IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL TODD SILVERIA, and JOHN RAYMOND TRAVIS, Defendants and Appellants.	Supreme Court No. Crim. S062417 Santa Clara County Superior Court No. 155731

Appeal from the Judgment of the Superior Court
of the State of California for the County of Santa Clara

Honorable Hugh F. Mullin, III, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS PAGE

TABLE OF CONTENTS (Continued) PAGE

TABLE OF CONTENTS (Continued) PAGE

TABLE OF CONTENTS (Continued) PAGE

TABLE OF CONTENTS (Continued) PAGE

TABLE OF CONTENTS (Continued) PAGE

TABLE OF AUTHORITIES **PAGE**

TABLE OF AUTHORITIES (Continued) **PAGE**

STATUTES

Penal Code

CONSTITUTIONS

California Constitution

United States Constitution

JURY INSTRUCTIONS

CALIFORNIA RULES of COURT

TABLE OF AUTHORITIES (Continued) **PAGE**

BOOKS

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STATE OF APPEALABILITY

This is an automatic appeal from a death judgment that finally disposes of all issues between the parties. (Penal Code section 1239.)[1]

STATEMENT OF THE CASE

On May 8, 1992, the Santa Clara County grand jury returned an Indictment charging appellant, DANIEL TODD SILVERIA, with six felonies. (CT 3:458-464.)[2] Count 1 accused him of the murder of James Madden in violation of section 187 of the Penal Code and was alleged to have been committed on or about January 28 and January 29, 1991. (CT 3:458-459.)

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1 All statutory references are to the Penal Code unless otherwise indicated.

2 References to the clerk's and reporter's transcripts are set forth sequentially by volume and page. For example, Volume 1, page 100 of the clerk's transcript is referred to as CT 1:100. Volume 1, page 100 of the reporter's transcript is referred to as RT 1:100. References to Volume 1, page 100 of the augmented clerk's and reporter's transcripts are referred to as ACT 1:100 and ART 1:100, respectively.

Count 1 also alleged four special circumstances: (1) murder by lying-in -wait pursuant to section 190.2(a)(15); (2) murder during a burglary pursuant to section 190.2(a)(17)(G); (3) murder during a robbery pursuant to section 190.2(a)(17)(A); and (4) torture-murder pursuant to section 190.2(a)(18). (CT 3:459-460.)

It was further alleged that in the commission of count 1, that appellant personally used two different deadly and dangerous weapons, a knife and a stun gun, within the meaning of section 12022(b). (CT 3:460.)

Count 2 accused appellant of robbery of James Madden in violation of section 211 allegedly committed on or about and between January 28, 1991 and January 29, 1991. (CT 3:461.)

Count 3 accused appellant of burglary of LeeWard's, a craft store, in violation of section 459 allegedly committed on or about or between January 28, 1991 and January 29, 1991. (CT 3:462-463.)

Count 4 accused appellant of the burglary of Sportsmen's Supply, in violation of section 459 allegedly committed on or about January 24, 1991. (CT 3:462.)

Count 5 accused appellant of robbery of Ramsis Youssef in violation of section 211 allegedly committed on or about January 24, 1991. (CT 3:462.)

Count 6 accused appellant of robbery of Ben Graber in violation of section 211 allegedly committed on or about January 24, 1991. (CT 3:463.)[3]

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[3] Co-defendants John Travis, Christopher Spencer and Matthew Jennings were indicted on the same charges and allegations charged in counts 1-3, except that the torture-murder special circumstance and the personal use of a deadly or dangerous weapon enhancements were not alleged against Jennings. (CT 3:458-462.) Only Jennings and appellant were charged with counts 4 and 5. (CT 3:462.) Only Spencer and appellant were charged with count 6. (CT 3:463.) Troy Rackley was tried separately. (CT 3:597-598.)

On May 28, 1992, appellant was arraigned in the Santa Clara County Superior Court and Geoffrey Braun appeared as defense counsel. (CT 3:478.)

On August 19, 1992, appellant entered a plea of not guilty to all of the charges and denied both the deadly weapon enhancements and all of the special circumstance allegations. The matter was continued to December 16, 1992, for trial setting. (CT 3:565.) The matter had been continued several times (CT 3:679, 735) when, on January 13, 1993, it was continued to January 19, 1993, for all purposes including assignment to Judge Hugh Mullin, III. (CT 3:739.)

On January 19, 1993, jury trial was set for September 20, 1993. (CT 3:742.) On September 13, 2003, appellant filed a motion to sever appellant's guilt and penalty phases from co-defendants' trials. (CT 5:1150-1177.) On September 15, 1993, appellant filed a notice of his intention to join parts V and VI of co-defendant Jennings motion to dismiss. (CT 5:1178-1179.) On September 16, 1993, appellant filed appellant's Motion to Exclude Confession. (CT 5:1180-1200.)

On September 20, 1993, Judge Mullin set January 10, 1994, as the date for trial setting. (CT 5:1201.) On October 21, 1993, appellant filed a Notice of Appellant's Intent to Join Co-defendant Jennings' Motion to Exclude Victim Impact Testimony. (CT 5:1227-1228.) On November 8, 1993, he filed a Notice of Motion to Dismiss Allegations of Special Circumstances (murder while lying-in-wait and torture-murder). (CT 5:1238-1267.) On November 12, 1993, the trial setting date of January 10, 1994, was vacated and a new date, January 31, 1994, was set. (CT 6:1268.) On January 10, 1994, the matter was set for August 1, 1994, for jury selection. (CT 7:1738.) On April 4, 1994, appellant filed supplemental points and authorities in support of his motion to suppress evidence. (CT 8:1891-1921.) On April 18, 1994, Judge Mullin filed

his written ruling denying appellant's: (1) motion to suppress evidence (CT 1946-1949, 1970-1975); and (2) motion to dismiss all or part of the Indictment including lying-in-wait and torture-murder special circumstance allegations. (CT 8:1950-1958.)

On April 27, 1994, prosecutor Ronald Rico filed a Second Amended Notice of Aggravating Circumstances pursuant to section 190.3. (CT 8:2014-2017.) On July 7, 1994, Judge Mullin denied appellant's motion to sever. (CT 9:2141-2144.) On July 13, 1994, the dates of July 18, 1994 and August 1, 1994, were vacated and jury selection was scheduled to begin on April 17, 1995. (CT 9:2145.) On October 11, 1994, the trial date of April 17, 1995, was vacated and reset for May 8, 1995. (CT 9:2165.)

On January 9, 1995, appellant filed a Supplemental Memorandum in Support of Motion for Severance and in Opposition to the Prosecutor's Proposed Redactions of Confessions. (CT 9:2176-2203.) On January 10, 1995, the motion to sever was denied. (CT 9:2211.) On January 18, 1995, appellant filed a Motion for Separate Juries. (CT 9:2214-2218.) On January 20, 1995, Judge Mullin ruled that victim impact evidence was admissible but that prosecutor Rico must first make an offer of proof prior to its admission. (CT 9:2219-2223.)

On April 6, 1995, after further consideration, Judge Mullin filed his ruling granting appellant's motion to sever based on Aranda/Bruton grounds. However, he also ordered that two trials would be held with two defendants in each trial. He further ordered that a separate jury would be impaneled for each defendant. (CT 9:2257-2259.) Jury selection for appellant and co-appellant John Travis was scheduled to begin on May 8, 1995. The trial of co-defendants Christopher Spencer and Mark Jennings was scheduled to trail appellant's trial. (CT 9:2259-2260.)

On April 12, 1995, prosecutor Rico filed a Third Amended Notice Pursuant to Section 190.3. (CT 9:2287-2291.) On April 17, 1995, appellant filed a partial list of Proposed In Limine motions. (CT 10:2299-2306, 2312-2314.) On May 2, 1995, appellant plead guilty to count 4, burglary of Sportsmen's Supply. (CT 10:2346.) As to appellant only, the Indictment was amended so that count 5 became count 4 and count 6 became count 5. (CT 10:2347.)

Jury selection commenced on May 8, 1995. (CT 10:2351.) On June 22, 1995, appellant filed a motion to exclude his testimony, references and statements, and his conviction relating to the burglary of Sportsmen's Supply, original count 4. (CT 10:2406-2416.) On July 31, 1995, the jury and alternates were selected and sworn. (CT 10:2539-2541.)

On August 14, 1995, both the prosecution and defense presented their opening statements. (CT 11:2597.) On August 16, 1995, prosecutor Rico began presenting his case (CT 11:2602) and rested on September 20, 1995. (CT 11:2705.) On September 26, 1995, defense counsel Braun presented his case and rested the same day. (CT 11:2750-2751.) On October 11, 1995, Rico presented his opening argument. (CT 11:2755.) Braun began his closing argument the same day and concluded on October 12, 1995. (CT 11:2755-2756.) Thereafter, prosecutor Rico presented his closing argument, Judge Mullin instructed the jury and it began deliberations. (CT 11:2756.)

Appellant's jury reached certain verdicts from October 16 through October 23, 1995, but Judge Mullin ordered the jury foreperson to seal the verdict forms until co-appellant Travis's jury reached its verdicts. (CT 11:2793-2794.)

On October 30, 1995, after the Travis jury reached its verdicts, the court clerk read appellant's verdicts in court. Appellant was found guilty of all

counts. In addition, the burglary and robbery special circumstance allegations were found true. Finally, the personal use of a deadly or dangerous weapon, a knife, allegation was found true. (CT 11:2802-2803.)

However, the murder while lying-in-wait special circumstance was found ***not*** true. (CT 11:2802.) The jury also ***deadlocked*** on the torture-murder special circumstance and the personal use of a deadly or dangerous weapon (stun gun) allegation.) (CT 11:2803; RT 125:12015-12017.) A mistrial was declared as to the torture-murder allegation. (CT 11:2803; RT 130:12064.)

On November 7, 1995, Judge Mullin granted prosecutor Rico's motion to require that appellant's penalty phase testimony be heard by co-defendant Travis and Travis's jury. (CT 13:3096.)

On November 15, 1995, appellant's first penalty phase began. (CT 13:3115-3116.) Prosecutor Rico made his opening statement. During Braun's opening statement, Judge Mullin excused the jury, then ordered the defense opening statement to be sealed pending further order of the court. The jury returned, Braun concluded his opening statement, and the matter was continued to November 20, 1995. (Ibid.)

On November 20, 1995, prosecutor Rico presented his case and rested the same day. (CT 13:3191.) Appellant's jury was admonished and ordered to return on November 27, 1995. (Ibid.) On November 27, 1995, defense counsel Braun began presenting the defense case. (CT 13:3195.)

On December 4, 1995, appellant filed a motion to admit witness testimony describing appellant's expressions of remorse. (CT 13:3204-3214.) Judge Mullin denied the motion. (CT 13:3216.)

On December 5, 1995, appellant testified on his own behalf. Defense counsel Braun objected to the presence of co-defendant Travis and Travis's jury during appellant's testimony. (CT 13:3219.) On December 14, 1995,

upon the conclusion of appellant's cross-examination by prosecutor Rico, both juries were excused for the holiday recess until January 2, 1996. (CT 13:3238.)

On January 2, 1996, appellant resumed the stand and was cross-examined by James Leininger, counsel for co-defendant Travis, and was recross-examined by prosecutor Rico. (CT 13:3241-3242.) Defense counsel Braun continued to present the defense case.

On January 23, 1996, Leininger began presenting Travis's case and Travis testified on his own behalf. (CT 13:3306.) On February 2, 1996, Braun resumed the presentation of appellant's case. (CT 13:3363.) Braun and Leininger alternated the presentation of their respective cases. (CT 13:3364.)

On February 6, 1996, Travis rested. Prosecutor Rico presented rebuttal then rested. Braun also rested the same day. (CT 13:3366-3367.)

On February 7, 1996, Judge Mullin instructed the jury and prosecutor Rico presented his opening argument. (CT 13:3369-3370.) Braun began his argument the same day (CT 13:3370) and concluded on February 8, 1996. (CT 13:3371-3372.) Rico began his closing argument that day and concluded the following day. (CT 13:3372-3374.) On February 9, 1996, Braun presented his closing argument, the jury received final instructions and deliberations began. (CT 13:3374.) Deliberations continued to February 15, 1996, when the jury informed Judge Mullin that it was deadlocked. (CT 14:3442.)[4]

Judge Mullin declared a mistrial and ordered the courtroom cleared except for the jury and court staff. (CT 14:3443.) Thereafter, he addressed the

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Appellant's jury deadlocked when four jurors opposed the death penalty. (RT 181:18239-18240.) Co-defendant's Travis's jury deadlocked when two jurors opposed the death penalty. (RT 181:18313-18327.)

jury, allowed questions, informed them of the debriefing process available to them, then discharged them. (CT 14:3443-3444.)

The matter was continued several times for setting of the retrial of the penalty phase. (CT 14:3444, 15:3617, 15:3622, 15:3641, 15:3675, 15:3688, 15:3876, 15:3986.)

On October 30, 1996, appellant filed a motion to sever his penalty phase retrial from that of Travis. (CT 16:4005-4035.) Judge Mullin denied parts one, four, five and seven of the motion on November 21, 1996. (CT 17:4345.) He denied parts two, three and six on December 10, 1996. (CT 17:4376-4377.) On December 18, 1996, he denied the motion in its entirety. (CT 18:4528.)

On November 12, 1996, Braun filed a motion to permit him to plead for mercy. (CT 17:4246-4254.) Judge Mullin denied the motion on December 2, 1996, reasoning that mercy was not listed as a mitigating factor in section 190.3. (CT 17:4358.)

On December 2, 1996, appellant filed a motion to be permitted to ask on voir dire whether prospective jurors would always vote for the death penalty and reject LWOP no matter what mitigating evidence was presented. (CT 17:4355-4356.) On December 10, 1996, the motion was denied; Judge Mullin would use his own language to instruct the jury. (CT 17:4376-4377.)

Jury selection also began on December 2, 1996. (CT 17:4357.) On December 10, 1996, appellant filed a motion to preclude prosecutor Rico from arguing improper concepts to the jury. (CT 17:4367-4376.) On January 22, 1997, Judge Mullin denied appellant's motion to voir dire the venire regarding the death penalty. (CT 18:4598-4600.) On January 31, 1997, appellant filed a motion to preclude prosecutor Rico from arguing the lying-in-wait and torture-murder special circumstances because his first jury had already

concluded that the first allegation was untrue as to appellant, and Travis's jury had determined that the latter was untrue as to Travis. (CT 18:4620-4630.) On February 5, 1997, appellant renewed his motion to sever his case from Travis's case. (CT 18:4642.)

On February 10, 1997, the jury and alternates were sworn to try the case. (CT 18:4645.)

On February 13, 1997, Judge Mullin preinstructed the jury and both Rico and Braun presented opening statements. (CT 18:4649-4650.) Judge Mullin denied appellant's motion for a mistrial and/or permission to use the concept of mercy in counsel's statements and arguments to the jury. (CT 18:4649.) On April 23, 1997, he denied appellant's motion to reconsider his earlier ruling denying the defense motion to be allowed to plead for mercy from the jury. (CT 21:5260.) Leininger also presented his opening statement for Travis on February 13, 1997. (CT 18:4650.)

Juror 4 was questioned the same day outside the presence of the other jurors regarding her knowledge of defense witness Leo Charon. She was reminded of the admonition not to discuss the case and excused for the weekend. (CT 18:4650.)

On February 18, 1997, prosecutor Rico began presenting his case. (CT 18:4656.) Judge Mullin denied appellant's motion for mistrial made during the testimony of prosecution witness Officer John Boyles. (CT 18:4658.) On February 24, 1997, he denied appellant's motion for mistrial made during the testimony of prosecution witness Cindy Bevan. (CT 19:4678.)

On February 26, 1997, Judge Mullin ruled that appellant's first penalty phase trial testimony could be read into the record by prosecutor Rico during his case-in-chief to prove aggravating circumstances under section 190.3(a). (CT 19:4688.) Braun read his prior examination of appellant, his co-counsel,

Annrae Angel, read appellant's prior responses, prosecutor Rico read his prior cross-examination of appellant, and another prosecutor, Malcolm Sprott, read appellant's responses to this cross-examination into the record. (CT 19:4688-4690.) Co-appellant Travis's counsel, Leininger, read his prior cross-examination of appellant into the record and prosecutor Sprott read appellant's responses to this cross-examination into the record as well. (CT 19:4692-4693.)

On March 3, 1997, Judge Mullin denied appellant's motions for mistrial made during the testimony of prosecution witness officer Brian Allen. (CT 19:4694.)

On March 4, 1997, Judge Mullin denied appellant's motion for mistrial made during the testimony of prosecution expert witness, pathologist Parviz Pakdaman. (CT 19:4696-4697.)

On March 6, 1997, Judge Mullin denied appellant's motions for mistrial made during the testimony of prosecution expert witness Robert A. Stratbucker and the prosecution rested. (CT 19:4700, 19:4702.)

On March 7, 1997, Judge Mullin denied appellant's motion for mistrial made after he ruled that prospective defense witness and former police officer, Michael George, had a legitimate right to invoke his Fifth Amendment privilege against self incrimination with regard to his sexual abuse of appellant when appellant was 12 years old and a foster child in his home. Judge Mullin ordered George to be returned to prison forthwith. (CT 19:4707.) He also denied appellant's motion to modify the court's prior ruling excluding appellant's confession. (Ibid.)

On March 10, 1997, Braun began presenting his case in mitigation. (CT 19:4708.) On the same day, Judge Mullin denied appellant's motion to have the remaining portions of his prior testimony read to the jury. (CT 19:4710.)

On March 12, 1997, before being excused for the evening, juror 4 was questioned again regarding her knowledge and feelings about defense witness Leo Charon. Prosecutor Rico then moved to have juror 4 removed from the jury for cause. Judge Mullin took the matter under submission (CT 19:4714-4715) but then granted the motion on March 13, 1997. (CT 19:4719-4721.)

On March 18, 1997, appellant filed a memorandum in support of his motion to admit, as a declaration against penal interest, the statement of former officer, Michael George, that he had sexually molested appellant when appellant was a child in his home. (CT 19:4730-4743.) On March 19, 1997, Judge Mullin ruled that George was unavailable and that this evidence would be limited under Evidence Code section 352 because this case was not People v. George. (CT 19:4747, RT 258:30371, 258:30452-30454.)

On March 26, 1997, Judge Mullin denied appellant's motion for mistrial made during the testimony of defense expert Dr. Harry Kormos. (CT 21:5044.) On March 27, 1997, appellant rested his case in mitigation. (CT 21:5046.)

On April 2, 1997, Leininger began presenting Travis's case. (CT 21:5192.) On April 7, 1997, Travis testified on his own behalf. (CT 21:5200-5210, 21:5216-5217, 21:5224-5226.)

On April 9, 1997, Braun moved for a mistrial based on Judge Mullin's hostile and demeaning treatment toward him but the motion was denied. (CT 21:5212-5213; RT 32026-32033.)

On April 14, 1997, Judge Mullin denied appellant's motion for mistrial based on the prosecution's reading excerpts from a book, "Will you Die for Me?" written by Tex Watson, a former member of the Charles Manson family. (CT 21:5224-5226; RT 270:32498.)

On April 16, 1997, Travis rested his case (CT 21:5231, 21:5239-5239) and prosecutor Rico presented his rebuttal. (CT 21:5239-5241.) On April 28, 1997, Rico began his closing argument to the jury (CT 21:5289) and concluded on April 29, 1997. (CT 21:5291-5292.) Braun began his closing argument the same day (CT 21:5291-5292) and concluded on April 30, 1997. (CT 21:5301-5302.) Leininger presented his closing argument the same day. (Ibid.) Rico also began his rebuttal argument that day and concluded on May 1, 1997. (CT 21:5302-5303, 21:5306.) Braun and Leininger presented rebuttal arguments the same day. (CT 21:5306.)

On May 1, 1997, Judge Mullin instructed the jury and they began deliberations. (CT 21:5306.) The jury returned a death verdict on May 5, 1997. (CT 21:5308, 21:5313, 22:5459-5460.) The motion to modify the verdict and sentencing was set for July 17, 1997. (CT 22:5460.) Judge Mullin then released the jury and ordered the courtroom cleared except for the jury and court staff. (CT 22:5461.) He informed the jury of the debriefing process available to them on May 7, 1997, then thanked and excused them. (Ibid.)

On May 15, 1997, appellant filed motions to modify the verdict and for a new trial based on numerous trial court errors. (CT 22:5501-5534.)

On May 22, 1997, appellant filed a motion to disqualify Judge Mullin pursuant to Code of Civil Procedure 170.1(a)(6) based on the judge's comments to the jury on May 5, 1997, after he had ordered the courtroom cleared except for the jury and court staff. (CT 23:5543-5548.) On May 23, 1997, Judge Mullin filed his Answer denying that there are any grounds for disqualification. He attached the reporter's transcript as Exhibit A. (CT 23:5553-5572.) On June 6, 1997, Judge Peter G. Stone denied the motion. (CT 23:5643-5645.)

On June 13, 1997, Judge Mullin denied appellant's motions for a new trial and modification of the verdict. (CT 23:5768-5769.) He then invited members of the victim's family to be heard. Thereafter, he sentenced appellant to death on count 1. (CT 23:5769.) He also sentenced appellant to the following determinate term: for count 2 (robbery), the mid-term of three years (stayed pursuant to section 654); for count 3 (burglary), the mid-term of two years (stayed pursuant to section 654); for count 4 (burglary), the mid-term of two years; for count 5 (robbery), the mid-term of three years and for count 6 (robbery), the mid-term of 3 years. (CT 23:5778-5779.) Judge Mullin also ordered that the sentences for the arming allegations and for counts 4, 5, and 6 be stayed "pending the finality of the execution of the sentence and judgment as to count 1. (CT 23:5779.) This appeal follows.

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STATEMENT OF THE FACTS

GUILT PHASE:

The Prosecution's case

On January 24, 1991, the burglary of Sportsmen's Supply store (RT 99:9383) and the so-called "stun gun" robberies of Ramsis Youssef at the Quik Stop Market (RT 95:9021-9022) and Ben Graber at the Gavilan Bottle Shop were committed in San Jose. (RT 96:9081-9082.)

On the morning of January 29, 1991, Gayle Carlile, the assistant manager of LeeWards Crafts store in Santa Clara, entered LeeWards and discovered the body of the store manager, James Madden, in a back office. (RT 103:9913, 9999.)

Officer Cindy Bevan responded to LeeWards and saw Mr. Madden lying on the floor on his right side. He was bound at the ankles and wrists and had a duct tape over his mouth. There was a large amount of blood on his shirt, and he had several injuries. (RT 104:10044.)

Sergeants Ted Keech and Stewart Cusimano of the Santa Clara Police Department responded to LeeWards and arrived about 8:20 am. (RT 104:10096-10098.) Ms. Carlile informed Sgt. Cusimano that appellant and co-appellant Travis were former employees of LeeWards. (RT 104:10028.) Cusimano and Keech obtained the personnel files of appellant and Travis and assigned the task of locating them to other officers. (RT 104:10125-10126.)

On the evening of January 29, 1991, appellant was arrested for the burglary and the "stun gun" robberies mentioned above after his vehicle was stopped by police while attempting to exit the parking lot of the Oakridge Mall in San Jose. (RT 106:10306-10307, 106:10311-10313.) Co-appellant Travis was also arrested for the above robberies while driving another vehicle in the parking lot that night. (RT 106:10314.)

San Jose police officer, Jean Sellman, informed appellant that he was under arrest for suspicion of armed robberies. (RT 106:10315.) Sellman also searched appellant's vehicle and its contents looking for the "stun gun" that had been used in the robberies. (Ibid.) He discovered a baggie of marijuana, a stun gun, assorted tools, silver duct tape, a nine-volt battery and $694.40. (RT 106:10316-10327.)

After they were transported to the San Jose County Jail, Officer John Boyles interrogated appellant, co-appellant Travis and Troy Rackley in connection with the "stun gun" robberies. (RT 107:10553-10557.)

Shortly thereafter, Sergeants Keech and Cusimano arrived at the jail, and Boyles informed them of the stun gun and money found on appellant. (RT 107:10559.) Keech and Cusimano interrogated appellant, co-appellant Travis, Rackley, and two additional suspects, Christopher Spencer and Matthew Jennings, about the murder of Mr. Madden. (RT 107:10573-10574.) Appellant eventually admitted that he, co-appellant Travis, Spencer, Rackley, and Jennings were involved in the robbery and killing of Mr. Madden at LeeWards. (CT 20:4952-4964.)

On January 30, 1991, forensic pathologist Parviz Pakdaman of the Santa Clara County coroner's office (RT 112:10982-10983) performed the autopsy. (RT 112:10988.) Mr. Madden was received in a body bag, face down and fully clothed. His mouth, hands and feet were bound with duct tape. (RT 112:10989-10990.) He had an abrasion on his head and a superficial cut on the right side of his neck. There were five injuries on the front of his neck across the airway. Four of them were superficial and did not go beyond the skin surface. However, one injury was a stab-like wound which penetrated one-and-a-quarter inches into the trachea. There were also 24 stab wounds to the chest, eight on the right side and 16 on the left. Each lung had four

perforations and the heart had six perforations. There were also three stab-like cuts to the abdomen which penetrated the liver. Altogether, 32 wounds were inflicted upon Mr. Madden. (RT 112:11002-11005.)

Dr. Pakdaman further testified that the wound to the trachea would result in blood penetrating the airway causing Mr. Madden to cough and have difficulty breathing. (RT 112:11006.) The wounds to the chest would introduce air into the chest cavities causing the lungs to collapse also making it increasingly difficult to breathe. (RT 112:11007.) The depth of the wounds to the chest wall ranged from two to five-and-half inches. (RT 112:11012.) Mr. Madden also had two fractured ribs, one on each side, which he believes were caused by stab wounds. (RT 112:11013-11014.) Dr. Pakdaman explained that the six stab wounds to the heart would cause it to go into ventricular fibrillation "which is a fatal complication." (RT 112:11015.) In addition, blood would escape through these wounds into the sac that surrounds the heart, eventually causing the heart to stop pumping. (RT 112:11015-11016.)

Dr. Pakdaman also saw four pinpointed and closely placed parallel reddish-purple abrasion-like injuries to Mr. Madden's right thigh which were consistent with stun gun marks. (RT 112:11016-11019.)

Dr. Pakdaman opined that the stab wounds to Mr. Madden's neck, chest and abdomen caused his death. (RT 112:11019.) He did not know which wound was inflicted first, nor could he tell the order in which they were inflicted. If the superficial wounds were inflicted first, then Mr. Madden lived a long while. But if the serious wounds, especially the ones to the heart, came first then Mr. Madden probably died within minutes. He further opined that Madden died within 15 minutes to, at most, 30 minutes but this depended on a large number of factors. (RT 112:11020-11022.) The presence of foamy

material in the airway suggested that Madden was alive when the wounds to his chest and neck were inflicted. (RT 112:11022-11024.)

Dr. Robert Allen Stratbucker testified that he is a medical doctor but that his practice is limited to consulting activities in physiology and medical engineering. (RT 113:11072-11073.) Stratbucker also testified that he has reviewed literature and performed experiments relating to stun guns. He has also previously testified as an expert on the effect of stun guns on the human body. (RT 113:11083-11084.) Stratbucker further testified that a stun gun causes "a very intense kind of bright pain, sharp pain." (RT 113:11128.) When asked if there was a term in the literature for the type of pain caused by a stun gun, Stratbucker replied, "if you look up the medical literature and try to do a search on this subject, you'll find most of this under the subject of 'electrical torture' and it's a full-fledged category in the . . . medical literature." (RT 113:11129.) Stratbucker also testified that the area where the stun gun was applied (Mr. Madden's right thigh) was a "relatively highly sensitive area." (RT 113:11130.)

The Defense Case

During his guilt phase opening statement, defense counsel Geoffrey Braun told the jury that he believed that the prosecution would prove most if not all of the crimes alleged against appellant. He conceded that appellant helped to plan the robbery of LeeWards and was legally and morally responsible for Mr. Madden's death. (RT 93:8819-8823.) He also told the jury that appellant had cooperated with police and confessed his involvement in these crimes. (RT 93:8823-8824.) He further told the jury that appellant was not going to contest the other so-called "stun gun" robberies. (RT 93:8825.)

However, Braun sought to show that there was no evidence of blood on appellant's clothing which, in turn, buttressed appellant's contention that he was not an active participant in stabbing Mr. Madden until the very end when appellant stabbed Mr. Madden one time. (See RT 44:3666, 44:3669.)

During appellant's interrogation by Sergeants Keech and Cusimano, appellant told them that he had discarded the clothing he had worn during the stabbing of Mr. Madden (LA Gear shoes, jeans, t-shirt and thermal shirt) in a dumpster at the Oakridge Mall. (CT 62:4921-4922, 63:4982-4983.)

Braun called Elizabeth Skinner, a criminalist with Santa Clara County crime lab, as his only guilt phase witness. (RT 109:10677) Skinner testified that she received a pair of Levi's, a black t-shirt and a pair of LA Gear shoes from Detective Allen of the Santa Clara Police Department. She examined this clothing for blood and did not detect any on the t-shirt or shoes. There was a small stain on the right knee of the Levi's which tested "positive presumptive for blood." She performed an additional test to determine if this stain was human blood but the test was inconclusive. (RT 115:11285-11288.) Skinner further testified that these items were recovered from a dumpster located at the Oakridge Mall.[5] (RT 115:11289.)

Skinner also received clothing from Detective Allen that had been taken from co-appellant Travis. She tested his athletic shoes and jeans for blood. There were "numerous positive presumptive tests for blood" on the shoes and

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5

Prosecution witness, Sergeant Brian Lane, had previously testified that the clothing and shoes he had retrieved from a dumpster at the Oakridge Mall included these items. (RT 110:10709-10722, 110:10723-10725.) Prosecution witness, Detective Brian Allen, had previously testified on cross-examination that he had taken the black t-shirt, Levi's and LA Gear shoes to the crime lab. (RT 112:10922-10924.)

a smear of blood on the inside of the right front pocket of the jeans. She agreed that this smear of blood was consistent with a person who, while wearing a bloody glove, thrust his hand into that pocket then took it out. Skinner also tested the clothing of co-defendants Spencer and Travis which tested positive for blood. She confirmed that the blood on Spencer's shoes and Travis's clothing was human blood. Skinner further testified that all of the above clothing and shoes were among the items lost by Sergeant Keech before trial. (RT 115:11292. See also RT 112:10925-10940.) Appellant was convicted and the matter went to penalty phase.

THE FIRST PENALTY PHASE

Appellant's penalty phase ended in a mistrial when four jurors could not agree that death was an appropriate punishment. (RT 181:18239-18240.)

THE SECOND PENALTY PHASE

The Prosecution's Case

1. The Circumstances of the Crime

Appellant and co-appellant Travis's second penalty phase trials were joined and tried before one jury. (RT 200:22910-22912, RT 200:22962.)

Prosecutor Rico presented evidence that on January 24, 1991, appellant, Matthew Jennings, and Troy Rackley robbed **Ramsis Youssef**, the clerk of the Quik Stop Market, through Youssef's prior testimony which was read into the record after a finding that Youssef was unavailable. (RT 237:27583-237:27587, 238:27603-27648.) Youssef had also testified that Rackley shocked him with a stun gun (RT 238:27625-27626), and that appellant twice threatened to kill him, first, when appellant demanded the surveillance tape (RT 238:27629), and again when appellant said he would return if Youssef gave the tape to police. (RT 238:27636.)

Ben Graber, the clerk of the Gavilan Bottle Shop, testified that on January 24, 1991, he was robbed by persons using a stun gun. (RT 238:27649-27656.)

Officer John Boyles testified that after appellant was arrested and transported to the jail, he interviewed appellant about his participation in the above "stun gun" robberies and that appellant had admitted that he participated in both of these robberies. (RT 238:27711.)

Cynthia Tipton testified that appellant telephoned her from the jail and admitted that he had agreed to stab Mr. Madden (RT 239:27842), and did stab him during the robbery of LeeWards. (RT 239:27839.) She also testified that appellant told her that he had waited for Mr. Madden to be alone and that Madden had been duct-taped to a chair. (RT 239:27846.)

David Kenneth Anthony testified that after he found out that Mr. Madden had been murdered, he told police that they should talk to appellant and co-appellant Travis. (RT 239:27950, 239:27957-27958.)

Gayle Carlile testified that appellant and co-appellant Travis had worked at LeeWards Craft Store but were terminated in November of 1990 because they were unreliable and their work was unsatisfactory. (RT 242:28144-28149.) On the morning of January 29, 1991, she went into LeeWards (RT 242:28173) and discovered Mr. Madden's body in Office B at the back of the store. (RT 242:28176-28179.) Approximately $9,447.12 had been taken. (RT 242:28186.) When police asked her if she knew of any disgruntled employees, she told them that appellant and co-appellant Travis had been fired recently. (RT 242:28187.)

Officer Jack Soderholm testified that on January 29, 1991, he went to LeeWards, contacted Gayle Carlisle and she showed him Mr. Madden's body. He checked Mr. Madden for vital signs and found none. Soderholm then

radioed communications and told them of the body and his belief that a murder had been committed. (RT 242:28223-28226.)

Cindy Bevan testified that she was a Santa Clara police officer on January 29, 1991. On that date, she went to LeeWard's and saw Mr. Madden's body bound by duct tape and in a chair which had tipped over. She and Officer Soderholm walked out and notified detectives. Sergeants Keech and Cusimano arrived to investigate. (RT 242:28226-28231.)

Sergeant Keech testified that when he examined Mr. Madden's body, Mr. Madden was on his right side, legs extended, bent at the waist in approximately a 45-degree angle. He was still seated in a small, green chair that was on its side and was bound with two-inch silver duct tape around the ankles, head and mouth very tightly. He was also bound around his wrists in a figure eight behind his back and behind the upper part of the chair. There was a lot of blood on the front of Mr. Madden's shirt and he had suffered numerous stab wounds including an obvious wound to the neck area. There was also blood on the front of his pants and on the floor. Keech opined that Mr. Madden was seated in the chair initially because of the blood that pooled on the front of his pants before he fell to the side and ended up on the floor. (RT 242:28255-28260.)

Keech also inspected the safe and saw empty cashier trays on the safe. He also saw plastic bags that had been torn open; they were later determined to be deposit bags used for daily deposits. He saw no money in the safe. Keech then called the coroner, and Mr. Madden's body was removed from the scene by Coroner's investigator Norman Sanders. They wanted to transport Madden in the same position he was in when found. The duct tape was left in place. They had him lifted up and placed in the body bag which was sealed by

Coroner's Office personnel, and he was transported to the Coroner's Office. (RT 242:28260-28266.)

Keech also testified that he elected to focus on past employees as possible suspects, ultimately settled on appellant and co-appellant Travis and assigned Officers Richard Rodriguez and Patrick McGinty to locate them. (RT 242:28266-28272.)

Keech further testified that he met appellant and co-appellant Travis at the San Jose Police Department in the early morning of January 30, 1991. Christopher Spencer, Matthew Jennings and Troy Rackley had also been arrested. Keech learned that when these arrests were made, police found duct tape, a stun gun, and money which they took into evidence. (RT 242:28273-28278.)

Gregg Orlando testified that appellant showed him a large sum of money. (RT 243:28343, 243:28349-28350.) When Orlando asked appellant what he had done to get all that money, appellant replied, "We killed somebody last night." (RT 243:28351-28352.) Orlando further testified that appellant told him they were going to the Oakridge Mall to get new clothes, and then they were going to Reno. (RT 243:28353.)

Officer Jean Edward Sellman testified that he searched appellant's car after appellant's arrest and found duct tape, a bag of marijuana, appellant's identification, tools, a nine-volt battery, the stun gun and about $587. (RT 243:28403, 243:28410-28416.)

Daniel Todd Silveria: Although appellant testified during the first penalty phase, he chose not to testify during the second penalty phase. Judge Mullin ruled that appellant was, therefore, unavailable, and prosecutor Rico could read appellant's prior penalty phase, cross-examination testimony into the record to prove circumstances in aggravation under section 190.3(a). (CT

19:4688; RT 200:22912, 244:28468.) However, Judge Mullin also granted Braun's request that he be allowed to read appellant's prior direct examination testimony so that his cross-examination would make sense. (RT 244:28469.) Although Braun stated that he did not want to appear to be a tool of the prosecutor in providing evidence against appellant, he proposed that he read appellant's prior direct examination and that his co-counsel, Annrae Angel, read appellant's responses. (Ibid, RT 244:28478-28479.) He also agreed that the reading of appellant's prior testimony need not be reported. (RT 244:28474-28475.)

Braun and Ms. Angel read appellant's prior direct testimony to the jury. (RT 244:28482-28484, 244:28496-28497.) A summary of appellant's direct testimony follows:

Appellant worked at LeeWards for a few months in 1990 and was discharged on October 15, 1990. He testified that he, co-appellant John Travis, Chris Spencer, and Matthew Jennings robbed LeeWard's and participated in the murder of Jim Madden. Appellant further testified that he felt horrible about the effect his actions had on Mr. Madden's family and his daughter. He had also written a letter to the Madden family which expressed his remorse. (ACT 9:2409-2410.)

Appellant further testified that they discussed robbing Leeward's a few days before the robbery. They were drinking Jack Daniels and smoking marijuana. Appellant and Travis did most of the talking because they were familiar with the store. Appellant suggested that they wait for Madden to come out the back door, approach him, move him back in, tell him to turn off the alarm, then get the money and leave. Appellant's plan did not include causing any harm to Madden. Co-appellant Travis said that Madden needed to be killed because he could identify them. Appellant was surprised that

killing Madden was even suggested and protested immediately saying "no way." Appellant and Travis argued and then appellant walked away. Appellant returned but realized he was not getting anywhere by protesting so he said something like "whatever." (ACT 10:2466-2479.)

There were no further discussion regarding killing Mr. Madden that night. That question was not resolved but the discussion came up again the next day. Co-defendant Spencer said he would kill Madden. Travis's position was that Mr. Madden had to be killed. Appellant did not recall protesting that day but gave up because he was not getting anywhere. Appellant did not agree that Madden had to be killed. At the end of this discussion, appellant did not intend to kill Madden himself. He did not believe that the other defendants would kill him either because, although they were not good people, taking part in a murder was unthinkable. (ACT 10:2481-2484.)

Appellant testified that he does not believe that his use of alcohol or drugs is any kind of excuse for his crimes. (ACT 10:2486-2487.) Appellant knew they brought a can of gasoline that night because someone had suggested that they burn the store with Madden inside it. Appellant did not think this would actually happen and told Troy Rackley to leave the can outside because they would not need it. Appellant did not intend to harm Madden. Appellant also told Spencer to slash the tire on Madden's truck so Madden could not go for help after the robbery. (ACT 10:2491-2496.)

Appellant had the stun gun, Spencer had the knife and duct tape, and the others had various tools. Appellant said he never thought Madden would be killed despite Travis's comments. Appellant and Spencer confronted Madden at the door. Madden was startled but calmed down when he saw appellant. Appellant told Madden to turn off the alarm; they were there for the money. Madden was afraid and did what he was told. Appellant told Madden

that they were not there to hurt him. They just wanted the money. All five defendants were in the office, so appellant told them to give Madden room. Rackley and Jennings left. Jennings came back to the doorway and appellant told him to go get the car. Appellant told Madden to open the safe, take the money out and put it in the duffel bag. After all the money was out of the safe, appellant thought they needed to restrain Madden so he could not go anywhere so they duct taped him. Appellant taped his ankles, Travis taped his hands and mouth. After Madden was taped up, there was a phone call. Appellant took the tape off of Madden's mouth so he could answer the phone. Madden told appellant that it was the alarm company calling, and they needed a code. Madden told appellant to get it out of his wallet. Appellant got it out and Madden gave the caller the code and got off the phone. Appellant looked in the wallet for money. He saw money and thought of taking it but left it because Madden was going to be stranded at the store, and appellant wanted to leave him with some money. (ACT 10:2497-2510.)

After the phone call, appellant re-taped Madden's mouth. Appellant testified that he stunned Madden on the leg with the stun gun twice to render him unconscious so that he would not be killed. Appellant felt a sense of urgency when he stun-gunned Madden. Appellant zapped Madden a second time when he saw that Madden was still conscious. (ACT 10:2511-2515.) Madden was still conscious so appellant grabbed the duffel bag containing the money and said "Let's go." Appellant stepped toward the door and said, "let's go" several times. (ACT 10:2515-2516.)

At this point, co-appellant Travis told Spencer to kill Madden. Spencer seemed uncertain, and Travis repeated, "Kill him." Spencer started stabbing Madden in the chest very quickly. Travis watched, then held Madden. Travis told Spencer to "go for Jim's throat." Spencer went for Mr. Madden's throat

several times. This happened very quickly as appellant stood still, in disbelief and numb. Appellant could not believe it was happening. He did not tell Spencer to stop. He did not want Madden to die but cannot say why he did nothing to stop it. (ACT 10:2517-2523.)

Travis took the knife from Spencer and started stabbing Madden in the neck, chest and the ribs. Appellant kept putting his head down and then up to see what was going on, but did nothing to intervene. He may have said, "Come on, let's go" when this was happening. Appellant was standing between Madden and the door holding the duffel bag. When Travis stopped stabbing Madden, he turned to appellant and gestured that it was appellant's turn. Travis held out the knife and said, "Here, it's your turn" or 'here.'" Appellant said, "No." Mr. Madden was unconscious at that point, seated in a chair and slumped over. Appellant saw blood all around his chest and neck. Appellant said, "No" when Travis held out the knife. Travis said, "yes" and they went back and forth. Appellant finally took the knife and Mr. Madden one time in the rib area. Appellant then gave the knife back to Travis. (ACT 10:252523-2527.) Appellant testified that he stabbed Madden because he felt like they were not going to go anywhere until he did. Appellant further testified that he did not believe he "had the moral or emotional strength to do anything but that." (ACT 10:2527.) At that point, appellant was very reluctant and did not feel in control. Appellant also testified that he was sorry that he did not do something other than what he did. (ACT 10:2527.)

Appellant also testified that neither his background up to that point, nor his use of alcohol and drugs in the several years and months leading up to that crime, excused what he did that night. Appellant testified that after he stabbed Madden, he saw Travis stab him a few more times. Appellant just stood there. When Travis and Spencer stepped aside, the chair fell over. Appellant saw no

sign of life in Madden when those last blows were struck. Travis told appellant to check Madden's pulse. Appellant believed that he said that Madden still had a faint pulse, and then they left. (ACT 10:2528-2530.)

Thereafter, prosecutor Rico read his prior cross-examination of appellant to the jury. (RT 244:28497-28510, 245:28512-28519, 245:28520-28522.) A summary follows: appellant testified that on January 24, 1991 (ACT 10:2654-2655), he, and co-defendants Jennings and Rackley decided to rob the Quik Stop store. (ACT 10:2616-2618.) Rackley had the stun gun during this robbery. (ACT 10:2620.) Appellant told Rackley to get ready to zap the clerk Ramsis Youssef and Rackley zapped him on the back. Appellant and Rackley took money out of the cash register. Appellant told the clerk to give him the videotape in the store camera because he was concerned that he would be identified. Youssef told appellant that the camera was broken. Appellant testified that he told Youssef that he would come back and kill him in order to scare him.[6] (ACT 10:2620-2627.) Appellant also told Rackley to get ready to zap Youssef when Rackley was demanding the keys to Youssef's car. Appellant had already seen Rackley use the stun gun on Youssef once before and saw that it did not knock him to the floor or render him unconscious. (ACT 10:2627-2628.) Appellant agreed that he was running this robbery. (ACT 10:2633.)

Appellant also testified that he, and co-defendants Spencer and Rackley, decided to rob the Gavilan Bottle Shop later that evening. (ACT 10:2645.) This time, appellant had the stun gun and used it on the clerk Ben Graber.

6

Youssef had previously testified that appellant threatened to kill him if he did not give appellant the videotape of the surveillance camera (RT 95:9052), and if he told police about the robbery. (RT 95:9058.)

(ACT 10:2646-2647.) Appellant told Graber they wanted his money, to enter the store and turn off the alarm. They took money from the register and from Graber's wallet. (ACT 10:2648-2651.) Appellant told him to lay down on the floor, and they left the store. (ACT 10:2653.)

Appellant testified that he wanted to rob LeeWards. (ACT 10:2684-2685.) Appellant again testified that Travis said that they had to kill Mr. Madden, and that appellant said that they did not have to kill him, and they argued back and forth. (ACT 10:2711.) Travis was adamant that Mr. Madden had to be killed, and appellant was emphatic in his opposition to killing him. (ACT 10:2712-2714.) The next day, appellant, Travis, Spencer, Jennings and Rackley discussed the robbery again. Spencer was holding a knife and said that he would kill Mr. Madden. Appellant and Travis again talked about whether Mr. Madden would be killed but appellant could not recall what he said then. (ACT 10:2717-2720.)

Appellant further testified that he had the stun gun before they went to LeeWards, and found that watching the current when he fired it fascinating. (ACT 10:2736.) Appellant also testified that he wanted the jury to know everything that he recalled and what he did during the murder. (ACT 10:2736.) Appellant could not recall everything on Saturday night when Travis first said that Mr. Madden had to be killed because appellant was physically and emotionally "messed up." Appellant had tried to drink Jack Daniels but was too ill. He smoked marijuana but it did not have the usual effect on him. (ACT 10:2738-2739.)

Appellant again testified that it was not in his plan to kill Mr. Madden. It was Travis who wanted to kill him. (ACT 10:2749, ACT 11:2750-2753.) On Monday night, appellant protested again when they discussed burning the store with Mr. Madden inside of it. (ACT 11:2761-2762.)

Appellant testified that he applied the stun gun to Mr. Madden two times before he said "let's go" because he was trying to knock him out. (ACT 11:2829-2830.) The stun gun did not cause Mr. Madden to lose consciousness, and appellant acknowledged that neither robbery victims Youssef and Graber had lost consciousness either. (ACT 11:2833.) Appellant again said he did not want Mr. Madden killed and did not believe that he would be killed. (ACT 11:2834-2838.)

Appellant further testified that after the stun gun did not render Mr. Madden unconscious, appellant grabbed the money, walked toward the door and said, "come on let's go." Travis refused and ordered Spencer to kill Mr. Madden. (ACT 11:2840-2841.) Appellant kept saying "let's go." Mr. Madden began to panic and Travis again told Spencer to kill him. Mr. Madden tried to fight when Spencer approached and started stabbing Mr. Madden in the chest. (ACT 11:2841-2845.) Travis then told Spencer to "go for the throat." (ACT 11:2845.) Spencer tried to cut Mr. Madden's throat. (ACT 11:2846.) Spencer then passed the knife to Travis, and Travis stabbed Mr. Madden in the neck, then started stabbing him in the chest. (ACT 11:2847.) Mr. Madden lost consciousness when Travis was stabbing him. (ACT 11:2848.) Then Travis passed the knife to appellant. Appellant took the knife and stabbed Mr. Madden one time driving the knife in to the hilt. (ACT 11:2848-2849.)

Appellant testified that he taped Mr. Madden's ankles tightly because he wanted to tie him securely. (ACT 11:2853.) Appellant denied that he taped his mouth tightly so he could not hear him scream. (ACT 11:2854.) Appellant did not know if he was the one who bent the knife blade when he stabbed Mr. Madden. Appellant felt the knife hit something when he stabbed him. (ACT 11:2863.)

Appellant further testified that he could not do anything to stop the killing because control of the situation switched from appellant to Travis. (ACT 11:2869.) He did not know what kept him from leaving. When asked why he stabbed Mr. Madden if he did not want him killed, appellant said he did not want to stab him but did so because he did not think he had the strength to do anything else, and he did not feel they were going to leave until he did stab him. (ACT 11:2869-2870.) Appellant denied that he felt sorry himself. He testified that he deserved whatever punishment was given to him and felt the jury would give him the appropriate one. (ACT 11:2871.)

Thereafter, Travis's counsel, Leininger, read his cross-examination of appellant to the jury. (RT 245:28523-28525, 247:28544-28546.) A summary follows: appellant admitted that he, Travis and Spencer actually killed Mr. Madden, but Mr. Madden would not have been killed if Travis had not wanted him killed. When asked how he knew this, appellant replied, "Because he took control in that office." (ACT 11:2974-2973.)

Then prosecutor Rico followed by reading his re-cross-examination of appellant to the jury. (RT 247:28547-28551.) Appellant denied that he went to LeeWards with the intention of killing Mr. Madden. (ACT 11:2986.) Appellant agreed that he was the one who devised the plan to rob LeeWards. (ACT 11:2989.) Appellant believed that he was in control up to the point when he said, "let's go," but leadership switched when Travis told Spencer to kill Mr. Madden. (ACT 11:2990-2991.) Appellant testified that he took certain steps to try to safeguard against killing Mr. Madden; he ordered that the gas can that others had talked about using to burn the store and Mr. Madden be left outside. (ACT 11:2993-2996.) Appellant denied that he used the stun gun during the stabbing. (ACT 11:3009.) Appellant felt intimidated by

Travis's intense manner before appellant stabbed Mr. Madden one time. (ACT 11:3021.)

Leininger read his re-cross-examination of appellant to the jury. (RT 247:28551.) A summary follows: when asked whether it took more will to turn around and walk out the door while Travis stared at him than to stab someone, appellant responded that a weak will power can do that. Appellant said that he did not have the moral strength to do anything but what he did do. (ACT 11:3029.)

Sergeant Brian Neal Allen testified that a bent knife was recovered at the scene of the murder but no fingerprints were found on it. (RT 247:28612, 247:28635-28636.)

Parviz Pakdaman testified that he is an assistant medical examiner for the County of Santa Clara Coroner's Office. He is a forensic pathologist and conducts autopsies to determine cause of death. (RT 248:28689-28691.)

Dr. Pakdaman also testified that he performed the autopsy on Mr. Madden on Jan 30, 1991. (RT 248:28697-28700.) It started at 9:00 a.m. and finished at noon. Mr. Madden's clothes were blood soaked, the shirt and t-shirt had a "number of defects" on them. He described Mr. Madden as face down, wrists bound behind his back, ankles snugly taped and tape was found across his mouth. (RT 248:28700.) 32 wounds were inflicted upon Mr. Madden with a sharp instrument. Of these injuries, five were to the neck, 16 to the left side of the chest, eight to the right side and three to the upper abdomen. There was also an abrasion on the right side of the forehead and "four isolated pinpoint-like abrasions on the front part of the right thigh." (RT 248:28705-28709.) Four of the neck wounds were skin deep but the wound located on the left side was a "stab-like" wound and penetrated one-and-a quarter inches into the trachea. (RT 248:28710-28712.) Of the 24 wounds to

the chest, there were four wounds on each side that penetrated the lungs and six wounds that penetrated the heart. The deepest wound was to the right chest wall. This wound traveled downward, penetrated the abdomen and injured the right lobe of the liver. The depth of these chest wounds ranged from 2 ½ inches to 5 ½ inches. (RT 248:28712-28714.) There were also three stab-like wounds to the upper abdomen. One was relatively superficial but the other two penetrated 2 ½ inches and cut the liver. (RT 248:28715-28717.)

Dr. Pakdaman further testified that the one deep penetrating injury to the left side of the neck perforated the trachea which made it difficult for Mr. Madden to breathe because blood penetrated into the upper airways. This would cause Mr. Madden to start coughing up a mixture of blood and air. The eight stab wounds to the lungs caused further breathing problems because they resulted in profuse bleeding into the chest cavity and introduced air into an area which is supposed to be a vacuum. The six puncture wounds to the heart caused it to lose its pumping capacity and allowed blood to escape in the chest cavity, both of which prevented blood from reaching vital organs. In addition, the third rib on the left side and the sixth rib on the right side were fractured by the sharp blade that passed through the chest wall. Mr. Madden's death was caused by the wounds to his neck, chest and abdomen. (RT 248:28718-28722.)

Dr. Pakdaman testified that it would be a "guessing game" to say how long Mr. Madden lived during this attack. He opined that Mr. Madden died within minutes, but he could not say how many. He agreed that he had previously testified that Mr. Madden lived about 10 to 30 minutes "but that's again guessing." (RT 248:28732-28733.)

Dr. Robert Allen Stratbucker testified that he is a medical doctor currently engaged in "the full-time practice of biomedical engineering," which

he defined as the "application of engineering principles to medicine." (RT 249:28858-28859.)

Stratbuckner also testified that he had conducted experiments with stun guns and had previously testified as an expert on the use of, and effect of, stun guns on the human body. (RT 249:28876-28881.) He tested the stun gun used in the instant case. (RT 249:28902-28903.) The stun gun gets its power from a nine volt battery, but "there is a limit to the total amount of energy" that can be delivered to a person. (RT 249:28907.) It causes injury by passing an electrical current through tissue. (RT 249:28914.) Stratbucker also claimed that he could quantify the pain caused by a stun gun. He stated that "many pain fibers will be activated when one pulse flows from one probe to the other," and this is repeated with every pulse "again and again and again." The pain spreads out over the body in a very wide area. (RT 249:28916-28921.) He said the term for this type of pain is "bright" pain, it's very sharp cutting type of pain but it only lasts for the duration of the stimulus. (RT 249:28922.)

Stratbucker looked at a photo of Mr. Madden's leg and testified that the marks on Mr. Madden's thigh indicate that the stun gun was applied twice. Stratbucker opined that a person would automatically try to move away from the stun gun when it's applied, because of the withdrawal reflex. (RT 249:28923-28925.) Mr. Madden would actually feel more pain if the stun gun were applied over his pants than if it were applied directly to his skin. (RT 249:28931.)

Stratbucker heard Dr. Pakdaman's testimony regarding all of Mr. Madden's injuries. (RT 249:28932.) He testified that the penetration of person's heart with a sharp object does not always result in immediate death, fibrillation or cardiac tamponade. (RT 249:28934-28939.) He also opined that both the bruise on Mr. Madden's forehead and the stun gun marks on his leg

occurred when he was alive. (RT 249:28940-28941.) Stratbucker further opined that if the stun gun was used before the knife attack, there would be a "total activation of the withdrawal reflex mechanism" coupled with all the voluntary effort to avoid "this extremely painful stimulus that he could muster. So it would be an absolutely superhuman kind of an effort possibly even causing chairs to fall over and the individual to be dislocated and duct tape to be torn and various other superhuman effort. . . ." (RT 249:28948.) This superhuman effort was the reason the duct tape on Mr. Madden's ankles was torn. (RT 249:28948-28949.)

Stratbucker also testified that application of the stun gun would not render a person unconscious. Rather, it would be like applying smelling salts to a prizefighter whose been knocked down. (RT 249:28949-28950.) The victim would feel pain and suffering, the pain would be "at an absolute maximum intensity." (RT 249:28957.) Stratbucker further testified that Mr. Madden "remained conscious to the - - to the bitter end . . . ." (RT 249:28959.)

2. Victim Impact Evidence

Susan Thuringer testified that she knew Mrs. Madden and was with her on January 29, 1991, when Mrs. Madden learned that her husband had been murdered. Mrs. Madden was late in arriving at work and "was weepy and distraught because Jim hadn't come in, hadn't come home, and she didn't know where he was." (RT 250:29022.) Thuringer also testified that she telephoned a close friend, the Chief of Police in Watsonville, to see if he could find out any information for her. He told her there was a death involved at LeeWards. A short while later, the Santa Clara police called and confirmed that Mrs. Madden's husband had been murdered. When Thuringer told Mrs. Madden that Mr. Madden had been murdered, "[i]t was really awful." Mrs.

Madden screamed and tried to get up and get away so they restrained her. (RT 250:29024.) When Mrs. Madden's daughter Julie returned from school, Mrs. Madden told her of Mr. Madden's death. Thuringer heard Julie scream and cry while Mrs. Madden tried to comfort her. They stayed with Mrs. Madden for most of the day. (RT 250:29022-29025.)

Thuringer further testified that Mrs. Madden is still not over Mr. Madden's murder. Thuringer testified that Mrs. Madden really went to pieces when prosecutor telephoned her to reschedule a court appearance, "It just brings it back fresh all over again, You just don't forget it. It's just like the same day it happened and you can hear everything and - - I'll never forget it as long as I live." (RT 250:29025-29026.)

Kay House, Mrs. Madden's supervisor, testified that she was present when Mrs. Madden arrived at work on Jan 29, 1991. House testified that Mrs. Madden went into House's office, burst into tears and told House that she was really worried because Mr. Madden had not come home. House also testified that Mrs. Madden told her that she came to work because she just knew something was wrong and she did not want to be alone. They received a telephone call informing them that Mr. Madden had been killed at LeeWard's. (RT 250:29027-29030.) Mrs. Madden continued to cry and got more and more upset because she was sure something was wrong. House testified that when Mrs. Madden was told that Mr. Madden had been murdered, "Oh it was horrible. She just screamed and screamed and screamed. And everybody in the building heard her. I mean, I think everybody who worked there will never forget it. It was just awful." (RT 250:29031.) House further testified that when an officer arrived and also told Mrs. Madden that Mr. Madden had been killed, she wanted to go home. Mrs. Madden was hysterical and very upset. She could not calm down. "It's such an awful thing. . . She was very upset."

(RT 250:29032.) House also testified that she was present when Julie was told of her father's murder. Half the time Julie just screamed and cried and said, "I don't want my daddy to be dead." House testified that Mrs. Madden is "not the same person. It's still really difficult for her. She has a lot of bad days still, and any time there's any kind of legal proceeding going on it brings it all back home like it was brand new . . . It's still very difficult still to this day." (RT 250:29033.) House testified that when their court appearance was rescheduled, Mrs. Madden "could not even talk to [the prosecutor]. She was just in tears." House stated that Mrs. Madden said, "I had Susan talk to Ron, because I can't. I just feel like I'm being tortured. This is just a constant torture to me." (RT 250:29034.) Finally, House testified that it's always difficult on their wedding anniversary or the anniversary of Mr. Madden's death. Mrs. Madden usually tries to take that day off because she can not focus at work. (RT 250:29035.)

Officer Brian Lane was told that Mr. Madden's wife worked at the University of Santa Cruz. He testified that when he arrived there to tell her that Mr. Madden had been murdered, he heard some very loud screaming and crying coming from an adjoining office. He was told that Mrs. Madden had just been informed of her husband's murder. He further testified that "[s]he was devastated, very upset, very - - crying hysterical" (RT 250:29035-29038.)

Eric Louis Lindstrand testified that he met Mr. Madden in college. Mr. Madden met Lindstrand's sister, they dated, fell in love and got married. Linstrand was happy when he learned that Mr. Madden was going to be his brother-in-law. Mr. Madden was a good friend and he made Lindstrand's sister happy. Linstrand further testified that Mr. Madden was a good man, fun to be with, enjoyed life and was a devoted, loving father. Lindstrand regretted that he did not see Mr. Madden as often as he wanted to. (RT 250:29040-

29043.) Lindstrand was at work when he received a message to call his sister. He called Mrs. Madden and she told him that Mr. Madden was dead. Linstrand testified that he "just screamed out," "the whole place stopped," and it "[h]it [him] like being hit in the head with a hammer." (RT 250:29044.) Linstrand further testified that "a part of all of them died that day, especially Sis. It's been tragic. She tries to hold up." "A good part of her life is just a big, sad open wound." (Ibid.) Linstrand also testified that Mrs. Madden cried a lot and that he had heard through his other sister that Mrs. Madden would throw up every day, "it's part of her ritual." (RT 250:29044-29045.) Lindstrand further testified that he thought there was a time that Mrs. Madden had said that if it hadn't been for her daughter, Julie, Mrs. Madden "would have thought about suicide. She was just devastated. She still is. . . . But her child is a blessing. It keeps her going. But it's like hell, like hell for her." (RT 250:29045.)

When the prosecutor asked Lindstrand if he had seen how Mr. Madden's murder had affected Julie, Lindstrand testified that Julie wouldn't let Mrs. Madden out of her sight for a long time. Julie was afraid to go out, "her mom couldn't go to the restroom without Julie being right there." (Ibid.) Julie was seven when Mr. Madden was murdered but his death set her back five or six years; she's just frightened. When the prosecutor asked Lindstrand whether he was there to see how Julie reacted at her father's funeral, Lindstrand testified that that was "another day from hell." Julie was pretty broken up. (RT 250:29045-29046.) When the prosecutor asked whether Julie had gotten over Mr. Madden's death, Lindstrand testified, Julie "is in counseling. You never get over this. I've suffered a loss apart from this. You don't get over this. You learn to live with this. It's like learning to live without a heart. It's like learning to live without your legs. You learn how to

survive. If you're lucky, you learn how to try and not let your life be ruined." (RT 250:29046.) Lindstrand also testified that Julie has had dyslexia and has had trouble in school. Julie sees her mother and grandmother hurting and Lindstrand knows that she's hurting. She's tried to do the best she can but "you don't get over this." Julie was seven at the time and she is not going to have a dad "when she does all the things teenagers do. I mean , it's been a ruinous situation." (RT 250:29047.)

Lindstrand also testified that Mrs. Madden has also not recovered, her torment is just printed all over her body physically." He also stated that it had "been hell" for him too. He and Mr. Madden were friends and it was hard to talk about but he said "it's like a shadow. I mean, I've sought counseling, become sort of existential, you know, why would God let – when you have a kind - - have this kind of devastation you say, 'what in the heck.'" Lindstrand tried not to be bitter but it was very disturbing. ". . . in a smaller way than his mom and his wife, it's been part of [his] life [for] six years." (RT 250:29047-29048.)

James Douglas Sykes, II, testified that his wife, Judy, is Mr. Madden's sister. Sykes learned that Mr. Madden had been murdered and when he arrived at Mrs. Madden's house, everyone was crying. Sykes and Mrs. Madden picked Julie up from school and Mrs. Madden took her upstairs and told her that her father had been killed. Sykes heard a "very excruciating painful waning scream" from Julie. (RT 250:29059-29062.) Sykes was at Mr, Madden's funeral, so was Julie. He has lost a friend. (RT 250:29062.) When the prosecutor asked him how Mr. Madden's death had impacted Julie, Sykes testified that Julie was always looking over her shoulder as if she were afraid someone was going to be there. Sometimes Julie would say, "You know, my dad is watching out for me." (RT 250:29062-29063.)

Judith Lillian Sykes testified that Mr. Madden was her only brother and she had no sisters. (RT 250:29063-29064.) They were very good friends and they got along well. Mr. Madden was a strong person but also very kind and gentle. He was very caring with all of his family. When her father died, Mr. Madden was very supportive of her mother. Mr. and Mrs Madden had one of the best marriages Ms. Sykes had ever seen. (RT 250:29064-29066.) Ms. Sykes was surprised that Mr. Madden took to fatherhood very well. He was comfortable with Julie and, as she got older, they were friends. It was very hard on Julie when Mr. Madden passed away. (RT 250:29066.) Mrs. Madden told Ms. Sykes of Mr. Madden's death. Ms. Sykes had to tell her mother that Mr. Madden had been killed and it "was a very difficult thing." (RT 250:29067.) When Ms. Sykes told Mr. Madden's mother, Joan, of Mr. Madden's death, Joan looked like she was going to pass out, she started crying, put her head in her hands and kept saying she could not believe it. (RT 250:29068.) Ms. Sykes further testified that Mr. Madden's death was tough on her; she almost feels like part of her is missing. Also, Mrs. Madden's whole life is just kind of on hold. She is very nervous, her skin condition has worsened because of stress and she has a tough time. (RT 250:29068-29069.)

When Rico asked Ms. Sykes to explain how Mr. Madden's death affected his daughter Julie, Ms. Sykes testified that Julie was very close to Mr. Madden. A few days after the funeral, Julie asked her, "Aunt Judy, how am I going to talk to him? Who am I going to talk to?" Ms Sykes did not know what to say to her. (RT 250:29069.) It's not the same. Julie either gets quiet, does not feel good or starts to cry. (RT 250:29069-29070.)

When Rico asked Ms. Sykes how Mr. Madden's death had affected their mother, Ms. Sykes testified that her mother often says that the joy in her life is gone. Her mother is a little bit more nervous and is very protective of

Ms. Sykes. Ms. Sykes also testified that her grandmother had a nice relationship with Mr. Madden but his death has left his grandmother frightened of being alone. (RT 250:29071-29072.)

Ms. Sykes further testified that the passage of time has not really lessened the impact of Mr. Madden's death on their lives. She said it was somehow acceptable when her father passed away from a heart attack but "With my brother being murdered senselessly and brutally, there's something about that that you can't accept. And you can't come to terms with it very well. So the closure is not the same. And there's something about it you kind of just can't get past. You eventually learn to deal with it, but it's not - - it's not like losing someone from a heart attack or - -" (RT 250:29072.)

Shirley Jane Madden was Mr. Madden's wife. (RT 250:29073.) She testified as follows: she met her husband in 1977, and they married in 1979. They had fun before they were married. Julie was born in 1984 and Jim was a very, very loving and kind husband. She was gifted to have a husband like him. He was a wonderful father to Julie; he referred to them as his girls. Mrs. Madden felt cherished and safe. He was her protector. (RT 250:29073-29075.) She last saw Jim alive on Jan 28, 1991. Julie persuaded her to stop and briefly visit Jim at LeeWard's. As they were leaving the parking lot, she looked into the rearview mirror and thought, "You know what if this is the last time I see him?" She did not know if this was a premonition or what. She thought, "Oh, don't be foolish. You know, don't buy trouble." (RT 250:29076-29077.) Jim was supposed to be home at 10:30 or 11:00 p.m. but he did not come home. She telephoned the store about 11:00 or 11:30 p.m. The phone kept ringing so she thought he was on his way home. She tried to go to sleep. When she got up about 5:30 a.m. he still was not home. She was getting a little frantic so she called the CHP to see if there had been any

accidents. She also called the Santa Clara Police Department and told them that Jim had not come home. They went out to check the store and called her back about a half hour later. They told her the doors were locked and Jim's truck was in the back. She was really upset and called the manager of the other LeeWard's to see if Jim had spent the night there. Julie got up about 6:30 or 7:00a.m. Mrs. Madden was crying and very upset but took Julie to day care and went to work. She was still upset and crying when she arrived because she did not know what had happened. She was really worried so she called the manager of the other LeeWards store again. (RT 250:29077-29081.) She told her coworkers about her fears. "It was just - - it was just horrible. It was just horrible." (RT 250:29082.) They called the police and then told her Jim had been killed in a robbery. "It was horrible. I don't - - you know, I couldn't - - it was horrible." (RT 250:29081-29082.) Mrs. Madden further testified that she picked up Julie from day care, took her bear and her "fuzzy" with her, and told her that her dad had died. Julie started screaming and crying. She could not believe it. Julie later told Mrs. Madden that she didn't really believe that her dad had died until they were at the funeral and saw the coffin. (RT 250:29083-29084.) Mrs. Madden also testified that Jim's murder has been extremely hard on his mother. Jim's death has also changed her life considerably. She loved him so much and she feels so lonely and empty without him. She never thought anything like this would happen. They had a good marriage and she misses him terribly. (RT 250:29085.)

Mrs. Madden also testified that it was "horrible" when she was notified of the change in her court appearance date. She stated, "This is so hard for me to do, because I'm in a room full of strangers, talking to you about something that's very intimate to me: My relationship with my husband." "Every time this gets put off it feels like - - . . . it feels like a little bit of torture to me. . . I

don't feel like I have any peace. . . any closure. And all I want is to have a little bit of justice for my husband, you know. That's all I want." (RT 250:29085.)

Mrs. Madden said she's been going through this for six years and Julie had been in therapy for almost six years. For the first year, Julie slept with her every night. Even today, she gets panic attacks where she gets terrible stomach aches and she feels like she is going to die. She is afraid that something is going to happen to Mrs. Madden. It's been hard for her. Before Jim's death, "it was just wonderful." Jim "was a wonderful husband and [she] felt secure and Julie felt secure and loved." (RT 250:29086.) Julie knows her father was killed in a robbery. The day Mrs. Madden told her, Julie assumed he'd been shot. At that time, Mrs. Madden did not know how Jim had been killed. Later, Mrs. Madden told Julie that the robbers had used a knife. "That's all she knows. She doesn't know the rest of it." (RT 250:29089.) When the prosecutor asked Mrs. Madden whether the passage of six years had healed this, she replied, "No." (RT 250:29091.)

Joan Madden is Mr. Madden's mother. (RT 250:29091.) She testified that they were a very happy family. Jim was an easy child to raise, he was a lot of fun, kind, gentle and just enjoyed people and living. It went very smoothly, really. They got along fine as Jim grew older. The only "boner" she and Jim had was his long hair "and that was a constant problem." (RT 250:29093.) Jim's father had a heart attack at Jim's house one week before Julie was born. Jim took care of the funeral arrangements, he was the one that gave his father mouth to mouth resuscitation and Mrs. Madden called the ambulance. Jim took care of everything. Jim got along fine with his grandmother, he took her to baseball games. He was a wonderful father. Mrs. Madden was very upset because Jim's father died at her house. She went into

post-partum depression and had a pretty hard time for a while. Jim just did everything. He was the one that bathed her. He was a very good husband and liked being married. He adored Mrs. Madden and was more than willing to do anything for the baby. When Julie was born, Jim said they were having Christmas at his house because she is going to be home for Christmas. They always spent the holidays there. Jim was kind of a natural father. He took Julie to the doctor, roller skating and bicycle riding. They were just buddies all the time. They did everything together. (RT 250:29092-29097.) Joan Madden further testified that her daughter came to her house and told her that Jim had been murdered. She then said, "I just couldn't believe it. I just - - especially to be murdered of all things. I thought that maybe he had an accident or - - but it was just horrible and it is - - still is horrible." (RT 250:29098.) There was not a lot of joy in her life except for Julie. The pain doesn't go away. Her longing to see and talk to Jim doesn't go away and the horror of what he went through doesn't go away. They try very hard not to spoil Julie because Jim said they could not spoil her. (Ibid.) When asked if she had seen how this has affected Mrs. Madden, Joan Madden testified that Mrs. Madden has gained at least 30 pounds, her face is totally broken out all the time, she had psoriasis, and all of this is just from stress. Mrs. Madden also suffers from depression. (RT 250:29099.)

When prosecutor Rico asked Joan Madden whether she noticed any change in Julie, she said that the first Christmas after Jim died "we really didn't think Julie was going to be able to survive. My son-in-law's family had come for the holiday and even they said you've got to get her some sort of psychiatric help - - or she was already under school psychiatrists and [Mrs. Madden] said, 'Well, I'll get her a private psychiatrist also.'" (Ibid.) She also testified that Julie would not let her mother out of her sight. If her mother

went out the front door to pick up the newspaper, Julie "got hysterical. She got absolutely hysterical. She cried all the time. She was afraid of everything. She - - she wanted her father, because her father understood things. She just - - it was just a terrible time for a little girl." (RT 250:29099.) Time has helped but Julie "has been under counseling for a long time. When Julie loses sight of her mother "even to this day, the panic will set in." (RT 250:29100.) "The holidays are unbearable. They're - - we get through them and all we can say is thank God they're over for another year. They are just miserable." (Ibid.) Once Joan Madden took Julie shopping for a Mother's Day gift and Julie said, "You know, grandma, what I really, really want?" Then Julie said, "I wished you only died for one day." (RT 250:29101.)

