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 REPLY BRIEF

MICHAEL HERSEK
State Public Defender

JOHN FRESQUEZ
Sr. Deputy State Public Defender
California State Bar No. 112903

770 L Street, Suite 1000
Sacramento, California 95814
Telephone: (916) 322-2676

Attorneys for Appellant

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

CASES

TABLE OF AUTHORITIES (Continued) **PAGE**

TABLE OF AUTHORITIES (Continued) **PAGE**

TABLE OF AUTHORITIES (Continued) **PAGE**

TABLE OF AUTHORITIES (Continued) **PAGE**

STATUTES

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

APPELLANT'S REPLY BRIEF

Introduction

In this Reply Brief, appellant Silveria addressed only those assertions respondent made relating to Arguments I through XIV. Appellant adequately addressed the issues raised in Argument XV and XVI and respondent presented no reason to readdress these arguments here. Moreover, the absence of a reply to any specific assertion made by respondent is not intended as a concession, abandonment or waiver of the point by appellant. (See People v. Hill (1992) 3 Cal.4th 959, 995, fn. 3.) Rather, it reflects appellant's view that the issue has been adequately presented.

Furthermore, respondent asserted in its brief that all of appellant Silveria's arguments fail. Fortunately, that determination is not respondent's to make. Respondent also routinely asserted that no errors occurred in this case but, if they did occur, they were harmless. Respondent, however, cannot deny that death "takes toll . . . of all but truth."[1]

- - - - -

[1] Truth, by John Masefield.

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 NOT TRUE, HAD DEADLOCKED ON THE SECOND SPECIAL CIRCUMSTANCE, AND IT WAS STRICKEN BEFORE THE SECOND PENALTY PHASE BEGAN

A. The Guilt and Two Penalty Phases

1. The Guilt Phase

As explained in the AOB, appellant Silveria's guilt phase 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 as charged in count 2, and the burglary 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, this 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 it could not unanimously agree that appellant committed a torture-murder. 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 both 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

Before the first penalty phase began, prosecutor Ron Rico balked at striking the torture-murder special circumstance against appellant Silveria explaining 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.) Judge Mullin ordered the torture-murder special circumstance held in abeyance and proceeded to the penalty phase. (RT 131:12112.)

Over defense objection, and in a second attempt to show that appellant committed a torture-murder, prosecutor Rico argued (RT 176:17655-17657; 17671-17672) and presented evidence through his expert, Dr. Robert Stratbucker, relating both to the torture-murder special circumstance, and the personal use of a deadly and dangerous weapon (stun gun) enhancement (RT 125:12012-12022) even though the jury had deadlocked (RT 113:11128-11129, 11149; CT 11:2802-2803) on both the stun gun enhancement and the torture-murder special circumstance. Rico also argued that appellant committed the murder while lying-in-wait. (RT 176:17671-17672.)

However, four days after penalty deliberations began, the jury deadlocked on the question of punishment after four jurors could not agree that

\\\\

\\\\

\\\\

\\\\

death was the appropriate punishment for appellant, a mistrial was declared, and the jury was discharged. (RT 181:18240-18251.)[2]

On May 7, 1996, over six months after Judge Mullin had declared a mistrial as to the torture-murder special circumstance, 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 both the torture-murder special circumstance as to appellant Silveria (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.

3. The Second Penalty Phase

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 *not true* 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.)

\\\\

\\\\

---

2 One could argue that because the first jury was exposed to these errors and still did not impose the death penalty, the errors were not prejudicial in the second penalty phase. However, one need only recall that eight jurors from the first jury did, in fact, vote for death. We will never know what these jurors would have decided absent these errors. Indeed, the errors could have cost appellant Silveria a unanimous LWOP sentence in the first penalty phase.

B. The Lying-In-Wait Error

1. Underlying Facts

During the second penalty phase trial, and 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 not true. (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."] Later, 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) over and above which is necessary to get us the penalty phase. . . ." (RT 273:32788.) The judge told Rico that he was not going give a lying-in-wait instruction but Rico could argue "lying-in-wait" to the jury. (RT 273:32793-32795.) Braun renewed his objection to Rico's arguing that appellant committed a murder while lying-in-wait. 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 found not true beyond a reasonable doubt, *it is still a factor, circumstance of the crime. That's the end of it.*

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

Consequently, Rico again told the jury during closing argument that appellant committed a murder while lying-in-wait. (RT 276:33040-33042.) Rico 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.)

2. State Law Error

Respondent asserted that appellant:

> conflates the purpose of a special circumstance and evidence in aggravation; one is directed to eligibility and one to appropriateness of punishment. In order for a defendant to be eligible to receive the death penalty, a jury must find as true at least one special circumstance and that finding must be made beyond a reasonable doubt. In contrast, evidence in aggravation is any evidence within the categories set forth in section 190.3, which jurors may consider when weighing the appropriate penalty to impose. This distinction is particularly significant in this case, where the sentence was imposed by a second penalty phase jury as part of a retrial, and thus, Silveria's eligibility for the death penalty was not in question.

(Respondent's Brief, hereinafter RB, at p. 67.)

Respondent is confused. Only a special circumstance allegation *found to be true* may be considered as evidence in aggravation. Penal Code section 190.3(a)[3] clearly states:

> In determining 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 has been convicted in the present proceeding *and the existence of any special circumstances found to be true pursuant to Section 190.1.*

Thus, one problem in this case is that Judge Mullin improperly permitted Rico to argue to the second penalty phase jury that appellant should

---

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

be executed based, in part, on a lying-in-wait special circumstance that the jury found NOT true. Therefore, this special circumstance allegation cannot properly be considered a circumstance of the crime and therefore cannot properly serve as a basis for seeking appellant's execution.[4]

Next, respondent asserts that Judge Mullin did not violate state law because nothing in sections 190.1, 190.3 and 190.4 forecloses reliance on "facts" that could have supported a special circumstance that the jury found not true. It further asserts that the prosecutor's argument that "Silveria had waited for Madden to emerge from Lee Wards was a circumstance of the crime relevant to the determination of punishment." (RB 67-68.)

Respondent missed the point. Appellant Silveria does not contend that the prosecutor could not argue the proven "facts" of the case. It may not have been improper to argue that appellant "waited for Madden to emerge from Lee Wards as a circumstance of the crime" because these facts were supported by the evidence, i.e., appellant admitted as much.

However, Judge Mullin erred when he ruled that even though the lying-in-wait special circumstance allegation "was found *not true* beyond a reasonable doubt, *it is still a factor, circumstance of the crime. That's the end of it.*" (RT 273:32798-23799. Italics added.) This special circumstance allegation was simply NOT a circumstance of the crime because the jury found it not true.

4

Assume a capital case in which a defendant was tried for several offenses including a robbery, the only offense resulting in an acquittal. No judge who sufficiently respects the law would have allowed the prosecutor to argue to the penalty phase jury that the defendant had committed that robbery. Judge Mullin should not have allowed prosecutor Rico to argue that appellant committed a murder while "lying-in-wait."

It is evident, therefore, that Judge Mullin violated state statutory law when he allowed prosecutor Rico to describe mere facts as evidence of a special circumstance allegation that had already been rejected by the jury. This error undoubtedly contributed to the jury's determination that appellant Silveria should die.

3. The Double Jeopardy Error

Next, respondent seemed to recognize that "when a special circumstance allegation has been found not true, retrial of that allegation is barred by the Double Jeopardy Clause." (RB 68.) Respondent then claimed that appellant was not being retried on the lying-in-wait special circumstance, rather the jury was determining his penalty. (Ibid.) Respondent further asserted that "[t]he Double Jeopardy Clause 'has no bearing on the kind or quantity of evidence that may be introduced in successive trials of an issue.'" (Ibid, citing People v. Robertson (1989) 48 Cal.3d 18, 46,)

However, respondent failed to recognize easily observable facts that clearly distinguish Robertson from appellant's case. In Robertson, the defendant argued that because the prosecutor failed to introduce evidence relating to two attacks on two victims at the first trial, Double Jeopardy principles precluded the use of this evidence at retrial. This Court rejected Robertson's argument because he "was never once in jeopardy for any offense arising out of" those attacks. (Robertson, at p. 46.)

In contrast, Rico's lying-in-wait arguments surely placed appellant twice in jeopardy for a special circumstance found not true. Although his argument may not have been accompanied by a second formal charging allegation and an accompanying instruction, it is plain from this record that Rico wanted the second jury to believe that appellant participated in the murder while lying-in-wait. Hence, Rico's arguments served as a de facto

retrial of an allegation found not true by the first jury and was, thus, clearly prohibited by the Double Jeopardy Clause of the Fifth Amendment.

Next, respondent asserted that Judge Mullin did not err under "the collateral estoppel doctrine of the Double Jeopardy Clause" and that appellant's argument "fails under this Court's rulings in People v. Taylor (1990) 52 Cal.3d 719, and People v. Santamaria (1994) 8 Cal.4th 903. (RB 68.)

Once again respondent fails to recognize important differences between the above cases and appellant's case. In Taylor, the defendant was *convicted* of attempted rape but the jury found the attempted rape special circumstance untrue. On appeal, the defense contended that trial counsel was ineffective for failing to object to the use of the attempted rape conviction as an aggravating circumstance in light of the jury's finding the attempted rape special circumstance not true. This Court rejected the defendant's argument and ruled that the conviction for attempted rape was properly admitted as a circumstance of the crime under factor (a) *because he was, in fact, convicted of that offense.* (People v. Taylor, supra, 52 Cal.3d at p. 743.) In contrast, appellant's jury found the lying-in-wait special circumstance *not* true. Consequently, Taylor is inapposite, and prosecutor Rico could not lawfully argue that appellant committed a murder while lying-in-wait.

In People v. Santamaria, supra, 8 Cal.4th 903, the jury convicted the defendant of murder and robbery, and found true the robbery-murder special circumstance. However, it found not true the allegation that defendant personally used a knife. On appeal, the court reversed the convictions finding that an 11-day continuance during jury deliberations was prejudicial error. On remand, the court ruled that the prosecutor could not retry the knife-use enhancement. It also precluded the prosecutor from retrying the defendant on

the theory that he personally used the knife during the killing. (People v. Santamaria, supra, 8 Cal.4th at p. 909.) When the prosecution later stated that it was unable to proceed because the knife wound was the cause of death, the court dismissed the case. The prosecutor appealed and the appellate court affirmed finding that the not true finding regarding the knife use enhancement barred retrial on the theory that defendant personally used a knife. This Court granted the Attorney General's petition for review. (People v. Santamaria, supra, 8 Cal. 4th at pp. 909-910.)

On review, this Court observed that the parties in Santamaria agreed that the jury's "not true" finding on the knife-use allegation precludes retrial of that enhancement allegation. This observation is alone sufficient to demonstrate that the Santamaria case actually supports appellant's contention that the jury's not true finding on the lying-in-wait special circumstance precluded Rico from telling appellant's penalty phase jury that he committed a murder while lying-in-wait.

In fact, the true issue in Santamaria was whether the not true finding regarding the knife use allegation prevented retrial of the murder charge for which the defendant had previously been convicted. For reasons not relevant to appellant's case, this Court ruled that the not true finding did not preclude a retrial of Santamaria's *murder conviction*. (People v. Santamaria, supra, 4 cal.4th at pp. 910-927.) That issue is clearly different than appellant Silveria's contention that the not true finding regarding the lying-in-wait special circumstance precluded Rico from arguing that appellant committed murder by lying-in-wait. It is evident that Judge Mullin erred when he overruled appellant's objections and allowed Rico to make this improper argument.

In sum, respondent is mistaken when it asserted that "the Double Jeopardy Clause did not bar the penalty jury from considering whether Silveria had lain in wait." (RB 69.)

C. The Mistried Torture-Murder Special Circumstance

1. State Law, In re Winship and Double Jeopardy

As explained in the AOB, prosecutor Rico was free to timely retry the mistried torture-murder special circumstance prior to the penalty phase without risk of placing appellant Silveria 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 mistried 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 where there is no burden of proof. (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 within 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 re-litigate 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 law, Rico forfeited his right to retry the torture-murder special circumstance when his 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 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.)

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 (1969) 395 U.S. 711, 717; Burks v. United States (1978) 437 U.S. 1, 16.)

Respondent failed to address appellant Silveria's contentions that: (1) 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); and (2) 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. Respondent's failure suggests that it recognized the futility of contesting appellant's authority regarding this issue. (See section 190.1; In re Winship, supra, 397 U.S. at p. 364; People v. Collins, supra, 17 Cal.3d at p. 693 [jury unanimity required].)

Next, respondent asserted that appellant's Double Jeopardy argument fails because the prosecutor never "re-charged Silveria . . .with that [torture-murder] special circumstance; the court never instructed the jury on that

special circumstance; the penalty retrial jury never rendered a verdict on that special circumstance." (RB 70.)

Respondent is correct to the extent it states that appellant was not formally re-charged with the torture-murder special circumstance, the penalty phase jury was not instructed on torture-murder, and the jury did not return a torture-murder verdict in the penalty phase.

However, respondent failed to see the difference between procedure and substance. While it easily speaks to procedure, respondent did not address the substance of appellant's contention that Judge Mullin improperly allowed Rico to present, and the jury to consider, both evidence and forceful argument of torture-murder against appellant Silveria during the second penalty phase even though the guilt phase jury deadlocked on this special circumstance, and it had been stricken months before retrial.[5] Indeed, respondent failed to deny that the prosecutor did so in a successful attempt to convince the jury that appellant Silveria should be executed. (See AOB, Argument I, at pp. 94-100.)

Next, respondent asserted that "the admission of evidence and argument relating to torture did not 'reopen the process of adjudication' on the torture special circumstance under *Haskett.*" (RB 70. But see AOB, Argument I, at pp. 105-106.) It further claimed that People v. Haskett (1982) 30 Cal.3d 841, is distinguishable because Rico never argued or implied that the original jury had erred or acted improperly when it hung on appellant Silveria's torture special circumstance. (RB 71.)

5

Respondent also asserted that appellant's argument regarding his right to a speedy trial on this special circumstance is moot. (RB 70.) This form over substance assertion fails for the same reason. (See AOB, Argument I, at pp. 106-108.)

Respondent is correct to the extent it stated that Rico did not suggest that the first penalty phase jury erred or acted improperly.

However, respondent failed to recognize that the Haskett prosecutor's impermissible attempt to reopen the process of adjudication also included his attack on "acquittals and retrying charges on which the jury could not agree in the guilt phase." (See AOB, Argument I, at pp. 105-106.) It is evident from the AOB that appellant Silveria relied on the following ruling of this Court:

> 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; AOB, Argument I, at 105-106.)

Respondent mistakenly continued to claim that Rico's torture-murder argument was lawful because the penalty retrial jury did not decide the issue of appellant's guilt, or the truth of the torture special circumstance. "Its task was limited to determining the appropriate punishment." (RB 71.) It further asserted that whether appellant committed a torture-murder was an "ultimate fact"for the torture allegation, "but not for the penalty for murder." (RB 71.)

