IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DAVID LESLIE MURTISHAW,** Defendant and Appellant.	S110541 **CAPITAL CASE**

Kern County Superior Court No. SC019333A
The Honorable Roger D. Randall, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

A. Introduction

This is an appeal from a penalty phase retrial. It was appellant David Leslie Murtishaw's third penalty trial for his convictions for murder based on the deaths of three young people and injury to a fourth person in the Mojave Desert in 1978. All three penalty phase trials have resulted in juries deciding that appellant should be sentenced to death.

After the first trial, a jury found appellant guilty of three counts of first degree murder (Pen. Code, § 187) and one count of assault with intent to commit murder (Pen. Code, § 217 [repealed 1981]); found true an allegation that appellant had personally used a firearm (Pen. Code, § 12022.5); and found true the alleged special circumstance of multiple murder (former Pen. Code, § 190.2). The jury fixed the punishment at death. This Court affirmed the judgment of guilt. The Court reversed the sentence of death. (*People v. Murtishaw* (1981) 29 Cal.3d 733.)

There was a penalty phase retrial in 1983. Again, a jury decided that the penalty should be death. This Court affirmed the judgment. (*People v. Murtishaw* (1989) 48 Cal.3d 1001 [*Murtishaw II*].) The United States District Court for the Eastern District of California denied appellant's petition for writ

of habeas corpus. The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment as to the death sentence. (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926.) The death sentence was vacated. (1 CT 2.)

B. The Judgment Now On Appeal

A third penalty phase trial took place before a jury in 2002. The jury was sworn on August 22, 2002. (2 CT 319.) The jury was advised that appellant had already been found guilty and convicted of three counts of first degree murder and that the special circumstance of multiple murder had been found true. (1 RT 184-185; 12 RT 2783; 2 CT 432 [instruction]). The only question before the jury was the appropriate penalty. (2 CT 408, 432.) On September 6, 2002, the jury decided that the penalty should be death. (2 CT 408; 13 RT 2882-2883.)

Appellant filed a motion for a new trial (2 CT 506-518) and a motion to modify the verdict (2 CT 519-524). After a hearing on October 4, 2002, the trial court denied the motions and imposed a sentence of death for each of the three counts of murder. (2 CT 549-551; see 13 RT 2910-2911.) The court sentenced appellant to the upper term of four years imprisonment for assault with intent to commit murder. (2 CT 550; 13 RT 2911.) The court sentenced appellant to an additional term of two years imprisonment for the Penal Code section 12022.5 firearm enhancement. (2 CT 550; 13 RT 2911.) The court stayed the determinate sentences. (2 CT 550; 13 RT 2911.)

Appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. The Penalty Phase Retrial Evidence of the Crimes

1. Wyatt's Testimony

The prosecution presented evidence of the circumstances of the crimes primarily through the surviving victim, Lance Wyatt.[1/] In April 1978, Wyatt was a beginning film student at the University of Southern California. (8 RT 1746.) He lived in Los Angeles with his wife, 21-year-old Marti Soto. (8 RT 1745; see 9 RT 1926.) Soto was a student at Pepperdine University. (8 RT 1746.)

Wyatt was making a short film as an assignment for one of his classes. (8 RT 1747.) He had recruited Soto and a friend, 24-year-old Jim Henderson, to be actors. (8 RT 1754, 1765-1766; see 9 RT 2063.) On Saturday, April 8, 1978, Wyatt and Soto picked Henderson up at his school, Laverne College. (8 RT 1747.) Their attempts to film at Joshua Tree that day were foiled by rain. (8 RT 1747-1749.) They decided to try again the next day, and Wyatt and Soto took Henderson back to their apartment with them to spend the night. (8 RT 1749.)

That night, Ingrid Etayo came over to visit Wyatt and Soto. (8 RT 1749.) They were all friends from high school in Venezuela.[2/] (8 RT 1746.) Etayo, who was 22 years old, attended college in Florida, but was visiting in California. (8 RT 1749.) Etayo told the others that she wanted to help them with the film the next day. (8 RT 1749.)

The next day, Sunday, April 9, 1978, Wyatt learned that it was still raining at Joshua Tree, and decided to try the Mojave Desert area around

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1. Lance Wyatt had changed his name. At the time of the murders and the first two trials, his name was Lance Buflo. (8 RT 1745,1864.)

2. Wyatt's father worked for the Department of State. (8 RT 1746.)

California City. (8 RT 1750.) Wyatt drove into the desert with Soto, Henderson, and Etayo in his black and white 1974 Chevrolet. (8 RT 1750.) At about 11:30 or 12:00, they stopped to begin filming a scene. (8 RT 1752.) They unloaded the car, laid out a blanket for the props and for sitting on, and got to work. (8 RT 1752-1754.)

The short film was about a character, played by Henderson, who was stranded in the desert and taunted by a figure, played by Soto, representing the inevitability of his own death. (8 RT 1757.) Wyatt began with a scene in which Henderson's character drove into the desert, ran out of gas, and began to walk off into the desert with a gas can.[3/] (8 RT 1755.) While they were filming, the students heard six to ten shots fired over their heads. (8 RT 1754-1755.) It was not uncommon for people to come to the desert to shoot (see 8 RT 1686), so they just honked the horn to alert the shooter that people were in the area and resumed filming. (8 RT 1755.)

After several takes of the scene, two men later identified as appellant and his brother-in-law, Greg Laufenberger, appeared on the road walking from the south. (8 RT 1761.) Both men carried rifles, and appellant carried a partly-full six-pack of beer by an empty plastic ring. (8 RT 1761.) Wyatt and Henderson decided that they would ask the men not to get too close, because no other people were supposed to be in the film. (8 RT 1761.) Henderson approached them, then walked with them to the car where Wyatt was. (8 RT 1762.)

Appellant told Wyatt and Henderson that he and Laufenberger had been in Los Angeles drinking beer, had gotten bored, and had decided to come to the desert. (8 RT 1762.) Appellant said that his car had broken down. (8

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3. At appropriate points during Wyatt's testimony, the unedited film from that day was played for the jury. (See 8 RT 1757, 1759, 1766, 1775, 1782.)

RT 1762.) He thought the problem was the starter. (8 RT 1762.) He asked Wyatt and Henderson if they could give him a ride to a gas station. (8 RT 1762.) Wyatt told him that they could, but not until much later because he was working on his film. (8 RT 1762.) Appellant and Laufenberger walked away to the north. (8 RT 1763.)

Wyatt watched them leave and wondered whether he should continue filming. (8 RT 1763-1764.) Wyatt did not feel comfortable having appellant and Laufenberger around after talking to them, observing the beer, and hearing the shots fired close to them. (8 RT 1763-1764.) Soto noticed his hesitation and came over to talk with him. (8 RT 1764.) Wyatt told Soto and Henderson that "I thought we should leave, that I didn't -- I just didn't like the looks of it." (8 RT 1764.) Soto and Henderson thought Wyatt was overreacting. (8 RT 1764.) Soto reminded Wyatt that he was behind schedule on his film class assignment. (8 RT 1764.)

They decided to stay, and Wyatt and Henderson finished filming the scenes with the car. (8 RT 1764.) The four students then moved over to a wash about 300 feet away. (8 RT 1764-1765.) Wyatt filmed some scenes in which Soto wore a dark hooded bathrobe and portrayed death following Henderson's character. (8 RT 1765-1766.)

At about 3:30 p.m., Soto and Etayo drove to California City to pick up some lunch. (8 RT 1767.) On their way to the car, the women saw appellant and Laufenberger. (8 RT 1779.) Appellant again asked for a ride, but Soto lied and told him they were not going to town. (8 RT 1779.)

While Soto and Etayo were gone, Wyatt and Henderson worked on a scene in which Henderson's character became frustrated and exhausted and collapsed in the desert. (8 RT 1768.) Appellant and Laufenberger reappeared to the east, still carrying rifles. (8 RT 1767-1768.) Appellant called out that they did not want to disturb the filming, but just wanted to watch for a while.

(8 RT 1767-1768.) They sat down on the edge of the wash. (8 RT 1768.)

Wyatt became nervous about the presence of appellant and Laufenberger. (8 RT 1769.) He walked over to speak with them, to "try and get a feeling for what they were about . . . ." (8 RT 1769.) To make conversation, Wyatt asked appellant and Laufenberger about their shooting. (8 RT 1769.) Laufenberger displayed his rifle, an old pump action .22. (8 RT 1769.) At the conclusion of this short conversation, appellant followed Wyatt to the blanket about 30 feet away where Henderson sat with the props. (8 RT 1769.)

Wyatt prepared to film another sequence. For this scene, he had rented a revolver from Paramount Studios. (8 RT 1770.) Wyatt got the revolver out and loaded it with blanks. (8 RT 1770.) Meanwhile, appellant was telling Wyatt and Henderson about his car. (8 RT 1770.) Appellant commented that his wife might have to come pick him up because he could not get his car started. (8 RT 1770.) Appellant asked Wyatt whether he made any money making films. (8 RT 1771.) He offered Wyatt and Henderson drinks from his beer can. (8 RT 1771.) At this point, Wyatt noticed a "fairly strong odor" of beer on appellant, but appellant's speech was lucid, coherent and responsive. (8 RT 1771, 1828.)

Wyatt asked appellant about his rifle, and appellant handed it to him. (8 RT 1772.) It was a semi-automatic rifle, and appellant said that the clip held ten rounds. (8 RT 1772.) Appellant commented that he would like to buy an illegal "banana clip," which would hold more rounds. (8 RT 1773.) Wyatt fired a shot into the air. (8 RT 1771.)

Wyatt turned back to his filming. (8 RT 1774.) Appellant got up and said that he would look for Laufenberger. (8 RT 1775.) Wyatt saw the two of them sit down on the edge of the wash to watch again. (8 RT 1775.)

Wyatt and Henderson worked on a scene in which Henderson's character woke up in the desert to find a revolver lying beside him. (8 RT 1775.) Wyatt wanted it to appear that Henderson picked up the revolver and the revolver discharged on its own. (8 RT 1775.) They did several takes, then appellant and Laufenberger approached. (8 RT 1777.) Appellant asked again if they could give him a ride and asked how long it would be. (8 RT 1777.) Wyatt said that he would give him a ride, but that he had to finish filming, and it would still be a while. (8 RT 1777.) Appellant said that he and Laufenberger would go to the highway and see if they could hitch a ride to town. (8 RT 1777.) Appellant and Laufenberger walked off to the south, and Wyatt and Henderson got back to work. (8 RT 1777-1778.)

Shortly after that, Soto and Etayo returned. (8 RT 1778.) The four students sat down and had lunch. (8 RT 1779.) Soto told Wyatt about their encounter with appellant. (8 RT 1779.)

After lunch, Wyatt filmed some scenes with Soto and Henderson. (8 RT 1780-1783.) In one of them, Soto, portraying death, walked up to Henderson's character and threw the revolver down next to him as he lay unconscious in the desert. (8 RT 1780.) In another, Soto danced around a burning bush, mocking Henderson's character's religious beliefs. (8 RT 1781-1783.) Henderson's character fired on Soto's character two or three times, to no effect. (8 RT 1781-1783.) Finally, Wyatt sat down and reviewed his story boards for 10 or 15 minutes. (8 RT 1782, 1784.) They were ready to go. (8 RT 1785.)

Wyatt, Soto, Henderson, and Etayo began to gather up the props, equipment, and other things and carry them to Wyatt and Soto's car. (8 RT 1785.) The prop revolver was packed away in a satchel with the blanks. (8 RT 1785-1786.) Henderson had just put his first load down at the rear of the car and turned to help Soto and Wyatt when they heard one or two shots ring out.

(8 RT 1786-1788.)

Henderson called out that he had been shot. (8 RT 1787-1788.) Wyatt saw that the right side of his white shirt was soaked in blood. (8 RT 1789.) Then there was a volley of shots and Wyatt heard Soto's body hit the ground. (8 RT 1789-1790.) The other three ducked down behind the car. (8 RT 1791.) Wyatt looked under the car and saw Soto lying on her side. (8 RT 1791.)

