In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DANIEL TODD SILVERIA AND JOHN RAYMOND TRAVIS,** **Defendants and Appellants.**	**CAPITAL CASE** Case No. S062417

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

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

An indictment filed in Santa Clara County Superior Court on May 8, 1992, charged appellants Daniel Todd Silveria ("Silveria") and John Raymond Travis ("Travis") as follows:

Count One: Murder (Pen. Code, § 187)[1] of James Madden ("Madden");

Count Two: Robbery (§§ 211, 212.5, subd. (b)) of Madden; and

Count Three: Second degree burglary (§§ 459, 460.2) of a shop, LeeWards.

The indictment further charged Silveria as follows:

Count Four: Second degree Burglary (§§ 459, 460.2) of a shop, Sportsmen's Supply;

Count Five: Robbery (§§ 211, 212.5, subd. (b)) of Ramsis Youssef;

Count Six: Robbery (§§ 211, 212.5, subd. (b)) of Ben Graber.

As to Count One (murder), the indictment further alleged as to Silveria and Travis that the murder had been committed while lying in wait (§ 190.2, subd. (a)(15)), during the commission of a burglary (§ 190.2, subd. (a)(17)), and during the commission of a robbery (§ 190.2, subd. (a)(17)), and that the murder involved the infliction of torture (§ 190.2, subd. (a)(18)). The indictment further alleged that Silveria had used two deadly weapons, a knife and a stun gun, and that Travis had used a deadly weapon, a knife, during commission of the murder (§ 12022, subd. (b)). (3 CT 458-463.)[2]

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[1] All further statutory references are to the Penal Code, unless otherwise noted.

[2] The indictment also charged co-defendants Christopher Spencer and Matthew Jennings with murder, robbery, and burglary.

On August 19, 1992, Silveria and Travis pleaded not guilty to the charges, and denied the allegations. (3 CT 564, 565.)

On April 6, 1995, the trial court granted appellants's motions to sever. The trial court ordered two trials with two co-defendants in each. Silveria and Travis were to be tried together, each by an individual jury. (9 CT 2257-2260.)

On May 2, 1995, Silveria withdrew his plea of not guilty to Count Four (burglary of Sportsmen's Supply) and entered a plea of guilty. (10 CT 2346.)

Jury selection in Silveria and Travis' trial began on May 8, 1995. (10 CT 2352.) The two juries were sworn on July 31, 1995. (10 CT 2539, 2541.) Additional jurors for Travis' jury were sworn on August 15, 1995. (11 CT 2601.)

On October 30, 1995, Silveria's jury found him guilty of all charges. The jury found the special circumstances that Silveria had used a knife and that the murder had been committed during a robbery and a burglary true. The jury found the special circumstance that the murder had been committed by lying in wait not true. The trial court declared a mistrial on the special circumstances that Silveria had used a stun gun and that the murder had involved torture. (11 CT 2803.)

The same day, Travis's jury found him guilty of all charges. The jury found the special circumstances that Travis had used a knife and that the murder had been committed during a robbery and a burglary true. The jury found the special circumstance that the murder had involved torture not true. (11 CT 2803.) The trial court declared a mistrial on the special circumstance that Travis had committed the murder while lying in wait. (12 CT 3074.)

The penalty phase trial began on November 8, 1995, and was submitted to Silveria's jury on February 9, 1996, and Travis's jury on

February 14, 1996. (13 CT 3107, 3374, 3384.) On February 15, 1996, the Silveria jury told the court that it was deadlocked. (14 CT 3442.) The court declared a mistrial the same day. (14 CT 3443.) On February 21, 1996, the Travis jury told the court that it was deadlocked. (14 CT 3568.) The court declared a mistrial the same day. (14 CT 3568.)

On May 7, 1996, the trial court granted the prosecution's motion to dismiss the lying-in-wait and torture allegations. (15 CT 3674-3675.)

On October 30, 1996, Silveria moved to sever his penalty retrial from Travis's. (16 CT 4005-4034.) On November 5, 1996, Travis moved to join Silveria's severance motion. (16 CT 4103-4108.) The trial court denied parts one, four, five, and seven of the motion on November 21, 1996. (17 CT 4345.) The trial court denied parts two, three, and six on December 10, 1996. (17 CT 4376.) On December 18, 1996, the trial court denied the motion in its entirety. (18 CT 4528.)

Jury selection in Silveria and Travis' penalty retrial began on December 2, 1996. (17 CT 4357.) The jurors were sworn on February 10, 1997. (18 CT 4646.)

On May 5, 1997, the jury returned verdicts of death for Silveria and Travis. (21 CT 5312, 5313; 22 CT 5457, 5458.)

This appeal follows automatically from the verdicts of death.

STATEMENT OF FACTS

I. GUILT PHASE[3]

A. The Stun Gun Robberies

Shortly before 1:00 a.m. on January 24, 1991, a "Parali/azer" brand stun gun, which uses nine-volt batteries, was stolen from Sportsmen's Supply Sporting Goods in San Jose. (95 RT 8973, 8975, 8989, 9020.)

At 2:20 a.m. on January 24, 1991, Ramsis Youssef was working as a cashier at Quik Stop Market in San Jose. Silveria, Rackley, and Jennings robbed him and stole money from the store. Rackley used a stun gun on Youssef's hand. A video recording of the robbery was played to the jury. (95 RT 9025, 9030, 9035, 9049-9050.)

Around 10:11 p.m. on January 24, 1991, a group of men stopped Ben Graber as he was leaving work at the Gavilan Bottle Shop. One of the men shocked Graber on his thigh with a stun gun. The men robbed Graber and took cash from the store. (96 RT 9084-9087, 9090, 9099.)

B. The Robberies Investigation

On January 25, 1991, Detective John Boyles was assigned to investigate the stun gun robberies. (96 RT 9134, 9135.) After playing the video of the Quik Stop robbery for other officers, one of them identified Rackley. (96 RT 9110, 9112, 9138.)

On January 28, 1991, Detective Boyles showed the video to a juvenile probation officer, who identified Jennings. (96 RT 9114, 9116, 9118.)

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[3] Because appellants's claims on appeal relate predominately to penalty phase issues, and to avoid needless repetition of the circumstances of the charged crimes, respondent provides only a brief description of the evidence presented at the guilt phase. For a fuller description, see pages 7-17, post.

Later that day, Detective Boyles spoke with an informant named Cynthia Tipton who wanted to talk about the robberies. (96 RT 9147, 9150-9152.) Tipton had lived with Silveria in Santa Clara, and she knew Spencer and Travis. She had seen Jennings with a stun gun. When she confronted Silveria about the stun gun robberies on January 28, he told her he had something planned for that night. (98 RT 9188-9192, 9199, 9202, 9212-9215.) Detective Boyles directed another officer to look for Silveria and Spencer, and that officer learned that the two had packed and were planning to leave the area. (105 RT 10163, 10173, 10176, 10183.)

C. The Murder

At 10:53 p.m. on January 28, 1991, an alarm went off at the LeeWards store in Santa Clara. The alarm company dispatcher spoke with someone at the store at 11:02 p.m. (101 RT 9763, 9768.)

The next morning, employees at LeeWards discovered Madden's body in the LeeWards office. (103 RT 9999.)

D. After The Murder

At 2:00 a.m. on January 29, 1991, Silveria and Spencer rented rooms at a motel in Redwood City with cash. (105 RT 10147, 10150, 10153, 10155.) Later that day, Spencer, Silveria, Travis, and Jennings each purchased cars, paying the down payments in cash.[4] Silveria purchased a Honda, and Travis purchased a Datsun. (105 RT 10188, 10195, 10196, 10221-10222, 10244-10246.)

That evening, Silveria took "a wad of cash" to the Oakridge Mall in San Jose and purchased new clothes and sandals. (105 RT 10257, 10260-10261, 10264.) Travis and Rackley were also at the mall, and purchased pants with cash. (105 RT 10250, 10254.)

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[4] Half of the $1,000 down payment for Spencer's car was cash; the other half came from a car he traded in. (105 RT 10199, 10201.)

E. The Murder Investigation

On the morning of January 29, 1991, officers responded to LeeWards. (104 RT 10033-10035.) Madden's body was tightly bound at the wrists, ankles, and mouth with two-inch silver duct tape. (104 RT 10111, 10112, 10113, 10044, 10066.) Madden also had stab wounds in his neck, chest, and throat. (104 RT 10112, 10067.) The body was lying on its side in a chair that had been knocked over. (104 RT 10066.) Several of the store's deposit bags were torn open, and the contents of the back safe were scattered on the floor. (104 RT 10117.)

Around 6:46 p.m. that evening, the police received a call from an informant claiming to know who was responsible for the stun gun robberies. The caller gave the names "Matt" and "Troy" and said the suspects were at the Oakridge Mall. (106 RT 10288.) A mall security guard found the suspects and followed them as they left the mall and got into a Honda and a Datsun. (106 RT 10296.) Silveria was driving the Honda, and Travis was driving the Datsun with Rackley as a passenger. (106 RT 10313.) The men were arrested, and police found marijuana, cash, the stun gun, and a roll of duct tape in the cars. (106 RT 10316-10318, 10320, 10323, 10418, 10424, 10435.) Jennings and Spencer were later arrested in a car matching a description the police had obtained. (110 RT 10699-10701.)

The police interviewed Silveria and Travis, and recordings of the interviews were played to the juries. (107 RT 10557, 10622, 10631, 10666). Later, the police recovered a knife from LeeWards that had Madden's blood on it. (110 RT 10790, 10794, 10831-10832.)

The coroner testified that Madden had died after sustaining a total of 32 cuts, slashes, and stab-like wounds to his neck and chest, as well as fractured ribs and four abrasions that indicated a stun gun had been used on his leg. (112 RT 11005, 11013, 11016, 11019; 113 RT 11138, 11197.) The

piece of duct tape from Madden's head matched the end of the roll of duct tape recovered by the police from the Honda driven by Silveria. (110 RT 10808.)

Several witnesses testified having seen the group of men with a stun gun and talking about committing robberies. (99 RT 9412-9414, 9544, 9550-9551; 100 RT 9655, 9657; 101 RT 9718.) Silveria and Travis had worked at LeeWards in late 1990, but signed voluntary resignation forms on November 15, 1990. (103 RT 9921-9922, 9965.)

Before the Silveria jury only, Tipton testified that Silveria had called her from jail and confessed his participation in the murder. (98 RT 9351, 9353-9357, 9371.) Gregg Orlando testified that Silveria told him "we killed somebody last night." (107 RT 10526-10527.)

II. PENALTY RETRIAL[5]

A. The Prosecution's Case

1. Circumstances of the crime

a. Silveria's prior testimony

Silveria's testimony from the first penalty trial was read to the jury.[6] (243 RT 28482-28484, 28496-28497:) He admitted having worked at LeeWards prior to robbing it on January 28, 1991, with Spencer, Travis, and Jennings. (9 ACT 2410.) He also admitted participating in the murder of Madden, for which he felt "horrible, real rotten." (9 ACT 2410.)

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[5] Silveria and Travis' first penalty trial ended in mistrials for each defendant. Their penalty retrials were joined and tried before one jury. (200 RT 22910-22912, 22962.) Respondent will address the appellants' first penalty trial as required to address their legal claims.

[6] Silveria refused to testify at the penalty retrial. Pursuant to certain evidentiary rulings by the trial court, only portions of his prior testimony were read into the record at the penalty retrial. (244 RT 28471-28474.)

Silveria stated that he consumed alcohol, marijuana, and methamphetamine during that period of his life. (9 ACT 2425.)

Silveria had known Travis since they were children, but they became close friends only when they were 15 or 16 years old. (9 ACT 2438.) While working at LeeWards, Silveria recommended Travis for an open position. (10 ACT 2660-2661; 11 ACT 2888.) By the time of the LeeWards robbery, he and Travis "were like family." (11 ACT 2750.) Prior to the crime at LeeWards, Silveria and his friends had "play[ed] around" with the stun gun, using it "jokingly" on each other. (9 ACT 2456.)

Silveria admitted spearheading the robbery of the Quik Stop. (10 ACT 2616, 2633.) He was the one who demanded the cash from Youssef. (10 ACT 2622.) Afterwards, he demanded the store's security videotape, threatened to come back and kill Youssef, and directed Rackley to use the stun gun on Youssef. (10 ACT 2623, 2627, 2628-2629.) After the robbery, he was the one who divided the stolen money. (10 ACT 2632-2633.)

The next day was the robbery of the Gavilan Bottle Shop. (10 ACT 2645.) Silveria, Spencer, and Rackley drove around "looking for somewhere to rob." (10 ACT 2645.) Silveria had the stun gun and used it on Graber. (10 ACT 2646, 2647.) Silveria then ordered Graber to turn off the store alarm and demanded the store's money. (10 ACT 2648.) Silveria took the money from the register and from Graber's wallet. (10 ACT 2651.)

After the robbery at the Gavilan Bottle Shop, Travis and Silveria began organizing a plan to rob LeeWards. (9 ACT 2460; 10 ACT 2470; 11 ACT 2929.) The plan was further developed with Spencer, Jennings, and Rackley at a house in Uvas Canyon. (10 ACT 2474.) Travis and Silveria continued to "[do] most of the talking." (10 ACT 2475, 2682.) Silveria suggested that they wait for Madden to come out the back of the store, then

approach him and take him back into the store to turn off the alarm. (10 ACT 2475; 12 ACT 1989.) Travis responded that Madden would need to be killed, since he could identify Silveria and Travis. (10 ACT 2477; 11 ACT 2911.) Silveria protested that a killing did not have to happen, and the two argued about it. (10 ACT 2478, 2712-2714.) Spencer volunteered that he would stab someone. (10 ACT 2718, 2742.) Silveria eventually gave up the argument, but did not express agreement. (10 ACT 2479, 2481-2482, 2737.) He did not believe that his friends were so violent as to murder someone (10 ACT 2483, 2484), and instructed Spencer to obtain masks for them to use during the robbery, although no masks were obtained (10 ACT 2488-2489, 2687, 2688). Silveria also saw the other men put some gasoline in a can to be used at LeeWards to burn the store with Madden inside. (10 ACT 2707; 11 ACT 2778.)

The night before the LeeWards robbery, the men went to the store intending to rob it, but saw that it was closed. (11 ACT 2752.) Silveria was disappointed. (11 ACT 2754.)

The next night, Silveria was not under the influence of drugs or alcohol. (10 ACT 2486, 2763; 11 ACT 2764.) Although he and Travis had no masks, Silveria "didn't care" if they were identified. (10 ACT 2490; 11 ACT 2798, 2801.) After arriving at the LeeWards, Silveria went inside to ask the employees who was working that night and when the store was going to close. (11 ACT 2786-2788.) He had also seen Madden's truck parked by the store. (11 ACT 2790.) Later, Silveria noticed that Spencer had a knife (10 ACT 2498, 2782) and directed him to slash Madden's tire so that Madden would not be able to go for help (10 ACT 2496, 2782). Silveria brought the stun gun, Travis had a hammer, Rackley had "some type of hand device that had spikes on it," and Jennings had a "nail puller." (10 ACT 2498; 11 ACT 2771; 12 ACT 2941, 2999.) Silveria told Rackley to leave the gasoline can outside. (10 ACT 2494; 11 ACT 2814-2815.)

Silveria confronted Madden when Madden was exiting the rear door of LeeWards. (10 ACT 2500.) He told Madden they were there for the money, and he had Madden disarm the store alarm from inside. (10 ACT 2501.) Silveria "assumed control" of the robbery, because he just wanted to get the money and get out. (11 ACT 2807-2808, 2816; 12 ACT 2990-2991.) Silveria then had Madden open the store safe and put the money in a duffel bag. (10 ACT 2504.) The men then restrained Madden with duct tape so he could not leave. (10 ACT 2505.) Silveria taped his ankles, and Travis taped his hands. (10 ACT 2507; 11 ACT 2821-2822.) The phone rang; the store's alarm company was calling. (10 ACT 2508.) Silveria took Madden's wallet out and found the alarm code card. Someone then un-taped Madden's mouth, and Silveria had Madden read the code to the person on the phone. Someone then re-taped Madden's mouth. (10 ACT 2509; 12 ACT 2949-2950.) Silveria saw money in Madden's wallet, but he left it there. (10 ACT 2510.)

Silveria then stunned Madden on the leg with the stun gun twice, trying to knock him unconscious. (10 ACT 2512; 11 ACT 2830.) Madden moved in his restraints, but maintained consciousness. (10 ACT 2515.) Silveria grabbed the money in the duffel bag and said, "let's go" several times. (10 ACT 2516.) Travis directed Spencer to kill Madden. (10 ACT 2517; 11 ACT 2840.) Spencer began stabbing Madden in the chest, then upon Travis's direction, stabbed Madden in the throat. (10 ACT 2520-2521.) After those four or five stabs, Spencer gave the knife to Travis. (10 ACT 2521, 2522.) Travis stabbed Madden once deeply in the neck, then in the chest about five times. (10 ACT 2523; 11 ACT 2847.) Travis offered Silveria the knife. While Silveria initially refused, he eventually accepted the knife and stabbed Madden once in the rib area, pushing the knife in to the hilt. (10 ACT 2525-2526; 11 ACT 2849.) He then returned the knife to Travis, who stabbed Madden several more times. (10 ACT 2527, 2529.)

Silveria checked for a pulse and said that Madden still had a faint pulse, after which the men left. (10 ACT 2530-2531.)

Travis had been wearing gloves during the robbery, and he threw them out the car window as they were driving. (10 ACT 2531.) The men drove to a hotel in Redwood City and got rooms. (10 ACT 2531.) The next day, Silveria went to Pacific Sunwear and bought a new outfit. (10 ACT 2533.) He also bought a Honda Civic, a fanny pack, and marijuana. (10 ACT 2534-2535.)

b. Other witnesses

Youssef, the Quik Stop clerk, was unavailable at the time of the penalty retrial, having left the country to reside in Egypt. (237 RT 27583-27587.) The prosecution read a transcript of Youssef's guilt phase testimony into the record. (238 RT 27603-27648.) Youssef's prior testimony described the robbery of the Quik Stop, including how Rackley had shocked him with a stun gun (238 RT 27625-27626) and Silveria had twice threatened to kill him (238 RT 27629, 27636). The prosecution played a videotape of the robbery to the jury. (238 RT 27670, 27675.)

Graber testified that he was robbed while working at the Gavilan Bottle Shop. The robbers "zapped" Graber with a stun gun (238 RT 27653) and took money from the cash register and Graber's wallet (238 RT 27654).

Detective Boyles testified that he received a call from a female informant named "Cynthia," who identified the suspects in the stun gun robberies. (238 RT 27699, 27704.) After Silveria and Travis were arrested, Detective Boyles interviewed each of them. (238 RT 27709, 27711.) Silveria admitted he had participated in the Quik Stop and Gavilan Bottle Shop robberies. (238 RT 27711.)

Officer Brian Hyland described his attempts to locate the stun gun robbery suspects. During the course of his investigation, he learned from

Silveria's brother Michael that Silveria was preparing to leave the area. (238 RT 27744.) Michael testified that in January 1991, Silveria had stated that he had "made a lot of money" and wanted Michael to leave the area with him. (239 RT 27796-27798.)

Cynthia Tipton testified that Silveria had lived with her before the stun gun robberies. (239 RT 27806.) On several occasions, Silveria and his friends—Jennings, Spencer, and Travis—would return home with things Tipton thought of as suspicious, including 50-pound sacks of sugar, a gallon of soy sauce, "a whole bunch" of lottery tickets, and a fish bowl full of change. (239 RT 27812.) When Tipton confronted Silveria about his involvement in the stun gun robberies, he responded, "They don't know who we are. They don't have descriptions. They don't know who they're dealing with." (239 RT 27831; 272 RT 32708-32709.)

On January 28, 1991, Silveria came to Tipton's house to take a shower. (272 RT 32699.) He told Tipton that he had contracted poison oak in Uvas Canyon. (272 RT 32700-32701.) He talked about "something big" that he and his friends were going to do that night. (272 RT 32702, 32706.) Tipton tried to talk Silveria out of going with them. (272 RT 32705.) Tipton later provided information to the police. (239 RT 27833.)

Tipton further testified that Silveria had called her from jail after his arrest in the instant case. (239 RT 27838.) During the call, Silveria admitted that he had waited for Madden to be alone before burglarizing LeeWards (239 RT 27846) and had personally stabbed Madden (239 RT 27839, 27842).

Wendy Lee testified that at 2:00 a.m. on January 29, 1991, a person came to the Best Western Sundial Motel in Redwood City where she was working and filled out a registration card with the name "Chris Spencer." (241 RT 28036.) Later, another person came and filled out a registration

card with the name "Dan T. Silveria." (241 RT 28041.) The men both paid cash for their rooms. (281 RT 28038, 28042.)

Susan Morrison worked at Mid Peninsula Leasing in Redwood City. (241 RT 28049.) On January 29, 1991, Spencer purchased a Triumph Spitfire, and Silveria purchased a Honda Civic. (241 RT 28054.) The men paid the down payments with cash. (241 RT 28057.)

Ebrahim Bahar worked at Rose Auto Sales in San Jose. (241 RT 28061.) On January 29, 1991, he sold a Datsun Z to Silveria and Travis. (241 RT 28062, 28065.) The men paid the down payment with cash. (241 RT 28066.)

Christopher Kelley worked at Macy's at Oakridge Mall. (241 RT 28075.) On January 29, 1991, Travis purchased a pair of jeans with cash, and he wore them out of the store. (241 RT 28076-28077, 28079.)

Deborah Nelson worked at Pacific Sunwear at Oakridge Mall in San Jose. (241 RT 28081.) At approximately 6:00 p.m. on January 29, 1991, Silveria came in and purchased a pair of pants, a shirt, and a pair of sandals. (241 RT 28082-28083.) Silveria had a "wad" of $100 bills and paid with one. (241 RT 28084.)

Cecilia Jenrick and Edna Chapman testified that they worked at LeeWards, and on the morning of January 29, 1991, they discovered Madden's body at the store and notified police. (242 RT 28138, 28142.)

Gayle Carlile, an assistant manager at LeeWards, testified that Silveria and Travis had worked at LeeWards (242 RT 28146), but soon failed to report for scheduled shifts. (242 RT 28147, 28150.) Upon request, they each signed voluntary resignation forms on November 15, 1991. (242 RT 28207, 28209.) On the morning of January 29, 1991, Carlile was with Jenrick and Chapman when they discovered Madden's body in the store. (242 RT 28179.) Madden had been restrained in a chair that had tipped over. (241 RT 28179.) Approximately $9,447.12 had been

taken from the store. (242 RT 28186.) Carlile was treated for post-traumatic stress for nearly ten months and was transferred to a different store location. (242 RT 28188, 28191, 28192.)

Officers Jack Soderholm and Cindy Bevan responded to LeeWards upon the call of a dead body. (242 RT 28223-28224, 28227.) After locating the body, Officer Soderholm found no vital signs and reported it as a murder victim. (242 RT 28225.)

Sergeant Ted Keech arrived at LeeWards after Officers Soderholm and Bevan. (242 RT 28240.) He observed Madden's body bound by duct tape and seated in a small chair that had been knocked on its side. (242 RT 28255.) Madden's ankles, head, and mouth were bound "extremely tight" with duct tape, and his wrists were bound behind his body and the back of the chair. (242 RT 28255, 28259.) There was a great deal of blood, and from deformities in Madden's shirt, it appeared he had suffered numerous stab wounds. (242 RT 28256-28259.) Sergeant Keech also observed empty cashier trays on top of the store safe and torn-open and empty plastic deposit bags. (242 RT 28261.) He arranged for Madden's body to be transported for autopsy in the condition and orientation that it had been found. (242 RT 28264-28265.)

Sergeant Keech began the investigation by considering past LeeWards employees, eventually focusing on Silveria and Travis. (242 RT 28267-28268.) Later, he learned that they had been arrested—with Rackley, Jennings, and Spencer—on other charges, and went to the police station to meet with them. (242 RT 28274.) Sergeant Keech also learned that the arresting officers had seized duct tape, a stun gun, and cash during the arrest. (242 RT 28275.)

Gregg Orlando knew Silveria "for a long time" prior to the murder. (243 RT 28344.) On January 29, 1991, Silveria, Travis, and Rackley came to Orlando's house. (243 RT 28345.) Orlando saw a "[s]ignificant

amount" of cash in Rackley's fanny pack. (243 RT 28347-28348.) Silveria also proudly showed Orlando an inch-thick fold of $20 bills. (243 RT 28349-28350, 28378.) When Orlando asked how Silveria had gotten the money, Silveria responded that "[w]e killed somebody last night." (243 RT 28351-28352.) Silveria told Orlando the group was headed to Oakridge to get "a wardrobe" and then were planning to go to Reno. (243 RT 28353.) When the men left, Silveria took the Honda while Travis and Rackley left in the Datsun. (243 RT 28347.)

Joanne Schlachter worked as a dispatcher for the San Jose Police Department. (243 RT 28392.) On January 29, 1991, a man called and said that the suspects in the stun gun robberies were at the Oakridge Mall. (243 RT 28392-28396.) Schlachter dispatched officers to locate them. (243 RT 28394.)

Officer Jean Sellman responded to Oakridge and observed two vehicles "zigzagging" through the parking lot. (243 RT 28406.) The lead car was a Datsun 280Z with two occupants, and the following vehicle was a Honda Civic, which had only its driver. (243 RT 28406-28407.) Officer Sellman stopped the cars and arrested Silveria, the driver of the Civic. (243 RT 28407.) Travis was the driver of the 280Z. (243 RT 28408-28409.) Officer Sellman searched the Civic, finding: a fanny pack containing $587 cash, marijuana, and Silveria's identification; a roll of duct tape; a crowbar; a nine-volt battery; and a stun gun. (243 RT 28410-28413, 28415-28416.)

Officer James Werkema searched the Datsun. (243 RT 28433.) He found: a fanny pack containing $33.40 cash; packages of Duracell batteries from LeeWards; and loose currency totaling $1,313. (243 RT 28435-28438.) Travis had a warrant out for his arrest. (243 RT 28433.)

Detective Brian Allen participated in the collection of Madden's wallet, the daily safe audit forms, the deposit bags, and the murder weapon from LeeWards. (247 RT 28614-28615.) The authorities were unable to

find fingerprints on the Honeywell card or knife. (247 RT 28628, 28636.) There was $14 in cash and credit cards in the wallet. (248 RT 28650, 28652.)

Criminalist Elizabeth Skinner testified as an expert "in the area of physical comparison and matches of physical evidence." (248 RT 28661, 28670.) She testified that an end of one piece of duct tape from Madden's head matched the end of the roll of duct tape recovered by police from Silveria's car. (248 RT 28675.)

Dr. Parviz Pakdaman, an assistant medical examiner with the Santa Clara County Coroner's Office, testified as an expert in pathology and determination of cause of death. (248 RT 28689, 28691, 28697.) Dr. Pakdaman conducted Madden's autopsy. (248 RT 28698.) Dr. Pakdaman removed duct tape from the body's wrists, ankles, and mouth. (248 RT 28705.) He observed a total of 32 cuts, slashes, and stab-like wounds: 5 on the neck, 16 on the left side of the chest, 8 on the right side of the chest, and 3 in the abdomen. (248 RT 28706.) One of the cuts to the neck penetrated the airway. (248 RT 28710.) Four of the wounds to the left chest penetrated the lungs, and four of the wounds to the right chest penetrated the lungs. (248 RT 28712-28713.) Six penetrated the heart. (248 RT 28713.) The deepest wound on the right side of the chest was 5.5 inches deep and penetrated into the abdomen to injure the liver. (248 RT 28714.) Dr. Pakdaman also found four closely-placed abrasions on the right thigh (248 RT 28707) and two fractured ribs (248 RT 28720). The presence of a blood-air froth in Madden's airway meant that the victim had been alive during the time of at least some of the injuries. (248 RT 28733.) Dr. Pakdaman opined that the cause of Madden's death was stab wounds of the neck, chest, and abdomen. (248 RT 28721.) He further stated that "[t]his is one of the most atrocious cases that I've ever seen." (248 RT 28737.)

Robert Stratbucker testified as an expert in internal medicine, cardiovascular physiology, physiology, neurophysiology, respiratory physiology, electrophysiology, engineering, the "use of and effect on a human body of a stun gun," and pathology. (249 RT 28881, 28897, 28900.) He described how stun guns cause electrical current to run between their two prongs. (249 RT 28912.) The stun gun in this case ran a current of about 50,000 volts. (249 RT 28915.) Stratbucker opined that Madden was stunned with the stun gun twice in the thigh, which is a sensitive area of the body. (249 RT 28923-28924; 250 RT 28996.) Based on Madden's wounds, Stratbucker opined that the stun gun was used on Madden while he was still alive. (249 RT 28940; 250 RT 29003.) A person who was bound in the same manner as Madden would have made "an absolutely superhuman kind of an effort" to avoid the pain through withdrawal reflex. (249 RT 28947.)

2. Victim Impact testimony

Shirley "Sissy" Madden ("Sissy") was Madden's widow. (250 RT 29073.) She and Madden married in 1979. (250 RT 29074.) Sissy gave birth to their only child, a daughter named Julie, in January 1984. (250 RT 29075.) Madden was a kind, loving husband, and "a wonderful father" to Julie. (250 RT 29075.) The Maddens had a "wonderful" family life. (250 RT 29086.)

On the evening of January 28, 1991, Sissy took Julie to LeeWards to visit Madden. (250 RT 29076.) Then Sissy took Julie home to get dinner. (250 RT 29078.) Sissy expected Madden to be home between 10:30 and 11:00 p.m. (250 RT 29078-27979.) Around 11:00 or 11:30 p.m., he had not returned, so Sissy called LeeWards. (250 RT 29079.) The phone rang without an answer, so Sissy assumed Madden was on his way home. (250 RT 29079.) By 5:30 a.m. the next morning, Madden had still not arrived. (250 RT 29080.) Concerned, Sissy called the highway patrol and police.

(250 RT 29080.) The police called back shortly thereafter and told Sissy that they had checked LeeWards and found the doors locked and Madden's car in the parking lot. (250 RT 29080.) Although Sissy was upset and crying, she took Julie to day care and went to her job in the biology department of the University of California. (250 RT 29081.)

Sissy was upset at work, and told her coworkers about her concerns. (250 RT 29081.) Soon after that, two of them took Sissy into an office and told her that Madden had been killed in a robbery. (250 RT 29082.) A detective came to the office and took Sissy and her coworkers to Sissy's house. (250 RT 29083.) Sissy let Julie complete her day at school. (250 RT 29083.) When Julie got home, Sissy told her that Madden had died. (250 RT 29084.) Julie screamed and cried. (250 RT 29084.)

Since the murder, Sissy has felt "lonely and empty." (250 RT 29085.) Every time Sissy was notified of a change in the trial proceedings, it felt "like a little bit of torture." (250 RT 29085.) Julie slept with Sissy for a year after Madden died, and had been in therapy for six years. (250 RT 29086.)

Susan Thuringer and Kay House worked with Sissy. (250 RT 29022, 29027-29028.) On the morning of January 29, 1991, Sissy came in late and was upset and crying because Madden had not returned home the previous night. (250 RT 29022, 29028.) Thuringer and her coworkers made some phone calls and learned that Madden had been murdered during a robbery. (250 RT 29024-29025, 29029-29030.) Thuringer told Sissy, and Sissy screamed. (250 RT 29024, 29031, 29082.) Thuringer and House went with Sissy and the police to Sissy's house to meet with Madden's daughter Julie. (250 RT 29024-29025, 29032.) Sissy told Julie about Madden's death, and Julie screamed and cried. (250 RT 29025, 29033.) Thuringer, House, and Sissy still work together, and Sissy is still not over Madden's death. (250

RT 29025, 29033.) Whenever Sissy is notified of a change in the trial proceedings, she cries. (250 RT 29025, 29034.)

Officer Lane went to the university on January 29, 1991, to notify Sissy of Madden's death. (250 RT 29036.) As he walked in, he heard loud screaming and crying. (250 RT 29037.) When he met Sissy, she was crying and hysterical. (250 RT 29037.) Officer Lane went with Sissy and her coworkers to Sissy's house. (250 RT 29037.)

Eric Lindstrand was Sissy's brother and Madden's brother-in-law. (250 RT 29041.) Lindstrand knew Madden as "a good friend" and "a great person," and was "thrilled" when he and Sissy married in June 1979. (250 RT 29041-29042.) Madden was a "devoted, loving" father to Julie. (250 RT 29043.) Since Madden's death, Sissy's life has been "a big, sad open wound." (250 RT 29044.) At one point, Sissy told Lindstrand that she was considering suicide. (250 RT 29045.) Julie, who was seven years old when her father was murdered, became afraid to go anywhere without her mother in sight. (250 RT 29045.) At the time of the penalty retrial, Julie was still in counseling and was having difficulty at school. (250 RT 29046.) Lindstrand himself missed his friend, and going through the murder and aftermath was "hell." (250 RT 29047-29048.)

James Sykes was married to Madden's sister Judith. (250 RT 29059.) On January 29, 1991, he received a call at work and was told that Madden had died. (250 RT 29060.) He left and went to Sissy's house. (250 RT 29060.) Everyone was crying. (250 RT 29060.) Julie was in school, and Mr. Sykes went to pick her up. (250 RT 29061.) When they got back, Sissy took Julie upstairs to tell her what had happened. (250 RT 29061.) Mr. Sykes heard Julie make "a very excruciating painful waning scream." (250 RT 29061.) For a long time afterwards, Julie "was always looking over her shoulder" as if "she was afraid that somebody was going to be out there." (250 RT 29063.)

Judith Sykes was Madden's older sister. (250 RT 29064, 29068.) They got along very well and stayed close even after they each married. (250 RT 29065.) Madden and Sissy had "one of the best marriages [Ms. Sykes had] seen." (250 RT 29065.) On January 29, 1991, Sissy called and told Ms. Sykes that Madden had died. (250 RT 29067.) Ms. Sykes went to tell Joan Madden ("Joan"), who was Ms. Sykes's and Madden's mother. (250 RT 29067.) When Ms. Sykes told Joan, Joan cried. (250 RT 29068.) Since Madden's death, Ms. Sykes felt like a part of her is missing. (250 RT 29068.) She noticed that Sissy appeared depressed and nervous since Madden's death. (250 RT 29069.) Ms. Sykes has also noticed that Joan's mother—Ms. Sykes's and Madden's grandmother—has been frightened since Madden's murder. (250 RT 29071-29072.)

Madden's mother Joan testified that her husband died of a heart attack shortly before Julie was born. (250 RT 29094.) Madden had been present and tried mouth-to-mouth resuscitation while Sissy called the ambulance. (250 RT 29094.) The death had upset Sissy, who "went into postpartum depression" after Julie was born. (250 RT 29095.) Madden "took care of everything" for Sissy and Julie, and he "was a wonderful father." (250 RT 29095.) After Madden died, Sissy gained 30 pounds of weight, was depressed, and had stress-aggravated psoriasis. (250 RT 29099.) Julie became "absolutely hysterical" if Sissy left her sight, even just to go out the front door to pick up a newspaper. (250 RT 29099.) Joan testified that the pain of Madden's death has not gone away. (250 RT 29098.)

B. Silveria's Case

1. Silveria's family

Cynthia Green was Silveria's cousin. (252 RT 29142.) In 1970 and 1971, when Green was 13 to 14 years old, she spent the summer with Silveria's family in Washington state. (252 RT 29146, 29151-29152.) She

took care of Silveria, his sister Lenae, and his brother Sonny, with little to no help from Silveria's parents. (252 RT 29150, 29154.) She never saw Silveria's mother show any motherly affection to any of the children. (252 RT 29155.) On the car trip up to Washington in 1970, Silveria's father "pushed around," "smacked," and kicked the children for being noisy during the car trip. (252 RT 29147.) Green once observed Silveria's father "doing drugs." (252 RT 29151.) On another occasion, Silveria's father struck Green in the shoulder because she had left a shoe on the floor. (252 RT 29156-29157.) He also kicked Green in the backside. (252 RT 29157-29158.)

Green testified that Silveria's father was also violent with the other members of his family. He would strike Sonny in the arm, the backside, and the back of the head. (252 RT 29159.) He also hit Sonny with a belt on more than one occasion. (252 RT 29159.) In the summer of 1971, when Silveria was about 18 months old, his father would sometimes strike Silveria's crib "real hard" if Silveria was crying in it. (252 RT 29160.) Green saw Silveria's father "beating on" his wife several times. (252 RT 29162, 29164.) Green never saw Silveria's father show any affection to his wife, Silveria, or Sonny. (252 RT 29161, 29165.) In fact, he was verbally abusive to them. (252 RT 29165.) In contrast, Green testified that Silveria's father treated Lenae "like an [a]ngel." (252 RT 29165, 29177.)

