



Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California

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The author recently represented a defendant in his automatic appeal to the California Supreme Court. That appeal has been decided. The opinion in that case is not one of the sixteen opinions discussed in this Article.

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INTRODUCTION

Until the middle of the twentieth century, efforts to abolish or reform capital punishment were ultimately aimed at the legislative halls. When capital punishment was abolished, it was done by legislative enactment.¹ And with the exception of the minor adjustments routinely produced by the judicial process, the reform of capital punishment law was produced by legislative alteration as well.²

The debate fostering or opposing these changes was seldom laconic. It evoked strong emotions on both sides of the issue and tended to galvanize public opinion into support or opposition to capital punishment. Few remained undecided on these issues. Yet public opinion shifted from time to time.³ Over the years, as political support shifted as well, capital punishment was abolished or restored, the list of capital crimes was altered, or the procedures used to invoke capital punishment were modified in a variety of ways.⁴ But these changes were always forged by the forces of politics, by political action in the political branches of government where it was always subject to revision by a subsequent legislative vote or by a vote of the People at the next election. Thus, though the question of capital punishment was both highly controversial and highly divisive, there was little to distinguish that question from other highly divisive and controversial issues that were regularly resolved in the legislative halls by the process of politics. Simply put, capital punishment was routinely considered to be a political issue properly resolved by the political branches of government.

By the late 1950s, frustrated by their inability to produce the changes they sought by the political process,⁵ abolitionists and reform-

¹ See, e.g., H. BEDAU, *THE DEATH PENALTY IN AMERICA* (3d ed. 1982); AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: *THE DEATH PENALTY* 12-13 (1987) [hereafter AMNESTY INT'L REPORT].

² See Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 146-58 (1986).

³ See AMNESTY INT'L REPORT, *supra* note 1, at 174-75.

⁴ See Poulos, *supra* note 2, at 146-58.

⁵ Only 10 years before the Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated nearly all capital punishment statutes in the United States, even the American Law Institute believed that it could not influence the aboli-

ers began challenging the constitutionality of both the death penalty and the procedures by which it was employed in the state and federal courts.⁶ Although these arguments were universally rejected in the 1950s and 1960s,⁷ in 1972 courts began holding that capital punishment and the procedures under which it was invoked suffered from a variety of constitutional defects.⁸ The most important of the 1972 decisions was *Furman v. Georgia*.⁹ It became the foundation stone for a constitutional jurisprudence governing the death penalty throughout the Nation.

Furman invalidated every death penalty statute that conferred unguided discretion on the sentencing authority to choose between life or death as the punishment for a capitally convicted murderer.¹⁰ Since, by

tion of capital punishment question. Accordingly, the Institute took no position on the abolition of capital punishment when it promulgated the Model Penal Code. The commentary to the Code offered the following explanation:

The Model Code provision on capital punishment was adopted in tentative form at the 1959 meeting of the Institute. Then, as today, the death penalty ranked high among the issues of public controversy in the criminal law. . . .

. . . [T]he Reporters favored abolition of the capital sanction. The Advisory Committee recommended by a vote of 17-3 that the Institute express itself upon the issue, whatever its opinion proved to be. By a vote of 18-2, the Advisory Committee also recommended that the Institute favor abolition. The Council was divided on the issue of retention or abolition but substantially united in the view that the Institute could not be influential in its resolution and therefore should not take a position either way. The Institute agreed with the Council, and the Model Code therefore does not take a position on whether the sentence of death should be retained or abolished.

MODEL PENAL CODE AND COMMENTARIES § 210.6, comment 1, at 110-11 (1980) (footnotes omitted).

For a discussion of *Furman* and post-*Furman* death penalty law, see *infra* notes 9-30 and accompanying text.

⁶ See Poulos, *supra* note 2, at 146-58.

⁷ *Id.* at 159.

⁸ On February 18, 1972, the California Supreme Court, in an opinion by Chief Justice Wright, held that capital punishment was invalid per se under the California Constitution. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972). Four months and a few days later, on June 29, 1972, the United States Supreme Court held that unguided jury discretion in capital cases violated the cruel and unusual punishments clause of the eighth amendment as made applicable to the states by the due process clause of the fourteenth amendment. *Furman v. Georgia*, 408 U.S. 238 (1972).

⁹ 408 U.S. 238 (1972).

¹⁰ *Id.* at 256-57, 309-10, 314. Three justices decided the case on this narrow issue, but two justices argued that the death penalty was per se unconstitutional under the

1972, every state except one conferred unguided discretion to punish a broad class of murderers with death, *Furman* invalidated nearly all of the capital punishment statutes in the United States.¹¹ Had the California Supreme Court not invalidated the state's death penalty a few months before,¹² the California statute authorizing the death penalty for first degree murder would have been unconstitutional under *Furman*.¹³ Thus the reformers secured from the courts what they could not obtain through the political process.

Quite understandably, the proponents of capital punishment challenged the *Furman* majority's action on a variety of grounds.¹⁴ For the purpose of the current inquiry, the most important challenge was to the legitimacy of the majority's action. In essence, it was argued that the majority's holding was not grounded in the Constitution, but on the belief that the abolition of capital punishment was best for the Nation. But justices of the United States Supreme Court must apply the law of the Constitution, not their own conceptions of what is best for the Nation, in resolving disputes submitted to them. In our system of government, the power to decide what is in the best interest of the Nation is exclusively reserved to the political branches of government. *Furman*, according to this criticism, was a political decision that usurped the power of the state legislatures and violated the fundamental principles of our democracy.¹⁵ Furthermore, the Court's holding in *Furman* was particularly egregious because it came packaged in constitutional wrappings which, in contrast to political decisions, put it beyond the immediate reach of the political process.

The multiple *Furman* opinions themselves fueled these arguments. Although five votes supported the terse per curium reversal in *Furman*, neither a majority nor a plurality opinion supported the majority's ac-

eight amendment. *Id.* at 257-306, 314-71; *see also id.* at 375; *infra* note 57.

¹¹ *See* 408 U.S. at 400-01. Delaware was the only state that did not use unguided sentencing discretion to inflict or withhold capital punishment for murderers in general. DEL. CODE ANN. tit. 11, §§ 107, 571 (Supp. 1970); *see* Poulos, *supra* note 2, at 248-51. Rhode Island also had a single narrowly defined capital murder offense punishable by a mandatory sentence of death, but the death penalty was inapplicable to murder in general in that state. R.I. GEN. LAWS § 11-23-2 (1956); *see* Poulos, *supra* note 2, at 248-51.

¹² *Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

¹³ The California statute conferred unfettered discretion on the sentencing authority to select between a life sentence and the death penalty. *See infra* notes 40-45 and accompanying text.

¹⁴ *See, e.g.*, R. BERGER, DEATH PENALTIES (1982).

¹⁵ *See, e.g., id.*

tion.¹⁶ Instead, each of the five justices in the majority wrote separately, and none joined the opinion of his brethren.¹⁷ If the eighth amendment embargoed the use of capital punishment, why indeed did these five justices struggle to articulate five different reasons why this was so?

Furthermore, although each of the justices in the majority wrote for himself alone, the four dissenters united not only in their opposition to the majority's holding on the merits, but also on the question of the legitimacy of the majority ruling. Though the dissenters each wrote separately,¹⁸ three of the four dissenting opinions were joined by the other dissenting justices.¹⁹

The dissenters' most important single theme was that the majority's decision violated the fundamental principles that justify judicial review in a democratic society.²⁰ Justice Rehnquist wrote, "this decision holding unconstitutional capital punishment is not an act of judgment but rather an act of will."²¹ Justice Powell accused the majority of shattering the "root principles of *stare decisis*, federalism, judicial restraint and — most importantly — separation of powers."²² Each of the four dissenting justices joined the Rehnquist²³ and Powell²⁴ dissenting opinions. Furthermore, portions of the dissenting opinions of Chief Justice Burger and Justice Blackmun criticized the majority's "process of decision making" and accused them of usurping legislative power under the guise of the eighth amendment.²⁵ The dissenters thus united in concluding that the eighth amendment did not invalidate the states' use of capital punishment for the crime of murder. With varying degrees of enthusiasm, they also united in the challenge that the majority's holding was illegitimately made.

This two-fold unity in the dissent, coupled with the disarray in the separate rationales of the five separate opinions supporting *Furman's* holding, ensured that the constitutionality of capital punishment and the judiciary's legitimate role in deciding that question would continue

¹⁶ See 408 U.S. 238, 240 (1972).

¹⁷ Justices Douglas, Brennan, Stewart, White, and Marshall wrote separate concurring opinions. *Id.*

¹⁸ Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist wrote separate dissenting opinions. *Id.*

¹⁹ *Id.* at 375, 414, 465.

²⁰ *Id.* at 465-70 (Rehnquist, J., dissenting).

²¹ *Id.* at 468.

²² *Id.* at 417.

²³ *Id.* at 465.

²⁴ *Id.* at 414.

²⁵ *Id.* at 403, 410-11.

to fester for some time to come.

There was another aspect of the *Furman* opinions that further exacerbated the controversy over capital punishment. Until *Furman*, the question of capital punishment had been debated in the legislative halls on the familiar grounds of morality, expediency, and sound public policy. After *Furman*, the legislative debate focused on the constitutional validity of the proposed legislation.²⁶ Given the difficulty of parsing the five separate opinions supporting the Court's holding in *Furman* and discovering their common criteria for validating new capital punishment legislation under the eighth amendment, the task of drafting a statute that would pass constitutional muster was frustrating at best. At worst, *Furman* spawned legislation that later proved invalid under the eighth amendment, thus adding to the frustration and anxiety already generated by that case.

Moreover, the subsequent ruling by a state or federal court that a statute enacted in response to *Furman* violated the eighth amendment further fueled the claim that the courts were acting illegitimately when they invalidated legislation duly enacted by the political branches of our government.

Furman thus added to the intensity of an already emotional and divisive debate on capital punishment. *Furman* gave little guidance on the Constitution's criteria for a valid death penalty statute. *Furman* changed the focus of the debate on capital punishment from morality and sound public policy to the question of constitutional validity. *Furman* also provided a lightening rod for the argument that courts acted illegitimately when they invalidated death penalty statutes under the eighth amendment or similar provisions in state constitutions.

Furman was decided at a time when public support for the death penalty was rising. Indeed, it had risen steadily since the late 1960s.²⁷ Not surprisingly, in the four year period between June 29, 1972 (the day the Court decided *Furman*) and July 2, 1976 (the day the Court initially decided the validity of death penalty legislation enacted in response to *Furman*) thirty-five of the forty-one states with pre-*Furman* death penalty legislation enacted new death penalty laws.²⁸ By the mid-1980s, national polls indicated that seventy-five to eighty-four percent of the American people supported capital punishment.²⁹ This was the

²⁶ See *Woodson v. North Carolina*, 428 U.S. 280, 298 (1976) (plurality opinion); see also Poulos, *supra* note 2, at 233-36.

²⁷ See AMNESTY INT'L REPORT, *supra* note 1, at 174.

²⁸ See Poulos, *supra* note 2, at 145.

²⁹ See AMNESTY INT'L REPORT, *supra* note 1, at 174.

highest proportion of the population to support the death penalty since 1936.³⁰

Whether *Furman* and its progeny contributed to the rise in public support for capital punishment is yet to be determined. But once the courts were perceived to be acting politically, to be frustrating the democratic process by illegitimately deciding the question of capital punishment, political action aimed at restoring the courts to their proper role came to be seen by many as both appropriate and necessary. In California, this political action took the form of a campaign to deny the Chief Justice of California and several justices of the California Supreme Court further terms in office at the 1986 judicial retention election.

This Article explores California's experience with the contemporary capital punishment controversy. The development of California's death penalty law from 1850 to 1972 (the year *Furman* was decided) exemplifies the evolution of capital punishment law by legislative change forged on the anvil of politics.³¹ Section I outlines this legislative development for the crime of murder.³² This section analyzes the constitutional amendment adopted by the People in 1972 to overturn the California Supreme Court's decision in *People v. Anderson*. This section then analyzes the post-*Furman* legislation enacted in 1973 and again in 1977. Finally, this section discusses the popular dissatisfaction with the 1977 death penalty legislation that culminated in the adoption of a new death penalty statute by California's initiative process in 1978.

The People's frustration with both the constitutionalization of the capital punishment question and the fruits of the California legislative process was not abated by the adoption of the constitutional amendment in 1972 and the enactment of the initiative measure in 1978. The California Supreme Court now had become the source of the People's continuing frustration with the implementation of a "tough" capital punishment statute in the State. Apparently convinced that the court, under the leadership of Chief Justice Rose Bird, was illegitimately reversing death judgments, a majority of the People voiced their dissatisfaction with the court's death penalty decisions. At the judicial retention election held in November 1986, the voters refused to confirm the three justices who were thought to be responsible for these illegitimate rever-

³⁰ *Id.*

³¹ Compare Poulos, *supra* note 2, at 144-58 (analyzing these developments throughout United States) with *infra* text accompanying notes 36-225 (analyzing California experience).

³² This study is limited to the crime of murder since all death penalty judgments entered in California since 1972 have been for capital murder convictions.

sals. Section II chronicles and analyzes the Bird court's handling of automatic appeals, the popular dissatisfaction with the high reversal rate in those cases, and the subsequent retention election which resulted in the defeat of the targeted justices.

George Deukmejian was the principal author of the 1973 death penalty statute³³ that the California Supreme Court subsequently invalidated on eighth amendment grounds.³⁴ As Governor in 1987, he appointed three new justices to replace the three justices who were defeated at the retention election. Since Governor Deukmejian previously had appointed two members of the court, these three additional appointments put his appointees in a position to control the court's actions. Section III of this Article analyzes the voting behavior in automatic appeals of each of the justices during the first year of the new court's existence. Section III discusses the extraordinary change produced by the Governor's appointees and analyzes the automatic appeals decided this year to determine how the change was wrought.

This Article ends in Section IV with a discussion of the dramatic difference between the behavior of the Bird and Lucas courts in death penalty appeals. Specifically, Section IV considers whether the courts' differences are attributable to permissible differences in the justices' legal perspectives or to their submission to power politics and the People's demand that executions resume in California.³⁵

I. A BRIEF HISTORY OF CALIFORNIA DEATH PENALTY LEGISLATION

A. 1850 to 1972

When California adopted its first penal statutes in 1850, the statutes defined murder as a single offense punishable, as it was at common law, by a mandatory sentence of death.³⁶ Six years later, following the

³³ See *infra* text accompanying notes 67-78.

³⁴ See *infra* text accompanying notes 79-98.

³⁵ It is also possible, of course, that a combination of these two propositions explains the dramatic turnabout of the reversal rate in automatic appeals.

³⁶ Act of Apr. 16, 1850, ch. CXXV, 1850-1853 Cal. Comp. Laws 638. The pertinent sections read:

Section 19. Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

Section 20. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

example set by the Pennsylvania Legislature in 1794,³⁷ California divided murder into two degrees: first and second degree murder.³⁸ These two degrees of murder were distinguished by the same criteria used in the original Pennsylvania statute.³⁹

The definitions of murder, of murder in the first and second degrees, and the mandatory punishment of death for murder in the first degree as they stood in 1856 were carried forward into the Penal Code of 1872, with only minor changes in phrasing.⁴⁰ Two years later, Califor-

Section 21. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. The punishment of any person convicted of the crime of murder shall be death.

Id. §§ 19-21.

³⁷ 1794 Pa. Laws ch. 257, § 2; see Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 764-73 (1949); Poulos, *supra* note 2, at 147-48.

³⁸ Act approved Apr. 19, 1856, ch. CXXXIX, 1856 Cal. Stat. 219. Section 2 reads, in pertinent part:

All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree. . . . Every person convicted of murder of the first degree, shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the State Prison for a term not less than ten years and which may extend to life.

Id. at 219.

³⁹ The Pennsylvania statute provided, in relevant part:

That all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree

1794 Pa. Laws ch. 257, § 2. Aside from the omission of the word "by" in front of the phrase "lying in wait," and the spelling of "willful," the only meaningful change in the California version is the addition of torture as one means to classify a murder as first degree rather than second degree murder. This method of classifying murders is commonly known as the "Pennsylvania formula."

⁴⁰ CAL. PENAL CODE §§ 187-190 (1872). These sections read:

Section 187. Murder is the unlawful killing of a human being, with malice aforethought.

Section 188. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life

nia adopted an innovation enacted in Tennessee in 1838:⁴¹ mandatory capital punishment for first degree murder was abolished, and in its place the sentencing authority, whether judge or jury, was given unfettered discretion to choose between the penalty of death and a term of imprisonment.⁴² Although there were changes in the definition of the degrees of murder from time to time,⁴³ the basic structure of the substantive law governing the death penalty for first degree murder remained unchanged for nearly 100 years.⁴⁴ Eligibility for the death penalty was determined by the substantive law of the capital offense of first degree murder, and the death penalty was imposed by the exercise of virtually unfettered discretion in the sentencing authority.⁴⁵

There was, however, one significant change made in the procedures for invoking the death penalty. In 1957, capital trials were bifurcated. The sentencing portion of the capital trial was severed from the guilt determination process. The determination of guilt or innocence of the capital offense, first degree murder in our present inquiry, was decided first. If the jury convicted the defendant of first degree murder, then

of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Section 189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, is murder of the first degree; and all other kinds of murder are of the second degree.

Section 190. Every person guilty of murder in the first degree shall suffer death, and every person guilty of murder in the second degree is punishable by imprisonment in the State Prison not less than ten years.

Id.

⁴¹ Act of Jan. 10, 1838, ch. 29, 1837-1838 Tenn. Acts; see Poulos, *supra* note 2, at 148-55.

⁴² As amended in 1874, CAL. PENAL CODE § 190 read:

Every person guilty of murder in the first degree, shall suffer death or confinement in the State Prison for life, at the discretion of the jury, trying the same; or upon a plea of guilty, the [c]ourt shall determine the same; and every person guilty of murder in the second degree, is punishable by imprisonment in the State Prison not less than ten years.

1873-1874 AMENDMENTS TO THE CODES OF CALIFORNIA 315 (Bancroft & Co. 1874).

⁴³ For example, the same year that the legislature abolished mandatory capital punishment for first degree murder, it also changed the definition of that offense to include a homicide committed during the perpetration or attempt to perpetrate the felony of mayhem within the first degree felony-murder rule. *Id.* at 314.

⁴⁴ Since the sentencing decision was discretionary, no substantive or procedural laws constrained the sentencing authority's decision with respect to capital punishment.

⁴⁵ *E.g.*, *McGautha v. California*, 402 U.S. 183 (1971).

there was a subsequent penalty proceeding before the same jury (unless certain specified situations occurred) to fix the punishment.⁴⁶ These two portions of the capital trial were commonly known as the “guilt phase” and the “penalty phase.”⁴⁷

These changes were produced by the legislative process over a considerable period of time, after much debate, and presumably with the support of a sufficient percentage of the populace both to warrant the legislation and to withstand its repeal. Indeed, despite public opinion polls in the 1960s indicating that, by a small margin, more citizens opposed capital punishment than supported it, repeal efforts were not successful in the California Legislature. The death penalty remained as one of the most controversial features of California criminal law throughout the 1960s.

B. 1972 to 1978

1. *Anderson* and *Furman*

Dissatisfied with the California Legislature’s response to demands for the abolition of capital punishment and for further reform of capital procedures, and undoubtedly encouraged by the success of the civil rights movement and the criminal law revolution,⁴⁸ reformers began to raise constitutional challenges to both capital punishment and the procedures used to impose it.⁴⁹ Finally, in 1972, in *People v. Anderson*,⁵⁰

⁴⁶ Act approved July 8, 1957, ch. 1968, 1957 Cal. Stat. 3509 (codified at former CAL. PENAL CODE § 190.1). For a short period of time, California operated under a mandatory capital punishment statute. See *infra* text accompanying notes 67-98. Since 1957, however, California continually has decided the question of the imposition of the death penalty in a bifurcated trial, the two portions of which continue to be known as the “guilt” and “penalty” phases.

⁴⁷ One should note that if the defendant imposes a plea of not guilty by reason of insanity, then the capital trial is trifurcated. The determination of the sanity issue occurs in a separate proceeding following the guilt phase, but preceding the penalty phase of the capital trial. This third phase of the trial is known as the “sanity phase.” CAL. PENAL CODE §§ 190.1(c), 1026 (West 1988 & Supp. 1989). Since the law applicable to the sanity phase of the trial applies to all criminal cases, all criminal cases will have bifurcated trials when a “not guilty by reason of insanity” plea is entered. If the case is capital, the trial will be trifurcated.

⁴⁸ For a general discussion of the evolution of the thinking on this topic, see Poulos, *supra* note 2, at 146-72.

⁴⁹ See, e.g., *People v. McGautha*, 70 Cal. 2d 770, 452 P.2d 650, 76 Cal. Rptr. 434 (1969) and cases cited therein; *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968); *People v. Seiterle*, 65 Cal. 2d 333, 420 P.2d 217, 54 Cal. Rptr. 745 (1966); *People v. Duncan*, 51 Cal. 2d 523, 334 P.2d 858 (1959); see also *McGautha v. California*, 402 U.S. 183 (1971).

the California Supreme Court held that capital punishment was invalid per se under the California Constitution.⁵¹ Four months and a few days later, the United States Supreme Court held that unguided jury discretion in capital cases violated the cruel and unusual punishments clause of the eighth amendment as made applicable to the states by the due process clause of the fourteenth amendment.⁵² While *Furman* invalidated the procedure used in California to employ capital punishment (unguided sentencing discretion), the rationale of the *Anderson* decision prohibited the use of capital punishment for any crime under any circumstances. In other words, *Anderson* totally abolished the death penalty in California. What the California Legislature consistently refused to do by legislation, the California Supreme Court did under its constitutional power to interpret the state constitution.

Immediately after the opinion was announced in *Anderson*, the proponents of capital punishment began the process of restoring the death penalty in California. Believing that the California Legislature would fail to propose an appropriate constitutional amendment, they bypassed the legislative process for proposing constitutional amendments and took the question directly to the People of California in the form of an amendment to the constitution by the initiative process. A proposed amendment to article I, section 6 began circulating within weeks.⁵³ It expressly authorized capital punishment. *Anderson* thus would be overruled by constitutional amendment. The initiative qualified for the ballot on March 23, 1972, as Proposition 17.⁵⁴ Much of the rhetoric

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

⁵¹ In *Anderson*, Justice Wright wrote for a nearly unanimous court:

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

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

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

⁵² *Furman v. Georgia*, 408 U.S. 238 (1972). *Anderson* was decided on February 18, 1972, and *Furman* on June 29, 1972.

⁵³ See *People v. Superior Court (Engert)*, 31 Cal. 3d 797, 808, 647 P.2d 76, 82, 183 Cal. Rptr. 800, 806 (1982).

⁵⁴ Proposition 17 reads:

PROPOSED AMENDMENT TO ARTICLE I, Sec. 27.

All statutes of this state in effect on February 17, 1972, requiring, au-

supporting Proposition 17 consisted of attacks on both the California Supreme Court (for its opinion in *Anderson*) and the United States Supreme Court (for its subsequent decision in *Furman*).

Proposition 17 was approved by sixty-seven percent of those voting in the general election on November 7, 1972.⁵⁵ With the passage of Proposition 17, the death penalty was no longer unconstitutional per se under the California Constitution.⁵⁶

Having removed the impediment created by the California Constitution, and having been vindicated by the vote of the People, the supporters of capital punishment returned to the legislative halls. Given the ease by which the voters of California adopted Proposition 17, the California Legislature turned its attention to drafting a death penalty statute which would comply with the cruel and unusual punishments clause of the eighth amendment as interpreted in *Furman*. *Furman* was unequivocal on only two points: unguided discretion to impose capital punishment upon conviction of a capital offense violated the eighth amendment's cruel and unusual punishments clause; and the federal constitution, unlike the California Constitution as interpreted by the *Anderson* court, did not render capital punishment per se invalid.⁵⁷ Capital punishment thus could be restored in California under *Furman*, so long as the sentencing authority was not given unfettered discretion to choose between life and death. What was unresolved, how-

thorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

PROPOSED AMENDMENTS TO CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS, General Election, Tues., Nov. 7, 1972, Part II — app. at 20.

⁵⁵ *Rockwell v. Superior Court*, 18 Cal. 3d 420, 446 n.1, 556 P.2d 1101, 1117 n.1, 134 Cal. Rptr. 650, 666 n.1 (1976) (Clark, J., concurring). Justice Clark cited these statistics in noting that the legislature might draft another death penalty statute to express the will of the People. *Id.*

⁵⁶ *See People v. Superior Court (Engert)*, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).

⁵⁷ The concurring opinions of Justices Brennan and Marshall concluded that capital punishment was per se unconstitutional under the cruel and unusual punishments clause. The three remaining opinions supporting the Court's terse per curiam opinion reached different conclusions. *See Furman v. Georgia*, 408 U.S. 238, 240-57 (1972) (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

ever, was whether *any* discretion could be conferred on the sentencing authority after *Furman*.⁵⁸

Two very different interpretations of *Furman* emerged in states wishing to restore capital punishment. The minority view emphasized the fact that the discretion conferred in the pre-*Furman* death penalty legislation was virtually unfettered. According to this view, the unguided nature of the discretion produced the constitutional flaw. Since individualized capital sentencing demands a measure of discretion, individualized capital sentencing would be constitutionally permissible so long as a way could be found to guide the sentencing authority's discretion by appropriate legal standards.⁵⁹ This minority of states looked to the American Law Institute's Model Penal Code for guidance and patterned their new death penalty legislation on Section 210.6 of the Code.⁶⁰ Between June 29, 1972 (the date *Furman* was announced) and July 2, 1976 (the date the Supreme Court first addressed the constitutionality of death penalty legislation enacted in response to *Furman*), twelve states enacted legislation patterned on Model Penal Code Section 210.6.⁶¹ California was not one of these states.

The National Association of Attorneys General⁶² and a majority of state legislatures focused on the existence of any discretion to impose capital punishment on some but not all who were convicted of a given capital offense.⁶³ Under their analysis of *Furman*, "a mandatory death penalty for specified offenses" was the "alternative considered most preferred as best withstanding constitutional attack."⁶⁴ Individualized sentencing for capital murder, first begun in Tennessee in 1838,⁶⁵ would have to be abandoned for it is dependent upon a measure of discretion and, according to the majority's analysis, the cruel and unusual punishments clause embargoed all discretion in capital sentencing. Following this view, twenty-two states reverted to the common law model: everyone convicted of a capital offense would be automatically sentenced to death.⁶⁶

⁵⁸ See Poulos, *supra* note 2, at 172-80.

⁵⁹ *Id.* at 180-200.

⁶⁰ *Id.* at 192-200.

⁶¹ *Id.* at 199.

⁶² *Id.* at 198-99.

⁶³ *Id.* at 186-92, 198-200.

⁶⁴ THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, SUMMARY OF PROCEEDINGS 1973, at 21, 60.

⁶⁵ See *supra* note 41 and accompanying text.

⁶⁶ See Poulos, *supra* note 2, at 199.

2. The 1973 Statute

Espousing the views of the majority, the California Legislature enacted a mandatory capital punishment statute in 1973.⁶⁷ Since the enactment of the first penal laws in California in 1850, eligibility for the death penalty for a homicide was determined by the definition of the capital offense of murder, and later by the definition of first degree murder. When the legislature wished to alter the scope of death eligibility for the crime of murder, the substantive offense was amended. But in 1874, California conferred unguided discretion on the sentencing authority to assess the appropriate punishment.⁶⁸ After that change, death eligibility was dependent upon two factors: a finding that the defendant was guilty of the charged capital offense; and a determination by the sentencing authority, based on the record in the case, that the death penalty was warranted.⁶⁹ The 1973 mandatory death penalty statute thus returned the law to the way it stood prior to the amendment in 1874.

But the resurrection of prior California law had a distinctly modern patina. The 1973 mandatory death penalty statute formally departed from the traditional way of defining death eligibility in California. The definition of the capital offense, first degree murder, was not changed. Instead, death eligibility turned on a conviction of first degree murder committed in one or more of five enumerated "special circumstances."⁷⁰ To be death eligible for a homicide, a defendant first must be convicted of first degree murder.⁷¹ Then if one or more of the enumerated "special circumstances" were charged in the accusatory pleading, the "truth" of the charged special circumstance was to be determined in a further proceeding in which the burden of proof beyond a reasonable doubt would be borne by the prosecution.⁷² Upon a finding by the trier of fact that a special circumstance was true, the defendant would auto-

⁶⁷ Act of Sept. 24, 1973, ch. 719, 1973 Cal. Stat. 1297 (codified at former CAL. PENAL CODE §§ 190-190.2) [hereafter 1973 Mandatory Death Penalty Statute].

⁶⁸ See *supra* note 42 and accompanying text.

⁶⁹ For a general discussion of the effect of conferring unguided sentencing discretion on the substantive law of the capital offense, see Poulos, *supra* note 2, at 147-58.

⁷⁰ 1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2).

⁷¹ As amended by the 1973 Act, § 190 provided as follows: "Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in § 190.2 have been charged and found to be true in the manner provided in § 190.1." *Id.* § 2 (codified at former CAL. PENAL CODE § 190).

⁷² *Id.* § 4 (codified at former CAL. PENAL CODE § 190.1).

matically receive a sentence of death.⁷³

Although the terminology was different and the truth or untruth of the charged special circumstances were determined in a proceeding that followed the determination of guilt of first degree murder,⁷⁴ the five enumerated special circumstances functioned in precisely the same way as the definitional elements of the crime of first degree murder. They defined eligibility for the death penalty in exactly the same way as the elements of first degree murder defined death eligibility under the law as it stood on the day that the Penal Code of 1872 became effective.⁷⁵ And since the punishment flowed axiomatically from a finding of the "truth" of a charged special circumstance, the special circumstances were undeniably rules of substantive law, just as the definitional rules that distinguish murder in the first degree from murder in the second degree are rules of substantive law. In other words, the special circumstances functioned to divide the crime of first degree murder into a capital crime and a noncapital crime in precisely the same way that the rules of first degree murder served to divide the old capital offense of murder⁷⁶ into a capital offense (first degree murder) and a noncapital offense (second degree murder). The newly defined offense of first degree murder with a special circumstance found to be true just as well could have been called "capital murder." In the words of the California Supreme Court, "the 'special circumstances' enumerated in section 190.2 are . . . aggravating factors creating categories of first degree murder for which death is the prescribed penalty."⁷⁷

The special circumstances enumerated in the 1973 mandatory capital punishment statute also had the familiar structure of a rule of substantive law defining a given offense.⁷⁸ Consequently, litigating these special circumstances was exactly like litigating substantive rules of law. In short, there was no real distinction between the elements of a special circumstance and the elements of any other crime beyond the unique

⁷³ *Id.* § 5 (codified at former CAL. PENAL CODE § 190.2).

⁷⁴ The requisite subsequent proceeding became known as the "special circumstance phase" of the capital trial.

⁷⁵ See *supra* text accompanying notes 40-44.

⁷⁶ See *supra* text accompanying note 40.

⁷⁷ *Rockwell v. Superior Court*, 18 Cal. 3d 420, 429, 556 P. 2d 1101, 1105, 134 Cal. Rptr. 650, 654 (1976). The quoted passage reads in full: "The People do not claim that the 'special circumstances' enumerated in § 190.2 are other than aggravating factors creating categories of first degree murder for which death is the prescribed penalty." *Id.*

⁷⁸ 1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2).

label "special circumstance."

As prosecutions under the 1973 mandatory death penalty statute were working their way to the California Supreme Court,⁷⁹ the United States Supreme Court decided the constitutionality of death penalty legislation enacted in response to *Furman* in Georgia,⁸⁰ Florida,⁸¹ Texas,⁸² North Carolina,⁸³ and Louisiana.⁸⁴ The Georgia, Florida and Texas⁸⁵ statutes followed the minority view identified above.⁸⁶ These statutes retained individualized capital sentencing and guided sentencing discretion by the use of both aggravating and mitigating circumstances. The Supreme Court upheld these statutes.⁸⁷ On the other hand, North Carolina and Louisiana followed the majority reading of *Furman*⁸⁸ and enacted mandatory death penalty legislation.⁸⁹ The United States Supreme Court invalidated these mandatory statutes on the ground that the eighth amendment requires individualized capital sentencing in which factors mitigating both the crime and the personal turpitude of the offender are taken into account.⁹⁰

⁷⁹ See, e.g., Salzman, *A Personal Perspective*, 7 CAL. J. 288 (1976); *Significant Court Actions, A Death Penalty Question*, 7 CAL. J. 284 (1976).

⁸⁰ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁸¹ See *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁸² See *Jurek v. Texas*, 428 U.S. 262 (1976).

⁸³ See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁸⁴ See *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁸⁵ The Texas statute differed materially from the statutes enacted in Georgia and Florida. However, the Court treated the Texas statute as though it expressly provided for a sufficient measure of individualized capital sentencing to pass muster under the eighth amendment's cruel and unusual punishments clause. See *Jurek*, 428 U.S. at 276.

⁸⁶ See *supra* text accompanying notes 59-61.

⁸⁷ See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek*, 428 U.S. 262.

⁸⁸ See *supra* text accompanying notes 62-66.

⁸⁹ See Poulos, *supra* note 2, at 200-26 (discussing mandatory capital punishment legislation enacted in North Carolina, Louisiana, and 20 other states that adopted mandatory capital punishment in response to *Furman*).

⁹⁰ See *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976) (stating that statute must provide "meaningful opportunity for consideration of mitigating factors presented by circumstances of the particular crime or by the attributes of the individual offender"); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (stating that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death").

In *Roberts* and *Woodson*, the Court articulated three reasons for holding that mandatory capital punishment was unconstitutional: (1) mandatory capital punishment exceeded the limits imposed by contemporary standards of decency; (2) mandatory capi-

Shortly after the Supreme Court filed its opinions in the 1976 cases, the California Supreme Court pondered the question of the constitutionality of the 1973 mandatory death penalty statute in *Rockwell v. Superior Court*.⁹¹ The court framed the issue as follows:

No argument is made that the "special circumstances" delineated in section 190.2 fail to meet the court's criterion that those aggravating circumstances which warrant capital punishment be specifically set forth. Our inquiry is therefore directed to whether the "sentencing authority" is given the opportunity to consider mitigating as well as aggravating factors and whether it has sufficient guidance as to what mitigating factors should be considered, in deciding whether to impose the death penalty. It follows that we must also determine whether the defendant is afforded adequate opportunity to present to the sentencing authority evidence on and argument regarding these mitigating factors and their relevance to the appropriate penalty.⁹²

Rejecting the Attorney General's suggestion that the mandatory death penalty statute be amended by judicial decision to meet the requirements of the eighth amendment,⁹³ the court concluded that,

[Because section 190 through 190.3 fail to provide] for consideration of evidence of mitigating circumstances as to the offense or in the personal characteristics of the defendant, and afford no specific detailed guidelines as to the relevance of such evidence in determining whether death is an appropriate punishment, they permit arbitrary imposition of the death

tal punishment did not resolve the question of unbridled sentencing discretion, but simply "papered over" the problem; and (3) mandatory capital punishment eschews individualized sentencing where factors mitigating both the crime and the personal turpitude of the offender may be taken into account in assessing the penalty. *Roberts*, 428 U.S. at 332-36; *Woodson*, 428 U.S. at 298, 302-03; see Poulos, *supra* note 2, at 226-34 (discussing *Roberts* and *Woodson* and their impact on mandatory capital punishment statutes). Nevertheless, the principal reason for invalidating mandatory capital punishment schemes is "the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures." *Sumner v. Shuman*, 483 U.S. 66, 85 (1987); see Poulos, *supra* note 2, at 232-34.

⁹¹ 18 Cal. 3d 420, 556 P. 2d 1101, 134 Cal. Rptr. 650 (1976).

⁹² *Id.* at 437-38, 556 P.2d at 1111, 134 Cal. Rptr. at 660.

⁹³ *Id.* at 444-45, 556 P.2d at 1116, 134 Cal. Rptr. at 665. Even the concurring opinion of Justice Clark, joined by Justice McComb, rejected the Attorney General's submission:

As Justice Holmes observed, hard cases tend to make bad law. Because our Legislature so clearly intended to enact a constitutional death penalty statute, and because its failure to do so was so clearly caused by the *Furman* court's failure to provide intelligible guidelines for legislation, one is tempted to accept the Attorney General's frank invitation to save the law by rewriting it under the guise of interpretation. However, the courts must not, in this case or any other, act as a super-legislature.

Id. at 448-49, 556 P.2d at 1118, 134 Cal. Rptr. at 667.

penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.⁹⁴

Although the decision in *Rockwell* virtually was compelled by the Supreme Court's 1976 death penalty decisions,⁹⁵ proponents of capital punishment now began to criticize the California Supreme Court for invalidating capital punishment under the guise of the eighth amendment. *Rockwell's* holding frustrated the popular will. Thus, to the People,⁹⁶ *Rockwell* was not only wrong, it also represented an illegitimate exercise of power both by the United States Supreme Court⁹⁷ and by the California Supreme Court.⁹⁸

3. The 1977 Legislation

Eight months and a few days after the California Supreme Court filed its opinion in *Rockwell*,⁹⁹ the California Legislature enacted death penalty legislation specifically designed to comply with the 1976 decisions of the United States Supreme Court.¹⁰⁰ In light of the overwhelming support for Proposition 17 at the general election on November 7, 1972, there was little doubt that new death penalty legislation would be adopted in California in response to *Rockwell* and the United States Supreme Court's 1976 death penalty decisions. The argument largely concerned the details of the new law. Opponents of capital punishment sought to limit the law as severely as possible, whereas proponents wanted to expand the law to the fullest limits permitted by the rationale of the Supreme Court's 1976 cases. The result was a compromise that satisfied neither faction.¹⁰¹

The penalty phase of the capital trial introduced into California law

⁹⁴ *Id.* at 445, 556 P.2d at 1116, 134 Cal. Rptr. at 665.

⁹⁵ See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). For a discussion of these cases, see *supra* note 90.

⁹⁶ In contrast to the California Supreme Court, the courts of North Carolina, Louisiana, and Oklahoma had upheld mandatory capital punishment statutes under *Furman* before the United States Supreme Court filed its opinions in *Roberts* and *Woodson*. See, e.g., *State v. Roberts*, 319 So. 2d 317 (La. 1975); *State v. Woodson*, 287 N.C. 578, 215 S.E.2d 607 (1975); *Williams v. State*, 542 P.2d 554 (Okla. Crim. App. 1975).

⁹⁷ *Woodson*, 428 U.S. 280; *Roberts*, 428 U.S. 325; see *supra* note 90.

⁹⁸ *Rockwell v. Superior Court*, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976); see *supra* notes 91-95 and accompanying text.

⁹⁹ *Rockwell* was decided on December 7, 1976.

¹⁰⁰ Act of August 11, 1977, ch. 316, 1977 Cal. Stat. 1256 [hereafter 1977 Death Penalty Legislation].

¹⁰¹ See *infra* note 129.

in 1957¹⁰² was repealed by the 1973 mandatory death penalty statute.¹⁰³ The 1977 legislation restored the penalty phase as a pivotal feature of capital cases.¹⁰⁴ Using the pattern established by the 1973 statute,¹⁰⁵ eligibility for the death penalty was based on a conviction of first degree murder coupled with a finding of truth of a least one of the enumerated special circumstances.¹⁰⁶

The special circumstances defined in the 1977 legislation were substantially similar to or identical with the special circumstances defined in the 1973 mandatory statute. Both defined special circumstances for a contract killer,¹⁰⁷ the killing of a peace officer,¹⁰⁸ the killing of a wit-

¹⁰² See Act approved July 8, 1957, ch. 1968, 1957 Cal. Stat. 3509; see also *supra* note 46.

¹⁰³ 1973 Mandatory Death Penalty Statute, *supra* note 67, § 3. The penalty phase, being entirely superfluous in a mandatory death penalty scheme, was repealed. The "special circumstance phase" replaced the penalty phase of the capital trial. *Id.* § 4. The purpose for *routinely* litigating the "truth" of the charged special circumstances in a separate proceeding which followed the determination of guilt of first degree murder is not apparent. Nor has this author been able to discover a reason for using this procedure.

¹⁰⁴ 1977 Death Penalty Legislation, *supra* note 100, §§ 7, 11-12 (codified at former CAL. PENAL CODE §§ 190.1, 190.3-.4).

¹⁰⁵ See *supra* text accompanying notes 70-78.

¹⁰⁶ 1977 Death Penalty Legislation, *supra* note 100, § 7 (codified at former CAL. PENAL CODE § 190.1).

¹⁰⁷ The provision in the 1977 legislation states: "(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim . . ." 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(a)).

The equivalent provision in the 1973 statute provided: "(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. 'An agreement,' as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim." 1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2(a)).

Both provisions are ambiguous regarding the liability of the person hiring the actual killer. The remaining special circumstances in the 1973 statute were limited to a defendant who "personally committed the act which caused the death of the victim." *Id.* Therefore, a strong argument exists that both the person who hires the killer and the hired killer fall within the scope of the "contract-killer" special circumstance. Otherwise, there would be little point in placing the contract-killer provision in a separate subsection from the remaining special circumstances. The same argument applies to the 1977 legislation. All of the other special circumstances either apply to a defendant who "physically aided or committed such act or acts causing death" or require that the defendant be "personally present during the commission of the act or acts causing death, and with intent to cause death [the defendant] physically aided or committed

ness,¹⁰⁹ a murder during one of five enumerated felonies,¹¹⁰ a prior

such act or acts causing death” 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(b)-(c)). It seems that the purpose served by placing the contract-killer special circumstance in a separate subsection was to permit application of that special circumstance to the person who hires the killer, even though she is not personally present or did not physically aid or commit the act or acts causing death. Thus, despite the change of wording in the contract-killer special circumstance, between the 1973 and the 1977 statutes, arguably the statutes had exactly the same scope: both the hired killer and the person who hired the killer fall within this special circumstance.

¹⁰⁸ The provision in the 1977 legislation states:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(c)(1)).

The equivalent provision in the 1973 statute provided:

(1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2(b)(1)).

The special circumstance in the 1977 legislation apparently copied the 1973 statute with one amendment. The 1977 legislation expanded the definition of “peace officer” by including the officers defined in subdivision (b) of section 830.2, and in subdivision (a) or (b) of section 830.3. Otherwise, the two provisions use precisely the same language.

¹⁰⁹ The provision in the 1977 legislation states:

(2) The murder was willful, deliberate, and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(c)(2)).

The equivalent provision in the 1973 statute provided:

(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2(b)(2)).

These two provisions are identical except for the last qualifying phrase in the 1977 provision. This phrase significantly narrows the scope of the 1977 special circumstance.

murder conviction,¹¹¹ and a multiple-murder.¹¹² The 1977 legislation added two special circumstances not found in the 1973 statute: murder perpetrated by means of a destructive device or explosive,¹¹³ and mur-

¹¹⁰ The provision in the 1977 legislation states:

(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;

(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(c)(3)). The special circumstance provision in the 1973 statute is virtually identical. *See* 1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2(b)(3)).

¹¹¹ *See infra* note 112.

¹¹² The provision in the 1977 legislation reads:

(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(c)(5)).

The equivalent provision in the 1973 statute provided:

(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2(b)(4)).

The difference in the wording of these two provisions appears to be purely stylistic.

¹¹³ The 1977 legislation defines this special circumstance as: "(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive." 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(b)).

der by torture.¹¹⁴

The 1977 legislation also expanded the scope of the special circumstances in another important way. The 1973 mandatory capital punishment statute limited the special circumstances to defendants convicted of first degree murder who "personally committed the act which caused the death of the victim,"¹¹⁵ with the single exception of the contract killer special circumstance.¹¹⁶ With a similar exception for the contract killer¹¹⁷ and for murder by means of a destructive device or explosive,¹¹⁸ the 1977 legislation expanded the remaining special circumstances to include defendants who were "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."¹¹⁹ The 1977 legislation thus expanded the scope of the special circumstances by including defendants who were personally present and who "physically" aided the commission of the act or acts causing death.¹²⁰ "Accomplices" had not been liable for the death penalty under the 1973 mandatory death penalty statute.¹²¹ Under the 1977 legislation, they now were eligible in some circumstances for the death penalty.¹²²

¹¹⁴ The 1977 legislation defines this special circumstance as: "The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain." *Id.* (codified at former CAL. PENAL CODE § 190.2(c)(4)).

¹¹⁵ 1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2(b)).

¹¹⁶ *Id.* (codified at former CAL. PENAL CODE § 190.2(a)).

¹¹⁷ 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(a)).

¹¹⁸ *Id.* (codified at former CAL. PENAL CODE § 190.2(b)). The reason for not requiring the defendant to be personally present for this special circumstance should be obvious.

¹¹⁹ *Id.* (codified at former CAL. PENAL CODE § 190.2(c)).

¹²⁰ There is one area in which the 1977 legislation also might have narrowed the scope of the special circumstances set forth in the 1973 statute. The 1973 statute required the defendant to personally commit the act which caused death, whereas the 1977 legislation required a defendant to be personally present and commit the act or acts causing death. If a defendant can personally commit an act without being personally present when the act is committed, then the 1977 legislation narrowed the liability from that provided by the 1973 statute. This author doubts that this was intended to restrict the liability of a defendant who personally commits the act causing death. Instead, it was probably meant to limit the liability of the defendant who "aided" another to commit the act or acts causing death.

¹²¹ *See* 1973 Mandatory Death Penalty Statute, *supra* note 67, § 5 (codified at former CAL. PENAL CODE § 190.2).

¹²² The 1977 legislation provides that except where death eligibility is predicated on either the contract-killer or the murder perpetrated by means of a destructive-device-or-

Despite the specific changes in the reach of the special circumstances defined in the 1977 legislation as compared to the 1973 statute, the purpose and function of the special circumstances were precisely the same in both laws. They defined eligibility for the death penalty as a matter of substantive criminal law in the same manner as the elements of the crime of first degree murder defined eligibility for the death penalty under the pre-*Anderson* law of California.¹²³ They effectively divided the crime of first degree murder into a capital offense (first degree murder with a special circumstance) and a noncapital offense. Conformity with the United States Supreme Court's 1976 death penalty decisions, and with *Rockwell*, was achieved by creating sentencing standards to be employed by the sentencing authority at the penalty phase of the capital trial. These standards are known as the "factors" or "circumstances" in aggravation and mitigation.¹²⁴ The 1977 legislation also specified the process by which the sentencing authority was to arrive at its decision:

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.¹²⁵

Finally, the 1977 legislation abolished the "special circumstance" phase of the 1973 mandatory death penalty statute as a necessary and separate phase of a capital trial, with one exception.¹²⁶ When the alleged special circumstance was a prior conviction of murder in the first or second degree, a special circumstance phase of the trial was re-

explosive special circumstances, "the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death." 1977 Death Penalty Legislation, *supra* note 100, § 13 (codified at former CAL. PENAL CODE § 190.5(b)). For the purposes of the foregoing provision, "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 or conduct he orders, initiates, or coerces the actual killing of the victim." *Id.* (codified at former CAL. PENAL CODE § 190.5(c)). All parties classified at common law as an accessory before the fact, a principal in the first degree, or a principal in the second degree are liable as principals in California. CAL. PENAL CODE § 31 (West 1988).

¹²³ See *supra* text accompanying notes 74-78.

¹²⁴ 1977 Death Penalty Legislation, *supra* note 100, § 11 (codified at former CAL. PENAL CODE § 190.3).

¹²⁵ *Id.*

¹²⁶ *Id.* § 7 (codified at former CAL. PENAL CODE § 190.1(a)).

tained.¹²⁷ Since special circumstances are distinguishable from the elements of first degree murder only by their respective names, it makes little sense to litigate the “truth” or “untruth” of the special circumstance in a separate proceeding. Accordingly, unless the prior-murder special circumstance is alleged in the case, the “truth” or “untruth” of the special circumstance is determined concurrently with the question of the guilt of the defendant of first degree murder in the guilt phase of the capital trial.¹²⁸ The obvious reason for making an exception for the prior-murder-conviction special circumstance is to protect the defendant from the prejudice inherent in learning that the defendant has been convicted previously of murder while the trier of fact is deciding the question of the defendant’s guilt of first degree murder. The legislature’s general abolition of the separate special circumstance phase of the capital trial further confirms that the special circumstances are simply capital offenses under another name.

The 1977 death penalty legislation thus embraced the basic structure of the 1973 statute. It amended several of the special circumstances. It added two additional special circumstances. It excised the provisions for an automatic sentence of death and restored the penalty phase and individualized capital sentencing from pre-*Furman* law, but it guided the sentencing authority’s decision by aggravating and mitigating factors.

4. The 1978 Death Penalty Initiative

Almost immediately, proponents of capital punishment in California abandoned the legislative halls and took to the streets. Their purpose was to repeal the 1977 legislation and replace it with a “stronger” statute enacted by the People through the initiative process.¹²⁹ State Sena-

¹²⁷ *Id.*

¹²⁸ The statute does not address the question of how multiple special circumstance allegations are to be tried when the “prior-murder” special circumstance is joined with one or more of the special circumstances that are to be tried concurrently with the question of the defendant’s guilt of first degree murder. To date, the court has not addressed this issue.

¹²⁹ Cynthia Roberts provides a glimpse of the compromise that produced the 1977 legislation. She helps to explain why capital punishment proponents angrily left the legislative halls and turned to the initiative process:

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

tor John V. Briggs, the sponsor of the Death Penalty Initiative, claimed:

The California citizenry wants a tough, effective death-penalty law to protect the state's families from ruthless killers. But every attempt to enact such a law has been thwarted by the powerful anti-capital punishment members of the Legislature. . . . The current law was drafted in such a way as to make it as weak and ineffective as possible . . . , but this initiative would give Californians the toughest death-penalty law in the country.¹³⁰

The 1978 Death Penalty Initiative, Proposition 7, qualified for the ballot on June 27, 1978. It was approved by seventy-two percent of the voters at the general election held on Tuesday, November 7, 1978.¹³¹ Except for crimes committed before its effective date,¹³² the 1978 Initia-

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

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

Roberts, *Court of Last Resort: The Assembly's Graveyard for Law-Enforcement Legislation*, 8 CAL. J. 197 (1977).

Unfortunately, much of the political debate about the restoration of capital punishment in California centered around "tough" and "weak" legislation and what would pass constitutional muster under the eighth amendment. *See supra* notes 99-101 and accompanying text. What California needed was a debate about the death penalty and public policy. But, for the most part, issues about the wisdom of capital punishment, public policy, and appropriate death penalty provisions were ignored in the race to restore capital punishment. *See Poulos, supra* note 2, at 198-200, 233-34.

¹³⁰ *California Journal Ballot Proposition Analysis*, 9 CAL. J. Special Report 4-5 (Oct. 1978) [hereafter *Ballot Proposition Analysis*].

¹³¹ Salzman, *Election '78 Post-Mortem*, 9 CAL. J. 386, 390 (1978).

¹³² Since the 1977 Death Penalty Legislation contained an urgency provision, it became effective on August 11, 1987, when the legislature passed the bill over Governor

tive currently governs capital punishment in California.¹³³

Senator Briggs' hyperbole promised a revolution. It delivered an altered death penalty statute. The structure of capital punishment law established in the 1977 legislation was maintained without change. Death eligibility remained dependent upon conviction of first degree murder and upon a finding of the truth of at least one of the enumerated special circumstances.¹³⁴ The "truth" or "untruth" of the special circumstances still was to be decided in the guilt phase of the capital trial with the familiar exception of the prior-murder-conviction special circumstance.¹³⁵ The special circumstances still functioned as rules of substantive law effectively subdividing the offense of first degree murder into a capital and a noncapital offense.¹³⁶ Once death eligibility is established in this manner, the sentence is determined in the familiar penalty phase of the trial¹³⁷ by weighing the aggravating factors against the mitigating factors.¹³⁸

The 1978 Initiative did make important changes within this established structure. Ten new special circumstances were added:¹³⁹ (1) mur-

Edmund G. Brown, Jr.'s veto and filed it with the Secretary of State. See 1977 Death Penalty Legislation, *supra* note 100, § 26. As an initiative measure, the 1978 Death Penalty Initiative became effective when the voters approved it on November 7, 1978. Since the 1978 Initiative cannot apply to a crime committed before its effective date, the 1977 legislation governs a capital crime committed between August 11, 1977 and November 7, 1978. See *People v. Easley*, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983); *People v. Haskett*, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982). A capital crime committed before August 11, 1978 is not subject to the death penalty because both the 1973 Mandatory Death Penalty Statute and its predecessor statutes are unconstitutional and because the 1977 legislation may not apply retroactively. See *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979).

¹³³ The 1978 Death Penalty Initiative is codified at CAL. PENAL CODE §§ 190-190.5 (West 1988 & West Supp. 1989).

¹³⁴ CAL. PENAL CODE §§ 190.1-2 (West 1988).

¹³⁵ *Id.* § 190.1(a)-(b).

¹³⁶ *Id.* § 190.1(b).

¹³⁷ *Id.* §§ 190.1(c), 190.3-4.

¹³⁸ *Id.* § 190.3.

¹³⁹ The 1977 legislation defined eight special circumstances. See *supra* text accompanying notes 107-14. The 1978 Initiative defines nineteen. See *infra* text accompanying notes 140-49. However, one of the special circumstances enumerated in the 1977 legislation was divided and its *actus reus* was narrowed in the 1978 Initiative. Former CAL. PENAL CODE § 190.2(b) defined a special circumstance in terms of a willful, deliberate, and premeditated murder "perpetrated by means of a destructive device or explosive." The 1978 Initiative defined two special circumstances in terms of a murder by "means of a destructive device, bomb, or explosive": when the device, bomb, or explosive was concealed and when the device, bomb, or explosive was mailed or delivered. CAL. PENAL CODE § 190.2 (a)(4), (6). Because the *actus reus* of both of these special circum-

der to prevent arrest or to escape from lawful custody;¹⁴⁰ (2) murder of a federal law enforcement officer;¹⁴¹ (3) murder of a fireman;¹⁴² (4) murder of a prosecutor;¹⁴³ (5) murder of a judge;¹⁴⁴ (6) murder of other specified government officials;¹⁴⁵ (7) an “especially heinous, atrocious, or cruel” murder;¹⁴⁶ (8) murder by lying in wait;¹⁴⁷ (9) murder because of the victim’s “race, color, religion, nationality or country of origin;”¹⁴⁸ and (10) murder by poison.¹⁴⁹

The 1978 Initiative also substantially amended the *actus reus* of five of the special circumstances shared with the 1977 legislation. Each of these changes enlarged the scope of the special circumstance beyond what it had been under the 1977 legislation. The “contract-killer” special circumstance¹⁵⁰ was replaced by a murder for “financial-gain” special circumstance.¹⁵¹ The murder of a peace officer special circumstance was changed by expanding the definition of “peace officer.”¹⁵² “Witness-murder” was expanded by including within its scope the intentional killing of a witness “in retaliation for his testimony in any criminal proceeding.”¹⁵³ The “felony-murder” special circumstance was expanded in two ways. First, the list of qualifying felonies was augmented by adding four felonies (sodomy, oral copulation, arson, and train wrecking).¹⁵⁴ Second, the limitations on the qualifying felonies of kidnapping,¹⁵⁵ rape,¹⁵⁶ and burglary¹⁵⁷ were removed. Finally, the “tor-

stances is included within the physical acts prohibited by the corresponding single special circumstance in the 1977 legislation, the 1978 Initiative added ten, not eleven, special circumstances.

