

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT COPY

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,

v.

JAMES ANTHONY DAVEGGIO

and

MICHELLE LYN MICHAUD,
Defendants and Appellants,

CAPITAL CASE

No. S110294

(Alameda County Superior
Court No. 134147A & B)

**BRIEF OF AMICUS CURIAE
CALIFORNIA APPELLATE PROJECT
IN SUPPORT OF THE AUTOMATIC APPEAL OF
JAMES ANTHONY DAVEGGIO**

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DEATH PENALTY

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INTRODUCTION

Pursuant to its simultaneously submitted application for permission to file, amicus curiae, the California Appellate Project, submits this brief in support of the automatic appeal of appellant, James Anthony Daveggio. This pleading presents one argument not previously briefed – that the trial court abused its discretion in failing to grant Mr. Daveggio’s multiple severance motions, depriving him of a fair trial and due process of law. As set forth in that application, this brief is presented to the Court to ensure that Mr. Daveggio receives a full presentation of all viable claims in his automatic appeal (*In re Smith* (1970) 3 Cal.3d 192, 197) and thus, to protect his state and federal constitutional rights to appellate review and effective assistance of counsel on appeal of his capital conviction. (Cal. Const., Art.

I, §15; U.S. Const., Amends. VI and XIV.) Because this argument is new, it is numbered XIV, which is sequential to the last numbered argument in appellant's opening brief.

ARGUMENT

XIV.

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT MR. DAVEGGIO'S SEVERANCE MOTIONS, DEPRIVING HIM OF A FAIR TRIAL AND DUE PROCESS OF LAW.

The trial court abused its discretion in denying appellant Daveggio's multiple severance motions because the evidence before the trial court at the time of the motions showed that co-defendant Michaud's defense was prejudicially antagonistic to appellant's defense. It is reasonably probable that appellant would have received a more favorable result in both the guilt and penalty phase had the trial court granted the severance motions because joinder prevented the jury from being able to assess his guilt or innocence on an individual and independent basis.

Even if severance had not been warranted at the time of appellant's severance motions, reversal is nonetheless required because joinder resulted in gross unfairness and a denial of his due process rights under the 5th, 7th, 8th, and 14th Amendments to the United States Constitution.

A. Procedural History

On November 22, 2000, appellant's counsel moved to sever his trial from co-defendant Michaud. (2 CT 375-381.) Appellant argued that Michaud's defense was antagonistic to his own and that severance was necessary to ensure a fair trial. He also asserted that separate trials were necessary to the extent the prosecution would introduce Michaud's

extrajudicial statements. (2 CT 378-79.) Appellant asserted that Michaud “[would] contend that Mr. Daveggio was responsible for the planning and execution of all the crimes which were committed, and that she was more or less along for the rides.” (2 CT 380.) Appellant specified that “[s]he may also present a defense of complete or imperfect duress, by which she will introduce evidence that Mr. Daveggio subjected her to physical abuse and emotional intimidation which compelled her to participate in the criminal acts.” (2 CT 380.) The court was aware that appellant might very well testify at the guilt phase trial and would likely mount a defense that Michaud was responsible for the murder. (2 CT 412.)

Appellant argued that a joint trial would “subject Mr. Daveggio to two prosecutions, one presented by the People, and one by his codefendant.” (2 CT 380.) Appellant stated that his codefendant, Ms. Michaud, had given at least four extensive interviews with law enforcement after her arrest. In those interviews, Michaud admitted that she was present and participated in the charged crime, as well as other crimes which the prosecution would likely seek to introduce through Evidence Code section 1101 or 1108. (2 CT 377-378.) Michaud additionally claimed that appellant was the person who actually killed the victim and “instigated, directed, and was more culpable than she for all the crimes.” (2 CT 378.) Appellant argued that the prosecution was likely to introduce extrajudicial statements made by Michaud that would incriminate him and could not be redacted to avoid prejudice. (2 CT 378.)

