.4th 394, 444, citing ***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 206.)

"In the future, if in a particular case the parties and the trial court decide that an instruction on this issue would be appropriate, the court might instruct the jury as follows: 'It is your responsibility to decide which penalty is appropriate in this case. You must base your decision upon the evidence you have heard in court, informed by the instructions I have given you. You must not be influenced by speculation or by any considerations other than those upon which I have instructed you.'" (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 206.)

A prospective juror's anecdotal remark during voir dire about a commutation 40 years earlier of her uncle's death sentence did not trigger a sua sponte duty to instruct on commutation. (***People v. Kaurish*** (1990) 52 Cal.3d 648, 709.)

Giving the "*Morse* instruction" regarding parole-board powers does not cure error in instructing on commutation. (***People v. Haskett*** (1982) 30 Cal.3d 841, 862-863; see ***People v. Morse*** (1964) 60 Cal.2d 631, 648.)

§ 13.12.1.1 Prejudice

"To the extent [the trial court may have erred in refusing requested instruction concerning the possibility of punishment], absent any evidence to suggest that the jury was confused about the issue [of whether a defendant's sentence would be carried out] or concerned that [the defendant's sentence] would not be carried out, the failure to instruct on the issue cannot be deemed prejudicial." (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 206-207.)

The giving of the *Briggs* instruction was nonprejudicial where the judge also told the jury not to consider the possibility of commutation and to confine its deliberations to the specified factors in aggravation and mitigation. (***People v. McLain*** (1988) 46 Cal.3d 97, 119.)

Even if jury was not told it should not consider the possibility of commutation, absent evidence that the jury actually considered the Governor's commutation power, the court's failure to give a cautionary instruction was not prejudicial. (***People v. Gallego*** (1990) 52 Cal.3d 115, 201-202.)

However, the giving of an unadorned *Briggs* instruction still requires reversal. (***People v. Harris*** (1989) 47 Cal.3d 1047, 1101-1102; ***People v. Warren*** (1988) 45 Cal.3d 471, 489.)

The mention of the commutation power at the voir dire of three jurors was not prejudicial, since the jury's attention is not focused on its duty to select a penalty at that time, no "*Briggs* Instruction" was later given, and the court told the jury that the questions of counsel are not evidence. (***People v. Pinholster*** (1992) 1 Cal.4th 865, 918-919, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

§ 13.12.2 Inquiry by Jury

If a jury raises the prospect of commutation the trial court must make a short statement indicating the Governor's commutation power applies equally to both potential sentences (death and life without possibility of parole) while emphasizing it is a violation of a juror's duty to consider the possibility of commutation in determining the appropriate penalty. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1084, quoting ***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 203-204.)

"A trial court in capital case does not err when it answers a jury question generally related to the commutation power by instructing that the Governor may commute either a death sentence or a life without possibility of parole sentence, but that the jury must not consider the possibility of commutation in determining the appropriate sentence." (***People v. Williams*** (2010) 49 Cal.4th 405, 468; ***People v. Bramit*** (2009) 46 Cal.4th 1221, 1248.)

The California Supreme Court has declined to follow Ninth Circuit authority to the contrary, and repeatedly reaffirmed its view, that "there is no reason to mention the restrictions on the Governor's power of commutation because they are irrelevant to the jury's determination, and there is good reason not to stress the defendant's record." (***People v. Williams*** (2010) 49 Cal.4th 405, 468; ***People v. Bramit*** (2009) 46 Cal.4th 1221, 1247; ***People v. Beames*** (2007) 40 Cal.4th 907, 932.)

A question about parole implicitly raises the issue of commutation, as jurors are not concerned about a distinction between parole and commutation; rather, they are "simply interested in the bottom line: Will the defendant ever be released from prison?" (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1247.)

Where the jury expressly asked whether the defendant "might be paroled as a result of future legislative or judicial action," it would have been "proper for the court to tell the jury that in unusual cases, future action by the Legislature or the courts might result in the parole of a defendant who has been sentenced either to death or to life without possibility of parole, but that the jury should not speculate on such possibility and instead should assume the sentence it reaches will be carried out." (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1247-1248; ***People v. Perry*** (2006) 38 Cal.4th 302, 321-322; ***People v. Kipp*** (1998) 18 Cal.4th 349, 378-379.)

Where the jury inquired whether the defendant would ever be released from prison or whether a judge could overturn a death verdict, the trial court properly instructed the jury not to speculate and to follow the court's instruction previously given. (***People v. Williams*** (2015) 61 Cal.4th 1244, 1288, citing ***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 206.)

If the jury asks about the possibility of appeal, it is proper for the judge to simply say the jury is not to consider such matters. (***People v. Thomas*** (1992) 2 Cal.4th 489, 539; ***People v. Mincey*** (1992) 2 Cal.4th 408, 468-469.)

§ 13.12.3 Instruction Sentence Imposed Will Be Carried Out

A defendant is not entitled to an instruction that if sentenced to life without possibility of parole, he would never be released from prison. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1084; ***People v. Arias*** (1996)13 Cal.4th 92, 172.)

A defendant is not entitled to an instruction to assume or presume that a sentence of life without possibility of parole will be carried out because asking the jury to assume a sentence of life without possibility of parole means the defendant will be imprisoned for the rest of his life is inaccurate in that it fails to acknowledge the Governor's power of commutation. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1084; ***People v. Williams*** (2008) 43 Cal.4th 584, 647.)

"[B]ecause of the possibility of appellate reversal or gubernatorial commutation or pardon, it would be inaccurate and therefore erroneous to instruct the jury that if it returns a death verdict the sentence of death *will* inexorably be carried out." (***People v. Wallace*** (2008) 44 Cal.4th 1032, 1091, emphasis in original, internal quotation marks omitted.)

If an instruction is given on the subject of whether a sentence of life without possibility of parole will be carried out, the jury should not be instructed to "assume" the sentence will be carried out; instead, the instruction "should simply admonish the jury to refrain from speculating on matters beyond the evidence and the trial court's instructions." (***People v. Sandoval*** (2015) 62 Cal.4th 394, 444; ***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 206.)

A penalty-phase jury may properly be instructed "whether or not there were circumstances that might preclude either the death penalty or life without possibility of parole being carried out, [the jury] should assume it would be carried out for purposes of determining the appropriate sentence for this defendant." (***People v. Ledesma*** (2006) 39 Cal.4th 641, 737.)

Responses to juror questionnaires did not require instruction in the penalty phase that the sentence selected would be carried out, because jurors were informed during voir dire to assume that whatever penalty was selected would be carried out. (***People v. Hinton*** (2006) 37 Cal.4th 839, 861.)

Where the trial court learns about jurors' concerns whether either punishment, death or life without possibility of parole, would actually be carried out, at an early stage in the trial (voir dire), and the jurors were promptly told by defense trial counsel, or the court itself, to assume either punishment would be carried out – and nothing occurred subsequently at trial to raise the issue, there was no error in failing to instruct in the penalty phase to assume the penalty selected would be carried out. (***People v. Hinton*** (2006) 37 Cal.4th 839, 861-862.)

Defendant's requested instruction, to the effect that the jury could consider as a mitigating factor evidence that defendant would serve the rest of his life in prison as a cooperative and compliant prisoner, was properly refused. It was argumentative and, to the extent it implied defendant would inexorably serve the rest of his life in prison, incorrect. (***People v. Ashmus*** (1991) 54 Cal.3d 932, 1003-1004, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

§ 13.12.4 Ineffective Assistance of Counsel

Defense counsel was not ineffective for failing to request the jurors be reinstructed at end of the penalty phase to assume that the sentence selected would be carried out. (***People v. Hinton*** (2006) 37 Cal.4th 839, 862.)

Defense counsel's lack of request that the penalty-phase jury be instructed to assume the sentence selected will be carried out may be due to a desire to avoid highlighting the possibility that a death sentence might not be carried out. (***People v. Hinton*** (2006) 37 Cal.4th 839, 862; ***People v. Kipp*** (1988) 18 Cal.4th 349, 378-379.)

§ 13.12.5 Definition of LWOP

Cross-Reference:

§ 11.24,	*re* Nature of life imprisonment without possibility of parole
§ 11.57.2,	*re* Nature of life imprisonment without possibility of parole
§ 11.75,	*re* LWOP conditions

CALJIC No. 8.84 adequately defines the alternative sentence to death. (***People v. Ervine*** (2009) 47 Cal.4th 745, 798.)

Trial court did not err in refusing defense instruction defining life imprisonment without parole as meaning defendant "would stay in prison for the rest of his natural life." (***People v. Scott*** (2015) 61 Cal.4th 363, 408.)

A trial court does not err in refusing to instruct the jury that life without possibility of parole means "exactly what is says. The defendant will be imprisoned for the rest of his life" and "the death penalty means exactly what it says: That the defendant will be executed" because "it is incorrect to tell the jurors that the penalty they select will inexorably be carried out." (***People v. Thomas*** (2012) 53 Cal.4th 771, 827, internal quotation marks omitted.)

The trial court is not obligated to define the term "life without possibility of parole" because the term has a plain meaning and does not require further explanation. Moreover, such an instruction would be erroneous in light of gubernatorial powers of pardon and commutation and the possibility the death-penalty statute could be invalidated in the future. (***People v. Watson*** (2008) 43 Cal.4th 652, 700; see also ***People v. Wallace*** (2008) 44 Cal.4th 1032, 1091 [CALJIC No. 8.84 adequately informs jury that defendant sentenced to LWOP is ineligible for pardon].)

The term "life without possibility of parole" is clear and unambiguous and does not require sua sponte instruction defining the term. (***People v. Zamudio*** (2008) 43 Cal.4th 327, 372.)

The California Supreme Court has "rejected defense efforts to rely on contemporary opinion surveys, not part of the current record or subject to cross-examination, suggesting that many jurors do not understand that life without the possibility of parole actually means no possibility of parole." (***People v. Ervine*** (2009) 47 Cal.4th 745, 798.)

Simmons v. South Carolina (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133], does not require an instruction defining LWOP. (***People v. Williams*** (2010) 49 Cal.4th 405, 469.)

The LWOP instruction should not be given even where the prosecutor argues defendant's future dangerousness, whether in prison or after escape. (***People v. Sakarias*** (2000) 22 Cal.4th 596, 641.)

The model jury instructions adequately describe life without possibility of parole. "The problem is not with the jury instructions. The phrase 'without possibility of parole' is clear and on its face absolutely bars parole. The problem is that some jurors may not accept the role of juries in the California death penalty scheme, and instead of making a decision based solely on weighing the aggravating and mitigating circumstances, may seek an assurance that there are no circumstances under which a sentence of life without possibility of parole could be altered to permit parole. The trial court cannot provide such an assurance. (*People v. Kipp* [1998] 18 Cal.4th 349, 378.) It can explain to the jury that in unusual cases, future action by the judiciary or the Governor may permit a defendant who has been sentenced either to death or to life imprisonment without possibility of parole to obtain parole, but that the jury should not speculate on such possibility but instead should assume the sentence it reaches will be carried out. (See *People v. Samuels* (2005) 36 Cal.4th 96 (conc. opn. of Werdegar, J.).) But that is a

matter within the trial court's discretion; the court in this case did not err by simply directing the jury to assume that a sentence of life imprisonment without the possibility of parole means that the defendant will be confined for life without the opportunity for parole, and telling the jury not to speculate on any events that might lead to a different outcome. (See *People v. Snow* (2003) 30 Cal.4th 43, 123; *People v. Kipp* [1998] 18 Cal.4th 349, 378-379.)" (***People v. Perry*** (2006) 38 Cal.4th 302, 321-322.)

Where the jury's inquiry about the "meaning" and "definition" of LWOP implicitly raised the commutation question, it was not error for the court to give a modified *Briggs* instruction. (***People v. Whitt*** (1990) 51 Cal.3d 620, 656-657, abrogated on other grounds, *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

C. DETERRENCE, COSTS [§ 13.13]

The court is not required to instruct the jury to refrain from considering either the deterrent effects of capital punishment or the costs of either the death penalty or life without possibility of parole when such considerations are not raised at trial. However, such instruction would not be error if given. (***People v. McKinnon*** (2011) 52 Cal.4th 610, 696; ***People v. Zamudio*** (2008) 43 Cal.4th 327, 371 [trial court did not err in refusing to instruct on the death penalty's deterrent effect and the costs of punishment, where neither party raises the issue]; ***People v. Benson*** (1990) 52 Cal.3d 754, 806-807 [no requirement for the trial court to instruct the jury on costs of maintaining prisoner or deterrence (or lack thereof) of the death penalty where the issue was not in dispute at trial].)

While the defense requested instruction stating "[i]n deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence you may not consider for any reason whatsoever the deterrent or nondeterrent effect of the death penalty or the monetary cost to the state of execution or maintaining a life prisoner" was not legally incorrect, the trial court did not err in refusing to give it since neither party raised the issue of cost or deterrence at trial. The jury was cautioned during voir dire that cost was not a factor in determining penalty, no evidence was introduced on the subject, and neither side mentioned cost during argument to the jury. "The prosecutor's questions to a defense penalty witness about life prisoners' access to television, libraries, recreational facilities, and conjugal visits did not raise the cost issue." Accordingly, the proposed instruction was unnecessary. (***People v. Elliott*** (2012) 53 Cal.4th 535, 591.)

D. EVIDENTIARY MATTERS [§ 13.14]

Trial courts are "strongly urge[d] to ensure penalty phase juries are properly instructed on evidentiary matters. 'The cost in time of providing such instructions is minimal, and the potential for prejudice in their absence surely justified doing so.'" (***People v. Moon*** (2005) 37 Cal.4th 1, 37, fn. 7, quoting ***People v. Carter*** (2003) 30 Cal.4th 1166, 1222.)

Failure to give penalty phase jury instructions relevant to assess the credibility of witnesses, or any of the applicable evidentiary instructions from CALJIC Nos. 1.00 through 3.31, after specifically instructing jury to disregard all other instructions given in the prior phases of trial, was harmless beyond a reasonable doubt where the jury never expressed confusion or uncertainty and never requested clarification, and counsel for both sides strongly argued for the credibility of certain witnesses in their penalty phase arguments. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 846.)

It was harmless error not to instruct the penalty-phase jury on evidentiary matters, after instructing the jury to disregard the guilt-phase instructions, because defendant failed to demonstrate a reasonable likelihood that the instructions given in the case precluded the sentencing jury from considering any constitutionally relevant mitigating evidence. (***People v. Moon*** (2005) 37 Cal.4th 1, 39; ***People v. Carter*** (2003) 30 Cal.4th 1166, 1221.)

E. FUTURE DANGEROUSNESS [§ 13.15]

Cross-Reference:

§ 11.21, *re* Future dangerousness

§ 12.26, *re* Future dangerousness

To the extent that the discussion upholding the trial court's refusal to give an instruction on future dangerousness in *People v. Lucas* (2014) 60 Cal.4th 153, 321-322 could be read to mean a jury may not consider a defendant's future dangerousness, it is disapproved. The instruction requested in *Lucas* was inappropriate because a jury *may* consider future dangerousness. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 53, fn. 19.)

F. INCORRECT STATEMENT OF LAW [§ 13.16]

A court must refuse an instruction that is an incorrect statement of the law. (***People v. Sanders*** (1995) 11 Cal.4th 475, 560; ***People v. Ashmus*** (1991) 54 Cal.3d 932, 994, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

G. JOINT PENALTY TRIALS [§ 13.17]

It is sufficient to instruct to decide separately the question of penalty as to each of the defendants and not to consider against one defendant that which has been admitted only against another defendant, to ensure individualized sentencing in joint penalty trials.

(***People v. Lewis*** (2008) 43 Cal.4th 415, 461, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

H. LINGERING DOUBT [§ 13.18]

A lingering doubt instruction is not required under federal or state law as the concept is encompassed in section 190.3, factor (k) and in standard penalty phase instructions related to that factor. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256.)

There is no federal constitutional right to a residual doubt instruction at the sentencing phase of a capital case. Dictum that a lingering doubt instruction may be required as a matter of statutory law "has been put to rest." "[T]he standard instructions on capital sentencing factors, together with counsel's closing argument, are sufficient to convey the lingering doubt concept to the jury." (***People v. Hartsch*** (2010) 49 Cal.4th 472, 513.)

"Although a defendant may assert his or her possible innocence in mitigation, and the jury may consider lingering doubt in determining the appropriate penalty, there is no requirement that the court specifically instruct the jury to consider lingering doubt." (***People v. Lewis*** (2009) 46 Cal.4th 1255, 1314-1315; ***People v. Page*** (2008) 44 Cal.4th 1, 55.)

A trial court need not specifically instruct on lingering doubt in penalty phase because concept is sufficiently covered by CALJIC No. 8.85. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1176.)

A defendant is not constitutionally entitled to an instruction at the penalty phase to reconsider the issue of guilt as a basis for mitigation. (***Franklin v. Lynaugh*** (1988) 487 U.S. 164, 172-176 [108 S.Ct. 2320, 101 L.Ed.2d 155]; ***People v. Harris*** (2005) 37 Cal.4th 310, 359; ***People v. Slaughter*** (2002) 27 Cal.4th 1187, 1219, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

CALJIC No. 8.85 is sufficient to comply with the holding of *Eddings v. Oklahoma* (1982) 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1], which requires that the sentencer in a capital case be allowed to consider any relevant mitigating factor. (***People v. Lewis*** (2009) 46 Cal.4th 1255, 1315; ***People v. Zamudio*** (2008) 43 Cal.4th 327, 370 [lingering doubt concept sufficiently covered in CALJIC No. 8.85].)

Where sanity was not at issue at the guilt or penalty phase, it was not error for the court to instruct the penalty jury on the presumption of sanity, thereby negating "lingering doubt" on sanity. (***People v. Haskett*** (1990) 52 Cal.3d 210, 235.)

The standard instruction at the start of the second penalty trial that the previous jury had found the charges of the information true did not foreclose the jury from consideration of lingering doubt of guilt. (***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1238; ***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1235, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

Instructions at the penalty phase would not have been misconstrued by two alternate jurors substituted in at beginning of penalty phase to mean that only original jurors could consider lingering doubt. (***People v. Nguyen*** (2015) 61 Cal.4th 1015.)

Error in excluding evidence in a penalty-phase retrial was compounded by an instruction to the jury that defendant's responsibility for shooting had been conclusively proven and that no evidence to contrary would be presented. (***People v. Gay*** (2008) 42 Cal.4th 1195, 1226.)

I. MOTIVE [§ 13.19]

The trial court did not err in refusing the defense request for an instruction that motive for commission of the crime could be consid ered as a mitigating factor extenuating the gravity of the crime. There is no reasonable likelihood that the jury misunderstood the trial court's instruction in the language of Penal Code section 190.3, factor (k) as indicating the jury could not consider defendant's motivation as a mitigating factor. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1233.)

J. ORDER OF INSTRUCTION [§ 13.20]

The order in which penalty-phase instructions are given is immaterial. (***People v. Cummings*** (1993) 4 Cal.4th 1233, 1339.)

K. PINPOINT INSTRUCTIONS [§ 13.21]

The trial court properly refuses a clarifying instruction that factor (a) does not permit the penalty-phase determination to be based on facts common to all murders. (***People v. Moon*** (2005) 37 Cal.4th 1, 40.)

A penalty-phase jury is not constitutionally required to disregard those aspects of the crime common to all first degree premeditated murders (***People v. Moon*** (2005) 37 Cal.4th 1, 40), or special circumstances. (***Ibid***.; ***People v. Earp*** (1999) 20 Cal.4th 826, 901.)

"[I]n order to perform its moral evaluation of whether death is the appropriate penalty, the facts of the murder 'cannot be comprehensively withdrawn from the jury's consideration.'" (***People v. Moon*** (2005) 37 Cal.4th 1, 40, quoting ***People v. Earp*** (1999) 20 Cal.4th 826, 900-901.)

There is no requirement that the trial court give pinpoint instruction during the penalty phase that the jury may consider in mitigation any perception it might have had that defendant lacked premeditation or deliberation before the murder. (***People v. Huggins*** (2006) 38 Cal.4th 175, 251.)

There is no requirement that a trial court instruct sua sponte how to consider the fact the defendant testifies in the penalty phase that he prefers the death penalty to a sentence of life without possibility of parole. (***People v. Webb*** (1993) 6 Cal.4th 494, 534-535; ***People v. Guzman*** (1988) 45 Cal.3d 915, 960-961, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; ***People v. Grant*** (1988) 45 Cal.3d 829, 849-850.)

L. RACE – [§ 13.22]

The trial court did not err in rejecting defendant's "proposed instruction to disregard his and the victim's different races and to require jurors to sign a certificate stating that they did not consider race in their verdict. The requested instruction was derived from the Federal Death Penalty Act of 1994 (18 U.S.C. § 3593(f)), and it asks the jury not to "consider the race, color, religious beliefs, national origin, sex or sexual orientation of the defendant or any victims" and to sign a certificate that the above considerations did not enter into their sentencing decision." The instruction is not constitutionally required and the trial court instructed the jury in the language of CALJIC No. 8.84.1 that "it must neither be influenced by bias nor prejudice against the defendant." The "'court need not interject the issue of race itself and then tell the jury to disregard it, at least absent some indication the jury might improperly consider race." (***People v. Williams*** (2015) 1 Cal.5th 1166, 1202-1203, citing ***People v. Smith*** (2003) 30 Cal.4th 581, 639.)

M. RELATIVE CULPABILITY – CODEFENDANT'S PLEA BARGAIN / SENTENCE [§ 13.23]

Cross-Reference:

§ 11.43, *re* Codefendant's sentence

§ 12.51.7, *re* Relative culpability

The trial court did not err in refusing to instruct the jury it could consider as a mitigating circumstance grants of immunity or life sentences given to co-perpetrators. (***People v. Maciel*** (2013) 57 Cal.4th 481, 549.)

Parker v. Dugger (1991) 498 U.S. 308 [111 S.Ct. 731, 112 L.Ed.2d 812], does not suggest that California is constitutionally required to adopt a rule allowing the consideration of the sentences of accomplices at the penalty phase. (***People v. Landry*** (2016) 2 Cal.5th 52, 122 ; ***People v. Maciel*** (2013) 57 Cal.4th 481, 549; ***People v. Brown*** (2003) 31 Cal.4th 518, 563.)

"[E]vidence of an accomplice's sentence is irrelevant at the penalty phase because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition." (***People v. Landry*** (2016) 2 Cal.5th 52, 122 [internal quotation marks and citations omitted].)

Since evidence of a codefendant's disposition is not a mitigating factor, the trial court does not have an obligation to instruct the jury to consider the codefendant's sentence in determining the proper penalty. (***People v. Vieira*** (2005) 35 Cal.4th 264, 299; ***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1251.)

The trial court is not obligated to instruct that an accomplice's plea bargain constitutes mitigation. (***People v. Morris*** (1991) 53 Cal.3d 152, 225, overruled on other grounds, *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

N. REMAND / RETRIAL [§ 13.24]

The trial court is not required to inform the jury of the history of the prior proceedings, and certainly is not required to give a partial history. (***People v. Edwards*** (1991) 54 Cal.3d 787, 845.)

O. STANDARD OF REVIEW [§ 13.25]

For federal constitutional purposes, what is crucial is the meaning that the instructions communicated to the jury. If that meaning was not objectionable, the instructions cannot be deemed erroneous. In determining the meaning communicated to the jury, the strict test whether a "reasonable juror" could have understood the charge as defendant asserts has been supplanted in ***Boyde v. California*** (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316], with the more tolerant test whether there is a "reasonable likelihood" that the jury so understood the charge. (***Estelle v. McGuire*** (1991) 502 U.S. 62 [112 S.Ct. 475, 116 L.Ed.2d 385]; ***People v. Benson*** (1990) 52 Cal.3d 754, 801.)

"'The presumption that the jurors in this case understood and followed the mitigation instruction to them is not rebutted by empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross-examination.'" (***People v. Jackson*** (2009) 45 Cal.4th 662, 695, quoting ***People v. Welch*** (1999) 20 Cal.4th 701, 773.)

P. TYPOGRAPHICAL ERRORS [§ 13.26]

A typographical error on a single instruction, which stated that the penalty was life "with" the possibility of parole, was harmless where there could be no doubt the jury, from repeated references, knew the proper penalty. (***People v. Morris*** (1991) 53 Cal.3d

152, 228-231, overruled on other grounds, *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Q. VICTIM-IMPACT EVIDENCE [§ 13.27]

The standard instructions adequately convey to the jurors the proper consideration and use of victim impact evidence. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 54; ***People v. Johnson*** (2015) 60 Cal.4th 966, 993-994; ***People v. Tate*** (2010) 49 Cal.4th 635, 708.)

The California Supreme Court has "repeatedly rejected the claim that the court had to give, even on request, additional instructions regarding victim impact evidence – both that offered under section 190.3, factor (a), and that offered under section 190.3, factor (b) – in addition to the standard instructions the court gave in this case." (***People v. Johnson*** (2015) 60 Cal.4th 966, 993-994.)

It was not error for the court to instruct at the prosecution's request that the victim's family members were not allowed to offer their opinions regarding what punishment they hoped the defendant would receive in order "to forestall the jury from improperly considering why the family members did not offer opinions on the appropriate punishment during their victim impact testimony." (***People v. McDowell*** (2012) 54 Cal.4th 395, 422.)

The trial court need not instruct a jury not to be influenced by emotion resulting from victim-impact evidence. It need not give duplicative instructions; an instruction that the jury may not impose the death penalty as a result of an irrational, subjective response to emotion evidence is duplicative of CALJIC No. 8.84.1. (***People v. Carey*** (2007) 41 Cal.4th 109, 134.)

The trial court properly refused a defense-requested instruction on victim-impact evidence as confusing and lacking clarity as to whose emotional reaction it was directing jurors to consider with caution – those of the victim's family or their own. (***People v. Harris*** (2005) 37 Cal.4th 310, 358-359.)

The trial court properly instructed the jury at the prosecution's request on victim-impact evidence as follows: "'[If] supported by the evidence, it is proper to consider the impact of the murder on the victim's family (including their pain and suffering) when determining the appropriate penalty. You are further instructed that such evidence is to be included within the meaning of factor (a), the circumstances of the offenses, in the preceding instruction (CALJIC No. 8.85) and is not a separate factor in aggravation.'" (***People v. Harris*** (2005) 37 Cal.4th 310, 358-359.)

Instruction with CALJIC No. 8.84.1 is sufficient for informing the jury regarding consideration of victim-impact evidence. (***People v. Morgan*** (2007) 42 Cal.4th 593, 624.)

"[J]urors may in considering the impact of the defendant's crimes, 'exercise sympathy for the defendant's murder victims and ... their bereaved family members.'" (***People v. Zamudio*** (2008) 43 Cal.4th 327, 369.)

The following instruction on victim impact is not required or appropriate: "Victim-impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim-impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard." (***People v. Garcia*** (2011) 52 Cal.4th 706, 762-763; ***People v. Bramit*** (2009) 46 Cal.4th 1221, 1245; ***People v. Zamudio*** (2008) 43 Cal.4th 327, 369-370.)

The trial court properly refused to instruct the jury with a proposed instruction on victim-impact evidence stating: "'Evidence has been introduced that may arouse in you a natural sympathy for the victim or the victim's family. [¶] You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case. [¶] You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.'" The jury was adequately instructed regarding consideration of victim-impact evidence by CALJIC No. 8.84.1. (***People v. Foster*** (2010) 50 Cal.4th 1301, 1361-1362; accord, ***People v. Russell*** (2010) 50 Cal.4th 1228, 1265-1266 & fn. 6 [properly refused proposed instruction stating, "Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role in deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence or argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy."].)