When there was a pause in the shooting, Wyatt, Henderson and Etayo ran to Soto. (8 RT 1791.) Wyatt and Henderson pulled her to the passenger side of the car. (8 RT 1792.) Soto began to vomit, and Wyatt tried to prop her head up so that she would not choke. (8 RT 1792.) Wyatt testified: "And then I noticed the blood on the back of her head. And I started screaming. . . . I kind of lost it." (8 RT 1792.) Etayo screamed and called out that people were hurt and whoever was shooting should stop. (8 RT 1793.)

There was another volley of shots. (8 RT 1793.) Some of these hit the car and car windows. (8 RT 1793.) After those shots stopped, Henderson and Wyatt went to the spot where Soto had fallen to try to find the car keys. (8 RT 1794.) Equipment and bags were lying where they had been dropped, and Wyatt and Henderson rummaged through everything trying to find the keys. (8 RT 1794-1795.) After looking for a short time, Wyatt returned to Soto's side while Henderson continued to search. (8 RT 1795.)

Shots rang out again, closer. (8 RT 1795; see 8 RT 1799.) Henderson, Etayo, and Wyatt gathered on the ground next to the car beside Soto as bullets hit the car and the ground around them. (8 RT 1795-1786.) Henderson told the others that they were all going to be killed and that he would run for help. (8 RT 1795-1796.) But five or six shots were fired at Henderson as he ran across the dirt road, and "he just dropped right there. And I heard all the air come out of him, just one big breath." (8 RT 1796.)

Wyatt testified that, at that point, "I realized that I would have to make a decision that I didn't want to make." (8 RT 1827.) He did not want to leave his wife, Soto, who was badly hurt but still alive. (8 RT 1827.) But appellant was "so close," and he knew they had to "do something right now. Or that's the end" for the three of them that were still alive. (8 RT 1827.) From his position on the ground next to the car, Wyatt looked through the two rear wheels. (8 RT 1797.) As he did so, he saw appellant rise up from behind some bushes. (8 RT 1797.) Appellant raised his rifle to his shoulder, pointed it at Wyatt's face, and began firing. (8 RT 1797-1798.) As he ducked, Wyatt heard the bullets hit the car and the ground around him. (8 RT 1798.) One bullet struck Wyatt in the hand. (8 RT 1797-1798.)

Wyatt quickly told Etayo that appellant was very close and that they would have to run. (8 RT 1799.) He told her that they should each run in a different direction. (8 RT 1799.) Wyatt began to run, but tripped and fell about 100 feet away. (RT 1800.) He landed on his injured hand, and tore open the wound. (8 RT 1800.) Wyatt rolled over on his back and saw appellant come out from behind the bushes. (8 RT 1800-1801.)

Appellant approached the car, holding the rifle at his waist and pointed at the car. (8 RT 1801-1802.) Etayo still sat there beside Soto. Etayo saw Wyatt, and yelled at him to run. (8 RT 1803.) Wyatt ran another 100 feet, then crouched behind some shrubs and looked back toward the car. (8 RT 1803.) He saw appellant standing over Etayo with his rifle pointed at her, and heard them yelling at each other. (8 RT 1803-1804.) Wyatt could make out the word "car" two or three times. (8 RT 1804.)

Wyatt had not seen Laufenberger, and feared that he might be circling around them. (8 RT 1804.) Wyatt ran again. (8 RT 1804.) As he ran, he heard about 10 shots fired in rapid succession. (8 RT 1804.) He knew that Etayo was dead. (8 RT 1804.)

Wyatt reached Highway 14 and desperately tried to flag down a car. (8 RT 1805.) A young couple driving a black van picked him up. (8 RT 1806.) Wyatt told them that his wife and some people had been shot, and they drove south on Highway 14 toward Mojave. (8 RT 1806.) After a short distance, Wyatt saw appellant and Laufenberger standing beside the road without the rifles trying to hitch a ride. (8 RT 1806.) Wyatt immediately told the couple not to stop and pick them up. (8 RT 1806.) Then he asked them to try to get a good look at them because they were responsible for the shooting. (8 RT 1806-1807.)

They reached a gas station in Mojave, and Wyatt asked the couple to call the police. (8 RT 1807.) The man said that he saw a patrol car across the street. (8 RT 1807.) Wyatt, however, began vomiting and headed for the bathroom while the man went across the street to contact the police. (8 RT 1807.)

Paramedics arrived and it was arranged that Wyatt would get into an ambulance to try to find the scene of the shooting and the patrol car would follow. (8 RT 1808.) Wyatt had not driven to the place where he was filming by Highway 14, he did not know the area well, and it was getting dark, so it took some time. (8 RT 1808-1809.) As they searched, they came upon a green or gold Plymouth. (8 RT 1809-1810.) Wyatt and the officers believed that the car must be appellant's car. (8 RT 1810.) At that point, they knew they were close to the scene, and the paramedics decided it was time to take Wyatt to the hospital. (8 RT 1810.)

2. Discovery Of The Scene

The Kern County Sheriff's Department had called for assistance in locating the victims. (8 RT 1665.) Deputy Sheriff Byron Gunnell participated in the search. (8 RT 1665-1667.) First, he saw appellant's car in a large washout area. (8 RT 1668.) There were skid marks indicating that the driver

had approached the wash at a high rate of speed. (8 RT 1668.) He noticed several beer cans littered around the car. (8 RT 1670.) There were several bullet holes in the car. (8 RT 1670.)

Deputy Gunnell continued his search. (8 RT 1670.) At about 8:00 p.m., he came upon Wyatt and Soto's car. (8 RT 1670-1671.) He immediately saw Henderson's body. (8 RT 1673-1674.) He checked for signs of life, but there were none. (8 RT 1674.) Deputy Gunnell approached the car, and found Etayo's body. (8 RT 1676-1677.) He observed numerous bullet holes in her body and no signs of life. (8 RT 1677.)

Deputy Gunnell had been hearing a scratching sound, and looked for the source of it. (8 RT 1675, 1677-1678.) This turned out to be Soto. She was lying on her stomach on the passenger side of the car, "clawing in the dirt, attempting to move, trying to crawl." (8 RT 1678.) Deputy Gunnell saw that Soto had "a large hole in the back of her head" and that there was "a lot of blood." (8 RT 1678.) A great deal of dirt and debris had accumulated in her mouth, and she was having difficulty breathing. (8 RT 1678-1679.) Deputy Gunnell cleared the debris from her mouth with his finger. (8 RT 1679.) He called for an ambulance. (8 RT 1681.) Then he covered Soto with a blanket to keep her from going into shock and tried to comfort her. (8 RT 1679, 1681.)

Soto was pronounced dead at Antelope Valley Hospital. (8 RT 1886.)

B. The Investigation

1. The Autopsies

Medical examiner Lakshmanan Sathyavagiswaran examined Marti Soto's body.[4/] (9 RT 1886.) Soto had died of a single gunshot wound to the back of the head that caused brain injury. (9 RT 1886.)

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4. The medical examiner referred to Marti Soto as "Marta Buflo" in his testimony.

Dr. Sathyavagiswaran also explained the results of the autopsies performed on James Henderson and Ingrid Etayo, as the doctor who had performed them was deceased by the time of this trial. (9 RT 1887.) Henderson had sustained six gunshot wounds. (9 RT 1895-1899.) One bullet entered his back, went through his heart and left lung, and exited his chest. (9 RT 1894.) Two other bullets entered Henderson's back, caused injury to the right lung, and came to rest in the upper left chest. (9 RT 1897.) All three of these were fatal wounds. (9 RT 1901.)

Another bullet entered Henderson's right flank and was recovered behind the breast plate. (9 RT 1896.) This one was potentially fatal. (9 RT 1901.) One bullet entered Henderson's left arm and was recovered in the muscle of the arm (9 RT 1898) and one bullet entered his left thigh and exited the body. (9 RT 1899.)

Ingrid Etayo suffered 10 or 11 gunshot wounds. (9 RT 1902-1912.) One bullet entered her chest, went through the liver, heart, and left lung, and was recovered in front of the left scapula. (9 RT 1907-1908.) One entered Etayo's abdomen, went through the liver, and was recovered in the left posterior chest. (9 RT 1908-1909.) One bullet entered at Etayo's lower lip, passed through the jaw and the base of the skull, and was recovered in the brain. (9 RT 1909.) All three of these were fatal wounds. (9 RT 1908-1909, 1911.)

One bullet entered Etayo's neck on the right and exited the back of her neck. (9 RT 1907.) Three bullets entered her right arm and exited the body. (9 RT 1902-1903.) A fragment of a bullet was recovered from one of these. (9 RT 1903.) Two bullets entered Etayo's left arm: one entered the back of the left forearm and exited the front of the left forearm (9 RT 1903) and the other entered the front of the left arm and was recovered in the elbow area (9 RT 1905). One bullet entered the back of Etayo's left leg and was recovered near

the ankle. (9 RT 1905-1906.) One bullet caused a superficial defect on her head. (9 RT 1911-1912.)

2. The Rifles And Bullets

Because it was dark when the crime scene was found, officers renewed their search the morning after the murders. (8 RT 1683, 1724.) Officers found two .22 rifles just east of where the Plymouth had been abandoned. (8 RT 1683-1684; 9 RT 1855-1856.) One was a Ruger .22 caliber rifle, model 1022. (8 RT 1697, 1734-1735.) A Huntsmaster .22 caliber rifle was found about 10 to 20 feet away. (9 RT 1856.)

The Ruger was a semiautomatic rifle. (8 RT 1696.) It had a magazine or clip that detached for loading. (9 RT 1856.) The magazine held 10 rounds. (8 RT 1696.) The rifle automatically chambered a new round each time the trigger was pulled. (9 RT 1858.)

The Huntsmaster, on the other hand, was a pump-action rifle. (9 RT 1856.) Bullets were dropped individually into the magazine. (9 RT 1856.) The magazine held 15 shells. (8 RT 1697.) Each time the rifle was fired, it was necessary to operate the pump to eject the spent cartridge and chamber another round. (9 RT 1856-1857.)

The bullets that were recovered from the victims' bodies were submitted to a firearms examiner. (8 RT 1694, 1696.) Ten of these were in a condition that allowed examination and comparison. (8 RT 1711-1712.) The markings on all ten matched the markings on bullets test-fired from the Ruger. (8 RT 1696, 1705-1706, 1711-1712.) They could not have been fired from the Huntsmaster. (8 RT 1705.)

Examination of the Plymouth revealed bullet impressions on the top and driver's side fender. (8 RT 1693-1694; see also 8 RT 1670.)

Wyatt's vehicle had numerous bullet holes. (8 RT 1680, 1728-1732.) Gasoline had leaked onto the ground. (8 RT 1727.) Officers found .22 caliber

shell casings on the ground 11 feet from Etayo's body and in a clearing behind some bushes. (8 RT 1732, 1737-1738.)

3. Appellant's Statement

Appellant was interviewed at the Kern County Sheriff's Department on April 10, 1978. (People's Exhibit [Exh.] 9d; see 9 RT 1870.) He was advised of and waived his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. (Exh. 9d at 13.)[5/] A tape of the interview was played for the jury. (9 RT 1873.)

Appellant gave the following account of the shootings and events leading up to the shootings:

Appellant's sister and brother-in-law, Beverly and Greg Laufenberger, came to appellant's house to visit on April 9, 1978. (Exh. 9d at 14.) They played cards and drank for a while, then Greg Laufenberger suggested that he and appellant go to the desert to go shooting. (Exh. 9d at 15, 52-53.) Appellant borrowed a .22 caliber pump-action rifle and they picked up the semiautomatic rifle. (Exh. 9d at 14-15.) They purchased shells and beer and headed to Mojave in appellant's green Plymouth. (Exh. 9d at 14-15, 21.)

As appellant was driving down a dirt road in the desert, he slammed on the brakes in an attempt to avoid a wash. (Exh. 9d at 15, 64.) His car engine died and he could not get the car started again. (Exh. 9d at 15.) Laufenberger suggested that they do some shooting as long as they were there. (Exh. 9d at 16, 66.) Appellant set a beer can on his car and shot at it, hitting the car itself several times. (Exh. 9d at 16, 61.) Appellant said that he was "mad." (Exh. 9d at 16.)