Green left San Jose for a number of years, but returned in 1976. (252 RT 29166, 29168.) Silveria's mother would sometimes send one of the kids to Green's home "asking for food, or for money to buy food to help feed the kids." (252 RT 29169, 29171-29172.) Silveria's father was no longer living with the family. (252 RT 29169.) When Green would visit Silveria's home, she found it "was a pigsty," with clothes all over the floor and the sink full of dishes. (252 RT 29170.) Around 1976 or 1977, Green "went off and did [her] own thing in life," and did not hear about Silveria's

arrest for murder until a year and a half before the time of her testimony. (252 RT 29174.)

Geraldine Macias was Green's younger sister and Silveria's cousin. (252 RT 29181.) When Macias was 12 years old, the Silveria family lived with hers for a few months. (252 RT 29182-29183.) Macias never saw Silveria's mother help out with the cleaning or child care. (252 RT 29185.) Instead, Silveria's mother would just smoke and drink "a lot." (252 RT 29185.) Around 1974, after the Silveria family had moved into their own place, Macias learned that Silveria's father had left his family. (252 RT 29186.) When Macias would visit their apartment, she saw that it was "dirty," with "[g]arbage all over." (252 RT 29186.) Silveria and his siblings were dirty and were wearing dirty clothes. (252 RT 29187.)

Macias testified that when Silveria was six years old, he seemed to be a happy child. (252 RT 29189-29190.) When Silveria was still "a kid," Macias saw his father hit him. (252 RT 29198.) In 1988 or 1989, Silveria came to live with Macias and her new family for a year. (252 RT 29191.) Silveria did chores and enjoyed taking care of Macias's young children. (252 RT 29192.) Macias noticed that when Silveria went to visit friends in his mother's neighborhood, he would return with a bad attitude, and even "[h]is language would be worse." (252 RT 29194-29195.)

Macias testified that Silveria went to live with his father after leaving Macias's house. (252 RT 29199.) She saw Silveria and his father drinking alcohol and doing "[c]rank and marijuana" together. (252 RT 29203, 29204.) Silveria's father was still verbally and physically abusive to Silveria. (252 RT 29204, 29205.) On one occasion, Silveria was fired from his job at the 7-Eleven for stealing, and his father broke Silveria's nose in anger. (252 RT 29212.) Silveria moved out after that incident. (252 RT 29218.)

Lenae Crouse ("Lenae") was Silveria's older sister. (252 RT 29239.) Their father would treat Lenae differently than Silveria and his brothers. (252 RT 29241.) He would bring Lenae gifts when he returned from trips, and never mistreated her. (252 RT 29241.) In contrast, he would frequently hit, spank, and push Silveria and his brothers. (252 RT 29243.) On one occasion, Lenae saw her father throw a coffee mug at Sonny, hitting him just above the eye. (252 RT 29247-29248.) Lenae never saw Silveria's father show Silveria, Sonny, or their mother any affection. (252 RT 29252.)

Around 1973, when Lenae was six or seven years old, her mother and father split up, and her father left the family. (252 RT 29240, 29297, 29329.) Her mother went on welfare and received food stamps, but there was never enough food for the family after the first few days of the month. (252 RT 29254.) Silveria and Sonny would sometimes steal food from stores to feed the family, and their mother would sometimes have to pay people who confronted her about the thefts. (252 RT 29255, 29304.) The boys were "totally beyond [their] mother's control," often leaving the house at night against their mother's wishes. (252 RT 29303, 29312.)

When Sonny was eight years old and Silveria was six years old, the boys were taken into foster care. (252 RT 29252.) After the boys left, only Lenae, her mother, and her younger brother Michael remained in the home. (252 RT 29256.) The children still did not have enough to eat, even with Michael stealing food. (252 RT 29257.) Silveria and Sonny would sometimes visit from their foster care with the Hebert family. (252 RT 29264.) They expressed a desire to stay in the apartment with their mother, even though it was dirty and there was not enough food. (252 RT 29264.) On one occasion, Lenae saw that Silveria was sad and scared at the thought of returning to the Heberts. (252 RT 29265.) When Lenae asked him why he was scared, he told her that the Hebert's son had stabbed him in the arm

with a pencil three times[7] and would "make him do things." (252 RT 29271, 29276.) Lenae told her mother to notify the social worker, and Silveria told her what had happened. (252 RT 29277-29278.) Silveria and Sonny returned to live with their mother, Lenae, and Michael. (252 RT 29313.) At first they cooperated with their mother, but soon went back to doing "their own things." (252 RT 29313-29314.)

In 1981, when Lenae was 14 years old, she moved in with some welcoming neighbors, the Guimmonds. (252 RT 29258, 29278, 29314.) When the Guimmonds left the apartment complex two years later, they took Lenae with them. (252 RT 29258.) She saw Silveria again in late 1990, when she and Silveria both worked the Christmas season at a Toys R Us. (252 RT 29281.) At first, Silveria looked "pretty good," but over time he began looking "kind of dirty," and Lenae assumed he was doing drugs. (252 RT 29281-29282, 29324.)

Shirley Cotta was Silveria's aunt. (255 RT 29806.) Before testifying, she had not seen Silveria since he was two years old. (255 RT 29806, 29810.) Around that time, Cotta's husband was a lawyer who worked on divorces, and Cotta received a request to help Silveria's mother divorce her husband. (255 RT 29811, 29819.) The divorce petition indicated the date of separation as April 10, 1974, and the divorce became final on January 24, 1975. (255 RT 29812, 29815.) In October 1981, Cotta received a request to "see [Silveria's mother] and think about taking [Silveria and Sonny]." (255 RT 29813, 29815.) Cotta went to their apartment, and found bags of garbage on the floor and the sink overflowing with dishes, food, and debris. (255 RT 29814.)

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[7] Santa Clara County Sheriff's Deputy Al Holborn testified that on March 10, 1997, he observed three faded blue or green dots on Silveria's left arm, just below the shoulder. (252 RT 29334.)

2. Silveria's foster families

Linda Cortez was a social worker with the Santa Clara County Department of Social Services from 1967 to 1982. (254 RT 29572.) In March 1976, she was supervising the four Silveria children: Silveria, Sonny, Lenae, and Michael. (254 RT 29573; 255 RT 29777.) Silveria and Sonny, dependents of the court at their mother's request, were placed in foster homes. (254 RT 29577; 255 RT 29785.) Silveria had a severe myopic condition in one eye, and he had special glasses designed to address that condition. (254 RT 29605.) Silveria eventually had surgery on the eye in 1978 or 1979. (254 RT 29607.)

In April 1976, Sonny was placed with the Hebert family, and Silveria was placed with the Garcia family. (254 RT 29575.) Around March 1977, Silveria was placed with Sonny in the Hebert home. (254 RT 29576, 29594.) Silveria was seven years old at the time. (254 RT 29576.) Although the boys frequently expressed their desire to return to their mother, Cortez felt that their mother was not ready for them to return home. (254 RT 29597, 29599-29600, 29616, 29643.) While Cortez felt the Hebert home was not "a particularly nurturing home" for Silveria and Sonny (254 RT 29619, 29647), she was reluctant to move them to a different foster home because it would have meant splitting them up (254 RT 29625). She was still trying to get them home with their mother. (254 RT 29628, 29647.) Nevertheless, even by October 1980, Cortez still felt that the boys should remain in foster care. (254 RT 29641, 29646.) The boys were disappointed when Cortez told them of her decision, and Cortez believed that "it would be natural for them to question whether or not [their mother] loved them and whether or not she really cared about bringing them home." (254 RT 29644.)

In early 1981, Cortez gave Silveria's mother an ultimatum: "actively get involved in returning the kids home" or Cortez would have to plan on

some type of long-term placement for them elsewhere. (254 RT 29653; 255 RT 29747.) Silveria's mother complied, but in April 1981 notified Cortez that Silveria had told her that Dean had molested him. (254 RT 29657.) Cortez spoke with Silveria, who said that the Heberts' son Dean had forced him into acts of fellatio and sodomy. (254 RT 29658.) After investigating, Cortez decided not to return the boys to the Hebert home, and to let them live with their mother. (254 RT 29662; 255 RT 29735.)

By October or November 1981, the boys began getting in trouble. (255 RT 29740.) Sonny was "involved" in the vandalism of a nearby building, and Silveria began stealing food items and alcohol from local stores. (255 RT 29741, 29770-29771.) Nevertheless, Cortez found Silveria to be "a very likable child" who "responded to consistent limits" and was "[v]ery eager to please." (255 RT 29746.) Cortez had no contact with Silveria after 1981 when he was 12 years old. (255 RT 29773.)

a. The Garcias

Between March 1976 and March 1977, Francine Herevia lived with her parents, Marcus and Lorain Garcia, in San Jose. (252 RT 29222.) During that period, her parents took in Silveria as a foster child. (252 RT 29222.) Silveria was six years old at the time. (252 RT 29222.) Silveria got along well with the family, including Herevia's young children. (252 RT 29224.) Herevia treated him like one of her own children, and Silveria responded positively. (252 RT 29226.) Silveria had a lazy eye, and Herevia helped make sure he made his medical appointments to treat it. (252 RT 29227.)

Later, Herevia's family had to leave the San Jose area for a new home about three hours away. (252 RT 29228.) They discussed taking Silveria with them, but decided that he should remain in the area to be close to his family. (252 RT 29228.) Herevia had no further knowledge of Silveria's life. (252 RT 29236.)

b. The Heberts

Elizabeth Munoz lived next to the Hebert family in San Jose. (253 RT 29342-29343.) Evelyn and Mark Hebert ("Evelyn" and "Mark", respectively) lived there with their two children, Dean and Mark. (253 RT 29345.) The Heberts also took in foster children. (253 RT 29345.) Around 1975, the Heberts took in Silveria and Sonny. (253 RT 29345, 29357.) Silveria and Sonny would play with Munoz's two children. (253 RT 29346.) Silveria was "a very sweet and loving child." (253 RT 29348.) He and Sonny would sometimes do chores for Munoz and her husband. (253 RT 29348.) Munoz never saw the Heberts show affection to Sonny or Silveria. (253 RT 29355, 29358.) In Munoz's opinion, the Heberts took in foster children "for monetary gain." (253 RT 29356.) After Silveria left the Hebert home, Munoz had no contact with him until being contacted about the murder trial. (253 RT 29365.)

Justin Munoz ("Justin") was Munoz's son. (253 RT 29373.) As a child, he played with Silveria and Sonny when they lived with the Heberts. (253 RT 29373.) Silveria was "a normal kid." (253 RT 29374.) Justin noticed that Evelyn punished Silveria and Sonny more harshly than her natural children. (253 RT 29375.) Justin never saw her show the boys any affection, although he never saw her show any affection to her natural children either. (253 RT 29375-29376.) On one occasion, Justin saw Dean Hebert pin Silveria down, strip off all of Silveria's clothes, take Silveria's glasses, and make Silveria walk around the back yard. (253 RT 29379-29380.) Justin did not see Silveria again after elementary school. (253 RT 29385.)

Dean Hebert ("Dean") was born on October 4, 1966. (253 RT 29418, 29466.) He and his older brother Mark lived with their parents at 414 Los Pinos Way. (253 RT 29418.) Evelyn would sometimes discipline Dean by spanking him with a belt or shoe, but most of the time was "a warm and

nurturing" mother. (253 RT 29423-29425.) When Dean was six or seven years old, the Heberts fostered a child named Henry Goodman. (253 RT 29438.) Goodman, who was two to four years older than Dean, molested Dean for almost three or four years. (253 RT 29439-29440.) The molestations included forced oral and anal sex. (253 RT 29440.) By the time Dean was a teenager, he had begun consuming alcohol and drugs, and he "had a bad attitude about everything." (253 RT 29443, 29447.)

After Silveria arrived at the home, Dean would sometimes blame him for things that Dean had done in order to avoid responsibility. (253 RT 29430.) Silveria never protested. (253 RT 29430-29431, 29437.) On one occasion, Dean took Silveria's clothes and made him run around the yard. (253 RT 29435.) On another occasion, Dean took Silveria's glasses and smashed them. (253 RT 29436.) Eventually, Dean began beating Silveria up, punching and kicking him. (253 RT 29448, 29451; 254 RT 29521.) Silveria never fought back (253 RT 29451), and Sonny never intervened (253 RT 29459). On one occasion, Dean jabbed Silveria in the shoulder with a pencil. (253 RT 29454.) Around the beginning of 1981, Dean once forced Silveria to engage in oral and anal sex. (253 RT 29460, 29484-29485; 254 RT 29510-29511, 29516.)

After Silveria's murder trial began, Dean was interviewed by the defense and denied sexually abusing Silveria. (253 RT 29467-29468.) However, after Silveria was convicted of murder, the defense team stressed how important Dean's testimony would be in determining the penalty, and Dean admitted the abuse. (253 RT 29483.) Dean had no specific memory of stabbing Silveria with a pencil until the defense questioned him about it. (253 RT 29487.)

Robert Ector was a teacher at Bertha Taylor Elementary School in the 1978-1979 school year. (253 RT 29387.) Silveria was in Ector's fourth-grade class that year, and Sonny had been Ector's student the year before.

(253 RT 29388.) Silveria was "a bit below average" student, but Ector felt that was because he was not receiving the parental support that children need for academic success. (253 RT 29390, 29393.) Silveria often volunteered to help Ector at the school, which made Ector believe that Silveria wanted to spend as much time at the school as possible. (253 RT 29390, 29391.) Ector found Silveria to be "a very friendly boy" who "loved to play around and have fun." (253 RT 29394-29395.) In contrast, Ector found Sonny to be "one of the angriest kids, meanest kids [he had] ever run across." (253 RT 29396.) Ector often saw Sonny bully Silveria. (253 RT 29396.) Ector had no contact with Silveria after Silveria completed the fifth grade. (253 RT 29412-29413.)

c. The Georges

Deborah Thomas was married to Michael George from 1978 to 1990. (254 RT 29525.) From 1978 to 1987, the couple lived at 655 Minnesota Avenue in Willow Glen. (254 RT 29525-29526.) In April 1982, George brought Silveria home to live with them and their three sons. (254 RT 29527-29528.) George, a police officer, frequently would bring home boys for dinner or the weekend because "[h]e felt sorry for kids." (254 RT 29529.) Thomas was not happy to have Silveria there, especially because George spent most of his free time with Silveria instead of his family. (254 RT 29539, 29543.) However, she asked Silveria to help out around the house, and Silveria did so. (254 RT 29539, 29550.) While living with the Georges, Silveria once stole a pair of tennis shoes from a child at his school. (254 RT 29562.) When Thomas learned that Silveria had stolen her son's Christmas money, she told George that Silveria had to leave. (254 RT 29539-29540.) Thomas and George divorced in 1990. (254 RT 29551.)

Daniel DeSantis was the principal investigator for Silveria's defense. (261 RT 30934.) In April 1996, DeSantis learned that George had been

arrested in Lake County. (261 RT 30935.) DeSantis learned that George had pleaded guilty to eleven counts of child molestation. (261 RT 30936.) The parties stipulated that the victim in that case was not Silveria. (261 RT 30940.) DeSantis went to meet George on two occasions. (261 RT 30941-30943.) On the first occasion, Silveria's attorney confronted George by telling him, "I know you molested Daniel." (261 RT 30984.) George then admitted engaging in about 10 acts of mutual masturbation and oral copulation with Silveria. (261 RT 30947-30950.) George also admitted giving Silveria alcohol prior to the molestations. (261 RT 30951.) On the second visit, George indicated that he was not willing to testify in Silveria's case. (261 RT 30955.)

d. The Gambles

John Gamble was Silveria's foster brother. (255 RT 29821, 29822.) Gamble met Silveria when he was 11 or 12 years old and living in Willow Glen. (255 RT 29822, 29876.) Silveria was living with the Georges. (255 RT 29824.) Gamble and Silveria became friends. (255 RT 29825.) When Gamble would visit Silveria at the Georges, he saw how Thomas treated Silveria "like a slave" doing chores. (255 RT 29827-29828, 29833, 29877; 256 RT 29911.) At one point, Gamble learned that Silveria was in juvenile hall and told his mother, who was a sheriff. (255 RT 29834-29835.) His mother left the house and came back with Silveria. (255 RT 29836.) From that point on, Silveria lived with Gamble and his family. (255 RT 29836.) Gamble's family treated Silveria like a son and brother. (255 RT 29882.)

When Gamble and Silveria were about 15 years old, they began drinking alcohol. (255 RT 29837, 29865.) After Gamble had a painful breakup with a girlfriend, he was contemplating suicide. (255 RT 29841-29842.) Silveria found him and consoled him. (255 RT 29842-29844, 29903.) When Silveria would visit his mother, he would return and not behave as well. (255 RT 29847.) On one occasion, Gamble saw Silveria

roll on the ground through the Oakridge Mall on a dare so that a friend would loan him money for food. (255 RT 29848.) Silveria was "generally a peaceful person." (255 RT 29861.) However, when he drank alcohol, he became "[a]ngry, violent." (255 RT 29866.) Gamble once found a dead squirrel that Silveria used as a puppet. (255 RT 29869-29870.)

Gamble's parents eventually separated. His father moved out of the house. When Gamble was 18 years old, his mother moved with his sister and Silveria to Sacramento. Gamble moved in with his father. (255 RT 29872-29873, 29893, 29895.) After Silveria was arrested for murder, Gamble visited him about once a year. (255 RT 29899-29900.) For at least the first two visits, Silveria denied killing anyone. (255 RT 29900.)

Patricia Gamble ("Patricia") was Silveria's foster mother. (256 RT 30061.) Patricia's son John introduced her to Silveria as his friend. (256 RT 30061-30062.) Patricia saw that Silveria was "shabby," with uncut hair and ill-fitting clothes. (256 RT 30063.) Otherwise, he was "very typical." (256 RT 30065.) One day, Gamble came home and said that the George family had given Silveria up and that Silveria was at juvenile hall. (256 RT 30069-30070.) Patricia and her family decided to apply to become Silveria's foster family. (256 RT 30070, 30071; 257 RT 30207.) Silveria began living with Patricia, her husband John, her son Gamble, and her daughter Lisa, in May 1983, and he lived with Patricia "on and off" until 1990. (256 RT 30061, 30064.)

Patricia made a point of taking Silveria to his mother's house to introduce herself and to invite Silveria's mother to visit. (256 RT 30078.) Patricia would also occasionally talk to Silveria's mother at her work and tell her that Silveria wanted to visit. (256 RT 30083.) Silveria's mother appeared "very indifferent," and there were only two phone contacts between mother and son while Silveria lived with Patricia. (256 RT 30079-30080, 30082-30083.)

Patricia testified that Silveria "was more of a help to [her] than [her] other two children" around the house. (256 RT 30073, 30075.) On one occasion, he waxed the entire kitchen floor without being asked. (256 RT 30074.) While he was generally well behaved, he was also hyperactive. (256 RT 30087.) Patricia put Silveria in counseling, but, after six to eight visits, Silveria declared he did not need it, so Patricia pulled him out. (256 RT 30091-30092.)

Patricia and her husband separated in March 1985.[8] (256 RT 30095.) In 1985, Patricia began noticing that Silveria was drinking alcohol. (256 RT 30097, 30100.) Because she and her ex-husband had a good relationship even after the divorce, her ex-husband offered to take Silveria to live with him. (257 RT 30147-30148.) Silveria agreed, telling Patricia "It's not that I don't love you, mom. I just need a dad." (257 RT 30148.) However, Patricia's ex-husband was not capable of taking Silveria at that time, so Silveria remained with Patricia. (257 RT 30148.) Eventually, Patricia had to take Silveria back to Juvenile Hall because of his drinking problem. (257 RT 30148.) Silveria made no effort to argue or resist, which surprised Patricia. (257 RT 30149, 30198.) When Patricia had to send Silveria back on another occasion, he was again "completely passive and agreeable." (257 RT 30149.) Patricia asked the authorities to test Silveria for "potential for violence," since she was concerned about the destructive behavior she had recently noticed from Silveria. (257 RT 30150.) A probation officer conducted a psychological test of Silveria and told Patricia the results. (257 RT 30155.) Patricia decided to bring Silveria back to her home, but to get him counseling. (257 RT 30157.) The counseling continued until Silveria violated his probation by drinking and was sent away to a juvenile detention ranch. (257 RT 30158-30159.) Patricia visited Silveria every

[8] They successfully reconciled in 1992. (256 RT 30096.)

weekend, and was eventually allowed to take him home over the weekends. (257 RT 30159-30160.) Although she invited Silveria's mother to visit with her, Silveria's mother never went. (257 RT 30161-30162.)

The next time Silveria drank and got into trouble, he was sent to a group home. (257 RT 30162.) In February 1988, Patricia moved to Sacramento. (257 RT 30163.) In June, Silveria moved from San Jose to live with Patricia. (257 RT 30163-30164.) Silveria stayed for only two months before leaving for North Carolina with Travis. (257 RT 30164.) In 1989, Silveria returned to Sacramento. (257 RT 30170.) He began working at a Sizzler Restaurant, where he befriended Thomas Root. (257 RT 30170.) After meeting Root, Patricia noticed that Silveria's appearance changed for the worse. (257 RT 30170-30171.) Silveria soon moved out to live with Root in "[a] drug house." (257 RT 30172-30173.) Patricia concluded that Silveria was using drugs, and that he had lied to her when she confronted him about it. (257 RT 30172, 30243.)

Patricia sent Silveria back to San Jose, where he was supposed to live with his mother. (257 RT 30173, 30238.) In August 1990, Patricia received a call from an Army recruiter asking for Silveria's diploma, because Silveria was trying to enlist. (257 RT 30173-30174.) Root, who had Silveria's diploma, made Patricia pay $50 for it. (257 RT 30174.)

In October 1991, Patricia returned to Santa Clara County. (257 RT 30174.) She visited Silveria in jail and sent him money. (257 RT 30174-30175, 30178, 30179.) Patricia soon noticed that Silveria had taken an interest in religion and the Bible. (257 RT 30183.) Their discussions demonstrated to Patricia that Silveria was continuing his studying as time progressed. (257 RT 30185.) A few months after Silveria was incarcerated, he told Patricia that "he knows how it feels to grow up without a father and that it hurt him to know that Julie now would not have a father to grow up with . . . ." (257 RT 30194.) Silveria also complained

about the conditions in the jail and told Patricia that he felt sorry for himself for being in jail. (257 RT 30254-30255.) On one occasion, Silveria admitted stabbing Madden. (257 RT 30251.)

Around November 1993, Patricia stopped visiting Silveria because it was too painful for her to see him incarcerated. (257 RT 30179-30180.) She also was angry that "as a new Christian he was very zealous and was trying to convert" her from her faith as a Jehovah's Witness. (257 RT 30181.)

3. Other witnesses

Julie Morrella met Silveria when they were both in the eighth grade, and the two became friends. (256 RT 29921-29922.) In the ninth grade, she and Silveria dated, even though they went to different high schools. (256 RT 29923.) In April 1985, about five months later, they split up. (256 RT 29924.) However, they got back together that summer. (256 RT 29925.) Morrella left two months later to live with her mother in Manteca for a short while. (256 RT 29925.) When she returned to San Jose, she learned that her stepmother had found some love letters from Silveria in her room. (256 RT 29926, 30013.) Her parents told her to stop seeing Silveria, and Morrella did so even though she loved him. (256 RT 29927, 29930.) Silveria was upset over the split. (256 RT 29929-29930.)

Morrella felt that Silveria lacked affection by the optimistic way he talked about his mother. (256 RT 29934.) In her words, Silveria "would just hope that there would be a point in time that he would be able to be with [his mother]." (256 RT 29934.) Morrella also noticed how much affection Silveria needed from her. (256 RT 29935-29936.) Silveria "was always really loving and caring" and never mistreated Morrella. (256 RT 29936.)

Later, when Morrella was 16 or 17 years old, she ran into Silveria at the Oakridge Mall. (256 RT 29938-29939, 29941.) The two talked and

said they would call each other. (256 RT 29939.) A few years later, in late 1990, Morrella saw Silveria again at the Oakridge Mall. (256 RT 29941.) She "couldn't believe" how much Silveria's appearance had changed; "[h]e looked rundown. He looked terrible. He was a mess." (256 RT 29941.) She did not talk to him. (256 RT 29942-29943.)

Morrella began embracing Christianity and the Bible when she was 19 years old. (256 RT 29962.) When she learned that Silveria was in jail, she visited him with the intention of getting him to embrace Christianity. (256 RT 30027, 30030, 30054.) She began visiting him in jail in 1991. (256 RT 29943, 29952.) She visited him once or twice a week. (256 RT 29953, 29954-29955.) At first, Silveria "didn't look good at all" and "was real cold." (256 RT 29955-29957, 30021.) However, over time, Morrella noticed that his appearance gradually improved. (256 RT 29958-29959.) He also became more open and willing to talk to her. (256 RT 29961.) Eventually, she began discussing Christianity with Silveria. (256 RT 29964.) Silveria began bringing the Bible and other Christian books to his meetings with Morrella, and the two would discuss them. (256 RT 29966, 29967.) Morrella told Silveria how happy she was that he was reading the Bible. (256 RT 30039, 30051.) On more than one occasion, Silveria said that he had been praying for Madden's family and "felt terrible." (256 RT 29986, 29987.) He also said that he "felt very bad about the fact that Julie was going to grow up without a father." (256 RT 30000, 30043-30044.) However, Silveria never told Morrella that he had directed the Quik Stop robbery, stabbed Madden, or used a stun gun on Madden. (256 RT 30046.) After over a year, Morrella stopped visiting Silveria because she was developing feelings for him and was already in another relationship. (256 RT 29970-29972.)

About a year later, Morrella started visiting Silveria in jail again. (256 RT 29990-29991, 30000-30001.) Morrella noticed that Silveria

appeared to know much more about the Bible than he had known the last time she visited. (256 RT 30001, 30004.) Silveria repeated that he felt badly about Madden (256 RT 30004), and Morrella believed him to be sincere (256 RT 30009).

Morrella received several letters from Silveria while he was in jail. (256 RT 29975-29976.) The envelopes they came in were decorated and sometimes contained drawings. (256 RT 29975-29977.) The envelopes and four drawings were admitted into evidence. (256 RT 29980, 29982.)

From 1973 to 1983, Richard Guimmond lived with his wife Samica and daughter Tasha in the Villa San Pedro Apartments. (257 RT 30103, 30133.) Guimmond worked as an assistant manager at the complex. (257 RT 30105.) The neighborhood was "a ghetto." (257 RT 30106.) As manager, he knew the Silveria family living in the apartments. (257 RT 30107.) Guimmond saw how the Silverias ran out of money and food shortly after the first of each month. (257 RT 30111-30112.) Silveria had a reputation for stealing food. (257 RT 30119.) When Silveria and Sonny would come back to stay with their mother, she would exercise no control over them. (257 RT 30127-30128.) Guimmond noted that the boys "had graduated from stealing food to stealing money." (257 RT 30128, 30136.)

Guimmond's daughter Tasha and Lenae began playing with each other as children. (257 RT 30108.) Guimmond forbid Tasha from going to the Silveria apartment to play, because Lenae's mother smoked, "they had a lot of problems over there with lice," and the apartment was "kind of filthy." (257 RT 30110-30111, 30120.) Lenae began spending more and more time in the Guimmonds's home. (257 RT 30121.) When the Guimmonds decided to move out, Lenae came to live with them, and she stayed with them until her marriage. (257 RT 30104, 30134.)

4. Jail personnel

Patrick Doyle worked as a correctional deputy at the Santa Clara County Jail from 1991 to 1996. (258 RT 30336-30337.) Before that, Doyle had been a missionary, having studied for eight and a half years for the Catholic priesthood. (258 RT 30334.) Doyle first met Silveria when Silveria came to the jail. (258 RT 30340-30341.) At first, Silveria appeared withdrawn, but over time, he became less so. (258 RT 30341-30342.) After being in the jail for a few months, Silveria began asking Doyle questions about the Bible. (258 RT 30343.) Doyle believed that Silveria was interested in religion, and that, over time, Silveria became committed to Christianity. (258 RT 30344, 30346.) Silveria would discuss the Bible with other inmates. (258 RT 30346, 30352.) Doyle never heard of Silveria getting into a fight in the jail or of his ever being "a behavioral problem." (258 RT 30349-30350.) Silveria was not a member of a gang and Doyle did not believe him to be "criminally sophisticated." (258 RT 30351.) However, on one occasion, Silveria did lie to jail officers in an attempt to get his housing changed. (258 RT 30356-30357; 259 RT 30490.) Doyle admitted that he was known to many inmates as "Father Doyle" and that his Christian beliefs were widely known in the jail. (259 RT 30460-30461.)

Officer Edwin Lausten worked for the Santa Clara County Department of Corrections. (259 RT 30565.) He met Silveria in the jail in 1992. (259 RT 30566.) Silveria's behavior was always good and he was never a problem in the jail. (259 RT 30566.) On several occasions, Lausten saw Silveria consoling other inmates when they were depressed. (259 RT 30569.) On one occasion, Lausten allowed Silveria to use a private room to console another inmate, and Lausten saw Silveria reading the Bible with the other inmate. (259 RT 30571-30572.)

Reverend Leo Charon became an ordained minister in 1986. (259 RT 30596.) Since 1982, he had been ministering in the Santa Clara County Jail. (259 RT 30601.) His general approach was to apply the teachings of the Bible to daily life. (259 RT 30609-30610, 30612.) Charon met Silveria when Silveria had been in jail for about two years. (259 RT 30616.) Silveria began by attending Charon's Bible study classes. (259 RT 30616, 30623; 260 RT 30666-30667.) Silveria would sometimes bring in new members to the class. (259 RT 30639-30640.) He would also request that Charon bring other religious books for Silveria to read. (259 RT 30620; 260 RT 30688.) Later, Charon and Silveria began speaking one-on-one. (259 RT 30616, 30623.) They spoke about a variety of personal matters, including temptations, Silveria's plans for the future, and Scripture. (259 RT 30625.) About two years after the men met, they spoke about why Silveria was in jail. (259 RT 30629, 30632.) Silveria admitted participating in stabbing Madden and admitted using a stun a stun gun on Madden. (260 RT 30682-30683.) Silveria expressed his remorse about taking another life. (259 RT 30636.) Chaon observed that Silveria assumed leadership roles, especially when teaching. (259 RT 30643.) Silveria developed a reputation such that transferred inmates who wrote to Charon "almost always" asked about Silveria. (259 RT 30642.)

Charon also worked one-on-one with Travis. (260 RT 30666.) At one time, Silveria and Travis were housed adjacent to each other in one part of the jail. (260 RT 30674-30675.) Shortly after that time, Silveria requested that Charon baptize him. (260 RT 30676.) Charon baptized Silveria and Travis at the same time, one after the other. (260 RT 30656, 30677.) Charon believed that Silveria was "quite vocal and persuasive" when trying to convince others of his beliefs. (260 RT 30673.) He felt that Silveria was of "above average" intelligence and showed leadership ability. (260 RT 30691.)

Victor Bergado worked as a correctional officer for the Santa Clara County Department of Corrections. (260 RT 30694.) He met Silveria shortly after Silveria was booked in the jail. (260 RT 30697.) Bergado's first impression of Silveria was that he "was a hard person [who] didn't really talk." (260 RT 30698.) After three or four months, Bergado observed Silveria kneeling in his cell. (360 RT 30699, 30701.) When Bergado asked if Silveria was all right, he saw that Silveria was distraught and crying. (360 RT 30703.) Silveria said that he was "sad or sorry for the family of the victim." (260 RT 30705.) He said he was sorry for what he had done and that he was asking for forgiveness. (260 RT 30705.) From that point forward, Bergado, a Christian, began discussing Christianity with Silveria. (260 RT 30706.) He frequently observed Silveria carrying a Bible and discussing it with other inmates. (260 RT 30708.) Bergado never saw Silveria fighting with other inmates or jail staff, and in several instances saw Silveria sharing items from the commissary with other inmates. (260 RT 30712.) In Bergado's opinion, Silveria was among the least criminally sophisticated inmates Bergado had seen. (260 RT 30713-30714.)

Lauren Dennehy worked as a jail training officer for the Department of Corrections. (261 RT 30900.) She interacted with Silveria in the jail for at least a year. (261 RT 30902.) Silveria was a "cooperative, helpful" inmate. (261 RT 30902.) Once, when Dennehy was making a welfare check, she observed Silveria kneeling at his bunk, praying. (261 RT 30908.) She also noticed that Silveria arranged Bible study classes. (261 RT 30909.)

5. Expert witnesses

James Park testified as an expert on "prison classification and security." (260 RT 30753.) He interviewed Silveria once and had access to Silveria's records. (260 RT 30752, 30753.) In Park's expert opinion,

Silveria would make "a good adjustment" to prison life and would not pose "a threat or a danger to other staff or inmates" if transferred to a maximum security holding facility as part of a life without parole sentence. (260 RT 30754, 30826.) Park reached that conclusion based on Silveria's age, his constructive behavior in jail, and his good behavior while in custody. (260 RT 30761-30762.) Park also showed the jurors a generic diagram of the security measures employed by California's maximum security holding facilities. (260 RT 30764-30765, 30767.) He discussed the disciplinary process at such facilities. (260 RT 30802.) Finally, Park mentioned that state prisons all have "fairly extensive religious programs" that are available to the inmates. (260 RT 30803.)

Park admitted that he was personally opposed to the death penalty. (260 RT 30827.) Further, of the 100 cases in which he had testified, all 100 times he had been called by, and testified for, the defense. (260 RT 30827, 30828.) He also stated that prisoners in maximum security holding facilities could play sports like basketball and softball, could watch television in their cells if they had the money to purchase one, could listen to radio, read books and magazines, make phone calls, and write and receive letters. (261 RT 30867.)

Dr. Harry Kormos was a psychiatrist who specialized in post-traumatic stress disorder. (261 RT 30992.) He testified as an expert in "psychiatry[,] including the effects of childhood neglect and abuse on the development of adult personality." (261 RT 31017-31018.) He had testified in about 24 other trials, always for the defense. (271 RT 32564.) Dr. Kormos reviewed reports of the crime, reports of interviews with witnesses from Silveria's childhood, and Silveria's birth records. (261 RT 31019-31020.) Dr. Kormos also interviewed Silveria 12 to 15 times. (261 RT 31026; 271 RT 32570-32571.) In Dr. Kormos's opinion, Silveria suffered from the clinical condition of child neglect. (262 RT 31100; 271

RT 32613.) "Child neglect" is "a situation in which the child is not getting the kind of help, interaction, support, whatever you want to call it, from the parents that children need for development to occur normally, and in addition to that is getting mistreatment at the hands of those charged with its well-being." (262 RT 31105.) If such a child were also exposed to physical and sexual abuse, that child would "show a sense of insecurity in the world," tend towards depression, and have "a serious problem in self-esteem" such that "they don't really expect to succeed in anything." (262 RT 31108, 31110.) Dr. Kormos would not change his primary diagnosis from child neglect even if Silveria had lied about his actions on the night of the murder. (271 RT 32646-32648, 32653.) Dr. Kormos also diagnosed Silveria with alcohol, cocaine, and methamphetamine addiction. (271 RT 32668, 32676.)

Dr. Kormos described the difficulties surrounding Silveria's birth. According to the medical records Dr. Kormos reviewed, Silveria was born premature, had an excessive level of bilirubin in his blood, and had possibly malformed intestines. (262 RT 31129-31131.) The reports indicated that Silveria had to stay one month in the hospital after being born. (262 RT 31131.) Dr. Kormos ruled out the possibility that Silveria suffered from fetal alcohol syndrome, organic brain damage, or anti-social personality disorder. (262 RT 31168-31169, 31179.) Dr. Kormos concluded that children experiencing a childhood like Silveria's "will not know of limits on their behavior because they haven't had the experience of such limits being imposed." (262 RT 31139.) In Dr. Kormos's opinion, Silveria, Travis, Spencer, and Jennings had formed "a pseudo-family" to help each other. (262 RT 31190.)

C. Travis's Case

1. Travis's testimony

Travis testified on his own behalf. (266 RT 31663.) He indicated that he had no quarrel with having been found guilty of first degree murder, but he wanted to tell the truth and ask the jury to spare his life. (266 RT 31663-31664; 270 RT 32471.)

Travis remembered living with his parents in Italy until he was five years old, then leaving for San Jose without his father. (266 RT 31665; 267 RT 31838.) He was angry that his father was not going to live with the family any more. (266 RT 31666.) Travis recalled when the family moved to the "poor neighborhood" of Bendorf. (266 RT 31668.) Silveria lived next door, but the two did not become close friends until Travis was 16 to 18 years old. (266 RT 31855-31856.) Because Travis's mother was working so often, he was in charge of making breakfast and dinner for himself and his younger sister Deanna, and he had the run of the neighborhood in the evenings. (266 RT 31675.) Nevertheless, Travis's mother was loving and he was close with Deanna. (267 RT 31838, 31840.) However, Travis had problems in school, even at the elementary level. (266 RT 31672; 267 RT 31847.) When he was seven years old, he began smoking marijuana. (266 RT 31672; 267 RT 31845.) By the end of the sixth grade, Travis was also consuming alcohol. (266 RT 31767; 267 RT 31846, 31852-31853.)

