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, Defendant and Appellant.	Case No. S062417 Santa Clara County Superior Court No. 155731 Death Penalty Case

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

Honorable Hugh Mullin, III, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

MARY K. McCOMB
State Public Defender

JESSICA K. McGUIRE
Supervising Deputy State Public Defender
California State Bar No. 88563
KRISTIN TRAICOFF
Deputy State Public Defender
California State Bar No. 252083

770 L Street, Suite 1000
Sacramento, California 95814
Telephone: (916) 322-267

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

State Cases

TABLE OF AUTHORITIES

Page(s)

Statutes

TABLE OF AUTHORITIES

Page(s)

Constitutional Provisions

Court Rules

Jury Instructions

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.	Case No. S062417 (Santa Clara Superior Court No. 155731) Death Penalty Case

APPELLANT'S SUPPLEMENTAL REPLY BRIEF[1]

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

As set forth in appellant's Supplemental Opening Brief, the trial court doubly erred in its rulings concerning the testimony of appellant's psychiatric expert witness, Dr. Kormos. Initially, the court erred by limiting the scope of Dr. Kormos's direct examination based on a misapprehension of governing

---

[1] As in his Supplemental Opening Brief, appellant here numbers his arguments so as to correspond with those used in his Opening Brief.

law. The court then compounded that error when it permitted the prosecutor to cross-examine Dr. Kormos beyond the scope of direct examination. These errors, together and singularly, prejudiced appellant. Respondent's arguments rely on misstatements of fact and law and, as such, provide no basis for the Court to reject appellant's assignment of error. Reversal of appellant's penalty verdict is merited.

A. The Trial Court Erred in Limiting the Scope of Defense Counsel's Direct Examination of Dr. Kormos

Appellant described in his Supplemental Opening Brief that the trial court erroneously ruled that Dr. Kormos could not testify on direct examination to his expert opinions that were based on appellant's postarrest statements. (SAOB 3-11.) The trial court's ruling was error because it was based on a misapplication of *People v. Aranda* (1965) 63 Cal.2d 518, and *Bruton v. United States* (1968) 391 U.S. 123, and a misapprehension of the confrontation and hearsay implications of an expert witness's testimony as elucidated by *People v. Hajek* (2014) 58 Cal.4th 1144 and *People v. Sanchez* (2016) 63 Cal.4th 665. (*Ibid*.)

1. The Trial Court's Limitation of Dr. Kormos's Testimony Rested Entirely on *Aranda/Bruton* Concerns

Respondent does not dispute appellant's iteration of the scope of the *Aranda/Bruton* rule. (RSB 9-10; see SAOB 4-5.) Rather, respondent takes the position that there was no error because the trial court's limitation on Dr. Kormos's direct examination was not premised on *Aranda/Bruton*. (RSB 9-10.) The record contradicts respondent.

In the midst of the penalty retrial, co-appellant's counsel requested that the court instruct Dr. Kormos, during the course of his direct examination, that "he clearly understands any opinion he gives about Mr. Silveria's character is based on what he personally has observed and not the hearsay documents he's

read about [co-appellant]." (RT 262:30144.) The court responded that Dr. Kormos was entitled to base his opinion on hearsay, but opined that "[t]hat's a big problem. . . . It's a very large problem. . . . Because he has received, reviewed and based his opinion on some items that have been excluded on constitutional and decisional law grounds for the protection of the codefendant." (RT 262:30144.) The items to which the court was referring were statements by appellant, co-appellant, and another co-conspirator, the admissibility of which had been challenged in the retrial; as part of the court's ruling denying the motion to sever the defendants for retrial, the court had ordered several assertedly-*Aranda/Bruton* infected statements to be excluded or redacted. (See RT 200:22910-22915 [court addresses *Aranda/Bruton* admissibility issues in denying appellants' motion to sever for the retrial]; RT 204:23338-23349 [prosecutor represents that joinder is proper because the court had excluded or ordered redacted the *Aranda/Bruton* infected statements]; see generally 244:28485-28495; 245:28520-28522; 246:28526-28529 [trial court ordering redactions of appellant's prior statements and testimony to remove references to co-appellant's role in the capital crime].) Thus, although the court did not expressly invoke *Aranda* or *Bruton* in ruling on the scope of Dr. Kormos's testimony, the court's references to "items that have been excluded on constitutional and decisional law grounds for the protection of the codefendant" (RT 262:30144), plainly refers to the court's previous rulings that had excluded appellant's statements under *Aranda/Bruton*.

This understanding of the record is reinforced by what followed. After the court opined that Dr. Kormos's proposed testimony presented "a very large problem . . . [b]ecause he has received, reviewed and based his opinion on some items that have been excluded on constitutional and decisional law grounds for the protection of the codefendant," counsel for appellant argued that the dilemma was not his fault because he had provided Dr. Kormos with appellant's postarrest statements and the co-conspirator's postarrest statements

with the understanding that the defendants would be tried separately. (RT 262:30144-30145.) The court then reminded appellant's counsel that "there had already been an order excluding [co-appellant] Mr. Travis's confession, Mr. Silveria's confession and any reference to Mr. Travis's involvement if, and until, he testified or Mr. Silveria testified." (RT 262:31046.) By this statement, the trial court indicated that it was attempting to apply *Aranda/Bruton*'s rule: that the hearsay statements of a co-participant that inculpate the accused – here, co-appellant Travis – are inadmissible unless the hearsay declarant testifies and is subject to cross-examination. The court continued, explaining to appellant's counsel that Dr. Kormos "right now cannot be subject to any proper cross-examination by the district attorney or by [counsel for co-appellant] Mr. Leninger, and Mr. Leninger's client's constitutional rights are going to be violated. . . because he cannot get into the areas and some of the documents that your witness has considered." (RT 262:31048.)