The Defense Case

Cynthia Rose Green, appellant's cousin, testified on appellant's behalf: appellant has one sister and two brothers, Lenae, Sonny, and Michael. (RT 252:29141-29145.) In 1970, when Cynthia was 12 or 13 years of age, she went on a trip to Washington with appellant's family to help appellant's mother care for the children. They got fussy on the trip so when they would stop for gas, appellant's father would give them "due punishment." He'd push, smack and kick them. The house they moved into was unfurnished and stayed that way. There were some beds but no kitchen table, cooking utensils, couches, chairs, telephone or television. Appellant's father was a truck driver and was home one to two days per week. Appellant's mother did not help Cynthia take care of the children and there was little food in the house. They had cereal, bread, peanut butter and baloney. No cooking took place; Cynthia made sandwiches. (RT 252:29146-29151.) When that summer ended, appellant's father drove her back to San Jose. On that trip, Cynthia saw him doing something on a mirror; he was doing drugs. (RT 252:29151.)

Cynthia returned to Washington the following summer to again help take care of the children. This time, they had a better house; it had a backyard and furniture but no telephone. They went nowhere either summer because they did not have a car. The food was a little better, and there were some hot meals, usually prepared by Cynthia. Cynthia took care of the children. She bathed them and played with them. Appellant's mother did not help her. Instead, she would lie around, smoke and sometimes drink beer. Appellant's mother did not relate to the kids and did not show them any affection. Cynthia never saw appellant's mother check any of the children when they were injured to see if they needed medical attention. Cynthia also never saw her hug or kiss the children, or say "good bye" or "I love you." (RT 252:29151-29155.)

Appellant's father was still a truck driver and was around the house only two to three days per week. Most of the time, he was not in a good mood when he got home. When he drove into the driveway, the tires would spin causing gravel to fly away from the tires. The children, especially the boys, would cringe. Once he saw Cynthia's shoe in the front room, he opened the door and threw it as far as he could, then smacked her around for not putting it where it belonged. This happened to Cynthia more than once. Sometimes appellant's father would hit her and knock her down. He hit her with the back of his hands, with a closed fist, and he would shove and kick her on her backside too. (RT 252:29155-29157.)

Cynthia further testified that appellant's father did these things more often to appellant's brother Sonny. Sonny was his punching bag. He would hit Sonny in the arm, buttocks or on the back of his head with his hand. More than once, he knocked Sonny down and hit him with the belt. Appellant's father never acted like a father to Sonny; he was just very abusive. Sonny told Cynthia that he did not like his father very much and feared him greatly.

Appellant was about one-and-a-half years old at the time. Sometimes appellant cried in his crib, and this got on his father's nerves so he would smack on the crib really hard. This only made appellant cry louder. Cynthia did not recall that appellant was ever hit by his father. When appellant's father would come home, Sonny would hide and take appellant with him, and Cynthia tried to blend into the shadows. She never saw appellant's father show appellant, Sonny or their mother, Barbara, any affection. But he did show affection to Lenae. (RT 252:29157-29161.)

Cynthia further testified that appellant's father physically abused appellant's mother, Barbara. On one occasion, they had gone out drinking, and appellant's mother had leaned against another man. When they got home, they were both very drunk. Appellant's father took out his jealousy and aggression on appellant's mother by beating her up pretty badly. He shoved her head into the head board and repeatedly punched her like she was a bag. The children awakened and were hysterical. He left Barbara lying on the bed like a limp doll. They had no phone, and the police were never called. Cynthia took care of her after that beating for two to three days. Barbara received no medical attention. She could not move, her back was black and blue, her abdomen was very swollen and her face was just one black and blue spot. Cynthia comforted her the best she could. Appellant's father beat Barbara often. Cynthia saw bruises and abrasions on her face and arms. Cynthia also testified that Barbara saw appellant's father beating Sonny but did not intervene because she was afraid of the repercussions. Cynthia said she looked at Barbara's face, and it was the one time Cynthia saw any kind of affection, crying out and the desire to do something. But Barbara never did anything. Cynthia never saw appellant's father relate in any positive way to Sonny, appellant or appellant's mother. He also verbally abused the boys, telling them they were lazy, no

good and useless. He also called Barbara a slut and a bitch. He treated Lenae like an angel. (RT 252:29161-29166.) Cynthia left San Jose for several years. When she returned in 1976, Sonny and appellant were in foster care. (RT 252:29166-29168.)

Cynthia also testified that she went to Barbara's apartment a few times because Barbara would send one of the children to ask for food or money to buy food to help feed them. Appellant's father was no longer there. Barbara's apartment was a pig sty. Clothes were piled all over the floor and against the wall. You could not tell what was clean or dirty. The sink was full of dishes. It was just a mess. Barbara would sit in a chair smoking cigarette after cigarette. During her visits, Cynthia did not see Barbara relate in any positive way to the children, nor did Barbara exercise any control over them. Cynthia did not recall whether she saw appellant when she returned to San Jose. But in Washington, appellant was a very affectionate child. He loved attention and would hang on to her leg so she would pick him up and hold him. (RT 252:29169-29173.)

Geraldine Macias, appellant's cousin, testified on his behalf. (RT 252:29180-29181.) She testified that appellant's family lived with her family for a few months when she was 12 years of age. Appellant's father would come to the house between his trucking trips. There was a lot of house work to be done with ten kids in the house, but Barbara did none of it. Barbara would sit around, smoke a lot and drink beer. She did nothing to care for her children and was not affectionate toward them. She just yelled and screamed. (RT 252:29181-29185.)

Geraldine further testified that appellant's father left the family around 1974. She remembered that appellant and his brother Sonny went into foster care in February 1976. Geraldine went to appellant's apartment several times

before he was placed in foster care. It was always dirty with garbage all over the place. She did not recall seeing any food in the house, just beer. Appellant, Sonny and Lenae were dirty. Geraldine saw little discipline, just yelling and screaming. The children seemed to get in the way of Barbara's drinking though they were just being kids, playing. Geraldine never saw Barbara show any affection to the children or do anything positive with them. Appellant's family moved into several apartments, and they were all "rat holes." (RT 252:29186-29188.)

Geraldine also testified that appellant was just an average child; he was not aggressive, mean or violent. He seemed to be a happy kid when his mother wasn't yelling at him. In 1988 or 1989, when appellant was between 15 and 18 years old, he came to live with Geraldine. He stayed for several months and did chores and house work. He was helpful in that way and baby sat the children several times. They had a good time with appellant. Appellant related well and seemed to like them. He was well-behaved except when he returned from visiting friends in his mom's neighborhood, he would have a bad attitude. His conduct and language was not good but after he was home a while, his attitude improved. Geraldine further testified that when appellant was a teenager, his father had a very violent temper. He would hit appellant and Sonny for no reason. He would punch them on the arm and stomach and tell them "grow up" and be a man. Geraldine never saw Barbara try to stop it. Appellant's father was physically abusive, drank a lot and was violent. He used to visit appellant but these visits stopped because Geraldine did not want him around her children because of his attitude and language. When appellant's father hit him and Sonny, appellant would be hurt and did not understand why his father was so violent with him. (RT 252:29188-29199.)

After appellant lived with Geraldine, he moved in with his father. Geraldine testified that appellant's father had little contact with appellant from the time appellant was about four-and-a-half years old to the time appellant went to live with him. Appellant wanted a father and lived with him in a trailer for about six months. Sonny and appellant's younger brother, Michael, lived there too. Appellant worked at a trucking company washing trailers and then worked at 7-11. Geraldine saw appellant and his father doing drugs, crank and weed, together. Appellant's father furnished these drugs. Appellant's father continued to verbally and physically abuse appellant. When he punched appellant, appellant never fought back. After one such incident with his father, Geraldine saw appellant with a broken nose and bruises. Appellant's father admitted that he had done this to appellant. (RT 252:29199-29207.)

Geraldine also testified that she never saw appellant act in a violent or aggressive way when he lived with her. Appellant always had a lot of remorse for his father and did not understand why his father beat and verbally abused him. (RT 252:29208-29209.)

Francine Herevia testified that she lived with her parents, Marcus and Lorain Garcia, when they took appellant into their home as a foster child when he was six years old. Appellant lived there for about one year, and she never saw him again after he left their home. Appellant was just a little boy needing a lot of love. He fit in and got along well with Francine's children. He was affectionate and wanted affection. He never showed any aggression or violence, and he liked school. He also liked to draw. Francine hung his drawings up, and appellant put on a big grin and a bright face. Appellant missed his mother. Francine and her family moved to Dinuba and decided that appellant should stay close to his mother so she could have more contact with

him if she wanted it. (RT 252:29221-29229.) Appellant was very sad when they left to Dinuba. He wanted to go with them but they thought it was better for him to stay close to his family. Francine felt like she was leaving one of her sons. Appellant was basically a little boy like her own boys, but he needed more love. He was very helpful, and she would always hug him. (RT 252:29230-29235.)

Lenae Crouse, appellant's sister, testified that she was about nine years old when her father left for good. He treated her differently than he treated the boys. He brought her gifts and was happy to see her when he came home. He brought no gifts for appellant, Sonny or Barbara. Although Lenae did the same things appellant and Sonny did, her father never punished, mistreated or abused her. But he had little patience with appellant and Sonny. He would lash out in a fit of anger and hit them with his fist, the back of his hand and his palm. He would pick them up and throw them against a wall. They cried and were sad, but appellant took it harder than Sonny. He was smaller, and it hurt him and scared him more. Once, appellant's father threw a coffee mug at Sonny and hit him on the head above his eye. Although Sonny was injured, he did not get medical care. Appellant's father just walked out. Appellant did not try to win his father's love; he just let it be. (RT 252:29238-29248.)

Lenae further testified that her mother, Barbara, did not physically try to stop appellant's father from hitting appellant and Sonny. She would yell to leave them alone but was afraid of getting hit herself. She never called the police. Appellant's father would hit Barbara too. He would push her down, hit her and tell her not to interfere when he was hitting appellant and Sonny. Barbara would sit on the floor and cry after these beatings. Appellant's father continued to beat appellant, Sonny and Barbara until he left the family about two-and-a-half years after they returned to San Jose. Because he never hit

Lenae, she began to feel that she was the one he did not love because he abused the whole family but her. Once she, appellant and Sonny made a mess by smashing black walnuts on the cement. When appellant's father spanked only appellant and Sonny, she asked him to spank her too. He did. (RT 252:29251.) He never showed any affection to appellant, Sonny or their mother. Appellant and Sonny went into foster care when appellant was six and Sonny was eight. At this time, appellant was a shy, lovable kid but kind of withdrawn. He was not aggressive; he was agreeable and did what you asked him to do. There was no control or discipline in the house between the time appellant's father left, and appellant went into foster care. Even though they were very young, appellant and Sonny would leave the house when it was dark out. Barbara went on welfare and got food stamps. There was food in the house only for the first five or seven days of the month because they had no money. Lenae testified that she believed that Barbara used the money to buy alcohol. They would ask the neighbors for food, tried to borrow money for food or went to the church for hand-outs. Appellant and Sonny also stole food for the family. (RT 252:29249-29256.)

Things got worse after appellant and Sonny went into foster care. Barbara stayed out until the bars closed. Lenae was in charge when her mom was gone and had to care for appellant's younger brother Michael. The house was real dirty and Lenae did all the cleaning. She and Michael did not eat a lot of the time. There was a lady that would put groceries by the garbage can and Michael would go get them. He also stole food. After a while, Lenae began to go to a neighbor's house (the Guimmonds) for food. She was about ten or 12 years old. Eventually, she was invited to live with them, and she did when she was a freshman in high school. About two years later, the Guimmonds moved away and took Lenae with them. Sometimes, appellant

and Sonny would visit but there was no more food in the house than when just Lenae and Michael were there. The boys went to steal food. The Guimmonds would also feed Michael sometimes, but he ate out on the sidewalk because he was not very clean. Appellant drew pictures when they were little; he was a good artist. Once, he drew a "T-rex" with a boot hanging out of his bloody mouth. Appellant told her that he dreamed that dinosaurs were trying to eat him. When appellant was small, he was "cross-eyed" but had surgery to correct it. (RT 252:29256-29261.)

When appellant would come home for a visit from foster care, he would take care of Michael. He also took Michael with him to steal food. Barbara had a problem with alcohol, and it got worse. She stayed out and drank all night, then would come home drunk. Sometimes Lenae and Mr. Guimmond would go to the bar to bring her home. Barbara would not cook or clean the house. She smoked a lot. When appellant and Sonny would come home to visit, they did not want to return to the foster home, even though the house was dirty, and there was no food. (RT 252:29261-29264.)

Lenae also testified that appellant and Sonny came home to visit around Easter 1981. The night before they were to return to their foster home, appellant was sad and afraid because he had to go back. He was curled up in a fetal position and said he did not want to go back. Eventually, appellant told Lenae that a boy that lived at the foster home was physically mean to him. This boy would pin appellant down, sit on him and stab his arm with sharpened pencils. Appellant showed Lenae his arm and she saw three small, bluish marks. This physical abuse occurred the whole time that he was in that foster home. Appellant's foster mother would hit him on the head with shoes. The older boy would also take appellant into the den and make him do things. Lenae got angry and told appellant he would not have to go back there. She

told Barbara about this abuse and told her to call the social worker and tell her that appellant was not going to return to that foster home. (RT 252:29277.) Appellant did not want them to tell anyone about the abuse because he was afraid he would get more punishment. When the social worker arrived, appellant told her what had been happening to him. Lenae moved in with the Guimmonds a few months after appellant and Sonny returned home. When Lenae moved out, the condition at her mother's house got worse because Barbara did no cleaning and was not home much. She was drinking at a bar and no one was controlling appellant or Sonny. Ordell Fischer moved in with Barbara in 1988 or 1989. He was an alcoholic too. (RT 252:29271-29280.)

Lenae further testified that she and appellant worked for Toys R Us during Christmas 1990. Appellant started looking kind of dirty, had acne, was real skinny and looked like he was doing drugs. He was living in his car. (RT 252:29281-29282.)

Lenae testified that she loves appellant, and he never had a fair shot in life from day one. He has pretty much struggled ever since he came into this world. (RT 252:29283.)

Elizabeth Munoz testified that she lived next door to appellant's foster family, the Heberts. Evelyn and Mark Hebert lived with two sons, Dean and Mark. Appellant and Sonny lived with the Heberts in 1975. Elizabeth knew appellant and Sonny because they came over to play with her children, Deanna and Justin. (RT 253:29342-29348.) Appellant was a very sweet and loving child. He was good, eager to please and a very loving and affectionate little boy. Appellant called her "mom" once and did chores for her. He was never aggressive or violent and needed affection. (RT 253:29348-29351.)

Elizabeth also testified that the Heberts went to Great America but did not take appellant or Sonny. She also bought appellant brand new pair of

skates but she never saw him use them. Dean Hebert took them, and appellant had to use Dean's old skates. Dean was bossy and a bit aggressive with appellant. Once Dean made appellant cry when he took appellant's glasses, threw them up in the air and broke them. Elizabeth told Dean's mother that Dean broke appellant's glasses, but she told Elizabeth to mind her own business. On one occasion, appellant and Sonny were playing with matches in the bedroom and set fire to the mattress causing a lot of damage. Mr. and Mrs. Hebert were furious and would not let appellant and Sonny sleep in the house, they had to sleep on the burned mattresses. Elizabeth never saw the Heberts show any affection to appellant or Sonny. She thought the Heberts were taking in foster children for the money. (RT 253:29351-29356.)

Elizabeth further testified that she never saw appellant's mother visit appellant or Sonny. She never saw appellant get in trouble at school, and she could not believe that he had been arrested for murder. She was very sad to know this. She wrote appellant, and they exchanged letters after his arrest. (RT 253:29356-29361.)

Justin Munoz testified that he played with appellant and Sonny. Appellant was a normal kid. Mrs. Hebert treated the foster children differently. She yelled at them a lot more and punished them more for smaller things. She would make appellant or Sonny stand in a corner from ten to thirty minutes and never showed them affection. Dean often blamed appellant or Sonny for things he would do, and they would get punished. Once, Dean forced appellant to fight Sonny by pushing Sonny into appellant but appellant did not want to fight. Dean was hyperactive, domineering and selfish. Dean also pinned appellant down, took his clothes off and took his glasses again. He hid the clothes and made appellant walk around completely naked. Justin's sister, Justin, Dean and Sonny were there and went along with this. They

laughed and joked around. Dean was bigger and weighed quite a bit more than appellant. Appellant cried the whole time while he looked for his clothes, but no one helped him. Dean also put "snot" in appellant's food. Mrs. Hebert just watched television and ate crackers. She never had nice words to say to the appellant or Sonny. Justin often heard Mrs. Hebert yelling very loudly, and slapping sounds, and appellant and Sonny cry. Justin never saw appellant act aggressively or mean. Appellant was blamed for his broken glasses and was punished. Justin saw appellant use the skates Justin's mother bought appellant but appellant did not use them for long. Dean took them. (RT 253:29372-29383.)

Robert Ector testified that he was one of appellant's elementary school teachers when appellant lived with the Heberts. Appellant was a bit below average as a student. He had some learning disabilities but tried extra hard to do well. Appellant really liked Mr. Ector and tried to please him. Appellant worked very hard, volunteered to help and did very well. Appellant wanted to stay after school as much as he could. Mr. Ector also testified that he thought appellant was bright but performed below his capabilities because he did not have parental support. The area around the school was a solidly middle class community. Appellant was a very friendly boy, had friends and loved to play around and have fun. Mr. Ector never saw appellant get into any fights except with his brother. Appellant was an "at-risk" child and his brother, Sonny, was a bully to the extreme. Sonny bullied anyone he could, including appellant. Mr. Ector had never seen a child angrier then Sonny. Mr. Ector met Mrs. Hebert at parent-teacher conferences. She had a very negative tone when talking of appellant and Sonny. She said they were constantly causing her some sort of grief. Mrs. Hebert showed no interest in trying to improve appellant's and Sonny's situation, and she never volunteered to help at the

school. Mr. Ector never met Mr. Hebert. Appellant would come to visit Mr. Ector the following year, and he was the same kind of child. Mr. Ector testified that he was very surprised when he learned appellant had been arrested for murder. He did not think appellant was the type of person that would be involved in a murder. (RT 253:29386-29401.)

Dean Scott Hebert testified that appellant came to live as a foster child to his house after Sonny did. Dean's father had little to do with the foster children in his house. Dean's mother worked as a nurse for a convent and got home about 3:00 or 4:00 pm. She was a nervous person, got mad easily and often. She was warm to Dean and his brother, but not to appellant or Sonny. Dean also testified that a lot of the punishment that should have gone to Dean and his brother was inflicted on the foster children. Dean's mother punished appellant and Sonny more than she did Dean. Dean admitted that he blamed many things that he had done on appellant. Appellant would not say that it was Dean who had done those things; appellant would just take the blame. Sonny did not defend appellant either. Dean's mother would spank appellant with the belt, put him in a corner for long periods of time and make him stay in his room. Dean recalled that appellant was forced to stand in a corner so long he urinated on himself. This punishment happened most of the time they were there. Appellant was humiliated. Dean also recalled humiliating appellant by stripping off appellant's clothes and making him run around the yard. A few neighbors saw appellant this way. Dean did not give appellant his clothes and taunted him. Dean also recalled taking appellant's glasses, smashing them and then telling his mother that appellant broke them. Appellant was punished for this, and he just took it. Appellant never provoked anyone. (RT 253:29427-29439.)

Dean also testified that before Sonny and appellant came to his house, a foster child named Henry Goodman lived with the Heberts. Goodman sexually molested Dean when Dean was six or seven years old. Goodman continued to molest Dean two to three times a week for three to four years. Dean was forced to perform oral sex on Goodman, and Goodman would perform anal sex on Dean. Dean never told his mother or father. He was ashamed and afraid to tell. Goodman knocked and slapped Dean around once in a while. Goodman also molested another foster child named Douglas Morrison. (RT 253:29439-29443.)

Dean further testified that he was "pretty messed up" by the time he was 13 years old. His beatings and abuse of appellant increased as the years went by. He was twice convicted for indecent exposure and had problems with drugs and alcohol. (RT 253:29443-29447.)

Dean continued to take out his anger on appellant until he was doing it just about every day. He would beat, punch, kick and pin appellant down on the ground and mess with his head. This usually happened after school in the den. If appellant needed to go to the bathroom when he returned from school, he had to go in the yard because he could not get into the house. Dean punched appellant in the stomach, chest and arms. He would knock appellant to the ground, pin him down and punch him some more. He would also slap appellant on the face and mentally abuse him. Appellant never fought back, and this angered Dean even more. Dean never told his mother what he did to appellant. He recalled that he had held a pillow to appellant's face until appellant nearly passed out. He also recalled sitting on appellant and stabbing him with sharp objects, including a pencil which left marks on him. Appellant would put his arms up to block Dean's punches but Dean would pin them down. Appellant would cry but tried to hold it back. Dean also recalled

burning appellant with matches. Appellant was always quiet and became quieter towards Dean and tried to avoid him as much as possible. Sonny never helped appellant. (RT 253:29447-29460.)

Dean also testified that he began sexually abusing appellant in 1981. Dean made appellant perform oral sex on him and Dean would perform both oral and anal sex on appellant. Dean rubbed his genitals on various parts of appellant's body. Dean recalled that appellant and Sonny were removed from his home, and they never returned. He also recalled that very shortly after that, he was investigated for sexually molesting appellant by the San Jose Police Department. Dean went to the police station, denied it and was not prosecuted. Dean also denied the abuse to his mother, but she punished him because she thought he might have done something. Dean said he was very much ashamed of the things he did to appellant. (RT 253:29460-29463.)

After appellant and Sonny were removed from Dean's home, the Heberts did not take in any more foster children. Dean believes his parents took in foster children for the money. Dean did not think his parents were good foster parents for appellant. Dean said he was able to come forward and admit what he had done because he became a born-again Christian and actually got a conscience which he did not have before. He testified that he feels terrible for what he did to appellant over all those years. (RT 253:29463-29465.)

Deborah Sue Thomas testified that she had been married to former police officer, Michael George, from 1978 to 1990. In April 1982, Deborah lived with George and her three sons. She admitted that she did not want to testify. She met appellant in April 1982 when her husband brought appellant home to live with them. She had not talked to her husband about appellant living with them beforehand. Deborah testified that Officer George brought

boys home all the time. They were always boys between 12 and 14 years old. It was stressful, and she was not happy. Appellant stayed with them for about eight or nine months. After appellant left, Officer George brought home other boys for longer periods of time. She agreed that George brought home a boy named Michael Brich after appellant had moved out. (RT 254:29534.) Brich was about 13 years old. She was there when Officer George picked Brich up and brought him home. Brich had been in her home about six months when she and Officer George got into an argument, and she kicked Brich out. To Deborah's surprise, Officer George left with Brich. (RT 254:29525-29535.) He moved back for about six months but moved out again in December 1989. Officer George lived with Brich, on and off, until April 30, 1996. Deborah was unhappy the whole time appellant was there and she did not hide her feelings from appellant. She argued with Officer George about it. She made appellant do chores around the house, including dishes, yard work and house work. Deborah told Officer George that he had to get rid of appellant when appellant stole her son's Christmas money, $5.00. Appellant went to live at the Gamble home after he left Deborah's house. (RT 254:29536-29541.)

Deborah also testified that Officer George related to appellant like a father figure. He paid a lot of attention to appellant and took him everywhere with him. Deborah asked Officer George why he spent his time with appellant and no one else in his own family. She was not happy about this. Officer George did the same thing when he brought the other boys home. When Deborah objected, Officer George said he did this because he felt sorry for them. (RT 254:29541-29545.)

Deborah further testified that appellant was a fairly quiet kid. She recalled an incident during Christmas 1988, when Officer George told her through a closed door that he was trying to get Brich to go to sleep. She

thought this was strange. Brich was about 13 or 14 years old. She divorced Officer George in 1990. She admitted that she accused him of having a sexual relationship with Brich. She did not know if Officer George had molested appellant for the eight or nine months that appellant lived with them. George is no longer a police officer. He was arrested in April 1996, and is in prison. (RT 254:29550-29555.)

Linda Cortez testified that she had been a social worker with the Santa Clara Department of Social Services and, between 1976 and 1982, she was in the foster care unit supervising children who are under the court's protection because of abuse or neglect. (RT 254:29571-29572.)

In March 1976, she was assigned the Silveria case. Only appellant and Sonny were taken to the Santa Clara County Children's Home. They were there about five weeks before they were placed in foster homes. Sonny was placed with the Hebert family; appellant was placed with the Garcia family. Appellant was placed in the Hebert home with Sonny about one year later because the Garcia family was moving out of the county. He was about seven years old. (RT 254:29573-29577.) Appellant had adjusted well at the Garcia foster home. The Garcia family told Cortez that appellant was a sweet child and eager to please. He was very responsive to attention and affection.

Cortez reported that appellant's mother, Barbara, was still not ready for appellant and Sonny's return. (RT 254:29598-29601.) Cortez further testified that appellant's mother requested that appellant and Sonny be placed in foster care because she could not handle them, and she was afraid she would physically harm them if they stayed. Barbara's home was in such disarray that she needed homemaker services to help her manage her home. Barbara was on welfare when Cortez got the case and was eligible for AFDC because appellant's father was absent from the home and she was not working. Cortez

also testified that she did not recommend that appellant and Sonny be returned to their home when she wrote her first semi-annual review because Barbara was still having difficulty managing the two children who remained in her home. She still had problems with her parenting skills and had a lot of personal problems. (RT 254:29577-29587.)

Cortez also testified that appellant and Sonny were not placed with relatives because no relative offered to have them. Cortez talked to Barbara about possible placement with relatives, and Barbara said her parents were alcoholics. Cortez did not know of any paternal relatives. (RT 254:29588-29592.)

Cortez testified that Barbara made little effort to visit, call or write appellant or Sonny when they were in foster care. Appellant was frustrated about having so little contact with his family. He was very hyperactive and "distractable." He would always regress after visits with his family. He became defiant and hard to manage. Cortez concluded that appellant was a very sensitive child who became depressed after visits with his mother because he had to return to the foster home. (RT 254:29592-29598.)

Cortez wrote another report in January 1978, when appellant had been with the Heberts about eight or nine months. She wrote that Sonny had set a fire in his bedroom, and appellant was hyperactive and impulsive most of the time. She admitted that perhaps appellant should have been examined for possible neurological or psychological causes for the sudden changes in his behavior and hyperactivity but after discussion with the school, she concluded that it wasn't a serious enough problem to warrant evaluation. Appellant had a severe myopic condition in one eye and wore glasses to correct it. In 1978, appellant had eye surgery to correct this eye problem. Cortez also testified that the Heberts were being paid to care for appellant and Sonny. Appellant's

mother was present on the day of appellant's operation. Cortez also thought that appellant's father visited them once at Barbara's house the year before appellant left foster care. Barbara did not visit appellant any more after that first year. It was Cortez who always initiated any visits from Barbara. Barbara could have made a stronger effort to visit but she did not. She was ambivalent about it. Cortez was never aware of any child support payments by appellant's father. Barbara acted paranoid and defensive when she was asked about her intentions for appellant and Sonny. Appellant was depressed because his mother did not visit him. (RT 254:29602-29613.)

Cortez also testified that appellant's mother told her that appellant's father was very domineering, very controlling, disciplined by intimidation and sometimes beat her in front of the children. In December 1978, Cortez wrote another report recommending that appellant and Sonny stay in foster care because of the lack of visits and the continuing problem Barbara was having with the children that were at home. Appellant and Sonny asked why they could not go back home. Cortez told them that it depended on their mother being ready, the visits were part of the preparation for them to have a successful return home, and until their mother could show she could control them, they could not be returned. Appellant was disappointed. At this time, appellant and Sonny had been in foster placement for almost three years. It was agreed that continued placement with an eventual return to the home was the appropriate plan. Cortez did not recommend long-term placement because it's usually in the foster home, and the Hebert home was not a nurturing one. Cortez did not feel that appellant and Sonny wanted to be in that home until they reached maturity. (RT 254:29614-29619.)

Cortez also testified that appellant and Sonny asked her to find them another foster home if they could not go home, but they did not give her a

reason why they wanted to leave the Heberts. Cortez wrote another report in November 1979, stating that Barbara's visits with them did not increase. Cortez had no reports of appellant ever being aggressive or violent. Cortez did not believe Mrs. Hebert when she told Cortez that she felt like appellant and Sonny were part of the family. Cortez did not look for another foster home for appellant and Sonny because she wanted to return them to their mother. If she put them in another foster home they would probably be separated and placed farther away. This would make it more difficult to return them. Cortez said appellant's mother was doing things to improve her situation, and appellant and Sonny could have been returned had their mother visited them more often. Neither Barbara nor Mrs. Hebert ever appeared at any of the annual review juvenile court hearings. Cortez testified that she did not know that Barbara had a problem with alcohol. She felt that appellant should remain in foster care because of the lack of visits from his mother. The visits never increased. Cortez said that Barbara said she did not visit more because of the lack of transportation and she did not feel well.

Cortez further testified that when she wrote the October 1980 report, four-and-a-half years after appellant's foster placement, it appeared to her that there was no feasible possibility of appellant and Sonny returning home. Still, no long-term placement was explored. (RT 254:29619-29647.)

Cortez admitted that she concluded in the above report that Barbara was having difficulty with stress, could not manage four children and, in fact, could not even manage the two children she had at home. In the beginning of 1981, Cortez gave Barbara an ultimatum. She told her that if she did not get actively involved in returning the children home, Cortez would have to plan some type of long-term placement for them. She also told Barbara that she had to establish a specified visitation plan: that she was to see the boys separately

once a month and together once a month so there would be three visits per month. This visitation plan started in late 1980, and continued for four or five months before appellant and Sonny were removed from the Hebert home. (RT 254:29647-29657.)

In April 1981, Cortez received a telephone call from Barbara while appellant and Sonny were visiting her. Barbara told Cortez that appellant had told her that Dean Hebert had sexually molested him. Cortez talked to appellant, and he told her that Dean had forced him into acts of fellatio and sodomy twice. Appellant was embarrassed. Cortez reported this to the police and went to talk to the Mrs. Hebert and Dean. Cortez said that, at first, Mrs. Hebert was calm and said it was possible and it was probably curiosity. Dean denied it. Cortez also talked to Mrs. Hebert and Dean after the police investigation; Mrs. Hebert's reaction to the police was the opposite. She was defensive and denied the molestation could have happened. At that point, Cortez knew there was no point in returning appellant and Sonny to the Hebert house so she accelerated the plan to return them home. Cortez left appellant and Sonny at their home and then prepared the paper work to keep them there. (RT 254:29657-29662.)

Cortez also testified that she considered therapy for appellant because of the report of molestation, but it was very hard to find therapy sources for children. Appellant did not go into therapy. Therapy was not a priority because appellant had no problems in school. It did not occur to Cortez that the problems caused by appellant and Sonny were caused by what happened to them in the Hebert home. Cortez thought their troubles were caused by their peer group because appellant and Sonny were followers. Cortez also testified that Barbara was trying to bring appellant and Sonny under control. Her house was fine, and there were no problems under the housekeeping standards.

Cortez knew appellant for almost six years. He was a very likeable child, very sweet; he was hyperactive at times but he responded to consistent limits. He was very eager to please, and the teachers responded positively to him. Cortez liked him too. In late 1980, Cortez told Barbara that her parental rights would be terminated unless she complied with the schedule of visitation. It took Barbara four years after appellant was placed in a foster home for her to be able to have him return. Cortez testified that she would have taken appellant out of the Hebert home had appellant told her of the molestations and other abuse. She denied that she knew all along that the Hebert home was not a good placement. The children were not neglected, and they never complained to her. (RT 255:29734-29750.)

Cortez also testified that appellant's home was not totally unfit. Barbara was working on her problems, was making progress and was trying. "She just wasn't ready to have the kids returned." (RT 255:29750-29752.)

Shirley Cotta testified that appellant is her nephew. She last saw appellant outside this courtroom when he was two years old. Appellant's father was not a good father or husband. She saw appellant's father when appellant was two years old and also at her sister's funeral. These are the only two times she's seen him since they became adults. Shirley's husband helped Barbara file for divorce in 1975. (RT 255:29805-29812.)

Shirley also testified that she went to see appellant's mother in October 1981. The condition of the house was very bad. There were wet bags of garbage stacked everywhere on the floor. The floor was filthy, and dishes were in the sink and on the counter. The sink was spilling over with water, food and debris. Barbara was very withdrawn, constantly smoked and was weak and depressed. Shirley tried to get her to clean up, but Barbara said she had no dish soap and no money. Barbara told Shirley that appellant and Sonny

were completely out of control. Sonny had threatened both her and Lenae, and both boys were stealing money from her purse. Shirley tried to clean Barbara's home but it got her nowhere. Shirley was just overwhelmed with despair and left the house. Shirley was upset because she does not know how she could have helped or stopped what has happened since then. (RT 255:29812-29819.)

John Gamble testified that appellant was like a brother to him. He was 11 or 12 years old when he met appellant. Appellant had been a foster child in John's home. John knew that appellant was living with Officer George when they met. They became friends, and appellant helped John with his paper route. Appellant was often doing chores at the Georges,' so John would wait for him. Then they would leave because John did not feel comfortable there. John further testified that it seemed that Mrs. George always had appellant working. John offered to help but she did not like that. John thought Mrs. George was appellant's mother; he did not know then that appellant was a foster child. She treated appellant like a slave. John further testified that appellant was his best friend then. Appellant was a peaceful child, and John never saw him get into fights. Appellant visited John's house too, and he always treated John's parents well; he was respectful. Appellant and John's sister, Lisa, also became friends. Appellant treated Lisa very well, and they sometimes got along better than appellant and John did. John's parents had no problem with appellant visiting the Gamble home, and he often spent the night. John found out later from his mother that appellant was a foster child. Once, John went to the Georges' to visit appellant, and Mrs. George told him that appellant was in juvenile hall. John told his mother, who was a deputy sheriff at the time, because he hoped she could help appellant. Mrs. Gamble made a telephone call and then left. When she returned, she had appellant with her. Appellant began to live with the Gamble family at that point. John has thought

of appellant as his brother since then. Mrs. Gamble took appellant shopping and bought him new clothes and shoes. Appellant appreciated this. (RT 255:29820-29837.)

John further testified that about two years later, appellant began to drink heavily. John drank too. Appellant voluntarily did chores around the Gamble house; he did more than John and Lisa. Appellant was also protective of Lisa. Once, when John was 15 years old, they were playing with CB radios. Lisa got into trouble because she would talk to older boys and give them her address. They would come over at 9:00 or 10:00 pm. One night she jumped out of her window and went to talk to a guy. Appellant went outside and pulled Lisa away and told the guy to leave. This happened more than once. Appellant talked to Lisa nicely and told her she could be harmed, and this was not a smart thing to do. He also treated Mrs. Gamble well and called her mom. Once John was upset because he and his girlfriend had just broken up. The other kids were playing love songs and teasing him. He grabbed a knife and left the house planning to kill himself. Appellant showed up, sat down and told John that it was not right for them to tease him. Appellant saw the knife and took it away from John. They talked, appellant walked John back to the house, and appellant put the knife away. (RT 255:29837-29842.)

John also testified that appellant asked John to realize what he had and what he would lose, a good mom, a loving family and a sister. This helped John, and he was ready to go back home. Appellant did not tell anyone about what had happened. John further testified that this was emotional for him because he loves appellant, felt like appellant was a part of him and that they were like brothers. John also testified that once he found out appellant was a foster child, appellant told him that appellant's father was great person, but lived far away so appellant was unable to see him. John found out later that

this was not true. John went with appellant back to appellant's old neighborhood three times so appellant could visit his mother. She lived in a run down apartment and was cold to appellant. She was not interested in what he had been doing, or John or that appellant had brought someone with him. She was sitting on the couch with a boyfriend watching television, drinking and smoking. When appellant returned from his mother's house, he did not behave well; there was an attitude change. He seemed a little upset but kept it in. (RT 255:29842-29848.)

John testified that when he was 14 years old, appellant started doing strange things. They were at the mall with friends and were going to get some food. Appellant had no money so he asked to borrow some. A friend said he would have to earn it by rolling down the mall. Appellant did this. He was stopped a few times by security but continued on. Appellant also dressed strangely; he wore thermal bottoms with just shorts over them and a tight t-shirt. John thought appellant did this to get attention. Appellant was like the class clown. John also testified that he, appellant and some of his friends were shooting people with pin darts out of a straw. John got caught and was suspended from school. Appellant hit someone with the darts so he was arrested and spent some time in a juvenile facility. (RT 255:29848-29854.)

John also testified that appellant played basketball, baseball and football. John never saw appellant get into fights while playing sports. Appellant was a peaceful person and respectful of adults. He also treated his girlfriends well. John said that Julie Morrella was special to appellant. He treated her differently. He cared more for her than for the others. (RT 255:29857-29865.) John testified that he and appellant began to drink at the same time when John was about 15 or 16 years old. But appellant drank more and his behavior changed. He became angry and violent. Appellant got in one

fight with John. John testified that the build up to the fight made a difference in their relationship. It was changing, and it had to do with appellant's drinking. John testified that appellant also cut up the kitchen cabinets. Once, John saw a dead squirrel and appellant used it as a puppet. John's sister owned a gold fish. He and Lisa came home and saw it on a brick wall. It had been dissected. Appellant buried the squirrel after he played with it.

John also testified that he once walked into his kitchen and saw appellant lying on the ground kicking and screaming, "I hate this shit." John could not calm him down, appellant had been drinking and was much stronger. (RT 255:29865-29872.)

John's parents separated when he was about 15 years of age. His father moved out. John, Lisa and appellant stayed with Mrs. Gamble. Appellant related well to their dog Sparky and spent a lot of time with him every day. He also spent a lot of time in his room listening to music and singing; he seemed like he was in another world. (RT 29872-29875, 30145-30147.) Appellant was a good sport but would get mad at himself if he made a bad play. John further testified that he never saw Mrs. George smile at, speak kindly to or show any affection toward appellant. But he never complained. John also testified that he enjoys his visits with appellant in the jail, and visits him as often as he can. He loves appellant and wishes he could give him a hug. (RT 256:29910-29920.)

Julie Ann Morrella testified that she met appellant when she was 13 years old at John Muir Junior High. He was fun, joked a lot and liked a lot of attention. She liked appellant; they laughed together and had fun. They went to different high schools but met again at a school dance in 1984. She gave him her telephone number, and their relationship got serious. Appellant was a good boyfriend and made her feel good. They could not see each other that

much because they lived far apart, and neither of them drove a car. They decided to break up in April 1985 because they could not see each other that much. Their relationship "just kind of fizzled." (RT 256:29924.) Julie still liked appellant a lot, and they got back together in June. But two months later, Julie went to visit her mother in Manteca. She ran up the telephone bill; they wrote to each other and missed each other a lot. (RT 256:29920-29926.) When Julie returned to her home in San Jose, Julie got into trouble because her step mother had gone through her things and found their love letters. She was not allowed to have a boyfriend, so she was not permitted to see appellant anymore. Julie did not explain this to appellant; she just ended it. He was very disappointed.

Julie further testified that appellant was very wonderful. He was her first love, and he was the first person to love her in a very loving way. Appellant needed affection, and she thought that he lacked both love and affection. Appellant was living with the Gambles when they met. She knew he was a foster child. Julie also testified that appellant referred to his mother as "mommy" and wanted her to be the person who loved him more than anybody. He was never jealous and never mistreated Julie. She never saw appellant act aggressively or violent. Julie testified that appellant was allowed to do whatever he wanted when he visited his mother. (RT 256:29926-29938.)

Julie also testified that she saw appellant several years later when she worked at the Oakridge Mall. They were really excited to see each other. They agreed to call each other, but Julie had another boyfriend. (RT 256:29398-29940.) In December 1990, Julie saw appellant sitting alone on a bench at the Oakridge Mall. She could not believe what she saw. He looked run down, terrible and was a mess. He looked like he was on drugs. His eyes looked really dark, as though he did not sleep much. He was very thin and his

face was all broken out. He did not look good at all. Julie did not even talk to him. He was hunched with no confidence, not like she remembered him. He was alone. Julie did not think that appellant knew it was her. She saw him again when he was in jail. (RT 256:29941-29943.)

Julie began visiting appellant around March 1991, stopped visiting him a little over a year later, and then, after some time, began to visit him again. (RT 256:29952-29953.) Julie further testified that she saw appellant about one to two times per week in 1991. He looked really bad at first. He was real cold; he was not like the person she knew. He had changed both physically and in his attitude. He was nice to her, but he was like a different person. He was not the soft, nice guy she knew. Appellant did not understand why she was suddenly visiting him again. He did not really trust her at first but as time passed, he seemed more open and willing to talk to her. (RT 256:29954-29961.)

Julie also testified that appellant brought Christian books with him when they visited, and he would quote scripture. They would discuss the way the Bible worked in their lives today. (RT 256:29966-29970.) Julie stopped visiting appellant because she started to have real strong feelings about him again. She had another boyfriend and was always thinking of appellant. Julie said she and appellant discussed her strong feelings for him, and he told her it would be best for her if she did not come to see him anymore. She was heartbroken and really upset. All the feelings came up again, and she just wanted to see him more. Appellant sent her letters, drawings and poems. These letters came in envelopes that appellant decorated. (RT 256:29970-29981.)

Julie further testified that appellant talked about how he felt about the crime he had committed and the effect it had on Mr. Madden's family.

Appellant told her that he had been praying for the Madden family and that he felt really terrible. Appellant was very remorseful and upset. (RT 256:29982-29990.) Appellant also told Julie a few times that he felt very bad that Mr. Madden's daughter was going to grow up without a father. (RT 256:29999-30000, 256:30004-30009.) Julie also testified that when she resumed her visits with appellant, they again discussed the Bible. Appellant appeared to have more knowledge about the Bible than when she first visited him. (RT 256:30000-30004.)

Julie testified that she still cares about appellant very, very much. He is a loving person. He has been scared much of his life and has a lot of pain and it's difficult for him to express it. He is very valuable and has done a lot of good things. (RT 256:30009.)

Patricia Gamble testified that she was appellant's foster mother and that he came to live with her family in May 1983. Appellant lived with her on and off until 1990. She met appellant in September 1982, through her son John who told her that he felt sorry for appellant because he lived with a family that mistreated him. When her son brought appellant to her house to play, appellant looked very shabby. He had long hair in his eyes, pants that were too tight and too short and shoes with part of the sole missing. His shirt was a small man's shirt, not a shirt a boy would be wearing. Appellant was a little hyperactive but a very typical boy. He was respectful and got along very well with her son. He never showed aggression or violence before he moved in with them. (RT 256:30058-30068.)

Patricia further testified that she had met appellant's previous foster parents, Mike and Debbie George. John told her that the George family had given appellant up, and he was in juvenile hall. John asked Patricia if appellant could live with them. The whole family discussed it, and they

applied to become appellant's foster parents. Their application was approved, and appellant moved in within a week or two. (RT 256:30068-300071.)

Patricia also testified that appellant began to abuse alcohol in January 1985, when he was about 15 years old. Up to that point, appellant had been very respectful to her, her husband and her children John and Lisa. He fit in and was accepted into her home. Appellant helped to clean the house and did yard work. He had regular chores and worked harder than her children did. When Patricia picked appellant up from juvenile hall, she was given a small box of his clothing of which only a pair of socks and underwear was salvageable. Appellant also had a picture of Jesus and a book on birds. She took him shopping for clothing and shoes and he got a haircut. Patricia also took appellant to his mother's house so she would know where he was and the kind of people he was with. She told appellant's mother, Barbara, she was welcome to visit. When Patricia found out that Barbara did not have a car, she offered to pick her up so she could spend the day, have lunch, and find out what kind of people had her son. This way she would have peace of mind. Patricia did everything she could to encourage contact with appellant because reunification was the goal then. Barbara thanked her for the offer and commented on how nice he looked. But Barbara may have made only two telephone calls between that visit and when appellant turned 17. (RT 256:30071-30080, 256:30096-30101 .)

Patricia also testified that shortly after she became appellant's foster mother, she saw Debbie George at the grocery store. Mrs. George approached Patricia and told her that she (Mrs. George) had not been a good foster mother for appellant. Patricia testified that she could not be overly friendly to someone who had been so mean to a child. She further testified that Mike

George came over and tried to dissuade her and her husband from taking appellant. (RT 256:30080-30083.)

Patricia also testified that she and appellant tried to contact his mother and appellant tried to arrange visits with her but Barbara was not receptive to either contacts from appellant or his visiting her. Barbara made excuses and claimed she had to clean her house. Appellant told her he would clean her house if she would let him visit, and he did get to visit that time. Patricia never saw appellant's mother hug or kiss him. She smiled briefly but with no real warmth. Appellant behaved like her other two children; he was a typical teenager. Patricia was told that appellant had been in other foster homes and discovered from Barbara about appellant's abuse at the Hebert house. Patricia put appellant into counseling and he attended about six to eight times. But he and the therapist did not connect, and appellant felt that he did not need counseling. Patricia did not see a problem at the time, so she told appellant she would take him out of therapy but if any problems appeared she would put him back in. (RT 256:30083-30092.)

Patricia also testified that appellant bought them a card for their anniversary and had John and Lisa sign it. She saved the card which read, "To Mom and Dad, Happy Anniversary. Love ya, Danny." (RT 256:30094-30095.)

Patricia further testified that appellant began getting into trouble that was alcohol-related. She recalled taking appellant to juvenile hall because of his drinking problem. When she told him on two different occasions that she was taking appellant back to juvenile hall, he totally complied. He got dressed, got in the car and did not try to talk her out of it. She was surprised and when she did take him back, she was crying so hard she could not talk. It was appellant who told juvenile personnel why they were there. Patricia asked them if there was some tests they could do on appellant to test for potential for

violence. She was concerned about appellant's destructive behavior. Appellant stayed in juvenile hall for several days, and psychological tests were performed on him during that time. He soon returned to Patricia's home. (RT 257:30147-30151.)

Patricia testified that after talking with a probation officer, she believed it was appropriate to have appellant return to her home. She tried to seek some counseling for appellant so she took him to a county mental health outpatient facility and signed him up with a counselor. This went on for a month or two. Appellant seemed to be communicating with him. The sessions stopped because appellant was drinking again and went to the Boys Ranch for violating probation. Appellant was in the ranch for several months, and Patricia visited him every weekend. There was a time when he was allowed to come home for the day, then for weekends. (RT 257:30158-30162.)

Patricia asked appellant's mother, Barbara, more than once to come with her to visit him, but she never went. Appellant eventually came home and there was one more incident when appellant got into trouble because of his drinking. Patricia turned appellant over to authorities, and he was placed in a group home where he stayed until he turned 18. Patricia further testified that appellant was concerned about his younger brother Michael; he wanted him to have a better life. Appellant counseled Michael and worried about him. (RT 30166-30168.) Patricia had moved to Sacramento and in early 1989, appellant went there and moved back in with her. (RT 257:30169.) He got a job but soon became involved in drugs. He did not take care of himself, lost weight and started looking really bad, unkempt. Appellant soon moved out of Patricia's home again and moved in with a friend, Thomas Root. Patricia discovered that this was a drug house. On one occasion, appellant returned to Patricia's house and slit his wrist. He was taken for medical treatment and

then Patricia sent him back to San Jose. Patricia did not see appellant again until after he was arrested in this case. (RT 257:30166-30172.)

Patricia also testified that in August 1990, she was contacted by an army recruiter. Appellant was trying to enlist in the Army, and the recruiter wanted appellant's diploma. Root had it and made Patricia pay $50 for it. Root also had a picture of Jesus appellant had kept since he was a small boy. She had to pay for the picture too. (RT 257:30173-30174.) Patricia moved back to Santa Clara County in October 1991 but had visited appellant almost every week in the Santa Clara County jail before her return. (RT 257:30174-30175.) She sent appellant money and visited him about three times a month until November 1993. She stopped visiting appellant because seeing him in shackles depressed her and made her cry. She also allowed their different beliefs regarding Christianity to be the catalyst for ending her visits. (RT 257:30178-30181.)

Patricia further testified that during their visits, appellant shared things he was learning from the Bible and they discussed scripture until she stopped visiting him. Appellant had an excitement and real joy about what he was learning from the Bible. (RT 257:30183-30187.) They also talked several times about the crime and its effect on the Madden family. Appellant said he knew how it felt to grow up without a father, and it hurt him to know that Mr. Madden's daughter, Julie, would grow up without a father. Appellant said he was sorry for what he had done and that he prayed for the Madden family. Patricia believed that he was sincere. (RT 257:30187-30195.)

Patricia also testified that appellant expressed a need for affection and warmth when he lived with her. Appellant was always trying to do something extra to help out both because of his desire to help and his need for praise and positive reenforcement. Appellant was very hurt when Patricia's attempts to

arrange visits with his mother failed. He also showed an unusual degree of submissiveness. He never tried to talk Patricia out of taking him back to juvenile hall. Also, it seemed that when things would be going very well, appellant did things to sabotage them as if he felt he did not deserve for things to go well. Patricia believed that appellant's life has value and that he is a worthwhile person. There is more to him than the fact he had committed a murder. She loves him very much despite the problems they have had. There is something very good and very sad in him. Appellant means so much to her because she sees the good and the value in him. (RT 257:30196-30203.)

Patrick S. Doyle, a retired Santa Clara County Deputy Sheriff, testified that he spent over eight years studying for the priesthood. He also worked in the Santa Clara County jail from 1991 to November 1996. Doyle knows appellant and had regular contact with him when appellant was in the jail. Appellant was withdrawn, stood limply with his hands at his sides, his mouth slightly open, staring but did what he was told. Doyle testified that appellant's demeanor changed eventually. Appellant stood straighter, made eye contact, seemed a great deal more pleasant and was not a disciplinary problem. Doyle and appellant began to talk about the Bible. He realized that appellant was interested in religion when they began talking. As time passed he also realized that appellant was committed so he would suggest readings and later discuss them with appellant. Appellant started a Bible study group and asked Doyle more questions about religion. Doyle told him where to get the answers. Then, appellant would come back and tell him that he had read the material. After some time, Doyle concluded that appellant had become a Christian. At first, Doyle was extremely suspicious of appellant and wondered whether he was faking his interest in religion but finally concluded that appellant was honest, straightforward and sincere. (RT 258:30332-30348.)

Doyle further testified that his informal instruction with appellant continued for about 20 months, and he continued to see appellant from time to time up until Doyle left the jail. It appeared to Doyle that appellant had continued in his interest in the Bible and in being Christian. On one occasion, Doyle saw a guard yell at appellant and not allow him to retrieve an item. Appellant got really red in the face but soon he completely relaxed and did what he was told. Appellant was not a gang member, did not get into fights with other inmates, was not a behavioral problem in jail, was not criminally sophisticated and did not swagger or act cocky. Appellant lived like a Christian ought to live. When Doyle made his rounds, he would see appellant kneeling and praying. (RT 258:30348-30356.)

Doyle had been informed that appellant had lied to other officers to get his housing changed. He also heard that in 1995, appellant caused to pass a jail t-shirt to a female friend in court. Doyle testified that these two incidents did not change his opinion of appellant. In fact, the t-shirt incident reinforced Doyle's feelings that appellant was not criminally sophisticated. Becoming a Christian is not a one time process. "We're in process. Christ himself . . . instructs us that the just man stumbles seven times daily. I think we arrive at perfection the other side of this life." (RT 258:30358.) Doyle restated that his belief that appellant is a committed Christian was not changed by the above two incidents. (RT 258:30357-30358.)

Other correctional officers at the jail testified that they had known appellant for years and his behavior was good. They had never seen appellant act in a violent or threatening way. He had never been a problem. Appellant stayed busy with art work, crafts and had religious discussions with other inmates and got along very well with them. Appellant helped an inmate who was depressed due to a death in the family by talking to him and read to him

from the Bible and that appellant always volunteered to help clean up the module. (RT 259:30565-30576.) Officer Lauren Dennehy became aware that appellant was a Christian when she saw him kneeling down at his bunk praying. There has been nothing to cause her to believe that appellant's Christian faith was not genuine. (RT 261:30900-30912.) Officer Victor P. Bergado testified that while checking inmates in their cells, he saw appellant on his knees near his bed. He asked appellant if he was okay. Appellant turned around and Bergado saw that he was crying. When Bergado asked appellant if he needed any help, he refused any help and said he was just sorry for Mr. Madden's family. (RT 260:30705.) Appellant told him that he was praying. Bergado discussed Christianity with appellant then and continued to do so until 1994. Bergado had also seen appellant read the Bible and conduct Bible studies. Appellant's interest in Christianity has remained consistent, and Bergado never thought that this interest was insincere. Bergado further testified that he has never seen appellant fighting with inmates or staff, and he had never had any problems with him. Bergado also saw appellant share his commissary with other inmates and thought that appellant was the least criminally sophisticated inmate when he met him. (RT 260:30694-30714.)

Reverend Leo Charon testified that he has specialized in ministering to inmates in protective custody and those charged with violent crimes. He is also a therapeutic counselor and an alcohol and drug counselor. (RT 259:30595-30609.) When ministering to inmates, Charon uses the Bible and the teachings of Jesus. For violent inmates he concentrates on Scripture and if such inmates have alcohol and drugs problems; he also uses materials on chemical addiction. Charon stated that he had testified for appellant and co-appellant Travis in the first penalty phase but has not testified for any other inmates. (RT 259:30615.) He met appellant about five years earlier in Bible

study class and has seen him periodically one on one. Appellant had a healthy curiosity about Scripture from the beginning. He would read the portions of the Scripture that Charon was going to discuss at the next meeting. Appellant had good questions, and Charon often had to do research to get the answers. Appellant read a lot of religious material and asked Charon to bring in many different books including every version of the Bible so that he could compare particular passages. Charon further testified that appellant had an above average vocabulary and had a dictionary, a concordance and a lexicon. (RT 259:30609-30624.)

Charon also testified that appellant continues to attend his Bible classes and would refuse visits that conflicted with Bible study. They talked about personal matters, temptations, problems appellant was going through, Scripture, plans for the future and education. Appellant wanted to be a teacher. Charon testified that appellant is a good student and could attend any Bible school in the country and be on par with the average student there. He has counseled appellant to deal with his past and to recognize what he has done to society. This counseling started about two years after he met appellant and was always initiated by appellant. Appellant also discussed more than once how he felt about Mr. Madden's murder. (RT 259:30624-30630.)

Charon further testified that appellant said in many different ways that he was remorseful about taking another life. Appellant was as concerned about Mr. Madden's wife and family as he was about Mr. Madden. Charon thought that appellant needed to talk about this to obtain spiritual cleansing and he considered this to be a sign of progress. Appellant also showed interest in learning Greek and assumed a leadership role by teaching Bible studies. Appellant's study plan was very organized. Appellant also had a positive influence in Charon's Bible classes by asking good questions and

bringing in new members. Appellant counseled an inmate about his bad language and behavior. Other inmates respected appellant's Christianity. (RT 259:30636-30645.)

Charon also testified that appellant has consistently pursued knowledge of theology and has increased his depth of study. It would be very difficult for appellant to show the level of study and depth of interest that he has shown in Christianity over the years if he had no real interest in it. Charon had seen nothing in appellant that would lead him to believe that appellant's interest in Christianity is not genuine. He had worked with appellant for over a year before he baptized him and believes that appellant had admitted his faults and made an honest confession of his sins. (RT 260:30648-30660.)

James Park testified that he had worked for the California Department of Corrections for 31 years and retired in 1983. He has testified as an expert in capital cases nearly 100 times but, in many other cases, he has not testified when contacted by defense counsel because he could not make a favorable prediction regarding the client's adjustment in prison. (RT 260:30733-30752.)

Park further testified that he was retained as an expert in appellant's case in 1995. He received materials to review and interviewed appellant once. Judge Mullin accepted him as an expert in prison classification and security as it relates to LWOP prisoners and appellant. (RT 260:30752-30753.) Parks opined that, based on appellant's jail records, his age and certain circumstances of the offense, that appellant would adjust very well to state prison and would not be a threat or a danger to staff or inmates if he were to be sentenced to life without parole. (RT 260:30753-30754, 260:30761-30765, 260:30826.) Park further testified that appellant's outlook during the interview was good, productive and useful. Appellant engaged in constructive conduct in the jail. Although appellant had a few minor incidents in jail, these infractions have

been childish, and none involved any danger to staff or other inmates. Appellant had also obtained his GED and studied religion seriously. (RT 260:30761-30765.) Parks opined that inmates involved in religious programs tolerate prison somewhat better than those who are not. Religious prisoners keep to themselves and avoid prison gangs, hustling, trafficking and the exploitation of weaker prisoners. (RT 260:30761-30765.)

Daniel DeSantis, defense counsel's investigator, testified that he was assigned to inquire into whether appellant's former foster parent, ex-police officer Michael George, had molested appellant. In April 1996, he learned that George, a police officer in Lake County at the time, was arrested and plead guilty to 11 counts of child molestation of another boy. (RT 261:30934-30936.) DeSantis further testified that he interviewed George in prison in 1996, and in the Mendocino County jail in 1997. (RT 261:30934-30936.) George admitted that he had sexually molested appellant. George said that he and appellant engaged in mutual acts of masturbation and oral copulation about ten times shortly after appellant moved into George's home as a foster child. This abuse continued throughout appellant's stay with George. George also admitted that he gave rum and coke to appellant during these acts. De Santis further testified that George expressed remorse for what he had done to appellant. (RT 261:30947-30951.)

Dr. Harry R. Kormos, testified as an expert in psychiatry including the effects of childhood neglect and abuse on the development of the adult personality. (RT 261:31017.) He was retained by defense counsel in 1993 to do a psychiatric evaluation of appellant and to review his findings with counsel. (RT 261:31019-31020.) Based on materials he had reviewed, over 11 interviews of appellant, appellant's prior testimony, and summaries of prior testimony of several witnesses, Dr. Kormos opined that appellant suffered

from child neglect as of December 22, 1990. (RT 261:31026-31029, 262:31100.) He further testified that child neglect is not a mental disorder like schizophrenia or mood disorder but is still a very significant concern of mental health practitioners. Its effects can be widespread and will cause problems in many aspects of the personality and are not easily predictable. These include low self-esteem, poor impulse control and the inability to postpone gratification. There is also depression, drug addiction, delinquency and any number of negative outcomes that can be traced back to child neglect. (RT 262:31101-31102.) Moreover, these conditions can be quite serious and are more serious than some of the mental illnesses. Dr. Kormos further explained that the phrase "child neglect" is used to characterize the situation in which the child is not getting the kind of help, interaction or support from the parents that he or she needs to develop normally but, in fact, is being mistreated by the very persons charged with his or her care. It extends over a considerable period of time and shades into child abuse. (RT 262:31102-31106.)

Dr. Kormos also testified that a child suffering from child neglect, including physical and sexual abuse, will show insecurity, distrust, an inability to see tasks through to their conclusion, depression, eating disturbances, drawings depicting scenes that are anxiety producing, and in cases of sexual abuse, there would be sexual activity not present in a child who was not sexually abused. The earlier such neglect occurs, the worse the consequences are. Such a child will have a serious problem with self-esteem, will have a negative self image, think of themselves as bad in a mysterious way, and have problems in school and later on in work. Such a child cannot respond to impulses with any degree of confidence that if they do not satisfy the impulse that maybe they will be able to do so at a later time. They have difficulty delaying gratification, resolving identity issues, planning for the future and

trusting others. This sense of basic trust is absolutely necessary for all the other areas to be developed. There are different stages in life during which basic tasks must be developed. (RT 262:31108-31115.)

The first human developmental stage has to do with the development of trust and covers the time from delivery to about 18 months. From 18 months to three years of age, the child experiences that it has a separate existence from his or her mother and has a will of his or her own. From three to five years of age, the child is not as focused on the mother as before. The child is beginning to enter the environment and is becoming much more active. Conflicts gradually occur, rivalries develop and guilt feelings begin to appear. Between five and 11 years of age, the child begins to develop pleasure in his or her own competence and ability to do things. If this is not performed in a satisfactory way, there is a risk that a sense of inferiority will develop and the child will obtain a sense that he or she is not going to make it and it does not really matter how much effort he or she puts out. Adolescence covers the period from 11 to about 20 years of age. By this time the person should have arrived at a stable sense of who they are, what they are going to do and where they belong. (RT 262:31115-31120.)

Dr. Kormos agreed it was necessary for a child to successfully get through each of these stages in order to grow into a mature and law-abiding adult. If disturbances occur early, then all later stages in life will be damaged, and there is a less likelihood that things will come out as they should. If problems occur in the later stages, they will exacerbate the problems that already exist. Parents have an enormous influence of the development of the child. (RT 262:31120-31122.)

Dr. Kormos learned that the family history of appellant's mother, Barbara, was replete with alcoholism. Barbara, her parents, and several of her

siblings were alcoholics. In addition, Dr. Kormos obtained information that Barbara, her siblings and appellant's father had been abused during childhood and all of this information factored in to the child neglect diagnosis he made of appellant. He explained that there is a tendency for child abuse to perpetuate itself in succeeding generations; children who have been abused by their parents have a tendency to abuse their own children. Alcoholism also tends to run in the family. (RT 262:31122-31126.)

Dr. Kormos further opined that appellant never bonded with either his mother or father. Bonding is very important and is supposed to occur in the first phase of life. It consists of the mother and child finding it pleasurable and extremely important to be with each other, they develop a unique relationship that is going to form the basis of all subsequent mental development on the part of the child. It is an essential process that is vitally necessary for the child. It takes different forms at later phases of life but is the most important factor at the beginning. (RT 262:31127-31129.)

Dr. Kormos also received information about the circumstances of appellant's birth from hospital records. Appellant had many medical problems: he was born prematurely and had a rather low birth weight, under four pounds. His blood level of bilirubin was excessive which was most likely traceable to his mother being rhesus negative. This means that his red blood cells were being destroyed at a rate greater than his liver could tolerate and he became yellow. This also posed a severe threat to appellant's brain cells. In addition, appellant did not pass any stool for awhile which caused concern that his intestines were malformed and would require immediate intervention. He also had some breathing difficulties and had chalasia, meaning that his stomach did not close properly which caused a lot of vomiting which further threatened appellant's well-being. Appellant was hospitalized for about one

month after his birth. (RT 262:31129-31131.) Upon reading the nurses' notes, Dr. Kormos learned that appellant's mother visited appellant in the hospital only one time, and there was no indication that his father ever visited appellant. The absence of the mother for one month caused Dr. Kormos some concern about the bonding issue because the earlier the problems arise the more likely they are to interfere with normal development. It was important in the first month of life for the mother to hold the child, and a lot of physical contact is very much a part of the bonding process. (RT 262:31131-31132.)

Dr. Kormos's conclusion that appellant did not bond with his mother and father was buttressed by the fact that his father was rarely home, and his mother never showed any kind of physical affection to appellant when he was young. Dr. Kormos also opined that appellant never bonded with his father but, in fact, was traumatized by him based on the violence appellant received from his father, appellant's early memories of his father throwing him down some stairs, killing a stray dog that appellant had befriended with a shovel, and the relationship they developed later on. (RT 262:31133-31137.)

Dr. Kormos explained that the failure to bond would result in the parent having difficulty in dealing with the child as he grew up. Other problems that become apparent as the child developed into a teenager and young adult up to 21 are low self-esteem, depression and an inability to plan or to resist impulses. Dr. Kormos also opined that the inability of appellant's mother to control appellant was a result of their failure to bond. Appellant never learned from his family that there were limits to his behavior.

Although appellant acknowledged a number of problems with his parents, he also held on to a positive image of his mother and father. Dr. Kormos testified that children who describe their parents in a way directly contradictory to their actual experience is the result of being ashamed of what

has happened to them. This tendency to put a positive spin on things is a way of dealing with the hurt and shame. That appellant's father was often drunk, in a rage and almost always striking out at appellant most likely seriously interfered with appellant's development during the various stages of his life. The experiences a developing child has with his father greatly contributes to the proper development of the child's conscience. The failure of appellant's mother to intervene and physically protect him worsened the bonding problem and instilled a general fear in appellant with an attendant lack of confidence in his own well-being. (RT 262:31137-31143.) Appellant's sense of insecurity was likely heightened by witnessing his father hit his brother Sonny and his mother. These events will cause appellant to continue at a lower level of development. (RT 262:31143-31144.)

Dr. Kormos also opined that despite the bad effects appellant experienced up to six years of age, they could have been remedied by continued good parenting. (RT 262:31144-31145.) Appellant's placement in the Hebert home was a poor one because he was subjected to aggressive, restrictive and unjust punishment and sexual abuse. Both Mark and Dean Hebert sexually abused appellant. Appellant was also forced to undergo sexual advances from other members of the Hebert family while being taunted and laughed at. Appellant's brother, Sonny, did nothing to protect him. All of these events further hindered appellant's development. Dr. Kormos stated that appellant told him he did not report what was happening to him in the Hebert home to anyone because he had no way to compare his experiences to a normal experience. Appellant thought these things that happened to him were normal. (RT 262:31145-31155.)

All of the neglect, abandonment and abuses appellant suffered up to 11 years of age impaired his development in all those developmental stages to that

point, and he needed help. Given these terrible experiences, Dr. Kormos would expect appellant to have a sense of inferiority, lack of self-direction and a lack of trust in people. He would have difficulty in school and problems with abusing drugs and alcohol and with stealing. (RT 262:31155-31159.)

Dr. Kormos further opined that appellant's consumption of alcohol and drugs could have been appellant's attempt to self-medicate. (RT 262:31160-30163.) Dr. Kormos also opined that appellant's suffering sexual abuse by Officer George when he was a foster child in that home and his mistreatment by Mrs. George made it very difficult for appellant to correctly interpret the nature of authority and of legal behavior. Appellant was aware that he would not have been placed with Officer George without the permission of other authorities. This further confused him and affected his ability to fully trust adults and male adults in particular. (RT 262:31172-31174.)

Dr. Kormos testified that appellant's subsequent placement in Patricia Gamble's home and his being treated well there was not enough to prevent later self-destructive behaviors and his downward spiral because it came too late. The good influence of the Gamble home was insufficient to turn things around because appellant had suffered a lot of damage before that and received no specialized psychiatric treatment. (RT 262:31175-31177.)

In sum, Dr. Kormos opined that a solid majority of people who have endured the childhood abuse appellant has suffered would also suffer from severe psychiatric and psychological problems later in life. Emotional problems would interfere with good academic and occupational performance and with personal relationships. There would also be continuing symptoms of a psychiatric nature such as addiction, depression, anxiety, criminal behavior, and homelessness. Any number of outcomes were possible, and they would all be bad. There was an unusual accumulation of negative factors in

appellant's case, and when these factors were combined, there was a cumulative effect that was greater than the effects of any single factor. (RT 263:31223-31228.) The defense rested.

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PREFACE

Appellant Daniel Silveria presented a substantial amount of mitigating evidence including expert testimony which explained how his personal development was negatively affected by his being abandoned by his father at four years of age, then neglected and abandoned by his mother at six years of age, his physical and sexual abuse by the older boys in his second foster home which continued for several years, the sexual abuse in his third foster home for nearly a year when he was 12 years old, by police officer, Michael George, who plied him with alcohol prior to abusing him, his later homelessness, and his alcohol and drug abuse which began in his teens and continued up to the age of 21 when he committed the crimes. Appellant also presented evidence that he opposed the killing of Mr. Madden but lacked the moral strength either to stop it, or to refuse to stab him even once after co-appellant Travis and Spencer had already stabbed Mr. Madden 31 times. The first jury deliberated over several days but finally deadlocked after four jurors could not agree that death was the appropriate penalty for appellant.

During the second penalty trial, Judge Hugh Mullin, III, committed critical errors which increased both in number and prejudicial effect as the trial progressed. Indeed, he permitted the prosecutor to argue a lying-in-wait special circumstance the first jury had found not true, and admitted evidence of a "deadlocked" torture-murder special circumstance which had been stricken. In addition, the judge made errors in the second penalty trial he had not made in the first trial. Some of those errors involved the improper exclusion of mitigating evidence previously admitted, and the admission of aggravating evidence previously excluded. It follows, therefore, that these errors improperly contributed to the second jury's swift decision to sentence both appellant, and co-appellant Travis, to death after deliberating both of their fates for only six hours. (RT 281:33529.) Respondent will undoubtedly argue that no errors occurred here but, even if they did occur, they were harmless.

However, *fictio cedit veritati.* Fiction must yield to the truth.

I

THE TRIAL JUDGE ERRED IN THE SECOND PENALTY PHASE WHEN HE PERMITTED THE PROSECUTOR TO ARGUE AND PRESENT EVIDENCE OF: (1) LYING-IN-WAIT; AND (2) TORTURE-MURDER EVEN THOUGH THE GUILT PHASE JURY HAD FOUND THE FIRST SPECIAL CIRCUMSTANCE UNTRUE, HAD DEADLOCKED ON THE SECOND SPECIAL CIRCUMSTANCE, AND IT WAS STRICKEN BEFORE THE SECOND PENALTY PHASE BEGAN

A. The Guilt and First Penalty Phases

1. The Guilt Phase

Initially, appellant Silveria and co-appellant Travis were tried in the same courtroom with *separate* juries. On October 19, 1995, appellant's jury convicted him of the first degree murder of James Madden as charged in count one, and found true the allegation that appellant had personally used a deadly and dangerous weapon, a knife, during the murder. (RT 123:11930-11932, RT 130:12059.) Appellant was also convicted of the robbery of Mr. Madden as charged in count 2, and the burglary of LeeWards craft store as charged in count 3. (RT 130:12060-12061.) In addition, the two special circumstance allegations that the murder was intentional and was committed while appellant was engaged in a burglary and a robbery were found true. (Ibid.)

However, appellant's jury found *not true* the special circumstance allegation that appellant intentionally killed Mr. Madden while *lying-in-wait*. (CT 11:2802; RT 130:12060.)

This jury also *deadlocked on the torture-murder special circumstance* when they could not unanimously agree that appellant committed a torture-

murder.[7] In addition, the jury also *deadlocked on the personal use of a deadly and dangerous weapon (stun gun) enhancement* after six jurors could not find this allegation true. (CT 11:2802; RT 125:12012-12022.) On October 30, 1995, a mistrial was declared as to the torture-murder special circumstance and the personal use of a deadly and dangerous weapon (stun gun) allegations. (RT 130:12063-12064.)

2. **The First Penalty Phase**

However, before the first penalty phase began, prosecutor Ron Rico balked at striking the torture-murder special circumstance against appellant explaining to Judge Mullin that this allegation was "critical to [his] proof in [the] penalty phase against Mr. Silveria in terms of whether a death penalty is appropriate." (RT 131:12098; 130:12074, 12077.)[8] Judge Mullin ordered the torture-murder special circumstance held in abeyance and stated that they would proceed to the penalty phase. (RT 131:12112.)

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Travis's jury found the torture-murder allegation untrue even though he and co-defendant Spencer had inflicted 31 stab wounds upon Mr. Madden. (CT 11:2803-2804.)

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Prosecutor Rico's "critical" torture-murder theory against appellant was based on the allegation that appellant twice applied the stun gun to Mr. Madden's right thigh while Madden was bound to a chair and being stabbed repeatedly by co-defendants Travis and Spencer. (RT 118:11656-11657; 131:12098. See also RT 95:8999 and RT 113:11129 [prosecution expert Robert Stratbucker, testified that type of pain caused by a stun gun listed under "electrical torture" in the medical literature]; RT 113:11149 [it borders if not be flat out super torture].)

