No. S110541

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DAVID LESLIE MURTISHAW,

Defendant and Appellant

Kern County
Superior Court

No. SCO 19333A

# APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of
the State of California for the County of Kern

HONORABLE ROGER D. RANDALL, JUDGE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>DAVID LESLIE MURTISHAW,<br><br>Defendant and Appellant. | No. S110541<br><br>Kern County<br>Superior Court<br>No. SCO 19333A |

**APPELLANT'S OPENING BRIEF**

**STATEMENT OF THE CASE**

In Information No. SC019333A, filed in the Kern County Superior Court in 1978, appellant was charged with the murders of James Henderson, Ingrid Etayo, and Marti Soto, and assault with intent to murder Lance Bufflo. (Pen. Code, §§ 187, 217; *People v. Murtishaw* (1981) 29 Cal.3d 733, 748 ("*Murtishaw I*"), cert. den.(1982) 455 U.S. 922.) The Information also alleged the special circumstance of multiple murder, in violation of former Penal Code section 190.2, subdivision (c)(5) and that appellant used a firearm within the meaning of former Pen. Code, § 12022.5. (*Ibid.*) In 1979, appellant was convicted of all counts and sentenced to death by a jury. This Court affirmed the judgment of guilt but reversed the judgment of death. (*Id.* at p. 775.)

At the penalty retrial, appellant was again sentenced to death, and

that judgment was affirmed by this Court in 1989. (*People v. Murtishaw* (1983) 48 Cal.3d 1001 ("*Murtishaw II*"), cert. den. (1990) 497 U.S. 1010.) Following the denial of his state habeas petition, appellant sought relief in federal court. On June 26, 2001, the Ninth Circuit affirmed the district court's rejection of appellant's guilt phase claims, but reversed the district court's denial of the writ as to penalty, and the case was remanded to state court. (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926 ("*Murtishaw III*"), cert. den. (2002) 535 U.S. 935; 1 CT 1-2.)[1]

Jury selection for appellant's second penalty retrial began on August 13, 2002 and concluded on August 22, 2002. (1 CT 259-261; 2 CT 319-322.) The prosecution began presenting evidence on August 23, and rested on August 27, 2002. (2 CT 324-326, 361-364.) The defense presented evidence on August 28 and August 29, 2002. (2 CT 371-374, 379-382.) The prosecution presented rebuttal on August 30, 2002. (2 CT 387-389.)

Jury deliberations began on September 4, 2002. On September 6, 2002, the jury returned a verdict of death. (2 CT 408.)

On October 4, 2002, the court denied appellant's motion for a new trial, denied his objection to the authority of the court to sentence him under the 1977 death penalty statute, and denied his request to modify the verdict pursuant to former Penal Code section 190.4, subdivision (e). (2 CT 549-550.) The court sentenced appellant to death on Counts I, II, and III, and imposed an additional sentence of six years (the upper term of four years plus two years for the gun use enhancement), to be stayed pending completion of the appeal and execution of the death sentences. (2 CT 550,

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[1] "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript.

552-556.)

## STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)[2]

## STATEMENT OF FACTS

On April 9, 1978, Lance Wyatt,[3] a film student, drove from Los Angeles to the Mojave desert to make a short Super 8 film for a class assignment.[4] (8 RT 1746-1747.) He was accompanied by his wife, Marti Soto, and two friends, James Henderson and Ingrid Etayo. (8 RT 1750.) They set up their equipment in the desert, in an area off a dirt road near the intersection of Highways 58 and 14, outside California City, between 11:30 a.m. and noon. (8 RT 1751, 1752.)

After setting up, Wyatt began to shoot the initial sequence depicting Henderson driving a car. (8 RT 1755.) The movie was about a man who finds himself stranded in the desert and is taunted by a figure symbolizing the inevitability of his own death. (8 RT 1757.) While filming this sequence, a series of six to ten gun shots came over their heads. (8 RT 1754.) Wyatt honked the car horn to alert whoever was firing to their

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[2] All statutory references are to the Penal Code unless otherwise indicated.

[3] Wyatt changed his last name from Buflo in 1984. (9 RT 1864.)

[4] Super 8 is an amateur format, a type of film used before videotape and High 8 came into existence. (8 RT 1748.) Wyatt had the Super 8 footage he shot on April 9, 1978, transferred to videotape (People's Exhibit 5), which was displayed during the prosecutor's opening statement (8 RT 1656-1658), during Wyatt's testimony at trial (8 RT 1756; 8 RT 1757, 1759, 1766, 1775, 1776-1777), and again during the prosecutor's closing argument. (12 RT 2685-2686.)

presence. (8 RT 1754-1755.) There was no response, and Wyatt resumed filming. (8 RT 1759.)

Wyatt testified that near the end of the first sequence, appellant and his brother-in-law, Gregory Laufenberger, appeared and approached the group. (8 RT 1759-1760.) Both were carrying rifles, and one of them had a six-pack of beer. (8 RT 1761.) Appellant said his car had broken down, and asked for a ride to a gas station to get help to fix it. (RT 1762.) Wyatt agreed to do so after he finished filming. (8 RT 1762.) In Wyatt's opinion, appellant seemed attentive and lucid. (8 RT 1763.) After appellant and Laufenberger left, Wyatt remained concerned about their presence in the area; he wanted to leave but the others told him he was overreacting. (8 RT 1763-1764.)

After finishing the car scenes, the group moved about 300 feet to the west to film the sequences with Henderson and Soto, who was playing the figure representing death; she wore a bathrobe with a hood that completely obscured her. (8 RT 1764-1766.) Ingrid was not in the movie and remained about 100 feet away on a blanket with the extra props. (8 RT 1765.)

At about 3:30 p.m., the women left to drive to California City to purchase food for lunch. (8 RT 1767.) Shortly after they left, appellant and Laufenberger reappeared and said they wanted to watch the filming. (8 RT 1767.) They still had their guns. (8 RT 1768.) After more filming, Wyatt became apprehensive and decided to talk with them "to get a feeling as to what they were about." (8 RT 1769.) Laufenberger showed Wyatt his gun, which was an old pump action .22. (8 RT 1770.) Appellant told Wyatt he had purchased his car second-hand in Nevada, and offered Wyatt a sip of beer, which he accepted. (8 RT 1770-1771.) Wyatt told the police that

appellant was "smashed" but lucid. (8 RT 1828.) At trial, he testified that although there was a fairly strong of odor of beer on appellant, he was responsive and coherent. (8 RT 1823, 1771.)

In their presence, Wyatt returned to the blanket and retrieved the rented revolver to be used in the next scene and loaded it with blanks. (8 RT 1770.) Wyatt asked appellant about his rifle, and appellant handed it to him to fire a shot. (8 RT 1771.) When Wyatt pulled on the breech, the gun jammed and appellant took it back, explaining that it was a semi-automatic that reloaded automatically. (8 RT 1772.) Appellant said the clip held 10 rounds, and that he was trying to buy another clip that would hold more rounds, a clip he described as one he "wasn't allowed to have." (8 RT 1772 -1773.) Appellant's rifle looked the same as People's No. 6, a Ruger 1022 .22 rifle. (8 RT 1774.)

Wyatt resumed filming, and appellant and Laufenberger watched from about 40 feet away. (8 RT 1775-1776.) When Wyatt finished filming the next sequence, appellant and Laufenberger approached him again, asking how long it would be before he could give them a ride. (8 RT 1777.) Wyatt said it would be a while because he had to finish filming first, and appellant walked away, saying they would try to hitch a ride into town. (8 RT 1777.)

Etayo and Soto returned with lunch at about 4:30 p.m. (8 RT 1778.) Soto told Wyatt that she and Etayo had seen appellant and Laufenberger; they asked the women for a ride, but Soto told them she was not going into town. (8 RT 1779.) After a 15 minute break for lunch, they resumed filming for 30-40 minutes. (8 RT 1780.) Wyatt filmed several versions of a scene in which the character played by Henderson shot at the character played by Soto, and a scene in which Soto danced around a burning bush.

(8 RT 1780-1782.) Wyatt checked his story boards and then they began packing up to leave; Wyatt put the rented gun in a satchel and carried it back to the car. (8 RT 1779-1780, 1784-1786.) Ingrid and Henderson returned to the car first, followed by Wyatt and Soto.

When Wyatt got to the rear of the car, he heard two shots; Henderson yelled that he had been shot. (8 RT 1787-1788.) As Henderson got to the front of the car, there was another volley of shots, more than five but no more than ten, and Wyatt heard Soto's body fall to the ground. (8 RT 1789-1790, 1793.) Wyatt moved to the passenger side of the car, with Etayo and Henderson. At that point, the shots were coming from behind him and to his left (8 RT 1790-1791.) He looked under the car and saw Soto laying on her side. (8 RT 1791.) Wyatt and Henderson pulled Soto around to the passenger side, and Ingrid screamed that "whoever was shooting should stop shooting, that people were hurt," but there were more shots and the car's windows were shattered. (8 RT 1792-1793.)

When the shooting stopped, Wyatt and Henderson went to the driver's side to look for the car keys. (8 RT 1794.) While Henderson was still searching, the shooting started again. (8 RT 1795.) Henderson said they were all going to be killed and he was going to go for help; he started to run but was hit by another five or six shots and dropped to the ground. (8 RT 1796.) After Henderson was shot, Wyatt realized he would have to do something. (8 RT 1797.) He mimicked what Henderson had done, looking out to see who was shooting. Appellant "popped up from behind some bushes to about mid chest level," shot at Wyatt and hit his hand. (8 RT 1797-1798.) Wyatt then moved back to Etayo and told her they would have to run. (8 RT 1799.) He went east, fell and then looked back at the car, where he saw appellant rise up again and walk toward the rear of the car

with his rifle at his waist, pointing at the car. (8 RT 1800-1801, 1817.) Etayo was kneeling by the car with Soto, and she yelled to Wyatt to run. (8 RT 1803.) He ran another 100 feet, looked back and saw appellant about four feet from Etayo, his rifle pointed down at her. (8 RT 1803.) Etayo and appellant were yelling at each other, but the only word that Wyatt could hear was "car." (8 RT 1804.)

Concerned that Laufenberger might be circling around him, Wyatt started to run again. (8 RT 1804.) He heard what sounded like 10 shots in rapid succession, and kept running. (8 RT 1804.) He reached a paved road, and got a ride in a van going toward Mojave. (8 RT 1806.) After a short distance Wyatt saw appellant and Laufenberger, without their rifles, standing by the side of the road hitchhiking. (8 RT 1806.) The van stopped at a gas station where a police vehicle was parked, and Wyatt told them what had happened. (8 RT 1807.) An ambulance drove him back to the area of the shooting in an effort to locate Soto, but Wyatt was disoriented and was taken to a hospital for treatment before they could find her. (8 RT 1808-1809.)

**Physical Evidence**

Retired Sheriff's Department Reserve Deputy Gary Gunnell arrived at the scene of the shootings around 8 p.m. (8 RT 1664-1665, 1671.) Before locating the bodies, he observed skid marks and a vehicle (later identified as appellant's) in a wash. (8 RT 1668-1669.) There were bullet holes in the car, the windows had been shot out, and there were beer cans around the car. (8 RT 1670.) Gunnell discovered Wyatt's car, a black over white 1974 Chevrolet with numerous bullet holes, a short distance away. (8 RT 1670, 1674, 1680, 1750.) Two of the victims, Henderson and Etayo, were dead, but Soto was still alive. (8 RT 1674, 1677, 1678.) Gunnel

called for an ambulance and remained with Soto until it arrived about 20 minutes later. (8 RT 1681.) The next day, he returned to the crime scene and was present when other deputies found two .22 rifles. (8 RT 1683.) There were shell casings all over the area, some near the victim's car. (8 RT 1686.) The shootings occurred in an area known for "plinkers" – people who would come to the desert on weekends "to kill a bunch of beer cans." (8 RT 1686.)

Vernon Kyle, the chief criminalist of the Kern Regional Crime Laboratory, examined appellant's green 1971 Plymouth in April of 1978. (8 RT 1693-1694.) There was a bullet impression on the top of the car, and at least two more bullet impressions on the front driver's side of the vehicle. (8 RT 1694, 1700.) He also examined Wyatt's Chevrolet, and found 12 bullet holes, including 3 in the gas tank. (8 RT 1702.)

Kyle did a bullet comparison of the shells removed from the bodies of the victims and those test fired from a Ruger model 1022 found at the crime scene. The bullets recovered from the victims were either (1) fragments, (2) bullets too deformed to do a complete comparison, or (3) bullets that were in sufficiently good condition to do a comparison. (8 RT 1704.)[5] While it was not possible to do a comparison on the first and second groups, it was possible to determine the class characteristics of the third group, i.e., determine whether a bullet was consistent with having been fired from a weapon. (8 RT 1704.) In Kyle's opinion, all of the test fires from the Ruger matched the third group of bullets recovered from the victims. (8 RT 1696, 1705.)

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[5] In total, Kyle received four fragments, six projectiles that could be examined for class characteristics, and four that could be compared to bullets test-fired from the rifles. (8 RT 1708.)

Kyle also examined a Huntsmaster .22 caliber rifle found at the scene. (8 RT 1683-1684, 1697.) Both the Ruger and the Huntsmaster use .22 long rifle cartridges, but the Huntsmaster holds 15 cartridges, 5 more than the Ruger. (8 RT 1696, 1697.) Unlike the Ruger, the Huntsmaster does not have a detachable clip and must be pumped for each shot. (8 RT 1857.) In Kyle's opinion, the class characteristics of the Huntsmaster and Ruger are sufficiently different that the bullets recovered from the victims could not have been fired from a Huntsmaster. (8 RT 1706-1707.)[6]

Martin Williamson, a commander with the Kern County Sheriff's Department, was assigned to the technical investigations unit in 1978. (8 RT 1723.) He and his partner prepared a schematic drawing of the area where the victims were found. (8 RT 1724-1725.) On April 9, Williamson took photographs of the scene, including the bodies of Henderson and Etayo, Wyatt's Chevrolet, the locations of spent shells, the Ruger and Huntsmaster rifles, and also took an aerial photograph of the scene. (8 RT 1724-1737, 1855.) Williamson was unable to lift any usable prints from either rifle. (8 RT 1862.)

On April 12, 1978, Dr. Lakshmanan Sathyavagiswaran, who was then a Los Angeles County Deputy Coroner, performed an autopsy on Soto. (9 RT 1885-1886.) She died of a gunshot wound to the head, which caused brain injury. (9 RT 1886.) Dr. Sathyavagiswaran also reviewed the reports of the autopsies performed on Henderson and Etayo by Dr. Ambroseccia, a

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[6] Kyle received three bullet fragments recovered from the Chevrolet, one of which was consistent with the Ruger; because no projectiles were recovered from the Plymouth, Kyle could not do a comparison. (8 RT 1700-1701.)

Kern County coroner. (9 RT 1887.)[7] According to the report, there were six bullet wounds on Henderson's body; four bullets penetrated his chest, causing his death. (9 RT 1895-1898.) Dr. Ambroseccia noted 11 bullet wounds on Etayo's body. Five bullets penetrated her arm, one penetrated her leg, and another entered her neck. (9 RT 1902-1907.) Three wounds were fatal: a bullet that entered through her shoulder went through her heart and lung, a bullet that entered the front part of her body went through her liver, and a bullet that entered through her lower lip went into her brain. (9 RT 1907- 1912.) In Dr. Sathyavagiswaran's opinion, an indentation in the back of her head was caused by a bullet that hit her body and then fell off . (9 RT 1912, 1922-1924.)

Dr. Sathyavagiswaran could not tell the sequence in which the wounds were inflicted (9 RT 1917.) Some wounds could have been inflicted by the same bullet. (9 RT 1922.) Because he was not present at Dr. Ambroseccia's autopsies, he had no way of knowing what Dr. Ambroseccia observed. (9 RT 1922.)

**Defendant's Statement to Police**

After the shootings, appellant and Laufenberger hitchhiked to a telephone where appellant called his wife. She picked them up and they returned to appellant's home, where he told his family what had happened. Appellant surrendered to the police and was placed under arrest at 1 a.m. on April 10, 1978. Later that day, he gave a tape-recorded statement to the police admitting responsibility for the shootings. (9 RT 1870; Ex. 9d.)[8]

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[7] Dr. Ambroseccia died prior to appellant's retrial. (9 RT 1887.)

[8] An audiotape of appellant's statement was played to the jury. (9 RT 1872, 1873, 1875.) Pursuant to stipulation, no reporter's transcript of (continued...)

Appellant told the police he did not intend to kill the victims or steal their car, and described a confused state of mind and his belief that he began shooting in response to someone shooting at him.

