Loyola of Los Angeles Law Review

Volume 23
Number 1 *Symposium—The Death Penalty Approaches the 1990s: Where Are We Now*

Article 11

11-1-1989

Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts

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REVIEW OF DEATH PENALTY JUDGMENTS BY THE SUPREME COURTS OF CALIFORNIA: A TALE OF TWO COURTS

*Gerald F. Uelmen**

> It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.
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> . . . In the midst of them, the hangman, ever busy and ever worse than useless, was in constant requisition; now, stringing up long rows of miscellaneous criminals; now, hanging a housebreaker on Saturday who had been taken on Tuesday; now, burning people in the hand at Newgate by the dozen, and now burning pamphlets at the door of Westminster Hall; to-day, taking the life of an atrocious murderer, and to-morrow of a wretched pilferer who had robbed a farmer's boy of sixpence.[1]

I. INTRODUCTION

From 1979 through 1986, the Supreme Court of California reviewed sixty-four judgments of death. Five of them, or 7.8%, were affirmed. From 1987 through March of 1989, the Supreme Court of California reviewed seventy-one judgments of death. Fifty-one of them, or 71.8%, were affirmed. In two short years, the California affirmance rate for state

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1. C. DICKENS, A TALE OF TWO CITIES, ch. 1 (1859).

supreme court review of death penalty judgments moved from the third lowest in the United States to the eighth highest.[2] The revolution which demarcates this dramatic shift was the retention election of November, 1986, in which the voters of California removed Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso. In early 1987, Justice Malcolm Lucas was named Chief Justice, and Associate Justices John Arguelles, David Eagleson, and Marcus Kaufman were appointed to the court. Rarely has a high court undergone such a dramatic change in so short a time.

While legal observers spend oceans of ink and forests of paper tracing the minute shifts which emanate from the comings and goings of individual justices, rarely do they have such a laboratory to study judicial behavior. Reading a death penalty opinion of the Bird court, then a death penalty opinion of the Lucas court, one often sees the same precedents cited and the same legal principles exalted. The remarkable transformation of results occurred with very few opinions of the Bird court being overtly overruled or limited by the Lucas court. But in reading the collective whole, one is haunted by the sensation that two remarkably different institutions are at work, and the animus driving these two institutions is as different as night and day.

This Article will compare the process of reviewing death penalty judgments employed by the Bird court with the process employed by the Lucas court, as revealed in the published opinions of the two courts. The thesis that will emerge is that, at least in reviewing death penalty judgments, two very different models of the appellate function are at work.

The Lucas court approaches the review of death penalty cases very much like intermediate appellate courts approach the review of ordinary criminal cases. The process closely matches the process described in a classic study of criminal appeals in the California Court of Appeal for the First Appellate District as it operated in the mid-1970s: "The court approaches its work from a perspective that is noninterventionist, nonsupervisory, and conflict avoiding. Its decision process accentuates the value of finality and is strongly inclined toward affirmance."[3] That study noted that a high rate of affirmance of criminal appeals reflected basic institutional norms and perspectives. Essentially, the justices approached their task with great deference to the trial judge:

> As a result, the Court of Appeal seldom asks what the best or most appropriate answer to a legal issue would be; rather, it

2. *See infra* Appendix, Table 1.

3. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 612 (1982).

> usually asks only whether the trial court's answer is within acceptable bounds. In addressing that latter question, the basic norms of appellate review collectively call for the Court of Appeal to defer to the judgment of the trial court if possible, and direct the Court of Appeal to resolve any doubts or ambiguities in the direction of affirmance.[4]

The basic norms of appellate review thus become norms of affirmance. These include the principle of abstention in issues not presented below, the substantial evidence rule, and the harmless error rule. The common effect of each of these norms, as described by Dr. Davies, "is to cut off inquiry and transform problematic issues into routine affirmances. Once these norms are internalized by intermediate appellate judges, the norms create a perceptual filter that makes the appeals themselves appear to be devoid of any significant issues."[5]

It is not coincidental that the new justices appointed to the court in March of 1987 arrived with the norms of intermediate appellate judges well internalized and the concept of deference to trial judges firmly embedded. Justice Kaufman was a veteran of seventeen years on the Fourth District Court of Appeal. Justice Arguelles had served on the Second District Court of Appeal for only three years, but served for fifteen years as a trial judge on the Los Angeles County Superior Court. Justice Eagleson was a justice of the Second District Court of Appeal for two years, and had been a trial judge on the Los Angeles County Superior Court for the previous fourteen years.

The approach of the Bird court in reviewing death penalty judgments reflected a norm of reversal, in which the court paid little heed to principles such as abstention, the substantial evidence rule, and the principle of harmless error. Doubts, particularly those involving choice of sentence, were resolved in favor of reversal because of the severity and finality of the judgment being reviewed. Although the Bird court may be viewed as an extreme example, a similar phenomenon has affected other courts. For example, in a classic study of death penalty review by the United States Supreme Court during the Warren era, Barrett Prettyman, Jr. noted:

> The fact is that a Justice of the supreme court will delay an execution any time he has reasonable grounds to believe that the condemned man has not received every safeguard the Constitution demands. Life is precious and sacred, and the state

4. *Id.* at 592.
5. *Id.* at 607.

> undertakes no more awesome a responsibility than when it deliberately sets about to excise the life of one of its citizens. Every protection must be accorded innocent and guilty alike, regardless of delay, lest a mistake be made for which there can be no remedy.[6]

Ultimately, the difference in philosophy boils down to one question: Are death cases different? Prior to the 1986 general election, that question was posed to all of the justices of the California Supreme Court. Only Justices Lucas and Grodin responded:

> *Justice Lucas*: I personally do not apply "tougher" standards to capital cases, believing as I do that, assuming proper and careful attention is given to reviewing these cases, the law should be uniformly and consistently applied without regard to the penalty selected in a particular case.
> *Justice Grodin*: . . . the very fact that the penalty is final and irreversible makes it necessary for each judge, no matter what his or her personal views, to be exceedingly careful. Once the sentence is carried out, it is too late to correct mistakes.[7]

The significance of this difference in approach can be more clearly delineated by separating our analysis of the three determinations that are reviewed by the supreme court in capital cases. Whether it is appropriate to treat death cases the same as other cases might be answered differently in the context of guilt or special circumstance determinations than in penalty determinations. After contrasting the Bird court and Lucas court in each of these three spheres, I will conclude that it is most essential to preserve supreme court review of penalty phase determinations. There is little to be lost by consigning the task of reviewing guilt and special circumstance determinations to the intermediate courts of appeal. A system of two-tier review should be instituted, in which guilt and special circumstance determinations are reviewed in the intermediate courts of appeal, and penalty determinations are reviewed by the supreme court. The supreme court should also retain discretion to grant hearings on guilt and special circumstance issues after court of appeal review.

II. HISTORICAL PERSPECTIVE

The death penalty goes back to California's beginning as a state, and a brief overview of its history will put the past twelve years in sharper focus. We will never know how many Californians were officially exe-

6. B. PRETTYMAN, DEATH AND THE SUPREME COURT 251 (1961).
7. L.A. Times, Aug. 18, 1985, § I, at 1, col. 1.

cuted during the first forty-one years of California statehood. Executions were performed by county authorities, and records are not available. The state legislature remedied this situation in 1891, by requiring that all executions be carried out at one of the state prisons.[8] After 1893, all hangings were performed by the state authorities either at Folsom Prison or San Quentin. A total of 306 prisoners were executed by hanging during the forty-five year period ending in 1938, at an average rate of seven per year. Ninety-two were hanged at Folsom, while 214 met the end of the rope at San Quentin. Nearly all had been convicted of murder. Only three had been convicted of assault by one serving a life sentence, which became a capital offense in 1901,[9] and three were hanged for aggravated kidnapping, which was made a capital offense in 1933.[10]

Most of those who were hanged in California sought appellate review of their convictions, but at least seventy-four went to the gallows with no review of their convictions by an appellate court.[11] Automatic review of death penalty cases by the California Supreme Court was not instituted until April, 1936. Lethal gas was adopted as the means of execution for California on August 27, 1937.[12] The first person to die in California's gas chamber at San Quentin was Albert Kessell, a Sacramento murderer, who was executed on December 2, 1938.[13] One hundred ninety-one men and four women have since died in the San Quentin gas chamber.[14] Executions proceeded at an average rate of eight per year during the twenty-year period ending in 1958. While appeals were automatic, the delay between the pronouncement of sentence and actual execution averaged less than two years.[15]

Under the California Constitution adopted in 1879, clemency power was curiously distributed among the executive, legislative and judicial branches. Article VII, Section I provided that the governor could pardon or commute the sentence of a twice-convicted felon only with the concurrence of a majority of the supreme court.[16]

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8. 1891 Cal. Stat., ch. 191, § 9, at 274 (current version at CAL. PENAL CODE § 3603 (West 1988)).

9. CAL. PENAL CODE § 4500 (repealed 1977).

10. *Id.* § 209 (repealed 1977).

11. Danielson, Facts and Figures Concerning Executions in California, 1938-1962, April 15, 1963 (unpublished paper prepared with the assistance of Assembly Legislative Reference Service); *see also* Uelmen, *A Concise History of Capital Punishment in California*, 8 CAL. A. CRIM. JUST. F., Sept.-Oct. 1981, at 19.

12. Uelmen, *supra* note 11, at 19.

13. *Id.* at 20.

14. *Id.*

15. *Id.*

16. CAL. CONST. art. VII, § 1 (1879) (revised and renumbered as art. IV, § 8 (1966)).

A study of the criminal records of ninety-seven persons executed between 1938 and 1953 indicated that 51.6% had been in prison one or more times prior to the conviction for which they were executed.[17] However, there is no recorded example of the state supreme court recommending clemency of a twice-convicted felon. An application by Warren K. Billings, who was convicted of the San Francisco Preparedness Day Parade bombing with Tom Mooney, was denied by the supreme court in 1930.[18]

The power of executive clemency was used sparingly by California governors. Earl Warren presided over eighty-five executions during his eleven years as California Governor; he granted clemency in only eight cases.[19] Governor Goodwin Knight exercised clemency in six cases,[20] allowing the execution of forty-one others during his five years in office. A dramatic change took place in 1959, when Edmund G. "Pat" Brown became governor. Although he had served as District Attorney of San Francisco and California Attorney General, Brown was philosophically opposed to the death penalty. The most difficult case confronting him was that of Caryl Chessman, who had been on San Quentin's death row since 1948 after being convicted of aggravated kidnapping in Los Angeles County. Since Chessman was a twice-convicted felon, Brown could not commute the sentence without supreme court approval,[21] but he could grant a stay. In 1960, he stayed the execution for sixty days and called upon the Legislature to repeal the death penalty. The Legislature refused, and Chessman was executed on May 2, 1960. Only thirty-five executions took place while Brown was governor, the last in January of 1963; he exercised the commutation power twenty-three times, or 40% of the cases that came before him.[22]

Since Brown left office in 1967, only one execution has occurred in California. Four months after Ronald Reagan's election as governor, Aaron Mitchell, convicted of a Sacramento murder, was executed on April 12, 1967. The moratorium on executions since that time has been judicially imposed.

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17. Carter, Capital Punishment in California, 1938-53, 1953 (unpublished manuscript submitted to University of California School of Criminology).

18. *In re* Billings, 210 Cal. 669, 298 P.2d 1071 (1930).

19. G. UELMEN, CALIFORNIA DEATH PENALTY LAWS AND THE CALIFORNIA SUPREME COURT: A TEN YEAR PERSPECTIVE, Report to California Legislature, Senate Judiciary Committee 9 (1986).

20. *Id.*

21. CAL. CONST. art. VII, § 1 (1879).

22. Uelmen, *supra* note 11, at 21; *see also* E. BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW (1989).

Actually, the judicial moratorium began in 1964, with the case of *People v. Morse*.[23] The California Supreme Court held that it was error to instruct a jury deciding the death penalty that, if it did not sentence the defendant to death, the defendant might be paroled after seven years.[24] This necessitated new penalty trials for all prisoners on death row. Four years later, the United States Supreme Court's ruling in *Witherspoon v. Illinois*[25] also required the wholesale retrial of the penalty-phase proceedings of those awaiting execution, because of the exclusion of jurors with general objections to the death penalty.

By December 31, 1971, California had 105 prisoners on death row,[26] awaiting the final ruling on the ultimate constitutional question: Does the death penalty itself violate the California constitutional prohibition against cruel or unusual punishment? *People v. Anderson*[27] answered this question on February 18, 1972. Writing for a six member majority, Chief Justice Donald Wright held that "capital punishment is both cruel and unusual as those terms are defined under article I, section 6, of the California Constitution, and that therefore death may not be exacted as punishment for crime in this state."[28] Governor Reagan subsequently called the appointment of Chief Justice Wright "a terrible mistake."[29] Among the more notorious occupants of death row who escaped execution by virtue of the *Anderson* decision were Charles Manson, leader of the cult which committed the grisly Tate-LaBianca murders, Sirhan Sirhan, who assassinated Robert F. Kennedy in 1968, and Gregory U. Powell, convicted of the execution murder of a Los Angeles police officer in an onion field near Bakersfield. Public outrage over the opinion was expressed in the quick enactment of a 1972 constitutional amendment declaring that the death penalty is neither cruel nor unusual punishment.[30]

Meanwhile, the United States Supreme Court handed down nine separate opinions in the case of *Furman v. Georgia* on June 29, 1972.[31] The opinions were widely interpreted as prohibiting discretion in the imposition of the death penalty.[32] In 1973, the California Legislature re-

23. 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964).

24. *Id.* at 647-48, 388 P.2d at 45-46, 36 Cal. Rptr. at 213-14.

25. 391 U.S. 510 (1968).

26. Uelmen, *supra* note 11, at 21.

27. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

28. *Id.* at 633, 493 P.2d at 883, 100 Cal. Rptr. at 155.

29. L.A. Times, Aug. 18, 1985, § I, at 26, col. 1.

30. CAL. CONST. art. I, § 27 (1973). The amendment was enacted as Proposition 17 by a 67% majority in the election of November 7, 1972. *Complete Election Results*, CAL. J. (Supp.), Nov. 1972.

31. 408 U.S. 238 (1972).

32. *See, e.g.*, Bowers & Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capi-*

sponded to the mandate of Proposition 17 and the generally accepted interpretation of *Furman* by enacting a mandatory death penalty law specifically requiring that the death penalty be imposed in all cases of contract killings, murders of police officers or crime witnesses, multiple killings, and murders during commission of rape, robbery, burglary, kidnapping or child molestation. During the next three years, another sixty-eight persons were sentenced to death in California under this law.

In 1976, the United States Supreme Court held that a mandatory death penalty was unconstitutional in *Woodson v. North Carolina*[33] and *Roberts v. Louisiana*.[34] California was among the twenty states that had enacted mandatory death penalty laws.[35] On December 27, 1976, in a unanimous opinion, the California Supreme Court declared that the California death penalty law enacted in 1973 was unconstitutional.[36] The opinion surprised no one, since the United States Supreme Court had already held that "mandatory" death penalty laws were unconstitutional.[37] In the companion cases to *Woodson* and *Roberts*, the United States Supreme Court upheld the "guided discretion" death penalty laws of Georgia,[38] Florida[39] and Texas,[40] under which the legislature defined specific special circumstances justifying imposition of the death penalty, and required the judge or jury to weigh aggravating and mitigating factors in deciding whether death is the appropriate penalty.[41] The California Legislature responded by enacting a new death penalty law carefully modeled upon the laws upheld by the United States Supreme Court.[42] The new death penalty law was authored by Senator George Deukmejian. Governor Jerry Brown vetoed the bill, but the Legislature overrode his veto and enacted the bill effective August 11, 1977. Since

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tal Statutes, 26 CRIME & DELINQ. 563 (1980); Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737, 740-41 (1985); Zimring & Hawkins, *Capital Punishment and the Eighth Amendment:* Furman *and* Gregg *in Retrospect*, 18 U.C. DAVIS L. REV. 927, 932 (1985).

33. 428 U.S. 280 (1976).

34. 428 U.S. 325 (1976). In three companion cases to *Woodson* and *Roberts* the Court upheld statutes where the judge or jury had discretion to impose the death penalty. *See* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

35. *See* G. UELMEN, *supra* note 19, at 12.

36. Rockwell v. Superior Court, 18 Cal. 3d 420, 428, 556 P.2d 1101, 1111-12, 134 Cal. Rptr. 650, 654 (1976).

37. *See supra* notes 33-34 and accompanying text.

38. Gregg v. Georgia, 428 U.S. 153 (1976).

39. Proffitt v. Florida, 428 U.S. 242 (1976).

40. Jurek v. Texas, 428 U.S. 262 (1976).

41. *Id.* at 273-76; *Proffitt*, 428 U.S. at 255-60; *Gregg*, 428 U.S. at 206-07.

42. 1977 Cal. Stat. ch. 316, at 1257, § 9 (codified at CAL. PENAL CODE § 190.2 (repealed 1978)).

the new law could not be applied "retroactively" to crimes committed before the date of its enactment on August 11, 1977, California "started over" in its efforts to implement the death penalty.

Fifteen months later, in November of 1978, the 1977 death penalty law was repealed and replaced by a new death penalty law that broadly expanded the categories of cases in which the death penalty could be imposed.[43] The initiative measure, popularly known as the "Briggs Initiative" for its author, Senator John Briggs, was passed by a 72% majority of the electorate.[44]

Both the 1977 death penalty law and the 1978 Briggs Initiative require three separate factual determinations before a judgment of death may be imposed. First, the defendant must be convicted of an offense that carries a possible death penalty.[45] Such offenses include first-degree murder,[46] sabotage,[47] treason,[48] perjury procuring the execution of an innocent person,[49] train wrecking,[50] and deadly assault by one serving a life term.[51] Second, if the defendant is convicted of first-degree murder, the finder of fact must conclude that one of the special circumstances defined by statute is true.[52] If a special circumstance is found, a sentence of death or life imprisonment without possibility of parole must be imposed.[53] Otherwise, an ordinary sentence of twenty-five years to life, with eligibility for parole, is imposed.[54] The third factual determination required is whether aggravating circumstances outweigh mitigating circumstances, in which case a penalty of death may be imposed.[55] Each of these factual determinations must be upheld upon review by the California Supreme Court before a sentence of death can be carried out.[56]

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43. Initiative and Measure Proposition 14, § 5, Nov. 7, 1978 (codified at CAL. PENAL CODE § 190.2 (West 1988)); *see also* Historical Note in CAL. PENAL CODE § 190.2 (West 1988).

44. Salzman, *Election '78 Post Mortem*, CAL. J., Dec. 1978, at 386, 390; *see also* Schwab, *The History of the Death Penalty in California*, 4 L.A. LAW. 8, 13 (1981).

45. CAL. PENAL CODE § 190.1 (West 1988).

46. *Id.* § 190.

47. CAL. MIL. & VET. CODE § 1672 (West 1988).

48. CAL. PENAL CODE § 37 (West 1988).

49. *Id.* § 128.

50. *Id.* § 219.

51. *Id.* § 4500.

52. *Id.* § 190.1(b). A conviction of sabotage, treason, perjury procuring execution, train wrecking or assault by a person serving a life term does not require additional "special circumstances," *id.* § 190.3, but virtually all death penalty cases in California have involved a charge of first-degree murder.

53. CAL. PENAL CODE § 190.2 (West 1988).

54. *Id.* § 190.3.

55. *Id.*

56. *Id.* § 190.4.

III. THE UNDERLYING CONVICTION—THE "GUILT PHASE"

Of the sixty-four death penalty judgments reviewed with finality by the Bird court, the conviction of guilt of first-degree murder was affirmed in forty-two, or 65.6% of the cases.[57] Thirty-five of the affirmances, or 83.3%, were unanimous. Of the twenty-two reversals, only eight, or 36.3%, were unanimous.

Of the seventy-one death penalty judgments reviewed with finality by the Lucas court through March of 1989, the conviction of guilt of first-degree murder was affirmed in sixty-seven, or 94.4% of the cases.[58] Sixty-two of the affirmances, or 91.2%, were unanimous. Three of the four reversals were unanimous.

The affirmance rates of the Lucas and Bird courts might be compared to the affirmance rate for all criminal appeals heard by the courts of appeal. That rate is higher than the Bird court death penalty rate and lower than the Lucas court rate. In fiscal year 1986-1987, 81% of the criminal convictions reviewed by the courts of appeal were affirmed in full, while another 12% were affirmed with modifications.[59] However, the rate may vary significantly among various divisions of the courts of appeal. A 1984 study disclosed that the affirmance rate for criminal appeals heard by the seven divisions of the Second District Court of Appeal of California varied from 73% to 87%.[60]

How do the affirmance rates of the Bird and Lucas courts compare with the conviction affirmance rate in death penalty cases reviewed by the supreme courts of other states? While complete data has not been compiled in many other states, figures are available for the period 1972-1982 in Florida.[61] Florida's 1972 death penalty law was upheld by the United States Supreme Court in 1976, and the Florida Supreme Court has reviewed more death penalty judgments in recent years than any other court.[62] Of 145 cases reviewed up to 1982, a total of seventy were reversed, but only twenty of these were remanded for new trials on the issue of guilt.[63] The other fifty cases were reversals only of the death

57. *See infra* Appendix, Table 2, Table 5.

58. *See infra* Appendix, Table 3, Table 6.

59. This affirmance rate of 93% is higher than comparable rates reported for intermediate appellate courts in other states such as Texas (83%), New Jersey (84%), and Illinois (77%). Kanner & Uelmen, *Random Assignment, Random Justice*, 6 L.A. LAW., Feb. 1984, at 10, 15.

60. *Id.* at 17.

