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.[1]

For example, 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 evidence should not come in and cited Evidence Code § 352, arguing the evidence was far more unduly prejudicial than relevant. The parent testified and Henry was

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1 There is an exception to this rule announced in People v. Partida (2005) 37 Cal.4th 428. There, the defendant raised and Evidence Code §352 argument that the trial court should have excluded gang evidence. On appeal, he argued the same 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. Any error in admitting the gang evidence was deemed harmless under state law and did not render defendant's trial fundamentally unfair so as to deny federal due process.

convicted. On direct appeal, his lawyers argued that the evidence was irrelevant and inflammatory and that the resulting error resulted in a miscarriage of justice under the California Constitution (the standard for whether an error is harmless under the state constitution). The Court of Appeal found error, but ruled it harmless. Henry then petitioned in federal district court, arguing that the error was not harmless and denied him federal due process of law. The district court granted the petition, and the Court of Appeal for the Ninth Circuit affirmed the ruling.

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

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

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

In Baldwin v. Reese (2004) 541 U.S. 27, the court held that the petitioner did not "fairly present" claim of ineffective assistance of appellate counsel to the

state courts when his briefs in the state court did not complain that the ineffective assistance violated federal law. Just stating that the claim violates "due process" does not raise a federal claim. (Shumway v. Payne (9th Cir. 2000) 223 F.3d 982, 987-988 [petitioner "had to alert the state courts to the fact that [she] was asserting a claim under the United States Constitution"].)

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

This is no small point. Precious constitutional rights can be sacrificed for lack of the utterance of a few syllables in stating an objection. (*See, e.g,* Peterson v. Lampert (9th Cir. 2003) 319 F.3d 1153 [petitioner did not fairly present his federal claim to state supreme court because on the face of his petition for review he expressly limited his claim to state constitutional law, used the term "inadequate" assistance instead of "ineffective" assistance, and cited only state law cases – federal petition dismissed as a result].) *Accord* Fields v. Waddington (9th Cir. 2005) 401 F.3d 1018 (briefing a Washington state constitutional claim does not alert the state court that it is called upon to decide parallel federal claim, and does not serve to exhaust state remedies); Hiivala v. Wood (9th Cir. 1999) 195 F.3d 1098, 1106 (holding that, when the petitioner failed to cite federal case law or mention the federal Constitution in his state court briefing, he did not alert the state

court to the federal nature of his claims).

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

A remedy. To save this court's time during this trial, to not frustrate the jury during needless record-making sidebars for the utterance of lengthy grounds for objections, and to not unduly interrupt opposing counsel's presentation of his or her case, present counsel requests permission to use abbreviated terminology in making his constitutional objections. This same simplified technique is commonly used to make standard evidentiary objections under the Evidence Code. Thus, it is common to object by saying "352" in order to make an objection to evidence which has some relevance but which outweighed by it's prejudicial value. By the same token, the defense requests to make his constitutional objections in the following manner.

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

Option #2: If option #1 is rejected, then a "by the numbers" alternative is proposed: Any 5th Amendment due process objection would be made by simply by adding "5th" to the evidentiary objection. Sixth Amendment confrontation or right to present evidence issues would be made by adding "6th" to such claim protected by the 6th Amendment. When objecting to unconstitutional argument by

the prosecutor to the jury, counsel would object by saying "prosecution error."[2] This too requires agreement by the court on the record. The specifics of incorporated meaning of either option #1 or #2 are as follows:

☞ **"5th" =’s FIFTH AMENDMENT DUE PROCESS**

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

☞ **"6th" =’s SIXTH AMENDMENT CONFRONTATION & RIGHT TO PRESENT EVIDENCE IN DEFENSE OF THE ACCUSED**

This objection states that the defendant’s state and federal constitutional rights to confront witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and under the similar, but separate and independent California Constitutional protections provided by article one, sections seven and fifteen are violated. U.S. v. Kojayan, 8 F.3d 1315, 1321 (9th Cir. 1993)(prosecution violates the "advocate-witness" rule by asserting "facts" not in evidence); U.S. v. 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).

