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The Evidence for Death

Scott G. Parker†
David P. Hubbard‡

The authors of this Comment suggest that the California Supreme Court, disturbingly, often stumbles while tackling evidentiary issues arising in death penalty appeals. Beyond their immediate impact, erroneous rulings by the court can have lasting effects on the state's decisional law and on the public's perception of the integrity of the court itself. The authors examine closely the first sixty death penalty appeals decided by the supreme court since its drastic personnel change in 1987, finding a number of errors. They suggest that the problem may well stem from the court's crushing workload, exacerbated by the calendar memorandum system and the justices' own predilections. The authors conclude with a discussion of proposals for reform of the court's treatment of death penalty cases in general and suggest a new approach to its treatment of evidentiary issues in particular.

Erroneous rulings by the California Supreme Court pose a tremendous threat to the proper development of the state's decisional law. Inevitably, errors from a high court perpetuate themselves, both in the same matter and in subsequent cases. In addition, the supreme court itself is bound under the principle of stare decisis.1 As a result, erroneous rulings threaten the predictability or determinacy of the law as well as cast doubt upon the intellectual integrity of the supreme court.

This Comment examines the disposition of evidentiary issues raised in the first sixty death penalty appeals decided by the California Supreme Court since it underwent a dramatic change of personnel in 1987.2 When the outcome of a particular trial determines whether a criminal defendant lives or dies, focus on the procedures and administration of that trial should be especially sharp.3 Unfortunately, a careful analysis of the new

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The authors wish to thank Professor Preble Stolz, Dean Gerald Uelmen, Wendy Schmidt, Don Scaramastra, and Adam Battani for their assistance in the preparation of this Comment.
2. The examined opinions were filed over an 18-month period from July 1987 to December 1988. See infra notes 61-63 (listing all 60 cases).
3. In California, the only appeal for defendants sentenced to death is to the state supreme
court's first sixty death penalty opinions indicates that the court has been anything but sharp in resolving adequately the evidentiary issues before it.  

Evidence law provides a particularly appropriate area in which to measure the court's performance in death penalty cases. An inordinate number of evidence issues arise during a capital trial due to its length and complexity, and evidentiary rulings take on especial importance where living witnesses are not available to provide convincing testimony on which to base a conviction. Furthermore, the supreme court is likely to discuss many of the evidentiary questions on appeal because of their sheer number (with the accompanying opportunity for the court to shape court. See infra text accompanying note 59. Naturally, defendants may obtain further review in the federal courts to the extent their cases present federal constitutional issues.


5. Jury selection takes, on average, 5.3 times longer in capital cases than in noncapital cases; the capital trial takes, on average, approximately 3.5 times longer than a noncapital murder trial. L. Saunders, B. Moore & B. Gaal, An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of NonCapital Cases (Spring 1983) (unpublished manuscript) (attempting to calculate the costs of capital punishment incurred by the California criminal justice system), cited in Comment, The Cost of Taking a Life: Dollars and Sense of the Death Penalty, 18 U.C. Davis L. Rev. 1221, 1257 n.173, 1258 n.175 (1985) (authored by Margot Garey). Attorneys in the field estimate that a capital case takes about 30 days longer than a noncapital case to try. Id., cited in Comment, supra, at 1258 n.176. See generally Kaplan, supra note 4, at 571-76 (explaining why capital punishment is expensive); Spangenberg & Walsh, Capital Punishment or Life Imprisonment? Some Cost Considerations, 23 Loy. L.A.L. Rev. 45 (1989) (examining costs to judicial system of capital punishment and concluding that it is not an economical alternative to life imprisonment).

6. The absence of living victims or witnesses in some capital trials skews the sorts of evidence questions put to the court. The prosecution in such trials must instead rely on hearsay and on physical, circumstantial, or character evidence.
particular areas of evidence law) and the high stakes involved in such an appeal. Death penalty appeals also present an increased likelihood of errors in the resolution of evidentiary questions over garden-variety criminal and civil appeals. The opinions are lengthy, often focusing on penalty phase Penal Code issues, and the issues come before the court without the benefit of a lower appellate court's treatment of the problem. Thus, the court is more likely to stumble in its adjudication of evidence questions posed in these cases.

Unfortunately, a supreme court error in the area of evidence law has an especially pernicious effect on California law. Lawyers will build their cases in reliance upon supreme court statements as to what is admissible or inadmissible before the trial courts. The inferior appellate and trial courts of the state must defer to the high court's interpretations with little regard for the wisdom of those decisions. More fundamentally, supreme court errors reflect a deficiency in the court's intellectual rigor which undermines confidence both in the court itself and in the evidentiary rules that are subject to the court's review.

Part I of this Comment provides background information about the death penalty in California. Part II describes the methodology by which the authors evaluated the California Supreme Court's death penalty cases. Part III examines those cases in which the supreme court misstated or misapplied the law of evidence. Part IV explores the likely causes of these evidentiary errors. Part V discusses the impact of these errors on the study and practice of criminal and civil law in California. Part VI briefly discusses some proposals to alter the death penalty appellate process or the supreme court itself. The final Part also remarks on the court's ability to correct its trajectory without recourse to the more dramatic structural changes suggested by others.

I

THE DEATH PENALTY IN CALIFORNIA

It has been twenty-three years since California last employed the death penalty. Like many states, California has spent the better part

7. See infra note 212 and accompanying text.
8. See infra text accompanying note 223.
9. On April 12, 1967, the state executed Aaron Mitchell for having killed a police officer. Smith, Innocent on Death Row, San Francisco Examiner, Jan. 8, 1989 (Image Magazine), at 8, 12 (chronicling California's use of the death penalty and mistaken convictions in capital crimes). In 1990, convicted double-murderer Robert A. Harris came within three days of the gas chamber before receiving a postponement from a federal circuit judge. At press time, the Ninth Circuit Court of Appeals' resolution of new federal constitutional challenges to Harris' original 1979 conviction was pending. See Carlson, Unusual Charges at Hearing for Condemned Killer, San Francisco Chron., May 15, 1990, at A1, col. 5 (describing hearing before Ninth Circuit panel).
10. Thirty-seven states and the federal government have retained the death penalty in their criminal codes. Pallone, Advocacy Scholarship on the Death Penalty (Book Review Essay), Society,
of the past two decades attempting to maintain a viable, constitutionally sound death penalty statute. This Part outlines the recent history of capital punishment in California, including the rather dramatic formation of the Lucas court in 1986. It then briefly sets forth the relevant procedural requirements of California’s capital punishment statutes.

A. History of the Death Penalty in California

The state of California witnessed a flurry of judicial and political activity regarding capital punishment in 1972. Prior to that year, any person convicted of first degree murder in California could be executed if the jury, in its complete discretion, determined that death was the appropriate penalty. As a practical matter, however, the death penalty fell into disuse in the early 1960s; California executed only one person after January 1963. Then, in 1972, the California Supreme Court declared the state’s death penalty statute violative of the California Constitution’s prohibition against “cruel or unusual punishment.” This outraged death penalty proponents. In response, that same year, California voters approved a constitutional amendment specifying that capital punishment was not forbidden by the state constitution.
Unfortunately for death penalty proponents, the United States Supreme Court also jumped into the fray in 1972, holding in *Furman v. Georgia* that state statutes which give juries unguided discretion to impose the penalty are unconstitutional.\(^{17}\) Thirty-eight states passed new death penalty laws following *Furman*.\(^{18}\) California's attempt to comply with *Furman* was a 1973 statute mandating the death penalty for defendants convicted of first degree murder, if particular, enumerated, special circumstances were found.\(^{19}\)

Capital punishment in the state suffered another setback in 1976, when the U.S. Supreme Court issued a series of decisions invalidating statutes which called for a mandatory death sentence. The Court held that such statutes afforded the jury too little discretion.\(^{20}\) Relying on these cases, the California Supreme Court issued a unanimous decision striking down California's death penalty law as violative of the federal Constitution.\(^{21}\)

Once again the political response to the judicial decision was quick. In 1977, then-State Senator George Deukmejian authored yet another death penalty statute,\(^{22}\) which was subsequently approved by the legislature and enacted over the veto of Governor Edmund G. (Jerry) Brown,
Jr. 23 One year later, California voters overwhelmingly approved the Briggs Initiative, Proposition 7 on the statewide ballot, 24 which replaced the 1977 law. 25 Despite the controversy and criticism generated by the Briggs Initiative, 26 it endures as the current death penalty law in California.

While the California Legislature struggled to fashion a viable death penalty statute, capital punishment opponent Governor Brown was placing his stamp on the state judiciary. In 1977, Brown appointed Rose Bird the chief justice of the state supreme court, making her the first woman to sit in that august body. 27 Brown’s selection of the Santa Clara County public defender was immediately controversial. The choice outraged the political right, powerful business interests, and elements of the law enforcement establishment. 28 Bird barely survived her first retention election in 1978, 29 and was the target of at least five subsequent recall drives. 30

Although the Bird court upheld the constitutionality of the 1977 death penalty law 31 and never invalidated the Briggs Initiative, 32 the court’s record of frequent death penalty reversals quickly earned it criti-

24. The initiative passed by a margin of 71% to 29%. Id. at 18, col. 2; Morain, supra note 14, at 26, col. 3.
25. See CAL. PENAL CODE §§ 190-190.5 (West 1988) (codification with subsequent, minor legislative amendments). For a description of the procedures and requirements of both death penalty laws, see infra notes 51-59 and accompanying text.
26. Even many capital punishment proponents criticized the amendment. See, e.g., Reidinger, The Politics of Judging, A.B.A. J., Apr. 1, 1987, at 52, 54 (quoting the October 28, 1978, editorial page of the Oakland Tribune, which favored a stricter death penalty rule, warning that the initiative was “so poorly written that if the courts throw out some parts . . . California could be left with no death penalty at all”); San Francisco Chron., Oct. 26, 1978, at 6, col. 3 (attributing statements to a San Francisco district attorney which indicated that State Senator Briggs was using the death penalty to enhance his political career); see also G. UELMEN, supra note 13, at 60-61 (quoting legislators and district attorneys who predicted constitutional problems with the initiative); Morain, supra note 14, at 3, col. 1 (“[t]he law is ambiguous in some places and sloppy in others”). Ironically, the author of the statute, former Assistant U.S. Attorney Donald Heller, later became a defense attorney and death penalty opponent. Id. at 26, col. 3.
27. Reidinger, supra note 26, at 52.
28. Id.
29. When a new state supreme court justice is appointed in California, she faces an immediate election for voter approval to finish out the remainder of the departing justice’s term. The new justice must then face another retention election at the start of each new 12-year term. CAL. CONST. art. VI, § 16(a). For a thorough discussion of Chief Justice Bird’s first retention election, in which she garnered only 51.7% of the vote, see P. STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT (1981).
30. Reidinger, supra note 26, at 52.
32. Reidinger, supra note 26, at 54.
cism. In 1981, after the Bird court had reviewed nine death penalty appeals and affirmed just two sentences,\textsuperscript{33} the office of then-State Attorney General Deukmejian (the former state senator and author of the 1977 death penalty law) issued a pamphlet castigating the court.\textsuperscript{34} As the court continued to reverse death sentences,\textsuperscript{35} dissatisfaction grew.\textsuperscript{36} In 1982, long-time court critic Deukmejian succeeded Brown as governor of California, and by 1986, when six of the seven members of the court (including Chief Justice Bird) faced a retention election,\textsuperscript{37} public opinion strongly favored capital punishment.\textsuperscript{38}

Discussion of the court's record on the death penalty dominated public debate during the retention election of 1986.\textsuperscript{39} Crime victims, law


\textsuperscript{34} See CALIFORNIA DEP'T OF JUSTICE, supra note 14. The report is unrelenting in its assault on the court's treatment of death penalty cases. \textit{See, e.g.}, id. at 2 (The court "has effectively blocked the will of the people through myriad technicalities."); id. ("The death penalty has been essentially nullified by the California Supreme Court even though it is considered to be the singularly most effective deterrent to murder available."); id. at 8 (The court has "effectively nullified [the electorate's] votes by thwarting death penalty laws by using a smokescreen of technicalities to prevent any convicted killer from being executed."); id. ("A major reason that murder and other violent crimes have reached intolerable levels is the historic unwillingness of the California Supreme Court to follow the will of the people.").

\textsuperscript{35} After two affirmances in the first 9 cases, only 1 more death sentence was affirmed in the next 52 cases decided before election day, 1986. \textit{See} People v. Fields, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983), cert. denied, 469 U.S. 892 (1984). Chief Justice Bird dissented.

\textsuperscript{36} \textit{See, e.g.}, The Process of Capital Punishment: Special Hearing Before the California Senate Comm. on Judiciary, Mar. 19, 1985, at 4 (stating purpose of hearing—to determine why the death penalty had not been imposed in California, and why death penalty cases took so long to process) ("Public concern over the State's failure to impose capital punishment to date is obvious. . . . Much of the frustration centers on the State Supreme Court, seen as the archetype of a legal system that condones interminable appeals and delays.").

\textsuperscript{37} Chief Justice Bird and Associate Justices Mosk, Reynoso, Grodin, Lucas, and Panelli sought confirmation pursuant to CAL. CONST. art. VI, § 16(a). \textit{See supra} note 29.

\textsuperscript{38} By a 75% to 16% margin, those Californians surveyed in 1985 said they favored the death penalty, with 55% responding they favored it "very strongly." Balzar, 75% Support Death Penalty in California, L.A. Times, Aug. 19, 1985, § I, at 1, col. 2, at 12, col. 3 (CC ed.). Only nine percent said they opposed it "very strongly." Id. Twenty-eight percent said all murderers should be executed. \textit{Id.}

\textsuperscript{39} O'Hara, \textit{Caught in a Backlash}, MACLEAN'S, Nov. 17, 1986, at 34 (Bird's defeat came "in a backlash against her record of liberal judicial decisions, especially her refusal to impose the death penalty."); Reidinger, \textit{supra} note 26, at 52 (The election was "dominated by hysteria about the death penalty."); Tigar, \textit{Judges, Lawyers and the Penalty of Death}, 23 LOY. L.A.L. REV. 147, 147 (1989) ("[T]he electoral fate of Chief Justice Rose Bird of California had much to do with the death penalty") (citation omitted); Hager, \textit{Rising Stream of Death Penalty Cases Threatens to Swamp State High Court}, L.A. Times, Oct. 9, 1988, § I, at 3, col. 1 [hereinafter Hager, \textit{Rising Stream of Death Penalty Cases}] (asserting that the "bitter" election campaign focused on the death penalty); Hager, \textit{Death Penalty Upheld, First for New Court}, L.A. Times, Aug. 14, 1987, § I, at 3, col. 5 (The court's record on the death penalty was "the central issue."); \textit{See also} G. UELMEN, \textit{supra} note 13, at 3 ("Clearly, there is a widespread public perception that the decisions of the California Supreme Court have frustrated implementation of the death penalty in California."); Balzar, \textit{supra} note 16, at 18,
enforcement personnel, and even President Ronald Reagan spoke out against Bird and the court.\textsuperscript{40} Although California voters had never before failed to confirm an appellate judge during the fifty-year history of the retention election procedure,\textsuperscript{41} Chief Justice Bird lost by nearly a two-to-one margin, the magnitude of her defeat also toppling fellow liberal justices Cruz Reynoso and Joseph Grodin.\textsuperscript{42} While other factors contributed to the trio's defeat,\textsuperscript{43} the Bird court's death penalty record was clearly the primary impetus for the voters' repudiation of the three Brown appointees.\textsuperscript{44}

\textsuperscript{40} See, e.g., Lacayo, \textit{Shaking the Judicial Perch}, \textit{Time}, Sept. 15, 1986, at 76 (quoting a district attorney who complained that Bird "ha[d] been twisting the law so that it more closely reflect[ed] her own political beliefs"); Martin, \textit{Dead Man}, San Francisco Examiner, Jan. 8, 1989 (Image Magazine), at 19, 20, 23 (profile of death row denizen Robert A. Harris) (describing criticism of Bird by Sgt. Steve Baker, a San Diego police officer who aided in the capture of Harris before learning that Harris had killed Baker's son; Baker began speaking out because he "wanted to get rid of Rose Bird"); Reidinger, \textit{supra} note 26, at 52 (describing the television commercials featuring Marianne Frazier, mother of a murdered twelve-year-old girl, complaining that because of Bird her daughter's convicted killer was still alive); Reagan Hits Cranston on Military Issues, \textit{L.A. Times}, Nov. 2, 1986, § I, at 1, col. 4 (CC ed.) (quoting President Reagan's opposition to Bird); see also O'Hara, \textit{supra} note 39, at 34 (discussing the Frazier advertisements); Press, \textit{A Vote on the Quality of Mercy}, \textit{Newsweek}, Nov. 3, 1986, at 63 (same).

\textsuperscript{41} O'Hara, \textit{supra} note 39, at 34; Reidinger, \textit{supra} note 26, at 52.