The first penalty phase began on November 8, 1995. (RT 135:12461.) Over defense objection, and in a second attempt to show that appellant committed a torture-murder, prosecutor Rico argued and presented evidence relating both to the deadlocked torture-murder special circumstance, and the personal use of a deadly and dangerous weapon (stun gun) enhancement even though the jury had also deadlocked on this enhancement. (RT 113:11128-11129, 11149; RT 273:32798-23799; CT 11:2802; RT 125:12012-12022.)

However, four days after penalty deliberations began, a mistrial was declared when the jury again *deadlocked after four jurors could not agree that death was the appropriate punishment for appellant.* (RT 181:18240-18251.)

On May 7, 1996, over six months after Judge Mullin had declared a mistrial as to the torture-murder special circumstance allegation, prosecutor Rico finally moved to strike this special circumstance stating that he wanted to proceed directly to retrial of the penalty phase. (RT190:18386.) Judge Mullin struck the torture-murder special circumstance as to appellant (and the lying-in-wait special circumstance as to co-appellant Travis) "in the interest of justice." (RT 190:18387-18466.) The record does not show that he ever struck the personal use of a deadly weapon (stun gun) enhancement.

B. <u>The Second Penalty Phase</u>

Before the second penalty phase began, appellant renewed his objection to allowing the prosecutor to present argument and evidence relating to the lying-in-wait special circumstance *found untrue* as to appellant as well as the *deadlocked* torture-murder special circumstance. His efforts proved futile. (CT 18:4620-4630; RT 233:27309-27312.)

Selection of the second jury began on December 2, 1996. (RT 202:23027.) This jury was selected and sworn on February 10, 1997, nearly one year after the first jury deadlocked on penalty. (RT 234:27382-27384.)

1. Argument Erroneously Permitted

Judge Mullin tilled the soil from which many of his errors would grow when he prohibited counsel from informing the second jury: (1) that the first jury had found the lying-in-wait special circumstance untrue; (2) had deadlocked on the torture-murder special circumstance; and (3) a mistrial had been declared as to the latter special circumstance, and it had been stricken. During the jury instruction conference, he told counsel, "You will not be allowed to indicate to this jury what the prior jury did regarding either the torture or lying in wait special circumstance." (RT 273:32797.)

Then, on February 13, 1997, over defense objections, Judge Mullin permitted prosecutor Rico to argue in his opening statement that appellant murdered Mr. Madden while "lying-in-wait" even though the guilt phase jury had found this special circumstance untrue. (RT 236:27432-27433 ["Plans were made for the members of the group to *lie in wait* for Mr. Madden after everyone else had left the store on the night they were going to rob him."]

Moreover, even though the first jury: (1) had deadlocked on the torture-murder special circumstance and a mistrial had been declared over 15 months before the second penalty phase began; and (2) the torture-murder allegation had been stricken over eight months before the second penalty phase began, Judge Mullin also permitted Rico to argue, ". . . as [Mr. Madden] was being repeatedly stabbed, this man, [appellant], used this stun gun on him, *inflicting even more pain and torture* on the doomed victim during his valiant but helpless struggle against the restraints" (RT 236:27443. Italics added.)

2. Evidence Erroneously Admitted

The record shows that Judge Mullin believed that the prosecution's theory of torture-murder was based on evidence that appellant twice applied the stun gun to Mr. Madden's leg. In the judge's view, "the stun gun [was] the

main instrument of torture, if there was one, even more so than the multiple [32] stab wounds. . . ." (See RT 233:27318.)

Thus, despite additional defense objections and over 15 months after a mistrial had been declared as to the torture-murder special circumstance, Judge Mullin permitted prosecutor Rico to present evidence in yet a third attempt to show that appellant committed a torture-murder.

First, Rico read into the record a portion of appellant's first penalty phase cross-examination regarding torture:

> **Prosecutor Rico:** So I think you said awhile ago that you didn't want Mr. Madden killed and you didn't want him tortured, is that right?
>
> **Appellant:** That's right.
>
> **Prosecutor Rico:** But Mr. Madden was killed, wasn't he?
>
> **Appellant:** Yes, he was.
>
> **Prosecutor Rico:** And he was tortured, wasn't he?
>
> **Appellant:** I don't believe that I tortured Mr. Madden by legal definition.
>
> * * *
>
> **Prosecutor Rico:** Mr. Madden was tortured, wasn't he?
>
> **Appellant:** I would say so.
>
> **Prosecutor Rico:** Now you were there while this was being done, weren't you?

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Appellant: Yes.

(See ACT 11:2864-2865, copy of Court Exhibit 131.)[9]

Second, even though a mistrial had been declared as to the torture-murder special circumstance, Judge Mullin permitted Rico to present additional evidence through the expert testimony of Dr. Robert Stratbacker in a further attempt to show that appellant committed a torture-murder with the stun gun.

Dr. Stratbacker testified as an expert with regard to the effect a stun gun has on the human body. (RT 249:28881.) Prior to testifying about the extreme pain Mr. Madden felt when the stun gun was applied, Stratbucker caused the stun gun to spark five times (RT 250:28975) in front of the jury. (RT 249:28913.) Stratbucker then testified that there would be no sparks if there is a good connection to the skin, all of the energy is delivered into the skin at the site of the probes causing injury by passing 50,000 volts of electric current through tissue. (RT 249:28913-28916.)

Stratbucker also claimed the unique ability to quantify the pain caused by the stun gun. He testified, "Many pain fibers will be activated when one pulse flows from one probe to the other," and this is repeated with every pulse "again and again and again." The pain spreads out over the body "in a very wide area." (RT 249:28917-28918.) This type of pain is called a "bright" pain, it is a very sharp, cutting type of pain, it only lasts for the duration of the stimulus. (RT 249:28922.) Stratbucker also testified that the marks on Mr. Madden's leg indicate that the stun gun was applied twice (RT 249:28925) and

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Appellant testified only in the first penalty trial. (RT 147:13975-14103, RT 148:14140-14436, RT 151:14513-14693, RT 152:14697-14725, RT 153:14836-15017, RT 154:15018-15164, RT 155:15166-15316)

that Mr. Madden would have felt more pain if the stun gun were applied over his pants than if it were applied directly to his skin. (RT 249:28931.)

Stratbucker further testified that where the stun gun was used during the stabbing, "it seems clear that the stun gun . . . is being used for - - for a vicarious and *torturous kind of purpose*. (RT 249:28955, italics added.) Judge Mullin sustained a defense objection, struck this testimony and admonished the jury to disregard it. (Ibid.) However, when prosecutor Rico asked Stratbucker what he meant when he previously referred to the "improper[]" use of a stun gun, Stratbucker replied: "The use of a device for *inflicting the pain unnecessarily or torture*, some process of that kind." (RT 250:29010, italics added.) Judge Mullin overruled appellant's objection to this testimony. (Ibid.)

Stratbucker also testified that, based on his experience as a "medical man" and an expert in stun guns, Mr. Madden felt pain and suffering that was "at an absolute maximum intensity" (RT 249:28957), and he "remained conscious to the - - to the bitter end. . . ." (RT 249:28959.)[10]

Third, prosecutor Rico presented additional torture-murder evidence relating to the stun gun through the improper cross-examination of appellant's psychiatric expert, Dr. Harry Kormos, in violation of a stipulation forced upon

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Braun moved for mistrial based on Rico asking Stratbucker whether he had heard that Amnesty International (AI) had stated that stun guns were dangerous. Braun argued that although his objection was sustained, the thought of AI and stun guns was improperly placed in the minds of jurors. He also told the judge that an article appeared in the San Jose Mercury News the previous day in which AI condemned stun gun use by repressive governments. (Court Exhibit 132. RT 251:29133.) Judge Mullin, however, simply ridiculed the credibility of that newspaper and denied the motion for mistrial. He also said that he had not, and probably would not, read the article. He concluded that Rico's question was "asked in good faith but under [Evidence Code section] 352 sustained the objection." (RT 251:29131-29134.)

appellant that prevented his counsel from questioning Dr.Kormos about how appellant's past effected his crimes. (See Argument III, post, at pp. 137-151.)

3. The Jury Instruction Conference

During the jury instruction conference, prosecutor Rico again told Judge Mullin that he intended to argue "evidence of lying in wait" and any other aspect of factor (a) above which is necessary to get to the penalty phase. (RT 273:32787-32788.) The judge told Rico that he was not going give a lying-in-wait instruction but Rico (in contrast to his ruling forbidding Braun from asking the jury for mercy), could argue "lying-in-wait" to the jury. (RT 273:32793-32795.) Braun renewed his objection to Rico arguing lying-in-wait and torture-murder. Rico responded that he was permitted to do so in the first penalty phase. Judge Mullin agreed stating:

> I know it came in last time, I indicated that on the record last time, *just because the jury had acquitted one defendant of the torture special and one defendant of the lying in wait special did not preclude the [prosecutor] from arguing that to the juries, even to the people who had voted to find it not true.* Because it was not found not true beyond a reasonable doubt, *it is still a factor, circumstances of the crime. That's the end of it.*

(RT 273:32798-23799. Italics added.)

4. Prosecutor Rico's Closing Argument

During closing argument, Rico was permitted to argue once again both that appellant committed a murder while lying-in-wait (RT 276:33040-33042) and torture-murder. Rico told the jury that Mr. Madden was "... *tortu[r]ously* stabbed 32 times . . . ." (RT 276:33048.) He further argued that, "There's nothing else, no other term that can describe what Mr. Madden went through other than *super torture* under these circumstances." (RT 276:33052.) After arguing the victim impact, Rico also argued, "I have also listed other aspects

of the crime, for example, . . . *the evidence of lying in wait, the watchful waiting, the vicious torturous killing* that is involved . . . Give each and every one of those whatever moral weight, whatever compelling value it is entitled to." (RT 276:33078.)

Rico also argued that appellant used the stun gun at least twice causing "indescribable and unquantifiable pain and *torturous* suffering to this dying victim." Here, he argued both that appellant engaged in torture, and personally used a deadly and dangerous weapon, i.e., the stun gun even though the jury had deadlocked on both of these allegations. (RT 277-33114.)

Finally, Rico argued, "consider - - when you're weighing factor (k) and when you're asked to give great weight to that sympathetic aspect of [appellant's] background and character, consider the vicious and *torturous killing* that took place here and consider that from Mr. Madden's perspective, his viewpoint. What was it like? How valiantly did he struggle?" (RT 279:33409.) When considering sympathy for [appellant], ask yourselves "Just how does that compare with the moral weight which you should give the murder and all of its circumstances, including the vicious, *torturous aspect of the killing*. (RT 279:33410.)

Rico's arguments "demonstrate just how critical the State believed the erroneously admitted evidence to be." (Ghent v. Woodford (9th Cir. 2002) 279 F.3d 1121, 1131; see also Kyles v. Whitley (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."].)

On Thursday, May 1, 1997, at 2:20 p.m., the second jury began deliberations. (CT 21:5306; RT 279:33488-33489.) At 4:46 p.m. the jury was admonished and told to return on Monday, May 5, 1997, at 9:00 a.m. (CT 21:5307; RT 279:33497.)

On Monday at 2:00 p.m., the jury returned a death verdict for *both* appellant, and Travis, after deliberating for just over six hours (2 ½ hrs. on Thursday and 3 hrs. and 40 minutes the following Monday). (CT 22:5459; RT 281:33527-33529.)

This swift, deadly feat was remarkable considering that both appellant and Travis had presented a substantial amount of mitigating evidence for the jury to weigh. To take only six hours to pick a jury foreperson and decide the mortal fate of not one, but two people, each of whom presented substantial mitigating evidence is simply incredible. As demonstrated throughout this brief, it was Judge Mullin's numerous errors that led to the jury's swift choice of death.

C. State Law Relating to Special Circumstances

Special circumstances charged under section 190.2, including the lying-in-wait and torture-murder special circumstance allegations, can only be tried in the guilt phase. Section 190.1 provides in relevant part:

> A case in which the death penalty may be imposed . . . ***shall*** be tried in separate phases as follows:
>
> (a) The question of defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it ***shall at the same time*** determine the truth of all special circumstances charged. . . .

Section 190.3 provides in relevant part:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances ***found to be true pursuant to section 190.1***

Section 190.4 provides in relevant part:

> (a) Whenever special circumstances as enumerated in section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. ***The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of section 190.1.*** **[i.e., the guilt phase.]**
> * * *
> If the trier of fact finds that any one or more of the special circumstances enumerated in section 190.2 as charged is true, ***there shall be a separate*** penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a ***separate*** penalty hearing.
>
> In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, ***but*** the issue of guilt shall not be retried by the jury, ***nor shall such jury retry the issue of truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue.*** . . .

It is clear, therefore, that California statutory law requires that special circumstances be tried either during the guilt phase of a capital trial, or, in the case of mis-tried specials, prior to the penalty phase. (See Sections 190.1, 190.3, 190.4(a).)

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D. Retrying the Lying-in-Wait Special Circumstance In the Second Penalty Phase Previously Found Untrue Violated Both State Law and Federal Constitutional Law

California law also forbids the retrying of a special circumstance found *untrue*. (See section 190.3(a) [consider any special circumstance found "to be true"], and section 190.4(a) [nor shall such jury retry the issue of truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue]. See also People v. Haskett (1982) 30 Cal.3d 841 - - [prosecutor has a duty at the penalty phase to refrain from attacking acquittals reached in the guilt phase].)

Moreover, once a defendant has been "acquitted" of a charge, he cannot be placed twice in jeopardy through retrial of that charge. The Double Jeopardy Clause of the Fifth Amendment commands that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." Once a defendant is placed in jeopardy for an offense, and jeopardy for that offense terminates, the defendant may neither be tried nor punished a second time for that same offense. (North Carolina v. Pearce (1969) 395 U.S. 711, 717; Burks v. United States (1978) 437 U.S. 1, 16; Benton v. Maryland (1969) 395 U.S. 784, 794--[Double Jeopardy Clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment]. See also Ashe v. Swenson (1970) 397 U.S. 436 [double jeopardy clause incorporates the doctrine of collateral estoppel which provides that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit between the parties"].)

During the *guilt* phase of the present case, prosecutor Rico presented evidence and argument in an unsuccessful attempt to convince the jury beyond a reasonable doubt that appellant committed a murder while lying-in-wait. The

jury rejected this allegation by unanimously finding it untrue. (CT 11:2802; RT 130:12060.)

Consequently, Judge Mullin violated both the state statutory law described above, and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, when he allowed prosecutor Rico to again argue during the second penalty phase that appellant committed a murder while lying-in-wait even though the jury found this allegation untrue.

The jury's conclusion that this special circumstance was "not true" was a final determination of the ultimate issue with regard to this special circumstance. (See Ashe v. Swenson, supra, 397 U.S. at p. 443; Arizona v. Rumsey (1984) 467 U.S. 203, 211; Fong Foo v. United States (1962) 369 U.S. 141, 143 [jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it, its finality is unassailable]. See also Sanabria v. United States (1978) 437 U.S. 54, 64.)

Moreover, even though the second penalty phase of appellant's trial was not a new trial but part of the same proceeding, the Double Jeopardy Clause has effect internally within a single prosecution. (Yeager v. United States (2009) 557 U.S. ___, 129 S.Ct 2360, 174 L.Ed.2d 78. Cf. Bullington v. Missouri (1981) 451 U.S. 430, 439 [Double Jeopardy Clause applies to capital sentencing proceedings that "have the hallmarks of the trial on guilt or innocence"].)[11]

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This case does not involve a penalty phase retrial with an increase in sentence as in Bullington. Rather, it is an improper retrial of a guilt phase special circumstance in the penalty phase where the prosecutor evaded his burden to prove it true beyond a reasonable doubt to a unanimous jury. (See In re Winship (1970) 397 U.S. 358.)

Appellant's "acquittal" of this special circumstance allegation in the guilt phase precluded the prosecution from arguing to the jury during the second penalty trial that appellant committed the murder while-lying-in-wait.

E. The Mistried Torture-Murder Special Circumstance

1. Double Jeopardy

As to the mis-tried torture-murder allegation, prosecutor Rico was free to timely retry this special circumstance prior to the penalty phase without risk of placing appellant twice in jeopardy. (Richardson v. United States (1984) 468 U.S. 317, 325 ["protection of the Double Jeopardy Clause applies only of there has been some event, such as an acquittal, which terminates the original jeopardy. The failure of the jury to reach a verdict is not an event which terminates jeopardy"]; Paulson v. Superior Court (1962) 58 Cal.2d 1, 7-9.)

However, the right to retry a mis-tried charge in a capital case is not without limitation. When the jury does not make a finding that a special circumstance allegation is true, the prosecutor's remedy is to timely retry the special circumstance under section 190.4(a). Indeed, the prosecutor must retry the defendant in proceedings requiring proof beyond a reasonable doubt to a unanimous jury, i.e., prior to the penalty phase. (See section 190.1; In re Winship, supra, 397 U.S. at p. 364; People v. Collins (1976) 17 Cal.3d 687, 693 [jury unanimity required].)

Moreover, the prosecutor must have brought the defendant to trial in a timely fashion. (See section 1382 discussed below [court shall order dismissal in a felony case where retrial after mistrial did not occur withing 60 days of the mistrial.]

If, as in the present case, the prosecutor voluntarily chooses to forego that remedy by successfully moving to strike the special circumstance, he

cannot later relitigate that special circumstance in the penalty phase under section 190.3(a) where state law relieves him of any burden of proof.

Put simply, under the above state statutes, prosecutor Rico forfeited his right to retry the torture-murder special circumstance when his voluntarily motion to strike it was granted over six months after the mistrial had been declared. The fact that Judge Mullin granted Rico's motion to strike the special circumstance before the second penalty phase began was surely an event that terminated the original jeopardy with regard to the torture-murder special circumstance. (Richardson v. United States, supra, 468 U.S. at p. 325.)

Under these circumstances, permitting Rico to retry the torture-murder special circumstance over eight months after it had been stricken, and over 15 months after the mistrial had been declared, surely placed appellant twice in jeopardy in violation of the Double Jeopardy Clause of the Fifth Amendment. (North Carolina v. Pearce, supra, 395 U.S. at p. 717; Burks v. United States, supra, 437 U.S. at p. 16.)

2. Judge Mullin Improperly Permitted the Prosecutor to Reopen the Process of Adjudication

Even if this Court concludes that retrying a torture-murder allegation 15 months after a mistrial was declared, and which was stricken over eight months prior to the beginning of the second penalty phase, did not place appellant twice in jeopardy, Judge Mullin nevertheless erred in permitting Rico to retry the torture-murder allegation in the penalty phase of appellant's trial. That is, by allowing Rico to continue to present argument and evidence during the penalty phase that was intended to show that appellant committed a torture-murder, Judge Mullin impermissibly allowed Rico to reopen the process of adjudication.

In People v. Haskett, supra, 30 Cal.3d 841, the jury convicted Haskett of murder but deadlocked on charges of rape and robbery in the guilt phase. In the penalty phase, the prosecutor repeatedly implied that by failing to convict Haskett of these charges the jury had acted improperly, and invited the jury to correct its wrong decision in the penalty phase. This Court stated that the prosecutor's actions were an impermissible attempt to reopen the process of adjudication. (Id. at p. 866.) After discussing its decision in People v. Terry (1964) 61 Cal.2d 137, 145 - - [accused had no right to attack at penalty phase the illegality of guilt phase adjudication], this Court further stated:

> Even more obvious is the duty of the prosecution ***at the penalty phase to refrain from*** attacking acquittals or ***retrying charges on which the jury could not agree in the guilt phase.*** The court declared a mistrial on the rape and robbery counts only after ascertaining that the jurors were truly deadlocked and that each juror believed further deliberation would not be likely to result in unanimity. Consequently, although retrial would not have been barred by the double jeopardy clause [citations], the prosecutor's invitation to the same jury to reconsider those unresolved charges at the penalty phase was inconsistent with the court's order of mistrial based on its finding that additional deliberation would be futile.

(People v. Haskett, supra, 30 Cal.3d at pp. 866-867, italics added. See also People v. Sanchez (1995) 12 Cal.4th 1, 68.)

Thus, it is evident that Judge Mullin erred when he allowed Rico to reopen the guilt phase process of litigation during the penalty phase.

3. Judge Mullin Violated Appellant's Statutory and Constitutional Rights to a Speedy Trial of the Torture-Murder Special Circumstance

In Sykes v. Superior Court (1973) 9 Cal.3d 83, this Court stated:

> The right to a speedy trial is a fundamental right secured by the Sixth Amendment to the federal Constitution [fn. omitted] and

is made applicable to the states by the Fourteenth Amendment. (Lopfer v. North Carolina (1966) 386 U.S. 213, 223 [18 L.Ed.2d 1, 8, 87 S.Ct. 988].) Article I, section 13, of the California Constitution independently guarantees the right to a speedy trial. [Fn. omitted.] In addition, our Legislature has made provision for a "speedy and public trial as one of the fundamental rights preserved to a defendant in a criminal action. (§ 686, subd.1.) The policy behind the right to a speedy trial is expressed in section 1050 which states, "The welfare of the People of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of the courts and judicial officers and of all prosecuting attorneys to expedite such proceedings that is consistent with the ends of justice."

Section 1382, subdivision 2, implements the foregoing constitutional and statutory guarantees by providing that, absent a showing of "good cause," a defendant accused of a felony is entitled to have the charges against him dismissed if he is not brought to trial within 60 days of the filing of criminal charges or after particular events necessitating a retrial thereof. [Fn. Omitted.] A dismissal is thus mandated in those situations covered by the statute if, at the time a defendant moves therefor, the 60-day period has elapsed and good cause of for the delay is not shown by the prosecution. In these circumstances the defendant is not required to make any further showing, and in particular he is not required to make an affirmative showing that he has been prejudiced by the delay. [Citations omitted.]

Statutory rights not withstanding, the provision of our Constitution which guarantees a criminal defendant a speedy trial is self-executing and not dependent on statutory implementation. [Citation omitted.] It is not necessary to have specific legislation to carry into effect section 13 of article I. [Citation and internal quotations omitted.] The provisions of the Penal code are merely supplementary to and a construction of the Constitution. [Citations and internal quotations omitted.] It is thus unnecessary for petitioner, in asserting his constitutional right to a speedy trial, to rely on specific statutory provisions. [Citation omitted.]

(Sykes v. Superior Court, supra, 9 Cal.3d at p. 88-89.)

Section 1382 provides in relevant part:

> (a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases:
>
> (2) In a felony case . . . to be tried again following a mistrial . . . within 60 days after the mistrial has been declared. . . .

Thus, it is evident that Judge Mullin denied appellant his constitutional right to speedy trial on the torture-murder special circumstance when he permitted prosecutor Rico to begin presenting improper argument and inadmissible evidence of torture-murder 15 months after the mistrial had been declared and over eight months after the special circumstance was stricken.

F. Judge Mullin Also Violated Appellant's Constitutional Rights When He Instructed the Jury That they Were Free to Determine Whether Appellant Committed a Deliberate and Premeditated Murder

Appellant's guilt phase jury found him guilty of first degree murder but did not indicate whether the murder was deliberate and premeditated, or simply based on a felony murder theory. During the second penalty trial, Judge Mullin instructed the jury as follows:

> The juries that heard the guilt portion of the trial determined that Mr. Travis and Mr. Silveria were each guilty of murder in the first degree and that the special circumstances of murder in the course of burglary and in the course of robbery were true.
>
> Those juries were not asked to and did not state in their verdicts upon which theory they found the murder to be in the first degree. There is no way to know whether the prior juries found the defendants guilty of first degree murder on the same theory or on different theories, nor is it possible to know if either or both juries found the murder to be premeditated or intentional on the part of either or both defendants.

> It is not necessary that any or all of you make a determination as to which theory the defendants are guilty of first degree murder. *However, such a determination can be made by any or all of you and considered as a circumstance of the crime under Factor (a). You are free to make that determination for yourselves.*

(CT 22:5380; RT 276:32979. Italics added.)

Judge Mullin erred when he instructed the jury that they could make such a determination. A charge of first degree murder in a capital case can only be tried in the guilt phase of the trial, and must be proved beyond a reasonable doubt to a unanimous jury. (See section 190.1, section 1096; In re Winship, supra, 397 U.S. 358; People v. Collins, supra, 17 Cal.3d at p. 693.)

Section 190.1 provides in relevant part:

> A case in which the death penalty may be imposed . . . shall be tried in separate phases as follows:
>
> (a) *The question of defendant's guilt shall be first determined.* If the trier of fact finds the defendant guilty of first degree murder, it shall *at the same time* determine the truth of all special circumstances charged. . . .

Section 1096 provides in relevant part:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his . . . guilt is satisfactorily shown, he . . . is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him . . . guilty beyond a reasonable doubt.

In re Winship, supra, 397 U.S. at p. 364 , the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (See also People v. Collins, supra, 17 Cal.3d at p. 693 [among the

essential elements of the right to trial by jury are the requirements that a jury in a felony prosecution consists of 12 persons and that its verdict be unanimous].)

Certainly appellant's second penalty phase jury could have properly considered the fact that the first jury convicted him of first degree felony murder since prosecutor Rico clearly proved beyond a reasonable doubt to a unanimous jury that the murder was committed during a burglary and robbery.

However, nothing in the record shows that Rico proved beyond a reasonable doubt, to a unanimous jury, that appellant committed a deliberate and premeditated murder. In fact, evidence demonstrated that appellant opposed the plan to murder Mr. Madden. Travis testified that appellant said, "no way" or "no" when Travis said Mr. Madden had to be killed. (RT 266:31754-31756; RT 269:32259-32261; RT 270:32418-32419.) Appellant also testified that he said, "no way" and argued against killing Mr. Madden. (ACT 10:2461-2484, 2511-2516.) Appellant also knew that they had brought a can of gasoline to LeeWards because someone had suggested that they burn the store with Mr. Madden inside it. Appellant, nevertheless, told Rackley to leave the can outside because they would not need it. Appellant also told Spencer to slash the tire on Madden's truck so Madden could not go for help after the robbery. (ACT 10:2491-2496.) During the robbery, appellant also tried to prevent the murder by urging the other defendants to leave before Travis told Spencer to kill him. (RT 266:31776, 270:32422-32426.) Appellant admitted that he lacked the ability to resist the pressure exerted by Travis that he also stab Mr. Madden: Travis held out the knife and said, "Here, it's your turn" or 'here.'" Appellant said, "No." Mr. Madden was unconscious at that point seated in a chair slumped over. Appellant saw blood all around his chest and neck. Appellant said, "No" when Travis held out the

knife. Travis said, "yes" and they went back and forth. Appellant finally took the knife and stabbed Mr. Madden one time in the rib area. Appellant then gave the knife back to Travis. (ACT 10:252523-2527.) Appellant testified that he stabbed Madden because he felt like they were not going to go anywhere until he did. Appellant further testified that he did not believe he "had the moral or emotional strength to do anything but that." (ACT 10:2527.)

Judge Mullin, therefore, erred when he instructed the second penalty phase jury that they were free to determine whether appellant committed a deliberate and premeditated murder in a phase of the trial where the prosecutor had no burden of proof and unanimity was not required, then consider such a finding as a circumstance of the crime under factor (a).

Under the judge's erroneous instruction, one or all of the second penalty phase jurors could have improperly concluded that appellant committed a deliberate and premeditated murder by a lesser standard, or no standard at all; then sentenced him to death since such a murder increased his culpability.

G. In Sum, Judge Mullin's Numerous Errors Violated Appellant's State Rights and His Federal Constitutional Rights

It is plain that Judge Mullin denied appellant the rights afforded by sections 190.1 [if jury finds defendant guilty of first degree murder, it "shall at the same time" determine the truth of all special circumstances charged]; 190.3 [jury to consider any special circumstance found to be true "pursuant to section 190.1"], 190.4(a) [the truth of the special circumstances shall be made by the jury on the evidence presented at trial]; and People v. Haskett, supra, 30 Cal.3d 841, 866 [prosecution has a duty at the penalty phase to refrain from attacking acquittals or retrying charges on which the jury could not agree in the guilt phase].

Section 190.1 requires that a capital case must be tried in separate phases. Thus, the jury must determine the defendant's guilt of the first degree murder charge and the truth of the alleged special circumstances "at the same time" during the guilt phase of the trial. The case proceeds to the penalty phase only if the prosecutor proves the defendant guilty of first degree murder and the truth of at least one special circumstance beyond a reasonable doubt by a unanimous jury. Moreover, where, as in the present case, the jury deadlocks on a special circumstance and the court declares a mistrial as to that allegation, any retrial of the special circumstance must occur before the proceeding to the penalty phase of the trial. (See section 190.4 [if the jury finds that any one or more of the charged special circumstances is true, "there shall be a separate penalty hearing].)

Judge Mullin violated appellant's federal right to due process when he failed to comply with the mandates of the above state law. His failure permitted prosecutor Rico to relitigate the lying-in-wait and torture-murder special circumstances in the penalty phase where Rico bore no burden of proof and jury unanimity was not required in order to convince the jury that these extremely prejudicial allegations were true. (See In re Winship, supra, 397 U.S. at p. 364 [Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged;" People v. Collins, supra, 17 Cal.3d at p. 693 [among the essential elements of the right to trial by jury are the requirements that a jury in a felony prosecution consists of 12 persons and that its verdict be unanimous].)

Moreover, Judge Mullin's errors arbitrarily deprived appellant of a his state-created liberty interest in a sentencing determination based on the proper application of the California Penal Code in violation of federal due process.

(Hicks v. Oklahoma (1980) 447 U.S. 343 [Where a State has provided for the imposition of criminal punishment in the discretion of the jury, defendant's interest in the exercise of that discretion is not merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate liberty interest that the Fourteenth Amendment preserves against arbitrary deprivation by the State]; see also Vitek v. Jones (1980) 445 U.S. 480, 488-489 [violation of state law implicates a liberty interest protected by the Fourteenth Amendment's due process clause].)

Judge Mullin also violated appellant's right to a speedy trial with regard to the torture-murder special circumstance. (See Sykes v. Superior Court, supra, 9 Cal.3d 83; Lopfer v. North Carolina, supra, 386 U.S. at p. 223; Article I, section 13, of the California Constitution.)

Furthermore, Judge Mullin violated appellant's due process right to a fair trial during the second penalty phase when he allowed prosecutor Rico to retry whether appellant committed a deliberate and premeditated murder. Once again Rico bore no burden of proof and jury unanimity was not required. Judge Mullin essentially circumvented the constitutional mandate applicable to guilt phase law, namely that the State must timely prove beyond a reasonable doubt, to a unanimous jury that: (1) the murder was deliberate and premeditated; and (2) any special circumstance allegations are true. (See sections 190.1, 190.3, 190.4, 1096; In re Winship , supra, 397 U.S. at p. 364; People v. Collins, supra, 17 Cal.3d at p. 693.)

In addition, all of Judge Mullin's errors deprived appellant of his right to a reliable death verdict in violation of the Eighth Amendment. (Woodson v. North Carolina (1976) 428 U.S. 280.) How can a death verdict be reliable where the trial judge: (1) violated the double jeopardy clause by allowing the prosecutor to present argument in the second penalty phase of a lying-in-wait

special circumstance which had been found untrue in the guilt phase; (2) allowed the prosecutor to re-try the torture-murder special circumstance in the second penalty phase where he bore no burden of proof, and which began over 15 months after a mistrial had been declared; and (3) eliminated the requirement that the prosecutor prove guilt phase issues, including whether the murder was deliberate and premeditated, beyond a reasonable doubt to a unanimous jury?[12]

This Court should strike appellant's death sentence because the State cannot prove beyond a reasonable doubt that the Judge Mullin's errors did not contribute to the verdict obtained. (Chapman v. California, supra, 386 U.S. 18.)

12

The prejudice resulting from all of Judge Mullin's errors is addressed in Argument XIV, post, at pages 382-390.

II

THE TRIAL JUDGE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN HE: (1) REFUSED TO ALLOW APPELLANT TO PLEAD FOR MERCY EVEN THOUGH SUCH PLEA WOULD BE BASED ON MITIGATING EVIDENCE; (2) INSTRUCTED JURORS THAT THEY MUST NOT BE INFLUENCED BY PITY FOR APPELLANT; (3) UNFAIRLY ALLOWED THE PROSECUTOR TO ARGUE FOR RETRIBUTION; AND (4) INSTRUCTED JURORS TO REACH A JUST VERDICT REGARDLESS OF THE CONSEQUENCES

A. Judge Mullin Refused to Allow Appellant to Plead for Mercy Even Though Such Plea Would Be Based On Mitigating Evidence Appellant Presented at Trial

On November 12, 1996, before selection of the second penalty phase jury, defense counsel Braun moved for permission to plead for mercy in his summation to jury. (CT 17:4246-4251.) On November 21, 1996, he again argued that it was proper to ask for mercy and that the jury was required to consider mercy in making its penalty decision. (RT 200:22921.) He further argued that California law unquestionably allows the jury to consider sympathy for appellant based on relevant, mitigating evidence. Braun also explained that sympathy, standing alone, was meaningless and unless he was permitted to argue from that premise (jury felt sympathy) to the conclusion (jury should exercise mercy), the concept of sympathy becomes useless to appellant. (CT 17:4249; RT 200:22922.)

Stated plainly, it made no sense to allow the jury to *feel* sympathy for appellant based on his mitigating evidence but prevent defense counsel from asking the jury to *give effect* to that sympathy and evidence by according mercy to appellant and imposing a sentence less than death. (RT 200:22922, RT 200:22945-22954.)

Braun also argued that denying appellant a plea for mercy would violate appellant's rights under the Fifth, Eighth and Fourteenth Amendments. (Ibid.)

When Braun again explained that his request for mercy would be based on mitigating evidence, Judge Mullin asked:

> So the legislature has given a godlike quality to the Governor and the Supreme Court has given that same godlike quality to the jury? . . . Granting mercy is a God quality.

(RT 200:22945-22950.)[13]

13

Judge Mullin apparently relied on language in People v. Benson (1990) 52 Cal.3d 754. In Benson, the defendant argued on appeal that the trial court erred when it refused to *instruct* the jury that it could "consider pity, sympathy, *or mercy* for the defendant" in deciding the appropriate penalty. He contended that the law "grants the jury authority to choose life over death *simply because the former is desirable and the latter is not.*" (Id. at p. 808, italics added.) This Court disagreed stating, "Neither statute nor Constitution gives the jury the right to exercise what is essentially godlike power." It also stated that neither the 1978 death penalty law nor the Eighth Amendment "authorize imposition of punishment that is *unduly* lenient." (Ibid, italics added.)

However, Judge Mullin's reliance on Benson is misplaced. Benson essentially argued that the jury had authority to grant mercy even where it is untethered to the evidence "simply because" life is desirable and death is not. This Court held that the law does not authorize punishment that is "unduly" lenient, that is, granting mercy untethered to the evidence would result in punishment that was *unduly* lenient and is, therefore, impermissible. (People v. Griffin (2004) 33 Cal.4th 536, 592, fn. 26.) But the authority to dispense mercy *in response to the mitigating evidence presented* is no less potent than the jury's authority to impose death if it determines that aggravating evidence substantially outweighs mitigating evidence and concludes that death is the appropriate punishment. Hence, Benson does not support Judge Mullin's refusal to allow Braun to plead for mercy since Braun made clear that he would connect this plea to the evidence. Moreover, Benson involved the refusal to give a mercy *instruction*, not the refusal to allow an oral plea for mercy during penalty phase closing argument.

Braun disagreed that mercy is solely a godlike quality. Rather, it is also a human quality within the authority of a jury to exercise so long as it is based on mitigating evidence presented at trial. (RT 200:22951.) His efforts proved futile. (RT 200:22945-22954.)

On December 2, 1996, Judge Mullin formally denied Braun's request stating in relevant part:

> The idea of mercy falls, if at all, under factor (k) of Penal Code section 190.3. . . . Mercy is not a circumstance which . . . extenuates the gravity of the crime. It is forgiveness and forbearance of warranted punishment. The jury's job is not to forgive. The jury's job is to punish with either death or life without parole.
>
> The Court will instruct the jury using CALJIC 8.85. There the jury is told to consider all of the evidence and take into account Factors (a) through (k). Under factor (k), the jury should *consider* "any sympathetic or other aspect of the defendant's character or record that the defense offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.
>
> There . . . was no evidence of mercy presented. Mercy is not a sympathetic or other aspect of the defendant's character or record. There is sympathetic evidence and the jury should *consider* that evidence. The defendant's upbringing, background and life experiences, good and bad, are to be *considered* when the evidence of them is presented. The jury can only *consider* factors (a) through (k) if there is evidence presented to make them relevant.
>
> The Court will also instruct the jury using 8.88. There the jury is told, "in weighing the various circumstances you must determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances," "Mercy" is not mentioned. Again the jury's decision is to be

based upon the relevant evidence presented. There is no evidence of mercy.

(RT 202:23126-23130. Italics added.)

Judge Mullin also cited California v. Brown (1987) 479 U.S. 538, stating that to allow the defense to argue mercy would allow the jury to engage in the exact type of decision-making the United States Supreme Court condemned in People v. Brown (1985) 40 Cal.3d 512. He also cited People v. McPeters (1992) 2 Cal.4th 1148, stating that this case followed up on Brown by holding that to allow the idea of mercy is misleading and its "unadorned" use implies an arbitrary or capricious exercise of power rather than reasoned discretion based on the facts. Judge Mullin further stated that although this Court has previously observed that there was nothing in the cases that suggests that affording mercy to a defendant was unconstitutional, "there is nothing in the decisions that suggests that such a decision is authorized by the Constitution."[14] (RT 202:23127-23129.) Judge Mullin concluded:

> For these reasons counsel will not be allowed to argue mercy, or even use the word "mercy." And this extends to the district attorney in his argument. He's not allowed to argue anything about the lack of mercy the defendants showed the victim.

14

In California v. Brown, supra, 479 U.S. 538, 542, the Supreme Court held that an instruction given to jurors that they "must not be swayed by *mere* sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital trial did not violate the Eighth and Fourteenth Amendments because a reasonable juror would have interpreted that instruction as a "directive to ignore *only the sort of sympathy that would be totally divorced from the evidence* adduced during the penalty phase." (Italics added.) Thus, Brown and McPeters, like Benson, do not support the trial judge in this case since appellant's counsel expressly informed Judge Mullin that he intended to base his argument on the mitigating evidence actually presented to the jury. (RT 200:22945-22954.)

> Further, counsel are ordered to instruct their witnesses not to use the term either.

(See CT 17:4357-4358; RT 202:23130.)

Judge Mullin is mistaken. Braun was not going to ask the jury to "forgive[] or forbear[]" warranted punishment as asserted by the judge. Rather, Braun wanted to ask the jury to have mercy on appellant based on his mitigating evidence by imposing, in place of death, a punishment that would require appellant's removal from society for the rest of his life.

Moreover, Judge Mullin failed to understand that a plea for mercy based on the mitigating evidence did *not* involve an "unadorned" use of mercy. Such a plea, therefore, would not call for an arbitrary or capricious exercise of power. Rather, if granted, it would be the result of normative, moral evaluation of the evidence and the exercise of reasoned discretion *based on the facts*.

Appellant recognizes that under California law, it is well-settled that a trial judge has no duty to *instruct* the jury that it can consider mercy in determining penalty. (People v. Lucero (2000) 23 Cal.4th 692, 725; People v. Griffin, supra, 33 Cal.4th at p. 590; People v. Livaditus (1992) 2 Cal.4th 759, 781 ["we have repeatedly held that the trial court is not required to instruct on mercy]; People v. Champion (1995) 3 Cal.4th 41, 163 [no duty to instruct jury to consider sympathy, compassion or mercy.]

However, this Court has often made clear that a trial court should allow *argument* on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy when deciding a capital defendant's appropriate penalty. (See People v. Jackson (2009) 45 Cal.4th 662, 692; People v. Caro (1988) 46 Cal.3d 1035, 1067; People v. Andrews (1989) 49 Cal.3d 200, 227-228; People v. Robertson (1989) 48 Cal.3d 18, 52-57; People

v. Ramirez (1990) 50 Cal.3d 1158 [jury retained the authority to impose LWOP if they concluded on the basis of "pity, sympathy or mercy" for defendant that death was not the appropriate punishment]; People v. Wright (1990) 52 Cal.3d 367, 442-443 [Jury asked if mercy was a mitigating circumstance. Held: "'Sympathy is not itself a mitigating factor. . . recognition that a jury's exercise of sentencing discretion in a capital case may be influenced by a sympathetic response to mitigating evidence is entirely consistent with that observation. The jury is permitted to consider mitigating evidence relating to defendant's character and background precisely because the evidence may arouse sympathy or compassion for the defendant. (People v. Lanphear (1984) 36 Cal.3d 163, 166 . . . .)' While the trial court perhaps could have been more explicit in instructing the jury that *mercy was a permissible response* to defendant's mitigating evidence, the trial court's reply was adequate and not misleading." The Wright court also noted that the defense had argued that the jury could consider mercy]; People v. Berryman (1993) 6 Cal.4th 1048, 1098 [reasonable juror would have understood and employed the instructions actually given to allow him or her to consider and give effect to pity, sympathy and mercy to the extent he deemed it appropriate in this case-and indeed required him to do so"]; In re Lucas (2004) 33 Cal.4th 682, 735 [A significant potential exists that evidence of a childhood of deprivation and abuse "would produce sympathy and compassion in members of the jury and lead one or more to a more merciful decision."] See also Penry v. Lynaugh (1989) 492 U.S. 392, 326-327 ["there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by the defendant"]; and Brewer v. Quartermain (2007) 550 U.S. 286, 295 [the mitigating evidence presented may have served as a

basis for mercy even if the jury decided that the murder was committed deliberately and the [defendant] posed a continuing threat].)

Moreover, Judge Mullin expressly stated, "there was no evidence of mercy presented. Mercy is not a sympathetic or other aspect of the defendant's character or record." (RT 202:23127.) It is therefore evident that the judge did not direct Braun to refer instead to a synonym of "mercy" such as "pity," or "compassion." (Cf. People v. Ervine (2009) 47 Cal.4th 745, 802.)

Furthermore, this Court has often emphasized that the jury's "sentencing function is inherently normative [citation] and therefore the weight or importance to be assigned to any particular factor or item of evidence involves a moral judgment to be made by each juror individually." (People v. Crandell (1988) 46 Cal.3d 833, 882-883.)

In the present case, appellant presented a substantial amount of mitigating evidence for the jury to weigh in making its decision. However, Judge Mullin's refusal to allow Braun to ask the jury to have mercy on appellant based on that evidence denied the jury "a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its decision." (Penry v. Lynaugh, supra, 492 U.S. at p. 328.)

How can a judge of an American court believe that our law does not permit a citizen of the United States to ask his peers for mercy based on his mitigating evidence? Put simply, Judge Mullin was wrong and committed grave error when he refused to allow appellant to ask his jury for mercy.

In addition, prosecutor Rico violated Judge Mullin's "no mention of mercy" order when he told the jury during his opening statement Mr. Madden was "mercilessly" bound with duct tape. (RT 236:27443.) Consequently, Braun moved for mistrial or, in the alternative, to be allowed to argue mercy to the jury. (RT 236:27478-27479.) Judge Mullin denied both motions even

though he agreed that Rico had violated the earlier order that neither side was to refer to the term "mercy" or "lack of mercy" when addressing the jury. (CT 18:4649; RT 236:27479.) On April 23, 1997, Judge Mullin erred again when he denied Braun's motion for reconsideration. (RT 275:32954-32955.)

Moreover, as explained below, the prejudicial effect of this "no mercy" error was exacerbated by yet another error which occurred when Judge Mullin expressly instructed jurors that they must not allow pity for appellant to influence their penalty decision.

B. Judge Mullin Also Erred When He Instructed the Second Penalty Phase Jury With a Modified *Guilt* Phase Instruction Which Instructed Them That They Must Not be Influenced by Pity for Appellant

Beginning December 6, 1996, during selection of the *second* penalty phase jury and after Braun's initial requests to be allowed to plead for mercy was denied, Judge Mullin inexplicably instructed prospective jurors with a modified version of guilt phase instruction CALJIC No. 1.00 as follows:

> Now, a jury instruction is the law that the jury must follow in a case, even though they may not agree with it. . . . During the selection process I do read a couple of jury instructions, because they're - - you need to get familiar with a couple of points of law during the jury selection process. So will read a couple to you at this time. * * *
>
> *You must accept and follow the law as I state it to you*, whether or not you agree with the law. *If anything concerning the law said by the attorneys in their statements or arguments* or at any other time during the trial *conflicts with my instructions on the law, you must follow my instructions.*
>
> *You must not be influenced by pity for a defendant* ***or*** by prejudice against him. You must not be biased against the defendant because he has been arrested, charged with a crime or brought to trial. You must not be influenced by mere sentiment,

> conjecture, prejudice, public opinion or public feeling. Both the defendants and the People have a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict *regardless of the consequences*.

(RT 206:23472-23474. See also RT 211:23994; 211:24021, italics added.)

Judge Mullin did not instruct the first penalty phase jury that deadlocked on penalty that they could not be influenced by pity for appellant.

Braun objected that it was improper to read this instruction in the penalty phase of a trial. He further requested Judge Mullin to: (1) inform these prospective jurors that he had incorrectly instructed them that they must not have pity on appellant; (2) admonish them to disregard this instruction; and (3) refrain from giving this instruction to future panels of prospective jurors. (RT 206:23487; People v. Easley (1983) 34 Cal.3d 858, 874-880.)

Judge Mullin replied:

> That's denied. It is a proper instruction the way the court read it. They can't be influenced for [sic] pity for the defendant because he's been arrested, charged with a crime or brought to trial. They can't be prejudiced against him. It's "sympathy," that I edited out of it, that's a proper instruction.

(RT 206:23487-23488.)

Judge Mullin's reply is incredible. In truth, he expressly instructed prospective jurors that they "must not be influenced by pity for defendant *or* by prejudice against him." (RT 206:23474, 211:23994, 211:24021.) It was only in the next sentence that they were instructed that they "must not be *biased against* defendant *because he had been arrested, charged with a crime or brought to trial.*" (Ibid. Italics added.) Indeed, he continued to so instruct prospective jurors over defense objection. (RT 211:23994; 211:24021.)

The instructions given the jury were simple. Prospective jurors (many of which actually served on the jury) were first instructed not to be influenced by pity for appellant. Next, they were instructed not to be influenced by prejudice against him. Then, they further were instructed not to be *biased* against him *because* he had been arrested, charged with a crime or brought to trial.

In addition, it is clear that, unlike the Brown case discussed earlier, Judge Mullin did not instruct prospective jurors that they must not be influenced by "*mere*" pity, i.e., pity "not rooted" in the evidence. He clearly informed them that they could not be influenced by *any* pity for appellant.

Under these circumstances, no reasonable juror would have interpreted the "you must not be influenced by pity for a defendant" directive as an admonition to ignore only emotional responses "not rooted" to the evidence presented at trial. (See California v. Brown, supra, 478 U.S. at pp. 541-542 [in considering instructional error, the question is what a reasonable juror could have understood the charge to mean]; Francis v. Franklin (1985) 471 U.S. 307, 315-316 [to determine how a reasonable juror could interpret an instruction, we 'must focus initially on the specific language challenged. If the specific instruction fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law']. See also Sandstrom v. Montana (1979) 442 U.S. 510, 516-517.)

Rather, a reasonable juror would have understood Judge Mullin's instruction to mean what it plainly stated. Jurors must not be influenced by pity for appellant even if it were tethered to the evidence. Consequently, the judge prevented the jury from being influenced by any pity for appellant even

though Braun made clear that he would base his plea for mercy on the mitigating evidence actually presented during this second penalty phase.[15]

Braun made another attempt to correct Judge Mullin's error but the judge refused to reconsider his ruling. (RT 206:23520.)

Over Braun's additional objections, Judge Mullin continued to instruct each new panel of prospective jurors that they must "not be influenced by pity for a defendant" but sometimes added "or by prejudice or bias against him because he has been arrested, charged with a crime or brought to trial." (RT 206:23526, 208:23732, 209:23809, 209:23841.)

As stated above, however, no reasonable juror would logically interpret the phrase, "you must not be influenced by pity for a defendant" to mean that the juror should not be influenced by pity for a defendant *because* he has been arrested, charged with a crime or brought to trial.

Moreover, in these modern times, no reasonable juror would feel pity for a defendant simply because he has been arrested, charged with a capital crime, and brought to trial. Indeed, CALJIC No. 1.00 recognizes that, rather than pity, many misguided jurors would likely be prejudiced or biased against a defendant for these reasons alone. This is the reason this instruction expressly tells jurors that they must not be biased against a defendant because he has been arrested, charged with a crime or brought to trial.

Braun again attempted to convince Judge Mullin that it was error to continue to give a modified CALJIC No. 1.00 in the penalty phase. He also argued that instead of giving modified CALJIC No. 1.00, the judge should

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15

Jurors in the first penalty phase, unhindered by a "no pity for appellant" instruction, understood that they could feel pity for him if based on his evidence. (See RT 139:12879-12881; 176:17590-17608; 178:17974-17978.)

give CALJIC No. 8.84.1. (RT 206:23538.) Judge Mullin replied, "The Court has ruled. That's the end of it." (RT 206:23538-23539.)

On December 18, 1996, days after Judge Mullin had claimed that he was instructing prospective jurors not to have pity for appellant because he had been arrested, charged or brought to trial, he again expressly instructed prospective jurors from Panels J, K and L as follows:

> *You must not be influenced by pity for a defendant* **or** by prejudice against him. *You must not be biased against a defendant because he has been arrested, charged with a crime or brought to trial.*

(RT 211:23994; 211:24021. Italics added.)

Several of the prospective jurors who heard Judge Mullin's "no pity for appellant" instruction actually served on the jury. **Juror 6** aka J-35 (RT 226:26573-589), **Juror 7** aka J-34 (RT 226:26589-597), **Juror 10** aka J-69 (RT 228:26800-810), and **Juror 12** aka J-78 (RT 228:26866-884) were taken from Panel J. **Juror 8** aka K-65 (RT 229:27023-041) and **Juror 11** aka K-12 (RT 228:26915-924) were taken from Panel K. **Juror 2** aka L-74 (RT 27155-170) was taken from Panel L. **Alternate Juror 3** aka J-70 and **Alternate Juror 4** aka J-62 were taken from Panel J.

Appellant was entitled to a unanimous verdict reached by a properly instructed jury. (See Parker v. Gladden (1966) 385 U.S. 363, 366 [defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"].) This right was denied him if only one of these several jurors was improperly influenced by Judge Mullin's unconstitutional instruction.

Judge Mullin, as explained below, continued to make erroneous rulings despite Braun's objections.

C. Judge Mullin Also Refused to Instruct the Jury With CALJIC No. 8.84.1 Even Though This Instruction Was Expressly Formulated For the Penalty Phase

Later, on April 28, 1997, prior to opening arguments, Judge Mullin gave additional instructions to the jury including a hybrid instruction set forth below which combined parts of CALJIC No. 1.00 and CALJIC No. 8.84.1.

Ladies and Gentlemen of the Jury:

> You have heard all the evidence and now it my duty to instruct you on the law that applies to this penalty trial. The law requires that I read the instructions to you, although you will have these instructions in written form in the jury room to refer to during your deliberations.
>
> You have two duties to perform. First, you must determine what facts have been proved from the evidence received at trial and not from any other source. A "fact" is something that is proved directly or circumstantially by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict.
>
> You must accept and follow the law as I state it to you, regardless of whether you agree with the law. *If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.*
>
> You must not be influenced by conjecture, or by bias or prejudice against a defendant, or swayed by any public opinion or public feelings. Both the People and each defendant have a right to expect that you will conscientiously consider all the evidence, follow the law and reach a just verdict.

(RT 276:32965-32966. Italics added.)

In contrast, CALJIC No. 8.84.1 provides in relevant part:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. *Disregard all other instructions given you in other phases of this trial.*
>
> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

The Use Note for CALJIC No. 8.84.1 states, "This instruction is to be used in lieu of CALJIC 1.00, at the penalty trial." Thus, Judge Mullin should have understood that he should use CALJIC No. 8.84.1 as written, rather than incorporating language from CALJIC No. 1.00.

Moreover, CALJIC No. 8.84.1 does *not* instruct the jury that it cannot be influenced by pity for a defendant. Thus, Judge Mullin should have understood that the "no pity" language of his modified CALJIC No. 1.00 was improper in the penalty phase.

Furthermore, because the modified instruction given the jury (unlike CALJIC No. 8.84.1) failed to inform them that they must "[d]isregard all other instructions given to you in other phases of the trial," at least seven jurors remained under the mistaken belief that Judge Mullin's earlier "no pity" instruction given during voir dire was still in effect and that they "must not be influenced by pity" for appellant despite his mitigating evidence.

D. Judge Mullin Erred Again When He Permitted the Prosecutor to Argue for Retribution

After erroneously refusing to allow appellant to plead for mercy and ask the jury to spare his life, and instructing jurors that they could not feel pity for him, Judge Mullin blatantly displayed the depth of the unfairness and uneven treatment he accorded appellant during this trial when he allowed prosecutor Rico to ask the jury for retribution by imposing death.

Prosecutor Rico argued:

> The instinct for just retribution is part of the nature of every human being . . . Where certain crimes are concerned, and this is definitely one of them, *retribution is not a forbidden consideration or one inconsistent with society's respect for the very dignity of man and humanity.* The decision that capital punishment may be the appropriate action in an extreme case, which I submit this is, is the expression of the community's belief that certain crimes are so grievous an affront to humanity that the only appropriate response must be the death penalty. . . *Like it or not, ladies and gentlemen, retribution is still a part of being human and being a human being.* I submit that . . . when they chose to take Jim Madden's life that night they forfeited their own.

(RT 279:33420, italics added.)

Appellant previously filed a motion to prevent prosecutor Rico from arguing irrelevant and improper concepts to the jury including asking the jury for retribution against appellant. (CT 17:4367-4375.) Appellant argued that if Judge Mullin were correct in excluding an argument for mercy because mercy was not listed as a mitigating factor in section 190.3, then prosecutor Rico ought to be bound by this reasoning and precluded from arguing for retribution. (CT 17:4369.)

Judge Mullin, however, refused to acknowledge the logic and fairness inherent in appellant's argument and, incredibly, permitted Rico to ask the jury for retribution.

E. Judge Mullin Erred Again When He Instructed Jurors That They Must Reach A Just Verdict Regardless of the Consequences

Judge Mullin erred again when he instructed the jury as follows:

> Both the defendants and the People have a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict *regardless of the consequences*.

(RT 206:23472-23474. See also RT 211:23994; 211:24021, italics added.)

In People v. Ray (1996) 13 Cal.4th 313, this Court stated:

> We have repeatedly held . . . that language instructing the jury to disregard the consequences of its verdict is inappropriate and should not be given at the penalty phase of a capital trial. [Citations.]
>
> Our disapproval of the instruction lay in its potential to diminish the jury's sense of responsibility for the penalty decision . . . since the precise issue before the jury–whether the penalty shall be death or life imprisonment without possibility of parole–is the consequence of its verdict. [Citation.]

(People v. Ray, supra, 13 Cal.4th at pp. 353-354; See also Caldwell v. Mississippi (1985) 472 U.S. 320, 328-330.)

This error, like the others, served only to mislead the jury as to the nature and gravity of its sentencing responsibility. (See also Argument X, post, at pp. 228-237, regarding additional Caldwell error.)

F. Judge Mullin's Errors Greatly Diminished The Apprising Effect of the Sympathy Language of CALJIC Nos. 8.85 and 8.88

It is true that appellant's jury was instructed with the sympathy language of CALJIC Nos. 8.85 and 8.88. (RT 276:32978; RT 276:32988.) Furthermore, appellant recognizes that this Court has held that such language could not leave a jury with any ambiguity as to its power and duty to act on such considerations and is often sufficient to apprise the jury of its authority to impose a more merciful sentence, so long as it is based on the evidence. (See e.g., People v. Caro, supra, 46 Cal.3d 1035.)

However, the present case is different than Caro and similar cases. Consequently, these instructions failed to cure the harm caused by Judge Mullin's errors. That is, the apprising effect normally present in the sympathy language of CALJIC 8.85 and 8.88 was negated in this case in at least four ways:

First, as stated previously, Judge Mullin expressly forbade defense counsel from asking the jury to grant mercy to appellant even though such plea would have been based on the substantial mitigating evidence he presented. (Cf. People v. Caro, supra, 46 Cal.3d at p. 1067.) Consequently, the jury could have concluded that mercy was not a viable option for its consideration because Braun did not request it during his summation.

Second, neither Judge Mullin, nor prosecutor Rico, believed that the jury had the authority to exercise mercy even if appellant's plea for mercy was based on the evidence. In fact, Rico strongly, albeit incorrectly, argued that the jury lacked power to exercise mercy for appellant, and Judge Mullin agreed. (RT 200:22928-22950, 202:23124-23130.) Thus, if the judge and prosecutor held such a strong, albeit incorrect, view of the jury's alleged lack

of power to have mercy on appellant based on the evidence, how could the jurors have understood that they could do so?

Third, as also stated earlier, Judge Mullin expressly instructed prospective jurors, more than half of which served on the jury, that they: (1) must follow the law given them even if they disagreed with it, and even if counsel argued contrary to the instructions; and (2) they must not be influenced by pity for appellant. (See RT 206:23474, 211:23994, 211:24021.) Thus, in light of this incorrect, mandatory directive not to be influenced by pity for appellant, reasonable jurors would have surely understood that they could not allow pity to influence their penalty decision. Other instructions that informed jurors that they should consider evidence of sympathetic aspects of appellant's character or record did not explain to jurors that they could, in turn, feel pity for appellant and exercise mercy based on that evidence. Thus, CALJIC Nos. 8.85 and 8.88 were insufficient to eliminate the prejudice resulting from the refusal to allow a plea for mercy and the "no pity" instruction.

Fourth, Judge Mullin refused to give the jury the full guidance provided by penalty phase instruction CALJIC 8.84.1, including language that informed the jury to disregard its earlier "have no pity on appellant" instruction.

At best, the sympathy language of CALJIC Nos. 8.85 and 8.88 served only to weakly contradict the defective "no pity" instruction given appellant's jury. (See Francis v. Franklin, supra, 471 U.S. at p. 322 ["[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."] See also Sandstrom v. Montana, supra, 442 U.S. at p. 526 [if possibility of misunderstanding exists, "we have no way of knowing that [appellant] was not [sentenced] on the basis of an unconstitutional instruction"].)

Moreover, nothing in the contradictory instructions given the jury made clear that one of the instructions carried more weight than the other. (Ibid) Nor did any of the instructions tell the jury that it was to distinguish between "tethered" and "untethered" pity. (California v. Brown, supra, 479 U.S. at p. 542, 549.

Consequently, appellant's jury never truly understood that it could be influenced by pity (or compassion) for appellant based on his evidence *and* exercise mercy as a result.[16] Under the circumstances of this case, no reasonable juror would have understood that he or she had the power to exercise mercy so long as it was based on the mitigating evidence. (See California v. Brown, supra, 479 U.S. 538, 542 [reasonable juror would likely interpret "mere sympathy" phrase in instruction as an admonition to ignore only emotional responses not rooted in the evidence]; Francis v. Franklin, supra, 471 U.S. at pp. 315-316; Sandstrom v. Montana , supra, 442 U.S. at pp. 516-517.)

In sum, there is no justification for any of Judge Mullin's errors. His blatantly uneven and fundamentally unfair treatment of appellant is evidenced in part by his refusal to allow Braun to ask the jury for mercy and spare appellant's life on the one hand, while allowing the prosecutor to argue for retribution and appellant's death on the other.

16

On the other hand, CALJIC No. 8.85 plainly explained to jurors that they could consider *aggravating* evidence of victim impact under 190.3(a), and CALJIC No. 8.88 plainly explained to them that they could assign to *victim impact* evidence whatever sympathetic value they deemed appropriate. Hence, the jury was permitted to assign a sympathetic value to victim impact evidence, but could not consider pity for appellant, nor exercise mercy for him, despite the great amount of mitigating evidence appellant presented.

Judge Mullin's errors also deprived appellant of his Sixth Amendment right to effective assistance of counsel and the right to present a defense (Henry v. Conde (9th Cir. 1999) 198 F.3d 734, 739, his Eight Amendment right to a reliable death verdict, and his Fourteenth Amendment right to due process and a fair trial. (See Woodson v. North Carolina (1976) 428 U.S. 280; People v. Easley, supra, 34 Cal.3d at pp. 874-879; Eddings v. Oklahoma (1982) 455 U.S. 104, 110, and Lockett v. Ohio (1978) 438 U.S. 586, 604.)

Permitting a defendant to plead for mercy based on his mitigating evidence, and ensuring that jurors fully understand that they may properly feel pity for him based on that evidence and, thus, render a sentence more merciful than death, are a "constitutionally indispensable part of the process of inflicting the penalty of death." (Woodson v. North Carolina, supra, 428 U.S. 280, 304.) However, even in cases where the defendant's mitigating evidence was sufficient to evoke pity, jurors will undoubtedly restrain this human response with fatal consequences where they are also instructed that they cannot allow *any* pity for the defendant to influence their penalty decision.

Moreover, permitting prosecutor Rico to ask the jury for retribution after preventing appellant from asking for mercy is as uneven-handed as it is reprehensible. There is no good reason for such unjust treatment. And instructing penalty phase jurors to reach a verdict regardless of the consequences only served to mislead them as to the nature and gravity of their sentencing responsibility. (Caldwell v. Mississippi, supra, 472 U.S. at pp. 328-330.)

This Court should, therefore, vacate appellant's death sentence because the State cannot prove beyond a reasonable doubt that these errors did not contribute to the verdict obtained. (Chapman v. California (1967) 381 U.S.18.

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III

THE TRIAL JUDGE VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN HE IMPROPERLY EXCLUDED MITIGATING EVIDENCE BY LIMITING THE DIRECT TESTIMONY OF APPELLANT'S PSYCHIATRIC EXPERT TO A TIME BEFORE THE CRIMES, THEN ALLOWED THE PROSECUTOR TO PRESENT AGGRAVATING EVIDENCE ON CROSS-EXAMINATION TO A TIME INCLUDING THE CRIMES

A. Background

1. First Penalty Phase

Defense psychiatric expert, Dr. Harry Kormos, testified during the first penalty phase that defense counsel Braun had given him material to review in 1993, including the confessions appellant Silveria and co-appellant Travis made to police the morning they were arrested. (RT 162:16055-16056.)

Dr. Kormos opined that appellant's relationship with Travis was very important to appellant, and that it was particularly important at the time of the crimes. (RT162:16125-161126.) Dr. Kormos further testified that around the time of the crimes, appellant and the co-defendants had formed a "pseudo-family" that was extremely important to each of its members. (RT 162:16129-16130.) They did not accept each other unconditionally and, thus, were concerned about what the other members thought of them. They also competed with each other for favors, had a rotating leadership, and felt the need to present themselves in a particular light so that the group would continue its function. (RT 162:16131-16132.)

Dr. Kormos further opined that a person who has suffered the deprivations and abuses that appellant had endured would grow up with a

defective ability to deal with negative information and with reality. Such a person would develop a coping mechanism referred to as "wishful thinking" and would simply disregard the negative information. (RT 162:16132.) Dr. Kormos explained in the following colloquy with defense counsel Braun:

> **Braun:** Did you draw any conclusions concerning Danny's [appellant] manifestation of that form of thinking with respect with what you know about the planning of the robbery and the actual murder that occurred of the victim in this case?
>
> **Dr. Kormos:** Yes.
>
> **Braun:** . . . Assume that the evidence in the case shows that in the course of the planning of this robbery Danny was present when Mr. Travis and then later Mr. Spencer discussed killing the victim prior to the robbery and that there was discussed both a stabbing of the victim by Mr. Spencer and a killing of the victim by burning down the store, and assume further that the parties had discussed the fact that the victim would likely recognize them but that no real attempts were made to disguise the identity of the participants, and assume further that at the time the robbery went forward that Danny knew that the other participants were armed with various carpenter tools and that Mr. Spencer was armed with a knife, and assume further that Danny has testified that despite these facts he did not believe at the time he went to do the robbery that his friends or himself would actually attempt to or kill the victim, is a state of mind, such as Danny described he had, consistent with the form of thinking that you've just described?
>
> **Dr. Kormos:** Yes, very definitely.
>
> **Braun:** And can you say how that's so?
>
> **Dr. Kormos:** It is my understanding that Danny did not expect his friends to carry out a murder at that time, but rather they were engaging in the kind of tough talk and posturing that he was accustomed to that they were engaging in habitually. Furthermore, I believe that he really thought that even if he were

to be identified by the victim that that would not lead to his arrest. I believe that he thought that he could just get away, go far away and nobody would find him.

Braun: All right. Now, that doesn't seem to be very realistic thinking on Danny's part, if that's what he thought. Are you saying that because of this capacity to engage in wishful thinking that that's what you believe could have occurred?

Dr. Kormos: I believe that is what occurred, and if it was not very rational, then that doesn't surprise me at all.

Braun: . . . Assume that in his confession Danny told Sergeant Keech that it was his idea that after the robbery he was going to take the proceeds, leave the area, become a drug dealer and make a new life, are thoughts like that consistent with a person who has suffered the kind of abuses and deprivations that Danny suffered as a child?

Dr. Kormos: Certainly. (RT 162:16132-16135.)

As stated previously, the first penalty phase jury deliberated on February 9, 13, 14 and 15, 1996 (about 14 hours), before deadlocking after four jurors could not agree that the death penalty was the appropriate punishment for appellant. (CT 13:3374, CT 13:3379-3380, CT 13:3382; CT 14:3442-3443; RT 181:18251-18255.)

2. <u>The Second Penalty Phase</u>

During the first penalty phase, appellant and co-appellant Travis were tried at the same time but with separate juries. However, prior to the second penalty phase, Judge Mullin denied appellant's renewed motions for separate trials, and separate juries, and ordered that appellant and Travis be tried together with one jury. (RT 200:22909-22912, RT 207:23581-23584.)

Later, during the second penalty phase, Judge Mullin, prosecutor Rico, and Travis's counsel, Leininger, claimed to be concerned that appellant's

psychiatric expert, Dr. Kormos, had considered the confessions of appellant and Travis before arriving at his conclusions regarding appellant. (RT 262:31043-31050.)

However, Braun reminded Judge Mullin that he had given Dr. Kormos copies of the confessions of both appellant and Travis several years earlier in 1993. (RT 262:31045.) Braun explained that at that time he did not know that the case would be retried in a joint trial after an order excluding references to both confessions. Braun also informed the judge that he could not proceed without presenting Dr. Kormos's testimony. (RT 262:31046-31050, 31058-31059.)

Judge Mullin told Braun, "your expert right now cannot be subject to proper cross-examination by the [prosecutor] or Mr. Leininger, and Mr. Leininger's client's constitutional rights are going to be violated." (RT 262:31048.) Braun explained that the problem was a direct result of Rico getting these two cases consolidated. Braun further argued that he was entitled to put on the expert opinion of Dr. Kormos, and if it could not be accommodated without prejudice to Travis, then appellant was entitled to a mistrial. (RT 262:31049.) Judge Mullin denied the motion. (Ibid.)

After additional discussion, and because Judge Mullin threatened to: (1) hold Braun in contempt; and (2) strike all of Dr. Kormos's testimony (RT 262:31082-31083), Braun sought to salvage his defense case by proposing to confine his direct examination of Dr. Kormos from appellant's early childhood up to appellant's 21st birthday - which occurred 37 days before the crimes. (RT 262:31050-31093.) Prosecutor Rico agreed with this proposal with the understanding that he could cross-examine Dr. Kormos about events that occurred after appellant's birthday including the date of the crimes "*if*, for example, the Aranda-Bruton problem has been lifted." (RT 262:31094-

31095.) Travis's counsel, Leininger, impliedly agreed to the stipulation stating, "I believe at this point what I have heard is a protection of Mr. Travis's constitutional rights until such time as he takes the stand." Judge Mullin accepted the stipulation. (RT 262:31094-31096 [RT 162:31091-31096 are pages of the transcript of the in camera hearing held on March 26, 1997].)

Consequently, in contrast to the first penalty phase, Judge Mullin's threats to hold Braun in contempt, and to strike all of Dr. Kormos's testimony, resulted in the exclusion of critical mitigating evidence that would have explained to the jury: (1) how the neglect, deprivation and physical and sexual abuse appellant suffered throughout his childhood affected his conduct *on the day of the crimes*; and (2) how appellant's relationship with co-appellant Travis, and the other co-defendants, affected appellant's conduct *at the time of the crimes.*

Judge Mullin's ruling also resulted in the improper exclusion of evidence that demonstrated appellant's positive development in the *six years since the crimes*. (See RT 262:31097-31100 [Kormos' testimony was limited to no later than December 22, 1990, appellant's 21st birthday].) This excluded evidence, however, would have helped the jury to reliably determine the central issue before it, i.e., the nature and depth of appellant's moral culpability and, consequently, the appropriateness of the death penalty.

B. This Exclusion of Expert Mitigating Evidence Is One of the Most Indefensible Errors the Judge Committed in This Case

Judge Mullin claimed that he imposed these limitations on Dr. Kormos's direct testimony because he was concerned for co-appellant Travis's rights. (RT 262:31043-31044.)

This is nonsense. There was simply no legitimate basis to conclude that Travis's rights would be jeopardized by this mitigating evidence.

First, Judge Mullin, prosecutor Rico, and counsel for Travis had already learned *during the first penalty phase* that Dr. Kormos had reviewed both appellant and Travis's confessions. (RT 163:16216.) Yet, they expressed no such concern for Travis's rights at that time. (Ibid.)

Second, and more importantly, they knew that co-appellant Travis had already exercised his constitutional right to confront appellant when Travis fully cross-examined him *during the first penalty phase*. (ACT 11:2875-2975, 3024-3030.) In fact, Rico actually argued that appellant's renewed severance motion should be denied because, "We do not have the Aranda-Bruton situation here that we had in the guilt phase. . . ." (RT 204:23348, proceedings of December 4, 1996.)[17]

17

Judge Mullin had previously ruled that appellant's first penalty phase testimony was admissible against appellant, and co-appellant Travis, in the second penalty phase. The admissibility of former testimony is determined by Evidence Code section 1291. That section provides in relevant part:

> (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
> * * *
> (2) The party against whom the former testimony is offered was a party to the . . . proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

Thus, Judge Mullin admitted appellant's first penalty phase testimony against appellant and Travis in the second penalty phase because appellant was unavailable and Travis had fully cross-examined him "with an interest and motive similar to that which he had" in the second penalty phase. Therefore, the judge already knew that Travis's confrontation rights had been fully exercised when he rationalized his exclusion of Dr. Kormos's testimony on this ground.

Third, as a practical matter, Travis had already been convicted of first degree murder, and two special circumstances had been found true. Hence, Travis could not have suffered any more prejudice than that resulting from his own guilty verdicts. This is also true because Judge Mullin permitted Rico to read into the record during the second penalty phase, appellant's first penalty phase testimony relating to the murder, including Travis's participation in that murder, and Travis's cross-examination of appellant. (RT 244:28482-28497; ACT 10:2517-2527.)

Fourth, Braun had assured Judge Mullin that he would not question Dr. Kormos about co-appellant Travis. (RT 262:31059.)

Fifth, Travis admitted everything that he and appellant had previously confessed to in his own testimony in the second penalty phase. (RT 266:31663, 31745-31787. See also (Parker v. Randolph (1979) 442 U.S. 62, [Admission of inter-locking confessions with proper limiting instruction conforms to requirements of the Sixth and Fourteenth Amendments.)

