No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2020

JOHN RAYMOND TRAVIS, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA, CASE NUMBER S062417

CAPITAL CASE

MARK E. CUTLER
Calif. State Bar No. 53368
Member of the Bar,
United States Supreme Court (#192472)

Post Office Box 172
Cool, CA 95614-0172
Telephone: (530) 885-7718
Email: cutler@mac.com

Counsel of Record for Petitioner

QUESTIONS PRESENTED

CAPITAL CASE

1. May a trial court, consistent with the requirements of the federal Fifth, Sixth, Eighth and/or Fourteenth Amendment guarantees of a fundamentally fair trial in accordance with due process of law and a reliable and accurate determination of the facts underlying a sentence of death, and/or the protection against cruel and unusual punishment, and/or the right to the effective assistance of counsel, preclude all counsel from referencing the word "mercy" during argument to the jury in the sentencing phase of a capital trial?

2. May a trial court, consistent with the requirements of the federal Fifth, Sixth, Eighth and/or Fourteenth Amendment guarantees of a fundamentally fair trial in accordance with due process of law and a reliable and accurate determination of the facts underlying a sentence of death, and/or the protection against cruel and unusual punishment, and/or the right to the effective assistance of counsel, refuse to instruct the jury in the sentencing phase of a capital trial that the concept of "mercy," tethered to the circumstances of the crime and/or the background of the defendant, may be considered as a factor in mitigation of the sentence?

RELATED PROCEEDINGS

1. *People v. Silveria and Travis*, Santa Clara County Superior Court, No. 155731, judgment entered June 13, 1997.

2. *People v. Silveria and Travis*, California Supreme Court, No. S062417, opinion issued August 13, 2020, rehearing denied September 23, 2020.

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No. _____

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OF THE UNITED STATES

October Term, 2020

JOHN RAYMOND TRAVIS, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Petitioner John Raymond Travis respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of California, case Number S064217, entered on August 13, 2020, rehearing denied September 23, 2020, affirming the convictions for murder with special circumstances, burglary, and robbery, and affirming the sentence of death.

PARTIES TO THE PROCEEDING

The parties to these proceedings are Petitioner John Raymond Travis and the People of the State of California (Respondent).

OPINIONS BELOW

The Supreme Court of California issued an opinion in this case on August 13, 2020, reported at *People v. Silveria and Travis*, 10 Cal.5th 195, 471 P.3d 412 (2020), and all page references to that opinion in this petition are to the Cal.5th Official Reports version. A copy of the opinion as it was filed by the California Supreme Court is attached as Appendix A. A copy of the order modifying the opinion and denying rehearing is attached as Appendix B.

JURISDICTION

The opinion of the Supreme Court of California was filed on August 13, 2020 and a timely petition for rehearing was denied on September 23, 2020. The normal due date of 90 days after the denial of rehearing was December 22, 2020. However, pursuant to an order issued by this Court on March 19, 2020, in light of the ongoing public health concerns relating to COVID-19, "the deadline to file any petition for a writ of certiorari due on or after the date of this order [was] extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3."[1] This Petition is being filed within 150 days after the denial of the timely petition for rehearing, or by February 20, 2021. That date being a Saturday, the deadline would be the following Monday, February 22, 2021.

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[1] References to Rule numbers contained throughout this Petition are references to the Rules of the Supreme Court of the United States.

This petition is therefore timely filed, and this Court has jurisdiction pursuant to 28 U.S.C. § 1257 and the March 19, 2020 order.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall be deprived of liberty without "due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury …, and to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The Grand Jury returned an indictment on May 6, 1992, in the Santa Clara County Superior Court charging petitioner John Raymond Travis and three others, with one count of murder and closely related counts of robbery and burglary, occurring on January 28-29, 1991.[2] The indictment also alleged special circumstances of murder while lying in wait, murder in the commission of burglary, murder in the commission of robbery, and murder involving the infliction of torture.

On October 26, 1995, in the guilt phase, the jury returned a verdict finding Petitioner guilty of murder in the first degree, and of the related burglary and robbery counts. The robbery and burglary special circumstance allegations were also found to be true. The torture special circumstance was found not true, and the jury was unable to reach a unanimous verdict on the lying-in-wait special circumstance.

On February 21, 1996, after a full penalty trial, the jury was unable to reach a unanimous penalty verdict. On May 5, 1997, after a second full penalty trial, a verdict of death was returned. On June 13, 1997, the court imposed a judgment of death.

