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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiffs,
v.
THE ACCUSED
Defendant.

CASE NO:
POINTS & AUTHORITIES:
DEFENDANT’S MOTIONS IN LIMINE TO GUARANTEE FAIR TRIAL

I. MOTION TO PERMIT SHORTHAND OBJECTION TO FEDERALIZE OBJECTIONS INSTEAD OF LENGTHY, RECORD-MAKING ONES.

To make a proper constitutional objection, the state and federal courts have required precision and specificity by counsel. In other words, simply objecting “hearsay,” will not preserve a Sixth Amendment confrontation issue, nor will objecting “352” or “unfair trial” preserve a due process issue with this exception. In **People v. Partida** (2005) 37 Cal. 4th 428, the defendant raised and Evidence Code section 352 argument that the trial court should have excluded gang evidence. On appeal, he argued the error violated his right to due process. The California Supreme Court held that he could raise the due process argument only on the factual basis argued at trial (prejudice outweighed probative value). No other argument that due process required the trial court to exclude the evidence would be heard. The Supreme Court held that the error in admitting the gang evidence was harmless under state law and did not render defendant's trial fundamentally unfair so as to deny due process.

In **Duncan v. Henry** (1995) 513 U.S. 364, Mr. Henry was tried in a California court for alleged molesting a 5-year old child. The prosecution was allowed to put on evidence of the parent of another child who testified that twenty years previous, Henry molested that child. Henry’s lawyer objected that the

1 evidence should not come in and cited Evidence Code section 352, arguing the
2 evidence was far more unduly prejudicial than relevant. The parent testified and
3 Henry was convicted. On direct appeal, his lawyers argued that the evidence was
4 irrelevant and inflammatory and that the resulting error resulted in a miscarriage of
5 justice under the California Constitution (the standard for whether an error is
6 harmless under the state constitution). The Court of Appeal found error, but ruled
7 it harmless. Henry then petitioned in federal district court, arguing that the error
8 was not harmless and denied him federal due process of law. The district court
9 granted the petition, and the Court of Appeal for the Ninth Circuit affirmed the
10 ruling.

11 The U.S. Supreme Court summarily reversed the grant of relief stating that
12 Mr. Henry never explicitly raised the federal due process issue in state court and
13 thus did not "exhaust" his claim. The court observed that the test for the state law
14 claim was similar to, but not quite the same as the federal due process claim. By
15 not intoning the magic words "due process" under the federal constitution, the
16 issue was lost and Mr. Henry's reversal of his felony conviction went with it.

17 As the Supreme Court stated, similarity of claims is not enough to exhaust
18 an issue in state court to permit its being raised in federal court. Justice Stevens'
19 dissent placed the impact of this ruling more bluntly: the case "tightens the
20 pleading screws ... to hold that the exhaustion doctrine includes an exact labeling
21 requirement." (**Duncan v. Henry** (1995) 513 U.S. 364, 368.)

22 In **Idaho v. Wright** (1990) 497 U.S. 805, 812, two co-defendants were
23 convicted of child molestation and each appealed. One, Giles, appealed only on
24 statutory hearsay grounds. The second, Wright, raised hearsay and the related
25 constitutional Confrontation issue. The Idaho Supreme Court rejected Giles's
26 argument and affirmed his conviction, but it agreed with Wright on her
27 Confrontation claim and reversed her convictions. The ruling as to Wright was
28 affirmed by the U.S. Supreme Court. Not federalizing his claim cost Giles a

1 reversal of his conviction.

2 Of course, the federal rules apply equally to state review: no objection on
3 appropriate grounds, no review on appeal because the issue has not been preserved.
4 (**People v. Clark** (1993) 5 Cal. 4th 950, 988 n. 13 (When a party does not raise an
5 argument at trial, he may not do so on appeal); *see also* **In re Robbins** (1998) 18
6 Cal. 4th 770; **People v. Gordon** (1990) 50 Cal. 3d 1223, 1254, n. 6 (a hearsay
7 objection does not raise a federal confrontation question and thus the federal
8 constitutional issue was waived by counsel's incompetently made objection);
9 **People v. Raley** (1992) 2 Cal.4th 870, 892 (defendant contended on appeal the
10 court erred in admitting evidence and violated his federal constitutional rights, but
11 because defendant objected only on statutory grounds at trial, the constitutional
12 arguments are not cognizable on appeal.)

13 This is no small point. Precious constitutional rights can be sacrificed for
14 lack of a few syllables in stating an objection. *See, e.g.*, **Peterson v. Lampert** (9th
15 Cir. 2003) 319 F.3d 1153 (petitioner did not fairly present his federal claim to state
16 supreme court because on the face of his petition for review he expressly limited
17 his claim to state constitutional law, used the term "inadequate" assistance instead
18 of "ineffective" assistance, and cited only state law cases – federal petition
19 dismissed as a result.)

20 If there is an appeal of this matter, the State will urge that trial counsel
21 waived raising a constitutional claim and thus the defendant must be deemed
22 procedurally barred from asserting it – “[t]ime and again in his briefs, he [the State
23 Attorney General] claims that a contention by defendant is procedurally barred.”
24 (**People v. Gordon** (1990) 50 Cal. 3d 1223, 1250.)

25 **A remedy.** To save this court's time during this trial, to not frustrate the
26 jury during needless record-making sidebars for objections, and to not unduly
27 interrupt opposing counsel's presentation of his or her case, present counsel
28 requests permission to use abbreviated terminology in making his constitutional

1 objections. This same simplified technique is commonly used to make standard
2 evidentiary objections under the Evidence Code. Thus, it is common to object by
3 saying "352" in order to make an objection to evidence which has some relevance
4 but which outweighed by its prejudicial value.

5 By the same token, the defense requests to make his constitutional
6 objections in the following manner.

7 **Option #1:** The simplest alternative would make every hearsay, relevance
8 or "352" objection **deemed to have been made** under the due process clause of the
9 14th Amendments, and under the confrontation clause of the 6th and 14th
10 amendments. (This requires agreement by the court on the record.)

