SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) S062417
	)
v.	) (Santa Clara County
	) Number 155731)
DANIEL TODD SILVERIA and	)
JOHN RAYMOND TRAVIS,	) **DEATH**
	) **PENALTY**
Defendants and Appellants.	)
	)

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA

Honorable Hugh F. Mullin III, Trial Judge

APPELLANT'S REPLY BRIEF
(On Behalf of JOHN RAYMOND TRAVIS)

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DEATH PENALTY

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APPELLANT'S REPLY BRIEF

WORD COUNT CERTIFICATION (Rule 8.630 (b)(2))

Pursuant to California Rules of Court, Rule 8.630 (b)(2), counsel for John Raymond Travis hereby certifies that this reply brief contains 38,575 words, within the Rules of Court limit of 47,600 words..

I. THE PROFFERRED TESTIMONY FROM FIRST TRIAL JURORS WHO BEFRIENDED JOHN TRAVIS WAS CRUCIAL TO THE DEFENSE CASE AT THE PENALTY RETRIAL, WAS NOT AT ALL CUMULATIVE, WOULD NOT HAVE RESULTED IN ANY UNDUE CONSUMPTION OF TIME, AND ITS EXCLUSION WAS HIGHLY PREJUDICIAL (Respondent's Argument XIV)

Argument I in Appellant Travis's Opening Brief set forth a very important and quite uncommon (if not unique) claim that demonstrated how the trial court eviscerated the defense presentation at the penalty retrial. (T-AOB 136-191.)[1] Respondent has buried a short, incomplete, and simplistic answer to that claim, towards the end of Respondent's Brief. (RB 158-161.) A detailed summary of the actual argument will demonstrate that Respondent has totally failed to address the heart of Appellant Travis's very substantial claim.

A. Summary of the Facts Underlying Appellant's Full Claim

Appellant John Raymond Travis and his codefendant, Daniel Silveria, were both found guilty of a single count of murder in a single guilt trial in which separate juries were impaneled to try each defendant. The two separate juries then heard penalty trial evidence. Portions of that evidence

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1 Throughout this brief, references to John Travis's Opening

overlapped and were heard by both juries. Other portions were heard by only one or the other of the two juries. Neither jury was able to reach a unanimous penalty verdict; mistrials were declared as to each defendant. On motion of the prosecution, over the strong objection of each defendant, the trial court determined that there was no longer any need for separate juries for the penalty retrials of the two codefendants; accordingly, a single jury was impanelled to simultaneously decide the fates of both defendants.

Jail Chaplain Leo Charon had been an important witness for each defendant at the original penalty trials. Mr. Charon gave testimony heard only by Daniel Silveria's separate penalty jury, describing Silveria's deep and apparently sincere post-incarceration religious conversion. Mr. Charon also gave testimony heard only by John Travis's separate penalty jury, regarding Mr. Travis's unusually strong and apparently sincere progress in reaching a mature understanding of how his youthful addiction to drugs and alcohol had adversely impacted his life. (See T-AOB 70, 105-106, 144-147.)

A detailed summary of the original penalty trials and the penalty retrial, with full citations to the record, is contained in the Statement of the Facts portion of the opening brief, at T-AOB 43-135. A more abbreviated summary that focused on the facts that specifically pertained to the present issue was set forth at T-AOB 143-150.

As set forth in the opening brief, at the original penalty trial John Travis's defense counsel presented a three-pronged case in mitigation of

the penalty. The first prong consisted of very strong and uncontested testimony showing that John Travis was largely neglected by his parents, leaving him to grow up with far more influence from other misguided youths than from any parental authority. As a result, he remained quite immature into his early adulthood, and he was very dependent on drugs and alcohol from his early childhood through his early adulthood. (See T-AOB 83-96.)

The second prong of the defense case-in-mitigation consisted of expert testimony from Dr. Timmen Cermak who endeavored to explain: 1) how easily neglected children could progress into dependence on drugs and alcohol; 2) how a genetic predisposition toward alcohol addiction can greatly increase the likelihood that a particular individual will become addicted to alcohol; and 3) how drug and alcohol addiction could lead to an endless circle of unsuccessful attempts to escape from a disappointing and frustrating life. (See T-AOB 107-111.)

The third prong of the defense case-in-mitigation was based on the testimony of jail chaplain Leo Charon who worked with John Travis after Travis was incarcerated for the present offense. Travis remained in the county jail for several years while attorneys prepared for a complicated multi-defendant trial, eventually progressing to the lengthy initial guilt and penalty trials, and finally culminating in the penalty retrial. During the several years that John Travis remained in the county jail, he and Leo Charon had many opportunities to work together toward helping Mr. Travis reach a mature understanding of the ways in which his life had become lost to his

drug and alcohol addictions. Mr. Charon became convinced that Travis had been unusually successful in reaching that mature understanding of the negative influence of his drug and alcohol addiction, compared to the numerous other inmates with whom Charon had worked during his many years as a jail chaplain. Thus, Charon was uniquely positioned to bring together the first two prongs of the defense case-in-mitigation. (See T-AOB 105-107, 146-147.)

The prosecution had no actual evidence to rebut the defense showing on any of the three prongs. There was simply no way to dispute the defense evidence that John Travis was genetically predisposed to alcohol addiction, and no effort whatsoever was made to dispute the fact that John Travis's parents failed to provide any meaningful guidance and support, or that they left him to grow up on the streets without adult supervision. There was no way to dispute the evidence that Travis did, in fact, become dependent on drugs and alcohol at an unusually early age. No evidence was offered to dispute any of Dr. Cermak's conclusions about the impact of Travis's drug and alcohol addiction. No evidence was offered to rebut Leo Charon's testimony that Travis had made great progress while incarcerated and had finally achieved a mature understanding of the ways in which drug and alcohol addiction had taken over his life and led him to become a person desperate enough to engage in the behavior that caused the death of James Madden.

Without real evidence to rebut any of the three prongs, the prosecutor turned instead to a series of common generic themes in an effort to ridicule the otherwise undisputed defense evidence. As set forth in detail in the opening brief, the prosecution used every opportunity to hammer home the point that jail inmates facing trial on serious crimes had an incentive to exaggerate or even falsify information provided to expert witnesses, and to convince potential defense expert witnesses that they were bettering themselves while in jail. There was no evidence whatsoever John Travis actually resorted to such tactics; the prosecutor only showed the bare possibility that this could have occurred.

Most importantly, the prosecution sought to minimize the impact of Leo Charon's testimony by repeatedly stressing the fact that this same witness also offered important testimony in favor of John Travis's codefendant, Danny Silveria. Again, no evidence was offered to dispute the fact that Charon's testimony about both defendants was totally accurate; the prosecution showed only the bare possibility that some form of bias might have caused Charon to overstate the evidence favoring one or both of the defendants. In sum, the prosecution simply urged the jurors to speculate about possibilities that could never be completely disproved. (See T-AOB 147-150.)

At the first trial, when Leo Charon's testimony was given separately to two different juries, the prosecution was unable to persuade either jury to reach a unanimous verdict in favor of death. At the joint retrial, Charon was

required to give all of his testimony in front of a single jury charged with simultaneously determining the fate of both defendants. This made it even easier for the prosecutor to convince the jury that Charon should not be trusted, even though the prosecutor was never able to prove that any testimony Charon gave was less than one hundred percent true. In other words, all the prosecution was able to do was produce generic evidence that would be present whether Charon was totally truthful or whether he was embellishing due to some supposed (but unproven) anti-death penalty agenda. Nonetheless, the retrial testimony by Charon about both defendants, given in front of a single jury, deprived Travis of the benefits of Charon's first trial separate testimony in which Charon was better able to individualize the two defendants. Worse, the prosecutor's treatment of Charon's testimony unfairly diluted the credibility of this critically important witness.

This was the context that must be considered in order to understand why the defense accurately perceived the need for some powerful evidence at the penalty retrial to corroborate Leo Charon's testimony that John Travis had made unusually strong progress toward achieving the mature understanding of the impact drug and alcohol addiction had on his life – an understanding that was sadly lacking at the time of the commission of the present murder. This newly gained mature understanding was what had turned Travis into a very different person than he was at the time of the murder. A jury that believed in the truth of this defense evidence would

surely have been far more likely to conclude that life in prison without the possibility of parole was an adequate punishment for John Travis.

B. The Trial Court Seriously Abused Its Discretion in Refusing to Allow the Defense to Present the Testimony of Two Persons Who Had Become Totally Familiar With the Details of John Travis's Crime and His Background, and Who Had Befriended Him After the First Penalty Trial and Were in a Unique Position to Corroborate the Fact That John Travis Had Achieved a Mature Understanding of the Impact That Drug and Alcohol Addiction Had on His Life

The defense was fortunate to have available precisely the kind of powerful evidence that was needed to corroborate the testimony of Leo Charon, so that the jury would realize that Charon's testimony about John Travis was fair and accurate, and should not be cavalierly dismissed just because Charon also offered testimony favorable to John Travis's co-defendant. However, the hurdle the defense had to overcome was that the new and powerful evidence was to come from the mouths of one person who had served as an actual juror during the first trial, and another who had served as an alternate juror. The prosecutor objected to these witnesses, and

the trial court initially made it quite clear that such evidence would be categorically rejected simply because of their role as jurors at the first trial.[2]

1. The Trial Court Never Engaged in an Evidence Code Section 352 Analysis Below, So Respondent is Precluded from Relying on Such an Analysis on Appeal

As the defense persisted in its efforts to persuade the trial court that these witnesses should be allowed to testify, the trial court began to offer added reasons to disallow such evidence. Notably, the trial court never engaged in an Evidence Code section 352 analysis, but Respondent's position on appeal is based solely on such an analysis. (RB 159.) The trial court relied on a seriously flawed analysis to conclude that testimony from prior jurors would be prejudicial to the prosecution, but the court never weighed that prejudicial impact against the importance of these witnesses to the defense. As will be shown in subsequent sections of this argument, even if a section 352 analysis had been employed, it would still have been an abuse of discretion to disallow this evidence. But since Evidence Code section 352 was not the basis for the ruling below, it is not appropriate for Re-

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2 The trial court's first comment was: "You know what your chances of that one are?" The court soon followed with: "You better bring up some real good caselaw on that one." (RT 197:22660.)

spondent to rely on such an analysis for the first time on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 321 ["He further asserts it should have been excluded pursuant to Evidence Code section 352. Since he failed to make these objections at trial, the issue is waived."]; *People v. Anderson* (2001) 25 Cal.4th 543, 586; *People v. Williams* (1997) 16 Cal.4th 153, 206.) Thus, any such issue was forfeited below, and the present record is incomplete for engaging in such an analysis for the first time on appeal.

Furthermore, each point made by the prosecutor or trial court below in support of a conclusion that the evidence should not be permitted was discussed in detail in the opening brief (see T-AOB 179-185); multiple flaws in each rationale offered by the prosecutor and the trial court were set forth, leaving each point made by the prosecutor or the trial court below with no persuasive value at all. Respondent provides no rebuttal whatsoever to those points. Instead, Respondent repeats the points made below, with no attempt at all to address the series of flaws noted in the opening brief. As will be shown, this leads to the conclusion that even if an Evidence Code section 352 analysis were proper at this point, it would remain clear that the trial court abused its discretion.

The relevant procedural history was set forth at T-AOB 152-157. When trial counsel first mentioned the possibility that he would call a prior juror and a prior alternate juror as defense witnesses, the trial court did not even wait for a prosecution objection; instead, the court made it clear it

could not conceive of allowing such testimony. (RT 197:22660, discussed at T-AOB 152.)

The matter was discussed again a week later, when the prosecutor finally moved for an order precluding testimony by former jurors. The prosecutor offered no legal authority whatsoever, and conceded he did not even understand what testimony the defense might seek from former jurors. (RT 200:22917-22920, discussed at T-AOB 152.) Several days later, the defense made its offer of proof, explaining what led a first trial alternate juror to start visiting John Travis after the mistrial was declared. That alternate juror had visited Travis a couple times each month over the course of a year, in an effort to provide Travis with the kind of good relationship with an adult male that the alternate juror had thought was missing from Travis's life. He would testify to his belief that Travis was sincere in his effort to overcome his drug and alcohol addictions and to change his life. (RT 201:23000-23001, discussed at T-AOB 152-153.)

The second juror witness had served as the foreperson of the jury that had found Travis guilty of first-degree murder with special circumstances. She had also started visiting Travis regularly after the mistrial, had come to know him well, and could also strongly corroborate the conclusions that would be expressed by Leo Charon. (RT 201:23001-23004, discussed at T-AOB 153-154.)

The prosecutor then sought to explain his objection. Never mentioning Evidence Code section 352, he relied almost entirely on the trial court's

prior ruling that the present jury should not be informed in any way that there had been a prior hung jury on the penalty issue. The prosecutor did not believe the defense could present the former juror witnesses without revealing the fact they had served on the prior jury. Even if the defense did not reveal this fact on direct examination, the prosecutor would do so on cross-examination. (RT 201:23006-23010, discussed at T-AOB 154-155.)

When the trial court announced its ruling, it again said nothing about Evidence Code section 352, and it performed no balancing test. Indeed, completely absent from the prosecutor's objection and the trial court's ruling was any reference to the value of the proffered testimony to the defense case.

Instead, the trial court ruling first reiterated the court's absolute determination to avoid any mention whatsoever of the fact there had been a prior penalty trial. The court also referred to the totally unexplained fear that the prosecutor would need to rebut the defense testimony with testimony from the first trial jurors who had voted in favor of death – a possibility the trial court called "intolerable and completely improper", while offering no explanation of what relevant testimony the prosecutor could possibly hope to elicit from such other jurors. (RT 202:23123-23124, discussed at T-AOB 156-157.) The court added a further unexplained fear – that the present jurors would abdicate their responsibility and rely instead on the "findings" of the prior penalty jury, which had made no findings at all. (RT 202:23124, discussed at T-AOB 157.)

Thus, the trial court relied entirely on two fears – that the present jury would learn of the prior penalty trial and rely on findings that were never made, and that the prosecutor would "have to" call all the other jurors from the first trial. As shown in the opening brief (see T-AOB 179-183), and in subsequent sections of this argument, these fears made no sense at all and would be entitled to little or no weight if a proper Evidence Code section 352 analysis had ever been made. But all that is important for the present section of this argument is that no section 352 objection was ever made, and no section 352 weighing process ever occurred. In these circumstances, it is clear that appellate review of the trial court ruling must be based on the actual record below, and not on some hypothetical section 352 analysis that never occurred. (*People v. Bolin, supra,* 18 Cal.4th at p. 321; *People v. Anderson, supra*, 25 Cal.4th at p. 586. See also *People v. Paniagua* (2012) 209 Cal.App.4th 499, 517-519.)

2. The Proffered Testimony from a Former Juror and Former Alternate Juror Was Completely Different from Testimony Given by John Travis, Leo Charon, and Two Jail Guards and Was Not at All Cumulative

Apparently as part of an effort to make a section 352 analysis never made below, Respondent offers another new argument never made below – that the precluded witnesses were not at all important because their testimony would have been cumulative to other testimony offered by the de-

fense to show John Travis's jailhouse rehabilitation. This other testimony came from Travis himself, as well as Leo Charon and two correctional officers. (RB 159.) The problem was that the retrial jurors would likely view Travis's testimony as biased, based on his own self-interest, and Charon was repeatedly belittled by the prosecutor as a witness with an agenda.[3] Thus, evidence from other witnesses with no apparent bias in favor of Travis should not be considered cumulative. (See *People v. Sassounian* (1986) 182 Cal.App.3d 361, 401-402 [evidence that corroborates witnesses whose credibility has been attacked is highly relevant, requiring a correspondingly higher showing of prejudice to preclude admissibility].)

Neither the former juror nor the former alternate juror had any apparent bias. Both had survived a long and rigorous jury selection process, including detailed questioning regarding their attitudes about the death penalty, and each had been found acceptable to both the prosecution and the defense. Indeed, the former juror had been the foreperson of the jury that had found John Travis guilty of first-degree murder with special circumstances. Thus, there was a far lower probability that such testimony would be discounted as biased, compared to testimony from the defendant himself or from Leo Charon, rendering the proffered testimony non-

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3 See, for example, the discussion of the prosecutor's argument to the jury at T-AOB 169, demonstrating the prosecutor's attack on the credibility of John Travis and Leo Charon.

cumulative. If the prosecutor did choose to cross-examine the witnesses about their jury service (and the trial court allowed it), the defense could rebut any such impeachment by establishing the witnesses' opportunities during trial to learn about Travis's background in a way Charon could not personally have known.

It is true that the two correctional officers who testified for John Travis also could not be easily discounted as biased. However, they had a much more limited relationship with Travis than the former juror and alternate juror, who had learned every detail of Travis's history and of the crimes for which he had been convicted, and who had spent many hours engaged in very personal conversations with Travis. The correctional officers' testimony, while very helpful to the defense, was far more limited and impersonal than the kind of testimony from the prior juror and alternate juror that had been described in defense counsel's offer of proof. Thus, the precluded testimony cannot be properly rejected as cumulative.[4]

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4 Notably, before the first penalty trial, codefendant Silveria moved to limit victim impact testimony, specifically seeking to restrict the number of witnesses who could testify about the effect of the murder on any particular surviving relative. (CT 16:4040.) Nonetheless, the prosecution was permitted to present extensive testimony from Shirley Madden, the widow of the deceased, about the impact of learning about her husband's death. This was supplemented by repetitive testimony on these points by two of Mrs. Madden's co-workers and again by the officer who informed her of her husband's death. (See summary of testimony by Mrs. Madden (T-AOB 59-61, repeated in similar fashion at the penalty retrial), and similar testimony by co-workers Susan Thuringer (RT 250:29021-

(*Continued on next page*)

Aside from the great differences in potential biases among the actual and precluded defense witnesses, the evidence from the various witnesses was also very different in kind. As pointed out in the preceding paragraph, the former juror and former alternate juror had very different relationships with John Travis than the correctional officer witnesses. Thus, the precluded witnesses would have offered a very different perspective than the limited perspective of the correctional officers. Similarly, their perspective was very different than that of Leo Charon or of John Travis himself. Testimony so different in kind cannot be cavalierly dismissed as cumulative. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1054 ["The photographs were not cumulative to the testimony of the police detectives and medical examiner; rather, they illustrated that testimony and made its import clearer to the jury."]; *People v. Benavides* (2005) 35 Cal.4th 69, 96; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 7-8, discussed at AOB 166-167.)

Importantly, in the opening brief it was expressly shown that the United States Supreme Court has squarely rejected arguments that testimony very analogous to the present excluded testimony cannot properly be dismissed as cumulative. (See the discussion of *Skipper, supra,* 476 U.S. at pp. 3 and 7, at T-AOB 166-167.) Respondent counters that the only import

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(*Continued from previous page*)
29027) and Kay House (RT 250:29027-29035), and by Officer Brian Lane (RT 250:29036-29039). If none of this testimony was considered cumulative, then surely the testimony from the former juror and former alternate juror cannot be considered cumulative.

of *Skipper* is that "relevant mitigating evidence of jailhouse reformation could not be *categorically* excluded." (RB 160; emphasis in original.) Respondent's reading of *Skipper* is far too limited.

As discussed in the opening brief, the Supreme Court in *Skipper* expressly rejected a claim similar to the assertion by Respondent here. In *Skipper*, the defendant himself testified about his satisfactory behavior in jail and about his hope that in the future he would use his time productively and would not cause trouble. His former wife gave similar testimony. Thus, this evidence was **not** categorically excluded in *Skipper*. The defendant also sought to present corroborating testimony from correctional officers, and that was excluded. (*Skipper, supra,* 476 U.S. at pp. 7-8.)

The *Skipper* Court expressly noted that the precluded testimony could not be considered cumulative of the permitted testimony precisely because the correctional officers were more disinterested witnesses and their testimony was therefore likely to be given much greater weight by the jurors. (*Skipper, supra,* 476 U.S. at p. 7-8, discussed at T-AOB 167.) Thus, *Skipper* precisely rebuts Respondent's contention that the precluded testimony from the former juror and former alternate juror was cumulative of testimony from John Travis and Leo Charon. Respondent's cursory analysis fails to establish how the precluded testimony here was merely cumulative.

If anything, this case may be seen as stronger than *Skipper*. No less than the correctional officers in *Skipper*, the former juror and alternate juror

likely would have been perceived as free from bias here. At the same time, the precluded testimony was very different in kind from the correctional officer testimony and cannot be considered cumulative of that evidence. Moreover, to the extent that *Skipper* rejected the *categorical* exclusion of mitigating evidence, Respondent has nothing to say about the claim in the opening brief that the trial court *categorically* excluded testimony from any former juror. The trial court below never dismissed the former juror testimony as cumulative; instead, it was dismissed only because of the trial court's *categorical* refusal to permit testimony from any former juror, no matter how relevant it might be.

3. The Claim That Admission of the Former Juror Testimony Would Have Led to Rebuttal Testimony from Other Former Jurors Is a Complete Sham, Unsupported By Any Offer of Proof Whatsoever

Respondent repeats the bald assertion made below, that allowing testimony from the former juror and former alternate juror would have inevitably led to rebuttal testimony by other former jurors. But Respondent offers no support whatsoever for this assertion. Indeed, Respondent's total discussion of this point consumes only two sentences:

> "Further, if the defense witnesses were allowed, the prosecution would have had the opportunity to call other penalty trial jurors as rebuttal witnesses. The testimony of all these

> witnesses would have consumed an undue amount of time and risked confusing the penalty retrial jury." (RB 160.)

The brevity of Respondent's discussion of this point demonstrates the bankruptcy of this classic "sky is falling" argument. Indeed, the opening brief expressly noted that, "no suggestion was made by anybody as to how such rebuttal evidence could have been properly offered." (T-AOB 181.) Respondent's answer steers clear of "how" other jurors would be allowed to testify. If there was any support whatsoever for Respondent's position, some response to this clear point made in the opening brief would be expected.

Apparently the prosecutor below believed that the former juror and alternate juror would have offered their opinions that life without the possibility of parole was a suitable punishment, presumably opening the door to rebuttal testimony from other former jurors who believed death was the appropriate sentence. But no such testimony would have ever been allowed, and defense counsel's proffer never suggested the appropriate punishment was the subject of their proposed testimony. Instead, trial counsel's offer of proof made clear that the testimony he would elicit was based on relationships the witnesses had formed with John Travis during numerous visits over an extended period of time. Those relationships put the proffered witnesses in an excellent position to provide relevant opinions about the sincerity of John Travis claims.

In contrast, the People's opposition below never suggested any whose testimony legitimately could have been presented to rebut the juror testimony proffered by the defense. Indeed, at no time was it suggested that another juror had formed a relationship with John Travis, and was available to give relevant rebuttal testimony. Like the People below, Respondent fails to suggest what relevant testimony other former jurors could have offered. Respondent also fails to offer any other rationale for giving any weight whatsoever to the claim that other jurors would have been called in rebuttal. Respondent's hypocritical assertion is deserving of no weight and should be completely disregarded.

