[Note: STYLE SAMPLE ONLY – DO NOT USE ISSUES PRESENTED WITHOUT CHECKING FOR CURRENT AUTHORITY]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) No. _____
	)
Plaintiff and Respondent,	) Court of Appeal Case No. xxxxxx
	)
v.	) Xxxxxxx County
	) Superior Court
Mr. X [names deleted],	) Case No. X-xxxxx
	)
Defendant and Appellant.	)
_____	)

PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant X petitions this court for review following the decision of the Court of Appeal, First Appellate District, Division One, filed in that court on May 16, 1996 (see Exhibit A), and modified on June 11, 1996 (no change in judgment) (see Exhibit B). A copy of the decision of the Court of Appeal, including the dissenting opinion, is attached hereto as Exhibit C.

QUESTIONS PRESENTED

1. Given that California continues to require a unanimous verdict for conviction in a criminal case, is that right subverted in a manner inconsistent with the Fourteenth Amendment due process clause when a trial court, knowing the jury is deadlocked at 11-1 for conviction, simply removes the holdout juror and replaces her with an alternate?

2. Does the 1994 Revision of CALJIC No. 2.90, as given in this case, provide to a criminal trial jury a definition of "reasonable doubt" which is adequate to satisfy the Fourteenth Amendment due process clause? Mr. X submits the answer is "no."

NECESSITY FOR REVIEW

A grant of review and resolution of these issues by this court is necessary to settle important questions of law, of federal constitutional dimension, involving the right to a unanimous verdict and a pattern jury instruction which is now being given in virtually every trial of a criminal case, pursuant to rule 29(a)(1), California Rules of Court.

STATEMENT OF THE CASE AND FACTS

Appellant X was charged by information with murder of victim V with personal use of a firearm. (CT pp. 125-126.) Jury trial began on November 14, 1994. (CT p. 253.) The jury began deliberations on December 12, 1994.[1] (CT p. 307.) During the course of deliberations, the jury on three occasions, once on December 14 and twice on December 16, indicated by notes to the court that it was deadlocked. (CT pp. 313, 325, 327.) One note from the foreperson indicated that one or more jurors were not following the court's instructions, particularly CALJIC Nos. 1.00 and 2.90. (CT p. 320.)

Defense counsel requested by written motion that the court declare a mistrial. (CT pp. 329-343.) The prosecutor filed written opposition and requested in the alternative that the juror who allegedly was refusing to deliberate be dismissed. (CT pp. 345-353.) On December 16, the deliberating jury was excused and directed to return on January 3, 1995. (CT pp. 323-324.)

On January 3, 1995, the court granted the prosecutor's request for removal of Juror C. An

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[1] The court had told the jury at the outset to expect the trial to last two weeks, or possibly longer. (Augmented RT p. 26.)

alternate was seated, and later that day the jury reached its verdict that Mr. X was guilty of first degree murder with use of a firearm. (CT pp. 461-462.)

Victim V died of bullet wounds inflicted outside [Minjie]'s Nightclub on San Pablo Avenue in Oakland on October 30, 1993. (RT pp. 190, 203-205, 273, 526-527, 917-918.).) He had two bullet wounds in the left buttocks, one in the left back, and one behind his right ear. (RT pp. 267-268.) The wound behind the ear had stippling around it, and the path of the bullet was through the jaw into the base of the tongue. (RT pp. 267-268.) The wound in the back had a bullet path through the spleen and left lung, as well as grazing the heart. (RT p. 268.)

Of the people who saw the shooting, only witness L[2] identified Mr. X at trial as the shooter. Mr. T, a good friend who had met Mr. V by pre-arrangement at the club that night, attended a physical lineup including Mr. X but could not make an identification. (RT pp. 190, 216-217.) In an earlier photo lineup, he had selected a picture of Mr. X as looking similar to the suspect. (RT p. 725.) Dolores Reddicks, who had been seated in a car near the shooting, could not identify the shooter. (RT pp. 916, 922-923.) Rhonda Burrell, who was with Ms. Reddicks, noted it was dark but she was able to describe the shooter as a Black male, about 6'1" tall. (RT pp. 1004-1007, 1025.)

