COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DOUGLAS RAY STANKEWITZ, Defendant and Appellant.	F079560 Fresno County Superior Court No. CF78227015

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF FRESNO

Hon. Arlan Harrell, Judge

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

This is an appeal from imposition of a sentence of life without possibility of parole. Appellant spent approximately four decades on death row for a crime committed when he was 19 years old; his case was returned to Fresno County in 2012 for a retrial of the penalty phase. Decades of litigation were abruptly concluded by the prosecution's decision to drop the death penalty and the court's immediate imposition of a sentence of life without the possibility of parole. Appellant appeals from the sentence imposed.

On July 10, 1978, appellant Douglas Ray Stankewitz was sentenced to death after a jury found him guilty of the wilful, deliberate, and premeditated murder of Theresa Greybeal. (CT 84-87.) The jury further found that the murder was personally committed by appellant during the commission of a robbery (Pen.

Code, § 190.2, subd. (c)(3)(i)), during the commission and attempted commission of a kidnaping (Pen. Code, § 190.2, subd. (c)(3)(ii), and that in the commission of the offense appellant personally used a firearm (Pen. Code, § 12022.5). (CT 84-86.) Appellant was additionally convicted of robbery (Pen. Code, § 211) and kidnaping (Pen. Code, § 207), and the jury found true special allegations that he had personally used a firearm as to each of these offenses. (CT 85-86.)

On August 2, 1982, following an automatic appeal, the California Supreme Court reversed the judgment due to the trial court's failure to hold a competency hearing (Pen. Code, § 1368). (See *People v. Stankewitz* (1982) 32 Cal.3d 80, 94.)

On September 22, 1983, a second jury convicted appellant of first degree murder as well as the subordinate charges, and found true the same special circumstance allegations and other special allegations. (CT 88.) This jury also fixed the penalty at death. (CT 88.) On November 18, 1983, the court sentenced appellant to death. (CT 89-90.)

On July 5, 1990, the California Supreme Court affirmed this judgment in its entirety. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 116.)

On September 22, 2009, a federal district court granted appellant's petition for writ of habeas corpus as to his claim alleging ineffective assistance of counsel at the penalty phase of his second trial. (*Stankewitz v. Wong* (E.D. Cal. 2009) 659 F.Supp.2d 1103, 1112.) The court directed the State of California

to vacate and set aside the death sentence, unless within 90 days of the entry of the district court order, the State of California initiated proceedings to retry the sentence. In the alternative, the court ordered the state to resentence appellant to life without the possibility of parole. (*Ibid*.)

The Ninth Circuit affirmed the district court's order on February 6, 2012. (*Stankewitz v. Wong* (9th Cir. 2012) 698 F.3d 1163, 1176.)

Following remand to Fresno County for retrial, appellant filed multiple motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 and *Faretta v. California* (1975) 422 U.S. 806. (See, e.g., I Aug. CT 105, 149, 172, 174, 178, 180.)

On March 16, 2017, appellant moved to dismiss the case for failure to preserve evidence. (I Aug. CT 191 et seq; see *Brady v. Maryland* (1963) 373 U.S. 83; *California v. Trombetta* (1984) 467 U.S. 479.) On the same date, appellant filed a motion for a new trial as to guilt. (II Aug. CT 402 et seq.)

On May 1, 2017, appellant filed a motion to compel discovery. (II Aug. CT 569.) On June 23, 2017, appellant filed a reply to the People's opposition to the motion for new trial; in this filing, appellant also requested habeas corpus relief. (III Aug. CT 784 et seq.)

Also on June 23, 2017, the court denied the motion for new trial. (III Aug. CT 793-794.) On June 26, 2017, the court filed an order declaring that appellant's attempts to reopen the guilt phase were an improper attempt to expand the scope of the proceedings.

(III Aug. CT 797-798.) The court denied appellant's "application for habeas corpus relief" as filed on June 23, 2017. (III Aug. CT 798.)

On September 1, 2017, appellant moved to dismiss the charges due to outrageous government conduct and violations of due process. (III Aug. CT 831 et seq.) On December 20, 2017, the court denied this motion as well as the previous motion to dismiss. (V Aug. CT 1220 et seq.)

On May 24, 2018, appellant filed a motion for reconsideration. (V Aug. CT 1260 et seq.)

On August 8, 2018, appellant moved to disqualify the Honorable Arlan Harrell pursuant to Code of Civil Procedure section 170.1. (V Aug. CT 1324 et seq.) Judge Harrell filed a verified response on August 14, 2018. (V Aug. CT 1401 et seq.) On October 9, 2018, the request to disqualify Judge Harrell was denied. (VI Aug. CT 1604 et seq.)

On December 6, 2018, appellant filed a renewed motion to dismiss for *Brady* violations. (VI Aug. CT 1768 et seq.)[1]

On January 2, 2019, appellant moved to continue the trial date. (VII Aug. CT 1909 et seq.) On May 1, 2019, appellant filed a motion for a conditional examination of two witnesses. (VII Aug. CT 1972 et seq.) On the same date, appellant moved to compel DNA testing (VII Aug. CT 1975 et seq.), to compel specified

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[1]An earlier, incomplete version of this second *Brady* motion was filed on November 28, 2018. (VI Aug. CT 1626 et seq.)

evidence (VIII Aug. CT 2132 et seq.), and to preserve evidence. (VIII Aug. CT 2139 et seq.)

On March 22, 2019, the court granted the motion to continue. (CT 131-132, 185 et seq.) The court set a hearing date for the motion to dismiss for May 3, 2019. (CT 132.) The jury trial was tentatively set for November 4, 2019. (CT 132.)

On April 19, 2019, the People filed a notice requesting the court to resentence appellant to life without possibility of parole. (CT 140 et seq.)

On April 24, 2019, appellant moved to continue the hearing on the pending motion to dismiss. (CT 143 et seq.)

On April 26, 2019, the court denied the requested continuance. (CT 151 et seq.)

On April 30, 2019, appellant moved to continue sentencing in order to give the defense time to prepare a sentencing memorandum. (CT 153 et seq.)

On May 11, 2019, the court denied the requested continuance. (CT 157 et seq.)

On May 3, 2019, the court granted the People's request to resentence appellant to life without the possibility of parole. (CT 159-160.) On the same date, the court denied a request to continue the hearing for the *Trombetta/Brady* motion but ordered counsel to contact the court regarding dates for these motions to be heard. (CT 160.) The court then vacated the death sentence. (CT 160.)

The court sentenced appellant to a term of life without possibility of parole for count one, murder. (CT 160.) For count

two, robbery, the court reimposed the upper term of four years; the court imposed an additional two years for the firearm enhancement. (CT 160, RT 48.) For count three, kidnapping, the court reimposed the upper term of five years, with a concurrent term of two years for the firearm enhancement. (CT 160, RT 49.) Counts two and three were to run concurrently with one another and concurrently with the sentence of life without possibility of parole. (CT 160, RT 49.)

On June 13, 2019, the court denied appellant's request for a hearing on the pending motion to dismiss as well as the four pending motions filed as of May 1, 2019. (CT 166 et seq.)

On June 27, 2019, appellant filed timely notice of appeal from the denial of the motion to continue sentencing and of the request to argue the pending motions. (CT 171.) On December 20, 2019, this court granted appellant's motion to construes the notice of appeal, filed on June 27, 2019, to be an appeal from the judgment and sentence imposed on May 3, 2019.

STATEMENT OF APPEALABILITY

This appeal is from a judgment that finally disposes of the issues between the parties.

STATEMENT OF FACTS

For purposes of this brief only, appellant adopts the statement of facts recounted by the Ninth Circuit in *Stankewitz v. Woodford* (9th Cir. 2004) 365 F.3d 706.

"On the evening of February 7, 1978, Stankewitz, then 19 years old, left Sacramento, California driving a white Oldsmobile. He was headed for Fresno. In his company were his mother, brother, an older man named J.C. and three young companions -- Billy Brown, Marlin Lewis and Teena Topping. The group reached Manteca at about 1 a.m. on February 8 and stopped at a 7-Eleven store to buy oil for the car." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 708.)

"Manteca police observed the car irregularly parked and ran a check on the license plate. They received information indicating that the car had been stolen. Several officers then approached the car and frisked several of its occupants. One of the passengers stated that she had borrowed the car from her uncle in Sacramento. Based on that information, the officers contacted Sacramento police but were unable to determine whether the car had been stolen. The officers asked the group to follow them to the police station, where the officers made another unsuccessful attempt to contact the vehicle's owner. After about an hour and a half, they were allowed to leave, but the vehicle was impounded. Before leaving, the group obtained directions to the local bus depot." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 708.)

"The bus depot was not open when they arrived, so the group waited at a nearby donut shop. After several hours, Stankewitz, Brown, Lewis and Topping decided to hitchhike and obtained a ride to Modesto. Unable to get a ride any farther, the four walked to a nearby K-Mart store, where Stankewitz and Topping looked for a car in the parking lot to steal. Topping spotted a woman, the victim Theresa Greybeal, leaving the K-Mart store, and Topping, Lewis and Stankewitz followed Greybeal to her car. As Greybeal opened the car door, Topping pushed her inside and entered the car herself. Lewis jumped in the backseat and opened the passenger door, admitting Stankewitz. Brown then got into the backseat with Lewis. In the meantime, Stankewitz had produced a pistol, and Lewis had a knife." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 708.)

"With Topping driving, the group left the parking lot, proceeded to the freeway and turned south toward Fresno. Once on the freeway, Greybeal stated that none of this would have happened if she had had her dog with her. Stankewitz responded by pulling out his gun and stating, 'This would have took care of your dog.' After several miles, Topping asked Greybeal for money, and Greybeal handed Lewis $ 32 from her purse. She also gave her watch to Topping, commenting that she could put in an insurance claim for it." (*Stankewitz v. Woodford, supra*, 365 F.3d at pp. 708-709.)