¹⁴⁰ CAL. PENAL CODE § 190.2(a)(5) (West 1988).

¹⁴¹ *Id.* § 190.2(a)(8).

¹⁴² *Id.* § 190.2(a)(9).

¹⁴³ *Id.* § 190.2(a)(11).

¹⁴⁴ *Id.* § 190.2(a)(12).

¹⁴⁵ *Id.* § 190.2(a)(13).

¹⁴⁶ *Id.* § 190.2(a)(14).

¹⁴⁷ *Id.* § 190.2(a)(15).

¹⁴⁸ *Id.* § 190.2(a)(16).

¹⁴⁹ *Id.* § 190.2(a)(19).

¹⁵⁰ See 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(a)); see also *supra* note 107.

¹⁵¹ See CAL. PENAL CODE § 190.2(a)(1) (West 1988).

¹⁵² Compare 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified as former CAL. PENAL CODE § 190.2(c)(1)) with CAL. PENAL CODE § 190.2(a)(7) (West 1988).

¹⁵³ CAL. PENAL CODE § 190.2(a)(10) (West 1988).

¹⁵⁴ *Id.* § 190.2(a)(17)(iv), (vi), (viii), (ix).

¹⁵⁵ The kidnapping felony in the 1977 legislation contained the following limitation: “Brief movements of a victim which are merely incidental to the commission of another

ture-murder" special circumstance was amended by the addition of the following sentence: "For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration."¹⁵⁸

Of equal if not greater importance, the *mens rea* requirements specified in the special circumstances carried forward from the 1977 legislation were substantially altered. The general requirement that the defendant act with the "intent to cause death" was repealed.¹⁵⁹ In

offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph." 1977 Death Penalty Legislation, *supra* note 100, Section 9 (codified at former CAL. PENAL CODE § 190.2(c)(3)(ii)). The 1978 Initiative's "felony-murder" provision omitted this limitation. See CAL. PENAL CODE § 190.2(a)(17)(ii) (West 1988).

¹⁵⁶ The felony of rape in the 1977 legislation applied only to "[r]ape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261." 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(c)(3)(iii)). The 1978 Initiative's equivalent provision applied to any "[r]ape in violation of Section 261." CAL. PENAL CODE § 190.2(a)(17)(iii) (West 1988).

¹⁵⁷ The felony-murder special circumstance in the 1977 legislation specified the felony of burglary, but limited the qualifying offense to burglary "in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape." 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(c)(3)(v)). The equivalent provision in the 1978 Initiative reads, "Burglary in the first or second degree in violation of Section 460." CAL. PENAL CODE § 190.2(a)(17)(vii) (West 1988).

¹⁵⁸ CAL. PENAL CODE § 190.2(a)(18) (West 1988).

¹⁵⁹ For the full text of the general requirement of intent, see 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2 (b)-(c)). This general requirement expressly applied to all of the special circumstances except for the "contract killer" and the "destructive device or explosive" special circumstances. *Id.* (codified at former CAL. PENAL CODE § 190.2(a)-(c)). This general provision, however, was frequently redundant. Of the eight special circumstances enumerated in the 1977 legislation, four required that the murder be "willful, deliberate, and premeditated." *Id.* (codified at former CAL. PENAL CODE § 190.2(c)(1)-(4)). Since the term "willful murder" is an intent-to-kill murder, the general requirement added nothing to these special circumstances. See *People v. Wiley*, 18 Cal. 3d 162, 170, 554 P.2d 881, 885, 133 Cal. Rptr. 135, 139 (1976); CALIFORNIA JURY INSTRUCTIONS — CRIMINAL [CALJIC] No. 8.20 (1979 Revision) (4th rev. ed. 1979). The destructive-device-or-explosive special circumstance also specified that an "intent to cause death" was required. 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(b)). The "peace officer murder" special circumstance specifically required that the officer be "intentionally killed" so that the general provision added nothing to that special circumstance. *Id.* (codified at former CAL. PENAL CODE § 190.2(c)(1)). The contract-killer special circumstance contained an intentionality requirement as well. *Id.* (codified at former CAL. PENAL CODE § 190.2(a)).

addition, four special circumstances in the 1977 legislation, the “destructive-device-or-explosive,”¹⁶⁰ the witness-murder,¹⁶¹ the felony-murder,¹⁶² and the torture-murder¹⁶³ special circumstances, required that the murder be willful, deliberate, and premeditated. The 1978 Initiative eliminated each of these requirements. Instead, the two destructive-device-or-explosive special circumstances¹⁶⁴ now require that “the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.”¹⁶⁵ The witness-murder special circumstance requires that the witness be “intentionally killed for the purpose of preventing his testimony in any criminal proceeding.”¹⁶⁶ The provisions governing the felony-murder special circumstance in the 1978 Initiative are so ambiguously worded that its *mens rea* requirement cannot be easily determined,¹⁶⁷ although it is clear that the murder need not be willful, deliberate, and premeditated.¹⁶⁸ Lastly, the torture-murder special circumstance is written to require only an intentional murder,¹⁶⁹ though it is not without some ambiguity as well.

The 1978 Initiative made several other critical changes in the death eligibility of both perpetrators and accomplices. Under the 1977 legislation, except for the contract-killer and the destructive-device-or-explosive special circumstances, both perpetrators and accomplices had to meet the following criteria:

Thus the only special circumstances that could have been affected by the general provision that the defendant act with the intent to cause death were the prior-murder-conviction and the multiple-murder special circumstances. Understandably, the 1978 Initiative eliminated the general provision.

¹⁶⁰ 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(b)).

¹⁶¹ *Id.* (codified at former CAL. PENAL CODE § 190.2(c)(2)).

¹⁶² *Id.* (codified at former CAL. PENAL CODE § 190.2(c)(3)).

¹⁶³ *Id.* (codified at former CAL. PENAL CODE § 190.2(c)(4)).

¹⁶⁴ CAL. PENAL CODE § 190.2(a)(4), (6) (West 1988).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* § 190.2(a)(10). Under the 1977 legislation, the witness-murder special circumstance had required the same *mens rea* of intentional killing, but additionally required that the “murder was willful, deliberate, and premeditated.” 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(c)(2)). Under either statute, this special circumstance requires proof of a specific intent — that the purpose of the intentional killing was either to prevent the testimony of the witness in a criminal proceeding or in retaliation for such testimony. *See id.*; CAL. PENAL CODE § 190.2(a)(10) (West 1988).

¹⁶⁷ *See infra* notes 268-70 and accompanying text.

¹⁶⁸ *See* CAL. PENAL CODE § 190.2(a)(17) (West 1988) (felony-murder provision).

¹⁶⁹ *Id.* § 190.2(a)(18).

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 and any of the following additional circumstances exists . . .¹⁷⁰

The 1978 Initiative completely eliminated the requirement of personal presence. Thus, the rule with respect to the contract-killer and the destructive-device-or-explosive special circumstances in the 1977 legislation extended to all defendants, whether perpetrators or accomplices.

Accomplices were death eligible under the 1977 legislation (except for the contract-killer special circumstance) only if, in addition to personal presence, they physically aided in the commission of the act or acts causing death.¹⁷¹ The physical aid requirement was given a restrictive statutory definition in the 1977 statute:

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 or conduct he orders, initiates, or coerces the actual killing of the victim.¹⁷²

This physical aid limitation, like the requirement of personal presence, was abandoned as well. Accomplice liability, and perhaps the liability of some perpetrators,¹⁷³ is governed by the following expansive provision in the 1978 Initiative:

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 the state prison for a term of life without the possibility of parole, in any case in which one or more of the special

¹⁷⁰ 1977 Death Penalty Legislation, *supra* note 100, § 9 (codified at former CAL. PENAL CODE § 190.2(c)) (emphasis added). The same requirement of personal presence and intentional physical aid or actual commission is repeated in the section describing death penalty exemptions. *See id.* § 13 (codified at former CAL. PENAL CODE § 190.5(b)).

¹⁷¹ *Id.* § 9 (codified at former CAL. PENAL CODE § 190.2(b)).

¹⁷² *Id.* (codified at former CAL. PENAL CODE § 190.2(d)). This definition of physical aid was repeated in the section describing death penalty exemptions. *See id.* § 13 (codified at former CAL. PENAL CODE § 190.5(c)). The destructive-device-or-explosive special circumstance also provided for liability of the accomplice only if the accomplice "physically aided or committed such act or acts causing death." *See id.* § 9 (codified at former CAL. PENAL CODE § 190.2(b)). However, subsection (d) of § 190.2 and subsection (c) of § 190.5 did not apply to this provision.

¹⁷³ The section's ambiguity regarding perpetrators primarily involves the felony-murder special circumstance. This is the *Carlos-Anderson* debate between the Bird and Lucas courts discussed below. *See infra* text at notes 573-610.

circumstances enumerated . . . has been charged and specially found under Section 190.4 to be true.¹⁷⁴

The 1978 Initiative also made two important changes in the aggravating factors which guide the sentencing authority in the penalty phase of the trial. First, evidence of "any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence" was made admissible during the penalty phase.¹⁷⁵ Second, the following factor was added as new factor (c): "The presence or absence of any prior felony conviction."¹⁷⁶ In addition, factor (h) was amended to expressly include a mental "defect."¹⁷⁷ No other changes were made in the aggravating or mitigating factors.

The 1978 Initiative, however, did make two more critical changes in the penalty trial. The Initiative mandated that in the penalty phase:

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future [sic] 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.¹⁷⁸

This instruction became known as "the Briggs instruction."¹⁷⁹

The more crucial amendment changed how the penalty phase decision was to be made. The 1977 legislation provided that:

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.¹⁸⁰

The equivalent provision in the 1978 Initiative specifies a far different process:

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

¹⁷⁴ CAL. PENAL CODE § 190.2(b) (West 1988).

¹⁷⁵ *Id.* § 190.3.

¹⁷⁶ *Id.* § 190.3(c).

¹⁷⁷ *Id.* § 190.3(h). Factor (h) now states: "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication." *Id.*

¹⁷⁸ CAL. PENAL CODE § 190.3 (West 1988).

¹⁷⁹ *See infra* notes 583-84 and accompanying text.

¹⁸⁰ 1977 Death Penalty Legislation, *supra* note 100, § 11 (codified at former CAL. PENAL CODE § 190.3).

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.¹⁸¹

The 1978 Initiative also made changes in the procedures governing the retrial of a special circumstance upon which the jury could not agree and the retrial of the penalty issue when the penalty phase jury could not unanimously agree on a verdict. Under the 1977 legislation, when the jury “hung” on a special circumstance, the court was required to dismiss that jury and to order a new jury impaneled to try the issue.¹⁸² If the second jury could not agree, then the law required the court to dismiss the jury and to impose a punishment of confinement in state prison for life.¹⁸³ However, if the jury was unable to reach a unanimous verdict on the penalty, as distinguished from the special circumstance findings, the court was required to dismiss the jury and to impose the punishment of life imprisonment without possibility of parole.¹⁸⁴ The prosecution thus received two opportunities to prove a special circumstance if the first attempt produced a hung jury. If the second jury found the special circumstance to be true, the case then proceeded to the penalty phase of the trial. Only one attempt at a death verdict was allowed under the 1977 legislation. If the penalty jury could not agree, the court was required to sentence the defendant to life without possibility of parole.

With respect to the hung jury on a special circumstance, the 1978 Initiative conferred discretion on the court either to order a new jury impaneled or to impose a punishment of confinement in state prison for a term of twenty-five years.¹⁸⁵ The trial court was required to dismiss a penalty jury that was unable to reach a unanimous verdict and to impanel a new jury “to try the issue as to what the penalty shall be.”¹⁸⁶ If the second jury also failed to unanimously agree, the Initiative conferred discretion on the court either to order a new jury or to impose the punishment of life without possibility of parole.¹⁸⁷

The 1978 Initiative’s final change concerned the automatic applica-

¹⁸¹ CAL. PENAL CODE § 190.3 (West 1988) (emphasis added).

¹⁸² 1977 Death Penalty Legislation, *supra* note 100, § 12 (codified at former CAL. PENAL CODE § 190.4(a)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* (codified at former CAL. PENAL CODE § 190.4(b)).

¹⁸⁵ CAL. PENAL CODE § 190.4(a) (West 1988).

¹⁸⁶ *Id.* § 190.4(b).

¹⁸⁷ *Id.*

tion for modification of a death verdict. Under the 1977 legislation, if the penalty jury returned a verdict of death, the trial court was automatically required to make "an independent determination as to whether the weight of the evidence supports the jury's finding and verdicts."¹⁸⁸ The Initiative's provision omitted reference to the requirement that the judge make an "independent determination" and focused the inquiry on "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."¹⁸⁹ Although the Initiative's language suggests an important change, the California Supreme Court subsequently read the Initiative's provision to impose the duty on the trial court to make its own independent determination of the propriety of the death penalty by assessing the credibility of the witnesses, determining the probative force of the testimony, and weighing the evidence in light of applicable law.¹⁹⁰ Thus, despite the change in the wording of the statute, the court interpreted this provision as codifying existing law.¹⁹¹

a. A Summary of the Changes Made by the 1978 Initiative

Before turning to the Bird court's death penalty decisions and the controversy they engendered, a short summary of the changes actually wrought by the 1978 Initiative should prove helpful.

(1) The Structure of the Death Penalty Law

The 1978 Initiative retained the structure of the death penalty law established by the 1977 legislation.¹⁹² Many important changes were made, however, in the content of the law.

(2) The Special Circumstances

The 1978 Initiative added ten new special circumstances.¹⁹³ Although all of the eight special circumstances found in the 1977 legislation were

¹⁸⁸ 1977 Death Penalty Legislation, *supra* note 100, § 12 (codified at former CAL. PENAL CODE § 190.4(e)).

¹⁸⁹ CAL. PENAL CODE § 190.4(e) (West 1988).

¹⁹⁰ *People v. Rodriguez*, 42 Cal. 3d 730, 793-94, 726 P.2d 113, 154, 230 Cal. Rptr. 667, 706 (1986) (opinion by Grodin, J., joined by Justices Reynoso, Lucas, and Panelli) (stating that trial judge must determine propriety of death penalty by assessing credibility of witnesses, determining probative force of testimony, and weighing evidence in light of applicable law).

¹⁹¹ *Id.*

¹⁹² See *supra* notes 134-38 and accompanying text.

¹⁹³ See *supra* notes 139-49 and accompanying text.

carried forward into the 1978 Initiative, the Initiative expanded the reach of the *actus reus* of five special circumstances.¹⁹⁴ Important changes also were made in the *mens rea* requirement of each of the eight special circumstances carried forward from the 1977 legislation into the 1978 Initiative.¹⁹⁵

(3) The Liability of Perpetrators and Accomplices

The 1978 Initiative eliminated the requirement that both principals and accomplices be personally present during the commission of the act or acts causing death.¹⁹⁶ Furthermore, the 1978 Initiative eliminated the 1977 legislation's limitation of accomplice liability to defendants who physically aided the act or acts causing death¹⁹⁷ and its restrictive definition of physical aid.¹⁹⁸

(4) The Aggravating and Mitigating Factors

The 1978 Initiative added one aggravating factor to the list of aggravating and mitigating factors that guide the sentencing authority at the penalty phase of the capital trial: a prior felony conviction, whether or not the conviction involved a crime of violence.¹⁹⁹ And evidence of any prior felony conviction, whether or not that conviction involved a crime of violence, was made admissible during the penalty phase of the trial.²⁰⁰

In addition, the "diminished capacity" factor carried over from the 1977 legislation (factor (h)) was amended to make clear that mental defects could be taken into account along with mental diseases.²⁰¹ The 1978 Initiative made no other changes in the aggravating and mitigating factors.

(5) The Penalty Phase Procedures

The 1978 Initiative mandated an instruction on the governor's commutation power (the Briggs instruction).²⁰² No similar instruction had

¹⁹⁴ See *supra* notes 150-58 and accompanying text.

¹⁹⁵ See *supra* notes 159-69 and accompanying text.

¹⁹⁶ See *supra* notes 170-72 and accompanying text.

¹⁹⁷ See *supra* note 173 and accompanying text.

¹⁹⁸ See *supra* note 174 and accompanying text.

¹⁹⁹ See *supra* note 175 and accompanying text.

²⁰⁰ See *supra* note 176 and accompanying text.

²⁰¹ See *supra* note 177 and accompanying text.

²⁰² See *supra* notes 178-79 and accompanying text.

been required by the 1977 legislation.

Of more importance, the death penalty purportedly became mandatory on a finding that the aggravating circumstances outweighed the mitigating circumstances. Conversely, if the sentencing authority determined that the mitigating circumstances outweighed the aggravating circumstances, the 1978 Initiative purported to mandate a sentence of life without possibility of parole.²⁰³ Under the 1977 legislation, the jury had retained discretion over the appropriate penalty, even when the aggravating circumstances outweighed the mitigating circumstances.²⁰⁴

(6) The Procedures Governing Hung Juries

If the jury failed to decide the truth or untruth of a charged special circumstance, the 1977 legislation had required the court to impanel a new jury to determine the issue. If the second jury likewise failed to reach a verdict, then the court was required to dismiss the jury and to impose the punishment of confinement in state prison for life.²⁰⁵ In contrast, the 1978 Initiative conferred discretion on the trial court either to impanel a new jury to try the special circumstance issues or to sentence the defendant to state prison for a term of twenty-five years if the second jury failed to reach a verdict.²⁰⁶

Under the 1977 legislation, if the penalty phase jury unanimously failed to reach a verdict, then the trial court had been required to dismiss the jury and to impose the sentence of life without possibility of parole.²⁰⁷ The 1978 Initiative treated the failure of the penalty phase jury to reach a verdict in nearly the same way as a hung jury on the issue of the truth of a special circumstance. If the initial jury could not agree on the penalty, the judge was obligated to impanel a second penalty phase jury. If the second jury likewise could not agree unanimously on the penalty, then the Initiative conferred discretion on the court either to impanel another jury or to sentence the defendant to life without possibility of parole.²⁰⁸

²⁰³ See *supra* note 180 and accompanying text.

²⁰⁴ See *supra* note 181 and accompanying text.

²⁰⁵ See *supra* notes 182-83 and accompanying text.

²⁰⁶ See *supra* note 185 and accompanying text.

²⁰⁷ See *supra* note 184 and accompanying text.

²⁰⁸ See *supra* notes 185-87 and accompanying text.

(7) The Automatic Modification Proceeding

The 1978 Initiative appeared to change the judge's role in resolving the automatic request for modification of a death verdict. Under the 1977 legislation, the trial judge made an independent determination of the motion based on the judge's own evaluation of the credibility of the witnesses and the weight of the evidence.²⁰⁹ The 1978 Initiative seemed to abandon independent review by the judge. Instead, the judge reviewed the propriety of the jury's determination of the penalty issue in much the same manner as an appellate court would review the jury's verdict of guilt. Nevertheless, the California Supreme Court held that the change in wording in the 1978 Initiative did not change the law. The trial judge still is required to make an independent determination of the automatic motion for modification of the death penalty verdict.²¹⁰

5. A Summary of the Developments Between 1972 and 1978

The 1977 death penalty legislation became effective on August 11, 1977.²¹¹ It was replaced by the provisions of the 1978 Initiative that became effective when it was adopted by the voters on November 7, 1978.²¹² The 1977 legislation applied to capital murders committed during the nearly fifteen month period between the effective date of the legislation and the effective date of the Initiative. Capital murders committed after November 7, 1978, are governed by the provisions of the Initiative.²¹³ As of March 25, 1988, the end of the first year of the Lucas court's tenure, the 1978 Initiative has not been amended.

During the entire period in which the 1977 legislation was labored into law by the California Legislature, the 1978 Initiative was framed and qualified for the ballot. For the entire period of the following political campaign which resulted in the adoption of the Initiative by the People, not a single death penalty case was decided by the California Supreme Court. Events simply had moved too quickly.

The California Legislature initially responded to *Furman* by enacting the 1973 mandatory death penalty statute. The California Supreme Court invalidated this statute under the eighth amendment on December 7, 1976, in *Rockwell v. Superior Court*.²¹⁴ All of the automatic

²⁰⁹ See *supra* note 188 and accompanying text.

²¹⁰ See *supra* note 189-91 and accompanying text.

²¹¹ 1977 Death Penalty Legislation, *supra* note 100, at 1256.

²¹² See *supra* note 132.

²¹³ See *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979).

²¹⁴ 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976); see *supra* notes 91-95 and accompanying text.

appeals from judgments of death imposed under the 1973 statute were summarily disposed of by the court under the authority of *Rockwell*. California thus did not have a valid death penalty statute from February 18, 1972, the day *People v. Anderson*²¹⁵ was decided by the Wright court, to August 11, 1977, the effective date of the 1977 legislation.²¹⁶ Despite continuing criticism of *Anderson* and *Furman*,²¹⁷ the campaign for the adoption of the 1978 Initiative did not focus on the California Supreme Court and its handling of death penalty cases.²¹⁸ Nevertheless, the question of the constitutionality of the proposed initiative under the eighth amendment, as interpreted by the United States Supreme Court in *Furman* and its progeny, was a major issue in the campaign for its adoption.²¹⁹

Until the Initiative was adopted by the voters at the general election on November 7, 1978, the People's aspiration for a valid death penalty statute making a wide range of first degree murders punishable by death had been frustrated.²²⁰ With the enactment of the 1977 death penalty legislation, the proponents of capital punishment in California suffered a partial defeat. But as we have seen, they ultimately prevailed when a vast majority of voters approved the Initiative at the November 7, 1978 election. The proponents had demonstrated their capacity for amending the California Constitution and for enacting the "toughest" death penalty legislation "in the nation."²²¹ There seemed to be only one realistic impediment to returning to the days when executions were a part of normal life in California: the United States Supreme Court could invalidate the 1978 Initiative under the federal constitution.

Of course, the California Supreme Court also could invalidate the Initiative on constitutional grounds. When the 1978 Initiative became effective,²²² *Rockwell v. Superior Court*²²³ was the last death penalty case decided by the California Supreme Court. In that case, the Wright

²¹⁵ 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); see *supra* notes 50-51 and accompanying text.

²¹⁶ See *supra* note 100 and accompanying text.

²¹⁷ See, e.g., MCCLOSKEY, A REVIEW OF THE LITERATURE CONTRASTING MANDATORY AND DISCRETIONARY SYSTEMS OF SENTENCING CAPITAL CASES, 1973 REPORT OF THE GOVERNOR'S STUDY COMMISSION ON CAPITAL PUNISHMENT.

²¹⁸ See *supra* text accompanying notes 129-30.

²¹⁹ See *supra* note 129.

²²⁰ This is true, of course, insofar as the People's will was reflected accurately in the elections of 1972 and 1978.

²²¹ See *supra* notes 130-31 and accompanying text.

²²² The Initiative became effective when it was adopted by the People at the election held on November 7, 1978. See *supra* note 132.

²²³ 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976).

court invalidated the 1973 mandatory death penalty statute under the eighth amendment.²²⁴ The California statutes were changed by the 1978 Initiative, and the prediction was that the United States Supreme Court would uphold the Initiative if it ever reached the Court. Furthermore, the People of the State of California had clearly expressed their support for the implementation of capital punishment in California — once by the initiative amendment of the California constitution in 1972 (to overrule *Anderson*) and once by the overwhelming adoption of the 1978 Death Penalty Initiative. It thus did not appear to be very likely that the California Supreme Court would invalidate the 1978 Initiative under the eighth amendment.

But only time would tell how both the 1977 legislation and the 1978 Initiative would operate in the courtrooms of California.

II. CAPITAL PUNISHMENT UNDER THE BIRD COURT AND THE RETENTION ELECTION OF 1986

A. *Capital Punishment and the Bird Court*

1. From 1977 to November 1986

Between the California Supreme Court's decision in *Rockwell v. Superior Court*²²⁵ and the decision in the next capital case decided by the California Supreme Court, *People v. Teron*,²²⁶ the composition of the court changed. Chief Justice Wright wrote for the court in *Rockwell*. Justices Tobriner, Mosk, Sullivan, and Richardson joined the court's opinion.²²⁷ Justice Clark, joined by Justice McComb, wrote a separate concurring opinion.²²⁸ By January 11, 1979, the day the court decided *Teron*, Chief Justice Wright and Justices Sullivan and McComb had retired. Rose Bird was then the Chief Justice of California, and Justices Manuel and Newman had replaced Justices Sullivan and McComb.

Teron was the first automatic appeal decided under the 1977 death penalty legislation.²²⁹ Holding that the 1977 legislation could not be

²²⁴ See *supra* notes 91-95 and accompanying text.

²²⁵ 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976).

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

²²⁷ 18 Cal. 3d 420, 445, 556 P.2d 1101, 1116, 134 Cal. Rptr. 650, 665 (1976).

²²⁸ *Id.* at 446-49, 556 P.2d at 1116-18, 134 Cal. Rptr. at 665-67.

²²⁹ Gregory John Teron, Jr. committed a murder in 1975. At trial, the court applied the subsequently enacted 1977 legislation, and Teron received a death sentence. In an opinion that Justice Tobriner wrote and that Chief Justice Bird and Justices Mosk, Manuel, and Newman joined, the court held that the 1977 legislation could not apply retroactively to a killing on October 4, 1975. *Teron*, 23 Cal. 3d at 119, 588 P.2d at

applied retroactively, the court modified the judgment to provide for a sentence of life imprisonment. As so modified, the judgment convicting the defendant of first degree murder was affirmed.

Between the filing of the opinion in *Teron* on January 11, 1979 and the judicial retention election in California, on November 4, 1986, the Bird court decided sixty-four automatic appeals from judgments of death.²³⁰ In all but three²³¹ (95%), the death penalty was set aside, and the case was remanded for further proceedings in the superior court.²³² Chief Justice Bird did not vote to uphold the sentence of death in any of these three cases.²³³

In addition, during this same period, the court reviewed death penalty procedures by extraordinary writs in eight cases²³⁴ and on habeas

782, 151 Cal. Rptr. at 642 Justice Richardson wrote a separate opinion concurring in the judgment. *Id.* at 119, 588 P.2d at 782, 151 Cal. Rptr. at 642. Justice Clark dissented alone. *Id.* at 121, 588 P.2d at 783, 151 Cal. Rptr. at 643.

The 1973 Mandatory Death Penalty Statute was in effect in California at the time Teron committed the murder. In *Rockwell*, decided in 1976, the supreme court held that the 1973 Mandatory Death Penalty Statute violated the cruel and unusual punishments clause of the eighth amendment under the compulsion of *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976). *See supra* note 223 and accompanying text.

²³⁰ For discussion of the Bird court automatic appeal judgments, see *infra* notes 238, 240-41, 243-45, 247, 250-51, 254, 256 & 258 and accompanying text.

²³¹ The first affirmance came on October 23, 1980, in *People v. Jackson*, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981); the second, on February 11, 1981, in *People v. Harris (Robert)*, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679, *cert. denied*, 454 U.S. 882 (1981); and the third, on December 29, 1983, in *People v. Fields*, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983), *cert. denied*, 469 U.S. 892 (1984).

²³² The disposition varied in the individual cases depending upon the type of error committed and the point in the process at which it occurred.

²³³ For the dissents of the Chief Justice, see *Fields*, 35 Cal. 3d at 375-87, 673 P.2d at 709-18, 197 Cal. Rptr. at 833-42 (dissenting alone); *Harris (Robert)*, 28 Cal. 3d at 965-84, 623 P.2d at 256-68, 171 Cal. Rptr. at 695-707 (joined by Justice Mosk); *Jackson*, 28 Cal. 3d at 339-65, 618 P.2d at 178-95, 168 Cal. Rptr. at 632-49 (joined by Justice Tobriner).

²³⁴ The cases are listed in the order the court decided them. Cases decided on the same day are in the order in which they appear in the official reports. *See Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980) (individual sequestered voir dire for capital cases so that voir dire does not produce a "jury organized to convict"); *Martinez v. Superior Court*, 29 Cal. 3d 574, 629 P.2d 502, 174 Cal. Rptr. 701 (1981) (motion for change of venue on grounds of prejudicial pretrial publicity in death penalty case); *Keenan v. Superior Court*, 31 Cal. 3d 424, 640 P.2d 108, 180 Cal. Rptr. 489 (1982) (appointment of second attorney to defend capital case); *People v. Superior Court (Engert)*, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982) ("heinous, atrocious or cruel" special circumstance is unconstitutionally vague

corpus on one occasion.²³⁵ With one exception,²³⁶ the supreme court granted at least part of the requested relief in these nine cases as

under both state and federal constitutions; art. I, § 27 of California Constitution does not preclude review of capital procedures under state constitution); *Ramos v. Superior Court*, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982) (special circumstances are subject to Penal Code § 995 review; Penal Code § 1387 bars refiling of twice-dismissed special circumstances); *Odle v. Superior Court*, 32 Cal. 3d 932, 654 P.2d 225, 187 Cal. Rptr. 455 (1982) (motion for change of venue on grounds of prejudicial pretrial publicity in death case); *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) (proof necessary to support felony-murder special circumstance); *Williams v. Superior Court*, 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984) (severance of separate murder counts).

²³⁵ *In re Stankewitz (Laird)*, 40 Cal. 3d 391, 708 P.2d 1260, 220 Cal. Rptr. 382 (1985) (juror misconduct and timing of application for writ of habeas corpus). In this category fall cases in which the only relief sought and granted is under the writ of habeas corpus.

It is not uncommon, however, for the court to consolidate a writ of habeas corpus with an automatic appeal and to decide all issues in one opinion. Indeed, that is precisely what happened in the following 11 cases that the Bird court decided before the retention election: *People v. Smallwood*, 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986) (relief granted on appeal and writ denied); *People v. Frank*, 38 Cal. 3d 711, 700 P.2d 415, 214 Cal. Rptr. 801 (1985) (same); *People v. Alcala*, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984) (relief granted on appeal and writ denied as moot); *People v. Mazingo*, 34 Cal. 3d 926, 671 P.2d 363, 196 Cal. Rptr. 212 (1983) (judgment reversed and writ of habeas corpus granted); *People v. Robertson*, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982) (relief granted on appeal and writ denied); *People v. Stankewitz (Douglas)*, 32 Cal. 3d 80, 648 P.2d 578, 184 Cal. Rptr. 611 (1982) (same); *People v. Hogan*, 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982) (relief granted on appeal and writ denied as moot); *People v. Jackson*, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (judgment affirmed and writ denied); *cert. denied*, 450 U.S. 1035 (1980); *People v. Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980) (relief granted on appeal and writ denied); *People v. Lanphear I*, 26 Cal. 3d 814, 608 P.2d 689, 163 Cal. Rptr. 601 (relief granted on appeal and writ denied), *vacated*, 449 U.S. 810, *opinion on remand*, 28 Cal. 3d 463, 622 P.2d 950, 171 Cal. Rptr. 505 (1980); *People v. Frierson I*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) (judgment reversed and writ of habeas corpus granted). These cases are categorized as automatic appeals for the purpose of this Article. Accordingly, these cases also appear *infra* notes 238, 241, 247, 251, 254, 256 & 258.

Between the 1986 retention election and the end of the Bird court's tenure, the court also decided automatic appeals. In two of these cases, the court consolidated a writ of habeas corpus with the automatic appeal. *People v. Ledesma*, 43 Cal. 3d 171, 729 P.2d 839, 233 Cal. Rptr. 404 (1987) (writ granted and judgment vacated); *People v. Bloyd*, 43 Cal. 3d 333, 729 P.2d 802, 233 Cal. Rptr. 368 (1987) (writ granted and penalty judgment reversed); *see infra* text accompanying note 321.

²³⁶ *Odle v. Superior Court*, 32 Cal. 3d 932, 654 P.2d 225, 187 Cal. Rptr. 455 (1982) (denying writ to compel change of venue because insufficient showing of prejudice from pretrial publicity).

well.²³⁷

One can easily imagine that these decisions frustrated the proponents of capital punishment. A real sense of the magnitude of the frustration probably best emerges with a yearly accounting of the court's capital cases.

1979

In 1979, the first year that capital cases were ready for review under the 1977 legislation, the court decided three automatic appeals. All three resulted in a reversal of the death judgment.²³⁸

1980

The first affirmance of a judgment of death since the Wright court held in *Anderson* that the California statutes violated the California Constitution in 1972,²³⁹ came in 1980, in *People v. Jackson*.²⁴⁰ The

²³⁷ See *supra* notes 234-35 and accompanying text. During this same period, the court also considered various aspects of California death penalty legislation in the context of a judgment of less than death in seven cases: *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984) (entitlement to county funds for reasonably necessary ancillary defense services in special circumstance case in which prosecution seeks only life sentence without possibility of parole); *People v. Zimmerman*, 36 Cal. 3d 154, 680 P.2d 776, 202 Cal. Rptr. 826 (1984) (mandatory life sentence without possibility of parole is not cruel and unusual punishment; prosecutor's use of peremptory challenges to remove prospective jurors with reservations about capital punishment does not deny defendant representative jury at guilt phase of trial); *People v. Marsh*, 36 Cal. 3d 134, 679 P.2d 1033, 202 Cal. Rptr. 92 (1984) (trial court has discretion to strike special circumstance findings from conviction, thereby making defendant eligible for commitment to California Youth Authority); *Sand v. Superior Court*, 34 Cal. 3d 567, 668 P.2d 787, 194 Cal. Rptr. 480 (1983) (defendant in special circumstance case is not entitled to Penal Code § 987.9 funds when prosecution is not seeking death penalty); *Williams v. Superior Court*, 34 Cal. 3d 584, 668 P.2d 799, 194 Cal. Rptr. 492 (1983) (change of venue in special circumstance cases in which death penalty not sought); *People v. Williams*, 30 Cal. 3d 470, 637 P.2d 1029, 179 Cal. Rptr. 443 (1981) (trial court has authority to dismiss special circumstances under Penal Code § 1385); *People v. Davis*, 29 Cal. 3d 814, 633 P.2d 186, 176 Cal. Rptr. 521 (1981) (minors cannot be sentenced to life without possibility of parole under 1977 legislation). In only two of these seven cases, *Sand* and *Zimmerman*, did the court fail to grant part of the relief requested by the defendant.

²³⁸ See *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979); *People v. Allen*, 23 Cal. 3d 286, 590 P.2d 30, 152 Cal. Rptr. 454 (1979); *People v. Frierson I*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).

²³⁹ See *supra* notes 50-52 and accompanying text.

²⁴⁰ 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981).

court decided a total of five automatic appeals in 1980. Except for *Jackson*, the court reversed the death judgment in each case.²⁴¹ That same year, the court also granted extraordinary relief in a writ proceeding in another case.²⁴²

1981

The second affirmance of a death judgment came in 1981, in *People v. Harris (Robert)*.²⁴³ *Harris* was one of the three automatic appeals decided that year.²⁴⁴ The court reversed the judgment of death in the other two cases²⁴⁵ and ordered extraordinary relief by writ of mandate in another death penalty case.²⁴⁶

1982

There was no affirmance of a death judgment in 1982. The Bird court decided seven automatic appeals this year, and all seven cases resulted in a reversal of the death judgment.²⁴⁷ The court also consid-

²⁴¹ See *People v. Velasquez*, 26 Cal. 3d 425, 606 P.2d 341, 162 Cal. Rptr. 306, vacated, 448 U.S. 903, *opinion on remand*, 28 Cal. 3d 461, 622 P.2d 952, 171 Cal. Rptr. 507 (1980); *People v. Lanphear I*, 26 Cal. 3d 814, 608 P.2d 689, 163 Cal. Rptr. 601, vacated, 449 U.S. 810, *opinion on remand*, 28 Cal. 3d 463, 622 P.2d 950, 171 Cal. Rptr. 505 (1980); *People v. Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980); *People v. Thompson*, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980); *Jackson*, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603.

²⁴² *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980) (individual sequestered voir dire for capital cases so that voir dire does not produce "jury organized to convict").

²⁴³ 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679, *cert. denied*, 454 U.S. 882 (1981).

²⁴⁴ See *People v. Chadd*, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798, *cert. denied*, 452 U.S. 931 (1981); *Harris (Robert)*, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679; *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982).

²⁴⁵ The reversals were in *Chadd* and *Murtishaw*.

²⁴⁶ See *Martinez v. Superior Court*, 29 Cal. 3d 574, 629 P.2d 502, 174 Cal. Rptr. 701 (1981) (ordering trial court to change venue to preserve defendant's right to fair trial).

²⁴⁷ See *People v. Ramos I*, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), *rev'd*, 463 U.S. 992 (1983), decision after remand, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984); *People v. Haskett*, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982); *People v. Hogan*, 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982); *People v. Stankewitz (Douglas)*, 32 Cal. 3d 80, 648 P.2d 578, 184 Cal. Rptr. 611 (1982); *People v. Arcega*, 32 Cal. 3d 504, 651 P.2d 338, 186 Cal. Rptr. 94 (1982); *People v. Gzikowski*, 32 Cal. 3d 580, 651 P.2d 1145, 186 Cal. Rptr. 339 (1982); *People v. Robertson*, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982).

ered requests for extraordinary relief in four additional death cases. The court granted the requested relief in three²⁴⁸ and denied it in the fourth.²⁴⁹

1983

The final affirmance of a death judgment before the 1986 retention election came in *People v. Fields*.²⁵⁰ *Fields* was one of the five automatic appeals decided in 1983. The court reversed the death judgment in each of the remaining four cases.²⁵¹ The most controversial of the death penalty writ cases decided by the Bird court, *Carlos v. Superior Court*, was also decided in 1983.²⁵² In *Carlos*, the court granted the requested relief.²⁵³

1984

The pace of death penalty reversals more than doubled in 1984. The court decided twelve automatic appeals. The death judgment was reversed in each case.²⁵⁴ Again the court considered a single extraordinary

²⁴⁸ See *Keenan v. Superior Court*, 31 Cal. 3d 424, 640 P.2d 108, 180 Cal. Rptr. 489 (1982) (appointment of second attorney to defend capital case); *People v. Superior Court (Engert)*, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982) ("heinous, atrocious or cruel" special circumstance is unconstitutionally vague under both state and federal constitutions; art. I, § 27 of the California Constitution does not preclude review of capital procedures under state constitution); *Ramos v. Superior Court*, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982) (special circumstances are subject to Penal Code § 995 review; Penal Code § 1387 bars refiling of twice-dismissed special circumstances).

²⁴⁹ See *Odle v. Superior Court*, 32 Cal. 3d 932, 654 P.2d 225, 187 Cal. Rptr. 455 (1982) (motion for change of venue on ground of prejudicial pretrial publicity in death penalty case properly denied by trial court and relief denied).

²⁵⁰ 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983), *cert. denied*, 469 U.S. 892 (1984).

²⁵¹ The cases are listed in the order the court decided them. Cases decided on the same day are in the order in which they appear in the official reports. See *People v. Easley*, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983); *People v. Mazingo*, 34 Cal. 3d 926, 671 P.2d 363, 196 Cal. Rptr. 212 (1983); *People v. Joseph*, 34 Cal. 3d 936, 671 P.2d 843, 196 Cal. Rptr. 339 (1983); *People v. Mroczko*, 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983).

²⁵² 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) (felony-murder special circumstance enumerated in 1978 Initiative requires proof of intent-to-kill).

²⁵³ *Id.*

²⁵⁴ See *People v. Harris (Lee)*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, *cert. denied*, 469 U.S. 965 (1984); *People v. Zimmerman*, 36 Cal. 3d 154, 680 P.2d 776, 202 Cal. Rptr. 826 (1984); *People v. Lanphear II*, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984); *People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal.

writ application in a death case that year, and again the requested relief was granted.²⁵⁵

1985

The number of death penalty reversals doubled again in 1985, with the court deciding twenty-four automatic appeals and ordering twenty-four reversals.²⁵⁶ Although the court did not decide a request for ex-

Rptr. 265 (1984), *cert. denied*, 469 U.S. 1229 (1985); *People v. Alcala*, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984); *People v. Whitt*, 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984); *People v. Mattson*, 37 Cal. 3d 85, 688 P.2d 887, 207 Cal. Rptr. 278 (1984); *People v. Turner (Richard)*, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984); *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984); *People v. Holt*, 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984); *People v. Armendariz*, 37 Cal. 3d 573, 693 P.2d 243, 209 Cal. Rptr. 664 (1984); *People v. Bigelow*, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984).

²⁵⁵ See *Williams v. Superior Court*, 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984) (severance of separate murder counts when two counts of murder comprise special circumstance elevating case to a charge of capital murder).

²⁵⁶ See *People v. Anderson (Stephen)*, 38 Cal. 3d 58, 694 P.2d 1149, 210 Cal. Rptr. 777 (1985); *People v. Memro*, 38 Cal. 3d 658, 700 P.2d 446, 214 Cal. Rptr. 832 (1985); *People v. Frank*, 38 Cal. 3d 711, 700 P.2d 415, 214 Cal. Rptr. 801 (1985); *People v. Boyd*, 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985); *People v. Hayes (John)*, 38 Cal. 3d 780, 699 P.2d 1259, 214 Cal. Rptr. 652 (1985); *People v. Frierson II*, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985); *People v. Chavez*, 39 Cal. 3d 823, 705 P.2d 372, 218 Cal. Rptr. 49 (1985); *People v. Weidert*, 39 Cal. 3d 836, 705 P.2d 380, 218 Cal. Rptr. 57 (1985); *People v. Montiel*, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985); *People v. Guerra*, 40 Cal. 3d 377, 708 P.2d 1252, 220 Cal. Rptr. 374 (1985); *People v. Brown (Albert)*, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), *cert. granted*, 476 U.S. 1157 (1986), *rev'd sub nom. California v. Brown*, 479 U.S. 538 (1987) (remanded for reconsideration; opinion on remand pending); *People v. Massie*, 40 Cal. 3d 620, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); *People v. Fuentes*, 40 Cal. 3d 629, 710 P.2d 240, 221 Cal. Rptr. 440 (1985); *People v. Croy*, 41 Cal. 3d 1, 710 P.2d 392, 221 Cal. Rptr. 592 (1985); *People v. Phillips*, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985); *People v. Leach*, 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985); *People v. Walker*, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169 (1985), *aff'd on rehearing*, 47 Cal. 3d 605, 765 P.2d 70, 253 Cal. Rptr. 863 (1988); *People v. Balderas*, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985); *People v. Hamilton (Billy)*, 41 Cal. 3d 211, 710 P.2d 937, 221 Cal. Rptr. 858 (1985), *aff'd on rehearing*, 46 Cal. 3d 123, 756 P.2d 1348, 249 Cal. Rptr. 320 (1988); *People v. Davenport*, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985); *People v. Silbertson*, 41 Cal. 3d 296, 709 P.2d 1321, 211 Cal. Rptr. 152 (1985); *People v. Lucky*, 41 Cal. 3d 315, 710 P.2d 959, 221 Cal. Rptr. 880 (1985), *aff'd on rehearing*, 45 Cal. 3d 259, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988); *People v. Deere*, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985); *People v. Hamilton (Bernard)*, 41 Cal. 3d 408, 710 P.2d 981, 221 Cal. Rptr. 902 (1985), *vacated and remanded*, 478 U.S. 1017 (1986), 45 Cal. 3d 351, 753 P.2d 1109, 247 Cal. Rptr. 31,

traordinary relief in a death case in 1985, the court did grant relief on a writ of habeas corpus in one death case.²⁵⁷

1986 — Before the Retention Election

From January 1, 1986, to the retention election on November 4, 1986, the court decided an additional five automatic appeals. Again, the court reversed the death judgment in each case.²⁵⁸

2. A Summary and Analysis of the Bird Court Results

Except for 1981, in which there was one affirmance (*Harris*) and two reversals (*Chadd* and *Murtishaw*), a consistent pattern emerges: each year there is an ever increasing number of reversals of death judgments, with an occasional single affirmance in given years. Indeed, in the critical three years before the 1986 retention election,²⁵⁹ the number of death penalty reversals increased in a nearly perfect geometric progression: from five in 1983, to twelve in 1984, and to twenty-four in 1985.

If one looks only at the results of the Bird court's review of death judgments, these data raise the suspicion that the court has not applied neutral principles of law in deciding the cases. Prior experience with the proportion of reversals to affirmances in ordinary criminal cases suggests that there should be more affirmances than reversals. Yet the Bird court reversed ninety-five percent of the death judgments.²⁶⁰ Nevertheless, on reflection, one easily could anticipate a higher reversal rate in death penalty cases than in nondeath cases during the Bird court's tenure because of the following factors:

1. The Death Penalty Is Unique

Because the death penalty is uniquely final, there is an acknowledged enhanced interest in the fairness and reliability of death judg-

modified, 46 Cal. 3d 1034a (1988).

²⁵⁷ *In re Stankewitz* (Laird), 40 Cal. 3d 391, 708 P.2d 1260, 220 Cal. Rptr. 382 (1985) (juror misconduct and timing of application for writ of habeas corpus).

²⁵⁸ See *People v. Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986); *People v. Ratliff*, 41 Cal. 3d 675, 715 P.2d 665, 224 Cal. Rptr. 705 (1986); *People v. Smallwood*, 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986); *People v. Turner* (Melvin), 42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986); *People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986).

²⁵⁹ The three years before the retention election were 1983 through 1985. The retention election was held on November 4, 1986, but this calculation excludes all of 1986.

²⁶⁰ See *supra* notes 230-33 and accompanying text.

ments.²⁶¹ This amplified interest means that a death judgment should be reversed when the same error would permit an affirmance in a non-capital case.²⁶²

2. The Complexity of Death Penalty Law

Death penalty law is also more complex than noncapital criminal law. This complexity provides more opportunity for error in the courts below than in ordinary criminal cases.²⁶³

3. The California Law of Capital Punishment Was in Its Formative Stage During the Bird Court's Tenure

Both the 1977 legislation and the 1978 Initiative created a number of entirely new substantive and procedural rules. Many of these new rules bore no obvious relationship to the existing rules routinely employed in criminal cases. For example, both the 1977 legislation and the 1978 Initiative used a new device called a "special circumstance" to determine death eligibility.²⁶⁴ In noncapital criminal cases, liability for punishment, regardless of its severity, is determined by familiar rules of substantive criminal law.²⁶⁵ Since special circumstance issues were not obviously governed by these familiar rules, the special circumstance issues would have to be worked out on a case-by-case basis as the California Supreme Court decided the automatic appeals.²⁶⁶

Given the fact that the various trial courts first must resolve new death penalty issues in the course of capital proceedings, and given the

²⁶¹ See, e.g., *Lowenfield v. Phelps*, 108 S.Ct. 546, 551 (1988); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

²⁶² See, e.g., *People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 469 U.S. 1229 (1985).

²⁶³ See, e.g., *People v. Bigelow*, 37 Cal. 3d 731, 743, 691 P.2d 994, 1000, 209 Cal. Rptr. 328, 334 (1984); *Keenan v. Superior Court*, 31 Cal. 3d 424, 432, 640 P.2d 108, 112, 180 Cal. Rptr. 489, 494 (1982). The complexity explanation can take on the qualities of a self-fulfilling prophecy. In a sense, the court has some measure of control over the complexity of the rules it administers. If the court creates complex rules, then the law is more complex, and there will be more reversals. Exploration of this aspect of the complexity requires analysis of the rules the court actually created and the available alternatives. That study must await another day.

²⁶⁴ See *supra* notes 105-22 and accompanying text. Though the 1973 Mandatory Death Penalty Statute also used the "special circumstance" device to define death eligibility, the statute was held to be unconstitutional before the court was faced with the task of identifying the body of law to which the courts should look in interpreting special circumstance issues. See *supra* notes 91-95 and accompanying text.

²⁶⁵ These familiar rules are generally known as the elements of the offense and the various "defenses" which may be applicable in the case.

²⁶⁶ See, e.g., *infra* text accompanying notes 388-89.

number of trial courts in California, one easily could anticipate a variety of different, even contradictory, rulings. And when a lower court's resolution of an issue is later found to be inconsistent with the interpretation ultimately adopted by the supreme court, a reversal may be required. Thus, when a law creates entirely new substantive and procedural rules, there will be a formative period in which the courts work out new doctrine applicable to the new rules. There may be a relatively high reversal rate during this formative period. But once the rules are articulated by the reviewing courts, and once these new rules are consistently applied in the lower courts in accordance with the new precedent, the reversal rate should decline to the rate found in criminal cases decided under established law.

Additionally, the new rules enumerated in both the 1977 legislation and the 1978 Initiative had to function in an existing legal environment.²⁶⁷ Inevitably, the various trial courts inconsistently decided questions of how these new rules fit into the existing structure of the law, giving rise to the possibility of further reversals.

From 1979 (when the first case under the 1977 legislation was presented to the Bird court) until the retention election in 1986, California death penalty law was in this formative period.

4. The Ambiguity in the Statutory Law

In addition, the 1978 Initiative is rife with ambiguity. Most of these ambiguities present difficult problems of statutory interpretation.²⁶⁸ Although less ambiguous than the 1978 Initiative, the 1977 legislation contained ambiguities of its own.²⁶⁹ Ambiguous statutes produce reversals in essentially the same way as would entirely new substantive or procedural rules discussed in connection with factor 3, above. Furthermore, if these statutory ambiguities are resolved incorrectly in a standardized fashion, then all of the cases in which this common error appears must be reversed (assuming that the error is prejudicial). For example, when an incorrect interpretation of a statute is incorporated

²⁶⁷ See, e.g., *Ramos v. Superior Court*, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982) (holding that special circumstance is governed by same provisions governing criminal actions under Penal Code § 871 and § 1387).

²⁶⁸ See, e.g., *People v. Bigelow*, 37 Cal. 3d 731, 743, 691 P.2d 994, 1000, 209 Cal. Rptr. 328, 334 (1984); *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) (finding felony-murder special circumstance ambiguous).

²⁶⁹ See, e.g., *People v. Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980) (holding that concurrence requirement applies to felony-murder special circumstance); *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979) (discussing ambiguity over whether 1977 legislation was meant to apply to crimes committed before its enactment).

into a standard jury instruction routinely given in capital cases, reversals may be compelled in a large number of cases.²⁷⁰ As we shall see, this has happened on a number of occasions with the 1977 legislation and with the 1978 Initiative.²⁷¹

5. The Constitutionalization of Death Penalty Law

California capital punishment law also is governed by an evolving body of federal constitutional law which applies only to capital cases. Since this body of law is relatively new and still in its formative stage, more reversals are to be anticipated in capital cases than in noncapital cases for the same reasons discussed in connection with factor 3, above.

Thus, one would have expected a high reversal rate in death penalty cases during the formative years of California death penalty law. Indeed, the evidence available from other states suggests that there is generally a high reversal rate in death cases and that the reversal rate may remain higher than ordinary criminal cases even after the formative period has passed.²⁷²

Nevertheless, only by analyzing the record, the briefs, and the court's opinion in each case could one rationally decide whether the Bird court's very high reversal rate in death penalty appeals resulted from court-articulated law on the one hand, or from the justices' disregard of the law and the enforcement of their own personal views on the other.²⁷³ But this is neither the time nor the place for that inquiry. This

²⁷⁰ In *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), the Bird court held that the felony-murder special circumstance in the 1978 Initiative was ambiguous. The court then construed the statute as requiring proof of an intent-to-kill for this special circumstance. Shortly after the *Carlos* decision, the court held in *People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 469 U.S. 1229 (1985), that *Carlos* error required an automatic reversal of a felony-murder special circumstance finding made without the requisite intent-to-kill finding, except in certain specified situations. If the judgment of death rested solely on the invalid felony-murder special circumstance finding, then the death judgment must be reversed as well. Since the standard California jury instructions on the felony-murder special circumstance did not require the jury to find the necessary intent-to-kill, many cases in which that standard jury instruction was given had to be reversed. *See infra* notes 573-81 and accompanying text.

²⁷¹ *See infra* notes 582-90 and accompanying text.

²⁷² AMNESTY INT'L REPORT, *supra* note 1, at 88-89. *See generally* Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982). Of course, the first factor indicated above continues even after the formative period is over and may alone account for the higher reversal rate in death cases. *See supra* text accompanying notes 261-62. Further evidence is needed, however, before a less speculative conclusion can be drawn.

²⁷³ This analysis would be necessary unless, of course, the justices were to candidly admit that they were illegitimately deciding the cases.

Article is not concerned with the accuracy of the claim that the Bird court justices disregarded the law and applied their own private preferences and thus illegitimately decided death penalty cases. Rather, our concern here is with the way in which the unexplained high Bird court reversal rate raised a public suspicion that something was amiss with the court's death penalty decisions.

B. The 1986 Retention Election and the Fall of the Bird Court

As the number of death penalty reversals accumulated, the pro-capital punishment interests in California became progressively more disgruntled with the Bird court's handling of capital cases. Insult added to injury when the court blamed the capital punishment proponents for drafting and promoting a death penalty initiative that was so ambiguous that many of the reversals were the fault of that statute, not of the court.²⁷⁴ From the perspective of the pro-capital punishment interests, the Bird court was the latest in a long line of impediments that had wrongly frustrated a functional death penalty in California. With considerable time and effort, these obstacles had been overcome. The California Constitution had been amended in response to *Anderson*;²⁷⁵ the *Furman* majority had been brushed aside in the Supreme Court's 1976 cases;²⁷⁶ and after one death penalty statute had been struck down on federal constitutional grounds,²⁷⁷ and a legislative battle lost in 1977, a "tough" death penalty had been adopted by an overwhelming majority of the People in 1978.²⁷⁸ The Bird court now emerged as the last impediment to enforcing the People's will for a functional, tough death penalty law in California.

Focusing on the court's high reversal rate in automatic appeals, the pro-capital punishment interests in California publicly claimed that Chief Justice Bird and Justices Mosk, Reynoso, and Grodin were not enforcing the law, but applying their own personal views on capital punishment when they reversed death penalty judgments. There is little evidence that the capital punishment proponents analyzed the record, the briefs, and the court's opinions before reaching a conclusion that the high reversal rate demonstrated illegitimate decisionmaking by these accused members of the Bird court. If this type of analysis was undertaken, it was never publicly disclosed or mentioned in the ensuing re-

²⁷⁴ See *supra* notes 268-70 and accompanying text.