Respondent's confusion persists. As explained above, only a special circumstance found to be true can be considered as evidence in aggravation under section 190.3(a). The problem in appellant's case is that his jury made

no such finding regarding torture-murder, yet Judge Mullin permitted Rico to re-introduce torture-murder evidence and argument to convince the jury that appellant Silveria should die because he committed a torture-murder.

Next, respondent contradicted itself. It previously claimed that whether appellant had committed a torture-murder was *not* an "ultimate fact" for the "penalty for murder." (RB 71.) Later, it asserted that "the prosecutor's argument and elicitation of evidence that addressed torture was proper because it related to the circumstances of murder." (Ibid.)

Of course, if torture-murder truly related to the circumstances of murder, then it could be properly considered when deciding the penalty for murder. However, it cannot be properly considered in appellant's case because the guilt phase jury did NOT find it to be true.

In sum, respondent simply failed to understand that unless the guilt phase jury *unanimously* found the torture-murder special circumstance true *beyond a reasonable doubt*, argument and evidence of a torture-murder is inadmissible during the penalty phase because it is not a circumstance of the murder under section 190.3(a). Put plainly, Judge Mullin erred when he allowed Rico to present torture-murder evidence and argument to the penalty phase jurors to successfully convince them that appellant Silveria should die.

Finally, respondent asserted that appellant's due process rights were not violated because "none of the actions Silveria challenges was improper." (RB 74.)

Appellant, however, has demonstrated in the AOB (Argument I, at pp. 111-114) and this reply brief that Judge Mullin also violated appellant's federal right to due process when he failed to comply with the mandates of the above state law. His failure permitted Rico to re-litigate the lying-in-wait and torture-murder special circumstances in the penalty phase where the

prosecution 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 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.)

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 both state law and 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 NOT true in the guilt phase; (2) allowed the prosecutor to re-try the stricken torture-murder special circumstance in the second penalty phase which began over 15 months after a mistrial had been declared; and (3) eliminated the prosecutor's burden of proving a guilt phase special circumstances beyond a reasonable doubt to a unanimous jury?

This Court should strike appellant Silveria'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 (1967) 386 U.S. 18, 24.)

- - - - -

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

As explained in the AOB, Judge Mullin repeatedly refused to allow appellant Silveria's trial counsel, Geoffrey Braun, to plead for mercy in his argument to the second penalty phase jury even though Braun explained that such plea would be based on relevant mitigating evidence. (See AOB, Argument II, at pp. 115-122.)

When Braun also explained that this Court had previously observed that reasonable jurors would have understood that jury instructions allowed them to consider and give effect to pity, sympathy and mercy to the extent appropriate to this case, 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 200:22950.)

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.) Judge Mullin 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 relied on 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." (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.
>
> Further, counsel are ordered to instruct their witnesses not to use the term either.

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

Respondent simply followed Judge Mullin's lead by also relying on California v. Brown, supra, 479 U.S. 538, and People v. McPeters, supra, 2 Cal.4th 1148, and asserting that "the United States Supreme Court forbids capital jurors from deciding a defendant's punishment in an "arbitrary and unpredictable fashion" and the "unadorned" use of mercy implies an "arbitrary or capricious exercise of power." (RB 78.) According to respondent, Judge Mullin did not err because to allow a mercy plea would invite the jury to

decide appellant's penalty in an "arbitrary and unpredictable" way. (RT RB 78.)

However, like Judge Mullin, respondent ignored the important distinction between appellant Silveria's case and the Brown and Mc Peters decisions.

In California v. Brown, supra, 479 U.S. at p. 542, the jury was instructed 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. The United States Supreme Court held that this instruction did not violate the Eighth and Fourteenth Amendments because a reasonable juror would have interpreted the 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.)

McPeters stated that the "unadorned" use of the word "mercy" implied an arbitrary or capricious act of power. (Id., 2 Cal.4th at p. 1195.)

However, appellant often stressed at trial, as he does in this appeal, that his mercy plea would have been based on his mitigating evidence. Therefore, no reasonable person could claim that it would have been "totally divorced from the evidence," or would have been an "unadorned" use of the word "mercy." Respondent, like Judge Mullin, refused to recognize 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 a normative, moral evaluation of the evidence and the exercise of reasoned discretion *based on the facts*.

Next, respondent cited cases supporting the notion that courts have discretion to limit the argument of counsel to "relevant and material matters"

and to "ensure that argument does not stray unduly from the mark." (RB 77.) Respondent also asserted that jury decisions may not be the product of "emotional responses" not rooted in the evidence or based on "extraneous emotional factors." (Ibid.) It then cited People v. Gonzalez (2011) 51 Cal.4th 894, a victim impact case in which this Court observed that "allowing the jury to consider victim impact evidence does not mean that there are no limits on emotional evidence and argument." (RB 77-78.)

None of these cases support Judge Mullin's refusal to allow appellant to plead for mercy based on his mitigating evidence. First, a plea for mercy in this case would have been based on the evidence and thus would surely be "rooted in the evidence." Second, a plea to spare a person's life based on the evidence, and made during the penalty phase of a capital trial, cannot be reasonably characterized as based on an "extraneous emotional factor" or as "straying unduly from the mark." Whether appellant should live or die was the issue of the day. A mercy plea rooted in appellant's evidence is surely relevant to the determination of that issue.

In fact, the Gonzalez case actually supports appellant's contention that Judge Mullin should have allowed him to plead for mercy. In Gonzalez, this Court stated that trial courts "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury *to show mercy* or to impose the ultimate sanction. . . ." (People v. Gonzalez, supra, 51 Cal.4th at pp. 951-952.) Only "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (Id. at p. 952.)

Surely, a mercy plea based on the evidence would have addressed a relevant subject that could have provided the jury with legitimate reasons to

forgo a death sentence. It is plain, therefore, that Judge Mullin erred when he prohibited appellant's mercy plea.

Next, respondent merely echoed Judge Mullin when it asserted that "an exercise of mercy is–as the trial court stated–fundamentally forgiveness or forbearance of *warranted* punishment." (RB 78; RT 202:23126-23130.)

Respondent is mistaken. A mercy plea would *not* have asked the jury to "forgive or forbear" warranted punishment. Rather, it would have asked the jury to punish appellant with life in prison without the possibility of parole instead of death, based on appellant's mitigating evidence. No one can reasonably claim that imprisonment of a person in his early twenties for the rest of his life without the possibility of parole is a forgiveness or forbearance of warranted punishment.

Next, respondent asserted that the jury was not deprived of the power to consider sympathy or compassion for appellant claiming that Judge Mullin's refusal to permit a mercy plea:

> merely guided the language [appellant] was to use in requesting leniency, replacing the word "mercy" with a synonym that did not connote an emotional response to the mitigating evidence instead of a reasoned moral response. (*People v. Ervine* (2009) 47 Cal.4th 745, 802.)

(RB 78-79.)

Respondent's reliance on Ervine is misplaced. In Ervine, the judge did delete "mercy" from the penalty phase instruction, but he also instructed jurors that they could consider "sympathy, pity and compassion" in deciding defendant's penalty. (See People v. Ervine, supra, 47 Cal.4th at p. 801.)

However, in the present case, Judge Mullin never instructed appellant's jury that it could consider "sympathy, pity and compassion" in deciding

appellant's punishment. In fact, as explained in the AOB, the judge actually pre-instructed future jurors that they must not be influenced by pity for appellant in reaching their penalty decision.[6] (See AOB, Argument II, at pp. 122-126.)

Thus, although "mercy" and "compassion" may be synonymous when the latter term is used in place of the former, it cannot be fairly assumed that appellant's jury understood that it could consider pity and compassion and grant appellant mercy where Judge Mullin expressly instructed jurors that they must not allow pity to influence its decision, and he never instructed them that they could consider "compassion" in deciding appellant's penalty. (Cf. People v. Ervine, supra, 47 Cal.4th at p. 802.)

Next, respondent asserted that defense counsels' arguments made the jury "aware of their power to consider sympathy and compassion arising from the mitigating evidence." (RB 79.)

Respondent is mistaken for several reasons. First, it ignored another instruction Judge Mullin gave the jury. The judge stated:

> *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.*

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

This instruction clearly told the jury that they must: (1) accept the law as Judge Mullin stated it; (2) ignore any conflicting arguments and statements

---

6 See appellant Silveria's AOB, at pp. 131-134 for the discussion which explains how Judge Mullin's errors greatly diminished the apprising effect of the sympathy language of CALJIC Nos. 8.85 and 8.88.

made by counsel; and (3) follow the judge's instructions. Thus, appellant's jury could not possibly have believed that it had the power to consider pity, sympathy, and compassion in deciding appellant's penalty.

Second, appellant's trial counsel, Geoffrey Braun, made a barren request that the jury "spare" appellant's life. (RT 278:33280.) Braun's co-counsel merely stated that "[w]e can have compassion enough for everybody in this case." (RT 278:33281.) However, Braun's simple request to "spare" appellant's life, could not have possibly counteracted Judge Mullin's express instructions to the jury: (1) that pity for appellant must not influence its penalty decision; and (2) must ignore conflicting arguments of counsel and follow his instructions.

Third, respondent failed to recognize that arguments of counsel cannot substitute as instruction by the Court. (See Taylor v. Kentucky (1978) 436 U.S. 478, 489-490.)

Fourth, Leininger's "compassion for everybody" statement related only to co-appellant Travis since he was entitled to an individualized jury decision.

Next, respondent asserted that appellant's objection to Rico's violation of Judge Mullin's "no mention of mercy" order was untimely, and harmless. (RB 79.)

Respondent is wrong. Appellant's trial counsel joined in the objection and Judge Mullin considered and ruled on it. (See also AOB, Argument II, at pp. 121-122.)

Moreover, Judge Mullin's willingness to ignore Rico's violation of its "no mention of mercy" order further demonstrated to the jury the extent to which the judge leaned on the prosecution's side of the scale. (See AOB, Argument XII, at pp. 258-332.)

B. The No Pity for Appellant Silveria Instruction

As explained in the AOB, rather than instructing the jury with penalty phase instruction CALJIC 8.84.1, Judge Mullin instructed prospective jurors with a modified version of guilt phase instruction CALJIC No. 1.00:

> 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; RT 211:23994; 211:24021, emphasis added. See also AOB, Argument II, at pp. 122-126;)

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. Italics added.)

Respondent did not dispute that Judge Mullin's reply was unworthy of belief. In truth, no reasonable juror would believe that this instruction was a directive not to feel pity for appellant *because he had been arrested."* This Court should not hesitate to reject the judge's false characterization of the above instruction.

Respondent also did not dispute that Judge Mullin expressly instructed prospective jurors that they "must not be influenced by pity for defendant *or* by prejudice against him." (RB 80; See AOB, Argument II, at pp. 127-128.) In fact, respondent recognized that "an instruction at the penalty phase not to be influenced by pity or sympathy is erroneous and is generally ground for reversal of a verdict imposing the death penalty. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 784)." (RB 80.) Respondent asserted, however, that "Silveria's claim fails because the instruction, even if erroneously given, was not prejudicial." (RB 80.)

Respondent is mistaken. First, it failed to acknowledge that the first jury, unhindered by the "no pity" instruction, deadlocked on the question of penalty after it could not unanimously agree that death was the appropriate punishment for appellant. Respondent also failed to recognize that the "no pity" instruction undoubtedly contributed to the second jury's decision that appellant should die. What can be more prejudicial than a death verdict

obtained in part by an erroneous jury instruction that prevented the jury from feeling pity for appellant based on his mitigating evidence.

Moreover, respondent once again mistakenly relied upon California v. Brown which observed that a penalty phase instruction that informed jurors, in relevant part, that they must not be swayed by "mere" sympathy did not violate the Constitution. (RB 80.)

Respondent, however, omitted a critical portion of the Brown Court's ruling. As explained before, the Supreme Court also stated that an instruction not to be swayed by "mere" sympathy would not violate the Eighth and Fourteenth Amendments to the United States Constitution "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." (California v. Brown, supra, 479 U.S. at p. 542.[7] Italics added.)

In the present case, Judge Mullin's "no pity" instruction was not qualified by the word "mere." It was an express directive to the jury not to allow *any pity* to influence their decision, i.e., even pity based on the evidence. Consequently, no reasonable juror would interpret an instruction that informed the jury that it "must not be influenced by pity for a defendant" as a "directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." (California v. Brown, supra, 479 U.S. at p. 542.)

7

Chief Justice Rehnquist focused on word "mere" in the instruction and from this concluded that a "reasonable" juror would have understood the instruction to apply only to the sort of sympathy totally divorced from the evidence. (Id. 479 U.S. at p. 542.)

Next, respondent asserted that the "no pity" instruction did not violate the Constitution because the instructions and counsels' arguments 'adequately informed' the jury of its responsibility to consider" all of appellant's mitigating evidence. (RB 80-82.)

As explained above, respondent again ignored the fact that Judge Mullin *expressly instructed jurors that they must ignore conflicting arguments of counsel and follow his instructions*. Moreover, an instruction informing the jury to *consider* appellant's mitigating evidence did him little good when it was preceded by an instruction which informed the jury that it *must not allow pity to influence its decision*. It makes little sense to allow jurors to consider appellant's mitigating evidence but prevent them from having any pity on him arising from consideration of that evidence. Put simply, none of the instructions given the jury counteracted Judge Mullin's express "no pity" instruction. (See AOB, Argument II, pp. 131-134; Taylor v. Kentucky supra, 436 U.S. at pp. 489-490.)

Next, citing People v. Seaton (2001) 26 Cal.4th 598, 684-685, respondent again asserted that appellant's claim "fails" because no error occurs from a "no-pity instruction" where other instructions and counsel's argument correctly "directed jurors to consider the sympathy [sic] value of evidence." (RB 82.)

Appellant replies again to respondent's repetitious assertion only because respondent failed to state a critical portion of this Court's observation in Seaton. This Court observed:

> At the penalty phase, the trial court told the jury: 'You must not be influenced by pity for a defendant or by prejudice against him.. (Italics [omitted].) But it also instructed the jury that '*in this part of the trial, the law permits you to be influenced by mercy, sentiment and sympathy for the defendant.*' It later

> reiterated the point when it explained to the jurors that at the guilt phase it had instructed the jury not to consider sympathy for the defendant but *'[a]t the penalty phase you may do so, that is, consider [sympathy].'*

(People v. Seaton, supra, 26 Cal.4th at pp. 684-685. Italics added.)

As should be clear by now, Judge Mullin never mitigated his "no pity" instruction with another instruction that informed appellant's penalty phase jury that the law permitted jurors to be influenced by mercy, sentiment and sympathy for the defendant.

