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.	)	S062417 (Santa Clara County Number 155731) **DEATH PENALTY**

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 OPENING BRIEF
(On Behalf of JOHN RAYMOND TRAVIS)

MARK E. CUTLER, CA Bar #53368

Post Office Box 172
Cool, CA 95614-0172
Telephone: (530) 885-7718

Attorney for John Raymond Travis

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS

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.	)	S062417 (Santa Clara County Number 155731)

APPELLANT'S OPENING 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 opening brief contains 137,875 words. This exceeds the 102,000 word limit specified in Rule 8.630 (b)(1)(A), but permission to file an oversize brief has been granted, pursuant to Rule 8.630 (b)(5), and 8.631, subd. (b)(3), (c), and (d)(1)(A)(ii), in this Court's order filed December 3, 2009.

STATEMENT OF APPEALABILITY

This appeal is from a judgment that finally disposes of all issues between the parties, and is automatic.

STATEMENT OF THE CASE[1]

On May 6, 1992, Indictment number 155731 was filed in the Santa Clara County Superior Court charging Daniel Todd Silveria, John Raymond Travis, Christopher Alan Spencer, and Matthew George Jennings with one count of murder and closely related counts of robbery and burglary.[2] In addition, Silveria and Jennings were charged with an unrelated additional robbery and an unrelated additional burglary. Finally, Silveria and Spencer were charged with another unrelated robbery.[3] The various counts were as fol-

---

1. Throughout this brief, references to the record on appeal in the present case will be abbreviated as follows: References to the 179 volume Clerk's Transcript on Appeal will be designated by "CT" followed by the volume number and page number, separated by a colon. References to the 287 volume Reporter's Transcript on Appeal will be designated RT followed by the volume number and page number, separated by a colon. In addition, there are 21 more volumes that are labeled as Reporter's Transcripts, with no volume number. Each of these volumes is differentiated by a date on the front cover. These will each be referred to by "RT," followed by the date in numerical format (mm/dd/yy) followed by a semi-colon, followed by the page number.

2. The same charges had previously been filed against the same defendants in an earlier indictment, number 145818, filed April 3, 1991. After Defendant Silveria filed a motion to quash that indictment due to the systematic exclusion and under-representation of Hispanics and Asians from the 1991 Grand Jury pool, the District Attorney convened a new Grand Jury and obtained the present indictment. (See procedural summary at CT 3:485-486.) After the new indictment was filed, the original indictment was stricken pursuant to Penal Code section 1385. (CT 3:516.)

3. As will be shown, a severance was later granted. John Travis and Daniel Silveria were tried together and were both sentenced to death. Christopher Spencer was tried separately and was also sentenced to death. Matthew Jennings pled guilty pursuant to a plea bargain and was sentenced to life in prison with no possibility of parole. A fifth person, Troy Rackley, was also charged with the same murder, but charges against him were ini-

(Continued on next page.)

lows:

COUNTS ALLEGED AGAINST ALL FOUR DEFENDANTS:

Count 1 - Murder of James Madden (Penal Code section 187), occurring on January 28-29, 1991;

Count 2 - Robbery of James Madden (Penal Code section 211), occurring on January 28-29, 1991;

Count 3 – Second degree burglary of Leewards (Penal Code section 459), occurring on January 28-29, 1991.

COUNTS ALLEGED AGAINST SILVERIA AND JENNINGS ONLY:

Count 4 – Second degree burglary of Sportsmen's Supply (Penal Code section 459), occurring on January 24, 1991;

Count 5 – Robbery of Ramsis Youssef (Penal Code section 211), occurring on January 24, 1991.

COUNT ALLEGED AGAINST SILVERIA AND SPENCER ONLY:

Count 6 – Robbery of Ben Graber (Penal Code section 211), occurring on January 24, 1991.

Four special circumstances in regard to the murder count were alleged as to each of the four defendants: Murder while lying in wait (Penal Code § 190.2 (a)(15)), murder in the commission of burglary (Penal Code § 190.2(a)(17)), murder in the commission of robbery (Penal Code § 190.2(a)(17)), and murder involving the infliction of torture. (Penal Code § 190.2(a)(18).)

(Continued from last page.)

tially filed in juvenile court. He was subsequently found unfit to be tried as a minor. He was tried separately as an adult, was convicted of murder, and was sentenced to 25 years to life in prison.

The indictment also alleged that, in the commission of the murder of James Madden, Daniel Silveria, John Travis, and Christopher Spencer each personally used a knife (Penal Code section 12022 (b)); and Daniel Silveria personally used a stun gun (Penal Code section 12022 (b)). (CT 3:1-6.)

On August 19, 1992, John Travis entered pleas of not guilty to each count and denied the knife use enhancement and all special circumstance allegations. (CT 3:562.)

Over the next thirty months, a variety of motions were filed and heard. On February 1, 1993, the case was assigned for trial to Judge Hugh F. Mullin III. (CT 4:769.) The pretrial motions heard by Judge Mullin included motions to suppress evidence pursuant to Penal Code section 1538.5 (CT 4:749-757 and CT 8:1891-1921, filed by Defendant Silveria, CT 5:1058-1078, filed by Defendant Travis, and CT 5:1079-1085, filed by Defendant Jennings; see prosecutor's responses at CT 6:1269-1338, CT 6:1420-1438, and CT 6:1439-1508), and motions to sever defendants (CT 5:1086-1096 filed by Defendant Jennings, CT 5:1150-1177, filed by Defendant Silveria and joined by Defendant Travis at CT 5:1231-1237; see prosecutor's response at CT 6:1339-1381).

The Penal Code section 1538.5 motion to suppress evidence was denied on April 18, 1994. (CT 8:1970-1975.)

An extended evidentiary hearing on the motions to sever defendants was held on April 18, 19, 29, 21, 22, 26, 27, and June 16 and 17, 1994. (CT 8:1993-2000, 2002, 2018, and CT 9:2073 and 2076.) The motion was discussed on June 21 and argued on June 22, 1994. (CT 9:2077 and 2078.) On

July 7, 1994, an order was issued denying the portions of the severance motion based on evidence that jurors were unlikely to give individualized consideration to capital defendants who were tried jointly. Other portions of the severance motion, based on statements made by the various defendants that implicated other defendants, were deferred pending a proposed redaction of the statements. (CT 9:2141-2144.)

After a further hearing on January 9 and 10, 1995, the trial court accepted proposed redactions and denied the severance motion. (CT 9:2210-2211.) However, the proposed redactions were discussed further on February 21, 22, and on March 20, 21, 22, and 23, 1995. (CT 9:2251-2256.) On April 6, 1995, a written ruling was filed, recounting the laborious efforts that had been made in an unsuccessful effort to achieve fair redactions of the various statements. Concluding that no fair redaction was possible, the court granted a severance and ordered two separate trials, with Defendants Silveria and Travis to be tried jointly in the first trial. In addition, the court ordered separate juries for each defendant in each trial. (CT 9:2257-2260; see also CT 9:2269.)

Meanwhile, on January 27, 1994, Judge Mullin issued an order stating that all rulings on all motions, whether statutory, common law, pre-trial, or in limine, were binding on all parties and were made in his capacity as the motions court as well as the trial court. (CT 8:1877.)

A series of in limine motions, involving the admissibility of various anticipated evidence, were discussed on April 17, 1995, and argued on April

18, 19, 27, and May 1 and 2, 1995. (CT 10:2311, 2321, 2329-2330, 2334, 2342, and 2347.)

On May 2, 1995, Defendant Silveria entered a guilty plea to the burglary charged in Count 4 of the indictment. (CT 10:2346.)

Jury selection began on May 8, 1995 and concluded on August 11, 1995. (CT 10:2351-2357, 2373-2405, 2417-2425, 2487, 2497, 2501-2531, 2539-2541, and CT 11:2586-2596.) The evidentiary portion of the guilt trial commenced August 16, 1995 and the guilt trial continued until jury deliberations for Defendant Silveria began on October 12, 1995, and for Defendant Travis on October 20, 1995. (CT 11:2602-260. 2756-2757, and 2790-2791.)

The Silveria jury reached its verdicts on October 23, 1995, its eighth day of deliberations. Those verdicts were sealed pending the completion of the Travis deliberations. The Travis jury reached its verdicts on October 26, 1995, its fifth day of deliberations. (CT 11:2790, 2793-2799.) On October 30, 1995, all verdicts were read. Mr. Silveria and Mr. Travis were both found guilty of murder in the first degree and of the burglary and robbery counts related to that murder. Burglary and robbery special circumstance allegations were found true as to each defendant. Knife use enhancement allegations were also found true as to both defendants. Mr. Silveria was also convicted of the other two robbery counts that were charged against him, but not against Mr. Travis. (CT 11:2802-2804.)

Mr. Silveria's jury found the lying-in-wait special circumstance not true. The Silveria jurors were also unable to reach a unanimous verdict in regard to the torture-murder special circumstance and the use of a stun gun

enhancement allegation. In contrast, Mr. Travis' jury found the torture-murder special circumstance not true, and was unable to reach a unanimous verdict on the lying-in-wait special circumstance. (CT 11:2802-2804; CT 12:2817-2820 and 2934-2939.)

When the penalty phase portion of the trial proceeded, substantial portions of the evidence pertained only to one defendant or the other, and those portions of the evidence were presented only to one jury or the other on different days. Both juries were together to hear victim impact evidence and the small amount of additional evidence that applied to both defendants. Mr. Travis' penalty trial commenced on November 8, 1995 and continued through February 15, 1996, when deliberations commenced. Mr. Silveria's penalty trial commenced on November 15, 1995, and continued until his jury began deliberations on February 9, 1996. (CT 12:3107-3108, 3115-3116, 3373-3375, 3441.) Mr. Silveria's jury deliberated for five days and a mistrial was declared on February 15, 1996, as to the penalty, when the jury was unable to reach a unanimous verdict. The Travis jury reached the same result on February 21, 1996, its third day of deliberations, and the court again declared a mistrial. (CT 13:3373-3375, 3379-3380, 3382, CT 14:3441-3444, 3482-3483, 3568-3569.)

On May 30, 1996, the District Attorney's Office announced it was no longer seeking a death sentence for original co-defendant Matthew Jennings. The trials of Mr. Jennings and original co-defendant Christopher Spencer were severed from each other. (CT 15:3677-3678.) On September 19, 1996, Mr. Spencer's separate jury trial ended with a death verdict. (CT 16:3950,

3952-3954.)

Mr. Travis, Mr. Silveria, and the prosecutor all filed new pleadings regarding whether those two defendants should again have separate juries for the penalty retrial. (CT 16:4005-4035, 4103-4108, CT 17:4213-4242.) The matter was debated on November 19, 1996. (RT 199:22878-22905.) On November 21, 1996, the trial court rejected some of the grounds that had been put forth for separate trials or separate juries. (RT 200:22909-22912.) Later that day, further argument was heard on other grounds for separate juries or trials, which the trial court rejected. (RT 200:22956-22962.) Only eleven days later, on December 2, 1996, selection of a single jury commenced, to hear the penalty trial for both defendants. (CT 17:4357.)

The joint penalty trial continued until jury deliberations began on May 1, 1997. On May 5, 1997, the jury returned death verdicts for each defendant. (CT 21:5306-5308, 5312-5313.) Coincidentally on that same date, in his separate jury trial, original co-defendant Matthew Jennings was found guilty of first degree murder with special circumstances. (CT 21:5462-5466, 5468.)

On June 13, 1997, the court denied both Daniel Silveria's and John Travis' motions for a new trial and automatic motions for modification of the verdicts. The court imposed judgments of death on each defendant. (CT 23:5768-5770, 5771-5780, and 5781-5789.)

STATEMENT OF THE FACTS

A. Guilt Phase Evidence

1. Introduction

John Travis was charged with and convicted of burglary, robbery, and murder, based on a single event involving a single victim. That event took place at Leewards Crafts Store in Santa Clara County in the late evening hours of Monday, January 28, 1991. The manager of the store, Jim Madden, was the last person in the store after it had closed for business for the day, and all other employees had left, and a maintenance crew had cleaned the store and departed. When Mr. Madden exited the store, he was greeted by five young men waiting at the back door - Daniel Silveria, John Travis, Christopher Spencer, Matthew Jennings, and Troy Rackley. These men took him back into the store, forcibly persuaded him to open the safe, removed approximately $9,000 from the safe, tied Mr. Madden to a chair, and stabbed him numerous times, resulting in his death.

Much of the guilt phase evidence was directed at the prosecutor's unsuccessful effort to persuade the juries that the murder was committed by means of lying in wait, and that the murder involved the infliction of torture. While those special circumstance allegations were not found true, the evidence offered to support them remained important because that evidence was relied on by the prosecutor as part of the circumstances of the crime which

the prosecutor argued constituted factors in aggravation calling for the penalty of death.

However, the juries that returned the guilt verdicts were not able to reach unanimous penalty verdicts. This made it necessary for the prosecutor to repeat much of the guilt phase evidence at the retrial of the penalty phase. Therefore, the summary of the guilt phase evidence will concentrate most heavily on the evidence necessary to support the verdicts against the defendants. Some of the evidence that will be summarized initially with greater brevity will then be summarized in more detail in the penalty phase portion of this statement of the facts.

Evidence presented in the guilt trial also included three other crimes charged against some of Mr. Travis' co-defendants. These crimes – two robberies and one burglary – occurred several days prior to the murder at Leewards. Mr. Travis was never charged with those crimes, and no evidence was presented indicating he participated in them in any way. They do bear some tangential relevance to the murder charge and to some of the issues that will be raised on this appeal, so the evidence supporting those crimes will be included in this statement of facts, but not in as much detail as will be necessary for the summary of the evidence supporting the murder charge.

2. Summary of the Guilt Phase Evidence

a. Sportsmen's Supply Burglary, January 24, 1991, NOT Charged Against John Travis

On January 24, 1991 at approximately 1 AM, Sergeant Kaye Foster of the Santa Clara County Sheriff's Office received a report of an audible burglar alarm and responded to the Sportsmen's Supply Sporting Goods at 1536 Camden Avenue in San Jose. When Sgt. Foster arrived, Deputies Lucas and Morgan were already at the scene. (RT 95:8950-8952.) Foster observed a knife and bolt cutters at the store. Two jackets were found on an air conditioning unit next to a location where rifles had been stacked. (RT 95:8961-8965.)

Meanwhile, John Baker, the owner of the store, had been informed of the alarm by the Wells Fargo Alarm Company and had also responded to the store. He had last been at the store at about 7 PM the preceding evening. He realized someone had broken into the store when he saw a broken window and also saw that sheet metal protecting the window had been cut.[4] Twenty-one rifles and shotguns, found stacked outside the building, had been locked securely inside the building when Mr. Baker had last been there. Also, floodlights outside the premises had been functioning properly when Mr. Baker

---

4. It was eventually determined that fingerprints found on glass pieces of the broken window belonged to Matthew Jennings. (RT 99:9385-9389.)

had last been there, but had since been partially unscrewed so they were no longer lit. (RT 95:8972-8979, 8986.)

The only items actually missing from the area of the premises were a Parali/azer stun gun (an electrical device used for self-defense) and a pair of gloves.[5] (RT 95:8988-8989, 9019.) The stun gun required a standard square 9 volt battery. (RT 95:9020.)

b. Quik Stop Market Robbery, January 24, 1991, NOT Charged Against John Travis

On January 24, 1991, at 2:20 AM, Ramsis Youssef was working alone as the cashier at the Quik Stop Market, #34 at 2704 South Bascom Avenue in San Jose. A person later identified as Daniel Silveria entered the store, bummed a cigarette from Youssef, and left. Silveria returned soon afterward with two persons later identified as Troy Rackley and Matthew Jennings. They asked for 9-volt batteries, but then said the price was too high. They left. Soon afterward, Silveria returned once again, while Youssef

---

5. The stun gun contained two electrical probes. Once both probes were in contact with a person, the gun could be fired and would discharge an electrical impulse into the person. (RT 95:8993.) Mr. Baker had once inadvertently stunned himself with such a gun and had experienced pain and an electrical shock. He was then unable to control his motion, but he did not receive any burn. (RT 95:9015-9018.)

Robert Stratbucker, a physician and biomedical engineer with expertise in stun guns (RT 113:11072-11086), explained that a stun gun causes an electrical current to pass through the skin, causing a sharp pain, which causes the stunned person to reflexively withdraw. (RT 113:11126-11132.)

was in the cooler area. Silveria pointed at the electric eye signal in the doorway and then apparently attempted to jump over the signal. RT 95:9025-9041, 9049-9051.)

Rackley and Jennings re-entered soon afterward. Rackley said they were hungry and wanted to buy sandwiches. Then Youssef was surprised when Rackley fired a stun gun at him, hitting him in the back and causing immediate extreme pain. Youssef grabbed at Rackley's shirt and asked what he was doing. Rackley then stunned Youssef again, this time in the hand. (RT 95:9045-9051, 9058-9059.) Jennings remained by the door, apparently acting as a lookout. He took a doughnut and began to eat it. Silveria and Rackley demanded money. Youssef opened the register and Silveria reached across the counter to take approximately $250. The men also took cartons of cigarettes. (RT 95:9051-9055.)

Silveria pointed at a security video camera in the store and demanded the videotape, threatening to kill Youssef. Youssef falsely told him that the camera never functioned and there was no tape. (RT 95:9052-9053.) Rackley asked Youssef about his car. Although it was parked in the corner of the parking lot, Youssef did not want to give up his car and said the car in the lot belonged to a neighbor. (RT 95:9054.)

The men left the store. As they departed, Silveria told Youssef if there was a videotape, and Youssef ever gave it to the police, he would return to kill Youssef. (RT 95:9058.) Undeterred by this threat, Youssef did supply a videotape of the robbery to the police. San Jose Police Officer Kevin Abruzzini viewed the tape and recognized the man holding the stun gun.

from several past contacts. That man was known to Officer Abruzzini as Troy Chapple. That information was passed on to Officer Boyles. (RT 96:9106-9112.)

Officer Boyles also showed the video tape to James Ireland, a Santa Clara County Juvenile Probation Officer. Ireland recognized Matthew Jennings as one of the robbers. (RT 96:9114-9118.)

c. Gavilan Bottle Shop Robbery, January 24, 1991, NOT Charged Against John Travis

On January 24, 1991, Ben Graber was working at the Gavilan Bottle Shop, which was owned by a friend. The store closed at 10 and Graber was alone, closing up the shop. He went out the front door at about 10:11 PM and was surprised by some people who told him to go back inside. One of the people was armed with a stun gun which was used to give Graber a small shock in his left thigh. Graber opened the register and was told to lie on the floor. The men took money from the cash register and from Graber's wallet. Graber did not get a good look at any of the men, and was not able to make any identification. (RT 96:9083-9090, 9096-9097.)

d. Initial Investigation of the Burglary and Two Robberies

San Jose Police Detective John Boyles was assigned to investigate both the Quik Stop Market robbery and the Gavilan Bottle Shop robbery. He quickly noted that both robberies involved the use of a stun gun, and the de-

scriptions of the suspects were also similar. (RT 96:9134-9136.) After Officer Abruzzini informed Det. Boyles that he knew one of the robbers in the videotape as Troy Chapple, Boyles ran that name through department computers and came up with the name Troy Rackley. Boyles also learned of the Sportsmen's Supply burglary, in which a stun gun had been taken. (RT 96:9139-9142.)

Det. Boyles prepared a photo lineup that included Troy Rackley and showed it to Ramsis Youssef, the clerk from the Quik Stop Market. Boyles also received the name of Matthew Jennings from juvenile probation officer Ireland, after Ireland viewed the tape. Thus, by the afternoon of January 25, Boyles was looking for Rackley and Jennings. (RT 96:9143-9145.)

Around 5:00 PM on January 28, 1991, Det. Boyles received a phone call from a female who claimed to have information about the stun gun robberies. She did not give Boyles her name or phone number, but she did supply him with the names John, Chris, Danny, and Matt, as suspects. Boyles put out a "be-on-the-lookout" alert for these four and Troy Rackley. Around 6:00 PM on January 28, Boyles met with Officer Hyland, who worked in the department's major crimes unit. Boyles sought assistance from Hyland. They met and Boyles showed Hyland photos and the videotape of the Quik Stop robbery. He also gave Hyland a list of possible suspects, naming Troy Rackley, Matthew Jennings, and a third person named Dan. Det. Boyles told Hyland he had information from an informant that the suspects might be staying in the Uvas Canyon area. (RT 96:9145-9150; 98:9214-9216, 104:10163-10165.)

Det. Boyles went home for the day after meeting with Officer Hyland. Around 9:00 PM, Boyles received a call from a night detective informing him that a woman named Cynthia had called, left a phone number, and said she had additional information about the stun gun robberies. Boyles called the number and was connected to a female who sounded like the same woman Boyles had talked to that afternoon. Boyles received additional information, including the last names of the suspects, which he then added to the "be-on-the-lookout" bulletin. (RT 96:9151-9154; 98:9218-9220.)

Meanwhile, Officer Hyland was informed by Sgt. McCall that more information had been received from an informant. McCall said there was supposed to be another robbery that night, January 28, 1991. That made Hyland anxious to locate the suspects as quickly as possible, before another robbery occurred. McCall also told Hyland that the suspect formerly known only as Dan had a last name like Silveras or Silveria.[6] Hyland checked the police computer database and found a Danny Silveria who was similar in age to Jennings and Rackley, and who also lived in the same area as them. (RT 105:10166-10170.)

Hyland went to Jennings' address and encountered four males walking away. He asked to speak to them and learned two of them were brothers

---

6. Sgt. McCall had received this information in a call from a female who gave no name. She said that Danny Silverias or Silveria was in a black-over-red Dodge Charger and planned to commit a robbery that night. McCall had no information regarding where that robbery would occur. (RT 106:10300-10303.)

of Matthew Jennings. They did not know where Matthew was, but they did give Hyland the names of Chris Spencer and John Travis as people with whom Matt Jennings had been keeping company.[7] Matt Jennings' brothers also said Matt had been packing a suitcase and had made plans to leave the area. (RT 105:10171-10173, 10183-10184.) Hyland obtained an address for Chris Spencer, went there, and spoke to Spencer's father, who said Chris was not at home. The father took Hyland to Chris' bedroom, where the officer saw a citation issued for a red Charger with a license number of 1770HVZ.[8] (RT 105:10173-10175.)

Next, Hyland went to the address he had for Danny Silveria, encountering his brother and step-father there. Silveria's brother also gave information about the suspects packing suitcases and making plans to leave the area and live in the mountains. As he departed, Hyland talked to Julie Smedley, who had been sitting on a sidewalk near the Silveria apartment. Hyland asked her about the 5 persons they were seeking and she responded with information about a home in Uvas Canyon. Hyland then went back to the department, updated other officers, considered his investigation at a dead end, and ended the investigation for the evening. (RT 105:10175-10179, 10183-10184.)

---

7. At that point, the only information Hyland had about John Travis or Chris Spencer was that they were friends of the other three and had been with them earlier in the evening of January 28. (RT 105:10182.)

8. Hyland had conflicting information as to whether the Charger was red and black or red and white. (RT 105:10178.)

The next day, January 29, 1991, at 6:46 PM, San Jose Public Safety Dispatcher Joanne Schlachter answered a 911 call from a person wanting to speak to Officer Hyland, who was not available. The caller said he knew that the people responsible for robbing the mini-marts with a taser gun were currently at the arcade at the Oakridge Mall. He gave the names Troy and Matt, describing Troy as 18 or 19 and Matt as wearing a white shirt and black pants. The information was sent to a police dispatcher, and Oakridge Mall security was notified that the police would be responding. (RT 106:10281-10283, 10288-10291.)

Dana Withers was a security officer at Oakridge Mall. Mike Graber was working with him on the evening of January 29, 1991. That evening, an individual approached Withers and asked him to keep an eye on three young men in an arcade, while he called the police about a robbery case. Withers had a mobile radio with a phone patch, so he could communicate with other radios and could also make phone calls. He communicated with Graber, who was driving around the perimeter of the mall and who was in contact with a police officer. Withers followed the three men through the mall and watched them go to the north parking lot where they got into two vehicles, a Honda Civic and a 280-Z. The two cars drove east, but were stopped by officers before leaving the mall property. (RT 106: 10293-10297.)

San Jose Police Officer Jean Edward Sellman was on patrol when he received a dispatch at 6:46 PM directing him to respond to the Oakridge Mall arcade to look for two white males believed to be the stun gun bandits, 18-19 years old, named Troy and Matt. Sellman arrived at the arcade and

was unable to find the men, but was informed by radio that they were on the north side getting into a 240 ZX and a Honda Civic. He drove around and eventually saw the two cars proceeding together. He pulled up behind the Civic while Sgt. Brandt, in another patrol car, pulled in front of the lead car. Danny Silveria was driving the Civic and John Travis was driving the Datsun. Sellman placed Silveria under arrest for robbery. (RT 106:10306-10313.)

Sellman saw a fanny pack in the right front seat of the Civic and searched it, looking for a stun gun. He found a wallet with Silveria's ID, a baggie of marijuana and $587 in currency. He took the key from the ignition, opened the trunk, and found a dark blue bag and a light blue bag. Inside the dark blue bag he found a Parali/azer stun gun. In the light blue bag, he found a hammer, vice grips, duct tape, and a prying tool, along with over $100 in rolls of coins. (RT 106:10315-10327, 10349.)

Silveria was in a position to see the search that Sellman had performed. He yelled to Sellman as though he wanted to talk. Sellman approached and Silveria asked for what crime was he being arrested. Sellman said armed robbery and Silveria said more than once, "Are you sure that is all I am under arrest for?" Sellman said yes, but Silveria did not seem to comprehend. Silveria seemed very excited and over-eager to talk, but Sellman preferred to get his work at the scene done and leave any interrogation to investigators at the police facility. (RT 106:10328-10331.)

The other car that had been stopped, the 280-Z, was searched by San Jose Police Sergeant James Werkema. Inside a black leather fanny pack he

found behind the driver's seat, he discovered $1,313 in a case. Another $131 was on the floorboard and the seat area. A white fanny pack with rolls of coins was behind the passenger seat, and $100 was found on the floor behind the driver's seat. The officer also found a temporary ID sticker in the window and a purchase contract in the name of Danny Silveria. (RT 106:10412-10422.)

Meanwhile, Officer Hyland had been notified of the suspects at the Oakridge Mall and proceeded there himself, arriving after the cars had been stopped. He spoke to the occupants of the two stopped cars and verified they were John Travis, Danny Silveria, and Troy Rackley. Hyland transported all three to the station, asking them where Jennings and Spencer could be found.[9] Silveria wanted to be cooperative in helping to find the others. Hyland learned they had new cars, described as a black and white Triumph and a red and white pickup truck, and planned to leave the state within an hour. (RT 106:10361-10372, 10375.)

Hyland asked whether Jennings or Spencer had pagers. Silveria said Jennings did, and the phone number was obtained from a card in Travis' wallet. Hyland called the pager number from a pay phone in the police de-

---

9. At that point, Silveria and Rackley were being held on the robbery charges. But John Travis was being held only on a misdemeanor traffic warrant. Hyland suspected John Travis of involvement in the robberies, but he conceded that the only evidence to support that suspicion was that Travis was with the others, that Hyland believed the proceeds of the robberies had been used to buy the vehicles and the clothes in the vehicles, and that Travis had been stopped in one of the vehicles. (RT 106:10389-10390.)

partment lobby. A few minutes later the pay phone rang. Silveria answered and made plans to meet Jennings and Spencer at a Baskin-Robbins store. Hyland and other officers went there, but Jennings and Spencer did not appear. The officer paged them again, and they called back once more, arranging with Silveria to meet at a friend's apartment. (RT 106:10373-10379.)

The officers proceeded to the specified apartment and saw Spencer's Triumph in a parking stall. Hyland knocked on the apartment door and no one answered, but the door swung open, revealing somebody on a couch watching television. The officers were permitted to enter and look around, but they did not find Spencer or Jennings, only Chris Wagner, John Durbin, and Alice Gutierrez. The officers did find a bag with $1,300 in a bedroom, and a pager. They also found marijuana plants in closets. While still at the apartment, Hyland was notified that other officers had apprehended Jennings and Spencer.[10] (RT 106:10378-10387.)

Around 7:50 PM, Hyland contacted Det. Boyles and informed him that Rackley, Silveria, and Travis were in custody. Boyles went to the San Jose Police Department, and met with officers to learn what had happened at the time of the arrests. Around 8:30 or 8:45 PM, he began interviewing Troy

---

10. Officer Larry Esquivel was in the apartment with Officer Hyland, looking for Jennings and Spencer. Esquivel walked down to the carport area and saw a red pickup truck approaching, fitting the description of the vehicle Jennings was expected to be using. Esquivel approached the vehicle, learned the driver was Jennings, and asked him to get out. Jennings was arrested while another officer dealt with the passenger, who turned out to be Spencer. Spencer was also detained. (RT 110:10696-10701.)

Rackley, finishing by 9:30 PM. Next he interviewed John Travis. At 11 PM, he interviewed Danny Silveria, finishing shortly after midnight. Before interviewing Silveria, he had learned about the arrest of Jennings and Spencer, and he asked Officer De La Rocha to interview them. (RT 107:10554-10559.)

When Boyles met with John Travis and advised him of his *Miranda* rights, Travis agreed to talk. He gave the officer a date of birth of December 27, 1969. Boyles asked about the source of the money that had been found in the car Travis was driving, and Travis said it was from selling drugs. In his trial testimony, Boyles conceded he had no specific evidence that Travis had been involved in the burglary or robberies that Boyles was investigating. During the interview with Travis, Boyles did not gain any further information about those crimes. To Boyles' knowledge, those charges were never filed against Travis. (RT 109:10652-10655, 10659.)

e. January 28, 1991 Robbery and Homicide at Leewards

In January 1991, Jim Madden was the manager of Leewards, a crafts store on Stevens Creek Blvd. Heather Anderson and Gayle Carlile were the assistant managers. Ms. Anderson was responsible for auditing funds in the store and also made daily bank deposits. (RT 100:9742; 103:9877-9879.) Ms. Anderson and Ms. Carlile shared an office at the back of the store, known as Office B. Mr. Madden used the other office at the rear of the store, Office A. The combination safe with the bank deposits was inside Office B.

The manager and both assistant managers had the combination. There was another safe in the front of the store, near the cash registers. (RT 103:9886-9889.) The front safe was a drop safe, bolted to the floor and used to drop in money during the workday so there would not be so much money in the registers. (RT 103:9924.) Employees were paid each Thursday, and would come to Office B to pick up their paycheck. (RT 103:9930-9931.)

When Ms. Anderson started working at Leewards in October 1991, John Travis and Danny Silveria were both employed there, as stock associates. (RT 103:9879, 9885.) The other assistant manager, Gayle Carlile, had been with Leewards for 4 years. Ms. Carlile explained that Silveria had been hired in August 1990, and Travis had been hired soon afterward. Silveria had originally worked at Leewards through a temporary employment service, and had then been hired as a regular employee. Leewards was looking for more employees at that time, and Silveria suggested Travis, who was soon hired. (RT 103:9913-9918, 9921-9922.) However, by November 1990, both Silveria and Travis were missing their scheduled work shifts on a regular basis. Missing three consecutive shifts was considered abandonment of the job, and on November 15, 1990, they were both allowed to sign voluntary termination papers to avoid being discharged.[11] (RT 103:9963-9965.)

---

11. Ms. Carlile overheard the discussion between Jim Madden, Danny Silveria, and John Travis when the voluntary termination papers were signed. She described Madden as stern, but not angry. He seemed disappointed at the need for termination of employment. Ms. Carlile perceived Silveria's attitude as one of accepting the consequences of his poor work attendance. She believed John Travis commented that he did not really want to

(Continued on next page.)

On January 28, 1991, Ms. Anderson left work for the day at 5 PM. When she left, Mr. Madden, Ms. Carlile, and other employees were still in the store. (RT 103:9880-9881.) At the time she left, she knew that there were three days worth of bank deposits in the safe, as they had not been taken to the bank over the weekend. When she left work on January 28, she asked Mr. Madden if she should take the deposits to the bank, but Madden said he would take care of that himself later. (RT 103:9906-9908; see also RT 103:9968-9969.) According to Ms. Carlile, there should have been approximately $9,000 in the safe the night of January 28, 1991. (RT 103:9975-9980.)

In January 1991, Jennifer Bailey worked as a sales assistant at Leewards. She worked the afternoon and evening shifts on January 28, 1991. Jim Madden was there when she arrived that afternoon. She worked until 10 PM and believed David Anthony, another Leewards employee, had left shortly before she did.[12] When she left, Madden was the only Leewards employee still at the store. She recalled that 2 or 3 maintenance persons were

---

(Continued from last page.)

quit, but he was not angry or confrontational when he said that. (RT 104:1009-10010, 10013-10015.)

12. The store was open until 9 PM Monday through Friday, and until 5 or 6 PM on weekends. Madden stayed to close the store one night each week and the two assistant managers each closed the store 3 nights a week. A schedule was made up each week, designating which management person would close the store each night. (RT 104:10005-10008.) Except for the three management persons, other employees would not know in advance who was going to be the night manager on any particular day. (RT 104:10032.)

cleaning the store that night, but she believed they left before she did.[13] Madden let her out the back door when she left. At that time, the proceeds from that day's sales would have been in the safe or locked in the office. (RT 100:9737-9747.)

Tina Marie Smith was a dispatcher/operator for Honeywell Protection Services, servicing alarms for commercial and residential areas. On January 28, 1991, the alarm at Leewards was set at 10:50 PM, but then went off at 10:53 PM. At 11:02 PM, Ms. Smith called Leewards to determine whether this was a real alarm or an inadvertent one. A man answered and Ms. Smith asked him to give the pass card number to prove he was authorized to cancel the alarm. He said he had to get the card from his wallet, and soon after he gave the correct number. At that point Ms. Smith no longer suspected anything was wrong. (RT 101:9762-9771.)

At 6:37 AM the following day, Santa Clara Police Officer Elden Zercher was contacted and was told that the wife of Jim Madden had called the police to express concern about the welfare of her husband, who had never come home the preceding night. Officer Zercher was given a description of the truck that Madden had been driving. The officer went to Leewards and saw the truck in the rear parking area. He noticed that the right front tire was

---

13. Manuel Ramos and Oscar Castillo were the two persons who cleaned Leewards that night. Their recollection was that they did not finish cleaning until 10:30 or 10:35 PM on January 28, 1991. At that time, they knocked on the door of the office inside the store and a man came out and let them out through the front door. (RT 101:9775-9778, 9780-9783.)

flat. The rear door of the store was locked and nothing else appeared to be out of the ordinary. The officer went around to the front, looked inside, saw nobody, and left the scene. (RT 103:9826-9836.)

At 7 AM, Leewards employee Cecilia Jenrick arrived at work. She did not have a key to the store and rang the bell in the rear, getting no response. She waited in her car for an assistant manager to arrive to unlock the door. (RT 103:9842-9845.) At 7:45 AM, Edna Chapman, another Leewards employee, arrived and also had to wait for an assistant manager with a key. (RT 103:9847-9850.)

At 8 AM, Gayle Carlile arrived and saw Edna Chapman and Cecilia Jenrick outside. She also noticed Jim Madden's truck in the parking lot. She used her key to open the door. Normally, the alarm would beep when the first person walked in and would have to be disarmed. It did not beep that morning, indicating it had not been armed. That did not seem unusual, since Ms. Carlile assumed Jim Madden was already in the store. (RT 103:9982-9986.)

Ms. Carlile walked down the hallway, looked inside Office A, and then entered Office B. She noticed a register drawer on the desk, which indicated the safe was open. She turned to the right and discovered Jim Madden's body. She turned back to the other women and said Jim was dead. She then went to Office A and called 911. (RT 103:9995-10002.)

f. Initial Police Investigation of the Leewards Crimes

Santa Clara Police Officers Jack Soderholm and Cindy Bevan were among the first police officers to arrive at the Leewards scene. Soderholm checked Jim Madden for vital signs and found no pulse. He was very cold to the touch. (RT 104:10033-10038.) Officer Bevan noted that the white male victim was found lying on the ground with duct tape around his wrists and ankles and over his mouth.[14] He was lying on the floor near a chair that was tilted on its side. (RT 104:10044.)

Officer Brian Allen noticed Jim Madden's wallet lying on the desk. A Honeywell alarm card was partly pulled out of the wallet. The wallet still contained $14 in cash, plus an ATM card and two credit cards. (RT 104:10059, 10063, 10089-10091.) According to Officer Allen, Madden was still partly in the chair, which had been knocked over and was partially on top of the body.[15] Madden had been stabbed several times in the chest and neck.[16] (RT 104:10066-10067.)

---

14. The duct tape covering Madden's mouth was circled around his head several times in a very tight fashion. The tape was wrapped very tightly around the ankles. The wrists were tightly bound in a figure 8 fashion. (RT 104:10112-10113.)

15. The primary investigating officer expressed his opinion that Madden had been seated upright during at least some of the stabbing. He believed that during or after the stabbing the chair had tipped over, leaving Madden on his side. (RT 104:10113-10114.)

16. An autopsy was performed the following day by Parviz Pakdaman, a medical examiner with the Santa Clara County Coroner's Office. (RT 112:10982,10988.) He determined that Madden had been stabbed, cut, or slashed 32 times. Twenty-four of these wounds were stab wounds in the

(Continued on next page.)

Santa Clara Police Sergeant Ted Keech was the primary investigating officer in the Leewards case. His partner was Sergeant Cusimano. After they arrived at the scene and were briefed by the other officers, Sgt. Keech interviewed assistant manager Gayle Carlile, in order to get an overview of what had occurred. (RT 104:10096-10106.) Apparently suspecting that the crime might have been committed by someone familiar with Leewards, Sergeant Keech asked for information about former Leewards employees. Gayle Carlile gave him the personnel files for John Travis, Danny Silveria, and David Anthony. Anthony was interviewed that night and ruled out as a suspect. (RT 104:10124-10126; 107:10578.)

Det. Keech assigned Officers McGinty and Rodriguez to locate John Travis and Danny Silveria. (RT 107:10565-10566.) They went to the addresses listed in the job applications and spoke with Travis' grandfather and a female at Silveria's address. Then they reported their results to Det. Keech. (RT 107:10547-10549, 10565-10567.) Keech then directed McGinty and Rodriguez to make further efforts to locate Travis and Silveria. Keech told

---

(Continued from last page.)

chest area, ranging from 2" to 5-1/2" deep, mostly in the area of the heart. There were three stab wounds to the abdomen, penetrating the liver. There were 4 superficial cuts on the front of his neck and one stab wound on the side of the neck that penetrated the trachea. (RT 112:11000-11007, 11012, 11050.) Two ribs were fractured, apparently as a result of the stabbing. (RT 112:11013.)

Dr. Pakdaman also found 4 pinpointed and closely placed parallel abrasion like injuries on the right thigh, consistent with a stun gun wound. (RT 112:11016-11019.)

them to contact the San Jose Police Department to see if they had a more current address for the suspects.[17] (RT 107:10568-10569.)

g. San Jose Police Investigating the Stun Gun Robberies and Santa Clara Police Investigating the Leewards Homicide Discover They Are Seeking the Same Suspects

On the evening of January 29, 1991, San Jose Police Sergeant Brad Barnett was assigned to the night detective unit. He received a call from Santa Clara Police Officer Patrick McGinty, asking for information on John Travis or Danny Silveria, suspects in a robbery-homicide case. Barnett discovered they were both in custody at the San Jose Police Department in connection with some armed robberies. He passed that information on to McGinty, who then had Barnett talk to Detective Keech. Keech said the homicide victim had been bound with duct tape. Barnett recalled seeing duct tape among the seized evidence when the arrested suspects were being processed. He also informed Keech that a stun gun and several thousand dollars in currency and coin had been seized. Barnett told Keech that five suspects were in custody, and he gave Keech all 5 names. (RT 107:10539-10542, 10570-10571.)

---

17. The Santa Clara officers had also learned that John Travis had been the victim of an assault about a week earlier, and wanted to determine what information the San Jose police had regarding that incident. (RT 107:10580.)

Around midnight, or soon afterward, San Jose Police Detective John Boyles had finished interviewing Rackley, Travis, and Silveria in connection with the stun-gun robberies. At that point he learned from Officer De La Rocha that Santa Clara police officers had called, looking for the same individuals that San Jose had in custody. Soon afterward, Sergeants Keech and Cusimano from Santa Clara came to the San Jose Police Department, where Boyles gave them the information he had acquired. (RT 107:10557-10559, 10572-10573.) Keech and Cusimano had interviewed 4 of the 5 suspects, starting around 1 AM and finishing around 7 AM.[18] (RT 107:10573.)

Detective Keech interviewed John Travis from 5:30 AM until 6:25 or 6:30 AM. The interview was tape-recorded.[19] (RT 109:10663-10664.) At the outset of the interview, the officers commented on Travis' black eye. He explained that he had been jumped recently. (CT 20:4874.) The officers did not advise Travis of his *Miranda* rights, but did refer to the fact that he had been advised earlier by the San Jose officers. The officers asked if he would waive his rights and he agreed to talk, but only after being allowed to use a

---

18. Because Troy Rackley was a juvenile, he was apparently taken to a different facility and was not interviewed until later. (RT 107:10573.)

19. The tape recording of the interview was played for the John Travis jury, but it was stipulated that the tape need not be reported. The tape was received in evidence as People's Exhibit #84. A transcript of the tape, prepared by the prosecution, was supplied to the jurors and was received in evidence as People's Exhibit 85. A copy of the prosecution transcript was attached to a motion filed on behalf of Matthew Jennings, seeking to suppress statements. That transcript appears at CT 20:4874-4907. Citations to that copy of the transcript will be used for the summary of the tape set forth in this statement.

restroom. After a pause during which he was apparently allowed to use the restroom, Travis said he was willing to talk to the officers. (CT 20:4875-4876.)

The first substantive question asked by the officers was simply a general request for Travis to tell his side of what happened at Leewards the preceding night. Travis confessed immediately, explaining they had all gotten drunk and loaded at Uvas, and decided they wanted some money. He and Silveria knew there would be money in the safe at Leewards, since they used to work there. They went to Leewards, waited for Jim Madden to come out the rear door, rushed him, made him turn off the alarm, took his money, and then stabbed him. Travis said that first Chris Spencer stabbed Madden in the chest and slit his throat, then Travis stabbed him, and then Silveria did also.[20] (CT 20:4876-4877.)

Travis admitted that the idea had originated from himself and Silveria, although they had expected there would be $30,000 in the Leewards safe. Instead, there was only $9-10,000. (CT 20:4877.) Travis said they just wanted the money and did not want to kill Madden, but they realized when they were there that they would have to kill Madden since he would be able

---

20. After the suspects had been interviewed about the events at Leewards, Santa Clara Police Officers Floyd Worley and Brian Allen were sent back to the crime scene to search for the knife used to stab Madden. The knife was eventually found at the scene, in a cubbyhole in the warehouse area at the rear of Leewards. Its blade was bent. No identifiable fingerprints were recovered from the knife. (RT 110:10733, 10736-10741, 10832-10833.)

to identify them. In further explanation, he acknowledged realizing before they arrived at the store that Madden would have to be killed. (CT 20:4878-4879.)

Travis explained how they rushed Madden, took him to the office with the safe, and told him to open the safe. They tied him up with duct tape. Travis admitted that he told Spencer to kill Madden, and then Spencer stabbed Madden in the chest. Eventually Travis took the knife and stabbed Madden once in the side and then in the chest. (CT 20:4880-4885.)

After describing what had occurred at Leewards, Travis told the officers about staying in a motel after the crime, then buying cars the next day and going to Oakridge Mall to buy clothes. (CT 20:4889-4894.) Travis acknowledged that they had talked about robbing Leewards over a period of time, but they were not really serious about it until they discussed it at Uvas. (CT 20:4895-4896.) He said they were all "pretty high" on beer and marijuana when they were at Leewards. He believed he was sober by the time of the police interview, but he also noted he was tired. (CT 20:4897.)

h. More Detailed Information Later Supplied by Acquaintances of the Suspects and Other Persons

Cynthia Tipton, the female informant who contacted Det. Boyles, testified at length at the trial. During December 1990 and January 1991, she lived at 230 Bendorf in Santa Clara, with her son Samuel, and her boyfriend, John Wagener. Danny Silveria was a close friend and sometimes spent the

night at Cynthia's apartment, as did several other neighborhood kids. (RT 98:9188-9191.)

Ms. Tipton had known Chris Spencer for a long time, and Spencer was always welcome in her home. He was always polite and often came over to drink beer with Ms. Tipton's boyfriend, John Wagener. When Ms. Tipton moved to the 230 Bendorf address, she was in an upstairs apartment, and Matthew Jennings lived below her, along with his family. Jennings, Spencer, and Silveria began coming over very frequently.[21] Around Christmas 1990, they began bringing John Travis with them, introducing him as a friend from out of town. (RT 98:9192-9193.)

Kathleen Ham was a girl who had grown up in the neighborhood. She and her child had lived with Ms. Ham's mother until they were kicked out of the mother's home. They moved into Ms. Tipton's home around Christmas, 1990, along with Ms. Ham's boyfriend, Tom Swenor. Ms. Tipton did not like Tom Swenor. Silveria had also been kicked out by his parents about two weeks before Christmas, and he was also staying at the Tipton home. From then until late January, Ms. Tipton saw Silveria, Travis, Spencer, and Jennings almost every day. Through them, Ms. Tipton also met Troy Rackley, although he was not at her home as often as the other four. (RT 98:9193-

---

21. Ms. Tipton's boyfriend, John Wagener, enjoyed playing loud guitar music and was known as a heavy drinker. Men and women who ranged in age from 18 to 50 regularly came over to party, using marijuana, speed, and glue as well as alcohol. Although initially opposed to all of the drug usage, Ms. Tipton eventually decided she could not police all the visitors and decided instead to join them. (RT 98:9247-9250.)

9196.) Ms. Tipton did not like John Travis. When Travis started coming over frequently to visit Silveria, Ms. Tipton asked Silveria not to bring Travis to her home. (RT 98:9197.)

On one Thursday night when Silveria, Travis, Spencer, and Jennings were all at Ms. Tipton's home, she saw Jennings laughing and playing with a stun gun. Jennings said he had stolen it from his father.[22] The four young men also flashed a lot of money. Ms. Tipton's son, Sam, had become very close to Silveria. Sam and other kids in the neighborhood told Ms. Tipton about the stun gun robberies that had recently occurred in the neighborhood. Jennings' girlfriend also talked about the robberies, as did Kathy Ham and Tom Swenor. (RT 98:9202-9204, 9208, 9232.)

Tom Swenor also recalled seeing the young men at Cynthia Tipton's home with a stun gun. One of the men said they had broken into a place and obtained the stun gun, then robbed another place on the way home. They said Spencer was the lookout and getaway driver during the Sportsmen's Supply burglary, but he fled when he saw a police officer and left the others high and dry. Swenor was quite uncertain about just who said what. He readily acknowledged that he was addicted to various drugs at the time of these

---

22. After initially testifying that John Travis was present with the others when they were playing with the stun gun, Ms. Tipton acknowledged on cross-examination that she could not remember if she saw Travis with the others that night. She believed Travis probably stayed downstairs at that time, as she did not like him in her home. (RT 98:9232-9234.) Ms. Tipton also acknowledged that she would get mixed up about who was present at any particular time, since everybody was in and out all of the time. (RT 98:9239.)

events, and that his drug use had clouded his memory of these events. (RT 99:9395, 9403, 9408, 9411-9422, 9427-9430, 9443, 9448.) Swenor's girlfriend, Kathy Ham, also recalled hearing some of these discussions, but was equally uncertain about who said what. (RT 99:9475-9479.)

Silveria stopped living at Ms. Tipton's home and began staying instead at a home in Uvas Canyon, along with Travis, Spencer, Jennings, and Rackley. They had no water at that home and one Monday morning Silveria came to Ms. Tipton's home and asked to take a shower because he had poison oak all over him. Rackley was with Silveria, but remained downstairs while Silveria and Ms. Tipton talked upstairs. Ms. Tipton was upset and told Danny Silveria that she knew he and the others were involved in the robberies. She advised Silveria to stay away from the others, as they would get him in trouble. Silveria treated it like a joke and said not to worry. He acknowledged the police had their descriptions, but he believed the police did not know who they were. Silveria also said they had something planned that very evening, but he did not say what it was. (RT 98:9208-9214.)

Kathy Ham also recalled being present at a time when Matthew Jennings said she should be nice to the young men because they were going to come into a lot of money. She believed Travis and Silveria were present at the time, but they said nothing. (RT 99:9484-9485.)

Ms. Tipton became concerned and called the police the day that Silveria had come to her home to shower. She talked to Detective Boyles, did not give him her name, but she told him that John, Chris, Danny, and Matt were involved in the stun gun robberies, that they had a stun gun, that she

feared they might hurt themselves or others, and that she had the impression that something big was going to happen that night. Det. Boyles asked her to obtain the last names of the four young men, and information about any vehicles they were using. Ms. Tipton called Jennings' girlfriend and also talked to her own son, Sam, in an effort to learn the last names. (RT 98:9214-9218.) At some point, Ms. Tipton called Det. Boyles again and provided the last names. (RT 98:9219-9220.)

Kathy Ham acknowledged that she had told an investigator in a taped interview that John Travis and Danny Silveria had been upset with their former boss at Leewards because they felt they were fired unjustly, and that they were going to get even. However, when she testified at trial, she did not recall making that statement, or whether it was true. (RT 99:9495-9499, 9509.)

Bob Standard was another person who stayed at Cynthia Tipton's home around January 1991, apparently at the same time that Danny Silveria was spending some nights there. He conceded he may have told Silveria about a vacant cabin he had been to previously, in the Uvas Canyon area. He gave Silveria written directions to the cabin. He drove there once in a large green car at a time when Silveria, Travis, Jennings, Spencer, and Rackley were all staying at the cabin. Standard also recalled hearing Silveria and Travis discuss a place where they had worked, and he believed all 5 of the young men had been present when he heard them discuss plans to rob the

place. He did not recall any discussion about killing anybody.[23] (RT 99: 9535-9540, 9543-9545, 9553-9558, 9560-9562: 9580; 100:9590-9591.)

Charles Larson owned a cabin in the mountainous Uvas Canyon area. He did not go there often in the winter, but was there briefly once in December 1990. At that time he noticed things that caused him to believe someone had been staying in his cabin without his permission, but he did nothing about it. However, in January 1991, he received a phone call from a Uvas Canyon neighbor who relayed information that caused Larson to visit the cabin again.[24] He saw further evidence that someone had been staying there without permission. (RT 9287-9298.) Larson found items, including cloth-

---

23. Cynthia Tipton contradicted Standard, claiming he had later told her that he had been at Uvas Canyon on a Sunday night when he heard the 5 young men discuss plans to commit a robbery and to murder a former boss who knew them. (RT 100:9625-9629.) However, Tipton conceded that she had first told authorities about what Standard had said during the time of her trial testimony. When she first described Standard's alleged statements to the police, she referred to him hearing the other discuss planning a robbery, but she did not mention anything about Standard hearing plans to kill the manager. Tipton claimed her failure to mention that fact was an oversight. (RT 99:9230; 100:9617, 9646.)

24. The neighbor was Lynn Marie Van Steenwyk, who occasionally rode her horse across Larson's property and who had seen two cars there that did not belong there. One was red and black and the other was green. She spoke to an occupant of the green car, who said the property belonged to his grandmother, Mrs. Bennett. She identified a photo of John Travis as the person to whom she spoke. Ms. Van Steenwyk knew that the property owner was Charles Larson, so she called him that evening. (RT 96:9102; 98:9334-9340.) On cross-examination, Ms. Van Steenwyck noted that another person, whom she identified as Daniel Silveria, later got out of the red and black car. She still thought Travis was the one who referred to the grandmother, but expressed great uncertainty about just who said or did what. (RT 98:9340-9342.)

ing, newspaper articles, a name tag, and silver duct tape that did not belong to him. (RT 98:9298-9307.)

Larson filed a vandalism report with the Santa Clara County Sheriff's Office, and Deputy Dennis Scribner met with Larson at the cabin on January 29, 1991, around 11:30 AM. Larson turned over a number of items, including a name tag that said, "Leewards, Dan Silveria, Stock Associate," and a news article about a stun gun robbery at a liquor store. (RT 98:9310-9316.)

Kathleen Beavers also lived near Larson's Uvas Canyon cabin. Around January 24 or 25, 1991, she noticed a car come up her driveway, and then turn around and leave very slowly. It was red with a black top and was not the kind of 4-wheel drive vehicle normally seen in the area. She identified a photo of Chris Spencer's red car as similar to the vehicle she had seen. (RT 98:9217, 9320-9324.) On January 28, 1991, Ms. Beavers' son, Lake Beavers, and his girlfriend, Katherine Brooks, came up the driveway at dusk, around 5:30 or 6 PM. They saw a carload of kids coming down the driveway and pulled over to let them pass. She identified a photo of Chris Spencer's car as similar to the one she saw. She thought the people in the car were around 19 or 20, and thought one was a female because of long hair and feminine features. (RT 98:9324-9333.)

At 2 AM on Tuesday, January 29, 1991, a man who identified himself as Chris Spencer came to the Best Western Sundial Motel in Redwood City and rented Room 206 for the night. He was alone and paid cash. He asked for a room with 2 beds. Afterward, another man who identified himself as

Dan Silveria rented Room 220, also paying in cash. He said nothing that suggested he was with Spencer. (RT 105:10147-10155.)

During the day of January 29, 1991, Danny Silveria bought a 1980 Honda Civic from a car dealer in San Carlos, going to the dealer's other office in Redwood City to complete the paperwork. He paid $1,000 in cash and agreed to pay another $196.95 per month for 12 months. Chris Spencer was with him and bought a 1979 Triumph Spitfire, paying $500 in cash and trading in his 1973 Dodge Charger, while also agreeing to pay the balance at $216.04 per month for 12 months. There were three other persons with Silveria and Spencer. One was identified as John Travis and the other two looked similar to photos of Matt Jennings and Troy Rackley (RT 105:10186-10199.)

At another car dealer in San Carlos on the same day, a 1979 Datsun Z was sold to John Travis and Danny Silveria. The salesman recalled that the person actually buying the car did not have his driver's license with him, so the contract to buy the car was made out with the names of both men. The car dealer received $1,300 in cash, with the balance of $655.98 to be paid within a month. (RT 105:10215-10224, 10234.)

At a third car dealership in San Carlos, a 1975 Chevy Luv was sold that same day to Matthew Jennings. He paid $1,000 in cash and was to make 4 payments of $162.72. There was one other person with Jennings when he purchased the vehicle. (RT 105:10241-10247.)

That afternoon, Danny Silveria, John Travis, and Troy Rackley came over to the residence of Gregg Orlando. They were in 2 cars, a Honda Civic

and a 280-Z. At one point when Travis and Rackley were out of the room, Silveria showed Orlando a wad of money and an ounce or two of marijuana. Orlando believed the money amounted to one or two thousand dollars. Silveria said he was going to get a new wardrobe, and then they were going to Reno. (RT 107:10515-10522.)

Various sales persons at the Oakridge Mall remembered sales they made on January 29, 1991. Christopher Kelley worked in the young men's department at Macys. Troy Rackley bought some Z. Cavaricci pants, paying cash for them. John Travis was with Rackley. After they left, Kelley found blue sweat pants left behind in the fitting room. They looked awful, so he did not think anyone would be back for them. He discarded them in a dumpster behind the building. (RT 105:10250-10254; 96:9102.)

Deborah Ann Nelson worked at Pacific Sunwear at the mall. About 6 PM, Danny Silveria bought a woven button-up shirt, a pair of cotton pants, and sandals. He had arrived in jeans, tennis shoes, and a shirt, that were all very dirty. The clerk recalled being surprised at the wad of hundred dollar bills the very unkempt customer took from his pocket in order to pay for the new clothes. He was given a bag for his old clothes and dumped the bag in a trash can in front of the store.[25] (RT 105:10257-10266; 96:9102.)

Later, Ms. Nelson noticed Silveria go by the store, carrying a bag from Foot Locker. (RT 105:10268-10269.) Eric Beckles worked at Foot

---

25. The various articles of older clothing that had been discarded at the Oakridge Mall by Silveria and Rackley were later recovered by the police. (RT 110:10709-10713.)

Locker that day and recalled selling a pair of tennis shoes at 4:34 PM on January 29, 1991. (RT 105:10275-10276.)

John Durbin had known Matt Jennings since Junior High School. Through Jennings, he had met persons he knew only as Chris, John, and Danny. Durbin lived in an apartment with Chris Wagner and Wagner's girl-friend, Alice Gutierrez. Around 7 PM on January 29, 1991, Matt Jennings and Chris Spencer showed up, asking to use the bathroom, change clothes, and look at an atlas. They brought bags with new clothes, had recent hair-cuts, and flashed money around. Thirty or forty-five minutes after they left, police arrived and found cash that was not Durbin's. (RT 106:10437-10442; RT 107:10447-10453.)

B. Penalty Phase Evidence

1. Introduction

As noted above, the first penalty trial resulted in no unanimous verdict for either John Travis or Danny Silveria. In that trial, the two defendants were tried jointly, but separate juries were impaneled to separately consider the two defendants. Later, there was a single penalty retrial wherein a single jury determined that both defendants should suffer the penalty of death.

There were significant differences between the two penalty trials. The initial penalty trial did not require the introduction of guilt phase evidence, since the juries were the same ones that had heard the guilt trial. However, because the circumstances of the crime constituted a substantial part of the

prosecution effort to prove aggravating factors, it was necessary for the prosecution to repeat much of the guilt phase evidence at the penalty retrial.

Furthermore, at the initial penalty trial, the prosecution presented evidence that John Travis had participated in an attempted escape with several other jail inmates, while awaiting trial on the present charges. Most of the prosecution evidence pertaining to this escape attempt came from the testimony of two jail inmates who admitted their own participation in the effort. Their testimony indicated that the escape plans included a conspiracy to attack and possibly kill a jail officer who would otherwise stand in the way of a successful escape.[26] Thus, at the initial penalty trial, evidence of the alleged escape plan was presented in support of the Penal Code section 190.3, subdivision (b) aggravating factor of other violent criminal acts that involved the threat to use force or violence.

However, the two jail inmates who were essential to the prosecution effort proved to be poor witnesses, contradicting each other in crucial details, possessing considerable incentive to tell a story that would please the prosecution regardless of its truth, and suffering from many other strong attacks on their credibility. Even the prosecutor apparently saw these weaknesses, as he chose not to use these witnesses at all during the penalty retrial. Instead, the only use of the escape evidence at the retrial consisted of cross-examination of John Travis about the non-violent aspects of the escape plot,

---

26. In actuality, as will be shown, the alleged escape plans were so poorly thought out that it is, at best, highly unlikely that the escape ever could have succeeded, even if the plans had not been interrupted.

in a claimed effort to rebut what the prosecution perceived as a defense effort to prove that Mr. Travis had accepted religion and improved his behavior while incarcerated in jail.

Despite the failure to reach unanimous penalty verdicts against either defendant, the first penalty trial cannot be dismissed as moot. Before and during the penalty retrial, important rulings were made regarding the admissibility of various categories of evidence, whether certain witnesses would be permitted to testify at all, and regarding the use of a single jury to determine the fate of both defendants, rather than continuing in the use of separate juries or granting a severance altogether. A number of arguments in this brief will pertain to these rulings. Because the evidence presented at the first penalty trial became the factual basis for many such rulings, it is necessary to summarize that evidence even though it did not support any verdicts.

Similarly, it will be necessary to briefly summarize evidence offered by Danny Silveria in his first trial case in mitigation, even though much of that evidence was presented only to Mr. Silveria's jury and was not heard by John Travis' first jury. Such evidence remains highly relevant to the fairness of the trial court's rulings that resulted in a single jury at a joint retrial, and that shaped the evidence heard by that jury.

2. The First Penalty Trial, Resulting in No Unanimous Verdicts

a. The Prosecution Evidence in Support of Aggravating Factors

1) Evidence of the Alleged Escape Plans

At the time of the first penalty trial, Jon Bolton was in custody in Clark County, Nevada, for burglary and grand larceny. He also had 17 prior felony convictions for forgery, burglary, and grand theft. (RT 135:12498; 136:12678-12680, 12683-12685.).)

Bolton testified that in early September 1992, he was housed on the Fifth floor of the Santa Clara county jail, in cell 46 in pod 5-A. Next to him, Ralph Gonzales occupied cell 48. Another occupant of the same pod, Ricardo Lovato, had been an acquaintance of Bolton's during a prior period when both were out of custody. According to Bolton, Lovato informed him that efforts were in progress to saw out a window in Gonzales' cell so that a number of inmates would be able to escape.[27] Bolton became involved with

---

27. Of course, even if the inmates were able to get out of the window, that would still leave them five stories above the ground. Bolton described the plan as involving the use of a rope made from bed-sheets to lower inmates, one-by-one, down the side of the building to a roof of another section of the building. From that roof, estimated by Bolton as 1-2 stories above the ground, the inmates would leap to the ground below, which Bolton believed was made up of loose rock. The plotters initially discussed possible ways to get persons outside the jail to wait for them with transportation from the scene, in the event they survived the jump from the roof. Eventually, however, that was given up and it was simply decided that once they reached the ground, it would be every man for himself. (RT 136:12654-12661.)

Lovato, Gonzales, Matt Jennings, and John Travis in this escape effort. Bolton understood that other inmates were also involved, but Bolton never talked to them. (RT 135:12498-12503.)

The various participants in this scheme would come to Gonzales' cell and use a hacksaw blade, or a piece of stainless steel wire from a jail chair, to slowly cut through bars in the cell window. Bolton's alleged role was to facilitate transportation away from the jail, and to oversee plans for burglaries that would net the plotters supposedly valuable computer chips. Bolton was to market these chips through an electrical parts company owned by Lovato's brother. Bolton had previously worked for Lovato's brother as a technician, and claimed to be familiar with many of his contacts. Sale of these stolen computer chips would supposedly raise the money necessary for the further flight of the escapees. (RT 135:12505-12514.)

Bolton also claimed that the plotters engaged in conversations regarding what to do if a guard or police officer became aware of the plans. Eventually it was decided that one of the jail guards would be likely to overhear the final stages of kicking out the window in Gonzales' cell, once the bars were cut through. According to Bolton, John Travis said not to worry about that guard; if he did overhear anything, then Travis and Jennings would take care of the guard. (RT 135:12520-12523.)

This supposedly evolved into a more specific plan. When it was time to kick out the cell window, a pot would be dropped in the dayroom where the guard was stationed, making noise to distract him from the sound of the breaking window. This would supposedly draw the guard further into the

dayroom where he would be subdued and "taken out" by Travis and Jennings.[28] (RT 135:12523-12524.)

Bolton claimed that neither he nor Lovato wanted to be involved in harming the guard.[29] While Bolton liked the idea of escaping from custody, he did not want to be a fugitive from a violent crime.[30] He decided to withdraw from the plan and notify the authorities. However, when he did so, he decided not to mention anything at all about the alleged plans to harm a guard, since Bolton was uncertain how the authorities would react when he confessed his own role in the plot. Bolton decided to give the authorities just enough information to stop the plot from going forward, since that would be sufficient to prevent anyone from being hurt. (RT 135:12529-12535.)

---

28. One of the most bizarre aspects of Bolton's story was that somewhere between 40 and 80 people would be in a position to see the planned attack on the guard. Bolton claimed nobody was concerned about such a large number of witnesses, since every one of these people apparently knew about the escape plan and they all intended to leave through the window once the escape was under way. Apparently the 4 or 5 ringleaders of the escape plan would be rewarded by being the first ones to leave through the window. (RT 136:12668-12670.)

29. Although Lovato was not invariably present when Bolton heard other inmates discussing the plans, Lovato was confident that he had seen and heard most of what Bolton had seen and heard. Bolton also remembered talking directly to Lovato about the alleged plans to injure or kill a guard. (RT 136:12665-12667.)

30. Indeed, among the many prior felony convictions admitted by Bolton was one for a 1987 escape from the same jail. (RT 136:12683.)

Bolton then revealed the escape plot to the authorities and told them who was involved.[31] After that, he never went back to the same housing. Bolton did not ask for any deal or promises in return for his information. However, Bolton knew he faced up to seven years in prison for the charges pending against him at the time of the escape plot. Perhaps coincidentally, before the month of September 1992 had ended, Bolton entered into a plea bargain to dispose of his pending charges. Furthermore, he somehow managed to delay sentencing in his own case for more than another year.[32] (RT 135:12535-12540; 140:12977.)

In November 1993, the still-unsentenced Bolton gave a further taped statement to Bill Clark, an investigator for the District Attorney's Office who happened to also be doing the prosecution investigation for the Leewards homicide trial. Once again, no deals or promises were made, but a month later, when Bolton was finally to be sentenced, the deputy district attorney

---

31. Bolton claimed he acted alone in going to the authorities, and that Lovato had no advance knowledge of Bolton's departure from the pod. (RT 136:12672-12673.)

32. According to Bolton, his sentencing was delayed from January until December 1993, while he sought continuances in order to complete a substance abuse program. Bolton claimed he received continuances by writing directly to the judge, without giving any notice to the district attorney's office. Bolton claimed to have no knowledge of an October 1993 statement by Deputy District Attorney Kathy Storton that Bolton was manipulating the judicial system and should be ordered to serve his suspended prison sentence. (RT 136:12608-12611.) However, later in his testimony, Bolton did acknowledge a vague recollection of being in court when a female deputy district attorney tried to enforce a plea bargain and have him sent to prison. (RT 140:12988.)

prosecuting the Leewards case appeared in court and mentioned something to the judge about Bolton's safety in the event he was sentenced to prison. As an apparent result, Bolton received a suspended sentence of 7 years in prison. One of the conditions of his suspended sentence was that he testify truthfully in subsequent court proceedings in the Leewards case. Bolton was released from custody the day after he was sentenced. (RT 135:12540-12548.)

Bolton's probation conditions also required him to submit to drug testing and to "stay out of trouble." Nonetheless, Bolton used drugs after his release. He was also required to keep in touch with his probation officer, but he stopped doing that in May or July 1994, when he decided to leave Oakland. Although he was in custody in Nevada on pending charges of burglary and grand larceny, allegations that his California probation had been violated had not yet been filed. He expected that they would be. (RT 135:12549-12557; 140:12996.)

Bolton insisted that his strong desire to avoid prison on the California charges had nothing to do with his decision to give the District Attorney's Office a more-detailed statement about the alleged escape plot, in November 1993. On the other hand, Bolton was initially unable to explain what did cause him to suddenly give a new statement about the escape, some 14 months after his original statement. (RT 136:12611.) Then Bolton said he had become concerned about the type of custody to which he would be subjected if he remained in custody, whether in jail or in prison. He communi-

cated that concern to his attorney who asked him to tell the authorities what had happened. (RT 136:12612-12614.)

Bolton soon came up with yet another explanation for his new statement. He believed there was an on-going investigation into the year-old escape plot, and he asked his attorney to check on the status of that investigation. Bolton hoped that once the investigation ended, he could get a letter from someone at the jail, and that such a letter would be helpful when he would be sentenced for the California charges on which he had still not been sentenced. (RT 136:12636-12640.)

Bolton had apparently been reminded of the investigation into the escape plot when Deputy Jensen approached him, seeking a statement. Jensen had advised Bolton of his rights, saying that was necessary because he did not know the extent of Bolton's involvement. Bolton declined to talk to Jensen without counsel present, and then asked his counsel to find out whether the investigation was over, since Bolton was unable to talk to Deputy Jensen without waiving his rights. (RT 136: 12635-12636, 12641.) Bolton's counsel asked Bolton just what had occurred in the jail, then checked with the authorities, and then told Bolton they still wanted to talk to him. Bolton was willing to talk, as long as his attorney was present. (RT 136:12641-12642.) Bolton claimed he had nothing to do with getting the District Attorney's Office involved; when Deputy District Attorney Rico and DA Investigator Bill Clark wanted to talk to Bolton, Bolton assumed it had been Jensen who asked them to join the interview. (RT 136:12642-12644.)

Bolton acknowledged he told Investigator Clark that he needed a showing of good faith. Bolton was unclear about what that meant, although he reiterated his concern that there would be no favorable letter from the jail until the escape investigation had been completed. Since Deputy District Attorney Rico and Investigator Clark insisted on hearing the whole story, Bolton eventually decided to give it to them. (RT 136:12647-12652.)

Nonetheless, Bolton insisted there was never any discussion of any benefit that he would receive in return for his statement and testimony. His main concern was that he did **not** want to end up in protective custody, nor did he want to be harmed for giving testimony.[33] He claimed he had simply not thought the matter out very much. (RT 136:12686-12687.)

District Attorney Investigator William Clark reiterated that he made it clear to Bolton that no one in the district attorney's office was making him any deals or promises in connection with any statement he might give. (RT 138:12841-12842.) However, Clark conceded that when he asked Bolton to explain why he had not revealed all of the details of the alleged escape plan in his original statement more than a year earlier, Bolton responded that he was concerned about receiving fair treatment, and if there had been some showing of good faith, he might have divulged the details earlier. Clark formed the opinion that Bolton was not having a good relationship with jail personnel, and did not feel he was getting the treatment he deserved. None-

---

33. Bolton explained that inmates in protective custody all wore brown-colored jail clothing, which he viewed as being equivalent to wearing a target on your back. (RT 136:12689-12690.)

theless, Clark insisted he did nothing to indicate Bolton would get anything in return for his information. (RT 138:12845-12847.) However, Clark acknowledged that he attended Bolton's sentencing in December 1993, and he was not at all surprised when Bolton was released soon after the sentencing.[34] (RT 138:12850-12851.)

Ricardo Lovato echoed some portions of Bolton's testimony, and sharply contradicted others. As of September 2, 1992, Lovato was in the Santa Clara County main jail for an electronics-related robbery. Lovato reiterated the basic escape plan, in which John Travis, Matt Jennings, Jon Bolton, and Ralph Gonzales were cutting through the bars in the window in Gonzales' cell. (RT 136:12706-12711, 12714-12716, 137:12719-12720.)

Lovato recalled an occasion 3 or 4 days before September 2, 1992, when John Travis said something to the effect that there was to be no turning back. He claimed that Travis said that he would kill or shoot or blow away anyone who got in the way of the escape. Lovato also claimed that Travis was arranging with Jon Bolton to obtain some weapons. (RT 137:12730-12736.)

Lovato did not say anything to the authorities while the planning was still in progress. Instead, it was only after the authorities interrupted the es-

---

34. Clark knew that one condition of Bolton's suspended sentence was that he maintain contact with the District Attorney's office. Bolton did not do that. When the prosecution wanted to call him as a witness in the present trial, Clark had to track Bolton down, finally finding him in Nevada. (RT 138:12853.)

cape plans and rounded up everybody that Lovato talked to anybody about the plot. Lovato also claimed he had other plans to get out of jail, involving some kind of operations with other officers. (RT 137:12740-12741.)

Lovato insisted that Bolton had told the other escape plotters that he could arrange for his brother-in-law to have an escape vehicle ready outside the jail. They were also trying to get Bolton's brother-in-law to supply weapons. (RT 137:12750-12751.)

Lovato also described another criminal plan in which he and Bolton were involved. Bolton allegedly had possession of a check protector and blank checks from Franklin Savings, where he had previously been employed. Lovato sent a friend named Pam to meet with Bolton's wife to pick up the checks. However, something went wrong and the person to whom Pam was to sell the checks became nervous and called the police, resulting in the arrest of Pam. (RT 137:12742-12745, 12748-12750, 12774.) Apparently the police also talked to Bolton's wife and the wife feared that she and Bolton were both about to be charged with something. That greatly angered Bolton, who threatened Lovato and Pam. This caused Lovato enough concern that he reported the threat to the police. Coincidentally, it was later that evening or the next day that Bolton reported the escape plan to the authorities and all the inmates were removed from the pod.[35] (RT 137:12757-12758.)

---

35. Bolton maintained he did not know what happened to the stolen checks and check protector. He admitted being familiar with a woman named Pam, did not recall who she was, but conceded she may have had some connection to Lovato. Bolton claimed not to recall any details about

(Continued on next page.)

Lovato maintained that he had a much smaller role in the escape plans than Bolton had claimed. He was also quite sure there was no plan to harm any guard inside the jail, although he did believe they would take care of any guard who happened to get in the way. The escape plan had never progressed to a point where there was a specific date for weapons and transportation to be ready. (RT 137:12759-12762, 12777-12778.) Lovato was not surprised that Bolton said Lovato was part of the escape plot. Lovato believed Bolton was trying to save his own butt, and he would dump on anybody in order to accomplish that goal. (RT 137:12775.) Lovato disliked Bolton and believed Bolton felt the same way about him. (RT 137:12778.)

In the early morning hours of September 2, 1992, jail night watch commander William Slack was informed that an inmate had reported that an escape was planned for that night. All inmates were locked down pending further investigation. Cuts were found in the bars in the window in cell 48. (RT 137:12782-12792.) Officer David Damewood participated in the search of cell 48 and found 2 hacksaw blades and 2 wire strands stuck in a vent under a desk. (CT 137:12806-12809.) The top bar in the window was cut completely through on one side. (RT 137:12811.) Officer Everett Fitzgerald searched the cell occupied by John Travis and Matt Jennings and found 10-15 sheets, but no blankets. Regulations would have allowed each inmate to have 2 sheets and 2 blankets. (RT 137:12815-12819.)

(Continued from last page.)

the check protector matter, and said he did not really want to answer questions about it. (RT 140:12979-12982.)

Called as a defense witness, Deputy Kevin Jensen explained that he worked in the jail in 1992, and in September 1992 he was assigned to interview both Jon Bolton and Ricky Lovato about an alleged escape plot. The deputy noted that the escape plans the inmates described included a jump from the third floor roof to the ground, after using bed sheets to lower themselves to the third floor roof. But the jump from there to the ground would have been thirty feet. The deputy explained that both Lovato and Bolton said that part of the plan was that relatives of an inmate would be waiting in a van outside the jail, to aid in the flight from the jail. However, Bolton said that it would be relatives of Lovato waiting in the van, while Lovato said it would be Bolton's brother-in-law. (RT 170:17084-17089.) Deputy Jensen was aware at the time of the interviews that charges were pending against both Bolton and Lovato in a matter that involved both of them, plus Bolton's wife and Lovato's girlfriend. (RT 170:17089-17090.) Jensen noted that even after Bolton finally made his allegations of planned violence, in late 1993, no charges were ever filed against any of the alleged participants in the escape plot. (RT 170:17090-17094.)

2) Letter Sent By John Travis to Charles "Tex" Watson

In September 1991, Charles "Tex" Watson was an inmate at the California Men's Colony in San Luis Obispo. Watson was affiliated with the Manson family and was involved in the Sharon Tate murders. Watson's mail was undergoing special screening as a result of information the warden had

received, indicating that Watson was running some kind of religious ministry business (the Abounding Love Ministries) from the institution. Screening of Watson's mail began on September 13, 1991. On September 20, 1991, a letter was intercepted by the security investigations unit, and was turned over to Correctional Lieutenant Jackie Graham. The letter contained a return address indicating it was from John R. Travis, 885 North San Pedro, San Jose, CA 95110. Lt. Graham examined the contents of the letter and believed it described a murder and robbery. The letter was signed "J. R. T." Lt. Graham gave the letter to Sgt. Samaniego for follow-up, and advised him to contact the Santa Clara County District Attorney's Office, which Samaniego did. Some time later, an investigator named William Clark, from the Santa Clara County District Attorney's Office, came to the institution and obtained the letter from Lt. Graham and Sgt. Samaniego. (RT 138:12824-12830, 12836-12838.)

It was stipulated that the letter was, in fact, written by John Travis. (RT 138:12841.)

3) Prior Felony Conviction

Documents were received in evidence showing that on March 14, 1990, John Travis had been convicted of burglary. (RT 138:12869-12870.)

4) Victim Impact Evidence

Kay House worked in the Biology Department at the University of California at Santa Cruz. Jim Madden's widow, Sissy Madden, had worked with her in that department for 8 or 9 years. On the morning of January 29, 1991, Sissy Madden came into Ms. House's office and burst into tears because Jim Madden had not come home the night before. Mrs. Madden was very worried about him. Mrs. Madden explained that she had called the sheriff's office and they had found Jim's truck at Leewards with a flat tire, but had not located him. Mrs. Madden also tried calling Leewards after 9 AM, when it should have been open, but there was no answer. (RT 140:13007-13009.)

Ms. House called the campus police and asked if they could find out anything. They called back and said Jim had been killed, but they asked her not to say anything to Mrs. Madden as someone was en route to inform her. Ms. House and other co-workers stayed with Mrs. Madden as she became increasingly concerned and frantic. Finally, Mrs. Madden said she could not stand it any longer and she was going to Leewards to find out what had happened. Her co-workers then told her to sit down, and Susan Thuringer told her that Jim had been killed. Mrs. Madden screamed and screamed in a manner that Ms. House had never heard before, and would never forget. She thrashed about and had to be held down in order to calm her. Within a few minutes, a deputy arrived to talk to Mrs. Madden. (RT 140:13009-13011.)

Susan Thuringer had worked in the same department for 10 years. She repeated everything Ms. House had described, adding only that the co-workers decided they did not want a stranger to break the news to Mrs. Madden, so Ms. Thuringer told her before the deputy arrived. Afterward, Ms. Thuringer drove Mrs. Madden home and stayed with her until the Madden's daughter, Julie, came home and was informed of her father's death. Ms. Thuringer recalled the sounds that Julie made in response to the news as even worse than the sounds that Mrs. Madden had made. (RT 140:13012-13015.)

Sgt. Brian Lane of the Santa Clara Police Department was the officer who arrived at 10:10 AM to notify Mrs. Madden of her husband's death. He reiterated what previous witnesses had said, again describing Mrs. Madden's hysterical reaction and adding nothing of substance. (RT 140:13016-13018.)

Eric Louis Lindstrand had met Jim Madden in 1978 when Madden was going to Merced Junior College with a childhood friend of Lindstrand. That friend had brought Jim Madden with him on a spring break visit. Lindstrand's sister, Sissy, was there at the time and met Jim Madden. On a later occasion, Madden informed Lindstrand that he and Lindstrand's sister were going to get married. Madden was very happy. (RT 140:13019-13020.)

Lindstrand described Madden as a great guy who was patient, caring, and fun-loving. The marriage occurred in 1979. The friendship between Jim Madden and Eric Lindstrand deepened. Lindstrand thought this was the best thing that ever happened to his sister, and he believed they had a really good marriage. Their daughter, Julie, was born in 1983 or 1984. Jim was a de-

voted father and when he came home from work, Julie was always very happy to see him. (RT 140:13021-13022.)

Lindstrand was at work when he got a call from his sister and was told that Jim had been murdered. The impact on his sister was devastating and heartrending. She had been in therapy since the killing, in an effort to get a grip on life. Jim's death was crushing to her, like her heart had been taken away. It had also been devastating for Julie Madden, who initially refused to believe her father was dead. When Julie saw her father in his casket at his funeral, it was a ripping and terrible experience, but she finally seemed to realize that he was going to be gone. She had also been in therapy and losing her father like that left a crushing void. (RT 140:13022-13023.)

James Sykes was married to Jim Madden's sister, Judy. James Sykes and Madden had been friends from the time they met in 1974 or 1975. Sykes was at a seminar when he received the news of Madden's death and he immediately went to the Madden home, where Sissy Madden was crying with her co-workers. Later in the day, he drove Sissy to pick up Julie from school. Sykes again described the terrible sounds from Julie when she was informed of her father's death. However, soon afterward Julie stopped crying and just sat there. Sykes recounted an incident just a week before his trial testimony, when he and his wife were overnight guests at Sissy Madden's home. In the middle of the night, he could hear Julie crying. (RT 140:13028-13033.)

Sykes' wife, Judy, also testified about her brother, Jim Madden, who she described as kind, gentle, strong, and compassionate. She and her brother remained very close after they were both married. She learned of Jim's mur-

der when Sissy called her just after lunch. She then went to tell her mother. She thought her mother would pass out, but she was okay once she was in a chair. A lot of joy had gone out of her mother's life. Judy Sykes also noticed that for one-and-one-half to two years, Julie Madden would get hysterical whenever her mother was out of her sight. She believed Julie was afraid to be alone because her father had been alone when he had been killed. Like her husband, Judy Sykes recalled the recent episode when Julie had cried about missing her father. Judy also believed Sissy Madden had become extremely nervous and fragile, so that it would not take much to push her over the edge. (RT 140:13047-13052.)

Judy Sykes also believed her mother had become fragile. A few months earlier, her mother's little dog had been killed, causing her to lay on the floor saying, "I can't take any more." (RT 140:13052.)

Jim Madden's widow, Sissy Madden again repeated much of what had been said by others, and added a few details. She had met Jim Madden in February 1978 and they were married in June 1979. Their daughter Julie was born January 3, 1984. Jim Madden became the manager of Leewards in January 1990. Mrs. Madden described him as a wonderful husband, kind and loving. He was also a wonderful father, patient and loving. She recalled how he would get on the floor and play with Julie. When he was at home, he was devoted to his daughter. (RT 140:13053-13054.)

Jim Madden's responsibilities at Leewards required him to work long hours. On the evening before he was killed, Sissy Madden took Julie to ballet class. Afterward, they would pass near Leewards and Julie wanted to stop

at the store and visit her father. They stayed at the store 15 or 20 minutes. After Jim kissed Julie good-bye and Sissy kissed Jim good-bye, Sissy drove out of the parking lot and thought to herself, "What if I never see him again?" (RT 140:13054-13056.)