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5. This exhibit bears page numbers at the top and bottom of the page. Page references in this brief are to the numbers at the top right of the page.

Appellant and Laufenberger went walking around with their rifles, drinking beer and shooting. (Exh. 9d at 16.) Appellant was using the semi-automatic rifle. (Exh. 9d at 26.) They saw Wyatt and Henderson with their movie equipment. (Exh. 9d at 16.) Appellant asked Wyatt and Henderson if they could get a ride into town to get a starter. (Exh. 9d at 16.) Wyatt said it would be a while. (Exh. 9d at 71.) Appellant and Laufenberger watched the filming for a while. (Exh. 9d at 17.) Appellant described a girl shooting a pistol and dancing around a tree on fire. (Exh. 9d at 17.)

When appellant saw the students going to their car, he approached with Laufenberger 20 or 30 feet behind him. (Exh. 9d at 17, 73.) Then:

> and they 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 a girl or you know someone, something went bang and it come towards me and, at that time also 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 cause I didn't hear nothin' at first, and so I took my clip out and I was putting some more in it and I heard him saying, yelling at the people saying, "Throw out your gun," you know, and uh – about that time someone came running from the car towards me, there was some bushes and I didn't know exactly, you know, if they had a gun or what cause when he said throw out your gun, you know, a person come running and, and I was getting up and all I could see was just a, somethin' coming at me and I didn't know and so I just shot it some more, I don't know.

(Exh. 9d at 17-18.)

Appellant told detectives that his brother-in-law came running up and said, "'Let's take their car and get out of here.'" (Exh. 9d at 18.) Appellant told him no, that he'd seen gas leaking from the car. (Exh. 9d at 18.) Appellant and Laufenberger ran to appellant's car, but it still would not start. (Exh. 9d at 18.) They ran "almost all the way into Mojave," throwing the rifles down as they ran. (Exh. 9d at 18.) They got a ride to a gas station and called their wives, who picked them up. (Exh. 9d at 18-20.) After talking to family members, appellant called police. (Exh. 9d at 20-21.)

Appellant thought that he and Laufenberger drank three to four six-packs of beer from the beginning of the day until the end. (Exh. 9d at 22.)

C. Victim Impact Testimony

Six of the victims' family members testified.

Lance Wyatt testified that his wife, Marti Soto, had been his high school sweetheart. (9 RT 1865.) Wyatt remembered her as "lively" and "full of life." (9 RT 1865-1866.) He told the jury, "I loved her and still love her very much." (9 RT 1866.) Wyatt still dreamed about the violence. (9 RT 1866.) But worse than that, he also had dreams in which he saw his wife on the street but she did not want anything to do with him because he had left her in the desert. (9 RT 1866-1867.)

Wyatt explained:

> I didn't run to save myself. Marti was still alive. And I wasn't going to just sit there and let her die there. It was a tough choice, but I just wasn't going to lay down and die and not do anything. The only thing I could do was leave the scene.

(9 RT 1867.) But 24 years later, Wyatt felt that "it is not something that will ever be resolved in my mind. My heart says I should have stayed." (9 RT 1867.)

Wyatt had changed his name in 1984 because he "felt that if I ever were to remarry I didn't want to give that name to another woman." (9 RT 1864.) But he had never remarried. (9 RT 1865.)

Soto's mother, Marta Soto, testified that Marti Soto had wanted to teach handicapped children and had wanted a lot of children of her own. (9 RT 1928-1929.) She testified that Marti's brother, Carlos, "went almost crazy," and felt that he had failed to protect her. (9 RT 1930.) For years, the family did not return to church and lived "like hermits." (9 RT 1933.) She would never get over Marti's murder. (9 RT 1934.)

Ingrid Etayo's sister and niece testified. Etayo's sister, Haydee Kassai, testified that, at the time of her death, Etayo had just graduated from the University of Tampa and had been about to travel to Europe as a graduation gift. (9 RT 1995-1996.) She was engaged to be married, and the wedding had been planned for that December. (9 RT 1996.) After her murder, Etayo's mother "was never the same." (9 RT 1996.) Her father was "affected very deeply" and still wrote her letters. (9 RT 1997.) The murder affected Kassai by making her constantly fearful that her own children would not come home one day. (9 RT 1997.) Kassai said, "You learn to go on in life because you have to. But it is the pain that you carry on forever." (9 RT 1999.)

Etayo's niece, Sybelle Sprague, testified that she had been close to Etayo as a child. (9 RT 2059-2060.) Since the murder, she was fearful and "always looking over my shoulder." (9 RT 2060.) Sprague and the rest of her family still missed Etayo, especially when something reminded them of her. (9 RT 2061.) "There is always a loss. You always feel it. It never really goes away." (9 RT 2061.)

Jim Henderson's parents testified. (9 RT 2062, 2068.) At the time of his murder, Henderson was to graduate from Laverne College in six weeks. (9 RT 2063.) He was a theater major and loved all aspects of the theater. (9 RT 2063, 2068-2069.) Henderson was engaged to be married. (9 RT 2066.) He and his fiancé planned to marry in Paris and join the Peace Corps. (9 RT 2066.) Patricia Henderson testified that she had never gotten over her son's murder, and that "even the good memories hurt." (9 RT 2065.) She said that it had been a "crushing blow" to her other children. (9 RT 2064.)

Jim Henderson's father, Robert Henderson, testified that he felt that he had lost not only his son, but the daughter-in-law and grandchildren that he would have had. (9 RT 2070.) After the murder, he had to give up his high pressure career in construction and start another career. (9 RT 2071.)

D. Defense

Appellant presented evidence of his adaptation to prison life, his work creating a combined Gospel, his family's history of substance abuse and mental problems, and his drug use around the time of the murders.

1. Appellant's Life As A Prisoner

James Esten, a correctional consultant and former employee of the California Department of Corrections, told the jury about the nature and degree of supervision provided for prisoners serving life imprisonment without the possibility of parole. (10 RT 2107-2129, 2142.) Esten also testified that appellant's central file reflected no disciplinary actions for the entire 24 years of his incarceration. (10 RT 2131.) In prison, appellant had been involved in self-help, academic programs, and Bible study. (10 RT 2132-2133.)

James Moyers, a psychotherapist with a bachelor's degree in religious studies, told the jury about appellant's work on merging the four Gospels of the Bible into one narrative in plain, easily understood language. (11 RT 2453-2473.) The project had required serious study. (11 RT 2460.) Appellant had created three versions over the years. (11 RT 2461.) Moyers found that appellant had done an "excellent job." (11 RT 2468.) The resulting document was "in the mainstream of Christian thought and Biblical scholarism [sic]." (11 RT 2466.)

2. Appellant's Drug Use

Terence McGee, a physician specializing in addiction medicine, interviewed appellant. (10 RT 2211.) McGee testified that appellant had reported using "a lot of drugs" the night before the murders. (10 RT 2223.) Appellant told McGee that he thought that he had used phencyclidine (PCP). (10 RT 2223.) Appellant also reported that he had about 11 beers on the day of the murders. (10 RT 2223.)

McGee testified that PCP is a long-acting drug, and that appellant could have been under its influence the day of the murders. (10 RT 2227.) McGee told the jury that PCP intoxication can cause violent and bizarre behavior as well as panic reactions. (10 RT 2289, 2290.) The drug can cause the distortion of visual perception, causing confusion, fear, and loss of contact with reality. (10 RT 2289.) It can also cause "an amnesiac effect." (10 RT 2227.) In McGee's opinion, appellant did not have control over his actions on the day of the murders. (10 RT 2240-2241.)

Stephen Pittel, a forensic psychologist, also interviewed appellant and reviewed materials relating to this case. (11 RT 2307-2311.) Pittel testified that according to "numerous people," appellant's history of substance abuse began when he was 10 to 14 years old, and PCP "became his drug of choice." (11 RT 2328; see also 11 RT 2334.) Pittel testified that PCP psychosis can persist for a week. (11 RT 2331.) Pittel explained that PCP psychosis is "characterized by extreme disorientation, often by visual and auditory hallucinations, and by a total loss of contact with reality." (11 RT 2335.) PCP combined with alcohol can lead to violence. (11 RT 2345.)

In Pittel's opinion, appellant was under the influence of PCP and alcohol the day of the murders. (11 RT 2343.) Pittel testified that appellant's statements to police and Laufenberger's testimony from the 1979 and 1983 trials showed that appellant had used PCP the night before the murders. (11 RT 2340.) On cross-examination, however, Pittel was asked whether it was true that in fact Laufenberger had never testified that appellant took PCP the night before, but had testified that he arrived at appellant's house on the morning of the murders. (11 RT 2412.) Pittel then testified that he relied on the reports of experts who had been called at appellant's previous trials and who had operated

under the assumption that appellant had taken PCP. (11 RT 2412-2413.)[6/] He did not know the basis for their assumption. (11 RT 2413.)

Pittel described a family history of mental illness and substance abuse. (11 RT 2315-2328.)

Pittel also testified that he believed that appellant had suffered brain damage due to several "relatively mild head injuries" and two more serious head injuries over the years. (11 RT 2337-2338, 2343, 2369-2370.) Pittel believed that appellant was under the influence of some unspecified mental disease, disorder, defect, or impairment at the time of the murders. (11 RT 2346, 2368-2369.) Pittel noted appellant's genetic predisposition, history of head injuries, history of substance abuse, history of parental neglect, and the fact that he had never before committed an act of violence. (11 RT 2368-2369.)

Susan Murtishaw was married to appellant's brother, Steven. (10 RT 2177.) She testified that appellant had become a religious person. (10 RT 2192-2193.) She told the jury that other family members suffered from depression. (10 RT 2196-2197, 2202, 2204-2205.) She testified that appellant had worked to support his wife and her three children. (10 RT 2189.)

E. Prosecution's Rebuttal Evidence

Bradley Borison, a state prison inmate, testified as a rebuttal witness. (9 RT 2002; see 9 RT 1958.) He said that he had met appellant in the central receiving facility of the Kern County jail in July 2002. (9 RT 2013.) Appellant told him that he had been convicted of a triple murder. (9 RT 2021.) Appellant told him that a fourth person, the husband of one of the victims, had been shot in the hand and survived. (9 RT 2021.) He admitted that he had been the shooter, but said that he had been high on PCP. (9 RT 2024, 2027.) Appellant

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6. Furthermore, perusal of the transcript of appellant's statement to law enforcement officers does not reveal any mention of PCP use. To the contrary, appellant denied using drugs other than marijuana. (Exh. 9d at 45, 54.)

said that he had intended to steal the victims' car to get back to Los Angeles and purchase drugs. (9 RT 2025-2026.) Appellant told Borison that his former brother-in-law and the surviving victim had testified against him. (9 RT 2029.)

ARGUMENT

I.

THE JURY WAS CORRECTLY INSTRUCTED ON ITS PENALTY DETERMINATION IN THE LANGUAGE OF THE 1977 LAW AND THE TRIAL COURT WAS CORRECT TO DECLINE TO GIVE APPELLANT'S PROPOSED INSTRUCTION ON WEIGHING

Appellant contends that the trial court should have instructed the jury that even if the factors in aggravation outweighed the factors in mitigation, the jurors still had the discretion to vote for life or death. (AOB 35, 37.) Appellant claims a violation of state law, and violations of his rights under the Eighth and Fourteenth Amendments. The jury was correctly instructed in the language of the 1977 law and no error appears.

A. Background

At the time appellant committed these murders on April 9, 1978, the death penalty statute adopted by the California Legislature in 1977 ("the 1977 law") was in effect.[7] (*Murtishaw II, supra*, 48 Cal.3d at p. 1025.) The parties agreed that the jury must be instructed on its penalty determination in the language of that statute. (1 RT 66.) Accordingly, the jury was instructed in the language of the 1977 law (former Pen. Code, § 190.3) as follows:

> 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 crimes of which the defendant was convicted in the present proceeding and the existence of any special

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7. The 1977 law was replaced by an initiative measure approved by the voters on November, 7, 1978 ("the 1978 law"). (*People v. Rodriguez* (1986) 42 Cal.3d 730, 777.)

circumstances []found to be true.