Moreover, although this Court observed in Seaton that counsel's arguments also served to inform the jury that sympathy could play a role in its verdict (Id at p. 685), the present case is different because Judge Mullin expressly instructed appellant's jury that they must (1) ignore conflicting arguments and statements of counsel, and (2) follow his instructions.[8]

In sum, Judge Mullin erred when he instructed the jury with a modified guilt phase instruction which precluded the jury from allowing pity to influence its decision whether appellant should live or die.

\\\\

\\\\

8

The Seaton Court also observed that jurors were informed in other instructions that they could consider sympathetic aspects of the defendant's character and that they could assign whatever value they deemed appropriate to the penalty phase evidence. (People v. Seaton, supra, 26 Cal.4th at p. 685.) As explained in the AOB, however, Judge Mullin's errors greatly diminished the apprising effect of the sympathy language of CALJIC Nos. 8.85 and 8.88 given in appellant's case. (See AOB, Argument II, at pp. 131-134, and this ARB, post, at pp. 32-35.)

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

As stated in the AOB, after erroneously refusing to allow appellant Silveria to plead for mercy, and instructing jurors that they must not allow pity for appellant to influence their penalty decision, Judge Mullin displayed the depth of the unfairness and uneven treatment he accorded appellant during this trial when he allowed the prosecutor to ask the jury for retribution by sentencing appellant to death. 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.)

First, respondent asserted that Judge Mullin did not err by allowing Rico to "strongly" argue "that when a community's 'instinct for just retribution' has been properly channeled into a law allowing for the death penalty, society is better because it is thus governed by law and order." (RB 82-84.) According to respondent, Rico was "urging jurors to apply the death penalty law that 'channeled' human beings's [sic] desire for retribution" in response to appellant's argument that retribution was the only justification offered the jury for killing appellant. (RB 84.)

Respondent entirely missed the point. Appellant does not contend that he should not be punished for the crimes he committed. Rather, appellant contends that *if* Judge Mullin were correct in excluding a plea for mercy because mercy was not listed as a mitigating factor in section 190.3, then Rico should also be bound by this reasoning and precluded from arguing for retribution because retribution is also not listed as an aggravating factor. (CT 17:4369.) Indeed, respondent, like Judge Mullin, failed to acknowledge both the logic inherent in appellant's argument, and the blatant unfairness in refusing appellant a mercy plea while permitting the prosecutor to ask the jury for retribution.

Moreover, respondent failed to deny the unfairness and uneven treatment Judge Mullin accorded appellant when he allowed Rico to ask for retribution *after* the judge: (1) instructed jurors that they could not feel pity for appellant; and (2) refused to allow appellant to plead for mercy based on his mitigating evidence. (See AOB, Argument XII, at pp. 258-332.)

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

Respondent essentially concedes that Judge Mullin erred when he instructed the jury that it must reach a just verdict regardless of the consequences. (RB 86.) However, it also asserted that this error was not prejudicial claiming that the instructions viewed as a whole, including CALJIC Nos. 8.85 and 8.88, did not mislead the jury as to the nature and gravity of its responsibility. (Ibid.)

However, respondent failed to address appellant Silveria's contention that all of Judge Mullin's errors including the "no pity" instruction, refusal to allow a mercy plea, and the "regardless of the consequences" instruction

greatly diminished the apprising effect of the language of CALJIC Nos. 8.85 and 8.88.

As stated in the AOB in Argument II, at pages 131-134, it is true that appellant's jury was instructed in the language of CALJIC Nos. 8.85 and 8.88 that it must consider and weigh the aggravating and mitigating factors (RT 276:32978; RT 276:32988.) However, these instructions failed to cure the harm caused by Judge Mullin's errors. That is, the apprising effect normally present in the weighing and 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 and weigh 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 weighing and 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 (1985) 471 U.S. 307, 322 ["[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; Sandstrom v. Montana (1979) 442 U.S. 510, 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 instruction carried more weight than the other. (Ibid) Nor did any of them 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.[9] 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. (See also AOB, Argument XII, at pp. 258-332.)

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 Eighth 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;

9

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.

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 Silveria from asking for mercy is as blatantly unfair and 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 (1985) 472 U.S. 320, 328-330.)

This Court should, therefore, vacate appellant Silveria'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, 24.

- - - - -

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. Relevant Facts

During the first penalty phase trial, appellant Silveria and co-appellant Travis were tried at the same time but with separate juries. After listening to all the evidence including the testimony of his psychiatric expert, Dr. Harry Kormos, appellant's jury deliberated about 14 hours over four days, before deadlocking after four jurors could not agree that the death penalty was the appropriate punishment. (CT 13:3374, CT 13:3379-3380, CT 13:3382; CT 14:3442-3443; RT 181:18251-18255.)

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.)

During the ***second penalty phase***, Judge Mullin, prosecutor Rico, and Travis's counsel, Leininger, claimed to be concerned that Dr. Kormos, had considered the confessions of both appellant and Travis before arriving at his conclusions regarding appellant. (RT 262:31043-31050.)

Braun responded by reminding Judge Mullin that he had given Dr. Kormos copies of both confessions 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 said 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 the consolidation of these two cases. He further argued that he was entitled to introduce Dr. Kormos's expert opinion, and if it could not be accommodated without prejudice to co-appellant Travis, then appellant was entitled to a mistrial. (RT 262:31049.) Judge Mullin denied the motion during the following colloquy:

> **Judge Mullin:** This was brought upon by your actions Mr. Braun, and your decision.
>
> **Braun:** No, Your Honor. Oh, no.
>
> **Judge Mullin:** The two choices the Court sees is to strike Dr. Kormos's testimony, and that's it, *or* hold that under submission, and for *you* to determine whether or not, along with Mr. Silveria, whether or not he's going to testify.

(RT 262:31049-31050.)

Braun responded that he could not proceed without presenting the testimony of Dr. Kormos. (RT 262:31050.)

Prosecutor Rico informed Judge Mullin that so long as Dr. Kormos does not testify to having viewed or considered any confessions, or to what appellant Silveria has said about co-appellant Travis, Rico could cross-

examine Dr. Kormos regarding appellant's other statements. (RT 262:31053-31055.)

Braun was not agreeable to Rico's proposal and even though he did not believe there was a problem, Braun offered to temporarily rest his case and allow co-appellant's case to go forward to completion. (RT 262:31057.)

Braun also contended that he was entitled to put on an expert witness to testify about appellant's psychiatric condition as he was growing up and his condition at the time of the crime.

Furthermore, Braun reminded Judge Mullin that: (1) Braun had not asked Dr. Kormos during his direct examination whether Dr. Kormos had received the two confessions; (2) he did not intend to question Dr. Kormos about those confessions; and (3) at prosecutor Rico's request, appellant Silveria's prior testimony regarding concerning the planning and execution of the crime, including everything that appellant had said about co-appellant's participation in it, had already been read to the jury. (RT 262:31059.)

Braun also reminded Judge Mullin that his previous order excluding both confessions already prevented Rico from cross-examining Dr. Kormos about any alleged inconsistencies between appellant's prior testimony and what appellant said to police in his confession. Indeed, the judge's order also prohibited co-appellant Travis from cross-examining Dr. Kormos about appellant's confession.

Because Judge Mullin had already threatened to hold Braun in contempt (RT 262:31044-31045), and (2) threatened to strike all of Dr. Kormos's testimony (RT 262:31082-31083) *unless Braun proposed a solution*, Braun again offered to temporarily rest his case and allow co-appellant's case to go forward. (RT 262:31060.) However, Judge Mullin rejected Braun's proposal, stating:

> Now here's the Court's solution. Now there are three. . . *The first choice is to strike Dr. Kormos's testimony and he will not testify any further.* Keep in mind that the adverse party may cross-examine . . . an expert witness regarding his opinion when he indicates his opinion is based on certain material. He can be cross-examined by that material even though he did not rely on it. If he considered it, it is enough to allow full cross-examination as to the content of that material. That's the first choice. (RT 262:31060. Italics added.)
>
> The second choice then is to give you time to think about whether or not you want Mr. Silveria to testify, and that will pretty much take care of the problem. Or the third is Mr. Rico's alternative. . . . (RT 262:31061.)

This record shows that Judge Mullin's threat to exclude *all* of Dr. Kormos's testimony improperly forced Braun to confine his direct examination of his expert from appellant's early childhood up to appellant's 21st birthday - which occurred 37 days before the crimes. (RT 262:31050-31093.)[10] Put another way, the judge's unconstitutional ultimatum caused Braun to sacrifice

\\\\

\\\\

\\\\

10

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 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].)

a critical portion of his mitigating psychiatric evidence in order to prevent Judge Mullin from excluding all of it.

B. Respondent's Assertions

First, respondent asserted that appellant's argument relating to this issue "must not be heard" because appellant invited any error. (RB 89.)

Respondent is mistaken. If appellant's argument is not heard, how can this Court determine its validity?

Second, respondent states:

> Here it was Silveria's attorney who proposed the limitation on Dr. Kormos's testimony. He had a clear tactical basis for that decision, *as the trial court had indicated it might strike all of Dr. Kormos's testimony otherwise*. [Fn. Omitted.] Accordingly, Silveria invited any error and cannot challenge the court's decision here. (RB 89. Italics added.)

Here, respondent failed to understand that *forcing* appellant to propose a "solution" to a non-existent problem by illegally threatening to strike all of the testimony of appellant's psychiatric expert unless appellant proposed a solution cannot fairly be described as "tactical." Consequently, appellant's forced sacrifice of critical mitigating evidence was not invited error. It was thrust upon him over objection and under protest.

Next, respondent asserted that Judge Mullin's decision to limit Dr. Kormos's expert testimony was "proper" because it was based in part upon his review of inadmissible materials which allegedly prevented prosecutor Rico and co-appellant Travis from fully cross-examining Dr. Kormos on a source for his opinion. Respondent also stated once again that the judge could have struck "all" of Dr. Kormos's testimony, "unless other arrangements were made." (RB 89.)

Respondent is wrong. In truth, the claim that the constitutional rights of co-appellant Travis were going to be violated because neither he, nor prosecutor Rico, could fully cross-examine Dr. Kormos *is a myth.*

First, Judge Mullin had already deprived both the prosecutor and co-appellant of the right to cross-examine Dr. Kormos about appellant's confession's by his previous ruling excluding any evidence of appellant's confession. (See AOB, Argument IV, at pp. 152-157.)

Second, Judge Mullin should surely have realized that Braun's expert testimony presented no threat to the prosecution or co-appellant after Braun reminded him that: (1) Braun had *not* asked Dr. Kormos during his direct examination whether Dr. Kormos had received the confessions; (2) he did *not* intend to question Dr. Kormos about those confessions; and (3) at Rico's request, appellant's prior testimony concerning the planning and execution of the crime, including everything that appellant had said about co-appellant's participation in it, *had already been read to the jury.* (RT 262:31059. See also ACT 10:2477–["as we were discussing robbing this place John Travis said that Jim Madden needed to be killed because he could identify us"; ACT 10:2517–[John Travis said, "kill him"]; ACT 11:2844–["John told Chris to kill him and Chris started stabbing him in the chest"]; ACT 11:2847–["John stabbed Jim in the neck and chest"].) Nothing in appellant's confession was more damaging than this information which had already been heard by the jury.

Under these circumstances, there was no legitimate basis for Judge Mullin to restrict Dr. Kormos's direct testimony to a time before the crimes.

Consequently, in contrast to the first penalty phase trial, Judge Mullin's threats to hold Braun in contempt, and to strike all of Dr. Kormos's testimony unless Braun proffered a solution to this alleged problem, resulted in the

exclusion of critical psychiatric evidence in the second penalty phase 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, and the other co-defendants, affected appellant's conduct *at the time of the crimes.*

Moreover, Judge Mullin's ruling 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.

Next, respondent asserted that appellant's contention that Judge Mullin threatened to hold Braun in contempt was specious. (RB 89.) It also noted that undersigned appellate counsel did not cite to the record when contending in the AOB that Judge Mullin threatened Braun with contempt. (RB 90.)

Addressing respondent's second assertion first, it is correct. Undersigned counsel apologizes for this omission and is grateful to respondent for correcting this oversight by citing to the reporter's transcript on appeal. (See RT 262:31044-31055.)

At that point in the record, Judge Mullin stated that allowing Dr. Kormos to testify "about the hearsay documents he had reviewed when forming his opinion" was "a very large problem" because Dr. Kormos had reviewed and based his opinion on items that had been excluded. Braun asked permission to address the issue and the following colloquy ensued:

Judge Mullin: Yes, I wish you would. That's the real issue, Mr. Braun. Let's see how you handle this one.

Braun: I'm prepared to do that, Your Honor.

Judge Mullin: Do it then, please.

Braun: But I would ask that the Court address me in a more respectful fashion.

Judge Mullin: Mr. Braun, would you please just continue on.

Braun: This is not my fault.

Judge Mullin: Mr. Braun, you are so close to contempt in this matter I can't believe it.

(RT 262:31044-31045.)

Judge Mullin had previously accused Braun of causing this "problem" and Braun denied the accusation. (RT 262:31049-31050.) Here, in response to the judge's comment that he wanted to see how Braun "handled this one," Braun simply requested that the judge address him in a more respectful manner. Braun then attempted to explain that the perceived problem was not his fault when the judge told Braun "you are so close to contempt . . . I can't believe it." (Ibid.)

Put simply, Judge Mullin's "contempt" language, and his threat to strike Dr. Kormos's prior testimony, and exclude his further testimony, surely coerced Braun into sacrificing a critical portion of his expert's testimony in order to save a part of it.

Moreover, it was disingenuous for the judge to blame Braun for this alleged problem because, as Braun explained, Dr. Kormos had already reviewed appellant's confession before the judge: (1) ruled that evidence of

appellant's confession was inadmissible; and (2) consolidated the cases for trial. (RT 262:31045-31046.)

Respondent also asserted that "at no other point during the resolution of this issue" did the judge "ever express any displeasure at [sic] Silveria or Braun." (RB 91.)

Respondent, however, ignored the chilling effect upon Braun caused by the numerous additional hostile comments and disrespectful conduct Judge Mullin directed toward Braun which began as early as the pretrial proceedings in this case. (See AOB, Argument XII, at pp. 258-332.)

Next, respondent repeated its assertion that Judge Mullin properly restricted Dr Kormos's direct examination because this expert could not be cross-examined regarding appellant's confession. (RB 91.)

Appellant has already explained in the AOB and this reply brief why this assertion lacks any merit. Nevertheless, in reply to respondent's repeated assertions, appellant offers the following additional facts:

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

Second, both Judge Mullin and Rico knew that co-appellant had already exercised his constitutional right to confront appellant when co-appellant fully cross-examined appellant *during the first penalty phase of the trial.* (See 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.)[11]

Third, as a practical matter, co-appellant had already been convicted of first degree murder, and two special circumstances had been found true. Moreover, as stated previously, Judge Mullin permitted Rico to read into the record appellant's first penalty phase testimony relating to the murder, including co-appellant's participation in that murder, and Travis's cross-examination of appellant. (RT 244:28482-28497; see also ACT 10:2477--[as we were discussing robbing this place John Travis said that Jim Madden

---

[11] 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.

