IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARVIN TRAVON HICKS Defendant and Appellant.	)	No. S232218

Second Appellate District, Division Five, Case No. B259665
Los Angeles Superior Court No. MA058121
Honorable Kathleen Blanchard, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUE ON REVIEW

By order of this Court, filed March 23, 2016, the issue presented by this case is "Did the trial court err when it refused to inform the jury at the retrial of a murder charge that defendant had been convicted of gross vehicular manslaughter in the first trial? Compare *People v. Batchelor* (2014) 229 Cal.App.4th 1102."

STATEMENT OF THE CASE

In 2012, appellant killed a 2-year-old girl in a car crash after leading police on a high-speed chase. He was charged with murder (Pen. Code § 187), along with gross vehicular manslaughter (Pen. Code § 191.5, subd. (a)), evasion of a peace officer causing injury (Veh. Code § 2800.3, subd. (a)), evasion of an officer causing death (Veh. Code § 2800.3, subd. (b)) and felony driving under the influence with two great bodily injury allegations (Veh. Code § 23153, subd. (a); Pen. Code § 12022.7, subds. (a) and (d)). (1CT 8-12.) The jury convicted him on all charges except for the murder, on which they failed to reach a unanimous verdict (1CT 127-132.)

A second jury trial ensued on the murder charge on April 1, 2014 (1CT 84). The trial court refused appellant's request to inform the jury under the authority of *People v. Batchelor* (2014) 229 Cal.App.4th 1102 that appellant had already been convicted of vehicular manslaughter (4 RT 2710-2711, 2715-2725). The jury convicted him of second-degree murder (1CT 217).

On October 10, 2014, the court sentenced appellant to 15 years to life for the murder plus 7 years for evasion of a police officer causing injury. One of the remaining counts was dismissed as a lesser included offense of another, and sentence on the remaining counts was stayed. (1CT 263-267.)

On December 23, 2015, the Court of Appeal affirmed the judgment in a partially published opinion in which it disagreed with the *Batchelor* decision, and this

Court granted appellant's Petition for Review on March 23, 2016, limiting the question on review to whether the trial court erred in refusing to inform the jury at the retrial of the murder charge that appellant had been convicted of gross vehicular manslaughter in the first trial.

STATEMENT OF FACTS FROM THE RETRIAL

Prosecution Evidence

(a) Reckless driving culminating in the fatal collision.

Several civilian witnesses and sheriff's deputies saw appellant driving a black Toyota in a reckless manner at high speeds on public streets in the Lancaster area from about 4:45 to 5:00 p.m. on December 6, 2012.

As Kim Thomas was driving on 30th East and Avenue P, she saw the Toyota stop two car lengths before a stop sign. The driver appeared to be talking to someone, though he was alone in the car. (6RT 4504-4505.) He then turned left onto Avenue P at a high rate of speed (5RT 4507-4508; 6RT 4510). Thomas, along with other cars, passed the Toyota on Avenue P, as it was then going only about 25 miles per hour, but a little while later on Sierra Highway, it sped by her going 65 or 70 (6RT 4508-4511). Later, Thomas saw the Toyota stopped on Sierra Highway, blocking both lanes. The driver was pushing it while waving his hands and appearing to be talking to himself. After briefly speaking to a bicyclist, he started hitting and kicking the Toyota, jumped back into it, and started driving north at a "pretty fast" rate of speed, in excess of the 60 or 65 miles per hour at which Thomas was traveling. (6RT 4510-4513.)

John Alvarez too saw the Toyota blocking traffic while the driver was talking to a bicyclist. Alvarez maneuvered around it, but shortly thereafter it passed him at a high rate of speed, crossing the double yellow line into oncoming traffic lanes while

attempting to pass other vehicles. Alvarez phoned 911. (4RT 3635-3629.)

At about 5:00 p.m., Deputy Sheriff Thomas Kim saw the Toyota pass him at about 100 miles per hour on Sierra Highway, then proceeding recklessly on the wrong side of the highway and going through a red light at Avenue K without the brake lights appearing (4RT 3639-3648). Deputy Kim broadcast a description of the Toyota to all sheriff's vehicles in the area. He was unable to keep pace with it, but other sheriff's vehicles arrived and pursued it with their sirens and emergency lights on (4RT 3657-3660).

