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February 25, 2014

Frank A. McGuire,
Clerk of the Supreme Court of California
ATTN: MARY JAMESON
350 McAllister Street, First Floor
San Francisco, CA 94102

Re: *People v. Jose Luis Leon*, S143531

Dear Ms. Jameson:

This letter is to inform the Court of typographical errors or omissions contained in Appellant's Opening Brief, filed on February 20, 2014.

The first error relates to the misspelling of the word "Authorities" in the heading of the Table of Authorities, pages vii-xx.

The second error relates to the erroneous citation, on page 70, lines 23-24, to "*People v. Brown* (1985) 40 Cal.3d 512, 541," which instead should be a citation to "*People v. Brown* (1988) 46 Cal.3d 432, 451."

The third error relates to the incomplete citation, on page 70, lines 26-27, to "*People v. Champion* (1995) 9 Cal.4th 879, 948," which instead should be cited as, "*People v. Champion* (1995) 9 Cal.4th 879, 948, rev'd on other grounds, *People v. Combs* (2004) 34 Cal.4th 821, 860."

For the Court's convenience, the following corrected pages to be substituted in Appellant's Opening Brief are attached: a corrected Table of Authorities (pages vii-xx), pages 70-77 of the brief, and a corrected and signed Certificate of Counsel (page 106).

Respectfully submitted,

ANDREA G. ASARO
Senior Deputy State Public Defender
Attorney for Appellant

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death instead of life without parole.

(11 CT 2956-2957; 4 Supp. CT 101; 12 RT 2266 [CALJIC 8.88].) In implicit recognition of this deficiency, CALCRIM No. 766 modified CALJIC No. 8.88 to provide in pertinent part:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both outweigh* the mitigating circumstances *and* are also so substantial in comparison to the mitigating circumstances *that a sentence of death is appropriate and justified.*

(CALCRIM No. 766, italics added.)

Moreover, as noted in Argument IV.D.1., below, unlike CALCRIM No. 766, none of the instructions given in this case informed the jurors that the central determination in the weighing exercise was whether the death penalty was the "appropriate and justified" sentence for appellant – rather than one that was "warranted" in his case. The ultimate question in the penalty phase of any capital case in fact is whether death is the *appropriate* penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Moreover, to satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; *i.e.*, it must be appropriate. This Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1988) 46 Cal.3d 432, 451 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948, rev'd on other grounds, *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Milner* (1988) 45 Cal.3d 227,

256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) CALJIC 8.88 did not make clear this standard of appropriateness.

A rational juror could have found that death was warranted, but not appropriate, because the meaning of "warranted" is broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found such a sentence was permitted. That is far different from the finding the jury is required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

The instructional error involved in using the term "warrants" was not cured by the earlier reference in CALJIC No. 8.88 to a "justified and appropriate" penalty. (11 CT 2956-2957; 4 Supp. CT 101; 12 RT 2266 [CALJIC 8.88] ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate . . . ."].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the words "justified and appropriate" was prefatory in effect and impact; the operative language, delineating the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors that to return a sentence of death they must be persuaded "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it *warrants* death instead of life without parole." (11 CT 2956-2957; 4 Supp. CT 101; 12 RT 2266 [CALJIC 8.88],

italics added.)

The court's failure to give CALCRIM instructions erroneously allowed the jury to impose a death judgment without first reliably determining that death was the appropriate penalty as required by the Eighth and Fourteenth Amendments and by state law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The judgment of death must be reversed.

C. The Trial Court Erred Prejudicially In Refusing To Give Any Of the Three Specially-Drafted Instructions Requested By the Defense

Independent of the trial court's failure to give exclusively CALCRIM instructions, the court erred in refusing to give defense counsel's three specially-drafted instructions, all of which had been incorporated into CALCRIM No. 763, were supported by the evidence and were legally required to be given. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509; *People v. Melton* (1988) 44 Cal.3d 713, 788.) Moreover, the requested instructions would have helped guide the jurors' deliberations in accordance with the defense goal of eliciting sympathy for appellant and would have precluded the jury considering in aggravation factors not legally permitted to be considered as such.