"When the group arrived in Fresno, they drove to a bar called the 'Joy and Joy.' Topping went into the bar and returned

after a few minutes with a woman named Christina Menchaca. Menchaca joined the group, and they drove around the corner to the Olympic Hotel. Topping and Menchaca went into the hotel. A few minutes later they returned to get Stankewitz, and all three re-entered the hotel. Shortly thereafter, the three returned to the car. They appeared to be moving more slowly, and their eyes were glassy." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 709.)

"Topping then suggested they go to Calwa, California, to 'pick up,' a slang expression meaning to obtain heroin. They drove to Calwa, where Topping told everyone to get out. Brown, Lewis, Stankewitz and Greybeal exited the car. Brown asked Greybeal for a cigarette; she gave him one and took one for herself. After two or three minutes, Topping told Brown to get back in the car. Brown and Lewis re-entered the car. From inside the car, Brown saw Stankewitz walk toward Greybeal, who was standing five or six feet away, facing away from the car. Stankewitz raised the gun in his left hand, braced it with his right hand and shot Greybeal once in the head from the distance of about one foot. Greybeal fell to the ground, fatally wounded." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 709.)

"After shooting Greybeal, Stankewitz got into the car and said, 'Did I drop her or did I drop her?' As Topping drove away, Stankewitz said to her, 'Drive carefully. We don't want to get caught.' Later that evening, the group drove to Clovis, California, where Stankewitz unsuccessfully tried to sell Greybeal's watch. In Clovis, Brown learned that his mother had filed a missing person's

report on him and asked to be driven home. When he arrived home, Brown began to cry and told his mother what had happened. His mother called the police, and an investigator came to the house and took a statement from Brown. Later that evening, Fresno police apprehended Stankewitz, Topping and Lewis, still in possession of Greybeal's car. The pistol that was used to kill Greybeal was found in the car. The police recovered Greybeal's watch from Menchaca, who was nearby, and arrested her as well." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 709.)

"By amended information filed on July 6, 1978, Stankewitz was charged with the murder, robbery and kidnaping of Greybeal, all committed with the use of a firearm. The information alleged two special circumstances: the murder (1) was willful, deliberate and premeditated and (2) was personally committed by Stankewitz during the attempted commission of a robbery and a kidnaping. Stankewitz pleaded not guilty to all charges and denied the firearms allegations and special circumstances." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 709.)

"Brown, Lewis, Menchaca and Topping were also charged with murder. Brown's charges were later dropped in return for his testimony against Stankewitz; the charges against Lewis, Menchaca and Topping were severed. Lewis, Menchaca and Topping successfully moved for change of venue based on excessive pretrial publicity. Menchaca and Topping were allowed to plead guilty as accessories and did not receive state prison time.

Lewis pled guilty to second-degree murder." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 709.)

The Ninth Circuit also summarized the details of the 1978 trial:

"On July 3, 1978, two days before the trial was set to begin, Stankewitz's public defender informed the court that he had come to doubt Stankewitz's mental competency to stand trial. [Citation.] A court-appointed expert examined Stankewitz and testified that Stankewitz had a mental defect which prevented him from rationally assisting his public defender, but that Stankewitz might cooperate with appointed private counsel. [Citation.] The court declined to hold a competency hearing and refused Stankewitz's later motion for substitution of counsel. [Citation.]" (*Stankewitz v. Woodford, supra*, 365 F.3d at pp. 709-710.)

"At trial, counsel presented a diminished capacity defense based upon mental defect, against Stankewitz's wishes. [Citation.] The jury convicted Stankewitz of all charges and sentenced him to death. [Citation.] The California Supreme Court reversed this conviction upon automatic appeal, holding that the trial court had erred by not taking any action to unravel the dispute between the public defender and Stankewitz. [Citation.] The court held that because Stankewitz had refused to cooperate with the public defender, the trial court should have at least substituted counsel if not held a full competency hearing. [Citation.]" (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 710.)

The Ninth Circuit summarized the retrial proceedings in 1983:

"Before the start of the second trial, Stankewitz was accorded a competency hearing and hearing pursuant to *People v. Marsden* [1970 2 Cal.3d 118], to determine whether there was a conflict between Stankewitz and the public defender who had been appointed to represent him. [Citation.] The court found such a conflict, relieved the public defender and appointed private counsel, Hugh Goodwin. [Citation.] The court deemed Stankewitz competent to stand trial as Stankewitz had refused to be interviewed by two court-appointed psychiatrists and there was no other evidence of incompetence presented. [Citation.]" (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 710.)

"During the guilt phase of the trial, the state presented 15 witnesses; Goodwin presented no evidence. In keeping with Stankewitz's wishes, Goodwin did not present a diminished capacity defense and instead focused his efforts on attacking the testimony of Billy Brown, who named Stankewitz as Greybeal's shooter. At the penalty phase, the prosecution presented 17 witnesses; Goodwin presented four live witnesses and, by stipulation, the testimony of two other witnesses by affidavits. Stankewitz did not testify at either the guilt or penalty phase." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 710.)

"The prosecution's penalty-phase witnesses included Jesus Meraz, a farm worker who testified he was robbed by Menchaca and others he could not see; George Key, who was robbed and

badly beaten by Stankewitz and others in 1973 when Key was 70; and Steven Reid, a California Highway Patrol officer who was shot in the head while participating in a high-speed chase after a car in which Stankewitz, along with his brother Johnnie, was a passenger. These and other witnesses testified to numerous incidents of Stankewitz's violent and criminal behavior:

- *Robbery and assault of George Key*. George Key and his wife, Neva Key, testified about the severe beating that Stankewitz and a companion administered to Mr. Key when they stole his car on April 24, 1973.
- *Shootout with Officer Reid*. Officer Reid, who chased after Eddie Davis and Johnnie and Doug Stankewitz in Key's stolen car, testified that he saw only two people in the stolen car and that, after Davis was shot, Stankewitz was found in the car after the shootout ended. In his closing argument, the prosecutor implied that Stankewitz must have shot Officer Reid.
- *Attack at the Youth Training School*. Thomas Walker, a counselor for the California Youth Authority, testified that Stankewitz kicked and bit him during a scuffle that occurred on July 20, 1975 when Stankewitz was not permitted to go to the gym.
- *Robbery and kidnaping of Jesus Meraz*. Meraz testified that Christina Menchaca invited him to a car on February 8, 1978, where he was robbed while someone threatened him with a knife and a man

resembling Stankewitz threatened him with a gun. Meraz's belt was later found in the car that the group took from Greybeal.

- *Stabbing of Carl Hogan*. Several witnesses testified that Stankewitz stabbed fellow inmate Carl Hogan in the neck while incarcerated in San Quentin prison. Stankewitz told Officer James Crowder that it was inmate code to kill Hogan because Hogan "had killed a kid."
- *Attack on Sheriff Dominick Damore*. Sheriff Damore testified that Stankewitz attacked him and several officers who were attempting to take a photograph of Stankewitz for booking on April 18, 1977. According to Damore, it took five people to subdue Stankewitz.
- *Attack on guards*. Officer William Yount testified that Stankewitz attacked him and other guards who attempted to get Stankewitz to stop talking to another prisoner while being transferred on March 2, 1982.
- *Light bulb attack*. Sergeant Steve Szmaciarz testified that Stankewitz threw a light bulb toward him through the bars of Stankewitz's cell on December 13, 1980. The bulb shattered, sending fragments into Szmaciarz's face.
- *Liquid attack*. Sergeant Charles Caraway testified that Stankewitz, along with three other inmates,

threw a liquid at an inmate in San Quentin on January 28, 1982."

(*Stankewitz v. Woodford, supra*, 365 F.3d at pp. 710-711.)

"By contrast, Goodwin presented the following witnesses at the penalty phase:

- *Glenn E. Davis*, a jail chaplain at Fresno County Jail, testified as a Christian that anyone who is converted can change. He did not mention Stankewitz until cross examination, when he testified that Stankewitz had shown no interest in conversion and that he had not recently expressed any interest in counseling to Davis.
- *Don Penner*, an assistant district attorney for the County of Fresno appearing under subpoena served the previous day, testified that he had no doubt 'about the power of God to change a person's life,' but did not speak specifically about Stankewitz and added on cross-examination that he was not 'opposed to the death penalty as a general principle.'
- *Theresa Montgomery*, Stankewitz's sister-in-law, testified in general terms about conditions on the reservation. She also noted that Stankewitz and his family could have a positive impact on the reservation in that people on the reservation 'would look at life in a different perspective . . . by what's going on . . . To see what he's gone through and what he's going through . . . so they can see where they're headed.'

- *Joe Walden,* Stankewitz's juvenile probation officer at age six, testified about Stankewitz's family, Stankewitz's history as a ward of the state and two instances of child abuse.
- *Sheriff of Fresno County Harold McKinney* testified by stipulation that he was familiar with, and favorably impressed by, the work done by jail chaplains.
- *Jean Shacklett*, a parole investigator, testified during Stankewitz's first trial that on February 8, 1978 she saw 'what [she] thought was a needle mark' on Stankewitz's arm. She did not testify about Stankewitz's drug use at any time or about use on the day of the offense. At Stankewitz's second trial, Goodwin, by stipulation, read portions of Shacklett's previous testimony into evidence."

(*Stankewitz v. Woodford, supra*, 365 F.3d at p. 711.)

"Stankewitz was found guilty of murder with special circumstances, robbery and kidnaping. The jury fixed the penalty as death. On November 18, 1983, the court pronounced a judgment of death against Stankewitz. Upon automatic appeal, the California Supreme Court affirmed the judgment in its entirety [citation], and the U.S. Supreme Court denied Stankewitz's timely petition for writ of certiorari." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 712.)

ARGUMENT

I.