11 **Option #2:** If option #1 is rejected, then a "by the numbers" alternative is
12 proposed: Any 5th Amendment due process objection would be made by simply
13 by adding "5" to the evidentiary objection. Sixth Amendment confrontation or
14 right to present evidence issues would be made by adding "6" to such claim
15 protected by the 6th Amendment. When objecting to unconstitutional argument by
16 the prosecutor to the jury, counsel would object by saying "prosecution error."¹
17 This too requires agreement by the court on the record. The specifics of
18 incorporated meaning of either option #1 or #2 are as follows:

19 **L "5" = 's FIFTH AMENDMENT DUE PROCESS**

20 This objection encompasses the Fifth Amendment of the U.S. Constitution
21 due process guarantee of a fair trial as made available to the States through
22 the 14th Amendment. **Franklin v. Duncan**, 70 F.3d 75 (9th Cir. 1995),
23 *adopting*, 884 F.Supp. 1435, 1456 (N.D. Cal 1995)(denial of introduction of
24 defense evidence to impeach complaining witness denied due process fair
25 trial.).

25 **L "6" = 's SIXTH AMENDMENT CONFRONTATION & RIGHT TO**

27 ¹ **People v. Hill** (1998) 17 Cal.4th 800, 823, fn. 1, held that the claim of prosecutorial
28 misconduct is more properly called prosecutorial "error."

1 **PRESENT EVIDENCE IN DEFENSE OF THE ACCUSED**

2 This objection states that the defendant’s state and federal constitutional
3 rights to confront witnesses against him as guaranteed by the Sixth and
4 Fourteenth Amendments to the United States Constitution, and under the
5 similar, but separate and independent California Constitutional protections
6 provided by article one, sections seven and fifteen are violated. **U.S. v.**
7 **Kojayan**, 8 F.3d 1315, 1321 (9th Cir. 1993)(prosecution violates the
8 "advocate-witness" rule by asserting “facts” not in evidence); **U.S. v.**
9 **Prantil**, 756 F.2d 759, 764 (9th Cir. 1985) (unfairly impugning defense
counsel denies due process.); accord *See U.S. v. Rodrigues*, 159 F.3d 439,
451 (9th Cir. 1998).

10 **L “8” =’s EIGHTH AMENDMENT PROTECTION AGAINST CRUEL**
11 **OR UNUSUAL PUNISHMENT & THE STATE CONSTITUTIONAL**
12 **PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.**

13 If the defendant moves under **Romero** to strike strikes, he is also raising the
14 issue as a cruel or unusual constitutional claim.

15 **L “PROSECUTION ERROR” MEANS THE FOLLOWING:**

16 This objection includes the statement that the prosecutor’s comment
17 is irrelevant, inflammatory, and prejudicial. The objection is
18 grounded in the defendant’s state and federal due process rights to a
19 fair trial under the Fifth and Fourteenth Amendments to the United
20 States Constitution, as well as my client’s state and federal
21 constitutional right to confront witnesses against him as guaranteed by
22 the Sixth and Fourteenth Amendments to the United States
23 Constitution, and under the similar, but separate and independent
24 California Constitutional protections provided by article one, sections
25 seven and fifteen. The error has "so infected the trial with unfairness
26 as to make the resulting conviction a denial of due process."
(**Donnelly v. DeChristoforo** (1974) 416 U.S. 637, 643.) I also ask the
court to assign this as misconduct,² strike the offending comments,

27 ² This “misconduct” request is required by the California Supreme Court.

28 (continued...)

1 and admonish the jury to disregard it per **People v. Bolton** (1979) 23
2 Cal. 3d 208, 215-16, n. 5.³ If the court will not do that, I ask for a
3 mistrial given the extremely prejudicial nature of the statements on
4 my client's fair trial rights. (**Berger v. U.S.**(1935) 295 U.S. 78.)

5 **II. COMPLAINING WITNESSES AND THE DEFENDANT SHOULD BE**
6 **ADDRESSED BY THEIR NAMES AND NOT BY CONCLUSORY AND**
7 **ARGUMENTATIVE LABELS WHICH ASSUME FACTS NOT IN**
8 **EVIDENCE AND UNDERMINE THE PRESUMPTION OF INNOCENCE.**

9 The question at this trial is whether the complaining witnesses were
10 "victims" (the prosecution theory), or lying and/or mistaken (the defense theory).
11 Neither the prosecutor, court personnel, nor the State's witnesses should be
12 allowed to characterize any complaining witnesses⁴ during the trial (except in final

12 (...continued)

13 Thus, generally, the requirement of an objection to prosecutorial argument is stated
14 in **People v. Green** (1980) 27 Cal. 3d 1, 24 (failure to object to prosecution
15 argument waives the issue unless an objection would have been fruitless.) And
16 the courts have held that objecting may not be enough -- "As a general rule a
17 defendant may not complain on appeal of prosecutorial misconduct unless in a
18 timely fashion--and on the same ground--the defendant [requested] an assignment
19 of misconduct and [also] requested that the jury be admonished to disregard the
20 impropriety. [Citation.]" (**People v. Samayoa** (1997) 15 Cal. 4th 795, 841.)

21 ³ This request would include the statement to the jury by the court: "Ladies and
22 Gentlemen of the jury, the prosecutor has just made certain uncalled for
23 insinuations about the defendant. I want you to know that the prosecutor has
24 absolutely no evidence to present to you to back up these insinuations. The
25 prosecutor's improper remarks amount to an attempt to prejudice you against the
26 defendant. Were you to believe these unwarranted insinuations, and convict the
27 defendant on the basis of them, I would have to declare a mistrial. Therefore, you
28 must disregard these improper, unsupported remarks."

⁴ A prosecutor has the duty to see that his or her witnesses volunteer no
statement that would be inadmissible and must be especially careful to guard

(continued...)