Although Ms. L identified Mr. X at trial as the shooter, when she was contacted by police on two separate occasions after the shooting she told the police that she saw the shooting and that the shooter was not Mr. X.[3] (RT pp. 536, 545, 547.) She explained at trial that she did not tell the truth

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[2] Ms. L was a secretary in the personnel department at the Naval Supply Center in Oakland, where she had worked since March of 1988. (RT pp. 492-493.) Shortly after she began working there, she met Mr. J, who was a mariner whose personnel records and pay were handled by the office where she worked. (RT pp. 190, 493, 518.) For about the same length of time she had also known Mr. X, who was a mariner too. (RT pp. 502-503.)

[3] These occasions were a telephone call on November 19, 1993, and an in-person visit on March 18, 1994. (RT pp. 727, 729.)

to the police on those occasions because she was afraid of Mr. X.[4] (RT pp. 536, 539.) The only person she had told that Mr. X was the shooter was her sister, whom she told within a few days after the incident.[5] (RT pp. 641-642.)

Ms. L told Sergeant W on July 5, 1994, that Mr. X was the shooter. (RT p. 557.) This conversation occurred after Ms. L was arrested on no-bail warrants for driving under the influence, driving with a suspended license, and traffic tickets. (RT pp. 540-541.) Her son and her nephew were with her, and she had to make arrangements for one of her sisters to watch them. (RT p. 541.) At that time her mother was in the hospital in a coma. (RT p. 563.)

Sergeant W had her arrested on those warrants because he wanted to talk with her. (RT p. 735.) He told her so. (RT p. 562.) He told her they were no-bail warrants and she would not get out of custody that day; she told him her mother was in the hospital in a coma. (RT p. 563.) This interview occurred at the police station; she had been taken directly there rather than to the jail after being arrested. (RT pp. 560-561.) Ms. L told Sgt. W that Mr. X had shot Mr. V -- she explained at trial that she did so because she wanted to do the right thing -- and Sgt. W then had another officer take her home. (RT pp. 543, 566.)

On October 29, 1993, Ms. L had left work at about 4:30 and had been driven by a friend to [Minjie]'s, arriving at about 5 p.m. (RT pp. 493-494.) Also present at [Minjie]'s that evening were

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[4] She saw Mr. X in the office a few weeks after the shooting. He said hello in passing, and he did not threaten her. (RT pp. 537-538.)

[5] The previous afternoon she had testified that July 5, 1994, was the first time in her life that she had told anyone that Mr. X had shot Mr. V. (RT p. 557.) Ms. L admitted that she lied under oath at the preliminary examination when she testified then that she had not told anyone about Mr. X's being the shooter until she told Sgt. W on July 5, 1994. (RT pp. 641-642.) Her explanation for that lie was that she did not want to get her sister involved. (RT pp. 641, 644.)

Ms. D, Ms. G, and Ms. L, who had met at the club to celebrate Ms. G's birthday.[6] (RT pp. 131-133.)

During the evening, Ms. L had three or four Cadillac margaritas and some hors d'oeuvres. (RT p. 496.) Sometime between 11 and midnight she went out to the car of a co-worker, and they shared a marijuana cigarette. (RT p. 498.) When Ms. L was in the car smoking marijuana with her friend, she saw Mr. X on the corner. (RT p. 501.) Mr. X was walking back and forth, looking across the street toward [Minjie]'s. (RT p. 502.) She did not want Mr. X to see her; she was not afraid of him, but she did not want to talk with him because she just did not feel like being with him. (RT pp. 515-516.) He did not acknowledge having seen her. (RT pp. 515-516.) She went back into [Minjie]'s. (RT p. 516.)