THE TRIAL COURT'S REFUSAL TO EXERCISE SENTENCING DISCRETION DEPRIVED APPELLANT OF DUE PROCESS AND THE RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS

On April 19, 2019, the prosecution gave notice of its intent to cease its four-decade pursuit of the death penalty; appellant was sentenced to life without possibility of parole exactly two weeks later. In imposing that sentence, the trial court refused to grant a continuance, to entertain defense motions, or to permit the defense to file a statement in mitigation. Instead, the court declared that it lacked discretion to consider any alternative sentence. (RT 41-43.)

The court's refusal to exercise sentencing discretion or to permit counsel to present arguments was based on a fundamental misreading of the law and of its inherent authority as a court sitting in judgment. As such, the life sentence was imposed without due process and in a manner that deprived appellant of the right to counsel at a critical stage of the proceedings.

The United States Constitution and the California Constitution require that no person shall be deprived of liberty without due process. (U.S. Const., Amend. XIV; Cal. Const. Art. I, § 7.) Further, a defendant has a Sixth Amendment right to counsel at sentencing hearings; even if he "has no substantive right to a particular sentence," "sentencing is a critical stage of the criminal

proceeding" at which he is entitled to the effective assistance of counsel. (*Gardner v. Florida* (1977) 430 U.S. 349, 358; *Mempa v. Rhay* (1967) 389 U.S. 128, 134-137)

Appellant asks this court to remand for a meaningful sentencing hearing.

A. Procedural History

At the sentencing hearing on May 3, 2019, the court noted that it had denied a defense request to "research and present a motion to sentence Mr. Stankewitz to a term of life, rather than a term of life without the possibility of parole." (RT 36.) According to the court, this had been premised "on the theory that the Court had some authority to do that under Penal Code section 1118." (RT 36.) The court noted that its denial of that request was due to what the court perceived as its limited discretion given the federal court order. (RT 36.)

Defense counsel Peter Jones renewed the motion by co-counsel Curtis Briggs and Tony Serra to continue sentencing, as neither attorney had been able to be present at the hearing. (RT 37.) Jones stated, "I know Mr. Serra has indicated he wanted to present the Court with an argument and points and authorities that would allow the Court to strike the special circumstances and impose a sentence of life with parole." (RT 37.) Jones indicated his belief that the court had the power to strike the special circumstances under Penal Code sections 1385 and 1118, noting that Penal Code section 1385.1, prohibiting a court from striking special circumstances, was not adopted until 1990. (RT 37.)

The court responded that, based on the "directive from the Federal Court," the court's jurisdiction was closely circumscribed. (RT 41.) "[T]he order was to impose a specific sentence in the case if the People did not pursue the death penalty." (RT 41.) The court reasoned that since the prosecution had removed the death penalty from the table, "it doesn't appear to the Court that it has any ability -- and to be completely frank, I'm not sure how I would perform -- if I did have the ability, I can't say what I would do." (RT 41.) "I'm a rule follower, basically, and I was given very specific directions from the Federal Court in this particular instance." (RT 41)

Defense counsel interjected and again expressed the desire of the defense to move the court to strike the special circumstances and impose a life sentence with the possibility of parole. (RT 41-42.) The court's response was that "when the Federal Court gives a directive to a State Court that the State Court is going to follow that directive. So the Court will proceed to sentencing." (RT 42.) The court continued: "As indicated, it would be the Court's intent to follow the directive of the Federal Court and impose life without the possibility of parole." (RT 43.)

In proceeding directly to imposition of sentence without consideration of mitigating evidence or exercising any sentencing discretion, the court paraphrased the procedural posture again: "It was the Ninth Circuit decision in *Stankewitz versus Wong* which directed this Court to either vacate and set aside the death sentence imposed in 19 -- as a result of the conviction in this case,

or resentence the defendant to life without the possibility of parole, depending upon whether the People continued to pursue the death penalty in this particular case." (RT 47.) Because the prosecution had given notice that it was "ceasing any attempt to have this Court impose the death penalty, the court concluded, "This Court has one option, and that is, to impose life without the possibility of parole." (RT 47.) The court stated, "the Court hereby vacates the death sentence imposed concerning Mr. Stankewitz pursuant to that Federal directive and will resentence Mr. Stankewitz concerning the first degree murder conviction with special circumstance to a term of life without the possibility of parole." (RT 47-48.) The court also reimposed the original sentences for the subordinate terms of robbery and kidnap. (RT 48-49.)

B. Standard of Review

The trial court explicitly declined to exercise sentencing discretion. (See RT 47.) As such, the issue before this court is the trial court's failure to exercise discretion, not whether the court abused its discretion. A reviewing court independently decides whether a trial court had discretion to act and whether the lower court in fact recognized that it had such discretion. (See, e.g. *People v. Downey* (2000) 82 Cal.App.4th 899, 912 [failure to recognize discretion not to impose consecutive sentence]; *In re Manzy W.* (1997) 14 Ca1.4th 1199, 1207 -1208 [failure to declare juvenile true finding misdemeanor or felony]; *People v. Medina*

(2001) 89 Cal.App.4th 318, 323 [failure to recognize discretion to reinstate on probation].)

"A ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law." (*People v. Penoli* (1996) 46 Cal.App.4th 298, 302.) Where a sentencing decision is based on an erroneous understanding of the law, the matter must be remanded for an informed determination. (*People v. Downey, supra*, 82 Cal.App.4th at p. 912; *People v. Sherrick* (1993) 19 Cal. App. 4th 657, 661; *People v. Manners* (1986) 180 Cal. App. 3d 826, 834-835.)

Although a court's reasons for ruling in a particular manner are ordinarily not reviewable on appeal, this bar does not apply "when the court's comments unambiguously disclose that it failed to pass on the merits of the issue [citation], or that its ruling embodied, or rested upon, a misunderstanding of the relevant law [citation]." (*People v. Penoli, supra*, 46 Cal.App.4th at p. 306.) Thus, this court reviews the issue de novo.

C. The Court Erred in Finding That the Federal Court Order Precluded it from Exercising Sentencing Discretion.

The federal court order which the lower court here felt foreclosed any exercise of discretion reads as follows:

> Eight years ago, we recognized that Stankewitz advanced a colorable claim of ineffective assistance of counsel and we remanded for an evidentiary hearing to give the state an opportunity to rebut Stankewitz's allegations. After agreeing to proceed without an

> evidentiary hearing and failing to meaningfully rebut Stankewitz's allegations, the state asks us to remand for an evidentiary hearing so that it can try again. The state has given us no good reason to do so. We affirm the district court's order granting Stankewitz a writ of habeas corpus directing the State of California to either: (a) vacate and set aside the death sentence in People v. Douglas Ray Stankewitz, Fresno County Superior Court Case No. 227015-5, unless the State of California initiates proceedings to retry Stankewitz's sentence within 90 days; or (b) resentence Stankewitz to life without the possibility of parole.

(*Stankewitz v. Wong* (9th Cir. 2012) 698 F.3d 1163, 1176.) The federal court offered the state of California two choices, but either of those choices necessarily required that the judgment of death be vacated. Thereafter, with no judgment in place, the court's authority was circumscribed not by the language of the federal court order, but by California law. And under California law, the court had the authority to consider sentencing options.

California law certainly contemplates that when a trial court resentences a defendant following remand from a reviewing court, the trial court may reconsider all prior sentencing determinations. (See, e.g., *People v. Ramirez* (2019) 35 Cal.App.5th 55, 64.) "When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme." (*People v. Hill* (1986) 185 Cal.App.3d 831, 834; accord, *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1259.) The sentencing court may "consider any and all factors that would affect sentencing." (*People v. Ramirez, supra*, 35 Cal.App.5th at p. 64.)

It is true that in analogous cases, California courts have found that a trial court's jurisdiction on remand "is defined by the terms of the remittitur." (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655; see *People v. Lewis* (2004) 33 Cal.4th 214, 228.) The reviewing court's order, as stated in the remittitur, is "decisive of the character of the judgment to which the appellant is entitled." (*People v. Lewis, supra*, 33 Cal.4th at p. 228, internal quotation marks and citations omitted.) "On remand, the lower court may act only within [the remittitur's] express jurisdictional limits." (*Ibid*.)

But the federal court order in this case necessarily required that the sentence be vacated. The order required the superior court to "vacate and set aside the death sentence" *unless* the prosecution initiated "proceedings to retry Stankewitz's sentence within 90 days," *or* to resentence appellant to life without the possibility of parole. (*Stankewitz v. Wong, supra*, 698 F.3d at p. 1176.) Obviously, however, a retrial of the penalty phase would have necessitated a vacating of the original judgment. Similarly, imposition of life without the possibility of parole required that the original judgment of death be vacated. In fact, the court vacated the death sentence prior to imposing sentence, an action that is not encompassed in a overly literal reading of the federal court order. (RT 47.) (Cf. *People v. Warren* (1986) 179 Cal.App.3d 676, 687 [granting of habeas corpus necessarily vacates prior judgment, thus clearing way to impose different sentence].)

Moreover, had the case preceded to penalty trial, there is no question that appellant would have been entitled to a new and complete sentencing hearing regardless of the outcome of the penalty phase. Nothing in the federal court order, and certainly not in California sentencing law, suggests that the court would have been bound by the sentencing decisions made at the 1983 sentencing hearing, a hearing which was irredeemably tainted by the now-reversed penalty phase that preceded it. (See *Stankewitz v. Woodford* (9th Cir. 2004) 365 F.3d 706, 716.)

Further, on a determination that a particular punishment is cruel or unusual, a trial court has the authority to modify the judgment to reduce the degree of the offense. (*People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1499; *People v. Cole* (2001) 88 Cal.App.4th 850, 869; see *People v. Mora* (1995) 39 Cal.App.4th 607, 615–616; *People v. Leigh* (1985) 168 Cal.App.3d 217, 223; see *People v. Dillon* (1983) 34 Cal.3d 441.)

Where the record shows that the trial court proceeded with sentencing on the incorrect assumption that it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Defendants are entitled to sentencing decisions made in the informed discretion of the court, "and a court that is unaware of its discretionary authority cannot exercise its informed

discretion." (*People v. McDaniels, supra*, 22 Cal.App.5th at p. 425; *People v. Brown, supra,* 147 Cal.App.4th at p. 1228.)