Joseph Carvalho married Travis's mother when Travis was about 9 or 10 years old. (266 RT 31676; 267 RT 31839.) Carvalho moved in with the family and brought his two daughters with him. (266 RT 31676.) Travis was angry that Carvalho came into the home and "was basically taking over." (266 RT 31678.) Carvalho also "spanked" Travis with a cutting board or belt. (266 RT 31689.) On one occasion, Carvalho broke an inch-

thick cutting board on Travis's backside. (266 RT 31690.) However, Travis noticed that the family was more financially stable, as Carvalho's presence came with new furniture and new clothes for the children. (266 RT 31680.) Carvalho also held Bible studies with the family and took Travis fishing, trying to establish a father-son bond. (266 RT 31681; 267 RT 31841.)

At some point, Travis's mother told him that Carvalho had molested his own daughters and Deanna. (266 RT 31682.) Travis was devastated. (266 RT 31682.) He felt that he had failed Deanna. (266 RT 31688.) Travis, Deanna, and their young brother Joey all went to counseling. (266 RT 31683-31685.) Eventually, the family discussed allowing Carvalho back. (266 RT 31686.) When Carvalho returned, Travis made an effort to stay away from the house. (266 RT 31688.) Around the time Travis was 14 years old, he saw his mother and Carvalho arguing. (266 RT 31692.) He jumped between them and began fighting Carvalho, who got Travis in a headlock and ran his head through a wall. (266 RT 31692.) Eventually, Travis heard that Carvalho was molesting the girls again, and Travis's mother divorced him. (266 RT 31697.)

After Travis's mother filed for divorce, Carvalho came by the house and was verbally abusive of her. (266 RT 31698, 31699.) Travis, who was 18 or 19 years old at the time, told him to leave. (266 RT 31699.) Carvalho grabbed a fishing pole and began swinging it at Travis, who defended himself with a stick. (266 RT 31699-31700.) Then Travis grappled with Carvalho, punching him. (266 RT 31700-31701.)

Travis dropped out of school in the eleventh grade. (266 RT 31698; 267 RT 31860.) He was "a very poor student" and did not pay attention in class. (266 RT 31701.) He had also taken to cutting class and using glue, marijuana, cocaine, and methamphetamine. (266 RT 31701-31702.) He purchased the drugs with money he got from reselling candy he stole from

food stores. (266 RT 31702.) At the time, he was friends with Silveria, Jennings, and Spencer. (266 RT 31708.)

Travis had problems with obeying his mother's rules, and she suggested that he stay with his father in North Carolina. (266 RT 31706; 267 RT 31853-31854, 31857.) When Travis went to North Carolina, he learned that his father was "a constant womanizer and a drinker." (266 RT 31707; 267 RT 31863.) While there, he drank with his father "and partied." (266 RT 31707.) Travis eventually returned to San Jose. (266 RT 31707.)

About a year later, Travis returned to North Carolina because he knew that a warrant had been issued for him in California. (266 RT 31709.) The warrant followed Travis's and Jennings's burglary of an apartment next to Jennings's family's. (267 RT 31867.) Travis had entered the apartment through the attic and stolen "some VCRs and some food," then traded the VCRs for marijuana. (266 RT 31710.) Jennings had already been arrested and had told the police of Travis's involvement. (267 RT 31871.) In North Carolina, Travis did some painting and construction work, and also sold drugs with his father. (266 RT 31710.) Travis "got tired of running," returned to California, turned himself in, and served "a year of county time" following his conviction for first degree burglary. (266 RT 31711; 267 RT 31870, 31871-31872.) He was discharged from the jail when he was 19 years old.

Around that time, Travis's mother met Cory Morton ("Cory"). (266 RT 31720; 267 RT 31866.) Travis, his friends, his mother, Deanna, and Cory would have "drug and alcohol part[ies]." (266 RT 31721.) Eventually, the family was evicted because of the partying and the number of visitors. (266 RT 31721; 267 RT 31879.) Travis's mother, Cory, and Travis's little brother Joey went to Oregon. (266 RT 31723; 267 RT 31881.) Deanna had already left the house. (267 RT 31881.) Travis spent

some time living with Spencer's family, then ended up living on the streets. (266 RT 31723.)

Sometime thereafter, Travis and Silveria went to North Carolina together. (266 RT 31714; 267 RT 31883.) They drove Silveria's car there. (266 RT 31715.) When they arrived, they worked at a slaughterhouse for a month or two. (266 RT 31717.) Eventually, Travis's father kicked them out because Travis lied about going to work when he had instead quit his job and done drugs with Silveria and another friend. (266 RT 31718; 267 RT 31885-31887.) Travis and Silveria went to a drive-in restaurant, where Travis drunkenly demanded food and swore at the clerk. (267 RT 31889.) A police officer behind Travis pulled them over. (267 RT 31890.) Silveria had a suspended driver's license and was arrested, and his car was impounded. (266 RT 31719; 267 RT 31890.) Silveria had Patricia Gamble wire money to them, and the two men hitchhiked down to Atlanta, Georgia, before returning to California "[t]hrough a shelter-type program." (266 RT 31719-31720; 267 RT 31890.) Travis had to lie to the shelter about their ages, because the shelter did not accept persons 18 years and older. (267 RT 31891.)

After returning from North Carolina for the third time, Travis went to a computer training school with Silveria. (269 RT 32163.) A friend of his, Peter Rosa, had a scam whereby the men would get loan money from the school for tuition, then spend the money on drugs. (269 RT 32164-3165.) Travis and Silveria agreed to participate. (269 RT 32169-32170.) However, when they began school and learned the loans came only in quarters, they decided to stay in school. (269 RT 32170.) Nevertheless, Travis and Silveria ended up quitting the class without completing it. (269 RT 32170; 270 RT 32415.)

Around September 6, 1990, Travis began working at LeeWards as a stock clerk. (266 RT 31729; 269 RT 32173.) He noticed the two safes in

the store and once saw a large amount of money in the back safe. (269 RT 32175-32176.) He thought the front safe contained only paperwork. (269 RT 32176.) Travis continued consuming crank and marijuana while working, and by November 1990, he and Silveria had stopped showing up for work. (266 RT 31730; 269 RT 32178.) Madden terminated Travis and Silveria for their absenteeism, but allowed them to leave by mutual agreement instead of firing them outright. (269 RT 32180-32181.) Travis said that he did not want to lose his job, but Madden did not respond. (269 RT 32180-32181.) Travis also called the store a day or two later asking for his job back, but he was not rehired. (269 RT 32182.) Travis knew Madden was the manager at LeeWards, and had once seen Madden's wife and child in the store. (266 RT 31733.) He knew that a night manager would have to be killed during the robbery, but the fact that Madden had a wife and child "didn't enter [his] mind." (266 RT 31733.) Around this time, Travis, Silveria, Jennings, and Spencer all spent time together after work. (269 RT 32173-32174.)

Travis went to Fresno and lived with an ex-girlfriend for a month, then returned to San Jose in December 1990. (266 RT 31724; 269 RT 32183.) Upon his return, he saw his mother with Joey at the bus station returning from Oregon. (266 RT 31725.) Travis gave them ten dollars then left with Spencer, Jennings, and Silveria. (266 RT 31725, 31726; 269 RT 32184.) At the time, Travis did not have a relationship with his mother and viewed Spencer, Jennings, and Silveria as his family, "a modern day Manson family." (269 RT 32185.) The men "basically partied" for a few days, and then Travis met Tipton through Silveria. (266 RT 31726-31727; 269 RT 32187.) Travis stayed at Tipton's home for a few nights. (266 RT 31727.) Between November and December 1990, he often slept in a cubbyhole under her apartment or in Spencer's car. (266 RT 31727-31728.)

In late December 1990 or early January 1991, Travis began living with Rackley's sister Gina. (269 RT 32188.) He met Rackley around that time. (269 RT 32188.) On January 24, 1991, Jennings came over "complaining about somebody taking his beeper." (266 RT 31735.) Spencer, Jennings, Rackley, Silveria, and Travis went to retrieve it. (269 RT 32200.) Travis got in a fight with "this guy" who had it. (266 RT 31736.) Travis ended up getting hit with a pair of brass knuckles in the upper lip and nose. (266 RT 31736.) Travis went to the hospital, spent the night at Jennings's house, then went to a motel. (266 RT 31738-31739, 31742.) Jennings, Silveria, Rackley, and Spencer were there and wanted to watch the news because there was "a segment on stun gun robberies" and "[t]hey wanted to see if they got their descriptions." (266 RT 31742.) Travis saw cash and coin that he was told were the proceeds of a robbery (269 RT 32212), but he denied being any part of any of the stun gun robberies (266 RT 31742). After leaving the motel, the group returned to Gina's house and discussed committing other crimes. (266 RT 32217.) They talked about finding "a bigger place" to rob "that would have a lot of money so we could lay low for a while." (266 RT 31743.) Jennings suggested LeeWards. (266 RT 31744.) The five of them then went to a cabin in Uvas Canyon and stayed there on January 25, 26, 27, and 28. (266 RT 31739, 31741.) The fist night, they lit a fire using a fuel can they found at the cabin. (266 RT 31742-31743.)

On January 26, Travis went to a store with Standard, Silveria, and Spencer to prepare for a barbecue. (266 RT 31746.) They purchased hot dogs, hamburgers, and potato chips. (266 RT 31747.) Travis recalled that, before going to Uvas Canyon, Spencer had bought a knife. (266 RT 31747.) That night, after Standard had left (269 RT 32235-32236), the group had another campfire and discussed committing a robbery again. (266 RT 31748.) Travis mentioned that he knew there was money at

LeeWards and that there was not much security, and the group decided to rob LeeWards. (266 RT 31749; 269 RT 32237-32238.)

On January 27, Spencer went out shopping by himself. (266 RT 31751.) After Spencer returned, Travis said "that whoever the manager would be had to be killed because [he] didn't want to be identified." (266 RT 31753, 31754; 269 RT 32258.) Travis "didn't care" if he had to kill someone at LeeWards who could identify him, because he did not want to get caught; he "just wanted money to get drugs." (269 RT 32223, 32244.) Silveria opposed the idea of killing anyone. (266 RT 31754; 269 RT 32259; 270 RT 32419.) Spencer, on the other hand, "was waving [a fillet] knife in his hand, joking around saying . . . I'll kill him, I'll take care of it." (266 RT 31755; 269 RT 32261.) Travis assumed that since Spencer had volunteered, Spencer was going to do it. (269 RT 32263, 32271.) Jennings mentioned burning LeeWards down with the manager inside.[9] (266 RT 31755; 269 RT 32264.) That night, Spencer drove the group to LeeWards, but they found that it was closed and no one was there. (266 RT 31756; 269 RT 32272.) Travis saw that Spencer had brought a knife. (269 RT 32270.) The group returned to the cabin and lit another fire, using the last of the camp fuel in the can. (266 RT 31757.)

On the morning of January 28, Travis siphoned some gasoline out of the car and into the fuel can so they could light another fire. (266 RT 31759-31760; 269 RT 32267, 32277.) That night, the subject of LeeWards came up again. (266 RT 31758.) Travis repeated that the manager had to be killed, although, because he and Silveria had not worked there recently, he did not know who the manager would be. (266 RT 31759; 269 RT 32282.) The group got into the car and headed to LeeWards, which was

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[9] Travis later testified that he did not recall who suggested burning LeeWards down. (269 RT 32264.)

still open. (266 RT 31761.) Spencer spoke about going to Kentucky after the robbery, and Travis thought he and Spencer would go to Nevada. (269 RT 32288-32289.) Spencer, the driver, parked behind the store in the back parking lot. (266 RT 31761.) The men got out of the car and hid behind a fence. (266 RT 31762; 269 RT 32292.) Travis and Silveria crossed the street to look into the store, saw shoppers inside, and returned to the back of the store. (266 RT 31763; 269 RT 32295.) Silveria told Spencer to slash the tire on Madden's truck, and Spencer did so. (266 RT 31762; 269 RT 32294.) Then Silveria and Rackley went into the store and came back out. (266 RT 31763; 269 RT 32296.) At that point, the group knew that Madden would be the manager in the store that night. (266 RT 31763-31764.) The group continued to wait, because they wanted as few people in the store as possible. (266 RT 31764; 269 RT 32299.) In the meantime, Travis took a hammer out of the car to use to intimidate anyone in the store, but he put it back because he felt he did not need it. (266 RT 31765; 269 RT 32308.) Rackley or Jennings had a nail puller, Silveria had the stun gun, and Spencer had the knife. (266 RT 31766.) Travis saw Rackley put the fuel can containing gasoline behind a tire of the trailer nearby. (269 RT 31762, 32307.)

Silveria told Spencer to stand on one side of the door while he stood on the other side. (266 RT 31766; 269 RT 32305; 270 RT 32352.) As Madden exited the store, Silveria and Spencer confronted him. (266 RT 31766.) Spencer had the knife in his hand "and shoved it facing upward in [] Madden's face . . . ." (270 RT 32352.) Madden said, "Oh, my God. You know, what's happening here? . . . Oh, Danny. It's you." (266 RT 31766.) Silveria told him to hurry up and turn off the store's alarm. (266 RT 31766.) Madden disabled the alarm and the entire group entered the store. (266 RT 31767.) They went to the back office where the safe was. (266 RT 31767.) Silveria told Madden to take the money out of the safe,

and Madden complied. (266 RT 31768; 270 RT 32354.) Madden put the money in a bag that Rackley had brought in. (266 RT 31769; 270 RT 32357.) Travis saw a roll of duct tape come out of the bag. (266 RT 31769.) He told Madden to sit in a chair because he was afraid Madden might run out the door. (266 RT 31771-31772; 270 RT 32424, 32446.) Silveria taped Madden's ankles, and Travis taped his hands behind the chair and his mouth. (266 RT 31772; 270 RT 32357-32358, 32466.) The phone rang, and Travis panicked because he thought it was the police. (266 RT 31772, 31774; 270 RT 32361.) Silveria held the phone to Madden's ear, then Silveria took a security card out of Madden's wallet, and Madden "gave some kind of a message from that card to the person on the phone." (266 RT 31773-31774; 270 RT 32359-32360, 32361-32362, 32366.) Silveria then re-taped Madden's mouth and picked up the bag of money. (270 RT 32368, 32371.)

Travis turned to Spencer and told Spencer to kill Madden. (266 RT 31774.) He spoke under his breath so that Madden would not hear. (266 RT 31775; 270 RT 32372.) Spencer hesitated, and Travis repeated himself. (266 RT 31775.) Just then, Silveria said "let's go." (266 RT 31776; 270 RT 32425.) At the same time, Spencer attempted to slice Madden's throat. (266 RT 31775; 270 RT 32373.) Spencer then started stabbing Madden from the front. (266 RT 31777.) Despite "[l]ots of blood," Madden did not appear to be dying. (266 RT 31777.) While Spencer was stabbing Madden, Silveria "went forward real quick" and used the stun gun on Madden. (270 RT 32384, 32386.) Travis saw Madden struggle, flex his legs, and make muffled screams when Silveria used the stun gun. (270 RT 32390-32391.) After numerous stabs, Spencer handed Travis the knife and ran out of the office. (266 RT 31778; 270 RT 32375-32376) Travis was angry because he felt that Spencer had "placed me in a position that now I had to take care of something that he failed to do." (266 RT 31779.) He

stabbed Madden in the throat and chest until Madden slumped over. (266 RT 31779; 270 RT 32380, 32382.) Travis still saw Madden breathing. (270 RT 32429.) Travis then handed the knife to Silveria. (266 RT 31780; 270 RT 32429.) The knife was not bent at that time. (266 RT 31782; 270 RT 32387.) Travis saw Silveria stab Madden once. (266 RT 31781; 270 RT 32383-32384.) Madden toppled over in his chair. (270 RT 32386.) Travis asked Silveria to check Madden for vital signs, and Silveria said Madden had a weak pulse. (270 RT 32387-32388.) Then Silveria gave the knife back to Travis, and Travis hid it in the warehouse area of the store. (266 RT 31782; 270 RT 32388.) The group then left the LeeWards and drove up to Redwood City. (266 RT 31782-31783.) On the way, Travis threw the gloves he had been wearing out the car window. (270 RT 32391.)

Travis had never used a weapon on anyone before Madden, but Madden was "an obstacle" to Travis's goal of escaping capture. (266 RT 31785-31786.) Travis "just didn't care" about murdering Madden. (266 RT 31786.) He was angry about the fight a few days ago and everything else that had gone wrong in his life, and "wanted somebody to pay . . . ." (266 RT 31790-31791.) He "was going to get what I wanted . . . the money, the drugs and a new life." (266 RT 31793.) Although Travis had consumed alcohol and marijuana on the night of the murder, he did not intend his drug use to be an excuse for his crime. (267 RT 31850.) However, he believes that his drug use "play[ed] a major factor in [his] thinking, in [his] behavior." (267 RT 31850.)

Travis agreed that "the prior testimony about buying cars and so forth" was "pretty much the way the next day went." (266 RT 31783; see 270 RT 32392-32393.) After Travis was arrested, he gave a statement to the police. (266 RT 31783.) He was advised of his Miranda rights and waived them. (269 RT 32319.) A tape recording of his statement was

played to the jury. (269 RT 32320; 270 RT 32398.) Travis admitted that in his confession he tried to minimize his role in the murder. (270 RT 32413.) He recalled telling the interrogating officers that if one of the female assistant managers had been on duty that night he would not have harmed them, only left them tied up, because he "got along with them." (270 RT 32417.) Although Travis also testified that he had got along well with Madden, he could not explain why he was willing to murder Madden except that he had "problems . . . with male figures" in his life. (270 RT 32417-32418, 32452.)

On his first or second night in jail, Travis met an inmate named Russell who told Travis "that Jesus loves me." (266 RT 31793-31794.) That statement "showed [Travis] just what type of person [he] had become." (266 RT 31794.) Travis began listening to a broadcast from Texas by a man named Chaplain Ray. (266 RT 31794.) Travis wrote to Chaplain Ray requesting copies of free books about people who had gone through a religious conversion to Christianity. (266 RT 31796.) In 1993, Travis received a book that told the story of Tex Watson, and the description of "how Christ impacted [Watson's] life" impressed Travis a lot. (266 RT 31797, 31799; 270 RT 32473.) After eight months in jail, Travis wrote Watson a letter because he related to Watson's case and wanted to "witness" to him; that is, Travis wanted to tell Watson "about his own life, the experiences he's went through, things he's done . . . and your life thereafter being Jesus Christ." (266 RT 31801, 31802-31803; 267 RT 31815.) Travis mentioned that he had been called "Baby Manson" by other inmates in the jail who learned what he had done. (266 RT 31806-31807.) He also wrote that he had stabbed Madden "and enjoyed every minute of it." (266 RT 31808.) Travis wrote that because he believed he had minimized his involvement in the murder in his earlier confession, and he decided that he "must have enjoyed" it because he stabbed Madden so

many times. (266 RT 31809.) In fact, he did not enjoy it. (266 RT 31809.) Travis wrote Watson that he repented all of his sins. (267 RT 31812.)

In October 1992, Travis was moved to a different unit in the jail. (267 RT 31817.) Jennings was in that unit. (267 RT 31817.) Along with a few other inmates, Travis became involved in an ongoing escape attempt from one of the upper cells. (267 RT 31817; 270 RT 32402.) A bar in a window of one of the cells had been partly cut, and Travis participated in the further cutting of that bar. (267 RT 31818.) The plan was to kick out the window after the bar was removed and escape to the street outside. (267 RT 31819, 31821.) Travis had accumulated some extra sheets to use as a rope that would have allowed the escapees to reach the ground outside the window. (267 RT 31823.) To distract the guards, the group had prepared a diversion in which some inmates were to argue over spilled coffee in another room. (267 RT 31821-31822; 270 RT 32403-32404.) However, the group was unable to cut completely through the bar. (267 RT 31819.) Another inmate leaked the plan, and Travis was moved to another unit. (267 RT 31823; 270 RT 32406.) He was never charged for his participation in the escape attempt. (267 RT 31823.)

After the failed escape attempt, Travis "sat down and . . . really started thinking hard concerning . . . where [he] was going." (267 RT 31825.) He decided to make a change and "went into recovery, started studying on AA . . . ." (267 RT 31826; 270 RT 32405.) He had been "angry with" God shortly before the escape attempt, because Deanna's young son had passed away at that time. (267 RT 31827.) Travis had felt that "I took a life, [God] therefore took a life in turn." (267 RT 31827.)

Sometime later, Travis became a trustee in the jail. (267 RT 31824; 270 RT 32431.) As a trustee, he mopped, cleaned the showers, and delivered the food trays. (267 RT 31824.) He had access "to the entire pod" as a trustee. (267 RT 31824.) Travis was also a trustee and a trustee

helper in other units of the jail. (267 RT 31824-31825.) In 1993, Silveria was moved into the same unit as Travis. (270 RT 32432.) The two of them talked about their case and about the Bible. (270 RT 32432-32434.)

When Travis began working with Charon, his "thinking was immature." (267 RT 31829-31830.) For example, when asked to inventory his faults, Travis would provide a "shallow" list that avoided the "deep-root issues." (267 RT 31830.) Eventually, Travis learned that he "had a lot of anger inside . . . a lot of rage . . . a lot of pride, a lot of selfishness." (267 RT 31831.) Travis "tried to use [his] recovery as a means to reach out to others" in the jail by sharing his experiences. (267 RT 31833-31834.) He tried to help others "because I don't want to see people fall into the situation that I found myself in." (267 RT 31835.) Travis wanted the jurors to spare his life and allow him to continue that work. (267 RT 31825-31826; 270 RT 32462.) He felt "[i]t would be better" if he were given a life sentence, because the lessons he would teach to other inmates could be used when they were paroled. (270 RT 32490.) However, he would still be willing to assist inmates on death row. (270 RT 32490.) Travis was sorry for the "very heinous" things he had done. (270 RT 32459, 32461.)

2. Travis's family

Pamela Morton is Travis's mother. (264 RT 31234.) Morton and her husband John gave birth to Travis on December 27, 1969. (264 RT 31235, 31281.) In 1975, Morton left her husband and moved to San Jose. (264 RT 31242, 31283.) Several years later, she went on welfare. (264 RT 31247.) In 1979, she met and married Carvalho. (264 RT 31248, 31287.) The first two years of the marriage were good. (264 RT 31248, 31287.) By 1981, Carvalho was abusive and often argued with Morton. (264 RT 31255-31256.) On one occasion, Travis got into a fist fight with Carvalho, and Carvalho punched a hole through the bathroom wall with Travis's head.

(264 RT 31256.) Morton also learned that Carvalho was molesting his daughter and Morton's daughter. (264 RT 31248.) After Carvalho went to jail and had therapy, Morton took Carvalho back. (264 RT 31254, 31293-31294.) However, Carvalho began molesting the girls again, so Morton divorced him. (264 RT 31254, 31259.) After the divorce, Carvalho came to the house and insulted Morton. (264 RT 31260.) Travis and some of his friends beat up Carvalho. (264 RT 31260-31261, 31296-31297.)

Around 1988, Morton met and had a relationship with Cory. (264 RT 31262, 31298.) Cory was only a few months older than Travis. (264 RT 31298.) Morton, Cory, Travis, Spencer, and Jennings would often have "parties" where alcohol and marijuana were consumed. (264 RT 31264, 31300.) Morton was evicted and moved to Oregon, and Travis went to live with Jennings's family. (264 RT 31267.) A few months later, Morton and Cory split up, and Morton returned to California. (264 RT 31269.) She did not see Travis again until he was in jail. (264 RT 31279.)

Morton recalled that around 1986, when Travis was 16 or 17 years old, he went to North Carolina to visit his father. (264 RT 31270, 31271, 31302.) Morton supported the trip because she hoped that Travis and his father would bond. (264 RT 31302.) After a year, Travis returned. (264 RT 31274.) Travis seemed "more withdrawn and depressed." (264 RT 31278.) Travis went to North Carolina again later, bringing Silveria. (264 RT 31278.) When Travis returned, he lived with Morton. (264 RT 31278.) When he was in the tenth grade, he dropped out of school. (264 RT 31278-31279.)

Deanna Travis ("Deanna") is Travis's sister. (264 RT 31314.) From when she was 5 or 6 years old until she was 15 years old, she remembered living in a roach-infested apartment with her family. (264 RT 31316-31317.) When she was seven years old, Carvalho began molesting her, and Deanna also saw him molest one of his own daughters. (264 RT 31322.)

Carvalho continued molesting Deanna for three years. (264 RT 31322.) After Carvalho was removed, the family all consented to allow him to return. (264 RT 31323-31324.) He molested Deanna again, Deanna told her mother, and Carvalho was removed again. (264 RT 31324.) Deanna saw Carvalho being violent with Travis. (264 RT 31327.) On one occasion, Carvalho got angry "and put [Travis]'s head through the back of the wall downstairs." (264 RT 31327.)

When Deanna was 13 or 14 years old, she began consuming alcohol, marijuana, acid, and "crank," a combination of cocaine and methamphetamine. (264 RT 31317-31318, 31333-31334.) Deanna knew that Travis was also using drugs, and that he and Jennings had once broken into a house and stolen a VCR to get money. (264 RT 31346, 31348.) When Deanna was 15 years old, she became pregnant by Silveria. (264 RT 31351.) Shortly thereafter, her mother kicked her out of the house. (264 RT 31333.)

In January 1991, Deanna saw Travis when he came to a motel with Spencer, Silveria, and Jennings. (264 RT 31339, 31352.) "[H]is eyes were dead" but he told Deanna that she "didn't have to worry about money any more, that [she] didn't have to live like [she] was living." (264 RT 31339.) Although Deanna has visited Travis in jail, Travis has never told her exactly what he did. (264 RT 31354.)

3. Expert witnesses

Charon testified as an expert on the identification of alcohol and drug problems and the recovery process. (264 RT 31370.) Charon met Travis when Travis began attending Buble study classes in jail in 1992 or 1993. (264 RT 31358; 265 RT 31445, 31447.) A couple years later, Charon began working with Travis on the "twelve step" program used in Alcoholics Anonymous. (264 RT 31373; 265 RT 31460.) Travis initially did not buy into the program, but eventually embraced the first step of

admitting that he had a drinking problem. (264 RT 31379, 31384; 265 RT 31449.) Travis eventually also "[m]ade a searching and fearless moral inventory" of himself with Charon. (264 RT 31393-31394.) As part of that, he admitted that he had robbed Madden for the money and stabbed him several times. (265 RT 31470, 31474.) Travis also made an effort to "[m]ake direct amends" to the people he had harmed. (265 RT 31426-31427.) Travis expressed remorse for his crimes. (265 RT 31432.) Charon believed that Travis had gone "to whatever lengths he [could] to try to understand" the twelve step program. (265 RT 31442.) Travis told Charon that he would like to become a counselor for the chemically addicted. (265 RT 31508, 31524-31525.) Travis continued to be involved in Bible studies until the instant trial began. (265 RT 31472.)

Charon acknowledged that, in a letter to Tex Watson written around September 14, 1991, Travis referred to himself as "Baby Manson" because of "the power of mind control he had on his friends." (265 RT 31510-31511.) In that same letter, Travis professed to having repented his sins and "accepted Jesus Christ as his Lord and Savior." (265 RT 31515.)

Sharon Lutman was a registered nurse who testified as an expert in the assessment of chemically dependent people. (265 RT 31527, 31539.) She interviewed Travis in jail on March 26, 1997. (265 RT 31540.) Lutman took a history of Travis's drug and alcohol use. (265 RT 31541.) Travis reported that he began using marijuana at the age of 7 and alcohol between the ages of 10 and 14. (265 RT 31542.) Between the ages of 14 and 15, he began using cocaine; between the ages of 15 and 16, he began snorting methamphetamine. Around that time he also began using acid. (265 RT 31543-31544, 31547.) Travis said that he got the money for drugs by stealing food and selling it to other children. (265 RT 31543.)

Lutman described the biophysical effects of drug consumption, noting that the use of drugs affects the brain in such a way that if a user were to

stop consuming the drugs, they would crave the dopamine high the drugs induced. (265 RT 31568-31569.) Further, as the brain adapts to the consumption of narcotics, achieving the same dopamine high requires the user to consume more of the drug. (265 RT 31573.) Based on Lutman's assessment, she determined that Travis was an alcoholic. (265 RT 31588.) Travis spoke with Lutman about his work with Charon, and Lutman believed that Travis sincerely acknowledged his faults and desired to make amends to Madden's family. (265 RT 31596; 266 RT 31645.) Lutman had no contact with Travis other than her hour and a half interview in 1997. (265 RT 31605.)

Dr. Timmen Cermak was a psychiatrist who testified as an expert on addiction and "the problems related to it." (267 RT 31921.) Dr. Cermak reviewed copies of the investigation of Travis's family members and personally interviewed Travis, Morton, Deanna, and Charon. (267 RT 31923.) Dr. Cermak also hired a neuropsychologist to test Travis for organic brain disorder. (267 RT 31923-31294.) There was no evidence of brain damage. (267 RT 31924; 268 RT 31992.) Dr. Cermak then ran a series of personality tests on Travis. (267 RT 31925.) From October 1992 to March 1997, Dr. Cermak spoke with Travis five times. (267 RT 31925.) Dr. Cermak concluded that Travis was chemically dependent and suffered from post-traumatic stress. (267 RT 31931.) The post-traumatic stress was indicated by Travis's "psychic numbing," a condition that occurs when a person gets so overwhelmed by the intensity of his emotions that he "shut[s] down," and has flashbacks and obsessive thinking that can result in "an intrusion of a massive and overwhelming amount of feeling." (268 RT 32014-32015, 32053.) He was also "rigid," in the sense that "he didn't want to feel guilty" and his newly-acquired religious beliefs were "a convenient and rigid and somewhat superficial way initially to not feel guilty." (267 RT 31932, 31961-31962.) Travis also struck Dr. Cermak as

immature. (267 RT 31933, 31934.) Dr. Cermak saw no evidence of schizophrenia, antisocial personality disorder, bipolar disorder, manic depressive disorder, or psychosis. (267 RT 31934-31936.)

Dr. Cermak testified that a male child with a father who is an alcoholic has a 25 percent chance of becoming an alcoholic himself, and, if both parents are alcoholics, the chance of the child becoming an alcoholic is 50 percent. (267 RT 31941-31942; 268 RT 32136.) Dr. Cermak opined that Travis's father was an alcoholic. (267 RT 31938.)

Dr. Cermak believed that Travis experienced shame from several events throughout his life, including when he became aware of the molestation of his sister and stepsister, the beatings by his father, his witnessing the beatings of his sister and stepsisters, his witnessing the beatings of his mother, and his observation of his mother's excessive drinking. (268 RT 32124-32126.) Having interviewed Travis about the fight in which Travis was injured by brass knuckles, Dr. Cermak concluded that the shame of that injury "went so deep into him that it literally affected his sexual identity, his sexual pride." (267 RT 31951.) Dr. Cermak also believed Travis was shamed by his mother marrying and having intercourse with Cody, a man only three months older than Travis. (267 RT 31952.) Dr. Cermak opined that the amount of shame that Travis had accumulated related directly to the amount of anger he felt at the time of the murder. (267 RT 31953.) In sum, "Travis was thrown into a highly distorted view of the injustices in his life. And when he was shamed in front of his friends as badly as he was four days before the murder[,] he believed that someone had to pay. It was almost a matter of self-defense of correcting an injustice." (267 RT 31983; 268 RT 32092-32093, 32145.) However, Travis's participation was also "in large part motivated by a desire to save face . . . . [I]t was getting rid of the vulnerability and in that having a sense

of greater power in his life and he did that for how the others perceived him and how he perceived himself." (268 RT 32096.)

Over the course of the five years Dr. Cermak spoke with Travis, he noted that Travis became more willing to consider how his chemical dependence affected him, his religious beliefs became less rigid, and he became more emotionally available. (267 RT 31958-31959, 31964.) In Dr. Cermak's opinion, Travis had become more mature and better able to contain his impulses and talk about his emotional life. (267 RT 31968.) Dr. Cermak was personally opposed to the death penalty. (268 RT 32036.) On March 27, 1995, he wrote a letter to Travis's attorney regarding the type of juror he thought would look on his testimony favorably. (268 RT 32048-32050.)

4. Jail personnel

Keith Forster worked for the Santa Clara County Department of Corrections. (270 RT 32499.) He had supervised Travis in jail and known him for about two years. (270 RT 32501, 32521.) He had observed Travis conducting Bible studies with other inmates. (270 RT 32505.) In Forster's opinion, Travis "treats the staff respectfully and does follow the rules." (270 RT 32507.) Forster agreed to testify for Travis because he felt that Travis would be able "to change lives" for other inmates if he were allowed to live. (270 RT 32516.) Forster admitted not knowing the circumstances of the murder for which Travis had been convicted. (270 RT 32524.)

David Damewood worked for the Santa Clara County Department of Corrections. (271 RT 32549.) Travis was moved into Damewood's unit in the jail in late 1992. (271 RT 32551.) Damewood selected Travis as a trustee for two years. (271 RT 32552.) Damewood "never had any problems" with Travis. (271 RT 32554, 32556.)

D. Prosecuton's Rebuttal

Sergeant David Tomlinson worked for the Santa Clara County Sheriff's Department. (272 RT 32711.) According to jail records, Travis and Silveria were housed on the same tier in the same unit from September 21, 1993, to August 5, 1994. (272 RT 32717.) Before that time, Silveria had filed a series of grievance forms in an attempt to change where he was housed. (272 RT 32719.) In particular, he complained that he feared violence from a particular inmate. (272 RT 32722.) As a result of his requests, Silveria was moved to the unit where Travis was also housed. (272 RT 32723.) On February 10, 1994, Silveria submitted another grievance in which he wrote "I told [the jail] classification [department] what I told them in order to be with my codefendant. Apologize for lying. . . . I know I shouldn't have lied. It definitely backfired. I'm going to be here for well over a year and I want to make the best, even though I was dishonest with you in order [to] get next to my codefendant." (272 RT 32724-32725.)

ARGUMENT

I. THE PROSECUTOR'S ARGUMENT ON TORTURE AND LYING IN WAIT WAS PROPER (SILVERIA CLAIM I, TRAVIS CLAIM XI)[10]

Silveria argues that the trial judge erred when he permitted the prosecutor to argue and present evidence of lying-in-wait and torture in the penalty retrial. Specifically, Silveria complains that that the trial court improperly allowed the prosecutor to argue that: (1) the members of the group made plans to "lie in wait" for Madden; (2) Silveria, in using the stun

[10] In an effort to avoid unnecessary repetition when responding to appellants's arguments, respondent notes where Silveria's and Travis's arguments overlap, while mostly following the order of Silveria's arguments.

gun on Madden, inflicted "pain and torture"; (3) Madden was "tortu[r]ously stabbed 32 times"; (4) Madden endured "super torture"; (5) he had presented "evidence of lying in wait" and a "torturous killing"; (6) Silveria's use of the stun gun cause "torturous" suffering to Madden; and (7) that the "torturous killing" should obviate any feelings of sympathy for the appellants. (SAOB 94, 98-99.) Silveria also argues that the trial court improperly allowed the prosecutor to introduce: (8) Silveria's first penalty trial testimony in which Silveria testified that Madden was tortured; (9) Stratbucker's testimony that the stun gun was used for a "tortuous kind of purpose"; and (10) cross-examination of Dr. Kormos relating to whether Silveria told Dr. Kormos that he had used a stun gun prior to or during the stabbings. (SAOB 95-98, 146-148.) Travis argues that it was "fundamentally unfair to allow the prosecutor to argue torture as a factor in aggravation." (TAOB 479-482.) These claims fail.

A. Background

When Silveria was convicted of first degree murder, the jury also found the special allegation of lying-in-wait not true. (11 CT 2803.) After the jury deadlocked on the special allegation of torture, the trial court declared a mistrial. (11 CT 2803.) The prosecutor later withdrew the special allegation of torture. (15 CT 3674-3675.)

When Travis was convicted of first degree murder, the jury found the special allegation of torture not true. (11 CT 2803.) After the jury deadlocked on the special allegation of lying-in-wait, the trial court declared a mistrial. (11 CT 2803.) The prosecutor later withdrew the special allegation of lying-in-wait. (15 CT 3674-3675.)

Silveria and Travis jointly moved to preclude the prosecutor from arguing evidence that supported the dismissed allegations at the penalty retrial. (18 CT 4620-4629; 233 RT 27309-27317.) Specifically, Silveria moved to preclude the prosecutor from arguing that he had the intent to kill

before entering LeeWards, and Travis moved to preclude the prosecutor from arguing that he had an intent to torture during the murder. (18 CT 4620.) The court denied the motion. (233 RT 27317-27320.)

