In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DANIEL TODD SILVERIA and JOHN RAYMOND TRAVIS,

Defendants and Appellants.

CAPITAL CASE

Case No. S062417

Santa Clara County Superior Court Case No. 155731
The Honorable Hugh F. Mullin, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

In supplemental briefing, appellant Silveria expands on various arguments made in his opening brief, augments existing arguments by joining related claims made by co-appellant Travis, and renews his challenge to the constitutionality of California's death penalty scheme by claiming support from a recent United States Supreme Court decision. None of Silveria's supplemental claims entitle him to any relief.

ARGUMENT[1]

III. THE TRIAL COURT PROPERLY LIMITED SILVERIA'S PSYCHIATRIC EXPERT TESTIMONY

In his opening brief, Silveria argued that the trial court erred by limiting the testimony of his psychiatric expert witness, Dr. Kormos. (AOB 135.) In his supplemental brief, Silveria asserts that the trial court erred by prohibiting Dr. Kormos from relying on Silveria's excluded confession while testifying. (ASOB 3.) Silveria also argues the trial court erred by allowing the prosecutor to cross-examine Dr. Kormos "beyond these limits." (ASOB 3.) Silveria's arguments fail.

A. Background

In Silveria's first penalty trial, Dr. Kormos testified that he had reviewed Silveria's confession, as well as that of co-defendant Travis. (162RT 16055-16058.) At the penalty retrial, the trial court denied Silveria's motion for severance and ordered Silveria and Travis tried by a single jury. (200RT 22911-22912.) The court excluded evidence of Silveria's confession because it "cannot be properly redacted to afford the People and [Travis] their right to a fair trial" (200RT 22911), but permitted

[1] For ease of reference, respondent will follow the numbering of arguments appellant used in his supplemental briefing, which correspond to the argument numbers used in his opening brief. (See ASOB 2.)

portions of Silveria's penalty trial testimony to be presented at the retrial, since he had been subjected to cross-examination. (200RT 22912; see 244RT 28471-28474.)

Accordingly, the trial court thereafter held that Dr. Kormos would not be able to testify that he had relied on the excluded confession. (262 RT 31048.) The court reasoned that the prosecutor and co-defendant Travis "cannot properly and fully cross-examine [Dr. Kormos], because [they] cannot get into the areas and some of the documents that your witness has considered." (262RT 31048.)

Silveria suggested that "if that is a problem," then either the testimony and prosecutorial cross-examination be limited to admissible materials, or the court grant a mistrial. (262RT 31049.) The trial court denied both suggestions (262RT 31049.)

The prosecutor suggested that there be "no reference to [Dr. Kormos] having viewed or considered confessions" and thus "no hint that any such items exist." (262RT 31054.) The prosecutor's suggestions would allow the parties to cross-examine Dr. Kormos on Silveria's statements, so far as there were no "specifics as to under what circumstances those [statements] came out, that is, whether one was in a confession" or during one of Dr. Kormos's interviews. (262RT 31054.) Travis indicated tentative agreement with this plan. (262RT 31055-31056.)

The trial court asked Silveria whether he was agreeable to the prosecutor's proposal, and Braun declined. (262RT 31056.) The court then indicated the three options for Silveria: (1) strike Dr. Kormos's testimony; (2) defer striking the testimony to give Silveria time to decide whether to testify, eliminating the problem; or (3) the prosecutor's proposal. (262RT 31060-31061.) After a short recess, Silveria indicated an agreement between the parties in which Dr. Kormos would make no reference to confessions and that he would not be cross-examined on any statements of

Silveria beyond the prior testimony that had already been read to the jury. (262RT 31061-21062.) However, Braun noted that the parties disagreed on the extent of cross-examination, so he suggested that he ask Dr. Kormos about Silveria's childhood and then "cut Dr. Kormos off at some point prior to the commission of the crime and not ask him questions concerning Mr. Silveria's state of mind at or about the time of the crime." (262RT 31064.) According to Braun's suggestion, there would thus "be no questions regarding [Silveria]'s state of mind about the crime." (262RT 31066.) The prosecutor indicated his concerns with the proposal (262RT 31066-31069), after which Braun pushed again for "my alternative proposal, which I think is a far better solution. Again, I'm proposing to cut Dr. Kormos's testimony off short of the crime." (262RT 31071.)