Similarly unavailing is Respondent's added bald assertion that the testimony and the phantom rebuttal would have been "confusing" and would have consumed an "undue" amount of time. It is difficult to fathom how the proposed testimony of the former juror and alternate juror would have taken longer than a few minutes for each. Indeed, the court would have no doubt carefully limited what the jury heard to relevant matters. Absent proper rebuttal beyond what the prosecution had already presented, in a short time the penalty jury would have had the benefit of valuable evidence available from no other source.

4. The Claim That Testimony from Former Jurors Would Have Caused the Present Jurors to Abdicate Their Responsibility Is Also Completely Unsupported

Respondent's next claim is as brief as the preceding one and is similarly unsupported:

> "Indeed, if the penalty retrial jurors heard such extensive testimony from former jurors, they might have abdicated their sentencing responsibility in deference to the first jury's findings, even if they did not know the first penalty phase had resulted in a mistrial." (RB 160.)

For one thing, if the jurors did not know the results of the first penalty trial, it is illogical to posit their deference to findings about which they had been told not to speculate. In any event, the simple answer to this concern is that the jurors could have easily been instructed not to do precisely what Respondent claims to fear; it should be presumed that the jurors would have followed such a focused instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 ["[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions"]; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["We presume that jurors comprehend and accept the court's directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and

faithfully follow instructions."]; *People v. Avila* (2006) 38 Cal.4th 491, 475; see also discussion at T-AOB 182-183.)

Notably, the trial court's ruling occurred eight days before ordering the penalty retrial to would be heard by a single jury for both defendants instead of two juries, as had been done during the first trial. In justifying that ruling, the court expressed full confidence that jurors would have no problem understanding and following instructions to give individualized consideration to each defendant even though it would be simultaneously deciding the fate of both of them. (RT 207:23582-23583.) Surely jurors who could be trusted to follow such an instruction could also be trusted to follow an admonition to decide the case for themselves and not be influenced by the fact there had been a prior hung jury.

Respondent's lack of faith in the integrity of the jury's fact-finding defies common sense. How could present jurors defer to the first jury's findings if they did not know what those findings were? And if the present jury did learn or discern the fact that the prior penalty trial resulted in a mistrial, despite proper instructions from the court, how is it that the jury could use that information to "abdicate" its responsibilities? Is Respondent claiming that the present jurors would have "deferred" to a prior hung jury by "deciding" to also fail to reach any verdict?

Appellant pointed out these flaws in the opening brief. (T-AOB 182-183.) Nonetheless, Respondent fails to address them. Thus, we simply do not know what Respondent is claiming, since Respondent fails to offer any

explanation at all. Once again, Respondent has taken a bankrupt position that lacks force in fact or law.

Moreover, in *People v. Homick* (2012) 55 Cal.4th 816, 882-884, this Court squarely rejected a position strikingly similar to the one apparently taken by Respondent here. In *Homick*, a defendant on trial for two capital murders in California had previously been convicted in federal court for crimes that arose out of the same acts as the California crimes, and many of the same witnesses who testified at the federal trial then testified at the California trial. When witnesses were examined during the California trial, there were some references to their prior testimony in the federal trial, despite an order from the trial court that no mention be made of the federal trial.

One major prosecution witness was a codefendant whose trial had been severed from Mr. Homick's trial. The codefendant had been tried first and convicted of murder with special circumstances. He then made a bargain with the prosecution to testify against his codefendants, in both the federal and California prosecutions, in return for a prosecution agreement not to seek the death penalty against him.

When this key prosecution witness took the stand in Mr. Homick's trial, the trial judge gave up the notion of keeping mention of the federal trial from the jury, and instead instructed the jury that there had been a prior federal trial at which the witness had pled guilty and testified against all the other defendants. On appeal, Mr. Homick contended the trial court

erred because the court's instruction implied that he had been convicted of the federal charges. After first finding the claim forfeited because trial counsel had not objected to the instruction, this Court added that even if preserved defendant's contention would have been rejected. As this Court explained:

> "... Nothing in the statement suggested the outcome of the federal proceedings with respect to defendant. Defendant's claim that the instruction unmistakably implied to the jury he was convicted and thus 'diminished [their] feelings of responsibility' is wholly speculative and without support in the record." (*People v. Homick, supra* at p. 884.)

Even more so in the present case, if testimony from a former juror had revealed to the present jury that the prior hung jury, *Homick* reasoned the supposition that the present jurors might have abdicated their responsibility was "wholly speculative and without support in the record." (*Id.*) Respondent's fear is groundless, as in *Homick*.

5. Respondent's Remaining Claim, That the Proffered Testimony Might Have Revealed the Fact That There Had Been a Prior Hung Jury, Is Also Meritless

Respondent describes the trial court's concern as being that, "[t]he former jurors' testimony would ... likely have revealed the existence – and perhaps the result – of the first penalty trial." (RB 159.) Again, no further

analysis is offered. Again, the opening brief set forth the flaws in this supposed concern. (See T-AOB 179-181.) Again, Respondent has nothing at all to say about these asserted flaws.

Perhaps the best illustration that this was not nearly as big a problem as Respondent asserts is contained in the trial court's own words. Later in the trial, when Dr. Timmen Cermak began his testimony as a defense expert, the trial court reminded counsel they should not make any reference to the fact that Dr. Cermak had testified in a prior *penalty* trial. It was permissible to refer to testimony at a prior trial, but not to specifically identify that prior trial as a penalty trial. But the court then added, "Because otherwise I will inform the jury of exactly what happened in the past and let the chips fall where they may." (RT 267:31918.)

This amply demonstrates that the trial court did not believe a fair trial was impossible if the jury did learn that there had been a prior penalty trial. The court saw no need to wait to see which side might inadvertently refer to the prior penalty trial, or whether an admonition would cure any harm. Instead, the court was willing to "let the chips fall where they may," if the fact of a prior penalty trial became known.

In any event, courts have often deemed it preferable to avoid giving jurors knowledge of the results of prior trials; but in these circumstances and in others closely analogous, such a preference has regularly given way to the need to present relevant evidence, even if it might disclose potentially prejudicial evidence. For example, efforts are routinely made to keep a

jury from learning that a defendant on trial is incarcerated rather than at liberty on bail. (*People v. Taylor* (1982) 31 Cal.3d 488, 499 and 501.) However, any prejudice from learning that a defendant is incarcerated has long been found insufficient to preclude admissibility of letters the defendant mailed to his fiancé from jail, when those letters were relevant to prove a consciousness of guilt. (*People v. Hunt* (1982) 133 Cal.App.3^{d} 543, 559-560.)

Similarly, the fact that a defendant is a member of a gang is another example of potentially prejudicial evidence that would normally be inadmissible. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) Nonetheless, such evidence of gang membership becomes admissible despite its prejudicial impact when it is relevant to prove some fact in issue. (*People v. Frausto* (1982) 135 Cal.App.3d 129, 140.) As another example, Evidence Code section 1101, subdivision (b) expressly provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact ... other than his or her disposition to commit such an act." This clearly demonstrates state reliance on the principle that evidence normally deemed very prejudicial can nonetheless be properly admitted when the evidence is relevant.

Respondent's claim is meritless. The proffered evidence in the present case was highly relevant and was a critically important part of the defense case-in-mitigation. If the testimony of former jurors did reveal the

fact of the prior hung jury, it would have been easy to fashion an admonition to disregard such a fact. Even if the jurors were unable to disregard that fact, it is totally speculative whether knowledge of a prior hung jury would sway a juror in favor of one side or the other.

6. The Refusal to Allow the Proffered Evidence Was Error, Whether Based on Any or All of the Factors Relied on Below, or on the Evidence Code Section 352 Analysis Sought By Respondent for the First Time on Appeal

As demonstrated in the previous three subsections of this argument, none of the reasons set forth by the trial court withstand analysis. First, the concern that other jurors would be called in rebuttal is specious; no basis has been shown that would have allowed the testimony of any other former juror, in the face of a relevance objection. Second, testimony could have been structured to avoid revealing to the present jury that there had been a prior hung jury. Alternatively, even if the testimony revealed the fact of the previous deadlock, any potential danger could have easily been obviated by appropriate admonition. Third, it is entirely speculative to claim that knowledge of the prior hung jury would corrupt the present verdict. Neither the trial court nor the prosecutor below, nor Respondent on appeal, have provided any reason to believe that knowledge that a prior jury failed to reach a unanimous verdict would cause the present jury to do the same, or

would push the present jury in favor of a death verdict or against a death verdict.

In these circumstances, for any or all of the reasons relied on by the trial court, it was an abuse of discretion to disallow the testimony of the former juror and former alternate juror. This was important evidence of value to the trier of fact, and the court's cryptic refusal to allow it undermined the penalty phase determination.

It has been shown above that neither the prosecutor nor the trial court below relied on any Evidence Code section 352 analysis, rendering such an analysis inappropriate on appeal. Nonetheless, even if the People properly may invoke section 352 for the first time on appeal, the result should be the same, especially since section 352 discretion is more circumscribed at a penalty trial than it would be at a guilt trial. (*People v. Box* (2000) 23 Cal.4th 1153, 1201.)

The defense need for the testimony from the prior juror and alternate juror was great. (See AOB 185-188.) Their testimony would have strongly corroborated the testimony of Leo Charon, whose credibility was repeatedly attacked, usually by disingenuous means, that the prosecutor would not have been able to exploit with witnesses associated with just jury service. Thus, the proffered testimony was highly relevant and critically important to the defense.

Weighed against this high probative value, the danger of undue prejudice to the People was negligible or non-existent. The proffered testimony

was not cumulative since it was of a different kind and since it would have corroborated an important defense witness whose credibility the prosecutor had attacked. There was no showing whatsoever that the proffered testimony would have resulted in any undue consumption of time. There was little or no danger that the testimony would have caused any confusion of the issues or would have misled the jury in any way. Far from it; without this testimony, the People below were able to confuse the jury by their unfair attacks on the credibility of Leo Charon.

In sum, the probative value carried great weight, and the factors relied on by Respondent should carry little, if any, weight. Under these circumstances, any preclusion of this testimony based on a section 352 analysis would be a clear abuse of discretion.

7. The Erroneous Exclusion of the Testimony of the Prior Juror and Prior Alternate Juror Was Highly Prejudicial

In the opening brief, it was shown in detail that the erroneous exclusion of this critically important defense evidence was prejudicial. (T-AOB 185-191.) Respondent does not even attempt to argue that, if there was error in excluding the proffered evidence, it was harmless beyond a reasonable doubt. The probative value of the evidence disallowed by the court's was great and was entitled to considerable weight. Bolstered by the precluded testimony, it is reasonably possible that the opinions offered by Leo

Charon would have been accepted, rendering it reasonably possible that the jurors would have concluded that life in prison without the possibility of parole would have been deemed an appropriate sentence. Thus, for the reasons set forth in the opening brief, if error is found in the exclusion of this evidence, that error should be deemed prejudicial. Reversal is necessary.

II. THE TRIAL COURT EFFECTIVELY, BUT ERRONEOUSLY, EXCLUDED PROPER TESTIMONY FROM DEFENDANT TRAVIS'S COUNSEL BY PLACING UNREASONABLE CONDITIONS ON SUCH TESTIMONY (Respondent's Argument XV)

A. Introduction

As a result of the trial court's two devastating rulings, explained previously, that the former juror and former alternate juror would not be permitted to testify (see Argument I, *ante*, and T-AOB 136-191), and that, unlike the first trial, the penalty retrial would have only one jury simultaneously hearing all evidence pertaining to either defendant (see Argument V, *post*, and T-AOB 328-372), defense counsel concluded there was only one remaining person who could effectively corroborate Leo Charon: himself. Many long discussions over a six-year period had convinced counsel that John Travis was sincere about achieving a mature understanding of the damage that drug and alcohol addiction had caused him. But once the trial court made clear that any testimony from defense counsel would be limited so thoroughly that no character evidence at all could be given, and only unnecessary expert opinions could be voiced, and that even that limited testimony would necessitate a complete waiver of attorney-client privilege and an in camera review of trial counsel's entire file, defense counsel concluded he should forego that option and elected not to testify at all. The Opening Brief demonstrated that the limitations imposed by the trial court were un-

supported and constituted serious error that deprived John Travis of a variety of federal constitutional rights. (T-AOB 192-227.)

Respondent contends that the claim is moot because the trial court never made any actual ruling at all, and instead merely engaged in idle conversation. (RB 163.) Respondent also contends that even if the issue is not moot, there as still no error since the proffered testimony was unimportant and any weight it carried would have been reduced even further by "extensive" cross-examination about counsel's supposed bias. (*Ibid.*) Ignoring the actual calendar of events, Respondent additionally claims the defense delayed unreasonably before initiating court consideration of the possibility of testimony by defense counsel, and this, in turn, would have led to an unreasonable delay in the penalty retrial itself. (RB 163-164.) Respondent further contends that the trial court was somehow in a better position than defense counsel to determine what was best for John Travis, so that speculative concerns about possible harm to the interests of the defense should have trumped the defense's own conclusions about the best way to proceed. (RB 164-165.)

Finally reaching the merits, Respondent first sees no error in restricting defense counsel's testimony so as to preclude any character evidence, which was all that the defense really wanted to provide. (RB 165.) Second, Respondent sees nothing wrong with requiring a full and complete waiver of attorney-client privilege on all matters pertaining to the issues of guilt or penalty or anything else ever discussed by Mr. Travis and the attorney who

had represented him for six years, even though any testimony from defense counsel that might be permitted would be so limited as to be meaningless. (RB165-166.)

No support is offered for Respondent's argument, except for two citations standing for of broad and uncontested legal principles. (RB 163 and 164.) Respondent simply ignores almost every point made in the opening brief, and offers little more than broad conclusions unsupported by authority or analysis. In this reply argument, it will be shown that each of the brief and unsupported points made by Respondent cannot withstand critical analysis.

B. The Issue of Defense Counsel's Entitlement to Testify Was Fully Preserved Below and Not Rendered Moot By the Procedural History in the Trial Court

The necessary procedural history was fully set forth at T-AOB 193-202, with full citations to the record. Summarizing that discussion, after two rulings that gutted the planned defense, trial counsel informed the court that he planned to testify on his own client's behalf, since he was the only remaining person who could corroborate Leo Charon's opinions. The prosecutor objected to such testimony and the trial court ordered defense counsel to supply briefing on the matter. After thirteen days (which included two weekends and a mid-week Christmas holiday), defense counsel supplied that briefing, explaining the jurors at John Travis's first trial who had

voted for a death sentence had explained that they questioned the credibility of Travis's claim that he was in recovery from drug and alcohol addiction. The strongest support for that claim had come from Mr. Charon, but the force of his testimony would be diminished at the retrial because of the ruling that he would have to testify on behalf of both defendants before a single jury.

Defense counsel's motion next explained that aside from the former juror and former alternate juror, whose planned testimony about the recurring meetings with John Travis over an extensive period had been disallowed by the trial court, counsel himself was the only remaining person who had talked extensively enough with Mr. Travis during his six-year incarceration. Thus, he was the only remaining witness who could corroborate Leo Charon with character evidence supporting the sincerity of John Travis's claimed mature understanding of his drug and alcohol addiction problems, and the sincerity of Travis's remorse over his part in the murder of the victim. In sum, the case was close enough that the first jury had been unable to reach a unanimous verdict, and the defense strategy at the retrial was to fortify the most important portion of the defense presentation that had been found unpersuasive by the jurors who had voted in favor of a death sentence. The defense motion also provided full legal authority allowing a defense attorney to become a witness when unanticipated events made such testimony necessary for the presentation of a proper defense.

Despite Respondent's claim, made for the first time on appeal, that time was of the essence and that defense counsel had delayed unreasonably, the prosecution waited a full thirty-one days before filing its five page response. (CT 18:4631-4636.) That response relied on the potential dangers posed by testimony from defense counsel, and contended that there were many other ways to provide the evidence the defense required, although the prosecutor declined to suggest what any of these many other ways might be that he would find unobjectionable. (CT 18:4634.) Notably, the prosecutor below **never** contended that defense counsel had delayed unreasonably in bringing the issue to the attention of the court.

When the motion was argued in the trial court, defense counsel explained in more detail the nature of the testimony he proposed to give, and also made clear that his client was prepared to give a waiver of attorney-client privilege that would allow the prosecution to fully-cross-examine counsel on the matters that would be contained in his direct testimony. (RT 233:27293-27297, summarized at T-AOB 198-199.)

In response, the trial court made it abundantly clear that it would require a full and complete waiver of attorney-client privilege, and the court was not moved by counsel's reminder that guilt and innocence were no longer at issue. After the prosecution and counsel for the codefendant argued, defense counsel for Mr. Travis asked if he could clarify one point, but the court refused to hear whatever he wanted to say. The trial court de-

clined to provide an actual ruling, but instead set forth a number of requirements he suggested counsel contemplate over the upcoming weekend.

To begin with, the trial court lectured defense counsel about how foolish the court considered counsel's proposed testimony. (RT 233:27304-27305.) Next, the court stated in unequivocal terms that if counsel was allowed to testify, he could do so only in the capacity of a certified drug and alcohol counsel and not as a character witness. The court soon added, "there's going to be a definite line drawn if this happens." (RT 233:27306.) Despite the seemingly absolute nature of the conditions the trial judge intended to impose, he then insisted he was not making a ruling but was just setting forth his thoughts, for counsel to think about. (*Id.*) Nonetheless, the court then emphasized, "As I indicated, there's going to have to be a complete waiver by Mr. Travis of all attorney-client privileges." (*Id.*) Further, the court would conduct an in camera review of trial counsel's **entire** file or boxes or whatever might be the form of defense counsel's papers.(*Id.*)

Besides these conditions, the court added that defense counsel would have to make himself available for interviews by the prosecutor and counsel for codefendant Silveria. (RT 233:27307.) And the trial judge warned Mr. Travis's counsel: "[i]f this happens, there's going to be no delays in this trial by anybody." (RT 233:27307.) Explaining that he would get his formal decision together "as fast as I can," the judge scheduled a hearing for a few days later, and gave no indication that he expected any further input from counsel for either side. (*Id.*) Thus, when the matter was just over,

the state of the record left little question that several conditions would have to be fully satisfied before the court would allow counsel to testify.

At the next hearing, the trial court did not invite any further discussion, but simply asked, "[r]egarding Mr. Leininger's [counsel for Defendant Travis] and Mr. Travis's desire to have Mr. Leininger testify as an expert in alcohol and/or drug recovery, is that still the motion or not?" (RT 235:27391.) At this point, nothing had changed. The limitations and conditions imposed by the court's previous statements to counsel and about which the judge had been adamant had not in any way become less inflexible, as implicitly appears in the court's last phrase ("is that still the motion or not?").

On this record defense counsel had no basis for expecting the court to entertain additional argument. The court had received written points and authorities from the defense and prosecution, had heard argument from all parties, and then had refused to hear more from counsel while stating it would have a ruling ready by the next hearing pertaining to this motion. Counsel had made his position clear and really had no more to add. The court had all the information it needed to proceed to a formal ruling. The strong terms that had been used when the court had announced its "guidelines" at the prior hearing left no reason to believe the court could be persuaded to adopt a less absolute position.

It was in this context that defense counsel stated to the trial judge that, given the court's restriction disallowing counsel's ability to testify as

to any character evidence, the entire reason for his testimony was defeated. Counsel explained further that his purpose had been to compensate for the loss of the *character evidence* that would have been given by the former juror and former alternate juror, whose testimony had been precluded. In light of that restriction, there was no reason left for counsel to testify. (RT 235:27931.)

Nonetheless, defense counsel added, his position had not changed: "The record is clear, I think, about my request, my desire. I'm not going to withdraw the motion...." (RT 235:27392.) Rather, it was due to the restrictions imposed by the court that there was no point in his testifying. (*Id.*)

After a brief diversion, when defense counsel discussed difficulties he was having in getting funding for experts (RT 235:27392-27394), the court returned to the subject of counsel's aborted desire to testify. However the trial judge did not intimate any change in the restrictions he had set forth the preceding week, nor did he invite any further input from counsel regarding whether the preclusion of character evidence should be absolute. Instead, the judge simply said to counsel and Mr. Travis that he believed they had made the right decision. (RT 235:27394-27395.)

Considering this entire context presented fully by the record, it is disingenuous of Respondent to now claim that the matter was rendered moot when defense counsel stated he did not wish to testify, before the court made its formal ruling that counsel could only testify under the guide-

lines that had been pronounced. (RB 163.) To the contrary, the court had stated its position clearly in unequivocal and absolute terms. Trial counsel made it equally clear that the court's unequivocal and absolute conditions before permitting him to testify were unacceptable; at the same time counsel emphasized he was **not** withdrawing his motion. The hearing had been set solely for the purpose of the court announcing a formal ruling; had the court reconsidered the matter since the last hearing, and on reflection concluded that defense counsel should be allowed to testify under less restrictive conditions, the court had ample opportunity to inform counsel of that fact, and no doubt would have done so. Instead, implicitly refusing to alter its intended ruling, the court simply informed counsel he had made the correct choice.

In these circumstances, any further effort by counsel to persuade the court to ease the announced restrictions, or to insist on a formal ruling, would have been entirely futile. Neither argument nor objection is required to preserve a point when it would have been futile to argue or object. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 852-853.) Instead, counsel here simply recognized the fact that his testimony would not be permitted to encompass character evidence that could substitute for the precluded testimony from the former juror and former alternate juror. Making crystal clear that he was **not** withdrawing his motion, he also gave the only rational response he could give

to the trial court's query whether he still desired to testify as an alcohol and/or drug recovery expert -- an untenable position counsel rightly refused to accept as a condition to testifying.

Indeed, the court's query, itself, recognized that the "guidelines" had shifted the pending issue away from whether counsel still wanted to give character testimony, to the far more limited question that remained "[r]egarding Mr. Leininger's [Defendant Travis's counsel] and Mr. Travis's *desire to have Mr. Leininger testify as an expert in alcohol and/or drug recovery*, is that still the motion or not?" (RT 235:27391; emphasis added.) In other words, the court expressly recognized that its guidelines had greatly narrowed the issue, and counsel responded by making it as clear as possible that he was not withdrawing his original broader motion; instead counsel had concluded there was no point in testifying pursuant to the guidelines that precluded any character testimony. It was as clear as it could be that the court had precluded counsel from giving character testimony; to insist that the court state what everybody obviously understood was futile. Respondent's view of the record is patently incorrect.

C. The Precluded Testimony Was Critical To The Defense Case-In-Mitigation

Respondent's claim that the character evidence counsel wished to present was not critical (RB 163) fares no better. It was already shown in the preceding argument (ARB 13-18, *ante*) that evidence from witnesses

who had a strong personal relationship with John Travis and could testify to the sincerity of his achieved mature understanding of the harm that drug and alcohol addiction had caused him, and the sincerity of his remorse regarding his part in causing the death of the victim, was vitally necessary to corroborate the testimony of Leo Charon, whom the prosecutor had sought so hard and so unfairly to discredit. The proffered testimony from the prior juror and prior alternate jurors was certainly the best evidence for this purpose, but once that testimony had been precluded, trial counsel was the only remaining witness who could fill the gap.