On nights that Jim closed the store, it was not unusual for him to arrive home as late as 11 or 12 PM. Sissy went to sleep that night and woke up later, realizing Jim was still not home. She called Leewards and there was no answer, so she assumed he was on the way home. When she awoke at 5 or 6 AM and he was still not home, she began to panic and called the police in tears. They called back 15 minutes later, said they had sent a car, and that the doors were okay. Sissy got her daughter off to school and went to work, still upset and crying. (RT 140:13057-13058.)

Sissy Madden reiterated what other witnesses had described in regard to learning from co-workers that Jim had been killed. She also described calling relatives, how James Sykes, her brother-in-law, came over and helped her pick up Julie from school, and how she told Julie her father had been killed in a robbery. (RT 140:13059-13062.) Afterward, Julie seemed afraid her mother was also going to die, so she would not sleep by herself for a year-and-a-half. (RT 140:13068.)

Mrs. Madden described the emotional emptiness that followed the loss of her husband. She said it was awful to have to call a friend to take Julie to her first father-daughter dance. During the month preceding her trial testimony, there had been a lot of talk about Jim's death among family members, bringing back all the unhappy feelings. Julie had problems at

school that went beyond what the school psychologist could handle, so she had been going to a private therapist for the last three-and-a-half years. When the prosecutor had asked whether Julie would want to testify at the penalty trial, Mrs. Madden discussed it with Julie's therapist. In the presence of the therapist, Mrs. Madden asked Julie how she felt about testifying; Julie started to cry and said she was afraid to testify. (RT 140:13063-13068.)

The final victim impact witness was Joan Madden, the mother of Jim Madden. Describing her son's childhood, she noted he was a normal child, bright and outgoing. He was in the Peewee League and in the Cub Scouts. He participated in track, played guitar, and was active in church. He was the school president in the Eighth grade, and was constantly given more responsibilities in church. (RT 140:13069-13070.) He had a good relationship with his grandmother, as they were both Dodger fans and they went to games together. (RT 140:13073.)

Joan Madden repeated once again some of the events that occurred when the family learned of Jim Madden's death, and she also reiterated once again the way Julie reacted to the loss of her father. She explained Sissy Madden's bouts of depression and loneliness, and the sadness the family felt at holidays, especially Christmas. She left the stand in tears as she was unable to complete her last anecdote about Julie.[36] (RT 140:13075-13079.)

---

36. The victim impact evidence was all presented on November 20, 1995. three days before Thanksgiving. The prosecutor then rested. The next portion of the trial dealt with co-defendant Danny Silveria's case in mitigation, presented only to his jury. Thus, after spending a full day listen-

(Continued on next page.)

b. An Overview of Co-Defendant Silveria's Evidence in Mitigation[37]

Cynthia Green's mother and Danny Silveria's father were brother and sister, making Danny her cousin. In 1970, Cynthia spent the summer with the Silveria family in Yakima, Washington. There was barely enough food to eat, and Barbara Silveria did not relate very much to her children. Danny's father regularly smacked the children around quite hard when he was in a bad mood. He also severely beat Barbara Silveria. (RT 143:13370-13392.)

Lenae Crouse was Danny Silveria's sister. She recalled their father as a truck driver who was gone most of the time. When he was at home, he treated Lenae like an angel on a pedestal, but the slightest thing would make him angry at Danny and Sonny. He regularly hit the boys, and also physically abused their mother. (RT 144:13613-13624.)

Shirley Cotta was the sister of Danny Silveria's father. She described her brother as not being a good provider or a faithful husband during his marriage to Barbara Silveria. Ms. Cotta sympathized with Barbara Silveria in

---

(Continued from last page.)

ing to the testimony of the friends and family of the victim, the Travis jury did not return to court until 15 days later, on December 5, 1995.

37. As mentioned in the introduction to the summary of penalty phase evidence, Danny Silveria's evidence in mitigation was almost entirely presented during times when the separate jury for John Travis was not present. Furthermore, the first penalty trial, resulted in no unanimous verdict in regard to either defendant. Nonetheless, the evidence was known by the trial court when it ruled on a number of important issues regarding the penalty retrial. Thus, the evidence will be relevant to a number of issues raised in this brief, and is therefore included in this summary.

view of her living conditions which resulted from a lack of financial or emotional support and eventual abandonment by her husband. (RT 144:13470-13472, 13475-13476.)

Danny Silveria's parents divorced in 1974. Linda Cortez became the social worker for the mother and her children in 1975, and remained in that role until 1982. (RT 142:13216-13227.) When Ms. Cortez was assigned to the family in 1975, Danny and his brother, Sonny, were both wards of the court, placed there by their mother, who was unable to cope with her children. Another brother, Michael, and a sister, Lenae, lived at home with their mother. The mother was unable to cope very well with the two children still at home, and did not maintain significant contacts with the two children who were outside of the home. The mother appeared to be under stress and on the verge of a nervous breakdown. The home was in a constant state of disarray. (RT 142:13244-13252.)

In 1976 or 1977, Danny Silveria was taken in as a foster child by the Herevia family. They treated him well and he seemed content, although he craved love. After a year, the Herevia family moved from San Jose to Dinuba. The family and the welfare department decided it was in Danny's interest to remain in the San Jose area for possible reunification with his real family. Thus, after a year in a pleasant home, the youngster was suddenly left behind when his new family moved away. (RT 142:13127-13137.)

After spending a matter of months in the children's home, Danny was finally placed in a new foster home, with the Hebert family. (RT 143:13397.) Although the Hebert home was only 2 miles from Barbara Silveria's home,

she did not visit her sons. (RT 143:13322.) Elizabeth Munoz lived next door to the Hebert family, and recalled Danny and Sonny Silveria as foster children in that family from 1976 to 1979. She knew Danny and Sonny, as they played with her own children. She believed Danny did not get much affection, and she never saw Mrs. Hebert show any affection toward him. She recalled an incident when the Heberts took their two natural children to Great America when it first opened, but the two foster children were left behind. She recalled another incident when one of the Heberts' natural children, Dean Hebert, had a pair of skates he was supposed to share with Danny and Sonny. However, the foster children just sat around while Dean skated. Mrs. Munoz bought a new pair of skates and gave them to Danny, making him very happy. The next time Mrs. Munoz saw the boys skating, Dean was using the new skates and Danny was wearing Dean's old skates. Nonetheless, Danny was happy to be skating. On another occasion Mrs. Munoz saw Dean break Danny's eyeglasses and Danny was afraid he would be in trouble because his glasses were broken. When Mrs. Hebert got home, Mrs. Munoz told her it was Dean who broke Danny's glasses, but Mrs. Hebert simply told her to mind her own business. (RT 143:13395-13407.)

Mrs. Munoz' son, Justin, recalled that Dean was always breaking things and blaming Danny or Sonny, who would then be punished. He recalled another incident when Dean stripped Danny of all his clothes and hid the clothes and Danny's glasses in the backyard. Danny, who was completely naked, then had to search for his clothes and glasses in the yard while

other boys and girls were playing in the yard and laughing at Danny, who was in tears. (RT 143:13419-13428.)

In April 1981, Danny reported that he had been molested a year or two earlier by his foster brother, Dean Hebert. After talking with the Hebert family, social worker Linda Cortez believed the molestation had, in fact, occurred, and she decided it was time to try returning Danny and his brother Sonny to their mother's home somewhat earlier than had been planned. Ms. Cortez believed the mother was functioning adequately in late 1981. In early 1982, there were massive cutbacks in the welfare department due to lack of funding, and Ms. Cortez was laid off from her job. (RT 143:13326-13337.)

Late in 1981, Shirley Cotta, the sister of Danny Silveria's father, visited Barbara Silveria. She saw that Barbara's apartment was filthy, with garbage spilling over in the kitchen, broken tables in the living room, and clothes and debris everywhere. There were unwashed dishes in the kitchen, and no clean dishes at all. Barbara was thin, pale, and shaking. She sat at the kitchen table smoking. She was withdrawn and lethargic. Ms. Cotta offered to help her start cleaning up, but Barbara said she had no soap and no groceries. Ms. Cotta started to sweep up but became so overwhelmed by the task that she left and never had any subsequent contact with Barbara or the children. (RT 144:13480-13482.)

Richard Guimmond was the assistant manager of an apartment complex where the Silveria family came to live around 1978 or 1979. He observed Danny and his brother, Sonny Silveria, in their mother's home. The home was a filthy mess and the boys were always hungry. Eventually the

boys began stealing food. Nonetheless, Guimmond always liked Danny and was pleased when Danny later dated his daughter, Tasha. (RT 142:13142-13164.) Tasha recalled that when she was in the Silveria home, Danny's mother, Barbara Silveria, just smoked cigarettes, drank beer, and watched television. Barbara never cleaned the house and there was never any food in the house. (RT 142:13187-13205.)

Deborah Thomas had been married to San Jose police officer Mike George until their divorce in 1990. In April 1982, the couple had a 7-year old son and 3-month old twins. One day that month, Officer George picked up 12-year old Danny Silveria for stealing food and decided to bring him home, with no warning to his wife. Ms. Thomas opposed this surprise addition to the family, but Danny remained. This was a continuing source of fights between the couple, and Ms. Thomas felt she was in no position to give Danny any attention. Officer George had previously brought home 12-14 year old boys who stayed for weekends or came for periodic visits, but Danny stayed for 9-12 months. It concerned Ms. Thomas that her husband took Danny everywhere while paying little attention to his own children. (RT 144:13488-13493.)

Eventually Danny took $5 from the couple's older boy, and also cut school. Ms. Thomas was furious and insisted her husband get Danny out of the home. However, Officer George continued his pattern of bringing boys home and giving them a great deal of attention, while ignoring his own children. In December 1988, he brought home 14-year old Mike Brich. At one point Brich told Ms. Thomas that he was jealous of her and her children, and

that he would eventually win her husband away from her. One day her husband told Ms. Thomas he was in bed with Mike Brich. In May 1989, Officer George and Mike Brich moved out together, and were still living together in November 1995, when Ms. Thomas testified. When she sought a divorce from her husband in 1990, she said in an affidavit that her husband and Mike Brich were having an unnatural relationship. (RT 144:13493-13495, 13500-13502.)

While Danny Silveria was living with the George family, he became friends with John Gamble, a boy Danny's age who lived next door to the Georges. When Danny no longer lived with the Georges, he moved in with the Gamble family. (RT 144:13519-13533.)

At the time of the present trial, John Gamble's mother, Patricia Gamble, was a management analyst in the family support division of the same district attorney's office that was prosecuting Danny Silveria and John Travis. Mrs. Gamble recalled meeting Danny through her son, who told her how sad Danny seemed and how much he needed a friend. Mrs. Gamble also noticed that Danny wore hand-me-down clothes that were so tight they must have been uncomfortable. When the Gambles took Danny in as a foster child, Mrs. Gamble was surprised at how few belongings he had to bring with him. After he moved in, Mrs. Gamble contacted Barbara Silveria, gave her the Gambles' phone number and address, and said she was welcome to visit Danny at any time. Danny lived with the Gambles until he was 20, in 1990, and during that 8 year period, Barbara Silveria only initiated one visit to the Gamble home. (RT 145:13702-13718.)

Mrs. Gamble had been in communication with Danny during his incarceration on the present charges. She believed his interest in Fundamentalist Christianity was sincere, and that he had learned a lot about the scriptures. (RT 145:13790.) Julie Morrella had known Danny Silveria since the Eighth grade, dated him from November 1984 through April 1985, and then dated again from June 1985 until her parents pressured to end the relationship because they felt the young couple was getting too close. Danny always treated her very well. She started visiting Danny when she learned he was in jail in order to open the door of Christianity to him. She visited regularly and they often discussed Danny's progress in learning about Christianity. She believed he was very sincere in that interest. (RT 146:13831-13882.) On several occasions, Silveria had also expressed remorse about the Madden killing to both Julie Morrella and to Patricia Gamble. (RT 152:14801-14806, 14826-14829.)

Dr. Earle Sloan was the medical director for custody health services at Santa Clara Valley Medical Center, and was in charge of medical care for Santa Clara County jail inmates. In April 1991, he tested Danny Silveria for AIDs, and the results were positive. (RT 148:14113-14118.) Silveria believed this resulted from having been persuaded to engage in sexual activities with a gay acquaintance, Thomas Roots. (RT 149:14282-14291.)

Santa Clara County Correctional Officer Victor Bergado got to know Danny Silveria early in Silveria's pretrial time in the county jail. While Silveria was apprehensive and hard at the outset of his jail time, he quickly became more cooperative and respectful. Within the first few months that Sil-

veria was in custody, Bergado noticed him kneeling in prayer and crying against his bed. Bergado asked if Silveria was okay, and he replied that he had become a Christian, and that he was sorry for what he had done. Bergado had subsequent conversations with Silveria about religion and Christianity. On occasion Bergado would see Silveria reading his bible. (RT 156:15335-15347.)

Bergado was known among the inmates as a serious Christian, and inmates often asked him about the Bible. In most instances, subsequent fighting, profanity, or other bad behavior by such inmates would show Bergado they had not been sincere in their expressions of Christian belief. In contrast, he did not recall ever seeing Silveria revert to such behavior. Instead, he would see Silveria helping other inmates. Compared to other inmates he had known, Bergado saw Silveria as having no criminal sophistication. (RT 156:15348-15351.)

Lauren Dennehy was another Santa Clara County Correctional Officer who had gotten to know Silveria. She recalled Silveria as being one of a very few inmates who was cooperative the entire time she had known him. Silveria had never been a problem and definitely did not have the level of sophistication that most inmates had. She believed Silveria's commitment to Christianity and to bible studies was genuine. (RT 156:15378-15386.)

Edward Guiza, Patrick Doyle, and Edwin Lausten were other Santa Clara County correctional officers who had made similar observations of Silveria, finding him consistently well-behaved and sincere in his acceptance

of Christianity and his interest in the scriptures. (RT 156:15420-15432; 15439-15455, 15485-15494.)

Leo Charon was a reverend with the Capstone Ministries. His responsibilities included working in the chaplaincy in the county jail. He had many contacts in the jail with Danny Silveria and believed Silveria had applied himself remarkably well to Christian studies. He believed Silveria was more sincere in his Christian studies than were most other jail inmates. (RT 152:14745-14773.)

Licensed Clinical Social Worker Lynne Woodward reviewed the unfortunate events of Silveria's childhood and explained the expected impacts such a childhood would have on one's personality and decisions as a young adult. (RT 157:15555-15575, 15578-15599; 158:15603-15637, 15650-15680; 159:15706-15721.)

Dr. Harry Kormos, a psychiatrist with expertise on the long-term effects of childhood neglect and abuse on the development of the adult personality, also provided insight on the impact of Silveria's upbringing on his later behavior. (RT 161:16028-16047; 162:16063-16085, 16090-16100, 16105-16141; RT 163:16142-16147.)

James Park detailed his long career with the California Department of Corrections, and his expertise in inmate classification matters. He believed that if Silveria received a sentence of life without parole, he would not be a significant security risk or danger to staff or other inmates, and that he would conform well to the prison routine. (RT 159:15722-15745.)

c. Testimony Given By Daniel Silveria in the Presence of Both His Jury and John Travis' Jury

Danny Silveria explained that he worked at Leewards crafts store from early September 1990, until he was discharged by Mr. Madden around November 15, 1990. He freely admitted participating in the robbery of Leewards and the murder of Jim Madden, along with Chris Spencer, John Travis, and Matt Jennings. He expressed great remorse about what he had done to Madden and about the effect on Madden's family. (RT 147:13977-13978; 153:14955-14956.)

He explained that when he worked at Leewards, he had no permanent address. He spent his nights at various locations, including Cynthia Tipton's home, Gina Rackley's home, Uvas Canyon, his mother's home, and at a homeless shelter in downtown San Jose. He even spent some nights on a couch in a field outside the homeless shelter, after he was kicked out of the shelter for a curfew violation. He was using drugs and alcohol const. Most frequently he used marijuana. (RT 147:13983-13985.)

He obtained the job at Leewards by initially being assigned there through a temporary agency. Soon he was hired directly by Jim Madden, working as a stock associate. His responsibility was to keep the shelves filled, but he also dealt directly with customers. He liked the job and thought it was one of the best he ever had. After he had been there a couple of days, Madden mentioned he needed more workers and Danny recommended his friend, John Travis. John was then hired immediately. (RT 147:13989-13991.)

Explaining his attitude at work, Danny said he worked hard on the days that he worked, but there were also days he did not want to work, and he knew that showed. Outside of work, he was using marijuana and drinking beer. He also used methamphetamine to a lesser extent. (RT 147:13991-13992.) He believed he got along well with Jim Madden and he wanted to make a good impression. He thought Madden was patient with him, and was a really nice guy. Danny recognized that his work performance was up and down. After getting a few paychecks, he began to get complacent and became more interested in having a good time than in working. (RT 147:13995-13996.)

After a holiday weekend, Danny called in to work and said he was not feeling well. Madden said the store was very busy and they needed him. He said if Danny did not come to work, the store would have to let him go. Danny did not believe Madden would do that, and did not come to work that day. It turned out Madden was serious, and both Danny and John lost their jobs. Madden allowed them to resign rather than be fired. Danny realized Madden was right in what he did, and Danny held no grudge against him. There were no harsh words from Madden when he let them go, and Danny realized Madden was disappointed in him.[38] (RT 147:13996-13998.)

While working at Leewards, Danny noticed store employees handling large amounts of money. Once, he talked to one of the employees while she

---

38. Silveria acknowledged that while he and John Travis worked at Leewards, they referred to Madden as "Madman," but he insisted this was done jokingly, and there was no animosity. (RT 153:14965-14966.)

was counting money. Danny had dreamed of having a large amount of money all his life, and those thoughts were triggered when he saw large amounts of money at Leewards. He believed John Travis had also seen the money in the store. He and John started talking about how nice it would be to have a lot of money, but they did not actually make any plans to rob Leewards until the last few days before the robbery. (RT 147:13999-14001.)

Danny recalled knowing John Travis since they were babies. They were born six days apart and lived next door to each other when they were children. However, they were not frequent playmates at that time, and did not become close friends until they were 15 or 16, when they would see each other when Danny visited his mother, who still lived next door to the Travis family. They started hanging around together regularly after Danny got out of a group home when he was 18, and lived at his mother's home for a while. Afterward, Danny met Matt Jennings either through John Travis or Chris Spencer. (RT 147:14004-14008.) When Danny was 17 or 18, he traveled with John Travis to North Carolina, where they lived with Travis' father for several months. (RT 153:14841-14842; 155:15170-15172.) They returned to San Jose together and then started hanging out extensively with Jennings and Spencer. (RT 153:14844.)

After losing the Leewards job, Danny was quickly hired at Toys 'R Us for what was apparently a Christmas job. Danny's sister, Lenae, and Chris Spencer also worked there. Danny worked there about a month, until shortly before Christmas in 1990. He did not hold any other jobs between that time and his arrest in late January 1991. He was spending a lot of time

with John Travis and Matt Jennings climbing rocks, playing basketball and football, swimming, and bowling. They also smoked a lot of marijuana, sometimes used crank and alcohol, and occasionally used cocaine, LSD, and mushrooms. (RT 147:14011-14015.)

Sometime around the end of December 1990, Danny, John Travis, and Matt Jennings committed their first crime together. They were walking together one night, carrying a pellet gun, and spontaneously decided to rob a Gasco. John Travis was the lookout while Danny and Matt met the cashier as he was coming out the door. They told him to turn off the alarm and give them money. They left with $30-40. (RT 147:14008-14010, 14015.) The success gave Danny some confidence, and soon afterward he participated in another spontaneous robbery of a Winchell's Donut establishment, netting about $40-50. He committed that crime with Troy Rackley; John Travis was not involved. (RT 147:14015-14017.)

Danny Silveria acknowledged that the guilt phase evidence about the Sportsmen's Supply burglary and the Quik Stop robbery had been accurate.[39] (RT 147:14019.) He believed the Testimony about the Gavilan Bottle

---

39. Silveria and Matt Jennings had passed Sportsmen's Supply on a prior occasion and decided it would be a good place to acquire a handgun. Silveria wanted a handgun so he could rob a bigger place and obtain a greater amount of money. He did not want to shoot anybody, but did want to have a handgun to make people follow his directions. Silveria also believed they could steal rifles from Sportsmen's Supply and then sell them. (RT 153:14879-14881.)

(Continued on next page.)

Shop robbery was also accurate, except that he recalled approaching Mr. Graber as he was coming out of the door. He used the stun gun because Graber assumed a defensive position. He thought he had stunned Graber on the hand, not the leg. (RT 147:14020.) According to Silveria, it was Troy Rackley who took the stun gun from Sportsmen's Supply, and Silveria did not know about it until afterward.[40] (RT 147:14022.)

After the Sportsmen's Supply burglary and the Quik Stop robbery, they went to Gina Rackley's house and spent the night there. John Travis had not participated in the Quik Stop robbery, and Silveria did not recall him being present when the others arrived at Gina Rackley's. However, at some point that day Silveria, Spencer, Jennings, Rackley, and Travis were all together at Gina Rackley's home. (RT 153:14935-14939.)

The first serious discussion Silveria recalled about robbing Leewards occurred at Gina Rackley's house. It was either Silveria himself or John Travis who suggested Leewards as a target. The group discussing another robbery had decided that the next one should be for a lot of money. It was in

---

(Continued from last page.)

The decision to rob the Quik Stop was made spontaneously, when Silveria, Spencer, and Jennings passed it while walking home after the Sportsmen's Supply burglary. (RT 153:14919-14911.)

40. John Travis was not with the others for the Sportsmen's Supply burglary or the Quik Stop or Gavilan Bottle Shop robberies. Those crimes occurred on or very close to a day when John Travis had been in a fight with someone who used brass knuckles and badly hurt Travis' face. Silveria remembered accompanying Travis to the hospital after that fight. (RT 155:15181-15182.)

that context that Leewards was suggested. (RT 147:14027.) This discussion occurred after the Gavilan Bottle Shop robbery. During the 4 days between the Gavilan Bottle Shop robbery and the Leewards offense, Silveria was back and forth between Uvas Canyon and the Edenvale neighborhood in San Jose several times.[41] Some of those nights he slept at Gina Rackley's home. He was also stopping at Cynthia Tipton's. There was a second discussion about robbing Leewards in which a more detailed plan was made, but Silveria was unsure where that occurred. The only other discussion he recalled about Leewards was probably Saturday night, January 27, 1991, or possibly the preceding night. Either way, that discussion occurred in the nighttime, around a campfire at Uvas Canyon. (RT 147:14032-14038.)

When the campfire discussion occurred, the participants were Silveria, John Travis, Chris Spencer, Matt Jennings, and Troy Rackley. Silveria did not believe Bob Standard was there during that discussion. Silveria was drinking Jack Daniels and smoking marijuana during that discussion, but he believed he still knew what he was saying. He and John Travis did most of the talking because they were familiar with the store. Silveria had the primary role in the planning; he would say what he thought they needed to do and nobody protested. At the outset, Silveria did not see any need for anybody getting harmed. (RT 147:14039-14040; 155:15220-15221.) Silveria expected there would be 2 or 3 employees present in addition to the night

---

41. Silveria recalled one prior visit to Uvas Canyon, when Bob Standard showed them the cabin. (RT 147:14026.)

manager, and that all of them would leave the store at the same time, but he believed he and his 4 friends could maintain control. (RT 147:14041-14042.)

During the Uvas Canyon campfire discussion, John Travis suggested for the first time that Jim Madden might have to be killed, since he would recognize Travis and Silveria.[42] Silveria was surprised at the suggestion and argued against it. When his protests seemed to get nowhere, he finally said, "Whatever," and walked away from the others. There was no further discussion about killing anybody that night, and in Silveria's mind the issue was not yet resolved.[43] (RT 147:14042-14045.)

---

42. In the earlier informal discussion at Gina Rackley's, the danger that Jim Madden would recognize Travis and Silveria was mentioned, and there was a discussion of the possibility of disguising themselves with masks or even a sheet over their head. Chris Spencer shopped for masks at one point, but could not find any. No further attempt at a disguise was made. (RT 147:14052-14054.)

Silveria explained that he was not actually concerned about being recognized and was not thinking in terms of how many years in prison he might get for committing a robbery. He was focused on obtaining money, believing the robbery would net them $20-30,000. He planned to leave the state and go far away after the robbery, but he had made no specific plans where he would go. He acknowledged he was not thinking very far ahead, and much of what occurred simply unfolded as it happened. (RT 147:14054-14056.)

43. During the initial discussion of killing Madden, somebody in the group suggested burning down the store with Madden inside, taking care of Madden and also destroying the employment records for Silveria and Travis. When the group drove to Leewards to commit the robbery, Silveria was aware of the fact that someone had put a can of gas in the car, but when Silveria was asked at the scene, probably by Troy Rackley, whether the gas should be brought inside Leewards, he said, "No." (RT 147:14056-14057.)

The subject came up for discussion again the next day and Chris Spencer volunteered to stab somebody. John Travis' opinion had not changed, and Silveria did not protest further. He did not intend to kill Madden himself, and he did not believe the others would actually do it. (RT 147:14046-14049.)

On Sunday night, January 27, 1991, the group drove to Leewards planning to commit the robbery. However by the time they arrived the store was closed and nobody was left inside, so no robbery occurred. (RT 147:14038, 14050.) The group returned on Monday, January 28 and saw Jim Madden's truck in the back parking lot. Silveria decided a tire on Madden's truck should be slashed, so that Madden would be stuck at the store after the robbery, rather than being able to go anywhere. Silveria told Chris Spencer to do the slashing. It never occurred to Silveria to disable the telephone. (RT 147:14056-14061.)

When the group arrived at Leewards, Silveria and one of the others went inside to be sure who was the night manager.[44] They also took turns watching the front of the store from a bus stop across the street, so they would know when the store was closing. Eventually, Silveria saw Madden bringing in tables from outside, which let him know the store was closing.

---

44. Silveria believed the probability was 50-50 that the night manager would be either Madden or Gayle Carlile. Nonetheless, when the subject came up in the advance planning, it was always assumed that Madden would be the night manager. There was never any discussion about what to do if the night manager was Gayle Carlile. (RT 155:15275-15276.)

But Silveria then noticed that a cleaning crew had arrived. In all, they spent a couple of hours outside the store before Madden finally came out the back door. (RT 154:15075-15089.)

Silveria recalled no advance plan to use duct tape to restrain anybody. There had been some discussion of the need to restrain stock boys who might be in the store, in order to maintain control. However, there was no set plan, just a realization that there might be a need to restrain one or more persons if they became a problem. (RT 147:14061-14062.)

Silveria had brought the stun gun with him, but he claimed he was not aware of the fact that Chris Spencer had brought a fillet knife, until shortly after the group arrived at Leewards. When they went in the store, Silveria knew that John Travis had a hammer, Matt Jennings had a nail puller, and Troy Rackley had something with spikes on it. These items all came from the trunk of Chris Spencer's car, where he kept carpentry tools for his work as an apprentice journeyman. Silveria also knew that Chris had some duct tape that had been used to tape the car's exhaust, so it would not drag on the ground. (RT 147:14063-14064.)

Silveria explained that when Jim Madden came out the back door of Leewards to leave for the night, Silveria grabbed the door and the group confronted Madden. He seemed startled at first, but quickly recognized Silveria and seemed to calm down, saying something like, "Oh, it's you Danny." Silveria replied by telling him to turn off the alarm; he explained they were there for the money. Madden disabled the alarm and appeared to be obviously scared. Madden said, "Don't hurt me." Silveria replied they were not

there to hurt him, just to get the money.[45] Madden said he did not have the night deposit on him, so Silveria directed him to the safe. (RT 147:14065-14067.)

Madden seemed intimidated by all of the young men in the office, with their various weapons. Silveria told the others to give Madden some space. Matt Jennings and Troy Rackley then exited the building. Jim opened the safe, still unrestrained. Silveria had Madden take the money out and put it into a duffel bag. Silveria then decided Madden should be restrained so he could not go anywhere. Silveria recalled the duct tape that Chris Spencer had earlier, and then discovered it was in the duffel bag that had been brought inside the office. Silveria taped Madden's ankles while John Travis or Chris Spencer taped his hands. Travis also taped Madden's mouth. After Madden was taped the phone rang. Silveria decided to take the tape off of Madden's mouth so Madden could talk to whoever was calling.[46] Madden said it was the alarm company and he needed to give them a code from his wallet. Silveria got Madden's wallet and found the card, holding it so Madden could read the code. Silveria noticed money and credit cards in Madden's wallet, but left that there since he knew Madden would be stranded at the store. (RT 147:14067-14075.)

---

45. Silveria spontaneously assumed control of the group after Madden opened the door. Before that there had been no planned discussion of who would take charge. (RT 154:15099- 15100.)

46. There was no discussion of what to do when the phone rang. Silveria just told Madden to answer it. Afterward, Silveria could not explain why he did not just let the phone ring. (RT 154:15114-15115.)

After the call, Silveria put tape back over Madden's mouth. He then stunned Madden twice on the leg. Silveria expressed some confusion about why he did that, but he apparently believed that he could somehow render Madden unconscious with the stun gun, and that if he did that the others might not do anything further to Madden. However, the stun gun only caused Madden to move more, not to lose consciousness. Silveria gave up, grabbed the money, and said, "Let's go." He repeated that several times while starting toward the door with the duffel bag. Chris Spencer and John Travis remained near Madden. Travis then told Spencer, "Kill him." Spencer said, "What do I do?" Travis repeated, "Kill him."[47] (RT 147:14076-14084.)

Chris Spencer then started stabbing Madden in the chest. Events were happening very quickly, and Silveria was not counting the number of times Spencer stabbed Madden. He remembered seeing a couple of stabs in the chest, and 4 or 5 blows. John Travis just watched at first, and then told Spencer to go for the throat. Chris attempted to do that and then handed the knife to Travis. Silveria kept looking away, looking down and then back up. He did not want Madden to die, but did not tell anyone to stop. He felt numb and could not believe what was happening. He simply did nothing. (RT 147:14085-14088.)

After Spencer gave the knife to Travis, the latter stabbed Madden in the neck once, in the chest a few times, and in the ribs. Silveria saw him de-

---

47. Silveria believed that sometime around this point in the robbery, control of the situation switched from him to John Travis. (RT 154:15160.)

liver about 5 blows. Travis had a hand on Madden at one point, but was not really holding him. Finally Travis stopped stabbing, turned to Silveria, held out the knife, and said "here." He may have also said, "It's your turn." Madden appeared unconscious, slumped over in the upright chair, with blood all over his chest. When Travis handed him the knife, Silveria said, "No," at first, but then took the knife and stabbed Madden once in the rib area. He plunged the knife in all the way to the hilt and felt it hit something. He was uncertain whether that caused the knife to bend.[48] (RT 154:15140, 15153-15154.) He then gave the knife back to Travis, who stabbed Madden a few more times. At some point, Madden's chair fell over. (RT 147:14088-14094.)

Silveria explained that he felt very reluctant while stabbing Madden. He wanted to get out of there and go far away, but he felt that they were not going anywhere until he participated in stabbing Madden. When the stabbing was finished, Silveria saw no movement or gurgling or any other sign of life in Madden. Travis said to check his pulse. Silveria did not remember doing that, but he was aware that in his statement to the police a day later he said that Madden still had a faint pulse. They left him at that point. (RT 147:14092-14095.)

Silveria recalled the group going to a motel in Redwood City, where he checked in under his own name. He and his friends congratulated each

---

48. Silveria felt that John Travis' manner had become somewhat intimidating. Nonetheless, Silveria agreed that he acted on his own volition in participating in the stabbing of Madden. (RT 155:15257.)

other for the success of the robbery, but he did not recall any further conversation at the motel. The next day, he was still wearing the same clothes he had worn at Leewards – LA Gear shoes, a black undershirt with a St. Clare Cadillac logo, and a white undershirt with maroon stripes. He wore a blue thermal over those two shirts, and a pair of Levis 501 jeans. He continued to wear these clothes until he bought a new outfit at Pacific Sunwear, at the mall. He also recalled buying a car that day, as well as a black fanny pack and $300 worth of marijuana. (RT 147:14096-14100.)

Silveria maintained he felt bad after the robbery, "like crap." He knew it was a terrible crime. He did not think he appreciated the full gravity of what he had done until some time later. When he first talked to Sgt. Keech, he denied any involvement in the Leewards crimes for about an hour, because he was extremely scared. (RT 147:14099-14103.)

d. Evidence in Mitigation Offered by John Travis

1) Evidence Pertaining to John Travis' Background and Development

John Travis' mother, Pamela Morton, married John Travis, Sr. in November 1967, when she was only 17 years old. Mr. Travis, Sr. was in the army. John Travis, Jr. was born December 27, 1969 in Killeen, Texas. From 1970-1974, the family was stationed in Naples, Italy. John's mother did not have any drinking problem at the time she married, but John's father did. On

weekends, John, Sr. often went drinking with friends and got home late. Pamela would not see or hear from him all day. John's father was also very much a ladies' man, often chasing other women. (RT 164:16337-16339, 16373.)

When John's mother was pregnant with her daughter, John's father hit her in the stomach once while drunk. He also pushed her on the couch and hit her on the side of her face. John's mother wanted to keep the family together, but separated from her husband in 1974, in the hope that he would get help and they would reunite. Instead, he ran off with another woman and filed for divorce in 1977. John Travis, Jr. was very withdrawn after the separation. He had always been very quiet, gentle, and loving. His father had never spent any significant time with him. Following the departure of John's father, it was ten years before John ever saw him again. (RT 164:16338-16341, 16374.)

John's father rarely contributed to the support of his family. John's mother was unskilled and lived on welfare payments, supporting John and his younger sister, Deanna. Around 1980, John's mother married again, to Joseph Carvalho, whom she had met in 1979. He offered the family financial security and initially seemed like a good man. However, Carvalho's own daughter, Susan, began having problems at school and was also behaving inappropriately around her father. When questioned by John's mother, Susan told her something that made her call the police. Subsequently, Carvalho was convicted of child molestation. (RT 164:16341-16342, 16346-16347, 16376.)

Carvalho had also been physically violent with the children and with his wife. He would spank the children with a belt when disciplining them, forcing John to pull down his pants in front of his sister and step-sister. That occurred throughout the 2-1/2 to 3 years that the marriage to Carvalho lasted. (RT 164:16347-16349.) On one occasion Carvalho picked up his wife and threw her on a kitchen table, resulting in a bad injury to her back. She tried to call the police, but he grabbed her around the neck and choked her until she bit him on the arm. Her son, John, witnessed this attack. (RT 164:16367-16368.)

After Carvalho's arrest and some incarceration, the court referred him to a program that encouraged reunification with the family. The husband and wife participated in group therapy and the children, including John, were also involved somewhat. Eventually Carvalho returned to the home. That seemed okay for a little while, But he soon turned mean again. On one occasion, Carvalho grabbed his wife's arm and John got angry because Carvalho was hurting his mother. John and Carvalho got into a fight which led resulting in Carvalho slamming John's head into the bathroom wall, leaving a big dent in the wall. Also, John's mother learned from John's sister, Deanna, that Carvalho had returned to his pattern of molestation. John's mother called the police and Carvalho's probation officer, and he was returned to custody. (RT 164:16350-16356.)

Carvalho was eventually released again. John's mother got a restraining order to keep him away from her and her children, but Carvalho ignored it and tried to return home. He insisted he wanted to talk and refused to

leave, even though his wife said there was nothing to talk about. Eventually Carvalho got back in his car, but he got out again in the middle of the street and shouted filthy names at his wife while all the neighbors listened. John got angry and told Carvalho not to make a scene. Carvalho reached in the car for something that looked like a big fillet knife. John backed off, then picked up a stick to defend himself. Eventually some friends aided John in fighting Carvalho, who finally got in his car and left for good. (RT 164:16356-16358.) John was 15 or 16 at the time of this incident. (RT 164:16387.)

After Carvalho's departure, the family returned to its condition of financial struggle, but they nonetheless felt better than they had with Carvalho. By this point, John was 16 or 17. The family lived in a neighborhood where there was a lot of drug abuse, gang activity, and fighting.[49] About a year after Carvalho's final departure, John's mother began a new relationship, with Cory Morton, at a time when John Travis was 18 or 19. Morton had initially been friends with John's sister, Deanna. Morton was only 19, just a few months older than John. John and Deanna were both unhappy at Morton's new role in the life of their mother. John's mother began drinking. She and Morton started having very wild parties, and she described her own lifestyle as a mess. John and his friends, Chris Spencer and Matt Jennings,

---

49. At some point, when John Travis was about 16, he dropped out of school and went to North Carolina to see his natural father. That did not work out well, as the father was using drugs and having all kinds of parties. John again visited his father when he was 18, but simply had another bad experience with his father's drinking and drug use. (RT 164:16393-16394.)

attended these parties while there was drinking and marijuana use occurring. (RT 164:16358-16362, 16388.)

John's sister, Deanna, began to be stay away from home for 2 or 3 days at a time. John's mother suspected Deanna was using drugs. Cory Morton tried to take over the family and boss John and Deanna around. He would not let them get close to their mother. Eventually Morton told John's mother to choose between him and her children. She chose Morton, and told Deanna to leave, even though she was only 15. Deanna began to stay with friends. (RT 164:16362-16363.)

Eventually John's mother and Cory Morton were evicted as a result of their parties. John started to stay with Matt Jennings' family. By this point John and Deanna were both on their own. John's mother and Cory Morton moved to Oregon. About 8 months later, they separated and John's mother returned to San Jose. She again lived on welfare. John remained on his own until the time of his arrest. (RT 164:16363-16365.)

John's mother recalled that she and her children had a deep religious orientation when John was a child.[50] Until John was 9 or 10, he received religious training and was involved in boy scout activities. Later, when he was spending his time on the streets, the religious aspect of his life was gone. (RT 164:16365.) However, she also noted that she and John had reconciled during the time John had been in jail awaiting trial in the present case. She

---

50. Indeed, John Travis testified that his mother had once told him that the reason John's father left her was his belief that she was practicing excessive Christianity.

believed John had totally changed his attitude, and was not the same person he had been when he was 19. When John was 15-17 years old, he had dropped out of school and spent his time hanging out with friends, forming close relationships with Chris Spencer, Matt Jennings, and Danny Silveria. When John was 17-18, he had been out of his mother's control, doing whatever he wanted with no parental restraint. In contrast, during his period of pre-trial incarceration, he had become more caring about people, kind, generous, patient and understanding. (RT 164:16369-16373.)

John Travis' sister, Deanna Travis, was 3-1/2 years younger than John. She remembered being very close to John, who took care of her and was like a father to her. She remembered the house they grew up in as a place to which she was too embarrassed to bring friends. At times when her mother worked late, John would make dinner. (RT 164:16398-16401.)

Deanna remembered when Joe Carvalho moved in with her mother. Carvalho's two daughters, Jennie and Susie, also moved into the home. Eventually Carvalho began to molest Deanna. Later, she learned he had also been molesting his own daughters. Deanna believed the molestations had a profound effect on her, and still affected her at the time she testified. The molestations went on for a year or two, or perhaps even three, but Deanna told nobody because Carvalho had threatened to kill her and her family. She had seen his violent behavior, so she believed these threats. Deanna was about 7 at the time. After Deanna's mother learned about Carvalho's molestation of his own daughter, Susie, Deanna finally told her mother that she had also been molested. (RT 164:16401-16406.)

Deanna saw her brother John once in January 1991. He was with Matt Jennings, Danny Silveria, and Chris Spencer. Deanna thought John's eyes looked cold. He seemed like a different person than the brother she remembered. He looked unfeeling, as if he had lost everything he ever cared about. His nose was swollen and bruised and his lip had stitches. His clothes were raggy, as if he had been wearing the same clothes for a while. Deanna knew something was wrong, but she felt helpless. (RT 164:16415-1641.)

Deanna thought her brother had become more caring during his pretrial incarceration. In 1991, while John was in jail, Deanna had a baby boy who died 3 months later. John helped Deanna get through that unhappy period. Over the last 3-4 years, while John had been in jail, Deanna had seen dramatic changes in him. (RT 164:16418-16421.)

2) John Travis' Testimony About His Background

John Travis was able to recall living in Naples, Italy when he was 5 years old, and coming home to San Jose without his father. When John was 6, his father came to San Jose to help his mother move to a new apartment, but when John asked if he would stay his father said he had to work with the army. John recalled being angry, and did not see his father again until he was 16. (RT 165:16503-16504.)

John recalled very poor living conditions when he was growing up with his mother and sister. They had to use plywood to patch holes in the roof that leaked in the rain. John was unhappy about the poor living condi-

tions, and he did not go to school on a regular basis. He experimented with marijuana when he was only 7 years old. A good friend had a parent who constantly had bags of marijuana, and the two boys would steal some from a bag and smoke it. (RT 165:16505-16506.)

John recalled his mother as hard-working and supportive. She was involved with a very controlling man named Larry, and had a third child by him, Joey. John's mother got a job that required her to work the graveyard shift, leaving John to cook and baby-sit for Deanna and Joey. At some point Larry left and then Joe Carvalho came into their lives. At first John liked Carvalho, who took John fishing. Carvalho also brought improvement to the family's financial circumstances. Later, when John learned that Carvalho had molested Deanna and at least one of his own daughters, John became very angry and did not know what to say to his sister. (RT 165:16507-16510.)

John recalled the same unpleasant encounters with Carvalho that John's mother had described for the jury. He was about 13 or 14 when Carvalho slammed his head into the bathroom wall. By the time John was 14, he had begun drinking alcohol heavily. Drugs and alcohol were both very accessible in the neighborhood in which they lived. By age 14, he was drinking every day or two, and was mixing that with marijuana. He also started using cocaine at age 14. He started stealing candy from a store and then selling it during school hours, to get money to buy more drugs. He got depressed and stressed, leaving him unable to focus on school work. He dropped out of school in the eleventh grade. (RT 165:16512-16519.)

By the time John was 16, he was not minding his mother very well. She suggested he go to North Carolina and live with his father. He tried that and discovered his father was much like himself. They drank and used drugs together, even selling LSD together. Eventually the relationship between father and son did not work out very well, and John returned to San Jose. (RT 165:16520-16521.)

John also recalled his displeasure when his mother dated Cory Morton, who was only a few months older than John. With all the partying that was going on in the household, John's life became an endless cycle of sex, drugs, and rock and roll. John became very lazy and did not want to do anything except get high. He worked only when necessary to support his drug habit. (RT 165:16521-16524.)

When John was about 17, he and Matt Jennings went into the attic above Matt's parents' apartment. They punched holes through the attic and gained entry into a neighbor's apartment. They stole food and VCRs that they traded for marijuana. John then made his second trip to North Carolina, in order to avoid prosecution for the burglary.[51] He worked with his father on a floor refinishing job. His father drank from the time he woke up until the time he went to bed. John also continued to drink and use marijuana. He and his father used LSD together. After less than a year, John returned to San

---

51. John went to North Carolina after he had learned that Matt Jennings had been arrested for the burglary.

Jose, turned himself in for the burglary, and spent 8-10 months in jail.[52] (RT 165:16526-16529, 16691.)

After John was released from jail, he lived with his grandfather, Harry Travis, for a while. John's grandfather insisted that John look for a job, as a condition of living with him. John regularly left the house looking for work, but instead he would end up going to visit a friend and use drugs. His grandfather was also an alcoholic. (RT 165:16529, 16547-16548.)

Soon after moving out of his grandfather's home, John returned to North Carolina a third time, taking Danny Silveria with him. Once again, John and his father, and now Danny also, fell into the same pattern of drug and alcohol use. John's father was also living with a girl named Anita, who did not like John living with them. John and Danny got jobs at a slaughterhouse. Eventually they stopped working, but told John's father they were still working. John's father found out they had lied and threw them out of the house. Soon after that, Danny Silveria was stopped while driving a car that still had California license plates, and he also had a suspended driver's license. Danny had to call Patricia Gamble to have money sent to him for bail. Neither John nor Danny had money to get Danny's car out of the impound yard, so they started hitchhiking and walking a lot. They ended up in a

---

52. This was John's only criminal conviction, prior to the Leewards incident. When he was in North Carolina, he felt badly about Matt Jennings being in jail while he was free, so he returned to San Jose and turned himself in. Afterward, he was upset at Matt when he learned that Matt blamed John for everything. However, while John was in custody, Matt visited him and the two renewed their friendship. (RT 165:16690-16691.)

homeless shelter in Atlanta, Georgia, stayed there two weeks, and then the shelter paid for them to take a bus back to San Jose. (RT 165:16529-16536.)

After Danny Silveria and John Travis were back in the San Jose area, they became close friends with Matt Jennings and Chris Spencer. Most of their mutual activities related to using drugs together. John Travis was using drugs as often as he was able to do so. Whenever he obtained money, drugs were his first priority. He used a lot of LSD, and even more often he used marijuana, alcohol, and crank. Looking back on this time of his life, with the benefit of what he had learned in jail in the Twelve Steps program, John could see that he used drugs to repress his anger, depression, and stress. Drugs could only do so much, before he would be back to feeling stressed and depressed, but then he would seek his escape by returning to drugs. By the time he was 18 or 19, his need for drugs was controlling his life. (RT 165:16537-16545.)

Chris Spencer had a steady construction job and was often able to pay for drugs and alcohol for the four friends. John would get jobs in order to earn money for drugs, but when he acquired drugs he would go to work under the influence. That made him lazy, soon leading to the loss of the job. (RT 165:16546-16547.) Eventually, John started getting temporary jobs through Manpower and another similar agency. Danny Silveria was doing the same, until he turned a temporary job into a permanent position at Leewards. Leewards needed more help and soon hired John Travis. (RT 165:16549-16550.)

While working at Leewards, John regularly smoked marijuana before going to work, and then he would go to the restroom during work hours to inhale lines of crack. (RT 165:16547.) He and Danny Silveria soon started to call in sick on a frequent basis. John knew the absences were causing stress for Jim Madden, but that made no difference since John was only working to get money for drugs. Later, looking back on this period, John realized he had become morally and spiritually bankrupt. (RT 165:16550-16552.)

Even food was secondary to the pursuit of drugs. Food seemed unimportant, because the methedrine John was using left him with little appetite. Although John weighed 205-210 pounds at the time he testified, after four years in jail, John recalled weighing as little as 145 pounds prior to the Leewards crime. (RT 165:16553.)

Like Danny Silveria, John said he did not feel animosity toward Jim Madden after the loss of the Leewards job. John appreciated the fact that Madden had given him a job, and did not hate him. He acknowledged that he and Danny Silveria used "Madman" as a nickname for Jim Madden, but that was not meant in a derogatory fashion; rather, it was a joking reference to the constant stress Madden seemed to experience, and the fact that he was always running around the store in a hurry. (RT 165:16554-16555.)

Around the time that John lost the Leewards job, the people he was living with were evicted. John contacted an old girlfriend who lived in Fresno, and he went and stayed with her for about a month, around November 1990. John then returned to San Jose and stayed for a short while at Cynthia Tipton's, whom he met through Danny Silveria. However, Cynthia

did not like John and after a few days she kicked him out. He spent a few days (including his 21st birthday) living in the back of Chris Spencer's car, just one month before the Leewards crime. (RT 165:16537, 16555-1616558.)

John tracked down Matt Jennings, who was staying at Gina Rackley's home. That was when John met Troy Rackley, Gina's brother. John also stayed with them for a few days, or perhaps as long as a week. When he was not staying at Gina Rackley's, John would try to talk his way into Cynthia Tipton's apartment. Some nights he slept under the stairway, downstairs from Cynthia's apartment. (RT 165:16559-16561.)

Around January 24, 1991, John was involved in a fight. Matt Jennings had complained about a fellow who took his pager away. After drinking a substantial amount of Jack Daniels whiskey, John said they should go and take the beeper back. They found the person who had taken it and John snatched it back from his hands. That led to a fight, which John was winning, until the other guy took brass knuckles from his pocket and used them to break John's nose and split his lip. John had to go to the hospital to have stitches in his lip.[53] This was a major blow to John's pride, since John felt he had been humiliated in front of his friends. This made John feel helpless. (RT 165:16561-16565.)

Looking back on this event, John felt that it caused him to bring a lot of repressed anger to the surface. John's initial reaction was a desire to go

---

53. Hospital records indicated that John was treated at the Medical Center at 6:47 PM on January 23, 1991. (RT 170:17016.)

back and fight the other person again. However, he was not in very good shape for such an undertaking. He was an emotional wreck in addition to being in pain from his physical injuries. He realized he did not like the way he was living, and he began to hate himself. Immediately after going to the hospital, John returned to Matt Jennings' home where Matt's mother took care of him. John had been given a prescription for codeine, and he was using those pills readily. He was either at the Jennings' home or Gina Rackley's home, recuperating from his injuries, at the time his friends were involved in the Sportsmen's Supply burglary, the Quik Stop robbery, and the Gavilan Bottle Shop robbery. (RT 165:16565-16567.)

While John was at the Rackley home, there were discussions about robberies and money. John and his friends talked about robbing a place that would have a lot of money, such as a check cashing business, a new motel, or Leewards. John and Danny Silveria knew from their experience at Leewards that there would be a large amount of money there, and no real security. (RT 165:10569-16570.)

About this time, Gina Rackley was evicted from her apartment due to excessive noise. John and his friends had no place else to stay, so they went to the cabin in Uvas Canyon that Bob Standard had once shown them. (RT 165:16559, 16567-16568.)

3) John Travis' Testimony Regarding the Leewards Offenses

John Travis had no quarrel with the jury's guilt phase verdicts. He believed he had been judged fairly. (RT 165:16502-16503.) John's description of the weekend at Uvas Canyon was much like the description Danny Silveria had given. On Friday night, there was a campfire with a lot of alcohol drinking and marijuana smoking. On Saturday, Bob Standard came up with some friends for a barbecue. After they left, John Travis, Danny Silveria, Matt Jennings, Chris Spencer, and Troy Rackley remained and had another campfire at which the serious discussion of a robbery occurred. When the discussion turned to Leewards, there was mention of uncertainty about whom would be the night manager, but whoever it was would recognize John and Danny. (RT 165:16571-16577.)

John was still feeling the anger he had felt since the fight a few days earlier. John felt he did not want to get caught and go to prison. He said to the others that the manager might have to be killed. John and his friends were all very drunk and there was a lot of tough talk that was not really meant to be serious. In the back of his mind, John knew some of it might come true. However, they made no detailed plan that night, regarding how to carry out the robbery. (RT 165:16578-16580.)

Sunday night there was a more detailed discussion of the robbery. John was now convinced that Madden had to be killed. John knew that Madden was as innocent as a person could be, and John had no problems with him except that he would identify John and Danny. John acknowledged that

Danny's reaction was that he did not want to take part in a killing. Chris Spencer waved a knife around and was laughing, while voicing his willingness to take care of the manager.[54] John took that seriously, He responded to Spencer, if you are going to do it, then do it. John believed that was the plan. There was no other discussion about how the night manager was to be killed. The group went to Leewards Sunday night, but they had gone there too late and the store was already closed. (RT 165:16578-16581, 16592-16594, 174:17336.)

John acknowledged that when they returned on Monday, he initially armed himself with a hammer, while the others took other tools. John believed there would be more than one person to control, so the implements would be needed for intimidation. However, once it was clear that only Madden was present, John threw the hammer back into the car, believing such weapons would be unnecessary. John knew Chris Spencer was still armed with a knife, as he held it out when Madden first opened the door. (RT 165:16598-16599.)

John's description of the events inside Leewards closely matched Danny Silveria's description. (RT 165:16600-16604.) When Madden was tied to the chair with duct tape, that had nothing to do with any plan to kill

---

54. John was aware of the fact that Chris Spencer felt bad about abandoning Silveria, Jennings, and Rackley during the Sportsmen's Supply burglary. John believed Spencer was volunteering to kill Madden because Spencer thought he had to prove himself to his friends. (RT 174:17447.) Everybody was very drunk at the time Spencer volunteered to take care of the manager. (RT 174:17457.)

him; instead, that was merely to prevent him from running away. After the money was obtained and the call from the alarm company had been handled, Madden was fidgeting in the chair and John thought he was going to break loose and try to escape. John turned to Chris Spencer and said low under his breath, kill Madden. Spencer seemed reluctant, and John repeated, "Kill him. Kill him." Spencer then used profanity and started stabbing Madden.[55] (RT 165:16604-16609.)

John had an unrealistic expectation that Madden would die instantly once he was stabbed. However, instead of being quick, the stabbing became prolonged. John could see the wounds and Madden's struggling and felt everything change. He believed Spencer had screwed up, so he took the knife and started stabbing Madden. John remembered stabbing Madden once in the neck and once in the heart, and he knew he had told the police in his early confession that he had stabbed Madden twice. However, by the time he testified, John conceded the evidence indicated that he must have stabbed Madden more than twice. John was just trying to end it, but Madden continued to fight hard. Eventually John handed the knife to Danny Silveria, simply because he wanted to get rid of it. He saw Silveria stab Madden once. By then Madden's head was drooped down and his body was becoming limp. John took the knife back and hid it in a cubbyhole on the way out of the store. (RT 165:16609-16613.)

---

55. John's recollection was that Danny Silveria did not stun Madden with the stun gun until after Spencer started stabbing Madden. (RT 174:17375.)

John conceded he had told the police that he had a sense of excitement when Madden was killed. In his testimony, John explained he really meant he had a sense of fear. His adrenaline was very high. When he described his feelings to the police as excitement, he did not mean enjoyment. Instead, he was talking about the feeling the adrenaline produced. He was scared and nervous. He could not believe what he had just done. He acted like the killing did not affect him, only because he did not want his friends to believe it had affected him. (RT 165:16614-16617.)

John explained that when he told Spencer to kill Madden, he was not issuing an order. If Spencer had not stabbed Madden and the others had all left, John did not think Madden would have been killed. When he testified at the trial, John believed that his participation in killing Madden was a way of getting back at the "society" that John blamed for the unpleasant circumstances of his life. (RT 165:16616-16618.)

However, by the time of his trial testimony, John took full responsibility for what he did, regardless of the consequences. He felt remorseful and knew that for the rest of his life he would never forget the fact that he had taken the life of an innocent man. When John had watched members of Madden's family testify, he felt very ashamed and embarrassed. (RT 165:16618-16619.)

4) John Travis' Testimony Regarding Events After His Incarceration

When John Travis was arrested in the present offenses and placed in the Santa Clara County jail, he had several days of serious remorse. Another inmate called him to his cell, told him Jesus loved him, and gave him reading material about an extension correspondence ministry program. John cried in his cell for the next four days. A lot of his early religious thinking returned to him. He began participating in religious programs and earned a number of certificates for completing work on books of the New Testament. When he first talked to his trial counsel about drugs and alcohol, he said he did not have a problem, but over time he changed his mind and came to realize that drugs and alcohol had taken away his ability to think and act correctly. John felt his life had begin to change as a result of his efforts to recover from his addictions. (RT 165:16623, 16642-16644.)

John participated in a Twelve Step program to try to recover from his drug and alcohol addiction. He earned his GED equivalent of a high school diploma, and he also participated in a lot of religious study. He determined that he needed to give up everything to God, including drugs and alcohol. He became familiar with KFAX, a Christian radio station that broadcast programming for prisoners. He listened to Chaplain Ray on that station, talking about lives that had been transformed in prisons. Chaplain Ray offered free books for inmates, so John wrote to him and received some reading materials. One book that Chaplain Ray sent to John was "Will You Die for Me?"

written by Tex Watson. Watson had been a member of the Manson family. (RT 165:16624-16628.)

John had merely asked for life-changing books and had not requested the Tex Watson book, but once he received it he read it. John was too young to remember the Manson crimes, so reading about them in Watson's book was new to him. He saw some similarities between Watson's actions and his own. Watson was quite vivid about the crimes and the drugs he was taking. He also described his religious conversion. After reading the book, John believed Watson was acting as a prison chaplain. As a result of his own renewed interest in religion, John wrote to Watson, believing he was a clergyman. John viewed his letter to Watson as a form of Christian witnessing. He wanted to let Watson know about the similarities he saw between himself and Watson.[56] He tried to explain in the letter who he was before he accepted Christ, and who he had become afterward. In the letter, John described an incident after his arrest, when news accounts of his crime had appeared on television and another inmate called John "Baby Manson." (RT 165:16628-16631, 174:17486.)

Although John referred to mind control in his letter to Watson, he did not believe he had any power to control the minds of his friends. Rather, he was trying to relate his own experiences to what he had read in Watson's

---

56. John explained that he was not impressed by what Watson had done in the past. Rather, he was impressed by the person he believed Watson had become, in contrast to the man he had been earlier. (RT 174:17489-17491.)

book. John had become convinced that when he had described his participation in stabbing Madden to police soon after his arrest, he had minimized his role. When he wrote in the letter to Watson that he had stabbed Madden repeatedly, he believed that was what he must have done.[57] Similarly, when he wrote to Watson that he enjoyed killing Madden, he said that because he had come to believe he must have felt some enjoyment or he would not have done what he had done. Looking back, he did not believe he had enjoyed the killing, although it had released a lot of hate and anger that he had felt. John's letter to Watson also included a description of the emptiness he felt inside after the killing. John knew that taking the life of an innocent man had been drastically wrong. (RT 165:16632-16636.)

References that John made to Satan in his letter to Watson were simply a result of John attributing the presence of evil in his life to Satan. John saw this as a Christian perspective – attributing to Satan the forces that cause people to sin. (RT 174:17439-17440.)

John acknowledged that after he arrived in a different jail in the latter part of 1992, he learned of ongoing efforts by other inmates planning to escape. His sister, Deanna, had a baby who had died as an infant, and that was a severe blow to John's religious faith. John started having difficulty dealing with a lot of old problems, and he found the Christian life a hard one to live.

---

57. Even at the time of his testimony, John could not recall stabbing Madden more than twice. However, having heard the prosecution evidence, John continued to believe he must have stabbed Madden more than twice. (RT 174:17382.)

He began to slip back into old behavioral problems. When Matt Jennings informed him of the ongoing escape efforts, John joined the others in taking turns cutting away at the bars in the window of Ralph Gonzales' cell. (RT 165:16644-16647.)

John agreed with the testimony given by inmates Lovato and Bolton that there was a plan to distract a correctional officer when the escape was to actually occur, but John absolutely denied the existence of any plan to harm a correctional officer. John denied being present at any discussion about anybody waiting outside the jail with weapons for the escapees, although he did hear after the fact that a relative of Bolton's was supposed to obtain guns for achieving a theft of computer parts after the escape. (RT 165:16657-16658.)

After the authorities learned of the escape plans, John was moved to Unit 4-C. After a few months there, he was made a trustee.[58] Later in his incarceration, John began to mature more and realized that the escape plan had been stupid. (RT 165:16661, 16664.) John knew his life was a complete wreck, and he became determined to take his faith in God seriously. He became a born-again Christian and believed he had been able to help other inmates deal with their problems. He had shared the Twelve Steps program with other addicted inmates. John attended Chaplain Leo Charon's bible

---

58. Correctional Officer David Damewood was the person who made John a trustee. He described John as one of the best trustees he ever had, noting that John never abused his position or caused any problems. (RT 172:17244-17249.)

studies every Thursday afternoon, went to church every Sunday, went to church meetings, and held bible study classes with other inmates. (RT 165:16664-16666, 16668.)

5) Other Evidence in Mitigation Offered by John Travis

Leo Charon had earned a certificate in drug and alcohol counseling and interned at Star Lodge Psychiatric Hospital in Santa Cruz County. He was a founder and director of Capstone Ministries, which ministered to chemically addicted outpatients and to incarcerated prisoners. At the time of his testimony, he had been working with jail inmates for 14 years. (RT 164:16425-16428.)

Mr. Charon met John Travis in the jail sometime around the first half of 1993. He noticed diplomas on John Travis' cell wall indicating involvement in drug and alcohol counseling. Mr. Charon was also meeting regularly with a group of inmates, initially involving religious activities, but later expanding to include discussions of drug and alcohol problems. At first John seemed to not believe he had such a problem, but over time he did begin to understand his own alcohol problem. (RT 164:16430-16433.)

Mr. Charon gave John Travis a Twelve Step workbook that had a Christian emphasis. John worked through the various steps, eventually assumed the responsibility for his addiction, and went on from there to accept his responsibility for the wrong things he had done in the past. Over time, John began helping other inmates deal with their own addiction problems.

John seemed to have some natural leadership qualities that made other inmates go to him for help. Mr. Charon believed John had made a sincere recovery from his own addiction, although Charon stressed that recovery was a continuing process that did not end as long as the person was alive. (RT 164:16434-16449.)

Charon believed he had a friendlier relationship with John Travis than he had with most other inmates. They had some in-depth discussions with each other, and he had known John for a longer period of time. While John did not seem totally honest with Charon at the outset, over time Charon had come to believe that John was being honest with him. John had told him what he had done in regard to the Leewards crime, and he was obviously emotionally involved when he discussed this with Charon. (RT 164:16470-16475.) Charon felt that John had progressed much further than the average inmate.[59] Charon was satisfied with John's growth and maturity. (RT 164:16479.)

In discussing the Leewards crime, John had described the anger he felt the night of the homicide. John recounted an incident that had happened a few days before the homicide, when he was beaten badly by someone wearing brass knuckles. John had been very embarrassed in front of his

---

59. Mr. Charon readily acknowledged that he felt that John Travis and Danny Silveria had each been above average for inmates, both in their progress and in their relationship with Charon. He believed they were both exceptional people within the jail. He had baptized both of them, even though he did not normally baptize persons who were incarcerated. (RT 164:16485-16489.)

friends and had been left with considerable anger and hostility. (RT 164:16476-16478.) Charon believed that when John participated in the killing of Jim Madden, he felt he was somehow striking back at society. (RT 164:16498.)

Mr. Charon had read the letter John Travis wrote to Tex Watson. He also read a book that Watson had written. (RT 164:16449-16450.) Charon explained that in the Christian faith, there was a practice called witnessing. Persons who believed in such a practice felt that they had a responsibility to share their faith with other people. That could be accomplished by telling others what you had done. That was not to be achieved because you were proud of what you had done, but because you were embarrassed by it and wanted to help others avoid doing the same. Witnessing was a spiritual experience that could be done orally or in writing. Charon noted that by the second page of John's letter to Watson, he began talking about his relationship with the Lord. Charon believed that John had tried to describe his own past experiences in a manner similar to the experiences Watson had in earlier years. Charon believed that the point of John's letter to Watson was to say that in the manner that Travis believed Watson had accepted the Lord, so could John Travis. In other words, Travis was trying to identify with Watson, both in the terrible things they had done and in their acceptance of the Lord. (RT 164:16458-16464.)

Dr. Timmen Cermak was a medical doctor with a specialty in psychiatry. He was a founding member of the National Association for Children of Alcoholics. (RT 169:16828-16831.) He described the pervasive impact

that childhood events and stress can have on a person, especially in regard to the development of values. Without active intervention, time alone was usually not enough to heal the damage. (RT 169:16836-16838.)

Dr. Cermak traced the alcoholism and drug abuse of John's father and paternal grandfather. John's mother had been physically and sexually abused when she was nine, and that caused her extreme anxiety that still continued. Just before John's birth, she experienced a conversion hysteria reaction, and she arrived at the hospital in an apparently catatonic state. (RT 169:16844-16847.)

Dr. Cermak noted that when a child molestation occurs, psychiatrists considered it a significant event for every member of the family. Nonetheless, John had never received any therapy to deal with the impact he felt from learning of the molestation of his sister. John responded to this and other unpleasant childhood events by simply not having feelings about them. This was a process called psychic numbing, used by persons to deal with situations outside the range of normal human experience. (RT 169:16851-16853.)

Indeed, children of alcoholics who also have troubled childhoods often suffer trauma that produces symptoms comparable to the post-traumatic stress syndrome suffered by Viet Nam veterans. They can experience selective amnesia and flashbacks. They can appear to others to be fine on the outside, while having serious problems on the inside. It was clear to Dr. Cermak that John had suffered sufficient trauma in his life to initiate some of those symptoms. A common symptom that the doctor believed John experienced

was an inability to picture who he would be in the future. John turned to drugs and alcohol in a major way as his means of dealing with such problems. (RT 169:16854-16855.)

Dr. Cermak also explained that when people turned to drugs and alcohol, it was not necessarily a result of simple weakness. Studies had established a clear genetic disposition to alcoholism. Persons with alcoholic fathers were 4-9 times more likely as other persons to become alcoholics, even if they were not raised in the alcoholic household. (RT 169:16856.)

One problem of addiction to drugs or alcohol is that persons suffering such an addiction commonly start out in a state of denial, not believing that their use of drugs or alcohol is causing them any negative impact. This often developed into a circular problem; as the brain gets more and more affected by excessive use of drugs and alcohol, it gets increasingly difficult for addicts to understand what is happening to them. In John's case, he was in a stage of full-blown chemical dependency before the end of his fourteenth year. The younger a person is when such a dependency begins, the more quickly the person becomes dependent. (RT 169:16858-16859.)

John's problems were exacerbated by his mother's state of mind. John's mother never had much of an adolescence of her own, and when John was 15 and most in need of her guidance, she was only beginning to let her own adolescence emerge. She began to enjoy excessive partying and gave up all efforts to control her children, just when John was in need of structure. By age 16, John dropped out of school. (RT 169:16861-16864.)

From the ages of 16 through 19, John Travis' chemical dependency became the central organizing principle of his life and greatly affected his personality. All of his behavior related to procuring drugs, using drugs, and talking about drugs. Addiction in a youth can commonly lead to stunting of emotional growth, and much of John's maturation stopped at the age of 14. His chemical dependency led to social isolation, dysfunction in the school and work environments, and then to criminal and other anti-social behavior and clouded judgment. (RT 169:16876-16878.)

Since John never went beyond his adolescent defenses, he continued to see any problems he had as being out of his control, and therefore not his responsibility. He also continued to be in denial, not believing he had a problem. He had no perspective at all on the damage that drugs and alcohol were causing in him. (RT 169:16879.)

With the possible exception of a boss at one construction job, John never had a positive relationship with any older male. He viewed his family as victims of Joseph Carvalho. When he attempted to establish a relationship with his natural father, they simply participated together in the same alcohol and marijuana lifestyle John had already begun. John had no adult model telling him that his chemical dependency was not okay. (RT 169:16880-16881.)

By the age of 21, around the time of the Leewards crime, John was a chronically intoxicated person who was really still an adolescent, and an immature one at that. He was out of control and had no sense of a moral compass. When Dr. Cermak first met John in jail, he had begun to profess a

conversion to Christianity, but Dr. Cermak found his spiritual life to be quite rigid and somewhat shallow. He had no real understanding of his chemical dependence, mistaking the abstinence that resulted from incarceration for recovery. In contrast, five years later John was able to discuss recovery concepts with some depth and could realistically relate them to himself. He had become much more honest about how he was affected by his drug use. His spiritual life was also expanding. His maturation process had been reinvigorated, he had discovered the tools for recovery, and he was finally accepting a level of responsibility regarding his recovery and regarding the ways in which he had hurt other people. Dr. Cermak believed John would be able to continue to use the tools for recovery in a positive manner, and that he had matured sufficiently to have real feelings of remorse about the killing of Madden. (RT 169:16887-16899.)

3. Penalty Retrial Evidence

a. Introduction

As noted earlier, neither the Travis jury nor the Silveria jury was able to reach a unanimous penalty verdict at the original joint penalty trial, with separate juries. As will be discussed in detail in various arguments contained in this brief, a number of critical ruling shaped the character of the penalty retrial.

First, the trial court granted the prosecution request to have both John Travis and Danny Silveria tried together, with a single jury to make the pen-

alty determination for both defendants. This greatly concerned John Travis' trial attorney, who believed Leo Charon had been a very effective witness for John at the first penalty trial, describing how seriously John had eventually taken his need for recovery from addiction, and how dedicated and effective John had been in pursuing his recovery. However, the prosecutor was clearly intent on exploiting the fact that Mr. Charon had given glowing testimony about Danny Silveria's religious progress, as well as about John Travis' recovery efforts. To have a single jury hear Mr. Charon give separate testimony on behalf of each defendant, and then to have that same jury determine the fate of each defendant, caused counsel to conclude it was important to have one or more additional witnesses who could verify the sincerity of John's efforts.

Toward this end, John Travis' trial attorney informed the court that after the first trial, one of the regular Travis jurors and one of the alternate Travis jurors had taken interests in John and had begun visiting him regularly in the county jail. Counsel proposed to call one or both of these persons to testify that they had met with John regularly over a long period of time, had come to know him well, and had observed persuasive indications that John Travis was quite sincere in his efforts toward recovery. However, the trial court categorically refused to allow any juror from the first trial to testify as a witness at a retrial.

In light of this ruling, John Travis' trial attorney concluded that there was only one other person who had visited John regularly during his lengthy period of incarceration, who could voice an opinion on the sincerity of

John's recovery efforts. That person was trial counsel himself. He sought to testify on John's behalf, even if it meant he would have to withdraw as John's counsel. However, the trial court set sharp limits on the nature of the testimony that trial counsel would be allowed to give. Furthermore, the court insisted that such testimony would be permitted only if John Travis completely waived all aspects of his attorney-client privilege, and counsel turned over his entire case file for an in camera review to determine what should be released to the prosecution. In addition, the prosecutor would be entitled to interview trial counsel, and if counsel failed to cooperate in such an interview, the prosecution would be allowed to exploit that fact in front of the jury. Trial counsel then determined not to go forward with his request to testify, in view of these restrictions.

b. Prosecution Evidence in Aggravation Regarding the Circumstances of the Crime

1) Introduction

A major aspect of the prosecution case in mitigation pertained to the circumstances of the crime. Because the jury selected for the penalty retrial had not heard the guilt phase evidence, it was necessary for the prosecutor to repeat much of that evidence in the penalty retrial.

2) Crimes in Which Danny Silveria Was Involved, But John Travis Was Not Involved

In regard to the robbery of the Quik Stop Market, the clerk, Youssef Ramsis, who had testified in the first trial, was found unavailable as a witness (RT 237:27583.) His testimony from the guilt trial, summarized above, was read to the penalty retrial jury. (RT 238:27603-27648.) Ben Graber, a friend of the owner of the Gavilan Bottle Shop, was taking care of the store at the time it was robbed, Graber described the robbery in much the same fashion as he had at the guilt trial, summarized above.[60] (RT 238:27649-27659.)

Various police officers repeated their guilt trial testimony, summarized above, explaining how the video tape of the Quik Stop robbery and subsequent information from an informant (later determined to be Cynthia Tipton) was used to identify Troy Rackley, Matt Jennings, and Danny Silveria as suspects. The officers also learned that two other persons named Chris and John were spending time with the three suspects. (RT 238:27665-27706.)

Other officers repeated their guilt trial testimony regarding the efforts to locate the suspects in the stun gun robberies, and the apprehension of three

---

60. Because the Sportsmen's Supply Burglary was not a crime involving the threat or use or attempted threat or use of violence, it did not qualify under any of the statutory aggravating factors. No evidence of that burglary was introduced in the penalty retrial.

of them at the Oakridge Mall on Tuesday evening, January 29, 1991. They also repeated the description of the arrest later that evening of the other two suspects, and the initial interviews of all five suspects, conducted that night (RT 238:27707-27725. 27731-27767.) Additionally, evidence was again presented regarding the stun gun, large amounts of cash, and other items seized from the vehicles of the suspects and the apartment where the later two were located. (RT 238:27762-27666.)

3) Evidence Pertaining to the Leewards Robbery and Homicide

Descriptions of the activities of the five suspects in the days before the first 2 robberies and the Leewards offenses, summarized above, were repeated by relatives and acquaintances, including Michael Scott Silveria (a brother of Danny Silveria) and Cynthia Tipton. (RT 239:27803- 27847, 27792-27801.) Similarly, other guilt trial witnesses who were not related to or acquainted with the suspects again described their pertinent observations. These included Kathleen Beavers and Katherine Brooks, describing their observations of people they did not know, in the area around the Uvas Canyon cabin that belonged to Charles Larson. (RT 239:27924-27936.)

Leewards employees Jennifer Bailey and David Anthony repeated their descriptions of the closing of the store on the evening of Monday, January 28, 1991, with James Madden remaining at the store after the employees had left. (RT 239: 27939-27949,27951-27957.) Oscar Castillo and Manual

Ramos again described their janitorial work at Leewards after 9 PM that same night, noting that when they left for the night, Madden remained in the store alone. (RT 239:27960-27955.) Tina Smith, of Honeywell Protection Services, again described the signal they received of a deactivated alarm at Leewards at 10:53 PM, and her subsequent phone conversation with Madden in which he supplied the appropriate code number to clear the alarm. (RT 240:28005-28016, 28023-28026.)

To prove the events that led up to the decision by the five boys to rob Leewards, and the events that occurred when they arrived at Leewards and encountered Madden in the late evening of January 28, 1991, the prosecution was permitted to have the testimony of Daniel Silveria, given at the first trial, read to the jury.[61] (RT 244:28482-28510, 245:28512-28525, 247:28544-28551.)

Santa Clara Police Officer Elden Zercher again described his unsuccessful efforts to check on the welfare of James Madden in the early morning hours of January 29, 1991, in response to the concerned phone call from Mrs. Madden. (RT 242:28124-28128.) Leewards employees Cecilia Jenrick,

---

61. Silveria was found unavailable as a witness, since he determined he would exercise his Fifth Amendment privilege against self-incrimination and would not testify at the penalty retrial. Only the portions of his former testimony that were given at the first penalty trial in the presence of the John Travis jury, and were subject to cross-examination by counsel for John Travis, were read to the jury at the penalty retrial. (See RT 243:28336.) That testimony was fully summarized above, in the summary of the evidence at the first penalty trial. (See pp. 71-83, above.) It was noted in that summary which portions were given in the presence of John Travis' jury.

Edna Chapman, and Gayle Carlile all repeated their testimony regarding the discovery of James Madden's body when they arrived at work around 8 AM on January 29, 1991. (RT 242:28134-28138, 28140-28143, 28173-28180.) In addition, Ms. Carlile reiterated her more detailed description of the mid-November 1990 termination of John Travis' and Daniel Silveria's employment as sales associates (RT 242:28146-28154, 28161), and of her conclusion that when Mr. Madden was found dead, more than $9,000 in cash was missing from the safe. (RT 242:28158-28165, 28186.)

Investigating Officer Ted Keech once again described the initial investigation at Leewards on January 29, 1991, and his early decision to focus on prior Leewards employees as initial suspects. (RT 242:28239-28268.)

Wendy Lee, who helped manage the Best Western Sundial Motel in Redwood City, again described renting rooms to Chris Spencer and Dan Silveria, at around 2 AM on January 29, 1991. (RT 240:28034-28044.) Susan Morrison and Ebrahim Bahar repeated their testimony about selling used cars to Daniel Silveria, Chris Spencer, and John Travis on January 29, 1991. (RT 241:28049-28057, 28061-28067.)

Gregg Orlando again described the January 29, 1991 visit he received from his friend, Danny Silveria, accompanied by Troy Rackley and John Travis, when he saw a large amount of currency in Rackley's fanny pack, and when Danny Silveria showed him a thick wad of $20 bills and said they had killed someone for it the preceding night. (RT 243:28344-28353.)

Macy's employee Christopher Kelley and Pacific Sunwear employee Deborah Nelson again recounted their sales of clothing to John Travis and

Danny Silveria, at the Oakridge Mall in the late afternoon or early evening of January 29, 1991. (RT 241:28075-28080, 28081-28085.)

San Jose Police Department public safety dispatcher Joanne Schlachter and Oakridge Mall security officer Dana Withers gave a further description of the events leading up to the location of Danny Silveria, John Travis, and Troy Rackley at the Oakridge Mall early in the evening of January 29, 1991. (RT 243:28392-28396, 28398-28401.) Officers Jean Sellman and James Werkema described the events that immediately followed, when these three suspects were arrested at the mall, their vehicles were searched, and a stun gun, duct tape, a large amount of money, and other evidence was seized. (RT 243:28403-28420, 28428-28437.)

Dr. Parvis Pakdaman once again described the autopsy he performed on the body of James Madden, and the various injuries he observed. (RT 248:28689-28737.) This time, over strong defense objection, the prosecutor was allowed to ask Dr, Pakdaman whether he would ever be able to forget this case, and the doctor was permitted to respond that "This is one of the most atrocious cases that I've ever seen." (RT 248:28736-28737; see objections and discussion at RT 248:28734-28735, and motion for mistrial at RT 248:28737.)

In what was apparently viewed as further evidence of the circumstances of the crime, California Men's Colony Correctional Lieutenant Jackie Graham again described his discovery of the letter that John Travis wrote to former Manson family member, Charles "Tex" Watson, and his actions in turning the letter over to the Santa Clara County District Attorney's

Office. (RT 247:28581-28594; see also the related testimony of Correctional Sergeant Michael Samaniego, at RT 247:28604-28606.) Dr. Robert Stratbucker was also once again permitted to offer his expertise regarding the effect of being stunned with a stun gun. (RT 249:28858-28881, 28900-28966.)

c. Other Prosecution Evidence in Aggravation Was Limited to Victim Impact Evidence, and Evidence that John Travis Had Previously Been Convicted of Burglary

The reaction of James Madden's widow, Sissy Madden, to the news of her husband's death was again repeated by Mrs. Madden's co-workers, Susan Thuringer (RT 250:29021-29027) and Kay House (RT 250:29027-29035), and by Officer Brian Lane (RT 250:29036-29039).

Eric Lindstrand again described how he met Jim Madden when they were college students, and Madden's subsequent marriage to Lindstrand's sister. (RT 250:29040-29047.) James Sykes, the husband of Madden's sister Judy Sykes, repeated his description of hearing of Madden's death and going immediately to Sissy Madden's home. (RT 250:29058-29062.) James Sykes' wife, Judy Sykes, again testified about the reaction to Jim Madden's death by Joan Madden, the mother of Ms. Sykes and Jim Madden. (RT 250:29064-29072.) Joan Madden repeated her own memories of her reaction, as well as other memories of her son and anecdotes about the impact of Madden's death on his wife and daughter. (RT 250:29092-29101.) Madden's wife, Shirley (also referred to as Sissy), reiterated her description of her reaction to her husband's death, telling her daughter about it, how her daughter reacted,

and how the lives of her and her daughter had been affected ever since Madden's death. (RT 250:29073-29091.)

Notably, the prosecution evidence in aggravation at the penalty retrial did **not** include any of the first penalty trial evidence regarding the involvement of John Travis in an attempt to escape from the Santa Clara jail while the present trial was pending.

d. Daniel Silveria's Evidence in Mitigation

Danny Silveria's cousin, Cynthia Green, again described the summers she spent with Danny's family, when Danny was about a year-and-a-half old. (RT 252:29142-29172.) Cynthia's sister, Geraldine Macias, again described her memories of the poor living conditions endured by Danny and his siblings, and the poor housekeeping habits of Danny's mother. (RT 252:29180-29208.) Danny's sister, Lenae Crouse, repeated her own recollections of the poor conditions of her childhood, the harsh treatment her father displayed toward her brothers, Danny and Sonny, the difficulties Danny faced as he moved from one foster home to another, and Danny's reports of being sexually abused while he was a foster child in the Hebert home. (RT 252:29238-29291.)

Francine Herevia again testified about the year when her parents took in Danny as a foster child, only to give him up when they moved to Dinuba. (RT 252:29221-29235.) Elizabeth Munoz repeated her memories of living next door to the Hebert family during the time Danny was a foster child there

and was mistreated by the Heberts and by their son, Dean. (RT 253: 29342-29361.) Ms. Munoz' son, Justin, repeated his similar memories, when he was a playmate of Danny's and witnessed Danny's treatment at the hands of Dean Hebert and Dean's mother. (RT 253:29372-29383.) Robert Ector testified about his recollections of being Danny Silveria's 4th grade teacher, and his memory of Danny's brother, Sonny, as one of the meanest and angriest students he had ever encountered.[62] (RT 253:29387-29413.)

Danny Silveria's case in mitigation was strengthened by the testimony of Dean Hebert, who had not testified at the first penalty trial. Hebert recalled the years when his parents took in Danny Silveria as a foster child. He noted his father was an alcoholic who always had a beer in his hand and who was verbally abusive when he was drunk. His father did not relate very much to the family. Dean Hebert remembered his mother as warm and nurturing toward her natural children, but not toward the foster children. Dean also discussed the harsh punishments meted out by his mother, and how Danny and Sonny suffered more frequent punishment than did Dean. (RT 253:29417-29435.)

Dean Hebert candidly admitted his own humiliating treatment of Danny, and how he would blame Danny for misdeeds he had committed. Dean described an earlier foster child of the Hebert family, Henry Goodman, who had forced Dean to commit acts of oral copulation, and who eventually

---

62 During the first penalty trials, Mr. Ector testified only before Danny Silveria's separate jury. (RT 113:13435-13458.)

engaged in anal sex with Dean. Later, when Goodman had left the home and Danny had arrived, Dean regularly beat Danny up, punched him, kicked him, and unsuccessfully tried to provoke Danny to fight back. On another occasion he jabbed Danny in the shoulder with a sharp pencil, leaving marks. He also burned Danny with matches (RT 253:29435-29459.)

Dean also admitted that eventually he started to sexually abuse Danny, making Danny perform oral sex on him and then doing the same to Danny. They also engaged in anal sex. Dean was very much ashamed of the things he did to Danny. (RT 253:29460-29465.)