61. *See* Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913 (1983).

62. *Id.* at 916.

63. *Id.* at 919.

penalty.[64] Thus, the comparable rate of affirmance of the conviction of guilt in death penalty cases for the Florida Supreme Court is 86.6%, substantially higher than the 65.6% posted by the Bird court and somewhat lower than the 94.4% posted by the Lucas court.

A. Competency of Defense Counsel

Of the twenty-two death penalty cases in which the Bird court reversed the conviction of guilt,[65] the reversals in nine cases[66] were based on issues related to the role of defense counsel in capital cases. In four cases, the court unanimously concluded the defendant was deprived of the effective assistance of counsel guaranteed by the federal and state constitutions.[67] In three of these cases, the court found that the incompetency of retained counsel deprived the defendants of the effective assistance of counsel.[68] In the fourth case, a conflict of interest in joint representation of two defendants by the same contract public defender necessitated reversal.[69] Two other convictions were reversed due to deprivation of the defendant's rights to self-representation under *Faretta v. California*.[70] In *People v. Joseph*,[71] the court held that the trial court erred by applying a higher standard of competency to waive counsel in capital cases than in non-capital cases.[72] In *People v. Bigelow*,[73] the court held that the trial court erred in concluding that it lacked discretion to appoint advisory counsel for a defendant who elected to represent him-

64. *Id.*

65. *See infra* Appendix, Table 5.

66. People v. Ledesma, 43 Cal. 3d 171, 729 P.2d 839, 233 Cal. Rptr. 404 (1987); People v. Massie, 40 Cal. 3d 620, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984); People v. Mroczko, 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983); People v. Joseph, 34 Cal. 3d 936, 671 P.2d 843, 196 Cal. Rptr. 339 (1983); People v. Mozingo, 34 Cal. 3d 926, 671 P.2d 363, 196 Cal. Rptr. 212 (1983); People v. Gzikowski, 32 Cal. 3d 580, 651 P.2d 1145, 186 Cal. Rptr. 339 (1982); People v. Chadd, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (1981); People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).

67. *Ledesma*, 43 Cal. 3d at 171, 729 P.2d at 839, 233 Cal. Rptr. at 404; *Mroczko*, 35 Cal. 3d at 86, 672 P.2d at 835, 197 Cal. Rptr. at 52; *Mozingo*, 34 Cal. 3d at 926, 671 P.2d at 363, 196 Cal. Rptr. at 212; *Frierson*, 25 Cal. 3d at 142, 599 P.2d at 587, 158 Cal. Rptr. at 281.

68. *Ledesma*, 43 Cal. 3d at 223, 729 P.2d at 873, 233 Cal. Rptr. at 439; *Mozingo*, 34 Cal. 3d at 935, 671 P.2d at 368, 196 Cal. Rptr. at 217; *Frierson*, 25 Cal. 3d at 166, 599 P.2d at 601, 158 Cal. Rptr. at 294-95.

69. *Mroczko*, 35 Cal. 3d at 13, 672 P.2d at 852, 197 Cal. Rptr. at 69.

70. *Bigelow*, 37 Cal. 3d at 743, 691 P.2d at 1000, 196 Cal. Rptr. at 334 (citing Faretta v. California, 422 U.S. 806 (1975)); *Joseph*, 34 Cal. 3d at 945, 671 P.2d at 848, 196 Cal. Rptr. at 344 (citing Faretta v. California, 422 U.S. 806 (1975)).

71. 34 Cal. 3d 936, 671 P.2d 843, 196 Cal. Rptr. 339 (1983).

72. *Id.* at 945, 671 P.2d at 848, 196 Cal. Rptr. at 344.

73. 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984).

self.[74] Both of these holdings were also unanimous.[75] Still another unanimous reversal was based on deprivation of the defendant's right to counsel of his choice, when the trial court refused a continuance to permit the defendant to select a replacement for an experienced trial lawyer who withdrew as co-counsel on the eve of trial.[76]

Two more convictions were reversed by a vote of five to two because the requirements of California Penal Code section 1018 were not observed.[77] Section 1018 requires the consent of defense counsel to a plea of guilty entered in a capital case.[78] In *People v. Chadd*,[79] the dissenters urged that section 1018 be declared unconstitutional.[80] In *People v. Massie*,[81] the dissenters argued that the reluctant concurrence of defense counsel in a plea entered before *Chadd* was decided was sufficient to comply with section 1018.[82]

The Lucas court has been much less hospitable to claims related to the competence of defense counsel. It has yet to reverse a guilt determination on that ground,[83] and many of the dissents to affirmances have objected to the short shrift given this issue. In *People v. Wade*,[84] the court affirmed the conviction of a defendant whose counsel apologized to the jury for having to defend him, and recounted that his wife had placed flowers on the grave of the victim.[85] Dissenting Justice Broussard challenged the majority's conclusion that these were "legitimate tactical decisions," noting counsel's failure to offer any argument in the sanity phase of the trial.[86] A conflict of interest claim was rejected in *People v. Bonin*,[87] where an allegation that counsel had a fee agreement giving him literary rights to defendant's story was not investigated by the trial

74. *Id.* at 743, 691 P.2d at 1000, 209 Cal. Rptr. at 334.

75. *Id.* at 756, 691 P.2d at 1009-10, 209 Cal. Rptr. at 343; *Joseph*, 34 Cal. 3d at 948, 671 P.2d at 850-51, 196 Cal. Rptr. at 346.

76. *Gzikowski*, 32 Cal. 3d at 589, 651 P.2d at 1151, 186 Cal. Rptr. at 345.

77. *Massie*, 40 Cal. 3d at 622, 709 P.2d at 1310-1311, 221 Cal. Rptr. at 142; *Chadd*, 28 Cal. 3d at 743, 621 P.2d at 839, 170 Cal. Rptr. at 800.

78. CAL. PENAL CODE § 1018 (West 1988).

79. 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (1981).

80. *Id.* at 759, 621 P.2d at 848-49, 170 Cal. Rptr. at 810 (Richardson, J., dissenting in part).

81. 40 Cal. 3d 620, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985).

82. *Id.* at 626-27, 709 P.2d at 1314, 221 Cal. Rptr. at 145 (Lucas, J., dissenting in part).

83. *But see In re* Sixto, 48 Cal. 3d 1247, 774 P.2d 169, 259 Cal. Rptr. 491 (1989). In this case, decided after the period covered in this Article, the court granted a petition for habeas corpus by a death row inmate on the ground of ineffective assistance of counsel.

84. 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1987).

85. *Id.* at 987, 1000, 750 P.2d at 800, 809, 244 Cal. Rptr. at 911, 920.

86. *Id.* at 1000, 750 P.2d at 809, 244 Cal. Rptr. at 920 (Broussard, J., dissenting).

87. 47 Cal. 3d 808, 765 P.2d 460, 254 Cal. Rptr. 298 (1989).

court.[88] Again, Justice Broussard dissented.[89]

Faretta-related claims were rejected over dissents in two cases. In *People v. Crandell*,[90] the court held that failure to appoint advisory counsel upon request of a defendant who was representing himself was not reversible error.[91] The majority opinion by Justice Kaufman seized on language in *People v. Bigelow*[92] that such a failure should result in automatic reversal where it is an abuse of discretion.[93] Justice Kaufman concluded that the trial court simply failed to exercise discretion; however, if it had, its refusal to appoint advisory counsel would not have been an abuse.[94] Dissenting Justices Arguelles, Broussard and Mosk contended that the majority was discounting the significance of the capital nature of a case in applying the *Bigelow* rule.[95] *Crandell* offers a stark example of the "norm of affirmance" in operation, where deference is given to the discretion of the trial judge even when the trial judge actually failed to exercise discretion.[96] The second case involving a *Faretta* claim involved a defendant who asserted his right to self-representation on the eve of trial.[97] The claim was rejected as untimely.[98]

The difference in the fate of incompetence of counsel claims between the Bird and Lucas courts underlines the differing models of review. If counsel's performance is found truly inadequate, the ordinary consequence should be reversal. It has been estimated that 15-20% of trial representation in California death penalty cases is "significantly substandard."[99] Less than 2% of death row inmates are represented by retained counsel.[100] Rates of payment for appointed counsel and the pressures imposed on lawyers who accept such appointments are hardly configured to attract the best lawyers. Although many claims of incompetence are

88. *Id.* at 838, 765 P.2d at 475-76, 254 Cal. Rptr. at 313-14.

89. *Id.* at 858-62, 765 P.2d at 490-92, 254 Cal. Rptr. at 328-30 (Broussard, J., dissenting).

90. 46 Cal. 3d 833, 760 P.2d 423, 251 Cal. Rptr. 227 (1988), *cert. denied*, 109 S. Ct. 1936 (1989).

91. *Id.* at 851, 760 P.2d at 432, 251 Cal. Rptr. at 233.

92. 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984).

93. *Crandell*, 46 Cal. 3d at 861, 760 P.2d at 436, 251 Cal. Rptr. at 240 (citing People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984)).

94. *Id.* at 862-63, 760 P.2d at 437-38, 251 Cal. Rptr. at 240-41.

95. *Id.* at 888, 760 P.2d at 461, 251 Cal. Rptr. at 258 (Arguelles, J., dissenting in part); *id.* at 898-900, 760 P.2d at 461-63, 251 Cal. Rptr. 265-67 (Broussard, J., dissenting).

96. Davies, *supra* note 3, at 606.

97. People v. Moore, 47 Cal. 3d 63, 78-79, 762 P.2d 1218, 1226, 252 Cal. Rptr. 494, 502 (1988), *cert. denied*, 109 S. Ct. 2442 (1989).

98. *Id.* at 80, 762 P.2d at 1227, 252 Cal. Rptr. at 503.

99. Millman, *Financing the Right to Counsel in Capital Cases*, 19 LOY. L.A.L. REV. 383, 385 (1985).

100. *Id.* at 384.

yet to be litigated in habeas corpus proceedings, the Lucas court appears ready to dispose of these claims as readily as they are disposed of by the courts of appeal:

> Probably the best example of an insurmountable standard is found in an issue frequently raised in criminal appeals, inadequate representation by trial counsel. If representation were found to be inadequate, that would normally require reversal, but inadequate representation is seldom found. In any trial, counsel makes tactical and strategic decisions about what evidence and arguments to present and what to omit or downplay. Thus, on the basis of a cold record it is often difficult to say with any confidence whether an apparent blunder or omission was the result of incompetence or of design. The legal doctrine typically applied in the appeals studied avoided the need to make those difficult judgments, however, by setting the standard for review such that competence is presumed unless the representation is so bad that the proceeding amounts to little more than a "farce or a sham."[101]

While the standard being applied by both the Bird and Lucas courts was ostensibly the same standard set by the United States Supreme Court,[102] the results have changed dramatically. In this arena, the explanation does not appear to be entirely the harmless error rule, but a difference in the willingness to attribute "a wide variety of apparent failings of counsel . . . as 'trial strategy.' "[103]

B. Admissibility of Evidence

The second largest category of reversals of convictions of guilt by the Bird court, eight cases,[104] was based on the erroneous admission or exclusion of evidence on the issue of guilt. Three of these cases involved the erroneous admission of out-of-court statements by the defendant. In

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101. Davies, *supra* note 3, at 606-07 (footnotes omitted). Davies found a claim of inadequte representation succeeded in only two of the 118 cases in which it was raised (1.7%).

102. *See* Strickland v. Washington, 466 U.S. 668 (1984). Under the standard set out in *Strickland*, a defendant must show that the outcome would "reasonably likely" have been different but for counsel's incompetence. *Id.* at 696.

103. Davies, *supra* note 3, at 607.

104. People v. Louis, 42 Cal. 3d 969, 728 P.2d 180, 232 Cal. Rptr. 110 (1986); People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984); People v. Holt, 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984); People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984); People v. Mattson, 37 Cal. 3d 85, 688 P.2d 889, 207 Cal. Rptr. 278 (1984); People v. Alcala, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984); People v. Arcega, 32 Cal. 3d 504, 651 P.2d 338, 186 Cal. Rptr. 94 (1982); People v. Hogan, 31 Cal. 3d 815, 649 P.2d 93, 183 Cal. Rptr. 817 (1982).

People v. Hogan,[105] the defendant's statements were found involuntary.[106] In *People v. Mattson*,[107] the court concluded that the defendant's statements were elicited in violation of *Miranda v. Arizona*.[108] In *People v. Arcega*,[109] the court found that statements made by the defendant to a psychiatrist conducting a competency examination were erroneously admitted in violation of the defendant's constitutional privilege against self-incrimination.[110] Justices Mosk and Richardson dissented in *Hogan*[111] and *Arcega*,[112] while Justices Kaus and Grodin dissented from Justice Mosk's majority opinion in *Mattson*.[113]

Three other convictions were overturned because of erroneous admission of prior criminal conduct of the defendant. In *People v. Alcala*,[114] the defendant's convictions of three prior abductions of young girls were erroneously admitted to show the defendant's identity as the perpetrator of the charged abduction and murder.[115] In *People v. Holt*,[116] one basis for reversal was that the defendant's prior convictions of burglary and prison escape were erroneously admitted to impeach his testimony at trial.[117] Both cases were decided five to one, with Justice Mosk dissenting in each case.[118] In a third case,[119] reversed for failure to consider appointment of advisory counsel for a defendant who elected to represent himself, the court also concluded that evidence of the defendant's other crimes was erroneously admitted.[120]

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105. 31 Cal. 3d 815, 649 P.2d 93, 183 Cal. Rptr. 817 (1982).

106. *Id.* at 840-41, 647 P.2d at 107-08, 183 Cal. Rptr. at 831-32.

107. 37 Cal. 3d 85, 688 P.2d 886, 207 Cal. Rptr. 278 (1984).

108. *Id.* at 91, 688 P.2d at 889-90, 207 Cal. Rptr. at 281-82 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).

109. 32 Cal. 3d 504, 651 P.2d 338, 186 Cal. Rptr. 94 (1982).

110. *Id.* at 523, 651 P.2d at 347, 186 Cal. Rptr. at 103.

111. *Hogan*, 31 Cal. 3d at 859-64, 647 P.2d at 119-22, 183 Cal. Rptr. at 843-46 (Richardson & Mosk, JJ., dissenting).

112. *Arcega*, 32 Cal. 3d at 531-34, 651 P.2d at 352-55, 186 Cal. Rptr. at 108-11 (Richardson & Mosk, JJ., dissenting).

113. *Mattson*, 37 Cal. 3d at 94-96, 688 P.2d at 892-94, 207 Cal. Rptr. at 283-85 (Kaus & Grodin, JJ., dissenting).

114. 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984).

115. *Id.* at 634, 685 P.2d at 1142-43, 205 Cal. Rptr. at 792.

116. 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984).

117. *Id.* at 454, 690 P.2d at 1217, 208 Cal. Rptr. at 557. It would appear that the enactment of Proposition 8 in June, 1982, would change one basis for the result in *Holt*, permitting use of all prior felonies involving "moral turpitude" to impeach the defendant's testimony. *See* People v. Castro, 38 Cal. 3d 301, 315, 696 P.2d 111, 119, 211 Cal. Rptr. 719, 727 (1985).

118. *Holt*, 37 Cal. 3d at 462-64, 690 P.2d at 1223-24, 208 Cal. Rptr. at 563-64 (Mosk, J., dissenting in part); *Alcala*, 36 Cal. 3d at 636-37, 685 P.2d at 1144-45, 205 Cal. Rptr. at 793-94 (Mosk, J., dissenting).

119. *Bigelow*, 37 Cal. 3d at 731, 691 P.2d at 994, 209 Cal. Rptr. at 328.

120. *Id.* at 747, 691 P.2d at 1003, 209 Cal. Rptr. at 337.

In two more cases, the Bird court reduced a first-degree murder conviction to second degree, in part due to the erroneous exclusion of expert testimony,[121] and reversed a conviction because the hearsay testimony of a missing preliminary hearing witness was admitted without a sufficient showing of "due diligence" by the prosecution to locate him.[122] The first case was a unanimous opinion,[123] but the second case produced a four-to-three split on the court, with Justices Grodin, Panelli and Lucas dissenting.[124]

Justice Mosk dissented in half of the Bird court reversals based on admission of evidence, in many instances because he concluded the errors were harmless.[125] Many of his concurrences in Lucas court affirmances are on the same basis.[126]

In contrast to the eight reversals by the Bird court based on erroneous admission of evidence, only one death judgment has been reversed by the Lucas court on that ground. In *People v. Boyer*,[127] by a vote of five to two, the court reversed a judgment of guilt on the grounds that admission of the defendant's confession violated the rule of *Miranda v. Arizona*.[128] In several other cases, the court has found that evidence was erroneously admitted, but its admission was harmless error.[129] The court has rarely relied upon Proposition 8 to uphold the admission of evidence that would have been excluded before the initiative's enactment in 1982.[130]

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121. People v. McDonald, 37 Cal. 3d 351, 355, 690 P.2d 709, 711, 208 Cal. Rptr. 236, 238 (1984).

122. People v. Louis, 42 Cal. 3d 969, 990-94, 728 P.2d 180, 193-95, 232 Cal. Rptr. 110, 123-25 (1986).

123. *McDonald*, 37 Cal. 3d at 351, 690 P.2d at 709, 208 Cal. Rptr. at 236.

124. *Louis*, 42 Cal. 3d at 969, 728 P.2d at 180, 232 Cal. Rptr. at 110.

125. *See, e.g.*, *Holt*, 37 Cal. 3d at 462, 690 P.2d at 1223, 208 Cal. Rptr. at 563 (Mosk, J., dissenting); *Alcala*, 36 Cal. 3d at 636, 685 P.2d at 1144, 205 Cal. Rptr. at 793 (Mosk, J., dissenting); *Arcega*, 32 Cal. 3d at 531, 651 P.2d at 352, 186 Cal. Rptr. at 108 (Mosk, J., dissenting); *Hogan*, 31 Cal. 3d at 859, 647 P.2d at 119, 183 Cal. Rptr. at 843 (Mosk, J., dissenting).

126. *See, e.g.*, People v. Bunyard, 45 Cal. 3d 1189, 1200, 756 P.2d 795, 801, 249 Cal. Rptr. 71, 77 (1988) (Mosk, J., concurring); People v. Anderson, 43 Cal. 3d 1104, 1114, 742 P.2d 1306, 1309, 240 Cal. Rptr. 585, 588 (1987) (Mosk, J., concurring).

127. 48 Cal. 3d 247, 768 P.2d 610, 256 Cal. Rptr. 96 (1989).

128. *Id.* at 280, 768 P.2d at 629, 256 Cal. Rptr. at 115 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).

129. *See, e.g.*, People v. Coleman, 46 Cal. 3d 749, 774-76, 759 P.2d 1260, 1276-77, 251 Cal. Rptr. 63, 99-101 (1988) (*Kelly-Frye* violation); People v. Bunyard, 45 Cal. 3d 1189, 1203, 756 P.2d 795, 803, 249 Cal. Rptr. 71, 79 (1988) (hearsay); People v. Anderson, 43 Cal. 3d 1104, 1129, 742 P.2d 1306, 1319, 240 Cal. Rptr. 585, 598 (1987) (*Bruton* error).

130. As of this date, few of the cases reviewed involve murders that occurred after June 1982, when Proposition 8 took effect.

The Lucas court results are remarkably consistent with those reported for the routine processing of criminal appeals by the intermediate courts of appeal:

> Issues where either the harmless error rule or the substantial error rule are likely to apply had very low success rates: prosecutorial misconduct (4.1%), admission of prejudicial evidence (2.8%), improperly obtained statements—*Miranda* issues (1.8%), and improper identification procedures (0%). Note too, that these four issues have harmless error rates of 39.0%, 21.8%, 4.5%, and 11.9%, respectively. Clearly the harmless error rule has a significant impact on these issues, especially prosecutorial misconduct and admission of prejudicial evidence.[131]

The functioning of the harmless error rule as a norm of affirmance was the focus of major attention in Davies' study of decision-making by the court of appeal. His observations are especially pertinent to review of evidentiary issues in capital cases by the Lucas court:

> The harmless error rule has two important implications for appellate supervision. First, it is a norm of affirmance; unless an error is clearly prejudicial, the rule calls for the Court of Appeal to affirm. This is especially so since the burden of showing prejudice is usually placed on the appellant . . . .
>
> The second implication of the harmless error rule lies in the discretion it confers on the Court of Appeal. Because the harmfulness or harmlessness of an error is very difficult to specify with precision, the harmless error rule allows the Court of Appeal a substantial latitude of choice in determining whether to reverse any individual case. Hence, while it creates a general tendency to affirm, the prejudicial error rule also gives the Court of Appeal a flexible intellectual framework for choosing whether to ignore or to pounce on errors made during the trial.[132]

Several justices interviewed by Davies noted how the "harmless error" rule waxed and waned on an almost cyclical basis. One study of federal appellate courts found the rate of harmless error issues in criminal appeals increased four-fold in a ten-year period.[133] Davies also points out how frequently the rule is used "to bypass determining whether a legal

131. Davies, *supra* note 3, at 617-18 (footnotes omitted).

132. *Id.* at 602-03 (footnotes omitted).