1 argument) as "the victim" or "victims," any more than the defense should called
2 the defendant throughout the trial as "the framed victim." This prohibition would
3 include voir dire, opening statement (which is not to be argumentative), and trial
4 testimony.

5 Common sense dictates that at least until the jury decides the case, the
6 complaining witness remains an alleged victim, and not "the victim." The "victim"
7 characterization is argumentative and subverts the defendant's presumption of
8 innocence by the State's repeated characterizing for the jury the complaining
9 witness's version as the correct one. The term is statutorily defined as one against
10 whom a crime has been committed. (Penal Code § 679.01(b).)

11 As such, to so label the complaining witness throughout the trial violates the
12 defendant's state and federal right under due process (as described above) to his
13 presumption of innocence as protected by the due process clause of the 5th and
14 14th Amendments to the U.S. Constitution. It also violates the defendant's Sixth
15 Amendment and 14th Amendment right to a jury determination of the facts, as well
16 as the analog protection provided by the California Constitution.

17 Descriptive words make a difference in perceptions. In a study done over
18 thirty years ago,⁵ experimenters reported that after subjects viewed films of auto
19 accidents and answered questions about their experience, the mere phrasing of
20 questions changed estimates of the cars' speed. The question, "About how fast
21

22 (...continued)

23 against statements that would also be prejudicial. (**People v. Schiers** (1971) 19
24 Cal.App.3d 102, 113-114.) This includes a duty to warn the witness against
25 volunteering inadmissible statements. See **People v. Warren** (1988) 45 Cal.3d
26 471, 482-483 [247 Cal.Rptr. 172].

27 5 "Reconstruction of Automobile Destruction: An Example of the Interaction
28 Between Language and Memory" by E. Loftus and J. Palmer, *Journal of Verbal
Learning and Verbal Behavior* 13, 585-589 (1974).

1 were the cars going when they *smashed* into each other?" elicited higher speed
2 estimates than when less suggestive terms were used (*e.g.*, "collided," "bumped,"
3 "contacted," or "hit.") Also, when asked a week later about what they saw, subjects
4 who received the verb "smashed" were more likely to say "yes" to the question,
5 "Did you see any broken glass?", even though no broken glass was in the film.

6
7 The study presents an empirical basis why witnesses and the prosecutor must
8 be precluded from adorning their testimony or argument with argumentative,
9 suggestive and biased statements. Such statements bias the jury through none-too-
10 subtle programming.

11 Further, prosecutorial statements are assumed to make an impression upon
12 the minds of the jurors because the office "carries such weight with a jury that his
13 statement of fact predicated on his knowledge, rather than on the evidence,
14 constitute reversible error." (**People v. Purvis** (1963) 60 Cal.2d 323, 341 [33
15 Cal.Rptr. 104].) Generally, a lawyer cannot use subterfuge to place before a jury
16 matters which it cannot properly consider. (**People v. Daggett** (1990) 225
17 Cal.App.3d 751, 759 [275 Cal.Rptr. 287].) And, a prosecutor cannot use argument
18 or questioning as a basis to "testify" before the jury. (**People v. Hill** (1998) 17
19 Cal.4th 800, 827-28 [72 Cal.Rptr. 2d 656].) "When a lawyer asserts that something
20 not in the record is true, he is, in effect, testifying. He is telling the jury: 'Look, I
21 know a lot more about this case than you, so believe me when I tell you X is a
22 fact.' This is definitely improper." (**United States v. Kojayan** (9th Cir. 1993) 8
23 F.3d 1315, 1321.)

24 In **People v. Sanchez** (1989) 208 Cal.App.3d 721, 739-740, the court
25 rejected an appeal claim of constitutionally ineffective assistance of counsel for
26 failure to assert this position at trial but his was because there were fewer mentions
27 of the term by the prosecutor than defense, and because it was largely restricted to
28 comments in *voir dire*. However, even though the issue was not raised properly

1 on appeal, the court found that the use by the prosecutor was "possibly
2 objectionable," but that there was no prejudice on the facts of the case. *See also*
3 **Godbey v. Oklahoma** (1987) 731 P.2d 986 ("In the fifth instance the prosecutor
4 referred to the complaining witness as a victim. During his objection, defense
5 counsel asserted that the witness should be referred to as "alleged victim," which
6 the trial court sustained.")

7 The court following cases support prohibiting the use of the argumentative
8 term "victim:" **Jackson v. State**, 600 A.2d 21, 24 (Del. 1991) ("We agree with
9 defendant that the word "victim" should not be used in a case where the
10 commission of a crime is in dispute"); **Allen v. State**, 644 A.2d 982, 983 n.1 (Del.
11 1994) ("when, as here, consent is the sole defense in a rape case, the use of the
12 term "victim" by a prosecutor at trial is improper and to be avoided"); **Veteto v.**
13 **State**, 8 S.W.3d 805, 816-817 (Tex. App. 2000) ("Referring to A.L. as the victim
14 instead of the alleged victim lends credence to her testimony that the assaults
15 occurred and that she was, indeed, a victim. This situation is similar to a case
16 where consent is the sole issue in a rape trial. The Eastland Court of Appeals has
17 held in a rape case involving consent that a reference to the complainant as a victim
18 in the charge to the jury implied that the sexual encounter was not consented to and
19 was thus an improper comment on the weight of the evidence by the court.
20 **Talkington v. State**, 682 S.W.2d 674, 675 (Tex. App.--Eastland 1984, pet. ref'd).
21 Thus, the trial court also commented on the weight of the evidence by failing to
22 refer to A.L. as the "alleged" victim"); **State v. Wright**, 2003 Ohio 3511, P6 (Ohio
23 Ct. App., 2003) ("we are compelled to note that the trial court should refrain from
24 using the term "victim," as it suggests a bias against the defendant before the State
25 has proven a "victim" truly exists.")