\textsuperscript{42} Skelton & Hager, \textit{Lucas is Deukmejian's Choice to Replace Bird}, \textit{L.A. Times}, Nov. 27, 1986, § I, at 1, col. 2, at 3, col. 1 (CC ed.) Bird was rejected by 66% of the voters, Reynoso by 60%, and Grodin by 57%. \textit{State Election Returns}, \textit{L.A. Times}, Nov. 6, 1986, § I, at 24, col. 1. Justice Stanley Mosk, the senior member of the court, who did not face much organized opposition, was approved by 74% of the voters. \textit{Id}. The two Deukmejian appointees on the ballot were easily confirmed. Then-Justice Malcolm Lucas won the approval of 80% of the electorate, and Edward Panelli garnered votes of approval from 79%. \textit{Id}. Justice Allen Broussard, another Brown appointee, was the only sitting justice not up for retention in 1986. \textit{Id}. For one justice's description of his ouster from the Court, see J. GRODIN, \textit{In Pursuit of Justice} 168-82 (1989).

\textsuperscript{43} See Lacayo, \textit{supra} note 40, at 76 (citing accusations that the real motive of the campaigners against Bird was to achieve a court more sympathetic to business interests in civil cases); O'Hara, \textit{supra} note 39, at 34 (listing other factors in Bird's defeat, including lack of bench experience, her insistence on being called "chairperson" of the Judicial Council, and her failure to mount a strong counter-campaign; she was also "a lightning rod for statewide dissatisfaction with liberal courts," opposed by "a well-funded coalition of big business, political conservatives and supporters of capital punishment").

\textsuperscript{44} See, e.g., Lacayo, \textit{supra} note 40, at 76 (arguing the main charge against Bird was that, at the time, the court had reversed all but 3 of the 55 death cases which had not been reversed, four-fifths of the population favored capital punishment); Press, \textit{supra} note 40, at 63 (Bird had become a convenient lightning rod for voters' discontent concerning law-and-order issues); Reidinger, \textit{supra} note 26, at 54 (albeit the court never invalidated the Briggs Initiative, its reversals of death sentences seemed to suggest the court was "thwarting the will of the people"); Skelton & Hager, \textit{supra} note 42, at 1, col. 3 (controversy over Bird "centered especially on [the court's] overturning of numerous death penalty sentences in a state where voters overwhelmingly
The ouster of Bird, Reynoso, and Grodin led to a sudden and pronounced shift in the political composition of the California Supreme Court. Rose Bird, like Grodin and Reynoso, left office after the expiration of her term in January 1987. Governor Deukmejian, who had pledged to name hard-liners to replace the defeated justices, elevated Justice Malcolm Lucas to chief justice shortly thereafter. The court vacancies were filled by David Eagleson, Marcus Kaufman, and John Arguelles. The seven-member California Supreme Court is presently comprised of five Deukmejian appointees and two liberal holdovers, Justices Stanley Mosk and Allen Broussard.

B. Death Penalty Procedures Under the 1977 and 1978 Laws

All of the death penalty judgments reviewed by the California Supreme Court in the past decade were rendered under either the 1977 or 1978 law described in the preceding Section. The following is a brief overview of the procedural requirements of each law.
Under both death penalty laws, California employs a unique, trifurcated procedure, in which the jury must make three separate findings to render a judgment of death. The jury must determine that: (1) the defendant is guilty of a capital crime; (2) one or more statutory "special circumstances" warranting consideration of the death penalty exist; and (3) the defendant should be executed rather than sentenced to life imprisonment without possibility of parole.

In the first phase, the jury determines whether the defendant is guilty of a capital crime. The guilt phase is ostensibly like any other criminal trial, except that the higher stakes add to its complexity, time, and cost. If the defendant is convicted of a capital offense, then the trial moves into the special circumstances phase. In this phase, the trier of fact determines whether one or more of the special circumstances allegations are true beyond a reasonable doubt. If a special circumstance is

51. Most states' post-Gregg death penalty statutes use instead a bifurcated procedure patterned after the Model Penal Code. See MODEL PENAL CODE § 210.6 comment 13, at 167, 169-71 (1980) (revised comment); see also Spangenberg & Walsh, supra note 5, at 52 (virtually all states with the death penalty employ bifurcated proceedings).


53. CAL. PENAL CODE § 190.1(a) (West 1988).

54. See sources cited at supra note 5; see also N.Y. State Defenders Ass'n, Capital Losses: The Price of the Death Penalty for N.Y. State (1982) (tabulating the cost of the death penalty to the state and county's criminal justice system through the first three stages of a typical death penalty case—$1.8 million); Nakell, The Cost of the Death Penalty, 14 CRIM. L. BULL. 69, 69-80 (1978) (purporting to show how capital punishment serves to drive up the costs within the criminal justice system); Moran & Ellis, Rethinking Capital Punishment, L.A. Daily J., Oct. 22, 1986, § 1, at 4, col. 3 (arguing that California and New York could save a great deal of money by eliminating death penalty trials).

55. CAL. PENAL CODE § 190.4(a) (West 1988). Further proceedings are needed to make special circumstances findings only if a prior murder conviction is charged. Id. § 190.1(b). While most of the special circumstance determinations can be made from the evidence adduced during the guilt phase of the capital trial, evidence of a prior murder conviction is not normally admissible in such a proceeding and can only be introduced in a separate proceeding after the defendant's guilt of the charged crime has already been established.

found, then the trial proceeds to the penalty phase. At this point, the same jury chooses between imposing a sentence of death or a sentence of life imprisonment without possibility of parole.\textsuperscript{56}

If the jury returns a verdict of death, the judge automatically considers whether to modify the sentence to life imprisonment without possibility of parole.\textsuperscript{57} Under the 1978 statute, the judge applies a somewhat different standard of review to the jury's verdict than he did under the 1977 law; nonetheless, the requirements are basically the same.\textsuperscript{58}

Once a judgment of death is rendered at the trial court level, the defendant enjoys the right to an automatic appeal to the supreme court, bypassing the lower courts of appeal entirely.\textsuperscript{59} It is the opinions

\textsuperscript{56} CAL. PENAL CODE § 190.3 (West 1988) (penalty phase); id. § 190.4(c) (same jury unless a jury trial was waived by the defendant, the defendant was convicted by a plea of guilty, or the court discharges it). The 1977 and 1978 versions of section 190.4 differ somewhat on the procedures for impaneling a new jury if the previous one cannot reach unanimity on the special circumstances. Compare id. § 190.4(a) with Act effective Aug. 11, 1977, ch. 316, § 12, 1977 Cal. Stat. 1255, 1260-61 (repealed 1978).

Surprisingly, the factors are very similar in the 1977 and 1978 laws. Compare Act effective August 11, 1977, ch. 316, § 11, 1977 Cal. Stat. 1255, 1259-60 (repealed 1978) with CAL. PENAL CODE § 190.3 (West 1988). The 1978 rules, however, have a lenient standard for the admissibility of evidence of prior felony convictions in the penalty phase. Compare id. § 190.3 (in addition to evidence of prior criminal activity involving force or violence, the trier of fact may take into account "the presence or absence of any prior felony convictions") with Act effective Aug. 11, 1977, ch. 316, § 11, 1977 Cal. Stat. 1255, 1259 (repealed 1978) ("no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence").

The instructions on the use of those factors in the jury's decisionmaking process vary dramatically in the two death penalty laws. Compare Act effective Aug. 11, 1977, ch. 316, § 11, 1977 Cal. Stat. 1255, 1260 (repealed 1978) ("After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole."), with CAL. PENAL CODE § 190.3 (West 1988) (prescribing that the trier of fact "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances"). The tougher language in the 1978 statute has provoked a great deal of judicial scrutiny. See, e.g., People v. Davenport, 41 Cal. 3d 247, 277-80, 710 P.2d 861, 880-82, 221 Cal. Rptr. 794, 813-15 (1985) (jury instruction using Briggs Initiative language was so misleading as to require reversal of a death sentence); People v. Brown, 40 Cal. 3d 512, 540, 709 P.2d 440, 456, 220 Cal. Rptr. 637, 652-53 (1985) (use of the same statutory language as in Davenport not a per se constitutional violation), rev'd on other grounds sub nom. California v. Brown, 479 U.S. 538 (1987); People v. Ramos, 37 Cal. 3d 136, 158-59, 689 P.2d 430, 440-41, 207 Cal. Rptr. 800, 810-11 (1984) (declaring a statutory jury instruction, that the governor could commute a sentence of life imprisonment without the possibility of parole to a sentence including the possibility of parole, violative of the state constitutional guarantee of due process), cert. denied, 471 U.S. 1119 (1985). For an analysis of the constitutional issues implicated by the penalty phase provisions of the Briggs Initiative, see G. UELMEN, supra note 13, at 53-59.

\textsuperscript{57} CAL. PENAL CODE § 190.4(c) (West 1988).

\textsuperscript{58} Compare id. (The judge determines if the jury's findings "are contrary to law or the evidence presented."). Compare Act effective Aug. 11, 1977, ch. 316, § 12, 1977 Cal. Stat. 1255, 1261 (repealed 1978) (The judge independently determines "whether the weight of the evidence supports the jury's findings and verdicts.").

\textsuperscript{59} CAL. CONST. art. VI, § 11 ("The Supreme Court has appellate jurisdiction when judgment of death has been pronounced."); CAL. PENAL CODE § 1239(b) (West 1982 & Supp. 1990) (making
generated from these appeals that form the subject of this study.

II

Methodology

This Comment is the product of a comprehensive reading of the first sixty death penalty opinions issued by the California Supreme Court since Chief Justice Malcolm Lucas assumed leadership of the court in 1987. In forty-six of these cases, the court affirmed the capital conviction(s) and judgment of death. In eleven, the court affirmed the conviction(s) and judgment of death. In the remaining cases, the court reversed or remanded the case for further proceedings.


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(...)


64. See CAL. PENAL CODE § 190.3 (West 1988). For a general discussion of evidence issues in...
cases, the precedential effect of supreme court rulings here is restricted to capital trials (and with these rules as well, only to the special circumstances and penalty phases). The authors have therefore limited their analysis to dispositions of evidence issues arising from the first set of rules, where the precedential value of the court’s pronouncements encompasses all civil and criminal actions in the state.

The authors compared the court’s resolution of relevant evidence issues to existing sources of California evidence law. Fortunately, the state’s evidence law is largely grounded in the California Evidence Code, which served as the primary basis for comparison. However, because the code specifically permits courts some discretion to expand the law toward the admissibility, as opposed to the exclusion, of evidence, the authors also compared the court’s rulings to existing case law and treatises on evidence law.

III
THE PROBLEM CASES

The Lucas court has proven capable of churning out death penalty
opinions at a rather astounding rate, but it has done so only at a high cost. With disturbing regularity, these decisions have been marred by errors in the statement or application of evidence law.

The cases in which the authors found unsound evidentiary rulings are analyzed below. These cases are not arranged in any particular way, simply because they do not fit into a particular pattern. In fact, the essentially random nature of the errors makes it unlikely that these rulings were the product of a hidden agenda or a clumsy reshaping of California evidence law. Rather, the randomness of the errors suggests that they are largely the result of problems in the court's process of rendering opinions.

A. People v. Ruiz and People v. Bean

People v. Ruiz and People v. Bean are examined together because both involve the difficult issue of severance or joinder of separate criminal charges. Under the California Penal Code, a criminal defendant may be charged in the same action with separate offenses of the same class of crime under separate counts, even if the offenses do not otherwise share a common bond (e.g., the same victim, modus operandi, or location). Trial courts are, however, expressly permitted to sever the charges and try them separately in the interest of justice. The Lucas court has encountered particular difficulty applying the test under which it reviews a trial court's exercise of discretion in the face of such a severance motion.

67. See infra notes 212-13 and accompanying text.

68. The authors chose not to include certain other cases in which the court's cryptic disposition or confusing comments regarding evidence issues obscured its likely rationale. For example, in People v. Gates, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987), cert. denied, 486 U.S. 1027 (1988), a shooting-victim's tape-recorded statement, taken in the hospital some two hours after the shooting, was admitted into evidence. Id. at 1182, 743 P.2d at 310, 240 Cal. Rptr. at 675. The court's resolution of defendant's ineffectiveness of counsel claim included the suggestion that counsel may not have objected to admission of the statement because the attorney "determined an objection would have been futile since the tape would qualify under a hearsay exception." Id. at 1183, 743 P.2d at 311, 240 Cal. Rptr. at 676.

To the extent the court intended to endorse the view that some hearsay exception would have covered admission of the tape, there was error, because no exception applied. The court may simply have meant that a reasonable attorney might have thought a hearsay exception applied (an odd suggestion, since none did).


71. See CAL. PENAL CODE § 954 (West 1985) ("[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or . . . two or more different offenses of the same class of crimes or offenses, under separate counts") (emphasis added).

72. Id. (severance may be ordered "in the interests of justice and for good cause shown"); see People v. Lucky, 45 Cal. 3d 259, 276-78, 753 P.2d 1052, 1062-63, 247 Cal. Rptr. 1, 11-12 (1988), cert. denied, 109 S. Ct. 848 (1989).
I. Background: The Williams Test

In *Williams v. Superior Court*, the supreme court established the current test under which it reviews the trial court's discretion to sever or join two or more cases. The court considered whether the joinder of unrelated charges to be tried before one jury would deny the defendant due process and a fair trial. Under the court's rule, the first issue raised by a motion to sever is cross-admissibility: Whether evidence admissible to one case would also be admissible in the trial of the other(s) under the regular rules of evidence. If evidence pertaining to the various charges is cross-admissible in the separate trials, the possibility of prejudice to the defendant in trying the cases together ordinarily would be dispelled.

If the court does not find the evidence cross-admissible, however, then the court must engage in a balancing process, weighing factors favoring joinder against the possible prejudice to the defendant's right to a fair trial. Two factors that might favor joinder include efficient use of judicial resources—at least to the extent that the evidence presented for the different charges will overlap—and convenience to the defendant, although this would not be an appropriate consideration where the defendant wants severance rather than joinder. On the other hand, where the defendant can demonstrate substantial prejudice by joinder, severance is appropriate.

The *Williams* court suggested four factors that indicate whether the defendant will be substantially prejudiced: (1) if the evidence is cross-admissible (which is considered at the threshold, as discussed above); (2) if the charges or evidence are highly inflammatory; (3) if the evidence for some charges is significantly stronger than for others, presenting the possibility that the jury will improperly consider the stronger evidence for one charge in evaluating the others; and (4) if the defendant will be subject to the death penalty.

In both *Ruiz* and *Bean*, the Lucas court attempted to apply the *Williams* test to the denial of a motion for severance. Unfortunately, it misapplied the rule in both cases.

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73. 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984).
74. *Id.* at 448, 683 P.2d at 703, 204 Cal. Rptr. at 704. Clearly, if the rules of evidence will permit the jury to hear the evidence pertaining to the severed charges, then there is little point in actually trying the charges separately.
75. *Id.* at 451, 683 P.2d at 705, 204 Cal. Rptr. at 706.
76. *Id.,* 683 P.2d at 705, 204 Cal. Rptr. at 706-07.
77. *Id.* at 452, 683 P.2d at 706, 204 Cal. Rptr. at 707 ("[A] demonstration of substantial prejudice by a defendant may be sufficient to warrant a severance of charges which could otherwise be properly joined.").
79. In fairness to the Lucas court, its predecessor struggled with *Williams* as well. In People v. Balderas, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985), the court correctly noted the four
2. People v. Ruiz

In *Ruiz*, the defendant was charged with the murders of his first and second wives, the first murder preceding the second by a little more than three years. He was also charged with slaying his second wife's teenage son. The jury found him guilty of first degree murder as to both Pauline (the second wife) and her son, Tony, and guilty of second degree murder as to Tanya (the first wife). Because there were no witnesses to the killings, the evidence against Ruiz was largely circumstantial. 80

Tanya married Ruiz in 1972 and she disappeared in August 1975. Initially, Ruiz was suspected of causing her death, but he was not formally charged at the time due to a lack of evidence. 81 Weeks before her disappearance, Tanya confided to her mother that she was not getting along with her husband and that their marriage was in trouble. Tanya's mother later testified that Tanya was "scared to death" of Ruiz and his "terrible temper." 82

According to Ruiz, when he first learned that Tanya was missing in August 1985, he chose neither to call the police nor to go out looking for her himself. He merely made a few phone calls to places he thought she might be. When he did not locate her, he simply assumed she had "left" him. 83 This "estranged wife" theory drew suspicion because Tanya, an epileptic, had uncharacteristically told no one she was leaving, including those on whom she relied for help. She had not told her physician that she was moving, despite her need for special medication. Tanya also completely stopped all communication with her family members, with whom she had been in monthly telephone contact. 84

prongs of the test and purported to apply them. *Id.* at 171-77, 711 P.2d at 491-96, 222 Cal. Rptr. at 195-200. However, the decision was criticized at the time as "water[ing] down" *Williams* by permitting a weakly supported charge to be tried with other counts for which there was stronger evidence. *See* Newman v. Superior Court, 179 Cal. App. 3d 377, 385, 224 Cal. Rptr. 538, 543 (1986) (Poché, J., concurring) ("What is foreseeable is that defendant will be convicted on both crimes so long as the evidence on one is convincing.").

Whatever the merit to this criticism, the next significant Bird court opinion on the subject arguably over-corrected the problem. In People v. Smallwood, 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986), the court properly applied *Williams*, but included some strong language that seemed to expand the prosecution's burden rather significantly in the event the first *Williams* prong (cross-admissibility) was not satisfied. *See id.* at 429, 722 P.2d at 205-06, 228 Cal. Rptr. at 922 ("Joiner under circumstances where the joined offenses are not otherwise cross-admissible has the effect of admitting the most prejudicial evidence imaginable against an accused"). The Lucas court wisely clarified this issue in *Bean*, see 46 Cal. 3d 919, 939 n.8, 760 P.2d 996, 1008 n.8, 251 Cal. Rptr. 447, 479 n.8, (1988), *cert. denied*, 110 S. Ct. 1499 (1990), while otherwise misapplying *Williams* as described at *infra* text accompanying notes 99-122.