(b) The absence of criminal activity by the defendant, other than the homicides which are the basis of this case, which involved the use or attempted use 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 disturbance.

(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 for 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 offenses the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect 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 to the offense and his participation in the commission of the offense 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 as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.[8/]

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8. Factor (j) was not part of the 1977 law, but was added based on the recommendation in *People v. Easley* (1983) 34 Cal.3d 858, 879, footnote 10. (See RT 2574-2577.) The addition of this language is not at issue on appeal.

> 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.

(2 CT 433-434; see also 12 RT 2783-2785.)

Appellant did not and does not now argue that this instruction, based on the 1977 law, was inapposite. But at trial appellant had requested an *additional* instruction "pointing out that even if the factors in aggravation outweigh mitigation, the jury can still vote for life." (12 RT 2594.) The trial court noted that such an instruction was not part of the 1977 law:

> [T]hat is not the instruction as it was given under the 1977 statute. And it simply says, you shall consider, take into account, and be guided by the following factors. And we have talked about what those factors are. And, it tells them you can't consider as aggravation, et cetera, and sends them on their way. It gives them no other – it is now your duty, in the next instruction, to determine which of the two penalties to impose. 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.)

Appellant argued that under the 1977 law the jurors retained discretion to vote for life imprisonment even if the factors in aggravation outweighed the factors in mitigation. (12 RT 2596.) The trial court responded: "[t]here's nothing that they are going to be told that would guide them in any other direction." (12 RT 2596.)

Appellant's proposed instruction was not submitted to the jury.

B. Standard Of Review

When a defendant challenges a penalty phase jury instruction on appeal, the question is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380; accord, *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

C. Appellant's Claim Fails Under *People v. Ledesma*

Appellant maintains that it was error not to submit his proposed instruction telling the jurors that even if the factors in aggravation outweighed mitigation, they could still vote for life. This Court has rejected this very claim in a case directly on point. (*People v. Ledesma* (2006) 39 Cal.4th 641, 738-739.)

Appellant argues that the instruction on the penalty determination, as given, did not expressly advise the jurors to "weigh" the aggravating and mitigating factors and then decide whether the aggravating factors were so substantial in comparison to the mitigating factors that a death sentence was warranted. (AOB 41.) Appellant points to this Court's earlier decision following his second trial; specifically, the Court's comment that under the 1977 law, the jury had discretion to "spare the defendant's life regardless of its view of the aggravation-mitigation balance." (AOB 37, quoting *Murtishaw II*, *supra*, 48 Cal.3d at p. 1026.) Therefore, reasons appellant, his proposed instruction was "a correct statement of law, and the trial court's refusal to give the instruction was error." (AOB 40.) Appellant suggests that, in the absence of his proposed instruction, the jury could have returned a verdict of death if they found aggravation and mitigation to be in equipoise or without weighing aggravation and mitigation at all. (AOB 42.)

In *People v. Ledesma*, a death penalty case tried under the 1977 law, the defendant had also requested that the jury be instructed to weigh aggravating and mitigating factors. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 738.) Specifically, Ledesma requested, just as appellant did, that the jury be specifically instructed that it "could return a verdict of life imprisonment without the possibility of parole even if the aggravating factors outweighed the mitigating factors." (*Id.* at 739.) This Court held that the trial court was correct to refuse the proposed instruction:

> The 1977 death penalty law under which defendant was tried did not require specifically that the jury "weigh" aggravating factors, and the jury was instructed, in accordance with that statute, to "consider, take into account and be guided by" the aggravating and mitigating circumstances. (See former § 190.3, added by Stats.1977, ch. 316, § 11, p. 1260.)

(*People v. Ledesma*, *supra*, 39 Cal.4th at pp. 738-739.)

Furthermore, this Court has explained that the language of the 1977 law does not have the effect that appellant ascribes to it. The 1977 law permitted a jury to choose a sentence of life without the possibility of parole "if it believed that the offense did not warrant the death penalty" even if aggravating circumstances outweigh mitigating circumstances. (*People v. Easley*, *supra*, 34 Cal.3d at pp. 883-884.) If the statutory language had this meaning, it follows that the instruction couched in the same statutory language gave the jurors discretion to vote for life even if the factors in aggravation outweighed the factors in mitigation.

Appellant, however, also argues that the language used in the instruction given in his case advising the jury to "consider, take into account and be guided by" the aggravating and mitigating circumstances, "do not mandate a moral 'weighing' or balancing of aggravation against mitigation." (AOB 42.)

This Court has rejected this argument as well; in fact, it relied in part on the discussion in the decision following the second trial in appellant's case. In *People v. Ledesma*, this Court pointed out that:

> [W]e have noted that "there may well be no significant difference between" the 1977 law's requirement that the jury "consider" the aggravating and mitigating factors and the 1978 law's requirement that the jury "weigh" these factors. (*People v. Easley* (1983) 34 Cal.3d 858, 884, fn. 19 []; *Murtishaw* [*II*], *supra*, 48 Cal.3d at pp. 1027-1028, fn. 12 [].)

(*People v. Ledesma*, *supra*, 39 Cal.4th at p. 739; see also *People v. Frierson* (1979) 25 Cal.3d 142, 180 [1977 law's language "essentially equivalent" to the

Florida statute requiring the sentencer to "weigh" factors and upheld in *Proffitt v. Florida* (1976) 428 U.S. 242].)

As this Court explained in more detail in discussing the use of the term "weighing" in the 1978 law in *People v. Brown*:

> [T]he word "weighing" is a metaphor for a process . . . . the word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. . . . thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, (1985) 40 Cal.3d 512, 541, reversal of death sentence on other grounds rev'd *sub nom California v. Brown* (1987) 479 U.S. 538.) Similarly, a juror who "consider[s]" the aggravating and mitigating factors under the 1977 law "simply determines under the relevant evidence which penalty is appropriate in the particular case." (*Ibid.*)

Appellant's concern that his jury was not instructed to undertake the appropriate "moral 'weighing' or balancing of aggravation against mitigation" (AOB 42) is unfounded.

In short, this Court has been presented with the same proposed instruction in a case tried under the same 1977 law, and decided that the instruction would not have been proper. This holding must be dispositive of appellant's claim.

D. Constitutional Arguments

Appellant urges that the trial court's ruling violated the Eighth and Fourteenth Amendments. These arguments fail to provide any reason to depart from this Court's holding in *People v. Ledesma*.

"In assessing whether the jury was adequately guided under the Eighth or Fourteenth Amendment, we ask whether there is a reasonable likelihood the jury understood the charge as defendant asserts. We determine how it is

reasonably likely the jury understood the instruction, and whether the instruction, so understood, accurately reflects applicable law." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1161, internal quotation marks and citations omitted.)

1. Fourteenth Amendment Argument

Appellant argues that his Fourteenth Amendment right to due process was violated by the trial court's refusal to give his proposed instruction. (AOB 45.) This is so, according to appellant, because he had a liberty interest in having the jury exercise its discretion under California law. (AOB 45-47.) Of course, where a state has placed the discretion to impose criminal punishment within the discretion of the jury, the defendant "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 [citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

In this case, the instruction that was given to the jury regarding their penalty determination was taken directly from California's 1977 death penalty statute. Appellant does not contend otherwise. Appellant's proposed language, on the other hand, was *not* taken from the 1977 law. As discussed above, this Court has found that a trial court's refusal to give an instruction like appellant's proposed instruction in a case tried under the 1977 law comported with state law. It is therefore difficult to see how appellant's jury was not instructed on the scope of its sentencing discretion under state law. (See AOB 47.)

Appellant fails to show how he was deprived of any procedural right guaranteed him under the 1977 law.

2. Eighth Amendment Argument

Appellant argues that the trial court's refusal to give his proposed

instruction resulted in a violation of the Eighth Amendment requirement that the jury's discretion in a capital case be directed and limited so as to minimize the risk of arbitrary and capricious imposition of the death penalty. (AOB 48.)

The Eighth Amendment requires 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.) The Eighth Amendment also requires that the jury be allowed to "consider and give effect to all relevant mitigating evidence" offered by the defendant. (*Boyde v. California, supra*, 494 U.S. at pp. 377-378.) Within these parameters, the state enjoys wide "latitude to prescribe the method by which those who commit murder shall be punished." (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 309.)

The United States Supreme Court has found that the Eighth Amendment does not compel a state to require the jury deciding punishment in a capital case to weigh aggravating circumstances against mitigating circumstances. (*Zant v. Stephens* (1983) 462 U.S. 862, 875; *Boyde v. California, supra*, 494 U.S. at p. 377.) In fact, in *Gregg v. Georgia*, the Court approved Georgia's death penalty law "even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." (*Zant v. Stephens, supra*, 462 U.S. at p. 875, discussing *Gregg v. Georgia, supra*, 428 U.S. 153.) "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California* (1994) 512 U.S. 967, 978-979; accord, *People v. Sanders* (1995) 11 Cal.4th 475, 564.)

Indeed, in *Boyde v. California*, the United States Supreme Court specifically rejected essentially the same Eighth Amendment argument

presented here:

> Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances "outweigh" the mitigating circumstances. But there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty." [Citation.]

(*Boyde v. California, supra*, 494 U.S. at p. 377 [discussing an instruction based on California's 1978 law].)

Appellant relies on the United States Supreme Court's decision in *Brown v. Sanders*, in which the Court stated: "we have held that 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) 494 U.S. 212, 216-217.) Appellant urges that this means that "a state cannot completely dispense with weighing if that 'prevents a jury from giving meaningful effect to the mitigating evidence . . . .' [Citation]." As the trial court noted (12 RT 2596), nothing in the instruction given in the language of the 1977 law *prevented* the jury from "consider[ing] and giv[ing] effect to all relevant mitigating evidence" (*Boyde v. California, supra*, 494 U.S. at pp. 377-378) offered by appellant. In fact, the instruction given expressly told the jury to "consider all of the evidence" received at trial and to "consider, take into account and be guided by" mitigating and aggravating factors. (2 CT 434.) Among the factors that the jury was told to consider was "[a]ny 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 as a basis for a sentence less than death . . . ." (2 CT 434.) The jury therefore "adequately was advised that it could consider and give effect to *all* of the evidence presented by defendant in mitigation." (*People v. Griffin* (2004) 33 Cal.4th 536, 591.)

Consistent with United States Supreme Court authority, this Court has found that the 1977 law and its requirement that the jury "consider, take into account, and be guided by" the aggravating and mitigating circumstances to be sufficient to guide the jury's discretion and valid under the Eighth Amendment. (*People v. Frierson*, *supra*, 25 Cal.3d at p. 180; see also *People v. Williams* (1988) 44 Cal.3d 883, 956.) It follows that instructing the jury in this language, as the trial court did in this case, comports with the Eighth Amendment and no additional instruction was necessary.

E. Conclusion

The trial court did not err in refusing to instruct the jury that even if the factors in aggravation outweighed the factors in mitigation, the jurors still had the discretion to vote for life or death. The jurors were told to "consider, take into account and be guided by" the aggravating and mitigating factors. This accurately reflected the 1977 death penalty law, and permitted the jury to choose a sentence of life without the possibility of parole "if it believed that the offense did not warrant the death penalty" even if aggravating circumstances outweighed mitigating circumstances. (See *People v. Easley*, *supra*, 34 Cal.3d at pp. 883-884.) Appellant's first claim is without merit and must be rejected.

II.

THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURY IT COULD NOT CONSIDER EVIDENCE OF THE PRIOR DEATH VERDICTS AND REVERSALS; THIS EVIDENCE WAS INTRODUCED BY APPELLANT AS PART OF HIS DEFENSE

Appellant contends that the trial court should have sua sponte instructed the jury not to consider the two prior verdicts fixing his punishment at death or the two reversals of those verdicts in determining the penalty in this case. (AOB 52.) This claim fails because this evidence was introduced by

appellant as part of his defense and such an instruction would have undermined his defense.

