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SUPERIOR COURT, METROPOLITAN DIVISION
COUNTY OF KERN
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11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
12 IN AND FOR THE COUNTY OF KERN METROPOLITAN DIVISION

DISTRICT ATTORNEY
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14 People of the State of California,
15 Plaintiffs,
16 - vs -
17 VINCENT EDWARD BROTHERS,
18 Defendant.

) CASE NO. BF106161A
)
) DEFENDANT'S PROPOSED PENALTY
) PHASE JURY INSTRUCTIONS WITH
) POINTS AND AUTHORITIES IN SUPPORT
) THEREOF
)
) Department Eight
) The Hon. Michael G. Bush
)
)
)
)

21 COMES NOW DEFENDANT, VINCENT EDWARD BROTHERS, who respectfully
22 submits the following proposed penalty phase jury instructions with points and authorities:
23
24

1 **THE COURT SHOULD SUPPLEMENT STANDARDIZED INSTRUCTIONS**

2 *Penal Code §1093(f)* charges the court with the responsibility of instructing the jury “on any
3 points of law pertinent to the issue, if requested by either party.”

4 “[T]he fact that pattern jury instructions are available should not preclude a judge from
5 modifying or supplementing a pattern instruction to suit the particular needs of an individual
6 case.” (ABA Standards for Criminal Justice, *Discovery and Trial by Jury* (3rd edition 1996)
7 Standard 15-4.4)

8 “[T]he trial court is not obligated ... to repeat the words chosen by the CALJIC committee
9 however helpful they may be. Instead, the trial court’s obligation is to state the law correctly.”
10 (*People v. Runnion* (1994) 30 Cal. App. 4th 852, 858)

11 Through usage and custom, standard pattern instructions often are cited as legal authority.
12 However, this is a mischaracterization. “Jury instructions are only judge-made attempts to recast
13 the words of statutes and the elements of crimes into words in terms comprehensible to the lay
14 person. The texts of standard jury instructions are not debated and hammered out by legislators,
15 but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any
16 mountain or rise up from any sea. Their precise wording, although extremely useful, is not
17 blessed with any special precedential or binding authority. This description does not denigrate
18 their value, it simply places them in the niche where they belong.” (*McDowell v. Calderon* (9th
19 Cir. 1997) 130 F3d 833, 841.)

20 As explained by the California Supreme Court: “we caution that jury instructions, whether
21 published or not, are not themselves the law, and are not authority to establish legal propositions
22 or precedent. They should not be cited as authority for legal principles in appellate opinions. At
23 most, when they are accurate, as the quoted portion was here, they restate the law.” (*People v.*
24

1 *Morales* (2001) 25 C4th 34, 48 fn 7; see also *People v. Alvarez* (1996) 14 Cal 4th 155, 217
2 ["CALJIC 1.00 is not itself the law. Like other pattern instructions, it is merely an attempt at a
3 statement thereof."].

5 **PATTERN INSTRUCTIONS ARE NOT SACROSANCT**

6 The rote recitation of general form instructions will not always suffice to fulfill the court's
7 instructional obligations (*People v. Thompkins* (1987) 195 Cal App 3rd 244, 250; *U.S. v. Lofton*
8 (10th Cir. 1985) 776 F. 2nd 918, 922; *Wright v. U.S.* (D.C. Cir. 1957) 250 F2d 4, 11.) The court
9 "should not require a party to rely on abstract generalities ... but should instruct the jury in terms
10 that relate to the particular case before it. [Citation]." (*Fish v. L.A. Dodgers Baseball Club* (1976)
11 56 Cal App 3rd 620, 642 [overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8
12 Cal 4th 548, 575, 580; see also *People v. Rollo* (1990) 20 Cal 3rd 109, 123, fn 6)

13 "[T]he so-called CALJIC stereotyped instructions are no more sacrosanct than any others.
14 Unless a particular instruction fits the evidentiary situation and presents a fair and impartial
15 picture of the issues, it should not be given." (*People v. Mata* (1955) 133 Cal App 2nd 18, 21)
16 "Although the CALJIC pattern instructions perform an invaluable service to the bench and bar,
17 that those instructions are not sacrosanct, is apparent from their treatment by the appellate
18 courts." (*People v. Vargas* (1988) 204 Cal App 3rd 1455, 1464; see also *People v. Eckstrom*
19 (1974) 43 Cal App 3rd 996, 1006; *Riordan & Gillette, Cal. Criminal Law*, (CEB 1986) 32.18, p.
20 682.) "[T]he trial court is not obligated ... to repeat the words chosen by the CALJIC committee
21 however helpful they may be. Instead, the trial court's obligation is to state the law correctly."
22 (*People v. Runnion* (1994) 30 Cal App 4th 852, 858).

