

**Additional cases on relevance of closing argument
to whether an instruction was erroneously ambiguous:**

As in all cases where these potentially misleading instructions have been given, we examine the entire record, focusing **particularly on the arguments of counsel** and any other relevant instructions, to determine whether the jury may have been misled regarding the scope of its sentencing discretion and its responsibility to consider all of the mitigating evidence in the case. (*People v. Melton* (1988) 44 Cal.3d 713, 761, 244 Cal.Rptr. 867, 750 P.2d 741; *People v. Hendricks* (1988) 44 Cal.3d 635, 650–651, 244 Cal.Rptr. 181, 749 P.2d 836; **452 *People v. Brown*, supra, 40 Cal.3d at p. 544, fn. 17, 230 Cal.Rptr. 834, 726 P.2d 516.) In this case the court gave no other instructions which served to clarify the nature of the weighing process, the scope of the jury's sentencing discretion, or its obligation to consider all mitigating evidence. Employing our **case-by-case analysis of the arguments**, under these circumstances it must be concluded that the prosecutor's argument exacerbated the ambiguity in the instructions in two important ways.

(*People v. Crandell* (1988) 46 Cal. 3d 833, 883–84, emphasis added, abrogated on other grounds by *People v. Crayton* (2002) 28 Cal. 4th 346.)

On balance, given the circumstances surrounding the erroneous instruction—the multiple ways in which the jury was exposed to it, the confusing and **ambiguous nature of the prosecutor's arguments** on the unanimity instruction, the state of the evidence for Count Four, and the jury's acquittal on Count **Three—we find a reasonable likelihood that the jury was misled** and defendant was harmed by the error.

(*People v. Ngo* (2014) 225 Cal. App. 4th 126, 154–55.)