After waiving his rights, appellant told the police that on the morning of April 9, 1978, he and his brother-in-law, Greg Laufenberger, decided to drive to the desert in appellant's 1971 green Plymouth to shoot at cans. (Ex. 9d at pp. 2, 9.) He borrowed a .22 pump shotgun from his wife's former husband, with whom appellant, his wife and her children were living. After picking up Laufenberger's rifle and buying shells and two six-packs of beer, they drove to Mojave. *(Id.* at pp. 2-3, 33, 38, 53.)

On the way, they stopped in Lancaster to buy gas for the can appellant kept in his car and again in Mojave where they bought another six- pack of beer. (*Id.* at p.3.) Appellant had drunk a few beers before Laufenberger came to his house, a couple while he was there, and a couple on the way to Laufenberger's house. (*Id.* at p. 9.) On the drive to the desert, he was drinking one beer after another, and Laufenberger kept telling him he was drinking too much. (*Id.* at pp. 9-10.)

On a dirt road outside Mojave, appellant had to slam on the brakes to avoid going into a ditch, and the car stalled and would not start again. (*Id.* at p. 51.) Appellant tried to fix it but the starter was broken, so he and Laufenberger decided to shoot cans for a while; appellant was angry about the car and put a can on the car and shot at it, but hit the car instead. (*Id.* at

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[8](...continued)
the contents of the tapes was prepared. (9 RT 1871.) A written transcript of appellant's statement (Exhibit 9d) was distributed for the jury's use during the playing of the tape, but the transcript was then returned to the court, and the jury was instructed that only the tape, and not the transcript, was evidence. (9 RT 1871-1872.)

pp. 4, 51-53.) They walked around the area and saw a car and two men who said they were filming and asked appellant and Laufenberger to stay out of the way. (*Id.* at p 4.) Appellant agreed and told them about his car problem. (*Ibid.*)

While waiting for the people to finish filming, they walked back to appellant's car and made another unsuccessful attempt to get it started. (*Id.* at p. 4.) As they started back to the film site, they saw the two women leaving in the car; appellant asked for a ride, but they said they were not going into town. (*Id.* At pp. 4, 57.) They then watched the filming, which involved a man throwing a gas can.

One of the men approached appellant, and appellant offered him a sip of beer. (*Id.* at p. 5.) The man asked if he could shoot appellant's gun, and appellant agreed. (*Ibid.*) At this point, it was very hot and appellant felt dizzy. (*Id.* at p. 45.) The man said they would be there quite a while so appellant and Laufenberger went back to appellant's car, where they drank more beer and shot at cans. (*Id.* at p. 5.)

When it started to get dark, they walked back to the other car, where the people were still filming. They were lighting a tree on fire and dancing around it, and "one person, I think a girl," had a pistol and was shooting "off in the other direction and this guy was taking pictures and I don't know how many times they shot it[,] they shot it a lot because I remember they kept putting more in and shooting it." (*Id.* at p. 5.) As the film people started to leave and appellant started to walk toward them, he heard two shots and just started shooting back. (*Id.* at p. 21.)

> "[T]hey got, I don't know, about 30 feet or so from their car I seen I don't even know if it was a boy or girl or you know someone, something went bang and it come towards me and and, I don't know and I just started shootin' back in that direction...hittin' their car and

> I guess all around it and I didn't know until I kinda went to the ground and ...I didn't know what was happening and my brother in law, cause I didn't hear nothin' at first, and so I took my clip and I was putting some more in it and I heard him saying, yelling at the people saying 'Throw out your gun.' ... about that time someone come running from the car towards me, there was some bushes and I didn't know exactly if they had a gun or what cause when he said throw out your gun a person came running and, I was getting up and all I could see was just a, somethin' comin' at me and I didn't know and so I just shot some more."

(*Id.* at 5-6.) Appellant did not see anyone throw anything down after Laufenberger said "throw out your gun," so he started shooting again. (*Id.* at pp. 22, 27). He did not remember how many times he shot. Everything was foggy and blurry. He was scared and his only thought was about why someone was trying to shoot him. (*Id.* at p. 70.)

After the shooting, Laufenberger said something like "let's get in their car," but appellant said no because he had seen gas or something clear leaking out of the car. (*Id.* at pp. 6, 16, 27.) Laufenberger took off running and appellant started to run too; he didn't think about going over to the people because he was "scared and mixed up." (*Id.* at pp. 6, 17.) Appellant went back to his car but it still would not start. Appellant saw Laufenberger running far ahead and saw him drop his gun, and appellant followed suit. (*Id.* at p. 6.)

They ran down Highway 14 where they hitched a ride to a gas station and called their families. Appellant's wife picked them up, and drove them home. At first appellant told his wife that his car was stolen, but then decided to tell the truth and to surrender to the police. (*Id.* at p. 8.)

In total, appellant said he drank three to four six-packs before the shootings. (*Id.* at p. 10.) When asked if he thought he was intoxicated

during that day, appellant said he thought so: "I don't think I ever drank that much beer before." By the time he called his wife, he was sobered up but was in a daze; he was shaky and couldn't think.

**Testimony of Jailhouse Informant Bradley Borison**

Bradley Borison, a state prison inmate who was being housed at the Kern County Jail in July of 2002, had been convicted of nine felonies, including grand theft, forgery and two counts of perjury, by the time he testified at appellant's trial on August 27, 2002. (9 RT 2003.) Borison admitted obtaining false identification cards from the Department of Motor Vehicles in eight different names (9 RT 2036, 2038, 2039, 2055), opening bank accounts by making deposits with checks in false names and then withdrawing cash (9 RT 2042-2047), and defrauding American Express. (9 RT 2047.) His liver was failing, and he had been told he would die if he did not get a liver transplant, which could not occur as long as he was in custody. (9 RT 2004, 2053.)

Appellant's case was the fourth case in which Borison "assisted law enforcement" in Kern County by reporting conversations with inmates accused of murder. (9 RT 2004.) He claimed that he did not seek or receive any leniency or consideration in return for his assistance in the three prior cases (9 RT 2005), and in fact had been penalized by being placed in protective custody, which limited his ability to earn good time credits and thereby increased the amount of time he would actually serve in prison, delaying the possibility of a liver transplant by 10 months. (9 RT 2006-2008.)

Despite his dire situation, Borison testified that he offered information to the prosecution in this case because it was the right thing to do, and denied that there was an agreement for any consideration in return

for his testimony. (9 RT 2011-2012.) He did ask for help in earning additional good time credits, but the prosecutor refused, advising him that if he wanted to testify, he would have to do so freely and without any promises. (9 RT 2009.) Nevertheless, Borison later learned that the prosecutor's office "unilaterally" decided to contact the warden of the state prison where Borison was serving his sentence, asking him to consider awarding Borison the additional 10 months good time credit. (9 RT 2009-2010.) Borison was "pleasantly surprised" when he learned of the prosecutor's action, but insisted that there was no agreement or consideration for his testimony against appellant. (9 RT 2010-2011.)

Borison claimed that he had a number of conversations with appellant between July 6 and July 15, 2002. (9 RT 2021.) He testified that appellant initially said he had killed three people, was high on PCP at the time and did not remember much about the actual shootings. (9 RT 2021-2022, 2023.) In a later conversation, appellant said his car broke down, and he wanted to steal the victim's car so he could drive back to Los Angeles to get more drugs, and made comments that caused Borison to believe that appellant remembered the shootings. (9 RT 2026, 2028; 2024.) Appellant also told him that he had been disciplinary-free in prison for 24 years. (9 RT 2025, 2033.)

**Victim Impact Evidence**

Soto was 21 years old when she died. (9 RT 1926.) Her parents moved from Cuba to the United States when she was about three years old. (9 RT 1927.) Her mother described her as a "very lovely, very nice kid," who was close to her older brother. She loved animals and at one point planned to be a veterinarian, but later decided to teach handicapped children. She was very outgoing and generous with friends and strangers.

She wanted to have many children, and her mother had looked forward to helping her raise them. (9 RT 1929.)

Lance Wyatt described his wife as a person who was "very full of life" and someone he still loves. (9 RT 1866). Soto was a very petite woman, only about five feet tall and weighing about 89 pounds. (9 RT 1866.) They were high school sweethearts. (9 RT 1866.) She had a "strong sense of [their] having a destiny together, which drove a lot of . . . [their] relationship, and her commitment to [their] relationship. (9 RT 1866.)

For many years since her death, he has experienced a lot of grief and loneliness. (9 RT 1866.) He has violent dreams, and dreams about his wife in which she does not recognize him, or refuses to have anything to do with him. He thinks these dreams reflect his fear that she would never forgive him for leaving her in the desert. (9 RT 1867.) He understands intellectually that he had to leave her to try to save her, but "when you go on to an empty life . . . you wish you stayed . . . it is not something that will ever be resolved in my mind. My heart says I should have stayed." (9 RT 1867.) In 1984, he changed his last name from Buflo to Wyatt because he did not want to give that name to another woman if he ever remarried. (9 RT 1864.) He has not married again. (9 RT 1965.)

Ingrid Etayo was 22 years old when she died. (9 RT 1995). She had just graduated from the University of Tampa and was on her way to Europe as a graduation gift; she was planning to be married on December 17, 1978. (9 RT 1995-1996.) Haydee Kassai, her older sister, described her as an honest, loving and caring human being who loved life. (9 RT 1995.) Her death totally changed three generations of her family. Etayo's mother has never been the same. She wore black for 10 years and was still taking

sleeping pills and talking to Etayo's pictures in 2002. (9 RT 1996-1997.) Etayo's father changed from an outgoing person to someone who kept to himself; he began writing Etayo letters expressing his feelings about her death in the first year and has continued to do so. (9 RT 1997-1998.)

Haydee was 12 years older than Etayo. At the time of Etayo's death, their relationship was a close one, and they talked a lot about her wedding plans. (9 RT 1998.) Etayo was always smiling and fun to be around. After Etayo's death, Haydee lived in fear, afraid that her own children would not come home. (9 RT 1997.) She still carries the pain caused by her sister's death, but has learned to go on with life because there is no choice. (9 RT 1998.)

Sybelle Sprague, Haydee Kassai's daughter, was 10 when her aunt was killed. (9 RT 2057-2058.) She vividly recalls the day when the police came to her home and her mother broke down. (9 RT 2058-2059.) She was very close to Etayo, who was very affectionate and made her feel special. (9 RT 2059.) Her aunt liked music and dancing. After her death, Sybelle's parents became very strict and overprotective, and would become frantic if she came home late. (9 RT 2060.) Sybelle became paranoid, always looking over her shoulder to see if someone was following her, and she said that her sister sleeps with every light on. (9 RT 2061.) Her family has not recovered from Etayo's death, and continues to experience a sense of loss. (9 RT 2061.)

At the time of his death, James Henderson was 24 years old and about to graduate from Laverne University. (9 RT 2063.) He and his fiancee were joining the Peace Corps and were about to leave for Paris, where they wanted to get married. (9 RT 2066.) His mother, Patricia Henderson, described him as very loving, with a good sense of humor. He

wrote poetry, and was an aspiring actor who was interested and active in all aspects of the theater. (9 RT 2063-2064; 2068-2069.) His father, Robert Henderson, thought his son was a unique individual with a promising future. (9 RT 2068.)

Mr. and Mrs. Henderson never recovered from their son's death. Mr. Henderson testified that the loss of his son caused him to lose the ability to enjoy life, and deprived him of the possibility of the grandchildren he hoped his son would father. (9 RT 2070.) After his death, Mr. Henderson was no longer able to focus on his work, and gave up a lucrative job and retired for a year. (9RT 2066.) He then took a job as a school bus driver. (9 RT 2066.) As a result of the killing, he and his wife have lost their sense of security (9 RT 2072), and their two other children both moved out of California; James's brother was so crushed that it led to the break-up of his marriage. (9 RT 2064-2065.)

**Mitigating Evidence**

James Esten, a corrections consultant, worked at the Department of Corrections for more than 19 years; at the time of his retirement, he was a program administrator.[9] (10 RT 2108.) While employed at the Department of Corrections, he obtained an MA degree in educational administration. (10 RT 2109.) He chaired the classification committee while at the Corrections Training Facility at Soledad, where he classified more than 12,000 prisoners. (10 RT 2111-2112.) The classification system takes into account facts of the crime committed by the inmate, the inmate's sentence, and the security needs of the institution. (10 RT 2111-2112, 2116.) For purposes of the classification process, an inmate's past behavior in prison is

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[9] This job is now designated facility captain. (10 RT 2108.)

considered the best predictor of future behavior in prison. (10 RT 2133.)

Esten reviewed appellant's central file, which includes every document that relates to an inmate during incarceration, his medical chart, and some transcripts from the earlier proceedings, and met with appellant twice. (10 RT 2124-2125, 2116, 2144.) The San Quentin classification committee described appellant as cooperative and noted his involvement in a variety of academic improvement programs and in Bible study work, and commended him for his positive attitude. (10 RT 2132-33.)

Like all Death Row prisoners, appellant is classified maximum A, the most restrictive custody designation. (10 RT 2126.) For the entire 24 years of his incarceration, however, appellant has had no disciplinary action, and has been assigned to North Seg, where the Death Row inmates who are least likely to be involved in negative behavior are housed. (10 RT 2130-2131.) In Esten's experience, it is "highly unusual" for an inmate to have such a clean record, and "very hard" to maintain grade A status for 24 years. (10 RT 2133, 2166.) There is a waiting list for North Seg and an inmate does not need to commit a crime to be removed. (10 RT 2167.)

If appellant were to be sentenced to life without possibility of parole, he would be sent to a Level 4 maximum security institution like Pelican Bay or Corcoran. (10 RT 2134.) Esten described in detail the physical layout of a typical Level 4 facility (10 RT 2134- 2143), and testified that if sentenced to such a facility, appellant would probably not escape. (10 RT 2144-2145.) At a Level 4 facility, appellant would have more privileges than he has on North Seg. (10 RT 2166.)

On Death Row, there is a significant difference between the conditions of confinement for Grade As like appellant, and those classified Grade B. (10 RT 2149.) Grade A prisoners have privileges that Grade Bs

do not, including contact visits, phone use, more yard time, greater canteen access, more personal property and access to hobby programs, and so have an incentive to obey the rules to remain Grade A. (10 RT 2150-2157.) Because Grade A status is based on post-confinement behavior, not pre-confinement conduct, "some of the inmates who were the most horrible in terms of their pre-confinement conduct are ranked Grade A." (10 RT 2161.)

Susan Murtishaw has been married to appellant's younger brother Steven for 23 years. (10 RT 2177.) She met appellant about four years before the murders. (10 RT 2185.) She would see him once or twice a month; he usually had a beer in his hand but she never saw him using narcotics. (10 RT 2187-2188.) Appellant was kind to her, both before and after his incarceration, and never became angry or hostile to her. (10 RT 2188, 2190.) Before his arrest, appellant was married to Melody, who was 10 years older than him, and he was working to support her and her three children. (10 RT 2189.)

In addition to Steven, who is younger than appellant, appellant has two older brothers, Gerald and Ronald, and a younger sister, Beverly. (10 RT 2189.) Many members of appellant's immediate family suffer from depression and anxiety. Appellant's mother, Carol, has had periods of severe depression for many years and has been hospitalized. (10 RT 2196.) Appellant's older brother Ronald has had mental problems since Susan met him; he was hospitalized once, and has taken medication for anxiety and depression. (10 RT 2205.) Susan's husband Steven periodically suffers from severe stress and anxiety. (10 RT 2184.) Carol Murtsihaw takes BuSpar, and Steven recently started taking Selexa [*sic*]; Steven also took

lithium for a short time in 1984.[10] (10 RT 2196, 2183.) Appellant's sister Beverly also has mental problems. (10 RT 2196.) Susan has seen depression in other people, but Carol's depression is more severe, and the anxiety experienced by Ronald and Steven is "fairly severe." (10 RT 2205.)

Appellant was raised as a Mormon, but he was not religious when Susan first met him. (10 RT 2191-2192.) He became religious at San Quentin, and has been working for a long time on rewriting the Bible in less formal terms. (10 RT 2181-2183.) Susan has seen two copies, and read portions. (10 RT 2181.) She identified Exhibit Z as a copy appellant sent to his mother, which Susan personally picked up and mailed to appellant's counsel. (10 RT 2180, 2182, 2200.)

Dr. Terence McGee is a medical doctor who specializes in addiction medicine. Before attending medical school, he worked for the Los Angeles County Sheriff's Department and the Inglewood Police Department, where he had wide exposure to people who were under the influence of drugs, including PCP. (10 RT 2206-2208.) He has run the drug testing programs for a number of county agencies throughout California, and has testified as an expert for both the prosecution and defense in state and federal court, including for the prosecution in a death penalty case. (10 RT 2209-2211.)

