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SUPREME COURT
FILED

MAY 17 2013

Frank A. McGuire Clerk

Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,)
)
)
v.)
)
ANDREW LAWRENCE MOFFETT,)
)
Defendant and Appellant.)

No. S206771
(Court of Appeal No. A133032)
(Contra Costa County Superior
Court No. 05051378-8)
APPELLANT'S MOTION FOR
JUDICIAL NOTICE OF RECORD
AND FILE IN *People v. Moffett*
(Court of Appeal No. A122763)

TO: THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Appellant, by and through counsel, pursuant to Evidence Code sections 452, 454, and 459, and California Rules of Court, rules 8.252(a) and 8.520(g), hereby requests this court to take judicial notice of the record and file in *People v. Moffett* (Court of Appeal No. A122763).

Memorandum Of Points And Authorities

Appellant respectfully requests that this Court take judicial notice of the entire Court of Appeal record, file, and briefing in *People v. Moffett* (Court of Appeal No. A122763). This Court is authorized to take judicial notice of these records. (Evid. Code, §§ 452, subd. (d), 459; Cal. Rules of Court, rule 8.520(g).) This is an appeal following a remand for resentencing to determine whether to reimpose LWOP on this juvenile murder defendant and to correct other sentencing errors. As respondent notes in its opening brief on the merits (RAOB 2, fn. 3), the Court of Appeal in this case took judicial notice of the trial and sentencing record in the original appeal (No. A122763). The record of the underlying trial (and the original sentencing and the probation report) is necessary to understand the factual and procedural background for purposes of reviewing the reimposition of LWOP in light of *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455], including respondent's claim (RAOB 7, fn. 4) appellant was present at the shooting. (See also Declaration Of Counsel, *post*.) Respondent's opening brief on the merits refers extensively to the previous appeal record (RAOB 2-11), as does appellant's answer brief submitted with this motion. Judicial notice of the record and file in Court of Appeal No. A122763 is necessary for the Court to resolve the claims raised in this appeal from resentencing. Finally, it is not practicable to file a copy of the record in No. A122763 with this motion because the transcripts spanning a two-defendant murder trial are lengthy.

Respectfully Submitted,

Joseph Shipp
Counsel for Appellant

Declaration Of Counsel

I, JOSEPH SHIPP, declare:

1. I am an attorney licensed to practice in the State of California. I have been appointed to represent appellant in this Court in the above-titled action.

2. The Court of Appeal granted judicial notice of the requested records as part of this appeal from resentencing because it was necessary to review the resentencing issues.

3. The requested records remain necessary to understand the facts and procedural history and to review the constitutionality of reimposition of LWOP in light of *Miller* (and state cruel and unusual punishment standards), the validity of presumptive LWOP under section 190.5, and other recurring case-specific errors implicating *Miller* which were noted by the Court of Appeal. This is particularly so since no updated probation report was ordered before the resentencing and respondent alternatively urges in favor of a finding any error was harmless based on the underlying facts and appellant's juvenile record. (RAOB 30-31; see also Evid. Code, sec. 453 [mandatory judicial notice by trial court upon proper notice]; *People v. Lawley* (2002) 27 Cal.4th 102, 163, fn. 24 [judicial notice of transcripts of trial]; *People v. Sakarias* (2000) 22 Cal.4th 596, 635-636 [same].)

4. The requested record of the original appeal spans several thousand pages and it is not practicable to append it to this motion.

5. Respondent has fair access to these records by virtue of its copy of the record, which the parties utilized in both appeals.

Executed under penalty of perjury at Oakland, California this 15th day of May, 2013.

Joseph Shipp
Counsel for Appellant

DECLARATION OF SERVICE

Re: *People v. Moffett*

No. S206771

I, Joseph Shipp, declare that I am over 18 years of age, and not a party to the within cause; my employment address is Post Office Box 20347, Oakland, California 94620. I served a true copy of the attached: APPELLANT'S MOTION FOR JUDICIAL NOTICE on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Attorney General
Attn.: David Baskind
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102

Clerk, Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, California 94102-3600

Bradley O'Connell
First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, CA 94107

Andrew Lawrence Moffett G-34925
Salinas Valley State Prison
P.O. Box 1050
Soledad, CA 93960-1050

Each envelope was then, on May 15, 2013, sealed and deposited with the United States Postal Service at Oakland, California, in the County in which I am employed, with the first class postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed at Oakland, California, this 15th day of May 2013.

Joseph Shipp
Declarant