R. WAIVER / FORFEITURE [§ 13.28]

Where there was no discussion of the defendant's proposed instruction (asking the jury to consider whether the victim contributed to the extreme mental or emotional state of the defendant) the failure to press for a ruling results in the forfeiture of defendant's claim of an erroneous refusal to instruct the jury. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1233.)

Where defendant does not suggest that instructions on sentencing discretion were incorrect, but only that they were inadequate, the failure to request clarifying instructions

bars appellate review. (***People v. Johnson*** (1993) 6 Cal.4th 1, 52, abrogated on other grounds, *People v. Rogers* (2006) 39 Cal.4th 826, 879.)

S. WRITTEN INSTRUCTIONS [§ 13.29]

The California Supreme Court recommends that juries in capital cases be provided with written instructions so as to cure any inadvertent errors that may occur when the instructions are read aloud. (***People v. Huggins*** (2006) 38 Cal.4th 175, 190, fn. 3; ***People v. Seaton*** (2001) 26 Cal.4th 598, 673.)

At the request of counsel, the trial court collected the written copies of guilt-phase instructions from the jury and admonished them not to refer to those instructions further because they would be given a new set of instructions with a different focus. While this was consistent with CALJIC No. 8.84.1, and "'an effective, perhaps even preferable'" practice, the trial court must follow up such an admonition by later providing those instructions that are applicable to the penalty phase. (***People v. Moon*** (2005) 37 Cal.4th 1, 37.)

The presumption that jurors understand and follow the court's instructions includes written instructions. "When a discrepancy exists between the written instructions and the oral version of those instructions, the written instructions provided to the jury will control." (***People v. Edwards*** (2013) 57 Cal.4th 658, 746; see also, ***People v. Jurado*** (2006) 38 Cal.4th 72, 123 [when jury receives an instruction in both spoken and written forms, and the two versions vary, the court presumes the jury understood and followed the written version of the instruction].)

II. GUILT-PHASE & SANITY-PHASE INSTRUCTIONS IN PENALTY PHASE [§ 13.30]

The court is "not required to specify the applicable guilt phase instructions." (***People v. Butler*** (2009) 46 Cal.4th 847, 873.)

The California Supreme Court has encouraged a trial court to reread the guilt phase instructions regarding consideration of evidence in the penalty phase. Reinstruction with guilt phase instructions did not undermine the standard jury instructions that "convey to the jury its responsibility in deciding the appropriate punishment" and "provided guidance to the jury in determining the facts upon which its moral judgment was to be exercised." (***People v. Thomas*** (2012) 53 Cal.4th 771, 830-831.)

Since the trial court advised the jury that, unless otherwise indicated, all applicable guilt-phase instructions apply to the penalty phase, and to disregard any guilt-phase instructions that conflicted with the penalty-phase instructions, the court was not obligated to repeat all the guilt-phase instructions that applied to the penalty phase in instructing the jury for that phase. Nothing suggested the jury was misled into believing

instructions such as CALJIC Nos. 2.01, 2.09, 2.22, and 2.82, did not continue to apply at the penalty phase, so the trial court did not err in failing to give these particular instructions again a second time in the penalty phase. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1175.)

In the absence of a request, the trial court is under no duty to give an instruction at the penalty phase regarding evidence received at the guilt phase. (***People v. Maury*** (2003) 30 Cal.4th 342, 443.)

"[I]f the trial court instructs the jury at the penalty phase not to refer to instructions given at the guilt phase, it must later provide the jury with those instructions applicable to the evaluation of evidence at the penalty phase." (***People v. Lewis*** (2008) 43 Cal.4th 415, 535, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

It was harmless error not to instruct the jury in the penalty phase on evidentiary matters, after instructing the jury to disregard guilt-phase instructions, because defendant failed to demonstrate a reasonable likelihood that the instructions given in the case precluded the sentencing jury from considering any constitutionally relevant mitigating evidence. (***People v. Brasure*** (2008) 42 Cal.4th 1037, 1073-1074; ***People v. Moon*** (2005) 37 Cal.4th 1, 39; ***People v. Carter*** (2003) 30 Cal.4th 1166, 1221.)

Failure to complain below that court should have instructed which guilt instructions applied to the penalty phase forfeits the issue on appeal. (***People v. Livingston*** (2012) 53 Cal.4th 1145, 1178; ***People v. Rogers*** (2009) 46 Cal.4th 1136, 1175.)

By failing to request the instructions at trial, the defendant forfeited any claim with respect to the failure to reinstruct in particular on the respective duties of the judge and jury and the concluding instructions in the penalty phase. (***People v. Ervine*** (2009) 47 Cal.4th 745, 803-804.)

A. ACCOMPLICES [§ 13.31]

Instructions on accomplices should be given at the penalty phase where applicable. (***People v. Nelson*** (2011) 51 Cal.4th 198, 217; ***People v. Hernandez*** (2003) 30 Cal.4th 835, 874, disapproved on other grounds, *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32; ***People v. Mincey*** (1992) 2 Cal.4th 408, 461.)

In both the guilt and penalty phases of trial, the court ordinarily must instruct the jury sua sponte with CALJIC No. 3.18 to view an accomplice's testimony with care and caution when out-of-court statements to police by accomplices are admitted into evidence. The court has recognized an exception, however, when the penalty phase accomplice testimony relates to an offense of which the defendant has already been convicted. (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 207.)

It was not necessary to reinstruct the jury to find corroboration regarding penalty phase testimony by an accomplice about the details of a murder in Kansas for which the

defendant had already been convicted. Giving a corroboration instruction when the jury necessarily must find sufficient corroboration because the defendant has already been convicted could result in the jury focusing undue significance on the fact accomplice testimony was corroborated, rather than on the penalty issue. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1143.)

The court has no sua sponte duty to modify an accomplice instruction on its own to state it applies to out-of-court as well as in-court statements. (***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1251.)

No harmless error is found where the court fails to give an accomplice instruction when the potential bias of a witness was obvious, the jury was aware both the witness and the defendant were charged with murder, the witness's case was trailing behind defendant's, and the prosecutor told the jury not to believe everything the witness said. (***People v. Mincey*** (1992) 2 Cal.4th 408, 461.)

There is no entitlement to an accomplice instruction where defendant calls the accomplice as his own witness. (***People v. Clark*** (1992) 3 Cal.4th 41, 157, abrogation on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704; ***People v. DeSantis*** (1992) 2 Cal.4th 1198, 1247.)

B. ADMISSIONS – DEFENDANT – CALJIC No. 2.71 [§ 13.32]

The trial court is required to give an instruction admonishing the jury to view defendant's admissions with caution only upon request by the defense, even where defendant's admissions were solely inculpatory. (***People v. Jackson*** (2009) 45 Cal.4th 662, 694; see also ***People v. Livaditis*** (1992) 2 Cal.4th 759, 782-784.)

The trial court's failure to instruct on how to determine whether the defendant's statements were confessions or admissions was error where the trial court admonished the jury to disregard guilt phase instructions during the penalty phase. The defendant was not prejudiced, however, given that the penalty phase evidence was "relatively brief and quite straightforward." (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1082, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Error in giving CALJIC No. 2.71 in the penalty phase was found harmless because defendant's statements were entirely exculpatory. (***People v. Slaughter*** (2002) 27 Cal.4th 1187, 1201, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

C. BURDEN OF PROOF [§ 13.33]

> *Cross-Reference*: § 13.53, *re* Burden of proof

There is no reasonable likelihood the jury at the penalty phase would infer that it is required to engage in a different analysis on reasonable doubt than that already engaged in during the guilt phase. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1026.)

While it was error not to reinstruct on the definition of reasonable doubt where the trial court instructed the penalty jury to disregard all guilt phase instructions during the penalty phase, "its failure to do so was harmless. Absent any suggestion to the contrary, the jury would likely have assumed the reasonable doubt the court referred to at the penalty phase had the same meaning as the term had during the guilt phase. There is no reasonable likelihood the jury would have believed the reasonable doubt analysis it was required to engage in at the penalty phase was somehow different than the reasonable doubt analysis it had already engaged in at the guilt phase. That the court would not have changed the meaning of such an important term without saying so is a commonsense understanding of the instructions in the light of all that has taken place at the trial that is likely to prevail over technical hairsplitting. Additionally, the jury did not request a further explanation of the reasonable doubt standard, as it surely would have done had it been confused as to the meaning of reasonable doubt." (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1082, internal quotation marks & citations omitted, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

D. CIRCUMSTANTIAL EVIDENCE – CALJIC No. 2.01 [§ 13.34]

CALJIC No. 2.01, which ties circumstantial evidence to the reasonable-doubt standard and CALJIC 2.02 which addresses sufficiency of circumstantial evidence to prove a defendant's specific intent or mental state, need not be given in the penalty phase of a capital trial, where the only evidence the prosecution introduced in the penalty phase was victim impact evidence. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1234.)

CALJIC No. 2.01 is only required in the penalty phase where the prosecution substantially relies on circumstantial evidence to prove unadjudicated violent criminal conduct. "'Where circumstantial inference is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, the instruction may confuse and mislead, and thus should not be given.'" (***People v. Edwards*** (2013) 57 Cal.4th 658, 766 quoting ***People v. Brown*** (2003) 31 Cal.4th 518, 563.)

There is "no federal or state right to an instruction on circumstantial guilt phase evidence in aid of a penalty phase lingering doubt argument." (***People v. Edwards*** (2013) 57 Cal.4th 658, 766.)

Instructions on circumstantial evidence (CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1) do not negate the presumption-of-innocence or reasonable-doubt requirement. (***People v. Wilson*** (1992) 3 Cal.4th 926, 942-943.)

E. FAILURE TO TESTIFY [§ 13.35]

The trial court does not have a sua sponte duty to instruct the jury not to draw any inferences from a defendant's failure to testify. (***People v. Hawkins*** (1995) 10 Cal.4th 920, 964, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89; see ***People v. Davenport*** (1995) 11 Cal.4th 1171, 1231, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

F. HEARSAY – CALJIC No. 2.10 [§ 13.36]

Cross-Reference: § 3.63.3, *re* Limiting instruction

A limiting instruction (modified version of CALJIC No. 2.10) was properly given in the penalty phase to clarify that defendant's statements to a doctor were to be considered for the limited purpose of assessing the doctor's opinion. Defendant's statements to the doctor lacked sufficient indicia of reliability for due process considerations to preclude use of CALJIC No. 2.10. (***People v. Elliot*** (2005) 37 Cal.4th 453, 481-482.)

Defendant cannot insulate factual assertions and self-serving testimony in the penalty phase from any cross-examination simply by having an expert relate them to the jury. (***People v. Stanley*** (1995) 10 Cal.4th 764, 839.)

G. HUNG JURY [§ 13.37]

Defendant is not entitled to have the trial court explain to the jury what would happen in the event of a deadlock. (***People v. Lucas*** (2014) 60 Cal.4th 153, 320, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19; ***People v. Castaneda*** (2011) 51 Cal.4th 1292, 1351; ***People v. Gurule*** (2002) 28 Cal.4th 557, 648.)

The trial court did not err in refusing to instruct the jury on the consequences of a deadlock in responding to a jury note that asked, "What happens if the jury is unable to reach a unanimous decision?" A trial court is "not required to educate the jury on the

legal consequences of a possible deadlock." The proper focus of the jury's deliberations in the penalty phase is "which penalty to chose, and not whether to make the choice in the first place." Where the jury question comes early in the deliberations and it is not clear there is an actual deadlock as opposed to a hypothetical failure to agree, the "potential for mischief" from instructing on the consequences of a deadlock "is especially acute." (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1281.)

The California Supreme Court assumed without deciding, based on the tension between *People v. Waidla* (2000) 22 Cal.4th 690, 746 [holding court may instruct a deliberating jury in response to a request], and *People v. Belmontes* (1988) 45 Cal.3d 744, 814 [citing "potential confusion and misguiding jury in their proper role and function" by answering jury question on deadlock with language from section 190.4], that the trial court erred in instructing the jury by quoting section 190.4, subdivision (b), in response to jury's question about the effect of a deadlocked jury. (***People v. Lucas*** (2014) 60 Cal.4th 153, 320-321, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

H. INDIVIDUAL OPINION OF EACH JUROR – CALJIC No. 17.40 [§ 13.38]

A trial court has no duty to repeat CALJIC No. 17.40 at the penalty phase and a claim of error on that basis was forfeited on appeal for failing to request the instruction at trial. (***People v. Livingston*** (2012) 53 Cal.4th 1145, 1178.)

I. PRESUMPTION OF INNOCENCE [§ 13.39]

The trial court is not under any obligation to give an instruction on the presumption of innocence in connection with unadjudicated offenses offered in aggravation. (***People v. Benson*** (1990) 52 Cal.3d 754, 809-810.) That conclusion is not altered by ***Ring v. Arizona*** (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]. (***People v. Prieto*** (2003) 30 Cal.4th 226, 262-263.)

Failure to raise the issue of an instruction on the presumption of innocence in the penalty phase as to factor (b) evidence forfeited the claim on appeal. A claim of error was also meritless because the trial court instructed the jury that the guilt-phase instructions applied during the penalty phase except when they differed from the penalty-phase instructions, and those instructions discussed the presumption of innocence and the beyond-a-reasonable-doubt standard. (***People v. Rundle*** (2008) 43 Cal.4th 76, 188, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

There is no requirement that the jury be instructed on a presumption of life without possibility of parole in the penalty phase. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Jackson*** (2009) 45 Cal.4th 662, 701; ***People v. Perry*** (2006) 38 Cal.4th 302, 321; ***People v. Kipp*** (2001) 26 Cal.4th 1100, 1137.)

J. SANITY INSTRUCTIONS [§ 13.40]

The failure to specify which of the previous sanity-phase instructions continued to apply in the penalty phase was potentially misleading, and trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply. (Cf. CALJIC No. 8.84.1 (6th ed. 1996) & accompanying Use Note; ***People v. Weaver*** (2001) 26 Cal.4th 876, 982.)

K. SHACKLES / RESTRAINTS [§ 13.41]

The possibility that a witness's "fleeting and ambiguous references" during the penalty phase to the possibility the defendant might be in restraints did not create any duty to instruct the jury to disregard restraints in reaching their penalty verdict. "The purpose of requiring the instruction is to prevent the jury from inferring that, because a defendant charged with a violent crime is restrained, he is a violent person disposed to commit the charged crime. Where, however, as here, a defendant has been convicted of a special circumstance murder, the rationale requiring a sua sponte instruction is no longer applicable." (***People v. Lopez*** (2013) 56 Cal.4th 1028, 1080-1081, internal quotation marks & citations omitted, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

L. SINGLE WITNESS – CALJIC No. 2.27 [§ 13.42]

It was proper to give a modified CALJIC No. 2.27 (Single Witness) instruction at the penalty phase, with the phrase "required to be established by the prosecution" deleted. (***People v. Montiel*** (1993) 5 Cal.4th 877, 941, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

M. SYMPATHY [§ 13.43]

Trial court did not err in instructing the jury: "Sympathy for the family of the defendant, as opposed to defendant himself, is not a matter you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless and to the extent it illuminates some positive quality of the defendant's background or character." (***People v. Cordova*** (2015) 62 Cal.4th 104, 149.)

Instruction with CALJIC No. 8.85 which reads, "Sympathy for the family of the defendant is not a matter you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character" did not violate his federal constitutional rights. (***People v. Williams*** (2013) 56 Cal.4th 165, 197.)

An instruction on sympathy, which stated, in relevant part, "If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based

upon such sympathy or compassion alone, reject death as a penalty" was properly rejected as argumentative and duplicative of factor (k) in CALJIC No. 8.85. "'CALJIC No. 8.88 adequately informed the jurors that they could consider sympathy, mercy, and compassion in deciding whether death was the appropriate penalty.'" (***People v. Clark*** (2016) 63 Cal.4th 522, 640-642, quoting ***People v. Smith*** (2005) 35 Cal.4th 334, 371.)

The impact of a defendant's execution on his family may not be considered by the jury as mitigating. (***People v. Williams*** (2013) 56 Cal.4th 165, 197; ***People v. Smith*** (2005) 35 Cal.4th 334, 366-367.)

§ 13.43.1 CALJIC No. 1.00

The jury need not be affirmatively instructed it can consider sympathy. (***People v. Champion*** (1995) 9 Cal.4th 879, 943, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860.)

It is not error for the trial court to instruct the jury it may consider sympathy. (***People v. Hardy*** (1992) 2 Cal.4th 86, 203.)

It is error to instruct the jury it cannot consider sympathy. (***People v. Bandhauer*** (1970) 1 Cal.3d 609, 618.)

Giving CALJIC Nos. 1.00 or 8.84 in penalty phase, which advise the jury not to be swayed by mere sympathy, is not federal constitutional error. (***California v. Brown*** (1987) 479 U.S. 538 [107 S.Ct. 837, 93 L.Ed.2d 934]; ***People v. Brown*** (1988) 45 Cal.3d 1247, 1253.)

Failure to countermand CALJIC No. 1.00 in the penalty phase does not constitute error where the jury was not misled into believing it could not consider sympathy for defendant in determining penalty. (***People v. Frye*** (1998) 18 Cal.4th 894, 1025, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Medina*** (1995) 11 Cal.4th 694, 779-780.)

Determining whether the jury was adequately instructed on the role played by sympathy in the penalty phase, and on the breadth of its duty to consider proper matters in mitigation, entails analysis of the record as a whole, including instructions and the prosecutor's and defense counsel's arguments. The key inquiry is whether the jurors may have been misled into believing that mitigating evidence about defendant's character or background must be ignored. (***People v. Melton*** (1988) 44 Cal.3d 713, 758-760; ***People v. Howard*** (1988) 44 Cal.3d 375, 432.)

The trial court did not err in instructing the jury it may not consider sympathy for the defendant's family or friends. Sympathy for the defendant's loved ones and their reaction to a death verdict do not relate to either the circumstances of the capital crime or the character or background of the accused. (***People v. Bemore*** (2000) 22 Cal.4th 809, 856.)

§ 13.43.2 "Disregard of Consequences" Portion of CALJIC No. 1.00

Although it may not be error to instruct the penalty jury to disregard the consequences of its decision, this portion of CALJIC No. 1.00, like the anti-sympathy direction, should not be given in the penalty phase. (***People v. Wade*** (1988) 44 Cal.3d 975, 998; ***People v. Howard*** (1988) 44 Cal.3d 375, 443.)

It is error to instruct the jury to disregard the consequences of its decision under CALJIC No. 1.00. However, if the jury was not misled, there is no error. (***People v. Nicolaus*** (1991) 54 Cal.3d 551, 585; ***People v. Pensinger*** (1991) 52 Cal.3d 1210, 1263.)

Where no anti-sympathy instruction is given, it is not error to give the "regardless of the consequences" instruction. (***People v. Wrest*** (1992) 3 Cal.4th 1088, 1113.)

§ 13.43.3 Mercy

The trial court did not err in refusing defense requested instruction on mercy as the standard instructions were sufficient and "no specific instruction on mercy was required." (***People v. Sanchez*** (2016) 63 Cal.4th 411, 485.)

Standard CALJIC instructions regarding section 190.3, factor (k) (see CALJIC Nos. 8.85 and 8.88), "leave adequate room for the consideration of mercy." (***People v. Thomas*** (2012) 53 Cal.4th 771, 827; ***People v. Burney*** (2009) 47 Cal.4th 203, 261 [CALJIC No. 8.85 adequately instructs on sympathy and mercy]; ***People v. Brasure*** (2008) 42 Cal.4th 1037, 1070 [same].)

Standard jury instructions (CALJIC Nos. 8.15 and 8.88) adequately instructed jury may exercise mercy, even though word "mercy" is not specifically included or defined. (***People v. Wallace*** (2009) 44 Cal.4th 1032, 1090.)

A trial court properly refused an instruction on mercy informing the jury it can exercise mercy based on how execution would affect defendant's family members because sympathy for a defendant's family is not itself a mitigating factor. (***People v. Thomas*** (2012) 53 Cal.4th 771, 827.)

N. UNANIMITY [§ 13.44]

"The death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing, deprive defendant of the right to a jury trial, or constitute cruel and unusual punishment on the ground that it does not require either unanimity as to the truth of aggravating circumstances or findings beyond a reasonable doubt that an aggravating circumstance (other than Pen. Code, § 190.3, factor (b) or (c) evidence) has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence. Nothing in *Hurst v. Florida* (2016) 577 U.S. ___ [193 L.Ed.2d

504, 136 S.Ct. 616], [FN 16] *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856], *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S. Ct. 2531], *Ring v. Arizona*, *supra*, 536 U.S. 584, or *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], affects our conclusions in this regard." (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235, internal quotations, footnotes, & citations omitted.)

"Neither the federal or state constitution requires a jury make *unanimous* findings concerning the particular aggravating circumstances, find all aggravating factors *beyond a reasonable doubt*, or find beyond a reasonable doubt that the aggravating factors *outweigh* the mitigating factors. The United States Supreme Court's recent decisions interpreting the Sixth Amendment jury-trial guarantee do not alter that conclusion." (***People v. Salazar*** (2016) 63 Cal.4th 214, 255, internal citations & quotation marks omitted; italics in original.)

There is no requirement under state or federal law that the jury unanimously agree on the aggravating circumstances that support the death penalty. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1129; ***People v. Jackson*** (2009) 45 Cal.4th 662, 701; ***People v. Hoyos*** (2007) 41 Cal.4th 872, 926, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641; ***People v. Stanley*** (2006) 39 Cal.4th 913, 963.) There is no requirement that a jury unanimously agree as to each instance of unadjudicated criminal activity before considering it. (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 308.) However, penalty-phase instructions must make clear that an individual juror may consider other violent crimes in aggravation only if the juror is satisfied beyond a reasonable doubt that defendant committed those crimes. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1052.)

There is no need to instruct that the jury need not be unanimous in finding the existence of mitigating factors. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256.)

The absence of a non-unanimity instruction regarding mitigating evidence did not undermine the defendant's constitutional rights. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1140.)

The phrasing of standard penalty-phase instructions did not support a conclusion that the jury would misconstrue those instructions to require unanimity before finding a mitigation circumstance. Thus, the trial court was not required to instruct the jury that unanimity not required for finding of mitigation circumstance. (***People v. Phillips*** (2000) 22 Cal.4th 226, 239.)

O. WITNESS WILLFULLY FALSE STATEMENT – CALJIC No. 2.21 [§ 13.45]

CALJIC No. 2.21, concerning the testimony of a witness who makes a willfully false statement, may be given at the penalty phase when appropriate under the evidence.

(***People v. Johnson*** (1993) 6 Cal.4th 1, 48, abrogated on other grounds, *People v. Rogers* (2006) 39 Cal.4th 826, 879.)

III. PENALTY PHASE – AGGRAVATING / MITIGATING FACTORS [§ 13.50]

A. GENERALLY [§ 13.51]

An instruction that evidence should be considered only if it was relevant to one of the statutory factors would be proper, but is not required sua sponte. (***People v. Coddington*** (2000) 23 Cal.4th 529, 637, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

An instruction to consider only Penal Code section 190.3 aggravating factors was unnecessary where no extraneous aggravating evidence had been introduced. (***People v. Espinoza*** (1992) 3 Cal.4th 806, 827.)

§ 13.51.1 Proper Use of 1977 Law and 1978 Law in Instructing Jury

It is error to instruct the jury under the 1978 death-penalty law in a 1977 death-penalty case. (***People v. Rodriguez*** (1986) 42 Cal.3d 730, 783.) However, the error can be harmless. (***People v. Frierson*** (1991) 53 Cal.3d 730, 749-750; ***People v. Murtishaw*** (1989) 48 Cal.3d 1001, 1025-1031.)

The trial court properly refused defendant's request for a Penal Code section 190.3 "shall" instruction (on effect of mitigating evidence) under the 1978 law in a case tried under the 1977 law. (***People v. Stankewitz*** (1990) 51 Cal.3d 72, 109.)

§ 13.51.2 Limiting Instructions *re* Evidence of Defendant's Bad Character From Guilt Phase

There is no sua sponte duty to instruct the penalty-phase jury not to consider evidence in the guilt phase as showing bad character. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 475.)

In light of the language in CALJIC No. 8.84.1 to consider "all of the evidence which has been received during any part of" the trial, the jury might have considered facts presented during the guilt phase as evidence of bad character and, thus, as aggravating evidence unauthorized by statute. However, in the absence of a request, the trial court did not have an obligation to instruct the jury to consider such evidence only for the light it shed on defendant's guilt. (***People v. Champion*** (1995) 9 Cal.4th 879, 946-947, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860.)

Defendant's claim that the trial court erred in instructing the jury it could consider guilt-phase evidence which included defendant's use of racial epithets in describing the victim was waived because defendant requested the allegedly erroneous instruction (CALJIC No. 8.85 (5th ed. 1988)) and failed to seek a limiting instruction. (***People v. Quartermain*** (1997) 16 Cal.4th 600, 630.)

B. WEIGHT TO BE GIVEN FACTORS [§ 13.52]

A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision. The sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty. (***People v. Sanders*** (1995) 11 Cal.4th 475, 564.)

§ 13.52.1 No Requirement to Identify Factors as Aggravating or Mitigating

There is no federal constitutional requirement to identify factors as aggravating or mitigating. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." (***Tuilaepa v. California*** (1994) 512 U.S. 967, 979 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

The California Supreme Court has "repeatedly held, there is no requirement that a court instruct a jury as to which of the factors enumerated in section 190.3 are aggravating and which are mitigating." (***People v. Clark*** (2016) 63 Cal.4th 522, 640; ***People v. Souza*** (2012) 54 Cal.4th 90, 140 [instruction is not flawed because it fails to "identify which facts may be considered aggravating and which may be considered mitigating]; ***People v. Nelson*** (2011) 51 Cal.4th 198, 226; ***People v. Cruz*** (2008) 44 Cal.4th 636, 681.)

There is no constitutional requirement that Penal Code section 190.3 define which factors are aggravating and which are mitigating. (***People v. Nelson*** (2011) 51 Cal.4th 198, 226; ***People v. Espinoza*** (1992) 3 Cal.4th 806, 827; ***People v. Raley*** (1992) 2 Cal.4th 870, 919.)

An instruction is not flawed because it fails to "identify which facts may be considered aggravating and which may be considered mitigating." (***People v. Souza*** (2012) 54 Cal.4th 90, 140; ***People v. Cruz*** (2008) 44 Cal.4th 636, 681; ***People v. Pollock*** (2004) 32 Cal.4th 1153, 1193.)

The aggravating or mitigating nature of the various factors should be self-evident to any reasonable person within the context of each particular case; thus, the trial court does not err in refusing to instruct the jury that particular factors could only be considered in mitigation. (***People v. Pollock*** (2004) 32 Cal.4th 1153, 1193; ***People v. Musselwhite*** (1998) 17 Cal.4th 1216, 1268.)

§ 13.52.2 No Requirement to Define "Aggravating" and "Mitigating"

It is well established that the words *aggravating* and *mitigating* are commonly understood terms that the trial court need not define for the jury. (***People v. Streeter*** (2012) 54 Cal.4th 205, 263, fn. 8.)

An instruction defining *mitigation* in terms of moral culpability, under some circumstances, could mislead jury. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 736.)

§ 13.52.3 No Requirement to Instruct Absence of Mitigating Factor Not Aggravating

The trial court is not required to instruct that the absence of a mitigating factor is not aggravating. (***People v. Bryant*** (2014) 60 Cal.4th 335, 458; ***People v. Nelson*** (2011) 51 Cal.4th 198, 226; ***People v. Jackson*** (2009) 45 Cal.4th 662, 695; ***People v. Carey*** (2007) 41 Cal.4th 109, 133; ***People v. Stanley*** (2006) 39 Cal.4th 913, 962.)