1. Sympathy Or Compassion For the Defendant

First, the defense requested the jury be instructed that it could consider sympathy or compassion for appellant. (11 CT 2963.) CALCRIM No. 763 correctly expanded the instruction on sentencing factor (k) to include: "In reaching your decision, you may consider sympathy or compassion for the defendant . . . ." None of the CALJIC instructions given so instructed the jury. Yet both federal and state law establish that a capital

jury must be instructed to consider any mitigating evidence, including sympathy for the defendant. (*Lockett v. Ohio*, *supra*, 438 U.S. at pp. 604-605; *People v. Benson* (1990) 52 Cal.3d 754, 799; *People v. Easley* (1983) 34 Cal.3d 858, 876.) This Court made clear in *People v. Lanphear* (1984) 36 Cal.3d 163 that the jury must be permitted to consider sympathy for the defendant. (*Id.* at pp. 167-168 ["Inconsistent and ambiguous instructions" did not make clear to the jury "its option to reject death if the evidence aroused sympathy or compassion"].)

Moreover, the Eighth and Fourteenth Amendments require a jury to consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Relevant mitigating evidence encompasses the "compassionate or mitigating factors stemming from the diverse frailties of humankind." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 304, quoting *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) It includes both "mitigating aspects of the crime" (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 245; see also *Roberts v. Louisiana* (1977) 431 U.S. 633, 637 (per curiam)), and "mitigation that is unrelated to the crime." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.)

The constitutional requirement that a jury consider mitigating evidence is not satisfied by mere introduction of evidence; jury consideration of mitigating evidence must be ensured through proper instructions. "In the absence of jury instructions . . . that would clearly direct the jury to consider fully [defendant's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence . . . ." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 323; see also *Mills v. Maryland* (1988) 486 U.S. 367, 374-375;

Hitchcock v. Dugger (1987) 481 U.S. 393.) As this Court observed in *People v. Gordon* (1990) 50 Cal.3d 1223: "[U]nder *Lockett v. Ohio* [*supra*] and its progeny . . . [defendant] . . . had a right to 'clear instructions which not only do not preclude consideration of mitigating factors . . . but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . . ."'" (*Id.* at p. 1277, citations omitted.)

Here appellant was entitled to have the jurors instructed they could consider sympathy and compassion in deciding whether to sentence him to death. The instruction would have focused the jury's attention on the mitigating evidence presented, through appellant's relatives and friends, regarding his impoverished background, innocent character and good conduct, consistent with the theory of the defense at the penalty phase.

2. Non-statutory Aggravating Circumstances

Defense counsel also requested the jurors be instructed they could not consider as an aggravating circumstance anything other than the factors set out in the list of sentencing factors. (11 CT 2964.) Appellant was legally entitled to this instruction. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 509; *People v. Gordon*, *supra*, 50 Cal.3d at p. 1275, fn. 14.) Here, the instruction requested would have clarified, for example, that what the prosecutor referred to as appellant's "normal" behavior *after* the homicides could not be considered a factor in aggravation. (12 RT 2274.) None of the CALJIC instruction given so stated; the instruction is incorporated in CALCRIM No. 763:

> [You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any other facts or circumstances as a basis for imposing the

death penalty.]

(CALCRIM No. 763.)[17]

3. Double Counting

Finally, defense counsel requested the jurors be instructed that a factor could not be considered both a "special circumstance" and a "circumstance of the crime." (11 CT 2965.) None of the CALJIC instructions given prohibited double counting, leaving the jury free to consider the fact that appellant had been convicted of two counts of murder as both a special circumstance (multiple murder) and a circumstance of the crime under sentencing factor (a). Yet appellant was legally entitled to an instruction prohibiting such double counting. (*People v. Melton*, *supra*, 44 Cal.3d at p. 788.) CALCRIM No. 763 includes such an instruction:

> [Even if a fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact only once as an aggravating factor in you weighing process. Do not double count that fact simply because it is both a "special circumstance" and a "circumstance of the crime."]