133. Winslow, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538, 545 (1979).

error occurred at all by jumping to a finding that even if there were an error it would be harmless."[134]

C. Jury Selection

Issues relating to jury selection are particularly significant in capital cases, since the jury makes the ultimate choice between life and death.[135] The United States Supreme Court has issued a number of major opinions, not all consistent with each other, regarding the exclusion of jurors with scruples against the death penalty.[136] One of the most controversial rulings of the Bird court related to the voir dire procedure in capital cases.[137]

In reviewing the underlying conviction of guilt, the Bird court reversed two convictions because of errors in the jury selection procedure. In *People v. Harris*,[138] the conviction was set aside on a four-to-three vote because the defendant was not given a full hearing on his claim that minorities were underrepresented in the jury pool from which jurors were drawn.[139] The challenge to Los Angeles County's use of voter registration lists as the sole source of prospective jurors produced a badly splintered court, with Justice Grodin reluctantly concurring without accepting all of the reasoning of Justice Broussard's majority opinion.[140] In *People v. Turner*,[141] a unanimous court reversed the conviction of a black defendant for the murders of two white professionals because the prosecutor's use of peremptory challenges to remove all three black jurors was inadequately explained.[142] The court's prior decision in *People v. Wheeler*[143] imposed a burden of justification on the prosecutor once a *prima facie* showing of group bias is made.[144]

The Lucas court reversed one conviction on *Wheeler* grounds, re-

134. Davies, *supra* note 3, at 604.

135. CAL. PENAL CODE § 190.4 (West 1988).

136. *Compare* Witherspoon v. Illinois, 391 U.S. 510 (1968) *with* Wainwright v. Witt, 469 U.S. 412 (1985).

137. Hovey v. Superior Court, 28 Cal. 3d 1, 80, 616 P.2d 1301, 1354, 168 Cal. Rptr. 128, 181 (1980).

138. 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, *cert. denied*, 469 U.S. 965 (1984).

139. *Id.* at 71, 679 P.2d at 455, 201 Cal. Rptr. at 804. In People v. Myers, 43 Cal. 3d 250, 256, 729 P.2d 698, 700, 233 Cal. Rptr. 264, 265 (1987), the court declined to hold *Harris* retroactive.

140. *Harris*, 36 Cal. 3d at 71, 679 P.2d at 455, 201 Cal. Rptr. at 804 (Grodin, J., concurring).

141. 42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986).

142. *Id.* at 720, 726 P.2d at 106-07, 230 Cal. Rptr. at 660-61.

143. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

144. *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. The United States Supreme Court adopted a similar rule in *Batson v. Kentucky*, 476 U.S. 79 (1986). The differences be-

jecting an argument that prosecutorial discrimination in excusing black jurors can be justified by defense tactics of excusing white jurors.[145] In *People v. Snow*,[146] a unanimous court agreed that the use of six of sixteen peremptories to excuse black jurors was discriminatory.[147] In another case, the court rejected a *Wheeler* claim, concluding that the prosecutor's explanations for using peremptory challenges to remove three black jurors, four Jewish jurors, and two Asian jurors were sufficient to meet his burden of justification.[148] The majority seized the occasion to specifically disapprove a Bird-era precedent disallowing the prosecutor's subjective reactions to juror body language and mode of answering as adequate grounds for justification of peremptory challenges.[149] As noted by Justice Panelli in his majority opinion, "we hereby return to a standard of truly giving great deference to the trial court in distinguishing bona fide reasons from sham excuses."[150] In dissent, Justices Mosk and Broussard chastised the majority for paying lip service to the *Wheeler/Batson* rule while violating both its letter and spirit.[151]

The exaltation of greater deference to trial judges as justification for diluting *Wheeler/Batson* requirements is quite consistent with the approach of an intermediate appellate court to the review of routine criminal cases, as described by Davies:

> [T]he justices spoke of trial court judges more as fellow professionals than as subordinates. Hence, they defined their supervisory function primarily in terms of writing opinions that would *assist* trial judges in resolving questions. They approached the court system as though it were a self-correcting institution, and they believed that rules would be followed if they were clear. This premise is difficult to square with much of the literature describing trial court processes—or with some of the justices' own observations about conditions in the trial courts. Nevertheless, this passive and restrained form of supervision is all

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tween *Wheeler* and *Batson* are explained in Uelmen, *Striking Jurors Under* Batson v. Kentucky, 2 CRIM. JUST., Fall 1987, at 2.

145. People v. Snow, 44 Cal. 3d 216, 225, 746 P.2d 452, 456, 242 Cal. Rptr. 477, 481 (1987).

146. 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987).

147. *Id.* at 226, 746 P.2d at 457, 242 Cal. Rptr. at 482.

148. People v. Johnson, 47 Cal. 3d 1194, 1217-18, 767 P.2d 1047, 1054-55, 255 Cal. Rptr. 569, 576-77 (1989).

149. *Id.* at 1219-22, 767 P.2d at 1056-58, 255 Cal. Rptr. at 578-80.

150. *Id.* at 1221, 767 P.2d at 1057, 255 Cal. Rptr. at 579.

151. *Id.* at 1254, 767 P.2d at 1079, 255 Cal. Rptr. at 601 (Mosk & Broussard, JJ., dissenting).

that the institutional norms of the court of appeal allow.[152]

D. Competency of the Defendant

The Bird court followed a rule of per se reversals for denial of a hearing on the competency of the defendant to stand trial, once the defendant produced "substantial evidence" of incompetency.[153] In *People v. Stankewitz*,[154] the court concluded by a four-to-two vote that the "substantial evidence" test was met by the testimony of a single, court-appointed psychiatrist.[155]

Two of the four reversals of the conviction of guilt by the Lucas court have resulted from failures to conduct competency hearings.[156] Both decisions were unanimous.[157] Both involved a failure by the trial judge to conduct a competency hearing after expressing doubts as to the competency of the defendant based on psychiatric reports.[158] Thus, the prosecution had no room to argue that the "substantial evidence" test was not met. The rulings were formulated in jurisdictional terms, holding that the trial court lacks jurisdiction to proceed until the competency hearing is concluded.[159]

E. Miscellaneous

The remaining reversals of underlying convictions of guilt by the Bird court were based on a variety of grounds, including erroneous jury instructions,[160] failure to grant a severance of counts,[161] misconduct by a

152. Davies, *supra* note 3, at 611 (emphasis in original) (footnotes omitted).

153. *See* People v. Pennington, 66 Cal. 2d 508, 517-20, 426 P.2d 942, 949-51, 58 Cal. Rptr. 374, 381-83 (1967).

154. 32 Cal. 3d 80, 648 P.2d 578, 184 Cal. Rptr. 611 (1982).

155. *Id.* at 92, 648 P.2d at 584, 184 Cal. Rptr. at 617.

156. People v. Marks, 45 Cal. 3d 1335, 1340, 756 P.2d 260, 264, 248 Cal. Rptr. 874, 877 (1988); People v. Hale, 44 Cal. 3d 531, 538-39, 749 P.2d 769, 773-74, 244 Cal. Rptr. 114, 118-19 (1988).

157. *Marks*, 45 Cal. 3d at 1335, 756 P.2d at 260, 248 Cal. Rptr. at 874; *Hale*, 44 Cal. 3d at 531, 749 P.2d at 769, 244 Cal. Rptr. at 114.

158. *Marks*, 45 Cal. 3d at 1338, 756 P.2d at 263, 248 Cal. Rptr. at 876-77; *Hale*, 44 Cal. 3d at 538, 749 P.2d at 773, 244 Cal. Rptr. at 118.

159. *Marks*, 45 Cal. 3d at 1340, 756 P.2d at 264, 248 Cal. Rptr. at 877; *Hale*, 44 Cal. 3d at 541, 749 P.2d at 775, 244 Cal. Rptr. at 120.

160. People v. Croy, 41 Cal. 3d 1, 14, 710 P.2d 392, 400, 221 Cal. Rptr. 592, 599-600 (1985).

161. People v. Smallwood, 42 Cal. 3d 415, 433, 722 P.2d 197, 208, 228 Cal. Rptr. 913, 925 (1986).

juror,[162] and denial of pretrial discovery.[163] Then-Justice Lucas wrote dissenting opinions in three of these four cases. He argued that the erroneous jury instructions were harmless,[164] that the denial of severance was not an abuse of discretion,[165] and that the jury misconduct had been waived by a failure to promptly assert it.[166] He also joined in Justice Grodin's dissent in the fourth case, urging a limited remand rather than an outright reversal.[167]

The Lucas court now uses these procedural arguments often to reject similar claims. In *People v. Bean*,[168] for example, over the dissent of Justices Broussard and Mosk, the court rejected the defendant's claim that the denial of severance of counts was an abuse of discretion.[169] In *People v. Dyer*,[170] the court rejected the per se reversal rule for erroneous aiding and abetting instructions previously utilized by the Bird court.[171]

F. Summary of Underlying Conviction Cases

By increased reliance on such concepts as harmless error and waiver, and greater deference to trial court discretion, the Lucas court has increased the affirmance rate for the underlying conviction of guilt from 65.6% to 94.4%,[172] an even higher rate than that for routine criminal cases reviewed by the intermediate courts of appeal.[173] Little or no change in legal doctrine or rules accompanied this substantial increase in the affirmance rate. The low rate of affirmance by the Bird court cost them dearly, in terms of the level of support for the court among trial judges. A majority of California trial judges voted with the majority of

162. *In re* Stankewitz, 40 Cal. 3d 391, 402, 708 P.2d 1260, 1266, 220 Cal. Rptr. 382, 388 (1985). *Stankewitz* was the only case in which the Bird court set aside the underlying conviction on a petition for a writ of habeas corpus rather than on direct review.

163. People v. Memro, 38 Cal. 3d 658, 684, 700 P.2d 446, 464, 214 Cal. Rptr. 832, 850 (1985).

164. *Croy*, 41 Cal. 3d at 25-26, 710 P.2d at 407-08, 221 Cal. Rptr. at 607-08 (Lucas, J., dissenting).

165. *Smallwood*, 42 Cal. 3d at 433-36, 722 P.2d at 208-10, 228 Cal. Rptr. at 925-27 (Lucas, J., dissenting).

166. *Stankewitz*, 40 Cal. 3d at 403-05, 708 P.2d at 1266-67, 220 Cal. Rptr. at 389 (Lucas, J., dissenting).

167. *Memro*, 38 Cal. 3d at 705-10, 700 P.2d at 479-82, 214 Cal. Rptr. at 865-68 (Grodin, J., dissenting).

168. 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988).

169. *Id.* at 935-36, 760 P.2d at 1005, 467 Cal. Rptr. at 476.

170. 45 Cal. 3d 26, 753 P.2d 1, 246 Cal. Rptr. 209 (1988), *cert. denied*, 109 S. Ct. 330 (1989).

171. *Id.* at 64, 753 P.2d at 23, 246 Cal. Rptr. at 231.

172. *Compare* Table 5 *with* Table 6 at Appendix *infra*.

173. *See supra* text accompanying note 60.

Californians to remove the Chief Justice in 1986.[174] Not surprisingly, the new court places deference to trial judge determinations higher on its agenda. Deference to lower courts is consistent with the institutional roots for the norms of affirmance identified by Davies at the court of appeal level:

> There are two likely institutional roots for the norms of deference to the trial court's prior decision. First, simply in terms of economy and the need to reach a final decision, there are benefits to the court system in not unnecessarily doubling work by redeciding issues. Indeed, since the appellate court often has less information before it than the trial court had, there are substantial reasons to doubt that a de novo decision by the appellate court would necessarily be an improvement over the trial court decision. These considerations underlie the strong emphasis on values of "finality" in the judicial administration literature.
>
> There appears to be a second institutional source of appellate deference to the trial courts, however. That is simply that it is to the institutional advantage of an intermediate appellate court to minimize conflict with the trial courts. . . . The approval of the judges of other courts and of various bar groups and state officials—or at least the absence of overt criticism from those sources—is the primary means the courts of appeal have for demonstrating their satisfactory performance.[175]

The pressures identified by Davies are at their absolute height in reviewing the conviction of guilt in a capital case. The cost of reversal on this issue is enormous, both in terms of the expense of retrial and the morale of trial judges. On the other hand, reversals on the penalty issue involve significantly less cost, as well as less risk that the defendant will be freed. Thus, it should not be surprising that judgments of guilt in the most complex murder trials are affirmed at a higher rate than very ordinary criminal cases.[176] This result may well be because the "norms of affirmance" exert their strongest influence to treat errors as non-reversible in precisely those cases where the costs of reversal are highest.

IV. THE FINDING OF SPECIAL CIRCUMSTANCES

Under both the 1977 law and the 1978 Briggs Initiative, a sentence

174. Note, *Judiciary Elections—The 1986 Elections for the California Supreme Court*, 9 HARV. J.L. & PUB. POL'Y 751, 752 (1986).

175. Davies, *supra* note 3, at 592-93 (footnotes omitted).

176. *See supra* note 60 and accompanying text.

of death or life without parole can be imposed for first-degree murder only if the fact finder concludes that one or more of the special circumstances specified in California Penal Code section 190.2 exists.[177] Recognizing that not all first-degree murders merit the ultimate penalty of death, the special circumstances contribute to the fulfillment of the constitutional mandate of the United States Supreme Court that discretion be directed and limited to provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[178] The special circumstance must be proven beyond a reasonable doubt.[179] With a prior conviction of murder as the sole exception, the fact finder decides the truth of the special circumstance at the same time that it determines the guilt or innocence of the defendant on the underlying murder charge.[180] If a verdict of guilty is returned with a finding that one or more special circumstances exists, the jury (or judge, if jury is waived) then proceeds in a separate hearing to decide whether a punishment of death or life without parole should be imposed.[181]

When a death penalty judgment is reviewed on automatic appeal to the California Supreme Court, the court ordinarily has no occasion to review the finding of special circumstances if it reverses the underlying conviction. The case is remanded for a new trial to redetermine both guilt of the underlying charge and the truth of special circumstances.[182] If the underlying conviction is affirmed, however, the court must still review the finding of special circumstances.[183] If the finding of special circumstances is reversed, the case is usually remanded for a new trial limited to the issue of the truth of the "special circumstances." However, remand may be precluded by the constitutional prohibition of double jeopardy if the finding of special circumstances is reversed due to insufficiency of the evidence.[184]

Of the sixty-four death penalty judgments reviewed on automatic appeal by the Bird court from 1979 through 1986,[185] the court affirmed the conviction and proceeded to review the findings of special circum-

177. CAL. PENAL CODE § 190.4 (repealed 1978); *id.* (West 1988).

178. Gregg v. Georgia, 428 U.S. 153, 188 (1976); Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

179. CAL. PENAL CODE § 190.4 (West 1988).

180. *Id.*

181. *Id.*

182. M. MILLMAN, THE CALIFORNIA DEATH PENALTY DEFENSE MANUAL (1989).

183. *Id.*

184. *See, e.g.*, People v. Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980).

185. *See infra* Appendix, Table 5.

stances in forty-two cases.[186] Of those forty-two cases, the court reversed twenty-one (50%) of the findings of special circumstances.[187] All but four of these reversals, however, were in cases tried under the 1978 Briggs Initiative.[188] While the special circumstances provisions of the 1977 law emerged virtually unscathed from the process of judicial review, 61.5% of the cases tried under the Briggs Initiative in which convictions were affirmed were reversed due to error in the finding of special circumstances.[189] Most of these reversals were due to the same error: failure to instruct the jury of the need to find intent to kill where "felony-murder" special circumstances were utilized, as required by *Carlos v. Superior Court*.[190]

One of the first death penalty decisions issued by the Lucas court overruled *Carlos*.[191] In subsequent cases, the finding of special circumstances necessary to support a death judgment has rarely been disturbed. Of the seventy-one death penalty judgments reviewed by the Lucas court up to March 1989,[192] the court has affirmed the conviction and proceeded to review the findings of special circumstances in sixty-seven cases.[193] Of those sixty-seven cases, only one has resulted in total reversal of the findings of special circumstances.[194] That single case arose under the 1977 law.[195] Thus, in reviewing findings of special circumstances under the Briggs Initiative, the record went from 61.5% reversal to 100% affirmance. While this remarkable turnaround is largely attributable to the overruling of *Carlos*, we will see other examples where the "norms of affirmance" readily explain the difference. Rarely does more than one voice dissent to these dispositions.

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186. *See infra* Appendix, Table 1, Table 3. In one case reviewed under the 1978 Briggs Initiative, the court reviewed and reversed the finding of special circumstances after reversing the underlying conviction. People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984).

187. *See infra* Appendix, Table 2, Table 5.

188. People v. Frierson, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985); People v. Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980); People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980); People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979).

189. *See infra* Appendix, Table 2, Table 5.

190. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

191. People v. Anderson, 43 Cal. 3d 1104, 1147, 742 P.2d 1325, 1331, 240 Cal. Rptr. 585, 611 (1987) (overruling Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983)).

192. *See infra* Appendix, Table 6.

193. *Id.*

194. People v. Morris, 46 Cal. 3d 1, 756 P.2d 843, 249 Cal. Rptr. 119 (1988).

195. *Id.* at 9, 756 P.2d at 847, 249 Cal. Rptr. at 123.

A. The 1977 Law

The 1977 law specified a total of eleven possible special circumstances that might be alleged to justify imposition of a sentence of death or life without parole for first-degree murder.[196] The death penalty was imposed under the 1977 law in a total of twenty-seven of the cases reviewed by the Bird court.[197] In most of these cases, more than one special circumstance was found. Nineteen of the cases included findings that the murder was committed during the commission of another felony.[198] Twelve cases included findings that the defendant was convicted of more than one murder.[199] One case included a finding that the mur-

196. CAL. PENAL CODE § 190.2 (repealed 1978). The 11 special circumstances specified under the 1977 law were as follows: (1) murder for hire; (2) murder by explosive; (3) murder or acting in the murder of a peace officer; (4) murder of a witness; (5) murder during the commission of a robbery; (6) murder during the commission of a kidnapping; (7) murder during the commission of rape; (8) murder during the commission of a lewd or lascivious act upon a child under 14; (9) murder during the commission of a residential burglary; (10) murder involving torture; (11) murder by a person with a prior conviction of murder.

197. *See infra* Appendix, Table 5.

198. People v. Phillips, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1986) (robbery); People v. Croy, 41 Cal. 3d 1, 710 P.2d 392, 221 Cal. Rptr. 592 (1986) (robbery); People v. Frierson, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985) [hereinafter *Frierson II*] (kidnapping); People v. Frank, 38 Cal. 3d 711, 700 P.2d 415, 214 Cal. Rptr. 801 (1985) (kidnapping); People v. Mattson, 37 Cal. 3d 85, 688 P.2d 889, 207 Cal. Rptr. 278 (1984) (rape, kidnapping, lewd and lascivious acts with child under 14); People v. Lanphear, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984) [hereinafter *Lanphear II*] (robbery); People v. Harris, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, *cert. denied*, 469 U.S. 965 (1984) (robbery, burglary); People v. Fields, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983), *cert. denied*, 469 U.S. 892 (1984) (robbery); People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982) (robbery, kidnapping, rape); People v. Stankewitz, 32 Cal. 3d 80, 648 P.2d 578, 184 Cal. Rptr. 611 (1982) (robbery, kidnapping); People v. Harris, 28 Cal. 3d 935, 673 P.2d 240, 171 Cal. Rtpr. 679, *cert. denied*, 454 U.S. 1111 (1981) (robbery, burglary); People v. Chadd, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798, *cert. denied*, 452 U.S. 931 (1981) (robbery, rape); People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981) (burglary); People v. Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980) (robbery, burglary); People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980) (robbery); People v. Lanphear, 26 Cal. 3d 814, 608 P.2d 689, 163 Cal. Rptr. 601, *vacated sub nom.* California v. Lanphear, 449 U.S. 810 (1980) [hereinafter *Lanphear I*] (robbery); People v. Velasquez, 26 Cal. 3d 425, 606 P.2d 341, 162 Cal. Rptr. 306, *vacated sub nom.* California v. Velasquez, 448 U.S. 903 (1980) (robbery); People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) [hereinafter *Frierson I*] (robbery, kidnapping); People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979) (robbery).

199. People v. Memro, 38 Cal. 3d 658, 666, 700 P.2d 446, 451, 214 Cal. Rptr. 832, 837 (1985); *Mattson*, 37 Cal. 3d at 88, 688 P.2d at 890, 207 Cal. Rptr. at 279; *Harris*, 36 Cal. 3d at 42, 680 P.2d at 1083, 201 Cal. Rptr. at 784; People v. Easley, 34 Cal. 3d 858, 864, 671 P.2d 813, 816, 196 Cal. Rptr. 309, 312 (1983); *Robertson*, 33 Cal. 3d at 34, 655 P.2d at 284, 188 Cal. Rptr. at 82; People v. Gzikowski, 32 Cal. 3d 580, 582, 651 P.2d 1145, 1147, 186 Cal. Rptr. 339, 340 (1982); People v. Arcega, 32 Cal. 3d 504, 510, 651 P.2d 338, 339, 186 Cal. Rptr. 94, 95 (1982); People v. Hogan, 31 Cal. 3d 815, 820, 649 P.2d 93, 95, 183 Cal. Rptr. 817, 819

der involved infliction of torture,[200] one included a finding that the murder was done for valuable consideration,[201] one included a finding that the victim was a police officer in the line of duty[202] and four included a finding that the defendant had a prior murder conviction.[203]

In reviewing these twenty-seven cases on automatic appeal, the Bird court reversed the conviction of guilt in eleven cases.[204] Out of the sixteen cases in which the conviction was affirmed, the court upheld the finding of special circumstances in all but four cases.[205] Two of the four cases involved procedural errors which were unrelated to the legal definition of special circumstances. In *People v. Teron*,[206] the court simply held the 1977 death penalty law could not be retroactively applied to a murder committed prior to its enactment.[207] While the underlying conviction of murder was affirmed, the finding of special circumstances was reversed.[208] In *People v. Frierson*,[209] the court reversed the finding of special circumstances because of defense counsel's refusal to present evidence that the defendant wanted to present.[210] The same case had previously been reversed on the conviction of guilt due to incompetence of counsel.[211]

The other two cases in which findings of special circumstances were reversed under the 1977 law involved allegations that the murders were committed "during the commission," in one case of a robbery and kidnapping,[212] and in the other case of a robbery and burglary.[213] In both cases, the court found the felonies in question were incidental to the mur-

(1982); People v. Haskett, 30 Cal. 3d 841, 847, 640 P.2d 776, 780, 180 Cal. Rptr. 640, 644 (1982); People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982); *Chadd*, 28 Cal. 3d at 744, 621 P.2d at 839, 170 Cal. Rptr. at 800; People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981).