81. *Id.*, 749 P.2d at 857, 244 Cal. Rptr. at 203.
82. *Id.*, 749 P.2d at 857, 244 Cal. Rptr. at 203.
83. *Id.* at 600-01, 749 P.2d at 858, 244 Cal. Rptr. at 204.
84. *Id.* at 601, 749 P.2d at 858, 244 Cal. Rptr. at 204.
Tanya’s body was never found, and the police were unable to discover any physical evidence of foul play.

By June 1978, Ruiz was married to Pauline, who had a teenage son, Tony, from a previous marriage. Pauline and Tony disappeared in October 1978. In August of that year, Pauline and Tony had begun to complain to friends about Ruiz’s behavior. Just weeks before their disappearance, Pauline had told a friend, “If Tony and I, either one of us show up missing, raise hell with the police.”

On December 14, 1978, a friend of Pauline’s reported to police the disappearance of Tony and Pauline. Investigators interviewed Ruiz, who said he did not know where they had gone. After further attempts by the police to locate Pauline and Tony proved unsuccessful, a search of Ruiz’s ranch house revealed a nearby shallow grave which held their bodies. Pauline and Tony had both been shot in the head, at least one with a .22-caliber rifle.

Ruiz was immediately arrested. A search of the interior of the ranch house uncovered a .22 Marlin rifle and a rope similar in fiber to the one binding Tony’s body.

At Ruiz’s pretrial hearing, the judge denied his motion to have the charges for Tanya’s murder severed from those for the murders of Pauline and Tony. On appeal, Ruiz argued that the evidence against him for Tanya’s murder was “extremely weak” and that its joinder with the stronger case involving Pauline’s and Tony’s murders was prejudicial error. He contended that the evidence relevant to Tanya’s murder and that relevant to Pauline’s and Tony’s murders were not cross-admissible, and that the two cases should therefore have been tried separately.

The supreme court disagreed. In an opinion authored by Chief Justice Lucas, a majority of the court relied on the “prior conduct to prove identity” doctrine of section 1101(b) of the California Evidence Code to hold that severance was not required. Under the facts of the case, this “prior conduct” doctrine is inapposite, since the case law has established that it relates only to “signature” traits of the crimes. Such traits make it probable to infer that the same person or persons perpe-

85. Id. at 601-02, 749 P.2d at 858-59, 244 Cal. Rptr. at 204-05.
86. Id. at 603, 749 P.2d at 859, 244 Cal. Rptr. at 205.
87. Id., 749 P.2d at 859, 244 Cal. Rptr. at 205.
88. Id. at 605, 749 P.2d at 860, 244 Cal. Rptr. at 206.
89. Id., 749 P.2d at 860, 244 Cal. Rptr. at 206.
90. See id. at 605, 749 P.2d at 861, 244 Cal. Rptr. at 207 (referring to Evidence Code section 1101 as governing cross-admissibility).
91. Id., 749 P.2d at 861, 244 Cal. Rptr. at 207.
EVIDENCE FOR DEATH

trated both offenses. However, to qualify as “signature” traits, it is not enough that two claimed offenses share some common marks: the modus operandi must be so distinct or so recurrent that it reliably identifies the accused as the criminal in all like situations.

In Ruiz, there was a paucity of “signature” evidence. While both of the defendant’s wives complained of marital discord and subsequently disappeared under strange circumstances, few other parallels existed between the two cases. Signature traits are most often found either at the crime scene or on the victim, and in this case one of the victims was never located. Because Tanya’s body was not discovered, there was virtually no way to establish definitive similarities in the way the crimes were committed.

The Tanya case was so impoverished that the prosecution would have had a difficult time obtaining a conviction on those charges in a severed trial. Indeed, no prosecution on the Tanya disappearance was attempted until the murders of Pauline and Tony, although no new evidence relating to Tanya’s disappearance had been discovered. However, by conducting a joint trial, the prosecution benefited from the spill-over effect of the strong Pauline/Tony case evidence. This required reversal of the finding that Ruiz killed Tanya. Moreover, because the spill-over evidence was so inflammatory and so clearly prejudicial, it tainted the penalty phase of the trial as well, and therefore required reversal of the death sentence.

93. See Ruiz, 44 Cal. 3d at 627, 749 P.2d at 875, 244 Cal. Rptr. at 221 (Broussard, J., dissenting) (citing Rivera, 41 Cal. 3d at 392, 710 P.2d at 364, 221 Cal. Rptr. at 564).
94. See id. at 627-28, 749 P.2d at 875-76, 244 Cal. Rptr. at 221-22 (Broussard, J., dissenting).
95. See id. at 628, 749 P.2d at 875-76, 244 Cal. Rptr. at 221-22 (Broussard, J., dissenting).
96. Id., 749 P.2d at 875-76, 244 Cal. Rptr. at 221-22 (Broussard, J., dissenting). In People v. Bean, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988), cert. denied, 110 S. Ct. 1499 (1990), arguably stronger evidence of similarities was considered insufficient to establish cross-admissibility. See infra text accompanying notes 99-103.
97. Because the majority found the evidence in each case to be cross-admissible, “any spill-over effect would have been entirely proper.” Ruiz, 44 Cal. 3d at 607, 749 P.2d at 862, 244 Cal. Rptr. at 208. Without cross-admissibility, any spill-over effect (that is, bolstering the Tanya count with evidence from the Pauline/Tony counts) would have been prejudicial. Inexplicably, the majority believed there was no improper spill-over, because the jury's conviction for second degree murder in the Tanya case proved its ability to distinguish among the various charges filed against defendant. Id., 749 P.2d at 862, 244 Cal. Rptr. at 208. To one who might suspect that the conviction for second degree murder merely reflected the jury's recognition that the evidence was far weaker in the Tanya case, there is no assurance that Ruiz would have been convicted at all without the Pauline/Tony evidence.
98. See id. at 626, 749 P.2d at 874, 244 Cal. Rptr. at 220 (Broussard, J., dissenting) (“That finding [of defendant’s guilt for the death of Tanya] is critical to the jury’s decision to impose the death penalty for the other murders, and the errors in the guilt trial as to Tanya not only require reversal of defendant’s conviction for her murder but also require reversal of the death penalty.”).
3. People v. Bean

The case of People v. Bean\(^9\) involved the bludgeoning deaths of Beth Schatz and Eileen Fox, two elderly women who lived in mobile home parks in Sacramento. The first victim, Beth Schatz, was killed by someone who entered her mobile home while she and her husband slept.\(^{100}\) Her death was caused by multiple blows to the head with a heavy instrument, probably a ball-peen hammer. Several items of property were stolen from the home. A shoe impression and two handprints on the premises proved to be Bean’s.

Three days later, Eileen Fox, a retired nurse, was found dead in her home.\(^{101}\) The coroner concluded that Fox had died of a heart attack, precipitated by an assault to her face and head. The injuries were caused by a blunt object, such as a human fist or foot, but there was no evidence that any weapon was used. The victim’s car and purse were apparently taken from her home. A pair of brown, plastic-framed sunglasses was found at the crime scene. A fingerprint was discovered on these sunglasses, but expert witnesses from the defense and the prosecution disagreed on the value of the print.\(^{102}\)

Bean, like Ruiz, moved to sever the two murder charges against him and have separate proceedings conducted. The trial court refused to grant this request, and the supreme court affirmed. But here, Justice Eagleson, writing for the majority, held that the cases were not similar enough for the purpose of establishing identity to make the evidence cross-admissible.\(^{103}\) Of course, under Williams this determination was not fatal to joinder, because trial courts have broader discretion to deny severance than to admit non-cross-admissible evidence in a severed trial.\(^{104}\) When evidence is not cross-admissible, the court must balance the benefits of joinder against the possibility of prejudice to the defendant.\(^{105}\) The court, however, failed to weigh these competing considerations with the scrutiny and care appropriate to capital cases.

Instead, the Bean court applied the Williams balancing test in a remarkably slanted fashion. The Bean version of the test departs from Williams by overemphasizing the benefits of joinder in terms of resources.

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100. For a complete description of the facts regarding the murder of Beth Schatz, see id. at 929-31, 760 P.2d at 1001-02, 251 Cal. Rptr. at 472-73.
101. For a complete description of the facts regarding the murder of Eileen Fox, see id. at 931-33, 760 P.2d at 1002-03, 251 Cal. Rptr. at 473-74.
102. Id. at 931-32, 760 P.2d at 1003, 251 Cal. Rptr. at 474. Defendant admitted owning a similar pair of glasses. Id. at 933, 760 P.2d at 1004, 251 Cal. Rptr. at 475.
103. Id. at 938, 760 P.2d at 1007, 251 Cal. Rptr. at 478.
104. Id. at 935-36, 760 P.2d at 1005-06, 251 Cal. Rptr. at 476-77.
105. See supra text accompanying notes 75-77.
saved. In *Williams*, the efficient use of public funds was simply an "additional factor" in the balancing process. Conservation of judicial resources was not treated as a universal value favoring joinder in every possible case, but rather as a fact-specific inquiry into the likely savings in the particular matter at hand. In fact, the *Williams* court found that duplication of efforts in separate trials would be minimal in the case before it, because the different counts were not connected by common witnesses, victims, and the like. Furthermore, the court stressed that "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." In contrast, the *Bean* court considered the conservation of judicial resources the "foremost" benefit of joinder to the state. Without reference to any particular facts of the case before it, the court lauded the conservation of judicial resources and public funds which it presumed are universally inherent in a joined trial. For example, such a trial requires only one courtroom, judge, jury, and set of court personnel; furthermore, joint trials speed the processing of criminal charges through the system. According to *Bean*, "these considerations outweigh the minimal likelihood of prejudice through joinder of the charges."

By distorting the original *Williams* test while purporting to follow it, the court has markedly increased the burden on a criminal defendant who is charged with unrelated offenses which nonetheless meet the base requirements of joinder under section 954 of the California Penal Code. The impact of this shift is evident in *Bean*. The court stated that the defendant had the burden of showing prejudice, and then rather cursorily held that he failed to carry this burden. The facts of the case, however, suggest otherwise.

*Bean*’s motion for severance satisfied all four factors of the *Williams* test which demonstrate prejudice to the defendant. First, the court admitted that the evidence of the Schatz murder was not cross-admissible to establish guilt for the Fox offenses. Second, the evidence was

106. *Bean*, 46 Cal. 3d at 939-40, 760 P.2d at 1008, 251 Cal. Rptr. at 479 ("Foremost among these benefits [of joinder] is the conservation of judicial resources and public funds.").
108. See id. at 451, 683 P.2d at 705-06, 204 Cal. Rptr. at 706-07.
109. See id., 683 P.2d at 705-06, 204 Cal. Rptr. at 706-07.
110. *Bean*, 46 Cal. 3d at 939, 760 P.2d at 1008, 251 Cal. Rptr. at 479.
111. See id. at 451-52, 683 P.2d at 706, 204 Cal. Rptr. at 707 (citation omitted).
112. *Bean*, 46 Cal. 3d at 939, 760 P.2d at 1008, 251 Cal. Rptr. at 479.
113. See id. at 939-40, 760 P.2d at 1008, 251 Cal. Rptr. at 479.
114. *Bean*, 46 Cal. 3d at 939, 760 P.2d at 1008, 251 Cal. Rptr. at 479.
115. See id., 760 P.2d at 1008, 251 Cal. Rptr. at 479.
116. *Bean*, 46 Cal. 3d at 939, 760 P.2d at 1008, 251 Cal. Rptr. at 479.
117. See supra text accompanying note 78.
118. *Bean*, 46 Cal. 3d at 936-38, 760 P.2d at 1006-07, 251 Cal. Rptr. at 477-78.
prejudicial because it strongly suggested that the defendant had a penchant for brutally murdering elderly women.\textsuperscript{119} Third, the evidence against the defendant for the Fox murder was sparse and probably could not have supported a conviction on its own.\textsuperscript{120} Finally, the defendant was subject to the death penalty, and although he would have been at risk in a trial for the Schatz crimes alone, the multiple murder conviction—which was unlikely without joinder—was a special circumstance increasing the possibility of capital punishment.

The problems that the \textit{Williams} test seeks to avoid are twofold. The first is that the jury may convict the defendant on both counts as if he were charged with one continuous crime. The second is that the jury may decide that the defendant, whom the evidence has proven guilty on one count, is probably guilty of the other offense as well, despite the lack of substantial evidence as to the second charge. This second horror is precisely what happened in \textit{Bean}. The evidence presented at trial on the Schatz counts was overwhelming, but the evidence on the Fox counts was very weak. Justice Broussard, dissenting in \textit{Bean} as he had in \textit{Ruiz}, stated this position:

Since at the time of the motion [for severance], the evidence of defendant's participation in the Fox murder was limited to the discovery near the body of some sunglasses marked with his fingerprint, it should have been clear that trial of the Fox and Schatz cases together would be unduly prejudicial as to the far weaker Fox counts.\textsuperscript{121}

The result was that the jury almost certainly convicted the defendant on the Fox charges based on the the certainty of his guilt with respect to the Schatz charges.

Compounding the concerns about "spill-over" problems in cases like this one are guilt-phase errors which continue to wreak havoc in the penalty phase of the trial. Reverberations from errors in the guilt phase are felt in the special circumstance determinations and can have a direct effect on the penalty judgment. In his \textit{Bean} dissent, Justice Broussard explained the problem:

As for the penalty verdict in the Schatz case, the evidence in the Fox case was so weak that a jury determining penalty after a separate trial for the Schatz crimes may well have found that the prosecution could not prove the Fox crimes beyond a reasonable doubt. In addition, a jury determining penalty would not have been confronted with a multiple-murder spec-

\textsuperscript{119} See \textit{id.} at 960, 760 P.2d at 1022, 251 Cal. Rptr. at 493-94 (Broussard, J., dissenting) ("[T]he nature of crimes, involving senseless brutality against older, helpless victims, was inherently inflammatory.").

\textsuperscript{120} See \textit{id.} at 961, 760 P.2d at 1022-23, 251 Cal. Rptr. at 494 (Broussard, J., dissenting) ("[W]ithout the inevitable prejudicial spillover from the Schatz evidence, a jury hearing only the evidence in the Fox cases would not have convicted.").

\textsuperscript{121} \textit{Id.} at 960, 760 P.2d at 1022, 251 Cal. Rptr. at 493 (Broussard, J., dissenting).
cial circumstance, another weighty factor in aggravation. Under these circumstances, I find it reasonably possible that the error in failing to sever affected the penalty verdict.\textsuperscript{122}

The defendant's conviction on the Fox counts, which could not have been obtained had the proceedings been severed, significantly influenced the penalty phase of the proceeding.

4. Conclusion

_Ruiz_ and _Bean_ can almost be read as companion cases. In both, the Lucas court took an approach to severance motions that significantly departed from that of the _Williams_ court. Yet it moved in this direction without overruling or distinguishing _Ruiz_ and _Bean_ from _Williams_ and its progeny. In _Ruiz_, the court expanded the definition of "signature" traits to make the evidence of the two murders cross-admissible. In _Bean_, the court simply declared that the defendant had failed to meet the burden of establishing prejudice, and the court placed an undue emphasis on the importance of conserving judicial resources. In so doing, the court watered down the _Williams_ test to such an extent that a denial of a motion to sever may no longer be subject to meaningful review.\textsuperscript{123}

_B. People v. Rich_

In _People v. Rich_,\textsuperscript{124} the California Supreme Court struggled with the bane of evidence students everywhere: the hearsay rule. Rich was convicted on multiple counts of murder, kidnapping, assault, rape, and

\textsuperscript{122} Id. at 959, 760 P.2d at 1021-22, 251 Cal. Rptr. at 493 (Broussard, J., dissenting).

\textsuperscript{123} Of course, under the common law system, courts may speed or spark the evolution of legal principles by revising or rejecting previous holdings. This is particularly true for judge-made rules like the _Williams_ test. However, the _Ruiz_ and _Bean_ opinions do not lend themselves to this "evolutionary" interpretation. For one thing, both opinions freely pledge faithfulness to the _Williams_ test. In fact, the _Bean_ court specifically overruled a Bird court decision, _Smallwood_, which seemed to diverge from the _Williams_ test. See supra note 79 (discussing _Smallwood_).

Another argument against this "evolutionary common law" explanation for the Lucas court's treatment of _Williams_ is the court's inability or unwillingness to settle on a replacement analysis. In _Ruiz_, it applied _Williams_ faithfully but stretched the concept of "cross-admissibility." In _Bean_, it declined to use the new "anything goes" cross-admissibility approach, but instead exaggerated the judicial economy factor in the original test. In a subsequent case, Frank v. Superior Court, 48 Cal. 3d 632, 770 P.2d 1119, 257 Cal. Rptr. 550 (1989), a confused court used an entirely different, though still "watered down," approach. In analyzing the propriety of a trial court's failure to sever two rape charges, the court ignored the cross-admissibility prong and focused instead on the relative strengths and inflammatory nature of the offenses. See id. at 641, 770 P.2d at 1124, 257 Cal. Rptr. at 556. Whether the charges would have been cross-admissible is open to doubt. Compare id. at 642-43, 770 P.2d at 1124-25, 257 Cal. Rptr. at 555-56 (Kaufman, J., concurring) (concluding that the charges were cross-admissible) with id. at 643, 770 P.2d at 1124, 257 Cal. Rptr. at 556 (Broussard, J., dissenting) (concluding that the charges were not cross-admissible). The majority simply found that defendant did not carry his burden of establishing prejudice caused by the failure to sever. Id. at 641, 770 P.2d at 1124, 257 Cal. Rptr. at 555.

other sexual offenses, following a mid-summer 1978 crime spree near Redding, California. The court, in an opinion by Chief Justice Lucas, affirmed the sentence of death.\textsuperscript{125} In so doing, the court twice carelessly invoked the rules pertaining to hearsay.