Before testifying, Dr. McGee interviewed appellant for four hours, and reviewed declarations from Dr. Nell Riley, a neuropsychologist, and Dr. Stephen Pittel, a clinical psychologist, as well as declarations from

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[10] Buspar is an anti-anxiety drug, and celexa is an antidepressant. (Http://www.medecinenet.com/buspirone/article.htm; http://www.medecinenet.com/citalpram/article.htm .) Lithium is used for the treatment of manic/depression (bipolar disorder) and depressive disorders. (Http://www.medecinenet.com/lithium/article.htm.)

appellant's family and friends, filed in earlier court proceedings in appellant's case. (10 RT 2211, 2244.) Dr. McGee testified that appellant came from a "quintessentially dysfunctional family full of drug abuse, alcohol abuse and schizophrenia." (10 RT 2212.) Appellant abused drugs from the age of seven or eight, including sniffing gasoline to the point that he experienced hallucinations, "and had an enormous appetite for any sort of drug which would seem to remove him from his abjectly miserable situation." (10 RT 2211-2212.)

Everyone in appellant's family except his oldest brother has a mental disorder. (10 RT 2219.) Appellant's mother, Carol Murtishaw, has been hospitalized a number of times at Metropolitan State Hospital, a psychiatric facility for the indigent (10 RT 2220); after her first hospitalization, "she almost never got dressed again," spending most of the day on the couch in her nightclothes (10 RT 2222). Appellant's brother Ronald has been hospitalized for schizophrenia; he would "water lawns in the middle of the night and stand in neighbors' yards and preach about Jesus." (10 RT 2220.)

Appellant's father, Henry Murtishaw, drank constantly. He owned and operated a gas station that was only marginally successful and the family had money problems. Henry split his time between appellant's mother and his girlfriend. (10 RT 2224.) When appellant was a young boy, his father would take him shooting; appellant said that once he started shooting, he could not control himself and stop shooting until he emptied the gun, no matter what the family did to try and stop him. (10 RT 2224-2225.) In Dr. McGee's opinion, this was a symptom of appellant's compulsive disorder. (10 RT 2225.)

Appellant's drug use was another example of his many obsessive-compulsive behaviors. (10 RT 2213-2215.) He had an enormous capacity

for consuming alcohol and other narcotics; he used PCP, barbituates, cocaine, marijuana and LSD. (10 RT 2223.) Appellant told McGee that he believes he is dyslexic, but did not realize it until after he was incarcerated. (10 RT 2216.) He had difficulty reading, and when he got to the end of a sentence he could not remember the beginning; similarly, he could not follow directions because he could not remember them. (10 RT 2216.) In addition, he believes he does not see words the way other people do. (10 RT 2216-2217.) Appellant told McGee that he did not deserve happiness or hope, and was extremely self-critical. (10 RT 2218.) McGee described appellant as one of the strangest people he had ever encountered. (10 RT 2226.)

Appellant told McGee he thought he committed the murders, but McGee did not think he had an actual memory of the events. (10 RT 2225-2226.) Appellant cannot recall the details, and gets confused about what he has been told and what he remembers. (10 RT 2226, 2230.) If appellant used PCP the night before the murders, as he told McGee he did, he may still have been under its influence the next day. (10 RT 2227.) PCP has a very long half-life, and its effects may last 18 to 32 hours, depending on the amount consumed. (10 RT 2229.) PCP has an amnesiac effect, and a synergistic effect when combined with alcohol, which can independently impair the formation of memory. (10 RT 2227, 2230, 2222.)

The combination of PCP and alcohol can also cause aggression and violent, irrational behavior. People under the influence of PCP do things that "stagger the imagination." Dr. McGee gave as an example a man who attempted to cut off his own penis while under the influence of PCP. (10 RT 2234.) While the facts of the crime suggested to McGee that drugs were involved, he could not give an opinion without a blood or urine test or

physical examination of appellant done around the time of the crime. (10 RT 2235.)

Based on his review of the report of Dr. Nell Riley, McGee testified that neuropsychological testing of appellant disclosed frontal lobe impairment. (10 RT 2232-2233.) When asked by appellant's trial counsel to elaborate, Dr. McGee declined, explaining that the nature and effect of the impairment was beyond his expertise, but did note that the effects of PCP can be more severe if the user has brain damage. (10 RT 2233.) According to Dr. McGee, Dr. Riley also noted appellant's obsessive compulsive behaviors, including chewing his fingernails down to the flesh. (10 RT 2232.)

Appellant told McGee he did not think he used PCP on the day of the killings, but may have used it the night before; appellant was certain he drank beer the night before and took pills. (10 RT 2251.) In McGee's opinion, it was possible that appellant was "loaded" at the time of the crimes. McGee did not review the police reports (10 RT 2250), and was not aware of appellant's statement to the police that he had never used "hard narcotics." McGee would not accept that statement at face value because appellant knew too much about drugs. (10 RT 2255.) He had no way of telling whether appellant lied to the police or lied to him about his drug use. (10 RT 2256.) If appellant's statement to the police contained details of what happened before and after the killings, that would make it less likely that he was under the influence of PCP at the time of the killings. (10 RT 2264-2265.)

McGee was not sure about which expert reports he reviewed in

addition to the reports of Riley and Pittel.[11] (10 RT 2299.) He testified that the reports of psychologists and neuropsychologists about appellant's mental state did not have much to do with his opinion as an expert in addiction medicine. (10 RT 2247-2248.) He reached his own opinion based on what appellant told him, as corroborated by the declarations of family members. (10 RT 2242, 2247.) Dr. Riley's report was not essential to his opinion as an addiction medicine specialist, so reading the report of Dr. Maloney mentioned in her report was not important. (10 RT 2247-2248.)

In Dr. McGee's opinion, appellant does not "walk with the rest of the ducks." (10 RT 2275.) "I don't know anybody like him, anyone who thinks like him." (10 RT 2287.) McGee did not have the expertise to know whether Dr. Riley's opinion was correct, but it could be a potential explanation for why appellant was so odd. (10 RT 2275, 2287.) Moreover, while it was beyond McGee's expertise to say whether long-term drug use, genetic or environmental factors caused appellant's skewed thinking, he confirmed that "[p]eople that use PCP and all those drugs have a skewed way of looking at things." (10 RT 2301.)

Dr. McGee reviewed and agreed with the statements in a declaration prepared by Dr.Ronald Siegel regarding the behavioral effects of PCP. (10 RT 2285, 2295.) Dr. Siegel is a psychologist who has studied drugs and how they affect people's behavior for over 20 years and whose opinion McGee respects. (10 RT 2285.) The declaration reviewed by McGee did not mention appellant. (10 RT 2295.) When shown another report in which

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[11] McGee testified at another point that he did not review the reports of Drs. Maloney, Matychowiak, Burdick, or Badgley, or the reports of Dr. Siegel in this case. (10 RT 2266-67, 2287.)

Siegel concluded that appellant was not exhibiting the classic signs of PCP intoxication, McGee testified that it carried some weight but that he and Siegel did not always agree. (10 RT 2286.) Specifically, McGee disagreed with Siegel's conclusion that appellant fabricated information to save his life; in McGee's view, appellant did not seem to care about the outcome of the trial, one way or another. (10 RT 2293.)

PCP can produce a panic reaction "in the sense that a person becomes frightened due to an overwhelming intense hallucinogenic effect" which can distort visual perception and cause mental confusion and fear. (10 RT 2289.) If appellant reported seeing a dark threatening figure approaching him and he fired at it because he was in fear, that would be consistent with the perceptual distortions and panic that can be caused by PCP use. (10 RT 2291.)

Stephen Pittel, Ph.D., is a forensic psychologist, a professor at the Wright Institute in Berkeley, and the director of research at a drug and alcohol abuse treatment facility in San Rafael. (11 RT 2307-2308.) Dr. Pittel has testified in many criminal and civil cases about the effects of drugs, and participates in educational programs for the capital defense bar. (11 RT 2389, 2422; 2390-2393, 2396.)

He was initially retained in this case in 1989, and prepared declarations in 1989, 1993 and 1997 regarding the effects of PCP and the state of knowledge about PCP in 1978. (11 RT 2309-2310.) At that time, he received well over 2,000 pages of documents, mostly consisting of the transcripts of the 1979 and 1983 trials. (11 RT 2424.)

After he was retained for this trial, his role changed to that of social historian; Pittel believed that the history of appellant's drug use could not be understood without reference to his family history. (11 RT 2424-2425.)

Pittel reviewed 29 declarations executed by appellant's family members, friends and experts that had been submitted to the courts, and three volumes of the 1983 penalty phase retrial. He also reviewed the testimony of Drs. Siegel, Burdick, Matychowiak, and Kelley. (11 RT 2310-2311.) In addition, he interviewed Susan Murtishaw several times, and interviewed appellant on August 24, 2000. (11 RT 2311-2312, 2347.)

Based upon the above information, Pittel testified that there was a history of mental illness in appellant's family, going back for generations. (11 RT 2319-2321.) Appellant's mother was hospitalized numerous times for depression, and appears to suffer from bipolar disorder. (11 RT 2323.) On at least six occasions, she disappeared, sometimes staying away for weeks at a time. (*Ibid.*) When she was not manic, she spent her time in a depressed state, lying on the couch and watching television. (*Ibid.*) She and her husband fought frequently. (11 RT 2324.) For three years prior to their divorce, appellant's father alternated living with his wife and the woman he later married; after the divorce, appellant's mother went into a deeper depression. (11 RT 2325.)

Appellant's siblings have all had mental problems of varying severity. (11 RT 2321.) Appellant's brother Ron has had two lengthy hospitalizations; he was initially diagnosed as bipolar and later as schizophrenic. (11 RT 2321-2322.) Like Ron, appellant's sister Beverly was also hospitalized on two occasions, first given a diagnosis of manic depression and then a diagnosis of schizophrenia. (11 RT 2322.) Appellant's brother Stephen was hospitalized once, was treated for manic depression for about a year, and suffers from seasonal affective disorder. (11 RT 2322.) Even appellant's oldest brother Gerald (who was described by appellant's sister-in-law Susan as the most normal of appellant's

siblings) was seen on one occasion by a psychiatrist because he believed he saw people levitating; on another occasion, he had to be restrained by members of his church congregation because he was "out of control." (11 RT 2321.)

Appellant's father was described by some family members as an alcoholic or heavy drinker, and appellant's paternal grandfather died of cirrhosis of the liver. (11 RT 2326, 2328.) Appellant's maternal grandmother was hospitalized for alcoholism and committed suicide. (11 RT 2328.)

Appellant started drinking alcohol and sniffing glue at an early age, and by the time he was 14, he was drinking about a 12-pack of beer a day. (11 RT 2328.) Appellant, his sister Beverly and his brother Ron had significant histories of alcohol abuse, PCP abuse and experimentation with many other drugs, like LSD and cocaine. (11 RT 2328-2329.) PCP became appellant's drug of choice. (11 RT 2328.) To escape the stressful atmosphere in his family's home, appellant would use drugs or take long walks. On occasion, he stayed away for three or four days without explanation. (11 RT 2336.)

Appellant has a history of seven head injuries, three of which caused unconsciousness. (11 RT 2337-2338.) One of these injuries occurred in 1976, when his wife's ex-husband hit him on the head with a bottle; as a result, he was hospitalized with a concussion, and was unconscious for a day and a half. (11 RT 2428.) Pittel testified that the effect of drugs are more unpredictable if the user has suffered head injuries. (11 RT 2339.) If appellant has a hearing problem, it would make it difficult for him to

accurately identify where a sound is coming from. (11 RT 2343.)[12]

Six months before the killings, appellant had a hernia operation which prevented him from working. Because of this economic setback, he and his wfe and her children moved in with his wife's ex-husband. Appellant's family did not like his wife, who was quite a bit older than appellant, because she made overt sexual overtures to other people, including members of appellant's family. (11 RT 2426-27.)

Pittel relied on the declarations of family members regarding appellant's behavior after the crime but before he turned himself in, the prior testimony of Laufenberger, and the opinions of Drs. Siegel and Cohen as evidence that appellant used PCP the night before the murders. (11 RT 2339-2342.) Laufenberger testified for the prosecution in 1979 and 1983, but was not called as a witness at this trial. (11 RT 2341.) On cross-examination, Pittel accepted the prosecutor's representation that Laufenberger did not testify that appellant used PCP on April 9 or the night before. (11 RT 2412.) This did not change Pittel's opinion, which was based on additional information, including the reports of Drs. Siegel and Cohen. (11 RT 2387, 2413.)

In Pittel's opinion, appellant was mentally impaired at the time of the crime, although he could not definitively determine if it was because of mental illness, mental defect or a temporary condition caused by drugs. (11 RT 2346.) The fact that appellant had never committed an act of violence before the killings suggests that he was acting out of character and under

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[12] Appellant does not think he has a hearing problem, but appellant's brother Gerald told a defense investigator that appellant does have a hearing impairment in one ear. Pittel testified that he found medical documentation of appellant's hearing problem in the materials he reviewed. (11 RT 2342.)

the influence of some mental impairment (11 RT 2368-2369.) Alcohol would damage appellant's mental processes, and PCP "can do far more damage . . . lack of coordination, disorientation, confusion, hallucinations, beliefs about what is real and what is not real can all be distorted by PCP." (11 RT 2344.) The literature on PCP indicates that alcohol in conjunction with PCP is "most likely to give rise to violence." (11 RT 2345.)

Pittel did not read appellant's statement to the police,[13] but explained that appellant's ability to remember details of the events before and after the killings when talking to the police was not inconsistent with the effects of PCP. (11 RT 2376.) Memory is not necessarily impacted unless PCP is injected or taken in the form of ketamine. (11 RT 2378.) Given appellant's experience working at his father's gas station, details such as the tools needed to repair the car or the model of the truck that gave him a ride away from the scene are "examples of an over learned activity, which he probably wouldn't forget under any circumstance." (11 RT 2378.) Appellant's lack of memory for the time of the shooting may be attributable to psychogenic amnesia – i.e., "when a person commits an act that is out of character for themselves[, i]t is very, very difficult" to remember doing it. (11 RT 2379.) Pittel could not say with certainty what caused appellant to remember some things accurately and other things inaccurately, but it was his opinion that appellant's actions on April 9 were "completely out of character" and that he was under the influence of PCP. (11 RT 2442.)

Dr. Matychowiak examined appellant in 1978 pursuant to Penal Code sections 1026 and 1368. (11 RT 2432.) Pittel testified that

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[13] Pittel testified that appellant's counsel asked him to review that statement, but it was not provided to him. (11 RT 2372.)

Matychowiak's initial diagnostic impressions were consistent with his own (11 RT 2430), but he disagreed with Matychowiak's conclusion that appellant had sufficient mental capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of law. (11 RT 2355.) Pittel believed that Matychowiak's opinion was flawed by by his failure to obtain a detailed family history or perform a "neuropathological [*sic*] battery." (11 RT 2433.)

Pittel testified that Dr. Riley performed a complete neuropsychological assessment battery in 1992. (11 RT 2439.) Pittel explained that no other expert involved in this case had performed such an evaluation. (11 RT 2440.)[14] Matychowiak did not give appellant any neuropsychological tests and Siegel gave only one, which was not scientifically appropriate. (11 RT 2433, 2315.) While Siegel opined that appellant might be malingering, Pittel's experience was precisely the opposite: appellant minimized the things that could help him. (11 RT 2452.)

James C. Moyers is a psychotherapist who has a bachelor's degree in religious studies with a focus on early Christianity, and a master's degree in counseling psychology (11 RT 2453.) The prosecutor stipulated that Moyers was an expert in religious studies, the Bible and psychotherapy. (11 RT 2454.)

Appellant told Moyers that on October 23, 1983, while reading a passage from the Bible "that speaks about grace being available for people

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[14]According to Dr. Riley's report, Dr. Maloney was supposed to conduct a neuropsychological evaluation, but did not do so; instead, he gave appellant the Rohrsach, incomplete sentences and MMPI tests, which are not neuropsychological tests. (11 RT 2374.)

who, as he was feeling, feel that they are beyond hope and [he] felt something happen to him . . .and for the first time felt himself worthy of salvation." (11 RT 2454, 2456, 2458.) This type of experience is often described as a rebirth or conversion. (11 RT 2456.) Moyers explained:

> [R]ebirth is a classic term. Coming into a new life. And there's release that people talk about, having gone through a struggle of feeling divided, feeling in conflict, inner conflict, lacking peace, meaning, direction. And suddenly all that is lifted, and there's new meaning. There's new life. There's new possibilities that didn't seem attainable before.