In the prosecutor's opening argument at the penalty retrial, he described the stun gun robberies and then stated that "[p]lans were made for the members of the group to lie in wait for Mr. Madden after everyone else had left the store on the night they were going to rob him." (236 RT 27432.) He also argued that, as Madden was being stabbed, Silveria "used this stun gun on him, inflicting even more pain and torture on the doomed victim . . . ." (236 RT 27443.)

During the penalty retrial, the prosecutor read a portion of Silveria's prior testimony into the record:

> [Prosecutor]: So I think you said awhile ago that you didn't want Mr. Madden killed and you didn't want him tortured; is that right?
>
> [Silveria]: That's right.
>
> Q: But Mr. Madden was killed, wasn't he?
>
> A: Yes, he was.
>
> Q: And he was tortured, wasn't he?
>
> A: I don't believe that I tortured Mr. Madden by legal definition.
>
> Q: But you were there and you saw what was being done to him, by you and the others, didn't you?
>
> A: Yes.
>
> Q[:] Mr. Madden was tortured, wasn't he?
>
> A: I would say so.

(ACT 2864-2865.)

When examining Stratbucker—the stun gun expert witness—the prosecutor posited a hypothetical whereby a victim was bound in a chair and stabbed, then stunned with a stun gun. (249 RT 28952-28953; see 249 RT 28936-28937 [original hypothetical].) Stratbucker opined that in such a case, "it seems clear that the stun gun under those circumstances is being used for—for a vicarious [*sic*] and torturous kind of purpose." (249 RT 28955.) Silveria objected, and the trial court struck that comment and admonished the jurors to disregard it.[11] (249 RT 28955.) On cross-examination, Silveria questioned Stratbucker about whether he had ever advised a police department "that the use of a taser is life-threatening or dangerous to a suspect." (250 RT 28991-28992.) Stratbucker responded, "I may have advised caution and concern about the use of such of [*sic*] devi[c]e improperly . . . ." (250 RT 28991-28992.) On redirect, the prosecutor asked what Stratbucker had meant by the use of a taser or stun gun "improperly." Stratbucker responded, "[t]he use of a device for inflicting the pain unnecessarily or torture, some process of that kind." (250 RT 29010.)

While cross-examining Dr. Kormos, the prosecutor asked what Silveria had told Dr. Kormos about the stun gun. Dr. Kormos replied that Silveria had told him that he used the stun gun "while the stabbing was being carried out," not before the stabbings. (271 RT 32646.)

Shortly before closing arguments began in the penalty retrial, the trial court ruled that the attorneys "will not be allowed to indicate to this jury what the prior jur[ies] did regarding either the torture or lying in wait special circumstance[s]." (273 RT 32797.) However, the prosecutor would

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[11] The court denied Silveria's motion for a mistrial, finding that striking the testimony and admonishing the jury was sufficient to dispel any prejudice. (250 RT 28972-28974.)

still be able to argue torture and lying in wait. The court reasoned that even though "it was found not true beyond a reasonable doubt, it is still a factor, circumstance of the crime." (273 RT 32798.)

In his closing argument, the prosecutor described the period of time that Silveria and Travis had been "watching and waiting" for LeeWards to close. (276 RT 33040-33042.) He argued that Madden "was viciously and tortuously stabbed 32 times" (276 RT 33048) and was subjected to "super torture" (276 RT 33052). The prosecutor urged the jury to consider "the evidence of lying in wait, the watchful waiting, the vicious torturous killing that is involved . . . ." (276 RT 33078.) He declared that Silveria "used the stun gun not once, but at least twice, causing indescribable and unquantifiable pain and torturous suffering to this dying victim." (277 RT 33114.) The prosecutor described the killing as "torturous" again later in his argument. (279 RT 33409, 33410.)

B. Legal Principles

Section 190.1 reads in pertinent part:

> A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:
>
> (a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged . . . .

Section 190.3 reads in pertinent part:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. . . .
>
> [¶] . . . [¶]

[I]n no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. . . .

[¶] . . . [¶]

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Section 190.4 reads in pertinent part:

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. . . .

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue.

C. The Prosecutor's Argument Was Proper

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

1. The lying-in-wait special circumstance

Silveria argues that the trial court erred under state law by allowing the prosecutor to argue and present evidence that the murder was committed while lying in wait, because the allegation of lying in wait was found not true. He also argues that the error violated the Double Jeopardy Clause of the Federal Constitution. (SAOB 102-103.) Silveria's argument fails.

Nothing in sections 190.1, 190.3, or 190.4 addresses—much less forecloses—the prosecution's reliance on facts that could have supported a special circumstance that the jury found not true. Section 190.4 forbids *a retrial* on a special circumstance found not true; it does not limit the introduction of relevant evidence during the penalty phase. Here, Silveria was not being retried on the lying-in-wait special circumstance. The prosecutor never argued that the jurors could impose a death penalty on the basis of finding such a special circumstance true, nor was the jury instructed regarding the application of the lying-in-wait circumstance.

Rather, the prosecutor's argument that Silveria had waited for Madden to emerge from LeeWards was a circumstance of the crime relevant to the determination of punishment. (§ 190.3, subd. (a).) The trial court therefore did not violate state law.

Nor did the trial court violate the Double Jeopardy Clause. When a special circumstance allegation has been found not true, retrial of that allegation is barred by the Double Jeopardy Clause. (See *People v. Lewis* (2008) 43 Cal.4th 415, 509.) As just discussed, Silveria was not being re-tried on the lying-in-wait special circumstance; rather, the jury was determining the penalty for the first degree murder he committed. The Double Jeopardy Clause "has no bearing on the kind or quantity of evidence that may be introduced in successive trials of an issue." (*People v. Robertson* (1989) 48 Cal.3d 18, 46.) Accordingly, the trial court did not err by allowing the prosecutor to argue that Silveria had committed the murder while lying in wait.

Nor did the trial court err under the collateral estoppel doctrine. Under the collateral estoppel doctrine of the Double Jeopardy Clause, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Ashe v. Swenson* (1970) 397 U.S. 436, 443.) However, "[i]t is questionable whether the doctrine of collateral estoppel even applies to further proceedings in the same litigation." (*People v. Memro* (1995) 11 Cal.4th 786, 821.) Even if it applies here, Silveria's argument fails under this Court's rulings in *People v. Taylor* (1990) 52 Cal.3d 719, and *People v. Santamaria* (1994) 8 Cal.4th 903.

In *Taylor*, the defendant was found guilty of the first degree murder and attempted rape of a woman, but the jury found an attempted rape special circumstance not true. The defendant argued that counsel was ineffective for failing to object to the prosecution's use of the attempted

rape as an aggravating circumstance at sentencing. The court rejected the defendant's argument, stating: "The fact that the jury found the special circumstance not true does not invalidate the guilt verdict returned on the attempted rape charge. The attempted rape was clearly encompassed within the authority to consider 'the nature and circumstances of the present offense' under factor (a) of section 190.3." (*Taylor*, *supra*, 52 Cal.3d at p. 743.)

In *Santamaria*, the defendant was found guilty of murder, but the jury found the alleged knife use enhancement not true. On retrial, the defendant argued that, under the Double Jeopardy Clause, the prosecution should not be permitted to argue that he personally used a knife to commit the murder. While the court agreed that the defendant could not be retried for the knife use enhancement, it disagreed with his argument that the prosecution was so limited. The court held that "the jury's not true finding on the enhancement allegation does not mean defendant did not use the knife, only that there was a reasonable doubt that he did." The court refused to limit the prosecution under the Double Jeopardy Clause. (*Santamaria*, *supra*, 8 Cal.4th at p. 921-922.)

Silveria's argument fails under *Taylor* and *Santamaria*. Whether Silveria had lain in wait for Madden was an "ultimate fact" for the lying-in-wait special allegation, but not for murder. (*Santamaria*, *supra*, 8 Cal.4th at p. 921.) Therefore the Double Jeopardy Clause did not bar the penalty jury from considering whether Silveria had lain in wait. Nor is it likely that the jurors believed they were supposed to retry a special circumstance on which they were given no instructions. (See *People v. Avila* (2009) 46 Cal.4th 680, 719 ["jurors not instructed on mayhem were unlikely to attribute to that word its legal definition" when prosecutor argued defendant committed "murder and mayhem"].) Accordingly, the trial court did not err.

2. The torture special circumstance

Silveria alleges that the trial court improperly allowed the prosecutor "to retry the torture-murder special circumstance over eight months after it had been stricken, and over 15 months after the mistrial had been declared," thereby violating the Double Jeopardy Clause of the federal Constitution. (SAOB 104-105.) Silveria also contends that such a retrial runs afoul of *People v. Haskett* (1982) 30 Cal.3d 841, and violated his right to a speedy retrial. (SAOB 105-108.) Travis alleges that the prosecutor's argument was improper criticism of the first jury's not true finding. (TAOB 481.) These arguments fail.

Appellants were never retried on the torture special circumstance. Silveria's allegation was dismissed prior to his penalty retrial, and Travis's allegation had been found not true. (11 CT 2803; 15 CT 3674-3675.) The prosecutor never re-charged Silveria or Travis with that special circumstance; the court never instructed the jury on that special circumstance; the penalty retrial jury never rendered a verdict on that special circumstance. Thus, appellants's argument that they were retried fails, and their argument that such a retrial violated their rights to a speedy trial are moot.

Nor did the admission of evidence and argument relating to torture "reopen the process of adjudication" on the torture special circumstance under *Haskett.* In *Haskett*, the defendant was charged with the rape, robbery, and attempted murder of his half-sister and with the first degree murder of her two sons. (*Haskett, supra*, 30 Cal.3d at p. 847.) The jury found the defendant guilty of the murder and attempted murder charges, but was unable to reach a unanimous verdict on the rape and robbery charges. The trial court declared a mistrial on those charges. (*Id.* at p. 849.) In the penalty phase, the prosecutor "repeatedly implied that by failing to convict defendant of rape and robbery *at the guilt phase* the jury had acted

improperly, and invited the jury to correct its 'wrong decision' in the penalty phase." (*Id.* at pp. 864-865.) The court held that the prosecutor's actions "went far beyond the boundaries of propriety" and constituted "an impermissible attempt to reopen the process of adjudication." (*Id.* at p. 866.) It declared that it "is the duty of the prosecution at the penalty phase to refrain from attacking acquittals or retrying charges on which the jury could not agree in the guilt phase." (*Id.* at p. 866.)

Haskett is distinguishable from the instant case. First, the prosecutor here never argued or implied that the original juries had erred or acted improperly when one hung on Silveria's torture special circumstance and the other found Travis's torture special circumstance not true. Indeed, the trial court had ordered that no mention be made of the original juries's decisions. (273 RT 32797.) Second, the penalty retrial jury did not decide the issue of appellants's guilt, or the truth of the torture special circumstance. Its task was limited to determining the appropriate punishment. Thus, *even if* the prosecutor had improperly argued that the first jury erred, there was no risk that the penalty retrial jury could have concluded that the torture evidence "might be used to resolve their earlier dispute, or that their assessment of the situation as intractible [*sic*] was based on an erroneous view of the evidence or the applicable law." (See *Haskett*, *supra*, 30 Cal.3d at p. 867.) Third, as discussed above regarding the lying-in-wait special circumstance, whether Silveria had tortured Madden during the murder was an "ultimate fact" for the torture special allegation, but not for the penalty for murder that the jury was to determine. (*Santamaria*, *supra*, 8 Cal.4th at p. 921.) Thus, the prosecutor's argument and elicitation of evidence that addressed torture was proper because it related to the circumstances of the murder. (§ 190.3, subd. (a).) For the same reasons, Travis's claim that the prosecutor's argument was an improper attack on the first jury's not true finding must fail.

D. The Trial Court's Instruction

Silveria argues that the trial court improperly instructed the penalty retrial jurors as follows:

> The juries that heard the guilt portion of the trial determined that Mr. Travis and Mr. Silveria were each guilty of murder in the first degree and that the special circumstances of murder in the course of burglary and in the course of robbery were true.
>
> Those juries were not asked to and did not state in their verdicts upon which theory they found the murder to be in the first degree. There is no way to know whether the prior juries found the defendants guilty of first degree murder on the same theory or on different theories, nor is it possible to know if either or both juries found the murder to be premeditated or intentional on the part of either or both defendants.
>
> It is not necessary that any or all of you make a determination as to which theory the defendants are guilty of first degree murder. However, such a determination can be made by any or all of you and considered as a circumstance of the crime under [section 190.3, subdivision] (a). You are free to make that determination for yourselves.

(276 RT 32979.) Silveria contends that "[u]nder the judge's erroneous instruction, one or all of the second penalty phase jurors could have improperly concluded that appellant committed a deliberate and premeditated murder by a lesser standard [than proof beyond a reasonable doubt], or no standard at all; then sentenced him to death since such a murder increased his culpability." (SAOB 111.) This argument fails.

Initially, Silveria is barred from challenging this instruction because he requested it (16 CT 4096-4101; 22 CT 5331; 197 RT 22663; 233 RT 27272-27273) and consented when the court indicated that it would modify the instruction slightly before giving it to the jury (274 RT 32903-32906). (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 ["'[i]f defense counsel intentionally caused the trial court to err,'" acting for tactical

reasons and not out of mistake, the claim is barred on appeal as invited error]; *People v. Prieto* (2003) 30 Cal.4th 226, 264-265 [defense counsel's deliberate tactical choice to request an instruction bars consideration of error in the giving of the instruction on appeal].) Here, Silveria's attorney argued that the instruction was necessary to prevent the jurors from trying to determine a precise theory of murder, because "it's not their province" (273 RT 32786) and they might have incorrectly concluded that Silveria had been convicted of premeditated murder without the instruction (14 CT 4098). This was a sound tactical decision. Silveria is therefore barred from challenging this instruction.

In all events, the court did not err by giving the challenged instruction. The guilt phase juries did not need to unanimously agree on a theory of first degree murder. (*People v. Geier* (2007) 41 Cal.4th 555, 592.) Thus, the first paragraph of the challenged instruction accurately describes the law. Further, since "[t]he defendant's culpable mental state may be considered as a circumstance of the crime under section 190.3, factor (a)" even when the verdict is based upon a felony-murder theory, the second paragraph accurately instructed the penalty retrial jurors. (*People v. Dykes* (2009) 46 Cal.4th 731, 802-803, fn. 18.)

Nor did the instruction improperly direct the jurors regarding the standard of proof for their verdict. The trial court instructed the jurors that, when considering the circumstances of the crime, "there is no burden of proof in a penalty phase. [¶] Each individual juror may weigh and consider each and all of the various factors and circumstances on which relevant evidence has been offered in this case, being free to assign whatever value he or she deems appropriate to each factor and circumstance." (276 RT 32984.) Later, the jurors were instructed, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the

mitigating circumstances that it warrants death instead of life without parole." (276 RT 32989.) Those instructions correctly identified the standard by which the jury was to determine Silveria's punishment. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Sanders* (1995) 11 Cal.4th 475, 564 [sentencer may be given unbridled discretion in determining penalty after finding defendant is eligible for death].) Accordingly, Silveria's argument fails.

E. Due Process

Silveria alleges that his right to due process was violated by the trial court allowing the prosecutor to argue and introduce evidence on the lying-in-wait and torture special circumstances. (SAOB 111-113.) He also argues that his due process right to a fair trial was violated by the jury instruction on whether he had committed a deliberate or premeditated murder. (SAOB 113.) However, as discussed above, none of the actions Silveria challenges was improper. Accordingly, there was no due process violation.

II. THERE WAS NO ERROR RELATED TO MERCY OR PITY (SILVERIA CLAIM II, TRAVIS CLAIMS III, XI)

Silveria argues that the trial court erred when it "(1) refused to allow [Silveria] to plead for mercy even though such plea would be based on mitigating evidence; (2) instructed jurors that they must not be influenced by pity for [Silveria]; (3) unfairly allowed the prosecutor to argue for retribution; and (4) instructed jurors to reach a just verdict regardless of the consequences." (SAOB 115.) Travis argues that the court erred by (1) refusing to instruct on mercy; (2) precluding reference to the concept of mercy; and (3) allowing the prosecutor to argue "analogous concepts" in aggravation. (TAOB 228.) These claims fail.

A. The Trial Court Did Not Err By Refusing A Mercy Instruction

Travis argues that the trial court should have given the "mercy instruction" that he requested. (TAOB 256-282.) He acknowledges that this Court has rejected a constitutional right to mercy instructions, but asserts that "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." (TAOB 281.) Travis's claim fails.

In *People v. Ervine* (2009) 47 Cal.4th 745, the trial court refused to instruct the jurors on mercy and prohibited all reference to "mercy" in argument. (*Id.* at p. 801.) This Court stated, "As defendant concedes, we have repeatedly rejected the claim that omission of "mercy" from the jury instructions constitutes error." (*Ibid.*) The Court also noted that the jury had been instructed with CALJIC No. 8.85, which "adequately instructs the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy." (*Ibid.*, citing *People v. Burney* (2009) 47 Cal.4th 203, 261.)

Travis's claims fail under *Ervine*. The jurors here were instructed with CALJIC No. 8.85 (22 CT 5376-5377) and thus were adequately instructed on the circumstances that may be considered in mitigation, including sympathy and mercy. (*Ervine*, *supra*, 47 Cal.4th at p. 801; *Burney*, *supra*, 47 Cal.4th at p. 261.) Accordingly, the trial court did not err by refusing Travis's requested instruction.

B. The Trial Court Did Not Err By Refusing To Allow Mercy Argument

Silveria argues that he presented "a substantial amount of mitigating evidence," and that the trial court's refusal to allow him "to ask the jury to

have mercy . . . denied the jury 'a vehicle for expressing its "reasoned moral response" to that evidence in rendering its decision.' (*Penry v. Lynaugh* [(1989) 492 U.S. 392,] 328.)" (SAOB 121, 133.) Similarly, Travis argues, "Sympathy was not an adequate substitution for mercy in this case." (TAOB 289.) These arguments fail.

1. Background

On November 12, 1996, Silveria moved to argue mercy to the penalty retrial jury.[12] (17 CT 4246-4250; see 200 RT 22921-22954.) The next day, Travis moved to join in Silveria's motion. (17 CT 4281-4283.) The court denied the motion on December 2, 1996. (17 CT 4358.) Specifically, the trial court rejected a jury instruction on mercy and refused to allow any argument on mercy. (202 RT 23124.) It ruled in part:

> The idea of mercy falls, if at all, under Factor (k) of Penal Code Section 190.3. That is, quote, "any other circumstance which extenuates the gravity of the crime," closed quote. Mercy is not a circumstance which extends to gravity [*sic*]—extenuates the gravity of the crime. It is forgiveness and forbearance of warranted punishment. The jury's job is not to forgive. The jury's job is to punish with either death or life without parole.

(202 RT 23126.) The trial court then discussed *California v. Brown* (1987) 479 U.S. 538, in which the United States Supreme Court ruled that death penalty juries "may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (*Id.* at p. 541; see also *Saffle v. Parks* (1990) 494 U.S. 484, 490 [antisympathy

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[12] On January 10, 1996, Silveria had requested that the court instruct the first penalty jury that "it is now proper for you to consider sympathy for defendant . . . in deciding the issue of penalty . . . ." (13 CT 3251-3265.) The court denied the motion on February 9, 1996. (13 CT 3373.)

instruction does not violate constitutional rights].) The trial court noted that in *People v. McPeters* (1992) 2 Cal.4th 1148, superseded by statute on another ground as stated in *People v. Wallace* (2008) 44 Cal.4th 1032, this Court stated 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." (*Id.* at p. 1195.) Accordingly, the trial court ruled:

> For these reasons counsel will not be allowed to argue mercy, or even use the word "mercy." And this extends to the district attorney in his argument. He's not allowed to argue anything about the lack of mercy the defendants showed the victim. Further, counsel are ordered to instruct their witnesses not to use the term either.

(202 RT 23130.)

2. Legal principles

Under section 1044, trial courts have discretion "to limit . . . the argument of counsel to relevant and material matters . . . ." In particular, "[t]he right to present closing argument at the penalty phase of a capital trial, while broad in scope, is not unbounded . . .; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark." (*People v. Harris* (2005) 37 Cal.4th 310, 355, internal quotation marks omitted.)

"Juror determinations may not be the product of 'emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase,' or 'extraneous emotional factors.'" (*Harris*, *supra*, 37 Cal.4th at p. 355, quoting *California v. Brown*, *supra*, 479 U.S. at pp. 542-543.) In *People v. Gonzalez* (2011) 51 Cal.4th 894, this Court held:

> We have noted that allowing the jury to consider victim impact evidence does not mean that there are no limits on emotional evidence and argument. [Citation.] [T]he jury must face its

> obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [A]lthough a court should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction, still, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed. [Citation.]

(*Id.* at pp. 951-952, internal quotation marks omitted.)

3. The trial court did not err

The trial court properly ruled that mercy not be discussed in argument. As it indicated, the United States Supreme Court forbids capital jurors from deciding a defendant's punishment in an "arbitrary and unpredictable" fashion. (See *Brown*, *supra*, 479 U.S. at p. 541.) While jurors may properly consider feelings of sympathy for a defendant, an exercise of mercy is—as the trial court stated—fundamentally forgiveness or forbearance of *warranted* punishment. (See Merriam Webster's Collegiate Dictionary (10th ed. 1995) p. 727, col. 2 ["Mercy implies compassion that forbears punishing even when justice demands it"]; *McPeters*, *supra,* 2 Cal.4th at p. 1195 ["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"].) If the circumstances of this case warranted the death penalty for Silveria, an argument appealing to mercy would only have improperly invited the jurors to decide Silveria's punishment in an "arbitrary and unpredictable" fashion. Therefore, the trial court properly limited counsels' arguments when it barred them from referring to mercy.

Nor did the trial court's ruling deprive the jurors of their power to consider sympathy or compassion for appellants. "This ruling was not, as defendant asserts, one that prevented him from requesting leniency; it merely guided the language he was to use in requesting leniency, replacing

the word 'mercy' with a synonym that did not connote an emotional response to the mitigating evidence instead of a reasoned moral response." (*People v. Ervine* (2009) 47 Cal.4th 745, 802.) Indeed, Silveria's attorneys argued that he was "a worthwhile human being" and "a person worth saving" (278 RT 33280), and they requested that the jurors find "compassion" for him during their deliberations (278 RT 33281; 279 RT 33448, 33458). Travis's attorney implored the jurors for "sympathy and empathy" (278 RT 33300) and "compassion" (278 RT 33340, 33481), and asked them to "live with the peace that comes not from vengeance . . . but from the forbearance of imposing death" (278 RT 33354). These arguments were plainly based on the mitigating evidence of appellants's upbringings and their good behavior in jail. Thus, the jurors were plainly aware of their power to consider sympathy and compassion arising from the mitigating evidence. Accordingly, Silveria's and Travis's arguments fail.

Silveria also contends that the trial court erred by denying a mistrial after the prosecutor "told the jury during his opening statement [that] Mr. Madden was 'mercilessly' bound with duct tape." (SAOB 121.) The prosecutor had argued: "Somewhere during this horrible attack, as Mr. Madden was desperately and furiously struggling against the tightly-wrapped duct tape that so mercilessly bound him . . . ." (236 RT 27443.) Initially, Silveria is barred from challenging this argument because he did not make a timely objection. (*People v. Gonzalez* (2011) 52 Cal.4th 254, 305; *People v. Turner* (2004) 34 Cal.4th 406, 430.) Instead, Silveria's attorney only joined in Travis's motion for mistrial later that day. (236 RT 27478-27479.) The delay demonstrates how little prejudice the defense detected from the prosecutor's argument. In all events, the prosecutor's argument was harmless: it was an isolated comment and he did not directly argue that Silveria was merciless. Silveria's claim fails.

C. The Trial Court's Instruction That The Jury Not Be Influenced By Pity Was Not Prejudicial

Silveria argues the trial court erred when it instructed potential penalty retrial jurors with CALJIC No. 1.00 as follows:

> You must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested, charged with a crime or brought to trial. You must not be influenced by mere sentiment, conjecture, prejudice, public opinion or public feelings. Both the defendants and the People have a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict regardless of the consequences.

(206 RT 23474; see 206 RT 23526 ["You must not be influenced by pity for a defendant or by prejudice or bias against him because he has been arrested, charged with a crime or brought to trial"].) Silveria's claim fails because this instruction, even if erroneously given, was not prejudicial.

This Court has stated that "an instruction *at the penalty phase* not to be influenced by pity or sympathy is erroneous and is generally ground for reversal of a verdict imposing the death penalty." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 784, emphasis in original.) However, in *California v. Brown*, *supra*, the United States Supreme Court held that an instruction informing jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital trial did not violate the Constitution. (*California v. Brown*, *supra*, 479 U.S. at p. 539.) The determinative issue is "whether the jury instructions, taken as a whole, and considered in combination with the prosecutor's closing argument, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the [defendant]." (*Id.* at p. 546 (conc. Opn. of O'Connor, J.).) This is particularly significant in this case, where the challenged

instruction was given only during voir dire and was not repeated as part of the final instructions prior to deliberation.

The instruction given here did not run afoul of the Constitution. Taken as a whole, the instructions and the prosecutor's argument "adequately informed" the jury of its responsibility to consider all of the mitigating evidence introduced by Silveria. During voir dire, as part of the general instructions that included the no-pity instruction, the trial court instructed the potential jurors that they should consider mitigating evidence, including "facts about the defendant's life, his upbringing and so on." (206 RT 23476.) The trial court also told the prospective jurors that the instructions would be re-given prior to deliberations. (206 RT 23473, 23525.) The final instructions given to the penalty retrial jurors did not direct them to ignore pity. (22 CT 5350.) In fact, the jurors were specifically instructed to consider all of the mitigating evidence. (22 CT 5376-5377, 5397-5398.) Further, the prosecutor's argument specifically directed the jurors that they could assign whatever "moral or sympathetic value" they determined from the mitigating evidence presented. (276 RT 33020, 33068, 33078; 277 RT 33118.)[13] The prosecutor also referred to the defense's attempt to elicit sympathy and compassion (277 RT 33118, 33127, 33137; 278 RT 33368) without stating or implying that such a determination would be improper. Under these circumstances, the no-pity instruction given to some of the jurors prior to their selection did not detract from their understanding that they were to consider Silveria's mitigating

[13] The defense's closing arguments also directed the jurors to consider the moral or sympathetic value of the mitigating evidence. (*See* 277 RT 33183 ("moral or sympathetic value"); 278 RT 33280 (Silveria "is a worthwhile human being, [] a person worth saving"), 33281 ("compassion"), 33300, 33340 (Travis arguing for "sympathy and empathy"); 279 RT 33458, 33481 (compassion).)

evidence. (See *People v. Seaton* (2001) 26 Cal.4th 598, 684-685 [no error from no-pity instruction where other instructions and counsel's argument correctly directed jurors to consider sympathy value of mitigating evidence].) Accordingly, Silveria's claim fails.

Silveria claims that the trial court erred by not reading from CALJIC No. 8.84.1, which provides in relevant part: "Disregard all other instructions given to you in other phases of this trial." Silveria argues that without this instruction, "at least seven jurors remained under the mistaken belief that [the court]'s earlier 'no pity' instruction given during voir dire was still in effect and that they 'must not be influenced by pity' for [Silveria] despite his mitigating evidence." (SAOB 127-128.) However, as described above, the remaining instructions given by the court more than adequately informed the jurors of their responsibility to consider Silveria's mitigating evidence. (22 CT 5376-5377, 5397-5398.) That understanding was further underscored by the closing arguments, in which the prosecutor and defense attorneys all directed the jurors to consider the moral and sympathetic value of Silveria's mitigating evidence. Under these circumstances, the jurors could not have been confused, and there was no error from the absence of CALJIC No. 8.84.1. Accordingly, Silveria's claim fails.

D. The Trial Court Did Not Err By Allowing The Prosecutor To Argue Strongly

Silveria argues that the trial court should not have allowed the prosecutor "to ask the jury for retribution by imposing death" after "refusing to allow [Silveria] to plead for mercy and ask the jury to spare his life." (SAOB 129.) Travis makes a similar argument, alleging that the trial court improperly allowed the prosecutor to argue "blatant emotional appeals . . . that have nothing in particular to do with the specific facts of the present case." (TAOB 290-292; 483-485.)

1. Background

In the prosecutor's rebuttal closing argument, he stated:

> [Silveria's counsel] argues that since the victim can't be brought back nothing can be gained by killing a killer so why should society do that. I submit, ladies and gentlemen, that everyone from a civilized society has the right to make sure that the law, theoretically and ideally, is carried out as it's supposed to be, because each of us have given up our personal right to do that ourselves.
>
> The instinct for just retribution is part of the nature of every human being. Channeling that instinct to the administration of criminal justice serves an important purpose in promoting the stability of a society that is governed by law, a society that is governed by law and order.
>
> 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.
>
> [TRAVIS'S COUNSEL]: Your Honor, I'm going to object to any use of the word of the community's feelings about this. There are direct instructions that these jurors—
>
> THE COURT: The objection is sustained.
>
> [TRAVIS'S COUNSEL]: I also move to have that stricken.
>
> THE COURT: Stricken.
>
> [PROSECUTOR]: Like it or not, ladies and gentlemen, retribution is still a part of being human and of being a human being. I submit that in spite of the fact that both defendants are asking you, or their lawyers are, to spare their lives, that when they chose to take Jim Madden's life that night they forfeited their own.

(279 RT 33420-33421.)

2. The prosecutor's argument was proper

The trial court did not err because the prosecutor's argument was proper.[14] First, the prosecutor's argument was that when the community's "instinct for just retribution" has been properly channeled into a law allowing for the death penalty, society is better because it is thus "governed by law and order." Thus, the prosecutor was urging the jurors to apply the death penalty law that "channeled" human beings's desire for retribution. In *People v. Huggins* (2006) 38 Cal.4th 175, this Court declared that it is "legitimate argument for the prosecutor to argue that if the jury could not protect society by sentencing defendant to death, its failure to do so would create an incentive for society to engage in improper self-help to protect itself." (*Id.* at p. 253.) That is what the prosecutor was doing here.

Second, the prosecutor was responding to argument made by appellants. Silveria's attorney had argued in relevant part:

> Now, what justification can the state offer you for killing Mr. Silveria? I submit there is only one, and that is pure retribution for what might colloquially be termed payback or vengeance.

(277 RT 33158; see also 33160.) Similarly, Travis's attorney had argued against "retribution" and "vengeance." (278 RT 33300, 33354.) The prosecutor properly responded to those arguments. "Isolated, brief references to retribution or community vengeance such as occurred here, although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the

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[14] To the extent that Silveria's argument can be construed as a claim of prosecutorial misconduct—a claim not argued or supported by cited authority in Silveria's opening brief—it is forfeited by his failure to object to the prosecutor's argument. (*Turner*, *supra*, 34 Cal.4th at p. 430.)

imposition of the death penalty." (*People v. Ghent* (1987) 43 Cal.3d 739, 771.) Here, the prosecutor's isolated comments were not particularly inflammatory, nor did they form the principal basis of his argument in favor of the death penalty. Accordingly, the trial court properly allowed it.

Travis argues that the prosecutor "was able to imply that anything less than a death verdict would invite a return to vigilante justice and lynch mobs." (TAOB 483.) He contends that such a "strong appeal to emotion" was improper. (TAOB 484-485.) However, the arguments he complains of (see TAOB 475-476) were isolated and not objectionable. (See, e.g., *People v. Gamache* (2010) 48 Cal.4th 347, 389 [proper for prosecutor to argue jurors are "conscience of the community"].) Moreover, the prosecutor's own argument stressed what a "solemn responsibility" the jurors had. (276 RT 33003.) Considering his argument as a whole, the prosecutor made no improperly inflammatory argument.

Travis also argues that "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." (TAOB 485.) However, the prosecutor's argument, taken as a whole, plainly expressed no such intention. (See Arg. X(C), post.) To the extent that the prosecutor referred to the jurors as representatives of the community that passed the death penalty law, such comments were proper. (*People v. Ledesma* (2006) 39 Cal.4th 641, 741, citing *Caldwell v. Mississippi* (1985) 472 U.S. 320.) Accordingly, Travis's argument fails.

E. The Trial Court's Instruction That The Jury Not Consider The Consequences Was Not Prejudicial

Silveria argues the trial court erred when it instructed potential penalty retrial jurors with CALJIC No. 1.00, which in relevant part reads: "Both the defendants and the People have a right to expect that you will

conscientiously consider and weigh the evidence, apply the law and reach a just verdict regardless of the consequences." (206 RT 23474.)

In *People v. Ray* (1996) 13 Cal.4th 313, this Court held that "language instructing the jury to disregard the consequences of its verdict is inappropriate and should not be given at the *penalty* phase of a capital trial." (*Id.* at p. 354, emphasis in original.) However, the *Ray* court concluded that, given the instructions in that case as a whole, "it is not reasonably likely that the jury was misled as to the nature and gravity of its sentencing responsibility." (*Ibid.*)

The instructions here, viewed as a whole, did not mislead the jury as to the nature and gravity of its responsibility. As noted previously, this instruction was given only during voir dire and was not repeated prior to deliberation. Further, as in *Ray*, the jurors here were instructed with CALJIC No. 8.88 to "weigh" the aggravating and mitigating factors to determine "the appropriateness" of the death penalty (276 RT 32988-32989; 22 CT 5397), and with CALJIC No. 8.85 to consider all of the aggravating and mitigating evidence (276 RT 32977-32978; 22 CT 5376). They were also directed that it was their responsibility to "determine" the penalty (276 RT 32975; 22 CT 5371) and to assume that their decision would be carried out (276 RT 32975; 22 CT 5372). Thus, taken as a whole, the instructions adequately informed the jury of its responsibility. Silveria's claim fails.

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

Silveria argues that the trial court improperly limited the testimony of his psychiatric expert, Dr. Kormos, to the time period from Silveria's early childhood until his 21st birthday. Silveria contends that such a limitation "resulted in the exclusion of critical mitigating evidence that would have explained to the jury: (1) how the neglect, deprivation and physical and

sexual abuse appellant suffered throughout his childhood affected his conduct *on the day of the crimes*; and (2) how appellant's relationship with co-appellant Travis, and the other co-defendants, affected appellant's conduct *at the time of the crimes*." (SAOB 139, emphasis in original.) Silveria also asserts that the limitation "resulted in the improper exclusion of evidence that demonstrated appellant's positive development in the *six years since the crimes*." (SAOB 139.) Silveria's argument fails.

A. Background

In the first penalty trial, Dr. Kormos testified that he had interviewed Silveria approximately 15 times and had reviewed his and Travis's confessions, various reports, and the transcripts of Silveria's trial testimony. (162 RT 16055-16058.) Dr. Kormos opined that Silveria's relationship with Travis was "particularly important at the time of the crime." (162 RT 16126.) He further testified that Silveria and the other defendants had formed a "pseudo-family" around the time of the crime. (162 RT 16129.) It was a "pseudo-family" in the sense that "these people didn't really have the kind of unconditional acceptance of each other that ideally one would fine in a functional, real family," instead "competing with each other, competing for the favors of each other, having rotating leadership, having a need to present oneself in a particular light in order to have the family, pseudo-family, continue its function." (162 RT 16131-16132.)

Silveria's counsel Geoffrey Braun ("Braun") proposed a detailed hypothetical that essentially described the planning of the LeeWards murder, and asked Dr. Kormos if Silveria could still have thought no one would be killed if that hypothetical plan was carried out. (162 RT 16133.) Dr. Kormos opined that Silveria could have thought the talk of murder was "the kind of tough talk and posturing that he was accustomed to" and that Silveria "really thought that even if he were to be identified by the

victim . . . he could just get away, go away far away and nobody would find him." (162 RT 16133-16134.)

Defense counsel posed another hypothetical: "assume that in his confession Danny told Sergeant Keech that it was his idea that after the robbery he was going to take the proceeds, leave the area, become a drug dealer and make a new life, are thoughts like that consistent with a person who has suffered the kind of abuses and deprivations that Danny suffered as a child?" Dr. Kormos responded, "Certainly." (162 RT 16134.)

In the penalty retrial, Silveria and Travis were tried together before a single jury, and the trial court excluded the evidence of Silveria's confession. (See Arg. IV(A), post.) The issue of whether Dr. Kormos could rely on that confession in his testimony arose, and the trial court noted that he could not, because otherwise Dr. Kormos "cannot be subject to proper cross-examination by the district attorney or by [Travis's counsel], and [Travis]'s constitutional rights are going to be violated." (262 RT 31048.) The court offered Silveria three choices— it would strike Dr. Kormos's testimony, give Silveria time to decide if he wanted to testify, or follow the prosecutor's suggestion and limit direct and cross-examination by omitting any reference to the confessions. (262 RT 31060-31061.) Silveria's counsel suggested that he limit Dr. Kormos's testimony to Silveria's childhood "and cut Dr. Kormos off at some point prior to the commission of the crime and not ask him questions concerning Mr. Silveria's state of mind at or about the time of the crime." (262 RT 31064.) This proposal was accepted by the prosecutor, Travis's counsel, and the court, with the proviso that the prosecutor could "recall Dr. Kormos and question him in any proper area under the law." (262 RT 31094-31096.)[15]

[15] This discussion was sealed and transcribed at 262 RT 31091-31096.