After hearing argument from all parties on the issue, the court proposed several possible remedies, of which the court required appellant's counsel to select one. (RT 262:31060-31061.) One of these remedies was that appellant could testify at the penalty phase retrial, which, the court opined, "will pretty much take care of the problem." (RT 262:31061.) This again demonstrates that the court's reason for limiting Dr. Kormos's testimony was its perception that co-appellant's right to confrontation would be imperiled by the jury hearing the content of appellant's hearsay statements to Dr. Kormos.

The court then recessed and permitted the parties to discuss the proposed remedies. After that discussion, co-appellant's counsel reiterated that his central concern was that Dr. Kormos would testify to "statements attributed to Mr. Silveria" concerning co-appellant's "participation in" criminal acts, which would "offend[] everything the Court has already pointed out. That would be the constitutional rights of my client or the safeguards for my client's constitutional rights." (RT 262:31077-31078.) The court then agreed to the

parties' suggested limitations on Dr. Kormos's testimony, explaining that the court's agreement was premised on "the Court's prior rulings, especially *Aranda* and the limiting of the use of Section 356 of the Evidence Code in that regard. The only reference to Mr. Travis's involvement or what Mr. Travis said would be limited to what Mr. Silveria testified to on the former occasion and was actually read to the jury." (RT 262:31079.)

In sum, the substance of the court's ruling was that Dr. Kormos had reviewed materials that included appellant's statements inculpating co-appellant Travis; that the court had previously excluded these statements under *Aranda/Bruton* when ruling that the defendants would be retried jointly; and, as a consequence of *Aranda/Bruton*'s limitations, neither the District Attorney nor co-appellant's counsel could effectively cross-examine Dr. Kormos without risking him communicating the substance of at least some of the *Aranda/Bruton*-infected statements, which, if it occurred, would violate co-appellant Travis's confrontation rights. The record permits no other interpretation and, indeed, respondent has posited none. (See generally RSB 9-11.) Accordingly, the Court must reject respondent's unsupported assertion that the court did not premise its limitation of Dr. Kormos's testimony on *Aranda/Bruton*. (See RSB 10.)

2. There Is No Confrontation Clause Violation Where the Hearsay Declarant Has Testified and Been Cross-Examined by the Party at Interest

Respondent misapprehends the thrust of appellant's argument, confusing the trial court's limitation on appellant's own testimony on retrial with the court's limitation on Dr. Kormos's testimony that was premised on *Aranda/Bruton* concerns. Respondent appears to understand appellant's argument to be that the trial court erred in reading a redacted version of appellant's testimony from the first trial to the jury at the penalty phase retrial. That understanding is incorrect.

As appellant set forth in the Supplemental Appellant's Opening Brief, the trial court limited Dr. Kormos's testimony out of concern that his testimony would reveal statements made by appellant that had inculpated co-appellant. (SAOB 3.) To allow that testimony, the court reasoned, would violate co-appellant's constitutional right to confrontation, as articulated by *Aranda/Bruton*. (See section III.A.1, *supra*.) In making this ruling, the trial court failed to account for the fact that appellant had testified at the first trial and co-appellant had been allowed to cross-examine him about the circumstances of the crime. (SAOB 4-5; see RSB 10 (acknowledging same).) As such, there was no confrontation problem lurking within Dr. Kormos's proposed testimony, as co-appellant had been allowed to exercise his confrontation right at a prior adversarial proceeding. (SAOB 4-5, collecting cases.) Respondent's Supplemental Brief fails to address that this legal error underpinned the trial court's ruling and, as such, constituted an abuse of discretion as a matter of law. (SAOB 5, citing *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746.)

3. The Trial Court's Ruling Conflicts with the Rules Set Forth in *People v. Hajek* and *People v. Sanchez*

In the Supplemental Appellant's Opening Brief, appellant described how the trial court erred additionally under *People v. Hajek* (2014) 58 Cal.4th 1144, 1176, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, and *People v. Sanchez* (2016) 63 Cal.4th 665, 685-686. (SAOB 6-11.)[2]

---

[2] Respondent suggests that *Sanchez* may not be applicable to appellant because its issuance postdated appellant's trial. (RSB 10.) The Courts of Appeal that have considered this issue have held that *Sanchez* does apply retroactively to cases that were not yet final at the time of *Sanchez*'s issuance. (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1284; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 503; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 412.) This Court has not held expressly on the question, though, as the Court of Appeal noted in *K.W.*, after issuing *Sanchez* this Court remanded

Put simply, even if Dr. Kormos had based his expert opinion on inadmissible hearsay, the trial court's remedy was overbroad, per *Hajek*'s and *Sanchez*'s rules. Rather than create a blanket prohibition on entire swaths of Dr. Kormos's proposed testimony – which the court effectuated by ruling that Dr. Kormos could not testify about any of appellant's adulthood, lest those opinions had been influenced by the asserted-*Aranda/Bruton*-infected statements – the court was required to more specifically consider the proposed testimony and exclude only those portions that would have "presented, as facts, the contents of the testimonial hearsay statements." (*People v. Sanchez, supra*, 63 Cal.4th at p. 7; SAOB 6-11.) As appellant detailed in his Supplemental Appellant's Opening Brief, none of the proposed testimony of Dr. Kormos should have been excluded under this standard. (SAOB 9-11.)