1 Accordingly, judges, prosecutors and defense attorneys in California should “understand both
2 [the] value of CALJIC recommendations, and their limitations.” (*Runnion* at 841; see also
3 *People v. Lee* (2005) 131 Cal App 4th 1413, 1426 [“The CALJIC Committee cannot be expected
4 to anticipate every issue that may arise at trial. Indeed, the introduction to CALJIC specifically
5 states that the trial court may need to give an instruction that is not included in CALJIC”].)
6

7 **FEDERAL CONSTITUTIONAL PRINCIPLES REQUIRE THE JUDGE TO LOOK**
8 **BEYOND THE STANDARD PATTERN INSTRUCTIONS**

9 “A jury cannot fulfill its central role in our criminal justice system if it does not follow the
10 law. It is not an unguided missile free according to its own muse to do as it pleases. To
11 accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the
12 relevant law and as to its function in the fact-finding process, and it must assiduously follow
13 these instructions.” (*McDowell v. Calderon* (9th Cir. 1997) 130 F3d 833, 836.)

14 The judge’s instructional authority also resides in the Due Process and Jury Trial Clauses of
15 the federal constitution (Sixth and Fourteenth Amendments) whose mandate of a fair jury trial
16 for a person accused of a crime supersedes a mere recommendation in the domestic court rules.
17 (See e.g., *Rock v. Arkansas* (1987) 483 U.S. 44; *Green v. Georgia* (1979) 442 U.S. 95; *Davis v.*
18 *Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Washington v. Texas*
19 (1967) 388 U.S. 14).

20 Thus, it would be unconstitutional to interpret standardized instructions as tying the judge’s
21 hands when it comes to instructing the jury. The judge must have the leeway to give other
22 instructions when necessary to properly instruct the jury: “A jury cannot fulfill its central role in
23 our criminal justice system if it does not follow the law. It is not an unguided missile free
24

1 according to its own muse to do as it pleases. To accomplish its constitutionally-mandated
2 purpose, a jury must be properly instructed as to the relevant law and as to its function in the
3 fact-finding process, and it must assiduously follow these instructions.” (*McDowell v. Calderon*
4 (9th Cir. 1997) 130 F.3d 833, 836.) “Indeed, one can legitimately argue that the primary function
5 of the judge in a jury trial is to explain the applicable legal principles in such a way as to focus
6 and define the factual issues which the jury must resolve.” (*People v. Thompkins, supra*, 195
7 Cal.App.3d at 250.)

8
9 **THE DEFENDANT IS ENTITLED TO INSTRUCTIONS BASED UPON THE**
10 **DEFENDANT’S THEORY OF THE CASE**

11 It is established that the defendant has a right to have the jury instructed on the defense
12 theory of the case. “A criminal defendant is entitled, on request, to an instruction ‘pinpointing’
13 the theory of his defense.” (*People v. Wharton* (1991) 53 Cal. 3d 522, 570. Such an instruction
14 may “direct attention to evidence from ... which a reasonable doubt could be engendered”
15 (*People v. Hall* (1980) 28 Cal. 3d 143, 159). A defendant is entitled to a pinpoint instruction that
16 relates “his [evidentiary theory] to an element of the offense.” (*People v. Saille* (1991) 54 Cal. 3d
17 1103, 1120)

18 **THE DEFENSE IS ENTITLED TO PINPOINT INSTRUCTIONS NO MATTER HOW**
19 **WEAK THE EVIDENCE**

20 A requested instruction must be given if the defendant “proffers evidence enough to deserve
21 consideration by the jury, i.e., evidence from which a jury composed of reasonable men could
22 have concluded” that the facts underlying the instruction did exist (*People v. Flannel* (1979) 25
23 Cal. 3d 668, 684).

1 To justify an instruction on an issue raised by the evidence, it is not required that positive or
2 direct evidence be presented on that issue. It is sufficient to support an instruction if the fact may
3 reasonably be inferred from proved circumstances (*People v. Reese* (1944) 65 Cal. App. 2d 329).

4 The trial court is barred from assessing the credibility of the evidence. The fact that the
5 evidence may not be of a character to inspire belief does not authorize the court to refuse an
6 instruction based upon it (*People v. Flannel* (1979) 25 Cal. 3d 668).

7 "In evaluating the evidence to determine whether a requested instruction should be given, the
8 trial court should not measure its substantiality by weighing the credibility [of the witnesses] ...
9 Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of
10 the accused." (*People v. Tufunga* (1999) 21 Cal. 4th 935, 944).