In whatever form, and whatever the source, that evidence was the centerpiece of the defense case-in-mitigation. There could be no credible urging of lingering doubts about guilt in a case where the defendant had fully confessed before counsel was even appointed, and had taken the stand and acknowledged the truth of his confession. The trial court had already precluded any argument for mercy, or even any use of the word. (See Argument III, *post* and in the opening brief.) In these circumstances, the entire focus of the defense case-in-mitigation was based on persuading the jurors that John Travis was no longer the same person he had been when the murders had occurred years earlier.

At the time of the murders, John Travis was a young man, and was even more immature than his youthful age would indicate. His deprived upbringing, one that left him largely unsupervised during his most formative years, leading to drug and alcohol addiction by the time he was in his

early teens, was uncontested by the prosecution. There could be no denying the fact that drug and alcohol abuse had led Travis and his codefendants to concoct the hopelessly immature plans that resulted in the death of the victim.

With that backdrop for the penalty retrial, John Travis's only hope was to persuade the jurors that something had drastically changed between the time the murder occurred in January 1991, and the time of the penalty retrial in February 1997. Leo Charon dramatically provided just that evidence, but his testimony was hampered by generic insinuations of bias and by the fact that he had also testified in favor of the codefendant, in front of the same jury. The proffered testimony from the prior juror and prior alternate juror would have overcome both of these problems, but that testimony had been precluded. If trial counsel had been permitted to give the desired character evidence that would have strongly corroborated Charon's testimony, his testimony still might have been vulnerable to generic claims of bias in favor of his own client, but at least its source would not have been a witness who had also testified in favor of the codefendant.

Respondent also claims that counsel's testimony was unnecessary because the subjects were already covered by other witnesses – John Travis, Leo Charon, expert witnesses Cermak and Lutman, and two correctional officers. However, as already shown in Argument I, section A (2), *ante* at pp. xx-xx, all of these witnesses, other than the two expert witnesses, were not adequate substitutes for the character evidence that the pre-

cluded juror and alternate juror would have supplied. The same reasoning applies here. In regard to the two expert witnesses, while their testimony was very helpful to the defense, it was based on a clinical relationship that in no way could be compared to the very personal relationship that had developed between Mr. Travis and his attorney over a seven-year period which included a prior full and lengthy guilt and penalty trial.

Counsel obviously had a great many visits with John Travis and was in the very best position to observe his client's growing maturity over their six-year relationship. Dr. Cermak's contacts with Travis paled by comparison. Indeed, prior to the date of the last hearing on defense counsel's motion to permit his own testimony, Dr. Cermak had only interviewed Travis three times in person (once in 1992 and twice in 1995) and once by phone (in 1996).[5] (RT 267:31925.) Dr. Cermak testified only as an expert witness, not as a character witness. Thus, the proffered testimony from trial counsel was totally different from the testimony given by Dr. Cermak, and the latter was not an adequate substitute for the former.

Ms. Lutman was in an even worse position to serve as a substitute for the kind of evidence trial counsel would have provided. She was a nurse and chemical dependency counselor who was not even contacted about being a witness until March 1997, when the penalty trial was underway, and

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5 Dr. Cermak interviewed John Travis one more time, in mid-March 1997, after the penalty trial was already underway. (RT 267:31925.)

well **after** the hearings on defense counsel's motion to testify. (RT 265:31527-31528, 31536.) Lutman had met with John Travis only once, conducting a ninety-minute interview. (RT 265:31539.) Again, while her testimony was helpful, it was no substitute for character testimony from a witness who had talked to Mr. Travis on a great many occasions over a six-year period. Having met with him only once, at the very end of the six-year period, Ms. Lutman was in no position to provide character evidence about the fundamental changes in Travis's self-awareness that trial counsel had personally observed.

Respondent's last point regarding the asserted unimportance of testimony from trial counsel actually reinforces the error in its exclusion. According to respondent, defense counsel would have been subjected to extensive cross-examination about bias, which "may" have substantially reduced the weight the jury would have given to such testimony. (RB 163.) First, this contention is entirely speculative, as evidenced by Respondent's own use of the word "may," and by Respondent's factually unsupported "sky-is-falling" style of argument. We simply cannot know what would have occurred during the cross-examination of defense counsel that never happened. Second, granted that the prosecutor would have done his best to try to persuade the jurors that trial counsel was biased in favor of his client. it is not at all clear what the prosecutor could have done to go beyond the obvious fact that trial counsel was testifying in his client's behalf while presenting his defense and urging the jury not to return a death verdict.

Respondent offers no examples to support the contention that cross-examination about possible bias would have been "extensive." Indeed, it is difficult to imagine many questions the prosecutor might have asked that would not risk a response that could hurt the prosecution case.[6] Also, repetitious efforts to hammer home the obvious point that defense counsel had some biases in favor of his client, assuming the judge did not cut the prosecutor off, likely would have carried the risk of alienating the jury. In sum, there is simply no basis to believe that any cross-examination on this point would have been "extensive." Respondent's "sky is falling" position is unfounded.

D. There Was No Need for Any Substantial Delay in Order to Allow Defense Counsel to Testify and There Was No Unreasonable Delay in Bringing the Issue to the Court's Attention

Respondent lumps together two claims that are related, albeit independent; both are without foundation. Respondent first contends that allowing defense counsel to testify would have resulted in a substantial delay of

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6 For example, if the prosecutor asked, "isn't it true you would utilize any tactic you could think of to avoid having your client sentenced to death", defense counsel might respond: "No, counsel. Personally, I think the death penalty can be appropriate in the right case. This just isn't the right case." In other words, almost anything the prosecutor could have asked would have opened the door to a harmful response from an experienced defense attorney.

the penalty trial; then Respondent asserts that the delay was even more unreasonable because it was attributable in part to defense counsel's "substantial delay" in bringing the issue to the court's attention. (RB 163-164.) Respondent's first point is unsupported and the latter point is simply untrue.

In explanation of the initial point that the defense delayed unreasonably, Respondent simply states that the testimony of the former jurors had been excluded on December 2, 1996, but trial counsel did not raise the possibility of being a witness for his own client until sixteen days later, on December 18. (RB 164.) Respondent completely ignores another very important event.

Defense counsel's desire to offer his own testimony was based in part on the need for a replacement for the precluded testimony from a former juror and former alternate juror. However, when counsel first brought the matter to the trial court's attention, he emphasized the importance, in his decision to seek to testify, of the trial court's ruling that the penalty retrial would be heard before a single jury for both defendants, rather than separate juries as had been utilized for the original trial. Counsel concluded that would make Leo Charon a much less persuasive witness for John Travis. (RT 211:23965-23966.) That ruling had not occurred until December 10, 1996. (RT 207:23581-23584.) Thus, trial counsel brought the matter to the court's attention only eight days after this crucial ruling.

The decision to offer his own testimony in support of his client was certainly a major one, and far from an everyday occurrence in a criminal

case. Trial counsel cannot reasonably be faulted for taking just over a week to think the matter through, to consider whatever other options might have been available, to conduct legal research on the propriety of pursuing such a course, and on the ethical implications, and to discuss with his client the ramifications of such action, including the need for a waiver of at least some portion of the attorney-client privilege.

Respondent also fails to mention that trial counsel had much else on his mind during those eight days; the ruling that the retrial would be before a single jury occurred early on December 10, 1996, but the remainder of that day was spent on jury selection. (RT 207:23541-23640.) This was followed by two more full days of jury selection. (RT 208:23641-23747 and RT 09:23752-23853.) Jury selection in a death penalty trial is a very demanding process, with full days spent in court and hundreds of pages of juror questionnaires to review each evening.

Counsel then had a four-day weekend to catch his breath and contemplate the possibility of his own testimony. The next court day was another full day of jury selection. (RT 210:3854-23923.) The day after that was the day that counsel brought up the possibility of testifying on behalf of his client. Under these circumstances, the suggestion that counsel delayed unreasonably before advising the court of his desire to testify on behalf of his client is ludicrous.

Respondent also neglects to note that the evidentiary portion of the trial did not begin until February 18, 1997 (RT 235:27598), and John

Travis's first witness was not called until April 2, 1997 (RT 264:31234). Thus, three-and-one-half months passed between the date the court was notified of defense counsel's desire to testify, December 10, 1996, and the start of the presentation of defense evidence. Had it become necessary to appoint new counsel for the limited purpose of handling the examination of defense counsel and perhaps arguing the portion of the penalty case pertaining to testimony presented by defense counsel, there was ample time for new counsel to become prepared without necessitating delay in the penalty retrial. There would have also been ample time for the trial court to conduct an in camera review of the portions of defense counsel's file that were relevant to any proper cross-examination of defense counsel.

Moreover, Respondent exaggerates in speculating that new counsel "would have required substantial time to familiarize him- or herself with the case and prepare for the penalty retrial." (RB 164.) To the contrary, new counsel's job would have been extremely limited and focused. All that was needed was enough preparation to enable new counsel to examine defense counsel regarding his familiarity with John Travis's growing maturity in understanding his drug and alcohol problems and the harm they had caused him, and regarding defense counsel's perception of the genuine nature of John Travis's remorse for his role in the death of the victim. Indeed, defense counsel could have written a full script for new counsel's direct examination; that alone would have supplied most of the information needed for new counsel to handle cross-examination of defense counsel.

In short, with the broad overview of the case that defense counsel would be expected to provide, there was no need for new counsel to become familiar with every detail regarding the first trial and any expected differences in the penalty retrial. At most, if cross-examination of defense counsel took any unexpected turns, a brief recess would have enabled new counsel to confer with defense counsel regarding any other information that was necessary to allow new counsel to fully protect John Travis's interests. Nothing in the record suggests new counsel would have been unable to proceed in this narrow framework without holding up the trial while preparing.

E. Defense Counsel, and Not the Trial Court, Was in the Best Position to Protect the Interests of John Travis

Citing a single case for the proposition that the trial court had an affirmative duty to protect John Travis's right to the effective assistance of counsel (see RB 164, citing *Smith v. Superior Court* (1968) 68 Cal.2d 547, 559), a case meant to shield a defendant from the trial court's interference with his best interests, Respondent constructs a novel argument that if trial counsel had testified, there would have been several potential risks: 1) defense counsel would have had to be replaced by an attorney with less familiarity with the case; 2) defense counsel would have risked his credibility as an advocate by testifying as a witness; and 3) he would have been subject to cross-examination about various privileged communications which could

have weakened John Travis's defense. As a result, Respondent reasons, a trial court "solicitous of Travis's right to effective representation" would have properly acted within its discretion by refusing to allow defense counsel to testify. (RB 164-165.)[7]

Respondent's effort to find support for that proposition from *Smith v. Superior Court, supra*, demonstrates its lack of substance. Indeed, *Smith* points in precisely the opposite direction. There, the trial court formed its own opinion that defense counsel was providing ineffective assistance of counsel and removed appointed counsel over the objection of the defendant and the attorney. (*Smith, supra,* 68 Cal.2d at p. 249.) On appeal, this Court

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7 In a footnote, Respondent cryptically comments that there was no written waiver by John Travis, as required by the State Bar before an attorney acts as both advocate and witness. (RB 164-165, fn. 50.) If meant to convey an earnest concern for protecting Travis's rights (and that is why the State Bar has that rule), Respondent's acknowledgement that defense counsel had stated his client was willing to waive any privilege of confidentiality he had in regard to testimony by his counsel certainly obviated any legitimate concerns. Since Travis was present during these hearings, and counsel had made clear that he had discussed the matter of such a waiver fully with his client, Respondent's point appears to be specious

Besides that, the trial court's clear insistence on limiting defense counsel's testimony in a manner that would exclude the only evidence he wished to offer ended the matter before it reached a point where a written waiver would have been required. Clearly the defense intended to supply whatever waiver would have been required if the point of actual testimony by trial counsel had ever been reached. The trial court never relied on the absence of a written waiver as a reason for precluding the evidence the defense had sought to offer. Thus, Respondent's point remains a *non-sequitur*.

simply noted in passing that "[c]ounty counsel, as attorney for respondent court, correctly points out that it is the duty of the trial judge to protect the defendant's right to a counsel who is effective." (*Id.*, at p. 55.) Moreover, in the very next sentence, this Court added: "But in discharging that duty the judge must be on his guard neither to infringe upon the defendant's right to counsel of his choice, nor to compromise the independence of the bar." (*Id.*)

Even more importantly, in *Smith* itself this Court went on to conclude that, despite any theoretical duty to protect the rights of a defendant to effective assistance of counsel, the trial court's order removing appointed counsel exceeded its authority. (*Smith, supra*, 68 Cal.2d at p. 562.) Thus, it did not hold what Respondent claims. Respondent has cited no authority whatsoever for actually utilizing this so-called duty to protect defendants as a basis for overriding the decisions made by a defense attorney.

More to the point is one of the principles expressed by this Court in *Smith* in reaching its conclusion that the trial court had exceeded its authority, quoting this Court's prior opinion in *People v. Crovedi* (1966) 65 Cal.2d 199, 206, *Smith* explained that it is "'the state's duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command.'" (*Smith, supra*, 68 Cal.2d at p. 559.) That, of course, is precisely the principle that appellant is relying on in arguing that the trial court

improperly interfered in John Travis's desire to defend himself in the manner he deemed best.

Even if there were authority allowing trial courts to override strategic decisions made by defense counsel,[8] it would have been improper to use it in this specific instance. Respondent's list of risks to the interests of John Travis (see RB 164-165) is greatly exaggerated.

Respondent's first stated fear, that defense counsel would have had to be replaced by an attorney with less familiarity with the case, is without substance. As already shown in the preceding sub-section of this argument, the problem's resolution was far less complicated than Respondent describes. All that would have been necessary was the appointment of new counsel to handle a very specific and narrow area of examination and argument, which could have been scripted by defense counsel based on his familiarity with the case. Respondent has not shown any basis for conclud-

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8 None is cited because the point poses an important distinction that Respondent overlooks. Of course trial courts can "override" strategic decisions made by defense counsel in the sense that a proper ruling disallowing desired evidence can force defense counsel to pursue a different strategy. But this portion of Respondent's argument baldly asserts that the trial court had a duty to weigh the pros and cons of a choice from the perspective of the defendant and preclude a defense attorney from pursuing a strategy simply because the trial court believed the defendant would be better served by a different strategy. No known authority supports that remarkable position.

ing that defense counsel would have had to be relieved and new counsel appointed to handle the entire penalty trial.

Respondent's second identified risk was that defense counsel's credibility as an advocate might have been weakened if he also became a witness. While more realistically a concern, for counsel the alternative was that the entire defense case-in-mitigation would be in jeopardy. The lack of any witness who had actually known and observed John Travis over his six-year period of growing maturity, and who could corroborate the crucial testimony of Leo Charon severely weakened Travis's defense. It was the job of defense counsel to weigh those two risks and determine which was the greater. Hard choices must be made in some situations, and this was clearly one of those situations.

Respondent's third asserted concern was that defense counsel would have been subject to cross-examination about various privileged communications. Again, if that posed a risk, it was one that defense counsel was in the best position to assess. Neither Respondent nor the trial court could know what was said in confidence between Travis and his counsel, but defense counsel did know and could best determine whether there was any real risk.

After all, John Travis had fully confessed before court proceedings had ever been instituted. His guilt had already been determined by a prior jury, and the issue at the retrial was limited to penalty. It is entirely possible that he had never said anything to defense counsel which would have added

to the information that the prosecutor already possessed. Certainly there is no obvious area about which defense counsel would have had a serious concern, and quite possibly there was no such area at all. As with other potential risks, this was clearly a decision to be made by the defense and not the court. (*People v. Crovedi, supra,* 65 Cal.2d at p. 206.)

In sum, trial counsel might well have known that there was no risk at all that the prosecution would learn anything damaging to John Travis's defense. Alternatively, if there was such a risk, counsel had obviously considered it and found that it was outweighed by the risk of leaving Leo Charon's testimony uncorroborated. The latter risk was very real in view of defense counsel's conversations with jurors from the first trial who had voted in favor of a death sentence and who had identified that specific problem as the main basis for voting as they had.

F. The Trial Court Had No Proper Basis for Precluding Defense Counsel from Giving Character Evidence Regarding His Client

In a single paragraph, Respondent set forth several reasons for upholding the trial court's restrictions on defense counsel offering any character evidence should he testify regarding John Travis. (RB 165.) None of the reasons set forth by Respondent withstands analysis.

Preliminarily, Respondent again asserts "that the trial court never explicitly ruled that such a limitation would apply." (RB 165.) That conten-

tion was fully dealt with in the first section of this argument, where it was explained why the procedural history of this issue did not render the claim moot. (See Section B of this argument, at pp. 33-40, *ante*.)

As shown there, the trial court made it abundantly clear what would be required if defense counsel were allowed to testify. The trial court promised a formal ruling the following week and never indicated it was seeking further input from counsel. At the time set for the ruling, the court asked if counsel still intended to testify. Defense counsel made it quite clear that he was **not** abandoning his request to be allowed to give testimony about his observations of John Travis's growing maturity and understanding of his drug and alcohol addiction problems. Instead, counsel was merely acquiescing – declining to testify pursuant to the burdensome "guidelines" that the court had set forth.[9] The court never hinted at its willingness to reconsider its guidelines; to the contrary, the judge told defense counsel he had made the correct choice.

These circumstances were analogous to those described by this Court in *People v. Cleveland* (2004) 32 Cal.4th 704, 757-758. There, a de-

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9 In other words, there was no reason whatsoever for defense counsel to believe he needed to repeat his argument (or would even be permitted to) in support of giving character evidence on behalf of Travis. Instead, the trial court's query whether counsel still wished to testify could only be interpreted in context as a continuation of the colloquy about counsel's willingness to accept the guidelines pursuant to which he would agree to be bound, that had been set forth the preceding week.

fendant sought a full severance from his codefendant. After that was denied, he agreed to a bifurcated trial, in which the same jury would hear penalty phase evidence first as to one defendant and then, separately, as to the other defendant. This Court concluded that the agreement to bifurcated trials was, effectively, mere acquiescence to the lesser of two evils that were the remaining choices after severance was denied. That did not constitute a waiver of the severance issue. Similarly here, after the court had heard full argument from both sides and made its position, counsel made clear that he was not waiving the issue he had raised, but was instead choosing not to go forward under the onerous conditions the court had outlined. Counsel chose the lesser of two evils, but did not thereby waive what he had originally sought..

Respondent next contends that if defense counsel had been allowed to give character evidence, he would have been subject to full impeachment and extensive discovery that might have consumed undue time. (RB 165.) Again, it has been shown earlier in this argument that no undue time would have been consumed, and that counsel, rather than the court, was in the best position to determine what, if any, impeachment might actually have been available to the prosecutor, as well as what might have to be disclosed in discovery. Respondent has no way of knowing whether there was any real danger to the defense, and has set forth only highly speculative possibilities. This was a strategic decision that was uniquely within the knowledge

possessed only by defense counsel, and Respondent's gross speculation provides no legitimate basis for overruling the defense position.

Respondent's last argument once again restates the flawed timeliness argument: character testimony by defense counsel, it is asserted, would have probably created a need for the appointment of new counsel, which would have consumed a significant amount of time. (RB 165.) This was fully answered in section D of this argument, at pp. 45-49, *supra*. As already explained, ample time was available for the appointment and preparation of new counsel. New counsel's role would have been limited to a very narrow direct examination that could have been fully scripted by defense counsel, and the information needed for new counsel to protect John Travis's rights during any prosecution cross-examination of defense counsel was similarly limited and could have been explained without any need for delay. Indeed, the defense never requested any delay and was well aware of the trial court's determination to avoid delay. Once again, Respondent's speculation is no substitute for matters that were uniquely known to defense counsel and not to the prosecutor or the trial court.

G. The Trial Court Had No Proper Basis for Requiring a Complete Waiver of All Attorney-Client Privilege, in the Event Defense Counsel Were to Testify

Respondent suggests, without analysis, that the trial court never explicitly ruled that a complete waiver of attorney-client privilege would be

required. Respondent adds that, since defense counsel no longer wished to testify, there was no opportunity below to show good cause for requiring a full and complete waiver. And Respondent then again argues that cases cited in the opening brief are distinguishable, since testimony by defense counsel would have resulted in substantial risks and delays. (RB 165-166.)

The last point is another *non-sequitur* with no apparent connection to the extent of the waiver of attorney-client privilege that would have been proper, even assuming defense counsel had been permitted to testify in regard to a very narrow and limited area pertaining to his relationship with his client. In any event, as already shown, whatever risks might have been involved were uniquely within counsel's knowledge; the decision whether the potential benefits of character evidence by counsel outweighed those risks was a strategic decision for the defense. Moreover, the delay Respondent posits is a fiction no matter how many times it is repeated. Respondent offers no support for the assertion that such factors compel a broader waiver of privilege than would otherwise be appropriate.

Respondent's first and second contentions, that the trial court never made an explicit ruling and that the prosecution never had an opportunity to show good cause, are belied by the circumstances. As fully explained in section B of this argument, at pp. 35-40, the trial court made it abundantly clear that any testimony by defense counsel, even on the more limited subjects the court permitted, would require a full waiver of attorney-client privilege. Moreover, the prosecution had ample opportunity to present its

argument regarding the extent of the waiver that could properly be required, and to respond to defense counsel's contentions that any waiver should have been limited to the very narrow subjects that he desired to cover, on which cross-examination would have been appropriate. In short, Respondent offers nothing more than speculation to uphold the trial court's position.

For all these reasons, reversal is required.

III. BASED ON THE PARTICULAR CIRCUMSTANCES OF THE PRESENT CASE, THE REFUSAL TO INSTRUCT ON THE EXERCISE OF MERCY TETHERED TO THE EVIDENCE, AND THE PRECLUSION OF ANY ARGUMENT IN FAVOR OF THE EXERCISE OF MERCY TETHERED TO THE EVIDENCE, CONSTITUTED PREJUDICIAL ERROR THAT WAS EXACERBATED BY ALLOWING THE PROSECUTOR TO MAKE COMPARABLE ARGUMENTS IN FAVOR OF A DEATH SENTENCE (Respondent's Argument II)

A. Introduction

Many capital defendants have sought mercy from their juries, and this Court has frequently recognized the need for capital juries to make a determination whether mercy should be exercised. At that same time, this Court has, on a number of occasions, found no error in a trial court's refusal to instruct on the concept of mercy. This Court has even found no error in refusing to allow defense counsel to argue regarding the concept of mercy. This results in a seeming conundrum that can only be resolved by a more careful distinction between the concept of mercy tethered to the particular evidence in a case, and mercy that is not tethered to any evidence but is sought only on the basis of antipathy toward the death penalty. Decisions of this Court and the United States Supreme Court establish that the latter is entitled to no consideration, but the former can be a critically im-

portant factor in capital sentencing. (See cases cited and analyzed at AOB 250-281.)