(See also People v. Seijas (2005) 36 Cal.4th 291, 303--[If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial].) Judge Mullin had previously ruled that appellant's first penalty phase testimony was admissible against appellant and co-appellant in the second penalty phase because (1) appellant chose not to testify in the second penalty phase, and (2) co-appellant had fully cross-examined him in the first penalty phase with an interest and motive similar to that which he had in the second penalty phase. Thus, the judge already knew that co-appellant's confrontation rights had been fully exercised when he rationalized his exclusion of Dr. Kormos's testimony on this ground.

needed to be killed because he could identify us; ACT 10:2517–[John Travis said, "kill him"]; ACT 11:2844–[John told Chris to kill him and Chris started stabbing him in the chest]; ACT 11:2847–[John stabbed Jim in the neck and chest].) Hence, co-appellant could not have suffered any more prejudice than that resulting from his own guilty verdicts and appellant's prior testimony.

Fourth, co-appellant 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 neither the cross-examination rights of the prosecutor or the confrontation rights of co-appellant would have been violated by Dr. Kormos's psychiatric testimony relating to the time of the crimes, or appellant's positive development after the crimes.

Moreover, Braun told Judge Mullin that he had no intention of questioning Dr.Kormos about the confessions, but even if Dr. Kormos had actually testified about appellant's confession, co-appellant would not have been harmed by such testimony 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.

Finally, respondent asserted that Judge Mullin properly permitted Rico to cross-examine Dr. Kormos about the murder even though the judge had prevented Braun from doing so. (RB 91.) Respondent claimed that Braun "broke" the stipulation on direct examination by asking Dr. Kormos about the

effects of appellant Silveria's abuse "later in life." (RB 92.) Then, as predicted, respondent asserted that "any error was harmless." (Ibid.)

As explained in the AOB, after Dr. Kormos' direct testimony was restricted to a time before the crimes, Judge Mullin ruled that the prosecutor 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, despite the stipulation and the above limitation he placed on Rico's cross-examination, Judge Mullin 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 motion for a mistrial was denied. (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:

> **Prosecutor 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:** 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: 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: 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: Are you aware of that testimony?

Dr. Kormos: Yes, I am.

(RT 271:32646-32647.)

After additional defense objections were overruled, prosecutor 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 allegedly 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's confrontation rights were in danger. (See AOB, Argument III, at pp. 137-141.) Co-appellant'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 prosecutor 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.)

In sum, respondent's assertion 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 personal use of the stun gun enhancement and the truth of the torture-murder special circumstance.

And as previously stated, 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.)

Furthermore, these allegations were stricken long before the second penalty phase began.

In addition, during his cross-examination of Dr. Kormos regarding appellant's comments about the time of the crimes, Rico was able to suggest to the jury that appellant suffered from an anti-social personality disorder rather than child neglect. (RT 271:32647-32648.)

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.[12]

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 rights to a fair, reliable, non-arbitrary and individualized sentencing determination that death is the appropriate punishment which 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, supra, 438 U.S. at p. 604. See also Skipper v. South Carolina (1986) 476 U.S. 1, 4-9; Penry v.

12

See AOB, Argument XII, judicial misconduct, at pp. 258-332.

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.

Judge Mullin's errors also violated appellant's 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 Judge Mullin's errors did not contribute to the verdict obtained. (Chapman v. California (1967) 381 U.S.18, 24.)

- - - - -

IV

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

A. Appellant's Confession

Respondent asserted that "Silveria cannot complain that the trial court improperly excluded his confession, because Silveria never tried to introduce his confession into evidence." (RB 94.)

Respondent, however, ignored the fact that appellant was forced to comply with Judge Mullin's numerous orders prohibiting the introduction of this confession. For example, when prosecutor Rico objected to any attempt by appellant's counsel, Braun, to elicit any testimony about appellant's confession regarding the murder, 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.)

Moreover, respondent also ignored Judge Mullin's later ruling prohibiting appellant from introducing his confession on grounds that it would violate co-appellant's confrontation rights. (RT 243:28288, 28291-28292; RT 244:28488-28489.)

Appellant Silveria, therefore, cannot reasonably be faulted for complying with the judge's express order not to introduce appellant's confession particularly since the order was accompanied by a warning that it would be perilous for him to do so.

Next, respondent asserted that appellant "withdrew his motion before the scheduled hearing and before the court ruled on the issue (244 RT 28495; 246 RT 28526)." (RB 94.)

Respondent is correct. Appellant acknowledged as much in his AOB at page 154. However, that fact does not dispose of the issue. Respondent neglected to mention that Braun also: (1) explained that he was withdrawing his motion in light of the judge's earlier rulings which prohibited references to appellant's confession, and (2) immediately presented a modified motion to elicit the simple fact that appellant had 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. See also AOB at p. 154.)

Judge Mullin modified his ruling to allow Braun to ask Keech whether appellant admitted his participation in the murder. However, the judge also ruled that 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.)

Respondent also failed to acknowledge that Braun later objected to the judge's latest limitation on the admission of appellant's confession. Braun 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 251:29135-29136.) Judge Mullin refused to change his restrictive 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 251:29136-29137.)

Finally, respondent failed to acknowledge that Judge Mullin also refused Braun's subsequent motion to modify the question to Keech to reflect that appellant denied culpability for an hour before confessing. (RT 251:29138.)

Next, respondent asserted that appellant's confession was inadmissible hearsay. (RB 94.) Respondent stated that the declaration against penal interest exception to the hearsay rule did not apply here because the declarant must be unavailable and appellant was not unavailable though he invoked his right not to testify. (Ibid.)

First, the United States Supreme Court has held that the exclusion of a third party account of a confession by a codefendant during the penalty phase on hearsay grounds denied the defendant the right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. The Court observed that the excluded testimony was highly relevant to a critical issue in the penalty phase of the trial, and substantial reasons existed to assume its reliability. It held that in these "unique circumstances, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (Green v Georgia (1979) 442 U.S. 95, 95-96. Internal quotations omitted.) The Green case applies here.

Moreover, respondent ignored the fact that when Judge Mullin asked Braun whether the portion of appellant's confession that Braun sought to elicit was hearsay, Braun explained that he was also relying on two other exceptions

\\\\

\\\\

\\\\

to the hearsay rule, i.e., the present state of mind[13] and spontaneous statement exceptions to hearsay.[14] (RT 241:28106-28108.)

It is plain that appellant's confession was admissible under both of these exceptions to the hearsay rule. Surely appellant's statements admitting his participation in the murder, and his expressions of remorse for that participation, reflected his then existing state of mind which was certainly in issue during the penalty phase where the crucial question before the jury was whether appellant's death was the appropriate penalty. Moreover, appellant made these statements during an interrogation by homicide detectives on the same night as the murder. Consequently, appellant's statements were admissible under the spontaneous statement exception to hearsay.

13

Evidence Code section 1250 provides in relevant part:

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) the evidence is offered to prove or explain acts or conduct of the declarant.

14

Evidence Code section 1238 provides in relevant part: Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act , condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of the excitement caused by such perception.

Respondent further asserted that even if appellant's confession were not barred by the hearsay rule, co-appellant would have had to waive his right to confront appellant regarding his confession. (RB 94.)

However, as explained above, and in the AOB at pages 156 and 157, there was simply no valid basis for any concern that co-appellant's confrontation rights would be jeopardized if appellant's confession were admitted as mitigating evidence. *Co-appellant Travis had actually confronted appellant during the first penalty phase about his testimony relating to his confession.* Furthermore, co-appellant would have suffered no prejudice by the admission of appellant's confession because co-appellant 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 co-appellant's participation in the murder. In addition, co-appellant 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 co-appellant's murder conviction and the true finding of special circumstances, the second jury had also heard co-appellant's admissions about his participation in the murder.

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

Finally, respondent asserted that "any error was harmless beyond a reasonable doubt" allegedly because appellant's expressions of remorse and "early admission of guilt would have been substantially diluted by his evasiveness and lying." (RB 95.)

Respondent failed to recognize that it is for the jury to judge credibility and morally assess and assign whatever mitigating value it feels is appropriate to appellant's expressions of remorse and early acknowledgment of guilt Judge Mullin's exclusion of appellant's confession prevented the jury from considering extremely important evidence which was relevant to its penalty determination.

And as stated in the AOB, the first communication from the jury during deliberations was to request the police report of appellant's initial arrest and confession. (CT 21:5309.) This request demonstrates that appellant's confession was important to the jury's determination of penalty. However, after Judge Mullin noted that appellant's confession had not 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 also stated, "They [jurors] 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.)

It is, therefore, plain that Judge Mullin's restrictive rulings regarding appellant's confession resulted in the exclusion of important mitigating evidence from the jury's consideration. The fact that appellant had confessed on the night of his arrest showed his early acknowledgment of responsibility and remorse. His confession was therefore admissible under at least two exceptions to the hearsay rule, section 190.3, subdivisions (a) and (k), and the federal constitutional cases cited in the AOB and later in this brief.

B. Appellant's Letter to Julie Morrella Expressing Remorse

Respondent asserted that the trial court properly excluded appellant's letter to Julie Morrella because it was hearsay. (RB 97.)

Respondent is mistaken. As explained above in the analysis regarding appellant's confession, appellant's letter to Morrella was admissible under the present state of mind exception to hearsay. (See this ARB, at pp. 58-59.)[15]

Respondent further asserted that appellant "makes no argument whatsoever, regarding the theory of admissibility of the letter. (RB 98.)

Nonsense. Respondent overlooked appellant's authority cited at the very beginning of his argument, and in two additional locations in the AOB. (See AOB, Argument IV, at pp. 152, 158 and 164.)

Respondent further asserted that the present state of mind exception did not apply alleging that appellant's statements were made under circumstances indicating its lack of trustworthiness. (RB 98.) It feebly attempts to support this assertion by relying only upon the fact that appellant Silveria his expressions of remorse *after* he was arrested. (RB 98--[definite chance the statements were made in contemplation of litigation "based on when they were made"].)

15

Respondent claimed that there "is only 'one' letter in dispute and requests appellant to identify "what other written expression of remorse he is referring to." (RB 97, fn. 23.) Braun clearly stated to Judge Mullin, "[n]ow, as far as the letters, there was one letter that Mr. Silveria wrote to Miss Morella *referring to the remorse letter he wrote to the family.*" (RT 256:29950.) Appellant Silveria wrote one letter to Morella (ACT 13:3316-3318) in which he referred to the letter he wrote to Mr. Madden's family. (ACT 13:3343-3344.) Both letters were excluded. (RT 256:29951; CT 21:5231.)

However, if appellant's oral expressions of remorse to Morrella made *after* his arrest were sufficiently trustworthy to be admitted, then so too were his written expressions of remorse. There was no proper reason to exclude his letter to Morrella.

Next, respondent asserted that the same lack of reliability that makes statements excludable under state law makes them excludable under federal law. (RB 98-99.)

However, as explained above, respondent failed to adequately explain why it claimed that appellant's written expressions of remorse were unreliable. Simply pointing to the time they were made is not enough to justify their exclusion. This is particularly true since Judge Mullin did admit appellant Silveria's oral expression of remorse also made after his arrest.

Respondent also asserted that appellant's right to present mitigating evidence does not preclude the State from applying the "ordinary rules of evidence" including Evidence Code section 352. (RB 99.)

Appellant does not begrudge the State from applying the ordinary rules of evidence. In fact, in this instance, appellant contends that Judge Mullin failed to follow those very rules with regard to the present state of mind, and spontaneous declaration exceptions to hearsay. Had the judge done so, he would not have excluded relevant mitigating evidence that the jury was entitled to consider in deciding whether death was the appropriate punishment for appellant.

Moreover, appellant's expressions of remorse during the penalty phase raised no legitimate concern that such evidence was more prejudicial than probative in violation of Evidence Code section 352. Indeed, his remorse was extremely relevant to the question of his punishment and did not unduly prejudice the prosecution's case.

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

Incredibly, after presenting examples of the various objections made by prosecutor Rico to Braun's direct examination of Morrella, and sustained by Judge Mullin (RB 99-101), respondent asserted that it was "entirely unclear what evidence Silveria contends was excluded." (RB 101.)

However, since appellant fully explained in the AOB what evidence Judge Mullin excluded from the second penalty phase, he cannot make it any simpler. (See AOB, Argument IV, at pp. 159-161.)

Moreover, respondent's failure to understand may be due to the fact that it completely overlooked appellant's contention that Judge Mullin prevented Morella from testifying about her visits with appellant between February 1996 to the time of her testimony. (See AOB. Argument IV, number 4, at pp. 161-163.)[16]

Next, respondent asserted once again that appellant's statements to Morella were inadmissible hearsay, and irrelevant. (RB 101-102.)

Respondent is again mistaken. Evidence of appellant's interest in Christianity and the Bible is relevant to his moral development since the crimes. Moreover, appellant fully addressed these particular errors in the AOB and sees no need to waste this Court's time with unnecessary repetition. (See AOB, Argument IV, at pp. 159-161.)

\\\\

16

Undersigned counsel did err by providing incomplete citations to the record in this portion of the AOB. All citations to RT 256:3001-3002, 3002, and 3003 should have been citations to RT 256:30001-30002, 30002, and 30003. I apologize for the inconvenience caused by these errors.

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

Here, respondent asserted that Judge Mullin did not err when he excluded appellant's letters to the Madden family and Liz Munoz because they were inadmissible hearsay, and unreliable. (RB 103.)

Respondent, however, failed to acknowledge that Judge Mullin did not exclude these letters as hearsay. Rather, he relied on foundational grounds stating, "In front of this jury, in this trial, no foundation was laid. That's why it's not being received into evidence." (See RT 272:32770; CT 21:5241.) Appellant fully explained in the AOB why Judge Mullin's ruling was in error. (AOB, Argument IV, at pp. 163-164.) Moreover, respondent failed to understand that appellant's letters were admissible under the present state of mind exception to the hearsay. (See ARB, ante, at pp. 58-59.)

Respondent further asserted that appellant "offers no justification for the admission of the letters, relying instead on his repetitious assertion that they constituted 'mitigating evidence.'" (Ibid.)

Respondent appears to have a fundamental lack of understanding of both state law and federal constitutional law relating to capital cases. Section 190.3 provides that relevant mitigating evidence is admissible in the penalty phase of a capital trial. Moreover, federal constitutional law provides that all relevant mitigating evidence is admissible in such a trial. (See e.g. Lockett v. Ohio (1978) 438 U.S. 586.) Appellant relied upon both state and federal law, and is compelled to do so "repetitiously" in order to dispel respondent's repetitious denials that error occurred in this case.

Finally, respondent asserted that admitting the letters would permit appellant to address the jury without subjecting himself to cross-examination. (RB 103.)