On December 22, 2000, Michaud also moved to sever the trial due to conflicting defenses. (2 CT 405.) Her motion made specific reference to her prior testimony in the *Aleda Perez* case in which she was granted immunity and attempted to blame appellant. (2 CT 405.) According to her

motion, Michaud anticipated that appellant would testify and blame her for the murder. (2 CT 405.) The prosecutor filed a motion in opposition of severance on December 28, 2000. (2 CT 413.)

On January 2, 2001, the court held a hearing on the severance motion (2 CT 428-38) and an in-camera hearing with only appellants, the court, and the court reporter present. (See Supp. 2 CT 264-sealed.)

The court denied the severance motion on both the *Aranda-Bruton* ground and the antagonist defenses ground. (2 CT 448-50.) The court based its ruling on assurances from the prosecution that it did not intend to introduce Michaud's statements, and on *People v. Hardy* (1992) 2 Cal.4th 86, on the antagonistic defenses ground. With respect to the latter, the court admitted that "[t]his is an area of law that's just not an easy thing to figure out." (2 CT 448.)

On June 21, 2001, appellant moved for separate juries based on his conflicting defense with Michaud. (4 CT 861-65.) The court denied the motion. (3 RT 575-76.)

On January 17, 2002, after appellant pled guilty to counts 1, 2, and 3, the trial court ruled that the testimony of the victims named in those counts, as well as that of uncharged victims, would nonetheless be admissible at trial. In light of this ruling, appellant renewed his motion to sever the trial. (15 RT 3510.) The court again denied the motion. (*Ibid.*)

On January 24, 2002, appellant's counsel argued that the guilty plea made the reasons for severance "even more compelling . . . because the evidence against Michaud will be more extensive, pointing in different

directions from that against Mr. Daveggio.” (15 RT 3556.) Since the trial court had denied his severance motion, counsel alternatively requested that the court advise the jury of appellant’s guilty plea “at an early juncture.” (15 RT 3557.) However, Michaud’s counsel objected to that on federal constitutional confrontation grounds, claiming among other things, that it could “lighten the prosecution's burden in seeking death.” (15 RT 3559.)

The court ruled that any prejudice to Michaud would be negated by the court telling the jury about the plea as opposed to hearing it from appellant. The court also asserted that its limiting instructions to the jury would cure any remaining prejudice. The court further stated, “I don’t think the law anticipates because someone pleads guilty to a lesser count in a capital case that immediately the case gets severed.” (15 RT 3561.)

On February 5, 2002, before the jury was sworn, appellant’s counsel renewed his motion to sever the trial based on his notes regarding the exhibits the prosecutor was planning to use during opening statement. (16 RT 3576-77.) Counsel argued “there's material dealing with the counts that my client has pled guilty to that will inflame the jury and there's no way any admonishment from the court would be able to not have an adverse psychological and evidentiary impact on these jurors.” (*Ibid.*) Michaud also renewed her severance motion at that time. (16 RT 3577-78.)

The court denied the renewed severance motions, relying on its prior ruling that the testimony of the victims in counts 1 through 3, as well as the uncharged victims, would be admissible even if the case was tried by itself. (16 RT 3581.)

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B. Standard of Review

Under Penal Code section 1098, two or more defendants who are jointly charged with an offense must be tried jointly unless the court, in its discretion, orders separate trials. The purpose of the statute is to save time and expense to both the state and defendant. (*People v. Scott* (1944) 24 Cal.2d 774, 778-779.) Regardless, a court retains the power to sever properly joined cases in the interests of justice; further, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452; *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.)

A court's denial of a motion for severance is reviewed for abuse of discretion, judged on the facts as they appeared at the time of the ruling. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) Consistent with the Eighth Amendment requirement of heightened reliability in capital cases, "severance motions in capital cases should receive heightened scrutiny for potential prejudice." (*People v. Keenan* (1988) 46 Cal.3d 478, 500; see, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 376.)