11 The defendant's testimony, though "less than convincing," is sufficient to support a requested
12 instruction (*People v. Turner* (1990) 50 Cal. 3d 668, 690).

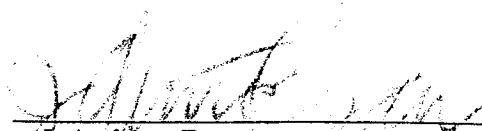
13 "Disbelief of a defendant's version of the facts is not, however, a reason for rejecting a
14 requested instruction; it is the jury's function to weigh the evidence and determine credibility."
15 (*People v. Sullivan* (1989) 215 Cal. App. 3d 1446, 1452; *People v. Jeffers* (1996) 41 Cal. App.
16 4th 917, 925).

17 "Even where there is conflicting evidence on [an] issue, nevertheless the law requires that
18 however incredible the testimony of a defendant may be he is entitled to an instruction based
19 upon the hypothesis that it is entirely true." (*People v. Stevenson* (1978) 79 Cal. App. 3d 976,
20 985).

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22 Date: 5-11-77

23 Law Office of J. Anthony Bryan

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By J. Anthony Bryan

1 **Defendant's Requested Penalty Phase Jury Instruction One**

2 Given as Requested

3 Given as Modified

4 Refused

5 Withdrawn

6
7 **Instruction**

8 "If you have any lingering doubt concerning the guilt of the defendant as to any of
9 those charges of which he was found guilty, or if you have any lingering doubt
10 concerning the truthfulness of any of the special circumstance allegations which were
11 found to be true, you may consider that lingering doubt as a mitigating factor or
12 circumstance.

13 A lingering doubt is defined as any doubt, however slight, which is not sufficient to
14 create in the minds of the jurors a reasonable doubt.

15 The People and the defendant have the right to a verdict on the matter of penalty
16 which is reached only after a full participation of the 12 jurors who ultimately return the
17 verdict. This right may be assured in this phase of the trial only if the [each] juror
18 participates fully in the deliberations, including such review as may be necessary of the
19 evidence presented in the guilt phase of the trial.

20 Therefore, the reasonable doubt of guilt and truthfulness of the charges and special
21 circumstances as to which verdicts have been returned shall not be reexamined by the
22 jury. However, for the purpose of determining if there is a lingering doubt concerning the
23 guilt of the defendant on any charge as to which he has been found guilty, or a lingering
24

1 doubt as to the truthfulness of any special allegation which has been found to be true, the
2 jury shall begin its deliberations from the beginning with respect to the evidence
3 presented in the guilt phase of this trial. You are instructed to set aside and disregard all
4 past deliberations, if any, concerning whether there is any lingering doubt as to the guilt
5 of the defendant or the truthfulness of any special allegation and begin deliberating anew.

6 This means that each [...] juror must set aside and disregard any earlier deliberations
7 concerning a possible lingering doubt as if they had not taken place.
8

9 Authority

10 The footnotes to CALCRIM No. 3576 recommend that “If the defendant requests an
11 instruction on lingering doubt regarding guilt, the court should review the instruction
12 approved of in *People v. Cain*, supra, 10 Cal.4th at pp. 64–65.” In *People v. Cain* (1995)
13 10 Cal.4th 1, the above instructions were found appropriate.

14 It is clearly proper to rely on lingering doubt as a factor in mitigation (*People v.*
15 *Thompson* (1988) 45 Cal 3rd 86)

16 While there is no requirement of an instruction on lingering doubt, it is a proper
17 consideration for a jury (*People v. Brown* (2003) 31 Cal 4th 518; see also *People v.*
18 *Johnson* (1992) 3 Cal 4th 1183, 1251-52, concurring opinion of Mosk (with Kennard)
19 [recognizing that the trial court is required to expressly instruct on “lingering doubt”
20 when “there is a reasonable likelihood that, in the absence of such an advisement, the jury
21 will labor under a misconception in this regard”] (*id.* at 1261, Mosk Conc. Op.)

22 The instant matter is distinguishable from cases where a lingering doubt instruction
23 was denied because of the abundance of exculpatory evidence that was excluded from
24 guilt phase. Once the jury hears the abundance of evidence concerning third party

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culpability, and the evidence indicating the impossibility of Defendant making the round trip from Columbus, OH to Bakersfield, CA, there is a very strong possibility that the jurors will have lingering doubts regarding Defendant's guilt, thus requiring an instruction on lingering doubt.

