No. S110541

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DAVID LESLIE MURTISHAW,

Defendant and Appellant

Kern County
Superior Court

No. SCO 19333A

APPELLANT'S REPLY BRIEF

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

HONORABLE ROGER D. RANDALL, JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATUTE

JURY INSTRUCTIONS

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Plaintiff and Respondent,	Kern County Sup. Ct. No. SCO 19333A
v.	No. S110541
DAVID LESLIE MURTISHAW,	
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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent where necessary in order to present the issues fully to the Court. Appellant does not reply to respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any specific contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

ARGUMENT

I

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ABOUT THE SCOPE OF ITS SENTENCING DISCRETION WAS PREJUDICIAL ERROR

In *Murtishaw II*, this Court held that the trial court erred in delivering an instruction in the language of the 1978 death penalty statute, instead of its 1977 counterpart, but found no ex post facto violation or prejudice from the instruction because the scope of discretion under the two laws is essentially the same. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1025-1031.) At his subsequent retrial, appellant therefore requested the court to instruct the jury that it had discretion to choose a sentence of life without possibility of parole even if it found that the aggravating factors outweighed the mitigating factors. (12 RT 2594-2595.) The court declined, and instead delivered the version of the penalty instructions that were given at appellant's 1979 trial. (12 RT 2596.)

Respondent contends that appellant's instructional claim should be rejected, arguing that the same claim was rejected in *People v Ledesma* (2006) 39 Cal.4th 641,738-739. (Respondent's Brief ["RB"] at pp. 25-27.) Respondent's contention must fail because there is a significant and controlling difference between this case and *Ledesma* – the holding of *Murtishaw II* is the law of the case which must be followed here.[1] "Where

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[1] Although appellant did not use the phrase "law of the case" in his opening brief, he argued that he was entitled to the instruction because of this Court's holding in his earlier appeal. (Appellant's Opening Brief ["AOB"] at pp. 37-40.) Respondent recognizes as much: "Appellant points to this Court's earlier decision following his second trial." (RB at p. 25) In addition, respondent relies on *Murtishaw II* in Argument III, contending

(continued...)

an appellate court states a rule of law necessary to its decision, such rule must be adhered to" in any subsequent proceeding in the same case, "even where the former decision appears to be erroneous." (*People v. Whitt* (1990) 51 Cal.3d 620, 638, quoting *People v. Shuey* (1975) 13 Cal.3d 835, 841.) In order to qualify as law of the case, the point of law must have been necessary to the prior decision and actually presented and determined by the court. (*Shuey, supra*, 13 Cal.3d at p. 842.)

The scope of the jury's discretion under the 1977 statute was raised and decided in *Murtishaw II*, and was clearly necessary to that decision. In rejecting appellant's ex post facto argument based on the erroneous 1978 law instruction, it was necessary for this Court to compare the scope of discretion conferred by the two laws. In doing so, this Court discussed *People v. Easley* (1983) 34 Cal.3d 875, explaining that "[i]n that relatively early case, we reasoned that the two *laws* were prejudicially dissimilar, in that the 1977 statute, unlike its 1978 successor, allowed the jury to decide death was inappropriate and grant mercy even if aggravation outweighed mitigation." (*Murtishaw II, supra*, 48 Cal.3d at p.1026; emphasis in original.) Analyzing its later decisions in *People v. Boyd* (1985) 38 Cal.3d 762, and *People v. Brown* (1985) 40 Cal.3d 512, this Court held that the 1978 law did not operate less favorably to appellant than the 1977 statute.

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[1](...continued)
that the law of the case doctrine compels rejection of appellant's instructional claim regarding unreasonable self-defense in mitigation. Under these circumstances, appellant submits that respondent should not have been misled about the application of that doctrine to Argument I. However, if respondent wishes to file a supplemental respondent's brief to address the application of the law of the case doctrine to this issue, appellant does not object.

> [A] 1978-law sentencer [is left] with the same range of potential mitigating evidence and the same broad power of leniency and mercy afforded a 1977-law jury. (See *People v Rodriguez* (1986) 42 Cal.3d 730, 779 . . . .) Indeed, the majority in *Brown I* expressly noted that its analysis left only one essential distinction between the 1977 and 1978 schemes: the limitation on relevant aggravating evidence under the 1978 law. (40 Cal.3d at p. 544 . . . .) Thus we may easily reject defendant's ex post facto claim.