It is plain, therefore, that Travis's confrontation rights would simply not have been violated by Dr. Kormos's expert psychiatric testimony relating to appellant up to, and including the time of the crimes. Moreover, Travis would not have been harmed by this evidence any more than he had already been prejudiced by his own convictions and testimony. There was simply no valid reason to prevent Braun from eliciting crucial expert opinion evidence extremely relevant both to appellant's conduct at the time of the crimes, and his positive development thereafter, to show mitigation.

Once again, Judge Mullin improperly excluded evidence during the second penalty phase he had properly admitted in the first.

C. Judge Mullin Violated Appellant's Constitutional Rights When He Excluded Dr. Kormos's Testimony Relating to Appellant's Conduct Both During and After the Crimes

Judge Mullin's ruling prohibiting Braun from examining Dr.Kormos about the reasons for appellant's conduct at the time of the crimes, and his positive development after the crimes, violated appellant's Sixth Amendment right to effective assistance of counsel and his right to present a defense. (Henry v. Conde (9th Cir.1999) 198 F.3d 734, 739.)

Moreover, one of the fundamental aspects of death penalty law is that in order to attain a fair, reliable, and individualized sentencing decision the jury must be permitted to consider all relevant mitigating evidence. As stated by the United States Supreme Court: "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Lockett v. Ohio (1978) 438 U.S. 586, 604; Skipper v. South Carolina (1986) 476 U.S. 1, 4-9; Penry v. Lynaugh (1989) 492 U.S. 302, 318; Hitchcock v. Dugger (1987) 481 U.S. 393, 394-399; Eddings v. Oklahoma (1982) 455 U.S. 104; Woodson v. North Carolina (1976) 428 U.S. 280, 304.)

Indeed, "when any barrier, whether statutory, instructional, evidentiary, or otherwise (Mills v. Maryland (1988) 486 U.S. 367, 374-375) precludes a jury or any of its members (McKoy v. North Carolina [(1990)] 494 U.S. [433,] 438-443) from considering relevant mitigating evidence, there occurs federal constitutional error. . . ." (People v. Mickey (1991) 54 Cal.3d 612, 693.)

Furthermore, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to

punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." (Trop v. Dulles (1958) 356 U.S. 86, 100.) And because death in its finality is a punishment different in kind rather than degree, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in the specific case." (Woodson v. North Carolina, supra, 428 U.S. 280 at pp. 304-305.)

In Eddings v. Oklahoma, supra, 455 U.S. at pp. 113-117, the United States Supreme Court held that a state trial judge's refusal to consider the defendant's family history and mental and emotional disturbance in mitigation violated the Eighth and Fourteenth Amendments. The Court stated in relevant part:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

(Id. at pp. 113-114, first emphasis in original.)

Judge Mullin's exclusion of critical psychiatric evidence that explained: (1) how appellant's relationship with co-defendants affected his conduct at the time of the crimes; (2) how the physical and sexual abuse he endured for several years affected his conduct at the time of the crimes; and (3) appellant's positive development after the crimes, irreparably undermined the reliability of the jury's determination that appellant should die in violation of appellant's Eighth and Fourteenth Amendment rights. (Ibid.)

The exclusion of this evidence also violated appellant's due process right to a fair trial in violation of the Fourteenth Amendment. "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." (Estelle v. Williams (1976) 425 U.S. 501, 503.) And "[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process." (Irvin v. Dowd (1961) 366 U.S. 717, 722.)

Morever, as explained below, appellant's rights continued to be violated and the prejudice to appellant continued to increase when Judge Mullin unfairly permitted prosecutor Rico to present to the jury *aggravating evidence of appellant's conduct at the time of the crimes.*

D. Judge Mullin Once Again Violated Appellant's Sixth, Eighth and Fourteenth Amendment Rights When He Permitted Prosecutor Rico To Break the Stipulation and Cross-Examine Dr. Kormos About Appellant's Conduct at the Time of the Crimes

After Dr. Kormos' direct testimony was restricted to a time before the crimes, Judge Mullin ruled that prosecutor Rico could call Dr. Kormos as if on cross-examination but Ricos's questioning must be "limited to what was brought up on direct examination only." (RT 271:32557-32558.)

However, Judge Mullin once again demonstrated the depth of his unfair and uneven treatment of appellant when, despite the stipulation and the above limitation he placed on Rico's cross-examination, he permitted Rico to cross-examine Dr. Kormos about appellant's use of the stun gun *during the crimes*:

> **Prosecutor Rico:** Now you did talk to Mr. Silveria, did you not, about the circumstances of the crime that he committed?
>
> **Braun:** Excuse me Your Honor. I thought that we just got through having a bench conference on this very subject.

Rico: I don't recall what Mr. Braun is talking about. I am cross-examining him regarding what he said on direct.

Mr. Braun: Your Honor, I object that this is beyond the scope of the direct and beyond the scope of what Mr. Rico's agreement was. And I also object to the fact that Mr. Rico is forcing me to make this objection under these circumstances.

Rico: Your Honor, I'll rephrase the question, but I don't see anything objectionable with it.

The Judge: Go on to something else for a moment, would you please? If you can.

Rico: Well, I would prefer to wait. This was the area I was going to go into.

(RT 271:32571.)

Judge Mullin asked counsel to approach the bench. At the bench, Braun reminded the judge that he had just ruled that Rico was not allowed to cross-examine Dr. Kormos about what appellant said to him about the crimes and Rico violated both the stipulation and the judge's ruling. Braun also objected to having to object in front of the jury which made it seem as if he were trying to suppress what appellant had said to Dr. Kormos. (RT 271:32572.) Judge Mullin replied, "I don't want to hear about you having to object." (Ibid.)

Braun again reminded Judge Mullin that he had ruled that Rico's cross-examination could not go beyond Braun's direct examination, and his direct examination did not go beyond appellant's 21st birthday which occurred before the crimes. (RT 271:32573.) Braun also reminded the judge that he had disagreed with Rico when Rico argued that Braun and Leininger had questioned Dr. Kormos beyond the scope of the stipulation. (Ibid.)

Braun further argued that if Rico was allowed to violate the stipulation and the judge's ruling, appellant would be greatly prejudiced because had Braun known that Rico would be allowed to do this, Braun would have structured his direct examination of Dr. Kormos in an entirely different way. (RT 271:32574-32575.) Braun further stated, "Pursuant to the agreement, I deliberately excluded things that would have otherwise been important to a jury to hear concerning what Dr. Kormos's opinions were about Mr. Silveria's participation in the crime. I changed my entire approach." (RT 271:32575.) Braun moved for a mistrial, but Judge Mullin denied the motion. (RT 271:32575-32576.)

After further discussion, Judge Mullin again ruled that Rico was "limited to cross-examining Dr. Kormos only on what he was examined on by Mr. Braun and cross-examined on by Leininger." (RT 271:32577.)

However, after accepting Rico's argument that Braun had gone beyond the scope of the stipulation because Braun had asked questions which included the phrase "later on in life " (RT 271:32599, 32601-32602), Judge Mullin ruled that Rico could, in fact, cross-examine Dr. Kormos about the basis of his opinion even if they included appellant's statements about the crimes, and his life after he reached 21 years of age. (RT 271:32602.)

Thereafter, the following colloquy occurred:

> **Rico:** In formulating the opinions that you've testified about your assessment and diagnosis of Mr. Silveria would it be important to you if he lied to you about how - - about - - about aspects of how he committed the crime?
> * * *
> **Dr. Kormos:** My answer would be that it would be important to me to know whether Danny Silveria lied to me, but I can't stop there. I would also consider it important as to why he lied and how he lied. (RT 271:32641-32642.)

After much discussion and several defense objections that were overruled, the following colloquy occurred:

> **Prosecutor Rico:** Okay. The aspect I'm talking about is the use of the stun gun and in that regard this is what I wanted to ask you: What did Mr. Silveria tell you about his use of the stun gun on Jim Madden during the commission of the crime?
>
> **Braun:** I have two objections, Your Honor. One is that the asking of this question violates the previous stipulation. Second that it is irrelevant to the doctor's opinion about the formation of a diagnosis of child neglect.
>
> **Judge Mullin:** The objections are overruled.
>
> **Dr. Kormos:** Danny told me that he had used the stun gun on - - on the victim while the crime was being committed. I realize this is an awkward answer, but I'm trying to respect the guidelines that I have been given.
>
> **Prosecutor Rico:** I understand. All right. Did he tell you that he used the stun gun on the victim prior to any stabbing being carried out, or that he used while the stabbing was being carried out?
>
> **Dr. Kormos:** The latter - -
>
> **Braun:** Your Honor, I have the same objection on the same two grounds.
>
> **Judge Mullin:** The objection is overruled.
>
> **Dr. Kormos:** My answer is the latter. (RT 271:32646.)
>
> **Prosecutor Rico:** All right. Now are you aware of previous testimony that has been read in to the record by Mr. Silveria in which he indicated under oath that he had used the stun gun in some type of an effort to knock Mr. Madden out before any stabbing?

Braun: The same objection on the same two grounds.

Judge Mullin: Same ruling.

Prosecutor Rico: Are you aware of that testimony?

Dr. Kormos: Yes, I am.

(RT 271:32646-32647.)

After additional defense objections were overruled, Rico asked Dr. Kormos whether there was an inconsistency between appellant's prior testimony and the statements appellant made to him. Dr. Kormos agreed that there was an inconsistency. Rico then proceeded to ask Dr. Kormos whether this inconsistency, and the fact that deceit and manipulation are features of antisocial personality disorder, caused him to change his diagnosis of child neglect "as opposed to antisocial personality disorder." Dr. Kormos testified that his diagnosis of child neglect remained unchanged. (RT 271:32647-32648.)

At side bar, Braun argued that this testimony was irrelevant because Dr. Kormos's diagnosis was made as of the time appellant reached his 21st birthday, and before appellant testified in December 1995. Braun also argued that there was no tendency in reason to impeach Dr.Kormos's testimony as of the time appellant was 21 so the questions and answers should be stricken and the jury admonished to disregard them. Judge Mullin replied:

> Based on the Court's ruling earlier this afternoon that motion is denied. The doctor testified back in March that certain information that he received including confession, prior testimony, police reports and so on, that he reviewed all those matters, and he testified then and he testified today that he relied on those matters in forming his diagnosis.

(RT 271:32648-32649.)

Judge Mullin's blatantly unfair treatment of appellant is incredible.

First, he prevented Braun from questioning Dr. Kormos about appellant and the crimes because Dr. Kormos had relied upon the confessions, then he justified allowing Rico to cross-examine Dr. Kormos about appellant and the crimes because Dr. Kormos relied upon the confessions.

Second, as explained above, neither Dr. Kormos' review of the above-mentioned materials, nor his prior testimony, justified Judge Mullin's supposed concern that co-appellant Travis's confrontation rights were in danger. (See this Argument, ante, at pp. 137-141.) Travis's rights would simply not have been violated by Dr. Kormos's testimony relating to appellant's conduct at the time of the crimes, or after the crimes.

Third, Judge Mullin was already aware of the materials Dr. Kormos had reviewed when he initially told Rico he could not exceed the scope of Braun's direct examination.

Fourth, Judge Mullin recognized that Rico's cross-examination "goes slightly beyond the stipulation" but claimed that it was "based on what took place during direct examination by [Braun] and the cross-examination by Mr. Leininger." (RT 271:32648-32649.)

Judge Mullin's claim is absurd. There is nothing in the record of Dr. Kormos's direct examination by Braun, or his cross-examination by Leininger, that justifies the judge's decision to allow Rico to violate the stipulation and ask Dr. Kormos about appellant's conduct during the crimes when he had already prevented Braun from doing so. Indeed, the record shows that neither Braun, nor Leininger, asked Dr. Kormos any questions about the crimes, and so they fully complied with the stipulation forced upon appellant by the judge.

It is evident that Rico's motive here was to present additional torture-murder evidence through Dr. Kormos's cross-examination. That is, Rico wanted to show that appellant tortured Mr. Madden with the stun gun even though the first jury deadlocked on both the: (1) personal use of the stun gun enhancement; (2) truth of the torture-murder special circumstance; and (3) these allegations were stricken long before the second penalty phase began.

As previously stated, prosecutor Rico, himself, admitted to Judge Mullin that the torture evidence was "critical to [his] proof in [the] penalty phase against Mr. Silveria in terms of whether a death penalty is appropriate." (RT 131:12098; 130:12074, 12077.) Moreover, Judge Mullin also believed that "the stun gun [was] the main instrument of torture, if there was one, even more so than the multiple [32] stab wounds. . . ." (See RT 233:27318.)

Consequently, permitting prosecutor Rico to cross-examine Dr. Kormos about appellant's conduct *at the time of the crimes* in a completely illegal and blatantly unfair attempt to show appellant committed a torture-murder, after preventing appellant from presenting evidence directly relating to the same time period to show mitigation, violated appellant's constitutional rights. Indeed, Judge Mullin's erroneous rulings suggest that he had improperly aligned himself with Rico in seeking appellant's death sentence.[18]

In sum, Judge Mullin's unfair and uneven treatment of appellant denied appellant his Sixth Amendment right to effective assistance of counsel and to present a defense (Henry v. Conde, supra, 198 F.3d at p. 739), his Eighth and Fourteenth Amendment right to a reliable, individualized jury decision that death is the appropriate punishment (Lockett v. Ohio, supra, 438 U.S. at p. 604; Skipper v. South Carolina, supra, 476 U.S. at pp. 4-9; Penry v. Lynaugh,

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18

See Argument XII, judicial misconduct, post, at 258-332.

supra, 492 U.S. at p. 318; Hitchcock v. Dugger, supra, 481 U.S. at pp. 394-399; Eddings v. Oklahoma, supra, 455 U.S. 104; Woodson v. North Carolina, supra, 428 U.S. 280, 304; and his Fourteenth Amendment right to due process and a fair trial. (Estelle v. Williams (1976) 425 U.S. 501, 503 ["The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment"]; Irvin v. Dowd, supra, 366 U.S. at p. 722 ["[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process"].)

Because the irreversible penalty of death is qualitatively different than any other sentence, the utmost scrutiny must be employed when determining the effect the errors had on the jury's death verdict. (Woodson v. North Carolina, supra, 428 U.S. at pp. 304-305.)

Appellant's death judgment cannot withstand that scrutiny. This Court should, therefore, vacate appellant's death sentence because the State cannot prove beyond a reasonable doubt that these errors did not contribute to the verdict obtained. (Chapman v. California (1967) 381 U.S.18.

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IV

JUDGE MULLIN EXCLUDED SEVERAL ADDITIONAL ITEMS OF APPELLANT'S MITIGATING EVIDENCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. The Law

As stated previously, a fair, reliable, non-arbitrary, and individualized sentencing determination requires that the jury be permitted to consider all relevant mitigating evidence proffered by the defendant at trial. "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Lockett v. Ohio (1978) 438 U.S. 586, 604. See also Skipper v. South Carolina (1986) 476 U.S. 1, 4-9; Penry v. Lynaugh (1989) 492 U.S. 302, 318; Hitchcock v. Dugger (1987) 481 U.S. 393, 394-399; Eddings v. Oklahoma (1982) 455 U.S. 104, 113-114; Woodson v. North Carolina (1976) 428 U.S. 280, 304.) Indeed, "when any barrier, whether statutory, instructional, evidentiary, or otherwise (see Mills v. Maryland (1988) 486 U.S. 367, 374-375) precludes a jury or any of its members (McKoy v. North Carolina [(1990)] 494 U.S. [433,] 438-443) from considering relevant mitigating evidence, there occurs federal constitutional error. . . ." (People v. Mickey (1991) 54 Cal.3d 612, 693.)

B. Additional Mitigating Evidence the Jury Was Not Allowed to Consider

1. Appellant's Confession

During the guilt phase of appellant's trial, Judge Mullin permitted prosecutor Rico to introduce evidence that appellant had confessed to

participating in the murder of Jim Madden to Sergeants Ted Keech and Stewart Cusimano. (RT 108:10625-10633.) In the first penalty phase, appellant's confession was also discussed during the testimonies of Dr. Kormos (RT 162:16132-16135), and appellant. (RT 14102-14103.)

However, prior to the second penalty phase, Judge Mullin joined the cases of appellant and co-appellant Travis and informed prosecutor Rico that he could not use appellant's confession in his case-in-chief to show the circumstances of the crime . Nevertheless, because appellant had testified in the first penalty phase of the trial, but chose not to testify in the second penalty phase, Judge Mullin ruled that Rico could introduce appellant's prior penalty phase testimony in lieu of his confession to show the circumstances of the crime. (RT 200:22911-22912; 244:28488-28489.)

During the second penalty phase, prosecutor Rico objected to any attempt by appellant's counsel, Geoffrey Braun, to elicit from prosecution witness, Officer John Boyles, the fact that appellant had confessed to Sergeants Keech and Cusimano. Judge Mullin replied, "They will do so at their own peril." After Braun responded, "Well, I don't know," Judge Mullin repeated, "Do so at your own peril. Thank you." (RT 238:27721-27722.)

Judge Mullin later ruled that appellant could not introduce his confession to his participating in the murder of Mr. Madden as mitigating evidence *at any time* claiming that to do so would violate the co-appellant Travis's confrontation rights. (RT 243:28288, 28291-28292; 244:28488-28489. (See Argument III, at pp. 137-144, which shows that there was no legitimate basis for concern that Travis's rights might be jeopardized.)

Later, during a break in the reading of appellant's first penalty phase testimony, Judge Mullin reminded counsel that appellant's confession to Keech and Cusimano was inadmissible. (RT 244:28488.) At this point,

prosecutor Rico argued that the portion of appellant's prior testimony that referred to parts of appellant's confession to Keech and Cusimano should be read to the jury because Travis had the opportunity to cross-examine appellant at that time, i.e., Aranda-Bruton no longer applied to this segment of appellant's confession. (RT 244: 28490.) Rico maintained, however, that the remainder of appellant's confession was still inadmissible. (RT 244:28491-28492.)

Braun argued that the first jury heard appellant's confession during the guilt phase and heard references to it during the first penalty phase so they were able to consider it in context. However, it would be unfair to admit only the impeaching portion of appellant's confession while excluding the mitigating portion of that confession. (See RT 244:28493.) Braun further argued that if a portion of appellant's confession was admitted, then it should all be admitted under Evidence Code section 356. (Ibid.) Judge Mullin again ruled that references in appellant's prior testimony to his earlier confession to Sgts. Keech and Cusimano would not be allowed. (RT 244:28494.)

During a later hearing, Braun informed Judge Mullin that in light of his denial of appellant's motion for a separate penalty phase trial, and his refusal to admit appellant's confession, Braun was withdrawing his motion to introduce the confession. (RT 246:28526.) However, Braun requested permission to at least elicit the simple fact that appellant had indeed confessed to Sergeant Keech as early as 1991. Braun explained that: (1) this limited testimony would not violate Travis's constitutional rights; and (2) the jury was entitled to know that appellant admitted his guilt the night of his arrest rather than being left with the impression that appellant did not do so until he testified in 1995. (RT 246:28526-28527.) Judge Mullin said he would allow Braun to ask Keech whether appellant admitted his participation in the murder.

However, prosecutor Rico would then be allowed to ask Keech whether, in his opinion, appellant minimized his participation in the crime. Judge Mullin then stated, "That's as far as it goes. So that will be up to Mr. Braun if he wants to open up that area." (RT 246:28529.)

Braun later objected to this limitation on the admission of appellant's confession. He explained that Sgt. Keech had not yet interrogated the other defendants and had no evidentiary basis upon which to opine that appellant minimized his participation in the murder. Braun further argued that the evidentiary significance of appellant's confession was that it demonstrated an early acknowledgment of guilt. (RT 252:29135-29136.) Judge Mullin refused to change his ruling, stating that there was some basis in fact for Keech's opinion that appellant minimized the extent of his participation and, because appellant did not confess to the murder "right off the bat," it "wasn't the earliest acknowledgment of guilt." (RT 252:29136-29138.)

After all sides had rested, the first communication from the jury during deliberations was to request the police report of appellant's initial arrest and confession. (CT 21:5309.) However, Judge Mullin agreed that appellant's confession had never been admitted. (RT 280:33499.) Braun sought a stipulation that appellant confessed the night he was arrested but counsel could not agree. ((RT 280:33499-33503.) Judge Mullin stated, "They aren't even supposed to know that he confessed." (RT 280:33500.) The judge later instructed the jury as follows:

> The police reports and any confession, if any, by anyone, other than Mr. Travis, were not admitted into evidence. You have all the evidence that the law allows you to consider at this time and upon which to base your verdicts.

(RT 281:33524.)

Evidence that appellant confessed on the night of his arrest was relevant mitigating evidence because it showed his early acknowledgment of responsibility and remorse. His confession was therefore, admissible under section 190.3, subdivisions (a) and (k), and the federal constitutional cases cited above.

Moreover, as explained above, there was simply no valid basis for Judge Mullin's concern that Travis's confrontation rights would be jeopardized if appellant's confession were admitted as mitigating evidence.

First, after the guilt phase verdicts, prosecutor Rico had successfully argued that if appellant testified about the murder in the penalty phase of the trial, Aranda-Bruton no longer applied and appellant would be subject to cross-examination even by co-appellant Travis. (RT 134:12433-12451; 147:13968.)

Second, as previously explained, appellant did testify in the first penalty phase and Judge Mullin allowed Travis to fully cross-examine him even though the judge had previously ordered that appellant and Travis be tried by separate juries. (RT 155:15166-15263.) Thus, Travis fully exercised his right to confront appellant after appellant testified in front of the first jury.

Third, in truth, Travis would have suffered absolutely no prejudice from the admission of appellant's confession because Travis had already admitted every single fact that appellant had stated about Travis's participation in the murder. Indeed, Travis expressly admitted these facts both in front of the first jury (RT 108:10659-10668; 165:16568-16613) and the second jury. (RT 266:31663, 31774-31787.) Thus, everything appellant said in his confession about Travis's participation in the murder was admitted by Travis himself in the guilt and penalty phases of the first trial. Moreover, Travis *had already been convicted* of first degree murder with special circumstances based on his own admissions and conduct at the time of the murder.

Therefore, appellant's confession could not possibly have harmed Travis anymore than Travis had already harmed himself. (Parker v. Randolph (1979) 442 U.S. 62, 60 L.Ed.2d 719, 725- [Admission of inter-locking confessions with proper limiting instruction conforms to requirements of the Sixth and Fourteenth Amendments.)

In sum, the admission of appellant's confession would not have violated Travis's confrontation right because Travis had actually confronted appellant during the first penalty phase about this testimony. Furthermore, Travis would have suffered no prejudice by the admission of appellant's confession because Travis had already been convicted of murder with special circumstances found true after he expressly provided to police and the first jury all the evidence of his guilt, including everything appellant said in his confession about Travis's participation in the murder. In addition, Travis also testified in the second penalty phase where he once again admitted every prejudicial fact that appellant said about him in his confession. Thus, in addition to the evidence of Travis's murder conviction and the true finding of special circumstances, the second jury had also heard Travis's admissions about his participation at the time of Mr. Madden's murder.

Hence, there was no legitimate basis for excluding from the jury's consideration of evidence that appellant had confessed his guilt and expressed remorse for the murder to Sergeant Keech as early as the night he was arrested.

2. Appellant's Letters to Julie Morrella Expressing Remorse

During the first penalty phase of the trial, Judge Mullin admitted several letters appellant had written to his ex-girlfriend, Julie Morella, in which appellant expressed remorse for his participation in the murder of Mr. Madden. (RT 146:13870-13874; RT 149:14342-14364.)

During the second penalty phase, Braun again sought to introduce the testimony of Ms. Morella to demonstrate that appellant had personally expressed remorse for the crimes both in his oral conversations with her and in his letters to her. Citing Green v. Georgia (1979) 442 U.S. 95 and Chambers v. Mississippi (1973) 410 U.S. 284, Braun argued that Judge Mullin should not apply the state's evidentiary rules in a mechanistic fashion to exclude this relevant mitigating evidence. (RT 256:29944-29951.)

Judge Mullin, without any explanation, limited Ms. Morella's testimony by ruling that she could only testify about appellant's *oral* expressions of remorse to her. She was not permitted to testify about the remorse appellant expressed in his letters to her. Judge Mullin added, "it's going to be limited to that. And you control the witness, because it you don't control the witness, I'll cut her off." (RT 256:29951. See also RT 256:29996.)

It is not possible to know to what extent appellant's written expressions of remorse to Ms. Morella may have influenced some of the jurors in the first penalty phase such that they could not unanimously agree that death was the appropriate penalty in this case. Nevertheless, such evidence was surely relevant and mitigating and, therefore, admissible in the second penalty phase. If appellant's oral expressions of remorse to Ms. Morella were admissible, then certainly his written expressions of remorse were too. Indeed, his written expressions were no less reliable than his oral ones since their existence was readily provable. Moreover, appellant's sincerity could have been readily measured by the jury since his written expressions would have been directly presented to the jury unfiltered through the testimony of another. Put simply, there was no proper basis for the exclusion of appellant's written expressions of remorse.

3. Ms. Morella's Testimony Regarding Appellant's Interest in Christianity and the Bible

During the first penalty phase, Judge Mullin permitted Ms. Morella to testify that her main purpose in seeing appellant was to talk to him about Christianity. She testified that when she first starting visiting appellant, he was pretty cold, he was not who she remembered him to be. His eyes were dark, and he was disturbed and did not look good at all. Then appellant started to change; he softened. He had been reading the Bible, and Ms. Morella felt like the Lord was really making a difference in appellant's life. His face lit up, his eyes were not so dark, and he seemed a little more uplifted. Appellant would bring the Bible with him to the visits, and was excited about reading it. Ms. Morella testified that appellant had found the Lord and his interest in the Bible increased over time. He would quote scripture and continued doing this, up to the time she testified. She also testified that appellant was sincere. (RT 146:13856-13863.)

However, during the second penalty phase, Judge Mullin sustained prosecutor Rico's hearsay objection and struck Ms. Morella's testimony that appellant had told her he was really excited because he had started reading the Bible. (RT 256:29963.) Braun attempted to explain that he was not offering this testimony for its truth but Judge Mullin replied, "It's not offered for a relevant purpose. . . ." (RT 256:29963-29964.) Judge Mullin also sustained prosecutor Rico's objection to Ms. Morella's testifying that appellant told her he had started reading the Old Testament. Judge Mullin also refused Braun's request for a side bar. (RT 256:29964.) When Braun attempted to elicit testimony from Ms. Morella regarding appellant's excitement about discussing the Bible, Judge Mullin sustained prosecutor Rico's objection and told Braun,

"You're going to have to instruct your witness she cannot testify as to what somebody else said." (RT 256:29965.) The following colloquy ensued:

Judge Mullin: It is hearsay. Now continue.

Braun: May we approach?

Judge Mullin: No

Braun: Please.

Judge Mullin: No.

(RT 256: 29966.)

Judge Mullin continued to sustain prosecutor Rico's hearsay objections and continued to strike Ms. Morella's testimony relating to appellant reading the Bible. (Ibid.) He also continued to refuse Braun's request for a side bar:

Braun: Would you discuss particular passages in the Bible?

Ms. Morella: He would usually with me what he had been reading, what he had been learning.

Prosecutor Rico: Your Honor, I'm sorry. Hearsay.

Judge Mullin: Sustained stricken.

Braun: Your Honor, that's not hearsay.

Judge Mullin: It's based on hearsay, counsel. Now continue.

Braun: May we approach the bench?

Judge Mullin: No. This is your witness, counsel.

Braun: Yes, I know, Your Honor, and I would wish to ask certain questions.

Judge Mullin: Then ask the questions appropriately and control the witness.

Braun: I believe I am asking appropriate questions.

Judge Mullin: Apparently you're not, at least I don't agree with you. Now continue.

(RT 256:29966-29967.)

Once again, Judge Mullin excluded relevant mitigating evidence by applying the hearsay rule even where Braun explained that he was not offering this testimony for its truth. The judge responded to this explanation by stating that the testimony was not "offered for a relevant purpose." However, surely appellant's state of mind is relevant to the question of his punishment, given that this evidence went to the question of appellant's character. (Lockett v. Ohio (1978) 438 U.S. 586, 604.)

The judge also applied the hearsay rule in a mechanistic manner to exclude this mitigating evidence. However, if appellant's oral expressions of remorse were admissible as mitigating evidence, then surely his oral expressions regarding his positive religious development were admissible.

Moreover, his continual and disdainful refusal to grant Braun's request for a side bar demonstrates once again his prejudicial treatment of both defense counsel and appellant in front of the jury.

4. Judge Mullin Forbade Ms. Morella From Testifying about Visits With Appellant Between February 1996 and the Present

Braun asked Ms. Morella whether appellant appeared to know more about the Bible than when she last visited him a year earlier. Ms. Morella testified that it was very obvious based on appellant's knowledge of scripture and the changes he was making. (RT 256:3001-3002.) Judge Mullin sustained prosecutor Rico's "non-responsive" objection and struck this testimony. (RT 256:3002.) The following colloquy ensued:

> **Braun:** All right. Leaving aside the fact that Danny was changing, but just based on the content - -

Judge Mullin: Approach the bench please. Mr. Braun, that is contemptuous conduct.

Braun: What is?

Judge Mullin: Paraphrasing, beginning or prefacing the question with testimony that had just been stricken because it was objectionable.

Braun: I'm sorry. I totally lost track of - -

Judge Mullin: Maybe you ought to pay attention to the Court's ruling.

Prosecutor Rico: The problem is this - -

Judge Mullin: I know what the problem is and I don't need to be reminded of it. But that is contemptuous conduct. You do it again, Mr. Braun, and there will be serious consequences to pay. That's number one.

Braun: I would ask the Court not to waggle its finger at me in the presence of the jury.

Judge Mullin: Mr. Braun, be quiet and then I won't have to. I won't tolerate any evidence or accept any evidence of visits between this witness and the defendant between February of '96 and the present under 1252..

Judge Mullin prevented Ms. Morella from testifying about her visits with appellant from February 1996 through March 17, 1997, claiming such testimony was unreliable. (RT 256:29906, 3003; Evidence Code § 1252.)[19]

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Evidence Code section 1252 restricts the admissibility of statements of a mental or physical state which are untrustworthy. It states:

> "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

However, there is absolutely *nothing* in the record which demonstrates in any way that Ms. Morrella's testimony about her visits with appellant between February 1996 to March 1997, was untrustworthy. Evidence Code section 1252, therefore, does not provide a valid basis for excluding appellant's mitigating evidence.

Ms. Morella's testimony relating to her visits with appellant over the preceding 13 months was plainly admissible as mitigating evidence under section 190.3, subdivision (k). Judge Mullin, therefore, should not have excluded this evidence.

Moreover, Judge Mullin should not have chastised and wagged his finger at Braun in front of the jury.

5. Appellant's Letters to the Madden Family and Liz Munoz

Braun sought to have two letters admitted as mitigating evidence during the second penalty phase of the trial arguing that the foundation for their admission had been laid by appellant in the first penalty trial. (RT 272:32766-32769.) Judge Mullin, however, refused to admit them into evidence because no foundation had been laid in front of the second penalty phase jury. (CT 21:5241; RT 272:32770.)

The first letter (defense exhibit 312) was addressed to Liz Munoz and described appellant's relationship with God and expressed his gratitude that she too knew Jesus. (ACT 13:3307-3311.) The second letter (defense exhibit 333) was directed to Mr. Madden's family in which appellant expressed his shame and remorse for what he had done to them and his hope that they could someday forgive him. (ACT 13:3343-3344.)

Both Judge Mullin and prosecutor Rico knew full well that appellant wrote both of these letters, and that appellant had laid the foundation for their admission in this trial during the first penalty phase. Consequently, the judge

relied upon a mechanistic application of the rules of evidence to prevent the jury from considering mitigating evidence of appellant's background, his shame, remorse, and request for forgiveness from the Madden family for the murder of Mr. Madden, and the pain he inflicted upon them.

C. Conclusion

The United States Supreme Court has held that state courts cannot impede a defendant's right to put on a defense or reject a defendant's evidence by imposing "mechanistic" (Chambers v. Mississippi (1973) 410 U.S. 284; Green v. Georgia (1979) 422 U.S. 95) or arbitrary (Washington v. Texas (1967) 388 U.S. 14; Rock v. Arkansas (1987) 483 U.S. 44) evidentiary rulings.

In the present case, Judge Mullin arbitrarily and mechanistically applied state evidentiary rules both to prevent, and restrict, the jury's consideration of relevant mitigating evidence which was admissible under state and federal law. (See section 190.3, subdivisions (a), (f) and (k); Eddings v. Oklahoma, supra, 455 U.S. at pp. 113-117; Hicks v. Oklahoma (1980) 447 U.S. 343; see also Lockett v. Ohio, supra, 438 U.S. at p. 604; Skipper v. South Carolina, supra, 476 U.S. at pp. 4-9; Hitchcock v. Dugger, supra, 481 U.S. at pp. 394-399; Woodson v. North Carolina, supra, 428 U.S. at p. 304; section 190.3(k).) Indeed, he applied the hearsay rule to exclude portions of appellant's evidence even where such evidence was not offered for its truth.

This Court should, therefore, strike appellant's death sentence because the State cannot prove that Judge Mullin's exclusion of the above evidence was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. 18, 24.)

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V

THE TRIAL JUDGE VIOLATED SECTION 190.3(a), THE EIGHTH AMENDMENT, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN HE PERMITTED PROSECUTOR RICO TO ELICIT TESTIMONY FROM MR. MADDEN'S WIFE THAT DELAYS IN THE TRIAL FEEL LIKE A LITTLE BIT OF TORTURE TO HER, SHE HAS NO PEACE OR CLOSURE, AND THAT ALL SHE WANTED WAS JUST A LITTLE BIT OF JUSTICE FOR HER HUSBAND

A. Background

Prior to the first penalty phase, defense counsel Braun joined co-defendant Jennings's motion to exclude all victim impact evidence outside the limits set forth in Payne v. Tennessee (1991) 501 U.S. 808, 205 [evidence that is unduly prejudicial as to render the trial fundamentally unfair]; People v. Edwards (1991) 54 Cal.3d 787, 835 [irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response]; and People v. Boyd (1985) 38 Cal.3d 762, 776 [evidence irrelevant to the factors listed in section 190.3].) (CT 5:1216-1223, 1227.)

On January 20, 1995, Judge Mullin filed a written ruling specifically excluding opinions of the victim's family regarding the crime itself, the defendant or the appropriate sentence. (CT 16:4041-4045.)

On April 12, 1995, prosecutor Rico filed a third amended Notice of Aggravation in which he stated in relevant part that he intended to introduce evidence of the circumstances of the crime and victim impact evidence regarding the unique and individual characteristics of James Madden and the impact of Mr. Madden's death on his family, loved ones, close associates and friends, including but not limited to: (1) his daughter Julie Madden; (2) his

widow, Shirley Sissy Madden; (3) his mother, Joan Madden; (4) his sister, Judith Sykes; (5) his brother-in-law James Sykes, and (6) his aunt, Peggy Finger. Rico also intended to introduce direct and circumstantial evidence tending to show the fear, pain, suffering, trauma and mental and physical anguish that the Mr. Madden experienced. (CT 9:2287-2291.)

On November 2, 1995, Braun expressed concern that objecting to inadmissible victim impact evidence in front of the jury would be unduly prejudicial to appellant and made several requests to Judge Mullin that he order Rico to provide specific discovery regarding the nature of the victim impact evidence he intended to introduce, so that Braun could move to exclude inadmissible evidence outside the jury's presence. (RT 30:2485, 2494-2503, 2499; RT 42:3467-3480, 3489-3490; RT 132:12212-12116, 12222-12224.)

Braun also explained to Judge Mullin that the letters from Mr. Madden's family did not reveal what Rico actually intended to introduce as victim impact evidence. Consequently, he asked the judge to instruct Rico to specifically indicate, both as to time and content, the victim impact evidence he intended to introduce so that the judge could limit it to relevant admissible victim impact evidence. (RT 132:12212-12224; See People v. Edwards, supra, 54 Cal.3d at p. 836 [decision permitting victim impact evidence does not mean that there are no limits on emotional evidence and argument].)

Judge Mullin, in response to a defense objection regarding Mr. Madden's daughter Julie, stated in relevant part:

> Well, one of the jobs of the district attorney is to tell his witnesses what they can say and what they can't say . . . The burden is on the district attorney to make sure that his witnesses, especially in his victim impact area, which is a very touchy area, know exactly what they can and cannot say. . . .

(RT 132:12229.)

During the first penalty phase, prosecutor Rico introduced evidence through various witnesses about the impact Mr. Madden's loss had on Mr. Madden's widow, his daughter, his mother, his sister and his two brothers-in-law. (RT 140:13006-13080.)

However, despite the aggravating evidence admitted during this penalty phase, the jury could not unanimously agree that death was the appropriate punishment for appellant so Judge Mullin declared a mistrial and discharged the jury. (RT 181:18245-18255.)

B. Error During the Second Penalty Phase

Prior to the second penalty phase, Braun filed another motion to limit certain victim impact testimony including specific anecdotes about Mr. Madden prior to the murder and cumulative testimony of each of the victim impact witnesses concerning the devastating effect of the murder on the mother, wife and daughter of Mr. Madden so that the second penalty phase jury would not hear the same evidence from at least five victim impact witnesses. Braun specifically asked Judge Mullin to order Rico to inform each victim impact witness of the parameters of the judge's order so that inadmissible victim impact evidence would not come before the jury. (CT 16:4036-4040; RT 200:22965-22968, 22977-22978.)

Judge Mullin stood by his original ruling regarding victim impact evidence issued on January 20 and modified on November 2, 1995, limiting such evidence from the time of the homicide to the time of the testimony (RT 132:12224-12225), and further stated that he would "not allow any additional victim impact evidence that wasn't presented in the first trial." (RT 200:22980-22981.)

Shirley Sissy Madden testified that she is the widow of Jim Madden. (RT 250:29073.) On the night Mr. Madden was killed, she and Julie went to

LeeWards to visit with him for awhile. After this visit, as she was driving out of the parking lot, she looked at Mr. Madden through her rear view mirror and thought, "You know, what if this is just the last time I see him?" (RT 250:29077.) After testifying about how much she loved Mr. Madden, how lonely and empty she felt without him and how her life had changed since his death, she offered testimony that was not admitted in the first trial during the following direct examination.

> **Prosecutor Rico:** Now, were you originally scheduled to come in this week, yesterday morning?
>
> **Mrs. Madden:** Yes.
>
> **Prosecutor Rico:** All right. And did that have to be changed because of the timing of witnesses and their testimony?
>
> **Mrs. Madden:** Yes.
>
> **Prosecutor Rico:** How did it impact on you when that had to be changed? Could you explain that?
>
> **Mrs. Madden:** This is - - it is horrible. This is so hard for me to do, because I'm in a room full of strangers, talking to you about something that's very intimate to me. My relationship with my husband.
>
> I feel like - - *every time that this gets put off if feels like - - I don't know that you can understand, but it feels like a little bit of torture to me. It means that, you know, it's just one more - - I don't feel like I have any peace.* I don't feel like I have any closure. *And all I want is just, you know, to have just a little bit of justice for my husband, you know. That's all I want.*
>
> And this has been six years now, and it doesn't seem like a lot, one afternoon or one day doesn't seem like a lot, but I have been going through this now for six years, just waiting and waiting for a phone call, having to call - - I don't know, calling the

attorney, "*When is this going to happen*?" It's just - - it's not pleasant.

(RT 250:29085-29086, italics added.)

After additional testimony regarding how Mr. Madden's death had affected their daughter Julie, Rico asked Mrs. Madden whether she had talked to Julie about coming to court. (RT 250:29089.) Mrs. Madden replied, "Yes." (Ibid.)

At side bar, Braun objected that evidence of trauma caused by extended court proceedings was both cumulative and unduly prejudicial to appellant. He also informed Judge Mullin that he would make a mistrial motion based on Mrs. Madden's testimony linking the trauma she has suffered to delays in court proceedings and her statement that all she wanted was a little bit of justice for her husband. (RT 250:29089-29090.)

Judge Mullin sustained Braun's objection and told Rico he thought he "better be finished with this witness." (RT 250:29090.)

Braun moved for a mistrial based on Mrs. Madden's improper victim impact testimony (RT 250:29102-29103), but the judge denied the motion. (RT 250:29109.)

C. The Law

The Eighth Amendment to the United States Constitution permits the introduction of victim impact evidence, i.e., evidence of the specific harm caused by the defendant to the victim and the victim's family, when admitted to allow the jury to meaningfully assess the defendant's moral culpability and blameworthiness. (Payne v. Tennessee, supra, 501 U.S. at p. 205.) However, such evidence violates the due process clause of the Fourteenth Amendment

when it is so unduly prejudicial that it renders the trial fundamentally unfair. (Ibid.)

In California, evidence describing the effect that the victim's loss has had on the victim's family is admissible as a circumstance of the crime pursuant to section 190.3(a) "provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (People v. Pollock (2004) 32 Cal.4th 1153, 1180; People v. Boyette (2002) 29 Cal.4th 381, 443-444; People v. Stanley (1995) 10 Cal.4th 764, 832.) "'[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (People v. Edwards, supra, 54 Cal.3d at p. 836, quoting People v. Haskett (1982) 30 Cal.3d 841, 864.) Victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members, or friends, and such testimony is not permitted. (People v. Smith (2003) 30 Cal.4th 581, 622.) Moreover, victim impact evidence that is "too remote from any act of defendant to be relevant to his moral culpability" should be excluded. (People v. Harris (2005) 37 Cal.4th 310, 352.)

D. Analysis

Judge Mullin erred when he permitted Mrs. Madden to tell the jury that it felt like torture every time court proceedings were continued, make an emotional plea for justice for her husband, state that she had already waited six years for that justice, and then ask, "When is this going to happen?"

Trial delays, and the effect they had on Mrs. Madden, are simply too remote from any act of appellant to be relevant to his moral culpability. (People v. Harris, supra, 37 Cal.4th at p. 352.) And Mrs. Madden's request for justice for her husband's murder violated the Eighth Amendment because it

essentially told the jury that, in her opinion, death was the appropriate sentence for appellant. (See Payne v. Tennessee, supra, 501 U.S. at p. 830, fn. 2; Booth v. Maryland (1987) 482 U.S. 496, 503; People v. Smith, supra, 30 Cal.4th at p. 622.)

Moreover, Mrs. Madden's emotional plea for justice, telling the jury that it felt like torture every time court proceedings were continued, that she had already waited six years for that justice, and her question to the prosecutor, "When is this going to happen?" likely provoked arbitrary and capricious action by the jury in deciding penalty in violation of the Eighth and Fourteenth Amendments. (Gregg v. Georgia (1976) 428 U.S. 153, 189 [Where discretion is afforded the jury on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action]; Gardner v. Florida (1977) 430 U.S. 349, 358 [It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion]; see also Godfrey v. Georgia (1980) 446 U.S. 420, 428.)

Mrs. Madden's testimony also violated appellant's right to due process under the Fourteenth Amendment because it was so unduly prejudicial that it rendered his second penalty phase trial fundamentally unfair. (Payne v. Tennessee, supra, 501 U.S. at p. 825.) Mrs. Madden's improper, emotionally charged testimony contained irrelevant information and inflammatory rhetoric that diverted the jury's attention from its proper role and invited an irrational, purely subjective response to the question of whether appellant should live or die. (See People v. Edwards, supra, 54 Cal.3d at p. 836.)

E. Judge Mullin Also Erred When He Permitted Prosecutor Rico to Present Future Victim Impact Evidence Despite His Earlier Ruling Prohibiting It, Then Allowed Rico to Argue the Future Impact That This Case Would Have on the Jury

As stated above, Judge Mullin limited victim impact evidence from the time of the homicide to the time of the testimony in this trial. (RT 132:12224-12225; RT 200:22980-22982.) That is, future victim impact evidence was inadmissible in this trial.

During Rico's closing argument to the jury, however, Judge Mullin permitted Rico to argue that the jurors and their families, the defendants' families, and the victim's family would continue to suffer from the impact of the appellant's criminal act on future holidays. Braun's objection that this was improper future victim impact evidence because it went beyond the time of the trial was overruled. (RT 279:33435-33436). Rico then argued to the jury as follows:

> as the holidays come and go in the years to come . . . with each holiday, Valentine's Day, Mother's Day, Father's Day or Christmas, you will think about this . . . . [A]s the years come, as the years pass, you will consider that *Julie Madden* no longer has a father to give Valentine's Day gifts to or Father's Day gifts to. You will be wondering who will be taking Julie shopping for a Mother's Day gift this year. As time goes on and the holidays come and go *you will remember this case, ladies and gentlemen, for the rest of your lives. Every Christmas, what will you think of? Will you think of an empty space around the holiday table?* Or . . . will you think of John Travis or Daniel Silveria somewhere in a prison facility living out the rest of . . . their natural lives, receiving visitors, sending holiday greetings, receiving cards or gifts?

(RT 279:33437. Italics added.)

First, it is evident that Judge Mullin permitted Rico to violate his earlier order restricting victim impact to no later than the time of trial (RT 132:1224-

1225) when Rico argued that Mr. Madden's daughter no longer has a father to celebrate Valentine's Day, Mother's Day, Father's Day, or Christmas as these "holidays come and go in the years to come."

Second, Judge Mullin improperly permitted Rico to violate his earlier ruling that victim impact evidence not presented in the first penalty phase was inadmissible in the second penalty phase. (RT 200:22981.) That is, the judge allowed Rico to invite jurors to consider the impact *they* would suffer in the future.

This argument not only violated the judge's previous ruling, it was improper because the impact the jury would suffer is simply too remote from any act of appellant to be relevant to his moral culpability. (People v. Harris, supra, 37 Cal.4th at p. 352 [victim impact evidence that is "too remote from any act of [the] defendant to be relevant to his moral culpability" should be excluded).]

Prosecutor Rico implied in his argument that in order to mitigate the impact that the jurors would suffer on their future holidays, they should impose the death penalty on appellant, so that "each Christmas" the jurors would not have to think of "Daniel Silveria somewhere in a prison facility . . . receiving visitors, sending holiday greetings, receiving cards or gifts." (RT 279:33437.) Rico, however, went too far when he added the jury to the list of victims of appellant's offense. Victim impact evidence that counts the jurors among the victims of a defendant's crime is simply "too remote from any act of the defendant to be relevant to his moral culpability," (People v. Harris, supra, 37 Cal.4th at p. 352.) Evidence of potential future impact on the jurors is not evidence "that logically shows the harm caused by the defendant." (People v. Edwards, *supra*, 54 Cal.3d at p. 835.)

Moreover, suggesting to jurors that they make a sentencing decision based on how they would like to feel, and what they would like to think about, on each Christmas in the future improperly prompted the jury to make "an emotional response untethered to the facts of the case." (People v. Pollock, supra, 32 Cal.4th at p. 1180.) Put simply, Rico's argument was "inflammatory rhetoric" that "divert[ed] the jury's attention from its proper role" and invited them to make an "irrational, purely subjective response." (Ibid.)

This Court should, therefore, reverse appellant's death sentence because the State cannot prove beyond a reasonable doubt that the above errors did not contribute to the verdict obtained. (Chapman v. California (1967) 386 U.S. 18.

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VI

THE TRIAL JUDGE VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN HE PERMITTED PROSECUTION EXPERT PATHOLOGIST, PARVIZ PAKDAMAN, TO TESTIFY THAT THIS WAS ONE OF THE MOST ATROCIOUS CASES HE HAD EVER SEEN

Prosecutor Rico asked pathologist, Parvez Pakdaman, in front of the second penalty phase jury, how many autopsies he had performed in his career. (RT 248:28733-28734.) Pakdaman replied, ". . . 5000." (RT 248:28734.)

Braun objected to what he believed would be the next question and asked for a side bar. Braun told Judge Mullin that he had read co-defendant Christopher Spencer's trial transcript, and that Rico had asked Pakdaman during that trial whether this was the "ugliest, most brutal, nastiest murder you ever saw or close to it." Braun also told the judge that the expected answer was "yes, [it] is one of the most awful, gruesome, horrible murders." (RT 248:28734.)

Rico denied that he was going to ask this question but acknowledged that he was going to ask Pakdaman whether he recalled all of the autopsies he has done and whether "this one causes him to remember [it] more distinctly." Rico said that he thought it was appropriate because they were in the penalty phase "and we're talking about anything over and above the facts of the murder." (RT 248:28735.)

Leininger objected that Pakdaman was only qualified to testify about his medical opinion, not his personal opinion. Judge Mullin replied:

> He's qualified to talk about what he has seen. * * * I'll allow it in. In a penalty phase it's appropriate. In a guilt phase, no. In a penalty phase, yes. Keep in mind where we are, gentlemen.

(RT 248:28735-28736.)

Pakdaman was questioned as follows:

Prosecutor Rico: Doctor, given the number of autopsies you have personally performed in your career do you remember each and every one of them distinctly or not?

Dr. Pakdaman: Fortunately, no. I don't remember all of them.

Prosecutor Rico: Is this case one that you will ever forget?

Braun: I object to that question, Your Honor.

Leininger: I object to it, Your Honor.

Judge: Overruled.

Dr. Pakdaman: Your Honor, I should have objected to this question too. I've been to court nine times on this case and every time you ask the question I get upset.

Prosecutor Rico: Why is that, Doctor?

Braun: I object.

Leininger: I object, also, Your Honor.

Judge: Overruled.

Braun: My objection, Your Honor, stated for the record is relevance.

Judge: The Court finds it quite relevant.

(RT 248:28736.)

Dr. Pakdaman: This is one of the most atrocious cases I have ever seen.

(RT 248:28737.)

Braun objected again and moved for a mistrial. Judge Mullin overruled the objections and denied the motion stating:

> It is a proper relevant question in a penalty phase of a trial. This goes above and beyond the actual elements of the offense. It's completely proper in Factor (a) and actually goes along to some degree with victim impact evidence.

(RT 248:28737-28738.)

Evidence Code section 801 provides in relevant part:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless the expert is precluded by law from using such a matter as a basis for his opinion. (See also People v. Gardeley (1996) 14 Cal.4th 605, 614.)

Clearly, Dr. Pakdaman could, and did, properly testify under sections 801 and 190.3(a) about the number, severity and other details relating to Mr. Madden's injuries. This testimony was admissible because it addressed a subject beyond common experience and was intended to assist the trier of fact.

However, even when a witness qualifies as an expert, he "does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumption of fact

without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from the evidence." (Jennings v. Palomar Pomerado Health Systems, Inc. (2003) 114 Cal.4th 1108, 1117.)

Dr. Pakdaman's *personal* opinion that this case is one of the most atrocious cases he has ever seen had no evidentiary support, and added nothing to the jury's common fund of information with regard to Mr. Madden's injuries. (See Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155, 1155.) In addition, Dr. Pakdaman's testimony that he had been to court nine times and always gets upset when Rico asks him if this is a case he will ever be able to forget was simply irrelevant.[20] His testimony did not truly relate to the actual circumstances of the crime. Rather, he simply expressed his own subjective opinion as to where he would personally rank appellant's case in comparison to other cases never described, nor for which evidence was ever introduced. This testimony was, therefore, inadmissible.

In People v. Torres (1995) 33 Cal.App.4th 37, the appellate court explained:

> [O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. Put another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.

(Id. at p. 47.)

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20 Evidence Code section 210 provides in relevant part:

> Relevant evidence means evidence . . . having tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Similarly, Dr. Pakdaman's *personal* opinion regarding where this case stood in comparison to his other cases did not properly assist the jury in determining appellant's moral culpability and appropriate punishment. In fact, as stated above, his subjective opinion had no evidentiary support because it was based on a comparison with other cases never described, and for which evidence was never introduced.

Consequently, Dr. Pakdaman's personal opinion about this case has no relevance to the jury's duty to properly weigh both the aggravating and the mitigating evidence actually presented in this case in determining appellant's moral culpability, and, hence, his appropriate sentence.

Furthermore, by eliciting this testimony, and reminding the jury of Dr. Pakdaman's vast experience with autopsies and dealing with death, prosecutor Rico suggested to the jury that they could shift the *responsibility* for making a moral assessment regarding appellant to this "death expert." However, "[w]hen he testifies to conclusions that even a lay jury can draw, the expert is no longer testifying 'on a question of science, art or trade' in which he is more skilled than the jury. (Code of Civ. Proc., section 1870, subd. 9.) As Professor McCormick says: 'There is no necessity for such evidence and to receive it would tend to suggest that the judge and jury may shift the responsibility for the decision to the witnesses.' (Op. cit. p. 25,)" (See People v. Arguello (1966) 244 Cal.App. 2d 413, 418.)[21]

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In Arguello, the appellate court ruled that a police officer could not express an opinion that a defendant possessed drugs with an intent to sell. In People v. Newman (1971) 5 Cal.3d 48, 53, this Court apparently overruled *sub silentio* the specific application of this principle to that case but did not reject the principle itself.

Normally, a capital jury is faced with a very difficult decision in deciding whether death is the appropriate punishment after properly weighing both the aggravating and mitigating factors. Appellant's jury, however, was likely tempted to defer to Dr. Pakdaman, an expert who had more experience with death than anyone else in the courtroom, and who believed that appellant's case was one of the worst of over 5,000 of his other cases. (See People v. Kelly (1976) 17 Cal.3d 24, 31 ["Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials."].)

Such a shifting of responsibility for a capital decision from the jury to an expert witness violated appellant's Eighth and Fourteenth Amendment right to a reliable determination that death was the appropriate punishment for him. (Caldwell v. Mississippi (1985) 472 U.S. 320; Beck v. Alabama (1980) 447 U.S. 625, 637, 643; Woodson v. North Carolina (1976) 428 U.S. 280.)

Appellant's death judgment is also unreliable because it is inconsistent with decisions of this Court holding that penalty decisions should not be made by comparing one case to another. (People v. Bonin (1988) 46 Cal.3d 659, 695, fn. 5 [due to the requirement of a particularized inquiry into the circumstances of the offense and the character and propensity of the offender, the record of one case is irrelevant to the evaluation of prejudice in another regardless of similarity].)

Thus, Dr. Pakdaman's personal opinion regarding the condition of Mr. Madden's body compared to over 5,000 other bodies on which he performed autopsies was simply of no benefit to the peculiarly normative and individualized inquiry into the circumstances of the crime, and the character and propensity of appellant, which the jury was required to make. (See People v. Sanders (1990) 51 Cal.3d 471, 530 [the peculiarly normative and

individualized nature of the jury's sentence determination makes it inappropriate to consider the sentence imposed on superficially similar cases to determine prejudice].)

Furthermore, Dr. Pakdaman's testimony tended to usurp the jury's fact-finding role in violation of the Sixth Amendment and rendered appellant's trial fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. (Estelle v. McGuire (1991) 502 U.S. 62; McKinney v. Rees (9th Cir. 1993) 993 F. 2d 1378; Bryson v. Alabama (5th Cir. 1981) 634 F.2d 862, 865; Spencer v. Texas (1967) 385 U.S. 554, 573-575 (conc. and dis.opn. of Warren, C.J.).)

Dr. Pakdaman's remarks also fail to qualify as proper victim impact evidence. Although this Court has allowed victim impact testimony from friends of the victim, permitting the pathologist who performed the autopsy to give victim impact testimony goes too far. (See People v. Edwards, supra, 54 Cal.3d 587; Payne v. Tennessee, supra, 501 U.S. 808; see also People v. Smith (2003) 30 Cal.4th 581, 622 [victim impact evidence does not include characterizations or opinions about the crime, and such testimony is not permitted].)

Moreover, this inadmissible expert testimony was unduly prejudicial to appellant. The first penalty phase jury did not hear Dr. Pakdaman's irrelevant, yet highly inflammatory opinion that this was one of the worst of over 5,000 autopsies he had performed. That jury deadlocked after it could not agree that a death sentence was the appropriate penalty for appellant. (See RT 112:10982-113:11071.)

Rather, prosecutor Rico elicited this improper testimony during his second, successful attempt at convincing the jury that appellant should be executed. In fact, Rico fully exploited Judge Mullin's error in admitting this

testimony during his argument to the jury. Rico stated, ". . . how bad is this case? How did this case affect him [Dr. Pakdaman]? A coroner who deals with death for a living?" Rico also reminded the jury that even though Dr. Pakdaman had performed over 5,000 autopsies, he was "visibly emotional" and "upset" during his testimony because this was "one of the most atrocious cases [he had] have ever seen." (RT 276:33060-33062.) Rico further emphasized this point by arguing:

> How bad is this case? What's morally compelling about this case? To this day, ladies and gentlemen, some six plus years after this crime, after this autopsy, this case remains vivid in Dr. Pakdaman's memory as no doubt it will remain so in all yours for the rest of your lives.

(RT 276:33062.)

Prosecutor Rico's argument shows that he believed that Pakdaman's inadmissible testimony was crucial to his case. (See People v. Cruz (1964) 61 Cal.2d 861, 868 ["[t]here is no reason why we should treat this evidence as any less 'crucial' than the prosecutor - and so presumably - the jury treated it"]; People v. Woodward (1979) 23 Cal.3d 329, 341 [reversal ordered where the prosecutor exploited erroneously admitted evidence during his closing argument].)

Moreover, appellant has demonstrated many times in this opening brief that Judge Mullin rulings were unfair to appellant. This unfair treatment was again demonstrated when he permitted a prosecution expert witness to testify that this was one of the worst cases he had ever seen on the one hand, yet prevented defense psychiatric expert, Dr. Kornos, from explaining to the jury how appellant's physical and emotional abuse and abandonment by his parents, his continuous sexual abuse in various foster homes, his alcohol and drug

abuse and his subsequent homelessness affected appellant's conduct at the time of the crime on the other. (See Argument III, ante, at pp. 137-151.)

The judge's unfair rulings were also revealed when he prevented Braun from comparing appellant to other inmates to show that appellant had made better progress in his Christian studies. (RT 259:30644-30645; 260:30650 and 30653.)

This Court should, therefore, reverse appellant's death sentence because the State can not prove beyond a reasonable doubt that this error did not contribute to the verdict obtained.

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VII

THE TRIAL JUDGE ERRED WHEN HE PERMITTED PROSECUTOR RICO TO: (1) ELICIT TESTIMONY FROM CO-APPELLANT TRAVIS THAT HE AND APPELLANT HAD PARTICIPATED IN A "SCAM" TO OBTAIN MONEY; (2) ASK TRAVIS WHETHER APPELLANT DISPLAYED THE STUN GUN IN AN UNRELATED INCIDENT WHICH RICO KNEW TO BE FALSE; (3) ELICIT EVIDENCE THAT APPELLANT IMPREGNATED CO-APPELLANT'S SISTER WHEN SHE WAS 15 YEARS OLD; AND (4) ELICIT TESTIMONY FROM A DEFENSE WITNESS ABOUT AN UNRELATED ATTEMPTED MURDER BY THE NUESTRA FAMILIA PRISON GANG

A. The Law

In People v. Boyd (1985) 38 Cal.3d 762, this Court addressed the question whether the prosecution can present evidence at the penalty phase which is not relevant to any of the specific aggravating or mitigating factors listed in section 190.3. This Court concluded that evidence irrelevant to any of the listed factors in that statute is inadmissible. (Id. at pp. 772-776.) This Court stated in relevant part:

> The language of section 190.3 in the 1978 initiative permits introduction of evidence relevant *to* aggravation, mitigation and sentencing, with two exceptions: criminal activity not involving violence, and criminal activity of which the defendant was acquitted.

(Id. at p. 772.)

B. Evidence Appellant Engaged in a "Scam"

During Travis's penalty phase cross-examination, prosecutor Rico asked co-appellant Travis whether he had attended a computer training school

with appellant. (RT 269:32163.) Travis responded that a friend named Pete had devised a "scam" to get loan money from the school and invited Travis and appellant to join him in attending this school to get the money. (Ibid.) Braun essentially objected that this testimony was irrelevant to appellant. (RT 269:32163-32164.) Rico argued that he could ask these questions because Travis would be available for cross-examination. (RT 269:32164.) The judge overruled Braun's objection. (Ibid.) Travis testified that appellant was present when Pete mentioned the plan to receive a loan and use this money to buy drugs. (RT 269:32165.) Travis also testified that he told Pete this sounded good to him. (RT 269:32166.) Rico asked Travis whether appellant also said it sounded good. Braun objected that this was irrelevant to Travis's penalty phase, and Rico argued that this went to the nature of the relationship between Travis and appellant. Judge Mullin ruled that this "evidence was not limited to Mr. Travis's penalty phase." (Ibid.)

At side bar, Braun argued that this evidence should be limited to Travis since it did not relate to the joint participation of both defendants in the crime. Rather, it related to Travis's background information. (Ibid.) Braun also argued that Rico's cross-examination was beyond the scope of Leininger's direct examination. (RT 269:32167.) Rico responded that because Braun had tried to show that it was Travis who was the leader during the crimes, Travis's testimony was relevant to show that he and appellant acted "freely in concert" and neither one of them forced the other to do the crimes. (RT 269:32167-32168.) Braun, however, reminded Rico that no evidence that Travis was the leader had been introduced in this penalty phase trial, so it was irrelevant. (RT 269:32168.)

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Judge Mullin disagreed finding that the relationship between Travis and appellant was relevant and that this cross-examination did not exceed the scope of direct. (Ibid.)

Thus, prosecutor Rico asked Travis whether appellant also stated that the "scam" was a good idea. (RT 269:32169.) Braun objected that the question called for hearsay and was not proper factor (b) evidence as to appellant. Judge Mullin overruled his objection. (Ibid.) Travis replied, "I think he did." (RT 269:32170.) Travis further testified that he, Pete and appellant joined the school. They discovered that they were not going to get full checks. Rather, they received partial amounts. After staying in school for a couple of months, Travis and appellant quit the school. (RT 262:32170.)

It is clear that even if taken as true, evidence that appellant participated in a "scam" to obtain money from a training school is not relevant to any of the specific factors set forth in section 190.3. This Court has made clear that the purpose of the statutory exclusion of non-violent unadjudicated conduct is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. (People v. Boyd, supra, 38 Cal.3d at p. 776.) This "scam" evidence does not relate to the circumstances of the crime, does not involve violence, and did not result in any type of conviction. Thus, because that evidence is not probative of any specific listed factor in section 190.3, it has no tendency to prove or disprove a fact of consequence to the determination of the action. It is simply irrelevant to legally permissible aggravation and not entitled to any weight in appellant's penalty determination. (Ibid.)

Perhaps respondent will argue that Boyd does not apply here because this evidence was elicited during co-appellant Travis's testimony, and not the prosecutor's case-in-chief. That is, respondent may argue that this evidence

was intended as rebuttal to appellant's mitigating evidence. (See People v. Boyd, supra, 38 Cal.3d at p. 776 [once defense has presented factor (k) evidence, prosecution rebuttal evidence is admissible as tending to "disprove any disputed fact that is of consequence to the determination of the action. [Citation]"].) In People v. Rodriguez (1986) 42 Cal.3d 730, this Court also held in relevant part:

> . . . under Boyd, by placing his character in issue, a defendant widens the scope of admissible bad-character evidence and argument. The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it *undermines* defendant's claim that his *good* character weighs in favor of mercy. Accordingly the prosecutor, when making such a rebuttal effort, is not bound by the listed aggravating factors or by his statutory pretrial notice of aggravating evidence. (Section 190.3.)

(People v. Rodriguez, supra, 42 Cal.3d at p. 791, italics in original.)

However, this Court has placed limitations on the nature and scope of rebuttal that apply to appellant's case. In Rodriguez, this Court also stated:

> Nothing in our decision is meant to imply that any evidence by defendant of his *good character* will open the door to *any and all* "bad character" evidence the prosecutor can dredge up. As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers on his behalf.

(People v. Rodriguez, supra, 47 Cal.3d at p. 792, fn. 24. Italics in original.)

Despite Rico's claim to the contrary, appellant presented no evidence in this second penalty phase trial alleging that Travis was the leader and he was the follower at the time of the crimes. Moreover, because appellant did

not present any other evidence that Travis's "scam" evidence could logically rebut, this evidence was inadmissible against appellant.

In sum, Travis's "scam" evidence was inadmissible as aggravating evidence and was irrelevant as rebuttal. Judge Mullin, therefore, should not have admitted it against appellant.

C. Prosecutor Rico's Attempt to Elicit Evidence That Appellant Displayed a Stun Gun During An Unrelated Fight

During Travis's cross-examination, prosecutor Rico questioned him about an unrelated fight Travis had with a person who had taken a beeper from co-defendant Matthew Jennings. (RT 269:32200.) Travis testified that the co-defendants were present when he went to retrieve the beeper. (Ibid.) Rico then asked Travis whether he saw appellant display and trigger the stun gun before Travis began fighting. (RT 269:32201.) Braun objected that Rico asked this question in bad faith and asked to approach the bench. (Ibid.)

After Judge Mullin excused the jury, Braun stated that he had two objections. First, he argued that Rico had asked this question in bad faith because he knew that the police report of the incident stated that it was co-defendant Rackley who pulled out the stun gun at the time of the fight. Second, he argued that this evidence was irrelevant and simply another attempt by Rico "to get in evidence against Mr. Silveria which is not proper factor (a), (b) or (c) evidence. Judge Mullin interrupted and told Braun that he disagreed. (RT 269:32202-32203.) Braun again argued that this was inadmissible evidence under section 190.3. The following colloquy ensued:

> **Judge Mullin:** Can it be used to rebut evidence presented by the defense?
>
> **Braun:** What evidence does it rebut that was presented by the defense?

Judge Mullin: That was not my question. I want you to answer my question.

Braun: . . . it would only be proper to rebut evidence presented by the defense if the defense had presented some such evidence. Mr. Silveria didn't present any evidence concerning what he did or didn't do at the time of that fight or whether he was present or whether he was participating.

Mr. Travis introduced evidence concerning that fight for two specific purposes. Mr. Rico can cross-examine Mr. Travis as to those purposes, that is, that he didn't get injured and therefore maybe he did go to the robbery, and that he had no reason to be mad, because he didn't get hurt, or something of that sort.

[Rico] is in fact asking Mr. Travis if Mr. Silveria in some way participated in that fight and he's trying to imply to the jury that Mr. Silveria was the person who pulled out the stun gun . . . when he knows that's not true, that the evidence is that it was Mr. Rackley. So it's improper for both of those reasons.

(RT 269:32203-32204.)

Prosecutor Rico argued that Braun was wrong and that the police report about this unrelated incident dated January 24, 1991, listed only "WMA," not Rackley's name. (RT 269:32204.) Judge Mullin permitted Rico to show Travis an unidentified document and ask him whether it refreshed his memory "as to whether any one of [his] friends displayed the stun gun and kept hitting the test button?" (RT 269:32211.) Travis replied that it did not. Rico also asked Travis whether he was aware that "either Matt or Danny [appellant] had a stun gun." Travis testified that he saw the stun gun "at the Leavesly Inn and at Troy Rackley's." (Ibid.)

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Although Rico claimed that Braun was wrong when he stated that Rico knew that appellant was not the person who displayed the stun gun, the record shows that Rico, in fact, knew that it was Rackley who used the stun gun.

First, the record of an earlier hearing relating to statements appellant made to Officer John Boyles about the fight, shows that Rico knew appellant did not use the stun gun during this incident. Rico stated in relevant part:

> **Prosecutor Rico:** Witnesses put the stun gun in the possession of the defendants (RT 45:3711, lines 27-28). There's references to first names and I'm not sure that anyone actually put it in Mr. Silveria's possession, but Mr. Travis was there, Mr. Rackley was there. *I think they put it in Mr. Rackley's possession. . .* What truly happened in the case is there was a confrontation between the group from the defendants and these two individuals who happened to be black. There was an altercation. Mr. Travis apparently was beaten up or hurt. *Mr. Rackley tried to use the stun gun, but was hit.*

(RT 45:3712. Italics added.)

Second, the record of prosecutor Rico's guilt phase redirect examination of prosecution witness, Tom Swenor, about this unrelated incident reveals the following colloquy:

> **Prosecutor Rico**: At . . . or around the time of the reporting of this incident involving groceries, January 24, had you seen any of the members of this group around that time in possession of a stun gun?
>
> **Swenor**: Yes, I did.
>
> **Prosecutor Rico**: Can you explain when it was in terms of when this taking of the groceries was reported?
>
> **Swenor**: It was right when the groceries were being taken. Troy had it at the time. Troy Rackley had it and he tried to stun

- - stun gun one of the guys that were jumping us taking the groceries."

(RT 99:9467-9468.)

It is clear that prosecutor Rico knew that Rackley was the person who pulled the stun gun during this incident. Thus, in his zeal to obtain the death penalty against appellant based on torture-murder, Rico intentionally sought to elicit false stun gun evidence that was both misleading to the jury and clearly inadmissible against appellant under section 190.3. Furthermore, this false evidence could not possibly rebut any of the evidence appellant offered. (See People v. Boyd, supra, 38 Cal.3d at pp. 772-776; People v. Rodriguez, supra, 47 Cal.3d at p. 792, fn. 24.) Appellant presented no evidence in mitigation that this false evidence could rebut.

Judge Mullin, therefore, should not have permitted Rico to ask questions which suggested to the jury that appellant displayed the stun gun during this altercation when Rico knew that it was Rackley who did so. This failure by Judge Mullin only served to aid Rico in his attempt to suggest to the jury that appellant used the stun gun to commit a torture-murder. (See Argument I, ante, at pp. 94-100, 104-108, 111-114.)

D. Prosecutor Rico's Evidence That Appellant Impregnated Co-Appellant's Sister Deanna Travis

On direct examination, Leininger asked Deanna Travis, the sister of co-appellant Travis, how old her son was when he died. Deanna testified that he was three months and eleven days old. (RT 264:31339-31340.)

During prosecutor Rico's cross-examination of Deanna, he asked her about her intimate relationship with appellant and how old she was at that time. (RT 264:31350-31351.) Deanna testified that she was 15 years old when she got pregnant. Rico then asked, "By Danny?" She replied, "Yes."

(RT 264:31351.) Braun's motion to strike for lack of foundation was overruled. (Ibid.)

Evidence that appellant impregnated Deanna was not relevant as aggravating evidence under section 190.3. (People v. Boyd, supra, 38 Cal.3d at pp. 772-776.) Furthermore, this evidence was also inadmissible to rebut any of appellant's mitigating evidence because he did not offer any evidence that his impregnating someone could logically rebut. (People v. Rodriguez, supra, 47 Cal.3d at p. 792, fn. 24.) Judge Mullin, therefore, erred when he permitted prosecutor Rico to present this wholly irrelevant and highly prejudicial information to the jury.

E. Prosecutor Rico's Evidence That the Nuestra Familia Tried to Cut the Throat of A Person Unrelated to This Case

Braun called jail guard Edwin Lausten to testify about appellant's conduct in the jail, and jail guard Jeanine Powell's reputation for losing control of the jail module and her inability to get along with other jail guards. (RT 259:30565-30578.)

On cross-examination, prosecutor Rico asked Lausten whether he considered himself an "effective correctional officer," and Lausten replied that he did. (RT 259:30579.) Rico then asked Lausten whether he knew Gabriel Coronado. Both Braun and Leininger objected that this was irrelevant since Coronado had nothing to do with this case. (RT 259:30580.)