1. The Court Had Authority to Consider a Motion to Strike the Special Circumstances Under Penal Code section 1385.

The options available to the trial court included exercising discretion under Penal Code section 1385 to strike special circumstances. (See *People v. Williams* (1981) 30 Cal.3d 470, noted superceded by statute in *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn. 17; *People v. Chambers* (1982) 136 Cal.App.3d 444, 457.) In *Williams*, the California Supreme Court held that, under the 1978 version of the death penalty statute, the version that applies in the instant case, "trial courts have the authority under section 1385 to dismiss special circumstance findings in order to make it possible for a person to be eligible for parole." (*People v. Williams, supra*, 30 Cal.3d at p. 489.)

The court in *Williams* reviewed the legislative history of the 1977 and 1978 death penalty statutes and concluded: "Under the normal rules of statutory interpretation, section 1385 is applicable to a special circumstance finding. Thus, it provides the statutory authority to strike a special circumstance finding so that a person can be eligible for parole." (*People v. Williams, supra*, 30 Cal.3d at p. 485.)

A court may exercise its dismissal power under Penal Code section 1385 at any time before judgment is final. (*People v. Chavez* (2018) 4 Cal.5th 771, 776.) In criminal actions, the terms "judgment" and "sentence" are generally considered synonymous.

(*People v. McKenzie* (2020) 9 Cal.5th 40, 46; *People v. Spencer* (1969) 71 Cal.2d 933, 935, fn. 1. There is no "judgment of conviction" without a sentence. (*People v. McKenzie, supra*, 9 Cal.5th at p. 46; *In re Phillips* (1941) 17 Cal.2d 55, 58.) As noted, the judgment and sentence in this case were necessarily vacated by the remand to state court.

Although Penal Code section 1385.1 currently precludes a court from striking a special circumstance under Penal Code section 1385, that section was not enacted until 1990, more than a decade after the offense in this case. Changes to Penal Code section 1385.1 were not retroactive. (See *Tapia v. Superior Court, supra,* 53 Cal.3d at p. 298, fn.17.) A court may exercise its dismissal power under Penal Code section 1385 at any time before judgment is pronounced, but not after judgment is final. (*People v. McKenzie*, *supra*, 9 Cal.5th at pp. 46-47; *People v. Chavez, supra*, 4 Cal.5th at p. 777.)

Thus, appellant was entitled to ask the court to strike the special circumstances.

2. The Court Had a Duty to Consider Factors in Mitigation Prior to Imposition of Sentence, and to Permit Counsel to Prepare and Argue Sentencing Motions as Well as a Statement in Mitigation.

Moreover, given the passage of years and the myriad changes in the law, the court had a duty to order a new probation report, to consider factors in mitigation, and to allow the defense to prepare and present a statement in mitigation. As will be

discussed in more detail below, subsequent to the sentencing proceedings in this case, post-conviction counsel for appellant uncovered "substantial mitigating evidence." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 725.) This evidence was no more available to the sentencing court than it was to the penalty phase jury.

In addition to the mitigation evidence that was produced during federal court proceedings that should have been presented at sentencing, appellant should have been given the opportunity to present the court with any relevant *post-sentencing* conduct at a new sentencing hearing. In *Pepper v. United States* (2011) 562 U.S. 476, 490, the United States Supreme Court held that, under the federal sentencing guidelines, a trial court should consider a defendant's post-sentencing conduct, including his conduct in prison, if resentencing him following a successful appeal. California law also provides that post-sentencing conduct should be considered at a sentencing hearing. (See, e.g., People v. Warren, supra, 179 Cal.App.3d at p. 687; see also *People v. Bullock* (1994) 26 Cal.App.4th 985, 990 ["defendant's postconviction behavior and other possible developments remain relevant to the trial court's consideration upon resentencing"]; *People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1273; *People v. Foley* (1985) 170 Cal.App.3d 1039, 1047-1048 [same].)

3. The Court Had Discretion to Strike the Firearm Enhancements.

Appellant's two determinate terms were each enhanced by a two year firearm enhancement under Penal Code section 12022.5. (See RT 48-49.) At the time of his original sentencing, the trial court had no power to strike the firearm enhancement. In October of 2017, the California Legislature passed Senate Bill 620, under which, effective January 1, 2018, the sentencing court may, in the interests of justice pursuant to section 1385, strike or dismiss such an enhancement. (See Pen. Code, § 12022.5, subd. (c.)

This amendment applies retroactively and explicitly "applies to any resentencing that may occur pursuant to any other law." (Pen. Code, § 12022.5, subd. (c).) Courts have found that the amendments imposed by Senate Bill 620 reflect "a legislative determination that the previous bar on striking firearm enhancements was too severe, and that trial courts should instead have the power to strike those enhancements in the interest of justice." (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.) Courts have further found that "the Legislature intended the amendment to apply to every case to which it constitutionally could apply" (*Ibid*.)

Thus, under both the plain language of the statute as well as to the Legislature's clearly expressed intent that the statute apply retroactively, the sentencing court had discretion to strike one or both of the firearm enhancements. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104; *People v. Arredondo* (2018) 21

Cal.App.5th 493, 506-507; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679.) Upon remand, appellant is entitled to ask the court to strike these enhancements.

In sum, the court erred in finding that its discretion under the federal court order was limited to automatic imposition of life without possibility of parole.

D. Appellant Was Deprived of His Due Process Right to Be Sentenced by a Court Fully Aware of its Discretion.

The court's refusal to exercise discretion and entertain sentencing options was not only a fundamental misreading of its role in the present proceedings, those actions also deprived appellant of his liberty without due process of law as guaranteed by the state and federal constitutions. Appellant had an absolute right to be sentenced by a court that recognized and exercised its discretion under the law.

All defendants have a due process right to informed sentencing discretion. (*United States v. Tucker* (1972) 404 U.S. 443, 447; *Towsend v. Burke* (1948) 334 U.S. 736, 741*;* see *People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1273-1274 [failure to obtain new probation report violated due process]; *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) When a court erroneously believes that its sentencing powers are circumscribed by law, there can be no "informed" exercise of that discretion. (Cf. *People v. Belmontes, supra*, 34 Cal.3d at p. 348, fn. 8.)

This right to an exercise of informed discretion is based on federal and state due process considerations. (U.S. Const.,

Amend. XIV.; see *United States v. Tucker, supra,* 404 U.S. at p. 447; *Townsend v. Burke*, *supra*, 334 U.S. at p. 741; Cal. Const., art. I, § 15; *In re Cortez* (1971) 6 Cal.3d 78, 88.) The California Supreme Court has held that resentencing is appropriate unless the record on appeal *affirmatively demonstrates* that a sentencing court was aware of its sentencing discretion and was not simply following an incorrect interpretation of the law. (*People v. Superior Court* (*Romero*) (1996)13 Cal.4th 497, 530, fn. 13.) Here, the court was explicit in stating that it lacked "jurisdiction" to impose any sentence other life without possibility of parole. (RT 47.)

"Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*People v. Billingsley* (2018) 22 Cal.App.5th 1076.)

A court cannot exercise informed discretion where it is not aware of the scope of its discretion. (*People v. Belmontes, supra,* 34 Cal.3d at p. 348, fn. 8*;* see also *People v. Rodriguez* (1998) 17 Cal.4th 253, 257; see also *People v. Sherrick* (1993) 19 Cal.App.4th 657, 661 [remand for resentencing where trial court erroneously believed § 1203.066 limited probation].) Appellant is entitled to be sentenced by a court that is aware of its discretion and reasonably

exercises that discretion. (*People* v. *Belmontes*, *supra*, 34 Cal.3d 335.)

Appellant was also entitled to a full adversarial hearing at which his attorneys were permitted to present sentencing arguments and evidence in mitigation. "A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention is lacking in all the attributes of a judicial determination." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1297-1298, internal quotation marks omitted; *People v. Dennis* (1986) 177 Cal.App.3d 863, 873.) A defendant's due process rights include the right to a full adversarial proceeding, in which the prosecution and the defendant may present evidence, as well as argument. (*People v. Superior Court, supra*, 215 Cal.App.4th at p. 1298, citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1094; see *Wardius v. Oregon* (1973) 412 U.S. 470, 474-476 & fn. 6.)

Thus, the court's failure to permit counsel to file sentencing motions, the court's failure to order an updated probation report, and the court's failure to consider any sentencing options whatsoever deprived appellant of due process as guaranteed by the state and federal constitutions.

E. The Court's Refusal to Allow Counsel to Present Argument and Evidence in Mitigation Deprived Appellant of the Right to Counsel at Sentencing.

The Sixth Amendment guarantees that in all criminal prosecutions, "the accused shall ... have the Assistance of Counsel for his defense." (U.S. Const., Amend. VI.) Under the Sixth

Amendment, a defendant in a criminal case is entitled to representation by counsel at every "critical stage" of the case. (*Mempa v. Rhay, supra*, 389 U.S. at p. 137; *Estelle v. Smith* (1981) 451 U.S. 454, 467-470; *Reece v. Georgia* (1955) 350 U.S. 85, 90.) This right extends to sentencing proceedings. (*Gardner v. Florida, supra,* 430 U.S. at p. 358; *Mempa v. Rhay, supra*, 389 U.S. at pp. 134-137; *In re Perez* (1966) 65 Cal.2d 224, 229.)

Here, the court's actions prevented counsel from acting as a meaningful advocate. Counsel was not permitted to present arguments in mitigation or to urge the court to consider legal alternatives to a life sentence without a possibility of parole. As such, appellant was deprived of meaningful advocacy as counsel was required to stand by as the court refused to exercise its lawful discretion. Where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a deprivation of Sixth Amendment rights that renders the adversarial process presumptively unreliable. (Cf. *United States v. Cronic* (1984) 466 U.S. 648, 659; see also *Bell v. Cone* (2002) 535 U.S. 685, 697.)