The most significant of the court’s missteps occurred when the court apparently approved a “fresh complaint” exception to the hearsay rule in order to admit a police officer’s testimony.\textsuperscript{126} The officer testified that one victim, a fifteen-year-old who was kidnapped, raped, and sodomized by Rich, told the officer that Rich had graphically indicated that he was going to force her to participate in anal intercourse.\textsuperscript{127} The trial court overruled Rich’s hearsay objection to the admission of this evidence, finding that the statement came within the purview of the “fresh complaint” exception to the hearsay rule.\textsuperscript{128} The California Supreme Court agreed that the statement was admissible.\textsuperscript{129} Although it did not expressly rely on the fresh complaint “exception,” it offered no other rationale for its conclusion that the statement was admissible.\textsuperscript{130} Since no other exception to the hearsay rule applied, and since the court made no effort to disclaim the trial court’s reasoning, it is reasonable to infer that this was the basis of the court’s ruling.

The problem with the court’s apparent use of the “fresh complaint” exception to the hearsay rule is that it is very unclear that such an exception exists, or, if it does, what the requirements of the rule might be. California’s Evidence Code contains no statutory “fresh complaint” exception to the hearsay rule, although the Code could be read to allow courts to develop new exceptions as needed.\textsuperscript{131}

There has been sporadic discussion of a “recent” or “fresh” complaint doctrine in California cases, with the most recent comprehensive

\textsuperscript{125} Justices Mosk and Broussard did not join in the majority opinion. In a concurring opinion joined by Broussard, Mosk criticized the court’s discussion of one instance of possible prosecutorial misconduct. See id. at 1124-25, 755 P.2d at 1017, 248 Cal. Rptr. at 566-67 (Mosk, J., concurring).
\textsuperscript{126} The cursory discussion of this exception is buried in a general treatment of various trial court errors alleged by Rich. See id. at 1103-08, 755 P.2d at 1003-06, 248 Cal. Rptr. at 553-56.
\textsuperscript{127} Id. at 1105-06, 755 P.2d at 1004, 248 Cal. Rptr. at 554.
\textsuperscript{128} Id. at 1106, 755 P.2d at 1004, 248 Cal. Rptr. at 554.
\textsuperscript{129} Id., 755 P.2d at 1004, 248 Cal. Rptr at 554.
\textsuperscript{130} Id., 755 P.2d at 1004, 248 Cal. Rptr. at 554. The court hedged its bets, stating, “in any event we cannot imagine that this testimony amounted to prejudicial error in light of the other evidence.” Id., 755 P.2d at 1004-05, 248 Cal. Rptr. at 554.
\textsuperscript{131} The hearsay rule exceptions are codified in sections 1220-1350 of the Evidence Code. Unlike the Federal Rules of Evidence, see FED. R. EVID. 803(24), the California scheme contains no “residual exception” under which a court is explicitly permitted to admit hearsay evidence which does not fall into one of the enumerated exceptions but which nonetheless warrants admission. There are, however, hints in the codes suggesting that the common law may develop new exceptions. While privileges are not recognized in California unless provided by statute, CAL. EVID. CODE § 911 (West 1988), hearsay evidence is admissible as provided by law, id. § 1200(b). See also Senate Committee on the Judiciary, Comment to California Evidence Code (“exceptions [to the hearsay rule] may be found in other statutes or in decisional law”) (emphasis added).
analysis appearing in People v. Meacham. In that case, parents testified, as witnesses for the prosecution, that their minor children had complained of sexual touching by the defendant; this testimony was admitted under the doctrine. The language of the opinion, however, made clear that the complaints were admitted not as an exception to the hearsay rule, but as nonhearsay. The court admitted the statements merely to show that such complaints were made, forestalling an assumption that no complaint was made and thus no offense occurred. The Meacham jury was instructed that the evidence was admitted for the limited purpose of rebutting any presumption that there had been no complaint.

A survey of other California cases discussing the doctrine is inconclusive, although in only one case has the doctrine specifically been described as an exception to the hearsay rule. Despite this dearth of authority, the court in Rich expressly referred to the admissibility of the declarant's statement "under the 'fresh complaint' exception to the hearsay rule." If the court actually intended to create a new exception to the hearsay rule, then trial courts are in urgent need of guidance concerning a number of issues, such as how "fresh" the complaint must be, whether the declarant must be unavailable to testify, and whether all the details of the complaint are admissible. It is more likely, however, that the court merely wished to ratify one use of the fresh complaint doctrine to render the extrajudicial statements admissible for their nonhearsay

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133. Id. at 157-60, 199 Cal. Rptr. at 596-98.
134. Id. at 158, 199 Cal. Rptr. at 596.
135. Id., 199 Cal. Rptr. at 596. Hearsay is an extrajudicial statement "offered to prove the truth of the matter stated." CAL. EVID. CODE § 1200(a) (West 1966). If the statements were admitted solely to show that they were made, not that their contents were accurate, then the hearsay rule does not apply.
136. Meacham, 152 Cal. App. 3d at 158, 199 Cal. Rptr. at 596.
137. See People v. Panky, 82 Cal. App. 3d 772, 778, 147 Cal. Rptr. 341, 345 (1978) (recognizing fresh complaint exception to hearsay rule). But see People v. Brown, 35 Cal. App. 3d 317, 323-24, 110 Cal. Rptr. 854, 858 (1973) (admitting fresh complaints as nonhearsay). Other California cases discussing the doctrine have been decidedly obscure. See, e.g., People v. Burton, 55 Cal. 2d 328, 351, 359 P.2d 433, 443-44, 11 Cal. Rptr. 65, 75-76 (1961) ("[T]he prosecution can show the fact of a complaint to forestall the assumption that none was made and that therefore the offense did not occur."); People v. Belasco, 125 Cal. App. 3d 974, 980-81, 178 Cal. Rptr. 461, 464 (1981) (permitting testimony under the "complaint doctrine" to show the fact of a complaint), cert. denied, 496 U.S. 979 (1982); In re Marianne R., 113 Cal. App. 3d 423, 427, 169 Cal. Rptr. 848, 850 (1980) (permitting testimony in a civil trial to show the fact of a complaint under the "'complaint doctrine' exception" to the hearsay rule). The most recent case prior to Rich recognized that fresh complaints are admissible only for nonhearsay purposes. See People v. Fair, 203 Cal. App. 3d 1303, 1307, 250 Cal. Rptr. 486, 489 (1988).
139. These issues were discussed in Meacham, 152 Cal. App. 3d at 157-60, 199 Cal. Rptr. at 595-98, but in the context of nonhearsay evidence admitted for a narrow purpose.
pursposes. In either event, the court needs to clarify the issue.

The second error committed by the *Rich* court involved a simple misstatement of the "state of mind" exception to the hearsay rule. A sizable portion of the court's opinion concerned a discussion of alleged instances of prosecutorial misconduct during the guilt phase of the trial. One such instance was the prosecutor's request that a prosecution witness explain why he had refused to speak to defense counsel's investigator. The witness explained that he had stopped talking to the investigator because the investigator had stated that the defendant "was sick and he did not mean to do what he did." The court did not view the prosecutor's question as misconduct, and further noted that defense counsel had not objected to admission of the statement. The court theorized that counsel had not made a hearsay objection because "the evidence was admissible under the state of mind exception to the hearsay rule," because "[t]he statement was not admitted to prove the truth of the matter asserted — i.e., that defendant was sick and committed the crimes — but to explain the witness' subsequent conduct."

The court's comment is an obvious example of sloppy analysis. Hearsay is defined as an extrajudicial statement "offered to prove the truth of the matter stated." The "matter stated" in the investigator's statement was that defendant was sick and did not mean to commit the crimes. The witness' statement was not admitted to prove the truth of the matter asserted; instead, the statement was admitted to explain why defendant stopped talking to the investigator. Thus, the extrajudicial statement simply was not hearsay in light of the purposes of its admission. The court's explanation that the statement fell within the state of mind exception to the rule is perhaps the starkest example of the court's

140. It hardly seems likely that the California Supreme Court would intentionally create a brand-new exception to the hearsay rule in a one-paragraph disposition of a minor issue raised in a death penalty appeal. The paragraph is buried in a 43-page opinion (counting pages in the Pacific Reporter); the ruling appears to be dictum; and the court's language suggests that it is applying a long-settled principle.

142. *Id.* at 1093-94, 755 P.2d at 996-97, 248 Cal. Rptr. at 546.
143. *Id.* at 1093, 755 P.2d at 996, 248 Cal. Rptr. at 546.
144. Rightly so; there is no "misconduct" in rehabilitating the witness.
146. *Id.*, 755 P.2d at 996, 248 Cal. Rptr. at 546.
147. *CAL. EVID. CODE § 1200(a) (West 1966); see supra note 135. The quite similar federal version is at Federal Rule of Evidence 801(c).
149. *Id.*, 755 P.2d at 996, 248 Cal. Rptr. at 546.
150. In contrast, a typical hearsay statement that is admissible under the state of mind exception to the hearsay rule is the statement "I am upset," when it is admitted to prove that the speaker was upset. *See CAL. EVID. CODE § 1250(a) (West 1966) ("evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when: (1) [i]t the evidence is offered to prove the declarant's state of mind, emotion, or physical sensation"); see also FED. R.
recent laxity. The result is a silly misapplication of an elementary principle of evidence law.

C. People v. Bunyard

In *People v. Bunyard*, the court erroneously permitted an accomplice's testimony about other crimes to be used against the defendant. Bunyard was convicted on two counts of first degree murder following the shooting death of his wife and her full-term fetus. According to the uncontroverted evidence, Earlin Popham, a childhood friend of Bunyard's, shot Bunyard's wife in the head. Popham testified at trial that Bunyard had hired him to kill Bunyard's pregnant wife. Another one of Bunyard's friends, Randy Johnson, testified that Bunyard had offered him as much as $10,000 to kill the victims, but that he had always declined. On appeal, the court affirmed Bunyard's conviction, but reversed his death sentence on the ground that the penalty-phase jury was given a constitutionally unsound instruction.

The case against the defendant was largely based upon the testimony of the triggerman, Popham, whose testimony as an accomplice required corroboration under the law. Johnson's testimony supplied the necessary corroboration. Bunyard, however, urged that Johnson's testimony was incompetent evidence because it was evidence of "other crimes" (solicitation to commit murder) relevant only to prove criminal disposition, and thus erroneously admitted. Justice Arguelles' majority opinion noted that defendant had not raised the objection at trial, and thus had waived his claim of error. Nonetheless, the court went on to find Johnson's testimony probative of the defendant's plan to kill one of the victims, stating that "[w]here the 'other crimes' evidence relates to

EVID. 803(3). For a more thorough discussion of the state of mind exception, see 1 B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 14.1 (2d ed. 1982).

152. Id. at 1200, 756 P.2d at 801, 249 Cal. Rptr. at 77.
153. Id., 756 P.2d at 801, 249 Cal. Rptr. at 77.
154. Id. at 1201, 756 P.2d at 802, 249 Cal. Rptr. at 78.
155. Id. at 1202, 756 P.2d at 803, 249 Cal. Rptr. at 79.
156. Id. at 1242-45, 756 P.2d at 831-33, 249 Cal. Rptr. at 107-09. The Briggs Instruction, which informed the jury that the governor could commute a sentence of life imprisonment without possibility of parole to a sentence permitting parole, was passed into law as part of the 1978 Briggs Initiative. The Bird court, however, ruled that this instruction violated the state constitutional guarantee of due process. See *People v. Ramos*, 37 Cal. 3d 136, 153, 689 P.2d 430, 439-40, 207 Cal. Rptr. 800, 809-10 (1984), cert. denied, 471 U.S. 1119 (1985).
157. CAL. PENAL CODE § 1111 (West 1988) ("A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . .").
158. *Bunyard*, 45 Cal. 3d at 1206, 756 P.2d at 805, 249 Cal. Rptr. at 81 (upholding the sufficiency of Johnson's testimony to provide corroboration).
159. Id. at 1207, 756 P.2d at 806, 249 Cal. Rptr. at 82.
160. Id., 756 P.2d at 806, 249 Cal. Rptr. at 82.
the very same victim, it has been held admissible even when there is no issue of identity and no ambiguity about the proof of defendant's intent to show a defendant's 'common design or plan' towards that victim."

The problem with this ruling is that the court took a rule specifically applicable only to sex offense cases, applied it to this nonsexual criminal activity, and provided no rationale for extension of the rule. Evidence of past offenses that are similar or connected to the charged crime (as the solicitations of Johnson to murder surely were) are admissible against the defendant to identify him as the perpetrator of the crime charged. Nevertheless, the California Supreme Court has cautioned that "only common marks having some degree of distinctiveness tend to raise an inference of identity and thereby invest other-crimes evidence with probative value." In sex crimes, however, the judiciary has created a narrow exception to the requirement that intent, identity, or something other than the defendant's propensity to commit crime, be at issue. When other crimes are directed toward the prosecutrix, evidence of those crimes is admissible to demonstrate the defendant's lewd disposition toward that person. This narrow exception was the rule extended in Bunyard.

No California authority supports the court's contention that common scheme evidence is admissible in non-sex crimes in the absence of an identity issue. The Bunyard court cited one case, People v. Moon, in support of its view concerning the admissibility of other crimes evidence to show a common plan toward the particular victim. The prosecu-

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161. Id., 756 P.2d at 806, 249 Cal. Rptr. at 82.
162. See cases collected in 1 B. Witkin, supra note 64, §§ 374-378.
164. See generally 1 B. Witkin, supra note 64, §§ 380-384. As is evident from the discussion in Witkin's treatise, California courts have struggled with the concept of admitting other-crimes evidence in sex-crime cases where identity was not at issue. Until recently, courts had routinely admitted other-crimes evidence in the trials of sex offenses, generally on the theory that they tended to corroborate a victim's testimony or showed a common plan or scheme. See People v. Kazee, 47 Cal. App. 3d 593, 596, 121 Cal. Rptr. 221, 223 (1975) (corroboration permitted when testimony was from a witness other than complaining witness); People v. Covert, 249 Cal. App. 2d 81, 87-88, 57 Cal. Rptr. 220, 224-25 (1967) (applying "sound reasons of policy and logic for viewing common scheme or plan as the occasion for admissibility in most of these sex cases"). But see People v. Thomas, 20 Cal. 3d 457, 468-70, 573 P.2d 433, 438-39, 143 Cal. Rptr. 215, 220-21 (1978) (limiting the overbroad Covert-Kazee rule to similar sex offenses not remote in time). See generally 2 B. Jefferson, supra note 150, § 33.6, at 1212-13. In People v. Tassell, however, the supreme court rejected a separate rule for sex offenses where neither identity, intent, nor any other issue was in dispute. 36 Cal. 3d 77, 87-89, 679 P.2d 1, 7-8, 201 Cal. Rptr. 567, 573-74 (1984). Tassell apparently has not precluded the admission of other-crimes evidence in sex cases, despite the absence of an identity issue, where the prior offenses were committed against the prosecutrix herself. See 1 B. Witkin, supra note 64, § 384, at 357-58 (3d ed. Supp. 1989).
165. 165 Cal. App. 3d 1207, 756 P.2d at 806, 249 Cal. Rptr. at 82.
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tion in Moon, however, was for a sexual offense, and the only issue was whether evidence of uncharged sexual offenses committed against the prosecutrix was admissible where there was no identity issue and where the prosecution’s proof of intent was unequivocal. The majority also cited People v. Guerrero to bolster its holding that Johnson’s testimony was admissible as proof of the defendant’s plan to kill his wife. In Guerrero, however, the identity and intent of the victim’s assailant were at issue.

If the court wished to extend (rather dramatically) the common scheme theory of admissibility, it should have been far more explicit. If the court was extending the applicability of the rule by analogy, then the rationale underlying the analogy needs explanation. Instead, the majority appears to take the position that this exception to the bar to admission of past offenses has always existed; in fact, only in sex crime cases does the exception have a recognized justification (lewd disposition toward the victim).

D. People v. Heishman

In People v. Heishman, the court considered the admissibility of a murder victim’s prior statements of fear of the defendant. Heishman was convicted of murdering Nancy Lugassy, who had filed rape charges against him and was preparing to testify against him. Two friends of the killer, Nancy Gentry and Cheryl Miller, helped Heishman commit the murder. To lure Lugassy out of her house, Gentry went to Lugassy’s house and posed as a member of the Oakland Police Neighborhood Alert Program. After talking to Lugassy for a few minutes in the house, Gentry left, only to return a short time later complaining of car trouble. She asked Lugassy to come outside to help with the car. Lugassy agreed, and when she walked outside, Heishman shot her.