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[2] Other counts pertaining to different incidents (and irrelevant to the issues raised in this Petition) were charged against other defendants, but not against Petitioner.

Petitioner and Daniel Silveria were tried together in the present case. The other three persons involved in the crime were tried separately.

SUMMARY OF FACTS OF THE OFFENSE

The facts pertaining to the crime are thoroughly set forth in the opinion of the California Supreme Court. (*People v. Silveria and Travis,* 10 Cal.5th at pp. 208-210.) Facts pertaining to the penalty trial are set forth in the same opinion at pp. 210-214 and 222-231. Other facts that more fully describe the factual and procedural circumstances pertaining to the specific claims raised in this Petition are set forth in the same opinion at pp. 300-304.

In brief, the facts of the crime are that Petitioner and four other young men (ranging in age from 17 to 21) all came from broken homes and had been living without meaningful adult supervision for substantial periods of time. They banded together and lived for about a week in an unoccupied mountain cabin. Fueled by a combination of various drugs and alcohol, they decided to leave their hometown and seek a new start elsewhere. To accomplish this, they needed automobiles. To obtain the funds to purchase automobiles, they concocted a plan to rob a retail craft store where Petitioner and one of the others had been employed months earlier.

Together, the five young men gained entry hours after the store had closed when the only person in the establishment was the store manager, James Madden. They obtained cash receipts and bound Madden to a chair, using duct tape. Because Madden recognized the two persons who had previously worked in the store, the group decided he should be killed. Three of the individuals, including Petitioner, stabbed Madden numerous times and left him bound to the chair. All five were ar-

rested the following day. (*People v. Silveria and Travis*, at pp. 209-212; see also pp. 214-218 and 222-226.)

OTHER FACTS PERTAINING TO THE PRESENT CLAIM

Other facts pertaining to the mercy issue included: 1) Petitioner's youth at the time of the crime (one month past his twenty-first birthday); 2) his difficult childhood; 3) his minimal prior criminal record (including no prior instances of violent criminal behavior); 4) his remorse; 5) his addiction to drugs and alcohol; 6) his remarkable progress during nearly six years of pre-sentence jail time, in working closely with a jail minister who helped him achieve a sincere and mature understanding of the impact that drug and alcohol addiction had on the choices he had made that led up to the crime; and 7) his dedicated outreach in assisting other jail inmates in their efforts to achieve a similar appreciation of the impact of addictions on their life choices. (See 10 Cal.5th at pp. 222-231; see also Appellant's Opening Brief, pp. 125-135, summarizing Reporter's Transcript, vol. 264:31279-313499, vol. 265:31426-31596, vol. 267:31907-31985, vol. 266:31665-31732, 266:31793-31837 and vol. 270:32499-32556.[3])

Procedural facts related to the issues raised in this Petition include the trial prosecutor's successful effort to prevent the defense from arguing in mitigation of the penalty that the jury had the power to exercise mercy. At the prosecutor's re-

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[3] References designated "CT" or "RT" that follow are to the Clerk's Transcript or Reporter's Transcript, respectively, in the appellate record.

quest, and over the vigorous objections by the defense, the trial court refused to instruct the jury that mercy could be considered in mitigation of the sentence and ordered all counsel not to use the word "mercy" during their penalty phase arguments to the jury.

Notably, the prosecutor took the position that mercy was a God-like power that juries could not exercise. He conceded the jury could properly consider pity or sympathy, but he argued those concepts differed from mercy. (RT 40:3412-3414; see also RT 177:17858-17862.) The trial court's first ruling that prohibited using the word "mercy" during argument to the jury occurred during co-defendant Silveria's first penalty trial, when the present two co-defendants were tried by separate juries. The court agreed that mercy was a God-like power that the jury had no right to exercise. The judge concluded that arguing for sympathy was "in effect, asking the jury to exercise mercy without using the word mercy **because of the implications that that word has**." (RT 178:17907-17908; emphasis added.) The court noted that mercy, when not based on the evidence, invited the jurors to reach an emotional and arbitrary response, improperly giving the jurors unbridled discretion in deciding the penalty. (RT 178:17907.) During subsequent argument before Petitioner's separate jury, the same judge made the same ruling, simply referring to the reasons set forth earlier. (RT 180:18149-18150.) Ultimately, neither jury was able to reach a unanimous verdict, and penalty mistrials were declared.