(11 RT 2458.)

After his rebirth, appellant began to write a plain version of the gospels, one that would be easier to understand than the King James version Bible, and to attempt to merge the four gospel accounts into one continuous narrative, known as a Gospel harmony. (11 RT 2459, 2463.)[15] Appellant's reading skills were not very good, and he had difficulty retaining the meaning of one verse long enough to connect it to the next. (11 RT 2457.) Creating the harmony was a very difficult task; appellant had to learn something about phrasing and basic grammar, and had to use dictionaries and Bible commentaries. (11 RT 2460, 2467.) In addition, appellant was working under the adverse conditions of Death Row. (11 RT 2474.) The first version was for his own use, but the second and third versions, prepared in 1992 and 2001, have been distributed in this country and in Europe.[16] (11 RT 2461-2462.)

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[15] This practice is 2,000 years old, but appellant told Moyers he was not aware of it when he began his work. (11 RT 2459-2460.)

[16] These two versions were admitted into evidence as Exhibit Y and (continued...)

In Moyers opinion, appellant did an excellent job. His harmony is "almost a translation from King James to what we speak" today. (11 RT 2468.) Appellant modernized the language, and brought the verses together in a way that added meaning to them. (11 RT 2461, 2470-2471.) Although not necessarily the work of a superior thinker, the harmonies reflect the work of someone who has thought a lot about the subject matter and worked with determination for a long period of time. (11 RT 2483.) Both of the versions reviewed by Moyers were typewritten and appeared to have been written by the same person. (11 RT 2467, 2480.) Moyers characterized appellant's efforts as "quite remarkable and ongoing and persistent and obsessive." (11 RT 2485.)

Moyers testified that the dedication that went into creating the harmonies and appellant's reluctance to attempt to profit from his work attest to the sincerity of his religious conversion. (11 RT 2473.) The fact that appellant's conversion experience occurred six months after his return to Death Row in 1983 did not affect Moyer's opinion; being resentenced to death is the sort of event that is often part of a conversion. (11 RT 2479, 2484.)

**Rebuttal**

Correctional officer Keith J. Williams, who has worked on Death Row for approximately eight years, testified regarding the different privileges available to Grade A and Grade B prisoners. Those who are classified as Grade A have telephone privileges, greater access to the exercise yards, can purchase TVs, radios and musical instruments, and have

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[16](...continued)
Exhibit AA. (11 RT 2482; 2 CT 392-393.)

access to academic programs. (11 RT 2525-2528.) In his experience, it is not unusual for a Death Row prisoner who is Grade A to be "long term disciplinary free." (11 RT 2528.)

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## I

## THE TRIAL COURT'S ERRONEOUS REFUSAL TO INSTRUCT THE JURY ABOUT THE SCOPE OF ITS SENTENCING DISCRETION VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

### A. Introduction

At the conclusion of the penalty trial, the court gave the following instruction about the scope of the jury's sentencing discretion:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> > (a) the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
> >
> > (b) the absence of criminal activity by defendant, other than the homicides which are the basis of this case, which involved the use or threat of force or violence or the expressed or implied threat to use force or violence.
> >
> > (c) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional distress.
> >
> > (d) whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
> >
> > (e) whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his

conduct.

(f) whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or the effects of intoxication.

(h) the age of the defendant at the time of the crime.

(i) whether or not the defendant was an accomplice and his participation was relatively minor.

(j) any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

You must not consider as to aggravation any evidence of criminal activity by defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant.

After having considered all the evidence in this case and having taken into account all of the applicable factors upon which you have been instructed, you shall determine whether the penalty shall be death or confinement in state prison for life without the possibility of parole.

(12 RT 2784-2786.) Because pattern instructions for the 1977 law were no longer available, the trial court relied on the instructions given at the penalty phase of appellant's 1979 trial, and instructions provided to the prosecutor by the Attorney General's Office. (12 RT 2573-74, 2584, 2598.)

Appellant's counsel requested the court to further instruct that if the factors in aggravation outweighed the factors in mitigation, the jury still had discretion to vote for life. (12 RT 2594-2595.) The court refused, observing that the 1977 statute "simply says, you shall consider, take into account and be guided by" the factors, "and doesn't give them any direction or hint at them one way or the other how they should use their good judgment." (12 RT 2595-2596.)

The trial court's rejection of appellant's requested instruction was contrary to this Court's decision in *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1025-1027 ("*Murtishaw II*"), and violated appellant's rights under the Eighth and Fourteenth Amendments.

### B. The Court's Refusal to Instruct on the Scope of the Jury's Sentencing Instruction Was Error

At appellant's penalty retrial in 1983, the trial court instructed the jury in the unadorned language of the 1978 statute, advising the jury that if aggravation outweighed mitigation, "you shall impose death." (*People v. Murtishaw, supra*, 48 Cal.3d at p. 1025.) This was error because the crimes in this case occurred on April 9, 1978, before the effective date of the 1978 law. (*Ibid.*) Under the 1978 statute, the "weighing process" contained in section 190.3 "dictated the penalty, while a 1977-law jury could spare the defendant's life regardless of its view of the aggravation-mitigation balance." (*Id.* at p. 1026.) Thus, the jury retained discretion under the 1977 law "to spare defendant's life even if aggravation outweighed mitigation."

(*Ibid.*; *People v. Easley* (1983) 34 Cal.3d 858, 884, fn. 19.)

Appellant argued in *Murtishaw II* that the sentencing formula contained in the 1978 statute was less favorable to him than the one defined by the 1977 law, and that the erroneous instruction was not only error under state law but also violated the federal constitutional prohibition against ex post facto laws. The Court rejected that argument, holding that the jury has "the same broad power of leniency and mercy" under both the 1977 and 1978 laws,[17] and therefore concluded that appellant "was not tried under a less favorable *law* than in effect at the time" of the killings. (*People v. Murtishaw, supra,* 48 Cal.3d at p.1027; emphasis in original.) Citing *People v. Easley*, *supra,* and *People v. Brown*, *supra*, 40 Cal.3d 512, the Court explained the scope of the jury's discretion under both laws:

> [E]ach juror must assign whatever "moral or sympathetic value he deems appropriate" to the relevant sentencing factors, singly and in combination. He must believe aggravation is so relatively great, and mitigation so relatively minor, that the defendant deserves death rather than society's next most severe punishment, life in prison without parole. [*People v Brown, supra*, 40 Cal.3d at p]p. 540-542, & fn. 13, 545, fn. 19."

(*People v. Murtishaw, supra,* 48 Cal.3d at p. 1027.) This Court also held that the erroneous instruction was not prejudicial per se, and that there was no reasonable possibility that the jury was misled about the scope of its

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[17] In *People v. Brown* (1985) 40 Cal.3d 512, the Court held that there was "only one essential difference between the 1977 and 1978 schemes: the limitation on relevant aggravating evidence under the 1978 law. [*Brown*], 40 Cal.3d at p. 544." *(People v. Murtishaw, supra,* 48 Cal.3d at p. 1027.)

discretion. (*Id.* at pp. 1028-1031.)[18]

In *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, cert. den. (20) 535 U.S. 935 ("*Murtishaw III*"), the Ninth Circuit accepted this Court's interpretation of the 1977 law, as it was required to do, but reached a different conclusion about the federal constitutional implications of the unadorned instruction. That court concluded that in the absence of the clarifying language required by *People v. Brown, supra*, the instruction in the bare language of the 1978 statute "could be construed as removing the jury's discretion to impose life without the possibility of parole rather than death if aggravating circumstances even slightly outweighed mitigating circumstances" (*Murtishaw v. Woodford, supra,* 255 F.3d at p. 965), and was therefore an ex post facto violation. (*Id.* at pp. 966-967). In addition, the court found that the instruction was constitutionally erroneous and prejudicial under the standard adopted in S*tromberg v. California* (1931) 283 U.S. 359.[19] (*Murtishaw v. Woodford, supra*, 255 F.3d at pp. 967-969.)

Thus, under California law and the previous decisions in this case, it is clear that appellant's jury had the discretion to reject the death penalty even if it found that the aggravating factors outweighed the mitigating factors. (*People v. Murtishaw, supra,* 48 Cal.3d at p. 1026; *Murtishaw v. Woodford, supra,* 255 F.3d at p. 961.) The sentencing function under California's death penalty law "is inherently moral and normative, not

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[18] Justices Broussard, Arguelles and Mosk would have reversed the penalty because of this instructional error. (*People v. Murtishaw, supra,* 48 Cal.3d at pp. 1038-1045.)

[19] As discussed in Section D, *post*, the Ninth Circuit also held that the erroneous jury instruction violated the Due Process Clause under *Hicks v. Oklahoma* (1980) 447 U.S. 343. (*Murtishaw v. Woodford, supra*, 255 F.3d at pp. 969-971.)

factual; the sentencer's power and discretion under both the 1978 and 1977 provisions is to decide the appropriate penalty for the particular offense and offender under all the circumstances." *(People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) The ultimate question is not whether there is more good than bad about the defendant – an unlikely conclusion given that the defendant has already been convicted of first degree murder with special circumstances – but whether "the 'bad' evidence is so substantial in comparison with the 'good' that it warrants death *instead of life without parole*." (*People v. Brown*, *supra*, 40 Cal.3d at 544, fn. 15, emphasis in original.)

Because appellant's jury had the discretion to return a verdict of life imprisonment without parole even if aggravation outweighed mitigation, his requested instruction was a correct statement of law, and the trial court's refusal to give the instruction was error. It is well-established that the court must instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449.) Even in the absence of a request, the trial court bears "the ultimate responsibility for properly instructing the jury." (*People v. Wickersham* (1982) 32 Cal.3d 307, 355, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201; *accord*, *Payton v. Woodford* (2005) 544 U.S. 133, 146 ["The judge is, after all, the one responsible for instructing the jury, a responsibility that cannot be abdicated to counsel"].) The scope of the jury's penalty phase discretion, no less than the guilt phase requirement of proof beyond a reasonable doubt, is an essential legal principle on which the court must provide correct instructions.

The trial court's refusal to give appellant's requested instruction is inexplicable in light of its later order denying appellant's motion to modify

the verdict. In denying that motion, the court appears to have understood the scope of discretion conferred by the 1977 law. It found that the aggravating circumstances "are so substantial in comparison with the mitigating circumstances that they warrant death instead of life without parole." (13 RT 2908-2909.) This is the standard on which appellant's jury should have been but was not instructed.[20]

### C. The Court's Refusal to Instruct on the Scope of the Jury's Sentencing Discretion Requires Reversal Under State Law

Where there is a reasonable possibility that the jury has been misled to a defendant's prejudice about the scope of its sentencing discretion, reversal is required. *(People v.Brown* (1988) 46 Cal.3d 432, 448; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1036.) In the context of the instructions and the arguments of counsel in this case, there is a more than a reasonable possibility that appellant's jury was misled to appellant's detriment.

First, the only instruction addressing the scope of the jury's discretion was reasonably susceptible to several erroneous interpretations. Although this Court has construed the 1977 law to require weighing, the terms "consider" the evidence and "take into account" the applicable factors contained in the last paragraph of the instruction in this case do not require the jury to weigh the aggravating and mitigating factors and then decide whether the aggravating circumstances were so substantial in comparison to the mitigating circumstances that they warrant death rather than life without parole. As given, the instruction permitted the jury to return a verdict of death based on a determination that aggravation outweighed mitigation

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[20] Because appellant was entitled to the jury's exercise of sentencing discretion, the trial court's invocation of the correct standard does not cure the instructional error, or render it harmless. *See* Section I-F, *post.*

without a further finding that death was the appropriate penalty. Alternatively, the jury was free to return a verdict of death based on a conclusion that aggravation and mitigation were in equipoise, or worse, to return a verdict of death without any relative weighing of aggravation and mitigation at all.

The words used in the instruction given to appellant's jury – "consider" the evidence and "consider, "take into account" and be "guided by" the applicable factors (12 RT 2784-2785) – are synonyms, but they do not mandate a moral "weighing" or balancing of aggravation against mitigation.[21] That a jury could reasonably conclude that no weighing of aggravation against mitigation was required is best illustrated by the People's argument in *Easley* that the 1977 law may have benefitted defendants because the jury "could return a death verdict without regard to the relative weight of aggravation and mitigation." (See *People v. Easley*, *supra,* 34 Cal.3d at p. 883.)

The drafters of the 1978 law (Proposition 7) also appear to have construed the "consider, take into account and be guided by" language in the 1977 law to not require weighing. In the ballot pamphlet, the supporters of Proposition 7 explained that the addition of the "aggravating vs. mitigating circumstances" provision was required by the federal Constitution.

> The opposition can't understand why we included the aggravating vs. mitigating circumstances provision in Proposition 7. Well, . . .

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[21] "Consider" means "to think carefully about;" to "take account of" means to "consider a specific thing along with other factors before reaching a decision or taking action;" and a "guide" is "a thing that helps someone form an opinion or make a decision or calculation." (*The New Oxford American Dictionary* (2001) pp. 366, 11, & 756.)

> [any] first year law student could have told them this provision is required by the U.S. Supreme Court. The old law does not meet this requirement and might be declared unconstitutional.

Proposition 7's drafters were correct that weighing is constitutionally required: "in all capital cases, the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence." (*Brown v. Sanders* (2006) 546 U.S. 212, 126 S.Ct. 884, 889.)

Second, no instruction was given "which informed the jury 'about its sole responsibility to determine, based on its individualized weighing discretion, whether death is appropriate in this case.' [Citations omitted.]" (*People v. Edelbacher*, *supra,* 47 Cal.3d at p. 1036.) Other than the instruction quoted above, all the instructions were of the type normally given at the guilt phase to guide the jury's determination of facts (12 RT 2774-2790), not on the "individualized, *normative* determination about the penalty appropriate" for appellant. (*People v. Brown, supra,* 46 Cal.3d at p. 448, emphasis in original.)

Third, the arguments of counsel, which in any event are not a substitute for instructions by the court (*Taylor v. Kentucky* (1978) 436 U. 478,488-489), did not address the scope of the jury's discretion. The prosecutor's argument focused almost exclusively on the facts and impact of the offense and the facts presented by appellant in mitigation. His discussion of the law to be applied in selecting the penalty was limited to the following:

> Now I come to my last point. I am not going to bore you with a bunch of instructions. You are going to be asked to consider various factors, factors in aggravation and factors in mitigation.

> Factors in mitigation are things like how the defendant has led his life subsequently to this, lack of other incidents of murder or violent crime, that kind of thing. You also get to consider what he did and you get to consider the impact on the victims' families.

(RT 2731-2732.) In contrast to appellant's previous penalty trial, where the prosecutor "made clear that the jury was to weigh the various sentencing factors as it chose and must ultimately decide for itself which penalty defendant deserved under all the circumstances" (*People v. Murtishaw, supra,* 48 Cal.3d at 1030), the prosecutor never used the words "weigh" or "balance" or acknowledged in any way that the jury's decision should be based on whether the aggravating factors so substantially outweighed the mitigating factors that death was the only appropriate penalty.

Although appellant's counsel mentioned the statutory factors (see, e.g, 12 RT 2739- 2742), he too focused primarily on the facts. His only reference to the weighing process came at the conclusion of his argument, when he noted that it was a "weighted [*sic*] decision because you are asked whether a person should live or die, that's just it." (12 RT 2774.) In context, it appears that appellant's counsel misspoke, intending to refer to the "weighty" or serious decision that the jury must make. In any event, this single brief comment did not inform the jury that it should qualitatively balance the aggravating and mitigating factors. Nor did it inform the jury of its discretion to impose a life sentence even if aggravation outweighed mitigation.

Under these circumstances there is more than a reasonable possibility that the jury was misled about the scope of its sentencing discretion. An instruction informing the jury that it had the discretion not to impose death even if aggravation outweighed mitigation was critical to ensure that the

jury understood the scope of its sentencing discretion, and the court's refusal to give the requested instruction was prejudicial error.

### D. The Court's Refusal to Give the Requested Instruction Violated Appellant's Rights Under the Fourteenth Amendment

In *Hicks v. Oklahoma* (1980) 447 U.S. 343, the Supreme Court held that a state law guaranteeing a criminal defendant procedural rights at sentencing may create a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Under state law, Hicks had a right to a jury determination of sentence as well as guilt. Pursuant to Oklahoma's habitual offender statute, Hicks's jury was directed to impose a 40 year sentence if he was found guilty. Following his conviction, the state court held that the habitual offender statute was unconstitutional, but refused to set aside Hicks's sentence, reasoning that it was within the range of punishment the jury could have selected if permitted to exercise its discretion. The Supreme Court held that the state's action violated due process and reversed, explaining:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [citations omitted] and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Citations omitted.] In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

(*Hicks*, 447 U.S. at p. 346; emphasis in original.) Following *Hicks*, courts have found due process violations where a defendant was denied his full allotment of peremptory challenges under state law (*Van Sickel v. White* (9th Cir. 1999) 166 F.3d 953, 957), and where the state court failed to make the findings necessary to support a sentence under the state's habitual offender law (*Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 672-673.)