Over defense counsel’s objection, the victim’s neighbor testified

167. See Moon, 165 Cal. App. 3d at 1080-81, 212 Cal. Rptr. at 104-05. Moon was the first post-Tassell case to suggest that a justification remained for admitting other-crimes evidence against those accused of sex crimes against the prosecuting witness.
169. Bunyard, 45 Cal. 3d at 1207 n.7, 756 P.2d at 806 n.7, 249 Cal. Rptr. at 82 n.7.
171. As in Rich, see supra note 140, this does not appear to be an intentional redirection of the law. In the 33-page majority opinion (as printed in the Pacific Reporter), the court’s discussion of this issue is limited to one paragraph, part of which notes that Bunyard failed to preserve the issue for appeal by making a timely objection.
173. Defendant allegedly planned to kill Lugassy to keep her from testifying at the rape trial.
174. Id. at 159, 753 P.2d at 637, 129 Cal. Rptr. at 681.
175. Id. at 158, 753 P.2d at 636, 129 Cal. Rptr. at 680-81.
concerning statements the victim had made to her about her fear that the defendant would harm her. An Oakland police officer also testified, over Heishman's objection, that the victim had made similar statements to him. The supreme court, in an opinion by Justice Kaufman, held that the evidence was admissible. The court reasoned that the evidence of Lugassy's fear corroborated Gentry's (and Miller's) testimony that Lugassy was afraid to go outside and that Gentry's ruse was necessary to lure her outside. The court cited People v. Armendariz to support admission of the testimony.

The court's reasoning is unpersuasive and erroneous. The California Evidence Code allows state of mind hearsay in the following situations: (1) when the state of mind of the declarant is itself an issue in the action (in cases, for example, where the accused claims self-defense), and (2) when "[t]he evidence is offered to prove or explain acts or conduct of the declarant." In Heishman, the victim's statements cannot be admissible under the first exception because her state of mind was not an issue in the action. The evidence might appear admissible under the second exception because Lugassy's state of mind (being fearful of defendant) explained her conduct (staying indoors). According to Armendariz, however, "a victim's out-of-court statements of fear of an accused are admissible under section 1250 only when the victim's conduct in conformity with that fear is in dispute. Absent such dispute, the statements are irrelevant." In Heishman, there was no dispute about the victim's conduct. The testimony of the defendant's accomplices had already established that Lugassy needed to be lured outside. Her fear statements, even if introduced to corroborate Gentry's testimony, were cumulative and therefore inadmissible under Armendariz.

The three recent cases that most fully elaborate on the victim's fear/hearsay problem, People v. Green, People v. Arcega, and

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176. Id. at 171, 753 P.2d at 645, 246 Cal. Rptr. at 689.
177. Id., 753 P.2d at 645, 246 Cal. Rptr. at 689.
178. Justice Mosk dissented from the affirmance of the death sentence on other grounds. See id. at 205-07, 753 P.2d at 668-69, 246 Cal. Rptr. at 712-13 (Mosk, J., dissenting).
179. Id. at 171, 753 P.2d at 645, 246 Cal. Rptr. at 689.
180. Id. at 172, 753 P.2d at 645, 246 Cal. Rptr. at 689-90.
182. Heishman, 45 Cal. 3d at 172, 753 P.2d at 645, 246 Cal. Rptr. at 689-90 (citing Armendariz, 37 Cal. 3d at 586-87, 693 P.2d at 250-52, 209 Cal. Rptr. at 671-72).
183. CAL. EVID. CODE § 1250(a)(1) (West 1966). For section 1250(a)'s federal counterpart, see Federal Rule of Evidence 803(3).
185. Armendariz, 37 Cal. 3d at 586, 693 P.2d at 251, 209 Cal. Rptr. at 672.
186. Heishman, 45 Cal. 3d at 158-59, 753 P.2d at 636, 246 Cal. Rptr. at 681.
187. Armendariz, 37 Cal. 3d at 589-90, 693 P.2d at 253, 209 Cal. Rptr. at 674.
188. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).
189. 32 Cal. 3d 504, 651 P.2d 338, 186 Cal. Rptr. 94 (1982).
Armendariz, forcefully caution against the use of this form of extrajudicial declaration. The danger is that the jury will use evidence of the victim's mental processes to prove the defendant's state of mind, and to prove that the defendant acted in conformity with that state of mind. Prophetic expressions of fears are especially prejudicial because they misleadingly suggest that the victim had accurate knowledge of the defendant's intention to harm the victim, and that the defendant subsequently acted consistently with this state of mind.

The supreme court failed to heed its own cautions about the potentially dangerous and prejudicial effect of this type of evidence. Nor did the court, once it determined that the evidence was admissible under an exception to the hearsay rule, make a determination that the probative value of the evidence in question outweighed its prejudicial impact. The court opened the door to evidence that impermissibly invites the jury to use the victim's statements of fear as proof of the defendant's guilt.

E. People v. Silva

In People v. Silva, the court relaxed the standards governing the admissibility of adoptive admissions. In Silva, the defendant was sentenced to death for the kidnapping and murder of Kevin Thorpe, and the kidnapping of Thorpe's girlfriend, Laura Craig. He and two accomplices, Thomas and Shelton, kidnapped the couple on a Northern California highway and then took them to a cabin owned by Shelton. At the cabin, Shelton and the defendant chained Kevin to a tree for the night and imprisoned Laura inside. The next morning, Shelton and the defendant took Kevin to the top of a hill and shot him at least thirty-two times with an automatic pistol.

At trial, Shelton invoked his fifth amendment privilege to refuse to testify. However, Thomas testified to statements made to him by Shelton concerning Kevin's murder. Thomas stated that while standing around a burn barrel disposing of Kevin's personal effects, Shelton, in the presence of the defendant, told Thomas how the murder had taken place, how they had taken Kevin up the hill, and how the defendant had

190. Armendariz, 37 Cal. 3d at 586-89, 693 P.2d at 250-53, 209 Cal. Rptr. at 671-74; Arcega, 32 Cal. 3d at 526-27, 651 P.2d at 349-50, 186 Cal. Rptr. at 105-06; Green, 27 Cal. 3d at 24-26, 609 P.2d at 481-82, 164 Cal. Rptr. at 14-15.
191. Armendariz, 37 Cal. 3d at 589, 693 P.2d at 253, 209 Cal. Rptr. at 673-74; accord Green, 27 Cal. 3d at 26, 609 P.2d at 482, 164 Cal. Rptr. at 15.
193. Id. at 615-17, 754 P.2d at 1073-75, 247 Cal. Rptr. at 576-78.
194. Id. at 623, 754 P.2d at 1079, 247 Cal. Rptr. at 582.
195. Id., 754 P.2d at 1079, 247 Cal. Rptr. at 582.
emptied the clip of a machine gun into Kevin's body. Thomas further testified that the defendant did not interrupt or comment while Shelton described the murder. But Thomas said that he knew the defendant could hear Shelton's narrative because "he looked over at [Shelton] and smiled" while Shelton spoke.

Defendant made a pretrial motion to suppress this testimony. He asserted that the reported smile did not fall within the adoptive admission exception to the hearsay rule because Shelton's statements "were made in a setting wherein there was no reply called for." The trial judge disagreed, stating:

I cannot find as a matter of law that . . . [defendant] was not called upon to respond to the accusation. I think that whatever your status in society may be, if you are present when somebody accuses you of a capital crime of which you are innocent some response would be elicited, whatever the circumstances are. Therefore, I think it is not illogical to conclude that these two statements and [defendant's] failure to respond constitute adoptive admissions.

The trial judge's failure to consider the particular circumstances involved was an erroneous application of the law concerning adoptive admissions. Section 1221 of the California Evidence Code provides that "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." Thus, two requirements for the introduction of adoptive admissions can be gleaned from the code: "(1) the party must have knowledge of the content of [the] hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, [the] truth of the hearsay statement." However, it is a well-established rule regarding adoptive admissions that "[w]here the accused stands mute or responds evasively or equivocally[,] admissibility depends on the circum-

196. Id. at 617, 623, 754 P.2d at 1075, 1079, 247 Cal. Rptr. at 578, 582.
197. Id. at 617, 754 P.2d 1075, 247 Cal. Rptr. at 578.
198. Id. at 623, 754 P.2d at 1079, 247 Cal. Rptr. at 582.
199. Id., 754 P.2d at 1079, 247 Cal. Rptr. at 582 (quoting defendant's pretrial motion).
California's high court previously had noted the importance of the accused's fair opportunity to reply to the accusation. See, e.g., People v. Preston, 9 Cal. 3d 308, 313-14, 508 P.2d 300, 304, 107 Cal. Rptr. 300, 304 (1973).
200. Silva, 45 Cal. 3d at 623, 754 P.2d at 1079, 247 Cal. Rptr. at 582 (quoting Superior Court Judge Joseph Campbell) (emphasis added).
202. Silva, 45 Cal. 3d at 623, 754 P.2d at 1079, 247 Cal. Rptr. at 582 (citing 1 B. JEFFERSON, supra note 150, § 3.3, at 175) (emphasis in original).
stances existent."

Therefore, in some situations, a full denial is either not called for or is justifiably withheld, such as when the defendant fears a reprisal if he responds. In determining whether a denial is called for, the particular circumstances must be considered.

In Silva, there are two plausible reasons why the defendant did not deny Shelton’s story: fear of Shelton, or bragging rights. If Shelton had actually murdered Kevin and then unilaterally chose to give “credit” for the killing to the defendant, it is reasonable to infer that the defendant thought it better not to contradict Shelton. After all, if we accept the assumption that the defendant was a bystander and not the triggerman, this fear is real indeed: Shelton had just minutes before shot a young man more than thirty times with a machine gun. It is also possible that the defendant actually wanted “credit” for the killing, even though he may not have committed the act. The relationship between criminals of this sort is odd and not susceptible to normal interpretation. A fireside conversation among three men who have just enjoyed a spree of kidnapping, rape, robbery, and murder is so suspect that calling a smile by one of the defendants an adoptive admission may attach too much credibility to both the original declarant (Shelton) and the testifying witness (Thomas).

The trial judge was essentially correct in his base ruling: a jury could conclude that defendant’s smile was an adoptive admission, and thus the evidence was properly admitted. However, the judge’s gratuitous remark that an innocent person would deny such an accusation “whatever the circumstances are,” implying that a smile was an adoptive admission as a matter of law, was a clear diversion from the rules regarding adoptive admissions. The circumstances surrounding the defendant’s smile hardly permitted such a summary conclusion that the defendant actually believed the statements to which he allegedly acceded.

By failing to note the errant reasoning of the Silva trial judge, the supreme court appeared to give its imprimatur to the lower court’s

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204. See id. at 388-89, 17 Cal. Rptr. at 64 (listing fear, physical pain, suffering, advice of counsel, the self-incrimination privilege, belief that one’s self-interest is best served by silence, and other “physical or mental pressure” as justifications or explanations for a failure to deny an accusation) (quoting Simmons, 28 Cal. 2d at 715-16, 172 P.2d at 26-27).

205. CAL. EVID. CODE § 403(c) (West 1966) (jury determines whether admission was adopted if judge determines that a jury could so find); see People v. Edelbacher, 47 Cal. 3d 983, 1011, 766 P.2d 1, 17, 254 Cal. Rptr. 586, 602 (1989) (“To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant’s conduct actually constituted an adoptive admission becomes a question for the jury to decide.”) (citing People v. Richards, 17 Cal. 3d 614, 618, 552 P.2d 97, 99, 131 Cal. Rptr. 537, 539 (1976)) (emphasis added). For the federal version of section 403(c), see Federal Rule of Evidence 104(b).
remarks. The court evidently failed to understand the significance of defendant's contention appreciably better than did the trial judge: that the situation did not require a response. The court, in support of its position, merely cited a "typical example" from a highly regarded treatise for the proposition that silence or equivocacy in the face of an accusation by someone other than a police officer "lead[s] reasonably to the inference that he believes the accusatory statement to be true." There was no recognition of the relevance of the circumstances under which the statement was made.

What is especially troubling about the court's hurried appraisal of the lower court's ruling is that the adoptive admission appears to have been the crucial piece of evidence against the defendant. Without the admission, little evidence identified which of the three men participated in the various heinous acts described in the court's opinion. Furthermore, the horrifying story of the defendant's brutality was bound to stay with the jurors no matter how dubious the evidence of adoption may have been. Thus, the court's scrutiny of the statement's admission should have been all the more careful; at least, the court should have recognized the trial court's misconception of the rules governing adoptive admissions.

F. Summary of Findings

Among the Lucas court's first sixty death penalty cases, we have identified six with at least one suspect disposition of an evidence issue. None of the noted errors favored the defendant, and the sentence of death was affirmed in all but one of those cases. If we except the cases in which the convictions were reversed, or in which no evidence issues were substantively addressed, the percentage of opinions containing erroneous dispositions of evidence questions climbs higher. While it is dif-

206. Silva, 45 Cal. 3d at 623-24, 754 P.2d at 1079, 247 Cal. Rptr. at 582 (citing 1 B. JEFFERSON, supra note 150, § 3.3, at 175).
207. A great deal of physical and other circumstantial evidence linked Shelton, Thomas, and the defendant to these crimes. See id. at 618-19, 754 P.2d at 1076, 247 Cal. Rptr. at 579 (describing evidence implicating defendant). Nevertheless, the court's opinion (which is admittedly obscure on this point) suggests that the specific information concerning who did what to whom came from Thomas' testimony. See id. at 625, 754 P.2d at 1081, 247 Cal. Rptr. at 584 (evaluating the sufficiency of the evidence).
208. Only in People v. Bunyard, 45 Cal. 3d 1189, 756 P.2d 795, 249 Cal. Rptr. 71 (1988), was the sentence reversed. Even in Bunyard, however, the convictions for the capital crimes were upheld. For a full discussion of Bunyard, see supra notes 151-71 and accompanying text.
difficult to know what rate (if any) is "acceptable" or at least expected, surely a ten percent rate—even for such complex opinions as those concerning the death penalty—is sufficiently high to raise concern about the state of the law and of the court.

IV
CAUSAL FACTORS INFLUENCING EVIDENCE ERRORS

In the cases described in Part III, the supreme court has carelessly applied California evidence law. This Part explains the fundamental causes—structural and political—of the court's poor performance in this area.

A. Overwork

The California Supreme Court is simply swamped with death penalty cases.210 The Lucas court inherited a huge backlog of cases.211 Despite working seven-day weeks and generating a tremendous number of opinions,212 the court has not been able to reduce its docket.213 Some authorities have estimated that it would take years for the court to reduce its capital case backlog, even if it continued to work at a frenetic pace.214 Furthermore, the evidence suggests that the Lucas court's willingness to affirm death sentences will only encourage the imposition


210. As of mid-April 1990, there were 185 capital punishment cases pending before the court. Carlsten, Court Watchers Worry Over String of Retirements, San Francisco Chron., Apr. 23, 1990, at A4, col. 1.


212. Uelmen, The Lucas Court Is Suffocating, L.A. Times, May 9, 1988, § II, at 7, col. 1 (editorial) (arguing that the Lucas court is delivering exactly what the electorate ordered—accelerated processing of death penalty cases—but at the expense of other worthy cases). To illustrate, in the first volume of the official reports that is entirely composed of Lucas court opinions (44 Cal. 3d), 13 of the 48 reported cases are death penalty appeals, consuming 594 of the 1212 pages (an additional 42-page death penalty decision is omitted from the volume because the court granted a rehearing of the appeal). The numbers from the succeeding volume are more striking: in 45 Cal. 3d, 22 of 37 reported cases are death penalty appeals, taking up 1070 of the book's 1364 pages.

213. Unshackle the High Court, L.A. Times, Oct. 5, 1988, § II, at 6, col. 1 (editorial) (although the justices are ruling on the death penalty at the astonishing rate of once a week, they have yet to make more than a dent in their backlog of capital cases). When Lucas became chief justice in early 1987, there were 171 capital cases before the court; the justices then issued an unprecedented 56 rulings in little over a year. Hager, Rising Stream of Death Penalty Cases, supra note 39, at 38, col. 1. But as death verdicts continued to come to the justices for review, 174 cases were still pending as of October 1988, representing nearly half of the court's total docket. Id. By April 1990, the court's death penalty backlog had grown to 185. See supra note 210.

214. In 1988, Professor Barnett estimated that the court needed eight years to clear the backlog if it worked at its then-current feverish pace and death penalty appeals did not increase. Hager, Rising Stream of Death Penalty Cases, supra note 39, at 38, col. 2. Since the death penalty backlog
of more death sentences, thereby increasing the court's workload.215 The
court is thus confronted with an awesome task. Since it lacks the assis-
tance of intermediate appellate courts,216 the court must hear every capi-
tal case resulting in a death sentence, without the benefit of any prior
discussion or filtering of the complex issues involved,217 in addition to
processing its usual criminal and civil case load.218

has now increased, see supra note 213, the court would need to do nothing but review death penalty
cases to clear its docket by the mid-1990s.

The California Penal Code provides inter alia that “in all cases in which a sentence of death has
been imposed, the appeal to the state supreme court must be decided and an opinion reaching the
merits must be filed within 150 days of certification of the entire record by the sentencing court.”
CAL. PENAL CODE § 190.6 (West 1988). In an effort to reduce the backlog of death penalty cases
pending before the court, Chief Justice Malcolm Lucas has instituted a self-imposed deadline that
death penalty appeals opinions must be delivered within 90 days of oral argument. Hagers, Lucas
Carrizosa, Quietly, Justices Modernize, San Francisco Banner Daily J., Mar. 8, 1990, at 1, col. 5, at
8, col. 4.