26 The precedent is compellingly reasoned and should be followed in this case.

27 Witnesses in this case should be addressed by their proper given names. It
28 that is unsatisfactory for some reason, then the non-argumentative term

1 “complaining witness” should be used.

2
3 **III. IT IS MISCONDUCT FOR THE PROSECUTION TO TELL THE**
4 **JURY IT REPRESENTS THE “PEOPLE” IN A MANNER THAT IMPLIES**
5 **THAT HE/SHE REPRESENTS THE JURORS AGAINST THE**
6 **DEFENDANT.**

7 The prosecutor may, as some do, maintain that it is correct to tell the jury that
8 he/she represents the people of the state of California, and that “I am an advocate
9 for them.” This statement improperly suggests to the jurors -- who are supposed
10 to be impartial fact-finders -- that they are in fact aligned with the prosecutor
11 against the defendant.⁶

12 It is, of course, misconduct to suggest such a notion. As the Supreme Court
13 stated in **People v. Eubanks** (1996) 14 Cal.4th 580, 589-590), the role and interest
14 of the prosecution in a criminal case is obviously *not* that of the jury and the phrase
15 “the People” includes the defendant:

16 The nature of the impartiality required of the public prosecutor
17 follows from the prosecutor's role as representative of the People as a
18 body, rather than as individuals. **"The prosecutor speaks not solely**
19 **for the victim, or the police, or those who support them, but for all**
20 **the People. That body of 'The People' includes the defendant and**
21 **his family and those who care about him.** It also includes the vast
22 majority of citizens who know nothing about a particular case, but
23 who give over to the prosecutor the authority to seek a just result in
24 their name." (Corrigan, On Prosecutorial Ethics (1986) 13 Hastings
25 Const.L.Q. 537, 538-539.) Thus the district attorney is expected to
26 exercise his or her discretionary functions in the interests of the
27 People at large, and not under the influence or control of an interested
28 individual. (**People v. Superior Court (Greer)**, supra, 19 Cal. 3d at p.
267.) [Emphasis added.]

29 Unlike the adversary role of the prosecutor, the domain of the judge and the

30 6 This is not an argument that any reference to “the People,” as in the charging
31 document, instructions, etc., is a *per se* violation. (See **People v. Black** (2003)
32 114 Cal.App.4th 830, rejecting such an argument.) It narrowly focuses on the
33 prosecutor’s improper usage of the phrase to make it appear to the that the court,
34 jury and the prosecution are on one side with the defendant on the other.

1 jury is true disinterest and objectivity in a criminal case. (**Id.** at 590.) To suggest
2 to jurors that the prosecutor's role and interest and the jury's role and interest are
3 one and the same is a total distortion of the constitutional role each must play and
4 undermines the defendant's Fifth Amendment right to due process of law, the
5 presumption of innocence, proof beyond a reasonable doubt, and the Sixth
6 Amendment right to trial before an impartial jury.

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1 **IV. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **ADDING THE NECESSARY LEVEL OF CERTITUDE TO THE**
3 **REASONABLE DOUBT INSTRUCTION BY DEFINING “ABIDING**
4 **CONVICTION” AND PREVENT UNDERMINING DEFENDANT’S DUE**
5 **PROCESS AND SIXTH AMENDMENT RIGHT TO A JURY DECISION**
6 **BASED UPON SUFFICIENT EVIDENCE OF EVIDENTIARY**
7 **CERTAINTY.**

8 CALJIC 2.90 reads:

9 A defendant in a criminal action is presumed to be innocent until the
10 contrary is proved, and in case of a reasonable doubt whether his guilt
11 is **satisfactorily shown**, he is entitled to a verdict of not guilty. This
12 presumption places upon the People the burden of proving him guilty
13 beyond a reasonable doubt. Reasonable doubt is defined as follows: **It**
14 **is not a mere possible doubt because everything relating to human**
15 **affairs is open to some possible or imaginary doubt.** Rather, it is
16 that state of the case which after the entire comparison and
17 consideration of all the evidence leaves the minds of jurors in that
18 condition that they cannot say they feel an **abiding conviction** of the
19 truth of the charge. (emphasis added.)

20 The new CALCRIM instruction does not differ materially. See Number 103
21 which defines reasonable doubt as: “Proof beyond a reasonable doubt is proof that leaves
22 you with an abiding conviction that the charge is true.”

23 The instructions must be supplemented with a definition of “abiding
24 conviction” to add the following words to the last sentence: “that they cannot say
25 they feel an abiding conviction of the truth of the charge. **[Add:]** Abiding
26 conviction means convincing you to a near certainty of the truth of the charge.”

27 Further, the jury should not be admonished that a doubt is not reasonable if
28 it is "merely possible." Such an instruction unconstitutionally tells jurors to reject
a possible doubt as unreasonable. Yet, a possible doubt arising from the evidence
can be a reasonable one.

"Jurors are not experts in legal principles; to function effectively, and justly,
they must be accurately instructed in the law." (**Carter v. Kentucky** (1981) 450
U.S. 288, 302.) Instructional guidance here is critical to insure that the jury does
not convict because of its own interpretation of “abiding conviction” that falls
short of the very high degree of probability constitutionally required. These two
words of the current instruction have to convey the entire weight of the

1 constitutional burden of proof beyond a reasonable doubt. They fail in that
2 endeavor and, at a minimum, the court must provide a definition of the terms
3 “abiding conviction” that insures that the jury is not misled into diluting the State’s
4 burden of proof beyond a reasonable doubt.

5 Thus, this motion may alternatively be deemed a request to define “abiding
6 conviction” by providing an additional sentence to the CALJIC 2.90 instruction
7 that reads: “The phrase ‘abiding conviction’ means, in the context of the entire
8 instruction, that state of the case which after the entire comparison and
9 consideration of all the evidence leaves the minds of jurors in that condition that
10 they cannot say they find the charge(s) to be true because they are not proven to an
11 evidentiary certainty. In other words, you must have a state of mind of near
12 certainty in the truth of charges.”

