CALIFORNIA APPELLATE PROJECT

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August 2, 2016

Robert Toy
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

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CLERK SUPREME COURT

Re: **PEOPLE V. MARVIN TRAVON HICKS; Notice of Errata**

Dear Mr. Toy,

I respectfully request to correct a mistake in Appellant's Opening Brief on the Merits by substituting the attached revised version of pages 30 and 31 for the original version of those two pages. I apologize for the inconvenience.

Thank you for your assistance.

Sincerely,

NANCY GAYNOR (SBN 101725)
Attorney for Appellant
Marvin Travon Hicks

irreconcilable with the separation of powers clause of the California constitution. Trenchant though these observations may be, none of them addresses, much less undermines, *Geiger's* recognition that the risk identified in *St. Martin* is not dependent on the niceties of the technical distinction between lesser included and related offenses, a distinction that has no meaning to jurors confronted with the question of whether to set free a defendant who is clearly guilty, though not necessarily of the crime charged.[4]

Moreover, the principle of mutuality addressed in *Birks* favors appellant's position. Noting that California takes seriously the principle of mutual fairness to the defense and prosecution, the Court found that the *Geiger* rule offended this principle by creating a tactical imbalance that was both "significant and inappropriate" in granting the defense a superior right to require or prevent the consideration of nonincluded offenses (19 Cal.4th at pp. 126-128.) Just such an unfair tactical advantage was granted the People here. Without the requested instruction, the prosecution had the advantage of an opportunity to receive a manslaughter verdict if the jury didn't convict of murder and then

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[4] This court has acknowledged that California's definition of a lesser included offense may properly be termed "technical" (*People v. Birks, supra,* 19 Cal.4th 108, 118). The artificiality of the concept in the present situation is illustrated by the fact that had the prosecutor been sufficiently loquacious in the information to describe what exactly appellant did to warrant being charged with murder, vehicular manslaughter would qualify as a necessarily included, rather than merely "related," offense and no second trial could have occurred at all. (*People v. Wolcott* (1983) 34 Cal.3d 92, 98 [a lesser crime is included in a greater one when "the language of the accusatory pleading encompasses all the elements of the lesser offense"]; *People v. Fields* (1996) 13 Cal.4th 289 [interpreting Pen. Code § 1023 to preclude retrial of a charge on which the jury has deadlocked if they've convicted the defendant of a lesser included offense].)

to try again for a murder conviction with a new jury who wrongly believed that complete acquittal and guilt of murder were the only possible outcomes defining appellant's fate, while appellant had to contend with a jury ignorant that he had already been held accountable for the middle ground. As recognized in *People v. Batchelor, supra,* 29 Cal.App.4th 1102, 1116-1117, "[t]he People *chose* to charge both murder and manslaughter in the information. The circumstance that the first jury was unable to reach a verdict on the murder charge should not properly be an opportunity to retry the case in a new posture, giving the jury the false impression that, absent a conviction for murder, defendant's actions would be left unpunished. In other words, the People may not have their cake and eat it too" (emphasis added). Insofar as the *Geiger* rule violates mutuality by granting the defense a superior right to control the jury's consideration of nonincluded offenses, the same unfair advantage was granted the prosecution here by allowing it to reap the benefit of a middle-ground conviction while keeping the second jury in the dark.

E. Precedent for the instruction: the not guilty by reason of insanity cases.

As alluded to in section C, *ante*, the question whether the kind of risk presented in appellant's second trial should be tolerated rather than alleviated by an instruction educating the jury on the realities of the situation is not of first impression in California. It has been answered in favor of educating the jury in cases where they are asked to determine whether a defendant, already adjudged guilty of a crime, is to be found sane or not guilty by reason of insanity. (*People v. Moore* (1985) 166 Cal.App.3d 540;

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On August 3, 2016, I served the within

NOTICE OF ERRATA

in said action, by emailing a true copy thereof to:

Kamala D. Harris, Attorney General
docketingLAawt@doj.ca.gov.

and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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Honorable Kathleen Blanchard, Judge

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

Executed August 3, 2016, at Los Angeles, California.

Jackie Gomez