This is no less true here, where the denial of counsel was due to the court's actions rather than to a failure by counsel. A criminal defendant is entitled to counsel who can act as a meaningful advocate, not counsel who is relegated to standing by without the ability to effectively intercede on the defendant's behalf. "Lawyers in criminal cases 'are necessities, not luxuries.'" (*United States v. Cronic, supra*, 466 U.S. at p. 653.) By failing to

permit counsel to act as an advocate on his client's behalf, the trial court deprived appellant of the effective assistance of counsel.

F. The Failure to Exercise Discretion and to Allow Counsel to Advocate Was Prejudical and Requires Remand.

The court here sentenced appellant without considering the voluminous evidence uncovered during postconviction proceedings, evidence that the federal court ruled should have been available at the penalty phase proceedings. Because the court here refused to allow the defense to present a statement in mitigation or to entertain a motion to strike the special circumstances, and because the court simply imposed a sentence of life without possibility of parole without a meaningful hearing, the matter must be remanded.

Because the court here in essence failed to conduct a sentencing hearing at all, this error cannot be deemed harmless. The United States Supreme Court has recognized that structural erorrs "should not be deemed harmless beyond a reasonable doubt" (*Weaver v. Massachusetts* (2017) 137 S.Ct. 1899, 1907; see also *Arizona v. Fulminante* (1991) 499 U S. 279, 309-310.) "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." (*Weaver v. Massachusetts*, *supra*, 137 S.Ct. at p. 1907.) A structural error is not simply an error in the process itself, but rather an error which affects the framework within which the criminal prosecution proceeds. (*Ibid*.; see also *Arizona v. Fulminante, supra*, 499 U S. at p. 310.) Such errors defy

analysis by traditional harmless error standards. (*Weaver v. Massachusetts*, *supra*, 137 S.Ct. at pp. 1907-1908; *Arizona v. Fulminante, supra*, 499 U S. at p. 309.)

"Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal." (*People v. Penoli, supra*, 82 Cal.App.4th at p. 306; see also *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392; *In re Ronnie P.* (1992) 10 Cal. App. 4th 1079, 1091.)

Similarly, this court should evaluate the deprivation of the right to effective counsel as a denial of a fundamental right protected by the Sixth Amendment. Where counsel is precluded from acting at all on the defendant's behalf, the denial of representation defies harmless error analysis. (Cf. *United States v. Cronic, supra*, 466 U.S. at p. 659.) Denial of the Sixth Amendment right to counsel is reversible per se. (Cf. *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150.)

Even if this court does not find that the error was structural, the prosecution must still prove that the error was harmless beyond a reasonable doubt. Although simple sentencing error may be found harmless unless a reasonable probability exists that a remand would result in a less onerous sentence (*People v. Skenandore* (1982) 137 Cal.App.3d 922, 925, citing *People v. Watson* (1956)46 Cal.2d 818, 836), when the error takes on a federal constitutional dimension, a new sentencing hearing is required unless an appellate court can establish that the error is

harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 368 U.S. 18, 24.) Where, as here, a defendant has been deprived of his right to present a full defense, the court should apply the *Chapman* test. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 691.)

Along the same lines, an interferene with the right to effective assistance of counsel that does not amount to a complete deprivation of that right is evaluated under *Strickland v. Washington* (1984) 466 U.S. 668. Under this standard, reversal is required where there exists "merely a reasonable chance, [or] more than an abstract possibility" that the result would have been more favorable absent the denial of the right to effective assistance. (*Strickland v. Washington, supra*, 466 U.S. at p. 687.)

Whatever standard is used, "absent unusual circumstances, the presence of a mitigating factor renders improper reliance on an aggravating factor prejudicial, since, with the improper factor eliminated, the presence of mitigation might reasonably affect the balance of the trial court's judgment." (*People v. Levitt* (1984) 156 Cal.App.3d 500, 518 disapproved on another point in *People v. Johnson* (2016) 62 Cal.4th 600, 659 fn. 6.)

Regardless of which standard this court applies, this case must be remanded for resentencing to allow for a true sentencing hearing at which counsel is able to present arguments and facts in mitigation, and at which the court is aware of its authority to consider sentencing options other than life without possibility of

parole. Unlike the typical case in which this court might have to speculate as to what evidence the defense could have produced to argue in favor of striking the special circumstances or otherwise exercising sentencing discretion, in this case the court has available to it the federal court opinions summarizing the extensive evidence in mitigation that was not available to the court when it sentenced appellant in 1983, and that was disregarded by the sentencing court in the present proceedings.

The Ninth Circuit observed that the deficiencies at the second penalty phase proceeding were profound. (See *Stankewitz v. Wong, supra*, 698 F.3d at p. 1166; *Stankewitz v. Woodford, supra*, 365 F.3d at p. 716.) The evidence was described as "minimal," "consisting of testimony from six witnesses (only four of whom were actually in court) and covering only approximately 50 pages in the transcript." (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 716.) Two of the witnesses testified only to their personal religious belief that God change lives; a third witness's testimony (entered by stipulation) would have concerned the admirability of the work of prison chaplains. (*Ibid*.) None of this testimony was specific to appellant. Other evidence concerned a parole investigator's observation, on the day after the shooting, of "what appeared to be infected sores and needle marks" on appellant's arm; the testimony did not link this to drug use. (*Id*. at p. 717.)

The remaining testimony addressed to some extent the difficulty of life on the reservation and the abuse and neglect appellant had suffered during childhood; however, the Ninth

Circuit observed that this testimony "did not provide the sort of detailed information" that came to light during post-conviction proceedings. (*Stankewitz v. Woodford, supra*, 365 F.3d at p. 717.)

Even discounting for the moment the newly discovered evidence cited by counsel during the proceedings below (see, e.g., RT 40-41), the evidence reviewed by the district court presented an overwhelming picture of a childhood filled with deprivation and suffering. As the Ninth Circuit observed, in comparison to the "meager evidence" presented by counsel at the penalty phase, appellant "made compelling allegations in his habeas petition regarding his deprived and abusive upbringing, potential mental illness, long history of drug use and consumption of substantial quantities of drugs in the days leading up to Greybeal's murder." (*Stankewitz v. Wong, supra*, 698 F.3d at p. 1166.) Further, the district court credited most of those allegations, "noting that many were proved by official documents in the record." (*Id.* at p. 1167.) The evidence convincingly showed that appellant "was already severely emotionally damaged by the time he was removed from his home at age six." (*Ibid.*)

The Ninth Circuit observed that the evidence produced in post-conviction proceedings demonstrated "a deprived background, being institutionalized early in his life and essentially raised in institutions," and that appellant had been "hardened by the years of criminal associations and surroundings." (*Stankewitz v. Wong, supra*, 698 F.3d at p. 1167.) The district court had reviewed a social evaluation conducted when appellant was nineteen and

concluded that from a childhood development standpoint, appellant had "suffered from early childhood losses, prolonged separation from parents, poor institutional surrogate care," resulting in "poor social adjustment as manifested by frequent runaways, behavior problems, scholastic under-achievement and finally culminating in anti-social behavior which has occurred both in and out of institutional placements." (*Stankewitz v. Wong, supra*, 698 F.3d at p. 1167, quoting district court findings.) The district court also noted that appellant "had a very severe substance abuse problem that began at age 10, and that he had binged on substantial quantities of alcohol, heroin and methamphetamine leading up to the murder." (*Stankewitz v. Wong, supra*, 698 F.3d at p. 1167.)

The Ninth Circuit cited documentary evidence showing that appellant "was born into a poverty-stricken home described by police and probation reports as dirty, covered in cockroaches and fleas, and without electricity or running water." (*Stankewitz v. Wong, supra*, 698 F.3d at p. 1168.) The court quoted the district court finding that appellant and his nine siblings were "highly neglected" and often did not have enough food. (*Ibid.*) "A psychiatric evaluation of Stankewitz's mother, Marian, confirms that she had been an alcoholic since she was a child and that she was severely intellectually impaired;" the court also reviewed Marian's lengthy criminal history which had culminated in voluntary manslaughter for shooting and killing a man while she was drunk at a party. (*Ibid.*) Marian had self-reported regular

consumption of three to four six packs of beer or two fifths of a gallon of whiskey a night, including during her pregnancy with appellant. (*Ibid*.) A probation report reviewed by the federal courts described Marian as "incapable of caring for herself and all of her children and certainly incapable of caring for Doug." (*Ibid*.)

The Ninth Circuit also summarized evidence regarding appellant's father, Robert, who was an alcoholic and the leader of a motorcycle gang. (*Stankewitz v. Wong, supra*, 698 F.3d at p. 1168.) Robert was arrested multiple times "between 1951 and 1968 for crimes that include wife beating, robbery, non-support, public drunkenness, forgery, disturbing the peace and contributing to the delinquency of a minor." (*Ibid*.) "A judge described Robert as an 'outlaw' and 'a definite menace to society' who had 'low intelligence,' was 'without education,' had 'no respect for the rights or feelings of other [sic]' and 'like[d] violence.'" (*Ibid*.) Marian reported that Robert had severely beaten her while she was pregnant with appellant, "knocking her to the ground, kicking her stomach several times and breaking her nose." (*Ibid*.) Appellant and his siblings had witnessed Robert beating and threatening to kill Marian, and attempting to run her over with a car. (*Ibid*.) "On another occasion, Robert pulled a gun on Marian and fired several shots between her legs." (*Ibid*.) These "brutal attacks" led to Robert and Marian separating in 1966, when Stankewitz was eight. (*Ibid*.)

According to appellant's aunt and sister, both parents beat all of the children regularly, beating them more if they cried.