Moreover, in *Hajek* the Court specifically rejected the notion, espoused by the trial court here, that an expert who relies on inadmissible hearsay in forming his opinion could not be effectively cross-examined on the reliability of his opinions without revealing inadmissible evidence. (SAOB 7.) In *Hajek*, the Court held that, where an expert has relied on hearsay sources including *Aranda/Bruton*-infected statements, the expert may be cross-examined on the reliability of the expert's opinion, including his having credited the statements made by the hearsay declarant and whether such crediting was reasonable. (*People v. Hajek, supra*, 58 Cal.4th at p. 1177; SAOB 6-7.) For this additional reason, the trial court's restriction of Dr. Kormos's testimony was error, as the court's ruling rested on its misunderstanding of the limitations of cross-examination of expert witnesses where the expert has relied on inadmissible hearsay in forming his opinion.

---

several cases back to the Courts of Appeal for reconsideration in light of *Sanchez*. (*Conservatorship of K.W., supra*, 13 Cal.App.5th at p. 1284.)

4. Trial Counsel Did Not Invite the Error

Respondent argues that appellant is foreclosed from raising this error on appeal because any error was invited by his defense counsel at trial. (RSB 11.) Respondent is wrong. (SAOB 11-12.) The invited error doctrine will only preclude consideration on appeal where the record demonstrates that defense counsel had a tactical reason for requesting or acquiescing to the action taken by the trial court. (SAOB 11, citing *People v. Moon* (2005) 37 Cal.4th 1, 28.) Here, the record plainly shows that counsel for appellant sought to have Dr. Kormos testify on retrial to the same extent that he testified at the first trial. (RT 262:31045-31048.) When the prosecutor suggested that the jury be instructed that any hearsay Dr. Kormos related should not be taken for the truth of what it asserted, appellant's counsel agreed. (RT 262:31042.) When the prosecutor suggested, however, that appellant should have discharged Dr. Kormos as an expert and prepared a new expert to testify based on materials that did not include the assertedly problematic hearsay, appellant's counsel stringently resisted that remedy as unworkable, unfair, and not required under governing law. (RT 262:31045-31048). Appellant's counsel then suggested that he simply call Dr. Kormos as a witness and not elicit any inadmissible hearsay on direct examination – an approach, it bears noting, that would comport with *Sanchez* and *Hajek* – but the court rejected that option as unfair to the prosecutor, whom, the court stated, had a right to fully cross-examine Dr. Kormos. (RT 262:31049.) Appellant's counsel argued that any unfairness that would accrue to the State was the result of the prosecutor's own choice to try the defendants jointly, and thus could not and should not have been attributed to appellant; he then moved for a mistrial on the basis that appellant was not being permitted to present his defense. (RT 262:31049.) The court denied the motion for a mistrial. (*Ibid.*)

The court then gave appellant's counsel two choices: having the entirety of Dr. Kormos's testimony stricken or calling appellant to testify. (RT

262:31050.) Appellant's counsel explained that he "intend[ed] to continue to present the testimony of Dr. Kormos [because] I don't see how I can proceed in this case without doing so." (*Ibid*.) The court again reiterated its erroneous belief that this dilemma was counsel's own doing, for having given his expert inadmissible hearsay statements on which to base his opinion. (*Ibid*.) The prosecutor then suggested that Dr. Kormos be allowed to testify about "inconsistencies" in appellant's statements, without describing "the specifics" of those statements. (RT 262:31054.) The court asked appellant's counsel if he was amenable to that proposal and counsel responded no, that he would rather recall Dr. Kormos after co-appellant Travis testified. (RT 262:31057.)

The court again blamed appellant's counsel for the "problem" and demanded, "how do you propose to solve it? That's all I'm interested in hearing." (RT 262:31058.) Counsel again argued that he could examine Dr. Kormos in a manner that in no way elicited – nor would require the elicitation on cross-examination – of the purportedly problematic statements. (RT 262:31060.) The court responded, "I already know what your solution is. Now, here's the Court's solution" and presented appellant with three options: strike Dr. Kormos's testimony, call appellant to testify, or comply with the prosecutor's suggested remedy. (RT 262:31061.) The court then informed the parties it would take a recess, during which time the parties were to confer and after which appellant's counsel would "let me know which of the alternatives" he was electing. (RT 262:31061.)

After recess, appellant's counsel informed the court that they had conferred as ordered and had agreed on the approach suggested by the prosecutor, with some modifications. (RT 262:31062.) One of the modifications, suggested by appellant's counsel, was that he would not ask Dr. Kormos on direct examination about appellant's state of mind at the time of the crime. (RT 262:31065.) The court agreed to the proposal, including appellant counsel's suggested modifications. (RT 262:30177-30181.)