§ 13.52.4 No Requirement to Instruct Mitigating Factors Need Not be Proved Beyond a Reasonable Doubt

A trial court is not required to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt. (***Kansas v. Carr*** (2016) 577 U.S. ___ [136 S.Ct. 633, 642, 193 L.Ed.2d 535]; ***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Rangel*** (2016) 62 Cal.4th 1192, 1233-1234; ***People v. Sandoval*** (2015) 62 Cal.4th 394, 446.)

§ 13.52.5 No Requirement to Instruct Need Not Be Unanimous in Finding Mitigating Factors

There is no requirement that jury be told it need not be unanimous in finding the existence of a mitigating factor. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Sandoval*** (2015) 62 Cal.4th 394, 446.)

§ 13.52.6 No Sua Sponte Duty to Instruct That Only Factors (a) through (j) Can Be Considered in Aggravation

The trial court must, upon request, give instruction that only factors (a) through (j) of section 190.3 may be considered in aggravation. (***People v. Berryman*** (1993) 6 Cal.4th 1048, 1100, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800,

823, fn. 1; ***People v. Gordon*** (1990) 50 Cal.3d 1223, 1275, overruled on other grounds, *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

§ 13.52.7 No Duty to Instruct Factors (d)-(h), (j) Can Only Be Considered in Mitigation

There is no requirement to instruct the jury that mitigating factors can only be mitigating. (***People v. Bryant*** (2014) 60 Cal.4th 335, 458; ***People v. Perry*** (2006) 38 Cal.4th 302, 319; ***People v. Farnam*** (2002) 28 Cal.4th 107, 191.)

The trial court is not required to instruct jury that section 190.3 factors (d), (e), (f), (g), (h), and (j) could only mitigate, and not aggravate, the crime. (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1430; ***People v. Elliot*** (2005) 37 Cal.4th 453, 488; ***People v. Brown*** (2004) 33 Cal.4th 382, 402.)

Since most of the 11 factors listed in CALJIC No. 8.84.1 can only be mitigating, it was error for the trial court to instruct the jury that all of them could be aggravating factors or mitigating factors. However, since that instruction was requested by the defense, any error was invited and cannot be raised on appeal. (Record does not establish ineffective assistance of counsel.) (***People v. Wader*** (1993) 5 Cal.4th 610, 657-658.)

An instruction which told the jury that the list of factors in CALJIC No. 8.84.1 "contains every aggravating factor which you may consider" was a correct statement of law and would not have been understood by the jury to mean that factor (k) was aggravating. (***People v. Beeler*** (1995) 9 Cal.4th 953, 996-997, abrogated on other grounds recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705.)

§ 13.52.8 No Duty to Instruct That One Mitigating Factor Is Sufficient to Support a Verdict of Life Without Possibility of Parole

The standard jury instructions adequately inform the jury of their sentencing responsibilities and it is not necessary to instruct that one mitigating factor could outweigh aggravating factors, or is sufficient for returning a verdict of life imprisonment without parole. (***People v. Jones*** (2012) 54 Cal.4th 1, 79-80.)

§ 13.52.9 Deleting Inapplicable Factors

It is not error to instruct with CALJIC No. 8.85 without deleting inapplicable factors. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256.)

The court is not required to delete from the standard instruction assertedly inapplicable mitigating factors. (***People v. Bryant*** (2014) 60 Cal.4th 335, 458.)

The trial judge is not required to edit CALJIC No. 8.84.1 by deleting the aggravating and mitigating factors which are clearly inapplicable under the facts of the present case. (***People v. Jackson*** (2009) 45 Cal.4th 662, 700; ***People v. Schmeck*** (2005) 37 Cal.4th 240, 305, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; ***People v. Anderson*** (2001) 25 Cal.4th 543, 600.)

There is no requirement to delete inapplicable factors from CALJIC No. 8.85. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1179; ***People v. Cook*** (2007) 40 Cal.4th 1334, 1366; ***People v. Perry*** (2006) 38 Cal.4th 302, 319; ***People v. Smith*** (2005) 35 Cal.4th 334, 368-369.)

§ 13.52.10 No Requirement That Jury "Factor Out" What Is Common to All First Degree Murders

There is no constitutional requirement that, in considering the aggravating circumstances of a capital crime, the penalty-phase jury must "factor out" those elements common to all first degree premeditated or felony-murders. (***People v. Jones*** (2012) 54 Cal.4th 1, 76-77; ***People v. Earp*** (1999) 20 Cal.4th 826, 901; ***People v. Frye*** (1998) 18 Cal.4th 894, 1027, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 13.52.11 Not Error to Delete Reference to Mitigating Factor Where No Evidence Supports Existence of Factor

Deleting a reference to the mitigating factor "effects of intoxication" was not error where there was no evidence defendant had taken any intoxicants at the time of the crime. (***People v. Thomas*** (1992) 2 Cal.4th 489, 542-543; ***People v. Lucky*** (1988) 45 Cal.3d 259, 296.)

§ 13.52.12 Non-Prejudicial Erroneous Deletions

Deletion of factor (b) regarding other violent-crimes evidence was invited by defense counsel's request and non-prejudicial, since the only other crime admitted into evidence was a robbery that would have fallen within the omitted factor (b). (***People v. Turner*** (1990) 50 Cal.3d 668, 712-713.)

Deleting an applicable mitigating factor (h) regarding the effect of alcohol was error, but was not prejudicial because it did not prevent the jury from considering evidence of alcohol ingestion in mitigation under another instruction directing the jury to consider the defendant's physical condition. (***People v. Marshall*** (1996) 13 Cal.4th 799, 855-858.)

§ 13.52.13 Overlap / Double-Counting Factors (a), (b), (c)

The California Supreme Court has recognized a "theoretical problem" posed by the language in section 190.3, factor (a), which directs a jury to consider both "circumstances of the crime" and the "special circumstances" that have been found true. If a jury is given no clarifying instruction, it might conceivably double-count any circumstances of the crime that are also special circumstances, and therefore, upon a defendant's request, the trial court should instruct the jury not to double count circumstances of the crime that are also special circumstances. (***People v. Cowan*** (2010) 50 Cal.4th 401, 499; ***People v. Ramirez*** (2006) 39 Cal.4th 398, 476.) However, where the defendant does not request an instruction admonishing the jury not to double-count special circumstances, the California Supreme Court has repeatedly held that the trial court has no duty to instruct the jury sua sponte. (***People v. Salazar*** (2016) 63 Cal.4th 214, 254-255; ***People v. Ramirez*** (2006) 39 Cal.4th 398, 476.)

A trial court should, when requested, instruct the jury against "double-counting" multiple felony-murder special circumstances, i.e., that the jury should not double-count the underlying felony (e.g., robbery or burglary) both as a circumstance of the murder and again as a special circumstance. (***People v. Monterroso*** (2004) 34 Cal.4th 743, 789.)

A trial court's refusal to give a requested instruction cautioning against double-counting under factor (a) does not warrant reversal absent misleading argument by the prosecutor. (***People v. Ayala*** (2000) 24 Cal.4th 243, 289.)

In the absence of prosecutorial argument to the contrary, it is unlikely the jury would give undue weight under factor (a) to evidence which proved the circumstances of the offense and also proved the special circumstance. (***People v. Medina*** (1995) 11 Cal.4th 694, 779.)

There is no error in failing to instruct that multiple felony-murder special circumstances should be considered as one. It is constitutionally permissible for a sentencer "to determine that a death-eligible murderer is more culpable, and thus more deserving of death, if he not only robbed the victim but committed an additional and separate felonious act, burglary, in order to facilitate the robbery and murder." (***People v. Melton*** (1988) 44 Cal.3d 713, 767-768, disapproving contrary language in *People v. Harris* (1984) 36 Cal.3d 36 (plur. opn.); accord, ***People v. Monterroso*** (2004) 34 Cal.4th 743, 789.)

No inappropriate "overlap" exists where a prior felony conviction for violent conduct is used under both factors (b) and (c). The two factors have entirely different focuses. If one prior course of conduct meets both criteria, it may be argued under both. (***People v. Davenport*** (1995) 11 Cal.4th 1171, 1228-1229, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; ***People v. Fierro*** (1991) 1 Cal.4th 173, 230, disapproved on other grounds by *People v. Thomas* (2012) 54 Cal.4th 908, 941, and *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 205.)

CALJIC No. 8.84.1 (1986 rev.) is not erroneous or misleading and does not imply the jury may "double count" evidence under factors (a) and (c). (***People v. Mayfield*** (1997) 14 Cal.4th 668, 805, abrogated on other grounds, *People v. Scott* (2015) 61 Cal.4th 363, 390.)

C. BURDEN OF PROOF [§ 13.53]

"Neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires that jurors in a capital case be instructed that they must find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." (***People v. Salazar*** (2016) 63 Cal.4th 214, 255, internal quotation marks & citations omitted.)

Trial courts should not instruct the jury in the penalty phase regarding a burden of persuasion because "[u]nlike a guilt determination, the sentencing function is inherently moral and normative, not factual, and hence, not susceptible to a burden-of-proof quantification." (***People v. Salazar*** (2016) 63 Cal.4th 214, 255, internal quotation marks & citations omitted; ***People v. O'Malley*** (2016) 62 Cal.4th 944, 1014 [same].)

"Neither the federal Constitution nor section 520 of the Evidence Code requires that the jury be instructed that the prosecution has the burden of proof with regard to the truth of aggravating circumstances or the appropriateness of the death penalty, and the trial court is not required to explicitly tell the jury that neither party bears the burden of proof." (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1429.)

Decisions interpreting the jury-trial guarantee in the Sixth Amendment (***Cunningham v. California*** (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; ***United States v. Booker*** (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]; ***Blakely v. Washington*** (2004) 542 U.S. 961 [125 S.Ct. 21, 159 L.Ed.2d 851]; ***Ring v. Arizona*** (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; ***Apprendi v. New Jersey*** (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]) have not changed the prior conclusions of the California Supreme Court regarding whether a burden of proof or unanimity is required at the penalty phase. (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1250 & fn. 22.)

The statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance. The special circumstance thus operates as the functional equivalent of an element of the greater offense of capital murder. The jury's finding beyond a reasonable doubt of the truth of a special circumstance satisfies the requirement of the Sixth Amendment that a jury find facts that increase a penalty of a crime beyond the statutory minimum. (***People v. Lewis*** (2008) 43 Cal.4th 415, 521, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

The jury need not find beyond a reasonable doubt that the death penalty is appropriate. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1129; ***People v. Burney*** (2009)

47 Cal.4th 203, 268; ***People v. Carrington*** (2009) 47 Cal.4th 145, 199-200; ***People v. Stanley*** (2006) 39 Cal.4th 913, 963.)

Unanimous agreement beyond reasonable doubt that aggravating circumstances outweigh mitigating is not required. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1129; ***People v. Burney*** (2009) 47 Cal.4th 203, 268; ***People v. Alcala*** (1992) 4 Cal.4th 742, 809.)

The trial court need not instruct that "no party bears the burden of proof on the matter of punishment." (***People v. Lewis*** (2009) 46 Cal.4th 1255, 1319.)

California's death-penalty law expresses no preference as to the appropriate punishment, and the trial court did not err in so instructing the jury. (***People v. Samayoa*** (1997) 15 Cal.4th 795, 852.)

The trial court is not required to instruct the penalty jury on a presumption of life without possibility of parole. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Cage*** (2015) 62 Cal.4th 256, 293-294; ***People v. Boyce*** (2014) 59 Cal.4th 672, 724; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 958.)

D. FACTOR (a) – CIRCUMSTANCES OF THE CRIME [§ 13.54]

The trial court is not required to give an instruction clarifying what is meant by circumstances of the crime as a factor in deciding whether to impose the death penalty under Penal Code section 190.3, subdivision (a). (***People v. Wader*** (1993) 5 Cal.4th 610, 663-664.)

§ 13.54.1 Lack of Remorse

It is not error to refuse to instruct that the jury may not consider lack of remorse as an aggravating factor where the prosecutor did not argue matters precluded by law, such as the defendant's claim of innocence evidences a lack of remorse, or a lack of remorse unrelated to the crime can be considered as a circumstance in aggravation. (***People v. Harris*** (2005) 37 Cal.4th 310, 361.)

Defendant's claim that "a special instruction is required directing the jury how to assess and consider the absence of remorse rejected … [b]ecause the phrase has no technical or specialized meaning, an instruction as to its meaning and what weight it should or should not be given is unnecessary. In this case, there was no danger the jury would consider the absence of remorse to be a factor in aggravation in and of itself because it was specifically instructed that the absence of a statutory mitigating factor did not constitute an aggravating factor. The prosecutor made the same point when he told the jury the absence of remorse could be considered only in the context of factor (a), the circumstances of the crime." (***People v. Tully*** (2012) 54 Cal.4th 952, 1059.)

E. FACTOR (b) – CRIMINAL ACTIVITY INVOLVING FORCE OR VIOLENCE [§ 13.55]

§ 13.55.1 Generally

The criminal activity involving force or violence referred to in Penal Code section 190.3, subdivision (b), is limited to conduct other than the crime for which the death penalty is sought. To avoid any possible confusion, trial courts should expressly instruct the jury on this point. However, failure to do so is usually harmless absent misleading prosecutorial argument. (***People v. Rogers*** (2006) 39 Cal.4th 826, 898; ***People v. Webster*** (1991) 54 Cal.3d 411, 452-453.)

§ 13.55.2 Nature of "Other Crimes"

Violent uncharged crimes that were before the jury as circumstances of the charged crimes (prior domestic violence incidents) were not improperly considered by the jury as factor (b) crimes, as CALJIC No. 8.85 made clear to the jury that only evidence of criminal activity other than the crimes for which the defendant was being tried could be considered. (***People v. Russell*** (2010) 50 Cal.4th 1228, 1270-1271.)

Where prior acts of violence would support conviction under more than one criminal statute, the trial court does not err by choosing one statute to describe the conduct rather than another which defendant requests. (***People v. Memro*** (1995) 11 Cal.4th 786, 881, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)

A trial court is under no obligation to specify for the jury the violent criminal activity that may be considered. Accordingly, it is defense counsel's responsibility to point out if an incident is omitted from the list of factor (b) evidence in the instruction and request a more complete instruction on the subject. When the defendant fails to do so, the contention that the jury was not adequately instructed as to the violent activity it may consider is forfeited on appeal. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1122.)

§ 13.55.3 Elements of Other Crimes

Absent a request, there is no duty to instruct the jury regarding the names or elements of other crimes. (***People v. Johnson*** (2015) 61 Cal.4th 734, 778; ***People v. Bacon*** (2010) 50 Cal.4th 1082, 1122; ***People v. Anderson*** (2001) 25 Cal.4th 543, 589, fn. 14 [noting *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], does not require otherwise]; ***People v. Barnett*** (1998) 17 Cal.4th 1044, 1175; ***People v. Price*** (1991) 1 Cal.4th 324, 489 [also not required to instruct on lesser included offenses].)

"The fact that defendant offered to stipulate that the prior crimes occurred did not eliminate the prosecutor's right to have the jury instructed on the elements of those crimes." (***People v. McDowell*** (2012) 54 Cal.4th 395, 442.)

A trial court, however, may instruct on the elements of unadjudicated crimes on its own motion when it is "'"vital to a proper consideration of the evidence."' [Citation.]" (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1147, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Although there is no sua sponte duty to instruct the jury regarding elements of unadjudicated crimes, when the court does so, the instructions should be complete and accurate. Therefore, the California Supreme Court assumes, without deciding, that penalty instructions on the elements of aggravating "other crimes" should include, on the court's own motion if necessary, any justified-intoxication instructions. (***People v. Montiel*** (1993) 5 Cal.4th 877, 942, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

The trial court's instruction to the jury concerning the factor (b) evidence did not improperly removed from its consideration whether the defendant's acts constituted criminal activity, i.e., violated a criminal statute. (***People v. Moore*** (2011) 51 Cal.4th 1104, 1139; ***People v. Harris*** (2008) 43 Cal.4th 1269, 1311-1312.)

§ 13.55.4 Defenses to Uncharged Crimes

It is within the discretion of the trial court to refuse a requested instruction regarding a defense to a crime (manslaughter) presented under factor (b) where the jury had before it the evidence and argument from which it could rationally assess the defendant's degree of culpability for the prior violent crime, and the legal label (manslaughter) was not vital to that argument; and because giving the instruction could have confused the jurors as to their task in the penalty phase. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1126.)

§ 13.55.5 Reasonable Doubt

People v. Robertson (1982) 33 Cal.3d 21, 53-55, 60-62, requires a trial court to instruct the jury at the penalty phase that uncharged crimes must be proved true beyond a reasonable doubt before they can be considered by the jury as aggravating factors in the penalty determination. (***People v. Russell*** (2011) 50 Cal.4th 1228, 1267.)

Evidence which may show other crimes does not necessarily require a "proof beyond a reasonable doubt" instruction where the prosecution offers it for some other purpose (i.e., circumstances of the present offense, or rebuttal to mental-state evidence) and does not argue that it constitutes "other-crimes evidence." (***People v. Williams*** (1988) 44 Cal.3d 1127, 1146-1147.)

No error in failing to instruct sua sponte that uncharged crimes must be proven true beyond a reasonable doubt before being considered as aggravating factor where prosecution did not argue that any factor (b) evidence had been presented. (***People v. Russell*** (2011) 50 Cal.4th 1228, 1268; ***People v. Benavides*** (2005) 35 Cal.4th 69, 113 [no sua sponte duty when evidence of uncharged acts of violence admitted at the guilt phase and is not referred to at the penalty phase]; ***People v. Cox*** (2003) 30 Cal.4th 916, 964 [same], overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

There is no unanimity requirement regarding proof beyond a reasonable doubt for purposes of considering factor (b) crimes as aggravating factors in the penalty determination. (***People v. D'Arcy*** (2010) 48 Cal.4th 257, 308.)

It is not necessary to instruct the jury it must find beyond a reasonable doubt conduct considered under factor (b) when the defendant has already been convicted of the crime in question. The reasonable doubt instruction is required for *unadjudicated* violent criminal acts because the lack of a conviction raises reliability concerns. Where defense is disputing conduct (whether broken bottle intentionally used as a weapon to slit prior murder victim's throat) that formed the basis of the crime for which defendant has already been convicted (second-degree murder), and not some other crime with which he could have been charged, but was not, there is no requirement the trial court give an additional reasonable doubt instruction regarding that conduct as factor (b) evidence. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1123.)

In the absence of evidence to the contrary, it is presumed that the jury follows the instruction not to consider other-violent-crimes evidence unless it has found beyond a reasonable doubt that the defendant committed the offenses. (***People v. Koontz*** (2002) 27 Cal.4th 1041, 1089.)

§ 13.55.6 Harmless Error

Robertson error (failure to instruct uncharged crimes must be proven beyond a reasonable doubt before considered as aggravating factor in penalty determination) is a matter of state law and does not create a constitutionally protected liberty interest. Thus, consistent with the Constitution, the California Supreme Court may apply the state harmless-error analysis to *Robertson* error, i.e., whether it is "reasonably possible" the failure to instruct affected the verdict. (***People v. Avena*** (1996) 13 Cal.4th 394, 429-432 [error harmless where evidence of uncharged crime was "quite strong" and defendant presented no contrary evidence].)

Even if the beyond-a-reasonable-doubt instruction had been required, its absence would not have been prejudicial because the evidence of the defendant's violent crime is uncontroverted. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1123-1124.)

The erroneous failure to give a beyond-a-reasonable-doubt instruction as to unadjudicated criminal activity was harmless where the prosecutor, in argument, conceded that the jury could not consider such evidence unless proved beyond a

reasonable doubt and told the jury he was not asking them to make that finding. (***People v. Champion*** (1995) 9 Cal.4th 879, 950, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860.)

"Small errors in the reasonable doubt instruction that are not likely to confuse or mislead the jury are harmless." (***People v. Hawkins*** (1995) 10 Cal.4th 920, 963, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

F. FACTOR (c) – PRIOR FELONY CONVICTIONS [§ 13.56]

As a matter of state law, juries should be instructed with the beyond-a-reasonable-doubt standard of proof regarding evidence of the fact of a criminal conviction admitted under 190.3 factor (c). Any error in failing to instruct that the burden of proof for factor (c) evidence is beyond a reasonable doubt is harmless error unless it is reasonably possible the omission affected the verdict. (***People v. Williams*** (2010) 49 Cal.4th 405, 459.)

A trial court need not instruct that the absence of prior felony convictions is necessarily mitigating, even if requested to do so. (***People v. Russell*** (2010) 50 Cal.4th 1228, 1269; ***People v. Monterroso*** (2004) 34 Cal.4th 743, 788.)

Instructional error which allowed the jury to consider a subsequent felony conviction under Penal Code section 190.3, subdivision (c), was harmless where the conduct was properly admitted under subdivision (b). (***People v. Ashmus*** (1991) 54 Cal.3d 932, 999, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

CALJIC No. 8.84.1, factors (b) and (c), pertains only to criminal acts other than those for which defendant was convicted in the present proceeding. It would be improper for the jury to consider the present crimes as separate aggravating factors. To avoid any possibility of confusion, trial courts should expressly instruct that factors (b) and (c) are limited to crimes other than the present ones. (***People v. Champion*** (1995) 9 Cal.4th 879, 945, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860; ***People v. Miranda*** (1987) 44 Cal.3d 57, 105-106, fn. 28, overruled on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

G. FACTOR (d) – EXTREME MENTAL OR EMOTIONAL DISTURBANCE [§ 13.57]

CALJIC No. 8.84.1, factor (d), which allows the jury to consider whether the crime was committed while defendant suffered "extreme mental or emotional disturbance" does not unconstitutionally preclude the jury from considering mental or emotional disturbances which are not "extreme." The "catch-all" provisions in factor (k) properly allow this. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 847-848; ***People v. Farley*** (2009) 46 Cal.4th 1053, 1134; ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1429;

People v. Davenport (1995) 11 Cal.4th 1171, 1230, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

H. FACTOR (f) – MORAL-JUSTIFICATION EXTENUATION [§ 13.58]

The instruction which speaks to "moral justification" is not unconstitutionally vague because it does not serve to narrow class of those eligible for death penalty. Since it is a factor in mitigation and the jury is not limited to statutory mitigation, it is not vague. (***People v. Visciotti*** (1992) 2 Cal.4th 1, 73-75.)

Instruction of factor (f) did not need modification in light of factor (k). (***People v. Lang*** (1989) 49 Cal.3d 991, 1037, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1190; ***People v. Johnson*** (1989) 47 Cal.3d 1194, 1247.)

I. FACTOR (g) – EXTREME DURESS OR SUBSTANTIAL DOMINATION BY ANOTHER [§ 13.59]

Factor (g) which sets forth as a mitigating circumstance whether defendant acted under *extreme* duress or under *substantial* domination of another person includes lesser forms of duress and domination when read in conjunction with factor (k). (***People v. Wright*** (1990) 52 Cal.3d 367, 444, overruled in part, *People v. Williams* (2010) 49 Cal.4th 405, 459; ***People v. Morales*** (1989) 48 Cal.3d 527, 568, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459; ***People v. Adcox*** (1988) 47 Cal.3d 207, 270.)

The instruction which speaks to "extreme" duress is not unconstitutionally vague because it does not serve to narrow class of those eligible for death penalty. Since it is a factor in mitigation and the jury is not limited to statutory mitigation, it is not vague. (***People v. Visciotti*** (1992) 2 Cal.4th 1, 73-75.)

J. FACTOR (h) – MENTAL DISEASE OR DEFECT [§ 13.60]

"[T]he statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors." (***People v. Morrison*** (2004) 34 Cal.4th 698, 730.)

K. FACTOR (i) – AGE [§ 13.61]

The trial court is not required to instruct that age is relevant only to mitigation. (***People v. Verdugo*** (2010) 50 Cal.4th 263, 304; ***People v. Burney*** (2009) 47 Cal.4th 203, 257; ***People v. Panah*** (2005) 35 Cal.4th 395, 499-500.)

L. FACTOR (j) – ACCOMPLICE OR RELATIVELY MINOR PARTICIPANT [§ 13.62]

The California Supreme Court has not decided whether factor (j) can be considered aggravating. (***People v. Hillhouse*** (2002) 27 Cal.4th 469, 508.) However, in dicta, the Court suggests that the jury can consider the fact the defendant acted alone as a circumstance of the crime under factor (a), and that it matters little whether the jury considers that fact under factor (a) or factor (j). (***People v. Carpenter*** (1997) 15 Cal.4th 312, 414-415, abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176, 1191.)

M. FACTOR (k) – CATCH-ALL [§ 13.63]

The giving of the former version of CALJIC No. 8.84.1, factor (k), which advised the jury it could consider any other circumstances which extenuate the gravity of the crime, did not violate the Eighth Amendment. The instruction did not prevent the jury from considering mitigating evidence pertinent to the offender as well as the offense. (***Boyde v. California*** (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316]; ***People v. Livaditis*** (1992) 2 Cal.4th 759, 781-782; ***People v. Stankewitz*** (1990) 51 Cal.3d 72, 107-108.)

In light of ***Boyde v. California*** (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316], the language in factor (k) satisfies the Eighth Amendment. (***Brown v. Payton*** (2005) 544 U.S. 133 [125 S.Ct. 1432, 1438-1439, 161 L.Ed.2d 334]; ***People v. Champion*** (1995) 9 Cal.4th 879, 946, overruled on other grounds, *People v. Combs* (2001) 34 Cal.4th 821, 860; ***People v. Payton*** (1992) 3 Cal.4th 1050, 1070.)

It is generally the task of defense counsel in closing argument, rather than the trial court in its instructions, to make clear to the jury which penalty-phase evidence or circumstances should be considered extenuating under factor (k). (***People v. Vieira*** (2005) 35 Cal.4th 264, 299.)

IV. PENALTY-PHASE CALJIC INSTRUCTIONS [§ 13.70]

Cross-Reference:

§ 6.81, *re* New jury instructions adopted – CALCRIM

A. CALJIC No. 8.84.1 [§ 13.71]

CALJIC No. 8.84.1, directing the jury to determine facts from evidence received in entire trial, does not unconstitutionally allow consideration of nonstatutory aggravating

circumstances in determining penalty. (***People v. Nelson*** (2011) 51 Cal.4th 198, 226; ***People v. Ramirez*** (2006) 39 Cal.4th 398, 474; ***People v. Harris*** (2005) 37 Cal.4th 310, 359; ***People v. Taylor*** (2001) 26 Cal.4th 1155, 1180.)

The trial court is not required to modify CALJIC No. 8.41.1 to remind jurors of the normative and moral nature of the penalty decision. The standard instructions adequately inform jurors of their sentencing responsibilities in compliance with both state and federal constitutional standards. (***People v. Jones*** (2012) 54 Cal.4th 1, 74; ***People v. Ramirez*** (2005) 39 Cal.4th 398, 470.)

The court's refusal to delete all references to special circumstances from CALJIC No. 8.84.1(a) was proper. (***People v. Morris*** (1991) 53 Cal.3d 152, 224, overruled on other grounds, *People v. Stansbury* (1995) 9 Cal.4th 824; see also ***People v. Cain*** (1995) 10 Cal.4th 1, 69.)

In directing the jury during the penalty phase to determine what the facts are from the evidence received during the entire trial, CALJIC Nos. 8.84.1 and 8.85, do not unconstitutionally allow consideration of non-statutory aggravating circumstances in the determination of the penalty. (***People v. Scott*** (2011) 52 Cal.4th 452, 497.)