Respondent, however, failed to recognize that appellant had, in fact, fully subjected himself to cross-examination by prosecutor Rico during the first penalty trial. Moreover, it was Judge Mullin who sustained Rico's objection and denied Braun's motion to read this portion of appellant's prior testimony to the second jury. (RT 272:32769-32770.)

The law is clear. 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, supra, 438 U.S. at p. 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.)

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

- - - - -

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

Mrs. Madden, 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, presented 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.
>
> **Rico:** All right. And did that have to be changed because of the timing of witnesses and their testimony?
>
> **Mrs. Madden:** Yes.
>
> **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.)

Respondent asserted that Mrs. Madden's testimony was proper victim impact evidence, was isolated and did not invite an inappropriate emotional response from the jury. (RB 104-105.)

Respondent is wrong. It is evident that prosecutor Rico asked Mrs. Madden how the delays in the trial affected her in order to evoke an improper emotional response in front of the jury. However, "'[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 (1991) 54 Cal.3d 787, 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" is inadmissible. (People v. Harris (2005) 37 Cal.4th 310, 352.)

In sum, 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 (1991) 501 U.S. 808, 830, fn. 2; Booth v. Maryland (1987) 482 U.S. 496, 503; People v. Smith, supra, 30 Cal.4th at p. 622.)

Furthermore, 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.)[17]

Respondent also asserted that prosecutor Rico's future impact argument to the jury was proper because Judge Mullin limited the admission of evidence, not counsel's arguments. (RB 105-106. See AOB, Argument V, subsection E, at p. 172.)

Appellant repeats prosecutor Rico's closing argument here for this Court's convenience: Rico first argued 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 objected that this was improper future victim impact evidence because it went beyond the time of the trial but the objection 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

---

17

Respondent mistakenly claims that Braun did not make a timely objection to Mrs. Madden's testimony. (RB 104, fn. 26.) Judge Mullin actually sustained Braun's objection (RT 250:29090) but erroneously denied his motion for mistrial. (RT 250:29102-29103; RT 250:29109.)

> . . . their natural lives, receiving visitors, sending holiday greetings, receiving cards or gifts?

(RT 279:33437. Italics added.)

However, as explained in the AOB, Judge Mullin limited victim impact evidence from the time of the homicide to the time of the testimony in this trial. (See AOB, Argument V, at p. 167; RT 132:12224-12225; RT 200:22980-22982.)

Although no *witness* testified about future victim impact, respondent failed to recognize that the prosecutor, in effect, so "testified." Whether considered argument or evidence, Rico's statements to the jury about the future victim impact the families and jury would experience violated the spirit of the judge's order limiting this type of evidence. What is the good of prohibiting future victim impact evidence if the judge allows the prosecutor to argue the existence of such evidence in his closing argument to the jury?

As shown above, Rico told jurors 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." Rico also invited jurors to consider the impact they would suffer *in the future*. Thus, it is plain that Rico's comments violated the judge's ruling excluding future victim impact evidence.

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, 24.

- - - - -

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

Respondent asserted that Dr. Pakdaman's testimony was "proper expert opinion" which "could have" assisted the jury in their consideration of the "relative" brutality of the murder and assessing the amount of pain Mr. Madden experienced "relative to other stabbing victims." (RB 107.)

Respondent's assertion, however, is inconsistent with decisions of this Court holding that penalty decisions should not be made by comparing one case to another. (See 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 that this case is one of the most atrocious cases he has ever seen 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].)

Put another way, Dr. Pakdaman's opinion did not properly assist the jury in determining appellant's moral culpability and appropriate punishment. In fact, as stated previously, Dr. Pakdaman's opinion had no evidentiary support because it was based on a comparison with other cases never described, and for which evidence was never introduced. (Cf. People v. Torres (1995) 33 Cal.App.4th 37, 47–[opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact . . . the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt].)

Consequently, Dr. Pakdaman's opinion had 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, appellant's appropriate sentence. Indeed, Dr. Pakdaman's opinion tended to usurp the role of the jury. Moreover, his opinion 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.)

Next, respondent denied that prosecutor Rico suggested to the jury that they could shift the responsibility for making a moral assessment regarding appellant to Dr. Pakdaman. It alleged that Dr. Pakdaman's testimony "merely placed Mr. Madden's murder "in context" and the jury was aware that it had the responsibility to determine appellant's culpability. (RB 107-108.)

However, by eliciting Dr. Pakdaman's testimony and reminding the jury of Dr. Pakdaman's vast experience with autopsies and dealing with death, prosecutor Rico did, in fact, suggest to the jury that they could shift that responsibility to this "death expert."

Moreover, when the expert "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.)[18]

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 cases he had seen. (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.)

\\\\

18

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.

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.).)

Respondent failed to deny that 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 irrelevant. Dr. Pakdaman's testimony did not truly relate to the actual circumstances of the crime. Rather, he simply expressed his frustration caused by the number of court appearances he had to make, and 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.

Respondent also failed to deny that Dr. Pakdaman's remarks did not 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].)

Furthermore, respondent failed to deny that Dr. Pakdaman's improper testimony was prejudicial to appellant, and that prosecutor Rico exploited Judge Mullin's error by relying on Dr. Pakdaman's testimony in his argument to the jury.

As explained in the AOB, 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; AOB, Argument VI, at pages 181-183.) Prosecutor Rico elicited this improper expert testimony during the second penalty phase where he finally convinced the jury that appellant should be executed.

Moreover, 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].)

Appellant has demonstrated many times in the AOB that Judge Mullin rulings were unfair to appellant. That 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. Kormos, 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 by older boys and his own foster father, his alcohol and drug abuse, and his subsequent homelessness affected appellant's conduct at the time of the crimes on the other. (See AOB, Argument III, at pp. 137-151.)

Judge Mullin'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. (Chapman v. California (1967) 386 U.S. 18, 24.

- - - - -

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. Evidence Appellant Silveria Engaged in a Scam

Respondent asserted that appellant's irrelevancy objection to this scam evidence "is forfeited because he did not object on this basis below." (RB 110.)

Respondent apparently misread the record. When prosecutor Rico was questioning co-appellant about the alleged scam during co-appellant's portion of the penalty phase, Braun objected stating, "Excuse me, Your Honor. I object to any of this testimony insofar as it may concern Mr. Silveria" (RT 269:32163.) Braun further explained that they were in co-appellant's penalty phase and any testimony which included appellant in the alleged scam was irrelevant in that phase. (RT 269:32164, 32166.) Of course, since this scam evidence was not presented during appellant's portion of the penalty phase, it was not possible for Braun to make a relevancy objection in that stage of the

\\\\

\\\\

proceedings.[19] Later, when Rico asked co-appellant whether appellant agreed that the scam was a good idea, Braun futilely objected on grounds the question called for hearsay and was "not proper Factor (b) evidence, as to Mr. Silveria in any event." (RT 269:32169-32170.) Braun was not required to do more to preserve this issue for appeal.

Next, respondent asserted that this scam evidence was properly admitted because the relationship between appellant and co-appellant was an important issue to be determined by the jury and evidence of their "prior criminal activity together" was "therefore relevant to the circumstances of the crime." (RB 110.)

Respondent is mistaken. First, it ignored the fact that Judge Mullin instructed the jury as follows: "And in this case, you must decide separately the question of penalty as to each of the defendant's without regard to what you may decide for the other defendant *and without comparing one defendant to the other.*" (RT 236:27416. Italics added.)

Second, respondent failed to recognize that the jury must make in individualistic determination of appellant's culpability.

Third, it disregarded the import of People v. Boyd (1985) 38 Cal.3d 762, even though it cited this case in its brief. (RB 109.) In Boyd, this Court concluded that evidence irrelevant to any of the listed factors in section 190.3 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

---

19

Braun also objected on grounds that cross-examination of co-appellant should be limited to matters elicited on direct-examination. (RT 269:32167-32168.) His objection was overruled. (RT 269:32168-32169.)

> violence, and criminal activity of which the defendant was acquitted.

(Id. at p. 772.)

It is plain that the scam evidence suggested criminal activity which did not involve violence. It was, therefore, inadmissible.

Respondent further asserted that prosecutor Rico presented this evidence to rebut the inference that appellant was attempting to pull himself together by trying to enlist in the army. (Ibid.)

First, respondent failed to point to any part of the record which shows that Rico intended this evidence to serve as rebuttal. Respondent cannot assign an intent to the prosecutor which is not supported by the record. Second, the scam evidence cannot rebut the fact that appellant attempted to enlist in the Army because he, in fact, tried to do so. (See AOB, Argument VII, at pp. 186-188.)

Finally, respondent asserted that the scam evidence was admissible to impeach appellant. It claimed that co-appellant's testimony relating to appellant's involvement in the scam was relevant to show that co-appellant "may have been untruthful as a witness, and that Silveria may have been untruthful in his prior testimony." (RB 111.)

However, respondent does not explain what statements or testimony of appellant's that this evidence could impeach. Surely Rico had no intention of impeaching appellant's confession that he helped to plan the robbery and participated in the murder.

Moreover, if co-appellant's scam testimony was relevant to show he lied on the stand, how can any reasonable person conclude from his lies that appellant lied during his prior testimony?

In sum, 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 and was not entitled to any weight in appellant's penalty determination. (See People v. Boyd, supra, 38 Cal.3d at p. 776.) Admission of this evidence was error.

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

During co-appellant's cross-examination, prosecutor Rico questioned him about an unrelated fight co-appellant had with a person who had taken a beeper from co-defendant Matthew Jennings. (RT 269:32200.) Co-appellant testified that the co-defendants were present when he went to retrieve the beeper. (Ibid.) Rico then asked co-appellant 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 co-appellant 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.) Co-appellant replied that it did not. Rico also asked him whether he was aware that "either Matt or Danny

[appellant] had a stun gun." Co-appellant testified that he saw the stun gun "at the Leavesly Inn and at Troy Rackley's." (Ibid.)

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:

> 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 Rico's guilt phase redirect examination of prosecution witness, Tom Swenor, 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.
>
> **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.)

Respondent asserted that prosecutor Rico "simply asked" co-appellant "who – if anyone–had possessed or displayed the stun gun during that fight," and that "that question was rationally related to the circumstances of the crime, since a stun gun was used on Madden." (RB 112.) Respondent further asserted that Rico never implied that appellant possessed or used the gun, and no evidence was ever admitted that appellant had done so. (Ibid.)

Respondent is mistaken. The record makes clear that Rico knew that Rackley was the person who pulled the stun gun during this incident. 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 had offered. (See People v. Boyd, supra, 38 Cal.3d at pp. 772-776; People v. Rodriguez (1986) 42 Cal.3d 730, 792, fn. 24.) Put simply, 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 AOB, Argument I, at pp. 94-100, 104-108, 111-114.)

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

On direct examination, co-appellant's counsel, Leininger, asked Deanna Travis, co-appellant's sister, 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.) She 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.)

However, evidence that appellant impregnated Deanna when she was 15 years old 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 could be rebutted by evidence that he allegedly impregnated a minor. (People v. Rodriguez, supra, 42 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.

Respondent correctly asserted that Braun did not object on relevancy grounds. (RB 114.) However, it incorrectly asserted that evidence that appellant impregnated 15 year-old Deanna Travis was relevant because it "went directly to her credibility." (Ibid.) First, Deanna's sexual relationship with appellant when she was 15 had no bearing on her credibility. Second, she

was called as a mitigation witness for co-appellant during his portion of the penalty phase. Consequently, her relationship with appellant was irrelevant to any issue in the case.

D. Prosecutor Rico's Evidence That the Nuestra Familia Tried to Cut the Throat of A Person Unrelated to This Case

Respondent asserted that Judge Mullin properly allowed prosecutor Rico to elicit evidence of and attempted murder completely unrelated to appellant's case. (RB 116.) It reasoned that elicitation of this attempted murder evidence was a proper attack on correctional officer Edwin Lausten's credibility since he had testified that he was an effective officer and this attack "occurred in his proximity." (RB 116.)

This assertion strains credulity. No reasonable person would believe that Rico's true purpose in eliciting this prejudicial evidence was to attack Lausten's credibility. It is evident that Rico wanted the jury to hear evidence of an attempted murder of an inmate by slicing his throat, a manner similar to the actual murder of Mr. Madden. However, evidence of an attempted murder of an inmate completely unrelated to appellant's case is inadmissible as aggravating evidence against appellant. (People v. Boyd, supra, 38 Cal.3d at pp. 772-776.)

Respondent further asserted that Rico's "questions were harmless" because the jury did not learn that it was the Nuestra Familia prison gang who attempted the murder, and because the jury either likely "felt sympathy" for appellant or looked upon his "purported rehabilitation more favorably." (RB 116.)

First, it is true that the record does not show that the jury overheard the sidebar discussion during which the Nuestra Familia was identified as being responsible for the attack. However, evidence of an unrelated attempted

murder by means of a sharp instrument which resulted in cuts to the victim's throat are nevertheless prejudicial since this attack is very similar to the manner in which Mr. Madden was killed. Second, respondent's speculation that the jury likely felt sympathy for appellant or looked upon his rehabilitation more favorably is disproved by the fact that appellant was sentenced to death.

Furthermore, respondent does not dispute that evidence of an attempted murder in Lausten's presence by the Nuestra Familia was also inadmissible as rebuttal because it failed 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, 42 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 was irrelevant to this case.

E. 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, 24.

- - - - -

VIII

THE TRIAL JUDGE VIOLATED SECTION 1089, AND THE STATE AND FEDERAL CONSTITUTIONS WHEN HE DISCHARGED JUROR 4 DURING APPELLANT'S CASE IN MITIGATION

Respondent asserted that Juror 4's bias was a "demonstrable reality" because she believed defense witness, Reverend Leo Charon, was incapable of lying or misleading anyone, and that appellant Silveria "ignored the fact that the decision to remove Juror 4 was based on her *explicitly stated* inability to believe that Charon would lie." (Ibid. Italics in original.)

Respondent is mistaken. Appellant did, in fact, recognize that Juror 4 stated that she believed that Charon would be incapable of telling a lie or misleading anyone. (See AOB, Argument VIII, at pp. 210-211.)

However, as explained in the AOB, the demonstrable reality test requires a showing that Judge Mullin relied on evidence that, *in light of the entire record*, supports his conclusion that juror bias was established. (See People v. Barnwell (2007) 41 Cal.4th 1038, 1052-1053.)

The entire record does not support the judge's decision to discharge Juror 4. **First:** Juror 4 did ***not*** say that ***she*** would believe that what Charon 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) she 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.)

It is clear that 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.

Second, 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.)

Third, 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.)

Fourth, 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.

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, surely he would have discharged her long before so many witnesses had testified in this case.

Ninth, whether 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.