(*Murtishaw II, supra*, 48 Cal.3d at p. 1027.) It is therefore apparent that this Court's discussion of the discretion afforded by the 1977 law was far more than a "comment." (RB at p. 25.) It established the law of the case, which required the trial court to give appellant's requested instruction.

Respondent's reliance on *People v. Ledesma, supra*, is misplaced for other reasons as well. Like this case, the crime in *Ledesma* occurred before the enactment of the 1978 death penalty law, and his retrial in 1989 was governed by the 1977 statute. Without articulating the arguments advanced by Ledesma on appeal in support of his instructional claim, this Court held:

> The trial court properly denied instructions proposed by the defendant that would have required the jury 'weigh' aggravating and mitigating factors. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1025 . . . [trial court erred in giving instructions based on 1978 death penalty law in case to which 1977 law applied.) The 1977 death penalty law under which [Ledesma] 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 . . . .) Furthermore, we have noted that there 'may well be no significant difference between' the 1977's law 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, supra*, 48 Cal.3d at pp. 1027-1028, fn. 12 . . .)

(*Ledesma, supra,* 39 Cal.4th at pp. 738-739.) In addressing Ledesma's additional requested instruction, which appears to be the same as the instruction requested by appellant, this Court relied on the fact that the instruction requiring weighing, discussed above, was properly rejected, holding that because the jury was not "required to weigh the aggravating and mitigating factors, defendant's further request for an instruction that the jury could return a verdict of life without possibility of parole even if the aggravating factors outweighed the mitigating factors was irrelevant and unnecessary." (*Id.* at p. 739.) In contrast, appellant did not request an instruction that would have "required" the jury to weigh aggravating and mitigating circumstances, and to that extent his case is distinguishable.

Moreover, *Ledesma's* reasoning on this point is not persuasive. First, although the opinion's observation that the 1977 death penalty "law" did not "require specifically" that the jury weigh the factors is a correct statement as far as it goes, it does not explain why that is dispositive of the *instructional* issue. Second, *Ledesma's* acknowledgment that there "*may 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 to "weigh" those factors, is contrary to this Court's opinions in *Easley*, *Brown*, and *Murtishaw II*, which squarely hold that the two are the same. Third, that the two statutes are equivalent in this respect not only fails to explain why the trial court's refusal to give Ledesma's requested instructions was not error but also affirmatively supports giving the requested instruction, the meaning of which is now explicitly conveyed in CALCRIM No. 766 as follows:

> In reaching your decision, you must consider, take into account and be guided by the aggravating and mitigating

circumstances . . . .

> Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating or mitigating circumstances. *Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death.* 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.*

(Emphasis added.) CALJIC 8.88.1 also explicitly directs the jury to "consider, take into account and be guided by" the aggravating and mitigating circumstances, and that it must be "persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances" that it warrants death. (CALJIC 8.88, ¶¶ 1, 4.)

In this case, respondent (like the court below) focuses solely on the language of the 1977 statute and the 1979 instruction in the same language, and fails to recognize that the statute was later construed by this Court in a manner that requires further explanation. It is not surprising that, having argued in *Easley* that under the 1977 law, a jury "could return a death verdict without regard to the relative weight of aggravation and mitigation" (*Easley*, *supra*, 34 Cal.3d at p. 883), respondent cannot now explain how the same statutory language could reasonably be construed in accord with the scope of discretion described in *Murtishaw II*, *supra*, 48 Cal.3d at p. 1027.

Appellant has demonstrated that simply instructing the jury to "consider, take into account and be guided by" the aggravating and mitigating circumstances is not sufficient to convey the scope of the jury's discretion under the 1977 law, as construed by this Court. (AOB at pp. 42-

43). The decision of the drafters to include the additional language contained in CALCRIM No. 766 emphasized above, which explicitly informs the jury that it retains the discretion to impose life even if aggravation outweighs mitigation, further supports appellant's argument.[2]

In the Opening Brief, appellant explained why the court's refusal to give his requested instruction was prejudicial. (AOB at pp. 49-51), Respondent has chosen not to address the effect of any error, an omission which should be regarded as a tacit admission that the error was prejudicial. For there reasons, the judgment must be reversed.

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[2]Although respondent has not argued that appellant's requested instruction was somehow incorrect, appellant notes that if the trial court perceived some problem with the language proposed by appellant, it had a duty to modify the instruction, rather than rejecting it outright. (*See People v. Falsetta* (1999) 21 Cal.4th 903, 924.)