This record does not support a finding that appellant's counsel sought to have Dr. Kormos's testimony limited as a strategic choice benefiting appellant. (See *People v. Moon*, *supra*, 37 Cal.4th at p. 28.) On the contrary; appellant's counsel argued that the presentation of Dr. Kormos's full testimony was essential to appellant's defense, even moving for a mistrial after the court indicated it would circumscribe the testimony. The trial court denied the mistrial motion, repeatedly castigated appellant's counsel for creating the "problem" it perceived in Dr. Kormos's testimony, and demanded appellant's counsel propose a remedy. Backed into this corner, appellant's counsel simply selected a remedy that he perceived to be the best of the bad choices he was offered. (See RT 262:31070-31073, 31075-31076.) This does not constitute invited error. (See *People v. Tate* (2010) 49 Cal.4th 635, 695 fn. 32 [holding counsel did not invite error where he "acquiesced" to the court's course of action after repeatedly requesting the court take a different course of action]; *People v. Moon*, *supra*, 37 Cal.4th at p. 28 [holding counsel did not invite error when he agreed to an instruction proposed by the trial court, but had no apparent tactical purpose for the instruction being given].)

5. The Limitation of Dr. Kormos's Testimony Was Not Harmless

Respondent has not borne his burden to show that the deprivation of appellant's federal constitutional rights that occurred by the trial court's error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

As described in the Supplemental Appellant's Opening Brief, the prejudicial effect of the exclusion of Dr. Kormos's testimony is manifest by the first jury's and retrial jury's different verdicts and different lengths of time of deliberation, with the first jury deliberating over nine hours longer than the retrial jury. (SAOB 12-13.) Respondent asserts, without citation, that the difference in time is not "significant" and therefore supports a finding of

harmlessness (RSB 12), but this Court and others have squarely disagreed. Courts have repeatedly found that the mere fact that the first jury heard evidence the retrial jury did not hear is compelling indication that the exclusion of the evidence at the retrial was not harmless. (See SAOB 13, collecting cases.) Courts, including this Court, have also found that lengthy deliberations indicate that the jury struggled to reach its verdict, which in turn indicates that the jurors struggled to conclude that the aggravating evidence was so substantial as to warrant a death sentence rather than a life sentence. (*Ibid*., collecting cases; see also RT 236:27415-27416 [instructing the retrial jury per CALJIC 8.88].) Here, both indicators of prejudice are present: the first jury heard Dr. Kormos's uncircumscribed testimony, deliberated for seven days, and still could not conclude that the evidence supported a death verdict. (See SAOB 13.) The retrial jury, in contrast, heard a limited version of Dr. Kormos's testimony and then deliberated for only a few hours before returning a death verdict. (*Ibid*.) Hence, both measures of prejudice combine to demonstrate that the error in excluding portions of Dr. Kormos's testimony was not harmless beyond a reasonable doubt.

Moreover, the nature of the excluded testimony went to the heart of the defendant's penalty phase presentation, further demonstrating the lack of harmlessness in excluding it. Respondent attempts to downplay its significance by noting that Dr. Kormos was permitted to testify, generally and vaguely, about appellant's psychological development during his childhood. (See RSB 11-12.) What was missing for the retrial jury, however, was precisely that testimony that the first jury heard: how appellant's childhood experiences affected his psychological development, which then manifested in certain behaviors and responses in adulthood, including at the time of the crime. In other words, the retrial jury lacked the evidence that would help them give import to the psychological features that Dr. Kormos had identified and described. (See, e.g., *People v. Hajek, supra*, 58 Cal.4th at pp. 1166, 1169

[describing the evidence offered by the defendant at his 1995 capital trial, including expert testimony describing his mental health problems, their likely etiology, and the expert's opinion that the defendant was "in a hypomanic state" around the time of the crime and on the day of the murder "was under the influence of a bipolar or cyclothymic disorder"].) The absence of this evidence was, as described in the Supplemental Appellant's Opening Brief, highlighted by the prosecutor, who intoned that "Daniel Silveria the child did not kill Jim Madden." (RT 279:33426.) Absent the trial court's error, appellant could have presented evidence that described precisely how his experiences as a child were relevant to his behavior as an adult, including on the day of the capital crime. (See, e.g., *People v. Varona* (1983) 143 Cal.App.3d 566, 570 [error not harmless where prosecutor's closing argument called attention to the defense's failure to present evidence on a point where a prior ruling or prosecutorial action had precluded the defense from such presentation]; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 [holding that "statements from the prosecutor matter a great deal" to a prejudice analysis].)[3]

B. The Trial Court Erred In Overruling Appellant's Objections to the Prosecutor's Cross-Examination of Dr. Kormos

The trial court again erred when, after having limited the direct examination of Dr. Kormos for the reasons described above, it permitted the

---

[3] Respondent also makes the fleeting argument that the retrial jury may have sentenced appellant to death due to other factors, such as the jurors' consideration of appellant's decision not to testify at the penalty phase retrial. (RSB 12-13.) Had members of the jury considered appellant's decision not to testify as evidence favoring the prosecution, that would have constituted misconduct. (See, e.g., *People v. Lavender* (2014) 60 Cal.4th 679, 686-687; see also RT 276:32972 [retrial jury instructed that they may not consider nor draw any inference from a defendant's decision not to testify].) Because the Court presumes the jury follows its instructions (see *Richardson v. Marsh* (1987) 481 U.S. 200, 206), it must reject respondent's argument.