Deborah Thomas reluctantly reiterated her testimony regarding the 8 or 9 months that Danny spent in her household, after her police officer former husband brought Danny home with no prior notice to her. She also again described her husband's eventual decision to leave her in order to continue a relationship with another young boy. (RT 254:29525-29555.) In developments that occurred after her testimony at the original penalty trial, Ms. Thomas noted her former husband had been arrested in 1996 and had been convicted and sentenced to prison. (RT 254:29553-29554.) Certified court records showed that the conviction was for lewd acts on a minor. (RT 254:29555; Defense Exhibit 349.) In addition, Daniel DeSantis, who was the principal investigator for the Silveria defense team, gave new testimony about interviews he conducted with Officer George, during which George admitted he had molested Danny Silveria. (RT 261:30934-30956.)

Linda Cortez once again summarized her years as the welfare worker assigned to Danny Silveria's family. She described the various placements of

Danny in foster homes and acknowledged the shortcomings of those placements. She also described the problems experienced by Danny's natural mother, Barbara Silveria. (RT 254:29573-29662, 25529734-29746.)

Shirley Cotta, the sister of Danny Silveria's natural father, again candidly acknowledged her brother's serious shortcomings as a husband and father. She also described the atrocious conditions she found in Barbara Silveria's home on the last occasion when Ms. Cotta visited her sister-in-law. (RT 255:29806-29819.) Richard Guimmond, who managed the apartments where Barbara Silveria lived, also repeated his recollections of her deficiencies as a mother and a housekeeper. (RT 257:30102-30131.)

John Gamble reiterated his testimony regarding his friendship with Danny when Danny was living at the George home and John Gamble had a paper route in the neighborhood. Later, when Officer George's wife insisted that Danny leave the home, John's parents took him in as a foster child and provided him the most stable and desirable home Danny ever had. (RT 255:29821-29853, 29858-29874.) John's mother, Patricia Gamble, again reviewed her observations of Danny's poor treatment while living in the George home, and her own subsequent efforts to provide a good home for Danny, who had long been starved for affection. (RT 256:30058-30101, 257:30146-30203.)

Julie Morella repeated her testimony about her friendship with Danny, the period during which they dated, and her experiences visiting Danny in jail and encouraging his study of Christianity. (RT 256:29920-30009.)

Testimony about Danny's good behavior in jail while awaiting trial on the present offenses, and his apparent sincere efforts to study and practice Christianity, was repeated by several jail correctional officers, including Patrick Doyle (RT 258:30332-30353), Edwin Lausten (RT 259:30565-30577), Victor Bergado (RT 260:30694-30714), and Lauren Dennehy (RT 260:30900-30912). Former Department of Corrections Administrator James Park again expressed his opinion that Silveria would make a good adjustment and not be a threat or danger to prison staff or other inmates, if he was sentenced to life without the possibility of parole and remained at a Level 4 holding facility. (RT 260:30733-30826.)

Leo Charon, who had been an important witness in front of separate juries for both Danny Silveria and John Travis during the first penalty trial, was once again a major witness for Danny Silveria. He again reviewed his work as a jail chaplain, and his work with Danny in Danny's studies of Christianity. He again expressed his opinion that Danny was serious about his studies, while most inmates in bible study classes were not. Charon believed it would be quite difficult for anyone to show the consistent level of interest in Christianity that Danny had shown, if the interest was not sincere. (RT 259:30595-30647, 260:30648-30663.)

Dr. Harry Kormos also testified again for Danny Silveria. He again explained the long-term effects of childhood neglect and abuse on the development of the adult personality, and provided insight on the impact of Silveria's upbringing on his later behavior. (RT 261:30992-31038; 262:31097-31191, 263:31215-31228.)

e. Evidence in Mitigation Offered by John Travis

1) Evidence Pertaining to John Travis' Background and Development, and the Changes in His Attitudes While in Pretrial Custody on the Present Charges

John Travis' mother, Pamela Morton repeated her first trial testimony regarding her marriage to, and eventual divorce from, John's father. She again detailed the family's circumstances after the divorce, and her relationship with Joseph Carvalho, who physically abused her and John, and sexually abused John's sister, Deanna, as well as one or both of Carvalho's own daughters. She also reiterated her later relationship with Cory Morton, who was only a few months older than John. (RT 264:31234-31281.) She concluded by acknowledging that after years of being unable to face the problems that had arisen during the lives of her children, she now realized she had let her children down and had effectively abandoned them. (RT 264:31279-31280.)

John's sister, Deanna Travis, also testified again, setting forth her recollections of the difficult periods in the family history, especially the years when Joseph Carvalho was in the household. (RT 264:31314-31340.)

As noted above, Leo Charon, who had testified separately at the first penalty trial – once for Daniel Silveria in front of only the Silveria jury, and once for John Travis in front of only the John Travis jury – had already testi-

fied for Danny Silveria in front of the single jury at the penalty retrial. He also testified again for John Travis, appearing once more before the same single jury that had already heard his testimony for Silveria.

Mr. Charon had already explained his work as a jail chaplain in his testimony for Daniel Silveria, so his testimony for John Travis concentrated on Charon's personal experience as a recovered alcoholic, and his work with jail inmates with drug or alcohol addiction problems. He repeated his first trial testimony regarding the Twelve Step program and John Travis' impressive efforts to make a sincere recovery from addiction to drugs and alcohol. Mr. Charon concluded with an expression of his belief that John Travis was going to whatever lengths he could to try to understand the recovery program, and that John had shown rigorous honesty in his recovery efforts. Charon also noted the drastic change from John's initial superficial attitude to his eventual serious attitude. In an apparent reference to John's letter to Charles "Tex" Watson, Mr. Charon again explained the Christian practice of witnessing, or explaining one's own experience without God to others, and then explaining how God had made a difference in the person's life.[63] (RT 264:31357-31399, 265:31426-31444; see also RT 265:31483-31484.)

---

63. In redirect examination, Mr. Charon explained more directly that he believed the letter to Tex Watson was a form of witnessing on John's part – confessing his own situation and identifying with another person. (RT 265:31505-31506.) On re-cross examination, he added that John's letter to Tex Watson included a portion in which John wrote that he repented his sins, received Jesus Christ as his Lord and Savior, and that he poured out his heart to God. (RT 265:31510-31511.)

Although the prosecution evidence in aggravation at the penalty retrial did not include any reference to John Travis' participation in the aborted effort to escape from the county jail while awaiting trial, the prosecutor did ask Mr. Charon if John had ever talked to him about participation in an escape plan. Charon replied that John had not discussed that topic with him. (RT 265:31476-31479.) In re-cross examination, He conceded that if John had, in fact, received Jesus Christ as his Lord and Savior, Charon would not have expected John to be involved in an escape plot a year later. However, he added that is was common for Christians to slip a great deal during their efforts to find God, and that the involvement in an escape plot could have been more a matter of stupidity or lack of intelligence, rather than a sign of insincerity in Christian beliefs. Mr. Charon continued to believe that John was sincere when he said he was following in the footsteps of the Lord. (RT 265:31516-31518.)

Near the conclusion of his testimony, Mr. Charon noted that he had seen very few people reach John's level of recovery in a jail setting. (RT 265:31523-31524.)

John Travis' mitigation evidence at the retrial also included testimony from Sharon Lutman, who had **not** testified at the first trial. Ms. Lutman was a registered nurse with certification in chemical dependency. She was also a licensed marriage and family counselor. For sixteen years, she had been actively involved in a group called We Care, a support group for health professionals who suffered from chemical dependency. The trial court accepted her as an expert witness regarding the assessment of chemically dependent per-

sons. She noted that among medical professionals who entered treatment for chemical dependency, 10-15% chronically relapsed, another 30-40% had relapses within a 2 to 5 year period and then achieved abstinence, and about 40% were able to maintain continuous sobriety. (RT 265:31527-31539.)

In March 1997, Ms. Lutman had been asked by John Travis' trial counsel to do an assessment of John. She visited the jail and interviewed him for 90 minutes on March 27, 1997, just a week before her testimony.[64] John was shackled during the interview, but was nonetheless quite open and responsive. He had no hesitancy in sharing his story, although he was hesitant in expressing his feelings. (RT 265:31536-31540.)

Ms. Lutman talked to John about his history of drug and alcohol abuse, and about heavy drinking by John's father and maternal grandfather. John told her he began using marijuana at the age of 7 and he used alcohol regularly from the age of 10. He realized now that by the time he was 14, he already had an alcohol problem. He told Ms. Lutman that he drank to escape from the reality of the physical abuse he had suffered in his household, and from the sexual abuse his sister had suffered. He felt he had higher self-esteem when he drank alcohol. (RT 265:31541-31543.)

When John was 14 or 15 he was snorting cocaine once or twice a week, paying for it by stealing food from grocery stores and selling it to

---

64. On cross-examination, the prosecutor had the witness make it crystal clear that the only contact she ever had with John Travis was this 90 minute interview, 6 years after the Leewards offenses occurred. (RT 265:31605.)

other kids at school. John began snorting methamphetamine when he was 15 or 16, doing that daily as well as using marijuana daily. When he was 17 a girlfriend told him he had a problem and he succeeded in abstaining for about a week, but then he started smoking marijuana again. By the time he was 18, he was starting to have paranoid experiences from the methamphetamine usage. (RT 265:31543-31545.)

John told Ms. Lutman that he had experienced moments of rage during which he feared he might hurt his girlfriend. Ms. Lutman noted that paranoid thoughts and uncontrollable rage were common results of daily use of methamphetamine. John was also using LSD several times a week. In the weeks before the Leewards offense, John was using marijuana and alcohol continuously, plus whatever methamphetamine he could obtain. He ran out of methamphetamine on the day of the Leewards offense, using the little bit left in the bottom of the bag that day. After that, he drank Jack Daniels whiskey heavily the rest of the day. (RT 265:31546-31548.)

After his arrest on the Leeward's offenses, John began drinking pruno, or jailhouse wine, while in custody. He stopped using pruno, or any other mood-altering substance, around August or September of 1992, and had not used any in the nearly 5 years since then. Initially, John had resisted the notion that he was an alcoholic, believing instead that he was simply a person who screwed up and got in trouble on a regular basis. Initially, he simply did not have enough information to understand how drugs and alcohol contributed to the choices he had made. Ms. Lutman noted that it was very typical for persons with drug or alcohol addiction to remain in denial

about the impact of their addiction on their lives. In most cases, it took a major event for such persons to realize alcohol was a bigger problem than they had believed. (RT 265:31549-31551.)

Ms. Lutman digressed into a technical discussion about the impact of drugs and alcohol on the pleasure center of the brain, explaining tolerance – the need to use more and more of a substance to achieve the same effect – and withdrawal, which caused depression. (RT 265:31559-31581.)

Returning specifically to John Travis, Ms. Lutman described John's reports of having difficulty thinking clearly while under stress. He also reported having periods of being overwhelmed by anger. He had difficulty remembering things, especially dates and time frames. Ms. Lutman saw these symptoms as ongoing effects of the overuse of drugs and alcohol. (RT 265:31585-31586.)

Ms. Lutman talked to John about his efforts in the Twelve Step program. She was well aware of the fact that a jail inmate facing such serious charges might well try to deceive her, since he had so much at stake in the trial. She relied on her training and her experience with thousands of individuals in her effort to assess the credibility of the information she received from John. Based on the history John gave, as well as other factors, she believed it was clear John was both an alcoholic and a drug addict. John fit the classic profile of a Type 2 alcoholic – the male child of a male alcoholic, who used drugs and alcohol very early and had all the negative consequences of heavy drug and alcohol use. John now understood that he suffered from

the diseases of addiction and alcoholism, and that they were lifelong diseases that needed ongoing treatment. (RT 265:31587-31592.)

Ms. Lutman believed John had incorporated the Twelve Step program as a daily support system for his issues of anger, pride, and depression. He recognized that the things his step-father, Joseph Carvalho, had done were wrong, but John recognized he was also wrong himself in injuring Carvalho during their final fight. John had a desire to talk to the Madden family and make amends, but he realized that could do more harm than good. His tone of voice and the intensity with which he expressed that desire and understanding to Ms. Lutman seemed most genuine. She believed John had learned enough about addiction and recovery to be able to effectively help others. (RT 265:31594-31596.)

The final expert witness called in support of John Travis was Dr. Timmen Cermak, who had also testified for John at the first trial. He again described his work with children of alcoholics, and the impact that childhood events have on an individual's development of values. He explained that the key to understanding John Travis' personality was John's thoroughgoing chemical dependence, which resulted from the stress of John's childhood. That stress overwhelmed John's capacity to deal with the circumstances of his life. Dr. Cermak explained the natural progression of John's chemical dependency as a means of escaping the reality of his unsatisfying life. He again described John's growing maturity during the post-incarceration period in which he got to know John, and John's apparently sincere and impressive recovery effort, (RT 267:31907-31985.)

Santa Clara County Correctional Officer Keith Forster, who had **not** testified at the first trial, described his knowledge of John Travis over a period of several years in jail. He was aware of John's involvement in the aborted escape plot. However, in contrast to the difficulty Officer Forster had experienced in dealing with a number of other inmates who had been convicted of first degree murder, John was sufficiently reliable to be allowed out of his cell with several other inmates at a time. Officer Forster had observed John together with other inmates for bible studies. John had a good rapport with several other inmates in protective custody, and he obviously wanted to make his time in custody worthwhile. (RT 270:32499-32506.)

In Officer Forster's opinion, John treated the jail staff with respect and he followed the rules. He believed John was sincere in the recovery and bible study efforts he had undertaken in jail, and he had absolute confidence that John meant whatever he said. John was not like inmates who would continually return to jail for new crimes. Officer Forster had experience determining which inmates were trying to manipulate him and which were not. He had known some inmates whom he believed absolutely deserved the death penalty, and others who could still be an asset, so that it would be a waste of talent to execute them. He believed there was a definite opportunity for John Travis to be useful even if he spent the rest of his life in a prison. (RT 270:32507-32516.)

Similar testimony was given by Correctional Officer David Damewood, who had previously given such testimony at the first penalty trial. (RT 270:32549-32556.)

2) John Travis' Testimony About His Background

As he had at the first penalty trial, John Travis again testified in detail about his recollections of his childhood living conditions. He described the breakup of his parents' marriage, the anger he experienced, the impoverished living conditions, his introduction to the use of marijuana at the age of 7, and his pre-teen use of alcohol. He again described the impact of his mother's relationship with Joseph Carvalho, initially raising the family's standard of living, but then deteriorating into physical abuse of John and his mother, and sexual abuse of John's sister. He reiterated his growing drug and alcohol use in his middle teenage years, his sharing of drugs and alcohol with his natural father when he visited him in North Carolina, the impact of his mother's relationship with Cory Morton, who was just a few months older than John, and his growing friendship with Danny Silveria, Matt Jennings, Chris Spencer, and eventually with Troy Rackley. (RT 266:31665-31732.)

3) John Travis' Testimony Regarding the Leewards Offenses

As he did at the first penalty trial, John openly admitted his participation in the Leewards crimes and expressed his great remorse for the harm he helped cause. He described his employment at Leewards, the termination of that employment, his growing frustration at his homelessness and the deterioration of his lifestyle, his growing use of drugs and alcohol, his growing friendship with the other participants in the Leewards crime, and the great

humiliation and anger he felt when he was badly beaten just a few days before the Leewards robbery and homicide. He again detailed his recollection of the events and discussions when he and his friends spent several days at a cabin in the Uvas Canyon area, the planning of the Leewards robbery, and the manner in which the plans were put into action. He again maintained he held no grudge against James Madden for the termination of employment at Leewards, but that Madden was killed instead only because he would have been able to identify the perpetrators of the robbery. (RT 266:31663-31664, 31733-31792, 267:31836.)

4) John Travis' Testimony Regarding Events After His Incarceration

John repeated his first trial description of his arrival at the county jail after his arrest for the Leewards crimes, the influence another inmate had in getting John interested in Christianity, and how that interest led him to read about Charles "Tex" Watson, in a book John received when he responded to an international prison ministry that broadcast its programming into prisons and jails. He explained his belief that Watson was a clergyman, and he wrote to Watson to share what he saw as their common history of going from the commission of a very violent crime to a consuming interest in Christianity. He wrote to Watson about the Leewards crime as part of the Christian practice of witnessing, and not to brag about what he had done. He conceded his involvement in an aborted escape plot while in the county jail, soon after the

death of his sister's infant son, and he denied any plans to injure any correctional officer. He explained how, after the escape plot was revealed and stopped, he realized he was not taking his Christian beliefs seriously. That was when he began working with Leo Charon, studying the Twelve Steps program, and also began his serious effort at recovery from his drug and alcohol addictions. He closed his direct examination by expressing his desire to help others who had been in the same types of circumstances he had experienced, or who may be heading into such circumstances. He wanted to be able to share what he had finally learned. (RT 266:31793-31810, 267:31812-31837.)

f. Rebuttal Evidence Offered by the Prosecution

Cynthia Tipton was recalled and testified that she talked with Danny Silveria before noon on the day of the Leewards robbery and homicide. Danny told her that he and the others would be doing something big that night. He did not express any reluctance about his involvement in whatever was planned for that night. (RT 272:32699-32709.)

Correctional Officer David Tomlinson described some grievance forms that Danny Silveria had submitted during his 6-1/4 years in the county jail. He also noted that on one occasion, Silveria admitted he had lied in an effort to get moved to a different housing unit within the jail. (RT 272:32711-32729.)

No rebuttal evidence was offered concerning John Travis.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY PRECLUDED TESTIMONY AT THE PENALTY RETRIAL BY FIRST TRIAL JURORS WHO HAD BEFRIENDED JOHN TRAVIS, AND THEN COMPOUNDED THE ERROR BY PLACING UNREASONABLE CONDITIONS ON PROFFERED TESTIMONY BY TRIAL COUNSEL

A. Introduction

As noted in the Statement of the Facts, two separate juries had been empanelled at the original guilt and penalty phase trials. One jury considered only the case against John Travis and the other jury considered only the case against Daniel Silveria. While much of the evidence was relevant to both defendants and was heard simultaneously by both juries, other evidence was relevant to only one defendant or the other and was heard only by the jury hearing the case of the defendant for whom the evidence was relevant. In particular, Leo Charon gave strong testimony to Daniel Silveria's jury pertaining to Silveria's unusual strong religious conversion. Charon also gave separate, but similarly strong testimony to John Travis' jury regarding Travis' exemplary progress in understanding how his addiction to drugs and alcohol had impacted his life.

After both juries were unable to reach unanimous verdicts at the first penalty trial, the court chose to empanel only one jury to decide the penalty for both defendants at the penalty retrial. As will be shown, this created a difficult problem for John Travis, because the value of Leo Charon's impor-

tant testimony was likely to be diminished if a single jury heard the same witness testify strongly in favor of each defendant. The present argument and the one that follows will pertain to the defense efforts to overcome this problem, and the court's rulings that stymied those efforts. To put the problem in a proper perspective, it will be helpful to start with a brief reiteration of the evidence at the first penalty trial.[65]

At the first penalty trial, John Travis' evidence in mitigation started with testimony from his mother and sister about the circumstances of the family from John's birth until the time of the Leewards offense. That family history showed that John started using drugs and alcohol at a very early age, and that he was fully dependent on such substances by his early teenage years. By the time of the Leewards offense, John's entire life revolved around obtaining and using drugs and alcohol.

John's next penalty phase witness was Leo Charon, a minister and a drug and alcohol abuse counselor who had spent a number of years ministering to jail inmates. Mr. Charon provided a good deal of insight regarding the process of addiction and the difficulties involved in trying to overcome addiction. He also described the close relationship he developed with John Travis, and John's impressive progress toward overcoming his addictions.

John also testified on his own behalf, providing even more insight into his childhood and his eventual drug and alcohol addictions. He de-

---

65. For a more detailed summary of both penalty trials, with full citations to the record, see the Statement of the Facts portion of this brief, at pp. 43-137.

scribed the events leading up to the Leewards offense, as well as the offense itself. He also described his efforts in the jail to overcome his addictions. To put all of this information together in a manner best supporting a conclusion that John Travis should not be executed for his crimes, Dr. Timmen Cermak explained how a childhood such as John's could easily cause a person to seek solace in drugs and alcohol, and to then become lost in the endless pursuit of drugs and alcohol, both to ease the original pain and to ease the disappointing and frustrating life that became hopelessly affected by the drugs and alcohol. Aside from the circular nature of the addiction problem, Dr. Cermak also explained how addiction can be genetically influenced, and how John's family history demonstrated a classic pattern of such a genetic predisposition toward addiction.[66]

In sum, the defense effort was to persuade the jury that John did not become a heavy user of drugs and alcohol simply because he was a weak person who would rather party than work. Instead, he was genetically predisposed to abuse drugs and alcohol. Furthermore, it was not surprising that he turned to a chemically-oriented escape mechanism when his family circumstances left him without the support or guidance that might allow some people to overcome the deprivations and abuse John experienced in his

---

66. The only other witnesses called on John Travis' behalf in the first penalty trial were three correctional officers and the attorney who previously represented a jail inmate who testified against John Travis. All four of these witnesses were called in an effort to rebut portions of the evidence presented by the prosecution regarding John's participation in an unsuccessful plot to escape from the Santa Clara County Jail.

childhood. Once the process had begun, its own circular impact, coupled with the continued lack of support or guidance, led John down an almost inevitable path to failure. By the time John turned 21, shortly before the Leewards offenses, he was ill-equipped to function as an adult, and his judgment was seriously impaired by his use of drugs and alcohol and his failure to outgrow the immaturity that most people have left behind by that age.

The defense candidly acknowledged that none of this was an excuse for the choices that John made that led to his involvement in the murder of James Madden. Instead, this evidence was offered to generate understanding of the circumstances that led John to those tragic choices, and to persuade the jury that executing him was not the appropriate way to punish him for his single violent crime. Rather, it would be appropriate to punish John with a sentence that would keep him in a highly secure prison setting for the rest of his life.

Leo Charon's testimony provided crucial support for the defense effort to persuade the jury to spare John's life. All of the other witnesses called on John's behalf could only explain how and why John became hopelessly addicted to drugs and alcohol at an early age. Only Leo Charon could show that, despite John's deprived upbringing, his addiction to drugs and alcohol, and the bad choices that led to John's participation in a tragic murder, there was still good reason to choose to spare John's life. Only Leo Charon could show that John had finally begun to make great strides toward overcoming his drug and alcohol addiction, and that he still had something positive to of-

fer society in his desire to work with other addicted inmates in overcoming their problems.

That defense effort in the first penalty trial obviously met with some degree of success. The same jury that had found John Travis guilty of the first-degree murder of Madden, and that heard extensive testimony that, while awaiting trial for capital murder, John had participated in an effort to escape from custody, was unable to agree on the appropriate penalty. However, during that first penalty trial, the prosecutor had made his disdain for Leo Charon plain. Mr. Charon had not only given important testimony on behalf of John Travis, but also on behalf of Danny Silveria. As will be shown in the detailed summary of additional relevant facts, the prosecutor appeared to believe that there were inconsistencies between Mr. Charon's statements on behalf of John Travis and his statements on behalf of Danny Silveria.

The prosecutor went to great lengths to try to persuade the jury of his view of Leo Charon. However, the prosecutor was openly frustrated by the fact that the testimony regarding each defendant was given in front of different juries. Not surprisingly, when both initial penalty juries failed to arrive at unanimous verdicts, the prosecutor was most eager to have a single jury for the penalty retrial. He succeeded in persuading the judge to order just that. Clearly, the defense was concerned about what the prosecutor would do to nullify the value of Leo Charon's testimony, if he were to testify on behalf of both defendants, to a single jury which would decide the penalty for each defendant.

Counsel for John Travis quickly recognized that he greatly needed to corroborate Leo Charon's testimony with one or more additional witnesses who could testify to John Travis' growing maturity and to the sincerity of John's efforts to overcome his addictions. Fortunately for John Travis, such witnesses were available. In the year between the end of the first penalty trial and the start of the retrial, one actual juror and one alternate juror from the first penalty trial had taken active interests in John Travis. They had visited him in the jail after the trial ended. They were impressed by him and continued to visit him on a regular basis. The former alternate juror, in particular, formed a good relationship with John and had many long talks with him about his progress in the jail. This former alternate juror could testify convincingly that John had progressed a long way from the directionless youth who had helped to kill Jim Madden, and had finally become a mature adult who could live a meaningful life, even if it was all to be spent inside a prison.

Defense counsel made known his intention to call these new witnesses at the retrial. From the outset, the trial judge reacted in disbelief, and made it clear this would not be allowed. As will be shown, the trial court was never able to articulate a sound legal basis for such a ruling. Instead, the court eventually relied on a weak and transparent excuse that completely fails to withstand analysis. That is, the court was concerned that any such testimony would necessarily disclose the fact that there had been a prior penalty trial which had not resulted in a unanimous verdict. Although in many other instances the court expressed confidence that the new jury would be

able to understand and follow complex legal instructions to disregard highly prejudicial matters, in this one instance the court was convinced that no admonition could prevent the jury from being influenced by knowledge of a prior jury's inability to reach a unanimous penalty verdict. As will be shown, there were numerous flaws in the court's reasoning. Nonetheless, John Travis was not allowed to present this important evidence to the jury.

As will be discussed fully in the argument in this brief following the present argument, John Travis' attorney next proposed that if testimony from the former juror and alternate juror was not allowed, there was only one other witness who could give comparable testimony – counsel himself. As will be shown in the next argument, the trial court put unreasonable conditions on any such testimony, causing counsel to withdraw the proposal.

As a result, John's presentation at the penalty retrial went much like the first trial. The only new witness was Sharon Lutman, an expert in the assessment of chemically dependent persons. Ms. Lutman was called in at the last minute, following the ruling precluding the testimony from the former juror and former alternate juror. Thus, she was able to meet with John only once, shortly before she testified. Indeed, the prosecutor heavily stressed that shortcoming. Although Lutman expressed her opinion that John's efforts appeared sincere, she could hardly have been as persuasive as the two unpaid witnesses who had visited John regularly over a period of time, and, importantly, who had chosen to do so on their own.

The prosecutor did his best to exploit the situation he had achieved – Leo Charon testifying on behalf of both defendants in front of the same jury.

Other than the fact of a single jury, rather than the dual juries utilized at the first trial, the most significant difference between the two trials was one that favored John Travis. At the retrial, the prosecutor chose not to present the inmate witnesses who had testified previously that the escape effort which John had joined included specific plans to kill a jail correctional officer. The testimony of those inmate witnesses had been replete with credibility problems.

Indeed, the prosecutor totally abandoned his first trial effort to present the jail escape evidence in support of the other violent criminality aggravating factor. Instead, the escape effort was relegated to rebuttal evidence, brought up briefly to attempt to rebut evidence that John was striving to be a good Christian while in jail. Nonetheless, the second penalty jury took relatively little time to decide that both youthful defendants should be executed for their one night of violence which claimed a single victim.

B. Additional Factual Background

Leo Charon's testimony on behalf of each defendant at the first trial was summarized in the Statement of the Facts section at the outset of this brief, at pp. 144-150. That summary will be supplemented here with additional details relevant to the present issue.

1. Leo Charon's First Trial Testimony Before the Silveria Jury Only

Leo Charon first testified on behalf of Danny Silveria, in front of the Silveria jury only, at the first penalty trial. He described his own experience ministering in the jail and his work with Danny Silveria. He explained how Danny started out expressing an interest in Christian teachings, how he studied various materials and developed a relatively sophisticated understanding of Christian principles, and how he had begun leading his own bible study classes with other inmates. (RT 152:14745-14761.) Danny Silveria's counsel then asked Mr. Charon if he was aware of jail inmates who had ulterior motives for claiming to have an interest in Christianity. Mr. Charon readily conceded that was a familiar situation. (RT 152:14762.)

The prosecutor then interrupted to object to what he expected next – an opinion as to whether Danny Silveria's professed Christian beliefs were sincere. The prosecutor labeled any such opinion as speculative, with no explanation why this would differ from the many opinions the prosecutor had elicited from various witnesses. The court overruled the objection, and allowed the Silveria defense to proceed. (RT 152:14762-14763.)

Mr. Charon went on to explain that he had encountered inmates who could persuasively con others over a short period of time, but that it was very difficult to do so over a period of several months, and even more difficult to do so over a period of years. Mr. Charon believed it was not difficult to discern such insincerity over a long enough period of time, and he had done just

that on numerous occasions. He did not believe Danny Silveria was that kind of inmate. Danny was planning on taking specific courses that would lead to a degree in theology, so he could be a chaplain in the prison. That demonstrated a deep-seated interest. Over four years of working with Danny, Mr. Charon had noticed nothing that would indicate Danny's interest was anything but genuine. (RT 152:14763-14764.)

Mr. Charon acknowledged familiarity with some minor transgressions by Danny over the years he had spent in jail, and did not see that as inconsistent with sincerity in Christian beliefs. Most people had periods in which they were less than perfect, and Mr. Charon saw the determinative factor as what was the norm and what was the exception. (RT 152:14765-14766.) Mr. Charon had also heard Danny talk about the crimes for which he had been convicted, and had heard him express extreme remorse. Mr. Charon believed those expressions of remorse were sincere. (RT 152:14769-14770.)

Mr. Charon explained that he had baptized persons in jail only on rare instances, because he usually believed it was better for an inmate to wait until he was out of jail and could join a regular church, and then be baptized in a church in which the inmate would have ongoing participation. He would only make exceptions for persons who were not going to be released within any reasonable period of time, and even then, only if they expressed the desire to be baptized over and over again over a period of time. Danny Silveria was one of the few inmates he had consented to baptize in jail. (RT 152:14771-14772.)

Mr. Charon closed his direct examination testimony with an expression of his belief that Danny Silveria had displayed a high degree of humility, a real sincere sorrow and remorse for the crime he had committed, and a high indication that he would never engage in such behavior again. (RT 152:14773.)

On cross-examination, even though only Danny Silveria's jury was present, the **prosecutor** brought out the fact that Mr. Charon baptized John Travis on the same day that he baptized Danny Silveria. (RT 152:14785.) Indeed, the prosecutor even questioned Mr. Charon in front of the Silveria jury at some length, about his awareness of the book that John Travis had received from Chaplain Ray, written by Tex Watson. This was done even though there was no evidence that Danny Silveria ever read or talked about the Tex Watson book. (RT 152:14788-14792.)

Later, on re-cross examination in front of only the Silveria jury, the prosecutor asked Mr. Charon if he also believed that John Travis' commitment was sincere. Silveria's counsel objected to the relevance of such a question, and the objection was sustained. (RT 152:14798.)

2. Leo Charon's First Trial Testimony Before the Travis Jury Only

Later in the first penalty trial, Leo Charon was called by John Travis' counsel and testified before only the John Travis jury. That testimony was also summarized in the Statement of the Facts section at the outset of this

brief. As discussed in that summary, Mr. Charon explained that over time he came to believe that John Travis was honest with him in their discussions about John's past and about his drug and alcohol addictions. Mr. Charon believed John had progressed more than the average inmate. (RT 164:16470-16475, 16479.) He acknowledged that he felt that John Travis and Danny Silveria had both been above average for inmates, in their progress and in their relationship with Charon. He believed they were both exceptional people within the jail. (RT 164:16485-16489.)

Mr. Charon explained that his relationship with John Travis was friendlier than the relationships he had with most other inmates, but he promptly added that he had known John over a longer period of time than was the case with most inmates. (RT 164:16470.)

On cross-examination, the prosecutor promptly returned to the same theme he had unsuccessfully tried to pursue when Mr. Charon testified before the Silveria jury. His initial questions to Mr. Charon reiterated the reverend's belief that his relationship with John Travis was closer and friendlier than with most other inmates. The prosecutor then asked, "But don't you feel the same way about his co-defendant, Danny Silveria?" (RT 164:16480.)

John Travis' counsel then objected to the relevance of that question. In an extended bench discussion, The prosecutor expressed his unsupported belief that Mr. Charon had testified before the Silveria jury that Danny Silveria was a special exceptional person, and that now he was saying the same things about John Travis, and was merely substituting one name for the other. Although the prosecutor's claim greatly overstated the record, the trial

court expressed some agreement with him. The court stated that the court's impression from Charon's earlier testimony was that Silveria was number one and Travis was way down the list. The court acknowledged Mr. Charon never actually said that, but the court gave no other explanation as to what caused the court to receive that impression. The court even claimed to have received the impression that when Leo Charon baptized both Silveria and Travis on the same day, Silveria was the one who was saved and sincere, while Travis only had a second rate conversion. In contrast, during Charon's testimony for John Travis, the court felt Mr. Charon seemed to be talking much more strongly in favor of John Travis. (RT 164:16480-16482.)

Aside from being totally unsupported by the record, the court's "impression" of Mr. Charon's testimony about the two co-defendants was quite unfair for another reason. When Mr. Charon testified about Silveria, he was testifying only about Silveria's sincere interest in studying Christianity, and the great progress Silveria made in learning about religion and putting into practice the principles of Christianity. On the other hand, the focus of Mr. Charon's testimony about John Travis was the sincerity of John's progress toward understanding and fighting to overcome his drug and alcohol addiction. John's religious involvement was discussed, but nobody ever claimed John had made the kind of progress with religion that Danny Silveria had made.

Counsel for John Travis readily noticed the fallacy in the thinking of the trial court and the prosecutor, explaining, "I haven't talked about his conversion. I haven't talked about a baptism. I haven't talked about any of

this stuff. I'm talking about John as a recovering alcoholic." (RT 164:16482-16483.) The Court acknowledged this was true, but added that Mr. Charon had referred to the validity of John's acceptance of God, which went hand-in-hand with the Twelve Step program to which Mr. Charon ministered. The court ruled that the prosecutor could pursue his line of questioning briefly, finding it relevant to the credibility of the witness. (RT 164:16483.)

The prosecutor then directly asked Mr. Charon if he believed his relationship with John Travis was "basically above average or something special as far as the relationships you ordinarily have with inmates; is that correct?" Mr. Charon responded that it was above average. (RT 164:16484.) The prosecutor then asked whether he felt the same way about Danny Silveria. Mr. Charon said that he did, and added that he had known Danny even longer than he had known John. (RT 164:16485.) Next, the prosecutor asked whether Mr. Charon believed that John Travis had accepted the Lord, and Mr. Charon acknowledged he had such a belief, and that he felt the same way about Mr. Silveria. (RT 164:16485-16486.) Counsel for John Travis again objected, contending Mr. Silveria's religious conversion was irrelevant to Mr. Travis' penalty determination. That objection was overruled. (RT 164:16486.)

On further prodding from the prosecutor, Mr. Charon acknowledged he believed both Danny Silveria and John Travis had accepted the Lord, both had shown remorse for their crimes, and both had led Bible study groups in the jail. He believed they were both exceptional people in the jail. (RT 164:16487-16488.) The prosecutor responded, "Two exceptional people who

happen to be co-defendants?" (RT 164:16488.) At that point the court sustained a defense objection, and stated "I think we've gone far enough into it." (RT 164:16488.)

The prosecutor then informed the court he had one more question in that series and the court said he could proceed. The prosecutor asked whether Mr. Charon had testified previously that it was unusual for him to baptize someone in jail. Mr. Charon acknowledged it was not typical. Counsel for John Travis objected, noting he had not examined the witness about Mr. Travis being baptized. That objection was overruled, and the witness acknowledged he had baptized both John Travis and Danny Silveria, possibly on the same day. (RT 164:16488-16489.)

C. Procedural Background

On November 14, 1996, just before in limine motions were scheduled to be heard prior to jury selection for the penalty retrial, counsel for Daniel Silveria filed a Motion to pre-instruct the jury and to preface the questionnaire on issues related to retrial of penalty phase. The motion included several requests that Mr. Silveria's counsel believed would help to avoid speculation by the jury as to why the penalty was being retried. The motion sought to have the jury instructed to draw its own conclusions as to whether the murder of James Madden was premeditated, or whether it was a first degree murder committed in the course of committing burglary and/or robbery. The motion also sought to have the new jury instructed not speculate on what theory was found by the previous jury. The motion also sought to have the

new jury instructed not to speculate on the reason for the penalty retrial, but the defense did want the jury to be expressly told that the retrial was **not** due to any action of a higher court. (CT 16:4096-4102.)

On November 13, 1996, during hearings on in limine motions prior to the beginning of jury selection for the penalty retrial, the motion to pre-instruct the jury was argued. Counsel for John Travis joined in the motion. The prosecutor opposed the motion, arguing the new jury should simply be told that guilt was determined by an earlier jury, and the new jury was not to speculate why the earlier jury had not also determined the penalty; the prosecutor believed the new jury should **not** be told that there had been a prior hung jury on penalty. The court accepted the prosecutor's position and issued an order that no attorney and no witness was to mention the fact that the upcoming trial was a retrial of a penalty phase. (RT 197:22654-22657.)

Counsel for Mr. Silveria pointed out that when penalty phase witnesses who had testified in the first trial testified again, it was inevitable that references would be made to their prior testimony. The judge saw no problem with that, suggesting that such questions should be phrased in terms of testimony given in front of the prior jury, without any reference to a prior penalty phase. Counsel remained concerned, since there would be a number of witnesses who obviously had nothing to say that was relevant to the guilt determination, so the jury would inevitably figure out that there had been a prior penalty trial. The judge was not swayed, and voiced confidence the jury would not speculate improperly, so there would be no problem. (RT 197:22657-22660.)

In the course of the discussion, counsel for John Travis mentioned that he might be calling a juror from the prior trial as a witness in the retrial. Before hearing any explanation as to why counsel wanted to do that, the court simply stated, "You know what your chances of that one are?" The court then added, "You better bring up some real good caselaw on that one." (RT 197:22660.)

The following week, on November 21, 1996, the prosecutor expressly moved for an order precluding the Travis defense from calling former jurors as witnesses, even though he conceded he had no idea what basis the defense might have for calling former jurors. Counsel for John Travis expressed puzzlement, since the prosecutor had presented no legal authority for his position. The judge responded that an offer of proof would be required from counsel for Mr. Travis. Still in the dark as to the defense theory, the court stated that calling any juror would open up a Pandora's Box, and the prosecutor would be allowed to respond by calling the rest of the former jurors. (RT 200:22917-22920.)

On November 25, 1996, counsel for John Travis made his offer of proof. He explained that on the day the prior jury ended its penalty phase deliberations without a unanimous verdict, Travis Alternate Juror #4 had come up to counsel and asked if he could visit Mr. Travis in the jail. Since then he had visited Travis a couple times each month. He believed John's problems had been a result of a negative relationship with every male adult he ever knew. The alternate juror tried to, and succeeded in, relating well to John. He was the only person who had visited John regularly, just to be his friend. He

could testify to John's sincerity about changing his life and overcoming his drug and alcohol addictions.[67] (RT 201:23000-23001.)

Counsel for John Travis noted that he could present the witness as persons who had visited John in jail, without ever referring to his participation on a prior jury. Counsel added that Actual Travis Juror #8, who had been the foreperson of the prior jury, had also come to counsel about visiting John Travis. She could testify to her visits with John and her discussions with him, regarding things that were important to him. Counsel noted that in 6 years of custody, John had virtually no other visitation from outside persons, except for recently re-establishing a relationship with his mother. Counsel noted that testimony from these two witnesses was very important, because discussions with prior jurors had convinced counsel that many of them remained skeptical about the sincerity of John's efforts to improve himself in jail. Counsel described this as character evidence, going only to the issue of John's rehabilitation and his ability to do something constructive in prison if he was allowed to serve a sentence of life without possibility of parole. Counsel had no plans to question the former actual juror about any of the deliberations of the prior jury. (RT 201:23001-23004.)

Leo Charon was the only other person who knew John in the same way as the two former jurors. Counsel believed Mr. Charon's effectiveness

---

67. For an even more detailed summary of how well Alternate Juror #4 came to know John Travis, and the kinds of things he would have said in his testimony, see the letter from him that was attached to John Travis' subsequent probation report. (CT 23:5731-5733.)

as a witness had been undercut by the prosecutor, by stressing that fact that Mr. Charon was a Chaplain and was himself a recovered alcoholic and drug addict. In contrast, the two former jurors had no motive to favor John. Former Juror #8 would express her opinion that John was sincere and had shown maturity in his discussions with her. She had known him for over a year and could talk about what she had observed about John. (RT 201:23004.)

Counsel for John Travis believed that the thrust of the prosecutor's argument to the first jury had been that John Travis was evil and should be destroyed. But counsel was convinced John Travis was a different person now than he was when the murder occurred. The two former jurors were the people who had seen this firsthand, and could testify to their observations, with no compensation. (RT 201:23006.)

In response, the prosecutor did not think it was practical to present the prior jurors as witnesses without disclosing the fact they had been jurors on the prior trial. The prosecutor believed that his cross-examination would have to explore how they came to know John Travis. If they believed John Travis had changed, then the prosecutor would have to ask what they knew of Travis before his incarceration. The prosecutor would want to show that all the former jurors knew was what they had heard in the first trial.[68] The

---

68 This was a puzzling concern, since what they had heard in the first trial was virtually every possible detail about the present crime and about John's life, from his birth to his behavior in jail after the crime and right up to the time of the first penalty trial. With all that information, plus

(Continued on next page.)

prosecutor would also want to impeach these witnesses with any bias they might have. Former Actual Juror #8 had tried to persuade the prosecutor after the first trial that he should settle for a life without parole penalty, so the prosecutor believed she did have a personal agenda that he would want to explore. Without explaining how it would be relevant, he argued he would want to bring out that fact that she was one of only two prior jurors who voted for life without parole. Thus, the prosecutor saw no way to avoid asking her about the content of prior deliberations. (RT 201:23006-23009.)

The prosecutor conceded that the situation was somewhat different as to the former alternate juror, since he had not participated in any deliberations. Without explaining why it would be relevant, the prosecutor nonetheless insisted he would have to question the alternate juror about the fact the prior jury had voted 10-2 in favor of death. The prosecutor also claimed he would have to contact other former jurors and ask them about any statements these two might have made that might reflect a bias. The prosecutor summed up his position as being that he could not be precluded from cross-examination, but that any cross-examination would lead to problems.[69] (RT 201:23009-23010.)

(Continued from last page.)

regular visits with John Travis for long and personal conversations, in jail, over an additional year, one would expect these former jurors to have as much relevant knowledge as anybody could possibly possess.

69 In other words, the prosecutor resorted to a typical "sky is falling" argument, without offering any specific basis to support his fears.

Defense counsel responded that difficulties the prosecutor might face in cross-examining these witnesses would be no worse than the difficulties faced by the defense in trying to cross-examine friends and relatives of the victim who testified to victim impact evidence. The court had put many restrictions on what the defense could go into with those witnesses, and the defense simply had to live with those restrictions. Counsel also stressed that none of the problems the prosecutor had described, especially in regard to calling other jurors in rebuttal, would apply to the alternate juror. However, counsel also remained unconvinced that any opinion the former actual juror had expressed in deliberations would be relevant in the present trial. Counsel suggested having the jurors testify first in Evidence Code section 402 hearings, outside the presence of the jury, to determine if any of the problems the prosecutor imagined would turn out to be real. (RT 201:23011-23014.)

On December 2, 1996, the court announced its ruling. The court remained absolutely determined to prevent the new jury from learning that there had been a prior penalty phase, and that there had been an inability to reach a verdict. The court believed that if prior jurors were called as witnesses, the possibility of the results of the prior penalty phase leaking out would increase "at least a hundredfold on direct examination alone." Proper subjects for cross-examination would raise that possibility even more. Without offering any rationale, the trial court expressed its conclusion that if the prior jurors were called, the prosecutor could then call other jurors who had voted for death as rebuttal witnesses. While the court never explained how such rebuttal could possibly be proper, the court believed that alone made

the defense request "intolerable and completely improper." (RT 202:23123-23124.)

The court built off of this unsupported conclusion to reach the further conclusion that once the result of the prior penalty trial was made known, the current jury would then "be tempted to and could actually abdicate its own duty in favor of a prior jury's findings, even though there was a mistrial."[70] (RT 202:23124.) With no further explanation, the court ruled, "For these reasons alone neither the People nor the defense will be allowed to call as witnesses any prior juror, including alternates." (RT 202:23124.)

Shortly after this ruling was announced, counsel for John Travis sought clarification, asking "... just so I understand this, you're indicating that an alternate is in the same situation as a juror would be?" Still offering no explanation, the court responded, "No question about it." The court then repeated that statement and added, "The Court's position is it causes the same dangers." (RT 202:23132.)

D. The Impact of the Ruling on the Mitigating Evidence John Travis Was Able to Present at the Penalty Retrial

With trial court ruling that precluded testimony from the former juror and alternate juror, the penalty retrial evidence offered by John Travis went

---

70. The judge offered no explanation at all what this meant. Since the prior jury had made no findings, it is unclear why or how the prior result might affect a present juror, even if there was some reason for a present jury to "abdicate its own duty ..."

much like the first trial. As detailed in the penalty retrial portion of the statement of the facts at pp. 127-137, earlier in this brief, John Travis' mother and sister again testified to the conditions of the family from John's infancy until the time of the Leewards crime. Leo Charon and Dr. Timmen Cermak gave testimony very similar to their first trial testimony. John again testified in his own behalf, talking freely about his background, the events that led up to the Leewards crime, the crime itself, and John's post-arrest progress in the jail. Jail correctional officers were again called to express their views that John Travis was not a problem inmate. The only significant new witness was Sharon Lutman, a certified drug and alcohol counselor who was added to the defense team so late that she only had one opportunity to meet with John for a 90 minute interview. In addition to the testimony of these witnesses that was summarized in the statement of the facts, other testimony specifically relevant to the present issue was as follows:

In his testimony on behalf of Danny Silveria, Leo Charon acknowledged he had been an alcoholic himself, and that his own spiritual recovery from alcoholism inspired him to want to help others do the same. (RT 259:30599-30600.) He had been teaching Bible study classes in the county jail for 15 years, as of the time he testified, and had done similar work in state prisons for years before that. (RT 259:30600-30602, 30612-30613.)

In the course of Mr. Charon's testimony about Danny Silveria, the prosecutor objected to any effort to have the witness compare Silveria's sincerity with that of other inmates. The prosecutor claimed that any such comparison would force him to seek to cross-examine Charon about specific

other inmates with whom he was familiar, and that any such effort would be frustrated because Mr. Charon would assert the penitent-clergyman privilege to any such questions about other inmates. The trial court agreed with the prosecutor's position, and disallowed any comparison to other inmates. Indeed, Charon was not even permitted to testify that Silveria's consistent pursuit of knowledge about theology was "very unusual," since such a conclusion necessarily depended upon comparisons to other inmates. (RT 259:30644-30645; 260:30650 and 30653.)

The only reference to John Travis during the direct examination of Leo Charon by counsel for Danny Silveria occurred when the witness mentioned that he baptized John Travis at the same time that he baptized Danny Silveria. (RT 260:30656.) Despite that insignificant reference to John Travis, and the rulings that precluded questions that would allow the witness to compare Danny Silveria to any other inmate, the prosecutor's cross-examination began with questions about both Danny Silveria and John Travis. Counsel for John Travis promptly objected to going beyond the scope of direct examination, clearly inferring that he wanted any cross-examination about John Travis to be delayed until he had an opportunity to call the witness and present direct examination on behalf of John Travis. Counsel for Danny Silveria also objected, noting that he had not asked the witness to make any comparisons between John Travis and Danny Silveria. The prosecutor responded that the very limited references to John Travis during direct examination were enough to permit him to inquire into Leo Charon's relationship with him as well as with Danny Silveria. Counsel for

John Travis pointed out that the prosecutor had succeeded in precluding Mr. Charon from comparing Danny Silveria to other inmates, and now the prosecutor wanted to have Silveria compared to John Travis. The trial court again sided with the prosecutor, noting only that John Travis had been mentioned on direct examination without objection. (RT 260:30664-30666.)

As he had in the first trial, the prosecutor went on to question Leo Charon about baptizing John Travis and Danny Silveria on the same day. The prosecutor then seized on extremely minor incidents to show that, on a few occasions in his many years of pre-trial incarceration, Danny Silveria had engaged in activities which could be seen as manipulative. The prosecutor then shifted to questions about the concept of jailhouse religion, implying strongly that the two defendants were insincere in their religious activities, even though the prosecutor did not have a shred of evidence to back up such claims of insincerity. Finally, even though he was still cross-examining Leo Charon only in regard to testimony given on behalf of Danny Silveria, the prosecutor asked about Mr. Charon's knowledge about Tex Watson, Watson's book that John Travis had read, and Chaplain Ray, who had sent John Travis the book by Tex Watson. (RT 260:30669-30682.)

Subsequently, Leo Charon was recalled to the witness stand to testify on behalf of John Travis. Once again, his testimony was similar to the testimony he gave for John Travis at the first penalty trial. Mr. Charon noted that he was a recovered alcoholic himself. (RT 264:31364.) As summarized in more detail in the statement of the facts, at pp. 125-127, earlier in this brief, Mr. Charon described his work with John in the Twelve Step program,

John's eventual efforts to make a sincere recovery from his drug and alcohol addiction, and Mr. Charon's own belief that John was honest in his recovery efforts, and that John's seriousness had grown remarkably from a more superficial starting point in the earlier portion of his incarceration. (RT 264:31373-31399, 265:31426-31444.)

Once more, in cross-examination, the prosecutor questioned Mr. Charon about the abstract possibility that a person facing a potential death sentence would have an incentive to attend bible study classes and otherwise improve himself in an effort to look better in front of a jury. (RT 265:31472.) Once again, the prosecutor failed to produce any evidence whatsoever that this, in fact, applied to John Travis.

In his cross-examination of Sharon Lutman, the prosecutor stressed the fact that her direct contact with John Travis was limited to a single 90 minute interview that occurred six years after the murder of James Madden. (RT 265:30605.) He also brought out the fact that Ms. Lutman and John Travis' trial counsel, James Leininger, had known each other for a number of years and served together on the Board of Directors of Wee Care. (RT 265:31598.)

After Dr. Cermak testified on behalf of John Travis, the prosecutor questioned him in a manner designed to present him as a paid member of the defense team. (RT 268:32037-32038.) The prosecutor even brought out the fact that on one occasion, Cermak wrote defense counsel a letter containing some suggestions that might benefit the defense during jury selection. (RT 268:32045, 32049-32050.)

E. The Trial Court Had No Proper Basis to Disallow Defense Testimony from a Former Juror and/or a Former Alternate Juror

1. The United States Supreme Court Has Expressly Recognized a Defendant's Constitutional Right to Have the Sentencing Body Consider the Type of Evidence That Was Offered on Behalf of John Travis

In a criminal trial, a defendant has due process and compulsory process and confrontation rights, under the federal Fifth' Sixth' and Fourteenth Amendments, to present all relevant evidence in his defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14, 23.) More specifically, in addition to such basic trial rights, a defendant in a capital penalty trial has an Eighth and Fourteenth Amendment right to present all relevant evidence in mitigation, including the very type of evidence that would have been supplied by the former juror and former alternate juror offered on behalf of John Travis. (*Lockett v. Ohio* (1978) 438 U.S. 586, 597-608; *Eddings v. Oklahoma* (1982) 455 U.S. 104.)

Lockett, *supra*, discussed and approved principles set forth earlier in *Woodson v. North Carolina* (1976) 428 U.S. 280, in a different context. In *Woodson*, the United States Supreme Court held that a death penalty law that made the death penalty mandatory for first-degree murder was unconstitutional, in violation of the Eighth and Fourteenth Amendments. In a 3-justice

lead opinion, *Woodson* explained that one of the problems with a mandatory death penalty law was "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[71] (*Id*, at p. 303.) The lead opinion expanded on this principle:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." (*Id*, at p. 304.)

The lead opinion squarely concluded that these principles must be incorporated into a death penalty law in order to satisfy the requirements of the Eighth Amendment:

> "... we believe that, in capital cases, the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular of-

---

71. Two other justices concurred in the judgment on the ground that any death sentence constituted cruel and unusual punishment. Thus, it is clear that those two justices agreed with the rationale of the lead opinion, and only failed to join that opinion because they believed the Eighth Amendment required even more. (*Woodson*, *supra*, 428 U.S. at pp. 305-306, concurring opinions of Justices Brennan and Marshall.)

> fense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson, supra,* at p.304.)

Against this backdrop, *Lockett* considered a statute that precluded the sentencing body from giving independent consideration to mitigating evidence, unless that evidence supported one of three narrowly defined factors. Among the factors that could **not** be considered under the Ohio statute at issue were Lockett's "character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." (*Lockett, supra,* 438 U.S. at p. 597.) In rejecting the restrictions of the Ohio statute, the Court reached broad conclusions:

> "... we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. ... Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques -- probation, parole, work furloughs, to name a few -- and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett, supra,* 438 U.S. at pp 604-605.)

The present case differs from *Lockett* in that here, the desired mitigating evidence was precluded by a judicial ruling, not by a statute. But as *Eddings v. Oklahoma* (1982) 455 U.S. 104, made clear, the same constitutional principles are applicable to the preclusion of relevant mitigating evidence as a result of a judicial ruling. In *Eddings*, a sentencing judge in a capital case took the position that, as a matter of law, he was not permitted to consider in mitigation evidence of the defendant's family history. Disagreeing, and applying *Lockett*, the High Court explained:

> "Just as the State may not, by statute, preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> "Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence.

> Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. See *McGautha v. California*, 402 U.S. 183, 187-188, 193 (1971)." (*Eddings, supra*, 455 U.S. at pp. 113-115.)

In closing, the lead opinion gave clear instructions to the trial court: "On remand, the state courts **must consider all relevant mitigating evidence** and weigh it against the evidence of the aggravating circumstances." (*Eddings, supra*, 455 U.S. at p. 117; emphasis added.)

In *Lockett* and in *Eddings*, whole categories of mitigating evidence were precluded, while in the present case only specific proffered witnesses were barred from testifying about relevant mitigating evidence. However, in *Skipper v. South Carolina* (1986) 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669, the High Court expressly applied *Lockett* and *Eddings* in a context indistinguishable from the present one. *Skipper* concluded that evidence of good conduct in jail following arrest was among the kinds of mitigating evidence that was relevant and must be considered.

Especially relevant to the present case is the fact that, among the evidence offered by Skipper and precluded by the trial court was testimony from "one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail." (*Skipper, supra*, 476 U.S. at p. 3.) Finding such evidence should have been permitted, the High Court stated, "... a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is, by its nature, relevant to the sentencing determination." (*Id*, at p. 7.) The former

juror testimony excluded in the John Travis' case is indistinguishable from this aspect of *Skipper*.

Also highly relevant to the present issue was the *Skipper* Court's rejection of the argument that similar testimony from other witnesses rendered the precluded testimony unnecessary:

> "Finally, the State seems to suggest that exclusion of the proffered testimony was proper because the testimony was merely cumulative of the testimony of petitioner and his former wife that petitioner's behavior in jail awaiting trial was satisfactory, and of petitioner's testimony that, if sentenced to prison rather than to death, he would attempt to use his time productively, and would not cause trouble. We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. **The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses** -- and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges -- **would quite naturally be given much greater weight by the jury**." (*Id,* at p. 7-8; emphasis added.)

Similarly in the present case, the evidence John Travis was allowed to present, from Leo Charon, Dr. Cermak, and Sharon Lutman, all suffered from serious problems that would have been absent from testimony by the former juror and former alternate juror. As shown above, in the description of the evidence presented on John Travis' behalf at the retrial, the prosecutor once again heavily stressed the fact that Mr. Charon offered mitigating evi-

dence not just for John Travis, but also for his co-defendant, Danny Silveria. Dr. Cermak was questioned about the income he earned for the testimony he gave. Sharon Lutman was also questioned about the payment she received from the defense, and was forced to admit she had spent only 90 minutes with Travis, and that occurred shortly before she testified.

In contrast, if the former juror and alternate juror had been permitted to testify, the new jury would have learned that these two witnesses had received detailed information about John Travis' background and about his crimes, from various witnesses who testified at the guilt and penalty phases of the first trial. The new jury would have learned that these witnesses then took it upon themselves, with no expectation of compensation or other benefit, to visit John Travis in the jail on a regular basis, and had continued to do so over a long enough period to give them meaningful insight into the sincerity of his religious conversion, his recovery from addiction, and his desire to help other inmates. Just as in *Skipper*, the testimony of such witnesses would naturally have been given much greater weight by the jury than was apparently given to the witnesses who did testify.

Also highly relevant to the present discussion is the *Skipper* Court's analysis of the prejudicial impact of the error:

> "Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances,

> it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.
>
> "The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand, ..." (476 U.S. at p. 7-8; emphasis added.)

In the present case, as in *Skipper*, the prosecutor took full advantage of the muzzle that had been placed on crucial defense mitigating evidence. As discussed above, he repeatedly sought to detract from the credibility of the defense witnesses by his cross-examination of them. Following up on the themes made clear in the cross-examination, he did his best in argument to the jury to make light of John Travis' claims of a sincere religious conversion and addiction recovery effort: "Does reading the Bible make one Christian? Does carrying a Bible to court or having a Bible brought to court or an Alcoholics Anonymous book brought to court make one something that one isn't?" (RT 279:33406, ll. 24-28.) He also cited Leo Charon as acknowledging in his testimony that some inmates try to use religion defensively. (RT 277:33407, l. 16-18.) Thus, the prosecutor freely argued his theme that neither John Travis' religious conversion, nor his efforts to recover from drug and alcohol addiction were sincere. Instead, the prosecutor cynically urged the jurors to reject such evidence as an effort by the defense to con them, just as defense counsel had predicted.

Holmes v. South Carolina (2006) 547 U.S. 319 offers additional support for the present contention. At issue in *Holmes* was a judicially created South Carolina rule that precluded a criminal defendant from presenting evidence that a different person was guilty of the charged crime, in cases where strong forensic evidence showed that it was the defendant who was guilty. The High Court acknowledged the wide latitude that states had in determining what evidence was admissible at a trial, but such latitude must always be limited by the criminal defendant's right to a meaningful opportunity to present a complete defense, which *Holmes* explained was based on a combination of the Fourteenth Amendment Due Process guaranty and the Sixth Amendment compulsory process and confrontation clauses. (*Id.,* at p. 324.)

As several previous cases had concluded, this federal constitutional right is "abridged by evidence rules that '[infring[e] upon a weighty interest of the accused' and are '"arbitrary" or "disproportionate to the purposes they are designed to serve."' [547 U.S. 325] *Scheffer, supra*, at 308 (quoting *Rock v. Arkansas*, 483 U.S. 44, 58, 56 (1987))." (*Holmes v. South Carolina, supra,* 547 U.S. at p. 325.) *Holmes* defined "arbitrary" rules as "rules that excluded important defense evidence but that did not serve any legitimate interests." (*Ibid.*) In the present case, the trial court's determination to preclude any evidence whatsoever that came from a person who had been a juror or an alternate juror at John Travis' first penalty trial was just such an arbitrary rule that infringed on John Travis right to present a complete penalty phase defense; it was disproportionate to any perceived problem, and served no legitimate interests. The preclusion of this evidence was constitutional error.

2. No Rule of Law Precludes Relevant Testimony from a Former Juror

There simply is no rule of law that precludes calling as a witness a person who had served as a juror at an earlier trial in the same case, whether that earlier trial resulted in a verdict or in a mistrial. Of course, if a former juror is called as a witness, the testimony the former juror offers must be relevant. Moreover, it cannot merely reflect an expression of an opinion as to the juror's belief in what should be the proper verdict. If a former juror does have relevant testimony to offer, and it does not bear on that proposed witness' role as a juror or his opinion as to the appropriate verdict, as was clearly true in the present case, then there is no basis whatsoever for failing to apply the normal rules of evidence.

Those normal rules include Evidence Code section 351: "Except as otherwise provided by statute, all relevant evidence is admissible." The normal rules also include the federal Fifth and Fourteenth Amendment due process rights and Sixth Amendment compulsory process rights, allowing the defendant to present relevant evidence, to present a meaningful defense, and to have a fundamentally fair jury trial. (*Brady v. Maryland* (1963) 373 U.S. 83; *Kyles v. Whitley* (1995) 514 U.S. 419; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57-58; *Taylor v. Illinois* (1988) 484 U.S. 400; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Pointer* v. *Texas* (1965) 380 U.S. 400, 405.) In a capital penalty trial, the normal rules include the federal Eighth and Fourteenth Amendment rights to present all relevant mitigating evidence

(*Lockett v. Ohio*, *supra*, 438 U.S. 586; *Eddings v. Oklahoma supra,* 455 U.S. 104), and to reliable fact-finding. (*Beck v. Alabama supra,* 447 U.S. 625, 637, 643; *Woodson v. North Carolina supra,* 428 U.S. 280.) All of these rights were violated by the present preclusion of testimony from the former juror and alternate juror.

California's Evidence Code openly contemplates the possibility that a juror may be called as a witness. Evidence Code section 704 provides:

> "(a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.
>
> "(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, the court shall declare a mistrial and order the action assigned for trial before another jury.
>
> "(c) The calling of a juror to testify before the jury as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a juror shall be deemed a motion for mistrial.
>
> "(d) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness."

Of course, Evidence Code section 704 would not have applied in the present case because the juror and alternate juror whom the defense wanted to call were not sworn and impaneled in the trial that was underway; instead, they

had served in a prior trial in the same case. But under section 704, even currently-serving jurors are not precluded from testifying. Indeed, in that situation, if a party objects to their testimony, the remedy is not to exclude relevant testimony, but to declare a mistrial so the matter can be heard by a different jury. That, of course, would be precisely the equivalent of what John Travis' counsel proposed here, since the result here would have been a new jury in the case hearing testimony from a former juror in the same case. Obviously, then, no rule precludes what the defense proposed to do in the present case.

In *People v. Knox* (1979) 95 Cal.App.3d 420, 432-435, one juror overheard a hallway conversation between a police officer and an important prosecution witness. A second juror reported to the court that the first juror had stated, "Did you hear the officer? They framed that man." The first juror was questioned by the court and denied saying anybody was being framed, but acknowledged he overheard the officer telling the witness to keep the blame off of himself while testifying. This juror was apparently excused from the jury. The defense then wanted to call this juror as a witness in order to impeach the credibility of the prosecution witness. The trial court refused to allow this testimony.

The Court of Appeal in *Knox* first referred to Evidence Code section 704, set forth above. The Court of Appeal recognized that the section did not literally apply, since the removed juror was no longer part of the impaneled jury. Nonetheless, the Court of Appeal believed that some weight should be given to the problems addressed by section 704:

> "It would appear that some weight should be given to these considerations in the case of the testimony of a former juror as well. The jury may continue to identify with a witness who was until recently a member of their group in the same way they are presumed to identify with an active member of the jury." (*Id.*, at p. 434.)

Even that more limited concern was not a factor in the present case, since the former juror and alternate juror the defense wished to call had never been members of the **same group** as the jury hearing the penalty retrial. Instead they had been involved only in a former trial in the case, which did not involve any of the penalty retrial jurors. Thus, there was little or no danger of the present jurors identifying in this manner with the former juror and alternate juror.

Moreover, even in the situation presented in *Knox*, the Court of Appeal went on to explain, "Although a consideration, clearly the above discussion does not strictly apply to the situation in this case. The admissibility of Mr. Conley's testimony must be considered independently of his former status as a juror." (*Id.*, at p. 434.) In the present case, there was even stronger reason to consider the admissibility of testimony from the proffered witnesses independently from their status as a former juror and former alternate juror.

In *Knox*, the Court of Appeal went on to consider the trial court ruling on a straight Evidence Code section 352 analysis, finding no abuse of discretion because the prosecution witness in question was strongly impeached by separate evidence about his immunity agreement with the prosecution, and

because the probative value of the former juror's testimony was slight, since the trial court weighed conflicting accounts by the officer and the witness and believed them when they stated the officer only urged the witness to tell the truth. (*Id.*, at p. 435.)

It appears that *Knox* was wrong in concluding that, as part of an Evidence Code section 352 analysis, a trial judge can weigh conflicting testimony and decide which witness is more credible. As this Court subsequently recognized in *People v. Hall* (1986) 41 Cal.3d 826, 834, such credibility determinations are to be made by the jury, not by a court conducting an Evidence Code 352 analysis. (See also *People v. Cudjo* (1993) 6 Cal.4th 585, 610.)

In any event, it will be shown in the next section of this argument there simply was no good reason to preclude the testimony from the former juror and alternate juror, to balance against the defense need for this testimony. Thus, even if an Evidence Code section 352 analysis was undertaken in the present situation, it would have been an abuse of discretion to exclude the testimony of the former juror and alternate juror on that basis. Furthermore, the present trial judge never indicated he was relying on any Evidence Code section 352 balancing analysis in the present ruling. Indeed, the actual legal basis for the ruling was never made clear at all. (RT 207:23123-23124.)

This case is also different from *People v. Sanders* (1988) 203 Cal.App.3d 1510, where the defendant was on trial for sale of marijuana. During trial, a juror recognized the defendant as a person who had previously sold marijuana to the juror's brother. The juror reported this to the

court and was excused from further service on the jury. However, the prosecution then called the excused juror as a witness, to testify to his observations of the defendant selling marijuana. The defense objected to this testimony, but it was permitted nonetheless.

The Court of Appeal concluded in *Sanders* that the testimony by a removed juror violated the defendant's Fifth and Sixth Amendment rights to due process and to a fair and unbiased jury. In reaching this conclusion, the Court of Appeal relied heavily on *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473, in which bailiffs who had watched over the jury during a three-day period of sequestration were then called as leading prosecution witnesses. Describing the rationale of *Turner*, the Court of Appeal in *Sanders* explained:

> "The United States Supreme Court held that the witnesses' close and continuous association with the jurors deprived Turner of his constitutional right to trial by an impartial jury as guaranteed by the due process clause of the Fourteenth Amendment. Although the witnesses testified they had not discussed the case with the jurors, the court found their close relationship had a prejudicial impact on the credibility attached to the witnesses' testimony. (379 U.S. at pp. 472-473 [13 L.Ed.2d at p. 429].)" (*People v. Sanders, supra*, 203 Cal.App.3d at pp. 1513-1514.)

The *Sanders* Court found this same rationale applicable in the case before it:

> "Melanche enjoyed an intimate association with the jury panel during the two-day period of voir dire examination. The record does not reveal the amount of time spent by Melanche

> with the other jurors but the jurors conversed with one another in the halls of the courthouse prior to court sessions and at recesses. Also, it appears that Melanche was together with the other jurors in the jury assembly room prior to the day that the case was assigned for trial. Notwithstanding Melanche's testimony that he did not speak with any jurors about Sanders's subsequent marijuana sales, this case demonstrates a reasonable probability of prejudice from his testimony as a witness. The special relationship which may develop among members of a jury venire and especially members of the panel selected and sworn in a case may impermissibly permeate the jury's objectivity in the event a former juror is called as a witness. By virtue of the jury's familiarity and close association with Melanche, the jury may have attached greater credibility to his testimony." (*People v. Sanders, supra*, 203 Cal.App.3d at p. 1515.)

In the present case, in contrast with *Sanders*, there was no special relationship between the jurors hearing the penalty retrial and the former juror and alternate juror who had served on the prior trial. Had the defense been permitted to call either or both of the proffered witnesses, they would have appeared as total strangers to the seated jurors. Furthermore, the federal constitutional rights that weighed against the prosecution's use of this evidence in *Sanders* do not apply in the present case; instead, as shown at the outset of this section of this argument, Fifth, Fifth, Eighth, and Fourteenth Amendment rights to a meaningful opportunity to present his defense, and in particular to present mitigating evidence in a penalty phase trial, all weighed in favor of admission of the former juror testimony in the present case.

Notably, while *Sanders* relied heavily on *Turner*, this Court allowed bailiff testimony and distinguished *Turner* in a context that further supports

the position of John Travis here. In *People v. Cummings* (1993) 4 Cal.4th 1233, 1289-1291, the courtroom bailiff in a capital trial overheard the defendant make incriminating statements and was subsequently permitted to testify regarding those statements. This Court distinguished *Turner* because the bailiff was not involved in the investigation of the crimes and was not identified as a witness prior to the trial. As *Cummings* emphasized, the bailiff was not a principal or key witness and his association with the jurors had been minimal. Also, he had been relieved of courtroom duties when he became a witness, and the jury was admonished not to give his testimony any greater weight simply because he had been a bailiff.

In the present case, the proffered witnesses had **no** association with the present jurors at all, making the case for admissibility even stronger than in *Cummings*. Further, an admonition to give no greater weight to the testimony of the proffered witnesses just because they had formerly been a juror and an alternate juror in the present case would have been just as effective here as it was in *Cummings*.

In sum, no rule of law precludes testimony from a former juror. California law even contemplates the possibility of testimony from an actual juror, and the cautionary concerns identified in those circumstances do not apply to the present context. The United States Supreme Court has recognized the application of the federal constitution in parallel circumstances. The reasoning in the cases that have considered jurors as witnesses, or closely analogous situations, supports the admission of the evidence offered in the present case. It was constitutional error to preclude it.

3. None of the Reasons Set Forth by the Trial Court, for Precluding Testimony from the Former Juror and Former Alternate Juror, Withstand Analysis

As shown in preceding sections of this argument, based on federal constitutional principles as well as state law, the testimony the defense sought to elicit from a former juror and a former alternate juror was the type of testimony that has clearly been held admissible in capital penalty trials. No rule of law or policy precluded the use of a former juror or former alternate juror as a witness, as long as they had relevant testimony to give. Thus, as a **general** proposition, the testimony should have been permitted in this trial. In this section of this argument, it will also be shown that no **specific** reason identified by the trial court for precluding these witnesses, withstands analysis.

The trial court's primary concern in the present case appears to have been the fear that testimony from prior jurors would necessarily disclose to the jury that there had been a prior penalty trial which had resulted in a hung jury. Even assuming the general desirability of not disclosing the fact of the prior penalty trial (a proposition not at all clearly established in the caselaw), and assuming further that in some cases there is good reason not to explore that issue with the new jury being empanelled, it would seem next to impossible to avoid, juror speculation that the reason they had been called upon to determine only the penalty was that guilt had already been determined. Indeed, even aside from such all but certain speculation, it was obviously go-

ing to be nearly impossible to prevent the present jury from realizing there had been a prior penalty trial.

As defense counsel pointed out, witnesses would be called who provided no testimony that was relevant to the guilt issues. These witnesses would certainly be asked about testimony they had given previously in this case. Even if the questions were carefully phrased to refer only to prior testimony, rather than to a prior penalty trial, jurors would certainly understand that some of the witnesses could have only testified at a prior penalty trial.[72] (RT 197:22657-22660.)

Beyond its fear that calling former jurors as witnesses would lead to the disclosure of the prior penalty trial, the trial court engaged in unwarranted speculation about the harm that could be caused. First, the court expressed concern that the results of the prior penalty trial would somehow be revealed. Nothing in the record justified that concern. Counsel had no proper reason to make any inquiry about the inability of the two prior juries to reach unanimous verdicts. Certainly no attorney had made any offer of proof as to

---

72. For example, James Park, a long-time administrator with the California Department of Corrections, testified about the classification of inmates sentenced to life without parole, expressed his opinion that if Danny Silveria received a sentence of life without parole, he would not be a significant security risk or danger to staff or other inmates, and he would conform well to the prison routine. (RT 159:15722-15745.) Obviously such testimony had nothing to do with guilt phase issues. Indeed, in cross-examining Park, the prosecutor made it clear that Park **only** testified in penalty trials. (RT 260:30826-30828; see also RT 260:30750-30751.) Before that, it had been made apparent that Park had testified previously in the present case. (See RT 260:30752. ll. 14-27.)

how such information might be relevant to any disputed issue. Thus, all counsel and the juror-witnesses could have easily been instructed to avoid any reference to the prior results. That was the method used by the court in several other instances where one side or another feared that something prejudicial might be inadvertently revealed, and no explanation was ever given why that would not suffice in the present situation.

The trial court next offered even greater speculation in predicting that the prosecutor would respond to the former juror witnesses by rebuttal testimony from other former jurors who had voted for death in the first trial. The court described this as "intolerable and completely improper." (RT 202: 23124.) Once again, no suggestion was made by anybody as to how such rebuttal evidence could have been properly offered. The former jurors would have given defense testimony regarding the relationships they formed with John Travis after their jury service ended. Other former jurors who had voted for death did not form such relationships, and it is not at all apparent what they might have had to say that could have constituted proper rebuttal, let alone have any relevance. At the very least, before depriving the defense of the right to call crucial witnesses, the trial court should have elicited some credible theory from the prosecutor to support the "parade of horribles" cited as reasons for excluding the testimony.

Speculating even further, the trial court next opined that once the present jury somehow learned the results of the prior penalty trial, it would then "be tempted to and could actually abdicate its own duty in favor of a prior jury's findings, even though there was a mistrial." (RT 202:23124.) This fear

was truly puzzling. Perhaps a jury could be influenced if it learned that a prior jury heard all the same evidence and came to a unanimous decision one way or the other. However, it is not at all clear how the present jury could abdicate its own duty after learning that a prior jury had been unable to reach a result. It is pure conjecture to suppose any jury would abdicate its duty for that reason.

In any event, if the result of the prior penalty trials did somehow get revealed, a commonly invoked remedy was available. The court certainly could have fashioned an admonition to disregard that information and reach an independent conclusion based only on the evidence properly received during the penalty retrial.

Indeed, the trial court had earlier taken a totally contrary position when the defense expressed concerns about potential publicity regarding the death sentence for co-defendant Christopher Spencer. Spencer had been tried separately and a death sentence had been pronounced just a few weeks before jury selection began in the present penalty retrial. Counsel for both John Travis and Danny Silveria sought a delay in Spencer's sentencing, to prevent the inevitable media coverage that would occur shortly before jury selection was to get underway. The court saw no cause for concern and expressed confidence that voir dire would take care of any potential problem. (RT 195:22500-22505.) It would have done well to recall its perspective on the effect of the Spencer jury's verdict when taking up the problem at hand.

Furthermore, soon after Spencer was sentenced to death, both Danny Silveria and John Travis sought a change of venue because an interview with

the prosecutor had been broadcast on a local radio station, wherein the prosecutor openly referred to the Spencer death verdict as just, and as the only appropriate verdict in the case. (See CT 16:3993-4000; RT 197:22709-22716.) The change of venue motion was withdrawn, due to the lack of any available funding for a jury survey, but the court again saw no real problem and was confident the matter could be adequately addressed in voir dire.[73] (RT 197:22725-22733.)

Notably, after substantial defense evidence regarding the difficulties that jurors would have giving individualized consideration to John Travis and Danny Silveria if their penalty was determined by a single jury, the court expressed confidence that, due to the severity of the penalties at issue, jurors would certainly follow instructions regarding the need for individualized consideration. (RT 207:23581-23583; see also the separate argument in this brief pertaining to the denial of the request for a severance or separate juries for the penalty retrial.) This confidence in the ability of jurors to follow admonitions simply cannot be reconciled with the court's unsupported fear that knowledge of the inability of a prior jury to reach a verdict would cause the present jury to abdicate its duties.

---

73. It is true that some prospective jurors were excused because of their knowledge of the Spencer death sentence. (See, for example, RT 219:25390.) However, the danger that other jurors would not recall the Spencer verdict or connect it with the present case until after jury selection was complete was at least as great as the danger that the present jury would find out the result of the prior penalty trials, and would be influenced by that information.

In sum, John Travis was deprived of a variety of federal constitutional rights, discussed earlier in this argument, when he was not allowed to present crucial evidence in mitigation. All that was balanced against his various constitutional rights was speculation about events that were unlikely to occur, and which could have been rectified by proper admonitions if they did occur. Indeed, the defense urged the court to have the former jurors examined outside the presence of the jury in an Evidence Code section 402 hearing, to determine whether any of the expressed concerns were a demonstrable reality. (RT 201:23014.) This suggestion was ignored. The end result was a completely arbitrary exclusion of important defense evidence that cannot be justified. (See *Holmes v. South Carolina, supra,* 547 U.S. 319, discussed earlier in this argument.)

John Travis' position is two-fold and simple. In view of the importance to the defense of the two witnesses' testimony, and the multiple federal constitutional rights supporting admission of the evidence, the reasons cited by the trial court were "arbitrary" and "disproportionate to the purposes they are designed to serve," and served no "legitimate interests." (*Holmes v. South Carolina, supra,* 547 U.S. at p. 305.).

But even if the reasons cited by the trial court, separately or cumulatively, could ever overcome the strong defense need in the present case, there is nothing in the present record to pose a demonstrable reality that the problems predicted by the judge would actually occur. To the contrary, the court throughout relied only on gross speculation. Several alternatives available to the judge were inexplicably rejected or disregarded. He could have, but

failed to, accept the defense suggestion to have the witnesses questioned first outside the presence of the jury. Furthermore, the trial judge failed to even require a meaningful offer of proof from the prosecution, to demonstrate some relevant basis for his threat to call other former jurors in rebuttal, or for inquiring into the numerical result of the prior penalty jury. Under such circumstances, whatever grounds may have justified the court's concerns in disallowing the testimony of the former juror and alternate juror, on this record in which the defense need for the evidence was great, the federal constitutional rights supporting the right of the defense to present such evidence should have prevailed.

4. John Travis Was Prejudiced by the Preclusion of this Highly Relevant Evidence

As shown above, the erroneous ruling precluding the testimony of the former juror and former alternate juror unquestionably implicated several federal constitutional rights. If the present jury had heard the testimony of these important defense witnesses, there is at least a reasonable possibility that one or more of the present jurors would have concluded that John Travis' life should be spared. Thus, the error cannot be declared harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Therefore, the error must be deemed prejudicial.

The prejudice to John Travis resulting from the erroneous preclusion of testimony was great. As set forth in detail earlier in this argument, the de-

fense had a strong and legitimate need to persuade the jury that John Travis was sincere in his claim that he had seriously confronted his addiction to drugs and alcohol, that he was making remarkable progress in overcoming the problems and accepting responsibility for the failures in his past, and that he could provide support and insight to other inmates with addiction problems, if he was allowed to spend the rest of his life in prison. Had the disallowed witnesses been permitted to testify, the present jury would have learned that a former juror and alternate juror, who were both exposed to all of the details regarding John Travis' crime and background, had formed a relationship with John after the conclusion of the first trial, had visited John regularly and had concluded that John was sincerely determined to change his life and overcome the negative impacts of his drug and alcohol addiction. (RT 201:23000-23001; see also the more detailed letter from the former alternate juror, at CT 23:5731-5733.)

John Travis was not asking the jury to excuse his conduct in participating in the present homicide, nor was he seeking his freedom. He was simply asking the jury to recognize that he was finally in a position to lead a useful and meaningful life, even if it was all to be spent as a state prison inmate.

The evidence showed that aside from the present single-victim homicide, John Travis had only one prior felony conviction (burglary), and had no prior acts involving criminal force or violence or attempted or threatened force or violence. This was not a case that strongly called for a sentence of death. A verdict of life without the possibility of parole was a very realistic

option in this case. (See also Argument XII, later in this brief, for a general discussion of principles regarding prejudice that apply to all of the penalty phase errors set forth in this brief.)

The witnesses who did testify on behalf of John Travis included his mother and sister, who had an obvious bias in his favor. The witnesses also included Sharon Lutman, whose personal contact with John was minimal, and Dr. Cermak, whose personal contact with John was also limited. Correctional officer witnesses also had only limited contacts with John. The prosecutor made very strong efforts to persuade the jury that Sharon Lutman, Dr. Cermak, and the correctional officer witnesses could have all been fooled and/or manipulated by a man desperate to save his own life. While the prosecutor offered no evidence whatsoever to show that such manipulation was a reality in the present case, he was quite skillful in constantly urging it as a possibility.

The only witness who had substantial and continuous contact with John Travis over a long period of time, and who was neither related to John nor compensated for their testimony, was Leo Charon. While Mr. Charon's testimony on John's behalf was unwavering, he was harshly attacked by the prosecutor because he also gave strong testimony on behalf of Danny Silveria. Furthermore, the fact that Leo Charon was a recovered alcoholic himself, and that he had chosen to make a career of working with jail inmates, would have also caused jurors to conclude he might be biased in favor of jail inmates.

In sharp contrast, the jurors would have had little reason to distrust the testimony of a former juror and former alternate juror who had voluntarily taken it upon themselves to befriend John Travis. These were people who had no history of being sympathetic to persons like John Travis, who were not being paid for aiding John Travis' defense, and who had no apparent motive to favor John. Indeed, one had been the foreperson of the jury that found John Travis guilty of first-degree murder with special circumstances.[74]

Clearly, either or both of these disallowed witnesses would have added substantial strength and convincing force to the defense position in the penalty phase. Under these circumstances, as noted above, the erroneous ruling precluding the testimony of these witnesses cannot be declared harmless beyond a reasonable doubt. The error must be deemed prejudicial. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Indeed, in *People v. Gonzalez* (2006) 38 Cal.4th 932, 960-962, this Court found prejudicial error where there had been a prior hung jury, and trial court error at a penalty retrial caused the defense to forego mitigating evidence similar in nature to the evidence precluded here. In *Gonzalez*, at the first penalty retrial, the defense presented testimony by a priest who ex-

---

74. In her juror questionnaire, the former actual juror had voiced her opinion that crime stemming from drug use was out of hand. She believed that "Regardless of background or excuses, each one of us is ultimately responsible for our own actions." (CT 25:6286.) She had no strong beliefs for or against the death penalty. (CT 26:6304-6305.) The former alternate juror believed the death penalty was a necessity in some cases. (CT 29:6889-6890.)

pressed the opinion that a twenty-year-old person, who had been a gang member and who was convicted of first degree murder, was nonetheless capable of positive change if allowed to serve a sentence of life in prison without possibility of parole. After a hung jury, the defense desired to present the same witness at the retrial, along with another priest who worked with prison inmates and had seen positive changes in inmates serving life sentences or awaiting execution. The additional priest would have also testified that he had worked with the defendant and felt he could change for the better in prison.