☞ **"8th" =’s EIGHTH AMENDMENT PROTECTION AGAINST CRUEL OR UNUSUAL PUNISHMENT & THE STATE CONSTITUTIONAL PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.**

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

☞ **"PROSECUTION ERROR" MEANS THE FOLLOWING:**

This objection includes the statement that the prosecutor’s comment is irrelevant, inflammatory, and prejudicial. The objection is

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

grounded in the defendant's state and federal due process rights to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, as well as my client's state and federal constitutional right to confront witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and under the similar, but separate and independent California Constitutional protections provided by article one, sections seven and fifteen. The error has "so infected the trial with unfairness 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,[3] strike the offending comments, and admonish the jury to disregard it per People v. Bolton (1979) 23 Cal. 3d 208, 215-16, n. 5.[4] If the court will not do that, I ask for a mistrial given the extremely prejudicial nature of the statements on my client's fair trial rights. **(**Berger v. U.S. (1935) 295 U.S. 78.)

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

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

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

The question at this trial is whether the complaining witnesses were "victims" (the prosecution theory), or lying and/or mistaken (the defense theory). Neither the prosecutor, court personnel, nor the State's witnesses should be allowed to characterize any complaining witnesses[5] during the trial (except in final argument) as "the victim" or "victims," any more than the defense should called the defendant throughout the trail as "the framed victim." This prohibition would include voir dire, opening statement (which is not to be argumentative), and trial testimony.

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

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

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

as the analog protection provided by the California Constitution.

Descriptive words make a difference in perceptions. In a study done over thirty years ago,[6] experimenters reported that after subjects viewed films of auto accidents and answered questions about their experience, the mere phrasing of questions changed estimates of the cars' speed. The question, "About how fast were the cars going when they *smashed* into each other?" elicited higher speed estimates than when less suggestive terms were used (*e.g.*, "collided," "bumped," "contacted," or "hit.") Also, when asked a week later about what they saw, subjects who received the verb "smashed" were more likely to say "yes" to the question, "Did you see any broken glass?", even though no broken glass was in the film.

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

Further, prosecutorial statements are assumed to make an impression upon the minds of the jurors because the office "carries such weight with a jury that his statement of fact predicated on his knowledge, rather than on the evidence, constitute reversible error." (People v. Purvis (1963) 60 Cal.2d 323, 341.) Generally, a lawyer cannot use subterfuge to place before a jury matters which it cannot properly consider. (People v. Daggett (1990) 225 Cal.App.3d 751, 759.) And, a prosecutor cannot use argument or questioning as a basis to "testify" before the jury. (People v. Hill (1998) 17 Cal.4th 800, 827-28.) "When a lawyer asserts that something not in the record is true, he is, in effect, testifying. He is telling the jury: `Look, I know a lot more about this case than you, so believe me when I tell

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

you X is a fact.' This is definitely improper." (United States v. Kojayan (9th Cir. 1993) 8 F.3d 1315, 1321.)

In People v. Williams (1860) 17 Cal. 142, a prosecution for murder where the defendant claimed self-defense, one of the issues presented was the propriety of an instruction that read, in part: "'The fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, or *even against his victim*, give the defendant any right to take his life...." (Id. at p. 146, italics added.) The high court concluded use of the "victim" label, where the question was whether there had been a crime, was improper. The court explained:

> The word victim, in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. We are not disposed to criticise [sic] language very closely in order to reverse a judgment of this sort, but it is apparent that in a case of conflicting proofs, even an equivocal expression coming from the Judge, may be fatal to the prisoner. When the deceased is referred to as "a victim," the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. *The Court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression.* The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the Court, and the great deference which they pay to the opinions and suggestions of the presiding Judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the Court. A word, a look, or a tone may sometimes, in such cases, be of great or even controlling influence. A Judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts; for of this matter, under our system, they are the exclusive judges. (Id. at 147; italics added.)