After returning from the car to the club, at about midnight Ms. L saw Mr. V. (RT p. 518.) She saw him again as she was leaving for the evening at closing time, about 1:30 or 1:40 a.m. (RT pp. 520-522.) Mr. V had told her he was going to walk a woman to her car, and there had been some talk earlier about Mr. V giving Ms. L a ride home. (RT pp. 521-522.)

As Ms. L walked out the door, she saw Mr. V walking a woman across the street.[7] (RT p. 522.) Ms. L was going to yell across the street to Mr. V that she and her group had made other arrangements for a ride, but she saw Mr. V talking with Mr. X. (RT pp. 523-524.) She could not hear voices, but she assumed they were talking because Mr. V was moving his hands up and down. (RT

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[6] Ms. L is Ms. G's sister. (RT p. 132, 494.) Ms. G's birthday is October 29. (RT p. 494.) At the preliminary examination, Ms. L had testified these events occurred on October 28. (RT p. 565.)

[7] Witness R and her friend witness B had gone to [Minjie]'s on October 29 to celebrate R's birthday a couple of days early. (RT p. 911.) Ms. B introduced Ms. R to Mr. V, and Mr. V introduced the man who was with him (apparently Mr. T). (RT pp. 913-914.) The four of them walked together to Ms. B's car. (RT p. 915.) The two women got into the car, and Mr. V stood at the driver's door and talked with Ms. B for about five minutes. (RT p. 916.)

pp. 525-526.)[8] As Mr. V started back across the street, he was shot. (RT pp. 203-205, 526-527, 917-918.) Mr. X shot Mr. V in the lower part of his body. (RT pp. 526-527.) After two shots had been fired, Mr. V fell; as he tried to get up, Mr. X shot him several more times. (RT p. 527.) Mr. X then backed away from Mr. V. (RT p. 528.)

Ms. M, Mr. V's mother, testified that Mr. V had called her at her home in Florida on October 28, 1993. (RT p. 421.) Mr. V, who was very excited, said he had just been in a store where he had seen appellant-X, and Mr. V told her he was afraid of Mr. X. (RT p. 421-423, 426.)

The four slugs recovered after the shooting were .25 caliber and were all fired by the same gun. (RT pp. 293, 298.) Mr. X owned two .25 caliber pistols. (RT pp. 720-721, 747-748.) There are tens of thousands of such guns in this country. (RT p. 299.)

[8] Neither Mr. T, Ms. R, nor Ms. B described such a conversation; all testified the shooting started when Mr. V was still near the driver's door of Ms. B's car. (RT pp. 203-204, 917-918; 1007-1009.)

ARGUMENTS

I

THE COURT ERRED IN EXCUSING JUROR C. WITHOUT GOOD CAUSE RATHER THAN GRANTING APPELLANT'S MOTION FOR MISTRIAL, EFFECTIVELY DENYING HIM HIS RIGHT TO A VERDICT BY A UNANIMOUS JURY

Mr. X acknowledges, "An appellate court reviews a trial court's finding of good cause [for removing a sitting juror] under the deferential abuse-of-discretion standard." (*People v. Price* (1991) 1 Cal.4th 324, 400.) However, under the circumstances of this case, the trial court's action in removing juror C. meets the abuse of discretion standard. This case calls for particularly close scrutiny of the trial court's exercise of discretion because the removal came not only while the jury was deliberating but also after the jury had three times informed the court that it was deadlocked. Moreover, the trial court knew on December 16 the deadlock was 11-1 for conviction because the foreperson, juror R., told the court in chambers the vote was 11-1 (RT pp. 1382-1383) and juror H. told the court in chambers the "problem" juror was applying a higher standard of reasonable doubt (RT p. 1392), thus leaving no question the majority vote was for conviction.