1 **Defendant's Requested Penalty Phase Jury Instruction Two**

2 Given as Requested

3 Given as Modified

4 Refused

5 Withdrawn

6
7 **Instruction**

8 "The defendant in this case has been found guilty of murder of the first degree. The
9 allegation that the murder was committed under a special circumstance has been specially
10 found to be true. It is the law of this state that the penalty for a defendant found guilty of
11 murder in the first degree shall be death or confinement in the state prison for life without
12 possibility of parole in any case in which the special circumstance charged in this case
13 has been especially found to be true.

14 Under the law of this state, you must now determine, if you can, which of said
15 penalties shall be imposed on the defendant. At the first phase of the trial, you were
16 given instructions concerning the law applicable to this case. It will not be necessary to
17 repeat at this time most of those instructions, WITH ONE NOTABLE EXCEPTION.
18 THAT EXCEPTION IS THAT IN THIS PART OF THE TRIAL THE LAW PERMITS
19 YOU TO BE INFLUENCED BY MERCY, SYMPATHY, COMPASSION OR PITY
20 FOR THE DEFENDANT OR HIS FAMILY IN ARRIVING AT A PROPER PENALTY
21 IN THIS CASE.

22 However, you must not be influenced by prejudice against the defendant. You must
23 not be biased against the defendant on the issue of penalty because he has been arrested
24

1 for this offense, charged with a crime, or brought to trial. None of these circumstances
2 determines the appropriate penalty and you must not infer or assume from any or all of
3 them that the death penalty is more likely to be appropriate than the punishment of life
4 imprisonment without the possibility of parole. You must not be influenced by mere,
5 conjecture, passion, prejudice, public opinion or public feeling. This means that you may
6 not indulge in prejudice against the defendant arising out of some perception that public
7 sentiment favors the death penalty in this case or any other case. The law has no
8 preference as to which punishment is appropriate in any particular case. Both the people
9 and the defendant have a right to expect that you will consider all of the evidence, follow
10 the law, exercise your discretion conscientiously, and reach a just verdict.”

11
12 **Authority**

13 CALJIC 1.00, 8.84, 8.84.1 (modified); *People v. Marshall* (1990) 50 Cal.3d 907, 929-
14 935; *People v. Douglas* (1990) 50 Cal.3d 468, 534-535; *People v. Carrera* (1989) 49
15 Cal.3d 291, 344; *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1029; *People v. Friend*
16 (1957) 47 Cal.2d 749.

1 **Defendant's Requested Penalty Phase Jury Instruction Three**

2 Given as Requested

3 Given as Modified

4 Refused

5 Withdrawn

6
7 **Instruction**

8 "You are instructed that the death penalty means exactly what it says: That the
9 defendant will be killed.

10 You are instructed that life without possibility of parole means exactly what it says:
11 The defendant will be imprisoned for the rest of his life.

12 For you to conclude otherwise would be to rely on conjecture and speculation and
13 would be a violation of your oath as trial jurors."

14
15 **Authority**

16 *Caldwell v. Mississippi* (1985) 472 U.S. 320; *People v. Ramirez* (1990) 50 Cal.3d 1158,
17 1196; *People v. Ramos* (1984) 37 Cal.3d 136, 159, n. 12.

1 **Defendant's Requested Penalty Phase Jury Instruction Four**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6

7 **Instruction**

8 "In deciding whether death or life imprisonment without the possibility of parole is the
9 appropriate sentence, you may not consider for any reason whatsoever the deterrent or
10 non-deterrent effect of the death penalty or the monetary cost to the state of execution or
11 maintaining a prisoner for life."

12

13 **Authority**

14 *Spaziano v. Florida* (1984) 468 U.S. 447; *People v. Thompson* (1988) 45 Cal.3d 86, 131-
15 132; *People v. Love* (1961) 56 Cal.2d 720, 731-32.

1 **Defendant's Requested Penalty Phase Jury Instruction Five**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6
7 **Instruction**

8 "The factors which I have just listed are the only factors that can be considered by
9 you as aggravating factors. However, you may find one or more of these factors to be [a]
10 mitigating factor[s]. You are not required to find that any of these factors are
11 aggravating. It is up to you to determine whether these factors exist, and if they do exist,
12 whether they are mitigating or aggravating.

13 The factors which I will soon list can only be considered by you to be mitigating
14 factors.

15 The absence of a mitigating factor is not, and cannot be considered by you as, an
16 aggravating factor."

17
18 **Authority**

19 *People v. Bonillas* (1989) 49 Cal.3d 757, 793; *People v. Hamilton* (1989) 48 Cal.3d
20 1142, 1184; *People v. Caro* (1988) 46 Cal.3d 1035, 1065; *People v. Bonin* (1988) 46
21 Cal.3d 657, 699-700; *People v. Williams* (1988) 45 Cal.3d 1268, 1324; *People v. Melton*
22 (1988) 44 Cal.3d 713, 769-770; *People v. Rodriguez* (1986) 42 Cal.3d 730, 789-790;

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People v. Davenport (1985) 41 Cal.3d 247, 288-290; *People v. Boyd* (1985) 38 Cal.3d 762, 772-779.