II

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY NOT TO CONSIDER THE PRIOR DEATH JUDGMENTS OR REVERSALS WAS PREJUDICIAL CONSTITUTIONAL ERROR

All the members of appellant's jury were aware that two prior juries had sentenced appellant to death and that both death sentences had been reversed on appeal. In his opening brief, appellant argued that the trial court had a sua sponte duty to instruct the jury not to consider this information in determining the appropriate penalty, and that the court's failure to so instruct was prejudicial constitutional error. (AOB at pp. 52-59.) Respondent contends that (1) because evidence of the prior verdicts and reversals was introduced by the defense as part of the case in mitigation, an instruction would have undermined the defense case; (2) appellant forfeited his argument by failing to request a limiting instruction; and (3) no prejudicial error occurred. (RB at pp. 31-40.) Respondent is wrong on all counts.

First, appellant did not rely upon the *fact* of the prior death judgments and their subsequent reversal as part of his defense. The mitigating themes advanced by appellant were his preparation of a Gospel harmony, his perfect record in custody, his lack of any prior criminal record, his age, and the reasons for his loss of control at the time of the offense. (9 RT 2079-2087 [opening statement].) The evidence of appellant's exemplary behavior on Death Row was presented to show appellant's future non-dangerousness if sentenced to life without possibility of parole. Although the existence of the prior death verdicts and subsequent court action was contextual information that was necessarily disclosed as part of this mitigating evidence, those background facts were not relevant to any disputed issue in the case.

Respondent points to a passage in defense counsel's closing argument, in which he referred to the prior death judgments in the context of arguing that the victim impact evidence was not a reason to impose death. "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, 24 years, it doesn't make any difference." (12 RT 2739.) In context, this comment was simply an effort to rebut the significance of the victim-impact evidence introduced over appellant's objection, similar to the prosecutor's use of living conditions on Death Row to rebut the significance of appellant's perfect disciplinary record. (12 RT 2728-2729.)

Indeed, even in the absence of the evidence of appellant's good conduct on Death Row, the passage of time since the date of the crimes – a subject on which the prosecutor individually questioned every juror[3] – alerted the jury to the fact that there were prior proceedings in the case, as did the court's statements during voir dire. (1 RT 184-185, 227.)

Appellant agrees with respondent that it is probably inevitable that a jury at a penalty retrial will become aware of the prior death judgment and reversal (RB at p. 39), and it therefore follows that the presentation of evidence of exemplary behavior while on death row cannot be a valid reason to forfeit the instructional claim. It is that very inevitability, and the irrelevant and prejudicial inferences that the jury is likely to draw, that makes an instruction directing the jury not to draw any inferences from the fact of the prior death judgments and appeals a legal principle "closely and

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[3] See, e.g., 2 RT 291, 2 RT 331, 2 RT 363; 3 RT 446; 4 RT 709, 4 RT 800-801, 4 RT 875; 5 RT 892, 5 RT 968, 5 RT 1063; 6 RT 1122, 6 RT 1230.

openly connected with the facts before the court and that [is] necessary for the jury's understanding of the case the issues" at every penalty retrial, on which the court should instruct sua sponte. (See, e.g., *People v Montoya* (1994) 7 Cal.4th 1027, 1047.)

The record contains no support for respondent's contention that appellant's counsel made a tactical decision not to seek an instruction directing the jury not to draw any inference from that information in order to avoid undermining the case in mitigation. (RB at p. 38.) Moreover, instructing the jury to disregard the fact of the prior death judgments and reversals would not have undermined the evidence of appellant's exemplary behavior, but instead would have prevented the jury from improperly rejecting the mitigating effect of appellant's good behavior by relying upon the judgment of other jurors that death was the appropriate punishment. (*People v. Davis* (Ill. 1983) 452 N.E.2d 525, 537 [jury should not be told about prior death judgment; "[i]f a juror was uncertain as to whether defendant was qualified for the death sentence, the knowledge that 12 other people determined he was could have swayed the juror's verdict in favor of death."]. Any question the trial court may have had about whether an instruction would undermine the defense would have been answered if the court had asked counsel. (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7.)