After instructing penalty phase jury with CALJIC No. 8.84.1 to disregard all guilt phase instructions omitted from penalty phase, court erred when it failed to specifically reinstruct jury "at the penalty phase how to consider statements by attorneys, testimony for which an objection was sustained, and insinuations couched in questions (CALJIC No. 1.02); nor was it instructed regarding the prohibition on independent investigation (CALJIC No. 1.03), the definitions of 'evidence,' 'direct evidence,' and 'circumstantial evidence' (CALJIC No. 2.00), how to consider inconsistent statements by witnesses (CALJIC No. 2.13), assessing the believability of a witness (CALJIC No. 2.20), the weighing of conflicting testimony (CALJIC No. 2.22), or the sufficiency of the testimony of a single witness (CALJIC No. 2.27)." However, error does not necessarily require reversal, and evidence is evaluated "to determine whether it was likely the omitted instructions affected the jury's evaluation of the evidence." (***People v. Souza*** (2012) 54 Cal.4th 90, 134-135; ***People v. Moon*** (2005) 37 Cal.4th 1, 36-38.)

B. CALJIC No. 8.85 PENALTY TRIAL – FACTORS FOR CONSIDERATION [§ 13.72]

CALJIC No. 8.85 sets forth the applicable factors, derived from Penal Code section 190.3 factors (a) through (k), to be weighed by the jury to reach a penalty determination. (***People v. Farnam*** (2002) 28 Cal.4th 107, 191.)

CALJIC No. 8.85 is both correct and adequate; pinpoint instruction regarding mitigating evidence is not required. (***People v. Valencia*** (2008) 43 Cal.4th 268, 309.)

Instructions that direct a jury to consider Penal Code section 190.3, factors (a), (b), and (i), do not violate the United States Constitution. California's capital-sentencing

factors are not flawed even though they do not instruction the jury how to weigh the facts in deciding which of the two possible sentences to impose. (***Tuilaepa v. California*** (1994) 512 U.S. 967, 976-979 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

CALJIC No. 8.85 is the "standard pattern instruction describing the sentencing factors for the penalty phase." (***People v. Moon*** (2005) 37 Cal.4th 1, 41.)

The California Supreme Court has rejected the argument that Penal Code section 190.3 or CALJIC No. 8.85 "are unconstitutionally vague, arbitrary, or render the sentencing process unconstitutionally unreliable under the Eighth and Fourteenth Amendments ...." (***People v. Moon*** (2005) 37 Cal.4th 1, 41-42; ***People v. Kipp*** (1998) 18 Cal.4th 349, 381.)

Pattern instruction CALJIC No. 8.85, regarding factors in aggravation and mitigation which the jury is to consider in imposing a penalty, does not violate a defendant's "state and federal constitutional rights under the Eighth Amendment or state and federal constitutional guaranties of due process of law or equal protection of the laws." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 103, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

CALJIC No. 8.85 does not inherently encourage the jury to "double count" the same facts. (***People v. McKinnon*** (2011) 52 Cal.4th 610, 693-694.)

CALJIC No. 8.85 is not unconstitutional for not labeling which sentencing factors are aggravating and which are mitigating. (***People v. Burney*** (2009) 47 Cal.4th 203, 264-265; ***People v. Moon*** (2005) 37 Cal.4th 1, 41, citing ***People v. Williams*** (1997) 16 Cal.4th 153, 268-269.)

CALJIC No. 8.85 is not unconstitutional for prefacing some sentencing factors with the phrase "whether or not." (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1249; ***People v. Tafoya*** (2007) 42 Cal.4th 147, 198; ***People v. Moon*** (2005) 37 Cal.4th 1, 42, citing ***People v. Morrison*** (2004) 34 Cal.4th 698, 730.)

CALJIC No. 8.85 is not unconstitutional for failing to inform the jury some factors can be mitigating only. (***People v. Perry*** (2006) 38 Cal.4th 302, 319; ***People v. Moon*** (2005) 37 Cal.4th 1, 42, citing ***People v. Morrison*** (2004) 34 Cal.4th 698, 730; ***People v. Farnam*** (2002) 28 Cal.4th 107, 191.)

CALJIC No. 8.85 is not unconstitutional for failing to inform the jury that the absence of a mitigating factor cannot be considered an aggravating factor. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Moon*** (2005) 37 Cal.4th 1, 42; ***People v. Weaver*** (2001) 26 Cal.4th 876, 993.)

CALJIC No. 8.85 is not rendered unconstitutional if the trial court fails to delete inapplicable factors. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Bramit*** (2009) 46 Cal.4th 1221, 1249; ***People v. Watson*** (2008) 43 Cal.4th 652, 701; ***People v. Zamudio*** (2008) 43 Cal.4th 327, 372; ***People v. Perry*** (2006) 38 Cal.4th 302, 319.)

Failing to state that CALJIC No. 8.85's list of aggravating factors is exclusive and that non-statutory aggravating factors cannot be considered does not render it unconstitutional. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1179; ***People v. Moon*** (2005) 37 Cal.4th 1, 42, citing ***People v. Taylor*** (2001) 26 Cal.4th 1155, 1180.)

There is no requirement to instruct the jury that mitigating factors can only be mitigating. (***People v. Perry*** (2006) 38 Cal.4th 302, 319; ***People v. Farnam*** (2002) 28 Cal.4th 107, 191.)

CALJIC No. 8.85 is not unconstitutional for using "restrictive adjectives" such as "extreme" and "substantial." (***People v. Perry*** (2006) 38 Cal.4th 302, 319; ***People v. Moon*** (2005) 37 Cal.4th 1, 42, citing ***People v. Weaver*** (2001) 26 Cal.4th 876, 993.)

CALJIC No. 8.85's summary of aggravating and mitigating factors is not unconstitutional. The terms "extreme mental or emotional disturbance" in factor (d) and "extreme duress" and "substantial domination" in factor (g) do not unconstitutionally limit the mitigating factors the jury can consider. (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1249; ***People v. Perry*** (2006) 38 Cal.4th 302, 319; ***People v. Smith*** (2005) 35 Cal.4th 334, 374.)

CALJIC No. 8.85 adequately instructs the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy. (***People v. Scott*** (2015) 61 Cal.4th 363, 408; ***People v. McKinnon*** (2011) 52 Cal.4th 610, 695; ***People v. Ervine*** (2009) 47 Cal.4th 745, 801 [presumed the jury understood from this instruction that it could consider mercy and compassion].)

CALJIC No. 8.85 does not unconstitutionally allow for consideration of non-statutory aggravating circumstances in the determination of penalty. (***People v. Nelson*** (2011) 51 Cal.4th 198, 226; ***People v. Scott*** (2011) 52 Cal.4th 452, 497.)

C. CALJIC No. 8.86 [§ 13.73]

The trial court did not err in refusing to instruct with CALJIC No. 8.86 sua sponte where defendant first told the jury about his conviction for drug possession, and the prison packet on the conviction was admitted by stipulation. While such an instruction is normally required to be given even absent a request when evidence of prior crimes is introduced or referred to as an aggravating factor, no instruction was necessary where there was no question defendant was convicted of the offense. The most the instruction would have accomplished would be to imply that the conviction was a factor in aggravation, which would only benefit the prosecution. (***People v. Harris*** (2005) 37 Cal.4th 310, 360.)

D. CALJIC No. 8.87 [§ 13.74]

"'CALJIC No. 8.87 is not invalid for failing to submit to the jury the issue of whether the defendant's acts [a threatening letter admitted pursuant to section 190.3,

factor (b)] involved the use, attempted use, or threat of force of violence. The question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court.'" (***People v. Clark*** (2016) 63 Cal.4th 522, 640, internal citations omitted, quoting ***People v. Nakahara*** (2003) 30 Cal.4th 705, 720, emphasis in original.)

E. CALJIC No. 8.88 PENALTY TRIAL – CONCLUDING INSTRUCTION [§ 13.75]

"Language similar to CALJIC No. 8.88 appears in CALCRIM No. 763." (***People v. Burney*** (2009) 47 Cal.4th 203, 263, fn. 18.)

"CALJIC No. 8.88 explains to the jury how it should arrive at the penalty determination." (***People v. Perry*** (2006) 38 Cal.4th 302, 320.)

CALJIC No. 8.88 "accurately describes how jurors are to weigh the aggravating and mitigating factors." (***People v. Elliot*** (2005) 37 Cal.4th 453, 488.)

CALJIC No. 8.88 is the standard penalty-phase concluding instruction describing the sentencing factors for the penalty phase, and it does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendments. (***People v. Moon*** (2005) 37 Cal.4th 1, 41-42.)

"CALJIC No. 8.88 properly instructs the jury on its sentencing discretion and the nature of its deliberative process," and there is no need to elaborate how the jury should consider any particular type of penalty-phase evidence. (***People v. Valencia*** (2008) 43 Cal.4th 268, 310.)

Death is considered to be a more severe punishment than LWOP, so the trial court does not err in instructing the jury with CALJIC No. 8.88 to the effect that each juror must be persuaded that "the aggravating circumstances are so substantial in comparison with mitigating circumstances that it warrants death instead of life without parole." (***People v. Harris*** (2005) 37 Cal.4th 310, 361.)

The California Supreme Court has "repeatedly held that "'there is no legal requirement that penalty phase jurors be instructed that death is the greater punishment, because the penalty trial itself and the jury instructions given, particularly CALJIC No. 8.88, make clear that the state views death as the most extreme penalty." (***People v. Jones*** (2012) 54 Cal.4th 1, 81, quoting ***People v. Cowan*** (2010) 50 Cal.4th 401, 501.)

The trial court "gave a modified version of the second part of CALJIC No. 8.88 as the concluding instruction, but inexplicably failed to give the first part of the instruction." There was no "reasonable likelihood the trial court's failure to instruct in the relevant language of CALJIC No. 8.88 misled the jurors or left them without adequate guidance as to the scope of their sentence discretion or responsibility" based on the instructions given, the argument of counsel, the jury's question and the court's response to that question, as well as subsequent events suggesting "the jury was aware of its proper role in weighing

aggravating and mitigating circumstances." (***People v. Streeter*** (2012) 54 Cal.4th 205, 263.)

The trial court did not err in refusing defense request to supplement instruction to inform the jurors that they could return a life verdict even in the absence of mitigating factors and despite the presence of aggravating factors. CALJIC No. 8.88 adequately advises jurors on the scope of their discretion to reject death and to return a verdict of life without possibility of parole. (***People v. McKinnon*** (2011) 52 Cal.4th 610, 695-696.)

§ 13.75.1 "So Substantial" Language

The "so substantial" language in CALJIC No. 8.88 is constitutionally adequate. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Rogers*** (2009) 46 Cal.4th 1136, 1179; ***People v. Moon*** (2005) 37 Cal.4th 1, 43; ***People v. Boyette*** (2002) 29 Cal.4th 381, 465.)

The requirement that the jury find the aggravating circumstances "so substantial" in comparison with the mitigating circumstances that it "warrants death" is not vague or directionless. (***People v. Chatman*** (2006) 38 Cal.4th 344, 409; ***People v. Arias*** (1996) 13 Cal.4th 92, 170.)

§ 13.75.2 "Warranted" Language

CALJIC No. 8.88 is not unconstitutional or defective for requiring the jury to determine whether death is "warranted" as opposed to "appropriate." (***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Rogers*** (2009) 46 Cal.4th 1136, 1179; ***People v. Watson*** (2008) 43 Cal.4th 652, 702.)

§ 13.75.3 Constitutionality

CALJIC No. 8.88 does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendment. (***People v. Moon*** (2005) 37 Cal.4th 1, 42; ***People v. Crew*** (2003) 31 Cal.4th 822, 858.)

CALJIC No. 8.88 is not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without possibility of parole. (***People v. Salazar*** (2016) 63 Cal.4th 214, 256; ***People v. Rogers*** (2009) 46 Cal.4th 1136, 1179; ***People v. Moon*** (2005) 37 Cal.4th 1, 42, citing ***People v. Dennis*** (1998) 17 Cal.4th 468, 552.)

"CALJIC No. 8.88 adequately guides selection of the appropriate punishment, including the jury's discretion to reject a death sentence in the absence of mitigating evidence." (***People v. Clark*** (2016) 63 Cal.4th 522, 641.)

CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury that it has discretion to return a verdict of life even in the absence of mitigating circumstances." (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1179; ***People v. Moon*** (2005) 37 Cal.4th 1, 43, citing ***People v. Ray*** (1996) 13 Cal.4th 313, 355.)

CALJIC No. 8.88 is constitutional, and the California Supreme Court has consistently rejected the claim that the jury must not be instructed regarding aggravating and mitigating factors that are inapplicable to the case. (***People v. Zamudio*** (2008) 43 Cal.4th 327, 372.)

CALJIC No. 8.88 is "not unconstitutional for failing to require juror unanimity on aggravating circumstances." (***People v. Moon*** (2005) 37 Cal.4th 1, 43, citing ***People v. Boyette*** (2002) 29 Cal.4th 381, 465.)

CALJIC No. 8.88 is not unconstitutional for failing to require written findings on aggravating circumstances. (***People v. Moon*** (2005) 37 Cal.4th 1, 43; ***People v. Brown*** (2004) 33 Cal.4th 382, 402; ***People v. Nakahara*** (2003) 30 Cal.4th 705, 721.)

CALJIC No. 8.88 is not unconstitutional for failing to require written findings so as to facilitate "meaningful appellate review." (***People v. Moon*** (2005) 37 Cal.4th 1, 43, citing ***People v. Williams*** (1997) 16 Cal.4th 153, 276.)

CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (***People v. Moon*** (2005) 37 Cal.4th 1, 43, citing ***People v. Maury*** (2003) 30 Cal.4th 342, 440.)

CALJIC No. 8.88 is "not unconstitutional for failing to define the meaning of life without possibility of parole." (***People v. Moon*** (2005) 37 Cal.4th 1, 43, citing ***People v. Jones*** (1998) 17 Cal.4th 279, 314.)

The absence in Penal Code section 190.3 and CALJIC No. 8.88 of any burden of proof except as to prior criminal acts under factor (b) is not unconstitutional. (***People v. Elliot*** (2005) 37 Cal.4th 453, 487-488; ***People v. Moon*** (2005) 37 Cal.4th 1, 43; ***People v. Brown*** (2004) 33 Cal.4th 382, 401-402; ***People v. Michaels*** (2002) 28 Cal.4th 486, 541.)

CALJIC No. 8.88 does not reduce the prosecution's burden of proof generally, and it is not unconstitutional for failing to assign and allocate a burden of proof of beyond a reasonable doubt or to inform the jury who bears the burden of proof. (***People v. Moon*** (2005) 37 Cal.4th 1, 43.)

CALJIC No. 8.88 does not direct a verdict "as to certain issues in the defendant's case." (***People v. Moon*** (2005) 37 Cal.4th 1, 43.)

California's death-penalty sentencing scheme is not unconstitutional based on the holdings in ***Apprendi v. New Jersey*** (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], or ***Ring v. Arizona*** (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or ***Blakely v. Washington*** (2004) 542 U.S. 961 [125 S.Ct. 21, 159 L.Ed.2d 851], or ***United States v. Booker*** (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], or ***Cunningham***

v. California (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1250 & fn. 22.)

F. CALJIC No. 8.89 [§ 13.76]

Former CALJIC No. 8.89 which advised the jury it shall determine whether the penalty is to be death or life imprisonment does not coerce a verdict and may properly be given. (***People v. Harris*** (1981) 28 Cal.3d 935, 963-964.)

Similarly, the court is not required to instruct the jury that in addition to choosing life or death, it has the option of reaching no verdict at all. (***People v. Wader*** (1993) 5 Cal.4th 610, 664; ***People v. Miranda*** (1987) 44 Cal.3d 57, 105, overruled on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

Chapter Fourteen
PENALTY PHASE – VERDICT

I. JURY FINDINGS [§ 14.10]

The Constitution does not require written findings by the jury during the penalty phase. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1234; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 957; ***People v. Foster*** (2010) 50 Cal.4th 1301, 1365-1366 [jury need not file written findings as to which aggravating factors were relied on in imposing the death penalty]; ***People v. Gamache*** (2010) 48 Cal.4th 347, 406 [same].)

Special jury findings may accompany a general verdict so long as they do not interfere with the jury's deliberative process. (***People v. Gurule*** (2002) 28 Cal.4th 557, 631-632; ***People v. Davis*** (1995) 10 Cal.4th 463, 512.)

"Neither the federal or state constitution requires a jury make *unanimous* findings concerning the particular aggravating circumstances, find all aggravating factors *beyond a reasonable doubt*, or find beyond a reasonable doubt that the aggravating factors *outweigh* the mitigating factors. The United States Supreme Court's recent decisions interpreting the Sixth Amendment jury-trial guarantee do not alter that conclusion." (***People v. Salazar*** (2016) 63 Cal.4th 214, 255, internal citations & quotation marks omitted; italics in original.)

The trial court did not err in rejecting defendant's "proposed instruction to disregard his and the victim's different races and to require jurors to sign a certificate stating that they did not consider race in their verdict. (***People v. Williams*** (2016) 1 Cal.5th 1162, 1202.)

> *Cross-Reference*:
>
> § 13.44, *re* Unanimity
>
> § 13.53, *re* Burden of proof

II. VERDICT FORMS [§ 14.20]

Although it is proper to employ separate verdict forms when there is more than one murder victim, no authority compels the rendering of separate penalty verdicts as to each victim. (***People v. Kopatz*** (2015) 61 Cal.4th 62, 93; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 159.)

It was error to allow the jury to return three death verdicts for two victims (separate penalty verdict for each victim and an additional verdict for the multiple murder special circumstance). The error was "only technical because the death verdict for the

multiple murders was effectively superfluous." Defendant was not entitled to relief because he "failed to show there is a reasonable possibility the death verdict for the multiple murders prejudicially infected the entire penalty decision process." (***People v. Kopatz*** (2015) 61 Cal.4th 62, 93-94.)

It was error to allow the jury to make multiple-murder special circumstance findings as to each count of murder. (***People v. Romero & Self*** (2015) 62 Cal.4th 1, 43; ***People v. Nunez*** (2013) 57 Cal.4th 1, 49.)

Defendant not prejudiced by jury making duplicative multi-murder special circumstance findings because the jury knows the number of murders on which the special circumstances are based. (***People v. Romero & Self*** (2014) 62 Cal.4th 1, 43.)

Where the verdict form setting the penalty at death erroneously mentioned the second-degree murder of a different victim in addition to the first-degree murder for which death was a possible penalty, it was not necessary to set aside the death verdict. Reversing the death sentence imposed for the second-degree murder was the appropriate remedy because the form was not entirely incorrect since the multiple murder special circumstance was based upon both murders; and in any event, the jury's intent was "unmistakably clear." (***People v. Johnson*** (2015) 61 Cal.4th 734, 784-785.)

"The verdict form's failure to reference an attempted commission of robbery did not serve to limit the charges against defendant. Nor did the jury's return of that form restrict its finding to one of a completed robbery. A verdict should be read in light of the charging instrument and the plea entered by the defendant. [Citations.] ... [T]he form of the verdict generally is immaterial, so long as the intention of the jury to convict clearly may be seen. [Citations.] … That the form did not describe *all* of the circumstances under which the allegation could be proved is, under these circumstances, merely a technical defect that may be disregarded because the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice." (***People v. Jackson*** (2014) 58 Cal.4th 724, 750-751, internal quotation marks omitted, emphasis in original.)

Defendant forfeited claim that verdict forms were improper by failing to object. (***People v. Johnson*** (2015) 61 Cal.4th 734, 784; ***People v. Kopatz*** (2015) 61 Cal.4th 62, 92; ***People v. Jones*** (2003) 29 Cal.4th 1229, 1259; ***People v. Bolin*** (1998) 18 Cal.4th 297, 330; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 158-159.)

Single verdict forms (death or LWOP) in the penalty phase for multiple counts of capital murder do not raise a possibility that the jurors were not unanimous in returning a sentence of death. (***People v. Crittenden*** (1994) 9 Cal.4th 83, 159.)

Chapter Fifteen
PENALTY PHASE – MOTION TO MODIFY

I. MOTION TO MODIFY PUNISHMENT [§ 15.10]

A. GENERALLY [§ 15.11]

"Every death verdict triggers an automatic application for modification of the sentence." (***People v. Gamache*** (2010) 48 Cal.4th 347, 403, citing § 190.4(e); ***People v. Mungia*** (2008) 44 Cal.4th 1101, 1139 [same].)

"Pursuant to section 190.4, in ruling upon an application for modification of a verdict imposing the death penalty, the trial court must reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict. The statute thus requires the court to make an independent determination concerning the propriety of the death penalty. The court must state the reasons for its ruling on the record, but need not describe every detail supporting its ruling so long as the statement of reasons is sufficient to allow meaningful appellate review." (***People v. Cunningham*** (2015) 61 Cal.4th 609, 669, internal quotation marks & citations omitted.)

Pursuant to Penal Code section 190.4, subdivision (e), the trial court does not resentence the defendant, but rather considers whether to modify the death verdict. Thus, the court may not take into consideration any evidence not presented to the jury that returned the death verdict. (***People v. Lewis*** (2004) 33 Cal.4th 214, 231.)

A trial court can grant a motion to modify and impose a lesser punishment without granting or ordering a new trial if the trial court concludes the verdict or finding is contrary to the law or evidence. (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1334.)

The trial court is not required to "demand argument or briefing" on an automatic motion to modify. (***People v. Gamache*** (2010) 48 Cal.4th 347, 404; see also ***People v. Mendoza*** (2000) 24 Cal.4th 130, 198 [written briefs permissible but not obligatory].)

A trial court is "not required to find that evidence offered in mitigation does in fact mitigate." (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1334; ***People v. Guerra*** (2006) 37 Cal.4th 1067, 1162, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151 [same].)

The 1978 version of Penal Code section 190.4, subdivision (e), contains slightly different language than the 1977 version. Nonetheless, both versions have the same meaning. (***People v. Memro*** (1995) 11 Cal.4th 786, 884, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18; ***People v. Frierson*** (1991) 53 Cal.3d 730, 751.)

The trial court should refrain from advising the jury that its death verdict was correct, because it suggests the court has already made a decision on the modification motion. (***People v. Farnam*** (2002) 28 Cal.4th 107, 193-194.)

While the court was "fairly brief in its comments, there is nothing to indicate the court was unaware of the proper standard of review or applied an incorrect one." (***People v. Moon*** (2005) 37 Cal.4th 1, 46, fn. 8.)

The mere fact the prosecutor is asked to draft a judgment in advance of a modification hearing does not indicate the court had already made up its mind regarding the automatic motion to modify. (***People v. Jackson*** (2009) 45 Cal.4th 662, 696.)

"The trial court's preparation of a written tentative ruling in advance of the modification hearing was not error." (***People v. Gamache*** (2010) 48 Cal.4th 347, 404.)

The trial court's use of its own notes was not improper because those notes related to the evidence received at trial and therefore did not involve consideration of "undisclosed and unknown information" in ruling on the 190.4 motion to modify the death sentence. (***People v. Tully*** (2012) 54 Cal.4th 952, 1065; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1065 ["court consulted its private notes only for the purpose of complying with the mandate of section 190.4, subdivision (e)"].)

The granting of a motion to modify the death sentence that was successfully challenged on appeal did not constitute the equivalent of an acquittal barring further proceedings under double jeopardy principles. (***People v. Burgener*** (2003) 29 Cal.4th 833, 887.)

B. CONSIDERATIONS [§ 15.12]

§ 15.12.1 Relevant Evidence – Generally

Ruling on a motion to modify must be based on evidence presented at trial. (***People v. Lewis*** (2004) 33 Cal.4th 214, 230; ***People v. Raley*** (1992) 2 Cal.4th 870, 921 [trial court may not consider probation report]; ***People v. Edwards*** (1991) 54 Cal.3d 787, 847 [trial court correctly refused to consider defendant's new mitigation evidence not presented to penalty jury]; ***People v. Cooper*** (1991) 53 Cal.3d 771, 849 [trial court properly declined to hear from victims' relatives at modification hearing].)

Like the penalty-phase jury, the trial judge may rely on the presence of aggravating circumstances under factors (a), (b), and (c). However, factors (d), (e), (f), (g), (h), and (j) can only mitigate, and absence of any of these factors may not be considered aggravating. (***People v. Morrison*** (2004) 34 Cal.4th 698, 728.)

"[A] court ruling on a modification application is limited to the matters identified in section 190.4, which necessarily excludes any materials not presented to the jury. [Citation]. The bar applies even to evidence that is favorable to the defendant. [Citation]." (***People v. Burgener*** (2003) 29 Cal.4th 833, 892.)

The trial court "properly refused to consider the letters submitted by defendant's friends and family in advance of deciding the automatic motion to modify the judgment." (***People v. Mickel*** (2016) 2 Cal.5th 181, 202.)

Although sympathetic factors are integral to both a jury's death-penalty determination and the trial court's ruling on a motion to modify the verdict, sympathy is not itself a mitigating factor or circumstance. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1162, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

The trial court appropriately did not consider defendant's statements to an expert for the truth of the matters asserted. The trial court properly considered statements as they bore on the reliability of the expert's opinion. (***People v. Elliot*** (2005) 37 Cal.4th 453, 486.)

Where a guilt-phase jury hung in the penalty phase and a death verdict was returned by a second jury, the modification motion is limited to consideration of the evidence presented to the second penalty-phase jury. Thus, the trial court erred in considering guilt phase evidence which was not presented to second jury. The error was harmless. (***People v. Hawkins*** (1995) 10 Cal.4th 920, 971, fn. 7, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

The judge's reference to Determinate Sentencing Law (DSL) guidelines did not result in error at a section 190.4(e) proceeding, because the factors considered were relevant to capital sentencing. (***People v. Mattson*** (1990) 50 Cal.3d 826, 878-879.)

In ruling on a modification motion, a trial court may not consider the fact that the jury heard improper evidence; the Supreme Court's possible reversal of the verdict; and other possible future legal problems. (***People v. Burgener*** (1990) 223 Cal.App.3d 427, 435.)

§ 15.12.2 Age

The trial court considered evidence that defendant was 21 years old at time of crime as applicable to age as a factor in mitigation and properly found it did not amount to statutory mitigation. (***People v. Wallace*** (2008) 44 Cal.4th 1032, 1095, 1097.)

In denying the motion to modify the death sentence, the trial court acknowledged section 190.3, factor (i), the age of the defendant at the time of the crime, and the fact that the defendant was 18 years of age when she committed the crime might be a mitigating factor, but concluded under the circumstances of the case it was not mitigating. The trial court was "not required to find that evidence offered in mitigation does in fact mitigate." (***People v. Alfaro*** (2007) 41 Cal.4th 1277, 1334.)

§ 15.12.3 Citizen Petitions

The record shows the trial court properly refused to consider citizen petitions in ruling on modification motion. (***People v. Zapien*** (1993) 4 Cal.4th 929, 997-998.)

§ 15.12.4 Circumstances of Crime

The facts that defendant had served prior prison terms, that he was on parole when he killed the victim in this case, and that his performance on parole was unsatisfactory were before the jury and properly considered as circumstances of the crime. (***People v. Wader*** (1993) 5 Cal.4th 610, 667-668.)

§ 15.12.4.1 Victim Impact

A trial court considering a motion to modify the verdict (Pen. Code, § 190.4) should consider only that victim-impact evidence that was before the jury, and therefore any statements from victim's relatives that were not presented to the jury should not be considered in ruling on the motion. (***People v. Abel*** (2012) 53 Cal.4th 891, 940.)