(*Stankewitz v. Wong, supra*, 698 F.3d at p. 1168.) Robert often whipped them with a belt, and on one occasion came into the house in the middle of the night armed with a gun, threatening to shoot one of appellant's brothers. (*Ibid.*) Marian beat the children with electric cords or belts, and once pulled a gun on appellant's sister. (*Ibid.*) Appellant was removed from his home at age six following "a severe beating" his mother administered with an electrical ironing cord. (*Ibid.*)

The Ninth Circuit found that the severe emotional damage inflicted on appellate was "well-supported by the record." (*Stankewitz v. Wong, supra*, 698 F.3d at p. 1168.) An elementary school teacher reported on appellant's behavioral problems, which included running out the door, yelling, kicking and screaming. (*Ibid.*) A probation officer reported that following appellant's removal from his home, pediatric staff was unable to control him; appellant repeatedly chewed through physical restraints. (*Ibid.)* Appellant was removed from two foster homes for throwing chairs at and kicking his foster parents, running away, and attacking probation officers. (*Ibid.*)

Further, It must be emphasized that appellant was nineteen years old at the time of this offense. During the intervening years, California has amended its murder, death penalty, and other sentencing laws; moreover, both the courts and the Legislature have recognized the crucial role that adolescent brain development plays in youthful offenders under the age of 25. (See, e.g., Pen.

Code, § 3051; *Miller v. Alabama* (2012) 567 U.S. 460, *People v. Caballero* (2012) 55 Cal.4th 262.)

Penal Code section 3051 entitles a prisoner whose serious crimes were committed during this crucial period of brain development to a special hearing at which the court must [sum up]. By its terms, Penal Code section 3051 does not presently apply to appellant because his sentence is one of life without possibility of parole and he was nineteen years old at the time of the offense. Had his sentence been one of life *with* the possibility of parole, he would have been eligible for a youth offender parole hearing during his twenty-fifth year of incarceration (a milestone that has long since passed, as appellant has been incarcerated for this offense for 42 years as of the filing of this brief).

The Legislature enacted section 3051 at the urging of the California Supreme Court that it establish a parole eligibility mechanism for prisoners serving de facto life terms for nonhomicide crimes committed as juveniles. (*People v. Edwards* (2019) 34 Cal.App.5th 183, 193-194, citing *People v. Caballero*, *supra*, 55 Cal.4th at p. 269, fn. 5.) The Legislature went further, creating a parole eligibility mechanism for juvenile offenders that includes homicide defendants, and later expanding that mechanisms to reach most defendants serving long sentences for crimes they committed at 25 years of age or younger. (*People v. Edwards, supra*, 34 Cal.App.5th at p. 194, citing *People v. Contreras* (2018) 4 Cal.5th 349, 381.) Appellant's current sentence puts him just outside the reach of this law: his sentence is too long

for eligibility under Penal Code section 3051, subdivision (b)(1)-(3), and he was approximately sixteen months too old at the time of the offense to qualify under subdivision (b)(4).

Had the court entertained a successful motion to strike the special circumstances, even given a subsequent life sentence, appellant would have been eligible for a youthful offender hearing under Penal Code section 3051, subdivision (b)(3). Regardless, the same principals that led the United States Supreme Court to decide *Miller v. Alabama*, and the California state Legislature to adopt Penal Code section 3051, should have informed the court's exercise of discretion, had the court recognized the existence of such discretion in the first place.

As the Legislature recognized in section I of the 2013 statute enacting section 3051, "youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society." (Pen. Code, § 3051, 2013 Cal Stats. ch. 312.) The Legislature specifically adopted the findings of the United States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407 to the effect that "'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control.'" (Pen. Code, § 3051, 2013 Cal Stats. ch. 312, quoting *Miller v. Alabama,*

supra, 183 L.Ed.2d at p. 471.) The 1983 court necessarily considered none of this vital and relevant policy when it imposed sentence; the 2019 court in turn refused to consider it.

The probation report before the court below, and before the sentencing court in 1983, was prepared in 1978, contained no statement from either the defendant or defense counsel, and consisted primarily of a recitation of the trial evidence along with a recounting of appellant's juvenile and adult criminal records. (Conf. CT X-13.) The social history was four paragraphs long and principally concerned appellant's age and the criminal histories of his family members. (Conf. CT 14.) The psychological history was three paragraphs long, identified appellant as a "sociopath" with no "mental defect." (Conf. CT 15.)

To be clear: *none* of the evidence described by the Ninth Circuit and found credible by the district court was considered by the court that pronounced sentence in 1983, and none of that evidence was considered by the court that pronounced sentence in 2019. Thus, no court with the power and willingness to exercise sentencing discretion has ever considered more than the "meager" mitigating evidence that appellant's trial attorney produced during the 1983 trial. (See *Stankewitz v. Wong, supra*, 698 F.3d at p. 1166.)

Accordingly, appellant asks this court to remand for resentencing.

II.

APPELLANT'S RIGHTS TO COUNSEL AND TO DUE PROCESS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO GRANT A CONTINUANCE FOR SENTENCING

As noted in the previous section, although the proceedings below were very lengthy, only two weeks passed between the prosecution's decision to no longer pursue the death penalty and the actual imposition of judgment. Trial counsel, who had been preparing for a new penalty phase and related collateral proceedings, sought a continuance in order to pivot to preparing for the sentencing hearing. The court denied the requested continuance on the grounds that the court had only one option at sentencing anyway, to sentence appellant to life without possibility of parole. (CT 158.)

The denial of the continuance was error. As discussed at length in the previous argument, the court's discretion was far broader than the court perceived it to be. Appellant was entitled to a meaningful sentencing hearing at which he was represented effectively by counsel who had had time to prepare and present arguments. The failure to provide him with such a hearing deprived him of due process and the right to counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the federal constitution. Accordingly, appellant asks this court to remand for resentencing.

Should have been entitled a sentencing, but was denied by the court: a violation of due process and the right to counsel

A. Procedural History

On March 22, 2019, the court set a hearing date for May 3 for a motion to dismiss filed by the defense. (See CT 151.)

On April 19, 2019, the prosecution filed notice of their intent to ask the court to resentence appellant to life without the possibility of parole. (CT 140 et seq.)

On April 24, 2019, appellant moved to continue the May 3 hearing to June 14, due to a conflicting medical appointment for one of appellant's attorneys. (CT 143 et seq.) On April 26, 2019, the court denied this continuance. (CT 151-152.)

On April 30, appellant moved to continue sentencing. (CT 153 et seq.) The motion noted that the prosecution's request to proceed to sentencing had been filed "a little more than a week ago" and that it had been unanticipated by the defense. (CT 153.) The motion requested "adequate time" to present a sentencing memorandum in which appellant would urge the court to sentence him to life with the possibility of parole. (CT 153-154.) The motion cited Penal Code section 1118,[2] and argued that counsel required time to present and prepare a motion to set aside the "death penalty conviction." (CT 154.)

The court denied this motion on May 1, 2019, citing the perceived limitation on its "jurisdiction" based on the Ninth Circuit order: "The People's election not to pursue a death sentence leaves one sentencing option under the directive of the

[2]See footnote 3, supra.

Federal Courts. Defendant's motion to continue the May 3 hearing is denied." (CT 158.)

On May 3, 2019, the court granted the prosecution's motion to resentence appellant to life without the possibility of parole. (CT 159-160.) At this hearing, the court discussed its earlier denial of the requested continuance, in which it noted that the request had "referred to this hearing as a sentencing hearing." (RT 36.) The court reiterated that it had denied the continuance due to its perceived lack of jurisdiction to entertain any option other than to impose a sentence of life without possibility of parole. (RT 36.)

Peter Jones, the only counsel present for appellant at the May 3 hearing, orally renewed the requested continuance. (RT 36-37.) Jones cited the need to prepare points and authorities regarding the court's authority to strike the special circumstances and impose a sentence of life with the possibility of parole, noting that the court had such authority under Penal Code sections 1118[3] and 1385, and that the case had predated the adoption of Penal Code section 1385.1. (RT 37.) Jones also cited the pending motions to dismiss. (RT 38.)

The court denied the requested continuance, stating that it had denied the continuance "twice previously," apparently referring to the request to continue the motion hearing as well as the request to continue sentencing. (RT 39.) Again citing the "jurisdiction" conferred by the federal court order, the court declined to continue the matter to allow the defense to present a

[3]See footnote 3, supra.

motion to strike the special circumstances. (RT 40.) When counsel again requested to present the court with arguments regarding striking the special circumstances, the court asked whether "those issues could not be raised post judgment?" (RT 41.) The court then stated its intent to proceed to sentencing; the defense declined to waive time. (RT 42-43.)

B. The Denial of the Requested Continuance Deprived Appellant of His Federal and State Constitutional Rights to Due Process and the Effective Assistance of Counsel.

The court abused its discretion in denying the requested continuance. Under the circumstances, that abuse of discretion deprived appellant of his right to due process, his right to the effective assistance of counsel, and his right to confront witnesses. This court should remand for further proceedings.

The decision of whether to grant a continuance is one that rests within the discretion of the trial court, but is circumscribed by considerations of due process. A continuance should be granted upon a showing of good cause. (Pen. Code, § 1050, subd. (e).) The determination of whether good cause exists rests within the "sound discretion" of the trial court. (*People v. Sakarias* (2002) 22 Cal.4th 596, 646; *People v. Howard* (1992) 1 Cal.4th 1132, 1171.) However, a trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. (*People v. Snow* (2003) 30 Cal.4th 43, 70; *People v. Sakarias, supra*, 22 Cal.4th at p. 646; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107; *People v. Fontana*

(1982) 139 Cal.App.3d 326, 333.) Though trial courts have a legitimate interest in the timely disposition of cases, they should not deny a "justifiable request for delay" because of a "myopic insistence upon expeditiousness." (*People v. Crovedi* (1966) 65 Cal.2d 199, 207.)