The defense sought discovery of the rebuttal evidence the prosecution would seek to present if these witnesses testified. The trial court erroneously refused to order such discovery, and the defense then made a tactical decision not to call these witnesses. This Court concluded there was a reasonable probability these witnesses would have been presented if the defense had received discovery about any rebuttal the prosecution would have offered. Further, this Court found a reasonable possibility that the verdict would have been different if these witnesses had been presented:

> "Although the crime here was egregious, a death verdict was not a foregone conclusion. Indeed, the first penalty trial ended with a hung jury. The aggravating evidence of defendant's other crimes (possession of an assault weapon, two assaults on inmates, and possession of a shank in jail), although serious, was not overwhelming. Father Horan's proffered evidence regarding the ability of persons to change was not very compelling, but defendant presented similar evidence in mitigation at the first penalty trial and obtained a hung jury. The main difference

> between the two trials was that defendant presented mitigating evidence at the first trial that he did not present at the second trial. Under the circumstances, we find it reasonably possible the verdict at the second trial would have been different had defendant presented similar mitigating evidence at the second trial." (*Gonzalez, supra,* at p. 962.)

Similarly here, while the crime was serious, a death verdict was not a foregone conclusion. The first penalty trial ended in a hung jury. The aggravating evidence of other crimes was no more serious than in *Gonzalez*. The proffered evidence here was at least as helpful, if not more helpful, than the evidence at issue in *Gonzalez*. Here there were two major differences between the two penalty trials. First, the evidence of a prior attempted escape that was set forth in great detail in the first trial, including testimony that Mr. Travis conspired with others to kill a jail guard, was mentioned only briefly at the retrial, without any reference to intended violence. This certainly increased the likelihood of a more favorable result at the retrial. But the other major difference was that Leo Charon's testimony about Mr. Travis and Mr. Silveria was given separately, to separate juries, at the first trial, but would be given to a single jury at the retrial, allowing the prosecutor to fully exploit the fact that Mr. Charon was giving glowing testimony about both defendants at the same time. Under these circumstances, it was reasonably possible that the verdict at the retrial would have been more favorable if the defense had been allowed to present the testimony of two additional witnesses, with no apparent biases, who would have greatly corroborated the testimony of Leo Charon.

Finally, even if a lesser standard could be applicable in these circumstances, the closeness of the case in regard to penalty still leads to the conclusion that the arbitrary exclusion of this important defense evidence cannot be deemed harmless.

II. THE ERROR IN PRECLUDING TESTIMONY AT THE PENALTY RETRIAL BY FIRST TRIAL JURORS WAS COMPOUNDED BY PLACING UNREASONABLE CONDITIONS ON PROFFERED ALTERNATIVE TESTIMONY BY TRIAL COUNSEL

A. Introduction

In the preceding argument in this brief, it was shown that the trial court erroneously precluded testimony from a former juror and former alternate juror, who would have provided strong evidence that John Travis was sincere in his post-arrest efforts to overcome his addictions to the use of drugs and alcohol. As explained next, the Court's rejection of trial counsel's proffered testimony, in the alternative, compounded that error.

Apart from the former juror and former alternate juror, there was only one other non-relative who had met with John Travis on a regular basis while he was in jail awaiting trial, and who could testify to John's growing maturity and to the sincerity of his recovery efforts. That person was trial counsel himself. Once again, the court reacted viscerally, starting from an absolute position that had to be abandoned when the court realized it was without legal support. Eventually the court conceded it could not prevent counsel from testifying on behalf of his client, but the court imposed a series of burdensome conditions on any such testimony. Those conditions made it impossible for counsel to proceed in an effective manner, requiring him to withdraw his plans to testify, but making clear he was doing so only because of the unreasonable conditions the court had required.

It will be shown in this argument that the trial court's unreasonable restrictions on trial counsel's being permitted to testify were improper and unconstitutional. As a consequence of that error, the defense was once again deprived of vital mitigating evidence that bore directly on the jury's penalty determination – evidence necessary to supplement the testimony of professionals regarding their opinions of John Travis' progress and his sincerity. This proffered evidence was of an entirely different nature than any other evidence that John Travis could present, and was and essential addition to the effectiveness of the expert testimony. Once again, a series of federal constitutional protections were implicated in this erroneous ruling.

B. Factual and Procedural Background

Most of the factual background necessary for the resolution of this issue is fully set forth in the factual background portion of the preceding argument in this brief, at pages 144-150. As explained fully in the previous argument in this brief, the trial court erred in ruling that a former juror and former alternate juror could not testify. That ruling deprived the defense of testimony regarding the relationships the former juror and alternate juror developed with John Travis, and their beliefs that he was quite sincere in his determination to overcome his drug and alcohol addiction. Faced with that adverse ruling, counsel for John Travis tried a new approach to the problem.

On December 18, 1996, while jury selection was underway, counsel for John Travis noted that since the court would not let him call jurors from the first trial as witnesses, the only other person who could supply the

needed testimony was defense counsel himself. Thus, he intended to testify. No one other than the former jurors, counsel, and Leo Charon had visited John Travis consistently over a long period. Counsel believed that Leo Charon's effectiveness as a witness had been compromised by the ruling consolidating the two defendants for a penalty retrial before a single jury.[75] (RT 211:23965-23966.) Defense counsel added that funding was not available for every expert he needed. As a result, he might also have to qualify himself as an expert witness in the area of alcohol and chemical dependency. (RT 211:23967.)

The prosecutor immediately objected to defense counsel calling himself as a witness, arguing that if counsel was to be a witness, he would have to withdraw as John Travis' attorney for all further proceedings. The prosecutor believed that was absolutely unfeasible at the stage the trial had reached. (RT 211:23968.) In response, defense counsel reminded the court that this problem had resulted from the consolidation of the defendants for the retrial, a situation that was not the fault of the defense. Counsel also noted that John Travis was willing to waive the attorney-client confidentiality, if counsel were allowed to testify on his behalf. The court instructed counsel to supply briefing on the matter. (RT 211:23969-23970.)

On December 31, 1996, counsel supplied the briefing the court had requested, filing a Motion to Allow Counsel to Testify as Both Character

---

75. The possibility of consolidating the penalty trials had been under discussion for some time, but the actual ruling had not occurred until December 10, 1996. (RT 207:23581-23584.)

Witness and Expert Witness or to Allow Counsel to Withdraw. (CT 18:4540-4544.) In that motion, counsel reiterated that the court had denied the right of the defense to call a former alternate juror as a character witness. The motion also noted that, in ruling on another motion, the court had ruled that the concept of "mercy" could not be mentioned by any witness, would not be mentioned in the instructions, and could not be mentioned in argument by counsel. (See Argument III, later in this brief, contending that ruling was also error,) In the face of these two rulings, counsel believed that the court had gutted John Travis' penalty phase defense. (CT 18:4540.)

Counsel next reiterated his conclusion, based on remarks made to him by first trial jurors, many of whom questioned the credibility of John Travis' evidence that he was in recovery from alcohol and drug addiction, and that he had found a new relationship with God. Counsel once again summarized the testimony the former alternate juror would have given. Next, counsel referred to Justice Charles Campbell, a judge from Texas who had testified in support of the unsuccessful defense effort for a severance or for separate juries for the two defendants in the penalty retrial. (CT 18:4540-4541.)

Justice Campbell had testified at an in limine hearing on December 3, 1996, the day after the court had granted the prosecution request to bar any former jurors as witnesses. Justice Campbell had been an elected County Attorney and District Attorney in Texas, and had prosecuted a number of capital cases. He had also worked in the Texas Attorney General's office, handling more capital cases on appeal. He had then served for 12 years on the Texas Court of Criminal Appeals, which had original jurisdiction over capi-

tal appeals. He had reviewed 250-300 capital cases on direct appeal, and many hundreds more in habeas corpus proceedings. (RT 203:23134-23141.)

Justice Campbell, whom the trial court found to be qualified as an expert witness on capital trials, testified that his experience had convinced him that it was very difficult for capital defendants to receive the individual consideration of jurors if they were tried jointly. Justice Campbell offered a number of reasons to support his analysis and conclusions. (RT 203:23157-23182.) In his judgment, because John Travis and Danny Silveria had relatively similar moral culpability in the commission of the present murder, it was especially important for each of them to try to differentiate themselves from the other in some alternative way. That would be very difficult to do, Justice Campbell observed, because they also had similar backgrounds. (RT 203:23173-23182.) **He specifically agreed that presenting the same witness on behalf of each defendant, testifying to the sincerity of each defendant's religious conversion, would only increase the likelihood that the jury would fail to differentiate between the two defendants.** (RT 203:23178-23179.)

In the motion, defense counsel described Justice Campbell as having testified that the use of Leo Charon as a witness for both defendants would result in the dilution of Reverend Charon's testimony, since the testimony would sound redundant when comparable comments were made on behalf of each defendant. While counsel believed that Charon would be telling the truth on behalf of each defendant, he also expected the prosecutor to repeat his first trial tactic of sarcastically and cynically impugning the reverend's

credibility simply because he reached similar conclusions about each defendant. (CT 18:4541.)

It appears that defense counsel's motion may have confused the testimony of Justice Campbell with testimony given by Charles Gessler, another witness who testified in regard to the same severance/consolidation motion. Mr. Gessler had worked in the Los Angeles County Public Defender's Office for 31 years. He had been involved in trying many capital cases, and in supervising many other attorneys in the office who also tried capital cases. (RT 203:23208-23211.) He expressed conclusions similar to those expressed by Justice Campbell, regarding the difficulty of obtaining individualized consideration from a single jury that was simultaneously deciding the fates of two or more capital defendants.

Specifically in regard to the use of Leo Charon as a witness for both defendants in front of a single jury, Mr. Gessler stated that the force of Mr. Charon's testimony would be greatly diminished because it would lose its uniqueness. If the jury concluded that one of the claimed religious conversions was phony, they would almost certainly conclude the other was as well. Mr. Gessler would personally not want to use that type of witness for each of two defendants. Indeed, in one famous capital trial in which he participated (the trial of the Menendez brothers, for the murder of their parents), he decided not to let such a witness testify on behalf of his own client simply because of the problems it would cause in the brothers' joint penalty trial. (RT 203:23250-23251.)

Defense counsel's motion to allow his own testimony then went on to note again that, other than the disallowed former jurors and Leo Charon, John Travis' only other consistent visitor was counsel himself, who had met regularly with John for nearly six years. The discussions between counsel and John Travis went well beyond John's legal defense, and also included discussions about religion and about drug and alcohol recovery. Indeed, defense counsel was also a certified alcohol and drug counselor and had undertaken that role with John. Counsel believed that without either of the former jurors as witnesses, the only meaningful defense John would receive would require counsel himself to testify as a character witness, even if it meant removing him from the case and appointing new counsel to defend John Travis. (CT 18:4541.)

The motion then went into a discussion of legal authority allowing counsel to become a witness, as long as the client consented. Counsel acknowledged that some authority suggested counsel should withdraw from representing the defendant in such circumstances, but the cases arose in different contexts and it was unclear whether they would apply in the present circumstances. (CT 18:4542.)

The prosecutor filed a responsive pleading a month later, on January 31, 1997. The response referred to potential ethical problems and suggested that similar testimony could be presented by other witnesses. The prosecutor also expressed concerns about his perceived need to invade confidential attorney-client matters, if he were faced with the need to cross-examine defense counsel. (CT 18:4631-4636.)

The Motion to Allow Counsel to Testify was heard on February 5, 1997. Defense counsel repeated his argument that he was the only person who had had consistent contact with John Travis over the preceding six years. He also had knowledge of the addiction recovery process that John Travis was going through. Counsel clarified his intended testimony, explaining that it would cover the sincerity of John's recovery from alcohol and drug abuse, and the sincerity of John's remorse regarding the Madden homicide. Counsel did not intend to testify regarding the sincerity of John's religious progress. Instead, Leo Charon would still be called for that more limited purpose. (RT 233:27293-27294.)

Counsel repeated his earlier representation that his client would waive attorney-client privilege, so the prosecutor could fairly cross-examine counsel. The judge then asked counsel whether he would be turning **all** his files over to the prosecutor. The judge suggested that notes on **all** of counsel's conversations with John Travis over the **entire six-year attorney-client relationship** would be discoverable by the prosecution. Defense counsel countered that his testimony would not cover the entire attorney-client relationship. He would be testifying only about his observations of John Travis over the six-year period, what John was like at the beginning and how he had changed. Counsel was willing to turn over all notes of conversations he had with John Travis that would be relevant to such topics. (RT 233:27294-27297.)

The court stated "I'm not allowing you to even think about testifying unless I get a **full waiver** from your client." (RT 233:23297; emphasis

added.) Counsel replied that guilt and innocence were no longer at issue. (RT 233:27297-27298.)

In response, the prosecutor contended that the basis of any opinion that counsel might express about his client would make discoverable **any prior communications between defense counsel and John Travis over the last six years**, including notes that were taken. If no notes existed, **the prosecutor believed he was entitled to discovery of defense counsel's personal recollections of such discussions**. (RT 233:27299-27300.) The prosecutor also contended he should be able to rebut counsel's testimony by calling himself or another attorney employed by the District Attorney's office, as an expert witness on capital case tactics. According to the prosecutor, such a witness should be allowed to testify that it was a frequently used tactic in capital cases for defendants to present evidence of an abused childhood, and about how they had now found God and entered into recovery programs. (RT 233:27301-27302.)

Counsel for co-defendant Silveria also argued, agreeing that John Travis had the right to call his counsel as a witness. However, he believed Danny Silveria would be prejudiced by such testimony, since his counsel would not be personally vouching for him. Thus, he would suffer by comparison. Therefore, if John Travis' counsel were allowed to testify, counsel for Danny Silveria believed there should be a severance of defendants. (RT 233:27303-27304.)

Defense counsel then asked if he could clarify something, but the court refused to allow him to be heard. (RT 233:27304.) Instead, the court

set forth what it termed guidelines, to think about until the following Monday.[76] The court believed any testimony by defense counsel would be "completely foolish," but the court conceded it appeared to be ethically permissible. The court voiced strong warnings that if defense counsel testified and did not come off credibly as a witness, he would not be credible as counsel when he argued the defense position to the jury. The court then made clear that any testimony by defense counsel would be only as an expert certified alcohol and drug counselor, regarding the recovery process. He would not be permitted testify regarding religion, **nor could he testify as a character witness**. (RT 233:27304-27305.)

The court reiterated that there would "have to be a **complete waiver** by Mr. Travis of all attorney-client privileges." (RT 233:27306; emphasis added.) As for discovery, the court stated that "**your whole file, boxes, whatever it is**, be turned over to the Court for an in camera hearing, ..." (RT 233:27306; emphasis added.) Also, the court added, the prosecutor would be allowed to request an interview of defense counsel. If an interview was sought and was refused, the prosecutor would be allowed to bring that up in evidence and in argument. Furthermore, defense counsel would not be permitted to argue his own credibility. The court also asked who would conduct the direct examination of defense counsel. Finally, there was to be no delay

---

76. The court repeatedly referred to its statements as guidelines, not rulings. However, the court failed to explain the distinction, as it set down a series of restrictive "guidelines." (RT 233: 27304-27306.)

whatsoever in the opening statements of the penalty trial, scheduled to begin eight days later, on February 13, 1997. (RT 233:27306-27307.)

When the matter came on for a final ruling on February 11, 1997, defense counsel explained that he had concluded that, in light of the restrictions the court had placed against moral and character evidence, counsel would not be an effective witness for John Travis. Defense counsel believed the precluded moral and character evidence was necessarily included within recovery evidence. Counsel's intended purpose had been to substitute his testimony for the moral and character testimony that would have been offered by the former alternate juror, who had also been precluded. But if counsel's testimony was to be limited to testimony about the recovery process, with no assessment of John Travis' progress or sincerity, that limited testimony could be given by a different witness, although such a witness would be hampered by the lack of prior knowledge of John Travis. Counsel stressed that he was **not withdrawing the motion**. Instead, he was simply not going forward under the restrictions imposed by the court. (RT 235:27391-27393.) The discussion closed with the court expressing its view that, in light of the comments it had made the previous week, it believed the defense had made the right decision. (RT 235:27395.)

C. No Rule of Law Precluded Counsel's Effort to Substitute His Own Testimony for the Precluded Testimony

As the result of the present ruling and the ruling that precluded testimony from a former juror and former alternate juror, John Travis' penalty retrial was much like the first penalty trial, with heavy reliance on the testimony by Leo Charon and Dr. Timmen Cermak, supplemented with new testimony from Sharon Lutman. (See pp. 125-132, *supra.*) The record of the first penalty trial reflects that the prosecutor exploited every possible weakness, real or imaginary, in the testimony of these witnesses. (See pp. 146, 159 *supra.*) Those problem areas could have been overcome, had counsel been permitted to present the alternative testimony from the former juror and alternate juror, or from counsel himself. However, the adverse rulings by the trial court, individually and in combination, left the Travis defense helpless to combat those problems.

As explained in the preceding argument (see pp. 138-193, *supra*), the defense reasonably perceived a strong need to produce testimony about John Travis' progress in jail, and the sincerity of his efforts, from witnesses who had experienced direct personal contact with him over an extended period of time. While Dr. Cermak had given impressive testimony about John Travis' efforts, the prosecutor had made great efforts in the first trial to imply that the doctor could have been fooled by a desperate and manipulative defendant trying to save himself from execution. The prosecutor was expected to, and did, repeat this tactic in the retrial. Leo Charon had also given impressive

testimony on behalf of John Travis, and had the advantage of more personal contact over an extended period of time. However, the impact of his testimony was weakened by the fact that he had also given testimony on behalf of Danny Silveria. As explained by expert motion witness Charles Gessler, Charon's testimony would be weakened even further in a consolidated trial, because the same jury would hear his testimony on behalf of each defendant.

Notably, the prosecution produced no significant evidence that Dr. Cermak had, in fact, been taken in by a manipulative inmate, or that Leo Charon was, in fact, unreliable because he had chosen to work inside the jail and had found good things to say about both defendants. All the prosecutor had to do was raise such doubts, however, and the defense mitigating evidence would be seriously weakened. The defense concern was not only justifiable, but very real, in light of counsel's explanation that first trial jurors who had been on the side voting for death for John Travis had directly expressed the concern that he might have been insincere in his claimed recovery efforts.

Testimony from the former juror and alternate juror would have been the best way to solve this problem for the defense. These witnesses were not paid defense experts and had no apparent reason for being biased in favor of John Travis. Their testimony would have added a powerful boost to the defense case in mitigation. An erroneous ruling precluded that important testimony and left a gaping hole in the defense position. While testifying himself in behalf of his client was not counsel's first choice, it was the only reasonable course left when the court-ordered consolidation further neutralized Leo

Charon as a favorable defense witness, and the erroneous ruling precluded the testimony of the former juror and former alternate juror.

Counsel had reached the decision to testify himself reluctantly because there are well-known reasons to avoid giving such testimony: "An attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 912 [cert. den.,439 U.S. 981 (58 L.Ed.2d 652, 99 S.Ct. 568)].) As *Comden* stated:

> "The testimony might at least kindle a reasonable doubt in the mind of a reasoning juror. The attorney would attempt to shift between the sworn objectivity of the witness and the duty-bound partisanship of the advocate. Because of his professional and official role, his sworn testimony would lay silent claim to a heightened degree of credibility. He would thrust upon his opponent a sticky choice between vigorous cross-examination of his professional colleague and abdication of his own professional responsibility. After cross-examination the witness would doff his hat as witness, pick up his hat as advocate and stand before the jury in summation. The synthetic change of hats would hardly interrupt the flow of impressions and influences emanating from him as a unitary human being. In his role as advocate he would assure the jurors of his own veracity as witness. In justice to his client, he could do no less. His opponent would then be driven to attack his credibility as a witness. In justice to his client, the opponent too could do no less. (*People v. Smith* (1970) 13 Cal.App.3d 897, 908.)"

Nonetheless, "... an attorney acting as counsel in a case is as competent to testify as any other witness. (*People v. Stokley*, 266 Cal.App.2d 930,

936, cert. den., 395 U.S. 914; *People v. Burwell*, 44 Cal.2d 16, 38; *People v. Vacca*, *supra*, 185 Cal.App.2d at pp. 128-129.)" (*People v. Guerrero* (1975) 47 Cal.App.3d 441, 443-444.) "[R]eason suggests that if a party is willing to accept less effective counsel because of the attorney's testifying, neither his opponent nor the trial court should be able to assert this choice against the party without clear evidence of detriment to the opponent or injury to the integrity of the judicial process." (*Comden v. Superior Court, supra,* 20 Cal.3d at p. 918.) This critical point was emphasized in *Comden*:

> "Situations occur where forced relinquishment of the advocate's role may work undue hardship on the client. '[A] lawyer [should] not testify in litigation in which he is an advocate unless circumstances arise which could not be anticipated and it is necessary to prevent a miscarriage of justice. In those rare cases where the testimony of an attorney is needed to protect his client's interests, it is not only proper but mandatory that it be forthcoming.' (*Schwartz v. Wenger* (1963) 267 Minn. 40 [124 N.W.2d 489, 492], cited in American Bar Assn., Code of Professional Responsibility, supra, p. 22.) (*People v. Smith*, *supra*, 13 Cal.App.3d at p. 909.)"

The present case was just such a rare case. As explained above, after exhausting all other possibilities, as a direct result of the trial court's rulings, the defense found itself in a position where there was no adequate substitute remaining for presenting counsel's own testimony. Moreover, the problem was not attributable to John Travis or his attorney. This was not a problem that could have been foreseen sufficiently in advance for counsel to have withdrawn at a time when it would have caused less disruption in the upcom-

ing retrial. First, if the retrial had remained severed to the extent of separate juries, as had been the case in the first trial, then there would have been less of a need to supplement the testimony of Leo Charon. Second, counsel reasonably expected he would have been able to present the testimony of the former juror and former alternate juror, and should not be faulted for failing to foresee the court's erroneous ruling, on the eve of retrial, foreclosing that testimony. Third, even if the problem had been anticipated as soon as the first penalty trial ended in a hung jury, there would have still been a substantial problem in the withdrawal of the sole attorney for John Travis, who had defended him on this case for five years at the time of the mistrial.[77] The necessity for counsel's testimony, in these circumstances, was "mandatory," just as *Comden* envisioned. (*Comden, supra,* 20 Cal. 3d at p. 918.)

Another case strongly supporting counsel's position is *People v. Goldstein* (1982) 130 Cal.App.3d 1024. There, the defense attorney learned, on the day that trial was to commence, that a defense witness had recanted expected testimony on the defendant's behalf, and had agreed to testify for the prosecution. Counsel moved to withdraw and be permitted to testify to prior inconsistent statements that the recanting witness had made directly to counsel. The Court of Appeal found no error in refusing to allow counsel to

---

77. In any event, if withdrawal of counsel from further representation was needed in the present case, counsel had offered to permit that in order to avoid depriving his client of essential testimony. It was the prosecutor who voiced strong objection to such a withdrawal at a late stage of the proceedings.

withdraw at that late stage of the proceedings. (*Id*, at p. 1030.) Nonetheless, the Court of Appeal found a denial of due process in disallowing such important defense evidence. (*Id*, at pp. 1030-1032.) The *Goldstein* court observed that the case before it involved, "an attorney who, without fault or purpose on his part, after a trial's commencement found it to be in his client's interest that he testify on the client's behalf." (*Id*, at p. 1031.) The same was true in the present case.[78]

In addition to caselaw supporting the presentation of testimony by counsel, when needed, the California State Bar's Rules of Professional Conduct expressly recognize the potential need for such testimony. Rule 5-210 provides:

> "A member shall not act as an advocate before a jury which will hear testimony from the member unless:
>
> "(A) The testimony relates to an uncontested matter; or
>
> "(B) The testimony relates to the nature and value of legal services rendered in the case; or
>
> "(C) The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the of-

---

78. The *Goldstein* court went on to find the error harmless, because the witness who recanted did admit, while on the stand, that he had made previous inconsistent statements that favored the defendant. Thus, as it turned out, the testimony that defense counsel wanted to give would have added nothing to the admissions made by the witness. (*People v. Goldstein*, *supra*, 130 Cal.App.3d at pp. 1032-1033.) In the present case, there was no similar event that rendered unnecessary the testimony trial counsel would have given.

> fice or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal."

In the present case, counsel's dual role as advocate and witness would have been permissible under the first sentence of subdivision (C); counsel would have been testifying with the informed, written consent of his client.

In sum, it is clear that the testimony that defense counsel sought to give on behalf of John Travis was admissible. The trial court therefore erred in barring counsel's testimony unless counsel limited his testimony to expert testimony regarding the recovery process, with no testimony about the character of John Travis, and unless john Travis agreed to a complete waiver of all aspects of attorney-client privilege, and to an *in camera* review of the contents trial counsel's entire file in the case, as well as the submission of defense counsel to an apparently no-holds-barred interview by the prosecutor. As will be shown in the next two sections of this argument, these limitations were unwarranted and unreasonable, resulting in constitutional error.

D. There Was No Basis for Restricting Counsel's Testimony to Expert Testimony Regarding the Recovery Process, and Disallowing Any Character Evidence Regarding John Travis

As set forth in more detail in Subd. (E)(1) of the preceding argument at pp. 164-173 in this brief, a defendant in a capital penalty trial has an Eighth and Fourteenth Amendment right to present all relevant evidence in mitigation. (*Lockett v. Ohio* (1978) 438 U.S. 586, 597-608; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-117.) More generally, all criminal defen-

dants have federal Fifth Sixth and Fourteenth Amendment due process and compulsory process and confrontation rights to present all relevant evidence in their defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14, 23.) One example of mitigating evidence that **must** be considered is evidence of good conduct in jail following arrest, including testimony from "one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 3, 90 L.Ed.2d 1, 106 S.Ct. 1669.)

The testimony defense counsel wanted to give in the present case would have included testimony that over a six-year period of regularly meeting with John Travis in the jail, he had observed John Travis make an excellent adjustment as well as honest, sincere, and remarkable progress in understanding and overcoming his drug and alcohol addiction problems. Counsel had also observed the sincerity with which John expressed remorse about the death of James Madden. (RT 233:27293-27294.) Such testimony was well within the range of testimony that must be considered, pursuant to *Skipper* and related cases discussed above.

It has been shown earlier in this argument that such evidence was not merely relevant. It was also essential, given the combined impact of: 1) the ruling that precluded comparable testimony from the former juror and former alternate juror; 2) the ruling that weakened the force of Leo Charon's testimony by forcing him to testify before a single jury that would decide the

fates of both John Travis and Danny Silveria; and 3) the prosecution tactic of implying that John was insincere and Mr. Charon was biased.

The only testimony that the court would allow from counsel was expert testimony regarding the recovery process. That testimony, in and of itself, would have added nothing to the similar testimony from Dr. Cermak, Leo Charon, and Sharon Lutman. The testimony that would have been unique, and could have only come from defense counsel, was the very testimony precluded by the court's guidelines – testimony about the character of John Travis, as observed by counsel during six years of close contact. Thus, the trial court "guidelines" cannot be seen as a reasonable restriction on testimony from trial counsel. Instead, the guidelines, which did not have the imprimatur of caselaw, and were inconsistent with *Comden*, precluded all important aspects of trial counsel's proffered testimony, and thereby deprived John Travis of the various federal constitutional rights set forth earlier in this subdivision.

E. There Was Also No Basis for Insisting on a Total Waiver of All Aspects of Attorney-Client Privilege, as a Condition for Allowing Testimony from Trial Counsel

As shown in the preceding subdivision of this argument, the restriction on the type of testimony that trial counsel would be allowed to give was, in and of itself, unreasonable and deprived John Travis of the right to present crucial evidence in his own behalf. Thus, if that had been the only problem

with the trial court's guidelines, it would have been sufficient to constitute serious constitutional error that would mandate reversal of the penalty verdict. Indeed, in explaining why he was not going forward with his request to testify, counsel referred only to this aspect of the court's guidelines as causing counsel to conclude it was pointless to go forward with testifying. (RT 235:27391-27393.)

Nonetheless, there was an additional independent and equally serious error in the guidelines set forth by the trial court. As explained above, the court insisted that if counsel were to testify, there would first have to be a "complete waiver" of attorney client privilege by John Travis. In addition, trial counsel's "whole file, boxes, whatever it is, ..." would have to be turned over to the court for *in camera* review. (RT 233:27306.) Furthermore, counsel would have to allow himself to be interviewed in advance by the prosecutor, in an apparent response to the prosecutor's assertion that he was entitled to all prior communications between defense counsel and his client over the last six years, including notes that were taken, and, where no notes existed, to discovery of defense counsel's personal recollections of such discussions. (RT 233:27299-27300, 27306.)

This was an unprecedented, unnecessary, and thoroughly excessive invasion of the federal Sixth and Fourteenth Amendment right to the effective assistance of counsel. Certainly counsel understood that if he testified, he would be subject to cross-examination in regard to all matters covered on direct examination, and that John Travis would have to agree to waive the attorney-client privilege to the extent necessary to allow fair cross-

examination. However, neither the court nor the prosecutor suggested any basis for concluding that fair cross-examination would include every aspect of every discussion between counsel and his client over the six-year life of the trial proceedings. Neither the prosecution nor the trial court cited pertinent case authority supporting that position, and there is none to be found.

To begin with, this was a penalty retrial only. John Travis had already been found guilty of first-degree murder with special circumstances. Thus, guilt was not an issue at the penalty retrial. It is true that, as part of its case in aggravation, the prosecution intended to prove the circumstances of the offense, requiring it to produce much of the evidence used to obtain the guilt phase verdicts. However, John Travis had fully confessed his guilt upon his arrest and had reiterated that confession in detail in his own first trial penalty phase testimony. The prosecutor had no reason to believe that the defense would proceed differently in the retrial. Thus, there was simply no basis whatsoever for prosecution access to written notes or trial counsel's recollections of every discussion between trial counsel and John Travis regarding Travis' guilt of the charged crimes.

It was clear that counsel did not intend to testify about guilt matters. Rather, he intended to testify only about John Travis' efforts to overcome his drug and alcohol addictions, and his expressions of remorse for the crime he had committed. Cross-examination beyond the scope of such direct examination would not be appropriate. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1193.) Similarly, while there are circumstances in which discovery may exceed the scope of admissible evidence, there was no basis in the present case

for abandoning all limits and directing defense counsel to turn over everything for *in camera* review, and to subject himself to an open-ended interview by the prosecutor.

Also, while character evidence in mitigation can open the door to broad cross-examination, it does not open the door to unlimited cross-examination. (cf. *People v. Wagner* (1975) 13 Cal.3d 612, 619-620.) Here, defense counsel did not intend to offer broad testimony regarding good character. Instead, he intended to offer character evidence in two very narrow areas – John Travis' recovery efforts and his remorse for the homicide.

> "Nothing in our discussion is meant to imply that any evidence introduced by defendant of his "good character" will open the door to any and all "bad character" evidence the prosecution can dredge up. As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24.)

In the present case, there were many obvious areas that would have been discussed by trial counsel and John Travis during the preceding six years which would have no conceivable bearing on the limited testimony trial counsel intended to present. For example, aside from discussion about guilt issues, there certainly would have been discussion about the circumstances of the single prior felony conviction offered as aggravating evidence against Travis. There would have certainly been broad discussions about his knowledge of and feelings toward Danny Silveria, who was tried with him, and the three other co-defendants who were tried separately. There also

would have been broad discussions about aspects of John Travis' childhood and family that were not connected to his efforts to recover from drug and alcohol addiction, or to remorse for the murder of James Madden. These are only some of the most obvious areas of discussion that would have been irrelevant to any proper cross-examination of defense counsel; certainly there were many other discussions in a six-year period about matters that are less obvious, but still irrelevant to any proper cross-examination of counsel.

Another important consideration in the present case is that John Travis testified in the first penalty trial. He was fully examined and cross-examined about guilt issues, about his efforts to recover from his addictions, about his remorse, and about a variety of other subjects. Thus, if the prosecutor had been given **no** additional information in discovery, this still would not have been a case where the prosecutor was left without resources needed for a fair cross-examination of defense counsel, who would be testifying only in very limited areas. In these circumstances, it would have been especially appropriate to take a very restrictive view of the extent of the discovery to be made available to the prosecutor in this area. Similarly, it would have been especially appropriate to strictly limit any further invasion of attorney-client privilege.

Indeed, when it is a criminal defendant who seeks to examine a prosecution witness in areas arguably protected by the attorney-client privilege, courts have not hesitated to take a very restrictive approach. In *People v. Flores* (1977) 71 Cal.App.3d 559, a prosecution witness testified against the defendant under a grant of immunity. When the defense sought to examine

the prosecution witness about discussion he had with his own attorney before the grant of immunity, the court advised the witness he could assert the attorney-client privilege and the witness did so. (*Id.*, at p. 562.)

On appeal, the defendant in *Flores* argued that, because the grant of immunity had been made known to the jury, the witness' assertion of attorney-client privilege regarding discussions pertaining to the immunity deprived the defendant of his federal constitutional right to confront the witness, and to fully cross-examine him on his bias. The *Flores* Court responded by first explaining the importance of the attorney-client privilege, and then stated, "To vitiate that privilege, simply by reason of the extension of a grant of immunity from prosecution, would pervert and frustrate the underlying policies upon which the privilege is founded. (Citations omitted.)" (*Id.*, at p. 563.)

The defendant in *Flores* did not dispute the importance of the attorney-client privilege. Rather, he argued that "the need for confidentiality has been removed by the grant of immunity from prosecution and the admission by the witness of his complicity in the perpetration of the crime." (*Flores, supra*, 71 Cal.App.3d at p.564.) The defendant further asserted, "the need to invade the privacy of the conversation between the attorney and his client in order to expose the witness' bias against the defendant. The grant of immunity was arranged by Archuleta's attorney following their consultation. It is likely that the conversation between the two concluded the terms under which Archuleta agreed to testify." (*Flores, supra*, at p. 564.)

Responding to these arguments, the Court of Appeal concluded that the bias of the witness "was clearly made known to the jury through disclosure of the immunity from prosecution for the crime, and by the very nature of his testimony and his acknowledged participation in the attack." (*Id.*, at p. 565.) The Court found that the defendant did not suffer any injustice, and went on to explain:

> "The privilege of confidential communication between client and attorney should not only be liberally construed, but must be regarded as sacred. Courts should not whittle away at the privilege upon slight or equivocal circumstances. The grant of immunity and Archuleta's testimony admitting his complicity in the crime are not facts of such compelling force to require a waiver of the confidential nature of the attorney-client communication; its confidentiality must be kept inviolate. (See *People v. Kor* (1954) 129 Cal.App.2d 436, 443; *People v. Abair* (1951) 102 Cal.App.2d 765; *People v. Singh* (1932) 123 Cal.App. 365; *United States v. Le Pera* (9th Cir. 1971) 443 F.2d 810, 813, cert. den., 404 U.S. 958 [30 L.Ed.2d 275, 92 S.Ct. 326].)" (*People v. Flores*, *supra,* 71 Cal.App.3d at p. 565.)

Indeed, when the shoe was on the other foot, the trial court in this very case responded in exactly the same manner as did the Court of Appeal in *Flores.* In the first penalty trial, the prosecution presented substantial evidence in aggravation regarding John Travis' involvement in a failed effort to escape from the county jail while awaiting prosecution on the present charges. The only proof that the escape plans involved any threat of violence came from two witnesses who admitted their own heavy involvement in the escape plans and whose credibility was in so much doubt the prosecution it-

self decided not to call them again during the penalty retrial. Witness Jon Bolton made inconsistent and puzzling claims about his reasons for cooperating with the prosecution. The defense sought a waiver of the attorney-client privilege so Bolton's former attorneys could be questioned about their recollections, but Bolton was uneasy about agreeing to a waiver. (RT 136:12632-12634.) The witness testified before the jury about his own recollection of discussions he had with one of his former attorneys. (RT 136:12641-12644.) Another of Bolton's prior attorneys was called as a witness, but the examination of him by the defense was seriously curtailed to avoid any invasion of attorney-client privilege. (RT 172:17230-17243.)

Thus, it seems apparent that the trial court well understood the need to protect the attorney-client privilege, and to carefully examine any need for cross-examination in order to minimize invasion of the privilege. Unlike in *Flores*, discussed above, where there was no constitutional right of confrontation in the balancing process, in the present case there was such a constitutional right, plus the added right to present all relevant mitigating evidence. But the present case is like *Flores* in an important respect: the prosecution would have had ample opportunity for fair cross-examination of defense counsel. The prosecution also had the benefit of its earlier full cross-examination of John Travis about these matters. Furthermore, any bias that defense counsel may have had because of his six-year association with John Travis as his client would have been readily apparent to the jury.

Littlefield v. Superior Court (1982) 136 Cal.App.3d 477 provides another example of the reluctance of courts to invade the attorney-client privi-

lege even when matters covered by the privilege have been the subject of material testimony. In that case, Angelo Buono was charged with a series of murders. A major witness against Buono was Kevin Bianchi, who had originally been charged with the same murders, and who had been allowed to plead guilty to one murder and avoid a possible death sentence, in return for testifying against Buono. The defense position was that Bianchi had made false statements against Buono in order to save his own life. As the Court of Appeal explained:

> "In support of that theory, the defense desires to cross-examine Bianchi about his conversations with the public defender's office leading to the bargain and to subpoena from the public defender, the other petitioner here, all notes and records of the conversations between Bianchi and that office. The defense also seeks to examine as to the content of a confession allegedly made by Bianchi to a clergyman in Washington. The trial court has issued orders, herein attacked, permitting such cross-examination and validating the subpoena." (*Id.*, at p. 481.)

Notably, the trial court order at issue in *Littlefield* was quite comparable to the guidelines set forth in the present case. That order, and the defense justification for it was summarized as follows:

> "The challenged orders require prosecution witness Bianchi to testify on cross-examination as to the content of confidential conversations between him and his defense counsel, petitioner Los Angeles County Public Defender, concerning the "Hillside Strangler" murders and compel the public defender to disclose to defendant Buono's defense counsel, pursuant to subpoena duces tecum, all notes and ma-

> terials in the possession of the public defender concerning those conversations. Buono asserts the need to inquire into these conversations to discover whether Bianchi was given critical information by his defense counsel in 1979 that enabled him to appear to have been a percipient witness to Buono's commission of the murders. Buono contends he must be allowed this information to impeach Bianchi by showing Bianchi obtained critical facts secondhand from his defense counsel. (136 Cal.App 3d, at p. 480.)"

Summarizing its conclusions, the Court of Appeal stated that **even if** it was true that the Public Defender, in the course of advising Bianchi about the wisdom of the plea bargain, had disclosed facts to Bianchi that would enable him to fabricate testimony against Buono, the Court of Appeal saw "nothing to permit a violation of the traditional attorney-client privilege." (*Id.*, at p. 481.)

The Court of Appeal explained the defense theory urged in support of the desired invasion of the attorney-client privilege: "...that prior testimony by the witness Bianchi as to some of the topics of his confidential discussions with the public defender constitutes a waiver of the privilege." (*Littlefield, supra,* 136 Cal.App.3d at p. 481.) Rejecting this, the Court of Appeal first cited *People v. Flores*, 71 Cal.App.3d 559 discussed above, in noting that the simple fact that Bianchi would be testifying in return for a favorable disposition of his own case was enough to give the defense a basis to attack his credibility. Furthermore, Bianchi had already admitted that he had changed his story several times, and had previously given false testimony. In light of these factors, the Court of Appeal could not see any reason why "Buono needs any invasion of privilege to aid in his jury argument." (*Little-*

field, supra, 136 Cal.App.3d at p. 483.) Notably, *Littlefield* was cited with apparent approval by this Court, in a similar context. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1228.)

Once again, the present case has all the factors found determinative in *Littlefield.* The mere fact of the attorney-client relationship was all that the prosecutor needed to support an argument that defense counsel had reason to be biased in favor of his client. Moreover, the testimony that John Travis had given during the first trial, plus whatever testimony trial counsel would have given in the retrial, would provide the prosecutor with an ample basis for conducting cross-examination. There was simply no need for the complete invasion of the privilege that was embodied in the trial court guidelines.

In sum, there was far less reason to invade the attorney-client privilege here than there was in *Littlefield* or in *People v. Flores, supra,* 71 Cal.App.3d 559. Yet, rather than take a carefully limited approach, delaying any invasion of privilege until the prosecution made a specific and persuasive showing of a necessity for an invasion, the trial court here went to the opposite extreme, insisting on a complete waiver and a review of all defense counsel files before any testimony would occur, and before there was any basis to assess a prosecution need for an invasion of the privilege. Nothing in the law sanctioned so extreme a requirement as a condition for allowing counsel to testify. Under these circumstances, it is clear the trial court was not setting guidelines that carefully balanced conflicting rights and needs, but instead was unreasonably and without authority conditioning the prof-

fered testimony in a manner that left defense counsel with no choice but to forego the plan to offer testimony on behalf of his client.

Another case that was similar in context to *Flores* and *Littlefield* was *Maas v. Municipal Court* (1985) 175 Cal.App.3d 601, which found no waiver of attorney-client privilege despite an immunized witness' agreement to testify "completely" in exchange for immunity. *Maas* provides clear and simple summaries of concepts directly applicable to the present case: "The Legislature has determined that the importance of preserving confidentiality in the attorney-client relationship outweighs any concerns raised by the possibility that the exercise of the privilege may occasionally result in the suppression of relevant evidence. (Citation omitted)" (*Id.*, at p. 606.) Also:

> "Waiver of the attorney-client privilege and of other statutory privileges occurs with respect to a protected communication if the holder of the privilege 'has disclosed a significant part of the communication ... .' (Evid. Code, § 912.) However, a client does not waive the privilege by testifying about facts which might have been discussed in confidential conversations with his or her lawyer, as such testimony is not equivalent to disclosure of the actual content of those attorney-client conversations. (*Littlefield v. Superior Court* (1982) 136 Cal.App.3d 477, 483.)" (*Maas v. Municipal Court, supra*, 175 Cal.App.3d at p. 606.)

This latter principle should apply no differently when it is the attorney, rather than the client, who testifies about facts that may have been discussed in confidential conversations with the client. Thus, at the very least, the trial court should have waited to see what testimony was actually given by coun-

sel, before determining whether any waiver of privilege occurred. Also, if at that point there was a basis for finding some waiver, any further invasion of privileged areas that might become permissible would have to be kept as limited as possible.

In the present case, while the trial court insisted that a **complete** waiver of attorney-client privilege be tendered in advance of any testimony by defense counsel, the court was somewhat more limiting in regard to discovery. The court did not order defense counsel to immediately turn his entire file over to the prosecution. Instead, the court ordered that the entire file be turned over to the court promptly, for an *in camera* review, followed by determination by the court which portions should be given to the prosecution. However, even this *in camera* review violated controlling legal principles, as set forth in *People v. Pack* (1988) 201 Cal.App.3d 679.

In *Pack*, a defendant charged with rape obtained issuance of a subpoena duces tecum, directing that mental health records of the victim be sent to the court for *in camera* review. In that review, the trial court found nothing that should be turned over to the defense. On appeal, the Court of Appeal refused to even review the records to verify the correctness of the trial court's determination, since they were covered by the psychotherapist-patient privilege. In light of the privilege, the Court of Appeal concluded that even an *in camera* review was improper until the defendant had made a showing of good cause. The mere fact that the records *might* contain relevant information was not enough to overcome the privacy interest of the victim that would result from an *in camera* review. (See also *Pennsylvania v.*

Ritchie (1987) 480 U.S. 39, 58-59.) Echoing language used in *Maas* in the attorney-client privilege context, the *Pack* court noted:

> "That the privileged documents may contain relevant evidence is not a reason for disclosure. In considering the psychotherapist-patient privilege, the Legislature expressly recognized that it might result in the withholding [sic] of relevant information, but believed that the interests of society were better served by an assurance of confidentiality. (Citations omitted.) Many rules of evidence exclude otherwise admissible, relevant evidence. (*People v. Fleming* (1983) 140 Cal.App.3d 540, 544.)" (*Pack, supra,* 201 Cal.App.3d at p. 686-687.)

Similarly in the present case, the mere fact that somewhere in trial counsel's entire file there might be something that would turn out relevant to some issue raised by the testimony counsel planned to give was not enough to overcome the strong policy interest in protecting the privacy of six year's worth of attorney-client communications. Indeed, here the trial court did not simply insist on reviewing anything in counsel's files pertaining to communications with John Travis about remorse and about recovery from addiction, nor did the court even limit its intended *in camera* review to all communications between counsel and John Travis. Instead, the trial court insisted it would have to review **everything** trial counsel had done in six years of preparing for a death penalty trial. No good cause was shown to justify even a limited review, let alone the complete review the court contemplated in this case.

In sum, the cases discussed above indicate it is highly questionable whether there should have been any waiver of attorney-client privilege at all.

At the very least, the trial court should have waited until hearing trial counsel's actual testimony before determining whether there was a basis to find a waiver of privilege. Most importantly, if a waiver of privilege did occur, it should have been strictly limited to specific matters encompassed in the testimony actually given. There was no good cause, or any basis whatsoever, for demanding a "complete" waiver of the privilege by John Travis, or for demanding an advance *in camera* review of trial counsel's entire file. This premature attempt to invade attorney-client privilege violated John Travis federal Fifth, Sixth, and Fourteenth Amendment rights to due process of law, to a fundamentally fair jury trial, to present a defense, and to the effective assistance of counsel. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (Fifth Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473)

F. The Improper Restrictions that Deprived the Defense of Crucial Mitigating Evidence Were Prejudicial

It has been shown above that a variety of federal constitutional rights supported John Travis' right to present crucial mitigating evidence. In addition to the constitutional rights discussed earlier, the court's rulings that kept out crucial mitigating evidence rendered the ensuing penalty verdict unreliable, in violation of the federal Eighth and Fourteenth Amendments. (*Beck v.*

Alabama (1980) 447 U.S. 625, 637, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

In the final section of the closely related argument pertaining to the ruling that precluded testimony from a former juror and a former alternate juror, it was shown that a death verdict against John Travis was by no means a foregone conclusion. (See Argument I, section E, subd. 4, at pp. 187-193.) To the contrary, in the range of cases in which a death verdict has been imposed, this case must be considered among the closest cases for a decision between life without parole or death. For all of the reasons set forth in the referenced section of the preceding argument, the improper guidelines that made it pointless for trial counsel to testify must be deemed prejudicial. (See also Argument XII, later in this brief, for a general discussion of principles regarding prejudice that apply to all of the penalty phase errors set forth in this brief.)

It is true that one of the factors set forth in the preceding argument in favor of a finding of prejudice was the fact that the testimony the defense wanted to elicit from the former juror and alternate juror would have been especially strong because these witnesses had no apparent biases in favor of John Travis. In contrast, the testimony at issue in the present argument would have come from defense counsel, and would not have had the same advantage of a lack of any apparent reason for bias. Nonetheless, the testimony from defense counsel would have still been an important supplement to the testimony of Leo Charon, since it would have come from a witness who had known John Travis well over an extended period of time, but who

was not also giving testimony in favor of co-defendant Danny Silveria. The combination of the proffered testimony from defense counsel plus the testimony from Leo Charon, Dr. Cermak, and Sharon Lutman (summarized in the penalty phase statement of the facts, earlier in this brief) would have been powerful and persuasive. Thus, while not necessarily as helpful as the testimony from the former juror and former alternate juror would have been, this was the only feasible alternative left to the defense, and it cannot be said that the penalty verdict would have necessarily been the same, if the jury had been given the benefit of this additional testimony. Thus, the errors set forth in this argument must be deemed prejudicial.

III. THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR AND DENIED JOHN TRAVIS A FAIR TRIAL WHEN IT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY THAT IT COULD CONSIDER MERCY BASED ON THE EVIDENCE, AND ERRONEOUSLY PRECLUDED THE DEFENSE FROM EVEN REFERRING TO THE CONCEPT OF MERCY, OR ARGUING THAT IT COULD BE CONSIDERED IN WEIGHING AGGRAVATING EVIDENCE AGAINST MITIGATING EVIDENCE, AND THE PREJUDICIAL EFFECT OF THE ERROR WAS EXACERBATED WHEN THE PROSECUTOR WAS PERMITTED TO ARGUE ANALOGOUS CONCEPTS IN AGGRAVATION

A. Introduction

Few, if any, principles of criminal sentencing are more familiar than the concept of throwing oneself on the mercy of the court. (See *e.g., Pennsylvania ex Rel. Herman v. Claudy* (1956) 350 U.S. 116, 121; *In re Christopher B.* (1996) 43 Cal.App.4th 551, 555; *People v. Delahoussaye* (1989) 215 Cal.App.3d 1, 11; *In re Lower* (1979) 100 Cal.App.3d 144, 149; *People v. Moore* (1970) 5 Cal.App.3d 612, 614.) Put differently, it has long been widely accepted that justice should be tempered with mercy. (See *e.g., People v. Howard* (1992) 1 Cal.4th 1132, 1188; *People v. Hayes* (1990) 52 Cal.3d 577, 638-639; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1031.)

With such a long history of associating mercy with sentencing, it is not surprising that the concept of mercy was covered in the jury questionnaire used in the first trial in the present case. However, as will be explained, the prosecutor eventually challenged the appropriateness of allowing the jury

to even consider mercy; rather, he argued mercy was for God to exercise, not jurors, and apparently not judges. Later, during first trial penalty phase argument to the Silveria jury by counsel for co-defendant Silveria, the trial court concluded that counsel could not use the word "mercy" in his argument. Nonetheless, the court seemed willing to allow counsel to somehow argue the concept, as long as the word "mercy" was not used.

During the first penalty trial argument by counsel for John Travis to Travis jury, the word "mercy" was mentioned. The prosecutor's instant objection was sustained. The trial court explained it was relying on the same reasons and rulings made when the issue arose in front of the Silveria jury.

Before the penalty retrial, both defendants filed written motions in advance, seeking permission to argue the concept of mercy to the jury. Counsel argued strongly, explaining why the concept of "sympathy" was not sufficient in the present case. Nonetheless, the trial court ruled that counsel would not be allowed to use the word "mercy" in their arguments to the jury, and that they must instruct their witnesses not to use the word.

The defense then countered with another argument. If it was improper for the defense to argue for mercy, then it should be equally improper for the prosecutor to argue many of the concepts he had urged to the jury in the first trial. These included prosecution arguments on six points: that a death sentence would be appropriate retribution; that the defendants, by their acts, were responsible for their own death sentences; that a sentence of life without parole cheapened the value of life; that the jury would be performing its duty by imposing a death sentence; that choosing life without parole was the

easy way out; that the defendants deserved no more sympathy than they showed to the victim; and that the failure to return a death verdict would sow the seeds of anarchy, vigilantism, and a breakdown in the social order. In response, the trial court simply ordered that all counsel were to refrain from arguing improper concepts. However, in sharp contrast to its advance ruling that the word "mercy" could not be used at all, the court ruled that any other objections to improper arguments had to be made in front of the jury and would not be decided in advance by looking back to the prior trial arguments.

With this extensive background and the court's effort to avoid improper argument, it is astonishing that after succeeding in precluding the defense from arguing mercy, the prosecutor began the retrial in his opening statement by contending that the defendants had treated their victim mercilessly. The trial court, conceding the prosecutor had already violated its earlier order, still refused to provide any relief, but warned that any further violations would be treated harshly.

By the end of the retrial, neither the word, nor the concept of mercy was used by the defense. Defense requests to instruct that jury that mercy could be a basis for a sentence less than death were also denied.

As will be explained, the trial court prejudicially erred. Although decisions of this Court have upheld trial court refusals to **instruct** the jury that mercy could be a basis for voting for a sentence of life without parole, those decisions appear to be limited to cases where the "mercy" at issue was not tethered to the particular evidence. Moreover, those very decisions have im-

pliedly approved defense counsel arguments that asked the jurors to exercise mercy. Indeed, the very same principles that were used by the United States Supreme Court in upholding sympathy as a proper basis for choosing life without parole rather than death, apply equally to the concept of mercy. In addition, it will be shown that under the facts of the present case, sympathy was not a fair substitute for mercy, so the error was highly prejudicial. Finally, it will be shown that the trial court exacerbated its error by allowing the prosecutor to argue improper concepts in aggravation of the penalty.

B. Factual and Procedural Background

1. Events during the First Trial Proceedings

The juror questionnaire approved by the court for use in selecting the jurors for the first Silveria and Travis trials contained the following question: "Do you think even the worst criminal should be considered for mercy?" (See, for example, CT 24:41, question #204.) During a pre-trial discussion of the questionnaire, the prosecutor questioned whether such an inquiry was appropriate. He conceded the jury could properly consider pity or sympathy, but he argued those concepts differed from mercy. The prosecutor argued that mercy was a God-like power, and that neither the applicable California death penalty statutes, nor the federal Constitution, gave the jury the right to exercise such a power. He compared the exercise of mercy to a priest telling a parishioner, " 'All is forgiven, my son.' " (RT 40:3412-3414.)

Therefore the prosecutor argued that the jury's consideration of sympathy was limited to sympathy raised by the evidence. Thus, he believed that "mercy," in the context of the reference in the questionnaire, was improper because it was not based on any evidence. (RT 40:3415.)

The trial court's initial response was to note that this concerned a questionnaire for jury selection purposes, not a jury instruction. Instead, this was merely an effort to get the prospective jurors to express some attitudes. The court found the question useful for that purpose. The question remained in the questionnaire, but the court indicated it did not intend to include such a concept in the instructions to the jury. (RT 40:3415-3418.)

Later, during the actual voir dire process involving only the Silveria jury, one prospective juror brought up the fact that she was Catholic. She had been brought up to forgive people. She was asking herself whether she could forgive someone who committed murder. The judge told her forgiveness does not enter into the penalty decision. (RT 71:6115.) During the voir dire of a prospective juror who was selected as an actual alternate juror on the Travis jury, and who eventually became an actual juror, the prosecutor requested follow-up questioning because the prospective juror had indicated on the questionnaire that he would consider mercy. The court refused to engage in any follow-up questions, observing this time that the propriety of considering mercy depended on how mercy was defined. (RT 76:6840.)

During the argument portion of the penalty trial, when only Silveria's counsel and the prosecutor were present – but not John Travis' counsel – Silveria's counsel stated in argument, "Now I want to say this about a deci-

sion, a decision for mercy, a decision to sentence Danny to life imprisonment without the possibility of parole –" (RT 177:17857-17858.) At this point, the prosecutor interrupted and objected to the reference to a decision for mercy. Out of the Silveria jury's presence, the prosecutor repeated the argument he had made during the discussion about the questionnaire. Counsel for Silveria contended that mercy was simply a generic term that encompassed much of what he had already discussed in his argument to the jury. The trial court now expressed the view that since mercy was not mentioned in the instructions, any plea for mercy was tantamount to asking the jury to disregard the instructions. The court therefore precluded any reference to mercy, unless counsel could produce authority to support such an argument. (RT 177:17858-17862.) A short time later, the court referred to *People v. Benson* (1990) 52 Cal.3d 754, 808, as apparent authority against any jury consideration of mercy. (RT 177:17867.)

The next day, counsel for Silveria countered with a citation to *People v. Berryman* (1988) 6 Cal.4th 1048, 1097, as a case approving mercy as a subject for argument to the jury, and as appropriate for a jury's consideration, even if it was not necessary to refer to it in instructions. The court promised to review *Berryman* and *Benson* and then rule on whether mercy could be argued. (RT 178:17895-17898.)

Soon afterward, following a fifteen-minute recess (RT 187:17906), the court ruled on the mercy issue, setting forth a lengthy explanation for the prosecutor and Danny Silveria's counsel, but still in the absence of John Travis or his counsel. The court relied on *Benson* for the proposition that

mercy was a Godlike power that the jury had no right to exercise. The judge believed the dictionary definition of mercy was consistent with the *Benson* discussion. He referred to the "unadorned" use of the word mercy as applying an "arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances." (RT 178:17907.)

The court concluded the defendant was not allowed to argue for "pure" mercy, but only for sympathy. The judge explained that arguing for sympathy was "in effect, asking the jury to exercise mercy without using the word mercy because of the implications that that word has." (RT 178:17907-17908.)

Moments later, in the prosecutor's portion of penalty phase argument to the Silveria jury, the prosecutor began to make an affirmative argument that the jury could **not** base its penalty decision on mercy. Counsel for Silveria objected and in the ensuing discussion the judge again made clear his belief that the defense could ask for what was essentially mercy, without using the word "mercy." The court ruled that neither side should use the actual word "mercy." Instead, the prosecutor should simply argue that the jury should only consider sympathy as set forth in the instructions, and nothing more. (RT 178:17922-17926.) Later in the day, the judge added a citation to *People v. McPeters* (1992) 2 Cal.4th 1148, as further support for his position. (RT 178:17983.)

Argument to the Silveria penalty jury ended that day, and on the next court day the argument to the Travis jury began. Counsel for John Travis had not been present for the argument to the Silveria jury, and had not been part

of the extensive debate and ruling regarding the use of the word "mercy" during his argument to the jury. On the second day of argument to the Travis jury, counsel for John Travis responded to a prosecution reference to Penal Code section 190.3, subdivision (k) as factor K, or "the Kitchen Sink." Counsel noted that his kitchen sink had a garbage disposal in it. He explained, "I really don't think that that is an appropriate way to describe the kind of things we talked about in Factor (k). Compassion and mercy and justice are virtues. They're not sinks. They're not garbage. All right." (RT 180:18149.)

The prosecutor objected to the use of the word mercy and the court sustained the objection. The court told defense counsel to use the word sympathy, but not mercy. The court stated it was relying on the same reasons and rulings set forth in the Silveria record. Counsel asked if he could talk about mercy without describing what he was talking about, but the court said to just talk about sympathy. (RT 180:18149-18150.)

2. Events During the Penalty Retrial Proceedings

a. Mercy

Prior to the selection of the jury for the penalty retrial, counsel for Danny Silveria filed a motion to allow counsel to argue for mercy in mitigation of the penalty. Counsel reiterated his previous argument based on *People v. Berryman, supra,* 6 Cal.4th 1040, 1097-1098, and added several other citations to California Supreme Court decisions that had approved arguments

seeking mercy. (CT 17:4246-4250.) The following day, counsel for John Travis filed a joinder in that motion. (CT 17:4281-4283.)

On November 21, 1996, the "Mercy" motion was argued. Counsel for Danny Silveria and John Travis reiterated their previous contentions, based on *Berryman*, *Ray*, and *Osband, supra*. Counsel for Danny Silveria argued that sympathy and mercy go hand in hand – he was clearly allowed to urge the jurors to feel sympathy for his client, but what good was that if he could not tell them to use that sympathy as a basis for extending mercy to his client? Counsel for John Travis echoed this argument, noting that sympathy and compassion were just feelings, but mercy encompassed taking action on such a feeling. (RT 200:22921-22923.) Counsel also disputed the contention that only God could exercise mercy; rather, trial judges often exercised mercy in their sentencing decisions. (RT 200:22926-22927.)

The prosecutor's lengthy response reiterated the same points he had made throughout the proceedings. While acknowledging the similarities between sympathy and mercy, he contended that sympathy was tied to the evidence, while mercy was not tied to any evidence. (RT 200:22927-22935.) The prosecutor did slightly expand his prior argument that only God could dispense mercy, adding now that the Governor also could dispense mercy, through the power to commute a death sentence. He explained, "That's where mercy comes: Either from God or the Governor, not from the jury." (RT 200:22935-22936.)

The prosecutor continued at some length with his theme that mercy was very different from sympathy, and was not tied to the evidence. (RT

200:22936-22942.) Finally, counsel for John Travis pointed out that all the cases the prosecutor was relying on dealt with the issue of instructing on mercy, not arguing for mercy. Counsel also noted that he was **not** calling for the jury to rely on mercy "in lieu of evidence." (RT 200:22942.)

The prosecutor returned to his same theme again. This time he tried to explain what he saw as the difference between sympathy and mercy: "... sympathetic evidence or sympathetic aspects of the evidence is something that comes from within the defendant, his background within the facts of the crime. Mercy is something that comes from within the jurors. That's not part of the evidence." (RT 200:22944.)

In response, counsel for Danny Silveria made clear that what the defense sought was no more untethered from the evidence than was the sympathy they were permitted to urge. Counsel observed that the prosecutor "... implies that by the defendants asking for mercy they are urging the jury to disregard the evidence. Far from it. ... What we are arguing to the jury is because of the sympathetic factors and the evidence which we have adduced we believe that this is an appropriate case for the jury to exercise mercy." (RT 200:22948.) Nonetheless, the trial court responded, "That's not what the law says." (RT 200:22948.) Explaining this, the judge asked why Penal Code section 190.3, subdivision (k) did not expressly refer to mercy.[79] (RT

---

79. Apparently the trial court was confusing the statute with the CALJIC instruction. While Penal Code section 190.3, subdivision (k) does not refer to mercy, **it also does not refer to sympathy**. It simply states, "Any other circumstance which extenuates the gravity of the crime even

(Continued on next page.)

200:22948.) Silveria's counsel responded that the statute also said nothing about vengeance or retribution, and yet prosecutors were routinely permitted to argue for those concepts. (RT 220:22949.)

Counsel for Silveria reiterated his understanding that he could only ask for mercy that was based on the evidence: "If I were to get up and say the death penalty is a terrible thing, exercise mercy on Mr. Silveria, I'd be laughed out of court." (RT 200:22949.) The trial court refused to budge, responding simply that "Granting mercy is a God quality." (RT 200:22950.)

Silveria's counsel further emphasized that during argument in the first penalty trial, the prosecutor had been allowed to display a number of photographs of the very bloody victim after he had been removed from a body bag and placed on a slab at the morgue. The prosecutor was permitted to point at those photos and argue that the defendants who were responsible for doing that to Mr. Madden deserved to die. Counsel failed to understand why the prosecutor should be allowed to make such an argument, while the defense was precluded from pointing to the deprived background of their clients, as actually shown by the evidence, and argue from this evidence that they deserved mercy. (RT 200:22952-22953.) The discussion resumed several days

---

(Continued from last page.)

though it is not a legal excuse for the crime." As will be shown later in this argument, because decisions of this Court and the United States Supreme Court held that the federal Constitution requires construing this language to encompass sympathy, the CALJIC instruction was altered to include sympathy. The defense in this trial was simply arguing that for the very same reasons, the language of the statute must be construed to encompass mercy, as long as it was based on the evidence.

later, going on at some further length, but mainly just reiterating points made earlier. (RT 201:22988-22999.)

The following week, the trial court issued a broad ruling rejecting the defense arguments. The court stated that it would not instruct on mercy, nor would it would not allow the defense to argue for mercy. The court added that it would not allow the prosecutor to argue about any lack of mercy shown by the defendants to the victim. The court explained that there was no evidence to support such an instruction. The judge said he saw mercy as forgiveness, and believed it was not the job of a jury to forgive. He reasoned that allowing a jury to exercise mercy would give the jury unbridled discretion to do anything it wished, in violation of principles set forth in United States Supreme Court cases. Moreover, mercy was not a sympathetic or other aspect of the defendant's character or record. The court acknowledged that the existence of sympathetic evidence that the jury should consider, but that did not encompass mercy. The judge believed that granting mercy was the same as granting an unduly lenient sentence that was not based on the evidence. (RT 202:23124-23130.)

Subsequently, during opening statements to the jury, the prosecutor described the murder of Jim Madden. In doing so, the prosecutor referred to the duct tape "that so mercilessly bound him ..." (RT 236:27443, l. 14-15.) At the next break in the proceedings, counsel for John Travis objected to this statement violated the court's ruling that mercy was not to be mentioned. Counsel contended that describing the defendants as "merciless" was the same as saying they had shown no mercy to Madden. The defense moved for

a mistrial. In the alternative, they moved for reconsideration of the ruling that precluded them from arguing in favor of mercy. (RT 236:27477-27479.)

The trial court agreed that the prosecutor's argument was a violation of its earlier ruling, but the court refused to provide any relief, except to state that any future violation of the ruling would be dealt with severely. (RT 236:27479.)

On April 23, 1997, shortly before arguments to the jury were to begin in the penalty retrial, counsel for Danny Silveria urged the trial court to reconsider the preclusion of argument seeking mercy. Counsel added more citations in favor of allowing arguments for mercy. Counsel also sought to offer a proposed instruction on mercy, but the court initially said it was too late to submit any new instructions. The court then changed its mind and said it would consider the proposed instruction. (RT 275:32954-32957.) The next day the court ruled it would not give the proposed instruction.[80] (RT 276:32963.)

---

80. The proposed instruction is apparently the one that appears at CT 22:5336. It states: "In weighing any sympathetic aspects of the character and record of each of the defendants which you find to be true, in accordance with the foregoing instruction, you may consider and give effect to compassion and mercy for a defendant to the extent that you deem appropriate in this case." In context, it appears clear that the word "instruction" in the middle of this proposal was intended to be plural, rather than singular.

b. Prosecution Themes Which the Defense Believed Were Analogous to Mercy

Faced with defeat on their efforts to argue mercy to the jury, the defense turned next to arguments the prosecutor had made in the first penalty trial, which the defense believed were emotional appeals untethered to any evidence, at least to the same extent as the judge and prosecutor believed was true of arguments for mercy. Counsel for Danny Silveria filed a Motion to Preclude People from Arguing Improper Concepts to Jury or Juries. (CT 17:4367-4374.)

The motion started out by identifying specific objectionable portions of the prosecutor's first trial argument:

1. "Like it or not, ladies and gentlemen, retribution is still part of being a human being and of being human." (RT 178:17929; see also RT 180:18187.)
2. "This man deserves the death penalty...." (RT 176:17718.)
3. Mr. Silveria "has earned the ultimate penalty." (RT 176:17609.)
4. "... [W]hen this man, Danny Silveria, took Mr. Madden's life he took his own as well." (RT 176:17702; see also RT 178:17927.)
5. "Remember if and when you decide it is appropriate to impose the death penalty, this is not something that you or we as a system are doing to this man. This is something that he has brought on himself ..." (RT 176:17716.)
6. "When the State of California executes Danny Silveria, if it does in this case, it is recognizing that the worth of the life of his victim and of the

lives of his family that he left behind to whom he harmed forever, the victim's family, it is recognizing the worth of those lives. I say to you that the refusal to apply capital punishment in a case as serious and as aggravated as this, contrary to [defense counsel's] assertion, would cheapen all of our lives across the board." (RT 178:17929; see also RT 180:18187.)

7. "Remember, there is no guilt in performing one's duty, especially a duty that is required by law passed by your fellow citizens and affirmed by the courts of this state and this country." (RT 176:17612.)

8 "I submit to you that it would be the easy way out for you in this case to simply allow him to go off to prison and live out the rest of his days." (RT 176:17609; see also RT 176:17610.)

9. "Then what is left basically is whether all of you individual – individually have the courage, have for want of a better term the guts basically to impose such a sentence on another person for what they've done." (RT 176:17719.)

10. "When people begin to believe that an organized society is unwilling or unable to impose on criminal offenders the punishment that they so truly deserve for what they have done, then it seems clear that they have sown the seeds of anarchy and of people justifying self-help, vigilante justice, people wanting to help themselves to right a wrong and lynch laws, those types of things." (RT 180:18186-18187; see also RT 178:17928.)

Silveria's motion went on to argue that these prosecution themes all suggested rationales for imposing a death sentence which went outside the statutory procedure of balancing aggravating and mitigating circumstances. This, of course, was the rationale relied on by the prosecutor for precluding defense arguments for mercy – a rationale upheld by the trial court, The motion also noted a case apparently not cited in the previous discussions, wherein this Court had expressly stated that "... mercy was a permissible response to defendant's mitigating evidence, ..." (*People v. Wright* (1990) 52 Cal.3d 367, 442.)

The motion went on to discuss the listed prosecution themes in groups, making various points about each. For example, it pointed out that the theme that the defendants had earned death sentences as soon as their crime was committed effectively told the jury to look only at the crime, rather than to balance the crime and any other aggravating factors against the mitigating factors. The theme that it is the defendants who are responsible for their own death sentences, and not the State or the jurors, also was an improper effort to relieve the jurors of feeling responsible for a decision to impose a death sentence, and was therefore constitutionally suspect. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320.) The same was true for the theme that imposition of a death sentence was merely the performance of a duty required by law.

Other themes were flawed as well, Silveria's counsel argued. The theme that the jury's failure to impose a death sentence would cheapen the life of the victim or his family was a pure appeal to emotion. The theme that

life without parole was the easy way out invoked the jurors' feelings of personal shame that they should feelif they failed to vote for death. Even worse, the theme that the failure to impose death would invite vigilante justice and anarchy was another appeal to raw emotion without any reference to the required weighing process.

Two weeks later, counsel for John Travis filed a joinder in Danny Silveria's motion, and added additional arguments. (CT 18:4531-4538.) Like the Silveria motion, Travis's also listed a number of specific objectionable statements – 22 of them – made by the prosecutor during the first trial penalty phase argument. These basically followed the same themes as the specified remarks in the Silveria motion, and also included a number of prosecution references to factor (k) as the "kitchen sink." Counsel for Travis reiterated the arguments made in the Silveria motion, and also argued that the prosecution theme of repeatedly referring to the defense mitigating evidence as "kitchen sink" evidence was a subtle way of saying that defense mitigating evidence was automatically garbage to be washed away. Counsel argued this was an improper way to deal with valid mitigating evidence, expressly sanctioned by the legislature.

These joined motions were argued on February 5, 1997. The prosecutor had filed no written response to either motion. Indeed, despite having successfully precluded the defense from arguing in favor of mercy, the prosecutor expressed surprise that the defense would make such an effort to edit his argument in advance. (RT 233:27285.) Similarly, despite its willingness in advance to foreclose any defense references to mercy, no matter what

the context, the court took an opposite approach in response to the defense motions to limit the prosecutor. The court simply ruled, "The Court orders that all counsel not argue improper concepts to the jury." The court added, "... if somebody argues something that is improper, you're going to have to get up and object. That's what objections are for." (RT 233:27289.)

The court did go on to provide a number of guidelines, stressing, however, that they were not rulings. The court saw no problem with the prosecutor arguing for retribution, since that was simply another word for punishment. The court believed that arguing that the defendant deserved to die, or earned the death penalty, was not improper, as long as it was done with reference to this particular crime and to the weighing process. The court tentatively agreed that arguing that the defendant had imposed the death penalty on himself was not proper. And while arguing that imposing death was a duty required by law and affirmed by courts is misleading in isolation, the court believed it was permissible to the extent it meant that the jury must follow the law. That is, if following the law meant returning a death verdict, then the jurors would be fulfilling their duty. (RT 233:27290-27291.)

Continuing with its provision of guidelines to counsel, the court explained its belief that arguing that the failure to impose death dishonors the victim and his family, or cheapens the life of the victim, would be improper without admissible evidence to support such a statement. As for arguments about having the guts to impose death, or not taking the easy way out, the court said that would be permissible if made in the context of weighing aggravation against mitigation. The court added that arguing that the defen-

dants deserve no more sympathy than they showed to the victim seemed permissible, while arguing that a failure to impose a death sentence would sow the seeds of anarchy and vigilante justice appeared improper. (RT 233:27289-27293.)

c. The Prosecutor's Argument to the Jury

Apparently the court's "guidelines" meant nothing to the prosecutor. Within the opening minutes of his argument to the jury, the prosecutor told the jury the defendants had "earned that ultimate penalty." (RT 276:33002, l. 17.) That was said with no reference to any weighing process. Seconds later, again without reference to any weighing process, the prosecutor said that "to let them go off to prison to live out the rest of their natural lives would be the easy way out." (RT 276:33002, ll. 26-28.) Seconds after that, the prosecutor told the jury their verdict would "reflect the conscience of the community ..." (RT 276:33003, l. 11.) That was followed immediately with the admonition not to take that responsibility lightly and a reminder not "to take the easy way out ..." (RT 276:33003, ll. 13-15.)

At that point, moments after this barrage of statements by the prosecutor, counsel for Danny Silveria objected. Despite the fact the prosecutor still had not tied any of these comments to any weighing process, the court overruled the objection, simply noting, "This is argument." (RT 276:33003, ll. 16-20.) Apparently seeing this as a free rein to completely ignore the "guidelines," the prosecutor followed this by an expression of thanks for

having such a legal process, rather than a "society that's made up of vigilante justice or lynch mobs crying out for vengeance in the streets." (RT 276:33004, ll. 7-10.) Both defense counsel objected, and apparently this was finally too much for the judge, as the objections were sustained. (RT 276:33003.)

Soon afterward, the prosecutor again told the jurors they were the "conscience of this community ..." Counsel for John Travis objected, noting the jury would be instructed not to be swayed by social beliefs. The objection was sustained. (RT 276:33005-33006.) The prosecutor quickly returned to another controversial theme, stating "There's no guilt in performing one's duty that is required by the law, passed by your fellow citizens and affirmed by the court." This time the defense objection was overruled. (RT 276:33006.) The prosecutor then repeated this line and another defense objection – that there was no duty to impose the death penalty – was overruled. (RT 276:33006-33007.) The prosecutor repeated this statement a third time, and once again a defense objection was overruled. (RT 276:33007, ll. 15-22.) For no obvious reason, the prosecutor repeated this same statement a fourth time. This time the defense objected specifically to the portion referring to the law being affirmed by the courts, and the court sustained that objection. (RT 276:33008.)

Predictably, the prosecutor eventually referred to factor (k) evidence as "the kitchen sink." A defense objection was overruled. (RT 276:33021.)

As the prosecutor's argument continued the next day, he told the jury, "Remember, if and when you decide that it is appropriate to impose the

death penalty here on John Travis or Daniel Silveria, or, as I submit, on both of them, this is not something that you or we as a system are doing to these men. This is something that each of these two defendants has brought upon himself –" (RT 277:33135-33136.) Surprisingly this objection was overruled (RT 277:33136) – a ruling totally at odds with the court's previous statement setting forth guidelines: "As far as 'The jury is not imposing the death penalty on the defendant, the defendant has imposed it upon himself,' the Court would tend to agree that this would be improper." (RT 233:27290.)

In closing his first penalty phase argument to the retrial jury, the prosecutor stated, "The issue is whether you have the strength, the courage to do what the law requires, to weigh and evaluate and to impose what is required here by the facts and circumstances of this horrible crime, ... A free society requires of its citizens, of it jurors, vigilance, courage and strength and resolve in making the decision that you're going to have to make here." A defense objection was overruled. (RT 277:33138.)

In his rebuttal argument, the prosecutor deftly combined several different themes that had elicited repeated objections:

> "Where certain crimes are concerned, and this is definitely one of them, retribution is not a forbidden consideration or one inconsistent with society's respect for the very dignity of man and humanity. The decision that capital punishment may be the appropriate action in an extreme case, which I submit this is, is the expression of the community's belief that certain crimes are, and those who commit them in and of themselves are, so grievous an affront to humanity that the only appropriate response must be the imposition of the penalty of death." (RT 279:33420.)

A defense objection to this argument was sustained. (RT 279:33420.) However, when this was followed immediately by the statement that "when they chose to take Jim Madden's life that night they forfeited their own," the defense objection was overruled. (RT 279:33420-33421.)

C. The Trial Court's Combined Rulings Barring the Defense from Asking the Jury to Exercise Mercy if The Jurors Concluded It Was Justified by the Evidence Resulted in Constitutional Error

1. A Brief Summary

John Travis' argument in regard to mercy is actually quite simple. Just as sympathy is a proper concept to argue in urging a jury to choose life without parole rather than death, as long as it is tied to the actual evidence, so is mercy. While the two concepts can be similar enough in some contexts for one to cover the other, that was not true here. Under the specific circumstances of the present case, based on the actual evidence, there were strong reasons for jurors to exercise mercy, **even if they did not feel sympathetic**. That is, somebody who started using alcohol and drugs at a very young age, and who then chose to allow alcohol and drugs to dominate his life may not have elicited much sympathy from juror's deciding the penalty for first degree murder. But such jurors might have nonetheless been persuaded that factors outside of John Travis' control contributed sufficiently to his drug and alcohol addiction to render him worthy of mercy, especially when considered together with his lack of any other violent criminal behavior and his

post-arrest efforts to improve himself. Thus, the ability to ask for sympathy was not an adequate substitute for seeking mercy, and on this unusual record the court's the preclusion order barring the jury's consideration of mercy must be deemed prejudicial error of constitutional dimension.

In the remaining subsections of this section of this argument, these principles will be developed more fully.

2. Mercy, When Justified by the Evidence, Meets All the Same Criteria that Renders Sympathy a Proper Concept to Argue in Mitigation of the Penalty, and the United States Supreme Court Has Expressly Recognized the Validity of Capital Juries Exercising Mercy

In *People v. Robertson* (1982) 33 Cal.3d 21, 56-59, this Court squarely held that a capital defendant must be allowed to argue for **sympathy** when seeking a penalty of life without parole rather than death. In framing the issue, *Robertson* explained:

> "The Attorney General acknowledges that in a consistent line of cases stretching back more than two decades this court had held that in the penalty phase of a capital trial the jury may properly consider sympathy or pity for the defendant **in determining whether to show mercy** and spare the defendant from execution, and that it is error to advise the jury to the contrary. (See, e.g., *People v. Vaughn* (1969) 71 Cal.2d 406, 422; *People v. Polk, supra*, 63 Cal.2d 443, 451; *People v. Friend* (1957) 47 Cal.2d 749, 765-768.) He initially argues, however, that this line of Cali-

> fornia authority is no longer valid in the modern death penalty era ushered in by the United States Supreme Court decisions in *Furman v. Georgia* (1972) 408 U.S. 238 [33 L.Ed.2d 346, 92 S.Ct. 2726] and *Gregg v. Georgia* (1976) 428 U.S. 153 [49 L.Ed.2d 859, 96 S.Ct. 2909] and their offspring. He submits that jury consideration of sympathy for the defendant is inconsistent with the 'guided discretion' mandated by *Furman* and *Gregg* and asserts that under those decisions the jury at the penalty phase may only consider the specific factual mitigating circumstances enumerated in the governing death penalty statute." (*Robertson, supra*, 33 Cal.3d at p. 57; emphasis added.)

Thus, even in this early discussion of the appropriateness of arguing for sympathy, this Court expressly recognized that the entire reason for asking a jury to consider sympathy was to use that as **a reason for the jury to show mercy**. *Robertson* and the federal constitutional underpinning acknowledged by the Attorney General nearly three decades ago demonstrates the correctness of the arguments of trial counsel, noted above, that sympathy, without mercy, was an empty argument. Significantly, the "unbridled discretion" arguments in regard to mercy, made by the prosecutor and accepted by the trial court in the present case, were precisely the same as the arguments tendered by the Attorney General in regard to sympathy, in *Robertson*. (33 Cal.3d at p. 57.)

Robertson next went on to explain how the consideration of "sympathy factors" was mandated by United States Supreme Court death penalty cases, which had squarely rejected the position taken by the Attorney General:

"Recent Supreme Court decisions clearly refute that submission. In *Lockett v. Ohio* (1978) 438 U.S. 586 [57 L.Ed.2d 973, 98 S.Ct. 2954], the lead opinion invalidated an Ohio death penalty statute which had strictly limited the mitigating factors the sentencing authority could take into account in deciding whether to impose the death penalty, concluding that under the Eighth Amendment the sentencing authority may 'not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' (Original italics.) *Id.*, at p. 604 [57 L.Ed.2d at p. 990] (plurality opn. of Burger, C. J.).) Earlier this year, a majority of the Supreme Court explicitly reaffirmed the *Lockett* holding, reversing a death penalty imposed upon a 16-year-old on the ground that the sentencing judge had not fully considered all the potentially mitigating circumstances present in that case. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104 [71 L.Ed.2d 1, 102 S.Ct. 869].)

"*Lockett* and *Eddings* make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it. As the plurality opinion in *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [49 L.Ed.2d 944, 961, 96 S.Ct. 2978], emphasized: 'A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of **compassionate** or mitigating factors stemming from the diverse frailties of humankind. ... [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment [citation] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally in-

> dispensable part of the process of inflicting the penalty of death.' (Italics added.) Thus, as we explained in our recent opinion in *People v. Haskett*, *supra*, 30 Cal.3d at page 863: '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.' " (*Robertson, supra*, 33 Cal.3d at pp. 57-58; emphasis added.)

Among the dictionary definitions of "mercy" are "forbearance and compassion," "kind or compassionate treatment." (*Webster's New World Dictionary of the American Language, College Edition.*) Thus, if compassionate factors cannot be excluded from the consideration of a capital jury, then how can "mercy" be excluded from its consideration?

Here, the basic flaw in the reasoning of the prosecutor and trial court below was their failure to recognize the distinction between mercy in the abstract and mercy based on the particular evidence presented to the jury. In contrast, as shown in the factual background section earlier in this argument, both defense counsel clearly recognized this distinction in their arguments. They recognized that it would be improper to argue **in the abstract** that the death penalty is always wrong, and that jurors should always exercise mercy rather than ever vote to execute any capital defendant. On the other hand, an argument that the **specific evidence** about the defendant's background that was presented to the jury during the trial justifies the exercise of mercy in this particular case, fits squarely within the principles of *Lockett*, *Eddings*, and *Woodman*, as set forth by this Court in *Robertson*.

Indeed, this distinction was made crystal clear by the United States Supreme Court itself, in *Penry v. Lynaugh* (1989) 492 U.S. 302. There, in a

portion of the lead opinion that was joined by five Justices, comprising a majority, the Court explained:

> "The State contends, however, that to instruct the jury that it could render a discretionary grant of **mercy**, or say 'no' to the death penalty, based on Penry's mitigating evidence, would be to return to the sort of unbridled discretion that led to *Furman v. Georgia*, 408 U.S. 238 (1972). We disagree.
>
> "To be sure, *Furman* held that,'in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.'"
>
> *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). But as we made clear in *Gregg*, so long as the class of murderers subject to capital punishment is narrowed, **there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant.** *Id.* at 197-199, 203." (*Penry v. Lynaugh, supra,* 492 U.S. at pp. 326-327; emphasis added.)