§ 15.12.4.2 Probation Report

"In ruling on an automatic motion to modify a verdict of death, the trial court is to consider only the evidence before the jury, and a probation report does not fall within that category." (***People v. Mendoza*** (2000) 24 Cal.4th 130, 198.)

"[T]he better practice is for the court to rule on the motion to modify before reading any applicable probation reports (§ 1203, subds. (b), (g)) or hearing victim statements pursuant to section 1191.1. [Citations]. The failure to do so is not error, however, where nothing in the record suggests the court relied on any impermissible material in ruling on the motion to modify. [Citations]." (***People v. Rogers*** (2006) 39 Cal.4th 826, 907.)

Even where record reflects the trial court considered a probation report and victim statements, an appellate court assumes there was no improper influence on the trial court absent specific evidence to the contrary. (***People v. Farnam*** (2002) 28 Cal.4th 107, 196.)

§ 15.12.5 Lack of Remorse

The court may consider lack of remorse in ruling on a modification motion. (***People v. Crittenden*** (1994) 9 Cal.4th 83, 150; ***People v. Caro*** (1988) 46 Cal.3d 1035, 1067-1068, abrogated on other grounds, *People v. Whitt* (1990) 51 Cal.3d 620, 657, fn. 29.)

§ 15.12.6 Relative Culpability

A motion to modify does not include intercase proportionality review. (***People v. Bennett*** (2009) 45 Cal.4th 577, 628; see also ***People v. Crew*** (1991) 1 Cal.App.4th 1591, 1600-1604 [trial judge may not rely on facts of other capital cases with which he had been involved when deciding the modification hearing as intercase proportionality review is not one of the factors to be used in deciding the motion].)

A grant of immunity to an accomplice should not have been considered on a motion to modify, since disparate sentences are irrelevant to the sentencing determination. (***People v. Danielson*** (1992) 3 Cal.4th 691, 718, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

C. COURT TRIAL [§ 15.13]

The California Supreme Court has not decided whether a defendant is entitled to a modification hearing pursuant to Penal Code section 190.4, subdivision (e), when a jury trial was waived and the penalty verdict was determined by the court. (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1091; ***People v. Scott*** (1997) 15 Cal.4th 1188, 1225; ***People v. Diaz*** (1992) 3 Cal.4th 495, 575.)

A hearing pursuant to Penal Code section 190.4, subdivision (e), in a case where jury trial was waived on the issue of penalty would not be entirely futile inasmuch as it would provide a record of the trial court's reasons for denying the motion to modify the verdict which would enable review of "'the propriety of the penalty determination made by the trial court sitting without a jury.'" (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1091, quoting ***People v. Horning*** (2004) 34 Cal.4th 871, 912.)

A defendant who waived a jury trial on penalty is not entitled to have another judge conduct a hearing on an automatic motion to modify the verdict. (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1091.)

D. REASONS [§ 15.14]

The trial court must set forth its reasons for the denial of the motion for modification on the record and with sufficient particularity to allow effective appellate review. However, the trial court need not recount "every detail" supporting its determination. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 790; ***People v. DePriest*** (2007) 42 Cal.4th 1, 56; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1063-1064.)

"[A] trial court need not recount details of, or identify, all evidence presented in mitigation or aggravation" when ruling on a motion for modification. (***People v. Romero*** (2008) 44 Cal.4th 386, 427.)

"[T]he court is not required to engage in a rote recitation of every single factor in mitigation. The trial court's mere failure to mention expressly all evidence presented in

mitigation does not mean the trial court ignored or overlooked such evidence, but simply indicates that the court did not consider such evidence to have appreciable mitigating weight. Absent an indication that the court ignored or overlooked the mitigating evidence, [the reviewing court] will not find error…" (***People v. Tully*** (2012) 54 Cal.4th 952, 1064.)

Where a court did not refer to all evidence in mitigation, the reviewing court does not presume the court did not consider all evidence in mitigation. (***People v. Tully*** (2012) 54 Cal.4th 952, 1063-1064.)

Defendant is not deprived of meaningful oral argument where the trial court has prepared a written statement of reasons in advance of a modification hearing. (***People v. Medina*** (1995) 11 Cal.4th 694, 783.)

The trial court's comment that it was not going to deviate from the jury's judgment did not indicate that the trial court felt powerless to disagree, but simply that the court, after weighing the evidence, agreed with the verdict. (***People v. Moon*** (2005) 37 Cal.4th 1, 46; compare ***People v. Burgener*** (2003) 29 Cal.4th 833, 891; ***People v. Bonillas*** (1989) 48 Cal.3d 757, 801 [trial court's statements revealed application of an incorrect standard in denying motion to modify verdict].)

E. SELF-REPRESENTATION [§ 15.15]

Cross-Reference: § 3.130, *re* Self-representation

It is an open question whether there is a Sixth Amendment right to self-representation during a section 190.4(e) proceeding (automatic motion to modify death sentence). Regardless of whether such right exists, a trial court has discretion to permit self-representation in a 190.4(e) hearing. Penal Code section 686.1's requirement of representation by counsel does not apply to a section 190.4(e) hearing. (***People v. Burgener*** (2016) 1 Cal.5th 461,474-475.)

The trial court's "careful colloquy" adequately warned the defendant regarding the risks or disadvantages of self-representation in a section 190.4(e) hearing. (***People v. Burgener*** (2016) 1 Cal.5th 461, 466-470 (verbatim colloquy) and 473-474].)

The defendant made it clear that his request for self-representation was in order to control his own destiny, not to frustrate the orderly administration of justice. The trial court did not abuse its discretion in allowing the defendant to represent himself notwithstanding that the defendant's "refusal to argue for mitigation and his desire for a swift resolution might have increased the likelihood that he would receive a death sentence." (***People v. Burgener*** (2016) 1 Cal.5th 461, 471-473.)

F. APPEAL [§ 15.16]

On appeal, the California Supreme Court will "independently review the trial court's ruling after reviewing the record, but [does] not determine the penalty de novo. Where the record shows the trial court properly performed its duty under section 190.4, subdivision (e), to conduct an independent reweighing of the aggravating and mitigating evidence, the court's ruling will be upheld." (***People v. Cunningham*** (2015) 61 Cal.4th 609, 669, internal citations & quotation marks omitted.)

The fact the trial court suggested settlement of the case prior to trial does not preclude a finding the death penalty was appropriate when the court reviewed the case under Penal Code section 190.4, subdivision (e). (***People v. Edwards*** (1991) 54 Cal.3d 787, 848.)

§ 15.16.1 Forfeiture

Defendant forfeited his claim on appeal that the trial court improperly denied his automatic application for modification of his death sentence because of his failure "to object below to any aspect of the court's reasoning in denying the application." (***People v. Jackson*** (2015) 58 Cal.4th 724, 770.)

Failure to specifically object to trial court's failure to state sufficient reasons for denying modification motion forfeits issues on appeal. (***People v. Jackson*** (2009) 45 Cal.4th 662, 697; ***People v. Mungia*** (2008) 44 Cal.4th 1101, 1140.)

There is no basis for distinguishing between cases where the trial court stated reasons for denying a modification motion for purposes of applying the forfeiture rule for failure to object below to consideration of inadmissible or irrelevant evidence. Defendant "must bring any deficiency in the ruling to the trial court's attention by a contemporaneous objection, to give the court an opportunity to correct the error." (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1140-1141.)

Failure to object to a trial court's consideration of statements from victim's relatives that were not before the jury in ruling on a motion to modify the verdict pursuant to 190.4 forfeits the claim on appeal. (***People v. Abel*** (2012) 53 Cal.4th 891, 940.)

Failure to object at the 190.4(e) hearing to the Attorney General's response to the court's question whether it was bound by prior factual findings of the judge who presided over the defendant's original guilt and penalty trial, or to the trial court's reasoning for its ruling on the motion to modify the death sentence forfeited the claim on appeal that the court improperly refusing to consider the factual findings by the judge who presided over the original trial in independently reviewing the record under section 190.4(e). (***People v. Burgener*** (2016) 1 Cal.5th 461, 475-476.)

G. HARMLESS ERROR [§ 15.17]

Any error flowing from the trial courts "somewhat ambiguous" statements that "could likely have been clarified had defendant offered a contemporaneous objection" found harmless where "the court's comments during the course of its extensive review of the aggravating and mitigating evidence presented at trial demonstrate there is no reasonable possibility that any error affected its ruling. For the same reason, any asserted federal constitutional error was harmless beyond a reasonable doubt." (***People v. Jackson*** (2014) 58 Cal.4th 724, 771, internal citations omitted.)

To the extent, if any, the trial court considered an expert's belated opinion on the subject of remorse, "any error could not have prejudiced the defendant." (***People v. Rodriguez*** (2014) 58 Cal.4th 587, 651.)

Where the trial judge has died before conclusion of the appeal (rendering remand an impractical option), error held harmless and judgment affirmed. (***People v. Mincey*** (1992) 2 Cal.4th 408, 478; ***People v. Allison*** (1989) 48 Cal.3d 879, 912.)

H. REMANDS [§ 15.18]

When a case is remanded, following appeal, to the trial court solely for the purpose of rehearing the modification motion, "the trial court does not resentence the defendant bur rather considers whether to modify the verdict." Accordingly, "the court may not take into consideration any evidence not before the jury that returned the death verdict." (***People v. Lewis*** (2004) 33 Cal.4th 214, 231.)

Upon remand for a new modification hearing, the trial court is bound by the Supreme Court's determination of issues raised in the appeal. (***People v. Sheldon*** (1994) 7 Cal.4th 1136, 1142.)

Defendant waived any claim regarding the scope of the remand order by the Court of Appeal by failing to assert it in a timely manner below. (***People v. Burgener*** (2003) 29 Cal.4th 833, 889.)

Following remand for a new modification hearing, the trial court erred in considering additional mitigating evidence offered by defendant, but the error was invited and harmless. (***People v. Massie*** (1998) 19 Cal.4th 550, 568; ***People v. Sheldon*** (1994) 7 Cal.4th 1136, 1140.)

A remand for a new Penal Code section 190.4, subdivision (e), hearing is unwarranted when the statement of decision makes it apparent the trial court did not deem the issue of penalty to be a close one. (***People v. Daniels*** (1991) 52 Cal.3d 815, 893, reversed on other grounds, *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181.)

Where the guilt verdict and special-circumstances findings have been affirmed, and the case remanded to the trial court solely for consideration of the automatic motion for modification of the penalty verdict, the subsequent automatic appeal upon a denial of

the motion to modify is limited to issues arising from the modification application. (***People v. Brown*** (1993) 6 Cal.4th 322, 327.)

§ 15.18.1 Different Judge for Modification Motion

"[S]ection 190.4, subdivision (e) does not require that the motion be heard by the same judge who presided at trial. The statutory procedure merely creates a preference for the same judge to hear the motion if possible." Where trial judge recused himself precluding his further participation, a "judge of the same court was authorized to rule on the motion." (***People v. Collins*** (2010) 49 Cal.4th 175, 259; ***People v. Burgener*** (2003) 29 Cal.4th 833, 886 [where judge who heard prior modification motion not available following remand, the motion may be heard by another judge of same court]; ***People v. Bonillas*** (1989) 48 Cal.3d 757, 801, fn. 14 [same].)

When the original trial judge is unable to hear the modification motion, the defendant is not entitled to have the replacement judge hear live testimony in order to determine whether the weight of the evidence supports the death judgment; the replacement judge is required to evaluate witness credibility as best he or she can from the written record. (***People v. Lewis*** (2004) 33 Cal.4th 214, 224-226.)

When a different judge considers a modification motion after reversal of the trial judge's reduction of a death verdict to LWOP, the judge does not err by declining to consider the trial judge's previous findings, reading the appellate decision, or denying the motion using the statutory language. (***People v. Crew*** (2003) 31 Cal.4th 822, 859.)

Defendant waived objections to substitution of judge following remand for automatic motion to modify where he failed to articulate objection on basis below, as well as being barred for failing to wait until after the substituted judge had ruled on the application before objecting to the substitution. (***People v. Burgener*** (2003) 29 Cal.4th 833, 886.)

Chapter Sixteen
APPEAL

I. AUTOMATIC APPEAL [§ 16.10]

A defendant cannot entirely waive the right to appeal in a capital case. Article VI, section 11, of the California Constitution provides that the "Supreme Court has appellate jurisdiction when judgment is pronounced, and Penal Code section 1239, subdivision (b), provides that when "a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her counsel." "This statute imposes a duty upon the [California Supreme Court] to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial. [The Court] cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him." (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1072, internal quotation marks & citations omitted, quoting ***People v. Stanworth*** (1969) 71 Cal.2d 820, 833.)

The scope of the automatic appeal covers the entire judgment, including both capital and non-capital convictions. (***People v. Massie*** (1998) 19 Cal.4th 550, 574.)

The requirements of Penal Code section 1237.5 regarding certificates of probable cause following entry of a guilty or nolo contendere plea do not apply to death-penalty appeals. (***People v. Massie*** (1998) 19 Cal.4th 550, 569.)

A capital defendant's constitutional right to self-representation at trial does not support a claim of a right to waive an automatic appeal, and the no-waiver rule in capital cases does not violate equal protection principles. (***People v. Massie*** (1998) 19 Cal.4th 550, 569-570.)

No conflict of interest arises over a defense attorney's duty to adhere to client's wishes with respect to abandonment of an appeal because there is no means by which to effectuate that wish since the Legislature has decided that capital defendant's direct appeal cannot be waived. (***People v. Massie*** (1998) 19 Cal.4th 550, 572.)

II. HARMLESS ERROR [§ 16.20]

The California Constitution prohibits a judgment from being set aside unless 'the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) Pursuant to this mandate, [the California Supreme Court has] regularly employed harmless error analysis in deciding whether a death verdict should be affirmed. (***People v. Sandoval*** (2015) 62 Cal.4th 394, 447.)

Error in the penalty phase is subject to harmless error analysis unless it "is a situation in which it cannot be fairly determined whether the error affected the jury's verdict. (See ***People v. Anzalone*** (2013) 56 Cal.4th 545, 554 [ ] ["A structural error requires per se reversal because it cannot be fairly determined how a trial would have

been resolved if the grave error had not occurred"].)" (***People v. Johnson*** (2015) 61 Cal.4th 734, 785.)

California courts "do not have the discretion to reverse a judgment without first conducting harmless error review" even where the People fail to assert or argue harmless error. (***People v. Sandoval*** (2016) 62 Cal.4th 394, 446, citing Cal. Const., art. VI, § 13.)

A. HARMLESS-ERROR STANDARD [§ 16.21]

The "reasonable possibility" standard of harmless error that applies to any error occurring during the penalty phase of a capital case is more stringent than the "reasonable probability" standard that is applied to ordinary state-law errors in the guilt-phase, and is "the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman* [*v. California* (1967) 386 U.S. 18, 24]" that applies to errors of a federal constitutional magnitude. (***People v. Jackson*** (2014) 58 Cal.4th 724, 791, internal quotation marks & citations omitted.)

§ 16.21.1 Length of Deliberations

"[T]he length of deliberations demonstrates nothing more than that the jury was conscientious in its performance of high civic duty.'" (***People v. Lucas*** (2014) 60 Cal.4th 153, 312, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19, quoting ***People v. Cooper*** (1991) 53 Cal.3d 771, 837.)

B. EFFECT OF INVALID SPECIAL CIRCUMSTANCE OR SENTENCING FACTOR [§ 16.22]

Although the United States Supreme Court held California is a "non-weighing state," it also held the test for determining constitutional error for an invalidated special circumstance or sentencing factor is the same for both "weighing" and "non-weighing" states, namely, "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (***Brown v. Sanders*** (2006) 546 U.S. 212, 220 [126 S.Ct. 884, 163 L.Ed.2d 723], fn. omitted; accord, ***People v. Clark*** (2016) 63 Cal.4th 522, 624 [because jury authorized to give aggravating weight to facts and circumstances of murder under other valid special-circumstances, invalidating burglary and robbery special circumstances does not require reversal of death sentence]; ***People v. Debose*** (2014) 59 Cal.4th 177, 196.)

Invalidation of two special circumstances on appeal did not render a death-penalty sentence unconstitutional because two other found special circumstances satisfied *Furman*'s narrowing requirement and all of the facts and circumstances admissible to

prove the invalid eligibility factors were also properly adduced as aggravating facts and circumstances under another factor (here it was factor (a), the "circumstances of the crime"). (***Brown v. Sanders*** (2006) 546 U.S. 212, 224 [126 S.Ct. 884, 894, 163 L.Ed.2d 723].)

Instructional error, even one which impermissibly shifts the burden of proof, or omits an element of the offense or a special circumstance, may be subjected to the *Chapman* harmless-error standard. (***Pope v. Illinois*** (1987) 481 U.S. 497, 501-504 [107 S.Ct. 1918, 95 L.Ed.2d 439]; ***Rose v. Clark*** (1986) 478 U.S. 570 [106 S.Ct. 3101, 92 L.Ed.2d 460].)

"[T]he omission of one or more elements of a charged offense or special circumstance allegation is amenable to review for harmless error under the state and federal Constitutions, at least as long as the omission neither wholly withdrew from jury consideration substantially all of the elements, nor so vitiated all of the jury's findings as to effectively deny defendant a jury trial altogether." (***People v. Mil*** (2012) 53 Cal.4th 400, 415, internal quotation marks & citations omitted.)

No harmless error analysis and death sentence reversed when the only two special circumstance findings had to be set aside because a prior murder that was the basis for the prior-murder special circumstance as well as the multiple-murder special-circumstance was invalidated based on a constitutional deficiency from violation of Double Jeopardy Clause. (***People v. Trujeque*** (2015) 61 Cal.4th 227, 253.)

III. IN PROPRIA PERSONA [PRO SE] [§ 16.30]

"A criminal defendant's rights regarding legal representation are more limited on appeal than at trial." (***In re Barnett*** (2003) 31 Cal.4th 466, 472.)

"[T]here is no right – constitutional, statutory, or otherwise – to self-representation in a criminal appeal in California." (***In re Barnett*** (2003) 31 Cal.4th 466, 473.)

"[A]ll appellate motions and briefs must be prepared and filed by counsel and may not be submitted pro se. Although [the court] will accept and consider pro se motions regarding representation (i.e., *Marsden* motions to substitute counsel), such motions must be clearly labeled as such and must be limited to matters concerning representation. Any other pro se document offered in an appeal will be returned unfiled, or, if mistakenly filed, will be stricken from the docket." (***In re Barnett*** (2003) 31 Cal.4th 466, 473-474.)

IV. ISSUES RELATING TO APPEAL [§ 16.40]

A. AFFIRMANCE RATE (C.S.C.) [§ 16.41]

The fact that, after the removal of members of the California Supreme Court, the death-penalty affirmance rate of that court increased does not demonstrate a lack of impartiality or a disabling conflict of interest on the part of the court. Indeed, any

conflict of interest would apply to all California judges and the common law rule of necessity would preclude disqualification. (***People v. Kipp*** (2001) 26 Cal.4th 1100, 1139-1140.)

B. APPELLATE DELAY [§ 16.42]

A traditional so-called *Lackey* claim, "which takes its name from a memorandum opinion on denial of certiorari by Justice John Paul Stevens in *Lackey v. Texas* (1995) 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 … argues that a lengthy period of incarceration on death row awaiting execution is impermissibly cruel and unusual because the long delay robs the ultimate penalty of any legitimate retributive value, diminishes to the vanishing point any deterrence value to an execution, and is psychologically damaging to the condemned inmate to an unjustifiable degree." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1370, internal quotation marks & citations omitted.)

A so-called *Jones* claim is derived from *Jones v. Chappell* (C.D.Cal. 2014) 31 F.Supp.3d 1050, reversed *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538. "[A]though both *Lackey* and *Jones* claims stem from a concern over how a long postconviction delay in carrying out the death penalty may be squared with the Eighth Amendment's constitutional limitations, they are distinct. A *Lackey* claim examines how a long postconviction delay affects the state's interest in retribution and deterrence, as well as the allegedly psychologically brutalizing effect on the condemned inmate; a *Jones* claim, by contrast, examines whether a long postconviction delay leads to the infliction of a criminal sanction in a manner that is so arbitrary that its imposition can be characterized as cruel and unusual." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1372.)

"[T]he kernel of a *Jones* claim is not the delay per se, but the arbitrariness that such delay injects into the system." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1371.)

The California Supreme Court assumed without deciding that the legal premise underlying a so-called *Jones* claim is correct, i.e., that "long and systemic delays in postconviction review of death penalty verdicts could render the capital case system in this state impermissibly arbitrary in violation of the Eighth Amendment" and it further assumed the validity of "key facts" presented to the federal court in the form of two declarations, neither of which was properly before the California Supreme Court on direct appeal, nor properly subject to judicial notice, in rejecting a *Jones* claim on direct appeal. (***People v. Seumanu*** (2016) 61 Cal.4th 1293, 1373-1374.)

"Unquestionably, some delay occurs while this court locates and appoints qualified appellate counsel, permits those appointed attorneys to prepare detailed briefs, allows the Attorney General to respond, and then carefully evaluates the arguments raised, holds oral argument, and prepares a written opinion. Further delays occur when this court locates and appoints qualified counsel for habeas corpus, allows ample time for counsel to prepare a petition, and then evaluates the resulting petition and successive petitions. But such delays are the product of a constitutional safeguard, not a

constitutional defect, because they assure careful review of the defendant's conviction and sentence." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1374, internal quotation marks & citations omitted.)

"[T]he delay inherent in the automatic appeal process is not a basis for finding that either the death penalty itself or the process leading to it is cruel and unusual punishment." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1369, internal quotation marks & citations omitted; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 958 [same].)

"That some inmates will exhaust their appeals and collateral attacks sooner than others, that some will obtain relief on appeal or on habeas corpus and others not, is inevitable given the complexity of the judicial review process. These differences are not necessarily attributable to arbitrariness in the process of review under state law, but may instead represent the legitimate variances present in each individual case." (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1374-1375.)

The delay attributable from retrial following reversal of defendant's initial death sentence by a federal court does not constitute cruel and unusual punishment. (***People v. McDowell*** (2012) 54 Cal.4th 395, 412.)

The California Supreme Court has repeatedly rejected claims that a defendant's due process right to a speedy appeal and right to equal protection are denied based on delay in appointing appellate counsel. Defendants' reliance on federal authority in non-capital cases is misplaced, as such decisions do not address the "'unique demands of appellate representation in capital cases'" and defendants have failed "'to demonstrate that the delay inherent in the procedures by which California recruits, screens, and appoints attorneys to represent capital defendants on appeal, is not necessary to ensure that competent representation is available for indigent capital appellants.'" (***People v. Vines*** (2011) 51 Cal.4th 830, 890.)

A defendant under a judgment of death does not suffer cruel and unusual punishment by the inherent delays involved in resolving the appeal. There is no conceivable prejudice if appeal results in reversal, and if judgment is affirmed, the delay has prolonged the defendant's life. (***People v. Seumanu*** (2015) 61 Cal.4th 1293, 1369; ***People v. Charles*** (2015) 61 Cal.4th 308, 336; ***People v. Richardson*** (2008) 43 Cal.4th 959, 1037.)

The time defendant has spent awaiting execution does not amount to cruel and unusual punishment under the Eighth Amendment. (***People v. Demetrulias*** (2006) 39 Cal.4th 1, 45; ***People v. Huggins*** (2006) 38 Cal.4th 175, 254.)

Appellate delay does not prevent fulfillment of the legitimate purposes of punishment (deterrence and retribution). (***People v. Ochoa*** (2001) 26 Cal.4th 398, 463, abrogated on another point as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

While excessive delays in the appellate process may give rise to a denial of due process, a defendant must show actual prejudice resulted from the delay, such as an impairment of grounds for appeal. (***People v. Young*** (2005) 34 Cal.4th 1149, 1230.)

The delay in appointing appellate counsel was not a denial of the defendant's federal constitutional rights. (***People v. Bennett*** (2009) 45 Cal.4th 577, 629.

C. CONSTITUTIONALITY [§ 16.43]

§ 16.43.1 Generally

California's death penalty law "does not violate international law, the Eighth and Fourteenth Amendments, or evolving standards of decency." (***People v. Townsel*** (2016) 63 Cal.4th 25, 73, internal quotation marks & citations omitted.)

California's 1978 death-penalty law, which requires the jury to be instructed that it shall impose the death penalty if it concludes the aggravating factors outweigh the mitigating factors is constitutional. (***Boyde v. California*** (1990) 494 U.S. 370, 377 [110 S.Ct. 1190, 108 L.Ed.2d 316]; see also ***Blystone v. Pennsylvania*** (1990) 494 U.S. 299 [110 S.Ct. 1078, 108 L.Ed.2d 255] [finding Pennsylvania death-penalty law (which is similar to California law), which requires trier of fact to impose death penalty if aggravating factors outweigh mitigating factors, constitutional and not an impermissible mandatory death penalty.)

The United States Supreme Court in *Boyde* sanctioned the type of "guided discretion" provided by California's 1978 death-penalty law. (***Kansas v. Marsh*** (2006) 548 U.S. 163, 177 [126 S.Ct. 2516, 2526, 165 L.Ed.2d 429] [reaffirming the viability of *Boyde* in finding "[t]he system in Kansas provides the type of 'guided discretion,' […], we have sanctioned in *Walton*, *Boyde*, and *Blystone*"].)

The 1978-death penalty law as set forth in Penal Code section 190.3 is proper under ***Lockett v. Ohio*** (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973]. It permits the defendant to present any evidence to show a penalty less than death is appropriate in his case. (***California v. Ramos*** (1983) 463 U.S. 992, 1004-1005 [103 S.Ct. 3446, 77 L.Ed.2d 1171].)

§ 16.43.1.1 Factor (b)

Section 190.3, subdivision (b), is constitutional. (***Tuilaepa v. California*** (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]; ***People v. Taylor*** (2010) 48 Cal.4th 574, 651-652; ***People v. Young*** (2005) 34 Cal.4th 1149, 1207-1208; ***People v. Anderson*** (2001) 25 Cal.4th 543, 584-585.)

The California Supreme Court has "repeatedly concluded there is no constitutional infirmity in using the same jury that decided guilt to weigh evidence of unadjudicated crimes" in the penalty phase. (***People v. Taylor*** (2010) 48 Cal.4th 574, 652.)

The jury's consideration of unadjudicated criminal activity in the penalty phase is not unconstitutional, and the jury need not make a unanimous finding the defendant was guilty of the unadjudicated crimes. (***People v. Taylor*** (2010) 48 Cal.4th 574, 651; ***People v. Elliot*** (2005) 37 Cal.4th 453, 488; ***People v. Brown*** (2004) 33 Cal.4th 382, 402; ***People v. Lewis*** (2001) 26 Cal.4th 334, 395.)

§ 16.43.2 Burden of Proof

"Unlike the guilt determination, the sentencing function is inherently moral and normative, not factual and, hence, not susceptible to a burden-of-proof quantification." (***People v. Salazar*** (2016) 63 Cal.4th 214, 255, internal quotation marks & citations omitted.)

Decisions interpreting the jury-trial guarantee in the Sixth Amendment (***Cunningham v. California*** (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; ***United States v. Booker*** (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]; ***Blakely v. Washington*** (2004) 542 U.S. 961 [125 S.Ct. 21, 159 L.Ed.2d 851]; ***Ring v. Arizona*** (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; ***Apprendi v. New Jersey*** (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]) have not changed the prior conclusions of the California Supreme Court regarding whether a burden of proof or unanimity is required at the penalty phase. (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1250 & fn. 22.)

The statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance. The special circumstance thus operates as the functional equivalent of an element of the greater offense of capital murder. The jury's finding beyond a reasonable doubt of the truth of a special circumstance satisfies the requirement of the Sixth Amendment that a jury find facts that increase a penalty of a crime beyond the statutory minimum. (***People v. Lewis*** (2008) 43 Cal.4th 415, 521, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

The jury need not find the death penalty appropriate beyond a reasonable doubt. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1129; ***People v. Burney*** (2009) 47 Cal.4th 203, 268; ***People v. Carrington*** (2009) 47 Cal.4th 145, 199-200; ***People v. Stanley*** (2006) 39 Cal.4th 913, 963.)

Unanimous agreement beyond reasonable doubt that aggravating circumstances outweigh mitigating factors is not required. (***People v. Bacon*** (2010) 50 Cal.4th 1082, 1129; ***People v. Burney*** (2009) 47 Cal.4th 203, 268; ***People v. Alcala*** (1992) 4 Cal.4th 742, 809.)

"'The death penalty law is not unconstitutional for failing to impose a burden of proof – whether beyond a reasonable doubt or by a preponderance of the evidence – as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.'" (***People v. Hoyos*** (2007) 41 Cal.4th 872, 926, abrogated on other grounds,

People v. McKinnon (2011) 52 Cal.4th 610, 641; ***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1066.)

The California death-penalty law which does not specify the burden of proof for the penalty phase, but does require a beyond-a-reasonable-doubt standard for proving special circumstances, and then requires the jury to consider and take into account all mitigating and aggravating circumstances in determining whether to impose the death penalty, is constitutional. (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1429.)

There is no requirement that the jury as a whole unanimously find the existence of the other criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235; ***People v. Foster*** (2010) 50 Cal.4th 1301, 1364; ***People v. Huggins*** (2006) 38 Cal.4th 175, 239.)

§ 16.43.3 Cruel and Unusual Punishment

California's death-penalty law is not cruel and unusual punishment. (***People v. Moon*** (2005) 37 Cal.4th 1, 47-48.)

Imposition of a death sentence for one who raped but did not kill a child, and did not intend to assist another in killing the child, is prohibited by the Eighth Amendment. (***Kennedy v. Louisiana*** (2008) 554 U.S. 407 [128 S.Ct. 2641, 171 L.Ed.2d 525].)

Imposition of the death penalty for the rape of an adult woman is grossly disproportionate and excessive. It is, therefore, forbidden by the Eighth Amendment as cruel and unusual punishment. (***Coker v. Georgia*** (1977) 433 U.S. 584, 592 [97 S.Ct. 2861, 53 L.Ed.2d 982].)

The death penalty does not violate the Eighth Amendment, notwithstanding the abolition of the death penalty by nations in Western Europe and the United States Supreme Court's ruling in ***Atkins v. Virginia*** (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335], that the execution of mentally retarded persons violates the prohibition against cruel and unusual punishment. (***People v. Hoyos*** (2007) 41 Cal.4th 872, 927, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641.)

The purported inconsistency between international law and California's alleged regular imposition of the death penalty does not render the death penalty cruel and unusual punishment. (***People v. Masters*** (2016) 62 Cal.4th 1019, 1078.) The California Supreme Court has repeatedly rejected the argument that California imposes the death penalty as a "regular punishment." ***(People v. Johnson*** (2016) 62 Cal.4th 600, 657.)

Justice Blackmun's dissent from the denial of certiorari in *Callins v. Collins* (1994) 510 U.S. 1141 [127 L.Ed.2d 435, 114 S.Ct. 1127], and his concurring opinion in *Sawyer v. Whitley* (1992) 505 U.S. 333, 357-360 [120 L.Ed.2d 269, 112 S.Ct. 2514], do not convince the California Supreme Court that the death penalty constitutes cruel and

unusual punishment or other basis for relief on direct appeal. (***People v. Masters*** (2016) 62 Cal.4th 1019, 1077-1078.)

The absence of intercase proportionality review does not deny a defendant the federal constitutional guarantees of due process, equal protection, or right to be free from cruel and usual punishment. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235.)

The felony-murder special circumstance is not unconstitutional for permitting an aider or abettor to be eligible for the death penalty without intending to kill. (***People v. Clark*** (2016) 63 Cal.4th 522, 609-610.)

Penal Code section 4500's [assault by a life prisoner] death eligibility provision is constitutional. (***People v. Landry*** (2016) 2 Cal.5th 52, 114.)

Cross-Reference:

§ 16.80, *re* Proportionality review / disparate sentence

§ 16.43.4 Due Process (Fourteenth Amendment)

A defendant is not denied due process or a fair trial because the trial judge or California Supreme Court justices are subject to judicial elections. (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1089-1090.)

The absence of intercase proportionality review does not deny a defendant the federal constitutional guarantees of due process, equal protection, or right to be free from cruel and usual punishment. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235.)

§ 16.43.4.1 Factor (a)

Factor (a) "does not foster arbitrary and capricious penalty determinations." (***People v. Bramit*** (2009) 46 Cal.4th 1221, 1248.)

§ 16.43.4.2 Factor (b)

Factor (b) evidence does not violate state and federal constitutional rights to equal protection and due process by allowing consideration of unadjudicated criminal conduct in capital sentencing that may not be used in sentencing non-capital offenders. (***People v. Taylor*** (2010) 48 Cal.4th 574, 651; ***People v. Watson*** (2008) 43 Cal.4th 652, 701.)

§ 16.43.5 Equal Protection

"Equal protection does not require California to adopt procedural rules available to capital defendants in other jurisdictions." (***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1111.)

There is no denial of equal protection because capital defendants do not receive the benefit of the same procedural protections as non-capital defendants. (***People v. Townsel*** (2016) 63 Cal.4th 25, 73; ***People v. Charles*** (2015) 61 Cal.4th 308, 337; ***People v. Williams*** (2013) 58 Cal.4th 197, 295; ***People v. Scott*** (2011) 52 Cal.4th 452, 497; ***People v. Nelson*** (2011) 51 Cal.4th 198, 227; ***People v. Jackson*** (2009) 45 Cal.4th 662, 701.)

"The death penalty law does not violate the equal protection clause because persons facing a death sentence lack certain procedural protections, such as written findings and unanimity as to aggravating factors including unadjudicated criminal activity under section 190.3, factor (b), afforded to persons charged with noncapital offenses." (***People v. Townsel*** (2016) 63 Cal.4th 25, 73.)

The death-penalty law does not deny equal protection because of the differences in rights of civil litigants versus criminal defendants, e.g., the right to take depositions. "[C]ivil litigation is entirely different from criminal litigation, and there is no requirement the two systems be similar." (***People v. Rountree*** (2013) 56 Cal.4th 823, 863.)

The absence of intercase proportionality review does not deny a defendant the federal constitutional guarantees of due process, equal protection, or right to be free from cruel and usual punishment. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235.)

§ 16.43.5.1 Factor (b)

Factor (b) evidence does not violate state and federal constitutional rights to equal protection and due process by allowing consideration of unadjudicated criminal conduct in capital sentencing that may not be used in sentencing non-capital offenders. (***People v. Taylor*** (2010) 48 Cal.4th 574, 651; ***People v. Watson*** (2008) 43 Cal.4th 652, 701.)

§ 16.43.6 Narrowing Function

California's death penalty law "'adequately narrows the class of death eligible defendants.'" (***People v. Salazar*** (2016) 63 Cal.4th 214, 255, quoting ***People v. Boyce*** (2014) 59 Cal.4th 672, 723; see also ***People v. Duff*** (2014) 58 Cal.4th 527, 568-569.)

Penal Code "[s]ection 190.2 does not fail to meaningfully narrow the pool of offenders eligible for the death penalty." (***People v. Townsel*** (2016) 63 Cal.4th 25, 72.)

The 1978 death penalty law is not unconstitutional because the special circumstances were enacted by voter initiative rather than by the Legislature. Nothing in

Supreme Court precedent relating to narrowing the circumstances under which defendants are death-eligible requires special circumstances to be defined by the Legislature as opposed to voter initiative. (***People v. Weaver*** (2012) 53 Cal.4th 1056, 1091.)

"California's death penalty statute 'does not fail to perform the constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed.'" (***People v. Beames*** (2007) 40 Cal.4th 907, 933.)

"[T]he felony-murder special circumstance (§ 190.2, subd. (a)(17)) is not overbroad and adequately narrows the pool of those eligible for death." (***People v. Nelson*** (2011) 51 Cal.4th 198, 225; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 957 [statutory special circumstances that qualify a defendant for the death penalty, including the felony-murder special circumstance, are not unconstitutionally overbroad].)

Statistical analysis based on published appeals from murder convictions does not persuade the California Supreme Court that California's death-penalty statute fails to narrow the class of death-eligible defendants. (***People v. Vieira*** (2005) 35 Cal.4th 264, 303; ***People v. Frye*** (1998) 18 Cal.4th 894, 1029, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

As the criteria in the California capital scheme that define the class of murderers for which death is a potential penalty, the special circumstances set forth in section 190.2 must comport with Eighth Amendment requirements by providing not only clear and objective standards for channeling jury discretion, but also detailed and specific guidance, thus making the process for imposing a death sentence "rationally reviewable." (***People v. Crittenden*** (1994) 9 Cal.4th 83, 154; ***People v. Bacigalupo*** (1993) 6 Cal.4th 457, 467-468.)

Because they do not perform a narrowing function, the aggravating factors in section 190.3 are not subject to the Eighth Amendment standard used to define death-eligibility criteria. (***People v. Bacigalupo*** (1993) 6 Cal.4th 457, 477.)

First-degree-murder liability and special-circumstance findings may be based upon common elements without offending the Eighth Amendment. (***People v. Catlin*** (2001) 26 Cal.4th 81, 158.)

The torture-murder special circumstance does not violate Eighth Amendment narrowing requirement. (***People v. Streeter*** (2012) 54 Cal.4th 205, 251.)

Murder by means of poison is a relatively rare crime and the special circumstance does not have the potential of sweeping into the death-eligible category most persons who commit first-degree murder. (***People v. Catlin*** (2001) 26 Cal.4th 81, 159.)

§ 16.43.6.1 Propositions 114 and 115

Any effect which Propositions 114 and 115 had on the constitutional narrowing function of the death-penalty law occurred after commission of defendant's offenses and, therefore, had no bearing on the constitutionality of the statute applicable to defendant. (***People v. Crittenden*** (1994) 9 Cal.4th 83, 155.)

Proposition 115 did not expand the death penalty such as to render it impermissibly vague. (***People v. Morgan*** (2007) 42 Cal.4th 593, 622.)

Special circumstances added by Propositions 114 and 115 did not make the special circumstances over-inclusive by their number or terms. (***People v. Arias*** (1996) 13 Cal.4th 92, 187.)

§ 16.43.7 Eighth Amendment Reliability Requirement

Eighth Amendment reliability is attained when the prosecution discharges its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death-penalty statute, the death verdict is rendered under proper instructions and procedures, and the trier of fact has duly considered relevant mitigating evidence, if any, which has been presented by the defendant. (***People v. Jenkins*** (2000) 22 Cal.4th 900, 1044.)

The Eighth Amendment requirement of reliability does not require relaxing the requirements set forth in ***California v. Trombetta*** (1984) 467 U.S. 479 [104 S.Ct. 2528, 102 L.Ed.2d 281], for demonstrating the denial of due process based on a failure to preserve evidence. (***People v. Lucas*** (2014) 60 Cal.4th 153, 222, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

Factor (a) does not lead to arbitrary and capricious decisionmaking in violation of the Eighth Amendment because prosecutors made arguments in different cases, arguing in one case a defendant is deserving of the death penalty for the savage nature of an attack involving multiple wounds, while arguing in another case that the death penalty is warranted for an execution-style killing in cold blood. Arguments based on divergent circumstances of individual cases does not adversely affect the validity of factor (a). (***People v. Jackson*** (2009) 45 Cal.4th 662, 699-700.)

§ 16.43.8 Vagueness

California's death penalty statute is not impermissibly broad, on its face, or as interpreted by the California Supreme Court. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1234.)

"Section 190.2 is not impermissibly broad, and section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death penalty." (***People v. Cordova*** (2015) 62 Cal.4th 104, 150.)

None of the statutory aggravating or mitigating factors are constitutionally vague. Defendant pointed to nothing in the record suggesting his jury considered impermissible evidence in aggravation or failed to consider appropriate evidence in mitigation. (***People v. Williams*** (1997) 16 Cal.4th 153, 267-268.)

Factors (a) (circumstances of the crime), (b) (other violent criminal activity), and (i) (defendant's age) direct the sentencer's attention to specific, understandable facts about the defendant and the capital crime that might bear on his moral culpability. These factors are not "illusory" or impermissibly "vague." (***Stringer v. Black*** (1992) 503 U.S. 222 [112 S.Ct. 1130, 117 L.Ed.2d 367]; ***People v. Arias*** (1996) 13 Cal.4th 92, 187-188; ***People v. Cudjo*** (1993) 6 Cal.4th 585, 637; ***People v. Tuilaepa*** (1992) 4 Cal.4th 569, 594-595.)

In *Tuilaepa v. California*, the United States Supreme Court held the sentencing factors set forth in § 190.3, particularly factors (a) (circumstances of the capital crime), (b) (other violent criminal activity), (c) (prior felony convictions), and (i) (defendant's age), are not impermissibly vague. (***Tuilaepa v. California*** (1994) 512 U.S. 967, 975-980 [114 S.Ct. 2630, 2636-2639, 129 L.Ed.2d 750]; see also ***People v. Box*** (2000) 23 Cal.4th 1153, 1217, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129]; ***People v. Turner*** (1994) 8 Cal.4th 137, 207-208, abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

§ 16.43.8.1 Identifying Factors as Aggravating or Mitigating

Cross-Reference:

§ 13.52.1, *re* No requirement to identify factors as aggravating or mitigating

There is no federal constitutional requirement to identify factors as aggravating or mitigating. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." (***Tuilaepa v. California*** (1994) 512 U.S. 967, 979 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

Penal Code section 190.3 is not invalid, although it does not expressly state which factors are aggravating factors and which factors are mitigating factors. Nor is the trial court "'constitutionally required to instruct the jury as to which of the listed sentencing factors are aggravating, which are mitigating, and which could be either mitigating or

aggravating, depending upon the jury's appraisal of the evidence.'" (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1097, quoting ***People v. Jennings*** (2010) 50 Cal.4th 616, 690.)

The Eighth and Fourteenth Amendments do not require the jury unanimously find the existence of aggravating factors, or make written findings regarding aggravating factors. (***People v. Lucas*** (2014) 60 Cal.4th 153, 332-333, disapproved on other grounds by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

§ 16.43.8.2 Factor (a)

Considering the circumstances of the crime pursuant to Penal Code section 190.2, factor (a), does not result in the arbitrary and capricious imposition of the death penalty. (***People v. Townsel*** (2016) 63 Cal.4th 25, 73; ***People v. O'Malley*** (2016) 62 Cal.4th 944, 1013.)

The circumstances of the crime – factor (a) – has not become arbitrary and capricious over time based on its application. "It was apparent in *Tuilaepa* II that factor (a) would allow wide-ranging and arguably contradictory circumstances to be urged as aggravating factors." (***People v. Foster*** (2010) 50 Cal.4th 1301, 1363.)

"[C]onstruing section 190.3, factor (a) to include victim impact evidence does not render the statute unconstitutionally vague or overbroad." (***People v. Carrington*** (2009) 47 Cal.4th 145, 197.)

The admissibility of a broad array of victim impact evidence as circumstances of the crime does not render factor (a) unconstitutionally vague. (***People v. Pollock*** (2009) 32 Cal.4th 1153, 1183; ***People v. Boyette*** (2002) 29 Cal.4th 381, 445, fn. 12.)

Permitting consideration of evidence about a victim's life that was not known or foreseeable to a defendant does not render factor (a) unconstitutionally vague. (***People v. Jones*** (2012) 54 Cal.4th 1, 70; ***People v. Carrington*** (2009) 47 Cal.4th 145, 196-197.)

§ 16.43.8.3 Factors (d) & (g)

Factors (d) and (g) statutory terms are not vague and do not inhibit the consideration of mitigating evidence or render the factors unconstitutionally vague. (***People v. Anderson*** (2001) 25 Cal.4th 543, 601.)

§ 16.43.8.4 Factor (i)

Defendant's age at the time of the crime (§ 190.3, factor (i), is not an unconstitutionally vague sentencing factor under the Eighth Amendment. (***Tuilaepa v. California*** (1994) 512 U.S. 967, 977 [114 S.Ct. 2630, 129 L.Ed.2d 750]; ***People v. O'Malley*** (2016) 62 Cal.4th 944, 1013.)

A defendant's due process and Eighth Amendment rights are not violated by factor (i) because it permits consideration of a defendant's age without providing guidance on the relevance of the factor. (***People v. Mendoza*** (2016) 62 Cal.4th 856, 916.)

§ 16.43.9 Waiver / Forfeiture

The California Supreme Court has consistently considered "as applied" constitutional challenges to the death-penalty law without discussing whether they were raised in the trial court. (***People v. Hernandez*** (2003) 30 Cal.4th 835, 863, disapproved on other grounds, *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.)

D. BRIEFS [§ 16.44]

An appellate brief must support each point with argument and, if possible, citation of authority. (Cal. Rules of Court, rule 14(a)(1)(B); ***People v. Gray*** (2005) 37 Cal.4th 168, 198.)

Where there was no citation to the record or legal argument in either the opening brief nor reply brief, the reviewing court declined to consider the argument, as a reviewing court may treat an issue as waived and decline to consider it where the appellate brief presents no legal argument on the point. (***People v. Myles*** (2012) 52 Cal.4th 1181, 1222, fn. 14; see also ***People v. Hovarter*** (2008) 44 Cal.4th 983, 1029 ["Every brief should contain a legal argument with citation of authorities on points made."]; ***People v. Wilkinson*** (2004) 33 Cal.4th 821, 846, fn. 9.)

The California Supreme Court will not ordinarily consider arguments that are raised for the first time in a reply brief. (***People v. Mickel*** (2016) 2 Cal.5th 181, 197; ***People v. Tully*** (2012) 54 Cal.4th 952, 1075.)

An argument raised simply to "assure preservation of it for any future federal proceeding" which is not supported by argument and authority is not properly raised (***People v. Clair*** (1992) 2 Cal.4th 629, 653, fn. 2; ***People v. Roberts*** (1992) 2 Cal.4th 271, 340-341) except for "routine or generic" instructional and constitutional challenges to the death penalty. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 303-304, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 643.)

Perfunctory assertions of error, without development or a clear indication they are intended to be discrete contentions, are not properly presented and will be rejected on that basis (***People v. Turner*** (1994) 8 Cal.4th 137, 214, fn. 19, abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555), except for "routine or generic" instructional and constitutional challenges to the death penalty (***People v. Schmeck*** (2005) 37 Cal.4th 240, 303-304, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 643).

Perfunctory argument in the trial court that evidence is "inadmissible pursuant to the U.S. Constitution" does not preserve federal constitutional claims on appeal. (***People v. Davis*** (1995) 10 Cal.4th 463, 507, fn. 8; ***People v. Rowland*** (1992) 4 Cal.4th 238, 262, fn. 2.)

Rules of Court do not permit incorporating a habeas petition by reference in brief on appeal as to any arguments which the court may ultimately decide, in reviewing the petition, should have been raised on appeal. (***People v. Richardson*** (2008) 43 Cal.4th 959, 1038.)

E. CONSOLIDATION [§ 16.45]

Consolidation is not necessary for consideration and decision in an automatic appeal in order to consider a habeas corpus petition. "Indeed, it is inappropriate, inasmuch as the habeas corpus petition extends far beyond the record on appeal. Neither is consolidation necessary for consideration and decision of his habeas corpus petition vis-à-vis his appeal. The habeas corpus petition is not confined to the record on appeal." (***People v. Waidla*** (2000) 22 Cal.4th 690, 703, fn. 1.)

F. EFFECT OF REVERSIBLE ERROR AT PENALTY PHASE [§ 16.46]

Reversible error at the penalty phase does not entitle a defendant to a life-without-parole term; the remedy is a new penalty trial. (***People v. Robertson*** (1982) 33 Cal.3d 21, 55-56; ***People v. Haskett*** (1982) 30 Cal.3d 841, 861.)

G. EXECUTION [§ 16.47]

Challenges to method of execution are not cognizable on appeal because it does not affect the validity of the judgment. (***People v. Gutierrez*** (2009) 45 Cal.4th 789, 834; ***People v. Tafoya*** (2007) 42 Cal.4th 147, 199; ***People v. Rogers*** (2006) 39 Cal.4th 826, 911; ***People v. Demetrulias*** (2006) 39 Cal.4th 1, 45.)

The defendant makes no showing that the number of condemned prisoners executed in California, or the order in which their execution dates are set, is determined by any invidious means or method, with discriminatory motive or effect, or indeed according to anything other than the pace at which various defendants' appeals and habeas corpus proceedings are concluded. (***People v. Snow*** (2003) 30 Cal.4th 43, 127.)

An imperfection in the method of execution does not affect the validity of a death judgment. On direct appeal, the defendant is restricted to claims bearing on the validity of the death sentence itself. A claim regarding the existence or non-existence of regulations that may or may not be in effect when the judgment is to be carried out does not affect the validity of the death judgment. (***People v. Cornwell*** (2005) 37 Cal.4th 50,

105-106, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

H. INCONSISTENT VERDICTS [§ 16.48]

Inherently inconsistent verdicts are allowed to stand as a general rule. It is possible that the jury arrived at an inconsistent conclusion through mistake, compromise, or leniency. Thus, if the defendant is given the benefit of an acquittal on the count on which they were acquitted, it is neither irrational nor illogical to require the defendant to accept the burden of conviction on the count for which he was convicted. (***People v. Avila*** (2006) 38 Cal.4th 491, 600-601.)

An "'inconsistency in a verdict may show no more than lenity, compromise, or mistake, none of which undermines the validity of the verdict.'" (***People v. Abilez*** (2007) 41 Cal.4th 472, 513.)

Independent review of the sufficiency of the evidence is all that is required to protect the defendant against jury irrationality. (***People v. Avila*** (2006) 38 Cal.4th 491, 601.)

"There is no prohibition against considering all of the evidence in the record to determine the sufficiency of evidence on one count merely because the jury did not reach a unanimous verdict on a count to which the evidence may have related. The failure of the jury to reach a verdict on the allegation that defendant personally used a .38-caliber handgun may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 890-891 [internal quotation marks and citations omitted].)

A conviction for attempted rape is not defective and may be used in aggravation under Penal Code section 190.3, subdivision (a), even though jury did not find the attempted-rape special circumstance true. (***People v. Taylor*** (1990) 52 Cal.3d 719, 743.)

I. JURISDICTION PENDING APPEAL [§ 16.49]

During pendency of the appeal, the trial court loses jurisdiction to do anything connected with cause which may affect the judgment, but retains certain powers over the parties and incidental aspects of the cause, such as procedural steps in connection with preparation and correction of the record. (***People v. Johnson*** (1992) 3 Cal.4th 1183, 1257.)

While original habeas corpus jurisdiction is held concurrently by the Superior Courts, Courts of Appeal, and California Supreme Court, jurisdiction is limited to the extent that a court cannot interfere with the appellate jurisdiction of a higher court. (***In re Carpenter*** (1995) 9 Cal.4th 634.)

Determination of issues in a writ that are not cognizable on appeal cannot interfere with the appellate jurisdiction of a higher court. (***In re Carpenter*** (1995) 9 Cal.4th 634.)

Where a habeas claim is also raised, or could be raised on direct appeal, from the appellate record, the Superior Court's consideration of the writ interferes with the appellate court's jurisdiction over the pending appeal. (***People v. Mayfield*** (1993) 5 Cal.4th 220, 225, abrogated on other grounds, *People v. Scott* (2015) 61 Cal.4th 363, 390.)

Appellate jurisdiction is limited to the four corners of the record on appeal. (***In re Carpenter*** (1995) 9 Cal.4th 634, 646.)

Where review of order denying Penal Code section 190.4 motion to modify sentence was pending on automatic appeal, superior court lacked authority to grant habeas corpus petition and order a new hearing on the motion. (***People v. Mayfield*** (1993) 5 Cal.4th 220, 224-227, abrogated on other grounds, *People v. Scott* (2015) 61 Cal.4th 363, 390.)

Where the underlying judgment was vacated in companion habeas corpus proceeding, the automatic appeal is dismissed as moot. (***People v. Neely*** (1993) 6 Cal.4th 877, 899.)

J. INTERNATIONAL LAW [§ 16.50]

Cross-Reference:

§ 3.71, *re* Violation of Vienna Convention on Consular Relations

"'Imposition of the death penalty in accordance with state and federal constitutional and statutory law does not violate international law or the Eighth Amendment to the federal Constitution.'" (***People v. Martinez*** (2016) 62 Cal.4th 856, 916, quoting ***People v. Bryant, Smith, & Wheeler*** (2014) 60 Cal.4th 335, 469.)

California's death penalty does not violate international law. (***People v. Salazar*** (2016) 63 Cal.4th 214, 257; ***People v. Townsel*** (2016) 63 Cal.4th 25, 73.)

California's death-penalty law does not violate the International Covenant of Civil and Political Rights which prohibits the "arbitrary" deprivation of life and bars "cruel, inhuman or degrading treatment or punishment." The covenant specifically permits the use of the death penalty "if imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime." (Art. VI, § 2.) When the United States ratified the treaty, it specifically reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under the laws permitting imposition of the death penalty. (See 138 Cong. Rec. S-4718-01, S4783

(1992); ***People v. Mungia*** (2008) 44 Cal.4th 1101, 1143; ***People v. Perry*** (2006) 38 Cal.4th 302, 322; ***People v. Brown*** (2004) 33 Cal.4th 382, 403-404.)

California's death penalty law does not violate international law, such as the International Covenant on Civil and Political Rights, or the American Declaration of the Rights and Duties of Man. (***People v. O'Malley*** (2016) 62 Cal.4th 944, 1014; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 958.)

The California Supreme Court has repeatedly rejected the contention that "the use of capital punishment 'as regular punishment' violates international norms of humanity and decency and hence violates the Eighth and Fourteenth Amendments of the United States Constitution." As the Court has explained, "California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to "regular punishment" for felonies." (***People v. Kopatz*** (2015) 61 Cal.4th 62, 95-96, internal quotation marks & citations omitted; ***People v. Debose*** (2014) 59 Cal.4th 177, 214, 172 [same].)

The death penalty as applied in California is not rendered unconstitutional through operation of international law and treaties. (***People v. Nelson*** (2011) 51 Cal.4th 198, 227; ***People v. Mills*** (2010) 48 Cal.4th 158, 215.)

"California's status as being in the minority of jurisdictions worldwide that impose capital punishment, especially in contrast to nations of Western Europe, does not violate the Eighth Amendment." (***People v. Mungia*** (2008) 44 Cal.4th 1101, 1143.)

California's death-penalty law does not violate international laws and norms in contravention of the prohibition on cruel and unusual punishment. (***People v. Kopatz*** (2015) 61 Cal.4th 62, 95-96; ***People v. McCurdy*** (2014) 59 Cal.4th 1063, 1112; ***People v. Perry*** (2006) 38 Cal.4th 302, 322.)

International norms do not require the application of the death penalty to only the most extraordinary crimes. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 849.)

California's imposition of death does not offend international norms of humanity and decency. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 708; ***People v. Beames*** (2007) 40 Cal.4th 907, 935.)