If a trial court abuses its discretion in failing to grant severance, reversal is required if it is reasonably probable that the defendant would have received a more favorable result in a separate trial. (*People v. Keenan, supra*, 46 Cal.3d at p. 503.) In assessing a claim of improper denial of severance, an appellate court ". . . must weigh the prejudicial impact of all of the significant effects that may reasonably be assumed to have stemmed from the erroneous denial of a separate trial." (*People v. Massie* (1967) 66 Cal.2d 899, 923.)

Additionally, even if a motion to sever was properly denied at the time it was made, reversal is required on appeal where the joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127.)

C. The Trial Court Abused Its Discretion in Denying Appellant's Severance Motions Because The Evidence Before The Trial Court At The Time Of His Multiple Motions Established that Co-Defendant's Michaud's Defense was Antagonistic to Appellant's Defense.

A trial court abuses its discretion when it fails to consider a defendant's severance motion under a correct view of the law. (*Massie, supra*, 66 Cal.2d at p. 916-918 [this Court held that the trial court committed prejudicial error and reversed Massie's codefendant's conviction where the judge refused to consider two valid reasons for severance].)

The trial court should order separate trials "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*Massie, supra*, 66 Cal.2d at p. 917.)

When codefendants' conflicting defenses "move beyond the merely inconsistent to the antagonistic," they prevent a reliable judgment and require severance. (*People v. Cummings, supra*, 4 Cal.4th at p.1287; *United States v. Mayfield, supra*, 189 F.3d at p. 899, quoting *United States v. Tootick, supra*, 952 F.2d at p. 1081, cited with approval in *United States v. Zafiro, supra*, 506 U.S. at pp. 542-543, [conc. opn. of Stevens, J.];

People v. Wheeler (1973) 32 Cal.App.3d 455 [one defendant claimed second defendant forced him to participate in crime, but erroneous failure to sever cases held harmless].)

This Court has turned to federal authority for guidance in determining whether severance was required due to conflicting defenses. (*People v. Hardy, supra*, 2 Cal.4th at pp. 168-170.) “The prototypical example is a trial in which each of two defendants claims innocence, seeking to prove instead that the other committed the crime.” (*United States v. Holcomb* (5th Cir.1986) 797 F.2d 1320, 1324.)

Severance is accordingly required when conflicting defenses are mutually exclusive; this Court has asserted that mutually exclusive defenses exist “where the acceptance of one party's defense will preclude the acquittal of the other.” (*People v. Hardy, supra*, 2 Cal.4th at p. 169 [citations and quotation marks omitted].) In *People v. Hardy*, this Court explained that severance was properly denied because the three codefendants’ claims of innocence, although “technically ‘conflicting’,” were not “particularly ‘antagonistic,’ since they were not fatally contrary to one another.” (*Id.* at 168-69.) Hardy claimed he was not present at the crime scene and did not participate in the conspiracy; one codefendant claimed he withdrew from the conspiracy; and the final codefendant relied on an alibi defense and claimed the other codefendant and an unknown third person committed the murders. The Court stated it was “perfectly consistent” that one codefendant withdrew and that Hardy was not one of the conspirators. (*Id.* at 169.) Similarly, the conspirator who relied on an alibi presumably was not present and thus could not know if the other codefendant withdrew or whether Hardy was present. (*Id.* at p. 169.) Thus, the defenses were not antagonistic at all because the jury could accept any of the codefendant’s

claims of innocence without foreclosing acquittal of any of the other codefendants. Accordingly, the trial court did not abuse its discretion in denying Hardy's severance motion.

Conflicting defenses may be sufficiently antagonistic to require severance—even if one codefendant does not directly blame the other—if the defenses are “closed in a fashion that does not suggest the intervention of a third party.” (*United States v. Tootick, supra*, 952 F.2d at p.1081, citing *United States v. Romanello, supra*, 726 F.2d at p. 177.) In *Tootick*, the 9th Circuit Court of Appeal held that the trial court committed prejudicial error in denying Tootick's severance motion even though Tootick did not directly accuse his codefendant. Rather, Tootick's defense concerned his state of intoxication: he claimed he was too drunk to have attacked the victim. Tootick's codefendant accused Tootick and denied any involvement. Since only Tootick and his codefendant were present when the victim was attacked, the jury could not acquit Tootick without disbelieving his codefendant. Accordingly, the trial court erred by not severing the trial.