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused has the right to have the assistance of counsel for his defense. (U.S. Const., Amend. VI.) The California Constitution has a nearly identical provision. (Cal. Const., art. I, § 15.) The California Supreme Court has stated that "[t]he right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights." (*People v. Ortiz* (1990) 51 Cal.3d 975, 982, citing *Magee v. Superior Court* (1973) 8 Cal.3d 949, 954.) Under both the federal and state constitutions, the ultimate purpose of the right to counsel is to protect the fundamental right to a proceeding that is both fair in its conduct and reliable in its result. (*People v. Roybal* (1998) 19 Cal.4th 481, 511, fn. 4.)

The right to counsel includes the right to adequately prepare a defense. (*People v. Maddox* (1967) 67 Cal.2d 647, 652; *Cooper v. Los Angeles Superior Court* (1961) 55 Cal.2d 291, 302; *People v. Sarazzawski* (1945) 27 Cal.2d 7, 17.) In the case of *In re Cordero* (1988) 46 Cal.3d 161, the California Supreme Court made clear that counsel has an obligation to "investigate carefully all defenses of fact and of law that may be available to the Defendant." (*Id*. at

p. 183, quoting *People v. Pope* (1979) 23 Cal.3d 412, 425; see also *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, 4, citing *People v. Frierson* (1979) 25 Cal.3d 142, 159-160, *In re Saunders* (1970) 2 Cal.3d 1033, 1048-1049 [effective assistance of counsel requires "investigation and presentation of crucial defenses."].)

At the time judgment and sentence are pronounced, a defendant has a constitutional right to competent counsel. (*Mempa v. Rhay, supra,* 389 U.S. 128; *In re Cortez, supra,* 6 Ca1.3d at p. 88.) This includes the right to have qualified counsel adequately prepare and present a motion for new trial, which is considered a critical stage of the proceedings. (*Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696, 699.)

The denial of a continuance to allow defense counsel to properly prepare and respond to the prosecution's evidence has been held to result in the denial of a criminal defendant's right to the effective assistance of counsel. (See *United States v. Gallo* (6th Cir. 1985) 763 F.2d 1504, 1523-1524 [denial of continuance reversible error because counsel was unable to adequately defend a complex case].) The United States Supreme Court implicitly recognized that a denial of a continuance can deprive a defendant his right to the effective assistance of counsel in *Morris v. Slappy* (1983) 461 U.S. 1, 11-12.

Here, the requested delay would not have significantly impeded justice. As noted, this case was over forty years old at the time of sentencing, but the prosecution had abruptly ended its quest for the death penalty a mere two weeks prior to the date

upon which the court pronounced sentence. Defense counsel had spent years preparing for a penalty phase retrial but was given no time whatsoever to prepare for sentencing.

Moreover, the court's reasons for denying the requested continuance were fundamentally unsound. The court stated that it had denied the request "twice" previously, but one of those requests was in fact for a motions hearing that was unrelated to, and set for a time following, sentencing. (RT 39.) The court's principal reason for denying the continuance was its conclusion that it needed no input from the defense because its only option was to sentence appellant to life without possibility of parole. (RT 40.) This was an abuse of discretion, and a denial of due process.

Further, by denying the motion to continue, the trial court deprived appellant of the effective assistance of counsel because counsel was prevented from preparing and presenting a statement in mitigation, from advancing potentially legitimate grounds for a new trial, from presenting an invitation to the court to strike the special circumstances, and from otherwise advocating for a sentence of less than life without possibility of parole. The trial judge "failed to adequately balance [appellant's] Sixth Amendment rights against any inconvenience and delay from granting the continuance." (*United States v. Nguyen* (9th Cir. 262 F.3d 998, 1004.) The denial therefore also violated his Sixth and Fourteenth Amendment rights to present a defense. (See *United States v. Pope* (9th Cir. 1988) 841 F.2d 954, 958]; *Bennet v.*

Scroggy (6th Cir. 1986) 793 F.2d 772, 777; see also *Hicks v. Wainwright* (5th Cir. 1981) 633 F.2d 1146, 1148-1149.)

C. The Erroneous Denial Of The Continuance In This Case Requires Reversal

Because the denial of the continuance effectively deprived appellant of his fundamental constitutional right to counsel, the reversible per se standard should apply to the error in this case. The United States Supreme Court has distinguished between those constitutional errors which are amenable to harmless error analysis and those that amount to "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." (*Arizona v. Fulminante, supra*, 499 U.S.at p. 309.) In describing those types of errors which amount to structural defects in the trial mechanism, the *Fulminante* court specifically referred to the deprivation of the right to counsel, citing its opinion in *Gideon v. Wainwright* (1963) 372 U.S. 335. (See also *Rose v. Clark* (1986) 478 U.S. 570.)

In this case, the trial court's denial of the continuance effectively deprived appellant of his right to counsel in presenting sentencing arguments, evidence in mitigation, and motions for new trial and to strike the special circumstance. In *People v. Fontana, supra*, 139 Cal.App.3d at p. 326, the Court of Appeal held that the erroneous denial of a continuance that deprived a defendant of counsel prepared to proceed with a probation revocation hearing was reversible per se without a showing of

prejudice. A similar conclusion should apply in this far more serious case case.

However, should this court find that the error here was not structural, then the erroneous denial of a continuance was prejudicial under the constitutional standard set forth in *Chapman v. California*. The *Chapman* standard requires that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman v. California, supra* , 386 U.S. at p. 24.)

Appellant incorporates herein the facts summarized in Argument I, section E, above. This is not a case which requires this court to speculate as to what evidence could have been brought forth at sentencing in order to urge the trial court to consider a lesser sentence; the federal court litigation revealed mountainous evidence that was not previously considered by a sentencing court. Moreover, in the oral request for a continuance, counsel cited the need to present recently discovered evidence in a format appropriate for sentencing. (RT 37-39.)

Even using the lesser standard set forth in *People v. Watson, supra,* 46 Cal.2d 818, it is clear that the error prejudiced appellant. The denial of the requested continuance deprived appellant of the ability to demonstrate that he should be given the opportunity to seek parole after 42 years in state prison for a crime committed when he was 19 years old.

Although this case has been in the court system since 1978, it has nonetheless been repeatedly defined by a literal rush to judgment. Not only was appellant's original death sentence imposed in July of 1978, a mere five months after the offense, the second death sentence was imposed only fourteen months after the California Supreme Court reversed the first judgment of death. Similarly, although over a decade lapsed between the Ninth Circuit's initial order and the imposition of judgment in this case, only a little over two weeks passed between the prosecution's decision not to pursue the death penalty and the court's pronouncement of judgment.

Under the circumstances, the court's denial of the requested continuance was an abuse of discretion, and that abuse of discretion deprived appellant of due process and the right to counsel as guaranteed by the federal constitution. Accordingly, appellant asks this court to remand for resentencing.

III.

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL AND RELATED MOTIONS AS UNTIMELY; THIS ERROR DEPRIVED APPELLANT OF DUE PROCESS AND THE RIGHT TO COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

In addition to the sentencing discretion inherently retained by the court below, including the authority to strike a special circumstance under Penal Code section 1385, the court similarly retained the right to grant a motion for new trial prior to sentencing. The court thus erred in denying the earlier motion for new trial on the grounds that it was untimely and not properly before the court, and further in erred in foreclosing defense counsel from filing a renewed motion prior to sentencing. Appellant asks this court to remand for further proceedings.

A. Procedural History

****Evidence concealed by the prosecution during trials****

On March 16, 2017, appellant filed a motion for new trial under Penal Code section 1181. (II Aug. CT 402 et seq.) This motion was based on newly discovered evidence, evidence which was alleged to have been concealed by the prosecution during the previous trials. (II Aug. CT 403.) The motion rested on three principal grounds. First, the motion relied on a shell casings report showing that the shell casings found at the site of the Meraz shooting did not match the gun used to kill Graybeal, although the prosecution had strongly insinuated at trial that the same gun had been used in both crimes; this report was alleged not to have been turned over to the defense. (See II Aug. CT 411,

see also Exhibit B, II Aug. CT 461; see also Exhibit D, II Aug. CT 472.) Second, the motion relied on the 1993 recantation of witness Billy Brown, who at that time reported that he had not seen who fired the gun but did see the gun in the hands of Marlin Lewis immediately after he heard the gun shot; Brown had allegedly given information contradicting his eventual preliminary hearing tesitmony to law enforcement immediately after the shooting. (See II Aug. CT 412, 414, Exhibit A, II Aug. CT 419 et seq.) The motion also alleged that the details of Billy Brown's immunity agreement had not been provided to the defense. (See II Aug. CT 416.) Finally, the motion stated that certain psychiatric records had not been provided to the defense, including two reports from 1970, prepared by a prosecution expert who had testified at trial, that were not provided to the defense until 2012. (II Aug. CT 416-417.)

On June 23, 2017, without ordering a hearing on the allegations, the court denied appellant's motion for new trial. (III Aug. CT 794.) The court found that the motion was not timely: "The motion is properly to be brought before judgment is entered. In this case judgment was entered quite some time ago." (VII Aug. RT 437.)[4] The court further found its consideration of the motion precluded by the prior affirmance of guilt by state and federal courts. (VII Aug. RT 437.)

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[4]To the extent that the motion for new trial was reframed as a petition for writ of habeas corpus, the court declined to address it. (VII Aug. RT 438.)

On June 26, 2017, the court filed an order declaring that appellant's attempts to reopen the guilt phase were an improper attempt to expand the scope of the proceedings. (III Aug. CT 797-798.)

Appellant filed a motion for reconsideration on May 24, 2018, which included arguments regarding the motion for new trial as well as the motion to dismiss. (V Aug. CT 1260 et seq.) The court denied this request on June 23, 2018, finding that the motion was untimely and not properly before the court, and that the court had no jurisdiction to dismiss the entire action. (V Aug CT 1321-1322.)

As discussed in the previous arguments, on April 30, appellant moved to continue sentencing. (CT 153 et seq.) This motion cited Penal Code section 1118,[5] and argued that counsel required time to present and prepare a motion to set aside the "death penalty conviction." (CT 154.)

