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May 11, 2020

Supreme Court of California
350 McAllister St.
San Francisco, C A 94102

**Re: People v. Daniel T. Silveria and John R. Travis –
S062417**
Pre-Argument List of Additional Authorities

To Chief Justice Tani Cantil-Sakauye, and the Associate Justices
of the Supreme Court of the State of California:

Please consider the following updated authorities in connection
with the resolution of the above-entitled automatic appeal:

**Travis AOB Argument I - Disallowing Testimony from Former
Juror**

People v. Morris (2015) 239 Cal.App.4th 276, 285: “Plainly, had the trial court declared a mistrial, and had Vinoya taken the stand at retrial and repeated her testimony, excused Juror No. 10 could have testified in rebuttal to impeach Vinoya’s testimony. In other words, excused Juror No. 10 could testify for the prosecution at a trial in which he had not once been a sworn and seated trial juror. Similarly, excused Juror No. 10 could testify at a retrial.”

Travis AOB Argument III – Precluding Instructions or Argument Referencing Mercy as a Factor in Mitigation

People v. Boyce (2014) 59 Cal.4th 672, 707: “As for mercy, we repeatedly have cautioned against using that word in the penalty phase instructions, explaining, ‘[t]he **unadorned** use of the word “mercy” implies an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances.’ (*People v. McPeters* (1992) 2 Cal.4th 1148, 1195, superseded by statute on another ground as stated in *Verdin v. Su-*

perior Court (2008) 43 Cal.4th 1096, 1106; accord, *People v. Lewis* (2001) 26 Cal.4th 334, 393.) Moreover, the court **did not foreclose defense counsel from urging the jury to show sympathy and mercy** to defendant. (See *Lewis*, at p. 393.)” (Emphasis added.)

People v. Hensley (2014) 59 Cal.4th 788, 826: “This advice indicates, falsely, that the ‘law of the land’ does not permit a juror to consider mercy in determining whether to vote for a death verdict. The law of California is otherwise. (Citations omitted.)”

People v. Lucas (2014) 59 Cal.4th 153, 312: “The one obviously improper reference to higher authority -- that only God may grant mercy -- was cured by the court's admonition and the court's standard instructions listing mercy as a factor to consider.” (See also p. 311, fn. 61: “Before the defense began its closing statements, the court admonished the jury: ‘I want to advise you that the law does specifically provide that the jury may consider mercy for the defendant in considering his sentence.’”)

Kansas v. Carr (2016) 577 U.S. ___, 136 S.Ct. 633, 642, Justice Scalia for the Court (one Justice dissenting on other grounds), recognizing “... 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.”

People v. Henriquez (2017) 4 Cal.5th 1, 41-43, a discussion much like that in *People v. Ervine* (2009) 47 Cal.4th 745, 801-803 (discussed at AOB 278-281), with references to unadorned mercy and to mercy tethered to the evidence, but failing to acknowledge any distinction between them.

Travis AOB Argument VIII – Removal of Seated Juror

People v. Leon (2015) 61 Cal.4th 569, 591-593, esp. p. 593: “The court below did conduct a limited oral voir dire, but it was insufficient. Specifically, the court did not inquire about the jurors’ ability to set aside their biases and follow the law despite clear statements in the questionnaires expressing the jurors’ willingness to do so. Nor does the record disclose any other basis for the

court's findings of incapacity. Under these circumstances, its conclusions are not entitled to deference.”

People v. Woodruff (2018) 5 Cal.5th 697, 743-745.

People v. Buenrostro (2018) 6 Cal.5th 367, 412-418.

Travis AOB Argument XII – General Principles Regarding Prejudicial Impact of Errors

Andrews v. Davis (9th Cir. 2019) 944 F.3d 1092, 1117: “Evidence of abuse inflicted as a child is especially mitigating, and its omission is thus particularly prejudicial.”

Very truly yours,

Mark E. Cutler
Counsel for John R. Travis

DECLARATION OF SERVICE BY MAIL

I, Mark E. Cutler, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is P.O. Box 172, Cool, CA 95614-0172.

On May 11, 2020 I served the attached

PRE-ORAL ARGUMENT LIST OF ADDITIONAL AUTHORITIES

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John Raymond Travis, K-57201
CSP-SQ
NBN-6-N-24
San Quentin, CA 94974

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

Executed this 11th day of May, 2020, at Cool, California.

Mark E. Cutler

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. SILVERIA (DANIEL TODD) & TRAVIS (JOHN RAYMOND)**

Case Number: **S062417**

Lower Court Case Number:

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

5/11/2020

Date

/s/Mark Cutler

Signature

Cutler, Mark (cutler@mac.com)

Last Name, First Name (PNum)

Mark E Cutler, Attorney-at-law

Law Firm