Appellant Travis's position is simply that when the line is drawn correctly, he should prevail under the particular combination of circumstances regarding the present crime and Travis's most unfortunate background. In many cases, instructions or argument on other factors, such as sympathy, may be adequate to also substitute for instructions or argument on mercy. However, that is not true in every case, and was certainly not true here.

B. It Was Error to Refuse to Give a Defense-Requested Instruction Regarding Mercy Tethered to the Evidence

Appellant Travis's opening brief analyzed in detail numerous capital cases which discussed the concept of mercy, leading to a conclusion that when this Court has rejected instructions pertaining to the exercise of mercy, it has done so only in two contexts: 1) in circumstances where the defense sought to rely on the concept of mercy in the abstract, untethered to the specific evidence in the particular case; or 2) in circumstances where this Court merely cited cases falling into the preceding category, with no new analysis. This Court has never engaged in a reasoned analysis of the concept of mercy tethered to the specific evidence presented in the particular case. It should do so here and hold that when mercy is tethered to the

specific evidence, counsel must be permitted to argue such mercy as a factor in mitigation, and upon request, penalty phase juries should be instructed that such tethered mercy is available as a legitimate mitigating factor. (See T-AOB 256-282.)

This point is clear from *People v. Ervine* (2009) 47 Cal.4th 745, 801-803 as analyzed at T-AOB 278-281. In *Ervine*, the defense requested an instruction based on mercy tethered to the evidence. The instruction was given in regard to sympathy, pity, and compassion, but the word "mercy" was deleted. Also, as in the present case, both sides were ordered to refrain from making any arguments regarding mercy. In affirming the death sentence, this Court made reference to prior decision finding no error in the refusal to instruct on the exercise of mercy; but nowhere in the discussion did the *Ervine* court even acknowledge the existence of a distinction between mercy in the abstract and mercy tethered to the specific evidence of the particular case. *Ervine* also relied on the belief that the concept of mercy, while not expressly mentioned, was adequately covered by instructions on sympathy, pity, and compassion as mitigating factors.

Further evidence that the *Ervine* court did not regard the distinction between mercy tethered to the evidence and mercy as an abstract, generic concept, was shown when the opinion upheld the preclusion of argument for the exercise of mercy, based on the decision in *People v. McPeters* (1992) 2 Cal.4th 1148, 1195, which expressly referred only to the **unadorned** use of mercy untethered to the particular facts and circumstances.

(*Ervine, supra,* at p. 72.)"'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.' " (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

In other words, *McPeters* never considered the actual issue presented in *Ervine* -- reliance on mercy tethered to the evidence. Therefore, *McPeters* offered no support for the conclusion that *Ervine* ostensibly drew from *McPeters*. This glaring error can only be explained by concluding that the *Ervine* court failed to recognize that there was a distinction between the unadorned exercise of mercy untethered to the evidence, and the narrower concept actually at issue in *Ervine* and in the present case – mercy tethered to the specific evidence in the particular case.

Respondent sets forth a very brief argument to the contrary at RB 75, relying solely on *Ervine*. Most notably, Respondent never even addresses the problematic aspects of *Ervine* set forth in the opening brief. Respondent has not identified any flaw in the analysis of *Ervine* contained in the opening brief. Thus, the analysis set forth in the opening brief stands without contradiction. This Court should adopt it and disapprove the contrary approach in *Ervine* and *McPeters* when the justification for mercy is tethered to specific evidence in the case.

As noted above, *Ervine* also relied on the premise that the concept of mercy, while not expressly mentioned in instructions or argument, was adequately covered by instructions pertaining to sympathy, pity, and compas-

sion as mitigating factors. (*People v. Ervine, supra,* 47 Cal.4th 745, at p. 802.) In the opening brief, it was explained that this premise might have been fair in the context offered in *Ervine*, because the mitigating evidence in that case portrayed the defendant as an admirable man, who served his country in war and cared for his father until the father's death. (See T-AOB 280-281.) Such evidence could easily cause jurors to feel sympathy and compassion toward the defendant for the very same reasons they might conclude the defendant deserved their mercy.

John Travis's case stands in sharp contrast. The mitigating evidence showed that, after a deprived childhood which left him unsupervised and on the streets from a very early age, he chose drugs and alcohol to ease his pain, becoming addicted by his early teenage years and leading to his joinder with a group of similarly unsupervised youths who turned to crime, and eventually violence, to support their addictions. It was argued in the opening brief that in these particular circumstances, jurors were not likely to feel sympathetic toward Travis, but if they had been allowed to consider the concept of mercy they might well have concluded that he deserved the exercise of mercy. (See T-AOB 280-281 and, in more detail, 282-290.) Thus, even if the concept of sympathy was an adequate substitute for mercy in *Ervine*, it was not an adequate substitute in the present case.

Once again, Respondent completely fails to address or even acknowledge this distinction. Respondent simply relies on *Ervine* without any comment on the opening brief's demonstration that *Ervine* is distin-

guishable from Travis's case. Respondent's sparse discussion offers no assistance in resolving the specific issues set forth in the opening brief; that analysis stands without contradiction.

The fundamental question that should be addressed is simple: what legitimate purpose is served by precluding the defense from using the word "mercy," when the plea for mercy is tethered to specific evidence in the particular case? Respondent has failed to provide any answer to that question; neither have any of this Court's decisions that have addressed "mercy" issues in capital cases. The reason for the lack of any answer to this fundamental question is also simple: there are no legitimate purposes, at least not where application of that factor is compelling. It is time for this Court to set the law right, and this is the case to do it.

C. Since the Filing of the Opening Brief, More Decisions from this Court Have Recognized the Legitimacy of Mercy As A Factor in the Determination of the Sentence in a Capital Case

In *People v. Verdugo* (2010) 50 Cal.4th 263, the defendant contended that the trial court erroneously allowed the prosecution to cross-examine a defense witness about a prior bad act of the defendant. In the course of finding no error, this Court reasoned: quoted from:

> "When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. 'The theory for permitting

> such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines defendant's claim that his good character weighs in favor of **mercy**.' [Citation.]" (*Verdugo, supra,* at pp. 300-301, quoting *People v. Loker* (2008) 44 Cal.4th 691, 709; emphasis added.)

Similarly, *People v. Gamache* (2010) 48 Cal.4th 347, 389, approved a prosecution argument that the defendant did not deserve mercy, and expressly recognized the responsibility of the jury to determine whether or not to grant mercy to the defendants in capital cases. Likewise, *People v. Murtishaw* (2011) 51 Cal.4th 574, 595, quoted with approval from prior cases that recognized the need for "'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.'" (Emphasis added.) *People v. Gonzales* (2011) 52 Cal.4th 895, 951-952, and *People v. Virgil* (2011) 52 Cal.4th 1210, 1275 again quoted with approval the same cases quoted in *Murtishaw*.

Since this Court clearly recognizes that mercy is a proper consideration in determining the appropriate penalty in a capital case, there is no rational basis for precluding defense counsel from discussing the concept of mercy during argument, and there is no rational reason for refusing to include the concept of mercy in the instructions that guide the jury that makes the determination of the appropriate sentence. Once again, the fact that so many capital defendants have sought instructions regarding mercy, and so many prosecutors have vigorously opposed such instructions,

demonstrates that advocates on both sides of numerous capital cases believe that references to mercy do make a difference. This Court should confer its express approval of that concept, and find prejudicial error in the trial court's contrary rulings.

D. It Was Error to Preclude Defense Counsel from Arguing in Favor of the Exercise of Mercy Tethered to the Evidence

Respondent presents a more detailed argument in favor of the trial court's order precluding defense counsel from using the word "mercy" during argument to the jurors. (RB 75-79.) Nonetheless, Respondent still fails to deal with the heart of the issue.

First, Respondent starts with a rambling paragraph that essentially restates the argument against the unadorned use of the word "mercy", which invites arbitrary and unpredictable jury decisions. (RB 78.) This, of course, has nothing whatsoever to do with the actual argument. In neither the trial court nor the opening brief was it asserted that the defense had a right to rely on the unadorned use of mercy, or mercy untethered to the evidence. Instead, it has always been the defense position that it was proper to argue for mercy only when tethered to the specific evidence in the particular case. As explained repeatedly, there was ample evidence in the present case to justify a jury conclusion that it would be proper to exercise mercy for John Travis based on that evidence.

In sum, Respondent has ignored the actual issue and, instead, put forth and knocked down a completely different argument that was never made. In doing so, Respondent relies on *People v. McPeters, supra,* 2 Cal.4th at page 1195. *McPeters* was discussed and distinguished at T-AOB 272. Respondent completely ignores that analysis and has thereby left it unrefuted.

Next, Respondent repeats the familiar argument that any exercise of mercy by a capital jury is subsumed within the concept of sympathy, which was covered in jury instructions and argument. However, the single case relied on by Respondent, *People v. Ervine, supra,* 47 Cal.4th at page 802, was also discussed fully in the opening brief, with a detailed explanation why it does not properly resolve the actual issue presented here. (See T-AOB 278-281.) Once again, Respondent completely ignores that analysis and thereby leaves the opening brief explanation of the problems with reliance on *Ervine* unrefuted.

Also, the opening brief thoroughly explained why, under the particular circumstances of the present case, sympathy was not an adequate substitute for mercy, even if it might have been an adequate substitute under the very different circumstances in *Ervine*. (T-AOB 282-290.) Respondent fails to address any aspect of that discussion at all.

E. Conclusion

It has been shown above and in the opening brief that both this Court and the United States Supreme Court have repeatedly recognized the very legitimate role that mercy plays in the determination of the proper sentence in a capital case. John Travis has always conceded that "unadorned" mercy, or mercy not tethered to specific evidence in the particular case, is not available under decisions from this Court or from the High Court. Instead, the argument in the opening brief focused very carefully on the distinction between such untethered mercy and mercy that is specifically tied to evidence produced in the present trial.

Relying on that difference between tethered and untethered mercy, the opening brief distinguished many cases that either clearly dealt only with untethered mercy in the abstract, or contained no analysis and simply cited earlier cases that dealt only with untethered mercy. Respondent apparently prefers to pretend that no such distinction was ever made, and relies openly on the concept of untethered mercy that was never actually at issue in the present case. Thus, no part of Respondent's argument provides assistance in dealing with the actual issue raised in the opening brief.

Put differently, if Respondent's analysis were correct, and included all exercise of mercy, whether tethered to the evidence or not, then the entire concept of mercy would be banned from consideration in capital sentencing. Clearly that is not the case, since, as shown above, this Court regularly refers to the responsibility of capital case juries to determine whether

to exercise mercy in a particular case. (See section C of this argument, at pp. 65-67, *supra*.) This fact, alone, demonstrates that Respondent's analysis must be flawed.

If juries are responsible for determining whether to exercise mercy in the particular case before them, then attorneys representing capital defendants cannot properly be precluded from discussing that important responsibility when arguing the defense case to the jury. Similarly, there is no proper basis for refusing a requested instruction that informs the jury of their responsibility to determine whether the evidence in a particular case justifies the exercise of mercy. Thus, this Court should begin the process of clarifying where the line between tethered and untethered mercy should be drawn. The unique combination of circumstances in the present case -- a crime that does not engender sympathy and a background that justifies mercy -- makes this a perfect example of a case where mercy was tethered to the specific evidence and instructions or argument on sympathy were inadequate to assist the jury

It follows that the penalty verdict cannot stand. The judgment must be reversed on this ground.

IV. THE REMOVAL OF A SEATED JUROR AFTER TRAVIS'S PENALTY RETRIAL HAD BEGUN WAS NOT JUSTIFIED TO A DEMONSTRABLE REALITY (Respondent's Argument VIII)

A. Introduction

Appellant Travis's Opening Brief (see T-AOB 294-326) explained that after the jury had been selected for the penalty retrial and counsel had begun their opening statements, one juror realized that she had experienced some brief and distant social contacts with a defense witness whom she had not recognized solely from his name among the prosecution's list of 300 expected witnesses. Questioning by the trial court disclosed that the juror believed that the witness, a minister, was not likely to lie under oath, but she fully realized he could be mistaken about something and affirmed that she would assess that in the same way she would for any other witness. Despite urging from defense counsel to ask specifically whether she could apply the credibility factors that would be set forth in the instructions and assess the witness's credibility the same as any other witness, the trial court refused to delve any further.

At all times, the trial court stated the belief that the witness was entirely truthful and that she had innocently failed to recognize the witness's name in the prosecutor's long list of witnesses. Instead of applying the proper "demonstrable reality" standard, however, the trial court simply determined that if the new information about the witness had been known be-

fore the jury was sworn, the juror would have been removed for cause. The juror was then removed over defense objection and replaced by an alternate.

It was also shown in the opening brief that even the "good cause" standard had not been met. Furthermore, the trial court's inquiries were inadequate to permit any proper determination whether the juror should have been removed, under the "good cause" standard, or the "demonstrable reality" standard. Even more baffling, when counsel for codefendant Silveria offered to not use the witness at issue, the trial judge said that would make no difference, and made clear he had no interest in any further input from counsel for John Travis.

Under these circumstances, the removal of this juror was unjustified and the error was prejudicial.

B. Respondent's Brief Analysis Fails to Rebut the Arguments Set Forth in the Opening Brief

Respondent initially seizes on isolated responses for the removed juror, obtained during an incomplete examination, and concludes that since the juror at one point stated that she did not believe the witness would be capable of lying, her bias was a "demonstrable reality" and her removal was therefore proper. (RB 120.) Not so.

Respondent ignores all of the other responses given by this juror as fully discussed in the opening brief. (See T-AOB 297-303.) Respondent

ignores the fact that there was no evidence that the juror ever had a direct conversation with the witness; instead the record shows nothing more than the fact that the witness and the jurors' husband were both ministers in the same city (facts known to the prosecution before it expressed satisfaction with the juror during jury selection), and that the witness had been present at several social functions the juror had attended over a period of several years. Respondent ignores the fact that, to the limited extent the court inquired, the juror stated she could apply the same standards she would apply to any other witness; she said that she would base her decision only on the evidence presented during the trial, and not on any prior social contacts she had with the witness.

Respondent also ignores the fact that the trial court repeatedly expressed confidence the juror was being entirely sincere and truthful. Thus, there was no credibility issue that might allow the judge to conclude that some responses from the juror were truthful and others were not. Respondent offers no authority at all for the proposition that, under such circumstances, a reviewing court can uphold a juror's removal based on one isolated response, while ignoring all the other responses. The case law is to the contrary. Respondent also offers no authority for upholding the removal of a juror when the trial court has failed to conduct an adequate examination. Indeed, Respondent does not identify any flaw in the analysis in the opening brief explaining why the examination was inadequate. Instead, Respondent simply ignores that problem.

If Respondent's analysis were correct, then every prospective juror who ever states a belief that police officers would not lie under oath necessarily would have to be removed for cause, regardless of any other responses such prospective jurors might give after being more fully informed about the proper standards for assessing the credibility of witnesses.

As the opening brief explains, *People v. McPeters* (1992) 2 Cal.4th 1148, 1174-1176 has remarkable similarities to the present case, except that when the juror in *McPeters* realized he knew a prosecution witness – the husband of the murder victim – he revealed his direct business dealings with the witness during a realty transaction that was still in progress, and stated that he thought highly of the witness based on those contacts. This Court nonetheless found no implied bias and no error in refusing to remove the juror. Respondent does not explain why *McPeters* should be distinguished from the present case; instead, Respondent simply ignores that case or the analysis set forth at T-AOB 320-321.

Respondent finds it unnecessary to discuss the opening brief analysis explaining why the present record did not justify the removal of the juror, or why the trial court failed to conduct an adequate inquiry, because, once again, Respondent sees one isolated response as settling the issue. (RB 120.) Respondent relies on a single authority, *People v. Goins* (1981) 118 Cal.App.3d 923, 926. There, the Court of Appeal upheld the removal of a juror and explained:

> "The juror, who was replaced, informed the court during the presentation of the defense case, that he knew the person with whom defendant had been living and who appeared as a defense witness. The juror further stated that he was so favorably disposed toward this person that he could not be impartial in weighing his testimony." (*Ibid.*)

That ended the *Goins* court's analysis. *Goins* is plainly inapplicable for many reasons. First, the appellate court's opinion in *Goins* long predated this Court's decision in *People v. Cleveland* (2001) 25 Cal.4th 466, which established the "demonstrable reality" standard. Without the benefit of *Cleveland*, *Goins* simply applied an abuse of discretion standard to the trial court finding of good cause. Furthermore, the extremely brief discussion in *Goins* does not indicate that the removed juror ever qualified the statement that he could not be impartial in any way; in contrast, the present juror made it clear she did not know the witness directly and that she would be able to determine his credibility in the same manner as she would for any other witness. Finally, *Goins* does not indicate that the defense ever expressed any dissatisfaction with the inquiry conducted by the trial court; such dissatisfaction was expressed here and was well-justified as explained in the opening brief in an analysis that Respondent does not challenge, but simply ignores. In sum, the present case is nothing at all like *Goins*.

Also ignored by Respondent is another recent decision by this Court that totally undermines Respondent's analysis. In *People v. Allen and Johnson* (2011) 53 Cal.4th 60, during jury deliberations, the foreman informed

the court of a juror's statement that after the prosecution had rested, he believed the case against the defendant had not been proven. Other jurors agreed the juror at issue had made up his mind before all the evidence had been presented. After interviewing all of the jurors, the trial court discharged the juror, in part based on the conclusion that the juror had made up his mind prior to the start of deliberations. (*Id.*, at pp. 65-69.)

This Court agreed that the statement attributed to the juror "might suggest that the juror had made up his mind before all evidence was presented and the court had instructed on the law." (*People v. Allen and Johnson, supra,* 53 Cal.4th at p. 70.)[10] Quoting from *People v. Lomax* (2010) 49 Cal.4th 530, 589,[11] this Court discussed the "demonstrable reliability" standard, explaining it: "'involves "a more comprehensive and less deferential review" than simply determining whether any substantial evidence' supports the court's decision. " (*People v. Allen and Johnson, supra,* 53 Cal.4th at p. 71.) In the face of this authority, Respondent's analysis does nothing more than use one isolated statement as "any substantial evidence,"

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10 In regard to the issue of the propriety of interviewing all of the jurors, this Court in *Allen & Johnson* noted that *Cleveland* arose in a different context - *Cleveland* involved a purported refusal to deliberate while *Allen & Johnson* involved a claim that a juror had made up his mind before deliberations had begun. (*Allen & Johnson*, supra, at p. 70.) But on the ultimate issue of the standard to use for removing a seated juror, *Allen & Johnson* used the same "demonstrable reality" standard that was used in *Cleveland*. (*Allen & Johnson*, *supra*, at p. 71.)

11 *Lomax* had relied on *Cleveland*. (*Lomax, supra,* at p. 588.)

and does not look to the totality of the evidence or the adequacy of the inquiry. Case law since *Cleveland* makes clear that approach is wrong.

This Court in *Allen & Johnson* concluded that the trial court had interpreted the juror's statement to mean he had prejudged the case, when the true meaning was not entirely clear. (53 Cal.4th at p. 72.) But this Court looked at all of the evidence and concluded that other evidence indicated that the juror did not have a closed mind and did not refuse to deliberate. (*Id.* at pp. 73-74.) Ultimately, this Court held that the trial court erred in discharging the juror:

> "In light of his undecided vote and participation in the deliberative process, Juror No. 11's mid-deliberation statement about the prosecutor's case, even when coupled with his expression of strong views during deliberations, does not establish prejudgment to a demonstrable reality. The court abused its discretion in discharging him on that basis."

(*Id.*, at p. 76.)

Thus, *Allen and Johnson* squarely rejects the "any substantial evidence" approach of such earlier cases as *Goins* that relied on one isolated statement made by a juror. Instead, the court must consider the entire record. Respondent's focus here is on a similar isolated statement, ignoring everything else. When the entire record is analyzed, as was done in the opening brief, it is clear that there was no showing establishing a "demonstrable reality" that removal of the seated juror was required in this case. Under the *Cleveland* standard, this was error.

Respondent makes brief reference to the fact that the opening brief summarized a series of examinations of other prospective and actual jurors who were not removed for cause despite expressing a belief that police officers would never lie under oath, or despite having family members who had been robbed and/or murdered under circumstances analogous to the present murder. (See T-AOB 315-318.) Respondent simply expresses a belief that these other juror responses do not affect the determination whether the need for the removal of the juror whose disqualification was at issue was justified to a "demonstrable reality." Respondent ignores the fact that this same trial judge in this same case found no need to remove several other jurors for good cause despite the disclosure of biases at least as strong as whatever was shown in regard to the removed jurors. The court's satisfaction with these other jurors demonstrates the lack of good cause for removal of the one juror at issue here.

Respondent quibbles about which "good cause" standard the trial court relied on (RB 121), but never addresses the actual issue raised – that **none** of the statutory "good cause" standards are sufficient to satisfy the "demonstrable reality" standard imposed by *Cleveland*. Respondent never claims that the trial court applied a "demonstrable reality" standard; instead, Respondent simply ignores this flaw, failing to recognize that a trial court operating under the "good cause" standard used during jury selection has greater discretion than a trial court that is determining whether the need for removal of a seated juror, after the trial is underway, has been shown to

a "demonstrable reality."[12] Since the trial court applied the wrong standard, its ruling must be considered an abuse of discretion. (See T-AOB 322.)

Finally, Respondent claims that the Travis defense waived the issue created when counsel for the codefendant offered to delete Leo Charon as a witness, and the trial court responded that would make no difference. (See T-AOB 323-324.) According to Respondent, because counsel for John Travis never offered to also delete Charon as a witness, the issue was not preserved. (RB 121-122, especially fn 30.) Respondent notes the claim that the trial court had made it as plain as possible that it did not want to hear more from trial counsel, and acknowledges the court's statement that defense counsel had adequately indicated his objections the previous day. Respondent contends that this provides no basis for concluding the trial court would fail to consider a new objection.

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12 There is considerable justification for the more stringent standard for removal of a juror after the jury is sworn, and the trial has begun. It is one thing to remove a juror during the normal selection process, when both sides can readjust their strategies in light of the removal; it is entirely different to do so after the exercise of peremptory challenges is closed and jeopardy has attached. As shown in this very case, both defendants had numerous peremptory challenges remaining after the juror ultimately removed had been accepted by both sides during the jury selection process, and both then accepted the entire jury after the prosecutor had passed on the exercise of a peremptory challenge. (See T-AOB 310-311, fn. 98.) If the juror had been removed for cause in the regular course of jury selection, it is quite likely that the entire makeup of the final jury would have been very different.

This rather desperate-seeming assertion ignores the rest of the context. When the trial court here made its ruling, counsel for the codefendant reminded the judge of his prior offer to delete Leo Charon as a witness, and the judge responded that made no difference. It was at that very point that counsel for John Travis asked whether he should state his objections for the record and the court responded that was not necessary. (RT 255:29857.) Under these circumstances, it is nonsensical to contend that Travis waived that aspect of the issue; rather, it was abundantly clear the trial court did not want any further input from defense counsel.

The judgment must therefore be set aside on this basis as well.