prosecutor to cross-examine Dr. Kormos beyond the scope of that limitation. This both constituted its own reversible error, as well as compounded the prejudicial effect of the error described in section III.A, *supra*. (SAOB 14-17.) Put simply, the record reflects that appellant's counsel adhered to the limitations the court placed on the direct examination of Dr. Kormos and the trial court made an express finding to that effect. (SAOB 15-16.) The trial court then, inexplicably and without factual basis, permitted the prosecutor to cross-examine Dr. Kormos beyond this scope. (*Ibid*.) The court gave no explanation for this sua sponte reversal of its prior finding, nor any indication as to why the prosecutor would be permitted to – from the trial court's point of view, given its ruling in limiting the scope of direct examination – risk violating co-appellant Travis's confrontation rights in the process. (SAOB 15-17.) Because the ruling lacked a factual or legal basis, it constitutes error. (*Ibid*.)

Respondent argues that, as a factual matter, appellant's counsel did violate the terms of the limitation on Dr. Kormos's testimony in direct examination. (RSB 12-13.) The record shows the contrary, as appellant detailed in his Supplemental Appellant's Opening Brief. (SAOB 15-16.) Moreover, given that the trial court limited Dr. Kormos's testimony due to its perception that portions of it would violate co-appellant's confrontation rights, even if the court determined that appellant's counsel exceeded the bounds of direct examination, the proper remedy would not be to permit the prosecutor to further violate co-appellant's rights in cross-examination but to choose a more appropriate remedy, such as striking the improper direct examination testimony. (SAOB 16-17.) Respondent's contrary argument that "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" (RSB 14), ignores the fact that those limitations were enacted precisely because the court perceived them to be required under the law. (See section III.A, *supra*.)

Respondent does not dispute, and thus concedes, that this error was not harmless. (See *In re Bolden* (2009) 46 Cal.4th 216, 224 [a party's failure to dispute a legal or factual point means the party "effectively concedes" the point]; SRB 13-14.) As described in the Supplemental Appellant's Opening Brief, the record and the governing jurisprudence demonstrate that this error prejudiced appellant such that relief is warranted.

//

//

//

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

A. Introduction of Nonstatutory Aggravation Evidence Violated Appellant's Constitutional Rights, Prejudicing Him

Appellant has detailed how the prosecutor's elicitation of testimony describing other, uncharged crimes attributed to appellant, constituted error that prejudiced him. (SAOB 18-22.) Respondent argues that this evidence was relevant because it elucidated the relationship between appellant and co-appellant and between appellant and his prior girlfriend. (RSB 15.) This argument is unavailing. Even relevant evidence must be excluded if its admission would violate the defendant's federal constitutional rights. (See, e.g., *People v. Souza* (1994) 9 Cal.4th 224, 232.) Here, the admission of uncharged crimes evidence violated appellant's federal constitutional rights under settled governing law. (See SAOB 18-20.) As such, its admission was error.

Nor is it the case that, as Respondent posits, the uncharged crimes evidence constituted appropriate rebuttal for appellant's mitigation evidence. (See RSB 15.) Respondent has identified no evidence in the record that the uncharged-crimes evidence would rebut. (See RSB 15.) For example, in *People v. Landry* (2016) 2 Cal.5th 52, 117-118, one of the few cases in which the Court has found this form of rebuttal evidence proper, the Court held that the prosecutor had been properly permitted to elicit from one of the defendant's mitigation witnesses evidence concerning the defendant's criminal history. There, the witness was a California Youth Authority worker who had evaluated

the defendant when he was admitted to CYA after a juvenile offense. (*Id.* at pp. 115-116.) On direct examination, defense counsel elicited testimony from the witness describing defendant's history of abuse and his opinion of defendant's possibility of successful mental health treatment and rehabilitation. (*Ibid.*) On cross-examination, the prosecutor then elicited from the witness testimony describing that witness's knowledge of the defendant's criminal history, as a means of impeaching the conclusions of his assessment and to rebut the "selective[] questioning" of the witness that defense counsel had performed on direct examination. (*Id.* at p. 117.)

Here, there was no comparable connection between the asserted "rebuttal" evidence and any evidence it is asserted to rebut. The prosecutor elicited lengthy testimony from co-appellant describing a "scam" appellants assertedly perpetrated on a trade school. (SAOB 20; RT 269:32163-32166, 32169-32170.) There is no defense theory or evidence that this testimony would serve to rebut, and respondent offers none. (See RSB 15.) Indeed, the prosecutor relied on this testimony simply to argue to the jury that defendant was a bad person with a history of doing bad things (RT 279:33441; see also RT 279:33453-33454), demonstrating that this was not used for rebuttal, but for precisely the improper purpose for which this form of evidence is typically excluded.