Second, in relying upon the general proposition that the trial court has no duty to give a limiting, clarifying or amplifying instruction in the absence of a request, respondent misunderstands the nature of the instruction at issue. The rule invoked by respondent applies where a party complains that "an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate

clarifying or amplifying instructions." (*People v. Andrews* (1989) 49 Cal.3d 200, 218, overruled on other grounds.) In each of the cases cited by respondent (RB at pp. 33-34), the trial court correctly instructed on a specific issue raised by the evidence, and the defendant's complaint was the court's failure to modify that specific instruction in some way. (See *People v. Andrews, supra* [failure to modify instruction directing jury to view accomplice testimony with distrust]; *People v. Freeman* (1994) 8 Cal.4th 450, 494-495 [failure to instruct on limited purposes for which jury could consider prior crime evidence]; *People v. Hawkins* (1995) 10 Cal.4th 920, 942 [same]; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1711 [failure to limit use of flight evidence]; *People v. Duran* (1983) 140 Cal.App.3d 485, 493 [failure to limit use of defendant's statement].) In contrast, the trial court here gave no instruction at all addressing the wholly irrelevant fact of appellant's prior trials and reversals, and so there was nothing for counsel to seek to clarify. In any event, one of the justifications for placing a *sua sponte* duty on the trial court to instruct on critical principles of law is to protect against the inadvertent failure of the parties to request a necessary instruction. (*People v. Sedeno, supra*, 10 Cal.3d at p. 717, fn.7.)

Third, the prejudicial impact of the jury's knowledge of the prior death verdicts cannot be refuted. As one court has observed, "we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." (*United States v. Williams* (5th Cir. 1978) 568 F.2d 464, 471.) The same conclusion must be drawn when a capital sentencing jury learns that the defendant has previously been sentenced to death twice for the same crime. Even in the absence of a request by counsel, the highly prejudicial impact of that information required the court to instruct the jury not to consider it for any

purpose in order to discharge its responsibility to provide appellant with a fair trial before an unbiased jury.

Respondent also fails to address *People v. Duran* (1976) 16 Cal.3d 282, 292, relied upon in appellant's opening brief (AOB at p.57), which presents a better analogy to this case. Like this case, *Duran* involves trials where the jury must be informed of information (visible restraints on the defendant) which is irrelevant to the issues in dispute but highly prejudicial. Under such circumstances, the interests of the parties and the court are best served by a sua sponte instruction.

Citing *People v. Anderson* (1990) 52 Cal.3d 453, 468, and *People v. Whitt* (1990) 51 Cal.3d 620, 641, respondent contends "[t]his 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." (RB at p. 39.) Respondent misstates the holdings of these cases. This Court did not determine whether the trial court's comments about the prior proceedings were error, holding instead that the claims were forfeited by counsel's failure to object to the instruction in *Anderson*, *supra*, 52 Cal.3d at p. 468, and by invited error in *Whitt*, *supra*, 51 Cal.3d at p. 640 (any error in instruction disclosing prior death judgment was invited by defense counsel who "urged the court to instruct the jury with virtually all the information now challenged on appeal"), and further holding that the court's specific comments were not prejudicial. In the context of prejudice, appellant's case is significantly different because it involves two prior death judgments for the same offenses that were in fact reversed.

Respondent's reliance on the holdings of *People v. Bittaker* (1989) 48 Cal.3d 1046, 1106, and *People v Fierro* (1991) 1 Cal.4th 173, 245 – that

passing references to the availability of appellate review were not reversible error – is also misplaced. Neither case was a penalty retrial following reversal on appeal, and the prosecutor's references were therefore to some future event whose outcome could not be known. Here, the jury was aware that two prior death judgments had in fact been set aside.

For the reasons stated above and in the Opening Brief, the trial court's failure to instruct the jury not to consider or take into account the prior death judgments and reversals in this case violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and the parallel provisions of the California Constitution, and require that the death judgment be set aside.

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III

THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE CONSIDERATION OF THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL REFUSAL TO INSTRUCT ON UNREASONABLE SELF-DEFENSE

Although evidence that appellant honestly but unreasonably believed he was being fired upon and shot back in self-defense was presented at all his trials, no jury has ever been informed of the legal or moral significance of that evidence or given an opportunity to give effect to it. In *Murtishaw I,* this Court held that the record contained "substantial evidence to support a finding that appellant acted under the unreasonable belief that his life was in danger" (*People v. Murtishaw* (1981) 29 Cal.3d 733, 753), but held that the trial court had no sua sponte duty to instruct on that defense at the guilt phase because appellant's case was tried before the decision in *People v. Flannel* (1979) 25 Cal.3d 668, at a time when the doctrine was obscure and undeveloped (*People v. Murtishaw, supra,* 29 Cal.3d at pp. 753-754.) In *Murtishaw II,* this Court held that the trial court had no sua sponte duty to instruct on imperfect self-defense at the first penalty retrial in this case. (*People v. Murtishaw* (1988) 48 Cal.3d 1001, 1017-1018.)