The court stated that it believed Braun's proposal was relatively fair. (262RT 31079, 31082.) The parties agreed that Dr. Kormos's testimony would be limited to the time before the crime, with no testimony as to the crime itself or anything thereafter. (262RT 31086-31089.)

B. Silveria's New Challenges to the Limitations on Dr. Kormos's Testimony are Inapposite

Silveria raises two supplementary challenges to the limitations on Dr. Kormos's testimony. The challenges fail.

First, Silveria contends that the rule of *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 was "not implicated" because he had testified at the first penalty trial and been cross-examined therein. (ASOB 4-5.) He asserts the trial court's ruling was therefore "based on its plain misapprehension of the governing law, constituting an abuse of discretion." (ASOB 5.) Initially, respondent notes that Silveria's argument does not challenge the limitation to Dr. Kormos's testimony, and thus fails. In all events, Silveria's argument also fails because his prior testimony was not limited due to *Aranda*/*Bruton*. Rather,

the court prevented Silveria from presenting the entirety of his prior testimony because it was hearsay and the only cross-examination allowed at the first penalty trial had been on the circumstances of the crime ("factor (a)"). (243RT 28462; see 244RT 28471 [later clarifying that Silveria's testimony on the Quik Stop and Gavilan Bottle Shop would be allowed]; see also 134RT 12450.) Silveria's argument is therefore inapposite.

Second, Silveria contends that *Aranda*/*Bruton* did not forbid Dr. Kormos from offering "the same testimony . . . that had been presented at the first penalty phase," because such testimony did not relate "the contents of Silveria's post-arrest statements." (ASOB 9.) Again, Silveria's argument is misplaced because the trial court never made a contrary ruling. As explained, the limitations on Dr. Kormos's testimony were suggested by Silveria, and the court's original ruling related to the ability of Travis and the prosecution to cross-examine Dr. Kormos, not on *Aranda*/*Bruton*.

To the extent that Silveria is arguing the trial court erred at the beginning by indicating it would strike Dr. Kormos's testimony, his reliance on *People v. Sanchez* (2016) 63 Cal.4th 665, 685-686 is unavailing. In *Sanchez*, this Court held "[w]hen an expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation . . . ." (*Id.* at p. 686.)

Assuming for the sake of argument that *Sanchez* described the state of the law in Silveria's 1997 penalty retrial, it supports the trial court's decision. In cross-examining Dr. Kormos, Travis and the prosecutor were entitled to ask questions about "the matter upon which his or her opinion is based" (Evid. Code, § 721, subd. (a)); that is, they were entitled to ask Dr. Kormos about Silveria's confession. However, as that confession had been

excluded from evidence, Travis and the prosecutor were thus presented with a dilemma: forgo thorough cross-examination, or introduce case-specific hearsay by asking Dr. Kormos about the confession. The trial court reasonably decided not to place them in that situation. Indeed, the trial court's initial ruling also protected Silveria. (See *People v. Malik* (Oct. 25, 2017, C080291) ___ Cal.App.5th ___ [2017 WL 4784605 at *5] [violation of Confrontation Clause when prosecutor introduces case-specific hearsay through cross-examination of defense expert].) Silveria's reliance on *Sanchez* is thus unavailing.

C. Silveria's Reliance on a Footnote in *Tate* Does Not Defeat the Conclusion that He Invited Any Error

As argued in the Respondent's Brief, Silveria invited any error in the limitation of Dr. Kormos's testimony, as it was Braun who suggested the limitations. (See RB 89.) In his supplemental brief, Silveria relies on *People v. Tate* (2010) 49 Cal.4th 635, 695, fn. 32, for the proposition that "the record demonstrates that defense counsel's actions did not indicate a tactical choice within the meaning of the invited error doctrine." (ASOB 12.) However, unlike the record in *Tate* and contrary to Silveria's assertion, the record here establishes that Braun had a tactical purpose for suggesting the limitations. Namely, his suggestion allowed him to present Dr. Kormos's diagnosis of child neglect while avoiding any *Aranda*/*Bruton* issues and limiting the extent of the prosecutor's cross-examination. (See 262RT 31064-31066, 31070-31073.)