200. *Robertson*, 33 Cal. 3d at 51, 655 P.2d at 296, 188 Cal. Rptr. at 94.

201. *Easley*, 34 Cal. 3d at 864, 671 P.2d at 816, 196 Cal. Rptr. at 312.

202. *Croy*, 41 Cal. 3d at 5-6, 710 P.2d at 393, 221 Cal. Rptr. at 593.

203. *Lanphear II*, 36 Cal. 3d at 165, 680 P.2d at 1082, 203 Cal. Rptr. at 123; People v. Mrocsko, 35 Cal. 3d 86, 97, 672 P.2d 835, 840, 197 Cal. Rptr. 52, 57 (1983); *Lanphear I*, 26 Cal. 3d 814, 608 P.2d 689, 163 Cal. Rptr. 601 (1980); *Velasquez*, 26 Cal. 3d at 428, 606 P.2d at 342, 162 Cal. Rptr. at 307.

204. *See infra* Appendix, Table 2.

205. *Id.*

206. 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979).

207. *Id.* at 115-19, 588 P.2d at 780-82, 151 Cal. Rptr. at 640-42.

208. *Id.* at 108, 588 P.2d at 775, 151 Cal. Rptr. at 635.

209. 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985).

210. *Id.* at 815-18, 705 P.2d at 403-05, 218 Cal. Rptr. at 80-82.

211. *Frierson I*, 25 Cal. 3d at 157-67, 599 P.2d at 595-601, 158 Cal. Rptr. at 289-95.

212. People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).

213. People v. Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980).

der, rather than vice-versa.[214] As the court construed the requirement that the murder occur "during the commission" of an enumerated felony, it would not apply to situations where a robbery is committed merely to facilitate or conceal a murder.[215] The court did not find error in the instructions to the jury in either case. Rather, based on an insufficiency of the evidence, it concluded that the special circumstances alleged had not been proven.[216] In numerous subsequent cases under the 1977 law, the Bird court distinguished its holdings in *People v. Green*[217] and *People v. Thompson*,[218] upholding findings of special circumstances that included a murder "during the commission" of robbery, kidnapping, rape and burglary.[219]

The Lucas court has reviewed eleven death penalty judgments imposed under the 1977 law,[220] reversing one on the underlying conviction of guilt.[221] Of the ten remaining, only one was reversed on the finding of special circumstances. In *People v. Morris*,[222] the defendant was convicted of the shooting murder of a nude man in a bathhouse frequented by homosexuals.[223] Based on a "robbery-murder" special circumstance, he was sentenced to death.[224] The court concluded there was insufficient evidence to prove a robbery, and remanded for resentencing.[225] In the course of its ruling, however, the court rejected a claim that the robbery could not supply a special circumstance since it was time-barred by the statute of limitations.[226] The majority held that the crime relied upon to supply the special circumstance need not be separately charged.[227] Justice Broussard dissented, contending this interpretation of the 1977 law repudiated five precedents decided by the Bird court.[228]

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214. *Id.* at 324, 611 P.2d at 894, 165 Cal. Rptr. at 300; *Green*, 27 Cal. 3d at 61, 609 P.2d at 505, 164 Cal. Rptr. at 38.

215. *Thompson*, 27 Cal. 3d at 322, 611 P.2d at 893, 165 Cal. Rptr. at 299; *Green*, 27 Cal. 3d at 59-62, 609 P.2d at 504-06, 164 Cal. Rptr. at 37-39.

216. *Thompson*, 27 Cal. 3d at 325, 611 P.2d at 895, 165 Cal. Rptr. at 301; *Green*, 27 Cal. 3d at 74, 609 P.2d at 514, 164 Cal. Rptr. at 47.

217. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).

218. 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980).

219. *See, e.g.*, *Phillips*, 41 Cal. 3d at 60, 711 P.2d at 442, 222 Cal. Rptr. at 127; *Fields*, 35 Cal. 3d at 367, 673 P.2d at 704, 197 Cal. Rptr. at 803; *Ramos*, 30 Cal. 3d at 586, 639 P.2d at 927, 180 Cal. Rptr. at 285; *Robertson*, 33 Cal. 3d at 51, 655 P.2d at 296, 188 Cal. Rptr. at 94.

220. *See infra* Appendix, Table 6.

221. People v. Snow, 44 Cal. 3d 216, 746 P.2d 445, 242 Cal. Rptr. 447 (1988).

222. 46 Cal. 3d 1, 756 P.2d 843, 249 Cal. Rptr. 119 (1988).

223. *Id.* at 10, 756 P.2d at 847-48, 249 Cal. Rptr. at 123-24.

224. *Id.* at 9, 756 P.2d at 847, 249 Cal. Rptr. at 123.

225. *Id.* at 10, 756 P.2d at 847-48, 249 Cal. Rptr. at 124.

226. *Id.* at 18, 756 P.2d at 853, 249 Cal. Rptr. at 129.

227. *Id.*

228. *Id.* at 43, 756 P.2d at 870, 249 Cal. Rptr. at 146 (Broussard, J., dissenting).

In *People v. Kimble*,[229] the court upheld felony-murder special circumstance findings for burglary and rape under the 1977 law even though the jury had not been instructed of the need to find an "independent felonious purpose" pursuant to *People v. Green*.[230] Justice Mosk dissented, urging that such error should be reversible per se.[231]

B. The Carlos/Garcia *Rule and Its Demise*

The 1978 death penalty law,[232] adopted by initiative in November, 1978,[233] substantially expanded the special circumstances available to permit a sentence of death or life without parole. The *new* categories included: (1) murder committed to prevent arrest or perfect an escape from lawful custody; (2) murder of federal law enforcement officers, firemen, prosecutors, judges or elected officials related to the performance of their duties; (3) murder which was "especially heinous, atrocious or cruel"; (4) murder committed by lying in wait; (5) murder committed because of the victim's race, color, religion or nationality; (6) murder committed by poison.[234]

The initiative measure also made significant modifications in the categories of special circumstances previously defined in the 1977 law.[235] Most significant were the changes in the "felony-murder" categories. Under the 1977 law, an intent to kill on the part of the defendant was an absolute prerequisite to finding that the murder was committed during the commission of an enumerated felony.[236] Section 190.2(c) had required that "the defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death."[237] Section 190.2(d) had further provided:

> For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word

229. 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988), *cert. denied*, 109 S. Ct. 188 (1989).

230. *Id.* at 501, 749 P.2d at 816, 244 Cal. Rptr. at 161.

231. *Id.* at 517, 749 P.2d at 827, 244 Cal. Rptr. at 172-73 (Mosk, J., dissenting).

232. CAL. PENAL CODE § 190-190.5 (West 1988).

233. Initiative Measure, Proposition 14, Nov. 7, 1978.

234. CAL. PENAL CODE § 190.2(a) (West 1988).

235. *Compare* CAL. PENAL CODE § 190.2(a) (repealed 1978) *with* CAL. PENAL CODE § 190.2(a) (West 1988).

236. CAL. PENAL CODE § 190.2(c) (repealed 1978).

237. *Id.*

> or conduct he orders, initiates or coerces the actual killing of the victim.[238]

Both of these provisions were eliminated by the Briggs Initiative; however, the new law created some ambiguity concerning whether a defendant participating in a felony had to actually intend to cause the death of the victim. Section 190.2(a)(17) now requires that "the murder was 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 [an enumerated felony]."[239] Section 190.2(b), however, imposes a broad requirement of intent on all special circumstances with the exception of that for prior conviction of murder:

> Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraph . . . (17) . . . of subdivision (a) of this section has been charged and specially found under § 190.4 to be true.[240]

The issue of intent raised by this ambiguity achieved constitutional stature in *Enmund v. Florida*,[241] in which the United States Supreme Court held that the eighth amendment prohibition of cruel and unusual punishment precludes the imposition of a death penalty without proof that the defendant killed, attempted to kill, or intended or contemplated that life would be taken.[242] The Court noted that only eight jurisdictions permitted imposition of a death penalty for participation in a robbery in which another robber takes a life: California, Florida, Georgia, Mississippi, Nevada, South Carolina, Tennessee and Wyoming.[243] Four years later, the United States Supreme Court held, in a five-to-four ruling, that

238. *Id.* § 190.2(d).

239. CAL. PENAL CODE § 190.2(a)(17) (West 1988).

240. *Id.* § 190.2(b).

241. 458 U.S. 782 (1982).

242. *Id.* at 801.

243. Many of these states responded to *Enmund* by incorporating a requirement that the jury be instructed to make a factual finding of intent to kill before a death penalty can be imposed. In *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984), the Georgia Supreme Court held that where the death penalty is sought in a felony-murder case, the jury must be given the option of *three* verdicts: guilty of malice-murder, guilty of felony-murder or not guilty. *Id.* at 395 n.3, 321 S.E.2d at 715 n.3. The Mississippi Legislature amended that state's death penalty law to require *Enmund* findings. 1983 Miss. Laws ch. 429, § 2 (codified at MISS. CODE ANN.

the *Enmund* findings can be made by an appellate court, a trial judge or a jury, and special instructions for a factual determination by the jury are not constitutionally required.[244]

The California Supreme Court addressed this problem for the first time in *Carlos v. Superior Court*.[245] *Carlos* was not a review of a death penalty judgment, but rather a pretrial writ challenging the sufficiency of the evidence presented at a preliminary hearing.[246] Significantly, the issue was resolved as a question of statutory construction, rather than as a constitutional question. The court resolved the ambiguity by construing California Penal Code section 190.2(b) to require a finding of intent to kill before a defendant is subject to a felony-murder special circumstance finding under section 190.2(a)(17).[247] Strong support for this interpretation was found in the ballot arguments that accompanied the Briggs Initiative.[248] Voters were given emphatic assurances that one who merely aided another in committing a murder without intent to kill was not subject to the death penalty because section 190.2(b) "says that the person must have *intentionally* aided in the commission of a murder to be subject to the death penalty under this initiative."[249]

Eight months later, in *People v. Garcia*,[250] the court declared that *Carlos* would apply retroactively to all cases not yet final, and that, with limited exceptions to be noted, *Carlos* error is reversible per se, with no additional showing of prejudice required.[251] The per se rule was found to be constitutionally required, because a failure to instruct the jury that intent to kill must be found deprives the defendant of his constitutional right that a jury be convinced beyond a reasonable doubt.[252]

The *Carlos/Garcia* rulings had greater impact on death penalty adjudication in California than any other decisions of the California Supreme Court. Of the twenty-six cases in which the Bird court upheld

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§ 99-19-101(7) (Supp. 1985)). The South Carolina Supreme Court held that during the penalty phase of a capital case:

> the trial judge should charge that the death penalty can not be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be used.

State v. Peterson, 287 S.C. 244, 248, 335 S.E.2d 800, 802 (1985).

244. Cabana v. Bullock, 474 U.S. 376, 392 (1986).

245. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

246. *Id.* at 136, 672 P.2d at 865, 197 Cal. Rptr. at 82.

247. *Id.* at 141, 672 P.2d at 868, 197 Cal. Rptr. at 86.

248. *Id.* at 144, 672 P.2d at 871, 197 Cal. Rptr. at 88.

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

250. 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984).

251. *Id.* at 544-45, 684 P.2d at 827, 205 Cal. Rptr. at 266.

252. *Id.* at 551, 684 P.2d at 832, 205 Cal. Rptr. at 271.

the conviction of guilt and reviewed the finding of special circumstances under the Briggs Initiative,[253] sixteen (61.5%) resulted in reversal of the finding of special circumstances, and every one of these reversals was based at least in part on the *Carlos/Garcia* rulings.[254]

The felony-murder special circumstances are frequently utilized in death penalty cases under the Briggs Initiative. Of the thirty-seven cases tried under the Briggs Initiative that were reviewed by the Bird court,[255] all but five included an allegation of at least one felony-murder special circumstance.[256] Of the sixty Briggs cases reviewed by the Lucas court,[257] only fifteen (25%) have not included a felony-murder special circumstance. The five Bird court cases in which felony-murder special circumstances were *not* alleged all resulted in affirmance of the finding of special circumstances.[258]

Only four cases in which felony-murder special circumstances were alleged under the 1978 Briggs Initiative resulted in Bird court affirmance of the finding of special circumstances.[259] All came within exceptions to

253. *See infra* Appendix, Table 2, Table 5.

254. *Id.*

255. *See infra* Appendix, Table 5.

256. People v. Bloyd, 43 Cal. 3d 333, 362, 729 P.2d 802, 820, 233 Cal. Rptr. 368, 385 (1987) (multiple murder); People v. Allen, 42 Cal. 3d 1222, 1236, 729 P.2d 115, 120, 232 Cal. Rptr. 849, 854 (1986) (multiple murder, witness killing, prior murder); People v. Rodriguez, 42 Cal. 3d 730, 742, 726 P.2d 113, 119, 230 Cal. Rptr. 667, 673 (1986) (killing of police officer); People v. Deere, 41 Cal. 3d 353, 357, 710 P.2d 925, 927, 222 Cal. Rptr. 13, 15 (1985) (multiple murder); People v. Davenport, 41 Cal. 3d 247, 260, 710 P.2d 861, 869, 221 Cal. Rptr. 794, 801 (1985) (torture murder).

257. *See infra* Appendix, Table 3, Table 6.

258. *Bloyd*, 43 Cal. 3d at 340, 729 P.2d at 804, 233 Cal. Rptr. at 370 (multiple murder); *Allen*, 42 Cal. 3d at 1236, 729 P.2d at 120, 232 Cal. Rptr. at 854 (multiple murder, witness killing, prior murder); *Rodriguez*, 42 Cal. 3d at 742, 726 P.2d at 119, 230 Cal. Rptr. at 673 (killing of police officer); *Deere*, 41 Cal. 3d at 356, 710 P.2d at 927, 222 Cal. Rptr. at 15 (multiple murder); *Davenport*, 41 Cal. 3d at 255, 710 P.2d at 864, 221 Cal. Rptr. at 797 (torture murder).

259. In *People v. Brown*, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), *rev'd in part sub nom.* California v. Brown, 479 U.S. 538 (1987) the jury made a special finding that the murder was premeditated, thus precluding any attack on the finding of a rape-murder special circumstance under *Carlos/Garcia*. In *People v. Montiel*, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985), the jury made a finding that the murder was intentional in the course of finding another special circumstance was true, that the murder "was intentional and carried out for financial gain." Even though the financial gain special circumstance was set aside, the court held the intent finding could be utilized to sustain the felony-murder "special circumstance." *Id.* at 926, 705 P.2d at 1257, 218 Cal. Rptr. at 581. In *People v. Walker*, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169 (1985) (opinion in official reporter depublished after a grant of a rehearing), the court found two exceptions to *Carlos/Garcia* applicable. First, the issue of intent was necessarily resolved adversely to the defendant under other instructions. The defendant was charged with assault with intent to kill two other victims shot at the same time as the murder victim, and the court found it "inconceivable the jury would find that

the *Carlos/Garcia* rulings.[260] While most Bird court reversals of special circumstances findings pursuant to the *Carlos/Garcia* rule were in cases where felony-murder special circumstances were alleged pursuant to section 190.2(a)(17), the *Carlos/Garcia* rule raised troublesome issues with respect to other definitions of special circumstances as well.

The "intent" requirement of section 190.2(b) includes each of the nineteen enumerated special circumstance definitions except subsection (a)(2), prior conviction of murder.[261] This creates an anomaly because some of the enumerated definitions include a specific requirement of intent, while others do not. The multiple-murder special circumstance of subsection (a)(3), for example, simply requires that the defendant "has in this proceeding been convicted of more than one offense of murder in the first or second degree."[262] In *People v. Turner*,[263] the court reversed a special circumstance finding of multiple murder as well as two felony-murder special circumstance findings, holding that *Carlos* interpreted section 190.2(b) to apply to the actual killer as well as to an accomplice, and by its terms it applied to the multiple-murder special circumstance as well as the felony-murder special circumstance.[264] Thus, the intent instruction required by *Carlos* had to be given under all of the special circumstances enumerated in section 190.2(a) except (a)(2).

The continuing viability of the *Carlos/Garcia* rule was one of the first issues tackled by the Lucas court.[265] Meanwhile, the United States Supreme Court had seriously undercut the *Enmund* ruling by its decision in *Tison v. Arizona*.[266] In *Tison*, two sons helped their father escape from prison and supplied him weapons used to murder a family of four in

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defendant intended to kill only the victims who survived, but not the one who died." *Id.*, 765 P.2d at 482, 253 Cal. Rptr. at 879. Second, an exception applies "where the parties recognized that intent to kill was in issue, presented all evidence at their command on that issue, and . . . the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration." *Id.*, 711 P.2d at 474, 222 Cal. Rptr. at 178-79. The court assumed that all evidence available on intent was presented because it was an explicit element in issue, but suggested that the defendant could pursue a writ of habeas corpus if he "can demonstrate that this assumption is inaccurate." *Id.*, 711 P.2d at 475-76, 222 Cal. Rptr. at 180. In *People v. Burgener*, 41 Cal. 3d 505, 511, 714 P.2d 1251, 1254, 224 Cal. Rptr. 112, 115 (1986), the jury made an express finding of intent to kill. In *People v. Myers*, 43 Cal. 3d 250, 255, 729 P.2d 698, 699, 233 Cal. Rptr. 264, 265 (1987), a robbery-murder special-circumstance finding was not challenged on appeal.

260. *See supra* note 259.

261. CAL. PENAL CODE § 190.2(b) (West 1988).

262. *Id.* § 190.2(a)(3).

263. 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984).

264. *Id.* at 329, 690 P.2d at 686, 208 Cal. Rptr. at 213.

265. *See* People v. Anderson, 43 Cal. 3d 1104, 742 P.2d 1325, 240 Cal. Rptr. 585 (1987).

266. 481 U.S. 137 (1987).

order to steal the family's car.[267] Although the court remanded to the state court to determine the defendants' mental state, the Court recognized that the death penalty could be imposed on the sons even though they did not intend the killings or directly participate in them, since their conduct established "reckless indifference to human life."[268] In reconciling this ruling with *Enmund*, the Court distinguished *Enmund* as a case of "felony murder *simpliciter*," while *Tison* involved a "midrange" case of aggravated felony-murder.[269] Most significant, however, was the Court's categorization of the approaches taken by the various states to the issue. California's position was characterized as a misinterpretation of *Enmund*:

> The dissent objects to our classification of California among the States whose statutes authorize capital punishment for felony murder *simpliciter* on the ground that the California Supreme Court in *Carlos v. Superior Court* construed its capital murder statute to require a finding of intent to kill. But the California Supreme Court only did so in light of perceived federal constitutional limitations stemming from our then recent decision in *Enmund*.[270]

To the newly constituted California Supreme Court, that could only be read as an open invitation to reconsider the *Carlos* ruling.

In *People v. Anderson*,[271] the California Supreme Court directly overruled *Carlos*, announcing a new interpretation of section 190.2(b) and section 190.2(a)(17): "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved before the trier of fact can find the special circumstance to be true."[272] The same interpretation was also extended to the multiple murder special circumstance,[273] overruling *People v. Turner*.[274] While the decision surprised no one, the identity of the author did: Justice Stanley Mosk, who had concurred in the original *Carlos* decision. Justice Mosk relied heavily on the decisions of the supreme court limiting *Enmund*:

> First, *Bullock* and *Tison* have compelled us to dismiss, as a matter of federal constitutional law, the concerns that our un-

267. *Id.* at 141.
268. *Id.* at 158.
269. *Id.* at 155.
270. *Id.* at 153 n.8 (citations omitted).
271. 43 Cal. 3d 1104, 742 P.2d 1325, 240 Cal. Rptr. 585 (1987).
272. *Id.* at 1138-39, 742 P.2d at 1344-45, 240 Cal. Rptr. at 604-05.
273. *Id.* at 1148-49, 742 P.2d at 1351-52, 240 Cal. Rptr. at 611-12.
274. 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984).

> derstanding of the reasoning of *Enmund* had engendered. Second, we are no longer of the opinion that the reading of section 190.2(a)(17) that we adopt today raises grave and doubtful constitutional questions under the Eighth Amendment and the equal protection clause . . . .[275]

Justice Broussard dissented, claiming little had changed except the composition of the court. He dismissed both *Cabana* and *Tison* as having little effect on the reasoning of *Carlos*: "It is disingenuous to claim that a passing remark in *Cabana v. Bullock* and a mistaken footnote in *Tison v. Arizona* justify reconsideration of that decision."[276] Noting that intent-to-kill instructions were being routinely given in the cases tried after *Carlos* was filed, he concluded:

> Indeed, the only reason *Carlos* is an issue today is that this court has failed to decide a number of cases that were tried prior to December of 1983 in which an intent-to-kill instruction was not given. Some of those cases, including the present one, will have to be retried anyway, but in others *Carlos* stood as a possible barrier to the execution of that minority of murder defendants unlucky enough to have their cases still pending before this court in January of 1987. The majority tear down that barrier, heedless of the effect of their decision upon cases not yet tried.[277]

The tearing down of the *Carlos* barrier certainly broke the logjam. After the decision in *Anderson*, the affirmance of special circumstance findings became quite routine. The vast majority of affirmances have been unanimous. On occasion, the Lucas court has reversed some multiple findings of special circumstances,[278] but none of the sixty Briggs Initiative cases decided by the Lucas court thus far have resulted in a reversal of the judgment because of an erroneous finding of special circumstances.