215. Some authorities believe that prosecutors may have been inhibited from making capital
charges in the past because of the strong likelihood that a death sentence would be overturned by the
Bird court. The new court's abrupt reversal of that trend may be providing at least subconscious
encouragement to bring death charges now. Hager, Rising Stream of Death Penalty Cases, supra
note 39.

216. See supra note 59 and accompanying text (describing death penalty appeals procedure and
the right to automatic appeal to the supreme court from a death sentence).

217. Death penalty appeals are extraordinarily complex, often requiring consideration of scores
of objections. In volumes 44 and 45 of the third series of California Reports, for example, the 35
decisive in death penalty appeals averaged more than 45 pages in length, while all other reported
cases therein averaged less than 20 pages. See supra note 212.

218. The court's workload has in fact made it quite difficult to make time for noncapital
punishment cases containing important criminal and civil issues. Currently, there is an "intolerable"
 delay in the adjudication of civil cases before the court. Weisberg, Essay—Redistributing the Wealth
of Capital Cases: Changing Death Penalty Appeals in California, 28 SANTA CLARA L. REV. 243, 245
(1988); see also Unshackle the High Court, supra note 213 (noting court's tremendous workload,
backlog of capital cases, inability to spare the time to hear important civil and noncapital criminal
cases, and delays in issuing opinions); Hager, Mosk Wants "Drastic" Action to Clear High Court's
Action] (noting that cases involving environmental protection, personal injury, civil rights, and other
issues will not be heard until the backlog is reduced); Hager, Death Cases Seen Delaying Justices on
Key Civil Issues, L.A. Times, July 24, 1988, § I, at 1, col. 1 (describing how civil cases languish due
to the court's workload and capital backlog); Uelmen, supra note 212 (warning that the court does
not have adequate time for non-death penalty matters).

As a result of this lack of time, the court has been forced to make greater use of the
depublication procedure, whereby a California court of appeal decision of which the supreme court
does not approve is stripped of its precedential value, but for which the supreme court does not issue
its own opinion. Uelmen, supra note 212 (noting that the number of depublications is at a record
high); see also Unshackle the High Court, supra note 213 (noting the increasing use of depublication).

Many commentators, including some of the justices themselves, have begun to worry that the
court will soon have no time for any cases other than capital punishment appeals. Justices Lucas
and Mosk have both warned that without some sort of reform, the California Supreme Court will
become a court devoted primarily to the death penalty. See Hager, Mosk Wants "Drastic" Action,
supra (reporting Mosk's renewal of his proposal for a reconstituted court to avoid making the
development of civil law a casualty of the death penalty); Morain, Capital Cases Before Court Will
Not surprisingly, a number of negative consequences arise from the court's increasing volume of work. The foremost of these is the threat to the quality of the court's work posed by the hectic pace of decisions issued. To keep from falling further behind in its casework and also to render review within its self-imposed ninety-day deadline, the court writes opinions very quickly. Often this means that issues that have no great bearing on the ultimate outcome of the case, such as evidentiary issues raised during the guilt phase of the trial, are given little thought or discussion. The evidence of guilt in most of these cases is so overwhelming that the court usually defers to the trial judge's discretion and the jury's determination of the facts. Thus, the "real" dispute in

Take Years to Resolve, L.A. Times, Aug. 18, 1985, § I, at 26, col. 1 (reporting that Lucas estimated that he and his staff spend one-fourth to one-half of their time on death penalty cases); see also Uelmen, supra note 11, at 295 ("Death penalty cases usurp the docket of the supreme court, reducing the justices to performing like a badly overworked intermediate appellate court, unable to give other issues the attention they deserve."); Unshackle the High Court, supra note 213 (quoting Dean Uelmen's statement that the California Supreme Court is "no longer functioning as the architect of California case law").

219. Professor Barnett has argued that the court's present pace of decisions "threatens the quality of its work in other cases, as well as [in] death penalty cases themselves." Hager, Rising Stream of Death Penalty Cases, supra note 39, at 38, col. 2. When the court announced that it would adhere to the 90-day deadline for issuing opinions, see supra note 214, commentators again argued that the quality of the court's opinions might be undermined. See Hager, Lucas Expects More Speed, supra note 214.

It should be noted that the authors of this Comment are not the first to perceive an alarming error rate in opinions by this court in general. Dean Uelmen noted that, in petitions for rehearing, "lawyers are complaining that inaccuracies in the opinions reflect the haste with which they are being rendered." Uelmen, supra note 212 (editorial backing a variation of Justice Mosk's plan for reconstituting the court); see also Carlsen, Court Admission Has Experts Worried, San Francisco Chron., Sept. 7, 1989, at A9, col. 3 (discussing court errors in administering the death penalty appeals process, including its 1987 affirmation of a death sentence on a record in which more than 1,000 pages were missing, and the near execution of an inmate in 1989 because the court mistakenly believed his execution date had been canceled).

220. None of the three successful appeals of capital convictions in the first 60 death penalty cases before the Lucas court was grounded upon an evidentiary error. See infra note 253. The Bird court reversed capital convictions on grounds of evidence admissibility in eight cases. See Uelmen, supra note 11, at 250 & n.104.

221. The court has proven to be especially deferential to the trial court's discretion in admitting relevant but potentially inflammatory evidence. See, e.g., People v. Coleman, 46 Cal. 3d 749, 773-76, 759 P.2d 1260, 1276-77, 251 Cal. Rptr. 83, 99-101 (1988) (allowing trial court's admission of evidence that defendant's fingerprint at the murder scene was "bloody," despite the lack of a proper basis for admission, on the grounds that it was harmless error), cert. denied, 109 S. Ct. 1578 (1989); People v. McDowell, 46 Cal. 3d 551, 565, 758 P.2d 1060, 1067-68, 250 Cal. Rptr. 530, 537 (1988) (upholding trial court's admission of testimony by widow of rape-murder victim, purportedly relevant to establish that victim did not ordinarily wear ripped and torn panties), cert. denied, 109 S. Ct. 1972 (1989); People v. Brown, 46 Cal. 3d 432, 442, 758 P.2d 1135, 1141, 250 Cal. Rptr. 604, 611 (1988) (upholding trial court's admission of a mannequin dressed like the decedent and decorated with bullet holes), cert. denied, 109 S. Ct. 1329 (1989); People v. Milner, 45 Cal. 3d 227, 250, 753 P.2d 669, 684, 246 Cal. Rptr. 713, 728-29 (1988) (upholding trial court's request that the testifying defendant don the bloodstained pants he was allegedly wearing on the day of the murder for an in-court demonstration).

222. The jury is, of course, the appropriate factfinding body. In only one capital case has the
most capital cases is over the imposition of the death sentence, rather than over the guilty verdict. Errors committed in the guilt phase, to the extent the supreme court recognizes and notes them, are invariably ruled harmless. Given that the court does not have time to examine thoroughly each technical evidentiary objection raised during the guilt phase, and given that these issues will virtually never control the court’s resolution, it is not surprising that the court’s coverage of these questions tends to be cursory.

A second negative influence of the heavy death penalty caseload on the quality of the court’s opinions is intellectual fatigue. Although little had been written on the subject of judge “burnout” in the past, commentators are beginning to recognize its growing prevalence. The justices on the California Supreme Court no doubt feel the effects of this phenomenon more acutely than most, for they are the object of intense public and scholastic scrutiny.

The errors exposed in the court’s recent death penalty case decisions are disturbing because they reveal a court less sharp than it should be. Tight and thorough examination of each issue and sub-issue takes incredible intellectual stamina and is difficult to sustain in the face of a crushing workload. Often the defendant has no realistic chance of having his con-

Lucas court found insufficient evidence to sustain a jury’s verdict, and even in this case, the error affected only the defendant’s penalty. See People v. Morris, 46 Cal. 3d 1, 19-22, 756 P.2d 843, 853-56, 249 Cal. Rptr. 119, 129-32 (1988) (affirming murder conviction but reversing robbery conviction and death penalty).


In fact, of all the trial court evidence errors noted by the Lucas court in the death penalty cases it has reviewed thus far, none was considered reversible. See infra note 253. Considering the Chief Justice’s judicial philosophy, this is hardly surprising. See Hager, Death Penalty Cases Not Rushed, Lucas Says, L.A. Times, Oct. 5, 1988, § I, at 4, col. 2, at 20, col. 1 ("Lucas said he could offer no explanation for the turnabout [in the number of death penalty affirmances] — but he did refer indirectly to the new court’s standard for determining ‘harmless error’ in capital trials. Under Lucas, the court has been substantially more reluctant to find that procedural errors could have affected the outcome of a case and thus required reversal of a death verdict.").


See Hager, supra note 218 (reporting concerns of Dean Uelmen). When Justice Arguelles announced his retirement in early 1988 (after two years on the court), there was wide speculation that his decision was a result of the court’s crushing workload. See State High Court Justice Arguelles to Quit March 1, San Francisco Chron., Nov. 22, 1988, at A1, col. 6 ("Legal scholars recently have predicted that justices might soon retire from the court because of the crushing caseload, especially the lengthy and troublesome death penalty cases that have flooded the court."). As, one by one, all three of the post-Bird appointees have resigned, critics have increasingly decried the toll that death penalty appeals take on members of the court. See Carlsten, supra note 210.
The conviction overturned due to the bulk of evidence against him. The penalty phase contentions are therefore usually of greater consequence than are the guilt phase contentions, and are accordingly given the lion's share of the court's mental energy. This situation inevitably results in a few flawed guilt phase evidence rulings, particularly where the facts are complicated.

Ironically, the court compounds its problems by poorly budgeting its intellectual energy in some instances. Evidentiary questions are sometimes addressed when they are not properly before the court or when for some other reason they need not be examined. The court often seems pressed to prove the absence of error and addresses the merits of certain contentions which are utterly without consequence.227 For instance, objections not preserved for appeal have nevertheless been analyzed and treated by the court in dicta.228 The same practice occurs in situations where the error, if any, was harmless.229 This unnecessary effort seems peculiar for an overworked court. Erroneous court treatments of evidentiary issues that are not properly before it are especially frustrating, because the resulting confusion is created unnecessarily.230

227. For a discussion of the reasons for the court's actions in this regard, see infra Part VI.

228. See, e.g., People v. Johnson, 47 Cal. 3d 1194, 1232, 767 P.2d 1047, 1064-65, 255 Cal. Rptr. 569, 586-87 (1989) (defendant raised late objection to admission of testimony by a witness who had been hypnotized, but the court rejected the error contention on the merits); id. at 1235, 767 P.2d at 1066-67, 255 Cal. Rptr. at 588-89 (defendant abandoned error contention regarding admission of witness' drawings, but the court addressed the merits "in any event"); People v. Bonin, 47 Cal. 3d 808, 845-46, 765 P.2d 460, 481-82, 254 Cal. Rptr. 298, 319-20 (1989) (doubting that objection to admission of witnesses' testimony was properly made, but positing that the claim was preserved "[f]or the sake of discussion," and addressing the merits); People v. Rich, 45 Cal. 3d 1036, 1088, 755 P.2d 960, 993, 248 Cal. Rptr. 510, 543 (1988) (court discussed merits of prosecutorial misconduct allegation although defense counsel evidently did not object to conduct), cert. denied, 109 S. Ct. 884 (1989); People v. Howard, 44 Cal. 3d 375, 407, 749 P.2d 279, 295-96, 243 Cal. Rptr. 842, 859 (after addressing merits of defendant's hearsay contention, the court noted that no objection on this basis was raised at trial), cert. denied, 109 S. Ct. 188 (1988).

229. See, e.g., People v. Robertson, 48 Cal. 3d 18, 37-42, 767 P.2d 1109, 1118-21, 255 Cal. Rptr. 631, 640-43 (1989) (lengthy discussion of possible trial court error in accepting defendant's stipulation to admit former testimony, followed by notation that any error was nonprejudicial in any event); People v. Grant, 45 Cal. 3d 829, 843, 755 P.2d 894, 901-02, 248 Cal. Rptr. 444, 451-52 (1988) (court considers merits of defendant's claim that an involuntary statement was improperly admitted into evidence, although "no prejudice appear[ed]"); Gates, 43 Cal. 3d 1168, 1182-83, 743 P.2d 301, 310-11, 240 Cal. Rptr. 666, 675-76 (1987) (court finds no error in exclusion of hearsay testimony, but if any error, it was harmless), cert. denied, 486 U.S. 1027 (1988); cf. People v. Walker, 47 Cal. 3d 605, 638, 765 P.2d 70, 89, 253 Cal. Rptr. 863, 882 (1988) (addressing merits of defendant's contention that admission of evidence in penalty phase was error due to violation of duty to preserve evidence, although issue was mooted by finding of error on other grounds).

230. For examples of this phenomenon, see Rich, 45 Cal. 3d at 1105-06, 755 P.2d at 1004-05, 248 Cal. Rptr. at 554 (court found statement admissible under fresh complaint exception to hearsay rule, although any erroneous admission of the hearsay was harmless); Gates, 43 Cal. 3d at 1182-83, 743 P.2d at 310-11, 240 Cal. Rptr. at 675-76 (court analyzed allegedly ineffective defense counsel's possible reasons for failing to object to admission of hearsay evidence, but then found that any error was harmless).
A second likely cause of errors in court opinions, and particularly in death penalty opinions, is the court's "calendar memorandum" system for preparing cases. The supreme court utilizes a calendar memorandum system to expedite the justices' preparation for the case's argument and disposition. Under this system, a new case is assigned to a particular justice for review and preparation of a calendar memo; the resulting document serves at least as a summary of the pertinent issues for resolution by the court, and at most as a draft opinion for the court. In practice, the system encourages "one-justice" or even "no-justice" opinions, where the work of a single staff attorney or justice may go largely unreviewed and unchanged by other members of the court.

Death penalty appeals are generally handled by the court's senior staff attorneys, who are career research attorneys employed by the court. The extent to which these attorneys are supervised in the preparation of the memo, or of a draft opinion, may vary from chambers to chambers. As it is, "it is no secret that at least some of [the justices] do not draft the opinions that circulate in their name." Furthermore, it seems unlikely that justices in other chambers, particularly those who agree with the draft opinion, will have the time and inclination to pore over these tremendously long, often tedious cases.

The dissenting justices might be expected to examine proposed opinions somewhat more closely. Indeed, dissenters in the death penalty cases have highlighted some of the same errors this Comment's authors have described. However, the workload problems described above have diminished the number of dissents generated by the court, as some commentators have recently complained. Again, when the focus of a death penalty appeal is on the penalty phase issues raised, a possible dissenter is not likely to focus upon what the majority opinion treats as a

231. The court has recently announced changes in a number of its operating procedures, see Carrizosa, supra note 214, at 1, col. 5, but the calendar memorandum system remains in use. See Supreme Court of California, Practices and Procedures 15, 26-27 (1990).


233. Barnett & Stolz, What's Absent from the Richardson Report, L.A. Daily J., Mar. 7, 1988, at 4, col. 3; see also Letter from Dean Gerald F. Uelmen to Scott G. Parker (Feb. 7, 1990) ("On occasion, I even wonder if we are seeing 'no-Justice opinions,' produced entirely by staff underlings.").

234. See P. Stolz, supra note 29, at 199.

235. See, e.g., People v. Ruiz, 44 Cal. 3d 589, 625, 749 P.2d 854, 874, 244 Cal. Rptr. 200, 220 (Broussard, J., dissenting).

In addition, the Lucas court generally has a solid ideological majority favoring affirmation, and only two justices, Mosk and Broussard, are likely to dissent in any given case. Consequently, these two justices face added time pressures if they attempt to dissent frequently in addition to writing the majority opinions that are assigned to them.

The calendar memorandum system is a frequent target of criticism. While it may increase efficiency, it also discourages the sort of independent and duplicative cross-checking of points and issues which prevents errors.

C. The Effect of Political Ideology on the Lucas Court

It would be misleading to imply that the California Supreme Court's misapplications of evidence law demonstrate a hidden political agenda or that they are the product of direct political motivation. To so imply would be to accuse the court of the worst form of judicial activism. But it would be naive to ignore the politicized creation of the Lucas court and the political context within which it operates. The authors believe that external political pressures and the justices' own philosophies have contributed to the accuracy problem by creating a climate in which attention to the detailed or "technical" claims of the clearly guilty is disfavored.

There is no question that the voting populace of California is vehemently in favor of capital punishment. The 1986 retention elections...
and, to a lesser degree, the concurrent gubernatorial campaign could reasonably be interpreted as public referenda on capital punishment. The public reacted against the Bird court's constant reversals of death sentences by ousting three justices who were allegedly "soft" on the death penalty issue. This lesson could not have gone unnoticed by those justices remaining on the court as well as the newer justices appointed by Deukmejian. The danger that the threat of political reprisals will influence judicial decisions is always present in a system utilizing retention elections. As unelected but politically accountable public officers, the current justices are pressured by considerations of political survival to impose the death penalty more often than did the court before it.