As *Penry* clearly recognized, the propriety of allowing a jury to dispense **mercy** is constitutionally proper, so long as the decision to do so is based on the evidence and not on an arbitrary rejection of capital punishment in the abstract.

More recently, in *Brewer v. Quarterman* (2007) 550 U.S. 286 the high court invalidated a Texas procedure that failed to give the defense a full opportunity to have the jury consider mitigating evidence. Quoting with ap-

proval from the District Court opinion granting relief, the high court explained, "'The mitigating evidence presented may have served as a basis for **mercy** even if a jury decided that the murder was committed deliberately and that Petitioner posed a continuing threat.'" (*Brewer v. Quarterman, supra,* 550 U.S. at p. 295; emphasis added.) Thus, under *Brewer*, as it had 18 years earlier in *Penry*, the Court continues to recognize the legitimacy of seeking mercy from a capital jury.

California decisions have also recognized the legitimacy of mercy supported by the evidence. The need to allow the consideration of sympathetic factors was explained in a case decided shortly after *Robertson*, *People v. Lanphear* (1984) 36 Cal.3d 163, 166:

> "Sympathy is not itself a mitigating 'factor' or 'circumstance,' but an emotion. Recognition that a jury's exercise of sentencing discretion in a capital case may be influenced by a sympathetic response to mitigating evidence is entirely consistent with that observation. The jury is permitted to consider mitigating evidence relating to the defendant's character and background precisely because that evidence may arouse 'sympathy' or 'compassion' for the defendant.
>
> "Using the term 'sympathy factor' in *Easley* and in *People v. Robertson* (1982) 33 Cal.3d 21, 58, as a shorthand reference to the range of mitigating factors or circumstances which the jury must be permitted to consider, we explained that both California precedent and controlling decisions of the United States Supreme Court not only permit, but mandate freedom on the part of the jury to act on the basis of sympathy or compassion **when that sympathy is a reaction to**

evidence regarding the defendant's character or background."

In similar fashion, "mercy" is not itself a mitigating factor, but it can be a proper reaction of a capital jury, as long as it is a reaction to evidence regarding the defendant's character or background, rather than to capital punishment as an abstract proposition. This distinction should present no problem, because the manner in which a capital jury is chosen necessarily precludes the seating of any juror who believes in the abstract that mercy is always the proper response, and that execution is not. (*Wainwright v. Witt* (1985) 469 U.S. 412.) Thus, the only way that mercy could be obtained from a seated capital jury is if it is sought on the basis of the specific evidence the jury has heard.

3. This Court's Treatment of Mercy in Regard to Capital Sentencing, While Not Always Clear and Consistent, Have Never Precluded Arguments by Defense Counsel Seeking Mercy Based on Evidence Presented, and, on Close Analysis, Would Also Support the "Mercy" Instruction Requested by Defense Counsel

The contrast between the cases cited by the prosecution and trial court below, compared with those relied on by the defense, superficially suggests that this Court's pronouncements on the propriety of considering mercy in determining the penalty in a capital case have been conflicting. On close analysis, however, there appears to be considerable consistency in what sometimes may appear to be contrary pronouncements, once it is recognized

that they arise in differing contexts. A substantial number of such cases will be discussed herein, to make it clear that the statements this Court has made against the consideration of mercy all pertain to mercy **in the abstract**, unconnected to the evidence in a particular case. Until recently, this Court had never criticized such an instruction when the consideration of mercy is limited to that which is **based on the particular evidence**, nor has this Court ever questioned the right of defense counsel to argue for mercy tethered to the evidence. Indeed, as long as it is tied to the evidence, this Court has regularly **endorsed** such instructions and argument in support of mercy.

In *People v. Melton* (1988) 44 Cal.3d 713, the jury was given a standard guilt-phase instruction to disregard sympathy or pity. That instruction was not repeated in the penalty phase, but neither was it countermanded. This Court found the jury was not misled, when considering all of the instructions and arguments in context. Among the instructions this Court impliedly approved as negating any danger that the jury was misled was one that informed them: "that a mitigating circumstance is one which, though it does not excuse or justify the capital crime, may be considered 'in fairness and **mercy** ... as extenuating or reducing the degree of moral culpability.' " (*Id.*, at p. 760.)

In *People v. Williams* (1988) 44 Cal.3d 1127, the defendant argued on appeal that the jury was misled by an early version of CALJIC 8.84.1, which tracked the language of Penal Code section 190.3, subdivision (k), but did not expressly state that the jury could consider sympathetic aspects of the defendant's background. This Court found no harm, because the prosecutor

argued that the jury could consider such evidence, while also contending that it was insufficient in that case to overcome the aggravating evidence. This Court also noted with apparent approval that defense counsel "told the jury that it was **obligated to consider** 'sympathy' and '**mercy**' as mitigating factors in arriving at its sentencing decision. We conclude the jury was not misled about the scope of its factor (k) inquiry." (*People v. Williams*, *supra*, 44 Cal.3d at p. 1148; emphasis added.)

Later that same year, in an unrelated case involving another capital appellant named Williams, this Court considered a claim that the trial court erred in refusing to instruct that: "'You may consider pity, sympathy, and mercy in deciding the appropriate penalty; however, your opinion may not be governed by guessing, prejudice, or public opinion. Moreover, you may not impose the death penalty out of mercy or pity for the defendant.'" (*People v. Williams* (1988) 45 Cal.3d 1268, 1322.) In finding this instruction was properly refused, this Court explained: "The first sentence of the proposed instruction could reasonably have been understood by the jurors as permitting them to indulge in sympathy unrelated to any of the evidence adduced at trial." (*Id.*) However, as explained thoroughly in the earlier sections of this argument, the defense in the present case recognized it could not ask for mercy **unrelated to the evidence produced at trial**. Rather, the defense only wanted to argue for mercy that was appropriate in light of the evidence produced at trial.

In *People v. Caro* (1988) 46 Cal.3d 1035, this Court did not disapprove of a mercy instruction, but did find no prejudice from the failure to give one:

> "Defendant argues that the judgment must be reversed because the jury was not instructed that it had 'the power to exercise mercy' in its sentencing discretion. The argument fails. The jury was instructed that it could consider sympathy, and counsel did not contradict this instruction. The jury also received an expanded factor (k) instruction, commending to its consideration specific aspects of defendant's character and background as shown by the evidence. Defendant contends that there is a crucial difference between pity, sympathy, and mercy, inasmuch as the first two are sentiments whereas the third implies action. We do not agree, however, that instructions to consider various factors, including sympathy for the defendant, could leave a jury with any ambiguity as to its power and duty also to act on such considerations. (*People v. Melton, supra*, 44 Cal.3d 713, 760.)" (*People v. Caro, supra,* 46 Cal.3d at p. 1067.)

This discussion in *Caro* expressly noted the contention made by trial counsel in the present case, that "mercy" differs from "sympathy" in that the latter is a sentiment and the former is an action. While this Court found no harm in *Caro*, there are several reasons why that conclusion should not preclude relief here.

First, *Caro* said nothing to dispute the contention that "mercy" differed from "sympathy," but merely concluded that under all the facts and circumstances in that case, the jury was not misled. Second, nothing in *Caro* indicates the defense **requested** an instruction on mercy. The opinion frames

the issue as merely a failure to give the instruction, indicating the defense was arguing on appeal that the instruction should have been given *sua sponte*. In the present case, the defense affirmatively requested a mercy instruction. Third, *Caro* does not disapprove a "mercy" instruction; it merely found no prejudice in failing to give it in the context of that case. Fourth, *Caro* says nothing to indicate that counsel was precluded from **arguing** for mercy, only that the trial court failed to instruct on the concept.

Fifth, and most importantly, the background evidence in *Caro* was much different than in the present case. In *Caro*, the defense presented evidence of abusive parents, but also showed that the defendant overcame that and

> "... did well in school, and was respected as a student and athlete, earning honors at every stage. He was well-liked in high school and in college, but had few if any close friends and was known as a person who handled his problems privately. He attended San Diego State University after high school, pursuing a major in engineering. He was active in community service activities and in ROTC. He dropped out of college his final year and joined the Marines, where he earned a lieutenant's commission and aviator's wings." (*Id.*, 46 Cal.4th at p. 1053.)

The defense in *Caro* also presented psychological evidence showing that, despite the very successful aspects of the defendant's life, psychological problems stemming from the earlier child abuse caused him to indulge in hostile and aggressive thoughts.

Thus, in *Caro*, the background evidence showed a number of positive aspects of the defendant, but they were not sufficient to overcome the psy-

chological problems caused by his abusive childhood. In contrast, in the present case, what the jury heard about John Travis' life up until the commission of the capital offense was a story of continual failure. As a result of this difference between *Caro* and the present case, even if it is fair to say the *Caro* jury did not need "mercy" instructions in addition to "sympathy" instructions, that does not mean that sympathy instructions and/or argument could be a fair substitute for mercy arguments in the present circumstances.

In other words, in *Caro,* the many good things the jury heard about the defendant's background that would have caused a jury to be sympathetic would have also caused the jury to see the same factors as a direct basis for a more lenient penalty than death. In contrast, here the jury heard nothing to like about John Travis' life prior to the commission of the present offense. Rather than seeing a person with strong and likable aspects to his personality, as was the case in *Caro*, the jury saw in John Travis a man who simply tried to ignore the impact of his abusive childhood by escaping in drugs and alcohol. The kind of reaction that would inspire would not translate so directly into a sympathetic feeling that would, in turn, lead to a conclusion that leniency was appropriate. In these circumstances, it was much more important for defense counsel to have the freedom to argue that it was understandable for jurors to dislike the choices John Travis made as he grew up, but to nonetheless conclude that he deserved mercy because of the circular trap he found himself in, even if the evidence did not cause the jurors to feel great sympathy for him.

Next, in *People v. Hamilton* (1989) 48 Cal.3d 1142, 1182, this Court stated:

> "Defendant argues that the trial court erred by failing to instruct, *sua sponte*, that the jury could consider sympathy and mercy for the defendant when deciding the appropriate penalty. Since the decision in *California v. Brown* (1987) 479 U.S. 538, we have consistently rejected that contention. (*E.g., People v. Lucky* (1988) 45 Cal.3d 259, 298; *People v. Miranda*, *supra*, 44 Cal.3d 57, 102.)"

Notably, however, the two cases *Hamilton* cited as consistently rejecting this claim, *Lucky* and *Miranda*, both dealt only with sympathy instructions, not mercy instructions. Both simply follow the principle that the jury should not be instructed that it can choose life without parole over death on the basis of **untethered** sympathy. Thus, neither of those cases, nor *Hamilton*, are relevant to the present question, except that in *Lucky*, in finding the jury was not misled, this Court noted with apparent approval that "Defense counsel, on the other hand, was allowed to argue without objection that the jury should show **mercy** either because or in spite of defendant's record and background." (*People v. Lucky, supra,* 45 Cal.3d at p. 299; emphasis added.)

In *People v. Andrews* (1989) 49 Cal.3d 200, 227-228, this Court again found the jury was not misinformed when the trial court failed to instruct that it had the discretion to exercise mercy. Once again, there is no indication the instruction was requested in that case. Furthermore, the Court referred to portions of the prosecutor's argument that indicated the jury had the power to exercise mercy, but that it was not appropriate to do so under the circum-

stances of that case. Thus, in rejecting any *sua sponte* duty to instruct on mercy, this Court nonetheless implied that arguments for mercy were appropriate.[81]

In *People v. Wright* (1990) 52 Cal.3d 367, 441-443, a deliberating jury sent the court a note asking if mercy could be considered in mitigation. The trial court refused to answer "yes" or "no," but instead told the jury to

---

81. In a dissenting opinion in *Andrews*, Justice Mosk would have found the failure to instruct on mercy was prejudicial error. Quoting from federal authority, Justice Mosk explained:

> "In modern Eighth Amendment jurisprudence, mercy is 'one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life.' (*Drake v. Kemp* (11th Cir. 1985) 762 F.2d 1449, 1460 (in bank).) 'Just as retribution is an appropriate justification for imposing a capital sentence, [citation], a jury may opt for mercy and impose life imprisonment at will. The ultimate power of the jury to impose life, no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale.' (Ibid.)" (*People v. Andrews, supra,* 49 Cal.3d 200, 236, dissenting opinion of Justice Mosk.)

The majority responded to Justice Mosk's comments by noting that "To the extent the dissent is asserting the jury must be instructed it is empowered to exercise mercy for reasons unrelated to the evidence, the argument is inconsistent with *California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]." (*People v. Andrews, supra,* 49 Cal.3d at p. 228, fn. 26.) Thus, even the majority only disputed the right to seek mercy for reasons **unrelated to the evidence**. As repeatedly noted above, in the present case the defense merely contended it should be allowed to argue for mercy **based on the actual evidence presented**.

refer to the instructions already given, and to "'use its own moral judgment in determining the facts and assigning weight to them.'" (*Id.*, at p. 442.) This Court in *Wright* reaffirmed that it was appropriate for a jury to consider mercy, as long as it was a reaction to the evidence in mitigation:

> "Inasmuch as the jury's inquiry seemed directed at how they should consider the evidence, the trial judge properly reemphasized that the jurors were to use their own moral judgment in weighing the facts presented at the penalty phase. While the trial court perhaps could have been more explicit in instructing the jury that **mercy was a permissible response to defendant's mitigating evidence**, the trial court's reply was adequate and not misleading." (*Id.*, at p. 442; emphasis added.)

Thus, *Wright* squarely concluded that mercy was a proper consideration. The failure to make that clear was found harmless because the trial court had made clear that the jury was to use its own moral judgment, **and** because counsel had repeatedly made it clear in argument to the jury that mercy was an appropriate consideration:

> "Counsel's closing argument echoed these same concerns. He told the jury: 'I want to tell you ... what the definition of mitigation is in the legal sense, the legal [definition] of Black's Law Dictionary. [¶] "Mitigation is not a justification or excuse of the offense in question but it is a matter which in fairness and **mercy**"-and **I underline the word "mercy"**-"that as part of the legal definition of the mitigation may be considered extentuating or reducing the degree of moral culpability." ' A few moments later, counsel implored the jurors thusly: 'I also ask that you be **merciful**. This is certainly a case where it is proper to ask for **mercy** and not just an emo-

> tional appeal, not in this case-in one case and ask you to be **merciful**.' Counsel returned to this theme when he later argued, 'And remember the mitigating includes fairness and **mercy**.' "(*Wright, supra*, 52 Cal.3d at p. 443; emphasis added.)

Wright, therefore, makes it clear that arguments by counsel calling for mercy are appropriate. Furthermore, since such arguments were precluded in the present case, the refusal to instruct on mercy cannot be deemed harmless.

Just four days after the *Wright* opinion was filed, this Court again endorsed an argument calling for mercy. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court rejected a contention that defense counsel had failed to provide effective assistance of counsel in failing to make a persuasive final argument. Finding that counsel's brief argument was nonetheless satisfactory, *Hayes* described the argument:

> "Finally, defendant faults trial counsel for failing to make a persuasive penalty phase argument. Although relatively brief, counsel's argument does not demonstrate incompetent assistance. Counsel argued that the death penalty was the most extreme penalty; that it should not be imposed to achieve revenge; that it was not an effective deterrent; that defendant's past crimes were committed as a consequence of his involvement with drugs and alcohol; that evidence had been introduced to show that defendant was a 'personable individual,' a 'constructive force,' and 'a leader' who had 'blossomed' when placed in a structured setting away from drugs; that defendant would adapt to life in prison and would possibly help someone else there; that a sentence of life without parole would mean that defendant would spend the rest of his life 'in a cage, away from society'; and, finally, that a sentence of life without parole would show that the jury had

'tempered justice with **mercy**.' " (*Id.*, at pp, 638-639; emphasis added.)

Strangely, in a case decided the same day as *Hayes*, and just four days after *Wright*, this Court voiced a seemingly inconsistent view of seeking mercy from a capital sentencing jury. In *People v. Benson, supra,* 52 Cal.3d 754, 808-809, this Court explained:

> "Defendant requested the court to instruct the jury that 'In this part of the trial you may consider pity, sympathy, or mercy for the defendant in deciding on the appropriate penalty for him.' The court refused.
>
> "Defendant contends that the court erred. He claims that the requested instruction was legally correct: **the law, he says, grants the jury authority to choose life over death simply because the former is desirable and the latter is not**. We disagree. Neither statute nor Constitution gives the jury the right to exercise what is essentially godlike power.
>
> "Defendant argues to the contrary. He says that the 1978 death penalty law grants the jury authority to dispense mercy. We are not persuaded: there is no adequate support for the assertion. He then says that the Eighth Amendment grants such authority. Again we are not persuaded. To be sure, 'Nothing in any of [the] cases [of the United States Supreme Court] suggests that the decision to afford an individual defendant mercy violates the Constitution.' (*Gregg v. Georgia* (1976) 428 U.S. 153, 199 [49 L.Ed.2d 859, 889, 96 S.Ct. 2909] (lead opn. of Stewart, Powell, and Stevens, JJ.); accord, *McCleskey v. Kemp* (1987) 481 U.S. 279, 307 [95 L.Ed.2d 262, 288, 107 S.Ct. 1756].) But nothing in any of those cases suggests that such a decision is in fact authorized by the Constitution. At its root, the Eighth Amendment is simply prohibitory: it

> bars imposition of punishment that is unduly severe. (See, e.g., *People v. Marshall*, *supra*, 50 Cal.3d at p. 938.) It does not grant power, and hence does not authorize imposition of punishment that is unduly lenient. (Compare *People v. Andrews* (1989) 49 Cal.3d 200, 227-228 [rejecting a similar claim of instructional error].) (Emphasis added.)" (*People v. Benson, supra,* 52 Cal.3d at pp. 808-809.)

The only logical explanation for *Benson*'s strong language against mercy, coming only four days after mercy was unambiguously endorsed in *Wright*, is the way the issue was framed in the emphasized portion in the second paragraph of the discussion just quoted. Thus, in *Benson* the claim on appeal was apparently made strictly in terms of whether a jury had the power to exercise mercy that was **not** based at all on the evidence in the particular case, but was instead based on the notion that a jury should be free to reject death simply because a death judgment is morally wrong, no matter what the evidence might be. As shown repeatedly above, that was not the contention in the present case.

Further support for the conclusion that the *Benson* discussion is limited solely to mercy unconnected to the evidence in a particular case is the fact that the *Benson* opinion was authored by Justice Mosk. As shown earlier in this argument, it was Justice Mosk who dissented in *Andrews, supra*, the preceding year, taking a very strong position in favor of the power of a jury to exercise mercy in a capital case. (*People v. Andrews, supra,* 49 Cal.3d 200, 236 (dis. opn. of Mosk, J.).) It is inconceivable that Justice Mosk could have changed his position so completely in one year, without even offering some explanation or acknowledging the change. Rather, it is apparent that

Justice Mosk recognized the difference, noted in established precedent, between mercy based on the evidence and mercy untethered to any evidence. Plainly, *Benson* exemplified the latter.

Such a narrow interpretation of *Benson* also seems appropriate in light of the very brief discussion of the identical issue in *People v. Daniels* (1991) 52 Cal.3d 815, 885:

> "At the penalty trial defendant requested an instruction that 'in this part of the trial the law permits you to be influenced by mercy, sentiment, and sympathy-but not prejudice or public opinion-in arriving at the proper penalty in this case.' He argues that the court erred in rejecting the instruction.
>
> "Essentially the same issue arose in *People v. Williams* (1988) 45 Cal.3d 1268, 1322, in which the defendant claimed the court erred in refusing to instruct that ' "[y]ou may consider pity, sympathy, and mercy in deciding the appropriate penalty; however, your opinion may not be governed by guessing, prejudice, or public opinion ...." ' Our opinion held that the trial judge could properly refuse the instruction because it could be 'understood by the jurors as permitting them to indulge in sympathy **unrelated to any of the evidence adduced at trial.**' (*Ibid.*; see *California v. Brown* (1987) 479 U.S. 538, 542 [93 L.Ed.2d 934, 940, 107 S.Ct. 837].)" (*People v. Daniels, supra*, 52 Cal.3d at p. 885, emphasis added.)

Daniels was decided only seven days after *Benson*. Thus, it is apparent that what was said so directly in *Daniels* constitutes the basis for the wordier route to the same conclusion in *Benson*.

Notably, *Benson* was the primary case relied on by the prosecutor and the trial court below. As shown, viewed in context it is clear that *Benson* does **not** address the issue of the propriety of seeking mercy based on the particular evidence. This demonstrates the flaw in the ruling below.[82] "'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.)

Further evidence that *Benson* must be read very narrowly is shown in several post-*Benson* cases. In *People v. Cooper* (1991) 53 Cal.3d 771, 844, decided just over four months after *Benson*, this Court noted with apparent approval that the jury had been instructed that it "'may consider pity, sympathy, or mercy for the defendant.'" Later that year, in *People v. Nicolaus* (1991) 54 Cal.3d 551, 588-589, this Court rejected a claim of error in refusing to instruct the jury that it could exercise mercy and reject the death penalty, citing several prior cases (discussed above) which had rejected such a contention. However, in explaining why the jury was fully informed of its

---

82. Judging from the language found in the record here, *Benson* also seems to be the source of the position taken by the court and the prosecutor below that mercy was a godlike power not available to juries. (See the final sentence in the second paragraph of the quoted portion of *Benson*, set forth above. Of course, the very task the jury faces in a penalty trial – deciding whether it is appropriate for the defendant to live or die – is also often considered a godlike power. (See *People v. Jennings* (1988) 46 Cal.3d 963, 991; *People v. Kipp* (1998) 18 Cal.4th 349, 380.) Thus, even if the dispensation of mercy is a godlike act, it seems quite reasonable to grant such a power to a group of people who are given the responsibility for determining whether a defendant should live or die.

proper discretion, this Court noted that "the prosecutor, in his closing argument, expressly identified mercy as a valid consideration in the penalty determination." (*Id.*, at p. 589.)

In finding no error in refusing to instruct on mercy, this Court explained:

> "Since the high court's decision in *California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837], we have consistently rejected this contention. (See, e.g., *People v. Andrews* (1989) 49 Cal.3d 200, 227-228; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1182; *People v. Caro* (1988) 46 Cal.3d 1035, 1067; *People v. Williams* (1988) 45 Cal.3d 1268, 1322-1323; *People v. Lucky*, *supra*, 45 Cal.3d at pp. 297-299; *People v. Miranda*, *supra*, 44 Cal.3d at p. 102.)" (*People v. Nicolaus*, *supra*, 54 Cal.3d at p. 588.)

As shown above, these cases deal with **untethered** mercy or sympathy, and all but one deal with a failure to instruct *sua sponte*, rather than a refusal to give a requested instruction.

For instance, in *Williams*, although no error was found in refusing an instruction pertaining to mercy, the Court's analysis reflects that the requested instruction would have allowed the jury to base leniency on sympathy untethered to any evidence. *Caro* simply found no prejudice in failing to give a mercy instruction ***sua sponte***, where counsel was not precluded from arguing for mercy. *Miranda* and *Lucky* only discuss untethered sympathy and say nothing about mercy, except that *Lucky* approved a defense argument urging mercy. *Hamilton* as noted above, was another case dealing with a claim that a mercy instruction should have been given ***sua sponte***, and even on that

more limited issue, *Hamilton* simply cited *Miranda* and *Lucky* without explaining how they were relevant.

In any event, *Nicolaus* dealt only with the need for **instructions** on mercy. It said nothing to indicate that there was anything wrong in **arguing** for mercy. Indeed, as noted above, in finding the instruction unnecessary, this Court in *Nicolaus* stressed the fact that the prosecutor in argument told the jury that mercy was a valid factor to consider.

In *People v. Ashmus* (1991) 54 Cal.3d 932, 993, decided soon after *Nicolaus*, a mercy instruction was given, and the issue raised on appeal differed from all of the prior cases discussed above:

> "At defendant's request, the trial court instructed the jury that 'In your determination of what punishment to impose, you may consider sympathy, pity, or **mercy**.'
>
> "Nevertheless, defendant now claims that the instruction was erroneous. His argument is that at least on the facts of this case, its words were ambiguous: Did they cover only defendant? Or did they extend-impermissibly-to the victim and perhaps others as well?
>
> "We disagree. A reasonable juror would have understood the instruction under challenge to allow consideration of sympathy, pity, or **mercy** only for defendant in deciding whether to take or spare his life. Such a juror could not have taken the language to carry the meaning defendant asserts it suggested. The 'defendant only' coverage of the instruction is practically declared by the words themselves. It is also confirmed by their context. Indeed, one of the instructions, which was given at defendant's request, stated that the listed circumstances in aggravation-

> which did not include sympathy, pity, or **mercy** for the victim or others-were exclusive. (Emphasis added.)"

Consistent with the distinction addressed above, *Ashmus* adds little to the present discussion, except that this Court discussed a mercy instruction and said nothing whatsoever to indicate it should not have been given at all.

People v. McPeters (1992) 2 Cal.4th 1148, is another case that found no error in refusing to instruct on mercy in the abstract, explaining: "The unadorned use of the word 'mercy' implies an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances. Defendant was not entitled to a pure 'mercy' instruction. (Citations omitted.)" (*Id*, at p. 1195.) Once again, *McPeters* does not affect defendant Travis' contention at all, since it was made clear in the trial court that defense counsel recognized the need to limit any plea for mercy to mercy justified by the specific facts of this case.

In *People v. Clark* (1992) 3 Cal.4th 41, 164, this Court found nothing improper about a prosecution argument that the jury could not consider sympathy or mercy. This Court explained:

> "In context, the argument was not misleading. In urging that the jury should not be induced to reject the death penalty by arguments that its imposition is a 'purely discretionary' matter, or that it should not act on the basis of mercy, sympathy or personal feelings of guilt, the prosecutor correctly advised the jury that they did not have ' "unbridled discretion in determining the fates of those charged with capital offenses." ... [¶] ... Under the Constitution, the jury must "ignore emotional responses that are not rooted in the aggravating and mitigating evidence intro-

> duced during the penalty phase." (*California v. Brown, supra*, 479 U.S. at p. 542 [93 L.Ed.2d at p. 940].) ...' (*People v. Kimble* (1988) 44 Cal.3d 480, 507-508.)" (*People v. Clark, supra,* 3 Cal.4th at p. 164.)

Thus, *Clark* is simply one more case that rejects the propriety of mercy untethered to any evidence. As such, it does nothing to detract from the argument that mercy is a proper factor to consider, when it **is** tethered to the evidence.

People v. Berryman, supra, 6 Cal.4th 1048, 1097-1098, cited to the trial court, is one more case that makes crystal clear this Court's recognition of the propriety of a penalty jury's consideration of mercy when based on the evidence. In *Berryman*, the standard "do not be swayed by sympathy" instruction was given in the guilt phase. In the penalty phase, the jury was expressly told it could consider sympathy, and was given a standard instruction in the language of Penal Code section 190.3, subd. (k). Rejecting a claim of error on appeal, this Court explained:

> "... he effectively asserts that the instructions quoted above told the jury that in determining penalty it could not consider or give effect to pity, sympathy, or **mercy**, or at least did not tell it that it could. We reject the claim out of hand. A reasonable juror would have understood and employed the instructions in question to **allow him to consider and give effect to** pity, sympathy, and **mercy** to the extent he deemed appropriate in this case-**and indeed to require him to do so**. There is no reasonable likelihood that the jury misconstrued or misapplied the instructions in violation of the Eighth or Fourteenth Amendment or any other legal provision or principle." (*Berryman, supra*, 6 Cal.4th at p. 1098; emphasis added.)

Once again, this Court said nothing at all to indicate there was any problem in considering mercy. Indeed, the quoted language strongly suggests this Court agreed that Eighth and Fourteenth Amendment principles **required** the jury to consider mercy.

In *People v. Ray* (1996) 13 Cal.4th 313, 354-355, especially at footnotes 20 and 21, this Court concluded that error occurred in instructing the penalty jury not to consider the consequences of its decision. However, that error was deemed harmless in light of other standard instructions and two special instructions requested by the defense, both of which referred to the jury's power to exercise mercy, as long as it was based on the evidence. Since these instructions were relied on to support the conclusion that the jury was properly informed of its sentencing discretion, it seems apparent that this Court in *Ray* was voicing its approval of the contents of those instructions.

In *People v. Lewis* (2001) 26 Cal.4th 334, 393, this Court found no error in refusing to instruct the jury that in deciding the penalty, it could decide to exercise mercy on behalf of the defendant. Seeing this as a mercy instruction untethered to the particular evidence, this Court rejected the instruction for the same reasons used in similar cases, discussed above. However, once again, in finding that the jury was adequately informed of its discretion by all the instructions and the argument of counsel, this Court expressly noted, "In closing argument, both defense counsel urged the jury to show sympathy and **mercy** to defendant." (*Id.*; emphasis added.) Thus, once again this Court gave no indication there was anything wrong about such an argument.

In *People v. Hughes* (2002) 27 Cal.4th 287, 395, this Court found no fault with a prosecution argument that the evidence did not justify forgiving the defendant. This Court explained:

> "We agree with the People that, when viewed in the context of the remainder of the prosecution's argument, the prosecutor simply and **properly** was asserting that although the jury **may consider** sympathy and **mercy**, defendant was unworthy of such sympathy or mercy. (Emphasis added.)"

It could hardly be stated more clearly that consideration of mercy is proper in a capital penalty trial.

In *People v. Griffin* (2004) 33 Cal.4th 536, 590-592, the trial court refused a requested instruction on the exercise of mercy based on the evidence, but this Court simply concluded that other instructions permitted the jury to consider such a mitigating factor. Moreover, counsel was permitted to urge the jury to exercise mercy. In a footnote, this Court noted that mercy "*apart from the evidence*" was not a proper mitigating factor. (*Id.*, at p. 592, fn. 26.) Thus *Griffin* makes it clear that mercy based on the evidence is a proper mitigating factor and that defense counsel is entitled to argue for jury consideration of such a factor.

In *People v. Wallace* (2008) 44 Cal.4th 1032, 1089-1090, the defense at trial had requested an instruction that covered mercy, sympathy, empathy, and compassion. The trial court modified the proposed instruction to delete any reference to mercy. This Court reiterated earlier cases that had said that when a jury is instructed with CALJIC 8.85 and 8.88, there is no need for a

further instruction on mercy, since the instructions as given adequately "inform the jury that it may exercise mercy..." (*Id*, at p. 1090.) In finding no reason to believe the jury was misled about "'...its obligation to take into account mercy...' (*People v. Hughes, supra*, 27 Cal.4th at p. 403)" (*People v. Wallace, supra,* 44 Cal.4th at p. 1090), this Court expressly relied on the fact that, "...defense counsel argued, without objection, that the jury could exercise mercy...." (*Ibid.*)

Thus, *Wallace* again makes it clear that defense counsel arguments for mercy are proper even if instructions on mercy are not required. Moreover, in concluding that there was no need to instruct on the concept of mercy, *Wallace* simply cited *People v. Hughes, supra,* 27 Cal.4th 287, 403, and *People v. Wader* (1993) 5 Cal.4th 610, 663. However, *Hughes* is another case where the instruction that was sought openly allowed the jury to exercise mercy for **any** reason, rather than merely considering mercy that was tethered **to the evidence**. *Hughes* cited only *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1187-1188, another case that only dealt with a requested instruction for mercy in the abstract, rather than mercy tied to the evidence. *Rodrigues*, in turn merely cited *People v. Benson, supra,* 52 Cal.3d 754, 808, *People v. McPeters, supra,* 2 Cal.4th 1148, 1195 and *People v. Williams, supra,* 45 Cal.3d 1268, 1322, all of which were discussed above.

Wader, the other case cited in *Wallace*, does not even bother to set forth the requested mercy instruction, so it cannot be determined whether it dealt with mercy in the abstract or mercy tethered to the evidence. The extremely brief discussion in *Wader* cites only *People v. Caro*, supra, 46

Cal.3d at p. 1067, and *People v. Livaditis* (1992) 2 Cal.4th 759, 781-782. *Caro* was discussed in detail above. *Livaditis* is another case wherein a instruction on mercy in the abstract was sought: "Defendant contends the court had a sua sponte duty to instruct the jury that it 'had the absolute discretion to exercise mercy and impose a life sentence, even in the face of a finding on [its] part that death was appropriate.'" (*Livaditis, supra*, at p. 781.) *Livaditis* cited cases already discussed above.

It is true that in *Wallace* itself, the instruction that was sought does appear to pertain to mercy tethered to the evidence: "'If a mitigating circumstance or an aspect of defendant's background or his character arouses mercy, sympathy, empathy, or compassion such as to persuade you that death is not the appropriate penalty, you may impose a sentence of life without possibility of parole.'" (*Wallace, supra,* 44 Cal.4th at p. 1089.) However, nothing in the *Wallace* Court's fleeting discussion of the refused instruction referred to or considered the distinction between mercy in the abstract and mercy tethered to the evidence, and again establishes no precedent for a point never addressed.

In sum, as shown in the preceding paragraphs, this survey of this Court's decisions suggests that the so-called rule that no mercy instruction need be given originated, and largely has been applied, in cases where the sought instruction allowed the exercise of mercy **in the abstract**. This Court has never discussed, let alone resolved, a specific contention that a requested instruction on mercy tethered to the evidence must be given. This Court has never explained why the concept of mercy is deserving of any less respect

then the concept of sympathy, when supported by the evidence. If, as some of the earlier cases make explicit, mercy is no different than sympathy, then there is no good reason why that single word should not be added to the normal instructions in order to ensure all the avoidance of confusion, as reflected in the present case. Indeed, the simple fact that the Attorney General has argued in so many cases that mercy instructions need not be given is, itself, ample evidence that the People, as well as many defendants, recognize that there is added significance in expressly instructing on mercy as well as sympathy when justified by the evidence presented. The present case amply supports, if not compels, that modest clarification of the law and its application here.

The concept of mercy again came before this Court recently in *People v. Ervine* (2009) 47 Cal.4th 475. There, the defense requested an instruction that included the concept of mercy tethered to the evidence.[83] The instruc-

---

83 The requested instruction stated:

> " '[a]t the penalty phase, you may consider sympathy, pity, compassion, or mercy for the defendant that has been raised by any aspect of the offense or of the defendant's background or character in determining the appropriate punishment. [¶] . . . [¶] You may decide that a sentence of life without possibility of parole is appropriate for the defendant based upon the sympathy, pity, compassion or mercy you felt as a result of the evidence adduced during the penalty phase.' " (*People v. Ervine, supra*, slip op. at p. 70.)

tion was given, except that the references to mercy were deleted. The trial court also ordered both sides not to make any arguments about mercy. On appeal, the defense argued the court had erred, both in refusing to instruct on mercy, and in forbidding counsel to argue for mercy. This Court affirmed the judgment.

Rejecting the defense contentions, this Court first noted that it had repeatedly found no error in previous decisions regarding the refusal to instruct on mercy. (*People v. Ervine, supra,* 47 Cal.4th at p. ___; slip op. at p. 71.) In this brief discussion, *Ervine* nowhere acknowledged the distinction found in its previous cases discussed above – that the decisions finding no error originated in cases where the instruction sought would have allowed the jurors to exercise mercy even when it was not tethered to any evidence. *Ervine* also explained that the concept of mercy was adequately covered by the inclusion in the instructions of sympathy, pity and compassion as mitigating factors. (*Id.*) However, as demonstrated earlier in this argument, there are some contexts where sympathy can include mercy, but there are others – such as in the present case – where sympathy is not an adequate substitute for mercy.

Ervine then went on in a single paragraph to conclude that that same reasons for finding no error in the refusal to instruct on mercy also applied to the trial court order that forbade counsel arguing for mercy. (*People v. Ervine, supra,* slip op. at p. 72.) In that brief discussion, this Court referred to *People v. McPeters, supra,* 2 Cal.4th 1148, 1195, for its conclusion that "[t]he unadorned use of the word 'mercy' implies an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts

and circumstances." But *McPeters* was inapposite because the instruction requested by the defense in *Ervine* did not refer to "unadorned" mercy; instead, it referred only to mercy engendered **by the evidence**. This Court ended its brief discussion with the conclusion (supported by no cited authority) that none of the defense evidence offered by Ervine "...would have weighed more heavily had the jury been explicitly instructed as to mercy in addition to compassion." (*People v. Ervine, supra,* slip op. at p. 72.) As shown earlier in this argument, with respect to sympathy, at least in the circumstances of the Travis case, compassion was not a substitute for mercy.

Indeed, the specific defense evidence in *Ervine* was quite different than the defense evidence in the present case. *Ervine* summarized the mitigating evidence in that case: "...his 'quiet upbringing,' his mother's death while he was a teenager, his service in Vietnam, his role as caregiver for his father until his death, his wife's betrayal, and the testimony of his friends and neighbors ..." (*People v. Ervine, supra,* slip op. at p. 72.) Such evidence presents a jury with a picture of an admirable man, who served his country in war and cared for his father until the father's death. In contrast, here the mitigating evidence pertained to John Travis' deprived childhood and his early addiction to alcohol and then drugs. Thus, while the jurors in *Ervine* had a more than adequate basis for feelings of sympathy and compassion that would include mercy, jurors in the present case could, and apparently did, feel no sympathy or compassion toward John Travis. It was, however, at least reasonably possible that one or more jurors could have been swayed if

Travis' counsel had been permitted to ask the jurors to exercise mercy tethered to the evidence.

In sum, whenever this Court has rejected a mercy instruction, it did so in a context where it perceived the defense as seeking to encourage the jury to exercise pure mercy – untethered to any particular evidence – or it provided no meaningful analysis because it relied on cases that dealt only with mercy in the abstract. Whenever this Court has expressly discussed mercy that was tethered to the particular evidence, it has strongly endorsed the propriety, and even the obligation, of the jury to consider such a plea for mercy. Furthermore, until *Ervine* this Court has never suggested there is anything improper in a defense counsel's argument seeking mercy.[84] Indeed, this court has often used such defense arguments to render harmless any failure to instruct on mercy. *Ervine,* in short, does not undermine John Travis's position. To the extent some of its language contains generalizations that may affect this case, further clarification and limitation appears necessary.

Thus, it was error to refuse to instruct on mercy in this case. Because counsel was also prohibited from arguing for mercy, that error cannot be deemed harmless. Furthermore, the preclusion of arguments seeking mercy also constituted separate error which, under the particular facts of the present

---

84 Even in *Ervine*, this Court did not suggest that it would be improper to allow a defense attorney to argue for mercy tethered to the evidence. Instead, this Court simply found no error in refusing to allow an argument for mercy, once again failing to recognize or analyze the distinction between unadorned mercy and mercy tethered to the evidence.

case, cannot be deemed harmless. (See Argument XII, later in this brief, for a general discussion of principles regarding prejudice that apply to all of the penalty phase errors set forth in this brief.) These errors, both separately and in combination, deprived John Travis of his Eighth and Fourteenth Amendment rights to have the jury fully consider, and have an opportunity to give effect to, all of his mitigating evidence. (*Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104.) For the same reasons, he was deprived of his federal Fifth, Sixth, and Fourteenth Amendment rights to a fair jury determination in accordance with due process of law. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.).) Also, as a result of these errors, he was deprived of his federal Eighth and Fourteenth Amendment rights to a reliable sentence determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

4. Under the Particular Circumstances of the Present Case, Instructions and Argument Regarding Consideration of Sympathy Were Not Adequate to Substitute for the Precluded Instructions or Argument Regarding Mercy

In light of the preceding discussions of decisions by this Court and by the United States Supreme Court, it should be beyond dispute that instruc-

tions and argument pertaining to mercy are appropriate in capital cases, as long as they are tethered to the particular evidence. This distinction was clearly recognized by the defense below, but the prosecutor honored it only in the breach, and the trial court, impliedly rejected the distinction despite multiple efforts by the defense to make its position clear. Thus, the court's determination of this issue was erroneous because it deprived John Travis of the right to ask the jury for mercy.

Mr. Travis recognizes that in many of the cases discussed in the preceding section of this argument, this Court has found failures to instruct on mercy to be harmless, in light of all of the instructions and the argument of counsel. As suggested several times, those discussions should not apply to the present case for several reasons. First, in many of those other decisions, this Court pointed to **arguments** for mercy, as well as instructions on sympathy, to render the error harmless. Here, however, as directed by the trial court, there were no such arguments for mercy. Second, except for *Ervine*, distinguished above, in none of the cases where this Court found the failure to instruct on mercy to be harmless was the defense **precluded from arguing** for mercy, as it was here. Third, under the particular facts in this case, instructions and argument regarding sympathy could not adequately substitute for instructions or argument regarding mercy, even if they can be an adequate substitute in other contexts. It is this latter proposition that will be developed more fully in the present section of this argument.

Preliminarily, it should be noted that the People below clearly recognized that, at least in the context of this case, arguments for mercy differed

substantially from arguments for sympathy. As shown in the earlier sections of this argument, the prosecutor fought long and heard to prevent the defense from arguing for mercy. Having made such strong efforts at trial to stop the defense from arguing for mercy, the People should not be permitted to take the position on appeal that the erroneous preclusion of such argument made no difference. (Compare *People v. Louis* (1986) 42 Cal.3d 969, 995; *People v. Powell* (1967) 67 Cal.2d 32, 56-57; *People v. Cruz* (1964) 61 Cal.2d 861, 868.)

Moreover, it was explained above, in the discussion of *People v. Caro*, *supra*, 46 Cal.3d 1035, that the evidence about Mr. Travis' unfortunate childhood would not necessarily engender feelings of sympathy, even though they could constitute a strong basis justifying the exercise of mercy. To fully appreciate that problem in the present case, it is necessary to review the ceaseless efforts of the prosecutor to turn John Travis' unfortunate upbringing against him. Throughout jury selection, the presentation of evidence, and the arguments to the jury, the prosecutor never missed an opportunity to point out that some other persons with unfortunate childhoods did not make the same bad choices that John Travis made, and did not grow up to commit homicide. Those efforts can only be seen as a very strong attempt to cause the jury to feel unsympathetic toward John Travis despite his unfortunate upbringing. In such circumstances, it would be the height of hypocrisy for the People to turn around on appeal and argue that sympathy was an adequate substitute for mercy in this case.

At the urging of the prosecutor, the jury questionnaire used to aid in selecting the jury at the penalty retrial contained the following question: "157. Do you think people can overcome most hardships or disadvantages if they set their minds to it?" (See, for example, CT 122:31087.) Playing off of this question, examples of questions frequently asked of prospective jurors were as follows:

> "EXAMINATION OF PROSPECTIVE JUROR E-32
> BY MR. RICO:
> Q. Good afternoon, Ms. XXXXXXXX. My name is Ronald Rico with the District Attorney's Office.
> "Along those same lines do you think that even if a person has – well, let's say an awful, a terrible childhood – that they necessarily or automatically always grow up to commit criminal acts?
> A. No.
> Q. Okay. Do you have any thoughts as to whether or not even those from a bad background or an experience have choices that they make in their life?
> A. Certainly.
> Q. Now, in your experience you said that your father had had an alcohol problem?
> A. Correct.
> Q. Did he ever get involved in any violence or violent acts as a result of that or not?
> A. Not that I can remember.
> Q. Okay. And you grew up, as Mr. Leininger pointed out, and that was something that affected you as a child, but – well, let me ask it this way: Have you in your life come across people who had difficult backgrounds, childhoods and nevertheless didn't choose to break the law?
> A. Yes." (RT 217:25083-25084.)

Indeed, the prosecutor used such questions so often that it caused counsel for co-defendant Silveria to register an objection:

> "I would object to and ask that the court rule that some of the questions that Mr. Rico is asking when he does his voir dire are out of order and restrict him from further asking questions along those lines.
>
> "It's true that the defense is asking jurors if they could be receptive to mitigation evidence, if it would be willing to seriously weigh and consider it, but, in response, Mr. Rico is specifically asking people if they know individuals who have overcome hardships, if they realize that committing a crime is a choice, if they think people have the ability to choose and exercise free will.
>
> "I submit that those are not questions designed to elicit any information, but are, in fact, an attempt by Mr. Rico to pre-argue exactly the argument that he has previously made and, of course, would be making again at this time in this case. They are not proper questions." (RT 218:25109.)

The objection was not successful. (RT 218:25109-25110.)

During examination of witnesses, the prosecutor exploited several opportunities to re-emphasize his theme that the defendants deserved no sympathy because they continued to have choices despite their upbringings. For example, Danny Silveria's fourth grade teacher, Robert Ector, testified that silveria tried hard to do well, but did not appear to be receiving any parental support with his school-work. Ector also testified that he had taught Silveria's older brother, Sonny, who was one of the angriest and meanest students Ector had ever encountered. (RT 253:29387-29393, 29396.) On cross-examination, the prosecutor brought out the fact that Ector had taught many

at-risk children during his career, but this was the first time he ever had to testify in a murder trial involving a former student. (RT 253:29408-29409.)

Similarly, after Dean Hebert testified in regard to his mother's harsh treatment of Danny Silveria, and his own abuse of Silveria, the prosecutor brought out the fact that Hebert, who had himself been sexually abused by a prior foster brother, had never been convicted of a felony, nor had he ever robbed or killed anybody. (RT 254:29507.) After Department of Social Services worker Linda Cortez testified about her years of being the social worker for the Silveria family, the prosecutor brought out the fact that, to her knowledge, none of the other children in her caseload had grown up to commit murder. (RT 255:29802.)

Once the evidentiary portion of the trial was completed, the prosecutor repeated this theme in his argument to the jurors:

> "The defendants may not have had an ideal childhood by any means. In fact, Mr. Silveria's may well have been downright awful. How many people in this country, in this state, in this county or in this room have had or know people who have had awful childhoods but who have not grown up to rob or to kill or to murder in such an absolutely inhuman way?
>
> "Even if the defendants' childhoods were as bad as depicted here or even worse, terrible as that may be, so what?" (RT 277:33131-33132.)

It should have been obvious to the trial court that this repeated prosecution theme was quite unfair. It was never contended that every person who has a deprived childhood will necessarily turn out to be violent, and/or turn to drugs, alcohol, and crime. Instead, the defense expert evidence simply

showed that persons with backgrounds such as that of John Travis or Danny Silveria are more likely to turn to drugs and alcohol and, especially if they do not have the strong support of parents, relatives, or adult mentors, they are more likely than others to fail. The fact that some have the support or the inner strength to overcome a deprived childhood in no way dispels John Travis's position that those who are unable to overcome such handicaps may nonetheless merit mercy, even if they do not engender feelings of sympathy.[85]

Instructions or argument allowing the jurors to consider sympathy in determining the appropriate penalty would likely be understood by lay jurors in the kinds of terms set forth in a typical dictionary, such as *Webster's New World Dictionary of the American Language, College Edition*. There, definitions of "sympathy" include: "sameness of feeling; affinity between persons or of one person for another;" "agreement in qualities; harmony; accord;" "a mutual liking or understanding arising from sameness of feeling;" "the entering into or ability to enter into another person's mental state, feelings, emotions, etc." Perhaps if any jurors had come from a seriously deprived childhood of their own, they might be able to identify with the defendants and feel sympathy towards them. But it is far more likely that the jurors found

---

85 Indeed, the prosecutor's reasoning would mean that evidence of a defendant's deprived childhood would never be of any value as a mitigating factor in any capital case. Such a position cannot be reconciled with the clear United States Supreme Court precedent discussed earlier in this argument.

themselves disliking John Travis and not identifying with him in any way. Such a reaction would cause such jurors to accept the prosecutors theme that he did not deserve their sympathy.

On the other hand, even jurors who did not feel sympathy toward John Travis and believed that he failed in life because he was too weak to overcome his deprived childhood, could very well feel that he deserved mercy; not mercy in the generic sense of life always being preferable to death, but mercy that came directly as a natural and reasonable response to the particular facts in this case. If defense counsel had been able to argue directly for such mercy, and if the court had told the jurors in the instructions that it was appropriate to consider such feelings of mercy, then jurors who felt little or no sympathy might well have concluded that, in light of his deprived childhood and his genetic predisposition to alcoholism, they were not prevented from considering whether Mr. Travis deserved mercy to the extent that he should pay for his terrible crime by spending the rest of his life in prison, rather than receiving a sentence of death.

In sum, mercy was a proper consideration for instructions and argument to the jury. Under the facts of this case, a plea for mercy was far more likely to succeed than was a plea for sympathy. The prosecutor recognized that and repeatedly fought hard to preclude arguments or instructions regarding mercy, even though he knew full well that the jury would hear arguments and instructions regarding sympathy. Sympathy was not an adequate substitute for mercy in this case. Indeed, sympathy has never been found by this Court to constitute an adequate substitute for mercy where the defense was

precluded from even mentioning mercy in argument, although supported by the evidence. Under these circumstances, As shown earlier, the right of the defense to ask the jury for mercy, under the particular facts of this case, is not only consistent with most of this Court's pronouncements, but is also consistent with the application of federal constitutional principles in decisions of the high court. The trial court's erroneous rulings precluding arguments for mercy and denying any instructions regarding mercy must be deemed prejudicial, since they cannot be declared harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *People v. Brown* (1988) 46 Cal.3d 432, 446-449.)

D. The Trial Court Exacerbated Its Errors By Allowing the Prosecutor to Argue Concepts in Aggravation of the Penalty That Suffered from the Same Problems the Trial Court Believed Would Result from Arguments or Instructions Regarding Mercy

As shown in the preceding sections of the argument, the trial court precluded arguments or instructions regarding the consideration of mercy because the court believed such arguments would give the jury unbridled discretion in deciding the penalty, rather than guided discretion based on the particular facts of this case. Also, the court relied on the fact that mercy did not appear in any of the factors in aggravation and mitigation listed in Penal Code section 190.3. At the same time, defense objections to comparable prosecution themes in final argument were overruled. The combination of

these rulings rendered the penalty trial an unfair and lopsided contest that seriously prejudiced John Travis.

The prosecutor's arguments denied John Travis a fair trial in numerous respects. As shown above, the prosecutor was permitted to argue that the defendants had earned the ultimate penalty, that a sentence of life without parole would be the easy way out, that the verdict of the jurors would represent the conscience of the community, that there was no guilt in voting for a death sentence as that penalty had been passed by the jurors' fellow citizens and upheld by the courts, that an execution would be something the defendants brought on themselves rather than something the jurors or the State was doing to them, that returning a death verdict took courage and strength, and that a death verdict was justified by the need for retribution and by respect for the dignity of man and humanity.[86] All of this was improper and exacerbated the trial court's errors in precluding the defense instructions and argument on mercy.

The concepts that the trial court allowed the prosecutor to argue in aggravation of the penalty were all blatant emotional appeals that can be

---

86 Later in this brief (see Arguments X and XI, *infra.*) it will be argued that many of these aspects of the prosecutor's argument were improper in and of themselves. For the purpose of the present argument, it does not matter whether those prosecution themes would have been improper in and of themselves; instead, what matters here is that these prosecution themes suffered from the same problems that were urged against the defense desire to argue for mercy. Thus, regardless of whether these prosecution themes might have been permissible in the abstract, it was nonetheless fundamentally unfair to allow the prosecutor to utilize such themes while simultaneously barring the defense from referencing the concept of mercy.

made in every single capital case and that have nothing in particular to do with the specific facts of the present case. Thus, these are all reasons that could be used by jurors to choose death, rather than life without parole, regardless of the strength of the actual aggravating and mitigating factors.[87] It is simply impossible to reconcile the trial court's belief that a plea for mercy would leave the jurors with unguided discretion, while the arguments the prosecutor was permitted to make would not. Even more, the prosecutor's themes all involved reasons for voting for a death sentence which do not appear in Penal Code section 190.3.[88]

Allowing the prosecutor to make these arguments, while simultaneously forbidding the defense from even mentioning the word "mercy," rendered the penalty trial even more fundamentally unfair and unreliable than did the rulings regarding mercy in and of themselves. The end result was that the defense was forbidden to ask the jury to reject a death sentence by exer-

---

87 In other words, these arguments should be limited to debates regarding whether there should be a death penalty at all. But once there is a death penalty law that presumes that most first degree murders should not result in a death sentence, these arguments shed no light whatsoever on how to distinguish the few first degree murder cases that do merit a death sentence from the larger number of first degree murder cases that do not merit a death sentence.

88. It is, of course, possible to qualify some of these prosecution themes by adding the phrase "based on the facts of this case," and thereby arguably bring them within the "circumstances of the crime" aggravating factor. In some instances the prosecutor attempted to do that, but in others he did not. In any event, to the extent that was done, it still remained indistinguishable from the defense desire to similarly tie pleas for mercy to the facts of the present case.

cising mercy, based on the evidence, while the prosecutor was permitted to ask for death by urging the jurors to be courageous and strong rather than take the easy way out, to respect the law passed by their fellow citizens and upheld by the courts, to respect the need for retribution, and to respect the dignity of humanity. These sharply contrasting rulings stacked the deck against John Travis and rendered the penalty trial fundamentally unfair.

Thus, the federal Fifth, Sixth, Eighth, and Fourteenth Amendment principles cited above were implicated even more fully by the effect of the rulings allowing these prosecution arguments, combined with the rulings against defense pleas for mercy. Also, the combined unfairness of these rulings, fully exploited by the prosecutor, make it clear that the errors cannot be deemed harmless beyond a reasonable doubt. John Travis was seriously and unfairly handicapped in his effort to persuade the jury to choose a sentence of life without parole. The penalty determination must be reversed.

IV. THE TRIAL COURT ERRONEOUSLY REMOVED A SEATED JUROR DURING THE PENALTY RETRIAL, OVER THE OBJECTION OF THE DEFENSE, WHEN IT WAS REVEALED THAT THE JUROR HAD SUPERFICIAL PERSONAL KNOWLEDGE ABOUT ONE DEFENSE WITNESS, BUT WITHOUT ANY SHOWING OF A DEMONSTRABLE REALITY THAT HER KNOWLEDGE WOULD IMPACT HER ABILITY TO CONDUCT HERSELF AS AN IMPARTIAL JUROR, AND THE ERROR WAS EXACERBATED BY THE COURT'S RELIANCE ON AN INCORRECT STANDARD, AND BY THE COURT'S FAILURE TO CONSIDER A REASONABLE ALTERNATIVE SUGGESTED BY DEFENSE COUNSEL, ALL RESULTING IN DEPRIVING APPELLANT OF HIS FEDERAL FIFTH AND SIXTH AMENDMENT RIGHT TO A FUNDAMENTALLY FAIR TRIAL BY JURY AND OF ADDITIONAL RELATED FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

It has been shown in previous arguments in this brief that John Travis' death sentence resulted from a penalty retrial that was seriously flawed. During the evidentiary portion of the trial, crucial defense witnesses were not permitted to testify. (See Arguments I and II, *supra.*) After all parties had rested and counsel made their arguments to the jury, counsel for John Travis was not permitted to ask the jury for mercy. (See Argument III, *supra.*) In this argument, it will be shown that the flaws that marred this penalty retrial also impacted the composition of the jury that was to decide John Travis' fate.

Early in the penalty retrial, a sworn juror realized she had met a defense witness at some social events connected to the juror's husband's employment. This juror had been fully candid in her questionnaire and voir dire responses, and the trial court was satisfied that the juror was sincere and honest in her responses, and had never intentionally hidden any information. The defense witness in question was named in the list of witnesses attached to the juror questionnaire, but that list included more than 300 names, and the juror failed to make any connection when she viewed the name with no other information about the witness. After both defense attorneys talked about that witness during opening statements, revealing for the first time that he worked as a minister and that his duties included work with inmates of the local jail, the juror first realized that she had met the witness at some social events.

The juror's contacts with the witness were superficial and very occasional, limited to seeing him at crowded social events, such as a wedding, a graduation, or an office Christmas party. There was no indication she had ever had a direct conversation with the witness. She did indicate she would start with a presumption that the witness was truthful, but the witness was a minister and it is likely that many jurors with no prior acquaintance with such a witness would also start with a comparable belief. Indeed, it is very common during jury voir dire for a potential juror to express similar feelings about the testimony of a police officer, and such beliefs rarely result in the granting of a challenge for cause.

After the juror had been questioned further by the court, there was no showing of a demonstrable reality that would support any conclusion that the juror was unable to properly perform the functions of a juror, including assessing the credibility of this witness. Nonetheless, the prosecutor insisted that he would have exercised a peremptory challenge against the juror if he had been aware of her acquaintance with the defense witness. Notably, the prosecutor had been fully aware of the fact that the juror's husband was also employed as a minister in the same city as the defense witness, but the prosecutor had never asked the juror during voir dire if the juror or her husband had ever had any social or professional contact with the witness. However, instead of reminding the prosecutor of this missed opportunity, the judge expressed concern about the fact that the prosecutor had not had an opportunity to exercise a peremptory challenge against the juror with the subsequently learned information in mind. After superficial further questioning, the trial court concluded it had no choice in the matter, and that it was required to excuse the juror and replace her with an alternate.

It will be shown in this argument that there is no precedent for permitting the prosecutor to effectively continue exercising peremptory challenges after the jury has been sworn. It will also be shown that the questions the court chose to put to the juror were not sufficient to establish a bias, to a demonstrable reality. Instead, the trial court expressed conclusions that were not supported by the record, failed to ask obvious questions that should have been asked, and employed an incorrect standard. Thus, the removal of the juror was erroneous in many ways, depriving John Travis of his federal Sixth

Amendment right to a trial by jury, as well as violating other constitutional and statutory rights.

B. Factual and Procedural Background

During the first penalty trial, Leo Charon testified before separate juries, first as a witness for Danny Silveria and subsequently for John Travis. Charon's testimony was summarized in the statement of the facts, at the outset of the brief, at pp. 70, 105-107. Pertinent to the present issue, he testified he was a Reverend employed by Capstone Ministries, which provided chaplaincy services in the Santa Clara County Jail. (RT 152:12745.)

During the jury selection process for the penalty retrial, Juror G-18, like all other prospective jurors, submitted a juror questionnaire. (CT 36:8618-8667.) In that questionnaire, she wrote she had been married for 14 years (CT 36:8622), and her husband was a family ministries pastor at the Family Bible Church in San Jose. (CT 36:8623.) She also checked "No," in response to a question asking if she was acquainted with any potential witness. (CT 36:8646.) That question referred to a witness list that contained the name "Leo Charon" among a list of more than 300 potential witnesses. The witness list provided no information about Leo Charon, other than his name. (CT 36:8656-8665.)

Despite the fact that Juror G-18's questionnaire disclosed that her husband had an occupation similar to Leo Charon's, and that they both worked in the same city, neither the prosecutor nor anyone else sought to ask in voir dire whether she or her husband might have had occasion to have so-

cial or professional contact with Mr. Charon. Similarly, nobody made any effort to bring to her attention that fact that witness Leo Charon was a reverend with a local church. No party challenged her for cause.[89] (RT 220:25561-25573.)

After the jury was sworn, opening statements were given. In previewing expected defense testimony, counsel for Danny Silveria and counsel for John Travis both referred to Leo Charon by name and stated that he was a minister who worked with jail inmates. (RT 236:27514, 27533-27534.) Immediately after the opening statements, Juror G-18 notified the court that she now realized she was acquainted with Leo Charon. (RT 236:27538-27539.) She explained that her husband had worked with Charon in a recovery program approximately ten years earlier. Juror G-18 did not know Leo Charon intimately, but she had met him on social occasions and she knew that he was a good man. She was initially uncertain whether that would have any effect on her. Her husband and Charon had both worked for CityTeam Ministries, but both had left that organization 4 or 5 years before the trial. (RT 236:27539.)

The court expressly asked if there was anything in her friendship with Leo Charon, her knowledge of him, or any conversation she ever had with him that would affect her ability to be fair and impartial to both the prosecution and the defense. She replied, "I don't think so." (RT 236:27539-27540.)

---

89. In contrast, Juror G-18 was expressly questioned about her notation in her questionnaire that her father had been employed as a probation officer. (RT 220:25562.)

The court followed up by asking whether she could listen to testimony from Charon with an open mind "and if something he said seemed to ring true with you, fine, and if it didn't, fine the other way." She responded, "Yes." (RT 236:27540.) The court then conferred with all counsel briefly, and asked Juror G-18 another follow-up question - whether there was anything about her husband's relationship with Leo Charon that would affect her in the present case. She responded, "No." (RT 236:27540-27541.) The discussion then ended with no action being requested by any party.

A week later, the prosecutor brought the matter up again, expressing concern about the fact that Juror G-18 failed to indicate in her juror questionnaire that she was acquainted with Leo Charon. (RT 240:27990.) The prosecutor complained that he had accepted her as a juror without knowing she had failed to disclose her connection with Charon. (RT 240:27991, ll. 24-28.) The prosecutor asserted that if he had known in advance that the juror was acquainted with Charon, "there is no way that I would have accepted her as a juror." (RT 240:27993.)

Counsel for John Travis noted that in his ministry work, Leo Charon commonly used only his first name. Counsel himself had known him only as "Leo" for a number of years. (RT 240:27994, ll. 16-21.) The court readily agreed that the juror had not intentionally hidden any information:

> "THE COURT: I think she innocently did not know or recognize him (sic) name. I don't think there's any question about that. It was not brought up until his name was brought up during the opening statement who he was and where he

> came from. Then it rang a bell with her. I'll take that on face value." (RT 240:27994-27995.)

However, the court did express concern that the prosecutor did not have an opportunity to consider exercising a peremptory challenge against Juror G-18 with the added information in mind. (RT 240:27995, ll. 21-24.) The court concluded that all counsel would be permitted to submit any desired follow-up questions they had for Juror G-18, and the matter would be taken up again the following week. (RT 240:27996.)

When the matter was discussed again, the prosecutor had submitted some proposed questions. Counsel for John Travis had no proposed questions, but did have concerns about the prosecutor's proposed questions. Counsel for Danny Silveria had failed to submit any questions within the time limit the court had set, but did tender four questions that he wanted the court to use instead of the prosecutor's questions. He criticized the prosecutor's questions as seeking too much detail. The court ruled that it would determine what questions to ask, and that once it began questioning the juror, **there would be no further input from counsel.** (RT 246:28536-28539.) The court also reiterated its belief that there had been no intentional withholding of information by the juror: "I do think that was quite innocent on her part, missing the name." (RT 246:28539, ll. 15-16.)

The prosecutor reiterated that his major concern was that he would have used a peremptory challenge on Juror G-18 if he had known of her acquaintance with Leo Charon. He also remained concerned that she referred to Leo Charon by his first name. Counsel for John Travis reiterated his belief that everybody called chaplains by their first names. (RT 246:28539-28540.)

The court stated that the only issue it was concerned with was whether the juror would have been removed for cause if the information had been known during voir dire. (RT 246:28541.)

The actual questioning of the juror did not take place until nearly two weeks later. In response to questions from the court, Juror G-18 explained: She did not recognize Leo Charon's name on the witness list and did not realize she knew him until he was mentioned in the opening statements. When her husband and Leo Charon both worked for City Team Ministries, her husband was chaplain of the recovery program and she believed Charon was house manager of the homeless program.[90] When she socialized with him, it was never a matter of just her and her husband being out with Leo Charon and his wife. Rather, Juror G-18 would see Charon only at City Team functions, such as year-end parties or graduation ceremonies for men in the recovery program. Indeed, she did not even know whether Charon was married. (RT 254:29663-29664.)

The last time she had seen Leo Charon was five months earlier, at the wedding of a City Team employee. Before that, it had been at least three years since she had seen him. Her only knowledge about his background or his personal life consisted of her belief that he was a recovering alcoholic

---

90. Notably, Juror G-18 demonstrated her sincerity in following the admonitions the court had given to the jurors when she stated that even after this matter came up in court, she had not asked her husband anything at all about his relationship with Leo Charon. She understood she was not allowed to discuss that or anything else about the case with her husband. (RT 254:29663, l. 27-29664, l. 3.)

himself.[91] Noting that she had previously told the court she believed Leo Charon was a good man, the court asked what she meant by that. She explained she meant simply that he seemed to have a good rapport with the men at City Team, and from what she had seen they appeared to trust him and to be able to talk to him.[92] (RT 254:29665.)

The court expressed its concern that if Juror G-18 was called upon to assess Leo Charon's credibility, she might base her opinion on things she knew that other jurors did not know. (RT 254:29665-29666.) The juror acknowledged that from what she knew of him, she "wouldn't believe that he would ever lie about any dealings with somebody." (RT 254:29666.) Whatever he said, she would believe that he believed it to be true, but she also realized that he could be wrong about what he believed. (RT 254:29666.)

In response to a classic leading question by the court[93], she agreed she would not think Leo Charon was capable of telling a lie in testimony

---

91. This personal information about Charon was accurate and was openly referred to before the entire jury in the testimony at the retrial. (RT 164: 259:30599, 264:31364.)

92 The evidence that the prosecutor knew was coming clearly showed that John Travis and Danny Silveria trusted Leo Charon. More importantly, the very fact that the jail hired Charon to work with inmates clearly implied a strong level of trust in the man. No evidence was offered by anybody to dispute the clear fact that Leo Charon was trustworthy. Thus, this aspect of Juror G-18's personal knowledge about Charon would not have given her information about him that was significantly different from the information given to all of the jurors.

93 Q "So if - - basically what you're saying is that if Mr. Charon testified under oath you would not believe that he would be capable of telling a lie or misleading anybody?

(Continued on next page.)

given under oath. However, she went on to explain that she would give every witness the benefit of the doubt. She would assume everybody was telling the truth. Also, while she would tend to believe that whatever Leo Charon said on the stand, he believed it was true, (RT 254:29666-29667.)

The judge next asked what she would do in the jury room if the jury was discussing the weight to be given to Leo Charon's testimony; would she want to tell the other jurors what she knew about his background? She responded, "I could keep it out if I was told to, yes." (RT 254:29667.) The judge reiterated the need to base the jury deliberations on the evidence received in court, and she stated, "Yes. And I wouldn't disclose any of that, no." (RT 254:29667-29668.)

The questioning then ended and the matter was discussed between the court and counsel. The prosecutor claimed that Leo Charon had testified to two different stories and had tried to twist the truth, if not outright lie.[94] The prosecutor contended Juror G-18 had already prejudged Leo Charon's testimony. The court interrupted and reminded the prosecutor that the juror had stated that Leo Charon could be wrong about something, even if he believed it was true. (RT 254:29669-29670.) The prosecutor claimed that Leo Charon had "portrayed John Travis as the most sincere convert to the Travis jury and

---

(Continued from last page.)

A Right." (RT 254:29666.)

94. In fact, there was never any inconsistency in any testimony Leo Charon gave.

then switched names and portrayed Mr. Silveria --."[95] (RT 254:29671.) The court interrupted again and responded, "that doesn't automatically follow that she is going to say, okay, Mr. Travis is the most recovered convert that – in the world. Mr. Charon could still be wrong as far as she's concerned." (RT 254:29671.)

Counsel for John Travis responded, emphasizing that there was no support in the record for the prosecutor's claim that Leo Charon had given any inconsistent testimony. Instead, Charon had only testified that, while many inmates try to be manipulative, he believed that Danny Silveria was sincere in his religious conversion and that Travis was sincere in his recovery efforts. Indeed, counsel for John Travis did not see any real importance in Travis' religious beliefs, except as they tangentially applied to his recovery efforts. (RT 254:29673-29675.)

Travis' counsel added that the problem the prosecutor faced was no different from the problem faced by defense counsel in almost every case, where many jurors tended to believe that whatever a police officer has testified to under oath must be true. (RT 254:29675.) Counsel for Danny Silveria

---

95. As fully set forth in the statement of the facts, at pp. 70 and 105-107, and in the factual background portion of Argument I, at PP. 146-150, earlier in this brief, pertaining to precluded testimony from a former juror and former alternate juror, Leo Charon did not give such inconsistent testimony. Instead, he simply explained that Danny Silveria had made an unusually sincere and successful conversion to Christianity, and that John Travis had made unusually strong efforts to overcome his drug and alcohol addiction. Leo Charon never described John Travis religious conversion as being more sincere than, or even comparable to, Danny Silveria's.

added that he had tried to urge the court to specifically ask the juror if she would give Reverend Charon any more or less credibility than any other witness, but the court had precluded him from making that request.[96] (RT 254:29676.) Counsel believed the juror had simply been saying that she started with a presumption that every witness would tell the truth under oath, but that if cross-examination or other evidence indicated that presumption was incorrect, she would be able to evaluate the impact of that, whether it involved Charon or any other witness.[97] (RT 254:29676-29677.) Counsel expressly requested that, before making an ultimate decision about the juror, the court should ask her specifically whether she would give Leo Charon more or less credibility than any other witness.

Finally, counsel for Danny Silveria stated that if the choice were between removing Juror G-18 or eliminating Leo Charon from his witness list, he would choose to eliminate Charon as a tactical choice. Rather than inquire

---

96. At a point in the judge's examination of the juror when such a suggested question would have been quite appropriate, the record shows that counsel for Danny Silveria did attempt to make a comment, but the court replied abruptly, "No. I'm going to continue this, Mr. Braun. I'm not going to tolerate any interruption from anybody sitting at that table." (RT 254:29666.)

97 This may or may not be an appropriate attitude for a juror, but that is a question which need not be decided. If Juror G-18 had not known Leo Charon, this information never would have been revealed and she would have sat as a juror for the remainder of the trial. Thus, the propriety of starting with an assumption that all witnesses are truthful is not the issue; instead, the only issue is whether the juror would have treated Charon any differently because of her superficial prior acquaintance with him.

whether counsel for John Travis would make the same tactical choice, the court simply took the matter under submission at that point. (RT 254:29678.)

The following day, the court read into the record the 4 written questions that counsel for Danny Silveria had requested before the examination of Juror G-18. One of the questions was a request to read CALJIC 2.20 to the juror and ask her if she could apply the standards of credibility to all witnesses, including Leo Charon. (RT 255:29854-29855.) The court at no time acted on this request.

The court then announced its ruling. First, the court stated it was "convinced there is absolutely no juror misconduct ..." (RT 255:29855, ll. 12.13.) Cryptically, the court stated that Leo Charon was unlike most other witnesses in that it was not only Charon's observations that were important, but also his opinion and credibility. No explanation was given as to why his credibility was any more in issue than that of any other witness. Indeed, the court immediately went on to state: "Credibility of any witness is always an issue." (RT 255:29855, ll. 26-27.)

The court then explained that the juror knew that she could not share her knowledge and opinion of Leo Charon with any other jurors. The court saw this as a problem, because she would improperly base her own assessment of Leo Charon's credibility on facts that were not in evidence. Furthermore, Juror G-18's personal knowledge of Leo Charon and her inability to share that knowledge with the other jurors would prevent her from participating in any deliberations about Charon's credibility. Because she did not believe Leo Charon would lie, the court reasoned, the juror had prejudged

Charon's testimony based on evidence obtained outside of court, and could not assess his testimony with an open mind. As a result, the court believed it had no choice but to excuse Juror G-18 for cause, and the court believed she would have been excused for cause had this information been known during voir dire. (RT 255:29855-29856.)

The court expressed regret at its own conclusion because the juror "is and would continue to be a fine juror and perfectly qualified except for this impediment." (RT 255:29857, ll. 1-3.) Counsel for Danny Silveria then asked the court to address the statement counsel had made at the conclusion of his argument, apparently referring to his offer to remove Leo Charon from his list of witnesses. The court stated cryptically, "It doesn't make any difference. She still – Mr. Charon is still a witness." (RT 255:29857.) Counsel for John Travis asked if he needed to state his objections for the record and the court responded that enough had been said in arguments the preceding day. (RT 255:29857.) At the end of that day's session, the court informed Juror G-18 that she was excused. (RT 255:29904-29905.)

C. The Removal of Juror G-18 Was Improper Because the Inability to Fulfill Her Duty to Conduct Herself as an Impartial Juror Does Not Appear in the Record as a Demonstrable Reality

In *People v. Cleveland* (2001) 25 Cal.4th 466, this Court unanimously set forth the standards that should govern when a trial court considers the removal of a sworn juror during jury deliberations. Although the present re-

moval occurred before any deliberations had begun, the basic framework for appellate review set forth in *Cleveland* appears to be equally applicable here. Indeed, this Court has accepted the use of the *Cleveland* analysis in a pre-deliberation removal. (*People v. Hernandez* (2003) 30 Cal.4th 1, 4 and 10.)

Cleveland began its analysis by quoting pertinent portions of Penal Code section 1089:

> "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, **or upon other good cause shown** to the court is **found to be unable to perform his duty**, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." (*Cleveland, supra*, at p. 474; emphasis added.)

Cleveland then noted that a determination to discharge a juror was reviewed on appeal for abuse of discretion, but any inability to perform as a juror "'"must appear in the record as a **demonstrable reality**.'" [Citation.]' [Citation.]" (*Id.*, emphasis added.)

The same "demonstrable reality" standard applies in the context of the present case:

> "... [b]efore a juror may be dismissed for losing, during trial, the ability to render a fair and unbiased verdict, 'the juror's inability to perform his functions must appear as a demonstrable reality.'" (*People v. Williams* (1997) 16 Cal.4th 153, 231, quoting *People v. Van Houten* (1980) 113 Cal.App.3d 280, 288.)

"Bias in a juror may not be presumed." (*People v. Williams, supra*, 16 Cal.4th at p. 232.) Additionally, in *People v. Wilson* (2008) 44 Cal.4th 758, 821, this Court stated unequivocally that the demonstrable reality standard requires a stronger evidentiary showing than would be required for the abuse of discretion standard. *Wilson* also repeated what had been said in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052: " 'To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.' " (*People v. Wilson, supra,* 41 Cal.4th at p. 821.)

The perceived problem with the juror in *Cleveland* was a refusal to deliberate. *Cleveland* noted, "But caution must be exercised in determining whether a juror has refused to deliberate. California courts have recognized the need to protect the sanctity of jury deliberations. [Citation.]" (*People v. Cleveland, supra,* 25 Cal.4th at p. 475.) In the present case, the perceived problem was an inability to assess the credibility of a prosecution witness based solely on evidence received in court. While this case does not present the problem of inquiring into confidential jury deliberations, the same need for caution exists nonetheless.

Much of the remaining discussion in *Cleveland* pertained to the need to avoid circumstances that will allow a discharge to be based on the juror's view of the sufficiency of the prosecution case. (*People v. Cleveland, supra,* 25 Cal.4th at pp. 480-485.) The rationale is obvious. Once enough informa-

tion is known to have a strong suspicion that the juror in question appears likely to be favoring one side or the other, the danger that a discharge will affect the outcome of a case increases. That rationale applies in the present case. Certainly both the prosecution and the defense attorneys perceived Juror G-18 as more likely to be favorable to the defense than would be a juror selected at random.[98] Thus, just as in *Cleveland* the need for caution here was great.

In the present case, the showing before the trial court that the Juror G-18 was unable to carry out her responsibilities as a juror failed to satisfy the demonstrable reality standard. When asked if her acquaintance with Leo Charon would affect her ability to be fair and impartial to both the prosecu-

---

98. There is nothing inappropriate in perceiving a juror as more likely to favor one side or the other, even at an early stage of a trial. After all, the law expressly provides for a number of peremptory challenges for each side. Obviously, all parties exercise their peremptory challenges with the hope of achieving a jury that will contain persons who will be more likely to favor their side. (See *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221.) In the present case, it is likely that the fact that Juror G-18 was married to a pastor was a fact that would cause the defense to feel she might be likely to give greater weight to the expected defense mitigating evidence than would a juror picked at random.

Indeed, counsel for Danny Silveria noted during the discussions of what to do about Juror G-18 that she had been the very last regular juror selected. When she was called to the jury box and the prosecutor passed, both defense counsel then also passed and the jury selection was complete. (See RT 234:27375.) Counsel for Danny Silveria explained the defense accepted the jury at that point because they believed Juror G-18 added favorably to the overall balance of the jury. (See RT 254:29677.) Thus, the defense properly perceived her as a potentially favorable juror well before it was known she had any acquaintance with Leo Charon.

tion and the defense, the juror replied, "I don't think so." (RT 236:27539-27540.) When asked if she could remain open-minded, she said "Yes." (RT 236:27540.) When asked if her husband's relationship with Charon would affect her in the present case, she said, "No." (RT 236:27540-27541.)

Here, an admonition telling Juror G-18 that she must utilize the factors in CALJIC 2.20 to assess the credibility of all witnesses, including Leo Charon, and that she must not discuss her acquaintance with Charon with any other jurors, would have addressed any problem. (See *People v. Adcox* (1988) 47 Cal.3d 207, 253 [jury presumed to have followed the court's instructions].) Instead, the trial court did not even bother to ask the juror whether she could apply the criteria in CALJIC 2.20 and assess Leo Charon's credibility the same way as any other juror. One defense attorney tried to suggest that to the court, but the trial judge had already decided not to allow any further input from counsel. The record makes clear that the trial court never doubted the sincerity of Juror G-18 here. Thus, had she been asked more about her ability to follow the court's instructions, and still maintained she could properly assess Charon's credibility, there would have been no apparent basis for the court to disbelieve her.

It is true that Juror G-18 later expressed her belief that Leo Charon would not lie. However, she also believed Charon could be mistaken in a conclusion. The juror did state a belief Charon was incapable of lying under oath, but that was only a one-word affirmation in response to a classic leading question. ("Q BY THE COURT: Okay. So if – basically what you're saying is that if Mr. Charon testified under oath you would not believe that

he would be capable of telling a lie or misleading anybody?" "A Right." (RT 254:29666.) She quickly went on to explain that she would assume everybody was telling the truth (RT 254:29666-29667), making it clear she was **not** applying a different standard for Leo Charon.[99]

In context, what the juror was saying was no different than what would be expected from **any** juror, even one who did not have any prior acquaintance with Leo Charon. In other words, it is likely that most jurors would **start** with a belief that a **minister**, testifying **under oath**, would not lie. This was a risk that was voluntarily taken by the prosecutor when he failed to exercise a peremptory challenge at a time when he knew that Leo Charon would be a defense witness, that Charon was a pastor, and that Juror G-18 was married to a pastor. It could hardly have been a surprise to learn later that Juror G-18 would start with a presumption that Leo Charon, or any other minister, would be telling the truth when testifying under oath. That in no way indicates that Juror G-18 would be unable to apply the normal rules

---

99 Notably, no evidence was ever offered that would indicate Leo Charon was lying. The most the prosecutor could legitimately argue was that there was a speculative possibility that Leo Charon was manipulated by John Travis and/or Danny Silveria, and that he was mistaken in his belief they were sincere. The judge and the prosecutor already knew that was case, from the first penalty trial evidence. The juror made it clear that she had no problem assessing all of the evidence and determining whether Charon had been mistaken in his beliefs, and that her prior knowledge of him would not impact such an assessment.

for assessing credibility, if cross-examination or other evidence did cast doubt on Charon's credibility.[100]

Moreover, whatever influence this juror's superficial contacts with Leo Charon might have had if she had been permitted to take part in deliberations appears no different from the life experiences that may inevitably impact some jurors. In *People v. Wilson*, *supra*, 44 Cal. 4th 758, several deliberating jurors complained that one African-American juror was siding with the defense because the defendant was also African-American. This Court found error in the removal of that juror and concluded there was no demonstrable reality that the juror in question would improperly rely on his own life experiences as an African American man, rather than on the evidence:

> "That the alleged problems with Juror No. 5 arose during deliberations at the penalty phase rather than the guilt phase is significant. Rather than the factfinding function undertaken by the jury at the guilt phase, 'the sentencing function [at the penalty phase] is inherently moral and normative, not factual; the sentencer's power and discretion . . . is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances.' (*People v. Rodriguez*

---

100. Put differently, it is not at all unusual for a prospective juror to state during voir dire that they would expect a police officer testifying under oath to tell the truth. Further questioning will typically lead to the juror agreeing that even police officers should be judged by the same standards as any other witnesses. Nothing in the present case establishes, to a demonstrable reality, that the feelings of Juror G-18 about Leo Charon were any different than these common feelings prospective jurors have about police officers.

> (1986) 42 Cal.3d 730, 779.) Given the jury's function at the penalty phase under our capital sentencing scheme, for a juror to interpret evidence based on his or her own life experiences is not misconduct. 'Jurors' views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work.' (*In re Malone* (1996) 12 Cal.4th 935, 963.) '[D]uring the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. . . . [¶] A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting "an opinion explicitly based on specialized information obtained from outside sources," which we have described as misconduct.' (*People v. Steele* (2002) 27 Cal.4th 1230, 1266.) '[T]he jury is a "fundamentally human" institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution.' (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)" (*People v. Wilson, supra,* 44 Cal.4th at p. 830.)

Similarly here, Juror G-18 would have violated no rule if her deliberations were informed by her life experiences. If life experiences properly include a juror's professional work, as stated in *Malone* and reiterated in *Wilson*, they must necessarily also include a juror's understanding of, or participation in, a spouse's professional work. Thus, if Juror G-18 had been permitted to deliberate, and had referred to her husband's work as a minister, she would not have been improperly relying on facts not in evidence.

The simple fact is that the trial court made no meaningful effort to determine if Juror G-18's feelings that Leo Charon would not lie under oath simply fell within that normally expected initial attitude of many jurors, or if her beliefs actually went beyond that and were based on some feeling that Leo Charon was even more credible than other ministers. What was said by the juror indicated she did **not** know Charon well enough to have a meaningful belief based on his particular character, as opposed to a generalized belief no different from other jurors. Rather than reflect the juror's inability as a demonstrable reality, the record shows the trial court reached a conclusion too quickly. The trial court then asked leading questions to try to support that conclusion, rather than attempting to inform the juror of the factors that should be used in assessing credibility and seeking to determine if she could restrict her assessment to such factors.