A. Background

The jury was advised that appellant had already been found guilty and convicted of three counts of first degree murder and that the special circumstance of multiple murder had been found true. (1 RT 184-185; 12 RT 2783 [instruction]; 2 CT 432 [instruction]; see also 1 RT 159-160).[9/] They were instructed that the only question before them was the appropriate penalty. (2 CT 408, 432.)

Appellant presented mitigating evidence of his positive adaptation to prison life over the 24 years since he was convicted, his conversion to Christianity, and of the combined Gospel that he had worked on while incarcerated. (10 RT 2107 et seq; 11 RT 2453 et seq.) During this and other testimony, it was mentioned that appellant had spent his years on Death Row. (9 RT 2025; 10 RT 2126, 2130, 2167-2168; 11 RT 2477-2479, 2484.) During the trial, it was also mentioned obliquely that appellant's case had previously been appealed, mostly in the context of identifying reports and documents. (10 RT 2245; 11 RT 2367, 2370-2371, 2478.)

As appellant recognizes, the fact that he had previously been sentenced to death came out in his own mitigation evidence and he did not object to any other mention of the prior death verdicts or appeals. (AOB 52.)

Appellant argues, for the first time on appeal, that the trial court should have instructed the jury "not to consider the prior death verdicts or the prior reversals in this case in determining penalty." (AOB 52.) Appellant

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9. "The defendant in this case has been found guilty of murder in the first degree. The charge that the murders were committed under (a) special circumstance (that is, that there were multiple murders) has been specially found to be true." (2 CT 432.)

suggests that such an 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." (AOB 57.)

Appellant contends that admission of the evidence of the prior verdicts and appeals and the absence of such an instruction led the jury to believe that the ultimate responsibility for the death verdict lay with an appellate court and not the jurors, in violation of *Caldwell v. Mississippi* (1985) 472 U.S. 320. (AOB 53.) Appellant also contends that the jury might have improperly considered the evidence of the two prior death verdicts as a reason to recommend a death sentence. (AOB 54.)

B. This Claim Is Forfeited

Appellant introduced evidence that he had been incarcerated on Death Row for 24 years pursuant to verdicts of death in his prior trials. Appellant did not request any jury instruction limiting the jury's consideration of the prior death verdicts or the prior reversals in this case in determining the penalty. He urges that the trial court had a sua sponte duty to give such a limiting instruction.

The trial court has a sua sponte duty to instruct on the "general principles of law relevant to the issues raised by the evidence"; that is, "those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Middleton* (1997) 52 Cal.App.4th 19, 30, disapproved on another ground in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 fn. 3, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715.) But "this obligation does not extend to instructions limiting the purposes for which particular evidence may be considered."

(*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711, quoting *People v. Duran* (1983) 140 Cal.App.3d 485, 493.) Where the jury is given instructions that comply with the minimum requirements of the law, the trial court has no duty to give limiting, amplifying, or clarifying instructions in the absence of a request. (*People v. Farley, supra*, 45 Cal.App.4th at p. 1711.)

Accordingly, this Court has found that the trial court in a capital case has no sua sponte duty to craft and submit an instruction limiting the jury's consideration of prior criminal conduct (*People v. Hawkins* (1995) 10 Cal.4th 920, 942); *People v. Freeman* (1994) 8 Cal.4th 450, 494-495); or accomplice testimony (*People v. Andrews* (1989) 49 Cal.3d 200, 218).

As discussed above, the jury was correctly instructed on the law governing its consideration of aggravating and mitigating evidence in its penalty determination in the language of California's 1977 death penalty law. (See Part I, *ante*.) Appellant's complaint is only that the trial court did not give an instruction *limiting* the jury's consideration of his own mitigating evidence. The failure to request this limiting instruction forfeits the issue. (*People v. Farley, supra*, 45 Cal.App.4th at p. 1711; *People v. Duran, supra*, 140 Cal.App.3d at p. 493.)

In any event, appellant's claim fails on the merits.

C. *Caldwell v. Mississippi*

Appellant contends that, in the absence of a limiting instruction, the evidence that there had been prior death verdicts and the references to his appeals could have "undermined [the jurors'] sense of responsibility for determining appellant's sentence." (AOB 52.) Appellant relies on the United States Supreme Court's decision in *Caldwell v. Mississippi, supra*, 472 U.S. 320.

In *Caldwell v. Mississippi*, defense counsel had told the jurors in a penalty phase argument that they bore an "awesome responsibility." (*Caldwell*

v. Mississippi, supra, 472 U.S. at p. 324.) The prosecuting attorney responded by forcefully arguing that this was "unfair" and that the jury's decision would be reviewed by the state supreme court. (*Id.* at pp. 325-326.) The prosecuting attorney said: "[T]hey know your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. . . ." (*Id.* at p. 325.) Upon objection, the trial court said, "I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands." (*Ibid.*) The prosecuting attorney continued: "[T]hey know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so." (*Id.* at pp. 325-326.)

A plurality of the United States Supreme Court found a violation of Caldwell's Eighth Amendment right to the jury's responsible and reliable exercise of sentencing discretion. (*Caldwell v. Mississippi, supra*, 472 U.S. at pp. 328-329.) The plurality concluded 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 defendant's death rests elsewhere." (*Ibid.*)

The United States Supreme Court has since explained that *Caldwell v. Mississippi* is "'relevant only to certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" (*Romano v. Oklahoma* (1994) 512 U.S. 1, 9, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 184, fn. 15.) "Thus, '[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'" (*Ibid.*, quoting *Dugger v. Adams* (1989) 489 U.S. 401, 407.)

D. The Penalty Phase Strategy Included Disclosure Of The Prior Death Sentences

In this case, there were no arguments by the prosecuting attorney or comments by the trial court that could have caused the jurors to be misled about their role in sentencing appellant or that allowed them to feel a lessened sense of responsibility. To the contrary, the jurors were made aware of appellant's prior death sentences and appeals because it was important to give context to the defense strategy of "Death Row redemption." (See *Anderson v. Calderon* (2000) 232 F.3d 1053, 1080, overruled on other grounds, *Osband v. Woodford* (9th Cir. 2002) 290 F.3d 1036, 1043; *People v. Anderson* (1990) 52 Cal.3d 453, 468; *People v. Whitt* (1990) 52 Cal.3d 453, 468.)

In his defense, appellant presented the testimony of James Esten, a correctional consultant and former employee of the California Department of Corrections, in order to persuade the jury that appellant had improved himself while on Death Row. Esten testified that appellant's file reflected no disciplinary actions for the entire 24 years of his incarceration on Death Row. (10 RT 2131.) Moreover, appellant had been involved in self-help, academic programs, and Bible study. (10 RT 2132-2133.) Esten further testified to the similarity of the environment and restrictions that appellant would experience as a prisoner serving a life sentence of life without the possibility of parole. (10 RT 2126; see 10 RT 2107-2129, 2142.) Esten testified that among Death Row inmates, appellant was considered among the least likely to engage in negative behavior. (10 RT 2130.) Esten also made the point that a prisoner serving a sentence of life without the possibility of parole must do exactly that and would die in prison.[10/] (10 RT 2112.)

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10. Note also appellant's counsel's decision that appellant would appear before the jury in prison clothing, because counsel did not want the jury to receive any impression that appellant would ever be released from prison. (1 RT 172.)

Appellant also presented the testimony of James Moyers, a psychotherapist with a bachelor's degree in religious studies. Moyers testified that appellant had experienced a religious conversion or "rebirth" in prison. (11 RT 2456-2459; 11 RT 2472-2473.) Moyers told the jurors about appellant's work on merging the four Gospels of the Bible into one narrative in plain, easily understood language. (11 RT 2453-2473.) The project had required serious study (11 RT 2460, 2471) under the difficult circumstances of Death Row (11 RT 2474). Moyers believed that the combined Gospel project showed that appellant's conversion was authentic. (11 RT 2473.)

All of this laid the groundwork for counsel's argument to the jury. The fact that appellant had previously been sentenced to death, in particular, was critical to counsel's argument against a death sentence in this trial. Counsel recognized the "terrible loss"of the victims' families, and argued:

> The death of Mr. Murtishaw at this point will serve no end toward comforting those people, ending those losses. *They have already had two death verdicts*, we know that, and they still suffer greatly. So, rendering a decision that Mr. Murtishaw[] should die because somehow it will comfort the family, you have *living proof* here for 25 years, 24 years, *it doesn't make any difference.*

(12 RT 2739, italics added.)

Counsel then argued to the jury that, since appellant had been convicted and sentenced to death, he had become a different person who had demonstrated that his life had some value. Counsel talked about appellant's 24-year record of "exemplary behavior" in prison and urged that "not only has he functioned well for 24 years, but the probabilities are that he will consider -- he will continue to function well in the future, as the best indicator of future performance is the past record." (12 RT 2742-2743.) Counsel argued that the prison system was working well for appellant. (12 RT 2773.)

Counsel reminded the jury of the conversion that appellant had experienced in prison. (12 RT 2768-2772.) He argued, "By giving David life,

he can continue his work with the Bible, and probably do a lot of good while he is in prison." (12 RT 2769.)

Counsel concluded that "to kill David would just make[] no sense at all at this point because he can function perfectly well, he's not a danger to himself, he is not a danger to others, and he might actually do a little good." (12 RT 2773-2774.)

E. Appellant's Contentions

Appellant argues that an instruction was necessary because the jury might have considered the fact that there had been a previous death verdict as a reason in favor of returning a death verdict in this case. (AOB 54.) But counsel made a tactical decision that the jurors could take a different view and see that events since the death sentence was originally imposed had made it unnecessary. (See, e.g., 12 RT 2739.) To carry out his strategy, a necessary premise for counsel's argument was appellant's lengthy incarceration. And the fact that appellant had been incarcerated on Death Row was integral to the theme of the argument. Counsel gave the jurors a reason to find that, unlike the juries in appellant's earlier trials, they were in a unique position to know that a sentence of life without the possibility of parole was the appropriate punishment for appellant.

Counsel's decision also distinguishes this case from *People v. Woolley* (Ill. 2002) 793 N.E.2d 519. In that case, the trial court advised the jurors that a death verdict had been returned by another jury and reversed on appeal. (*Id.* at p. 298.) It was *not* part of defendant Woolley's strategy to disclose that information, and the defendant moved for a mistrial. (*Id.* at p. 302.) Here, appellant presented evidence that he had been sentenced to death by another jury and *invited* the jury to consider that and find that a death verdict no longer served any purpose.

This Court has found that, where a defendant's prior death sentence and reversal necessarily comes to the jury's attention as part of the penalty phase defense strategy, there can be no error in the disclosure nor any prejudice to the defendant. (*People v. Anderson*, *supra*, 52 Cal.3d at p. 468; *People v. Whitt*, *supra*, 52 Cal.3d at p. 641.) It follows that there was no need to instruct the jury *not* to consider it for any purpose. Indeed, that would have interfered with appellant's defense.

Appellant also argues that the knowledge that prior death judgments had been reversed on appeal diminished the jurors' sense of responsibility in violation of *Caldwell v. Mississippi*, *supra*, 472 U.S. 320. (AOB 56.) The essence of the problem in *Caldwell v. Mississippi*, of course, was that the jury was told that the state supreme court would review their decision in a context in which they were actually being urged not to feel completely responsible for the sentence. In this case, the prior appeals were merely mentioned in passing. When such a "passing reference" is not intended to nor used to "'dilute' the jury's sense of responsibility," it will not constitute reversible error. (*People v. Fierro* (1991) 1 Cal.4th 173, 245; accord, *People v. Bittaker* (1989) 48 Cal.3d 1046, 1106.)

Furthermore, it was inevitable that the jury would know that an appeal was available to appellant, in light of the posture of the case and especially in light of the defense discussed above. "Any reasonable jury, apprised that defendant had already once been sentenced to death and was now being resentenced for the same crimes, could easily infer that an appeal from a death verdict was available and would inevitably be taken." (*People v. Whitt*, *supra*, 52 Cal.3d at p. 641; accord, *People v. Anderson*, *supra*, 52 Cal.3d at p. 468.)

Because the jurors were not encouraged to feel that appellate review diminished their responsibility, no special instruction was necessary.