*Hicks* has also been applied to capital sentencing. In *Rust v. Hopkins* (8th Cir. 1983) 984 F.2d 1486, 1492, the sentencing panel failed to apply the subsequently-established state law requirement that aggravating circumstances be found beyond a reasonable doubt. That standard was first applied by the state reviewing court, which affirmed the conviction. (*Ibid.*) The Eighth Circuit Court of Appeals set aside the death judgment, holding that Rust had a liberty interest in the application of the correct sentencing law by the sentencing panel that was protected by the Due Process Clause. "The sentencing panel's use of an improper standard contaminated all its findings regarding aggravating circumstances. Rust simply never had an opportunity to be sentenced by a panel as contemplated by the Nebraska statute." (*Id.* at p. 1493.) The court further held that the deprivation of Rust's state law right to be sentenced by the sentencing panel under the right law was too serious to be cured by appellate review or reweighing.

Similarly, in *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, the trial court did not weigh the aggravating and mitigating circumstances in the manner required by Idaho law. (*Id.* at p. 1299.) The Ninth Circuit Court of Appeals held that the state law created a liberty interest protected by the Due Process Clause. Paraphrasing *Hicks*, the court explained:

> [W]here the state has provided a specific method for the determination whether the death penalty shall be imposed, 'it is not

> correct to say that the defendant's interest' in having that method adhered to 'is merely a matter of state procedural law.' [*Hicks*, 447 U.S.] at 346 . . .

(*Fetterly v. Paskett, supra*, 997 F.2d at p.1300.)

Indeed, in appellant's own case, the Ninth Circuit Court of Appeals held that instructing the jury on the wrong law also violated *Hicks* because it impaired the proper scope of the jury's sentencing discretion. (*Murtishaw v. Woodford, supra,* 255 F.3d at pp. 969-971.) In addition to relying on *Hicks,* the court found "notable" Justice Scalia's comment in his dissent in *McKoy v. North Carolina* (1990) 494 U.S. 433, that ambiguous jury instructions in capital cases do not violate the Eighth Amendment merely because they are ambiguous, "but they do violate the Due Process Clause if they misstate the law to the defendant's detriment – and it is not essential that the law as misstated be an unconstitutional law." (*Id.* at p. 460, fn.1.)

*Hicks* compels the conclusion that the trial court's refusal to instruct appellant's jury about the scope of its sentencing discretion under state law violated the Due Process Clause. It also establishes why the trial court's apparent invocation of the correct standard in denying appellant's motion to modify the judgment does not cure the error. Appellant was entitled to the jury's exercise of discretion in accord with state law in the first instance. In ruling on a motion under Penal Code section 190.4, subdivison (e), however, "'the trial judge's function is *not* to make an independent and de novo penalty determination. . . '" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1161; emphasis added.) Thus, under *Hicks*, the trial court's ruling is not an adequate substitute for the unanimous determination of 12 jurors.

For the reasons presented in Section C, the deprivation of appellant's rights under the Due Process Clause was not harmless beyond a reasonable

doubt, and reversal of the death judgment is required.

### E. The Court's Refusal to Give the Requested Instruction Violated Appellant's Rights Under the Eighth Amendment

The requirements of California's death penalty law are necessary to comply with *Furman v. Georgia* (1972) 408 U.S. 238, and its progeny.

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably *directed* and *limited* so as to minimize the risk of wholly arbitrary and capricious action.

(*Gregg v. Georgia* (1976) 428 U.S. 153, 189 [opinion of Stewart, Powell, and Stevens, JJ.], emphasis added.) The trial court's refusal to give appellant's requested instruction unconstitutionally undermined this mandate in several ways.

First, as shown above, the language of the instruction permitted the jury to reach a decision without ever weighing aggravation against mitigation. "[A] state enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." (*Kansas v. Marsh* (2006) __ U.S. __, 126 S.Ct. 2516, 2525.) However, whether a statute is characterized as a "weighing" or "non-weighing" statute, the United States Supreme Court has made clear that the aggravating and mitigating circumstances must be weighed in some manner: "in *all* capital cases, the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence *against* the defendant's mitigating evidence." (*Brown v. Sanders*, *supra*, 546 U.S. 212, 126 S.Ct. 884, 889, emphasis in original.) Thus, a state cannot completely dispense with weighing if that "prevents a jury from

giving meaningful effect to the mitigating evidence that may justify . . . a life sentence rather than a death sentence." (*Brewer v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 1706, 1710.)

Second, strict adherence to the state law procedures for imposing death is necessary to comply with the Eighth Amendment's requirement of heightened reliability in the determination that death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305 [plurality opinion of Stewart, Powell, Stevens, JJ.].) "States may impose the ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations." (*Barclay v. Florida* (1983) 463 U.S. 939, 958-959 [concurring opinion of Stevens, J.].) Reliability is required in part to ensure "that the aggravating and mitigating circumstances "present in one case will reach a similar result to that reached under similar circumstances in another case." (*Id.* at p. 954.) The goal of similar sentences under similar circumstances is undermined by the trial court's refusal to instruct the jury on the scope of its discretion.

Thus, the court's refusal to instruct appellant's jury correctly on the scope of its discretion violated the Eighth Amendment, and also deprived appellant of a fundamentally fair penalty trial, in violation of the Due Process Clause of the Fourteenth Amendment.

**F. The Death Judgment Must Be Reversed**

Because the error violated appellant's federal constitutional rights, the judgment must be set aside unless respondent can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 368 U.S. 18, 24.) That the instructional error was not harmless under either the federal or state harmless error standard is convincingly demonstrated by the fact that the case for death was a close one. The case in aggravation

was limited to evidence of the circumstances of the offense and the impact of the killings on Wyatt and the victims' families. It was undisputed that at the time of the crime, appellant was only 20 years old, had no criminal record and voluntarily surrendered to the police before he was identified as a suspect.

In his defense, appellant presented substantial mitigating evidence. He was raised in a "quintessentially dysfunctional family full of drug abuse, alcohol abuse and schizophrenia." (10 RT 2212) At the age of seven or eight, appellant began to use drugs and alcohol to escape his "abjectly miserable situation." (10 RT 2211-2212.) Like his siblings and other members of his family, appellant has symptoms of mental illness. Before his arrest, he had experienced seven head injuries, three of which caused unconsciousness, and had been exposed to toxic chemicals while working at a paint factory. These factors, combined with his prior drug use and his use of alcohol on the day of the killings, likely contributed to his mistaken belief that he was being attacked and needed to defend himself.

In addition, during his entire time on Death Row, appellant has not been the subject of any disciplinary action, which is "highly unusual." (10 RT 2133.) In 1983, appellant experienced a spiritual rebirth, and since then has dedicated his time to the preparation of a Gospel harmony, combining the four books of the Bible into a continuous narrative in plain language.

Jury deliberations began at 3:02 p.m. on September 4, continued on September 5 and into the afternoon of September 6, when the jury returned its verdict at 2:45 p.m. (2 CT 395-401.) During deliberations, the jury asked for a further definition of "extenuation," and requested rereading of certain testimony. (2 CT 399-401.) Viewed in light of the substantial mitigating evidence, these factors demonstrate that this was a close case.

(See *People v. Murtishaw, supra,* 29 Cal.3d at p. 773 ("two full days" of deliberations suggested that the issue of penalty was close); *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [jury deliberations of 12 hours indicates that the case was close]; *People v. Fuentes* (1986) 229 Cal.App.3d 1282, 1295 [length of deliberations indicates close case]; *People v. Pearch* (1991) 229 Cal.App. 1282, 1295 [same]; *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 572 -573 [same].)

Finally, in evaluating prejudice, it is necessary to take into account the hung jury provision of former Penal Code section 190.4, subdivision (b), "which provided that if the jury was unable to agree on a verdict at the penalty phase, the trial court must impose a sentence of life without possibility of parole rather than hold a new penalty trial." (*People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 21.) In light of the substantial mitigating evidence and the length of the jury's deliberations, it is likely that at least one juror would have voted for life if the jury had been properly instructed, and the court would therefore have been required to sentence him to life without possibility of parole pursuant to former section 190.4(b). For these reasons, the error was not harmless beyond a reasonable doubt, and the judgment must be reversed.

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## II

## THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY NOT TO CONSIDER THE FACT OF APPELLANT'S PRIOR DEATH JUDGMENTS IN THIS CASE AND THEIR REVERSAL WAS PREJUDICIAL ERROR

### A. Introduction

During jury selection, the court informed the prospective jurors that appellant had previously been found guilty of three murders and a special circumstance, and inquired about their knowledge of the prior proceedings in this case. (2 CT 323; Court's Ex. II, pp. 1-1, 1-2 [1 RT 163].) At trial, it was established that appellant had spent 24 years on Death Row, that he had twice been sentenced to death before, and that those sentences had twice been set aside in later proceedings in state and federal court. (See, e.g., 9 RT 2025, 2033; 10 RT 2130-2131, 2133; 10 RT 2245; 11 RT 2367, 2370-71, 2478.) This evidence was admitted without objection. Some of the evidence was presented by appellant in mitigation, and the rest was introduced by the prosecution in an effort to impeach defense experts.

This evidence created a real and substantial risk that appellant's jurors would consider it in a way that unacceptably undermined their sense of responsibility for determining appellant's sentence. The trial court therefore had a sua sponte duty to instruct the jury not to consider the prior death verdicts or the prior reversals in this case in determining penalty. The court's failure to do so deprived appellant of a fundamentally fair penalty trial, a reliable penalty determination, the right to full consideration of his mitigating evidence, and due process of law. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17; *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Brewer v. Texas* (2007) __ U.S. __, 167 L.Ed.2d 622, 127 S.Ct. 1706.)

### B. The Trial Court Had a Sua Sponte Duty to Instruct the Jury on the Proper Use of the Evidence of the Prior Proceedings in This Case

Under well-settled California law, the trial court is responsible for insuring that the jury is correctly instructed on the law. "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The trial court's duty includes instructing sua sponte on those principles of law openly and closely connected with the evidence presented and necessary to the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) In this case, an instruction directing the jury not to consider the fact of the prior proceedings in aggravation or in selecting penalty was necessary to the jury's proper understanding of its constitutionally mandated role.

The Supreme Court has made clear that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the death sentence rests elsewhere." (*Caldwell v. Mississippi, supra,* 472 U.S. at pp. 328-329.) In *Caldwell*, the prosecutor told the jurors during penalty phase closing argument that a death sentence would be subject to appellate review. The Court held that those comments undermined the reliability of the death judgment by creating a bias in favor of death. "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts." (*Id.* at p. 331.) Knowledge of the availability of appellate review also permits the jury to avoid discharging its "awesome responsibility" to determine the appropriate

penalty because "it can more freely 'err because the error may be corrected on appeal.' [Citation omitted]." (*Id.* at p. 331.) As a result, a defendant might be executed, "although no sentencer had ever made a determination that death was the appropriate sentence." (*Id.* at p. 332.)

In *Romano v. Oklahoma* (1994) 512 U.S. 1, the defendant argued that the principles of *Caldwell* precluded the admission of evidence of his prior death sentence in another case. The Court rejected this argument, explaining that the evidence was accurate at the time it was admitted, the parties did not affirmatively undermine the jury's sense of responsibility, and the jury instructions "clearly and properly described the jurors' paramount role in determining [Romano's] sentence and they also explicitly limited the jurors' consideration of aggravating factors to the four which the State sought to prove." (*Romano v. Oklahoma, supra,* 512 U.S. at p. 13.)

In contrast to *Romano*, this case involves evidence of two prior death verdicts and two penalty reversals for the very same crimes. Without an explicit directive not to consider the fact of the two prior death judgments and subsequent reversals, it is likely that the jury would use this evidence improperly in determining sentence.

First, one or more jurors may have considered the fact that two previous juries returned a death verdict in this case as a reason to impose death, even though the opinions of prior jurors were irrelevant. The instructions, patterned on the language of former section 190.3 did not limit the jury's consideration of aggravation to the factors enumerated in the statute. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 773.) In contrast to evidence that a defendant has been sentenced to death for a different crime, which could "plausibly" make the jury equally more or less inclined to impose death (*Romano v. Oklahoma, supra*, 512 U.S. at p. 14), the jury's

knowledge that two previous juries concluded that death was the proper penalty in this case could only cut against appellant.

In *People v. Woolley* (Ill. 2002) 793 N.E.2d 519, the Illinois Supreme Court reversed a death judgment because the trial judge erroneously informed prospective jurors that Woolley had previously been sentenced to death in this case and the death sentence had been reversed. At the end of the retrial, the court instructed the jury that the verdict of the first jury was "null and void and should not be considered by you for any reason.'" (*Id.* at p. 522.) Despite this instruction, the Illinois Supreme Court reversed, explaining that "merely hearing that another jury . . . also imposed the death sentence may have diminished the jury's sense of responsibility in determining whether defendant *should* be sentenced to death (*Id.* at p. 524, emphasis in original.) Here, appellant's jury was aware that appellant had been sentenced to death twice before, a powerful indicator that death was the appropriate punishment for his crimes.

Second, an instruction was necessary to prevent the jury from dismissing or devaluing appellant's mitigating evidence because of the assumption that the prior juries heard the same mitigating evidence and concluded that it was insufficient. Such an assumption would have been inaccurate. This Court's opinions in appellant's two previous appeals establish that the aggravating and mitigating evidence introduced at this trial was not the same as the evidence presented at the earlier trials. (*People v. Murtishaw, supra,* 29 Cal.3d at pp. 743-749; *People v. Murtishaw* (1989) 48 Cal.3d 1001,1007-1012.) But without adequate instruction, appellant's Eighth Amendment right to have this jury consider and give full effect to his mitigating evidence was likely compromised. (See *Brewer v. Texas, supra*, 127 S.Ct. 1706.)

Third, the jury's sense of responsibility for its decision was further undermined by the knowledge that the two prior death judgments were both set aside by a higher court. This information went far beyond mere knowledge of the availability of an appeal, which may not by itself violate *Caldwell*. "[A]ny reasonable juror, knowing that defendant was once sentenced to death and is now being retried for the same offense, could easily infer that an appeal was available to him." (*People v. Anderson* (1990) 52 Cal.3d 453, 468.) But any reasonable juror, knowing that appellant was *twice* sentenced to death and was now being retried for the same offense, would infer not only that an appeal was available but that the appellate court would not hesitate to reverse this jury's death verdict, as it had reversed the two prior death verdicts. Moreover, "[a]s was explained in *Caldwell*, jurors may not understand the limited nature of appellate review, which affords substantial deference to a jury's determination that death is the appropriate penalty." (*Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 296 (en banc).) Here, knowledge of the prior reversals permitted a juror who was unsure of the appropriate penalty to vote for death without resolving that question because of the possibility that an appellate court would again step in.

Because of the grave risk that the jury will misuse evidence of prior death verdicts and reversals in the ways identified above, courts have recognized that such evidence is inherently prejudicial. (*State v. Britt* (N.C. 1975) 220 S.E.2d 283, 292 ["The probability that the jury's burden was unfairly eased by that knowledge is so great we cannot assume an absence of prejudice"]; *People v. Woolley, supra,* 793 N.E.2d at 524 ["merely hearing that another jury . . . also imposed the death sentence may have diminished the jury's sense of responsibility"].) An instruction directing the

jury not to consider the fact that a previous jury voted for death for any purpose is therefore necessary, and should be regarded as general principle of law closely and openly connected with the facts where evidence of appellant's conduct on Death Row is introduced by the parties. Under similar circumstances, when it is necessary to restrain a defendant in view of the jury, this Court has imposed a sua sponte duty to caution the jury against considering the fact of the restraints for any purpose. (*People v. Duran* (1976) 16 Cal.3d 282, 292; CALJIC 1.04.) No less should be required under the circumstances of this case. A capital defendant should not be forced to forego his Eighth Amendment right to present highly relevant mitigating evidence in order to enforce his right to a fair and reliable determination of penalty without regard to otherwise irrelevant and inherently prejudicial information about prior death verdicts in the same case.