B. Silveria's Claim Is Foreclosed As Invited Error

Silveria's argument must not be heard, because he invited any error. "If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186.) Here, it was Silveria's attorney who proposed the limitation on Dr. Kormos's testimony. He had a clear tactical basis for that decision, as the trial court had indicated it might strike all of Dr. Kormos's testimony otherwise.[16] Accordingly, Silveria invited any error and cannot challenge the court's decision here.

C. The Trial Court Properly Limited Dr. Kormos's Testimony

In all events, Silveria's claim fails because the trial court's decision was proper. An expert giving testimony may be subjected to the most rigid cross-examination concerning his opinion and its sources. (*People v. Nye* (1969) 71 Cal.2d 356, 374-375.) Dr. Kormos's expert opinions were based in part upon his review of materials ruled inadmissible at the penalty retrial. Accordingly, both Travis and the prosecution were prevented from cross-examining Dr. Kormos on one of the sources of his opinion, denying both parties their right to full cross-examination. The trial court could therefore have struck all of Dr. Kormos's testimony, as it stated it would do unless another arrangement was made. The arrangement here—suggested by Silveria himself—was proper. Accordingly, Silveria's claim fails.

Silveria's miscellaneous arguments are specious. First, he asserts that the trial court threatened to hold Braun in contempt, and for that reason,

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[16] "A claim that the tactical choice was uninformed or otherwise incompetent must, like any such claim, be treated as one of ineffective assistance of counsel." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) Silveria makes no such claim here.

Braun suggested the limitation on Dr. Kormos's testimony. (SAOB 138, 139.) During the discussion of Dr. Kormos's testimony, Travis objected to Dr. Kormos testifying about the hearsay documents that he had reviewed when forming his opinion. (262 RT 31043.) The court noted that the issue was "a very large problem" because Dr. Kormos was entitled to base his opinion on hearsay, and had "received, reviewed and based his opinion on some items that have been excluded . . . ." (262 RT 31044.) Braun asked to speak:

> MR. BRAUN: Yes, Your Honor. If I can address that issue?
>
> THE COURT: Yes, I wish you would. That's the real issue, Mr. Braun. Let's see how you handle this one.
>
> MR. BRAUN: I'm prepared to do that, Your Honor.
>
> THE COURT: Do it then, please.
>
> MR. BRAUN: But I would ask that the Court address me in a more respectful fashion.
>
> THE COURT: Mr. Braun, would you please just continue on.
>
> MR. BRAUN: This is not my fault.
>
> THE COURT: Mr. Braun, you are so close to contempt in this matter I can't believe it.

(262 RT 31044-31045.) After that, Braun addressed the issue. It is plain from the record that the trial court was merely expressing its frustration at Braun's repeated refusal to address the issue at hand. Moreover, at no other point during the resolution of this issue did the trial court ever express any

displeasure at Silveria or Braun.[17] (See 262 RT 31045-31096.) Silveria's argument that the court's "threat" of contempt invited Braun's tactical decision regarding Dr. Kormos's testimony is specious.

Second, Silveria argues that "[t]here was simply no legitimate basis to conclude that Travis's rights would be jeopardized" by Dr. Kormos's unlimited testimony. (SAOB 139.) Silveria asserts that, at the first penalty trial, Dr. Kormos testified that he had reviewed the confessions, Travis had fully cross-examined him, and no party had expressed any concerns at that point. (SAOB 140.) This argument fails. There was no concern over Travis's right to cross-examine at the first penalty trial because the confessions were admissible and Dr. Kormos was subject to full cross-examination. At the penalty retrial, before a new jury, Silveria chose not to testify, his confession was not admitted, and therefore Dr. Kormos could not be cross-examined on one of the sources from which he drew his expert conclusions. Both the prosecution and Travis were entitled to such cross-examination at the penalty retrial.

Silveria contends the trial court allowed the prosecutor to cross-examine Dr. Kormos on the crimes, in violation of the stipulation. (SAOB 144-150.) The trial court initially refused to allow the prosecutor to cross-examine Dr. Kormos on what Silveria had told him. (271 RT 32580.) After hearing argument from counsel, however, the trial court concluded that Silveria's attorney had broken the stipulation on direct examination. (271 RT 32599-32602.) The court allowed the prosecutor to ask general questions about whether Silveria had lied to Dr. Kormos and whether such lying would affect Dr. Kormos's diagnosis. (271 RT 32602, 32609-32610.)

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[17] Respondent notes that the only record citation Silveria provides in reference to a threat of contempt contains no mention of contempt. (SAOB 138.)

Dr. Kormos testified that his opinions would be affected by knowing whether Silveria lied to him, "why he lied and how he lied." (271 RT 32642.) However, Dr. Kormos explained that even had Silveria lied about applying the stun gun to Madden before the stabbings, that lie would not change his diagnosis from child neglect. (271 RT 32646-32648.)

This testimony was proper, and any error was harmless. Silveria's attorney had asked questions of Dr. Kormos regarding the effects of Silveria's abuse "later in life." (263 RT 31223, 31226.) The trial court reasonably concluded that such questions violated the stipulation limiting Dr. Kormos's testimony to the time before Silveria's 21st birthday, and therefore reasonably permitted the prosecutor to venture slightly beyond the stipulation's terms as well. In all events, Dr. Kormos's testimony that Silveria suffered from child neglect that would affect his decisions "later in life" was admitted. Any error was therefore harmless.

IV. THE TRIAL COURT PROPERLY EXCLUDED OTHER MITIGATING EVIDENCE (SILVERIA CLAIM IV)

Silveria argues that the trial court improperly excluded his confession, his letters to Morrella, Morrella's testimony related to Silveria's interest in Christianity, Morrella's testimony about her visits from 1996 to the time of the penalty retrial, and Silveria's letters to the Madden family and Munoz. (SAOB 152.) Not so.

A. Silveria's Confession

Silveria argues that the trial court erred by excluding his confession from the penalty retrial. He asserts that the confession was admissible mitigating evidence because it "showed his early acknowledgment of responsibility and remorse." (SAOB 156.)

1. Background

During the guilt phase, Sergeant Keech testified that Silveria confessed on January 30, 1991, shortly after his arrest. (108 RT 10627.) A tape recording of the confession was played to Silveria's jury. (108 RT 10631, 10633.)

Prior to the penalty retrial, Silveria moved for severance. (16 CT 4005.) One of the grounds for severance he argued was that "any proposed use of either defendant's unredacted confession to the police is going to require a severance on the Sixth Amendment grounds set forth in *Bruton v. United States* (1968) 391 U.S.[ ]123 . . . ." (16 CT 4029.) The court denied severance, but ruled that the prosecutor could not use Silveria's or Travis's confession because they "cannot be properly redacted to afford the People and the defendants their right to a fair trial." (200 RT 22911-22912.) However, the court ruled that the prosecutor could introduce Silveria's prior testimony. (200 RT 22912.) Later, when the prosecutor sought to incorporate references to the confession included in Silveria's prior testimony, Silveria successfully objected. (244 RT 28492-28494.) Silveria withdrew his motion to introduce the beneficial portions of his confession. (244 RT 28495.) The trial court granted his request to ask Sergeant Keech the sole question "did [Silveria] admit his participation in the LeeWards robbery and murder to you?"[18] (246 RT 28526-28529.)

After the jury began deliberations, it sent out a communication requesting "any police reports from Mr. Silveria's initial arrest/confession . . . ." (280 RT 33498.) The court responded: "The police reports and any confession, if any, by anyone, other than Mr. Travis, were not admitted into evidence. You have all the evidence that the law allows you to consider at

[18] It does not appear that Silveria ever asked Sergeant Keech this question.

this time and upon which to base your verdicts." (281 RT 33524.) Silveria specifically approved of this language. (280 RT 33504.)

2. The trial court properly excluded silveria's confession

Silveria's claim fails. In the first part, Silveria cannot complain that the trial court improperly excluded his confession, because Silveria never tried to introduce his confession into evidence. Although his attorney once stated that he "intended" to elicit testimony about Silveria's "expressions of remorse" contained in the confession (241 RT 28105), he withdrew his motion before the scheduled hearing and before the court ruled on the issue (244 RT 28495; 246 RT 28526). Silveria identifies—and respondent has located—no other attempts by Silveria to introduce his confession into evidence. Silveria cannot complain of an error that never occurred.

Secondly, even if Silveria had moved to admit his confession, it remained inadmissible. As a declaration not made by a testifying witness, it was hearsay. (See Evid. Code, § 1200.) Evidence Code section 1220 provides an exception to the hearsay rule for party admissions only when they are offered *against* the declarant. Evidence Code section 1230 provides an exception to the hearsay rule for declarations against interest, but requires that the declarant be unavailable, and Silveria could not have been "unavailable" for those purposes by invoking his right not to testify. (*People v. Elliot* (2005) 37 Cal.4th 453, 483.) Thus, Silveria's confession was inadmissible hearsay.[19]

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[19] Moreover, even if the confession were not barred by Evidence Code section 1200, Travis would have had to waive his right to confront Silveria about the confession. (*Bruton*, *supra*, 391 U.S. 123; *see People v. Floyd* (1970) 1 Cal.3d 694, 719-720 (*Bruton* applies even when it is a codefendant, rather than the prosecution, seeking to admit a confession), overruled on another ground in *People v. Wheeler* (1978) 22 Cal.3d 258.)

In all events, any error was harmless beyond a reasonable doubt. (*People v. Jennings* (2010) 50 Cal.4th 616, 652, citing *Harrington v. California* (1969) 395 U.S. 250, and applying *Chapman v. California* (1967) 386 U.S. 18.) The confession[20] contained an extensive admission of guilt. However, it began by Silveria repeatedly denying involvement in the robbery and murder at LeeWards. (See, e.g., 20 CT 4910, 4934-4935, 4938, 4940-4941, 4943, 4950-4951.) Thus, the value of the evidence of Silveria's early admission of guilt would have been substantially diluted by his evasiveness and lying. The confession did contain some expressions of remorse (20 CT 4952, 4993 (Silveria states he should "die for this"), 4961 ("I can even shed a tear for him").) However, it also contained a brutal description of the robbery and murder, as well as Silveria's attempts to minimize his involvement (e.g., 20 CT 4957, 4992 [Madden "was dead already" when Silveria stabbed him], 4977 ["I was a polite crook"].) In addition to the other evidence presented at the penalty retrial, it is not reasonably possible that the confession's admission would have resulted in a different verdict.[21] Accordingly, any error was harmless, and Silveria's claim fails.

B. Silveria's Letter To Morrella

Silveria argues that the trial court erred by excluding "letters [he] had written to his ex-girlfriend, Julie Morella, in which [he] expressed remorse for his participation in the murder of Mr. Madden." (SAOB 157.) Not so.

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[20] A transcript of Silveria's confession is located at 20 CT 4908-5011.

[21] Respondent notes that, while the confession was not admitted into evidence, Silveria's attorney did argue that Silveria was the first to confess. (236 RT 27471, 27474.)

1. Background

In the first penalty trial, Morrella testified that Silveria sent her things from jail, including a letter, a Christmas card, drawings, decorated envelopes, and poems. (146 RT 13864-13879.) The drawings were admitted into evidence during Morrella's testimony (146 RT 13872), but Silveria's counsel did not move the other items into evidence at that time (see 146 RT 13965-13966). In particular, he did not attempt to enter the letter into evidence because the trial court had earlier ruled that Silveria's expressions of remorse—both written and oral—were inadmissible hearsay, at least until such time as Silveria testified. (146 RT 13811, 13813, 13815, 13849.)

Silveria later testified that he had sent the letter, Christmas card, and poems to Morrella. (149 RT 14372 (letter), 14347 (Christmas card), 14349 (poems).) The court admitted the items into evidence.[22] (159 RT 15699 (letter), 15332-15333 (Christmas card and poems).) Silveria also testified that he had spoken with Morrella about his remorse. (149 RT 14376.)

After Silveria testified, Morrella was recalled and testified that Silveria had orally expressed his remorse when she visited him in jail. (152 RT 14801-14806.)

At the penalty retrial, Silveria's counsel moved for permission to ask Morrella about Silveria's oral expressions of remorse. (256 RT 29944-29946.) The court permitted counsel to ask Morrella about Silveria's oral expressions of remorse. (256 RT 29951.) Morrella testified that he had expressed his remorse during her visits. (256 RT 29986-29990.) The court

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[22] The Christmas cards and poems were admitted into evidence, but not for the truth of the matter(s) asserted. (155 RT 15330, 15332-15333.)

also admitted the envelopes and drawings into evidence. (256 RT 29980, 29982.)

2. The trial court properly excluded Silveria's letter to Morrella

The trial properly excluded Silveria's letter[23] to Morrella. The letter's expressions of remorse were hearsay (Evid. Code, § 1200) and not admissible.

Silveria may argue that the letter would have been admissible under Evidence Code sections 1220, 1230, 1250, or 1251. Evidence Code section 1220, which provides an exception to the hearsay rule for party admissions, does not apply, because it can be invoked only when the statements are offered *against* the declarant. Evidence Code section 1230 provides an exception to the hearsay rule for declarations against interest, but requires that the declarant be unavailable, and Silveria could not have been "unavailable" for those purposes by invoking his right not to testify. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 483.) Likewise, Silveria was not "unavailable" for the purposes of Evidence Code section 1251, which provides an exception to the hearsay rule for statements of previous mental state. (*People v. Edwards* (1991) 54 Cal.3d 787, 819.)

Nor did the trial court err under Evidence Code section 1250. That section provides an exception to the hearsay rule for statements of state of mind, but is subject to Evidence Code section 1252, which states: "Evidence of a statement is inadmissible under this article if the statement

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[23] In his opening brief, Silveria repeatedly refers to "letters" in the plural. (SAOB 157-158.) However, there is only one "letter" in dispute. To the extent that Silveria argues "[i]t is not possible to know what extent appellant's written expressions of remorse to Ms. Morrella may have influenced some of the jurors in the first penalty phase," respondent suggests that Silveria first identify what other written expression of remorse he is referring to. (SAOB 158.)

was made under circumstances such as to indicate its lack of trustworthiness." (See *Edwards*, *supra*, 54 Cal.3d at pp. 819-820.) "The United States Constitution compels the admission of hearsay evidence only if the proponent shows the evidence is highly relevant to a critical issue and is sufficiently reliable." (*People v. Smith* (2003) 30 Cal.4th 581, 629.) Here, the trial court reasonably found that the letter's expression of remorse was untrustworthy because "there is a definite chance of insincere motive as to whether [Silveria] made the statement . . . in contemplation of litigation based on when they were made." (146 RT 13815; see also 13811.)[24] He also heard the prosecutor's argument that the statements were unreliable because Silveria made them to Morrella, who was "very religious in nature" and "went to see [Silveria] with the express purpose of helping him find God and that she was very gratified when . . . he began to indicate certain things in that regard." (256 RT 29948.) Thus, the letter was not so reliable that the trial court was obligated to admit it under Evidence Code section 1250. Moreover, Silveria had ample opportunity to present evidence of his remorse without the letter, notably by Morrella's testimony that he had expressed remorse orally to her. Accordingly, the court acted within its discretion when it excluded the letter. (See *Smith*, *supra*, 30 Cal.4th at p. 629.)

Respondent notes that Silveria makes no argument whatsoever regarding the theory of admissibility of the letter. However, to the extent that he contends the evidence violated his federal constitutional right to have the sentencer consider all relevant mitigating evidence, respondent notes that "[t] he same lack of reliability that makes the statements

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[24] The trial court made that observation in the first penalty trial. Its familiarity with the facts and issues from that trial necessarily informed its decision at the penalty retrial.

excludable under state law makes them excludable under the federal Constitution." (*People v. Livaditis* (1992) 2 Cal.4th 759, 780.) To the extent that Silveria argues the trial court erred under *Chambers v. Mississippi* (1973) 410 U.S. 284, by applying the hearsay exclusion "mechanistically" in spite of his right to present mitigating evidence, respondent notes that "the United States Supreme Court never has suggested that this right precludes the state from applying ordinary rules of evidence to determine whether such evidence is admissible." (*People v. Smithey* (1999) 20 Cal.4th 936, 995.) Further, the trial court also excluded the letter under Evidence Code section 352 (146 RT 13815), and this Court has previously ruled that "due process does not bar the application of Evidence Code section 352 at the penalty phase of capital trials." (*People v. Yeoman* (2003) 31 Cal.4th 93, 141.)

C. Morrella's Testimony

Silveria contends that the trial court erroneously refused to allow him to question Morrella about Silveria's excitement about Christianity and the Bible. (SAOB 159-161.)

1. Background

In the first penalty trial, Morrella testified that Silveria was "pretty cold" when she first started visiting. (146 RT 13857.) Over time, she began noticing his appearance improve, which she attributed to "the Lord [] really making a difference in his life." (146 RT 13858.) Morrella testified that "he was excited about reading the Bible." (146 RT 13589, 13860.) She felt that Silveria was sincere in his faith. (146 RT 13861-13893.)

In the penalty retrial, Morrella testified that Silveria "was real cold" when she first started visiting. (256 RT 29955-29957.) Over time, she began noticing his appearance improve. (256 RT 29957-29959.) His attitude also improved. (256 RT 29959-29960.) When counsel asked her

why he felt better, she responded "because he started to read the Bible." (256 RT 29961.) The prosecutor objected to the question as speculative, and the court sustained the objection and struck the testimony. (256 RT 29961.)

When counsel asked Morrella if she had talked to Silveria "about the Lord," Morrella responded "he was really excited because he had started reading the Bible." (256 RT 29963.) The prosecutor objected to the question as hearsay, and the court sustained the objection and struck the testimony. (256 RT 29963.) When counsel explained that he was not offering the testimony for the truth of the matter asserted, the court responded that "[i]t's not offered for a relevant purpose." (256 RT 29963-29964.) Three questions later, when Morrella volunteered that Silveria said that "he was starting with the Old Testament," the court once again sustained the prosecutor's objection and denied a requested bench conference by Silveria's counsel. (256 RT 29964.)

Morrella then testified that Silveria and she had spoken about religion on several occasions, and that "he was very excited about it." (256 RT 29965.) The following colloquy ensued:

> [DEFENSE COUNSEL]: Did Danny seem to be very excited about discussing the Bible, and if so, what makes you draw that conclusion?
>
> [MORRELLA]: I think that the reason why I'm drawing that conclusion is because he expressed to me that— well, each visit, like I would go and visit him, he would bring in like some kind of literature. He would bring— he would always bring in a Bible or book that he's reading about Christianity. He would say, "Gosh, I just read a really good book."
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [PROSECUTOR]: Could we approach?

THE COURT: You're going to have to instruct your witness she cannot testify as to what somebody else said.

[DEFENSE COUNSEL]: Your Honor, I will instruct the witness.

THE COURT: It is hearsay. Now continue.

[DEFENSE COUNSEL]: May we approach?

THE COURT: No.

[DEFENSE COUNSEL]: Please?

THE COURT: No.

(256 RT 29965-29966.)

The court continued to sustain the prosecutor's objections to questions that elicited hearsay. (256 RT 29966, 29967.) Eventually, Morrella testified that she believed that Silveria had been reading the Bible based on his bringing other Christian literature to their visits and his quotation of Scriptures. (256 RT 29967-29968.)

2. The trial court did not err

Silveria contends the trial court "excluded relevant mitigating evidence by applying the hearsay rule even where [defense counsel] explained that he was not offering this testimony for its truth." (SAOB 161.) This claims is meritless.

Initially, it is entirely unclear what evidence Silveria contends was erroneously excluded. Morrella testified that she believed Silveria was excited about Christianity and that she believed he had been reading the Bible. (256 RT 29965, 29967-29968.) Since Silveria utterly fails to identify any erroneously excluded evidence, his claim must fail.

To the extent that Silveria contends that the trial court should have permitted Morrella's testimony that "He told me that he was really excited because he had started reading the Bible" (*see* 256 RT 29963), his claim

fails. The statement's only relevance is to establish the truth of the matters asserted— namely, that Silveria was excited and that he had begun reading the Bible. That is inadmissible hearsay under the Evidence Code.

Defense counsel argued that Morrella's answer was admissible "not for the truth of the matter. It is for the reason this witness began to discuss—" (256 RT 29963.) The reason why Morrella spoke with Silveria about Christianity is both irrelevant to the issues in the penalty retrial and duplicative of her immediately preceding testimony (256 RT 29963 ("That's what was in my mind when I first went to see him")) and her subsequent testimony (256 RT 29970 ("that was like one of my original intentions to go visit")). Accordingly, it was not error to exclude it.

To the extent that Silveria argues now that his "state of mind is relevant to the question of his punishment, given that this evidence went to the question of appellant's character" (SAOB 161), his claim fails. A claimed exception to the hearsay rule may not be raised for the first time on appeal. An offer of proof must be made at trial and a proper foundation laid. (*People v. Livaditis*, *supra*, 2 Cal.4th 759, 778.) As defense counsel made no such foundation below, Silveria cannot make that claim here. Moreover, the statements were unreliable: Silveria was in a penal setting, faced with the death penalty, and may have feigned interest in Christianity in order to perpetuate the visits from Morrella. The trial court could therefore have properly excluded the testimony under Evidence Code section 1352. In all events, as the substance of Morrella's testimony was nevertheless admitted at other points in her testimony, Silveria's claim is meritless.

D. Silveria's Letters To The Madden Family And Munoz

Silveria argues that the trial court erroneously excluded a letter he wrote to Munoz and a letter he wrote to the Madden family.[25] (SAOB 163.) Silveria contends that the trial court and prosecutor "knew full well" that he had written those letters and that he "had laid the foundation for their admission in this trial during the first penalty phase." He concludes that the trial court must have "relied upon a mechanistic application of the rules of evidence" to exclude them, presumably in violation of *Chambers v. Mississippi*, *supra*. (SAOB 163-164.) Silveria is wrong.

The letters were inadmissible hearsay. As discussed above, the admission of evidence is governed by the Evidence Code. Silveria ignores Evidence Code section 1200, which bars the admission of hearsay evidence. He offers no justification for the admission of the letters, relying instead on his repetitious assertion that they constituted "mitigating evidence." (SAOB 164.) However, "[a]dmission of such statements in the form and for the purpose offered here would effectively permit defendant to address the jury without subjecting himself to cross-examination. . . . [T]he defendant is entitled to no unique immunity from examination by the People." (*People v. Whitt* (1990) 51 Cal.3d 620, 644.) Since, unlike the first penalty trial, Silveria did not testify at the penalty retrial, his letters were inadmissible hearsay. Further, they were unreliable: Silveria was in a penal setting, faced with the death penalty, and may have feigned remorse and an interest in Christianity at the prospect of his penalty trial. Accordingly, the trial court could reasonably have excluded them under Evidence Code section 1352. Silveria's claim fails.

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[25] Copies of the letters may be found at 13 ACT 3307-3311 (Munoz) and 3343-3344 (Madden).

V. THE TRIAL COURT PROPERLY ALLOWED SISSY MADDEN'S TESTIMONY (SILVERIA CLAIM V)

Silveria argues the trial court improperly allowed the prosecutor to elicit testimony from Madden's wife, Sissy, "that delays in the trial feel [sic] like a little bit of torture to her, she has no peace or closure, and that all she wanted was just a little bit of justice for her husband." (SAOB 165.) He also argues that the trial court improperly permitted the prosecutor to argue "future victim impact evidence" in violation of the court's earlier ruling that no new victim impact evidence would be admitted at the penalty retrial. (SAOB 172.) These claims fail.

A. Sissy's Testimony

The trial court did not err by allowing Sissy's testimony. The Eighth Amendment does not bar a capital jury from considering evidence of "the specific harm caused by the crime in question," provided that it is not cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825, 829.)

Sissy's testimony was proper victim impact evidence.[26] She did not attribute the delays in the proceedings to either of the appellants; even had the jurors understood her testimony that way, the comment was isolated and proper. (*People v. Booker* (2011) 51 Cal.4th 141, 193 [victim's mother's testimony that years between death and trial were "hell" "did not provoke a purely irrational response" from the jury].) Sissy's reference to wanting justice was also isolated and did not invite an inappropriate emotional response from the jurors. (*People v. Benavides* (2005) 35 Cal.4th 69, 107

[26] Respondent notes that Silveria's attorney did not place a timely objection to this testimony. (*See* 250 RT 29085-29086.) He stated that he intended to move for a mistrial only after several more questions. (250 RT 29089-29090.)

[single reference to wanting "justice to be done" "could not reasonably be seen as having encouraged an inappropriate response by the jury"].) Accordingly, Sissy's isolated comments about the trial proceedings and her wanting justice were proper.

B. The Prosecutor's Argument Was Proper

The trial court ruled that the victim impact evidence would be limited to the time between Madden's murder and the time of the penalty retrial. (132 RT 12224-12225; 200 RT 22982.) In closing argument, the prosecutor said to the jurors:

> As the holidays come and go in the years to come, I submit that with each holiday, Valentine's Day or Mother's Day, Father's Day, or Thanksgiving or Chrismas, you will think about this. And remember, Ms. Angel pointed out this is a case that no doubt will stay with you forever, for a long time.
>
> Mother's Day is a week from this Sunday, on the 11th. As the years come, as the years pass, you will consider that Julie Madden no longer has a father to give Valentine's Day gifts to or Father's Day gifts to. You will be wondering who will be taking Julie shopping for a Mother's Day gift this year.
>
> As time goes on and the holidays come and go you will remember this case, ladies and gentlemen, for the rest of your lives. Every Christmas what will you think of? Will you think of Julie Madden missing her father? Will you think of an empty space around a holiday table? Or, on the other hand, will you think of John Travis or Daniel Silveria somewhere in a prison facility living out the rest of his or her— his or their natural lives, receiving visitors, sending holiday greetings, receiving cards or gifts?

(279 RT 33437.)

Silveria contends that the references to future holidays violated the trial court's order that limited victim impact evidence to the time between the murder and the penalty retrial. (SAOB 172-173.) However, the court's order limited the admission of evidence, not counsel's arguments. The

prosecutor was entitled to comment on the evidence of Madden's death, "including the reasonable inferences and deductions that can be drawn therefrom," including his absence at future holidays. (*People v. Hamilton* (2009) 45 Cal.4th 863, 928.) This argument was proper.

Silveria further contends that the prosecutor erred by urging the jurors to impose the death penalty "so that 'each Christmas' the jurors would not have to think of [Silveria] somewhere in a prison facility . . . ." (SAOB 173.) However, "just as a prosecutor may ask the jurors to put themselves in the shoes of the victim, a prosecutor may ask the jurors to put themselves in the place of the victim's family to help the jurors consider how the murder affected the victim's relatives." (*People v. Jackson* (2009) 45 Cal.4th 662, 692; see *People v. Rich* (1988) 45 Cal.3d 1036, 1089-1090.) That is what the prosecutor did here. Silveria's claim fails.

VI. THE TRIAL COURT PROPERLY ALLOWED DR. PAKDAMAN TO TESTIFY THAT THIS WAS ONE OF THE MOST ATROCIOUS CASES HE HAD EVER SEEN (SILVERIA CLAIM VI, TRAVIS CLAIM IX)

Silveria and Travis argue that the trial judge erred by allowing Dr. Pakdaman to testify that the instant case was "one of the most atrocious cases" he had ever seen. (SAOB 175; TAOB 451.) Specifically, Silveria contends that "Dr. Pakdaman's *personal* opinion that this case is one of the most atrocious cases he has ever seen had no evidentiary support, and added nothing to the jury's common fund of information with regard to Mr. Madden's injuries." (SAOB 178.) Similarly, Travis argues that Dr. Pakdaman's "subjective opinion" "did not relate to the actual circumstances of the crime." (TAOB 455.) Silveria also argues that the testimony "suggested to the jury that they could shift the *responsibility* for making a moral assessment regarding appellant to this 'death expert.'" (SAOB 179.) Travis argues that the prosecution intended such a shift. (TAOB 457.) These arguments fail.

A. Background

Dr. Pakdaman testified that he had performed over 5,000 autopsies with the Coroner's Office. (248 RT 28691, 28733-28734.) He had also performed "[p]robably a couple thousand" other autopsies before working there. (248 RT 28696.) Dr. Pakdaman had been involved in "around one hundred cases of stab wounds." (248 RT 28696.) The prosecutor asked Dr. Pakdaman whether he had any reason to particularly remember this case. (248 RT 28736.) After objections by the defense were overruled (see 248 RT 28734-28736), Dr. Pakdaman testified that he would always remember this case, because "[t]his is one of the most atrocious cases that I've ever seen." (248 RT 28736-28737.) The prosecutor recounted this testimony in his closing argument. (276 RT 33061.)

B. Dr. Pakdaman's Testimony Was Proper

Dr. Pakdaman's testimony was proper expert opinion. Under Evidence Code section 720, an expert may testify on a subject that is beyond the experience of the jury and based on special knowledge or experience. Dr. Pakdaman plainly had experience in the examination of corpses well beyond that of the jurors. His opinion that Madden's wounds were particularly "atrocious" could have assisted the jurors in their consideration of the relative brutality of the murder. Put simply, the jurors had no way of assessing the amount of pain that Madden had experienced relative to other stabbing victims. Dr. Pakdaman's expert testimony, based on his examination of Madden's wounds and his experience examining others who had died with stab wounds, assisted the jurors in that determination. Thus, this testimony was relevant, admissible, and proper.

Silveria also argues that Dr. Pakdaman testified as a "death expert," thus alleviating the responsibility of the jury to determine the penalty. However, Dr. Pakdaman's testimony merely placed Madden's murder in

context; he was not making a normative evaluation of Silveria's culpability. Thus, his testimony was not an improper opinion on Silveria's state of mind during the murder or on the ultimate fact of whether Silveria deserved a death sentence. As described in Argument II(D), ante, the jury was well aware that it had a responsibility to determine those issues for itself. Silveria's argument fails.

Travis argues that the admission of Dr. Pakdaman's testimony "is inconsistent with pronouncements by this Court that penalty determinations should not be made by comparing one murder case to another." (TAOB 458-461.) However, the cases Travis cites refer to the rule forbidding direct comparison between two cases— i.e., the record in the case of one capital defendant sentenced to life without parole with another capital defendant not yet sentenced (*People v. Bonin* (1988) 46 Cal.3d 659) or the sentence of a co-defendant with that of a defendant (*People v. Sanders* (1990) 51 Cal.3d 471). As discussed above, Dr. Pakdaman's testimony merely allowed the jurors to understand the severity and painfulness of Madden's wounds. It was not an impermissible comparison of Travis's moral culpability with that of any other person. Indeed, the jurors were plainly aware that such a determination was theirs to make based upon the particularized circumstances of the instant case. Travis's claim fails.

VII. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO ELICIT EVIDENCE FROM WITNESSES (SILVERIA CLAIM VII)

Silveria argues that the trial court erred by allowing the prosecutor to: (1) elicit evidence that Silveria engaged in a "scam" to obtain money; (2) ask Travis whether Silveria had displayed the stun gun in an unrelated incident; (3) elicit evidence that Silveria impregnated Travis's sister when she was 15 years old; and (4) elicit testimony from a defense witness about

an unrelated attempted murder. (SAOB 184.) Silveria's argument lacks merit.

A. Legal Principles

In *People v. Boyd* (1985) 38 Cal.3d 762, this Court held that section 190.3 bars the prosecution from presenting evidence of non-violent, unadjudicated criminal conduct, because such evidence is not relevant to any of the aggravating factors listed in section 190.3. (*Id.* at pp. 772-774.)

"Once the defense has presented evidence of circumstances admissible under factor (k), however, prosecution rebuttal evidence would be admissible as evidence tending to 'disprove any disputed fact that is of consequence to the determination of the action.'" (*Id.* at p. 776.)

"[A]fter *Boyd*, the People may not present aggravating evidence showing the defendant's bad character unless the evidence is admissible under one of the listed factors or as rebuttal." (*People v. Avena* (1996) 13 Cal.4th 394, 439.)

B. Evidence That Silveria Engaged In A "Scam"

Silveria argues that the trial court improperly allowed the prosecutor to elicit evidence about his involvement in a "scam" that was not relevant under section 190.3. (SAOB 184-188.)

1. Background

During Travis's cross-examination, the prosecutor asked him about his employment. Travis testified that his friend Peter Rosa "had come up with a scam to get some type of loan money" from a school called the Technical Training Center. (269 RT 32163.) The "scam" involved receiving loan money from the school that would be used to buy drugs. (269 RT 32164.) Travis testified that he and Silveria agreed it "sounded like a good idea." (269 RT 32169-32170.) The three men enrolled, but Travis and Silveria quit after a few months. (269 RT 32170.)

2. The evidence was properly admitted

Initially, Silveria's claim is forfeited because he did not object on this basis below. While he repeatedly objected that it was irrelevant as to *Travis*, he never objected that it was irrelevant as to himself. (269 RT 32164, 32166, 32168.) The claim is therefore forfeited. (*People v. Martinez* (2010) 47 Cal.4th 911, 961.)

Even if Silveria's claim is heard, it fails because the evidence was properly admitted. The relationship between Silveria and Travis was an important issue to be determined by the jurors. The two had quarreled over whether lethal force would be used during the robbery; had both been involved in stabbing Madden; and had each described the other as "family." (See 11 ACT 2750 (Silveria says he and Travis were "like family"); 262 RT 31190 (Dr. Kormos testifies Silveria and Travis were in a "pseudo-family"); 269 RT 32185 (Travis says he and Silveria were in a "modern day Manson family").) Evidence of their prior criminal activity together was therefore relevant to the circumstances of the crime.

The evidence was also admissible as rebuttal character evidence. "[E]vidence offered to rebut defense mitigating evidence need not relate to any specific aggravating factor listed in section 190.3. . . . A prosecutor does not violate *Boyd* by showing that the evidence in mitigation offered by the defendant fails to carry extenuating weight when evaluated in a broader factual context." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 92.) Patricia Gamble testified that in August 1990, she received a call from an Army recruiter asking for Silveria's diploma, because Silveria was trying to enlist. (257 RT 30173-30174.) In his opening argument, Silveria had argued that his attempt to enlist in the Army was an "attempt to pull himself together." (236 RT 27511.) The prosecutor properly introduced evidence of Silveria's

involvement in the Technical Training Center "scam"—which occurred around that time[27]—to rebut that inference.

The evidence was also admissible to impeach appellants's credibility. "Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach" that witness. (*People v. Harris* (2005) 37 Cal.4th 310, 337; see Evid. Code, § 780, subd. (e).) Appellants's prior attempted fraud was relevant to demonstrate that Travis may have been untruthful as a witness, and that Silveria may have been untruthful in his prior testimony. Accordingly, the trial court properly admitted this evidence.

C. Evidence That Silveria Had Displayed A Stun Gun

Silveria argues that the trial court erred in allowing the prosecutor to cross-examine Travis on whether Silveria had displayed a stun gun at a fight. (SAOB 188-191.)

1. Background

The prosecutor cross-examined Travis about the fight to retrieve Jennings's beeper in which Travis was injured. (269 RT 32200.) Travis had testified that after the fight, he had gone to the Leavesly Inn and seen either Jennings or Silveria with a stun gun. (269 RT 32200.) The prosecutor asked: "Do you recall before this fight either Danny, Matt or Chris displaying and triggering the stun gun before— while in your presence before you and this other person got into a fight?" (269 RT 32201.) Before Travis could answer, there was a lengthy discussion at sidebar on the issue, with the trial court ultimately ruling that "the area that

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[27] Indeed, Silveria's attorney argued that Silveria's enrollment in the computer training program was also an attempt at pulling himself together. (236 RT 27512.) The prosecutor could also have introduced this evidence to counter that argument.

we're in right now is within the scope of proper cross-examination." (269 RT 32207.)

Later, the prosecutor asked "Did either you, Danny, Chris, Matt or Troy display a stun gun and keep hitting the test button before the fight took place between you and the other person?" Travis denied seeing the stun gun at the fight. (269 RT 32208.) The prosecutor gave Travis a document to read and asked, "Does looking at that document refresh your recollection as to whether prior to the fight you or any one of your friends displayed a stun gun and kept hitting the test button?" Travis said that it did not, and the prosecutor moved on. (269 RT 32211.)