V. IN LIGHT OF THE EXTRAORDINARY CIRCUMSTANCES OF THE PRESENT CASE, AFTER THE TRIAL COURT HAD CONCLUDED THAT SEPARATE JURIES WERE NECESSARY TO ASSURE A FAIR TRIAL AND BOTH ORIGINAL PENALTY TRIALS ENDED IN MISTRIALS WHEN NEITHER JURY WAS ABLE TO REACH A UNANIMOUS PENALTY VERDICT, IT WAS IMPROPER TO REJOIN THE TWO DEFENDANTS FOR A PENALTY RETRIAL BEFORE A SINGLE JURY (Respondent's Argument XI)

A. Introduction

As Appellant Travis previously explained (see T-AOB 327-371), the trial court originally denied John Travis's motion to sever his trial from that of Danny Silveria, but the court did order that the joint trial be conducted before separate juries; each jury was to determine guilt and penalty issues with regard to only one of the two defendants. Most evidence pertained to both defendants and was presented simultaneously with both juries present. Some evidence pertaining to one defendant, but not the other, was presented separately only to the jury concerned with that defendant. In the resulting trial, both defendants were convicted of murder with special circumstances, but neither jury was able to reach a unanimous penalty verdict.

The trial court chose a different procedure for the penalty retrials, ordering that a single jury would hear all of the evidence and decide the penalty issue for both defendants. This ruling came despite an evidentiary record that showed strong support for the need for joint trials, with no sig-

nificant justification provided from any prosecution evidence. The defense evidence, on the other hand, included very strong expert testimony based on well-organized surveys by a pioneer in the field, under survey conditions as close to an actual trial as could realistically be achieved within a court's budgetary limits. These surveys demonstrated an unusually strong correlation between joinder before a single jury and the likelihood of a predisposition favoring a death verdict. Other defense evidence consisted of expert testimony from a highly experienced criminal defense attorney and a very experienced and conservative former justice of the Supreme Court of the State of Texas who had reviewed hundreds of death sentences. Both gave strong testimony regarding how their experiences had convinced them that it was very difficult to get jurors simultaneously deciding penalty issues for multiple defendants to give individualized consideration to each defendant, and that it would be especially difficult under the confluence of unusual circumstances that existed in the present case. The prosecution presented no evidence that contradicted either of these two witnesses.

Nonetheless, the trial court chose to disregard the survey evidence because it did not meet the admittedly impossible standard of duplicating actual jury trials. The trial court also chose to disregard the other defense experts based only on the belief that any problems would be overcome by an admonition to the jurors to give individualized consideration to each defendant. Not only was that conclusion inconsistent with the uncontradicted testimony from the defense experts, it was also inconsistent with the trial

court's own separate ruling that any juror who learned that there had been a prior penalty mistrial could not be trusted to follow an admonition to decide the case based on the evidence presented, rather than on any speculative conclusion that might be drawn from the fact there had been a prior hung jury.

In short, the opening brief demonstrated multiple reasons why it was improper to require retrial of both defendants before a single jury, that the trial court's error resulted in the deprivation of a variety of state and federal constitutional rights, and that it was manifestly prejudicial. Respondent disagrees on every point, but fails to offer a persuasive rationale. (See RB 127-134.)

B. Respondent's Analysis Goes No Further Than Reliance on Cases Concluding That Joined Penalty Trials Can Be Permissible Under Some Circumstances, While Providing No Analysis of the Circumstances Presented by this Case

Initially, Respondent ignores all of the problems cited in the opening brief and simply concludes that instructing the jurors to consider the evidence against each defendant individually was enough to insure individualized sentencing. Respondent relies solely on *People v. Ervin* (2000) 22 Cal.4th 48, 69 and *People v. Taylor* (2001) 26 Cal.4th 1155, 1173, as if they stood for the proposition that such intructions to the jury necessarily cure

every problem in every case, no matter what the particular circumstances might be. (RB 131.)

Ervin was a very different case that provides no support for Respondent's sweeping conclusion. In *Ervin*, although appellant's motion to sever had been denied before the trial began, he contended severance became necessary based on subsequent developments, including the excusal of some prospective jurors who said they might be unable to impose a death sentence on the codefendant, and introduction of some evidence admissible only against one defendant, which required some limiting instructions. This Court simply responded that appellate review of the denial of a severance motion has long been limited to the evidentiary showing that existed when the motion was made. Because the motion was not renewed, appellant could not raise this claim on appeal. (*Ervin*, *supra*, 22 Cal.4th at p. 68.) In contrast, in the present case, John Travis relies on the solid evidentiary support that existed when the severance motion was made. Thus, this part of *Ervin* is completely inapposite.

The appellant in *Ervin* also argued that the trial court had a *sua sponte* duty to grant a severance after the new grounds had developed. Observing that the trial court had broad discretion, this Court nonetheless emphasized its ability to "reverse a conviction when, because of consolidation ' "gross unfairness" ' has deprived the defendant of a fair trial." (*Ervin, supra*, 22 Cal.4th at p. 69, citing *People v. Pinholster* (1992) 1 Cal. 4th 865, 933.) In *Ervin*, the jury had imposed death on two defendants, but life

without parole on a third defendant, suggesting the jury had given each defendant individualized consideration. (*Ervin*, *supra*, 22 Cal.4th at p. 69.) The present case, in contrast, had a much stronger evidentiary showing of gross unfairness and nothing whatsoever to demonstrate that the jurors did give individualized consideration to the two defendants.

In *Taylor*, this Court found no showing that separate juries were needed for the penalty trial, relying only on *Ervin*, which has already been shown inapplicable to the particular circumstances of the present case. (*Taylor, supra*, 26 Cal.4th at p. 1174.) This Court simply noted that there was nothing in the record to support the contention that individualized sentencing had been denied. Again, here there was ample evidentiary support in the record, implicating the fair-trial concerns in *Ervin*. It follows that appellate review cannot be undertaken without considering the actual evidentiary showing in support of the need in this case for separate juries.

In other words, the cases relied on by Respondent go no further than concluding that in their particular circumstances, an admonition was enough to solve the problem. They do not support a conclusion that an admonition always solves the problem, no matter what the particular circumstances might be. Ironically, Respondent's approach to appellate review is a fine example of a denial of individualized consideration.

Respondent does go on to acknowledge the fact that expert testimony was offered in this case, but then sweeps it back under the rug with a simple notation that the trial court rejected that testimony.[13] (RB 131-132.) However, Respondent completely fails to deal with the real issue – whether the trial court was reasonable in rejecting the expert testimony, most of which was unrefuted. Furthermore, even without regard to the expert testimony, many factors remained here which are absent in the cases relied on by Respondent. These include the similar roles played by each defendant in the planning and execution of the robbery/murder, the very similar social histories of the two defendants, the similar mitigating evidence of growing maturity during an unusually long period of county jail incarceration, and the fact that both relied heavily on the same witness, Leo Charon.[14]

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13 Interestingly, Respondent relies on the claimed "well-established presumption that jurors follow the instructions given by a court" (RB 132), but ignores its effect on another point stressed in the opening brief – that if the trial court truly believed admonitions to jurors are always obeyed, logically it was left with no reason for refusing to allow testimony by a former juror and former alternate juror. (See Argument I, *ante*, and in the opening brief.) In that situation, the major basis of the trial court ruling was an unshakeable certainty that jurors could not be expected to obey a much simpler admonition to disregard the fact that a prior jury was unable to reach a penalty verdict.

14 Respondent does provide a very brief discussion of the fact that both John Travis and his codefendant relied on Leo Charon's testimony. However, Respondent simply concludes without analysis that such conflicting penalty phase evidence is not exactly the same as conflicting defenses in guilt trials, rendering principles developed in guilt trial cases inapplicable to penalty trials. (RB 133.) Respondent is wrong; while the two

(*Continued on next page*)

C. Respondent Has Utterly Failed to Show That the Error Was Harmless

Respondent's discussion ends with a conclusion that, even if there was error in denying separate juries for the penalty retrial, that error was harmless. Strangely, Respondent discusses only reasons why Silveria was not prejudiced, relying heavily on the fact that, in separate trials, Silveria's entire confession would have been admitted against him. (RB 134.) That factor does not apply at all to John Travis, who testified at the retrial and was fully cross-examined. This factor is significant, and Respondent's failure to address the distinction is telling.

Nothing about the "brutal robbery and murder" causes this demonstrably prejudicial error to be harmless. While the brutality of the crime -- a factor present in virtually every capital case -- could cause a juror to vote for death, that was not a foregone conclusion. Indeed, Respondent fails to mention the fact that when these same two defendants were initially tried before separate juries, neither jury was able to reach a unanimous verdict.

Respondent's ubiquitous assertion of harmlessness is also silent about the defendant and the individual considerations to that question. It ignores that John Travis was a young man with no prior record of violent conduct. Indeed, aside from the one violent incident that resulted in the

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(*Continued from previous page*)
situations are not precisely the same, they are sufficiently similar for principles from one context to retain great relevance in the other context.

death of the present single victim, no other act of violence by John Travis was offered in aggravation. And there was strong mitigating evidence of Travis's deprived childhood and his remarkable improvement in maturity while in jail.

In sum, reasonable jurors could have easily concluded that life without parole was an adequate punishment for John Travis. In fact, a number of reasonable jurors actually did reach such a conclusion at his original penalty trial, where the jury deciding Travis's fate did not have to simultaneously decide the fate of his codefendant.

Finally, Respondent argues the wrong standard of prejudice for this type of error. (See T-AOB 488-495.). According to Respondent, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41 stands for the proposition that "Even if a trial court abuses its discretion in failing to grant severance, 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.) But in that case the lenient standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 was utilized in relation to the guilt phase aspect of the severance motion. In contrast, because the error here impacts a penalty determination, the standard of review should be the more stringent test of *Chapman* v. *California* (1967) 386 U.S. 18, 23-24. (See *People v. Brown* (1988) 46 Cal.3d 432, 448, and T-AOB 488-495.)

Thus, to show prejudice, John Travis need not establish a reasonable probability of a better result absent the error; instead, he must show only a

reasonable possibility. Put differently, it is the People, as the beneficiary of the error, who must demonstrate that there was no reasonable possibility of a better result absent the error. That standard cannot be met in the extraordinary setting of this case where at the original penalty trial there were separate juries, and each trial ended with a more favorable result than the present death verdict. These unique circumstances compel reversal under *Chapman*.

VI. IN LIGHT OF THE EXTRAORDINARY CIRCUMSTANCES, IT WAS FUNDAMENTALLY UNFAIR TO ALLOW THE PROSECUION AT THE PENALTY RETRIAL TO USE THE PRIOR TESTIMONY OF CODEFENDANT SILVERIA AGAINST JOHN TRAVIS (Respondent's Argument XVI)

Appellant Travis's opening brief (see T-AOB 372-397) explained that a defendant's privilege against self-incrimination does not end after a guilty verdict; that privilege continues at least through sentencing and possibly even beyond that point. As a result, the prosecutor had no right to call codefendant Silveria as a witness at John Travis's initial penalty trial, before a jury that was concerned only with determining the appropriate penalty for Travis and not Silveria. Additionally, it was argued that as a result of these two undisputed principles, the prosecutor also had no right to insist that testimony that codefendant Silveria chose to give before his own jury must also be heard by John Travis's separate jury. The trial court erred in acquiescing to the prosecutor's insistence, and it was fundamentally unfair to allow the prosecutor to use the fruits of that error against Travis at the penalty retrial. (T-AOB 378-379.)

Separately, the opening brief described the well-established principle that, after a mistrial resulting from a deadlocked jury, the posture of the case returns to its status before the mistrial was declared. Based on that principle, it was contended that it was improper to permit the prosecution to be in a better position at the retrial. But certainly the prosecutor here was in

a better position after the mistrial because, even though codefendant Silveria chose not to testify at the retrial, the prosecutor was allowed to use Silveria's first trial testimony not only against Silveria himself, but also against John Travis. (T-AOB 379-381.)

The opening brief fully acknowledged established caselaw that allows prosecutors to use a defendant's testimony given at the first trial against that same defendant upon his retrial. (See *People v. O'Connell* (1984) 152 Cal.App.3d 548, 553-554, and *People v. Malone* (2003) 112 Cal.App.4th 1241, 1244-1245.) However, two arguments were made that distinguished *O'Connell* and *Malone* from the present case. First, neither of those cases considered the argument that, after a hung jury, parties are supposed to be returned to the same position as before. Second, it was argued that *O'Connell* and *Malone* considered only the use of a defendant's first trial testimony against that very same defendant at a retrial. Those defendants chose to offer their own testimony at the first trial. In contrast, John Travis made no such choice in regard to codefendant Silveria's testimony; to the contrary, he vigorously objected to Silveria's testimony because the same jury was also deciding Travis's fate. Thus, although neither Travis nor the prosecution could or did call Silveria to testify against Travis himself, at either the first trial or the retrial, by deft maneuvering the prosecutor here was nonetheless allowed to achieve the same result, by using Silveria's first trial testimony against John Travis at this joint penalty retrial. (T-AOB 381-388.)

And as has been further explained, what happened here is a questionable outgrowth of a non-statutory procedure that is fraught with unfairness. A prosecutor's use of first trial testimony of one defendant against a codefendant at a retrial as yet has not received this Court's explicit blessings. Nor should it, at least under the kind of circumstances in which it was used here.

The procedure of ordering separate juries for codefendants in capital cases itself arose out of thin air, with no recognition in any California statute and no procedural guidelines from this Court, despite the warnings from many courts that such guidelines are needed, and despite the passage of decades since the procedure came into use. But if such a procedure is to be allowed for reasons of efficiency, there is no reason to also allow it to be used for prosecutors to gain strategic advantages they would not have had without it. Nonetheless, that is precisely what was allowed here. (T-AOB 388-395.)

Notably, when this Court first considered the dual jury procedure, it gave only conditional approval: "We conclude, therefore, that the use of dual juries is a permissible practice. The procedure is not a basis for reversal on appeal in the absence of identifiable prejudice resulting from the manner in which it is implemented." (*People v. Harris* (1989) 47 Cal.3d 1047, 1075.) Such "identifiable prejudice from the manner in which it is implemented" has been demonstrated here.

Finally, it was shown that the prosecutor's purported reason for forcing Silveria's testimony to be used against John Travis in the first place – to avoid a scenario in which each testified before only their own jury and blamed the other – was a sham. Instead, all that was accomplished was that the prosecutor was able to present his aggravating evidence – the circumstances of the present crime – not just once, not even just twice, but three times. Essentially the same facts were first proved by the prosecution's witnesses, then repeated in great detail during extensive cross-examination of Travis, and then a third time through the former testimony of Silveria, in which he, too, was cross-examined in great detail. This extended use of cumulative evidence was not only a further reason why John Travis's trial was rendered fundamentally unfair, but was also the reason why the error in allowing this to happen at all must be deemed prejudicial. (T-AOB 396-397.)

Respondent has little to say about any of this. (RB 166-167.) Without directly addressing any of the several arguments made in the opening brief, Respondent simply offers the conclusion that the trial was not fundamentally unfair, and that Silveria's prior testimony was admissible under Evidence Code section 1291. Relying on the cases that have said that a defendant's testimony at a trial which ends in a hung jury may be used against that defendant at a retrial, Respondent does not address or even acknowledge the fundamental differences between the typical situation reflected in those decisions and the use here of first trial testimony by one de-

fendant against the other defendant at a retrial. Nor does Respondent explain why this scenario, where the second defendant (Travis) had no choice in the first defendant's (Silveria's) decision to offer the testimony.

Respondent thus says nothing to question the principle that after a hung jury, the parties should be returned to the same positions they were in before the deadlock, nor to dispute that principle's application here. Respondent has not explained why, at a trial at which separate juries are ordered, the court properly could allow the prosecution to present the testimony of codefendant Silveria, who chose to testify on his own behalf, to the jury separately trying John Travis, over the objections of both defendants. But even beyond that, Respondent offers nothing to justify why such testimony, whether or not improperly required at the initial trial, should be available for the prosecutor's reuse at the retrial before a single jury. The court's error is manifest and serious, and undermined the fairness of that retrial and resulting verdict.

In sum, Respondent has ducked every one of the difficult questions posed by the exceptional setting of the penalty retrial. The broad propositions on which Respondent's position rests have no application to so unusual a procedure - one that violated the defendant's rights. The opening brief set forth a series of reasons why the rulings in the present case resulted in fundamental unfairness, reasons Respondent has not refuted or even discussed.

Absent any showing of justification for the enormous procedural advantage extended the prosecution here due to the initial use of the dual jury system -- a procedure which is supposed to exist only for reasons of efficiency and not for the granting of a strategic advantage for one side to use against the other -- this Court should hold that procedure's misuse here was prejudicial error. The improper advantage conferred on the People made all the difference. It allowed the prosecutor to effectively present his aggravating evidence cumulatively – not just twice, but three times. This was not a fair trial. Accordingly, reversal on this ground is unavoidable.

VII. TRAVIS'S MOTION TO SUPPRESS (PEN. CODE § 1538.5) SHOULD HAVE BEEN GRANTED BASED ON HIS UNLAWFUL ARREST AFTER AN UNJUSTIFIED VEHICLE STOP AND THE WARRANTLESS SEARCH OF HIS VEHICLE (Respondent's Argument XVII)

A. Introduction

As appellant Travis's opening brief explained, probable cause for stopping the vehicle driven by John Travis was practically non-existent, and below the standard required to satisfy the Fourth Amendment. Following the car stops, Travis was arrested on a misdemeanor traffic warrant, but there was still no probable cause to support an arrest of him for any of the stun gun robberies. Furthermore, even if the vehicle stops had been valid, once the suspects were safely handcuffed and secured in patrol cars, there was no justification for the search of Travis's vehicle. Finally, John Travis should have been given an opportunity to post bail on the misdemeanor for which he was arrested. (T-AOB 398-420.)

Respondent, in contrast, sees ample justification for the vehicle stop, and the search of the vehicles. (RB 168-176.) However, Respondent's analysis is flawed in several respects.

B. The Vehicle Stops

Respondent agrees that the vehicle stops were based on a combination of facts obtained from an anonymous phone-caller/informant, prior po-

lice investigation, and observations by two shopping mall security guards. (RB 173.) Respondent concludes, without explanation, that "[t]he mall security guards located two suspects who matched the informant's description...." (RB 173.) Respondent does not mention, in this portion of the argument, what that description was, nor does Respondent explain how it can be concluded that the suspects located by the security guards matched that description. In fact, the facts are considerably more complicated than Respondent implies, and when fully analyzed, they demonstrate that Respondent's simplistic conclusion is indefensible.

To begin with, the initial descriptive information available to the police **dispatcher** who was in contact with the security guards were limited to the following facts: One suspect was named Troy and was 18-19 years old. A second suspect named Matt was wearing a white shirt and black pants. (RT 4:494-496.) There was no evidence that the **security guards** were aware of any other descriptive information. Very importantly, no evidence was ever produced regarding what descriptive information was actually conveyed to or known by the security guards; the evidence showed only what was known by the police dispatcher.

Disregarding that fatal flaw, when recounting the facts elicited at the evidentiary hearing, Respondent noted the following about the description provided by the informant and the facts known to the officers: Troy Rackley had been identified as one of the three robbers shown in a surveillance video tape. (RB 168.) Later, Matt Jennings was identified as another of the

robbers. (RB 169.) An anonymous informant called and named the stun gun robbers as Danny, John, Matt, and Chris. (RB 169.) When asked about "Troy," the caller only said that he hung around with the other four. (RB 169.)

Respondent fails to mention that the only "fact" provided by the caller was that Matt had been at her home playing with a stun gun. The officers had no knowledge why the anonymous caller believed that Danny, John, and Chris were also involved in the robberies, and the caller never said that Troy was involved in the robberies. (RT 1:44-47, 112-113, 119.) Also, at this point, the **only** evidence at all that even possibly pertained to John Travis was the fact that the anonymous caller (who was never asked what supported her conclusions) had said someone named "John" was among the persons involved in the robberies. (RT 1:130, 133-134.) Thus, three important things remained lacking – 1) "John" is a very common name, and there was no evidence at all that John Travis was the person the caller had identified; 2) even if this was John Travis, there was no information why she believed he was one of the stun gun robbers;[15] and 3) no

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15 Indeed, all information known at the time indicated that John Travis was **not** one of the stun gun robbers. He was not among the three suspects shown in the surveillance video, and he spent much of the time during which the robberies were occurred recovering from a serious beating he had received for reasons unrelated to the robberies.

evidence was supplied to establish that this anonymous caller was a **reliable** informant.

Later the same day, a different officer received an anonymous phone call from a woman who said Danny Silveria (or Silveras) was "possibly" involved in the robberies. And she also said the suspects were driving a Dodge Charger that was **red** and white or **red** and black. (See T-AOB 402.) However, when officers conducted their own examination, contacting relatives of the known suspects, they were told that Matt Jennings had last been seen leaving with Chris Spencer in Spencer's **black and white** Dodge Charger. (See T-AOB 402.) Thus, if this was the car the informant had referred to, either the officers had been very careless in their note-taking, or the informant had been mistaken about the color of the car.

Still later, the first officer to talk to an informant had further phone contact with a woman who sounded like the first caller, who now supplied a first name and a phone number for herself, and who informed the officer that the last names of two of the suspects were Jennings and Silveria. She added that Jennings was driving a **red** and white car that was possibly a Dodge Charger. (See T-AOB 403.) But as noted above, the only Dodge Charger ever shown to be connected to any of the suspects was black and white. No red and white car of any make or model was ever shown to be connected to any of the suspects.

Later, a call was received from a person who supplied a name that the police refused to ever reveal. There is no evidence this caller was the

same as the person who made any of the prior calls. This caller informed the police that the stun gun robbers were at the Oakridge Mall. One suspect, named Troy, was described only as 18-19 years old. The other, named Matt, was described only as wearing a white shirt and black pants. (RT 4:494-496.) This was the **only description** of any of the suspects that was ever provided by any informant. But when the vehicle stops occurred, there was no Dodge Charger, and no red, black, or white vehicle in sight; the vehicles that were stopped were a silver Datsun and a silver Honda. Furthermore, when these two vehicles were stopped, they contained three people, not two, and none of them was named Matt. Also, none of them wore a white shirt, as the informant had described; Troy Rackley was wearing a blue sweatshirt or polo shirt, John Travis wore a red and black striped shirt, and Danny Silveria wore a mostly black shirt. (See T-AOB 404-407.)

Thus, it is mystifying why Respondent would state that the security guards had located two suspects who matched the informant's description. Instead: 1) neither of the vehicles that were stopped based on information from the security guards remotely resembled the only vehicle described by the informant; 2) the stopped vehicles contained three persons, not the two that the informant had described; 3) none of the three men in the two vehicles was named Matt; and 4) none of the three men who were stopped wore a white shirt. Apparently the only fact that might have been correct was that one of the men was 18 or 19 years old. Respondent supplies no authority that such a non-specific description established probable cause to stop the

two vehicles, especially when so much about the vehicles and the men inside them was so very different than the information supplied by the informant.

Respondent also notes that the officers had already learned that there was an outstanding misdemeanor warrant for John Travis. (RB 173.) That may be so, but what Respondent ignores is that at the time the two cars were stopped, there was not yet any reason at all to think that John Travis was in either of them. Thus, the outstanding misdemeanor arrest warrant provided no justification at all for the car stop.

Next, Respondent states a conclusion without any explanation – that the mall security guards located the suspects and provided accurate vehicle and information to the police. (RB 174.) Again, Respondent ignores other facts that greatly detract from the significance of the information received from the mall guards. All that is known is that one guard received unspecified information that caused him to follow two men who were joined by a third man who then left the mall and got into a silver Honda and a silver Datsun, and then started driving from the west end of the mall to the north side. (See T-AOB 404.)

Once again, important information is lacking. 1) What was the basis of the informant's belief that Matt Jennings and Troy Rackley were at the Oakridge Mall? 2) What information was actually received by the mall guards? 3) What caused the mall guards to follow two men, who were joined by a third, none of whom was Matt Jennings, and none of whom

wore a white shirt? In sum, while the mall guards may have correctly reported that three men got in a silver Honda and a silver Datsun and were leaving the mall, there was no evidence produced at the hearing to explain why the mall guards chose these men to follow. Once again, the mall guards' accurate descriptions of the vehicles and their locations still remained far short of probable cause to detain the two vehicles. (See full discussion at T-AOB 411-416.)

Respondent states a conclusion that the officers had reasonable suspicion to believe the Honda and Datsun contained at least 2 of the 3 stun gun robbery suspects. (RB 174.) But Respondent utterly fails to explain what that reasonable suspicion was. In light of the undisputed information set forth above and ignored by Respondent, it is clear there was nothing approaching reasonable suspicion. Perhaps reasonable suspicion might have existed, but if it did, the People below failed to establish it at the evidentiary hearing, and Respondent fails to explain why a reviewing court should be satisfied with the record produced below.

C. The Vehicle Searches

Respondent asserts there was probable cause to search the vehicle that John Travis was driving. While Travis was arrested on the outstanding misdemeanor bench warrant, there is no claim that there was any evidence

of that crime that justified a search of the car.[16] Respondent also does not seriously explain any basis for arresting Travis for robbery at that point, and the opening brief explained fully why there was no probable cause for such an arrest. Instead, Respondent argues that the mere presence of Troy Rackley in a car he did not own and was not driving was enough to justify a search of the car for evidence or fruits of the stun gun robberies. (RB 174.) Respondent ignores the fact that there was no evidence whatsoever connecting the car to any of the robberies. Respondent cites no case at all for the proposition that Rackley's presence in the car was sufficient to establish probable cause to search the entire vehicle, after both occupants were safely in police custody inside a different vehicle. As appellant has argued, the law is to the contrary. (See *Arizona v. Gant* (2009) 556 U.S. 332, discussed at T-AOB 416-419.[17])

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16 Indeed, the crime was a failure to appear on a traffic ticket (RT 4:434), so there was no basis for any belief that a search might produce evidence or fruits of that crime.

17 *Gant*'s application to the present case has been jeopardized by the United States Supreme Court's subsequent decision in *Davis v. United States* (2011) 564 U.S, ___. *Davis* readily agreed that *Gant* applies retroactively to cases that were not yet final on appeal when *Gant* was decided. However, *Davis* evaded that retroactivity ruling by also concluding that the remedy of exclusion of the evidence should not be available if the authorities that conducted the search acted in good faith, based on the state of the law at the time of the search. But such a "good faith" exception should not apply here, where probable cause for the vehicle stop was so totally lacking, and the only crime for which Travis was arrested -- failure to appear on a traffic ticket -- left no basis at all to believe that a search was

(*Continued on next page*)

Respondent also notes that there was evidence that someone named John had been involved in the robberies. (RB 174.) Respondent ignores the fact that the "evidence" came from an anonymous informant who did not reveal why she believed "John" was involved in the robberies. Furthermore, the record is clear the officers arrested the occupants of the vehicle before even attempting to ascertain their names. It is not at all clear whether the names were obtained before the vehicle searches. Thus, Respondent falls far short of showing that reliance on evidence about "John," even if that was John Travis, formed any basis for the car search.

Respondent adds the fact that an officer had asked for the vehicles to be impounded, so the search was a proper inventory search. (RB 174-175.) This bare conclusion also has multiple flaws. As explained above and in the opening brief, prior to the search there was no basis to suspect that the vehicle had anything to do with the robberies. Thus, while an officer may have asked that the vehicle be impounded, Respondent fails to explain why such an order was justified. Respondent seeks to distinguish *People v. Williams* (2006) 145 Cal.App.4th 756 because the car in that case was legally parked, while the car in the present case was being driven through a public parking lot. (RB 175, fn. 56.) Respondent does not point to any evidence establishing whether the car being driven through the parking lot by John

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needed for officer safety, or that any fruits or evidence of the crime might be hidden in the vehicle.

Travis pulled into a legal parking place before coming to a stop. Even if the car had not reached a legal parking place, that factor was almost certainly the result of a police order rather than the free choice of the driver.

Thus, the record still fails to justify the search as a proper inventory search. To reiterate, since the search was made without a warrant, it was the People's burden to establish the specific facts that would support a search. That burden was not carried below, and Respondent ignores it on appeal.

D. The Informants

Finally, it should be noted that throughout Respondent's argument there are multiple references to the "informant" that appear to assume there was only one informant, an informant evidently known to an officer, and therefore (or for some other unexplained reason) an informant who should be considered reliable. The record, however, is not so clear.

What is known is the following:

1. On January 28, 1991, around 5:00 PM, Det. Boyles received a totally anonymous call from a woman who named Danny, John, Matt, and Chris as persons involved in the stun gun robberies. She gave no information explaining the basis of her beliefs, except to say that she had seen Matt playing with a stun gun. (RT 1:44-47, 112-113, 119.)
2. Later that day, Sgt. McCall received a call from an informant who said Danny Silveria or Silveras was **possibly** involved in the robberies and she mentioned a red and black or red and white Dodge

Charger. (RT 2:220-225, 229, 232, 236, 3:239.) There was no showing that this was the same informant as the one who made the first call. There was again no effort to ascertain the basis for her belief that Danny Silveria was involved in the robberies. The only Dodge Charger shown to have anything at all to do with the suspects was black and white, so the description of a partially red Charger was not accurate.

3. Around 9:00 PM, Det. Boyles contacted a caller who left a first name (Cynthia) and phone number. He thought she sounded like the first caller. She supplied the last names of Jennings and Silveria and referred to a red and white car that might have been a Charger. (RT 1:48-51.) Thus, this **might** have been the first caller, but that was left uncertain. There was still no explanation why she thought that Danny Silveria was involved in the robberies. She was wrong about ay involved car being partially red.

4. The next day, January 29, 1991, around 6:45 PM a 911 female caller said the persons involved in the stun gun robberies were at the arcade at Oakridge Mall. The caller referred to only two suspects, one named Troy who was 18-19 years old, and one named Matt, who wore a white shirt and black pants. This caller supplied a name, but the police never divulged it. (RT 4:496, 498, 504, 508, 5:561-562.) There was no showing the police had any prior contact with her. She did not reveal the basis for her beliefs that Matt and Troy were in-

volved in the robberies or that they were at the mall. Mall guards followed two men who were joined by a third, but none of them was Matt Jennings and one wore a white shirt.

Respondent asserts that a reliable informant had named "John" as one of the suspects in the stun gun robberies. (RB 175.) But the only time "John" was mentioned was in the first contact noted above, from a totally anonymous caller. Possibly that was the same person as the one in the third contact, but that was never clearly established. Respondent does not explain why this informant should be considered reliable, especially since she never gave any information whatsoever as to what caused her to believe that "John" was involved in the robberies. Also, as noted in the opening brief, "John" is an extremely common first name, so it is a stretch to conclude the caller meant John Travis.

Respondent notes at one point that the third caller **might** have been the same as the first caller, "as was proven later at trial..." (RB 173.) However, what was proven later at trial is irrelevant; the validity of the vehicle stop and vehicle search must be based on what was proved at the evidentiary hearing pertaining to the Penal Code section 1538.5 motion to suppress.

Respondent states that an informant "personally known by Officer Hyland" provided information about the suspects being at the Oakridge Mall. (RB 173-174.) This seems to imply some pre-existing relationship between the informant and Officer Hyland. All that was actually shown

was that the caller had given a different officer a name and phone number, and that information was passed on to Officer Hyland. There is no evidence that Officer Hyland knew anything more about this person than her name and phone number, or that this was the same person who had provided any of the earlier information. What we do know about this caller was that she was apparently wrong about the name of one of the two suspects she said was at the mall, and was also wrong about the shirt she described as being worn by one of the two suspects.

Respondent again asserts that the informant who called about the suspects at the mall was reliable because she was known by Officer Hyland and because the informant's information about the location of the suspects was correct, since the mall guards were able to locate and follow them. (RB 176.) As shown above, it is somewhat of an overstatement to say that the caller was known by Officer Hyland.

In any event, the claim that the informant should be deemed reliable because she gave accurate information about the location of the suspects is a classic example of bootstrapping. Nobody knew how accurate her information was until after the vehicles had been stopped and searched, but the validity of the vehicle stops and searches must be based on what was known before they occurred; a search cannot be justified by its fruits. (*People v. Harris* (1975) 15 Cal.3d 384, 932.) Before the vehicles were stopped, all that was known was that the caller gave very vague descriptions of two men, and that mall guards located and followed three men (none of whom

matched the only clothing description that was given) for reasons that were never explained. That is hardly enough to establish that the informant was reliable.

E. Conclusion

The police action in the present case should be found unlawful at the outset, in view of the absence of reasonable cause to stop the two vehicles in the first place. The two vehicles were stopped based on nothing more than a hunch with no significant support. Even if we fully credit the informant received from one or more informants, the fact remains that the mall security guards followed two men who matched no description other than an approximate age of 17 or 18. Malls are filled with males of that age, and the record leaves no basis for finding that the security guards had any reasonable basis for following these particular two males.

Indeed, neither one of these males matched the only other descriptive information -- that one wore a white shirt and black pants. Next, a third male joined the first two, but nothing in the record provides any reason to believe this third person was guilty of any crime. These three men got into two vehicles -- a Honda and a Datsun, neither of which remotely resembled the only previously known description of a suspect vehicle -- a Dodge Charger. The mall guards broadcast accurate descriptions of the Datsun and the Honda but the officers who stopped the vehicles had no basis at all for believing either vehicle had been involved in any crime, and they still had

no basis to conclude that the occupants of the vehicles included any of the suspects in the robberies.

That much alone requires a conclusion that the vehicle stop were unjustified and that any evidence found in either vehicle must be suppressed. Furthermore, the discussions in the opening brief and in this brief demonstrate that after the vehicles were stopped, there was a series of questionable actions by the officers. It is not clear whether the insufficiency of the evidence to support the vehicle stops and subsequent actions was due to the overall actions of the officers, or to the inadequate record presented at the evidentiary hearing. That question need not be resolved; all that matters is that, for whatever reason, the record is inadequate to justify the searches. All evidence found in the vehicles or on the persons of any of the occupants of the vehicles must be suppressed.

VIII. THE TRIAL COURT COMMITTED MULTIPLE ERRORS IN DENYING ONE GUILT PHASE JUROR'S HARDSHIP CLAIM AND IMPROPERLY EXCUSING TWO PENALTY PHASE JURORS DURING JURY SELECTION (Respondent's Argument XIII)

A. Introduction

Appellant Travis's opening brief challenged trial court rulings affecting three separate jurors in both the guilt and subsequent penalty phase juror selection process, arguing each compels reversal. (T-AOB 421-450.) Respondent's Argument XIII finds nothing improper in any of these judicial rulings. (RB 145-157.) To the contrary, all three were improper.

First, as explained in T-AOB Argument VIII (B)(1), the trial court erroneously denied a hardship request from a juror (H-65) who stated he was involved in a special project at work and informed the court he would have to work from 6 PM until 1 AM, 7 days a week, while serving as a juror. This happened even though the same trial judge had earlier excused several other prospective jurors with comparable problems, while stating that it was important that jurors in a lengthy trial be able to concentrate on the evidence without such distractions. But here, the timing for the defense could not have been worse. Prospective Juror H-65 was part of the panel of alternate jurors summoned after appellant Travis had already used the only peremptory challenge he was allowed for that alternate seat. This prospective juror was then selected as an alternate, and then -- when an actual juror

was excused for hardship -- H-65 was selected to serve as a juror for the guilt trial. (T-AOB 421-427.)

Second, as shown in T-AOB Argument VII (B)(2), two prospective jurors (E-45 and F-77) were excused over defense objection simply because they expressed negative beliefs about the death penalty. These prospective jurors were removed for cause even though they stated they would follow the instructions of the court and could consider voting in favor of a death verdict. (T-AOB 422-426, 428-450.) This was improper. Respondent does not persuade otherwise.

B. The Trial Court Improperly Rejected Juror H-65's Hardship Claim, Especially in Light of Completely Inconsistent Rulings on Several Other Hardship Claims

1. Respondent Incorrectly Relies on Forfeiture

Respondent first contends that any error was forfeited because defense counsel did not challenge Juror H-65 for cause. (RB 157.) The ubiquitous assertion of forfeiture in this specific context is inapt. Respondent fails to explain what purpose would have been served by a defense challenge for cause after the court had already denied the prospective juror's hardship claim. Once the prospective juror had explained his/her circumstances and sought to be excused, the trial court was clearly not convinced the juror should be excused. Defense counsel had no way to add any new

information that was not known to the trial court when the hardship claim was denied. Thus, any challenge for cause would have been futile. Neither argument nor objection is required to preserve a point when it would have been futile to argue or object. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 852-853.)

In making this contention, Respondent relies on *People v. Mickey* (1991) 54 Cal.3d 612, 664-665, and *People v. Mills* (2010) 48 Cal.4th 158, 186-187. (RB 157.) *Mickey* involved a completely different context, which is readily distinguishable. At issue in *Mickey* was whether the trial court was too lax in granting 229 hardship excusals, which, it was argued, effectively removed anybody who did not wish to serve in a capital case, leaving a non-representative pool of volunteers. Such a broad appellate contention obviously involves numerous factors that would not necessarily have been considered by the trial court in granting those hardship excusals. Thus, it is not surprising that this Court would fault the defense for not bringing such concerns to the attention of the trial court. The present case, in contrast, involves a single juror who actively sought a hardship excusal because the demands of a job would require that the juror work every night from 6 PM to 1 AM, in addition to jury service. Unlike *Mickey*, here the appellate contention is simply that such a juror cannot serve effectively in a lengthy capital trial, a point that the trial judge himself squarely recognized in regard to at least three other prospective jurors whose hardship requests were

granted. (See T-AOB 425-426.) Because the judge already understood the problem (both in general terms and as to this specific juror), there was nothing for trial counsel to add; Respondent does not suggest what more trial counsel might have said that would have altered the trial court's understanding of the issue.

In *Mickey*, *supra*, 54 Cal.3d at pages 664-665, the result sought on appeal was exactly the opposite of the result sought by the excused jurors below, so it was not covered by their hardship requests. That is, the jurors sought to be excused, were excused, and the argument on appeal, for the first time, was that they should **not** have been excused. In contrast, here the juror in question sought to be excused and the trial court refused. The argument on appeal seeks the same result the juror sought below – that the juror should have been excused. In these circumstances, the same argument made on appeal was fully covered below by the juror's own hardship request. Thus, *Mickey* provides no support for Respondent's position.

People v. Mills, supra, 48 Cal.4th at pp. 185-187, comes closer to the present case, but is still distinguishable. *Mills* actually presented two different situations. The first involved to two alternate jurors. Both had been challenged for cause by the defense and the challenges were denied. Unlike here, defense had not exhausted available peremptory challenges. For that reason, this Court found the argument regarding those challenges was not preserved on appeal. Also, the jurors in question were selected merely as alternates and never became actual jurors, so there was no harm to the de-

fense. In contrast, the alternate juror in this case, H-65, was seated as an actual juror before the evidentiary portion of the trial had even begun, and served as an actual juror throughout the lengthy trial. Therefore, H-65 was one of the jurors who voted in favor of finding John Travis guilty of murder with special circumstances, completely unlike this part of *Mills*.

The other portion of the *Mills* discussion involved a challenge for cause that was denied, followed by the use of a peremptory challenge to remove that juror, followed by the exhaustion of all peremptory challenges. (*People v. Mills, supra,* 48 Cal.4th at pp. 186-187.) Defendant argued on appeal that the trial court erred in denying the challenge for cause. This court found the argument was not preserved because trial counsel had failed to seek additional peremptory challenges, or otherwise express dissatisfaction with the chosen jurors. But there is a critical distinction between this case and *Mills*: in contrast with appellant's case, none of the jurors whose challenges for cause were denied ended up on the jury in *Mills*. But here, there was no peremptory challenge available at that stage.[18]

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18 In sum, the present case is quite different from *Mills*. Here, a juror who actively sought to be excused for hardship, and who had excellent reasons to support that request, was rebuffed by the trial court. Here, the appellate contention is that after the challenge was denied and, unlike in *Mills*, that juror did actually serve on the jury. No peremptory challenge was available to remove him. At that stage, any request for additional peremptory challenges or other expression of dissatisfaction would have involved nothing more than repeating the grounds for hardship that had already been tendered and rejected. In this situation, the requirement of a re-

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This court has not previously applied *Mills* to a situation comparable to the present one, where objection would be futile and serve no purpose. And the ultimate holding in *Mills* makes clear why this follows:

> "To prevail on such a claim, defendant must demonstrate that the court's rulings affected his right to a fair and impartial jury." (*People v. Yeoman* (2003) 31 Cal.4th 93, 114.) "[T]he loss of a peremptory challenge in this manner ' "provides grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him." ' " (*Ibid.*) Because none of the identified prospective jurors served on defendant's jury, nor was he forced to tolerate an incompetent juror on his jury as a result of exhausting his allotted peremptory challenges, the trial court's decision to deny his challenges for cause could not have affected his right to be tried by a fair and impartial jury. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1056.)"

(*People v. Mills, supra*, 48 Cal.4th at p. 187.)

The present case stands in sharp contrast. Unlike *Mills*, the identified prospective juror did serve on John Travis's guilt jury, forcing him to tolerate an incompetent juror. As explained at T-AOB 425-426, the trial judge himself recognized the very problem that made this juror incompetent to serve. In regard to three other prospective jurors whose hardship excusals

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quest for additional challenges, or other expression of dissatisfaction, would serve no purpose. As noted above, futile objections are not required.

were granted because they would have had to continue working while serving as jurors, the trial judge concluded that one such juror would not be appropriate and would be exhausted within a month (RT 63:4965); that another would not be able to concentrate on the case (RT 81:7439-742); and that the third would be unable to give the case the attention it deserved. (RT 81:7522-7524.) If the judge was correct in the concern with those jurors about Travis's fair-trial right, he plainly erred in refusing to excuse H-65 for hardship. Juror H-65's hardship was manifest and its disallowance was an abuse of discretion.

2. Respondent Also Fails on the Merits

The Attorney General's defense of the court's ruling fares no better. Respondent first notes, with no elaboration, the trial court's expressed concern that jury selection had gone on a long time and had reached a point where a lot of time and money had been invested, and the pool of remaining jurors was shrinking, so that it had become necessary for the court to be very stringent about granting hardships requests. (See RB 157 and RT 89:8402.) It is not clear why Respondent believes this supports their position; in fact, it demonstrates that the trial court was utilizing an improper standard, one that completely ignored the serious problems the court had readily recognized earlier. Respondent offers no principle and no caselaw that would support the court's conclusion -- that at a later stage of trial the

court can start denying valid hardship claims it would have granted earlier, just because there is a danger of running out of qualified jurors. The desire to protect taxpayers' funds is understandable, but has never been utilized to trump a defendant's right to a qualified jury, especially in a lengthy capital trial.

Respondent next asserts that the court was mindful of H-65's being accustomed to working 80 to 100 hours per week, and could find that serving as a juror and the working 50 hours a week, a "vigorous schedule" was consistent with the juror's "usual schedule." (RB 157.) Respondent ignores reality; if that is what the judge thought, it was an abuse of discretion without more to fail to replace H-65.

It is one thing to work long hours at an engineering job for which a person has been well-educated and trained, and has worked at long enough to be able to handle expected responsibilities; it is quite a different thing to have to drive downtown every morning, park and get into the courthouse, serve all day as a juror in a death penalty case, then drive to his job and work seven more hours, until finally getting home in time for a few hours of sleep. Serving as a juror in a capital case requires more than simply sitting in court and trying to stay alert all day; it also requires some amount of time to process the unfamiliar experience of listening to testimony all day long and thinking about how it all fits together. The jurors who were chosen for the initial guilt and penalty trials in this case served from the beginning of opening statements on August 15, 1995 (RT 94:8896) until the pen-

alty mistrial was declared on February 21, 1996 (RT 184:18325), a period exceeding six months. Indeed, as already noted, the trial judge himself had recognized earlier that jurors with similar distractions were not suitable jurors in a case like this.

Finally, Respondent attempts to rationalize that this juror's recognition of his own ability to serve explains why, earlier in the selection process, H-65 did not make a request to be excused. (RB 157.) Of course, the record paints a different picture: no request had been made earlier, when most hardship requests were heard, because at that time the prospective juror did not have a special project that would require working long hours every night after court. But after the full jury had been selected, two seated jurors suddenly discovered they had problems and could not serve.[19] The

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19 Respondent's stated basis for distinguishing other jurors excused for hardship is belied by the record. A full jury for John Travis was sworn on July 31, 1995. (RT 87:8208.) Alternates were then chosen with each side allowed one peremptory challenge per chair. The first person called to seat #1 was removed on a prosecution peremptory challenge and the second person called to that seat was removed by a defense peremptory challenge. Juror H-65 was then called and automatically seated, as no peremptory challenges remained. (RT 87:8209-8210.) A total of five alternates were chosen and sworn. (RT 87:8213.)

Within minutes, seated juror C-67 informed the court that her husband still had no permanent job, so her paycheck was needed. She was granted a hardship excusal by stipulation. (RT 79:8230.)

On August 7, 1995, the court and counsel discussed what to do next. The court reported that another Travis Juror, J-71, who had been told by her employer she could work weekends and still be paid, had now

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remaining sworn jurors and alternates were brought into court and told that after that day, they would be on the trial for an expected eight months. The court asked if anybody had a problem with that. (RT 89:8396-8397.) Juror #12 responded first, expressing concern about a rumor that there would soon be layoffs at her place of employment, but the judge rejected that hardship claim as too tenuous. (RT 89:8397-8400.)

It was at this point that Juror H-65 described his problem:

> "I have an issue in that after discussing this with my employer – I mean, they were aware that this was going to happen, but it's been determined that the project I'm working

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learned that she could not do that. (RT 88:8310.) As the discussion progressed, the court conceded that without a stipulation, two Travis alternate jurors would become regular jurors and the evidentiary portion of the trial would begin with only three alternates instead of the planned five. (RT 88:8323.)