²⁷⁵ See *supra* notes 53-56 and accompanying text.

²⁷⁶ See *supra* note 90 and accompanying text.

²⁷⁷ See *supra* notes 91-94 and accompanying text.

²⁷⁸ See *supra* notes 129-33 and accompanying text.

tention election campaign. Instead, the public criticism of the Bird court primarily focused on the unexplained high reversal rate.²⁷⁹ When a specific case did receive publicity, it was merely to illustrate the horrible deed perpetuated by the defendant — presumably the sort of deed that deserved capital punishment under existing law. By reversing the death judgment in such cases, the Bird court thwarted justice and prevented implementation of the death penalty in California.²⁸⁰ An analysis of the validity of the court's action in reversing these death judgments was notably missing, at least to a lawyer.

The regular judicial retention election, which would be held at the general election on November 4, 1986, presented the pro-capital punishment interests in California with the opportunity to remove what they regarded as the last impediment to enforcing the People's expressed will for an effective death penalty in California. At that election, six of the seven justices of the California Supreme Court would be on the ballot for confirmation for another term of office: Chief Justice Bird, and Justices Mosk, Reynoso, Grodin, Lucas, and Panelli. Only Justice Broussard would not be on the ballot. If the voters denied Chief Justice Bird and Justices Mosk, Reynoso, and Grodin new terms in office, then the election would remove the majority of the Bird court responsible for the handling of death penalty appeals. Moreover, Governor Deukmejian — a vociferous and tireless supporter of capital punishment — then would be able to appoint a new majority to the court. If the Governor (who already had a reputation for appointing pro-capital punishment lawyers to the bench)²⁸¹ made "appropriate" appointments to the court, then the way the court handled capital cases would change. The last impediment to an effective death penalty law would vanish.

Although there is a continuing debate over the purpose of judicial retention elections, there is little argument that the California retention election is an appropriate vehicle for the removal of justices who are abusing their office by enforcing their personal views rather than enforcing the law. Certainly, the claim that the Bird court was acting illegitimately would be grounds for voting the offending justices out of office, provided the charges were true. But as we have seen, the primary focus was on the results produced by the Bird court's review of capital cases, with no analysis of the cases to determine whether the court was truly acting illegitimately or simply applying law which pro-

²⁷⁹ See, e.g., *infra* notes 290-91 and accompanying text.

²⁸⁰ See *infra* notes 306-11 and accompanying text.

²⁸¹ See *infra* note 337 and accompanying text.

duced a high reversal rate. If the law produced the high reversal rate, then the justices deserved to remain in office. The appropriate remedy would have been to change the law, not the court.

But the anticipation that the Governor would replace the defeated justices with judges who favored capital punishment appeared to be an integral part of the strategy for removing the Bird court as an impediment to an effective death penalty in California. If the targeted justices were "blocking the implementation of capital punishment"²⁸² in California by enforcing their own views on capital punishment, then the problem could be remedied by appointing new judges (theoretically, even judges who were opposed to capital punishment) so long as the new justices would honor the oath of office and resolve capital cases under the law. Yet the appointment of new justices, regardless of their views on capital punishment, who were committed to resolving disputes under the law did not appear to be part of the plan. Why would this be so?

Several explanations suggest themselves. First, the pro-capital punishment interests used the claim that the Bird court justices were enforcing their own views on capital punishment (rather than enforcing the law) as a subterfuge for the real objection which they never voiced: they objected to the law applied by the Bird court, and they sought to effect change in that law by changing the composition of the court. The subterfuge seemed necessary because the claim of illegitimate judicial decisionmaking was believed to be indispensable to defeating the justices in the retention election. This theory explains why the proponents of capital punishment failed to analyze the Bird court opinions to determine the cause of the high reversal rate, and why an analysis of those opinions was not made an issue in the retention election. It also explains why their plan anticipated the appointment of pro-capital punishment judges by the Governor.

Even more significant than the lack of candor, however, is the apparent reliance on the very illegitimacy that this strategy claimed to oppose. While asserting that the targeted Bird court justices should be dismissed from office because they illegitimately employed their personal views to reverse death penalty judgments, the proponents of capital punishment sought to have pro-capital punishment judges appointed so that their views on capital punishment would change the reversal rate. If ultimately the People's values indicate that the Bird court was incorrectly applying the law, then ultimately any judge committed to

²⁸² See *infra* note 336.

legitimate judicial decisionmaking should be able to make the necessary changes in the judge-made rules. The insistence on the appointment of pro-capital punishment judges is vital only if one appoints pro-capital punishment judges who are also willing to allow their personal views to affect the law they apply. Under this theory, in the final analysis, the real objection was not that the targeted Bird court justices employed personal views to decide death penalty appeals, but that the personal views of the Bird court justices produced the wrong results. The real goal of the retention election campaign was to defeat the Bird court majority so that the Governor could appoint pro-capital punishment judges who would employ their personal views to uphold, rather than reverse, capital cases.

Of course, there is a more charitable variation on this theme. The proponents of capital punishment, or at least some of them, might have honestly believed that the targeted justices on the Bird court were illegitimately deciding death penalty cases and that they should be defeated at the retention election for abusing their office. The anticipated appointment of pro-capital punishment judges was important because a justice's perspective on an issue such as capital punishment may work in a variety of subtle, but legitimate ways.²⁸³ Perspective certainly can affect the judgment of the most honest person attempting to comply with the law.²⁸⁴ If this was the real strategy for the appointment of pro-capital punishment judges, why was there no attempt to explain the Bird court's high reversal rate as a product of illegitimate decisionmaking rather than as the product of the law applied by the court? Why also was there no attempt to explain exactly how and why a judge's views on capital punishment may affect both the process by which the judge externalizes her decision and how the judge applies the law in given cases.

One final theory to consider is that the pro-capital punishment interests simply were not very sophisticated in their response to the high reversal rate. They objected to the results of the Bird court review in capital cases and to the reversal of such a large proportion of the cases, regardless of the reasons for the reversals. Results alone were what they sought to change. By removing the targeted justices, they would accomplish two goals. First, they would remove the justices who were "block-

²⁸³ For a discussion of this question, see *infra* text accompanying notes 600-01.

²⁸⁴ The theory of the problem with "death qualified" jurors, for example, rests on the recognition that personal views on capital punishment affect honest people who are trying to apply the law. See, e.g., *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

ing the implementation of capital punishment."²⁸⁵ Second, the defeat of those justices would serve notice on all future judges that they could be thrown out of office at a retention election if the results of their decisions conflicted with the voters' view of what the correct results should be. The proponents of capital punishment had demonstrated that they best understood the will of the People. They had changed the California Constitution in 1972, and they had enacted a new death penalty statute through the initiative process in 1978. Now, in 1986, they would demonstrate a similar understanding of the will of the People by changing the composition of the only court to review death penalty judgments in California, the California Supreme Court. The Governor then could appoint whom he would. But, regardless of whether the new appointees supported or opposed capital punishment, they undoubtedly would receive a clear message from the retention election: judges who reverse a large proportion of death penalty cases are in serious danger of defeat at retention elections on this ground alone.

Obviously, if a judge heeds this threat and fails to reverse cases that she should reverse, then she violates the fundamental requirement that judges decide cases according to the law alone. The use of a retention election to coerce judges to disregard the law and to reach results preferred by the People is so damaging to our commitment to the rule of law that we should not assume that coercion was the moving force of the anti-Bird court campaign. In other words, the results of the retention election should not be read as legitimating the removal of a justice from office if the justice reverses death judgments. Nor do the election results mean that the People wish to abandon the fundamental requirement that judges must decide cases under the rule of law. Clearly, the voters in California overwhelmingly support capital punishment. But little else is clear from the results of the retention election.

Thus, as we shall see below, because of the way the retention campaign proceeded, one cannot tell which theory or theories actually motivated capital punishment proponents to campaign against the targeted justices. An even more puzzling question is exactly what theories the People embraced when they refused to give Chief Justice Bird and Justices Reynoso and Grodin new terms in office.²⁸⁶

²⁸⁵ See *infra* note 336.

²⁸⁶ The campaign against the retention of Chief Justice Bird and Justices Reynoso and Grodin largely focused on the charge that these justices had illegitimately reversed death judgments by applying their own personal views rather than the law. It is tempting to argue, therefore, that the removal of these justices from office confirms the fundamental principal of our system that judges must decide cases under the law. But this

Opposition to Chief Justice Bird and to Justices Reynoso and Grodin came from a number of sources.²⁸⁷ The California District Attorney's Association was highly critical of the Bird court's opinions in criminal cases. By mid-1985, however, the Association withdrew from the campaign fearing that it might lose its tax exemption.²⁸⁸ Nevertheless, a number of the Association's members formed the Prosecutor Working Group. That group actively opposed the confirmations of Chief Justice Bird and Justices Reynoso and Grodin.²⁸⁹

In August 1986, Governor Deukmejian announced in a news conference that he opposed the confirmations of Chief Justice Bird and Justices Grodin and Reynoso on the ground that their votes and opinions on death penalty cases "indicate a lack of impartiality and objectivity."²⁹⁰ Other politicians made similar statements.²⁹¹ In addition, and perhaps of more importance, there were two major organizations²⁹² de-

argument depends upon the view that the People agreed that the rejected justices were illegitimately reversing death judgments and that this was the reason the People rejected these justices at the election. The exit polls discussed below indicate that a majority of the People actually may have voted against these justices because the justices opposed the death penalty. *See infra* text accompanying notes 312-14.

²⁸⁷ As the high reversal rate continued and the retention election approached, the justices' handling of the death penalty emerged as the dominant issue in the candidacy of Chief Justice Bird and "the other liberal justices facing the voters in November." Culver & Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 86 (1986). Amid growing public concern with the court's handling of capital cases, Chief Justice Bird became the lightning rod for the court's critics. Some criticism of the Chief Justice carried over from the first attempt to defeat her at the polls in 1978. *Id.* at 84-85. Other criticism focused on her performance as Chief Justice of California and as Chair of the Judicial Council. *Id.* Ultimately, "the chief justice seem[ed] to have emerged in the public's perception as the personal symbol of the liberal proclivities of the court." *Id.* at 87.

²⁸⁸ *Id.* at 88.

²⁸⁹ L.A. Times, Aug. 14, 1985, at 3, col. 5.

²⁹⁰ L.A. Daily J., Aug. 8, 1986, at 22; *see also* Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365, 367 (1987).

²⁹¹ Culver & Wold, *supra* note 287, state:

California politicians have differed with respect to Bird's re-election bid. Virtually all Republicans are united in opposition to her. Many Democrats, including gubernatorial candidate Bradley, United States Senator Alan Cranston, and California Attorney General John Van de Kamp are maintaining a neutral stance. Only one major Democratic officeholder, Secretary of State March Fong Eu, has openly opposed Bird; Eu, in fact, has suggested that Bird resign.

Id. at 88.

²⁹² There were other organizations that actively campaigned against the Chief Justice and Justices Reynoso and Grodin, such as H.L. Richardson's Law and Order

voted to the defeat of the "November Three": Crime Victims for Court Reform and Californians to Defeat Rose Bird.²⁹³ Early in 1986, these two organizations combined forces to create the California Coalition for Court Reform. Both parent organizations continued to function separately as well.²⁹⁴

In the early stages of the campaign, the opposition forces also targeted Justice Mosk for defeat. However, they removed him from the "hit list" shortly after the California Coalition for Court Reform was formed.²⁹⁵ In August 1986, at the same time Governor Deukmejian announced in a news conference that he opposed the Chief Justice and Justices Reynoso and Grodin, the Governor stated that he would vote to retain Justice Mosk.²⁹⁶ The Governor's statement of support for Justice Mosk mirrored the campaign against the justices, for it now focused on the "November Three" alone.²⁹⁷ The focal issue of the opposition to each of the three justices remained their voting records in capital cases.

In contrast to the highly organized and politically astute opposition, the justices did not muster an equivalent campaign.²⁹⁸ Chief Justice Bird created the Committee to Conserve the Courts, but the Committee did not mount an effort on her behalf (or on behalf of the other two justices) until mid-summer of 1986.²⁹⁹ Even then, the campaign widely was thought to be ineffective.³⁰⁰ Only four months before the election,

Committee, and the Pro-Life Council, but these organizations tended to play a comparatively minor role when compared to the two major organizations under discussion. *Id.*

²⁹³ Grodin, *supra* note 290, at 87-88. For a description of the campaign focus on Chief Justice Bird, see *supra* note 287.

²⁹⁴ Culver & Wold, *supra* note 287, at 88.

²⁹⁵ Wold & Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349 (1987).

²⁹⁶ *Id.*

²⁹⁷ Six of the seven members of the California Supreme Court were on the retention ballot in November 1986. *Id.* There was little or no organized opposition to Justices Lucas and Panelli, both of whom Governor Deukmejian had appointed. *Id.* With the removal of most of the opposition to Justice Mosk, the campaign focused on Chief Justice Bird, and to a somewhat lesser extent, on Justices Reynoso and Grodin. *Id.* Justice Broussard, whom Governor Jerry Brown appointed to the court, was the only justice on the court not on the retention ballot in 1986. *Id.*

²⁹⁸ For a terse, general description of the campaign efforts of Chief Justice Bird and of Justices Reynoso and Grodin, see Zeiger, *Judgment Day For The Supreme Court: Rose Bird Faces the Ultimate Jury*, 17 CAL. J. 423 (1986).

²⁹⁹ Wold & Culver, *supra* note 295, at 349.

³⁰⁰ Indeed, Professors Wold & Culver observe that:

To Credit the Committee to Conserve the Courts with a campaign strategy is to be charitable

the Independent Citizens' Committee to Keep Politics Out of the Courts was organized to support the beleaguered justices and to promote the independence of the judiciary.³⁰¹ Former Governor Pat Brown and Shirley Hufstедler, former judge of the United States Circuit Court of Appeals for the Ninth Circuit and former U.S. Secretary of Education, cochaired the Committee. The Committee supported the retention of all six justices, but it did not generate much publicity in the state's media.³⁰² Although Justices Reynoso and Grodin also waged their own campaigns, their efforts were no match for the opposition.³⁰³

Commentators have estimated that eleven and one-half million dollars was spent on the retention campaign. Chief Justice Bird and Justices Reynoso and Grodin collectively spent about four and one-half million dollars.³⁰⁴ The opposition spent approximately seven million.³⁰⁵ The opposition spent much of its money publicizing capital punishment and arguing that the November Three had thwarted the will of the People by reversing nearly every death penalty case the court reviewed.³⁰⁶ Although the voters were presented with many variations on this theme, the primary charge was the now familiar claim that the justices reversed death penalty judgments because of their personal opposition to capital punishment and not because "the law" required reversals under the facts of the cases reviewed.³⁰⁷ Direct mailings, radio

. . . In a post-election essay, Zimmerman [the first consultant retained by Chief Justice Bird, but fired after a short time because she disagreed with the firm's campaign strategy] succinctly articulated the problems with her "remarkably inept" campaign: "she had no campaign manager, no political consultant, no advertising agency, no pollster, no steering committee and no fundraising coordinator. . . . And although polling indicated that judicial independence was the one message that would *not* work, she adopted it as the sole basis of her campaign.

Id. at 350.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ Justice Grodin relates his personal experiences with the campaign in Grodin, *supra* note 290, at 367-69. Professors Wold and Culver made the following statement concerning the campaign activity of the other five justices on the November retention ballot: "Neither Mosk, Panelli nor Lucas engaged in any campaigning. In late summer 1986, Grodin and Reynoso each ran several television ads that focused on their individual records." Wold & Culver, *supra* note 295, at 350 n.8. For another discussion of the campaign efforts of the justices, see Zeiger, *supra* note 298, at 423-27.

³⁰⁴ Grodin, *supra* note 290, at 368.

³⁰⁵ *Id.*

³⁰⁶ See Culver & Wold, *supra* note 287, at 86-89; Grodin, *supra* note 290, at 366-67.

³⁰⁷ See *supra* notes 286-87.

broadcasts, and television spots repeated these messages. For example, one television advertisement linked the three justices as an evil triumvirate³⁰⁸ and urged the voters to vote “three times for the death penalty; vote no on Bird, Reynoso, Grodin.”³⁰⁹

In one of the more charitable and temperate attacks on the November Three, the President of the California District Attorneys Association (apparently attempting to justify his Association’s early opposition to the justices) wrote:

A judge must decide cases according to the law, regardless of the popularity of his decision. But that is precisely the problem I see — and I think most Californians see — with this [s]upreme [c]ourt. Several of the justices do not view their job as one of correcting errors of law which the lower courts have committed. These justices see their function as one of modifying or “modernizing” the law to correspond to their own moral and political philosophies. . . .

. . . I believe that any judge who perceives his function in this way should be removed. Those who seek to remove such a judge are not attacking the independence of the courts, they are protecting it by keeping the courts in their proper role in a democratic government. . . .

Those who defend judicial activism cite the supposed improvements in the law that the courts have made. . . . Whether the law has improved is not only a matter of opinion, it begs the question. In a democracy, no one — not even judges — should be able to create and change law and at the same time be immune from accountability to the people.

That is what Jefferson meant when he said that governments derive their powers from the consent of the governed. Judges can legitimately

³⁰⁸ Grodin, *supra* note 290, at 367. Their opponents frequently asserted that Bird, Reynoso, and Grodin were a “gang of three” that rendered an indistinguishable brand of “liberal justice” and that the voters therefore should vote against all three justices. See Winograd, *Bird, Grodin, Reynoso: Are They a “Gang of Three?”* 17 CAL. J. 439 (1986). In his statistical study of the voting behavior of the three justices on the supreme court for the years 1984 and 1985, Winograd concludes that:

[I]t can be stated without equivocation that there is no common front composed of Bird, Reynoso and Grodin. Of the 277 cases examined, there was not one opinion in which the three stood united apart from any other members of the [c]ourt. . . .

. . . .

In the last analysis, the statistical evidence does not support the claim that Jerry Brown bequeathed a set of judicial clones who share views dramatically isolated from others on the [c]ourt. This being so, it places an added burden on the justices’ opponents to explain why all three justices should be attacked as a group. The November reconfirmation election results may well depend on opponents’ ability to make that case or to obscure the differences so the public does not notice.

Id. at 439, 441.

³⁰⁹ Grodin, *supra* note 290, at 367.

claim independence only if they confine themselves to announcing the law created by government agencies that are directly responsible to the governed.

Thus, the overriding issue before the voters in 1986 should not be whether the [s]upreme [c]ourt justices have been pro-business or anti-business, pro-death penalty or anti-death penalty, but whether they have been faithful or unfaithful to the principles of republican government and the right of the people to govern themselves — whether the justices are willing to follow the people's will as embodied in statutes and the constitution.

There is a great deal of evidence that Bird, Reynoso, Grodin and Mosk are unwilling to act as judges should act in a democracy. Their claim to "independence" is false because they have forgotten who the real lawmakers are in a democracy. Their rulings in the death penalty cases, for example, strongly suggest their intention to thwart the clearly expressed will of the people. As the chief justice seems to see it, the California trial courts can never try a death penalty case correctly.³¹⁰

The opponents were successful in framing the issues for the retention election and in convincing a majority of the electorate to remove Chief Justice Bird and Justices Reynoso and Grodin because the justices personally opposed capital punishment.³¹¹ Exit polls showed that only eleven percent of the voters who voted against the Chief Justice gave as a reason that she was not qualified. Only eighteen percent of these voters avowed that she was too liberal; while sixty-six percent said that they voted against Chief Justice Bird because she opposed the death penalty.³¹² Clearly, the voters held similar views with respect to Justices Reynoso and Grodin.³¹³ One recent study summarized the voting behavior in the 1986 retention election as follows:

In sum, survey data gathered by the California Poll strongly suggested that voter opposition to Bird, and ultimately to two other liberal members

³¹⁰ Bradbury, *Judicial Morality in a Democracy*, CAL. L., Sept. 1985, at 10, 12. This is neither the time nor the place for commentary on the validity of these charges.

³¹¹ The vote on the six justices on the retention ballot was as follows:

Justice	Confirm	Reject
Bird	2,369,063 (34%)	4,622,066 (66%)
Reynoso	2,536,114 (40%)	3,874,601 (60%)
Grodin	2,741,962 (43%)	3,570,569 (57%)
Mosk	4,472,678 (74%)	1,604,806 (26%)
Panelli	4,648,505 (79%)	1,260,385 (21%)
Lucas	4,692,329 (79%)	1,211,013 (21%)

S.F. Chron., Nov. 6, 1986, at 9, col. 2.

³¹² Grodin, *supra* note 290, at 367; *see also supra* note 287 (explaining that Chief Justice Bird became "lightening rod" for court's critics and symbol of court's liberalism).

³¹³ Grodin, *supra* note 290, at 367; Wold & Culver, *supra* note 295, at 353-54.

of the California court, was animated by two basic attitudes. One view was that the court had persistently been too lenient toward criminal defendants generally and convicted murderers in particular; the other was that the justices had repeatedly exhibited hostility toward capital punishment. As the Field Institute itself concluded shortly before the election: "The public's strong support for the death penalty and the belief that the Chief Justice is personally opposed to it are directly linked to the desire to have Bird removed from the high court."³¹⁴

Arguably the pro-capital punishment interests in California successfully framed the Bird court's handling of death penalty cases as an issue of the legitimacy of the justices' actions.³¹⁵ Had it been established that Chief Justice Bird and Justices Reynoso and Grodin indeed were deciding these cases on the basis of their own personal views on capital punishment and not according to the law,³¹⁶ then their removal from office at the retention election would have been entirely appropriate. But the campaign did not produce convincing evidence that illegitimate decisionmaking caused the high reversal rate. The campaign included little discussion about the law the Bird court applied in reversing these cases and even less analysis of the actual opinions themselves.³¹⁷ Instead, the pro-capital punishment interests may have successfully linked the high reversal rate to judicial misbehavior, without producing the necessary proof.³¹⁸ The burden then was cast upon the justices' campaigns to correct this misconception, but those campaigns did not produce effective counter-arguments.³¹⁹ The failure to rebut effectively the charges against Chief Justice Bird and Justices Reynoso and Grodin apparently gave an aura of accuracy to the charges made in the opposi-

³¹⁴ Wold & Culver, *supra* note 295, at 354 (quoting The Field Institute, The California Poll 3 (Aug. 12, 1986)).

³¹⁵ Since the exit polls show only that the voters removed the justices from office because of the justices' personal opposition to capital punishment, one cannot be sure the voters believed that the defeated justices translated their personal opposition into reversals of death judgments which should have been affirmed under the law. The evidence is simply far too crude to enable one to draw accurate conclusions about precisely how the justices' personal opposition to the death penalty justified turning them out of office.

³¹⁶ This includes situations in which the judge must make law because there is no law at hand suitable for the resolution of the dispute presented to the court. The judge must make law by looking to other rules, to broader legal principles, and perhaps to contemporary community values.

³¹⁷ See *supra* notes 279-85 and accompanying text.

³¹⁸ See *supra* notes 287-97 & 311-15 and accompanying text.

³¹⁹ See *supra* notes 298-304 and accompanying text. Perhaps these issues are simply too complex to be effectively presented to the voters in a statewide campaign. But even if that is true, the opponents are not powerless to combat this type of campaign.

tion campaigns.

The term of office of the defeated justices would end on January 4, 1987.³²⁰ Between election day and the end of the Bird court's tenure, the California Supreme Court decided an additional seven automatic appeals.³²¹ The judgment imposing the sentence of death was affirmed in one case,³²² and there were varying types of reversals in the remaining six.³²³ With respect to the six reversals, the court granted rehearing petitions in *People v. Johnson*³²⁴ and *People v. Wade I.*³²⁵

Thus, in the eight year period between the day the Bird court decided the first automatic appeal under the 1977 death penalty legislation³²⁶ and the filing of the last of the death penalty cases decided by

³²⁰ Under the California Constitution, the court's new term begins on the first Monday in January. CAL. CONST. art. VI, § 16. The new term began on January 5, 1987.

³²¹ These seven cases are presented in the order the court decided them. Cases decided on the same day are listed in the order in which they appear in the official reports. *See* *People v. Louis*, 42 Cal. 3d 969, 728 P.2d 180, 232 Cal. Rptr. 110 (1986); *People v. Allen*, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986), *cert. denied*, 484 U.S. 872 (1987); *People v. Ledesma*, 43 Cal. 3d 171, 729 P.2d 839, 233 Cal. Rptr. 404 (1987); *People v. Myers*, 43 Cal. 3d 250, 729 P.2d 698, 233 Cal. Rptr. 264 (1987); *People v. Johnson (Joe)*, 43 Cal. 3d 296, 730 P.2d 131, 233 Cal. Rptr. 562, *reh'g granted*, 47 Cal. 3d 576, 764 P.2d 1087, 253 Cal. Rptr. 710 (1988); *People v. Bloyd*, 43 Cal. 3d 333, 729 P.2d 802, 233 Cal. Rptr. 368 (1987); *People v. Wade I.*, 43 Cal. 3d 366, 729 P.2d 239, 233 Cal. Rptr. 48 (1987).

³²² *People v. Allen*, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986), *cert. denied*, 108 S. Ct. 202 (1987).

³²³ The following cases appear in the order the court decided them. *See* *People v. Louis*, 42 Cal. 3d 969, 728 P.2d 180, 232 Cal. Rptr. 110 (1986) (reversal of entire proceeding below — guilt, special circumstance, and penalty); *People v. Ledesma*, 43 Cal. 3d 171, 176, 729 P. 2d 839, 840, 233 Cal. Rptr. 404, 405-06 (1987) (habeas corpus proceeding was consolidated with automatic appeal; court granted writ and vacated entire judgment on ground of ineffective assistance of trial counsel); *People v. Myers*, 43 Cal. 3d 250, 276, 729 P.2d 698, 715, 233 Cal. Rptr. 264, 280 (1987) (reversal of death judgment, but affirmance of guilt and special circumstance proceedings); *People v. Johnson (Joe)*, 43 Cal. 3d 296, 730 P.2d 131, 233 Cal. Rptr. 562 (1987) (reversal of entire proceeding below — guilt, special circumstance, and death sentence); *People v. Bloyd*, 43 Cal. 3d 333, 729 P.2d 802, 233 Cal. Rptr. 368 (1987) (reversal of death judgment and affirmance of judgment in all other respects); *People v. Wade I.*, 43 Cal. 3d 366, 729 P.2d 239, 233 Cal. Rptr. 48 (1987) (reversal of the one special circumstance finding and death judgment; affirmance of judgment in all other respects).

³²⁴ 43 Cal. 3d 296, 730 P.2d 131, 233 Cal. Rptr. 562 (1987). The supreme court granted the Attorney General's petition for rehearing on March 26, 1987.

³²⁵ 43 Cal. 3d 366, 729 P.2d 239, 233 Cal. Rptr. 48 (1987). The supreme court granted the Attorney General's petition for rehearing on March 26, 1987.

³²⁶ The first decision in an automatic appeal under the 1977 Death Penalty Legislation was on January 11, 1979, in *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979).

the Bird court,³²⁷ seventy-one automatic appeals were decided.³²⁸ In all but four of these cases (94%),³²⁹ there was at least a partial reversal of the judgment entered below.³³⁰

III. THE EMERGENCE OF THE LUCAS COURT

A. *An Analysis of the Results Produced by the Lucas Court the First Year*

1. Introduction

The "New Court" officially began on January 5, 1987, but for nearly four months it was a court with only four justices.³³¹ Hampered by the political significance of the death penalty and by the three vacancies on the bench, the court did nothing of importance in death penalty cases until after the Deukmejian appointees were confirmed. Associate Justice Malcolm Lucas became Chief Justice of California on February 5, 1987.³³² Former Court of Appeals Judges John A. Arguelles, David N. Eagleson, and Marcus M. Kaufman became associate justices of the court on March 18, 1987.³³³

On Wednesday, March 26, 1987, the fully reconstructed California Supreme Court met for the first time.³³⁴ Given the retention election,³³⁵ the Governor's views on capital punishment,³³⁶ and the reputation of

³²⁷ The court filed five opinions on January 2, 1987, the last business day of the Bird court. *See supra* note 321 and accompanying text.

³²⁸ *See* Table 1, *infra* p. 328.

³²⁹ The first affirmance came on October 23, 1980, in *People v. Jackson*, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981); the second on February 11, 1981, in *People v. Harris (Robert)*, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679, *cert. denied*, 454 U.S. 882 (1981); the third on December 29, 1983, in *People v. Fields*, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983), *cert. denied*, 469 U.S. 892 (1984); and the fourth on December 31, 1986 (after retention election), in *People v. Allen*, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986), *cert. denied*, 484 U.S. 872 (1987).

³³⁰ *See supra* notes 238, 241, 245, 247, 251, 254, 256 & 258 and accompanying text.

³³¹ The four justices were Justices Mosk, Broussard, Lucas, and Panelli.

³³² 43 Cal. 3d iii, nn.2 & 5 (1987).

³³³ *Id.* at nn.6-8.

³³⁴ *See* Minutes of the Supreme Court, 1987 California Official Reports, Official Advance Sheets, No. 11, at 7 (San Francisco, Mar. 26, 1987).

³³⁵ *See supra* notes 274-319 and accompanying text.

³³⁶ Governor Deukmejian expressed his views on capital punishment and the Bird and Lucas courts in a radio broadcast on November 5, 1988:

In recent years, Californians have clearly demonstrated their support for capital punishment. They voted twice in support of the death penalty in 1972 and again in 1978.

the new appointees as “conservative-to-moderate,” with views on capital punishment not greatly different from those of the Governor,³³⁷ observers anticipated that the “Lucas court” would dispense a different brand of justice than what was delivered by the Bird court, especially in death penalty cases.³³⁸ The prediction proved to be true.

2. The Affirmance Rate

During the first year of its tenure as a court with a full complement of justices — from March 26, 1987 to March 25, 1988 — the Lucas

Then, in 1986, California voters removed three [s]upreme [c]ourt justices from the bench, in large part because the court had established a clear pattern of blocking the implementation of capital punishment.

Since then, a number of important developments have occurred.

I have now had the opportunity to appoint five new justices to the state [s]upreme [c]ourt. This new majority is now deciding capital punishment cases on their merits.

The [s]upreme [c]ourt under Chief Justice Rose Bird upheld only four death sentences in nine years. In just the last year and a half, the new [s]upreme [c]ourt, under the leadership of Chief Justice Malcolm Lucas, has affirmed 43 cases.

Even with the affirmation of these death sentences, there still has not been an execution in California in 21 years. The primary reason stems from the fact that there appears to be no finality to these cases. For example, there is wide use of the time-consuming legal doctrine called habeas corpus. Under this doctrine, criminals who have had their death sentences upheld by our highest state and federal courts can still file petitions in our courts claiming irregularities in their trials such as bias in jury selection and incompetence of counsel.

Of course, a fair trial must be guaranteed — and I have no quarrel with the right to an appellate review to determine whether the trial proceedings were indeed fair. However, I believe such reviews should be conducted within a reasonable time period.

[The Governor’s description of two death penalty cases, which he apparently believes establish that the writ of habeas corpus is being abused in death penalty cases in California, is omitted.]

We are supporting efforts in Washington to reform habeas corpus so that there is some degree of finality to the criminal justice process. With a valid capital punishment statute on the books for over a decade, the people of California deserve the protection that will come from implementing the death penalty.

Potential murderers must know that if they take the life of a peace officer or other innocent victim, that they will indeed pay with their own lives.

Governor’s Broadcast, Nov. 5, 1988 (transcript available at U.C. Davis Law Review).

³³⁷ See, e.g., Yoachum, *Duke’s Court Veers to Right*, 18 CAL. J. 299 (1987).

³³⁸ *Id.*

court decided sixteen automatic appeals.³³⁹ There were four reversals³⁴⁰ and twelve affirmances,³⁴¹ for an affirmance rate of seventy-five percent or, conversely, a reversal rate of twenty-five percent.³⁴² The highest af-

³³⁹ The cases are listed in the order the court decided them. Cases decided on the same day are in the order in which they appear in the Official Reports. See *People v. Hendricks I*, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987); *People v. Ghent*, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987), *cert. denied*, 485 U.S. 929 (1988); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987); *People v. Gates*, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987), *cert. denied*, 108 S. Ct. 2005 (1988); *People v. Miranda*, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987), *modified*, 44 Cal. 3d 241a, *cert. denied*, 108 S. Ct. 2026 (1988); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987), *aff'd on rehearing*, 49 Cal. 3d 502, 778 P.2d 129, 262 Cal. Rptr. 1 (1989); *People v. Snow*, 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987); *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842, *modified*, 44 Cal. 3d 1254c, *cert. denied*, 109 S. Ct. 188 (1988); *People v. Kimble*, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148, *cert. denied*, 109 S. Ct. 188 (1988); *People v. Hale*, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988); *People v. Hovey*, 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121, *cert. denied*, 109 S. Ct. 188 (1988); *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200, *cert. denied*, 109 S. Ct. 186 (1988); *People v. Hendricks II*, 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181, *modified*, 44 Cal. 3d 1254a, *cert. denied*, 109 S. Ct. 247 (1988); *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867, *modified*, 45 Cal. 3d 648c, *cert. denied*, 109 S. Ct. 329 (1988); *People v. Williams*, 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336, *modified*, 45 Cal. 3d 517a, *cert. denied*, 109 S. Ct. 249 (1988); *People v. Wade II*, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905, *modified*, 45 Cal. 3d 648A, *cert. denied*, 109 S. Ct. 248 (1988).

Bell is included in the analysis of the first year of the Lucas court's work in automatic appeals despite the fact that the Bird court granted the rehearing in that case. This is because the original opinion in *Bell* represents a portion of the court's work in automatic appeals this year, and the opinion expresses the justices' views on the issues resolved in the original opinion, though they were subsequently abandoned. Since this Article concerns changes the retention election and the new court appointments made and not doctrine the court announced this year, the subsequent grant of the petition for rehearing in *Bell* does not obliterate the original opinion for these purposes. At any rate, excluding *Bell* from the total only changes the first-term Lucas court affirmance rate from 75% to 73%.

³⁴⁰ See *Hendricks I*; *Anderson (James)*; *Snow*; *Hale*. For the citations to these cases, see *supra* note 339.

³⁴¹ The 12 cases are *Ghent*, *Gates*, *Miranda*, *Bell*, *Howard*, *Kimble*, *Hovey*, *Ruiz*, *Hendricks II*, *Melton*, *Williams*, and *Wade II*. For the citations to these cases, see *supra* note 339. Since the court granted a rehearing in *Bell*, only 11 death judgments were finally affirmed.

³⁴² We might exclude *Bell* on the ground that a rehearing was granted in that case. See *supra* note 339. Thus, the affirmance rate drops to 73%, and the reversal rate climbs to 27%. Since this change is not very significant, the inclusion of *Bell* does not adversely affect the analysis even if one disagrees with my decision to include *Bell*.

firmance rate for the Bird court was thirty-three percent in 1981 (and the court decided only three cases that year).³⁴³ In no other year did the affirmance rate exceed twenty percent.³⁴⁴ In four of its eight years, the Bird court did not affirm a single case. And for the entire eight year period in which the Bird court decided death penalty cases, the cumulative affirmance rate was six percent.³⁴⁵ These data suggest that, in comparison with the Bird court it replaced, the Lucas court indeed has wrought a dramatic change in the handling of death penalty cases in California.³⁴⁶

Furthermore, three of the four reversals by the Lucas court this first year had nothing to do with the fact that they were capital cases before the court on automatic appeal.³⁴⁷ These were the reversals in *Hendricks I*,³⁴⁸ *Snow*,³⁴⁹ and *Hale*.³⁵⁰ As we shall see, there are compelling reasons for removing these three cases from the analysis of the court's death penalty jurisprudence. If these three cases are removed from the analysis, the Lucas court record becomes an even more dramatic signal of change.

The first automatic appeal decided by the Lucas court was also the first reversal on nondeath-penalty grounds. The court decided *People v. Hendricks (Hendricks I)* on July 6, 1987.³⁵¹ Justice Mosk wrote for a unanimous court. The court affirmed the judgment of guilt and the special circumstance findings. The sanity phase verdict was set aside, and the judgment imposing the death penalty was reversed.³⁵² For some unexplained reason, the sanity phase of the trial was not held immediately following the guilt phase.³⁵³ Shortly after returning a verdict of

³⁴³ See Table 1, *infra* p. 328.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ For a discussion of the significance of these findings, see *infra* text accompanying notes 534-49 & 800.

³⁴⁷ One should note, however, that these cases would not have been decided initially by the California Supreme Court if they had not been capital cases. Rather, they would have been heard in the court of appeals, as are all appeals from criminal convictions in the superior court except for death penalty cases.

³⁴⁸ 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987); see *infra* notes 351-58 and accompanying text.

³⁴⁹ 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987); see *infra* notes 359-63 and accompanying text.

³⁵⁰ 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988); see *infra* notes 364-68 and accompanying text.

³⁵¹ 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66.

³⁵² *Id.*

³⁵³ A sanity hearing must be conducted immediately after the guilt phase of a capital

death at the penalty phase of the trial, the court discharged the jury. On the day set for sentencing, the parties reminded the court that it had not held a sanity hearing. Over the defendant's objection, the trial court impaneled a new jury to decide the issue of sanity alone. The new jury could not reach a verdict, and the court declared a mistrial of the sanity issue.³⁵⁴ Then, in the words of Justice Mosk, the trial court "committed the utterly incomprehensible act of recalling the original jurors — more than five months after their discharge and return to the community — to consider the question of sanity."³⁵⁵ Finding this action to be "wholly beyond the jurisdiction of the court" under the settled law of the state,³⁵⁶ the California Supreme Court set aside the sanity determination as "a nullity."³⁵⁷ Since a valid verdict at the sanity phase of the trial is a prerequisite to conducting the penalty proceeding, the court also reversed the penalty judgment.³⁵⁸

Although the court's disposition of the special circumstance arguments is certainly debatable, there is nothing in *Hendricks I* to suggest that the Lucas court disposed of the sanity and penalty issues differently than the Bird court might have resolved those issues. The trial judge clearly erred by recalling the previously discharged jury, and a reversal virtually was inevitable under existing law on noncapital grounds. *Hendricks I* thus provided no real test of the Lucas court's conception of its role in automatic appeals.

In *Snow*, the second reversal on nondeath-penalty grounds, Chief Justice Lucas wrote for a unanimous court.³⁵⁹ During jury selection,

trial. CAL. PENAL CODE § 190.1(c) (West 1988).

³⁵⁴ *Hendricks I*, 43 Cal. 3d at 589, 737 P.2d at 1350, 1352, 238 Cal. Rptr. at 68 (1987).

³⁵⁵ *Id.* at 588, 737 P.2d at 1352, 238 Cal. Rptr. at 68.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 599, 737 P.2d at 1359, 238 Cal. Rptr. at 75.

³⁵⁸ *Id.* at 599, 737 P.2d at 1360, 238 Cal. Rptr. at 76.

³⁵⁹ 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987). The court decided *Snow* on December 24, 1987. Intervening between *Hendricks I* and *Snow* was the death penalty reversal in *Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585, which the court decided on October 13, 1987. *Id.*

Although Justice Eagleson wrote separately in *Snow*, he concurred "fully in the majority's reversal of the judgment under *People v. Wheeler* [22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978)]." *Snow*, 44 Cal. 3d at 228, 746 P.2d at 458, 242 Cal. Rptr. at 483. Justice Eagleson wrote separately to record his disagreement with what he found to be an ambiguously worded statement in the Chief Justice's opinion for the court. *Id.* He emphasized that the *Wheeler* doctrine applies to the defense as well as to the prosecution. *Id.* Thus, despite the fact that Justice Eagleson wrote a separate concurring opinion, the court was unanimous in its decision to reverse the judgment for *Wheeler* error. *See id.* For further discussion of the application of *Wheeler* in *Snow*, see

the prosecution had exercised sixteen peremptory challenges. It used six of these challenges to exclude Blacks from the jury over repeated objections by the defense that the prosecutor's exclusion of these prospective jurors violated the rule announced in *People v. Wheeler*.³⁶⁰ *Wheeler* held that a party may not use peremptory challenges to exclude from a jury, solely because of a presumed "group bias," all or most members of an identifiable group of citizens distinguished on racial, religious, ethnic, or similar grounds.³⁶¹ Finding *Wheeler* error, the Lucas court reversed the entire judgment.³⁶² Given the prosecutor's behavior in this case and the trial court's response, any criminal conviction would have been reversible for *Wheeler* error, for *Wheeler* applies to all criminal cases.³⁶³ Thus, again, the Lucas court reversed the case on noncapital grounds.

The final reversal on other than death penalty grounds came on February 25, 1988, in *People v. Hale*.³⁶⁴ During the arraignment in the trial court, and with the concurrence of both the prosecutor and defense counsel, the court made the requisite finding that there was an issue of the defendant's mental competence to stand trial and that a hearing would be held to determine that issue. Once the present sanity issue is properly raised and the court orders a hearing, all further proceedings in the criminal prosecution must be suspended until that issue is resolved.³⁶⁵ According to the record in the case, the sanity hearing was never held.³⁶⁶ This lapse "rendered the subsequent trial proceedings void because the court had been divested of jurisdiction to proceed pending express determination of the competency issue."³⁶⁷ Since the error contaminated all further proceedings, the supreme court ordered a complete reversal.³⁶⁸

infra text accompanying notes 361-63.

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

³⁶¹ *Id.*

³⁶² *Snow*, 44 Cal. 3d at 228-30, 746 P.2d at 458-60, 242 Cal. Rptr. at 483-85.

³⁶³ *See, e.g.*, *People v. Hall*, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) (reversing conviction of assault and false imprisonment). *Wheeler* itself was not a death penalty case; nor was *Snow* — the first reversal of an automatic appeal under *Wheeler*. *See e.g.*, *People v. Turner (Melvin)*, 42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986).

³⁶⁴ 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988).

³⁶⁵ CAL. PENAL CODE § 1368 (West 1982); *see also In re Davis*, 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973); *People v. Pennington*, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967).

³⁶⁶ *Hale*, 44 Cal. 3d at 536, 749 P.2d at 772, 244 Cal. Rptr. at 117.

³⁶⁷ *Id.* at 541, 749 P.2d at 775, 244 Cal. Rptr. at 121.

³⁶⁸ *Id.*

The incomprehensible error in *Hendricks I*, and the trial court's inexplicable failure to hold the hearing previously ordered in *Hale* are not likely to recur in other cases. Neither of these holdings appear to endanger the validity of other death judgments because they are both based on unique facts and foolish mistakes. Furthermore, the reversals clearly were compelled under existing California law and arguably under federal constitutional law as well.³⁶⁹ On the other hand, the reversal in *Snow* for *Wheeler* error may well serve as precedent for the reversal of future death cases.³⁷⁰ But *Snow* is simply an application of existing California law and thus would serve only as authority for a reversal under *Wheeler*. Moreover, had California law been silent on this issue, *Batson v. Kentucky*³⁷¹ would have compelled a reversal.

Thus, in reversing each of these cases, the Lucas court simply applied existing California law as it would to any criminal case. Finally, the court did not have a legitimate option in its disposition of these cases because, if my analysis is correct, federal constitutional doctrines also compelled reversals in each of these three cases. For these reasons, the reversals in *Hendricks I*, *Snow*, and *Hale* tell us nothing about the current court's conception of its role in automatic appeals or how the court is reacting to death penalty issues. Consequently, these three decisions should not be included in the analysis of the Lucas court's death penalty jurisprudence.

If *Hendricks I*, *Snow*, and *Hale* are removed from the analysis on the ground that they had nothing to do with the death penalty despite

³⁶⁹ During the course of his opinion for a unanimous court in *Hendricks I*, Justice Mosk recognized that the rule invoked in that case "is designed to guarantee a fair trial, controlled by the court and shielded from outside influences." 43 Cal. 3d 584, 597, 737 P.2d 1350, 1358, 238 Cal. Rptr. 66, 74 (1987). The due process clause of the fourteenth amendment, of course, guarantees the right to a fair trial and arguably there was a due process violation in this case. But the court did not need to reach the federal issue as it ordered the reversal under California law.

In *Hale*, Chief Justice Lucas wrote for a unanimous court that, "Defendant persuasively argues that the court's failure to hold a competency hearing pursuant to § 1368 constituted a denial of due process under *Pate v. Robinson* (1966) 383 U.S. 375, 377." *Hale*, 44 Cal. 3d at 538, 749 P.2d at 773, 244 Cal. Rptr. at 118.

³⁷⁰ The supreme court has reversed other death cases for *Wheeler* error. *See, e.g.*, *People v. Turner (Melvin)*, 42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986).

³⁷¹ 476 U.S. 79, 86 (1986) (holding that equal protection clause prohibits state from excluding members of defendant's race "from the jury venire on account of race"). Indeed, Chief Justice Lucas's opinion tacitly recognizes that *Batson* would have compelled a reversal. *See People v. Snow*, 44 Cal. 3d 216, 222, 226-27, 746 P.2d 452, 454, 457-58, 242 Cal. Rptr. 477, 479, 482-83 (1987).

the fact that they were automatic appeals,³⁷² then the reversal rate on *death penalty issues* for the first year of the Lucas court drops to eight percent, and the affirmance rate climbs to ninety-two percent.³⁷³

The dramatic change in the reversal rate from the days of the Bird court, regardless of which Lucas court figure is used (8% or 25%), is not the only apparent difference in the way these two courts handled death penalty appeals.³⁷⁴ The Lucas court decided more automatic appeals in its first year (sixteen) than the Bird court decided in any year except for 1985. In 1985, the Bird court decided twenty-four capital cases. The next highest number was twelve, occurring once in 1984 and once in 1986. The average for the entire eight year period in which the Bird court decided automatic appeals was nine decisions per year.³⁷⁵

On the assumption that it probably took several years for convictions under the 1978 Initiative to reach the point where they could be decided by the supreme court, perhaps a more accurate comparison would employ the average number of cases decided each year by the Bird court for the five year period beginning in 1982. During that period, the Bird court decided an average of twelve cases each year.³⁷⁶ Using this figure of twelve cases per year as the comparative index, the Lucas court's record of deciding sixteen automatic appeals in its first year represents a one-third increase (33.3%) in the number of death penalty cases decided in a single year. In view of the inexperience of the new appointees (Justices Arguelles, Eagleson, and Kaufman) with automatic appeals, one would not have anticipated that the Lucas court would have so substantially increased the number of death penalty cases so abruptly.

³⁷² A word of caution is in order. I have not factored out similar cases in the data for the Bird court which appear in Table 1, *infra* p. 328. The data for the Bird court are based simply on the disposition of automatic appeals. I am, however, currently analyzing the Bird court cases in connection with my research for an article analyzing the Bird court's treatment of death penalty cases.

³⁷³ These figures, of course, exclude *Hendricks I*, *Snow*, and *Hale* on the ground that the reversal in these three cases formally had nothing to do with the fact that they were capital cases before the court on automatic appeal. With the exclusion of these three cases, the court decided death penalty issues in only 13 automatic appeals, with the result that there was one reversal. See *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987) (finding *Ramos* error). The remaining 12 cases were affirmed. See *supra* notes 339-41.

³⁷⁴ See *infra* text accompanying notes 534-49 & 800 (discussing significance of these findings).

³⁷⁵ See Table 1, *infra* p. 328.

³⁷⁶ See *id.* Sixty cases were decided in this five-year period. There were two affirmances and fifty-eight reversals. See *id.*

An analysis of the voting patterns of the justices in these cases demonstrates that the Deukmejian-appointed justices joined together to form a new majority on the court, a startlingly efficient majority that was able to decide a high volume of cases with a dramatically low reversal rate.³⁷⁷ Precisely how these justices combined together to produce such results is the subject of the next inquiry.

B. *The Individual Voting Records of the Justices*

1. Introduction

Since the reversal rate is the product of the *disposition* of the issues raised in the appeal, an analysis of the voting behavior of the individual justices must begin with an analysis of how each justice voted with respect to the disposition ordered in the majority opinion. Furthermore, since capital trials are separated into three and sometime four phases or clusters of issues (the guilt judgment, the special circumstance findings, the sanity judgment, and the penalty phase judgment), the following analysis first considers the individual justice's votes relative to the disposition of the issues raised in each of these phases of the trial.³⁷⁸ Next, the analysis compares the votes of each justice on the disposition of the various phases of the trial with the votes of his colleagues on the same issues. This analysis measures the degree to which the justices have agreed on the dispositions ordered in the majority opinion.

The analysis then moves from the justices' votes on the *disposition* of the issues to the voting record of each justice with respect to the *rationale* articulated in the majority opinion for the ordered disposition. This section of the analysis will explore the extent to which the justices agree on the law used in the majority opinion as the rationale for its disposition of the various issues. The focal points of this analysis are the number of times each justice authors, joins, or expressly agrees with the rationale set forth in the majority opinion³⁷⁹ and the number of times

³⁷⁷ See *infra* notes 384, 388, 404, 423 & 433 and accompanying text.

³⁷⁸ Though there may be a separate special circumstance phase of the trial in certain situations, generally the special circumstances are determined in the guilt phase of the trial. See *supra* notes 126-28 and accompanying text. Though it may not be entirely accurate to refer to the special circumstance phase of each of these trials, I nevertheless do so for it avoids the use of otherwise awkward phrases.

³⁷⁹ There is no difficulty interpreting the degree to which a justice agrees with the majority's rationale when the justice in question either authors the majority opinion or signs that opinion without writing separately. When the justice writes separately, this Article uses the traditional distinction between an opinion concurring in the majority opinion and an opinion concurring in the judgment. When a judge concurs in the ma-

the justice either dissents or concurs in the judgment.³⁸⁰

Finally, the analysis considers the manner in which each of the justices articulated his³⁸¹ opinion on the disposition of the issues and his rationale for doing so. By considering the number and type of opinions each justice authors, one can roughly assess the justice's impact on the law of capital punishment in California.

2. The Guilt, Special Circumstance, and Sanity Phase Dispositions

An analysis of the voting behavior of each of the justices in these death penalty cases shows that there was little disagreement on the court on the *disposition* of both the guilt and special circumstances phases of the trial. The justices also agreed on the disposition of the sanity phase issues presented in the automatic appeals during the Lucas court's first year.

Table 2 depicts the voting record of each justice as it relates to issues resolved in the majority opinions,³⁸² regardless of how the justice expressed his views.³⁸³

The Deukmejian appointees (Chief Justice Lucas and Justices Panelli, Arguelles, Eagleson, and Kaufman), together with Justice Mosk, agreed with the majority opinion's *disposition* of the guilt judgments in each case.³⁸⁴ Justice Broussard's lone dissent in *Wade II*³⁸⁵

majority opinion, the judge is adopting the majority's rationale for disposing of the issues, except for the instances in which the judge writes separately either to address some issue differently or to dissent to a specific issue. There is usually no difficulty interpreting the dissenting portion of the opinion. There is a problem, however, with deciding when a separate opinion either concurs in the majority opinion or concurs in the judgment when the judge does not expressly indicate the nature of the judge's agreement with the majority. I have resolved this difficulty by classifying each separate opinion written by a justice as an opinion concurring in the judgment unless the justice either expressly indicates concurrence in the majority opinion or unless that conclusion is unequivocally implied by the justice's language.

³⁸⁰ When a justice concurs in the court's judgment, the justice agrees only with the disposition and not with the majority's rationale for ordering the disposition. In a pure dissent, the justice disagrees with both the rationale and the disposition. Of course, the three types of separate opinions (concurrences in the opinion, in the judgment, and dissents) can combine in a variety of ways.

³⁸¹ The male pronoun is used only because all of the justices of the California Supreme Court this year were male.

³⁸² See Table 2, *infra* p. 329.

³⁸³ Thus, a judge could have joined the majority opinion, an opinion of another judge, or could have written separately. These data are presented in other tables set forth *infra*. Table 2 presents the individual justice's votes on the disposition of the cases.

³⁸⁴ See Table 2, *infra* p. 329. The majority affirmed the entire judgment in 12 cases.

was the only disagreement on the court this year over the disposition of a guilt phase judgment in a capital case.³⁸⁶ This means that the other justices never disagreed on the disposition of the guilt phase judgment and that Justice Broussard disagreed with his brethren in only 6% of the cases.³⁸⁷ But because Justice Broussard voted to reverse the entire judgment in *Wade II*, he did not address the special circumstance or penalty phase issues that the majority resolved in that case. Justice Broussard thus expressed his opinion on the special circumstance and penalty phase issues in one less case than did the majority. For this reason, Justice Broussard had only twelve opportunities to agree or disagree with his colleagues on the penalty phase issues, whereas the Deukmejian Justices and Justice Mosk were presented with thirteen, and only thirteen opportunities to agree or disagree on the special circumstance issues, whereas his colleagues were presented with fourteen.

The Deukmejian appointees again agreed among themselves 100% of the time on the disposition of the special circumstances determinations

Although the court may have reversed or vacated one or more of the superfluous special circumstance findings, this did not affect either the defendant's death eligibility or the death penalty assessment. For a list of these 12 affirmances, see cases cited *supra* notes 339 & 341.

Since this Article is concerned only with the Lucas court's handling of death penalty cases, I have excluded from my analysis all references to offenses that do not affect either the defendant's death eligibility or the penalty imposed. On occasion, there was disagreement concerning an offense which would not qualify the defendant for the death penalty under any circumstance, but which was jointly tried with death qualifying offenses at the trial. *See, e.g.*, *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987).

In *Ruiz*, Justice Broussard dissented from the affirmance of the second degree murder conviction for the killing of Tanya Ruiz. 44 Cal. 3d at 626, 749 P.2d at 874, 244 Cal. Rptr. at 220. In *Bell*, Justices Broussard and Arguelles dissented to the affirmance of the conviction of violating Penal Code § 12021, possession of a concealable firearm by an ex-felon. 44 Cal. 3d at 170, 176, 745 P.2d at 593, 597, 241 Cal. Rptr. at 910, 914. But since each justice voted to affirm the death qualifying convictions in both *Ruiz* and *Bell*, this Article does not consider the disagreement in these two cases.

³⁸⁵ 44 Cal. 3d 975, 1000, 750 P.2d 794, 809, 244 Cal. Rptr. 905, 920 (1988). Thus, with the exception of *Wade II*, Justice Broussard agreed with the disposition of the guilt phase judgment in all of the automatic appeals decided by the Lucas court this year. *See* cases cited *supra* note 340.