In analogous circumstances in this very case, the trial court readily accepted jurors' own assessments of their ability to be fair and impartial. For example, in the first trial, the jury questionnaire asked, "Do you believe that it is possible that a peace officer might not tell the truth?" Juror P-32 answered "No," and commented "It's my understanding there is a penalty for lying under oath." (CT 27:6751.) At the same time, Juror P-32 expressed the view that a guilty defendant "could probably lie" and that "Family members or friends of defendant could possibly lie." (*Id.*) Despite these answers, on the questionnaire, the judicially conducted voir dire failed to seek any clarification whatsoever. (RT 92:8750-8755.) Juror P-32 served as an actual alternate juror. (RT 94:8878-8883.)

Similarly, Juror P-56 said in his questionnaire that it was not possible for a peace officer to lie, because "He/she is to uphold the law/ I need to have faith in that." (CT 28:6816.) At the same time, he believed a defendant would lie to save his life and other witnesses might lie to cover up something. (*Id.*) Juror P-56 also served as an actual alternate juror. (RT 94:8883.)

Other rulings by this same judge regarding other potential jurors demonstrated the judge's remarkable faith in the ability of other jurors to follow instructions despite difficult personal experiences. First trial prospective Juror P-5 disclosed that his brother-in-law had been murdered in a drug-related shootout. Even more upsetting was the murder of a cousin with whom the prospective juror had been close, committed by a person whom the cousin's ex-wife had hired. In addition, prospective Juror P-5's own wife had been robbed while she was working in a retail store. She had been forced to lie down on the floor and believed she was about to be killed. She and another worker fled from the store. The robber fired shots at them, but missed. The same robber was later arrested for another robbery in which he had, in fact, murdered two people, and prospective Juror P-5's wife had testified at that robber's trial. (RT 66:5357-5361.) Not surprisingly, prospective Juror P-5 conceded these experiences had an effect on his attitude toward persons accused of murder. (RT 66:5359, ll. 24-27.) Unlike Juror G-18 in the second trial, however, the trial court deferred to prospective Juror P-5's belief he could be a fair and impartial juror.

Having related these troubling personal experiences, and knowing the present case involved charges of murder and robbery, when prospective Ju-

ror P-5 was asked if he could set aside his feelings and base his decision on the evidence, he responded in regard to his cousin's murder, "I would hope I could, you know." (RT 66:5360, ll. 10-19.) In regard to setting aside his wife's experience with being a robbery victim who thought she would be killed, the prospective juror stated, "I believe I could set it aside, yeah." (RT 66:5361, ll. 20-23.) With that relatively weak assurance, the trial court denied defense counsel's challenge for cause. (RT 66:5368-5371.)

Another example of this kind occurred at the penalty retrial, but with a completely different result than was the case with Juror G-18. Prospective Juror F-64 explained during voir dire that her daughter and her daughter's husband had been murdered in 1985. After that, she joined a victims' rights group called Parents of Murdered Children, and attended some meetings. (RT 220:25463-25467.) The court simply asked if the incident would affect her ability to be fair and impartial, and the prospective juror answered, "No." (RT 220:25463-25464.) The judge asked no other questions at all regarding any potential impact that the murder of her own adult daughter might have on her ability to be fair in a murder trial, nor did the judge make any inquiry into the circumstances under which the murder had occurred.

Counsel for Danny Silveria tried to inquire more specifically. Noting that the present trial was expected to feature testimony from members of the victim's family, **including the mother of the victim**, counsel asked whether the prospective juror would be able to get past any natural feelings of identifying with another mother of a murdered adult. The prosecutor objected, arguing that called for prejudgment, and the objection was sustained. (RT

220:25467-25469.) The court then interrupted and asked simply whether the juror believed she could listen to such testimony with an open mind, and the jurors responded, "I think so." (RT 220:25469.) Silveria's counsel then attempted to rephrase the question several times, asking the juror whether testimony from the family of the victim would overwhelm any other evidence, whether the juror would consider such victim impact evidence so aggravating that no mitigating evidence could overcome it, and how the juror thought she might react to victim impact evidence. In each instance, the prosecutor's objection was sustained, and counsel finally gave up trying. (RT 220:25469-25470.)

Although it was quite legitimate to be concerned about this juror's potential reaction to victim impact evidence, especially since it would include testimony from the mother of the victim, the trial court made no effort at all to fashion any other question to probe any further into this crucial area. Juror F-64 became an actual juror and participated in the decision that John Travis should die for his crime.[101] (RT 234:27362-27375.)

---

101. It is true that neither defendant challenged Juror F-64 for cause. However, in view of the repeated rulings precluding meaningful questions in this area, the record would not have supported any challenge for cause. The real problem is that the court failed to allow any of the questions defense counsel sought to ask about the impact of testimony from the victim's mother, and the court failed to fashion any probing questions of its own. Instead, the court simply accepted at face value Juror F-64's general statement that she **thought** she could listen with an open mind.

The relevance to the present issue is that the judge accepted this equivocal answer to a general question with no effort to probe meaningfully, while the judge refused to accept Juror G-18's unequivocal statement that

(Continued on next page.)

It has often been said that "'court[s] must not presume the worst' of a juror." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729, and cases cited therein.) Here, the trial court had been alerted to a potential problem that may have merited inquiry, but the court improperly relied on a single response without sufficient questioning to determine whether the problem was real or speculative. "[O]nce a juror's competence is called into question, a hearing to determine the facts is clearly contemplated. Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review. (.)" (*People v. Burgener* (1986) 41 Cal.3d 505, 519-520; citations omitted.[102])

The failure to conduct a sufficient hearing permeated the present removal. Without informing Juror G-18 of the credibility assessment factors in CALJIC 2.20 and inquiring whether she could utilize those factors and assess Leo Charon's credibility in the same manner as any other witness, the trial court's determination was inadequate to make a finding that good cause was established to discharge her. The court's inquiry simply started from a premature conclusion that the juror was unable to perform her duties, and failed to adequately cover areas that would have allowed a meaningful determination one way or the other.

(Continued from last page.)

she could assess Leo Charon's credibility with an open mind, and that she would not be affected by her husband's relationship with Charon.

102 Overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743.

That an adequate inquiry could have easily resulted in an opposite conclusion in the present circumstances is amply demonstrated by this Court's decision in very similar circumstances in *People v. McPeters* (1992) 2 Cal.4th 1148, 1174-1176. There, after the jury had been sworn in a capital case, one juror realized that the husband of the victim was a real estate agent for a person whose home the juror was in the process of buying. The juror brought this to the attention of the trial court, and acknowledged he thought this would affect his judgment because he had met with the victim's husband on three occasions and thought highly of him. Despite this initial reaction, on further inquiry by the trial judge, the juror was able to assure the court that he would be objective and would assume the husband of the victim was no different than any other witness.

This Court found no implied bias in *McPeters*, since the failure to disclose this information during voir dire was inadvertent. In light of the juror's assurance that he could be fair, this Court agreed the trial court had acted properly in refusing to remove the juror, emphasizing that the juror's contact with the witness "was brief and not naturally or inevitably productive of bias, ..." (*Id.*, at p. 1175.)

The present case bears striking similarities, but is a far stronger case for accepting a juror's assurance of impartiality. As in *McPeters*, Juror G-18's contacts with witness Leo Charon were brief and less recent, and there is no indication in the record here that those contacts were of a type to be naturally or inevitably productive of bias. Indeed, in *McPeters*, the contacts appear to have been more direct than Juror G-18's very occasional observa-

tion of Leo Charon at crowded social functions. Unlike *McPeters*, the record in this case does not indicate that Juror G-18 **ever** had a direct conversation with Leo Charon.

Furthermore, the juror in *McPeters* dealt directly with the witness (who was also the husband of the murder victim) and had apparently been impressed with the manner in which the witness conducted his business. In the present case, the record does not disclose any actual basis for Juror G-18's limited contacts with Leo Charon to have provided her with information that would affect her assessment of his credibility. As noted above, the inadequate inquiry in the present case leaves no basis in the record for finding that Juror G-18 had any **specific** reason to believe Charon would not lie, as opposed to the natural and expected reaction of any juror that any minister testifying under oath in a capital case would not be likely to lie.

In sum, further inquiry was not merely called for; it was required before the trial court could properly determine whether Juror G-18 should be discharged. Had further inquiry occurred, quite likely it would have resolved the problems perceived by the trial court. The trial court clearly found Juror G-18 to be sincere and honest, with no reason to question her credibility. At least it should have given her the opportunity to state whether she could apply CALJIC 2.20 to Leo Charon in the same manner as any other witness. The failure to make adequate inquiry under the standard consistently applied by this Court's decisions rendered the discharge erroneous.

D. The Ruling Below Was Also Defective Because the Trial Court Employed the Wrong Standard

Additionally, the trial court abused its discretion by employing the wrong legal standard in removing Juror G-18. As noted above, the present trial court made clear that the standard it employed was whether Juror G-18 would have been removed for cause if the information about her brief contacts with Leo Charon had been known during voir dire. (RT 246:28541; RT 255:29855-29856.) However, there is no authority supporting the proposition that challenges for cause can be reopened after the jury has been sworn, whenever it is discovered that a seated juror made an entirely innocent error in responding to a voir dire question.

Instead, as previously made clear by this Court, the correct standard is the demonstrable reality standard, as explained in *People v. Cleveland, supra,* 25 Cal.4th at p. 474. "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (*People v. Cortez* (1971) 6 Cal.3d 78, 86, quoting with approval from *People v. Surplice* (1962) 203 Cal.App.2d 784, 789:) Here, the trial court openly employed an incorrect standard. Therefore, to whatever extent there was any discretion to be exercised, it cannot be presumed that is was exercised correctly. As shown above, a proper exercise of discretion, employing the correct standard, would have resulted in either retaining Juror G-18, or, at a minimum, in questioning her more thoroughly.

E. The Court Below Also Erred in Refusing to Consider the Alternative of Deleting Leo Charon from the List of Witnesses

As noted above, counsel for co-defendant Silveria expressly stated that he would be willing to eliminate Leo Charon as a witness, rather than lose Juror G-18 as a juror. The trial court made no effort to determine if counsel for John Travis would make the same agreement. (RT 254:29678.) Later, when the trial court reached its conclusion that the juror must be removed, counsel for the co-defendant reminded the judge of his willingness to remove Charon as a witness, but the judge simply stated that would make no difference at all. Counsel for John Travis asked if he should state his objections for the record and the court responded that was not necessary. (RT 255:29857.)

The trial court never explained why there would be any remaining problem with Juror G-18 in the event Leo Charon was not offered as a witness. Certainly, the record fails to demonstrate any demonstrable reality of her inability to properly function as a juror in the absence of any testimony from Charon. Thus, the inexplicable refusal to consider this very viable alternative constitutes another reason why the removal of Juror G-18 cannot be upheld.

Respondent should not be heard to complain that counsel for John Travis failed to adequately preserve this issue below. The trial court made it as plain as possible that it had heard enough and did not want to hear more. The trial court squarely rejected the offer from co-counsel to forego use of

Leo Charon as a witness, stating it would make no difference. No further argument or objection is required to preserve a point when it would have been futile to argue or object. (*Reid v. Superior Court* (1983) 140 Cal.App.3d 624, 630-631; *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; *People v. Jaspal* (1991) 234 Cal.App.3d 1446, 1455.)

F. The Errors Violated Federal Constitutional Rights and Was Prejudicial

Besides being contrary to established principles of state law, the trial court's errors shown above necessarily violated federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair trial by jury in accordance with Due Process of law, and to reliable fact-finding in a capital sentencing proceeding. (*Murphy v. Florida* (1975) 421 U.S 794, 44 L.Ed.2d 589, 95 S.Ct. 2031; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (Fifth Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.) Further, they also violated the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to have a trial completed by the originally chosen jury absent some manifest necessity precluding that re-

sult. (*Crist v. Bretz* (1978) 437 U.S. 28, 35, citing *Wade v. Hunter* (1949) 336 U.S. 684; *Green v. United States* (1957) 355 U.S. 184, 188.) In view of these federal constitutional violations, the erroneous rulings must be deemed prejudicial unless they can be declared harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 24.)

In *People v. Hamilton* (1963) 60 Cal.2d 105, 128, this Court set forth the principles that govern the assessment of the impact of an erroneous removal of a seated juror:

> "While it has been said repeatedly, in the cases cited above, that a defendant is not entitled to be tried by a jury composed of any particular individuals, but only by a jury composed of qualified and impartial jurors, this does not mean that either side is entitled to have removed from the panel any qualified and acting juror who, by some act or remark made during the trial, has given the impression that he favors one side or the other. It is obvious that it would be error to discharge a juror for such a reason, and that, if the record shows (as it does here), that, based on the evidence, that juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side. If it were not, the court could 'load' the jury one way or the other. That is precisely what occurred here. The juror asked, in good faith and in order to be instructed by the court, questions which indicated that (temporarily at least) she was considering the probability of a life sentence. To dismiss her without proper, or any, cause was tantamount to 'loading' the jury with those who might favor the death penalty. Such, obviously, was prejudicial to appellant."

Hamilton's long-established views about assessing prejudice when a juror is dismissed improperly should govern here. Juror G-18's marriage to a local minister and her superficial contacts with Leo Charon created the impression that she might have been more willing than other jurors to seriously consider the mitigating evidence the defense would be offering. Nevertheless, she stated she could listen to Charon's testimony with an open mind. The prosecutor's less-than-compelling grounds for discharging the juror mid-trial did not warrant the court's bypassing of the *Cleveland* analysis, especially without adequately exploring whether Juror G-18 could apply the credibility factors set forth in CALJIC 2.20 to Leo Charon's testimony in the same fashion as to any other witness. The result here, as in *Hamilton*, was to improperly "load" the jury with persons more likely to return a death sentence, prejudicing John Travis and rendering the resulting death verdict unreliable.

The court also failed to adequately explore whether Juror G-18's comments about presuming Leo Charon would testify truthfully were based on any special knowledge of Charon specifically, or were no different than the likely presumption most jurors would have, that a minister testifying under oath would probably be telling the truth. The present trial court may have been sincerely motivated, but the result was the loss of a juror who appeared willing to seriously consider defense mitigating evidence. The improper loss of such a juror was obviously prejudicial to the defense.

V. THE TRIAL COURT ERRED IN REJOINING DEFENDANTS TRAVIS AND SILVERIA FOR A PENALTY RETRIAL WITH A SINGLE JURY, AFTER SEPARATE JURIES HAD BEEN UNABLE TO AGREE ON PENALTY VERDICTS FOR EITHER DEFENDANT

A. Introduction

As described in the Statement of the Case and Statement of the Facts at the outset of this brief, the original indictment in the present case was brought against four defendants, Daniel Todd Silveria, John Raymond Travis, Christopher Alan Spencer, and Matthew George Jennings. (CT 3:1-6.) Motions to sever defendants were filed by Defendant Jennings (CT 5:1086-1086) and Defendant Silveria. (CT 5:1150-1177.) These motions were joined by Defendant Travis. (CT 5:1231-1237.) The prosecutor filed a single response. (CT 6:1339-1381.) These motions were based on two independent grounds: 1) that jurors would be unable to give the constitutionally required individualized consideration to capital defendants who were tried jointly, at least under the circumstances of the present case; and 2) that the prosecution would inevitably seek to introduce statements by the various defendants that were admissible only against the defendant who made the statement.

After an extended evidentiary hearing, the trial court issued an order denying the portions of the severance motion that were based on evidence that jurors were unlikely to give individualized consideration to capital defendants who were tried jointly. Other portions of the severance motion,

based on statements made by the various defendants that implicated other defendants, were deferred pending a proposed redaction of the statements. (CT 9:2141-2144.) When extensive efforts to redact the statements were unsuccessful, a second ruling was issued that granted partial severances, ordering two separate trials, with Defendants Silveria and Travis to be tried jointly in the first trial. In addition, the court ordered separate juries for each defendant in each trial. (CT 9:2257-2260; see also CT 9:2269.)

After the joint guilt trial before separate juries, both Defendants Silveria and Travis were convicted of first degree murder, robbery, and burglary, and special circumstances based on murder in the commission of robbery and burglary were found true. During the penalty trial, victim impact evidence and a small amount of additional evidence was presented simultaneously against both defendants, to both juries. Substantial other evidence that pertained only to one defendant or the other was presented separately to the separate juries. Mistrials were declared in both instances, when neither penalty jury was able to reach a unanimous verdict. (CT 13:3373-3375, 3379-3380, 3382, CT 14:3441-3444, 3482-3483, 3568-3569.)

Mr. Travis, Mr. Silveria, and the prosecutor all filed new pleadings regarding whether those two defendants should again have separate juries for the penalty retrial. (CT 16:4005-4035, 4103-4108, CT 17:4213-4242.) The matter was debated on November 19, 1996. (RT 199:22878-22905.) On November 21, 1996, the trial court rejected some of the grounds that had been put forth for separate trials or separate juries. (RT 200:22909-22912.) Later that day, further argument was heard on other grounds for separate juries or

trials, and they were also rejected by the trial court. (RT 200:22956-22962.) Only eleven days later, on December 2, 1996, selection of a single jury commenced, to hear the penalty trial of both defendants. (CT 17:4357.) That jury eventually returned death verdicts against both defendants. (CT 21:5312-5313.)

The problem regarding statements by one defendant admissible only against that defendant was greatly reduced during the penalty retrial, since the guilt of each defendant had already been established in the earlier guilt trial. However, the separate issue regarding the inevitable inability of a penalty jury to give individualized consideration to each defendant during a combined penalty trial – the concern that resulted in severance in the first place – remained a very real problem. While this could present a problem in any joint capital trial, it was an especially great problem in this case. Here, defendants Silveria and Travis had been close friends for several years and had similar backgrounds marked by divided families, abusive caretakers, and substance abuse. Neither had any other record of violent criminality beyond the present case, and both had very strong but somewhat similar mitigating evidence in the form of their substantial maturity gained after their incarceration, turning both into role models in the jail in regard to finding meaning in religion and in recovering from substance abuse.

All of this was readily apparent to the trial court following the first penalty trials and no justification for rejoining the defendants for retrial as to the punishment determination was demonstrated. As a result, it was a gross abuse of discretion to force Travis into a joint penalty retrial with Silveria

before a single jury. Indeed, the error was also of federal constitutional dimension, as it rendered the penalty trial so fundamentally unfair as to result in a denial of due process of law, an unreliable penalty verdict, and a denial of the right to individualized consideration.

In summarizing the extensive evidence presented to the trial court in regard to the problems inherent in joint penalty trials of capital defendants, both the evidence from the original motion to sever and from the renewed hearings after the completion of the first penalty trial will be included. Both the defense and the prosecution referred to the earlier evidence in their later arguments. (RT 204:23309 and 23348.) While the trial court was not persuaded by the earlier evidence, it did refer to it during its ultimate ruling denying severance or separate juries for the penalty retrial. (RT 207:23581-23582.) Thus, it is clear that all parties and the court understood that the hearings on the issue after the initial penalty mistrials incorporated the earlier evidence as well as the additional evidence.

B. The Initial Severance Hearings

1. Testimony by Edward J. Bronson

Although Dr. Bronson was called as a witness by counsel for co-defendant Silveria, his testimony was expressly adopted by John Travis. (CT 5:1233.)

Ed Bronson was a professor of political science at California State University at Chico. In addition to having earned a Ph.D. in political science,

Bronson also held a Master of Laws degree from New York University. Bronson had received training in the basic techniques of social science and did a major research project on the conviction-proneness of death-qualified juries. He had testified as an expert in that area in 50 or 60 cases, including the trial level proceedings in *People v. Hovey* (1988) 44 Cal.3d 543, and *Lockhart v. McCree* (1986) 476 U.S. 162.)

Aside from his extensive work in the area of the conviction-proneness of death-qualified juries, Dr. Bronson had also developed expertise and testified on other subjects, including change of venue motions and voir dire in general. He had testified in support of change of venue motions over 50 times, but he had also recommended against seeking a change of venue in an equal number of cases. (RT 10:1085-1088.) Dr. Bronson had also consulted in about a dozen cases on matters concerning the composition of juries, or under-representation of certain ethnic groups. (RT 10:1093-1094.) Another area in which Bronson had qualified as an expert witness was in motions to sever charges or co-defendants. He had conducted seven major surveys to determine whether juries were more likely to convict defendants with multiple charges, or who were tried with co-defendants. (RT 10:1095-1102.)

Defense counsel offered Dr. Bronson as an expert on the subject of severance of co-defendant motions. Counsel for other defendants also offered him as an expert on the subject of prejudice to co-defendants as a result of joint trials, and on the efficacy of jury instructions to cure the prejudice

that results from joint trials. (RT 10:1110-1111, 1115.) The trial court found Dr. Bronson to be qualified as an expert in all three areas.[103] (RT 10:1159.)

Dr. Bronson had been given detailed information about the charges against the four defendants and the differences between their alleged involvement in the crimes. From that information, he created a scenario, or description of a crime, to be used in surveying groups of people about how they would react if the defendants were tried jointly, versus how they would react to individual defendants tried separately. He noted there were special problems in a capital case, because the decision made by jurors in the penalty phase was a normative one, where the values and attitudes and individual jurors was much more important than in a guilt trial, where it was more straightforward to resolve facts and sort out conflicting defenses. (RT 10:1162-1165.)

Dr. Bronson was especially concerned about the need for individualized consideration in the penalty phase, as opposed to making a comparative analysis between several defendants. In the present case, the penalty phase defense of the various defendants would be similar and repetitive. He feared that would cause the jurors to become desensitized, especially in regard to matters such as a troubled childhood. In other words, jurors make accept that as mitigating in an individual case, but their sympathetic feelings would be lost if they heard similar evidence in regard to several different defendants.

---

103 Bronson conceded that he was personally opposed to the death penalty, but he did not adopt that point of view until after he had become involved in death penalty research. (RT 10:1134.)

In the present case, all four defendants were young and, compared to most capital defendants, their backgrounds were relatively free of violence, and of crime in general. RT 10:1165-1167.)

Another important factor in the present case was the shared weapon – one knife that was passed to three different defendants who each stabbed the victim with that same knife. Dr. Bronson feared that factor would cause the jurors to blur or confuse the issue of individual responsibility. That is, it presented the jurors with a broader shared role, in contrast to the typical case with clearly distinctive roles. (RT 10:1167-1168.)

Other factors that Dr. Bronson saw as important included the fact there were four defendants. The more defendants there were, the greater the risk of confusion. Also, some of the defendants had been accused of participating in plots to escape from jail. Attempted escape could be a highly aggravating factor in a penalty trial. (RT 10:1169-1171.)

Dr. Bronson had conducted studies to determine whether the joinder of capital defendants would lead to prejudice at the penalty phase. His goal was to determine whether there was a greater likelihood of a death verdict as a result of joinder of defendants. A separate goal was to determine whether jurors would make the same kind of individualized penalty decisions at joint trials that they would make if each individual had a separate penalty trial. Dr. Bronson wrote an extensive description that included many important aspects of this case. Participants in the survey were told they were serving on a jury in a capital case and had found the defendants all guilty as charged. Some of the survey participants were given a joined version of penalty phase

evidence and others received severed versions. The participants were asked to make penalty determinations and to state reasons for their verdicts. Participants who received the joined versions were expressly instructed to consider each defendant individually. (RT 10:1179-1181.)

Dr. Bronson's scenario describing the facts did not include every detail of the present case, but did include the important ones. It involved three defendants. Two of the three had been employees of the victim and had been fired. They planned and executed a robbery with some pre-discussion of what to do afterward. They waited outside, came into the crime scene, robbed the victim, and then one defendant ordered the killing and all three participated in the stabbing. They discussed it with others and all confessed and there was other supporting evidence. In Dr. Bronson's scenario, the final defendant only stabbed once. Bronson limited his scenario to three defendants because that was sufficient to isolate the crucial variables for which he was testing, and avoided the much larger sample size that would be needed for four defendants. (RT 10:1181-1184.)

Dr. Bronson's survey used actual CALJIC instructions on the major issues in the case. While most of the participants were college students, he also managed to include a number of people who had been in an actual jury pool and had gone through a death-qualification process in other cases. For the student participants, Dr. Bronson used a modest death-qualification questionnaire, based on the principles of *Witherspoon v. Illinois* (1968) 391 U.S. 510, in order to eliminate people who would always or never vote for a death sentence. (RT 10:1187-1188.)

The written scenario also informed the survey participants that the listed special circumstances had unanimously been found true. Standard penalty phase instructions were included, along with summaries of the expected aggravating and mitigating evidence, plus brief arguments for and against a death verdict. Participants were asked to choose either a death verdict or life without possibility of parole, and if they wished, they could explain their reasons for their choice. (RT 11:1200-1201.)

Dr. Bronson started with 236 college students. He eliminated those who were underage, non-citizens, or who did not survive his death-qualification process, leaving him with 166 students. His pool of actual jury pool members started at 98, and ended at 74, giving him a total of 240 participants in the full survey. He was satisfied that was a sufficient mix to allow him to determine that student responses were very similar to the responses of actual jury pool members. (RT 11:1195-1197.)

Dr. Bronson explained that the written surveys were quite lengthy, compared to most surveys. The surveys for participants who were determining the penalty for only one defendant were 1,672 words long. The ones for participants who would determine the penalty for all three defendants were nearly twice as long, since they included different penalty phase information for each defendant. Dr. Bronson believed the more information that was provided, the more the results would approach reality, as long as the surveys were not so intimidating that participants failed to read them fully. In these surveys, however, a large number of participants had included written com-

ments, expressing their anger or their sympathy. That demonstrated that they became quite emotionally involved in the survey.[104] (RT 11:1202-1203.)

The results of the survey that was based only on the facts of the present case showed that 64.1% of the verdicts from the persons who rendered verdicts for all three defendants were in favor of death. On the other hand, in the surveys given to persons who only determined penalty for one defendant, only 47.2% of the verdicts were in favor of death. Dr. Bronson considered the difference between 47.2% and 64.1% to be enormous, from a statistical point of view. This indicated that out of a twelve-person jury, two persons who would vote for death in a combined trial would instead vote for life without parole if they were considering only one defendant. Based on statistical analysis, Dr. Bronson believed there was less than one chance in a thousand that the results he found were random. (RT 11:1206-1212.)

Looking at his results in a different statistical fashion, Dr. Bronson explained they indicated that the likelihood that any individual juror would choose death rather than life without parole was 1.5 times greater in the combined trial situation, as opposed to the individual defendant situation. (RT 11:1216.) Dr. Bronson had great confidence in his results, especially because the separate results for the adult jury pool participants, compared to

---

104 A complete summary of the results of the surveys pertaining to the present trial, plus similar surveys taken for a three-defendant capital case in Fresno County, was received in evidence as Court Exhibit 37 and can be found at CT 8:1937-1945. (RT 11:1252 and 1309.) The written Fresno County survey is at CT 8:1922-1929.

the results for the college student participants, and compared to the combined results, showed virtually the same results in each instance.[105] (RT 11:1217-1219.)

Considering all of the results achieved in both the Fresno County survey and the present case, Dr. Bronson conceded that the nature of the particular crime, and the individual differences between the various defendants, were the major factors affecting the verdicts. Nonetheless, the single variable of consideration of individual defendants versus simultaneous consideration of multiple defendants, produced substantial differences that held up in every instance, despite differences in the facts of different cases or in the role and background of different defendants. That is, the same patterns held up for student participants and for adult juror pool participants, as well as for the Fresno County study and the study for the present case. (RT 11:1236-1242.)

Dr. Bronson conceded that his surveys only measured the initial vote of each participant, rather than the vote that would be cast after jury deliberations. But he was also aware of other studies of the effect of jury deliberations in a wide range of trials; they indicated that 90% of the time the initial

---

105. Dr. Bronson also summarized the results he had achieved in a similar survey pertaining to a Fresno County capital case. In that case, a significantly higher percentage of the participants voted for death in both the one-defendant surveys and the three-defendant surveys. Dr. Bronson believed that was because the facts in the Fresno County case were more aggravated than the facts in the present case. However, the difference between the percentage of death verdicts reached by persons who considered only one defendant, versus the percentage of death verdicts by persons who considered all three defendants simultaneously, was quite similar to the differences found here. (RT 11:1220-1227.)

division of the jury determined the outcome after deliberations. Dr. Bronson also found significance in the fact that participants in his study were given an opportunity to explain their reasons for the vote they cast, and a large majority of the respondents did provide some reasons. Among the respondents who only considered a single defendant, 56% mentioned the defendant's social history among their reasons for their vote. In contrast, for respondents who voted for penalties for all three defendants, only 34% mentioned social history as a factor. This strongly supported Dr. Bronson's belief that a jury that heard a single story of a tragic or abusive childhood was more likely to be sympathetic, while a jury that heard similar social histories for multiple defendants were more likely to conclude that all capital defendants had tragic stories, and if jurors bought into them, nobody would ever be held responsible for anything. (RT 11:1242-1246.)

Dr. Bronson also noted that of the 65 respondents who cast votes for all three defendants and who provided reasons for their votes, 23 of them provided exactly the same comment for each defendant, indicating they were being lumped together. Dr. Bronson's ultimate conclusions from his study pertaining to the present case was that: 1) prospective jurors in such a case were more likely to vote for death when the penalty phases were joined than when they were severed; 2) jurors in a joined penalty phase were less likely to make individualized decisions; and 3) jurors in a joined penalty trial were less open to consideration of social history, even though it was a vital part of the mitigation evidence. He also found all three of those patterns to be true in his separate study of a Fresno County case. Indeed, the disparities in the re-

sults when comparing joined and unjoined defendants were remarkably consistent throughout the studies. (RT 11:1247-1250, 1260.)

Dr. Bronson made it clear he was **not** expressing an opinion that **every** multiple defendant capital case had to be severed to assure fair penalty trials. He conceded there might be less of a problem in a two-defendant case than in a three-defendant case. The most important factor in the present case was that each of the defendants had similar mitigation evidence to present, showing culturally deprived childhoods with elements of mistreatment. (RT 11:1310-1311.)

Dr. Bronson acknowledged that there had been criticism of studies like his, which did not involve the behavior of actual jurors. The major criticism raised in that regard had been that actual jurors would take their responsibilities much more seriously. But Dr. Bronson noted that the comments made by many of the persons who participated in his surveys demonstrated that they did become emotionally involved in the cases. He also noted that any differences between his respondents and actual jurors would be much less important in the present context than in a study that purported to predict what verdict would be reached in different circumstances. Dr. Bronson was not predicting what the verdicts would be, but was instead showing the initial attitudes that jurors were likely to bring to their deliberations. He believed the initial attitudes of real jurors would be affected by severed trials versus joined trials in much the same way as the attitudes of those who participated in his surveys. (RT 11:1315-1320.)

2. Testimony by Ronald Dillehay

Dr. Ronald Dillehay also testified at the hearing on the original severance motion. He was a professor of psychology and associate dean of the graduate school at the University of Nevada in Reno. Aside from his teaching and administrative duties, he was as a consultant in areas involving social psychology and the law, principally in matters involving the behavior of juries; he had worked in that area for 20 years. Dr. Dillehay had conducted studies with students acting as jurors. The students would attend actual trials and hear the actual instructions given by the judge, then conduct their own deliberations. Most recently, Dr. Dillehay had been researching the ability of jurors to understand the instructions given in capital penalty trials, and to set aside biases or outside information. (RT 13:1521-1528.) Dr. Dillehay was accepted by the court as an expert witness on the methodology used by Dr, Bronson in his surveys.[106] (RT 13:1558.)

Dr. Dillehay had been familiar with the published work of Dr. Bronson for many years. He considered Dr. Bronson to be a pioneer in the area of the conviction-proneness of death-qualified juries. He frequently cited Dr. Bronson's work in his own published articles. Dr. Dillehay had no direct in-

---

106. Dr. Dillehay acknowledged that his own views would substantially impair his own ability to perform as a fair and impartial penalty phase juror. He supported the concept of the death penalty and believed that some defendants deserved to be executed for their crimes, but he did not have enough confidence in the ability of the present criminal justice system to properly identify those individuals. As a result, he could not support use of the present system to arrive at death verdicts. (RT 13:1546-1547.)

volvement in Dr. Bronson's survey in the present case, but he did review Dr. Bronson's surveys and conclusions and he observed Bronson testify in the present proceedings. In Dr. Dillehay's opinion, Dr. Bronson's work in this matter constituted competent research. It was reasonably conceived and adequately executed. He believed Bronson's analyses regarding the effects of joinder on judgment regarding penalty were informative. (RT 13:1558-1563.)

Dr. Dillehay found Dr. Bronson's factual descriptions of the survey case to be well-written and nicely stated, containing the essential information. He saw nothing in the scenarios that would bias the results. He did have some concerns about the length of the surveys, but he did not see that as a biasing factor. (RT 13:1567-1569.) He echoed Bronson's opinion that research on actual jurors had established that 90% of the final results in felony trials were predictable from the first ballot. In other words, there was a very high correlation between first ballots, or pre-deliberation opinions, and final verdicts. (RT 13:1594-1595.) Dr. Dillehay was persuaded by Dr. Bronson's surveys that the phenomenon of joinder affecting the ultimate penalty verdict was very real. (RT 13:1606.)

3. Testimony by Bernhard Cohen

The only witness called by the prosecution at the original severance hearing was Dr. Bernard Cohen, a professor of sociology at Stanford University and Director of the Laboratory of Social Research. (RT 13:1641-1644.) He had conducted or supervised 30-40 experiments and 50-60 surveys over a

40 year career. He had only testified as an expert witness in 3 prior cases, all pertaining to change of venue issues. In two of those three prior cases, he testified in opposition to Dr. Bronson. (RT 13:1652-1654.)

Dr. Cohen acknowledged that none of his work had involved studies of juries. (RT 13:1657.) The prosecutor explained he was offering Dr. Cohen as an expert only on the methodology of social research, and not on juries or any legal issue. (RT 14:1670.) The Court accepted him as an expert witness in that limited area. (RT 14:1683.)

Dr. Cohen readily agreed that the issue of the impact of joinder versus severance was a proper subject for social science research. Where important decisions were at stake, it was vital to guard against biases in the research. He conceded it was impossible to do research without cutting some corners. Dr. Cohen believed it was possible to design an experiment that could demonstrate whether defendants in a joined trial were more likely to receive a death sentence than defendants in a severed trial. He believed you could never prove that a particular factor was the cause of a particular result; instead, the most you could show was that one factor provided a better explanation of the consequences than did alternative factors. The goal in designing an experiment was to eliminate alternative factors, thereby isolating causal factors. (RT 14:1687-1697.)

Turning specifically to Dr. Bronson's survey, Dr. Cohen noted that the greater length of the survey given to participants who cast votes for all three defendants, compared to the survey given to respondents who only considered one defendant, was a variable that had not been isolated. Thus,

Cohen did not believe the length factor could be eliminated as an explanation of the difference in the results. (RT 14:1699.)

Dr. Cohen believed that individual jurors tended to be consistent in their thinking, totally independent of whether they were getting the same questionnaire or different questionnaires. In other words, in most situations, the same responses to several things from the same individual were correlated. All things being equal, the responses to three capital case scenarios by the same individual were more likely to be similar than the responses from three different persons. Rather than seeing this aspect of human nature as the very source of the problem – inability to give individualized penalty consideration to multiple capital defendants tried simultaneously – Dr. Cohen saw this as a factor that stacked the cards in favor of the results reached by Dr. Bronson. In sum, Dr. Cohen concluded that he could not determine whether Dr. Bronson's results were caused by joinder or by the natural consistency that would be expected as part of human nature. (RT 14:1713-1718.)

Dr. Cohen's criticism appears to be based on a serious misconception of the legal issue involved in Dr. Bronson's survey. Dr. Cohen apparently failed to recognize that this aspect of human nature was the very basis of Dr. Bronson's hypothesis. Rather than identifying an alternative explanation for the results, Dr. Cohen simply found a different label for the hypothesis. In addition, he set forth other criticisms of Dr. Bronson's work which do not withstand analysis. For example, Cohen contended that it was inappropriate to combine the student results with the jury pool results because the former had a near 100% return while the latter return rate was 33%. (RT 15:1739.)

However, it does not appear to make any difference whether the student and jury pool results are combined or viewed separately; the same pattern of more death verdicts in the joined scenarios appears no matter how you view the data.

Similarly, Dr. Cohen criticized the practice of combining results from surveys that were mailed by jury pool members and surveys taken by students in a classroom setting. Cohen believed these differences in procedure precluded combining the results. He noted that in the case of mail-in surveys, only persons with strong convictions will bother to fill out and return the surveys. Also, while students were asked to volunteer to take the test, he believed there would be strong social pressure that would cause some people to respond even if they did not want to participate. (RT 15:1744-1747; 16:1792.) Once again, he failed to explain why this should matter, since the resulting patterns were so similar regardless of which procedure was used.

Dr. Cohen complained that the Fresno County case, which was referred to in Dr. Bronson's related survey, involved allegations of rape. Sixty percent of the respondents in the Fresno study were female, and Dr. Cohen believed women tend to take rape allegations more seriously. (RT 15:1772.) Once again, however, Cohen failed to explain how this factor would detract from Bronson's conclusions. Dr. Bronson had explained that the more aggravated nature of the Fresno County crime could explain why there were more death verdicts returned in that survey, regardless of whether the defendants were considered individually or collectively. Bronson also had explained that factor appeared to make no difference in regard to the point he

was testing for, since he found very similar patterns in both the Fresno study and the present case study, in regard to the key question of whether combined consideration led to a greater frequency of death verdicts. (RT 11:1220-1227; see also fn. 105, at p. 337, earlier in this argument.) Indeed, when Dr. Cohen was repeatedly asked on cross-examination whether he had any reason to believe that the difference between male and female attitudes about rape would affect the joined-defendants scenario any differently than the individual-defendant scenario, he was unable to articulate a responsive answer. (RT 16:1812-1814.)

Dr. Cohen did concede that the suggestions he was making that he believed would have improved the validity of Dr. Bronson's study would also have made the study more expensive. Cohen also agreed that all surveys and studies in social science required a trade-off between gaining the greatest accuracy possible and doing so with a reasonable expenditure of time and money. (RT 16:1850.) He concluded that the most that could be done with the kind of survey Dr. Bronson conducted was to test for attitudes, not predict behavior. (RT 19:2012.) However, as noted earlier, Dr. Bronson explained that all he was trying to do was test for attitudes and not predict behavior. (RT 11:1315-1320.) Dr. Cohen recognized that a study with predictive value regarding the behavior of juries would require mock juries. He agreed that such a study would be very expensive. (RT 19:2013.)

4. The Ruling on the Initial Severance Motion

As noted at the outset, the trial court eventually granted the initial severance motion, based on grounds pertaining to statements made by the various defendants that implicated other defendants. Before making that ruling, the trial court made a preliminary ruling denying severance based on jury surveys. In that ruling, the trial court concluded that it did not question the results of Dr. Bronson's surveys. However, the court was concerned with the differences between the survey groups and real life juries. The court acknowledged it was not practical to conduct a study presenting a complete case to various mock juries. However, the court believed the Bronson surveys did not supply enough information to the participants. (CT 9:2141-2142.)

Notably, as discussed above, prosecution witness Dr. Cohen's primary complaint about the Bronson surveys was that they were already too long. Thus, it does not seem practical for the trial court to conclude that they were flawed because they failed to supply substantially more information. Indeed, its ruling readily acknowledged that the court was "not sure and actually doubts whether this 'real life' can ever be practically achieved in a study." (CT 9:2142, ll. 24-25.) The court did not fault the Bronson study or the manner in which it was conducted, but concluded, "There is no way to predict and no study can show what will happen here without a real life trial atmosphere, when no real life procedures and safeguards are followed." (CT 9:2142, l. 27-2143, l. 1.)

The court expressed specific concern with the lack of in-person voir dire and death qualification of the participants in the same manner that would be used in a trial. The court was also concerned that the survey participants did not see or hear live witnesses or live defendants, and did not have to make a real life-or-death choice. The court believed the uniqueness of each defendant would be more fully stressed in a full trial, and that proper instructions by the court would even make a joint trial beneficial to each defendant. (CT 9:2144.) The court did not explain the nature of the benefit it believed the defendants would receive. The court simply saw no credible evidence to cause it to conclude that proper voir dire and instructions would fail to put to rest the defense concerns or fail to guaranty proper verdicts in a jointly tried case. (CT 9:2144.)

C. Further Severance Hearings After Both Original Penalty Phase Juries Failed to Reach Unanimous Verdicts

As described at the outset of this argument (with full citations to the record), a severance motion was granted on other grounds, and appellant John Travis was tried together with only one other defendant, Danny Silvieria. Furthermore, two separate juries heard both the guilt and penalty phases, so each jury had to deal with only a single defendant. Both defendants were convicted of the substantive charges and of the felony based special circumstances, but in regard to the torture and lying-in-wait special circumstances, each jury found one untrue and was unable to agree as to the

other. In addition, both juries failed to reach unanimous verdicts in the penalty phase trials.

The prosecutor nonetheless elected to seek penalty retrials against both defendants. At that point, a new debate ensued regarding whether there should again be separate juries for the two defendants, or a single jury to consider both defendants simultaneously. In points and authorities filed on behalf of co-defendant Silveria, the defense again argued that the Bronson studies indicated a single jury would be unable to give individualized consideration to the two defendants. It was noted that both John Travis and Danny Silveira had converted to Christianity, but that in the first trial the prosecutor had attacked their sincerity.[107] This would make it especially

---

107. For example, in the first trial, the prosecutor had argued to Travis' jury:

> "Perhaps it is true that both Mr. Travis and Mr. Silveria have accepted or been converted or however you want to use the phrase, been converted or had a religious experience or have accepted God or Jesus Christ into their lives.
>
> "Perhaps it's simply coincidence that they have both done that pending their respective penalty trials. Perhaps it is just coincidence that they were both baptized by Leo Charon on the same day. Perhaps it's just coincidence that at some point Mr. Silveria wanted to be reassigned to where Mr. Travis was and the two of them spent some time in adjoining areas and now they have both found themselves walking the same path and teaching Bible classes.
>
> "When Mr. Charon came in I think he conceded basically or the evidence was presented through cross-examination, he seemed to suggest

(Continued on next page.)

difficult for a single jury to treat them as individuals. (CT 16:4010-4023.) Counsel for John Travis expressly joined in that motion, and added as an additional ground that Travis would be prejudiced by the many volatile and stressful interchanges that seemed to occur whenever the trial judge, the prosecutor, and counsel for Danny Silveria had to deal with one another. (CT 16:4103-4106.)

That new ground added by counsel for John Travis was taken quite seriously. Counsel for Danny Silveria noted that he had seriously considered moving to withdraw from the case for the same reasons set forth in Travis' motion. Counsel for Silveria conceded he had been "stressed out," and that the pressures he felt from the trial judge were "almost intolerable for me to work under." (RT 200:22959-22960.) The trial court commended counsel for Travis for the delicate wording of his motion. The court agreed that counsel's concerns were valid and caused him to pause for reflection. But the judge remained convinced the jurors would decide the case based on the evidence, rather than personal feelings. The court promised to do all that it could to make sure no conduct by the attorneys or the court would affect the verdict. With that in mind, the court denied any severance based on the

---

(Continued from last page.)

> when he testified here that Mr. Travis was the one that was so special in terms of his religious experience dealing with inmates in the jail and he conceded he had testified in the Silveria case and I submit in that case kind of the reverse. Mr. Silveria was the religious one." (RT 180:18178-18179.)

grounds set forth in the motion made on behalf of Travis. (RT 200:22961-22963.)

Thereafter, a further evidentiary hearing was held to support the defense contention that, under the particular circumstances, a single jury would not be likely to provide the individualized sentencing consideration required by federal constitutional principles. Once again, witnesses were called by counsel for Danny Silveria, but counsel for John Travis expressly joined the motion and adopted the testimony. (RT 203:23303.)

1. Testimony by Justice Charles Campbell

Justice Charles Campbell had been an elected County Attorney and District Attorney in Texas, and had prosecuted a number of capital cases.[108] He had also worked in the Texas Attorney General's office, handling more capital cases on appeal. He had then served for 12 years on the Texas Court of Criminal Appeals, which had original jurisdiction over capital appeals. He had reviewed 250-300 capital cases on direct appeal, and many hundreds more in habeas corpus proceedings. (RT 203:23134-23141.) During his term on the Court of Criminal Appeals, approximately 80-90 percent of the capital

---

108. Justice Campbell's testimony was also highly relevant to the separate issue in this brief regarding the unfair restrictions placed on counsel for John Travis when he expressed a desire to testify on behalf of his client. The summary of his testimony that was included in that argument is repeated here, along with a new summary of additional testimony that did not pertain to the unfair restrictions argument.

cases were affirmed. Justice Campbell considered himself a conservative member of the Court. (RT 203:23141-23142.)

The trial court found Justice Campbell by to be qualified as an expert witness on capital trials. (RT 203:23157.) Campbell explained that earlier in Texas it had been common practice to have joint trials in capital cases with multiple defendants. However, after the United States Supreme Court decided *Franklin v. Lynaugh* (1988) 487 U.S. 164 and Penry v. Lynaugh (1989) 492 U.S. 302, a number of elected Texas District Attorneys in metropolitan areas became concerned about the high court's stress on the need for individualized consideration in capital sentencing. By 1989, many of them had concluded it had become too problematic to try multiple-defendant capital cases jointly. As a result, it had become common practice in Texas to have separate trials for multiple defendants. (RT 203:23159-23160.)

In Justice Campbell's opinion, capital defendants should be tried separately in order to assure individualized consideration. In his experience, whenever there was a particularly heinous murder involving multiple defendants, the jury was prone to want to return at least one death sentence. Justice Campbell had reviewed the facts of the present case and believed that the moral culpability of the two present defendants was similar. He believed capital jurors weighed heavily the behavior of capital defendants after their crimes. Here, because of the present similarity in culpability in regard to the crime itself, it was important for each defendant to try to distance himself from his co-defendant, in an effort to obtain a verdict of life without parole. To avoid a death verdict, it would be important for each defendant to con-

vince their jury that they were worth more than the last worst act they committed. With comparable roles in the crime and comparable backgrounds, the present defendants would have to fight against each other to make the other look more like a bad guy. (RT 203:23164-23176.)

Justice Campbell believed that for a capital defendant to obtain a life without parole verdict, it was important to personalize himself so the jury would see him as an individual. It would be especially helpful in a multiple defendant case to make the jury see the defendant worth something that his co-defendant is not. Such differentiation would be very difficult in the present case, where the defendants had comparable roles in the crime, similar backgrounds, and were of a similar age. He believed justice would be better served by separate trials or separate juries. He did believe in the potential effectiveness of limiting instructions, but felt that such instructions were more problematic in the context of a normative decision, rather than a factual determination. (RT 203:23178-23182.)

Justice Campbell specifically agreed that presenting the same witness on behalf of each defendant (Leo Charon), testifying to the sincerity of each defendant's religious conversion, would only increase the likelihood that the jury would fail to differentiate between the two defendants. (RT 203:23178-23179.)

2. Testimony by Charles Gessler

Charles Gessler had worked as an attorney in the Los Angeles County Public Defender's Office for 31 years. He had been involved in trying many

capital cases, and in supervising many other attorneys in the office who were assigned to approximately 100 capital cases each year. (RT 203:23208-23211.) Gessler had lectured at seminars on the subject of severance in capital cases and had testified in two capital cases as an expert on that subject. (RT 203:23217.) The trial court accepted him as an expert witness in regard to California capital case procedure and issues pertaining to severance of defendants. (RT 203:23217, 23226.)

Mr. Gessler had personally tried four capital cases in which a death sentence was sought against multiple defendants. The first one involved two brothers, Woodrow and Robert Warren. Mr. Gessler had a major problem in that case, due to his client's loyalty to his younger brother. His client absolutely refused to testify or in any way go against the interest of his brother. Rather than acknowledging that his brother was the trigger man, he persisted in claiming neither of them were involved in the crime. (RT 203:23226-23233.)

Another serious problem faced by Mr. Gessler in that case was the unwillingness of family members to say something positive about one brother and negative about the other. As a result, Gessler was unable to call any family members as witnesses. However, after the resulting death sentence was reversed on appeal (see *People v. Warren* (1988) 45 Cal.3d 475), the brothers were retried simultaneously with two separate juries. Finally, each jury heard the full story regarding the individual on whom they were to pass judgment. Friends and family members of each brother, unwilling to testify against the interests of one in a joint trial, were finally willing to tes-

tify in separate trials. The brother who was the trigger man came forward and admitted his role before the jury of the other brother. (RT 203:23233-23235.)

From Mr. Gessler's broad experience in participating in voir dire of prospective jurors in capital cases, he believed that 75% of them wanted to know everything possible about the facts of the crime, but many did not care very much about the background or character of the accused. Mr. Gessler believed it was more difficult for a defendant to get separate and individual consideration when more than one was being tried on penalty jointly before a single jury. In that situation, jurors would tend to focus on the relative culpability of the defendants in the capital crime. If culpability was about the same, it was very difficult for jurors to separate the individuals. If jurors decide to vote for death for one defendant where culpability is equal, they will tend to do the same for the other defendant, regardless of differences in other aggravating or mitigating factors. The fact that the decision made in a penalty trial was normative rather than factual only made the problem worse. (RT 203:23239-23243.)

Another problem faced by joint defendants in a capital trial was that they would each have only a small number of peremptory challenges to exercise independently, while the prosecutor would have many times more. The defense would have a block of joint challenges to make up the difference, but their interests were not necessarily the same. Aside from different interests of the defendants themselves, their attorneys might have very different styles. Some attorneys were more strident in court and raised many

objections. Others might be more "laid back," seeking to get the jurors to see them as a nice attorney who would not try to hide anything from them. These different kinds of attorneys could be looking for very different kinds of jurors. Differences in the aggravating or mitigating evidence pertaining to their client could also cause the attorneys to have very different goals in jury selection. (RT 203:23244-23245.)

Mr. Gessler had discussed these problems with many other attorneys who tried capital cases and found that their opinions were largely similar to his own. He believed jurors who decided on death for one defendant with greater aggravation would be inclined to give the same penalty to both, if they were equally culpable in the capital crime. Where two defendants were closely related by blood or close friendship, they would tend to hold back information to keep from harming the other. Mr. Gessler also believed the persuasive force of mitigating evidence would be significantly weakened if a single witness gave similar mitigating testimony on behalf of each defendant. (RT 203:23246-23249.)

When asked specifically about the use of Leo Charon as a witness for both defendants in front of a single jury, Mr. Gessler stated that the force of Mr. Charon's testimony would be greatly diminished because it would lose its uniqueness. If the jury concluded that one of the claimed religious conversions was phony, they would almost certainly conclude the other was also. Gessler would personally not want to use that type of witness for each of two defendants. Indeed, in one famous capital trial in which he participated (the trial of the Menendez brothers, for the murder of their parents), he

decided not to let such a witness testify on behalf of his client simply because of the problems it would cause. (RT 203:23250-23251.)

Mr. Gessler had reviewed materials pertaining to the present case and believed the relative culpability of the two defendants was very close. The friendship they had maintained was another factor that would cause a single jury to judge them as a pair, rather than as individuals. Similar themes in the mitigating evidence they would present would also exacerbate the problem. When the jury hears the same thing twice, it loses its individuality. Furthermore, whenever there were joined defendants, it exerted greater pressure on their attorneys to reach a joint consensus rather than work solely for the best interests of their client. Attorneys always had to make judgment calls, but they were more complicated whenever there were multiple defendants. Mr. Gessler did have faith in juries, but he believed that in some instances it was very difficult for them to do what judges instructed them to do. (RT 203:23252-23254, 23269-23271.)

Summing up his conclusions, Mr. Gessler believed that on a continuum of 1 to 10, he would put the present case at an 8 or 9 in regard to the probable inability of jurors to give each defendant individualized consideration and base a verdict on each defendant's uniqueness. (RT 204:23101.)

3. The Argument and the Ruling on the Final Severance Motion

Counsel for Danny Silveria expressly asked the trial court to consider the earlier testimony of Dr. Bronson and Dr. Dillehay in regard to the present

severance motion. (RT 204:23309.) Subsequently, the prosecutor also made clear his understanding that the earlier testimony would be considered on the present motion. (RT 204:23339.) Before ruling on the present motion, the court expressly stated it had reread and considered the pleadings and testimony from the earlier severance hearing. (RT 207:23581.)

Counsel for Silveria reminded the court that during the original guilt and penalty trials before separate juries, when one jury reached its conclusions before the other, the court had been extremely careful to make sure that the jury that was still deliberating did not learn about the results that had been reached by the other jury. This could only be explained by a fear that if the latter jury knew what the other jury had concluded, that might influence its own decision. Such a fear flew in the face of any confidence that jurors would follow instructions to decide each defendant's case individually, on its own merits. (RT 204:23314.)

Counsel added that when John Travis had expressed his desire to call a juror from the first trial as a witness in his penalty retrial, the court had ruled that the former juror would not be allowed to testify. (See Argument I, earlier in this brief, pertaining to the ruling disallowing this testimony from a former juror.) A major reason for that ruling had been the court's absolute determination to prevent the new jury from learning that there had been a prior penalty phase, and that there had been an inability to reach a verdict. The court had stated its belief that if prior jurors were called as witnesses, the possibility that the results of the prior penalty phase would leak out would increase "at least a hundredfold on direct examination alone." Proper

subjects for cross-examination would raise that possibility even more. (RT 204:23314; see also RT 202:23123-23124.)

Indeed, as counsel reminded the trial judge, when the court made its ruling precluding testimony from a former juror, it expressly concluded that once the result of the prior penalty trial was made known, the current jury would then "be tempted to and could actually abdicate its own duty in favor of a prior jury's findings, even though there was a mistrial." (RT 202:23124.) If such a fear was at all reasonable, then there was certainly a far greater danger of the loss of individualized consideration when a single jury was asked to decide the penalty for two defendants simultaneously.

Nonetheless, the trial court denied the motion for severance or for separate juries. The court remained convinced the Bronson surveys were flawed, and the added testimony from Justice Campbell and Charles Gessler did not persuade the court. The court remained convinced it could properly instruct a jury to insure a fair trial, and that the jurors would follow such instructions. The court tried to distinguish its earlier position in regard to the need to keep the first trial jurors from knowing the results of other trials, because at that time each of the juries had hear different evidence. The judge also stated his belief that there were no great similarities between John Travis and Danny Silveria. The court believed they were culpable in different ways and, perhaps, to different degrees, and that their backgrounds were different. (RT 207:23581-23584.)

D. Under the Particular Circumstances of the Present Case, It Was an Abuse of Discretion to Deny the Motion for Severance or Separate Juries, and the Resulting Joint Trial Was Fundamentally Unfair

The issue here is extremely narrow and dependent on an unusual factual record. John Travis is not contending that a severance of parties must be granted in every capital trial or capital penalty trial involving multiple defendants. Travis is not even contending that a severance of parties must be granted in every capital penalty trial involving multiple defendants who are close friends or relatives. Instead, under the totality of circumstances uniquely before the trial court in the present case, he argues it was an abuse of discretion to deny the motion for severance or for separate juries.

A number of largely unique circumstances combine together to lead to this conclusion – the following in particular: 1) the roles of the defendants in the capital crime were reasonably similar in that both took active roles in the planning of the crime, both were present at the scene of the crime, and both participated in stabbing the victim, even using the very same knife; 2) the prior criminality of both defendants was reasonably similar in that both were very young adults with no prior record of violence, minimal prior incarceration, and a history of illegal use of drugs and alcohol, plus a small number of property crimes; 3) the pre-crime mitigating evidence that each would be presenting was reasonably similar in that both came from broken homes with some degree of physical abuse, but were left without significant adult supervision at a relatively early age, and both reacted to that by drop-

ping out of school and turning to alcohol and drugs at an early age; 4) the post-crime mitigating evidence that each would be presenting was reasonably similar as both had become model prisoners with apparently sincere religious conversions; and 5) both defendants would be relying on the same witness to supply the strongest evidence of the sincerity of their post-crime religious conversions.

Besides these, on other very important factor makes the present case like no other. The trial court did not have to rely on an offer-of-proof from defense counsel, but instead had just witnessed a full penalty trial of both defendants. As a result, the trial court knew exactly what mitigating evidence would be produced. The court also knew the questionable manner in which the prosecutor would seek to exploit the similarities in the mitigating evidence and the reliance on the same witness to prove the sincerity of the religious conversions. Finally, the court knew that the case against each defendant was close in regard to penalty, as demonstrated by the fact that in the initial penalty trials before separate juries, neither jury was able to reach a unanimous verdict. (See *People v. Rivera* (1985) 41 Cal.3d 388, 393, fn. 3; *People v. Brooks* (1979) 88 Cal.App.3d 180, 188; *People v. Sergill* (1982) 138 Cal.App.3d 34, 41)

In *People* v. *Boyde* (1988) 46 Cal.3d 212, 231-232, this Court explained:

> "The California Penal Code provides for joint trials of defendants jointly charged with criminal offenses. 'When two or more defendants are jointly charged with any public offense,

> whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. ...' (§ 1098.) The Legislature has in this manner expressed a preference for joint trials. (See *People* v. *Lara* (1967) 67 Cal.2d 365, 394; *People* v. *Isenor* (1971) 17 Cal.App.3d 324, 330-331.) The statute nevertheless permits the trial court to order separate trials, and the decision to do so is one 'largely within the discretion of the trial court.' (*People* v. *Turner* (1984) 37 Cal.3d 302, 312); *People* v. *Graham* (1969) 71 Cal.2d 303, 330.) Whether denial of a motion to sever constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion to sever. (*People* v. *Turner*, *supra*, 37 Cal.3d at p. 312.)"

Discretion, however, has its limits. "Put simply, the joinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 448.) Also, "... since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Id.*, at p. 454.)

Furthermore, appellate review is not limited to just the question of whether the trial court abused its discretion based on the information before it at the time of the motion and ruling. A reviewing court must also determine if the resulting trial was fair. As explained in *People* v. *Greenberger* (1997) 58 Cal.App. 4th 298, 342-343:

> " 'After trial, of course, the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law.'

> (*People* v. *Turner* (1984) 37 Cal.3d 302, 313.) The appellate court looks 'to the evidence actually introduced at trial' in making this latter determination. (*People* v. *Bean* (1988) 46 Cal.3d 919, 940.)"

This case is somewhat unique because almost all appellate decisions pertaining to severance of parties arise in the context of joined guilt trials. In those circumstances, *Boyde* set forth the factors to be considered in determining whether a severance should have been granted:

> "The grounds which may justify a severance were summarized in *People* v. *Massie* (1967) 66 Cal.2d 899: (1) Where there is an extrajudicial statement made by one defendant which incriminates another defendant and which cannot adequately be edited to excise the portions incriminating the latter; (2) where there may be prejudicial association with codefendants; (3) where there may be likely confusion from evidence on multiple counts; (4) where there may be conflicting defenses; and (5) where there is a possibility that in a separate trial the codefendant may give exonerating testimony. (*People* v. *Massie*, *supra*, 66 Cal.2d at pp. 916-917.)" (*People* v. *Boyde, supra,* 46 Cal.3d at 232.)

Of these five grounds, the first and last have little or no part in a joined penalty trial. The other three, considered in their broadest form (prejudice, confusion, or conflicting evidence), could have some application in regard to a penalty trial, but even as to those factors, case law that has arisen in the context of guilt trials will not typically be helpful in assessing the present trial court ruling. Nonetheless, it is apparent that when two capital defendants are tried in a single penalty trial before one jury, the likelihood of prejudice and confusion could only be magnified, not reduced.

As far as conflicting defenses or conflicting evidence, a useful analogy can be made to *People v. Graham* (1969) 71 Cal.2d 303. There, this Court recognized that when evidence helpful to one defendant would prejudice the other, a severance should be granted. (*Id.* At p. 320-321; see also *People v. Reeder* (1978) 82 Cal.App.3d 543, 549-557.) Here the defendants were tried jointly and Leo Charon's testimony was helpful to each defendant. However, the fact that Charon also testified for the other was harmful to each defendant. In separate trials, he could have testified for each defendant and the fact that he may have also testified for the other defendant in a separate trial should be deemed irrelevant, or at least more prejudicial than probative, pursuant to Evidence Code section 352.[109] This constituted a strong factor in favor of a severance or separate juries.

In any event, federal Fifth, Sixth, Eighth, and Fourteenth Amendment requirements of a fundamentally fair trial in accordance with due process of law, and reliable fact-finding in capital cases, should be the foremost factor in the context of a capital penalty trial. The fact that the trial resulted in a sentence of death should be an important factor to weigh in determining whether a severance should have been granted. It is well-established that a

---

109. That is, if the prosecutor's claim that Charon's testimony in favor of each defendant was inconsistent with his testimony in favor of the other defendant, it would be fair to bring that out to impeach his credibility. But as shown in Argument II, pertaining to the ruling disallowing testimony from a former juror, there was no inconsistency in Charon's testimony and there was no legitimate impeaching value. Thus, in separate trials, evidence that he had testified in the other defendant's trial would not be properly admissible.

death sentence is a significant factor to weigh in connection with a change of venue motion (*Martinez* v. *Superior Court* (1981) 29 Cal.3d 574, 582-584), and it should be equally important here. (See *Williams v. Superior Court, supra,* 36 Cal.3d at p. 454, quoted above.) The need for reliable fact-finding is at its height in a capital case, and it is especially important for the reviewing court to be alert to the danger that a death sentence resulted from unfairness caused by being tried jointly with a co-defendant, rather than from the actual evidence against the particular defendant. Thus, the critical factor that should have been considered by the trial court must be whether severance would have significantly enhanced the likelihood that the verdicts in the penalty trial would be reliable and that each of the defendants would receive individualized consideration.

Judged by this standard, the trial court's ruling must be considered a serious abuse of discretion. The trial court stubbornly clung to its belief that jurors would be able to follow court admonitions to accord each defendant individualized consideration, even though **all** of the evidence was to the contrary. All experts who testified on that subject were clear that, while admonitions could be helpful, they were not likely to be fully successful in the circumstances presented in this case. No expert voiced a contrary view. Furthermore, common sense and basic human nature strongly supports the views expressed by the expert witnesses. It seems quite natural that a single jury deciding the penalty for multiple defendants simultaneously would be very likely to engage in some comparisons between the two, rather than

judge each defendant entirely on the basis of aggravating and mitigating evidence pertaining to the individual.

Most importantly, the trial court itself made clear its own understanding that the jury would **not** be able to follow such admonitions when it ruled that John Travis would not be permitted to call a juror from the earlier trial as a witness. As described above, the trial court made clear at that time that it believed that anything that might reveal that there had been a previous trial in which the jury had been unable to reach a verdict would cause a new jury to "be tempted to and could actually abdicate its own duty in favor of a prior jury's findings, even though there was a mistrial." (RT 204:23314; see also RT 202:23123-23124; see Argument I, pertaining to the ruling disallowing testimony from a former juror.)

If the trial judge was so convinced that no admonitions from the court could prevent a jury that knew of a prior hung jury from abdicating its sentencing responsibility, then he could not possibly be confident that a new jury could follow directions to simultaneously decide the penalty for two different defendants without letting either penalty decision influence the other. The trial court sought to distinguish the two situations by explaining that its fear of jurors learning of the results reached by a prior jury stemmed from the fact that the jurors would be influenced by the results of a trial in which other jurors heard **different** evidence. (RT 207:23583.) This purported distinction simply does not withstand analysis. Indeed, it would seem far more likely that jurors would understand an admonition that they should not be influenced by the results of a different jury that heard different evidence,

than to expect that jurors simultaneously deciding the penalty for two different defendants could make each decision while ignoring the conclusions they themselves had come to in regard to the other defendant.

In denying the motion for severance or separate juries, the trial court also relied on its unfounded belief that there were no great similarities between the defendants. (RT 207:23583-23584.) Of course there were some differences between the acts of the two defendants and in regard to their backgrounds, but the unanimous expert opinion was that there were great similarities in regard to the factors that tend to influence penalty jurors in capital cases. The court gave no explanation how it could disagree with the conclusions that these two defendants were uncommonly similar in regard to their roles in the capital crime, and that their backgrounds and mitigating evidence was quite similar in regard to how such mitigating evidence would be perceived by the jury. Thus, the trial court based its rulings on conclusions that were unsupported by any evidence, unexplained by the court, and counter-intuitive in relation to common sense and human nature.

The lack of evidentiary support for the trial court's conclusion is readily apparent when comparing the present facts with those in *People v. Roberts* (1992) 2 Cal.4th 271, 328-329. There, this Court found no abuse of discretion in denying severance or separate juries in a capital trial where one defendant planned the murder and was the actual killer, while the other defendant had a much smaller role in the crime. Also, the defendant with the more serious role had a prior murder conviction, while the other defendant had a record of less serious crimes. In contrast, here both defendants partici-

pated in the planning of the present crime, both defendants participated in stabbing the victim, even using the same knife, and both defendants had comparable prior records.

People v. Ervin (2000) 22 Cal.4th 48, 95-96, was another case in which this Court found no abuse of discretion in the denial of separate juries for a capital penalty phase. The discussion in that case indicates that the motion was made late in the proceedings and was unaccompanied by any evidentiary support. This Court rejected the defendant's fears of comparisons, rather than individualized consideration, as speculative.[110] Here, in contrast, the fears were based on solid evidentiary support from multiple expert witnesses, not on speculation. Furthermore, *Ervin* is another case that involved greatly different culpability and different backgrounds, in contrast to the similarities relied on in the present case.

The dangers of a joint trial before a single jury in the present case should have been readily apparent at the time of the severance motion, after the trial court had just witnessed the mitigating evidence presented by each defendant to their original separate juries. But even if there was room for any doubt at the time the severance was denied, the resulting trial was riddled with unfairness that rendered the verdict against John Travis unreliable and

---

110 In the present case, it was the defense that presented solid evidence to back up its concerns, while the trial court relied entirely on unfounded speculation to purportedly rebut the defense claims.

deprived him of individualized consideration, and of the ability to present evidence in his own behalf.

As shown in Argument I, pertaining to the ruling disallowing this testimony from a former juror, when John Travis attempted to differentiate himself from Danny Silveria by bringing in the strongest witness aside from Leo Charon who could verify the sincerity of Travis' religious conversion, the sincerity of his alcohol addiction recovery efforts, and his growing maturity, the trial court refused to allow him to present that witness. As shown in Argument II, pertaining to the ruling regarding any testimony by defense counsel, when John Travis made another attempt to bring in the next strongest witness to verify the sincerity of his religious conversion, his recovery efforts, and his growing maturity, the court placed such unreasonable restrictions on that testimony that it was never presented. As a result, Travis had to rely strongly on Charon, even though Charon was also a fundamental part of Silveria's case in mitigation.

It was no surprise that the prosecutor did everything he could to exploit the fact that both defendants relied strongly on Leo Charon to support both of their claims of religious conversion and John Travis' claim of recovery from alcoholism.[111] Indeed, it is quite clear that the prosecutor wanted

---

111 This was especially unfair since jail inmates do not have a wide choice of ministers. Instead, they must make use of whatever services are offered. Thus, it is not surprising that both John Travis and Danny Silveria, who were housed in the same jail, relied on the same minister to guide them to a greater maturity.

both defendants tried before a single jury for that very reason. (See, for example, RT 260:30664-30666.)

In sum, the expert testimony offered by the defense in support of the motion for severance or separate juries (and not countered by prosecution experts) made it clear that, in the particular circumstances of the present case, if a single jury determined the penalty for both of these defendants, there was a strong likelihood that a significant number of jurors would be predisposed to treat the defendants the same rather than to accord them individualized discretion. There was also a strong likelihood that the persuasive force of the mitigating evidence would be significantly diminished, not because of any lack of credibility, but simply because jurors hearing similar mitigating evidence twice would be less likely to be swayed by it than would a jury hearing it only once, on behalf of a single defendant. Additionally, there was a reasonable likelihood that one or more jurors would find it impossible to follow court instructions regarding the need to decide each defendant's case on its own merits, without regard to the decision being made for the other defendant. There was an especially strong likelihood, which ripened into actuality, that the prosecutor would take unfair advantage of the use of Leo Charon as an important mitigating witness for each defendant. Furthermore, the trial court made it impossible for the Travis defense to ameliorate that harm by unreasonably disallowing testimony from a former juror and by unreasonably restricting proffered testimony from defense counsel.

As a result, John Travis was deprived of his federal Eighth and Fourteenth Amendment right to a reliable penalty verdict. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280.) The combination of rulings on the severance motion, the former juror testimony matter, and the counsel testimony matter, resulted in the deprivation of the federal Fifth, Sixth, and Fourteenth Amendment right to a meaningful opportunity to present a penalty phase defense, and resulted in a fundamentally unfair trial and the denial of due process of law. *Taylor v. Illinois* (1988) 484 U.S. 400; *Lankford v. Idaho* (1991) 500 U.S. 110; *Wealot v. Armontrout* (Eighth Cir. 1992) 948 F.2d 497; *Estelle v. McGuire* (1991) 502 U.S. 62; *Washington v. Texas* (1967) 388 U.S. 14, 18-19; *Miller v. Angliker* (2nd Cir. 1988) 848 F.2d 1312, 1323; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Smith v. Illinois* (1968) 390 U.S. 129.) These erroneous rulings effectively deprived Mr. Travis of his federal Eighth and Fourteenth Amendment rights to have the jury fully and fairly consider his mitigating evidence. (*Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104.)

Prejudice is clear under any standard. By crippling the defense presentation of its mitigating evidence and reducing the possibility of individualized consideration, the erroneous rulings unfairly increased the likelihood of a death verdict. Absent the error, it is reasonably likely the result would have been different. Indeed, in the initial penalty trial, when Mr. Travis had his penalty determined by a jury dealing with only one defendant, that jury was

unable to reach a unanimous penalty verdict, even though it had just found Mr. Travis guilty of capital murder and found two special circumstances to be true. As shown in the Argument XII, later in this brief, pertaining to the overall prejudicial nature of penalty phase errors, the present case was not a particularly strong case for a death verdict. For all these reasons, the error must be deemed prejudicial.

VI. WHERE TESTIMONY GIVEN BY A CO-DEFENDANT DURING A TRIAL THAT ENDS WITH A DEADLOCKED JURY IS USED OVER OBJECTION BY THE PROSECUTION IN IT'S CASE-IN-CHIEF DURING A RETRIAL, THE RESULT IS FUNDAMENTALLY UNFAIR, DEPRIVING THE DEFENDANT OF A VARIETY OF FEDERAL CONSTITUTIONAL RIGHTS, PARTICULARLY WHERE THE CO-DEFENDANT'S TESTIMONY WAS IMPROPERLY ADMITTED AGAINST THE DEFENDANT IN THE FIRST TRIAL

A. Introduction

John Travis and Danny Silveria were initially tried together, with separate juries chosen to simultaneously hear the evidence and then to individually determine the guilt of each defendant. The same procedure was used at the initial penalty trials. However, neither jury was able to reach a unanimous penalty verdict. For the penalty retrial, the trial court refused to again impanel two separate juries. Instead, a single jury heard the penalty evidence against both defendants and then decided the penalty for each of them. (See Argument V, pertaining to the denial of a severance or separate juries for the penalty retrial, for a detailed procedural background of the initial separate juries and the retrial before a single jury.)

During the guilt trial, neither defendant testified. At the initial penalty trial, much evidence that pertained to John Travis only was presented to his jury, but not to the separate jury for Danny Silveria. Likewise, much evidence that pertained only to Danny Silveria was heard only by his jury, and not by John Travis' jury. Nonetheless, when each defendant opted to testify

on their own behalf during the initial penalty trial, the prosecutor insisted that **both** juries hear the testimony of **each** defendant. Both defendants objected to such a procedure.

The defendants took the position that each of them was actually being tried separately, by separate juries, and that the juries shared the courtroom for the sake of judicial economy whenever evidence was presented that was admissible against each defendant. But if they had been tried separately in the more traditional fashion, and the prosecutor attempted to call one of them to testify at the trial for the other, then each defendant would have been entitled to refuse to testify, by virtue of their federal Fifth Amendment privilege against self incrimination. They argued there was no legitimate basis for putting the prosecutor in a stronger position just because the trial court had opted for separate juries rather than a complete severance.

The trial court overruled the defense objections. The court did conclude that when each defendant gave testimony about his own background which was not relevant to the other defendant, that testimony would be heard only by the jury for the testifying defendant. However, when either defendant testified about the present crime, or the events that led up to the crime, that testimony would be heard by both juries. Because that penalty trial ended in a mistrial when neither jury was able to reach a unanimous verdict, any direct error in requiring each defendant to give testimony before the jury for the co-defendant became moot, and therefore will not be raised as a direct claim of error in this appeal.

However, at the penalty retrial before a single jury, Danny Silveria chose not to testify at all. Arguing that he thereby became an unavailable witness, the prosecutor persuaded the trial court to allow the single jury to hear the portions of Danny Silveria's former testimony that had been subject to cross-examination by counsel for John Travis. Over the objection of the Travis defense, that evidence was admitted against John Travis, and was exploited by the prosecutor in his successful effort to obtain a death verdict against John Travis.

Thus, the initial error in requiring John Travis' jury in the original penalty trial hear Danny Silveria's testimony in his own behalf had a direct impact on John Travis' penalty retrial. John Travis contends that the prosecutor should not have been permitted to benefit by that error by using that improper testimony as former testimony in the penalty retrial. Therefore, the trial court erred again when it ruled that Danny Silveria's first trial testimony could be admitted against John Travis in the penalty retrial. It is that error that is the focus of the present claim, but the initial error committed during the first penalty trial must also be discussed fully in this argument in order to demonstrate why the ruling during the penalty retrial was erroneous.

B. Factual and Procedural Background

After the guilt verdicts were returned, defense counsel indicated informally that each defendant would likely testify in his own behalf during the penalty trial, or else the prosecutor assumed that would or might happen. The prosecutor apparently informed defense counsel that he intended to

bring an in limine motion to require each defendant to testify before both juries, and to be subject to cross-examination by counsel for the co-defendant as well as by the prosecutor.[112] (See CT 12:3051-3052, RT 131:12182.)

Even before the prosecutor actually brought such a motion, counsel for Danny Silveria filed an opposition to such requirements. (CT 12:3050-3059.) The next day, counsel for John Travis filed a joinder in that opposition. (CT 12:3068-3073.)

Counsel for Danny Silveria argued that Silveria would have a right to claim the Fifth Amendment privilege against self-incrimination if he was called as a witness in a separate penalty trial for John Travis. Silveria's counsel also argued that what the prosecutor proposed to do in the joint trial before separate juries was the functional equivalent of calling Silveria as a witness in a separate penalty trial for Travis, and therefore violated Silveria's privilege against self incrimination. Furthermore, he argued it would be unfair to force Silveria to be subjected to cross-examination by John Travis' counsel as well as by the prosecutor. Counsel for Silveria relied heavily on *People v. Fonseca* (1995) 36 Cal.App.4th 631, which will be discussed later in this argument. (CT 12:3050-3059.)

---

112 Appellant uses the modifier "apparently" because the record does not expressly show that these events occurred. What is clear from the record is that the prosecutor filed a motion to require any testimony by either defendant to be heard by both juries (CT 12:3080-3092), but co-defendant Silveria filed an opposition to that motion six day **before** the prosecutor's motion was filed. (CT 12:3050-3060.) Thus, it logically follows that the prosecution had informally communicated to the defense in advance that it intended to file such a motion.

Six days later, the prosecutor finally did file his written motion, seeking to require each defendant to testify in front of both juries. (CT 12:3080-3091.) He took the position that there would be no issue regarding the privilege against self-incrimination because that privilege would be waived by any defendant who took the stand. Summing up his position, the prosecutor contended that, "The Travis jury should be present to hear the relevant testimony of defendant Silveria – a percipient witness to the crime and circumstances attendant thereto – and defendant Silveria would and should legitimately be subject to full cross-examination by both the People and counsel for John Travis." (CT 12:3087.)

The following week, the motion was argued. (RT 134:12433-12451.) The defense reiterated its position that dual juries meant there were two separate trial proceedings, even though some portions overlapped. (RT 134:12437-12438.) The prosecutor expressed his concern that he not be faced with each defendant appearing only before their own jury, putting the blame on the other defendant, and leaving their jury unable to hear what the other defendant had to say.[113] (RT 134:12448.)

---

113. Of course, as shown in the summary of the penalty phase evidence in the statement of the facts section of this brief, that is not what the defendants did in their testimony. Instead, each accepted responsibility for the crime, and they differed only in some details. Indeed, in light of the detailed statements each defendant had made to the police soon after they were arrested, the prosecutor knew very well that there was no realistic danger that each would blame the other in the upcoming penalty trial.

Even putting that aside, the prosecutor's fear appears to beg the question. If there had been a complete severance, rather than separate juries, two

(Continued on next page.)

The trial court then ruled that both juries would hear the other defendant's testimony and cross-examination, limited to evidence pertaining to the circumstances of the crime. Each defense attorney was told to structure their client's testimony to accommodate this ruling, or else both juries would be permitted to hear the entire testimony of the defendants. (RT 134:12450.) Interestingly, the trial court also ruled that when each defendant testified before his own jury about other matters, that testimony would not be heard by the other jury and would not be subject to cross-examination by counsel for the co-defendant. (RT 134:12451.) Thus, at least to that extent, the trial court did continue to treat this as two separate trials, with some overlapping portions.

As noted earlier, both penalty trials before the separate juries resulted in mistrials when neither jury was able to unanimously agree on a verdict. After the prosecutor announced his decision to retry both penalty trials, the court rejected the continued use of separate juries and instead insisted on a single trial for both defendants, with a single jury. Danny Silveria never testified on his own behalf at the retrial. Nonetheless, the trial court ruled that,

---

(Continued from last page.)

defendants might well each put the blame on the other, and each defendant's jury would not hear from the other defendant. The prosecutor might find that frustrating, but he would have no legal basis for complaint. The real issue is whether putting the prosecutor in a stronger position just because the trial court opted for separate juries instead of separate trials resulted in a violation of John Travis federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair jury trial in accordance with due process of law, and a reliable penalty verdict.

since Danny Silveria was unavailable to the prosecution as a witness, the portion of Silveria's first trial testimony which had been heard by John Travis' jury and which had been subject to cross-examination by counsel for Travis would be admitted in the prosecution case-in-chief under the aggravating factor of circumstances of the crime. (RT 243:28457-28462.) Pursuant to this ruling, the permitted portions of Silveria's first trial testimony were read to both juries. (RT 244:28482-RT 245:28525; RT 247:28544-28551.)

C. The Trial Court Erred in Forcing the Defendants at the First Penalty Trials to Testify Before the Jury for the Co-Defendant, Where Each Would Be Subject to Cross-Examination By the Co-Defendant; As a Result, Danny Silveria's Former Testimony Should Not Have Been Available for the Prosecutor to Use in the Penalty Retrial

1. Testimony of a Defendant Obtained at a Trial That Ends in a Deadlocked Jury Should Not Be Admissible at a Retrial

a. A Defendant's Privilege Against Self-Incrimination Does Not End After Verdicts of Guilty Have Been Returned, But Continues at Least Until Sentence Has Been Pronounced

As noted in the preceding section, the defendants relied on *People v. Fonseca* (1995) 36 Cal.App.4th 631. In *Fonseca*, the defendant, on trial for

sale of cocaine, called as a witness the man who allegedly bought the cocaine from him. The witness had already pled guilty to possessing the cocaine, and had already been sentenced. The defendant expected the witness to testify that the defendant was not the person who sold him the cocaine. However, the witness refused to testify, exercising his Fifth Amendment privilege against self-incrimination. The defendant argued the witness no longer had such a privilege, since he had pled guilty and had been sentenced. The Court of Appeal disagreed, holding that the privilege lasted at least until sentencing and, if a notice of appeal had been filed, at least until the resolution of the appeal. If no notice of appeal had been filed yet, but could still be filed in a timely fashion, then the privilege lasted at least until the time to file a timely notice of appeal expired, and perhaps until the sentence had been served. (*Id.*, at p. 634-635.) Thus, *Fonseca* is relevant to the present issue since it demonstrates that the fact that guilt verdicts had been rendered did not extinguish the privilege for either John Travis or Danny Silveria.

b. After a Trial Has Resulted in a Deadlocked Jury, Each Party Is Returned to the Same Position as Before the Trial Had Begun

A well-established principle regarding hung juries is that, "When there has been a failure of trial by disagreement of the jury, the status is the same as if there had been no trial." (*People v. Messerly* (1941) 46 Cal.App.2d 718, 721; *People v. Crooms* (1944) 66 Cal.App.2d, 491, 499; see also *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1021; *People v. Dis-*

perati (1909) 11 Cal.App.409.) It follows from this principle that testimony from a trial that ended in a hung jury should not be available to an adverse party for use as former testimony, in a subsequent trial.

Nonetheless, case-law has permitted the use of such testimony. In *People v. O'Connell* (1984) 152 Cal.App.3d 548, 553-554, the defendant testified at a trial that ended in a hung jury. He did not testify at the retrial, and the prosecution was permitted to introduce his former testimony during their case-in-chief. The Court of Appeal rejected any analogy to *People v. Coleman* (1975) 13 Cal.3d 867, 889 (precluding subsequent trial use of a probationer's testimony that was given at a revocation hearing) or *Simmons v. United States* (1968) 390 U.S. 377, 394 (precluding subsequent trial use of testimony given by a defendant at a Penal Code section 1538.5 hearing on a motion to suppress evidence). The Court of Appeal simply found no violation of the privilege against self-incrimination, concluding that the defendant had not been forced to choose between one constitutional right or another when he chose to testify at the first trial. (*People v. O'Connell, supra,* 152 Cal.App.3d at p. 554.) There was no discussion whatsoever of the principle that, after a hung jury, the status is as if there had been no trial. "'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.)