A long discussion ensued in an effort to achieve a stipulated procedure acceptable to all parties. (RT 88:8323-8332.) However, because a similar problem had arisen with the Silveria jury, the judge insisted that both defendants and the prosecutor must stipulate to the same procedure. (RT 88:8333.)

The effort to come up with a stipulated process continued. (RT 88:8333-8376.) Finally the trial judge insisted that all parties agree to the procedure he had proposed, or he would simply deny the pending hardship excusals. He conceded that Juror J-71 had a legitimate problem, but he stated her remedy was to sue her employer, rather than to be excused from jury service. (RT 88:8376, 8379.) After more discussion, the judge's proposed procedure was accepted. (RT 88:8386.)

The next day, Juror J-71 was excused. (RT 89:8393.)

> on is expected to take additional time and will require that I keep working on it as we don't have time to retrain someone.
>
> "So my question to the court is given that during this time of the project – engineers usually work between eighty to one hundred hours a week. That means I will be working fifty hours outside of the courtroom.
>
> "If there's a concern for the attentiveness of the time off in the courtroom based on that information – and I'm exempt to labor laws in that case, such that engineers don't have unions."

(RT 89:8400-8401.)

Cutting in, the trial judge started asking about the specific hours the juror would have to work. The court then talked briefly with one other juror, and then made the speech noted above about how much time and taxpayers' money had been invested, and how stringent the court must now be about granting further hardship excusals. (RT 89:8401-8402.)

It may be true that Juror H-65 did not utter the words "I request a hardship excusal," but his reference to "attentiveness" before being cut off raised a red flag that should have alerted a less-rushed judge to recognize the juror's own concerns about how many hours were involved. Although the court told the jurors it wanted to know who else had a problem, and H-65 promptly made known his reservations, the judge asked no probing questions in response, his interest in moving on and getting a jury sworn as swiftly as possible being paramount. Under these circumstances it is hypo-

critical to contend that Juror H-65 should have made the kind of hardship request that might be expected from a trained lawyer. If the trial judge's reluctance to deal with the difficult situation Juror H-65 brought to his attention was understandable, surely the juror acted appropriately to bring his concern to the judge's attention. Respondent clearly misreads what the record shows the juror tried to communicate, unsuccessfully.

The bottom line is that if Juror H-65 was not seeking an excusal, then why did he raise this issue, which had not arisen until the last minute, at all? The answer is obvious; this juror, although somewhat intimidated by a judge who did not want to grant any more hardship excusals, was affirmatively describing the hardship he would suffer from so many long hours and asking gingerly to be excused. The case for excusal is clear. Nothing more should have been required to grant that request

C. The Trial Court Erred in Excusing Juror E-45 Because the Record Amply Demonstrates He Was Willing to Consider Voting for a Death Sentence in a Proper Case, and He Would Follow the Instructions of the Court Even if They Led to a Conclusion He Would Prefer to Avoid

Related problems arose when a new penalty juror was being selected, and the trial court with undue haste excused two prospective jurors, E-45 and F-77, for cause. As the opening brief acknowledged, Juror E-45 expressed strong beliefs against the death penalty in his questionnaire, but he

also made it clear he could consider voting for a death sentence in an appropriate case. In his oral voir dire by the trial court alone, with no questions permitted from defense counsel, E-45 was even clearer in stating his understanding that he was obligated and willing to follow the instructions of the court, even if that took him in a direction he would personally not prefer. He was unequivocally willing to consider all of the statutory aggravating and mitigating circumstances. Thus, pursuant to established caselaw principles, the record was inadequate to justify Juror E-45 being excused for cause, At most, the record suggests more detailed questioning may have been helpful, but the trial court did not do that; indeed, when defense counsel suggested that more clarification would be useful, the court would have none of it and excused the juror for cause. On this record, the trial court erred. (T-AOB 428-440.)

Respondent first concedes that Juror E-45 sometimes indicated he could act fairly and impartially, but Respondent argues the trial court was free to reject such oral responses while relying on the questionnaire answers that Respondent sees as disqualifying. (RB 151.) John Travis's position is that there is no inconsistency at all in the responses of Juror E-45. The record discloses no reason for the trial court to reject Juror E-45's oral statement that he could be fair and impartial.

It is true that Juror E-45 expressed some strong views in his questionnaire, but that, of course, was filled out before he was given any significant information about the role of a juror in a capital case. Even then, a re-

view of all of his questionnaire responses shows while Juror E-45 had strong personal misgivings about the death penalty, he was nonetheless willing to put his personal feelings aside and follow whatever instructions he received from the trial court. (See T-AOB 436-438.) Respondent points to no answer that indicated otherwise. To the contrary, as explained in the opening brief, the questionnaire responses were no stronger than several that were discussed in *People v. Stewart* (2004) 33 Cal.4th 425, 440-455, and found non-disqualifying. (T-AOB 430-440, esp. at pp. 436-438.) If it was the questionnaire responses that caused the trial court to have concern, then the appropriate course was to seek clarification in voir dire. (*Stewart, supra,* at pp. 448-449.)

Here, the trial court did not remind the prospective juror of his questionnaire responses and seek clarification. As shown in the oral voir dire quoted at RB 146-148, the court started by asking if both penalties would be possibilities, and Juror E-45 responded that he had issues with the death penalty, but he could look at what the law requires. The court cut him off mid-sentence and asked if he would be closed off to one penalty, The juror responded that it was difficult to say, since he had not heard the evidence or the circumstances. The court did then refer to the questionnaire, but rather than seek clarification to any specific question, the court simply noted that it appeared the juror did not favor the death penalty. The juror acknowledged the death penalty would be harder, and he would want more evidence than for life without parole. That type of response was also covered in *Peo-*

ple v. Stewart, supra, 33 Cal.4th at p. 447. (See discussion at T-AOB 435-436.)

At this point the trial court gave an extremely simplified summary of the type of case that would be presented, asking if Juror E-45 could vote for death in a case where a defendant deliberately participated in a multiple stabbing of a victim during a robbery, and the victim died. The juror responded that if that was all he heard, he would probably not vote for death. The court repeated the same question and the juror responded that if he were instructed on the law, then he might have to change his beliefs and could consider the death penalty. The judge repeated the question once again, and the juror responded that if that were all he knew about the case, he would probably not find that death was appropriate.

At no time did the juror indicate he could never vote for death in such a case; he simply said he would want to know more, but if that was all he knew, then he would **probably** not vote for death. One would hope that most prospective jurors would share such a belief.

> "So long as a juror's views on the death penalty do not prevent or substantially impair the juror from 'conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate' (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146), the juror is not disqualified by his or her failure to enthusiastically support capital punishment."

(*People v. Pearson* (2012) 53 Cal.4th 306, 332.)

When questioned by the court the juror never said he would be unable to consider death or be unable to follow instructions or be unable to put aside his own personal views. To the contrary, he was at all times open to the consideration of a death sentence. He was at all times prepared to follow the instructions and go where they pointed, regardless of whether he personally favored a different result. Even with the court's limited scenario, he did not say he was unwilling to consider death; he simply said he would probably vote for life without parole if the limited summary was the only information he had.

Important details not used in the extremely simplified summary related above included: 1) the victim was tied to a chair and totally helpless when he was stabbed; 2) a stun gun was used on the helpless victim before he was stabbed; 3) the defendants knew they would have to kill the victim even before the robbery began; 4) the defendants were high on illegal drugs when they committed the offense. Also, the limited summary did not include anything about the background of the defendants, or about the impact of the crime on the family of the victim. In sum, Juror E-45 was told so little that it is no surprise he would express reluctance to vote for a death sentence. This record simply fails to indicate in any way that the juror was unwilling to consider a death sentence under any circumstances, or that he

was unwilling to consider it in the case before him, or that his personal beliefs would override the court's instructions.[20]

In sum, there was no response in Juror E-45's oral voir dire that would support disqualifying this juror. *Stewart* itself dealt with excusals based solely on questionnaires, with no oral voir dire at all. In the present case, if the court had excused Juror E-45 based only on the questionnaire, with no oral voir dire at all, *Stewart* would mandate a reversal, because *Stewart* gives multiple examples of responses that were even stronger than the responses in the present questionnaire (*Stewart, supra,* at pp. 444-445, 448-449), yet *Stewart* concludes that excusal based only on such questionnaire responses would be improper; instead, the proper course was to seek clarification in oral voir dire. (*Stewart, supra,* at pp. 446-447,451, 454-455.) Here, the judge did conduct some oral voir dire, but **nothing** in those responses supports a conclusion the juror should be disqualified. If disqualification on Juror E-45's questionnaire alone would not be upheld on appeal (as it could not be, under *Stewart*), then it certainly cannot be upheld where the additional oral voir dire points away from disqualification.

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20 Appellant is not arguing that a trial court necessarily has to include all the details set forth in this paragraph when summarizing a case during voir dire; instead, appellant is only arguing that an uncertain response after a summary as abbreviated as the one given here is not sufficient to justify an excusal for cause, absent further questioning to ascertain the juror's true state of mind.

Respondent quotes *People v. Fudge* (1994) 7 Cal.4th 1075, 1094: "Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, ... equivocation should be expected." (RB 151.) Respondent sees that as a reason to **always** defer to the trial court (or, at least, to so defer in the present case), but such an interpretation of *Fudge* is inconsistent with the principles set forth in *Stewart*. Instead, the *Fudge* court's realistic description of the approach to voir dire from a juror's point of view is the very reason why a trial court must seek clarification, not obfuscation. In other words, if equivocation is to be expected, then a proper response would be to ask probing questions to resolve it.

In *Fudge*, the juror's disqualifying responses went far beyond anything shown in the present record. The juror at issue in *Fudge* stated she would not impose a death sentence in the case before her because the defendant was only eighteen when the crime was committed and only twenty at the time of trial. (*Fudge, supra,* at p. 1094.) The court explained further:

> Although at one point she stated she would not dismiss factors other than the defendant's age, and that she would weigh them all, immediately thereafter she stated the "only" factors she would consider were defendant's age and the severity of the death penalty. She later averred she would vote for life imprisonment and "wouldn't care what the circumstances were," that she would "disregard" the other factors. It thus appears that although Williams was willing to consider some of the anticipated sentencing factors, she would not consider all of

> them. She thus did not have an open mind regarding the penalty determination. (Cf. *People v. Clark, supra,* 50 Cal.3d at p. 597 [the proper inquiry is "whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination."].)

(*Fudge, supra,* at p. 1095.)

It was in that context that *Fudge* concluded that to the extent there was any uncertainty, it was proper to defer to the trial court. In sharp contrast, in the present case there was no meaningful equivocation at all, and no statements comparable to the responses in *Fudge*. In his questionnaire, Juror E-45 simply expressed a personal distaste for the death penalty. At one point he did respond that he would always vote against a death sentence, but that was in response to a question that gave no hint of the circumstances **or the instructions**. Juror E-45 responded unequivocally that he could follow instructions to consider all of the circumstances before deciding on a penalty. He also responded that before deciding whether death or life without parole was the appropriate penalty he would want to hear all of the circumstances about the murder and the background of the defendant. (CT 163:43550.)

Juror E-45's questionnaire responses provided **no tone or demeanor** for the court to assess, while in *Fudge* the disqualifying responses were all verbal. Unlike *Fudge*, Juror E-45's oral voir dire was not disqualifying or equivocal. Notably, Juror E-45 was never asked to explain his single questionnaire response, where he said he would always vote for death rather than life without parole. When a defense attorney suggested the need

for further clarification, the trial court simply ridiculed the attorney. In excusing the juror, the trial court said nothing about tone or demeanor. In sum, this case is nothing like *Fudge*, and offers no basis for a reviewing court to defer to the trial court.

D. For Similar Reasons, the Trial Court Also Erred in Excusing Juror F-77

Virtually everything that was said in the preceding section applies equally to Juror F-77. This juror expressed very strong personal feelings against the death penalty, sometimes using colorful language, but as shown above and in the opening brief, that in no way justifies an excusal for cause. This juror repeated expressed a willingness to consider all of the evidence and to listen with an open mind to the views of other jurors. This juror repeatedly expressed a willingness to consider a death verdict, and never stated otherwise. True, this juror indicated he would start with a preference against a death verdict and he stated he would have to be convinced he was wrong before he would return a death verdict, but in the opening brief it was shown that such a view is not a reason for disqualification, unless there is also an unwillingness to consider a death verdict. (See *People v. Ramirez* (2006) 39 Cal.4th 398, 446-449, *People v. Ledesma* (2006) 39 Cal.4th 641, 671-675, and *People v. Riggs* (2008) 44 Cal.4th 248, 282-285, discussed at T-AOB 446-449.)

Respondent argues against the application of *Ledesma* (RB 152), apparently seeking a rule that would allow a trial court to reject every challenge for cause against jurors who strongly support the death penalty and would have to be convinced by strong evidence to vote differently, but could consider both penalties, while the same trial court simultaneously granted every challenge for cause against jurors who are personally strongly opposed to the death penalty and would have to be convinced by strong evidence to vote otherwise, but who could also consider both penalties. Respondent seeks a level of unfairness that cannot be tolerated in 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.

(*People v. Stewart, supra,* 33 Cal.4th 425, 446.)

Respondent never comes to grips with the fact that there was simply no inconsistency here that would obligate a reviewing court to defer to a trial court resolution. Juror F-77, like the juror in the preceding section, was always consistent in acknowledging his strong personal opposition the death penalty, but he was also always consistent in expressing his ability and willingness to consider both penalties and to make his decision in the case before him based on the evidence and instructions, not simply on his personal opinion about the death penalty. In these circumstances, a reviewing court cannot base its ruling on one isolated statement, but must instead

consider the entire record in order to determine whether the juror would automatically vote for one penalty or the other, regardless of the evidence. Here, the record below does not even come close to indicating that Juror F-77 would ignore the evidence and vote solely on the basis of his personal views about the death penalty. Instead, this juror was clear, consistent, and unequivocal in stating his ability and willingness to set aside his personal beliefs and follow the law.

The trial court did not disqualify Juror F-77 based on disbelieving some answers and accepting others. Instead, the court's reasons for the disqualification were clearly stated: "... the juror is substantially impaired. He has a position and his position is that he would have to be convinced otherwise." (RT 220:25532.) As shown in the opening brief, that is simply not the standard. (See T-AOB 446-450.)

IX. THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING THE AUTOPSY SURGEON'S TESTIMONY THAT THIS WAS ONE OF THE MOST ATROCIOUS CASES HE HAD EVER SEEN (Respondent's Argument VI)

As appellant Travis's opening brief details, the trial court allowed the autopsy surgeon, Dr. Pakdaman, to testify over objection that in his personal opinion that the present case was one of the most atrocious cases he had ever seen in his long career, and he became upset every time the prosecutor asked him about it. The prosecutor forcefully reminded the jurors of this testimony in his argument. (TAOB 451-453.) Needless to say, Respondent brushes it off. (RB 106-108.) But this was far more than an expert simply describing his observations during an autopsy, and the court had no legitimate reason to allow it.

First, what is of concern to an autopsy surgeon is entirely different than what is of concern to a jury determining whether the appropriate penalty is death or life without parole. To an autopsy surgeon, a body with many unpleasant stab wounds is likely more "atrocious" than a body that displays a single bullet wound to the heart or the brain. An autopsy surgeon is in no position to make a moral assessment of the overall circumstances of the crime and the background of the defendant. Thus, the fact that the autopsy surgeon viewed this body's condition as more atrocious than others does not assist the jurors, in any lawful sense, in a proper evaluation of all

of the aggravating and mitigating circumstances. His own personal belief was irrelevant.

Second, this Court has recognized that, in a related context, the word "atrocious" is unconstitutionally vague when used to define a special circumstance. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797.) In the present context, the term was even more vague. Just what was the nature of the other cases the autopsy surgeon had handled and how were they less atrocious? Was this case more atrocious because there was more blood, or because more internal organs had been damaged, or because there were a large number of different wounds that the surgeon had to catalog in his report? Or was he thinking of factors personal to the victim (his age, his family, other matters personal to the case) that made this case stand out? Was it the body's appearance that provoked his reaction? All of these circumstances (or others) may have been present, singly or in combination, and any of them would be upsetting to a pathologist; but the resulting "atrocious" nature of the victim's body's condition does not legitimately prove "any disputed fact ... of consequence" (Evid. Code §210) to the penalty decision.

Third, this Court has made it clear that it is not permissible to make a penalty determination by comparing one murder case to another. As Respondent acknowledges, cases like *People v. Bonin* (1988) 46 Cal.3d 659, 695 and *People v. Sanders* (1990) 51 Cal.3d 471, 529-530 find no benefit accrues to jurors through such comparisons. Thus, it was a particularized

inquiry into the circumstances of the specific offense at issue, and the character of the particular defendant on trial, that were the proper focus of John Travis's jury -- not autopsies in other cases. But beyond that, Dr. Pakdaman's comparison of the "atrociousness" of this case (whatever that might mean) actively misled the penalty jurors by inviting improper consideration of a blatantly irrelevant and prejudicial factor.

Fourth, the surgeon's detailed report, prepared at the time of the autopsy, allowed him to give precise and detailed testimony about each and every wound. The defense in no way challenged his ability to recall his work on this case, and there was never any issue disputing his testimony about the cause of death or the number of wounds. Thus, Respondent's implicit justification for admitting Dr. Pakdaman's characterization as a means of demonstrating why the witness could recall this case years later is a subterfuge for the introduction of evidence that could be improperly used to appeal to the emotions of the jurors, encouraging reliance on and deference to an expert witness far more familiar with death than were the jurors. (T-AOB 451-464.)

Respondent grounds much of the People's argument on a disturbing premise that "... the jurors had no way of assessing the amount of pain that Madden had experienced relative to other stabbing victims." (RB 107.) That premise is surely false because to refer to this case as "one of the most atrocious I've ever seen" told the jurors nothing whatsoever about the amount of pain any other victim had suffered, compared to this case. Re-

spondent cites nothing in the record that indicates Dr. Pakdaman's assessment had anything at all to do with the amount of pain this or any previous victim had suffered. In some cases, one wound could have produced horrific pain -- far more than in another case with a greater number of wounds. Thus, the meaning Respondent purports to see aptly demonstrates the vagueness of the term "atrocious." Similarly, despite Respondent's effort to distinguish *Bonin* and *Sanders* (RB 108), as a matter of law the comparison of the present case to other murder cases was improper. Respondent believes those cases apply only when there is an effort to compare the charged murder to a specific other murder. This ignores the fact that the evidence is **less** meaningful when the comparison is expressed in broad generic terms, rather than in specific terms.

Respondent disregards that the record contains much testimony from the defendants themselves about the manner in which the victim had been killed. That evidence, plus the autopsy surgeon's proper testimony about the nature of the wounds the victim had received, was more than enough to allow the jurors to determine how much pain the victim might have suffered. That is the kind of evidence from which jurors are expected to reach a penalty determination. Comparisons to other cases are distracting and unnecessary, and here, confusing as well. Is Responding contending that in every case where a murder victim died instantaneously, it would be proper for a defense expert to testify in mitigation that he had performed autopsies in thousands of cases and that the present victim had suffered less pain than

in any of those other cases? If the victim suffered no pain, would that be a mitigating factor?

Respondent further suggests that Dr. Pakdaman was not offering an improper evaluation of the culpability of the defendants. (RB 107-108.) How does Respondent know that? As observed above, it is not at all evident from the record what aspects of the stab wounds the surgeon meant when he described them as atrocious -- the number or manner of wounds, the amount of blood, the damage to parts of the body -- let alone how that affected the amount of pain this victim suffered relative to other deceased persons. Respondent simply does not know what the witness really meant. How could the jurors know?

At bottom, Respondent's analysis must be rejected because its logical consequences are unacceptable. In a case where a murder victim died instantaneously, would this Court allow a defense expert to testify in mitigation that he had performed autopsies in thousands of cases and the present victim had suffered less pain than in any of those other cases? Of course not. Such evidence does not help the jury make the required particularized determination of the proper penalty in light of the present charged crime and the background of the defendant. Respondent's rationale would lead to a parade of experts on both sides to testify that the pain suffered by the present victim was greater or lesser than in some or in most other cases. Nothing in this court's past decisions even hints at a belief that such testi-

mony would assist the jury in making the proper particularized decision in the case before it.

Finally, Respondent's claim that "... the jurors were plainly aware that such a determination was theirs to make based upon the particularized circumstances of the instant case" (RB 108) add nothing. And it cannot be reconciled with Respondent's earlier statement that if the jurors had been made aware of the prior hung jury, they would have abdicated their own responsibilities and deferred to the "findings" of the prior jury. (See Argument I, *supra,* and in the opening brief.) Respondent cannot have it both ways.

This was not just another minor technical error on the court's part. The surgeon's improper comparison of this case with others in terms of "atrociousness" seriously affected the penalty determination in this demonstrably close case; reversal is necessary.

X. PERMITTING THE PROSECUTOR IN ARGUMENT TO DENIGRATE ALL FACTOR (K) EVIDENCE AS "THE KITCHEN SINK" DILUTED THE RIGHT OF THE DEFENSE TO PRESENT MITIGATING BACKGROUND AND CHARACTER EVIDENCE (Respondent's Argument XVIII)

In anticipation of the prosecutor's opening statement to the jury at the penalty retrial, the defense objected to the prosecutor's description of the defendant's mitigating evidence as ridiculing all defense mitigating evidence, which he described as "kitchen sink" evidence simply because it would be presented pursuant to Penal Code section 190.3, subdivision (k). The defense knew this was coming since the same prosecutor had used such language in the original penalty trials, which had resulted in mistrials. The trial court overruled the defense objection and the prosecutor proceeded to do just as had been predicted. Thus, even before the defense put on any witnesses, the prosecutor told the jurors that he expected the defense to offer mitigating evidence falling under factor (k), which he did not know how to describe except as being in a "kitchen sink" category. (T-AOB 465-468.)

As Travis's defense counsel argued in his objection, this was misleading because factor (k) evidence "has equal weight with all other factors." (RB 177, internal citation omitted.) " 'It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience.' " (*People v. Robertson* (1982) 33 Ca.3d 27, 57, quoting from *People v. Haskett* (1982)

30 Cal3d 841, 863.) Respondent rejects the potential for disparagement of the defense mitigating evidence in the prosecutor's "kitchen-sink" characterization (RB 176-179), turning a blind eye to that very purpose in his use of the phrase; this was misconduct.

Respondent concedes that it is misconduct for a prosecutor to employ "deceptive or reprehensible" means to obtain a desired result. (RB 178, quoting from *People v. Avila* (2009) 46 Cal.4th 680, 711.) But Respondent fails to offer any other rational motive for the prosecutor to use the "kitchen sink" language, over the objection of the defense, except to persuade the jurors to give such evidence less force. After all, when the prosecutor objected to the use of the word "mercy" by the defendants, the trial court sustained that objection despite a history of thousands of years of defendants throwing themselves on the mercy of the court, and despite frequent language in decisions by this court and the United States Supreme Court recognizing that the exercise of mercy is a proper function – indeed a responsibility – of juries determining the appropriate sentence in capital cases. (See Argument III, earlier in this brief and in the opening brief.)