Even in post-*Anderson* cases in which the defendant was an accomplice, the court has used a harmless error analysis to uphold a finding of special circumstance although the jury was not instructed on the need to find intent to kill. For example, in *People v. Garrison*,[279] Justice Panelli concluded that a failure to instruct the jury of the need to find intent to

275. 43 Cal. 3d at 1146, 742 P.2d at 1331, 240 Cal. Rptr. at 610.

276. *Id.* at 1156, 742 P.2d at 1338, 240 Cal. Rptr. at 617 (Broussard, J., dissenting).

277. *Id.* at 1165, 742 P.2d at 1344, 240 Cal. Rptr. at 623 (Broussard, J., dissenting).

278. *See, e.g.*, People v. Bonin, 47 Cal. 3d 808, 765 P.2d 460, 254 Cal. Rptr. 298 (1988); People v. Garrison, 47 Cal. 3d 746, 765 P.2d 419, 254 Cal. Rptr. 257 (1988); People v. Silva, 45 Cal. 3d 604, 754 P.2d 1070, 247 Cal. Rptr. 573 (1988); People v. Wade, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1987).

279. 47 Cal. 3d 746, 765 P.2d 419, 254 Cal. Rptr. 254 (1988).

kill was harmless because the finding could be implied from the simultaneous finding of intentional killing of a witness.[280] Justices Broussard and Mosk both dissented, protesting that faulty instructions on aiding and abetting the witness killing did not foreclose the possibility that a finding of intent was never made.[281]

C. *Other Special Circumstances Under the Briggs Initiative*

Apart from the ambiguity as to "intent to kill,"[282] many other definitions of special circumstances under the 1978 Briggs Initiative[283] created additional problems of interpretation for the Bird court. The special circumstance defined in California Penal Code section 190.2(a)(14),[284] that the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity," was declared unconstitutionally vague by a five-to-one vote of the court in *People v. Superior Court (Engert)*.[285] *Engert* was premised on both state constitutional grounds as well as federal grounds.[286] Similar provisions in other states have met with mixed success. The supreme courts of Florida, Georgia, Mississippi, Idaho and Wyoming have rejected the reasoning of *Engert*,[287] while Delaware has agreed.[288]

In striking down the special circumstance for "especially heinous, atrocious, or cruel" murders in *Engert*, the court noted the possible overlap with the special circumstance defined in section 190.2(a)(18),[289] where the murder "involved the infliction of torture," further defined as "the infliction of extreme pain no matter how long its duration."[290] In *People v. Davenport*,[291] the court affirmed a finding of special circumstances based on a torture allegation under the 1978 Briggs Initiative.[292] The 1977 death penalty law also provided for the finding of special circumstance in cases of torture, and explicitly required that the defendant

280. *Id.* at 789-90, 765 P.2d at 442-43, 254 Cal. Rptr. at 280-81.
281. *Id.* at 797, 765 P.2d at 447, 254 Cal. Rptr. at 285 (Broussard & Mosk, JJ., dissenting).
282. *See supra* notes 235-49 and accompanying text.
283. CAL. PENAL CODE § 190.2 (West 1988).
284. *Id.* § 190.2(a)(14).
285. 31 Cal. 3d 797, 800-01, 647 P.2d 76, 77, 183 Cal. Rptr. 800, 801 (1982).
286. *Id.*
287. *See* Arango v. State, 411 So. 2d 172 (Fla. 1982); Brown v. State, 250 Ga. 66, 295 S.E. 2d 727 (1982); Billiot v. State, 454 So. 2d 446 (Miss. 1984); Creech v. State, 105 Idaho 362, 670 P.2d 463 (1988); Hopkinson v. State, 704 P.2d 1323 (Wyo. 1985).
288. *See* Chaplin v. State, 433 A.2d 327 (Del. 1981).
289. CAL. PENAL CODE § 190.2(a)(18) (West 1988).
290. *Engert*, 31 Cal. 3d at 802 n.2, 647 P.2d at 78 n.2, 183 Cal. Rptr. at 802 n.2.
291. 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985).
292. *Id.* at 273-75, 710 P.2d at 876-78, 221 Cal. Rptr. at 809-11.

have possessed the intent to inflict extreme and prolonged pain.[293] The Briggs Initiative omitted any reference to intent, focusing on the victim's experience of pain.[294] The court in *Davenport* found this focus ambiguous because the victim's experience would be difficult to prove, and to distinguish murders on such a basis would raise a significant constitutional issue of equal protection of the law.[295] Thus, it incorporated prior judicial construction of the term "torture" to require an intent to torture the victim.[296] Since the trial court had instructed the jury that both an intent to kill and the intentional infliction of extreme physical pain must be proven to establish the torture "special circumstance," the finding was upheld by the court.[297]

The viability of *Engert* was thrown into doubt in a dissenting opinion that then Associate Justice Lucas attached to one of the final death penalty decisions of the Bird court, handed down on January 2, 1987. In *People v. Wade*,[298] Justice Lucas, joined by Justice Panelli, dissented to the reversal of a "heinous and cruel" special circumstance in a child abuse murder case.[299] A rehearing was granted after the new justices were appointed.[300] However, after rehearing, both justices apparently thought better of *Engert*, and joined in following *Engert* to reverse the "heinous and cruel" special circumstance.[301] At the same time, however, the court upheld a torture special circumstance despite the trial court's failure to explicitly instruct the jury in accordance with *Davenport*.[302] In *People v. Silva*,[303] the Attorney General's suggestion that *Engert* be reexamined was rejected "in this case."[304]

Two more special circumstance definitions under the 1978 Briggs Initiative were examined by the Bird court in *People v. Bigelow*.[305] First,

293. *Id.* at 260-62, 710 P.2d at 868-70, 221 Cal. Rptr. at 801-02.

294. *Id.*

295. *Id.* at 270, 710 P.2d at 875, 221 Cal. Rptr. at 808.

296. *Id.* at 266-71, 710 P.2d at 872-75, 221 Cal. Rptr. at 805-08.

297. *Id.* at 271-72, 710 P.2d at 876, 221 Cal. Rptr. at 809.

298. 233 Cal. Rptr. 48 (1987) [hereinafter *Wade I*]. The opinion was depublished upon grant of rehearing and therefore does not appear in the official reporter. The decision after rehearing appears at 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1987) [hereinafter *Wade II*].

299. *Wade I*, 233 Cal. Rptr. at 60 (Lucas & Panelli, JJ., dissenting).

300. *Wade II*, 44 Cal. 3d at 975, 750 P.2d at 794, 244 Cal. Rptr. at 905.

301. *Id.* at 993, 750 P.2d at 804, 244 Cal. Rptr. at 915.

302. *Id.* at 993-94, 750 P.2d at 804-05, 244 Cal. Rptr. at 915-16; see *supra* notes 286-92 for a discussion of *Davenport*.

303. 45 Cal. 3d 604, 754 P.2d 1070, 247 Cal. Rptr. 573 (1988), *cert. denied*, 109 S. Ct. 820 (1989).

304. *Id.* at 631, 754 P.2d at 1084, 247 Cal. Rptr. at 587.

305. 37 Cal. 3d 731, 750-52, 691 P.2d 994, 1005-06, 209 Cal. Rptr. 328, 339-41 (1984).

a finding that the murder was carried out for financial gain was reversed because the trial court construed it too broadly.[306] Noting that the special circumstance defined in section 190.2(a)(1) "replaced the precise language of the 1977 act with vague and broad generalities," the court adopted a limiting construction requiring that the victim's death be an essential prerequisite to the financial gain sought by the defendant. Second, a finding that the murder was committed "for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody," was also reversed because of the broad interpretation given by the trial court.[307] The court held that the special circumstance of avoiding arrest must be limited to cases in which arrest is imminent, and the special circumstance of perfecting escape must be limited to situations before the defendant has departed the confines of a prison facility and reached a place of temporary safety outside the confines of the prison.[308] In construing the financial gain, avoiding arrest, and perfecting escape special circumstances, the court was concerned that broad construction of these provisions would result in substantial overlap with felony-murder special circumstances. The court stated: "We believe the court should construe special circumstance provisions to minimize those cases in which multiple circumstances will apply to the same conduct, thereby reducing the risk that multiple findings on special circumstances will prejudice the defendant."[309]

Bigelow was significantly limited by the Lucas court in *People v. Howard*.[310] Seizing on the rationale offered in *Bigelow* that overlap with other special circumstances should be avoided, the court held that the *Bigelow* definition of "financial gain" need only be given when alternative special circumstances are also alleged.[311] Justice Broussard concurred, suggesting that although the error was harmless in this case, the financial gain special circumstance should not be given varying meanings depending on the charges filed.[312] *Howard* was followed in *People v. Edelbacher*,[313] where the jury instructions included no definition of "fi-

306. *Id.*

307. *Id.* at 741, 751-54, 691 P.2d at 999, 1005-07, 209 Cal. Rptr. at 333, 338-42.

308. *Id.* at 754, 691 P.2d at 1007, 209 Cal. Rptr. at 342.

309. *Id.* at 751, 691 P.2d at 1003, 209 Cal. Rptr. at 340.

310. 44 Cal. 3d 375, 409-10, 749 P.2d 279, 298, 243 Cal. Rptr. 842, 861, *cert. denied*, 109 S. Ct. 188 (1988).

311. *Id.* at 410, 749 P.2d at 298, 243 Cal. Rptr. at 861.

312. *Id.* at 447, 749 P.2d at 324, 243 Cal. Rptr. at 887 (Broussard, J., concurring in part and dissenting in part).

313. 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586 (1988).

nancial gain."[314] However, in *People v. Silva*,[315] the Lucas court reversed a finding of the financial gain special circumstance, citing *Bigelow*.[316] Chief Justice Lucas politely declined the invitation of the Attorney General to reconsider the *Bigelow* decision.[317]

The final special circumstance that presented a construction problem under the Briggs Initiative was section 190.2(a)(10), dealing with murders committed for the purpose of preventing a victim from testifying in a criminal proceeding.[318] In *People v. Weidert*,[319] the Bird court held that this provision could not be applied to a defendant who killed the victim to prevent his testifying in a juvenile delinquency proceeding.[320] The court relied upon the long-standing distinction between criminal and juvenile proceedings embodied in Welfare and Institutions Code section 203: "An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."[321]

The Lucas court has had no occasion to reconsider *Weidert*, but legislation is pending to amend section 190.2(a)(10) to include juvenile proceedings.[322]

D. Summary of Special Circumstances Cases

The remarkable divergence of results between the Bird court and the Lucas court in reviewing findings of special circumstances is largely attributable to the Lucas court's early decision to directly overrule *Carlos v. Superior Court*.[323] However, other Bird court precedents have been given constrictive interpretations, and harmless error has been liberally applied.[324] Finally, the Lucas court has frequently reversed certain special circumstance findings while upholding others in the same case.[325]

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314. *Id.* at 1025, 766 P.2d at 26, 254 Cal. Rptr. at 611-12.

315. 45 Cal. 3d 604, 754 P.2d 1070, 247 Cal. Rptr. 573 (1988).

316. *Id.* at 630, 754 P.2d at 1084, 247 Cal. Rptr. at 587 (citing People v. Bigelow, 37 Cal. 3d 731, 751, 691 P.2d 994, 1006, 209 Cal. Rptr. 328, 340 (1984)).

317. *Id.*

318. CAL. PENAL CODE § 190.2(a)(10) (West 1988).

319. 39 Cal. 3d 836, 705 P.2d 380, 218 Cal. Rptr. 57 (1985).

320. *Id.* at 854, 705 P.2d at 391, 218 Cal. Rptr. at 68.

321. CAL. WELF. & INST. CODE § 203 (West 1988) (construed in People v. Weidert, 39 Cal. 3d 836, 844, 705 P.2d 380, 384, 218 Cal. Rptr. 57, 61 (1985)).

322. S.B. 2, which includes juvenile proceedings, was approved by the Senate and forwarded to the Assembly. L.A. Daily J., May 30, 1989, at 5.

323. *See* People v. Anderson, 43 Cal. 3d 1104, 742 P.2d 1325, 240 Cal. Rptr. 585 (1987).

324. *See, e.g.*, People v. Howard, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842, *cert. denied*, 109 S. Ct. 188 (1988); People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984).

325. People v. Bonin, 47 Cal. 3d 808, 851, 765 P.2d 460, 485, 254 Cal. Rptr. 298, 323

Invariably, the Lucas court assumes that the submission of invalid special circumstances to the jury was "harmless error," and undertakes little or no analysis to support its conclusion.[326] In one case decided by the Bird court, *People v. Allen*,[327] a death penalty was upheld even though eight out of eleven special circumstances were set aside.[328] That case was cited by Chief Justice Lucas to uphold the death verdict in *People v. Silva*.[329] In *Allen*, the same evidence supported both the special circumstance findings that were upheld as well as those that were invalidated.[330] In *Silva*, it did not.[331]

Special circumstances review has been given routine treatment in the Lucas court, and the members of the court have ceased dissenting. As a result, the function originally envisaged for special circumstance findings, to provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,"[332] is disappearing from the law. This reflects a significant difference in how the Bird court and the Lucas court perceive their roles. The Bird court obviously desired that its decisions impact prosecutors by encouraging them to use the death penalty law cautiously and selectively. Strict interpretations of the special circumstance requirement accomplished this goal. As Table 4 indicates, new death penalty judgments declined every year from 1981 to 1985.[333] The Lucas court has rejected a supervisory role, and the number of new death judgments is spiraling upwards.

As the Davies analysis indicates, the limited conception of a supervisory role is consistent with functioning as an intermediate appellate court:

> The norms of affirmance have direct implications for the nature and intensity of the Court of Appeal's "supervision" of the criminal trial courts. The justices of the Court of Appeal do

(1989); People v. Hernandez, 47 Cal. 3d 315, 357, 763 P.2d 1289, 1314, 253 Cal. Rptr. 199, 233 (1988), *cert. denied*, 109 S. Ct. 3201 (1989).

326. *Bonin*, 47 Cal. 3d at 854, 765 P.2d at 487, 254 Cal. Rptr. at 325; *Hernandez*, 47 Cal. 3d at 357, 763 P.2d at 1314, 253 Cal. Rptr. at 223-24.

327. 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986), *cert. denied*, 108 S. Ct. 202 (1987).

328. *Id.* at 1288, 729 P.2d at 157, 232 Cal. Rptr. at 891.

329. 45 Cal. 3d 604, 632, 754 P.2d 1070, 1085, 247 Cal. Rptr. 573, 588 (1988) (citing People v. Allen, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986)).

330. *Allen*, 42 Cal. 3d at 1274, 729 P.2d at 147, 232 Cal. Rptr. at 889.

331. *Silva*, 45 Cal. 3d at 633, 754 P.2d at 1085-86, 247 Cal. Rptr. at 588.

332. Gregg v. Georgia, 428 U.S. 153, 188 (1976); *see also* Furman v. Georgia, 408 U.S. 238, 313 (1972).

333. *See infra* Appendix, Table 4.

> recognize that their ability to reverse provides them with a powerful sanction that can be used to supervise. . . . However, the justices said that they do not allow this supervisory potential to override the norms of affirmance. With near unanimity they rejected the notion that it might be appropriate to reverse a case simply to sanction a trial judge, prosecutor, or police officer for misconduct. Instead, they assigned higher priority to norms of affirmance like the harmless error rule than to supervisory concerns.[334]

V. THE DETERMINATION OF PENALTY

Under both the 1977 death penalty law[335] and the 1978 Briggs Initiative,[336] once a defendant has been convicted and an allegation of special circumstances found true, a separate hearing for the determination of penalty is mandated.[337] That hearing ordinarily takes place before the same jury that convicted the defendant and found the special circumstances to be true.[338] Even if the defendant waived a jury trial on the issue of guilt or special circumstances, or pled guilty, he is entitled to a jury determination of the penalty.[339] The jury must choose between the penalties of death or life imprisonment without possibility of parole, and must agree unanimously as to that choice.[340] Evidence of aggravating and mitigating circumstances is admitted, and the jury is instructed as to the exercise of its discretion.[341]

In reviewing the determination of penalty, the California Supreme Court may be called upon to decide a variety of issues, including the procedure by which the jury was selected, the admissibility of evidence, the competence of counsel, and the propriety of instructions to the jury.[342] From the restoration of the death penalty in California on August 11, 1977, to the departure of Chief Justice Bird and Justices Grodin and Reynoso in January 1987, the supreme court reviewed the penalty determination in twenty-two cases in which a conviction of guilt and finding of special circumstances were affirmed.[343] In one additional case,

334. Davies, *supra* note 3, at 608-09.
335. CAL. PENAL CODE §§ 190-190.9 (repealed 1978).
336. CAL. PENAL CODE §§ 190-190.9 (West 1988).
337. *Id.* § 190.3.
338. *Id.*
339. *Id.* § 190.4(b).
340. *Id.*
341. *Id.*
342. *Id.* § 190.4.
343. *See infra* Appendix, Table 5.

People v. Ramos,[344] the court reviewed the penalty determination even though the finding of special circumstances was reversed.[345] Of these twenty-three cases, the penalty determination was reversed in eighteen.[346] Three of the affirmances were in cases under the 1977 death penalty law.[347] Thus, the Bird court affirmed only two death penalties imposed under the Briggs Initiative.

From the swearing-in of the new justices in March 1987, through March 1989, the Lucas court reviewed the penalty determination in sixty-six cases where a conviction and finding of special circumstances were affirmed.[348] Fifteen have resulted in reversal,[349] one under the 1977 law[350] and fourteen under the Briggs Initiative. Half of the Briggs reversals were for giving the instructions on the governor's commutation power mandated by the Initiative.[351]

A. The 1977 Law

The determination of penalty was reviewed by the Bird court in a total of twelve cases under the 1977 death penalty law.[352] In three cases, the imposition of the death penalty was affirmed.[353] Of the nine cases in which the determination of penalty was reversed, five were for procedural errors[354] and four were for improper jury instructions.[355]

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344. 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), *cert. denied*, 471 U.S. 1119 (1985).

345. *Id.* at 591, 602, 639 P.2d at 930, 936, 180 Cal. Rptr. at 288, 294.

346. *See infra* Appendix, Table 2.

347. *See infra* Appendix, Table 5.

348. *See infra* Appendix, Table 3, Table 6.

349. *Id.*

350. *Id.*

351. *Id.*; *see infra* notes 405-11 and accompanying text.

352. *See infra* Appendix, Table 2, Table 5.

353. People v. Fields, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983), *cert. denied*, 469 U.S. 892 (1984); People v. Harris, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981), *cert. denied*, 454 U.S. 1111 (1982); People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981). All three cases were affirmed by a closely divided court (four to three in *Jackson* and four to two in *Harris* and *Fields*), and all three cases are still pending in the courts. Harris is seeking a writ of habeas corpus in the federal courts, while Jackson and Fields have petitions for writ pending in California courts.

354. People v. Phillips, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985); People v. Frank, 38 Cal. 3d 711, 700 P.2d 415, 214 Cal. Rptr. 801 (1985); People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 466, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982); People v. Lanphear, 26 Cal. 3d 814, 847, 608 P.2d 689, 705, 163 Cal. Rptr. 601, 619, *vacated sub nom.* California v. Lanphear, 449 U.S. 810 (1980) [hereinafter *Lanphear I*]; People v. Velasquez, 26 Cal. 3d 425, 443-45, 606 P.2d 341, 351-53, 162 Cal. Rptr. 306, 316-18, *vacated sub nom.* California v. Velasquez, 448 U.S. 903 (1980).

355. People v. Lanphear, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984) [hereinafter *Lanphear II*]; People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983);

Two of the cases reversed for procedural errors were reversed due to *Witherspoon* error.[356] In *Witherspoon v. Illinois*,[357] the United States Supreme Court established standards for the exclusion of jurors who have conscientious scruples regarding imposition of the death penalty.[358] While such scruples were expressed by jurors in both of the reversed cases,[359] the jurors never indicated they would automatically vote against the death penalty under all circumstances. Relying on specific language from *Witherspoon*, the California Supreme Court held that in both cases it was error to excuse the jurors.[360]

The United States Supreme Court again addressed the standard for exclusion of jurors with death-penalty scruples in *Adams v. Texas*,[361] holding that a juror could be excluded if his views about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[362] On petitions for certiorari, the United States Supreme Court vacated the convictions reversed by the California Supreme Court, and remanded the cases for "further consideration in light of *Adams v. Texas*."[363] On remand, the California Supreme Court again reversed the lower court, relying squarely on *Witherspoon*, to hold that *Adams* "does not alter this conclusion."[364] In 1985, the United States Supreme Court in *Wainwright*

People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982); People v. Haskett, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982).

356. *Lanphear I*, 26 Cal. 3d at 847, 608 P.2d at 705, 163 Cal. Rptr. at 619; *Velasquez*, 26 Cal. 3d at 443-45, 606 P.2d at 351-53, 162 Cal. Rptr. at 316-18.

357. 391 U.S. 510 (1968).

358. *Id.* at 522-23, n.21. The *Witherspoon* Court stated:

> If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality.

Id. at 520 (citation omitted).

359. *Lanphear I*, 26 Cal. 3d at 837-40, 608 P.2d at 701-03, 163 Cal. Rptr. at 613-15; *Velasquez*, 26 Cal. 3d at 437-38, 606 P.2d at 347-48, 162 Cal. Rptr. at 312-13.