Similarly, in *People v. Malone* (2003) 112 Cal.App.4th 1241, 1244-1245, the prosecution was permitted to introduce the former testimony of a defendant who testified at a trial that ended in a hung jury, and did not testify

in his retrial. Citing *O'Connell*, the Court of Appeal found no violation of the privilege against self-incrimination. The Court of Appeal also cited *Harrison v. United States* (1968) 392 U.S. 219, 222, for the proposition that, "a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives,..." (*People v. Malone, supra,* 112 Cal.App.4th at p. 1245.) *Harrison* however, is not so clear-cut and will be discussed again later in this argument. Like *O'Connell,* the Court of Appeal did not discuss the principle that the status after a hung jury is as if there had been no trial. Once again, "'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.'" (*People v. Jones, supra,* 11 Cal.4th at p. 123, fn. 2, quoting *People v. Gilbert, supra*, 1 Cal.3d at p. 482, fn. 7.)

c. Testimony Given By a Co-Defendant at a Trial that Ends with a Deadlocked Jury Should Not Be Available to an Adverse Party to Use Against the Defendant at a Retrial

John Travis' first contention, therefore, is that testimony given by a defendant at a trial that ends in a hung jury should not be available for use by the prosecution in its case-in-chief, at a retrial. Based on the well-established principle that a hung jury leaves the case as if no trial had occurred, and also based on state and federal constitutional protections against double jeopardy, there is no principled basis for the prosecution to receive this kind of benefit after a mistrial.

In the alternative, the cases that have allowed a defendant's **own** testimony to be used against that same defendant at a retrial after a hung jury should not be extended to justify the use of one defendant's testimony against a **different** defendant at a retrial. In *O'Connell* and *Malone*, the defendants made their own decision to testify in their own behalf. Even if it is appropriate to subsequently use that testimony against the person who gave it, the equities are far different in the present circumstances, where John Travis had no control whatsoever over Danny Silveria's decision to testify in the first trial. Danny Silveria was not called as a witness by the People or by John Travis in the first trial. At least in these circumstances, the rule that the parties should be returned to their original positions after a hung jury should be applied.

2. In the Alternative, Testimony That is Improperly Obtained at a Trial That Ends in a Hung Jury Should Not Be Admissible at a Retrial

As an additional alternative to the preceding contentions, even if this Court concludes that such former testimony is admissible in the circumstances presented in cases such as *O'Connell* or *Malone*, the present case differs from those cases in another crucial respect. In those cases, the testimony of the defendant at the initial trial was given freely and no taint of judicial error precluded its use in later proceedings. In contrast, both Danny Silveria and John Travis objected to the first trial requirement that both defendants

testify before the juries assigned to try the case of the co-defendant. If that requirement had not been imposed, then there would have been no first trial testimony by Silveria subject to cross-examination by counsel for John Travis. Without such first trial testimony by Silveria, there would have been no former testimony by him that would have been admissible against John Travis in Travis' subsequent retrial. Thus, if Travis is correct in his assertion that the trial court erred in requiring Silveria to testify before Travis' jury at the first trial, then Silveria's former testimony should not have been admitted against Travis at the retrial. In other words, the prosecution should not be permitted to benefit at the retrial from an error that occurred at the prosecution's behest in the first trial.

The principle that testimony obtained by means of such a judicial error should not be admissible in a later trial flows directly from *Harrison v. United States, supra,* 392 U.S. 219, the very case relied on in *Malone, supra.* In *Harrison:*

> "The petitioner was brought to trial before a jury in the District of Columbia upon a charge of felony murder. At that trial, the prosecution introduced three confessions allegedly made by the petitioner while he was in the custody of the police. After these confessions had been admitted in evidence, the petitioner took the witness stand and testified to his own version of the events leading to the victim's death. The jury found the petitioner guilty, but the Court of Appeals reversed his conviction, holding that the petitioner's confessions had been illegally obtained, and were therefore inadmissible in evidence against him. *Harrison v. United States*, 123 U.S.App.D.C. 230, 238, 359 F.2d 214, 222;

> on rehearing en banc, 123 U.S.App.D.C. 239, 359 F.2d 223.
>
> ...
>
> "Upon remand, the case again came to trial before a jury. This time, the prosecutor did not, of course, offer the alleged confessions in evidence. But he did read to the jury the petitioner's testimony at the prior trial -- testimony which placed the petitioner, shotgun in hand, at the scene of the killing. The testimony was read over the objection of defense counsel, who argued that the petitioner had been induced to testify at the former trial only because of the introduction against him of the inadmissible confessions." (*Harrison v. United States, supra,* 392 U.S. at pp. 220-221.)"

It was in this context that the High Court noted that

> "...we need not and do not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him." (*Id.,* at p. 222.)

The *Harrison* Court went on to conclude that the former testimony was obtained only because the petitioner had testified in order to overcome the impact of the illegally obtained confessions. Since improper use of the invalid confession impelled the trial testimony, it was tainted and could not be used against the defendant at the retrial. (*Id.*, at pp. 223-226.) Similarly, in the present case, the former testimony of Danny Silveria was not obtained because he freely and voluntarily chose to testify before John Travis' jury,

and be subjected to cross-examination by counsel for Travis. Instead, the testimony was obtained because the trial court erroneously required Silveria to choose between testifying about the present crimes and the circumstances leading up to it before both his own jury and Travis' jury, or not testifying at all. Forcing Silveria to testify before John Travis' jury, or give up his right to testify in his own behalf before his own jury, was directly analogous to the problems recognized in *People v. Coleman, supra,* 13 Cal.3d at p. 889 and *Simmons v. United States, supra,* 390 U.S. at p. 394, discussed above.

Indeed, in *Coleman* and *Simmons*, the choice that was forced on the defendant was a valid choice, even though it was a difficult choice. Even in that context, this Court and the High Court both found that when a defendant is faced with such a choice between two important rights, the resulting testimony should not be available to the government for use in subsequent proceedings. In the present context, the contention is that the choice forced on the defendants at the initial penalty trial was an invalid choice. If that is true, then the case for precluding future government use of the invalidly obtained testimony is even stronger.

3. The Testimony by Danny Silveria at the First Penalty Trial, That Was Admitted Against John Travis at His Penalty Retrial, Was Improperly Obtained

This brings us to the question of whether the trial court did err in requiring the defendants at the first trial to testify about the crime, and the cir-

cumstances leading up to it, before the separate jury for their co-defendant, or else give up their right to present their own testimony to their own jury. To answer this question, we must examine the prosecution theory of relevance, and the largely unexplored nature of a simultaneous trial of two defendants before two juries.

a. Under the Circumstances of the Present Case, Danny Silveria's Testimony Pertaining to the Crime and the Events Leading up to It Had no Proper Relevance to the Determination of the Appropriate Penalty for John Travis

First, in regard to relevance, the prosecutor knew from the detailed statements taken from each defendant soon after they were arrested that there was no basis to expect any substantial differences in each defendant's version of what had occurred. Thus, the prosecution had no reason to expect any significant **impeaching** evidence from either defendant, for use against the other defendant. Absent such impeachment, and considering that guilt had already been established in the guilt phase, and that there was no reason to expect either defendant to rely on lingering doubt as a mitigating factor at the penalty trial, what valid purpose was served by requiring either defendant to testify before the jury for the other defendant?

The answer is that no valid purpose was served. Instead, the prosecutor knew that each defendant had powerful mitigating evidence to offer, and that the prosecution had little aggravating evidence to add to the circumstances-of-the-crime aggravating factor. In that situation, the prosecutor

sought to artificially inflate his case in aggravation by presenting it over and over again. That is, first the prosecution presented witnesses to prove the events leading up to the crime and to establish the guilt of the defendants. Then he got to go through all of it again, in great detail, in his examination of Danny Silveria. Then he got to go through all of it again, repeating the great detail, in his examination of John Travis.

In other words, when the primary aggravating factor is the nature of the crime, and the prosecutor needs to combat powerful mitigating evidence, what could be better for the prosecutor than having a defendant on the stand who had given a detailed confession to the crime. The prosecutor knew the defendants could not credibly back away from their detailed confessions. He knew he could easily make the jurors dislike the defendants by watching them as they were forced to recount the unpleasant details of the crime they had committed. As just asked, what could be better for the prosecutor than that? The answer is being able to do it twice, with two different defendants.

The problem, however, is that such exploitation of cumulative evidence is simply unfair. That, of course, is the very reason why cumulative evidence is not admissible. This Court has recognized that the impact of evidence can be unfairly magnified when evidence that should be presented in the prosecution's case-in-chief is instead dramatically introduced late in the trial in improper rebuttal. (*People v. Carter* (1957) 48 Cal.2d 737, 753-754; *People v. Brown* (2003) 31 Cal.4th 518, 579.) Obviously, repeating cumulative evidence in detail, especially when it comes from the cross-examination of two separate defendants, can similarly unfairly magnify the impact of that

evidence. Here, the repetition of testimony about the same subjects was not brief; instead, it was quite substantial. The testimony by John Travis in the first penalty trial took two-and-one-half court days and filled 400 pages of the Reporter's Transcript. (RT 165:16502-16697; RT 170:17115-17182; RT 174:17331-17499.) The largely cumulative testimony of Danny Silveria that was heard by the Travis jury took four court days and filled 633 pages of the Reporter's Transcript. (RT 147:13976-14110; RT 153:14836-15017; RT 154:15018-15165; RT 155:15166-15323.)

It must be remembered that the issue in the initial penalty trial was the appropriate penalty for each defendant. Each jury was concerned only with determining the appropriate penalty for one of the two defendants. In the circumstances of the present case, Danny Silveria's testimony about the present crime and the facts that led up to it was almost entirely cumulative of John Travis' testimony on the same subjects, and was simply not relevant to a proper determination of Travis' penalty. Instead, it was used only to cumulatively, improperly, and unfairly magnify the circumstances-of-the-crime aggravating factor.

b. It Was an Abuse of the Dual Jury System to Allow the Prosecutor to Exploit the Dual Jury Trial By Forcing Each Defendant to Testify Before the Jury for the Other Defendant

The use of dual juries in capital cases, as a means of avoiding a full severance that would otherwise be required, is not recognized in any California statute. Nonetheless, the concept was approved by this Court in *Peo-*

ple v. Harris (1989) 47 Cal.3d 1047, 1065-1076. This Court acknowledged that many other state and federal courts, while upholding the use of dual juries in the particular case before them, nonetheless cautioned that the procedure carried many risks for unfairness, and that when it is utilized, great care must be taken to avoid unfairness. (*Id.*, at pp. 1072-1075.)

As an example of other state and federal court cautions about the dual jury system, in *United States v. Sidman* (9th Cir. 1972) 470 F.2d 1158, 1167-1170, the Ninth Circuit noted that affirmance of the conviction in the case before it should not be read as an endorsement of such an "experiment" in the absence of the establishment of guidelines by means of a rule of court. (*Id.*, at p. 1170.) Thirty-seven years later (and twenty years after *Harris*), such guidelines have still not been established in California. In *People v. Ricardo B.* (1987) 130 App.Div.2d 213, 518 N.Y.S.2d 843, 848, the Appellate Department of the New York Supreme Court explained:

> "[W]e share the concern of the courts in our sister states that the use of the multiple jury procedure should be utilized only after careful consideration of all pertinent factors and when there are substantial benefits in so doing and **no jeopardy to the rights of the defendants**. ... And, of course, in the rare case in which the multiple jury procedure might be appropriate, **care must always be taken by the trial court to insure that the due process rights of the defendants are not intruded upon**." (Emphasis added.)

With the need for caution in dual jury capital cases as a guideline, the interplay between the federal Fifth Amendment privilege against self-incrimination and the requirement that a defendant in a dual jury case testify

before the co-defendant's jury, as well as his own, can be examined. This can best be achieved by considering three different scenarios involving co-defendants who choose to testify on their own behalf.

The first scenario involves co-defendants who have been granted a complete severance, and who are tried in two completely separate trials. As seen earlier in this argument, in that situation each defendant would be free to testify in his own behalf before his own jury, subject to cross-examination by the prosecution, but not by the co-defendant, who may well have very different interests. Each defendant would retain a privilege that would allow him to refuse to testify if called at the separate trial of the co-defendant. (See *People v. Fonseca, supra,* 36 Cal.App.4th 631, discussed above.) The testimony of the defendant who was tried first could not be introduced by the prosecution as former testimony at the trial of the second defendant, because that defendant did not have a right to cross-examine the first defendant when the testimony was given. (*Crawford v. Washington* (2004) 541 U.S. 36.) No matter how inconsistent the testimony of the two defendants might be, or how relevant one defendant's testimony might be in the other defendant's case for other reasons, that testimony would remain unavailable to the prosecutor unless one defendant willingly relinquished his privilege against self-incrimination and agreed to testify at the other defendant's trial.

At the opposite extreme is the case where both defendants are tried in a single trial before a single jury. Then the jury would necessarily hear the full testimony of each defendant, if they chose to testify, and each defendant would be cross-examined by the co-defendant as well as the prosecutor. In

some instances, the jury might be told that testimony given by one defendant was admissible against that defendant only and could not be considered against the co-defendant. In all other respects, the testimony of each defendant would be fully available for use against the other defendant.

The third scenario, a dual jury case, where each defendant is tried simultaneously before two separate juries, lies somewhere in between these two extremes. To determine whether it is closer to the complete severance scenario, or the single trial with a single jury scenario, we should start by examining the rationale for a dual jury. As explained in *Harris, supra*, 47 Cal.3d at pp. 1065-1066, the typical rationale is that there is enough evidence that is admissible against one defendant but not the other that it becomes impractical to repeatedly admonish a single jury to consider evidence only against the one, and pretend the evidence does not exist as to the other.[114]

---

114. The only other apparent rationale for dual juries in the present case would be that the trial court was swayed by the impressive defense evidence that such a procedure was necessary to assure that each defendant received the constitutionally-required individual consideration of the jury during the penalty phase. As described earlier in this argument, the trial court maintained at all times that was **not** the reason for the choice of a dual jury trial. On the other hand, if that was a factor in the decision to opt for a dual jury trial, then the only thing that occurred during the first trial, that might account for the decision to have a single jury for the penalty retrial, was the fact that both first trial juries were unable to reach a unanimous verdict. However, because such a factor would be substantial evidence that the penalty issue was close as to each defendant, the factor would only add to, not subtract from, the need for separate juries or separate trials for the retrial.

Thus, in a dual jury situation, whenever evidence is admissible against only one of the defendants, it is presented to the jury for that defendant while the other jury is absent from the courtroom. The defendant whose jury is not hearing such parts of the evidence has no interest in the evidence that is given, and therefore has no right to cross-examination of the witnesses who testify in such a fashion.

In the present case, each defendant's privilege against self-incrimination was clearly implicated when each was required to testify before the jury for the co-defendant. The prosecutor below contended that once a defendant made the decision to testify in his own behalf he waived the privilege against self-incrimination for all purposes. That position, however, was clearly an over-simplification. Each defendant's waiver of privilege was greatly broadened, over their objection, when they were required to testify before the jury of the other defendant, because that requirement also meant they were required to submit to additional cross-examination by an additional party who did not necessarily share their own interests. Why should the prosecutor have been permitted to require that broader waiver of privilege?

As explained above, the answer to that question cannot simply be that the prosecutor should have such a right when the testimony of one defendant is inconsistent with the testimony of the other defendant, or is somehow useful for impeachment or relevant for some other purpose. If that was a sufficient answer, then it would also be sufficient even when the defendants are tried separately before separate juries. That is clearly not the state of the law.

But since that cannot be the basis for allowing the prosecutor to insist that each defendant testify before both juries or not at all, what other basis remains for infringing on each defendant's privilege against self-incrimination, by requiring them to be cross-examined by counsel for their co-defendant, as well as the prosecutor?

An alternative manner of analyzing this situation is to focus on the fact that the trial court, prior to the guilt trial, unambiguously concluded that the defendants could not be tried together fairly before a single jury, because it was not possible to fairly redact the many statements that had been made by the defendants. (CT 9:2257-2260; see also CT 9:2269.) Absent use of the dual jury procedure, a complete severance would have been required to satisfy the federal constitutional problems recognized in *People v. Aranda* (1965) 63 Cal.2d 518, and *Bruton v. United States* (1968) 391 U.S. 123. The dual jury procedure was used as an alternative, and ostensibly more efficient, method of satisfying *Aranda* and *Bruton*. While the dual jury method may have provided efficiencies in presenting many of the witnesses in a single trial rather than in two separate trials, there is no discernible reason to also allow the prosecutor to take advantage of this method to gain tactical advantages that would not have been present if a severance had been granted.

As shown above, had a full severance been granted, each defendant would have been able to choose to testify in their own behalf, and the prosecutor would not have been able to force either defendant to testify against the other defendant, or to use either defendant's own-trial testimony against the other defendant. Thus, the prosecution should have had no greater tactical

advantage in the dual jury context than in the complete severance context. A dual-jury trial should be considered as two separate trials, held simultaneously. (See *State v. Velez* (Fla.App.3 Dist. 1992) 596 S.2d 1197; *Feeney v. State* (Fla.App. 1978) 359 So.2d 569, 570.)

In sum, in light of the rationale used in upholding the use of dual juries as an alternative to a complete severance, no reason appears for granting the prosecutor such a broad advantage that would not be present if there had been a complete severance. There was simply no proper basis for allowing the prosecutor to take advantage of the circumstances in the manner in which he did in this case. The interplay of the principles recognized by out-of-state authority, and the overriding requirement of the Fourteenth Amendment due process clause forbid this abuse of the dual jury system. The trial court erred in ruling otherwise.

Thus, the fair and appropriate procedure to follow when a dual-jury trial is permitted is to allow each party to retain the benefits it would have had in separate trials, while maximizing the efficiency of presenting much or most of the evidence on a single occasion instead of repeating it on separate occasions. The prosecution should be able to determine which witnesses will be called during its case-in-chief, and to decide which witnesses will be heard by one jury or the other or both, subject to the dictates of *Aranda* and *Bruton* and any other applicable constitutional protections. Then, after the prosecution has presented its case, each defendant should have retained control of the decisions as to which witnesses to call on his own behalf. Any witness called on behalf of a defendant should be heard only by that defen-

dant's jury, unless the other defendant expressly agreed to have the co-defendant's witness be heard by his jury also, subject to any objections the prosecutor might have had on relevance grounds.

Only in that manner does the dual jury system remain fair to all parties – maintaining the rights that all would have had in separate trials, while still permitting the efficiency advantages claimed to be present in a dual-jury trial. The prosecution should decide how to present its case, and each defendant should decide how to present his case. But under the federal constitution, the prosecution had no power to call Danny Silveria to testify as a witness against John Travis. The prosecution should not have been permitted to use the dual-jury procedure as a subterfuge to avoid that constitutional prohibition. When Danny Silveria chose to testify in his own behalf, he should have been permitted to limit his testimony to his own jury. The same constitutional principle precluded the court from allowing the prosecutor to force a defendant who wanted to exercise his right to testify in his own behalf, to also testify against his co-defendant and be cross-examined by counsel for his co-defendant. The prosecutor should not have been able to benefit from this improper use of the dual jury system by using the invalidly-obtained testimony of Danny Silveria against John Travis in his penalty retrial. It was constitutional error for the court to permit this highly prejudicial procedure.

D. The Erroneous Admission of Danny Silveria's Former Testimony Against John Travis at the Penalty Retrial Was Highly Prejudicial

It has been shown there was no proper basis for allowing the prosecutor to force the defendants at the first penalty trial to give testimony in front of the jury for their co-defendant. Because the former testimony of Danny Silveria was obtained in an invalid manner, it should not have been admitted against John Travis at the penalty retrial.

The primary prejudice that resulted from the admission of Danny Silveria's former testimony against John Travis at the retrial flowed from the extreme amount of cumulative evidence that essentially allowed the prosecutor to repeat the most damaging evidence about the circumstances of the present crime over and over again. As shown above, the danger that flows from cumulative evidence is well-established. Perhaps improperly admitted cumulative evidence can be deemed harmless when it is not very extensive, but in the present case it involved several days' worth of testimony, encompassing hundreds of transcript pages.

Respondent will no doubt search hard to find isolated bits and pieces of Danny Silveria's testimony that may have been somewhat inconsistent with John Travis' testimony, or may have covered matters not covered by John Travis. If Respondent is successful in such a search, that will not change the fact that the former testimony was largely cumulative. Furthermore, to the extent the admission of Danny Silveria's improperly obtained former testimony exposed the jury to any significant evidence they would

not have heard otherwise, that only adds to the prejudice suffered by John Travis.

By allowing the prosecutor to effectively double the strength of its circumstances-of-the-crime aggravating evidence, the erroneous use of Danny Silveria's former testimony rendered the penalty verdict unreliable, in violation of the federal Eighth and Fourteenth Amendments. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.) The error also deprived John Travis of his federal Sixth and Fourteenth Amendment rights to a fair trial by jury, and the fundamentally unfair penalty trial also resulted in the deprivation of federal Fifth and Fourteenth Amendment Due Process rights. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (Fifth Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739.)

In view of these federal constitutional violations, and the fact that this was penalty phase error, the improper use of Danny Silveria's former testimony must be deemed prejudicial unless the error can be declared harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) No such declaration can be made here, in view of the closeness of the case in regard to penalty (See Argument XII, later in this brief, regarding the prejudicial impact of penalty phase errors.)

VII. THERE WAS NO PROBABLE CAUSE TO ARREST JOHN TRAVIS (OTHER THAN ON A TRAFFIC WARRRANT) OR TO SEARCH HIS VEHICLE, NOR WAS THERE ANY JUSTIFICATION FOR A SEARCH INCIDENT TO ARREST, AND ALL ITEMS SEIZED FROM THE VEHICLE, AS WELL AS THE CONFESSION THAT FOLLOWED SOON AFTER THE ARREST, SHOULD HAVE BEEN SUPPRESSED

A. Factual and Procedural Background

1. Pleadings

On or about January 23, 1993. Co-defendant Silveria filed a Motion to Suppress Evidence pursuant to Penal Code Section 1538.5 (CT 4:749-757.) On September 1, 1993, Travis also filed a Penal Code section 1538.5 Motion to Suppress Evidence (including statements). (CT 5:1058-1078.) The next day, then-co-defendant Jennings also filed a similar motion. (CT 5:1079-1085.) On November 12, 1993, the People filed their response to Silveria's motion. (CT 6:1339-1381.) On November 23, 1993, the People filed their response to John Travis motion. (CT 6:1439-7:1508.) That same day, the People also filed their response to the Jennings motion. (CT 7:1509-1581.)

An evidentiary hearing on the three suppression motions began on January 31, 1994, and continued over a number of days, finally concluding on April 6, 1994. (See summary of evidentiary hearing, starting in the next paragraph.) Meanwhile, on April 4, 1994, Silveria filed supplemental points and authorities in support of his motion. (CT 8:1891-1921.) On April 18,

1994, the trial court filed its written ruling denying the motions to suppress evidence. (CT 8:1970-1975.)

2. Evidence Offered in Support of Probable Cause for Stopping the Vehicles

Testimony at the evidentiary hearing revealed the following factual basis for the arrests and searches:

In January 1991, John Boyles was a detective with the San Jose Police Department, assigned to that department's robbery unit. On January 25, 1991, he was assigned to investigate a recent series of robberies in which a stun gun was used. These stun gun robberies included the January 24, 1991 robberies at the Quik Stop Market (at 2:20 AM) and the Gavilan Bottle Shop (at 10:11 PM). Det. Boyles also reviewed the police reports regarding the January 24, 1991 burglary at the Sportsmen's Supply (at 1:15 AM), in which a stun gun had been stolen. (RT 1:17-21.)

Det. Boyles viewed a videotape of the Quik Stop Market robbery. The videotape showed three suspects. RT 1:21-22, 25-26.) After Det. Boyles had made the videotape available to other officers, Officer Kevin Abruzzini recognized one of the suspects as looking like someone the officer had interviewed on January 18, 1991. Officer Abruzzini knew the suspect as Troy Chapple. Officer Abruzzini also supplied a birth-date for that person. Det. Boyles checked that name and birth-date against juvenile probation records and discovered the alternate name of Troy Rackley. Det. Boyles prepared a

photo lineup that included a photo of Rackley, and the victim of the Quik Stop robbery picked Rackley's photo as looking similar to one of the robbers. (RT 1:32-37.) However, when the victim of the Gavilan Bottle Shop robbery was shown the same photo lineup, he made no identification of the Rackley photo and, instead, picked one of the other photos as looking like one of the suspects. (RT 1:37-40.)

On January 28, 1991, Det. Boyles met with a juvenile probation officer, Jim Ireland, and showed Ireland the videotape of the robbery. He identified one of the robbers depicted in the videotape as Matt Jennings. Ireland had been present on a previous occasion when Jennings had been arrested. (RT 1:40-41.)

Later that same afternoon, around 5:00 PM, Det. Boyles received a phone call from a woman who refused to identify herself. The woman said she had read about the stun gun robberies in the newspaper and that the persons responsible for the robberies were named Danny, John, Matt, and Chris. Det. Boyles asked the woman if she knew anybody named Troy, and she responded that Troy also hung around with the other four boys she had named. The woman on the phone also told Det. Boyles that Matt had been playing with a stun gun at her home, and that he had told her the boys were all broke and were planning another job.[115] The woman could not supply an address

---

115 However, on cross-examination, after referring to his own report regarding the phone conversation, Det. Boyles testified that the woman did not say that any of the boys told her they were going to commit another robbery. (RT 1:115-116.)

for any of the boys, but she said they were not currently staying at their regular addresses anyway. Instead, they were staying in an abandoned house in the Uvas Canyon area, south of San Jose. (RT 1:44-47.)

Det. Boyles believed he asked the woman for her last name, but she refused to supply it. The detective did not ask her any follow-up questions regarding how she knew the names of the persons she had said were involved in the stun gun robberies. The only information she had given in that regard was the reference to Matt playing with a stun gun. (RT 1:112-113, 119.)

After talking with the woman, Det. Boyles put out a Be-On-the-Lookout notice for Troy Rackley, Matt Jennings, and anybody associated with them named John, Chris, or Danny. The notice said that these persons were suspects in the stun gun robberies and were likely to commit another robbery.[116] (RT 1:47-48.) Det. Boyles also discussed his investigation with Officer Brian Hyland, who worked in the department's MERGE [Mobile Emergency Response Group and Equipment] Unit, specializing in the investigation of high profile felonies. (RT 1:51-52.) Det. Boyles asked Officer Hyland to actively search for the suspects. (RT 1:57.)

Det. Boyles acknowledged he had no evidence that John Travis was involved in either stun gun robbery, or the gun shop burglary. He had no

---

116 Det. Boyles acknowledged that his Be-On-the-Lookout notice made no distinction between the two who had been identified from the videotape of one of the robberies, and the other three known only by first names. (RT 2:201.)

evidence at all regarding John Travis, other than the fact that the woman who called and would not give her own last name had said someone named John was involved in the robberies. (RT 1:130, 133-134.)

Det. Boyles went home soon after the 5:00 PM call from the woman. Sometime after 5:00 PM Sgt. McCall received another call from an informant who said Danny Silveria (or Silveras) was possibly involved in the robberies. The female informant also mentioned a red and black Charger,[117] and said the suspects would be pulling another job that night and would then be leaving town. Sgt. McCall passed this information on to Officer Hyland, but did so without making any mention of the informant. Sgt. McCall was not sure whether he called Det. Boyles or just left a note for him. (RT 2:220-225, 232, 236, 3:239.) The informant did not supply a name, address, or phone number. (RT 2:229.)

After Officer Hyland received the information regarding suspect Danny's last name, he ran it through the department computer and obtained a date of birth and an address that was not far from the addresses for suspects Jennings and Rackley. (RT 3:247-248.) Officer Hyland went to the address he had for suspect Jennings and learned from Jennings' older brother that Jennings had packed a suitcase earlier that evening and had left with Chris Spencer in Spencer's black and white Dodge Charger. Officer Hyland next went to Spencer's residence, spoke to Spencer's father, and obtained a traffic

---

117 However, according to Officer Hyland, Sgt. McCall told him the suspects were using a red and white Dodge Charger. (RT 3:246-247.)

citation from Spencer's room which listed the Charger's license number as 770 HVZ. (RT 3:252-259.)

Next, Officer Hyland went to Danny Silveria's address and learned from Silveria's brother that Silveria had also packed a suitcase and said he was leaving to go live in the mountains. Hyland was informed that Danny Silveria had left with Spencer, Travis, Jennings, and Rackley. (RT 3:259-260.) Hyland told everybody he talked to that they should call him if they saw any of the suspects. (RT 3:261.)

Around 9:00 PM on January 28, 1991, Det. Boyles received a call at home, from his department, informing him that a woman had called about the stun gun robberies. The woman left a first name – Cynthia – and a phone number. Det. Boyles called that number and spoke to a woman who sounded like the same woman he had spoken to on the phone earlier in the day. This time she supplied two last names for the suspects – Jennings and Silveria. She also supplied a new address for Jennings and said he was driving a red and white car, possibly a Charger. (RT 1:48-51.) After receiving this information, Det. Boyles put out a second Be-On-the-Lookout notice, adding Silveria's last name to the information in the original notice. (RT 2:201-203.)

3. Evidence Pertaining to the Arrests and Searches That Followed the Vehicle Stops

On January 29, 1991, Joanne Schlachter was working as a police dispatcher for the City of San Jose, answering 911 calls and routing them to the

appropriate police channel. At approximately 6:45 PM, she received a call from a person who had called 911 and wanted to talk to Officer Hyland, who was not available. The caller told Ms. Schlachter that the persons who had committed the taser gun robberies were at the arcade at Oakridge Mall. The caller described one suspect as named Troy, 18-19 years old, and the other as Matt, wearing a white shirt and black pants. (RT 4:494-496.) Schlachter routed the call to police dispatcher Ann McCarthy, to broadcast over the police radio. (RT 4:498.) The caller supplied a name and did not request confidentiality, but the police nonetheless claimed the identity of the caller was privileged; the court upheld that claim. (RT 4:496, 504, 508, 5:561-562.)

Dana Withers and Mike Graber were security officers at the Oakridge Mall on January 29, 1991. Graber was outside the mall, patrolling in a mobile unit, while Withers worked inside the mall. Graber had a radio with a phone patch, so he could send and receive radio calls within the mall, while also sending and receiving information to and from police dispatchers through the phone patch. (RT 5:553-555.) Withers received information that caused him to follow two men, who were joined by a third man as they proceeded toward the parking area. (RT 5:556.) Withers saw the two men get into a silver Honda Civic and a silver Datsun 280-ZX. They drove from the west end of the mall toward the north side, while Graber continued to relay information to the police department. (RT 5:556-557.)

On January 29, 1991, around 6:47 PM, Officer Hyland received a dispatch informing him that an informant had called in response to Hyland's request for any information about the whereabouts of the suspects. The in-

formant said the suspects were at the Oakridge Mall in San Jose, on their way to the parking lot to leave the mall. Hyland was too far away, so he called Officers Werkema and Ricketts and told them to go to the mall. Hyland continued to receive updates from his dispatcher, who was still receiving more information from the informant and was passing that along to Hyland and to officers arriving at the scene. (RT 3:265-268, 306, 315.)

The dispatcher informed Officer Hyland that suspects Matt and Troy were at the mall. (RT 3:307-308, 317, 321.) Hyland was also told that two vehicles were leaving the mall – a silver Honda and a silver 260Z or 280Z. (RT 3:268-269.) Meanwhile, Sgt. Sellman had received a call at 6:46 PM and was told to proceed to the Oakridge Mall. She was given a description of two persons who were believed to be the stun gun robbers. (RT 4:459-461.) Both men were described as white males, 18-19 years old. One was named Matt, wearing black pants and a white T-shirt; the other was named Troy, with no further description. (RT 4:461, 480.) After first unsuccessfully seeking the suspects in the area of the arcade, Sgt. Sellman eventually saw the two suspect vehicles moving in the mall parking lot, with the Honda driving unusually close behind the Datsun. (RT 4:61-464.) Sgt. Sellman started to approach the two cars while Sgt. Brandt also approached in another police vehicle, causing the suspect vehicles to come to a stop. (RT 4:464-465.)

Sgt. Brandt approached the Datsun, which had a driver and one passenger. Sgt. Sellman handcuffed the driver of the Honda, did a pat search, found no weapons, and then placed the Honda driver in Sellman's patrol car, without even asking his name. She then assisted Brandt in handcuffing the

driver of the Datsun. (RT 4:465-466, 483, 485.) Sellman looked inside the Honda, saw a black leather fanny pack on the passenger seat, and looked through it for the stun gun. (RT 4:466-467.) She believed this was a search incident to the arrest of the still-unidentified Honda driver, who was already in the officer's patrol car. (RT 4:467, 484.) Officers Ricketts and Werkema arrived at the scene at 7:20 PM, and focused their attention on the passenger side of the Datsun. (RT 4:466-467, 516-517.)

In the fanny pack in the Honda, Sgt. Sellman found $587 in cash, Danny Silveria's identification, and a clear plastic baggie which the officer believed contained marijuana. (RT 4:468.) She confirmed that the driver who had been removed from the Honda was Danny Silveria. (RT 4:468.) Still searching for the stun gun, Sellman opened the trunk of the Honda and found two canvas bags. The sergeant opened one bag and found a Parali/azer stun gun and some rolls of coins. The other canvas bag contained screwdrivers, a hammer, vice grips, carpentry tools, and a roll of duct tape. (RT 4:469-470.) Sgt. Sellman determined that the driver of the Datsun was John Travis. (RT 4:470-471.)

Sgt. Sellman conceded that up to this point, she had received no information at all indicating that anybody besides Matt and Troy were suspected of involvement in the stun gun robberies.[118] (RT 4:485.) She had

---

118 Notably, none of the three men in the two cars matched the only clothing description that the officers had received – a man in a white T-shirt and black pants. Rackley was wearing a blue sweatshirt or polo shirt with a narrow, round white collar, Travis was wearing a red and black hori-

(Continued on next page.)

placed Danny Silveria under arrest based solely on the information she had been receiving from the dispatcher. (RT 4:485-486, 490.) Even though Sellman had determined that the only person who had been in the Honda was neither suspect Matt nor suspect Troy, she spent thirty minutes searching the Honda, all on her own initiative; nobody else had directed her to conduct such a search. (RT 4:489-490.)

Meanwhile, Officer Werkema searched the Datsun, pursuant to the arrest of the driver and passenger, who had been handcuffed and placed in custody. Werkema knew that Troy Rackley had been identified as one of the stun gun robbers, and he also knew that there was an outstanding misdemeanor warrant for the arrest of John Travis. (RT 4:522-525, 544.) Inside the Datsun, Werkema found a black leather fanny pack containing$1,313, and a white fanny pack containing several rolls of coins and $7.40 in loose coins. In the rear of the vehicle, the officer found a duffle bag with some clothing, a prescription for John Travis, and 2 packs of AA Duracell batteries with a tag from Leewards.[119] (RT 4:526-529.)

By the time Officer Hyland arrived at the mall he saw two marked police cars with the two suspect vehicles. Three suspects were handcuffed and

---

(Continued from last page.)

zontally striped polo shirt, and Silveria was wearing an open-collar button shirt that was mostly black with a grayish motif. (RT 4:536-537.)

[119] Officer Werkema was not yet aware of the fact that a homicide had occurred that evening at Leewards. He did not become aware of that until after he had returned to he police station and detectives from the Santa Clara police department had arrived. (RT 4:530.)

inside the patrol cars when Hyland arrived. They identified themselves as Troy Rackley, Danny Silveria, and John Travis. (RT 3:268-269, 325-326, 328.) The two suspect vehicles had been impounded and warrant checks had been run on the three suspects. The officers learned there was a misdemeanor warrant outstanding for Travis. Rackley and Silveria were placed under arrest and all three suspects were transported to the police department.[120] (RT 3:270, 272.) The only question that was asked of the suspects at the scene was in regard to the whereabouts of Jennings and Spencer. (RT 3:273.)

Officer Hyland believed that Sgt. Sellman thoroughly searched the Silver Honda that Silveria had been driving, although Hyland was not sure whether that was already underway when Hyland arrived at the scene. Hyland did remember watching Sellman conduct the search, but he did not recall whether he was the one who directed Sellman to conduct the search. (RT 3:330.)

---

120 In Officer Hyland's mind, the three suspects were under arrest as soon as he knew who they were. He told all three they were under arrest as soon as he started speaking to them. (RT 3:329-330.) He believed that while they were still at the mall, he told John Travis that he was under arrest for robbery. (RT 3:365.) Apparently, the only reasons for arresting Travis for robbery were the fact that he was with the other suspects, that everybody Hyland talked to said that all five boys had been hanging around together for days and that they were planning to leave town. (RT 3:354-355.) Notably, however, the jail pre-booking records showed that Travis was booked only on the traffic warrant. (RT 5:687.)

4. Events after the Vehicle Stops, the Arrests, and the Car Searches

Around 7:50 PM on January 29, 1991, Officer Hyland contacted Det. Boyles and informed him that he had Troy Rackley, Danny Silveria, and John Travis in custody. Boyles asked Hyland to transport the suspects to the police department for interviews. Boyles had John Travis arrested only because the informant known only as Cynthia had said that someone named John was involved in the robberies. Boyles also asked Hyland to have their vehicles towed to a police warehouse to be searched for evidence of the robberies.[121] (RT 1:58-59, 134.) Hyland, and/or one or more of the other officers with Hyland, also informed Boyles that a large sum of money and a stun gun had been found in Silveria's car. (RT 1:126-127.) Boyles was not sure

---

[121] Boyles subsequently clarified this, explaining that he directed other officers to have Travis' car towed to the station, but he did not order the search of the car. Boyles believed the arresting officer had searched the car without any direction from Boyles. (RT 1:138.)

Boyles also recalled instructing the officers to bring the three suspects in for interviews, but he could not recall whether he specifically said they should be arrested. (RT 2:181-183.) Displaying a surprising misunderstanding of the differences between a detention and an arrest, Det. Boyles explained that his Be-On-the-Lookout notice said nothing about making any arrests; to Boyles that meant that the described suspects should be stopped and he should be contacted. If officers stopped any of the suspects and could not reach Boyles, they were to bring the suspects in for interviews; Boyles believed there was at least sufficient probable cause to do that. When Det. Boyles did receive the call that the suspects had been detained, he wanted to talk to the suspects and he authorized the officer to at least detain the suspects, but to arrest them only if there was probable cause to arrest. (RT 2:199-200.) Thus, the detective apparently believed that probable cause to detain was sufficient to permit transporting suspects to a police station to be interviewed, even if there was no probable cause to arrest them.

whether he received this information during the initial call about the arrests, or at a later time. (RT 1:126.)

When the suspects were brought to the police station, Det. Boyles talked first to Officer Hyland or Officer Rickets, who had also been present when the cars were stopped. It was during this conversation that Det. Boyles first learned of John Travis' outstanding arrest warrant for failing to appear on a traffic matter. (RT 2:187-188; see Vehicle Code section 40508.) Det. Boyles began the interviews with Troy Rackley starting around 8:30 PM. Rackley acknowledged his involvement in the two stun gun robberies and the gun store burglary. He said Silveria was with him at one robbery, and both Jennings and Silveria were with him at the other robbery. Rackley also identified Jennings and Silveria as being with him at the gun store burglary, adding that another unnamed friend drove the car that was used for that burglary. Rackley claimed that the money found in the vehicles during the searches that followed the arrests might have come from drug sales, but he denied knowledge of any other robberies. (RT 1:62-67, 76.)

After the interview of Rackley, Det. Boyles began his interview of John Travis, starting around 9:30 PM. Travis supplied an address and a phone number, and Det. Boyles noted that the phone number was the same one that has been given by the caller known only as Cynthia. (RT 1:77, 79-81.) Travis also said the money found in the vehicles had come from helping Silveria sell food that had been stolen from restaurants, and from the sale of

drugs. (RT 1:82.) After talking to Travis, Det. Boyles was uncertain whether Travis should remain in custody.[122] However, before making any decision one way or the other, Boyles learned that Travis had been implicated in the Leewards murder. (RT 1:142, 146.)

Det. Boyles next interviewed Danny Silveria, starting around 11:00 PM. (RT 1:82-83.) When Det. Boyles first saw Silveria that evening, he recognized him as the third robber depicted in the videotape of the Quik Stop robbery. (RT 2:179-180.) Silveria admitted he committed the gun shop burglary with Jennings and Rackley, and he named Chris Spencer as the driver. (RT 1:91.) Silveria also admitted committing the stun gun robberies with Jennings, Rackley, and Spencer. (RT 1:93-94.) Like the others, Silveria claimed the money found in the vehicles was from selling drugs. (RT 1:95-6.) He also admitted breaking into a Chinese restaurant four nights in a row, and then selling the food on the streets. (RT 1:96-97.)

B. The Evidence Did Not Establish Reasonable Suspicion to Support the Initial Car Stop

The foregoing reflects violations of Travis' Fourth Amendment rights on at least two grounds. In opposing the Penal Code section 1538.5 motion to suppress, the prosecution had the burden of showing "that the warrantless

---

122 Officer Hyland was uncertain whether John Travis was ever given an opportunity to post the $353 bail for the Vehicle section 40508 warrant. (RT 4:434.)

search or seizure was reasonable under the circumstances." (*People v. Williams* (1999) 20 Cal.4th 119, 130, citations omitted.)

The first flaw in the prosecution showing below was the complete failure to establish any reasonable suspicion whatsoever for the initial stop of the silver Datsun driven by John Travis. The prosecution evidence presented at the hearing on the motion to suppress attempted to establish reasonable suspicion to stop Travis' vehicle based on the following:

Troy Rackley and Matt Jennings had been identified as stun gun robbery suspects, based on the surveillance videotape of one of the robberies, which depicted a total of three suspects for that robbery.[123] An anonymous caller provided the police with first names only – Danny, John, and Chris – as additional perpetrators of the robberies. The officers had no information regarding the actual facts known to the anonymous caller, other than the fact that she had seen Matt playing with the stun gun. There was no other evidence that the person named "John" was involved in the robberies, and no evidence that the person named John was, in fact, John Travis. "John" is, perhaps, the most common first name for American males.

Even this skimpy information was worth little or nothing toward establishing reasonable suspicion to stop the vehicles, a requirement recently reiterated in *People v. Hernandez* (2008) 45 Cal.4th 295, and in *In re Ray-*

---

123 The victims of each of the stun gun robberies described only three perpetrators, who had already been identified as Matt Jennings, Troy Rackley, and Danny Silveria. (RT 1:25-27, 38.)

mond C. (2008) 45 Cal.4th 303. It is well established that an anonymous tip cannot justify a "stop-and-frisk." (*Florida v. J.L.* (2000) 529 U.S. 266.) Thus, even if there had been a basis for believing the "John" referred to by the caller was John Travis, that was still insufficient to justify stopping a vehicle. Here, as in *J.L.*, there was no basis for assessing the reputation of the caller. (*Id.*, at p. 270.) Also, as in *J.L., supra,* at pp. 270-271, the caller provided no predictive information that had been verified prior to the vehicle stops.

Subsequent information from a female caller – perhaps the same woman who had called earlier – suggested that a red and black (or red and white or black and white) Charger was involved in the robberies. But no Charger of any color, and no car that was red and black or red and white or black and white, was seen when the two vehicles were stopped at the mall. The police possessed no evidence whatsoever that a silver Datsun or a silver Honda had anything at all to do with the robberies.

The most up-to-date information prior to the stop of the two vehicles was supplied by a confidential informant who called to report that two suspects named Matt and Troy were at the arcade at the mall. The only descriptive information was that Matt was wearing a white shirt and black pants, and that both suspects were 18 or 19 years old. There was no information whatsoever regarding the caller's source of information, or any other information that would establish the reliability of the information that was supplied. A security guard working inside the mall began to follow two men, who were soon joined by a third man, but none of the three men was wearing

a white shirt, and there was no information regarding what caused the security guard to follow these particular individuals. While these men apparently did appear to be close to the 18-19-year-old age range, one would expect to find a large number of males within or close to that age range at a large metropolitan mall.

Although the security guard saw these three men enter the two silver vehicles that were soon stopped by the officers, that did not change the fact that the prosecution evidence failed to establish what caused the security guard to believe any of these three men were the stun gun robbers. It is true that the vehicle driven by John Travis also contained Troy Rackley, but there was no evidence that any officer involved in the stops recognized Rackley prior to the time the silver Datsun was stopped. Since "the reasonableness of a search is not to be justified by what the search turns up" (*People v. Sanson* (1957) 156 Cal.App.2d 250, 254), the fact that a passenger in the car was subsequently identified as Troy Rackley cannot be used to establish reasonable suspicion to stop the vehicle.

In sum, the most that can be gleaned from the prosecution evidence is that the two cars that were stopped apparently contained the three men who were being followed by the security guard. However, with no evidence to establish what caused the security guard to follow these three men, there remains a complete absence in the record of any reasonable suspicion to stop either of the two vehicles. "[R]easonable suspicion" is required to support the stop of a motor vehicle. (*In re Raymond C., supra,* 45 Cal.4th at pp. 306-307.) " 'It is well settled that while it may be perfectly reasonable for offi-

cers in the field to make arrests on the basis of information furnished to them by other officers, "when it comes to justifying the total police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness." (Citations omitted.)' " (*People v. Madden* (1970) 2 Cal.3d 1017, 1021.) The prosecution has not met this burden.

Here, the crucial information was not even furnished by another officer, but instead by a mall security guard. The rationale set forth in *Madden* becomes even more compelling where the presumed source of the justification for a detention is not a police officer. Although *Madden* arose in the context of establishing probable cause to arrest, the same principle applies to a pat-down during a detention. (*People v. Collins* (1970) 1 Cal.3d 658; *People v. Wooten* (1985) 168 Cal.App.3d 168.) The same reasoning must lead to the conclusion that the same rule applies in regard to establishing reasonable suspicion to support a car stop.[124]

---

[124] Notably, security guard Withers provided more detail in her subsequent trial testimony, but even if that testimony had been part of the record at the hearing on the motion to suppress, it would still have been insufficient. Ms. Withers simply testified that while she was patrolling the mall, a person approached her and asked her to keep an eye on three men while the individual called the police about a robbery. (RT 106:10293-10294.) This still leaves no information regarding why the individual who approached Withers believed the three men he asked her to watch were the stun gun robbers. That deficiency in proof alone undermined the prosecution effort to meet its burden.

Nevertheless, assuming this individual was the same person who called the police and talked to police dispatcher Joanne Schlachter, the prosecution record at the suppression hearing was still inadequate. There was

(Continued on next page.)

Due to the complete failure to establish any reasonable suspicion to support the vehicle stops, the subsequent arrests were invalid, all items found inside John Travis' car, and all statements made by John Travis at the scene of the arrests, must be suppressed as fruits of the invalid vehicle stop. (*People v. Gonzalez* (1998) 64 Cal.App.4th 432.)

C. After John Travis and His Passenger Had Been Arrested, Handcuffed, and Placed in a Patrol Car, There Was No Justification for the Search of the Passenger Compartment and the Trunk of John Travis' Car, Purportedly Incident to the Arrests

Aside from the invalidity of the car stops, after the cars were stopped and the occupants were identified, there was still insufficient information to support the arrest of John Travis for the robberies, assuming such an arrest occurred at the scene of the stops.[125] The only information known to the of-

---

(Continued from last page.)

still nothing at all to indicate why that person believed the three men at the mall were the stun gun robbers. Moreover, the information received from that caller was mistaken in regard to the clothing being worn by the suspect named Troy. Also, that person described the suspects at the mall as two men named Matt and Troy, but the security guard was following three men, and none of them were named Matt. With no other evidence to establish the reliability of this person or the bases of the conclusions this person had made, there is still a complete absence of reasonable suspicion to justify the car stops.

125 The prosecution witnesses were clear that Travis was arrested on the basis of the outstanding warrant for failure to appear on a traffic matter, but they were conflicting regarding whether John Travis was also arrested for robbery.

ficers was that an informant of unknown reliability believed that a person named John was involved with the other men in the robberies. But the officers still did not know what caused the informant to believe that a person named John was involved. Furthermore, there was no basis at all for believing that the person named John was, in fact, John Travis, other than the fact that John Travis associated with the known suspects. Mere association with persons suspected of a crime is not sufficient to establish probable cause to arrest. (See, for example, *People v. Gonzalez, supra,* 64 Cal.App.4th at p. 439.)

In any event, whether John Travis was arrested for robbery, or only for the outstanding misdemeanor warrant, the evidence was undisputed that all three suspects were handcuffed and placed in patrol cars before any search was conducted. Since the men were fully within the control of the police and were unable to access anything that might have been in either car, there was no justification to conduct any search of any part of the vehicles based on the search-incident-to-arrest exception to the warrant requirement. (*Arizona v. Gant* (2009) 556 U.S. ___)[126] This case is controlled by *Gant*, and requires suppression of the evidence seized in violation of Fourth Amendment principles.

---

126 While the present search was conducted long before *Gant* was decided, under the retroactivity analysis established in *Griffith v Kentucky* (1987) 479 U.S. 314, appellant should receive the benefit of *Gant* because his case is not yet final on appeal. (See *U.S. v. Gonzalez* (9th Cir. 2009) 578 F.3d 1130.)

It is true that *Gant* does leave open the possibility of justifying a car search after the arrest of occupants as a search for evidence of the crime for which the occupants were arrested. However, to support a search of a vehicle for evidence of a crime, there must still exist facts that establish probable cause to believe that such evidence will be found in the vehicle. (*Carroll v. United States* (1925) 267 U.S. 132, 153; *California v. Acevedo* (1991) 500 U.S. 565, 569.) As shown above, there was insufficient probable cause to arrest John Travis for robbery, and no reason to believe that the car possessed any evidence regarding the misdemeanor failure to appear on a traffic citation. Assuming there was cause to arrest Troy Rackley for robbery, he was a mere passenger in a car that did not belong to him, and there was no reason to believe that a silver Datsun was involved in the robberies. Indeed, there was no basis to believe that more than one vehicle was involved in the robberies, and all the information possessed by the officers indicated that the car involved in the robberies was a Dodge Charger that was some combination of red, white, and/or black, and was known to belong to Chris Spencer, who was not among the group detained at the mall. Thus, there was no probable cause for believing that the silver Datsun contained any evidence of the robberies, or that it had anything at all to do with the robberies.

It is also true both cars were impounded. However, that occurred after the officers had illegally searched the vehicles and found evidence pertaining to the stun gun robberies. It is not at all clear that the cars would have been impounded if they had not already been searched. Even assuming, for the sake of argument, that the officers here would have impounded the car in any

event, any such impoundment would have also been illegal. There was no showing whatsoever below that any community caretaking function required the impounding of the vehicles here. The cars were in a parking lot at a large shopping mall. Paraphrasing *People v. Williams* (2006) 145 Cal.App.4th 756, 762-763, the possibility that the cars would be stolen, broken into, or vandalized was no greater than it had been moments before when the suspects had left their cars parked in the same parking lot. The prosecution did not even attempt to show that the suspects would have been unable to arrange to have someone retrieve the vehicles from the parking lot and move them to a location where they would have been legally parked and reasonably safe until their owners were able to retrieve the cars or make other longer term arrangements.

In sum, even assuming the arrests were valid, there was no basis for conducting any search of the car that John Travis was driving. The evidence seized as a result should have been suppressed.

D. Once John Travis Had Been Booked on the Misdemeanor Traffic Warrant, He Should Have Been Permitted to Post Bail

An additional problem is that John Travis was never permitted to post bail on the misdemeanor traffic warrant for which he was arrested. Because the search of his car was invalid, as discussed above, evidence found in his car cannot be used to establish probable cause to arrest him for robbery. As shown above, no other probable cause existed to support his arrest for rob-

bery. Thus, there was no basis for holding him in custody for any reason other than the misdemeanor traffic warrant. Prior to attempting to interrogate him for the robberies, the police should have permitted him to post bail on the misdemeanor traffic warrant. (*People v. Superior Court (Simon)* (1971) 7 Cal.3d 186; *Carpio v. Superior Court* (1972) 19 Cal.App.3d 790, 793; Vehicle Code section 40307.)

Moreover, we know the record shows that John Travis had more than sufficient cash in his car to post bail on the misdemeanor warrant. While it is true that he told the police that the cash in his car was from proceeds from the sale of drugs, that explanation came only after the illegal search of items in the car. Indeed, it came so quickly after the search disclosed the cash that it clearly was the fruit of the invalid search.

In any event, even putting aside the cash that was in the car, the bail on the misdemeanor traffic warrant was small enough ($353 – see RT 4:434.[127]) that it was reasonably likely that it would have only taken a phone call, to which John Travis was entitled, to arrange for a friend or relative to assist in promptly posting bail. Under the circumstances, it was improper for the police to fail to provide such an opportunity. For this separate reason, the incriminating statements made in the hours soon after his unlawful detention should have been suppressed.

---

127 Furthermore, it is well known that bail bondsmen will post bond in return for a payment of 10% of the amount of the bail. Thus, there is no basis for presuming that John Travis could not have arranged for bail.

VIII. THE TRIAL COURT IMPROPERLY DENIED AN ACTUAL GUILT PHASE JUROR'S HARDSHIP REQUEST AND, AT THE PENALTY RETRIAL, IMPROPERLY EXCUSED TWO PROSPECTIVE JURORS WHO HAD NEGATIVE FEELINGS ABOUT THE DEATH PENALTY, BUT WHO WERE ALSO CLEAR IN STATING THEY COULD CONSIDER A DEATH SENTENCE AND WOULD FOLLOW THE COURT'S INSTRUCTIONS

A. Introduction and Procedural Background

Prior to the selection of jurors for the initial guilt trial, the court and counsel engaged in a series of discussions pertaining to juror questionnaires and to the procedures that would be used in court during the jury selection process. Similar discussions occurred before the selection of jurors for the penalty retrial. As will be shown, both in its comments and rulings, the trial court demonstrated a serious misunderstanding of several basic principles pertaining to jury selection in capital cases. As a result, one member of the jury that found John Travis guilty of first-degree murder with special circumstances was forced to serve as a juror despite a hardship that should have resulted in his excusal. Also, at the penalty retrial, two prospective jurors who were fully qualified to serve were improperly excused for cause simply because they expressed negative feelings about capital punishment.

Because the first penalty trial did not result in a verdict, any errors in removing first trial prospective jurors for cause because of a perceived substantial impairment in their ability to consider a death sentence as a sentencing option cannot be raised directly as appellate claims. (*People v. Stewart*

(2004) 33 Cal.4th 425, 455.) Nonetheless, discussions about such matters before the selection of the initial trial jurors, and during the exercise of challenges for cause, will be included in the present summary of evidence pertaining to the errors at the penalty retrial, because it is apparent that the same misconceptions disclosed during these discussions continued during the selection of the jury for the penalty retrial.

It is important to note that early in the discussion of the initial juror questionnaire, the trial court plainly stated that any objections by counsel for either defendant would be considered as objections on behalf of both defendants, unless someone clearly indicated otherwise. (RT 30:2537.)

Before the initial trial, the court made clear that it would allow some follow-up questioning by counsel, but that any such questioning would be very strictly limited. For example, the court refused to allow any follow-up questions by counsel pertaining to the subject of death qualification. Instead, any such follow-up questions would have to be submitted to the court, and the court would then decide whether to ask the questions. But the court also noted that counsel had been urged to put everything they wanted into the questionnaire, and the court saw that as counsels' opportunity to cover everything that might be covered in a follow-up question. (RT 43:3621-3622; see also RT 63:5038.) In a later comment displaying the judge's attitude toward possible follow-up questions sought by counsel, the court stated, "I'm not sure you should hold your breath on me accepting those. That questionnaire is about as complete as it could possibly be." (RT 63:5036.)

The court also made clear that it would not allow one side to "tear up" a juror, only to then be rehabilitated by the other side. Instead, "We will get the first impressions of that juror for purposes of jury selection." (RT 43:3623.) The court noted it's understanding that all counsel were objecting to this. (RT 43:3624.) At one point during the selection of the Silveria jury, the court stated, "Counsel, it's inappropriate for ... the court to try to turn a juror around ..." (RT 64:5080.)

When asked by defense counsel when the defense would have an opportunity to question jurors about matters other than death qualification, the court simply stated that Proposition 115 did not permit any examination in support of possible peremptory challenges. (RT 43:3624-3625.) Counsel for John Travis made it clear he was objecting to all of the limitations the court was putting on voir dire by counsel, to death qualification, and to the application of any restrictions resulting from Proposition 115. (RT 86:8150)

In contrast to the court's original attitude about putting everything counsel wanted into the juror questionnaire, the court decided to substantially pare down the questionnaire that would be used for the penalty retrial. The court proceeded to delete numerous questions from the questionnaire, over the objections of defense counsel. Usually these deletions were made because the court believed the questions sought information that could be used for peremptory challenges, rather than for cause challenges. (RT 196:22562-22631, especially at p. 22568 and 22584. On the other hand, the court made a statement that questions that had been deleted from the questionnaire could be asked by counsel. The court did not explain why questions

the court believed went to potential peremptory challenges rather than for-cause challenges would be permissible if asked orally, but not permissible in a questionnaire. (RT 197:22697.)

The court seemed to indicate it would take a more liberal view of limited voir dire by counsel than it had taken in the first jury selection, but then the court made it clear that voir dire by counsel was not to cover death qualification in any way. If it did, the court warned, any offending party would lose all further voir dire privileges as to any other juror. Also each attorney would be allowed only 1 or 2 minutes per juror. (RT 197:22692, 22695.) The court also explained its belief that under Proposition 115, the only thing that was required beyond the juror questionnaire was voir dire in regard to death qualification. Thus, the court believed its restrictive procedures were giving counsel more leeway than Proposition 115 required. (RT 215:24709.)

As the actual penalty retrial jury selection progressed, the court lectured counsel about asking too many questions about the death penalty. The court did not want counsel to ask questions about any weighing process. Instead, counsel were directed to ask only whether jurors would listen with an open mind to evidence pertaining to specific categories of mitigating or aggravating factors, or whether it would be important to jurors to hear such evidence. (RT 227:26727.) At another point, counsel for the co-defendant noted that the court was routinely asking prospective jurors if it was important to them to hear the mitigating and aggravating evidence. Counsel believed that when the two were lumped together in a single question, the answer was always affirmative. Counsel urged the court to instead ask two separate

separate questions, one pertaining to aggravating evidence and one pertaining to mitigating evidence. The court refused to alter its method. (RT 228:26885.)

B. Judicial Inconsistencies Regarding Hardship Excusals and Erroneous Excusals for Cause Rendered the Jury Selection Process Unfair

1. Inconsistencies in Rulings on Hardship Requests Led to an Actual Guilt Phase Juror Who Should Not Have Been Permitted to Remain on the Jury

The trial court was bizarrely inconsistent in the manner in which it reacted to juror requests for hardship excusals. Prospective juror M-56 informed the court that if s/he was chosen as a juror, s/he would have to continue to work at night during the trial. The court promptly responded that would not be appropriate because the juror would be exhausted within a month. (RT 63:4965.) During selection of Danny Silveria's guilt phase jury, prospective juror I-40 said s/he would be preoccupied with work and would try to work as much as possible during nights and weekends. That juror was excused over the objection of defense counsel, because the court was worried about the juror's ability to concentrate on the case. (RT 81:7439-7442.) Another Silveria guilt phase prospective juror, K-112, was excused after stating he would continue working before and after court and on weekends. The

court did not believe he could give the case the attention it deserved. (RT 81:7522-7524.)

In sharp contrast, prospective juror H-65 was treated quite differently. He informed the court he was working on a project that would go on longer than expected, that he would have to work 50 hours a week in addition to his jury time, and that he would be working from 6 PM to 1 AM seven nights a week. This did not faze the court at all. (RT 89:8400-8402.) Prospective juror H-65 was chosen as an actual alternate juror. During the selection of alternate jurors, prospective jurors were called one at a time and each side was permitted only one peremptory challenge for each alternate juror position. (RT 86:8124.) John Travis had used his single peremptory challenge on another prospective juror, and had no challenges left to exercise when prospective juror H-65 was added to the active panel of prospective alternate jurors. (RT 87:8210.) Furthermore, after the twelve regular jurors had been chosen, but before the selection of alternate jurors was complete, juror J-71 was excused for hardship and was replaced by juror H-65. (RT 89:8392-8393; 8404.) Juror H-65 remained on the guilt trial jury as Juror Number 6, through the guilt verdict.

In sum, the court repeatedly recognized that a juror in a lengthy capital trial who would also have to work full-time during nights and weekends could not possibly give the trial the undistracted attention and alertness that was required. Inexplicably, when faced with an actual alternate juror who had just such a problem, the court chose to ignore it. That alternate juror became an actual juror and participated in reaching the guilt verdicts.

"It is vital in capital cases that the jury should pass upon the cause free from external causes tending to disturb the exercise of deliberate and unbiased judgment." (*Mattox* v. *United States* (1892) 146 U.S. 149, 36 L.Ed. 917, 921, 13 S.Ct. 50; see also *People* v. *Hogan* (1982) 31 Cal.3d 815, 848.) As a result of leaving this juror on the panel, John Travis was deprived of his federal Fifth, Sixth, and Fourteenth Amendment right to due process and to a fundamentally fair trial by jury. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (Fifth Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739.) He was also deprived of his right to reliable fact-finding in a guilt verdict which subsequently supported a sentence of death. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

2. At the Penalty Retrial, the Trial Court Erroneously Excused for Cause Jurors Who Expressed Negative Feelings about the Death Penalty, Even Though They Clearly Stated They Would Follow the Instructions of the Court and Could Consider a Death Sentence

a. Prospective Juror E-45

Prospective juror E-45 acknowledged he had some issues with the death penalty, but believed he could look at what the law required. He felt disinclined to vote for a death verdict, but recognized he would have to hear the circumstances before coming to any conclusion. He would have to see more evidence to vote for a death verdict than to vote for life without parole. (RT 218:25130.)

The court then asked the juror to assume a case in which the defendants deliberately participated in the multiple stabbing of the victim during a robbery, and the victim died. The court then asked the juror whether he would always vote for life without parole in such a case and reject a death sentence. The juror responded that he believed he would vote for life without parole in such a case, and would probably not vote for death based on that. The judge sought to clarify: "Again, that's the only thing you know right now." The juror responded, "Probably not at this point, no." (RT 218:25131-25132.)

The court decided to inquire further. The court repeated its very brief description of the crime, and then asked if the juror could even consider a

death sentence in such a case. Prospective juror E-45 candidly responded, "Personally, no. But I guess if I were instructed as far as what the law should be, then I might have to look at, you know, changing my beliefs a little bit. I guess I could consider the death penalty." (RT 218:25134.) The court then gave the juror an abbreviated instruction on assigning weights to the various aggravating and mitigating factors, and explained that in order to return a death verdict the jurors would have to agree that the aggravating factors were so substantial in comparison to the mitigating factors that death was warranted instead of life without parole. The court then asked the juror to assume after that process, he did believe death was the appropriate penalty; if so, would he be able to vote for a death verdict? He responded, "If I went through all the different weights and things, yes, I guess so." (RT 218:25134-25135.)

The court next explained to the juror that under California law, there was no preference for one penalty over the other. Jurors were to weigh the factors and vote for the penalty they believed was appropriate. The juror affirmed that he could go through that process. The court then asked if the juror thought the death penalty could be appropriate in a case such as the present case, "without knowing anything about the case, other than that one assumption?" (RT 218:25136-25137.) In context, the reference to "that one assumption" apparently meant the very brief summary of the facts - a case in which the defendants deliberately participated in the multiple stabbing of the victim during a robbery, and the victim died. To this particular question, the

juror responded, "I guess, just with that one assumption, probably not appropriate." (RT 218:25137.)

Without inquiring further, the court excused prospective juror E-45, finding him to be "substantially impaired because of his views on the death penalty and it would prevent him from fulfilling his role as a juror according to his oath and the instructions." (RT 218:25137-25138.) As will be seen, this finding was completely unsupported by the record. But, moreover,, when one defense attorney expressed concern that the juror might not have understood just what the court was referring to in the last question, the court responded, "What, are you Carnac now?"[128] (RT 218:25138.)

Many of the principles governing a trial court's determination that a prospective juror is substantially impaired because of his views regarding the death penalty were set forth in this Court's opinion in *People v. Stewart* (2004) 33 Cal.4th 425, 440-455. This Court began its analysis:

> "As we observed in *People v. Cunningham* (2001) 25 Cal.4th 926 (*Cunningham*), decisions of the United States Supreme Court and this court establish that '[a] prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would " 'prevent or substantially impair' " the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt [supra]* 469 U.S. 412,

---

128 This was an apparent reference to Carnac the Magnificent, a psychic character portrayed by Johnny Carson in comedic skits, while he was host of The Tonight Show Starring Johnny Carson. (See http://en.wikipedia.org/wiki/Carnac_the_Magnificent)

> 424; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) [fn. 3] " ' "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' [Citation.]" [Citation.] In addition, ' "[o]n appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." [Citations.]' " [Citation.]' (*Cunningham, supra*, 25 Cal.4th 926, 975; see also *People v. Heard* (2003) 31 Cal.4th 946, 958 (*Heard*).)" (*People v. Stewart, supra,* 33 Cal.4th 425, 440-441.)

In the present case, Prospective Juror E-45 never indicated in any way that he was unable to conscientiously consider voting for a death verdict. To the contrary, he maintained he could and would follow the instructions given by the court. He expressly said he could consider voting for a death sentence. When faced with a one-sentence description of the circumstances he should consider in responding to the court, conveying only the barest facts, the juror simply indicated that if that were all he knew, he would probably conclude that a death verdict was not appropriate. That was a perfectly reasonable response to the poorly-worded question that was asked, and in no way indicated he could not consider a death verdict when he had full details about the present crime and the backgrounds of the defendants. Thus, there were no conflicting of ambiguous responses to leave to the trial court's determination. Moreover, as shown, after the trial court asked completely inadequate questions, and one defense attorney tried to correct the court's error by ex-

pressing the concern that the juror may not have fully understood the court, the court's only response was to ridicule the attorney.

Stewart went on to explain:

> "Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties (as defined by the court's instructions and the juror's oath) (*Witt, supra*, 469 U.S. 412, 424) ' " ' "in the case before the juror" ' " ' (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 (italics omitted))." (*People v. Stewart, supra,* 33 Cal.4th 425, 445.)

Here, the court did not have sufficient information to permit a reliable determination. Instead, the court asked only a few inadequate and poorly worded questions. The answers to those questions indicated only that while the juror could consider voting for a death verdict, he had problems with the death penalty, and would probably find a death penalty inappropriate, if he knew nothing more than the fact that the defendants had committed a robbery and stabbed the victim, who died. It is hardly surprising that a juror would want more information than that before concluding that a death verdict was appropriate. Here, however, the court did nothing to determine the state of the mind of the juror except to ask how he would respond in this single artificially limited context. The trial court's actions, in this regard, failed to satisfy the requirements set forth in *Stewart*.

Stewart explained further:

> "The prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors. (*Witt, supra*, 469 U.S. 412, 423 ['As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper.'].)" (*People v. Stewart, supra,* 33 Cal.4th 425, 445.)

In language that should be determinative in the present case, *Stewart* explained:

> "In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it 'very difficult' ever to vote to impose the death penalty. As explained below, however, a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled -- indeed, duty-bound -- to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.
>
> "Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt, supra*, 469 U.S. 412. In *Lockhart v. McCree* (1986) 476 U.S. 162, 176 (*Lockhart*), the high court observed that '[n]ot all those who oppose the death penalty are subject to removal for cause in 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 def-

> erence to the rule of law.' Similarly, in *People v. Kaurish* (1990) 52 Cal.3d 648, 699 (*Kaurish*), we observed: 'Neither *Witherspoon v. Illinois* (1968) 391 U.S. 510] nor *Witt, [supra*, 469 U.S. 412,] nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty. The real question is whether the juror's attitude will " ' prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Wainwright v. Witt, supra*, 469 U.S. at p. 424, fn. omitted.) A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law.' " (*People v. Stewart, supra,* 33 Cal.4th 425, 446.)

In the present case, the most that could possibly be said was that prospective juror E-45 had personal conscientious concerns about the death penalty, but as just shown, that is not enough to disqualify him. Considering the limited and poorly-worded questions asked by the trial judge (who refused to allow any counsel to question jurors in this particular area), the juror's responses showed only that he would personally prefer not to vote for death, but at the same time he was quite willing to consider a death verdict and he recognized that he needed to follow the instructions of the court even if they took him in a direction that he personally preferred to avoid. Under the standards as summarized in *Stewart*, his position left him well-qualified to be a juror.

Prospective juror E-45 did say that he would need more evidence to vote for a death sentence than to vote for life without parole, but this was also fully consistent with the allowable beliefs of a qualified juror. *Stewart* explained:

> "*Kaurish, supra*, 52 Cal.3d 648, recognizes that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to **impose a higher threshold before concluding that the death penalty is appropriate** or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt, supra*, 469 U.S. 412. ... A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart, supra,* 33 Cal.4th 425, 447.)

Paraphrasing language in *Stewart*, with substitutions in brackets:

> "It follows that a qualified juror might well answer [as juror E-45 did] to the [limited inquiries posed by the trial court], and yet, in response to [adequate] follow-up questioning, persuasively demonstrate an ability to put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence. Such

> a prospective juror would not be substantially impaired in performing his or her duties as a juror. The record here, however, suggests that the trial court erroneously equated (i) the nondisqualifying concept of a very difficult decision by a juror to impose a death sentence [when given only the barest information about the case], with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty, and failed to recognize that [the responses elicited from juror E-45], standing alone, did not elicit sufficient information from which the court properly could determine whether [juror E-45] suffered from a disqualifying bias under *Witt, supra*, 469 U.S. 412, 424. fn. 12." (*People v. Stewart, supra,* 33 Cal.4th 425, 447.)

It is true that *Stewart* dealt with exclusions based solely on responses to a written questionnaire, without any follow-up questions, but the principles set forth above apply equally to the present case. *Stewart* also summarized caselaw that gives great deference to a trial court's ruling about a particular juror after that juror has responded to follow-up questioning, and after the trial court has been able to assess demeanor, which is unavailable to a reviewing court. (*People v. Stewart, supra,* 33 Cal.4th at p. 451.) However, in the present case, the record contains no suggestion that the trial court's determination was based on the juror's demeanor in any way. Instead, the record is clear that the determination was based on the actual responses to the court's poorly-worded and overly-limited questions, and on the court's misunderstanding of the principles summarized in *Stewart* and set forth in the preceding paragraphs.

In his juror questionnaire (CT 163:43518-43567), prospective juror E-45 gave some mixed responses, at a point when he had not yet been in-

structed in the general principles of law that would govern a penalty trial. He was apparently pro-prosecution, as he wrote that criminal defense attorneys were overpaid, while prosecutors were underpaid. (CT 163:43535.) When asked for his general opinions about the death penalty, he wrote, "I do not believe that the death penalty is a deterrent to murder. I am not sure if we have the right to take a life for a life" (CT 163:43546.) His personal opinion was strongly against the death penalty. (CT 163:43547.) However, he also checked "Yes," that his views about the death penalty had changed substantially in recent years and added, "I find myself thinking there 'may' be special cases where it should be considered." (*Id.*) If the death penalty appeared on the ballot, he would vote against it, but he wrote "I believe it might be necessary for the death penalty but it should be the last resort." (*Id.*)

When asked if he would always vote for life without parole and reject death, prospective juror E-45 checked "yes," and he wrote "I don't believe that the death penalty is the appropriate penalty." (CT 163:43549.) However, he responded affirmatively to a question asking if he could follow instructions to consider all the circumstances before deciding which penalty should be imposed, and he had no problem with that concept. (CT 163:43549-43550.) When asked under what circumstances he believed a death sentence would be appropriate, he wrote, "It would have to be someone who is the epitome of evil." (CT 163:43550.) Before deciding whether to impose death or life without parole, he wanted to know "The circumstances around the murder. The past behavior of the defendant." (*Id.*) When asked if he believed the death penalty should never be imposed, he checked, "Yes," and wrote

"At this time I can not see how the penalty adds anything to the situation." (*Id.*)

Prospective juror E-45 personally believed that life without parole was a worse punishment than death, because "I believe that taking away someone's freedom is a greater punishment." (CT 163:43551.) When asked if, knowing he had two choices available, he could see himself voting for a death sentence in an appropriate case, he checked, "No," but he added that "I can not at this time but if given clear cases where it should be applied, I might be able to consider it." (*Id.*) Finally, and most importantly, he checked "Yes," that he could set aside any preconceived notions and make the penalty decision in accordance with the instructions he would receive from the Court. (CT 163:43552.) Notably, in a later section of the questionnaire, when asked if completing the questionnaire had caused him to form any opinions about the case, prospective juror E-45 responded, "That the crime was serious enough to look at the death penalty as an option." (CT 163:43554.)

In sum, his questionnaire responses made him well suited to sit as a juror in a capital case, under the principles set forth in *Stewart*, even though he had some clear misgivings about the death penalty. Indeed, *Stewart* itself described many stronger responses in questionnaires in that case, and noted they were not necessarily disqualifying under the appropriate standards. For example, one juror there wrote, " 'I do not believe a person should take a person's life. I do believe in life without parole.' " (*People v. Stewart, supra,* 33 Cal.4th 425, 448.) This Court commented:

> "We understand these two sentences as stating a generalized opposition to the death penalty, and approval of the sentence of life in prison without possibility of parole. But as noted above, *Lockhart, supra*, 476 U.S. 162, 176, and *Kaurish, supra*, 52 Cal.3d 648, 699, make clear that many members of society -- and thus many prospective jurors -- may share those exact same sentiments, and yet remain qualified to sit as a juror under the standard set out in *Witt, supra*, 469 U.S. 412, 424." (*People v. Stewart, supra,* 33 Cal.4th 425, 448.)

Another juror in *Stewart* wrote: " 'I am opposed to the death penalty.' " This Court commented:

> "But the same general opposition might be stated by many jurors who are properly qualified to sit on a death penalty jury, and is not disqualifying in and of itself, or considered in conjunction with the checked answer. (*Lockhart, supra*, 476 U.S. 162, 176; *Kaurish, supra*, 52 Cal.3d 648, 699.)" (*People v. Stewart, supra,* 33 Cal.4th 425, 448.)

One juror in *Stewart* wrote: " 'I do not believe in capit[a]l punishment.' " This Court commented:

> "That same juror, however, also wrote ' "I don't know" ' in response to question No. 35(2), which (as observed above...) probed personal opinions or beliefs favoring the death penalty. At a minimum, this juror's written responses suggested ambiguity and a need for clarification on oral voir dire; at most, this juror, like those addressed above, expressed a general opposition to the death penalty that is not, by itself or considered in conjunction with the checked answer, disqualifying." (*People v. Stewart, supra,* 33 Cal.4th 425, 448-449.)

Similarly in the present case, prospective juror E-45 simply gave honest answers about his own personal opinions, but never wavered in saying he could put aside his own opinions and follow the instructions of the court. As in *Stewart*, at most his responses called out for clarification in oral voir dire. However, instead of discussing the responses and seeking clarification, the trial court focused solely on the juror's personal discomfort with the death penalty and never seemed to understand that a juror who had serious misgivings, but could still follow the instructions of the court, was well-qualified under the appropriate standards.

Finally, because the excusal of prospective juror E-45 was not supported by the governing legal principles:

> "... under the compulsion of United States Supreme Court cases this error requires reversal of defendant's death sentence, without inquiry into prejudice. (See *Davis v. Georgia, supra,* 429 U.S. 122, 123; *Gray v. Mississippi, supra*, 481 U.S. 648, 659-667 (opn. of the court); id., at pp. 667-668 (plur. opn.); id., at p. 672 (conc. opn. of Powell, J.); *People v. Ashmus* (1991) 54 Cal.3d 932, 962; accord, *Chanthadra, supra*, 230 F.3d 1237, 1272-1273, 1275.)" (*People v. Stewart, supra,* 33 Cal.4th 425, 454.)

b. Prospective Juror F-77

Juror F-77 was another prospective juror who had personal reservations about capital punishment, but who remained well-qualified under the proper standard. He understood he would be instructed to begin deliberations with both penalties as possibilities, and he stated he would be able to do that,

and would not make up his mind until he discussed the case with the other jurors. (RT 220:25521.) When asked if he would automatically vote for one penalty over the other, he simply noted that he had stated in his questionnaire that he did have a problem with the death penalty. (RT 220:25521-25522.)

The judge gave his usual extremely brief summary of the case and asked if the juror would always vote for life without parole and reject death. The juror responded that he would want to listen to all the evidence and listen to how it affected the other jurors, "but I do have difficulty with the notion of the death penalty." (RT 220:25522.) When asked if he could vote for death if he believed it was appropriate, he responded, "I would want to keep an open mind and I would listen to arguments. If my opinion on the matter is wrong and I'm persuaded it's wrong, then I would change my opinion." (RT 220:25522.)

The judge again asked prospective juror F-77 if he was closed off to either penalty. The juror repeated that he had a problem with the death penalty, but added, "If somebody were to present me with an argument that I found overwhelming and persuasive, then my opinion would change." (RT 220:25523.) The judge asked him to explain what he meant and he stated, "Well, persuasive, if I were persuaded. If I were persuaded by another person's argument that my position was wrong, then I would change my position." (RT 220:25523.) The judge again asked if he would always vote for life without parole and reject death. He responded unequivocally, "No. I said that I would listen to all of the evidence presented in the court and I would listen to the arguments of other jurors." (RT 220:25523.)

The judge noted that in his questionnaire the juror had stated he did not believe the death penalty was a deterrent to murder. The judge said that as a juror, he would not be allowed to consider whether the death penalty was or was not a deterrent. He asked the juror if he could set that aside. The juror again responded unequivocally, "If you told me that that's what I must do so, I must do."[129] (RT 220:25524.)

Prodded by the court, prospective juror F-77 explained that he had a concern because a person like Charles Manson, who the juror believed did deserve the death penalty, was still alive. On the other hand, he had heard stories of innocent people being executed. (RT 220:25525.)

Questioned by the prosecutor, the juror acknowledged his personal belief that the death penalty appeared to be state-sanctioned murder. (RT 220:25527.) The juror then repeated that he could listen to other people to see if their arguments changed his position. (RT 220:25527-25528.) The prosecutor asked the juror if he already had a position and would have to be talked out of that position. The juror responded, "I would want to listen to all the evidence and I would want to listen to how that evidence had impacted other people and I would see whether my position was wrong. I would see whether –" (RT 220:25529.) The prosecutor then interrupted the answer with

---

129 It appears highly likely that the comma that the court reporter chose to place after the word "so" should instead have been placed after the preceding word. But no matter how the sentence is punctuated, taken in context it is clear that the juror was expressing his understanding that he could and would deliberate in the manner directed by the instructions of the court.

another question, to which a defense objection was sustained. (RT 220:25529.)

The prosecutor rephrased his question, asking whether the juror had already formed any opinion about this case. The juror responded, "Not at all. I know nothing about it." (RT 220:25530.) The prosecutor nonetheless challenged the juror. He relied on questionnaire responses indicating strong personal opposition to the death penalty. Defense counsel responded that it was a matter of semantics, that the juror admitted he had a personal bias, but that he would follow the law and could be persuaded if aggravating circumstances outweighed mitigating circumstances. The other defense attorney argued, "I think that each time the Court put it to him whether he could consider the death penalty and vote for it he said he could and that ought to be that." (RT 220:22531-22532.)

The trial court then granted the prosecutor's challenge, finding the juror substantially impaired because he had a position and would have to be convinced otherwise. The court believed that meant he did not have an open mind. (RT 220:25532.)

Once again, the trial court's ruling demonstrated a misunderstanding of the governing principles as set forth in *Stewart*. Juror F-77 clearly had a personal opposition to the death penalty, but he was also unequivocal, every time he was asked, in stating that he could set aside his personal beliefs and follow the instructions of the court, and consider both penalties. The judge and the prosecutor apparently misread the juror's personal opposition to the death penalty, believing that it necessarily meant he had strong feelings

about the present case. Yet when he was asked, he unequivocally stated he knew nothing about the present case, had no preconceived opinion, and wanted to hear the evidence and the views of the other jurors.

Stewart explained: "... a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled -- indeed, duty-bound -- to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart, supra,* 33 Cal.4th 425, 446.) Unfortunately, the present court and prosecutor mistakenly believed that a person who might find it difficult to impose death would have to be persuaded to change that position and therefore did not have an open mind. *Stewart* rejected equating the two.

Further, as noted earlier, *Stewart* expressly recognized:

> "... 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.)

Also, as noted earlier:

> "Neither *Witherspoon[v. Illinois* (1968) 391 U.S. 510] nor *Witt, [supra*, 469 U.S. 412,] nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty. The real question is whether the juror's attitude will ' " prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' (*Wainwright v. Witt, supra*, 469 U.S. at p. 424, fn. omitted.) A prospective juror personally opposed to the death

> penalty may nonetheless be capable of following his oath and the law." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

Here, on the other hand, the trial court and prosecutor clearly and mistakenly equated a firm belief that the death penalty was unjust with substantial impairment. The judge never squarely asked whether the juror could set aside his personal views and follow the law, but whenever the judge's questions came even close to that, the answer was clear - the juror understood he would have to follow the court's instructions, and he was willing to do so. Nothing the juror had to say indicated that his personal opinions about the death penalty would preclude him from following the law and fairly considering both options.