D. Any Error in the Limitation of Dr. Kormos's Testimony was Harmless

Any error from the limitation of Dr. Kormos's testimony was harmless. The bulk of his favorable testimony was admitted, insofar as he testified that: Silveria suffered from child neglect (262RT 31100; 271RT 32613); Silveria suffered from alcohol, cocaine, and methamphetamine

addiction (271RT 32668, 32676); neglected children suffer from low self-esteem and would not "know of limits on their behavior" (262RT 31108, 31110, 31139); Silveria, Travis, Spencer, and Jennings had formed a "pseudo-family" (262RT 31190); and that the abuse suffered by Silveria affected him "later in life" (263RT 31223, 31226). On the other hand, the evidence that Silveria had committed several robberies before planning and executing the LeeWards robbery and murder was very strong. In such circumstances, any error here was harmless.

Silveria contends the first penalty jury took more time to deadlock than the retrial jury took to return a verdict, and asserts that "[t]his alone is strong evidence that the exclusion of the same evidence on retrial was not harmless." (ASOB 13.) The first jury took approximately 14 hours to deadlock, while the second took approximately five and a half hours to return a death verdict.[2] However, that difference is less than nine hours, not a significant time. Further, the difference could be due to factors other than the limitation of Dr. Kormos's testimony, including: (1) the retrial jury hearing only penalty evidence, unlike the first jury, which also heard evidence to determine Silveria's guilt; (2) Silveria's refusal to testify at the

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[2] At the first penalty trial, the jury began deliberations at approximately 2:30 p.m. on February 9, 1996. (13CT 3374.) They deliberated for an hour and a half, and then they were excused until February 13, 1996. (13CT 3375.) On that date, they deliberated for approximately five and a half hours. (13CT 3379-3380.) The jurors deliberated for another three and a half hours on February 14. (13CT 3382.) On February 15, the jurors deliberated for three and a half hours before declaring themselves deadlocked. (14CT 3442.) Thus, the first penalty jury deliberated for a total of approximately 14 hours.

At the penalty retrial, the jury began deliberations at approximately 2:20 p.m. on May 1, 1997. (21CT 5306.) They deliberated for just over two hours before being excused until May 5. (21CT 5307.) On that day, the jurors deliberated for just over three and a half hours before reaching a death verdict. (21CT 5313; 22CT 5459.) Thus, the second penalty jury deliberated for a total of approximately five and a half hours.

retrial; or (3) differences in the presentation of evidence and the arguments of counsel (see, e.g., 269RT 32168 [Braun noting that in the first trial he had argued Travis was the leader, "but we certainly didn't this time"]).

Silveria also contends the error was not harmless because the prosecutor "[c]apitaliz[ed] on the absence of Dr. Kormos's testimony that would have connected Silveria's childhood trauma to his perceptions and behavior at the time of the crime . . . ." (ASOB 13.) However, the prosecutor argued only the unremarkable proposition that "[n]ot everyone with a bad or troubled childhood grows up to rob or kill." (279RT 33427.) Moreover, the comments Silveria complains of consumed only a few pages of the prosecutor's rebuttal closing argument, which spanned approximately 82 pages of transcript. (See ASOB [citing 279RT 33425-33429]; cf. 278RT 33358- 33397 & 279RT 33398-33439.) Such generalized, reasonable, and abbreviated argument did not create or exacerbate any prejudice.

E. The Trial Court Properly Overruled Silveria's Objections to the Prosecutor's Cross-Examination

Silveria repeats his argument that the court impermissibly allowed the prosecutor to cross-examine Dr. Kormos despite having "expressly found" that Silveria had adhered to the agreement that the parties "would not elicit from Dr. Kormos any testimony concerning his opinion of Silveria after age twenty-one, including any reference to Silveria's post-arrest statements." (ASOB 14; see AOB 144.) As explained in the Respondent's Brief, the trial court actually found that Braun had violated the agreement by asking Dr. Kormos several questions about Silveria's behavior "later in life." (RB 91-92; see 271RT 32599-32602; see also 263RT 31223-31226 [questions].) That decision was reasonable and, as explained in the Respondent's Brief, any error was harmless beyond a reasonable doubt. (See RB 95.)