³⁸⁶ There were two guilt phase reversals this year, in *Snow* and *Hale*. *See supra* notes 360-71 and accompanying text. The decision in each case was by a unanimous court. *Id.*

³⁸⁷ In other words, Justice Broussard agreed with the disposition of the guilt phase judgment ordered in the majority opinion in 94% of the automatic appeals decided this year.

made in the majority opinion in each of these cases.³⁸⁸ But it should be noted here that in none of the cases in which the majority opinion reversed one or more of the special circumstances findings did that reversal in turn compel a reversal of the death judgment, for at least one more special circumstance was affirmed.³⁸⁹ Thus, the defendant remained death eligible in each case in which the majority opinion reversed special circumstance findings.

In several of the cases, Justices Mosk and Broussard reached different special circumstance dispositions than those announced in the majority opinions.³⁹⁰ Justice Mosk would have reversed special circumstance findings in two cases affirmed by the majority opinion (*Kimble*³⁹¹

³⁸⁸ See Table 2, *infra* p. 329. The majority opinion reversed one or more of the special circumstance findings in three cases. In *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987), the court held that only one multiple-murder special circumstance may be sustained no matter how many murder charges are tried together. *Id.* at 1150, 742 P.2d at 1333, 240 Cal. Rptr. at 612. The majority opinion vacated one of two multiple-murder special circumstances for two first degree murders and affirmed one multiple-murder and two felony-murder (robbery) special circumstances. *Id. Williams*, 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336 (1988), also involved redundant multiple-murder special circumstances. *Id.* at 927, 751 P.2d at 424, 245 Cal. Rptr. at 365. The court modified the judgment to reflect that three first degree murders comprise one multiple-murder special circumstance, rather than the six multiple-murder special circumstances found true by the jury. *Id.* at 929, 751 P.2d at 425, 245 Cal. Rptr. at 367. The court affirmed other special circumstances as well. In *People v. Wade II*, 44 Cal. 3d 975, 993-95, 750 P.2d 794, 804-05, 244 Cal. Rptr. 905, 915-16 (1988), the court vacated the "heinous, atrocious or cruel" special circumstance, but affirmed the torture-murder special circumstances.

For some unexplained reason, the majority opinion also found invalid redundant multiple-murder special circumstances in both *Kimble* and *Ruiz*, but the court did not vacate or reverse the invalid finding in either case. Because the majority opinion did not take this action, these two cases are not listed in Table 2, *infra* p. 329. Nevertheless, since there were other valid special circumstance findings in each case, the defendant's death eligibility was not affected. Further, in both cases the court held that the redundant multiple-murder special circumstance findings did not affect the penalty phase judgments. *People v. Ruiz*, 44 Cal. 3d 589, 620-21, 749 P.2d 854, 870-71, 244 Cal. Rptr. 200, 216-17 (1988); *People v. Kimble*, 44 Cal. 3d 480, 504, 749 P.2d 803, 817, 244 Cal. Rptr. 148, 163 (1988). In *Kimble*, Justice Broussard concurred in the judgment "insofar as it affirms the convictions and the special circumstances findings." 44 Cal. 3d at 526, 749 P.2d at 833, 244 Cal. Rptr. at 179.

³⁸⁹ See *supra* note 388.

³⁹⁰ See Table 3, *infra* p. 330.

³⁹¹ *People v. Kimble*, 44 Cal. 3d 480, 517, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 172 (1988) (Mosk, J., concurring in the judgment and dissenting) (arguing that although felony-murder special circumstances are invalid, defendant is still death eligible because of valid multiple-murder special circumstance).

and *Williams*),³⁹² although in neither case would a reversal of the special circumstance challenged by Justice Mosk have eliminated the defendant's death eligibility.³⁹³ This amounts to a disagreement rate for Justice Mosk in 14% of the cases.³⁹⁴ Justice Broussard disagreed with the majority opinion's disposition of the special circumstance judgment in a dissenting opinion in two cases. He would have reversed the felony-murder special circumstance finding in *Anderson* (James) for *Carlos* error,³⁹⁵ and he dissented from the majority's interpretation of the financial-gain special circumstance in *Howard*.³⁹⁶ But since Justice Broussard had only twelve opportunities to agree with his colleagues, this amounts to a slightly inflated disagreement rate of 15%.

Although Justices Mosk and Broussard each disagreed with the Deukmejian majority's affirmance of special circumstance findings in two cases, these two justices did not agree on the defects they found in the majority's judgments. Justice Broussard did not join Justice Mosk's

³⁹² *People v. Williams*, 44 Cal. 3d 883, 973, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 397 (1988). See *supra* note 391.

³⁹³ The majority vacated special circumstance findings in *Wade*, *Williams*, *Kimble*, and *Anderson* (James). But in none of these cases did the reversal of the special circumstance eliminate the defendant's death eligibility. Since there were other valid special circumstances acknowledged by Justice Mosk in *Wade* and *Kimble*, even under Justice Mosk's views the defendant remained death eligible.

³⁹⁴ Justice Mosk had 14 opportunities to agree with his colleagues. He disagreed in only two cases. Viewed from the perspective of the number of disagreements over special circumstances, rather than the number of cases in which there was disagreement, Justice Mosk would have set aside six special circumstance findings. The majority set aside three. See Table 2, *infra* p. 329. This amounts to a 50% disagreement rate.

³⁹⁵ *People v. Anderson* (James), 43 Cal. 3d 1104, 1151-52, 742 P.2d 1306, 1334, 240 Cal. Rptr. 585, 613 (1987) (dissenting from overruling of *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983)).

³⁹⁶ 44 Cal. 3d 375, 446, 749 P.2d 279, 323, 243 Cal. Rptr. 842, 886 (1988) (Broussard, J., concurring in the majority opinion and dissenting).

As noted above, although in *Ruiz* the majority opinion recognized that one of the multiple-murder special circumstances was redundant and therefore invalid, the court did not vacate or reverse that erroneous special circumstance finding. See *supra* note 388. However, in his *Ruiz* opinion, Justice Broussard concurred "in the affirmance of the first degree murder convictions of defendant for the killing of Pauline Ruiz and her son, Tony, and of the finding of the special circumstance of multiple murder." 44 Cal. 3d 589, 625-26, 749 P.2d 854, 874, 244 Cal. Rptr. 200, 220 (1988). This carefully worded sentence might indicate that Justice Broussard did not concur in the judgment affirming the redundant multiple-murder special circumstances recognized by the majority opinion, but that he instead ignored its disposition. However, this inference is simply too speculative to classify his *Ruiz* opinion as a dissent to the redundant special circumstance disposition.

special circumstance dissents in *Kimble*³⁹⁷ and *Williams*.³⁹⁸ Furthermore, Justice Broussard's dissent in *Anderson* (James) was to a majority opinion authored by Justice Mosk. Justice Mosk also did not share Justice Broussard's dissenting views in *Howard*. Justice Mosk signed the majority opinion in that case.

There was no disagreement on the court with respect to the disposition of the issues unique to the sanity phase of criminal cases this year. The majority opinion in *Hendricks I* was unanimous in reversing the sanity phase judgment. Since the subsequent penalty phase judgment was dependent upon a valid sanity phase determination, the court also unanimously reversed the penalty judgment in *Hendricks I*.³⁹⁹ On the other hand, the sanity phase judgment was affirmed in *Williams* in an opinion authored by Justice Eagleson and joined by Chief Justice Lucas and Justices Panelli and Arguelles.⁴⁰⁰ Justice Mosk concurred in the judgment in *Williams*.⁴⁰¹ Justices Kaufman and Broussard also concurred in the judgment, and thus in the disposition of the sanity phase judgment, in a terse opinion written by Justice Kaufman and joined by Justice Broussard.⁴⁰²

There was also a sanity phase in the trial of Melvin Wade, but counsel apparently raised no issue unique to the sanity phase in that automatic appeal. Instead, the defendant in *Wade II* claimed on appeal that trial counsel had been constitutionally deficient in his representation at each phase of the trial, including the sanity phase. Since that issue is not unique to the sanity phase of a trial, this analysis excludes *Wade II* from further consideration.⁴⁰³

³⁹⁷ 44 Cal. 3d 480, 526, 749 P.2d 803, 833, 244 Cal. Rptr. 148, 179 (1988) (Broussard, J., concurring in majority's special circumstance findings and dissenting as to penalty).

³⁹⁸ 44 Cal. 3d 883, 974, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 398 (1988) (Kaufman, J., joined by Broussard, J., concurring in the judgment affirming convictions, special circumstances findings as modified, and death penalty).

³⁹⁹ 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987).

⁴⁰⁰ 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336 (1988).

⁴⁰¹ *Id.* at 973, 751 P.2d at 456, 245 Cal. Rptr. at 397.

⁴⁰² *Id.* at 974, 751 P.2d at 457, 245 Cal. Rptr. at 398.

⁴⁰³ Wade claimed that he was given constitutionally ineffective assistance of counsel at his trial. The claim focused primarily on the guilt phase of the trial. Nevertheless, he did claim that his trial lawyer ineffectively represented him at the sanity phase. The court rejected his claim in a terse footnote. *People v. Wade II*, 44 Cal. 3d 975, 989 n.8, 750 P.2d 794, 801 n.8, 244 Cal. Rptr. 904, 912, n.8 (1988). Since the claim was not unique to the sanity phase, but was a claim concerning trial counsel's representation, I have not classified *Wade* as a sanity phase determination for the purpose of this analysis.

3. The Penalty Phase Dispositions

It was the disposition of the penalty phase judgment in these automatic appeals that provoked most of the disagreement during the Lucas court's first year.

The disagreement, however, was not among the Deukmejian appointees. They joined the majority opinion's disposition of the penalty phase judgment in each of the thirteen cases affirming or reversing a penalty phase judgment.⁴⁰⁴ Justices Mosk and Broussard accounted for all of the disagreement in these cases.

Justice Mosk disagreed with the majority's affirmance of the penalty phase judgment in four cases.⁴⁰⁵ In *Gates*,⁴⁰⁶ *Miranda*,⁴⁰⁷ *Kimble*,⁴⁰⁸ and *Hendricks II*⁴⁰⁹ he would have reversed the penalty phase judgments.

⁴⁰⁴ See Table 2, *infra* p. 329. The 13 cases are the 12 affirmances specified *supra* notes 339 & 341, and *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987), in which the penalty judgment alone was reversed for *Ramos* error.

In column 5 of Table 2, *infra* p. 329, I have used as the criteria for inclusion in the penalty phase reversal category the specific consideration of penalty phase error in the majority opinion and the disposition of the claimed error by a reversal. Cases which consider penalty phase error and affirm the penalty phase judgment are found in column 1 of Table 2. The court reversed the death judgment in *Hendricks I*, but as noted above, that reversal was not on death penalty grounds. See 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987); see also *supra* notes 351-58 and accompanying text.

The two guilt phase reversals, in *Hale* and *Snow*, likewise did not adjudicate death penalty issues. Nevertheless, the court had to reverse the entire judgment in both cases, including the penalty phase judgment and all of the special circumstance findings, because a valid guilt phase determination is the condition precedent for the validity of all subsequent determinations. But since the court did not consider or dispose of claimed penalty phase error in *Hale* or *Snow*, those two cases are excluded from the penalty phase analysis for precisely the same reason that *Hendricks I* was excluded from this analysis. This means that there was only one true penalty phase reversal this year, and that was for *Ramos* error in *Anderson (James)*. Accordingly, only one case is shown to be reversed by a majority opinion in column 5 of Table 2.

⁴⁰⁵ See Table 2, col. 5, *infra* p. 329.

⁴⁰⁶ *People v. Gates*, 43 Cal. 3d 1168, 1214, 743 P.2d 301, 331, 240 Cal. Rptr. 666, 696 (1987) (Mosk, J., joined by Broussard, J., concurring and dissenting).

⁴⁰⁷ *People v. Miranda*, 44 Cal. 3d 57, 123, 744 P.2d 1127, 1169, 241 Cal. Rptr. 594, 637 (1987) (Broussard, J., joined by Mosk, J., concurring and dissenting).

⁴⁰⁸ *People v. Kimble*, 44 Cal. 3d 480, 517, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 172 (1988) (Mosk, J., concurring and dissenting — expressly joining Justice Broussard's dissent as to penalty reversal).

⁴⁰⁹ *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244 Cal. Rptr. 181, 193 (1988) (Mosk, J., joined by Broussard, J., concurring and dissenting). Since Justice Mosk wrote the majority opinion in *Anderson (James)*, he voted to reverse penalty judgments in a total of five cases.

In other words, Justice Mosk disagreed with the majority's disposition of the penalty phase judgment in 31% of the automatic appeals decided this first year.⁴¹⁰

Justice Broussard would have reversed the death judgments in six of the twelve cases in which the majority opinion affirmed the judgments of death.⁴¹¹ Although the majority affirmed twelve penalty phase judgments and reversed one (for a total of thirteen cases),⁴¹² because of his vote in *Wade II*, Justice Broussard was presented with only twelve opportunities to agree or disagree with his colleagues on penalty phase dispositions.⁴¹³ This means that Justice Broussard disagreed with the disposition of the penalty phase issue in 50% of the cases decided this year.⁴¹⁴ In addition, Justice Broussard filed a dissent to a penalty jury's use of overlapping felony-murder special circumstances as aggravating factors in *Melton*.⁴¹⁵ Justice Broussard nonetheless concurred in the

⁴¹⁰ The majority affirmed 12 cases in their entirety this year, including the affirmance in *Bell*, before the court granted rehearing in that case. See *supra* notes 339 & 341 and accompanying text. In four of these twelve, Justice Mosk disagreed with the majority opinion and voted to reverse the death penalty. The four cases are identified *supra* notes 406-09. But since Justice Mosk wrote the majority opinion in *Anderson (James)*, which reversed the death judgment for *Ramos* error, there were 13 penalty phase dispositions this year, and he disagreed in four. This represents disagreement in 31% of these cases.

⁴¹¹ See *Hendricks II*, 44 Cal. 3d at 656, 749 P.2d at 847, 244 Cal. Rptr. at 193 (Mosk, J., joined by Broussard, J., concurring and dissenting); *Kimble*, 44 Cal. 3d at 526, 749 P.2d at 833, 244 Cal. Rptr. at 179 (Broussard, J., concurring and dissenting); *People v. Ruiz*, 44 Cal. 3d 589, 625, 749 P.2d 854, 874, 244 Cal. Rptr. 200, 220 (1988) (Broussard, J., concurring in the judgment and dissenting); *People v. Bell*, 44 Cal. 3d 137, 170, 745 P.2d 573, 593, 241 Cal. Rptr. 890, 910 (1987) (Broussard, J., concurring in the judgment and dissenting); *Miranda*, 44 Cal. 3d at 123, 744 P.2d at 1169, 241 Cal. Rptr. at 637 (Broussard, J., joined by Mosk, J., concurring in the judgment and dissenting); *Gates*, 43 Cal. 3d at 1214, 743 P.2d at 331, 240 Cal. Rptr. at 696 (Mosk, J., joined by Broussard, J., concurring in the judgment and dissenting).

Since by a separate opinion Justice Broussard also concurred in the majority opinion written by Justice Mosk in *Anderson (James)*, Justice Broussard voted to reverse penalty judgments in a total of seven cases.

⁴¹² The one reversal of a penalty phase judgment came in *Anderson (James)* in an opinion written by Justice Mosk. Justice Broussard agreed with that disposition. See 43 Cal. 3d 1104, 1151, 742 P.2d 1306, 1334, 240 Cal. Rptr. 585, 613 (1987).

⁴¹³ The only issue decided by Justice Broussard in *Wade II* which touched on the penalty phase was the question of the ineffective assistance of counsel at the trial's penalty phase. I have classified this issue as not being a penalty phase issue, as it is not unique to the penalty phase process. For a related discussion, see *supra* note 403.

⁴¹⁴ In other words, given the twelve opportunities for agreement, Justice Broussard disagreed in six of the cases.

⁴¹⁵ 44 Cal. 3d 713, 772, 750 P.2d 741, 777, 244 Cal. Rptr. 867, 903 (1988).

majority's judgment affirming the death judgment in *Melton* because he did not find that the error prejudiced the penalty determination process.⁴¹⁶ Accordingly, for this analysis, *Melton* counts as an instance in which Justice Broussard concurred in the majority's judgment affirming the penalty phase judgment.⁴¹⁷

4. The Agreement Among the Justices on the Disposition Ordered in the Majority Opinion

So far we have considered the voting record of each justice relative to the disposition of the various phases of the capital trial ordered by the majority opinion in each of the sixteen automatic appeals decided this first year. The analysis now turns to the extent of agreement among the justices on the disposition that the court made in each case. The question examined here is: "How often did each justice agree with his brethren on the disposition ordered by the court in these cases?"

Since there was nearly universal agreement among the justices as to the court's disposition of the guilt phase judgment,⁴¹⁸ and only slightly more disagreement with respect to the disposition of the special circumstance findings,⁴¹⁹ this question will be explored only with respect to the more controversial question of the disposition of penalty phase issues in each case. Table 3 presents the data with respect to the agreement among the individual justices on the disposition of the penalty phase judgment in each of the automatic appeals.⁴²⁰

There were thirteen penalty phase dispositions ordered in the major-

⁴¹⁶ *Id.*

⁴¹⁷ *Melton* thus appears as one of the cases listed in Table 4, col. 10, *infra*, p. 331.

⁴¹⁸ As noted above, Justice Broussard would have reversed the guilt phase judgment in one case the court affirmed. That occurred in *Wade II*. In all of the other cases, the justices agreed that the guilt phase judgment, insofar as it was concerned with crimes making the defendant death eligible, should be affirmed. Further, in *Wade II* all of the justices, except Justice Broussard, voted to affirm. This means that, except for Justice Broussard, each justice agreed with each of his brethren in 100% of the cases with respect to the court's disposition of the guilt phase judgment. It also means that Justice Broussard agreed with each of his fellow justices on the court's disposition of the guilt phase judgment in 94% of the cases. *See supra* note 387 and accompanying text.

⁴¹⁹ Both Justices Mosk and Broussard disagreed with the disposition of the special circumstance findings in two cases. However, in neither of these instances would the special circumstance, which was the subject of each of the justice's disagreement, have affected the death eligibility of the defendant. This amounts to agreement on the special circumstance disposition ordered by the court in 12 of the 14 opportunities, for an agreement rate of 86%. *See supra* note 394 and accompanying text.

⁴²⁰ Table 3, *infra* p. 330.

ity opinions this year: twelve affirmances⁴²¹ and one reversal.⁴²² Each of the Deukmejian appointees agreed with all of the other Deukmejian appointees in every case on the *disposition* of the penalty phase issues.⁴²³ Thus, they agreed 100% of the time. Justice Mosk agreed with each of the Deukmejian appointees' disposition of the penalty phase judgment in nine cases.⁴²⁴ Justice Mosk thus agreed with Chief Justice Lucas and Justices Panelli, Arguelles, Eagleson, and Kaufman with respect to the disposition of the penalty phase of the trial in 69% of the cases. (This, of course, amounts to a disagreement rate of 31%.)

There was even more disagreement between Justice Broussard and the Deukmejian majority. Justice Broussard agreed with the majority on the disposition of the penalty phase judgments in one-half of the opportunities for agreement (six of the twelve cases)⁴²⁵ in which they all addressed penalty phase issues.⁴²⁶ Thus, he agreed with his brethren in

⁴²¹ See *supra* notes 339, 341 & 404 and accompanying text.

⁴²² See *supra* note 404 and accompanying text.

⁴²³ See Table 3, *infra* p. 330. This is, incidentally, the same percentage of agreement that existed among these justices on the disposition of the guilt, special circumstance, and sanity phases of these cases. See Table 2, *infra* p. 329; *supra* text accompanying notes 384, 388 & 399. In other words, the Deukmejian justices agreed with each other on the disposition ordered for each challenged phase of the trial.

⁴²⁴ See Table 3, *infra* p. 330. These nine cases are: *People v. Wade II*, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988); *People v. Williams*, 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336 (1988); *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988); *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); *People v. Hovey*, 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121 (1988); *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987); *People v. Ghent*, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987).

⁴²⁵ See Table 3, *infra* p. 330. These six cases are: *People v. Williams*, 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336 (1988); *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988); *People v. Hovey*, 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121 (1988); *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987); *People v. Ghent*, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987).

⁴²⁶ Except for Justice Broussard, all of the justices addressed penalty phase issues in 13 cases, including *Bell*. These 13 cases are the 12 affirmed by the majority opinion which appear in column 1 of Table 2, *infra* p. 329, and the one death penalty reversal in *Anderson (James)*, which is depicted in column 5 of Table 2, *infra* p. 329. Since Justice Broussard would have reversed the entire judgment in *Wade II*, he did not address death penalty issues in that case. Accordingly, *Wade II* must be excluded from the number of death penalty cases addressed by Justice Broussard. Furthermore, Justice Broussard dissented alone in *Wade II*. Thus, there were only 12 opportunities for

only 50% of the cases on the disposition of the penalty phase issues in these automatic appeals.⁴²⁷ (Conversely, of course, the disagreement rate was 50%.)

Although Justice Mosk agreed with the Deukmejian appointees in 69% of the penalty phase dispositions, and Justice Broussard agreed with them in only 50% of these dispositions, these two justices agreed with each other in a far larger proportion of the cases. They agreed on the disposition of the penalty phase judgments in ten⁴²⁸ of the twelve cases in which they had an opportunity to agree.⁴²⁹ This amounts to an agreement rate of 83% and a disagreement rate of 17%.⁴³⁰

5. Agreement on the Rationale Supporting the Disposition

Equally important findings appear from an analysis of the *rationales* upon which these *dispositions* are based. The rationales for the disposition of the guilt, special circumstance, sanity, and penalty phases issues are articulated in the opinions commanding a majority of the justices' votes. Since all sixteen of the automatic appeals were decided by majority opinions this year, the rationale for each disposition is set forth in the majority opinion deciding the case.⁴³¹ Table 4 depicts how each justice expressed his agreement or disagreement with the disposition of the case ordered in the majority opinion.⁴³²

Justice Broussard to agree with his colleagues on death penalty issues.

⁴²⁷ See *supra* notes 412-13 and accompanying text. Because Justice Broussard voted to reverse the entire judgment in *Wade II*, he did not consider the unique penalty phase issues raised. As a result, Justice Broussard's agreement rate here is slightly inflated.

⁴²⁸ See Table 3, *infra* p. 330. The cases on which they agreed are: *People v. Williams*, 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336 (1988); *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988); *People v. Hendricks II*, 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181 (1988); *People v. Hovey*, 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121 (1988); *People v. Kimble*, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988); *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988); *People v. Miranda*, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987); *People v. Gates*, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987); *People v. Ghent*, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987).

⁴²⁹ The two cases in which they disagreed on the proper disposition of the penalty phase issues are *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); and *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987).

⁴³⁰ See Table 3, *infra* p. 330.

⁴³¹ Since the Deukmejian appointees agreed among themselves on the disposition of each of the various phases of the trial 100% of the time, and since they comprised a majority of the court, each of the automatic appeals decided this year was by a majority opinion.

⁴³² Table 4, *infra* p. 331.

This analysis shows that there was only slight disagreement among the Deukmejian appointees on the *rationales* for the dispositions in the cases. Justice Panelli either authored or signed the majority opinion in each case. He thus agreed with the rationale for the disposition in each case, a 100% agreement rate.⁴³³

Justices Arguelles and Eagleson had the same 100% agreement rate with the majority's rationale, but there were slight variations in their willingness to sign the majority opinion without adding their thoughts on a given issue in a concurring opinion.⁴³⁴ Each either authored or signed fifteen of the sixteen majority opinions (94%), and each wrote one concurring opinion.⁴³⁵

Justice Arguelles wrote separately in *Bell*.⁴³⁶ His opinion focused on the defendant's conviction of the crime of possession of a concealable firearm by an ex-felon. He would have reversed the judgment insofar as it convicted the defendant of this offense. However, because this offense did not affect the defendant's death eligibility and because Justice Arguelles concluded that the existence of this erroneous conviction did not prejudice the defendant in the penalty determination process, the concurrence had nothing to do with Justice Arguelles' views on the law of capital punishment in California.⁴³⁷ Accordingly, with respect to the guilt phase dispositions making the defendant death eligible and with respect to the special circumstance, sanity, and penalty phase issues before the court in these automatic appeals, Justice Arguelles agreed with the majority's rationale 100% of the time.

Similarly, Justice Eagleson wrote a brief concurring opinion in *Snow*.⁴³⁸ He fully concurred in the majority's reversal of the judgment for *Wheeler* error, but he wrote to emphasize that the *Wheeler* rule applied equally to the defense, though the case did not involve that

⁴³³ *See id.*

⁴³⁴ *See id.*

⁴³⁵ *See id.*

⁴³⁶ 44 Cal. 3d 137, 176, 745 P.2d 573, 597, 241 Cal. Rptr. 890, 914 (1987). In the opening sentence of the opinion, Justice Arguelles expressly concurred "in the majority opinion in all respects." *Id.*

⁴³⁷ *Id.* at 177, 745 P.2d at 597, 241 Cal. Rptr. at 914. Though Justice Broussard also found that the defendant had been convicted erroneously of this offense, he believed that there was a "real probability" that the error adversely affected the penalty assessment to the defendant's detriment. *Id.* Accordingly, Justice Broussard wrote an opinion concurring in the judgment and dissenting from the affirmance of the firearm offense and the judgment of death affirmed by the majority in *Bell*. *See id.* at 176, 745 P.2d at 597, 241 Cal. Rptr. at 914.

⁴³⁸ 44 Cal. 3d 216, 228, 746 P.2d 452, 458, 242 Cal. Rptr. 477, 483 (1987) (Eagleson, J., concurring in the judgment).

issue.⁴³⁹ Since the court reversed *Snow* on grounds that had nothing to do with capital punishment, Justice Eagleson's concurring opinion did not indicate the slightest difference of opinion with his colleagues on death penalty issues.⁴⁴⁰ Thus, he too agreed with his brethren on the rationale for disposing of the issues presented in these cases 100% of the time.

Chief Justice Lucas signed or wrote fifteen of the sixteen majority opinions in automatic appeals this year (94%), but he wrote separately in *Anderson*.⁴⁴¹ The Chief Justice's opinion disagreed with a single issue: a finding of *Bruton-Aranda* error⁴⁴² at the guilt phase of the trial.⁴⁴³ With that one exception, he concurred "in the judgment, and in all aspects of the majority opinion" which was written by Justice Mosk.⁴⁴⁴ Quite obviously a disagreement over the *Bruton-Aranda* issue at the guilt phase of the trial signals no disagreement with his brethren on death penalty issues, and his opinion expressly concurred in all other aspects of the majority opinion.⁴⁴⁵ Consequently, Chief Justice Lucas, like his colleagues Justices Panelli, Arguelles, and Eagleson, agreed with the rationale for the disposition of the death penalty issues presented in the automatic appeals decided this first year 100% of the time.

The final Deukmejian appointee, Justice Kaufman, signed fourteen of the sixteen majority opinions (88%). In two terse separate opinions, he insinuated that there might be some disagreement between his views on several death penalty issues and the views of the Chief Justice and

⁴³⁹ *Id.* Though Justice Eagleson stated that he concurred in the judgment, his opinion completely agrees with the majority's rationale for reversing the death judgment for *Wheeler* error. Justice Eagleson wrote only to express his disagreement with dictum in the majority opinion.

⁴⁴⁰ See *supra* note 359.

⁴⁴¹ 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987). For an overall view of Chief Justice Lucas' record, see Table 4, *infra* p. 331.

⁴⁴² See *Bruton v. United States*, 391 U.S. 123 (1968); *People v. Aranda*, 63 Cal. 2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965). These cases address the admission of incriminating out-of-court statements by a codefendant.

⁴⁴³ *People v. Anderson (James)*, 43 Cal. 3d at 1151, 742 P.2d at 1334, 240 Cal. Rptr. at 613.

⁴⁴⁴ *Id.*

⁴⁴⁵ In *Anderson (James)*, Chief Justice Lucas wrote that he concurred "in the judgment, and in all aspects of the majority opinion" with the exception of the *Bruton-Aranda* issue. *Id.* Because he expressly concurred in the judgment, this opinion appears as an opinion concurring in the judgment in Table 4, *infra* p. 331. But since he completely agrees with the rationale for the disposition of the death penalty issues, Chief Justice Lucas is counted as agreeing with his colleagues 100% of the time in the rationale for the disposition.

Justices Panelli, Arguelles, and Eagleson. In *Anderson*, he concurred in the reversal of the judgment of death, but only "under compulsion of . . . *Ramos* . . . and *Montiel*."⁴⁴⁶ This qualification implied disagreement with *Ramos*, but admitted a willingness to adhere to the rule of *stare decisis*.⁴⁴⁷ Justice Mosk's majority opinion, on the other hand, fully embraces the rationale of *Ramos* and its progeny.⁴⁴⁸ Of course, as long as Justice Kaufman is willing to adhere to *stare decisis*, one would assume that his disagreement had been put to rest and that it will not surface as an important issue in future cases. No other justice joined Justice Kaufman in his opinion in *Anderson*.

Justice Broussard, however, did join Justice Kaufman's separate concurring opinion in *Williams*.⁴⁴⁹ Justice Kaufman's entire opinion consists of the following two sentences:

Notwithstanding the numerous trial errors and defects identified in the majority opinion, I have concluded that on the basis of the entire record there is no reasonable possibility that absent these errors and defects, the jury would have reached determinations more favorable to defendant. I therefore concur in the judgment affirming the convictions, the special circumstances findings as modified and the penalty of death.⁴⁵⁰

The terseness of the opinion counsels caution in using it as evidence of Justice Kaufman's disagreement with his colleagues over death penalty issues. The opinion refrains from taking issue with the rationale by which Justice Eagleson's majority opinion concluded that there were "numerous trial errors and defects" in the case.⁴⁵¹ Rather, it focuses entirely on the effect of those errors on the jury's verdicts. The key language is in Justice Kaufman's conclusion that "there is no reasonable possibility that absent these errors and defects, the jury would have reached determinations more favorable to defendant." Insofar as this language purports to identify a standard for the reversibility of error committed during a capital trial, it may imply that Justice Kaufman disagrees with his colleagues on the standard governing the reversibility of error in automatic appeals. During the first year of the Lucas court,

⁴⁴⁶ *Anderson* (James), 43 Cal. 3d at 1167, 742 P.2d at 1345, 240 Cal. Rptr. at 624 (Kaufman, J., concurring and dissenting).

⁴⁴⁷ In *Montiel*, the *Ramos* rule was applied and the death judgment was reversed. *Montiel* neither clarified nor extended the rule articulated in *Ramos*. See *People v. Montiel*, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985).

⁴⁴⁸ *Anderson* (James), 43 Cal. 3d at 1150-51, 742 P.2d at 1333-34, 240 Cal. Rptr. at 613.

⁴⁴⁹ 44 Cal. 3d 883, 974, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 398 (1988).

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

the majority opinions never clearly identify a standard for nonconstitutional penalty phase error.⁴⁵² Consequently, we cannot tell whether Justice Kaufman's opinion in *Williams* takes aim solely (though subtly) at this lapse or whether it aims at an unarticulated standard that the majority embraces, but does not announce in its opinion.⁴⁵³ Hopefully, the answer will appear in the opinions next year.

Justice Mosk either authored or signed nine majority opinions deciding automatic appeals from March 1987 to March 1988.⁴⁵⁴ All nine of these opinions disposed of guilt phase issues.⁴⁵⁵ In addition, in *Ghent*, Justice Mosk wrote that while he agreed with most of the opinion of the majority, he wrote separately "to note some reservations."⁴⁵⁶ He had two reservations. The first concerned the use of the defendant's age as an aggravating factor in the penalty assessment process. The second was the majority's "somewhat cursory treatment of international treaties to which the United States is a signatory."⁴⁵⁷

Justice Mosk believes that age is a neutral factor and that "the advantages and disadvantages of age, young or old, cannot be rigidly categorized. They are entirely in the eye of the beholder."⁴⁵⁸ On the other

⁴⁵² See, e.g., *id.* at 927, 949, 751 P.2d at 424, 439, 245 Cal. Rptr. at 365, 381. The court did, however, identify the standard applicable to the claim of inadequate assistance of counsel, a claim not unique to death penalty law. *Id.* at 954, 751 P.2d at 442, 245 Cal. Rptr. at 384.

⁴⁵³ The question of the standard applied by the Lucas court to assess the reversibility of errors in the penalty phase of capital trials is discussed in a forthcoming article by this author. This article analyzes and comments on the death penalty doctrine articulated by the Lucas court during this first year. It is a companion article to the current Article.

⁴⁵⁴ See Table 4, *infra* p. 331. These nine cases are: *People v. Wade II*, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988) (majority opinion by Lucas, C.J.); *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988) (majority opinion by Eagleson, J.); *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988) (majority opinion by Lucas, C.J.); *People v. Hale*, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988) (opinion by Lucas, C.J., for a unanimous court); *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988) (majority opinion by Lucas, C.J.); *People v. Snow*, 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987) (opinion by Lucas, C.J., for a unanimous court); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987) (majority opinion by Mosk, J.); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987) (majority opinion by Mosk, J.); *People v. Hendricks I*, 43 Cal. 3d 584, 737 P.2d 1350, 328 Cal. Rptr. 66 (1987) (opinion by Mosk, J., for a unanimous court).

⁴⁵⁵ See Table 4, col. 1, *infra* p. 331.

⁴⁵⁶ 43 Cal. 3d 739, 780, 739 P.2d 1250, 1277, 239 Cal. Rptr. 82, 109 (1987).

⁴⁵⁷ *Id.* at 780-81, 739 P.2d at 1277, 239 Cal. Rptr. at 109-10.

⁴⁵⁸ *Id.* at 780, 739 P.2d at 1277, 239 Cal. Rptr. at 109.

hand, the majority opinion *suggests* that it is error for prosecutors to argue that mere chronological age, a factor over which one can exercise no control, is itself an aggravating factor.⁴⁵⁹ For several reasons, however, the court appeared to find that it need not pass on the issue, and if it were error in this case, the error did not affect the death verdict.⁴⁶⁰ Consequently, the extent to which Justice Mosk and the majority justices actually disagree on this point is not clear.

The treaty issue obviously is not unique to death penalty cases, and Justice Mosk's quibble with the majority on age as an aggravating factor is of minor importance given the vagueness of the majority opinion on this point. Since Justice Mosk agreed with the remainder of the majority opinion in *Ghent*, Justice Mosk's opinion can be classified as an opinion that concurs in the rationale for affirming the death judgment. If this is the appropriate treatment of Justice Mosk's opinion, then he agrees with the rationale for disposing of the guilt phase issues in 62.5% of the automatic appeals decided this year. Conversely, Justice Mosk refused to embrace the majority's rationale for disposing of the guilt phase by either authoring or joining an opinion concurring in the judgment in the remaining six cases.⁴⁶¹ This amounts to a disagreement rate of 37.5%.

Seven of the nine cases that Justice Mosk authored or signed also disposed of special circumstance findings.⁴⁶² When Justice Mosk's opin-

⁴⁵⁹ *Id.* at 775, 739 P.2d at 1273, 239 Cal. Rptr. at 106.

⁴⁶⁰ *See id.*

⁴⁶¹ *See* Table 4, col. 8, *infra* p. 331. These six cases are: *People v. Williams*, 44 Cal. 3d 883, 973, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 397 (1988) (Mosk, J., concurring in affirmance of entire judgment); *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244 Cal. Rptr. 181, 193 (1988) (Mosk, J., joined by Broussard, J., concurring in judgment affirming guilt and sustaining special circumstance findings and dissenting from affirmance of judgment); *People v. Hovey*, 44 Cal. 3d 543, 586, 749 P.2d 776, 801, 244 Cal. Rptr. 121, 147 (1988) (Mosk, J., concurring in judgment affirming entire judgment); *People v. Kimble*, 44 Cal. 3d 480, 517, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 172 (1988) (Mosk, J., concurring in judgment affirming guilt and one of the multiple-murder special circumstance findings; dissenting from affirmance of judgment imposing death penalty; expressly concurring in Justice Broussard's concurring and dissenting opinion on penalty issues; and expressing "disagreement with the majority's conclusion that the felony-murder special-circumstance findings in this case are valid"); *People v. Miranda*, 44 Cal. 3d 57, 123, 744 P.2d 1127, 1169, 241 Cal. Rptr. 594, 637 (1987) (Broussard, J., joined by Mosk, J., concurring in judgment affirming guilt verdicts and special circumstance finding and dissenting from death penalty affirmance); *People v. Gates*, 43 Cal. 3d 1168, 1214, 743 P.2d 301, 331, 240 Cal. Rptr. 666, 696 (1987) (Mosk, J., joined by Broussard, J., concurring in judgment and finding of special circumstances and dissenting from death penalty affirmance).

⁴⁶² These seven cases are: *People v. Wade II*, 44 Cal. 3d 975, 750 P.2d 794, 244

ion in *Ghent* is added as an opinion concurring in the majority's rationale for disposing of the special circumstance issues, Justice Mosk embraced the rationale set forth in the majority opinion disposing of those issues in eight of the fourteen cases that included special circumstance dispositions this year. This amounts to an agreement rate of 57%. But Justice Mosk was unwilling to embrace the majority's rationale for disposing of special circumstance issues in the same six cases in which he refused to embrace the majority rationale for disposing of the guilt phase judgments.⁴⁶³ In these six, he either authored or joined an opinion concurring in the court's judgment.⁴⁶⁴ This amounts to a disagreement rate of 43%.

The majority actually affirmed twelve death judgments and reversed one, for a total of thirteen penalty phase dispositions. Justice Mosk authored or joined the majority opinion in six of these cases.⁴⁶⁵ When his *Ghent* opinion is added as an opinion concurring in the majority's rationale, Justice Mosk agreed with the majority rationale in seven of the thirteen cases. This is an agreement rate of 54%. In the remaining six cases, Justice Mosk would not adopt the majority's rationale for the penalty phase disposition. In two of these six, he agreed with the majority's disposition, though he did not agree with the rationale for affirming the death judgments. Accordingly, he filed an opinion concurring in the judgment alone.⁴⁶⁶ Finally, Justice Mosk disagreed with

Cal. Rptr. 905 (1988) (majority opinion by Lucas, C.J.); *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988) (majority opinion by Eagleson, J.); *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988) (majority opinion by Lucas, C.J.); *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988) (majority opinion by Lucas, C.J.); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987) (majority opinion by Mosk, J.); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987) (majority opinion by Mosk, J.); *People v. Hendricks I*, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) (opinion by Mosk, J., for a unanimous court).

⁴⁶³ See Table 4, col. 9, *infra* p. 331. These six cases are listed *supra* note 461.

⁴⁶⁴ See Table 4, col. 9, *infra* p. 331.

⁴⁶⁵ See *id.* col. 3. These six cases are: *People v. Wade II*, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988) (majority opinion by Lucas, C.J.); *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988) (majority opinion by Eagleson, J.); *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988) (majority opinion by Lucas, C.J.); *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988) (majority opinion by Lucas, C.J.); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987) (majority opinion by Mosk, J.); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987) (majority opinion by Mosk, J.).

⁴⁶⁶ See Table 4, col. 10, *infra* p. 331. These two cases are: *People v. Hovey*, 44 Cal. 3d 543, 586, 749 P.2d 776, 801, 244 Cal. Rptr. 121, 147 (1988) (Mosk, J., concurring

both the court's rationale and its disposition of death judgments in four cases.⁴⁶⁷ In these cases, he either authored an opinion dissenting to the affirmance of the penalty judgment⁴⁶⁸ or joined one of Justice Broussard's dissents to an affirmance of the penalty phase judgment.⁴⁶⁹ Thus, in 46% of the cases Justice Mosk refused to embrace the majority's rationale for disposing of penalty phase issues.

Justice Mosk authored three majority opinions this year. Writing for a unanimous court in *Hendricks I*, the sanity phase judgment was reversed. As a necessary incident of that disposition, the court also reversed the penalty phase judgment.⁴⁷⁰ In the second Mosk opinion, *Anderson* (James), the court affirmed the guilt judgment and special circumstance findings, but reversed the death judgment for *Ramos* error.⁴⁷¹ Chief Justice Lucas concurred in all aspects of Justice Mosk's opinion, except for the disposition of the *Bruton-Aranda* issue raised in the guilt phase of the trial.⁴⁷² Justice Kaufman dissented on the same issue, but he agreed with all other aspects of the opinion, including the reversal of the penalty phase judgment under the compulsion of *Ramos*.⁴⁷³ Justices Panelli, Arguelles, and Eagleson signed the Mosk opinion.

in affirmance of entire judgment); *People v. Williams*, 44 Cal. 3d 883, 973, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 397 (1988) (same).

⁴⁶⁷ See Table 4, col. 13, *infra* p. 331. The four cases are: *People v. Hendricks II*, 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181 (1988); *People v. Kimble*, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988); *People v. Miranda*, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987); *People v. Gates*, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987).

⁴⁶⁸ This happened in two cases: *Hendricks II*, 44 Cal. 3d at 656, 749 P.2d at 847, 244 Cal. Rptr. at 193 (Mosk, J., joined by Broussard, J., concurring in judgment affirming guilt and sustaining special circumstance findings and dissenting from death penalty affirmance); *Gates*, 43 Cal. 3d at 1214, 743 P.2d at 331, 240 Cal. Rptr. at 696 (Mosk, J., joined by Broussard, J., concurring in judgment affirming guilt and finding of special circumstances and dissenting from death penalty affirmance).

⁴⁶⁹ This happened in the remaining two cases: *Kimble*, 44 Cal. 3d at 517, 749 P.2d at 826, 244 Cal. Rptr. at 172 (Mosk, J., concurring in judgment affirming guilt and one of the "multiple murder" special circumstance findings and dissenting from death penalty affirmance by expressly concurring in Justice Broussard's dissenting opinion on penalty issues); *Miranda*, 44 Cal. 3d at 123, 744 P.2d at 1169, 241 Cal. Rptr. at 637 (Broussard, J., joined by Mosk, J., concurring in judgment affirming guilt verdicts and special circumstance finding and dissenting from death penalty affirmance).

⁴⁷⁰ *People v. Hendricks I*, 43 Cal. 3d 584, 599, 737 P.2d 1350, 1359-60, 238 Cal. Rptr. 66, 75-76 (1987); see *supra* notes 357-58 and accompanying text.

⁴⁷¹ 43 Cal. 3d 1104, 1115, 742 P.2d 1306, 1309, 240 Cal. Rptr. 585, 588 (1987).

⁴⁷² See *supra* notes 442-45 and accompanying text.

⁴⁷³ See *supra* note 446 and accompanying text.

Justice Mosk again wrote for the majority in *Bell*. The entire judgment was affirmed.⁴⁷⁴ Of the Deukmejian appointees, only Justice Arguelles did not sign the Mosk opinion. He concurred in all aspects of the majority opinion except for the disposition of the conviction for possession of a concealable firearm by an ex-felon.⁴⁷⁵ As noted above, however, the two dissents on the *Bruton-Aranda* issue in *Anderson* and Justice Arguelles' dissent in *Bell* had nothing to do with the death penalty issues tendered in either case.⁴⁷⁶ With respect to those issues, each of the Deukmejian appointees either joined or specifically approved of the rationale for the disposition ordered in the three Mosk opinions.

Significantly, the Deukmejian majority expressly agreed with Justice Mosk on the rationale articulated in his opinions only in the three majority opinions he authored. Although Justice Mosk's concurring opinion in *Ghent* agreed with most of the majority opinion, he wrote separately to note several reservations.⁴⁷⁷ None of the Deukmejian appointees joined the Mosk opinion in *Ghent*, nor did any of them join the Mosk opinions in the other five cases in which he filed opinions.⁴⁷⁸ Since Justice Mosk wrote nine opinions, and since the Deukmejian appointees embraced his rationale in only the three majority opinions he authored, the Deukmejian appointees agreed with Justice Mosk's rationale in only one-third of the opportunities for agreement (33.3%). Nevertheless, as noted above, Justice Mosk embraced the Deukmejian majority's rationale far more frequently than they agreed with him.⁴⁷⁹

The extent of agreement between Justices Mosk and Broussard is slightly more complicated. Since none of the Deukmejian appointees joined any portion of an opinion that Justice Mosk authored, except for the three opinions that he wrote for the majority, there is no need to parse the various death penalty issues in determining the extent to

⁴⁷⁴ See 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987) (opinion by Eagle-son, J.).

⁴⁷⁵ See *supra* notes 436-37 and accompanying text.

⁴⁷⁶ See *id.*; see also *supra* notes 442-45 and accompanying text.

⁴⁷⁷ See 43 Cal. 3d 739, 780, 739 P.2d 1250, 1277, 239 Cal. Rptr. 82, 109 (1987); see also *supra* notes 456-61 and accompanying text.

⁴⁷⁸ These five cases are: *People v. Williams*, 44 Cal. 3d 883, 973, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 397 (1988) (Mosk, J., concurring in the judgment and dissent); *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244 Cal. Rptr. 181, 193 (1988) (same); *People v. Hovey*, 44 Cal. 3d 543, 586, 749 P.2d 776, 801, 244 Cal. Rptr. 121, 147 (1988) (Mosk, J. concurring); *People v. Kimble*, 44 Cal. 3d 480, 517, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 172 (1988) (Mosk, J., concurring in the judgment and dissenting); *People v. Gates*, 43 Cal. 3d 1168, 1214, 743 P.2d 301, 331, 240 Cal. Rptr. 666, 696 (1987) (Mosk, J., concurring in the judgment and dissenting).

⁴⁷⁹ See *supra* notes 454-69 and accompanying text.

which they agreed with Justice Mosk's rationale. Simply put, none of the Deukmejian appointees agreed with anything Justice Mosk wrote outside of *Hendricks I*, *Anderson* (James), and *Bell*. But Justice Broussard, on the other hand, embraced all of the Mosk opinion in *Anderson* (James), except for the portion of the opinion deciding the *Carlos*-felony-murder special circumstance issue.⁴⁸⁰

As described above, aside from the novel treaty issue discussed in *Ghent*,⁴⁸¹ Justice Mosk addressed guilt phase issues in only three cases: *Anderson*, *Hendricks I*, and *Bell*. Justice Broussard agreed with both the rationale and the disposition of the guilt phase issues in the first two cases. However, Justice Broussard concurred only in the judgment with respect to the death qualifying offense in *Bell*. He dissented to the conviction for possession of a concealable firearm by an ex-felon and to the death judgment. He also did not join Justice Mosk's concurring opinion in *Ghent*, though he concurred in the affirmance of the guilt phase judgment in that case. Justice Broussard thus was presented with four opportunities to embrace Justice Mosk's rationale for affirming guilt phase issues. He agreed with Justice Mosk's rationale only twice, for a 50% agreement (or disagreement) rate.

Justice Mosk's three majority opinions this year (*Anderson*, *Hendricks I*, and *Bell*) also disposed of special circumstance issues. In addition, Justice Mosk wrote concurring opinions addressing special circumstance issues in *Kimble* and *Williams*.⁴⁸² Justice Broussard agreed with Justice Mosk's rationale with respect to the special circumstance findings only in *Hendricks I*.⁴⁸³ He thus was presented with five opportunities to agree with Justice Mosk's rationale for disposing of special circumstance issues. Justice Broussard agreed only once, for an agreement rate of 20% (or, conversely, a disagreement rate of 80%).

Finally, Justice Mosk addressed penalty phase issues in the two of the majority opinions he wrote this year (*Anderson* and *Bell*) and in his separate opinions in *Ghent*,⁴⁸⁴ *Hovey*,⁴⁸⁵ *Gates*,⁴⁸⁶ and *Hendricks*

⁴⁸⁰ See *supra* note 395 and accompanying text.

⁴⁸¹ See *supra* note 457 and accompanying text.

⁴⁸² See *supra* notes 455-61 and accompanying text. Justice Mosk's opinion in *Ghent* does not address special circumstance issues.

⁴⁸³ See *supra* notes 351-58 and accompanying text. To simplify the analysis, if a justice disagrees with one of the special circumstance findings, the analysis considers that he disagrees with all of the opinion's special circumstance findings. Therefore, although Justice Broussard did not disagree with all of the special circumstance findings in *Anderson* (James), the analysis treats him as doing so.

⁴⁸⁴ 43 Cal. 3d 739, 780, 739 P.2d 1250, 1277, 239 Cal. Rptr. 82, 109 (1987) (Mosk, J., concurring).

II.⁴⁸⁷ Justice Broussard concurred in Justice Mosk's opinion reversing the penalty phase judgment in *Anderson (James)*⁴⁸⁸ and in Justice Mosk's dissent to the majority's affirmance of the death judgment in *Gates*⁴⁸⁹ and *Hendricks II*.⁴⁹⁰ Thus, Justice Broussard agreed with Justice Mosk's rationale for disposing of guilt phase issues in 50% of the Mosk opinions.

Justice Broussard agreed even less with the rationale used by the majority to dispose of death penalty issues this year.⁴⁹¹ Justice Broussard authored none of the majority opinions in automatic appeals this year.⁴⁹² But he joined majority opinions disposing of three guilt judgments (all reversals),⁴⁹³ one special circumstance phase judgment,⁴⁹⁴ and one sanity phase judgment.⁴⁹⁵ He also wrote two opinions concurring in the majority opinion's disposition of two guilt phase judgments (both affirmances)⁴⁹⁶ and two penalty phase judgments (one reversal and one

⁴⁸⁵ 44 Cal. 3d 543, 586, 749 P.2d 776, 801, 244 Cal. Rptr. 121, 147 (1988) (Mosk, J., concurring in the judgment).

⁴⁸⁶ 43 Cal. 3d 1168, 1214, 743 P.2d 301, 331, 240 Cal. Rptr. 666, 696 (1987) (Mosk, J., concurring in the judgment and dissenting).

⁴⁸⁷ 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244 Cal. Rptr. 181, 193 (1988) (Mosk, J., concurring in the judgment and dissenting).

⁴⁸⁸ 43 Cal. 3d 1104, 1151, 742 P.2d 1306, 1334, 240 Cal. Rptr. 585, 613 (1987) (Broussard, J., concurring and dissenting).

⁴⁸⁹ 43 Cal. 3d at 1214, 743 P.2d at 331, 240 Cal. Rptr. at 696.

⁴⁹⁰ 44 Cal. 3d at 656, 749 P.2d at 847, 244 Cal. Rptr. at 193.

⁴⁹¹ See Table 4, *infra* p. 331.

⁴⁹² See Table 5, *infra* p. 332.

⁴⁹³ See *People v. Hale*, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988); *People v. Snow*, 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987); *People v. Hendricks I*, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987); see also Table 4, col. 1, *infra* p. 331.

⁴⁹⁴ See *Hendricks I*, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66; see also Table 4, col. 2, *infra* p. 331.

⁴⁹⁵ See *Hendricks I*, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66; see also Table 4, col. 4, *infra* p. 331.

⁴⁹⁶ See *People v. Howard*, 44 Cal. 3d 375, 446, 749 P.2d 279, 323, 243 Cal. Rptr. 842, 886 (1988); *People v. Anderson (James)* 43 Cal. 3d 1104, 1151, 742 P.2d 1306, 1334, 240 Cal. Rptr. 585, 613 (1987). I have classified these opinions by Justice Broussard as concurring with the majority. See Table 4, col. 5, *infra* p. 331.

I may have incorrectly classified Justice Broussard's *Anderson (James)* opinion. This opinion focuses exclusively on the majority's overruling of the *Carlos* intent-to-kill rule for the felony-murder special circumstances in the 1978 Initiative and for respect of *stare decisis*. *Anderson (James)*, 43 Cal. 3d at 1151, 742 P.2d at 1334, 240 Cal. Rptr. at 613. Justice Broussard's opinion does not indicate that he disagrees with the rationale for affirming the guilt judgment. Another valid special circumstance, multiple-murder, made the defendant death eligible, and Justice Broussard's views on the

affirmance).⁴⁹⁷ This means that he agreed with the majority's rationale for disposing of guilt phase judgments in only 31% of the cases,⁴⁹⁸ in 8% of the special circumstance judgments,⁴⁹⁹ 17% of the penalty phase judgments,⁵⁰⁰ and in one sanity phase judgment (50%).⁵⁰¹ In the remainder of the cases, he refused to embrace the majority's rationale, for he either concurred in the judgments only or he dissented.⁵⁰²

invalidity of the felony-murder special circumstance would not have affected the defendant's death eligibility. Since *Ramos* error reversed the death judgment, the impact of the invalid felony-murder special circumstance on the guilt assessment process did not arise. Justice Broussard's views on the invalidity of the felony-murder special under *Carlos* do not imply disagreement with either the affirmance of the multiple-murder special circumstance or the reversal of the penalty judgment. Furthermore, Justice Broussard's opinion is silent on all the majority opinion's issues except for the *Carlos* issue and the rule of *stare decisis*. However, during his discussion of *stare decisis*, Justice Broussard does note his agreement with *Ramos* and the reversal for *Ramos* error in this case.

I either could classify Justice Broussard's opinion as approving of the majority rationale for affirming the guilt judgment and the multiple-murder special circumstance finding and reversing the death judgment, or as concurring in the judgment ordered by the majority opinion. To avoid overstating Justice Broussard's disagreement with the majority, I classified his *Anderson* (James) opinion as approving of the majority's rationale.

Justice Broussard's opinion in *Howard* specifically concurs in "the majority opinion except for its discussion of the special circumstance of intentional murder for financial gain." 44 Cal. 3d at 446, 749 P.2d at 323, 243 Cal. Rptr. at 886.

⁴⁹⁷ See *Howard*, 44 Cal. 3d at 446, 749 P.2d at 323, 243 Cal. Rptr. at 886; *Anderson* (James), 43 Cal. 3d at 1151, 742 P.2d at 1334, 240 Cal. Rptr. at 613.

⁴⁹⁸ Justice Broussard agreed with the majority opinion's rationale for disposing of the guilt phase issue in five of the sixteen guilt phase dispositions in majority opinions this year, including *Bell*.

⁴⁹⁹ Because of his vote in *Wade* II, Justice Broussard had only 13 opportunities to agree with his colleagues' rationale in the disposition of special circumstance issues. See *supra* notes 387, 413 & 426 and accompanying text. He agreed with them in only one case, *Hendricks* I.

⁵⁰⁰ Because of his vote in *Wade* II, Justice Broussard had only 12 opportunities to agree with his colleagues' rationale in the disposition of penalty phase issues. See *supra* notes 387, 413 & 426 and accompanying text. He agreed with them in only two cases, *Anderson* (James) and *Howard*.

⁵⁰¹ Justice Broussard joined the majority opinion in *Hendricks* I, which reversed the sanity phase judgment. The *Hendricks* I court also invalidated the penalty phase judgment because a valid sanity phase determination is a condition precedent to a valid penalty phase proceeding. 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987). The other case presenting Justice Broussard with unique issues relating to the sanity phase was *Williams*. In that case Justice Broussard joined the opinion of Justice Kaufman, which concurred in the judgment only. 44 Cal. 3d 883, 974, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 398 (1988).