At bench, Rico's offer of proof was that the witness had testified about the requirements necessary to be an effective correctional officer and that jail guard Powell was not effective. Rico claimed he was offering evidence of the attempted killing of Coronado because it occurred in Lausten's presence, and Lausten had previously said that a guard must be alert and aware.

Leininger argued that the Nuestra Familia prison gang had tried to murder Coronado in the jail, and it was irrelevant to this case. Braun also argued that it was irrelevant and pointed out that Lausten had testified to two things: how appellant was as an inmate during the years Lausten had known him, and his opinion about jail guard Powell. (RT 259: 30581.) Braun explained that he asked Lausten his opinion of Powell to corroborate the earlier testimony of defense witness deputy Patrick Doyle regarding Powell. (RT 259:30581-30582.)

The following colloquy between Judge Mullin and Braun ensued:

> **Judge Mullin:** We're not going to hear their opinion about Officer Powell, though, because if Mr. Rico doesn't make the objection I'm going to. I'll allow this area about Mr. Coronado because, Mr. Braun, you opened the door.
>
> **Braun:** Oh, no, I didn't.
>
> **Judge:** Oh, yes, you did.
>
> **Braun:** That's highly unfair.

(RT 259:30582.)

Judge Mullin told the prosecutor to proceed. In front of the jury, Rico then asked Lausten, "Isn't it true, Officer Lausten, that in 1991, Gabriel Coronado was in your module probably standing no farther than the judge is from you now when someone tried to kill him and cut his throat and to this day - - you don't know. . . ." Judge Mullin sustained Braun's objection but Rico then asked, "Officer Lausten, did Gabriel Coronado have his throat cut in your module when you were nearby." Lausten testified that Coronado's neck was cut in his presence and he did not see it coming because he was on the

telephone calling another officer about the rehousing of an inmate. (RT 259:30582-30583.)

Evidence of an attempted murder of an inmate who has nothing to do with this case by the Nuestra Familia prison gang is inadmissible as aggravating evidence against appellant. (People v. Boyd, supra, 38 Cal.3d at pp. 772-776.)

Moreover, evidence of an attempted murder in Lausten's presence by the Nuestra Familia is also inadmissible as rebuttal because it fails to rebut Lausten's testimony that Powell often lost control of the jail module and had a bad reputation among the other guards. (People v. Rodriguez, supra, 47 Cal.3d at p. 792, fn. 24.) Judge Mullin, therefore, grossly erred in admitting this highly inflammatory and prejudicial attempted murder by a notorious prison gang which had nothing to do with this case.

F. The Erroneous Admission of This Evidence Compels Reversal

In sum, all of the prosecution evidence identified above was inadmissible as aggravating evidence, or as rebuttal. Judge Mullin's admission of this irrelevant and prejudicial evidence to the jury violated section 190.3, and People v. Boyd, supra, 38 Cal.3d at pages 772-776. It also violated appellant's Eighth and Fourteenth Amendment right to a reliable, individualized jury decision that death is the appropriate punishment (Lockett v. Ohio, supra, 438 U.S. at p. 604; Skipper v. South Carolina, supra, 476 U.S. at pp. 4-9; Penry v. Lynaugh, supra, 492 U.S. at p. 318; Hitchcock v. Dugger, supra, 481 U.S. at pp. 394-399; Eddings v. Oklahoma, supra, 455 U.S. 104; Woodson v. North Carolina, supra, 428 U.S. 280, 304; and his Fourteenth Amendment right to due process and a fair trial. (Estelle v. Williams (1976) 425 U.S. 501, 503 ["The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment"]; Irvin v. Dowd (1961) 366 U.S. 717, 722 ["[t]he

failure to accord an accused a fair hearing violates even the minimal standards of due process"].)

This Court should, therefore, vacate appellant's death sentence because the State cannot prove beyond a reasonable doubt that these errors did not contribute to the verdict obtained. (Chapman v. California (1967) 381 U.S.18.

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VIII

THE TRIAL JUDGE VIOLATED SECTION 1089, AND THE STATE AND FEDERAL CONSTITUTIONS WHEN HE DISCHARGED JUROR 4 DURING APPELLANT'S CASE IN MITIGATION

A. Introduction

Judge Mullin learned during opening statements in the second penalty phase that Juror 4 knew a defense witness. After conducting a hearing, he concluded that Juror 4 could carry out her duty as a juror. Thereafter, Judge Mullin allowed more than 55 witnesses to testify then, without any additional information, he conducted another hearing, but made no decision. After allowing two more defense witnesses to testify, he discharged Juror 4 from the jury over defense objection.

B. Facts

Juror 4 (G-18) confirmed to Judge Mullin during opening statements in the second penalty phase that she had notified the bailiff during a recess that she had just realized she knew defense witness, Reverend Leo Charon. (RT 236:27539.) She explained that her husband had worked in a CityTeam Ministries recovery program with Charon, she has known him for about ten years, has socialized with him, did not know him intimately, but knew he was a good man. (Ibid.) Juror 4 also confirmed that her husband left CityTeam Ministries four to five years earlier. (RT 236:27540.)

Judge Mullin later discharged Juror 4 "for cause" "under California Code of Civil Procedure [(CCP)] section[s] 225(c), 229(e), and 233, and/or the reasons or reasoning set forth therein" alleging that she had prejudged Charon's testimony and opinion, and could not consider his testimony with an open mind. (RT 255:29855-29857.) Charon had not yet testified.

C. Statutory Law Judge Mullin Mistakenly Relied Upon

1. The Judge Applied Statutes That Do Not Provide Authority for the Removal of Sitting Jurors

While a trial judge has broad discretion to remove a sitting juror for cause, he should exercise that discretion with great care. (People v. Barnwell (2007) 41 Cal.4th 1038, 1052.) "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion (Westside Community for Independent Living v. Obledo (1988) 33 Cal.3d 348, 355) the scope of which "always resides in the particular law being applied . . . Action that transgresses the confines of the applicable statute of law is outside the scope of discretion," and thus an abuse of it. (Hurtado v. Statewide Home Loans (1985) 167 Cal.App.3d 1019, 1022.)

In the present case, Judge Mullin abused his discretion when he discharged Juror 4 because he mistakenly relied upon the "reasoning" of two state statutes which authorize challenges only to *prospective* jurors during the initial jury selection process based on tests more easily satisfied than the test applicable to this case. However, these statutes do *not* authorize the removal of a juror who has already been sworn to try the case.

The first statute Judge Mullin relied upon, CCP section 225, defines the term "challenge," explains what is meant by challenges for cause and peremptory challenges, and provides that such challenges may only be made under this section *before* the jury is sworn. This section does not address objections to jurors who have already been sworn to try the case. It provides in relevant part:

> A challenge is an objection made to the trial jurors that may be taken by any party to the action, and is of the following classes and types:

(b) A challenge to a *prospective* juror by either:

(1) A challenge for cause, for one of the following reasons:

(C) Actual bias–the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire partiality, and without prejudice to the substantial rights of any party.

Thus, Judge Mullin should not have relied upon CCP section 225(b)(1)(C) to remove Juror 4 from the jury.

The second statute the judge relied upon, CCP section 229, also applies only to prospective jurors and provides in relevant part:

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

CCP section 229 does not provide authority for Juror 4's removal because she: (1) was no longer merely a prospective juror; and (2) had no "unqualified opinion or belief as to the merits of the action founded upon knowledge" of the material facts of this case. These statutes, therefore, do not authorize the removal of Juror 4 from the jury. (RT 255:29856.)

Indeed, excluding a prospective juror who gives equivocal statements during voir dire is much easier under the above statutes than even the outdated, easily satisfied "substantial evidence" test previously used to discharge a sitting juror for cause. (See People v. Hillhouse (2002) 27 Cal.4th 469 [if a *prospective* juror's statements are equivocal or conflicting, trial court's determination of juror's state of mind is binding; if not inconsistent, the trial court's ruling will be upheld if supported by substantial evidence].)

Thus, it is clear that Judge Mullin erred when he relied upon the "reasoning" of CCP sections 225 and 229 to remove Juror 4 from the jury.

In People v. Wilson (2008) 44 Cal.4th 758, this Court also discussed the proper statute and test to be applied in cases involving unintentional concealment of material information, as in the present case. (See RT 240:27994, wherein Judge Mullin stated that he believed that Juror 4 did not intentionally conceal that she knew Charon.)

In Wilson, this Court stated:

> Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal [citations], mere inadvertent or unintentional failures to disclose are not accorded the same effect. 'The proper test to be applied to unintentional "concealment" is whether the juror is sufficiently biased to constitute good cause for the court to find under Penal Code sections 1089 and [former] 1123 that he is unable to perform his duty. [Citations.]

(Id. at p. 823.)

As stated above, Judge Mullin, therefore, abused his discretion in relying on inapplicable, more easily satisfied statutes to discharge Juror 4 from appellant's jury. Surely he understood that the tests for removal of prospective jurors under CCP sections 225 and 229 were the easiest to satisfy, i.e., that reviewing courts will consider a trial judge's decision as binding where the prospective juror's statements are equivocal, or uphold the decision if supported by substantial evidence where the prospective juror's statements are not inconsistent. (People v. Hillhouse, supra, 27 Cal.4th 469.)

In addition, although a trial judge's factual findings are normally accorded deferential treatment, his decision to remove a *sitting* juror is not

binding on a reviewing court. (People v. Barnwell, supra, 41 Cal.4th at pp. 1052-1053; People v. Wilson, supra, 44 Cal.4th at p. 823.)

2. CCP section 233

Judge Mullin also relied upon CCP section 233 which does authorize the removal of a sworn juror shown to the court to be unable to perform her duty as a juror. (CCP section 233 [court may discharge juror who becomes sick, or upon other good cause shown, is unable to perform her duty].) The cases in the Notes of Decisions following this statute applied either the substantial evidence test (People v. Williams (2001) 25 Cal.4th 441, or the demonstrable reality test (Ibid; People v. Green (1995) 31 Cal.App.4th 1001.)

However, because Judge Mullin also relied on CCP sections 225 and 229, it is unlikely that he applied the demonstrable reality test. Indeed, if the judge considered Juror 4's statements to be conflicting, he likely believed that his discretion was so broad as to be binding on a reviewing court. (See People v. Hillhouse, supra, 27 Cal.4th 469.) In addition, the fact that the demonstrable reality test was not explicitly endorsed by this Court until Barnwell makes it unlikely that Judge Mullin applied that test.

Furthermore, Judge Mullin would have applied the substantial evidence test only if he considered Juror 4's statements to be consistent and unequivocal. (Ibid.) But if he considered her statements to be consistent and unequivocal, he would have had no proper basis for discharging Juror 4 from the jury. Thus, it is apparent that he applied the easiest test to satisfy, i.e., the test for excusing *prospective* jurors.

In light of Judge Mullin's reliance on the three CCP statutes, it is evident that he did not understand that he should have relied upon section 1089, and that a sitting juror's inability to perform as a juror must be shown as a demonstrable reality. (See People v. Compton (1971) 6 Cal.3d 55, 60;

People v. Marshall (1996) 13 Cal.4th 799, 843; People v. Barnwell, supra, 41 Cal.4th at pp. 1052-1053.)

Section 1089 expressly provides for the removal of sitting jurors as follows:

> If at any time, whether before or after submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty . . . the court may order the juror to be discharged and draw the name of an alternate who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

Appellant will demonstrate below that even if reliance upon CCP 233 could be considered the equivalent of reliance upon section 1089, Judge Mullin's decision to discharge Juror 4, nevertheless, violated appellant's statutory, and his state and federal constitutional rights.

D. Judge Mullin's Removal of Juror 4 Violated Section 1089 and the State and Federal Constitutions

Juror 4's discharge was without good cause in violation of: (1) section 1089, and People v. Barnwell, supra, 41 Cal.4th at pp. 1052-1053; (2) appellant's right to a unanimous, impartial jury trial under the Sixth Amendment to the United States Constitution, and article 1, section 16 of the California Constitution; and (3) appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution.

1. Actual Bias

Appellant recognizes that a juror who is actually biased is unable to perform her duty to fairly deliberate and is therefore subject to discharge under section 1089. (People v. Barnwell, supra, 41 Cal.4th at p. 1051.) However, in Barnwell, this Court also observed that removing a juror is a serious matter

implicating the constitutional protections appellant invokes, and, as stated above, although a trial judge has broad discretion to remove a juror for cause, "it should exercise that discretion with care." (Id. at p. 1052.)

2. The Standard of Review

In People v. Barnwell, supra, 41 Cal.4th 1052, this Court observed that it had previously given two different formulations of the applicable standard of review in juror removal cases: In some cases, this Court applied an "easily satisfied," "deferential standard" which provided that a judge's decision to remove a juror was to be upheld if supported by "substantial evidence." In other cases, this Court has held that a juror's disqualification must appear on the record as a "demonstrable reality." This Court also explained in Barnwell that the latter, more stringent standard traces back to People v. Compton, supra, 6 Cal.3d at p. 60, and requires a stronger evidentiary showing than mere substantial evidence to support a trial court's decision to discharge a sitting juror. (People v. Barnwell, supra, 41 Cal4th at p. 1052.)

This Court then expressly held:

> To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect appellant's fundamental rights to due process and to a fair trial by an unbiased jury.
>
> A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which the trier of fact *could* have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. [Citation.] Even where there is significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding.

> *The demonstrable reality test entails a more comprehensive and less deferential review.* It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the whole record, supports its conclusion that bias was established. It is important to note that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the trial court relied.
>
> In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but the record of reasons the court provides.

(People v. Barnwell, supra, 41 Cal.4th at pp. 1052-1053, second emphasis added; People v. Wilson, supra, 44 Cal.4th at p. 823.)

3. Juror 4's Alleged Disqualification (actual bias) Does Not Appear in the Record As a Demonstrable Reality

a. The Hearings

Appellant will first address the record of the hearings Judge Mullin conducted relating to this issue. Next, appellant will address the formal reasons the judge gave to justify his decision to discharge Juror 4.

It will become evident that the record of both the hearings, and Judge Mullin's ruling, fail to show as a demonstrable reality that Juror 4 was unable to perform her duty as a juror. (People v. Barnwell, supra, 41 Cal.4th at p. 1052-1053; People v. Wilson, supra, 44 Cal.4th at p. 823.) To the contrary, the record actually shows that Juror 4 was, in fact, fully capable of carrying out her duty and oath.

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During the first hearing, Judge Mullin questioned Juror 4 as follows:

> **Judge Mullin**: Is there anything about your friendship or knowledge, your conversations or whatever with Mr. Charon that would affect your ability to be fair and impartial both to the prosecution and the defense in this case?
>
> **Juror 4**: I don't think so.
>
> **Judge Mullin**: All right. Would you be able to listen to Reverend Charon, Leo Charon, With an open mind and if something he said seemed to ring true with you, fine, and it didn't, fine the other way?
>
> **Juror 4**: Yes.

(RT 236:27540.)

Prosecutor Rico asked the judge to ask Juror 4 whether there was anything about her husband's relationship with Charon that "would put any pressure on her to find him credible or not." (Ibid.) Judge Mullin continued questioning Juror 4 as follows:

> **Judge Mullin**: Okay. You indicated that . . . Leo Charon was your husband's boss you think?
>
> **Juror 4**: I know . . . my husband could have been his boss.
>
> **Judge Mullin**: Okay. Is there anything . . . because of your husband's relationship with Leo Charon that would affect you in this case; do you think?
>
> **Juror 4**: No.
>
> **Judge Mullin**: All right. Thank you very much. We'll see you Tuesday morning.
>
> **Juror 4**: Okay.

Judge Mullin: Thank you.

(RT 236:27541. Italics added.)

The following week, prosecutor Rico told Judge Mullin that he wanted to readdress Juror 4. (RT 240:27987.) Braun reminded the judge that a hearing on this issue had already been conducted and that Juror 4 had stated that her knowing Charon would not affect her ability to be fair and impartial. Braun also stated that there was no reason to revisit this issue because: (1) the judge had already accommodated Rico by asking Juror 4 a second time whether her husband's relationship with Charon would affect her in this case; (2) Juror 4 repeated that she could be fair and impartial; and (3) no new information had arisen since that inquiry. (RT 240:27989.)

Prosecutor Rico protested that he had accepted Juror 4 as a juror without knowing that she knew Charon and she did not inform the court that she knew Charon until the jury had been selected, sworn and opening statements had been made. (RT 240:27990-27992.) He was bothered because Juror 4 said Charon was a good man and argued that Juror 4 had already formulated an opinion as to Charon's nature and credibility. (RT 240:27992.) Rico further argued that he had he known that Juror 4 knew Charon he would not have accepted her as a juror, the fact that Juror 4 did not intend to deceive the court did not remedy the problem, and the prosecution would not receive a fair trial. (RT 240:27993-27994.)

Judge Mullin stated that he believed that Juror 4 did not intentionally conceal that she knew Charon. (RT 240:27994.) Later, the prosecutor agreed, adding that he believed that Juror 4 wanted to be fair. (RT 254:29668.)

Co-appellant Travis's counsel, Leininger, argued that Juror 3 (G-76) had served as a juror in a prior trial prosecuted by prosecutor Rico, the judge

asked Juror 3 the same question he asked Juror 4 and Juror 3 also stated he could be fair and impartial. Travis's counsel also informed the judge that he has a case with the husband of Juror J-35, and that alternate Juror J-70 has fairly frequent contact with a division of the police department in which counsel's son is the supervising sergeant. (RT 240:27995.)[22]

Judge Mullin told defense counsel to keep in mind that prosecutor Rico did not have the chance to exercise a peremptory challenge against Juror 4 while they could have peremptorily challenged alternate Juror J-70. (Ibid.)

Judge Mullin refused to hear any further argument from counsel and said he would allow counsel to submit additional questions to ask Juror 4. (RT 240:27996.)

One month later, *after 45 prosecution witnesses and 10 defense witnesses had testified* (RT 238:27597-254:29657), and without any additional

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Prosecutor Rico also knew that Juror 3 (G-76) had previously served on a jury in a criminal case he had successfully prosecuted (RT 222:25817-25818), and that Juror 3 had failed to reveal this fact to the court and counsel. (RT 222:25822.) Thus, Rico's protestations about Juror 4 ring hollow since Rico did not reveal that he knew Juror 3 to the judge or counsel until the voir dire of Juror 3. Juror 3, in turn, did not reveal that he recognized Rico until Rico expressly asked him during voir dire whether Juror 3 recognized him. (RT 222:25817.) Juror 3 denied that this would affect his ability to be fair and impartial in this case. Appellant's trial counsel, Braun, informed Judge Mullin that he had no knowledge of this prior relationship and asked the judge to inquire further. (RT 222:25817.) Judge Mullin asked Juror 3 whether there was anything about the case that would affect him in this case. Juror 3 replied, "No." Judge Mullin also asked him if he could completely set that experience aside, he replied, "Yes." (RT 222:25818-25819.) When asked by, Leininger, Travis's counsel, why he had not revealed that he had served in a prior trial prosecuted by Rico, Juror 3 replied, "I wasn't absolutely sure." (RT 222:25820.) All counsel passed for cause. (RT 222:25821.)

information, Judge Mullin held a third hearing during which Juror 4 explained that she did not recognize Charon's name until it was mentioned during opening statements. (RT 254:29663.) When asked if she had learned whether her husband was Charon's boss at CityTeam Ministries, Juror 4 replied that she had not because she understood that she was not to discuss the case. (RT 254:29663-29664.) Juror 4 further explained that she and her husband saw Charon only at CityTeam functions; they did not socialize otherwise. (RT 254:29664.) Juror 4 did not know whether Charon was married and had last seen him several months earlier at a wedding of a CityTeam employee. Prior to the wedding, she had not seen Charon for three years. (RT 254:29664-29665.)

Judge Mullin told Juror 4 that he was concerned that she might determine Charon's credibility based on out-of-court information. (RT 254:29665.) Juror 4 said she too would be concerned if she were the prosecutor faced with a juror who knew Charon as she does. (RT 254:29665-29666.) Seeking clarification, the judge questioned Juror 4 further:

> **Judge Mullin**: Can you express . . . what you mean by that a little bit?
>
> * * *
>
> **Juror 4**: Because I know him. What I know of him I just wouldn't believe that he would ever lie about dealings with somebody. So as far as that would go, *I would believe that* what he was saying *he* would believe it to be true.
>
> **Judge Mullin**: Okay. So if - - basically what you're saying is that if Mr. Charon testified under oath you would not believe that he would be capable of telling a lie or misleading anybody?
>
> **Juror 4**: Right.
>
> **Judge Mullin**: Okay. Let me ask you sort of the flip side of the question . . . Assume that Mr. Charon testifies . . . favorably for

the prosecution. If you were defense counsel, would you be comfortable with a juror such as yourself, or would your answer be the same? (RT 254:29666.)

Juror 4: It would be the same, *but* I guess from my consideration - - *I give everybody the benefit of the doubt. I'm assuming everybody is telling the truth. So I don't necessarily think that his favorable or not favorable testimony would - - would really sway me one way or the other.*

Judge Mullin: So as far as you're concerned it wouldn't make any difference who his testimony might favor. If it did favor anybody you would tend to believe him because of what you know about him? If I'm wrong, tell me.

Juror 4: Well, again, I would tend to believe that what he's saying *he* believes to be the truth. *That doesn't mean you can't be wrong about something.*

Judge Mullin: Okay. If during deliberations you and the other - - or you and eleven other jurors . . . are back in the jury room and the subject of Mr. Charon's testimony came up and the weight to be given to his testimony, do you think you would want to go into why you might think that he believed what he was saying was true, that is, your background information of him, or could you keep that out of the deliberations.

Juror 4: *I could keep it out if I was told to, yes.*

Judge Mullin: Because basically that's something that you know that the other jurors we're assuming they don't know at this time, and if you were to be telling them you would be giving them evidence, that is, the other jurors evidence that wasn't taken during the trial process. Do you see what I mean?

(RT 254:29667-29668. Italics added.)

Juror 4: Yes. And I wouldn't disclose any of that, no.

> **Judge Mullin**: Okay. That's the only questions I have at this time. . . I'm going to go ahead and release you at this time and if there's anything further we need we can do it at the close of business tomorrow or some other time. But other than that we'll see you tomorrow at 9:00 o'clock in the jury assembly room. Thank you very much.

(RT 254:29668.)

Judge Mullin invited comments from counsel but informed them that he did not know whether he would make a decision that evening. (Ibid.)

Prosecutor Rico stated that he believed that Juror 4 wanted to be fair and that her failure to disclose her knowing Charon was innocent and unintentional. However, he argued that Juror 4 had already prejudged Charon as a truthful person and that whatever he says would be what he believed to be true. (RT 254:29668-29670.)

Judge Mullin replied, "She stated that she believes that whatever he testified to he believes or would believe would be true. He could still be wrong she said. She volunteered that. He could still be wrong." (RT 254: 29670.) Rico agreed but continued to state that he would have to cross-examine Charon to show lack of credibility. (RT 254:29670-29672.) *Judge Mullin, however, responded that it would not automatically follow that Juror 4 was going to believe Charon. He could still be wrong as far as she was concerned.* (RT 254:29671. Italics added.) Rico insisted that the prosecution would not get a fair trial claiming that Juror 4 had prejudged Charon's credibility. (RT 254:29672.)

Braun reminded Judge Mullin that Juror 4's interaction with Charon was at year-end gatherings she attended with her husband, not one-on-one meetings. He also pointed out that Juror 4 based her opinion that Charon was a good man on the fact that the men in the program trusted him. He argued

that this did not provide a strong basis for giving Charon more credibility than any other witness. (RT 254:29675.) Braun also reminded the judge that although Juror 4 said that Charon would believe that he was telling the truth, he could also be mistaken. (RT 254:29676-29677.)

The following day, after two more defense witnesses had testified (RT 255:29733-29854), Judge Mullin discharged Juror 4. (RT 255: 29855-29856.)

However, the record of the hearings does not support the judge's decision to discharge her.

First, when asked whether knowing Charon would affect her ability to be fair and impartial, Juror 4 replied, "I don't think so." (RT 236:27539-27540.) When asked whether she would be able to listen to Charon with an open mind, Juror 4 replied, "Yes." She also, in effect, agreed that she could determine whether Charon's testimony "r[a]ng true" or not. (RT 236:27540.)

Second, at prosecutor Rico's request, Judge Mullin asked Juror 4 whether there was anything about her husband's relationship with Charon that would affect her in this case. Juror 4 replied, "No." (RT 236:27541.)

Third, after more than 46 witnesses had testified, the judge asked Juror 4 during the last hearing on this issue whether she had learned whether her husband had been Charon's boss at CityTeam Ministries, Juror 4 replied that she had not because she understood that she was not to discuss the case. (RT 254:29663-29664.) This reply further shows that Juror 4 understood her oath and took it seriously.

Fourth, it is true that Juror 4 did say that she would not believe that Charon would ever lie or mislead anyone. However, she never said that *she* would believe that what he said would be true. Rather, she explained that: (1) she believed that *Charon* would believe his own testimony to be true; (2) she would give all witnesses the benefit of the doubt, initially; (3) did not think

that Charon's testimony would "sway [her] one way or the other;" and (4) even though she believed that Charon would believe his own testimony to be true, this does not mean he could not be wrong. (RT 254:29667-29668.) Moreover, to lie is to make a statement *one knows is false*. (Webster's New World College Dictionary, 4th Edition (2004).) Juror 4 recognized the distinction between telling a lie (saying something one knows is false), and saying something that is not true, but is thought to be true. That is, she understood that although Charon's remarks might not be a lie because *he believed them to be true,* she could still determine whether they were wrong, inaccurate or untrue.

Fifth, Juror 4 told Judge Mullin that she would follow any instruction that forbade her from disclosing to the jury that she knew Charon. (Ibid.)

Sixth, the judge himself twice told the prosecutor that Juror 4 realized that despite her opinion of Charon, "he could still be wrong," it would not "automatically follow" that Juror 4 would believe Charon's testimony. "He could still be wrong as far as she was concerned." (RT 254:29670-29671.)

Seventh, prosecutor Rico also admitted that Juror 4 wanted to be fair and that he believed her when she said that she did not reveal that she knew Charon any earlier because she did not recognize him name on the juror questionnaire. (RT 254:29668.)

Eighth, the fact that Judge Mullin learned during opening statements that Juror 4 knew Charon, conducted a hearing and apparently found her capable of performing her duty, and permitted all of the prosecution witnesses, and 12 defense witnesses, to testify before he discharged her suggests that Juror 4 was fully capable of carrying out her duty as a juror. In fact, the judge had no new information to justify holding another hearing on this issue. Had

Juror 4 been actually biased, he would have discharged her long before so many witnesses had testified in this case.

Ninth, whether prosecutor Rico would have used a peremptory challenge to remove Juror 4 is irrelevant since only the "demonstrable reality" test applies to determine whether a sitting juror should be removed for cause.

b. Judge Mullin's Ruling

Judge Mullin explained his removal of Juror 4 as follows:

> All right. The Court is convinced that there is absolutely no juror misconduct and Juror Number 4 did not realize she knew the witness, Leo Charon, until February 13 of 1997 during the opening statements and she notified the Court immediately.
>
> It's important to note that Mr. Charon's testimony is unlike most witnesses in that it consists not only of his observations and conversations but more importantly his opinion and the credibility of that opinion.
>
> . . . in ruling . . . today the Court is not in any way basing its decision on Mr. Rico's statement that he will have to point out conflicts in Mr. Charon's prior testimony or to attack his credibility. Credibility of any witness is always an issue.
>
> Now Juror Number 4 realizes that her special knowledge and opinion if Mr. Charon cannot be shared with other jurors at any time including deliberations. She would therefore be judging his credibility on facts or factors that are not in evidence and that would be improper in and of itself.
>
> Also, just as important she would not be able to get involved in the deliberative process on the issue of Mr. Charon's credibility if and when that issue came up in deliberations. Juror Number 4 has stated of Mr. Charon that she would believe what he says is true and that he would - - that what he says could actually be wrong, but he would - - but that he would not think it was wrong.

> More importantly she does not believe that Mr. Charon would lie or even mislead anyone. Again, this is based on the evidence, if you want to call it that, that was obtained outside of this trial, that is, before this trial even began. This shows that she has prejudged his testimony or opinion and could not look at it with an open mind.
>
> The Court therefore must excuse Juror Number 4 for cause under California Code of Civil Procedure Section 225(c), 229(e) and 233 and/or the reasons or reasoning set forth therein. If this had been known at the time of the Hovey voir dire . . . she would have been excused for cause at that time.
>
> The Court does not want to do this as the Court believes that Juror Number 4 is and would continue to be a fine juror and perfectly qualified except for this impediment. This is borne out not only by her questionnaire, the voir dire of her on January 16 of 1997 and the questioning on February 13 of 1997 and yesterday, March 12 of 1997, but by the fact that all three attorneys did in fact pass her for cause and there was no challenge. The Court will excuse her at the end of today to avoid any embarrassment to her. (RT 255:29855-29857.)[23]

c. Analysis

Judge Mullin said he discharged Juror 4 based on four considerations he listed out of the order in which they occurred. Appellant will address those considerations in the same order but will place Juror 4's responses in context to permit a coherent consideration of the entire record in applying Barnwell's "more comprehensive and less deferential review, i.e., the demonstrable reality test" to these facts. (People v. Barnwell, supra, 41 Cal.4th at p. 1052.)

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23 Defense counsel Braun asked Judge Mullin to address his offer not to call Charon as a witness. The judge replied, "It doesn't make any difference . . . Mr. Charon is still a witness. She is excused for cause." (RT 255:29857; CT 19:4720-4721.)

Applying the Barnwell test to the present case, it is evident that the entire record fails to show as a demonstrable reality that Juror 4 was unable to perform her duty as a juror.

First, Judge Mullin attempted to justify his ruling by stating that "Charon's testimony is unlike most witnesses in that it consists not only of his observations and conversations but more importantly his opinion and the credibility of that opinion." (RT 255:29855.)

However, the mere fact that Charon's testimony might also include an opinion the credibility of which must be determined by the jury adds nothing to the analysis, and therefore does not support a finding that Juror 4 was unable to perform her duty as a juror. Juror 4, *like Juror 3 who knew Prosecutor Rico from an earlier case he had successfully prosecuted*, made clear that her knowing Charon would not affect her in this case.

Second, Judge Mullin stated that Juror 4 "realizes that her special knowledge and opinion of Mr. Charon cannot be shared with other jurors at any time including deliberations. She would therefore be judging his credibility on facts or factors that are not in evidence and that would be improper in and of itself." (RT 255:29855-29856.)

The judge's explanation is nonsensical. He recognized that Juror 4 understood that she could not tell other jurors that she knew Charon. But rather than recognizing that this fact actually revealed that Juror 4 understood her duty not to reveal extrajudicial information to other jurors, the judge concluded that her recognition of this duty would cause her to judge Charon's credibility on facts not in evidence. This is absurd. Juror 4's understanding of her duty not to reveal this information does not logically support a conclusion that she would judge Charon's credibility on facts not in evidence.

The issue here is whether she would determine Charon's credibility solely on the evidence at trial. Her remarks (she would keep an open mind, knowing Charon would not affect her in this case, she would not automatically be swayed one way or the other by his testimony, he could still be wrong) actually show that she would base her decision on the evidence presented at trial.

Third, Judge Mullin stated that Juror 4 "would not be able to get involved in the deliberative process on the issue of Mr. Charon's credibility if and when that issue came up in deliberations. Juror Number 4 has stated of Mr. Charon that *she would believe what he says is true* and that he would - - that what he says could actually be wrong, but he would - - but that he would not think it was wrong." (Italics added.)

Judge Mullin is wrong. Juror 4 did *not* say "*she* would believe what he says is true." She actually said, "I would tend to believe that what he's saying *he* believes to be the truth. That doesn't mean you can't be wrong about something." (RT 254:29667-29668.)

Juror 4's statement actually shows that she simply recognized that even though she thought Charon would believe he was telling the truth, he could still be wrong. Nothing in her remarks shows that *she* would automatically believe Charon's testimony to be true or that she could not engage in the deliberative process. Thus, this attempt to justify her discharge also fails to show as a demonstrable reality that she was unable to perform her duty to consider only in-court evidence relating to Charon's credibility during deliberations.

Fourth, Judge Mullin stated that most importantly, Juror 4 "does not believe that Mr. Charon would lie or even mislead anyone. Again, this is based on the evidence, if you want to call it that, that was obtained outside of

this trial, that is, before this trial even began. This shows that she has prejudged his testimony or opinion and could not look at it with an open mind."

As acknowledged above, Juror 4 did say that she did not believe that Charon would lie or mislead anyone, he would believe that what he said was true. But, as also explained above in "The Hearings" analysis, Juror 4 explained that this did not mean that *she* would automatically believe that what he said was true. She explained: (1) "So as far as that would go, I would believe that what he was saying *he* would believe it to be true; and (2) "I give everybody the benefit of the doubt. I'm assuming everybody is telling the truth. So I don't necessarily think that his favorable or [un]favorable testimony would - - would really sway me one way or the other."

Apparently, needing further clarification, Judge Mullin asked Juror 4 whether she would tend to believe Charon because of what she knew of him. Juror 4 explained, "Well again, I would tend to believe that what he's saying he believes to be the truth. That doesn't mean you can't be wrong about something." (RT 254:29667-29668.)

Juror 4 had already told the judge that she would remain fair and impartial, would listen to Charon's testimony with an open mind, and that there was nothing about her or her husband's relationship with Charon that would affect her in this case. (RT 236:27540-27541.)

Fifth, despite Judge Mullin's claim that he would have excused Juror 4 for cause during voir dire had he known that she knew Charon, the record shows that he was not troubled at all by other jurors who knew persons involved in this case:

Judge Mullin expressed no concern that alternate Juror 3 (J70) became Juror 4 after the original Juror 4 was removed from the jury. (CT 19:4723;

RT256:29906-29907.) New Juror 4 (J-70) works for the San Jose Police Department and knows Sergeant Michael Leininger, the son of Travis's trial counsel. (RT 228:26814-26816.)

In addition, Judge Mullin expressed no concern that Juror 3 actually knew Prosecutor Rico, had been convinced by Rico to convict a defendant in a previous trial, and that Juror 3 might evaluate the credibility of the prosecution's case against appellant based on his prior experience with Rico.

Moreover, during the first trial, Judge Mullin was not troubled in the least that Juror 5 knew a friend of appellant named Judy Fielder. The judge was also not troubled by the fact that when Juror 5 told Fielder that he was on appellant's jury, Fielder "begged" him to "hang" the jury because appellant did not deserve to die. After several hearings, it was defense counsel Braun who asked the judge to remove Juror 5 for cause because the juror: (1) continued to discuss the incident with other jurors even though he had been admonished not to do so, and (2); was not truthful when questioned about the content of the conversations he had with other jurors. (RT 103:9818-9823, 9899-9901; 9940-9943; RT 149:14436-144450; RT 152:14726-14740.) Judge Mullin denied Braun's motion because, even though Juror 5 stated that he did not appreciate Fielder's conduct, he claimed he could be fair and impartial. (RT 152:14740-14744.)

Had Judge Mullin applied the same "for cause" standard he used to keep Juror 5 in the first trial to Juror 4 in the second trial, Juror 4 would surely have remained on the jury.

Indeed, the trial record shows that over the course of both trials, Judge Mullin increasingly applied different standards in deciding similar issues, then issued uneven rulings to appellant's detriment.

Judge Mullin also accepted other jurors even though their responses to questions suggested that their ability to be fair and impartial was doubtful.

For example, during the first trial, the jury questionnaire asked, "Do you believe that it is possible that a peace officer might not tell the truth?" Prospective juror P-32 replied, "No," and stated, "It's my understanding there is a penalty for lying under oath." (CT 27:6751.) P-32 also expressed the view that a guilty defendant "could probably lie," and that family members and friends of defendant, "could possibly lie." Judge Mullin failed to seek clarification regarding whether this view would improperly affect P-32's ability to be fair and impartial. (RT 92:8750-8755.) P-32 was later sworn as alternate juror. (CT 94:8878-8883.)

Prospective juror P-56 stated in his questionnaire that it was not possible for a peace officer to lie, because "He/she has to uphold the law/I need to have faith in that." (CT 28:6816.) Conversely, P-56 believed both that a defendant would lie to save his life, and that other witnesses might lie. (Ibid.) P-56 was also sworn in as an alternate juror. (RT 94:8883.)

In addition, other rulings regarding prospective jurors demonstrated Judge Mullin's exceptional faith in their ability to be fair and impartial despite extremely trying circumstances. During the first trial, prospective juror D-5 revealed that his brother-in-law had been murdered in a drug-related shootout, and that close cousin had also been murdered by someone hired by the cousin's ex-wife. D-5's wife had been robbed while working at a store. The robber fired shots at her that missed as she fled the store. The robber was later arrested for another robbery during which he had murdered two people, and D-5's wife testified at that trial. (RT 66:5357-5361.) D-5 conceded that these experiences affected his attitude toward persons charged with murder. (RT 66:5359.) When asked if he could set aside his feelings about his cousin's

murder, and the robbery and attempted shooting of his wife, and base his decision on the evidence, D-5 replied, I would hope I could, you know," and I believe I could set it aside, yeah." (RT 66:5360-5361.) Judge Mullin said he believed that D-5 could be fair and impartial and denied Travis's challenge for cause. (RT 66:5362-5372.)

At the second penalty phase, prospective juror F-64 stated that her daughter and her daughter's husband had been murdered. F-64 joined, and attended meetings of "Parents of Murdered Children," a victim's rights group. When Judge Mullin asked her whether this would affect her ability to be fair and impartial, F-64 replied, "No." (RT 220:25463-25464.) Braun asked F-64 whether she could avoid identifying with another mother of a murder victim but Judge Mullin sustained prosecutor Rico's objection that the question asked F-64 to prejudge the case. (RT 220:25467-25469.) Braun attempted to ask F-64 whether the testimony of Mr. Madden's family would be so aggravating that no amount of mitigating evidence would overcome it but the judge sustained all of Rico's objections that the questions called for prejudgment of the case. (RT 220:25469-25470.) The murderer of her daughter and son-in-law was never caught. (RT 220:25470.) Prospective juror F-64 was selected and sworn and served as Juror 5 in this case. (CT 18:4645.)[24]

In sum, the entire record fails to show as a demonstrable reality that Juror 4 was unable to perform her duty as a juror. (People v. Barnwell, supra,

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Juror 5 (F-64) was not challenged for cause. However, the point here is that Judge Mullin should have recognized that if Juror 5, the mother of a murdered daughter whose murderer had never been caught, was not excludable for cause because she said this would not affect her ability to be fair and impartial, then certainly the responses of Juror 4, who simply knew a witness superficially, showed that she too was capable of performing her duties as a juror in this case.

41 Cal.4th at p. 1052-1053; People v. Wilson, supra, 80 Cal.Rptr.3d 211, 187 P.3d 1041.) To the contrary, the record shows that despite her acquaintance with Charon, Juror 4's responses demonstrated that she could assess his credibility with an open mind and, thus, could be fair and impartial. (See People v. McPeters (1992) 2 Cal.4th 1148, 1174-1176 [trial court properly refused to remove juror who said he could be fair where juror's contact with the witness "was brief and not naturally or inevitably productive of bias"].)

This Court should, therefore, reverse appellant's death sentence because the State cannot prove beyond a reasonable doubt that this error did not contribute to the verdict obtained. (Chapman v. California (1967) 386 U.S. 18.

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IX

JUDGE MULLIN DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS AND IMPROPERLY DILUTED RELEVANT MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN HE ERRONEOUSLY RULED THAT EX-POLICE OFFICER, MICHAEL GEORGE, HAD VALIDLY INVOKED THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION

In Washington v. State of Texas (1967) 388 U.S. 14, the United States Supreme Court held:

> The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser a footing that the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in In re Oliver, 333 U.S. 257, 92 L.Ed 682, 68 S.Ct. 499 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:
>
> > "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine witnesses against him, to offer testimony, and be represented by counsel." 333 US, at 273, 92 L ed at 694 (footnote omitted.)
>
> The right to offer testimony of witnesses, *and to compel their attendance, if necessary*, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to

> establish a defense. This right is a fundamental element of due process of law. (Washington v. State of Texas, supra, 388 U.S. at pp. 18-19. Italics added.)

In March or April 1982, when appellant was twelve years old, police officer, Michael George, arrested appellant for petty theft. (RT 148:14220-14221.) While taking appellant to juvenile hall, Officer George described his home, pets and children, and asked appellant if he would like to live with him. Appellant agreed, and Officer George picked him up from juvenile hall and took him home to live with him as his foster child. (RT 148:14221-14228.) Appellant stayed at Officer George's home for eight to ten months. (RT 148:14228; 254:29525-29534.) During this time, Officer George sexually abused appellant after first plying him with rum and coke. Over time, Officer George gave appellant baths, orally copulated and fondled appellant and had appellant masturbate him. He also attempted anal intercourse with appellant, completing partial penetration when appellant told him that it hurt and he could not continue. Once, Officer George also took appellant to a motel and asked him if he wanted to take a shower with him. (RT 148:14233-14238.)

On March 7, 1997, a hearing was held during the second penalty phase of appellant's trial to determine whether defense counsel, Geoffrey Braun, would be allowed to call now ex-police officer George to testify about his sexual abuse of appellant over 14 years earlier. (RT 252:29112-29116.) Braun informed Judge Mullin that George was going to invoke the privilege against self-incrimination and refuse to testify about his sexual abuse of appellant. (RT 251:29112.)

Braun also argued, however, that George could not properly rely upon the privilege because the six-year statute of limitations for his sexual crimes against appellant had expired, and George could no longer be prosecuted for

them.[25] (Ibid.) Braun further argued that even the "new" one-year statute of limitations (section 803) had expired since appellant reported George's sexual abuse during court proceedings over two years earlier in December 1995, and the State had not commenced any prosecution proceedings against George.[26] (RT251:29112-29113.)

Judge Mullin directed Braun to call George to see if he would, in fact, assert the privilege against self-incrimination. (RT 251:29121.) George was

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The statute of limitations for violation of sections 288 and 288(a)(c)(1) is six years.

Section 288 provides in relevant part:

> . . . Any person who wilfully and lewdly commits any lewd or lascivious act upon or with the body . . . of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

Section 800 provides in relevant part:

> . . . prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense.

26

Section 803, subdivision (f)(1) provides in relevant part:

> Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was a victim of a crime described in Section . . . 288, 288(a). . . .

called and he refused to answer any questions relating to his sexual abuse of appellant. (RT 251:29121-29123.)

Braun stressed to Judge Mullin that the privilege against self-incrimination did not apply to George because every applicable statute of limitations had expired and George, therefore, could not be prosecuted for his sexual crimes against appellant. Furthermore, there was absolutely no evidence of any other criminal charges pending against George. (RT 251:29124.)[27]

Nevertheless, Judge Mullin would not allow Braun to call George as a defense witness. He ruled as follows:

> The Court finds that Mr. George has a legitimate right to claim the Fifth Amendment. He's been in custody I'll say only ten months. There *could be* other victims out there, victims of Mr. George, and any testimony - - and the statute of limitations regarding other victims *could be* section 803 (f) and/or (g) of the Penal code which takes the statute of limitations because of the Legan case in this county back a ways.
>
> *And if there was and there very well could be I suppose* a prosecution of other victims who are still under the age of eighteen that *could* claim to be victims of Mr. George. And the testimony - - any testimony he gave in the Silveria case could be used against him under section 1101 of the Evidence Code.

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27 In April 1996, defense investigator, Daniel DeSantis, learned that George, who had transferred to work as a police officer in Lake County, had been convicted of 11 counts of child molestation of another boy in that county. (RT 261:30934-30936.) On May 31, 1996, George was sentenced to San Quentin, then sent to Solano State Prison in Vacaville. Because George had already been convicted and sentenced in this Lake County case nothing he would have testified to in appellant's case could not have impacted him in the Lake County case.

(RT 251:29125. Italics added.)

The language in the above ruling makes clear that Judge Mullin recognized that ex-police officer George could not be prosecuted for the sexual crimes George committed against appellant. It also reveals that Judge Mullin engaged in pure supposition in finding that George had a "legitimate" right to assert the privilege against self-incrimination. The judge allowed George to assert the privilege merely because "there *could be other* victims out there" and "*if there was and there very well could be I suppose a prosecution. . . .*" (RT 251:29125.)

This ruling is absurd. If the mere possibility of the existence of other crimes and other victims was all it took to find the privilege applicable, then every criminal suspect would always be able to assert it even though the statute of limitations for any actual crimes he or she previously committed had expired.[28]

It is evident from the above record that Judge Mullin knew that George was immune from prosecution for his sexual crimes against appellant. The judge, therefore, should not have prevented appellant from presenting relevant mitigating evidence by depriving appellant of his right to compulsory process for obtaining a witness in his favor. Put simply, Judge Mullin arbitrarily

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The fact that George was housed in Mendocino County at the time he asserted the privilege against self-incrimination suggested that he may have been taken there because of yet another sexual molestation case. However, George was being housed in the Mendocino County jail for his protection while he waited to testify in a *murder* case in Lake County. (CT 19:4735). Thus, this is not evidence of another pending child molestation case.

denied appellant his right to put on the stand a witness who was fully capable of testifying to the repeated sexual abuse this witness had personally and repeatedly inflicted upon appellant over several months, abuse for which George was no longer punishable due to the expiration of the statute of limitations.

George should not have been allowed to falsely shield himself from testifying about his sexual crimes against appellant. His direct testimony was extremely important to demonstrate for the jury how the sexual molestation of a twelve-year-old boy by his foster father contributed to the boy's abnormal development, which in turn contributed to his later criminal conduct as a young adult.

It is true that Braun was able to convince Judge Mullin to permit defense investigator DeSantis to testify before the jury that George had admitted that he sexually molested appellant. (RT 261:30934-30963.)

But this did not cure Judge Mullin's error.

First, Judge Mullin recognized that he was "limit[ing] the evidence in this area" and justified this limitation because this case was "not People v. George." (RT 258:30452.)

Second, the value and impact of this mitigating evidence was greatly diminished because, rather than seeing and hearing the actual perpetrator testify about his repeated sexual abuse of appellant, this evidence was diluted through the second-hand testimony of a defense witness who lacked personal knowledge of the abuse. In addition, before the jury could assign any mitigating value to this evidence, it had to first consider whether defense investigator DeSantis was biased in favor of the defense because he worked for the defense. And even if the jury found no bias, it still had to determine whether DeSantis was otherwise credible.

On the other hand, the dilution of the convincing force of this evidence would not have occurred had appellant been allowed to call George as a witness. George's testimony would have eliminated any doubt regarding the actual occurrence, manner, and number of times George molested appellant.

In addition, questions of DeSantis's possible bias and lack of credibility would not have arisen had the jury heard George personally describe the different ways and number of times he sexually abused appellant during the ten months he acted as appellant's foster father.

In short, George's direct testimony would have had a greater convincing force and, therefore, a greater mitigating value than the second-hand testimony ultimately given by a witness hired by the defense because it would have dispelled any doubts surrounding his sexual abuse of appellant.

Judge Mullin's errors denied appellant his Sixth Amendment right to compulsory process and to present a defense in violation of his Fourteenth Amendment right to due process. (Washington v. State of Texas, supra, 388 U.S. at p. 18-19.) The judge's errors also rendered the death verdict unreliable in violation of the Eighth and Fourteenth Amendments. (Woodson v. North Carolina (1976) 428 U.S. 280.) This Court should therefore strike appellant's death sentence because the State cannot prove beyond a reasonable doubt that the errors did not contribute to the verdict obtained. (Chapman v. California (1967) 386 U.S. 18.)

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X

THE JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION FOR MISTRIAL BASED ON PROSECUTOR RICO'S ASSERTION IN THE JURY'S PRESENCE THAT COUNSEL'S DIRECT-EXAMINATION CREATED A PROBLEM FOR THE APPELLATE COURT ON REVIEW

In Caldwell v. Mississippi (1985) 472 U.S. 320, 324-326, defense counsel, in their case for mitigation, put on evidence of Caldwell's youth, family background, poverty and general character evidence. In closing arguments they asked the jury to show mercy based on this evidence. In response, the prosecutor sought to minimize the jury's sense of importance of its role by arguing that its decision was automatically reviewable by the Mississippi Supreme Court. Caldwell was convicted of capital murder and sentenced to death. On review, the state Supreme Court divided four to four on the validity of the death sentence thereby affirming that sentence. On certiorari, the United States Supreme Court held in relevant part:

> . . . We conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." . . .
>
> In evaluating the various procedures developed by the States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human should die at the hands of the State. . . . Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of

> death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with–and indeed as indispensable to–the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." [Citations.]

(Caldwell v. Mississippi, supra, 472 U.S. at pp. 328-330.)

During Leininger's direct examination of his witness, Sharon Lutman, the following colloquy ensued in front of the second penalty phase jury:

> **Leininger:** Do I need these marked for identification? I'm not going to attempt to enter these.
>
> **Judge:** All right.
>
> **Leininger:** I'm going to show you a picture, Ms. Lutman, and maybe - - is there a shelf on there?
>
> **Prosecutor Rico:** Your Honor, if counsel is going to refer to an item in the record and display it to the jury as per testimony about it and then it's not marked and introduced into evidence, it does create a problem for the appellate court on review. I think that it's necessary if he intends to publish them to have them marked.
>
> **Judge:** All right. Let's mark them then.
>
> **Braun:** You Honor, I need to approach the bench on a procedural matter based on what Mr. Rico just said.
>
> **Judge:** All right.
>
> * * *
>
> **Braun [at side bar]:** Your Honor, based on Mr. Rico's remarks concerning - -
>
> **Judge:** You want a mistrial.

Braun: Yes, I do. And if the court denies this then I think we need to discuss alternatives, but first I move for a mistrial based on Mr. Rico's remark, that it's clearly put in the jury's mind that they are no longer going to be the last word, that an appellate court is going to be the last word. So I do move for a mistrial.

Prosecutor Rico: That's not the point, Your Honor.

Judge: That's denied.

Braun: I don't care what the point of it was.

Judge: The motion has been denied.
* * *
Braun: I have another motion then.

Judge: What's that?

Braun: . . . I believe severe prejudice has been done because of Mr. Rico's remark which he should have approached the bench to make. I would ask that the Court now instruct the jury twofold: First, that the reason the matter is being retried has nothing to do with any appeal that occurred and, in fact, no appeal has ever taken place in this case. And second - -

Judge: Other than a couple of writs.

Braun: Other than a couple of writs.

Judge: Shall I tell them that too?

Braun: You can if you want, but I'm not asking if the Court would do that because the courts have nothing to do with any reversal of any prior decisions. So I'd ask the Court to tell them that the reason the matter is before them for retrial has nothing to do with any appeal and no appeal from any previous jury decision has ever been taken.

And, second, that they are in no - - that they are to disregard what Mr. Rico said, that they are not to consider whether or not

this matter will ever be appealed or what the result of any such appeal might ever be. I think the better course is to grant the mistrial, but short of that I ask the Court to do the two things I'm now requesting.

(RT 265:31554-31556.)

Judge Mullin asked Leininger what he wanted to do and he agreed that Rico had committed a serious error. (RT 265:31557.) Thereafter the following colloquy ensued:

Braun: There's a Supreme Court case on point called Caldwell v. Mississippi which finds this to be federal constitutional error.

Judge: Let me tell you I think it's ridiculous. It's like telling the jury okay, now don't think of that pink elephant.

Prosecutor Rico: May I speak at some time?

Judge: Certainly.

Prosecutor Rico: The process that is going on is this was invited by counsel because what we're doing here is - -

Braun: As if I - -

Prosecutor Rico: Excuse me, Mr. Braun. Will you just let me -

Judge: Mr. Braun, he let you talk. Now I suggest you shut up for a moment. Thank you.

Braun: All right.

Prosecutor Rico: What's going on here is that there are three framed - -

Judge: I know what's going on here.

Prosecutor Rico: But the problem is the record doesn't show -

Judge: You didn't need to talk about the appellate court.

Prosecutor Rico: The record needs to show what was happening.

Judge: You didn't need to talk about the appellate court. That's why we're up here. Because you mentioned the appellate court. We're not talking about the three framed things out there. We're talking about the fact that somebody mentioned the appellate court.

(RT 265:31557-31558.)

The side bar concluded and Leininger continued his direct examination of the witness. (RT 265:31558.) Rico then objected in front of the jury that Leininger's direct examination procedure was "what precipitated the incident with his procedure in how he's handling this." (RT 265:32558-32559.) The judge chastised Leininger stating, "Before you expose it [picture of brain cells] to everybody else why don't you try asking the Court and then maybe everybody can go back to law school and learn some procedure." (RT 265:32559.)

Later, during a recess, Braun asked to go on the record. Judge Mullin replied, "You'll have about three minutes on the record." (RT 265:31581.) Braun then asked the judge to make a ruling on the remedial measures he requested since his motion for a mistrial had been denied following Rico's reference to a problem being created for appellate court review. (RT 265:31581.) Braun also requested an instruction that would inform the jury of the reason the penalty phase was being retried. Braun explained that Rico's reference to a problem for appellate court review would likely reinforce any thoughts the jury might have had that the case was being retried due to a

previous reversal. Braun also asked the judge to instruct the jury pursuant to the Caldwell decision. (RT 265:31581-31582.)

Prosecutor Rico tried to speak but Judge Mullin interrupted him stating:

> No. Wait a minute. What was happening makes absolutely no difference at all. The thing we're here and the thing we're concerned about is the use of the term "appellate court." Okay? That's what caused the problem. Whether Mr. Leininger's we'll call it use, proper or improper, of the exhibits, whether or not that caused it doesn't make any difference. * * *
>
> We're talking about the use of the term "appellate court." Based upon the Court's view of the jury, the lack of any reaction by the jury and simple common sense this Court will ***not*** admonish the jury regarding the use of the term "appellate court." To do so would only highlight the term and the problem that the defense counsel erroneously believes exist.
>
> Further, telling the jury that this case is not back here from an appeal or reversal is equally ridiculous as it would not only ring the bell again, but it would also act as a siren with flashing lights and arrows.
>
> We are in recess.
>
> **Prosecutor Rico:** And I simply inquire, Your Honor, whether -
>
> **Judge:** We are in recess. Some day you folks are going to realize when I say we're in recess that's it.

(RT 265:31583-31584. Italics added.)

Later, Rico exploited his own error in his opening argument to the jury:

> **Prosecutor Rico:** Remember, if and when you decide that it is appropriate to impose the death penalty here on John Travis or Daniel Silveria, or, as I submit, on both of them, *this is not something that you or we as a system are doing to these men.* This is something that each of these two defendants has brought upon himself.

Braun: I object to this argument for the reasons previously stated.

Leininger: I would also object for the reasons previously stated in argument before this Court.

Judge: The objection is overruled.

Prosecutor Rico: *This is not something that you or we as a system are doing to them.* This is something that each of these two men has brought upon himself, something that results from a choice or choices that he made - - that they made.

(RT 277:33135-33136. Italics added.)

The jurors knew that an earlier jury had already been involved in this case. However, they did not know *why* they were brought into a partial trial because Judge Mullin had previously ordered that counsel could not inform them that this was a retrial of the penalty phase. (CT 17:4278.) They, therefore, likely wondered whether their involvement was the result of an earlier appellate court decision. Furthermore, Rico's references to appellate court review suggested to the jury that the ultimate responsibility for determining the appropriateness of the death penalty rested with the appellate court. As the United States Supreme Court noted in Caldwell:

> In a capital sentencing contest there are specific reasons to fear substantial unreliability as well as bias in favor of the death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.
>
> Bias against the defendant clearly stems from the institutional limits on what an appellate court can do–limits that jurors often might not understand. The "delegation of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him

> of that right, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind." [Citation.] When we held that a defendant has a constitutional right to the consideration of such factors [citations], we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.

(Caldwell v. Mississippi, supra, 472 U.S. at pp. 330-331.)

Prosecutor Rico created the problem in the present case. He could have easily raised his concerns outside the jury's presence but chose, instead, to state in their presence that Leininger had created a problem for appellate court review. Judge Mullin failed to remedy the problem when he denied the motion for mistrial and refused to admonish the jury. He attempted to justify his refusal to admonish the jury by claiming that "[t]o do so would only highlight the term and the problem that the defense counsel erroneously believes exist." (RT 265:31583-31584.)

Judge Mullin, however, was wrong when he stated that defense counsel "erroneously" believed that a problem existed. Braun correctly recognized the problem created by Rico's references to appellate court review. Indeed, the judge's irritation, lengthy comments, and his statement, "That's what caused the problem" reveal that he, too, knew a problem existed. (RT 265:31557-31558, 31583-31584.)

Moreover, there was no valid reason for the judge to refuse to instruct the jury that the responsibility for determining the appropriateness of

appellant's death rested with them, and not the appellate court. And it was for appellant to decide whether he wanted the jury to be so instructed, notwithstanding the judge's comments regarding a "pink elephant," "bell," and "siren with flashing lights and arrows." (RT 265:31557-31558, 265:31583-31584.)[29]

Furthermore, Rico exploited both his own error, and Judge Mullin's failure to remedy that error, when he twice argued to the jury that "this is not something that you or we as a system are doing to these men. This is something that each of these two defendants has brought upon himself." (RT 277:33135-33136.)

Braun submitted special instruction No. 13 which would have informed the jurors that responsibility for determining penalty belonged to them and no one else pursuant to Caldwell. (CT 22:5330.) However, like so many other of Braun's futile requests, this motion fell on deaf ears. Judge Mullin responded, "It's been done. It has been argued. The Court has yelled at all of you. I'm not going to do it again. I'm not going to listen to you again." (RT 273:32880.)

Prosecutor Rico, despite his awareness of the problem he caused by his earlier reference to appellant court review, continued to fight against its elimination by opposing the curative instruction requested by Braun. (RT 273:32880.)

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29 Judge Mullin's derisive comments are a bit peculiar given that this Court has regularly held that it will not review claims of prosecutorial misconduct on appeal because defense counsel failed at trial to request an admonition to the jury. (See e.g., People v. Montiel (1993) 5 Cal.4th 877, 914.) The judge's hostility toward Braun and his disregard for appellant rights is further demonstrated in **Argument XII, post, at pp. 258-332.)**

This Court should vacate appellant's death sentence because the State cannot prove beyond a reasonable doubt that this error did not contribute to the verdict obtained. (Chapman v. California (1967) 386 U.S. 18.)

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XI

THE TRIAL JUDGE VIOLATED APPELLANT'S RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION, A FAIR TRIAL, AND A RELIABLE SENTENCE WHEN HE DENIED APPELLANT'S MOTION TO SEVER HIS SECOND PENALTY TRIAL FROM THAT OF CO-APPELLANT TRAVIS

A. Appellant's First Motion to Sever the Trials Was Granted

As previously stated, an original indictment was brought against appellant Silveria, co-appellant Travis, Christopher Alan Spencer, and Matthew George Jennings. (CT 3:458-464.)

Appellant and Jennings filed motions to sever which were joined by co-appellant Travis. (CT 5:1231-1237.) Prosecutor Rico filed a single response opposing the motions. (CT 6:1339-1381.) On July 7, 1994, Judge Mullin denied the portion of the severance motion that was based on the contention that jurors would be unable to give an individualized consideration to each defendant tried jointly. The remaining portions of the motion were deferred pending an attempt to redact the statements of the defendants that implicated the other defendants. (CT 9:2141-2144.)

However, on April 6, 1995, Judge Mullin granted appellant's motion to sever the trials for *two* reasons. First, he stated, "The Motion to Sever Based Upon Aranda-Bruton grounds is granted.[30] (CT 9:2257-2258.) The judge concluded that although the defendants confessions could be redacted

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30 Bruton v. United States (1968) 391 U.S. 1, addresses the right to confrontation and requires severance where the prosecutor intends to use a co-defendant's confession which implicates defendant unless references to defendant's identity can be redacted, defendant is given a separate jury, or the co-defendant testifies in court and is, therefore, subject to cross-examination.

"so that each is not facially incriminating," "justice would not" be served. He reasoned that the redactions would harm the defense by inaccurately suggesting that the declarant was the only actor, took responsibility for acts he denied, placed him at places and times that he was not present, and removed him from locations he claimed to be. (CT 9:2257-2258.)

Judge Mullin also granted appellant's severance motion to avoid suppressing appellant's mitigating evidence, and the prosecution's aggravating evidence. He explained:

> The final redactions cause *one further problem*, not covered in the Aranda line of cases. They effectively suppress evidence the defense has a right to produce - the actual tape recordings of the defendants. The transcription of the tapes . . . indicate certain inflections in voices, hesitancy in speaking, stuttering, etc. But because of redactions, not all parts of the taped statements can be used. Some have been edited and cannot be recovered. Some have been eliminated altogether. This denies the defendants the use of these tapes and therefore a possible defense or circumstance in mitigation. It deprives the people of possible valuable evidence and circumstances in aggravation. It deprives us all of Justice. By this ruling, the Court is not ordering 4 separate trials. The Court is ordering two trials - 2 defendants in each trial. Each trial will have 2 separate juries and therefore, each defendant will have a separate jury. The Court will empanel 1 jury for each defendant.

(CT 9:2258-2259. Italics added.)[31]

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31 Judge Mullin later clarified this ruling for prosecutor Rico stating, "The problem - - one thing you have to keep in mind is that the severance that the Court granted and the grounds upon which it did grant it was based on the prejudice that the defendants would suffer in the penalty phase, not the guilt phase. The voice inflections and so on all went to really penalty phase, not guilt phase." (RT 199:22897.)

During the guilt phase of the trial, appellant and co-appellant Travis were convicted by their respective juries of first degree murder, robbery, burglary, and the special circumstance allegations based on murder in the commission of robbery and burglary were found true. (CT 11:2802-2803.)

During the first penalty trial, evidence of the circumstances of the crime was simultaneously admitted against appellant and co-appellant Travis, to both juries. Thereafter, appellant presented a substantial amount of mitigating evidence only to his jury. His jury also considered evidence of appellant's confession having first learned of it during the guilt phase (RT 108:10625-10633), and later heard testimony about it during the first penalty phase. (See RT 162:16132-16135 - Dr. Kormos; RT 14102-14103 - appellant.)

On February 15, 1996, after considering all of the evidence, including appellant's confession, appellant's jury deadlocked, a mistrial was declared, and the jurors were discharged after they could not unanimously agree that death was the appropriate penalty for appellant. (CT 14:3442-3443.)

B. Appellant's Second Motion to Sever the Trials Was Denied

1. Parts One, Four and Five Were Denied First

On October 11, 1996, prosecutor Rico argued that appellant could be jointly retried with co-appellant Travis. (RT 193:22477.) Appellant's trial counsel, Geoffrey Braun, in turn, informed Judge Mullin that he would be making a new motion to sever based on several grounds including Bruton v. United States, supra, 391 U.S. 1. (RT 193:22477-22478.)

On October 29, 1996, Braun, in fact, moved on statutory and several federal constitutional grounds for a penalty phase trial separate from co-appellant Travis. At the very least, he sought a separate jury. (CT 16:4005-4035.)

Braun contended in part one that section 1098 did not authorize joinder of the two penalty trials because that section contemplates a joint trial only when two defendants are jointly charged and one or more common counts need to be determined by the trier of fact. Such is not the case when the juries that determined guilt and special circumstances in a capital case have been discharged for legal necessity, and only penalty is to be tried. (RT CT 16:4005.) On November 21, 1996, Judge Mullin rejected this ground of appellant's severance motion. (RT 200:22909-22911.)[32]

However, section 1098 contemplates a joint trial of two or more defendants only when one or more common counts against them needs to be determined by the jury. That section does not contemplate joinder in cases where, as in the present capital case, two defendants were tried together before separate juries and each jury determined the guilt and special circumstances of their respective defendants, but deadlocked on penalty and were discharged for legal necessity. Under these circumstances, the defendants are no longer "jointly charged" and the only issue before the newly sworn jury is the individualized determination of penalty for each defendant.

Thus, at this point, there simply was no statutory basis for consolidating appellant's penalty phase trial with that of co-appellant Travis. (People v. Ortiz (1978) 22 Cal.3d 38; Dove v. Superior Court (1974) 39 Cal.App.3d 960.) Judge Mullin, therefore, erred when he rejected this ground for granting the severance motion.

32

Section 1090 provides in relevant part, "[w]hen two or more defendants are jointly charged with any public offense . . . they must be tried jointly. . . ."

Judge Mullin also denied parts four and five of appellant's severance motion. (RT 200:22911-22912.) Both grounds were based on Bruton, supra. (CT 16:4006-4007.) Judge Mullin rejected part 4 as follows:

> Part 4: The Court is mindful of and incorporates its reasons for its ruling on the Aranda-Bruton severance motion dated 4/6/95 severing the four defendants from each other. The Court reiterates its concern that justice be served and the truth be found.
>
> *The reasons for the ruling then exist now.* The confessions cannot be properly redacted to afford the People and the defendants their right to a fair trial. Justice would not be served. Of course if the confessions were not taped, we would not have this problem. But if they were not taped, the defense would complain they weren't taped. It would be a no-win situation for the People.
>
> Therefore the motion to sever for separate trials set out in Part 4 is denied. The People may not use the confessions in their case-in-chief. Justice will still be served and the truth found because of the Court's ruling that follows in Part 5.

(RT 200:22911-22912. Italics added.)

With all due respect, Judge Mullin must have been confused.

First, redactions to a defendant's confession are made to prevent a violation of a co-defendant's rights. They are not made to afford the prosecution a fair trial.

Second, if the judge believed the reasons for granting the severance motion still existed, why deny appellant's motion? While excluding the confessions may permit joinder under Bruton, *the judge's second reason for granting the motion still existed.* That is, the inability to use the tapes of the confession would deny appellant important mitigating evidence in the penalty phase. Judge Mullin recognized as much when he previously explained that

his prior ruling granting severance was also "based on the prejudice that the defendants would suffer in the penalty phase, not the guilt phase." (RT 199:22897.) It cannot be reasonably denied that appellant's early acknowledgment of guilt, and his expressions of remorse for the murder on the night of his arrest, have a direct bearing on appellant's moral culpability. Therefore, excluding appellant's confession in any form (audiotapes, transcript or testimony) denied appellant his constitutional right to present important mitigating evidence. (**See Argument IV, ante, at pp. 152-157.**)

Third, the judge excluded the confessions after appellant and co-appellant Travis *had already been convicted*, and the first penalty trials had ended in a mistrial. At this point the "truth" had already been "found," and the second jury was fully aware of it. Indeed, appellant's confession on the night of his arrest quickly helped to reveal that truth. Thus, the issue was no longer "who had done what" but rather whether appellant should live or die because of the role he played in the crimes.

Judge Mullin also rejected part 5 stating:

> Part 5: When the People requested and the Court ruled in the first penalty trial that when one defendant and his jury would be present and the testifying defendant would be subject to cross-examination by co-counsel was well as by the People, the Court had in mind a possible hung jury and therefore the possible retrial of the penalty phase with one jury and the two defendants and their then former testimony could be used under Evidence Code section 1290, et seq.
>
> Further, all counsel were informed of this even though they objected. The People will be allowed under the Evidence Code to use this former testimony in their case in chief in lieu of the confessions the Court has excluded in Part 4.
>
> Defendant's motion as set out in Part 5 is denied. Counsel's estoppel argument is based upon a faulty assumption. Putting

> the Court's ruling in Parts 4 and 5 together, the confessions are inadmissible in the People's case in chief, but the prior testimony of each defendant is admissible in their - - in the People's case in chief as the witnesses are unavailable.

(RT 200:22912.)

Here, it appears that Judge Mullin improperly engaged in a pro-prosecution strategy that helped Rico introduce aggravating evidence while simultaneously excluding an important part of appellant's mitigating evidence. That is, by anticipating a "possible hung jury" at the first penalty trial, then ruling that co-appellant Travis could cross-examine appellant when he testified about the crimes at that trial even though he had already granted appellant's severance/dual juries motion, the judge laid the groundwork for a penalty retrial with one jury during which Rico could use appellant's prior testimony as aggravating evidence in lieu of appellant's confession.[33]

But by excluding appellant's confession in the penalty retrial, the judge unfairly prevented the jury from considering appellant's expressions of remorse and early acknowledgment of guilt. As stated above, this evidence was extremely relevant to appellant's moral culpability.

Ensuring a fair penalty retrial after a jury has deadlocked poses unique requirements which California courts must meet. At a minimum, the jury's inability to reach a verdict should not place the defendant in a worse position at the penalty retrial than he held at the original penalty phase. But that is precisely what happened to appellant in the present case. Judge Mullin improperly denied the second penalty phase jury access to the relevant

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33 It is not clear why Judge Mullin found appellant unavailable since appellant testified in the first trial and had not yet indicated that he would not testify in the second trial.

mitigating evidence contained in appellant's statements that the first jury had heard and considered before it deadlocked on penalty.

Consequently, prosecutor Rico was permitted to use appellant's confession to obtain a capital murder conviction, but appellant was precluded from using that very same evidence to try to save his own life. Plainly, appellant's second penalty phase trial did not even remotely resemble a level playing field. (See People v. Zapien (1993) 4 Cal.4th 929, 1015 (dis. opn. of Kennard, J.) [noting that "a level playing field" between defense and prosecution at a penalty retrial would "erase any appearance of impropriety and assure that no unfair advantage had been exploited"].)

Instead, the exclusion of appellant's statements rendered the second penalty trial fundamentally unfair under the Fourteenth Amendment. (See Payne v. Tennessee (1991) 501 U.S. 808, 825 [recognizing the federal due process clause as the mechanism for relief when undue prejudice results from evidentiary rulings at a capital penalty phase].)

To remedy that basic unfairness, and to avoid a death judgment that is unconstitutional under the Eighth and Fourteenth Amendments, this Court should construe sections 190.3 and 190.4 to require that at a penalty retrial in a capital case following a jury deadlock, the trial court must admit at the defendant's request any evidence the prosecution introduced at the guilt phase.

More specifically, under the circumstances in this case, this Court should rule that appellant should have been permitted to present his confession to the second penalty phase jury which already had been introduced in prosecutor Rico's case-in-chief at the guilt phase and considered by the first jury at the initial penalty phase. Such a rule would be in harmony with the purpose of and intent underlying sections 190.3 and 190.4 and with basic principles of equity.

Under California's death penalty statute, a penalty jury that also hears the guilt phase is not only permitted, but is required, to consider all the evidence from the entire trial including the guilt and special circumstances. (See section 190.4, subd. (d); CALJIC No. 8.85.)[34] This requirement makes sense given the intent underlying section 190.3 that a sentencing jury hear a broad range of evidence about the defendant's crime and his character. [35]

34

Section 190.4, subdivision (d) states in relevant part:

> In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial . . . hall be considered on any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

CALJIC No. 8.85 states in relevant part:

> In determining which penalty is to be imposed [on each defendant], you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. . . .

35

Section 190.3 describes admissible penalty phase evidence as follows:

> . . . evidence may be presented . . . as to any matter relevant to aggravation, mitigation, and sentence including . . . the nature and circumstances of the present offense, any prior felony conviction . . . the presence or absence of other criminal activity . . . which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

These categories of evidence are also included in the statute as specific sentencing factors. (Section 190.3, factors (a) - (k).)