In a footnote, Silveria argues that "[e]ven if the court had properly concluded that defense counsel had exceeded the bounds of the stipulation, the proper remedy was to strike the improper testimony, not to permit the prosecutor to elicit additional improper testimony." (ASOB 16, fn. 2.) However, nothing about the prosecutor's questions was improper under the law; it was only improper under the limitations to Dr. Kormos's testimony agreed upon by the parties. Thus, once Silveria brought up the issue of "later in life" on direct examination, the prosecutor was entitled to address it on cross-examination. Silveria's proffered remedy was not required by law.

VII. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO ELICIT EVIDENCE FROM WITNESSES

In his Opening Brief, Silveria asserted the trial court erred by allowing the prosecution to introduce evidence that he engaged in a "scam" (AOB 184-188), that he had impregnated Travis's underage sister (AOB 191-192), and that he displayed a stun gun during an unrelated fight (AOB 188-191). In the instant brief, Silveria expands on his contention (cf. AOB 194-195) that the first two alleged errors deprived him of due process and his right to a reliable sentencing determination. (ASOB 18-21.) He also brands the prosecutor's efforts regarding the third error "misconduct" and contends that it, "with the other misconduct alleged in the AOB and herein, deprived appellant of a fair trial, reliable sentencing determination, confrontation of the evidence against him, and due process of law under the United States Constitution." (ASOB 23.)

A. Evidence that Silveria Engaged in a "Scam" and Impregnated Travis's Sister

The prosecutor cross-examined Travis about a plan to get loan money from a school that would be used instead to buy drugs. (269RT 32163-32164; see RB 109.) According to Travis, Silveria agreed it "sounded like

a good idea," enrolled in the school, then quit after a few months. (269RT 32169-32170.) As argued in the Respondent's Brief, this evidence was properly admitted because it was part of Silveria's relationship with Travis, a critical aspect of the case and part of the circumstances of the crime. (See RB 110.) Alternatively, the evidence was also admissible to rebut Silveria's positive character evidence and to impeach Silveria's credibility, insofar as his previous testimony had been read to the jury. (See RB 110-111.) As the evidence was properly admitted, there was no federal constitutional error.

The prosecutor cross-examined Travis's sister about her relationship with Silveria, and she testified that she had become pregnant by Silveria when she was 15 years old. (264RT 31350-31351; see RB 113.) As explained in the Respondent's Brief, the witness's relationship with Silveria was patently relevant to the jury's evaluation of her testimony, so the evidence was properly admitted. (RB 114.) Accordingly, there was no federal constitutional error.

Even were this evidence erroneously admitted, any error was harmless. Silveria stood convicted of special circumstance first degree murder and multiple robberies and burglaries. The jury heard extensive testimony on his involvement in Madden's brutal killing. The "scam" and impregnation evidence cannot have meaningfully altered their evaluation of Silveria's character. Nor has Silveria identified any argument by the prosecutor placing any emphasis on this evidence. Accordingly, any error in its admission was harmless.

B. Evidence that Silveria Displayed a Stun Gun on Another Occasion

Travis testified about a fight in January 1991 in which he, Silveria, Spencer, Jennings, and Rackley had been involved. (See, e.g., 266RT 31736 & 269RT 32200; see also RB 47.) Travis testified that after the

fight, he had seen either Jennings or Silveria with a stun gun. (269RT 32200.) The prosecutor asked Travis whether he recalled having seen "either [Silveria], Matt or Chris displaying and triggering the stun gun before—while in your presence before you and this other person got into a fight?" (269RT 32201.) Braun objected on two grounds, one of which was that the prosecutor had asked the question "in bad faith." (269RT 32201.) After a sidebar in which the objections were overruled, the prosecutor repeated the question. (269RT 32208.) Travis denied seeing the stun gun at the fight. (269RT 32208.)

Silveria contends the prosecutor's question was misconduct, because "the prosecutor knew that there was no . . . evidence to justify these questions." (ASOB 26.) Specifically, Silveria asserts the prosecutor had stated at a pretrial hearing that "I'm not sure that anyone actually put it in [Silveria]'s possession" and had described only Rackley using the stun gun during the fight. (ASOB 26; see 45RT 3711-3712.) Silveria also notes that the prosecutor, on redirect examination of prosecution witness Tom Swenor at the guilt phase, elicited Swenor's testimony that he had seen Rackley using the stun gun. (ASOB 26; see 99RT 9468.)