An appropriate instruction would direct the jury not to consider the prior verdicts for any purpose and not to speculate about why the case was sent back for a new penalty trial. In addition, the instruction should emphasize that it is the jury's duty to make their own independent determination of the appropriate penalty, without any consideration of the prior proceedings in this case. Because such an instruction would favor the defense, it is unlikely to interfere with defense strategy, and is thus appropriately given sua sponte.

This Court has relied upon similar instructions to avoid prejudice at penalty retrials where the jury learns about the prior proceedings in the case. For example, in *People v. Ledesma* (2006) 39 Cal.4th 646, an appeal from a guilt and penalty phase retrial, defendant cited *Romano* to support his argument that a new jury should have been impaneled for the penalty phase

because the jury learned at guilt phase that he was previously sentenced to death. (*Id.* at p. 724.) This Court found no error because the trial court had instructed the jury that the first trial was not a fair one and it should therefore "'disregard completely the result of that trial in deciding upon a verdict in the present trial.'" (*Id.* at p. 725.) Similarly, in *People v. Ramos* (1997) 15 Cal.4th 1133, an appeal from a penalty retrial, this Court held that the trial court's refusal to instruct the jury to disregard the prior death sentence was not error because the jurors had in fact had been informed of their duty to disregard the prior verdict. (*Id.* at p. 1180.) Moreover, because Ramos was tried under the 1978 law, his jury was instructed to base its decision solely on the statutory factors in aggravation and mitigation specified in the instructions. (*Id.* At p. 1181.)

In contrast to *Ramos*, appellant's jury was never told to disregard the prior juries' death verdicts in determining penalty. The absence of such an instruction, in conjunction with the repeated admonition that they must accept the prior jury's findings of guilt, reasonably supported the inference that the prior penalty verdicts were also entitled to some weight. In further contrast to *Ramos*, appellant's jury's consideration of aggravation and its determination of penalty was not limited to the factors specified in the instruction. (12 RT 2784-2786; *People v. Murtishaw, supra,* 29 Cal.3d at 773.) The instructions given in this case therefore provided the jury with a "means to give effect to" the evidence of the prior death verdicts. (*Romano v. Oklahoma, supra,* 512 U.S. at 13.)

### C. The Trial Court's Failure to Instruct Appellant's Jury to Disregard the Prior Verdicts and Appeals in Appellant's Case Requires Reversal

The trial court's failure to instruct the jury to disregard the prior verdicts and appeals in this case impermissibly undermined the jury's sense

of responsibility and the reliability of the death judgment. This error violated appellant's rights to a fair and reliable penalty determination, the full consideration of his mitigating evidence, a fundamentally fair trial and due process of law. (U.S. Const., 5th, 6th, 8th & 14th Amends., Cal. Const., art. I, §§ 7, 15, & 17.) Because it cannot be said that the failure to instruct had "no effect" on the jury's verdict (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 341), the death judgment must be reversed.

Even if this error is subject to harmless error analysis, respondent cannot show that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432,448.) This was a close case: appellant presented substantial mitigating evidence and the jury deliberations spanned three days. (See Argument I, *ante*, at pp. 49-51.) Under the "hung jury" provision of former Penal Code section 190.4, subdivision (b), the court would have been required to sentence appellant to life without possibility of parole if one juror concluded that death was not the appropriate punishment. (*People v. Robertson* (1982) 33 Cal.3d 21, 56 fn. 21.) For these reasons, the court's failure to instruct was prejudicial and appellant's death sentence must be set aside.

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## III

## THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY TO CONSIDER WHETHER APPELLANT ACTED WITH AN HONEST BUT MISTAKEN BELIEF IN THE NEED TO DEFEND HIMSELF IN DETERMINING PENALTY WAS REVERSIBLE ERROR

### A. Procedural Background

Following his voluntary surrender to the police, appellant waived his rights and gave a statement in which he explained that he shot in response to gunfire he thought was aimed at him. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 755 ["*Murtishaw I*"].)

> He said he started toward the Chevrolet to get the promised ride into town. He then heard two or three shots. Knowing the students had finished the filming, he did not know what was happening; he felt confused, angry, and thought that the students were shooting at him. He immediately began firing at the car, emptying the entire clip. As he reloaded, he heard Lufenberger [*sic*] shout "throw out your gun." A shirtless man ran away (Bufflo); a hooded figure (Etayo) came at him from the car. He told the figure to stop and, when it did not, shot it.

(*Ibid.*) This Court characterized appellant's statement as "substantial evidence to support a finding that defendant acted under an unreasonable belief that his life was in danger," which would have required the trial court to instruct *sua sponte* at the guilt phase on the unreasonable self-defense doctrine reaffirmed in *People v. Flannel* (1979) 25 Cal.3d 668, if the trial had commenced after the decision in that case. (*People v. Murtishaw*, *supra*, 29 Cal.3d at p.760.) Evidence of unreasonable self-defense – an "honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury" (*People v. Flannel*, *supra*, 25 Cal.3d at p. 672) – would negate malice and reduce the crime from murder to manslaughter.

Despite the existence of this evidence, however, this Court held in *Murtishaw I* that the trial court's failure to instruct sua sponte on unreasonable self-defense at the guilt phase was not error because the doctrine was "obscure and undeveloped" prior to the *Flannel* decision. (*People v. Murtishaw*, *supra*, 29 Cal.3d at p. 761.) This Court affirmed appellant's murder convictions, and remanded for a new penalty trial on other grounds.

On appeal following the penalty retrial, this Court rejected appellant's argument that the trial court had a sua sponte duty to instruct on unreasonable self-defense at the penalty retrial. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1017 ["*Murtishaw II*"].) Although the Court recognized that the instruction that "defendant's *reasonable* belief in moral justification was a mitigating circumstance . . . possibly raise[d] the negative inference that an *unreasonable* belief was not a proper consideration," it concluded that the instruction on factor (j)-(k), "coupled with the arguments of counsel, adequately informed the jury that they could consider such evidence in mitigation." (*Ibid.*, emphasis in original.) The instructions did not "force counsel to argue" that appellant's perception of danger was "somehow 'reasonable;'" instead, defense counsel "adroitly avoided the distinction between 'reasonable' and 'unreasonable' self defense," by omitting the word "reasonable" from his discussion of this evidence. (*Id.* at p. 1017, fn.6. )

In this proceeding, the prosecution again introduced evidence of appellant's post-surrender statement to the police, playing the audio tapes and providing the jury with a transcript of the contents of the tape. (9 RT 1871-72; Ex.9a, 9b, 9c, 9d.). In contrast to the earlier trials in this case, however, appellant's counsel *requested* the court to instruct the jury to

consider appellant's mistaken belief in the need to defend himself as mitigation (12 RT 2635), and that his belief could be unreasonable but still genuine. (12 RT 2656.) To that end, defense counsel requested a number of CALJIC instructions, including mistake of fact and unreasonable self-defense (CALJIC Nos. 4.35,[22] 5.17[23]). (2 CT 456.)

During the conference on jury instructions, defense counsel argued that appellant's statement to the police was evidence that he believed he

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[22] At the time of trial, CALJIC No. 4.35 stated:

"An act committed or an omission made by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus, a person is not guilty of a crime if [he] [she] commits an act under an actual [and reasonable] belief in the existence of certain facts which, if true, would make the act or omission lawful."

[23] At the time of trial, CALJIC No. 5.17 stated:

"A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but not with malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter.

As used in this instruction, an 'imminent' [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer.

However, this principle is not available, and malice aforethought is not negated, if the defendant by [his][her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his][her] adversary's [use of force], [attack] [or] [pursuit.]"

was being fired upon and that the jury should be allowed to consider his mistake of fact as a circumstance in mitigation. (12 RT 2635.) Counsel pointed out that nothing in the pattern instruction covered mistake of fact. "The only thing that might come close is factor (e) reasonable belief in moral justification or extenuation for his conduct, but it does not address mistake of fact."[24] (*Ibid.*)

Without addressing the word "reasonable" in factor (e), the court expressed its opinion that a juror could consider a mistaken but good faith belief as "moral justification or extenuation." (12 RT 2635-2636.) However, the court was reluctant to give CALJIC No. 4.35 because it informs the jury that ignorance or mistake of fact is a guilt phase defense. Defense counsel then modified his request, asking the court to simply tell the jury that "an act committed or an admission [sic] made in ignorance or by reasonable mistake of fact can be considered by you in mitigation." (12 RT 2636.)

The prosecutor contended that appellant was "not entitled to a specific instruction on every theory of mitigation that already falls under an enumerated section," and that it was unnecessary to modify a guilt phase instruction so that the defense "will have one more thing to point to." (12 RT 2636.) Defense counsel responded that "although lawyers might look at [factor(e)] and say moral justification or extenuation would cover that type of conduct, a jury without instruction or guidance may not come to the same conclusion." (*Ibid.*)

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[24] Former CALJIC No. 8.88.1 defined factor (e) as "whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct." (12 RT 2784.)

The court refused to instruct that appellant's mistaken belief could be considered in mitigation. (12 RT 2637.) The court also rejected counsel's additional request to instruct that appellant's belief that he was being attacked could be unreasonable but still genuine. (12 RT 2656.)

Thus, despite the existence of evidence that appellant shot at the victims because he mistakenly believed they were shooting at him, evidence that this Court found "substantial" (*Murtishaw I, supra,* 29 Cal.3d at p. 760), no jury has ever been instructed to consider that evidence in determining appellant's culpability in assessing either his guilt or the appropriate penalty. Under the circumstances of this case, the trial court's refusal to give appellant's requested instructions violated appellant's state law rights as well as his rights to a fair, reliable and non-arbitrary determination of penalty and to the jury's meaningful consideration of all mitigating evidence, his right to present a defense, his right to a trial before a properly instructed jury, and his right to a fair trial and due process of law. (U.S. Const., Amends. 5, 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

### B. Appellant Was Entitled to an Instruction Explicitly Authorizing the Jury to Consider the Evidence of His Honest But Mistaken Belief in the Need to Defend Himself in Determining Penalty

A criminal defendant is entitled upon request to instructions which relate the evidence to a legal issue in the case or pinpoint the crux of his defense. (*People v. Kraft* (2000) 23 Cal.4th 978, 1068; *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Rincon Pineda* (1975) 14 Cal.3d 864, 885; *People v. Sears* (1970) 2 Cal.3d 180, 190; see also Pen. Code, § 1093, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue if requested by either party. . . ."].) The right to such instructions also applies at the penalty phase of a capital trial: the defendant

has "a right to 'clear instructions which not only do not preclude consideration of mitigating factors' [citation omitted], but which also 'guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender.' [Citation omitted.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1277.)

Of course, a trial court is not required to give instructions that contain incorrect statements of law or are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) However, the requested instructions here were neither. As a matter of state law, the evidence of appellant's honest but mistaken belief is relevant to the degree of his culpability and to penalty, as this Court has previously recognized in this case. (*People v. Murtishaw, supra,* 48 Cal.3d at pp. 1017-10128.)[25] This Court's recognition is consistent with the United States Supreme Court's holding that relevant mitigation includes all non-trivial aspects of the circumstances of the crime or defendant's character. (*Tennard v. Dretke* (2004) 524 U.S. 274, 286.) Evidence that could have led a properly instructed guilt-phase jury to convict appellant only of manslaughter cannot be dismissed as trivial.

No one disputed at trial that the evidence of appellant's mistaken but

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[25] Contrary to the prosecutor's argument (12 RT 2636), if the language of the requested instruction was somehow objectionable, the court should have modified the requested instruction. The trial court's duty to give instructions on defendant's theory of the case includes the duty to correct or tailor the instruction if necessary. (*People v. Hall* (1980) 28 Cal.3d 143, 159 [court erred in failing to correct an instruction that was too long and argumentative]; *People v. Guzman* (1975) 47 Cal. App.3d 380, 386 ["The time is past when a trial judge may refuse an otherwise proper instruction because of the use of an improper word"].)

good faith belief in the need to defend himself, even if unreasonable under the circumstances, could be considered in mitigation. In determining guilt, a properly instructed jury would have been told that a person who kills another in the actual but unreasonable belief in the necessity to defend himself, kills unlawfully but without malice, "even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief." (CALJIC No. 5.17.) If such a jury convicted appellant of murder, defense counsel would still have been able to remind them of this legal principle at the penalty phase and argue that lingering doubt concerning appellant's mistake of fact should be considered in determining whether appellant should be sentenced to death. Because the same evidence highly relevant to appellant's culpability was admitted at the penalty retrial, appellant was constitutionally entitled to instructions that clearly advised the jury it was authorized to consider this evidence in mitigation.

Appellant recognizes that this Court has held that instructions authorizing the jury to consider specific evidence in mitigation are properly refused if argumentative, i.e., "'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence' [Citations omitted]." (*People v. Mickey* (1991) 54 Cal.3d 612, 697.) To the extent that an instruction is deemed argumentative because it authorizes the jury not only to consider the evidence, but also to consider it *as mitigation,* those decisions must be reconsidered in light of recent United States Supreme Court authority.

In *Brewer v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 1706, Justice Stevens reviewed the Court's *Lockett* jurisprudence.

[W]e have long recognized that a sentencing jury must be able to

> give a "'reasoned moral response' to a defendant's mitigating evidence-particularly that evidence which tends to diminish his culpability-when deciding whether to sentence him to death [Citations omitted.] . . . In recent years, we have repeatedly emphasized that a *Penry* violation exists whenever a statute or a judicial gloss on a statute prevents a jury from giving meaningful effect to mitigating evidence that may justify . . . a life sentence rather than a death sentence.

(*Id.* at p. 1710.) The Court defined "meaningful effect" to mean that the jury must be allowed not only to consider mitigating evidence "but to respond to it in a reasoned moral manner and to weigh [it] in its calculus of deciding whether a defendant is truly deserving of death." (*Id.* at p. 1714.) Clearly labeling mitigating evidence as mitigating evidence is necessary to ensure that the jury will give it "meaningful effect," and can no longer be dismissed as argumentative.

An instruction informing the jury in this case that evidence of unreasonable self-defense was properly considered in mitigation was particularly crucial. As this Court recognized in *Murtishaw II*, 48 Cal.3d at p. 1017, the jury may have construed the instruction on former Penal Code section 190.3, factor (e) – "whether or not the offense was committed under circumstances which the defendant *reasonably* believed to be a moral justification or extenuation for his conduct" (12 RT 2784) – to preclude consideration of appellant's *unreasonable* belief in the need to defend himself mitigation. No other instruction specifically corrected that inference. While the instruction on factor (j)[26] *could* have been construed to

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[26] The instruction on factor (j) directed the jury to consider "any other circumstance which extenuates the gravity of the crime, and any other aspect of the defendant's character or record that the defendant offers as a (continued...)

allow consideration of the evidence, it did not require it and could as reasonably been construed to preclude it, if the jury accepted at face value the introductory language referring to "any *other* circumstance," i.e., of a type not enumerated above. Thus, there is no assurance that appellant's jury believed it was able to give effect to the evidence of appellant's good faith belief that he was entitled to defend himself.

The arguments of counsel did nothing to overcome the constitutional inadequacy of the instruction that was given. The prosecutor's argument did not address factor (e) or its relationship to factor (j) at all. Appellant's trial counsel did refer to the substance of factor (e) but in a confusing manner that did not explain why the instruction authorized the jury to consider as mitigation appellant's belief that he was in imminent peril. During his summary of the factors at the beginning of his argument, defense counsel stated:

> the other thing that you can consider, whether or not there was a reasonably believed moral justification. Now, this factor is really - - will be covered in another factor. I will get back to that in just a second.

(12 RT 2741.)

When appellant's counsel returned to this point, he discussed the evidence but not in the context of factor (j). He argued that the first two shots reported by both Wyatt and appellant may have been fired by Laufenberger, who was behind appellant, and that the combined effects of intoxication and his hearing impairment caused appellant to arrive at the

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[26](...continued)
basis for a sentence less than death, whether or not related to the offense for which he is on trial." (12 RT 2785.)

"wrong conclusion that he is being shot at by the other people." (12 RT 2752.) This would explain why appellant told the police he was being fired at "and fired in retaliation, which was an *unreasonable* response," but understandable under the circumstances. (12 RT 2752.)

> This is a person who is responding to a situation believing his life was threatened. A reasonable conclusion when you look at all the facts. Unreasonable in the law, you can still be found guilty of murder.

(12 RT 2753, emphasis added.) At best, appellant's counsel's argument was confusing about how the jury could give effect to this mitigating evidence, and at worst, it amounted to a concession that it did not fall within factor (e). As a result, there is a reasonable possibility that the instructions did not provide for adequate consideration of appellant's mitigating evidence.