California's death penalty does not generally violate international law, as international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 104, abrogated as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; ***People v. Lewis*** (2008) 43 Cal.4th 415, 539, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919; ***People v. Hoyos*** (2007) 41 Cal.4th 872, 925, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641.)

The court need not consider whether a violation of state or federal constitutional law would also violate international law, due to the failure of defendant to show that either state or federal constitutional law has been violated. (***People v. Hoyos*** (2007) 41 Cal.4th 872, 925, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641; ***People v. Hillhouse*** (2002) 27 Cal.4th 469, 511.) Had defendant shown prejudicial error under domestic law, the judgment would have been set aside on that basis without resort to international law. (*Ibid*.)

K. LAW OF THE CASE [§ 16.51]

The doctrine of law of the case is applied in death-penalty cases when the previous decision was rendered by a court of appeal, unless an intervening decision has altered or clarified the controlling rules of law, or if the rule stated in the prior decision was a manifest misapplication of the law resulting in substantial injustice. (***People v. Jurado*** (2006) 38 Cal.4th 72, 94; ***People v. Boyer*** (2006) 38 Cal.4th 412, 441-443.)

The existence of a death sentence is not a sufficient basis to avoid application of law of-the-case doctrine. (***People v. Gray*** (2005) 37 Cal.4th 168, 198.)

The doctrine of law of the case governs only the principles of law set forth by the appellate court, as applicable to a retrial of fact, and it controls the outcome on retrial only to the extent the evidence is substantially the same. The doctrine does not limit the new evidence a party may introduce on retrial. (***People v. Boyer*** (2006) 38 Cal.4th 412, 443.)

L. MENTALLY INCOMPETENT APPELLANT [§ 16.52]

A post-judgment proceeding may proceed even if appellant would no longer be considered competent to stand trial. "Meaningful" appellate review may take place even though an appellant must rely on a "next friend." (***People v. Kelly*** (1992) 1 Cal.4th 495, 544-545.)

M. POLITICS / JUDICIAL ELECTIONS [§ 16.53]

The California Supreme Court has repeatedly disagreed with claims that it has been "so influenced by political pressure in its review of capital cases that various constitutional rights associated with meaningful appellate review have been abrogated." (***People v. Gonzales*** (2011) 51 Cal.4th 894, 958.)

N. RACE [§ 16.54]

Detailed statistical study showing a correlation between race and imposition of the death penalty in Georgia does not show that death sentence imposed on Black defendant

for killing a White victim was the result of intentional racial discrimination or violated the Eighth Amendment. (***McCleskey v. Kemp*** (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262].)

The Constitution does not require that a state eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. (***McCleskey v. Kemp*** (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262].)

O. REQUEST TO PRESERVE MATERIALS [§ 16.55]

The trial court lacked jurisdiction to order preservation of materials not part of the record on appeal. Accordingly, order denying defense request did not affect substantial rights and appeal from that order was dismissed. (***People v. Johnson*** (1992) 3 Cal.4th 1183, 1257.)

The enactment of Penal Code section 1054.9 did not create any preservation duties that do not otherwise exist. (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 901; ***In re Steele*** (2004) 32 Cal.4th 682, 695.)

"Because the superior court has jurisdiction under Penal Code section 1054.9 to grant postconviction discovery to the extent consistent with the statute, the court has the inherent power under Code of Civil Procedure section 187 to order preservation of evidence that would potentially be subject to such discovery. Questions as to whether a movant is actually entitled to discovery of the material to be preserved, including compliance with the procedural requirements of Penal Code section 1054.9, will await the eventual filing and determination of the postconviction discovery motion." Preservation orders that provide for discovery beyond what is in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case or extends to judicial or other non-law-enforcement agencies, such as jury commissioners or indigent defense programs; or mandate that any such agency provide "an accounting as to whether the requested materials are in the possession of some other governmental unit, entity, official, or current or former employee, or whether any of the requested material has been destroyed" would be "beyond the scope of Penal Code section 1054.9 would thus exceed the trial court's jurisdiction on a motion to preserve evidence." (***People v. Superior Court (Morales)*** (Feb. 16, 2017, S228642) __ Cal.5th ___ [2017 Cal. LEXIS 1023 15-17*].)

Cross-Reference:

§ 17.13.2, *re* Section 1054 no preservation duties that do not otherwise exist

P. REMANDS [§ 16.56]

No remand necessary before invalidating special-circumstances dependent upon prior conviction where the constitutional deficiency (violation of Double Jeopardy Clause) in obtaining prior murder conviction apparent from record on appeal. (***People v. Trujeque*** (2015) 61 Cal.4th 227, 253.)

§ 16.56.1 Modification of Unauthorized Sentence

A reviewing court properly modifies an erroneously entered judgment of death as an unauthorized sentence pursuant to Penal Code section 1260, and there is no need to remand to determine whether the authorized sentence of second degree murder should be stayed. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1174.)

Q. RIGHT TO COUNSEL [§ 16.57]

A single attorney appointed both as counsel on appeal and for habeas might have a conflict of interest alleging, in the habeas petition, ineffective assistance on appeal, but that does not demonstrate how the dual appointment could interfere with counsel's representation on the appeal. There is no constitutional right to counsel on habeas. (***People v. Young*** (2005) 34 Cal.4th 1149, 1232; ***People v. Kipp*** (2001) 26 Cal.4th 1100, 1139-1140.)

R. REDUCED SENTENCE ON APPEAL [§ 16.58]

"[Penal Code section] 1181 does not confer upon [the California Supreme Court] the power to substitute its judgment as to choice of penalty for that of the trier of fact. [The California Supreme Court] thus may not reduce a capital defendant's sentence from death to life imprisonment, unless that sentence is contrary to the law or to the evidence, even if [it] were to disagree with the jury's penalty determination. [Citation.] Rather, '[a]bsent prejudicial error or legal insufficiency of evidence, [it] must uphold the jury's verdict of death.'" (***People v. Jennings*** (2010) 50 Cal.4th 616, 687.)

S. NO HEIGHTENED STANDARD OF REVIEW [§ 16.59]

"As the United States Supreme Court has held in a similar context, 'the standard of federal [constitutional] review for determining whether a state court has violated the Fourteenth Amendment's guarantee against wholly arbitrary deprivations of liberty is equally applicable in safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty.' (*Lewis v. Jeffers* (1990) 497 U.S. 764, 782 [111 L.Ed.2d 606, 110 S.Ct. 3092] [applying the standard established in *Jackson v. Virginia* (1979) 443 U.S. 307 [61 L.Ed.2d 560, 99 S.Ct. 2781], to federal

constitutional review of the state court's finding of an aggravating circumstance in a capital case].) As the high court observed in *Jeffers*, the application of the facts to the law at a state court trial – that is, the determination of whether the evidence is sufficient to sustain the charges – is a question of state law, except to the extent that the determination of sufficiency at issue was arbitrary or capricious under the federal due process or cruel and unusual punishment clauses. The application of state law in determining the sufficiency of the evidence will be considered arbitrary and capricious, and therefore a federal constitutional violation, 'if and only if no reasonable sentencer [or fact finder] could have so concluded.' (*Jeffers*, *supra*, 497 U.S. at p. 783.) Accordingly, we apply the standard of review set forth above to ensure that defendants' state and federal rights are protected." (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 161 & fn. 19.)

V. JURY-PROTECTION ORDERS [§ 16.60]

For cases with jury verdicts rendered on or after January 1, 1996, Code of Civil Procedure sections 237 and 206 provide for juror privacy and safety, and a criminal defendant's ability to contact jurors after trial only if sufficient need is shown. (***Townsel v. Superior Court*** (1999) 20 Cal.4th 1084, 1087.)

For cases with verdicts prior to January 1, 1996, Code of Civil Procedure sections 916(a) and 206 establish jurisdiction for a trial court to make post-judgment orders protecting juror privacy and safety, and controlling contact with jurors by a defendant.

VI. NEW TRIAL MOTION (PEN. CODE § 1118.1) [§ 16.70]

A trial court reweighs the evidence independently when a sufficiency of the evidence challenge is made in the context of a new trial motion. The trial court should not disregard the verdict but instead should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. (***People v. Guerra*** (2006) 37 Cal.4th 1067, 1159, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

"It is undeniable that trial judges are particularly well suited to *observe courtroom performance* and to rule on the adequacy of counsel in criminal cases tried before them. [Citation.] Thus, in appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 101, emphasis in original, internal quotation marks & citations omitted; overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Where the claim of ineffective assistance of counsel rests primarily on matters other than what the trial court could have observed during trial, it was within discretion of trial court to conclude claim should be litigated in a habeas corpus proceeding. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 101, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

VII. PROPORTIONALITY REVIEW / DISPARATE SENTENCE [§ 16.80]

On appeal, the California Supreme Court has no authority to independently evaluate whether the evidence shows that the defendant's sentence of death is appropriate. (***People v. Hines*** (1997) 15 Cal.4th 997, 1080.)

A. INTERCASE PROPORTIONALITY REVIEW [§ 16.81]

"Intercase" proportionality review is not required by the federal Constitution and the California Supreme Court has consistently declined to undertake it. (***Pulley v. Harris*** (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29]; ***People v. Salazar*** (2016) 63 Cal.4th 214, 257; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 957; ***People v. Lindberg*** (2008) 45 Cal.4th 1, 54; ***People v. Cook*** (2007) 40 Cal.4th 1334, 1368.)

California's death penalty scheme is not unconstitutional for not requiring intercase proportionality review. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235; ***People v. Gonzales*** (2011) 51 Cal.4th 894, 957; ***People v. Bacon*** (2010) 50 Cal.4th 1082, 1129; ***People v. Jackson*** (2009) 45 Cal.4th 662, 701.)

Neither due process, equal protection, prohibition against cruel and unusual punishment, or guarantee to a fair trial, requires intercase proportionality review. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235; ***People v. Mai*** (2013) 57 Cal.4th 986, 1057; ***People v. Murtishaw*** (2011) 51 Cal.4th 574, 597; ***People v. Foster*** (2010) 50 Cal.4th 1301, 1368; ***People v. Hoyos*** (2007) 41 Cal.4th 872, 927, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641.)

Equal protection does not compel that California's capital sentencing scheme include the same disparate sentence review previously provided noncapital convicts pursuant to the Determinate Sentencing Act. (***People v. Foster*** (2010) 50 Cal.4th 1301, 1368.)

Upon request, the California Supreme Court reviews facts of case to determine whether a death sentence is so disproportionate to a defendant's culpability so as to violate the California Constitution's prohibition against cruel or unusual punishment. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1032.)

B. INTRACASE PROPORTIONALITY [§ 16.82]

California Constitution, article I, section 27, does not preclude "intracase" review. (***People v. Bean*** (1988) 46 Cal.3d 919, 957.)

Both the federal and state Constitutions, under the "cruel and unusual punishment" provisions, preclude the imposition of punishment that is disproportionate to the crime or the criminal. (***Solem v. Helm*** (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637]; ***Enmund v. Florida*** (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140]; ***People v. Young*** (2005) 34 Cal.4th 1149, 1231; ***People v. Dillon*** (1983) 34 Cal.3d 441, 477-482, abrogated by statute as stated in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1185-1186 [*re* whether Legislature intended to abrogate common felony-murder rule]; ***In re Lynch*** (1972) 8 Cal.3d 410, 424.)

In evaluating whether a sentence is cruel or unusual punishment as applied to a particular defendant (intracase proportionality review), the reviewing court examines the circumstances of the offense, including the defendant's motive, extent to which defendant was involved in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must consider the defendant's personal characteristics, e.g., age, prior criminality and mental capabilities. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 791; ***People v. Tafoya*** (2007) 42 Cal.4th 147, 198.)

If the court concludes the penalty is grossly disproportionate to the defendant's culpability, or stated another way, that the punishment shocks the conscience and offends fundamental notions of human dignity, the sentence must be invalidated as unconstitutional. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 791; ***People v. Guerra*** (2006) 37 Cal.4th 1067, 1163-1164, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Crimes were not disproportionate to a death sentence where the defendant was the "kingpin in a brief but violent and lethal crime wave." (***People v. Williams*** (2015) 61 Cal.4th 1244, 1289.)

Crimes were found not disproportionate to punishment where defendant did not randomly select victim, but instead used his special knowledge as a workman or neighbor to assess their vulnerability before preying upon them, and that combined with the unusual emotional brutality and physical brutality toward victims, was such that his sentence is not so disproportionate to his personal culpability as to shock the conscience. (***People v. Bennett*** (2009) 45 Cal.4th 577, 629.)

§ 16.82.1 Codefendant's Case

While intercase proportionality review encompasses determining whether the death penalty is disproportionate to the defendant's personal culpability, which takes into account the defendant's relative culpability for the crime as compared to others who were

involved, the disposition of codefendants' cases is not part of the analysis. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 744.)

The fact that defendant was sentenced to death and his codefendant was not does not establish disproportionality violative of constitutional principles. (***People v. Avena*** (1996) 13 Cal.4th 394, 447; ***People v. Sanders*** (1995) 11 Cal.4th 475, 565.)

There is no requirement to engage in proportionality review for codefendants where one is not charged with a capital offense. (***People v. Box*** (2000) 23 Cal.4th 1153, 1219, overruled on other grounds, *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129]; ***People v. Williams*** (1997) 16 Cal.4th 153, 279-280.)

No comparison is required between a capital sentence and plea-bargained terms received by defendant's codefendants. (***People v. Ochoa*** (2001) 26 Cal.4th 398, 458, abrogated on another point as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

C. DISPARATE SENTENCE REVIEW [§ 16.83]

A capital defendant is not entitled to a disparate sentence review such as that afforded non-capital felons under the determinate-sentencing law. (***People v. Cox*** (1991) 53 Cal.3d 618, 691, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; ***People v. Bell*** (1989) 49 Cal.3d 502, 553.)

VIII. RECORD ON APPEAL [§ 16.90]

The California Supreme Court cannot consider on appeal evidence that is not in the record. (***People v. Ochoa*** (1998) 19 Cal.4th 353, 479; ***People v. Barnett*** (1998) 17 Cal.4th 1044, 1178; ***People v. Fairbank*** (1997) 16 Cal.4th 1223, 1249.)

"Appellate jurisdiction is limited to the four corners of the record on appeal." (***People v. Waidla*** (2000) 22 Cal.4th 690, 743, internal quotation marks & citations omitted.)

Counsel is not permitted to incorporate arguments from his related habeas petition "as background material" in support of his claims on automatic appeal. (***People v. Williams*** (2013) 56 Cal.4th 630, 683.)

Bench notes of judge do not constitute part of the record or the official work or actions of either the judge or clerk. (***People v. Lewis & Oliver*** (2006) 39 Cal.4th 970, 1065.)

A. ADEQUACY [§ 16.91]

"State law entitles a defendant only to an appellate record adequate to permit him or her to argue the points raised in the appeal. Federal constitutional requirements are

similar. The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review. Similarly, the Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner. The defendant has the burden of showing the record is inadequate to permit meaningful appellate review." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 914 [internal quotation marks and citations omitted]; ***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1349, [same] abrogated on other grounds by ***People v. Scott*** (2015) 61 Cal.4th 363, 391, fn. 3.)

An appellate record is inadequate only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. (***People v. Clark*** (2016) 63 Cal.4th 522, 569-570; ***People v. Young*** (2005) 34 Cal.4th 1149, 1170.)

Merely showing that missing material may have contained matter that demonstrated error or reflected a constitutional violation amounts to nothing more than speculation and is insufficient to demonstrate prejudice. (***People v. Young*** (2005) 34 Cal.4th 1149, 1170.)

The defendant bears the burden of demonstrating that the appellate record is not adequate to permit meaningful review. (***People v. Rundle*** (2008) 43 Cal.4th 76, 110-111, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

If the record can be reconstructed with other methods, such as "settled statement" procedures, the defendant must employ such methods to obtain appellate review. (***People v. Young*** (2005) 34 Cal.4th 1149, 1170.)

No prejudice on appeal from one missing exhibit. (***People v. Perry*** (2006) 38 Cal.4th 302, 317.)

Misconduct in the office of superior-court clerk resulted in destruction of 80 exhibits, with 62 exhibits reconstructed and 12 exhibits (all photographs) unable to be reconstructed. Defendant failed to show deficiencies left him unable to proceed on appeal because of an inadequate record to permit meaningful appellate review. (***People v. Osband*** (1996) 13 Cal.4th 622, 663.)

Where material from lost questionnaires of prospective jurors was present in the reporter's and clerk's transcripts through quotation and paraphrase, the record was ample record for meaningful appellate review of defendant's *Batson* claim. (***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1349-1350, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Appellant failed to carry his burden to show that the lost jury questionnaires impaired meaningful appellate review. (***People v. Haley*** (2004) 34 Cal.4th 283, 305-306.)

Absence of written findings does not deprive defendant of meaningful appellate review. (***People v. Rangel*** (2016) 62 Cal.4th 1192, 1235; ***People v. Tafoya*** (2007) 42 Cal.4th 147, 197.)

Unreported discussion between interpreters and witnesses did not deny the defendant a sufficient record to permit an adequate and effective appellate review. (***People v. Romero*** (2008) 44 Cal.4th 386, 411.)

Notes sent to a prosecutor by the grand jury do not establish unreported conversations between the foreperson and the district attorney. Even assuming such conversations, defendant has failed to meet burden in a post-conviction challenge of showing that irregularities in grand jury proceedings were structural and resulted in actual prejudice relating to his conviction. (***People v. Bennett*** (2009) 45 Cal.4th 577, 590.)

Defendant failed to demonstrate a substantial risk the judgment was arbitrary and capricious or that he was denied adequate and effective appellate review based on the trial court's denial of his motion to have entire trial audio recorded on ground Spanish translator may not accurately translate testimony of Spanish speaking witnesses. (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 914.)

§ 16.91.1 Failure to Comply With Penal Code § 190.9

The California Supreme Court has repeatedly emphasized the importance of complying with Penal Code section 190.9 requiring that all proceedings in a capital case be on the record. (***People v. Clark*** (2011) 52 Cal.4th 856, 1006, fn. 47 [47 ["The court's policy of conducting side bench conferences in the hallway resulted in nearly 180 unreported proceedings. Although section 1044 allows the trial judge broad discretion in the manner in which he or she conducts a criminal trial, we emphasize again the importance of complying with the requirements of section 190.9."]; ***In re Freeman*** (2006) 38 Cal.4th 630, 648-649, fn. 9 ["Because of the potential for confusion and mischief, we reiterate that trial courts in capital cases should meticulously comply with Penal Code section 190.9 and place all proceedings on the record."].)

Violation of Penal Code section 190.9's requirement that all proceedings in a capital case be on the record is not reversible per se, and the California Supreme Court has repeatedly declined to hold otherwise. (***People v. Taylor*** (2010) 48 Cal.4th 574, 660.)

"All proceedings in a capital case must, under section 190.9, be conducted on the record with a reporter present and transcriptions prepared. No presumption of prejudice arises from the absence of materials from the appellate record, and defendant bears the burden of demonstrating that the record is inadequate to permit meaningful appellate review. The record on appeal is inadequate only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. It is the defendant's burden to show prejudice of this sort." (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1257,

internal quotation marks & citations omitted, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192.)

In order to demonstrate prejudice from non-compliance with section 190.9's requirement that all proceedings in a capital case be conducted on the record, more is required than "merely listing the occasions on which there was an off-the-record discussion, and it is insufficient to simply link each missing transcript to various arguments without explaining why the missing transcript had any impact on the defendant's ability to raise the issue or on our ability to review it." (***People v. Hajek & Vo*** (2014) 58 Cal.4th 1144, 1257, internal quotation marks & citations omitted, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192.)

Private conferences between defense counsel and defendant, or among counsel and co-counsel and their witnesses, are not judicial proceedings within the meaning of Penal Code section 190.9, subdivision (a), and need not be transcribed. (***People v. Samayoa*** (1997) 15 Cal.4th 795, 820.)

The sheer number of unreported side bench conferences – "without more, provides no basis on which to question the fairness of defendant's trial." (***People v. Clark*** (2011) 52 Cal.4th 856, 1005, internal quotation marks omitted [no prejudice from 180 unreported side bench conferences].)

No prejudice shown from "a total of 62 discussions between the court and counsel were made 'off the record' during the trial, including a conference concerning the guilt-phase jury instructions. (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 194.)

"The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review. [Citations.] Similarly, the Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner. [Citation.] The defendant has the burden of showing the record is inadequate to permit meaningful appellate review." The due process clause safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial. A mere error of state law is not a denial of due process. (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 194-195.)

"[T]he violation of section 190.9, subdivision (a)(1), by itself, did not deprive defendants of a "liberty interest" under *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175." (***People v. Letner & Tobin*** (2010) 50 Cal.4th 99, 195.)

§ 16.91.2 Grand Jury Proceedings

The California Supreme Court assumed that Penal Code section 190.9 applies to grand jury proceedings in capital cases such that the prosecutor could not have the court reporter leave while giving opening and closing statements to the grand jury. (***People v.***

Bennett (2009) 45 Cal.4th 577, 589; see ***Dustin v. Superior Court*** (2002) 99 Cal.App.4th 1311, 1321-1323.)

Obviously, Penal Code section 190.9 cannot apply to a "case" before it even exists, so there was no duty to record the personal interviews of prospective grand jurors when the grand jury that ultimately heard defendant's case was interviewed, selected, and impaneled. (***People v. Bennett*** (2009) 45 Cal.4th 577, 590.)

B. CERTIFICATION [§ 16.92]

In order to expedite certification of the entire record on appeal in all capital cases, defendant's trial counsel, whether retained or court-appointed, shall continue to represent the defendant until the entire record on the automatic appeal is certified. (Pen. Code, § 1240.1(e)(1).)

The record in a death-penalty case is certified for completeness and accuracy, in a two-part procedure, within strict time limits after a judgment of death is imposed. (Pen. Code, § 190.8.)

C. CODEFENDANT'S TRIAL [§ 16.93]

Events which occurred in a codefendant's separate trial are not properly considered in the defendant's appeal from his/her trial. (***People v. Morrison*** (2004) 34 Cal.4th 698, 713, fn. 5.)

Appellant's request for judicial notice of the record in a codefendant's trial denied; otherwise it would result in improperly augmenting the record on appeal in appellant's case. (***People v. Waidla*** (2000) 22 Cal.4th 690, 716, fn. 1.)

D. CORRECTION [§ 16.94]

Corrections to the record shall not be required to include immaterial typographical errors that could not conceivably cause confusion. (Pen. Code, § 190.8(c).)

Where separate attorneys are appointed for appeal and habeas, appellate counsel has primary, if not exclusive, control of record correction, and habeas counsel should have no direct or active role. (***Marks v. Superior Court*** (2002) 27 Cal.4th 176, 186.)

People's untimely motion to correct record properly granted where correction was deletion of a single word amongst thousands of pages of transcripts which was only noticed when defendant raised the issue and defendant failed to show prejudice or denial of the right to effective appeal. (***People v. Lucas*** (1995) 12 Cal.4th 415, 469.)

Reviewing court not bound by court reporter's interpretation of speaker's intended meaning as indicated by punctuation supplied by court reporter. (***People v. Huggins*** (2006) 38 Cal.4th 175, 190-191.)

"A trial judge's own memory is among considerations that may be taken into account in making corrections to the trial record." (***People v. Romero*** (2008) 44 Cal.4th 386, 414.)

E. JUDICIAL NOTICE [§ 16.95]

Judicial notice cannot be taken of irrelevant matters. (***People v. Curl*** (2009) 46 Cal.4th 339, 360, fn. 16; ***People v. Rowland*** (1992) 4 Cal.4th 238, 268 fn. 6.)

Juror declarations concerning matters outside the record offered at "settlement" proceedings not a proper subject of judicial notice. (***People v. Tuilaepa*** (1992) 4 Cal.4th 569, 585, fn. 4.)

Court declines to take judicial notice of transcript of Attorney General argument before U.S. Supreme Court in *Boyde v. California*; not relevant to this case. (***People v. Payton*** (1992) 3 Cal.4th 1050, 1073.)

The general rule is that an appellate court should not take notice of matters which have not first been presented to, and considered by, the trial court, where to do so would unfairly permit one side to press an issue or theory that was not raised below. Request for judicial notice of a codefendant's separate trial transcript to support claim of prosecutorial misconduct due to allegedly inconsistent theories should be denied. (***People v. Waidla*** (2000) 22 Cal.4th 690, 743; ***People v. Sakarias*** (2000) 22 Cal.4th 596, 636.)

Normally transcripts of a prior trial would be irrelevant to an appeal from a judgment in a prosecution for a different crime, and judicial notice should be denied. (***People v. Young*** (2005) 34 Cal.4th 1149, 1171, fn. 3; ***People v. Catlin*** (2001) 26 Cal.4th 81, 170-171.)

F. SEALED RECORDS / TRANSCRIPTS [§ 16.96]

Where defendant sought to have access to sealed records for purposes of appeal, with respect to those sealed records for which neither defendant nor his counsel fall into a category authorized to access, appellants "must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record." (***People v. Avila*** (2006) 38 Cal.4th 491, 606.)

G. SETTLED RECORD [§ 16.97]

California Rules of Court prescribe the proper procedure for settling the record. (***Marks v. Superior Court*** (2002) 27 Cal.4th 176, 192-194.)

"It is the trial court's duty to settle the record, not to make one." (***People v. Houston*** (2012) 54 Cal.4th 1186, 1210, citing ***Marks v. Superior Court*** (2002) 27 Cal.4th 176, 195.)

A trial court may not refuse to settle a statement unless, after resort to all available aids, "it is affirmatively convinced of its inability to do so." (***Marks v. Superior Court*** (2002) 27 Cal.4th 176, 196.)

"[R]ecord settlement may be based on all available aids, including the memories of the trial judge and attorneys." (***People v. Houston*** (2012) 54 Cal.4th 1186, 1210.)

When the resolution of a defendant's claims does not depend upon a verbatim transcript, a settled statement suffices. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1382.)

"The settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier." (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1266; ***People v. Tuilaepa*** (1992) 4 Cal.4th 569, 585.)

"'The settlement of the record ... is primarily a question of fact to be resolved by the trial court. [Citation.] Once settlement is ordered, the trial court has broad discretion to accept or reject counsel's representations in accordance with its assessment of their credibility. [Citation.].' [Citation.]" (***People v. Freeman*** (1994) 8 Cal.4th 450, 510.)

"[T]he [final settled] statement, not any arguably contrary testimony at the settlement hearing, constitutes the binding appellate record." (***People v. Montiel*** (1993) 5 Cal.4th 877, 907, fn. 6, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

The trial court erred in "correcting" the record to indicate prospective jurors were administered the oath of truthfulness because while "record settlement may be based on all available aids, including the memories of the trial judge and attorneys … none of the participants in the record correction proceedings had witnessed the jury commissioner swearing in the prospective jurors, and no court personal testified at the record correction proceedings." Despite this error no entitlement to relief because it was presumed pursuant to Evidence Code section 664 that the prospective jurors were properly administered the oath of truthfulness. (***People v. Houston*** (2012) 54 Cal.4th 1186, 1210.)

In reconstructing lost exhibits, the trial court did not err in finding by a preponderance of the evidence, rather than beyond a reasonable doubt, that an exhibit matched the original. (***People v. Osband*** (1996) 13 Cal.4th 622, 664.)

The California Supreme Court reviews the trial court's findings regarding the reconstruction of missing exhibits, which are essentially factual, under a deferential substantial evidence standard. The Supreme Court then independently determines whether the record, as reconstructed and settled by the trial court, is adequate to allow the appeal to proceed meaningfully. (***People v. Osband*** (1996) 13 Cal.4th 622, 662.)