Silveria's assertion of misconduct lacks merit. A prosecutor commits misconduct by asking a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. (*People v. Earp* (1999) 20 Cal.4th 826, 859-860.) Here, the prosecutor's question did not imply any facts beyond Travis and "this other person" having gotten into a fight, a fact that was previously established by Travis's testimony. Specifically, the prosecutor's question did not imply that Silveria had carried or triggered the stun gun. Even if it had, there is no indication that the prosecutor's question was asked in bad faith, as the circumstances of the fight were unclear, and the fact that Swenor had seen

Rackley with the stun gun does not mean that Travis had not seen someone else with it at some point. Accordingly, there was no misconduct.

Moreover, any error was harmless. The prosecutor's questions were innocuous and elicited no evidence inculpating Silveria. Moreover, the jurors were instructed in accordance with CALJIC No. 1.02, which states in pertinent part that "[s]tatements made by the attorneys during the trial are not evidence" and "[d]o not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it enables you to understand the answer." (22CT 5352.) The jurors are presumed to have followed this instruction, "rendering it unlikely under any standard that [appellant] was prejudiced by the prosecutor's allegedly improper attempt to elicit inadmissible evidence." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1349.) The same result obtains even when this alleged instance of misconduct is combined with those alleged in the Opening Brief. (Cf. ASOB 27-28.)

IX. THE TRIAL COURT PROPERLY FOUND THAT GEORGE INVOKED THE FIFTH AMENDMENT

In his Opening Brief, Silveria argued that the trial court erred by finding that one of Silveria's foster fathers, Michael George, validly invoked the Fifth Amendment in refusing to answer questions about whether he had sexually abused Silveria. (AOB 221-227; see RB 122-123.) Silveria argued that the statute of limitations for George's abusive acts had passed, and that he therefore was not protected by the Fifth Amendment. (AOB 222-225.) In the instant supplemental brief, Silveria repeats his argument that the statute of limitations had run at the time of the trial court's ruling, and that the trial court erred by finding that George's testimony "could be used against him under section 1101 of the Evidence Code" at a hypothetical future case. (ASOB 31.)

As argued in the Respondent's Brief, George properly invoked the Fifth Amendment because he could reasonably have apprehended danger from providing testimony. (RB 124, citing *People v. Smith* (2007) 40 Cal.4th 483, 520.) First, he could reasonably have feared prosecution. At the time of the 1997 hearing, California law allowed for the prosecution of some sex-related child abuse crimes even if the original limitations period had expired. (See *People v. Frazer* (1999) 21 Cal.4th 737, abrogated by *Stogner v. California* (2003) 539 U.S. 607.) Thus, at that time, George could reasonably have feared that existing state law—or state laws to be enacted in the future—could expand the statute of limitations for his offenses or even revive them if they had expired. Second, George could reasonably have apprehended danger from providing testimony that could have been used as propensity evidence against him at a trial for another victim whose limitations period was still running.

Silveria takes issue with the trial court's finding that George could reasonably fear his testimony might be used against him as Evidence Code section 1108 evidence, branding it "rank speculation." (ASOB 31.) However, George alone knew whether he had abused other victims and what the circumstances of his abuse had been. His fear of his testimony being used against him could have been justified in light of his knowledge. In all events, it was not the function of the trial court to determine whether George's testimony would be admissible propensity evidence in a possible future trial. Rather, the trial court had to determine whether George could *reasonably apprehend danger* from his testimony. As explained, the trial court's finding that George could do so was correct.