Appellant recognizes that this Court has held that it is not error to refuse to give an instruction embodying correct principles of law if the instructions the jury receives on mitigation are otherwise correct. (See, e.g., *People v. Smith* (2003) 30 Cal.4th 581, 638; *People v. Bonillas* (1989) 48 Cal.3d 757, 789-790.) As shown above, however, the instructions in this case were not otherwise correct. The Eighth Amendment requires that jurors understand their right "to give meaningful effect" to all mitigating evidence (*Brewer v. Quarterman, supra,* 127 S.Ct. At p. 1710), and that this principle be clearly explained, not obscured or left to rest on the possibility that the jury will choose the constitutionally mandated interpretation of the instructions and reject competing inferences.

### C. The Court's Failure to Instruct the Jury as Requested by Appellant Compels Reversal of the Judgment

Appellant submits that because the refusal to give appellant's

requested instruction unconstitutionally interfered with the jury's ability to give full effect to mitigating evidence, the judgment must be reversed without any further consideration of whether the error was harmless. In *Quartman v. Nelson* (5th Cir. 2006) 472 F.3d 287 (en banc), the Fifth Circuit recently rejected the state's argument that harmless error analysis should be applied to this type of error. Noting that "the Supreme Court has *never* applied a harmless-error analysis to a *Penry* claim or given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence," the Fifth Circuit reasoned that this is because the error deprives the jury of a "vehicle for expressing its 'reasoned *moral* response to the defendant's background, character, and crime,'" which precludes it from making "'a reliable determination that death is the appropriate sentence.'" *Penry II,* 532 U.S. at 797, 121 S.Ct. 1910 (quoting *Penry I,* 492 U.S. at 328, 319, 109 S.Ct. 2934) (internal quotation marks omitted) (emphasis added). This reasoned *moral* judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues. It also differs from those at issue in cases involving defective jury instructions in which the Court has found harmless-error review to be appropriate.

(*Id.* at pp. 314-315; emphasis in original.) The court concluded:

> Given that the entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different from its answers to the special issues had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.

(*Id.* At 315.)

Even if the error is subject to harmless error analysis, however, the state cannot demonstrate that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Appellant presented substantial mitigation, and the jury deliberations spanned three days. (See Argument I, *ante*, at pp.49-51.) The jury's mid-deliberation request for a definition of the term "extenuate" (13 RT 2802) indicates their confusion about the meaning of factors (e) and (j). Viewed in the context of former Penal Code section 190.4, subdivision (b), there is more than a reasonable possibility that one or more jurors would have concluded that a life sentence was the appropriate punishment in this case, which would have compelled the court tio impose a sentence of life without possibility of parole. The death judgment must therefore be reversed.

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## IV

## THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE AND BY FAILING TO INSTRUCT ON THE PROPER USE OF THIS EVIDENCE

### A. Introduction

Before trial, appellant filed a written motion requesting the court to limit the admissibility of victim impact evidence to a description of the impact on a family member who was personally present at the homicide scene during or after the crime, and to the effects of the homicide which were known or reasonably foreseeable by appellant at the time of the killings. (1 CT 116-135.) Appellant further sought to exclude emotional and prejudicial evidence, and to limit the number of witnesses to one for each victim. (*Ibid.*) In support of his motion, appellant relied on Penal Code section 190.3, factor (a), Evidence Code section 352, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the parallel provisions of the California Constitution (Cal. Const., art. I, §§ 7, 15 & 17). (1 CT 116-135.)

Appellant requested that the court hold an in limine hearing to review the proposed testimony of the victims' family members in order to avoid the introduction of potentially inflammatory and prejudicial evidence. (1 CT 117.) The prosecutor objected on the ground that it would be too onerous for the elderly witnesses to testify twice, i.e., once before the court and again before the jury. (1 RT 76.)[27] Appellant's counsel responded that

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[27]Only Mrs. Soto and Mr. and Mrs. Henderson were "elderly." Marta Soto's husband, Lance Wyatt, was a contemporary of Soto, who was 22 in 1978 (9 RT 1866, 1926.) Haydee Kassai was 12 years older than

(continued...)

a hearing was necessary because the witnesses would be testifying about events that happened 24 years earlier. (1 RT 77.)

At the conclusion of this discussion, the court stated that it would have a "402 hearing" before the witnesses testified. (1 RT 77.) However, the court did not hold the hearing or make any inquiry into the substance of the family members' proposed testimony before they testified before the jury. Instead, the court simply advised five of the six witnesses to refrain from expressing any opinion about appellant or commenting directly to him. (9 RT 1925, 1988-1990.)[28]

At trial, appellant's renewed objections to the testimony of family members were again denied. (9 RT 1865.) The court also denied appellant's same objections to the videotape prepared by Lance Wyatt from the original film he shot on April 9, 1978. (9 RT 1865; 2 CT 329-334; 9 RT 1876-1882.)

The prosecution then presented victim-impact evidence from Marta Soto and Lance Wyatt, Marti Soto's mother and husband (9 RT 1926-1934, 1865-1868), Haydee Kassai and Sybelle Sprague, Ingrid Etayo's older sister and niece (9 RT 1994-1999, 2057-2061), and Patricia and Robert Henderson, the parents of James Henderson. (9 RT 2062-2072.) These witnesses testified about the victims' backgrounds and personal characteristics, their talents and good deeds, and their plans and hopes for the future. The six victim impact witnesses also testified about the

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[27](...continued)
Ingrid Etayo, who was also 22, and Sybelle Sprague was Etayo's niece. (9 RT 1998, 2058.)

[28]There is no indication in the record that the court cautioned Mrs. Soto before she testified.

continuing emotional effects of the deaths on themselves and their families.

The prosecutor commented extensively on this testimony in closing argument, concluding his argument with a virtually verbatim recitation of this testimony, and arguing that death was the only just penalty for the loss of these victim's lives. (12 RT 2731-2735.)

Appellant submits that the admission of this evidence was error under Evidence Code section 352, violated appellant's rights to a fundamentally fair, reliable and rational determination of sentence, a fair trial and due process of laws (U.S. Const., 6th, 8th and 14th Amends; Cal. Const., art I, §§ 7, 15 & 17), and the ex post facto clauses of the Constitution. (U.S. Const., Art. I, § 10., cl. 1.) In addition, the trial court's failure to instruct the jury on the proper use of the victim impact evidence independently violated his rights under the Eighth and Fourteenth Amendments.

**B. Applicable Legal Principles**

In California capital cases, victim impact evidence is considered part of the immediate circumstances of the crime and is therefore admissible under Penal Code section 190.3, factor (a). (*People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) This Court has "cautioned, however, 'that allowing such evidence under factor (a) 'does not mean that there are no limits on emotional evidence and argument.'' [Citations omitted.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1286-87.) The prosecution may not introduce irrelevant or inflammatory material that "diverts the jury's attention from its proper role or invites an irrational or purely subjective response." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.)

Although the Eighth Amendment erects no per se bar to the admission of evidence relating to the victim's characteristics and the impact

on the victim's family, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 821.) The admissibility of victim impact evidence must therefore be determined on a case-by-case basis. As Justice Souter explained in his concurring opinion in *Payne:*

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh* [(1989)] 492 U.S. 302, 319-328 [] (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting *California v. Brown* [(1987)] 479 U.S. 538, 545 [](O'Connor, J., concurring)); *Gholson v. Estelle* [(5th Cir. 1982)] 675 F.2d 734, 738 ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). . . . With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case."

(*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 836-837 [conc. opn. of Souter, J.], citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.) Because there are "limits on emotional evidence and argument [,] . . . the trial court must strike a careful balance between the probative and the prejudicial." (*People v. Edwards, supra*, 54 Cal.3d at p. 836.)

### C. The Court's Failure To Exercise Its Discretion in Determining the Admissibility of the Victim Impact Evidence Under Evidence Code Section 352 Was Prejudicial Error, And Violated Appellant's Rights To A Fundamentally Fair, Reliable And Rational Determination Of Penalty

Courts have recognized the importance of screening victim impact evidence before it is presented to the jury. For example, in *State v.*

*Muhammad* (N.J. 1996) 678 A.2d 164, the New Jersey Supreme Court held:

> Before a family member is allowed to make a victim impact statement, the trial court should ordinarily conduct a . . . hearing, outside the presence of the jury, to make a preliminary determination as to the admissibility of the State's proffered victim impact evidence. The witness's testimony should be reduced to writing to enable the trial court to review the proposed statement to avoid any prejudicial content.

(*Id.* at p. 180.) Because of the "potential for prejudice that is inherent in the presentation of victim impact evidence," *Muhammad* further requires the trial court to "weigh each specific point of the proffered testimony to ensure that its probative value is not substantially outweighed by the risk of undue prejudice or misleading the jury." (*Ibid.*) In Oklahoma, the prosecution must file a written Notice of Intent to Produce Victim Impact Evidence, "detailing the evidence sought to be introduced," and the court should hold an in camera hearing to determine admissibility. (*State v. Cargle* (Okla. Crim. App. 1995) 909 P.2d 806,828; in accord, *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891[requiring hearing outside the jury's presence].)

In this case, the trial court overruled appellant's Evidence Code section 352 objection without ever inquiring into what the witnesses would say. Although the court was not required "to provide a detailed and precise description of its weighing process" (*People v. Mickey* (1991) 54 Cal.3d 612, 656), the record here cannot support an inference that the trial court implicitly weighed the probative value of the evidence against its potential prejudicial effect because the court did not know what the witnesses intended to say.

The prosecutor did not make an offer of proof or provide the court with a summary of the witnesses' proposed testimony. Nor did the

prosecutor's Notice of Aggravation provide the information necessary to permit the court to exercise its discretion. The Notice, which was not filed until August 22, 2002, more than a month after the court first denied appellant's section 352 motion, did not describe the proposed testimony but stated only that unspecified "victim impact" evidence would be presented. (2 CT 317-318.) Without knowing the substance of the evidence, the court could not properly exercise its discretion. (Compare *People v. Mickey, supra,* 54 Cal.3d at p. 656 [no procedural error where court reviewed photographs before ruling]; *People v. Crittenden* (1994) 9 Cal.4th 83, 135 [no procedural error where, inter alia, prosecutor described photographs to court before it ruled].)

The victim impact evidence that was admitted without prior scrutiny was detailed, excessive and emotionally-charged. Much of it focused on the emotional impact of the murder on the victims' families, the type of victim impact evidence that "should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice." (*State v. Nesbit, supra,* 978 S.W.2d at p. 981.)

For example, Robert Henderson testified that he was not able to get over his son's death. (9 RT 2071.) "When a child of yours is killed you feel there ought to be something you could do. But you find out shortly thereafter that as a victim there is not much you can do but just sit back and suffer the consequences." (*Ibid.*) In the wake of his son's death, he became unable to focus on his job and gave it up within a year of his son's death; he did not work at all for a while, then took a lower-paying job as a school bus driver. (*Ibid.*)

Mrs. Henderson believed that her son's death caused her other children to move out of state and caused the disintegration of her younger

son's marriage. (9 RT 2064-2065.) The Hendersons became reluctant to let each other out of their sight:

> [Y]ou never have a secure feeling again. And, it puts you in a position where you are probably suspicious of people that you shouldn't be. And it just affects you in every way. It just take your life over. And what you thought was going to be something you could control, no longer are you controlling it.

(9 RT 2072 .) This testimony invited the jury to respond emotionally to the Hendersons's personal sense of powerlessness by taking action on their behalf and imposing a death sentence.

Similarly, Haydee Kassai, the sister and niece of Ingrid Etayo, described in detail the continuing impact of Etayo's death on the family. She testified that her mother wore black for 10 years and continues to take sleeping pills, and that her father became and remains a withdrawn person who writes letters to his dead daughter and says that life no longer has any meaning. (9 RT 1996-1998.) Her sister's death affected her life in many ways:

> Life was never the same. We lived in fear. When I was raising my children, I was always afraid they would not come home. So it has been and it will always be very difficult for us. It totally changed three generations . . . It affected my parent's generation, it affected my generation, and it affected my children's generation.

(9 RT 1997.)

Kassai's daughter Sybelle testified that her aunt's death affected everyone in the family. (9 RT 2058.) Her parents became "very overprotective," and she became paranoid, "always checking to see if someone is following" her. (9 RT 2060.) This feeling has not gone away:

> If I'm at the market, I can have all three kids and a full load of grocery . . . and if somebody walks in and they look weird or they

> look off to me or I get a weird sense, I grab my kids and run, I leave the groceries, I leave everything, I run.

(9 RT 2060-2061.)

Lance Wyatt, the husband of Marti Soto, changed his last name from Buflo to Wyatt because he did not want to give that name to another woman if he ever remarried, which he has not done. (9 RT 1864.) Since her death, his life has been "pretty bad;" he has had "a lot of grief for many years and a lot of loneliness." (9 RT 1866.) He has violent dreams, and nightmares in which Marta does not recognize him or does not want anything to do with him. (9 RT 1866-1867.) He believes the dream relates to his fear that she would never forgive him for leaving her in the desert. (9RT 1867.) He understands intellectually that he had to leave her to try to get help, but his "heart says" he should have stayed. (*Ibid.*)

Mrs. Soto testified that her daughter was "very lovely, a very nice kid" who did not cause her parents any problems. (9 RT 1927.) She loved animals and had many pets. (9 RT 1928.) At one point she wanted to be a veterinarian, but later decided she wanted to teach handicapped children. (*Ibid.*) She was a very giving person who would share her possessions with her friends and give money to the poor. (*Ibid.)* She planned to have many children and promised to bring them to her mother to help raise them. (9 RT 1929.)

For many years after Soto's death, the family lived like hermits. (9 RT 1933.) Her son was "almost crazy" because he could not protect his sister when she needed him; he abandoned his religion, was "very, very angry for a very long time," and "still . . . nobody can talk " to him about his sister. (9 RT 1930.) She abandoned her Catholic faith and her son became withdrawn. The family kept her room exactly as it was until their

home was destroyed in Hurricane Andrew, when they "lost almost every memory" they had. Mrs. Soto testified that she and her husband will never get over their daughter's death. Apparently speaking about the jurors, she explained "[i]f they had children, they know what it is." (9 RT 1932.)

Much of this testimony was highly emotional and diverted the jury from its proper role by inviting a subjective and irrational response. Mr. Henderson's testimony about his feelings of helplessness invited the jury to take action on his behalf. Details about the victims' accomplishments encouraged the jury to compare the lives of the victims and what they might have accomplished with appellant's life. Although this Court has not yet established detailed guidelines about the scope of evidence admissible to describe the victim's character, other jurisdictions have recognized that caution should be used in the "introduction of detailed descriptions of the good qualities of the victim" because such descriptions create a danger "of the influence of arbitrary factors on the jury's sentencing decision." (*State v. Bernard* (La. 1992) 608 So.2d 966, 971.) The Supreme Court of Tennessee has held that such evidence should be limited to a "brief glimpse" of the victim's character. (*State v. Nesbit*, *supra*, 978 S.W.2d at p. 891; in accord, *State v. Clark* (N.M. 1999) 990 P.2d 793, 808 ["victim impact evidence, brief and narrowly presented, is admissible" in capital cases]; *People v. Muhammad, supra,* 678 A.2d at p.180 [evidence should be "factual, not emotional . . . and free of inflammatory references and comments"].)

Evidence regarding the degree of the families' suffering should also be carefully screened. Highly emotional evidence about the severe and longstanding impact of the crimes may be misconstrued by the jury as indicative of a more heinous crime than one where the victim's family

members are emotionally less fragile, or less articulate.

In addition, some of the evidence in this case was clearly irrelevant. For example, Mrs. Soto testified about the fact that her family was forced to flee from Cuba in 1960, and that their home was destroyed by Hurricane Andrew, which occurred in 1992.[29] (9 RT 1927, 1932.) While these unfortunate events were totally unrelated to the death of their daughter, they undoubtedly created further sympathy for the Soto family.

The trial court's failure to exercise its discretion therefore resulted in the erroneous admission of highly emotional and prejudicial victim impact evidence. The prosecutor's extensive and inflammatory comments on this evidence exacerbated the prejudice. The prosecutor concluded his closing argument with an extensive discussion of the victim-impact evidence, summarizing the testimony of family members almost verbatim, and characterizing that testimony in inflammatory terms. He characterized the impact on all the families as a "war" and a "prison" (12 RT 2732), observed that Lance Wyatt was and will be in a "in a cell . . . for the rest of his life, dreaming of his wife who has never forgiven him for running away" (12 RT 2730), and then reviewed in detail the testimony of the family members describing their lives since the killings.[30] The prosecutor's metaphor clearly

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[29]See http://www.nhc.noaa.gov/HAW/english/history.shtml#andrew (National Hurricane Center).