(CALCRIM No. 763.)[18]

In sum, at the time of appellant's trial all three of the specially-drafted instructions requested by defense counsel were legally required to be given, were encompassed by CALCRIM No. 763 and were not covered

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[17] The Authority and Commentary to CALCRIM No. 763 state that the trial court is required on request to instruct the jury to consider only the aggravating factors listed. (Authority and Commentary, CALCRIM No. 763, citing *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 509; *People v. Gordon*, *supra*, 50 Cal.3d at p. 1275, fn. 14.)

[18] The Instructional Duty section of CALCRIM No. 763 provides that this instruction must be given on request, citing *People v. Melton*, *supra*, 44 Cal.3d at p. 788.

by any of the CALJIC instructions given. The trial court erred in denying defense counsel's request to give these instructions.

D. The Court's Erroneous Refusal To Give the Instructions Requested By the Defense Violated Appellant's Right To Due Process and To a Reliable Sentencing Determination

Allowing the decision of life or death to turn on deficient or erroneous sentencing criteria is inconsistent with the degree of reliability required by the Eighth Amendment:

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

(*Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-384.)

Moreover, when state law gives the jury a role in sentencing, the defendant has a liberty interest, protected under the due process clauses of the Fifth and Fourteenth Amendments, in having the sentence imposed by a jury accurately informed concerning the scope of their sentencing function under state law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343; see also *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301; *Fetterly v. Paskett* (9th Cir. 1994) 15 F.3d 1472, 1479-1481 (conc. opn. of Trott, J.).) The requested instructions were proffered as a means of "guid[ing] and focus[ing] the jury's objective consideration of the particularized circumstances of the . . . individual offender . . . ." (See *People v. Gordon*, *supra*, 50 Cal.3d at p. 1277, quoting *Spivey v. Zant* (5th Cir. 1981) 661 F.2d 464, 471.)

Further, while the due process clause does not generally compel any

specific instruction in criminal cases, it does "speak to the balance of forces between the accused and his accuser." (*Wardius v. Oregon* (1973) 412 U.S. 470, 474.)

Failing to give the requested instructions was prejudicial. There is a reasonable probability that, because the CALCRIM and other specially-drafted instructions were not given, the jurors did not understand that their fundamental role was to determine the appropriate sentence for appellant, did not give full mitigating weight to the evidence presented regarding appellant's background and good character, considered non-statutory aggravating circumstances and/or double counted the multiple murder special circumstance as a circumstance of the crime. (*People v. Brown*, *supra*, 46 Cal.3d at p. 463.) Had the jury been instructed in accordance with CALCRIM, or minimally the three specially-drafted instructions requested by the defense, there is a reasonable possibility of a different verdict. Accordingly, the trial court's refusal to give requested instructions was not harmless beyond a reasonable doubt and requires the reversal of the death judgment. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

CERTIFICATE OF COUNSEL

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

I, Andrea G. Asaro, am the Senior Deputy State Public Defender assigned to represent appellant Jose Luis Leon in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 28,973 words in length.

Dated: February 25, 2014

ANDREA G. ASARO
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Jose Luis Leon* California Sup. Ct. No. S143531
Riverside Co. Super. Ct. No. RIF109916

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California, 94607; that I served a copy of the attached:

APPELLANT'S LETTER OF ERRATA

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

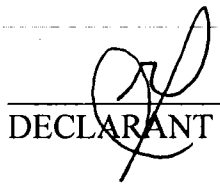
Kristen K. Chenelia
Deputy Attorney General
Attorney General's Office
P.O. Box 85266
San Diego, CA 92186

Clerk of the Court for Honorable
Christian F. Thierbach
Riverside County Superior Court
4100 Main Street
Riverside, CA 92501

Each said envelope was then, on February 25, 2014, sealed and deposited in the United States Postal Service mailbox at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described document will be hand delivered to appellant, Jose Luis Leon, at San Quentin State Prison within 30 days.

I declare under penalty that the foregoing is true and correct and that this declaration was signed on February 25, 2014, in Oakland, California.



DECLARANT