2. The trial court properly allowed cross-examination

Silveria argues that the prosecutor asked the question about who had used the stun gun in bad faith, because he "knew that it was Rackley who used the stun gun." (SAOB 190.) Silveria bases this assertion on the prosecutor's earlier comments that "I'm not sure that anyone actually put [the stun gun] in Mr. Silveria's possession, but Mr. Travis was there, Mr. Rackley was there. I think they put it in Mr. Rackley's possession." (45 RT 3712.) Silveria also relies on Swenor's guilt phase testimony that Rackley had used the stun gun. (99 RT 9467.)

Silveria's claim fails. The prosecutor was simply asking a question of Travis regarding who—if anyone—had possessed or displayed the stun gun during that fight. That question was rationally related to the circumstances of the crime, since a stun gun was used on Madden. The prosecutor never asked a leading question implying that Silveria had possessed or used the stun gun, and in fact specifically listed the names of all of the co-defendants. Furthermore, since Travis denied even seeing the stun gun during the fight, no evidence was admitted regarding Silveria having possessed it or used it. (See *Avena*, *supra*, 13 Cal.4th at p. 439 ["*Boyd*

concerns the *admission* of aggravating and mitigating *evidence*"].) Silveria's argument therefore fails.

D. Evidence That Silveria Impregnated Travis's Sister

Silveria argues that the trial court improperly allowed the prosecutor to elicit testimony from Travis's sister about her being impregnated by Silveria. (SAOB 191-192.) Specifically, the prosecutor asked:

> [THE PROSECUTOR]: Okay. And did you have a relationship with Danny at that time?
>
> [DEANNA]: Yeah, I did.
>
> [¶] . . . [¶]
>
> [THE PROSECUTOR]: Okay. And how was it that you and Danny started going together?
>
> [DEANNA]: Well, he was at my house and— I don't know. I was attracted to him.
>
> [THE PROSECUTOR]: Okay. All right. Now, how old were you at that time?
>
> [DEANNA]: Fifteen is when I got pregnant.
>
> [THE PROSECUTOR]: By Danny?
>
> [DEANNA]: Yes.
>
> [SILVERIA'S ATTORNEY]: Your Honor, I object and move to strike that unless there's some foundation of further proof that's adduced.
>
> THE COURT: Overruled.
>
> [THE PROSECUTOR]: How long were you— were you involved with Danny Silveria about?
>
> [DEANNA]: I couldn't remember. Maybe a couple of months. Maybe more. Maybe less.

(264 RT 31350-31351.)

Initially, Silveria's claim fails because he failed to object. Here, he argues that the evidence was not relevant under section 190.3. (SAOB 192.) However, he did not object to the testimony on the grounds of relevance, and has therefore forfeited this claim. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1076.)

In any event, Silveria's claim fails. Section 190.3 allows the admission of any relevant evidence, which is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Boyd*, *supra*, 38 Cal.3d at p. 773, quoting Evidence Code section 210.) The credibility of a defense witness is patently relevant, and the extent of Deanna's relationship with Silveria went directly to her credibility. (*People v. Souleotes* (1915) 27 Cal.App. 288, 289; see Evid. Code, § 780, subd. (f).) Accordingly, the trial court properly allowed the testimony.

E. Evidence About The Nuestra Familia

Silveria argues the trial court improperly allowed testimony about a Nuestra Familia murder. (SAOB 192-194.) Not so.

1. Background

Doyle, a correctional officer who worked at Silveria's jail, testified that he never heard of Silveria getting into a fight in the jail or of his ever being "a behavioral problem." (258 RT 30349-30350.) On cross-examination, the prosecutor asked him about several jail documents describing incidents involving Silveria and Travis. (259 RT 30464-30497.) In particular, he asked about one written by Officer Jeanine Powell regarding Silveria's attempt to change housing. (259 RT 30482.) He also asked Doyle about Silveria telling Powell that he would file a grievance. (259 RT 30493.)

Travis's attorney cross-examined Doyle about Powell, asking, "[I]f an officer such as Jeanine Powell didn't like someone, she could put on that form whatever she pleased; right?" (259 RT 30520.) On redirect, Silveria's attorney established that no punishment had been issued for the incidents described in the jail documents, including those drafted by Powell. (259 RT 30551-30554.) Silveria's attorney continued to ask Doyle about Powell and her reputation in the jail as a correctional officer. (259 RT 30560-30564.)

Lausten, a correctional officer who met Silveria in jail, testified for Silveria. (259 RT 30565.) He testified that Silveria behaved well in jail. (259 RT 30566.) On several occasions, Lausten saw Silveria consoling other inmates when they were depressed. (259 RT 30569.) On one occasion, Lausten allowed Silveria to use a private room to console another inmate, and Lausten saw Silveria reading the Bible with the other inmate. (259 RT 30571-30572.) Lausten also testified that another correctional officer, Jeanine Powell, was sometimes "not capable" of being an effective correctional officer, because she "loses control in the module." (259 RT 30577.)

On cross-examination, the prosecutor asked Lausten about what being "an effective correctional officer" meant to him, and Lausten responded that it required being "diligent at all times to make sure that everything is running smoothly . . . ." (259 RT 30578-30579.) Lausten testified that he believed himself to be such an officer. (259 RT 30579-30580.) The prosecutor then asked if Lausten knew who Gabriel Coronado was. (259 RT 30580.) Silveria objected that the testimony was irrelevant, but the court ruled that he had "opened the door." (259 RT 30582.) The prosecutor asked, "did Gabriel Coronado have his throat cut in your module when you were nearby?" and "you were there and didn't see this coming, did you?" (259 RT 30583.)

2. The cross-examination was proper

The trial court properly allowed the prosecutor's limited cross-examination about Gabriel Coronado. The defense had attacked Powell's competence as a correctional officer, since she was responsible for writing up Silveria twice. Importantly, Silveria's attorney had elicited testimony from Lausten that Powell was not an effective correctional officer. (259 RT 30577.) After Lausten testified that he himself was an effective officer, the prosecutor properly attacked his credibility by briefly questioning him about an attempted murder that occurred in his proximity— an oversight that would tend to show that Lausten was not, in fact, an effective correctional officer. That was proper.

In all events, the questions were harmless. Despite Silveria's repeated mention of "the Nuestra Familia" in his opening brief, that organization was not mentioned before the penalty retrial jury.[28] Moreover, there was no prejudice from the questions, insofar as the jurors were likely to have either felt sympathy for Silveria and Travis being in such a dangerous place, or looked upon their purported rehabilitation more favorably, as it occurred in such an environment. Accordingly, Silveria's claim fails.

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[28] Presumably, Silveria is referring to Travis's attorney's comments at sidebar: "Gabriel Coronado was an NF hit in a cell by two people who are on trial right next door right now. It was a hit done . . . with a sissy stick smuggled in the jail where I think four Nuestra Familia members hit this guy in a particular unit." (259 RT 30581.)

VIII. THE TRIAL COURT PROPERLY DISCHARGED JUROR 4 (SILVERIA CLAIM VIII, TRAVIS CLAIM IV)

Silveria and Travis argue that the trial judge violated section 1089 and the state and federal Constitutions when it discharged Juror 4[29] during Silveria's case in mitigation. (SAOB 196; TAOB 294.) Not so.

A. Background

On February 13, 1997, Juror 4 informed the court that her husband had worked with defense witness Charon. (236 RT 27539.) She had "known Leo for about ten years, socialized with him. I don't know him intimately, but I just know he's a good man." (236 RT 27539.) The trial court inquired whether Juror 4's familiarity with Charon would affect her ability to be fair and impartial or her evaluation of his testimony, and Juror 4 said that it would not. (236 RT 27539-27540.) The trial court also inquired whether her husband had worked under Charon, and Juror 4 said that she did not know. (236 RT 27541.)

On February 20, 1997, the prosecutor brought up Juror 4 again. He noted that she had not circled Charon's name on the witness list in her juror questionnaire, had known him for 10 years, and knew him as an "a good man." (240 RT 27987-27994.) The trial court allowed the attorneys to draft questions they wanted to ask Juror 4. (240 RT 27996.)

On February 28, 1997, Travis's attorney indicated he had no questions to ask Juror 4. (246 RT 28536.) Silveria's attorney indicated that he had considered some questions, but had not submitted any to the court. (246 RT 28536-28537.) The prosecutor had submitted a list of questions. (246 RT 28538; see 19 CT 4691.) The court took the matter under submission. (246 RT 28541.)

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[29] Juror 4 is sometimes referred to as "Juror G-18" in the record. (See 255 RT 29855.)

On March 12, 1997, the court conducted a hearing with Juror 4. (254 RT 29662.) Juror 4 indicated that she had not circled Charon's name on her questionnaire because she had not recognized it at the time. (254 RT 29663.) While she only saw him at work functions with her husband, she had run into him "in November" at a wedding. (254 RT 29664-29665.) The last time she had seen him before that was three years ago. (254 RT 29665.) Juror 4 stated that if she were the prosecutor and Charon testified favorably for the defense, she "would definitely have some concerns" about a witness such as herself. (254 RT 29666.) She explained:

> JUROR G-18: Because I know him. What I know of him I just wouldn't believe that he would ever lie about any dealings with somebody. So as far as that would go, I would believe that what he was saying he would believe to be true.
>
> [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?
>
> [JUROR 4]: Right.

(254 RT 29666.) Silveria's attorney indicated that he would rather have Juror 4 remain on the jury than call Charon as a witness. (254 RT 29678.)

The next day, the court dismissed Juror 4:

> All right. The Court is convinced that there is absolutely no juror misconduct and Juror Number 4 did not realize she knew the witness, Mr. Charon, until February 13 of 1997 during the opening statements and that she notified the Court immediately.
>
> It's important to note that Mr. Charon's testimony is unlike most witnesses in that it consists not only of his observations and conversations but more importantly his opinion and the credibility of that opinion.
>
> [¶] . . . [¶]

> Now, Juror Number 4 realizes that her special knowledge and opinion of Mr. Sharon [sic] cannot be shared with the other jurors at any time including deliberations. She would therefore be judging his credibility on facts or factors that are not in evidence and that would be improper in and of itself.
>
> Also, just as important she would not be able to get involved in the deliberative process on the issue of Mr. Charon's credibility if and when that issue came up in deliberations. Juror Number 4 has stated of Mr. Charon that she would believe what he says is true and that he would— that what he says could actually be wrong, but that he would not think it was wrong.
>
> More importantly she does not believe that Mr. Charon would lie or even mislead anyone. Again, this is based on the evidence, if you want to call it that, that was obtained outside of this trial, that is, before this trial even began. This shows that she has prejudged his testimony or opinion and could not look at it with an open mind.
>
> The Court therefore must excuse Juror Number 4 for cause under California Code of Civil Procedure Section 225(c), 229(e) and 233 and/or the reasons or reasoning set forth therein. If this would have been known at the time of the Hovey voir dire on January 16, 1997[,] she would have been excused for cause at that time.

(255 RT 29855-29856.)

B. Legal Principles

Section 1089 provides in relevant part: "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 or her duty . . . the court may order the juror to be discharged . . . ."

"A trial court's ruling whether to discharge a juror for good cause under section 1089 is reviewed for abuse of discretion. [Citations.] The juror's inability to perform the functions of a juror must appear in the record as a 'demonstrable reality' and will not be presumed. (*People v.*

Guerra (2006) 37 Cal.4th 1067, 1158.) "The demonstrable reality test . . . requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052-1053.)

C. The Trial Court Properly Excused Juror 4

The trial court properly excused Juror 4 due to her bias in favor of defense witness Charon. "A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge." (*Barnwell*, *supra*, 41 Cal.4th at 1051.) When questioned by the trial court, Juror 4 declared that, based on her out-of-court knowledge of Charon, she believed he would not be capable of lying or misleading anyone. (254 RT 29666.) The trial court actually relied on that testimony when it excused her. (256 RT 29856.) Accordingly, Juror 4's bias was a "demonstrable reality," and appellants's claims fail.

Appellants assert that "the record of the hearings does not support the judge's decision to discharge" Juror 4. However, the numerous reasons they proffer (see SAOB 210-212, 214-215; TAOB 314-315) ignore the fact that the decision to remove Juror 4 was based on her *explicitly stated* inability to believe that Charon would lie. The trial court also noted that, as Juror 4 had determined Charon's credibility based on her experiences with him outside the courtroom, she would be considering outside evidence and unable to participate in a full deliberation with the other jurors. (256 RT 29855-29856.) That decision was proper. (*People v. Goins* (1981) 118 Cal.App.3d 923, 926 [sitting juror who informed court he knew a defense witness and could not be impartial properly removed], disapproved of on another ground by *People v. Ortega* (1998) 19 Cal.4th 686.)

Silveria and Travis argue that the trial court's decision was somehow improper based upon a comparison with other jurors. (SAOB 216-219; TAOB 316-318.) However, they do not establish how the trial court's

decisions on other jurors affected the "demonstrable reality" of Juror 4's bias. Nor did any of the described jurors know a witness and pre-judge that witness's veracity. This claim therefore fails.

Appellants argue that the trial court abused its discretion because it "mistakenly relied upon" Code of Civil Procedure Sections 225 and 229, which "do *not* authorize the removal of a juror who has already been sworn to try the case." (SAOB 197-199, emphasis in original; TAOB 322.) This argument is specious. The trial court also relied on Code of Civil Procedure section 233. (255 RT 29856.) That section is functionally identical to section 1089. (*People v. Smith* (2005) 35 Cal.4th 334, 348-349 ["we perceive no functional difference between Code of Civil Procedure section 233 and Penal Code section 1089, and the parties suggest none"].) Appellants's claims fail.

Travis argues that the trial court erred by "refusing to consider the alternative of deleting Leo Charon from the list of witnesses." (TAOB 323.) Silveria's attorney had stated his willingness to remove Leo Charon as a witness rather than have Juror 4 removed. (254 RT 29678.) The next day, when the trial court removed the juror, Silveria's attorney brought up his suggestion again, and the court replied, "It doesn't make any difference. She still— Mr. Charon is still a witness." (255 RT 29857.)

Initially, Travis has forfeited this claim. During the discussion of this issue, Travis's attorney had ample opportunity to comment. (See 254 RT 29673-29675.) However, he never expressed a willingness to remove Charon from his witness list if Juror 4 were permitted to remain on the jury. After Silveria's attorney expressed such a willingness, Travis's attorney did not say anything, much less join; indeed, he submitted the matter immediately thereafter. (254 RT 29678.) At the time the court ruled, Silveria's attorney brought up his suggestion again, and Travis's attorney

said nothing. (255 RT 29857.) He has therefore forfeited the instant claim of error.[30]

In all events, the trial court's ruling was correct. Charon was listed on both Silveria's *and* Travis's witness lists. (17 CT 4311 [Travis], 4315 [Silveria].) As Travis never indicated a preference to keep Juror 4 rather than call Charon, Charon remained a witness, even if the trial court was obligated to consider Silveria's attorney's offer. Since Juror 4 had a demonstrated bias regarding Charon, the trial court's decision to dismiss her was proper.

IX. THE TRIAL COURT PROPERLY RULED THAT GEORGE INVOKED THE FIFTH AMENDMENT (SILVERIA CLAIM IX)

Silveria argues that the trial court denied "his Sixth Amendment right to compulsory process and improperly diluted relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments when he erroneously ruled that ex-police officer, Michael George, had validly invoked the Fifth Amendment's privilege against self-incrimination." (SAOB 221.)

A. Background

Silveria's attorney learned that, if called as a defense witness, Michael George intended to invoke his Fifth Amendment privilege against self-incrimination. (251 RT 29112.) Silveria's attorney argued that the

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[30] Travis argues the argument is preserved, because "[t]he trial court [had] made it as plain as possible that it had heard enough and did not want to hear more." (TAOB 323-324.) At the time the trial court ruled, it noted the attorneys's earlier objections. (255 RT 29857.) Specifically, it stated, "I think you stated [your objections] yesterday in your arguments . . . ." This statement is hardly proof that a *new* objection would have been futile. If Travis's attorney had an objection, comment, motion, or other procedural vehicle for expressing his willingness to remove Charon from the witness list, it was incumbent on him to raise it. His failure to do so forfeits the issue on appeal.

privilege did not apply, because George had molested Silveria between 1983 and 1990, outside of the statute of limitations for the molestations, even if they had begun to run only when Silveria testified in the guilt phase. (251 RT 29112-29113; see §§ 800, 803.) George was called as a witness outside the presence of the jury and testified that he would not answer any questions regarding any alleged sexual molest of Silveria. (251 RT 29122-29123.) The trial court ruled:

> The Court finds that Mr. George has a legitimate right to claim the Fifth Amendment. He's been in custody I'll say only ten months. There could be other victims out there, victims of Mr. George, and any testimony— and the statute of limitations regarding other victims could be Section 803(f) and/or (g) of the Penal Code which takes the statute of limitations because of the Legan case in this county back quite a ways.
>
> And if there was and there very well could be I suppose a prosecution of other victims who are still under the age of eighteen that could claim to be victims of Mr. George. And the testimony— any testimony he gave in the Silveria case could be used against him under Section 1108 of the Evidence Code.

(251 RT 29125.)

B. Legal Principles

This court has previously stated:

> It is a bedrock principle of American (and California) law, embedded in various state and federal constitutional and statutory provisions, that witnesses may not be compelled to incriminate themselves. In an oft-cited case, the high court stated that this privilege "must be accorded liberal construction in favor of the right it was intended to secure." (Hoffman *v. United States* (1951) 341 U.S. 479, 486.) A witness may assert the privilege who has "reasonable cause to apprehend danger from a direct answer." (*Ibid.*; accord, *Ohio v. Reiner* (2001) 532 U.S. 17, 21.) However, "The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself— his say-so does not of itself establish the hazard of incrimination." (*Hoffman v. United States*, *supra*, at p. 486.) The court may require the witness "to answer if 'it clearly

> appears to the court that he is mistaken.'" (*Ibid.*) "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (*Id.* at pp. 486-487.) To deny an assertion of the privilege, "the judge must be '"*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency" to incriminate.'" (*Malloy v. Hogan* (1964) 378 U.S. 1, 12, quoting *Hoffman v. United States*, *supra*, at p. 488.)

(*People v. Seijas* (2005) 36 Cal.4th 291, 304-305; see also Evid. Code § 404 [privileged "evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege"].) A trial court's ruling on the invocation of privilege is reviewed independently. (*Seijas*, *supra*, 36 Cal.4th at p. 304.)

C. George Properly Invoked The Fifth Amendment

George properly invoked his Fifth Amendment privilege against self-incrimination. The question is not "whether his testimony actually would have incriminated him, but rather whether it would have given him 'reasonable cause to apprehend *danger* from the testimony.'" (*People v. Smith* (2007) 40 Cal.4th 483, 520.) Whether or not he could have been prosecuted for the molestations of Silveria, George could still have reasonably apprehended danger from testifying. For example, perhaps Silveria had omitted an instance of molestation in his 1995 testimony that George's testimony would reveal. The statute of limitations on such an offense could still have been viable under section 804. Or perhaps, as the trial court noted, George's testimony in the instant case might come in under Evidence Code section 1108 if he were prosecuted for another victim. Indeed, George's testimony might have revealed a particular method or pattern of molestation that might have revealed additional

victims upon further investigation. Considering these circumstances, George could reasonably have apprehended danger from testifying. In all events, it is hardly "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have" a tendency to incriminate. (*Seijas*, *supra*, 36 Cal.4th at pp. 304-305, emphasis in original.) Accordingly, the trial court correctly found that George was entitled to invoke the Fifth Amendment.

X. THE TRIAL COURT PROPERLY DENIED SILVERIA'S MOTION FOR A MISTRIAL BASED ON THE PROSECUTOR'S ISOLATED MENTION OF AN APPELLATE PROCESS (SILVERIA CLAIM X)

Silveria argues that, under *Caldwell v. Mississippi* (1985) 472 U.S. 320, the trial court should have granted a mistrial after the prosecutor made a brief comment regarding the appellate process before the jury. (SAOB 228.) Silveria is wrong.

A. Background

During Travis's attorney's examination of Lutman, the following discussion occurred:

> [TRAVIS'S ATTORNEY]: I want to show you a picture here of something and see if we can talk about this for a minute.
>
> Do I need these marked for identification? I'm not going to attempt to enter these.
>
> THE COURT: All right.
>
> [TRAVIS'S ATTORNEY]: I'm going to show you a picture, Ms. Lutman, and maybe— Is there a shelf on there?
>
> [THE PROSECUTOR]: Your Honor, if counsel is going to refer to an item in the record and display it to the jury as per testimony about it and then it's not marked and introduced into evidence, it does create a problem for the appellate court on

review. I think that it's necessary if he intends to publish them to seek testimony about them to have them marked.

THE COURT: All right. Let's mark them then.

(265 RT 31553-31554.) Silveria's attorney then asked to approach the bench. At the bench, he moved for a mistrial, or in the alternative, that the jury be instructed that "the reason the matter is before them for retrial has nothing to do with any appeal and no appeal from any previous jury decision has ever been taken" and that they are to disregard the prosecutor's comment. (265 RT 31554-31556.) The court denied the mistrial motion and the special instructions. (265 RT 31555, 31583.)

B. Legal Principles

"In *Caldwell v. Mississippi* (1985) 472 U.S. 320 (*Caldwell*), the Supreme Court established the rule that 'a death sentence may not rest on a determination made by a sentencer who has been affirmatively misled to believe the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere.'" (*People v. Moon* (2005) 37 Cal.4th 1, 16.)

"In determining whether *Caldwell* error has occurred, '[w]e do not reach our conclusion based on any single statement uttered by the prosecutor. Rather, we consider the instructions of the court and the arguments of both prosecutor and defense counsel.'" (*People v. Young* (2005) 34 Cal.4th 1149, 1221.)

C. The Trial Court Properly Denied A Mistrial

There was no *Caldwell* error here. "[T]he mere mention of the appellate process, while ill-advised, does not—standing alone—necessarily constitute reversible *Caldwell* error." (*Moon, supra*, 37 Cal.4th at p. 18.) The prosecutor's isolated comment here was obviously not intended to dilute the jury's responsibility. Moreover, the jury was instructed on their

responsibility to decide Silveria's punishment. (See Arg. II(D), ante; 276 RT 32975, 32977-32978, 32988-32989 [instructions on jury's responsibility].) Finally, the arguments of counsel emphasized the jury's responsibility. For example, the prosecutor stated that the sentencing determination is "a solemn responsibility" (276 RT 33003, 33008), Silveria's attorney described it as a "very, very heavy responsibility" (278 RT 33275) and an "awesome responsibility" (279 RT 33458), and Travis's attorney argued that the jury's task was "sacred" (278 RT 33299). Under these circumstances, it is not possible that the prosecutor's isolated comment misled the jury as to its responsibility. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 186-187 [single mention of right to appeal]; *People v. Fierro* (1991) 1 Cal.4th 173, 244-245 [cross examination of defense witness about opportunity to appeal], overruled on another ground in *People v. Letner and Tobin* (2010) 50 Cal.4th 99.) Accordingly, Silveria's claim fails.

Silveria contends that the prosecutor's argument that "this is not something that you or we as a system are doing to these men" (see 277 RT 33135-33136) exacerbated the prejudice from his earlier comment. (SAOB 236.) It is not clear how Silveria believes this argument misled the jury as to its sentencing responsibility, and he does not elaborate in his brief. However, as discussed above, the court's instructions and the arguments of counsel plainly made the jury aware of its responsibility. There was no *Caldwell* error.

XI. THE TRIAL COURT PROPERLY DENIED SILVERIA'S MOTION TO SEVER THE APPELLANTS FOR THE PENALTY RETRIAL (SILVERIA CLAIM XI, TRAVIS CLAIM V)

Silveria argues that the trial court erred by denying his motion to sever his penalty retrial from Travis's. (SAOB 238-257.) First, he contends that there was no statutory basis for joinder. (SAOB 241.) He

urges this Court to "construe sections 190.3 and 190.4 to require that at a penalty retrial in a capital case following a jury deadlock, the trial court must admit at the defendant's request any evidence the prosecution introduced at the guilt phase." (SAOB 245.) Similarly, Travis argues that "under the totality of the circumstances uniquely before the trial court in the present case, . . . it was an abuse of discretion to deny the motion for severance or for separate juries." (TAOB 359.) These arguments lack merit.

A. Procedural History

On October 30, 1996, Silveria moved to sever his penalty retrial from Travis's, basing his motion on six different grounds. (16 CT 4005-4034.) On November 5, 1996, Travis moved to join Silveria's severance motion. (16 CT 4103-4108.) The trial court denied parts one, four, and five of the motion on November 21, 1996. (17 CT 4345; 200 RT 22910.) The trial court denied parts two, three, and six on December 10, 1996. (17 CT 4376; 207 RT 23581.) On December 18, 1996, the trial court denied the motion in its entirety. (18 CT 4528.)

B. The Trial Court Properly Denied Severance

Appellants contend the trial court erred by denying severance during the penalty phase. (SAOB 238.) This Court described the standard of review of the denial of a severance motion as follows:

> A trial court's denial of a severance motion is reviewed "for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion." [Citation.] A trial court's erroneous refusal to sever a defendant's trial from a codefendant's requires reversal if the defendant shows, to a reasonable probability, that separate trials would have produced a more favorable result [citation], or if joinder was so grossly unfair that it deprived the defendant of a fair trial [citation].

(*People v. Tafoya* (2007) 42 Cal.4th 147, 162.)[31] Respondent will address the grounds of Silveria's motion in the order he uses in his opening brief.[32]

1. Ground one

In Ground One, Silveria argued that section 1098 does not authorize joinder of two defendants where "only penalty is to be tried." (SAOB 241.) Section 1098 provides in relevant part, "When two or more defendants are jointly charged with any public offense, . . . they must be tried jointly . . . ." (See *People v. Boyde* (1988) 46 Cal.3d 212, 231 [recognizing legislative preference for joint trials].) On appeal, Silveria argues "there simply was no statutory basis for consolidating appellant's penalty phase trial with that of co-appellant Travis." (SAOB 241.) This argument fails.

First, Silveria ignores the legislative preference for joint trials, even for the penalty phase of a capital prosecution. (See *People v. Ervin* (2000) 22 Cal.4th 48, 96.) Second, Silveria and Travis were both charged with and convicted of the same murder and the same special circumstances. A joint trial would therefore have saved time and conserved judicial resources. Third, as the trial court noted, the prosecution's presented evidence was admissible against both defendants, indicating that there was no compelling reason for severance. Considering these circumstances, the trial court did

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[31] Silveria cites *Williams v. Superior Court* (1984) 36 Cal.3d 441, for the proposition that "this Court should 'analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case.'" (SAOB 253.) That comment was explicitly disavowed by this Court following the passage of section 790. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1229, fn. 19.)

[32] Appellants make no argument corresponding to Ground Six of Silveria's motion below, in which he argued for dual juries if severance were denied. (16 CT 4007.) Further, appellants make no challenge to the trial court's denial of "Ground Seven," a severance argument made by Travis. (200 RT 22910, 22961-22964; see 16 CT 4104.) Accordingly, respondent does not address those Grounds.

not abuse its discretion by denying Silveria's severance motion on this ground.

2. Grounds four and five

In Grounds Four and Five, Silveria moved for severance pursuant to *Bruton v. United States* (1968) 391 U.S. 123. (16 CT 4006-4007.) The trial court repeated its conclusion—made during the first trial, see 9 CT 2258-2259—that "[t]he confessions cannot be properly redacted to afford the People and the defendants their right to a fair trial." (200 RT 22911.) The court ruled that the confessions would therefore be inadmissible in the prosecution's case-in-chief. (200 RT 22912.)

On appeal, Silveria argues that the trial court's exclusion of the confessions "unfairly prevented the jury from considering appellant's expressions of remorse and early acknowledgement of guilt." (SAOB 244.) This claim fails. "*Bruton* and its progeny provide that if the prosecutor in a joint trial seeks to admit a nontestifying codefendant's extrajudicial statement, either the statement must be redacted to avoid implicating the defendant or the court must sever the trials." (*People v. Hoyos* (2007) 41 Cal.4th 872, 895, abrogated on another issue in People v. McKinnon (2011) 52 Cal.4th 610.) The trial court satisfied *Bruton* by preventing the prosecution from introducing the confessions in its case-in-chief. The court's ruling did not prevent Silveria or Travis from testifying; nor did it address what would occur if one or both of them attempted to introduce their own confessions.[33] Thus, at the time of the ruling, the trial court did not abuse its discretion by denying severance on this ground.

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[33] See Arg. IV(A), ante.

3. Ground two

In Ground Two, Silveria argued that a joint penalty trial would "prejudice" his "ability to obtain a personal and individualized consideration of the mitigation [*sic*] factors he presents and an individualized non-comparative determination of the penalty he should suffer . . . ." (16 CT 4006, 4011-4025.) On appeal, he argues the trial court erred by denying severance on this ground because "there was a substantial risk that the single jury's penalty determination against Travis could improperly influence its penalty decision regarding [Silveria]." (SAOB 251.) This claim fails.

The constitutional requirement of individualized sentencing in capital cases does not require separate penalty trials or separate juries at the penalty phase for codefendants. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1173; *People v. Ervin* (2000) 22 Cal.4th 48, 69.) Here, as in *Taylor*, the jurors were instructed "to consider the evidence separately as to each defendant," to "not consider as evidence against one defendant any evidence admitted only against another," and "to 'decide separately the question of the penalty as to each of the defendants,' the same instruction given in the Ervin case." (*Taylor*, *supra*, 26 Cal.4th at p. 1174; 22 CT 5375, 5396, 5398, 5401.) "These instructions were adequate to ensure individual consideration of penalty as to each defendant." (*Ibid.*; *Zafiro v. United States* (1993) 506 U.S. 534, 539 [limiting instructions "often will suffice to cure any risk of prejudice"].) As Silveria has made no "showing that the jurors in the joint trial were unable or unwilling to assess independently the respective culpability of each defendant," the trial court did not abuse its discretion in failing to sever Silveria's penalty phase trial. (*Ibid.*)

Travis makes much of "the expert testimony offered by the defense in support of the motion for severance or separate juries . . . ." (TAOB 369;

see TAOB 330-345, 350-356 [summary of testimony].) The trial court rejected this testimony, stating, "the Court believes that properly instructed jurors will give each defendant their individualized attention." (200 RT 23583.) The trial court's belief comports with the well-established presumption that jurors follow the instructions given by a court. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) Indeed, as described above, the jurors were properly instructed. Accordingly, Travis's claim fails.

4. Ground three

In Ground Three, Silveria argued that he would be prejudiced by the prosecution's introduction of the "exceedingly damaging evidence" of Travis's attempted escape. (16 CT 4006, 4026-4029.) On appeal, he broadens his allegation of prejudice to include Travis's letter to Watson, evidence that Travis "engaged in a scam to obtain money" and "got into a fight," and evidence that Silveria impregnated Travis's sister. (SAOB 254-256.) These claims fail.

A trial court ruling on a severance motion should consider the likelihood that one defendant will be unduly prejudiced by association with a codefendant. (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 40 ("*Coffman*").) Here, no such prejudice appears. The jurors were specifically instructed not to consider evidence of Travis's attempted escape against Silveria. (22 CT 5396.) Moreover, that evidence—and evidence of the letter Travis wrote to Watson—was relevant only to Travis, since Silveria was neither involved in the escape attempt nor mentioned in the letter. As previously discussed, the evidence of the "scam" and Silveria impregnating Travis's sister was relevant and properly admitted against Silveria. (See Arg. VII(B), (D), ante.) The "fight" evidence that was admitted—that Travis had sustained an injury in a fight at which Silveria

was present—was not unduly prejudicial to Silveria.[34] Finally, as in *Coffman*, "[t]he evidence here showed defendants both took an active role in the commission of the crimes; this is not a situation in which a marginally involved defendant might have suffered prejudice from joinder with a codefendant who participated much more actively." Silveria knew Madden, helped plan and carry out the robbery, bound Madden, and stabbed him. There was no undue prejudice from his association with Travis.

Travis argues that his defense conflicted with Silveria's. Specifically, "Charon's testimony was helpful to each defendant. However, the fact that Charon also testified for the other was harmful to each defendant." (TAOB 363.) In the context of guilt trials, conflicting defenses require severance "only where the acceptance of one party's defense precludes the other party's acquittal." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296.) Here, Charon's testimony was not a "defense," but only mitigating evidence in the penalty phase. The consolidation of the cases did not prevent or limit either Silveria or Travis from presenting that evidence. Moreover, the "conflict" described by Travis is not one rising to the level described in *Carasi*. As such, severance was not required on this ground.

C. Sections 190.3 And 190.4 Do Not Require Consideration of All Guilt Phase Evidence by A New Penalty Jury

Silveria urges this Court to "construe sections 190.3 and 190.4 to require that at a penalty retrial in a capital case following a jury deadlock, the trial court must admit at the defendant's request any evidence the prosecution introduced at the guilt phase." (SAOB 245.) Such a holding

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[34] Silveria repeats his assertion that the prosecutor improperly suggested that Silveria displayed a stun gun at the fight. That assertion fails as described in Argument VII(C), ante.

would run afoul of section 190.4, subdivision (d), which states in relevant part, "In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial . . . shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase." Here, the penalty retrial jury was patently not the "same trier of fact" as Silveria's guilt phase jury. (Cf. *People v. Alvarez* (1996) 14 Cal.4th 155, 242-243.) Indeed, to construe sections 190.3 and 190.4 as Silveria urges would render the "same trier of fact" requirement of section 190.4, subdivision (d), surplusage. Such a result should be avoided. (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1066.) Accordingly, Silveria's argument should be rejected.

D. Any Error Was Harmless

Even if this Court concludes the trial court erred by denying severance, it was harmless. "[R]eversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial." (*Coffman*, *supra,* 34 Cal.4th at p. 41.) As discussed, Silveria fully participated in Madden's brutal robbery and murder, including restraining and stabbing the victim. Moreover, had Silveira been granted a separate penalty jury, the prosecutor would likely have been able to use his entire confession against him, even if Silveria did not testify on his own behalf. (See Arg. IV(A)(2), ante.) Considering these circumstances, it is not reasonably probable that Silveria would have received a more favorable result from a separate jury. Accordingly, any error from the denial of severance was harmless.

XII. THE TRIAL COURT DID NOT DENY SILVERIA'S CONSTITUTIONAL RIGHTS BY ITS TREATMENT OF HIS ATTORNEY (SILVERIA CLAIM XII)

Silveria contends that "the trial court's unjustified abuse and unequal treatment of defense counsel, combined with a number of mistaken legal rulings" deprived him of various Constitutional rights. (SAOB 258.) Not so.

A. Background

On April 9, 1997, Silveria's trial counsel Braun moved for a mistrial. He complained that the trial court: "has continuously throughout this case either cut my objections short when they are in front of the jury or refused to hear me out when we are at bench" (269 RT 32037); "has demonstrated overt hostility toward me, not only in open court . . . but also at the bench" (269 RT 32037); overruled the defense's objections "in a demeaning tone of voice" (269 RT 32037-32038); and had created an "intimidating" atmosphere that made it "very, very difficult" for Braun to effectively represent Silveria (269 RT 32029). Because Braun felt that the trial court had made him "look small, ignorant and petty," he moved for a mistrial. (269 RT 32031.) The trial court denied the motion. (269 RT 32031.)

B. The Trial Court Did Not Commit Misconduct

Silveria argues that the trial court's "persistent hostility and verbal abuse of Braun . . . reflected a pattern of judicial hostility . . . ." (TAOB 329-330.) Not so.

As this Court explained in *People v. Blacksher* (2011) 52 Cal.4th 769:

> Although the trial court has both the duty and the discretion to control the conduct of the trial, the court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution. Nevertheless, [i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks

> inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior. Indeed, [o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.

(*Blacksher*, *supra*, 52 Cal.4th at p. 824, internal quotation marks and citations omitted.)

Travis was not denied a fair trial by the trial court's actions here.

He cites to dozens of decisions and comments by the trial court in his opening brief, although he concedes that "[n]ot every example amounts to misconduct independently, nor does each necessarily involve an erroneous legal ruling."[35] (SAOB 258, 264-327.) Indeed, few of the comments were made before jurors, and none showed such judicial bias or misconduct as to have denied Silveria a fair trial. Respondent will address four specific instances as examples of how the trial court did not act improperly.

Silveria complains that the trial court chastised Braun on February 22, 1995. (SAOB 265.) When addressing the redactions to Silveria's confession, the trial court directed Braun to make his objections briefly. (36 RT 2955.) Thereafter, the trial court continued to hear Braun's objections to the redactions, which were all based on his belief that a redacted confession would increase Silveria's moral culpability in the eyes of the jurors. When the court ruled that a particular group of questions and answers that implicated persons other than Silveria would be redacted, Braun objected. (36 RT 2975-2976.) The court repeated its ruling, but Braun continued to speak out until the court cut him off and said, "Let's move on to something else." (36 RT 2976-2977.) Soon thereafter, the

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[35] For the sake of brevity, respondent forbears from addressing each of these incidents individually.

court ruled that an entire section of the transcript would be redacted, because it could not be redacted in portions and still be understood. (36 RT 2980.) Braun objected, the court noted the objection, Braun made another complaint, the court noted it, Braun joined the prosecutor's position against the redactions, the court noted it, and then the court said "We will go on to something else, Mr. Braun." (36 RT 2981-2982.) Braun *continued* to argue against the ruling, even speaking over the trial judge. (36 RT 2982.) The court admonished, "Mr. Braun, when I tell you that that's enough and your objection is noted I expect you to be quiet. Is that understood?" (36 RT 2982.) In this context, the trial court's polite but firm admonition out of the jury's presence was entirely warranted and not misconduct.