13 Justice Mosk criticized the “abiding conviction” phrase in his concurring
14 opinion in **People v. Brigham** (1979) 25 Cal.3d 283, 299. He asked, “what is an
15 ‘abiding’ conviction?” “[I]t has long since fallen into disuse and is no longer part
16 of our daily speech,” and connote only the “*duration* of the jury’s belief.” (**Ibid.**)
17 Justice Mosk rightly stated that “the duration of a juror’s belief in guilty is
18 essentially irrelevant.” (**Id.** at 300.) Adding the word “conviction” is not only of
19 no help; it adds to the confusion because that word has a meaning of an
20 adjudication of guilt. (**Id.** at 300, n. 5.) Clearly, this is a phrase in need of
21 definition.

22 Instructions providing definitions are required for words or phrases that may
23 be beyond the jurors’ knowledge. This phrase is certainly one of them.⁷ An

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25 7 “Abiding conviction” is an arcane legal term needing precise definition given
26 its importance to the constitutional standard of proof (i.e., the filter by which the
27 jurors interpret all the evidence.). The following are examples of terms the courts
28 have required the trial courts to define for the jury in instructions: **1) "accident"**
(continued...)

1 alternate definition suggested by FORECITE [2.90e] is:

2 An abiding conviction based on proof beyond a reasonable doubt is
3 the highest level of certainty recognized in the law. It requires a
4 greater degree of certainty than the next lower standard of "clear and
5 convincing evidence." Clear and convincing evidence requires a
6 finding of high probability. The evidence must be so clear as to leave
7 no substantial doubt. It must be sufficiently strong to command the
8 unhesitating assent of every reasonable mind. Again, the proof
9 beyond a reasonable doubt standard requires a greater degree of
10 certainty than that required to meet the clear and convincing evidence
11 standard.

12 To be sure, appellate courts see nothing erroneous, vague or misleading
13 about CALJIC 2.90 in its current form either when viewed in isolation or with all
14 instructions given. Indeed, one court has stated a variant of this issue should be
15 taken off the menus of appellate counsel. (**People v. Hearon** (1999) 72 Cal. App.
16 4th 1285, 1287 (summarizing the rejections of it in the Courts of Appeal.) See also
17 **People v. Light** (1996) 44 Cal.App. 879, 888-898 (upholding "abiding
18 conviction" term against challenge.)

19 Yet, the defect in CALJIC 2.90 exists and it is clear that the concept of

20 7(...continued)
21 (**People v. Jimenez** (1992) 11 Cal. App. 4th 1611, 1628; **2**) "*aid*" and "*abet*"
22 (**People v. Ponce** (1950) 96 Cal. App. 2d 327, 331; **3**) "*assault*"; "*assault with a*
23 *deadly weapon*" (**People v. Valenzuela** (1985) 175 Cal. App. 3d 381, 393; **4**)
24 "*conspiracy*" (**People v. Earnest** (1975) 53 Cal. App. 3d 734, 745; **5**) "*efficient*
25 *intervening cause*" (**People v. Hebert** (1964) 228 Cal. App. 2d 514, 520-21; **6**)
26 "*opening or maintaining*" (**People v. Shoals** (1992) 8 Cal.App.4th 475, 489-91; **7**)
27 "*public place*" (**People v. Belanger** (1966) 243 Cal.App.2d 654, 657; **8**) "*culpable*
28 *negligence*" (**People v. Thurmond** (1985) 175 Cal.App.3d 865, 872-873; **9**)
"*traumatic condition*" (**People v. Burns** (1948) 88 Cal.App.2d 867, 874; **10**)
"*unconscious*" (**People v. Clark** (1993) 5 Cal.4th 950, 1020 (Supreme Court
assumes without deciding that "unconscious" requires definition); **11**) "*proximate*
causation" (**People v. Bland** (2002) 28 Cal. 4th 313, 335); **12**) "*unlawful*" (**People**
v. Lilloock (1968) 265 Cal.App.2d 419, 428-9 (a legal term as to which the jury
needs guidance from the court); *accord* **Barouh v. Haberman** (1994) 26 Cal. App.
4th 40, 45.)

1 reasonable doubt (the very high degree of probability required under the U.S.
2 Constitution to sustain a conviction) has been diluted below constitutional
3 minimums, especially when all the probability based CALJIC instructions are
4 added. A standard of proof is an effort at instructing the jury on the degree of
5 confidence our society thinks it should have in the correctness of its factual
6 conclusions. (**Jackson v. Virginia** (1979) 443 U.S. 307, 332.) *See Sullivan v.*
7 **Louisiana**, 508 U.S. 275, 277 (1993)("It would not satisfy the Sixth Amendment
8 to have a jury determine that the defendant is probably guilty, and then leave it up
9 to the judge to determine (as **Winship** requires) whether he is guilty beyond a
10 reasonable doubt.") With the revelation of wrongful convictions in serious
11 criminal cases (*See* Scheck, Neufeld, and Dwyer, **Actual Innocence** (Signet
12 2001)), the single most important bulwark against that phenomena is the
13 reasonable doubt standard. *In re Winship*, 397 U.S. 358, 363 (1970)("It is a prime
14 instrument for reducing the risk of convictions resting on factual error.")

15 There is no better way to bring about false convictions than to tell juries they
16 can convict based upon mere feelings of lasting belief in guilt resting on
17 "satisfactorily shown" evidence. These concepts gut the meaning of the State's
18 burden of proof which is to prove its case to a very high probability, described by
19 this Court as "evidentiary certainty" or a subjective state in the minds of the jurors
20 of near certainty. (*See People v. Johnson* (2004) 119 Cal. App. 4th 976
21 (reversible to tell jurors reasonable doubt means the same as an "every day
22 decision."))