Why couldn't the prosecutor simply agree not to use the "kitchen sink" language? Why was it so important for the new penalty jury to hear it (as the first one did)? If this was not an attempt to denigrate the value of all background and character evidence, before it had even been presented, then

what legitimate purpose did it serve?[21] Can we believe that the prosecutor was unable to think of any other way to refer to factor (k) evidence? Does such terminology do anything whatsoever to assist jurors in determining the proper result in a capital case? Simply asking these questions makes the answer apparent. There can be no doubt that the prosecutor was inviting the jury to lump all defense mitigating evidence pertaining to background and character, no matter what it might be into an inferior category that should be received with skepticism about its value in the legal process. This becomes misconduct because it is deceptive and reprehensible. It had no place in this trial.

In defense of the prosecutor's actions, Respondent argues: "There is no reasonable likelihood that the jurors construed his 'kitchen sink' comment as a disparagement of the mitigating evidence." (RB 179.) But if no disparagement was intended, why was it so important to the prosecutor that he be allowed to use such terminology, especially when the same prosecutor fought so hard, and successfully, to prevent the defense from using the time-honored term "mercy"? If all the prosecutor intended was a synonym for the term "all-encompassing," then why couldn't he simply use that

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21 According to Wikipedia.com, such language is derived from the expression "everything but the kitchen sink" and means "Attempting to include too wide a variety of things, typically with a result that is less functional than intended." (*http://en.wiktionary.org/wiki/kitchen-sinky*.)

term, or the term "factor (k)"? Indeed, why not simply explain what was contained in factor (k) (as the prosecutor did), and then describe actual kinds of evidence he expected and, later in closing argument, tell the jury why he felt such evidence was entitled to less weight than the aggravating evidence? Perhaps this was all about telegraphing that message at the outset, so that the thumb was already on the scales while the jury heard the evidence.

Although the intended disparagement worked, Respondent trivializes how the foregoing was unfair. And Respondent disregards entirely the denial of due process of law in the dilution of factor (k) evidence. (See T-AOB 467-468.) As argued before, reversal is necessary.

XI. IN CLOSING PENALTY PHASEARGUMENT TO THE JURORS, THE PROSECUTOR WAS IMPROPERLY PERMITTED TO APPEAL TO EMOTIONS AND TO MISLEAD THE JURORS REGARDING THE FINDINGS OF THE GUILT PHASE JURY, PARTICULARLY AS TO TORTURE (Respondent's Argument I and II)

A. Introduction

The penalty phase trial was fraught with serious error and prosecutorial misconduct, condoned by the trial court. Any one or more of the challenged rulings already detailed (T-AOB 469-478) should lead to reversal; together that result is unavoidable. The prosecutor's argument to the jurors (as developed in appellant Travis's opening brief) resorted to numerous unfair generic appeals to emotion that had nothing whatsoever to do with weighing the particular aggravating and mitigating factors or with returning a particularized verdict based on the specific evidence of the circumstances of the crime, victim impact, and the character and background of the defendants. (T-AOB 469-478.)

In addition, the prosecutor was allowed to characterize the present crime as "super-torture," even though the guilt phase jury had expressly found the torture-murder special circumstance **not true**, in regard to John Travis. While the trial court sought to justify that ruling because the burden of proof in a penalty trial was different than in a guilt trial, the court went further and precluded any argument or instruction that would inform the

jury that the guilt phase jury had found the torture-murder special circumstance not true. Since the penalty jury was informed that a prior jury had found Travis guilty of first degree murder during the commission of robbery and burglary, the court's failure to also tell the jurors of the additional "not true" finding was fundamentally unfair. (T-AOB 478-483.)

Finally, punctuating his appeal to the jurors' raw emotions by firing the stun gun into the air, producing an electric spark, and displaying numerous gruesome photographs, the prosecutor unfairly challenged the jury to have the strength and courage to fulfill society's demand for the death penalty, because the law required it here. (T-AOB 4834-486.)

Respondent argues that the prosecutor was properly permitted to argue as he did, in all respects. (RB [Arg. I] 61-71 and [Arg. II] 74-79, 82-85.) This court should not endorse Respondent's extreme position.

B. It Was Unfair to Inform the Penalty Jurors of the Verdicts Returned Against John Travis in the Guilt Trial, While Simultaneously Not Informing Them of the "Not True" Finding by the Guilt Jury, and Allowing the Prosecutor to Argue That the Present Murder Involved "Super-Torture"

Appellant's opening brief developed multiple reasons why it was fundamentally unfair to allow the prosecutor to argue that the present murder involved "super-torture," after the guilt-phase jury found the torture-murder special circumstance not true. Moreover, that error was compound-

ed by refusing to inform the new penalty jury of that guilt-phase finding, while at the same time informing the penalty-phase jurors about the guilt-phase jurors' special circumstance findings as to robbery and burglary. This patent inconsistency unfairly skewed the penalty determination. (T-AOB 474-483.)

First, Penal Code section 190.3, paragraph 3 expressly precludes offering evidence of prior criminality in aggravation of the penalty if the defendant has been prosecuted and acquitted of that activity. Thus, the Legislature has clearly rejected the very ground relied on by the trial court in making its ruling. That is, the Legislature has specifically precluded offering prior criminality in aggravation under the "no burden of proof" penalty phase standard, whenever there has been an acquittal of the same conduct under the "beyond a reasonable doubt" standard. There is simply no rational basis for refusing to apply the same principle in the present context.

Second, this unfairly put the prosecutor in a stronger position at the retrial than was warranted. The original guilt phase jury knew of its "not true" finding when it considered penalty and was unable to agree on a unanimous verdict. Even if it would have been proper to argue torture as an aggravating factor to that jury in the original penalty trial, based on a different burden of proof than for the guilt phase, the effect of such an argument would have been balanced by that jury's knowledge of its own prior verdict. Even utilizing a different standard, that jury would have been more likely than the present jury to reject reliance on that as a factor in aggrava-

tion. There is simply no reason why the retrial jury should not have had the same information that the original jury had, along with an instruction regarding the different burden of proof.

Third, an established principle precludes a prosecutor at a penalty trial from criticizing a guilt phase partial acquittal or deadlocked jury. (*People v. Haskett* (1982) 30 Cal.3d 841, 864-867.) Here, the prosecutor was permitted to accomplish the same end -- not by openly criticizing the prior equivalent of a partial acquittal, but by going **one step further** and having it effectively erased altogether, for the purpose of the penalty trial.

Respondent starts by noting that a special circumstance trial merely determines eligibility for the death sentence, while evidence offered in aggravation goes to the appropriateness of punishment. (RB 67.) That much may be true, but it is equally true when comparing a guilt phase acquittal of a crime that includes violent criminality and a penalty trial in which a prosecutor would want to use evidence of that same violent criminality in aggravation. Respondent fails to distinguish or even discuss this aspect of the claim set forth in the opening brief. Furthermore, this distinction still does nothing to rebut the argument that John Travis should have at least been entitled to have his penalty-phase jury informed of the prior guilt-phase rejection of the torture-murder special circumstance.

Respondent relies on *People* v. *Taylor* (1990) 52 Cal.3d 719, 743, and *People* v. *Santamaria* (1994) 8 Cal.4th 903, 921-922, to support the propriety of arguing facts in aggravation despite partially adverse findings

at the guilt trial. (RB 67-69.) Neither case addresses the issues presented in the present case.

In *Taylor*, the defendant was found guilty of the crime of attempted rape, but an attempted rape special circumstance was found not true. In a penalty trial before the **same jury**, the prosecutor argued the attempted rape as a factor in aggravation. First, since this was the same jury, it was well aware of its prior findings and needed no instruction about that, unlike in the present case. Second, the guilt phase jury had found the defendant guilty of attempted rape, unanimously and beyond a reasonable doubt. The untrue finding on the special circumstance must have been based on an intent issue, or whether the murder was in the commission of the attempted rape, so it was at least proper to argue the facts that had been found true beyond a reasonable doubt. Nothing in *Taylor* indicates the prosecutor did anything more than that. Here the prosecutor plainly went beyond the facts inherent in the guilt verdicts; he essentially treated a finding of "not true" as if the finding was "true."

Santamaria did involve a retrial, but it was not even a capital case, so no penalty trial was involved. Instead, in the first trial, the defendant was convicted of murder, but a knife use enhancement was found untrue. The murder conviction was reversed on appeal. When the case came on for retrial, the trial court ruled the prosecutor could not proceed on a theory that the defendant personally used a knife. That led to the prosecution announcing it was unable to proceed, and the case was dismissed. On the People's

appeal from that dismissal, the only issues discussed was whether double jeopardy or collateral estoppel principles precluded reliance on knife use as a theory of the murder offense.

Thus, **none** of the claims raised in the opening brief were discussed at all in *Santamaria*. "'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.' " (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) Nothing in the holdings of this court in *Taylor* or *Santamaria* is in any way inconsistent with the contention actually made in appellant Travis's opening brief.

Respondent also seeks to distinguish *People* v. *Haskett, supra,* 30 Cal.3d 841, which was relied on at T-AOB 481 for the proposition that prosecutors may not criticize guilt-phase partial acquittals. (RB 70-71.) In *Haskett*, the defendant was convicted of murder, but the jury was unable to reach a unanimous verdict on rape or robbery. At the penalty trial, the prosecutor repeated implied the jury had acted wrongly by not reaching unanimous verdicts, and invited the jury to correct its error during the penalty trial. Unquestionably *Haskett* contains many features that are different than the present case. Nonetheless, the rationale remains the same. Under *Haskett*, it would have clearly been improper for the prosecutor at a penalty retrial to criticize the guilt phase jury for its "not true" finding on the torture-murder special circumstance. Here, the prosecutor was permitted to go even further, effectively rewriting history and erasing the fact that the "not

true" finding had ever occurred. Respondent does not explain why the principle set forth in *Haskett* should not provide strong guidance to the resolution of this logically similar issue.

Finally, Respondent has completely ignored the analogy that John Travis made to Penal Code section 190.3, paragraph 3, which precludes evidence of prior violent criminality in aggravation if that evidence had previously been rejected under a "beyond a reasonable doubt" standard. Respondent has totally failed to address the contention that if the prosecutor was to be permitted to urge torture as a factor in aggravation, then fundamental fairness at least required informing the jury of the prior "not true" finding, accompanied by an instruction regarding the different burden of proof. Respondent's superficial analysis of the *Haskett* issue -- distinguishing that case on irrelevant grounds but failing to address the underlying principle that should control appellant's case notwithstanding unsubstantial differences in context here -- should be soundly rejected.

C. It Was Improper to Allow the Prosecutor to Engage in an Emotional Appeal That Society Demands a Penalty of Death for Anybody Convicted of Murder

In the opening brief, it was shown that the prosecutor was allowed to include in his argument to the jury a number of emotion-laden arguments that did nothing whatsoever to help the jurors separate capital cases that merit a death sentence from those that do not. He was allowed to use a

graphic depiction of a giant scales of justice, with a long list of aggravating factors that separated every possible nuance related to the evidence in aggravation, while listing only a single factor in mitigation – factor (k), which was also ridiculed as the "kitchen sink" category. (See Argument X, earlier in this brief and in appellant Travis's opening brief.) He argued that "our social contract" called for the ultimate punishment; that life without parole would be the easy way out and that it was the solemn responsibility of jurors to not take the easy way out; that the jurors represented the community and their verdict would reflect the conscience of the community. But jurors in a capital case are bound by no "social contract" to return a death verdict.

The prosecutor also raised the specter of "a society that's made up of vigilante justice or lynch mobs crying out for vengeance in the streets" (RT 276:33004) as an implied alternative to jurors taking the easy way out with life without parole. This was blatantly improper, as was the prosecutor's argument that the jurors were performing a duty required by a law passed by their fellow citizens and affirmed in the courts of the state and the country. He further misled the jurors by arguing that any cases that went beyond the theoretically most minimal elements of a case that could technically be charged as capital murder were automatically aggravated cases of capital murder.

All of this occurred while twenty-seven photographs of the deceased victim were prominently displayed, causing the victim's widow and mother to begin crying, with the widow continuing to cry throughout the argument.

And ignoring trial court rulings, the prosecutor argued that the murder meant the victim would not be present for his daughter's first father-daughter dance, and would not be able to walk her down the aisle at her wedding, despite the court having expressly precluded both arguments.[22] The prosecutor closed by stressing that the verdict would show the society whether these jurors had the courage and strength to make the proper decision. (See T-AOB 469-478, 483-485.)

Respondent sees no problem with such "strong" arguments. (RB 82-58.) Respondent relies on cases that have approved some portions of the argument made below, but none is apposite to appellant's specific contention that the only apparent purpose of the types of appeals to the jury which the prosecutor utilized here was to inflame emotions. Every one of these arguments would apply equally to virtually every case that could ever be charged as capital murder. It is the job of jurors to determine whether the particular case before them is sufficiently aggravated that it merits the extreme penalty that is only imposed in the most aggravated cases. Admonitions to return a verdict that steers away from potential vigilante justice are anathema to the law.

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22 Objections to these specific arguments were sustained, but the damage was already done. Earlier rulings, after arguments made in advance by the defense, were intended to avoid the need for objections in front of the jury, and to preclude improper arguments. But these rulings were rendered meaningless by a prosecutor who apparently saw himself as being above the law.

Respondent has failed to offer any explanation why prosecutors should be permitted to make such "strong" arguments, which serve no purpose other than to inflame the passions of the jurors. It is especially incongruous that Respondent defends such "strong" arguments but finds nothing wrong with the trial court's ruling that the defense could not use the simple word "mercy" in their arguments. (See Argument III, earlier in this brief and in the opening brief; see also RB 75-79.) Thus, the trial court unfairly tied one hand behind the backs of the defense, while simultaneously letting the prosecutor use every weapon in the book. This alone rendered the penalty trial fundamentally unfair.

Respondent does contend that some portions of the prosecutor's argument were necessary in response to arguments made by counsel for the codefendant. (RB 84.) Respondent cites no authority allowing improper argument in response to defense argument, whether proper or **improper**. But no necessity is demonstrated. To the contrary, Respondent would simply compound the prejudice suffered by John Travis when the trial court refused to sever the parties or order separate juries, as had been done for the original penalty trial, by asserting the prosecution's free rein to make misleading arguments even if improper. (See Argument V, earlier in this brief and in the opening brief.)

Moreover, arguments that supposedly justified the prosecutor's remarks were made **after** the trial court ruling that allowed these prosecution arguments, over the objection of the defense. If the defense knows in ad-

vance that the prosecutor will make such arguments with the blessing of the trial court, then the defense can hardly be expected to pull its punches. Such arguments by the defense would not have been necessary if the trial court had told the prosecutor at the outset that arguments should be restricted to the evidence, and to reasons why the specific aggravating evidence in this particular case so outweighed the mitigating evidence that a death sentence was the appropriate penalty.

Notably, *People v. Huggins* (2006) 38 Cal.4th 175, relied on by Respondent for allowing a prosecutor to argue that "if the jury could not protect society by sentencing defendant to death, its failure to do so would create an incentive for society to engage in improper self-help to protect itself" (*id.* at p. 253; see RB 84), went on in the very next sentence to explain: "These remarks were a permissible form of argument designed to show the circumstances in which society may be justified in taking one life to protect the lives of others." (*People v. McDermott* (2002) 28 Cal.4th 946, 1003.)[23] But the prosecutor's remarks here did no such thing. They did not show why the present circumstances were so aggravated, in comparison to the mitigating evidence, that it was necessary to take the lives of these particular defendants rather than imprison them for the rest of their lives without

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23 Notably, the discussion in *McDermott*, relied on as the sole authority cited in *Huggins*, pertained to completely different kinds of arguments that were not similar to a instilling fear into jurors that a failure to vote for a death sentence would invite vigilantism.

possibility of parole. Instead, these remarks could be made by prosecutors in **every** capital case penalty trial, arousing strong passions, but doing nothing whatsoever to help the jury to determine if the present case was among the few that do merit a death sentence.

Respondent cites *People v. Ledesma* (2006) 39 Cal. 4th 641, 741 as support for the prosecutor's argument that the jurors represented the community that passed the death penalty law. (RB 85.) However, *Ledesma* did not go that far; at best, it permitted arguments that the jurors were representatives of the community, but it said nothing about arguing that the jury represented the community that **passed** the death penalty law. Indeed Respondent also does not go far enough, since the prosecutor's actual argument here was that the jurors were representatives of the community that had passed the death penalty law, **which had been upheld by the courts**. If urging the jurors that voting for a death sentence was the only proper way to represent the community was not intended to shift the responsibility for a death sentence away from the jurors and onto the "community" and the courts instead, then what purpose did it serve? No constitutionally permissible purpose, appellant submits.

In sum, once again Respondent has resorted to vague rebuttals that fail to address still another in a series of egregious trial court errors. Respondent's defense of the prosecutor's argument only betrays its unfairness. A verdict of death on such a record cannot be upheld.

XII. RESPONDENT CANNOT REBUT APPELLANT'S DEMONSTRATION THAT THIS CASE MUST BE CONSIDERED CLOSE, SUCH THAT THE SUBSTANTIAL ERRORS AT THE PENALTY PHASE, INDIVIDUALLY OR CUMULATIVELY, MUST BE DEEMED PREJUDICIAL (Respondent's Argument XIX)

As demonstrated in the foregoing presentation, the record of John Travis's penalty phase trial reflects several substantial errors; it also contains a number of features indicating that the case was unusually close. True, not only was Travis guilty, but the crime was abhorrent, although that is true of practically every murder. The way in which the present victim was treated may make this murder more aggravated than some, or even many, but in nearly all other ways it is less aggravated than most. The fact remains this was not a case of multiple murders or murder with prior murders. This was a single victim and no evidence disclosed any other act of criminal violence in John Travis's life. Indeed, even the evidence of nonviolent prior criminality by Travis was minimal, compared to most cases in which a death verdict was returned. (See T-AOB 115-119, 495-496.)

It is also important that the defense presented strong evidence establishing multiple powerful mitigating factors about John Travis. He was genetically predisposed to drug and alcohol addiction. He also had a particularly difficult family history, recognized as an important factor in mitigation in *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115. He was left virtually unsupervised, to grow up on the streets of San Jose, from an alarmingly young age. Other strong mitigating evidence demonstrated that following

his arrest, Travis made a remarkable adjustment to the county jail, with growing maturity during a six-year period of pretrial incarceration. He became very involved in helping other jail inmates, and he became a useful worker in the jail. (T-AOB 125-135, 496-498.)

Besides these considerations is the significant fact that two separate juries in the prior penalty trials for both John Travis and his codefendant were unable to reach unanimous verdicts. This factor has been repeatedly recognized in published cases as one pointing strongly toward a finding that the case was close, in turn making it more likely that the trial error was prejudicial. (T-AOB 498-500.) And with the number of substantial erroneous rulings as occurred here, the likelihood approaches certainty.

Respondent does not contest the presentation of Appellant Travis's opening brief to this effect or refute any specific point made in the arguments; instead the People argue only that "there were either no errors or no prejudicial errors. Moreover, the case against Travis was strong and warranted his guilty verdict and death sentence." (RB 179.)

The weakness of Respondent's simplistic assessment is apparent. Any reasonable evaluation of this case would recognize the closeness of the penalty determination. Respondent acts as if the powerful mitigating evidence simply did not exist. Respondent says the case against John Travis was "strong," but there is no explanation of what this means. True, the case in favor of **guilt** was strong, but Travis's guilt had already been determined by a prior jury and the only issue on retrial with a new jury was the deter-

mination of the appropriate **penalty**. Respondent offers no explanation why the circumstances of this crime and the victim impact evidence were so strong in comparison to the very powerful mitigating evidence that no reasonable trier of fact could have reached a different result absent the errors in this trial, whether considered individually or cumulatively.

Furthermore, Respondent fails to meet the People's burden to demonstrate the errors were not prejudicial. When determining whether an error that impacts the penalty phase of a capital case is prejudicial or harmless, the applicable standard set forth in *Chapman* v. *California* (1967) 386 U.S. 18 provides that the beneficiary of error "which possibly influenced the jury adversely to a litigant" (*id.*, at p. 23) bears the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. (*Id.*, at p. 24.) Here there were numerous errors, substantial in effect. Respondent makes little effort to meet its burden as to each singly, let alone when they are considered together.

To merely assert, as does Respondent, that the evidence was strong enough to permit a jury to determine death was the appropriate punishment is not enough. Respondent must go much further and demonstrate beyond a reasonable doubt that no rational juror would have chosen a different result in the absence of the egregious errors in this trial. As *Chapman* recognized, even when the state has a reasonably strong case, it might still be true that fair-minded jurors could have returned a verdict more favorable to the de-

fendant. (386 U.S. at pp. 25-26.) Respondent falls far short of making the case for harmless error which the burden imposed by *Chapman* demands.

In any event, even if it reasonably could be said that the case against John Travis was "strong," that would not be enough to satisfy the stringent *Chapman* standard. For example, in *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-281, the high court made it clear that the federal Sixth Amendment right to a trial by jury sharply constrained reviewing courts from finding errors harmless by looking to the reviewing court's own opinion regarding the strength of the case against a defendant. Any such conjecture, *Sullivan* reasoned, amounted to nothing more than a reviewing court's speculation about what it believed a jury would have done, rather than focusing on whether it had been proved beyond a reasonable doubt that no reasonable jury would have reached a different verdict absent the error. What must be avoided is any appellate speculation about the behavior of jurors, which would amount to a constitutionally precluded directed verdict.

In sum, Respondent's argument really rests entirely on the claim that there were no errors in the present trial. In the unlikely event that this Court agrees, then there is no need to assess prejudice at all. But if this court disagrees and finds that one or more of John Travis's appellate contentions of prejudicial error have merit, then Respondent has offered no basis at all for finding such error harmless. This is especially true when error is cumulative, as the record here so sharply demonstrates. Reversal is compelled.

XIII. ADDITIONAL ERRORS AND FLAWS IN THE CALIFORNIA CAPITAL SENTENCING PROCEDURES ALSO SUPPORT THE NEED FOR REVERSAL OF THE DEATH JUDGMENT (Respondent's Argument XX)

In the opening brief, it was shown that a series of other errors and flaws in California's capital case procedures should result in reversal of the present death sentence. (T-AOB 503-512.) Respondent disagrees with every point. (RB 180-185.) Appellant has acknowledged that most of these points have been rejected by this court in prior decisions, but urged reconsideration and also sought to preserve the claims for federal review, as they had not yet been finally determined in the federal courts. (See T-AOB 503 and *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.) Thus, there is no need to reply to Respondent's arguments.

CONCLUSION

For the reasons set forth in the opening brief and in this brief, the judgment should not stand. Appellant John Travis's convictions should be reversed, and/or the penalty verdict should be vacated.

DATED: February ___, 2013

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, Mark E. Cutler, declare as follows:

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

On February __, 2013, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelope in the United States Mail at Cool, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of

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the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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

Executed this _____ day of February, 2013, at Cool, California.

_____