1 **Defendant's Requested Penalty Phase Jury Instruction Six**

2 Given as Requested

3 Given as Modified

4 Refused

5 Withdrawn

6
7 **Instruction**

8 "The mitigating circumstances that I have read for your consideration are given to
9 you merely as examples of some of the factors that you may take into account as reasons
10 for deciding not to impose a death sentence in this case.

11 But you should not limit your consideration of mitigating circumstances to these
12 specific factors. You also may consider any other circumstances relating to the case or to
13 the defendant as shown by the evidence as reasons for not imposing the death penalty.

14 Any one of the mitigating factors, standing alone, may support a decision that death is
15 not the appropriate punishment in this case.

16
17 **Authority**

18 *Lockett v. Ohio* (1978) 438 U.S. 586, 604-606; *People v. Williams* (1988) 45 Cal.3d
19 1268, 1322; *People v. Varnum* (1967) 66 Cal.2d 808, 815; *People v. Polk* (1965) 63
20 Cal.2d 443, 450-451.

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Defendant's Requested Penalty Phase Jury Instruction Seven

- Given as Requested
- Given as Modified
- Refused
- Withdrawn

Instruction

“In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found defendant guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance.”

Authority

Godfrey v. Georgia (1980) 446 U.S. 420, 433; *People v. Siripongs* (1988) 45 Cal.3d 548, 581 n. 11; *People v. Watson* (1981) 129 Ariz. 60, 63, 628 P.2d 943.

PROPOSED JURY INSTRUCTIONS
5/10/2007

1 **Defendant's Requested Penalty Phase Jury Instruction Eight**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6

7 **Instruction**

8 "The finding of a multiple murder special circumstance makes the death penalty no more
9 mandatory than the finding of any other special circumstance. Under our penalty
10 scheme, the jury must weigh the factors in aggravation and mitigation to determine
11 penalty. The circumstances of the crime is a potentially aggravating factor as to all
12 defendants who reach the penalty phase. Thus, defendants with a multiple murder special
13 circumstance are subject to no greater chance of receiving the death penalty than any
14 other defendant against whom a special circumstance finding has been made.

15

16 **Authority**

17 *People v. Gates* (1987) 43 Cal.3d 1168, 1169.

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1 **Defendant's Requested Penalty Phase Jury Instruction Nine**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

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7 **Instruction**

8 "You must not consider as an aggravating factor the existence of any special
9 circumstance if you have already considered the facts of the special circumstance as a
10 circumstance of the crimes for which the defendant has been convicted. In other words,
11 do not consider the same factors more than once in determining the presence of
12 aggravating factors."

13
14 **Authority**

15 *People v. Melton* (1988) 44 Cal.3d 713, 768.

1 **Defendant's Requested Penalty Phase Jury Instruction Ten**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6
7 **Instruction**

8 "You may not treat the verdict and finding of first degree murder committed under [a]
9 special circumstance[s], in and of themselves, as constituting an aggravating factor. For,
10 under the law, first degree murder committed with a special circumstance may be
11 punished by either death or life imprisonment without possibility of parole.

12 Thus, the verdict and finding which qualifies a particular crime for either of these
13 punishments may not be taken, in and of themselves, as justifying one penalty over the
14 other.

15 You may, however, examine the evidence presented in the guilt and penalty phases of
16 this trial to determine how the underlying facts of the crime bear on aggravation or
17 mitigation.

18
19 **Authority**

20 *Godfrey v. Georgia* (1980) 446 U.S. 420, 432-433; *People v. Murtishaw* (1989) 48 Cal.3d
21 1001, 1020; *People v. Siripongs* (1988) 45 Cal.3d 548, 581 n. 11; *People v. Gates* (1987)
22 43 Cal.3d 1168, 1169.