⁵⁰² See Table 4, cols. 8-13, *infra* p. 331.

Justice Broussard concurred in the judgments affirming the guilt and special circumstance dispositions in ten cases⁵⁰³ and in the judgments affirming the punishment of death in four.⁵⁰⁴ He filed dissents to one guilt phase disposition,⁵⁰⁵ two special circumstance judgments,⁵⁰⁶ and six affirmances of death judgments.⁵⁰⁷ This means that Justice Broussard

⁵⁰³ These 10 cases are: *People v. Williams*, 44 Cal. 3d 883, 974, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 398 (1988) (Kaufman, J., joined by Broussard, J., concurring in the judgment); *People v. Melton*, 44 Cal. 3d 713, 772, 750 P.2d 741, 777, 244 Cal. Rptr. 867, 903 (1988) (Broussard, concurring in the judgment); *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244 Cal. Rptr. 181, 193 (1988) (Mosk, J., joined by Broussard, J., concurring in the judgment and dissenting); *People v. Ruiz*, 44 Cal. 3d 589, 625, 749 P.2d 854, 874, 244 Cal. Rptr. 200, 220 (1988) (Broussard, J., concurring in the judgment and dissenting); *People v. Hovey*, 44 Cal. 3d 543, 587, 749 P.2d 776, 802, 244 Cal. Rptr. 121, 148 (1988) (Broussard, J., concurring in the judgment); *People v. Kimble*, 44 Cal. 3d 480, 526, 749 P.2d 803, 833, 244 Cal. Rptr. 148, 179, (1988) (Broussard, J., concurring in the judgment and dissenting); *People v. Bell*, 44 Cal. 3d 137, 170, 745 P.2d 573, 593, 241 Cal. Rptr. 890, 910 (1987) (Broussard, J., concurring and dissenting); *People v. Miranda*, 44 Cal. 3d 57, 123, 744 P.2d 1127, 1169, 241 Cal. Rptr. 594, 637 (1987) (Broussard, J., joined by Mosk, J., concurring in the judgment and dissenting); *People v. Gates*, 43 Cal. 3d 1168, 1214, 743 P.2d 301, 331, 240 Cal. Rptr. 666, 696 (1987) (Mosk, J., joined by Broussard, J., concurring in the judgment and dissenting); *People v. Ghent*, 43 Cal. 3d 739, 781, 739 P.2d 1250, 1278, 239 Cal. Rptr. 82, 110 (1987) (Broussard, J., concurring in the judgment). Although the majority decided 14 cases affirming special circumstance judgments, Justice Broussard addressed issues unique to the special circumstance phase in 13 cases. See Table 4, cols. 2, 9 & 12, *infra* p. 331. Because he would have reversed the guilt phase judgment in *Wade II*, Justice Broussard did not reach the special circumstance issues argued in that case.

⁵⁰⁴ These four cases are: *People v. Williams*, 44 Cal. 3d 883, 974, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 398 (1988) (Kaufman, J., joined by Broussard, J., concurring in the judgment); *People v. Melton*, 44 Cal. 3d 713, 772, 750 P.2d 741, 777, 244 Cal. Rptr. 867, 903 (1988) (Broussard, J., concurring in the judgment); *People v. Hovey*, 44 Cal. 3d 543, 587, 749 P.2d 776, 802, 244 Cal. Rptr. 121, 148 (1988) (Broussard, J., concurring in the judgment); *People v. Ghent*, 43 Cal. 3d 739, 781, 739 P.2d 1250, 1278, 239 Cal. Rptr. 82, 110 (1987) (Broussard, J., concurring in the judgment).

⁵⁰⁵ See *People v. Wade II*, 44 Cal. 3d 975, 1000, 750 P.2d 794, 809, 244 Cal. Rptr. 905, 920 (1988) (Broussard, J., dissenting).

⁵⁰⁶ See *People v. Howard*, 44 Cal. 3d 375, 446, 749 P.2d 279, 323, 243 Cal. Rptr. 842, 886 (1988) (Broussard, J., concurring and dissenting); *People v. Anderson (James)*, 43 Cal. 3d 1104, 1151, 742 P.2d 1306, 1334, 240 Cal. Rptr. 585, 613 (1987) (Broussard, J., concurring and dissenting).

⁵⁰⁷ These six cases are: *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244 Cal. Rptr. 181, 193 (1988) (Mosk, J., joined by Broussard, J., concurring in the judgment and dissenting); *People v. Ruiz*, 44 Cal. 3d 589, 625, 749 P.2d 854, 874, 244 Cal. Rptr. 200, 220 (1988) (Broussard, J., concurring in the judgment and dissenting); *People v. Kimble*, 44 Cal. 3d 480, 526, 749 P.2d 803, 833, 244 Cal. Rptr. 148, 179 (1988) (Broussard, J., concurring in the judgment and dissenting); *People v. Bell*,

sard either refused to agree with the rationale of the majority opinion, or disagreed with the rationale of the majority opinion in dissent; in 69% of the guilt phase determinations,⁵⁰⁸ in 92% of the special circumstance dispositions,⁵⁰⁹ and in 83% of the penalty phase dispositions.⁵¹⁰ In each of these cases, Justice Broussard's disagreement with the majority's rationale also signals the majority's disagreement with Justice Broussard's rationale, for no justice signed both a majority opinion and one of Justice Broussard's separate opinions in the same case this year.⁵¹¹

To what extent did Justice Mosk agree with the rationale articulated in Justice Broussard's opinions this year? Justice Mosk agreed with the disposition of the issues addressed by Justice Broussard in six opinions.⁵¹² Yet he either joined or specifically agreed with Justice Broussard

44 Cal. 3d 137, 170, 745 P.2d 573, 593, 241 Cal. Rptr. 890, 910 (1987) (Broussard, J., concurring and dissenting); *People v. Miranda*, 44 Cal. 3d 57, 123, 744 P.2d 1127, 1169, 241 Cal. Rptr. 594, 637 (1987) (Broussard, J., joined by Mosk, J., concurring in the judgment and dissenting); *People v. Gates*, 43 Cal. 3d 1168, 1214, 743 P.2d 301, 331, 240 Cal. Rptr. 666, 696 (1987) (Mosk, J., joined by Broussard, J., concurring in the judgment and dissenting).

⁵⁰⁸ He did not agree with the majority's rationale for disposing of the guilt phase issues in a total of 11 instances. The court made 16 such determinations, including *Bell*. See Table 4, cols. 1, 8 & 11, *infra* p. 331.

⁵⁰⁹ Justice Broussard did not agree with the majority's rationale for disposing of the special circumstance phase issues in a total of 12 cases. Justice Broussard had only 13 opportunities to agree with his colleagues, though they determined the validity of special circumstance proceedings in 14 cases. See *supra* notes 387, 413 & 426 and accompanying text. Table 4, cols. 2, 9 & 12, *infra* p. 331.

⁵¹⁰ Justice Broussard did not agree with the majority's rationale for disposing of the penalty phase issues in a total of 10 cases. For a listing of these cases, see *supra* note 503. The court determined the validity of penalty phase proceedings in 13 cases, including *Bell*. See Table 4, cols. 3, 10 & 13, *infra* p. 331.

⁵¹¹ Although it might be unusual for a justice to sign both a majority opinion and a separate opinion, a justice might choose to do so when the separate opinion concurs in the majority opinion and adds something with which the justice agrees. But this did not happen this year in automatic appeals.

⁵¹² These six cases are: *People v. Melton*, 44 Cal. 3d 713, 772, 750 P.2d 741, 777, 244 Cal. Rptr. 867, 903 (1988) (Broussard, J., concurring in the judgment); *People v. Hovey*, 44 Cal. 3d 543, 587, 749 P.2d 776, 802, 244 Cal. Rptr. 121, 148 (1988) (Broussard, J., concurring in the judgment); *People v. Kimble*, 44 Cal. 3d 480, 526, 749 P.2d 803, 833, 244 Cal. Rptr. 148, 172 (1988) (Broussard, J., concurring in the judgment and dissenting); *People v. Howard*, 44 Cal. 3d 375, 446, 749 P.2d 279, 323, 243 Cal. Rptr. 842, 886 (1988) (Broussard, J., concurring and dissenting); *People v. Miranda*, 44 Cal. 3d 57, 123, 744 P.2d 1127, 1169, 241 Cal. Rptr. 594, 637 (1987) (Broussard, J., joined by Mosk, J., concurring in the judgment and dissenting); *People v. Ghent*, 43 Cal. 3d 739, 780, 739 P.2d 1250, 1277, 239 Cal. Rptr. 82, 109 (1987) (Broussard, J., concurring in the judgment).

sard's rationale for the disposition in only two cases: *Miranda*⁵¹³ and *Kimble*.⁵¹⁴ This constitutes an agreement rate of only 33.3%. Thus, although these two justices agreed on the appropriate disposition of death penalty issues, they obviously saw the law justifying those dispositions quite differently in most of the cases.

6. How the Justices Expressed Their Individual Opinions in Automatic Appeals This Year

A justice votes on the disposition and its rationale by writing an opinion, by joining an opinion of one of her colleagues, or by a combination of these two techniques. Quite obviously, when the justice writes an opinion she takes an active role in the formulation of the law, and she functions as the spokesperson for all of the justices signing the opinion she has written. On the other hand, when the justice joins the opinion of a colleague, her role is passive. She speaks through a surrogate, and she does not participate directly in shaping the path of the law. Nevertheless, for a majority opinion her vote is crucial, for only majority opinions have the binding force of precedent, and only majority opinions receive respect under the doctrine of *stare decisis*. Furthermore, by joining any opinion of a colleague, the justice embraces the rationale articulated in that opinion. As a result, the act of joining should reveal how the justice sees the law on the issues resolved by the opinion. The data for the first year of the Lucas court appear in Table 5.⁵¹⁵

The most active justices in the automatic appeals this year were Chief Justice Lucas and Justice Broussard. Chief Justice Lucas wrote nine majority opinions⁵¹⁶ and one separate opinion.⁵¹⁷ He thus authored

⁵¹³ *People v. Miranda*, 44 Cal. 3d 57, 123, 744 P.2d 1127, 1169, 241 Cal. Rptr. 594, 637 (1987) (Broussard, J., joined by Mosk, J., concurring in the judgment and dissenting).

⁵¹⁴ *People v. Kimble*, 44 Cal. 3d 480, 526, 749 P.2d 803, 833, 244 Cal. Rptr. 148, 179 (1988) (Broussard, J., concurring in the judgment and dissenting).

⁵¹⁵ See Table 5, *infra* p. 332.

⁵¹⁶ See *People v. Wade II*, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988); *People v. Hendricks II*, 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181 (1988); *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); *People v. Hovey*, 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121 (1988); *People v. Hale*, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988); *People v. Kimble*, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988); *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988); *People v. Snow*, 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987); *People v. Ghent*, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987); see also Table 5, col. 1, *infra* p. 332.

opinions in 62.5% of the cases. Justice Broussard wrote ten separate opinions (eight contained dissents), though none was an opinion for the court.⁵¹⁸ Consequently, he likewise filed opinions in 62.5% of the automatic appeals decided this year. Chief Justice Lucas and Justice Broussard were closely followed this year by Justice Mosk. Justice Mosk wrote three majority opinions⁵¹⁹ and six separate opinions,⁵²⁰ for a total

⁵¹⁷ See *People v. Anderson (James)*, 43 Cal. 3d 1104, 1151, 742 P.2d 1306, 1334, 240 Cal. Rptr. 585, 613 (1987); see also Table 5, col. 3, *infra* p. 332. Chief Justice Lucas' separate opinion in *Anderson (James)* concurred in all aspects with Justice Mosk's majority opinion, except for the *Bruton-Aranda* issue.

⁵¹⁸ See *People v. Wade II*, 44 Cal. 3d 975, 1000, 750 P.2d 794, 809, 244 Cal. Rptr. 905, 920 (1988); *People v. Melton*, 44 Cal. 3d 713, 772, 750 P.2d 741, 777, 244 Cal. Rptr. 867, 903 (1988) (Broussard, J., concurring in the judgment); *People v. Ruiz*, 44 Cal. 3d 589, 625, 749 P.2d 854, 874, 244 Cal. Rptr. 200, 220 (1988) (Broussard, J., concurring in the judgment and dissenting); *People v. Hovey*, 44 Cal. 3d 543, 587, 749 P.2d 776, 802, 244 Cal. Rptr. 121, 148 (1988) (Broussard, J., concurring in the judgment); *People v. Kimble*, 44 Cal. 3d 480, 526, 749 P.2d 803, 833, 244 Cal. Rptr. 148, 179 (1988) (Broussard, J., concurring in the judgment and dissenting); *People v. Howard*, 44 Cal. 3d 375, 446, 749 P.2d 279, 323, 243 Cal. Rptr. 842, 886 (1988) (Broussard, J., concurring and dissenting); *People v. Bell*, 44 Cal. 3d 137, 170, 745 P.2d 573, 593, 241 Cal. Rptr. 890, 910 (1987) (Broussard, J., concurring and dissenting); *People v. Miranda*, 44 Cal. 3d 57, 123, 744 P.2d 1127, 1169, 241 Cal. Rptr. 594, 637 (1987) (Broussard, J., joined by Mosk, J., concurring in the judgment and dissenting); *People v. Anderson (James)*, 43 Cal. 3d 1104, 1151, 742 P.2d 1306, 1334, 240 Cal. Rptr. 585, 613 (1987); *People v. Ghent*, 43 Cal. 3d 739, 781, 739 P.2d 1250, 1278, 239 Cal. Rptr. 82, 110 (Broussard, J., concurring in the judgment); see also Table 5, col. 3, *infra* p. 332.

⁵¹⁹ These three majority opinions are: *People v. Hendricks I*, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987), *aff'd on rehearing*, 49 Cal. 3d 502, 778 P.2d 129, 262 Cal. Rptr. 1 (1989) (opinion authored by Eagleson, J.); see Table 5, col. 1, *infra* p. 332.

⁵²⁰ The six separate opinions were in *People v. Williams*, 44 Cal. 3d 883, 973, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 397 (1988) (Mosk, J., concurring in affirmance of entire judgment); *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244 Cal. Rptr. 181, 193 (1988) (Mosk, J., joined by Broussard, J., concurring in judgment affirming guilt and sustaining special circumstance findings and dissenting from death penalty affirmance); *People v. Hovey*, 44 Cal. 3d 543, 586, 749 P.2d 776, 801, 244 Cal. Rptr. 121, 147 (1988) (Mosk, J., concurring in affirmance of entire judgment); *People v. Kimble*, 44 Cal. 3d 480, 517, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 172 (1988) (Mosk, J., concurring in judgment affirming guilt and one of the multiple-murder special circumstance findings, dissenting from death penalty affirmance, expressly concurring in Justice Broussard's concurrence and dissent on penalty issues, and expressing "disagreement with the majority's conclusion that the felony-murder special-circumstance findings in this case are valid"); *People v. Gates*, 43 Cal. 3d 1168, 1214, 743 P.2d 301, 331, 240 Cal. Rptr. 666, 696 (1987) (Mosk, J., joined by Broussard,

of nine. He thus wrote in 56% of the cases. Then there was a large gap between these three seasoned supreme court justices and the new Deukmejian appointees.

Justice Eagleson was the fourth most active justice with three opinions written this year — two majority opinions⁵²¹ and one separate opinion.⁵²² This amounts to opinion writing in only 19% of the cases. Somewhat surprisingly,⁵²³ Justice Panelli wrote only two opinions, though both were opinions for the majority.⁵²⁴ He wrote in only 12.5% of the cases.

As measured by opinion writing,⁵²⁵ Justices Kaufman and Arguelles were the least active justices in automatic appeals this year. Justice Kaufman wrote only two short separate opinions.⁵²⁶ His opinion in *Anderson* (James) consisted of five sentences.⁵²⁷ His opinion concurring in the judgment in *Williams* consisted of two sentences.⁵²⁸ Justice Arguelles wrote only one separate opinion.⁵²⁹ Though the opinion is short (less than two pages in the Official Reports), it is considerably longer than either of Justice Kaufman's opinions. In terms of the percentage of cases in which they wrote, Justice Kaufman filed opinions in 12.5% of

sard, J., concurring in judgment affirming guilt and finding of special circumstances and dissenting from the death penalty affirmance); *People v. Ghent*, 43 Cal. 3d 739, 780, 739 P.2d 1250, 1277, 239 Cal. Rptr. 82, 109 (1987) (Mosk, J., concurring in most of majority opinion affirming entire judgment); *see also* Table 5, col. 3, *infra* p. 332.

⁵²¹ These two majority opinions are: *People v. Williams*, 44 Cal. 3d 833, 751 P.2d 395, 245 Cal. Rptr. 336 (1988); *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988); *see also* Table 5, col. 1, *infra* p. 332.

⁵²² The separate opinion is in *People v. Snow*, 44 Cal. 3d 216, 228, 746 P.2d 452, 458, 242 Cal. Rptr. 477, 483 (1987) (Eagleson, J., concurring); *see also* Table 5, col. 3, *infra* p. 332.

⁵²³ It is surprising because of Justice Panelli's experience on the California Supreme Court. He has been on the court longer than any other Deukmejian appointee except Chief Justice Lucas.

⁵²⁴ *See* Table 5, col. 1, *infra* p. 332. The two majority opinions were *Gates* and *Miranda*.

⁵²⁵ Each of the justices participated in all 16 automatic appeals that the court decided this year. When the justice did not write an opinion, that justice expressed a vote by joining a colleague's opinion.

⁵²⁶ *See* Table 5, cols. 1 & 3, *infra* p. 332.

⁵²⁷ 43 Cal. 3d 1104, 1167, 742 P.2d 1306, 1345, 240 Cal. Rptr. 585, 624 (1987) (Kaufman, J., concurring and dissenting).

⁵²⁸ 44 Cal. 3d 883, 974, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 398 (1988) (Kaufman, J., joined by Broussard, J., concurring in affirmance of entire judgment).

⁵²⁹ The separate opinion was in *People v. Bell*, 44 Cal. 3d 137, 176, 745 P.2d 573, 597, 241 Cal. Rptr. 890, 914 (1987) (Arguelles, J., concurring and dissenting); *see also* Table 5, cols. 1 & 3, *infra* p. 332.

the cases, and Justice Arguelles expressed his own opinions in a single case (6% of the cases).

From the perspective of the immediate impact on the law, all opinions are not equal. Indeed, only the author of a majority opinion has direct and immediate impact on the law addressed in the opinion. Assessed in these terms, Chief Justice Lucas was the most influential member of the California Supreme Court this year. He authored three times as many majority opinions in automatic appeals as any other justice (nine). This was more than the combined efforts of Justice Mosk (three majority opinions), Justice Panelli (two majority opinions), and Justice Eagleson (two majority opinions). If for no other reason than his greater number of majority opinions, Chief Justice Lucas has emerged as the leader of the reconstructed California Supreme Court.

From this same perspective, Justices Kaufman and Arguelles were the least influential of the Deukmejian appointees this first year, as neither wrote a single majority opinion. Furthermore, Justice Kaufman's opinions are so exceedingly short that they do little more than state his conclusions. One can reasonably doubt whether such opinions will have much influence on the future course of the law. Also, because Justice Arguelles' single opinion did not deal with death penalty issues, he had no influence at all on death penalty law this year beyond that achieved by joining the opinions of his colleagues.

Although Justice Broussard also did not author a majority opinion in an automatic appeal this year, his role was very different from that of any other justice on the court this first year. Eight of the ten opinions written by Justice Broussard (80%) contained a dissent.⁵³⁰ Justice Broussard thus functioned as the court's "loyal opposition." It is, however, far too early to tell how much influence Justice Broussard's views ultimately will have in shaping California death penalty law under the Lucas court.

Although Justice Broussard was not the sole dissenter this year in death penalty cases, he was by far the court's major official critic on

⁵³⁰ The eight dissents are found in Justice Broussard's opinions in the following cases: *People v. Wade II*, 44 Cal. 3d 975, 1000, 750 P.2d 794, 809, 244 Cal. Rptr. 905, 920 (1988); *People v. Melton*, 44 Cal. 3d 713, 772, 750 P.2d 741, 777, 244 Cal. Rptr. 867, 903 (1988); *People v. Ruiz*, 44 Cal. 3d 589, 625, 749 P.2d 854, 874, 244 Cal. Rptr. 200, 220 (1988); *People v. Kimble*, 44 Cal. 3d 480, 526, 749 P.2d 803, 833, 244 Cal. Rptr. 148, 179, (1988); *People v. Howard*, 44 Cal. 3d 375, 446, 749 P.2d 279, 323, 243 Cal. Rptr. 842, 886 (1988); *People v. Bell*, 44 Cal. 3d at 170, 745 P.2d at 593, 241 Cal. Rptr. at 910 (1989); *People v. Miranda*, 44 Cal. 3d 57, 123, 744 P.2d 1127, 1169, 241 Cal. Rptr. 594, 637 (1987); *Anderson (James)*, 43 Cal. 3d at 1151, 742 P.2d at 1334, 240 Cal. Rptr. at 613.

death penalty issues. The only other dissents filed this year on death penalty issues were written by Justice Mosk in *Gates*, *Hendricks II*, and *Kimble*.⁵³¹ None of the Deukmejian appointees wrote any dissents to a death penalty issue resolved this year; nor did they join a dissenting opinion written by Justices Mosk or Broussard.⁵³² However, Justice Broussard not only wrote eight dissents, he also joined the Mosk dissents in *Gates* and *Hendricks II*.⁵³³

7. A Summary of the Justices' Voting Record

Governor Deukmejian has long been a supporter of capital punishment in California⁵³⁴ and a critic of the way the Bird court handled death penalty appeals.⁵³⁵ Indeed, commentators suggest that dominating the California Supreme Court with his appointees was one of the few items on Governor Deukmejian's original political agenda.⁵³⁶ Consequently, it could not have been happenstance that he appointed two vigorous supporters of capital punishment to the supreme court, Justice Lucas (now Chief Justice Lucas) and Justice Panelli. After the retention election, the Governor had the opportunity to appoint three more justices. Governor Deukmejian responded to this opportunity by replacing the defeated justices with judges who shared his views on capital punishment.⁵³⁷ Of equal importance, he selected appointees who agreed among themselves on how the court should dispose of capital punishment issues and on what rationales the court should employ in doing so.⁵³⁸

⁵³¹ *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244 Cal. Rptr. 181, 193 (1988); *People v. Kimble*, 44 Cal. 3d 480, 517, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 172 (1988); *People v. Gates*, 43 Cal. 3d 1168, 1214, 743 P.2d 301, 331, 240 Cal. Rptr. 666, 696 (1987).

⁵³² Justice Arguelles, writing in *Bell*, and Justice Kaufman, writing in *Anderson (James)*, each wrote a single dissent in the automatic appeals decided this first year, but neither dissent was aimed at death penalty issues. See *supra* note 525 and accompanying text.

⁵³³ See *Hendricks II*, 44 Cal. 3d at 650, 749 P.2d at 847, 244 Cal. Rptr. at 193; *Gates*, 43 Cal. 3d at 1214, 743 P.2d at 331, 240 Cal. Rptr. at 696.

⁵³⁴ For example, Governor Deukmejian, then Senator Deukmejian, was one of the principal moving forces behind the first death penalty statute enacted by the legislature in 1973 (the mandatory death penalty legislation) in response to *Furman v. Georgia*, 408 U.S. 238 (1972). See *supra* notes 67-98 and accompanying text.

⁵³⁵ See *supra* note 336.

⁵³⁶ Zeiger & Block, *No Third Term: Deukmejian Starts Stampede Toward 1990*, 20 CAL. J. 50, 51 (1989).

⁵³⁷ See *supra* notes 332-38 and accompanying text.

⁵³⁸ See *supra* notes 384, 388 & 404 and accompanying text.

The voting records of the Deukmejian appointees during the first year of the Lucas court demonstrate that the Governor's prediction of how his appointees would behave was extraordinarily accurate. They agreed with each other 100% of the time on every death penalty issue.⁵³⁹ With the single exception of Justice Kaufman's two sentence opinion concurring in the judgment in *Williams*, the Governor's appointees also completely agreed on the rationale for disposing of these death penalty issues. And with the single possible exception of Justice Kaufman's *Williams* opinion,⁵⁴⁰ there was no disagreement in the guilt, special circumstance, or penalty phase issues in these capital appeals. In each case, except for the penalty phase reversal in *Anderson (James)* for *Ramos* error,⁵⁴¹ the court resolved the death penalty issues in one way: in favor of imposing capital punishment. Accordingly, there was a dramatic shift in the reversal rate from the days of the Bird court.⁵⁴² All of this met with the approval of Governor Deukmejian, who announced to the People in one of his weekly radio broadcasts:

[I]n 1986, California voters removed three supreme court justices from the bench, in large part because the court had established a clear pattern of blocking the implementation of capital punishment.

. . . I have now had the opportunity to appoint five new justices to the state supreme court. This new majority is now deciding capital punishment cases on their merits.

. . . The supreme court under Chief Justice Rose Bird upheld only four death sentences in nine years. In just the last year and a half, the new [s]upreme [c]ourt, under the leadership of Chief Justice Malcolm Lucas, has affirmed 43 cases. . . .⁵⁴³

The opinions of the justices did not present a spectrum of views on various death penalty issues this year. That is, they did not begin at one end of a scale and continually shade on into one another toward the opposite end of the scale. Instead, if one focuses on the most controversial issues this year (the penalty phase issues in these capital cases), and if one uses as the scale of measurement a justice's tolerance for error that may have adversely affected the penalty assessment process, the Deukmejian appointees cluster together at exactly the same point on this spectrum. Their opinions tolerate any kind of penalty phase error,

⁵³⁹ *Id.*

⁵⁴⁰ See *supra* notes 450-53 and accompanying text.

⁵⁴¹ *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987); see *supra* notes 404-12 and accompanying text.

⁵⁴² See *supra* notes 339-46 and accompanying text.

⁵⁴³ Governor's Broadcast, Nov. 5, 1988 (transcript available at U.C. Davis Law Review).

no matter how likely it appears that the error affected the judgment imposing the penalty of death, so long as it was not *Ramos* error. With the single exception of the reversal in *Anderson* for *Ramos* error,⁵⁴⁴ the Deukmejian justices affirmed every penalty phase judgment they considered this year,⁵⁴⁵ regardless of the type or number of errors found in the penalty phase proceedings.⁵⁴⁶ It was as though they wrote with a single pen, agreeing on everything of importance — the result (the disposition) and the rationale for reaching the result.

Justice Broussard stands alone at the other end of this scale, as far from the Deukmejian appointees as the cases permitted him. His opinions show little tolerance for penalty phase error that might have infected the penalty judgment. He also distanced himself from his colleagues by the views he expressed, even when he agreed with the majority's disposition of the penalty phase issues. There was not a single instance this year in which he joined a Deukmejian appointee's opinion that affirmed a judgment of death.⁵⁴⁷

I do not mean to suggest that Justice Broussard was invariably correct in his assessment of these cases. Nor do I suggest that he stands at the extreme end of a scale measuring intolerance for penalty phase error as the appointment is made with the executioner. Justice Broussard's views only appear to be extreme because they are quite distant from those of his colleagues.

Justice Mosk's opinions in the first year of the Lucas court locate him somewhere in the center of the scale, a considerable distance from the Deukmejian appointees on the one hand and from Justice Broussard on the other. He tolerates more penalty phase error than does Justice Broussard, but not as much as do the Deukmejian justices. In addition, Justice Mosk was not as reticent to join the Deukmejian justices' rationales for affirming the death judgments this year.⁵⁴⁸ Justice Mosk embraced some, but not all of the majority's rationale.⁵⁴⁹ In sum, he was the man in the middle.

⁵⁴⁴ See *supra* notes 404-12 and accompanying text.

⁵⁴⁵ The justices did not consider penalty phase issues in the three reversals in *Snow*, *Hale*, and *Hendricks I*. See *supra* notes 347-73 and accompanying text.

⁵⁴⁶ See *supra* note 404 and accompanying text.

⁵⁴⁷ See *supra* notes 384-533 and accompanying text.

⁵⁴⁸ See *supra* notes 488-514 and accompanying text.

⁵⁴⁹ See *supra* notes 454-87 and accompanying text.

C. *Do the Different Results Represent Change in the Way the Court Is Adjudicating Automatic Appeals?*

1. An Analysis

It is, of course, theoretically possible that the substantial change in the California Supreme Court's reversal rate does not reflect a change in the way the court decides automatic appeals. Instead, it simply may reflect the fact that any court, even the Bird court, would have affirmed the death judgments in the automatic appeals that the Lucas court decided this first year.

Indeed, there is evidence suggesting that the Bird court might have agreed with at least some of the Lucas court's twelve affirmances this year. In five of the twelve affirmances, Justices Mosk and Broussard agreed with the affirmance of the death judgment. Justice Mosk joined the majority opinion in *Howard*⁵⁵⁰ and *Melton*⁵⁵¹. He concurred in the majority opinion in *Ghent*⁵⁵² and in the judgments affirming the penalty phase judgments in *Hovey*⁵⁵³ and *Williams*.⁵⁵⁴ In *Howard*, Justice Broussard concurred in the majority opinion, except for the discussion of the financial-gain special circumstance.⁵⁵⁵ He concurred in the judgment affirming the judgment of death in *Ghent*,⁵⁵⁶ *Hovey*,⁵⁵⁷ and *Melton*.⁵⁵⁸ He also joined Justice Kaufman's opinion concurring in the judgment affirming *Williams* in its entirety.⁵⁵⁹ Furthermore, Chief Justice Lucas wrote the majority opinions in four of the cases (*Ghent*, *Howard*, *Hovey*, and *Melton*) and joined the Eagleson opinion in *Williams*. Justice Panelli joined all five of the majority opinions in these

⁵⁵⁰ *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988).

⁵⁵¹ *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988).

⁵⁵² 43 Cal. 3d 739, 780, 739 P.2d 1250, 1277, 239 Cal. Rptr. 82, 109 (1987) (Mosk, J., concurring).

⁵⁵³ 44 Cal. 3d 543, 586, 749 P.2d 776, 801, 244 Cal. Rptr. 121, 147 (1988) (Mosk, J., concurring in the judgment).

⁵⁵⁴ 44 Cal. 3d 883, 973, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 397 (1988) (Mosk, J., concurring in the judgment).

⁵⁵⁵ 44 Cal. 3d 375, 446, 749 P.2d 279, 323, 243 Cal. Rptr. 842, 886 (1988) (Broussard, J., concurring and dissenting).

⁵⁵⁶ 43 Cal. 3d at 781, 739 P.2d at 1278, 239 Cal. Rptr. at 110 (Broussard, J., concurring in the judgment).

⁵⁵⁷ 44 Cal. 3d at 587, 749 P.2d at 802, 244 Cal. Rptr. at 148 (Broussard, J., concurring in the judgment).

⁵⁵⁸ 44 Cal. 3d 713, 772, 750 P.2d 741, 777, 244 Cal. Rptr. 867, 903 (Broussard, J., concurring in the judgment).

⁵⁵⁹ 44 Cal. 3d 883, 974, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 398 (1988) (Kaufman, J., joined by Broussard, J., concurring in the judgment).

cases.⁵⁶⁰ Since these four judges (Chief Justice Lucas and Justices Mosk, Broussard, and Panelli) would have represented a majority of the Bird court as it existed at the time of the retention election, the inference is quite strong that the Bird court would have affirmed the death judgment in these five cases as well.⁵⁶¹

However, Justice Broussard did not agree with the affirmance of the death judgment in the remaining seven cases (of the twelve affirmed this year). Thus, unless Justice Broussard would have voted differently in the company of his Bird court colleagues or unless Chief Justice Bird or Justices Reynoso or Grodin would have joined Justices Lucas and Panelli, it is likely that the Bird court would have reversed the remaining seven cases.⁵⁶² This is especially true of *Gates*, *Miranda*, *Kimble*, *Hendricks II*, and *Wade*. In the first four cases, Justices Mosk and Broussard dissented to the affirmance of the death judgment. Consequently, two of the three justices defeated at the retention election would have had to vote with Justices Lucas and Panelli for the Bird court to have affirmed the death judgments. And there is no doubt as to how the Bird court would have ruled in *Wade*. On January 2, 1987, only a few hours before its tenure effectively lapsed, the Bird court affirmed the judgment of guilt and the torture-murder special circumstance finding, but reversed the heinous-murder special circumstance finding and the judgment of death in *Wade*.⁵⁶³ On the first day of busi-

⁵⁶⁰ See *supra* note 433 and accompanying text.

⁵⁶¹ One cannot be certain as to how the justices would have voted had the case been decided by the Bird court, for one cannot be sure of the influence such factors as views of one colleagues have on a justice's decision in a given case.

⁵⁶² These seven cases are: *People v. Wade I*, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988); *People v. Hendricks II*, 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181 (1988); *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); *People v. Kimble*, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987); *People v. Miranda*, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987); *People v. Gates*, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987).

⁵⁶³ Since the court granted a rehearing in *Wade*, the original opinion was not published in the bound volume of the Official Reports. However, the opinion appeared in the Official Advance Sheets and in the Advance Sheets of the Pacific and the California Reporters. See 43 Cal. 3d 366, 729 P.2d 239, 233 Cal. Rptr. 48 (1987). A highly divided court decided *Wade I*. A per curiam opinion, an opinion which fails to identify the justice signing the opinion, resolved the case. Chief Justice Bird, joined by Justices Broussard and Reynoso, dissented. Chief Justice Bird would have reversed the entire judgment. *Id.* at 386, 729 P.2d at 251, 233 Cal. Rptr. at 60. Justice Mosk filed a dissenting opinion, for he would have affirmed the entire judgment. *Id.* at 385, 729 P.2d at 251, 233 Cal. Rptr. at 59. Justice Lucas, joined by Justice Panelli, also dissented. Justice Lucas would have affirmed the entire judgment. *Id.* at 385, 729 P.2d at

ness of the Lucas court, March 26, 1987, the court granted a rehearing in *Wade*.⁵⁶⁴

The more problematic cases are *Bell* and *Ruiz*. Justice Mosk wrote the majority opinion affirming the entire judgment in *Bell*,⁵⁶⁵ and he joined the Lucas opinion in *Ruiz*.⁵⁶⁶ Justice Broussard dissented to the affirmance of the death judgment in both cases.⁵⁶⁷ But with Chief Justice Lucas writing the majority opinion in *Ruiz* and joining Justice Mosk's opinion in *Bell*, and with Justice Panelli joining both opinions, the Bird court would have needed only one additional vote to affirm both death judgments. It is doubtful that another of the Bird court justices would have joined Justices Mosk, Lucas, and Panelli in affirming the judgments of death in *Bell* and *Ruiz*. But if, out of an abundance of caution, we predict that in one of the decisions the Bird court would have affirmed the death judgment and in the other reversed, this means that the Lucas court still affirmed six death judgments that the Bird court would have reversed.⁵⁶⁸ This amounts to a one hundred percent increase in the affirmances.⁵⁶⁹ By any standard, this constitutes a substantial change in the way the California Supreme Court handles death penalty cases.⁵⁷⁰

251, 233 Cal. Rptr. at 60. Justice Reynoso, joined by Chief Justice Bird, also filed an opinion dissenting to the affirmance of the "torture murder" special circumstance finding. *Id.* at 396, 729 P.2d at 258, 233 Cal. Rptr. at 67. Apparently, Justice Grodin did not participate in the decision.

⁵⁶⁴ See Minutes of the Supreme Court, 1987 California Official Reports, Official Advance Sheets, No. 11, at 9 (San Francisco, Mar. 26, 1987).

⁵⁶⁵ 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987). The Lucas court recently affirmed *Bell* on rehearing. 49 Cal. 3d 502, 778 P.2d 129, 262 Cal. Rptr. 1 (1989). One should note that in this case the Lucas court first affirmed the death penalty and then granted the rehearing. This suggests that the Bird court might not have affirmed the death judgment if it had conducted the initial hearing.

⁵⁶⁶ 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988).

⁵⁶⁷ See *id.* at 625, 749 P.2d at 874, 244 Cal. Rptr. at 220 (Broussard, J., concurring in the judgment and dissenting); *Bell*, 44 Cal. 3d at 170, 745 P.2d at 593, 241 Cal. Rptr. at 910 (Broussard, J., concurring in the judgment and dissenting).

⁵⁶⁸ These six cases are: *People v. Wade II*, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988); *People v. Hendricks II*, 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181 (1988); *People v. Kimble*, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988); *People v. Miranda*, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987); *People v. Gates*, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987); and either *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); or *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987).

⁵⁶⁹ Under this analysis, the Bird court would have affirmed, at most, six of the twelve death judgments affirmed by the Lucas court this year.

⁵⁷⁰ The Bird court affirmed only one death penalty judgment after it began deciding

2. A Conclusion from the Analysis

Governor Deukmejian set out to change the way the California Supreme Court handled death penalty cases. He sought to remake the court in his own image. He was successful. His appointees have dramatically increased the affirmance rate, and they have done so by speaking in a single voice on every death penalty issue decided this first year, except for the terse Kaufman opinion in *Williams*, which was filed only hours before the year ended.⁵⁷¹ Blind luck did not produce the change in the court's affirmance rate in death penalty cases. There was not a sudden, fortunate string of cases that any court would have affirmed. Rather, there was a change in the way the California Supreme Court handled death penalty cases.

D. *The Problem Facing the New Court and Its Solution*

1. The Problem

The Bird court had created a body of death penalty doctrine as it decided the various automatic appeals over the years. Given the penchant of judges, and of the approved standard California jury instructions (CALJIC) for simply repeating the language of statutes in jury instructions, nearly all of the early death penalty cases tried under both the 1977 legislation and the 1978 Initiative contained substantially similar, if not identical, jury instructions. In the process of deciding automatic appeals during its tenure, the Bird court identified a number of problems with the instructions contained in the book of approved jury instructions for death penalty trials under the 1978 Initiative.⁵⁷² As

automatic appeals in 1979. See Table 1, *infra* p. 328. But since it could be anticipated that the reversal rate would have declined as the lower courts began applying the law announced in the various opinions of the Bird court, an increase in the affirmance rate would be expected. Thus, considering all applicable factors, the prediction that the Bird court would have affirmed six of the twelve death judgments affirmed this first year of the Lucas court arguably is a fair estimate.

⁵⁷¹ See 44 Cal. 3d 883, 974, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 398 (1988) (Kaufman, J., joined by Broussard, J., concurring in death judgment affirmance). *Williams* was filed on Friday, March 24, 1988. The first year of the Lucas court ended on Sunday, March 26, 1988.

⁵⁷² The original instructions for the 1978 Initiative are contained in CALIFORNIA JURY INSTRUCTIONS — CRIMINAL [CALJIC] Nos. 8.84, 8.84.1, 8.84.2. (4th rev. ed. 1979). These instructions do little more than repeat the statute's language. Courts routinely gave these instructions in the initial capital cases tried under the 1978 Initiative. The errors contained in the instructions existed in each case in which a court used the instructions. Fewer problems, however, existed with the standard jury instructions promulgated for the 1977 legislation. See *infra* notes 573, 584 & 589.

the standard, approved instructions, they were repeated in most of the early trials.

The most notorious problem with the 1978 Initiative was in its felony-murder special circumstance provisions. After finding these provisions ambiguous and thus in need of interpretation, the Bird court construed the word "intentionally" in subdivision (b) of section 190.2 to apply to all defendants — actual killers and accomplices alike — and to require proof of an intent-to-kill before a defendant was subject to a felony-murder special circumstance finding. That ruling came in *Carlos v. Superior Court*.⁵⁷³ *Carlos* was decided by a nearly unanimous court. Justice Broussard wrote the majority opinion. Chief Justice Bird and Justices Mosk, Kaus, Reynoso, and Karesh joined it.⁵⁷⁴ Justice Richardson dissented alone.⁵⁷⁵

Although the *Carlos* intent-to-kill rule was reaffirmed and applied in nineteen subsequent cases by the Bird court,⁵⁷⁶ the court's adherence

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

⁵⁷⁴ *Id.* Justice Karesh was a retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council. *Id.* As Chief Justice of California, Rose Bird was Chairperson of the Judicial Council. *Id.*

⁵⁷⁵ *Id.* at 154-60, 672 P.2d at 877-81, 197 Cal. Rptr. at 95-99 (Richardson, J., dissenting).

⁵⁷⁶ See *People v. Ratliff*, 41 Cal. 3d 675, 715 P.2d 665, 224 Cal. Rptr. 705 (1986); *People v. Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986); *People v. Silbertson*, 41 Cal. 3d 296, 709 P.2d 1321, 221 Cal. Rptr. 152 (1985); *People v. Balderas*, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985); *People v. Leach*, 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985); *People v. Fuentes*, 40 Cal. 3d 629, 710 P.2d 240, 221 Cal. Rptr. 440 (1985); *People v. Guerra*, 40 Cal. 3d 377, 708 P.2d 1252, 220 Cal. Rptr. 374 (1985); *People v. Montiel*, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985); *People v. Chavez*, 39 Cal. 3d 823, 705 P.2d 372, 218 Cal. Rptr. 49 (1985); *People v. Boyd*, 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985); *People v. Hayes*, 38 Cal. 3d 780, 699 P.2d 1259, 214 Cal. Rptr. 652 (1985); *People v. Anderson (Stephen)*, 38 Cal. 3d 58, 694 P.2d 1149, 210 Cal. Rptr. 777 (1985); *People v. Armendariz*, 37 Cal. 3d 573, 693 P.2d 243, 209 Cal. Rptr. 664 (1984); *People v. Whitt*, 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984); *Ramos v. Superior Court*, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982); *People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 469 U.S. 1229 (1985).

The Bird court applied the *Carlos* rule in three additional cases. See *People v. Hamilton (Bernard)*, 41 Cal. 3d 408, 710 P.2d 981, 221 Cal. Rptr. 902 (1985); *People v. Hamilton (Billy)*, 41 Cal. 3d 211, 710 P.2d 937, 221 Cal. Rptr. 858 (1985); *People v. Walker*, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169 (1985). One of these cases was later remanded from the United States Supreme Court. See *Hamilton (Bernard)*, 45 Cal. 3d 351, 753 P.2d 1109, 247 Cal. Rptr. 31, *modified*, 46 Cal. 3d 1034a (1988), *cert. denied*, 109 S.Ct. 879 (1989). The other two cases were reheard by the California Supreme Court. See *Hamilton (Billy)*, 46 Cal. 3d 123, 756 P.2d 1348, 249 Cal. Rptr.

to *Carlos* and the rule of *stare decisis* supporting its application did not resolve the controversy surrounding this issue. Instead, the repeated application of *Carlos* had the opposite effect. *Carlos* and the reversal of fifteen of these subsequent death cases under the *Carlos* rule⁵⁷⁷ formed part of the mounting criticism of the Bird court to the point that it became an issue in the retention election.⁵⁷⁸

When the fully reconstructed California Supreme Court finally took the bench in March 1987, a large backlog of death penalty cases greeted the new justices. The lack of an intent-to-kill instruction for the felony-murder special circumstance infected a large number of felony-murder special circumstance findings. According to one critic, the *Carlos* intent-to-kill rule may have been applicable to as many as fifty cases already tried under the pre-*Carlos* instructions.⁵⁷⁹

All of the cases that the Lucas court decided during this first year, except for *Snow* and *Hale*, had been previously briefed and argued before the Bird court.⁵⁸⁰ Each of the cases was awaiting decision in the California Supreme Court on the last day of the Bird court's tenure. Each had to be reargued before the new court. In nearly one-half of these cases, the *Carlos* rule was applicable to at least one of the special circumstance findings.⁵⁸¹ Given the prevalence of *Carlos* error and the

320 (1988), *cert. denied*, 109 S.Ct. 1176 (1989); *Walker*, 47 Cal. 3d 605, 765 P.2d 70, 253 Cal. Rptr. 863 (1988).

⁵⁷⁷ These 15 cases were *Ratliff*, *Balderas*, *Hamilton (Bernard)*, *Hamilton (Billy)*, *Silbertson*, *Fuentes*, *Guerra*, *Chavez*, *Boyd*, *Hayes (John)*, *Anderson (Stephen)*, *Armendariz*, *Ramos*, *Whitt*, and *Garcia*. For the citations to these cases, see *supra* note 576.

⁵⁷⁸ See Soberanis, *How Biased Is the Court?*, 17 CAL. J. 435, 437 (1986).

⁵⁷⁹ Ed Jagels, Kern County District Attorney and a spokesperson for Crime Victims for Court Reform (one of the major organizations opposing the confirmation of Chief Justice Bird and Justices Reynoso and Grodin), estimated that *Carlos* and its progeny "may affect as many as 50 other judgments." *Id.* From the day of the retention election to the end of the Bird court's tenure, the court decided seven automatic appeals. See *supra* note 321 and accompanying text. In not one of these cases did the parties litigate a *Carlos* issue.

⁵⁸⁰ The cases are listed in the order they were *reargued* to the Lucas court. See Minutes of the Supreme Court, 1987 California Official Reports, Official Advance Sheets, No. 11, at 24 (*Ghent*); *id.* at 25 (*Miranda*, *Kimble*); *id.* No. 12, at 1 (*Hendricks I*, *Hendricks II*); *id.* at 2 (*Bell*, *Howard*); *id.* No. 13, at 1 (*Williams*); *id.* No. 14, at 8 (*Hovey*); *id.* No. 18, at 2 (*Melton*); *id.* No. 20, at 16 (*Ruiz*); *id.* No. 21, at 1 (*Gates*); *id.* at 2 (*Anderson (James)*); *id.* No. 26, at 1 (*Snow*); No. 27, at 15 (*Wade*); *id.* 1988 California Official Reports, Official Advance Sheets, No. 4, at 8 (*Hale*).

⁵⁸¹ There was a felony-murder special circumstance finding in each of the following cases decided under the 1978 Initiative: *People v. Melton*, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988); *People v. Hendricks II*, 44 Cal. 3d 635, 749 P.2d 836,

anticipated reversal of a large number of death judgments under its compulsion, the *Carlos* rule presented a major impediment to achieving the goal of changing the way the Bird court handled death judgments. But the problem was not limited to the *Carlos* rule.

The Bird court had found other defects in the standard jury instructions routinely used in the trial of early death penalty prosecutions under both the 1977 legislation and the 1978 Initiative. There were sins of omission and commission in these penalty phase instructions. The most common of these instructional errors were the following:

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

244 Cal. Rptr. 181 (1988); *People v. Hale*, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988); *People v. Miranda*, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987); *People v. Gates*, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987); *People v. Anderson (James)*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987); *People v. Hendricks I*, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987). As we have seen, ultimately the Lucas court reversed *Hendricks I* and *Snow* on nondeath-penalty law grounds. *See supra* notes 351-63 and accompanying text. Since the court found multiple-murder as another valid special circumstance in *Anderson (James)* and reversed the death judgment in that case for *Ramos* error, a reversal would not have been compelled in *Anderson (James)*. The court also upheld a multiple-murder special circumstance in *Hendricks II*. Invalidating the felony-murder special circumstance finding under *Carlos* would not have affected the defendant's death eligibility, though it may have necessitated a new penalty trial. The Lucas court, however, rejected a similar argument in *Wade*. In *Miranda*, the jury made a special finding that the defendant was guilty of first degree murder and that the killing was willful, deliberate, and premeditated. Arguably this holding would have brought the case under one of the exceptions to the *Carlos* rule. A reversal of the special circumstance findings and the death judgment apparently would have been required in *Gates*. However, because the court relied upon *Anderson's (James)* overruling of *Carlos*, one cannot tell from the face of the opinion whether one of the exceptions to the *Carlos* rule might have been applicable.

Six of the sixteen cases decided this year were prosecutions under the 1977 legislation: *People v. Williams*, 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336 (1988); *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); *People v. Hovey*, 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121 (1988); *People v. Kimble*, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988); *People v. Bell*, 44 Cal. 3d 137, 745 P.2d 543, 241 Cal. Rptr. 890 (1987); *People v. Ghent*, 43 Cal. 3d 739 P.2d 1250, 239 Cal. Rptr. 82 (1987). The felony-murder special circumstance in the 1977 legislation was involved in five of these cases: *Williams* (robbery and kidnapping, along with multiple-murder special circumstance); *Hovey* (kidnapping); *Kimble* (burglary, robbery, and rape, along with multiple-murder special circumstance); *Bell* (robbery); and *Ghent* (rape). The felony-murder special circumstance defined in the 1977 legislation required a finding that the killing committed during the felony was done willfully and with deliberation and premeditation. *See supra* note 110. Therefore, it did not suffer from the same defect found in the 1978 Initiative's felony-murder provision.

error).⁵⁸² This problem arises in prosecutions under the 1977 legislation and the 1978 Initiative.

2. The Briggs instruction (the instruction mandated by the 1978 Initiative) permitting the jury to take the Governor's power to commute a sentence of life without parole into account in the penalty assessment process (*Ramos* error).⁵⁸³ This issue is confined to the 1978 Initiative.⁵⁸⁴

3. The failure of the trial court to instruct the jury that an uncharged crime must be proved beyond a reasonable doubt before the jury can use it as an aggravating factor (*Robertson* error).⁵⁸⁵ *Robertson* error can arise in prosecutions under the 1977 legislation and the 1978 Initiative.

4. The instructions permitting the prosecution to use aggravating evidence beyond those factors enumerated in the 1978 Initiative (*Boyd* error).⁵⁸⁶ This issue is confined to prosecutions under the 1978 Initiative.

5. The failure to instruct the jury on the proper use of defense mitigating evidence.⁵⁸⁷ Under the 1977 legislation this form of instructional error is known as factor (j) error. In the 1978 Initiative, it is known as factor (k) error.

6. The use of an antisympathy instruction at the penalty phase.⁵⁸⁸ This

⁵⁸² See, e.g., *People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986); *People v. Harris (Lee)*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, cert. denied, 469 U.S. 965 (1984); *People v. Allen*, 23 Cal. 3d 286, 590 P.2d 30, 152 Cal. Rptr. 454 (1979).

⁵⁸³ See, e.g., *People v. Myers*, 43 Cal. 3d 250, 729 P.2d 698, 233 Cal. Rptr. 264 (1987); *People v. Montiel*, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985); *People v. Ramos II*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800, cert. denied, 471 U.S. 1119 (1984).

⁵⁸⁴ Of course, it would be possible for a trial judge to give a similar instruction in a prosecution under the 1977 legislation, but the instructions would not be mandated by the statute.

⁵⁸⁵ See, e.g., *People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986); *People v. Davenport*, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985) (plurality opinion); *id.* at 295, 710 P.2d at 892-93, 221 Cal. Rptr. at 825-26 (Broussard, J., concurring and dissenting); *People v. Phillips*, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985) (plurality opinion); *People v. Robertson*, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982) (plurality opinion).

⁵⁸⁶ See *People v. Boyd*, 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985).

⁵⁸⁷ See, e.g., *People v. Allen*, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986); *People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986); *People v. Davenport*, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985) (plurality opinion); *id.* at 295, 710 P.2d at 892-93, 221 Cal. Rptr. at 825-26 (Broussard, J., concurring and dissenting); *People v. Easley*, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983).

⁵⁸⁸ See, e.g., *People v. Leach*, 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985); *People v. Brown*, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), *rev'd. sub nom. California v. Brown*, 479 U.S. 538 (1987); *People v. Montiel*, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985); *People v. Lanphear II*, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984); *People v. Easley*, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983).

instructional error can arise in prosecutions under the 1977 legislation and the 1978 Initiative.

7. The failure to instruct the jury that, despite the language of the 1978 Initiative, the jury retained discretion over the sentencing decision (the Initiative's mandatory sentencing error).⁵⁸⁹ This issue is confined to the 1978 Initiative.

Since these defects were embedded in the standard jury instructions employed in most, if not all, of the early cases,⁵⁹⁰ errors flowing from them permeated the inventory of automatic appeals on the court's docket. Furthermore, such errors, including *Carlos* error, would continue to appear in cases until juries began to receive instructions in the parlance of the new standard instructions adopted in response to the Bird court cases. Thus, as with *Carlos* error,⁵⁹¹ a reversal in one case for one of these reappearing errors could compel a reversal in a number of subsequent cases.⁵⁹² The specter of reversing a large number of cases for such errors must have presented an unacceptable alternative to the new Deukmejian majority.

If the prediction is correct that the Bird court would have affirmed five or six of the death judgments reviewed this year,⁵⁹³ and if the new

⁵⁸⁹ See, e.g., *People v. Myers*, 43 Cal. 3d 250, 729 P.2d 698, 233 Cal. Rptr. 264 (1987); *People v. Allen*, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986); *People v. Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986); *People v. Davenport*, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985); *People v. Brown*, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637, (1985), *rev'd on another ground sub nom. California v. Brown*, 479 U.S. 538 (1987).

⁵⁹⁰ See *supra* note 572 and accompanying text.

⁵⁹¹ See *supra* note 573 and accompanying text.

⁵⁹² See *supra* notes 576-77 and accompanying text.

⁵⁹³ The five cases are: *Williams*, *Melton*, *Hovey*, *Howard*, and *Ghent*. See *supra* notes 550-54. *Williams*, *Hovey*, and *Ghent* were prosecutions under the 1977 legislation. As such, they suffered from neither *Carlos* error nor many of the instructional issues identified above. See *supra* notes 573, 581 and accompanying text. *Melton* and *Howard* were 1978 Initiative cases. There was no felony-murder special circumstance in *Howard*, and the trial court so substantially altered the penalty phase instructions from their standard form that they arguably complied with the Bird court cases, though *Howard* was tried before many of these decisions were filed. See 44 Cal. 3d 375, 431, 749 P.2d 279, 313, 243 Cal. Rptr. 842, 877 (1988). Although there was a felony-murder special circumstance finding in *Melton*, the jury made a special separate finding that the defendant intentionally killed the victim, 44 Cal. 3d 713, 747-48, 750 P.2d 741, 760, 244 Cal. Rptr. 867, 886-87 (1988). The trial court did not give all of the erroneous instructions, and special defense instructions were given at the penalty phase which arguably cured the error in the standard instructions. *Id.* at 758-60, 750 P.2d at 767-69, 244 Cal. Rptr. at 894-95.

The sixth case was either *Ruiz* or *Bell*. See *supra* notes 565-70 and accompanying text. Because both were prosecuted under the 1977 legislation they did not share the

court were to reach the same disposition under existing law, the Lucas court's reversal rate this first year would have been either sixty-two percent (for five affirmances) or fifty-four percent (for six).⁵⁹⁴ But the Governor, the People, the politically powerful pro-capital-punishment interests, and probably the new appointees as well, did not look forward to the Bird court results under the Lucas court's name. Proponents of capital punishment anticipated more of a change than this.

The new court's options were limited. Only two alternatives, or perhaps a combination of both, promised a solution to the problem that the new appointees faced.