Other cases have also made it clear that a juror who admits to a predisposition in favor of one penalty, such that s/he would have to be persuaded to vote otherwise, is not precluded from serving, as long as the juror remains able to consider and weigh all of the evidence, just as prospective juror F-77 repeatedly said he could do. For example, in *People v. Ramirez* (2006) 39 Cal.4th 398, 446-449, one prospective juror described himself as a strong supporter of the death penalty, and stated that if the defendant were to be found guilty of first degree murder and eligible for capital punishment, he would vote for death **unless he were convinced otherwise**. Nonetheless, the juror also assured the court several times that he would not automatically vote for death, but would reach a sentencing decision based on all of the evidence. Defense counsel's challenge for cause, based on the prospective juror's indication that he would vote for a death sentence unless he was con-

vinced otherwise, was rejected. (*Ramirez*, s*upra,* 39 Cal.4th at p. 447.) This Court upheld the trial court ruling, explaining:

> "Although the prospective juror in the present case described himself as a strong supporter of the death penalty, he assured the court multiple times that he would not automatically vote for the death penalty and would, instead, reach a decision based upon all of the evidence. Defendant places great emphasis on the prospective juror's statement that he would vote to impose the death penalty unless he was convinced otherwise, but this comment must be considered in light of the prospective juror's explanation that he would not 'necessarily be committed from the outset to the imposition of the death penalty.' " (Ramirez, s*upra,* 39 Cal.4th at pp. 448-449.)

Here, prospective juror F-77 was the mirror image of that juror in that he would start with a predisposition in favor of life without parole, but prospective juror F-77 was indistinguishable from the juror in *Ramirez* in his repeated statements that he would consider all of the evidence and would not automatically vote against a death sentence.

Similarly, in *People v. Ledesma* (2006) 39 Cal.4th 641, this Court concluded that extremely strong support in favor of one of the available penalties was no bar to jury service as long as the juror could keep an open mind and consider all of the evidence. The jurors found suitable for jury service in *Ledesma* included: John V., who believed that an intentional murder of someone who had done nothing to harm the murderer **always** warranted the death penalty, but also promised to keep an open mind and vote for life without parole if the evidence supported it; Jean A., who believed in the

death penalty and thought she would have trouble being lenient, but agreed to keep an open mind and listen to all of the evidence; Gary M., who had been a victim of an armed robbery in which the perpetrator had tried to shoot him, and who believed that an intentional killing committed with a gun automatically warranted the death penalty, but who nonetheless affirmed that he would have to know the circumstances and hear the court's instructions before he could reach a penalty decision; Harley R., who believed the death penalty should be imposed if a person committed murder to cover up another crime, and who would not give background information much weight if the person were capable of telling right from wrong, but who also stated it was possible he could be swayed to vote against a death sentence, even though it would be very difficult to convince him to do so; and Kathryn R., who stated categorically that a deliberate murder should be punished by death, regardless of the background or mitigating evidence, but who also agreed to keep an open mind and consider all of the evidence. (*Ledesma, supra,* 39 Cal.4th at pp. 671-675.)

Certainly if these jurors in *Ledesma* were suitable jurors in a capital case, then so was Juror F-77 in the present case. This was not a case where the trial court disbelieved the prospective juror's repeated statements that he could consider all of the evidence and could vote in favor of death in an appropriate case. Instead, this was a case where the trial court erroneously believed that an acknowledged aversion to the death penalty automatically disqualified him.

In *People v. Riggs* (2008) 44 Cal.4th 248, 282-285, this Court found no problem with a juror who thought mitigating evidence about the defendant's background was entitled to no weight whatsoever, but who also stated ambiguously that she recognized the jury had to consider all of the evidence before determining an appropriate verdict. This Court stated:

> "The fact that this preexisting view might have made it more difficult for defendant to *convince* Juror A.M. of the relative strength of a mitigation case that included evidence of defendant's background does not prove that she would automatically vote for the death penalty, or that her belief prevented or substantially impaired the performance of her duties as a juror to follow the trial court's instructions to weigh the evidence to be offered." (*Id.*, at p. 287, emphasis in original.)

This Court also quoted with approval language from another case that is highly relevant to the present circumstances:

> "As the Supreme Court of Kentucky aptly stated in similar circumstances: 'Voir dire examination occurs when a prospective juror quite properly has little or no information about the facts of the case and only the most vague idea as to the applicable law. At such a time a juror is often presented with the facts in their harshest light and asked if he could consider imposition of a minimum punishment. Many jurors find it difficult to conceive of minimum punishment when the facts as given suggest only the most severe punishment. Similarly, many citizens are astounded to learn that being under the influence of drugs or alcohol [or, as here, the defendant's personal background] may be considered by them as factors mitigating the punishment which should be imposed. Predictably, when asked whether they believe being under the influence should mitigate punishment, the answer is often in the

> negative. A per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination. The test is not whether a juror agrees with the law when it is presented in the most extreme manner. The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.' (*Mabe v. Commonwealth* (Ky. 1994) 884 S.W.2d 668, 671.)" (*People v. Riggs*, *supra,* 44 Cal.4th at p. 287-288.)

Similarly here, the prospective jurors were given only a superficial summary of the facts of the case and very incomplete information about the applicable law. Under these circumstances, it is not surprising that prospective jurors such as juror F-77, or juror E-45 discussed in the preceding section of this argument, found it difficult to determine in advance whether they could conclude death was an appropriate penalty in the present case. The test is not whether a juror would choose death based on such limited information, but instead it is whether the juror could consider all of the evidence and abide by the instructions of the court. In the present case, there was simply no basis to conclude that either Juror E-45 or Juror F-77 failed to meet such a test.

As in the last section of this argument, the prospective juror F-77's questionnaire (at CT 147:38568-38617) shows strong personal views, but also demonstrates his willingness to set aside his personal views and follow the instructions of the court. The juror acknowledged he was personally against the death penalty and believed it should never be used, but he stated clearly that he would not automatically reject death and choose life without

parole. Instead, he wrote, "I am here to do my civic duty. I am ~~always~~ open to ~~other people's poi~~ the evidence. At this point I have heard none." (CT 147:38597-38599.) He checked an item stating he could not see himself rejecting life without parole and choosing death, but he added, "Sitting here now I cannot see it but I would always listen to other people's points-of-view." (CT 147:38601.) He responded unequivocally that he could set aside preconceived notions about the death penalty and follow the instructions of the court. (CT 147:38602.)

Prospective juror F-77, in short, was the very model of the qualified juror discussed in *Stewart*, who had strong personal opposition to the death penalty and would find it difficult to return such a verdict, but who was consistently confident in his ability to set aside his personal beliefs and perform his duties as a juror in compliance with the law and the instructions of the court. His excusal for cause was error under *Stewart, supra,* 33 Cal.4th at p. 447.)

As set forth in the preceding section of this argument, this unsupported excusal constitutes federal constitutional error and mandates reversal of the penalty verdict without inquiry as to prejudice.

IX. THE TRIAL COURT IMPROPERLY ALLOWED THE AUTOPSY SURGEON TO TESTIFY THAT THIS WAS THE MOST ATROCIOUS CASE HE EVER SAW; ADMISSION OF THIS TESTIMONY WAS PREJUDICIAL ERROR

A. Factual Background

Parvis Pakdaman was a licensed medical doctor and pathologist who had been employed since January 1984 as an assistant medical examiner in the Santa Clara County Coroner's Office. He estimated he had performed about 5,000 autopsies for his present employer, and a couple of thousand more before that. (RT 248:28689-28691.) However, only about one hundred of those autopsies involved stab wounds. (RT 248:28696.) Dr. Pakdaman performed the autopsy on James Madden, the victim of the present homicide. (RT 248:28698.)

Dr, Pakdaman noted that James Madden had suffered 32 stab wounds, mostly in the chest, with some also in the abdomen and some superficial cuts in the side of the neck. (RT 248:28705-28706.) A number of the wounds were deep, and the heart, lungs, and trachea were all penetrated. The loss of blood was substantial. (RT 248:28714-28720.)

During direct examination of Dr, Pakdaman at the penalty retrial, counsel for co-defendant Danny Silveria objected to a question which he believed the prosecutor was about to ask. A bench discussion was held and counsel explained that based on Dr. Pakdaman's testimony on prior occasions pertaining to this case, he expected the prosecutor to ask next whether the present murder was the worst one he had ever seen. Counsel believed

such a question would improperly go beyond the witness' expertise on cause of death. The prosecutor responded that what he actually intended to ask next was whether there was anything about the present case that caused him to remember it especially distinctly. Counsel for John Travis joined in the discussion, contending the witness should only be allowed to state his medical opinions, and not his personal opinion. The trial court responded that since this was a penalty phase and not merely a guilt phase, the witness would be allowed to talk about what he had seen. (RT 249:28734-28735.)

Back in the presence of the jury, the prosecutor then asked Dr. Pakdaman whether he had a distinct memory of each and every autopsy he had performed in his career. The witness responded in the negative. The prosecutor then asked if the witness would ever be able to forget the present case. Dr, Pakdaman responded, "I've been to court nine times on this case and every time you ask this question I get upset." (RT 248:28736.) The prosecutor asked the witness to explain why he got upset. Counsel for both defendants objected. The court overruled both objections before counsel had even explained the bases. Counsel for Silveria then noted his objection had been on the ground of relevance. The court responded that it found this "quite relevant." (RT 248:28736.)

The witness then responded to the prosecutor's question, stating "This is one of the most atrocious cases that I've ever seen." (RT 248:28737.) Counsel for Silveria then moved for a mistrial, arguing the answer was prejudicial, and counsel also incorporated the grounds stated previously. Counsel for Travis joined in the motion. The judge denied the motion, stat-

ing this was a proper and relevant question in a penalty trial. Without explaining any rationale, the court stated this was not only proper under factor (a) (circumstances of the crime), but also "goes along to some degree with victim impact evidence." (RT 248:28737.)

In his subsequent argument to the jury, the prosecutor fully exploited this testimony. He asked the jurors to remember how long Dr. Pakdaman had been a pathologist, reiterated how many thousands of autopsies he had performed, and reminded the jury that Dr. Pakdaman had lost track of exactly how many autopsies he had performed. The prosecutor then stated, "— how bad is this case? How did this case affect him. A coroner who deals with death for a living?" The prosecutor then began reading verbatim from his examination of Dr. Pakdaman, culminating in the doctor's statements that "This is one of the most atrocious cases that I have ever seen." (RT 276:33060-33061.)

Not satisfied with that, the prosecutor carried the point even further: "Do you remember his demeanor on the stand when he was being asked that and when he answered that? He was visibly emotional about this." (RT 276:33061.) The prosecutor then pressed his point even further:

> "How bad is this case? What's morally compelling about this case? To this day, ladies and gentlemen, some six plus years after this crime after this autopsy this case remains vivid in Dr, Pakdaman's memory as no doubt it will remain so in all of yours for the rest of your lives." (RT 276:33062.)

B. Dr. Pakdaman's Personal Opinion Regarding How This Case Compared to Others in Which He Happened to Be Involved Was Irrelevant; If His Opinion Had Any Relevance, the Probative Value Was Far Outweighed by the Prejudicial Impact

The simplest way to put this issue in a proper perspective is to contemplate what would happen if the defense called a highly experienced criminal defense attorney as a penalty phase witness and elicited testimony that: 1) the witness was familiar with a great many cases in which the prosecution had sought the death sentence; and 2) the mitigating evidence in the present case was stronger than in any of the other cases.

It is difficult to imagine a trial court allowing such testimony. However, such a personal opinion from an expert trial attorney would be every bit as relevant as Dr. Pakdaman's personal opinion was in the present case. How else could the defense respond to testimony such as that given by Dr. Pakdaman, except perhaps to call another medical examiner to testify, "I've seen worse." The court here should never have let the jury hear this improper and highly prejudicial testimony.

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code section 210.) The circumstances of the crime were certainly "of consequence to the determination" of the penalty, but those circumstances were shown in the testimony of witnesses

who described what they observed in regard to the crime scene, and the plans for and carrying out of the homicide. The testimony of Dr. Pakdaman did not relate to the actual circumstances of the crime; instead, the doctor simply expressed his own subjective opinion as to where he personally would rank this case in comparison to other cases with which he happened to be familiar.

Presumably, most of the thousands of autopsies performed by Dr. Pakdaman did not involve death by criminal means. Of those that did involve criminal means, it is likely that those involving multiple stab wounds would appear "worse" from the perspective of a pathologist than those involving most other types of weapons. Thus, Dr. Pakdaman's opinion seems to boil down to his conclusion that this homicide was messier, from a pathologist's point of view, than homicides committed with guns or other weapons. A skilled marksman's bullet to the heart may have left far less mess. How that is relevant to the jury's moral assessment of the crime and the criminal, in terms of whether death is the appropriate punishment, was never made clear. Alternatively, if there is any relevance, it is slight at best and was far outweighed by the danger of confusion of the issues or unfair prejudice to the defense. (Evid. Code section 352.)

In *People v. Torres* (1995) 33 Cal.App.4th 37, the Court of Appeal explained "... opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*Id.* At p. 47.) Similarly in regard to the penalty determination, the trier of fact was as competent as Dr. Pakdaman to weigh the evi-

dence and draw a conclusion as to how aggravated the circumstances of the present crime were.

Moreover, as suggested above, what makes one murder worse than another in the eyes of a pathologist has no direct relationship whatsoever with what makes one murder worse than another within the meaning of the list of aggravating and mitigating factors that guide a jury in determining whether death is an appropriate penalty in a particular case. In other words, **Dr. Pakdaman was not purporting to make a moral evaluation of the culpability of the person or persons responsible for the wounds suffered by the present victim**. Instead, Dr. Pakdaman was simply expressing the point of view of a medical examiner that, for reasons that were not even explained, the condition of this body happened to elicit a more memorable reaction than in most other cases in which this particular doctor had participated.

While Dr. Pakdaman's conclusion of atrociousness was an effective way to end his direct testimony with a dramatic flair, it is not at all clear what relevant information he was actually trying to provide to the jurors. When he went beyond his medical expertise and expressed a personal opinion, he was not telling the jury anything it could not decide for itself. This proposition has venerable roots:

> "When he testifies to conclusions which even a lay jury can draw, the expert is no longer testifying 'on a question of science, art or trade' in which he is more skilled than the jury. (Code Civ. Proc., § 1870, subd. 9.) As Professor McCormick says: 'There is no necessity for such

> evidence, and to receive it would tend to suggest that the judge and **jury may shift responsibility for decision to the witnesses.**' (op. cit. p. 25.)" (*People v. Arguello* (1966) 244 Cal.App.2d 413, 418; emphasis added.)[130]

Indeed, such a shifting of responsibility appears to be just what the prosecutor intended. The prosecutor repeatedly reminded the jury of Dr, Pakdaman's vast experience dealing with death and viewing dead bodies. By eliciting Dr. Pakdaman's opinion that this case was among the most atrocious, the prosecutor was openly urging the jury to abdicate its own responsibility for making a moral assessment, and to instead rely on the conclusion of a so-called expert that this was a particularly aggravated case. However, shifting responsibility for the decision, from the jury to the witness in this manner, deprived John Travis of his federal Eighth and Fourteenth Amendment right to reliable fact-finding in a capital case. (*Caldwell v. Mississippi* (1985) 472 U.S. 320; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

Another reason why evidence such as this renders the resulting death verdict unreliable, and thereby in violation of the federal Eighth and Fourteenth Amendments, is that we are left to guess just what Dr. Pakdaman

---

130. The precise application of this principle in *Arguello*, resulted in a holding that a police officer cannot express an opinion that the circumstances indicate that a defendant's possession of drugs was with the intent to sell. This has apparently been overruled *sub silentio* by this Court in *People v. Newman* (1971) 5 Cal.3d 48, 53. However, nothing in *Newman* calls into question the principle set forth in *Arguello*, only that specific application of the principle.

meant when he used the term "atrocious." In *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, this Court recognized that the phrase "heinous, atrocious, and cruel" was unconstitutionally vague when used to define a special circumstance. "None of these terms meets the standards of precision and certainty required of statutes which render persons eligible for punishment, either as elements of a charged crime or as a charged special circumstance." (*Id.*, at p. 802.) Indeed, the **People** expressly conceded, consistent with *Engert*, "that 'when these component terms of the challenged special circumstance are considered individually, the opportunity for varying interpretation thereby increases.'" (*Id.*, at p. 802.) That, of course, is exactly what we have in the present case, wherein a purported expert in death was allowed to label this murder as being among the most atrocious.

An additional problem with Dr. Pakdaman's testimony is that it is inconsistent with pronouncements by this Court that penalty determinations should not be made by comparing one murder case to another. In *People v. Bonin* (1988) 46 Cal.3d 659, this Court explained:

> "Defendant requests that pursuant to Evidence Code sections 452, subdivision (d), and 459, we take judicial notice of the record on appeal in *People v. Buono* (B003499, app. pending) and *People v. Maxwell* (B007390, app. pending). In support he argues that Buono and Maxwell have each been convicted of crimes as egregious as those of which he has been convicted, but have nevertheless received the penalty of life imprisonment without the possibility of parole. He then argues that the records in their cases are relevant to the issue whether any errors that occurred at the penalty phase of his trial were

> prejudicial. We are not persuaded. Under the modern system of capital punishment, which 'require[s] a particularized inquiry into " 'the circumstances of the offense together with the character and propensities of the offender' " ' (*McCleskey v. Kemp* (1987) 481 U.S. 279, 302 [95 L.Ed.2d 262, 285, 107 S.Ct. 1756, 1772]), we fail to see how the record in one case can be relevant to the evaluation of prejudice in another, no matter how similar the cases appear to be." (*People v. Bonin, supra,* 46 Cal.3d at p. 695, fn. 5.)

In the same manner, Dr. Pakdaman's personal reaction to the condition of the body of the victim in the present case, compared to the condition of other bodies on which the doctor performed autopsies, does nothing to contribute to a particularized inquiry into the circumstances of the crime and the character of the offender.

This principle was also relied on by this Court in *People v. Sanders* (1990) 51 Cal.3d 471, in rejecting an invitation to compare the defendant before this Court to his co-defendant, who did not receive a death sentence:

> "Although the evidence of guilt was largely the same for the two defendants, the determination of penalty requires the jury to engage in a normative function, weighing 'nonquantifiable' or intangible aspects of both the crime and the criminal. (*Allen, supra,* 42 Cal.3d at p. 1287.) Thus, '[t]he peculiarly normative and individualized nature of the jury's sentence determination in each case makes it inappropriate and **of no benefit** to consider the sentence imposed in superficially similar cases for the purpose of determining the prejudicial effect of error.' (*People v. Malone* (1988) 47 Cal.3d 1, 57, fn. 31; see also *People v. Dyer* (1988) 45 Cal.3d 26, 69-71 [rejecting this precise argument].)"

(*People v. Sanders, supra* 51 Cal.3d at pp. 529-530; emphasis added.)

If such a comparison is **of no benefit** in the context of *Sanders*, then Dr. Pakdaman's personal comparison is also of no benefit to the peculiarly normative and individualized decision the present jury was required to make.

Furthermore, in *Sanders, supra* 51 Cal.3d at p. 529, in the language just quoted, this Court readily acknowledged that "the evidence of guilt was largely the same for the two defendants ..." (Nonetheless, a comparison was of no benefit. In the present case, the comparison was not even between like cases. As noted earlier, it appears likely that most of the autopsies performed by Dr. Pakdaman did not involve death by criminal means. Even among those cases that did, it is highly unlikely that any significant number of them involved cases in which a sentence of death was sought. Thus, in determining whether the appropriate sentence in the present case was death or life without parole, how could it benefit the jury to have this case compared to cases that involved lesser sentences, or that did not even involve criminal means? But if the evidence is "of no benefit," then it has no tendency in reason to prove or disprove any disputed fact, and therefore is not relevant evidence. (Evidence Code section 210.)

Moreover, in this very case the trial judge precluded defense witnesses from making any comparison between the defendants and other jail inmates, when counsel for Danny Silveria sought to show that Silveria's progress in his studies of Christianity went far beyond most other jail inmates. (RT 259:30644-30645; 260:30650 and 30653.) There is no way to

reconcile that restriction with a ruling allowing Dr. Pakdaman to compare this autopsy to other autopsies he had performed.

It is also telling that Dr. Pakdaman referred to the fact he had been to court nine times in the present case.[131] Presumably, the vast majority of autopsies performed by the doctor would not have resulted in any court testimony. Of those that did require testimony, it is unlikely that testimony was needed on more than one or two occasions in more than a handful of cases. Thus, it is not at all surprising here that this case would stand out in Dr. Pakdaman's memory, for reasons that had nothing at all to do with the determination of the appropriate sentence for the present defendants.

Notably, this was **not** a case in which Dr. Pakdaman's ability to recall details of the autopsy he performed on James Madden was challenged in any way. Obviously, a detailed autopsy report was prepared at the time the autopsy was performed, and the accuracy of that report or of Dr. Pakdaman's testimony about the autopsy was never attacked by the defense. Thus, this was not a case in which the fact that Dr. Pakdaman had a personal reason for

---

131. As set forth in the statement of the case at the outset of this brief, this case was initially presented to a grand jury, and subsequently was resubmitted to another grand jury in order to avoid a defense contention that the first grand jury did not adequately represent the community. One of the defendants was a juvenile who was eventually found unfit to be tried in juvenile court, and who was given a preliminary examination and was then tried separately. Another defendant was also tried separately as a result of a severance motion. The present two defendants were retried after the initial juries were unable to reach unanimous penalty verdicts in regard to either of them. Thus, witnesses such as Dr. Pakdaman were called to court on a number of occasions, but the reason for the numerous occasions had nothing to do with a relevant issue.

having clearer recollections than in other 6-year-old cases was relevant to any matter in dispute.

In *People v. Alva* (1979) 90 Cal.App.4th 418, the defense offered the testimony of a psychiatrist who interviewed the victim of sex crimes and concluded she could be lying. Disallowing such testimony, the Court of Appeal concluded, "Psychiatric testimony which has the tendency to decide rather than to inform is inadmissible." (*Id*, at 427.) This conclusion was based on a principle earlier set forth by this Court: "...the evidence should be examined with a view to preserving the integrity of the jury as the finder of facts; ..." (*People v. Russell* (1968) 69 Cal.2d 187, 196.) Similarly, in *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 738, the court concluded that allowing expert testimony that 99% of child sexual abuse victims tell the truth usurped the jury's fact-finding role and made the trial fundamentally unfair.

Here too, the jury's integrity as finder of fact was adversely affected and resulted in an unfair trial. Dr. Pakdaman's testimony went well beyond any proper expression of expert opinion and invaded the jury's role in finding facts. As in *Alva*, Dr, Pakdaman's conclusion sought to decide, not to inform. Such an error effectively deprived Mr. Travis of his federal Sixth and Fourteenth Amendment rights to a fair trial by jury, and resulted in a fundamentally unfair trial that also deprived Mr. Travis of his federal Fifth and Fourteenth Amendment Due Process rights. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (Fifth Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967)

(Fifth Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.).)

Finally, even assuming that the evidence had some relevance, that relevance was slight for all the reasons set forth above. On the other hand, the potential for undue prejudice was great, for the reasons that will be explained in the next section of this argument. Therefore, even if there was some relevance, it was nonetheless an abuse of Evidence Code section 352 discretion to permit the prosecutor to adduce this evidence.

C. The Error Must Be Deemed Prejudicial

This error must be deemed prejudicial precisely because of the ambiguity inherent in the opinion Dr. Pakdaman was allowed to express. On the one hand, we can only guess at just what Dr. Pakdaman meant, or how his professional reaction related to placing the present murder on some type of moral continuum. On the other hand, what was clear to the jury is that the prosecution presented a witness who had more experience with death than any other person in the courtroom, and that witness described the present case as being among the very worst. Faced with a very difficult decision in determining whether death was an appropriate punishment in light of the circumstances of the crime and the background and character of John Travis, jurors would have been very tempted to defer to the so-called expertise of Dr. Pakdaman. "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Kelly* (1976) 17 Cal.3d 24, 31.)

Indeed, as shown in Argument I, earlier in this brief, pertaining to the ruling that precluded testimony from a former juror and a former alternate juror, the trial court was convinced that if the present jury learned that a prior penalty jury had been unable to reach a unanimous penalty verdict, the present jury was likely to "abdicate its own duty in favor of a prior jury's findings..." (RT 202:23124.) That, of course, was puzzling, since the prior jury made no findings in regard to penalty. However, there was certainly a much greater danger that the jury would defer to the personal opinion of an expert in death who told them this was among the most atrocious murders.

Because of the multiple federal constitutional rights implicated in this error, as set forth above, the error must result in reversal unless it can be said beyond a reasonable doubt that it did not impact the penalty determination. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In Argument XII, later in this brief, it will be shown that the present case must have presented a very close case in regard to penalty. In such circumstances, the danger of one or more jurors improperly relying on Dr. Pakdaman's vaguely expressed opinion was great, and the error cannot be deemed harmless.

X. THE PROSECUTOR ENGAGED IN MISCONDUCT, IMPROPERLY DILUTING THE VALUE OF DEFENSE MITIGATING EVIDENCE BY REFERRING IN ARGUMENT TO ALL FACTOR (K) EVIDENCE AS "THE KITCHEN SINK."

In his opening argument to the penalty retrial jury, the prosecutor predicted that the defense would rely the Penal Code section 190.3, subd. (k) factor in mitigation,[132] which he described as the "kitchen sink":

> "Now, after I argue this case, after I argue from the People's point of view and refer to Factor (a), Factor (b), Factor (c), then the way this is going to work is that the defense team of Mr. Braun and Ms. Angel on behalf of their client, Mr. Silveria, I submit, will urge you to consider and be swayed by Factor (k) evidence, **which you will see is sort of like a kitchen sink category** of –" (RT 276:33021; emphasis added.)

At this point counsel for Mr. Silveria objected to the use of the term "kitchen sink.". Counsel for John Travis also objected, noting that factor (k) evidence was just as important as evidence under any of the other factors.[133] The objection was overruled and the prosecutor then explained face-

---

132 Factor (k) includes: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

133. Well before arguments had even begun, counsel for John Travis had also filed a written objection to any such "kitchen sink" argument, noting the prosecutor had made such arguments in the first penalty trial. (CT 18:4532, ll. 21-25.) Counsel argued that kitchen sinks are used to send waste materials to the sewer, and that the prosecutor's references to factor (k) as the "kitchen sink" was a way of saying that **any** evidence the defense offered under factor (k) was necessarily garbage. (CT 18:4536, ll. 4-6.) Counsel contended this was an improper way to describe evidence that had

(Continued on next page.)

tiously, "I don't know how to refer to it other than as a kitchen sink." (RT 276:33021.) The prosecutor then read the description of factor (k) contained in CALJIC 8.84.1.[134] Next, he repeated his prediction that counsel for Mr. Silveria would rely on factor (k) evidence, and then he predicted that counsel for John Travis would do the same thing. (RT 276:33021-33022.)

As trial counsel had contended in his pre-argument motion to preclude such prosecutorial arguments, this was a clear prosecution effort to ridicule all factor (k) evidence in the abstract, rather than a mere argument that particular evidence offered in mitigation in this case merited little weight. The prosecutor sent a clear message that any factor (k) evidence was not to be taken seriously.

This was a disingenuous argument because the experienced prosecutor knew well that the United States Supreme Court and this Court had found such evidence to be very important:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the pos-

---

(Continued from last page.)

been expressly sanctioned by this Court and the United States Supreme Court.

134. The prosecutor stated, "Factor (k), any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (RT 276:33021.)

> sibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. ... [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment [citation omitted] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 49 L.Ed.2d 944, 961, 96 S.Ct. 2978; see also *Lockett v. Ohio* (1978) 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954, and *Eddings v. Oklahoma* (1982) 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869.)
>
> "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 Cal.3d 21, 57-58.)

In sum, by ridiculing factor (k) arguments that had not even been made yet, the prosecutor openly encouraged the jury to do just what *Woodson* cautioned against – treating "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." (*Woodson, supra,* 428 U.S. at p. 304.) This attempt to mislead the jury into **automatically** giving little or not weight to factor (k) evidence rendered the penalty trial fundamentally unfair, depriving Mr. Travis of his federal Fifth, Sixth, and Fourteenth Amendment tights to a fair trial by jury and to present a defense, all in accordance with due process of law. (*United*

States v. Universita (2d Cir. 1962) 298 F.2d 365, 367; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) The improper argument also rendered the resulting penalty verdict unreliable, violating the federal Eighth and Fourteenth Amendments. (*Beck v. Alabama* (1980) 447 U.S. 625; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280.) Furthermore, this unfair dilution of mitigating evidence interfered with Mr. Travis' Eighth and Fourteenth Amendment rights to have the jury hear and fairly consider all defense mitigating evidence. (*Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104.)

In view of these federal constitutional violations, the improper argument and the erroneous rulings allowing the argument must be deemed prejudicial unless they can be declared harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) No such declaration can be made here, especially when these errors are considered in combination with the improper preclusion of defense arguments for mercy, set forth in Argument III, earlier in this brief. (See also Argument XII, later in this brief, for a general discussion of principles regarding prejudice that apply to all of the penalty phase errors set forth in this brief.)

XI. ERRONEOUS TRIAL COURT RULINGS PERMITTED THE PROSECUTOR'S PENALTY PHASE ARGUMENT TO INCLUDE GROSS AND IMPROPER APPEALS TO EMOTION, ALONG WITH OTHER IMPROPER MATTERS, RESULTING IN MULTIPLE FEDERAL CONSTITUTIONAL VIOLATIONS AND A FUNDAMENTALLY UNFAIR TRIAL

A. Factual and Procedural Background

After both John Travis' and Danny Silveria's first penalty trials ended in separate deadlocked juries, the defense attorneys had a good idea of what to expect during the prosecutor's penalty retrial argument to the jury. This led to a number of discussions between the court and counsel regarding what should or should not be permitted during penalty retrial arguments.

On April 12, 1996, before the discussions occurred, counsel for co-defendant Silveria filed a motion to preclude the prosecutor from repeating improper arguments made during the first trial. (CT 17:4367-4375.) On December 12, 1996, counsel for John Travis joined in Silveria's motion and added arguments of his own. (CT 18:4531-4539.) The two defense motions listed a number of specific improper arguments made by the prosecutor at the first penalty trial.

On January 31, 1997, counsel for Silveria filed a motion, joined by Travis (see RT 233:27311), seeking to preclude any prosecution argument that Silveria intended to kill the murder victim, or that Travis intended to torture the victim. At the guilt trials, the first-trial jury had found the lying-in-wait special circumstance alleged against Silveria to **not** be true. Similarly,

Travis' first trial jury had found the torture-murder special circumstance alleged against Travis to **not** be true. Counsel argued that the only rational explanation for those findings was that the juries had concluded that Travis had no intent to torture, and that Silveria had no intent to kill, at least until after he had gained entry to the Leewards building. (CT 18:4620-4630.)

This motion was discussed on February 5, 1997. The prosecutor first argued that the original guilt trial juries had simply returned inconsistent verdicts. The trial court emphatically rejected that contention. (RT 233:27312.) Next, the prosecutor argued that despite the earlier rejection of the two special circumstances, lying-in-wait and torture remained valid circumstances of the crime that could be urged in aggravation. (RT 233:27313.) This argument swayed the court, since the prosecutor's burden on the guilt trial special circumstances had been proof beyond a reasonable doubt, while the prosecution had no burden of proof in regard to factors in aggravation at the penalty retrial. The court ruled the prosecutor could make these arguments to the retrial jury. (RT 233:27318-27320.)

Notably, the trial court had previously ruled that the retrial jury could not be informed of the fact that the first trial juries had rejected the torture-murder special circumstance alleged against Travis, and the lying-in-wait special circumstance alleged against Silveria.[135] (RT 273:32797.) But coun-

---

135 This ruling had occurred during a discussion of penalty phase instructions. The trial court had stated that nobody would be permitted to indicate to the retrial jury what the guilt trial juries had found in regard to the torture or lying-in-wait special circumstances. (RT 273:32797.) Counsel for

(Continued on next page.)

sel for John Travis sought reconsideration of that ruling, if the prosecutor was going to be permitted to present these theories to the retrial jury as factors in aggravation. The court declined to take any further action. (RT 276:32993-32994.)

The defense motions to preclude improper prosecution arguments were also discussed on February 5, 1997. The trial court refused to rule in advance on any of the points in issue, but did give general guidelines regarding which concepts appeared proper and which did not. The trial court's main conclusion was simply that all counsel should refrain from arguing improper points. (RT 233:27289.) The court indicated that it saw no apparent problem with the prosecutor arguing in favor of imposing a death sentence as an act of retribution for the murder that had been committed. The court similarly saw no apparent problem with arguing that the defendants deserved to die, or that they earned the death penalty. But arguing that the defendants imposed the death penalty on themselves appeared to be improper. Additionally, the court thought that arguing that imposing death is a duty required by law and affirmed by courts was misleading in isolation, but it would be permissible to the extent that it meant that the jury must follow the law and if

---

(Continued from last page.)

Travis countered that it was unfair to take the first trial verdicts piecemeal, informing the jury of the guilt verdicts that had been rendered in favor of the prosecution, while not informing the jury of the verdicts in favor of the defendants. (RT 273:32800.) The trial court saw no unfairness because of the differing burdens of proof. The court believed the retrial jury was not bound by the first trial juries' guilt phase verdicts, any more than the first trial jurors were during their penalty phase deliberations. (RT 273:32800.)

that meant returning a death verdict, then by doing so they would be fulfilling their duty. (RT 233:27289-27291.)

The court believed that arguing that the failure to impose a death sentence dishonored the victim and his family would be improper unless there was admissible evidence to back up such a claim. The court made some comments concerning arguments about having the "guts" to impose a death sentence, rather than taking the easy way out, but no clear guideline emerged. The court saw no apparent problem with arguing that the defendants deserved no more sympathy than they showed to the victim. On the other hand, the court believed that it appeared improper to argue that the failure to impose death sentences would sow the seeds of anarchy and vigilante justice. (RT 233:27291-27193.)

Another discussion occurred on April 21, 1997. Counsel for Silveria argued that the prosecutor should not be permitted to fire the stun gun that had been received in evidence, because the sound and the visible electrical sparking was very different when the gun was fired in the air, compared to when it was fired at a person. The court declined to rule, but indicated that the defense arguments were not persuasive. (RT 274:32931-32934.) Counsel for Silveria also objected to any re-use of the chart the prosecutor had used in the first trial, listing factors in aggravation and mitigation which the prosecutor believed were present, along with a graphic depiction of the scales of justice. The court ruled that the prosecutor could use the chart, but would have to remove the scales. (RT 274:32936-32938.)

However, the next day, the court reversed itself and concluded that there was no apparent problem with using the graphic depiction of the scales of justice with the chart. (RT 275:32944.) The court did allow further argument, and counsel for Silveria complained that, while the scale itself was level in the prosecution chart, the chart was still unfair as it contained a long list of aggravating factors broken down into every conceivable component part to make the list appear even longer, while the mitigation side referred only to factor (k)[136] with no additional detail. (RT 275:32945.) Counsel for Travis joined in that complaint (RT 275:32946) and added that the prosecutor had given no explanation why he needed to use such a chart. Counsel added that there was no apparent legitimate purpose, since the applicable instruction, CALJIC 8.88, expressly told the jurors not to just count the number of factors on either side, and not to imagine a scale. (RT 275:32952.) The court concluded that the prosecutor's graphic scale simply represented the scales of justice, and nothing more.[137] The court denied the defense request for reconsideration, and concluded the prosecutor could use the chart with the graphic depiction of the scales. (RT 275:32953-32954.)

Counsel for Silveria also sought to preclude any prosecution argument that everybody knows lots of children with unfortunate backgrounds who do

---

136 See Penal Code section 190.3, subdivision (k): "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

137 The court failed to comment on what possible proper purpose the scales served, if they really meant nothing more than the scales of justice.

not grow up to be murderers, but the court saw nothing wrong with such an argument. (RT 275:32961-32962.)

Five days later, on April 28, 1997, the graphic scale issue was discussed once again, immediately after the court had included reading its instructions to the penalty retrial jury. Counsel for Silveria noted that the prosecutor had prepared new aggravation/mitigation charts with a drastically changed graphic depiction of a scale. In contrast to the very small scale at the top of the chart used in the first penalty trial, the prosecutor's new chart had a very large scale superimposed over the entire chart, with the left side of the scale filled with listed aggravating factors broken down into every conceivable component, that would obviously weigh down that side of the scale, while the right side, representing mitigation, listed only "factor (k)" and looked empty. Counsel argued this went well beyond symbolic scales of justice and instead looked unmistakably like a hypothetical weighing of aggravation and mitigation. (RT 276:32995.)

Counsel for John Travis noted that the defense had never seen these charts before. As a result, the defense had no fair opportunity to prepare a different chart. The court had the two new prosecution charts marked Court exhibit #136 pertaining to Silveria, and #137 pertaining to Travis. The court again ruled that the prosecution could use the charts. Moments later, the prosecutor's opening argument began. (RT 276:32997-32998, 33001.)

In his argument, the prosecutor took every possible advantage of the trial court rulings, and sometimes even went beyond those rulings. The prosecutor repeatedly made emotional appeals and other arguments that had

nothing to do with the specifics of this case, but instead relied on every conceivable means to make the jurors feel that they would be subject to endless criticism if they were too weak to vote for a death sentence. Much of the prosecutor's argument consists of "sound bites," just as would be used in a Presidential election campaign – biting comments that could be used in an argument in any or every capital case, without regard to the particular nature of the crime or the persons who committed it.

For example, the prosecutor began by stating that the defendants "... have under our social contract earned that ultimate penalty." (RT 276:33002.) He continued by stating, "... to let them go off to prison to live out the rest of their natural lives would be the easy way out." (RT 276:33002.) Next, the prosecutor noted that the jurors had "... been selected as representatives of the community ..." (RT 276:33003.) This was followed by stating that the jury's verdict "... will reflect the conscience of the community ..." (*Id.*) Driving home the emotional appeal, the prosecutor added, "It's a solemn responsibility, it's not one to be taken lightly, nor is this responsibility one to take the easy way out of ..." (*Id.*)

At this point, Silveria's counsel objected to the use of the phrase "easy way out," but that objection was overruled. (RT 276:33003.) The prosecutor then repeated the point, adding that voting for life without parole would be "... to take the easy way out ...' (*Id.*) The prosecutor reminded the jurors that they had taken a solemn oath and had accepted a responsibility. (RT 276:33004.) The prosecutor expressed his thanks for the fact that "... we're no longer a society that's made up of vigilante justice or lynch mobs

crying out for vengeance in the streets." (*Id.*) Objections by counsel for both defendants were overruled. (*Id.*)

The prosecutor soon repeated the reference to the jury as the conscience of the community. (RT 276:33005.) Counsel for John Travis objected unsuccessfully again, contending that the jury had been instructed that they should not be swayed by social beliefs. (RT 276:33006.) The prosecutor then argued "There is no guilt in performing one's duty, especially a duty that is required by the law, passed by your fellow citizens and affirmed by the court." (*Id.*) Another objection by Silveria's counsel was overruled. (*Id.*) The prosecutor repeated the language about the death penalty law having been passed by "fellow citizens in your community and affirmed by the courts of this state and country" **three more times**. (RT 276:33007-33008.)

After some discussion of the specifics of the present case, the prosecutor argued that this case came within the felony murder rule and would therefore have been first degree murder even if the killing had been unintentional or even accidental. (RT 276:33033.) This was followed with specific hypothetical examples of unintentional or accidental killings during the commission of a robbery, that would be less egregious than the present crime but would still constitute first degree murder. (RT 276:33033-33035.) The prosecutor argued that any features of the present case that went beyond the least aggravated version of felony murder automatically became factors in aggravation. (RT 276:33033, 33035-33036.)

Soon after, pursuant to the ruling allowing the prosecutor to argue in aggravation facts that had been rejected by the guilt phase juries, the prose-

cutor argued that the acts of watching and waiting by the defendants constituted facts in aggravation. Similarly, he argued that the stabbing of the victim constituted torture – indeed, the prosecutor described it as "super-torture." (RT 276:33041, 33048, 33052.)

Aside from the verbal portions of the argument, the defense also objected to the prosecutor's use of twenty-seven photographs that were on display throughout the argument. When the photos were unveiled, the victim's widow and his mother, who were seated immediately to the left of the jury box, both began to cry. The widow cried continuously through the remainder of the argument. The widow and the mother also cried when the prosecutor dramatically fired the stun gun into the air during his argument. The judge simply responded that the photos had all been admitted into evidence. (RT 276:33066-33067.)

The prosecutor returned to his argument, using his aggravation/mitigation chart with the large graphic scales. (RT 276:33068-33069.) Later, in another appeal to pure emotion, the prosecutor argued that the victim would not be present for his daughter's future first father-daughter dance, or to walk her down the aisle at her wedding. Defense objections were sustained, as this had previously been expressly ruled inadmissible. But the advance objection and ruling, done in an effort to avoid having to object in front of the jurors, had accomplished nothing, since the prosecutor was able to say what he wanted before the renewed objection was sustained. (RT 276:33093.)

The prosecutor's argument continued on the following day. In an apparent effort to relieve the jurors of any feeling of personal responsibility for voting for a death verdict, the prosecutor argued that if the jury chose death, that was not something that the jurors, as part of a system, would be doing to the defendants; rather, each defendant had brought such a verdict on themselves. Defense counsel's renewed objections were overruled. (RT 277:33135-33136.)

Finally, the prosecutor concluded his argument with a return to his effort to shame the jurors into voting for death: "The issue is whether you have the strength, the courage to do what the law requires. ..." (RT 277:33138.) Soon after, he added: "A free society requires of its citizens, of it jurors, vigilance, courage and strength and resolve in making the decision that you're going to have to make here." (*Id.*) Once again, a renewed defense objection was overruled. (*Id.*)

B. The Prosecutor's Arguments Improperly Appealed to Emotions and to Jurors' Underlying Personal Beliefs About the Criminal Justice System Rather Than to an Assessment of Aggravating and Mitigating Factors Specific to This Case, Rendering the Trial Fundamentally Unfair

Many of the kinds of arguments included in the summary in the preceding section have withstood attacks in prior decisions of this Court, but typically when considered in isolation. The real problem in the present case arises from the combination of so many arguments that were blatantly de-

signed to persuade jurors that **any** murder should merit a death sentence for the perpetrator. But California's death penalty law is supposed to start from a recognition that a death sentence is not appropriate in every case, and that factors specific to the crime or the perpetrator are supposed to be used to differentiate the many cases in which a sentence less than death should be imposed from the relatively small number of cases in which a death verdict might be appropriate. (*Furman v. Georgia* (1972) 408 U.S. 238, 293-295 (concurring opinion of Justice Brennan), 309-310 (concurring opinion of Justice Stewart).) Additionally, other aspects of the prosecutor's argument and the court's rulings encouraged the jurors to rely on improper matters in reaching their penalty determination.

1. It Was Fundamentally Unfair to Allow the Prosecutor to Argue Torture as a Factor in Aggravation, While Refusing to Inform the Jurors That the Different Jury That Returned the Guilt Verdicts Had Found the Torture-Murder Special Circumstance Allegation to Be Not True

As described above, John Travis' guilt phase jury unanimously returned a "Not True" verdict in regard to the alleged torture-murder special circumstance. Nonetheless, over repeated defense objection, but with the misplaced blessing of the trial court, the prosecutor argued to the penalty jury that Travis tortured the victim and that such torture should be considered a strong factor in aggravation.

The trial court reasoned that the "Not True" finding in regard to the torture-murder special circumstance had occurred during the guilt trial where the prosecution faced a burden of proof beyond a reasonable doubt. But because the prosecution had no such burden in the penalty trial, the court believed the prosecutor should be permitted to rely on the torture-murder theory that had been rejected by the first jury.

Reliance on that premise was unsound. Assuming arguendo that such a distinction is appropriate, that did not justify the court's additional refusal to inform the penalty phase jury of the fact that the guilt phase jury at least had a unanimous reasonable doubt about the proof of the elements of the torture-murder special circumstance. The court's ruling cannot withstand analysis under the unusual facts here.

One reason for this conclusion is that the original penalty jury, which was unable to reach a unanimous penalty verdict, had full knowledge of the not-true finding signifying those jurors' rejection of the torture-murder special circumstance. Whatever merit there was to the trial court's conclusion that the penalty retrial jury could consider factors that had been rejected under a different burden of proof at the earlier guilt trial, that same reasoning applied equally to the first penalty jury. If those earlier jurors could properly consider factors under a new burden of proof at a penalty trial, with full knowledge of the earlier rejection of torture, then the penalty retrial jurors could do the same. To conclude otherwise would be to improperly place the prosecutor in a stronger position than he had been in before the original penalty trial which ended in a deadlocked jury. That, in turn, would be contrary

to a well-established legal principle: "When there has been a failure of trial by disagreement of the jury, the status is the same as if there had been no trial." (*People v. Messerly* (1941) 46 Cal.App.2d 718, 721; *People v. Crooms* (1944) 66 Cal.App.2d 491, 499; see also *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1021; *People v. Disperati* (1909) 11 Cal.App.409.)

It is also improper for a prosecutor to criticize a guilt phase partial acquittal or deadlocked jury. (*People v. Haskett* (1982) 30 Cal.3d 841, 864-867.) Although that is not quite what happened in the present case, the impact was very similar. Here, the prosecutor was urging the penalty retrial jury to utilize factors in aggravation that were based on allegations that the guilt phase jury had squarely rejected. Here, the prosecutor was not simply asking the jury to reconsider these factors under a different burden of proof; instead, the prosecutor was permitted to accomplish at the retrial what would have been forbidden at the original penalty trial. That is, at the original penalty trial the prosecutor could not have urged the jury to simply disregard the guilt phase finding that the torture-murder special circumstance was untrue, and to reconsider the issue as if the guilt phase finding had never occurred. (See, for example, *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238, re: impropriety of penalty phase efforts to re-litigate what had been determined in the guilt phase.) Yet that is precisely what the prosecutor was permitted to do at the penalty retrial. This was fundamentally unfair.

Another route to the same conclusion is to consider the fact that the penalty retrial jury was not permitted to decide for itself the issue of guilt; instead, the retrial jury was instructed that the prior jury had already found

both defendants guilty of first degree murder with special circumstances. (RT 276:32979.) It is fundamentally unfair to inform the retrial jury of such prior findings against the defendants, while refusing to inform them of prior findings in favor of the defendants.

Yet another path to the same conclusion is to consider the first sentence of Penal Code section 190.3, paragraph 3: "However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted." In other words, pursuant to this provision, when prior violent criminality has been previously charged as a substantive offense and rejected under a "beyond-a-reasonable-doubt" standard, that same conduct cannot be offered in aggravation of the penalty under a less demanding standard. There is no rational basis for treating differently evidence of criminal activity supporting a special circumstance that has been previously prosecuted and found not true. Alternatively, if a penalty retrial jury is allowed to consider such evidence under a new standard, then at the very least it should be informed of the fact that the original guilt jury rejected that evidence under the reasonable doubt standard.

In sum, either the prosecutor should not have been allowed to urge torture as a factor in aggravation, or the retrial jury should have been informed that the guilt jury had rejected the torture-murder special circumstance as not true. Instead, the prosecutor here was allowed to argue torture as an aggravating circumstance of the crime, without the jury being informed of the prior juror's verdict in this regard. This deprived John Travis of his federal Fifth, Eighth, and Fourteenth Amendment rights to a fundamentally

fair penalty trial in accordance with due process of law, and to a reliable penalty verdict.

2. The Prosecutor Should Not Have Been Permitted to Present a Penalty Phase Argument That Effectively Urged the Jury to Return a Death Verdict, Not Because It Was Merited By the Nature of the Instant Crime or the Perpetrators, But Because Society Demanded Such a Penalty for Anyone Guilty of Murder

As shown earlier in this argument, the prosecutor was permitted to argue that a jury that chose life without parole was taking the easy way out, that a death verdict was merely the fulfillment of a responsibility resulting from a law passed by the jurors' fellow citizens and affirmed by the courts, and that any action beyond the least-aggravated murder possible was automatically a factor in aggravation of the penalty;[138] in this way the prosecutor was able to imply that anything less than a death verdict would invite a return to vigilante justice and lynch mobs. These are not arguments that call upon a penalty jury to determine whether the evidence pertaining to the present crimes or to the backgrounds of the perpetrators demonstrated a combi-

---

138 The flaw in this aspect of the prosecutor's argument was that the least aggravated versions of felony-murder, even if technically chargeable as capital murder, would rarely, if ever, actually be charged that way. Thus, the range of cases for which a jury would be called upon to determine whether the penalty should be death or life without parole, would start with far more aggravated cases than those being described by the prosecutor.

nation of crime and perpetrator that were among the relatively few murders that merited a penalty of death. Instead, these were arguments that applied equally to every murder, urging the jurors to react with a gut emotional revulsion that would be expected in every case of murder.

Indeed, this strong appeal to emotion was punctuated by twenty-seven photographs of the bloody victim, prominently displayed throughout the argument, generating continuing tears from the victim's widow and mother. This emotional appeal was punctuated further by a large graphical depiction of the scales of justice with a very long list of assertedly aggravating factors on one side, arrayed against a mocking abbreviation of the many legitimate mitigating factors on the other side. Also, this emotional appeal was punctuated by the dramatic and completely unnecessary act of repeatedly firing the stun gun into the air, producing a sound and an electrical spark that was far different from what would occur when a stun gun was fired at a person.[139]

"[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed. (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) While it is true that the prosecutor did devote some portions of his argument to the specifics of the present crime and the backgrounds of the perpetrators, other substantial portions of the argument consisted of extremely inflammatory rhetoric calculated to divert the jury's attention from a fair consideration

---

139 There was no evidence that the stun gun had ever been fired into the air during the commission of the present crime.

of John Travis' very unfortunate childhood, his lack of maturity, and away from a proper determination of whether Travis' single act of violence justified the extinction of his own life, rather than a sentence that would keep him in prison for the remainder of his life.

Also, the prosecutor's references to a death verdict merely being the result of a law passed by the voters was an improper effort to shift responsibility away from the jurors themselves, in violation of the Eighth Amendment principles set forth in *Caldwell v. Mississippi* (1985) 472 U.S. 320. (See discussion in *People v. Farmer* (1988) 47 Cal.3d 888, 924-931.) The prosecutor's statement that "The issue is whether you have the strength, the courage to do what the law requires. ..." (RT 277:33138) unmistakably implied criticism of any juror who did not vote for death – implying that such jurors were lacking in strength and courage. Such criticism of jurors unwilling to vote for a death verdict was comparable to the comments described in *People v. Williams* (1988) 45 Cal.3d 1268, 1325-1326 as "...unfair and unkind criticism ...."

C. Conclusion

As shown in the preceding sections of this argument, the prosecutor's argument to the penalty retrial jury resulted in multiple violations of the federal Fifth, Sixth, Eighth, and Fourteenth Amendment guaranties of a fundamentally fair jury trial in accordance with Due Process of law, and to a reliable penalty verdict. As will be shown later in this brief (see Argument XII, subd. B, *infra.*), the issue of penalty in the present case was unusually close.

As a result, it was reasonably possible that the prosecutor's improper arguments here affected the penalty determination. (See discussion of applicable standard in Argument XII, subd. A, *infra*.) Put differently, it cannot be said beyond a reasonable doubt that the improper argument did not affect the penalty verdict. (*Id.*) Therefore, these errors must be deemed prejudicial and should result in reversal of the penalty determination below.

XII. DUE TO THE CLOSENESS OF THE PENALTY ISSUE, AND OTHER FACTORS, ANY SUBSTANTIAL ERRORS AT THE PENALTY PHASE, INDIVIDUALLY OR CUMULATIVELY, MUST BE DEEMED PREJUDICIAL

A. The Applicable Standard

Prior to the adoption of California's current death penalty procedures, in which juror discretion is guided by a statutory list of aggravating and mitigating factors, this Court recognized in two key cases that assessment of the impact of an error is more difficult in a penalty trial than in a guilt trial:

> "Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error." (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)
>
> .....
>
> "... the jury may conceivably rest the death penalty upon any piece of introduced data

> or any one factor in this welter of matter. The precise point which prompts the [death] penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> "We cannot determine if *other* evidence before the jury would neutralize the impact of an error and uphold a verdict.... We are unable to ascertain whether any error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.
>
> "Thus, *any* substantial error in the penalty trial may have affected the result; it is 'reasonably probable' that in the absence of such error 'a result more favorable to the appealing party would have been reached.' (Citation.)" (*People v. Hines* (1964) 61 Cal.2d 164, 169.)

After some experience implementing the current death penalty law, this Court expressed dissatisfaction with what had come to be known as the *Hamilton/Hines* standard, referring to it as the:

> "... very generous rule of penalty phase prejudice applicable to pre-1972 death penalty statutes. In view of the jury's 'absolute' penalty discretion under these laws, any 'substantial' penalty phase error was deemed prejudicial and reversible. (Id., at p. 763.) This strict standard of penalty phase reversal no longer applies, however, under the 1977 and 1978 death penalty laws, which include constitutionally sufficient standards to guide jury discretion." (*Robertson, supra*, 33 Cal.3d at p. 63 [conc. opn. of Broussard, J.]; see also *Davenport, supra*, 41 Cal.3d at pp. 280 [plur. opn.] & 295 [conc. & dis. opn. of Broussard, J.].)

While it is true that juries today have more guidance in choosing the penalty than did juries in the days of the death penalty law at issue in *Hamilton* and *Hines*, the fact remains that penalty determinations are still very different from guilt determinations. In the guilt phase, the jury makes inherently factual decisions – exactly what events occurred? What was the defendant's state of mind when they occurred? Which witnesses should be believed? In a penalty phase, juries make similar decisions in some respects, but they also make a highly normative determination when they make the ultimate decision as to whether death or life without parole is the appropriate penalty for a particular crime and offender. (*Kansas v. Marsh* (2005) 548 U.S. 163, 180.)

Thus, it is clear that the discretion that a jury possesses in deciding penalty remains much broader than the discretion possessed when determining guilt or innocence. Indeed, the present penalty phase jury was instructed, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (CALJIC 8.88, at CT 22:5397.) No guilt phase jury possesses discretion comparable to that.

In regard to review of the impact of state-law errors on a capital penalty verdict under the modern death penalty law, this Court has modified the *Hamilton/Hines* standard and held that the correct standard is whether there is a reasonable or realistic possibility that the jury would have rendered a different verdict absent the error or errors. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Subsequent to *Brown*, this Court has clarified that the *Brown* "reasonable possibility" test is really the same as the beyond-a-reasonable-

doubt test for prejudice articulated in *Chapman* v. *California* (1967) 386 U.S. 18. (*People* v. *Wallace* (2008) 44 Cal.4th 1032, 1092.)

The particular error under discussion in *Brown* was a failure to instruct on the need to find that prior violent criminality could be considered in aggravation only if found true beyond a reasonable doubt. Because the prior violent criminality was proven overwhelmingly and not refuted by the defense at trial, this Court was able to conclude that the omitted instruction would have made no difference.

However, the *Brown* rationale is not so easily applied when a jury hears evidence it should not have heard, or is deprived of evidence it should have received, or when the error at issue impacts the overall normative decision being made, rather than impacting a strictly factual decision as in *Brown*. *Brown* did not expressly accept or reject the underlying principles set forth in *Hamilton* and *Hines*. However, *Brown* did find that other penalty errors, which resulted in the jury hearing arguably improper aggravating evidence, argument, and/or instructions, were also harmless. This result was reached without substantial discussion, and was based on a simple conclusion that the properly admitted aggravating evidence was overwhelming, and that a consideration of all of the instructions and arguments indicated that the jury would not have been confused about proper legal principles. (*People v. Brown*, *supra*, 46 Cal.3d at 449, 451-454, 456.)

It is questionable whether the *Brown* reliance on "overwhelming" aggravation evidence is consistent with the principle that each juror has considerable discretion to determine how much weight should be assigned to

each aggravating or mitigating factor. It is also doubtful that it is fair for a reviewing Court to conclude that a jury properly understood instructions that were apparently misunderstood by the trial judge and prosecutor. Thus, Mr. Travis contends that any substantial error that was not purely technical must be deemed to satisfy the reasonable possibility test set forth in *Brown*.

Indeed, the "reasonable possibility" test was derived from a comment by Justice Broussard in a concurring opinion in which he simultaneously recognized the continued validity of the "any substantial error" test, albeit with a slight modification:

> "I am also troubled by the majority's discussion of prejudicial error. The majority quote from cases decided during the 1960's (*People v. Hines* (1964) 61 Cal.2d 164, 169; *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137) which stress the impossibility of determining whether any particular factor may have influenced one of the twelve jurors to vote for the death penalty. That language, however, was prompted by the fact that the jury at the time those cases were decided was required to decide the question of penalty 'without benefit of guideposts, standards, or applicable criteria.' (*People v. Hines*, *supra*, 61 Cal.2d at p. 168, quoting *People v. Terry* (1964) 61 Cal.2d 137, 154.) It does not apply with equal force to verdicts under the statute with constitutionally sufficient standards to guide jury discretion. **We may still use the 'any substantial error' test developed in the cited cases**, but 'substantiality' now should imply a careful consideration whether there is any reasonable possibility that an error affected the verdict." (*People v. Robertson* (1982) 33 Cal.3d 21, 63 [conc. opn. of Broussard, J.; emphasis added].)

Moreover, this court has recognized another context in which the "any substantial error" standard set forth in *Hamilton* and *Hines* applies: "Where the evidence, though sufficient to sustain the verdict, is extremely close, 'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial.' (*People v. Briggs* (1962) 58 Cal.2d 385, 407.)" (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494; see also *People v. Hickman* (1981) 127 Cal.App.3d 365, 373.) As will be shown in the next section of this argument, the present case must be deemed unusually close, in regard to the penalty determination.

Furthermore, the United States Supreme Court has expressly recognized the validity of the rationale underlying the conclusion reached in *Hines*, as set forth above:

> "It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258.)

In another capital case, the High Court again recognized this principle:

> "In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., *Lockett v. Ohio*, 438 U.S. at 605 ('[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty ... is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments'); *Andres v. United States*, 333 U.S. 740, 752 (1948) ('That reasonable men might derive a meaning from the instructions

> given other than the proper meaning of § 567 is probable. In death cases, doubts such as those presented here should be resolved in favor of the accused'); accord, *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." (*Mills v. Maryland* (1988) 486 U.S. 367, 377.)

Certainly **any** error that impacts on the reliability of the judgment in a capital case – even if it is purely an error of state law - carries federal Eighth Amendment reliability implications. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Furthermore, within the discussion of each error set forth in this brief, it has been shown that there are multiple reasons why the particular error should be considered federal constitutional error. Also, as noted earlier, this Court has concluded that the *Brown* standard is no different than the *Chapman* standard. Thus, every error in this case that affected the penalty determination should be deemed prejudicial unless the prosecution can prove beyond a reasonable doubt that the error did not contribute to the verdict.

A number of the penalty phase errors set forth in this brief pertain to evidentiary rulings. For example, the defense was precluded from presenting testimony of a former juror and former alternate juror which would have greatly increased the force of the defense case in mitigation. (See Argument I, earlier in this brief.) Defense counsel was precluded from giving important mitigating testimony that only he could give. (See Argument II, earlier in this brief.) Dr. Pakdaman was improperly permitted to testify that the present case was among the most atrocious he had ever seen. (See Argument IX, earlier in this brief.) This Court has recognized that the *Chapman* standard of

error is always a stringent one, but **especially** so when an evidentiary error is involved:

> "The burden is on the beneficiary of the error 'either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.' (*Ibid.*; see also *People v. Spencer* (1967) 66 Cal.2d 158, 168.) The *Chapman* court reiterated the approach it adopted in *Fahy v. Connecticut* (1963) 375 U.S. 85 [11 L.Ed.2d 171, 84 S.Ct. 229]: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' (*Id.* at pp. 86-87 [11 L.Ed.2d at p. 173]; see also *People v. Powell* (1967) 67 Cal.2d 32, 56-57.) **Where a fundamental constitutional right is at issue, erroneous evidentiary rulings are seldom harmless under this standard**: 'An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot ... be conceived of as harmless.' (*Chapman v. California*, supra, 386 U.S. at pp. 23-24 [17 L.Ed.2d at p. 710].)" (*People v. Stritzinger* (1983) 34 Cal.3d 505, 520; emphasis added.)

Of course, the federal *Chapman* standard itself is also affected by the inescapable fact that the greater discretion in normative sentence determinations, compared to factual guilt determinations, makes it far more difficult to determine whether an error did or did not have an impact on the outcome. For example, in *Caldwell v. Mississippi* (1985) 472 U.S. 320, a death judgment was reversed when the Court found an error and concluded, "[b]ecause we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."

In any event, whether this Court uses the "no effect" standard of *Caldwell*, the *Chapman* standard, or *any other standard*, it is especially clear in the present case that any error that potentially impacted on the penalty determination must result in reversal of the penalty verdict. As will be shown in the next section of this argument, this case must be deemed among the very closest of cases in regard to determination of the penalty.

B. The Present Case Was Unusually Close in Regard to the Penalty Determination

1. The Present Case Featured Little Aggravating Evidence and Considerable Mitigating Evidence

There are a great many factors that set the present case apart from most cases which result in a death verdict. First, it involved a single death. Certainly cases involving a defendant who is a serial killer, or who has killed more than one person in a single crime, or who has been convicted of a homicide in the past, would be seen by any juror as substantially more aggravated than a case where there was a single death, and the defendant has never killed in the past. Additionally, the only special circumstances found true here were that the murder occurred during the commission of burglary and robbery. While these are serious factors, they must be considered among

the least aggravating of the many different special circumstances set forth in California's death penalty law.[140]

Almost as important is the fact that no evidence was produced that Mr. Travis was ever involved in any other crime involving the use of force or violence or the attempted use of force or violence or the threat to use force or violence. Certainly cases involving defendants who have repeatedly been involved in violent criminal activity would be seen by any juror as substantially more aggravated than a case where the present homicide is the only instance of violent criminal conduct.

Another very important fact is that Mr. Travis did not even have a significant record of non-violent criminal activity. A single conviction for burglary was the only prior felony conviction ever suffered by John Travis.

Of the hundreds of death judgments that have been affirmed by this Court in the last quarter century, it is unlikely that more than a handful involved defendants who killed only once, had no other instances of violent criminality, and had no more than one prior felony conviction.

On the other hand, John Travis presented much other powerful mitigating evidence, going well beyond the lack of significant aggravating evi-

---

140. That is, most or all jurors would find commission of a burglary or a robbery to be less aggravated than multiple murder, murder with a prior murder, murder for financial gain, murder by means of a bomb, murder in the course of escape from lawful custody, murder of a peace officer, firefighter, prosecutor, judge, juror, or witness to a crime, murder because of the victim's race, religion, or nationality, or murder to further the activities of a criminal street gang, (Penal Code section 190.2)

dence pertaining to his prior record. Undisputed evidence established that Travis was genetically predisposed to drug and alcohol addiction, and that he was brought up under conditions of neglect and abuse that carried a high likelihood of pushing a person in the direction of his genetic predisposition toward substance abuse. All the prosecution was able to produce in response to such evidence was the acknowledgement that many people with comparable or worse backgrounds manage to avoid committing seriously violent crimes. That may be true, but does not change the fact that persons unfortunate enough to have such backgrounds, for which they cannot personally be faulted, are far more likely than others to turn to substance abuse and crime. Indeed, the United States Supreme Court has expressly recognized the importance, as mitigating evidence, of evidence pertaining to a difficult family history. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 115.)

A further significant aspect of the evidence that sets this case apart from most other cases in which a sentence of death has been returned is that John Travis made a remarkable adjustment to incarceration. While he acknowledged that early in his more than six years of pre-sentence incarceration he participated in a failed escape plan, there was no evidence of any misbehavior during the nearly five years after the escape plans were uncovered and before the jury returned a sentence of death. That must be considered an unusually positive adjustment for a youthful jail inmate.

But John Travis did much more than merely obey the rules and stay out of further difficulty for nearly five years of jail incarceration. Undisputed evidence showed that he became a sincere and dedicated Christian, and that

he made remarkable progress toward achieving a mature attitude and overcoming his drug and alcohol addictions. He became deeply involved in helping other inmates overcome their problems. He also became a useful worker trusted by a number of correctional officers who testified to the sincerity of John Travis' efforts to lead a useful life inside the jail. All the prosecution could do in rebuttal to this evidence was to obtain concessions that some jail inmates try to manipulate correctional officers. No evidence was produced, however, that John Travis did so. The United States Supreme Court has expressly recognized that juries give great weight to such testimony from correctional officers, who have no particular reason to be favorably predisposed toward inmates. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 7-8.)

2. The Prior Deadlocked Jury Further Supports the Conclusion that the Present Penalty Case Was Unusually Close

The present penalty verdict occurred at a retrial, after the original penalty jury was unable to reach a unanimous penalty verdict. The significance of a prior hung jury as a factor pointing toward a greater likelihood that an error must be deemed prejudicial has been expressly recognized:

> "In the instant case, defendant's first trial, without the prejudicial error which occurred at this second trial, had ended in a hung jury. We could thus avoid reversible error only if steadfast identification by one witness (Mitchell) be held sufficient for the jury to reach its guilty verdict; however, her identification of defendant **did not convince the jury the first time**. Here, in the

> second trial, the problem was compounded by prejudicial testimony which could have confused the issues and misled the jury. We believe, under the circumstances, that conviction resulted from prejudicial and, hence, reversible error." (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188; emphasis added.)

Indeed, the error at issue in *Brooks* was assessed under the most lenient standard of prejudice, set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Brooks, supra.*) As shown above, a more stringent standard of prejudice must apply in the present case, so the prior hung jury should be deemed an even more influential factor here.

People v. Sergill (1982) 138 Cal.App.3d 34, 41, also recognized a prior hung jury as a factor in assessing prejudice. In addition, in a discussion of prejudice in *People v. Rivera* (1985) 41 Cal.3d 388, 393, fn. 3, this Court expressly noted, "Further, it is noteworthy that a first trial of defendant ended in a hung jury." More recently, *People v. Lee* (2005) 131 Cal.App.4th 1413, 1430 recognized that when an error did **not** occur at a prior trial that ended in a hung jury, but did occur at a second trial that ended in conviction, makes it likely that the error was prejudicial.

Notably, there was even less reason in the present case for the first jury to be favorably disposed toward John Travis than there was for the second jury. First, the original penalty phase jury had just voted unanimously to find John Travis guilty of murder with special circumstances, while the retrial jury simply had to accept that guilt verdict. Also, the original penalty phase jury heard extensive testimony about Travis' involvement in an unsuccessful attempt to escape from the county jail while awaiting trial. That tes-

timony included claims that the escape plans allegedly included Travis knowing participation in contingency plans to kill a jail correctional officer in order to facilitate the escape. That evidence was offered in support of the other violent criminality aggravating factor, and would be expected to have a great impact on a jury deciding the appropriate punishment for a convicted murderer. In contrast, at the retrial the prosecutor chose not to present testimony from other participants in the escape plot, who had testified in the first trial. The second jury heard no evidence at all that any use of force was to be part of the escape plan. Indeed, they heard very little about the escape plan at all, as it was mentioned only briefly in an attempt to rebut evidence that John was striving to be a good Christian while in jail.

In sum, what seemed to be the heart of the prosecution's case in aggravation at the first trial was totally absent from the retrial. The deadlocked jury at the first trial, in the face of a stronger showing in aggravation, must be seen as a powerful indicator that this was a close case. Thus, the fact that the retrial jury reached a death verdict despite a lesser showing in aggravation indicates that Travis' chances were adversely impacted by the errors that occurred at the retrial, especially those that took the heart out of Travis' evidence of his unusually strong recovery efforts and his maturation. In sum, it is apparent a more favorable outcome for Travis was reasonably probable absent the errors that occurred here, so that any significant errors at the retrial must be deemed prejudicial.

C. All Instances In Which This Court Finds Error, But Finds the Error Harmless When Considered Individually, Must Also Be Assessed Together to Determine Whether Their Cumulative Impact Was Prejudicial

Many of the errors urged in this brief are sufficiently important as to justify reversal of the penalty verdict in and of themselves. However, if this Court finds more than one error, but concludes that each error, standing alone, can be deemed harmless despite the factors discussed above, then this Court must also consider the cumulative effect of the errors. (*Williams v. Taylor* (2000) 529 U.S. 362, 399; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Duran* (1976) 16 Cal.3d 282; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Williams* (1971) 22 Cal. App.3d 34, 40; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 386-387; and *People v. Cruz* (1978) 83 Cal.App.3d 308, 334.) Indeed, federal Fifth, Eighth, and Fourteenth Amendment Due Process and reliability concerns mandate meaningful appellate review in capital cases. (See *Parker v. Dugger* (1991) 498 U.S. 308, 321.) Absent a consideration of the cumulative impact of errors, meaningful appellate review would not be possible.

In other words, in some situations an error can be found to be sufficiently minor so that a more favorable result on a retrial is unlikely. However, if there is a series of errors that would **all** be corrected at a retrial, it becomes much more difficult to conclude that a different result is unlikely.

This is especially true in the context of the present trial, as described in the preceding section of this argument.

Cumulatively, these errors resulted in the deprivation of a fair trial in accordance with federal Fifth, Eighth, and Fourteenth Amendment and state constitutional guaranties of a fundamentally fair jury trial in accordance with due process of law.[141] Furthermore, as a result of the errors shown, the ability of the jury to fairly resolve the difficult penalty decision was inadequate to assure the degree of reliability needed to satisfy the federal Eighth Amendment, in the case of a guilt judgment used to support a death sentence. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

---

141. Indeed, every penalty phase error set forth in this brief implicated federal constitutional protections. Specific citations relating the particular type of error at issue to federal concerns are contained within each such argument.

XIII. A VARIETY OF ADDITIONAL ERRORS AND FLAWS IN THE CALIFORNIA CAPITAL SENTENCING PROCEDURES ALSO MANDATE REVERSAL OF THE DEATH JUDGMENT

In addition to the many errors that have been set forth in this brief, the present death judgment is also flawed because of a number of substantive and procedural defects in the California capital sentencing law. Although many of these points have been rejected by this Court in other cases, they should be reconsidered, and they have not yet been finally determined in the federal courts. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

A. The failure to require the jury to unanimously find that aggravating circumstances relied on were true beyond a reasonable doubt, or to unanimously find that aggravation outweighed mitigation beyond a reasonable doubt, or to unanimously find that death was the appropriate punishment beyond a reasonable doubt, violated Fifth, Sixth, Eighth, and Fourteenth Amendment due process, trial by jury, and reliability requirements. (See *In re Winship* (1970) 397 U.S. 358; *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296.). *Ring* held that the Sixth Amendment right to trial by jury applies to all factual determinations necessary to support a death sentence. In California, when a jury returns a verdict finding a defendant guilty of first degree murder, and finding one or more special circumstances true, there are still additional findings that must be made before a death sentence can be imposed. Those findings include: 1) that at least one aggravating factor exists; 2) that the aggravating factor or factors outweigh

ing factor exists; 2) that the aggravating factor or factors outweigh any mitigating factors; and 3) that death is the appropriate punishment. (Penal Code section 190.3.) In the present case, the jury was not required to make any of those factual findings beyond a reasonable doubt. While this Court rejected such an analysis in *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298, it did so in reliance on the belief that *Cunningham, supra,* merely extended *Blakeley, supra,* and *Apprendi, supra*, to California's Determinate Sentence Law, and that the principles established in those cases had no application to the death penalty determination. However, until *Cunningham* was decided, this Court refused to accept the fact that *Apprendi* and *Blakely* were clear enough to invalidate California's determinate sentence law. (*People v. Black* (2005) 35 Cal. 4th 1238.) The rationale set forth in *Cunningham* in regard to the Determinate Sentence Law undermines the rationale this Court has relied on in regard to the death penalty law. In *Black*, this Court concluded that once a person was convicted of a crime covered by the Determinate Sentence Law, the upper term constituted the maximum sentence and *Apprendi* had no application. (*Black, supra*, at pp. 1255-1261.) *Cunningham* rejected such reasoning and concluded that the middle term was the statutory maximum in the absence of additional fact-finding. Relying on the very same reasoning rejected in *Cunningham*, this Court in *Prince, supra,* concluded that death was the maximum sentence permitted for a conviction of capital murder. But just as in *Cunningham*, death is **not** available as a sentence based only on the finding of guilt. Under California's capital sentencing law, death cannot be imposed unless it is determined that aggravating factors exist, that they out-

weigh mitigating factors, and that death is the appropriate penalty. Certainly the first of those requirements is a factual determination, and the second requires a weighing of the strength of some factual findings against others. The jurors were also not required to agree with one another in determining which aggravating factor or factors existed. Therefore, under *Ring*, the penalty must be reversed. Under *Ring* and *Cunningham*, such factual findings must be made beyond a reasonable doubt, and by a unanimous jury.

B. The failure to require written findings as to the aggravating factors relied on by the jury, to require jury unanimity as to all aggravating factors, and the failure to provide a procedure enabling meaningful appellate review of the sentencing decision, violated Fifth, Sixth, Eighth, and Fourteenth Amendment due process and reliability requirements. (See *People v. Jackson* (1980) 28 Cal.3d 264, 315-317 (dissenting opn. of Bird, C.J.); but see *People v. Frierson* (1979) 25 Cal.3d 142, 172-188.)

C. California's statutory list of special circumstances include so many different types of murders, and have been interpreted so broadly, that almost every crime that could support a conviction for first degree murder would come within one or more of the special circumstances. Additionally, California's overly broad definition of felony murder exacerbates the problem by further expanding the range of death-eligible homicides. As a result, California's death penalty law fails to adequately narrow the class of persons who are death-eligible, in violation of the federal Eighth Amendment and article I, section 17 of the California Constitution. (*Furman v. Georgia* (1972) 408 U.S. 238, 313; see also Shatz & Rivkind, "The California Death

Penalty Scheme: Requiem for *Furman*?" (1997) 72 NYU L.Rev. 1283.) .)

D. California's failure to require inter-case and intra-case proportionality review violates the federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to be free from arbitrary and/or unreviewable proceedings leading to imposition of a death sentence, and to due process, a fair jury trial, and reliable penalty determinations. (*Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994; *Proffitt v. Florida* (1976) 428 U.S. 242, 259.)

E. California's death penalty law creates an impermissible barrier to consideration of mitigating evidence by precluding reliance on mental or emotional disturbance, or the dominating influence of another unless such factors are "extreme" (§ 190.3, factors (d), (g)) and/or "substantial" (id., factor (g)), in violation of the federal Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) While this Court has held that such excluded mitigating evidence can be considered under other listed mitigating factors, that principle is so counterintuitive that it would not likely be understood by most jurors. Indeed, why did the drafters choose to use such limiting adjectives if not to cause jurors to think their leeway to consider important mitigating evidence was limited? **Most importantly**, the prosecutor in the present case expressly argued that drug and alcohol use in this case was not mitigating because it did not rise to the level of being so drunk or drugged that the defendants could not appreciate the criminality of their conduct or conform their conduct to the requirements of the law. (RT 276:33102.) If the experi-

enced prosecutor understood the instruction in this manner, and argued it to the jury in this manner, what basis is there for assuming the jurors would realize on their own that neither the instruction nor the prosecutor meant what they said?

F. California grants unlimited discretion to prosecutors to decide when to seek a sentence of death, and when to offer or agree to a plea bargain that precludes a sentence of death. This results in completely different standards from one county to another throughout California, leading to a denial of due process, equal protection, and reliability in capital sentencing, in violation of the federal Fifth, Sixth, Eighth, and Fourteenth Amendments. *Bush* v. *Gore* (2000) 531 U.S. 98, 104-111, found federal equal protection violations where procedures for counting ballots in one county may differ from procedures for counting ballots in another county; surely procedures for determining which murder cases merit seeking a death penalty must also be reasonably uniform from one county to another.

G. John Travis was on death row for 40 months before counsel was ever appointed to represent him on her automatic appeal. Based on past history, it is likely to take eleven-to-thirteen additional years from the date counsel was appointed until his appeal is decided. The psychological brutality that results from such a prolonged wait for execution does not comport with "evolving standards of decency that mark the progress of a maturing society" from which the Eighth Amendment draws it meaning. (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) It is not enough to say that there is no prejudice because the appellant remains alive and in prison during those many long

years, and is therefore no worse off than a prisoner serving life without parole. That response misses the entire point of this argument. The cruel and unusual punishment does not arise merely from the time spent in prison prior to execution; it arises from the psychological brutality that inevitably results from spending those long years waiting for a premature death by execution. As a result, California's system results in the infliction of cruel and unusual punishment in violation of the federal Eighth, and Fourteenth Amendments *before* the sentence of death is ever executed.

H. The Penal Code section 190.3 factors in aggravation have been applied in such a broad manner that they include virtually every feature of every murder, including those that contradict one another. The result is so arbitrary and contradictory that jurors have inadequate guidance in determining which convicted murderers should live and which should die, in violation of the federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, a fair trial by jury, and a reliable penalty determination. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363.)

I. The failure to provide for a presumption in favor of life results in a violation of the federal Fifth, Eighth, and Fourteenth Amendment rights to due process and reliable penalty determinations. In guilt determinations, it has long been recognized that the presumption of innocence is necessary to protect the accused and to safeguard against errors in close cases. (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) In a penalty trial, where the stakes are even greater, there must be some comparable protection.

J. Because the California Supreme Court has proven itself unable

to review death judgments without being unduly influenced by political concerns, appellant has been denied his federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection of the law, to impartial appellate Justices, to meaningful appellate review, and to reliable determinations in proceedings leading to imposition of a death judgment. (See (See *Parker v. Dugger* (1991) 498 U.S. 308, 321, regarding the need for meaningful appellate review. See *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280, regarding the need for reliable fact-finding; see *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (Fifth Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J. regarding the need for fundamental fairness and impartial decision-making.) In *People v. Kipp* (2001) 26 Cal.4th 1100, 1140-1141, this Court accepted the fact that between 1979 and 1986, the California Supreme Court reversed 95% of the death judgments it reviewed. In 1986, a wide-spread political campaign succeeded in unseating three sitting Justices, largely as a result of the high percentage of death penalty reversals. (See *People v. Cox* (1991) 53 Cal.3d 618, 696.) Immediately, appellate review of death judgments in California went to the opposite extreme. From July 1987 to December 1994, the California Supreme Court affirmed 84% of the death judgments it reviewed, and between 1990 and 1994, the affirmance rate rose even higher, to 94%.[142] (*Kipp, su-*

142. A similar high affirmance rate has continued since 1994. Be-
(Continued on next page.)

pra.) In *Kipp*, this Court simply concluded that any relationship between affirmance of death sentences and retention in office was irrelevant, because Kipp had failed "to demonstrate that a justice of this court must affirm every death sentence or any particular death sentence, much less defendant's own sentence." (*Kipp*, *supra,* 26 Cal.4th at p. 1141.) Furthermore, this Court believed that "[e]ven if such a conflict of interest existed, moreover, it would apply equally to all California judges and, under the common law rule of necessity, the justices of this court would not be disqualified. (Citation omitted.)" (*Id.*) *Kipp*, however, misses the point. If California's death penalty law is so pervaded by politics that most, or even just many instances of appellate review are affected, then meaningful appellate review is impermissibly compromised even if an occasional extreme case results in relief. The appropriate response is to recognize that the death penalty cannot be carried out in California in a manner consistent with the various federal constitutional rights set forth above, and that federal constitutional protections therefore preclude carrying out any death sentences in California. Indeed, if fair appellate review is impossible, this must be considered a structural defect that mandates reversal of the penalty without the need to show prejudice in a given case. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.)

K. The various violations of state and federal law that have been articulated in this argument, and in other arguments in this brief, also consti-

---

(Continued from last page.)

tween 2000 and mid-2009, the affirmance rate exceeded 92%

tute violations of international law. The United States Constitution, Article VI, section 1, clause 2 includes all treaties made by the United States as part of the Supreme Law of the Land, binding judges in every state. (See *Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) Articles 6 and 14 of the International Covenant on Civil and Political Rights require fair and public hearings in the determination of criminal charges, and preclude arbitrary determinations to invoke the sentence of death. Also, Articles 1, 2, and 6 of the American Declaration of the Rights and Duties of Man protect the rights to life, liberty, and security, guaranty equality before the law, and protect the right of due process of law. For all of the reasons set forth in various arguments above, these rights were violated by the various errors that occurred in John Travis' trial.

CONCLUSION

Numerous serious flaws permeated both the guilt and penalty phases of the present trial. Individually and/or collectively, they rendered both phases fundamentally unfair and unreliable. The guilt verdicts should be reversed. If for any reason they are not, then the penalty verdict should be reversed.

DATED: March ___, 2010

Respectfully submitted,

MARK E. CUTLER, CA Bar #53368
Attorney for John Raymond Travis

Post Office Box 172
Cool, CA 95614-0172
Telephone: (530) 885-7718

DECLARATION OF SERVICE BY MAIL

I, Ellen I. 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 March ___, 2010 I served the attached

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

Office of the Attorney General
455 Golden Gate Ave.
San Francisco, CA 94102-3664

Office of the District Attorney
70 W. Hedding St.
San Jose, CA 95110

John Raymond Travis
P.O. Box K-57201 / 4-EB-94
San Quentin, CA 94974

John Fresquez
Asst. State Public Defender
801 "K" Street, Suite 1100
Sacramento, CA 95814

James Leininger
Attorney-at-law
181 Devine St.
San Jose, CA 95110

Superior Court
Appeals Division
191 North First Street
San Jose, CA 95113

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

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

Executed this ___ day of March, 2010, at Cool, California.

_____
Ellen I. Cutler