Here, the trial court failed to consider appellant's severance motion under a correct view of the law; at the time of the severance motion, the evidence before the trial court established that appellant and Michaud had antagonistic defenses that moved beyond merely inconsistent to the point of being mutually exclusive. As appellant stated in his motion, Michaud was prepared to “contend that Mr. Daveggio was responsible for the planning and execution of all the crimes which were committed, and that she was more or less along for the rides.” (2 CT 380.)

In addition, Michaud had admitted to law enforcement that she was present and participated in the charged crime, as well as other crimes which the prosecution would likely seek to introduce at trial. (2 CT 377-378.) Michaud also told law enforcement that appellant was the person who actually killed the victim and “instigated, directed, and was more culpable than she for all the crimes.” In addition to mentioning this to the court, appellant attached to his severance motion the record of one of Michaud’s post-arrest interviews with law enforcement in which she made those claims. The trial court was also aware that appellant might very well testify at the guilt phase trial and would likely mount a defense that Michaud was responsible for the murder. (2 CT 412.) Thus, the record before the trial court at the time the severance motion was made established that this was the prototypical example of antagonistic defenses; each defendant claimed innocence and sought to blame the other for the crime. (2 CT 378.)

Both appellant and Michaud’s antagonistic defenses were mutually exclusive because acceptance of one of their defenses precluded acquittal of the other codefendant. Unlike the codefendants’ claims of innocence in *Hardy*, each codefendants’ claim of innocence here is fatally contrary to the other. In *Hardy*, the jury could accept one codefendant’s defense without precluding acquittal of the others since the codefendants disputed their presence and claimed intervention by a third party.

Here, on the other hand, Michaud did not claim that she was not present, but rather, was going to present a defense of duress and claim “that Mr. Daveggio subjected her to physical abuse and emotional intimidation which compelled her to participate in the criminal acts.” (2 CT 378.) Thus, if the jury were to accept Michaud’s duress defense, they would have to also accept that appellant was responsible for the crimes, therefore

precluding his acquittal. Similarly, appellant was likely going to testify at the guilt phase trial and place blame for the murder on Michaud. (2 CT 412.) Accordingly, if the jury accepted appellant's defense, it would also preclude acquittal of Michaud.

Like the codefendant's claims in *Tootick*, appellant and Michaud's conflicting defenses did not suggest intervention of any third party. Ms. Michaud's defense is also analogous to Tootick's defense in that they both alleged that their own state of mind reduced their culpability. However, unlike Tootick's defense, Michaud *did* directly blame appellant, rendering her defense even more antagonistic than Tootick's. Appellant's defense is analogous to Tootick's codefendant's defense in that they both blamed their codefendant and denied any involvement. Thus, if the codefendants' claims of innocence were mutually exclusive in *Tootick*, then appellant's and Michaud's claims of innocence were also mutually exclusive. Since all of this was reflected in the record on January 2, 2001—the date upon which the trial court first denied appellant's severance motion—the trial court accordingly abused its discretion.

As a result, the trial court also abused its discretion when it denied appellant's renewed severance motions on January 17, 2002, and on February 5, 2002. By January 17, 2002, appellant had pled guilty to counts 1, 2, and 3, and the trial court had ruled that the testimony of the victims named in those counts, as well as that of the uncharged victims, would nonetheless be admissible at trial. As appellant's counsel argued, the guilty plea made the reasons for severance "even more compelling . . . because the evidence against Ms. Michaud will be more extensive, pointing in different directions from that against Mr. Daveggio." (15 RT 3556-57.) Thus, the trial court also abused its discretion by denying appellant's renewed motion

for severance on January 17, 2002. The reasons for severance were even more compelling on February 5, 2002. At this point, the antagonistic relationship between appellant's defense and Michaud's defense had led to a strategic conflict. Appellant had wanted the court to inform the jury of his plea at the earliest possible juncture in light of the trial court's denial of severance; Michaud's counsel objected to that request on federal constitutional confrontation grounds, claiming would "lighten the prosecution's burden in seeking death." (15 RT 3559.)