360. *Lanphear I*, 26 Cal. 3d at 821, 608 P.2d at 691-92, 163 Cal. Rptr. at 603-04 (citing Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21 (1968)); *Velasquez*, 26 Cal. 3d at 429, 606 P.2d at 343, 162 Cal. Rptr. at 308 (citing Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21 (1968)). Footnote 21 in *Witherspoon* declared that jurors could be excluded if they "made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . . ." *Witherspoon*, 391 U.S. at 522-23 n.21 (emphasis added).

361. 448 U.S. 38 (1980).

362. *Id.* at 45.

363. California v. Lanphear, 449 U.S. 810 (1980); California v. Velasquez, 448 U.S. 903 (1980).

364. People v. Lanphear, 28 Cal. 3d 463, 464, 622 P.2d 950, 952, 171 Cal. Rptr. 505, 507 (1980) (citing Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21 (1968)); People v. Velasquez,

v. Witt[365] finally clarified the conflict between the *Witherspoon* and *Adams* standards by explicitly rejecting footnote twenty-one of *Witherspoon* as dicta.[366] The *Witt* Court concluded:

> We therefore take this opportunity to clarify our decision in *Witherspoon*, and to reaffirm the above-quoted standard from *Adams* as the proper standard. . . . We note that, in addition to dispensing with *Witherspoon*'s reference to "automatic" decision making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."[367]

The new standard approved in *Witt* would probably not require reversal of cases like *Velasquez* or *Lanphear* if they were to recur today. However, this is not to suggest that either *Velasquez* or *Lanphear* was wrongly decided. As Justice Rehnquist conceded in his majority opinion in *Witt*, the confused state of the case law left trial courts a difficult task, "obviously made more difficult by the fact that the standard applied in *Adams* differs markedly from the language of footnote 21 . . . given *Witherspoon*'s facts a court applying the general principles of *Adams* could have arrived at the 'automatically' language of *Witherspoon*'s footnote 21."[368]

Another three reversals of penalty determinations were based on the erroneous admission of prejudicial evidence.[369] Also, a reversal for erro-

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28 Cal. 3d 461, 462, 622 P.2d 952, 953, 171 Cal. Rptr. 507, 508 (1980) (citing Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21 (1968)).

365. 469 U.S. 412 (1985).

366. *Id.* at 424.

367. *Id.*

368. *Id.* at 421.

369. In *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 466, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982), the evidence was a prediction by a psychopharmacologist that the defendant would continue to be violent in a prison setting. The court found such predictions too unreliable to be admissable as evidence in a death penalty determination. *Id.* at 767-75, 631 P.2d at 500-08, 175 Cal. Rptr. at 758-63. The admission of similar predictions was held not to violate the due process clause of the federal Constitution by the United States Supreme Court in *Barefoot v. Estelle*, 463 U.S. 880 (1983).

It might be suggested that enactment of Proposition 8 in June 1982, *see* CAL. EVID. CODE § 352 (West 1988), would require California courts to follow *Barefoot v. Estelle* and admit such evidence. Such a course would be dangerous. *Murtishaw* is premised on the conclusion that the prejudicial impact of the evidence outweighed its probative value. *Murtishaw*, 29 Cal. 3d at 773, 631 P.2d at 471, 175 Cal. Rptr. at 762. Such determinations are unaffected by Proposition 8. *See* CAL. EVID. CODE § 352. In *People v. Frank*, 38 Cal. 3d 711, 700 P.2d 415, 214 Cal. Rptr. 801 (1985), the erroneously admitted evidence consisted of notebooks which were illegally seized from the defendant. *Id.* at 729, 700 P.2d at 424, 214 Cal. Rptr. at 810. Although the court concluded their admission was harmless error in the guilt phase, their "dramatically greater" role in the penalty phase required reversal of the penalty determination. *Id.* at 735, 700 P.2d at 428, 214 Cal. Rptr. at 814. In *People v. Phillips*, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985), the court held that the admission of evidence regarding the defendant's discussion with another of proposed criminal activity was reversible error since evidence of

neous jury instructions came in *People v. Haskett*,[370] where the trial judge had instructed the jury that the governor could commute a sentence of life without possibility of parole.[371] Since *Haskett* arose under the 1977 law, however, the instruction was not mandated in that case.[372] Holding that it was error to give the instruction, the California Supreme Court principally relied on its precedent in *People v. Morse*.[373]

Two other reversals of penalty determinations under the 1977 law were attributable to errors in instructions to the jury. *People v. Easley*[374] involved one of the standard "boilerplate" instructions routinely given in criminal cases, California Jury Instruction Number 1.00: "As jurors, you must not be influenced by pity for a defendant or by prejudice against him. You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[375] The court held that it was error to give this instruction at the penalty phase of a capital case, even though it might be appropriate at the guilt phase.[376] Actually, *Easley* followed an earlier precedent of the court dating back to 1970.[377] The court concluded the instruction could have the effect of telling the jury not to give weight to mitigating evidence presented by the defendant.[378] The court relied on *Easley* when it reversed the penalty determination in *People v. Lanphear*.[379]

The United States Supreme Court reviewed the issue after the Bird court reversed a Briggs case on the same ground. In *California v. Brown*,[380] in a five-to-four opinion by Chief Justice Rehnquist, the Court

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other "criminal activity" in the penalty phase must relate to an actual completed crime. *Id.* at 83, 711 P.2d at 459, 222 Cal. Rptr. at 163.

370. 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982).

371. *Id.* at 861-63, 640 P.2d at 788-90, 180 Cal. Rptr. at 652-53.

372. Such an instruction was mandated by the 1978 Briggs Initiative, and will be discussed in greater detail in the treatment of cases decided under the 1978 Initiative. *See infra* notes 393-411 and accompanying text.

373. *Haskett*, 30 Cal. 3d at 861-63, 646 P.2d at 788-90, 180 Cal. Rptr. at 652-54 (citing People v. Morse, 60 Cal. 2d 631, 649-53, 388 P.2d 33, 51-55, 36 Cal. Rptr. 201, 212-15 (1964)).

374. 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983).

375. *Id.* at 875, 671 P.2d at 823, 196 Cal. Rptr. at 319 (construing CAL. JURY INSTRUCTIONS No. 1.00 (1979)).

376. *Id.* at 875, 671 P.2d at 823, 196 Cal. Rptr. at 319.

377. *Id.* (citing People v. Bandhauer, 1 Cal. 3d 609, 618, 463 P.2d 408, 416, 83 Cal. Rptr. 184, 192 (1970)).

378. *Id.* The courts of other states have generally rejected the *Easley* ruling, permitting "no sympathy" instructions.

379. 36 Cal. 3d at 165-66, 680 P.2d at 1082-83, 203 Cal. Rptr. at 123-24. *Lanphear* was reversed the first time because of *Witherspoon* error. *Id.* at 165, 680 P.2d at 1082, 203 Cal. Rptr. at 123.

380. 479 U.S. 538 (1987), *rev'g* People v. Brown, 40 Cal. 3d. 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985).

held that the "no sympathy" instruction did not violate federal due process guarantees.[381] The Court chided the California justices for reading the instruction in a hypertechnical way, focusing just on the word "sympathy."[382] The Chief Justice expressed confidence that the typical juror would understand the instruction as a simple admonition to limit their consideration to factors shown by the evidence.[383]

Thus, none of the nine Bird court reversals of penalty determinations under the 1977 death penalty law were due to flaws in the drafting of the legislation. At least six of the reversals could be directly traced to clear precedents decided long before the 1977 law was enacted.[384] While at least one of those precedents has since been repudiated by the United States Supreme Court,[385] only the United States Supreme Court is in a position to repudiate its own precedents.

The Lucas court reversed only one of the nine death judgments in which the penalty determination was reviewed under the 1977 law.[386] That case involved a second death penalty imposed upon Elbert Easley on remand after the first death penalty was reversed.[387] Finding that a conflict of interest was presented by defense counsel's simultaneous representation of Easley and a prosecution witness at his penalty trial, the court concluded that the conflict had an adverse effect on counsel's performance because cross-examination of the witness was hampered.[388]

An error in another penalty hearing under the 1977 law was found harmless in *People v. Kimble*.[389] There, the prosecutor argued that the aggravating circumstance of "violent criminal activity" under section 190.3(b) of the 1977 law could be based on the underlying crime of which the defendant had just been convicted.[390] Although the law clearly limited this circumstance to *other* violent criminal activity, the court held that the error was harmless since the evidence was appropriate to consider under factor 190.3(a).[391] In dissenting, Justice Broussard suggested this "artificial inflation" was compounded by other penalty phase

381. *Id.* at 539.

382. *Id.* at 541.

383. *Id.* at 541-42.

384. *See supra* notes 356-79 and accompanying text.

385. *Witt*, 469 U.S. at 424 (rejecting footnote 21 of *Witherspoon* as dicta).

386. People v. Easley, 46 Cal. 3d 712, 759 P.2d 490, 250 Cal. Rptr. 855 (1988) [hereinafter *Easley II*].

387. People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983).

388. *Easley II*, 46 Cal. 3d at 727, 759 P.2d at 499, 250 Cal. Rptr. at 864.

389. 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148, *cert. denied*, 109 S. Ct. 188 (1988).

390. *Id.* at 505-06, 749 P.2d at 819, 244 Cal. Rptr. at 164.

391. *Id.*, 244 Cal. Rptr. at 164-65.

errors.[392]

B. *The 1978 Briggs Initiative: Commutation Instruction*

The 1978 Briggs Initiative made two fundamental changes in the penalty determination procedure mandated by the 1977 death penalty law. The first change was to *require* an instruction be given to the jury that a sentence of life without possibility of parole can be commuted or modified:

> The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in the future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.[393]

Apparently, this instruction was intended to directly repudiate the 1964 ruling of the California Supreme Court in *People v. Morse*.[394]

In *People v. Ramos*,[395] the California Supreme Court held, in a six-to-one decision authored by Justice Tobriner, that the commutation instruction mandated by the Briggs Initiative violated the due process rights guaranteed by the fifth, eighth and fourteenth amendments of the United States Constitution by encouraging the jury to consider an irrelevant and confusing factor and biasing the outcome in favor of the death penalty.[396] This ruling was reversed by the United States Supreme Court, which held in a five-to-four decision that the instruction did not violate the federal constitution.[397] On remand, the California Supreme Court addressed the constitutionality of the instruction under the state

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392. *Id.* at 527, 749 P.2d at 833, 244 Cal. Rptr. at 179 (Broussard, J., dissenting).

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

394. 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964). The *Morse* court held that the possibility of parole is essentially irrelevant to the issues the jury is called upon to decide, and that instructing the jury as to the commutation power of the governor over life sentences is a "half-truth" because that power extends to sentences of death as well. *Id.* at 648-53, 388 P.2d at 43-47, 36 Cal. Rptr. at 211-15. None of the other 38 states with death penalty laws mandate an instruction regarding the governor's power to commute or modify a sentence, and the courts of 25 of those states have ruled that the jury should *not* consider the possibility of pardon, parole or commutation. In the 15 years since the death penalty was struck down in *Furman v. Georgia*, only one state supreme court (Indiana) has approved of an instruction allowing the jury to consider the possibility of parole or commutation in deciding whether to impose the death penalty.

395. 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), *rev'd*, 463 U.S. 992 (1983) [hereinafter *Ramos I*].

396. *Id.* at 591-92, 639 P.2d at 936, 180 Cal. Rptr. at 288.

397. California v. Ramos, 463 U.S. 992, 1013-14 (1983).

constitution.[398] Although intervening decisions in *Carlos* and *Garcia* then required reversal of the special circumstances finding in *Ramos II*, the court addressed the penalty phase issue "for guidance both at retrial and in other cases."[399] Although three of the justices who decided *Ramos I* had been replaced, the vote was again six to one to strike down the Briggs instruction, this time as a violation of the due process guarantee of the California constitution.[400] *Ramos II* was subsequently interpreted to require reversal of another death penalty determination in *People v. Montiel*.[401] The *Montiel* court suggested a rule of automatic reversal, since giving the instruction "necessarily subjects the defendant to prejudice."[402]

Among its final death penalty decisions, rendered on January 2, 1987, the Bird court reversed one more case on the grounds that the court gave an unadorned Briggs commutation instruction in the penalty phase.[403] In what many saw as an ominous sign, Justice Lucas and Justice Panelli noted they were concurring "under compulsion" of *Ramos II* and *Montiel*.[404]

The Lucas court has continued to reverse the penalty determination when an "unadorned" Briggs instruction is given. A total of seven death judgments were unanimously reversed through March 1989.[405] However, the court *has* limited *Ramos II* and *Montiel* in one significant way. In *People v. Hamilton*,[406] where the judge gave an ameliorative instruction limiting the impact of the Briggs instruction, the court concluded that the error of giving the Briggs instruction was harmless.[407] The ameliorative instruction immediately followed the statutory Briggs instruction with an admonition that the governor's power to commute or modify a sentence should not be considered in determining whether the defendant should be sentenced to death or life imprisonment without possibility of parole.[408] Justice Broussard dissented, suggesting that the

398. People v. Ramos, 37 Cal. 3d 136, 142, 689 P.2d 430, 432, 207 Cal. Rptr. 800, 802 (1984), *cert. denied*, 471 U.S. 1119 (1985) [hereinafter *Ramos II*].

399. *Id.* at 150, 689 P.2d at 437, 207 Cal. Rptr. at 807.

400. *Id.* at 159, 689 P.2d at 444, 207 Cal. Rptr. at 814.

401. 39 Cal. 3d 910, 928, 705 P.2d 1248, 1258, 218 Cal. Rptr. 572, 583 (1985).

402. *Id.* at 928, 705 P.2d at 1258, 218 Cal. Rptr. at 582-83.

403. People v. Myers, 43 Cal. 3d 250, 272-73, 729 P.2d 698, 712, 233 Cal. Rptr. 264, 277-78 (1987).

404. *Id.* at 277, 729 P.2d at 715, 233 Cal. Rptr. at 280 (Lucas, C.J. & Panelli, J., concurring).

405. *See infra* Appendix, Table 3, Table 6.

406. 45 Cal. 3d 351, 753 P.2d 1109, 247 Cal. Rptr. 31 (1988).

407. *Id.* at 372-76, 753 P.2d at 1123-25, 247 Cal. Rptr. at 44-47.

408. *Id.* at 374, 753 P.2d at 1124, 247 Cal. Rptr. at 45.

supplementary instruction only heightened rather than ameliorated the prejudice.[409] *Hamilton* has since been followed to affirm two additional death judgments despite the giving of a Briggs instruction.[410] Justice Broussard has concurred "under compulsion of *Hamilton*."[411]

C. The 1978 Briggs Initiative: The "Weighing" Instructions

The second fundamental change that the Briggs Initiative made in the penalty determination procedure established by the 1977 law related to the weighing of aggravating and mitigating circumstances. The 1977 law defined the aggravating and mitigating factors that might be relevant, and then provided that the jury "consider, take into account and be guided by" those factors in making the ultimate determination of the appropriate penalty.[412] The 1978 Briggs Initiative went a step further, concluding:

> [The trier of fact] shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.[413]

While this provision is susceptible to an interpretation that the death penalty is *mandatory* if a mechanical "balancing" weighs aggravating factors more heavily than mitigating factors, the Bird court rejected such an interpretation and upheld the statute against constitutional attack in *People v. Brown*.[414] The court noted that "[e]ach juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider," rather than mechanically counting the factors.[415] The word "shall," the court concluded, does not require any juror to vote for death unless he considers it the appropriate penalty under all the circumstances.[416] Nonetheless, the

409. *Id.* at 381, 753 P.2d at 1128-29, 247 Cal. Rptr. at 49 (Broussard, J., dissenting).

410. *See* People v. Coleman, 46 Cal. 3d 749, 782, 759 P.2d 1260, 1282, 251 Cal. Rptr. 83, 105 (1988), *cert. denied*, 109 S. Ct. 1578 (1989); People v. McLain, 46 Cal. 3d 97, 118-20, 757 P.2d 569, 581-82, 249 Cal. Rptr. 630, 642-43 (1988), *cert. denied*, 109 S. Ct. 1356 (1989).

411. *McLain*, 46 Cal. 3d at 122, 757 P.2d at 583, 249 Cal. Rptr. at 645 (Broussard, J., concurring).

412. CAL. PENAL CODE § 190.3 (repealed 1978).

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

414. 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), *rev'd on other grounds*, 479 U.S. 538 (1987) [hereinafter *Brown I*].

415. *Id.* at 542, 709 P.2d at 456, 220 Cal. Rptr. at 653.

416. *Id.*

court noted the potential for confusion if the statute were simply read to the jury with no further explanation.[417] In future trials, the court ruled, the scope of their discretion must be explained to juries.[418] In a modification of its opinion announced on January 30, 1986, the court indicated that a recently drafted modification of California Jury Instruction Number 8.84.2 would conform to the *Brown* requirements.[419] In cases already tried where no such instruction was given, the court indicated it would examine, on a case by case basis, whether "the sentencer may have been misled to defendant's prejudice."[420]

After *Brown*, the Bird court reviewed two cases to determine whether instructions pursuant to the Briggs Initiative misled the sentencer as to the discretion to be exercised. In both cases, a death penalty verdict was reversed. In *People v. Davenport*,[421] the jury was given an instruction that closely tracked the language of California Penal Code section 190.3, that a sentence of death *shall* be imposed if the aggravating circumstances outweigh the mitigating circumstances.[422] The court found the error was compounded by two other instructional errors: (1) the jury was not told that other crimes must be proven beyond a reasonable doubt, as required by *People v. Robertson*;[423] and (2) in delineating potential aggravating or mitigating circumstances, the court used the language of section 190.3(k), that the jury could consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[424] The court had previously noted the potential for confusion regarding subsection (k) in *People v. Easley*.[425] Section 190.2(k) could be construed to exclude circumstances that relate to the general character, family background or other aspects of the defendant unrelated to the crime.[426] Since the only mitigation evidence offered by the defendant related to the circumstances of his upbringing, the court found that the instructional errors were prejudicial.[427]

In *People v. Walker*,[428] the instruction that the jurors *shall* impose a

417. *Id.* at 544 n.17, 709 P.2d. at 459 n.17, 220 Cal. Rptr. at 656 n.17.
418. *Id.*
419. *Id.* at 545 n.18, 709 P.2d at 459 n.18, 220 Cal. Rptr. at 656 n.18.
420. *Id.* at 544 n.17, 709 P.2d at 459 n.17, 220 Cal. Rptr. at 656 n.17.
421. 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985).
422. *Id.* at 284-85, 710 P.2d at 885, 221 Cal. Rptr. at 818.
423. 33 Cal. 3d 21, 53, 655 P.2d 279, 298, 188 Cal. Rptr. 77, 96 (1982).
424. *Davenport*, 41 Cal. 3d. at 282, 710 P.2d at 883, 221 Cal. Rptr. at 816.
425. 34 Cal. 3d 858, 878, 671 P.2d 813, 826, 196 Cal. Rptr. 309, 332 (1983).
426. *Davenport*, 41 Cal. 3d at 282-83, 710 P.2d at 883, 221 Cal. Rptr. at 816.
427. *Id.* at 286-87, 710 P.2d at 886-87, 221 Cal. Rptr. at 819-20.
428. 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169 (1985). The opinion in the official reporter was depublished following a grant of a rehearing.

penalty of death if aggravating circumstances outweigh mitigating circumstances was again compounded by the subsection (k) instruction.[429] These errors were fully exploited in the prosecutor's closing argument, leading the court to conclude that sufficient prejudice was shown to warrant reversal.[430]

The impact of the "weighing" instruction condemned in *Brown* is unquestionably the most divisive issue the Lucas court has struggled with in death penalty cases. The alignments on this issue are volatile and unpredictable. For example, three of four reversals on this issue have been by four-to-three votes, with a different line-up of dissenters in each case.[431] Only Chief Justice Lucas has dissented in all three.[432]

The main focus in these cases has been the prosecutor's argument. In *People v. Milner*,[433] the only unanimous reversal, the prosecutor built the entire penalty argument on the theme that the jury could avoid personal responsibility for a death decision by "hiding" behind the law.[434] In *People v. Crandell*,[435] on the other hand, the prosecutor presented little argument; however, because the pro se defendant waived argument, the majority concluded that the argument erroneously focused the jury on the absence of justification for the crime and falsely implied a lack of mitigating factors.[436] Chief Justice Lucas dissented, joined by Justices Eagleson and Panelli.[437] In *People v. Farmer*,[438] the prosecutor told the jury: "You do not decide life or death. The law does that."[439] Justice Kaufman and Chief Justice Lucas joined Justice Panelli in dissenting.[440] Finally, in *People v. Edelbacher*,[441] the majority found the prosecutor's argument unduly focused on the weighing function without reference to

429. *Id.*, 711 P.2d at 477-78, 222 Cal. Rptr. at 181-82.

430. *Id.*

431. *See* People v. Edelbacher, 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586 (1989); People v. Farmer, 47 Cal. 3d 888, 765 P.2d 940, 254 Cal. Rptr. 508, *cert. denied*, 109 S. Ct. 3158 (1989); People v. Crandell, 46 Cal. 3d 833, 760 P.2d 423, 251 Cal. Rptr. 227 (1988), *cert. denied*, 109 S. Ct. 1578 (1989).

432. *See infra* notes 435-43 and accompanying text.

433. 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988).

434. *Id.* at 255, 753 P.2d at 687, 246 Cal. Rptr. at 731.

435. 46 Cal. 3d 833, 760 P.2d 423, 251 Cal. Rptr. 227 (1988).

436. *Id.* at 884-85, 760 P.2d at 452, 251 Cal. Rptr. at 256.