F. Conclusion

The instruction that appellant now insists should have been given -- telling the jury not to consider the prior death verdicts or the two reversals for any purpose -- was not only unnecessary in light of appellant's penalty phase strategy, it would actually have undermined it and interfered with his defense. Appellant's second claim on appeal must fail.

III.

THIS COURT HAS ALREADY FOUND THAT AN INSTRUCTION ON UNREASONABLE SELF-DEFENSE WAS NOT REQUIRED AND THE LAW OF THE CASE DOCTRINE PRECLUDES RELITIGATION OF THE ISSUE

Appellant contends that the trial court should have instructed the jury to consider whether appellant acted in the unreasonable but good faith belief in the need to act in self-defense. (AOB 60.) The doctrine of the law of the case precludes consideration of this claim.

A. Background

Appellant was interviewed at the Kern County Sheriff's Department on the day after the murders, April 10, 1978. (Exh. 9d; see 9 RT 1870.) A tape of the interview was played for the jury. (9 RT 1873.) In his statement, appellant suggested that he had heard a gunshot when the four students were loading their car and that he had seen one of them coming toward him:

> and they 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 a girl or you know someone, something went bang and it come towards me and, at that time also 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 cause I didn't hear nothin' at first, and so I took my clip out and I was putting some more in it and I heard him saying, yelling at the people saying, "Throw out your gun," you know, and uh – about that time someone came running from the car

towards me, there was some bushes and I didn't know exactly, you know, if they had a gun or what cause when he said throw out your gun, you know, a person come running and, and I was getting up and all I could see was just a, somethin' coming at me and I didn't know and so I just shot it some more, I don't know.

(Exh. 9d at 17-18.)

When the parties were discussing jury instructions with the trial court, appellant's trial counsel noted that appellant had "told the police that he believed he was being fired upon." (12 RT 2635.) Based on this evidence, counsel requested that the jury be instructed that they could consider whether appellant had acted in the unreasonable but good faith belief in the need to act in self-defense and requested CALJIC No. 5.17, the standard jury instruction. (2 CT 455, 458; see 12 RT 2638; 2656.) Counsel also requested that the jury be instructed that they could consider his reasonable mistake of fact as a circumstance in mitigation (12 RT 2635; see also 12 RT 2636) and offered a series of self-defense instructions (12 RT 2655-2656). (2 CT 455-458.)

The trial court refused these instructions. (12 RT 2635-2638, 2655-2656.) The trial court reasoned that the instruction, based on former Penal Code section 190.3, on the jury's penalty phase determination already allowed the jury to consider appellant's perception of events as related in his statement to law enforcement officers as mitigating evidence. (12 RT 2635-2636.)

B. Unreasonable Self-Defense

An instruction on unreasonable self-defense (also known as imperfect self-defense) is of course normally relevant only to guilt. In a murder case, the jury should be instructed on the lesser offense of voluntary manslaughter if there is substantial evidence that would permit a jury to reasonably conclude that the defendant lacked malice because he acted upon a sudden quarrel or heat of passion or because he acted in the unreasonable but good faith belief in the need to act in self-defense. (*People v. Breverman* (1998) 19 Cal.4th 142, 159-

160; *People v. Flannel* (1979) 25 Cal.3d 668, 674-683.)

The trial court's duty to instruct on voluntary manslaughter based on imperfect self-defense arises only when there is substantial evidence from which reasonable jurors could conclude that the defendant actually believed that he was in imminent danger of death or great bodily injury. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, 783; *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1446.) "The peril must appear to the defendant as immediate and present and not prospective or even in the near future." (*In re Christian S., supra,* 7 Cal.4th at p. 783, internal quotation marks omitted.)

For unreasonable self-defense, appellant offered CALJIC No. 5.17 (2 CT 455, 458), which would have told the jury:

> A person who kills another person in the honest 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 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.].

(See AOB 62, fn. 23.)

C. This Claim Was Rejected In *Murtishaw II*

Appellant maintains that it was necessary to instruct the jury that it could consider his unreasonable but good faith belief in the need to act in self-defense. (AOB 60, 62, 64, 67.) Without this instruction, continues appellant,

the jury was unable to consider all mitigating evidence in determining his penalty. (AOB 64.)

This very claim has already been raised to this Court and rejected. The same evidence of appellant's statement to law enforcement officers, including his description of his encounter with the four students at the end of the day, was presented to the jury in appellant's first penalty phase retrial. (*Murtishaw II*, *supra*, 48 Cal.3d at pp. 1008, 1017.) On appeal, appellant claimed that the trial court should have sua sponte instructed the jury that they could consider whether appellant had acted in the unreasonable but good faith belief in the need to act in self-defense. (*Id.* at p. 1017.) This Court held that the jury was correctly instructed:

> Defendant urges that the penalty judgment must be reversed because the trial court violated his Sixth, Eighth, and Fourteenth Amendment rights by failing to give, sua sponte, a *Flannel* instruction at the penalty retrial. He further claims that the failure to so instruct *precluded* the jury from considering the evidence adduced at the penalty retrial which was suggestive of an unreasonable belief in the need for self-defense.
>
> We may quickly reject this latter contention. The jury was instructed that a defendant's *reasonable* belief in moral justification was a mitigating circumstance ([Pen. Code], § 190.3, factor (f); see former § 190.3, factor (e)), thus possibly raising the negative inference that an *unreasonable* belief was not a proper consideration. However, the jury was also instructed to consider in mitigation "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (§ 190.3, factor (k); see former § 190.3, factor (j).) Had the jury believed defendant's evidence that he harbored an honest but unreasonable belief in the need for self-defensive action, the instructions permitted consideration of that information as a mitigating factor under factor (j)-(k). (*People v. Ghent* (1987) 43 Cal.3d 739, 776 [239 Cal.Rptr. 82, 739 P.2d 1250].) [Footnote.]
>
> In addition, we remain unpersuaded that a trial court has a constitutional duty to instruct sua sponte on unreasonable self-defense at the penalty phase of a capital trial. As stated *ante*, the court gave the

factor (j)-(k) instruction which, coupled with the arguments of counsel, adequately informed the jury that they could consider such evidence as a mitigating factor. The trial court thus fulfilled its legal obligation to instruct the jury on the general principles of law applicable to the penalty trial. (Cf. *People v. Wickersham* (1982) 32 Cal.3d 307, 323 [185 Cal.Rptr. 436, 650 P.2d 311] [concerning whether the trial court had a sua sponte duty to instruct on lesser degree of homicide].)

Defendant suggests that Fifth and Eighth Amendment concerns particularly required a penalty phase *Flannel* instruction in this case, since he had been *convicted* of capital murder without proper instructions on unreasonable self-defense. He urges that the importance of "lingering doubts" about his guilt, as a bar to execution, was therefore great. But this argument assumes premises we have already rejected. At defendant's pre- *Flannel* guilt trial, the jury was fully instructed on the definitions of malice and the degrees of homicide. The lack of further instructions explaining the particular theory of unreasonable self-defense neither denied him basic fairness nor undermined the fundamental reliability of the guilt judgment. The factor (j)-(k) instruction given at the second penalty trial allowed the sentencer to consider any "lingering doubts" about the culpability of defendant's conduct. No error appears.

(*Murtishaw II, supra*, 48 Cal.3d at pp. 1017-1018.)

D. The Law Of The Case Doctrine

Because appellant presents the same issue that was decided in *Murtishaw II*, he is barred from relitigating it here. "Under the doctrine of the law of the case, a principle or rule that a reviewing court states in an opinion and that is necessary to the reviewing court's decision must be applied throughout all later proceedings in the same case, both in the trial court and on a later appeal." *People v. Jurado* (2006) 38 Cal.4th 72, 94; accord, *People v. Boyer* (2006) 38 Cal.4th 412, 441; *People v. Gray* (2005) 37 Cal.4th 168, 196.) Even if the decision in the prior appeal was not essential to the disposition, it will control further proceedings if it could serve as a "guide to the court below on a new trial." (*People v. Boyer, supra*, 38 Cal.4th at p. 442.)

The law of the case doctrine applies to the "principles of law laid down by an appellate court" and those principles will apply "to the extent the evidence is substantially the same." (*People v. Boyer*, *supra*, 38 Cal.4th at p. 442.)

The law of the case doctrine furthers the goals of judicial economy and finality. (*People v. Gray*, *supra*, 37 Cal.4th at p. 196.) "Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding." (*Ibid.*) The law of the case doctrine applies in criminal cases, including death penalty cases. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 94; *People v. Gray*, *supra*, 37 Cal.4th at p. 197.)

E. This Court's Decision In *Murtishaw II* Is The Law Of The Case

In *Murtishaw II,* appellant complained, as he does here, of the failure to instruct the jurors in that penalty phase retrial that they could consider as mitigating evidence whether appellant had acted in the unreasonable but good faith belief in the need to act in self-defense. (*Murtishaw II*, *supra*, 48 Cal.3d at p. 1017.) Appellant further argued, as he does here, that this failure "precluded the jury from considering the evidence adduced at the penalty retrial which was suggestive of an unreasonable belief in the need for self-defense." (*Ibid.*, italics omitted; see AOB 64, 69-70.) This Court observed that the jury had been instructed that a defendant's reasonable belief in moral justification could be considered a mitigating circumstance. (*Murtishaw II*, *supra*, 48 Cal.3d at p. 1017.) And to the extent that the jurors could find that the evidence of appellant's perception of danger did not fall within this factor because of the use of the term "reasonable," the instruction provided another avenue. (*Ibid.*) The jurors were also "instructed to consider in mitigation '[a]ny other circumstance which extenuates the gravity of the crime even though it is not a

legal excuse for the crime.'" (*Ibid.*) This Court concluded that the instruction including these factors was sufficient: "Had the jury believed defendant's evidence that he harbored an honest but unreasonable belief in the need for self-defensive action, the instructions permitted consideration of that information as a mitigating factor." (*Ibid.*)

This ruling is the end of the matter. The same evidence of appellant's perceived need to defend himself was presented to the jury in the second penalty phase retrial in the same way: by playing the tape recording of appellant's statement to law enforcement officers. (*Murtishaw II*, *supra*, 48 Cal.3d at p. 1008; 9 RT 1873.) The jurors were instructed to consider the same factors. (*Murtishaw II*, *supra*, 48 Cal.3d at p. 1008; 2 CT 433-434; see also 12 RT 2783-2785.) As this Court has already found, the instruction given "allowed the sentencer to consider any 'lingering doubts' about the culpability of defendant's conduct. No error appears." (*Murtishaw II*, *supra*, 48 Cal.3d at p. 1018.)

There are exceptions to the application of the doctrine of law of the case: it will not apply "where there has been a manifest misapplication of existing principles resulting in substantial injustice or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determination." (*People v. Gray*, *supra*, 37 Cal.4th at p. 197, internal quotation marks and citations omitted.) Appellant does not recognize that the law of the case doctrine applies here, and so does not demonstrate that his case comes within one of these exceptions.

Appellant does suggest that the fact that counsel requested an instruction in his second penalty phase retrial compels a different result, as his claim in *Murtishaw II* was that the trial court should have instructed on unreasonable self defense sua sponte. (AOB 61-62; see *Murtishaw II*, *supra*, 48 Cal.3d at p. 1017.) But this makes no difference. In *Murtishaw II*, this

Court first held that the instructions given permitted consideration of appellant's statement as mitigating evidence. (*Ibid.*) That is, the Court considered the issue presented on the merits despite the absence of a request. The Court then went on to comment that, "in addition," it questioned whether there could ever be a sua sponte duty to instruct on unreasonable self defense at a penalty phase retrial. (*Id.* at pp. 1017-1018.)

Appellant also criticizes this Court's reasoning in *Murtishaw II*. He acknowledges the Court's finding that the jurors could have considered the evidence pursuant to the instruction to consider in mitigation "'[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.'" (AOB 67-68.) He asserts that the instruction "did not require it and could as reasonably been construed to preclude it . . . ." (AOB 68.) But this is no more than an attempt to relitigate an already-decided issue, which is exactly what is prevented by the doctrine of law of the case. (*People v. Gray*, *supra*, 37 Cal.4th at p. 197.) Moreover, "[w]here an appellate court states a rule of law necessary to its decision, such rule must be adhered to at any subsequent appeal in the same case, *even where the former decision appears to be erroneous*." (*People v. Boyer*, *supra*, 38 Cal.4th at p. 441, italics added, internal quotation marks and citations omitted.)