23 The right to a proper instruction on the burden

24 ... beyond a reasonable doubt is "indispensable, for it 'impresses on the
25 trier of fact the necessity of reaching a subjective state of certitude of
26 the facts in issue.'" *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068,
27 25 L. Ed. 2d 368 (1970). The reasonable doubt standard gives
28 substance to the presumption of innocence and instills confidence in
the community that the innocent will not be condemned. *Id.* at 363-64.
A defendant in a criminal case therefore has a constitutional right to
have the jury instructed that guilt must be established beyond a
reasonable doubt. [Citation]. *United States v. Nolasco*, 926 F.2d 869,

1 871 (9th Cir. *en banc* 1990).

2 When the concept of “moral certainty” was criticized by the U.S. Supreme
3 Court as misleading, the court stated that what reasonable doubt meant was
4 **evidentiary certainty**. That forceful concept stands as the bulwark against the
5 many CALJIC instructions emphasizing preponderance of evidence standards –
6 *e.g.*, jury should not believe the defendant to be more likely guilty than not guilty
7 based solely on his arrest, charge and standing trial (CALJIC 1.00); if one
8 interpretation of the evidence is reasonable and another unreasonable, the jury must
9 accept the reasonable (CALJIC 2.01); jury may reject a witness’s testimony if false
10 in part unless it finds the probability of truth favors the witness’s version. (CALJIC
11 2.21.2.) Also, prosecutors in their closing argument typically argue for guilt as the
12 “only reasonable” verdict.

13 **Cage v. Louisiana** (1990) 498 U.S. 39,⁸ involved an unconstitutionally
14 vague reasonable doubt definition focusing juror attention on moral beliefs rather
15 than whether the objective evidence offered was sufficient. The United States
16 Supreme Court held it unconstitutional because it defined reasonable doubt as
17 "founded upon a real tangible substantial basis and not upon mere caprice and
18 conjecture." (**Id.**, at 498 U.S. 40.) Concluding that the challenged instruction
19 equated a reasonable doubt with a "grave uncertainty," the high court concluded
20 that this might have altered the constitutional standard for penal liability to one of
21 "a moral certainty" that the defendant was guilty" (**ibid**); the high court reversed
22 the conviction due to this basic structural defect.

23 **Victor v. Nebraska** (1994) 511 U.S. 1, upheld a conviction where the
24 “moral certainty” version of CALJIC 2.90 was challenged. The Court did not
25 "countenance its use" (**id.** at 12, 22), recognizing that "a jury might understand the
26

27 ⁸ *Cage* was disapproved on other grounds in **Estelle v. McGuire** (1991) 502
28 U.S. 62, 73 fn.4.

1 phrase to mean something less than the very high level of probability required by
2 the Constitution in criminal cases." (**Id.** at 14.) The Court held, however, that the
3 instruction was buttressed by the phrase "abiding conviction" so that the jury
4 would know of the required high level of probability amounting to that "subjective
5 state of **near certitude** of the guilt of the accused." (**Id.** at 15; emphasis added.)⁹

6 Where the California courts have erred is in interpreting language in **Victor**,
7 and viewing it as approving an instruction which defines reasonable doubt *only* in
8 terms of an abiding conviction. (**Victor**, at 14-15.) In an overreaction to the
9 decision, the California Legislature, acting at the suggestion of the California
10 Supreme Court (**People v. Freeman** (1994) 8 Cal.4th 450, 504, fn. 9), eliminated
11 the probability standard from the reasonable doubt definition (formerly "abiding
12 conviction *to a moral certainty*") by striking "moral certainty" and not replacing it
13 with any probability standard.

14 In this critical passage of **Victor**, the Court cited **Hopt v. Utah** (1886) 120
15 U.S. 430, which had ruled approvingly of the language of an "abiding conviction,"
16 but on in the context of the instruction given there. The language of the
17 instruction in **Hopt** was tethered to a level of a high probability concept; in other
18 words, the instruction there required the lasting belief (abiding conviction) in a
19 decision involving a juror's own important affairs. Thus, the court said in **Hopt**
20 "it is difficult to conceive what amount of conviction would leave the mind of a
21 juror free from a reasonable doubt, if it be not one which is so settled and fixed as
22 to control his action in the more weighty and important matters relating to his own
23 affairs." (**Id.** at 339.) This is because "[i]f the evidence produced be of such a
24 convincing character that they would unhesitatingly be governed by it in such

25
26 9 **Victor** noted that in 1850, "moral certainty" meant "the state of subjective
27 certitude about some event or occurrence." (**Id.** at 12.) That level of certainty was
28 appropriate, but the Court feared that the term had lost its meaning over the next
century. (**Id.** at 23.)

1 weighty and important matters, they may be said to have no reasonable doubt....”
2 (**Id.** at 441.)

3 Indeed, **Hopt** referred to an English case as equivalent to the one approved
4 in Haupt’s case. It told the jury to have that “level of certainty with which you
5 should transact your own most important concerns in life.” (**Id.** at 441.) **Hopt**
6 recognized and approved of “abiding conviction” language because *it was tied to a*
7 *level of certainty*. Any notion that **Victor** or **Hopt** held that a mere “abiding
8 conviction” definition of reasonable doubt would be constitutional is destroyed
9 upon examination of the cases. Other courts have held such instructions rely only
10 on an “abiding conviction” unconstitutional. (*See* **Patzwald v. U.S.** (1898) 54 P.
11 458, 459-460 [7 Okla. 232]; **Williams v. State** (1896) 73 Miss. 820 [18 So. 826].)

12 Further, as noted in footnote 8 *supra*, just as the **Victor** court believed the
13 term “moral certainty” meant something different (less demanding) in
14 contemporary times than it did in 1850, the same may be said of an “abiding
15 conviction.”¹⁰ Today, the best a linguist would opine is that the term means
16 nothing more than a lasting belief. But in what? Matters found true by a
17 preponderance of evidence, or clear and convincing evidence could sustain a
18 lasting belief, but clearly would be unconstitutional if they were applied in a
19 criminal case.