Indeed, unlike many other states, California explicitly designates the "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true" as a sentencing factor to be weighed at the penalty phase. (Section 190.3, factor (a); see Brown v. Sanders (2006) 546 U.S. 212, 222-223 [the "circumstances of the crime" factor permits the sentencing jury to consider all facts and circumstances about crime, including those relating to invalidated crime-related special circumstances, in assessing the appropriate penalty].) The guilt phase usually will provide most of the evidence about the circumstances of the crime, and in some cases, as in this one, guilt-phase evidence also will relate to the defendant's character and other mitigating factors. (See, e.g., People v. Smithey (1999) 20 Cal.4th 936, 955-956 [guilt phase contained mitigating evidence regarding defendant's mental deficits].) Under sections 190.3 and 190.4, the penalty jury must weigh this evidence.

Moreover, the importance of having the sentencing jury consider all the mitigating evidence, including that presented at the guilt phase, does not evaporate when a jury deadlocks at the penalty phase. On the contrary, given that "'the sentencing function is inherently moral and normative'" (People v. Redd (2010) 48 Cal.4th 691, 757; People v. Rodriguez (1986) 42 Cal.3d 730, 779), it is just as important for the second penalty phase jury as for the first penalty phase jury to hear all the available evidence relevant to punishment. If the second penalty phase jury is deprived of relevant evidence heard by the first jury, then, as this Court has recognized in an analogous context, "'the second jury necessarily will deliberate in some ignorance of the total issue.'" (People v. Gay (2008) 42 Cal.4th 1195, 1218-1219, quoting People v. Terry (1964) 61 Cal.2d 137, 146 [trial courts erroneously excluded defendant's lingering doubt evidence from penalty retrials].) That is simply unacceptable

under sections 190.3 and 190.4 when a jury is deciding whether to sentence the defendant to life or death.

In addition, the question of the necessary scope of evidence at a penalty retrial takes on added urgency when a retrial follows a jury deadlock. Such a stalemate, especially one that does not result from a single hold-out juror, generally indicates a close case. (Ouber v. Guarino (1st Cir. 2002) 293 F.3d 19, 33; Hunley v. Godinez (7th Cir.1992) 975 F.2d 316, 320; Farmer v. State (Del. 1997) 698 A.2d 946, 948 [all recognizing that a deadlocked jury demonstrates a close case].)

In that situation, the trial court must be particularly careful on retrial that its evidentiary rulings do not significantly alter the picture of the defendant or his crimes presented to the first jury by restricting the evidence available to the second jury. This does not mean that, when justified, the parties may not present additional evidence at a penalty retrial. (See, e.g. People v. Robertson (1948) 48 Cal.3d 18, 45 [no double jeopardy violation when the prosecution, on retrial of the penalty phase after reversal of the death penalty, introduced evidence of incidents in aggravation that had not been offered at the first trial].)

However, the trial court must not arbitrarily upset the evidentiary balance by preventing the second jury considering mitigating evidence the deadlocked jury considered. Nevertheless, that is what happened in the present case. Judge Mullin's exclusion of appellant's confession prevented the second penalty phase jury from considering relevant mitigating evidence that had been considered both in the guilt phase and the first penalty phase by the first jury who deadlocked on penalty. Appellant's statements bore on the circumstances of his crimes and his character, which were highly pertinent under section 190.3, factors (a) and (k) to the second penalty phase "'jury's moral

assessment of . . . whether [he] should be put to death.'" (People v. Moon (2005) 37 Cal.4th 1, 40, quoting People v. Brown (1985) 40 Cal.3d 512, 540.)

Indeed, the absence of appellant's confession was one of the differences between the penalty retrial resulting in death and the original penalty phase resulting in a deadlock on the question of penalty. In precluding appellant's confession, Judge Mullin "deprived the jury of an examination of the whole picture" (People v. Terry, supra, at p. 147), which was plainly inconsistent with section 190.3's intent that all relevant evidence be presented to the sentencing jury.

Consequently, Judge Mullin's comments regarding a concern for appellant's right to a fair trial, the discussion above, as well as the one below, show that he actually denied appellant several constitutional rights.

2. Parts Two, Three and Six Were Also Denied

On December 10, 1996, Judge Mullin rejected parts two, three and six of the severance motion. (RT 207:23581-23584.) Part two was based on appellant's right to a personal and individualized sentencing decision. (CT 16:4006.) Part three contended that appellant would be unduly prejudiced by joinder of the penalty trials. (Ibid.) Part six requested dual juries. (CT 16:4007.)

C. Judge Mullin Erred In Rejecting All Six Parts of the Motion

In People v. Coffman and Marlow (2004) 34 Cal.4th 1, this Court observed:

> Section 1098 expresses a legislative preference for joint trials. The statute provides in pertinent part: When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials. Joint trials are favored because they promote [economy and] efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent

> verdicts. When defendants are charged with having committed common crimes involving common events and victims, . . . the court is presented with a classic case for a joint trial. [Internal citations and quotations omitted.]
>
> The court's discretion in ruling on a severance motion is guided by the non-exclusive factors enumerated in People v. Massie (1967) 66 Cal.2d 899, 917 [59 Cal.Rptr. 733, 428 P.2d 869], such that severance may be appropriate "in the face of 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." [Footnotes omitted.] Another helpful mode of analysis of severance claims appears in Zafiro v. United States [1993] 506 U.S. 534. There, the high court, ruling on a claim of improper denial of severance . . . ., observed that severance may be called for when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (Zafiro, supra, at p. 539; see Fed. Rules Crim.Proc., rule 14, 18 U.S.C. The high court noted that less drastic measures than severance, such as limiting instructions, often will suffice to cure the risk of prejudice. (Zafiro, supra, at p. 539.)

(People v. Coffman and Marlow, supra, 34 Cal.4th at p. 40.)

The present case, however, presents facts unlike any other capital case counsel could find.

First, as explained above, appellant's first request for severance/dual juries was *granted* before the guilt phase began, both to satisfy Bruton, and to avoid suppression of appellant's mitigating evidence. Although Bruton may have been satisfied when Judge Mullin prohibited prosecutor Rico from using the confessions in his case in chief of the second penalty trial, the second reason the judge relied upon for granting the severance motion still existed,

i.e., exclusion of appellant's confession would suppress appellant's mitigating evidence. Thus, for this reason alone it was an abuse of discretion for Judge Mullin to deny the motion. (People v. Hoyos (2007) 41 Cal.4th 872, 896.)

Second, after considering the: (1) aggravating evidence applicable only to appellant, including his confession; and (2) mitigating evidence applicable only to appellant, including his confession, and deliberating only appellant's fate for several days, appellant's first jury could not unanimously agree that death was the appropriate punishment for him. (RT 181:18239.) The second jury, however, was deprived of the ability to consider appellant's confession before determining that appellant should die after deliberating both his fate, and that of co-appellant Travis, *for only six hours*. (RT 281:33529.)

Third, this retrial involved only the penalty phase of a capital trial. Questions of guilt had already been determined, and the truth of special circumstance allegations had already been addressed. Indeed, the vast amount of evidence appellant intended to present was personal to him. It was simply irrelevant to the question of co-appellant Travis's penalty. Likewise, Travis's mitigating evidence was irrelevant to appellant's penalty.

Fourth, there was a substantial risk that the single jury's penalty determination against Travis could improperly influence its penalty decision regarding appellant. Judge Mullin had previously recognized a similar risk during the guilt and first penalty trial so he ordered appellant's verdicts sealed until Travis's jury reached a verdict. (RT 204:23314.) After the first penalty trial, he also told counsel, "You will not be allowed to indicate to this jury what the prior jury did regarding either the torture or lying in wait special circumstance." (RT 273:32797.) The judge's first order shows that he was aware of the risk that co-appellant Travis's jury could be improperly influenced by the verdict of appellant's jury. His second order shows that he

was aware of the risk that the second jury might be improperly influenced by the decisions of first jury. (See RT 202:23123-23124; RT 204:23313-23327.)

Judge Mullin should have, therefore, also recognized the risk that the jury's penalty decision regarding co-appellant Travis (who stabbed and cut Mr. Madden numerous times) might improperly influence its decision regarding appellant (who stabbed Mr. Madden one time after Travis handed him the knife).

Furthermore, although the Coffman and Marlow Court noted that joint trials are generally favored because they promote "economy and efficiency" and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts," *those interest were not served in appellant's case.*

That is, in a capital case involving one jury serving only in the penalty phase of a joint trial where the lives of two defendants are at stake, it is neither very economical, nor efficient, to expect that jury to consider two independent bodies of aggravating evidence, two independent bodies of substantial mitigating evidence, then accord each defendant a fair, reliable, individualized sentencing decision.

The risk of confusion, reversible mistake, and the amount of time it would take an *impartial* jury to consider such evidence is necessarily greater where only one jury determines the fate of two defendants. These risks increase in a capital case like appellant's where prejudicial errors prevented the jury from considering relevant mitigating evidence, and permitted them to consider inadmissible aggravating evidence.

On the other hand, two impartial juries, each of which would consider only the properly admitted evidence relating to the defendant in the case it was assigned, could properly accomplish this task with less risk of confusion, reversible mistake, and more quickly.

Furthermore, although joint trials may be favored because they promote economy and efficiency, such interests are not more important than a capital defendant's constitutional rights. Joint trials must never be used to deny a criminal defendant's fundamental right to due process and a fair trial. (Williams v. Superior Court (1984) 36 Cal.3d 441, 448.) And since this is a capital case, this Court should "analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (Id. at p. 454. See also People v. Turner (1984) 37 Cal.3d 302, 313 [reversal where consolidation deprived defendant of due process and a fair trial]; People v. Bean (1988) 46 Cal.3d 919, 940 [reviewing court looks to the evidence actually introduced at trial].) Granting appellant's severance motion would have guaranteed that his constitutional right to a personal individualized sentencing determination would be protected.

Finally, the interest in avoiding the "scandal and inequity of inconsistent verdicts" is, of course, not present in a penalty phase of a capital trial because the defendant is constitutionally entitled to a personal individualized sentencing determination.

The mode of analysis presented in Zafiro v. United States, supra, 506 U.S. 534, as discussed by this Court in People v. Coffman and Marlow, supra, seems well-suited to the facts of this case. That is, severance is called for when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (Id. at p. 40.)

The issues in this joint penalty phase trial, of course, do not involve questions of "guilt or innocence." Nevertheless, severance should have been granted because this joint trial compromised appellant's right to present his

confession as mitigating evidence, and prevented the jury from making a reliable sentencing decision.

And as will be shown below, denial of appellant's severance motion violated appellant's constitutional rights because both irrelevant evidence, and evidence admissible only against co-appellant Travis, spilled over to harm appellant.

D. The Evidence Admitted Against Co-appellant Travis Was Prejudicial to Appellant

1. Travis and Co-defendant Jennings Escape Attempt

Evidence that co-appellant Travis, and co-defendant Jennings, had attempted to escape from the jail during which Travis expressed a willingness to kill a jail guard was admitted against Travis in the joint trial. (RT 267:31816-31822.) Braun had previously objected in his severance motion to no avail that appellant's mitigation would lose much of its force if the same jury also hears the evidence admitted for and against Travis, including his attempt to escape. (RT 204:23321-23322.) Braun's later objection that forcing appellant to go to trial with Travis would be unduly prejudicial to appellant also proved futile. (RT 267: 31816.)

2. Letter Travis Wrote to a Manson Family Member

Evidence that Travis, while in jail, wrote a letter to Tex Watson, a member of the Charles Manson family, was also admitted against Travis in this joint trial. Travis wrote that people used to call him "Baby Manson" because of "the power of mind control [he] had on his friends." He also described the killing of Mr. Madden and how Travis "enjoyed every minute of it." Travis also claimed in this letter that he had "repented [his] sins and re-received Jesus Christ as his Lord and Savior." (CT 11:2688; RT 265:31513-31516; 247:28580-28593.) However, a year after Travis wrote this letter, he

attempted the jail escape mentioned above. On cross-examination, defense witness, Reverend Leo Charon, testified that if Travis's claim to conversion to Christianity were true, he would not have expected Travis to be involved in an attempt to escape from jail a year later. (RT 265:31516-31517.)

Braun had previously objected, unsuccessfully, that appellant would be prejudiced by evidence of co-appellant Travis's insincere conversion to Christianity as shown by the letter Travis wrote to Watson. (RT 204:23322.) He explained that this evidence directly contradicted Travis's claim that his conversion to Christianity was sincere. And because other evidence showed the close relationship appellant shared with Travis, it was highly likely that this aggravating evidence improperly caused the jury to also doubt the sincerity of appellant's conversion to Christianity. (CT 16:4010-4029.)[36]

Moreover, as shown below, during prosecutor Rico's presentation of both aggravating and rebuttal evidence against Travis, he attacked appellant with prejudicial innuendo, and evidence of appellant's prior conduct which was neither admissible against appellant as aggravating evidence, nor as rebuttal.

3. Evidence Travis Engaged in a Scam to Obtain Money

Prosecutor Rico presented evidence during his case against co-appellant Travis that Travis, and appellant, had engaged in a scam to get loan money from a computer training school. As explained earlier in this AOB, this evidence was inadmissible against appellant. (**See Argument VII, ante, at pp. 184-188**; People v. Boyd (1985) 38 Cal.3d 762, 772-776.)

36

Braun's objection to testimony relating to the letter Travis wrote to Tex Watson was overruled but his request for an instruction limiting the testimony to co-appellant Mr. Travis was granted. (RT 247:28580-28581.)

4. Evidence that Travis Got Into a Fight And Rico's Knowingly False Suggestion That Appellant Displayed the Stun Gun There

Prosecutor Rico presented evidence during his case against Travis that suggested to the jury that appellant had displayed the stun gun during a fight that Travis had with persons in their neighborhood. As explained earlier in this AOB, Rico knew that it was co-defendant Rackley who had displayed the stun gun. His zeal for suggesting to the jury that appellant had committed a torture-murder apparently motivated him to make a suggestion against appellant that he knew was false. (See **Argument VII, ante, at pp. 188-191.)**

5. Evidence that Appellant Impregnated Travis's Sister

Prosecutor Rico improperly presented evidence during his case against Travis that informed the jury that appellant had impregnated Travis's sister. **(See Argument VII, ante, at p. 191-192.)** This evidence too was inadmissible as a factor in aggravation or rebuttal. (People v. Boyd, supra, 38 Cal.3d at pp. 772-776.)

It is plain that Rico, in his attempt to convince the jury that co-appellant Travis deserved the death penalty, simultaneously sought appellant's death by continuing to suggest that appellant committed a torture-murder, and by disparaging him in the eyes of the jury with evidence that was inadmissible either as aggravation or as rebuttal.

None of the above evidence was admissible against appellant for any purpose. Consequently, forcing appellant to undergo a joint, second penalty trial with co-appellant Travis denied appellant the right to a personal and individualized sentencing determination in violation of the Fifth, Eighth and Fourteenth Amendments. (Zant v. Stephens (1983) 462 U.S. 862, 879; Lockett

v. Ohio (1978) 438 U.S. 586;[37] Skipper v. South Carolina (1986) 476 U.S. 1, 4-9; Penry v. Lynaugh (1989) 492 U.S. 302, 318; Hitchcock v. Dugger (1987) 481 U.S. 393, 394-399; Eddings v. Oklahoma (1982) 455 U.S. 104. This error, in turn, denied appellant his right to a reliable jury determination that death was the appropriate punishment in violation of the Eighth Amendment. (Woodson v. North Carolina (1976) 428 U.S. 280, 304.) Moreover, it denied appellant the right to a fair trial. (Estelle v. Williams (1976) 425 U.S. 501, 503 ["The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment"]; Irvin v. Dowd (1961) 366 U.S. 717, 722 ["The failure to accord an accused a fair hearing violates even the minimal standards of due process"]; Williams v. Superior Court, supra, 36 Cal.3d at pp. 448, 454; People v. Turner, supra, 37 Cal.3d at p. 313; People v. Bean, supra, 46 Cal.3d at p. 940; People v. Hoyos, supra, 41 Cal.4th at p. 896.)

This Court should reverse appellant's death sentence because the State cannot prove beyond a reasonable doubt that the judge's error did not contribute to the verdict obtained. (Chapman v. California, supra, 381 U.S.18.)

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Braun moved for severance on six grounds but combined grounds two and three as ground two in his points and authorities. Ground seven was filed by co-appellant Travis. (RT 200:22955-22959.)

XII

THE TRIAL JUDGE'S UNJUSTIFIED ABUSE AND UNEQUAL TREATMENT OF DEFENSE COUNSEL, COMBINED WITH A NUMBER OF MISTAKEN LEGAL RULINGS, DEPRIVED APPELLANT SILVERIA OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

"When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client." (People v. Fatone (1985) 165 Cal.App.3d 1164, 1175; People v. Sturm (2006) 37 Cal.4th 1218, 1234-1244.)

Appellant will demonstrate below that Judge Mullin engaged in a pattern of overt judicial hostility toward appellant's counsel, Geoffrey Braun, which began during pretrial proceedings, continued through the first penalty phase, and persisted through the second penalty phase of appellant's trial. Not every example amounts to misconduct independently, nor does each necessarily involve an erroneous legal ruling. But together they tend to illustrate the demeaning and hostile attitude Judge Mullin displayed toward Braun, both in and out of the jury's presence. In contrast, prosecutor Rico rarely received such treatment. To the contrary, Rico was treated with courtesy, his frequently snide comments directed at Braun were often ignored, and his objections were almost as frequently sustained.

Braun's *second penalty phase motion for mistrial* is set forth immediately below to present this issue in context. Next, *beginning with pretrial proceedings*, numerous examples of the judge's hostile comments and disrespectful conduct toward Braun follow in order to present a fuller mental image of the hostile atmosphere in which appellant's trial was conducted.

B. Braun's Motion for Mistrial

On April 9, 1997, Braun moved for a mistrial during the second penalty phase of the trial. He stated:

> **Braun:** I'm still very upset over what occurred at 1:30 yesterday afternoon when the Court indicated that I was in indirect contempt and [I] still felt it was appropriate for me to put something on the record concerning that.
>
> I think that the Court owes me an apology for accusing me of indirect contempt in the manner in which the Court did and I would ask permission now to put the matter on the record as to what in fact did happen, then there was [sic] other things that I needed to follow through with.
>
> **Judge Mullin:** Follow up. Do other things then. We're not going to hear this.

(RT 268:32026.)

> **Braun:** I think that the Court's refusal to allow me to put the matter on the record is part and parcel of what I am now about to complain about, which is that other counsel in this case are allowed to make a record, to complete their arguments and almost invariably I am not.
>
> I think the Court has continuously throughout this case either cut my objections short when they are in front of the jury or refused to hear me out when we are at bench, often turning its chair away or terminating the bench conference or walking out the door before I can finish making an objection or explaining an objection or putting something on the record that needs to be on the record.
>
> I think the Court has demonstrated overt hostility toward me, not only in open court throughout this trial, but also at the bench during bench conferences to the extent where it is noticed at the counsel tables and I am certain also noticed by the jury, both in the Court's mannerisms and in the volume in which the Court

castigates me at the bench, simply for making - - in my view simply for making arguments that ought to be made by any counsel who is zealously representing his client.

I think that the Court has often made it a practice of overruling my objections and Mr. Leininger's objections in a demeaning tone of voice. The Court did that yesterday in overruling one of Mr, Leininger's objections. I can't recall what the specific objection was.

In fact, I agreed with the Court's ruling, but I thought Mr. Leininger's objection was within the bounds of a reasonable objection to make, I agreed that it ought to be overruled, but in fact the tone of voice that the Court overruled it in I thought was extremely demeaning and prejudicial to the defense.

I thought that the Court treated me very badly in the manner of my calling Dr. Kormos as a witness, being blamed because Mr. Rico perceived that he had a problem with cross-examination, even though Dr. Kormos was furnished with no new materials since the last trial and had always been noticed.

Judge Mullin: What are you talking about? Would you explain that a little bit more.

Braun: I can't recall the exact day. Mr. Rico made an objection late in the afternoon on the day Dr. Kormos first started to testify. We agreed to argue the matter the next morning. And it was that following morning, which would have been the second day of Dr. Kormos's testimony, that the Court made the remarks it made that I'm referring to now, essentially castigating me and blaming me in a very angry and what I perceived as a hostile tone of voice for simply calling my witness.[38]

If the Court will recall, Mr. Leininger made a motion or joined in the severance motion and added as a ground the fact that he

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38 See Argument III, exclusion of expert evidence, ante, at pages 135-151.

felt he could not - - Mr. Travis could not get a fair trial as a result of being joined with me because of what Mr. Leininger perceived as the Court's overt hostility toward me throughout the previous trial, and indeed, in my opinion, ever since I began filing motions in this case in 1993.

(RT 268:32026-32028.)

And the Court's response to that was of course to deny that part of the motion, but also to indicate that the Court will try to make this a kinder and gentler trial. But, in fact, it is my opinion that the Court's demeanor and impatience is far worse than it was in the first trial, and I thought that what occurred yesterday was in fact the crowning glory of that.

The jury was not present, but I was arguing, as I am arguing now, that when the Court castigates me for an indirect contempt of court as it did, that I ought to be allowed to respond. And as I was attempting to do that, the Court was telling me it was not going to hear from me and eventually called the bailiff over to indicate that if I did not sit down that I would have the help of the bailiff.

Admittedly, the jury was not there; nevertheless, I felt that that was very intimidating, and indeed the whole atmosphere in this court is very intimidating to me and makes it very, very difficult for me to effectively represent my client.

It's also my opinion that the Court has been very one-sided against the defense, and me in particular, in the way it treats what appears to the Court as transgressions.

The worst example is what occurred yesterday when only I got castigated for indirect contempt for essentially smiling at Mr. Rico and starting to make a comment in a conversational tone of voice, when immediately prior thereto Mr. Rico had dropped something on his table, said God damn it and started saying out loud - - this is immediately after the Court left the bench just before the noon recess yesterday - - that he was not going to

proceed in the afternoon because of the calling of Dr. Cermak out of order.

I thought - - for instance, last week, when Mr. Rico, for no justifiable cause, informed the jury that this matter was going to be reviewed on appeal I made certain motions following that, including a mistrial motion, which the Court denied. I'm not rearguing those, but Mr. Rico was never taken to task for making a totally improper comment and, in my opinion, a comment which could have led to a mistrial.

Judge Mullin: I believe Mr. Rico was taken to task for that.

Braun: I agree with the Court, that in a sense he was. It was only because he kept trying to justify - -

Judge Mullin: Let's not argue it. The record will speak for itself.

Braun: That's correct. In any event, Your Honor, I would ask that the Court think about what has happened in here. I think I'm entitled to be treated with a certain amount of dignity and I would ask that we start at this time.

(RT 268:32029-32030.)

I would also point out, it's my opinion that the cumulative effect of the way the Court has been treating me since this trial began is extremely prejudicial. There's no doubt that the jury, as it should do, respects your office and therefore respects you as a judge, and I think the jury is assuming that all of that abuse that it observes - - and admittedly the one that happened yesterday was not in their presence - - is something I invariably deserve. I think the Court has made me look small, ignorant and petty and that it's highly prejudicial to my client. Based on that, I ask for a mistrial at this time.

Judge Mullin: That motion is denied. Anything that has come to you, Mr. Braun, you brought upon yourself. Under the appropriate code, the Court has a duty to control a proceeding.

> Now, the problem arises when counsel continue to argue objections and argue with the Court after the Court has ruled. And this applied to all counsel. And I have warned all counsel that when the Court has ruled, that's all the court wants to hear, whether it's out here in court in front of the jury or at sidebar.
>
> And I have indicated to counsel that when the Court has ruled and has heard enough, the Court will call an end to the sidebar, whether it's by turning its back and facing the jury, at which point the sidebar is over. Counsel continues to argue, and Mr. Braun unfortunately is the biggest offender of this in the Court's eyes.
>
> I think the record will show many times where the Court has had to tell Mr. Braun to please be quiet, to shut up, or whatever, because the Court has ruled, and Mr. Braun insists on going further and further and pushing the envelope further and further.

(RT 268:32029-32032.)

Prosecutor Rico stated that he felt he had to respond to avoid a finding by this Court that his failure to do so was a tacit agreement that Braun was correct. Rico also claimed that his reference to the appellate court was inadvertent. (RT 268:32032.) Judge Mullin agreed that Rico had created a problem by referring to the appellate court in front of the jury.[39] The judge, however, could not resist the urge to further ridicule Braun. When Rico tried to respond to the judge, the judge replied as follows:

> **Prosecutor Rico:** Your Honor - -
>
> **Judge Mullin:** We're in recess. One more thing: The record will show that I just cut off Mr. Rico. Thank you.

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39 Here, Judge Mullin admitted that Rico's reference to the appellate court was a problem even though he had previously denied it during the Caldwell hearing. (See Argument X, ante, at pp. 228-237.)

Prosecutor Rico: That's correct.

(RT 268:32032-32033.)

C. Judge Mullin's Comments, Threats and Refusal to Allow Braun to Fully State the Grounds For His Objections From Pretrial Through the First Penalty Phase

Judge Mullin first appeared in this case during the pretrial proceedings in 1993. (RT 1-4, Pretrial Proceedings of January 19, 1993.) Shortly thereafter, he used language inappropriate to his office, and began to display a disdainful and hostile attitude toward Braun in and out of the jury's presence.

On **February 23, 1993,** Braun sought a complete copy of appellant's medical records and objected to receiving copies only of records that Judge Mullin thought appropriate. Braun attempted to speak but the judge denied his request to be heard stating, "No, because you'd probably wind up with everything anyway." Braun argued that there is no provision of law that forbids him from receiving all of appellant's records and deciding their appropriateness himself. Judge Mullin, "Well, that's the ruling. I mean, that's what the appellate courts are for. You can get a writ, whatever you want to do . . . ." (RT 8-9, Pretrial Proceedings of February 23, 1993.)

On **January 10, 1994,** Judge Mullin informed counsel that jury selection would begin on August 1, 1994, and that all motions must be filed and heard by that date. The judge added, "I don't care what other court in this country or this world wants your bodies at that time, *too damn bad.*" (RT 23-25, Pretrial Proceedings of January 10, 1994. Italics added.) The judge also blurted, "I know that you're all going to get a copy of the transcript, but do me a favor: Please listen to *what the hell is going on.*" (RT 27-33, Pretrial Proceedings of January 10, 1994. Italics added.)

On **February 22, 1995,** during a hearing relating to redactions to be made to appellant's confession, Braun objected to a certain redaction stating that it was prejudicial to appellant because appellant talked about what happened when it was his turn to stab Madden, that it was the hardest thing he ever did, and he did not know why he did it. Braun further argued that while this did not exculpate appellant from the crime, it certainly tended to lessen his degree of moral depravity. Judge Mullin overruled Braun's objection. Braun stated that he had more to say but the judge did not allow him to elaborate. (RT 36:2976-77.)

During the same proceeding, Braun informed Judge Mullin that he agreed with prosecutor Rico that certain parts of appellant's confession should be admitted. The judge disagreed. Braun explained that there was nothing in the statement that even remotely prejudices any of the defendants. Judge Mullin replied, "Mr. Braun, when I tell you that that's enough and your objection is noted I expect you to be quiet. Is that understood?" (RT 36:2982-2983, Pretrial proceedings of February 22, 1995.)

On **April 27, 1995,** Judge Mullin continued the matter to May 1. Prosecutor Rico told the judge that he had to leave court that day by 3:00 pm. Braun informed Judge Mullin that he had a conflicting court appearance. Judge Mullin, nevertheless, told them to appear on that date. Rico attempted to explain stating he needed to state his reason for the record but the judge ignored him and left the courtroom. Braun stated, "May the record reflect that the court is no longer on the bench or in fact no longer in court." (RT 46:3725, 3786, Pretrial Proceedings of April 27, 1995.) This is the only time that appellant's counsel could find that the judge ignored the prosecutor.

On **May 8, 1995,** the first day of the guilt phase of the trial, Braun informed Judge Mullin that he had a motion to make. Judge Mullin told him to do it later. (RT 49:3965, 3977-3981.)

On **May 16, 1995**, Braun attempted to place certain matters on the record but Judge Mullin did not allow him to do so. The judge stated:

> What I'm going to do at this time is . . . make a court order you cannot raise the issue of funds or salary for you or your investigator or anybody else in this case. That is something this Court will not and cannot consider. You must take it up with Judge Komar or his designee. It's now a court order that you cannot bring it up and sanctions will be imposed if you continue bringing it up.

Braun stated, "If you refuse to let me put it on the record, your Honor, what am I going to do? I have to put it on the record somewhere." Judge Mullin replied, "It's not going to be on the record here. I can't consider it. It's not proper that I consider it. That's it." (RT 53:4374.)

Braun asked the judge to allow him to make a record somewhere. He replied, "No, you're not going to make it part of the record here. It's not something this Court should consider or should even be privy to, because it's not appropriate that I consider something like that. If I grant it for you, I don't grant it for somebody else. It's not appropriate. (RT 53:4375.)

Braun informed Judge Mullin that he asked Judge Komar to put it on the record and he refused. Judge Mullin replied, "You can also let him know I made it a court order for you not to bring it up here. . . ." (Ibid.)[40]

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Earlier in this proceeding, Judge Mullin permitted Braun to file an affidavit requesting that Judge Komar approve funds for appellant's representation. (RT 53:4341-4346.)

On **May 17, 1995,** Braun noted that in the juror questionnaires, many prospective jurors described defense attorneys as "greedy, avaricious, money-grubbing persons." Judge Mullin replied, "No comment by the Court. Go on." The judge also denied Braun's request to instruct the prospective jurors that he was being paid about one-third of what private attorneys charge. The judge also refused to ask any follow-up questions about the views certain prospective jurors had of defense attorneys. (RT 54:4448-4453-A.)

On **August 14, 1995,** after the jury had been excused, Judge Mullin informed Braun that he had come "very close" to "costing yourself some large dollars not to mention contempt of court." (RT93:8836-8837.) The judge was referring to Braun's earlier motion for mistrial based on his objection to Rico's opening statement which had been overruled. (RT 93:8816-8819.)

On **August 16, 1995,** Braun told Judge Mullin, outside the jury's presence, that he was concerned that the Arabic interpreter was not accurately translating the witness's answers during Ramsis Yousseff's testimony. (RT 95:9042-9043.) Judge Mullin asked the interpreter if he was giving the "exact responses" that Youssef was giving him. When the interpreter said that he was, Judge Mullin stated, "I'm not a linguist. [N]either apparently is anybody else in here." (RT 95:9043.)

On **August 22, 1995**, prosecutor Rico asked a prosecution witness whether she was ever in the presence of appellant and co-defendants when they said they might come into a lot of money. Braun objected on ground the question was compound and called for hearsay. Rico countered, "I can show a police report. I'm quoting her words, Your Honor." Braun objected, asked Judge Mullin to cite Rico for misconduct for making that statement in front of the jury, and asked the judge to admonish Rico not to do that again.

Judge Mullin replied, "No. Mr. Rico is not admonished. Mr. Braun, please sit down." (RT 99:9483-9489.)

Here, Braun's objection was overruled, his motions were denied, and he was ordered to sit down. On the other hand, Rico was permitted to state in front of the jury that he could show a police report from which he was supposedly quoting the witness's statement.

Later this day, Judge Mullin prevented defense counsel from impeaching this prosecution witness by asking her whether she was fugitive from justice arising out of her prior arrest for possession of drugs for sale. Counsel argued that the witness had been a fugitive for over two years, and that this was relevant to her credibility. The judge disagreed. He considered this irrelevant, then stated, ". . . it's not coming in. We're not going to try her case, number one." (RT 99:9501-9506.)

Moreover, Judge Mullin again threatened Braun with sanctions if he repeated his request for sanctions against prosecutor Rico. Although, the judge did not mention Braun directly, it is evident that he was addressing Braun because Braun was the only counsel who had previously requested sanctions. The judge stated, ". . . the next person who asks for sanctions for anything else will get them, but it won't be on the party they are asking them on. Do you understand? Because that's completely improper." (RT 99:9506.)

On **September 5, 1995**, Braun attempted to renew his motion to exclude a photo (Court Exhibit 84-G) of Mr. Madden which was taken immediately after he was removed from the body bag. Judge Mullin told Braun, "I tell you what. You can talk to him and at about ten minutes to 9:00 tomorrow morning we'll have a hearing, but we're not going to sit here and waste our time on the record." Braun informed the judge that it needed to be on the record. Braun then stated, "May the record reflect that the Court has

left the bench." Judge Mullin replied, "Yes. And the record will also reflect, Mr. Braun, that you are about one hair from contempt. Thank you." (RT 104:10132-10133.)

On **September 11, 1995**, Judge Mullin again threatened Braun with monetary sanctions. Braun sought to introduce a letter by co-appellant Travis to corroborate appellant's case. After Braun and prosecutor Rico presented their views, Travis's counsel, Leininger, asked to respond. Braun asked to be heard about one matter before Leininger was heard. The judge said, "Mr. Braun, no." Braun attempted to explain that Leininger had no standing to argue (apparently because Travis was being tried by a separate jury). The judge replied:

> Mr. Braun, I said no. . . One more time and it's going to cost you a lot of money. Do you understand!? I'm getting tired of having to tell you no and to sit down. Have a seat.

(RT 107:10589-10593.)

Braun was allowed to speak when Leininger finished. (RT 107:10593.)

On **September 26, 1995**, Braun objected to prosecutor Rico zapping the stun gun into the air as improper rebuttal argument. Judge Mullin overruled the objection after Rico's response. Braun stated, that he would like to finish the statement he was going to make. The judge ignored his request and Rico resumed his argument to the jury. (RT 118:11653-11654.)

On **November 27, 1995**, during the first penalty phase, Judge Mullin permitted prosecutor Rico to ask defense witness, Richard Guimmond, whether he knew that appellant had stolen certain items and was a chronic liar. The judge overruled Braun's objections, and denied his requests for a side bar conference three times in front of the jury. (RT 142:13169-13180.) After the

third denial, Braun asked the judge, "When does the Court suggest I make a record?" (RT 142:13180.) The judge allowed Braun to argue that Rico was asking the witness about matters of which the witness had no knowledge, and about which he had not been examined on direct. Braun's objections were overruled. (Ibid.)

Later this day, Braun asked defense witness, Tasha Guimmond, what appellant had told her about how he got three puncture wounds on his shoulder. In response to hearsay objections, Braun argued that appellant's statements should be admitted as an excited utterance, a spontaneous declaration, and as a statement of a present physical condition. Judge Mullin denied Braun's motion. Braun attempted to cite to a Supreme Court case, Judge Mullin cut him off stating, "Counsel, you motion is denied. Proceed." (RT 142:13197-13199.) Braun asked permission to make an offer of proof but Judge Mullin told him to ask his next question. Braun asked the judge when he could make this offer of proof. Judge Mullin replied, "Not now. Proceed." (RT 142:13199.)

Braun attempted to elicit from the above witness whether appellant had told her why he was becoming more moody and withdrawn while in the foster home in which he was physically and sexually abused. Rico objected on hearsay grounds. Braun argued that this was admissible under the present state of mind exception to hearsay. Braun also argued that it was admissible for the limited purpose of showing the action taken by the social worker as a result, i.e., removing appellant from the foster home and returning him to his mother. (RT 142:13200-13201.) Incredibly, Judge Mullin ruled the statement inadmissible on grounds it was irrelevant. (RT 142:13201.) Braun asked permission to approach the bench so that he could make an offer of proof but Judge Mullin refused. Braun stated that he would make the offer from

counsel's table but the judge told him to continue his examination of the witness. (RT 142:13201-13202.)

After this witness testified that both she and appellant's sister, Lenae, were present when appellant told her of the things that had happened to him at the foster home, and that Lenae had talked to the social worker about them, Braun again offered the information appellant gave to this witness, not for its truth, but for the limited purpose of showing why the social worker took steps to remove appellant from foster care. (RT 142:13203.) Judge Mullin again refused to admit this evidence because Braun was "still missing a link in the chain." (Ibid.) Braun again offered this evidence through this witness and state that he would also connect it up with the social worker. He also asked permission to approach the bench but it was denied. (RT 142:13204.) The following colloquy ensued in front of the jury:

> **Judge Mullin:** No continue on with something else. You've heard the Court's ruling - - I don't know - - five times now. I think five times is enough.
>
> **Braun**: Well, the Court indicated there was a missing link and I was trying to deal with that link.
>
> **Judge Mullin**: It's still missing. We don't know what information we're talking about here.
>
> **Braun**: I don't understand.
>
> **Judge Mullin**: We don't know what information the sister may have conveyed to the social worker, if it was the same information. This should have been done some time ago.
>
> **Braun**: Well, your Honor, I intend to call the social worker, but what I prefer not to have to do is cause this witness to have to wait until the social worker is done testifying which might be tomorrow morning and then have to call her back.

She has flown from Los Angeles to testify. If there is not a connection, then I would suggest that the court strike the testimony. I'm asking it be admitted for a limited purpose in any event.

Prosecutor Rico: Your Honor, may we approach?

Judge Mullin: I know this may be the easier way to do it, Counsel. As far as the witnesses are concerned, but according to the rules of evidence it's not the appropriate way to do it.

You can call the social worker and see if [she] heard the same information and, if so, I have no problem with you interrupting the social worker's testimony to bring back this witness back to finish up with her.

Unfortunately, there are the easy ways it seems and then sometimes there are the ways according to the Evidence Code. And I think we'll follow the Evidence Code.

Braun: I would - -

Judge Mullin: That's enough. That's the way it's going to be done.

Braun: I have no further questions for this witness.

RT 142:13204-13205.)

Here, Judge Mullin claimed that it would be inappropriate to allow Braun to present evidence "subject to being stricken" if it were not connected through a later witness's testimony. However, the judge's unfair treatment of Braun was revealed when he later permitted Rico to present evidence "subject to being stricken" during his direct examination of his expert, Dr. Robert Stratbucker. During Rico's direct examination of Stratbucker, Braun objected to Rico's hypothetical suggesting that Mr. Madden was "stun gunned" during

the knife assault because there was no such evidence. Judge Mullin ruled that he would allow it subject to a motion to strike if no such evidence is adduced during the trial. (RT 249:28951-28952.) This record demonstrates that Judge Mullin openly hindered Braun's attempt to present mitigating evidence to the jury by refusing to allow it subject to being stricken but allowed prosecutor Rico to present aggravating evidence subject to being stricken.

Later this day, Judge Mullin continued to exhibit a lack of respect for Braun in front of the jury. During prosecutor's Rico's cross-examination of Ms. Guimmond, Rico asked her whether she knew how many other kids had committed murder other than appellant. (RT 142:13207.) Braun said, "I'll stipulate that John Travis did and Chris Spencer and Matt Jennings. I object. That's totally argumentative." Judge Mullin stated, "If you're going to object, object, Mr. Braun . . . but don't go offering any stipulations like that. I think we've already discussed this some time ago." (RT 142:13207-13208.) Rico asked the witness how many children, other than co-defendants, grew up to commit murder. Braun objected that this question was argumentative but Judge Mullin overruled the objection (RT 142:13209.)

Later, during Braun's direct examination of ex-social worker, Linda Cortez, prosecutor Rico asked the judge in front of the jury whether Braun was going to mark the records he was using, move to have them introduced, and "thus offer testimony regarding what is otherwise hearsay?" (RT 142:13226.) An argument ensued when Rico also stated he wanted a chance to see the records. Braun stated that Rico had the records. Braun also stated that he had no objection to Rico looking at all of them "if he distrusts me." Judge Mullin replied, "Mr. Braun, why don't you just knock off the speeches. If I have to warn you one more time it's going to cost you some dollars." Braun stated, "I'll withdraw it. I'm sorry, your Honor." (RT 142:13226-13227.)

Here, Judge Mullin chastised Braun, and again threatened him with monetary sanctions for making "speeches," but said nothing to prosecutor Rico who had made "speeches" of his own.

On **November 28, 1995**, during Braun's direct examination of defense witness, Elizabeth Munoz, prosecutor Rico accused Braun of testifying. Judge Mullin said nothing at this time to Rico even though he made this accusation in front of the jury. However, when Braun denied that he was testifying, the judge stated in front of the jury, "Mr. Braun, you be quiet. Approach." (RT 143:13410.)

At side bar, Judge Mullin stated, "I've had enough speeches out of both of you." (RT 143:13410.) Although the judge included Rico in this comment, it was made out of the jury's hearing. As will be shown below, it also did little to stop Rico from making future "speeches" in front of the jury

During the testimony of defense witness, Justin Munoz, Braun asked the witness, "From what you could see what was it that made Mrs. Hebert [appellant's foster mother] decide to punish Danny [appellant] and Sonny for -- for what Dean did?" Prosecutor Rico objected on grounds this called for speculation. Braun pointed out that he asked this question based on what Munoz was able to personally observe. Judge Mullin told Braun, "Well, then, ask it that way." Rico added, "Thank you." (RT 143:13424-13425.)

On **November 29, 1995**, prosecutor Rico asked defense witness, John Gamble, whether appellant ever told him that Mr. Madden "suffered or not." Braun's several objections were overruled. Judge Mullin then stated, "Mr. Braun, sit down. . . Pay attention to the questions and answers." (RT 144:13605.) After the judge admonished and excused the jury, he stated that Braun had been arguing with the his rulings all week even after he tells Braun to be quiet and sit down. The judge asked for an explanation. Braun

apologized for arguing with the court in front of the jury, stating that he realized it was not proper. (RT 143:13607.) But when Braun tried to explain the basis for his objection, Judge Mullin would not permit him to explain. Rather, he told Braun they were at the bench to decide whether he was "going to nail [Braun] for about $1500. . . ." The judge also stated that he had been putting up with this for two or three days and was not going to tolerate it any longer. Braun apologized and tried to return to his objection. Judge Mullin said he had already ruled. (RT 143:13606-13608.)

On **December 4, 1995**, defense witness, Julie Morella, was testifying about the letters appellant had written to her, and certain drawings appellant drew on the envelopes containing the letters. Judge Mullin told Braun that the drawings had to be authenticated through appellant, not the witness, and they were not to be published until then. The judge also told Braun, "And walking back and forth in front of the jury so the jury can see them is publishing them. If I catch you doing this again, this too, will cost you some dollars. And, also, if you would leave the exhibits appropriately on the table when they have been published or introduced into evidence face down." Braun replied, "Very well." (RT 146:13864-13870.)

Once again, Judge Mullin threatened Braun with monetary sanctions when Braun was merely attempting to introduce appellant's mitigating evidence. Moreover, Morella was appellant's former girlfriend, and because she had received drawings from him in the past, she could identify these drawings as having been done by appellant. Furthermore, the drawings in question were on the envelopes containing the letters that appellant had sent to Morella. Thus, it was not unreasonable for Braun to attempt to introduce appellant's letters and drawings through this witness. Under these

circumstances, Judge Mullin simply overreacted when he again threatened to impose monetary sanctions upon Braun.

On **December 7, 1995**, Braun asked for a side bar conference during prosecutor Rico's cross-examination of appellant so that he could object to a question he anticipated that Rico would ask. However, at side bar, Braun hesitated stating that he did not want to suggest the question to Rico. (RT 149:14422-14423.) Judge Mullin said, "What's the God damned question." (Ibid.)

On **January 10, 1996**, Braun objected to Judge Mullin informing appellant's jury that the reason they were not going to finish direct examination, and that cross-examination would have to be continued, was because of Braun's failure to provide a document to prosecutor Rico so he could begin his cross-examination. Judge Mullin replied:

> All right. This is not something that needs to be put on the record at this time. So you didn't have to approach, number one.
>
> Number two, you've been warned many times that the Court was going to inform the jury that any discovery problem that you cause was going to be relayed to them. Now it's been done. Your objection is noted and overruled.

(RT 159:15706.)

On **January 11, 1996**, Judge Mullin permitted prosecutor Rico to state in front of the jury, "Your Honor," I think we better approach the bench, because I have another question that I can voice in front of the jury that I don't think Mr. Braun would like." (RT 160:15848.) The judge replied, "Approach the bench if we can get up here quietly." Rico said, "I'm trying." Braun responded, "Your Honor, I request that the Court admonish Mr. Rico not to --"

Judge Mullin interjected, "Mr. Braun, approach the bench! Some day you're going to learn to do what I ask you to do." (RT 160:15848-15849.) Here, Judge Mullin permitted Rico to freely make comments in front of the jury, yet chastised Braun when he had simply asked the judge to admonish Rico for making such comments.

At bench, Judge Mullin told Braun he was "pushing it." Rico accused Braun of wanting to argue "out there." The judge replied, "The record is clear that he wanted to argue it there in front of the jury."

The comments of both the judge and Rico are absurd. It was Rico who made the improper comment before the jury. Braun merely sought redress and was chastised for it.

Also, on this day, Judge Mulllin again demonstrated his unfair treatment of Braun. On re-direct examination, defense witness, James Park agreed with Braun that prosecutor Rico had asked Park several times whether he was against the death penalty. (RT 160:15873.) Braun then asked Park to explain why he opposed this penalty. Judge Mullin sustained Rico's relevancy objection and told Braun in front of the jury, "Mr. Braun, You're about that far away from it." Braun asked for a side bar. Judge Mullin replied, "No, you may not. This matter has been decided." Braun tried to explain but the judge would not allow him to. (RT 160:15873-15874.)

After the jury was excused for the day, Braun apologized "in one sense" for asking the witness why he opposed the death penalty, but explained that Rico had opened the door by asking the witness about it so many times. Judge Mullin disagreed that Rico had opened the door. (RT 160:15877.)

On January 16, 1996, Braun objected to a question prosecutor Rico asked defense expert, Lynne Woodward, stating that Woodward had just stated that she had reviewed certain records. Rico replied, "Your Honor, I'll

rephrase. If Mr. Braun wants to testify that's one thing. But I'll rephrase the question." (RT 161:15889.) Braun later objected to a question by Rico on grounds that Woodward had not relied on appellant's response to a question appellant responded to on a previous test, and that questions and answers to the test were to be read together. Rico replied, "Your Honor, I'm sorry. Is Mr. Braun testifying? Judge Mullin replied, "I think so." (RT 161:15908.)

Later, Rico asked Woodward whether she had changed her opinion regarding appellant's credibility after reviewing a response appellant gave to another question in a previously administered test. Braun objected on grounds that it was not known what appellant was told when he was given that test. Braun attempted to elaborate but Judge Mullin overruled the objection. Braun asked permission to finish the objection. Judge Mullin replied, "No, I've heard enough. Braun asked for a side bar conference. Jude Mullin replied, "The objection is overruled Mr. Braun. Thank you." Braun explained that he had an objection that he had yet to place on the record. Judge Mullin asked, "Can you do it without testifying?" Braun replied, ". . . I can't do it without stating the specifics. I think it would be perfectly proper to approach the bench." Braun was finally allowed to approach and stated his grounds on the record. (RT 161:to 15909-15910.)

The point here is that Judge Mullin unfairly allowed prosecutor Rico, to accuse Braun in front of the jury of "testifying," then he actually agreed with Rico that Braun was "testifying" when, in truth, Braun was only doing what he was ethically obligated to do in order to preserve the record. In addition, the judge improperly asked Braun, in front of the jury, whether he could make his objection without testifying.

On **January 17, 1996**, Braun asked defense psychiatric expert, Dr. Harry Kormos, what information he had learned about appellant's parents and

grandparents that contributed to his diagnosis of appellant. Prosecutor Rico objected on hearsay grounds and moved to inspect the file Dr. Kormos had with him claiming that he had not had the chance to inspect it. Rico continued stating his objection in front of the jury and the following colloquy occurred.

> **Prosecutor Rico:** If Mr. Braun wants to bring up what other people said happened to parents and grandparents and, as far as I know, great grandparents, I think the issue is one of relevance.
>
> **Braun:** Your Honor, in the first place, the material is not being offered for the truth of the matter, but only for how it affects this witness's opinion, which is proper for an expert.
>
> Second, as to the disclosure of the underlying material, that material was disclosed to Mr. Rico. It consisted largely of the interviews with Shirley Cotta.
>
> Third, I did attempt to bring out that information from Shirley Cotta, but the People objected and the material was not testified to in court. However, that doesn't prevent Dr. Kormos from relying on material he learned.
>
> **Judge Mullin**: Has that information that the doctor is going to rely on for that question been turned over to Mr. Rico?
>
> **Braun:** Yes, it has. The interview of Shirley Cotta was. There is an interview of Barbara Silveria which I have brought to court today and it is available to Mr. Rico.
>
> **Rico:** Your Honor. That's yesterday afternoon.
>
> **Judge Mullin:** At the recess, we'll have a hearing . . . , Mr. Braun. Be prepared for it.
>
> **Braun:** Your Honor, I have complied with the Court's order.
>
> **Judge Mullin:** Mr. Braun, Just be prepared for it. I'll allow the question at this time. However, ladies and gentlemen, the witness will be allowed to testify to certain information that he

has received from conversations with others, whether it was books or papers or records. However, the information the witness has received from these other sources and that he will testify to is not received and may not be considered by the jury as necessarily true. In permitting such testimony, the Court does not rule, and does not necessarily find, that all of the information is true or not true.

This type of testimony is proper for the jury to hear in order that the jury may understand the basis for the witness's opinion. The credibility of such information is for the jury to decide. Your finding of the information being credible or not credible may effect the strength of the witness's opinion. What effect this has is a matter for your opinion. Proceed."

(RT 162:16087-16089.)

Here, Judge Mullin instructed the jury sua sponte that they "may not" consider the information Dr. Kormos had received as "necessarily true," and once again improperly threatened Braun with monetary sanctions in front of the jury.

Later the same day, Judge Mullin sustained prosecutor Rico's objection to a question Braun asked of Dr. Kormos, denied Braun's request to approach the bench, ordered Braun to rephrase the question, then politely asked Rico to refrain from making speaking objections. Although Rico essentially made another speaking objection, Judge Mullin merely thanked Rico when he stated that he would do as asked:

Prosecutor Rico: . . . Is counsel asking whether anyone could control him [appellant] and keep him from stabbing his brother Michael or pushing him out a window, or is he talking over a period of time?

Braun: Your Honor, I object. I'm going to approach the bench. I seriously resent Mr. Rico making these kinds of speeches to

the jury and being allowed to get away with it. I ask we approach the bench.

Judge Mullin: It's denied. The objection is sustained. Rephrase the question. Mr. Rico, please refrain from speaking objections.

Prosecutor Rico: I assume the same applies to Mr. Braun? Yes, I will, your Honor.

Judge Mullin: Thank you.

(RT 162:16096-16097.)

Judge Mullin's uneven treatment of Braun is once again demonstrated by this record. Moreover, it was becoming increasingly obvious to the jury that the judge was treating Braun with hostility and disdain even as he treated Rico with respect and courtesy.

Later the same day, Judge Mullin excused the jury, then asked Braun to explain the "discovery problem" relating to information from appellant's mother, Barbara Silveria. Braun explained that he had fully complied with the judge's discovery order. One of the items that Rico did not have previously was the interview of Mrs. Silveria "which only would have become due at this time and is here for him." (RT 162:16102.) Judge Mullin told Braun that the copy of this interview should have been turned over yesterday afternoon when Dr. Kormos was here because of the ruling the previous week that information relied upon by any expert witness was to be turned over at the time the witness begins to testify. Braun apologized for not turning over the copy the previous afternoon, but he had not realized that Rico had not previously seen it. (RT 162:16102-16103.)

Judge Mullin fined Braun $200 payable to the County of Santa Clara by the close of business on January 26, 1996, and ordered Braun not to bill the county for this fine. (RT 162:16104.) Braun requested a hearing. Judge Mullin told Braun that he just had it. Braun requested counsel and a hearing, but Judge Mullin ignored him. (Ibid.)

Later, despite Judge Mullin's previous admonition to refrain from making speaking objections, prosecutor Rico stated in front of the jury, "Dr. Kormos, I can't ask you about Sonny's interview because I have not been furnished - -" The following colloquy ensued:

> **Braun:** Excuse me, your Honor. That's not necessary.
>
> **Prosecutor Rico:** It's true, your Honor.
>
> **Judge Mullin**: It may be true. It's not really necessary. You can deal with that part of that this afternoon.
>
> **Prosecutor Rico:** Let me ask you this: All right. I do have an interview here from the defendant's father.
>
> **Braun:** I object. Excuse me. I object to Mr. Rico testifying and making statements in front of the jury. Would the Court admonish him, please, to ask questions.
>
> **Judge Mullin:** Just ask a question.
>
> **Prosecutor Rico:** That was - - all right.

(RT 163:16201.)

It is evident from this record that once again Judge Mullin treated prosecutor Rico with much more patience and courtesy than he did Braun despite Rico's failure to follow the court's order regarding speaking objections.

Later still, Judge Mullin called counsel to the bench during Dr. Kormos's redirect examination and asked Braun how much longer he was going to take. He told Braun that he had already exceeded his time limit. He also told Braun that the Travis jury was going to come in at 10:00 am Monday and appellant's jury was going to go home. Braun replied, "If that has to be, that has to be." (RT 163:16325.) Judge Mullin told Braun that he was going to tell appellant's jury "right now" that Braun gave the judge the wrong estimate, and that Braun was trying to get "all this evidence in concerning this report." The judge also told Braun it was not necessary to do that and that it was about to cut Braun off himself. Judge Mullin then stated:

> I know what you're trying to do. You're trying to get the jury to take that as fact. That's exactly what you're trying to do. Unfortunately I'm not getting any objections from Mr. Rico. But I'm in charge of running this trial in the hopes of ascertainment of the truth.
>
> **Braun:** Can we excuse the jury so we can have this conversation so the jury can't hear?
>
> **Judge Mullin:** No.
>
> **Braun:** The record should reflect that the Court is speaking loud enough where the jury can hear.
>
> **Judge Mullin:** One more time it's going to cost you some more money, Mr. Braun.

(RT 163:16325-16326.)

Prosecutor Rico claimed that he did not object because he did not want to appear to be concealing this evidence from the jury, and because he hoped they could finish by 5:00 p.m. (RT 163:16326-16327.)

Thus, once again, Judge Mullin chastised Braun loud enough for the jury to hear when Braun was only doing what he was ethically obligated to do, i.e., present appellant's mitigating evidence.

Finally, Judge Mullin ordered Braun to "really summarize it and I mean cut it down. . . "On everything . . . On everybody you intend to use." (RT 163:16329.) Rico asked the judge to instruct the jury again that this was not offered for its truth and made a "continuing" objection. Braun noted that Rico neither thought an objection was appropriate, nor asked for an instruction that the matter not be taken as true, when Rico continually asked Dr. Kormos over and over again about unidentified reports that appellant had tried to throw Michael out of a second story window, started lots of fires, and chased Michael with a knife when he was under 5 yrs old. (RT 163:16330-16331.)

Judge Mullin told the jury that Braun would need more time to question Dr. Kormos, and that he was "quite upset with counsel. And that really sort of goes to both counsel and I'm not going to hear any comments from either of those counsel." (RT 163:16332.) Later, Judge Mullin told the jury, "I admit my comments about counsels' estimates were unfair. I will withdraw those and please disregard them." (RT 163:16333-16334.)

On **February 2, 1996**, during Braun's redirect examination of Dr. Kormos, Judge Mullin improperly sustained prosecutor Rico's objection on grounds that Braun question led the witness even though Dr. Kormos was an expert. (RT 173:17257-17259.) It is well settled that counsel is permitted to lead an expert witness. (See Chavez v. Zapata Ocean Resources (1984) 155 Cal.App.3d 115, 124; Chula v. Superior Court (1952) 109 Cal.App.2d 24, 38; 3 Witkin, Cal. Evidence (4th ed. 2000) Oral Examination, § 167, p. 232.)

Here, Judge Mullin improperly favored Rico by sustaining his baseless objection in violation of the rules of evidence.

On **February 8, 1996**, during his closing argument, Braun argued that the jurors should ask themselves "do I believe that it's right, do I believe that I have to sentence Danny [appellant] to death." Prosecutor Rico's objection to this argument as inappropriate was sustained. Braun tried to respond but Judge Mullin interrupted him, stating in front of the jury, "Counsel, the objection is sustained. You know that's improper. You may argue the law and the jury instructions." Braun responded by stating that he believed that was the law. The judge replied, "Well, I believe that you are wrong, Counsel. Do not do it again." (RT 177:17853.)

Here, Judge Mullin's comments again demonstrated his disdain for Braun, and incorrectly informed the jury that Braun was making an inappropriate argument when Braun was simply asking the jury to ask themselves whether a death sentence was the appropriate penalty.

In contrast, Judge Mullin favored Rico by letting him argue, over defense objection, his torture-murder theory even though the jury had deadlocked on this issue. Rico argued, "The torture a number of you believed to be true, others were not convinced on the reasonable doubt standard, but as the law indicates that can also be considered." (RT 178:17919.) Rico stated, "What I am about to do, your honor, is to write 'torture' in under 'murder." Judge Mullin replied, "That's fine." Then Rico argued, "One of the circumstances of the crime, the murder, that you can consider is - - and when I put 'torture,' I'm talking about the nature of the assault, what Mr. Silveria himself conceded was torturous."[41] (RT 178:17919-17920.)

On **February 15, 1996**, the jury deadlocked, a mistrial was declared, and it was discharged. (RT 181:18241-18252.) Nevertheless, Judge Mullin's

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41 See Argument I, ante, at pages 91-114.

hostility and verbal abuse of Braun undoubtedly helped to convince eight jurors that appellant should be executed. It also placed a undue mental burden on Braun that burdened him throughout the second penalty phase of the trial.

D. Judge Mullin's Hostile Comments, Threats and Refusal to Allow Braun to Fully State the Grounds For His Objections During the Second Penalty Phase

1. Events Prior to Jury Selection

On **October 11, 1996**, during a discussion regarding in limine motions to be filed in preparation for the second penalty phase of appellant's trial, Judge Mullin instructed Braun to get the motions filed stating, "If I understand and recall correctly, you've had since February of this year to be working on these motions." (RT 193: 22480.) Braun asked to respond but was interrupted by the judge:

> **Judge Mullin:** Counsel, I don't want to hear about bills. I already told you that. That is not something for this court to consider. You can go to the supervising judge or Judge Garibaldi, but don't bring it here. It's not something this court should consider, and I'm not going to hear it.
>
> **Braun:** May the record reflect that the Court is raising its voice to me?
>
> **Judge Mullin:** Yes, the record may reflect, and justifiably so.
>
> **Braun:** Your Honor, I'm not asking the Court to approve bills.
>
> **Judge Mullin:** I don't even want to talk about them, because it's not proper. That's why the Court is raising its voice, because you don't seem to understand.
>
> **Braun:** The Court told me I have been working on this since February and I am telling the Court that no one - - that conflicts refused to pay me.

Judge Mullin: Counsel, that's it. I don't want to hear any more about conflicts. It's as simple as that.

(RT 193:2240-22481.)

Here, Braun made clear that he was not asking Judge Mullin to approve any of his bills. He was merely trying to explain in October why he had not been working on this case since February. There was nothing improper about Braun's attempt to explain the circumstances so there was no good reason for the judge to raise his voice to Braun.

On **November 21, 1996**, Leininger, counsel for co-appellant Travis, addressed part seven of the severance motion counsel had filed. Leininger moved for a penalty phase separate from appellant because of a concern that the "spill-over" from the relationship between Braun and the Court would "contaminate" Travis's case. He concluded, "I think that by untying the bonds to Mr. Silveria, his defense and his defense counsel, that Mr. Travis and I would be able to take this journey in a - - in a far fairer uncomplicated uncontaminated environment." (RT 200:22956-22959.)

Braun responded as follows:

Obviously I can't join Mr. Leininger's motion for the reasons he sets forth, but I would like to support the factual basis for it. I think that the factual observations that he has made in setting forth his motion are well taken.

I do not wish to use to use this opportunity to put on the record what my view is of the obvious problems that have taken place between the Court and myself, but I can assure the Court that I feel every bit as strongly about them and more so than does Mr. Leininger. So much so that at a point about a week and a half ago I started working on a motion to withdraw for the reasons basically that are set forth in Mr. Leininger's moving papers.

. . . I decided I would try and proceed because that's what I do wish to do to continue to represent my client. But I have found that the pressure that Mr. Leininger refers to in his papers indeed do exist in this court and are almost intolerable for me to work under.

I have been stressed out to a very great degree by - - by proceeding under the conditions that I feel have existed here. I am not making a motion at this time. I do think that Mr. Leininger's points are well taken, however.

(RT 200:22959-22960.)

Judge Mullin asked Rico if he had anything to add:

Prosecutor Rico: Only to say that a murder trial particularly a capital case such as the one we have here is by its very nature a very stressful event.

Mr. Braun is a very zealous advocate. I know that there are and inevitably will be in any capital case such as this moments of tension, but that is not limited to just Mr. Braun and the Court or Mr. Leininger and the Court or myself and the Court. It transcends normal boundaries and depending on circumstances. Those moments of tension exist because we are all human.

But I - - I have nothing to comment on in terms of Mr. Leininger's motion except to say that I don't believe that this is any basis for a severance. And I also do not concede as Mr. Leininger and Mr. Braun apparently are trying to infer that there is some apparent - - I don't know for want of a better word animosity from the court towards Mr. Braun specifically or anything like that.

I don't want the record to reflect that there is any such inference because I think what we're talking about is the tension of a capital case and that is not directed to any one person.

Judge Mullin: Well, I agree with you, Mr. Rico, on that last point. Before I give my ruling on this there are a couple of things I want to say.

First of all, I wanted to commend Mr. Leininger for the delicate way in which he was able to word the motion. I'm sure that wasn't easy and I'm sure we all appreciate that. But probably more importantly as a result no matter how I rule, if nothing else, the motion gives us all pause to reflect and remind all of us of problems that can occur and hopefully will put us all on guard regarding the particular problem.

All right. Mr. Leininger's point as set out in point 4 of his notice of motion is a concern to all and it should be. It would be completely improper for a jury to base any part of a verdict on how they felt about any party. And the Court will not get into attorney or judge bashing now or in the future.

Suffice it to say that any jury, and especially one that is charged with the life and death fate of two defendants, would not let their personal feelings in any way dictate that fate. And I think that it was shown by the results of the last jury, both juries in this matter. And this applies no matter what their feelings might be regarding the attorney or attorneys.

Just as a judge may not let his or her personal feelings, positive or negative, affect any decision regarding a client, whether that client is a defendant or the People of the State of California, the same applies to a jury.

Counsel should be assured that the Court will conduct these proceedings as it deems proper and appropriate and with counsels' concerns in mind. The Court will do everything in its power to ensure that an attorney or even Court conduct will not affect the jury's verdict as to either or both defendants or the People of this state.

The motion to sever as set out in Part 7 is denied. If counsel wishes, or of the Court believes it to be necessary when the presentation of the evidence is at an end and before deliberations

> begin, the Court will give a cautionary instruction on this issue in an extremely neutral fashion.
>
> Keep in mind that the Court always gives its modified version of CALJIC 17.30 so as to ensure that anything I have said or done would not affect the jury's verdict. Something along these lines might be said. And I'll give 17.30 first as the Court gives it in its modified version.

(RT 200:22960-22963.)

Despite Judge Mullin's assurances that he would do everything in his power to ensure that even his own conduct would not affect the jury's verdict, he continued to treat Braun with open hostility and disdain, and continued to threaten him with monetary sanctions, even though Braun merely sought to protect appellant's rights as he was ethically obligated to do.

On **December 10, 1996**, during selection of the second penalty phase jury, Braun asked Judge Mullin to read the definitions of the terms "aggravating" and "mitigating" verbatim from CALJIC 8.85 [8.88] to all future panels of prospective jurors. The judge denied the motion. When Braun asked the judge why he denied the request, the judge replied, "You can. I'm not going to give you one, other than I believe what I did was proper." (RT 206:23488-23489.)

On **December 11, 1996,** Braun explained to Judge Mullin that it was error to instruct the prospective jurors with his modified version of guilt phase instruction, CALJIC No. 1.00, which included the phrase "regardless of the consequences." (RT 208:23750. See also Argument II, ante, at p. 130.) Braun asked the judge to instruct with penalty phase CALJIC No. 8.84.1 instead. Judge Mullin replied:

> I'm not going to do that, Mr. Braun, for the first third time. First of all, Mr. Braun, I am reading this instruction because I want in

> there the first part of the instruction as well as the jury should not be influenced by pity for a defendant or by prejudice or bias against him because he has been arrested, charged with a crime or brought to trial. That's what I want in there.
>
> 8,84.1 does not forbid that. Neither do the cases mentioned in the use note. They do not forbid that. Because I'm applying that to the fact that they've been charged, arrested and brought to trial.
>
> That's the end of it. I've ruled now for the third time. *If I have to rule a fourth time, it could be costly.* We're in recess.

(RT 208:23750-23751. Italics added.)[42]

On **January 14, 1997**, Braun objected to the granting of prosecutor Rico's challenge for cause of prospective juror E-45 because Braun did not believe that the juror understood Judge Mullin's question. The judge replied, "What are you Carnac now?" (218:25138.)

On **July 16, 1997**, Leininger informed Judge Mullin that he was not going to participate further in the voir dire process because they were getting pro-death prospective jurors who would deny the defense a fair trial. (RT 223:25964.) Leininger added, "I'm not going to go any further with what I think is really happening in this process because I don't want to anger the Court. . . ." (Ibid.)

Judge Mullin ordered Leininger to participate, and jury selection continued. (RT 223:25965.) Before the noon recess, Judge Mullin held an in

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42

See Argument II, ante, at pages 122-126. The analysis presented there demonstrates that despite Judge Mullin's contention to the contrary, he improperly instructed the second penalty phase jury that they should not allow *pity for appellant* to influence their decision regarding his penalty.

camera hearing with Leininger and co-appellant Travis regarding Leininger's comments that morning. (RT 223:26010-26011.)

Later, Judge Mullin addressed all counsel as follows:

> Counsel in this case are hereby put on notice that this Court will not tolerate any further attacks on the Court's integrity or independence directly or indirectly or by inference. The Court takes great offense at some of the comments that were made this morning and in the past. Such attacks are not only foolish but unethical and contemptuous.
>
> This Court will continue to follow the law of this state and make rulings accordingly. If counsel disagrees with those rulings, they should do so by entering their objections in accordance with the law. The record will preserve their objections for any further purpose. Any violation of this order will be dealt with severely.
>
> Now, the Court has tried to make the atmosphere here relaxed so that the case can be tried in a comfortable and yet professional manner. Perhaps this was an error. Perhaps familiarity breeds contempt.
>
> In any event, the Court considers this the last word anybody need to say about it and we will just continue on appropriately. And you can read into that word 'appropriately' anything that you wish.

(RT 223:26089-26090.)

Here, Judge Mullin clearly warned defense counsel that he would not tolerate any objection that suggested that the judge was not impartial. He also warned them that any violation of this order would be dealt with "severely." However (as explained later), the Constitution guarantees appellant the right to an impartial judge. Therefore, Braun was ethically obligated to make this objection if he believed that a basis existed to support it. Consequently, Judge

Mullin was wrong to warn defense counsel that making such an objection was "not only foolish, but unethical and contemptuous." This improper warning only served to further hinder Braun's efforts to defend appellant.

Incredibly, Judge Mullin also claimed that he had tried to maintain a "relaxed" courtroom atmosphere. The trial record set forth in this AOB, however, reveals the falsity of that claim.

On **February 5, 1997**, Braun stated to Judge Mullin that he would like to see the legal authority for permitting prosecutor Rico to argue for retribution when Braun was prevented from arguing for mercy.[43] (RT 233:27288-27289.) Judge Mullin replied, "Thank you. The Court orders that all counsel not argue improper concepts to the jury. Everybody get that one?" Braun replied, "I think I do get it, your Honor , but I think what that forces - - Judge Mullin interrupted stating, "Be careful. Because what you're going to have to do, if somebody argues something that is improper, you're going to have to get up and object. That's what objections are for." (RT 233:27289.)

Although Judge Mullin told Braun that he would have to "get up and object," the record shows that he continued to show impatience and hostility toward Braun when Braun did so.

2. <u>Events After the Jury Was Selected and Sworn</u>

Previously, on **November 19, 1996**, after ruling certain photos and Mr. Madden's bloody shirt were admissible over Braun's motion to exclude them, Judge Mullin also ruled, ". . . it can be displayed to the jury, but as soon as the witness is through testifying about the shirt . . . that as soon as the witness is through testifying about the shirt or the photographs *they should be taken*

43

See Argument II, ante, at pages 129-130, wherein Judge Mullin unfairly permitted prosecutor Rico to argue for retribution.

down. (RT 199:22872. Italics added.) Judge Mullin also told counsel that if they wanted the shirt covered when the witness was not being questioned about it, "you can simply ask me and I will have it . . . done." (RT 199:22873.)

The record below shows, however, that on **March 4, 1997**, prosecutor Rico made two snide comments about covering the shirt directed at Braun in front of the jury. When Braun protested, the judge said nothing to Rico about his comments. Instead, he told Braun to be quiet:

After Rico finished questioning pathologist, Parviz Pakdaman, about the defects in Mr. Madden's bloody shirt, the following colloquy occurred:

> **Prosecutor Rico:** All right. Your Honor, I would have no further questions on the shirt. If Mr. Braun wishes to cover it up, that would be fine.
>
> **Braun:** Well, I would ask that the person who uncovered it cover it.
>
> **Judge Mullin:** Cross-examination, Mr. Leininger?
>
> **Prosecutor Rico:** I had a couple of questions regarding the throat. I had nothing about the shirt. I was just referring to Mr. Braun if he wishes to cover it.
>
> **Braun:** Is Mr. Rico suggesting, your Honor, that I go up there and - -
>
> **Judge Mullin:** Oh, come on, people. Why don't we just cover the shirt. I don't believe it. I really don't believe it.
>
> **Braun:** I don't either.
>
> **Judge Mullin**: Mr. Braun why don't you just be quiet. Thank you.

(RT 248:28731.)

Judge Mullin not only did not have the shirt covered as he said he would, he also permitted Rico to both ignore his previous order to cover it, and to direct intentionally prejudicial comments to Braun with impunity, while telling Braun to be quiet when he protested.

Moreover, Judge Mullin's unfair treatment of Braun was further demonstrated when he ordered him, sua sponte, to place his exhibits face down after they had been introduced and published, and threatened him with monetary sanctions if he failed to do so (see, ante, at page 275), yet, said nothing to prosecutor Rico when he did not cover the bloody shirt after his direct examination of pathologist Pakdaman even though Judge Mullin had previously assured Braun that he would have it covered.

On **March 4, 1997**, during prosecutor Rico's direct examination of pathologist Pakdaman, Braun stated, "Excuse me, your Honor. I'm going to object to the next question and request that we approach the bench. (RT 248:28734.) Rico made a snide remark to Braun in front of the jury:

> **Prosecutor Rico:** Can counsel read minds?
>
> **Braun:** Yes, I can.
>
> **Judge Mullin**: I think that's enough from both of you. Approach the bench please. (Ibid.)

This is one of the rare times that Judge Mullin included Rico in his comments. However, it was clear to the jury that although it was Rico who made the snide remark, Judge Mullin also admonished Braun.

Later that day, Braun moved for mistrial out of the jury's presence, stating in relevant part:

> **Braun:** I object to the fact that the shirt was shown to the jury and move for a mistrial on that ground and it was exposed for about eight to nine minutes.

I also object to the way the Court treated me when the subject of covering the shirt up again arose. That shirt and the case that it's in is the People's exhibit. The People that have been responsible for putting that exhibit in place, moving it, covering it, uncovering it and so forth.