Prior to the penalty retrial (this time, with a single jury for the two defendants) both defendants again sought the right to ask the jury for mercy. (CT 17:4246-

4250, 4281-4283.) They argued that "sympathy" was only a feeling, but "mercy" was a means of acting on such a feeling. (RT 200:22926-22927.) The prosecutor argued that "mercy" was very different from "sympathy." (RT 200:22936-22942, 22944.) The defense made clear that it was seeking only to argue for mercy based on the trial evidence. They only wanted to argue that, based on the sympathetic factors shown by the defense evidence in mitigation, this was an appropriate case for exercising mercy. (RT 200:22942, 22948-22949.) Once again, the trial court was unmoved, stating again that "Granting mercy is a God quality." (RT 200:22950.) The following week, the trial judge explained his rationale more thoroughly, concluding that allowing a jury to exercise mercy would give the jury unbridled discretion to do anything it wished, in violation of principles set forth in United States Supreme Court cases. The judge again made clear his belief that seeking mercy was not at all like seeking sympathy. (RT 202:23124-23130.) Later, the court also refused to instruct the jury that mercy could be considered in reaching its penalty determinations. (RT 276:32963; CT 22:5336.)

In finding no constitutional error, the California Supreme Court referred to a prior decision holding that a trial court was permitted to direct the parties to refer in argument only to sympathy, pity, or compassion, rather than mercy. The Court believed those terms were synonymous with mercy. (*Silveria and Travis,* 10 Cal.5th at p. 301; see also *People v. Ervine*, 47 Cal.4th 745, 802 (2009).)

The Supreme Court recognized the difference between mercy that was not based on the evidence pertaining to the crime or the background of the offender,

and mercy that was **based on the trial evidence**. The Court expressly conceded that "so long as attorneys base their penalty arguments on the trial evidence, **it is not improper for them to use the word 'mercy' or its synonyms in argument**." (10 Cal.5th at p. 302; emphasis added.) Nonetheless, the Court's opinion failed to mention the fact that the parties here had expressly recognized the distinction and had sought only to argue for mercy that was based on the trial evidence. Cryptically, despite concluding that an argument seeking mercy based on the evidence would be proper, the California Supreme Court simultaneously concluded that there was "no error" in precluding precisely such a proper argument here. (10 Cal.5th at p. 300.)

The Supreme Court expressed its belief that the jury would understand it was free to consider mercy based on the evidence in mitigation of the sentence, even though the attorneys were precluded from using the word mercy, and even though the trial court had instructed the jury on various factors in mitigation without ever mentioning mercy. The Supreme Court stressed the arguments that trial counsel made in favor of sympathy and against vengeance and concluded there was no meaningful limitation on counsel's arguments despite the preclusion of the use of the word "mercy." The Court also concluded that the trial court instructions allowing the jury to consider sympathy were enough to inform the jury that it could also consider mercy. Thus, the Court concluded there was no reasonable likelihood that the jury was misled. (10 Cal.5th at p. 303.)

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A TRIAL COURT MAY PRECLUDE COUNSEL FROM USING THE WORD "MERCY" DURING ARGUMENT TO THE JURY IN A CAPITAL PENALTY TRIAL

A. Mercy is a Proper Factor for a Capital Sentencing Jury to Consider During the Process of Weighing Aggravating Factors Against Mitigating Factors, and Determining the Appropriate Penalty Merited by the Circumstances of the Crime and the Background of the Offender

Few, if any, principles of criminal sentencing are more familiar than the concept of throwing oneself on the mercy of the court. (See *e.g., Pennsylvania ex Rel. Herman v. Claudy,* 350 U.S. 116, 121 (1956); *In re Christopher B.*, 43 Cal.App.4th 551, 555 (1996); *People v. Powell;* 236 Cal.App.2d 884, 887 (1965); *In re Lower,* 100 Cal.App.3d 144, 149 (1979); *People v. Moore,* 5 Cal.App.3d 612, 614 (1970).) Nobody ever "throws themselves" on the sympathy of the court. As will be shown, "mercy" and "sympathy" may overlap in some ways, but they also can carry very different meanings, especially to lay jurors.

As this Court has expressly recognized in *Penry v. Lynaugh,* 492 U.S. 302 (1989) (six years before the present trial), permitting a capital sentencing jury to recommend mercy, when based on the evidence, is fully consistent with the guided discretion that is an essential requirement of modern capital sentencing:

> The State contends, however, that to instruct the jury that it could render a discretionary grant of **mercy**, or say "no" to the death penalty, based on Penry's mitigating evidence, would be to return to the sort of unbridled discretion that led to *Furman v. Georgia*, 408 U.S. 238 (1972). We disagree.

To be sure, *Furman* held that,

> in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.
>
> *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) But as we made clear in *Gregg*, so long as the class of murderers subject to capital punishment is narrowed, **there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant**. *Id.* at 197-199, 203.

Penry, at pp. 326-327; emphasis added.

Thus, the trial court was absolutely wrong in its insistence that giving a capital jury the right to dispense mercy would give such a jury unbridled discretion in violation of *Furman*.

The only other significant rationale offered by the trial court or the trial prosecutor was the argument that mercy is a "God-like" power that could not be granted by jurors. The simple answer is that anybody who follows a religion that causes them to believe that "mercy" is a "God-like" power would necessarily have to believe that condemning a human being to death by execution is also a "God-like" power.[4] If jurors are to be allowed to condemn a human being to death, then they

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[4] Indeed, the California Supreme Court has expressly recognized the "God-like" nature of a capital jury's decision to determine whether a defendant shall live or die. (*People v. Kipp*, 18 Cal.4th 349, 380 (1998); *People v. Jennings*, 46 Cal.3d 963, 991 (1988).)

must also be allowed to dispense mercy, when warranted by the evidence. (The only alternative is that if jurors cannot be allowed to exercise mercy because it is a "God-like" power, then neither should juries be permitted to choose whether a person shall live or die.)

The legitimacy of seeking mercy from a capital jury was again recognized by this Court in *Brewer v. Quarterman,* 550 U.S. 286, 295 (2007). There, quoting with approval from the district court opinion granting relief, this Court explained, "'The mitigating evidence presented may have served as a basis for **mercy** even if a jury decided that the murder was committed deliberately and that Petitioner posed a continuing threat. ...'" (Emphasis added.)

Even more recently, in *Kansas v. Carr,* 577 U.S. ___, 136 S.Ct. 633, 642 (2016), Justice Scalia, speaking for the Court (with one Justice dissenting on other grounds), recognized that "... whether mitigating circumstances outweigh aggravating circumstances is **mostly a question of mercy** ..." and "... jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, **which is what our case law is designed to achieve**." (Emphasis added.)

In sum, it is clear that mercy is an indispensable and constitutionally compelled aspect of capital sentencing. Jurors must be permitted to consider and dispense mercy when determining the appropriate sentence in a capital case. No rational basis has been presented for precluding use of the word "mercy" during final arguments to a capital sentencing jury. If jurors may consider and dispense mercy, then defense counsel must be permitted to inform the jurors of that power and must be permitted to expressly ask the jurors to grant mercy, when justified by the evidence that was presented to the jury at trial. This is especially true when the trial

court, as here, refused to instruct the jury regarding their power to consider mercy, based on the evidence, in mitigation of the sentence.

Prohibiting counsel from using the word "mercy" in penalty phase argument to the jurors was, therefore, clear error that rendered the sentence unreliable within the meaning of the federal Eighth Amendment requirement of reliability in the proceedings that support a sentence of death (*Beck v. Alabama,* 447 U.S. 625, 637, 643 (1980); *Woodson v. North Carolina,* 428 U.S. 280 (1976)), and also deprived Petitioner of his Eighth and Fourteenth Amendment rights to have the jury fully consider, and have an opportunity to give effect to, all of his mitigating evidence. (*Lockett v. Ohio,* 438 U.S. 586 (1978); *Eddings v. Oklahoma,* 455 U.S. 104 (1982).) The error also rendered the penalty trial fundamentally unfair in violation of the federal Fifth and Fourteenth Amendment guarantees of Due Process (*Estelle v. McGuire,* 502 U.S. 62 (1991); *McKinney v. Rees,* 993 F.2d 1378 (9th Cir. 1993); *Bryson v. Alabama,* 634 F.2d 862, 865 (5th Cir. 1981); see also *Spencer v. Texas,* 385 U.S. 554, 573-575 (conc. & dis. opn. of Warren, C.J.) (1967), and impaired Petitioner's exercise of the right to the effective assistance of counsel, in violation of the federal Sixth Amendment. (*Conde v. Henry*, 198 F.3d 734, 739 (9th Cir.1999).)

In sum, whether a state trial court, in the penalty phase of a capital case, may prohibit counsel from using the word "mercy" during argument to the jury, is an important question of federal law that has not been, but should be, settled by this Court. This important question of federal law has been decided by the California Supreme Court in a way that conflicts with relevant decisions of this Court. (Rule 10 (c).)

B. In This Context, "Sympathy" and "Mercy" Carry Differing Meanings, and Allowing the Defense to Ask for "Sympathy" Was Not an Adequate Substitute for Allowing the Defense to Ask for "Mercy"

As noted in the summary of the trial court proceedings, both the trial judge and the prosecutor were adamant in their insistence that "mercy" and "sympathy" carried different meanings – precisely the main point that Petitioner has argued all along.[5] Nonetheless, the California Supreme Court ignored this agreement of all counsel below, as well as the trial court, and concluded that both terms are interchangeable. Thus, in the view of the Supreme Court, allowing the defense to argue for sympathy was simply a means of seeking "mercy" without using the word "mercy."

Aside from being fundamentally inconsistent with the unanimous positions of the parties and trial court below (see RT 40:3412-3414, 200:22926-22927, 22936-22942, 22944, and 202:23124-23130) the California Supreme Court also chose to ignore the fact that such a different belief about the meaning of "mercy" and the meaning of "sympathy," was not limited to the parties in the case. Similar beliefs by trial courts, trial prosecutors, and trial defense counsel have been strongly urged in a number of capital cases decided by the California Supreme Court. Over and over, prosecutors in California have made great efforts to preclude the defense from asking for mercy, and/or preclude the trial court from instructing the jury about the

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[5] As shown above, the position of the trial court and trial prosecutor was that sympathy was a proper aspect of mitigation for argument to a jury, as made clear in cases from this Court. The court and prosecutor both concluded that it was proper to seek sympathy when based on the evidence, but it was improper to ask for "mercy," which the court and the prosecutor believed was a very different concept.

power to exercise mercy. Repeatedly, defense attorneys have sought instructions referring to mercy, and have sought the right to use the word "mercy" during argument. Time and again, trial courts have declined to mention mercy in instructions and, in some cases, have precluded defense counsel from using the word "mercy."

The widely shared view of capital case lawyers on both sides, and judges who have presided over capital trials, that there are important differences between the meaning of "sympathy" and the meaning of "mercy" is reflected in dozens of California capital appeal decisions. (See, for example, *People v. Williams*, 45 Cal.3d 1268, 1322-1333 (1988) *People v. Caro,* 46 Cal.3d 1035, 1067 (1988); *People v. Hamilton,* 48 Cal.3d 1142, 1182 (1989); *People v. Andrews,* 49 Cal.3d 200, 227-228 (1989); *People v. Benson,* 52 Cal.3d 754, 808-809 (1990); *People v. Nicolaus,* 54 Cal.3d 551, 588-589 (1991); *People v. McPeters* 2 Cal.4th 1148, 1195 (1992); *People v. Lewis,* 26 Cal.4th 334, 393 (2001); *People v. Griffin,* 33 Cal.4th 536, 590-592 (2004); *People v. Wallace,* 44 Cal.4th 1032, 1089-1090 (2008); *People v. Ervine,* 47 Cal.4th 745, 801-802 (2009); *People v. Boyce,* 59 Cal.4th 672, 707 (2014); and *People v. Henriquez,* 4 Cal.5th 1, 41-43 (2017).)

In the present case, the jurors heard detailed evidence that Petitioner and four other young men chose to saturate themselves with alcohol and unlawful drugs, leading to their ill-fated decision to rob and then brutally kill a completely innocent victim, who was a family-man and a successful businessman. After such evidence, including hours of victim-impact testimony, jurors were not likely to feel sympathetic toward Petitioner. On the other hand, the jurors had also heard detailed evidence about Petitioner's upbringing, including a father who abandoned him at a very young age, stepfathers who had cruelly mistreated him and sexually

abused his sister, and a mother who left him to spend his time learning to survive on the streets with other youths and without meaningful parental guidance, leading to alcohol and drug addiction at a very young age and to foregoing an education. The jurors also heard that after his arrest, during years of pre-verdict incarceration, Petitioner had completed high school studies and earned a GED degree. He had developed a close relationship with a jail pastor (who was himself a recovered addict) and with the benefit of that counseling had gradually attained a mature understanding of addiction and the impact it had on the life-choices he had made. The rors also heard evidence of Petitioner's progress as an inmate, to a point where he earned the position of a jail trustee, and his efforts to work with other jail inmates and help them work toward a better understanding of their own addiction issues impacted their life-choices. The jurors also heard evidence of Petitioner's minimal criminal history, which included no other crimes of violence.

The totality of that evidence may well have left jurors with a belief that Petitioner did not merit their sympathy. At the same time, one or more of those jurors could have concluded that the mitigating evidence rendered this a proper case for extending mercy to Petitioner despite their abhorrence of his crime and the choices he had made in his young lifetime. Trial counsel should have been permitted to openly argue for the exercise of mercy, especially after the trial court expressed its refusal to instruct the jurors regarding mercy. Everybody except the California Supreme Court, it seems, recognized that mercy, as a concept understood since biblical times, carried meanings not adequately expressed by a simple appeal for sympathy. Thus, under the circumstances of this case, the prohibition against uttering the

word mercy in the presence of the jury is not only unfathomable, but as applied here, unconstitutional.

II. CERTIORARI SHOULD ALSO BE GRANTED IN ORDER TO DETERMINE WHETHER A TRIAL COURT MAY REFUSE TO INSTRUCT THE JURY IN THE SENTENCING PHASE OF A CAPITAL TRIAL THAT THE CONCEPT OF "MERCY," TETHERED TO THE CIRCUMSTANCES OF THE CRIME AND/OR THE BACKGROUND OF THE DEFENDANT, MAY BE CONSIDERED AS A FACTOR IN MITIGATION OF THE SENTENCE

For the same reasons set forth in the preceding claim in this Petition, trial courts should also be required to instruct juries in capital cases that mercy may be considered in mitigation of the sentence, when based on the evidence pertaining to the crime and/or the background of the defendant. Even if not required in every capital case, such an instruction should at least be required in cases where the defense has requested an instruction regarding mercy. It is evident from the cases cited above that defense attorneys, trial prosecutors, and trial courts have repeatedly disagreed about the meaning of the word "mercy" and about the propriety of allowing jurors to exercise such a power. If these experienced capital trial attorneys, prosecutors, and trial judges are uncertain about the proper meaning of the word "mercy" and about the propriety of allowing jurors to dispense mercy, then it is unrealistic to believe that jurors inherently recognize they have such a power when neither the court nor the attorneys mention the word.

Jurors were left in confusion at best, and with no guidance at worst, regarding their right to dispense mercy. This deprived Petitioner of a substantial right and must be deemed prejudicial error. "As a general proposition, a defendant is entitled to an instruction as to any **recognized defense** for which there exists evidence sufficient for a reasonable jury to find in his favor. *Stevenson v. United States*, 162 U.S. 313 (1896); 4 C. Torcia, *Wharton's Criminal Procedure* § 538, p. 11

(12th ed.1976) ... ." *Mathews v. United States*, 485 U.S. 58, 63 (1988) (emphasis added). Here, the propriety of granting mercy based on the evidence was a primary "recognized defense" to the sentence of death and was well-supported by the evidence before the jury. A writ of certiorari should issue to make clear the application of this fundamental principle.

In sum, whether a state trial court, in the penalty phase of a capital case, may refuse to instruct the jury that the concept of mercy, tethered to the facts that have been presented to the jury, is also an important question of federal law that has not been, but should be, settled by this Court. This important question of federal law has been decided by the California Supreme Court in a way that conflicts with relevant decisions of this Court. (Rule 10 (c).)

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari. This Court should remove all doubt regarding the right of a capital defendant to expressly ask for mercy that is justified by the evidence, and to have the jury informed of its power to dispense mercy. The decision of the California Supreme Court was poorly crafted, failing to recognize and apply the distinction between mercy untethered by the evidence and mercy justified by the evidence. That Court originally set forth principles in cases where mercy was not tethered to the evidence, and then, without ever providing an adequate rationale, simply cited those cases to justify the denial of the right to expressly inform the jury of the power to exercise mercy, and the denial of the right to expressly ask for mercy. That is not an appropriate way for the highest court of the state with the greatest number of condemned persons in the country to carry out its obligation to provide meaningful appellate review. Further guidance from this Court is clearly needed.

DATED: February 18, 2021

Respectfully submitted,

MARK E. CUTLER
Calif. State Bar No. 53368
Member of the Bar,
United States Supreme Court (#192472)

Post Office Box 172
Cool, CA 95614-0172
Telephone: (530) 885-7718
Email: cutler@mac.com

Counsel of Record for Petitioner