The direct influence of these external pressures on the court is difficult to gauge. However, the justices' own philosophical approach to the process of judging and their personal values are apt to be an extremely important factor in making determinations such as how to budget time and intellectual resources. These determinations are likely

Feb. 6, 1989, at 66 (reporting on the "carnival" outside the Florida site of the execution of notorious serial killer Ted Bundy in January 1989, which appalled even some law-enforcement officials who favor the death penalty); Bearak, Bundy is Electrocuted as Crowd of 500 Cheers, L.A. Times, Jan. 25, 1989, § I, at 1, col. 3 (describing the atmosphere outside the execution); Parker, 2,000 Cheer Execution of Killer Bundy, Washington Post, Jan. 25, 1989, at A1, col. 2 (same).

241. See supra notes 39-49 and accompanying text. Bird was disliked by a variety of commercial interests for her stance on, among other things, consumer rights and wrongful discharge, but by far the key issue in her ouster was her view of the death penalty. See, e.g., Armstrong, Rose Bird's Trial By Ballot Fascinates U.S., Christian Science Monitor, Oct. 31, 1986, at 3 (clearly indicating the death penalty was the key issue in Bird's retention election). Indeed, because of the death penalty controversy, the campaign to remove Bird from the court became an event of national importance and concern. See id.; Harris, Rose Bird, 243 THE NATION 597 (1986).

242. Other recent state judicial elections have raised the death penalty issue. For example, in North Carolina, on the same day that California voters rejected Rose Bird, a Democratic candidate for the chief justiceship of the state supreme court defeated the Republican incumbent, Chief Justice Rhoda Billings. During the campaign, a group of Billings' supporters, known as "Citizens for a Conservative Court," unsuccessfully attempted to exploit the death penalty issue against her opponent and ultimate replacement, Democratic Justice James T. Exum, Jr., who was portrayed as "soft on capital punishment." Reidinger, supra note 26, at 56-58. Citizens for a Conservative Court termed Exum's dissents in 18 death cases "alien to the conscience of North Carolina." Press, supra note 40, at 65 (describing heated chief justice judiciary elections of California and North Carolina). However, unlike Bird, Exum had voted to uphold 35 such sentences despite his personal opposition to the death penalty. Id.; see also W. White, supra note 240, at 17 (An Ohio public defender was quoted as stating that "the Ohio State Supreme Court will be more receptive to attacks on a criminal defendant's conviction when the defendant has not been sentenced to death. The reason is that the Ohio Supreme Court, like other courts, is concerned about the political repercussions of reversing a death penalty.").

243. See Uelmen, supra note 11, at 295 ("[T]he electorate sent a loud and clear message, and the supreme court has responded to that message.").

244. Obviously, there may exist other external pressures on various justices, although most, if not all, of these pressures (e.g., financial considerations) would require the justice to recuse her-or himself.
to have a significant influence on the justices' propensity for cursory treatment of particular sorts of claims raised on appeal.

There is no question that the five members of the Lucas court appointed by Republican Governor George Deukmejian are "conservative" on a number of topics, including victims' rights. As "conservatives," one would expect these justices to be less inclined to countenance acquittals based upon "technicalities," perhaps best defined as mistakes or close calls which do not really raise doubts as to the accused's guilt. Reversals of first degree murder convictions or death sentences on rather technical (or especially on procedural) grounds epitomize those aspects of the criminal justice system that critics find most outrageous.

The opinions criticized for inattention to detail in Part III were all written by a Deukmejian appointee, and fully half of these were authored by Chief Justice Lucas himself. To the extent some of the evidentiary questions discussed in Part III may be considered "technical" questions, it is not surprising that these "conservative" justices did not scrutinize the issues as carefully as they did other, ostensibly more important issues.

245. Here the term "conservative" is employed in a political sense and not a purely jurisprudential sense; the term is not meant to imply that the court is averse to changing rules developed in past cases.

246. Political conservatives often lament the interference of "technicalities" in the criminal justice process. For instance, Richard Nixon's characterization of the Warren Court as soft on crime contributed to Nixon's successful presidential election in 1968, because it reflected the public's belief that procedural technicalities were preventing the police from stopping crime. Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 GEO. L.J. 185, 192 (1983); see also CALIFORNIA DEP'T OF JUSTICE, supra note 14, at 2 ("The California Supreme Court . . . has effectively blocked the will of the people through myriad technicalities."); id, at 3 (The Bird court has reversed death sentences "on one technicality or another."); id. at 8 (decrying the court's use of a "smokescreen of technicalities"); Ettinger, In Search of a Reasoned Approach to the Lesser Included Offense, 50 BROOKLYN L. REV. 191, 194 (1984) ("If a criminal avoids all responsibility for a crime due to a 'technicality,' the safety of the community has been compromised."). For a contrast of views on the importance of "technicalities," compare Zimring, Justice Teeters on the Fine Points, L.A. Times, Jan. 28, 1986, § II, at 5, col. 3 (editorial) (defending the Bird court's "punctilious attention to legal detail" and "nit-picking") with Johnson, Fixation on "Detail" Immobilizes Justice, L.A. Times, Jan. 28, 1986, § II, at 5, col. 3 (editorial) (providing the conservative response to Professor Zimring's position).

247. For example, when Justice Kaufman, one of the "replacement" justices, retired, he took the occasion of his farewell press conference to skewer the Bird court for its willingness to reverse death penalty judgments on a finding of virtually any error, no matter how unimportant. See Chiang, Justice Kaufman Departs with Blast at Rose Bird, San Francisco Chron., Apr. 13, 1990, at A1, col. 2.

248. Chief Justice Lucas authored the majority opinions in Ruiz, Silva, and Rich. The three justices appointed to replace Chief Justice Bird and Justices Grodin and Reynoso each authored one of the opinions described in Part III: Justice Kaufman wrote Heishman, Justice Arguelles wrote Bunyard, and Justice Eagleson wrote Bean.

249. Presumably the errors in all but Ruiz and Bean would meet this definition of "technicality." Even in Ruiz and Bean, the defendant's guilt of at least some of the capital charges filed seems reasonably certain.
D. Concluding Words Regarding the Causes of the Problem

Whatever the political views of the individual justices, the collective Lucas court undeniably shows greater deference to trial court judges and juries than did the Bird court. The court affirms both the convictions and death sentences of first degree murder defendants far more frequently. Indeed, nowhere among the new court's first sixty cases was there a reversal of a conviction or sentence based upon errors in the admission or exclusion of evidence.

It is hardly revolutionary to suggest that an overburdened court will attempt to focus on those areas of a case which are potentially dispositive of the issue. In death penalty cases, the evidentiary issues are generally not central to the life-or-death question before the court. Furthermore, a majority of the current court are apparently reluctant to allow technicalities to halt the machinery of justice, even if there were time to ponder each contention fully. Thus, "technical" evidentiary issues are exactly the types of problems on which the court will stumble if it cannot take the time to attend to each contention with punctilious care.

The calendar memorandum system contributes to the proliferation of errors by encouraging minimal participation by the justices in the actual preparation of the court's tentative opinion. Few opportunities exist for more than one justice to contribute to the resolution of each question. Then, for the same philosophical and temporal reasons which discourage justices from completely covering the more trivial evidentiary contentions raised by desperate appellants, the concurring justices are unlikely to conduct independent research into the issues already resolved in the lengthy opinion that they intend to join. Finally, dissenting opinions, which could be expected to point out the court's errors, are issued less frequently due to the crushing workload and the added time demand on the justices who would otherwise wish to dissent.

V

IMPACT OF EVIDENCE ERRORS

A. Impact on the Case Itself

The Lucas court has routinely found errors in many trial court evidentiary rulings in death penalty proceedings, although the court has inevitably found the errors to be harmless.252 There has usually been

250. For examples of cases in which the Lucas court has proved especially deferential, see supra note 221.

251. Under Chief Justice Rose Bird, the California Supreme Court upheld only 4 death verdicts in 68 cases. See supra note 45. The Lucas court has greatly reversed this trend, upholding 57 of 60 capital convictions and 46 of 60 death sentences. See supra notes 61-63 and accompanying text.

252. For example, errors that occur in the guilt phase have been held harmless by the Lucas court, even where the evidence admitted was obtained in violation of the defendant's constitutional
enough properly admitted evidence to convince the jury of the defendant's guilt beyond a reasonable doubt. In a number of the cases analyzed in Part III, the errors arguably were not damaging enough to overcome the presumption of harmlessness. We would hardly contend that six innocent men reside on death row solely due to the six problematic opinions we have discussed at length. On the other hand, we do not contend that these errors were irrelevant to the outcome of the trials in which the issues first arose.

The Ruiz and Bean severance cases contain erroneous rulings which permitted improperly admitted evidence to infect all three phases of the defendants' trials. Ruiz is an especially poignant example. There seems little doubt that the defendant would have been convicted of the murders of his second wife (Pauline) and her son (Tony) without the introduction of evidence relating to the disappearance and apparent death of his first wife (Tanya). However, conviction for the murder of Tanya was highly improbable without the boost given the prosecution by a jury fully apprised of the evidence against the defendant regarding Pauline and Tony. Furthermore, it is unclear whether that defendant would have received the death penalty, even for the murders of Pauline and Tony, had the cases not been joined and the jury presented with an additional murder to consider.

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253. In the majority of cases analyzed, the evidence against the accused was strong to overwhelming. See supra note 249. None of the three Lucas court reversals of capital convictions was for evidentiary errors, nor did the court find insufficient evidence to support the verdict. See People v. Marks, 45 Cal. 3d 1335, 756 P.2d 260, 248 Cal. Rptr. 874 (1988) (reversal for failure to hold a pretrial competency hearing); People v. Hale, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988) (reversal for failure to hold a pretrial competency hearing); People v. Snow, 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987) (reversal for failure to investigate prosecutor's possibly discriminatory use of peremptory challenges during voir dire).

254. The presumption of harmlessness is a rule of affirmance whereby an appellate court will not reverse an erroneous lower court decision unless it is likely that the error complained of affected the outcome of the case. Critics, however, have noted that such rules suffer from a lack of explicit guidelines and intrastate uniformity. See, e.g., Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988, 1010-12 (1973) (arguing a lack of uniformity both within and between various states); see also Davies, Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal, 1982 Am. B. Found. Res. J. 543, 602-03 (critically evaluating application of harmless error rule in California appellate courts). In addition, a presumption of harmlessness regarding evidentiary errors in a capital punishment case, because of the grave consequences at stake, may be inappropriate. See generally Saltzburg, supra, at 1021-22 (advocating a higher standard for measuring harmfulness of error in criminal actions).

255. See supra text accompanying notes 98, 121-22.
256. See supra text accompanying notes 97-98.
The *Silva* case provides another example. The adoptive admission issue may have been a significant factor in Silva's conviction and death sentence. Unfortunately, the *Silva* opinion is long on sordid "facts," but short on information regarding the source of those facts. It may be that Silva's smiling adoption of Shelton's burn-barrel tale was the key to his conviction. In answer to Silva's contention that the evidence was insufficient to sustain his conviction, the court stated:

"The jury could properly infer from Shelton's statement, and defendant's adoption of it, coupled with all the other circumstantial evidence implicating defendant (including his dominant role in planning and directing the kidnapping, his actions in menacing Kevin with a shotgun and other weapons, and his callous directions for disposing of Kevin's body) that defendant actively participated in Kevin's murder by personally shooting him to death."

Obviously, it is difficult to say whether this "other circumstantial evidence" was sufficient to find Silva guilty without the adoptive admission; it was, after all, insufficient to convict him of the murder of the female victim. Furthermore, whether the defendant would have received the death penalty if the jury had not heard Thomas' graphic and shocking tale is quite uncertain. Thus, allowing the adoptive admission may well have infected both the guilt and the penalty phases of Silva's trial.

**B. Impact on Evidence Law**

1. *Succeeding Cases*

Though these death penalty cases are recent and what may follow is unclear, the Lucas court has shown a willingness to use these cases for precedential support in subsequent death penalty matters. For example, to bolster its dubious ruling on the prejudicial impact of cross-admitted evidence in *Bean*, the court cited *Ruiz*. The Lucas court's other evidentiary errors have not yet reappeared in later death penalty opinions, which is unsurprising given that the fight in capital cases is usually over sentencing, not guilt. Thus, the supreme court has had little opportunity to resurrect its shaky rulings.

A more disturbing problem is that lower courts are likely to become infected by the supreme court's misapplication of evidence law. Although published lower court opinions have not yet cited these recent questionable rulings as precedent, we can expect their eventual appear-

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258. See supra note 207 and accompanying text.
259. Although Rose Bird's term as chief justice expired in January 1987, the Lucas court's first death penalty opinion was not published until July 1987. See supra note 60.
261. The published opinions of the California Courts of Appeal will be an important indicator
ance because the principle of stare decisis requires that lower courts defer to the supreme court's interpretation of the evidence code and case law—presumably even when the interpretations are inaccurate. Thus, the lower courts are bound to follow the high court's lead and reapply the error. Even if the supreme court's misinterpretations of the code are obviously dicta, there is no guarantee that the lower courts will disregard the supreme court's language and apply the code correctly. Furthermore, the spread of this "bad law" is compounded by the fact that the evidentiary errors made by the court are not limited to capital cases, but can be applied to the gamut of criminal and civil cases.

There is already tangible evidence of the spread of this "bad law" in case-finding resources such as digests, annotated codes, and legal encyclopedias. Short statements of Lucas court errors have found their way into California Jurisprudence, the California Digest of Official Reports, the annotated state codes, and even West's national digest system. Faulty statements or applications of the law create a minefield for the lawyers, judges, and clerks who rely on case headnotes when researching briefs and memoranda. When the court's evidentiary errors

of the magnitude of the impact of the Lucas court's errors. At this time, the intermediate appellate courts are just beginning to cite the cases discussed in Part III and other contemporaneous Lucas court decisions.

A full read on how thoroughly the lower courts will perpetuate the supreme court's missteps will not be available for some time. A number of the issues addressed by the court in the Part III opinions—such as the Silva adoptive admission—are not likely to arise in the lower courts or progress up the state court system with great frequency. Furthermore, the supreme court now utilizes the depublication tool, see supra note 218, which may effectively erase lower court efforts to resolve some of the more difficult issues posed by the high court. Numerous recent opinions dealing with the fresh complaint doctrine have been dealt with in this manner. See, e.g., People v. Leon, 214 Cal. App. 3d 925, 263 Cal. Rptr. 77 (1989), withdrawn (1990); People v. Serna, 214 Cal. App. 3d 299, 262 Cal. Rptr. 602 (1989), withdrawn (1990); cf. People v. Slaughter, 211 Cal. App. 3d 577, 259 Cal. Rptr. 437 (in a case involving sexual offenses and not the death penalty, the appellate court upheld the trial court's denial of motions to exclude evidence of uncharged offenses and "fresh complaints," citing Tassell and Bunyard as authority), rehe'g granted, 777 P.2d 1138, 261 Cal. Rptr. 704 (1989), review dismissed (1990).

262. Auto Equity Sales Inc. v. Superior Court, 57 Cal. 2d 450, 455, 369 P.2d 937, 939-40, 20 Cal. Rptr. 321, 322-24 (1962) ("Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California . . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction.").

263. For examples of such cases, see supra note 230.


are incorporated into either the official or commercial “key number” systems, they become part of the available legal data base. So instituted, the court’s evidence errors are perpetuated through the conscientious but misguided work product of practicing attorneys.

The damage caused by an erroneous ruling may be magnified by the statement’s separation from the specific case setting or by careless reporting on behalf of the legal publishing firms. For example, in People v. Rich, the trial court admitted some evidence under the “fresh complaint” doctrine, which it termed an exception to the hearsay rule. The supreme court, without explicitly adopting the trial court’s reasoning or proposing a new line of thought, merely stated its agreement that the statement was admissible. While the careful researcher might hesitate to conclude that the supreme court actually had embraced the doctrine as an exception to the hearsay rule, the headnote writers did not. Both the official and West headnotes to the case describe the statement in question as admissible under the “fresh complaint exception” to the hearsay rule. Thus, the court’s failure to provide a rationale for its decision, combined with sloppy reporting, may have resulted in an inaccurate headnote upon which the legal community will rely.

2. Legal Determinacy

One of the most important functions of any legal system is its predictability or determinacy. In ordering their affairs, people must know not only what the law is, but what the law is likely to be as time and their plans unwind. The principle of stare decisis helps ensure constancy by discouraging a court from straying from settled principles without a well-considered rationale or some significant alteration in the social or other forces that guide a court’s decisionmaking process. Adherence to settled law thus promotes faith in the reason and neutrality of the law among those who submit to its rule.

268. For example, all the evidence errors noted in Part III found their way into the case headnotes published in the California Official Reporter and in the West publications. See, e.g., People v. Rich, 45 Cal. 3d 1036, 1046 (headnote 37), 1053 (headnote 68), 755 P.2d 960, 965-66 (headnote 49), 970 (headnote 86), 248 Cal. Rptr. 510, 515-16 (headnote 49), 520 (headnote 86) (1988); People v. Silva, 45 Cal. 3d 604, 606 (headnote 5), 754 P.2d 1070, 1070-71 (headnote 3), 247 Cal. Rptr. 573, 573-74 (headnote 3) (1988); People v. Heishman, 45 Cal. 3d 147, 150 (headnote 9), 753 P.2d 629, 630 (headnote 12), 246 Cal. Rptr. 673, 674 (headnote 12) (1988); People v. Ruiz, 44 Cal. 3d 589, 590 (headnotes 1a-1c), 749 P.2d 854, 855 (headnote 1), 244 Cal. Rptr. 200, 201 (headnote 1) (1988).

269. 45 Cal. 3d at 1106, 755 P.2d at 1004-05, 248 Cal. Rptr. at 554.