The court denied the continuance on May 1, 2019, again citing the perceived limitation on its "jurisdiction" based on the Ninth Circuit order: "The People's election not to pursue a death sentence leaves one sentencing option under the directive of the Federal Courts." (CT 158.)

At the May 3, 2019, hearing at which the court imposed sentence, counsel for appellant asked the court to continue the hearing to allow time for the defense to file, among other things, a motion for new trial based on outstanding DNA testing. (RT 40-

[5]See footnote 3, above.

41.) The court ruled that these issues could be raised "post judgment" and also reiterated that the federal court order had left it with no discretion to take any action other than imposition of a sentence of life without possibility of parole. (RT 42.)

B. Standard of Review

A trial court has authority to grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. …" (Pen. Code, § 1181, subd. 8.) Typically, the appellate court applies an abuse of discretion standard in reviewing the denial of a motion for new trial. (*People v. Cua* (2011) 191 Cal. App. 4th 582, 608; see also *People v. Martinez* (1984) 36 Cal.3d 816, 821.) Here, however, the trial court did not deny the motion for new trial as a matter of discretion, but rather because it believed it had no power to entertain such a motion. (See RT 42.) Thus the issue before this court is the trial court's failure to exercise discretion, not whether the court abused its discretion. As discussed above in Argument I, a reviewing court independently decides whether a trial court had discretion to act and whether the lower court in fact recognized that it had such discretion. (See, e.g. *People v. Downey, supra,* 82 Cal.App.4th at p. 912; see also *In re Manzy W., supra,* 14 Ca1.4th at pp. 1207-1208; *People v. Medina, supra,* 89 Cal.App.4th at p. 323.)

Where the record demonstrates that a court failed to exercise the discretion vested in it by law, the appellate court should set aside even a ruling that was otherwise within the trial

court's power. (*People v. Penoli, supra,* 46 Cal.App.4th at p. 302.) Thus, this court reviews the issue de novo.

C. The Court Incorrectly Found That the Motion for New Trial Was Not Properly Before the Court and That it Had No Discretion to Entertain Such a Motion

The court's denial of the motion for new trial, the denial of the motion for reconsideration, and the denial of the requested continuance to allow preparation of a renewed motion for new trial all rested on the same fundamental misconception: that such a motion was not timely because it was not filed "before judgment." The court's rulings indicate a fundamental misunderstanding of the concept of "judgment" as defined by the California Supreme Court.

In denying the motion for new trial on June 23, 2017, the court found that the motion was not timely: "The motion is properly to be brought before judgment is entered. In this case judgment was entered quite some time ago." (VII Aug. RT 437; see also III Aug. CT 794.) The court further found its consideration of the motion precluded by the prior affirmance of guilt by state and federal courts. (VII Aug. RT 437.)

In the motion for continuance filed on April 30, 2019, counsel for appellant cited Penal Code section 1118,[6] and argued that counsel required time to present and prepare a motion to set aside the "death penalty conviction." (CT 154.) As was discussed in further detail in Argument II, the court denied the requested

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[6]See footnote 3, above.

continuance on the ground that it had no authority to alter the sentence under the jurisdiction conferred on it by the federal court. (RT 40.)

As already discussed, the court's interpretation of the limitations of the federal court order was simply incorrect. Moreover, to the extent that the court declined to hear a motion for new trial because it was filed after judgment, the court misconstrued the nature of "judgment."

The Penal Code requires that "application for a new trial must be made and determined before judgment." (Pen. Code, § 1182.) Again, in a criminal matter the judgment is the sentence; the terms are generally synonymous. (*People v. McKenzie*, *supra*, 9 Cal.5th at p. 46; *People v. Spencer, supra,* 71 Cal.2d at p. 935, fn. 1; *In re Phillips, supra*, 17 Cal.2d at p. 58.) If the judgment is vacated or set aside, the motion for new trial may then be entertained. (*People v. Hale* (1966) 244 Cal.App.2d 507, 511; see also *People v. Martin* (1963) 60 Cal.2d 615, 618; *People v. Grake* (1964) 227 Cal.App.2d 289, 292; *People v. Jaramillo* (1962) 208 Cal.App.2d 620, 627.)

In *People v. Chavez,* the California Supreme Court addressed the question of when, given that a grant of probation is not a final judgment, probation nonetheless becomes a "final judgment" precluding relief under Penal Code section 1385. The court concluded that a trial court lacked the power to dismiss a defendant's criminal convictions under Penal Code section 1385 after successful completion of probation. (*People v. Chavez, supra,*

4 Cal.5th at p. 777.) A court may exercise its dismissal power under section 1385 at any time before judgment is pronounced, but loses that authority after judgment is final. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 524, fn. 11.) A sentencing court may exercise its power under Penal Code section 1385 "until judgment is pronounced or when the power to pronounce judgment runs out." (*People v. Chavez, supra,* 4 Cal.5th at p. 777.) "Because the trial court's authority to render judgment ends with the expiration of probation, the court has no power to dismiss under section 1385 once probation is complete." (*People v. Chavez, supra,* 4 Cal.5th at p. 777.)

While the *Chavez* decision rested on the "fundamentally revocable nature of probation" (*People v. Chavez, supra*, 4 Cal.5th at p. 782, citing Pen. Code, §§ 1203.2, 1203.3), the court emphasized the fact that during the period of probation, the sentencing retains the power to revoke probation and sentence the defendant to imprisonment. (*People v. Chavez, supra*, 4 Cal.5th at p. 782.) Thus the crucial issue is the court's power to impose punishment - a power which the court unquestionably retained upon remand from federal court.

The holding in *People v. Pineda* (1967) 253 Cal.App.2d 443 does not change this result. The court there rejected a defendant's attempt to pursue a motion for new trial after an appellate court vacated his sentence and remanded to the trial court for resentencing. (*People v. Pineda, supra,* 253 Cal.App.2d at p. 450-451.) *Pineda* predates the holding in *Chavez* and its reasoning

runs directly contrary to the high court's holding in the latter case. Specifically, the *Pineda* court noted that the defendant there "equates sentence with judgment [citation], and concludes that the remand for sentence must of necessity open up the whole judgment, and permit consideration of a subsequently presented motion for new trial." (*People v. Pineda, supra*, 253 Cal.App.2d at p. 451.) But the court's definition of "judgment" as "a record of the adjudication of guilt and the determination of the penalty" (*ibid*) is fundamentally at odds with the definition adopted by the high court in *Chavez* and *McKenzie*, and must therefore be rejected in this context.

As already discussed at length in Argument I, the judgment in this case was necessarily vacated by the federal court order requiring retrial of the penalty phase. Appellant stood before the court convicted but unsentenced; as such, there was no judgment in existence to preclude the court from considering a motion for new trial. Thus, contrary to the court's finding that a motion for new trial was untimely, the court could have considered such a motion prior to pronouncing sentence.

D. The Court Erred in Failing to Hold an Evidentiary Hearing on the Motion for New Trial; this Error Deprived Appellant of Due Process as Guaranteed by the Fifth and Fourteenth Amendments, and of the Right to Effective Assistance of Counsel as Guaranteed by the Sixth Amendment; the Error Requires Remand.

The court here did not order an evidentiary hearing to determine the truth of the allegations in appellant's motion for

new trial; rather, the court ruled as a procedural matter that the motion was untimely and that it had no discretion to consider the matter. As such, the court deprived appellant of due process and the right to have counsel present his defense.

A defendant has a constitutional right to effective assistance of counsel at the time of sentencing. (*Mempa v. Rhay, supra,* 389 U.S. 128; *In re Cortez, supra,* 6 Ca1.3d at p. 88.) This right includes the right to have counsel prepare and present a motion for new trial where appropriate. (*Menefield v. Borg*, *supra*, 881 F.2d at p. 699.)

A defendant also has a right to have the trial court exercise its discretion where the law permits it to do so. "If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to a new trial." (Pen. Code, § 1202.) "A reviewing court may, in appropriate circumstances, prevent a miscarriage of justice by remanding the matter to the trial court for a belated hearing and ruling on the defendant's new trial motion." (*People v. Braxton* (2004) 34 Cal.4th 798, 805.)

Because the court's denial of the motion for new trial rested upon the unsound determination that the case was in a "post-judgment" posture and the court had no authority to proceed, appellant asks this court to remand for an evidentiary hearing on the matters raised in the motion for new trial.

CONCLUSION

For the foregoing reasons, appellant asks this court to remand for a meaningful sentencing hearing, and for a hearing on appellant's motion for new trial.

Dated: September 28, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.360(b), I certify that this brief contains 15,515 words, as determined by the word processing program used to create it.

/s/Elizabeth M. Campbell
Elizabeth M. Campbell
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a member of the State Bar of California and a citizen of the United States. I am over the age of 18 years and not a party to the within-entitled cause; my business address is PMB 334, 3104 O Street, Sacramento, California, 95816.

On September 28, 2020, I served the attached

APPELLANT'S OPENING BRIEF

(by mail) - by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Douglas Ray Stankewitz Appellant San Quentin State Prison B97879 San Quentin, CA 94964	Fresno County Superior Court 1100 Van Ness Avenue Fresno, CA 93724

(by electronic transmission) - I am personally and readily familiar with the preparation of and process of documents in portable document format (PDF) for e-mailing, and I caused said document(s) to be prepared in PDF and then served by electronic mail to the party listed below, by close of business on the date listed above:

Central California Appellate Program 2150 River Plaza Dr., Ste. 300 Sacramento, CA 95833 eservice@capcentral.org Office of the Attorney General P.O. Box 944255 Sacramento, CA 94244-2550 SacAWTTrueFiling@doj.ca.gov	Fresno County District Attorney 2220 Tulare Street #1000 Fresno, CA 93721 DAMotionService@FresnoCountyCA.gov

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

Executed on September 28, 2020, in Sacramento, California.

/s/Elizabeth M. Campbell
DECLARANT