437. *Id.* at 886, 760 P.2d at 453, 251 Cal. Rptr. at 257 (Lucas, C.J., Eagleson & Panelli, JJ., dissenting).

438. 47 Cal. 3d 888, 765 P.2d 941, 254 Cal. Rptr. 508, *cert. denied*, 109 S. Ct. 3158 (1989).

439. *Id.* at 928, 765 P.2d at 967, 254 Cal. Rptr. at 534.

440. *Id.* at 931, 765 P.2d at 969, 254 Cal. Rptr. at 537 (Panelli, J., dissenting in part). This was one of the truly rare occasions where Chief Justice Lucas and Justice Eagleson have ever parted company. They disagreed in only 2.9% of the cases decided in 1988-89. Uelmen, *Mainstream Justice*, CAL. LAW. 36, 39 (July 1989).

441. 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586 (1989).

the ultimate moral choice based on the propriety of the penalty.[442] Justice Panelli gave a separate concurring opinion and Justices Arguelles and Eagleson joined Chief Justice Lucas in a concurring and dissenting opinion.[443]

The Lucas court has found *Brown* error harmless in three cases.[444] All of these cases were decided by five-to-two votes, with Justices Mosk and Broussard dissenting.[445] Ironically, one of the three cases was *Brown*.[446] As previously noted, the reversal in *Brown* was based on the "mere sympathy" instruction.[447] The United States Supreme Court reversed on that ground and remanded.[448] On remand, the majority concluded that the weighing instruction was harmless in light of the prosecutor's argument, but reversed the penalty for an unrelated procedural error.[449] In *People v. Hendricks*,[450] the conclusion that prosecutorial characterization of the jury's role as "finders of fact" did not render the incorrect weighing instruction reversible drew a very spirited dissent from Justice Mosk.[451] Finally, in *People v. Gates*,[452] the penalty was upheld because the judge used "may" instead of "shall" in describing the jury's option if aggravating factors outweigh mitigating factors, even though the trial judge offered a very confusing explanation for his choice of words.[453]

Consistent principles are difficult to extract from these cases. The conclusion that they are largely driven by the horrendous circumstances of the underlying murder is hard to resist.

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442. *Id.* at 1038-39, 766 P.2d at 35, 254 Cal. Rptr. at 620-21.

443. *Id.* at 1043, 766 P.2d at 39, 254 Cal. Rptr. at 624 (Panelli, J., concurring). *Id.* at 1043, 766 P.2d at 39, 254 Cal. Rptr. at 624 (Lucas, C.J., Arguelles & Eagleson JJ., concurring in part and dissenting in part).

444. People v. Brown, 45 Cal. 3d 1247, 756 P.2d 204, 248 Cal. Rptr. 817 (1988) [hereinafter *Brown II*]; People v. Hendricks, 44 Cal. 3d 645, 749 P.2d 836, 244 Cal. Rptr. 181 (1988), *cert. denied*, 109 S. Ct. 247 (1989); People v. Gates, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987), *cert. denied*, 108 S. Ct. 2005 (1988).

445. *Brown II*, 45 Cal. 3d at 1264, 756 P.2d at 215, 248 Cal. Rptr. at 828 (Mosk & Broussard, JJ., dissenting); *Hendricks*, 44 Cal. 3d at 656, 749 P.2d at 847, 244 Cal. Rptr. at 193 (Mosk & Broussard, JJ., dissenting); *Gates*, 43 Cal. 3d at 1214, 743 P.2d at 331, 240 Cal. Rptr. at 696 (Mosk & Broussard, JJ., dissenting).

446. *See supra* notes 414-20 and accompanying text.

447. California v. Brown, 479 U.S. 538 (1987).

448. *Id.* at 543.

449. 45 Cal. 3d 1247, 1262-64, 756 P.2d 204, 219-21, 248 Cal. Rptr. 817, 826-27 (1988) (reversed for trial judge's failure to state reasons for denial of automatic motion for reconsideration of sentence).

450. 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181 (1988).

451. *Id.* at 656, 749 P.2d at 847, 244 Cal. Rptr. at 193 (Mosk, J., dissenting).

452. 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987).

453. *Id.* at 1198, 743 P.2d at 314, 240 Cal. Rptr. at 685.

D. Erroneous Exclusion/Admission of Evidence

As previously noted, the Bird court reversed three death penalty determinations for erroneous admission of evidence under the 1977 law.[454] Although no Briggs Initiative cases were reversed on that ground, the principles are largely the same under either law.

In a series of cases, the United States Supreme Court has mandated broad admissibility for "good character" evidence offered by the defendant to show mitigation in the penalty phase of a capital case, although similar evidence of bad character would not be admissible if initially offered by the prosecution.[455] The California Supreme Court has also ruled on this issue. In *People v. Lucero*,[456] the Lucas court unanimously reversed a death penalty determination because expert psychiatric testimony that the defendant would *not* be dangerous to fellow prisoners was excluded.[457] Recognizing that *People v. Murtishaw*[458] held that predictions of future dangerousness were inadmissible when offered by the prosecution,[459] the court concluded that United States Supreme Court precedent required admission of such evidence when offered by the defense.[460] In *People v. Robertson*,[461] however, the court found that a trial judge's comment that he would treat such evidence as neither aggravating *nor* mitigating did not require reversal.[462] Justices Mosk and Broussard dissented from the majority's characterization of the error as harmless because the trial judge characterized the choice between life and death as a very close one.[463]

"Harmless error" was also cited by the court in upholding a third death determination despite the erroneous admission of evidence.[464] Testimony that defendant threatened to kill others, gained via jailhouse informants, was admitted.[465] Justices Mosk and Broussard again

454. *See supra* notes 104-24 and accompanying text; *see also infra* Appendix, Table 5.

455. Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982).

456. 44 Cal. 3d 1006, 750 P.2d 1342, 245 Cal. Rptr. 185 (1988).

457. *Id.* at 1026, 750 P.2d at 1356, 245 Cal. Rptr. at 196.

458. 29 Cal. 3d 733, 631 P.2d 466, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922.

459. *Id.* at 767-68, 631 P.2d at 486, 175 Cal. Rptr. at 758.

460. *Lucero*, 44 Cal. 3d at 1026-27, 750 P.2d at 1357, 245 Cal. Rptr. at 197.

461. 48 Cal. 3d 18, 767 P.2d 1109, 255 Cal. Rptr. 631 (1989).

462. *Id.* at 53-54, 767 P.2d at 1129, 255 Cal. Rptr. at 651.

463. *Id.* at 64-83, 767 P.2d at 1136-48, 255 Cal. Rptr. at 658-70 (Mosk & Broussard, JJ., dissenting).

464. People v. Thompson, 45 Cal. 3d 86, 129, 753 P.2d 37, 64, 246 Cal. Rptr. 245, 272, *cert. denied*, 109 S. Ct. 404 (1988).

465. *Id.* at 118-19, 753 P.2d at 56-57, 246 Cal. Rptr. at 264-65.

dissented.[466]

E. Competency of Counsel

The Bird court reversed a total of three death penalty determinations based on the incompetence of defense counsel. In *People v. Deere*,[467] the defendant pled guilty to first-degree murder charges and admitted the special circumstance of multiple murder.[468] At the penalty phase, counsel cooperated with the defendant's wish that no mitigating evidence be presented.[469] The court held that the state's interest in an accurate determination of penalty requires counsel to present mitigating evidence even over the objection of his client.[470] *Deere* was a plain case of the defendant's use of the death penalty to commit suicide. The court concluded that while one might elect to sacrifice his life in atonement for a crime, he cannot compel the state to use its resources to take his life.[471] The state has its own strong interest in reducing the risk of mistaken or inappropriate death judgments.[472] *Deere* error was unanimously found in two other cases by the Bird court.[473]

The Lucas court has found little problem with incompetence of counsel in penalty determinations, although this has been perceived as a widespread problem in death penalty cases.[474] The only reversal on this ground came in *People v. Easley*.[475] In *People v. Miranda*,[476] the court rejected a claim that failure to present mitigating evidence during the penalty phase was incompetence of counsel, since counsel offered the tactical reason that cross-examination would prove more damaging.[477] Justices Broussard and Mosk dissented, asserting the lack of investigation raised a significant issue whether the tactical choice was an informed one,

466. *Id.* at 144-46, 753 P.2d at 74-75, 246 Cal. Rptr. at 282-84 (Mosk & Broussard, JJ., dissenting).

467. 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985).

468. *Id.* at 357, 710 P.2d at 926, 222 Cal. Rptr. at 15.

469. *Id.* at 361, 710 P.2d at 929, 222 Cal. Rptr. at 18.

470. *Id.* at 364-67, 710 P.2d at 931-33, 222 Cal. Rptr. at 20-22.

471. *Id.* at 362, 710 P.2d at 929-30, 222 Cal. Rptr. at 18.

472. *Id.* at 363, 710 P.2d at 930, 222 Cal. Rptr. at 19.

473. People v. Bloyd, 43 Cal. 3d 333, 729 P.2d 802, 233 Cal. Rptr. 368 (1987); People v. Burgener, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986).

474. *See, e.g.*, Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983).

475. 46 Cal. 3d 712, 759 P.2d 490, 250 Cal. Rptr. 855 (1988).

476. 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987), *cert. denied*, 108 S. Ct. 2026 (1988).

477. *Id.* at 121, 744 P.2d at 1167, 241 Cal. Rptr. at 635.

calling for a full hearing on the claim.[478] In an opinion announced on June 26, 1989 (after the period analyzed in this Article), the Lucas court affirmed the death sentence of a man who was allowed to represent himself at the penalty phase, and then urged the jury to impose a death sentence.[479] The court concluded that even though counsel continued in an advisory capacity, he had no obligation to present mitigating evidence after the defendant was allowed to proceed with self-representation.[480]

F. Summary of Penalty Cases

Although the Bird court reached the penalty issue with much less frequency, when it did, the result was predictable. The court reversed 78.3% of the cases it reviewed.[481] Many of these reversals were based on application of per se rules, under which the court declined to engage in extended determinations of whether an error was prejudicial.[482] The vast discretion vested in the jury to choose between life and death was perceived as requiring a strong presumption of prejudice.[483]

In reviewing penalty determinations, the Lucas court has affirmed 78.8% of the cases it reviewed.[484] Although substantially lower than its affirmance rate for guilt and special circumstance determinations, this rate is still remarkably consistent with the affirmance rate for the intermediate courts of appeal for sentencing errors in ordinary cases.[485] Despite the high affirmance rate, review of the penalty determination seems to engage the justices in a more intensive give-and-take process than review of guilt or special circumstances. The rate of divided opinions is substantially higher, and the line-up of majority and dissenters is less predictable.

The frequency of resort to harmless error by the Lucus Court in affirming penalty determinations is deeply disturbing. Unlike the review of guilt or special circumstances, which involve *factual* findings and conclusions, the determination of penalty involves an impenetrable process

478. *Id.* at 123-27, 744 P.2d at 1169-72, 241 Cal. Rptr. at 637-39 (Broussard & Mosk, JJ., dissenting).

479. People v. Bloom, 48 Cal. 3d 1194, 774 P.2d 698, 259 Cal. Rptr. 669 (1989).

480. *Id.* at 1226-27, 774 P.2d at 718, 259 Cal. Rptr. at 689.

481. *See infra* Appendix, Table 2.

482. *See, e.g.*, People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985).

483. *Id.* at 291, 710 P.2d at 889-90, 221 Cal. Rptr. at 822-23 (Bird, C.J., concurring and dissenting).

484. *See infra* Appendix, Table 3, Table 6.

485. A study by the Judicial Council conducted in 1981-82 showed sentencing errors were the single greatest cause for reversal in the court of appeal decisions studied, accounting for 23.2% of reversals. JUDICIAL COUNCIL OF CALIFORNIA, 1983 ANNUAL REPORT, ch. 2.

of collective conscience. We simply do not know why jurors choose death over life. To conclude that an error in instructions or the admission of evidence made no difference in the outcome requires rank speculation. That may explain why so little analysis accompanies the court's conclusion that a penalty-phase error was "harmless." While the harmless error doctrine may have a place in reviewing a factual conclusion, it should have no place in second guessing an exercise of discretion involving the choice of life or death.

VI. CONCLUSION AND RECOMMENDATIONS

In reviewing the transformation in the processing of death penalty appeals wrought by the 1986 electoral purge of the California Supreme Court, one persistent theme emerges. The Lucas court has assumed the non-interventionist, non-supervisory, and conflict-avoiding posture of an intermediate appellate court in reviewing death judgments. The "norms of affirmance" that have been identified in the processing of routine criminal appeals by intermediate courts of appeal[486] are given full sway.

One response might be an exhortation to the court to behave more like a supreme court in reviewing death judgments, to assume a role that more actively controls the discretion of prosecutors and trial courts in originating death judgments, sets minimal standards for defense lawyer competence, and applies a consistent standard of the proportionality of death as a punishment. Ironically, the Lucas court has eagerly assumed a supervisory role in the civil cases it has reviewed.[487] Close observers of the court's work can only marvel at the schizophrenic contrast between how civil cases are approached and decided and how death penalty cases are approached and decided. In this court, death cases *are* different—not different from ordinary criminal cases, but different from civil cases. Actually, this ironic difference may be inherent in the judicial function at any level. In his study of decision-making in the court of appeal, Dr. Davies observed:

> While due process concerns are theoretically most salient in the constitutional protections involved in criminal procedure, the court's perceptions of the social costs of strictly enforcing due process norms . . . are such that supervisory reversals are actually *less* likely in criminal than in civil cases. . . . The irony is that, given the extralegal characteristics that predominate in criminal appeals, the higher standards of due process that are

486. *See* Davies, *supra* note 3, at 619.

487. *See* Uelmen, *Mainstream Justice*, CAL. LAW., July 1989, at 36.

> theoretically applicable in criminal cases are probably *less* likely to be enforced by the Court of Appeal than the somewhat lower procedural standards applicable to civil appeals.[488]

Much the same point was made by Chief Justice Roger Traynor: "Appellate judges, persuaded by the record that the defendant committed some crime, are often reluctant to open the way to a new trial, given not only the risk of draining judicial resources but also the risk that a guilty defendant may go free."[489]

It would be irresponsible, however, to exhort the Lucas court to behave "more like a supreme court" in reviewing death cases without recognizing that the situation is not entirely of their making. The crushing backlog they inherited may be perceived as a direct result of the Bird court's behaving "too much like a supreme court" in reviewing death cases. Whether any court can treat death cases "like a supreme court" may simply be a function of numbers. If we give the supreme court the twelve death judgments per year they received up until the early 1970s, they might review those judgments differently than if we continue to give them forty per year. The reality of death penalty appeals is that they come to the supreme court the way ordinary criminal appeals come to the courts of appeal: without invitation.

The time has come to seriously rethink the procedure for automatic review of all death penalty judgments by the California Supreme Court. If the supreme court can fulfill this mandate only by functioning like an intermediate court of appeal, why not have the case go, initially, to the court of appeal? The review for error in both the underlying conviction of guilt and the finding of special circumstances can be done at that level with even greater efficiency and little difference in the results. The intermediate courts of appeal are already processing a substantial number of cases in which a sentence of life without possibility of parole was imposed. These cases also require findings of special circumstances.[490] If randomly apportioned among the various districts and divisions of the courts of appeal, a caseload of forty cases per year would require each court of appeal justice to sit on two such cases per year. The cases they reverse could go directly back to the trial courts, unless the supreme court granted a petition for hearing. The cases they affirm would then proceed to the supreme court for a review of the penalty determination. The court would also have the discretion to review any or all of the issues

488. Davies, *supra* note 3, at 609, 631 (emphasis in original).
489. R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970).
490. CAL. PENAL CODE § 190.2 (West 1988).

decided by the court of appeal relating to the finding of guilt and special circumstances.

This change will permit the supreme court to select particular cases or issues arising in the context of guilt determination and findings of special circumstances for review, and approach that review from its normal policy making perspective. The function of "error correction" will be left to the courts of appeal. This essential difference was underlined by the Davies study:

> The particularistic quality of the Court of Appeal's decision making can be readily appreciated by returning to the distinction between law articulation and error correction. By its nature, law articulation in the supreme court is *universalistic* and systematic in its orientation. The goal of such "policy generalization" is to develop principles and rules and disseminate them in published opinions so that a rule will apply to a whole set of cases in which the same issue might arise. In contrast, the error correction task in the Court of Appeal is aimed at "particular case disposition" and seeks to evaluate the overall substantive justice of the trial court disposition in light of the facts and equities of the particular case.[491]

By separating review of the guilt and special circumstance findings from review of the penalty determination, we more clearly identify what makes death penalty cases different and give that difference the attention it deserves. Actually, the guilt and special circumstance findings in death cases are identical in every respect to the life without possibility of parole cases currently reviewed by the courts of appeal. To the extent the supreme court should exercise supervisory responsibility over the processing of death cases, it can continue to do so by exercising its discretionary jurisdiction. In fact, it can do so more effectively than it does now, by identifying particular cases or particular issues after they have been exposed and considered by the court of appeal.

Maintaining automatic review for the penalty determination allows the supreme court to focus its entire attention on the issue of life or death. Having the supreme court review all such determinations assures the consistent application of the judgment of proportionality that inheres in such review. Reversals of the penalty determination at the supreme court level will result in a remand directly to the trial court for a new penalty hearing, that can again be directly reviewed by the supreme court if it results in another death judgment. The time that the supreme court

491. Davies, *supra* note 3, at 620 (emphasis in original).

saves in review of guilt and special circumstance determinations will allow the court to resume a more active role in reviewing civil and non-death criminal cases, while its review of death judgments will be focused more intensively on the elements that make death cases different.

There are downsides, to be sure.[492] First, sending death judgments to eighteen different divisions and districts of the court of appeal may result in conflict and inconsistency in the outcome of these cases. As already noted, reversal rates in ordinary criminal cases vary among divisions of the same district.[493] Secondly, prosecutors may respond to a break in the logjam by charging many more homicides as death penalty cases. While forty cases per year seems like a flood today, streamlining the system to handle those forty cases efficiently may simply invite a pace of eighty or a hundred cases per year. Third, spreading the burden among the courts of appeal means spreading the staff resources needed to handle this burden as well. Perhaps those staff resources are utilized more efficiently under the unified direction of the supreme court. Finally, introducing a two-tiered review may lengthen the appeal process for the cases that are affirmed.

None of these obstacles is insurmountable. The problem of inconsistency among divisions of the court of appeal will require careful utilization of the supreme court's discretionary review jurisdiction in a supervisory manner. The option to grant review can be selectively utilized to limit review to particular issues. The automatic review of the death penalty determination in every case will assure that every judgment is scrutinized by every justice of the supreme court. The court will be free to expand the scope of its review to guilt or special circumstance findings at any point in the course of the penalty review. Since the jury is routinely instructed that all evidence admitted during the guilt/special circumstance phase may be considered in making the penalty determination, the court will ordinarily review the evidence even in a penalty review. The review of guilt/special circumstance evidence will be greatly expedited by a prior review in the court of appeal. Even if a prior petition for discretionary guilt or special circumstance review has been denied, the supreme court should have the option to broaden its review to include guilt or special circumstance issues.

The potential explosion of death judgments is an issue that should be dealt with head-on, rather than indirectly by judicial logjams. Those who support the status quo logjam as a means of discouraging even more

492. *See generally* Weisberg, *Redistributing the Wealth of Capital Cases: Changing Death Penalty Appeals in California*, 28 SANTA CLARA L. REV. 243 (1988).

493. Kanner & Uelmen, *supra* note 59, at 14-15.

death judgments avoid coming to grips with the real problem: the disparity in filing standards that is inevitable when fifty-eight different elected prosecutors are each given ultimate authority to choose whether to pursue a death penalty. A direct remedy has been proposed, and should be seriously considered: giving the Attorney General statewide control over the filing of cases as death penalty cases.[494]

The spreading of staff resources may be a very healthy dispersal, since staff are influenced by the same institutional norms that influence the justices.[495] Keeping complete review of every aspect of death judgments in the supreme court will mean more and more delegation by the justices to a central staff of "death penalty professionals." Having a widely dispersed staff reviewing two cases per year may be preferable to a large permanent staff doing nothing but one death case after another.

Finally, introducing two tiers to the review process will not increase delay significantly for the vast majority of cases. The longest period of delay is in certifying the record.[496] Once a case has been processed through the court of appeal, it will be ready for immediate supreme court review. The supreme court's task will be made much easier by the prior analysis of the case in the court of appeal. Most important, dispersing the cases among the courts of appeal means much more expeditious review, and could even eliminate the current backlog.[497] Habeas corpus petitions would also be heard by the court of appeal. The only cases that might be delayed longer will be the cases in which the supreme court exercises its discretion to review the guilt or special circumstance determination.

In *A Tale of Two Cities*, Charles Dickens exposes the sharp contrasts of a revolution—the Declaration of the Rights of Man followed by the Reign of Terror. A comparison of the death penalty cases processed by the Bird court with those processed by the Lucas court should serve to remind us that we have lived through a revolution of sorts. While the electorate sent a loud and clear message, and the supreme court has responded to that message, the costs of that response are just becoming apparent. Death penalty cases usurp the docket of the supreme court, reducing the justices to performing like a badly overworked intermediate appellate court, unable to give other issues the attention they deserve.

494. *See* Peterson, *Death Penalty Appeals in California, Postscripts*, 28 SANTA CLARA L. REV. 243, 266-70 (1988).

495. Davies, *supra* note 3, at 634-35.

496. Weisberg, *supra* note 492, at 246-48.

497. There would be no constitutional impediment to applying the change retroactively and reassigning currently pending cases to the courts of appeal. *See id.* at 249 n.20.