Even if the court erred, it was harmless beyond a reasonable doubt. (See *People v. Trujeque* (2015) 61 Cal.4th 227, 269 [applying *Chapman v. California* (1967) 386 U.S. 18].) First, the jury ultimately heard evidence that George had abused Silveria. A defense investigator testified that

George was in custody in Lake County following his guilty pleas to eleven counts of child molestation against a different victim. (261RT 30936.) The investigator testified that George had admitted engaging in about 10 acts of sexual acts with Silveria. (261RT 30947-30950.) The investigator also testified that George had said he was not willing to testify in Silveria's case. (261RT 30955.) Second, the jury heard other evidence of Silveria's difficult childhood, including abuse and neglect from his parents (see, e.g, 252RT 29212 [father broke Silveria's nose]) and Dean Herbert (see, e.g., 253RT 29448, 29451 [beating Silveria up] & 253RT 29460, 29484-29485 [forcing Silveria to engage in sex acts]). Third, there is no evidence to conclude that George would actually have testified had the trial court found that he could not properly invoke the Fifth Amendment, nor is there any evidence as to what acts he would have described had he testified. In light of these circumstances, any error in the trial court's ruling was harmless.

XVI. SILVERIA JOINS ARGUMENTS BY CO-APPELLANT TRAVIS

Silveria seeks to join six arguments briefed by co-appellant Travis. (ASOB 34-36.) For the reasons given in the Respondent's Brief, he is not entitled to relief on any of the claims as briefed by Travis. (See RB 74-86 [Travis Claim III], 106-108 [Travis Claim IX], 117-122 [Travis Claim IV], 127-134 [Travis Claim V], 176-179 [Travis Claim X], 179 [Travis Claim XII].)

XVII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

In his Opening Brief, Silveria argued the California death penalty scheme violated the federal Constitution. (AOB 391-414.) In his supplemental brief, Silveria acknowledges the Court has rejected his arguments in previous decisions, but urges reconsideration in light of *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616]. (ASOB 37-53.) Silveria's arguments fail.

A. There is No Requirement that the Jury Find Aggravating Factors Beyond a Reasonable Doubt (Other than Factors 190.3(b)-(c))

Silveria contends that each fact necessary to impose a death sentence must be found beyond a reasonable doubt. (ASOB 38-41, 50-51.) The Court has repeatedly rejected this claim and Silveria has provided no persuasive reason to reexamine the issue. (See, e.g., *People v. Johnson* (2015) 60 Cal.4th 966, 997; *People v. Bryant* (2014) 60 Cal.4th 335, 458.) Moreover, nothing in *Hurst*, *Ring*, or *Apprendi* has affected the Court's conclusions on this issue. (See, e.g., *People v. Becerrada* (2017) 2 Cal.5th 1009, 1038; *People v. Rangel* (2016) 62 Cal.4th 1192, 1235 & fn. 16.)

B. There is No Requirement that the Jury Find that Aggravating Factors Outweigh Mitigating Circumstances Beyond a Reasonable Doubt

Silveria contends that the jury's "weighing determination" must be found beyond a reasonable doubt. (ASOB 41-44, 50-53.) The Court has repeatedly rejected this claim and Silveria has provided no persuasive reason to reexamine the issue. (See, e.g., *Bryant*, *supra*, 60 Cal.4th at p. 458; *People v. Lucas* (2014) 60 Cal.4th 153, 333.) Moreover, nothing in *Hurst* has affected the Court's conclusions on this issue. (See, e.g., *Becerrada*, *supra*, 2 Cal.5th at p. 1038; *Rangel*, *supra*, 62 Cal.4th at p. 1235 & fn. 16.)

C. Silveria's Argument is Not Furthered by His Reliance on Cases from Other Jurisdictions

Silveria points to the Delaware Supreme Court's fractured decision in *Rauf v. State* (2016) 145 A.3d 430, as support for his proposition that the jury find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. (ASOB 51-53.) *Rauf*'s various opinions hold that a determination as to the relative weight of aggravating and mitigating standards in the application of Delaware's death penalty must be made

beyond a reasonable doubt. (*Rauf, supra,* 145 A.3d at p. 434 (per curiam); *id.* at pp. 481-482 (Strine, J., concurring); *id.* at p. 487 (Holland, J., concurring); but see *id.* at p. 487 (Valihura, J., dissenting)). The rationale of those opinions is not clear, and they notably fail to cite or discuss *Kansas v. Carr* (2016) ___ U.S. ___ [136 S.Ct. 633], in which the high court observed that "the ultimate question of whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy" and "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." (*Id.* at p. 642.)