[30] "Mrs. Henderson says for 24 years, quote, it's been hell. Mr. Henderson had to close his business, quit his job, which was a lucrative one, and he became a bus driver for the school district. He says, quote, your heart is torn out." (12 RT 2732.)

"He will never have grandchildren or great grandchildren by his son Jim. So he says so Jim wasn't killed by himself. It was more people killed, (continued...)

[30](...continued)
unquote, meaning my grandchildren and great grandchildren. He can't enjoy Christmas or birthdays or any other holiday." (12 RT 2732-33.)

"Both the Hendersons' other children moved away, left California. Their living son's marriage eventually then divorced [sic], and they attribute it to his closeness to his brother Jim and how he never got over it." (12 RT 2732.)

"Ingrid's mother, since her murder, still has to take sleeping pills every night in order to sleep. She wore black for 10 years. She talks to Ingrid's picture." (12 RT 2734.)

"Her father is no longer the outgoing guy he was. He writes every year, on the anniversary of her murder, he writes Ingrid a letter telling her how he misses her. He says, quote, I have lost my daughter. Nothing else means anything." (*Ibid.*)

"Mrs. Sprague [Etayo's sister] says that everything has been affected since the murder of her aunt. She is paranoid. She goes into the market. If a guy looks at her wrong, she will simply leave the stuff she's been buying and the cart, grab her children, and run." (12 RT 2733.)

"She says that her parents became paranoid after the death of Ingrid. They were so strict that they would come unglued if she was back even an hour late from something she was at." (12 RT 2733-34.)

"She [Etayo's niece] says, quote, there is just -- it is empty. There is always the loss. You always feel it. It never really goes away. And she treats her children the same way she was treated based on the murder of her aunt." (12 RT 2734.)

"Mrs. Kassai refers to the pain you carry forever. She says that the murder of Ingrid has, quote, totally changed three generations, her parents' generation, her own, and her daughter's.." (12 RT 2734-35.)

"For years Mr. and Mrs. Soto didn't go to mass or take the

(continued...)

implied that a life sentence for appellant could not possibly be sufficient, because it was no worse than what the family members experienced. After a comprehensive review of the victims' characteristics, talents and achievements,[31] the prosecutor speculated about what they might have

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[30](...continued)
Sacraments. They lived, according to her, in a cave, like hermits." (12 RT 2735.)

"The Soto's left her room exactly as it was when she died and left it to the day the Hurricane Andrew destroyed their house. Carlos, her brother, still cannot even talk about it." (12 RT 2735.)

[31]"Jim Henderson was interested in the theater, acting, directing. He wrote poetry. He was loved by his fellow students. They put on a hell of a memorial for him. He was going with his fiancee. When they were married, he was going to join the Peace Corps." (12 RT 2732.)

"[Ingrid Etayo] was, quote, an affectionate, loving person, a family person. She was always on her side in the fights with her sister. [¶] Ingrid loved music, dancing, family. If there was music on and just Mrs. Sprague, Sybelle, in the room or Sybelle and her sister, she would dance as if they were in a disco or a ballroom. She gave Sybelle her first album, the Beach Boys album. Ingrid Etayo will never enjoy music again, but I bet David Murtishaw does" (12 RT 2733.)

"Mrs. Kassai . . . [d]escribes her sister, her younger sister by 12 years, whom she is almost a mother to, quote, like sunshine coming through a window. Ingrid graduated from the University of Tampa. She was going to be married in December. She was, quote, dynamic, full of dreams." (12 RT 2734.)

"And, finally, Marti Soto. A tiny girl who wanted to teach handicapped children. Who told her mother that she wanted her to help raise her children just the way her mother had raised her; that she wasn't losing a daughter, that she was gaining grandchildren. She was 21. [¶]
(continued...)

accomplished, urging the jury to consider

> [t]he grandchildren and great grandchildren [who] will never live. [¶] The poetry that won't be written by Jim Henderson. Movies that haven't been made by Lance Wyatt . . . Consider the handicapped children that weren't helped. The plays and movies that won't be produced.

(12 RT 2735-2736.) This argument improperly invited the jury to compare the potential worth of the victims' lives against appellant's life.

Under these circumstances, the erroneous admission of this evidence violated appellant's right to a fair and reliable capital sentencing hearing, to a penalty determination based on reason rather than emotion, and denied him due process by making the penalty trial fundamentally unfair. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17; see *Tuilaepa v. California* (1994) , 512 U.S. 967; *Payne v. Tennessee*, *supra*, 501 U.S. 808; *Booth v. Maryland* (1987) 482 U.S. 496.) Because the prosecution cannot show that these violations were harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), the judgment must be reversed.

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[31](...continued)
The mother says she was the youngest and only girl. Heaven sent. Loved animals. Had a whole bunch of them. She was so generous and ignored her parents. Remember Mrs. Soto saying one time she went to dinner and she gave all her money to an old begger [*sic*] lady. And her mother remonstrated with her why did you do that. She said my father knows how to make money and other people need it." (12 RT 2735.)

### D. The Admission of Victim Impact Evidence Violated the Ex Post Facto and Due Process Clauses of the Federal Constitution

Before trial, appellant objected to the admission of any victim impact evidence on the ground that this type of evidence was not admissible at the time of the killings in 1978, and that applying this Court's holding in *People v. Edwards, supra,* 54 Cal.3d at pp. 835-836, would violate the Ex Post Facto Clause and the Due Process Clause of the Fourteenth Amendment. (2 CT 331-334.) The court overruled this objection. Appellant recognizes that this Court has rejected similar arguments in other cases. (See, e,g., *People v. Roldan* (2005) 35 Cal.4th 646, 732.) In order to preserve this claim for federal review, appellant requests the Court to reconsider those decisions. (*People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

### E. The Trial Court's Failure to Instruct on the Proper Use of Victim Impact Evidence Was Reversible Error

Under settled California law, the trial court is responsible for insuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The trial court's duty includes instructing sua sponte on those principles of law openly and closely connected with the evidence presented and necessary to the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Other states require the trial court to instruct the jury on the appropriate use, and admonish against the misuse, of victim impact evidence. "Allowing victim impact evidence to be placed before the jury

without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Kosovich* (N.J. 2001) 680 A.2d 649, 661.) The highest courts in the states of Georgia, Oklahoma, New Jersey, and Tennessee therefore require the trial court to instruct the jury on how to use the victim impact evidence. (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842; *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829;[32] *State v. Kosovich, supra,* 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892.) In addition, the Pennsylvania Supreme Court has recommended the delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

The nature and extent of the family members' testimony and the prosecutor's lengthy and inflammatory argument in this case created a very real danger that the jurors' emotions would overcome reason, preventing them from making a rational penalty decision. The trial court therefore had a sua sponte duty to inform the jury that it could consider this evidence in determining the appropriate penalty because it shows that the victims, like defendant, were unique individuals, but that the law does not deem the life of one victim more valuable than another victim. The court should have also cautioned the jury to limit their consideration of this evidence to a rational inquiry into appellant's culpability, not as an emotional response to the evidence. (See *Commonwealth v. Means, supra,* 773 A.2d at p. 159.)

In addition, because of the "possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on the question" (*State v. Kosovich, supra,* 776 A.2d at p. 177), the court

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[32]The portion of *Cargle* limiting the admissibility of photographs of the victims while alive was superceded by statute. (*Coddington v. State* (Okla.Crim.App. 2006) 142 P.3d 437, 452.)

should have admonished the jurors not to consider in any way what they may have perceived to be the opinions of the victims' survivors or any other person in the community regarding the appropriate punishment. (See *Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn.2.)

Finally, in light of the irrelevant aspects of the evidence discussed above, the court should have cautioned the jury "that in assessing the victim impact evidence it could 'consider only such harm as was directly caused by defendant's act.'" (*People v. Panah* (2005) 35 Cal.4th 395, 495 [finding no error in admission of victim impact evidence, in part because of additional instruction].)

In *People v. Ochoa* (2001) 26 Cal.4th 398, 445, this Court addressed a different proposed limiting instruction, holding that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, the substance of which was also given in this case.[33] However, this instruction does not address the points discussed above. It does not address victim impact evidence, tell the jury why it was introduced, caution against an irrational decision, or warn the jurors not to draw any inference about the family members' opinions about the appropriate punishment.

Moreover, the terms "bias" and "prejudice" in the instruction that was given suggest racial or religious discrimination, not the intense anger or sorrow that victim impact evidence is likely to produce. There is no basis on which to infer that the jurors would recognize these highly understandable emotions as being covered by the reference to bias and prejudice. The

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[33]The court instructed: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings." (12 RT 2775.)

terms "public feeling" and "public sentiment" are reasonably construed to refer to the general public outside the courtroom, not the family members who have testified at trial. And nothing in this instruction told the jury that in determining penalty, it would be improper to compare the worth of the victims' lives to the life of appellant.

The failure to deliver an appropriate limiting instruction violated appellant's rights to a decision by a rational and properly instructed jury, his right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

### F. The Erroneous Admission of Victim Impact Evidence and the Trial Court's Failure to Instruct Regarding the Proper Use of that Evidence Violated Appellant's Rights Under the Eighth and Fourteenth Amendments

In this case, the challenged victim impact evidence included testimony about the victims and the impact of the killings that were not known and could not have been foreseen by appellant, evidence about events that occurred many years after the crimes, and the continuing emotional impact on the families more than 20 years later. Such evidence does not fall within any reasonable or common-sense definition of the phrase "circumstances of the crime." Therefore, as applied, former Penal Code section 190.3, factor (a), is unconstitutionally vague and overbroad, and creates the risk of an arbitrary and irrational judgment of death. (U.S. Const., 8th & 14th Amends; Cal. Const., art I, §§ 7, 15, 16 & 17.) Appellant recognizes that this Court has rejected similar arguments in other cases, including *People v. Brown* (2004) 33 Cal.4th 382, 396-398, but requests the Court to reconsider those decisions.

### G. Appellant's Death Judgment Must Be Reversed

The erroneous introduction of inflammatory and constitutionally irrelevant victim-impact evidence, the prosecutor's reliance on that evidence in argument, and the court's failure to instruct on the proper use of that evidence compels reversal of the judgment. As shown earlier in this brief, this a was a close case (See Argument I, *ante*, at pp.49-51.) Allowing the jury to rely on the victim-impact evidence without limitation rendered appellant's trial fundamentally unfair. Moreover, because these errors violated appellant's rights under the Eighth and Fourteenth Amendments, reversal is required under *Chapman v. California* (1967) 386 U.S. 18, 24.

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## V

## REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may require reversal. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 436-437 [the cumulative effect of errors, none of which individually are significant, could be collectively significant]; *People v. Hill* (1998) 17 Cal.4th 800, 844-847 [reversing death sentence due to cumulative error]). Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476, quoted in *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.) Reversal is thus required unless the cumulative effect of all of the errors was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The errors in this case combined to deprive appellant of a reliable, non-arbitrary determination of penalty, and a fundamentally fair trial, in violation of the Eighth and Fourteenth Amendments. The case in aggravation was improperly inflated by the erroneous admission of irrelevant and inflammatory victim-impact evidence, the prosecutor's

comments on that evidence and the court's failure to instruct the jury regarding its proper use, as well as by the court's failure to instruct the jury not to consider the prior death sentences in this case as a reason to impose death. In addition, the case in mitigation was improperly restricted by the court's refusal to instruct the jury about appellant's good faith belief in the need to defend himself, which prevented the jury from giving meaningful effect to that mitigating evidence. Finally, the jury's determination of penalty was skewed by the court's erroneous refusal to instruct on the scope of their discretion, and their sense of responsibility for their verdict was unconstitutionally undermined by the court's erroneous failure to limit the jury's consideration of the prior appellate reversals.

Thus, if this Court concludes that no individual error is reversible, this Court must vacate the death judgment because the cumulative effect of the errors was not harmless. Because it cannot be shown beyond a reasonable doubt that the errors that infected the penalty retrial had no effect, either individually or collectively, on the death verdict, reversal is required. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.)

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## VI

## CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many sections of the 1977 death penalty are the same as the 1978 statute, and share the same federal constitutional defects. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

### A. The Broad Application of Section 190.3 Subdivision (A) Violated Appellant's Constitutional Rights

Former section 190.3, factor (a), directed the jury to consider in aggravation the "circumstances of the crime." (Former CALJIC No. 8.88.1; 12 RT 2784.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite

circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the impact of the victim's death, the method of the homicide, the motive for the homicide, the time of the homicide, and the location of the homicide. In the instant case, the prosecutor repeatedly argued that all of the circumstances of the offense, as well as the impact of the victims' death on their families and the community,[34] were aggravating factors. (12 RT 2667-2705; 2669, 2730-2736.)

This Court has never applied any limiting construction to factor (a) under either the 1977 or 1978 law. (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, the 1977 statute violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permitted the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section

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[34] See Argument IV, *ante*.

190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

### B. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

#### 1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

Neither the 1977 nor the 1978 statutes require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was told that "neither side has a burden of proof." (12 RT 2666.)

*Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) ___ U.S. ___, 127 S.Ct. 856, 863-864, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings, including (1) that aggravating factors were present, and (2) that the aggravating factors were so substantial as to make death an appropriate punishment. (See Argument I, *ante*.) Because these additional findings were required

before the jury could impose the death sentence, *Ring*, *Apprendi, Blakely* and *Cunningham* require that each of these findings be made by the jury beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this

holding.

### 2. Some Burden of Proof Is Required

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural sentencing protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

The instruction delivered in this case – that neither side has the burden of proof (12 RT 2666) – failed to provide the jury with the guidance legally required for administration of the death penalty to meet minimum constitutional standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

### C. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

It violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and that application of the reasoning of *Ring* reasoning mandates jury unanimity under the overlapping principles of the Fifth, Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital

defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the federal constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

### D. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307; the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens, supra*, 462 U.S. at p. 879).

Nothing in the instructions delivered in this case informed

appellant's jury of its responsibility to make this ultimate determination. (12 RT 2783-87.) As a result, appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated.

This Court has previously rejected arguments that the jury must explicitly be informed of its duty to determine whether death is the appropriate penalty (see, e.g., *People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges this Court to reconsider those rulings

### E. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 5th & 14th Amends.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const., 14th Amend.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital

cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

### F. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

### G. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

#### 1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme," "reasonable" and "substantial" (12 RT 2784-85) acted as barriers to the consideration of mitigation in violation of the Fifth,

Sixth, Eighth, and Fourteenth Amendments to the federal constitution. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

### 2. The Failure to Delete Inapplicable Sentencing Factors

Several of the sentencing factors set forth on which the trial court instructed were inapplicable to appellant's case. (12 RT 2784-85 ["whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;" "whether or not the defendant acted under extreme duress or under the substantial domination of another person"].) Appellant specifically objected to instructions on inapplicable factors, but the court instructed on all of the factors. (12 RT 2578, 2784-85.) The court's instruction on inapplicable factors likely confused the jurors and prevented them from making any reliable determination of the appropriate penalty, in violation of appellant's constitutional rights. (*Monge v. California, supra,* 524 U.S. at p. 732, citing *Lockett v. Ohio, supra*, 438 U.S. 586, 604.)

Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

### 3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (12 RT

or that violate equal protection or due process. (See *Solem v. Helm* (1983) 463 U.S. 277, 290-292.) For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

## I. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the equal protection clause of the Fourteenth Amendment to the federal constitution. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Griffin v. Illinois* (1956) 351 U.S. 12, 28-29.)

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; California Rules of Court, rule 4.42, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has previously rejected these equal protection arguments. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider that ruling.

### J. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court numerous times has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments to the federal constitution, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment (see Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" at <http://web.amnesty.org> [as of 5/23/2007]) and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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## CONCLUSION

For all of the reasons stated above, the sentence of death in this case must be reversed.

DATED: September 17, 2007

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

**(Cal. Rules of Court, Rule 8.630(b)(2))**

I, Gail R. Weinheimer, am the Senior Deputy State Public Defender assigned to represent appellant David Leslie Murtishaw in this automatic appeal. I instructed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 29, 686 words in length.

Dated: September 17, 2007

Gail R. Weinheimer

GAIL R. WEINHEIMER
Attorney for Appellant

## DECLARATION OF SERVICE

Re: People v. DAVID LESLIE MURTISHAW No. S110541

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main St., 10th Floor, San Francisco, California 94105. I served a true copy of the attached:

**APPELLANT'S OPENING BRIEF**

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Each said envelope was then, on September 17, 2007, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on September 17, 2007, at San Francisco, California.

Glenice D. Fuller
DECLARANT