Respondent now contends that the doctrine of law of the case prohibits consideration of appellant's claim that the trial court erred in refusing his *request to instruct* on unreasonable self-defense at his second penalty retrial. Respondent's contention must be rejected because (1) the instructional issue appellant raises here is not the same as the issue decided in *Murtishaw II*; (2) the law of the case doctrine is inapplicable because of intervening changes in the law; and (3) its application here would be unjust.

1. The Law of the Case Doctrine Does Not Apply to the Issue Raised in This Appeal

In general, when an appellate court states a principle of law that is necessary to the decision, that rule becomes the law of the case which must be followed in subsequent proceedings in the same case, unless there is a significant change of circumstances. (*People v. Shuey* (1975) 13 Cal.3d 835, 841.) The doctrine is procedural, not jurisdictional (*People v. Stanley* (1995) 10 Cal.4th 764, 786-787), and is subject to several qualifications: the point of law involved must have been necessary to the prior decision, the matter must have actually been presented and litigated, and application of the doctrine must not result in an unjust decision. (*Pigeon Point Ranch Inc. v. Perot* (1963) 59 Cal.2d 227, 231, overruled on other grounds, *Kowis v. Howard* (1992) 3 Cal.4th 888, 899-901; see also *People v. Whitt* (1990) 51 Cal.3d 620, 638.)

The holding in *Murtishaw II* relied upon by respondent addressed an issue not raised here--whether the trial court should have instructed, *on its own motion*, on unreasonable self-defense, and whether the failure to so instruct precluded the jury from considering evidence of appellant's honest but objectively unreasonable belief in self-defense in mitigation. (*Murtishaw II*, *supra*, 48 Cal.3d at p. 1017.) This Court was "unpersuaded that a trial court has a constitutional duty to instruct sua sponte on unreasonable self-defense at the penalty phase," and held that instructions on the factors listed in former Penal Code section 190.3, subsections (a)-(j), were sufficient to fulfill the trial court's duty "to instruct on the general principles of law applicable to the penalty retrial." (*Ibid.*) In support of this holding, this Court cited *People v. Wickersham* (1982) 32 Cal.3d 307, 323, a case defining the scope of a trial court's duty to instruct on its own

motion on imperfect self-defense at a guilt trial. *Murtishaw II* did not decide or address whether it would be error to refuse such an instruction at the penalty phase, *if requested*, or hold that as a matter of law, such an instruction should never be given at the penalty phase.

The claim raised by appellant in this proceeding is whether the trial court erred in refusing appellant's *request* to instruct on unreasonable self-defense in mitigation. A request for instructions is not governed by *Wickersham*'s sua sponte rules, but by different legal principles. Under state and federal law, a defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. (*People v. Roldan* (2005) 35 Cal.4th 646, 715; *People v. Sears* (1970) 2 Cal.3d 180, 190; see also *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740.) It is equally well-established that both parties have the right to request specially-tailored instructions at the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

Murtishaw II also held that the failure to instruct on unreasonable self-defense at the penalty trial did not preclude the jury from considering that evidence. This Court acknowledged that the language of former section 190.3(e)[4] "possibly raise[d] the negative inference that an *unreasonable* belief was not a proper consideration" (*Murtishaw II, supra*, 48 Cal.3d at p. 1017; emphasis in original), but concluded that the factor (j) instruction permitted consideration of the unreasonable belief evidence, as well as "any 'lingering doubts' about the culpability" of appellant's

[4] Former section 190.3(e) directed the jury to consider "whether or not the offense was committed under circumstances which the defendant *reasonably believed* to be a moral justification or extenuation of his conduct." (Emphasis added.)

conduct. (*Id.* at pp.1017-1018, citing *People v. Ghent* (1987) 43 Cal.3d 739, 776.) This language was not "necessary" to the decision for purposes of law of the case. As noted above, the earlier appeal did not decide whether it would be error to refuse a requested instruction. This additional language was, in context, an explanation of why, under the facts of that proceeding (including the argument of defense counsel),[5] the absence of the instruction did not deprive appellant of a fair trial.