First, the new court could overrule the law announced in the various Bird court cases. However, there were difficulties with this approach. To begin with, the federal constitution appeared to mandate some of that law. The court could not effectively change that doctrine. But even if the court were free under the federal constitution to overrule some prior authority, a mass overruling of existing doctrine would unsettle large bodies of law now being routinely applied in death penalty trials throughout the state. If the new court jettisoned the Bird court rules, it would take time to work out new rules. As the new court worked through its new rules, the lower courts undoubtedly would give inconsistent interpretations to the embryonic doctrine in their struggle to keep abreast of its evolution. Errors might again permeate a large group of cases. If these errors were also encased in standard jury instructions, the problem facing the new court could be of similar magnitude to the one the court now faced. In short, it would be impossible to predict the adverse consequences that might flow from a mass overruling of existing doctrine. Overruling a substantial portion of the Bird court's law thus promised only a short-term solution. In the long run, it was likely that this strategy would destabilize death penalty law and produce serious problems in the future. Furthermore, since it is more work to create new rules than it is to apply existing ones, the parsimony principle alone counseled against a revolution in death penalty law.

Moreover, the Lucas court might have incurred considerable opposition from a variety of sources if the court extensively overruled the death penalty law announced in the Bird court cases. Except for spe-

defects presented by cases prosecuted under the 1978 Initiative.

⁵⁹⁴ The court would have reviewed 13 penalty phase judgments this year. An affirmance of five or six of these thirteen cases means that seven or eight of the cases would have been reversed. This yields the indicated reversal rates.

cific criticism of the *Carlos* intent-to-kill rule,⁵⁹⁵ claims that the Bird court had engaged in illegitimate decisionmaking did not target particular substantive doctrine. *Carlos* aside, neither rules nor jury instructions were singled out as examples of illegitimately conceived doctrine, doctrine created by the Bird court for the purpose of frustrating the implementation of capital punishment in California. This is not to say that the law announced in the Bird court opinions escaped heavy criticism.⁵⁹⁶ But the criticism aimed at the correctness of the rule, not at its legitimacy.⁵⁹⁷ There is a clear distinction between an erroneous rule and an illegitimate one. Of course, the Lucas court could have overruled the death penalty law announced by the Bird court on the ground that these rules were mistakenly conceived. But beyond the *Carlos* rule, the Lucas court had no obvious support for doing so.

Additionally, by overruling a considerable number of Bird court cases the Lucas court would make it unmistakably clear that the law changes with the personnel of the court. One of the major criticisms of Chief Justice Bird and those who voted with her was that they applied their own personal views on capital punishment rather than "the law" in reversing so many death penalty cases. The California Supreme Court is supposed to symbolize impartial application of law created by the democratic legislative process. Justices must act in accordance with this symbol. They must impartially apply "the law" created by the legislature (under the 1977 legislation) or the People (in the 1978 Initiative) to the facts of the case to reach a decision "under the law." In other words, it is the law that condemns the accused, not the court, and not the individual justices. Chief Justice Bird and Justices Reynoso and Grodin allegedly violated these rules. They purportedly enforced not "the law," but their own personal opinions.⁵⁹⁸ For these supposed transgressions, the People turned them out of office and replaced them

⁵⁹⁵ See *supra* note 578 and accompanying text.

⁵⁹⁶ For example, there was considerable criticism of a number of the rules fashioned by the Bird court in the dissenting opinions filed in the cases announcing the rules. See, e.g., *People v. Wade I*, 43 Cal. 3d 366, 385, 729 P.2d 239, 251, 233 Cal. Rptr. 48, 60 (1987) (Lucas, J., dissenting); *People v. Easley*, 34 Cal. 3d 858, 886, 671 P.2d 813, 831, 196 Cal. Rptr. 309, 327 (1983) (Richardson, J., dissenting).

⁵⁹⁷ See *Wade I*, 43 Cal. 3d at 386, 729 P.2d at 251, 233 Cal. Rptr. at 60; *Easley*, 34 Cal. 3d at 886, 671 P.2d at 831, 196 Cal. Rptr. at 327.

⁵⁹⁸ The vital link between the Bird court justices' personal views and the law they purported to apply never received scrutiny. It was as though, according to retention election campaign publicity, the justices applied no law and only applied their own personal views when they reversed death judgments. See *supra* notes 278-80, 306-10 and accompanying text.

with "true judges," judges who would impartially administer the law created by the democratic processes.⁵⁹⁹ Now, if the Lucas court's decisions emphasized the power of the justices to choose the law they wished to apply, the same criticism made of the ousted Bird court justices would eventually be turned against the Deukmejian appointees.

Thus, though mass reversal of Bird court doctrine could have been done on the grounds that it was illegitimately made and incorrectly conceived, the very act of overruling this doctrine confirms a justice's power of choice over the law applied by the court. Its vigorous exercise raises the question of legitimacy. If the law changes with the personnel of the court, then what is the distinction between a justice's personal views and the law? Isn't the Lucas court doing what the Bird court did, only now it is affirming instead of reversing? What has happened to the law of capital punishment in California? Although any lawyer or law student should be able to answer these questions, the answers would probably require a substantial change in the symbolism of the law we live by. That is simply too large a task to fit within the constraints of a political campaign in a retention election.⁶⁰⁰

A second, considerably more attractive solution to the problem of how to effect change was to retain the law announced by the Bird court, but to alter the way that the law was applied. If the Lucas court could apply the law in such a way as to make each decision dependent upon the facts presented in that case alone, then the court would be free to decide each case as though it presented unique issues. The decision in any given case would be relevant only generally to other cases. Precedent thus would be of limited value, and it would not embarrass the court at a later date when the reservoir of tainted cases was fully depleted. Furthermore, this method would not significantly unsettle existing death penalty law.

More importantly, a decision affirming (or reversing) a death judgment by an application of existing law would confirm and reinforce the symbol of the California Supreme Court as administrator of the law made by others. Thus, the goal of the retention election, the replacement of the defeated justices with "true judges" who would follow "the law" and *impartially* apply it, would appear fulfilled. The repeated application of this type of decision would help to heal the wounds inflicted during the retention election.

⁵⁹⁹ See *supra* notes 310, 336.

⁶⁰⁰ Perhaps this is the reason that the debate during the retention election did not focus, or even mention, these questions. See *supra* notes 278-319 and accompanying text.

Of course, a judge must not only follow the law, but must also impartially apply it to fully conform with our conception of justice under the law. But for reasons that need not detain us here, our conception of "impartiality" tolerates widely different applications of the law. As long as improper considerations (such as personal relationship or bribery) do not influence the decision, we are quite willing to concede that individual judges may differ widely in their application of the law to a given set of facts. We are even willing to agree that judges that a Republican governor or president appoints will probably apply the law to a given case in a different way than Democratic appointees will apply the same law to the same facts. Differences such as this fall within our conception of acceptable impartiality, of acceptable differences in judgment. Indeed, when Chief Justice Bird and Justices Reynoso and Grodin, who were appointed by Democratic Governor Edmund G. "Jerry" Brown, Jr., lost in the retention election, it was anticipated that Republican Governor George Deukmejian would appoint judges who would apply "the law" quite differently than their defeated brethren had applied it.⁶⁰¹ So long as the judges *impartially* applied *the law*, such a difference would be entirely acceptable. Even a substantial change in the reversal rate in death penalty cases would be acceptable, so long as it rested on the impartial application of existing law. Indeed, this sort of acceptable change may have been precisely what the voters desired.

There is one last reason that this more cautious approach to change must have seemed attractive to the Deukmejian appointees. Compared to decisions that overrule precedent, decisions applying existing legal rules are not highly noticeable events. They become noticeable or newsworthy when their impartiality is suspect or when they produce extraordinary results. Arguably, after the retention election the court needed to avoid notice, to escape the public eye as much as possible, so that the court would have a period of time to put its house in order. Of course, in view of the recent controversy surrounding the court, scrutiny by the press was unavoidable. If the press, however, reported both that the reversal rate changed and that the court produced the change by a new, but acceptable and impartial application of the law, news stories would suggest that the court had returned to business as usual. Eventually, both the People and the press would soon lose interest in scrutinizing the work of the court in death penalty appeals. We would return to a time in which the major criticism of the court's work came from the

⁶⁰¹ See *supra* notes 335-38 and accompanying text.

profession. The professional criticism would be resolved within the profession (by judges, lawyers, law students, and professors), with an occasional legislative alteration along the way. The court thus would return to its traditional place in the California legal system. And the law of capital punishment would return to the profession and to the legislature, where many believe these issues rightfully belong.

2. The Lucas Court's Solution: An Analysis of the Cases and the Court's Methods

Simply put, the choice facing the Lucas court was whether to accept or reject the doctrine articulated by the now discredited Bird court. The first year's opinions do not reveal whether the Deukmejian appointees ever made a conscious choice of strategy. These opinions, however, do reveal the Lucas court's methodology for solving the problem of automatic appeals. Except for the *Carlos* intent-to-kill rule, the Deukmejian justices purported to accept the Bird court doctrine. How the court managed to accept this doctrine, while affirming cases the Bird court would have reversed, is the subject of the next inquiry.

This inquiry must begin with a review of the familiar distinction between categorical rules and rules that employ multi-factored balancing tests. A categorical rule announces what must be done when given facts are present. If the facts calling forth the rule are found to exist, the rule commands that something be done. Thus, by definition, a categorical rule functions as an "either/or" proposition. If the essential specified facts calling forth the rule are established, the rule prescribes a particular course of conduct. If the necessary facts do not exist, the rule's prescribed course of conduct does not apply. The evaluation necessary concerns the factual predicate that invokes the rule. The *Carlos* intent-to-kill rule is a good example of a categorical rule.⁶⁰² If a culprit who is otherwise death eligible commits a homicide during one of the felonies listed in the felony-murder special circumstance provisions of the 1978 Initiative, then under the *Carlos* rule, an alleged felony-murder special circumstance can be found true only if the prosecution proves beyond a reasonable doubt that the culprit intended to kill the victim. The factual predicate for the *Carlos* rule is the commission of a homicide during one of the enumerated felonies. Once this finding is made, the *Carlos* rule is invoked, and death eligibility under the felony-murder special circumstance is dependent upon a further finding that

⁶⁰² *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

the homicide was committed with intent-to-kill. Thus, the *Carlos* rule requires that the jury be instructed on the intent-to-kill requirement. If the trial court fails to instruct the jury properly, then error always infects the felony-murder special circumstance finding.

On the other hand, a rule that utilizes a multi-factored balancing test differs from a categorical rule in three ways. First, the facts calling forth the multi-factored rule's application are not *specifically* identifiable in advance. Instead, the multi-factored rule sets a *general* standard or "test." This test applies to a wide range of facts which may combine in an array of different combinations.

Second, the standard or test contains an evaluative component requiring the exercise of judgment. This is the "balancing" aspect of the multi-factored rule. It requires consideration of all of the supporting facts on the one hand, and of all the refuting facts on the other to reach a conclusion. The metaphor called forth here is of the balance scale held aloft by the familiar statue of Blind Justice. All of the facts on one side of the issue are weighed against all of the facts on the other side of that issue, and a balance is struck between the two.

The third distinction between multi-factored and categorical rules is that the multi-factored rule also identifies a standard by which the evaluative judgment must be made. In the simple metaphor of the balance scale, the "standard" is simply the weight of the factors on each side. With real multi-factored rules, some other measure is used. Once (1) the various facts are (2) evaluated using (3) the appropriate measure, multi-factored rules function in the same way as do categorical rules. If the conclusion reached in the multi-factored rule's evaluative stage meets the legal standard, then the rule prescribes a course of conduct. If the standard is not met, the conduct prescribed by the rule is not required. In other words, the three steps of a multi-factored test's "evaluative phase" serve precisely the same function as the fact finding process for categorical rules.

In terms of the law of capital punishment, a good example of a multi-factored rule is found in the law governing the reversibility of error committed during a trial. Unless the error falls within the *per se* reversal rule (a categorical rule automatically requiring a reversal on a finding of a particular type of error), there will be reversal only if the error adversely affected the judgment entered below. Since all of these rules, except for the *per se* reversal rule, are multi-factored balancing rules, a discussion of the different reversal rules currently applicable in capital cases need not concern us now.

Once it is determined that judgments in criminal cases will not automatically be reversed for any error committed during the trial, rules

must be created to govern the questions of when trial error will compel reversal and when it will not. These rules should focus on the underlying fairness of the trial process and the result it produces, rather than on the virtually inevitable presence of some error in the cases.⁶⁰³ All three elements of a multi-factored balancing test are present in the rules generally used to govern these issues. First, there must be an examination of everything in the record relevant to the effect of the error on the trial process and its results.⁶⁰⁴ This is a multi-factored analysis. Second, the reviewing court must evaluate the probable effect of the error. Third, the court must employ an appropriate standard or measure.⁶⁰⁵ Indeed, the difference in the various multi-factored reversibility rules is in the standard articulated by the reviewing court for making the necessary evaluation. Once the evaluative stage is complete, then the rule functions as though it were a categorical rule. If the reviewing court concludes that the error adversely affected the trial process, then it reverses the judgment. If the finding is otherwise, then the court affirms the judgment.

For the purpose of this discussion, the critically important difference between multi-factored balancing rules and categorical rules is the degree of judgment multi-factored rules confer on the judges of a reviewing court. With the application of a categorical rule, there is no evaluation beyond the fact-finding process. By contrast, ad hoc evaluation is the essence of a multi-factored rule. Furthermore, our notions about the permissible scope of judgment which courts may exercise under these rules is quite similar, if not identical, to our views on the judge's duty to apply law impartially. As we have seen, as long as improper considerations do not influence the decision, we are quite willing to concede that individual judges may differ widely in the exercise of judgment. This is true even with respect to the evaluation of specific facts under a specific legal standard.⁶⁰⁶

a. The Overruling of People v. Carlos and the Affirming of People v. Ramos

⁶⁰³ See, e.g., *Rose v. Clark*, 478 U.S. 570, 577 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); see also R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 50 (1970).

⁶⁰⁴ R. TRAYNOR, *supra* note 603, at 49-50.

⁶⁰⁵ *Id.*

⁶⁰⁶ See *supra* note 601 and accompanying text (discussing acceptable differences between judgments of republican and democratic appointees and noting that voters in retention election may have wished to replace Bird court justices with judges who would exercise judgment more favorable to sustaining death judgments in California).

With this understanding, we now return to the problem facing the Deukmejian appointees. Although the cases demonstrate that they accepted most of the death penalty doctrine announced by the Bird court, much of that doctrine was cast in terms of categorical rules. This was true of the *Carlos* rule and of most of the rules governing jury instructions at the penalty phase of the trial.

As we have seen, the *Carlos* rule was particularly troublesome for the Deukmejian appointees. As a categorical rule, it provided no room for the exercise of judgment, and the cases decided during the first year of the Lucas court demonstrate that the Deukmejian appointees' judgment on death penalty issues was different from the judgment exercised by the Bird court majority. Even worse for the new justices, in *People v. Garcia*,⁶⁰⁷ the Bird court held that unless one of four exceptions applied, *Carlos* error necessarily invoked the per se rule of reversible error. The Deukmejian justices could thus look forward to reversing a number of death judgments under the categorical *Carlos-Garcia* rule, unless they changed the law.

On October 13, 1987, seven months after taking the bench, in *People v. Anderson (James)*,⁶⁰⁸ the Lucas court overruled *Carlos*. *Anderson* was the third automatic appeal decided by the Lucas court and the first case to review a felony-murder special circumstance finding in a prosecution under the 1978 Initiative. Surprisingly, Justice Mosk wrote *Anderson*. Only Justice Broussard, the author of *Carlos*, dissented to the reversal.⁶⁰⁹ With the demise of the *Carlos* intent-to-kill rule, the felony-murder special circumstance cases under the 1978 Initiative now would be reviewed under doctrine far more responsive to the judgment of the new justices.⁶¹⁰

Although predictions that the Lucas court would overrule most of the Bird court death penalty doctrine were not uncommon,⁶¹¹ *Carlos* and its progeny were the only death penalty cases overruled by the Lucas court during this first year.⁶¹² The Lucas court accepted all of the re-

⁶⁰⁷ 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 469 U.S. 1229 (1985).

⁶⁰⁸ 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

⁶⁰⁹ *Id.* at 1151, 742 P.2d at 1333-34, 240 Cal. Rptr. at 613.

⁶¹⁰ This author analyzes *Anderson (James)* and critiques the Lucas court's overruling of the *Carlos* intent-to-kill rule in an article forthcoming.

⁶¹¹ See, e.g., *Anderson (James)*, 43 Cal. 3d at 1152-53, 742 P.2d at 1334-36, 240 Cal. Rptr. at 613-15 (Broussard, J., concurring and dissenting).

⁶¹² Relying on *Carlos*, the Bird court held, in *Turner*, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984), that the multiple-murder special circumstance defined in the 1978 Initiative also required a finding of an intent-to-kill. *Turner* was likewise

maining doctrine, including the seven rules governing jury instructions at the penalty phase of the trial identified above.⁶¹³

Given Chief Justice Lucas' criticism of the *Ramos* rule when he was Justice Lucas on the Bird court,⁶¹⁴ it was particularly significant that, after overruling *Carlos*, the Lucas court nonetheless reversed the death judgment in *Anderson* for *Ramos* error.⁶¹⁵ Thus, in the same opinion that jettisoned the *Carlos* rule, the Lucas court announced its adherence to *Ramos* II. Adherence to *Ramos* II may have been more important to the Lucas court as "proof," as a symbol of the court's willingness to accept established doctrine and to apply it in an evenhanded way. The court apparently cared less about the specter of future reversals under the aegis of the *Ramos* rule itself, even though *Ramos* error invoked a virtual per se reversal test.⁶¹⁶

However, the Lucas court may not have paid a high price for its symbolic stand in applying *Ramos* as part of the ordinary course of the law. By the time the court decided *Anderson*, there was evidence that *Ramos* error did not infect many of the trials completed before the Bird court embargoed the Briggs instruction in *Ramos* I.⁶¹⁷ Since 1964, California law had conformed to the prevailing rule throughout the United States: it is reversible error to instruct a sentencing jury that it may take the possibility of pardon or parole into account as it assesses the punishment to be imposed upon a capitally convicted defendant.⁶¹⁸ It was this rule that was changed by the Briggs instruction mandated by the 1978 Initiative.⁶¹⁹ Many trial judges, however, apparently believed that the California Supreme Court would find the instruction constitutionally infirm, and thus they refused to give the Briggs instruction.⁶²⁰

overruled in *Anderson* (James). See 43 Cal. 3d at 1149-50, 742 P.2d at 1333, 240 Cal. Rptr. at 612.

⁶¹³ See *supra* notes 582-589 and accompanying text.

⁶¹⁴ See *People v. Ramos II*, 37 Cal. 3d 136, 159, 689 P.2d 430, 444, 207 Cal. Rptr. 800, 814 (1988) (Lucas, J., dissenting).

⁶¹⁵ See *People v. Anderson* (James), 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1988).

⁶¹⁶ See *People v. Ramos I*, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982); see also *People v. Myers*, 43 Cal. 3d 250, 729 P.2d 698, 233 Cal. Rptr. 264 (1987) (plurality opinion).

⁶¹⁷ See *Ramos I*, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266.

⁶¹⁸ See *People v. Morse*, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964); *Ramos I*, 30 Cal. 3d at 592-95, 639 P.2d at 930-32, 180 Cal. Rptr. at 288-90, and cases cited therein.

⁶¹⁹ *Ramos I*, 30 Cal. 3d at 590-91, 639 P.2d at 929-30, 180 Cal. Rptr. at 287-88.

⁶²⁰ See, e.g., *People v. Davenport*, 41 Cal. 3d 247, 279, 287, 710 P.2d 861, 880-81, 886-87, 221 Cal. Rptr. 794, 814, 819-20 (1985).

At least some prosecutors shared this view.⁶²¹ Consequently, few cases on appeal appeared tainted with *Ramos* error.⁶²² Indeed, the Lucas court confronted *Ramos* instructional error in only one case this year. That one case, of course, was *Anderson*.

b. The Lucas Court's Use of "Harmless Error" and the "Cure Technique"

By overruling *Carlos* and its progeny, the Lucas court saved itself from the embarrassing task of reversing a large number of cases in the court's inventory of automatic appeals, for the felony-murder special circumstance is the most prevalent death-qualifying special circumstance found in the cases.⁶²³ By overruling *Carlos*, the Lucas court also cast aside one of the symbols of the Bird court's reversals of death judgments.⁶²⁴ Yet by adhering to *Ramos* in the same opinion, the court generally rejected revolution in favor of a more traditional, conservative evolution.

The result of this conservative approach was that a number of instructional errors recognized by the Bird court's doctrine remained in the cases.⁶²⁵ Yet the Lucas court did not reverse a single automatic appeal this year for any of these remaining common errors. Rather, the court employed two techniques that allowed the Deukmejian justices to exercise fully their nearly unrestrained judgment as to whether they should reverse or affirm a case. Their judgment always sustained the verdicts of death despite any or all of those remaining common errors.

The first of these two techniques was the readily available reversible error doctrine. As we have seen above,⁶²⁶ almost all of the rules governing the reversibility of trial error are multi-factored balancing rules. Because of this, the rules confer judgment on the judges of the reviewing court to evaluate the impact of the error on the fairness of the trial

⁶²¹ *Id.*

⁶²² Furthermore, *Ramos I* was the first automatic appeal the Bird court decided under the provisions of the 1978 Initiative. Trial courts and counsel anticipated the decision, and the supreme court filed it in January 1982. Thus, the Lucas court probably expected that few of its backlogged cases in 1988 were infected with *Ramos* error. The fact that the Bird court reversed a total of only two additional penalty trials for Briggs instructional error further supported such a conclusion. See *People v. Myers*, 43 Cal. 3d 250, 729 P.2d 698, 233 Cal. Rptr. 264 (1987); *People v. Montiel*, 39 Cal. 3d 910, 705 P.2d 1298, 218 Cal. Rptr. 572 (1985).

⁶²³ See *supra* notes 573-77 & 581 and accompanying text.

⁶²⁴ See *supra* note 578 and accompanying text.

⁶²⁵ See *supra* notes 582-90 and accompanying text.

⁶²⁶ See *supra* note 603 and accompanying text.

process and the result it has produced under the unique facts and circumstances of the case under review. Precisely because we recognize that there is a wide spectrum of acceptable judgment exercisable at the evaluative stage of each of these rules, a decision by the Deukmejian justices that differs, even radically, from the judgment that the Bird court justices would have made is thought to fall well within the realm of acceptable legal behavior. The cases demonstrate that the Deukmejian justices have an extraordinary high tolerance for error, even when a person's life is at stake because except for the *Anderson* reversal, they found all of the error they evaluated to be "harmless" under the reversibility rules. If, as discussed above, the Bird court would have reversed six or seven of the twelve death judgments affirmed by the Lucas court this year,⁶²⁷ it is possible to attribute the entire difference in the reversal rate of the two courts to nothing more than a difference in the way the justices employed the law of reversible error in automatic appeals.

This is not to say that the judgment of the Deukmejian justices in evaluating these errors is not also subject to analysis and criticism, for surely it is. But as long as they adhere to the law of the reversibility rules and have fairly marshalled the facts of the case, the criticism must be leveled both against their judgment and the process by which they have applied the appropriate standard to the unique facts of a case. The first type of criticism, the criticism of their judgment, frequently appears to be nothing more than a disagreement with the judgment reached, little more than a complaint that the critic would prefer the judgment of another, such as one of the Bird court justices. The second type of criticism, which considers the way the justices apply the reversibility law, usually does not rise above the mundane, unique facts of the individual cases. Not high principle, but simple, particular disagreement is the typical result of the critic's labor. Furthermore, because the court's conclusion that an error did or did not adversely affect proceedings below is bound to the unique facts of the particular case, a decision under these rules has nearly no precedential value beyond identifying the appropriate standard for evaluating the error's impact. Consequently, the court's decisions finding harmless errors in this year's cases will not constrain the court as it works its way through the backlog of cases and then on into the future.

Apparently preferring neither to be tethered by precedent nor subject to criticism that they have relied entirely on findings that all error is

⁶²⁷ See *supra* notes 550-70 and accompanying text.

“harmless,” the Lucas court also has perfected a second technique for affirming death judgments even when the sentencing jury was not properly instructed by the trial court. This technique was an adaptation of the Bird court’s “Cure Technique,” which was itself an adaptation of federal practice.

The United States Supreme Court determines the existence of instructional error in a three-stepped analysis. First, the Court examines the challenged instruction in isolation from the remainder of the charge. At this initial stage of the analysis, the Court carefully analyzes the words actually spoken to the jury to determine if a “reasonable juror” “could have,” “might have,” or “may have” understood the instruction in an erroneous way.⁶²⁸ If the Court concludes that there is a reasonable possibility that the hypothetical juror could have misunderstood the instruction, then the instruction is invalid.⁶²⁹ The analysis then moves to the second stage. At this second stage, the Court considers the invalid instruction in the context of the entire jury charge to determine whether other instructions may have cured the error.⁶³⁰ “Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge [in an erroneous way].”⁶³¹ If the language of other instructions does not cure the defect, the analysis moves to its third and final stage. At this stage, the inquiry focuses on the appropriate reversibility rule to determine whether the judgment should be reversed for instructional error.⁶³²

Though seldom articulated in precisely the same terminology, for well over a century California law has used essentially the same analysis to determine the existence of instructional error in criminal cases.⁶³³ After the retention election, however, during the declining days of the Bird court’s tenure, Justice Grodin authored two plurality opinions that altered this analysis. In *People v. Allen*, Justice Grodin’s “lead” opinion for the court was joined only by Justice Mosk.⁶³⁴ The trial

⁶²⁸ See, e.g., *California v. Brown*, 479 U.S. 538, 541-43 (1987); *Francis v. Franklin*, 471 U.S. 307, 315 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 514-19 (1979).

⁶²⁹ See, e.g., *Brown*, 479 U.S. at 541.

⁶³⁰ *Id.*

⁶³¹ *Franklin*, 471 U.S. at 315.

⁶³² See cases cited *supra* note 628.

⁶³³ See, e.g., *People v. Roder*, 33 Cal. 3d 491, 502-04, 658 P.2d 1302, 1309-11, 189 Cal. Rptr. 501, 508-10 (1983); *People v. Bandhauer*, 1 Cal. 3d 609, 618-19, 463 P.2d 408, 415-16, 83 Cal. Rptr. 184, 191-92 (1970); *People v. Vaughn*, 71 Cal. 2d 406, 422, 455 P.2d 122, 131, 78 Cal. Rptr. 186, 195 (1969); *People v. Maxwell*, 24 Cal. 14, 16-17 (1864).

⁶³⁴ *People v. Allen*, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986). The

court's charge included the unadorned factor (k) instruction⁶³⁵ and the 1978 Initiative's mandatory instruction.⁶³⁶ Under the traditional analysis, which looks only to the wording of the instructions, error would have been found in both instructions.⁶³⁷ But Justice Grodin found no error because the prosecutor's arguments to the jury had "cured" defects in both instructions.⁶³⁸

Although other cases had used a prosecutor's arguments at the third stage of the traditional analysis to determine whether the instructional error required a reversal of the death judgment,⁶³⁹ *Allen* appears to be the first case in which a justice of the California Supreme Court has held that a prosecutor's arguments can be used to cure defects in the trial court's instructions to the jury. With Justice Panelli's cryptic concurrence in the judgment, which was joined by then Justice Lucas, the judgment of death was affirmed.⁶⁴⁰

Justice Grodin used precisely the same analysis in his "lead" opinion for the court in *Myers*, which was filed on January 2, 1987 (three days after the *Allen* opinion).⁶⁴¹ Only the conclusion was different. Two of the defendant's arguments were found to have merit. First, the trial court gave the Briggs instruction mandated by the 1978 Initiative. Since *Ramos* embargoed the use of this instruction and employed a virtual per se reversal rule, a new penalty trial was ordered.⁶⁴² Second, the

Bird court filed the opinion in *Allen* on December 31, 1986. Opinions written for the court which are signed by less than four justices, in this case only by Justices Grodin and Mosk, are frequently referred to as the "lead" opinions.

⁶³⁵ See *supra* note 587 and accompanying text.

⁶³⁶ See *supra* notes 179 & 589 and accompanying text.

⁶³⁷ See *supra* notes 628-32 and accompanying text.

⁶³⁸ *Allen*, 42 Cal. 3d at 1276-80, 729 P.2d at 148-52, 232 Cal. Rptr. at 882-86.

⁶³⁹ See, e.g., *People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986); *People v. Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986); *People v. Davenport*, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985); *People v. Brown*, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), *rev'd. sub nom. California v. Brown*, 479 U.S. 538 (1987). This technique for curing error in jury instructions was based on dictum found in a footnote in *Brown. Id.* at 544 n.17, 709 P.2d at 459 n.17, 220 Cal. Rptr. at 656 n.17. Though this dictum apparently addressed the question of the error's reversibility, the passage in the *Brown* footnote is highly ambiguous.

⁶⁴⁰ Justice Panelli's opinion in *Allen* consisted of the following two sentences: "Although I do not necessarily agree with the majority's analysis concerning the standard of review for penalty phase error, I fully agree that in the instant case the asserted errors, by any standard, were harmless. For this reason I concur in the majority's judgment." See 42 Cal. 3d at 1288, 729 P.2d at 157, 232 Cal. Rptr. at 891.

⁶⁴¹ *Myers*, 43 Cal. 3d 250, 729 P.2d 698, 233 Cal. Rptr. 264 (1987).

⁶⁴² *Id.* at 270-73, 729 P.2d at 710-13, 233 Cal. Rptr. at 275-78.

trial court instructed the jury in the language of the mandatory sentencing instruction routinely given in prosecutions under the Initiative. After assessing the prosecutor's penalty phase arguments, Justice Grodin concluded that the jury may have been misled as to the nature of its ultimate duty at the penalty phase. This error alone, according to Justice Grodin, was sufficient to require a new penalty trial.⁶⁴³ Again, as in *Allen*, only Justice Mosk joined the Grodin opinion in *Myers*.⁶⁴⁴

Although the use of a prosecutor's arguments to cure errors in jury instructions raises important and controversial questions, that discussion must be deferred to a later day.⁶⁴⁵ For now, the importance of this Cure Technique is the fact that Justice Grodin's method looks beyond the language of the instructions to determine whether instructional errors have been cured. This is an important departure from the traditional analysis. Once the court finds that the language of a jury instruction, viewed in isolation, is faulty under the traditional analysis employed both by the United States Supreme Court and the courts of California, that error may be cured only by placing the erroneous instruction in the context of the entire charge to the jury.⁶⁴⁶ This occurs at the second stage of the traditional analysis. If other instructions do not remedy the defects, the challenged instruction is not cured, and the analysis moves on to the question of the reversibility of the error.⁶⁴⁷ By looking beyond the language of the instructions themselves to cure instructional error (in these two cases, by looking to the arguments of the prosecutor), Justice Grodin has borrowed the methodology of the multi-factored balancing test without ever discussing the propriety of doing so. This is obvious from Justice Grodin's quotation of the following *dictum* from his *Brown* opinion:

Although we called for clarifying instructions in future cases [in *Brown*], we stated we would examine each prior case "on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 [Initiative]."⁶⁴⁸

⁶⁴³ *Id.* at 273-76, 729 P.2d at 712-15, 233 Cal. Rptr. at 277-80.

⁶⁴⁴ *Id.* at 276, 729 P.2d at 715, 233 Cal. Rptr. at 280. Justice Lucas, joined by Justice Panelli, concurred in the judgment reversing the death judgment, "but only under compulsion of *Ramos*." *Id.* at 277, 729 P.2d at 715, 233 Cal. Rptr. at 280. Justice Lucas preferred to withhold discussion of the *Brown* issue (the mandatory sentencing instruction) pending the United States Supreme Court's decision in that case. *Id.*

⁶⁴⁵ This author discusses these issues at length in an article forthcoming.

⁶⁴⁶ See *supra* notes 628-32 and accompanying text.

⁶⁴⁷ *Id.*

⁶⁴⁸ *People v. Allen*, 42 Cal. 3d 1222, 1277, 729 P.2d 115, 149, 232 Cal. Rptr. 849,

The remainder of this portion of the opinion makes it clear that the “context” at issue here is not limited to the context of the entire jury charge. Moreover, though Justice Grodin relied primarily upon the prosecutor’s arguments to cure the error in the instructions, there is nothing in his opinion suggesting that he means to limit his enlarged context to the arguments of the prosecutor. Indeed, he suggests otherwise by referring to the arguments of defense counsel⁶⁴⁹ and the voir dire examination of the venire.⁶⁵⁰

Likewise, without ever discussing the merits of the new technique or the reasons for abandoning the traditional technique, the Lucas court quickly seized upon the Grodin analysis and made clear that the now appropriate “context” included the arguments of defense counsel⁶⁵¹ and the entire record in the case.⁶⁵² The Lucas court then used the analysis to sustain the facially defective factor (j)⁶⁵³ and factor (k)⁶⁵⁴ instructions, the Initiative’s mandatory sentencing instruction,⁶⁵⁵ and the use of an

883 (1986) (quoting *People v. Brown*, 40 Cal. 3d 512, 544 n.17, 709 P.2d 440, 459 n.17, 220 Cal. Rptr. 637, 656 n.17 (1985)).

⁶⁴⁹ See *id.* at 1280 n.39, 729 P.2d at 151 n.39, 232 Cal. Rptr. at 885 n.39. Justice Grodin apparently used the arguments of defense counsel along with those of the prosecutor in his analysis of the faulty jury instructions in *Myers* as well. See *People v. Myers*, 43 Cal. 3d 250, 275, 729 P.2d 698, 714, 233 Cal. Rptr. 264, 279 (1987).

⁶⁵⁰ See *Allen*, 42 Cal. 3d at 1279, 729 P.2d at 151, 232 Cal. Rptr. at 885.

⁶⁵¹ See, e.g., *People v. Ruiz*, 44 Cal. 3d 589, 623-24, 749 P.2d 854, 872-73, 244 Cal. Rptr. 200, 218-19 (1988); *People v. Howard*, 44 Cal. 3d 375, 435-37, 749 P.2d 279, 315-17, 243 Cal. Rptr. 842, 878-80 (1988); *People v. Ghent*, 43 Cal. 3d 739, 777-78, 739 P.2d 1250, 1275-76, 239 Cal. Rptr. 82, 107-08 (1987).

⁶⁵² *Ruiz*, 44 Cal. 3d at 623, 749 P.2d at 842, 244 Cal. Rptr. at 218; see also *People v. Gates*, 43 Cal. 3d 1168, 1200, 743 P.2d 301, 321-22, 240 Cal. Rptr. 666, 687 (1987) (relying principally on evidence in case).

⁶⁵³ See *Ruiz*, 44 Cal. 3d at 623-24, 749 P.2d at 872-73, 244 Cal. Rptr. at 218-19; *People v. Hovey*, 44 Cal. 3d 543, 581-82, 749 P.2d 776, 798-99, 244 Cal. Rptr. 121, 144 (1988); *People v. Kimble*, 44 Cal. 3d 480, 509-10, 749 P.2d 803, 821-22, 244 Cal. Rptr. 144, 167-68 (1988); *Ghent*, 43 Cal. 3d at 777-78, 739 P.2d at 1275-76, 239 Cal. Rptr. at 107-08. Factor (j) appears in the 1977 legislation.

⁶⁵⁴ See *People v. Melton*, 44 Cal. 3d 713, 755-60, 750 P.2d 741, 765-69, 244 Cal. Rptr. 867, 892-85 (1988); *People v. Hendricks II*, 44 Cal. 3d 635, 652, 749 P.2d 836, 845, 244 Cal. Rptr. 181, 191 (1988); *People v. Howard*, 44 Cal. 3d 375, 433-34, 749 P.2d 279, 314-15, 243 Cal. Rptr. 842, 878 (1988); *Gates*, 43 Cal. 3d at 1199-1201, 743 P.2d at 321-22, 240 Cal. Rptr. at 686-87. *But see* *People v. Miranda*, 44 Cal. 3d 57, 102-03, 744 P.2d 1127, 1154-56, 241 Cal. Rptr. 594, 622-23 (1987). Though the *Miranda* opinion is very ambiguous on this point, Justice Panelli’s opinion employs a more traditional analysis — that the factor (k) error did not prejudice the defendant because of the absence of mitigating evidence in the record. *Id.* Factor (k) appears in the 1978 Initiative. It is identical to the factor (j) provision in the 1977 legislation.

⁶⁵⁵ See *Miranda*, 44 Cal. 3d at 103-104, 744 P.2d at 1156, 241 Cal. Rptr. at 623-

antisympathy instruction at the penalty phase of the trial.⁶⁵⁶ These are the basic instructions explaining to the jury the sentencing process and how mitigating evidence can apply in that process to arrive at the appropriate punishment. In each case, despite the fact that each of these standard instructions has been found facially defective, the Deukmejian justices held that each of these instructional errors was “cured” by the prior arguments of counsel uttered in the context of the entire record.⁶⁵⁷ The judgment of death was affirmed in each case.⁶⁵⁸

Under the California Supreme Court’s traditional method for analyzing jury instructions (used for over a century before Justice Grodin wrote the “lead” opinions in *Allen* and *Myers*),⁶⁵⁹ the court would have held these critical instructions erroneous, for they are facially defective,⁶⁶⁰ and when they are considered in the context of the instructions given in the entire charge, their flaws are not cured.⁶⁶¹ In the traditional reversibility analysis for instructional error (the third stage of the analysis), the arguments of counsel only demonstrate the error’s harm to the trial process — as evidence of how the instruction was actually misconstrued in the case — and never as a method of “curing” or “mitigating” the impact of the error on that process.⁶⁶² The only question

24; *Howard*, 44 Cal. 3d at 434-36, 749 P.2d at 315-17, 243 Cal. Rptr. at 878-80; *Hendricks II*, 44 Cal. 3d at 652-55, 749 P.2d at 845-47, 244 Cal. Rptr. at 191-93; *Melton*, 44 Cal. 3d at 761-62, 750 P.2d at 769-70, 244 Cal. Rptr. at 895-97; *People v. Wade II*, 44 Cal. 3d 975, 999, 750 P.2d 794, 808, 244 Cal. Rptr. 905, 919 (1988).

⁶⁵⁶ See *Wade II*, 44 Cal. 3d at 995-98, 750 P.2d at 805-07, 244 Cal. Rptr. at 916-18; see also *Howard*, 44 Cal. 3d at 431-33, 749 P.2d at 313-14, 243 Cal. Rptr. at 877-78 (trial court’s voir dire questions to six prospective jurors).

⁶⁵⁷ See *supra* notes 634-43 and accompanying text.

⁶⁵⁸ *Id.*

⁶⁵⁹ See *supra* notes 628-33 and accompanying text.

⁶⁶⁰ See, e.g., *People v. Davenport*, 41 Cal. 3d 247, 282-84, 710 P.2d 861, 883-85, 221 Cal. Rptr. 794, 816-18 (1985). Though *Davenport* was a plurality opinion signed by three justices, Justice Broussard’s separate opinion specifically concurred with “the discussion of the dispositive penalty phase issues set out in the plurality opinion . . . that the penalty judgment was flawed by instructional error . . . [and] that these errors, in combination, were prejudicial and require a new penalty trial.” *Id.* at 295, 710 P.2d at 892-93, 221 Cal. Rptr. at 825-26.

⁶⁶¹ See *id.* at 284-86, 710 P.2d at 885-86, 221 Cal. Rptr. at 818-19.

⁶⁶² See *id.* at 287, 710 P.2d at 886-87, 221 Cal. Rptr. at 819-20; *People v. Vann*, 12 Cal. 3d 220, 227 n.6, 524 P.2d 824, 829 n.6, 115 Cal. Rptr. 352, 357 n.6 (1974) (opinion by Wright, C.J.); *Parker v. Atchison, T. & S.F. Ry.*, 263 Cal. App. 2d 675, 680, 70 Cal. Rptr. 8, 11-12 (1968) (opinion by Justice Hufstедler). The point is well made by comparing Justice Reynoso’s plurality opinion in *Davenport*, with his dissenting opinion in *People v. Wade I*, 43 Cal. 3d 366, 396, 729 P.2d 239, 258, 233 Cal. Rptr. 48, 67 (1987). Justice Reynoso’s *Wade* dissent was later vacated as a result of the

under the traditional analysis would have been whether the error compelled a reversal of the death judgment. Given the importance of each of these instructions and the fact that counsel's arguments can only aid the finding of prejudice, these instructional errors probably would have compelled a reversal in each case.⁶⁶³

By adopting Justice Grodin's Cure Technique, the Deukmejian justices were able to affirm death judgments that probably would have been reversed under the traditional analysis.⁶⁶⁴ Moreover, by following the "lead" opinions in *Allen* and *Myers*, the Lucas court appeared to accept the Bird court doctrine and to apply it in accordance with the traditional conception of how a state supreme court should behave, despite the fact that only two justices signed each of those opinions. Without a majority of justices signing the opinions, the opinions could not command respect under the doctrine of *stare decisis*.⁶⁶⁵

Furthermore, as perfected by the Deukmejian majority and as fleshed out by the decisions this year, this method of analysis presents the court with all of the advantages of a multi-factored balancing test. And as we have seen, because multi-factored balancing tests are depen-

rehearing which was granted in *Wade* on March 26, 1987.

⁶⁶³ See *supra* notes 628-33 and accompanying text.

⁶⁶⁴ See *id.* This does not mean, however, that the Bird court would have necessarily reversed all of these cases. If one focuses on the Bird court after the retention election, after Justice Grodin wrote the plurality opinion in *Allen* and *Myers*, then it is possible that some of these automatic appeals would have been affirmed under Justice Grodin's Cure Technique. This is because Justices Grodin and Mosk were willing to use this analysis in those two cases. Since the cure analysis is also employed by Chief Justice Lucas and Justice Panelli (along with all the other Deukmejian appointees), a majority of the later Bird court might have sustained several of these death judgments. Indeed, that is one reason for the prediction that the Bird court would have affirmed five, or perhaps six, of the death judgments reviewed this year. See *supra* notes 550-68 and accompanying text. But, as evidenced by the reversal in *Myers*, Justices Grodin and Mosk, were willing to reverse cases under this analysis, something that has not yet happened with the Lucas court. In other words, in the hands of Justices Grodin and Mosk the cure analysis was "neutrally" applied. The facts and arguments were analyzed, and the instructions were "cured" or not depending upon what was said. There is some evidence this year that the Deukmejian justices are not "neutrally" or "impartially" employing the cure analysis. Instead, there are some indications that it is being used to achieve a result — the affirmance of every death judgment in the court's backlog of cases that can be possibly affirmed by rationalizing that conclusion under existing doctrine. This was essentially the charge made by Justice Mosk in his dissenting opinion in *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847-48, 244 Cal. Rptr. 181, 193-94 (1988) (Mosk, J., joined by Broussard, J., dissenting). This topic is discussed *infra* text accompanying notes 764-830.

⁶⁶⁵ See *supra* notes 634 & 641 and accompanying text.

dent upon a judge's evaluation of many factors in the record, the decision does not truly restrict the court's freedom to decide future cases on their unique facts. Additionally, it is difficult for criticism of this technique to rise above an apparent disagreement with judgment or a rather dull analysis of the court's application of the law to the facts of the case.⁶⁶⁶ Thus, the new technique allows the court to "cure" the errors in the standard penalty phase jury instructions given in the early cases, while it also suggests that the difference between the Deukmejian justices and the Bird court justices is simply a matter of permissible difference in judgment.

Given all the advantages of the Cure Technique, it is not surprising that the Deukmejian justices did not confine their use of that method to the errors in the standard penalty phase jury instructions identified by the Bird court in the early cases. The 1978 Initiative defined a specific intent-to-torture (an intent-to-inflict-cruel-pain) as an element of the torture-murder special circumstance.⁶⁶⁷ In *Wade*, the trial court failed to instruct the jury on this requirement. After conceding that the other instructions given in the case may not have cured this error, Chief Justice Lucas (the author of *Wade II*) concluded that the arguments of the prosecutor had cured the error.⁶⁶⁸ The court then affirmed the death judgment, despite the fact that it was supported only by the torture-

⁶⁶⁶ See *supra* accompanying notes 627-28.

⁶⁶⁷ See *People v. Wade II*, 44 Cal. 3d 975, 994, 750 P.2d 794, 804-05, 244 Cal. Rptr. 905, 915-16 (1988); *People v. Leach*, 41 Cal. 3d 92, 109-10, 710 P.2d 893, 903-04, 221 Cal. Rptr. 826, 836-37 (1985); *People v. Davenport*, 41 Cal. 3d 247, 260-71, 710 P.2d 861, 867-75, 221 Cal. Rptr. 794, 800-09 (1985).

⁶⁶⁸ *Wade II*, 44 Cal. 3d at 994-95, 750 P.2d at 805, 244 Cal. Rptr. at 916. The prosecution pursued two theories of first degree murder: first, that the murder was willful, deliberate, and premeditated; and second, that it was first degree murder under the first degree torture-murder rule. *Id.* at 990, 750 P.2d at 802, 244 Cal. Rptr. at 913. The trial court had instructed the jury that a specific intent to cause cruel pain and suffering is an element of the first degree torture-murder rule. But quite clearly, the jury could have found that *Wade* was guilty of first degree murder under the willful, deliberate and premeditated theory. This theory does not require proof of an intent-to-torture. Thus, there was not necessarily a jury finding on the intent-to-torture. Furthermore, since the torture-murder special circumstance instructions did not require the jury to make a finding on the intent-to-torture requirement, the special circumstance could have been found true without the required finding. Since the instructions specifically limited the intent-to-torture requirement to the first degree murder theory, under the traditional analysis a court undoubtedly would conclude that the error in the special circumstance instruction was not cured by the other instructions in the case and that the error compelled a reversal of the special circumstance finding. See *supra* notes 628-32 and accompanying text. Yet the Lucas court found that the arguments of the prosecutor cured this error.

murder special circumstance.⁶⁶⁹ There is not much doubt that *Wade* would have been reversed under the traditional analysis historically employed by the courts of California. For example, in *People v. Leach*,⁶⁷⁰ the Bird court employed the traditional analysis and set aside a torture-murder special circumstance finding on precisely the same ground — the trial court failed to instruct the jury on the intent-to-torture requirement.⁶⁷¹ Although Chief Justice Lucas' opinion in *Wade* demonstrates that the defendant relied on *Leach* for a reversal of the torture-murder special circumstance finding, Chief Justice Lucas makes no effort to distinguish *Leach*.⁶⁷²

c. The Lucas Court's Revisions of "Harris Error" and "Robertson Error"

Though the Lucas court's use of the Cure Technique to remedy the instructional error in *Wade* implies that the court will use this analysis for all instructional error in death penalty cases in the future,⁶⁷³ the court also continues to use its harmless error analysis alone to dispose of some instructional issues. Two of the three remaining standardized penalty phase instructional errors found in the Bird court cases, *Harris* error⁶⁷⁴ and *Robertson* error,⁶⁷⁵ were held to be harmless each time the court encountered them this first year.⁶⁷⁶ The last of these standardized errors, *Boyd* error,⁶⁷⁷ was involved only tangentially in the cases this

⁶⁶⁹ The only other special circumstance found true in the case was the heinous-atrocious-or-cruel special circumstance. This finding was set aside under *Wade II*, 44 Cal. 3d at 993, 750 P.2d at 804, 244 Cal. Rptr. at 915.

⁶⁷⁰ 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985).

⁶⁷¹ Compare *id.* at 109-10, 710 P.2d at 903-04, 221 Cal. Rptr. at 836-37 with *Wade II*, 44 Cal. 3d at 994, 750 P.2d at 804-05, 244 Cal. Rptr. at 915-16.

⁶⁷² *Wade II*, 44 Cal. 3d at 994, 750 P.2d at 805, 244 Cal. Rptr. at 916.

⁶⁷³ See *People v. Miranda*, 44 Cal. 3d 57, 108, 744 P.2d 1127, 1159, 241 Cal. Rptr. 594, 626 (1987) (involving variant of cure analysis to reject argument that witness credibility instructions given at guilt phase should have been read to jury at penalty phase).

⁶⁷⁴ See *supra* note 582 and accompanying text.

⁶⁷⁵ See *supra* note 585 and accompanying text.

⁶⁷⁶ See, e.g., *People v. Williams*, 44 Cal. 3d 883, 949-54, 751 P.2d 395, 439-43, 245 Cal. Rptr. 336, 381-85 (1988) (*Harris* error — three murders erroneously considered as six multiple-murder special circumstances rather than one); *People v. Gates*, 43 Cal. 3d 1168, 1202, 743 P.2d 301, 322-23, 240 Cal. Rptr. 666, 688 (1987) (*Robertson* error harmless); *Miranda*, 44 Cal. 3d at 97-98, 744 P.2d at 1151-52, 241 Cal. Rptr. at 619 (*Robertson* error harmless).

⁶⁷⁷ See *supra* note 586 and accompanying text.

year.⁶⁷⁸ The Lucas court, however, did not always dispose of *Harris* and *Robertson* error with a finding of harmlessness. Indeed the court refused to follow one branch of the *Harris* anti-inflation rule this year and gave the *Robertson* “reasonable doubt” rule a new restrictive interpretation.

There were originally two branches to the *Harris* rule. First, it prevented using the same conduct more than once for the same purpose. This branch of the rule is still in effect. A violation of this branch typically occurs when the defendant has committed two or more murders. Since the multiple-murder special circumstance requires that the defendant commit more than one murder, the second murder qualifies the defendant for the multiple-murder special circumstance. But in this situation, there is only one multiple-murder special circumstance, not two.⁶⁷⁹ The same analysis is equally applicable to the situation in which the defendant has committed more than two murders. There is still only one multiple-murder special circumstance regardless of the number of murders committed.⁶⁸⁰ If more than one multiple-murder special circumstance is found to be true, the improper inflation occurs when the sentencing jury considers these multiple findings as more than one aggravating factor.⁶⁸¹ The Lucas court followed this first branch of the rule this year.⁶⁸²

⁶⁷⁸ See *People v. Howard*, 44 Cal. 3d 375, 437-42, 749 P.2d 279, 317-20, 243 Cal. Rptr. 842, 881-83 (1988) (holding that evidence was properly introduced under factor (b) rather than under improper interpretation of factor (k); it was not *Boyd* error to refuse instruction limiting sentencing jury’s consideration to listed factors because of lack of objection to evidence presented; evidence was not clearly aggravating; prosecutor correctly explained aggravating factors that jury could consider and did not rely on challenged evidence in closing argument, assuming that *Boyd* retroactively applies); *Williams*, 44 Cal. 3d at 957-58, 751 P.2d at 445, 245 Cal. Rptr. at 386 (rejecting defendant’s argument that because jury instructions did not mandate consideration of statutory factors, jury not only disregarded factors but considered nonstatutory factors); *People v. Hovey*, 44 Cal. 3d 543, 583, 749 P.2d 776, 799-800, 244 Cal. Rptr. 121, 145 (1988) (finding that trial court did not err in refusing proposed instruction which would have precluded sentencing jury from considering as an aggravating factor any evidence not included in statutory list read to jury in this prosecution under the 1977 legislation).

⁶⁷⁹ See *People v. Harris (Lee)*, 36 Cal. 3d 36, 67, 679 P.2d 433, 452, 201 Cal. Rptr. 782, 801 (1984) (plurality opinion).

⁶⁸⁰ See *People v. Allen*, 42 Cal. 3d 1222, 1273, 729 P.2d 115, 146, 232 Cal. Rptr. 849, 880 (1986) (plurality opinion) (finding that although defendant was convicted of three murders, there was but a single multiple-murder special circumstance, not six).

⁶⁸¹ See *People v. Rodriguez*, 42 Cal. 3d 730, 787-88, 726 P.2d 113, 150-51, 230 Cal. Rptr. 667, 704-05 (1986).

⁶⁸² Indeed in *Williams*, the Lucas court held that it was error for the court to fail to

The second branch of the *Harris* rule embargoed the segmenting of a single indivisible course of conduct into various separate special circumstances and then using the separate special circumstances as multiple aggravating factors at the penalty phase of the trial.⁶⁸³ It was known as the overlapping felony-murder rule. It typically occurred when the defendant broke into the victim's home for the purpose of robbery, and a homicide then occurred during the course of the other felonies. Because the defendant had committed two felonies enumerated in the felony-murder special circumstance statute (robbery and burglary), the defendant could be prosecuted for two separate felony-murder special circumstances.⁶⁸⁴ But since the defendant committed these two felonies as a result of a single indivisible course of conduct, the *Harris* plurality held that the multiple felony-murder special circumstance findings could be considered as only one aggravating factor at the penalty phase.⁶⁸⁵ The Bird court never again encountered this branch of the *Harris* anti-inflation rule.

The *Harris* overlapping felony-murder rule reappeared for the first time before the Lucas court in *Melton*. James Melton, like Lee Harris, was convicted of both burglary and robbery. Two felony-murder special circumstances were found true, and the instructions permitted the sentencing jury to consider each of these special circumstances as a separate aggravating factor.⁶⁸⁶ The Lucas court refused to follow this branch of the *Harris* plurality opinion, preferring instead to permit the jury to consider both special circumstances as separate aggravating factors on the ground that they involved different conduct by the defendant.⁶⁸⁷ Since *Harris* was a plurality opinion, the Lucas court was able to rid itself of *Harris*' overlapping felony rule without endangering its

instruct the jury at the penalty phase to consider only one multiple-murder special circumstances. However, the court found the error to be harmless. 44 Cal. 3d 883, 950-51, 751 P.2d 395, 420-21, 245 Cal. Rptr. 336, 362 (1988). The appropriate remedy is for the charging papers to allege only one multiple-murder special circumstance separate from the individual murder counts. *Harris* (Lee), 36 Cal. 3d at 67, 679 P.2d at 452, 201 Cal. Rptr. at 801 (plurality opinion). When this remedy is not followed, *Williams* indicates that the jury should be instructed to consider only one multiple-murder special circumstance at the penalty phase. 44 Cal. 3d at 950-51, 751 P.2d at 420-21, 245 Cal. Rptr. at 362.

⁶⁸³ *Harris* (Lee), 36 Cal. 3d at 62-67, 679 P.2d at 448-52, 201 Cal. Rptr. at 797-801 (plurality opinion).

⁶⁸⁴ *Id.* at 66-67, 679 P.2d at 451-52, 201 Cal. Rptr. at 800-01 (plurality opinion).

⁶⁸⁵ *Id.*

⁶⁸⁶ *People v. Melton*, 44 Cal. 3d 713, 765, 750 P.2d 741, 772, 244 Cal. Rptr. 867, 898-99 (1988).