Next respondent asserted that Judge Mullin also "noted" that Juror 4 "had determined Charon's credibility based on her experiences with him outside the courtroom, she would be considering outside evidence and unable to participate in a full deliberation with other jurors." (RB 120.)[20]

Respondent, like Judge Mullin, is confused. 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

---

20

Respondent cited People v. Goins (1998) 19 Cal.4th 686, as support for this assertion but that case is distinguishable because the juror in that case actually informed the court that "he was so favorably disposed toward this [witness] that he could not be impartial in weighing his testimony." (Id. at p. 926.)

rather than realizing 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.

Put another way, simply because a juror knows a witness does not automatically mean that the juror will take this out-of-court knowledge into account during deliberations. As in the Goins case, there must be something in the record that shows that Judge Mullins conclusion "is manifestly supported by the evidence on which the court actually relied." (See People v. Barnwell, supra, 41 Cal.4th at pp. 1052-1053.)

Next, respondent asserted that appellant did "not establish how the trial court's decisions on other jurors affected the 'demonstrable reality' of Juror 4's bias. Nor did any of the described jurors know a witness and pre-judge that witness's veracity." (RB 120-121.)

First, appellant demonstrated in the AOB, and this reply brief, that the entire record relevant to the bias issue shows that Juror 4 did not prejudge Charon's veracity. Indeed, she specifically stated that Charon's testimony would not sway her one way or the other, and that even though Charon would

believe that what he said was true, this did not mean he could not be wrong. (RT 254:29667-29668.)

Second, respondent failed to recognize that the entire record relevant to the question of bias must be considered in applying the demonstrable reality test. Thus, appellant contrasted Judge Mullin's treatment of Juror 4 with other jurors because the judge claimed that he would have excused Juror 4 for cause during voir dire had he known that she knew Charon. Yet, the record shows that the judge was not troubled in the slightest by other jurors who knew persons involved in this case:

For example, 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) worked for the San Jose Police Department and knew Sergeant Michael Leininger, the son of co-appellant'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. (See AOB, Argument VIII, at pp. 216-220.)

In addition, other rulings regarding prospective jurors demonstrated Judge Mullin's exceptional faith in their ability to be fair and impartial despite circumstances which might adversely affect such impartiality. 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 co-appellant 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, sworn and served as Juror 5 in this case. (CT 18:4645.)[21]

Finally, respondent asserted that appellant's contention that Judge Mullin erred when he relied upon Code of Civil Procedure (CCP) sections 225 and 229 to remove Juror 4 was specious because the judge also relied upon CCP section 233. (RB 121.)

Respondent essentially concedes that Judge Mullin's reliance on CCP sections 225 and 229 was error since those statutes provide no basis for removing a sworn juror. (See AOB, Argument VIII, at pp. 197-199.)

Moreover, although respondent also asserted that there is no functional difference between CCP section 233 and section 1089, the penal code statute Judge Mullin should have applied in appellant case, it failed to address appellant's contention that Judge Mullin likely applied the less stringent

---

21

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.

"substantial evidence" test permitted by cases applying CCP section 233. Respondent also failed to dispute that Judge Mullin's errors also denied appellant right to a unanimous, impartial jury 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. (See AOB, Argument VIII, at pp. 200-220.)

In sum, the entire record relevant to the bias issue fails 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 (2008) 44 Cal.4th 758.) 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, 24.

- - - - -

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

Respondent asserted that ex-police officer George properly invoked his Fifth Amendment privilege against self-incrimination even if the statute of limitations prohibited George's prosecution for sexually molesting appellant Silveria. It attempts to support its claim that George "could" have "reasonably apprehended danger from testifying" by speculating that: (1) "perhaps appellant omitted an instance of molestation in his 1995 testimony that George's testimony would reveal" which was not subject to the statute of limitations; or (2) "perhaps . . . George's testimony might be admitted in some future trial "if he were prosecuted for another victim;" or (3) George's testimony "might" reveal "a particular method or pattern of molestation" that "might have revealed additional victims upon further investigation." (RB 124.)

Respondent's assertions are based on pure speculation and ignore the fact that the applicable statutes of limitations actually prohibited the State from prosecuting George for sexually abusing appellant.

Appellant recognizes that both state and federal law broadly favor the privilege against self-incrimination but such favor is not without limits. (See People v. Seijas (2005) 36 Cal.4th 291, 305.) Seijas was a second-degree murder case in which the trial court allowed a witness to assert the privilege

against self-incrimination. The Court of Appeal concluded, in relevant part, that the witness should have been forced to testify because he could not have reasonably feared prosecution for falsely identifying another person as the killer since the prosecution repeatedly stated that it had no intention of prosecuting the witness for either the murder or for providing false information to police.

However, this Court reversed the judgment of the Court of Appeal stating in relevant part:

> The court may not force a witness to make incriminating statements simply because it believes an actual prosecution is unlikely. The test was whether the statement might tend to incriminate, not whether it might tend to lead to an actual prosecution or, stated slightly differently, whether the statement *could*, not *would* be used against the witness. . . . Use of incriminating statements must be *forbidden*, as by a grant of immunity , and not merely *unlikely*, before the court may force a witness to make them. " People v. Seijas, supra, 36 Cal.4th at p. 305. Italics in original.)

Although George was not granted immunity from prosecution, the effect of the applicable statute of limitations is the same. As explained in the AOB, the prosecution was prohibited from prosecuting George for sexually molesting appellant because every applicable statute of limitations had expired.

\\\\

\\\\

\\\\

\\\\

\\\\

\\\\

(See AOB, Argument IX, at pp. 222-224.)[22] (Ibid.) Even the "new" one-year statute of limitations 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.[23] (RT 251:29112-29113.)

In sum, it is plain that the privilege against self-incrimination did not apply to George because every applicable statute of limitations had expired.

22

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.

23

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). . . .

Put another way, use of George's statements to prosecute him for sexually abusing appellant was *forbidden*, not merely *unlikely*. (People v. Seijas, supra, 36 Cal.4th at p. 305.) Judge Mullin, therefore, erred when he permitted George to assert the privilege.

Furthermore, there was absolutely no evidence of any other criminal charges pending against George. (RT 251:29124.)[24]

Finally, Judge Mullin 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 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. (See Washington v. Texas (1967) 388 U.S. 14.)

24

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 have impacted him in the Lake County case. And 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.

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, who was a police officer at the time, contributed to the boy's abnormal development, which in turn contributed to his later criminal conduct as a young adult.

As stated before, 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.

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.

In sum, 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, 24.)

- - - - -

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

Respondent asserted that the mere mention of the appellate process, "while ill-advised," does not amount to reversible Caldwell error. (RB 126.) It further asserted that "it is not possible" that the prosecutor's isolated comment misled the jury as to its sentencing responsibility because the jury had been instructed regarding its responsibility, and counsels' arguments emphasized the jury's "solemn," "very heavy," "awesome," and "sacred" responsibility." (RB 126-127.)

However, respondent failed to recognize that arguments of counsel cannot substitute as instruction by the Court. (Taylor v. Kenucky (1978) 436 U.S. 478, 489-490.) Respondent also ignored the fact that Judge Mullin adamantly refused appellant Silveria's requests that the jury be instructed that the penalty retrial was not the result of an appeal, to disregard prosecutor Rico's comment regarding the appellate court, and that it was not to consider whether this case would ever be appealed. (See AOB, Argument X, at pp. 229-233.)

An instruction specifically addressing this problem would have alleviated any concern that the jury may have been led to believe that the final sentencing decision belonged to the appellate court.

Moreover, although counsels' arguments may have informed the jury that their sentencing decision was a heavy and solemn one, they did not dispel

the suggestion that the ultimate responsibility for deciding the appropriateness of appellant's death sentence rested with the appellate court.

Finally, as set forth in the AOB, prosecutor Rico argued to the jury as follows:

> 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.

(RT 277:33135-33136.)

After Judge Mullin overruled appellants' objections, Rico again told the jury "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.)

Respondent complained that it was not clear how appellant believed that Rico's argument led the jury to believe the responsibility for determining the appropriateness of appellant's death rested elsewhere. (RB 127.)

Appellant will try to simplify. When prosecutor Rico twice told jurors that imposing the death penalty upon defendants was "not something that you or we as a system are doing to these men," he suggested to them that they were not responsible for imposing the death penalty. This improper argument exacerbated the misleading effect of the prosecutor's earlier comment relating to the appellate court.

In sum, the second penalty phase 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. Moreover, 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 an appellate court. As the United States Supreme Court noted in Caldwell v. Mississippi (1985) 472 U.S. 320, 330-331:

> 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.

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.)

Furthermore, as stated before, 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.)

And Rico, despite his awareness of the problem he caused by his earlier reference to appellate court review, continued to fight against its elimination by opposing the curative instruction requested by Braun. (RT 273:32880.)

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, 24.)

- - - - -

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

This portion of the ARB refers to Appellant Silveria's second motion to sever and follows the outline form contained in the AOB beginning on page 240.

1. Parts One, Four and Five

a. Part One: Appellant fully addressed Judge Mullin's denial of ground one of his motion to sever in the AOB and respondent's brief provides no reason to reply to its assertions regarding this ground. (See AOB, Argument XI, at pp. 240-241.)

b. Parts Four and Five: Respondent asserted that Judge Mullin satisfied Bruton [25] by preventing prosecutor Rico from using appellant Silveria's confession in his case-in-chief. (RB 130.)

Respondent, however, ignored the fact that Judge Mullin granted appellant's motion to sever before the trial began for two reasons:

Judge Mullin granted appellant's motion to sever based on Aranda-Bruton. (CT 9:2257-2258). He also granted the severance motion *to*

\\\\

25

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.

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.)[26]

Respondent also failed to recognize that Judge Mullin managed to protect prosecutor Rico's "valuable" aggravating evidence when, even though the judge prevented prosecutor Rico from introducing appellant's confession in his case-in-chief, he permitted Rico to use appellant's prior testimony relating to the crime as aggravating evidence in place of appellant's confession.

Moreover, respondent ignored the fact that the judge did nothing to protect appellant's valuable mitigating evidence but instead prevented

---

26 The judge later clarified this ruling, stating, ". . . 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.)

appellant from presenting his confession to the jury to show his remorse and early acknowledgment of guilt. (See AOB, Argument IV, at pp. 152-157.)

Furthermore, it bears repeating, there was no legal reason to exclude appellant's confession from the second penalty phase after the confession had been already been introduced and considered by the first jury during the guilt phase in which co-appellant Travis was convicted of first degree murder with special circumstances. Exclusion of appellant's confession at this late stage did absolutely nothing to protect co-appellant's constitutional rights. At this stage, the question before the jury was not whether co-appellant could be implicated in the crimes. Rather, it was whether appellant would live or die based upon the properly admitted aggravating and mitigating evidence. Put simply, Judge Mullin's exclusion of appellant's confession only served to (1) suppress the truth as it related to appellant's remorse and early acknowledgment of guilt, and (2) deprive the second jury from considering important mitigating evidence before deciding that appellant should be executed.

Next, respondent asserted that Judge Mullin's exclusion of appellant confession "did not prevent" appellant from testifying, "nor did it address what would occur" if appellant attempted to introduce his confession. (RB 130.)

Respondent, however, completely ignored the following facts: Prosecutor Rico objected during the second penalty phase to any attempt by appellant to elicit from prosecution witness, Officer John Boyles, evidence 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.) Respondent also ignored that Judge Mullin later ruled that appellant could not introduce his confession to 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.

However, appellant has demonstrated that the alleged concern that confrontation rights of co-appellant were in danger of being jeopardized was based upon a myth. (See the AOB, Argument III, at pp. 137-144 and this ARB, Argument III, at pp. 37–55.) That myth was, in part, revealed when 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 244:28488-28490.)

Nevertheless, Judge Mullin again ruled that references in appellant's prior testimony to his earlier confession would not be allowed. (RT 244:28494.) It is, therefore, evident that Judge Mullin excluded appellant's confession both in prosecutor Rico's case-in-chief and appellant's case in mitigation.[27]

2. Denial of Part Two

Respondent generally asserted that the constitutional requirement of an individualized sentencing determination in capital cases does not require

---

[27] Respondent also asserted that section 190.3 and 190.4 did not require the second penalty phase jury to consider all the evidence admitted in the guilt phase. (RB 133-134.)

Appellant adequately addressed this point relating to the admission of appellant's confession in the guilt and first penalty phase trials in his AOB and respondent provided no reason to revisit it. (See Argument XI, at pp. 240-249.)

separate penalty trials nor separate penalty phase juries. It further asserted that the instructions given appellant's jury were adequate to ensure an individualized consideration of penalty. (RB 131.)

Respondent, however, failed to specifically address appellant's contentions. The present case presents facts unlike any other capital case counsel could find.

First, as explained in the AOB, 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 in 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 compromise appellant ability to present important 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, the *first* jury could not unanimously agree that death was the appropriate punishment for appellant after considering: (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. (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, *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's penalty. Likewise, co-appellant's mitigating evidence was irrelevant to appellant's penalty case.

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 co-appellant's jury reached a verdict. (RT 204:23314.) After the first penalty trial ended in a mistrial, 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'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 (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 interests were not served in appellant's case.* (People v. Coffman (2004) 34 Cal.4th 1.)

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, and 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 more quickly, with less risk of confusion and reversible mistake.

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 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.) 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 second jury from making a reliable sentencing decision.

Respondent also asserted that appellant made no showing that the second jury was unable or unwilling to independently assess his culpability. (RB 131.) It further asserted that appellant was not prejudiced by Judge Mullin's refusal to reinstate his previous order granting the severance motion. (RB 132-133, 134 .)

Once again, respondent either ignored, or simply failed to recognize, that appellant's argument includes the contention that Judge Mullin's failure to grant the severance motion resulted in an *unreliable* death verdict. As explained in the AOB, and again below, the judge's error permitted the jury, in determining appellant's sentence, to consider evidence relating to appellant

which was irrelevant to the question of appellant's culpability, or was admissible only against co-appellant.

For example, evidence that co-appellant and co-defendant Jennings, had attempted to escape from the jail during which co-appellant expressed a willingness to kill a jail guard was admitted against co-appellant in the joint second penalty phase 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 co-appellant, including his attempt to escape. (RT 204:23321-23322.) Braun's later objection that forcing appellant to go to trial with co-appellant would be unduly prejudicial to appellant also proved futile. (RT 267: 31816.)

In addition, evidence that co-appellant, while in jail, wrote a letter to Tex Watson, a member of the Charles Manson family, was also admitted against him in this joint trial. He 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 he "enjoyed every minute of it." Co-appellant 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 co-appellant wrote this letter, he attempted the jail escape mentioned above. On cross-examination, defense witness, Reverend Leo Charon, testified that if co-appellant's claim to conversion to Christianity were true, he would not have expected him 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's insincere conversion to Christianity as shown by the letter co-appellant wrote to Watson. (RT 204:23322.) He explained that this evidence directly contradicted co-appellant's claim that his

conversion to Christianity was sincere. And because other evidence showed the close relationship appellant shared with co-appellant, 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.)[28]

Moreover, as shown below, during prosecutor Rico's presentation of both aggravating and rebuttal evidence against co-appellant, he attacked appellant by using prejudicial innuendo which included evidence of appellant's prior conduct which was neither admissible against appellant as aggravating evidence, nor as proper rebuttal. (See Argument VII, ante, at pp. 184-195.)

Moreover, Rico presented evidence during his case against co-appellant that he and appellant had engaged in a scam to get loan money from a computer training school. As explained in the AOB, this evidence was inadmissible against appellant. (See the AOB, Argument VII, pp. 184-188; People v. Boyd (1985) 38 Cal.3d 762, 772-776.)

Prosecutor Rico also presented evidence during his case against co-appellant that suggested to the jury that appellant had displayed the stun gun during a fight that co-appellant had with persons in their neighborhood. As explained in the AOB and above in this ARB, 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 the AOB, Argument VII, at pp. 188-191.)

28

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.)

Finally, prosecutor Rico improperly presented evidence during his case against co-appellant that informed the jury that appellant had impregnated co-appellant's sister. (See the AOB, Argument VII, pp. 191-192.) This evidence too was inadmissible against appellant 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 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, despite respondent's assertions to the contrary, forcing appellant to undergo a joint, second penalty trial with co-appellant 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;[29] 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

---

29

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.)

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 (1984) 37 Cal.3d 302, 313; People v. Bean (1988) 46 Cal.3d 919, 940; People v. Hoyos, supra, 41 Cal.4th at p. 896.)

Respondent again asserted, "Even if this Court concludes that the trial court erred by denying severance, it was harmless. 'Reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial.' [Citation omitted.]." (RB 134.)

What better showing can there be than to look to the more favorable result appellant Silveria obtained in his first, separate penalty phase trial when the first jury, who heard and considered appellant's confession, deadlocked when jurors could not unanimously agree that death was the appropriate penalty for appellant. Certainly a deadlock on penalty is a better result than a unanimous death verdict.

Finally, respondent asserted, "[h]ad Silveria been granted a separate penalty jury, the prosecutor could likely have been able to use his entire confession against him, even if Silveria did not testify on his own behalf." (RB 134.)

Respondent's suggestion that appellant Silveria might have been benefitted from the denial of the severance motion is absurd. Appellant had already been convicted of first degree murder with a true finding of robbery and burglary special circumstances. And there was nothing new in appellant's confession that would have rendered him any more culpable than he already was before the jury. On the contrary, admission of his confession would have

allowed the second jury to consider his remorse and early acknowledgment of guilt.

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, 24.)

- - - - -

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

Respondent denied that Judge Mullin's persistent hostility, verbal abuse and unequal treatment of appellant Silveria's trial counsel, Geoffrey Braun, deprived appellant of his constitutional rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (RB 135-144.)

In doing so, however, it confused co-appellant Travis with appellant Silveria. (See RB 135-"(TAOB 329-330)," and RB 136-"Travis was not denied a fair trial by the trial court's actions here.")

Respondent also relied upon this Court's decision in People v. Blacksher (2011) 52 Cal.4th 769, to assert that Judge Mullin's actions did not deny appellant Silveria a fair trial. (RB 135-136.)

That case, however, actually supports appellant's contentions more than it does respondent's. In Blacksher, defense counsel Thomas Broome attempted to elicit what a witness believed defendant knew. The prosecution objected to the question as speculative. Broome's response was, "it is a question. It is cross-examination." The judge sustained the objections stating that "we don't throw out the rules of evidence just because you're on cross." Broome also tried to elicit hearsay statements as prior inconsistent statements even though they were not inconsistent. Broome tried twice more to elicit inadmissible hearsay but the judge sustained the prosecution's objection to the second attempt stating, "nice try." The judge did not respond to Broome stating, "I have to keep trying judge." On these facts, this Court concluded

that to the extent that the court's comments to Broome were a reflection of frustration and irritation at counsel's repeated attempts to elicit *inadmissible hearsay*, they were not improper. This Court noted that such "manifestations of friction between court and counsel, while not desirable, are virtually inevitable in a long trial." (People v. Blacksher, supra, 52 Cal. 4th 825.) This Court also concluded that the judge's comments to defense counsel, Trina Stanley, were appropriate because she also made repeated attempts to elicit inadmissible evidence, and that merely one possibly sarcastic comment by the judge did not amount to judicial misconduct. (Id. at 825-826.)

However, the portion of the Blacksher decision that respondent relied upon is distinguishable. In the present case, Judge Mullin's comments and conduct during appellant's trial were significantly more numerous, hostile, and abusive than those of the trial judge in Blacksher. Moreover, Judge Mullin's hostile comments and mistreatment of appellant's counsel, Geoffrey Braun, were not brought about by Braun's attempts to elicit inadmissible evidence. Rather, they often occurred when Braun was merely attempting to introduce admissible mitigating evidence in an attempt to convince the jury to return a verdict less than death. (See the AOB, Argument XII, at pp. 258-328.)

Moreover, appellant contends that Blacksher actually supports his contention that Judge Mullin's conduct violated appellant's constitutional rights. In Blacksher, this Court also held in relevant part:

> Although the trial court has both a duty and the discretion to control the conduct of the trial, the court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution.

(People v. Blacksher, supra, at p. 824. Citations and quotations omitted.)

Appellant recognizes that a trial judge has the discretion to rebuke an attorney when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper conduct. He also recognizes that this Court's role "is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, [this Court] must determine whether the judge's behavior was so prejudicial that it denied [appellant Silveria] a fair, as opposed to a perfect trial." (People v. Blacksher, supra, at p. 824.)

Appellant has demonstrated that Judge Mullin's misconduct was both pervasive and prejudicial in violation of appellant's constitutional rights. (See AOB, Argument XII, pp. 258-332.) To be clear, appellant does not contend that he was denied something so unattainable as a "perfect" trial.[30]

Next, respondent notes that appellant "cites to dozens of decisions and comments" made by Judge Mullin but fails to dispute a great majority of them "[f]or the sake of brevity." (RB 136.)

First, respondent apparently fails to realize that facts do not cease to exist because they are ignored. Indeed, its failure to dispute appellant's remaining contentions is a tacit concession that they have merit.

Second, respondent addressed only "four specific instances" to try to show that Judge Mullin did not act improperly. (Ibid.) However, because the first three instances respondent disputed occurred during the first penalty phase trial, appellant brought them to this Court's attention simply to demonstrate the wide scope of Judge Mullin's misconduct. Assuming that these three instances

---

30

In truth, in the 25 years that undersigned counsel has represented defendants sentenced to death, he has not encountered a single case that posed even the slightest threat of being perfect.

would have demonstrated prejudicial misconduct, the remedy would be the granting of a new penalty phase trial. But, since the first penalty phase jury deadlocked and appellant did receive a new trial, these three examples of Judge Mullin's misconduct are moot for any purpose other than to help demonstrate the hostile atmosphere present during both of appellant penalty phase trials.

The last instance addressed by respondent did occur in the second penalty phase trial during Braun's direct examination of defense witness Julie Morrella. (RB 139-141.) Respondent, however, simply "cherry-picked" a small portion of appellant's argument about Judge Mullin's misconduct during Morrella's direct examination and attempted to dispute only that portion as if it represented appellant's only contention during this part of the trial. As explained in the AOB, Argument XII at pages 303-306, Judge Mullin did much more than respondent cares to recognize:

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.
>
> **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.)

Asking his witness why she concluded that appellant began to feel better was not, in and of itself, an improper question. Thus, Judge Mullins instruction to Braun to ask "proper" questions was unnecessary. Moreover, when Braun stated to Morrella that she "mentioned something about reading the Bible," the judge told Braun in front of the jury that, "I think you know better. You're supposed to know better." There was simply no basis for the judge to chastise Braun here. He struck as speculation only Morrella's conclusion that appellant began to feel better because he began reading the Bible. He did not strike it because Morrella said appellant had been reading the Bible.

Consequently, Braun's Bible comment did not warrant Judge Mullin's chastisement. Moreover, the judge should not have made such comments in front of the jury. (People v.Fatone (1985)165 Cal.App.3d 1164, 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].)

Respondent also ignored appellant's contentions regarding Judge Mullin's conduct during a later portion of Braun's examination of Morrella. Braun asked 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 told the judge that this evidence was not offered for its truth but when he tried to explain what it was intended to show, the judge simply restated that the objection was sustained. The following colloquy ensued:

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 clearly stated that he was not offering this evidence for its truth. Therefore, it was not inadmissible hearsay. Moreover, the judge should not have prevented Braun from explaining its relevancy. The judge was also wrong to exclude evidence that appellant was excited because he had started to read the Bible as irrelevant. Clearly, this evidence was relevant mitigating evidence, and there was simply no justifiable reason to prevent the jury from hearing and considering it in determining appellant's appropriate penalty.

Judge Mullin also refused Braun when he twice requested permission to approach the bench after the judge sustained Rico's objection and struck Morella's further testimony. (RT 256:29964.)

As stated in the AOB, the issue relating to the propriety of Judge Mullin's exclusion of appellant's mitigating evidence as irrelevant is addressed in the AOB in Argument IV, at pages 157-164.

The problem respondent failed to address 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 and thus preserving the issue for appeal.

Respondent also failed to address appellant contentions relating to Judge Mullin's later conduct during Braun's further examination of Morrella. She 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.)

Respondent failed to dispute that Judge Mullin demonstrated his 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 improper exclusion of mitigating evidence "between February of '96 and the present" is addressed in Argument IV, ante, at pages 161-164.

Next, respondent asserted that Judge Mullin's "impartiality" was shown by his "occasionally brusque handling of the prosecutor." (RB 140.)

The first instance cited by respondent is, in fact, more a chastisement of defense counsel than prosecutor Rico. Respondent omitted the judge's comment regarding his wish to see some "adult behavior" in the papers that get filed in court. It was Braun who filed numerous motions in court. Respondent also ignored the judge's comment about moving on to something "important." The judge suggesting that complaints about Rico's sarcasm were unimportant cannot fairly be described as "brusque treatment" of the prosecutor. The same is true of respondent's second example of "brusque treatment" of Rico since the judge was simultaneously treating Braun "brusquely" as well. Respondent's two remaining examples of the judge's brusque handling of Rico

pale in significance and "brusqueness" when compared to the numerous examples presented by appellant in his AOB. (See AOB, Argument XII, at pp. 258-332.) Consequently, respondent's feeble effort to minimize Judge Mullin's conduct failed to rebut appellant's numerous examples of the judge's misconduct.

Respondent also asserted that Judge Mullin's impartiality was demonstrated by the fact that he sustained some of Braun's objections. As stated in the AOB, appellant does not contend that everything Judge Mullin did was misconduct. Merely sustaining some of Braun's objections does not demonstrate impartiality, nor does it negate the fact that the judge otherwise engaged in prejudicial misconduct in violation of appellant's constitutional rights.

Next, respondent mistakenly relying on People v. Guerra (2006) 37 Cal.4th 1067, asserted that Judge Mullin's rulings, even if erroneous, did not establish judicial misconduct. In Guerra, this Court held in relevant part:

> a trial court's numerous rulings against a party–even when erroneous–do not establish a charge of judicial bias, especially when they are subject to review. [Citations omitted.] (Id. at p.1112.)

(See RB 141-143.)

Respondent missed appellant's point. Unlike the defendant in Guerra, appellant does not contend that Judge Mullin's erroneous rulings are the sole basis for the judge's misconduct. Rather, appellant contends that his charge of judicial misconduct is established both by Judge Mullin's *hostile attitude and numerous verbally abusive comments directed at Braun throughout the*

trial, and his *uneven* rulings which blatantly favored the prosecution. (See AOB, Argument XII, pp. 258-332.)

Moreover, the Guerra case is also distinguishable because unlike appellant Silveria, Guerra never expressed any concern that the judge was prejudiced against him during the trial. In fact, Judge Mullin warned 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 in the AOB, 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 facts addressed in the AOB and this ARB, however, reveal the absurdity of that claim.

The Guerra case is also distinguishable because, unlike appellant, Guerra's willingness to let the trial pass without any additional charge of bias strongly suggested that his initial charge of judicial bias lacked merit. (People v. Guerra, supra, 37 Cal.4th at p. 1112.)

Next, respondent's assertion that Judge Mullin properly overruled Braun hearsay objections when prosecutor Rico elicited inadmissible hearsay from ex-social worker Linda Cortez is incredible. (RB 142-143.)

As explained in the AOB, 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 at six years of age from his mother's home. 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:

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.

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.

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 nonsensical. 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. In fact, appellant was removed from that foster home because he had been physically and sexually molested there.

Furthermore, 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 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 again engaged in uneven rulings to appellant's detriment when he 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.
>
> **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 AOB, Argument VII, at pp. 192-194.)

Rico was also permitted to compare other persons to appellant. He asked co-appellant witness, Sharon Lutman, a registered nurse certified in chemical dependency, "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.)

It is evident, therefore, that the relevant facts in appellant's case are vastly different that the facts in Guerra. (People v. Guerra, supra, 37 Cal.4th at pp. 1111-1112.)

Next, respondent asserted that Judge Mullin properly ordered Braun to turn over to prosecutor Rico Braun's work product, i.e., transcript summaries Braun had personally prepared for his defense expert, Dr. Kormos. Respondent further asserted that Braun had waived any privilege he had in this work product by providing them to Kormos and questioning him about them. (RB 143.)

Respondent failed to recognize that appellant's point here was not only that Judge Mullin erred when he ordered Braun to turn over his work product

to prosecutor Rico. Appellant also offered this erroneous ruling as another example of Judge Mullin's unfair and uneven treatment of the defense.

As explained in the AOB, Argument XII, at pages 309-310, 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 Coito v. Superior Court (2012) 54 Cal.4th 480-[2018.030, subd. (a) provides absolute protection to any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories"]; 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];

Next, respondent asserted that Judge Mullin never "specifically" instructed jurors to consider appellant murder and robbery convictions as prior felony convictions, and that appellant "pointed to nothing in the record indicating the jurors had any reason to think that this instruction applied in

particular to his former testimony or his conviction for murder and robbery in the instant case." Respondent further asserted that the instruction "did not demonstrate any bias for or against any party." (RB 144.)

Respondent's assertions strain credulity. Judge Mullin 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.)

Judge Mullin should not have given this instruction to the jury. As stated in the AOB, 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.)[31]

No reasonable, fair-minded person can deny that the Judge Mullin instructed the jury with CALJIC No. 2.23 so that jurors would, in fact, consider appellant's burglary, robbery and murder convictions in determining his credibility, and ultimately his death sentence. As shown above, the judge said he believed the jury could consider appellant's current murder conviction as a prior felony.

Moreover, the jury surely considered the burglary, robbery and murder convictions as prior felonies because *there were no other felony convictions*

---

31 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. . . ."

for the jury to consider. Appellant had not been convicted of any felonies other than those for which he was convicted of in the present case.