Eric Eitner, an off duty deputy sheriff, saw the Toyota driving northbound on Sierra Highway as it went through an intersection at about 100 miles per hour with no apparent application of its brakes, causing several other drivers to belatedly apply their own brakes (4RT 3673-3674).

Deputy sheriffs Gustavo Munoz and Giovanni Lampignano were in their marked patrol car when they responded to a dispatch about the Toyota (4RT 3673-3674). Nearing the intersection of Avenue I and Sierra Highway, they saw the Toyota speed through a red light, lose traction and come to a stop at the southbound curb. Other vehicles in the intersection had to stop in reaction. (4RT 3675-3677.)

The deputies activated their lights and sirens and positioned their patrol car behind the Toyota. Appellant was hanging halfway out the driver door window, screaming. (4RT 3676-3677, 3686.) In response to Deputy Lampignano's commands,

appellant stared blankly, screamed obscenities, talked to himself, waved his hands as if he were hallucinating and growled like a dog (4RT 3678-3680, 3684-3686). Appellant then restarted his car and, while jerkily accelerating and braking in an attempt to make a left turn, caused a motorcyclist to almost lift his bike to get it out of appellant's path (4RT 3667, 3678-3679). Deputy Lampignano had to jump back into the patrol car because the Toyota came within two feet of him at a high speed (4RT 3679).

The deputies pursued appellant westbound down Avenue I with their lights and sirens activated. They could not keep up with him, though they'd accelerated to about 75 miles per hour in a 40 mile an hour zone. On three occasions, appellant veered into oncoming traffic for a few seconds, causing other cars to swerve to avoid collisions. The deputies lost sight of him after he ran a red light. (4RT 3680, 3687; 5 RT 4016.)

As Candyce Bailey was pausing on Avenue I to make a left turn, she saw the Toyota head towards her and then veer around her after coming within two or three inches of her vehicle. A short time later, she saw a police car in pursuit of the Toyota followed by five or six police cars with the lights and sirens activated. (4RT 3690-3695.)

Within moments, Tina Ruano stopped for a red light at the intersection of 10th Street West and Avenue I in a Lexus, with her two-year-old daughter Madison buckled into a rear passenger side child seat. As the light turned green, she entered the intersection, saw a black car coming from the right side, and remembered nothing more. (6RT 4581-4583.)

The collision of appellant's Toyota with the Lexus was witnessed by James Ouart and Rhonda Perez. Ouart estimated the Toyota as going 80 to 100 miles per hour. Both he and Perez described the event as an explosion, with Perez witnessing the Toyota going airborne and wrapping itself around a pole. (5RT 3948-3954, 4225-4227.)

Deputy Amos Cisneros, who was on approach to the intersection, heard a loud explosion (5RT 4017). Deputies Lampignano and Munoz arrived, exited their patrol car with weapons drawn and ordered appellant to show his hands. He was screaming, laughing, apparently angry and mumbling nonsense to himself. Upon being forcibly removed from the car, he was jittery, sweating profusely and staring blankly while talking to himself as if hallucinating (4RT 3684-3689.)

Madison Ruano was taken to the hospital in full arrest, and pronounced dead shortly after. The first two vertebrae in her neck were fractured and separated from each other causing her spinal cord to be severed from her brain in what the treating doctor termed a "functional decapitation." (5RT 4221-4245, 4246).

(b) Appellant's condition following the collision.

An Emergency Medical Technician who examined appellant at the collision scene deemed him to be alert and oriented on the "Alert and Oriented Times 3" scale, and showing a normal level of consciousness on the Glasgow scale (5RT 3957-3961). Appellant told the technician he was aware of the collision, had been wearing a seatbelt, ran through a red light and, though he was bleeding from a head laceration, had no pain

(5RT 3961-3965, 3971, 3974-3975, 3983). In the ambulance on the way to the hospital, appellant denied being in a car crash and having been chased by police; the technician thought his unawareness was feigned (3RT 1510-1511; 5 RT 3965, 3969, 3982).

Appellant arrived at the hospital at 5:38 p.m. There, he vacillated between being agitated and combative (it took four or five people to physically restrain him and strap him into a gurney), and calm; he required restraints in order to be treated, and displayed more strength than a man his size would normally have. (5RT 3964-3965, 3993-3995, 4000-4002, 4008.)

His blood, which was drawn shortly before 6 p.m., tested positive for PCP, marijuana and .02 blood alcohol content; the amount of PCP in his system indicated that it was ingested from a few minutes to 48 hours before the blood draw, and the amount of marijuana indicated ingestion from one to five hours before. (4RT 3616-3622, 3902-3915; 5RT 4005, 4219-4220).

Appellant was twice given the Glasgow test at the hospital to assess his neurologic status based on eye movement, responses to verbal questions and motor function. A person who is completely awake and normal would score a 15. Upon arrival, appellant scored 13, and upon discharge, 15. (5RT 4212-4217.)

(c) Accident reconstruction.

An accident reconstruction expert examined the Toyota and found no mechanical problems. He opined that it had been travelling west and hit the right side of

the Lexus at a minimum speed of 70 miles per hour while the Lexis was travelling at 16 miles per hour, with neither car showing signs of pre-impact braking. (5RT 4276-4291).

(d) Expert testimony regarding appellant's PCP use.

Two law enforcement criminalists testified on the effects of PCP: David Vidal, a retired senior criminalist with the Los Angeles County Sheriff's Department, and California Highway Patrol Officer Joshua Wupperfield.

According to Vidal, people under the influence of PCP exhibit nystagmus, muscle rigidity and profuse sweating; they can be extremely agitated and violent, stare blankly and speak repetitively. The length of influence is usually three to five hours. PCP use can severely distort judgment and the ability to operate a motor vehicle, and can cause short-term memory loss. (4RT 3910-3912; 5 RT 3915-3928.)

According to Patrol Officer Wupperfield, people under the influence of PCP cannot safely operate motor vehicles because PCP severely diminishes the ability to multi-task and causes mental impairment, aggressiveness and hallucinations; they are capable, however, of making decisions. Appellant's behavior on the day of the collision was consistent with PCP use. (6RT 4520-4561.)

(e) Prior convictions, drug counseling and drug awareness.

On June 1, 1995, appellant pled no contest to a violation of Vehicle Code section 23103 (reckless driving) and was ordered to complete an alcohol and drug education program (Exh. 29 at Supp. CT 27-32). On August 31, 2001, he pled no contest

to a violation of Vehicle Code section 23152, subd. (b) (driving under the influence of drugs or alcohol) and ordered to complete another such program (Exh. 31 at Supp. CT 36-40). Both programs included the effect of alcohol and drugs on the body and brain, and the dangers of driving under their influence; both programs included a showing of "Red Asphalt," a graphic documentary showing actual traffic collisions involving impaired drivers. (5RT 4248-4256.)

On April 9, 2009, appellant signed a driver's license form certifying that he had read, understood and agreed with the contents of the form, including certifications on the back of the form, one of which stated that he'd been "advised that being under the influence of alcohol or drugs or both, impairs the ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs or both. If I drive while under the influence of alcohol or drugs or both and as a result, a person is killed, I can be charged with murder." (5RT 4262-4265).

(f) Appellant's prior testimony.

The prosecutor read into evidence selected portions of appellant's testimony from the first trial, described to the jury as "a prior proceeding on April 10th, 2014" (5RT 4294). Appellant testified that he was the driver of the Toyota and responsible for the collision (5RT 4294). That morning, he smoked a PCP-laced marijuana cigarette, then went to sleep for several hours. He woke between 3:30 and 4:00 p.m. and decided to drive, so he picked up his car keys and left. (5RT 4300-4303).