In People v. Sanchez (1989) 208 Cal.App.3d 721, 739-740, the court rejected an appeal claim of constitutionally ineffective assistance of counsel for failure to assert this position at trial but his was because there were fewer mentions of the term by the prosecutor than defense, and because it was largely restricted to

comments in *voir dire*. However, even though the issue was not raised properly on appeal, the court found that the use by the prosecutor was "possibly objectionable," but that there was no prejudice on the facts of the case. *See also* Godbey v. Oklahoma (1987) 731 P.2d 986 ("In the fifth instance the prosecutor referred to the complaining witness as a victim. During his objection, defense counsel asserted that the witness should be referred to as "alleged victim," which the trial court sustained.")

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

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

Witnesses in this case should be addressed by their proper given names. It

that is unsatisfactory for some reason, then the non-argumentative term "complaining witness" should be used.

III. IT IS MISCONDUCT FOR THE PROSECUTION TO TELL THE JURY IT REPRESENTS THE "PEOPLE" IN A MANNER THAT IMPLIES THAT HE/SHE REPRESENTS THE JURORS AGAINST THE DEFENDANT.

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

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

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

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

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

One case addressed this issue and found the use of the term "the People" not erroneous. But, there are limits:

> No argument was made that the prosecutor placed any emphasis on representation of "the People," no contention that there was undue focus on, or repetition about, "the People"—in short, no contention that, save for the reference in the instructions, "the People" was in any way misused. So, our holding is what it is, and we go on record as saying that *the principle we confirm here today is not to be interpreted as a license* for a zealous prosecutor to somehow use our opinion as justifying anything other than the use of appropriate conduct to see that justice is done. (See Berger v. United States (1935) 295 U.S. 78 [79 L. Ed. 1314, 55 S. Ct. 629].)

(People v. Romero-Arellano (2009) 171Cal.App.4th 58, 70.)

IV. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ADDING THE NECESSARY LEVEL OF CERTITUDE TO THE REASONABLE DOUBT INSTRUCTION BY DEFINING "ABIDING CONVICTION" AND PREVENT UNDERMINING DEFENDANT'S DUE PROCESS AND SIXTH AMENDMENT RIGHT TO A JURY DECISION BASED UPON SUFFICIENT EVIDENCE OF EVIDENTIARY CERTAINTY.

CALCRIM 103 and 220 define reasonable doubt as: **"**Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true." The instruction must be supplemented with a definition of "abiding conviction" to add the following words to the above sentence: "*Abiding conviction means convincing you to a near certainty of the truth of the charge."*

"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 constitutional burden of proof beyond a reasonable doubt. They fail in that endeavor and, at a minimum, the court must provide a definition of the terms "abiding conviction" that insures that the jury is not misled into diluting the State's burden of proof beyond a reasonable doubt.

Thus, this motion may alternatively be deemed a request to define "abiding conviction" by providing an additional sentence to the CALCRIM 103 instruction that reads: "The phrase `abiding conviction' means, in the context of the entire instruction, that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of jurors in that condition that they cannot say they find the charge(s) to be true because they are not proven to an evidentiary certainty. In other words, you must have a state of mind of near certainty in the truth of charges."

Justice Mosk criticized the "abiding conviction" phrase in his concurring

opinion in People v. Brigham (1979) 25 Cal.3d 283, 299. He asked, "what is an `abiding' conviction?" "[I]t has long since fallen into disuse and is no longer part of our daily speech," and connote only the "*duration* of the jury's belief." (Ibid.) Justice Mosk rightly stated that "the duration of a juror's belief in guilty is essentially irrelevant." (Id. at 300.) Adding the word "conviction" is not only of no help; it adds to the confusion because that word has a meaning of an adjudication of guilt. (Id. at 300, n. 5.)