20 The central point of **Victor** is that the “abiding conviction” used *in*

21
22 10 One federal judge, commenting on the inadequacy of “abiding
23 conviction” language untethered to a certainty principle, said: “The [Supreme]
24 Court did not suggest that “abiding conviction” in itself stated the proper degree of
25 certainty or that such term did so in a manner that could overcome conflicting and
26 erroneous definitions used in the same instruction. In fact, the phrase employed in
27 **Victor** was “abiding conviction to a moral certainty,” which establishes a
28 considerably higher standard than does the simple term “abiding conviction”
without the added exponential phrase.” (**Ramirez v. Hatcher** (9th Cir. 1998) 136
F.3d 1209, 1219 (Reinhardt dissenting.)

1 *conjunction with* the “moral certainty” clause (a high probability) saved the
2 constitutionality of the instruction:

3 “we are satisfied that the reference to moral certainty, *in*
4 *conjunction with the abiding conviction language*,
5 “impressed upon the factfinder the need to reach a
subjective state of near certitude of the guilt of the
accused.” [Citation]. 511 U.S. 15.

6 The current instruction is so vague and low-probability oriented that jurors
7 would interpret it as requiring only a preponderance of evidence to convict. In
8 fact, in the September/October 1999 magazine, **The Sciences** (p. 18), a survey of
9 mid-level business executives was done to see what level of probability they
10 interpreted California’s reasonable doubt instruction required. The figures were
11 alarming:

12 35% put the probability at over 90%
13 35% put the probability at 80-90%
14 18% put the probability at 70-80%
15 12% put the probability at 50-70%

16 In other words, there was wide ranging disagreement and one-third of this
17 “relatively sophisticated and homogeneous population of businesspeople” (**id.** at
18 20) thought that probabilities ranging for 50% to 80% were good enough to
19 convict. From reading the article, this instruction did not include the “satisfactory
20 proof” clause which only further insures a low probability concept is
21 communicated. This is because CALJIC 2.90's definitional core of reasonable
22 doubt is not just an abiding conviction. It reduces the level of proof of guilt to that
23 which is “satisfactorily shown” -- in other words, “satisfactory proof” supporting
24 a lasting belief.¹¹ Preponderance of the evidence and clear and convincing

25
26 11 The “abiding conviction” language alone is far too weak to require
27 evidentiary certainty. One case, **Lisenbee v. Henry** (9th Cir. 1999) 166 F.3d 997,
28 rejected the argument that “abiding conviction” alone is defective, but the brief

(continued...)

1 evidence can generate lasting beliefs, but these reduced civil certainty standards are
2 obviously unconstitutional if used in a criminal case.

3 Coupled with the other “reasonableness” CALJIC instructions routinely
4 given the jury, the overall result trivializes the reasonable doubt standard so that a
5 jury has no clue of the required high level of "near certainty" (**People v. Hall**
6 (1964) 62 Cal.2d 104, 112 (opinion by Chief Justice Traynor), or "evidentiary
7 certainty" (**Cage v. Louisiana**, *supra*, at 489 U.S. 41), or a "subjective state of
8 **near certitude** of the guilt of the accused" (**Victor** *supra* at 15), or “utmost
9 certainty” (**In re Winship** (1970) 397 U.S. 358, 364.)

10
11 (...continued)

12 treatment is demonstrably irrational and erroneous. That case attempted to
13 distinguish **Colorado v. New Mexico**, 467 U.S. 310, 316 (1984). There, the Court
14 held that there must be a standard higher than mere preponderance for settling a
15 water dispute between two states. It selected the standard of “clear and
16 convincing evidence” which it defined as an abiding conviction in the truth of the
17 matter shown to a high probability. *Ibid.* See also **New Mexico v. House**, 127
18 N.M. 151 (1999) (defining “clear and convincing” evidence as “an abiding
19 conviction”). **Lisenbee** “distinguished” the **Colorado** definition of clear and
20 convincing evidence by stating, “Although the Court did use the phrase "abiding
21 conviction" in its definition of the clear-and-convincing-evidence standard, it did
22 so in tandem with the use of the phrase "highly probable." Colorado, 467 U.S. at
23 316, 104 S. Ct. at 2437-38, 81 L. Ed. 2d 247. The language in the jury instruction
24 in this case, on the other hand, does not.” Precisely. The California standard does
25 not add the term “highly probable” to the phrase “abiding conviction.” How then
26 would the omission of the “highly probable” phrase convey a *higher standard* of
27 proof (beyond a reasonable doubt) than that involved in the Colorado civil dispute?

28 Obviously, the absence of a probability standard could not possibly elevate a
feeling of lasting belief in the charge to one of near certitude. This is no mere
semantic discussion. **Addington v. Texas**, 441 U.S. 418, 425 (1979)(a standard of
proof is more than an empty semantic exercise.) In **In re Winship**, *supra* at 363,
the Court emphasized the “vital role in the American scheme of criminal
procedure” of the reasonable doubt standard, one that insures persons are not
convicted based on the same lower level of proof for a civil judgment.

1 Without some level of near certitude in the instruction to give the lasting
2 belief (abiding conviction) language meaning the resulting combination deflates
3 the required certainty to convict and denies due process of law. (*But see People v.*
4 **Osband** (1996) 13 Cal. 4th 622, stating these instructions do not confuse the jury
5 on the proper standard; *compare People v. Nguyen* (1995) 40 Cal. App. 4th 28
6 (improper argument for prosecutor to trivialize reasonable doubt standard with
7 examples of everyday decisions people make).) While *appellate attacks* to
8 overturn convictions based upon the omission of a certainty standard have failed in
9 this state, *see, e.g., People v. Hearon, supra*, the issue remains because a concept
10 of evidentiary certainty is required to be given the jury and the instructions here,
11 assessed in their entirety, do not come close to accurately demanding that level of
12 certitude. (**Victor v. Nebraska, supra** at 5 (taken as a whole, the instructions must
13 correctly convey the concept of reasonable doubt.)