Under these circumstances, the dissenting justice in the Court of Appeal has it exactly right: "Today there are numerous proposals before the Judicial Council and the Legislature that address this problem [the lone holdout juror] by either reducing the number of jurors or allowing non-unanimous verdicts. The trial court appears to fashioned a dangerous new solution: require the deadlocked jury to continue to deliberate until the holdout juror can be removed for failing to participate." (Slip opinion, Stein, J., dissenting, p. 1.)

That is, not only did the removal of juror C. deprive Mr. X of his right to be tried by the original jury selected and sworn (U.S. Const., Sixth Amendment), but the effect on the alternate who replaced

juror C. and the 11 original jurors who remained was an implicit message that holding out against the majority who voted guilty could result in removal from the jury. Thus, the ultimate impact of this process was akin to the so-called "dynamite charge" or "Allen instruction" in terms of its coercive effect on a minority juror to join with the majority so as to render a verdict, a process long-since disapproved in California jurisprudence. (See *People v. Gainer* (1977) 19 Cal.3d 835; also see dissenting opinion, p. 1, where this problem was also noted by Justice Stein.)

In this case, although the behavior of juror C. was sometimes characterized as a refusal to deliberate, the sum total of what the court learned from the few jurors who were questioned on the subject shows merely that juror C. did not agree with the other 11 jurors, that people became frustrated as a result, and at some point the impasse became such that further discussion was not fruitful -- exactly what must happen behind closed doors whenever a jury deadlocks heavily weighted toward a verdict.

Juror C.'s description of the events in the deliberations room shows a natural human reaction to being a holdout juror after attempts to reach a consensus have failed; she did not refuse to deliberation, but rather she simply stopped deliberating when it was clear to continue would be futile. Removing a juror based on that behavior undermines the right to a unanimous jury under California Constitution, article I, section 16, and Mr. X submits it thereby substantially erodes the right to trial by jury under the Sixth Amendment and constitutes a violation of the Fourteenth Amendment right to due process of law as well.

That is, although the Sixth Amendment does not require a unanimous jury in a criminal case (see, e.g., *Apodaca v. Oregon* (1972) 406 U.S. 404 [32 L.Ed.2d 184]), when a state confers such a fundamental right, the Fourteenth Amendment to the United States Constitution is violated when the state denies that right which it has created (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175]; see also *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716).

In sum, the trial court erred in denying appellant's motion for mistrial and by, in the alternative, requiring the jury to continue deliberations and ultimately replacing the holdout juror with an alternate, thereby effectively denying Mr. X his right to a verdict by a unanimous jury.[9] The approach of the Court of Appeal majority in this case, giving full deference to the trial court, completely insulates from appellate review the very problem identified by Mr. X and acknowledged by the dissenting justice -- a trial court can use the device of pressuring a deadlocked jury, especially when the trial has already lasted twice as long as predicted, into continuing deliberations until there is substantial evidence of refusal to deliberate, the very behavior in which a lone holdout juror eventually engage out of frustration and a sense of futility.

What happened to Mr. X should not be permitted in the first instance, and surely the abridgement of such a fundamental right should not be insulated from appellate review. This is a wrong crying out for a remedy from the California Supreme Court.

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[9] The problem was exacerbated in this case by the lengthy adjournment of deliberations over the Christmas and New Year's holidays, a problem raised in a separate issue as Argument I in appellant's Court of Appeal briefing and discussed there in relationship to this issue as well.

II

THE DEFINITION OF REASONABLE DOUBT PROVIDED TO THE JURY VIOLATED MR. X'S RIGHT TO DUE PROCESS OF LAW, REQUIRING REVERSAL PER SE

The definition of reasonable doubt provided to the jury in the court's instructions was that contained in the 1994 revision of CALJIC No. 2.90.[10] The 1994 revision appears to have followed the suggestion of this court in *People v. Freeman* (1994) 8 Cal.4th 450, 504 that the "moral certainty" standard be deleted from CALJIC No. 2.90, leaving the "abiding conviction" language to guide the jury as to the meaning of reasonable doubt. This suggestion in *Freeman* was in response to criticism of the "moral certainty" language in the former version of CALJIC No. 2.90 in *Victor v. Nebraska* (1994) 511 U.S. ___, ___ [127 L.Ed.2d 583, 593]. Mr. X respectfully submits the truncated version of CALJIC No. 2.90 which exists after this series of events, and which was given in this case, was inadequate to comply with his right to due process of law. (U.S. Const., Fourteenth Amendment; Cal Const., art. I, § 15.)

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[10] CALJIC No. 2.90 (1994 Revision) was given in this case as follows:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

"Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (CT p. 423; RT pp. 1318-1319.)

The former version of CALJIC No. 2.90 was read to the jury in the form of preinstruction during the jury selection process. (See Augmented RT pp. 41-42 and 408.) However, correct preinstruction at the beginning of trial does not cure error in instructions given to the jury just before they begin deliberations. (See *People v. Vann* (1974) 12 Cal.3d 220, 227, fn. 6; see also *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1219 [failure to repeat just before deliberations an instruction on burden of proof given during voir dire was prejudicial error]. This is particularly true in this case, because the jury was given the written instructions (see CT p. 449), which included the 1994 Revision of CALJIC No. 2.90, and in the case of a discrepancy between oral and written instructions, the jury is presumed to have followed the written instructions. (See *People v. Garceau* (1993) 6 Cal.4th 140, 189; and *People v. Andrews* (1989) 49 Cal.3d 200, 216.) Thus, this court must assume the jury applied the 1994 version rather than the earlier version of CALJIC No. 2.90 read during jury selection.

Mr. X respectfully suggests that the above-noted dicta of this court in *Freeman* was adapted too readily from dicta by the United States Supreme Court in *Victor*, probably due to the fact that the issue raised by Mr. X appears not to have been addressed in *Freeman*, as discussed more fully below. Moreover, this court in *Freeman* seemed clearly to contemplate its suggestion was merely a temporary solution, as follows: "More extensive changes -- such as those discussed in the concurring opinions -- might be preferable but must be left to others. We urge the Legislature or the Committee on Standard Jury Instructions--Criminal of the Los Angeles Superior Court (the CALJIC committee) to examine this matter comprehensively so that California may have the best possible instruction. The clarity and constitutionality of California's instruction on reasonable doubt are too important to simply ignore the high court's warning signals." (Id., at p. 504.)

In its criticism of the "moral certainty" language in the reasonable doubt instruction, the majority noted in *Victor*, 127 L.Ed.2d at p. 596: "An instruction cast in terms of an abiding conviction as to guilt, without reference to a moral certainty, correctly states the government's burden of proof." However, this dictum was not accompanied by any analysis as to how the phrasing "abiding conviction" contained sufficient guidance for a jury without substituting for "moral certainty" some other language to convey the concept that a standard of proof necessarily reflects a degree of certainty.

Indeed, this need was identified by Justice Mosk, concurring in *People v. Brigham* (1979) 25 Cal.3d 283, 299: "First, what is an 'abiding' conviction? Again the word has an antique ring: while it may have been current in 1850, it has long since fallen into disuse and is no longer part of our daily speech. As with the phrase, 'moral evidence,' the jurors are left without guidance from the trial court as to its intended meaning."

Along with criticizing "abiding conviction" as being no more useful to a jury's understanding the concept of reasonable doubt than "moral evidence," Justice Mosk in his concurring opinion focused on

the concept of certainty: "By singling out 'moral evidence' as the particular species of proof 'open to some possible or imaginary doubt,' it implies that 'physical evidence' is somehow not susceptible to uncertainty." (*Id.*, at p. 296.) Justice Mosk continued with this theme as follows: "Not even scientific or experimental evidence always rises to the level of certainty." (*Ibid.*)

Thus, while the current version of CALJIC No. 2.90, given in this case, has eliminated language determined in *Victor* and *Freeman* to be inappropriate, the instruction has substituted for that problem language nothing to define a degree of certainty, "the very high level of probability required by the Constitution in criminal cases." (*Victor, supra*, 127 L.Ed.2d at p. 596.)

The net result of this revision to CALJIC No. 2.90 is the only operative language defining reasonable doubt is "abiding conviction," a term which Justice Mosk quite correctly identified as being inadequate for the task. Indeed, the court in *Victor* determined that although "moral certainty" was inappropriate terminology, that concept together with the "abiding conviction" language was sufficient to convey to the jury that it needed to find near certitude of the guilt of the defendant. (*Victor, supra*, 127 L.Ed.2d at p. 596.)

This is the key point apparently not addressed in *Freeman*, likely because the problem identified in this case was not at issue there. That is, Mr. X urges that although the *Victor* court found "moral certainty" in the abstract adds nothing to a jury's understanding of the meaning of reasonable doubt, when coupled with the concept of "abiding conviction," it meant something in context and together the concepts were sufficient for the instruction to pass constitutional muster. Thus, deleting "moral certainty" may solve one problem, but the failure to substitute in its place some other description of level of certainty creates a new problem of even greater dimension. That is, Mr. X's jury was given no clue as to the level of certainty it must feel to find the case had been proved beyond a reasonable doubt, while *Victor* makes clear a jury must be given an instruction which enables it to understand it

must be satisfied to something like near certitude of the guilt of the accused.[11]

Mr. X respectfully submits this court did not properly focus on this aspect of *Victor* when it decided *Freeman*, but rather this court focused on the notion that "moral certainty" added nothing and thus could safely be deleted from the instruction. (*Freeman*, at p. 504.)

"Abiding conviction," standing alone as it is in this case, does not provide guidance as to the needed level of certainty. That phrase may connote something about the strength and depth of a juror's belief that a case has been proved. (*People v. Brigham, supra*, 25 Cal.3d at p. 290.) Yet, alone it does not distinguish "beyond a reasonable doubt" from other burdens. Thus, this instruction created the risk that Mr. X's jury could have returned its guilty verdicts "based on a strong and convincing belief which is something short of having been 'reasonably persuaded to a near certainty.'" (*Ibid.*, quoting *People v. Hall* (1964) 62 Cal.2d 104, 112.)

In other words, defining reasonable doubt in terms of "abiding conviction" does nothing to distinguish the prosecution's burden of proof beyond a reasonable doubt in a criminal case such as this from other, lesser standards of proof such as clear and convincing evidence. Indeed, at least one state actually defines clear and convincing evidence as an "abiding conviction." (*New Mexico Statutes Annotated - Uniform Jury Instructions*, No. 13-1009; see also *In re Doe* (1982) 647 P.2d 400, 402 [98 N.M. 198].) Other states and federal jurisdictions define clear and convincing evidence in terms indistinguishable from "abiding conviction," such as a "firm belief or conviction." (See, e.g., *Pattern Jury Instructions* (1994) U.S. Fifth Circuit District Judges Assoc., Inst. 2.14, p. 18; *Federal Criminal Jury Instructions* (2nd ed. 1991, Michie Co.), No. 70.02, Insanity Defense; and *Virginia Model Jury Instructions - Civil* (Rep.ed. 1993, No. 3.110.)

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[11] This case points up the problem. In the trial court's discussions with some jurors in regard to whether one juror was refusing to deliberate, a key factor noted by a juror was a disagreement over just how high a standard was proof beyond a reasonable doubt. (RT p. 1392.)

As Justice Mosk pointed out, whatever special meaning "abiding conviction" may have had when the source for the earlier version of CALJIC No. 2.90 was created in 1850, that meaning no longer exists in current society. A juror of today would bring to the process the present common meanings of "abiding" and "conviction." A "conviction" is commonly considered a "strong belief," and "abiding" is defined as "enduring" or "lasting." (Webster's, *New World Dictionary* (1979 ed.) pp. 2, 138.)