When the Court ruled that the exhibit should be covered up again I took it and still take it that it was the People's responsibility to do that. In the course of that colloquy in which I think my behavior was entirely appropriate the Court in the presence of the jury told me to be quiet which I thought was demeaning to me and harmful to the defense generally in how that whole thing appeared to the jury. I object to that and join that to the exposure of the shirt itself in my motion for mistrial.

The third thing that I would like to bring up at this time is at one point Mr. Leininger . . . accidently referred to Dr. Pakdaman who was the witness as "the victim." It was completely inadvertent on Mr. Leininger's part. At some point somebody said that he [Dr. Pakdaman] won't respond . . . and then *Mr. Rico gratuitously said on the record in front of the jury, referring to the victim [Mr. Madden] saying "and the victim won't respond either,"* or words to that effect, which I think was an entirely improper comment designed to inflame the jury against Mr. Silveria and Mr. Travis. I also move for a mistrial on that ground.

Judge Mullin: The last one is denied as being *totally ridiculous and without foundation.*

As far as the Court telling you to sit down, Mr. Braun, it's not the first time the Court has had to do that because you're a very slow learner.

As far as the shirt being re-covered up, it was your motion to have it covered or to cover it up and your conversations directly with Mr. Rico was [sic] completely improper, as you should know.

And as far as exposing the shirt again during Dr. Pakdaman's testimony, the shirt shows the amount of bleeding prior to death and it shows the blood loss through the thirty plus stab wounds and other cut after the body was moved which goes to the magnitude of the wounds and the damage caused by the infliction of the wounds.

(RT 248:28757-28760. Italics added.)

The motion for mistrial is denied.

Now apparently we're dealing with a kindergarten class here by the three of you and I'm not at all happy with any of you. So therefore we have to treat you like kindergartners. And if I have to do it in front of the jury, by God, I will. I would expect this from some of the newer attorneys in this county, not from you three. You've been around long enough.

Thou shalt not continue to argue a point or objection after the court has ruled.

Thou shalt not address each other directly, only through the Court. Apparently you can't do it civilly.

Thou shalt not interrupt an attorney during the attorney's argument.

Thou shalt not make snide, catty or cheap remarks whether under thy breath or not.

Thou shalt not interrupt a witness when the witness is answering thy questions.

And any violation of these orders will result in paying the coffers of the general fund of this County.

Does everybody understand that?

Braun: Yes, your Honor.

Mr. Leininger: Yes.

Prosecutor Rico: Yes.

Judge Mullin: It can be very expensive it you don't.

(RT 248:28760-28761.)

Here, Judge Mullin overruled Braun's objection to Rico's stating in front of the jury that "the victim won't respond either" describing the objection as ridiculous and without foundation. Thus, Rico was permitted to make even inflammatory "speeches" in front of the jury, while Braun was often prevented from placing the basis for his objections on the record.

This persistent uneven treatment of Braun places Judge Mullin's impartiality in question despite his earlier assertion that attacks on his "independence" were unethical and contemptuous.

Moreover, even though Judge Mullin "admonished" all counsel, the record of his treatment of Braun suggests that his comments were primarily aimed at Braun. Indeed, Braun to took the brunt of the judge's hostility since the judge had already described Braun's objection to Rico's comment, "The victim won't respond either" as "totally ridiculous and without foundation."

As shown below, Judge Mullin continued to display hostility and disdain toward Braun as the trial continued.

On **March 5, 1997**, pathologist, Parviz Pakdaman, complained about the questions he was being asked stating, "I don't really find any reason to really go through all these type of questioning and I'm really surprised. There may be some problem because of my language barrier - -" (RT 249:28820-28821.) Braun attempted to object but Judge Mullin, after initially instructing the

witness to "hold on a minute," simply ignored Braun and told Rico to ask his next question. (RT 249:28821.)

On **March 10, 1997**, Braun moved to call appellant to present only factor (k) evidence, and to preclude cross-examination relating to the circumstances of the crime, since appellant's prior direct and cross-examination concerning the crime had already been read to the jury. (RT 252:29340.) Judge Mullin replied, "Have a nice evening folks. Braun asked the judge whether he was going to rule the next day. The judge replied, "I don't know. The Court will rule on it when the Court gets around to it. . . Maybe tomorrow, maybe not." Braun told the judge he would need to know when he would rule. (Ibid.) Judge Mullin assured Rico that he would have time to respond to Braun's motion prior to his ruling. (RT 252:29341.)

Of course, a trial judge has reasonable discretion to choose when he will rule upon motions but here Judge Mullin displayed his disdain for Braun when he initially ignored Braun's motion, then again when he put off ruling on it indefinitely.

On **March 13, 1997**, during cross-examination of defense witness, ex-social worker, Linda Cortez, Judge Mullin permitted prosecutor Rico to elicit irrelevant hearsay allegations contained in a Department of Health Services report that appellant had engaged in bad childhood behavior before he was removed from his mother's home at six years of age. Rico cross-examined ex-social worker Linda Cortez, as follows:

> **Prosecutor Rico**: And wasn't it also true that the boys, meaning Sonny and Danny, acted out by defiant and aggressive behavior, lying and stealing?
>
> **Cortez**: That's what the report says.

Braun: Excuse me, Your Honor. * * * I have several objections to that. One is that the report is thirdhand hearsay. This is not anything that was told to this witness. This was something that was apparently told by Mrs. Silveria to other social workers. Secondly is that there's no distinction in what was being said as between Sonny and Danny.

Prosecutor Rico: Your Honor, I'm offering this for the same purpose as Mr. Braun did when he went through the records and was asking her questions about that.

Braun: I did not ask for thirdhand hearsay - -

Judge Mullin: It's not being received for the truth of the matter asserted then. The objection is overruled.

Braun: Your Honor, if it's not being received for the truth of the matter asserted, I would like an offer as to what it is received for.

Prosecutor Rico: For the same purpose that Mr. Braun had offered it for, to explain this witness's conduct as far as the boys are concerned and her actions.

(RT 255:29759-29760.)

After Judge Mullin suggested to prosecutor Rico the manner in which he should cross-examine Cortez about additional allegations of appellant's bad childhood behavior, Rico asked her:

Prosecutor Rico: All right. And were you aware that Mrs. Silveria had related that on one occasion - -

Braun: Excuse me, Your Honor. I object to this. This relates multiple hearsay - -

Judge Mullin: The objection is overruled.

Braun: - - at least three levels of it.

Judge Mullin: It's not received for the truth of the statements.

Prosecutor Rico: Were you aware at an early stage in your handling of this case that Mrs. Silveria had related around the time that she turned . . . Danny over to the Department of Social Services that there had been an occasion where her eight-year-old daughter had to intervene when Danny was chasing Michael with a knife in his hand?

Cortez: It said that in the report.

Prosecutor Rico: And were you aware that Mrs. Silveria also listed one of Daniel's problems as fire-setting?

Cortez: She said that in the report.

(RT 255:29765-29767.)

Judge Mullin said he overruled Braun's multiple hearsay objection on grounds this evidence was not admitted for its truth; it was admitted to show Cortez's subsequent conduct regarding appellant. (RT 255:28766-29767.)

The judge's ruling, however, is illogical. Appellant was removed from his mother's care in 1976, when he was six years old. (RT 254:29576.) Consequently, bad behavior allegations that appellant's mother allegedly made in 1976 to a different person *before* Cortez was assigned as appellant's social worker could not have logically influenced Cortez's decision *five years later* when she removed appellant from the Hebert foster home in 1981 because he had been physically and sexually molested there.

In truth, prosecutor Rico's own words reveal that he intended that the jury accept these allegations against appellant as true. He asked Cortez, "*And wasn't it also true* that . . . Danny, acted out by defiant and aggressive behavior, lying and stealing?" (RT 255:29759. Italics added.)

Thus, it is evident that Judge Mullin improperly permitted prosecutor Rico to elicit irrelevant hearsay testimony regarding appellant's alleged dishonest and aggressive behavior when he was only six years old. It is also evident that Rico intended that the jury accept this "evidence" as supporting a decision to sentence appellant to death.

Later that day, Judge Mullin also allowed the following questions and responses:

> **Prosecutor Rico:** Now, Ms. Cortez, was the Silveria household the worst situation you have ever encountered as a social worker?
>
> **Ms. Cortez:** No. In fact, compared to the other ones I had, she was one of the better ones.
>
> **Prosecutor Rico:** Barbara Silveria was not the worst mother you ever encountered?
>
> **Ms. Cortez:** She did not prostitute herself. She wasn't using drugs. She wasn't in and out of jail. She wasn't having babies that were drug-addicted. She wasn't psychotic. So compared to them she was pretty good.

(RT 255:29772-29773.)

Here, it is likely that Judge Mullin properly permitted Rico to compare appellant's household and mother to other households and other mothers who were psychotic, prostitutes, in and out of jail, and who had drug-addicted babies.

However, Judge Mullin's unfair treatment of Braun was again revealed when he prevented Braun from making similar comparisons when presenting his defense. For example, Braun was prevented from demonstrating the sincerity of appellant's conversion to Christianity by asking Reverend Leo

Charon to compare appellant to other inmates who use religion to gain an advantage. (RT 260:30686-30688.)

Judge Mullin's uneven treatment of Braun was also revealed when he allowed Rico to present wholly irrelevant and prejudicial evidence of the Nuestra Familia prison gang's attempt to commit a murder of an inmate that had nothing to do with this case, on the one hand, yet restricted Braun's ability to present evidence relating to appellant's conversion to Christianity on the other. (RT 256:29860-29861. See also Argument VII, ante, at pp. 192-194.)

Rico was also permitted to compare other persons counseled by Sharon Lutman, a registered nurse certified in chemical dependency, and witness for co-appellant Travis, with appellant and Travis. Rico asked Lutman, ". . . of all those thousands of individuals that you have dealt with who have had a problem with alcohol or drugs, how many of them have robbed and killed anyone? Judge Mullin overruled Braun's objection that this question was argumentative. (RT 266:31658-31659.)

On **March 17, 1997,** Braun asked defense witness, Julie Morrella, about her visits with appellant in the jail, and why she concluded that appellant started to feel better. (RT 256:29956-29961.) Morrella replied:

> **Morrella:** I think it's because he started reading the Bible.
>
> **Prosecutor Rico:** I would have to object and move to strike as speculation.
>
> **Judge Mullin:** Sustained. The jury is admonished to disregard it. Counsel, ask proper questions, please.
> * * *
> **Braun:** All Right. Now, you mentioned something about reading the Bible. Let me take a step back.
>
> **Prosecutor Rico:** I'm sorry, your Honor. That was stricken.

Judge Mullin: Sustained. Counsel, I think you know better. You're supposed to know better.

(RT 256:29860-29861.)

Judge Mullin should not have made such comments in front of the jury. (People v.Fatone, supra, 165 Cal.App.3d at pp. 1174-1175 [it is improper for a judge to state his or her negative personal views concerning the competence, honesty or ethics of the attorney in a trial in front of the jury].)

Braun then examined Morrella whether there was a time when she began to talk to appellant about the Lord. Morrella responded that appellant probably mentioned this first and that appellant had told her that he was really excited because he had begun reading the Bible. Judge Mullin sustained Rico's hearsay objection and struck this testimony. Braun tried to explain that this evidence was not offered for its truth, but rather to show "the reason this witness began to discuss - -" Judge Mullin, thereafter, excluded this evidence as irrelevant:

Braun: I'm sorry, your Honor. What's the basis?

Judge Mullin: The objection is sustained. It's hearsay.

Braun: Your Honor, I am offering the answer to the following question not for the truth of the matter.

Judge Mullin: It's not offered for a relevant purpose. Continue Mr. Braun.

(RT 256:29963-29964.)

Braun also twice asked permission to approach the bench after Judge Mullin sustained Rico's objection and struck Morella's further testimony. Judge Mullin refused these requests. (RT 256:29964.)

The issue relating to the propriety of Judge Mullin's exclusion of appellant's mitigating evidence as irrelevant is addressed in this AOB in

Argument IV, ante, at pages 157-164. The problem addressed here is Judge Mullin's improper chastisement of appellant's counsel in front of the jury, and his stubborn refusal to allow Braun to speak to him at side bar. There was simply no good reason for the judge to insult Braun in front of the jury. (See People v. Jackson (1955) 44 Cal.2d 511, 518-520 [judge's comments conveyed allegiance to the prosecution and disdain for defense counsel; People v. Fudge (1994) 7 Cal.4th 1075, 1107 [a trial court commits misconduct if it persists in making discourteous and disparaging remarks to defendant's counsel and utters frequent comment which discredits the cause of the defense].) There was also no good reason to prevent Braun from trying to explain to the judge why his rulings were in error.

Morrella further testified that appellant "was changing himself." (RT 256:30002.) Prosecutor Rico's objection was sustained and his motion to strike this testimony was granted. Judge Mullin interrupted Braun when Braun asked Morella, "All right. Leaving aside the fact that Danny was changing, but based on the content - -"

> **Judge Mullin:** Approach the bench, please.
> [At bench] Mr. Braun, that is contemptuous conduct.
>
> **Braun:** What is?
>
> **Judge Mullin:** Paraphrasing, beginning or prefacing a question with testimony that had just been stricken because it was objectionable.
>
> **Braun:** I'm sorry. I totally lost track of - -
>
> **Judge Mullin:** Maybe you ought to pay attention to the Court's ruling.
>
> **Prosecutor Rico:** The problem is - -

Judge Mullin: I know what the problem is and I don't need to be reminded of it.

But that is contemptuous conduct. You do it one more time, Mr. Braun, and there will be serious consequences to pay. That's number one.

Braun: I would ask the Court not to waggle its finger at me in the presence of the jury.

Judge Mullin: Mr. Braun, be quiet and then I won't have to. I won't tolerate any evidence or accept any evidence of visits between this witness and the defendant between February of '96 and the present under 1252.

(RT 256:30002-30003.)

The problem addressed here is Judge Mullin's open disdain and hostility toward Braun to the point of his wagging his finger at Braun in front of the parties, court staff, the witness, and the jury. Braun was merely attempting to present relevant mitigating evidence for the jury's consideration in determining whether appellant should live or die. The judge improperly interfered with this process. The judge's exclusion of mitigating evidence "between February of '96 and the present" is addressed in Argument IV, ante, at pages 161-164.

On **March 20, 1997**, during prosecutor Rico's cross-examination of defense witness, Patrick Doyle, Braun objected at side bar to Rico waiving around a piece of paper in front of the jury as they approached the bench, and to Rico showing the witness a report written by another officer that the witness had not previously seen. Judge Mullin replied, "So? The objection is overruled." (RT 259:30462.)

Later that day, prosecutor Rico also questioned the witness as follows:

> **Prosecutor Rico:** Back to the situation I asked you about where Mr. Silveria said that he admitted lying - - Let me ask you this first: You said you knew John Travis. Did you ever see - -

(RT 259:30498.)

Braun objected that there was no evidence that appellant had ever admitted lying. Rico withdrew the question. Braun explained again that there was no evidence to support Rico's statement. Judge Mullin took this opportunity to further ridicule Braun in front of the jury stating:

> The jury has already been instructed, counsel, *as you should know*, that a question itself is not evidence and may be considered only as it enables the jury to understand the answer.

(Ibid. Italics added.)

Here, Judge Mullin again improperly impugned Braun's competence in front of the jury. (People v.Fatone, supra, 165 Cal.App.3d at pp. 1174-1175.)

Later this day, during cross-examination of defense witness, Edwin Lausten, prosecutor Rico asked Lausten whether he knew inmate Gabriel Coronado. Braun objected that this was not relevant. Lausten had testified about two things, appellant's conduct as an inmate, and the witness's opinion of Officer Jeanine Powell. (RT 259:30580-30581.) Leininger objected on the same grounds explaining that Coronado was the victim of a hit carried out by four members of the Nuestra Familia prison gang, and had nothing to do with this case. (RT 259:30581.) The following colloquy occurred at the bench:

> **Judge Mullin**: I'll allow this area about Coronado because, Mr. Braun, you opened the door."
>
> **Braun:** Oh, no, I didn't.
>
> **Judge Mullin:** Oh, yes, you did.

Braun: That's highly unfair.

(RT 259:30582.)

Judge Mullin was disingenuous. Braun merely questioned Lausten about his opinion of Officer Powell. He did absolutely nothing to justify the judge's admission of this wholly irrelevant and prejudicial evidence of a prison gang's attempt to commit a murder of an inmate that had nothing to do with this case. (See Argument VII, ante, at pp. 192-195.)

On **March 24, 1997,** Braun asked permission at side bar to ask defense witness, Leo Charon, whether he had formed an opinion regarding the sincerity of appellant's conversion to Christianity as compared to other inmates. Braun explained that prosecutor Rico had opened the door to this question by asking the witness about jailhouse religion and the insincerity of inmates who use religion for their own advantage. (RT 260:30686-30687.) Rico argued that he asked about a concept, not about any individuals. Braun countered that Rico had opened the door so wide he could "drive a truck through it." (RT 260:30687.) Judge Mullin replied, "Denied."

As shown above, Judge Mullin allowed Rico to introduce wholly irrelevant, but highly prejudicial evidence of an attempted murder by a notorious prison gang because Braun had allegedly opened the door by asking question about Officer Powell, but refused to allow Braun to ask Reverend Charon his opinion regarding the sincerity of appellant's religious conversion as compared to other inmates even though Rico had opened the door to this evidence.

Moreover, Judge Mullin previously permitted Rico to compare appellant's home and mother to other homes and mothers through the testimony of ex-social worker Cortez, but did not allow Braun to compare appellant to

other inmates. The judge's one-sided rulings favoring prosecutor Rico did not go unnoticed by the jury. (See People v. Jackson (1955) 44 Cal.2d 511, 517-520 [comments and rulings by the trial judge conveyed allegiance to the prosecution and disdain for the defense].)

On **March 24, 1997,** Judge Mullin again demonstrated his unfair treatment of Braun. Prosecutor Rico, as he had done in the first penalty phase, elicited from defense witness, James Park, that Park was opposed to the death penalty. (RT 260:30827.) The next day, Braun asked Judge Mullin at bench for permission to ask Park why he was opposed to this penalty. (RT 261:30884.) Braun contended that Rico had introduced Parks opposition to this penalty solely to show that Park was biased and that he should, therefore, be permitted to rebut this assertion. (RT 261:30884.) The judge replied:

> **Judge Mullin**: The request is denied. His reasons do not in any way become relevant as to what this jury has to base their decision on.
>
> **Braun:** Well, your Honor, I'm not - -
>
> **Judge Mullin:** If that ruling sounds familiar, it is.

(RT 261:30885.)

On **March 25, 1997**, Braun objected to Judge Mullin's order requiring him to give to prosecutor Rico four summaries Braun had prepared from the reporter's transcripts of prior testimony of defense witnesses: Cynthia Green, Lenae Crouse, Patricia Gamble, and Linda Cortez. Braun explained that the summaries were not discoverable because they were work product. Braun further explained that he had personally summarized what was important to him from the transcripts, and sent the summaries to his psychiatric expert, Dr. Kormos. Braun also pointed out that Rico was present during the testimony of

these witnesses and already had copies of the actual transcripts. (RT 262:31039-31041.) After Rico argued for the summaries, Judge Mullin replied, "The order still stands." (RT 262:31040-31041.)

Here, Judge Mullin's ruling unfairly favored the prosecutor because he required Braun to provide summaries of transcripts he had personally prepared for his own use in preparing appellant's defense to Rico who had no right to them. (See Code of Civil Procedure, section 2018.010 et seq. [Attorney Work Product]; People v. Boehm (1969) 270 Cal.App.2d 13, 21 [memorandum written by an attorney summarizing the attorney's impression and conclusions is protected by the absolute work product privilege].)

On **April 8, 1997,** during a discussion about the scheduling of co-appellant Travis's expert witness, Dr. Timmen Cermak, Leininger stated that Dr. Cermak was a sole practitioner and could not move his calendar "as any civil servant might be able to do." (RT 267:31894.) Judge Mullin replied, "Let's not talk about us civil servants, Mr. Leininger. It will not go over big with the Court." (Ibid.) Leininger explained that he meant that it was not easy for a doctor in private practice to rearrange his schedule. (Ibid.)

During the afternoon session, the following colloquy occurred:

> **Judge Mullin**: All right. We'll be back on the record in People v. Silveria and Travis. The record will show that counsel and the defendants are present along with the civil servant judge, the civil servant clerk, the civil servant deputy and the civil servant court reporter.
>
> **Mr. Leininger**: And the civil servant defense lawyers.
>
> **Judge Mullin:** No. You're private; do you remember? You said you were private. I want to tell you that the Court takes umbrage at what you said. So let's just go on with something else now.

Leininger: I've attempted to apologize to the Court and I'll do it one more time. It was not meant to be derogatory about that, but I think there's a clear difference between - -

Judge Mullin: You were definitely being derogatory as far as I'm concerned.

Leininger: I apologize to the Court.

Judge Mullin: The Court will accept the apology. I hope the staff does too. First of all, the Court does not care one iota about what any of you think about me. So let's leave that as it may.

Also, Mr. Braun, regarding your indirect contempt that you weren't able to accomplish here after the Court took the recess this morning in your behavior regarding Mr. Rico, your laughing, your taunting him, as far as I'm concerned - - you don't need to answer this, Mr. Braun. Just have a seat because I'm not going to hear - - I am not - -

Braun: I feel I do.

Judge Mullin: I am not going to hear an answer from you, Mr. Braun. If you don't sit down I will hold you in direct contempt; do you understand? Now do it now.

As far as I am concerned, you're all acting like children. Why don't you all try being professional? If there's any further acting out like this the offending party will be banned from the courtroom during any recess.

Braun: Your Honor, there was acting out, but it wasn't by me.

(RT 267:31900-31901.)

Here, Judge Mullin's chastising Leininger for using the phrase "civil servants" as if it were some great insult is absurd particularly when Leininger explained that he did not intend it to be derogatory. Moreover, Judge Mullin

was not so sensitive about insults when he earlier dismissed Braun's concern that certain prospective jurors who stated that defense lawyers were "greedy, avaricious, money-grubbing persons" could prejudice appellant's right to an impartial jury. (RT 54:4448-4457-A.)

Furthermore, it is incredible that Judge Mullin would also take out his anger on Braun (who was quietly standing nearby) by accusing him of indirect contempt of court, then refuse Braun an opportunity to be heard.

On the other hand, Judge Mullin allowed Rico to speak freely. Rico then fully explained that he objected to calling Dr. Cermak at that point because it would interrupt Travis's testimony. (RT 267:31901-31903.) Judge Mullin then fully explained to Rico why Dr. Cermak was going to be called at this point in the trial, then called for the jury. (RT 267:31903-31905.)

Braun stated, "Your Honor, I wish to go on the record about the Court's remarks." (RT 267:31905.) Judge Mullin replied, "The Court does not wish to hear you, Mr. Braun. Have a seat. We are in recess until the jury arrives." (Ibid.)

Once again, Judge Mullin unjustly denied Braun the opportunity to respond to the accusation that he had attempted an "indirect" contempt of court.

The next day (April 7, 1997), Braun moved for a mistrial. The colloquy which ensued was set forth at the beginning of this argument but is again set forth below for this Court's convenience, and to present events in chronological order:

> **Judge Mullin:** The record will show that the jury has left. Mr. Braun, you indicated that you wanted to put something on the record.

\\\\

Braun: I'm still very upset over what occurred at 1:30 yesterday afternoon when the Court indicated that I was in indirect contempt and [I] still felt it was appropriate for me to put something on the record concerning that.

I think that the Court owes me an apology for accusing me of indirect contempt in the manner in which the Court did and I would ask permission now to put the matter on the record as to what in fact did happen, then there was [sic] other things that I needed to follow through with.

Judge Mullin: Follow up. Do other things then. We're not going to hear this.

Braun: I think that the Court's refusal to allow me to put the matter on the record is part and parcel of what I am now about to complain about, which is that other counsel in this case are allowed to make a record, to complete their arguments and almost invariably I am not.

I think the Court has continuously throughout this case either cut my objections short when they are in front of the jury or refused to hear me out when we are at bench, often turning its chair away or terminating the bench conference or walking out the door before I can finish making an objection or explaining an objection or putting something on the record that needs to be on the record.

I think the Court has demonstrated overt hostility toward me, not only in open court throughout this trial, but also at the bench during bench conferences to the extent where it is noticed at the counsel tables and I am certain also noticed by the jury, both in the Court's mannerisms and in the volume in which the Court castigates me at the bench, simply for making - - in my view simply for making arguments that ought to be made by any counsel who is zealously representing his client.

I think that the Court has often made it a practice of overruling my objections and Mr. Leininger's objections in a demeaning tone of voice. The Court did that yesterday in overruling one of

Mr. Leininger's objections. I can't recall what the specific objection was.

In fact, I agreed with the Court's ruling, but I thought Mr. Leininger's objection was within the bounds of a reasonable objection to make, I agreed that it ought to be overruled, but in fact the tone of voice that the Court overruled it in I thought was extremely demeaning and prejudicial to the defense.

I thought that the Court treated me very badly in the manner of my calling Dr. Kormos as a witness, being blamed because Mr. Rico perceived that he had a problem with cross-examination, even though Dr. Kormos was furnished with no new materials since the last trial and had always been noticed.

Judge Mullin: What are you talking about? Would you explain that a little bit more.

Braun: I can't recall the exact day. Mr. Rico made an objection late in the afternoon on the day Dr. Kormos first started to testify. We agreed to argue the matter the next morning. And it was that following morning, which would have been the second day of Dr. Kormos's testimony, that the Court made the remarks it made that I'm referring to now, essentially castigating me and blaming me in a very angry and what I perceived as a hostile tone of voice for simply calling my witness.[44]

If the Court will recall, Mr. Leininger made a motion or joined in the severance motion and added as a ground the fact that he felt he could not - - Mr. Travis could not get a fair trial as a result of being joined with me because of what Mr. Leininger perceived a the Court's overt hostility toward me throughout the previous trial, and indeed, in my opinion, ever since I began filing motions in this case in 1993.

(RT 268:32026-32028.)

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44 See Argument III, exclusion of expert evidence, ante, at pages 135-151.

And the Court's response to that was of course to deny that part of the motion, but also to indicate that the Court will try to make this a kinder and gentler trial. But, in fact, it is my opinion that the Court's demeanor and impatience is far worse than it was in the first trial, and I thought that what occurred yesterday was in fact the crowning glory of that.

The jury was not present, but I was arguing, as I am arguing now, that when the Court castigates me for an indirect contempt of court as it did, that I ought to be allowed to respond. And as I was attempting to do that, the Court was telling me it was not going to hear from me and eventually called the bailiff over to indicate that if I did not sit down that I would have the help of the bailiff.

Admittedly, the jury was not there; nevertheless, I felt that that was very intimidating, and indeed the whole atmosphere in this court is very intimidating to me and makes it very, very difficult for me to effectively represent my client.

It's also my opinion that the Court has been very one-sided against the defense, and me in particular, in the way it treats what appears to the Court as transgressions.

The worst example is what occurred yesterday when only I got castigated for indirect contempt for essentially smiling at Mr. Rico and starting to make a comment in a conversational tone of voice, when immediately prior thereto Mr. Rico had dropped something on his table, said God damn it and started saying out loud - - this is immediately after the Court left the bench just before the noon recess yesterday - - that he was not going to proceed in the afternoon because of the calling of Dr. Cermak out of order.

I thought - - for instance, last week, when Mr. Rico, for no justifiable cause, informed the jury that this matter was going to be reviewed on appeal I made certain motions following that, including a mistrial motion, which the Court denied. I'm not rearguing those, but Mr. Rico was never taken to task for making

a totally improper comment and, in my opinion, a comment which could have led to a mistrial.

Judge Mullin: I believe Mr. Rico was taken to task for that.

Braun: I agree with the Court, that in a sense he was. It was only because he kept trying to justify - -

Judge Mullin: Let's not argue it. The record will speak for itself.

Braun: That's correct. In any event, Your Honor, I would ask that the Court think about what has happened in here. I think I'm entitled to be treated with a certain amount of dignity and I would ask that we start at this time.

I would also point out, it's my opinion that the cumulative effect of the way the Court has been treating me since this trial began is extremely prejudicial. There's no doubt that the jury, as it should do, respects your office and therefore respects you as a judge, and I think the jury is assuming that all of that abuse that it observes - - and admittedly the one that happened yesterday was not in their presence - - is something I invariably deserve. I think the Court has made me look small, ignorant and petty and that it's highly prejudicial to my client. Based on that, I ask for a mistrial at this time.

Judge Mullin: That motion is denied. Anything that has come to you, Mr. Braun, you brought upon yourself. Under the appropriate code, the Court has a duty to control a proceeding. Now, the problem arises when counsel continue to argue objections and argue with the Court after the Court has ruled. And this applied to all counsel. And I have warned all counsel that when the Court has ruled, that's all the court wants to hear, whether it's out here in court in front of the jury or at sidebar.

And I have indicated to counsel that when the Court has ruled and has heard enough, the Court will call an end to the sidebar, whether it's by turning its back and facing the jury, at which point the sidebar is over. Counsel continues to argue, and Mr.

> Braun unfortunately is the biggest offender of this in the Court's eyes.
>
> I think the record will show many times where the Court has had to tell Mr. Braun to please be quiet, to shut up, or whatever, because the Court has ruled, and Mr. Braun insists on going further and further and pushing the envelope further and further.

(RT 268:32029-32032.)

Thus, Judge Mullin first blamed Braun for the judge's own misconduct, and then completely rejected Braun's concerns about the hostile manner in which he was treating Braun during the trial. Thereafter, the judge continued to display hostility and disdain toward Braun as the trial continued.

On **April 10, 1997,** Judge Mullin overruled defense objections to prosecutor Rico's questions regarding whether someone had displayed a stun gun during a fight involving co-appellant Travis. The judge also admonished counsel to use proper legal terminology on proper legal grounds when making an objection, then stated they were in recess. Braun stated, "Excuse me. There is one more thing I would like to put on - -" (RT 269:32201-32207.) The judge ignored Braun's request and apparently left the courtroom because the transcript merely states in relevant part, "Whereupon a recess was taken . . . ." (RT 269:32207. See Argument VII, ante, at pp. 188-191.)

During the afternoon session, after enduring hostile and disrespectful treatment from Judge Mullin through much of the trial, Braun admittedly tripped over the line regarding the respect due the office of a superior court judge. Braun's mistake occurred during a futile attempt (RT 270:32348) to redact certain assertions made by Sergeant Keech to co-appellant Travis during Keech's interrogation of Travis. Braun explained to the judge that lines 5 through 10 of page 6 of the transcript of the audiotape of Travis's confession

contained inadmissible hearsay. The transcript shows that before asking Travis a question, Keech tells Travis what co-defendant Spencer said to Keech. Braun further explained that the transcript should be redacted because he could not cross-examine Spencer regarding Keech's assertions to Travis about what Spencer had said to Keech. (RT 269:32321.) Judge Mullin denied that the transcript contained hearsay. (Ibid.) Braun responded that Spencer's statement was prejudicial to appellant and a limiting instruction would not alleviate the harm. (RT 269:32321-32322.) The following colloquy ensued:

> **Judge Mullin**: You're a little late on this, aren't you, Counsel.
>
> **Braun**: I am. But I didn't know Mr. Rico was going to play the tape.
>
> **Judge Mullin**: Mr. Braun, your credibility just went in the garbage can that is under that desk there. (Ibid.)
>
> **Braun:** Why don't you be quiet first. You haven't let me finish.
>
> **Judge Mullin:** I don't have to let you finish.
>
> **Braun**: Yes, you do.
>
> **Judge Mullin**: No, I don't. I'm running these proceedings. Your credibility is just about down to zero now that you have indicated that you had no idea that that whole tape is going to be played during the course of this trial.
>
> **Braun:** Can I make an objection?
>
> **Judge Mullin**: Do you understand what I just said?

(RT 269:32322-323323.)

> **Braun:** If you say it any louder we can dance to it. I'm sure every juror heard what we just said, Your Honor.

(RT 269:32323.)

> **Judge Mullin**: Mr. Braun, I ought to hit you for $500 right now for contempt. Do you understand that? Do you understand that?
>
> **Braun:** Yes, Your Honor.
>
> **Judge Mullin**: Thank you.
>
> **Braun**: I'd ask that the Court speak to me so that the jurors don't hear it.
>
> **Judge Mullin:** Mr. Braun - - Mr. Braun, the Court finds it necessary - - the Court finds it necessary to raise its voice just because you won't listen to the Court just as you didn't right then. You always insist on going ahead.
>
> **Braun**: I'm trying to respond to the Court - - to the questions the Court asked.
>
> **Judge Mullin:** No. You respond to what you want to respond to. Now go on. (RT 269:32323.)

As stated at the beginning of this argument, it is the client who pays the price when the court embarks on a personal attack on his attorney. (People v. Fatone, supra, 165 Cal.App.3d at p. 1175.) Likewise, it is the client who is unduly placed in jeopardy when his attorney responds in kind to continuous hostile and disrespectful treatment by the court.

On April 17, 1997, Judge Mullin entered an erroneous instructional ruling which improperly undermined appellant's defense while simultaneously aiding prosecutor Rico in his successful pursuit of appellant's death sentence: The judge informed counsel that he was going to instruct the jury with CALJIC No. 2.23, the prior felony conviction to impeach instruction. Braun argued that this instruction applied only to *prior* felony convictions, and the jury could

mistakenly believe that it also applied to the murder conviction in this case. (RT 273:32781.) Both Judge Mullin and prosecutor Rico responded that the current murder conviction could be considered by the jury as a prior felony conviction "so long as the conviction is prior to the testimony." (Ibid.) Judge Mullin reasoned that the murder conviction was not going to serve as an aggravating factor under section 190.3, subdivision (c). Rather, it was to be used in considering the credibility of witnesses. (RT 273:32782.) Consequently, he rejected Braun's request that the jury also be instructed that the instruction did not apply to "felonies for which the defendants were convicted in the guilt portion of this trial." (RT 273:32783.) Thereafter, the judge instructed the jury with CALJIC No. 2.23 as follows:

> The fact that a witness has been convicted of a felony. . . may be considered by you only for the purpose of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

(CT 22:5364.)

In People v. Hinton (2006) 37 Cal.4th 839, the defendant contended that evidence of a murder conviction was inadmissible as impeachment as a matter of law because the conviction related to an incident that occurred *after* the murder. He analogized to People v. Balderas (1985) 41 Cal.3d 144, in which this Court said that the "prior felony conviction[s]" described in section 190.3(c) were limited to those entered *before* commission of the capital crime. (Id. at p. 201.) However, this Court disagreed stating in relevant part:

> But the statute governing impeachment, Evidence Code section 788, contains no such limitation. The admission of a felony conviction for impeachment tests the defendant's credibility as a witness during trial. Whether the offense predated the charged

> crime has no bearing on its relevance to that issue. We therefore hold that a prior felony conviction for purposes of impeachment under Evidence Code section 788 means any conviction suffered *before trial*, regardless of the offense date. [Citations omitted.]"

(People v. Hinton, supra, 37 Cal.4th at p. 887. Italics added.)[45]

First, it is plain that Judge Mullin erred in instructing the jury that they could consider appellant's current murder and robbery convictions as prior felony convictions since those convictions did not occur before his trial. Second, although appellant did not personally testify in the second penalty phase of the trial, he was still a witness in this phase of the trial because the testimony he gave during the first penalty phase was read to the second penalty phase jury. Put simply, Judge Mullin should not have allowed the jury to consider those convictions in determining the credibility of appellant's prior testimony, and, inevitably, the appropriateness of his death sentence.

On **April 23, 1997,** Judge Mullin informed counsel that he had changed his mind about prosecutor Rico's charts and, so long as Rico does not attempt to mislead the jury, Rico could use charts (exhibits 136 and 137) with the scales the judge had previously excluded. The left scale held numerous items described as aggravating factors. The right scale held only "factor (k)" as a single item. (RT 275:32955-32954; CT 21:5260.) The judge concluded, "So they [the scales] are only there for their symbol as the scales of justice and nothing else." (RT 275:32954.)

45

Evidence Code section 788 provides in relevant part: "Prior felony conviction. For the purposes of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony. . . ."

Consequently, Braun the asked the judge to reconsider his earlier ruling which precluded Braun from using his charts (Court Exhibits 122 and 123). Braun contended that these charts were also for illustrative purposes only. (RT 275:32958-32959.) Judge Mullin said that he would look at them. (RT 275:32959.)

On **April 28, 1997**, Braun objected that prosecutor Rico now had completely different charts with the scales superimposed over the whole chart which showed aggravating factors filling one scale while the other scale was empty. (RT 276:32994-32996.) Judge Mullin had the chart relating to appellant marked as Court's Exhibit 136, and the chart relating to co-appellant Travis marked as Court's Exhibit 137. He then ruled that Rico could use both charts because, "There's nothing inappropriate about them." (RT 276:32998.)

Judge Mullin's unfair treatment of Braun was again evident when he inexplicably ruled that Braun could not use his charts (Court's Exhibits 122 and 123) even though Braun explained that they would only be used only for demonstrative purposes. (RT 276:33001.)

On **April 30, 1997**, the following colloquy occurred during Braun's opening argument to the jury:

> **Braun:** The death penalty ought to be and is reserved for the worst of the worst. By "the worst of the worst," I'm not just talking about a terrible crime, which this undoubtedly was, but for the worst, most despicable, unremorseful and unredeemable and dangerous people, which most assuredly Danny is not.
>
> It is reserved for people who have killed before, who have done violence before, who have long a long and continuing history of violent crime, and people who the jury knows would continue to behave in that fashion. People like Ted Bundy or Richard Ramirez or Richard Allen Davis.

Prosecutor Rico: I would object to this argument. I would move to strike these entire comments, as to Mr. Braun stating to the jury who this is reserved for, as there is no evidence of this. If I could respond to this, we could go into all kinds of areas.

Braun: It's not supposed to be evidence, your Honor. It's supposed to be argument. The district attorney pointed out - -

Judge Mullin: The objections is sustained as to comparing with other people.

Prosecutor Rico: Move to strike that portion.

Judge Mullin: Stricken.

Braun: I object to that argument being stricken.

Judge Mullin: It is stricken.

Braun: I would then move to strike the district attorney's - -

Judge Mullin: Continue on, Mr. Braun.

Braun: I have a motion.

Judge Mullin: Continue on with your argument.

Braun: Thank you. I have a motion concerning the striking - -

Judge Mullin: Mr. Braun, continue on with your argument. That's the last time I'm going to tell you.

(RT 278:33267-33268.)

Judge Mullin again displayed his hostility and disdain for Braun in front of the jury by refusing to listen to Braun's response to Rico's objection before sustaining that objection and striking Braun's argument. Moreover, Judge Mullin's one-sided rulings against the defense again became evident when he

prevented Braun from "comparing" appellant with other people even though, as demonstrated above, the judge had previously allowed Rico to make several comparisons of other people during the trial.

On **April 30, 1997**, in his opening argument, **Braun** argued:

> And so I ask you to ask yourselves when you're in that jury room: Do I personally believe that, as horrible as it is, life imprisonment without the possibility of parole, perpetual imprisonment in a maximum security prison, in one of those five-and-a-half by-eleven-foot cells, is not enough, that we have to demand in addition to that that the State of California strap Danny to a gurney and snuff out his life - -"
>
> **Prosecutor Rico:** Your Honor, I would object.
>
> **Judge Mullin**: The objection is sustained.
>
> **Prosecutor Rico:** Counsel knows - -
>
> **Judge Mullin:** Counsel well knows.

(RT 278:33273-33274.)

Here, Judge Mullin agreed, in front of the jury, with prosecutor Rico when Rico improperly suggested that Braun knew that he was presenting an illegal argument even though Braun's argument was entirely proper. (See People v. Fatone, supra, 165 Cal.App.3d at p. 1175; People v. Fudge, supra, 7 Cal.4th at p. 1107 [A trial judge commits misconduct if he persists in making disparaging remarks about defendant's counsel and in other ways discredits the cause of the defense].)

Moreover, despite Judge Mullin's previous admonition regarding "speaking" objections and "snide" comments, he continued to allow Rico to make them with impunity, at both Braun's and appellant's expense.

Later the same day, prosecutor Rico argued to the jury:

> I submit that what the defense wants you to do here is buy into the notion that Mr. Silveria and Mr. Travis, are somehow nothing but mindless serfs - -

Braun objected that Rico's argument lumped appellant and co-appellant together, and tried to explain why this was improper. Judge Mullin, however, overruled Braun's objection in front of the jury and prevented him from fully explaining the grounds for his objection. (RT 278:33391-33392.)

Later, after the jury was excused for the day, Braun explained to the judge that even if Rico argues that both defense counsel have made similar arguments, Rico should nevertheless, refer to the defendants separately. Judge Mullin interrupted Braun before he could finish his explanation, stating that the objection had been overruled. Braun agreed but again explained that he was not allowed to put his grounds on the record. Judge Mullin ignored Braun and apparently left the courtroom because the record merely states, "(Whereupon, the court was adjourned for the day.)" (RT 278:33397.)

Braun was likely trying to explain to Judge Mullin that appellant was constitutionally entitled to an individualized jury determination and that lumping appellant with Travis was constitutional error. Braun's efforts, however, proved futile.

On **May 1, 1997,** Braun objected to Rico's argument to the jury that "when they chose to take Jim Madden's life that night they forfeited their own" as implying that the act itself automatically warrants the death penalty. (RT 279:33421.) Judge Mullin replied, "This is argument counsel. The objection is overruled." (Ibid.)

Here, Judge Mullin permitted Rico to suggest to the jury that appellant had automatically forfeited his life because Rico was presenting "argument. "

Yet, the judge previously rejected Braun's explanation that his argument that the death penalty was reserved for the worst offenders was also just that, argument. (See this AOB, ante, at pp. 322-324.)

Immediately thereafter, **prosecutor Rico** argued:

> Mr. Braun argues that each one of you has the power to prevent a death sentence here. He's hoping, in effect outright asking, for one or more of you to hang this jury, to prevent a verdict, to allow this to continue or to prevent or further delay final determination in this case.

(RT 279:33421.)

Braun objected that Rico's argument was improper because it impugned Braun's motives, and asked the jury to speculate about what might happen if they did not reach a verdict. (Ibid.) Leininger objected that Rico's argument implies an action "that they would continue this case on forever and ever. . . ." Judge Mullin ignored Braun. After Leininger's objection, the judge stated, "The objection is overruled. He hadn't said that." (Ibid.)

Once again, the judge displayed his disdain for Braun in front of the jury by simply ignoring his objection, and its basis. Moreover, he allowed Rico to cast aspersions on Braun by telling the jury that Braun was "in effect outright asking" for one or more of the jurors to "hang this jury." It was apparently inconceivable to Rico that Braun was asking the jury for an LWOP sentence.

Later the same day, while Braun was presenting his closing argument, the following colloquy occurred:

> **Judge Mullin**: Mr. Braun, would you approach the bench. Actually you don't need to. That is a Court exhibit.
>
> **Braun:** Yes, your Honor.
>
> **Judge Mullin:** It should not be tampered with.

Braun: I believe it's proper for me to write on it.

Judge Mullin: Mr. Braun, it's a Court exhibit, it should not be tampered with.

Braun: All right. I will accept.

Judge Mullin: You don't have any choice but to accept it.

(RT 279:33452.)

Here Judge Mullin again displayed his hostility and disdain toward Braun in front of the jury. Initially, he called Braun to the bench then told him he did not need to approach. The judge then chose to chastise Braun in front of the jury, accusing him of "tampering" with the chart, and gratuitously telling him that he had no choice but to accept the judge's order. Moreover, the judge's prejudicial statements occurred during a crucial juncture for appellant, Braun's closing argument to the jury.

Furthermore, the chart the judge had marked as a court exhibit was prepared and submitted by Rico over Braun's objection. It should not have had any special status as a court exhibit.

E. The Law

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." (Glasser v. United States (1942) 315 U.S. 60, 71); see also Powell v. Alabama (1932) 287 U.S. 45, 52; People v. Davis (1973) 31 Cal.App.3d 106, 110.)

"The influence of the trial judge on the jury is necessarily and properly of great weight, . . . and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the

decisive word." (Bollenbach v. United States (1946) 326 U.S. 607, 612.) See also Quercia v. United States (1932) 289 U.S. 466, 470.)

Moreover, "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end . . . no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered . . . ['[E]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'] Tumey v. Ohio (1927) 273 U.S. 510, 532." (In Re Murchison (1955) 349 U.S. 133, 136; see also Irvin v. Dowd (1961) 366 U.S. 717, 722; People v. Rhodes (1974) 12 Cal.3d 180, 185.)

Thus, a trial judge must always remain fair and impartial. (Kennedy v. Los Angeles Police Department (9th Cir. 1989) 901 F.2d 702, 709.) He or she "'must be ever mindful of the sensitive role [the court] plays in a jury trial and avoid even the appearance of advocacy or partiality.'" (Ibid, quoting United States v. Harris (9th Cir. 1974) 501 F.2d 1, 10. See also Duckett v. Godinez (9th Cir. 1995) 67 F.3d 734, 740 [A violation of due process occurs when a judge creates a pervasive climate of partiality and unfairness, which prejudices the defendant and thereby deprives him of a fair trial].) It is well recognized, particularly in a death penalty case, that "it violates a defendant's due process rights to subject his life, as well as his liberty and property, to the judgment of a court in which the judge is not neutral or fair." (DelVecchio v. Illinois Dept. of Corrections (7th Cir. 1993) 8 F.3d 509, 514.)

In People v. Mahoney (1927) 201 Cal. 618, this Court made observations that are particularly relevant to the instant case. This Court stated:

> Jurors rely with great confidence on the fairness of judges, upon the correctness of their views expressed during trials. For this reason . . . a judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant . . . When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses . . . and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary.

(Id. at p. 626-627. Italics added.)

Indeed, "[a] trial court commits misconduct if it persists in making discourteous and disparaging remarks to a defendant's counsel . . . and in other ways discredits the cause of the defense. . . ." (People v. Fudge, supra, 7 Cal.4th at p. 1107, quoting from People v. Mahoney , supra, 201 Cal. at p. 627. See also People v. Santana (2000) 80 Cal.App.4th 1194, 1206-1209 [a court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution; People v. Carpenter (1997) 15 Cal.4th 312, 353; People v. Clark (1992) 3 Cal.4th 41, 143; People v. Jackson, supra, 44 Cal.2d at pp. 517-520 [comments by the court conveyed allegiance to the prosecution and disdain for defense counsel]. See also People v. Fatone, supra, 165 Cal.App.3d at p. 1169 ["it is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial. . . When a court embarks upon a personal attack on an attorney, it is not the lawyer who pays the price, but the client."].)

In the present case, "[t]he record is replete with the trial judge's blunt, caustic and cynical remarks which smacked of pro-prosecution bias. Those

made in the presence of the jury unmistakably denigrated the credibility of defense counsel, his client, his witnesses and his case." (See People v. Hefner (1981) 127 Cal.App.3d 88, 92.)

Indeed, Judge Mullin's persistent hostility and verbal abuse of Braun throughout the trial, in and out of the jury's presence, reflected a pattern of judicial hostility that increased in intensity and number as the trial progressed. This abuse and threats of contempt not only tended to belittle Braun in the eyes of the jury, but also to unnerve him and throw him off balance so that he could not devote his best talents to appellant's defense. (United States v. Kelley (6th Circ. 1963) 472 F.2d 302, 311-313.)

Moreover, Judge Mullin's remarks deflected the minds of the jurors from the evidence before them and caused them to reach conclusions based upon bias and undue prejudice, rather than on the evidence properly presented. (People v. Williams (1942) 65 Cal.App.2d 696, 703.)

In sum, Judge Mullin's conduct fatally infected the jury's view of the defense case, and stifled Braun's ability to fully defend appellant. The judge's conduct, therefore, rendered the trial fundamentally unfair in violation of appellant's constitutional rights to due process, a fair trial, a fair and impartial judge, a trial by an impartial jury, and a reliable, non-arbitrary, individualized sentencing determination. (See Woodson v. North Carolina (1976) 428 U.S. 280.) Moreover, the judge's conduct violated appellant's right to counsel by undermining the role of defense counsel, and his right to present a defense. Indeed, Judge Mullin's hostile actions displayed a deep-seated antagonism against the defense "that would make fair judgment impossible." (Liteky v. United States (1994) 510 U.S. 540, 555; see also People v. Burns (1952) 109 Cal.App.2d 524, 542-552 [The sum total of the trial judge's errors coupled with

the attitude of the court throughout the trial denied defendant a fair trial.] (See also Cal.Const. art. I, sections 15, 17 and 7, respectively.)

Moreover, a trial by a judge who is not fair or impartial constitutes a "structural defect[] in the constitution of the trial mechanism" and the resulting judgment is reversible per se. (Arizona v. Fulminante (1991) 499 U.S. 279, 309; (Gray v. Mississippi (1987) 481 U.S. 648, 668.)

The facts set forth above regarding Judge Mullin's uneven rulings, and his persistent, hostile display of the disdain in which he held Braun, demonstrate that he was prejudiced against the defense, and biased in favor of the prosecution. This structural defect in appellant's trial mandates a per se reversal of his death judgment.

Should this Court disagree that a per se reversal is mandated in this case, appellant's death judgment should, nevertheless, be reversed because the State cannot prove that Judge Mullin's errors were harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U. S. 18, 24.) His hostile, uneven treatment, and verbal abuse of Braun permeate the record and defy a finding of no prejudice. The prosecution's aggravating evidence related solely to the circumstances of the current offense, and two robberies which were committed a few days before the murder, during which appellant, or his accomplices, used a stun gun.

On the other hand, as demonstrated in this AOB, appellant proffered a substantial amount of relevant mitigating evidence. The significance of this mitigating evidence was demonstrated in the first penalty phase where appellant was tried separately. His jury deliberated his fate for several days, and then deadlocked after four jurors could not agree that death was the appropriate penalty for appellant. (RT 181:18239-18240.)

However, Judge Mullin's uneven treatment and persistent verbal abuse of Braun during the second penalty phase (where appellant and Travis were tried together) undoubtedly contributed to the second jury's swift decision to sentence appellant to death after deliberating for only six hours, not only his fate, but also the fate of co-appellant Travis. (See Kyles v. Whitley (1995) 514 U.S. 419, 455 - - "[T]he fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial"].) Appellant should not be punished because of the judge's disdain for his lawyer. (United States v. Elder (9th Cir. 2002) 309 F.3d 519, 521-529.)

This Court should reverse appellant's death sentence because the State cannot show beyond a reasonable doubt that the judge's errors did not contribute to the verdict obtained. (Chapman v. California, supra, 386 U.S. at p. 24.)

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XIII

DEFERENCE SHOULD NOT BE ACCORDED THE TRIAL JUDGE'S DECISION TO REMOVE PROSPECTIVE JURORS E-45, F-77 AND J-56 FOR CAUSE BECAUSE THE RECORD SHOWS THAT THEIR DEATH PENALTY VIEWS DID NOT PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF THEIR DUTIES IN ACCORDANCE WITH THEIR INSTRUCTIONS AND OATH

A. The Law

In Uttecht v. Brown (2007) 551 U.S. ___, 127 S.Ct. 2218, 167 L.Ed.2d. 1014, the United States Supreme Court clarified that Witherspoon v. Illinois (1968) 391 U.S. 510, and Wainwright v. Witt (1985) 469 U.S. 412, had established the following four principles:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon*, 391 U.S., at 521, 88 S.Ct. 1770, 20 L.Ed.2d 776. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt*, 469 U.S. at 416, 105 S.Ct. 844, 83 L.Ed.2d 841. Third, to balance these interest, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, 424, 105 S.Ct. 844, 83 L.Ed.2d 841. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.*, at 424-434, 105 S.Ct. 844, 83 L.Ed.2d 841.

(Uttecht v. Brown, supra, 167 L.Ed.2d at p. 1022.)

Thus, it is clear that courts reviewing claims of Witherspoon-Witt error owe deference to the trial court who is in a superior position to determine the demeanor of a potential juror.

However, deference is not abdication. The United States Supreme Court has never held that a reviewing court must automatically reject all such claims without even considering whether the trial court, in fact, erred in concluding that a potential juror was substantially impaired in his or her ability to impose the death penalty. Indeed, the Uttecht Court stated in relevant part:

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment.

(Uttecht v. Brown, supra, 167 L.Ed.2d at pp. 1028-1029.)

In the present case, it is true that the potential jurors excused for cause over defense objection stated in their questionnaires, and during voir dire, that they did not favor the death penalty. However, if this alone were the test for demonstrating substantial impairment, only those jurors who favored the death penalty would ever serve as jurors in a capital case.

In fact, the record shows that the excluded jurors gave answers that demonstrated that they could consider the evidence, arguments of counsel and follow the law as given them by the Judge Mullin, including imposition of the death penalty. Thus, their responses alone do not provide a basis for a finding that they were substantially impaired in their ability to impose the death penalty. In addition, there is nothing in the judge's statement of reasons that suggests that he excluded these potential jurors based on their demeanor.

To the contrary, appellant will demonstrate below that Judge Mullin used a different test to deny defense challenges to pro-death, prospective jurors than

he used to grant the prosecution's challenges to pro-life prospective jurors. Indeed, the responses of some of the pro-death jurors suggest that they were likely exhibiting a demeanor that belied their claim that they could impose LWOP.

B. Prospective Jurors Improperly Excluded in This Case

1. E-45's Voir Dire

Judge Mullin granted the prosecutor's challenge for cause and excused prospective juror E-45 over defense objection. Prior to his removal, E-45 was voir dired as follows:

> **Judge Mullin**: As you know, the defendants in this case have been convicted of murder in the first degree and the two special circumstances were found to be true by the guilt trial jury. Would you be able to accept that verdict?
>
> **E-45**: Yes.
>
> **Judge Mullin**: Okay. And, as you know, we're trying to select a jury for the penalty phase, and that jury's job is going to be to determine which of the two possible penalties is appropriate in this case, either death or life without parole. And the jury is going to have to make that determination without in any way letting their verdict as to one defendant affect their verdict as to the other defendant. Would you be able to do that?
>
> **E-45**: I believe so, yes.
>
> **Judge Mullin**: Because it's important that the jurors give each defendant their individual verdicts. Also, if you were a juror here, would you be able to keep an open mind throughout the course of the proceedings, that is, not make up your mind until you've heard everything out here in court that you're supposed to hear: The evidence presented by the attorneys, the instructions on the law from the Court and the arguments of the attorneys, and then had a chance to go back and deliberate?

E-45: Yes.

Judge Mullin: And when you initially went back there to deliberate, do you think you would be able to go back there with both penalties as possibilities?

(RT 218: 25128-25129.)

E-45: Yes - - well, I guess on the death penalty I have some issues with that, but I think I could look at what the law requires and - -

Judge Mullin: Would you automatically be closed off as to one penalty when you initially went back there?

E-45: It's hard to say. Right now, yes, but I haven't seen, I guess, the evidence, the circumstances.

Judge Mullin: Okay. From reading your questionnaire, I gather that you do not favor the death penalty, necessarily?

E-45: Right.

Judge Mullin: You would have more favor toward life without parole. What we want to make sure of is that jurors are not closed off to either penalty, that they actually could conscientiously consider both penalties as possibilities, again, without knowing anything about the facts of the case.

E-45: I have a - - probably the death penalty would be harder. I guess I would need to see more evidence than for the life in prison. So they're not equally balanced.

Judge Mullin: They're not equally balanced in your mind right now?

E-45: Right.

Judge Mullin: Okay. There was a question - - there was an answer to one of your questions: You do not believe that the death penalty is a deterrent to murder. Whether or not either

penalty is a deterrent or whether or not the death penalty is a deterrent will be debated and will continue to be debated and we'll probably never get an answer on it. The issue of whether either penalty is a deterrent or whether the death penalty is a deterrent is not an issue for the jury to decide, and any deterrent effect is not something that the jury can even consider in reaching a verdict in this case. Would you be able to do that?

E-45: Yes, I think so.

Judge Mullin: And the same goes for the cost of either penalty. There's debates on which one costs more. Again, that's not an issue for the jury to decide or for them to even consider. Would you be able to do that?

E-45: Yes, I can.

Judge Mullin: Okay. Let me ask you two questions, and these two questions are based pretty much on the same assumption. Assume that the evidence in this case showed that the defendants had deliberately participated in the multiple stabbing of the victim in this case during the course of a robbery and the victim died. And that's basically what the guilt phase jury found.

The first question, based on that assumption: Do you think that you would always vote for life without parole and reject the death penalty despite any aggravating evidence that may be presented during the course of the trial?

E-45: Yes, I think I would vote for life without parole, right.

(RT 218:25130-25131.)

Judge Mullin: Do you think you would ever vote for death based on that assumption?

E-45: Based on that?

Judge Mullin: Again, that's the only thing you know right now.

E-45: Probably not at this point, no.

Judge Mullin: All right. Do counsel need to approach?

Prosecutor Rico: I assume not, Your Honor.

Leininger (Travis's counsel): Yes, I need to approach.

Braun: Yes.

(RT 218:25132.)

At side bar, the prosecutor challenged E-45 as substantially impaired. Leininger argued that E-45 said he could consider both penalties so his preference for life without parole did not make him challengeable for cause. Braun argued that E-45 stated in his questionnaire that there could be cases where he would agree to impose the death penalty, it was not mandatory and that every case needed to be examined. (RT 218:25133.) Braun also agreed E-45's responses to the reverse "Kirkpatrick" question, if not further pursued, suggested that he should be excluded from serving on the jury. However, Braun further argued that E-45's responses were inconsistent and that Braun was not certain that E-45 understood the question. He asked the trial judge to instruct E-45 with CALJIC 8.88. If E-45 stated that he would never vote for the death penalty, then he should be excluded. Braun further stated, "but otherwise, I think there's enough - - contradictions in what he said that I don't think he's excludable. (RT 218:25133-25134.) Judge Mullin ended the side bar, then asked E-45 the following questions.

> **Judge Mullin**: Going back to that assumption, the multiple stabbing during a robbery, the victim died and so on. In a situation like that, could you even consider the death penalty?

E-45: *Personally, no. But, I guess if I were instructed so far as what the law should be, then I might have to look at, you know, changing my beliefs a little bit. I guess I could consider the death penalty.*

Judge Mullin: Let me ask you this: Assume that you sat through the whole trial, you've heard all the evidence, you heard the mitigating factors, you heard the aggravating factors through the evidence that was presented and so on, you're back in the jury room and you have listened to all the other jurors, they have listened to you, and with this following instruction in mind you've gone through the weighing process, you've given weights to the various - - you assigned what weights you thought was [sic] appropriate to each of the various factors and then you re-read part of this instruction that I'll read to you now: That in order to return a judgment of death, the jury must be persuaded, each juror must be persuaded, that the aggravating circumstances are so substantial in comparison with the mitigating factors that it warrants death instead of life without parole; with all this in mind, you sit there and *in your own mind you believe, based on the evidence and the instructions on the law, that this case warrants the death penalty, would you be able to vote for it*?

E-45: If I went through all the different weights and things, *yes, I guess so.*

(RT 218:25134-25135. Italics added.)

Judge Mullin asked counsel to approach the bench. Rico argued that E-45 was substantially impaired and should be excluded. (RT 218: 25135-25136.) Leininger argued that there was no meaningful difference between E-45, and the pro-death penalty prospective jurors who said they favored death but could consider both penalties. The judge told him to never compare one juror to another. (RT 218:25136.) Braun stated, "I believe if the Court read [CALJIC No.] 8.88, he understood it and indicated he could impose the death penalty,

then - -" The judge interrupted stating "All right" and ended the side bar conference. (Ibid.) Voir dire of E-45 continued.

> **Judge Mullin**: The law in California expresses no preference for either penalty. There is no presumption as to which penalty is appropriate in this case. Also, there's no burden on any counsel to prove how you should vote. Counsel's job is to present the evidence in the form of these circumstances in aggravation and in mitigation, and then the jury weighs that evidence, gives it the weight each juror believes that the evidence is entitled, weighs all the evidence and then votes for the penalty they think is appropriate. First of all, would you be able to go through this type of process?
>
> **E-45**: *Yes.*
>
> **Judge Mullin**: Okay. Can you think of any situation - - or let me - - do you think that the death penalty could be appropriate in a case such as this, without knowing anything about the case, other than that one assumption?
>
> **E-45**: I guess, just with that one assumption, probably not appropriate.
>
> **Judge Mulin**: Okay. All right. I'm going to go ahead and excuse you. I'm going to thank you very much for taking the time to fill out this questionnaire. It obviously took a lot of time and effort for everybody to do so, but it saved us a lot of time here this morning. But I will go ahead and excuse you. Thank you.

(RT 218:25137.)

After E-45 left the court room, Judge Mullin, "The Court finds that the juror is in fact substantially impaired because of his views on the death penalty and it would prevent him from fulfilling his role as a juror according to his oath and the instructions." (RT 218:25137-25138.) Braun objected to E-45's removal stating that he was not sure that E-45 understood the last question.

Judge Mullin, however, responded by ridiculing Braun as he often had during the trial. The judge asked, "What, are you Carnac now?" (RT 218:25138.) Braun replied, "I'm sorry, Your Honor. I'm not sure the juror understood what exactly the Court was referring to." (Ibid.)

Judge Mullin erred when he excused E-45 because when he was asked during voir dire whether he would be able to consider both penalties as possibilities during deliberations, he said that he could look at what the law requires and consider both penalties. He stated, "Yes - - well, I guess on the death penalty I have some issues with that, but I think I could look at what the law requires and - - " The judge interrupted him and asked if he would "automatically be closed off as to one penalty." E-45 replied, "It's hard to say. Right now, yes, but I haven't seen, I guess, the evidence, the circumstances." (RT 218:25130.) When asked again if he could even consider the death penalty, E-45 replied, "Personally, no. But, I guess if I were instructed so far as what the law should be, then I might have to look at, you know, changing my beliefs a little bit. I guess I could consider the death penalty." When he was further asked to assume that he had heard all the mitigating factors and aggravating factors, had listened to all the other jurors during deliberations, and had gone through the weighing process, and was instructed that in order to return a judgment of death, each juror must be persuaded, that the aggravating circumstances are so substantial in comparison with the mitigating factors that it warrants death instead of life without parole; with all this in mind, could he be able to vote for the death penalty, he replied, "If I went through all the different weights and things, yes, I guess so." (RT 218:25134-25135.) He also said that he could go through the deliberative process, weigh the evidence and give it the weight he believed it was entitled, then vote for the appropriate penalty. (RT 218:25136-25137.)

Moreover, E-45's response to Judge Mullin's last question during voir dire did not demonstrate that he could never consider imposing the death penalty in the appropriate case. First, that question excluded any consideration of aggravating and mitigating factors. It asked E-45 whether, assuming appellant was convicted of first degree murder during a robbery "without knowing anything about the case other than [this] assumption," he thought the death penalty could be appropriate. (RT 218:25137.) To impose the death penalty, the law requires that the jury must first conclude that the aggravating factors substantially outweigh factors in mitigation. Thus, E-45's response, "just with that one assumption, probably not appropriate" was entirely consistent with the instructions and the law. His response did not demonstrate that he would not consider the appropriateness of either penalty based on the aggravating and mitigating evidence and the instructions given at trial. In fact, had E-45 stated that the death penalty was appropriate under that scenario, a defense challenge for cause would have been appropriate because the death penalty is not appropriate absent consideration of aggravating and mitigating factors and the conclusion that aggravating factors substantially outweigh mitigating factors.

Furthermore, although E-45 first stated when he filled out his questionnaire that he was strongly against the death penalty and would always vote for life without parole regardless of the evidence, (CT 163:43546-43551), he also stated that his death penalty views had changed substantially in the last few years and that there may be cases in which it should be considered. (CT 163:43547; 43550; 43551.) In addition, when E-45 was later asked in the questionnaire whether he could "set aside any preconceived notions [he] may have about the death penalty or life without the possibility of parole and make any penalty decision in this case upon the law as it is given by the judge," he

checked the "Yes" response. (CT 163:43552.) And when asked whether he could change his vote during deliberations if the discussion showed to his satisfaction that he should, E-45 checked the "Yes" response. (Ibid.) When asked whether he "could set aside [his] own personal feelings . . . and follow the law as the court explains it to [him]," E-45 again checked the "Yes" response. (Ibid.) When asked whether there was any reason why he could not be a fair and impartial juror for both the prosecution and each defendant, he checked the "No" response. (CT 163:43554.) Finally, when asked whether he had formed any opinion about this case based upon completing this questionnaire, E-45 checked the "Yes" response and stated, "That the crime was serious enough to look at the death penalty as an option." (Ibid.)

It is true that E-45 said that he would need more evidence to impose a death sentence than to impose LWOP. However, "a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate. . . ." (People v. Stewart (2004) 33 Cal.4th 425, 447.)

2. F-77's Voir Dire and Improper Exclusion

Judge Mullin also granted prosecutor Rico's challenge for cause and excused prospective juror F-77. Prior to his removal, F-77 was voir dired as follows:

> **Judge Mullin**: Okay. Now, as you know, the defendants have been convicted of murder in the first degree and the special circumstances have been found to be true by the guilt jury and the jury has . . . would you be able to follow and accept that finding of guilt?
>
> **F-77**: I would have no option but to follow it.

Judge Mullin: Okay. And you know we're trying to select a penalty phase jury whose job it's going to be to determine which penalty is appropriate, either death or life without parole. And the jury is going to have to make that determination without letting their verdict as to one defendant affect their verdict as to the other defendant. Would you be able to do that?

F-77: Yes.

Judge Mullin: And, also, if you were a juror participating here, would you be able to keep an open mind throughout the course of the trial, that is, not make up your mind until you've heard everything in court here that you're supposed to hear, that is, the evidence presented by the attorneys, the arguments of the attorneys and then the instructions on the law from the court?

F-77: I'd do my best. I haven't served on a jury before. So I don't know, but I'd do my best.

Judge Mullin: I think as with anything somebody has got to go first and, as we indicated, this trial could go forty or fifty days and I think it would be human nature as a jurors [sic] to listen to the evidence, which is sort of like a story to some degree or even a TV program. You maybe start leaning one way and being swayed back the other way.

The important thing is the jury not make up their mind entirely and still have an open mind when you go through that door into the jury deliberation room to determine exactly which penalty is appropriate so they don't go back their predisposed. It would not be fair to one side or the other to have the jury make up their mind before all the evidence was presented. Do you think you'd be able to try to do that?

F-77: Yes, I could try to do that.

Judge Mullin: Okay, and when you went back there to deliberate initially do you think you'd be able to go back there with both penalties as possibilities?

F-77: Well, . . . I'm told that that's what I would have to do.

Judge Mullin: Would you be able to do that?

F-77: Yes.

Judge Mullin: Again, that goes to not making up your mind until you've had a chance to go back there and discuss the case with your fellow jurors, you get their input, you give them yours and so on. You'd be able to do that?

F-77: Yes.

Judge Mullin: Despite any evidence that may be presented do you think you'd automatically vote for one of those two penalties simply because you favored it over the other one?

F-77: Well, as I stated in my questionnaire, I do have problems about the death penalty, but I haven't served on a jury before.

Judge Mullin: Okay. You said that you're against the death penalty. Let me ask you this. And, again, we're not here to change anybody's mind or feelings or attitudes. You understand that? Okay. Assume that the facts of this case or the evidence in this case showed that the defendants had deliberately participated in the multiple stabbing of the victim in this case during the course of a robbery from which the victim died.

Now, with that assumption in mind do you think that you would always vote for life without parole and reject death despite any aggravating evidence that may be presented during the course of the trial?

F-77: I would want to listen to all of the evidence and I would want to listen to how it had affected other jurors, but I do have difficulty with the notion of the death penalty.

Judge Mullin: Would you be able to vote for the death penalty if - - if after hearing the evidence, applying the various weights to the various circumstances and reading again and having a

chance to discuss the law with your fellow jurors if you thought it was appropriate?

F-77: I would want to keep an open mind and I would listen to arguments. If my opinion on the matter is wrong and I'm persuaded that it's wrong, then I would change my opinion.

(RT 220:25519-25522. Italics added.)

Judge Mullin: So you're not closed off to either penalty at this point?

F-77: I do have a problem with the notion of the death penalty.

Judge Mullin: But are you closed off from it?

F-77: If somebody were to present me with an argument that I found overwhelming and persuasive, then my opinion would change.

Judge Mullin: Okay. What do you mean "overwhelmingly persuasive?"

F-77: Well, persuasive, if I were persuaded. If I were persuaded by another person's argument that my position was wrong, then I would change my position.

Judge Mullin: Okay. Well, let me ask you that question again. And again it's based on the assumption that the defendants have deliberately participated in the multiple stabbing of the victim during a robbery and the victim died. Would you always vote for life without parole and reject death despite any aggravating evidence that may be presented during the course of the trial?

F-77: No. I said that I would listen to all of the evidence presented in the court and I would listen to the arguments of other jurors.

Judge Mullin: And would you be able to listen to that evidence with an open mind and not place your - - any validity on the

evidence or any weights on the evidence until you had a chance to hear it?

(RT 220:25523.)

F-77: I would want to hear it.

Judge Mullin: Okay. In your questionnaire you talked about - - "I doubt that the death penalty deters murder." Whether or not either penalty is a deterrent can be probably debated forever. Nobody is going to come up with an answer to it. Whether or not either penalty is a deterrent is not something that the jury is allowed to consider. Would you be able to set that aside?

F-77: If you told me that that's what I must do so, I must do.

Judge Mullin: Also, the cost of either penalty, there's a debate on which costs more. That's also something the juror cannot consider. You'd be able to do that too?

F-77: Yes.

Judge Mullin: There was a question. "Do you feel that the death penalty is used too often, too seldom or randomly?" And you stated: "For reasons given in the previous question - - or answers I feel it should never be used. I hear that Charles Manson is still alive." Can you explain that or expand on that a little bit?

F-77: It's a long time since I wrote that.

Judge Mullin: Right.

F-77: Could you just say what I said again, please?

Judge Mullin: Okay. "I feel that the death penalty should never be used. I hear that Charles Manson is still alive."

F-77: I suppose that what I meant was that it appears that he is a monstrous person with no feelings of remorse and remains that

kind of person. And in studying and reading about cases it would appear that if one was going to make an exception and say one should have the death penalty, this would be one example where one would say this is really an evil person perhaps and so, well, yes, in this case let's allow it.

But, you see, I suppose the point I was making - - and it is a long time since I wrote it. The point that I was making is here's - - here's a person perhaps with no remorse or mitigating circumstances who is still alive and yet there have been cases in other countries that I know about where in fact an innocent person was put to death; here's a person who appears to be extremely evil with no mitigating circumstances and is still alive.

Judge Mullin: Okay. The Manson situation is obviously - - it's quite old now and the law was different at that time. And as far as the innocence in this case is concerned, the defendants have been convicted and by a jury beyond a reasonable doubt. One of the two penalties is going to be imposed. Do you have any problem with that?

F-77: No.

(RT 220:25523-25525.)