As another example, Silveria complains that the trial court chastised Braun "that he had come 'very close' to 'costing yourself some large dollars not to mention contempt of court.'" (SAOB 267.) Earlier, the trial court had ruled that the contents of the confessions could be argued, but not the confessions themselves. In other words, "[y]ou can say the evidence can show that, not where it came from." (86 RT 8141.) When Braun asked to approach the bench after the prosecutor's opening argument, the trial court anticipated Braun's objection and again explained its earlier ruling. (86 RT 8816.) Nevertheless, Braun moved for a mistrial on the ground that the prosecutor had argued evidence from the confessions, even though the prosecutor had never mentioned the source of that evidence. (See 93 RT 8816-8819.) The trial court heard Braun's motion, denied it, and later—out of the presence of the jurors—chastised him by saying, "you came very close, Mr. Braun, in costing yourself some large dollars not to mention contempt of court." (93 RT 8837.) The trial court's rebuke was plainly appropriate in light of its responsibility to prevent Braun from making similarly frivolous motions in the future.

As a third example, Silveria complains that the trial court rebuked Braun in front of the jurors by overruling his objection and stating, "Mr. Braun, sit down . . . . Pay attention to the questions and answers." (SAOB 274-275.) The full colloquy from the prosecutor's cross-examination of John Gamble:

> [THE PROSECUTOR]: And did [Silveria] ever tell you about whether the victim suffered or not?
>
> MR. BRAUN: Excuse me, Your Honor. The witness just got through saying—
>
> THE COURT: The objection is overruled.
>
> MR. BRAUN: There's no foundation.
>
> THE COURT: The objection is overruled.
>
> MR. BRAUN: He just got through saying—
>
> THE COURT: Mr. Braun, sit down.
>
> MR. BRAUN: Your Honor, I object.
>
> THE COURT: Pay attention to the questions and answers.
>
> MR. BRAUN: I object to the question.
>
> THE COURT: Your objection is noted and overruled. [¶] Mr. [Prosecutor]?
>
> MR. BRAUN: There's no foundation. The witness just stated that they didn't talk about it.
>
> THE COURT: Mr. Braun, we'll be holding a hearing during the recess which we'll take right now.

(144 RT 13605-13606.) At the hearing—out of the presence of the jurors—the trial court noted that Braun "seem[ed] to be having a problem" in that he continued to argue objections after the judge ruled on them.

Braun apologized, stating, "I realize it's not proper."[36] (144 RT 13606-13607.) As Braun's behavior was inappropriate and disruptive to the orderly flow of the proceedings, the trial court's brief directive to "sit down" was not misconduct.

As a fourth example, Silveria argues that the trial judge improperly impugned Braun's competence in front of the jury. (SAOB 303-304.) Specifically, the following colloquy occurred during Morrella's direct examination:

> [MORRELLA]: The reason why I think [Silveria] started to feel better, is that what you're asking me?
>
> [BRAUN]: Yes.
>
> [MORRELLA]: I think it's because he started to read the Bible.
>
> [THE PROSECUTOR]: I would have to object and move to strike as speculation.
>
> THE COURT: Sustained. The jury is admonished to disregard it. [¶] Counsel, ask proper questions, please.
>
> [BRAUN]: Julie, did it appear to you as time went on that Danny seemed more open and willing to talk to you?
>
> [MORRELLA]: Yes.
>
> [BRAUN]: All right. Now, you mentioned something about reading the Bible. Let me take a step back.
>
> [THE PROSECUTOR]: I'm sorry, Your Honor. That was stricken.
>
> THE COURT: Sustained. [¶] Counsel, I think you know better. You're supposed to know better.

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[36] This admission did not prevent Braun from attempting to argue his earlier objection *again* during the hearing. The trial court declined to address the issue, stating that it had already ruled. (144 RT 13607-13608.)

(256 RT 29961.) Braun continued with his examination. (256 RT 29961.)

The trial court's comments were not improper. Silveria relies on *People v. Fatone* (1985) 165 Cal.App.4th 1164, in which the Court of Appeal held, "It is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial." (*Id.* at pp. 1174-1175.) In *Fatone*, the trial judge specifically told the jury that defense counsel's actions were "improper and unethical." (*Id.* at p. 1173.) Here, the trial judge made only a brief comment, directed at Braun and not at the jurors, noting that Braun should not have asked a question prefaced with stricken testimony. Although the trial court could have reprimanded Braun privately, its comment did not deprive Silveria of a fair trial.[37] (*Blacksher*, *supra*, 52 Cal.4th at p. 824.)

The trial judge's impartiality is also demonstrated by its occasionally brusque handling of the prosecutor. For example, during one hearing, when the prosecutor made a sarcastic comment and Travis's attorney asked for "just a little adult behavior," the trial judge stated, "I would really like to see some adult behavior . . . here from everybody." (233 RT 27271-27272.) When the prosecutor and Braun exchanged sarcastic comments before the jury, the trial court chastised them, saying, "I think that's enough from both of you." (248 RT 28734.) The trial court also chastised the prosecutor over his reference to the appellate courts, interrupting his attempts to explain. (265 RT 31557.) Later, the trial court again cut off the prosecutor after ruling that the jurors would not be admonished about the reference to the appellate court. (265 RT 31583-31584.) These circumstances demonstrate that the trial judge was not biased in favor of the

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[37] When Braun later asked another question of Morrella that was prefaced with stricken testimony, the trial judge rebuked him in a bench conference, not in front of the jurors. (256 RT 30002; see SAOB 305-306.)

prosecutor. (See also 36 RT 2953; 197 RT 22695 [trial court cuts off prosecutor].)

Moreover, the trial court continued to hear and sustain certain objections made by Braun throughout the trial. (See, e.g., 269 RT 32165.) This continued through the closing arguments of the penalty retrial. (See, e.g., 276 RT 33099.) Such rulings demonstrate that the trial judge was still impartially conducting the proceedings, notwithstanding its occasional rebukes of Braun, most—if not all—of which were warranted by Braun's dilatory or disruptive actions. (See, e.g., Arg. III(C), ante.) Accordingly, Silveria was not denied a fair trial and his claim must be rejected.

Scattered throughout Silveria's list of instances of alleged judicial misconduct, he argues the merits of several rulings by the trial court.[38] As will be discussed, the trial court's rulings were not erroneous. "Moreover, a trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) Accordingly, Silveria's claim fails.

First, Silveria argues that the trial court erroneously sustained the prosecutor's objection to Braun's leading questions of defense expert Dr. Kormos. (SAOB 284.) Specifically, the prosecutor objected to Braun's question:

> I'd like to ask you about another statement in that report. Do you recall that in that report it was stated that on the occasion when Danny, my client, left his father's home it was because he had gotten fired from his job at the 7-Eleven and that Danny had then taken the money out of the joint account that he had with

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[38] The following discussion does not address the arguments Silveria makes on the merits where he references other claims made in his opening brief. (See, e.g., SAOB 285, n. 41, 303, 306.) Respondent addresses the merits of those claims elsewhere in this brief.

> his father and left and had returned about two weeks later with his cousin, Dina Macias?

(173 RT 17257.) Under Evidence Code section 767, a trial court has "broad discretion" to determine when a leading question is permitted on direct examination by the existence of "special circumstances." (*People v. Williams* (1997) 16 Cal.4th 635, 672.) Although leading questions are sometimes permitted on the direct examination of an expert witness, this is because their knowledge is specialized and such questions are sometimes "necessary to obtain relevant evidence." (See Assembly Com. on Judiciary com., Cal. Evid. Code, § 767.) Here, Braun's question asked whether Dr. Kormos recalled whether a report contained the statements described. The trial court did not abuse its discretion by requiring Braun to ask the more direct question of whether Dr. Kormos had read that part of the report. (*Williams*, *supra*, 16 Cal.4th at p. 672; see Evid. Code, § 765.) Braun asked such a question without objection elsewhere. (173 RT 17259.) Under these circumstances, no judicial bias or misconduct is shown.

Second, Silveria argues that the trial court erroneously overruled his hearsay objections to the prosecutor's cross-examination of Cortez. (SAOB 299-302.) Specifically, the prosecutor asked the social worker about several things written in the Social Service report on Silveria's family. (255 RT 29759-29767.) The prosecutor sought the answers to those questions to explain the effect it had on Cortez's subsequent decisions regarding Silveria's foster placement. (255 RT 29760, 29763.) Notwithstanding Silveria's complaint on appeal that the events in the reports "could not have logically influenced Cortez's decision *five years later*" (SAOB 301, emphasis in original), it was established that she had read the report upon being assigned the Silveria case. (255 RT 29767.) Testimony introduced to establish the effect on the hearer is not hearsay. (See *People v. Hines* (1997) 15 Cal.4th 997, 1047; Evid. Code, § 1200.)

Cortez's knowledge of Silveria's past family experiences certainly affected her decisions about his foster placement, and so the prosecutor's questions did not elicit hearsay. In all events, the trial court's ruling did not demonstrate bias or constitute misconduct.

Third, Silveria argues that the trial court erroneously required him to turn over work product. (SAOB 309-310.) Braun had "personally summarized" transcripts of the testimony of several defense witnesses and "sent the summaries to his psychiatric expert, Dr. Kormos." (SAOB 309.) The trial court ordered him to turn over copies that did not contain any of Braun's notes.[39] (262 RT 31042.) That order was plainly appropriate under Evidence Code section 721, subdivision (a), which provides "a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to . . . (3) the matter upon which his or her opinion is based and the reasons for his or her opinion." On direct examination of Dr. Kormos, Braun had established that Dr. Kormos had relied on the summaries to form his diagnosis of Silveria. (261 RT 31027.) The prosecutor was entitled to review the summaries for his cross-examination. To the extent that Braun's summaries of transcripts constituted attorney work product,[40] Braun waived any privilege he had in them by his having provided them to Dr. Kormos and by his direct examination. In all events, the trial court's ruling was not demonstrative of bias against Silveria or the defense.

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[39] The trial court had sanctioned Braun for his failure to comply with a similar order at the first penalty trial. (13 CT 3301-3303; 157 RT 15534-15539.)

[40] In criminal cases, an attorney's "work product" is defined as "any writing reflecting an attorney's impressions, conclusions, opinions, or legal research or theories." (*People v. Zamudio* (2008) 43 Cal.4th 327, 354-355, internal quotation marks omitted; § 1054.6.) Respondent does not concede that Braun's written summaries constituted attorney work product.

Fourth, Silveria argues that the trial judge erroneously instructed the jurors that they could consider a witness's prior felony conviction when evaluating that witness's credibility. (SAOB 319-321; 273 RT 32781-32783.) Specifically, he argues that the trial court "erred in instructing the jury that they could consider [Silveria]'s current murder and robbery convictions as prior felony convictions." (SAOB 321.) The trial court instructed the jurors with CALJIC No. 2.23, which reads in relevant part: "The fact that a witness has been convicted of a felony . . . may be considered by you only for the purpose of determining the believability of that witness." (22 CT 5364; see also 22 CT 5359-5360 [CALJIC 2.20 given on believability of witness].) The trial court never directed the jurors to consider Silveria's murder conviction or robbery convictions specifically. Silveria points to nothing in the record indicating the jurors had any reason to think that this instruction applied in particular to his former testimony or his convictions of murder and robbery in the instant case. In any event, the jurors were plainly aware that Silveria had been convicted of murder, insofar as they knew that they were there to determine his punishment, and had heard extensive evidence of his crimes. Moreover, they must have been aware of the bias inherent in Silveria's testimony, insofar as he was pleading for his own life. In all events, the trial court's instruction did not demonstrate any bias for or against any party. Silveria's claim fails.

C. There Was No Structural Defect

Silveria argues that "a trial by a judge who is not fair or impartial constitutes a 'structural defect[] in the constitution of the trial mechanism," requiring reversal. (TAOB 331, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; see also *People v. Brown* (1993) 6 Cal.4th 322, 332.) For the reasons given above, Silveria has not shown that the trial judge was not fair or impartial. His claim therefore fails.

XIII. THE TRIAL COURT PROPERLY DISCHARGED PROSPECTIVE JURORS E-45, F-77, AND J-56 FOR CAUSE (SILVERIA CLAIM XIII, TRAVIS CLAIM VIII)

Silveria argues that the trial court improperly discharged three prospective jurors, because "the record shows that their death penalty views did not prevent or substantially impair the performance of their duties." (SAOB 333.) Travis joins Silveria's argument on two of the discharged prospective jurors, and also claims that the trial court erred by refusing to excuse another juror for hardship. (TAOB 421.) These claims fail.

A. Juror Information

1. Juror E-45

In his questionnaire,[41] in response to the question "Is there anything about the nature of this case that would make it difficult or impossible for you to be a fair and impartial juror here?", Juror E-45 checked "Yes" and wrote "my views on the death penalty." (163 CT 43546.) When responding to a question about his "general feelings regarding the death penalty," Juror E-45 wrote, "I do not believe that the death penalty is a deterrant [*sic*] to murder. I am not sure if we have the right to take a life for a life." (163 CT 43546.) He indicated he was "strongly against" the death penalty because he did not believe it "does anything to stop a crime and that being incarcerated for life is penalty enough." (163 CT 43547.) He also wrote that the death penalty "should be the last resort" and that his religious or philosophical principles would affect his vote, because "I don't believe 'we' should play God." (163 CT 43547.) Juror E-45 also indicated that he would always vote for life without the possibility of parole and reject death,

[41] Juror E-45's questionnaire begins at 163 CT 43518. Silveria's description of Juror E-45's voir dire and questionnaire is in his opening brief at pages 335 to 341.

regardless of the evidence presented at the penalty retrial. (163 CT 43549, 43551.)

At voir dire, the trial court inquired about Juror E-45's attitude toward the death penalty:

> [THE COURT]: And when you initially went back there to deliberate, do you think you would be able to go back there with both penalties as possibilities?
>
> [JUROR E-45]: Yes— well, I guess on the death penalty I have some issues with that, but I think I could look at what the law requires and—
>
> [THE COURT]: Would you automatically be closed off as to one penalty when you initially went back there?
>
> [JUROR E-45]: It's hard to say. Right now, yes, but I haven't seen, I guess, the evidence, the circumstances.
>
> [THE COURT]: Okay. From reading your questionnaire, I gather that you do not favor the death penalty, necessarily?
>
> [JUROR E-45]: Right.
>
> [THE COURT]: You would have more favor toward life without parole.
>
> What we want to make sure of is that jurors are not closed off to either penalty, that they actually could conscientiously consider both penalties as possibilities, again, without knowing anything about the facts of the case.
>
> [JUROR E-45]: I have a— probably the death penalty would be harder. I guess I would need to see more evidence than for the life in prison. So they're not equally balanced.
>
> [THE COURT]: They're not equally balanced in your mind right now?
>
> [JUROR E-45]: Right.

(218 RT 25129-25130.) The voir dire continued:

> [THE COURT]: Okay. Let me ask you two questions, and these two questions are based pretty much on the same

assumption. Assume that the evidence in this case showed that the defendants had deliberately participated in the multiple stabbing of the victim in this case during the course of a robbery and the victim died. And that's basically what the guilt phase jury found.

The first question, based on that assumption: Do you think that you would always vote for life without parole and reject the death penalty despite any aggravating evidence that may be presented during the course of the trial?

[JUROR E-45]: Yes, I think I would vote for life without parole, right.

[THE COURT]: Do you think you would ever vote for death based on that assumption?

[JUROR E-45]: Based on that?

[THE COURT]: Again, that's the only thing you know right now.

[JUROR E-45]: Probably not at this point, no.

(218 RT 25131-25132.) After a sidebar discussion in which the prosecutor challenged Juror E-45 for cause, voir dire continued:

[THE COURT]: Going back to that assumption, the multiple stabbing during a robbery, the victim died and so on. In a situation like that, could you even consider the death penalty?

[JUROR E-45]: 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.

(218 RT 25134.) After further sidebar discussion, the court resumed voir dire, eventually asking:

[THE COURT]: Okay. Can you think of any situation—or let me—do you think that the death penalty could be appropriate in a case such as this, without knowing anything about the case, other than that one assumption?

[JUROR E-45]: I guess, just with that one assumption, probably not appropriate.

(218 RT 25137.) The court dismissed Juror E-45, finding "that the juror is in fact substantially impaired because of his views on the death penalty and it would prevent him from fulfilling his role as a juror . . . ." (218 RT 25137.)

2. Juror F-77

In his questionnaire,[42] Juror F-77 described his personal, philosophical, moral, or religious belief that "our Society [*sic*] might be better off without the Death Penalty. As a moral matter I do not see that the State has a right to take a life anymore [*sic*] than an individual does. Some States have made mistakes. I doubt if the Death Penalty deters murder. I believe the existence of the Death Penalty gives a sanction to murder in Society." (147 CT 38582.) When responding to a question on his "general feelings regarding the death penalty," he wrote, "Against it." (147 CT 38596.) He felt "it should never be used" (147 CT 38598), even for murder (147 CT 38600). He indicated that he could not see himself rejecting life in prison without the possibility of parole and choosing the death penalty. (147 CT 38601.)

At voir dire, the trial court inquired about Juror F-77's attitude toward the death penalty in this case, where "the defendants had deliberately participated in the multiple stabbing of the victim . . . during the course of a robbery from which the victim died." Juror F-77 responded, "I would want to listen to all of the evidence and I would want to listen to how it had affected other jurors, but I do have difficulty with the notion of the death

[42] Juror F-77's questionnaire begins at 147 CT 38568. Silveria's description of Juror F-77's voir dire and questionnaire is in his opening brief at pages 343 to 351.

penalty." (220 RT 25522.) Later, he repeated that he had a "problem" with the death penalty, but that if he were presented with an "overwhelming and persuasive" argument, his opinion could change. (220 RT 25523.) Upon questioning from the prosecutor, Juror F-77 stated that he believed the death penalty to be "state sanctioned murder." (220 RT 25527.)

Following the prosecutor's challenge for cause (220 RT 25531), the court dismissed Juror F-77, finding that "the juror is substantially impaired. He has a position and his position is that he would have to be convinced otherwise. He is not here with an open mind. [¶] And the Court finds that his attitudes and answers and feelings would make it impossible or at least substantially impair him from being a juror in this case and properly acting as a juror in accordance with the law and his oath" (220 RT 25532).

3. Juror J-56

In his questionnaire,[43] Juror J-56 wrote, "I would have a difficult time saying that another human being should be put to death." (169 CT 45382.) He was familiar with the case from reading about it in the newspaper "several years ago," but remembered that it was a "robbery, employee was beaten/tortured/murdered." (169 CT 45394, 45401.) Juror J-56 wrote that because "I do not think that I could assign the death penalty to someone," it would be difficult or impossible for him to be a fair and impartial juror. (169 CT 45396, 45404.) He wrote, "I just cannot see myself stating that a person should die for his/her crimes." (169 CT 45398.) Juror J-56 also wrote, "I cannot think of any circumstance that [sic] the death penalty is appropriate." (169 CT 45400.) He indicated that he would be unable to set aside his preconceived notions entirely, although he would do so "to the

[43] Juror J-56's questionnaire begins at 169 CT 45368. Silveria's description of Juror J-56's voir dire and questionnaire is in his opening brief at pages 351-360.

best of my ability." (169 RT 45402-45203.) He also anticipated "stress" from "knowing that I am part of the decision process for awarding [the] death penalty." (169 CT 45403.)

At voir dire, the trial court inquired about Juror J-56's attitude toward the death penalty. Juror J-56 indicated that he would not "automatically" vote for either life in prison or death. (227 RT 26712-26713.) When the court asked Juror J-56 about his questionnaire answers, Juror J-56 said, "I think I also mentioned in there that there might be a situation where I think a death penalty would be— or somebody's life could be taken, but I can't think of any offhand." (227 RT 26716.) When questioned by the court and by Silveria's attorney, Juror J-56 repeatedly stated that "it would be very hard" for him to set aside his personal feelings and vote for death. (227 RT 26717, 26719.) In response to questioning by the prosecutor, Juror J-56 indicated that he would be uncomfortable as a prosecutor with jurors like himself, because he was "a person who's reluctant to award the death penalty even though he or she might decide that the facts and the guidelines are met." (227 RT 26723-26724.)

After the prosecutor's challenge (227 RT 26725), the court dismissed Juror J-56, finding that "the juror could not tell us that he would— and clearly that he was willing to temporarily set aside his own personal views. It would be difficult, but he didn't say he could do that and that is consistent with his answers in the questionnaire" (227 RT 26727).

B. Legal Principles

"[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Moon* (2005) 37 Cal.4th 1, 13.)

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. The trial court must determine whether the prospective juror will be unable to faithfully and impartially apply the law in the case. A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court." (*Moon*, *supra*, 37 Cal.4th at p. 14, internal quotation marks and citations omitted.)

C. The Trial Court Properly Discharged Jurors E-45, F-77, And J-56

The trial court's decisions to discharge Jurors E-45, F-77, and J-56 were supported by substantial evidence. As described above, the questionnaires and voir dire demonstrate that those jurors would have at least a substantial impairment in being fair and impartial. Even though, as Silveria and Travis note, the jurors would sometimes indicate that they could act fairly or impartially, the trial court was not bound to accept those statements and reject the others. "In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.) It is for that reason that this Court must defer to the trial court's findings regarding the jurors's states of mind, since the trial court was in the better position to observe their demeanor and tones.

(*People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) Here, the trial court's findings of substantial impairment were supported by substantial evidence. Accordingly, Silveria's argument fails.

Silveria's and Travis's reliance on *People v. Stewart* (2004) 33 Cal.4th 425 is unavailing. (SAOB 343, 360-361; TAOB 430-440, 443-445.) In *Stewart*, this Court noted 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." (*Stewart*, *supra*, 33 Cal.4th at p. 447.) Here, the questionnaires of Jurors E-45 and J-56 explicitly stated that not only would it be "very difficult" for them to impose death, but that such difficulty affected their ability to be fair and impartial. Juror F-77 referred to the death penalty as "state sanctioned murder" and stated that he could not see himself voting for death absent an "overwhelming" argument. This substantial evidence supports the trial court's finding that the jurors's aversion to the death penalty rose beyond "difficulty" and into substantial impairments. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 645-646 [discharge for cause proper where questionnaire more particular than that in *Stewart*].)

Travis compares the dismissal of Juror F-77 to those this Court ruled were properly allowed to serve in *People v. Ledesma* (2006) 39 Cal.4th 641. (TAOB 446-447.) However, in *Ledesma*, this Court considered the trial court's disallowance of defense challenges for cause. Faced with the particular answers given by the challenged jurors, this Court affirmed the trial court's rulings. (*Ledesma*, *supra*, 39 Cal.4th at pp. 671-675.) As discussed above, the trial court's direct observation of the demeanor and tone of the challenged jurors here, combined with their questionnaire answers, supports its decisions. Travis's reliance on *Ledesma* is unavailing.

D. Comparative Analysis

Silveria contends the trial court erred because he allowed five "pro-death" jurors—Jurors A-69, B-17, C-47, C-67, and G-68—to pass, even though they gave "similar responses to death penalty questions." (SAOB 362.) This contention is meritless.

Initially, to the extent that Silveria invites this Court to engage in comparative analysis to support his claim that the trial court erred by discharging Jurors E-45, F-77, and J-56 for cause, respondent submits that such analysis is not required by law and is not helpful. The trial court's findings on discharged jurors's states of mind is upheld if supported by substantial evidence, see *Moon*, *supra*, 37 Cal.4th at p. 14; his subjective state of mind as evidenced by comparative analysis is irrelevant. Silveria's contentions to the contrary (SAOB 380-381) are made without citation to legal authority and do not establish the relevance of comparative analysis here.[44]

Nevertheless, even if Silveria's claim is heard, it lacks merit. The trial court's decisions regarding those five jurors are supported by substantial evidence.

Juror A-69 initially indicated that he would always vote for death. (136 CT 35499.) After hearing the trial court's opening instructions, however, he recanted and said "I'd like to consider the evidence." (212 RT 24172.) Moreover, Juror A-69 had misunderstood what "life without the possibility of parole" meant, and once the trial court explained the term, Juror A-69 indicated his mind had changed and he would be able to set aside his personal preferences. (212 RT 24173-24175, 24179-24181; see

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[44] Silveria makes no direct argument that the court erred by not striking these jurors for cause. Nor does Silveria make an explicit argument of judicial bias, with reference to legal authority, on this ground.

Ledesma, *supra*, 39 Cal.4th at p. 666 [referring to "the common misperception that all life prisoners may eventually be paroled"].) Juror A-69 also admitted that he had not known that all first degree murder is premeditated, and that he no longer felt that death was mandatory in this case. (212 RT 24181-24182.) The trial court denied the defense's challenges for cause, finding that once Juror A-69 understood "what life without parole really means," that sentence became a viable option for him. (212 RT 24186.)

Juror B-17 indicated that he was "strongly in favor" of the death penalty. (129 CT 33146.) He felt that it should be mandatory for murder. (129 CT 33149.) During voir dire, however, he said he thought he could conscientiously consider any presented mitigating evidence. (212 RT 24232-24233.) The trial court concluded that although he was "pro death," Juror B-17 knew that "he needs to listen [to] what was said" and was not "automatic death penalty." (212 RT 24245.)

Juror C-47 indicated that he believed the death penalty should be mandatory for murder and would vote for death unless there were "unusual" or "extenuating" circumstances. (123 CT 31349, 31350.) He wrote that he would make a decision on the penalty only "after all circumstances have been presented." (123 CT 31351.) At voir dire, he said that he would likely vote for death unless the mitigating evidence were "very powerful." (214 RT 24598.) After the court clarified that Juror C-47 was there only to determine the punishment, Juror C-47 indicated that he would listen with an open mind to the all the evidence. (214 RT 24599-24600.) The trial court found that "based on his answers here after further instructions" that he would be able to serve fairly. (214 RT 24614.)

Juror C-67 indicated in his questionnaire that the death penalty should be mandatory for first-degree murder. (128 CT 32899.) At voir dire, however, he stated that he would not automatically vote for either death or

life without parole. (215 RT 24676.) He indicated that his voir dire answer that the death penalty should be "mandatory" would more accurate if it read "presumptive." (215 RT 24677.) Juror C-67 said the appropriate penalty would "depend on what the situations and the mitigating factors might be." (215 RT 24677.) The trial court ruled that Juror C-67 "would have no problem listening to the evidence and voting for what is appropriate based on the evidence." (215 RT 24688.)

Juror G-68 indicated in his questionnaire that because he "believe[d] in the death penalty," it would be difficult or impossible for him to be a fair and impartial juror. (177 CT 47646, 47654.) However, he indicated that though he would "very likely" vote for death, his vote was not automatic and would depend on the circumstances. (177 CT 47649.) At voir dire, Juror G-68 affirmed that he would deliberate with an open mind as to the penalty. (222 RT 25779-25782.) When asked about his questionnaire answer, Juror G-68 said, "I would hope that I could put that bias aside. . . . [E]veryone . . . comes in with a certain background and it's going to lead them to be biased one way or the other, and that's why I put that down." (222 RT 25788.) He explained, "I look at things logically. I would like to say that I could sit down and weigh the evidence and decide one way or the other." (222 RT 25793.) The trial court concluded "he would be able to look with an open mind at the evidence." (222 RT 25796.)

The trial court's decisions on the above jurors are supported by substantial evidence. In each case, the juror indicated that he would be able to determine the penalty with an open mind. However, as Silveria notes, each of the five also gave conflicting answers in their questionnaires about their prospective ability to be fair. In such circumstances, this Court should defer to the trial court's rulings, as that court was in the better position to judge each juror's demeanor and tone. (*Carasi*, *supra*, 44 Cal.4th at p.

1290.) As described, those rulings were amply justified. Silveria's contrary claim fails.

E. The Trial Court Properly Permitted Juror H-65 To Serve

Travis contends that the trial court should have dismissed Juror H-65 for hardship. (TAOB 425-427.) Not so.

1. Background

During jury selection, Juror M-56 indicated that he or she would be required to work at night during the trial, albeit at reduced hours. (63 RT 4965.) The trial court excused the juror. (63 RT 4966.)

Juror I-40 said that his or her company was "redesigning for survival and downsizing." (81 RT 7439-7440.) Juror I-40 said that he or she would "feel an obligation" to continue working during the trial, and volunteered, "I really think it might affect my concentration on the duties on [*sic*] a trial." (81 RT 7441.) The trial court excused Juror I-40. (81 RT 7442.)

Juror K-112 said that two of the people in his or her department were on leave, and that his work "preoccupies [his] mind quite a bit." (81 RT 7523.) Juror K-112 planned on working during the trial and making phone calls at lunch and recesses. (81 RT 7523.) The trial court excused Juror K-112. (81 RT 7524.)

After the jurors were seated, Juror 6 indicated that her employer would not pay her during the trial. (89 RT 8392-8393.) As that job was her only source of income and the attorneys had agreed to reopen jury selection, the trial court excused her for financial hardship. (89 RT 8393.)

Thereafter, Juror H-65[45] said that he had learned that his company would need him to keep working. He stated that "engineers usually work between eighty to one hundred hours a week." (89 RT 8401.) He said he

[45] Juror H-65 had been seated as Alternate Juror 1. (87 RT 8210.)

would have to work fifty hours a week—or from 6:00 p.m. to 1:00 a.m. seven days a week—during the trial. (89 RT 8401.) Juror H-65 was selected at random to replace Juror 6. (89 RT 8404.)

F. The Trial Court Properly Allowed Juror H-65 To Serve

This claim is forfeit. Travis did not challenge Juror H-65 for cause after his new hardship was revealed, nor did he object to the trial court seating Juror H-65. Accordingly, he has forfeited his challenge on appeal. (*People v. Mickey* (1991) 54 Cal.3d 612, 664-665; see *People v. Mills* (2010) 48 Cal.4th 158, 186-187 [defendant who makes specific challenge and exhausts all peremptory challenges must still "express to the trial court dissatisfaction with the jury as presently constituted"].)

In any event, Travis's claim fails. At the time, the trial court noted that jury selection had taken three months and that "we don't have any control over the hardships that I can accept now. We have to be very careful, very stringent using them at this point because of the time and money, taxpayers' money, we have invested in getting this far . . . ." (89 RT 8402.) Moreover, Juror H-65 indicated that, as an engineer, he typically worked 80 to 100 hours a week. Thus, although Juror H-65 said he would have to work 50 hours a week during the trial, the trial court could reasonably have concluded that Juror H-65 was accustomed to a vigorous schedule. Indeed, unlike the other jurors excused for hardship, Juror H-65's schedule during the trial—even if the trial proceedings took 40 hours a week—would still total only 90 hours a week, falling squarely within his "usual" schedule. This may have been why Juror H-65 made no request to be excused, which demonstrated his own belief in his ability to continue serving as a juror. Accordingly, the trial court did not err by failing to excuse him for hardship.

XIV. THE TRIAL COURT DID NOT ERR BY PRECLUDING PENALTY RETRIAL TESTIMONY FROM PENALTY TRIAL JURORS (TRAVIS CLAIM I)

Travis argues that the trial court erred by refusing to allow him to call two jurors from his guilt and first penalty trial as witnesses at the penalty retrial. (TAOB 136.) This claim lacks merit.

A. Procedural History

On November 25, 1996, Travis made an offer of proof for two prospective defense witnesses. The first, who was alternate Juror A-4 in the guilt and first penalty trials, began visiting Travis in jail shortly after the verdict. (201 RT 23000-23001.) Juror A-4 would have testified as to Travis's rehabilitation in jail. (201 RT 23001.) The second witness, seated Juror 8, was the foreperson of Travis's first jury. (201 RT 23002.) She would have testified that she believed Travis's rehabilitation was sincere. (201 RT 23004.)

The prosecutor objected to these witnesses. He noted that both jurors had heard evidence in the original trial, and that full cross-examination on their familiarity with Travis was impossible without referring to the previous trial. (201 RT 23007-23009.)

On December 2, 1996, the trial court sustained the prosecutor's objection to the proffered witnesses. The court noted that it had already ruled that the penalty retrial jury was not to be advised of the prior penalty phase or its failure to reach a verdict. (202 RT 23123.) The court found that allowing the former jurors to testify would increase the probability of the prior jury results "leaking out at least a hundredfold." (202 RT 23124.) The court also noted that if the defense's witnesses were allowed, the prosecutor could call other former jurors in rebuttal, which would be "intolerable and completely improper." (202 RT 23124.) The court ruled

that neither the prosecutor nor the defense could call any former jurors. (202 RT 23124.)

B. Legal Principles

"Evidence Code section 352 permits a trial court, in its discretion, to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create the substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The court's ruling is reviewed for abuse of discretion." (*People v. Coffman* (2004) 34 Cal.4th 1, 88.)

C. The Trial Court Did Not Abuse Its Discretion

The trial court did not abuse its discretion. A defendant's constitutional right to present a defense remains subject to a trial court's authority to exclude evidence that is "'repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690.) Initially, Travis was permitted witnesses to testify as to his jailhouse rehabilitation; he himself, Charon, and jail guards Keith Forster and David Damewood all testified on that issue. The former jurors's testimony would have been cumulative to that testimony. Moreover, direct examination of the former jurors would necessarily have involved a description of their familiarity with Travis and the murder at issue, to say nothing of the cross-examination. The former jurors's testimony would therefore likely have revealed the existence—and perhaps the result—of the first penalty trial. Since the trial court had already ruled that the prior penalty trial was not to be mentioned,[46] the trial court reasonably excluded the former jurors.

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[46] After hearing argument, the trial court ruled that no attorney and no witness "will mention the fact that this is a retrial of a penalty phase. The jury is not going to know that." (297 RT 22657.)

Further, if the defense witnesses were allowed, the prosecution would have had the opportunity to call other penalty trial jurors as rebuttal witnesses. The testimony of all these witnesses would have consumed an undue amount of time and risked confusing the penalty retrial jury. Indeed, if the penalty retrial jurors heard such extensive testimony from former jurors, they might have abdicated their sentencing responsibility in deference to the first jury's findings, even if they did not know the first penalty phase had resulted in a mistrial. Considering these circumstances, the trial court acted within its discretion when it excluded the testimony of the former jurors.

Travis relates his case to that of the defendant in *Skipper v. South Carolina* (1986) 476 U.S. 1. (TAOB 166-169.) In *Skipper*, the South Carolina court barred testimony by the defendant's jailers and a jail visitor that the defendant had "made a good adjustment" during his time in jail. (*Skipper*, *supra*, 476 U.S. at p. 3.) That decision was based on a South Carolina Supreme Court ruling which had declared that evidence of a defendant's future adaptability to prison was irrelevant to a capital sentencing decision. (*Ibid.*) The high court reversed, concluding that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings* [*v. Oklahoma* (1982) 455 U.S. 104], such evidence may not be excluded from the sentencer's consideration." (*Id.* at p. 5.)

Travis's reliance on *Skipper* is unavailing. The high court's ruling was that relevant mitigating evidence of jailhouse reformation could not be *categorically* excluded. No serious allegation could be made that the trial court acted in such a manner here, as four witnesses testified on that issue for Travis. Further, *Skipper* also tacitly acknowledged that the admission of mitigating evidence is subject to traditional evidentiary rules. (*Skipper*, *supra*, 476 U.S. at pp. 5-6 [discussing whether testimony would have been

excludable as improper lay opinion], 7-8 [discussing whether testimony would have been excludable as cumulative].) As described above, the trial court correctly applied traditional evidentiary rules here. Under such circumstances, the fact that the trial court reasonably excluded the testimony of former jurors as unduly prejudicial does not render its ruling a violation of *Skipper*. Accordingly, Travis's claim fails.

XV. THE TRIAL COURT DID NOT ERR BY PRECLUDING TESTIMONY FROM TRAVIS'S TRIAL ATTORNEY (TRAVIS CLAIM II)

Travis argues that, even if the trial court properly excluded the testimony of former jurors, it erroneously denied him the opportunity to have trial counsel Leininger testify in their place. (TAOB 203.) Not so.

A. Procedural History

On December 18, 1996, Leininger indicated that, since the trial court had excluded the testimony of the former jurors, he wished to put himself on the witness list. (211 RT 23965.) The court requested briefing (211 RT 23970), which Travis filed on December 31, 1996 (18 CT 4540).