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1 **Defendant's Requested Penalty Phase Jury Instruction Eleven**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6
7 **Instruction**

8 "A mitigating circumstance does not constitute a justification or excuse for the offense in
9 question. A mitigating circumstance is a fact about the offense or about the defendant
10 which, in fairness, sympathy, compassion, or mercy, may be considered in extenuating or
11 reducing the degree of moral culpability or which justifies a sentence of less than death,
12 although it does not justify or excuse the offense.
13

14 **Authority**

15 *Skipper v. South Carolina* (1986) 476 U.S. 1, 3-5; *Eddings v. Oklahoma* (1982) 455 U.S.
16 104, 110-116; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Westbrook v. Zant* (11th
17 Cir. 1983) 704 F.2d 1487; *Finney v. Zant* (11th Cir. 1983) 709 F.2d 643; *Spivey v. Zant*
18 (5th Cir. 1981) 661 F.2d 464; *Washington v. Watkin* (5th Cir. 1981) 655 F.2d 1346;
19 *People v. Lucero* (1988) 44 Cal.3d 1006, 1030-1032; *People v. Davenport* (1985) 41
20 Cal.3d 247, 289; *People v. Brown* (1985) 40 Cal.3d 512, 539-540; *People v. Lanphear*
21 (1984) 36 Cal.3d 163, 166; *People v. Easley* (1983) 34 Cal.3d 858, 875-878; see also,
22 *Liebman & Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate:"*
23 *Mental Disorder as a Mitigating Factor* (1978) 66 Georgetown, L.J. 757.
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Defendant's Requested Penalty Phase Jury Instruction Twelve

- Given as Requested
- Given as Modified
- Refused
- Withdrawn

Instruction

“Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without possibility of parole.”

Authority

People v. Ramirez (1990) 50 Cal.3d 1158, 1198.

1 **Defendant's Requested Penalty Phase Jury Instruction Thirteen**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6
7 **Instruction**

8 "Any aspect of the offense or of the defendant's character or background that you
9 consider mitigating can be the basis for rejecting the death penalty even though it does
10 not lessen legal culpability for the present crime."
11

12 **Authority**

13 *Skipper v. South Carolina* (1986) 476 U.S. 1, 3-5; *Eddings v. Oklahoma* (1982) 455 U.S.
14 104, 110-116; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Westbrook v. Zant* (11th
15 Cir. 1983) 704 F.2d 1487; *Finney v. Zant* (11th Cir. 1983) 709 F.2d 643; *Spivey v. Zant*
16 (5th Cir. 1981) 661 F.2d 464; *Washington v. Watkin* (5th Cir. 1981) 655 F.2d 1346;
17 *People v. Lucero* (1988) 44 Cal.3d 1006, 1030-1032; *People v. Davenport* (1985) 41
18 Cal.3d 247, 289; *People v. Brown* (1985) 40 Cal.3d 512, 539-540; *People v. Lanphear*
19 (1984) 36 Cal.3d 163, 166; *People v. Easley* (1983) 34 Cal.3d 858, 875-878; see also,
20 *Liebman & Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate:"*
21 *Mental Disorder as a Mitigating Factor* (1978) 66 Georgetown, L.J. 757.
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1 **Defendant's Requested Penalty Phase Jury Instruction Fourteen**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6

7 **Instruction**

8 "Mitigating factors are not necessarily limited to those adduced from specific evidence
9 offered at the sentencing hearing such as character testimony. A juror might be disposed
10 to grant mercy based on other factors, such as a humane perception of the defendant
11 developed during trial."

12

13 **Authority**

14 *Kubat v. Thieret* (7th Cir. 1989) 867 F.2d 351, 373 n. 19; *People v. Jackson* (1990) 49
15 Cal.3d 1200, 1206.

1 **Defendant's Requested Penalty Phase Jury Instruction Fifteen**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6
7 **Instruction**

8 "If a mitigating circumstance or an aspect of the defendant's background or his character
9 called to the attention of the jury by the evidence or its observation of the defendant
10 arouses mercy, sympathy, empathy, or compassion such as to persuade you that death is
11 not the appropriate penalty, you may act in response thereto and impose a sentence of life
12 without possibility of parole."
13

14 **Authority**

15 *Skipper v. South Carolina* (1986) 476 U.S. 1, 3-5; *Eddings v. Oklahoma* (1982) 455 U.S.
16 104, 110-116; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *People v. Lucero* (1988) 44
17 Cal.3d 1006, 1030-1032; *People v. Easley* (1983) 34 Cal.3d 858, 875-878; *People v.*
18 *Lanphear* (1984) 36 Cal.3d 163, 165-166; *People v. Brown* (1985) 40 Cal.3d 512, 540;
19 see also, *California v. Brown* (1987) 479 U.S. 538, 539-542.
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1 **Defendant's Requested Penalty Phase Jury Instruction Sixteen**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6

7 **Instruction**

8 "You may spare the defendant's life for any reason you deem appropriate and
9 satisfactory."