A similar conclusion results from review of the testimony of Deanna Travis describing that appellant statutorily raped her. (SAOB 20-21.) Ms. Travis was called as a mitigation witness by co-appellant Travis and, in the course of her testimony, mentioned that she had had a son who had died at three months old. (AOB 191; RT 264:31339-31340.) On cross-examination, the prosecutor then questioned her about her sexual relationship with appellant, eventually eliciting that he had sexual contact with her when she was under age. (AOB 191-192; RT 264:31351.) This served to rebut nothing in appellant's case, as Ms. Travis's testimony was not part of appellant's

mitigation case, nor did appellant present any evidence or argument concerning his relationship with Ms. Travis as any part of his penalty phase defense. (See generally AOB 22-31, 44-89 [describing the penalty phase evidence presented by appellant].) As such, the admission of the evidence of statutory rape was error and violated appellant's federal constitutional rights. As with the evidence of the trade school "scam", respondent cannot demonstrate that this federal constitutional violation was harmless beyond a reasonable doubt, in light of how prejudicial this form of evidence is generally and the manner in which the prosecutor chose to capitalize on it in his closing argument to the jury. (See SAOB 22.)

B. The Prosecutor Committed Misconduct by Examining a Witness with Inflammatory, Factually Baseless Questions

Appellant has shown that the prosecutor committed misconduct by repeatedly implying, through his examination of co-appellant Travis, that appellant had brandished a stun gun during a particular fight. (AOB 188-191; SAOB 25-26.) Respondent agrees that a prosecutor commits misconduct when he asks a witness a question that implies a fact harmful to the defendant, unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or can prove the fact through other evidence. (RSB 16, citing *People v. Earp* (1999) 20 Cal.4th 826, 859-860.) Respondent contends that this standard was not met here, arguing that "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." (RSB 16.) Respondent is wrong. As the record shows, the prosecutor repeatedly asked co-appellant Travis if appellant had possessed or used a stun gun during this fight, twice referencing appellant specifically by name. (SAOB 25-26.) It is simply not the case that the prosecutor vaguely referenced "this other person" involved in the fight; the prosecutor's questions repeatedly asked Travis to

affirm that it was appellant specifically who had held and used the stun gun during the fight.

Additionally, it is not the case that the record fails to support a finding of bad faith by the prosecutor. Again, respondent misstates the record, contending that "the circumstances of the fight were unclear." (RSB 16-17.) While some circumstances of the fight may have been unclear, what was clear was that no witness – the People's own witness included – had described appellant as the one who had possessed or used the stun gun during the fight. (SAOB 25-26.) This demonstrates that the prosecutor lacked reasonable grounds to imply, through his questioning, that appellant had done so. The prosecutor simply had no basis to expect co-appellant to testify that appellant had used or brandished the stun gun and had no other evidence to establish that fact. (See *People v. Earp*, *supra*, 20 Cal.4th at pp. 859-860 [holding questioning was not improper only where "the prosecutor's questions were based on evidence already before the jury or inferences fairly drawn from that evidence"].)

Respondent has not proven that this misconduct was harmless beyond a reasonable doubt. Respondent's only argument on this point is that the questions were "innocuous and elicited no evidence inculpating Silveria." (RSB 17.) As this Court has held, baseless, inflammatory questions are not innocuous but are "'dynamite' to the jury" (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213, citation omitted) and are prejudicial precisely because they have no evidentiary basis. (*Ibid*.; see also *People v. Perez* (1962) 58 Cal.2d 229, 241, abrogated on other grounds by *People v. Green* (1980) 27 Cal.3d 1.) As detailed in the Supplemental Opening Brief, to which Respondent offers no contrary argument, this misconduct was especially harmful to appellant given the facts of the capital crime, namely, that the victim was assaulted with a stun gun prior to his homicide, and the competing theories between the defendants as to what appellant's role had been in planning and performing the acts comprising the capital crime. (SAOB 27.) In light of this, respondent has not

borne its burden to show that the misconduct was harmless beyond a reasonable doubt. (*Ibid*.)

//

//

//

IX
JUDGE MULLIN DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS AND IMPROPERLY DILUTED RELEVANT MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN HE ERRONEOUSLY RULED THAT EX-POLICE OFFICER MICHAEL GEORGE HAD VALIDLY INVOKED THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION

As explained in the Supplemental Appellant's Opening Brief, the trial court erred in failing to compel the testimony of Michael George, who could testify to the sexual abuse he committed on appellant when appellant was his foster child. The court denied the motion to compel on the basis of unspecified concerns that Mr. George's testimony "could be used against him" in hypothetical other prosecutions. (RT 251:29125; see AOB 224; SAOB 31.) Respondent reiterates these speculations in his Supplemental Brief, arguing that Mr. 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" or could have feared that his testimony "could have been used against him as propensity evidence at a trial for another victim." (SRB 18.)

These hypotheses do not suffice to justify the denial of the motion to compel. Rather, as set forth in the Supplemental Appellant's Opening Brief, the record must show that the witness made a particular showing that his proposed testimony could expose him to legal liability and that no legal impediments existed to such liability. (SAOB 29-30, collecting cases.) The United States Supreme Court and this Court have both recognized that expiration of a statute of limitations constitutes such a legal impediment to prosecution. (SAOB 30, citing *Hale v. Henkel* (1906) 201 U.S. 43, 67 abrogated on other grounds by *Murphy v. Waterfront Com'n of New York Harbor* (1964) 378 U.S. 52, and *Ex parte Cohen* (1894) 104 Cal. 524, 528.)