Judge Mullin then allowed counsel to voir dire F-77. Defense counsel asked questions about life without parole or the death penalty. (RT 220:25526-25527.) Prosecutor Rico asked F-77 if he really considered the death penalty to be state sanctioned murder, F-77 replied, "It would appear to be, yes." (RT 220:25527.) F-77 also agreed that he had stated that he wanted to do his civic duty and that he would listen to other jurors to see if their arguments could change his position regarding the death penalty. He also said that he would want to listen to all the evidence and how that evidence impacted other jurors and would see whether his position was wrong. (RT 220:25527-25529.) When Rico asked F-77 whether he had formed any opinions about this case, F-77

replied, "Not at all. I know nothing about it." (RT 220:25530.) At side bar, Rico pointed to F-77's questionnaire, argued that F-77 was "substantially impaired" and challenged him for cause. Leininger argued that F-77 favored life without parole but also stated that he would follow the law and would be willing to impose death if he were persuaded that aggravating factors outweighed mitigating factors. Braun argued that each time the trial judge asked F-77 if he could impose the death penalty he said that he could. (RT 220:25531-25532.) Judge Mullin, however, ruled as follows:

> The Court finds that . . . the juror is substantially impaired. He has a position and his position is that he would have to be convinced otherwise. He is not here with an open mind. And the Court finds that his attitudes and answers and feelings would make it impossible or at least substantially impair him from being a juror in this case and properly acting as a juror in accordance with the law and his oath.

(RT 220:25532.)

The judge then thanked and excused F-77. (RT 220:25532.)

Judge Mullin erred when he excluded F-77 because F-77 stated during voir dire that he could enter deliberations with both penalties as possibilities and would not make up his mind regarding the appropriate penalty until he had considered the evidence and discussed the case with the other jurors during deliberations. (RT 220:25521-25524.) He also stated that he would follow the judge's instructions (RT 220:25524) and that he had no problem with the fact that one of the two possible penalties was going to be imposed. (RT 220:25525.) F-77 also told prosecutor Rico that he had stated that he wanted to do his civic duty and that he would listen to other jurors to see if their arguments could convince him that the death penalty was the appropriate penalty. He also told Rico that he would want to listen to all the evidence and

how that evidence impacted other jurors and would see whether his position was wrong. (RT 220:25527-25529.) When Rico asked F-77 whether he had formed any opinions about this case, F-77 replied, "Not at all. I know nothing about it." (RT 220:25530.)

Moreover, although F-77 stated in his questionnaire that he was strongly against the death penalty and felt that it should never be used because the State does not have the right to take a life, death is final, restitution would be impossible and it does not deter murder (CT 147:38596-38598), when asked later in his questionnaire whether he would always vote for life without parole, and reject death, regardless of the evidence, F-77 checked the "No" response. He explained, "I am here to do my civic duty. I am always open to the evidence. At this point I have heard none." (CT 147:38599.) When told in his questionnaire that he would "be instructed to review and consider all of the circumstances surrounding the crime the defendants have been convicted of before you decide whether the death penalty should be imposed," and was then asked whether he could follow this instruction, F-77 checked the "Yes" response. (Ibid.) F-77 also stated that as he was sitting there filling out the questionnaire, he could not see himself rejecting life without parole and choosing death "but [he] would always listen to other people's points-of-view." (CT 147:38601.) And when asked, "Can you set aside any preconceived notions you may have about the death penalty or life without the possibility of parole and make a penalty decision in this case based upon the law as it is given by the judge?," F-77 checked the "Yes" response. (CT 147:38602.) He also checked the "Yes" response when asked if he could change his vote during deliberations if the discussion showed to his satisfaction that he should change it. (Ibid.) Furthermore, F-77 checked the "Yes" response when asked if he could "set aside [his] own personal feelings . . . and follow the law as the court

explains it to [him." (Ibid.) Finally, when asked if there was "any reason why [he] could not be a fair and impartial juror for both the prosecution and each defendant in this case," F-77 checked the "No" response. (CT 147:38604.)

3. J-56's Voir Dire and Improper Exclusion

Judge Mullin also granted Rico's challenge for cause and excused prospective juror J-56. Prior to his removal, J-56 was voir dired in relevant part as follows:

> **Judge Mullin**: As you know, the defendants have been convicted of murder in the first degree and the two special circumstances were found be true by the guilt trial jury. Would you be able to accept that verdict?
>
> **J-56**: That it was guilty?
>
> **Judge Mullin**: Yes.
>
> **J-56**: Yeah.
>
> **Judge Mullin**: All right. And if you were a juror participating here do you think you'd be able to keep an open mind throughout the course of the trial, that is, not make up your mind until you've heard everything out here in court that you're supposed to hear and then had a chance to go back and deliberate?
>
> **J-56**: Yes.
>
> **Judge Mullin**: . . . And when you initially went back there to deliberate would you be able to go back there with both penalties as possibilities?
>
> **J-56**: Yes. (RT 227:26711-26712.)
>
> **Judge Mullin**: Do you think despite any evidence that you might automatically vote for one of those penalties simply because you might favor it over the other one?

J-56: You're asking whether I could vote for one over the other one?

Judge Mullin: No. Do you think despite any evidence that may be presented that you would automatically because of personal feelings vote for one of those penalties simply because you might favor it over the other one?

J-56: No. I would not automatically do that.

Judge Mullin: Let me ask you another question. Do you think that despite the evidence you would automatically vote against one of those penalties simply because you didn't like it?

J-56: No. I would not automatically do that either.

Judge Mullin: All right. Let me ask you two more similar type questions, but they are based on one assumption. And the assumption is this: Assume that the evidence shows that the defendants had deliberately participated in the multiple stabbing of the victim in this case during the course of a robbery and the victim died. And that's pretty much what the guilt phase jury found.

Now with that assumption in mind would you always vote for death and reject life without parole despite any mitigating evidence that may be presented?

J-56: No. Because we're supposed to take mitigating evidence into account.

Judge Mullin: Right.

J-56: Right.

(RT 227:26712-26713.)

Judge Mullin: Okay. Let me ask you another question. It's sort of the reverse of the first one, but it's based on the same assumption. Would you always vote for life without parole and

reject death despite any aggravating evidence that may be presented?

J-56: No.

(RT 227:26714.)

Judge Mullin: All right. Just a few minutes ago I . . . read the legal definition of the circumstances in aggravation and mitigation as well as the guidelines that the jury is to follow in reaching a decision in this case. Let me give you a couple of examples of that type of evidence. First of all, evidence in the form a circumstance in aggravation among other things can include the circumstances of the crime itself, exactly what happened, who did what and so on. It can also include maybe testimony from the victim's family members as to the impact on them.

A circumstance in mitigation can include among other things evidence about the person's background, life experiences, school years - - during the school years, teenage years, early childhood years.

It could also include maybe the testimony of a psychologist or a psychiatrist who might give an - - their opinion as to what effect childhood, let's say, experiences might have on later adult behavior. Again, we don't know what the evidence is going to be, but it could be presented along those lines.

Would you be able to listen to both the aggravating and mitigating type of evidence that's presented with an open mind?

J-56: Yes.

Judge Mullin: And do you think you'd be able to withhold judgment on that and applying any weights according to the instructions on that type of evidence until you've heard it all?

J-56: Yes.

Judge Mullin: Okay. Do you think that that type of evidence would be important evidence for a juror to hear in order to try to make a penalty phase decision in a case such as this?

J-56: Yes.

Judge Mullin: Would you be able to consider all of that type of evidence, both the aggravating and mitigating?

J-56: Yes.

Judge Mullin: All right. There was a question in your questionnaire: "What are your general feelings regarding the death penalty?" And you stated: "I do not think that I could award the death penalty to someone. A person should not take another person's life."

Can you tell us what you mean by this in light of what we just talked about?

J-56: Well, as I said in there, I don't feel that somebody should be able to take somebody else's life.

Judge Mullin: All right. Is that in any situation?

(RT 227:26714-26715.)

J-56: I think I also mentioned in there that there might be a situation where I think a death penalty would be - - or somebody's life could be taken, but I can't think of any off hand.

Judge Mullin: All right. Now, that's your personal belief?

J-56: That's my personal belief.

Judge Mullin: And, as I indicated when everybody was here earlier, we're not here to change anybody's mind, change anybody's answers to the questionnaire. All we're trying to do is get to know people a little bit, get to know some of their beliefs or feelings. And whatever they are that's fine.

If your personal beliefs or feelings were to be in conflict with the law of the State of California - - and the law . . . does not express any preference for one penalty or the other. There's no presumption as to which penalty is appropriate in this case or any case.

There's no burden on counsel to - - like there is in the guilt phase of the trial where there's proof beyond a reasonable doubt and so on. The attorneys weigh - - rather, present the evidence to the jury, they argue their position to the jury, and the jury goes through the weighing process and decides which penalty is appropriate. That is basically the law in California. Okay?

Now, the law in California also does say that if the circumstances in aggravation are so substantial when compared with the circumstances in mitigation, then the jury can vote for the death penalty.

If your personal beliefs or feelings were to be in conflict with the California law, do you think you'd be able to set aside your personal beliefs and feelings for this particular trial for this purpose, or do you think that's something you couldn't do? Again, you're the only one that can answer that.

J-56: I think it would be very hard to do.

(RT 227:26716-26717.)

Judge Mullin then permitted counsel to question J-56. Leininger asked no death penalty questions. Braun asked J-56 if there was anything in the law as described by the judge that he disagreed with "in terms of having a problem setting aside [his] personal beliefs and following California law assuming that's what the California law is?" (RT 227:26718-26719.) J-56 responded as follows:

J-56: I think that I can follow those rules and per the guidelines that the judge sets up for aggravated and mitigated follow those and come to a conclusion based on those. But even once I come

to that conclusion, if it happens to be death, I would still have a hard time.

Braun: All right. . . . Although you would have a hard time if that was the conclusion that you reached, do you believe that under those circumstances you would be incapable to voting that way, or if that was your honest conclusion would you be capable of voting for it no matter what it was?

J-56: I would be capable of doing it, that's true. But, like I said, it would be very hard for me to then go through with it and to cause another person to die because of the result.

(RT 227:26719.)

Thereafter, prosecutor Rico questioned J-56 about his responses in his questionnaire. Specifically, Rico asked him if he recalled responding "yes" to whether there was any reason he could not be fair and impartial to all sides in the case. J-56 recalled that he did respond in this fashion. Rico then stated that J-56 also said, "I do not think that I could say that another person has to die." (RT 227:26720-26721.) Defense counsel objected to Rico's additional questions and the judge stated that they would have another side bar after the prosecutor finished questioning J-56. (RT 227:26722-26723.) Rico also asked J-56 whether, if he were the prosecutor, would he feel satisfied with twelve jurors with J-56's present frame of mind. (RT 227:26723.) J-56 replied:

J-56: Oh. Probably not.

Prosecutor Rico: Okay. And why would that be?

J-56: Because I have reservations about giving the death penalty and as district attorney it appears that that's your goal. And so here's a person who's reluctant to award the death penalty even though he or she might decide that the facts and guidelines are met.

Prosecutor Rico: Okay.

Judge Mullin: Thank you, Mr. Rico.

Prosecutor Rico: The point I want to make - - I need to clarify that, Your Honor.

Judge Mullin: No. I think we're finished. Time is up.

(RT 227:26723-26724.)

At side bar, Judge Mullin told Rico he was ready to grant his challenge for cause but said it wanted to hear from defense counsel. (RT 227:26725.) The following colloquy ensued:

Leininger: He has expressed his prejudice and his bias. He has said he will follow the law and that's all we have asked of jurors. I know this is the situation that - - almost every juror we've had has had a prejudice one direction or the other. (Ibid.)

Judge Mullin: But following the law also includes coming forth with a verdict. He has not said he'd be able to do that.

Leininger: He said it would be very hard for him to do.

Judge Mullin: He didn't say he could do it. And he was asked that - - no, he was asked that. Mr. Braun?

Braun: Well, my understanding is that he said he would be reluctant to do it, but I haven't heard a flat I won't do it.

Judge Mullin: No. I haven't heard him say that he would do it either.

Braun: I think his answers today are consistent with his answer to 138 which is that - -

Judge Mullin: Which makes him substantially impaired if you read his answers.

Braun: If you read this thing through what he says in 138 is he thinks the decision is compelled, but understanding that decision does not compel - -

Judge Mullin: No. And he knows it's not compelled because I told him that this afternoon and he comes up with the same answer.

Braun: My understanding is he's only reluctant and I agree with Mr. Leininger. I think we should ask him.

(RT 227:26725-26726.)

Judge Mullin ended the side bar discussion, then thanked and excused J-56. (RT 227:26727.) He then stated:

> All right. As I indicated at the bench, the People's challenge is accepted. The Court finds that the juror could not tell us that he would - - and clearly that he was willing to temporarily set aside his own personal views. It would be difficult, but he didn't say he could do that and that is consistent with his answers in the questionnaire. . . . And the Court finds that he is substantially impaired. (Ibid.)

Judge Mullin, however, erred when he excluded J-56. First, he claimed that J-56 came up with the "same answer" even after he had explained to him that the death penalty was not mandatory as J-56 thought when he answered questioned 138. However, the judge is wrong. During voir dire, J-56 did, in fact, state that he could impose the death penalty although it would be very hard to do so. When Braun asked him if he was capable of imposing this penalty, J-56 replied: "I would be capable of doing it, that's true. But, like I said, it would be very hard for me to then go through with it and to cause another person to die because of the result." (RT 227:26719.)

Moreover, although J-56 stated in his questionnaire that he was moderately against the death penalty, he did not think that he could impose it

on someone because a person should not take another person's life, and he would vote against it if it were on the ballot in the next election. (CT 169:45396-45397, 45404). When also asked in the questionnaire whether he had any objection to the law that states that in the penalty phase the jury had only two choices - death or life without parole, J-56 stated "No." (CT 169:45399.) And when asked if he would always vote for life without parole and reject death, he checked the "No" response. (Ibid.) When asked whether he could follow the instruction that he must review and consider all of the circumstances surrounding the crime before deciding on penalty, he checked the "Yes" response. (Ibid.) When asked if he felt the death penalty should never be imposed for murder, J-56 checked the "No" response. He also said that there might cases that would lead him to believe that the death penalty was warranted but could not then think of one and hoped he never does. (CT 169: 45500.) When asked if he could see himself, "in the appropriate case, rejecting life in prison without the possibility parole and choosing the death penalty, J-56 checked the "Yes" response. (CT 169:45501.) When asked in his questionnaire whether he could set aside any preconceived notions he had about either penalty and make the penalty decision based on the law as given by the judge, J-56 did check the "No" response. (CT 169:45402-45403.) However, he stated that he wondered whether the death penalty was, in fact, mandatory under certain circumstances even though the questionnaire suggested otherwise. He queried, "if the law was so specific, are the jurors simply around to judge the degree of aggravation and mitigation and if it is over a certain threshold - the death penalty? Yet this document mentioned that there are no laws that mandate a death penalty." (Ibid.)

During voir dire, Braun explained this misunderstanding to the trial judge. Judge Mullin responded that he had informed J-56 during voir dire that

there are no circumstances which make the death penalty mandatory. Thereafter, although the judge failed to see it, J-56 stated during voir dire that he could, in fact, impose the death penalty but it would be very hard to do. (RT 227:26719.)

Furthermore, J-56 also checked the "Yes" response when asked whether he promised to freely discuss the law and evidence with other jurors during deliberations in an effort to reach a verdict. Finally, he checked the "Yes" response when asked if he could change his vote if the discussion showed to his satisfaction that he should. (CT 169:45402.)

In sum, although J-56 stated that he would find it very difficult to impose the death penalty, he also stated both in his questionnaire and later during voir dire that he could impose it. The law does not require that jurors find it easy to impose the death penalty, only that they put aside their personal beliefs and follow that law as given by the court. Ultimately, J-56 made it clear during voir dire that he could do so.

In People v. Stewart, supra, 33 Cal.4th 425, this Court stated:

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. As explained below, however, a prospective juror who simply would find it "very difficult" ever to impose the death penalty is entitled - - indeed, duty-bound - - to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.
>
> Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under Witt, supra, 469 U.S. 412. In Lockhart v. McCree (1986) 476 U.S. 162, 176 (Lockhart), the high court observed that "[n]ot all

> those who oppose the death penalty are subject to removal for cause in a capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Similarly, in People v. Kaurish (1990) 52 Cal.3d 648, 699 (Kaurish); we observed: "Neither Witherspoon v. Illinois [supra, 469 U.S. 412] nor Witt, [supra, 460 U.S. 412,] nor any of our cases, requires that jurors be automatically excused if they merely express personal oppositions to the death penalty. The real question is whether the juror's attitude will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (Wainwright v. Witt, supra, 469 U.S. at p. 424, fn. omitted.) A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law."

(People v. Stewart, supra, 33 Cal.4th at p. 446.)

In the present case, Judge Mullin gave the above prospective jurors a superficial summary of the aggravating circumstances relating to the murder, no information about the actual mitigating circumstances in this case, incomplete information about the law, and asked poorly worded questions that only served to confuse the issue. The relevant question was not whether they could impose death based on such incomplete and misleading information. Rather, the question was whether they could set aside their personal views of the death penalty and follow their oaths and the law. Nevertheless, all of the above prospective jurors indicated, in one form or another, that they could consider the death penalty even though it would be difficult to do so. Thus, there was no proper basis to exclude them from the jury.

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C. Judge Mullin's Bias Against the Defense Was Again Revealed When He Did Not Exclude Pro-Death Penalty Prospective Jurors Who Gave Wavering Responses to the Life Without Parole Questions

There were several prospective jurors that defense counsel challenged for cause on grounds their strong pro-death penalty views prevented or substantially impaired the performance of their duties as jurors in accordance with their instructions and their oaths. However, despite their strong pro-death penalty views, Judge Mullin ruled that they were not excludable because they also said during voir dire that they could consider life without parole.

Appellant discusses these pro-death penalty potential jurors here to demonstrate that if these pro-death jurors were not excludable under Witherspoon-Witt, because they also said they could consider LWOP, then surely the pro-life prospective jurors were not excludable since they too said they could consider the death penalty. That is, because the pro-life prospective jurors also said during voir dire and in their questionnaires that they could set aside their personal views and consider the death penalty, they could not be constitutionally excluded for cause based on their death penalty views.

The discussion set forth below shows that Judge Mullin ruled that the responses to the questions about death and life without parole given by the pro-death penalty prospective jurors saved them from a for cause challenge. However, similar responses to death penalty questions given by pro-life prospective jurors were insufficient to do so.

1. Prospective Juror A-69

Prospective juror A-69 was questioned in his questionnaire about his attitudes regarding the death penalty and life without parole. (CT 136:35468, 35496-35502.) He stated that he was strongly in favor of the death penalty because it is a good deterrent. He would also like to see a maximum of one

year for appeals. "Having somebody on 'death row' for 20 years in [his] opinion [wa]s ridiculous." (CT 136:35497.) If the issue of whether California should have a death penalty law was on the ballot in the next election, he would vote for it "because [he] favor[s] the death penalty." (Ibid.) He also believed that it was used too seldom and should be carried out within a year of conviction. (CT 136:35498.) Question 122 asked A-69 if he understood that the jury had only two choices - death or life in prison without the possibility of parole. A-69 responded, "I didn't realize the other option was life in prison without the possibility of parole." (CT 136:35499.) The very next question asked whether he would "always vote for Death, and reject Life Without the Possibility of Parole, regardless of the evidence presented in this penalty trial." A-69 checked the "Yes" response. When asked to explain, he replied, "I still don't like life imprisonment" even though he now understood that a life term was without the possibility of parole. (Ibid.) Although A-69 stated that he could follow an instruction that required him to review and consider all of the circumstances concerning appellant and his background before deciding between the two penalties, he also explained that he had a problem with this instruction because "[he] just didn't believe in life imprisonment." (CT 136: 35499-35500.) When asked whether he believed the death penalty should be mandatory for murder, he checked the "Yes" response and explained, "I think that if it were known that the death penalty was mandatory, it would help to deter murder." (CT 136:35500.) A-69 also believed that the death penalty would be appropriate in cases involving "selling drugs to kids and kidnaping." (Ibid.) When asked what he would want to know about a defendant before deciding to impose the death penalty or LWOP, he replied, "These people have been convicted - unless th[ese] conviction[s] were overturned, I have all the information I need." (Ibid.) When asked if he could see himself, in the

appropriate case, rejecting the death penalty and choosing life in prison without the possibility of parole, A-69 checked the "No" response. He explained, "If the person is guilty of 1st degree murder I believe there is only one option - death penalty." (CT 136:35501.) When asked if he could set aside any preconceived notions he may have about the death penalty, and make any penalty decision in this case based upon the law as given by the judge, A-69 checked the "Yes" response but added, "Grudgingly." (CT 136:35502.)

Later, during voir dire, when asked if he could deliberate with both penalties as possibilities, he replied, "I could do it. I'd have a problem with it, but I could do it." (RT 212:24170.) He further stated, "Well, I'm having trouble with this thing in that if they are found guilty I believe in the death penalty and I think it should be applied." (Ibid.) When Judge Mullin again asked him if he could deliberate with both penalties as possibilities, or would his mind be "closed off" as to LWOP, A-69 replied, "I'm not sure." (RT 212: 24171.) When asked if his mind was "closed off" as to life without parole, he replied, "It's leaning towards that," then said "Not definitely." (RT 212:24171-24172.) When asked if he would always vote for death and reject life without parole despite any mitigating evidence, he replied, "No. I'd like to consider the evidence." (RT 212:24172.) He said that he could conscientiously consider both penalties as possibilities but was leaning one way. (Ibid.)

When Judge Mullin mentioned A-69's response in the questionnaire that he did not believe in life imprisonment with a short term parole, and stated that life without parole meant just that, A-69 claimed, "I don't think I was aware of that one when I filled out the questionnaire." The judge then voir dired A-69 as follows:

Judge Mullin: Most people aren't. You are not alone. Does that - - so with that information in mind let me ask you the question again that brought that answer. Do you have any personal, philosophical, moral or religious beliefs that would affect in some way your ability or willingness to serve as a juror in this case. And you said "yes." You believe in the death penalty. You do not believe in life in prison with a short term of parole. Would your answer change at all with that information in mind now?

A-69: I suppose so.

Judge Mullin: With that information in mind do you think a verdict of life imprisonment without parole is more possible in your mind now?

A-69: Yes, definitely. (RT 212:24172-24174.)

* * *

Judge Mullin: . . . Can you set aside any preconceived notions that you have about the death penalty or life without the possibility of parole and make any penalty decision in this case based on the law as it is given to you by the judge? And you said, "Yes, grudgingly." Was the - - why did you say "grudgingly?"

A-69: Because I was leaning towards the death penalty at that point.

Judge Mullin: Okay. When you put down "grudgingly" did that have anything to do with not understanding what life without parole meant?

A-69: Yeah.

(RT 212:24174-23175.)

Leininger observed that during voir dire, A-69 had changed some of the answers he had given in his questionnaire, then asked A-69 whether the changes were due to A-69's religious convictions. A-69 replied, "No. It's as

the judge explained. It's helped me a little bit on some of the answers . . . It hasn't changed my convictions. It's changed my understanding of what the law is." (RT 212:24175-24176.) Leininger then asked A-69 whether it was fair to say that A-69's "written answers" were still his "real answers," and that "his heart is really what [A-69 had] written," A-69 replied, "Yeah, I think that it's fair to say. . . Yes." (RT 212:24176.)

At side bar, Braun asked the judge to question A-69 regarding questions 123, 126b, 127, 130 and 136. (RT 212:24178.) Judge Mullin conducted additional voir dire, and A-69 stated that with his new understanding of the law relating to life without parole, he would not always vote for death and reject life without parole regardless of the evidence. (RT 212:24179.) A-69 agreed with the judge that this change in his answer was due to the judge's explanation regarding the meaning of life without parole. (RT 212:24179-24180.) A-69 also said that he no longer had a problem with the instruction requiring him to review and consider all the circumstances concerning appellant and his background before deciding on penalty because, after the judge's explanation about life without parole, he was now only opposed to a sentence of life with the possibility of parole. (RT 212:24180-24181.) A-69 stated, however, that the death penalty should still be mandatory for premeditated murder but when pressed by the judge, he claimed that he did not believe that the death penalty should be mandatory for appellant and Travis, and that he would now consider mitigating evidence. (RT 212:24181-24183.)

At side bar, Leininger essentially argued that A-69 was willing to go through the motions but would still impose the death penalty. (RT 212:24183-24184.) Braun also argued that A-69 now realized how he has to answer the questions in order to serve on the jury but that he really had not changed his mind and would always vote for the death penalty. (RT 212:24184.)

Prosecutor Rico argued that A-69 was not Witherspoon excludable and that he has stated that he could follow the law. (RT 212:24185-24186.)

Judge Mullin ignored Braun's request to respond to the prosecutor's argument and told A-69 to return at a later date because he was still part of the jury pool. (RT 212:24186.) The judge then stated that both defense challenges for cause were denied. He explained, "The Court believes that with the Court's explanation of what life without parole really means that that is now a possible viable option for him that I don't think was very viable or possible for him prior to realizing that if a person got life without parole that he would never be released from prison on parole. So the Court is denying the challenge." (RT 212:24186.)

Here, Judge Mullin was wrong in several respects. First, he simply failed to recognize that A-69 had already learned that LWOP meant LWOP when he had previously read and responded to questions 122 and 123 of the questionnaire. As stated above, when A-69 began filling out his questionnaire, he explained that he did not understand that the life option was "life in prison without the possibility of parole." (CT 136:35499.) When asked in the very next question whether he would "always vote for Death, and reject Life Without the Possibility of Parole, regardless of the evidence presented in this penalty trial," A-69 checked the "Yes" response. When asked to explain, he replied, "I still don't like life imprisonment." (Ibid.) Thus, the judge should have recognized that A-69's credibility was suspect when he claimed to have acquired a new understanding of the meaning of life without parole during voir dire, and that it was this new understanding that led to the changes in his answers.

Second, Judge Mullin was wrong when he said that it was the question about personal- philosophical- moral-religious views that caused A-69 to say

he had a problem with a life imprisonment with parole after a short time. (RT 212:24173.) A-69 was responding to question 114, which asked him to state his general feelings regarding the death penalty, when he stated that he had a problem with life imprisonment with parole after a short period of time. (CT 136:35496.) Appellant raises this point here only to show that the trial judge was not as attuned as he should have been to the questionnaire and A-69's responses to it.

Third, Judge Mullin excluded pro-life prospective jurors: (1) some of which were less adamant in their pro-life views than was A-69 in his pro-death views; and (2) who credibly stated that they could set aside their views and follow the law. In short, the judge allowed pro-death potential jurors to stay because they said they could consider LWOP, but removed pro-life prospective jurors from the venire even though they said they could consider the death penalty. This uneven treatment is yet another illustration of Judge Mullin's bias against the defense in this case.

2. Prospective Juror B-17

Prospective juror B-17 was voir dired in relevant part as follows:

> **Judge Mullin**: Again, if you were a juror participating here, would you be able to keep an open mind throughout the course of the trial, that is, during the presentation of all the evidence, the arguments of counsel, the instructions on the law from the Court, and not make up your mind until you've had a chance to go back into the jury room and deliberate?
>
> **B-17**: I believe so.
>
> **Judge Mullin**: When you go back there to deliberate would you be able to go back there with both penalties as possibilities?
>
> **B-17**: Probably.

Judge Mullin: Probably?

B-17: Probably.

Judge Mullin: Do you think you would automatically vote for one of those penalties simply because you favored that one over the other one?

B-17: No. I don't think so.

Judge Mullin: Do you think you would automatically vote against one of those penalties simply because you didn't like it or didn't favor it?

B-17: No.

(RT 212:24228-24229.)

Judge Mullin: Let me ask you two more questions, but these questions are based on the same assumptions. And the assumption is this: Assume that the guilt phase jury had found that the defendants had deliberately participated in a the multiple stabbing of the victim in this case during the course of a robbery and the victim dies therefrom. Would you always vote for death and reject life without parole despite any mitigating evidence that may be presented during the course of the trial?

B-17: Maybe not always, but probably.

Judge Mullin: Okay. Would you always vote for life without parole and reject death despite any aggravating evidence that may be presented during the course of the trial?

B-17: Probably not.

Judge Mullin: There was a question in here and the questions was: "What are the reasons you either support or oppose the death penalty?" And you didn't answer that one. I don't know if you missed it or just didn't have an answer.

B-17: I really didn't have an answer. I have no preference one way or the other. [B-17 had already checked the "strongly in favor of the death penalty" response when he claimed he had no preference. (CT 136:33146, question 115.)]

Judge Mullin: Okay. So you don't have an answer now either?

B-17: No.

Judge Mullin: Okay. There was a question: "Do you feel that the death penalty is used too often, too seldom or randomly?" And you said too seldom. "After being convicted there are too many appeals." There is an appellate process obviously to any kind of criminal case. Can you let the fact of any appellate process not affect your verdict in this case?

B-17: The reason I answered that is it just seems that these cases seem to drag on for years.

Judge Mullin: There's all kinds of reasons and when we get through with the case I'll discuss it with you, but I can't do it right now.

B-17: Right.

Judge Mullin: But it's important that that not be a factor when the jurors reach a decision. Could you do that?

B-17: I believe I could.

Judge Mullin: There was a question: "Do you feel that the death penalty should be mandatory for murder?" And you said yes. "If a person murders someone, they forfeit their own life." Do you think that everyone convicted of murder, murder in the first degree, should get the death penalty?

B-17: In most cases, yes.

(RT 212:24229-24231.)

Judge Mullin: And what would be the determining factor? Because you said most cases, not all cases.

B-17: There may be some extenuating circumstances, rage or something like that.

Judge Mullin: Would you be able to consider any extenuating circumstance or maybe what we call circumstances in mitigation? Do you remember I gave you that whole list of things the jury can consider? Would you be able to consider those things in making a decision?

(RT 212:24231.)

B-17: Probably.

Judge Mullin: Would you want to be able to have that information?

B-17: Yes.
* * *

Judge Mullin: Some of those are circumstances in mitigation like maybe something about the defendants' background, the way they were raised, educated, their early childhood experiences. Would you be able to hear those, that type of evidence before making a penalty phase determination?

B-17: Not particularly.

Judge Mullin: Do you think - - do you have an opinion as to whether or not the way a person is raised or their early childhood experiences can affect the way that they behave later on in life? Again, it's not being an excuse for what they do, but maybe a reason.

B-17: Yeah, I can see where somebody would consider it a reason.

Judge Mullin: Would you be able to consider it a reason, be able to consider it in trying to determine which penalty is appropriate?

B-17: Yeah, I think I could.

(RT 212:24232.)

Judge Mullin: Okay. If that evidence was presented . . . would you be able to take that and conscientiously consider it and give it the weight to which you think it is entitled?

B-17: Yeah, I think so.

(RT 212:24233.)

* * *

Judge Mullin: . . . There was a question in here: "What is your opinion regarding life in prison without the possibility of parole?" And you said: "It's a waste of taxpayer's money." Whether or not it's a waste of taxpayer's money or whether or not one penalty costs more than the other . . . it's not something that the jury can consider. Would you be able to follow that rule and not consider any cost?

B-17: Yeah. I probably could. * * * I can follow that.

(RT 212:24234.)

Counsel asked no death or life penalty questions. (RT 212:24234–24241.) Both defense counsel challenged B-17 for cause. Leininger argued that B-17 was talking out of both sides of his mouth and that his questionnaire answers showed that he would automatically vote for the death penalty. Braun argued that B-17's responses to questions 127 [should death be mandatory for murder? "Yes"] and 129 [death penalty appropriate for "convicted murderers"] show that he would automatically impose the death

penalty. (RT 212:24242-24244.) Prosecutor Rico argued that B-17's responses made him eligible to serve under Witherspoon, supra, and Witt, supra, (RT 212:24244.)

Judge Mullin ruled as follows:

> I'm denying the defense challenge. For one thing he said the word "probably" which means to him that he needs to listen to what was said. He can't commit one way or the other without hearing information, the background information of the defendants which may have some relevance as to their behavior.
>
> That along with his answers in the questionnaire showed that, yes, he is in favor of the death penalty. *He is pro-death, but he's not automatic death penalty. And under Wainwright, Witt, [sic] Witherspoon cases he is a proper juror for this case.*

(RT 212:24245. Italics added.)

If B-17 was not substantially impaired because he is "not automatic [sic] death penalty," then surely the pro-life potential jurors were not substantially impaired since they were not automatically pro-life.

3. Prospective Juror C-47

In his questionnaire, prospective juror C-47 was stated that he was strongly in favor of the death penalty and added, "Anyone who takes another's life unless there are unusual extenuating circumstances, deserves the death penalty." (CT 123:31347.) When asked if he would always vote for death and reject life without the possibility of parole, regardless of the evidence presented at trial, C-47 checked the "Yes" response and added, "unless there were unusual circumstances." (CT 123:31349.) When asked whether he felt that the death penalty should be mandatory for murder, he checked the "Yes" response and added, "unless there are extenuating circumstances. (CT 123:31350.) When asked under what circumstances he believed the death penalty was

appropriate, C-47 stated, "death as a result of committing a crime or planned murder." (Ibid.) He also stated that he could reject the death penalty in the appropriate case and choose life without parole. And he stated that he could set aside any preconceived notions about the death penalty or life without parole and make a penalty decision based upon the law as given by the trial court. (CT 123:31352.)

During voir dire, when asked whether he could keep an open mind during the trial, C-47 replied, "I believe so" and "I think so." (RT 214:24596-24597.) He also stated that he would not automatically vote for or against either penalty simply because he favored one and disfavored the other. (RT 214:24597.) But when asked whether he would always vote for death and reject life without parole despite any mitigating evidence that may be presented during the trial, C-47 replied:

C-47: "I could say no, but I would likely." (RT 214:24598.)

Judge Mullin: Vote for death?

C-47: Yeah.

Judge Mullin: Despite any mitigating evidence that may be presented?

C-47: Unless it were very powerful. (Ibid.)

When questioned further, C-47 again stated that he favored the death penalty. (Ibid) He also said that he could consider both penalties as possibilities in this case without knowing anything else about it. (RT 214:24600.) When asked whether he could follow an instruction that to return a judgment of death he must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death was warranted, he replied, "I think so." (RT 214:24603.)

Braun challenged C-47 for cause, in part, because his statement that he would always vote for the death penalty unless the mitigating evidence was overwhelming showed that C-47 would start off with the presumption that the death penalty was appropriate and would require appellant to prove otherwise. (RT 214: 24612.) Judge Mullin disagreed and denied the challenge for cause. (RT 214:24614.)

If C-47's responses were sufficient to save him from exclusion from the venire, then certainly the responses of the pro-life prospective jurors discussed above should have saved them as well. Other than the fact that they were pro-life and their responses related to the ability to impose death, there simply is no substantial difference in their responses and those of the pro-death prospective jurors the trial court refused to exclude.

4. Prospective Juror C-67

In his questionnaire, prospective juror C-67 stated that he was moderately in favor of the death penalty but added, "The taking of an innocent life is so enormous an act that the perpetrator ought not go on living." (CT 128:32896.) When asked how he would vote if the death penalty were on the ballot in the next election, C-67 checked the "For" response and explained, "It is the only appropriate punishment for first degree murder." (Ibid.) When asked whether he felt the death penalty was used too often, too seldom or randomly, he replied, "Too seldom for convicted murderers. Why are there so many obstacles to carrying out executions?" (CT 128:32897.) When asked whether he felt that the death penalty should be mandatory for murder, C-67 checked the "Yes" response and explained, "Yes, if it is murder in the first degree." (CT 128:32899.) When asked under what circumstances he believed the death penalty would be appropriate, he replied, "First-degree murder, mandatory I'd think, for 'special circumstances.'" (CT 128:32899.) When

asked what he would like to know about a defendant before deciding to impose the death penalty or life without parole, he replied, "Not much." (Ibid.) When asked whether he could set aside any preconceived notions he had about the death penalty or life without parole and make the penalty decision based upon the law as given by the trial court, C-67 checked the "No" response, added a question mark to it, and then stated, "It's possible that I might disagree strongly with the law. I don't know." (CT 128:32901.) When asked whether he could set aside his personal feelings generally and follow the law as explained by the trial court, he checked the "Yes" response but added, "I could try." (Ibid.)

C-67 was voir dired in relevant part as follows:

> **Judge Mullin**: Now, you indicated, on page 29, that you thought that first degree murder with special circumstances the death penalty should be mandatory.
>
> **C-67**: Well, I don't know perhaps if "mandatory" is the right word, but perhaps "presumptive" I would think.
>
> **Judge Mullin**: Okay. Well, in California it's not "presumptive." There is no presumption. Murder in the first degree with a special circumstance only makes the case eligible to go into a penalty phase where death or life without parole are the two, and only two, possibilities. And the defendants are going to get one of those two penalties no matter - - from - - by the end of this case. Do you think right now in your mind the defendants presumptively should get the death penalty? I mean you support the death penalty - -
>
> **C-67**: Yes.
>
> **Judge Mullin**: - - generally or lean in favor of the death penalty?

(RT 215:24677.)

> **C-67**: Yes.

When asked whether he could honestly listen to, and weigh mitigating evidence, C-67 replied, "Yes." (RT 215:24678.) Leininger asked no questions about the death penalty, but Braun asked the judge to question C-67 about his response in the questionnaire relating to his inability to set aside any preconceived notions he had about the death penalty and follow the law. (RT 215:24683.) Judge Mullin restated the question, C-67's response, and added, "Of course you don't know what the law is, either, except for a few instructions I have read." (Ibid.) C-67 replied:

> **C-67**: Right. I think that's a restatement of what I said earlier, that I sort of would view - - in a case like that, the death penalty would be kind of presumptive unless you have very strong evidence of mitigating circumstances. But as I stated, that was my personal view. Perhaps the law might - - as you indicated just now, the law says something else apparently.

(RT 215:24864.)

> **Judge Mullin**: Okay. All right. (Ibid.)

As was Judge Mullin's practice in this case, Braun was not permitted to ask C-67 any death penalty questions. After a series of leading questions by prosecutor Rico, C-67 stated that he could consider all the evidence, listen to the law, arguments of counsel, then evaluate the evidence during deliberations and arrive at "the appropriate penalty even if that's a difficult thing to do. . ." (RT 215:24687.) He also said he could not think of anything that would prevent him from being fair and impartial in this case. (Ibid.) Braun challenged C-67 for cause as being substantially impaired under Witt because C-67 stated both in his questionnaire and during voir dire that death is presumptive unless the defense proved that it was not.

Judge Mullin denied the challenge stating:

> All right. He's not in any way impaired. He would have no problem listening to the evidence and voting for what is appropriate based on the evidence. And I think his answers here in court do not indicate any impairment. The challenge is denied.

(RT 215:24688.)

C-67 *never* stated that he could put aside his preconceived notions about the death penalty and follow the law as stated by the trial judge. When asked about his response to this question in the questionnaire, he restated what he had also said in the questionnaire:

> Right. I think that's a restatement of what I said earlier, that I sort of would view - - in a case like that, the death penalty would be kind of presumptive unless you have very strong evidence of mitigating circumstances. But as I stated, that was my personal view. Perhaps the law might - - as you indicated just now, the law says something else apparently.

(RT 215:24864.)

At best, C-67 acknowledged that "perhaps the law might . . . the law says something else apparently" but *he* did not state that he could set aside his preconceived notions about the death penalty and follow the law.

C-67 did say that, "Yes," he "could try" to set aside his other personal feelings and follow the law as explained by the judge. (CT 128:32901) However, because this response did not relate to the penalties of death or life without parole, it was not as relevant with respect to the issue of impairment as was that of pro-life potential juror J-56, who said that he could impose the death penalty even though it would be difficult to do so. (RT 215:26719.)

Thus, here too, Judge Mullin rejected a defense challenge for cause to a pro-death penalty potential juror even though this potential juror never said

that he would set aside his preconceived death penalty notions and follow the law. On the other hand, the judge granted the prosecutor's challenges for cause of three pro-life potential jurors even though they said they could put aside their preconceived notions about the death penalty and life without parole and follow the law as given by the judge. This different treatment of prospective jurors further demonstrates Judge Mullin's bias against the defense.

5. Prospective Juror G-68

When prospective juror G-68 was asked in his questionnaire whether there was anything about this case that would make it difficult or impossible to be a fair and impartial juror, he checked the "Yes" response. He explained, "I believe in the death penalty." (CT 177:47646.) He strongly supports the death penalty (CT 177:47646-47647) and believes this penalty is appropriate where a "violent crime, premeditated murder" has been committed. (CT 177:47650.) He also felt the death penalty was the "more appropriate" penalty for murder. (CT 177:47651.) When asked whether there was any reason he would not be a fair and impartial juror for either side, G-58 checked the "Yes" response "maybe due to [his] belief in the death penalty." (CT 177:47654.)

When Braun asked him during voir dire whether there was anything he had heard in court that changed his response in the questionnaire that his belief in the death penalty would prevent him from being a fair and impartial juror, G-68 replied, "No, I guess not. I - - what I'm trying to say is I don't know, I really don't know, what the mitigating circumstances are. So I can't really judge on that. But I would say I would lean one direction . . . I have a bias toward one direction, let's put it that way." G-68 explained that he favored the death penalty (RT 222:25787.) When prosecutor Rico asked G-68 whether he could listen to all the evidence, arguments of counsel, the law as instructed by the trial court and discuss this with the other jurors during deliberations, G-68 replied:

> **G-68:** I've tried to say yes today, but I guess, judging from my questionnaire, maybe that's not possible, I don't know, you know, depending on what the attorneys feel, but I would like to say - - you know, I'm an engineer and I look at things logically. I would like to say that I could sit down and weigh the evidence and decide one way or the other. (RT 222:25793.)

When Prosecutor Rico asked G-68 whether he would be willing to consider the aggravating and mitigating evidence and "make up your mind as to what's right in this case," G-68 replied, "I guess that's my job as a citizen to do that if I am chosen" . . . "Well, I would try, yes." (RT 222:25794.)

Judge Mullin denied defense counsels' challenge for cause stating:

> This juror did not indicate that he's biased in this case in favor of the death penalty. He's just biased in favor of the death penalty. But the Court is convinced that he would be able to look with an open mind at the evidence, go through the weighing process that the Court instructed on this morning. And he is not excludable under the appropriate line of cases.

(RT 222:25794-25797.)

Here, Judge Mullin denied the defense challenge because, although G-68 was biased in favor of the death penalty, he was not so biased *in this case.*

It is apparent from the above record that Judge Mullin used one standard in excluding pro-life potential jurors and another standard when he refused to exclude pro-death potential jurors. This alone should be enough to show that the judge does not deserve the deference to the trial court in the determination for cause challenges the law usually provides. Moreover, in no instance did Judge Mullin state that he was granting challenges for cause because of what he observed of the demeanor of any prospective juror.

Moreover, Judge Mulin's reliance on different tests to exclude pro-life potential jurors shows that their demeanor had nothing to do with his decision.

In addition, it was the pro-death potential jurors whose views were extremely adamant and whose credibility was suspect as pointed out by defense.

Furthermore, because the judge did not apply the correct legal test to exclude prospective jurors E-45, F-77, and J-56, appellant is entitled to a per se reversal of his death verdict. "[U]nder the compulsion of United States Supreme Court cases this error requires reversal of [appellant's] death sentence, without inquiry into prejudice. (See Davis v. Georgia (1976) 429 U.S. 122, 123; Gray v. Mississippi (1987) 481 U.S. 648, 659-667 (opn. of the court); id., at pp. 667-668 (plur. opn.); id., at p. 672 (conc. opn. of Powell, J.) [Citations omitted].)" (People v. Stewart, supra, 33 Cal.4th at p. 454.)

Finally, Judge Mullin's errors denied appellant his Eighth and Fourteenth Amendment right to a reliable, individualized jury decision that death is the appropriate punishment (Lockett v. Ohio, supra, 438 U.S. at p. 604; Skipper v. South Carolina, supra, 476 U.S. at pp. 4-9; Penry v. Lynaugh, supra, 492 U.S. at p. 318; Hitchcock v. Dugger, supra, 481 U.S. at pp. 394-399; Eddings v. Oklahoma, supra, 455 U.S. 104; Woodson v. North Carolina, supra, 428 U.S. 280, 304; and his Fourteenth Amendment right to due process and a fair trial. (Estelle v. Williams (1976) 425 U.S. 501, 503 ["The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment"]; Irvin v. Dowd (1961) 366 U.S. 717, 722 ["[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process"].)

Should this Court conclude that appellant is not entitled to a per se reversal of his death judgment, it should, nevertheless, vacate appellant's death sentence because the State cannot prove beyond a reasonable doubt that these errors did not contribute to the verdict obtained. (Chapman v. California (1967) 381 U.S.18.

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XIV

APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE ERRORS IN THIS CASE, WHETHER CONSIDERED ALONE OR TOGETHER, WERE PREJUDICIAL

A. Federal Law

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power is exercised within the limits of civilized standards." (Trop v. Dulles (1958) 356 U.S. 86, 100.) And because death in its finality is a punishment different in kind rather than degree, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in the specific case." (Woodson v. North Carolina (1976) 428 U.S. 280, 304-305; See also Cal. Const., art. I, section 17.)

The errors committed by Judge Mullin in this case, individually and cumulatively, violated the Eighth and Fourteenth Amendments because they severely undermined the reliability of the jury's determination that appellant should die. The individual and cumulative effect of these errors also denied appellant his right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. In Estelle v. Williams (1976) 425 U.S. 501, 503, the United States Supreme Court held that "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." The "failure to accord an accused a fair hearing violates even the minimal standards of due process." (Irvin v. Dowd (1961) 366 U.S. 717, 722; Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process']; Greer v. Miller (1987) 483 U.S. 756, 764; See also Cal. Const., art. I, section 7.)

In cases where "there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (United States v. Frederick (9th Cir.1996) 78 F.3d 1370, 1381 (quoting United States v. Wallace (9th Cir.1988) 848 F.2d 1464, 1476). Moreover, " '[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'" (Thomas v. Hubbard (9th Cir.2001) 273 F.3d 1164, 1180 (quoting Matlock v. Rose (6th Cir.1984) 731 F.2d 1236, 1244), overruled on other grounds by Payton v. Woodford (9th Cir.2002 (en banc) 299 F.3d 815, 829 n. 11.)

The Fourteenth Amendment also protects a criminal defendant's rights to the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346.) In a death penalty case, the state-created liberty interest described in Hicks means the right to due process in accordance with state law. And in a capital case, the principle of Hicks also implicates the Eighth Amendment. Just as Hicks guards against arbitrary deprivations of liberty or life, so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (Parker v. Dugger (1991) 498 U.S. 308, 321.)

Because the penalty of death is qualitatively different than any other sentence, the utmost scrutiny must be employed when considering the effect the trial court's errors had on the jury's decision to impose death. (Woodson v. North Carolina, supra, 428 U.S. at pp. 304-305.) Appellant's death judgment cannot withstand that scrutiny. In assessing prejudice, errors must be viewed through the eyes of the jurors, not those of the reviewing court. A reasonable possibility that an error may have affected any single juror's view of the case

compels reversal. (See, e.g., Parker v. Gladden, supra, 385 U.S. at p. 366.) And it cannot be credibly said that the errors in this case had "no effect" on at least one juror. (Caldwell v. Mississippi (1985) 472 U.S. 320, 341.)

Moreover, when any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (Chapman v. California, supra, 386 U.S. at p. 21; People v. Williams (1971) 22 Cal.App.3d 34, 58-59 [applying Chapman standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

B. Summary of Relevant Facts

During the second penalty phase of the present case, prosecutor Rico presented evidence that appellant willingly took part in the planning of the robbery of LeeWards craft store where the murder of Mr. Madden occurred. He also presented evidence that appellant twice applied the stun gun to Mr. Madden's leg during the robbery-murder. The autopsy showed that Mr. Madden had been stabbed 32 times. Prosecutor Rico's evidence also established that co-defendant Spencer, and co-appellant Travis, stabbed Mr. Madden 31 times before Travis handed the knife to appellant who then stabbed Mr. Madden once. Rico also presented evidence that appellant had participated in the robberies of the Quik Stop Market and the Gavilan Bottle Shop several days prior to the murder. Appellant applied the stun gun to the clerk during the Gavilan robbery, told the clerk of the Quik Stop Market that he would kill him if he told police, and told an accomplice during this robbery to be ready to use the stun gun on the clerk. (See this AOB, ante, at pp. 19-34.)

Prosecutor Rico also presented evidence of seven victim impact witnesses: Susan Thuringer (Mrs. Madden's co-employee), Kay House (Mrs. Madden's supervisor), Eric Lindstrand (Mr. Madden's brother-in-law), James

Sykes (Mr. Madden's brother-in-law), Judith Sykes (Mr. Madden's sister), Shirley Madden (Mr. Madden's wife), and Joan Madden (Mr. Madden's mother). (See this AOB, ante, at pp. 34-44.) These witnesses largely testified to the personal positive characteristics of Mr. Madden and the emotional impact his murder had upon them and his daughter Julie. (Ibid.)

Appellant presented evidence that his father physically abused him, his mother, and his older brother. When appellant was four years old, his father abandoned the family and never returned. Appellant also presented evidence that his mother was an alcoholic who neglected appellant to the point that appellant began to steal to eat. When appellant was only six years old, his mother gave him up to the Department of Social Services. In his second foster home, appellant suffered repeated physical and emotional abuse by his foster mother for almost four years. During those years, appellant was also physically and sexually abused by two older foster brothers in that home. He was repeatedly forced to submit to acts of anal intercourse and oral copulation by those older boys. Later, when appellant was about twelve years old, he was placed in another foster home where he suffered repeated sexual abuse by his foster father who was a police officer at the time. Officer George plied appellant with rum and coke, then raped and engaged in acts of oral copulation with appellant for nearly a year. Eventually, appellant became addicted to alcohol and other drugs, became homeless and faced a dismal future. Appellant saw his father for a few hours when he was 12, and then lived with him for a short while when he was 19. During this time, they took drugs together. Appellant's father also got so angry at appellant that he struck him with his fist and broke his nose. (See this AOB, ante, at pp. 44-89.)

Appellant also presented evidence that on the night of his arrest, he confessed to the three robberies, expressed remorse for his participation in the

murder of Mr. Madden, and helped police locate other co-defendants that night. In addition, appellant presented evidence of his good behavior after his arrest up to the time of trial. Appellant did not believe that his background excused his crimes and presented evidence that during the planning of the robbery, he opposed the killing of Mr. Madden. In addition, when they arrived at the craft store, appellant told co-defendant Spencer to cut the tire to Mr. Madden's truck so that Madden could not go for help after the robbery. Moreover, co-defendants had previously discussed burning down the store with Madden inside of it but when they arrived at the store, appellant told the others to leave the gas can outside. Finally, after they got the money, and before the murder, appellant went to the office door and said "Let's go" several times. (See this AOB, ante, at pp. 108-111, regarding the question of premeditation.)

Appellant also admitted at trial, that after Spencer and Travis had stabbed Mr. Madden multiple times, he accepted the knife from Travis and stabbed Mr. Madden one time because, in the end, he lacked the moral strength to refuse. (AOB at p. 26.) With regard to appellant's stabbing of Mr. Madden, appellant presented expert psychiatric evidence through Dr. Kormos during the first penalty phase which explained to the jury how appellant's abandonment by his father, neglect and abandonment by his mother, his physical and sexual abuse by older males, including a police officer, and appellant's alcohol and other drug addictions negatively affected his emotional development which, in turn, negatively affected his ability to resist the pressure to participate in the stabbing of Mr. Madden. (AOB at pp. 135-137.) After evaluating all of the aggravating and mitigating evidence, the four jurors of the first penalty phase jury could not unanimously agree that the death penalty was the appropriate punishment for appellant. (RT181:18239-18240.)

However, during the second penalty phase, Judge Mullin, in addition to his other numerous errors, did *not* permit Dr. Kormos to explain to the jury how appellant's background affected his conduct *at the time of the murder*. (See Argument III, ante, at pp. 135-151.) Consequently, the second jury was not permitted to hear mitigating evidence that helped to explain why appellant could not resist the pressure applied by co-appellant Travis and, instead, stabbed Mr. Madden one time. Hence, the jury was unable to make a normative, moral evaluation of this evidence and assign any value to it before concluding that appellant should die. (See People v. (Albert) Brown (1985) 40 Cal.3d 512, 541.)

On the other hand, Judge Mullin unfairly helped Prosecutor Rico to obtain a death sentence for appellant by permitting Rico to present aggravating evidence to the jury through his cross-examination of Dr. Kormos about appellant's conduct *at the time of the murder*. (See Argument III, ante, at pp. 144-151.) This patently unfair treatment, standing alone, was grossly prejudicial to appellant's federal constitutional right to present a defense, to a fair penalty trial, and to a reliable death verdict.

In addition, a comparison of the victim impact evidence presented at the first and second penalty phase trials reveals that the admission of inflammatory, irrelevant victim impact evidence presented by Mrs. Madden during the second penalty phase of the trial was, in fact, prejudicial. (See Argument V, ante, at pp. 165-171.) With the exception of Mrs. Madden's victim impact testimony, the victim impact evidence presented at the second penalty phase essentially mirrored the evidence presented in the first phase. Nevertheless, the first jury deadlocked on the question of appellant's penalty. (RT 181:18239-18240.) The only substantial difference in the victim impact evidence during the second penalty phase was that Mrs. Madden described the delays in the trial as

torturous to her, she actually pleaded for justice for her husband's murder in front of the jury, stated she had already waited six years, then asked when this was going to happen. (RT 250:29085-29086.)

In addition, unlike the first penalty phase trial, prosecutor Rico argued to the jury that the jurors and all of the families involved would continue to suffer on future holidays. (See Argument V, ante, 172-174.)

Furthermore, Judge Mullin's many other errors, including permitting the prosecutor to argue and present evidence of lying-in-wait and torture-murder even though the jury found the first allegation untrue and deadlocked on the latter allegation (see Argument I, ante, at pp. 91-108), his "no pity" instruction, and his continuous hostility toward Braun coupled with his many other unfair rulings against appellant fatally infected the trial and were prejudicial under any standard of review. (See Argument XII, ante, at pp. 258-332.)

Indeed, even though appellant also presented substantial mitigating evidence, including his subsequent good behavior while in jail awaiting trial and his genuine conversion to Christianity, it took the second penalty phase jury no more than six hours to decide that both appellant Silveria and co-appellant Travis should be executed. This Court should consider all of the arguments raised by appellant and reverse appellant's death sentence.

C. State Law Errors

The state law errors in this case also compel reversal of appellant's death sentence. In People v. Brown (1988) 46 Cal.3d 432, this Court held that a death judgment will be reversed for state law error in the penalty phase of a capital trial where there is a "reasonable possibility" that the jury would have rendered a different verdict had the error or errors not occurred. (Id. at p. 446-448.) This standard is a more exacting standard than that used for assessing prejudice for guilt phase error under People v. Watson (1956) 46 Cal.2d 818, 836. (People

v. Brown, supra, 46 Cal.3d at p. 447.) It is "the same in substance and effect" as Chapman's "beyond a reasonable doubt" standard. (See People v. Ashmus (1991) 54 Cal.3d 932, 965.)

The decision of whether to sentence a defendant to death or to life without the possibility of parole requires the personal moral judgment of each juror. (People v. (Albert) Brown, supra, 40 Cal.3d at p. 541.) In a death penalty case, "individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (McCleskey v. Kemp (1987) 481 U.S. 279, 311; internal citation omitted.) Different jurors will have different interpretations of and assign different weights to the same evidence. (United States v. Shapiro (9th Cir. 1982) 669 F.2d 593, 603.) These differences in the decision-making process in the penalty phase of a capital case necessarily complicate the task of an appellate court in assessing the effect of trial error.

It is plain, however, that Judge Mullin prevented appellant's jury from evaluating and assigning any moral value to the numerous items of mitigating evidence the judge excluded from the evidence. The judge also permitted the jury to assign a moral value to aggravating evidence that was simply inadmissible. Given the first jury's deadlock on the question of penalty, and the numerous and highly prejudicial errors that occurred in the second penalty phase of appellant's trial, there is a reasonably possibility that the second jury would have reached a different verdict had the errors not occurred.

D. Summary

Considering the substantial amount of mitigating evidence appellant submitted in this case, including the full context of his role in the murder, his confession to police the same day he was arrested, his cooperation in helping police locate the other defendants, his good behavior after his arrest, the terrible

physical and sexual abuse appellant endured for years throughout his young life, and the fact that the first penalty phase jury could not unanimously agree that death was the appropriate penalty for appellant, it is evident that the Judge Mullin's multiple errors during the second penalty phase, where that jury decided both appellant's fate, and that of co-appellant Travis in only six hours, were extremely prejudicial to appellant.

Indeed, Judge Mullin's erroneous rulings, both individually and in combination, were so prejudicial that they deprived appellant of his fundamental rights to present a defense, a fair trial, a reliable and individualized death verdict, and equal protection. This Court should, therefore, strike appellant's sentence because the State cannot prove beyond a reasonable doubt that these numerous errors did not contribute to the verdict obtained. (Chapman v. California, supra, 386 U.S. 18; See also People v. Buffum (1953) 40 Cal.2d 709, 726, overruled on other grounds in People v. Morante (1999) 20 Cal.4th 403, 421-423; People v. Holt (1984) 37 Cal. 3d 436, 459; People v. Hill (1998) 17 Cal.4th 800, 844-845; United States v. Ortega (9th Cir. 1977) 561 F.2d 803; United States v. McLister (9th Cir. 1979) 608 F. 2d 785; Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614, 622; Harris v. Wood (9th Cir. 1995) 64 F.3d 1432, 1438; Berger v. United States (1935) 295 U.S. 78, 79, overruled on other grounds in Stirone v. United States (1960) 361 U.S. 212, 217; Taylor v. Kentucky (1978) 436 U.S. 478, 487, fn. 15; Kyles v. Whitley (1995) 514 U.S. 419, 436, fn. 10.)

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XV

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected arguments pointing out these deficiencies. In People v. Schmeck (2005) 37 Cal.4th 240, this Court held that challenges to California's punishment scheme it considered to be "routine" will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (Id. at pp. 303-304, citing Vasquez v. Hillery (1986) 474 U.S. 254, 257.)

In view of this Court's directive in Schmeck, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (People v. Edelbacher (1989) 47 Cal.3d 983, 1023, citing Furman v. Georgia (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (Zant v. Stephens (1983) 462 U.S. 862, 878.) California's capital

sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 contained 22 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes nearly all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (People v. Stanley (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider Stanley and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; RT 276:32977-32979.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (People v. Blair (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and

freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See Maynard v. Cartwright (1988) 486 U.S. 356, 363; but see Tuilaepa v. California (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (People v. Kennedy (2005) 36 Cal.4th 595, 641; People v. Brown (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence is Unconstitutional Because It is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (People v. Anderson (2001) 25 Cal.4th 543, 590; People v. Fairbank (1997) 16 Cal.4th 1223, 1255; see also People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable

doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (RT 276:32983-32985.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, Blakely v. Washington (2004) 542 U.S. 296, 303-305, and Ring v. Arizona (2002) 530 U.S. 584, 604, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; RT 276:32988-32989.) Because these additional findings were required before the jury could impose the death sentence, Ring, Apprendi, Blakely, and Cunningham v. California (2007) 549 U.S. 270, require that each of these findings be made beyond a reasonable doubt. The trial judge failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (People v. Sedeno (1974) 10 Cal.3d 703, 715; see Carter v. Kentucky (1981) 450 U.S. 288, 302.)

Appellant recognizes that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of Apprendi (People v. Anderson, supra, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings. (People v. Griffin (2004) 33 Cal.4th 536, 595.) This Court has rejected the argument that Apprendi, Blakely, and Ring impose a reasonable doubt standard on California's capital penalty phase proceedings. (People v. Prieto (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in Prieto so that California's death penalty scheme will

comport with the principles set forth in Apprendi, Ring, Blakely, and Cunningham.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (People v. Blair, supra, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. Hicks v. Oklahoma (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death

penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given in this case (RT 276:32977-32978, 276:32988-32989, respectively), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (People v. Lenart (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (People v. Arias (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in Lenart and Arias.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See Ballew v. Georgia (1978) 435 U.S. 223, 232-234; Woodson v. North Carolina (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (People v. Taylor (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in Ring v. Arizona, supra. (See People v. Prieto, supra, 30 Cal.4th at p. 275.)

Appellant asserts that Prieto was incorrectly decided, and application of the Ring reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (McKoy v. North Carolina (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see Monge v. California (1998) 524 U.S. 721, 732; Harmelin v. Michigan (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the Equal Protection Clause of the Fourteenth Amendment (see e.g., Myers v. Y1st (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (People v. Medina (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause of the federal Constitution and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the federal Constitution, as well as the Sixth Amendment's

guarantee of a trial by jury. Appellant asks the Court to reconsider Taylor and Prieto and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; RT 276:32985.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., Johnson v. Mississippi (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (People v. Anderson, supra, 25 Cal.4th at pp. 584-585.)

In the present case, the prosecution presented prejudicial evidence regarding unadjudicated criminal activity allegedly committed by appellant such as engaging in a scam to obtain money, using the stun gun in an unrelated incident, and impregnating a minor. (See Argument VII, ante, at pp. 184-192.)

The United States Supreme Court's recent decisions in Cunningham v. California, supra, 549 U.S. 270, Blakely v. Washington, supra, 542 U.S. 296, Ring v. Arizona, supra, 536 U.S. 584, and Apprendi v. New Jersey, supra, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this claim (People v. Ward (2005) 36 Cal.4th 186, 221-222) but asks this Court to reconsider its holdings in Anderson and Ward.

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (RT 276:32989.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See Maynard v. Cartwright (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (People v. Breaux (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (Woodson v. North Carolina, supra, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors. Rather it instructs them that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. However, these determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (Blystone v. Pennsylvania (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see Zant v. Stephens, supra, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See People v. Bacigalupo (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (People v. Arias, supra, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed To Inform Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See Boyde v. California (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (See Hicks v. Oklahoma, supra, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is

unnecessary to instruct on the converse principle. (People v. Duncan (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See People v. Moore (1954) 43 Cal.2d 517, 526-529; People v. Kelly (1980) 113 Cal.App.3d 1005, 1013-1014; see also People v. Rice (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See Wardius v. Oregon (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See Brewer v. Quartermain (2007) U.S. [127 S.Ct. 1706, 1712-1724; Mills v. Maryland (1988) 486 U.S. 367, 374; Lockett v. Ohio (1978) 438 U.S. 586, 604; Woodson v. North Carolina, supra, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (Boyde v. California, supra, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was

required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See McKoy v. North Carolina, supra, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (Ibid.; see also Mills v. Maryland, supra, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed On The Presumption Of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See Estelle v. Williams (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, The Presumption of Life: A Starting Point for

Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. Delo v. Lashley (1993) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In People v. Arias, supra, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (Id. at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (People v. Fauber (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See Gregg v. Georgia (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (People v. Cook (2006) 39 Cal.4th 566,

619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury On Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; § 190.3, factors (d) and (g); (RT 276:32978) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Mills v. Maryland (1988) 486 U.S. 367, 384; Lockett v. Ohio (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this argument (People v. Avila (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case, e.g., factors (e), and (f). The trial court failed to omit those factors from the jury instructions (RT 276:32977-32978), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in People v. Cook, supra, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No.

8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (RT 276:32977-32978.) The Court has upheld this practice. (People v. Hillhouse (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Davenport (1985) 41 Cal.3d 247, 288-289). Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See Stringer v. Black (1992) 503 U.S. 222, 230-236.) As such, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See People v. Fierro (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to

reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (People v. Sengpadychith (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (People v. Manriquez (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider them.

H. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (Trop v. Dulles (1958) 356 U.S. 86, 101).

(People v. Cook, supra, 39 Cal.4th at pp. 618-619; People v. Snow (2003) 30 Cal.4th 43, 127; People v. Ghent (1987) 43 Cal.3d 739, 778-779.)

In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (Roper v. Simmons (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions.

I. The Trial Court Violated Appellant's Constitutional Rights When It Instructed the Jury on First Degree Premeditated Murder And First Degree Felony-Murder Because the Indictment Charged Appellant With Only Violating Section 187, Second Degree Malice-Murder

At the end of the guilt phase of the trial, the trial judge instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; RT 117:11425-11426.), or committed murder during a burglary (CALJIC No. 8.24 or a robbery (CALJIC No. 8.21). (RT 117:11426-11427.) The jury found appellant "guilty of first-degree murder in violation of section 187(a) as alleged in count I of the Indictment. (RT 130:12059.)

Appellant contends that the Indictment did not charge him with first degree murder and did not allege the facts necessary to establish first degree murder. He, therefore, could not be convicted of first degree murder.[46]

46

Appellant does not contend that the Indictment was defective. Count 1 correctly charged second degree malice-murder in violation of section 187. The error arose when the jury was instructed on the uncharged crimes of first degree premeditated murder and first degree felony-murder under section 189.

Count 1 of the Indictment alleged that the "Grand Jury of the County of Santa Clara, State of California, hereby accuses Daniel Todd Silveria . . . of a felony, to wit, a violation of Section 187 of the California Penal Code (Murder), in that on or about and between 1-28-91 and 1-29-91 in Santa Clara County, defendants with malice aforethought killed James Madden. (CT 3:458.)

Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that appellant was charged exclusively with second degree malice-murder in violation of section 187, not with first degree murder in violation of section 189.[47] Section 187, the statute cited in the Indictment, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree

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47

The Indictment also alleged four special circumstances: murder by lying in wait (P.C. section 190.2(a)(15), murder while committing a burglary (P.C. section 190.2(a)(17) [(G)], murder while committing a robbery (P.C. section 190.2(a)(17) [(A)], and torture-murder (P.C. section 190.2(18). (CT 3:458.) These allegations, however, did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (People v. Bright (1996) 12 Cal.4th 652, 661.)

Moreover, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony-murder. A conviction under the felony-murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (People v. Hart (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not. (People v. Davis (1995) 10 Cal.4th 463, 519; People v. Green (1980) 27 Cal.3d 1, 61)

murder. [Citations.]." (People v. Hansen (1994) 9 Cal.4th 300, 307.)[48] "Section 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (People v. Watson (1981) 30 Cal.3d 290, 295.)[49]

Because the Indictment charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (Rogers v. Superior Court (1955) 46 Cal.2d 3, 7) which charges that specific offense. (People v. Granice (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; People v. Murat (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

48

Section 187(a), provides in relevant part:

> Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

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At the time the murder in this case occurred, section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Sections 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree.

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the Indictment or Information charged only murder with malice in violation of section 187. (See, e.g., People v. Hughes (2002) 27 Cal.4th 287, 368-370; Cummiskey v. Superior Court (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in People v. Witt (1915) 170 Cal. 104, 107-108, this Court stated:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in People v. Soto, [1883] 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[50] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this

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This statement alone should preclude placing any reliance on People v. Soto, supra 63 Cal. 165, overruled on another point in People v. Gorshen (1959) 51 Cal.2d 716. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (People v. Bradford (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of People v. Witt, supra, and all similar cases was undermined by the decision in People v. Dillon (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to Dillon, supra, 34 Cal.3d 441, we have reaffirmed the rule of People v. Witt, supra, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (People v. Hughes, supra, 27 Cal.4th at p. 369), it has never explained how the reasoning of Witt can be squared with the holding of Dillon.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (People v. Witt, supra, 170 Cal. at p. 107.) Dillon held that section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and legislative intent, the Dillon court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (People v. Dillon, supra, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that Dillon requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (People v. Carpenter (1997) 15 Cal.4th 312, 394, quoting People v. Pride (1992) 3 Cal.4th 195, 249; accord People v. Box (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be section 189.

No other statute purports to define premeditated murder or murder during the commission of a felony, and Dillon expressly held that the first

degree felony-murder rule was codified in section 189. (People v. Dillon, supra, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by section 189, and the Indictment did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (People v. Nakahara (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See People v. Hart, supra, 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; People v. Bradford, supra, 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[51]

The greatest difference is between second degree malice-murder and first degree felony murder. By the express terms of section 187, second degree malice-murder includes the element of malice (People v. Watson, supra, 30

51

Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in People v. Henderson (1963) 60 Cal.2d 482, he stated that:

> The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in Gomez [v. Superior Court] (1958) 50 Cal.2d 640, 645], where it was stated that "The elements necessary for first degree murder differ from those of second degree murder. . . ." (People v. Henderson, supra, at pp. 502-503 (dis. opn. of Schauer, J.), emphasis in original.)

Cal.3d at p. 295; People v. Dillon, supra, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (People v. Box, supra, 23 Cal.4th at p. 1212; People v. Dillon, supra, 34 Cal.3d at pp. 475, 476, fn. 23). In Green v. United States (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (Id. at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In Apprendi v. New Jersey (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (Id. at p. 476, emphasis added, citation omitted.) Appendri compels the conclusion that the premeditation and felony-murder allegations of section 189 constitute an element of the offense. (See also People v. Seel (2004) 34 Cal.4th 535.)[52]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the

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See also Hamling v. United States (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the Indictment. (See State v. Fortin (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; DeJonge v. Oregon (1937) 299 U.S. 353, 362; In re Hess (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding the malice which was an essential element of the crime alleged in the Indictment. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; People v. Kobrin (1995) 11 Cal.4th 416, 423; People v. Henderson (1977) 19 Cal.3d 86, 96, overruled on other grounds by People v. Flood (1998) 18 Cal.4th 470.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; Beck v. Alabama (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See State v. Fortin, supra, 843 A.2d at pp. 1034-1035.) Appellant's conviction for first degree murder should, therefore, be reversed.

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XVI

Pursuant to California Rules of court, rules 8.200(a)(5) and 8.360(a), appellant Silveria hereby adopts by reference all arguments raised by co-appellant Travis that may benefit appellant Silveria.[53]

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Rule 8.200 provides in relevant part:

(a) Parties' Briefs

> (5) . . . as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or related appeal.

Rule 8.360 provides in relevant part:

(a) Contents and form

> Except as provided in this rule, briefs in criminal appeals must comply as nearly as possible with rule[] 8.200.

CONCLUSION

"The most odious of all oppressions are those which mask as justice." (Krulewitch v. United States (1949) 336 U.S. 440, 458.) As I have stated to this Court in another case, American law is not mere theory, but a living force. And hence it is that Justice, in one hand, holds the scales in which she weighs the right, and in the other, carries the sword with which she executes it. The sword without the scales is brute force, the scales without the sword is the impotence of law. The scales and the sword belong together, and the state of law is perfect, only where the power with which Justice carries the sword is equaled by the skill with which she holds the scales.[54]

In the present case, Justice did not see that Judge Mullin often placed his elbow on the prosecution's side of the scales, then swung the sword that unjustly eviscerated appellant's case. This Court should remedy this injustice by reversing appellant Silveria's death sentence.

Dated: October 6th, 2010

Respectfully submitted,

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54 Von Ihering, Rudolph, The Struggle for Law, translated by John J. Lalor (Chicago: Callaghan and Company, 1879), pp. 1-2.

CERTIFICATE OF COUNSEL

I, John Fresquez, am the Senior Deputy State Public Defender assigned to represent appellant, DANIEL TODD SILVERIA, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 120,497 words in length excluding the tables and this certificate.

This Court granted appellant's application to file an overlength brief on June 4, 2010.

Dated: October 6th, 2010

John Fresquez
Sr. Deputy State Public Defender

DECLARATION OF SERVICE

Case No. **S062417**

Case Name: **People v. Daniel Todd Silveria & John Raymond Travis**

I, the undersigned, declare: 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 801 K Street, Suite 1100, Sacramento, California 95814. On October 6, 2010, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelopes with the United States Postal Service at Sacramento, California, with postage thereon fully prepaid. There is delivery service by the United States Postal Service at each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 6, 2010, at Sacramento, California.

Ricky Silahua