In any event, the most notable feature of the Delaware law invalidated in *Rauf* was that the jury's choice between a life sentence and death was completely advisory: the judge could impose a sentence of death even if all jurors recommended against it, as long as the jury had unanimously found the existence of a single aggravating factor. (See Del. Code tit. 11, § 4209(c)(3), (d)(1); *Rauf, supra*, 145 A.3d at 457 (Strine, J., concurring) [under Delaware law, the judge "has the final say in deciding whether a capital defendant is sentenced to death and need not give any particular weight to the jury's view"].) On the other hand, under California law, the death penalty may be imposed only if the jury has unanimously voted for death. (See Pen. Code, § 190.3.) California's death penalty statute is thus quite different from the statute invalidated in *Rauf.*

Similar shortcomings undercut Silveria's reliance on the opinion dissenting from the denial of certiorari in *Woodward v. Alabama* (2013) ___ U.S. ___ 134 S. Ct. 405, 410-411, as well as the opinions in *Woldt v. People* (Colo. 2003) 64 P.3d 256 and *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253. (ASOB 52.) The statutes at issue in *Woodward* and *Whitfield* allowed a judge to impose the death penalty even where the jurors voted against it, and *Woldt* did not require a jury vote on the death penalty at all. (See *Woodward, supra,* 134 S. Ct. at pp. 406, 410-412 [jury's decision as to

whether the defendant should be executed was merely an "advisory verdict"]; *Whitfield*, *supra*, 107 S.W.3d at pp. 261-262 [judge imposed death sentence after jurors voted 11-1 for life imprisonment]; *Woldt*, *supra*, 64 P.3d at pp. 259-262 [capital sentencing determinations under Colorado law were made by three-judge panel after jury's verdicts on first degree murder].) The *Woodward* dissent does not suggest that the death penalty may not be imposed without the jury finding beyond a reasonable doubt that aggravating factors outweigh mitigating factors. Rather, it suggests that a trial judge's view should not replace that of the jury. (*Woodford*, *supra*, 134 S. Ct. at pp. 410-411.) To whatever extent *Whitfield* or *Woldt* held that the beyond-a-reasonable doubt standard should apply to aggravating and mitigating factors, such holdings have been superseded by the analysis of the United States Supreme Court in *Carr*.

CONCLUSION

For the reasons given, respondent respectfully requests that this Court affirm Silveria's verdict and sentence.

Dated: November 2, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 4,827 words.

Dated: November 2, 2017

XAVIER BECERRA
Attorney General of California

/S/ ***ARTHUR P. BEEVER***
ARTHUR P. BEEVER
Deputy Attorney General
Attorneys for

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Silveria and Travis** No.: **S062417**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On November 3, 2017, I electronically served the attached **Supplemental Respondent's Brief** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on November 3, 2017, I placed a true copy enclosed in sealed envelopes in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Mark E. Cutler Attorney at Law P.O. Box 172 Cool, CA 95614-0172 (Attorney for Travis)	Dennis A. Fischer Law Offices of Dennis A. Fischer 825 Wilshire Blvd., Suite 717 Santa Monica, CA 90401 (Attorney for Travis)
John Fresquez Senior Deputy State Public Defender State Public Defender's Office 770 L Street, Suite 1000 Sacramento, CA 95814 (Attorney for Silveria)	Jessica K. McGuire Assistant State Public Defender State Public Defender's Office 770 L Street, Suite 1000 Sacramento, CA 95814-3518 (Attorney for Silveria)
The Honorable Jeffrey F. Rosen District Attorney Santa Clara District Attorney's Office 70 W. Hedding Street San Jose, CA 95110	Santa Clara Superior Court Criminal Division - Hall of Justice Attention: Criminal Clerk's Office 191 North First Street San Jose, CA 95113-1090

Sixth District Appellate Program Attn: Executive Director 95 South Market Street, Suite 570 San Jose, CA 9511	California Appellate Project (SF) 101 Second Street, Suite 600 San Francisco, CA 94105-3647

Governor's Office
Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 3, 2017, at San Francisco, California.

J. Espinosa	/s/ ***J. Espinosa***
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. SILVERIA (DANIEL TODD) & TRAVIS (JOHN RAYMOND)**
Case Number: **S062417**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **arthur.beever@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

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

11-03-2017

Date

/s/Arthur P. Beever

Signature

Beever, Arthur P. (242040)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm