

Law Office of Michael P. Goldstein

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October 31, 2018

Mr. Jorge E. Navarrete,  
Clerk and Executive Officer  
California Supreme Court  
350 McAllister St.  
San Francisco, CA 94102

Re: People v. Thomas Potts, No. S072161 [capital case]

Dear Mr. Navarrete:

Please advise the Court that I wish to bring to its attention the following authorities not yet available when the briefs were prepared. In addition, I will shortly file a motion for leave to submit a supplemental brief regarding authorities that require discussion.

Extemporaneous Pre-instructions on Circumstantial Proof (Argument II, AOB 63)

Error

*People v. Sandoval* (2015) 62 Cal.4th 394, 421 (the reason case law requires instructing that circumstantial evidence must rule out innocent hypotheses is “to ensure that the reasonable doubt standard and the burden of proof are properly applied”)

*People v. Centeno* (2014) 60 Cal. 4th 659 (trying to explain the reasonable-doubt standard presents a high risk of reversible error, especially if employing an analogy involving a less serious or oversimplified situation or trivializing the deliberative process by invoking a less rigorous decision-making task or encouraging jurors to jump to conclusions)

Harmlessness

*People v. Sandoval, supra*, 62 Cal.4th at p. 421 (“affirmatively mislead[ing] the jury about the proper standard . . . of proof” is “structural error requiring automatic reversal”)

*People v. Aranda* (2012) 55 Cal.4th 342, 365 (instruction lowering standard of proof is structural), 368 (omitting correct reasonable-doubt instruction’s application to one offense is prejudicial unless “it can be known beyond a reasonable doubt that other aspects of the trial prevented any possibility of juror confusion as to the correct standard of proof”; strength of the evidence not relevant to harmlessness inquiry)

Sixth-Amendment Violating Hearsay (Argument IX, AOB 196)

*People v. Centeno, supra*, 60 Cal.4th 659, 677, fn. 7 (where child witness answered no questions on cross-exam, “counsel could well have argued that [her] testimony should have been stricken for lack of an opportunity for meaningful cross-examination”)

Excusals of Death-Scrupled Jurors (Argument XII, AOB 236)

No Requirement to Object If Trial Was Pre-2011

*People v Covarrubias* (2016) 1 Cal.5th 838, 863, fn. 9

Failure to Voir Dire to Resolve Doubts From Questionnaires (prospective jurors H.D. [AOB 241], P.S. [AOB 243], V.B. [AOB 264])

*People v. Woodruff* (No. S115378, July 19, 2018), \_\_ Cal.5th \_\_, slip opn., pp. 47–50 (discussion of general principles; reversible error to excuse based on questionnaire indicating both strong opposition to death penalty and willingness to set aside views and follow the law)

*People v Covarrubias, supra*, 1 Cal.5th 838, 865–866 (reversal for excusal based only on questionnaire expressing “intense personal opposition to the death penalty,” along with possibility of setting aside those views)

*People v. Zaragoza* (2016) 1 Cal.5th 21, 37–39 (error to exclude, without voir dire, juror with religious objections that would make it difficult to vote for death but who wrote she could set aside her personal views)

*People v. Riccardi* (2016) 54 Cal 4th 758, 782 (reversal for failure to voir dire juror to clarify whether “like other jurors not disqualifiable under *Witherspoon-Witt*, [she] feared that actually being on a death jury would be difficult or uncomfortable, or she was advising the court that she could not impose a decision of death”)

*People v. Leon* (2015) 61 Cal.4th 569, 592–593 (reversal when voir dire confirmed jurors’ automatic refusal to impose death expressed on questionnaires but did not follow up on affirmative questionnaire responses about setting aside those views)

Excusing Potential Juror to Avoid Her Having to Do Something She Would be Uncomfortable With (J.M. [AOB 246])

*People v. Riccardi, supra*, 54 Cal 4th 758, 782 (see note, two paragraphs above this one)

Misinforming Prospective Jurors That the Law Could Compel Death Verdict (M.S. [AOB 261], R.H. [AOB 266], R.S. [AOB 270]; also J.M. [AOB 246])

*People v. Hardy* (May 31, 2018) 5 Cal. 5th 56, \_\_, slip opn., pp. 14–15 (prospective juror was told repeatedly and correctly that the law could never compel a vote for death).

Lack of Unanimity Requirement for Unadjudicated Criminality or for Aggravating Factors in General, Absence of Jury Findings Made Beyond a Reasonable Doubt, Failure to Instruct on a Burden of Proof Regarding Penalty (respectively, Arguments XV, AOB 291; XVIII.C.3, AOB 338; XVIII.C.1, AOB 333; XVIII.C.2, AOB 335);

*Hurst v. Florida* (2016) \_\_\_, U.S. \_\_\_; 136 S.Ct. 616 (Sixth Amendment right to trial by jury means that facts needed to impose sentence of death, such as whether murder was committed during a robbery or was especially heinous, atrocious, or cruel, must be found by a jury beyond a reasonable doubt)

Cumulative Unfairness vs. Cumulative Error (Argument XVI.A [AOB 318])

*People v. Romero and Self* (2015) 62 Cal.4th 1, 58 (opinion modified to add, to rejection of cumulative-error claim, “nor have defendants *otherwise* demonstrated that they were denied a fair trial,” emphasis added)

Very truly yours,

/s/

Michael P. Goldstein,  
Attorney for Appellant

cc: Sally Espinoza, Deputy Attorney General  
California Appellate Project  
Thomas Potts

**CERTIFICATE OF SERVICE**

Re: People v. Thomas Potts

No. S072161

I, MICHAEL P. GOLDSTEIN, certify that I am an active member of the California State Bar, and not a party to the within cause; that my business address is PMB 9122, 5000 MacArthur Blvd., Oakland, California 94613; and that I served a true copy of the foregoing

**LETTER CONCERNING ADDITIONAL AUTHORITIES**

on each of the following, by placing same in envelopes addressed respectively as follows:

Keith Fagundes  
Office of the District Attorney,  
County of Kings  
1400 W. Lacey Blvd.  
Hanford, CA. 93230

Superior Court,  
County of Kings  
1640 Kings County Dr.  
Hanford, CA 93230

Thomas Potts  
(Appellant)

On October 31, 2018, I sealed and deposited each envelope in the United States Mail at Oakland, California, with the postage fully prepaid.

In addition, I served the following through the TrueFiling system:

Sally Espinosa, Deputy Attorney General  
California Appellate Project.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on October 31, 2018, at Oakland, California.

/s/

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Michael P. Goldstein,  
Attorney for Thomas Potts

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **PEOPLE v. POTTS (THOMAS)**

Case Number: **S072161**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **mpgoldstein@earthlink.net**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	Application to file SAOB
SUPPLEMENTAL BRIEF	Supplemental Appellants Opening Brief
LETTER	Letter re New Authorities

Service Recipients:

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eService California Appellate Project California Appellate Project 000000	filing@capsf.org	e-Service	10/31/2018 12:19:35 PM
Michael Goldstein Attorney at Law 60358	mpgoldstein@earthlink.net	e-Service	10/31/2018 12:19:35 PM
Sally Espinoza Additional Service Recipients	sally.espinoza@doj.ca.gov	e-Service	10/31/2018 12:19:35 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/31/2018

Date

/s/Michael Goldstein

Signature

Goldstein, Michael (60358)

Last Name, First Name (PNum)

Law Office of Michael P. Goldstein

Law Firm