F. Conclusion

Appellant presents the same claim, based on the same facts, that was presented and resolved in his prior appeal. That decision is now the law of the case. Appellant's third claim must be summarily denied.

IV.

THERE WAS NOR ERROR IN ADMITTING VICTIM IMPACT EVIDENCE

Appellant contends that the testimony of the victims' family members

was highly prejudicial and violated state law, the California Constitution, and the Sixth, Eighth, and Fourteenth Amendments. (AOB 74.) Appellant also argues that the admission of victim impact testimony violated his rights under the Ex Post Facto Clause because the United States Supreme Court's decision in *Payne v. Tennessee* (1991) 501 U.S. 808, issued after the murders. (AOB 85.) This evidence was entirely proper.

A. The Victim Impact Testimony

Six of the victims' family members testified.

Lance Wyatt testified that his wife, Marti Soto, had been his high school sweetheart. (9 RT 1865.) Wyatt remembered her as "lively" and "full of life." (9 RT 1865-1866.) He told the jury, "I loved her and still love her very much." (9 RT 1866.) Wyatt still dreamed about the violence. (9 RT 1866.) But worse than that, he also had dreams in which he saw his wife on the street but she did not want anything to do with him because he had left her in the desert. (9 RT 1866-1867.)

Wyatt explained:

> I didn't run to save myself. Marti was still alive. And I wasn't going to just sit there and let her die there. It was a tough choice, but I just wasn't going to lay down and die and not do anything. The only thing I could do was leave the scene.

(9 RT 1867.) But 24 years later, Wyatt felt that "it is not something that will ever be resolved in my mind. My heart says I should have stayed." (9 RT 1867.)

Wyatt had changed his name in 1984 because he "felt that if I ever were to remarry I didn't want to give that name to another woman." (9 RT 1864.) But he had never remarried. (9 RT 1865.)

Soto's mother, Marta Soto, testified that Marti Soto had wanted to teach handicapped children and had wanted a lot of children of her own. (9 RT 1928-1929.) She testified that Marti's brother, Carlos, "went almost crazy," and

felt that he had failed to protect her. (9 RT 1930.) For years, the family did not return to church and lived "like hermits." (9 RT 1933.) She would never get over Marti's murder. (9 RT 1934.)

Ingrid Etayo's sister and niece testified. Etayo's sister, Haydee Kassai, testified that, at the time of her death, Etayo had just graduated from the University of Tampa and had been about to travel to Europe as a graduation gift. (9 RT 1995-1996.) She was engaged to be married, and the wedding had been planned for that December. (9 RT 1996.) After her murder, Etayo's mother "was never the same." (9 RT 1996.) Her father was "affected very deeply" and still wrote her letters. (9 RT 1997.) The murder affected Kassai by making her constantly fearful that her own children would not come home one day. (9 RT 1997.) Kassai said, "You learn to go on in life because you have to. But it is the pain that you carry on forever." (9 RT 1999.)

Etayo's niece, Sybelle Sprague, testified that she had been close to Etayo as a child. (9 RT 2059-2060.) Since the murder, she was fearful and "always looking over my shoulder." (9 RT 2060.) Sprague and the rest of her family still missed Etayo, especially when something reminded them of her. (9 RT 2061.) "There is always a loss. You always feel it. It never really goes away." (9 RT 2061.)

Jim Henderson's parents testified. (9 RT 2062, 2068.) He was a theater major and loved all aspects of the theater. (9 RT 2063, 2068-2069.) Henderson was engaged to be married. (9 RT 2066.) He and his fiancé planned to marry in Paris and join the Peace Corps. (9 RT 2066.) Patricia Henderson testified that she had never gotten over her son's murder, and that "even the good memories hurt." (9 RT 2065.) She said that it had been a "crushing blow" to her other children. (9 RT 2064.)

Jim Henderson's father, Robert Henderson, testified that he felt that he had lost not only his son, but the daughter-in-law and grandchildren that he

would have had. (9 RT 2070.) After the murder, he had to give up his high pressure career in construction and start another career. (9 RT 2071.)

B. Victim Impact Evidence Is Generally Admissible

Evidence of the impact of the crime on the victim's family is admissible under the United States Constitution and California law in determining the penalty for murder. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; *People v. Edwards* (1991) 54 Cal.3d 787, 833.) The United States Supreme Court has reasoned that "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825, internal quotation marks and citation omitted.) Such evidence serves the "entirely legitimate purpose[]" of "informing the sentencing authority about the specific harm caused by the crime . . . ." (*Ibid.*)

Accordingly, the Eighth Amendment does not bar a state from finding that "evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827.) In California, victim impact evidence is admissible as a circumstance of the crime under Penal Code section 190.3, factor (a). (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 833, 835.) The trial court has discretion in admitting and limiting victim impact evidence. (*People v. Kelly* (2007) 42 Cal.4th 763, 793.)

C. There Was No Ex Post Facto Violation

Appellant argues that the admission of victim impact evidence violated the ex post facto clause. (AOB 85; see 1 RT 71-75.) This is so, according to appellant, because the United States Supreme Court did not decide

Payne v. Tennessee until 1991, after his crimes. (AOB 85.) As appellant concedes, this Court has decided that admission of victim impact testimony in a trial concerning a crime that occurred before *Payne v. Tennessee* does not violate the prohibition on ex post facto laws nor due process. (*People v. Brown* (2004) 33 Cal.4th 382, 394-395; accord, *People v. Jurado*, *supra*, 38 Cal.4th at p. 132; *People v. Roldan* (2005) 35 Cal.4th 646, 731-732.) "*Payne* did no more than remove a judicially created obstacle that had withdrawn a type of evidence that could have proved a material fact. Accordingly, applying the rule in *Payne* in a case where the crime preceded that decision does not violate ex post facto principles." (*People v. Roldan*, *supra*, 35 Cal.4th at p. 732.)

D. Factor (a), Circumstances Of The Crime, Is Not Unconstitutionally Vague

Appellant claims that the admission of victim impact evidence as part of the circumstances of the crime pursuant to factor (a) of Penal Code section 190.3 renders factor (a) unconstitutionally vague and overbroad. (AOB 88.) This Court has repeatedly rejected this argument. (*People v Jurado*, *supra*, 38 Cal.4th at p. 132; *People v. Roldan*, *supra*, 35 Cal.4th at p. 733; *People v. Benavides* (2005) 35 Cal.4th 69, 107.)

E. Alleged Failure To Hold A Hearing

Appellant argues that the trial court failed to exercise its discretion under Evidence Code section 353 to weigh the probative value of the anticipated victim impact evidence against its potential prejudicial effect. (AOB 75-76.) Appellant complains that the trial court did not hold a hearing for this purpose and that the prosecution did not make an offer of proof or provide a summary of the testimony it intended to offer. (AOB 73, 76.)

Appellant cites no United States Supreme Court or California authority for the proposition that the prosecution must provide a summary of

victim impact testimony. (See AOB 75-76.) Appellant relies instead on New Jersey law. (AOB 76.) But this Court has said that a capital defendant is *not* entitled to receive a summary of the anticipated victim impact testimony. (*People v. Roberts* (1992) 2 Cal.4th 271, 330; accord, *People v. Benavides*, *supra*, 35 Cal.4th at p.107.)

Before trial, appellant requested an Evidence Code section 402 hearing regarding the admissibility of victim impact testimony because "there should be a limitation on what they can testify to." (1 RT 77.) The trial agreed that it would be appropriate to caution the witnesses about the limitations of their testimony. (*Ibid.*)

Contrary to appellant's argument (AOB 73, 76-77), the trial court did hold a further hearing on the admissibility of victim impact evidence pursuant to Evidence Code section 402 during the trial and outside the presence of the jury. (8 RT 1837 et seq.) The prosecuting attorney stated that he intended to call two members of each of the three victims' families, and provided the names and relationships. (8 RT 1837-1841.) The trial court discussed the limitations on the testimony, specifically a concern that the witnesses not express opinions about appellant. (8 RT 1838-1839.)

At this hearing, appellant's counsel objected to the presentation of two witnesses for each victim as cumulative and prejudicial. (8 RT 1839, 1841-1842.) The trial court overruled this objection, and stated that questioning "will be limited to what did the death of X have on you [sic] and not anything about how do you feel about the defendant or what should be done to the defendant." (8 RT 1842.)

The trial court cautioned Lance Wyatt right away: "You can answer questions about the loss of your wife, what that has meant to you and the effect it has had on the family. What I don't want to have is any – however you may feel about the defendant, I don't want any comments expressed about him in

that regard." (8 RT 1839.) Thereafter, each witness was cautioned in a similar manner, outside the presence of the jury, before testifying. (9 RT 1925 [Marta Soto]; 9 RT 1988-1989 [Sybelle Sprague, Haydee Kassai, Robert Henderson, and Patricia Henderson].)[11/]

At the conclusion of the Evidence Code section 402 hearing, appellant did not raise an objection based on the trial court's failure to adequately put its reasoning on the record. Nor did he speak up when the trial court spoke with the victim impact witnesses to complain that the trial court had failed to hold an adequate hearing or that he had not received adequate notice.

To the extent that appellant claims that the trial court failed in its duty to hold a hearing or ensure notice, then, his claim is based on a misapprehension of the record and, in any event, is forfeited. Issues surrounding the admissibility of victim impact evidence are subject to forfeiture just as other evidentiary issues. (See *People v. Kelly*, *supra*, 42 Cal.4th at p. 793; *People v Jurado*, *supra*, 38 Cal.4th at p. 133; *People v. Robinson* (2005) 37 Cal.4th 592, 652; *People v. Roldan*, *supra*, 35 Cal.4th at p. 732; *People v. Panah* (2005) 35 Cal.4th 395, 495-496; *People v. Pollock* (2004) 32 Cal.4th 1153, 1181.)

F. The Evidence Was Not Irrelevant Or Inflammatory

Appellant contends that the admission of the victim impact testimony violated his "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." (AOB 84.)

Victim impact evidence violates due process only if it is "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee*,

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11. Contrary to appellant's representation (AOB 73, fn. 28), Marti Soto's mother, Marta Soto, was cautioned by the trial court. (9 RT 1924-1926.)

supra, 501 U.S. at p. 825.) This Court has explained the limitations on victim impact evidence as follows:

> [T]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*People v. Edwards*, *supra*, 54 Cal.3d at p. 836, internal quotation marks and citations omitted; accord, *People v. Jurado*, *supra*, 38 Cal.4th at p. 131.)

As a threshold matter, this claim, too, is forfeited. Appellant did not object to any specific testimony at trial on the ground that it was too inflammatory or irrelevant. (See 9 RT 1864-1868, 1926-1934, 1994-1999, 2057-2061, 2062-2067, 2067-2072.)[12/] With victim impact evidence, as with other evidence, "[a] timely objection is statutorily required to preserve a claim of error in the admission of evidence." (*People v. Pollack*, *supra*, 32 Cal.4th at p. 1181.)

Appellant complains that the evidence was "emotionally-charged." (AOB 77.) The testimony was certainly moving, but that is the direct result of appellant gunning down three young college students, right in front of the husband of one, all of whom left behind unfulfilled plans for the future and grieving parents and relatives. "Emotional" does not equal "inflammatory."

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12. Appellant asserted a standing objection without specifying the grounds at the beginning of Wyatt's testimony. (9 RT 1865.) Presumably this was on the ex post facto grounds asserted before trial. In any event, this is not the proper way to raise objections to the relevance or prejudicial effect of evidence that had not even been elicited yet.

Appellant complains that the evidence included descriptions of the victims' accomplishments. (AOB 80.) But it is entirely proper for the prosecution to present evidence showing that "the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) In fact, "turning the victim into a faceless stranger at the penalty phase of a capital trial," would frustrate the goal of placing before the jury "all the information necessary to determine the proper punishment for a first-degree murder." (*Ibid.*) Testimony that Henderson excelled at theater, that Soto planned to teach handicapped children, and that Etayo had a gift for making those around her happy explained how the deaths of each of these individuals represented a loss not only to their families but to society.