⁶⁸⁷ *Id.* at 765-69, 750 P.2d at 772-75, 244 Cal. Rptr. at 898-901.

stance as a traditional court applying received doctrine.

The "clarification" of *Robertson* this year was far less controversial than the elimination of the *Harris* overlapping felony-murder special circumstance rule. As noted above, the Lucas court adhered to the *Robertson* rule as the Bird court actually applied it: when the prosecution introduces evidence of uncharged crimes in aggravation of the penalty under section 190.3(b), the jury must receive the reasonable doubt instruction.⁶⁸⁸ But Justice Broussard's separate opinion for the Bird court in *Robertson* would limit the reasonable doubt instructions to that situation alone.⁶⁸⁹ After recounting the situations in which evidence of other crimes are admissible in the guilt, sanity, and penalty phases of a trial, Justice Broussard wrote, "When the evidence is offered for any of these purposes — indeed, for any purpose other than to show an uncharged crime as an aggravating factor — there is no reasonable doubt standard to be met before the jury can consider that evidence."⁶⁹⁰

One of the exceptions envisioned by Justice Broussard's *Robertson* opinion was presented to the Lucas court in *Williams*. The defendant's own lawyer introduced the evidence of uncharged criminal activity during direct examination of his client (the defendant). The strategy was to bolster a tendered diminished capacity defense.⁶⁹¹ The trial court did not give the *Robertson* reasonable doubt instruction, and this omission was urged as error on appeal. Relying on Justice Broussard's opinion in *Robertson*, the supreme court held that the reasonable doubt rule did not apply.⁶⁹² Without overruling *Robertson*, the Lucas court effectively restricted its application to future cases.

d. *The Lucas Court's Handling of Easy Issues*

Over the years, the Bird court had considered and rejected a number of special circumstance and penalty phase arguments. Many of these arguments reappeared in the automatic appeals decided this first year.⁶⁹³ Not surprisingly, the Lucas court carefully followed the Bird

⁶⁸⁸ See *supra* note 585 and accompanying text.

⁶⁸⁹ See *People v. Robertson*, 33 Cal. 3d 21, 60-63, 655 P.2d 279, 302-05, 188 Cal. Rptr. 77, 101-03 (1982). Since *Robertson* was decided by a plurality opinion, Justice Broussard's opinion was critical to the binding force behind the plurality's holding.

⁶⁹⁰ *Id.* at 61, 655 P.2d at 303-04, 188 Cal. Rptr. at 102 (Broussard, J., concurring).

⁶⁹¹ *People v. Williams*, 44 Cal. 3d 883, 912-13, 751 P.2d 395, 413-14, 245 Cal. Rptr. 336, 355 (1988).

⁶⁹² *Id.* at 958-59, 751 P.2d at 445-46, 245 Cal. Rptr. at 387-88.

⁶⁹³ Since counsel for the appellants do not appear to be asking the Lucas court to reconsider the Bird court holdings on these issues, their presence in these cases is probably due to the fact that all but two of the automatic appeals decided this year had been

court opinions here. Using them as the controlling precedent, the Lucas court rejected these arguments as well.⁶⁹⁴

The court also confronted the perennial arguments which focus primarily (though not exclusively) on the application of settled rules of law to the unique facts presented in the special circumstance and penalty phase of the cases. These arguments, such as the frequently as-

previously fully briefed and argued before the Bird court. They were left undecided when the Bird court's tenure lapsed. They were then reargued and decided by the Lucas court. *See supra* notes 580-81 and accompanying text. Since the briefing took place some time before these cases were reargued, the issues were probably undecided at the time they were argued in the briefing. When the arguments were resolved by intervening authority, the issues apparently were not withdrawn from the case.

⁶⁹⁴ Little would be gained by listing all of these arguments and the cases in which they are rejected. A few examples should suffice to illustrate the point. It has been repeatedly argued that both the 1977 legislation and the 1978 Initiative are unconstitutional under the federal constitution. This argument was again encountered this year and rejected on the basis of Bird court authority. *See People v. Wade II*, 44 Cal. 3d 975, 999, 750 P.2d 794, 809, 244 Cal. Rptr. 905, 919 (1988); *People v. Ruiz*, 44 Cal. 3d 589, 625, 749 P.2d 854, 873-74, 244 Cal. Rptr. 200, 219-20 (1988); *People v. Hovey*, 44 Cal. 3d 543, 586, 749 P.2d 776, 801, 244 Cal. Rptr. 121, 147 (1988); *People v. Kimble*, 44 Cal. 3d 480, 516, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 172 (1988); *People v. Howard*, 44 Cal. 3d 375, 443-44, 749 P.2d 279, 321-22, 243 Cal. Rptr. 842, 885 (1988).

Defendants have argued that the trial court has a *sua sponte* duty to instruct the jury on the elements of an uncharged offense "proved" at the penalty phase of the trial as an aggravating factor. The Bird court rejected this argument, holding that while the trial court had no such *sua sponte* duty, the defendant was entitled to request these instructions. *See People v. Davenport*, 41 Cal. 3d 247, 281-82, 710 P.2d 861, 882-83, 221 Cal. Rptr. 794, 815-16 (1985); *People v. Phillips*, 41 Cal. 3d 29, 72 n.25, 711 P.2d 423, 451 n.25, 222 Cal. Rptr. 127, 155 n.25 (1985). The same argument was encountered this year and rejected on the basis of Bird court precedent. *See People v. Miranda*, 44 Cal. 3d 57, 99, 744 P.2d 1127, 1153, 241 Cal. Rptr. 594, 620 (1987); *People v. Gates*, 43 Cal. 3d 1168, 1020 n.12, 743 P.2d 301, 323 n.12, 240 Cal. Rptr. 666, 688 n.12 (1987); *People v. Ghent*, 43 Cal. 3d 739, 773, 739 P.2d 1250, 1272, 239 Cal. Rptr. 82, 104-05 (1987); *see also People v. Melton*, 44 Cal. 3d 713, 757-58, 750 P.2d 741, 759, 244 Cal. Rptr. 867, 885-86 (1988)

The last example is taken from the law of special circumstances. The 1977 legislation requires a "special finding" on each special circumstance found to be true. In *Davenport*, the Bird court held that this requirement was satisfied by a simple statement of the ultimate determination. 41 Cal. 3d at 273-75, 710 P.2d at 876-78, 221 Cal. Rptr. at 809-11. In *Ghent*, the defendant contended that the felony-murder (rape or attempted rape) special circumstance finding was insufficient because it failed to include additional findings regarding each of the underlying elements of that special circumstance (i.e., a premeditated murder, defendant's personal presence, and an intentional killing during rape or attempted rape). 43 Cal. 3d at 762-63, 739 P.2d at 1265, 239 Cal. Rptr. at 97. The court rejected the argument on the authority of *Davenport*. *Id.*

serted claims of *Witherspoon-Witt* error,⁶⁹⁵ ineffective assistance of counsel,⁶⁹⁶ prosecutorial misconduct,⁶⁹⁷ and erroneous admission or exclusion of evidence at the penalty phase,⁶⁹⁸ were universally resolved against the defendant.⁶⁹⁹ Insofar as any of these decisions “made new law,” it was by the process of accretion, as an inevitable result of applying established legal principles to new facts. It is generally agreed today that even the most conservative, traditional court makes law in this limited sense.

e. The Lucas Court's Handling of New Issues

When new issues did come before the Lucas court this year, they were, for the most part, variations on familiar themes. With respect to the special circumstances, the court held that jury instructions need not

⁶⁹⁵ *Witherspoon-Witt* error occurs if the prospective juror's views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. See *People v. Hendricks II*, 44 Cal. 3d 635, 645, 749 P.2d 836, 840-41, 244 Cal. Rptr. 181, 186-87 (1988); *People v. Ruiz*, 44 Cal. 3d 589, 617-19, 749 P.2d 854, 869-70, 244 Cal. Rptr. 200, 215-16 (1988); *People v. Hovey*, 44 Cal. 3d 543, 574-75, 749 P.2d 776, 793-94, 244 Cal. Rptr. 121, 139 (1988); *People v. Howard*, 44 Cal. 3d 375, 415-19, 749 P.2d 279, 302-05, 243 Cal. Rptr. 842, 865-68 (1988); *People v. Miranda*, 44 Cal. 3d 57, 93-96, 744 P.2d 1127, 1149-51, 241 Cal. Rptr. 594, 616-18 (1987); *People v. Ghent*, 43 Cal. 3d 739, 767-69, 739 P.2d 1250, 1268-69, 239 Cal. Rptr. 82, 100-01 (1987).

⁶⁹⁶ See *People v. Wade II*, 44 Cal. 3d 975, 986-89, 750 P.2d 794, 800-01, 807, 244 Cal. Rptr. 905, 911-12, 918 (1988); *People v. Williams*, 44 Cal. 3d 883, 951-54, 751 P.2d 395, 441-43, 245 Cal. Rptr. 336, 382-85 (1988); *People v. Miranda*, 44 Cal. 3d 57, 108, 118-23, 744 P.2d 1127, 1159, 1166-69, 241 Cal. Rptr. 594, 626, 633-36 (1987); *People v. Gates*, 43 Cal. 3d 1168, 1212-14, 743 P.2d 301, 329-30, 240 Cal. Rptr. 666, 695 (1987); *People v. Ghent*, 43 Cal. 3d 739, 772-73, 739 P.2d 1250, 1272, 239 Cal. Rptr. 82, 104 (1987).

⁶⁹⁷ See *Williams*, 44 Cal. 3d at 962-69, 751 P.2d at 448-53, 245 Cal. Rptr. at 390-94; *Hendricks II*, 44 Cal. 3d at 649-50, 749 P.2d at 843, 244 Cal. Rptr. at 189; *Ruiz*, 44 Cal. 3d at 620, 749 P.2d at 870, 244 Cal. Rptr. at 216; *Hovey*, 44 Cal. 3d at 579-81, 749 P.2d at 796-98, 244 Cal. Rptr. at 142-44; *People v. Bell*, 44 Cal. 3d 137, 163-66, 745 P.2d 573, 579-84, 241 Cal. Rptr. 890, 896-901 (1987); *Miranda*, 44 Cal. 3d at 108-13, 744 P.2d at 1159-62, 241 Cal. Rptr. at 626-29; *Gates*, 43 Cal. 3d at 1211-12, 743 P.2d at 328-29, 240 Cal. Rptr. at 667-79; *Ghent*, 43 Cal. 3d at 761-62, 769-772, 739 P.2d at 1264-65, 1269-72, 239 Cal. Rptr. at 96-97, 101-04.

⁶⁹⁸ See *Hendricks II*, 44 Cal. 3d at 646-49, 749 P.2d at 841-43, 244 Cal. Rptr. at 187-89 (admission of aggravating circumstances evidence); *Ruiz*, 44 Cal. 3d at 621-22, 749 P.2d at 871-72, 244 Cal. Rptr. at 217-18; *Hovey*, 44 Cal. 3d at 575-79, 749 P.2d at 794-96, 244 Cal. Rptr. at 139-42; *Howard*, 44 Cal. 3d at 426-32, 749 P.2d at 309-13, 243 Cal. Rptr. at 873-76; *Gates*, 43 Cal. 3d at 1209-11, 743 P.2d at 327-28, 240 Cal. Rptr. at 693 (exclusion of mitigating evidence).

⁶⁹⁹ See *supra* notes 695-98.

define the term "financial gain" in the absence of indications that the phrase would confuse the jury.⁷⁰⁰ The court also refused to extend the *corpus delicti* rule for felony-murder based special circumstances to the financial-gain special circumstance.⁷⁰¹ Additionally, the court rejected arguments that the multiple-murder special circumstance in both the 1977 legislation and the 1978 Initiative cannot be truthfully alleged in an accusatory pleading and cannot be supported by probable cause at the preliminary hearing.⁷⁰² Although the court resolved all of these arguments against the defense, one defense argument was nearly successful. In *Williams*, the court was willing to assume that the *Green*-independent-felonious-purpose rule applies with equal force to the kidnapping special circumstance. Yet even under this assumption, the court found the error to be harmless.⁷⁰³

The court generally rejected defense arguments on new penalty phase issues as well. The cases divide into two groups: (1) the penalty phase proceedings and (2) penalty phase jury instructions.

Four new issues were presented to the court this year that focus primarily on the trial process in the penalty phase. First, the 1978 Initiative prohibits the prosecution from introducing evidence in aggravation unless the defense has received notice within a reasonable time prior to trial.⁷⁰⁴ In *Miranda*, the court held that although written notice of the

⁷⁰⁰ Thus the court held that the instructions tendered by the defense that were designed to define that phrase in the financial-gain special circumstance were properly denied. *Howard*, 44 Cal. 3d 375, 407-10, 749 P.2d 279, 296-98, 243 Cal. Rptr. 842, 860-62 (1988). Justice Broussard filed a dissent on this issue. *Id.* at 446-47, 749 P.2d at 323-24, 243 Cal. Rptr. at 886-87 (Broussard, J., concurring and dissenting). Justice Broussard was the author of *People v. Bigelow*, 37 Cal. 3d 371, 691 P.2d 994, 209 Cal. Rptr. 328 (1984), the leading case on the financial-gain special circumstance.

⁷⁰¹ See *Howard*, 44 Cal. 3d at 413-16, 749 P.2d at 301-02, 243 Cal. Rptr. at 864-65. The corpus delicti rule requires that the qualifying felony be proved independently of an accused's extrajudicial statements before the statements may be used.

⁷⁰² The pertinent language in both statutes provides as follows: "The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree." The defendants argued that it is logically impossible to allege or establish that they had "in this proceeding been convicted" of multiple murder before the trial commenced. The arguments were rejected. See *People v. Williams*, 44 Cal. 3d 883, 922-25, 751 P.2d 395, 420-23, 245 Cal. Rptr. 336, 362-64 (1988) (1977 legislation); *People v. Anderson (James)*, 43 Cal. 3d 1104, 1148-49, 742 P.2d 1306, 1331-32, 240 Cal. Rptr. 585, 611-12 (1987) (1978 Initiative).

⁷⁰³ See *Williams*, 44 Cal. 3d at 927-29, 751 P.2d at 424-25, 245 Cal. Rptr. at 365-67. The *Green* rule states that the special circumstance of killing during the commission of one of felonies enumerated in Penal Code § 190.2(a)(17) exists only if the killing was to advance the independent felonious purpose.

⁷⁰⁴ CAL. PENAL CODE § 190.3 (West 1988).

evidence in aggravation routinely should be given, oral notice is sufficient.⁷⁰⁵ Second, although the prosecution apparently should give notice at a reasonable time before the guilt phase of the trial begins, notice given after the close of the guilt phase but before commencement of the penalty trial did not prejudice the defendant under the circumstances presented to the Lucas court in *Howard*.⁷⁰⁶ In *Howard*, the court also held that prosecution rebuttal evidence requires no advance notice provided the evidence is proper rebuttal.⁷⁰⁷ Third, in regard to admissibility of the evidence itself, the court held that in a prosecution under the 1977 legislation, evidence of the defendant's forceful or violent criminal activity following three months after the charged offense is properly admitted as aggravating evidence at the penalty phase of the trial.⁷⁰⁸ And finally, in *Miranda*, the court rejected an argument that the defendant was denied a fair and impartial penalty trial because three uniformed officers accompanied a prosecution witness into the courtroom.⁷⁰⁹

Most of the new penalty phase issues this year concerned penalty

⁷⁰⁵ 44 Cal. 3d 57, 96-97, 744 P.2d 1127, 1151, 241 Cal. Rptr. 594, 618 (1987).

⁷⁰⁶ 44 Cal. 3d 375, 419-25, 749 P.2d 279, 305-09, 243 Cal. Rptr. 842, 868-72 (1988). The court summarized this fact specific argument holding as follows:

We believe that the statutory purpose of advising an accused of the evidence against him in order to afford him a reasonable opportunity to prepare his defense at the penalty trial was met under the conditions here. Defendant was given specific notice of the evidence as soon as the prosecutor was aware of its existence. He was given extra time to prepare and never requested more. The fact that the violent incidents were numerous does not provide a basis for finding them inadmissible. We therefore conclude that even though the notice was not given until after the guilt phase had terminated, any error which may have occurred was not prejudicial nor was it reasonably possible that the penalty verdict was affected.

Id. at 425, 749 P.2d at 308-09, 243 Cal. Rptr. at 872. In an early passage, the court wrote, "assuming arguendo that the notice given by the prosecutor prior to the penalty phase was untimely and that, as defendant urges, notice must be given before the guilt phase commences, we find no prejudicial error." *Id.* at 423, 749 P.2d at 307, 243 Cal. Rptr. at 871.

Because of these two passages, it appears that the court is refraining from deciding the question of the notice's timing. Assuming that there was error, the court then would clearly decide that the error was not reversible.

⁷⁰⁷ *Id.* at 428-30, 749 P.2d at 311-12, 243 Cal. Rptr. at 874-75. Though the statute itself exempts rebuttal evidence from the notice requirement, the case makes it clear that the statutory exemption applies only to proper rebuttal evidence.

⁷⁰⁸ *People v. Hovey*, 44 Cal. 3d 543, 577-79, 749 P.2d 776, 795-96, 244 Cal. Rptr. 121, 141-42 (1988).

⁷⁰⁹ 44 Cal. 3d 57, 114-15, 744 P.2d 1127, 1163-64, 241 Cal. Rptr. 594, 630-31 (1987).

phase jury instructions. The court heard the following instructional arguments this year and resolved all but the last two against the defendant:⁷¹⁰

1. As long as the jury is instructed that all twelve jurors must agree on the penalty assessed, an instruction that the jury must also unanimously agree that the defendant committed uncharged criminal activity (beyond a reasonable doubt) before it can be used in the penalty assessment process is not required.⁷¹¹
2. An instruction telling the jury to consider any of the previously given instructions which are pertinent to the determination of penalty is proper. The trial court need not reinstruct on special circumstance instructions unless they are requested.⁷¹²
3. Instructions on the standards to be used by the jurors for assessing witness credibility, given at the guilt phase of the trial, need not be repeated

⁷¹⁰ Except for the last two, these issues are listed in the order the court decided them, not in the order of their importance.

⁷¹¹ See *People v. Ghent*, 43 Cal. 3d 739, 773-74, 739 P.2d 1250, 1272-73, 239 Cal. Rptr. 82, 105 (1987) (prosecuted under 1977 legislation); *Miranda*, 44 Cal. 3d at 99, 744 P.2d at 1152-53, 241 Cal. Rptr. at 620 (prosecuted under 1978 Initiative). Although in *Ghent* the defendant claimed that this instruction should have been given by the trial court *sua sponte*, the court did not reject the argument on the ground that the trial court did not have such a *sua sponte* duty. Instead, the court rejected the instruction on its merits. Chief Justice Lucas wrote:

Any such requirement would immerse the jurors in lengthy and complicated discussions of matters wholly collateral to the penalty determination which confronts them. Moreover, we see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proven beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty.

Ghent, 43 Cal. 3d at 773-74, 739 P.2d at 1272-73, 239 Cal. Rptr. at 105. The reasonable doubt instruction must be given *sua sponte* by the trial court under *Robertson*. In *Miranda* the court said, "There is no requirement that the jury agree on which factors were used to reach the decision. It is therefore unnecessary that the entire jury find the prosecutor met his burden of proof on the 'other crimes' evidence before a single juror may consider this evidence." 44 Cal. 3d at 99, 744 P.2d at 1152-53, 241 Cal. Rptr. at 620.

⁷¹² See *Ghent*, 43 Cal. 3d at 774-75, 739 P.2d at 1273-74, 239 Cal. Rptr. at 105-06. Unless the instruction was specifically limited to the special circumstance instructions, a problem arises with the general language of this instruction. If the court gave an antipathy instruction at the guilt phase of the trial, this instruction authorizes the jury to consider that instruction in the penalty assessment process. The court undoubtedly would hold this error to have been cured by something in the record given the court's current use of the "Cure Technique." See *supra* notes 628-72 and accompanying text. Nevertheless, it would appear to be the better practice to specifically inform the jury that it can take factually based sympathy into account in the penalty assessment process if such a general instruction is to be used.

sua sponte at the penalty phase⁷¹³ (nor need any other guilt phase instruction concerning the principles generally applicable to jury deliberations be repeated *sua sponte* at the penalty phase).⁷¹⁴

4. An instruction which repeats the statutory description of the mental or emotional disturbance factor (in the 1977 legislation) as "extreme mental or emotional disturbance" does not violate *Lockett* because the defect is cured by the factor (j) instruction.⁷¹⁵

5. It is not error for the trial court to read the entire statutory list of aggravating and mitigating factors to the jury and to instruct the jury to consider these factors "if applicable."⁷¹⁶

6. There is no requirement that the court instruct the jury to make written findings that the defendant committed uncharged criminal activity beyond a reasonable doubt before that activity can be used in the penalty assessment process under the 1978 Initiative.⁷¹⁷

7. The court has no *sua sponte* duty to instruct the jury to draw no adverse inferences because of the defendant's failure to testify at the penalty

⁷¹³ See *Miranda*, 44 Cal. 3d at 107-08, 744 P.2d at 1158-59, 241 Cal. Rptr. at 625-26. The jury was given CALJIC No. 2.20 at the guilt phase. The court then said, "We believe this is all that was required. In the absence of an affirmative showing that the jury did not continue to apply the instruction at the penalty phase, we cannot assume error." In accordance with its current penchant for treating the arguments of counsel as a valid substitute for jury instructions, the court then noted that counsel argued witness credibility to the penalty phase jury. *Id.* at 108, 744 P.2d at 1159, 241 Cal. Rptr. at 626; see also *Gates*, 43 Cal. 3d at 1209, 743 P.2d at 327, 240 Cal. Rptr. at 692 (suggesting that jury could have applied witness credibility instructions but not antisympathy instruction given at guilt phase because of difference in wording of instructions).

⁷¹⁴ See *People v. Melton*, 44 Cal. 3d 713, 758, 750 P.2d 741, 767, 244 Cal. Rptr. 867, 894 (1988).

⁷¹⁵ See *Ghent*, 43 Cal. 3d at 776, 739 P.2d at 1274, 239 Cal. Rptr. at 106. This would only be true if the factor (j) instruction was not itself defective. See *supra* notes 587 & 590 and accompanying text.

⁷¹⁶ See *People v. Wade II*, 44 Cal. 3d 975, 999, 750 P.2d 794, 808, 244 Cal. Rptr. 905, 919 (1988) (prosecuted under 1978 Initiative); *Melton*, 44 Cal. 3d at 770, 750 P.2d at 775-76, 244 Cal. Rptr. at 902 (prosecuted under 1978 Initiative); *People v. Ruiz*, 44 Cal. 3d 589, 619-20, 749 P.2d 854, 870, 244 Cal. Rptr. 200, 216 (1988) (prosecuted under 1977 legislation); *People v. Kimble*, 44 Cal. 3d 480, 516, 749 P.2d 803, 826, 244 Cal. Rptr. 148, 172 (1988) (prosecuted under 1977 legislation); *People v. Miranda*, 44 Cal. 3d 57, 104-05, 744 P.2d 1123, 1156-57, 241 Cal. Rptr. 594, 624 (1987) (prosecuted under 1978 Initiative); *People v. Ghent*, 43 Cal. 3d 739, 776-77, 739 P.2d 1250, 1274-75, 239 Cal. Rptr. 82, 107 (1987) (1977 legislation). Since the principal rationale for reading the entire list to the jury and permitting the jury to select the applicable factors is that the list in and of itself provides guidance to the jury, it would presumably be inappropriate for the trial court to delete any of these factors on the request of counsel.

⁷¹⁷ See *People v. Gates*, 43 Cal. 3d 1168, 1203, 743 P.2d 301, 323, 240 Cal. Rptr. 666, 688 (1987). The same claim has been rejected for prosecutions under the 1977 legislation. *Id.*

phase, though the defendant testified at the guilt phase of the trial.⁷¹⁸

8. An instruction informing the penalty phase jury that it must choose between two alternative verdicts — death or life without possibility of parole — is not erroneous on the ground that it fails to inform the jury that it has the additional choice of not rendering a verdict at all.⁷¹⁹

9. A defendant is not entitled to an instruction enumerating mitigating circumstances for the jury's consideration (at least when the instruction contains only a partial list of potentially mitigating factors).⁷²⁰

10. A defendant tried under the 1977 legislation is not entitled to certain instructions from the 1978 Initiative on the theory that they are "ameliorative" and thus retroactively apply in the defendant's favor.⁷²¹

11. In a prosecution under the 1978 Initiative, a defendant is not entitled to an instruction informing the jury that a felony conviction for violent crime can only be considered as a single aggravating factor, for the jury may properly take such a conviction into account as both violent criminal activity (factor (b)) and as a prior felony conviction (factor (c)).⁷²²

12. It is not error for the penalty phase jury instructions to permit the sentencing jury to consider overlapping felony-murder special circumstance findings as separate aggravating factors.⁷²³

13. Since the absence of mitigation does not constitute an aggravating factor, it is error for the court to instruct the penalty phase jury that "the absence of a statutory mitigating factor does not necessarily constitute an aggravating factor."⁷²⁴

14. Since it is improper for the sentencing jury to consider the crimes for which the defendant was convicted at the guilt phase of the trial as aggravating circumstances under factors (b) and (c),⁷²⁵ it is error for the penalty

⁷¹⁸ *Id.* at 1208-09, 743 P.2d at 327, 240 Cal. Rptr. at 692; *see also Miranda*, 44 Cal. 3d at 107, 744 P.2d at 1158, 241 Cal. Rptr. at 625.

⁷¹⁹ *See Miranda*, 44 Cal. 3d at 105, 744 P.2d at 1157, 241 Cal. Rptr. at 624. This was a prosecution under the 1978 Initiative. A similar argument was rejected in a prosecution under the 1977 legislation in *People v. Harris (Robert)*, 28 Cal. 3d 935, 963-64, 623 P.2d 240, 255, 171 Cal. Rptr. 679, 694 (1981); *see also Kimble*, 44 Cal. 3d at 511-16, 749 P.2d at 822-26, 244 Cal. Rptr. at 168-71 (rejecting similar argument with respect to trial court's response to jury inquiry in prosecution under 1977 legislation).

⁷²⁰ *See People v. Howard*, 44 Cal. 3d 375, 442-43, 749 P.2d 279, 320-21, 243 Cal. Rptr. 842, 883-84 (1988) (prosecuted under 1978 Initiative).

⁷²¹ *See People v. Ruiz*, 44 Cal. 3d 589, 622, 749 P.2d 854, 872, 244 Cal. Rptr. 200, 218 (1988) (prosecuted under 1977 legislation).

⁷²² *See People v. Melton*, 44 Cal. 3d 713, 764-65, 750 P.2d 741, 771-72, 244 Cal. Rptr. 867, 897-98 (1988) (prosecuted under 1978 Initiative).

⁷²³ *See id.* at 765-69, 750 P.2d at 772-75, 244 Cal. Rptr. at 898-901 (prosecuted under 1978 Initiative).

⁷²⁴ *See Melton*, 44 Cal. 3d at 769-70, 750 P.2d at 775, 244 Cal. Rptr. at 901-02 (prosecuted under 1978 Initiative).

⁷²⁵ Factor (b) is the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. CAL. PENAL CODE § 190.3(b) (West 1987). Factor (c) is the

phase instructions to permit the jury to do so.⁷²⁶

Of all of these instructional issues, the court resolved only the last two in favor of the defense. The instruction informing the jury that the absence of mitigation is not “necessarily” an aggravating factor (number thirteen above) is not likely to affect other cases in the backlog, nor will it endanger future judgments. It is not one of the standard instructions routinely given in death cases. It was correctly drafted by defense counsel, but erroneously modified by the court before it was read to the jury.⁷²⁷ Furthermore, under the existing Bird court precedent, the qualification is wrong. Simply put, the Bird court clearly and concisely held that the absence of mitigation does not constitute an aggravating factor.⁷²⁸ Honesty would have required the Lucas court to overrule this line of authority if the court were to sustain this instruction. But for the

presence or absence of any prior felony conviction. *Id.* § 190.3(c).

⁷²⁶ See *People v. Miranda*, 44 Cal. 3d 57, 105-06, 744 P.2d 1127, 1157-58, 241 Cal. Rptr. 594, 624-25 (1987) (prosecuted under 1978 Initiative). In *Miranda*, the defendant argued that the court was under a *sua sponte* duty to properly charge the jury that factors (b) and (c) applied only to other crimes and not to the offenses for which the defendant was convicted at the guilt phase of the trial. *Id.* The court agreed that it would be error for the jury to consider these crimes as aggravating factors under (b) and (c). *Id.* However, the court failed to address the *sua sponte* issue and instead apparently went on to find that the error was harmless on the record presented. In this respect, the opinion is very ambiguous. *Id.* But in a footnote the court said that, “in order to avoid any possible confusion on this point or the application of the factors, the trial court in the future should expressly instruct that subdivisions (b) and (c) refer to crimes other than those underlying the guilt determination.” *Id.* at 106 n.28, 744 P.2d at 1157 n.24, 241 Cal. Rptr. at 625 n.24; see also *Melton*, 44 Cal. 3d at 763-65, 750 P.2d at 770-72, 244 Cal. Rptr. at 897-98 (confining discussion to double counting under factor (b)); *People v. Kimble*, 44 Cal. 3d 480, 504-06, 749 P.2d 803, 818-19, 244 Cal. Rptr. 148, 163-65 (1988) (finding it improper for prosecutor to argue that crimes for which defendant was convicted at guilt phase may be considered by jury as aggravating factors under factor (b)).

⁷²⁷ The instruction tendered by defense counsel read as follows: “The absence of a statutory mitigating factor does not constitute an aggravating factor.” The trial court modified the instruction by inserting the word “necessarily” between “not” and “constitute” and as such erroneously modified the instruction that was read to the jury. The supreme court observed that the unmodified instruction is a correct statement of the law. *People v. Melton*, 44 Cal. 3d 713, 769, 750 P.2d 741, 775, 244 Cal. Rptr. 867, 901-02 (1988).

⁷²⁸ See, e.g., *People v. Rodriguez*, 42 Cal. 3d 730, 789-90, 726 P.2d 113, 151-52, 230 Cal. Rptr. 667, 705-06 (1986); *People v. Davenport*, 41 Cal. 3d 247, 288-90, 710 P.2d 861, 888, 221 Cal. Rptr. 794, 821 (1985) (plurality opinion) (holding that it was error for prosecutor to argue such to jury). The Lucas court relied on *Rodriguez* and *Davenport* for the ruling in *Melton*. See *Melton*, 44 Cal. 3d at 769, 750 P.2d at 775, 244 Cal. Rptr. at 901-02.

reasons seen above, the Lucas court elected to accept the Bird court doctrine and to rule in favor of the defense.⁷²⁹ Though the defense won the first victory in a new death penalty issue presented to the Lucas court, the battle was nonetheless lost. The court subsequently found the error harmless and affirmed the judgment of death.⁷³⁰

On the other hand, the last instructional issue (number fifteen above) potentially affects many other cases because it involves the standard jury instructions routinely given in all death penalty cases tried under the 1978 Initiative.⁷³¹ These instructions err by omission. They fail to clearly inform the sentencing jury that it cannot take into account the crimes for which the defendant was convicted at the guilt phase of the trial as aggravating circumstances under factors (b) and (c).⁷³² It is very likely that this error will rise again as the court works its way through the backlog of cases. It will appear in future cases until trial courts begin giving the instruction suggested by the court (number fourteen above) in death penalty trials. Nevertheless, this holding represents no weakness in the apparent resolve of the Deukmejian justices to uphold as many death judgments as possible. One only need examine the way the court resolved this issue to understand why this is true.

Defendant Miranda argued that "the trial court erred in failing *sua sponte* to modify CALJIC No. 8.84.1 to make clear that section 190.3, subdivisions (b) and (c) applied only to 'other crimes.'" ⁷³³ The court, speaking through Justice Panelli, replied:

We agree that subdivisions (b) and (c) pertain only to criminal activity other than the crimes for which the defendant was convicted in the present proceeding. It would therefore be improper for the jury to consider the underlying crimes as separate and distinct aggravating circumstances under either subdivision.⁷³⁴

In a footnote appended to the second sentence, Justice Panelli added:

Although we doubt that a jury would believe that factors (b) and (c) embrace the guilt phase offenses,⁷³⁵ in order to avoid any possible confu-

⁷²⁹ The costs incurred by overruling this line of authority are obviously outweighed by the benefits received by accepting the Bird court doctrine and applying it as received doctrine. *See supra* notes 595-98 and accompanying text.

⁷³⁰ *Melton*, 44 Cal. 3d at 770, 772, 750 P.2d at 775, 777, 244 Cal. Rptr. at 901-03.

⁷³¹ The instruction in question is CALJIC No. 8.84.1. *See People v. Miranda*, 44 Cal. 3d 57, 105-06, 744 P.2d 1127, 1157-58, 241 Cal. Rptr. 594, 624-25 (1987).

⁷³² This is the reason that the court "suggested" in a footnote that the instruction should be altered. *See infra* notes 735-36 & 740 and accompanying text.

⁷³³ *Miranda*, 44 Cal. 3d at 105, 744 P.2d at 1157, 241 Cal. Rptr. at 624.

⁷³⁴ *Id.* at 105-06, 744 P.2d at 1157, 241 Cal. Rptr. at 624-25.

⁷³⁵ *Id.* at 106 n.28, 744 P.2d at 1160 n.24, 241 Cal. Rptr. at 625 n.24. Since the

sion on this point or the application of the factors, the trial court in the future should expressly instruct that subdivisions (b) and (c) refer to crimes other than those underlying the guilt determination.⁷³⁶

Returning to the text of the opinion, the next paragraph continues as follows:

On this record, however, there is absolutely no indication that the jury would have understood that the guilt phase crimes came within subdivision (b) or (c).⁷³⁷ Neither the judge nor the prosecutor suggested to the jury that the guilt phase crimes were to be considered as aggravating factors under subdivision (b) or (c). The judge simply instructed the jury on the mitigating and aggravating factors in the language of section 190.3. During closing argument the prosecutor discussed each of the circumstances in aggravation without specifically referring to any of the enumerated statutory factors. Moreover, both counsel informed the jury that they were not simply to "count" the aggravating and mitigating factors in reaching their penalty determination. Therefore, it was the event itself, i.e., the act of violence in the killing of Robert Hosey and the circumstance of the Gary Black murder, which was presented to the jury, not its characterization under the instruction or statute as a particular subdivision.⁷³⁸

Quite obviously, Justice Panelli avoids the question presented by the defendant. Miranda argued that the trial court had a *sua sponte* duty

prosecutor in *Kimble* made precisely this mistake in his penalty phase argument to the jury, the court's expression of disbelief that lay jurors would not make this mistake certainly is not supported by the appellate records reviewed by the court this year. See *People v. Kimble*, 44 Cal. 3d 480, 504-06, 749 P.2d 803, 818-19, 244 Cal. Rptr. 148, 163-65 (1988). Of course, the error was found harmless and the judgment of death was affirmed. *Id.* at 505-06, 516-17, 749 P.2d at 819, 826, 244 Cal. Rptr. at 166-67, 172.

⁷³⁶ *People v. Miranda*, 44 Cal. 3d 57, 106 n.28, 744 P.2d 1127, 1157 n.24, 241 Cal. Rptr. 594, 625 n.24 (1987).

⁷³⁷ Under the traditional method for analyzing jury instructions for error, there is no requirement that there be any indication in the record that the jury misunderstood the instructions. See *supra* notes 628-33 and accompanying text. The actual language of the jury instructions is analyzed with an objective standard to determine whether there is a sufficient risk that the jury might have misunderstood the instruction. It is a question of the assessment of the probability or risk of an erroneous understanding by the jury. The presence of evidence in the record indicating that such a risk existed with the actual jury is helpful in making this determination. The absence of such evidence is irrelevant to the question of the existence of error in the instruction. The absence of an indication of jury confusion in the record is not relevant to the question of the reversibility of the record. But the presence of such evidence is important to the question of prejudice for the same reason that it is relevant to the question of the existence of error.

⁷³⁸ *Miranda*, 44 Cal. 3d at 106, 744 P.2d at 1157-58, 241 Cal. Rptr. at 625. Justice Panelli's conclusion follows from the premises concerning the arguments of counsel, but is irrelevant to the question of the existence of error in the instruction and merely establishes that the error was not exacerbated by the arguments of counsel. See *supra* note 736.

to clarify the standard instruction. To rephrase the issue, Miranda argued that the court's instructions must accurately inform the jury concerning the sentencing process and the factors to be used in arriving at the sentencing verdict. Though Justice Panelli agrees that the jury cannot validly consider the underlying crimes as separate and distinct aggravating circumstances under either subdivision (b) or (c), he never expressly states that the instruction is erroneous, and he never discusses the court's duty to instruct the jury accurately. He also avoids discussing the scope of a court's *sua sponte* duty with respect to jury instructions. Instead, in the footnote quoted above he admits that confusion is possible and directs future trial courts to inform the jury accurately of the law's requirements.⁷³⁹ In other words, the court ordered a prospective remedy for the flaw in the instructions. Because a court does not prescribe a remedy for an unflawed instruction, it is fair to infer that Justice Panelli, with the agreement of the remaining Deukmejian justices,⁷⁴⁰ concluded that the standard instruction contained a flaw.

In the second paragraph of the opinion's text quoted above, Justice Panelli appears to conclude that, because there is no indication in the record that the jury actually would have misunderstood the instruction, the error was harmless. However, these passages are so ambiguous that one must ponder them to arrive at their probable meaning: the standard instruction is flawed by error, but the error was not reversible on the record presented in *Miranda*. Thus, insofar as there was a defense victory in *Miranda*, it was purely pyrrhic, for the court ultimately found the error harmless and affirmed the judgment of death.⁷⁴¹

Elsewhere in the *Miranda* opinion, Justice Panelli demonstrates that he can write with sufficient clarity to reject unambiguously the defendant's claims. Why would he write ambiguously on the rare occasion when a *new* defense argument is sustained, while speaking clearly when defense arguments are rejected? This is not an isolated occurrence. Justice Panelli used the same type of obfuscation in the only other opinion he wrote in automatic appeals this year, *Gates*.⁷⁴² Similar

⁷³⁹ *Miranda*, 44 Cal. 3d at 106 n.28, 744 P.2d at 1157 n.24, 241 Cal. Rptr. at 625 n.24; *see supra* note 692.

dissented to the affirmance of the death judgment in *Miranda*. *Id.* at 123-27, 744 P.2d at 1169-72, 241 Cal. Rptr. at 637-39.

⁷⁴¹ *Miranda*, 44 Cal. 3d at 106, 123, 744 P.2d at 1157-58, 1169, 241 Cal. Rptr. at 625, 636-37.

⁷⁴² 43 Cal. 3d 1168, 1193, 743 P.2d 301, 317, 240 Cal. Rptr. 666, 682 (1987). In *Gates*, the defendant challenged a jury instruction for *Green* error. Justice Panelli responded by saying that if the judge misspoke, the mistake was cured by other instructions. *Id.*

ambiguous rulings on defense arguments also appear in opinions written by Chief Justice Lucas.⁷⁴³ Yet when the Deukmejian justices reject defense arguments and sustain a prosecution argument, the Lucas court speaks lucidly. Proof of this anomaly appears in the list above of the twelve new defense arguments on penalty phase instructions that the Lucas court clearly resolved against the defense and in favor of the prosecution this year.⁷⁴⁴ Ambiguities in these Lucas court opinions are

⁷⁴³ See, e.g., *People v. Howard*, 44 Cal. 3d 375, 443, 749 P.2d 279, 321, 243 Cal. Rptr. 842, 884-85 (1988); *People v. Ghent*, 43 Cal. 3d 739, 775-76, 739 P.2d 1250, 1273-74, 239 Cal. Rptr. 82, 106 (1987).

In *Ghent*, the issue was whether the prosecutor erroneously had argued that age was an aggravating factor. The court noted that the prosecutor's remarks reasonably may be viewed as merely arguing the inapplicability of a mitigating fact, rather than seeking to penalize defendant by reason of his age. The court then continued:

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

Ghent, 43 Cal. 3d at 775-76, 739 P.2d at 1273-74, 239 Cal. Rptr. at 106 (citation omitted).

One cannot determine from this passage whether the court is holding that there was no error because the case was tried before *Davenport* and the rule of that case is not to be retroactively applied, or that there was error but it was harmless.

In *Howard*, the trial court instructed the jury at the penalty phase that, "Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be." 44 Cal. 3d at 443, 749 P.2d at 321, 243 Cal. Rptr. at 884. Defendant claimed that it was prejudicial error to so instruct the sentencing jury. After reciting from *People v. Brown*, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), and *Brown's* holding that this instruction should never be given in a capital penalty trial, the opinion continued:

The *Brown* jury was affirmatively instructed to ignore sympathy. In the present case, of course, an instruction expressly informing the jury that it could consider 'pity' was given. In light of that specific admonition, the concern for misleading the jury expressed in *Brown* was not invoked here and we need not examine the record further to assure the jury was aware of its proper sentencing responsibilities.

Howard, 44 Cal. 3d at 443, 749 P.2d at 321, 243 Cal. Rptr. at 884-85.

One cannot tell from the court's disposition of this issue whether the instruction, although erroneous on its face, is cured by the pity instruction. This is partly because there is no discernable relationship between "pity" and an instruction informing the jury to reach a verdict regardless of the consequences. Indeed, the court may have had something quite different in mind.

⁷⁴⁴ See *supra* notes 710-26 and accompanying text.

not the result of an inability to write clearly or a failure to understand the importance of clear communication to the lower courts and counsel. Rather, obfuscation of the court's holding on arguments favoring the defense *appears* to be a consciously chosen strategy designed to permit the Lucas court the maximum freedom to deal in the future with the precedent created by the decision.⁷⁴⁵ Ambiguous holdings can be explained and interpreted in a variety of ways. And though this strategy can operate effectively only as a short-term solution, the Lucas court does not need a long term solution to work its way through the backlog of automatic appeals in its inventory of cases.

Furthermore, the cases decided this year are permeated with a similar practice: though the court discusses the question of the error raised by the defendant, it frequently fails to resolve that issue. Instead, the opinion disposes of the issue on the ground that if it were error, the error is harmless.⁷⁴⁶ In other words, the court prefers to dispose of

⁷⁴⁵ This did not occur in every case. The two most notable exceptions to the court's apparent preference for ambiguity when the ruling appears to favor the defense are *Melton* and *Kimble*. In *Melton*, the Lucas court held that it was error for the trial court to instruct the penalty phase jury that "the absence of a statutory mitigating factor does not necessarily constitute an aggravating factor." 44 Cal. 3d 713, 769-70, 750 P.2d 741, 775, 244 Cal. Rptr. 867, 901-02 (1988). In *Kimble*, the court held that it was error for the prosecutor to urge the jury to find the presence of violent criminal activity within the meaning of factor (b) of former Penal Code § 190.3 simply on the basis of the underlying offenses found to have been committed in the case. 44 Cal. 3d 480, 504-06, 749 P.2d 803, 818-19, 244 Cal. Rptr. 148, 163-65 (1988).

⁷⁴⁶ See, e.g., *People v. Wade II*, 44 Cal. 3d 975, 998-99, 750 P.2d 794, 808, 244 Cal. Rptr. 905, 919 (1988) (Lucas, C.J.) (instruction at penalty phase to reach just verdict, regardless of what consequences of such verdict may be); *People v. Williams*, 44 Cal. 3d 883, 927-29, 751 P.2d 395, 424-25, 245 Cal. Rptr. 336, 365-67 (1988) (Eagleson, J.) (claim of *Green* error in connection with felony-murder (kidnapping) special circumstance); *People v. Hendricks II*, 44 Cal. 3d 635, 645-46, 749 P.2d 836, 841, 244 Cal. Rptr. 181, 187 (1988) (Lucas, C.J.) (introduction of photographs into evidence at penalty phase); *People v. Hovey*, 44 Cal. 3d 543, 576-77, 749 P.2d 776, 795, 244 Cal. Rptr. 121, 140-41 (1988) (Lucas, C.J.) (use of photo of victim while alive during prosecutor's penalty phase argument and *Booth* error); *Kimble*, 44 Cal. 3d at 499, 749 P.2d at 814, 244 Cal. Rptr. at 159-60 (Lucas, C.J.) (admission of photo of victims while alive); *Howard*, 44 Cal. 3d at 423-25, 428, 749 P.2d at 307-09, 311-12, 243 Cal. Rptr. at 871-72, 874-75 (Lucas, C.J.) (notice of penalty phase evidence and admissibility of evidence offered in aggravation at penalty trial); *People v. Miranda*, 44 Cal. 3d 57, 112-13, 744 P.2d 1127, 1162, 241 Cal. Rptr. 594, 629 (1987) (Panelli, J.) (*Booth* error in prosecutor's penalty phase argument); *People v. Gates*, 43 Cal. 3d 1168, 1211-12, 743 P.2d 301, 328-29, 240 Cal. Rptr. 666, 693-95 (1987) (Panelli, J.) (prosecutorial misconduct during penalty phase argument); *Ghent*, 43 Cal. 3d at 771-72, 739 P.2d at 1271-72, 239 Cal. Rptr. at 103-04 (Lucas, C.J.) (*Booth* error in prosecutor's penalty phase argument).

many issues on the ground that the error is harmless instead of clearly resolving the question of the existence of error before addressing the question of reversibility. This enables the court to refrain from announcing clear rules of law that might favor the defense in future cases. Thus, the court avoids creating precedent favorable to the defense. This strategy allows the court to decide each case on its own unique facts.

3. A Summary

All of the automatic appeals decided this year came from the inventory of death penalty appeals that had accumulated during the Bird court's tenure. Except for *Snow* and *Hale*, each of the cases had been fully briefed and argued before the Bird court and were awaiting decision when the Bird court's tenure ended. They then were reargued before the Lucas court.⁷⁴⁷ In most of the cases, the penalty phase judgment was flawed by a series of instructional errors embedded in the standard jury instructions routinely used in early death penalty trials. In addition to these standardized instructional errors, the defendants urged other grounds for reversal in the cases.

In response, the Lucas court affirmed every death judgment that it addressed this year, except for the single reversal in *Anderson* (James) for *Ramos* error. This resulted in a shift from a very high reversal rate under the Bird court to an equally high affirmance rate under the Lucas court. With the further single exception of the reversal of the *Carlos* intent-to-kill rule, the Deukmejian justices produced this extraordinary change in the reversal rate by purporting to apply existing death penalty doctrine, doctrine largely fashioned by the Bird court. The affirmance of death judgments in cases in which reversals probably would have occurred under the Bird court *may* be attributable to the difference in the way the Bird and Lucas courts applied existing law. The Lucas court's ultimate resolution of each new special circumstance and penalty phase issue against the defense also may account for some of the anomalous reversals. But a rival hypothesis also emerges from these cases. The difference in the reversal-affirmance rate between the Bird and Lucas courts may be attributable to illegitimate decisionmaking in these automatic appeals. This question is explored below.⁷⁴⁸

The Lucas court found most of the error in the standard penalty phase jury instructions to be cured by the use of the multi-factored balancing test that Justice Grodin devised and used along with Justice

⁷⁴⁷ See *supra* note 580.

⁷⁴⁸ See *infra* text accompanying notes 764-830.

Mosk in the “lead” opinions in *Allen* and *Myers*. Without once discussing the merits of this technique or the reason for abandoning the traditional method for analyzing jury instructions, the Deukmejian justices adopted the Cure Technique as their exclusive method for analyzing jury instructions.⁷⁴⁹ They used it to cure all instructional error in the facially flawed factor (k), factor (j), antisympathy, and mandatory-sentencing instructions.⁷⁵⁰

The Deukmejian justices did not resort to the multi-factored cure analysis with respect to the remaining standardized penalty phase instructional errors recognized by a majority of the Bird court.⁷⁵¹ *Boyd* error was not directly presented to the court this year. The Lucas court, however, did find that all *Robertson* and *Harris* error recognized in the cases was harmless by using a reversibility test that employed a multi-factored balancing analysis.⁷⁵² Only *Ramos* error was applied by the Lucas court in precisely the same manner as it was applied by the Bird court majority.⁷⁵³

Arguments previously rejected by the Bird court were equally rejected by the Lucas court, based on the Bird court precedent.⁷⁵⁴ Additionally, all arguments that focused primarily on the application of settled rules of law to the unique facts presented in the cases — *Witherspoon-Witt* error, claims of ineffective assistance of counsel, prosecutorial misconduct, and erroneous admission or exclusion of penalty phase or special circumstance evidence — ultimately⁷⁵⁵ were resolved against the defendants.⁷⁵⁶

⁷⁴⁹ This traditional method of analyzing jury instructions is discussed *supra* text accompanying notes 628-33.

⁷⁵⁰ See *supra* notes 653-56 and accompanying text.

⁷⁵¹ The overlapping felony branch of the *Harris* anti-inflation rule was first articulated in Justice Broussard’s plurality opinion in *People v. Harris (Lee)*, 36 Cal. 3d 36, 62, 65, 67, 679 P.2d 443, 448, 451-52, 201 Cal. Rptr. 782, 797, 800-01 (1984). This branch of the rule was never adopted by a majority of the Bird court. See *supra* notes 683-85 and accompanying text. Not surprisingly, the Deukmejian justices refused to follow this aspect of the *Harris* rule this year. See *supra* notes 686-87 and accompanying text.

⁷⁵² See *supra* notes 674-76 and accompanying text.

⁷⁵³ See *supra* notes 614-22 and accompanying text.

⁷⁵⁴ See *supra* notes 693-94 and accompanying text.

⁷⁵⁵ For example, the court held that it was error for the prosecutor to argue at the penalty phase that the jury should view the guilt phase crimes as aggravating evidence under Penal Code § 190.3(b) in the 1977 legislation. *People v. Kimble*, 44 Cal. 3d 480, 505, 749 P.2d 803, 818, 244 Cal. Rptr. 148, 164 (1988). However, the court found that the error was harmless. *Id.* at 505-06, 749 P.2d at 819, 244 Cal. Rptr. at 164-165.

⁷⁵⁶ See *supra* notes 695-99 and accompanying text.

Finally, the Lucas court resolved all of the new special circumstance and penalty phase issues presented to it this first year against the defense. In the majority of instances in which the Lucas court resolved these issues against the defendant, it did so in a clear, unambiguous ruling.⁷⁵⁷ But in most of the instances in which the defendant's new argument seemed to be particularly meritorious or troublesome for the court, the Deukmejian majority either failed to rule in the defendant's favor (on the ground that even if it were error, the error was harmless), or it coupled an ambiguous ruling on the merits of the claim with an apparent finding that the error was also harmless.⁷⁵⁸ In the few instances in which the Lucas court clearly ruled in favor of the defense on new penalty phase issues, the court also found the error to be harmless.⁷⁵⁹ Findings that all special circumstance and penalty phase errors are harmless is one of the principal hallmarks of the Lucas court's opinions in automatic appeals this first year.

Looking back over the automatic appeals decided by the Lucas court this year and assuming that the court has discharged its duty to review death judgments for errors of law committed in the courts below,⁷⁶⁰ three general principles apparently guiding the court's judgment emerge from the cases:

1. Adhere to the rule of *stare decisis* and reverse no precedent. This rule is broken only when adherence to precedent will automatically compel a reversal in such a large number of cases that the injury to the court caused by overruling this precedent is outweighed by the number of reversals that may be required under the rule announced by the case.⁷⁶¹
2. Create no precedent that binds the court to rule in a specific way in the future. This principle is broken when the ruling favors the prosecution and results in an affirmance of the death judgment. It is rigorously observed when the court ambiguously rules in favor of the defense;⁷⁶² when the court fails to resolve issues on the ground that if it were error, the error is harmless; and when the court uses multi-factored balancing rules in the Cure Technique and in the standard for determining the reversibility of error. This principle avoids the creation of precedent that could cause the reversal of death judgments in future cases.
3. Reverse no death judgment because of an error in death penalty law. This principle is broken only when a reversal is compelled by a *per se*

⁷⁵⁷ See *supra* notes 710-26 & 744 and accompanying text.

⁷⁵⁸ See *supra* notes 745-46 and accompanying text.

⁷⁵⁹ For a discussion of the two most notable exceptions to the court's preference for ambiguity when the ruling appears to favor the defense, see *supra* note 745.

⁷⁶⁰ For a discussion of this assumption, see *infra* text accompanying notes 764-74.

⁷⁶¹ The court broke this rule one time by reversing the *Carlos* intent-to-kill rule. See *supra* notes 607-13 and accompanying text.

⁷⁶² See *supra* notes 744-46 and accompanying text.

rule of reversibility which should not be overruled for the reasons specified in the first principle.⁷⁶³

It remains to be seen whether these principles will apply only to the inventory of death penalty cases that are flawed by the errors in the early standard jury instructions.

IV. THE LUCAS COURT AND THE JUDICIAL PROCESS

A. *Result Tests and the Judicial Process*

Just as the high reversal rate raised the suspicion that something was amiss with the Bird court's process of decisionmaking in automatic appeals, so does a high affirmance rate raise a suspicion about the Lucas court. Before we examine evidence relevant to the proof of that suspicion, we must clearly define the suspected defect.

One of the fundamental principles of the Anglo-American judicial process is that judges must decide cases submitted to them under the rule of law. This means that in the process of deciding cases the legal rules compel the judgment. Once the facts of the case are determined, and the correct rule of law is identified (or created) by the judge, the judge (or jury) must apply that law to the facts of the case to produce a judgment.⁷⁶⁴ Another fundamental principle of the Anglo-American judicial process requires the law to be correctly conceived and applied in the case.⁷⁶⁵ This generally means that when the appropriate reversibility rule is met, an appellate court will set aside a lower court judgment.

Finally, to assure that the trial judge and the jury follow these principles and that trial courts will follow them in future cases, appellate

⁷⁶³ The court broke this principle only once by reversing *People v. Anderson* (James), 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987), for *Ramos* error. See *supra* notes 614-22 and accompanying text.

⁷⁶⁴ Of course, an extensive debate exists over whether judges should "make law," the limits of a judge's law making power, the sources for the law that a judge makes, and the process by which a judge performs or should perform this function. Commentators even debate whether judges actually resolve cases in this manner or whether it is possible for judges to do so. This Article does not seek to resolve these debates. The fundamental conceptions of the judicial process described in this Article still delineate the judge's role in contemporary America regardless of the debates' resolutions. If a judge fails to decide cases according to these fundamental conceptions, the judge's decisions are illegitimate, the judge abuses the office held, and in California, the electorate may deny the judge a further term in office.