Therefore, the trial court abused its discretion in denying appellant's motion not only on January 1, 2001, but also on January 17, 2002, and February 5, 2002.

D. It is Reasonably Probable That Appellant Would Have Received a More Favorable Result Had The Trial Court Granted the Severance Motion.

Although a reasonable probability of a more favorable outcome is not established if there exists sufficient independent evidence of guilt against the defendant, manifest prejudice results when joinder prevents the jury from being able "to assess the guilt or innocence of the defendants on an individual and independent basis." (*People v. Coffman* (2004) 34 Cal.4th 1, 42-43; *Tootick, supra*, 952 F.2d at p. 1083.) In *Tootick*, the Ninth Circuit outlined the various ways in which "mutually exclusive defenses can have a prejudicial effect upon the jury, and hence the defendants." (*Tootick, supra*, 952 F.2d at p. 1082.)

First, the Ninth Circuit explained that it creates a second prosecutor out of the codefendant who is accusing the other. (*Ibid.*) Thus, the codefendant's case became another forum in which the defendant is accused and tried. The codefendant is provided with perverse incentives to

do everything possible to convict his or her codefendant, but is not held to the same standard as the prosecutor. Next, *Tootick* observed that joinder turns a complex case into a simple one benefitting the prosecutor; when the jury cannot properly decide each codefendant's culpability, it instead convicts them both. (*Ibid.*) This benefit to the prosecutor is bolstered because the government's case becomes the only consistent presentation. Thus, each time a codefendant contradicts the other, it serves to reinforce the government's case. Similarly, all evidence that has the effect of exonerating one codefendant implicitly indicts the other. (*Ibid.*)

In concluding that manifest prejudice resulted from the failure to sever, the Ninth Circuit in *Tootick* observed that each codefendant had used his opening and closing statements, as well as his witness examinations, to undermine the other's claim of innocence and portray the other as the sole perpetrator of the crime. (*Tootick, supra*, 952 F.2d at p. 1085.) The Ninth Circuit also noted that the core of the government's closing argument focused on the exclusive nature of the two defendants' defenses to establish their mutual guilt: it was impossible for the jury to accept both defendants at their word. (*Id.* at 1085-86.) Lastly, the Ninth Circuit remarked that the trial court's generic instructions failed to cure any harm. Accordingly, joinder prevented the jury from assessing the guilt or innocence of each codefendant on an individual and independent basis and reversal was required. (*Id.* at p. 1086.)

Here, the trial court's failure to sever appellant's case from Michaud's case prevented the jury from being able to assess their respective guilt or innocence on an individual and independent basis. First, joinder in the face of antagonistic defenses turned Michaud into a second prosecutor against appellant. During the guilt phase, the jury was exposed to evidence

that was highly inflammatory and prejudicial to appellant that would have not been inadmissible in a separate trial. For example, two of Michaud's friends testified that her personality changed in 1997 after she met defendant. Before 1997, she was "beautiful" and enrolled her kids in Catholic school; after meeting appellant, she began using methamphetamine and appeared depressed. (30 RT 6507-08, 6382.)

The jury was also exposed to evidence that Michaud was a battered woman who was vulnerable to abusive men. (30 RT 6506-07.) A massage parlor owner testified that Ms. Michaud's own father visited her at the massage parlor and may have pimped her. (30 RT 6505-06, 6522.) Psychiatrist Pablo Stewart testified that co-defendant Michaud suffered from complex PTSD from working as a prostitute since she was 18 and that rendered her vulnerable to abusive men. Dr. Stewart testified that Michaud was severely mentally ill and had a propensity to be controlled in a relationship. (31 RT 6598-99, 6613, 6708.)