14 This is structural error and will warrant reversal *per se* under **Cage** if a
15 conviction results. (**Sullivan v. Louisiana** (1993) 508 U.S. 275.) This court
16 certainly has the power (and duty) to implement the U.S. Constitution’s guarantee
17 that no person is convicted on less evidence than that required by due process of
18 law and the Sixth Amendment right to trial by jury under that standard.. Appellate
19 decisions which refuse to reverse convictions do not forbid this court from
20 implementing the required language of the U.S. Supreme Court in **Cage** and
21 **Victor** by adding the few words to the instruction to communicate the
22 constitutional level of proof.

23 Nothing forbids it. Penal Code § 1096, as amended in 1995, restates the
24 CALJIC 2.90 instruction, but § 1096a also states only that “...no further instruction
25 on the subject of the presumption of innocence or the definition of reasonable
26 doubt **need be given.**” (Emphasis added.) That statutory language obviously does
27 not mandate that no additional words **can be given.** Given that this is the most
28 fundamental of constitutional guarantees and that the CALJIC-Penal Code § 1096

1 defect can be remedied by simply adding a few words to the current defective
2 instruction, it must be done. Specifically, the instruction would just add the words
3 "to an evidentiary certainty" to the current 2.90 following the words, "abiding
4 conviction", so it would read, "abiding conviction to an evidentiary certainty in the
5 truth of the charge."

6 The defense has commissioned a 50 state survey of jury instructions on
7 reasonable doubt. The survey of state rules shows the following: Several States
8 continue to have the proof to a "moral certainty" language in their definitions
9 (Alabama, Idaho, Minnesota, Tennessee). A plurality of States use a variant of the
10 **Hopt v. Utah** definition – proof such that a juror would not hesitate to act in their
11 own important affairs (Alaska, Arkansas, Colorado, Conn., D.C., Maryland,
12 Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio,
13 Pennsylvania, South Carolina, South Dakota, West Virginia, Wisconsin).

14 Other States employ definitions with a requirement of some form of high
15 probability (Arizona, Hawaii, Virginia), or "firmly convinced" (Delaware,
16 Louisiana, Missouri, Rhode Island), "firm and abiding" (North Dakota), "full and
17 abiding" (Iowa), "reasonable certainty" (Georgia), that "almost certain" (Maine),
18 "near certainty" (Massachusetts), or "more powerful than more likely true than not
19 true." (New Jersey, Indiana), "fully satisfies or entirely convinces you of the
20 defendant's guilt" (North Carolina), "proof which satisfies the mind, convinces the
21 understanding of those who are bound to act." (Utah)

22 Other States dictate that there either be no definition given (*accord U.S. v.*
23 *Walton* (4th Cir. 2000) 207 F.3d 694), or that there is no definition that the court
24 requires. (Illinois, Kansas, Kentucky, Michigan, Mississippi, Oklahoma, Oregon,
25 Texas, Vermont, Wyoming).

26 Two States veer close to California's minimal, defective definition --
27 Washington ("a doubt as would exist in the mind of a reasonable person ... abiding
28 belief in the truth of the charge), and Florida ("if there is not an abiding conviction

1 of guilt, or if having a conviction, it is one which is not stable, but one which
2 wavers and vacillates, then the charge is not proved beyond every reasonable
3 doubt”), but California’s instructions, taken as a whole, mandate convictions on
4 mere probabilities. No State appears to have gone so far as California in reducing
5 the definition of reasonable doubt simply to juror *feelings of a lasting belief*
6 established by evidence *satisfactorily shown*.

7 This is structural error and will warrant reversal *per se* under **Cage** if a
8 conviction results. (**Sullivan v. Louisiana** (1993) 508 U.S. 275.) This court
9 certainly has the power (and duty) to implement the U.S. Constitution’s guarantee
10 that no person is convicted on less evidence than that required by due process of
11 law and the Sixth Amendment right to trial by jury under that standard. Appellate
12 decisions which refuse to reverse convictions do not forbid this court from
13 implementing the required language of the U.S. Supreme Court in **Cage** and
14 **Victor** by adding the few suggested words to the instruction to communicate the
15 constitutional level of proof.

16 Nothing forbids it. Penal Code § 1096, as amended in 1995, restates the
17 CALJIC 2.90 instruction, but § 1096a also states only that “...no further instruction
18 on the subject of the presumption of innocence or the definition of reasonable
19 doubt **need be given.**” (Emphasis added.) That statutory language obviously does
20 not mandate that no additional words **can be given.** Given that this is the most
21 fundamental of constitutional guarantees and that the CALJIC-Penal Code § 1096
22 defect can be remedied by simply adding a few words to the current defective
23 instruction, it must be done. Specifically, the instruction would just add the words
24 "to an evidentiary certainty" to the current 2.90 following the words, "abiding
25 conviction", so it would read, "abiding conviction to an evidentiary certainty in the
26 truth of the charge." The courts have the duty to correct instructions that may
27 deviate from constitutional norms. (See **People v. Engelman** (2002) 28 Cal. 4th
28 436 (banning a “juror snitch” CALJIC instruction).

1 Further, "a defendant is entitled to an instruction as to any recognized
2 defense for which there exists evidence sufficient for a reasonable jury to find in
3 his favor [citation]." **Mathews v. United States**, 485 U.S. 58, 63 (1988); see also
4 **Taylor v. Kentucky**, 436 U.S. 478, 490 (1978)("We hold that on the facts of this
5 case the trial court's refusal to give petitioner's requested instruction on the
6 presumption of innocence resulted in a violation of his right to a fair trial.")

7 The burden of proof tells the factfinder the degree of confidence society
8 requires it to have in the correctness of its factual conclusion. A "feeling" of an
9 "abiding conviction in the truth" of the charge falls far short of the constitutional
10 minimum and must be addressed in the instructions.

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12 DATE

Respectfully submitted,

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Attorney for Defendant

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