The time has come to take on the task of careful, systemic reform that deals directly with the underlying problem. A two-tiered system of review, in which the courts of appeal review guilt and special circumstance findings, while the supreme court reviews penalty determinations, will permit the justices of the supreme court to get back to being a full-time supreme court again. It is a far, far better solution that I propose, than I have ever proposed.[498]

498. *Cf.* Uelmen, *First Year Report: Lucas Court*, CAL. LAW., June 1988, at 98.

APPENDIX

TABLE 1

STATE SUPREME COURT AFFIRMANCE RATES IN CAPITAL CASES 1977-1988

% Aff'd	State	Number of Cases
0.0	Colorado	3
0.0	New Jersey	10
7.8	California (Bird Court, 1970-86)	64
33.3	Oregon	3
33.3	Wyoming	9
33.3	Washington	12
42.3	N. Carolina	78
43.8	Maryland	32
46.3	S. Carolina	82
47.9	Mississippi	96
50.0	Kentucky	30
52.8	Arizona	125
52.8	Alabama	108
53.7	Florida	443
54.8	Oklahoma	84
58.3	Montana	12
58.8	Idaho	17
60.0	Illinois	105
61.8	Arkansas	55
62.5	Delaware	8
62.5	Pennsylvania	64
63.2	Louisiana	87
65.9	Nevada	44
67.1	Texas	319
68.4	Indiana	38
69.1	Tennessee	68
71.8	California (Lucas Court, 1987-89)	71
73.1	Georgia	245
73.7	Nebraska	19
74.5	Ohio	55
75.0	Utah	12
80.0	New Mexico	5
90.2	Missouri	61
90.6	Virginia	53

National Average: 59.2% Affirmed (2579 cases)

Sources: NAACP Legal Defense and Educational Fund, Inc., Capital Punishment Project

TABLE 2
BIRD COURT
SUMMARY OF OUTCOME OF CALIFORNIA
SUPREME COURT DECISIONS
REVIEWING DEATH PENALTY JUDGMENTS
1979-1986

	Conviction of Guilt		*Finding of Special Circumstances*		*Determination of Penalty*	
	AFF.	REV.	AFF.	REV.	AFF.	REV.
1977 Death Penalty Law	16	11	12	4	3	9
1978 Briggs Initiative	26	11	10	17	2	9
TOTAL	42	22	22	21	5	18

TABLE 3
LUCAS COURT
SUMMARY OF OUTCOME OF CALIFORNIA
SUPREME COURT DECISIONS
REVIEWING DEATH PENALTY JUDGMENTS
MARCH 1987-MARCH 1989

	Conviction of Guilt		*Finding of Special Circumstances*		*Determination of Penalty*	
	AFF.	REV.	AFF.	REV.	AFF.	REV.
1977 Death Penalty Law	10	1	9	1	8	1
1978 Briggs Initiative	57	3	57	0	43	14
TOTAL	67	4	66	1	51	15

TABLE 4
CALIFORNIA SUPREME COURT DISPOSITION
OF DEATH JUDGMENTS
1978-1989

	New Death Judgments	Supreme Court Dispositions†	"Backlog"
1978	7	0	7
1979	20	2	25
1980	24	6	43
1981	40	3	80
1982	39	7	112
1983	37	5	144
1984	29	10	163
1985	18	23	158
1986	26	10	174
1987	29	7	196
1988	36	49	183
1989*	7	15	175

* Through March, 1989
† Includes cases reviewed on habeas corpus

TABLE 5
DEATH PENALTY CASES REVIEWED BY THE BIRD COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Bloyd, 43 Cal. 3d 333, 729 P.2d 802, 233 Cal. Rptr. 368 (1987)	A	A	R	1978
People v. Meyers, 43 Cal. 3d 250, 729 P.2d 698, 233 Cal. Rptr. 264 (1987)	A	A	R	1978
People v. Ledesma, 43 Cal. 3d 171, 729 P.2d 839, 233 Cal. Rptr. 404 (1987)	R	—	—	1978
People v. Allen, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986), *cert. denied,* 108 S. Ct. 202 (1987)	A	A	A	1978
People v. Louis, 42 Cal. 3d 969, 728 P.2d 180, 232 Cal. Rptr. 110 (1986)	R	—	—	1978
People v. Rodriguez, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986)	A	A	A	1978
People v. Turner, 42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986)	R	—	—	1978
People v. Smallwood, 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986)	R	—	—	1978
People v. Ratliff, 41 Cal. 3d 675, 715 P.2d 665, 224 Cal. Rptr. 705 (1986)	A	R	—	1978
People v. Burgener, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986)	A	A	R	1978
People v. Hamilton, 41 Cal. 3d 408, 710 P.2d 981, 221 Cal. Rptr. 902 (1985), *vacated sub nom.* California v. Hamilton, 478 U.S. 1017 (1986)	A	R	—	1978
People v. Deere, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985)	A	A	R	1978
People v. Silberston, 41 Cal. 3d 296, 709 P.2d 1321, 221 Cal. Rptr. 152 (1985)	A	R	—	1978
People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985)	A	A	R	1978

TABLE 5 (Continued)
DEATH PENALTY CASES REVIEWED BY THE BIRD COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Hamilton, 41 Cal. 3d 211, 710 P.2d 937, 221 Cal. Rptr. 858 (1985), *cert. denied,* 109 S. Ct. 1176 (1989)	A	R	—	1978
People v. Balderas, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985)	A	R	—	1978
People v. Walker, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169 (1985)	A	A	R	1978
People v. Leach, 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985)	A	R	—	1978
People v. Phillips, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985)	A	A	R	1977
People v. Croy, 41 Cal. 3d 1, 710 P.2d 392, 221 Cal. Rptr. 592 (1985)	R	—	—	1977
People v. Fuentes, 40 Cal. 3d 629, 710 P.2d 240, 221 Cal. Rptr. 440 (1985)	A	R	—	1978
People v. Massie, 40 Cal. 3d 620, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985)	R	—	—	1978
People v. Brown, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), *rev'd in part sub nom.* California v. Brown, 479 U.S. 538 (1987)	A	A	R	1978
People v. Guerra, 40 Cal. 3d 377, 708 P.2d 1252, 220 Cal. Rptr. 374 (1985)	A	R	—	1978
People v. Montiel, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985)	A	A	R	1978
People v. Chavez, 39 Cal. 3d 823, 705 P.2d 372, 218 Cal. Rptr. 49 (1985)	A	R	—	1978
People v. Frierson, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985)	A	R	—	1977
People v. Hayes, 38 Cal. 3d 780, 699 P.2d 1259, 214 Cal. Rptr. 652 (1985)	A	R	—	1978

TABLE 5 (Continued)
DEATH PENALTY CASES REVIEWED BY THE BIRD COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Boyd, 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985)	A	R	—	1978
People v. Frank, 38 Cal. 3d 711, 700 P.2d 415, 214 Cal. Rptr. 801 (1985)	A	A	R	1977
People v. Memro, 38 Cal. 3d 658, 700 P.2d 446, 214 Cal. Rptr. 832 (1985)	R	—	—	1977
People v. Anderson, 38 Cal. 3d 58, 694 P.2d 1149, 210 Cal. Rptr. 777 (1985)	A	R	—	1978
People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984)	R	R	—	1978
People v. Armendariz, 37 Cal. 3d 573, 693 P.2d 243, 209 Cal. Rptr. 664 (1984)	A	R	—	1978
People v. Holt, 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984)	R	—	—	1978
People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984)	R	—	—	1978
People v. Turner, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984)	A	R	—	1978
People v. Mattson, 37 Cal. 3d 85, 688 P.2d 887, 207 Cal. Rptr. 278 (1984)	R	—	—	1977
People v. Whitt, 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984)	A	R	—	1978
People v. Alcala, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984)	R	—	—	1978
People v. Lanphear, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984)	A	A	R	1977
People v. Harris, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, *cert. denied,* 469 U.S. 965 (1984)	R	—	—	1977
People v. Fields, 35 Cal. 3d. 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983), *cert. denied,* 469 U.S. 892 (1984)	A	A	A	1977

TABLE 5 (Continued)
DEATH PENALTY CASES REVIEWED BY THE BIRD COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Mroczko, 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983)	R	—	—	1977
People v. Joseph, 34 Cal. 3d 936, 671 P.2d 843, 196 Cal. Rptr. 339 (1983)	R	—	—	1978
People v. Mozingo, 34 Cal. 3d 926, 671 P.2d 363, 196 Cal. Rptr. 212 (1983)	R	—	—	1978
People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983)	A	A	R	1977
People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982)	A	A	R	1977
People v. Gzikowski, 32 Cal. 3d 580, 651 P.2d 1145, 186 Cal. Rptr. 339 (1982)	R	—	—	1977
People v. Arcega, 32 Cal. 3d 504, 651 P.2d 338, 186 Cal. Rptr. 94 (1982)	R	—	—	1977
People v. Stankewitz, 32 Cal. 3d 80, 648 P.2d 578, 184 Cal. Rptr. 611 (1982)	R	—	—	1977
People v. Hogan, 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982)	R	—	—	1977
People v. Haskett, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982)	A	A	R	1977
People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1984), *cert. denied,* 471 U.S. 1119 (1985)	A	R	R	1978
People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied,* 455 U.S. 922 (1982)	A	A	R	1977
People v. Harris, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981), *cert. denied,* 454 U.S. 1111 (1982)	A	A	A	1977
People v. Chadd, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798, *cert. denied,* 452 U.S. 931 (1981)	R	—	—	1977

TABLE 5 (Continued)
DEATH PENALTY CASES REVIEWED BY THE BIRD COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied,* 450 U.S. 1035 (1981)	A	A	A	1977
People v. Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980)	A	R	—	1977
People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980)	A	R	—	1977
People v. Lanphear, 26 Cal. 3d 814, 608 P.2d 689, 163 Cal. Rptr. 601, *vacated sub nom.* California v. Lanphear, 449 U.S. 810 (1980)	A	A	R	1977
People v. Velazquez, 26 Cal. 3d 425, 606 P.2d 341, 162 Cal. Rptr. 306, *vacated sub nom.* California v. Velazquez, 448 U.S. 903 (1980)	A	A	R	1977
People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979)	R	—	—	1977
People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979)	A	R	—	1977

TABLE 6
DEATH PENALTY CASES REVIEWED BY THE LUCAS COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Boyer, 48 Cal. 3d 247, 768 P.2d 610, 256 Cal. Rptr. 96 (1989)	R	—	—	1978
People v. Coleman, 48 Cal. 3d 112, 768 P.2d 32, 255 Cal. Rptr. 813 (1989)	A	A	A	1978
People v. Robertson, 48 Cal. 3d 18, 767 P.2d 1109, 255 Cal. Rptr. 631 (1989)	A	A	A	1977
People v. Johnson, 47 Cal. 3d 1194, 767 P.2d 1047, 255 Cal. Rptr. 569 (1989)	A	A	A	1978
People v. Harris, 47 Cal. 3d 1047, 767 P.2d 619, 255 Cal. Rptr. 352 (1989)	A	A	R	1978
People v. Edelbacher, 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586 (1989)	A	A	R	1978
People v. Farmer, 47 Cal. 3d 888, 765 P.2d 940, 254 Cal. Rptr. 508, *cert. denied,* 109 S. Ct. 3158 (1989)	A	A	R	1978
People v. Bonin, 47 Cal. 3d 808, 765 P.2d 460, 254 Cal. Rptr. 298 (1989)	A	A	A	1978
People v. Garrison, 47 Cal. 3d 746, 765 P.2d 419, 254 Cal. Rptr. 257 (1988)	A	A	R	1978
People v. Walker, 47 Cal. 3d 605, 765 P.2d 70, 253 Cal. Rptr. 863 (1988)	A	A	A	1978
People v. Johnson, 47 Cal. 3d 576, 764 P.2d 1087, 253 Cal. Rptr. 710 (1988)	A	A	R	1978
People v. Hernandez, 47 Cal. 3d 315, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988), *cert. denied,* 109 S. Ct. 3201 (1989)	A	A	A	1978
People v. Adcox, 47 Cal. 3d 207, 763 P.2d 906, 253 Cal. Rptr. 55 (1988)	A	A	A	1978
People v. Moore, 47 Cal. 3d 63, 762 P.2d 1218, 252 Cal. Rptr. 494 (1988), *cert. denied,* 109 S. Ct. 2442 (1989)	A	A	A	1977

TABLE 6 (Continued)
DEATH PENALTY CASES REVIEWED BY THE LUCAS COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Malone, 47 Cal. 3d 1, 762 P.2d 1249, 252 Cal. Rptr. 525 (1988), *cert. denied,* 109 S. Ct. 2442 (1989)	A	A	A	1978
People v. Caro, 46 Cal. 3d 1035, 761 P.2d 680, 251 Cal. Rptr. 757 (1988), *cert. denied,* 109 S. Ct. 1944 (1989)	A	A	A	1978
People v. Griffin, 46 Cal. 3d 1011, 761 P.2d 103, 251 Cal. Rptr. 643 (1988)	A	A	R	1978
People v. Jennings, 46 Cal. 3d 963, 760 P.2d 475, 251 Cal. Rptr. 278 (1988), *cert. denied,* 109 S. Ct. 1559 (1989)	A	A	A	1978
People v. Bean, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988)	A	A	A	1978
People v. Crandell, 46 Cal. 3d 833, 760 P.2d 423, 251 Cal. Rptr. 227 (1988), *cert. denied,* 109 S. Ct. 1936 (1989)	A	A	R	1978
People v. Coleman, 46 Cal. 3d 749, 759 P.2d 1260, 251 Cal. Rptr. 83 (1988), *cert. denied,* 109 S. Ct. 1578 (1989)	A	A	A	1978
People v. Easley, 46 Cal. 3d 712, 759 P.2d 490, 250 Cal. Rptr. 855 (1988)	A	A	R	1977
People v. Bonin, 46 Cal. 3d 659, 758 P.2d 1217, 250 Cal. Rptr. 687 (1988), *cert. denied,* 109 S. Ct. 1561 (1989)	A	A	A	1978
People v. Karis, 46 Cal. 3d 612, 758 P.2d 1189, 250 Cal. Rptr. 659 (1988), *cert. denied,* 109 S. Ct. 1658 (1989)	A	A	A	1978
People v. McDowell, 46 Cal. 3d 551, 758 P.2d 1060, 250 Cal. Rptr. 530 (1988), *cert. denied,* 109 S. Ct. 1972 (1989)	A	A	A	1978
People v. Keenan, 46 Cal. 3d 478, 758 P.2d 1081, 250 Cal. Rptr. 550 (1988)	A	A	A	1978

TABLE 6 (Continued)
DEATH PENALTY CASES REVIEWED BY THE LUCAS COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Brown, 46 Cal. 3d 432, 758 P.2d 1135, 250 Cal. Rptr. 604 (1988), *cert. denied,* 109 S. Ct. 1329 (1989)	A	A	A	1978
People v. Boyde, 46 Cal. 3d 212, 758 P.2d 25, 250 Cal. Rptr. 83 (1988), *cert. granted,* 109 S. Ct. 2447 (1989)	A	A	A	1978
People v. Hamilton, 46 Cal. 3d 123, 756 P.2d 1348, 249 Cal. Rptr. 320 (1988)	A	A	A	1978
People v. McLain, 46 Cal. 3d 97, 757 P.2d 569, 249 Cal. Rptr. 630 (1988), *cert. denied,* 109 S. Ct. 1356 (1989)	A	A	A	1978
People v. Morris, 46 Cal. 3d 1, 756 P.2d 843, 249 Cal. Rptr. 119 (1988)	A	R	—	1977
People v. Marks, 45 Cal. 3d 1335, 756 P.2d 260, 248 Cal. Rptr. 874 (1988)	R	—	—	1978
People v. Williams, 45 Cal. 3d 1268, 756 P.2d 221, 248 Cal. Rptr. 834 (1988), *cert. denied,* 109 S. Ct. 883 (1989)	A	A	A	1978
People v. Brown, 45 Cal. 3d 1247, 756 P.2d 204, 248 Cal. Rptr. 817 (1988)	A	A	R	1978
People v. Bunyard, 45 Cal. 3d 1189, 756 P.2d 795, 249 Cal. Rptr. 71 (1988)	A	A	R	1978
People v. Rich, 45 Cal. 3d 1036, 755 P.2d 960, 248 Cal. Rptr. 510 (1988), *cert. denied,* 109 S. Ct. 884 (1989)	A	A	A	1977
People v. Ainsworth, 45 Cal. 3d 984, 755 P.2d 1017, 248 Cal. Rptr. 568 (1988), *cert. denied,* 109 S. Ct. 883 (1989)	A	A	A	1977
People v. Guzman, 45 Cal. 3d 915, 755 P.2d 917, 248 Cal. Rptr. 467 (1988), *cert. denied,* 109 S. Ct. 882 (1989)	A	A	A	1978

TABLE 6 (Continued)
DEATH PENALTY CASES REVIEWED BY THE LUCAS COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Grant, 45 Cal. 3d 829, 755 P.2d 894, 248 Cal. Rptr. 444 (1988), *cert. denied,* 109 S. Ct. 883 (1989)	A	A	A	1978
People v. Robbins, 45 Cal. 3d 867, 755 P.2d 355, 248 Cal. Rptr. 172 (1988), *cert. denied,* 109 S. Ct. 849 (1989)	A	A	A	1978
People v. Belmontes, 45 Cal. 3d 744, 755 P.2d 310, 248 Cal. Rptr. 126 (1988), *cert. denied,* 109 S. Ct. 848 (1989)	A	A	A	1978
People v. Babbit, 45 Cal. 3d 660, 755 P.2d 253, 248 Cal. Rptr. 69 (1988), *cert. denied,* 109 S. Ct. 849 (1989)	A	A	A	1978
People v. Siripongs, 45 Cal. 3d 548, 754 P.2d 1306, 247 Cal. Rptr. 729 (1988), *cert. denied,* 109 S. Ct. 820 (1989)	A	A	A	1978
People v. Silva, 45 Cal. 3d 604, 754 P.2d 1070, 247 Cal. Rptr. 573 (1988), *cert. denied,* 109 S. Ct. 820 (1989)	A	A	A	1978
People v. Warren, 45 Cal. 3d 471, 754 P.2d 218, 247 Cal. Rptr. 172 (1988)	A	A	R	1978
People v. Odle, 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137, *cert. denied,* 109 S. Ct. 275 (1988)	A	A	A	1978
People v. Hamilton, 45 Cal. 3d 351, 753 P.2d 1109, 247 Cal. Rptr. 31 (1988), *cert. denied,* 109 S. Ct. 879 (1989)	A	A	A	1978
People v. Poggi, 45 Cal. 3d 306, 753 P.2d 1082, 246 Cal. Rptr. 886 (1988), *cert. denied,* 109 S. Ct. 3261 (1989)	A	A	A	1978
People v. Lucky, 45 Cal. 3d 259, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988), *cert. denied,* 109 S. Ct. 848 (1989)	A	A	A	1978
People v. Milner, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988)	A	A	R	1978

TABLE 6 (Continued)
DEATH PENALTY CASES REVIEWED BY THE LUCAS COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Heishman, 45 Cal. 3d 147, 753 P.2d 629, 246 Cal. Rptr. 673, *cert. denied,* 109 S. Ct. 380 (1988)	A	A	A	1978
People v. Thompson, 45 Cal. 3d 86, 753 P.2d 37, 246 Cal. Rptr. 245, *cert. denied,* 109 S. Ct. 404 (1988)	A	A	A	1978
People v. Dyer, 45 Cal. 3d 26, 753 P.2d 1, 246 Cal. Rptr. 209, *cert. denied,* 109 S. Ct. 330 (1988)	A	A	A	1978
People v. Williams, 44 Cal. 3d 1127, 751 P.2d 901, 245 Cal. Rptr. 635, *cert. denied,* 109 S. Ct. 514 (1988)	A	A	A	1978
People v. Lucero, 44 Cal. 3d 1006, 750 P.2d 1342, 245 Cal. Rptr. 185 (1988)	A	A	R	1978
People v. Wade, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1987), *cert. denied,* 109 S. Ct. 248 (1988)	A	A	A	1978
People v. Williams, 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336, *cert. denied,* 109 S. Ct. 249 (1988)	A	A	A	1978
People v. Melton, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867, *cert. denied,* 109 S. Ct. 329 (1988)	A	A	A	1978
People v. Hendricks, 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181, *cert. denied,* 109 S. Ct. 247 (1988)	A	A	A	1978
People v. Ruiz, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200, *cert. denied,* 109 S. Ct. 186 (1988)	A	A	A	1978
People v. Hovey, 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121, *cert. denied,* 109 S. Ct. 188 (1988)	A	A	A	1977
People v. Hale, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988)	R	—	—	1978

TABLE 6 (Continued)
DEATH PENALTY CASES REVIEWED BY THE LUCAS COURT

	Guilt	Special Circumstances	Penalty	Law
People v. Kimble, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148, *cert. denied,* 109 S. Ct. 188 (1988)	A	A	A	1977
People v. Howard, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842, *cert. denied,* 109 S. Ct. 188 (1988)	A	A	A	1978
People v. Snow, 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987)	R	—	—	1977
People v. Bell, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987)	A	A	A	1977
People v. Miranda, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987), *cert. denied,* 108 S. Ct. 2026 (1988)	A	A	A	1978
People v. Gates, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987), *cert. denied,* 108 S. Ct. 2005 (1988)	A	A	A	1978
People v. Anderson, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987)	A	A	R	1978
People v. Ghent, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987), *cert. denied,* 108 S. Ct. 1099 (1988)	A	A	A	1977
People v. Hendricks, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987)	A	A	R	1978