Respondent has provided no authority – nor has appellant discovered any – holding that fear of future legislative changes suffices to permit a witness to invoke his Fifth Amendment privileges. (RSB 18.) Nor does Respondent identify anywhere on the record anything showing how Mr. George's testimony described acts so specific and unique as to become admissible as propensity evidence in hypothetical, future prosecutions for unknown other victims. (RSB 18; see SAOB 30-31.) Simply, the record must affirmatively demonstrate the reasonableness of the witness's fear that his testimony could be used against him in future proceedings and, here, the record does not contain such a showing. As such, the court's ruling was error.

Respondent fails to prove that this error was harmless beyond a reasonable doubt. As described in the Supplemental Appellant's Opening Brief, many courts have acknowledged that evidence of childhood sexual abuse is extremely mitigating and the weight afforded such evidence is far greater when the abuser himself testifies to the abuse he perpetrated. (See SAOB 32, collecting cases.) Although respondent correctly observes that some witnesses testified about some of the abuse appellant had experienced, Mr. George, as the perpetator of the abuse, could have testified to "description, details, and depth of abuse" which would have "far exceeded" that which the jury had heard from third parties. (See *Johnson v. Secretary, Dept. of Corrections* (11th Cir. 2011) 643 F.3d 907, 936; see also *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100, 1120-1125 [holding that defendant was prejudiced by his counsel's failure to present testimony of his mother describing her sexual abuse of defendant, despite the jury having heard other evidence establishing that defendant had been abused].) Moreover, as respondent notes, much of the evidence of Mr. George's abuse was introduced through the testimony of a defense investigator (see RSB 18-19), but, had the jury heard from Mr. George himself "the specifics of the abuse" he had perpetrated against appellant, the evidence "would have had much more credibility" than that offered by a member of the

defense team. (See *Cooper v. Secretary* (11th Cir. 2001) 646 F.3d 1328, 1352-1353.) Had the jury heard this powerful evidence, and in light of the indications in the record that the jury's decision to sentence appellant to death was a close call, there is at least a reasonable likelihood that one juror would have concluded that a sentence less than death was warranted. (See *People v. Duarte* (2000) 24 Cal.4th 603, 619.)

//

//

//

XVI
APPELLANT JOINS ARGUMENTS OF CO-APPELLANT'S OPENING BRIEF AND REPLY BRIEF

In his Supplemental Appellant's Opening Brief, appellant joined several arguments raised by co-appellant Travis (SAOB 35), and Respondent now incorporates by reference the arguments it made in opposition to Travis's arguments. (SRB 19.) Appellant joins the reply arguments of co-appellant Travis's in support of those raised in Travis's Appellant's Opening Brief, as he had previously indicated. (SAOB 35.)

//

//

//

XVII
CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

Appellant has argued that this Court's previous decisions regarding the constitutionality of California's death penalty scheme, as challenged under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), should be reconsidered in light of *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616] (*Hurst*). (ASOB 12-28.)

Respondent does not address the substance of appellant's claim, but simply argues that this Court has found that *Hurst* does not affect its previous decisions. (RSB 19-22.) In both of the cases cited by respondent, this Court stated that California's statute was materially different than the former Florida scheme because this state requires a jury verdict before death can be imposed, unlike the advisory opinion that was at issue in Florida. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16; *People v. Becerrada* (2017) 2 Cal.5th 1009, 1038.)

The issue before this Court is not the role of the jury in imposing death, but the factual determinations that must be made. As appellant argued (SAOB 37-41), this Court has construed Florida's sentencing directive to be comparable to California — if the sentencer finds that aggravating circumstances outweigh mitigation, a death sentence is authorized, but not mandated. (*People v. Brown* (1985) 40 Cal.3d 512, 542 (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538).)

In the past, this Court distinguished between the findings that are made before death is imposed — the weighing of aggravation and mitigation — and the kind of factual determinations at issue in *Apprendi* and *Ring*. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Merriman* (2014) 60 Cal.4th 1, 106.) *Hurst* made clear that the weighing decision — "that there

are insufficient mitigating circumstances to outweigh aggravating circumstances" — was part of the "necessary factual finding that *Ring* requires." (*Hurst*, *supra*, 136 S.Ct. at p. 622, citing former Fla. Stat. § 921.141(3).) The significance of *Hurst* for California, then, is that it brings the weighing process clearly within the ambit of *Ring*.

The decisions of the Florida Supreme Court in *Hurst v. State* (Fla. 2016) 202 So.3d 40 and the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 support appellant's understanding of the application of *Hurst*. In Florida, the state supreme court described the sentencing factors, including the weighing process itself, as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, 202 So.3d at pp. 53-54.) The court emphasized that the "critical findings necessary for imposition of a sentence of death" were "on par with elements of a greater offense." (*Id*. at p. 57.) In Delaware, the state supreme court explained that the weighing determination "is a factual finding necessary to impose a death sentence." (*Rauf v. State*, *supra*, 145 A.3d at p. 485 (conc. opn. of Holland, J.).) These cases support appellant's contention that even though the sentencer might have been different between the former Florida scheme and California's death penalty law, the necessary factual findings are similar.