Appellant had been convicted of "alcohol related reckless driving" in 1995 and required to attend a three-month drug and alcohol program. In 2001 he rear-ended another vehicle on the freeway resulting in injuries, for which he was convicted of driving under the influence and ordered to take an 18-month course which covered many of the issues of the previous program. (5RT 4303-4307.) He knew prior to these programs that people could be killed by someone driving under the influence of alcohol or drugs, and he still had that knowledge in 2012 (5RT 4309-4310).

Appellant had used PCP 10 to 15 times between 2001 and the date of the collision, and felt the effects of it each time. During a two-week period in October and November of 2011, he was hospitalized because of PCP use on one occasion; arrested and booked for being under the influence on another; and broke his garage door lock on a third, which is something he would not normally do, although he might not have been under the influence of PCP at the time. The effect of PCP on him was pretty sudden, could happen within a minute and could last for several hours. (5RT 4295-4231.)

Defense Evidence (Appellant's Testimony)

Appellant had battled substance abuse issues all his life, starting with alcohol and marijuana. He began smoking PCP in 2011 after his divorce, and used it about 10 to 15 times since. Although each experience with it was different, he liked the feeling it gave him and found it hard to stop using it. The highs would come on within a minute or so and could last for hours. (6RT 4811, 4813, 4815-4816, 4847.)

Appellant recounted his two prior alcohol-related driving convictions and the courses he was required to attend as a result of them. He did not remember the specifics of the courses, but was put on notice that driving while impaired was dangerous. (6RT 4811-4814, 4864). He also related the three incidents in October and November of 2011 that resulted, respectively, in his hospitalization, arrest, and the sheriffs coming to his house when he broke his garage door lock (6RT 4852-4857).

On the date of the collision, appellant woke at 7:00 a.m. with no plans for the day. After breakfast, he smoked a PCP-laced marijuana cigarette and drank some beer. The PCP affected him badly; he heard loud voices and felt as if he were being pushed, pulled and compressed. He went to sleep for several hours, waking at 4:00 or 4:30. He still heard the voices and felt compressed, so he tried to telephone his son for help but was unable to reach him. (6RT 4816-4829.)

He then decided to go to his son's house in Lancaster because he didn't want to be alone and wanted to get to a place where he felt safe. It did not occur to him to get to his son's house by any means other than driving or to go someplace nearer for help, so he got into his car and started to drive, first presumably grabbing his keys although he didn't remember doing so. Nor did he remember anything that occurred subsequently until he woke in county jail the next morning. (6RT 4818-4822, 4827, 4844-4846.)

On the day of the collision, appellant had the knowledge that driving under the influence is dangerous, and in his testimony he accepted responsibility for the death of

Madison Ruano. But when he left his home to get help, all he was thinking about was reaching his son. Nothing else crossed his mind; he did not process what he had learned in the past or weigh and balance the possibility of anything happening. (6RT 4821-4823.) When asked if he was responsible because he knew it was dangerous to drive while he was impaired that day, he answered, "I never – it is dangerous to drive if you're under the influence, but that never – I never formulated that process, or I never weighed the good and bad of being under the influence that day. I simply wanted to do something and I set out to do it." (6RT 4866-4867.)

ARGUMENT

THE TRIAL COURT ERRED WHEN IT REFUSED TO INFORM THE JURY AT THE RETRIAL OF THE MURDER CHARGE THAT APPELLANT HAD BEEN CONVICTED OF GROSS VEHICULAR MANSLAUGHTER IN THE FIRST TRIAL

A. Introduction and summary of argument.

This case concerns the relationship between the California rule that the jury must not speculate about punishment in reaching its verdict and the recognized danger that when it is clear the defendant is responsible for a criminal act (here, one with terrible consequences), the jury will convict of a greater crime than he committed if they believe their only other option is to let him walk free. In the situation here, where a defendant has, unbeknownst to the jury, already been convicted of a lesser degree of homicide and the jury's task is limited to deciding whether he is guilty of murder, the jury will naturally speculate about the consequences of their verdict by wrongly assuming that an acquittal will absolve him of all criminal responsibility, and that speculation will inevitably influence their verdict.

In this situation, an instruction informing the jury of the conviction with the proviso that their only task is to decide whether the elements of the greater crime have been proven will remove, rather than promote, any speculation about punishment, and is necessary to remove the risk that an unwillingness to set free a defendant who is clearly guilty of a horrendous act will affect the determination of guilt. There is precedent for

such an instruction in cases where the jury is tasked with determining whether a defendant is not guilty of a crime by reason of insanity. In that analogous context, California courts have recognized the utility – and necessity if the defendant requests it – of informing the jury that a favorable verdict will not result in the defendant's freedom. Such an instruction would not interfere with the prosecutor's charging decision or otherwise thwart any legitimate concerns of justice, but would enhance the truth-finding function of the jury by eliminating a serious risk to it.

B. The rule that juries are not to speculate about punishment.

It is axiomatic that a jury determining the defendant's guilt of a crime should not consider the subject of penalty or punishment. The reason for the rule is that it is the judge's task, not the jury's, to decide punishment and that without being admonished that penalty and punishment must not enter into its deliberations, "' a jury may permit their consideration of guilt to be deflected by a dread of seeing the accused suffer the statutory punishment' (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306; see also *People v. Alvarez* (1996) 49 Cal.App.4th 679, 687; *People v. Moore* (1985) 166 Cal.App.3d 540, 551; *People v. Allen* (1973) 29 Cal.App.3d 932, 936 ['It is settled that in the trial of a criminal case the trier of fact is not to be concerned with the question of penalty, punishment or disposition in arriving at a verdict as to guilt or innocence.'].)" (*People v. Nichols* (1997) 54 Cal.App.4th 21, 24.) Thus, it is standard procedure to instruct California juries accordingly, per CALCRIM No. 2550 or formerly, and still

occasionally, CALJIC No. 1742.[1]

Of course, the danger in the present case was not that the jury's consideration of punishment would prompt it to acquit out of dread that appellant would be unduly punished (compare three strikes cases such as *People v. Nichols, supra,* 54 Cal.App.4th 21), but that, without being told he had already been held criminally accountable for Madison's death, they would naturally speculate he would go unpunished for what was unquestionably and admittedly a criminal act with a terrible consequence unless they convicted, deflecting the question whether malice was proven and focusing instead on the necessity of holding him accountable. The requested instruction is perfectly consistent with the rule against considering punishment. Informing the jury of appellant's manslaughter conviction with the proviso that the jury's sole task was to determine whether the elements of murder were proven beyond a reasonable doubt would have addressed holding appellant accountable, taking the question of accountability, and therefore punishment, off the table so that the jury could focus solely on their proper task.

C. Speculation about punishment is an acknowledged reality.

As mentioned above, appellant's jury was instructed not to consider punishment. Lest it be said that jurors are presumed to follow their instructions, caselaw recognizes that it is natural, even inevitable, for the jury to speculate about punishment

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[1] CALJIC No. 17.42, given to appellant's jury at 1CT 228, states: "In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict."

regardless. Even as to less volatile subjects, the presumption is more a bow to practicalities than a reflection of reality. "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant." (*Richardson v. Marsh* (1987) 481 U.S. 200, 211.) See also Justice Jackson's concurring opinion in *Krulewitch v. United States* (1940) 336 U.S. 440, 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumental v. United States* (1947) 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction. [Citation.]"[2]

More to the point, this Court has frequently recognized that speculation about punishment is either "inevitable" or "probably unavoidable" in certain contexts, instructions to the contrary regardless. In *People v. Riel* (2000) 22 Cal.4th 1153, 1219,

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[2] Specific instances abound, e.g., *Bruton v. United States* (1968) 391 U.S. 123 [codefendant's confession inculpating defendant; instruction to disregard would be to no avail]; *People v. Hill* (1998) 17 Cal.4th 800 [prosecutor's repeated misstatements of law during argument – instruction that arguments of counsel are not evidence and law would come only from the judge to no avail]; *People v. Diaz* (2014) 227 Cal.App.4th 360 [videos defendant had been shown after past DUI convictions concerning consequences of alcohol-related driving offenses with commentary by victims' families and statements of a prosecutor and judge in drunk-driving murder case; curative instruction not to consider various aspects of the videos to no avail]; *People v. Alvarado* (2006) 141 Cal.App.4th 1577 [prosecutor's argument vouching for integrity of her office; no objection necessary because curative instruction could not have cured the harm]; *People v. Ozuna* (1963) 213 Cal.App.2d 338 [no curative instruction could prevent jury from being influenced by testimony defendant was an "ex-convict"]; *People v. Allen* (1978) 77 Cal.App.3d 924 [same, re reference to defendant being on parole].

the defendant claimed jury misconduct in the penalty phase of a capital trial based on a juror's remark that if a verdict of death were reached, the judge would just commute it to life in prison anyway. This Court disposed of the claim as follows:

> "A prediction that the court would commute a death verdict, if in fact made was merely the kind of comment that is probably unavoidable when 12 persons of widely varied backgrounds, experiences, and life views join in the give-and-take of deliberations. . . . The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence . . . and instructions . . . Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citation.] Moreover, under that 'standard' few verdicts would be proof against challenge." [Citing *People v. Marshall* (1990) 50 Cal.3d, 907 at p. 950, with a *see also* cite to *People v. Cox* (1991) 53 Cal.3d 618, 696.]

More recently, in another claim of improper juror speculation about punishment in a capital penalty trial, the Court recognized that such speculation is "an inevitable feature of the jury system." (*People v. Dykes* (2009) 46 Cal.4th 731, 812.) *Dykes* parenthetically cited numerous examples, presumably all in cases where the jury received the standard instruction not to speculate about penalty: *People v. Schmeck* (2005) 37 Cal.4th 240, 307 [speculation about the defendant's possible release]; *People v. Pride* (1992) 3 Cal.4th 195, 267-268 ["The average juror undoubtedly worries that a

dangerous inmate might escape" in answer to claim of juror misconduct in discussing possibility defendant would escape from prison]; *People v. Cox* (1991) 53 Cal.3d 618, 696 [juror comment about death penalty never being carried out].

The inevitability of speculation about the consequences of one's verdict is not confined to capital cases. In an example more closely connected to the present case, California has recognized that juries tasked with determining whether a prisoner, already found guilty of a crime, is to be adjudged not guilty by reason of insanity, are at high risk of allowing their decision to hinge on speculation that he will be released into the community if found sane. This risk, moreover, is so great as to require judges to grant a defendant's request that the jury be instructed that a not guilty by reason of insanity verdict will cause the defendant's confinement until his sanity has been judged restored or he has served the maximum sentence for his crime. (*People v. Moore* (1985) 166 Cal.App.3d 540; *People v. Dennis* (1985) 169 Cal.App.3d 1135; see also *People v. Kelly* (1992) 1 Cal.4th 495, 538.) These cases will be discussed more extensively in section E, *post*. The point to be made here is that, basic platitudes notwithstanding, it cannot be assumed that CALJIC No. 17.42 prevented appellant's jury from considering whether their verdict would absolve him of all criminal responsibility and thereby effect his release. As appellant will demonstrate, the nature of this case all but ensured they would do so and that that consideration would affect their determination of guilt.

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D. The risk that ignorance of appellant's manslaughter conviction undermined the determination whether murder was proven.

It has long been recognized that juries are apt to convict a defendant of a greater crime than was proven beyond a reasonable doubt if they are not given the option of finding him guilty of a lesser crime in lieu of complete acquittal. This principle was first laid out almost a half century ago in *People v. St. Martin* (1970) 1 Cal.3d 524 as to lesser crimes whose elements are necessarily included in the one charged. The danger was explained thusly:

> "The state has no interest in a defendant obtaining an acquittal where he is innocent of the primary offense charged but guilty of a necessarily included offense. Nor has the state any legitimate interest in obtaining a conviction of the offense charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense . . ." (*Id.*, at p. 533.)

This Court reiterated the principle, and risk, more recently in *People v. Barton* (1995) 12 Cal.4th 186, 196, in holding that not even a defendant's deliberate strategy could trump the obligation to present the jury with an informed choice: "Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to