10

11 **Authority**

12 *McCleskey v. Kemp* (1987) 481 U.S. 279, 292-295; *Adamson v. Ricketts*, 865 F.2d 101
13 (9th Cir.1988); *Moore v. Kemp* (11th Cir. en banc 1987) 809 F.2d 702, 733.

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Defendant's Requested Penalty Phase Jury Instruction Seventeen

- Given as Requested
- Given as Modified
- Refused
- Withdrawn

Instruction

“In determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant.”

Authority

Penry v. Lynaugh (1989) 109 S.Ct. 2934, 2951; *Hill v. Thigpen* (ND Miss. 1987) 667 F. Supp. 314.

1 **Defendant's Requested Penalty Phase Jury Instruction Eighteen**

2 ___ Given as Requested

3 ___ Given as Modified

4 ___ Refused

5 ___ Withdrawn

6

7 **Instruction**

8 “In the penalty phase of this trial, you may consider sympathy, pity, compassion, or
9 mercy for the defendant that has been raised by any aspect of the offense or of the
10 defendant’s background or character in determining the appropriate punishment.

11 You are not to be governed by conjecture, prejudice, public’ opinion, or public feeling.

12 You may decide that a sentence of life without possibility of parole is appropriate for
13 the defendant based upon the sympathy, pity, compassion, and mercy you felt as a result
14 of the evidence adduced during the penalty phase.”

15

16 **Authority**

17 *People v. Lanphear* (1984) 36 Cal.3d 163, 165; *People v. Brown* (1985) 40 Cal.3d 512,
18 540; *People v. Easley* (1984) 34 Cal.3d 858; see also, *California v. Brown* (1987) 479
19 U.S. 538, 542.

1 **Defendant's Requested Penalty Phase Jury Instruction Nineteen**

2 Given as Requested

3 Given as Modified

4 Refused

5 Withdrawn

6

7 **Instruction**

8 “With regard to factors in mitigation, offered by the defendant as reasons to impose a
9 sentence of life imprisonment without parole, each juror must make his or her own
10 individual assessment of the weight to be given to such evidence.

11 Unlike circumstances in aggravation, there is no requirement that all jurors
12 unanimously agree on any matter offered in mitigation. Each juror makes an individual
13 evaluation of each fact or circumstance offered in mitigation of penalty. Each juror
14 should weigh and consider such matters regardless of whether or not they are accepted by
15 other jurors.”

16

17 **Authority**

18 *McKay v. North Carolina* (1990) 110 S.Ct. 1227; *Mills v. Maryland* (1988) 108 S.Ct.
19 1860.

1 **Defendant's Requested Penalty Phase Jury Instruction Twenty**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6
7 **Instruction**

8 "A finding with respect to a mitigating factor may be made by one or more of the
9 members of the jury, and any member of the jury who finds the existence of a mitigating
10 factor may consider such a factor established, regardless of the number of jurors who
11 concur that the factor has been established.

12
13 **Authority**

14 *McKay v. North Carolina* (1990) 110 S.Ct. 1227; *Mills v. Maryland* (1988) 108 S.Ct.
15 1860.

1 **Defendant's Requested Penalty Phase Jury Instruction Twenty One**

2 ___ Given as Requested

3 ___ Given as Modified

4 ___ Refused

5 ___ Withdrawn

6

7 **Instruction**

8 “Proof of a mitigating circumstance differs from proof of an aggravating circumstance.
9 While an aggravating circumstance must be proven beyond a reasonable doubt, a
10 mitigating circumstance need not be proved beyond a reasonable doubt nor even by a
11 preponderance of the evidence, and each juror may find a mitigating circumstance to
12 exist if there is any evidence to support it.”

13

14 **Authority**

15 *People v. Bonillas* (1989) 48 Cal.3d 757, 789-790; *Cunningham v. California* (2007) 549
16 U.S. ___, 127 S.Ct. 856; *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New*
17 *Jersey* (2000) 530 U.S. 466, 490

1 **Defendant's Requested Penalty Phase Jury Instruction Twenty Two**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6
7 **Instruction**

8 "There has been no evidence presented that defendant has been convicted of any prior
9 felony. This circumstance should therefore be viewed as a circumstance in mitigation."
10

11 **Authority**

12 People v. Marshall (1990) 50 Cal.3d 907.
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1 **Defendant's Requested Penalty Phase Jury Instruction Twenty Three**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6

7 **Instruction**

8 “You may return a verdict of life imprisonment without possibility of parole even if you
9 find that the factors and circumstances in aggravation outweigh those in mitigation.”