Clearly, this is a phrase in need of definition. In People v. Pierce (2009) 172 Cal.App.4th 567, 573, the court noted that both the U.S. Supreme Court and California Supreme Court describe "an abiding conviction" as one that is "settled and fixed," yet also held that the meaning is so "self-evident and an unnecessary elaboration of a readily understood term" such that any further instruction is unnecessary. Ironically, the issue arose over just such a dispute with the defense properly arguing its meaning while the prosecutor argue that abiding conviction meant an abiding conviction only when the jury returned its verdict, not thereafter.

Instructions providing definitions are required for words or phrases that may be beyond the jurors' knowledge. This phrase is certainly one of them.[8] An alternate definition suggested by FORECITE is:

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

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8 "Abiding conviction" is an arcane legal term needing precise definition given its importance to the constitutional standard of proof (i.e., the filter by which the jurors interpret all the evidence.)

To be sure, appellate courts see nothing erroneous, vague or misleading about CALCRIM in its current form (or former CALJIC 2.90) either when viewed in isolation or with all instructions given. Indeed, one court has stated a variant of this issue should be taken off the menus of appellate counsel. (People v. Zepeda (2008) 167 Cal.App.4th 25, 28 ["We publish our decision primarily to deter the defense bar from continuing to use defendant's line of attack against CALCRIM No. 220, and we urge defense counsel to direct their resources to arguably meritorious grounds of appeal"]; People v. Hearon (1999) 72 Cal.App.4th 1285, 1287 [summarizing the rejections of it in the Courts of Appeal]; *see also* People v. Campos (2007)156 Cal.App.4th 1228, 1239 ["we caution the Bar that adoption of the Judicial Council of California Criminal Jury Instructions is not an excuse for advocates to dust off the old, hackneyed arguments that were thoroughly discredited under similarly worded CALJIC instructions and recycle them before this court"]; People v. Light (1996) 44 Cal.App. 879, 888-898 [upholding "abiding conviction" term against challenge].)

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

358, 363 (1970)("It is a prime instrument for reducing the risk of convictions resting on factual error.")

There is no better way to bring about false convictions than to tell juries they can convict based a feeling of an "abiding conviction" that the charge is true. The concept guts the meaning of the State's burden of proof which is to prove its case to a *very* high probability, described by the courts as "evidentiary certainty" or a subjective state in the minds of the jurors of near certainty. (*See* People v. Johnson (2004) 119 Cal.App.4th 976 (reversible to tell jurors reasonable doubt means the same as an "every day decision.")

The right to a proper instruction on the burden

> ... beyond a reasonable doubt is "indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The reasonable doubt standard gives 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, 871 (9th Cir. *en banc* 1990).

When the concept of "moral certainty" was criticized by the U.S. Supreme Court as misleading, the Court stated that what reasonable doubt meant was "evidentiary certainty." Cage v. Louisiana (1990) 498 U.S. 39,[9] involved an unconstitutionally vague reasonable doubt definition focusing juror attention on moral beliefs rather than whether the objective evidence offered was sufficient. The United States Supreme Court held it unconstitutional because it defined reasonable doubt as "founded upon a real tangible substantial basis and not upon mere caprice and conjecture." (Id. at 498 U.S. 40.) Concluding that the challenged instruction equated a reasonable doubt with a "grave uncertainty," the high court

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[9] *Cage* was disapproved on other grounds in Estelle v. McGuire (1991) 502 U.S. 62, 73 fn.4.

concluded that this might have altered the constitutional standard for penal liability to one of "a moral certainty" that the defendant was guilty" (ibid); the high court reversed the conviction due to this basic structural defect.