270. Id., 755 P.2d at 1004-05, 248 Cal. Rptr. at 554.

271. The West and official headnote systems also captured the court’s erroneous restatement of the “state of mind” exception to the hearsay rule, which should only serve to increase the court’s embarrassment. See id. at 1053 (headnote 68), 755 P.2d at 970 (headnote 86), 248 Cal. Rptr. at 520 (headnote 86).

EVIDENCE FOR DEATH

If a court adopted a policy of random or indiscriminate changes in the development of the law, people's respect for and faith in the law would quickly evaporate. Unfortunately, when the state's highest court issues erroneous rulings with some frequency, the same decline in respect and faith may occur. Development of the law becomes chaotic, contradictory, and ultimately less logical and less deserving of respect.

Legal determinacy is essential to the law of evidence, since it directly relates to the administration of justice in the trial courts. The trial attorney must be able to predict the resolution of evidentiary issues with some degree of certainty in order to know what she may prove or disprove and thus logically to pursue her legal matter. "[W]hen an evidentiary error occurs in the course of a trial, it disturbs [the] delicately balanced decision-making process." That decisionmaking process is most important in the context of a criminal trial, where evidentiary rules play an important role in protecting the accused from incarceration or other sanctions. If the defendant's life is at stake, it is all the more important that participants in the legal drama not be surprised by a sudden, unforeseeable, and ill-considered change in the rules.

While the preceding discussion may overdramatize the problem, there is little doubt that the existence of a body of erroneous evidentiary rulings by the California Supreme Court would quickly damage the determinacy of evidence law in the state. The rules of evidence permit the prosecutors, civil plaintiffs, and defendants to develop case strategies that are based on the assumption of a stable and predictable evidentiary environment. Any departure from this assumption can lead to unpredictable and unfair outcomes.

462, 469 (1987) ("The notion that legal rules produce determinate results reinforces the claim that the law is a neutral mechanism of dispute resolution.").

273. See Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 12 (1984) ("Determinacy... is the only way judges can appear to apply the law rather than make it.").

274. As indicated earlier, the errors in the Lucas court death penalty opinions do not appear to follow any particular path; nor do they seem the product of a reasoned decision to alter the rules in a somewhat offhand fashion. Perhaps the clearest example of this is the Ruiz-Bean problem, where the court has moved away from the original law in an almost incoherent manner. See supra note 123 and accompanying text. In the other cases, the court's discussion of the particular issue is usually so perfunctory, and the issue so far removed from the areas normally exciting the court's greatest attention, that it is extremely unlikely that the court is consciously, albeit quietly, shaping new law. If, in fact, these "errors" are examples of the court's new system of slipping changes in evidence law past a dozing bar, then the authors would withdraw this Comment and impose another on the long-suffering readership of the California Law Review, upbraiding the court for its underhandedness, rather than its sloppiness.

275. See E. IMWINKELRIED, P. GIANELLI, F. GILLIGAN & F. LEDERER, COURTROOM CRIMINAL EVIDENCE 1 (1987) ("An attorney is a craftsman; and the rules of procedure and evidence are the tools of the craft, the devices the attorney uses to achieve results for the client . . . . The attorney advisor must give his or her client a prediction of the legal consequences of historical events . . . . In a courtroom, a legal consequence will flow from an event only if evidence law permits proof of that event.").

276. Saltzburg, supra note 254, at 990.

277. See id. at 989 (arguing that nonconstitutional evidentiary rules may be more important than constitutional rights to a fair judicial procedure).
with a fair degree of certainty.\textsuperscript{278} That certainty will be lost if the court continues to pollute its opinions with erroneous rulings.

\section*{C. Impact on the Integrity of the Supreme Court}

Perhaps an even more troubling matter is that such evidentiary errors reflect a deficiency in the court's legal and intellectual rigor. Any court's reputation will suffer when an intellectual error, particularly a sloppy one,\textsuperscript{279} eludes detection and appears in a final opinion. But more important than the court's scholarly reputation are the concerns raised about the court's carefulness and intellectual honesty.

The court is responsible for delivering properly reasoned opinions.\textsuperscript{280} Given enough factual information, the general populace can determine whether a particular defendant is guilty of a crime and what punishment that crime warrants. The concept of the jury is built upon this idea. The supreme court, though, must go beyond this elementary task and express sound legal thought in every facet of its opinions.\textsuperscript{281} If not totally beyond reproach, the rationale behind its rulings should at least be sound.\textsuperscript{282} This is more than an academic argument for intellectually satisfying opinions, though that is part of it. Rather, the argument is more fundamental. It reflects a normative vision of the state supreme court as the most learned authority on state law.\textsuperscript{283}

If the court does not fulfill this function, then it will ultimately lose the respect of the general populace, legal scholars, attorneys, and lower court judges.\textsuperscript{284} Repeated mistakes can only bring disrespect upon the office and thus impair the court's ability to guide.

\textsuperscript{278} See id. at 989-90.

\textsuperscript{279} For the most egregious error we noted, see supra notes 141-50 and accompanying text (discussing one aspect of Rich).

\textsuperscript{280} See Fiss, \textit{The Supreme Court 1978 Term—Foreword: The Forms of Justice}, 93 Harv. L. Rev. 1, 13-14 (1979) (judges must justify their decisions); Marks, \textit{Understanding the Process of Judicial Policymaking Through Case Analysis}, 12 Stetson L. Rev. 671, 671 (1983) (appellate courts have an institutional duty to explain the reasoning behind previous holdings and their rationales for accepting or rejecting those holdings); Wellington, \textit{Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication}, 83 Yale L.J. 221, 225 (1973) ("it is an obligation of the courts to justify the rules they announce and to keep the rules and their justifications up-to-date"); cf. Lefar, \textit{Quality in Judicial Opinions}, 3 Pace L. Rev. 579, 581 (1983) (real reasons for a decision, which are apt to be socioeconomic or political, must be presented in an opinion).

\textsuperscript{281} See generally Dressler, supra note 225, at 375-77, 381.

\textsuperscript{282} Id. at 376 ("If we do not always like the principles or the results reached by the high court, we are at least entitled to understand what those principles are, and to know how they were reached.").

\textsuperscript{283} One commentator has termed the California Supreme Court the "architect of California case law." See Unshackle the High Court, supra note 213 (comment of Dean Uelmen, lamenting that the court is now too burdened to fulfill that role).

\textsuperscript{284} See Handler, \textit{A Matter of Opinion}, 15 Rutgers L.J. 1, 4 (1983) (judiciary must "exercise its powers intelligently and intelligibly . . . [f]or no better reason but to establish its own legitimacy").
VI
TOWARD A SOLUTION: SOME CONCLUDING REMARKS

This Comment has sought to expose a disturbing laxity in the resolution of evidentiary questions by the California Supreme Court. The authors are certainly not the first to address judicial behavior and the administration of justice in the California court system. In fact, a number of commentators have expressed concern that the court has become paralyzed by its workload. For many commentators, the issue has become a structural one: how best to alleviate the workload faced by the court. Proposals generally suggest redirecting death penalty appeals through the lower appellate courts or expanding the size and changing the functional division of the court. Structural changes of this magnitude involve serious political issues, the ramifications of which would be an appropriate subject for an entirely separate law review piece. A detailed analysis of the efficacy of these proposals is beyond the scope and purpose of our inquiry. Nevertheless, a few relatively minor internal steps by the court could help it to avoid the types of mistakes criticized here.

To begin with, the justices themselves need to take a more active role in drafting or at least checking the opinions. While the calendar memorandum system may be the most efficient tool for handling the court's tremendous workload, particularly for cases in which the issues are not especially complex, at some point the justices need to take responsibility for the decisions issuing in their names. Neither the court nor its employers—the people of the state—are ultimately benefited by timely opinions which obfuscate, rather than shape, the law.

285. See supra note 218.
286. Various court reconstitution plans include splitting the court into civil and criminal wings, or into death penalty and "other" wings. See Hager, Woesk Wants "Drastic" Action, supra note 218 (reporting Mosk's renewal of his proposal for an eleven-member, bifurcated court); Uelmen, supra note (editorial backing a form of Mosk's plan for reconstituting the court). For various discussions of proposals for rerouting death sentence appeals through the lower courts of appeal, see Uelmen, supra note 11, at 292-96 (proposing that guilt and special circumstances issues in death penalty cases be reviewed by courts of appeal, with penalty phase issues reserved exclusively for the supreme court); Welsberg, supra note 218 (examining closely three schemes for handling death penalty appeals); Unshackle the High Court, supra note 213 (editorial proposing at least a rerouting of cases through lower appellate courts).

The most direct means of bolstering the accuracy of the court's evidentiary rulings would be to establish an in limine procedure, whereby evidence issues would be treated separately from (and, presumably, more carefully than) the rest of the death penalty appeal. While such a system would probably make the court's evidence rulings less hurried, it would also serve to increase dramatically the court's workload and encourage unnecessary expenditures of time on unmeritorious contentions.

287. This is not a call for the abolition of the calendar memorandum system; even if the authors were persuaded that such action is necessary, it would nonetheless be far too impracticable in light of the burdens already placed on the justices. Each justice should at least satisfy himself, though, that the legal issues treated are correctly resolved before signing off on the opinion.
A more radical suggestion, which would go far in resolving the problem and which is not entirely foreign to the court's current standard operating procedure, would be to dispose of far more contentions in death penalty cases without reaching the merits. As mentioned above, when the court makes erroneous evidence rulings, it sometimes does so on issues it need not have addressed in the first place. In an attempt to be thorough, the court comments on evidence questions that (1) have already been determined to have no conclusive bearing on the outcome of the case (that is, constitute harmless error), or (2) were not properly preserved for appellate review through objections at trial. The irony, of course, is that the comments made on these "non-issues" invite error, as they often appear to have been made in haste.

We recommend that the court consider the following factors when approaching the numerous evidence issues raised in a death penalty appeal: (1) the merit of the defendant's contention; (2) whether the issue has been preserved for appeal and may be dispositive of the challenge of the sentence; (3) the importance of the issue to the defendant's case; and (4) the opportunity presented for the court to declare affirmatively what the law is. By limiting its discussion of evidence issues to situations that merit detailed treatment, the court can more accurately focus its attention on the question at hand and more pointedly assess the reasons for and ramifications of its analysis. This should circumvent the current lamentable practice of throwing out offhand paragraphs for countless issues, and generally approving of the trial court's rulings without explicitly adopting or even analyzing the trial court's reasoning.

288. See supra note 230.

289. In People v. Rich, for example, the court refers to the admissibility of some evidence under "the 'fresh complaint' exception to the hearsay rule" without citing any authority recognizing such an exception. 45 Cal. 3d 1036, 1106, 755 P.2d 960, 1004, 248 Cal. Rptr. 510, 554 (1988), cert. denied, 109 S. Ct. 884 (1989). The court also does not (and cannot) cite authority for its bizarre definition of the "state of mind" exception to the hearsay rule. See id. at 1094, 755 P.2d at 996, 248 Cal. Rptr. at 546.

290. After all, the court will want to explain to the appellant why any significant, plausible issues raised were decided against him.

291. This inquiry would be analogous to the U.S. Supreme Court's standard for federal constitutional claims of ineffective assistance of counsel; a court need not address the first prong of the test (whether counsel's performance was inadequate) if it finds that defendant has been unable to prove the second prong (prejudice). See Strickland v. Washington, 466 U.S. 668, 697 (1984) ("there is no reason for a court . . . to address both components of the inquiry if the defendant makes an insufficient showing on one").

292. For example, if a meritless contention is nevertheless the basis for the defendant's entire case, and the court wants to present the appearance of having given the argument serious consideration, it might elect to discuss the contention in greater detail than would otherwise be necessary.

293. The court may wish to take an opportunity to expound on a point of law, change the law, or explain how the settled law should be applied in a particular situation. Presumably, when the court is speaking pedagogically, it will take the necessary time to state the law accurately.
Adherence to this proposed policy would not entail a great departure from the court's current practice. Already, the court disposes of evidentiary and other issues in these mandatory appeals by briefly explaining why an issue does not merit discussion.\textsuperscript{294} The court, however, must be more consistent in making its initial determination whether to address a particular contention, and then must address it completely or resist the temptation to comment gratuitously.\textsuperscript{295}

Disposing of more issues without reaching the merits of the contention would involve an expanded use of the harmless error rule. The authors recognize that the harmless error rule is somewhat nebulous. Nonetheless, the court already applies it to any number of evidentiary questions raised in death penalty cases.\textsuperscript{296} As long as the court is committed to resolving these issues by employment of the rule, it is both dangerous and wasteful to sanction half-hearted treatment of the merits as well. An expanded use of the harmless error rule allows the court to address meritorious issues without having to economize on time or space while wrestling with less worthy issues.

Other advantages would inhere in the court's abstention from tackling unnecessary issues. Greater reliance on the harmless error rule and stricter adherence to the rules governing preservation of appealable

\textsuperscript{294} See, e.g., People v. Johnson, 47 Cal. 3d 1194, 1236-37, 767 P.2d 1047, 1067-68, 255 Cal. Rptr. 569, 589-90 (1989) (failing to address allegations of prosecutorial misconduct to which no objection was made), \textit{cert. denied}, 110 S. Ct. 1501 (1990); People v. Walker, 47 Cal. 3d 605, 629, 765 P.2d 70, 83, 253 Cal. Rptr. 863, 876 (1988) (declining to address contention that allowing jury to see defendant's physical restraints was error where no objection was made at trial), \textit{cert. denied}, 110 S. Ct. 1500 (1990). For examples of evidence issues disposed of in this manner, see People v. Burton, 48 Cal. 3d 843, 862-63, 771 P.2d 1270, 1282-83, 258 Cal. Rptr. 184, 196-97 (1989) (declining to address defendant's claims that penalty phase testimony violated hearsay, best evidence, and opinion rules, when no objection was made at trial), \textit{cert. denied}, 110 S. Ct. 1502 (1990); People v. Robertson, 48 Cal. 3d 18, 43, 767 P.2d 1109, 1122, 255 Cal. Rptr. 631, 644 (refusing to consider defendant's argument that trial court erred in failing to make a determination that the probative value of admitted evidence outweighed the evidence's prejudicial effect, where objection during trial was withdrawn; however, the court could not resist commenting briefly on the merit of defendant's original objection), \textit{cert. denied}, 110 S. Ct. 216 (1989); \textit{Johnson}, 47 Cal. 3d at 1238, 767 P.2d at 1068-69, 255 Cal. Rptr. at 590-91 (purportedly erroneous exclusion of testimony "could not have been prejudicial").

Obviously, where the high court has already identified a reversible error committed below, the court is much more likely to dispose summarily of other issues raised on appeal. See, e.g., People v. Wright, 48 Cal. 3d 168, 214, 768 P.2d 72, 100-01, 255 Cal. Rptr. 853, 881 (1989) (discussing only one of a "plethora" of penalty phase arguments raised because the one issue was sufficient to reverse the death judgment), \textit{reh'g granted} (1990); People v. Edelbacher, 47 Cal. 3d 983, 1032-33, 766 P.2d 1, 31, 254 Cal. Rptr. 586, 617 (1989) (limiting discussion of penalty phase issues to those dispositive of appeal).

\textsuperscript{295} For an example of such gratuitous treatment, see \textit{supra} note 130 and accompanying text. For a defensible example, see People v. Williams, 48 Cal. 3d 1112, 1133-39, 774 P.2d 146, 158-63, 259 Cal. Rptr. 473, 485-90 (1989) (although failure to grant change of venue necessitated reversal of conviction, the court discusses guilt phase evidence issues "[f]or the guidance of the trial court in the event of a retrial").

\textsuperscript{296} See cases cited at \textit{supra} note 294.
issues will train death penalty litigators to make timely objections and to focus their briefs on issues that really could make a difference in the outcome. These practices may have the salutary consequence of less complex, or at least less tangled, arguments on appeal. The attorneys, as well as the court, will be able to focus on the key issues upon which the case turns.

Under such a policy, all will benefit. Supreme court justices benefit because they may spend their time and intellectual energy solely on those matters—evidentiary and otherwise—which are of legal import to the case at hand or the law generally. Trial lawyers benefit because the conceptual and doctrinal domain in which they operate will be more predictable, with its development more carefully plotted. Defendants benefit because their well-founded evidentiary contentions will receive adequate, learned scrutiny. Appellate and trial courts will also benefit; they will not have to choose between following the high court's errors (thus perpetuating the problem) and ignoring them (thus acting contrary to the hierarchical structure of the state court system).

Ideally, the supreme court would have the time and inclination to treat fully every issue presented in every case argued. Unfortunately, the reality is that the overworked court lacks the time to tackle every issue. Death penalty appeals, which come to the court uninvited and must be quite unwelcome, have transformed the supreme court from a pedagogical, law-shaping body to something akin to an intermediate appellate court, frantically affirming, reversing, or depublishing the mountain of cases which rises before it. Until the court receives some sort of dramatic relief, the best it can do (and the best it should do) is pick its fights carefully and avoid becoming bogged down in the minutiae.

297. An objection to this proposal might be that the injection of "harmless error" determinations into these appeals might increase the subjectivity and unpredictability of the results. However, because the court already has and uses the harmless error tool in these cases, the risk of caprice or abuse already exists. Furthermore, determinations of harmless error, if made overly hastily and ill-advisedly, at least will not trickle into mainstream civil and criminal litigation the way changes in the rules of evidence must.