⁷⁶⁵ Although the Anglo-American legal tradition requires a judge to apply correct law in the case, it is unclear whether the rule of law incorporates the no-error principle or the "correctness" principle, or whether these principles establish a separate tenet. For the purpose of the current discussion, this distinction is of no importance.

review of the trial court's judgment for errors of law has become an integral part of the Anglo-American legal system.⁷⁶⁶ In the course of its review, an appellate court exercises two distinct functions.

First, an appellate court reviews the proceedings of the lower court for error. Second, an appellate court guides and develops the law within the judicial system.⁷⁶⁷ By a tradition so ancient that it is presumed to be part of the law of the land, the judges of the appellate courts must perform these functions by giving a reasoned opinion in support of their judgment.⁷⁶⁸ In contemporary America this has come to mean that the reasoned opinion must be in writing and be made available to the public in some systematic way.⁷⁶⁹

The California Constitution embraces these fundamental principles of the Anglo-American judicial process. A defendant in a capital case has a constitutional right to appeal a judgment of death directly to the California Supreme Court.⁷⁷⁰ Furthermore, by statute the state cannot execute the defendant until the California Supreme Court affirms the

⁷⁶⁶ Although appellate review has become an accepted part of the Anglo-American judicial process, the federal constitution does not provide a constitutional right to an appeal in a criminal case. Thus far, the United States Supreme Court has held that no such right exists as a matter of federal constitutional law. *See* *Abney v. United States*, 431 U.S. 651, 656 (1977). Nevertheless, if federal constitutional error taints a judgment in a criminal case, the judgment may be subject to collateral attack while the defendant remains "in custody." *See, e.g.,* *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *Fay v. Noia*, 372 U.S. 391, 420-24 (1963).

⁷⁶⁷ Judge Hufstедler labels these two functions the "review of correctness" and the "institutional function." Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971). Thus, an appellate decision assures that the judgment below is free from reversible error and serves as precedent to guide and develop the law within the state. As Judge Hufstедler points out: "With each rise in the appellate structure, the importance of the review for correctness diminishes and the importance of the institutional function increases." *Id.* Since California provides intermediate appellate review, review for correctness becomes more important in the courts of appeal than in the California Supreme Court. However, this is not true when the California Supreme Court reviews a death judgment in an automatic appeal. The California Supreme Court alone reviews death judgments. Therefore, the importance of the review for correctness reaches its apex in that court.

⁷⁶⁸ *See* P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 1088 (1975).

⁷⁶⁹ *See, e.g.,* W. REYNOLDS, *JUDICIAL PROCESS* § 3.9 (1980) (discussing opinion publication requirement). Not all appellate opinions are published in each jurisdiction. Opinions that are important only for the "review for error" function, but not for the "institutional function," may not be published. *Id.* California has rules governing the publication of appellate opinions. *See* CAL. RULES OF CT. 23.5-24.

⁷⁷⁰ *See* CAL. CONST. art. VI, § 11; CAL. PENAL CODE § 1239 (West Supp. 1989) (stating that upon death judgment "appeal is automatically taken by the defendant without any action by [defendant] or [defendant's] counsel").

judgment of death.⁷⁷¹ This provision imposes a duty on the California Supreme Court to determine “whether defendant was given a fair trial.”⁷⁷² Given the Anglo-American tradition establishing that the rule of law is the rule of “correct” law and given the consistent practice of the California Supreme Court under this constitutional provision, the duty of the court to determine whether the defendant has had a fair trial means that the California Supreme Court must review the entire record for errors of law.⁷⁷³ Finally, the traditional requirement that an appellate court discharge its functions in a reasoned opinion also is made applicable to the California Supreme Court by the California Constitution.⁷⁷⁴

1. The Correct Result Test of Harmless Error

Chief Justice Roger Traynor has taught us that appellate courts do not always adhere to these fundamental principles in the process of appellate review. Writing on the law governing the reversibility of errors committed in the lower courts, Chief Justice Traynor described what he called the “Correct Result Test” of harmless error.⁷⁷⁵ As indicated by its name, this test focuses on the result reached in the court below. Under this test, an appellate court will not reverse a judgment, regardless of the nature and number of errors found on appeal, if the court below reached the “correct” result.⁷⁷⁶ In assessing the “correctness” of the result, the appellate court substitutes itself for the court or jury trying the case and decides what result it would have reached in the case if the correct law had been applied accurately below.⁷⁷⁷ If the court decides that it would have reached the same result as ordered in the lower court then, despite the nature and number of errors committed, the court will affirm the judgment.⁷⁷⁸ Justice Traynor attributes

⁷⁷¹ See CAL. PENAL CODE § 1243 (West 1982).

⁷⁷² *People v. Stanworth*, 71 Cal. 2d 820, 833, 457 P.2d 889, 898, 80 Cal. Rptr. 49, 58 (1969) (quoting *People v. Perry*, 14 Cal. 2d 387, 392, 94 P.2d 559, 561 (1939)).

⁷⁷³ *People v. Deere*, 41 Cal. 3d 353, 363, 710 P.2d 925, 930, 222 Cal. Rptr. 13, 19 (1985).

In Justice Traynor’s words, the right to a fair trial is the right to “a trial free of harmful error.” R. TRAYNOR, *supra* note 604, at 20.

⁷⁷⁴ CAL. CONST. art. VI, § 14 (providing that “[d]ecisions of the [s]upreme [c]ourt and courts of appeal that determine causes shall be in writing with reasons stated”).

⁷⁷⁵ R. TRAYNOR, *supra* note 604, at 18-22.

⁷⁷⁶ *Id.* at 21-22.

⁷⁷⁷ *See id.*

⁷⁷⁸ This assumes that the error committed in the lower court does not invoke an automatic reversal rule.

the use of this test to the assumption "that there is never anything dubious about a judgment that has reached the correct result."⁷⁷⁹

However, if a court uses the Correct Result Test in a criminal case, it violates the defendant's right to a fair trial and a number of the defendant's other federal constitutional rights.⁷⁸⁰ Accordingly, Justice Traynor concludes that a court should never use the test as the standard for determining the reversibility of error on appeal in a criminal case.⁷⁸¹ Despite all that is wrong with the Correct Result Test, it is sometimes used in appellate opinions as the test for the reversibility of error found on appeal.⁷⁸² Apparently the belief "that there is never anything dubious about a judgment that has reached the correct result"⁷⁸³ beguiles some courts into ignoring the mischief it inflicts on the legal system and on the defendant in a criminal case.

2. The Correct Result Test as a Standard of Review

Although Chief Justice Traynor confined his remarks to the use of the Correct Result Test as a standard for assessing the reversibility of error on appeal, there is no reason to believe that appellate courts confine the Correct Result Test to the question of harmless error.⁷⁸⁴ Once a court accepts the Correct Result Test as a standard for determining the reversibility of the errors committed in the courts below, it is all too easy to use that test to decide the entire case. If the error is harmless in any event, why bother to decide the question of the existence of the error?⁷⁸⁵ Indeed, some appellate courts have been known to use pre-

⁷⁷⁹ R. TRAYNOR, *supra* note 604, at 18.

⁷⁸⁰ *See id.* at 18-21. Justice Traynor's book did not discuss the provisions of the California Constitution because his book did not focus on California law. Justice Traynor also did not specifically discuss the Anglo-American legal tradition addressed in this Article. *See supra* notes 764-70 and accompanying text.

⁷⁸¹ R. TRAYNOR, *supra* note 604, at 19-22.

⁷⁸² *Cf. id.* at 18-22; *see also* *People v. Ross*, 67 Cal. 2d 64, 80-81, 429 P.2d 606, 618, 60 Cal. Rptr. 254, 266 (1967) (Traynor, C.J., dissenting) (arguing that California Supreme Court's majority opinion impermissibly "focus[ed] solely on the outcome of the case" in its analysis of error).

⁷⁸³ *Id.* at 18.

⁷⁸⁴ Since Justice Traynor's book was concerned with solving the riddle of harmless error, he did not mention this point.

⁷⁸⁵ The Lucas court refused to rule on the existence of error in a number of automatic appeals decided this year on the ground that in any event the error was harmless. *See supra* notes 623-27 and accompanying text. This technique might be labelled the "avoidance" technique. If the court used the Correct Result Test in these cases to decide the reversibility of the error, then the court subtly used the Correct Result Test to decide the entire appeal. *See also infra* note 791 and accompanying text.

cisely this reasoning to affirm judgments of death in death penalty appeals.⁷⁸⁶

There are additional reasons for believing that appellate courts are prone to use the Correct Result Test to decide the entire case. For example, the Correct Result Test uses essentially the same process that lawyers use to evaluate cases in advance of trial. The lawyer musters the facts of the case, applies the law to those facts, and predicts a "correct" result. In using this analysis, the lawyer assumes the role of the jury (if a jury trial is anticipated) and asks what result the jury would reach by applying the correct law to the facts of the case. Having a predicted result in the case helps the lawyer to advise clients on a wide array of questions. In the context of a criminal case, lawyers nearly always use predicted results to advise defendants about the advantages and disadvantages of a negotiated plea.

Since appellate court judges are generally lawyers with years of practice experience, one can assume that most of them are familiar with this process and with its use to effect a result in many civil⁷⁸⁷ and criminal cases.⁷⁸⁸ Evaluating cases according to how a jury would apply the law to the facts of the case is what they have routinely done as lawyers. Given this perspective and the legal profession's overriding concern with results, if the judge concludes that any jury would return the same verdict no matter how many times the case goes to trial, the judge may adapt the process by which she decides the case. If the judge also is faced with a crushing calendar of important cases, and if the briefs in most of these cases are long and complex and tender many difficult issues, the temptation to use the Correct Result Test may be nearly irresistible. In the words of Chief Justice Traynor, "There is a superficial appeal to the argument that if a new trial without error would clearly have the same result, justice would be delayed and judicial resources wasted by requiring it."⁷⁸⁹ It thus should not be surprising to find that appellate courts do not always limit their use of the Correct Result Test to the question of the reversibility of error found in the proceedings below.⁷⁹⁰

⁷⁸⁶ Compare *Sanne v. Texas*, 609 S.W.2d 762, 770 (Tex. Ct. App. 1980) (avoiding four of defendant's error arguments and stating, inter alia, "[e]rror, if any, was harmless") with *id.* at 781-82 (criticizing majority opinion for dismissing errors as harmless "without discussion or analysis") (Phillips, J., dissenting).

⁷⁸⁷ Lawyers use this process in civil cases to evaluate settlement proposals.

⁷⁸⁸ Lawyers generally use this process to evaluate the possibility of entering into a negotiated plea.

⁷⁸⁹ R. TRAYNOR, *supra* note 604, at 21.

⁷⁹⁰ See, e.g., *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847, 244

If a court uses the Correct Result Test to decide an automatic appeal, one would expect the opinion to follow this form: After accurately stating the facts of the case, the judge would identify the correct rules of law governing the case, assume the role of the trial judge or jury (or both), apply those correct rules to the facts, and reach a conclusion. If the judge concludes that the judge or jury would have found the defendant guilty of the capital offense, found the special circumstance to be true, and sentenced the defendant to death, then the judge would affirm the death judgment. On the other hand, if the judge reaches a contrary conclusion at any of the three stages of the capital trial, the judge would reverse the judgment.⁷⁹¹ Absent from such an opinion is a statement of the law actually applied in the lower court, an analysis of the correctness of that law, and an assessment of the impact that any errors may have had on the result reached below. Though these topics are the essential ingredients of an opinion which reviews the lower court's judgment for correctness, they would be missing from the hypothetical opinion because they are irrelevant to the Correct Result standard of review.

There are a number of objections to the use of the Correct Result Test as the standard for reviewing death judgments in the California Supreme Court. One of the most important objections is that it would violate the court's duty to review death judgments for errors of law committed in the courts below.⁷⁹² Its use also would violate a number of the defendant's federal constitutional rights.⁷⁹³

Cal. Rptr. 181, 193 (1988) (Mosk, J., joined by Broussard, J., concurring in the judgment and dissenting). If Justice Mosk's dissenting opinion accurately describes the process by which the Deukmejian majority reached its judgment, then the Lucas court used the Correct Result Test to decide the entire case. *Id.* at 656, 749 P.2d at 848, 244 Cal. Rptr. at 194.

⁷⁹¹ The reversal would depend on the judge's conclusion with respect to each phase of the trial.

⁷⁹² *See supra* notes 771-73 and accompanying text. The use of the Correct Result Test violates this duty because the court does not review the errors allegedly committed in the lower court proceedings. These errors are irrelevant to affirmance or reversal of the judgment. Whether the judge or jury, applying correct law, would reach the same result on retrial represents the only consideration.

⁷⁹³ *See, e.g.,* R. TRAYNOR, *supra* note 604, at 18-22. Justice Traynor confines his analysis to use of the Correct Result Test as a standard for determining the reversibility of error on appeal. However, his analysis applies with equal, if not greater, force to use of the Correct Result Test to decide the entire appeal.

3. The Correct Result Test or Some Other Result Oriented Test: Does It Make a Difference?

Once one suspects that a court is using a result oriented test, one would further suspect that it is the Correct Result Test. This test uses the law as the standard for determining whether the result reached below should be affirmed or reversed. Thus, it is a principled result oriented test.⁷⁹⁴ Moreover, the result oriented technique lawyers use to evaluate cases and the result oriented test appellate courts sometimes (erroneously) use to decide the reversibility issue, both rely on determining the correctness of the result by applying the law that the court below should have applied to the facts of the case.⁷⁹⁵

On the other hand, a result oriented test does not necessarily rely on the law to determine the question of whether the judgment should be affirmed or reversed. That determination could rely on a variety of different criteria. For example, it could rely on the judge's personal views of what result is proper. Indeed, this charge was made against Chief Justice Bird and Justices Reynoso and Grodin during the 1986 retention election campaign.⁷⁹⁶

Regardless of the criteria a court uses to decide to affirm or reverse a judgment, all result oriented tests share the same fault. They ignore the errors committed in the courts below and focus exclusively on the results. Hence, when an appellate court uses any result oriented test it fails to discharge its "review for correctness" function.⁷⁹⁷ Since the "review for correctness" function is an essential component of the Anglo-American judicial process,⁷⁹⁸ and since the California Constitution requires the California Supreme Court to review automatic appeals for "correctness,"⁷⁹⁹ the use of any result oriented test by the California Supreme Court equally would violate these principles. For this reason, except for the satisfaction of knowing precisely what a court is doing, it makes no difference whether the court employs the Correct Result Test or some other result oriented standard. Since the use of any result oriented test is equally impermissible, the term "Result Test" will be used

⁷⁹⁴ This author objects to use of the Correct Result Test because judges cannot legitimately use this test in a legal system dedicated to the rule of law, the common law process, and the rights secured by federal and state constitutions. *See supra* notes 764-93 and accompanying text.

⁷⁹⁵ *See supra* notes 787-90 and accompanying text.

⁷⁹⁶ *See supra* notes 278-319 and accompanying text.

⁷⁹⁷ *See supra* notes 775-93 and accompanying text.

⁷⁹⁸ *See supra* notes 764-69 and accompanying text.

⁷⁹⁹ *See supra* notes 770-74 and accompanying text.

in the remainder of this Article to include the Correct Result Test and any other variety of result oriented standards.

B. Is the Lucas Court Using a Result Test to Decide Automatic Appeals?

1. Introduction

Two questions are raised by the suspicion that something is amiss with the Lucas court's process of decisionmaking in automatic appeals.⁸⁰⁰ First, is the available evidence sufficient to support an impartial finding that the Lucas court is using a Result Test to decide automatic appeals? Second, if the evidence will not support that finding, is it sufficient to raise a reasonable suspicion that a Result Test is being used?

It is not uncommon to find that a variety of inferences can be drawn from evidence examined as proof of any issue. At one extreme, the evidence may do no more than raise a suspicion in the mind of an impartial fact-finder that the issue under investigation is true. For example, the evidence may be too fragmentary or too sparse to support a factual finding on the question, or the consequences that might flow from that finding may make one demand more convincing evidence before the finding is made. At the other extreme, the inferences drawn from the evidence may convince an impartial fact-finder beyond a reasonable doubt that the evidence proves the suspected fact true. The difference between these two extremes is the sufficiency of the evidence to support a given finding with a certain degree of confidence that the finding is correct. The remaining sections of this Article discuss the available evidence relevant to the question of whether the Lucas court is using a Result Test to decide automatic appeals.

2. A Review of the Evidence

Before we turn to the evidence that applies exclusively to the Lucas court, one should keep in mind the context in which this evidence is found. A concern for results permeates our legal system, and as such, it is shared by the People whether they are defendants in criminal cases, members of the general public, or voters at a retention election.⁸⁰¹ Law-

⁸⁰⁰ The Lucas court's high affirmance rate raises this suspicion, just as the Bird court's high reversal rate raised a similar suspicion. *See supra* notes 339-77 & 534-49 and accompanying text.

⁸⁰¹ *See, e.g., supra* note 285 and accompanying text.

yers use a result oriented technique to evaluate cases.⁸⁰² Appellate judges have been known to use the Correct Result Test to determine the reversibility of error⁸⁰³ and sometimes to decide the entire case.⁸⁰⁴ Although lawyers may properly use a result oriented test, appellate judges may never do so, for it violates the fundamental principles that govern our courts. Since the objections to the use of a Result Test are widely accepted and generally known,⁸⁰⁵ why is it ever at work in any appellate court? The answer must lie with a Result Test's allure. There must be an enduring appeal to the argument "that if a new trial without error would clearly have the same result, justice would be delayed and judicial resources wasted by requiring it."⁸⁰⁶ This context may be helpful in interpreting the available evidence relevant to this inquiry.

a. *The Mosk Dissent in Hendricks II*

In the course of his dissenting opinion in *Hendricks II*, Justice Mosk, who was joined by Justice Broussard, wrote:

I dissent, however, from the affirmance of the judgment as to penalty. In their discussion the majority have devised a novel means to satisfy the constitutional requirement of heightened reliability for a sentence of death: no matter how misleading the instructions and the arguments of counsel may be, the prosecutor will be deemed able to "cure" the harm if his statements to the jurors are correct in *some* respect, and a reviewing court will stamp its approval on the ultimate result — even if the prosecutor himself is responsible in large part for misleading the jurors, and even if the result of his erroneous argument is death. I cannot subscribe to such an unprincipled "rule," even when it is applied in the case of one of society's malefactors. The grim satisfaction of eliminating one repetitive criminal is not worth the damage to the fair and orderly administration of justice.⁸⁰⁷

If one credits Justice Mosk's statement about how the Deukmejian majority reached its decision to affirm the judgment of death in *Hendricks II*, by placing its "stamp [of] approval on the ultimate result," then the Mosk dissenting opinion is evidence that the Lucas court applied a result oriented test to affirm the judgment of death in that case.

⁸⁰² See *supra* notes 787-88 and accompanying text.

⁸⁰³ See *supra* notes 782-83 and accompanying text.

⁸⁰⁴ See *supra* notes 784-86 and accompanying text.

⁸⁰⁵ See *supra* notes 791-93 and accompanying text.

⁸⁰⁶ R. TRAYNOR, *supra* note 604, at 21; see also *supra* notes 782-90 and accompanying text.

⁸⁰⁷ *People v. Hendricks II*, 44 Cal. 3d 635, 656, 749 P.2d 836, 847-48, 244 Cal. Rptr. 181, 193-94 (1988).

The court's use of a result oriented test in this very troubling automatic appeal is also evidence relevant to the further inference that the court is applying a result oriented test in other automatic appeals.

b. The Lucas Court's High Affirmance Rate in These Automatic Appeals

As noted above, the high affirmance rate, especially when we consider it in light of the substantial change from the low affirmance rate of the Bird court, raises a suspicion that something is awry with the process by which these appeals were affirmed.⁸⁰⁸ This high affirmance rate is also evidence relevant to the current inquiry.

Five factors indicated that a high reversal rate should have been expected from the Bird court.⁸⁰⁹ These same five factors applied equally to the cases that the Lucas court decided this year. The cases all came from the inventory of older automatic appeals flawed with the various errors recognized under Bird court precedent. Furthermore, except for the *Carlos* intent-to-kill rule, the Lucas court appeared to decide these issues exclusively on the basis of Bird court precedent. Because of these five factors, and because the Lucas court adhered to the Bird court precedent, a high reversal rate for the Lucas court would have been predicted. Yet the Lucas court produced the precise opposite, a very high affirmance rate.

Once we conclude that the difference in the reversal rate between the Bird and Lucas courts represents change in the way the court is deciding automatic appeals,⁸¹⁰ two probable explanations for the disparate results come to mind. Either the Deukmejian majority is applying the law received from the Bird court in a way different than the Bird court applied it, or the Lucas court is using a Result Test to decide these automatic appeals, and the law the court cites is being used as a rationalization to obscure that fact.

⁸⁰⁸ See *supra* notes 339-77, 534-49, 800 and accompanying text.

⁸⁰⁹ These five factors include: (1) the uniqueness of the death penalty (death is different); (2) the enhanced complexity of death penalty law; (3) the California law of capital punishment was in its formative stage during the Bird court's tenure; (4) the statutory law's ambiguity; and (5) the constitutionalization of death penalty law. For a discussion of these factors, see *supra* notes 261-72 and accompanying text.

⁸¹⁰ For a discussion of this issue, see *supra* notes 550-71. Most observers, including Governor Deukmejian, concede that the change in affirmance rate between the Lucas and Bird courts reflects changes in the two courts' methods of deciding automatic appeals. See, e.g., *supra* note 543 and accompanying text.

c. *An External Motive: The Political Pressure to Change the Bird Court's High Reversal Rate and to Affirm Death Judgments*

The overwhelming popular support for the death penalty in California and the refusal of a further term in office to Chief Justice Bird and Justices Reynoso and Grodin at the 1986 judicial retention election would provide a justice of the California Supreme Court with strong motivation to affirm death judgments. Unless the newly reconstructed court produced death penalty affirmances, the politically powerful pro-capital punishment interests probably again would rally the People against the justices at the next retention election.

In the course of his dissenting opinion in *Anderson* (James), Justice Broussard subtly accused his brethren of acting in response to this political pressure when the court overruled the *Carlos* intent-to-kill rule:

Periodically, when the political winds gust in a new direction, it becomes necessary to remind all concerned of the virtues of a steady course. As lawyers and judges, we sometimes deliver our reminder in Latin: stare decisis. . . .

. . . [T]he circumstances which warrant changes in the law do not include changes in personnel of the court. If the law were to change with each change in the makeup of the court, then the concept that ours is a government of law and not of men would be nothing more than a pious cliché.⁸¹¹

Because a Result Test disregards the errors committed in the court below and focuses only on the appropriateness of the result, it provides a facile solution for this troubling political problem. For example, if the court were to conclude that no matter how many times a particular case goes to trial the jury will return a verdict of death, then regardless of the errors committed in the lower court proceedings, the judgment of death arguably could be affirmed. A Result Test thus offers the Lucas court a way to satisfy the People's demand for death penalty affirmances in California. By gratifying this demand, the court could forestall a campaign by the pro-capital punishment interests in California to deny the new justices a further term in office.

d. *An Internal Motive: The Problem Presented by the Large Inventory of Older Cases That Contain Flaws Related to Standardized Jury Instructions*

⁸¹¹ *People v. Anderson* (James), 43 Cal. 3d 1104, 1152-53, 742 P.2d 1306, 1335, 240 Cal. Rptr. 585, 614-15 (1987) (Broussard, J., dissenting) (quoting Justice Ryan's concurring opinion in *People v. Lewis*, 88 Ill. 2d 129, 166, 430 N.E.2d 1346, 1364 (1982)).

Significantly, the use of a Result Test also offered a solution to another of the court's pressing problems. The new court could best avoid further political controversy over the handling of automatic appeals if it affirmed a number of death judgments soon after taking the bench. Unfortunately, the inventory of older cases tried under the flawed standard jury instructions presented a difficult problem for the Lucas court.⁸¹² Since the court decided to accept all of the Bird court death penalty precedent (except for the *Carlos* rule), it was foreseeable that the court would reverse a number of these older cases under that precedent.⁸¹³ If a substantial portion of the death judgments were reversed, the court still would appear to be the major impediment to implementation of the death penalty in California. Bird court results under the Lucas court's name was not the change the People or Governor Deukmejian had in mind when they, together, altered the composition of the court.

Furthermore, every death case the court reversed would return to the docket as another automatic appeal if a retrial ended in a judgment of death. Thus, the court had a motive to seek a solution to the special problem presented by the inventory of older flawed cases. A Result Test offers a beguiling remedy. The court could disregard errors and affirm all of the cases in which a death judgment seemed to the justices the proper result. These affirmances would mollify the People's concern with the court's handling of automatic appeals and would eliminate the possibility that the affirmed cases would return to clog the court's docket another day.

e. The Adoption and Use of a Multi-Factored Balancing Test to Cure Standardized Instructional Error

Standing alone, a reviewing court's adoption of a multi-factored balancing test to assess the validity of a particular procedure does not support an inference that the court has used a Result Test to review the judgments of lower courts. Multi-factored balancing tests are commonly accepted as legitimate tools for resolving certain categories of disputes. But the Lucas court's use of the Cure Technique,⁸¹⁴ which incorporates a multi-factored balancing test, to cure instructions in death penalty

⁸¹² See *supra* notes 572-92 and accompanying text.

⁸¹³ This reason apparently induced the Attorney General of California to urge the Lucas court "to reconsider not only [*Carlos*] and [*Turner*], but also virtually every other decision construing the 1977 or 1978 death penalty laws." *Anderson* (James), 43 Cal. 3d at 1153, 742 P.2d at 1335, 240 Cal. Rptr. at 614 (Broussard, J., dissenting) (citations omitted); see also *supra* note 600 and accompanying text.

⁸¹⁴ See *supra* notes 628-72 and accompanying text.

trials is evidence that the court is using a Result Test for two reasons.

First, the Lucas court never explained why it abandoned the traditional method of analyzing jury instructions in California⁸¹⁵ in favor of a technique that a majority of the Bird court never adopted⁸¹⁶ as a method for curing errors in crucial jury instructions.⁸¹⁷ Second, the architecture of the Cure Technique suggests that something is amiss. The rule uses a multi-factored balancing test, and multi-factored balancing tests tend to produce decisions with low accountability. This is because multi-factored balancing tests rely on the judge to evaluate an array of varying facts under a general standard.⁸¹⁸ Given our conception of the permissible scope of a judge's evaluative judgment, a wide range of different conclusions are both acceptable and foreseeable.⁸¹⁹ When this wide range of permissible judgment is coupled with the unique facts being evaluated in a given case, it is difficult to criticize or disagree with the decision on principle. In other words, it is difficult for another to hold the decisionmaker accountable for the decision, except in the most general terms.⁸²⁰ Because of this low level of accountability, the court can use a multi-factored balancing test to translate a conclusion reached under a Result Test into apparently acceptable legal doctrine.

Moreover, since the Cure Technique is so dependent upon the facts of each case, holdings under this analysis are of little precedential value. They will not bind the court under the principle of stare decisis beyond the commitment to apply the Cure Technique to flawed jury instructions in the future.⁸²¹ The fact that these rulings have so little

⁸¹⁵ See *People v. Allen*, 42 Cal. 3d 1222, 1277-80, 729 P.2d 115, 149-52, 232 Cal. Rptr. 849, 883-86 (1986).

⁸¹⁶ A majority of the Bird court never agreed whether the court could use the "cure" analysis to "cure" errors in penalty phase jury instructions. Furthermore, a majority did not agree that the court could use the analysis to establish that the penalty phase instructional error was harmless under the appropriate standard of review. The court affirmed a death judgment on a finding that counsel's arguments "cured" the errors in the standard flawed penalty phase jury instructions for the first time in *Allen. Id.* at 1280, 729 P.2d at 152, 232 Cal. Rptr. at 886. In all other cases that mention it, the Cure Technique appeared either as dictum, or the court used the technique to analyze the reversibility of error. See *supra* notes 639-48 and accompanying text.

⁸¹⁷ Chief Justice Lucas has suggested that various combinations of the concurring and dissenting opinions in *California v. Brown*, 479 U.S. 538 (1987), require the court to employ this analysis for federal constitutional error but does not address the state law question.

⁸¹⁸ See *supra* notes 602-03 and accompanying text.

⁸¹⁹ See *supra* note 606 and accompanying text.

⁸²⁰ See *id.*; *supra* notes 626-27 and accompanying text.

⁸²¹ See *supra* notes 665-66 and accompanying text.

binding force reinforces the value of their use as a method of translating a conclusion reached under a Result Test into seemingly legitimate legal doctrine.

The Lucas court has replaced an established rule which inevitably leads to a reversal in each case flawed with common instructional errors with another rule which permits the court to conclude that the errors have been cured.⁸²² The court then has used the new rule, the Cure Technique, to affirm each case in which these common errors appear and yet has never mentioned the replaced rule or offered an analysis of why it was abandoned.⁸²³ The inference here is that the court replaced the traditional rule because it did not like the *result* the rule produced — the reversal of death judgments. When we combine this behavior with the fact that the structure of the new rule easily allows the court to translate this concern for results into the language of acceptable legal doctrine, the inference is even more compelling that the court adopted this new rule because it permits the court to reach the results it prefers.

One case from the Lucas court's first year provides an excellent example of the Deukmejian majority using the Cure Technique to translate its assessment of a case under a Result Test into more acceptable legal doctrine. In *Hendricks II*, the trial court instructed the penalty phase jury with the flawed factor (k) and mandatory-sentencing instructions. The Deukmejian justices, speaking through Chief Justice Lucas, applied the Cure Technique and concluded that the arguments of counsel had cured the defects in these instructions. The court thus affirmed the judgment of death.⁸²⁴

Justice Mosk, joined by Justice Broussard, filed a vigorous dissent on this point. After criticizing the majority for employing a Result Test in the guise of the Cure Technique,⁸²⁵ Justice Mosk proceeded to analyze the relevant portions of the prosecutor's argument that the Lucas opinion omitted.⁸²⁶ Justice Mosk concluded that the arguments of counsel did not cure the error in the penalty phase instructions.⁸²⁷ When one

⁸²² See *supra* notes 634-50 and accompanying text.

⁸²³ See *supra* notes 651-58 and accompanying text.

⁸²⁴ *People v. Hendricks II*, 44 Cal. 3d 635, 650-56, 749 P.2d 836, 843-47, 244 Cal. Rptr. 181, 189-93 (1988).

⁸²⁵ *Id.* at 656, 749 P.2d at 847, 244 Cal. Rptr. at 193. The critical passage from the Mosk dissent appears in the text accompanying *supra* note 807.

⁸²⁶ *Hendricks II*, 44 Cal. 3d at 657-59, 749 P.2d at 849-51, 244 Cal. Rptr. at 195-97.

⁸²⁷ See *supra* note 807 and accompanying text. Under this analysis, the court should abandon the Cure Technique and should return to the traditional method for analyzing

reads the relevant portions of the prosecutor's argument,⁸²⁸ Justice Mosk's accusation appears to be both accurate and fair.

Chief Justice Lucas' opinion for the Deukmejian justices in *Hendricks II* demonstrates three points. First, the multi-factored balancing test used in the Cure Technique permits a court to translate an application of a Result Test into apparently acceptable legal doctrine. Second, a judge can use a multi-factored balancing test in such a way that there is little accountability for the judge's decision. Indeed, if Justice Mosk had not written his dissent, the Lucas opinion for the Deukmejian majority would have appeared to fall within the range of a judge's legitimate evaluative judgment. One needs only to read the Lucas opinion in isolation from the Mosk dissent to find an excellent illustration of this point. Lastly, the Lucas opinion shows that the Deukmejian majority employed a Result Test to affirm the judgment of death in one of the cases from the inventory of older automatic appeals flawed by errors in the standard penalty phase jury instructions. *Hendricks II* was one of those cases.⁸²⁹

f. The Language of the Court's Opinions

The Lucas court's opinions this year do not expressly use a Result Test to decide automatic appeals. They appear to resolve the issues they address by applying rules of law to the facts of the case to reach the court's conclusion. If the court is using a Result Test to decide these cases, the evaluation reached under that test has been translated into traditional legal language. Judicial opinions carry a presumption that what the court says it is doing accurately reflects what the court has

jury instructions. By joining Justice Grodin's plurality opinions in *Allen and Myers*, Justice Mosk has used the test both to affirm and to reverse death judgments. See *supra* notes 634, 644, 664 and accompanying text. However, the Deukmejian justices have consistently used this technique to affirm death judgments.

⁸²⁸ Compare *Hendricks II*, 44 Cal. 3d at 652-53, 749 P.2d at 845-46, 244 Cal. Rptr. at 191-92 (setting out portions of prosecutor's argument used by Chief Justice Lucas) with *id.* at 657-59, 661, 749 P.2d at 849-51, 244 Cal. Rptr. at 195-97 (setting out prosecutor's language deemed harmful by Justice Mosk).

⁸²⁹ Of course, it is possible that the Deukmejian justices did not even bother to analyze the result (the judgement of death) to see if they agreed that the same result would have been reached under a correct application of the law. But there is no reason to believe that the Deukmejian appointees are unprincipled in affirming the death judgments. The principled way of applying a result oriented test is to employ the Correct Result Test. See *supra* note 794 and accompanying text. Furthermore, as we have seen above, it is the result oriented test that the judges of a reviewing court are most likely to adopt. See *id.* and accompanying text.

done. The opinions themselves thus would offer the strongest evidence that the Lucas court is not applying a Result Test in deciding automatic appeals.

However, it is naive to assume that opinions necessarily reflect how the court actually resolves the case.⁸³⁰ In view of objections to the use of a Result Test, no court would decide an appeal by overtly using that test in the course of its opinion. When the majority uses a Result Test to decide the case, that fact may be disclosed in a dissenting opinion. Another way to discover the court's use of a Result Test is to weigh evidence supporting such a conclusion against the contrary evidence in the language of a court's opinions.

3. Has the Lucas Court Used a Result Test to Decide Automatic Appeals?

The combination of (1) the court's high affirmance rate in circumstances in which one would expect to find a relatively high reversal rate; (2) the motive to affirm death cases to appease the politically powerful pro-capital punishment interests and the popular will; (3) the motive to affirm the cases in the court's inventory of cases flawed with standardized instructional error; (4) the court's use of the Cure Technique; and (5) the evidence gleaned from Justice Mosk's dissenting opinion in *Hendricks II*, all combine to support a finding that the Lucas court has applied a Result Test in deciding automatic appeals this first year. The principal evidence supporting a contrary conclusion comes from the court's opinions themselves. They are cast in the familiar form and language of an opinion deciding cases under the traditional, constitutional requirement that the California Supreme Court must review the proceedings of the lower court for errors of law.

A finding that the Lucas court is applying a Result Test to decide automatic appeals is an extremely serious matter. It would mean that the justices are abusing their office by violating the most fundamental duty imposed upon appellate judges in the Anglo-American judicial process — the duty of assuring that the trial was fair and that the judgment it produced was the product of the law correctly conceived and applied in the proceedings below. Worse yet, such a finding would mean that the court is affirming death judgments when they should be reversing them under the law of the land.

Additionally, this issue arises in the wake of the Bird court contro-

⁸³⁰ For a discussion of the use of subterfuge in appellate opinions, see G. CALABRISI, *A COMMON LAW FOR THE AGE OF STATUTES* 172-77 (1982).

versy. Though the truth of the charges made against Chief Justice Bird and Justices Reynoso and Grodin has yet to be established, a clear majority of the voters at the retention election apparently believed them. The People lost faith in the California Supreme Court under Chief Justice Bird. They probably lost some faith in the entire judicial system and in the rule of law as well. A finding that the Deukmejian justices are violating the very law they are sworn to uphold, a finding that these justices are illegitimately affirming death judgments, will not heal the wounds caused by the Bird court controversy. It will inflame them.

The accusation is so serious, and its proof so devastating, that we should require more than the evidence available from sixteen cases decided in a single year. An impartial observer should reserve judgment on this question until more of the Lucas court's opinions are available and until commentators gather additional evidence from an analysis of the records and briefs in the cases. Even so, the existing evidence should be sufficient to raise a suspicion in the mind of an impartial observer that the Lucas court has used a Result Test to decide automatic appeals. Further evidence, gathered from the court's future action, is necessary to confirm or refute this suspicion.

CONCLUSION

The current controversy with capital punishment in California, and the way the Lucas court has handled automatic appeals, is best understood in light of what has gone before. Until 1972, California's capital punishment laws generally reflected the mainstream American experience with the death penalty. California never abolished capital punishment, even after periods of extensive, frequently acrimonious, debate.⁸³¹ That debate, however, did produce a series of legislative changes in the law. While most of these reforms mimicked the mainstream American experience, others developed along different lines.⁸³²

Opposition to the death penalty became widespread throughout the Nation in the 1950s and the early 1960s. During this period, nine American states either abolished capital punishment for all crimes or retained it for only a few narrowly defined offenses.⁸³³ California responded with the bifurcated capital trial in 1957, but neither abolished

⁸³¹ For a brief summary of early abolitionist movements in the United States, see AMNESTY INT'L REPORT, *supra* note 1, at 12-13.

⁸³² See, e.g., *supra* notes 48-56 and accompanying text.

⁸³³ See AMNESTY INT'L REPORT, *supra* note 1, at 13. The murder of a law enforcement officer and the murder by a prisoner already serving a life sentence exemplify these narrowly defined offenses. *Id.*

capital punishment nor narrowly defined the offenses punishable by death.⁸³⁴

As popular opposition to capital punishment rose, there was a concomitant rise in constitutional attacks on the institution of capital punishment in the courts. The last execution in California took place in 1967.⁸³⁵ By 1968, cases raising constitutional challenges to capital punishment were pending in the United States Supreme Court.⁸³⁶ This led to an unofficial moratorium on executions after 1967 and to the constitutional crises with capital punishment.⁸³⁷

A few years later, in 1972, capital punishment statutes were found to be constitutionally deficient for the first time in the history of our Nation. In *People v. Anderson*, the California Supreme Court held that the California death penalty statutes violated the California Constitution.⁸³⁸ In *Furman v. Georgia*, the United States Supreme Court ambiguously constitutionalized capital punishment law.⁸³⁹ Rather than settling the question of capital punishment, *Furman* and *Anderson* fueled the claim that capital punishment was a political issue exclusively reserved to the political branches of government and that courts acted illegitimately when they invalidated the public will embodied in capital punishment statutes.⁸⁴⁰

Public opinion on capital punishment proved to be volatile. As the courts decided *Furman* and *Anderson*, popular opposition to capital punishment was melting into public support for the punishment of death.⁸⁴¹ Sensing that they now represented the majority will, pro-capital punishment interests responded to the California Supreme Court's ruling in *Anderson* with a successful initiative amendment to the California Constitution.⁸⁴² Once the state constitutional impediment was removed, the legislature sought compliance with *Furman* by enacting the 1973 mandatory death penalty statute.⁸⁴³

The People's desire for an effective capital punishment statute again was frustrated when the California Supreme Court invalidated the

⁸³⁴ See *supra* note 46 and accompanying text.

⁸³⁵ See AMNESTY INT'L REPORT, *supra* note 1, at 13. Only one other execution occurred in 1967, in Colorado. *Id.*

⁸³⁶ *Id.*; see also Poulos, *supra* note 2, at 162.

⁸³⁷ See AMNESTY INT'L REPORT, *supra* note 1, at 13.

⁸³⁸ See *supra* notes 48-52 and accompanying text.

⁸³⁹ See *supra* notes 9-26 and accompanying text.

⁸⁴⁰ See *supra* notes 53-55 and accompanying text.

⁸⁴¹ See *supra* notes 27-30 and accompanying text.

⁸⁴² See *supra* notes 53-56 and accompanying text.

⁸⁴³ See *supra* notes 62-78 and accompanying text.

1973 mandatory statute on federal constitutional grounds.⁸⁴⁴ California was once more without a valid death penalty statute as a result of a decision of the California Supreme Court. Again, the California Legislature tried to comply with the United States Supreme Court's constitutional doctrine by enacting the 1977 death penalty legislation.⁸⁴⁵ Again, there was dissatisfaction with the laws. But this time the pro-capital punishment interests were among the statute's critics.

Before the California Supreme Court could uphold the 1977 legislation under both the federal and state constitutions,⁸⁴⁶ the pro-capital punishment interests again turned to the People by the initiative process.⁸⁴⁷ Having lost the political battle in California's legislative halls for a "tough" death penalty statute, capital punishment proponents drafted the 1978 Death Penalty Initiative. It qualified for the ballot, and a substantial majority of the voters adopted it.⁸⁴⁸ The Initiative substantially increased the number of capital offenses,⁸⁴⁹ significantly changed a number of the procedures created in the 1977 legislation,⁸⁵⁰ and demonstrated that a majority of the voters in California wanted what they had adopted — a "tough" death penalty statute.⁸⁵¹

Finally, as it had on two prior occasions,⁸⁵² the California Supreme Court, under the leadership of Chief Justice Rose Bird, once again emerged as an impediment to the implementation of capital punishment in California.⁸⁵³ During the period extending from the decision of the first automatic appeal under the new statutes to the day of the retention election, the Bird court reversed every automatic appeal it considered with only two exceptions.⁸⁵⁴ Whether the Bird court was justified in reversing all of these automatic appeals under the law is still an open question. But the court's high reversal rate raised the suspicion that

⁸⁴⁴ See *supra* notes 91-98 and accompanying text.

⁸⁴⁵ See *supra* notes 100-28 and accompanying text.

⁸⁴⁶ In 1980, the California Supreme Court upheld the constitutionality of the 1977 legislation. *People v. Jackson*, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981).

⁸⁴⁷ See *supra* notes 129-30 and accompanying text.

⁸⁴⁸ See *supra* note 131 and accompanying text.

⁸⁴⁹ See *supra* notes 139-49 and accompanying text.

⁸⁵⁰ See *supra* notes 182-91 and accompanying text.

⁸⁵¹ See *supra* note 130 and accompanying text.

⁸⁵² See *Rockwell v. Superior Court*, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976) (invalidating 1973 Mandatory Death Penalty Statute); *People v. Anderson (Robert)*, 6 Cal. 3d 628, 493 P.2d 800, 100 Cal. Rptr. 152 (1972) (invalidating California death penalty statutes).

⁸⁵³ See, e.g., *supra* notes 278-79 & 310 and accompanying text.

⁸⁵⁴ See *supra* notes 230-31 & 322 and accompanying text.

something was wrong with the way the court was deciding automatic appeals.⁸⁵⁵ As the court's critics perceived the problem, the final impediment to the implementation of capital punishment in California was not the constitution and not the legislation, but the court itself.

Now well versed in claims that the courts were interfering illegitimately with the People's demand for the capital sanction, the pro-capital punishment interests in the state claimed that Chief Justice Bird and Justices Reynoso and Grodin were illegitimately deciding automatic appeals by enforcing not the law but their own personal views on capital punishment.⁸⁵⁶ The claim that judges were illegitimately deciding capital cases was by now a familiar charge.⁸⁵⁷ The accusation made against Chief Justice Bird and Justices Reynoso and Grodin differed only in its details.⁸⁵⁸

In this instance, the available evidence indicates that the pro-capital punishment interests acted without first determining whether this claim was founded in fact.⁸⁵⁹ The charge became the focus of the campaign aimed at denying each of these three justices an additional term in office at the November 1986 retention election. Though the charge was never proved, a clear majority of the voters apparently believed it. Chief Justice Bird and Justices Reynoso and Grodin were refused another term in office.⁸⁶⁰

With these three vacancies, a Governor with a long record in support of capital punishment would make three new appointments to the supreme court. Governor Deukmejian elevated an earlier appointee to the California Supreme Court, Justice Malcolm Lucas, to the office of Chief Justice of California and appointed former Court of Appeals Judges John A. Arguelles, David N. Eagleson, and Marcus M. Kaufman to fill the three new vacancies.⁸⁶¹ It has been said that the domination of the California Supreme Court by his appointees was one of the

⁸⁵⁵ See *supra* note 259 and accompanying text.

⁸⁵⁶ See *supra* notes 279-80 and accompanying text.

⁸⁵⁷ For example, in *Furman v. Georgia*, 408 U.S. 238 (1976), Chief Justice Burger accused the majority of illegitimately deciding that death penalty statutes that conferred unfettered discretion on the sentencing authority to select between the punishment of death and a lesser sentence violated the eighth amendment. *Id.* at 375-76 (Burger, C.J., dissenting).

⁸⁵⁸ Opponents alleged that Chief Justice Bird and Justices Reynoso and Grodin illegitimately reversed death judgments. Opponents, however, did not allege that the justices illegitimately invalidated the capital statutes. See *supra* note 279 and accompanying text.

⁸⁵⁹ See *supra* notes 280-81 and accompanying text.

⁸⁶⁰ See *supra* notes 286-319 and accompanying text.

⁸⁶¹ See *supra* notes 331-33 and accompanying text.

few items on Governor Deukmejian's political agenda.⁸⁶² The Governor's goal was probably more specific: dominate the court with judges who shared his views on capital punishment.⁸⁶³ The retention election provided him with an opportunity to achieve this goal. Taking full advantage of his opportunity, the Governor endorsed the campaign to unseat the three Bird court justices.⁸⁶⁴ With the success of that campaign, he realized his goal.

The Governor could not have been more successful. His appointees not only agreed with his views, but they have agreed among themselves one hundred percent of the time on the disposition of every death penalty issue that the court resolved this year.⁸⁶⁵ Furthermore, with the single exception of Justice Kaufman's two sentence opinion concurring in the judgment in *Williams*, the Deukmejian appointees also completely agreed on the rationale for disposing of these death penalty issues.⁸⁶⁶ And in each case in which the court addressed death penalty issues this first year, except for the penalty phase reversal in *Anderson* (James), the court affirmed the judgment of death.⁸⁶⁷ This amounts to a ninety-two percent affirmance rate. In short, each of the Deukmejian appointees behaved as though they were of a single mind in deciding these automatic appeals this year.⁸⁶⁸

Just as the Bird court may seem to have been too disrespectful of the popular will, the Deukmejian justices appear to be too compliant. Just as the Bird court's high reversal rate raised the suspicion that something was amiss with the way it decided automatic appeals, so the Deukmejian majority's high affirmance rate raises the suspicion that the court has abandoned the law in favor of the use of a Result Test to review death judgments on automatic appeal.⁸⁶⁹ The available evidence tends to support a finding that the Lucas court is resolving death penalty appeals by an application of a Result Test.⁸⁷⁰ This would mean that the justices are abusing their office by violating the most fundamental duty imposed upon appellate judges in the Anglo-American judicial process — the duty of assuring that the trial was fair and that the judgment it produced was the product of the law correctly conceived

⁸⁶² See Zeiger & Block, *supra* note 536, at 51.

⁸⁶³ See *supra* notes 537-43 and accompanying text.

⁸⁶⁴ See *supra* note 290 and accompanying text.

⁸⁶⁵ See *supra* notes 384, 388 & 404 and accompanying text.

⁸⁶⁶ See *supra* notes 450-53 and accompanying text.

⁸⁶⁷ See *supra* notes 404-12 and accompanying text.

⁸⁶⁸ See *supra* note 546 and accompanying text.

⁸⁶⁹ See *supra* note 800 and accompanying text.

⁸⁷⁰ See *supra* notes 801-30 and accompanying text.

and applied in the proceedings below.⁸⁷¹ It also would mean that the Lucas court is affirming death judgments when they should be reversing them. Further evidence is needed before an impartial observer could draw this conclusion with sufficient certainty. However, even at this point, the evidence is strong.

For sixteen years, the People of the State of California have struggled to implement capital punishment in California. They have overcome every impediment placed in their way. They amended the California Constitution to overrule a decision of the California Supreme Court. They adopted a new death penalty statute by the initiative process because they were dissatisfied with the labors of the California Legislature. Most recently, they caused a change in the personnel of the California Supreme Court.

The California Supreme Court now is affirming death judgments. But is the Lucas court doing what the People had in mind by replacing Chief Justice Bird and Justices Reynoso and Grodin? Is the Lucas court legitimately deciding death penalty appeals? Or have the justices fashioned their opinions to conform to power politics and the People's general demand that the death penalty be implemented in California?

⁸⁷¹ See *supra* notes 764-70 and accompanying text.

TABLE 1
THE BIRD COURT DISPOSITION OF AUTOMATIC APPEALS

YEAR	1979	1980	1981	1982	1983	1984	1985	1986*	Cumulative
Affirmances									
No. of Cases:	-0-	1	1	-0-	1	-0-	-0-	1	4
Reversals									
No. of Cases:	3	4	2	7	4	12	24	11	67
Affirmance Rate (%) :	0%	20%	33.33%	0%	20%	0%	0%	8%	6%
Reversal Rate (%) :	100%	80%	66.67%	100%	80%	100%	100%	92%	94%
* The data for 1986 may be broken down further as follows:									
	Pre-Retention Election				Post-Retention Election				
Affirmances				-0-					1
Reversals				5					6
Affirmance Rate				0%					14%
Reversal Rate				100%					86%

TABLE 2
VOTING RECORD OF EACH JUSTICE RELATIVE TO THE DISPOSITION IN THE
MAJORITY OPINION*

	Affirm Entire Judgment	Reverse Guilt	Reverse One or More Special Circumstance Findings	Reverse Sanity	Reverse Penalty
Majority Opinion	12	2	3**	1	1
Lucas, C.J.	12	2	3	1	1
Arguelles, J.	12	2	3	1	1
Broussard, J.	5	3	5	1	7
Eagleson, J.	12	2	3	1	1
Kaufman, J.	12	2	3	1	1
Mosk, J.	8	2	6	1	5
Panelli, J.	12	2	3	1	1

* This table depicts the voting record of each of the justices relative to the disposition ordered in the majority opinion. Only the disposition which was ordered because of a finding of reversible error is depicted in this table. Reversals of subsequent stages of the trial, which are ordered because a prior proceeding has been reversed, are not shown. As indicated, the majority opinion in the sixteen automatic appeals decided this year affirmed twelve judgments in their entirety. In other words, the guilt judgment, at least one special circumstance finding, the sanity phase (if a sanity phase was involved in the trial), and the judgment of death were affirmed in twelve of the automatic appeals. The guilt judgment was reversed in two. Although the reversal of the guilt judgment compelled a reversal of all other phases of the trial, the reversal of the subsequent phases is not shown, for they were the inevitable result of the court's finding of reversible error at the guilt stage. Three special circumstance findings were set aside by the court, but as the defendant remained death eligible because one special circumstance was affirmed by the court, none of these rulings affected the judgment in the subsequent proceeding. There was one reversal of a sanity phase judgment this year. That reversal compelled a reversal of the death judgment as well. But since that ruling had nothing to do with death penalty law, the compelled reversal of the death judgment is not known. There was one reversal of a death judgment alone this year.

** Although the majority opinion recognized that it was error for the jury to find two multiple-murder special circumstances in *Kimble* and *Ruiz*, the court failed to set aside the additional finding in both cases.

TABLE 3
AGREEMENT AMONG THE JUSTICES ON THE PENALTY PHASE DISPOSITION*

	Broussard	Eagleson	Kaufman	Lucas	Mosk	Panelli
Arguelles	6/12 (50%)	13/13 (100%)	13/13 (100%)	13/13 (100%)	9/13 (69%)	13/13 (100%)
Broussard		6/12 (50%)	6/12 (50%)	6/12 (50%)	10/12 (83%)	6/12 (50%)
Eagleson			13/13 (100%)	13/13 (100%)	9/13 (69%)	13/13 (100%)
Kaufman				13/13 (100%)	9/13 (69%)	13/13 (100%)
Lucas					9/13 (69%)	13/13 (100%)
Mosk						9/13 (69%)

* The first figure represents the number of times that the justices actually agreed on the penalty phase disposition ordered in the majority opinion regardless of whether the agreement was by joining in the same opinion or by a concurrence in the judgment ordering the disposition. The second figure is the number of opportunities presented to the justices for agreement. The majority considered penalty phase issues in thirteen of the sixteen automatic appeals decided during the first year of the Lucas court's tenure. Justice Broussard would have reversed the entire judgment for guilt phase error in one case in which the majority affirmed the guilt phase judgment. Since the majority affirmed that guilt judgment and then adjudicated the penalty phase issues, whereas Justice Broussard did not consider those issues because of the way he would have disposed of the case, Justice Broussard had only twelve opportunities to agree with the other justices on penalty phase issues. All of the other justices had thirteen opportunities to agree or disagree. The percentage figure in parenthesis represents the agreement rate among the justices on penalty phase issues.

TABLE 4
OPINION*

Number of Disp.	Author or Join Majority Opinion			Author or Join Opinion Concurring in Majority Opinion			Author or Join Opinion Concurring in Judgment			Author or Join Dissenting Opinion				
	Glt.	Spec. Cir.	San. Pen.	Glt.	Spec. Cir.	San. Pen.	Glt.	Spec. Cir.	San. Pen.	Glt.	Spec. Cir.	San. Pen.		
(16)	(14)	(2)	(13)											
Lucas, C. J.	15	13	2	13	-0-	-0-	-0-	1	1	1	1	-0-	-0-	
Arguelles, J.	15	13	2	12	1	1	-0-	1	-0-	1	-0-	-0-	-0-	
Broussard, J.	3	1	1	-0-	2	-0-	-0-	2	10	10	4	1	3	
Eagleson, J.	15	14	2	13	-0-	-0-	-0-	1	-0-	-0-	-0-	-0-	-0-	
Kaufman, J.	14	12	2	11	1	1	1	1	2**	1	1	1***	-0-	
Mosk, J.	9	7	2	6	1	1	1	1	6	6	2	-0-	4	
Panelli, J.	16	14	2	13	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	

* This table displays the extent of the agreement between each justice and the rationale articulated in the majority opinion disposing of the issues this year. All dispositions, whether affirmances or reversals, are aggregated in this table. If a justice joins a portion of the majority opinion but dissents to one or more of the issues resolved by the majority, his vote is counted twice — once as joining the majority opinion and once as a concurrence or dissent as the case may be.

** Justice Kaufman signed both the majority opinion and Justice Eagleson's opinion concurring in the judgment in *Snow*.

*** Justice Kaufman dissented only to the resolution of the *Aranda-Bruton* issue by the majority in *Anderson*.

TABLE 5

	Majority Opinions Written	Separate Opinions Written	TOTAL Written	Majority Opinions Joined	Separate Opinions Joined	TOTAL Joined	Grand Total
Lucas, C. J.	9	1	10	6	-0-	6	16
Arguelles, J.	-0-	1	1	15	-0-	15	16
Broussard, J.	-0-	10	10	3	3	6	16
Eagleson, J.	2	1	3	13	-0-	13	16
Kaufman, J.	-0-	2	2	14	1*	14	16
Mosk, J.	3	6	9	6	1	7	16
Panelli, J.	2	-0-	2	14	-0-	14	16
TOTAL	16	21					

* Justice Kaufman signed both the majority opinion and the concurring opinion of Justice Eagleson in *Snow*.