2. Intervening Changes in the Law Preclude Application of the Law of the Case

Assuming arguendo that the issue resolved in *Murtishaw II* involves the same rule of law and its reasoning was necessary to that decision, intervening changes in the law preclude application of the law of the case doctrine to the present case.

First, as noted above, this Court cited *Wickersham* to support its conclusion that the trial court had "fulfilled its legal obligation to instruct the jury on the general principles of law." (*Murtishaw II, supra*, 48 Cal.3d at p. 1017.) *Wickersham* has since been overruled in part in a manner that affects appellant's case. In *People v. Barton* (1995) 12 Cal.4th 186, 199-200, this Court held that *Wickersham*'s characterization of the doctrine of unreasonable self-defense as a "defense" for purposes of the rule governing the court's sua sponte duty to instruct was inaccurate. (See also *People v.*

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[5] At the first penalty retrial, appellant's counsel argued that the evidence of appellant's good faith did fall within factor (f) (factor (e) at this trial, 12 RT 2784) because it provided a moral justification or extenuation for his conduct; in making that argument, counsel "adroitly avoided the distinction between 'reasonable' and unreasonable.'" (*People v. Murtishaw, supra,* 48 Cal.3d at p. 1017, fn. 6.) Appellant' s counsel's argument in this proceeding, as discussed within, and in the Opening Brief (AOB at pp. 68-69), was quite different.

Breverman (1998) 19 Cal.4th 142, 159.) This is significant because *Wickersham* relied on that characterization to find no error in the trial court's failure to instruct on voluntary manslaughter based on unreasonable self-defense on its own motion. (*Wickersham, supra*, 32 Cal.3d at p. 329.) Thus, *Murtishaw II*'s reliance on *Wickersham* has been significantly undermined by *Barton*; hence, when supported by the evidence, unreasonable self-defense is a principle of law on which the court must instruct sua sponte at the guilt phase.

Second, *Murtishaw II*'s extension of the reasoning of *People v. Ghent, supra*, 43 Cal.3d at p. 77, to conclude that the jury would consider evidence of unreasonable self-defense under subsections (j) and (k) has been undermined by later United States Supreme Court decisions addressing subsections (j) and (k). In *Ghent*, the issue was whether the language of former section 190.3(c), directing the jury to consider whether the defendant acted under the influence of "extreme" mental or emotional distress, precluded consideration of a lesser degree of mental or emotional distress. This Court found that an instruction in the language of former section 190.3, subsection (j), which directed the jury to consider "*any* other circumstance which extenuates the gravity of the crime" was sufficient to permit the jury to consider "a mental condition of the defendant which, though perhaps not deemed extreme, nonetheless mitigates the seriousness of the offense." (*Ibid;* emphasis in original.) That is not the situation presented here: by directing appellant's jury to consider whether he had a "reasonable" belief in moral justification, factor (e) excluded by implication the substantial evidence of his honest but objectively "unreasonable" belief. (See *In re Hubbard* (1964) 62 Cal.2d 119, 126-127 [use of "specific words and phrases connotes an intent to exclude that which is not specifically

stated"].) Thus, appellant's jury was not being asked to consider a lesser form of "reasonable belief" under factor (j), but rather the *opposite* or *absence* of a reasonable belief.[6]

Murtishaw II does not explain why or how a juror would construe evidence of appellant's objectively unreasonable but honestly-held belief in the need to defend himself as falling within the definition of "any other circumstance which extenuates the gravity of the crime," in the absence of an instruction like the one requested by appellant, and several subsequent United States Supreme Court decisions show that it is unlikely that a juror would do so. For example, in *Boyde v. California* (1990) 494 U.S. 370, the high court upheld the constitutionality of an instruction in the unadorned language of factor (k),[7] in part because it would be counter-intuitive for jurors to conclude that the character and background mitigating evidence introduced in that case did not lessen or excuse the gravity of the crime within the meaning of the catch-all instruction.

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[6] The same reasoning applies to *Murtishaw II*'s unexplained assumption that factor (j) would allow the jury to consider any lingering doubts about appellant's culpability. In any event, that aspect of *Murtishaw II* is inapplicable here because the parties did not raise the concept of lingering doubt. Given the court's repeated admonitions during voir dire that the question of appellant's guilt had already been decided and was not in issue (see, e.g., 2 RT 255 ["We are telling you he's guilty. That's not an issue for you to decide"]), it is highly unlikely that the jury would have construed factor (j) to include lingering doubt in the absence of any explanation of that concept.