Thus, Mr. X's jury could well have believed it was to apply a standard of proof based on an abiding conviction as requiring a level of proof by the prosecutor which led them to a belief in Mr. X's guilt which was "so clear as to leave no substantial doubt" or "sufficiently strong to command the unhesitating assent of every reasonable mind" -- the California definition of the lesser standard of proof by clear and convincing evidence. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 319-320; see also *In re Angelia P.* (1981) 28 Cal.3d 908, 919 [clear and convincing evidence requires a finding of high probability], and *People v. Brigham*, *supra*, 25 Cal.3d at p. 291: "a strong and convincing belief . . . is something short of having been 'reasonably persuaded to a near certainty.' [Citation].") Yet, proof beyond a reasonable doubt is a standard which is qualitatively and meaningfully higher than proof by clear and convincing evidence; the standard of proof beyond a reasonable doubt is intended and expected to produce different results in some fact situations than the lesser standard. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1369 [use of the standard of beyond a reasonable doubt in parental rights termination proceedings "might 'erect an unreasonable barrier' to freeing permanently neglected children for adoption. [Citation.]."

Mr. X notes that this defect could be solved by supplementing the 1994 revision of CALJIC No. 2.90 as follows:

"An abiding conviction based on proof beyond a reasonable doubt is the highest level of

certainty recognized in the law. Proof beyond a reasonable doubt requires a degree of certainty which is greater than the next lower standard of clear and convincing evidence, which lower standard requires evidence so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. An abiding conviction sufficient to meet the higher standard of proof beyond a reasonable doubt is also one which is lasting and permanent in nature." (See *People v. Brigham*, *supra*, 25 Cal.3d 283, 291-292; and *Lillian F. v. Superior Court*, *supra*, 160 Cal.App.3d 314, 319-320.)

In sum, the definition of reasonable doubt given in this case was defective in that it gave the jury no guidance as to the level of certainty to which it must be persuaded before it could reliably determine that the prosecution had met its burden of proof beyond a reasonable doubt. By suggesting a standard lower than that required, this instruction did not comport with due process of law. (*Cage v. Louisiana* (1990) 498 U.S. 39, 41 [112 L.Ed.2d 339].) A proper instruction on the definition of proof beyond a reasonable doubt is " . . . indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. [Citation.]" (*In re Winship* (1970) 397 U.S. 358, 363 [25 L.Ed.2d 368].) Thus, this was an error which impinged upon Mr. X's state and federal constitutional rights to due process of law.[12]

This kind of error is a structural defect which requires reversal per se because a defendant is entitled to have the jury, not a reviewing court, apply a correct reasonable doubt standard in determining the issue of guilt. (*Sullivan v. Louisiana* (1993) 508 U.S. ___ [124 L.Ed.2d 182].) In other words, if a reviewing court were to apply harmless error analysis to this error, that procedure

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[12] This kind of fundamental instructional error is reviewable on appeal even in the absence of an objection in the lower court. (California Penal Code section 1259; *People v. Hernandez* (1988) 47 Cal.3d 315, 353.) The trial court is required sua sponte to instruct generally, and of course correctly, on the presumption of innocence and the burden of proof. (See *People v. Vann*, *supra*, 12 Cal.3d 220, 225-226.)

would deprive Mr. X of his constitutional right to trial by jury. (U.S. Const., Sixth Amendment; Cal. Const., art. I, § 16.)

Therefore, the defective definition of reasonable doubt given in this case, pursuant to the 1994 revision of CALJIC No. 2.90, requires reversal per se of the entire judgment of conviction.

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CONCLUSION

For the reasons given, Mr. X requests that this court grant review to resolve these important issues of federal constitutional dimension.

Dated: June 16, 1996

Respectfully submitted,

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