Illustrative of the perverse incentives noted by the Ninth Circuit in *Tootick*, Michaud tried everything possible to blame appellant in her closing argument to the jury. Her counsel argued that Michaud was under the domination and control of appellant when the murder occurred. (34 RT 7262.) Counsel stated that Michaud had been doing well prior to meeting appellant, but appellant turned her into "a ghost person." (34 RT 7263.) Michaud's counsel also referenced the friends' testimony that "she [Michaud] would do whatever James [appellant] asked her to do. She would get whatever James asked her to get." (34 RT 7264.)

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Michaud's counsel further argued that appellant was the "muscle," the prime force in any of these incidents, and the "major participant." (34 RT 7267.) Ms. Michaud's counsel argued that appellant put a gun in Michaud's face prior to the murder, and triggered her severe mental illness: "because you're acting under a mental illness, complex posttraumatic stress, where you follow the orders of the dominant perpetrator, Mr. Daveggio." (34 RT 7270.) Thus, the argument of Ms. Michaud's counsel simply turned Michaud's guilt-phase case into another forum in which appellant was accused and tried.

Like the prosecutor in *Tootick*, the prosecutor here benefited from these defendants' antagonistic defenses. All of Michaud's evidence regarding her illness and appellant's influence served as an indictment against appellant. Due to the conflicting presentations between appellant and Michaud, the prosecutor's theory was the only unified and consistent presentation. During the closing argument, the prosecutor used the exclusive nature of their defenses to show their mutual guilt. The prosecutor consistently referred to appellant and Michaud as "they," and "them," thus implying that it was impossible for the jury to accept both defendants at their word. (34 RT 7225.)

Analogous to the trial court's actions in *Tootick*, the trial court's additional rulings and instructions to the jury in this case did not cure the harm to appellant. Similar to the trial in *Tootick*, the trial court here supplied the jury with generic instructions at traditional times. If appellant's case had been severed from that of his codefendant, his jury would have been instructed that codefendant Michaud was an accomplice as a matter of law and that her testimony had to be viewed with distrust. (34 RT 7272, 7383.)

In addition, as discussed in Argument X, following Michaud's guilt phase argument, appellant's counsel requested that he be provided five minutes to rebut portions of that argument. Michaud objected however, and after taking the matter under submission, the trial court denied the request. (34 RT 7272, 7383.)

The trial court's failure to sever also resulted in manifest prejudice to appellant in the penalty phase. Michaud presented more evidence at the penalty phase via witness testimony that her appearance and attitude changed after she met appellant. She presented witness testimony that when Michaud was with appellant, he ". . . had her on a string, like a puppet" and when he "pulled the string, she did whatever he wanted her to do." (37 RT 8098.) Michaud also called appellant's ex-wife to testify that appellant could be intimidating and usually had to be in control. (38 RT 8204-07.) Appellant, on the other hand, testified on his own behalf at the penalty phase, asserting that it was Michaud who killed the victim.

Citing his prior concern that the defendants' antagonistic defenses required a severance, appellant's counsel argued that Michaud's penalty phase evidence was extremely prejudicial to appellant and moved for a mistrial. (38 RT 8213.) Counsel argued that "clearly what may be proper mitigation as to Ms. Michaud is improper aggravation as to Mr. Daveggio There is evidence that may be admissible for one purpose that really is extremely prejudicial and would otherwise be inadmissible . . . as to [Mr. Daveggio's] supposed dominance, domineering or control over the codefendant." (38 RT 8213.)

The joinder of Michaud's mitigation case thus violated appellant's due process and Eighth Amendment rights to a fair, reliable, individualized

and non-arbitrary sentencing determination. (See *Woodson v. North Carolina* (1976) 428 U.S. 280 [holding that the Eighth Amendment requires an “individualized” sentencing determination in which the jury considers “the character and record of the individual offender and the circumstances of the particular offense.”]; see also *Zant v. Stephens* (1983) 462 U.S. 862, 879 [“What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.”])