[7] Although the trial court in the present case expanded factor (j) to include consideration of character and background evidence (12 RT 2785), that modification does not affect the mitigating evidence in issue. Thus, the language of the factor (j) instruction given in this case is the same in all relevant respects to the instruction addressed in the Supreme Court cases discussed above.

> Petitioner contends that this instruction did not permit the jury to give effect to evidence – presented by psychologists, family, and friends – of his impoverished and deprived childhood, his inadequacies as a school student, and his strength of character in the face of these obstacles. But as we explained last Term in *Penry v. Lynaugh*: "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*'" 492 U.S., at 319, 109 S.Ct., at 2947 (quoting *California v. Brown,* 479 U.S., at 545, 107 S.Ct., at 841 (O'Connor, J., concurring)) (emphasis added). Petitioner had an opportunity through factor (k) to argue that his background and character "extenuated" or "excused" the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, "long held by society," that in an appropriate case such evidence would counsel imposition of a sentence less than death.

(*Boyde*, *supra*, 494 U.S. at p. 382; emphasis in original; accord, *Ayers v. Belmontes* (2006) 549 U.S. 7, 15 [it would be "counterintuitive if a defendant's capacity to redeem himself through good works could not extenuate his offense and render him less deserving of death sentence"]; *Brown v. Payton* (2005) 544 U.S. 133, 142-143 [post-crime character transformation, like remorse," is something commonly thought to lessen or excuse a defendant's culpability].)

In contrast, there is nothing intuitive about regarding an unreasonable belief in self-defense as an extenuating factor, and no evidence to support the conclusion that unreasonable self-defense is commonly known and understood as a mitigating factor by persons untrained in the law. In the absence of the instruction requested by appellant, factors (e) and (j) were therefore contradictory. "Nothing in the

specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 320.) In arguing that appellant's belief was "unreasonable in the law," but reasonable in fact (12 RT 2753), trial counsel made matters worse. Counsel's explanation was both in accurate and confusing. For the reasons stated here and in the opening brief (AOB at pp.69-71), the trial court's refusal to instruct on unreasonable self-defense was prejudicial error.[8]

3. Application of the Law of the Case Doctrine in this Context Would be Unjust and a Violation of the Eighth and Fourteenth Amendments

As noted at the outset of this argument, although there was substantial evidence that appellant acted with an honest but objectively unreasonable belief in the need to defend himself, from which a jury could reasonably conclude that he lacked malice and therefore was not guilty of capital murder, or any murder at all under California law, the guilt phase instructions did not permit the jury to give any effect to that evidence. And, although the same evidence was presented in this proceeding, the jury was again prevented from taking it into account in determining the appropriate penalty. Appellant recognizes that as a general matter, this Court has held that the law of the case doctrine applies in capital cases. (See *People v. Stanley, supra,* 10 Cal.4th at 787, and cases cited therein.) However, this

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[8] If the trial court perceived some problem with the language proposed by appellant, it had a duty to modify the instruction, rather than rejecting it outright. (See, e.g, *People v. Falsetta* (1999) 21 Cal.4th 903, 924.)

Court has not done so under circumstances as extreme as those presented in the present case. Applying the law of the case doctrine to uphold appellant's death judgment despite its unreliability would be fundamentally unfair and the most unjust application of the law of the case that can be contemplated under the law. Accordingly, the law of the case doctrine should not be applied to appellant's case to bar consideration of the instant claim.

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CONCLUSION

For the reasons stated above and in appellant's Opening Brief, the death judgment must be reversed.

DATED: December 29, 2009

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

GAIL WEINHEIMER
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 36 (B)(2))

I, Gail R. Weinheimer, am the Senior Deputy State Public Defender assigned to represent appellant David Leslie Murtishaw in this automatic appeal. I instructed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 6,149 words in length.

Dated: December 29, 2009

Gail R. Weinheimer

GAIL R. WEINHEIMER
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. David Leslie Murtishaw No. S110541

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. On this day, I served true copies of the attached:

APPELLANT'S REPLY BRIEF

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

Jaime A. Scheidegger
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Each said envelope was then, on December 29, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on December 29, 2009, at San Francisco, California.

Glenice Fuller