Victor v. Nebraska (1994) 511 U.S. 1, upheld a conviction where the "moral certainty" version of CALJIC 2.90 was challenged. The Court did not "countenance its use" (id. at 12, 22), recognizing that "a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases." (Id. at 14.) The Court held, however, that the instruction was buttressed by the phrase "abiding conviction" so that the jury would know of the required high level of probability amounting to that "subjective state of **near certitude** of the guilt of the accused." (Id. at 15; emphasis added.)[10]

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

In this critical passage of Victor, the Court cited Hopt v. Utah (1886) 120 U.S. 430, which had ruled approvingly of the language of an "abiding conviction," but on in the context of the instruction given there. The language of the instruction in Hopt was tethered to a level of a high probability concept; in other words, the instruction there required the lasting belief (abiding conviction) in a

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

decision involving a juror's own important affairs. Thus, the court said in Hopt "it is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs." (Id. at 339.) This is because "[i]f the evidence produced be of such a convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt...." (Id. at 441.)

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

Further, as noted in footnote 8 *supra*, just as the Victor court believed the term "moral certainty" meant something different (less demanding) in contemporary times than it did in 1850, the same may be said of an "abiding conviction."[11] Today, the best a linguist would opine is that the term means

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11 One federal judge, commenting on the inadequacy of "abiding conviction" language untethered to a certainty principle, said: "The [Supreme] Court did not suggest that "abiding conviction" in itself stated the proper degree of certainty or that such term did so in a manner that could overcome conflicting and erroneous definitions used in the same instruction. In fact, the phrase employed in Victor was 'abiding conviction to a moral certainty,' which establishes a considerably higher standard than does the simple (continued...)

nothing more than a lasting belief. But in what? Matters found true by a preponderance of evidence, or clear and convincing evidence could sustain a lasting belief, but clearly would be unconstitutional if they were applied in a criminal case.

The central point of Victor is that the "abiding conviction" used *in conjunction with* the "moral certainty" clause (a high probability) saved the constitutionality of the instruction:

> "we are satisfied that the reference to moral certainty, *in conjunction with the abiding conviction language,* "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; italics added.)

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

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

In other words, there was wide ranging disagreement and one-third of this "relatively sophisticated and homogeneous population of businesspeople" (id. at 20) thought that probabilities ranging for 50% to 80% were good enough to convict. From reading the article, this instruction did not include the "satisfactory proof" clause which only further insures a low probability concept is communicated. The overall result trivializes the reasonable doubt standard so that

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(...continued)
term 'abiding conviction' without the added exponential phrase." (Ramirez v. Hatcher (9th Cir. 1998) 136 F.3d 1209, 1219 (Reinhardt dissenting.)

a jury has no clue of the required high level of "near certainty" (People v. Hall (1964) 62 Cal.2d 104, 112 (opinion by Chief Justice Traynor), or "evidentiary certainty" (Cage v. Louisiana, *supra,* at 489 U.S. 41), or a "subjective state of *near certitude* of the guilt of the accused" **(**Victor, *supra* at 15), or "utmost certainty" (In re Winship (1970) 397 U.S. 358, 364.)

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

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

Nothing forbids it. Penal Code § 1096, as amended in 1995, generally

restates the CALCRIM instruction, but § 1096a also states only that "...no further instruction on the subject of the presumption of innocence or the definition of reasonable doubt **need be given.**" (Emphasis added.) That statutory language obviously does not mandate that no additional words **can be given.** (See People v. Medalgi (1928) 94 Cal.App.543, 548 ["it will be observed that the provisions of the section last above quoted do not declare that no further instructions "shall be given," merely that no further instructions "need be given"; and consequently said section does not restrict the trial court to a reading of the definition given in section 1096. In other words, it is optional with the trial court whether or not it will give further instructions'].)

Given that this is the most fundamental of constitutional guarantees and that the CALCRIM-Penal Code § 1096 defect can be remedied by simply adding a few words to the current defective instruction, it must be done. Specifically, the instruction would just add the words "to an evidentiary certainty" to the current CALCRIM instruction following the words, "abiding conviction", so it would read, "abiding conviction to an evidentiary certainty in the truth of the charge."

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

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

[END]