On February 5, 1997, the trial court heard argument. (233 RT 27293.) The court stated, "I'm not allowing you to even think about testifying unless I get a full waiver from your client." (233 RT 27297.) Silveria's attorney requested a severance if the trial court allowed Travis's attorney to testify, because otherwise the jury would see that "Mr. Silveria's counsel is simply doing his legal duty of being an advocate for his client, but no more . . . ." (233 RT 27303.) The trial court issued the following "guidelines"[47]: (1) the testimony was allowed by ethics and law, but the court felt it would

[47] The court explained that by "guidelines," it meant "These are just my thoughts, something to think about" and "This is not a ruling, okay? These are the pitfalls that everybody is running into." (233 RT 27306.)

be foolish for Leininger to testify; (2) if Leininger lost credibility as a witness, there was a "very good" chance he would lose credibility as an advocate; (3) Leininger would only be qualified as an expert witness "regarding recovery as a certified alcohol and drug counselor, not as a religious antagonist or protagonist, and not as a character witness"; (4) there would have to be "a complete waiver by Mr. Travis of all attorney-client privileges"; (5) there would be difficulty in discovery, as Leininger would have to disclose his notes and would be subject to interview by the prosecution and Silveria; (6) it would be improper for Leininger to argue his own credibility in closing argument; and (7) someone would have to conduct the direct examination of Leininger. (233 RT 27304-27307.) The court cautioned that "there's going to be no delays in this trial by anybody." (233 RT 27307.) Finally, the court indicated that it would rule on the motion the next Monday.[48] (233 RT 27307.)

On February 11, 1997, counsel somewhat cryptically stated: "I'm not going to withdraw the motion, but I am going to simply indicate that at this point I don't want to go forward with my testifying, because I think, given the restriction, that accomplishes nothing and very well may accomplish some things that I don't need to accomplish in a negative fashion and that I can do the recovery work with another professionally-trained person to do that." (235 RT 27392.)

B. Legal Principles

"Whether an attorney ought to testify ordinarily is a discretionary determination based on the court's considered evaluation of all pertinent factors including, inter alia, the significance of the matters to which he

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[48] The following Monday—February 10, 1997—was spent in jury selection, so the final hearing was put off until the next day. (234 RT 27390.)

might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 913.)

C. This Claim Is Moot

Initially, this claim is moot. Before the court ruled on Travis's motion, Leininger indicated that he did not intend to testify. (235 RT 27392.) Since the court never ruled that Leininger could not testify, or that he could testify only under the conditions it had stated as "guidelines" earlier, there was no exercise of discretion to challenge. Accordingly, this claim must be denied.

D. The Trial Court Did Not Abuse Its Discretion

Even if Travis's claim is not moot, and even if the trial court's "guidelines" are read as limiting rulings on Leininger's proffered testimony—notwithstanding the trial court's explicit statement that the guidelines were *not* rulings—the trial court did not abuse its discretion.

First, while the character and recovery testimony that Leininger wished to present was relevant and perhaps weighty, it was not critical. Evidence of Travis's jailhouse recovery and good behavior was amply covered by several witnesses, including Travis himself, Charon, Lutman, Dr. Cermak, and two jailhouse guards. Moreover, Leininger would have been subject to extensive cross-examination on his bias as Travis's attorney, which may have substantially reduced the weight the jury gave his testimony.

Second, allowing Leininger to testify would have resulted in a substantial delay in the proceedings. By February 11, 1997, the final jury had been impaneled, and opening arguments were scheduled to begin in two days, on February 13. (See 236 RT 27418.) A new attorney for Travis

would have required substantial time to familiarize him- or herself with the case and to prepare for the penalty retrial. Were Leininger permitted to continue his representation, substantial time would have been required to find another attorney to make Travis's closing argument and to conduct Leininger's direct examination, and for the discovery of Leininger's notes and documents, especially if the trial court had to examine them *in camera* first. Moreover, the delay was unreasonable because it was attributable in some part to the defense; the trial court had excluded the testimony of the former jurors on December 2 (202 RT 23124), yet Leininger did not raise the possibility of himself being a witness until December 18.[49] In all events, the trial court could reasonably have refused to allow Leininger to testify in light of the substantial delay that would have ensued.

Third, the trial court had an affirmative duty to protect Travis's right to effective assistance of counsel. (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 559.) If Leininger were to testify, he would either have to be replaced as counsel by an attorney who did not have his extensive familiarity with Travis's case, or he risked his credibility as an advocate by testifying as a witness. In either case, Travis risked substantial damage to the efficacy of his defense. Moreover, if Leininger were to testify, the prosecution and Silveria would have been able to cross-examine Leininger on various privileged communications between Leininger and Travis. The exposure of such otherwise-privileged information may have substantially weakened Travis's defense. The trial court could properly have been solicitous of Travis's right to effective representation in such a situation.[50]

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[49] The delay at that late stage of the proceedings belies Leininger's claim that his testimony would have been critical to Travis's defense.

[50] Respondent notes that there is no record of an informed, written consent from Travis for Leininger to act as both advocate and witness. (See 211 RT 23969-23970 [Leininger orally states "Travis is willing to waive

(continued...)

Under these circumstances, the trial court would have acted within its discretion had it refused to allow Leininger to testify.

Travis argues that the trial court improperly restricted Leininger's proffered testimony to exclude character evidence. (TAOB 209-211.) However, as discussed above, the trial court never explicitly ruled that such a limitation would apply. Moreover, had Leininger offered an opinion on Travis's moral character, he would have been fully impeachable on the basis of that opinion. Such cross-examination by both the prosecution and Silveria would have required extensive discovery on the relationship between Leininger and Travis and may also have required undue time. Finally, if Leininger had testified as a character witness, it is probable that new counsel would have had to have been appointed, since it is unlikely that the jurors could parse their evaluation of his credibility as a witness from their consideration of his credibility as an advocate. Such replacement would have consumed a significant amount of time, and the trial court properly concluded that such delay was not warranted under the circumstances.

Relying on several cases from the Courts of Appeal, Travis contends that the court's requirement of a complete waiver of attorney-client privilege was improper. (TAOB 211-225.) However, as discussed above, the trial court never explicitly ruled that such a waiver would be required. Moreover, since Leininger indicated he no longer wished to testify, neither Silveria nor the prosecution was given the opportunity to show good cause

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(...continued)
any privilege of confidentiality he has in regards to my testifying"].) State Bar Rules of Prof. Conduct, rule 5-210, reads in pertinent part: "A member shall not act as an advocate before a jury which will hear testimony from the member unless: . . . (C) the member has the informed, written consent of the client."

for discovery into matters beyond those which Travis was apparently already willing to waive the attorney-client privilege. Finally, unlike each of the cases cited by Travis, here Leininger sought to be a witness notwithstanding his position as defense counsel. His testifying would necessarily have resulted in substantial risks to Travis's right to effective representation and a substantial delay in the proceedings. Accordingly, those cases are distinguishable, and Travis's claim must be rejected.

XVI. SILVERIA'S PRIOR TESTIMONY WAS PROPERLY ADMITTED (TRAVIS CLAIM VI)

Travis argues that "testimony given by a defendant at a trial that ends in a hung jury should not be available for use by the prosecution its case-in-chief, at a retrial." (TAOB 381.) He contends that the trial court erred by compelling Silveria to testify before Travis's first jury, and that the prosecution should not have benefitted from that error at the penalty retrial by the use of Silveria's testimony. (TAOB 382.) This claim fails.

A. Background

After appellants were found guilty, they each indicated a desire to testify at the penalty phase. The prosecutor moved to have them each testify before both juries. (12 CT 3080.) The trial court ruled that if Silveria or Travis chose to testify, he would have to do so before both juries for "Factor (a) evidence." The court allowed counsel to structure their clients's testimony such that both juries would hear the Factor (a) evidence, but only each defendant's jury would hear anything else. (134 RT 12450.)

B. Travis's Due Process Claim Fails

Initially, Travis's claim must be construed as a due process claim. He lacks standing to challenge the admission of Silveria's testimony on the ground that it was obtained in violation of Silveria's privilege against self-incrimination. (*People v. Jenkins* (2000) 22 Cal.4th 900, 965.) He does,

however, have standing to claim that his right to a fair trial was violated by the admission of Silveria's testimony. (*Id.* at pp. 966-967.) Nevertheless, such a claim fails. It is clear that Silveria's prior testimony—made voluntarily in court while Silveria was represented by an attorney—was not coerced, nor has Travis demonstrated that his trial was rendered fundamentally unfair by its admission. (*Id.* at pp. 966-967.) Accordingly, his claim must be rejected.

C. The Testimony Was Proper

In all events, Travis's claim fails. Silveria's prior testimony was admissible under Evidence Code section 1291. Moreover, contrary to Travis's argument, there is no principle in law prohibiting the admission of prior testimony from a trial that resulted in a hung jury.

In *People v. O'Connell* (1984) 152 Cal.App.3d 548, the Court of Appeal noted that "the general rule . . . is that use of a defendant's prior trial testimony in a subsequent proceeding against him does not violate his privilege against self-incrimination." (*Id.* at p. 553.) In *People v. Malone* (2003) 112 Cal.App.4th 1241, the appellate court upheld the admission of a defendant's testimony from a prior trial. (*Id.* at p. 1245.) In *People v. Harris* (1992) 8 Cal.App.4th 104, the appellate court affirmed the use of a defendant's guilt phase testimony against him in subsequent proceedings.

As these cases demonstrate, there is no error from admitting a defendant's prior testimony against him in a subsequent proceeding. Nor is there error from admitting a co-defendant's prior testimony, where the defendant has the same interests as at the prior proceeding and had the opportunity for full cross-examination, as here. Nor is there any rule of law stating that prior testimony is inadmissible because it was given in proceedings that resulted in a hung jury. (*Cf. People v. Bartow* (1996) 46 Cal.App.4th 1573, 1580-1582.) Accordingly, Travis's claim must be rejected.

XVII. TRAVIS'S ARREST WAS SUPPORTED BY PROBABLE CAUSE (TRAVIS CLAIM VII)

Travis argues that there was no probable cause supporting his arrest, his search, or the search of his vehicle. He contends that the seized items and his confession should have been suppressed. (TAOB 398.) This claim fails.

A. Procedural History And Background

On January 26, 1993, Silveria filed a motion to suppress evidence pursuant to section 1538.5. (4 CT 749.) On September 1, 1993, Travis filed a motion to suppress evidence pursuant to section 1538.5. (5 CT 1058.) On September 2, 1993, Jennings filed a motion to suppress evidence. (5 CT 1079.)

On November 12, 1993, the prosecution filed its response to Silveria's motion to suppress. (6 CT 1339.) On November 23, 1993, the prosecution filed its response to Travis's motion to suppress. (6 CT 1439.) On November 23, 1993, the prosecution filed its response to Jennings's motion to suppress. (7 CT 1509.)

On January 31, 1994, the trial court conducted a hearing on the motions to suppress. (1 RT 4.) Officer Boyles testified that, on January 25, 1991, he was assigned to investigate the stun gun robberies of the Quik Stop and the Gavilan Bottle Shop. (1 RT 17-20.) He learned that a stun gun had been stolen from the Sportsmen's Supply about an hour before the Quik Stop robbery. (1 RT 20-21, 107-108.) He obtained and viewed the surveillance tape from the Quik Stop robbery, which showed three men—later identified as Silveria, Rackley, and Jennings—robbing the store. (1 RT 21-28.) After Officer Boyle showed the tape to other officers, one of them identified Rackley, and Officer Boyle learned that Rackley had an outstanding warrant for probation violation. (1 RT 32-34.) When Officer Boyle interviewed Graber, the victim of the Gavilan Bottle Shop robbery,

Graber told him three men had robbed him with a stun gun, but Graber did not identify Rackley. (1 RT 39-40.) Officer Boyle showed the tape to a worker in the juvenile probation department, and that person identified Jennings. (1 RT 40-41.)

Around 5:00 p.m. on January 28, 1991, Officer Boyles received a phone call from an unidentified woman who claimed to have information about the stun gun robberies. (1 RT 44.) The woman said that the first names of the suspects were Danny, John, Matt, and Chris. (1 RT 45.) When Officer Boyles asked her about "Troy," she said that "he also hung around with that group." (1 RT 45.) The caller said the men were broke and "were going to do another job." (1 RT 46.) Around 9:00 p.m. that night, Officer Boyles spoke with another female caller—whose voice sounded the same as the first caller—who gave him Jennings's and Silveria's last names. (1 RT 48-49.) The caller said that Jennings was driving a red and white car, possibly a Charger.[51] (1 RT 51.) That night, Officer Boyles gave the information he had on the suspects to Officer Hyland. (1 RT 52, 57.)

Officer Hyland received a phone call from Officer Boyles around 5:00 p.m. on January 28. (3 RT 241-242.) Officer Boyles asked Officer Hyland to look for Rackley, Jennings, and "Dan" or "Danny." (3 RT 243-244.) Officer Hyland heard from another officer that an informant had provided a last name for the third suspect of Silveras or Silveria. (3 RT 247.) After conducting some research, Officer Hyland found information on Silveria, who had an address in the same area as Rackley and Jennings. (3 RT 247-248.) Officer Hyland visited Jennings's address and learned that Jennings

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[51] There was conflicting testimony on whether the caller said it was a red and black Charger or a red and white Charger. (*See* 2 RT 223; 3 RT 247.)

had left earlier in the day with Spencer, Rackley, Silveria, and Travis. (3 RT 254-255.) They had left in Spencer's black and white Charger. (3 RT 255.) Officer Hyland visited Spencer's address, and Spencer's father told him that Spencer had left earlier in the day with Jennings. (3 RT 257.) Spencer's father also said that Rackley, Silveria, and Travis were friends with Spencer. (3 RT 257-258.) Officer Hyland found a citation with the Charger's license plate in Spencer's room. (3 RT 258-259.) Officer Hyland went to Silveria's address, and Silveria's brother said that Silveria had left with Spencer, Travis, Jennings, and Rackley. (3 RT 260.) A woman outside Silveria's house knew Jennings, and told Officer Hyland that Jennings, Rackley, Spencer, Silveria, and Travis, might be in a vacant house in Uvas Canyon. (3 RT 262-263.) Officer Hyland returned to the station, did more computer research, and learned that Travis had an outstanding misdemeanor warrant. (3 RT 270, 289, 352; 4 RT 515.)

Schlachter worked as a police dispatcher. (4 RT 494.) She received a 911 call from Officer Hyland's informant around 7:00 p.m. (4 RT 496.) The informant told Schlachter that two of the stun gun robbery suspects were at the arcade in the Oakridge Mall, and provided the names "Troy" and "Matt" and their descriptions. (4 RT 496.)

Officer Hyland received information on his mobile computer terminal that the suspects were at the Oakridge Mall. (3 RT 267.) The information came through the police dispatcher from an informant that Officer Hyland had personally spoken with earlier.[52] (4 RT 428-429.) They were leaving

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[52] Officer Hyland invoked his privilege against identifying this informant. (4 RT 429; *see* Evid. Code, § 1041.) After voir dire, the trial court denied Spencer's motion to compel Officer Hyland to identify the informant. (4 RT 453.)

the parking lot in a silver 260 or 280Z and a silver Honda.[53] (3 RT 268, 364.) Officer Hyland directed other, closer members of his unit to respond to the mall. (3 RT 267.) When Officer Hyland reached the mall, he saw a silver Honda and a silver Z car, and that Travis, Silveria, and Jennings were out of the cars. (3 RT 269.) Travis was handcuffed and seated in a patrol car. (3 RT 328.) The cars were impounded. (3 RT 270, 271.)

Sergeant Sellman received information from the police dispatcher that two stun gun robbery suspects were at the Oakridge Mall. (4 RT 460.) When he could not locate them, he was informed that a mall security guard was following them. (4 RT 461.) Sergeant Sellman then learned that the suspects were in the mall parking lot entering a silver Datsun and a silver Honda. (4 RT 462-463.) In the parking lot, Sergeant Sellman saw the Honda following the Datsun, and he stopped both cars. (4 RT 463-464.) He arrested the driver of the Honda. (4 RT 465, 467.) Sergeant Sellman then searched a fanny pack on the Honda's passenger seat, looking for a stun gun. (4 RT 466-467.) He found $587 in cash, Silveria's identification, and a bag of marijuana in the fanny pack. (4 RT 468.) In the trunk of the Honda, he found the stun gun and some duct tape. (4 RT 469-470.) The Honda was later impounded. (4 RT 475.)

Officer Werkema searched the Datsun, which Travis had been driving. (4 RT 471, 521, 526.) Rackley was a passenger in the Datsun. (4 RT 542-545.) He found two fanny packs, one of which contained $1,313 in cash and a motor vehicle purchase order for Silveria and Travis. (4 RT

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[53] The vehicle information appears to have come from the mall security guards who had been following the suspects. Withers worked as a security guard at the Oakridge Mall. (4 RT 553.) He followed the three suspects from the mall to the Honda and Datsun. (4 RT 555-556.) Michael Graber, another mall security guard, communicated this information to the police. (4 RT 557.)

526.) In the trunk, Officer Werkema found two packets of batteries with a tag indicating they were from LeeWards. (4 RT 528-529.)

Around 7:50 p.m. on January 29, 1991, Officer Hyland told Officer Boyles that he had some suspects under arrest. (1 RT 58.) Officer Boyles requested that the vehicles they were driving be impounded so that he could look for evidence of the robberies. (1 RT 59.) Travis's booking sheet indicated he had been booked on an outstanding warrant, homicide, and robbery.[54] (2 RT 185, 188.) In his interview, Travis said the recovered money was from drug sales. (2 RT 189.)

On April 18, 1994, the trial court denied Travis's motion to suppress. (8 CT 1970.)

B. Legal Principles

As this Court explained in *People v. Carter* (2005) 36 Cal.4th 1114:

> An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. "The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review." [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.

(*Id.* at p. 1140, internal citations omitted.)

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[54] Travis's "prebooking information sheet" indicated he was arrested on the warrant and murder. (4 RT 432-433.)

C. The Vehicle Stop And Searches Were Proper

Travis's claim fails. His arrest and the search of the Datsun were proper, even without a warrant.

Officer Boyles, through his independent investigation of the robberies, identified Rackley and Jennings as suspects. Later, an informant provided the names Danny, John, Matt, and Chris, and also explained that "Troy" was a member of the group. The fact that the informant correctly identified Jennings's and Rackley's first names corroborated her information. The next call from an informant—who could have been the same person as the first informant, as was proven later at trial—provided Jennings's and Silveria's correct last names. Officer Hyland's independent investigation revealed that Spencer, Rackley, Jennings, Silveria, and Travis were friends and were all planning on leaving the area. The final call from an informant indicated that Jennings and Rackley were at the Oakridge Mall. Officer Hyland had personally spoken with that informant earlier and had requested the person to call with any additional information, as he or she did. The mall security guards located two suspects who matched the informant's description and passed along their vehicle information to the police. The police observed those cars in the parking lot as indicated, finding Rackley, Silveria, and Travis. Travis, who had an outstanding warrant—as Officer Hyland had learned prior to the events at the mall—was arrested. As will be described, these circumstances demonstrated sufficient cause to stop Travis's car, arrest him, and conduct a vehicle search.

The vehicle stop of Travis's car was proper. "An investigatory detention of an individual in a vehicle is permissible under the Fourth Amendment if supported by reasonable suspicion that the individual has violated the law." (*People v. Dolly* (2007) 40 Cal.4th 458, 463.) Here, an informant personally known by Officer Hyland had provided information

that two of the stun gun robbery suspects were at the Oakridge Mall. Mall security guards, having located the suspects, provided accurate vehicle and location information to the police. Under those circumstances, the police had reasonable suspicion to believe that the Honda and Datsun contained at least two of the stun gun robbery suspects.

After Travis's arrest,[55] the search of the car he had been driving was proper. The search of a vehicle incident to the arrest of an occupant is permissible "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" (*Arizona v. Gant* (2009) 556 U.S. 332 [129 S.Ct. 1710, 1719].) Rackley, the passenger in Travis's vehicle, had been identified as a stun gun robbery suspect from the QuikStop video. Even though the vehicle was being driven by Travis, the police also had evidence that Travis and Rackley were part of the same group of friends that were planning on leaving the area, and "John" had been given as a name of one of the men involved in the robberies. Accordingly, the police reasonably believed that evidence of the stun gun robberies might be contained in the Datsun. Further, inasmuch as Officer Boyles requested that the vehicles be impounded, the search of the vehicles

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[55] Travis does not challenge the legality of his arrest on his outstanding warrant. Confusingly, he argues that he was illegally arrested for the robberies. (TAOB 416-417.) However, "[t]he fact an officer may place a person under arrest for the wrong offense does not invalidate the arrest and require exclusion of evidence seized incident to the arrest, if the officer nevertheless had probable cause to arrest the person for another offense . . . ." (*In re Donald L.* (1978) 81 Cal.App.3d 770, 775.) Thus, *even if* Travis were wrongfully arrested for robbery, his arrest was still proper on his outstanding warrant.

was also proper as an inventory search.[56] (See *South Dakota v. Opperman* (1976) 428 U.S. 364, 376.) The search of the Datsun was therefore proper.

Travis argues that he was improperly denied bail on the traffic warrant, and that therefore "the incriminating statements made in the hours soon after his unlawful detention should have been suppressed." (TAOB 419-420.) Initially, since Travis provides no citations to the record establishing that he was denied bail, this argument is forfeit. (See *People ex rel. Dept. of Alcohol Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200.) In any event, Travis's claim fails on its merits. "Except under limited circumstances, the California Constitution guarantees a pretrial right to release on nonexcessive bail." (*In re Weiner* (1995) 32 Cal.App.4th 441, 444; Cal. Const. art. I, § 12.) However, contrary to Travis's conclusory assertion on appeal that he "had more than sufficient cash in his car to post bail on the misdemeanor warrant" (TAOB 420), the money was found in the Datsun and the police reasonably could have suspected the money was evidence of the robberies and refused to release it to Travis. Moreover, Travis's own statements indicated that the money was the proceeds of drug sales. Under such circumstances, Travis was not constructively denied bail by the withholding of the money recovered from his car. More importantly, the police had ample reason to arrest Travis for robbery. A reliable informant had given them the name "John" as one of the stun gun robbers, Travis had been arrested driving a vehicle with another suspect and in the company of a car being driven by a

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[56] Travis, relying on *People v. Williams* (2006) 145 Cal.App.4th 756, argues that an inventory search would have been invalid because there was no "community caretaking function require[ing] the impounding of the vehicles here." (TAOB 418-419.) In *Williams*, the impounded car was already legally parked. (*Williams*, *supra*, 145 Cal.App.4th at p. 762.) Here, Travis's car was stopped while being driven through a public parking lot. Travis's reliance on *Williams* is therefore unavailing.

third suspect, and both cars had contained evidence of the robberies. Under these circumstances, no denial of bail—even if Travis showed that one occurred here—would have required suppression of Travis's confession.

Travis, relying on *Florida v. J.L.* (2000) 529 U.S. 266, contends the vehicle stop was not supported by reasonable suspicion, since "there was no basis for assessing the reputation of the [informant]." (TAOB 412-413.) In *J.L.*, the high court overturned an officer's "stop and frisk" of a person based solely on a trip from an unknown location by an unknown caller without any indicia of reliability. (*J.L.*, *supra*, 529 U.S. at p. 269-274.) Here, however, the informant who called about the suspects at the mall was already known by Officer Hyland, who had spoken with that informant about the stun gun robberies. Moreover, the caller's information about the suspects's locations had been shown to be accurate prior to Travis's arrest, as mall security guards were able to locate matching persons and follow them outside. Thus, notwithstanding the informant's failure to accurately name one of the suspects at the mall, his or her information was sufficiently reliable to support reasonable suspicion to stop the cars.

XVIII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY REFERRING TO FACTOR (K) EVIDENCE AS A "KITCHEN SINK" (TRAVIS CLAIM X)

Travis argues that the prosecutor committed misconduct when he referred to the mitigating evidence under factor (k) as a "kitchen sink" in argument. (TAOB 465-468.) Travis contends that such argument amounted to "ridiculing factor (k) arguments that had not even been made yet" and urging the jurors into "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." (TAOB 467.) This claim is specious.

A. Background

Prior to opening arguments in the penalty retrial, Travis's attorney filed a written motion challenging the prosecutor's prospective use of the phrase "kitchen sink," in which he argued that the term "obviously reflect[s] garbage and any other waste material intended to be put into the sewer line through a kitchen sink." (18 CT 4536.)

In his closing argument of the penalty retrial, the prosecutor argued in relevant part:

> 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—
>
> [SILVERIA'S ATTORNEY]: I object to the phrase "kitchen sink."
>
> [TRAVIS'S ATTORNEY]: I object to the word "kitchen sink." It has equal weight with all other factors.
>
> THE COURT: Overruled.
>
> [THE PROSECUTOR]: I don't know how to refer to it other than as a kitchen sink. If you look at the instruction, it says: "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."
>
> Now, it's an all-encompassing— may I have just a moment, Your Honor? Thank you. It's an all-encompassing category. And I submit that when I'm done Mr. Braun and Ms. Angel will urge you to consider and be swayed by Factor (k) evidence, a category of, in effect, sympathetic evidence as to Mr. Silveria.

> Then Mr. Leininger, on behalf of his client, Mr. Travis, will endeavor to do the same as Mr. Braun and Mr. [*sic*] Angel did or Mr. Silveria, I submit, once again urging you to consider and be swayed by Factor (k), or sympathetic evidence, as to Mr. Travis and his background and so on.

(276 RT 33021-33022.)

Later, the prosecutor explained:

> Factor (k), which I referred to as a kitchen sink, meaning by that an all-encompassing category of which evidence can fall into [*sic*], Factor (k) allows you to consider 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 as a basis for a sentence less than death, whether or not related to the offense for which the defendant is on trial.
>
> Basically it is a catch-all category put in by statute for the defendant's benefit in a capital case. Factor (k) allows you to consider any sympathetic aspect of John Travis's character or record as a basis for a sentence less than death . . . .

(277 RT 33117-33118.)

B. Legal Principles

"A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact." (*People v. Avila* (2009) 46 Cal.4th 680, 711.) "When a claim of misconduct is based on the prosecutor's comments before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Friend* (2009) 47 Cal.4th 1, 29, internal quotation marks omitted.)

C. The Prosecutor Did Not Commit Misconduct

The prosecutor did not commit misconduct. There is no reasonable likelihood that the jurors construed his "kitchen sink" comment as a disparagement of the mitigating evidence or as an effort to reduce Travis to part of "a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Rather, as the prosecutor explicitly stated, he used that term to describe factor (k) as an "all-encompassing" or "catch-all" category of evidence. (277 RT 33117-33118; see Merriam Webster's Collegiate Dictionary (10th ed. 1995) p. 644, col. 2 [kitchen sink defined as "being or made up of a hodgepodge of disparate elements or ingredients"].) At no point did the prosecutor's comment refer to factor (k) evidence as garbage. Travis's argument to the contrary is specious.

XIX. SILVERIA'S AND TRAVIS'S DEATH PENALTIES ARE PROPER (SILVERIA CLAIM XIV, TRAVIS CLAIM XII)

Silveria argues that his death sentence "should be reversed because the errors in this case, whether considered alone or together, were prejudicial." (SAOB 382.) However, as discussed above, there were either no errors or no prejudicial errors. Moreover, the case against Silveria was strong and warranted his guilty verdict and death sentence. Accordingly, reversal is not required.

Travis argues that "the present case was unusually close" in that there was only a single murder victim, Travis had only one prior felony conviction, he "made a remarkable adjustment to incarceration," and the first penalty jury deadlocked. (TAOB 495-500.) He urges this Court to reverse based on the claims of error he has made, or upon a consideration of their cumulative effect. (TAOB 501.) However, as discussed, there were either no errors or no prejudicial errors. Moreover, the case against Travis was strong and warranted his guilty verdict and death sentence. Accordingly, reversal is not required.

XX. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL (SILVERIA CLAIM XV, TRAVIS CLAIM XIII)

Silveria argues that "[m]any features of California's capital sentencing scheme violate the United States Constitution." (SAOB 391.) Travis argues his sentence must be reversed "because of a number of substantive and procedural defects in the California capital sentencing law." (TAOB 503.) As appellants concede, their arguments have been rejected by this Court.

A. Section 190.2 Is Not Impermissibly Broad

Appellants argue that "California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes nearly all first degree murders eligible for the death penalty." (SAOB 391-392; see TAOB 505, 507.) This Court has repeatedly rejected such claims, and appellants offer nothing to distinguish their case from those previously decided. (See, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 958 [and cases cited therein]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43 [and cases cited therein].)

B. Section 190.3 Is Not Impermissibly Broad

Appellants argue that "the concept of 'aggravating factors' has been applied in such a wanton and freakish manner [that] almost all features of every murder can be and have been characterized by prosecutors as 'aggravating.'" (SAOB 392-393; see TAOB 508.) This Court has repeatedly rejected such claims, and appellants offer nothing to distinguish their case from those previously decided. (See, e.g., *Stanley, supra*, 39 Cal.4th at p. 967 [and cases cited therein]; *People v. Harris* (2005) 37 Cal.4th 310, 365 [and cases cited therein].)

C. California's Death Penalty Provides Appropriate Safeguards to Avoid Arbitrary and Capricious Sentencing

In addition to the above two provisions, appellants assert that other aspects of California's death penalty statute deprived them of necessary safeguards to avoid arbitrary and capricious sentencing. These include: no requirement that aggravating circumstances be proved beyond a reasonable doubt (SAOB 395); no requirement that the jury find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate punishment (SAOB 393-394); no instruction as to burden of proof except for other criminal activity and prior convictions (SAOB 395-396); lack of unanimity regarding aggravating circumstances (SAOB 396-399; TAOB 503); and inadequate instructions on the penalty determination (SAOB 399-403; TAOB 508).

All of these claims have been previously rejected by this Court, and appellants offer nothing specific to their case that would justify a departure from those holdings. (See, e.g., *Demetrulias, supra*, 39 Cal.4th at pp. 40-45 [and cases cited therein]; *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein]; *People v. Arias* (1996) 13 Cal.4th 92, 171 [and cases cited therein]; *People v. Duncan* (1991) 53 Cal.3d 955, 978.)

D. No Written Findings Were Required

Appellants assert that the California death penalty statute violates the Sixth, Eighth and Fourteenth Amendments as well as their rights to meaningful appellate review because it does not require written findings regarding sentencing. (SAOB 403-404; TAOB 505.) This claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *People v. Cook* (2006) 39 Cal.4th 566, 619.)

E. The Jury Instructions on Aggravating and Mitigating Factors Are Not Unconstitutional

Appellants assert that the use of CALJIC No. 8.85 resulted in a violation of their constitutional rights, because: it limits some mitigating factors by using the words "extreme" and "substantial"; inapplicable sentencing factors were not removed; and it fails to instruct that statutory mitigating factors are relevant solely as mitigating evidence. (SAOB 404-405; TAOB 506-507.) These claims have previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from those holdings. (See, e.g. *People v. Cook, supra,* 39 Cal.4th at p. 618; *People v. Avila* (2006) 38 Cal.4th 491, 614.)

F. There Is No Constitutional Requirement of Inter-Case Proportionality

Appellants assert that the failure of California's capital sentencing statute to require inter-case proportionality review renders it unconstitutional. (SAOB 405-406; TAOB 506.) This claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *People v. Famalaro* (2011) 52 Cal.4th 1, 77; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [proportionality review not constitutionally required].)

G. California's Death Penalty Statute Does Not Violate the Equal Protection Clause

Silveria asserts that the California death penalty statute violates the Equal Protection Clause of the Constitution due to its failure to require a specific burden of proof or unanimous findings for aggravating circumstances. This claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

H. California's Use of the Death Penalty Does Not Violate the Eighth and Fourteenth Amendments or International Law

Appellants assert that California's use of the death penalty violates international norms and thus violates the Eighth and Fourteenth Amendments. (SAOB 406-407; TAOB 510-511.) This Court has repeatedly rejected such claims, and appellants offer nothing specific to their case that would warrant a reversal of that position. (See, e.g., *Demetrulias, supra*, 39 Cal.4th at p. 43 [and cases cited therein]; *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

I. The Trial Court Properly Instructed On Murder

Silveria claims that the trial court erred by instructing on first degree murder—both premeditated and felony murder—when he was charged only with second degree murder in the information. (SAOB 407-414.) He has forfeited this claim, which in any event lacks merit.

1. This claim is forfeit

As an initial matter, Silveria failed to object to the giving of a first degree murder instructions at the time of trial (see 117 RT 11425-11427), therefore he has forfeited this claim on appeal. (*People v. Virgil, supra,* 51 Cal.4th at p. 1260.) In any event, the claim is without merit.

2. The trial court correctly instructed on first degree murder

Silveria claims that it was error to instruct the jury on first degree murder—either premeditated or felony murder—because the information charged him only with second degree murder in violation of section 187. As appellant acknowledges, this Court has previously rejected similar claims. (See, e.g., *People v. Bramit* (2009) 46 Cal.4th 1221, 1236 [information charging second degree murder under section 187 adequate to charge murder in any degree]; *People v. Hughes, supra,* 27 Cal.4th at pp.

369-370 [and cases cited therein].) Relying on language in *People v. Dillon, supra,* Silveria argues that the malice element included in section 187 creates a sufficiently significant distinction to prevent a finding of first degree murder under section 189. This Court has specifically rejected this argument, noting in *Bramit, Hughes* and other cases, that the holding in *People v. Witt, supra*, has been reaffirmed subsequently to *Dillon.* Similarly, Silveria's reliance on *Green v. United States* (1957) 344 U.S. 184, is misplaced as that case dealt with a question of double jeopardy where a jury rejected a finding of first degree murder in the initial trial, convicting the defendant of second degree murder. Following a reversal on appeal, the Court held that the differences between the two degrees would prevent a retrial for first degree murder under the double jeopardy clause.

Silveria also asserts that the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466, requires the giving of such an instruction. This argument has likewise been rejected. In *Bramit*, this Court held:

> We rejected this claim, too, in *Harris, supra*, 43 Cal.4th 1269. "The *Apprendi* claim is illusory; the information included special circumstance allegations that fully supported the penalty verdict." (*Id.* at p. 1295.)

(*Bramit, supra*, 46 Cal.4th at p. 1236.) Here, as in *Bramit*, Silveria was charged with a special circumstance—felony murder—which the jury unanimously found to exist. Thus, death was the maximum punishment possible based upon the charging instruments.

Silveria offers nothing unique to his case that would warrant overturning this Court's precedent. This claim is without merit.

J. Prosecutorial Discretion Does Not Violate The Constitution

Travis argues that California's grant of "unlimited discretion to prosecutors to decide when to seek a sentence of death . . . lead[s] to a denial of due process, equal protection, and reliability in capital sentencing

. . . ." (TAOB 507.) This Court has rejected such claims, and Travis offers nothing specific to his case that would warrant a reversal of that position. (See, e.g., *Harris*, *supra*, 37 Cal.4th at p. 366.)

K. The Delay Inherent In The Capital Appellate System Does Not Warrant Reversal

Travis argues that the delay before appellate counsel was appointed, combined with the "psychological brutality that results from such a prolonger wait for execution" violates the Eighth Amendment. (TAOB 507-508.) This Court has rejected such claims, and Travis offers nothing specific to his case that would warrant a reversal of that position. (See, e.g., *Demetrulias, supra*, 39 Cal.4th at p. 45 [and cases cited therein].)

L. This Court Has Not Denied Meaningful Appellate Review

Travis argues that this "Court has proven itself unable to review death judgments without being unduly influenced by political considerations," resulting in the compromise of meaningful appellate review. (TAOB 508-511.) This Court has rejected such claims, and Travis offers nothing specific to his case that would warrant a reversal of that position. (See, e.g., *People v. Gonzalez* (2011) 51 Cal.4th 894, 958 [and cases cited therein].)

XXI. SILVERIA CANNOT BENEFIT FROM THE INCLUSION OF TRAVIS'S ARGUMENTS (SILVERIA CLAIM XVI)

In his opening brief, Silveria writes that he "hereby adopts all arguments raised by co-appellant Travis that may benefit appellant Silveria." (SAOB 415.) Even if California Rules of Court, rules 8.630 and 8.200, allow Silveria to incorporate Travis's arguments in these proceedings, Silveria cannot benefit from the inclusion of Travis's arguments, because Silveria makes no argument on how any error asserted by Travis prejudiced Silveria's defense. Moreover, for the reasons given

above, Travis is not entitled to relief on his claims. Accordingly, Silveria is not entitled to relief on any of those claims.

CONCLUSION

For the reasons given, respondent respectfully requests that this Court affirm appellants's verdicts and sentences.

Dated: January 27, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 56,759 words.

Dated: January 27, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Silveria and Travis**

No.: **S062417**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 27, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 27, 2012, at San Francisco, California.

M. Argarin
Declarant

Signature

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