Appellant seems to complain that the evidence of the family members' "suffering" and the "severe and longstanding impact of the crimes" should not have been admitted. (AOB 80.) To the contrary, this was no more than the "specific harm" caused by the murders and, as such, was plainly admissible. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) That the specific harm included the psychological impact on the family members does not make it inadmissible. (*People v. Brown*, *supra*, 33 Cal.4th at p. 398.)

Appellant complains that evidence that Marti Soto's family fled Cuba in 1960, and lost their home in a hurricane in 1992, was irrelevant. Respondent disagrees. Soto's mother mentioned the hurricane because it had destroyed her daughter's room and then she felt that she had "lost almost every memory that we have" of her daughter. (9 RT 1932.) And Soto's mother testified that they came to the United States from Cuba when Soto was three years old in the context of describing her daughter as "American." (9 RT 1927-1928.) It is appropriate for witnesses to share with the jury "that defendant took away the victim's ability to enjoy her favorite activities, to contribute to the unique

framework of her family . . . , and to fulfill the promise to society that someone with such a stable and loving background can bring." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 797.)

Such testimony about the victim's life and the pain that his or her death caused family and friends is "typical of the victim impact evidence we routinely permit." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 793; see also *People v. Jurado*, *supra*, 38 Cal.4th at pp. 133-134 [collecting cases].)

On the other hand, the victim impact evidence had none of the characteristics that this Court has identified as improper. None of the victim impact testimony included "characterizations or opinions about the crime, the defendant, or the appropriate punishment." (See *People v. Pollack*, *supra*, 32 Cal.4th at p. 1180.) It was not accompanied by any theatrics, music, or dramatizations. (See *People v. Kelly*, *supra*, 42 Cal.4th at p. 798.)

In short, the testimony of the victims' surviving family members "was limited to how the crimes had directly affected them." (*People v. Pollack*, *supra*, 32 Cal.4th at p. 1182.) It "illustrated quite poignantly some of the harm that [appellant's] killing had caused; there is nothing unfair in allowing the jury to bear in mind that harm at the same time it considers the mitigating evidence offered by [appellant]." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 826.) The evidence did not invite the jury to elevate emotion over reason or to respond irrationally. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1287; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107.) That the direct impact of appellant's crimes was devastating to the victims' families does not make the testimony inadmissible; it was simply the harm that he had caused and was relevant.

G. The Trial Court Had No Sua Sponte Duty To Give Special Instructions On This Evidence

Appellant argues that the trial court had a sua sponte duty to craft and submit several limiting and clarifying instructions on the consideration of victim

impact testimony. (AOB 86-87.) Appellant suggests that the trial court should have instructed the jury: (1) that "it could consider this [victim impact] 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" (AOB 86); (2) to "limit their consideration of this evidence to a rational inquiry into appellant's culpability, not as an emotional response to the evidence" (AOB 86); (3) "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" (AOB 87); and (4) "that in assessing the victim impact evidence it could consider only such harm as was directly caused by defendant's act" (AOB 87).

This claim is forfeited. Although the court was bound to instruct the jury *sua sponte* on the general principles of law applicable to a case, this obligation does not extend to instructions limiting the purposes for which particular evidence may be considered. (*People v. Duran*, *supra*, 140 Cal.App.3d at p. 493.) A trial court has no sua sponte duty to give amplifying or clarifying instructions in the absence of a request when the instructions given comply with the minimum requirements of the law. (*People v. Beeler* (1995) 9 Cal.4th 953, 983.) When the instructions are correct as given, failure to request amplification or modification of the instructions constitutes forfeiture and precludes raising the issue on appeal. (*People v. Duran*, *supra*, 140 Cal.App.3d at p. 493.)

Appellant cites no United States Supreme Court or California authority for the proposition that the trial court in a capital case must supplant the standard instructions with multiple clarifying and limiting instructions on victim impact evidence. The trial court instructed the jury on their duty with CALJIC No. 8.84.1 (modified to reflect that this was only a penalty trial), which

told the jury:

> You will now be instructed as to the law that applies to this trial.
>
> You must accept and follow the law that I shall state to you.
>
> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(2 CT 410.)

This Court has held that this instruction is "sufficient to inform the jury of its responsibilities." (*People v. Ochoa* (2001) 26 Cal.4th 398, 455; accord, *People v. Morgan* (2007) 42 Cal.4th 593, 624; *People v. Carey* (2007) 41 Cal.4th 109, 134.) Additional instruction "would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1." (*People v. Ochoa, supra*, 26 Cal.4th at p. 455.)

H. Conclusion

Appellant's claims of error in connection with the victim impact evidence are without factual support, are not preserved for review, and are in any event entirely without merit. His fourth claim on appeal must be denied.

V.

APPELLANT'S CLAIMS OF ERROR ARE WITHOUT MERIT; ACCORDINGLY, HIS CLAIM THAT REVERSAL IS REQUIRED DUE TO THE CUMULATIVE EFFECT OF ERRORS FAILS

Appellant contends that the cumulative effect of errors committed at this penalty phase retrial requires reversal. (AOB 90.) As discussed throughout this brief, all of appellant's claims of error are without merit. This contention must therefore be summarily rejected. (See *People v. DePriest* (2007) 42 Cal.4th 1, 61; see also *People v. Halvorsen* (2007) 42 Cal.4th 379, 422; *People*

v. Tafoya (2007) 42 Cal.4th 147, 199.)

VI.

APPELLANT'S PERFUNCTORY CHALLENGES TO CALIFORNIA'S DEATH PENALTY SCHEME HAVE ALL BEEN REJECTED BY THIS COURT

Here, appellant presents a dozen or so constitutional challenges to California's death penalty scheme. (AOB 92-104.) All of these arguments have been rejected by this Court time and again. In fact, they have all been rejected quite recently. Appellant is aware of this. (AOB 92.) He desires to preserve them for federal review. (AOB 92.)

A. Factor (a) Is Not Impermissibly Vague Nor Overbroad

Appellant claims that factor (a) of Penal Code section 190.3, permitting consideration of the "circumstances of the crime," is too broad and results in the arbitrary and capricious imposition of the death penalty. (AOB 92-94.)

It does not. Penal Code "[s]ection 190.3, factor (a), which directs the jury to consider in determining the penalty the 'circumstances of the crime,' is neither impermissibly vague nor overbroad, and does not result in an arbitrary or capricious penalty determination." (*People v. Rundle* (Apr. 3, 2008, S012943) __ Cal.4th __ [2008 WL 878915 at *79].)

B. California's Death Penalty Statute Is Not Invalid For Not Employing A Reasonable Doubt Standard

Appellant claims that his death sentence is unconstitutional because California law does not require that the jury find beyond a reasonable doubt that aggravating factors outweigh mitigating factors. (AOB 94-95.) Appellant also claims that some burden of proof is required. (AOB 96.) Appellant asserts that recent United States Supreme Court decisions warrant reconsideration. (AOB

95.)

Appellant is wrong. California's death penalty statute is not invalid for not employing a reasonable doubt standard:

> The decisions in *Ring v. Arizona* (2002) 536 U.S. 584, and *Apprendi v. New Jersey* (2000) 530 U.S. 466 do not affect California's death penalty law. Moreover, because the determination of penalty is essentially moral and normative, and therefore different in kind from the determination of guilt, the federal Constitution does not require the prosecution to bear the burden of proof or burden of persuasion at the penalty phase.

(*People v. Rundle*, *supra*, 2008 WL 878915 at * 79, internal quotation marks and citations omitted; see also *People v. Brasure* (2008) 42 Cal.4th 1037, 1067-1068.)

C. There Is No Requirement Of Jury Unanimity In Finding Aggravating Circumstances

Appellant claims that the jury findings on aggravating circumstances must be unanimous. (AOB 97-98.) This Court has said:

> [W]e also disagree with defendant that our statute is unconstitutional because it does not require jurors to agree unanimously on the existence of particular factors in aggravation. While all the jurors must agree death is the appropriate penalty, the guided discretion through which jurors reach their penalty decision must permit each juror individually to assess such potentially aggravating factors as the circumstances of the capital crime ([Pen. Code,] § 190.3, factor (a)), prior felony convictions (*id.*, factor (c)), and other violent criminal activity (*id.*, factor (b)), and decide for him- or herself what weight that activity should be given in deciding the penalty. The series of normative judgments involved in deciding whether a particular circumstance is indeed aggravating and, if so, what weight it should be given, cannot be fitted into a scheme of unanimous jury factfinding.

(*People v. Brasure*, *supra*, 42 Cal.4th at p. 1068, internal quotation marks and citations omitted.)

D. An Instruction That The Jury Must Find Whether Death Is The Appropriate Punishment Is Not Required

Appellant argues that the Eighth Amendment requires that the jury be instructed that the "central determination is whether death is the appropriate punishment." (AOB 98.) This Court has held that California's death penalty scheme is not deficient on this ground. (*People v. Wilson* (Mar. 27, 2008, S070327) __ Cal.4th __ [2008 WL 795139 at *20].)

E. An Instruction That There Is A Presumption In Favor Of Life Is Not Required

Appellant contends that the Constitution compels that the jury be instructed in a capital case that there is a presumption in favor of a sentence of life imprisonment without the possibility of parole. (AOB 99.) California's statute is not invalid for failing to include this requirement. (*People v. Rundle*, *supra*, 2008 WL 878915 at *80.)

F. Written Findings Are Not Required

Appellant urges that the jury must be required to make written findings concerning its penalty phase determination. (AOB 100.) California's statute is not invalid for failing to include this requirement. (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1067.)

G. The Instruction On Mitigating And Aggravating Factors Is Not Deficient

Appellant asserts that the instruction on mitigating and aggravating factors is faulty for three reasons. (AOB 100-102.)

First, appellant contends that the use of adjectives such as "extreme," "reasonable," and "substantial" are "barriers" to the consideration of relevant mitigating evidence. (AOB 100.) This Court disagrees. (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1068.)

Second, appellant argues that the trial court in a capital case must delete all inapplicable sentencing factors in instructing the jury. (AOB 101.) Again, this Court disagrees. (*People v. Rundle*, *supra*, 2008 WL 878915 at *79.)

Finally, appellant contends that the trail court must advise the jury which sentencing factors are aggravating, which are mitigating, and which might go either way. (AOB 101-102.) The trial court has no such duty. (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1069.)

H. Intercase Proportionality Review Is Not Required

Appellant argues that California's death penalty scheme is unconstitutional because it does not require the trial court or this Court to engage in intercase proportionality review. (AOB 102-103.) But "[c]omparative intercase proportionality review by the trial court or appellate courts is *not* constitutionally required." (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1068, italics added, internal quotation marks and citation omitted.)

I. California's Death Penalty Scheme Does Not Violate The Equal Protection Clause

Appellant argues that California's death penalty scheme violates the Equal Protection Clause in that it "provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes . . . ." (AOB 103.) Appellant is wrong. "Because capital and noncapital defendants are not similarly situated in the pertinent respects, equal protection principles do not mandate that capital sentencing and sentence-review procedures parallel those used in noncapital sentencing." (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1069.)

J. There Is No Violation Of International Law

Appellant contends that California's use of the death penalty violates

international law and evolving standards of decency. (AOB 104.) This Court has recently explained:

> As we have consistently held, [i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. Because defendant's trial did not include any violations of state or federal law, we decline to find the law defective based on any provision of international law. We also reject defendant's related claim that the Eighth Amendment, which defendant asserts adopts evolving standards of decency of civilized nations, prohibits the use of death as a regular form of punishment.

(*People v. Wilson*, *supra*, 2008 WL 795139 at *22, internal quotation marks and citations omitted.)

K. Conclusion

Appellant's challenges to California's death penalty law are all without merit. Appellant's sixth and final claim on appeal must be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: April 17, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 19379 words.

Dated: April 17, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Murtishaw** No.: **S110541**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 17, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 17, 2008, at Sacramento, California.

_____
Declarant