In reviewing a trial court's settlement decision, the appellate courts "generally will not elevate form over substance if the statement as settled fully and accurately reflects the omitted oral proceedings. 'The rules confer full power over such a record in the trial judge. As long as the trial judge does not act in an arbitrary fashion he has full and complete power over such a record.' [Citation.]" (***Marks v. Superior Court*** (2002) 27 Cal.4th 176, 195.)

§ 16.97.1 Exhibits

"[T]he Rules of Court refer to preparation of a settled statement when 'oral proceedings cannot be transcribed.' (Cal. Rules of Court, rule 8.346(a).)" The California Supreme Court assumed without holding "that the settled statement procedures can be used in the case of demonstrative evidence." (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1266, fn. 14.)

"The trial court did not err in refusing to authorize defendant's appellate counsel to search an expert's files in hopes of finding a document resembling a diagram the expert drew on a chalkboard to illustrate and explain her testimony. No attempt was made to preserve the chalk drawing, which was by its nature ephemeral. It was not marked, lodged, or admitted into evidence, nor was a photograph taken to preserve it. Neither the attorneys nor the trial court could recall exactly what the diagram looked like." (***People v. Virgil*** (2011) 51 Cal.4th 1210, 1266.)

Chapter Seventeen
POST-CONVICTION DISCOVERY

I. PENAL CODE § 1054.9 [§ 17.10]

A. GENERALLY [§ 17.11]

Penal Code section 1054.9 allows for post-conviction discovery in cases where the defendant: (1) is "prosecuting" (i.e., pursuing not necessarily filing) a post-conviction petition for writ of habeas corpus or motion to vacate a judgment involving sentences of death or a sentence of Life Without Possibility of Parole; and (2) shows good-faith efforts to obtain discovery materials from defense counsel were unsuccessfully made. If a defendant is seeking post-conviction access to physical evidence, there must be good cause showing that the access to the physical evidence is reasonably necessary in the effort to obtain post-conviction relief. (Pen. Code, § 1054.9; ***In re Steele*** (2004) 32 Cal.4th 682, 688, 691, 693-697.)

Section 1054.9 is not merely a "file reconstruction statute" i.e., permitting only replacement of what has been lost. The statute allows the person to obtain what was actually possessed by the defense at the time of trial, as well as materials the defense should have possessed. (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 899; ***In re Steele*** (2004) 32 Cal.4th 682, 688, 695-697.)

Section 1054.9 does not allow for "'free-floating' discovery for virtually anything the prosecution possesses." (***In re Steele*** (2004) 32 Cal.4th 682, 695.)

Defendants seeking discovery beyond file reconstruction must show "a reasonable basis to believe that other specific materials actually exist. Otherwise, a discovery request can always become … a free-floating request for anything the prosecution team may possess." (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 899.)

Evidence Code section 664's presumption that an official duty has been regularly performed applies to requests for discovery pursuant to section 1054.9, and must be overcome as to the specific evidence being sought. (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 900; ***In re Steele*** (2004) 32 Cal.4th 682, 694.)

The showing required to establish a violation of the prosecution's duty to disclose exculpatory evidence differs from the showing necessary merely to receive the evidence pursuant to 1054.9. Accordingly, the materiality of the evidence being sought need not be established within the meaning of *Brady* and its progeny before the defendant even sees that evidence. (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 901.)

Proposition 115 did not abrogate the provisions of section 1054.9. (***People v. Superior Court (Pearson)*** (2010) 48 Cal.4th 564, 572.)

B. JURISDICTION / VENUE [§ 17.12]

Either a trial court or a reviewing court has jurisdiction over a motion for discovery pursuant to Penal Code section 1054.9. However, unless an execution is imminent, the discovery motion should first be filed in the trial court that rendered the underlying judgment. (***In re Steele*** (2004) 32 Cal.4th 682, 692.)

Where the time for seeking federal habeas relief has expired, or the federal courts have denied habeas relief, and an execution date has been set, discovery should be sought directly in the California Supreme Court. (***In re Steele*** (2004) 32 Cal.4th 682, 692, fn. 1.)

C. LIMITS ON DISCOVERY [§ 17.13]

Post-conviction discovery is limited to materials currently in the possession of the prosecution or law enforcement authorities involved in the case that fall into three categories: (1) materials the prosecutor provided at the time of trial but have since become lost to the defendant; (2) materials the prosecution should have provided at the time of trial; or (3) materials the defendant would have been entitled to at time of trial had the defendant specifically requested them. (***In re Steele*** (2004) 32 Cal.4th 682, 697.)

Section 1054.9 imposes no preservation duties that do not otherwise exist and only applies to materials currently in the possession of the prosecution or law-enforcement authorities. (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 901; ***In re Steele*** (2004) 32 Cal.4th 682, 695-696.)

The duty of disclosure under 1054.9 includes all information gathered in connection with the government's investigation but a prosecutor has no duty to disclose exculpatory evidence unless the prosecution team actually or constructively possesses that evidence or information. Possession of evidence or information by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team. (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 902; ***In re Steele*** (2004) 32 Cal.4th 682, 695-696 [the discovery obligation does not extend to all law enforcement authorities, but only to those who "were involved in the investigation or prosecution of the case"].)

An out-of-state law enforcement agency that acted on behalf of the prosecution in a limited sense (provided assistance and perhaps conducted a few interviews of potential witnesses) is not part of the "prosecution team" for purposes of 1054.9 discovery. (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 903.)

§ 17.13.1 Post-Conviction Access for DNA Testing (Pen. Code § 1054)

Procedures for obtaining access to physical evidence for purposes of post-conviction DNA testing are set forth in section 1054, and nothing in section 1054.9 can

be used to provide an alternative means for access to physical evidence for purposes of post-conviction DNA testing. (Pen. Code, § 1054.9(c).)

§ 17.13.2 Section 1054 No Preservation Duties That Do Not Otherwise Exist

Penal Code Section 1054.9 does not impose any duty of preservation of evidence that does not otherwise exist. (***Barnett v. Superior Court*** (2010) 50 Cal.4th 890, 901; ***In re Steele*** (2004) 32 Cal.4th 682, 695.)

D. PENDING PETITION NOT REQUIRED [§ 17.14]

Section 1054.9 allows for discovery to assist a petitioner in making a prima facie showing. Accordingly, it is not required that there be a habeas corpus petition pending when a motion for discovery pursuant to section 1054.9 is filed. (***In re Steele*** (2004) 32 Cal.4th 682, 688, 691, modifying rule enunciated in ***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1255-1261 [petitioner not entitled to post-conviction discovery unless petition states prima facie case for relief and order to show cause issued].)

E. REVIEW [§ 17.15]

Either party may challenge the trial court's ruling on the discovery motion by a petition for writ of mandate in the Court of Appeal. (***In re Steele*** (2004) 32 Cal.4th 682, 688.)

F. TIMELINESS [§ 17.16]

Section 1054.9 should be interpreted to promote "informal, timely discovery between the parties." "Beginning the process at the trial level encourages the settlement of disputes at that level and maximizes the possibility that any discovery issues can be resolved with a minimum of court involvement." (***In re Steele*** (2004) 32 Cal.4th 682, 692.)

Any motion for discovery, challenge to the order re discovery, or compliance with any discovery order must all be done within a reasonable time period. Unreasonable delay in seeking discovery pursuant to section 1054.9 will be considered in determining whether the prisoner's habeas petition was timely filed. Conversely, the date of compliance with a discovery order will also be considered in determining whether a habeas petition was timely filed. A petition for writ of mandate filed within 20 days after a discovery order has been issued is considered filed within a reasonable time for purposes of determining whether a habeas petition is timely. (***In re Steele*** (2004) 32 Cal.4th 682, 692, fn. 2.)

The fact that unreasonable delay in filing a 1054.9 motion is considered with respect to the timeliness of any subsequently filed habeas petition, does not support denying a post-conviction motion on the grounds of untimeliness. (***Catlin v. Superior Court*** (2011) 51 Cal.4th 300, 306.) The Legislature intended the consequences of an unreasonable delay in seeking 1054.9 discovery to be determined as part of the evaluation of the petitioner's habeas petition. (*Id*. at p. 307.)

To ensure against condemned inmates using post-conviction discovery motions for purposes of delay, the California Supreme Court will not, as a general rule, postpone consideration of a habeas petition merely because the petitioner's post-conviction discovery motion is pending in the trial court. (***Catlin v. Superior Court*** (2011) 51 Cal.4th 300, 308.)

"[T]he pendency of a last-minute discovery request under section 1054.9, with or without a concurrently filed habeas corpus petition [fn. omitted], will not – absent a compelling showing of good cause – justify the issuance of a stay of execution, nor should it justify the postponement of the setting of an execution date." (***Catlin v. Superior Court*** (2011) 51 Cal.4th 300, 308.)

While the ground of untimeliness is not available, it remains an open question whether multiple motions for post-conviction discovery pursuant to 1054.9 could result in the denial of subsequent motions on the ground that the motion is successive. (***Catlin v. Superior Court*** (2011) 51 Cal.4th 300, 308.)

G. COSTS [§ 17.17]

The actual cost of providing copies, or examination of evidence, shall be paid for by the defendant. (Pen. Code, § 1054.9(d).)

II. ACCESS TO JURORS [§ 17.20]

Cross-Reference: § 16.60, *re* Jury-protection orders

Code of Civil Procedure section 206 "presumes the trial court retains jurisdiction to act to protect jurors from harassment or other unwanted contact despite the court's having already received the verdict and discharged the jury" and also is a matter that a trial court can address during the pendency of an appeal (see Code Civ. Proc., § 916(a)). Moreover, trial courts retain inherent power to protect both juror safety and juror privacy. (***Townsel v. Superior Court*** (1999) 20 Cal.4th 1084, 1091.)

Subsection (f) of Code of Civil Procedure section 206 which provides the defense "may" request addresses and telephone numbers to "communicate with jurors for the purpose of developing issues on appeal or any other lawful purpose" and the court "shall"

provide the information requested to counsel, "never comes into operation in the case of the unwilling juror, the juror who refuses to discuss the case with counsel." "Notwithstanding subdivision (f), counsel still may not: communicate with a juror about the deliberations or verdict absent the 'juror's consent' (§ 206, subds. (b) & (c)), or discuss the case with a juror who exercises his 'absolute right' not to talk about the deliberations or verdict (§ 206, subd. (a)). As such, subdivision (f) never comes into operation in the case of the unwilling juror, the juror who refuses to discuss the case with counsel." (***Jones v. Superior Court*** (1994) 26 Cal.App.4th 1202, 1208.)

Code of Civil Procedure 237 authorizes juror information to be sealed if there is a compelling governmental interest, and a juror's refusal to discuss deliberations pursuant to Penal Code section 206 is a compelling governmental interest sufficient to authorize a court to keep that juror's address and telephone number sealed. (***Jones v. Superior Court*** (1994) 26 Cal.App.4th 1202, 1208-1209.)

Chapter Eighteen
IMPOSITION OF PUNISHMENT

I. SETTING EXECUTION DATE [§ 18.10]

When a judgment has been affirmed by the California Supreme Court, the execution date is to be set. It must be set not less than 60 days nor more than 90 days after the date of the proceeding. (Pen. Code, § 1193.)

If the first date is stayed, all dates thereafter are to be set not less than 30 nor more than 60 days from the date of the proceeding. (Pen. Code, § 1227.)

The date must be set at a public session of the court at which the defendant and the People may be represented. At least ten days before the session, the court shall mail notice of the proceeding to the Attorney General, the District Attorney, the defendant at his prison address, the defendant's counsel or, if none, to the counsel who most recently represented the defendant on appeal or in post-appeal legal proceedings, and to the executive director of the California Appellate Project. (Cal. Rules of Court, rule 4.315.)

Where California provided constitutionally adequate procedures in the setting of an execution date, any violation of state law did not result in the deprivation of a substantive right in violation of the Fourteenth Amendment. (***Bonin v. Calderon*** (9th Cir. 1996) 77 F.3d 1155, 1162-1163.)

Notwithstanding Penal Code section 1227, where a judgment of death has not been executed by reason of a stay or reprieve granted by the Governor, the execution shall be carried out on the day immediately after the period of the stay or reprieve expires without further judicial proceedings. (Pen. Code, § 1227.5.)

II. EXECUTION PROCEDURES [§ 18.20]

The judgment of death shall be executed within the walls of San Quentin State Prison. (Pen. Code, § 3603.)

Every male person, upon whom has been imposed the judgment of death, shall be delivered to the warden of the California state prison designated by the department for imposition of the death penalty. He shall be kept there until execution of the judgment. (Pen. Code, § 3600.)

Every female person, upon whom has been imposed the judgment of death, shall be delivered to the warden of the California Institution for Women pending decision upon appeal. (Pen. Code, § 3601.)

Upon affirmance of the appeal, the female person shall be delivered to the state prison designated by the department for imposition of the death penalty not earlier than three days before the punishment is to be imposed. (Pen. Code, § 3602.)

The punishment of death is to be inflicted by the administration of lethal gas or lethal injection at the election of the condemned inmate. (Pen. Code, § 3604.)

After the execution, the warden must make a return upon the death warrant to the county clerk of the court in which the judgment was rendered, showing the time, mode, and manner by which it was executed. (Pen. Code, § 3607.)

III. WITNESSES [§ 18.30]

The warden of the state prison where the execution is to take place shall be present at the execution and must invite the presence of the Attorney General, the members of the immediate family of the victim or victims of the defendant, and at least 12 reputable citizens, to be selected by him; and he or she shall, at the request of the defendant, permit those ministers of the Gospel, not exceeding 2, as the defendant may name, and any persons, relatives, or friends, not to exceed 5, to be present, together with such peace officers or any other Department of Corrections employee as he may think expedient to witness the execution. No other persons may be present at the execution and no person under 18 may be a witness. (Pen. Code, § 3605.)

IV. SUSPENSION OF EXECUTION OF THE DEATH PENALTY [§ 18.40]

"No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom the defendant is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken." (Pen. Code, § 3700.5.)

Concurrent determinate (DSL) term does not preclude execution during pendency of determinate term. (***People v. Taylor*** (1990) 52 Cal.3d 719, 751.)

A. INSANITY [§ 18.41]

A prisoner who is insane on the date set for his execution may not be executed. (***Ford v. Wainwright*** (1986) 477 U.S. 399 [106 S.Ct. 2595, 91 L.Ed.2d 335].)

The Eighth Amendment precludes executing a prisoner who cannot comprehend the meaning and purpose of the punishment. (***Panetti v. Quarterman*** (2007) 551 U.S. 930, 959 [127 S.Ct. 2842, 168 L.Ed.2d 662].)

The mental state required in order for an inmate to be competent to be executed "neither presumes nor requires a person who would be considered 'normal,' or even 'rational,' in a layperson's understanding of those terms." (***Panetti v. Quarterman*** (2007)551 U.S. 930 [127 S.Ct. 2842, 168 L.Ed.2d 662, 686].)

"A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." (***Panetti v. Quarterman*** (2007)551 U.S. 930 [127 S.Ct. 2842, 168 L.Ed.2d 662, 686].)

"Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purposes." It is error to have a substantive standard of competency to be executed that "treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." (***Panetti v. Quarterman*** (2007)551 U.S. 930 [127 S.Ct. 2842, 168 L.Ed.2d 662, 687].)

A prior finding of competency to stand trial does not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition. (***Panetti v. Quarterman*** (2007) 551 U.S. 930 [127 S.Ct. 2842, 168 L.Ed.2d 662, 671].)

§ 18.41.1 Premature Claims

Claims that the prisoner is "incompetent" are usually considered premature until the execution is "imminent." (***Stewart v. Martinez-Villareal*** (1998) 523 U.S. 637, 644-645 [118 S.Ct. 1618, 140 L.Ed.2d 849]; ***Panetti v. Quarterman*** (2007) 551 U.S. 930 [127 S.Ct. 2842, 168 L.Ed.2d 662, 678] [claims of incompetency to be executed remain unripe at early stages of the proceedings]; ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1430, citing Pen. Code, § 3700.5 [determination of whether a defendant is mentally competent to be executed is not determined until the defendant's execution date has been set].)

§ 18.41.2 Due Process Requirements

A State should have "substantial leeway" to determine its process once basic due process requirements are met. These basic requirements include an opportunity to submit "'evidence and argument from the petitioner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination.'" (***Panetti v. Quarterman*** (2007)551 U.S. 930 [127 S.Ct. 2842, 168 L.Ed.2d 662, 680].)

Once a prisoner makes a requisite preliminary showing that his current mental state would bar execution, the prisoner is entitled under the due process clause to an adjudication of his condition. (***Panetti v. Quarterman*** (2007)551 U.S. 930 [127 S.Ct. 2842, 168 L.Ed.2d 662, 671].)

§ 18.41.3 State Procedure for Determining Sanity to Be Executed

Whenever a court enters an order appointing a day for execution of a death judgment, the warden of the prison where the defendant has been delivered shall notify the Director of Corrections who shall appoint three alienists, from the staff of the department, to examine the sanity of the defendant. Their opinions on the sanity of the defendant are to be made in writing to the Governor and the warden at least 20 days before the date set for execution. A copy of the report is to be given to counsel upon request. (Pen. Code, § 3700.5.)

If there is reason to believe a defendant under a judgment of death is insane, the warden must bring this fact to the attention of the district attorney of the county where the prison is situated. The district attorney is to immediately file in the superior court of that county a petition stating the defendant is believed to be insane and asking there be an inquiry on the issue of sanity. A jury of 12 persons is to consider the issue. (Pen. Code, § 3701.)

The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses before the grand jury. (Pen. Code, § 3702.)

A verdict of the jury must be entered upon the minutes. If the defendant is found insane, the court order must direct the Department of Corrections to take the defendant to a medical facility until sanity is restored. (Pen. Code, § 3703.)

If the defendant is found to be sane, the warden must execute the judgment as specified in the warrant. If the defendant is found to be insane, the warden must suspend the execution and transmit a certified copy of the order of the court to the Governor. When the defendant recovers his sanity, the superintendent of the medical facility must certify that fact to the committing court. After 10 days' written notice to the defendant and the district attorney, a hearing is to be held in the committing court without a jury to determine if sanity has been restored. If the court concludes sanity has been restored, it must certify that fact to the Governor who must issue a new warrant setting an execution date. The defendant is then returned to the state prison pending execution. If it is found sanity has not been restored, the defendant is returned to the medical facility until sanity is restored. (Pen. Code, § 3704.)

B. PREGNANCY [§ 18.42]

If there is good reason to believe a female against whom a judgment of death has been rendered is pregnant, the proceedings must be as provided in section 3701 except, instead of a jury, the court may summon three disinterested physicians to inquire into the pregnancy. They shall examine the defendant in the presence of the court, but with closed doors if requested by the defendant, and hear any evidence that may be produced,

and make written findings which are to be approved by the court. The provisions of Penal Code section 3702 are applicable to this proceeding. (Pen. Code, § 3705.)

If it is found the female is not pregnant, the warden must execute the judgment; if it is found that she is pregnant, the warden must suspend the execution and transmit a certified copy of the finding to the Governor. When the Governor receives from the warden a certificate that the defendant is no longer pregnant, he must issue a death warrant. (Pen. Code, § 3706.)

C. MENTAL RETARDATION [§ 18.43]

Cross-Reference: § 3.92, *re* Post-conviction

Execution of the mentally retarded violates the Eighth Amendment. (***Atkins v. Virginia*** (2002) 536 U.S. 304, 317 [122 S.Ct. 2242, 153 L.Ed.2d 335].)

V. REPRIEVES, PARDONS, & COMMUTATIONS [§ 18.50]

Clemency encompasses the executive powers of pardon, commutation, and reprieve. The California Constitution uniquely distributes clemency powers to all three branches of state government. Article V, section 8, of the California Constitution provides that subject to application procedures provided by statute, the Governor may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, four justices concurring. (Pen. Code, § 4852.16; Cal. Const., art. V, § 8.)

"Consistent with the separation of powers principle (Cal. Const., art. III, § 3), pardon and commutation decisions have not traditionally been the business of courts and are rarely, if ever, appropriate subjects for judicial review. (*Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 276, 280, 118 S.Ct. 1244, [140 L.Ed.2d 387] (*Ohio Adult Parole Authority*).) The legislative branch cannot curtail the executive branch's constitutional clemency power but can regulate the application and investigation process. (*Ibid*.; see, *In re Rosenkrantz* (2002) 29 Cal.4th 616, 663, 128 Cal.Rptr.2d 104, 59 P.3d 174 [noting, in case involving governor's authority to review parole board decision, that clemency power in California's Constitution is similar to the provision addressed in *Ohio Adult Parole Authority*].)" (***Santos v. Brown*** (2015) 238 Cal.App.4th 398, 414 [189 Cal.Rptr.3d 234, 244], review denied (Oct. 14, 2015), internal quotation marks omitted.)

The Board of Parole Hearings may report to the Governor from time to time the names of any and all persons who should have their sentence commuted or be pardoned. (Pen. Code, § 4801.)

In the case of a person twice convicted of a felony, the application for pardon or commutation shall be made directly to the Governor who shall transmit all documents and papers in support of and in opposition to the application to the Board. (Pen. Code, § 4802.)

The Legislature has enacted statutes relating to the application process. (Pen. Code, § 4800 et seq.) However, failure to comply with these procedures does not invalidate a Governor's decision. (33 Cal.Ops.Atty.Gen. 64 (1959).)

The sentencing judge is required to immediately transmit the appellate record to the Governor. (Pen. Code, § 1218.)

The Governor is authorized to ask the sentencing judge, the district attorney, or both for a summary of facts at trial, "any other facts having reference to the propriety of granting or refusing said application," and a recommendation. (Pen. Code, § 4803.)

The Governor may ask the justices of the California Supreme Court and the Attorney General for an opinion. (Pen. Code, § 1219.)

The Governor receives reports from prison examiners regarding the prisoner's sanity. (Pen. Code, § 3700.5.)

The Governor may request the Board of Parole Hearings to investigate and report on all applications for commutation. The Board has the power to conduct a full investigation, including examining witnesses under oath, and to make a recommendation to the Governor. (Pen. Code, § 4812.)

Marsy's Law (Victim's Bill of Rights Act of 2008) cannot be construed to apply to commutations granted as a matter of executive clemency. (***Santos v. Brown*** (2015) 238 Cal.App.4th 398, 425.)

A. APPLICATION BY A TWICE-CONVICTED FELON [§ 18.51]

The Governor shall transmit all papers supporting and opposing the application of a twice-convicted felon to the Board of Parole Hearings. (Pen. Code, § 4802.) If the Governor requests an investigation by the Board on the application of a twice-convicted felon, then the Board shall transmit its recommendation to the Governor. (Pen. Code, § 4813.) If the Board makes a favorable recommendation, all papers are also forwarded to the California Supreme Court. (Pen. Code, § 4851.) The Governor may always refer the application of a twice convicted felon to the California Supreme Court for a recommendation. (Pen. Code, § § 4850, 4851.) The California Supreme Court shall transmit any favorable recommendation to the Governor. If the recommendation is

unfavorable, the court retains the papers in its files. (Pen. Code, § 4852; see also ***People v. Ansell*** (2001) 25 Cal.4th 868, 874, fn. 11.)

A defendant is "twice convicted" if the "current offense" is a felony and there is at least one prior felony conviction. (***People v. Hart*** (1999) 20 Cal.4th 546, 656, fn. 44.)

A defendant is not "twice convicted" where convicted of two felonies charged and tried in the same proceeding. (***Green v. Superior Court*** (1934) 2 Cal.2d 1, 2-3.)

The California Supreme Court assigns applications a case number and the fact of their filing is a matter of public record. The contents of the files are confidential. The Chief Justice's letter informing the Governor of the Court's recommendation is public. (Cal. Supreme Ct., *Internal Operating Practices & Procedures of California Supreme Court*.)

A reprieve is a temporary stay or deferment of execution of a sentence. (***Way v. Superior Court*** (1977) 74 Cal.App.3d 165, 176.)

VI. METHODS OF EXECUTION [§ 18.60]

Under California's current system (Pen. Code, § 3604(b)) a prisoner is executed by lethal injection unless he affirmatively elects lethal gas. (***Fierro v. Terhune*** (9th Cir. 1998) 147 F.3d 1158, 1160; ***People v. Young*** (2005) 34 Cal.4th 1149, 1234.)

A. CONSTITUTIONALITY OF METHODS OF EXECUTION [§ 18.61]

The United States Supreme Court has concluded that "[a] State with a protocol substantially similar" to the one used by Kentucky is constitutional. (***Baze v. Rees*** (2008) 553 U.S. 35, 61 [128 S.Ct. 1520, 170 L.Ed.2d 420] [plur. opn. of Roberts, C.J.].) California's protocol was superior to Kentucky's, inasmuch as it provides safeguards that Kentucky's does not, including the performance of "consciousness checks" before pancuronium bromide is injected. (See ***Baze v. Rees*** (2008) 553 U.S. 35, 120-121 [128 S.Ct. 1520, 170 L.Ed.2d 420] [dis. opn. of Ginsburg, J.]; ***People v. Salcido*** (2008) 44 Cal.4th 93, 169-170.)

§ 18.61.1 Lethal Injection

Lethal injection as a general form of execution does not violate the Eighth Amendment's proscription against cruel and usual punishment. (***Beardslee v. Woodford*** (9th Cir. 2005) 395 F.3d 1064, 1072 [acknowledging "objective evidence of contemporary values indicates that lethal injection has been deemed an acceptable means for society to implement the death penalty"]; ***Cooper v. Rimmer*** (9th Cir. 2004) 379 F.3d 1029, 1033 & fn. 3 ["Execution by lethal injection is now used by 37 of the 38 states with the death penalty, objectively indicating a national consensus."].)

By selecting lethal gas rather than lethal injection (the default method), the defendant waived his claim that execution by lethal gas was unconstitutional. (***Stewart v. LaGrand*** (1999) 526 U.S. 115 [119 S.Ct. 1018, 143 L.Ed.2d 196].)

§ 18.61.2 Lethal Gas

Execution by use of lethal gas is not cruel and unusual under the United States Constitution. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 745.)

The Ninth Circuit's previous ruling finding lethal gas unconstitutional (***Fierro v. Gomez*** (9th Cir. 1996) 77 F.3d 301, 309) was vacated by the Supreme Court and the matter remanded to the Ninth Circuit "for further consideration in light of ... [Penal Code section] 3604." (***Gomez v. Fierro*** (1996) 519 U.S. 918 [117 S.Ct. 285, 136 L.Ed.2d 204].)

By affirmatively electing lethal gas, a condemned inmate waives any claim that this form of punishment violates the Eighth Amendment. (***People v. Boyer*** (2006) 38 Cal.4th 412, 484; ***People v. Bradford*** (1997) 14 Cal.4th 1005, 1058-1059.)

B. PREMATURE CHALLENGES TO METHODS OF EXECUTION [§ 18.62]

Challenges to the method of a future execution are premature and therefore not cognizable on appeal because it does not impugn the validity of the judgment. (***People v. Charles*** (2015) 61 Cal.4th 308, 336; ***People v. Gutierrez*** (2009) 45 Cal.4th 789, 834; ***People v. Tafoya*** (2007) 42 Cal.4th 147, 198; ***People v. Demetrulias*** (2006) 39 Cal.4th 1, 45.)

Alleged imperfections and illegalities in the execution process that may or may not exist when a death sentence is implemented are premature. (***People v. Dykes*** (2009) 46 Cal.4th 731, 820; ***People v. Boyer*** (2006) 38 Cal.4th 412, 485.)