The juxtaposition of appellant’s mitigation next to Michaud’s mitigation evidence prevented the jury from determining the appropriate sentence for appellant based on his background, character, and crime. Since an individualized sentencing determination must be based on the “character of the individual and the circumstances of the crime,” the background and culpability of codefendants have no place in the jury’s decision. (See *Zant v. Stephens, supra*, 462 U.S. at 879.) Michaud attempted to show that although she was a prostitute, she had been trying to be good mother, doing things like volunteering at her church, and helping a 12-year old girl who had run away from home. Michaud also claimed that her personality changed only after meeting appellant and getting into drugs. (34 RT 7262.) Michaud’s tragic upbringing and various mental impairments were not relevant, however, to whether appellant should receive a death sentence.

A process that encourages the jury to compare and contrast defendants to determine which one should receive the death penalty cannot withstand constitutional scrutiny. Evidence of Michaud’s background and comparisons between her and appellant would not have been permitted had

appellant been tried separately. Accordingly, appellant's death sentence was the direct result of joinder, and reversal is required.

E. Even If Severance Was Not Warranted At The Time Of Appellant's Multiple Severance Motions, Reversal Is Nonetheless Required Because Joinder Resulted In Gross Unfairness And A Denial Of Appellant's Due Process Rights.

On appeal, reversal is required where the joinder of defendants actually resulted in gross unfairness amounting to a denial of due process even if severance was not initially warranted at the time the motion was made. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162; *People v. Arias, supra*, 13 Cal.4th at p. 127.)

For all the reasons stated in the section immediately above, Michaud's antagonistic defense presentations, at both guilt and penalty phases, resulted in gross unfairness such that appellant was denied due process of law. For the same reasons, appellant was also deprived of the heightened reliability required in capital cases. (U.S. Const., Amends V, VII, VIII and XIV; *People v. Keenan, supra*, 46 Cal.3d at p. 500; see *Zafiro v. United States, supra*, 506 U.S. 534; *Mills v. Maryland, supra*, 486 U.S. at p. 376.) Therefore, reversal is required even if severance was not warranted at the time of appellant's multiple severance motions.

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F. Conclusion

For all of the foregoing reasons, appellant Daveggio's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to fundamental fairness, a fair and reliable guilt determination, a fair and individualized sentence, as well as his rights under California law, were violated as a result of the trial court's denial of his severance motion. Accordingly, appellant respectfully requests that this court reverse his conviction and vacate his judgment of death.

Dated: December 28, 2018

Respectfully Submitted,

/S/

JOSEPH SCHLESINGER

Executive Director

CALIFORNIA APPELLATE PROJECT

State Bar No. 87692

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.360(B)(1))

I am the supervising attorney for the appellate team at the California Appellate Project and supervised the preparation of this amicus brief. I conducted a word count of this brief using my office's computer software, Microsoft Word 2013. On the basis of that computer-generated word count, I certify that this brief, excluding tables, exhibits, and certificates is 5059 words in length.

Dated: December 28, 2017.

/s/

Neoma Kenwood
Appellate Team Supervising
Attorney for the California
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DECLARATION OF SERVICE

Re: *People v. Daveggio & Michaud*, No. S110294
(related to Alameda Superior Court No. 134147A & B)

(Code Civ. Proc., § 1013a, subd. (2);
Cal. Rules of Court, rules 8.71(f), 8.77, 8.78(f) and (g)(2);
Cal. Supreme Court Rules Regarding Electronic Filing)

I, Fernando Yu Lei, declare:

I am a citizen of the United States, employed in the City and County of San Francisco, am over the age of 18 years and not a party to this action or cause. My electronic service address is flei@capsf.org, and my current business address is 101 Second Street, Suite 600, San Francisco, California 94105.

On December 28, 2017, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **BRIEF OF AMICUS CURIAE CALIFORNIA APPELLATE PROJECT IN SUPPORT OF THE AUTOMATIC APPEAL OF JAMES ANTHONY DAVEGGIO** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately 3:30 PM PST. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

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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.

Executed on December 28, 2017, at San Francisco, California.

/S/
Fernando Yu Lei

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