Consequently, it cannot be reasonably denied that this erroneous instruction improperly undermined appellant's defense while simultaneously aiding prosecutor Rico in his successful pursuit of appellant's death sentence.

Furthermore, Judge Mullin's decision to give this patently improper instruction over a defense objection further supports the conclusion that Judge Mullin had improperly aligned himself with prosecutor Rico in violation of appellant's constitutional rights. (See People v. Jackson (1955) 44 Cal.2d 511, 518-520; People v. Santana (2000) 80 Cal.App.4th 1194, 1206-1209.)

Finally, in what appears to be an attempt to address the structural defect issue, respondent simply asserted that appellant's contention that trial by an unfair or impartial judge is a structural defect requiring reversal fails "[f]or the reasons given above" because appellant "has not shown that the trial judge was not fair or impartial." (RB 144.)

First, respondent's failure to address other examples of numerous erroneous and uneven rulings appellant offered to demonstrate Judge Mullin's misconduct is a tacit concession that they have merit. (See AOB, Argument XII, at pp. 286-299, 302-303, 306-317, and 321-327.)

Second, respondent's weak attempt to address the applicability of the structural defect-reversal per se standard of review and its complete failure to address the beyond a reasonable doubt standard of review set forth in Chapman suggests that it misunderstands both the gravity of the issues and the constitutional law applicable to this case.

It bears repeating: "[u]pon 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 and uneven rulings 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.)

Furthermore, 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, and in appellant's AOB, 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 co-defendants, used a stun gun.

On the other hand, as demonstrated in the AOB in this case, appellant Silveria 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 co-appellant 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 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-and certainly not be sentenced to death- 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. 18, 24.)

- - - - -

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

Respondent asserted that this Court must give deference to Judge Mullin's conclusion that the anti-death penalty views of prospective jurors E-45, F-77 and J-56 substantially impaired their duties as jurors in accordance with instructions and their oaths. (RB 145-156.)

This Court has held the trial court's ruling will be upheld on appeal "if it is fairly supported by the record" and this Court will accept "as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (See People v. Pearson (2012) 53 Cal.4th 306, 327.) If the juror "has not made conflicting or equivocal statements regarding his or her ability to impose either a death sentence or one of life without the possibility of parole, the court's ruling will be upheld if supported by substantial evidence." (Id. at pp. 327-328.)

However, a reviewing court is not required to give *undue* deference to a trial court. The United States Supreme 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 (2007) 551 U.S. __, 127 S.Ct. 2218,167 L.Ed.2d 1014.)

Appellant Silveria contends that prospective jurors E-45, F-77 and J-56 were not substantially impaired because they said they could set aside their personal anti-death penalty views and impose a death sentence where appropriate. It is true that they gave responses indicating an opposition to the death penalty during voir dire and in their questionnaires. However, "personal opposition to the death penalty is not itself disqualifying, sine '[a] prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law." (People v. Pearson, supra, 53 Cal.4th at p. 331.)

Moreover, prospective jurors F-77 and J-56 never gave conflicting responses regarding their ability to impose a death sentence.

Prospective Juror F-77

Prospective Juror F-77 responded to questions regarding his death penalty views as follows:

> **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. 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.)

Judge Mullin excused prospective Juror F-77 stating:

> 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.)

This Court should not uphold Judge Mullin's ruling granting the prosecutor's for cause challenge of Prospective Juror F-77 because it is not supported by "substantial evidence." (People v. Pearson, supra, 53 Cal.4th at pp. 327-328, and cases cited therein.)

Prospective Juror J-56

Prospective Juror J-56 was voir dired in relevant part as follows:

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. 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.
>
> **Rico**: Okay.

(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 erred when he excluded J-56. He claimed that J-56 never said he could "come up with a verdict" even though the above record demonstrates the falsity of that statement. 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, when 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.)

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 a death sentence, he never stated that he would not impose it. In fact, he stated both in his questionnaire and later during voir dire that he could impose a death sentence. 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 (2004) 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.)

This Court should not uphold Judge Mullin's ruling granting the prosecutor's for cause challenge of Prospective Juror J-56 because it is not supported by "substantial evidence." (People v. Pearson, supra, 53 Cal.4th at pp. 327-328, and cases cited therein.)

The Judge's Unequal Rulings Favoring Pro-Death Jurors

If Judge Mullin refused to excuse for cause pro-death penalty prospective jurors because they gave responses that conflicted with their earlier pro-death penalty responses, then the "conflicting" responses given by Prospective Juror E-45 should have also qualified this juror to serve.

That is, the response given by this pro-life prospective juror demonstrated that he or she could put aside his or her personal death penalty views and vote for the death penalty in the appropriate case. (See AOB, Argument XIII, pp. 333-361.)

Next, respondent asserted that appellant Silveria's request that this Court compare Judge Mullin's treatment of pro-death penalty prospective jurors he allowed to remain with pro-life prospective jurors he struck from the venire was "not required by law. . .is not helpful," and a juror's "subjective state of mind as evidenced by comparative analysis is irrelevant." (RB 153-156.)

However, respondent failed to recognize two important considerations. First, appellant Silveria has consistently contended that Judge Mullin favored the prosecution and treated the defense in an uneven, unfair and persistently hostile manner. (See AOB, Argument XII, at pp. 258-232.)[32] Appellant also contended that the judge's uneven treatment of the defense was further demonstrated when he concluded that: (1) *pro-death penalty* prospective jurors A-69, B-17, C-47, C-67 and G-68, were *not* substantially impaired because they gave responses during voir dire that conflicted with their pro-death penalty views; and (2) pro-life jurors were substantially impaired even though they gave responses during voir dire that showed that they could impose the death penalty in an appropriate case. (See AOB, Argument XIII, at pp. 362-381.)

Second, the United States Supreme Court has considered the trial judge's treatment of different prospective jurors to determine whether it should accord deference to the judge's ruling regarding a challenge for cause. In Gray v. Mississippi(1987) 481 U.S. 648, the trial judge denied the prosecution's challenges for cause of several prospective jurors for whom the challenge should have probably been granted. The prosecutor had to use peremptory

---

32

Respondent makes the peculiar assertion that appellant "makes no direct argument that the court erred by not striking these jurors for cause" (RB 153, fn. 44.) It could not be more mistaken. (See AOB, Argument XIII, at pp. 333-381.) Respondent further contends that appellant made no "explicit argument of judicial bias, with reference to legal authority, on this ground." (Ibid.) Respondent apparently failed to recognize that the main point in this argument is that Judge Mullin erred in striking three pro-life prospective jurors from the venire, and that the judge's pro-prosecution bias first addressed in AOB, Argument XII, at pp. 258-332, including legal authority, was further demonstrated by his different treatment of pro-death penalty prospective jurors. See AOB, Argument XIII, at pp. 362-381.)

challenges to ensure that these prospective jurors were excluded from the venire and had exhausted all of his peremptory challenges by the time Mrs. H.C. Bounds was called to the jury box. Although her voir dire was somewhat confused, she ultimately stated that she could consider the death penalty and the judge concluded that she could impose it. The prosecutor did not want Bounds on the jury so he asked for one more peremptory challenge, arguing that the court had erroneously denied several of his for-cause challenges and thereby forced him to use peremptory challenges to remove those prospective jurors. The judge agreed that he may have erred, and the defense objected to granting another peremptory challenge to the prosecutor. The prosecutor then urged the judge to reverse one of the earlier denials of his for-cause challenge which would restore a peremptory challenge. The judge directed the prosecutor to question Bounds further, and Bounds responded that she could reach either a guilty or not guilty verdict and could impose the death penalty. Thereafter, the prosecutor renewed his for-cause challenge despite Bounds' responses. The defense argued that Bounds' answers did not render her excludable. Finally, the judge declined to reconsider his earlier refusals to strike prospective jurors for cause but granted the prosecutor's for cause challenge and struck Bounds. On appeal, the United States Supreme Court considered the trial judge's rulings regarding the for-cause challenges of Bounds and several prospective jurors and reversed concluding that the judge erred when he granted the prosecutor's for-cause challenge of Bound's. (Gray v. Mississippi, supra, 481 U.S. at pp. 629-631, 636-640.) Thus, it is evident that a reviewing court may consider the responses given by various prospective jurors to determine whether substantial evidence exists to show whether any of them were substantially impaired.

Moreover, in People v. Moon (2005) 37 Cal.4th 1, this Court observed that deference to the trial judge's decision to grant the prosecutor's for-cause challenge in the Gray case was not appropriate due to the judge's ulterior motives in that case, i.e., his attempt to right a wrong with a wrong. (People v. Moon, supra, 37 Cal.4th at pp. 14-15.)

Appellant Silveria contends that Judge Mullin's uneven and unfair treatment of the defense reflects an ulterior motive having little to do with whether prospective jurors E-45, F-77 and J-56 were substantially impaired. Appellant, therefore, urges this Court to consider not only whether the conflicting responses given by the above three pro-life prospective jurors rendered them qualified to serve, but to also consider whether the judge's refusal to strike several pro-death prospective jurors because they had given conflicting responses regarding their pro-death penalty views demonstrated a pro-prosecution ulterior motive making deference to his rulings inappropriate.

It is apparent that Judge Mullin used one standard to exclude pro-life prospective jurors and another standard to include pro-death prospective jurors. He, therefore, does not merit the deference the law usually provides.

Furthermore, because the record discloses no basis for a finding of substantial impairment 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; People v. Pearson, supra, 53 Cal.4th at p. 333.)

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, 24.

- - - - -

XIV

APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE ERRORS IN THIS CASE, WHETHER CONSIDERED ALONE OR TOGETHER, WERE PREJUDICIAL

A. Introduction

Predictably, respondent asserted that "there were either no errors or no prejudicial errors." (RB 179.) It further asserted that the case against appellant Silveria "was strong and warranted his guilty verdict and death sentence. Accordingly, reversal is not required." (Ibid.)

However, appellant did not challenge his *guilt convictions* so respondent's comments regarding them are irrelevant to the issues in this case.

Moreover, respondent offered no analysis to support its conclusion that the case against appellant "warranted his . . . death sentence." Its failure to provide any analysis or to dispute any of appellant's mitigating evidence suggests that it could not do so with any semblance of credibility.

B. The Relevant Evidence

Consideration of the relevant evidence will demonstrate the undue prejudice appellant endured 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 Chris Spencer and co-appellant Travis stabbed Mr. Madden 31 times before Travis handed the knife to appellant and appellant 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 AOB, 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 AOB, 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 time 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 AOB, 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 from the time of his arrest up to the time of trial. Appellant did not claim 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 AOB, Argument I, at pp. 108-111, regarding the question of premeditation.)

Appellant also admitted at trial, that after Spencer and co-appellant 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. (See 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. (See AOB, Argument III, 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. (RT 181:18239-18240.)

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 AOB, Argument III, 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 AOB, Argument III, at pp. 144-151.) This patently unfair treatment, standing alone, was grossly prejudicial to appellant's federal constitutional rights 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 AOB, Argument V, 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, stating that she had already waited six years, and asked when she would get such justice. (RT 250:29085-29086.)

In addition, unlike the first penalty phase trial, prosecutor Rico improperly argued to the jury that the jurors and all of the families involved would continue to suffer on future holidays because of the defendants. (See AOB, Argument V, at pp. 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 guilt-phase jury had found the first allegation untrue and deadlocked on the latter allegation (see AOB, Argument I, 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 AOB, Argument XII, 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, Judge Mullin's errors were so prejudicial that it took the second penalty phase jury no more than six hours to decide that both appellant and co-appellant Travis should be executed.

C. Federal Law

As explained in the AOB, "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 such 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 the Chapman standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

D. State Law

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 trial, there is a reasonably possibility that the second jury would have reached a different verdict had the errors not occurred.

E. Summary

Considering the substantial amount of mitigating evidence appellant Silveria 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 deadlocked after four jurors 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 trial, where that jury decided both appellant's fate, and that of co-appellant, 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.)

- - - - -

CONCLUSION

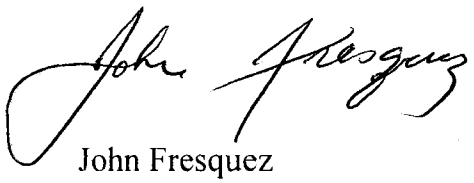
The defective formula for respondent's arguments is simple: all that is necessary to dispose of the issues raised in Appellant Silveria's AOB and ARB, is to deny that they exist.

Appellant, however, urges this Court to look behind respondent's verbal curtain of denial so that It may see the true number and extent of the prejudicial errors that occurred in appellant's case. An illegitimate penalty phase trial such as occurred in this case offends the senses and should not be permitted to stand as if it met state law, and state and federal constitutional mandates. This Court should reverse appellant Silveria's death sentence for all of the reasons stated in his AOB and this ARB.

Dated: February 7, 2013

Respectfully submitted,

Michael J. Hersek
State Public Defender



John Fresquez
Sr. Deputy State Public Defender

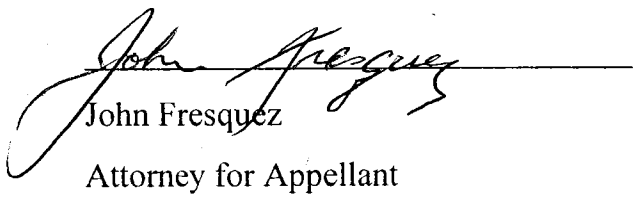
JF:AP:sa

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rules 8.630(b)(1)(C), 8.630(b)(2).)

I, John Fresquez, am the Sr. Deputy State Public Defender assigned to represent appellant, Daniel Todd Silveria, in this automatic appeal. I conducted a word count of this ARB using our office's computer software and hereby certify that this brief is 47,408 words in length excluding the tables and this certificate.

DATED: February 7, 2013



John Fresquez
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Daniel Todd Silveria***
Case Number: **Santa Clara County No. 155731**
Supreme Court No. S062417

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANTS REPLY BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ X / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on February 7, 2013, as follows:

Daniel Todd Silveria, #K57200
CSP-SQ
5-EB-99
San Quentin, CA 94974

Mark E. Culter
(Co-appellant's Counsel)
P.O. Box 172
Cool, CA 95614-0172

Laura Osman, Appeals Division
191 North First Street
San Jose, CA 95113
(For Judge Hugh Mullin. III)

James Leininger
(Co-appellant's Trial Counsel)
181 Devine Street
San Jose, CA 95110

District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Arthur P. Beever
Office of the Attorney General
455 Golden Gate Avenue
San Francisco, Ca 94102-3664

Geoffrey A. Braun
(Appellants Trial Counsel)
181 Devine Street
San Jose, CA 95110

Dennis Fischer
Attorney-at-Law
1448 15th Street, #206
Santa Monica, CA 90404-2756

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 7, 2013, at Sacramento, California.

Saundra Alvarez