10

11 **Authority**

12 *People v. Brown* (1985) 40 Cal.3d 512, 538-545; *Adamson v. Ricketts*, 865 F.2d 101 (9th
13 Cir.1988)

1 **Defendant's Requested Penalty Phase Jury Instruction Twenty Four**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6

7 **Instruction**

8 “In weighing the aggravating and mitigating factors, you are not to merely count numbers

9 on either side. You are instructed rather to weigh and consider the factors. One

10 mitigating circumstance may be sufficient to support a decision that death is not the

11 appropriate punishment in this case. The weight you give to any factor is for you

12 individually to decide.”

13

14 **Authority**

15 *People v. Howard* (1988) 44 Cal.3d 375, 435; see also, *People v. Grant* (1988) 45 Cal.3d

16 829, 857-858 n. 5 (“Since our decision in *Brown* such as instruction has been proper”);

17 *People v. Edelbacher* (1989) 47 Cal.3d 983, 1036 (This instruction was “properly

18 worded”).

1 **Defendant's Requested Penalty Phase Jury Instruction Twenty Five**

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- Given as Requested
- Given as Modified
- Refused
- Withdrawn

Instruction

“If you have a doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty at life in prison without the possibility of parole.”

Authority

People v. Cancino (1937) 10 Cal.2d 223, 330.

1 **Defendant's Requested Penalty Phase Jury Instruction Twenty Six**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6

7 **Instruction**

8 “Before you may consider any of the factors which I have listed for you as
9 aggravating, you must find that the factor has been established by the evidence beyond a
10 reasonable doubt. You may not consider any factor as a basis for imposing the
11 punishment of death unless you are first convinced beyond a reasonable doubt that it is
12 true.

13 All twelve jurors must agree as to the existence of any aggravating factor before it
14 may be considered by you. If the jury does not unanimously agree that the existence of
15 an aggravating factor has been proven, no juror may consider it in reaching their personal
16 penalty verdict.

17 In order to impose a death sentence, you must be unanimously convinced beyond a
18 reasonable doubt that the totality of the aggravating circumstances outweigh the totality
19 of the mitigating circumstances. If you are not unanimously convinced beyond a
20 reasonable doubt that the aggravating circumstances outweigh the mitigating
21 circumstances, you must return a verdict of life imprisonment without the possibility of
22 parole.

1 In order to impose a death sentence, you must unanimously be convinced beyond a
2 reasonable doubt that death is the appropriate punishment for the defendant. If you are
3 not unanimously convinced beyond a reasonable doubt that death is the appropriate
4 punishment, you must return a verdict of life imprisonment without the possibility of
5 parole.

6
7 **Authority**

8 *CALJIC 8.84.1* (as modified); *People v. Boyd* (1985) 38 Cal.3d 762; *Eighth and*
9 *Fourteenth Amendments.*

1 **Defendant’s Requested Penalty Phase Jury Instruction Twenty Seven**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6
7 **Instruction**

8 “Before you may impose a sentence of death, you must be unanimously convinced to
9 a high degree of certainty that the aggravating circumstances are so substantial in
10 comparison with the mitigating circumstances that it is appropriate to impose death
11 instead of life imprisonment without possibility of parole.

12 In making this determination, you may not act arbitrarily or mechanically. Rather,
13 each juror must assign whatever moral or sympathetic value he deems appropriate to the
14 relevant sentencing factors, singly and in combination. To return a sentence of death,
15 each juror must believe aggravation is so relatively great, and mitigation so
16 comparatively minor, that the defendant deserves death rather than society’s next most
17 serious punishment, life in prison without parole.”

18
19 **Authority**

20 *People v. Murtishaw* (1989) 49 Cal.3d 1001, 1027; *People v. Williams* (1988) 44 Cal.3d
21 883, 960.

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Defendant's Requested Penalty Phase Jury Instruction Twenty Eight

- Given as Requested
- Given as Modified
- Refused
- Withdrawn

“Nothing I have said requires you to reach a verdict of which penalty to impose in this case.

The possibility of a hung jury is an inevitable by-product of the requirement that a verdict must be unanimous.”

Authority

Penal Code §190.4(b); People v. Gainer (1977) 19 Cal.3d 835, 852.

Proposed Jury Instructions.doc
5/18/2007

1 **Defendant's Requested Penalty Phase Jury Instruction Twenty Nine**

2 _____ Given as Requested

3 _____ Given as Modified

4 _____ Refused

5 _____ Withdrawn

6

7 **Instruction**

8 “Before weighing any factor in aggravation, each of you must first all agree that the
9 factor in aggravation has been proven true beyond a reasonable doubt”

10

11 **Authority**

12 *Cunningham v. California* (2007) 549 U.S. ____, 127 S.Ct. 856; *Blakely v. Washington*
13 (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490