Although this Court has emphasized the normative aspect of a juror's penalty decision to find that California is not bound by *Apprendi* or *Ring*, the weighing determination and the ultimate sentence-selection decision are not a unitary finding. As appellant has argued, they are two distinct determinations. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances is the necessary factual finding that brings the jury to its final normative decision: Is death the appropriate punishment considering all the circumstances? (SAOB 50-53.)

Respondent glosses over the distinction between the jury's two penalty-phase determinations in arguing that *Kansas v. Carr* (2016) __ U.S. __ [136 S.

Ct. 633] (*Carr*) forecloses any argument that the State bears a burden of persuasion in the penalty phase. (RSB 21.) It is true that *Carr* questioned whether the sentence-selection decision is a factual determination to which a standard of proof can meaningfully be applied. (*Carr*, *supra*, 136 S. Ct. at p. 642.) But appellant has not argued otherwise. Appellant's argument pertains to the first part of the jury's penalty determination, concerning the existence of aggravating circumstances and whether they outweigh the mitigating circumstances, not to the second part, i.e., the determination of whether death ultimately ought to be imposed. Contrary to respondent's argument, *Carr* supports appellant's position because the Supreme Court specifically noted that the determination of whether an aggravating factor exists is "a purely factual determination," and that is a determination for which it is possible to apply a standard of proof. (*Ibid*.)[4]

As Justice Scalia wrote, concurring, in *Ring*, "all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) How a circumstance is labeled — whether as aggravating, mitigating, or, as in California, as capable of being interpreted either way — does not change the factual nature of the finding that is made. (See *Apprendi*, *supra*, 530 U.S. at p. 494 [emphasizing that the "relevant inquiry is one not of form, but of effect"].) That the process calls for jurors to then determine whether the aggravating circumstances substantially

---

[4] Accordingly, to the extent this Court has relied on *Carr* to reject appellant's claim (see *People v. Winbush* (2017) 2 Cal.5th 402, 489; *People v. Williams* (2016) 1 Cal.5th 1166, 1204), appellant requests that this Court reconsider the issue, taking into account appellant's argument presented here and in Appellant's Supplemental Opening Brief, and the analysis in *Hurst v. State*, *supra*, 202 So.3d 40 and *Rauf v. State*, *supra*, 145 A.3d 430.

outweigh the mitigating circumstances does not change the factual nature of this inquiry, nor does it change the guidance that the jury must receive in order for its verdict to conform to the Constitution's requirements.

The determination that aggravating circumstances outweigh mitigation is a necessary predicate to the imposition of the death penalty and one that must be made beyond a reasonable doubt. Appellant was not sentenced under these standards. His death sentence must be reversed.

//

//

//

CONCLUSION

For all the reasons argued above, and those stated in appellant's opening, reply, and supplemental briefs, the judgment against appellant must be reversed.

DATED: March 2, 2018

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

JESSICA K. MCGUIRE
Assistant State Public Defender

/s/
KRISTIN TRAICOFF
Deputy State Public Defender

Attorneys for Appellant DANIEL TODD SILVERIA

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I am the Deputy State Public Defender assigned to represent appellant, DANIEL TODD SILVERIA in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 7,233 words in length.

DATED: March 2, 2018

/s/
KRISTIN TRAICOFF

DECLARATION OF SERVICE

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

I, **Marsha Gomez**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

The envelopes were addressed and mailed on **March 2, 2018**, as follows:

Daniel T. Silveria, #K-57200 CSP-SQ 3-EB-43 San Quentin, CA 94974	Hon. Hugh Mullin, III, Judge c/o/ Criminal Appeals Unit Santa Clara County Superior Court 191 N. First Street San Jose, CA 95113

The aforementioned document(s) were served electronically via TrueFiling on **March 2, 2018**:

Arthur Beever Office of the Attorney General 455 Golden Gate Avenue San Francisco, CA 94102	California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105
Mark E. Cutler Attorney at Law P.O. Box 172 Cool, CA 95614-0172	Dennis A. Fischer 825 Wilshire Boulevard, #717 Santa Monica, CA 90401

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **March 2, 2018**, at Sacramento, CA.

/s/

MARSHA GOMEZ

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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: **kristin.traicoff@ospd.ca.gov**

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

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	Appellants Supplemental Reply Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Arthur P. Beever California Dept of Justice, Office of the Attorney General 242040	arthur.beever@doj.ca.gov	e-Service	3/2/2018 8:28:56 AM
California Department of Justice Docket Unit California Dept of Justice, Office of the Attorney General	SFAG.Docketing@doj.ca.gov	e-Service	3/2/2018 8:28:56 AM
Dennis Fischer Law Offices of Dennis A. Fischer 37906	dennisafischer@earthlink.net	e-Service	3/2/2018 8:28:56 AM
Dennis Fischer Law Offices of Dennis A. Fischer 37906	dennisafischer@gmail.com	e-Service	3/2/2018 8:28:56 AM
Mark Cutler Attorney at Law 53368	cutler@mac.com	e-Service	3/2/2018 8:28:56 AM
CAP eService Additional Service Recipients	filing@capsf.org	e-Service	3/2/2018 8:28:56 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

--
Date

/s/Kristin Traicoff

Signature

Traicoff, Kristin (252083)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm