IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL TODD SILVERIA and JOHN RAYMOND TRAVIS, Defendants and Appellants.	Case No. S062417 (Santa Clara County Superior Court No. 155731)

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

Honorable Hugh Mullin, III, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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INTRODUCTION

In this supplemental brief, appellant augments the federal constitutional bases of Arguments III, VII, and IX, previously presented to this Court in his opening brief. (See *Bell v. Cone* (2005) 543 U.S. 447, 451, fn. 3, citing *Baldwin v. Reese* (2004) 541 U.S. 27, 30-32 [holding that burden is on petitioner to raise federal law claim in the state court when state procedural law permit its consideration on the merits]; *Evitts v. Lucey* (1985) 469 U.S. 387, 396–397 & fn. 8 [holding that a criminal appellant has a Sixth Amendment right to effective representation in appellate proceedings]; *In re Smith* (1970) 3 Cal.3d 192, 202–203 [holding that constitutionally effective appellate counsel must "raise assignments of error which were crucial" in light of the record in the case].) Appellant also augments Argument XVI to comply with the rule set forth in *People v.*

Bryant (2014) 60 Cal. 4th 335, 363-364, which was issued after appellant's opening and reply briefs were filed. In order to avoid confusion, Arguments III, VII, IX, and XVI are numbered in the instant brief to correspond with the original argument numbers utilized in appellant's opening brief.

The instant brief also includes Argument XVII, which was not previously included in appellant's opening brief, as the legal basis for the argument was not available at the time of the filing of the opening brief. (See Cal. Rules of Court, rules 8.630(d), 8.520(d)(1).)

Appellant's submission of the instant brief is not intended to constitute abandonment of any arguments previously made in his opening brief or reply brief.

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III

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

As his third assignment of error, appellant argued that the trial court erred in ruling that appellant's psychiatric expert witness, Dr. Kormos, could not testify on direct examination to opinions based on appellant's confession and also erred in permitting the prosecutor to cross-examine Dr. Kormos beyond this scope. (AOB 135-151.) The court's limitation of Dr. Kormos's direct examination was based on its determination that, because appellant failed to testify at his penalty retrial, *People v. Aranda* (1965) 63 Cal.2d 518, and *Bruton v. United States* (1968) 391 U.S. 123, barred the jury from hearing evidence derived from appellant's post-arrest statements that inculpated his codefendant. (AOB 137-139; RT 262:31044-31049, 31082-31096.) The court nevertheless permitted the prosecutor to cross-examine Dr. Kormos beyond these limits, despite the court having made the factual finding that appellant's counsel had not opened the door to such cross-examination on direct examination and without any other legal basis. (AOB 144-149.) Both of these rulings deprived appellant of his rights to a fair trial, to present a defense, to due process of law, and to a reliable sentencing determination, under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 143-144, 150-151.)

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

1. *Aranda/Bruton* Is Not Implicated Where the Declarant Had Previously Testified and Was Cross-examined

The *Aranda/Bruton* rule derives from a criminal defendant's Sixth Amendment right to confront witnesses against him. (See *Bruton v. United States, supra*, 391 U.S. at pp. 126-127; *People v. Anderson* (1987) 43 Cal.3d 1104, 1121 [explaining that, although *Aranda* had not expressly relied on federal constitutional grounds, the court has since recognized that its holding was "based at least in part on constitutional considerations"].) The Supreme Court has long recognized that admission of hearsay – regardless of the form it takes – against the defendant does not violate the defendant's confrontation rights where the defendant has had an opportunity to cross-examine that witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 ["[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no restraints at all on the use of his prior testimonial statements"]; *California v. Green* (1970) 399 U.S. 149, 161 [holding that "none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial"].) Even where the hearsay declarant does not testify at the defendant's trial, no confrontation rights violation occurs if the defendant had previously had an opportunity to cross-examine the declarant in a prior adversarial proceeding. (*California v. Green, supra,* 399 U.S. at pp. 164, 167-168.) This principle remains true when the hearsay at issue is an *Aranda/Bruton*-infected statement. (*Nelson v. O'Neil* (1971) 402 U.S. 622, 629–30; see also *Crawford v. Washington,*

supra, 541 U.S. at pp. 53-54, 57 [identifying *Bruton* as one in a line of cases iterating the rule that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination"]; *People v. Hoyos* (2007) 41 Cal.4th 872, 896, abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610 [acknowledging "[a] codefendant's extrajudicial statement implicating another defendant need not be excluded when the codefendant testifies and is available for cross-examination," citing *Nelson v. O'Neil, supra,* 402 U.S. 622].) Here, appellant testified at the first penalty phase. (RT 147:13975-14028, 14032-14111; 153:14536-15017; 154:15018-15164; 155:15166-15325.) His codefendant's counsel had opportunity to and did cross-examine him extensively during that proceeding. (RT 155:15166-15263; CT 13:3241-3242.) Accordingly, admission of appellant's hearsay statements at the penalty retrial, including statements that implicated his codefendant, could not violate the codefendant's Sixth Amendment rights, regardless of whether or not appellant testified at the retrial. (See *Crawford v. Washington, supra,* 541 U.S. at pp. 53-54, 57; *Nelson v. O'Neil, supra,* 402 U.S. at pp. 629–630; *California v. Green, supra,* 399 U.S. at pp. 165-168.) The court's limitation of Dr. Kormos's testimony on retrial was therefore based on its plain misapprehension of the governing law, constituting an abuse of discretion. (See *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746 [holding that a decision by a trial court based on an error of law is an abuse of discretion].)

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2. *Aranda/Bruton* Is Not Implicated by an Expert's Reliance on the Statement of a Non-testifying Witness

Additionally, the trial court's ruling was error because appellant did not seek admission of his post-arrest statements, but sought to introduce the testimony of an expert who relied on materials including the statements in forming his opinion. Recently, this Court has recognized that an expert's testimony setting forth an opinion, where that opinion is based at least in part on a defendant's statements inculpating his codefendant, does not offend the confrontation clause under *Aranda/Bruton*. In *People v. Hajek* (2014) 58 Cal.4th 1144, 1176, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, one of the codefendants, Mr. Hajek, presented at the penalty phase the testimony of a psychiatric expert who opined that Mr. Hajek was mentally ill and was suffering from a manic episode at the time of the capital crime. (*Ibid.*) He based his opinion in part on statements of Mr. Hajek describing the crime, in which Mr. Hajek denied committing the murder and implicated his codefendant, Mr. Vo, as the actual killer. (*Ibid.*) On cross-examination, the prosecutor "sought to impeach [the expert] by suggesting he had avoided asking Hajek questions that would have undermined this diagnosis." (*Ibid.*) Mr. Vo's counsel objected to the expert's testimony on hearsay grounds, which was overruled, and later moved for a mistrial or for severance under *Aranda/Bruton*, which were denied. (*Ibid.*)

The Court held that the trial court's rulings were not error. The *Aranda/Bruton* rule, the Court explained, addresses the narrow situation where the "nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant" is sought to be admitted for the truth of what it asserts. (*People v. Hajek, supra,* 58 Cal.4th at p. 1177.)

Like other hearsay, the admission of this evidence violates the non-declarant codefendant's rights to confrontation and cross-examination under the Sixth Amendment, and is of a nature that is so prejudicial that no limiting instruction will suffice. (*Ibid.*) The same concerns, however, are not implicated by an expert's reliance on hearsay – including hearsay that is an *Aranda/Bruton*-infected statement – because the expert may be cross-examined on the reliability of his opinions, including the reasonableness of the expert's reliance on the accuracy of the statement. (*Ibid.*) Moreover, any references the expert's testimony may make to the *Aranda/Bruton*-infected statement were not presented to the jury for the truthfulness of the statement, but for the non-hearsay purpose of explaining the basis of the expert's opinion. (*Ibid.* [holding that the expert's testimony was lawful because "the point of the prosecutor's cross-examination was to suggest that Hajek's denial of culpability was a lie that [the expert] accepted at face value because it was consistent with his diagnosis. Thus the issue was not the identity of [the victim's] killer, but [the expert's] credibility as an expert"].)

Subsequent to *Hajek*, this Court further clarified the Sixth Amendment limitations on expert reliance on and testimony concerning otherwise-inadmissible hearsay evidence in *People v. Sanchez* (2016) 63 Cal.4th 665, 685-686. There, the court considered whether a prosecution gang expert could testify on an opinion that was based on hearsay statements of non-testifying gang members. The Court drew a distinction between expert testimony that simply "rel[ies] on background information accepted in their field of expertise" and testimony that "present[s], as facts, the contents of testimonial hearsay statements." (*Id.* at p. 685.) The former is permissible under the California Evidence Code and does not implicate

the confrontation clause; the latter is inadmissible under the Sixth Amendment. (*Id.* at pp. 685-686.) The Court delineated, specifically, the parameters of what is admissible expert testimony where the underlying materials on which the expert relied would, if admitted into evidence themselves, violate the defendant's confrontation rights:

> Gang experts, like all others, . . . can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. . . . Any expert may still rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the "matter" upon which his opinion rests. . . . There is a distinction to be made between allowing an expert to describe the type and source of the matter relied on as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception.

(Ibid.)

Hajek was not abrogated by *Sanchez*, but rather demonstrates the precise distinction that *Sanchez* endeavored to articulate: in *Hajek*, the psychiatric expert's testimony was not simply a Trojan horse to place Mr. Hajek's statements before the jury for the truth of what they asserted. (See *People v. Hajek, supra*, 58 Cal.4th at p. 1176.) Although the expert did testify that Mr. Hajek denied killing the victim and that the expert apparently believed those denials, he did not detail Mr. Hajek's statements to him on direct examination. (See *ibid.*) Instead, his crediting of Mr. Hajek's description of the crime was explained within the context of how the expert arrived at his diagnosis. (*Id.* at p. 1177.) This type of testimony remains admissible after *Sanchez*. (See *People v. Sanchez, supra,* 63 Cal.4th at p. 686 [holding that an expert may, consistent with the Sixth

Amendment, "describe the type and source of the matter relied on" in forming his opinion, even if that matter is hearsay].)

Here, the expert testimony appellant sought to introduce did not offend his codefendant's Sixth Amendment rights, under either *Hajek*'s or *Sanchez*'s limitations. As detailed in the AOB, at appellant's penalty retrial, defense counsel sought to introduce the same testimony from Dr. Kormos that had been presented at the first penalty phase. (AOB 138; RT 262:31046-31049) In the first penalty phase, Dr. Kormos had not related to the jury in his direct examination the contents of appellant's post-arrest statements. (RT 162:16125-16135.) Rather, like the psychiatric expert in *Hajek*, he testified appellant had made statements concerning the capital crime, which Dr. Kormos had considered along with a number of other materials. (RT 162:16055-16056.) Per *Sanchez*, this was proper. (See *People v. Sanchez, supra,* 63 Cal.4th at p. 686 [holding that an expert's testimony may "describe the type and source of the matter relied on" in forming his opinion, even if that matter is hearsay, without violating the defendant's confrontation rights].)

Dr. Kormos also testified at length about his diagnosis that appellant had suffered child neglect and how Dr. Kormos understood that to have resonated in appellant's adult life. This too was proper per *Hajek* and *Sanchez*. (See *People v. Sanchez, supra,* 63 Cal.4th at pp. 685-686; *People v. Hajek, supra*, 58 Cal.4th at pp. 1176-1177.) Dr. Kormos opined that appellant had, as a result of his childhood experiences, developed deep bonds of friendship with certain persons in his life, including his codefendant, and that those relationships were very important to him. (RT 162:16125-16132.) He further testified that he believed there was nothing in appellant's background or psychological makeup that would have led

him to initiate a murder. (RT 162:16137-16138.) In so testifying, Dr. Kormos did not relate the details of appellant's post-arrest statements; in fact, he did not specify at all the precise source of his opinion on the question of appellant's perceived relationship to his codefendant at the time of the crime or his role in planning and initiating the homicide. (See RT 162:16125-16138.) Moreover, because Dr. Kormos had testified that he had based his opinion on multiple sources from which Dr. Kormos could have derived an understanding of appellant's perceived role in the capital crime--including a report from another psychologist, appellant's previous testimony, and approximately twelve clinical interviews with appellant--it was not the case that Dr. Kormos's opinion implicitly telegraphed to the jury the contents of appellant's post-arrest statements. (See RT 162:16055-16056, 16149-16150.) In this way, Dr. Kormos's testimony is indistinguishable from that which the Court approved in *Hajek.* (See *People v. Hajek, supra*, 58 Cal.4th at pp. 1176-1177.)

Finally, Dr. Kormos responded in direct examination to two hypothetical questions posed by defense counsel, which included case-specific facts. (See RT 162:16132-16135.) This approach was specifically endorsed by *Sanchez* as an example of testimony that does not violate the Sixth Amendment. (*People v. Sanchez, supra,* 63 Cal.4th at p. 686 [holding that an expert "can give an opinion based on a hypothetical including case-specific facts"].)[1]

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[1] One of the hypothetical questions posed by defense counsel did expressly reference appellant's post-arrest statements:

> Assume that in his confession Danny told Sergeant Keech that it was his idea that after the robbery he was going to take the

(continued...)

In sum, because Dr. Kormos's testimony was confined to his clinical opinion and did not detail the contents of the *Aranda/Bruton*-infected statements upon which his opinion was based, codefendant Travis's confrontation rights were not imperiled. (See *People v. Sanchez, supra,* 63 Cal.4th at pp. 685-686; *People v. Hajek, supra*, 58 Cal.4th at pp. 1176-1177.) The court erred in ruling otherwise.

3. Defense Counsel Did Not Invite Error

The limitation on Dr. Kormos's testimony was not invited error. "The invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction." (*People v. Moon* (2005) 37 Cal.4th 1, 28.) In *People v. Tate* (2010) 49 Cal.4th 635, 695 fn. 32, the Court held that defense counsel

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[1] (...continued)
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?

(RT 162:16132-16135.) While *Sanchez* suggested, although did not hold, that such hypotheticals might implicate Sixth Amendment concerns, no such concerns exist here. (See *People v. Sanchez, supra,* 63 Cal.4th at p. 686.) Under *Aranda/Bruton*, the Sixth Amendment is not violated by the introduction of a non-testifying defendant's hearsay statements that do not facially inculpate his codefendant. (See, e.g., *People v. Hajek, supra*, 58 Cal.4th at p. 1177 [holding that there was no *Aranda/Bruton* error on the alternative basis that Mr. Hajek's statements did not facially inculpate his codefendant]; *People v. Floyd* (1970) 1 Cal.3d 694, 721 [holding *Aranda/Bruton* is only implicated by "those portions of [a defendant's] admissions which incriminated" his codefendant].) Because defense counsel's hypothetical only referenced appellant's statements of his post-arrest plans and in no way addressed his codefendant's role in the capital crime, codefendant Travis had no Sixth Amendment interest at stake in the question n Dr. Kormos's response.

had not invited error by acceding to the court giving an erroneous jury instruction. There, defense counsel had requested the correct instruction, then "later acquiesced in the giving of [the erroneous instruction] both before and after the court ruled it would not give" the instruction defense counsel had requested. (*Ibid.*) These facts demonstrated that counsel had no tactical purpose to acquiescing to the court's erroneous instruction, such that the defendant would be deemed to have invited the error. (*Ibid.*)

The same result obtains here. The record demonstrates that defense counsel vociferously sought to introduce Dr. Kormos's testimony that would include his opinions that had been reached after considering appellant's post-arrest statements and explained its importance to the defense presentation, but the court denied those requests. (RT 262:31046-31060.) Eventually, the court presented defense counsel with the option to replace or withdraw Dr. Kormos as a witness and strike his testimony, to call appellant to testify, or to come to an agreement with the prosecution and codefendant that would solve the court's perceived Sixth Amendment problem. (RT 262:31060-31061, 31080-31082.) When presented with this dilemma, defense counsel made clear that his agreement to the limitation of Dr. Kormos's testimony was only in response to the court's refusal to permit Kormos to testify as fully as he had during the first penalty phase and to avoid the court striking all of Kormos's testimony. (RT 262:31056-31089.) In light of this, the record demonstrates that defense counsel's actions did not indicate a tactical choice within the meaning of the invited error doctrine. (See *People v. Tate, supra,* 49 Cal.4th at p. 695, fn. 32.)

4. The Error Was Not Harmless

The court's improper limitation of Dr. Kormos's testimony was not harmless. As described in the AOB, at the first penalty phase Dr. Kormos

was able to opine on how appellant's childhood trauma molded his capacities and personality as an adult, particularly his abilities to plan thoughtfully, to lead peers, and to express refusal to comply with others' plans. (RT 162:16125-16135.) After hearing, inter alia, this testimony, the jury deliberated for seven days and still was unable to reach a unanimous death verdict. (See RT 279:33425-33427; CT 13:3374, 3384; CT 14:3442-3443.) This alone is strong evidence that the exclusion of the same evidence on retrial was not harmless. (See *People v. Duarte* (2000) 24 Cal.4th 603, 619 [holding that fact that previous jury had hung indicates lack of harmlessness, where first jury had heard the evidence that was later excluded on retrial]; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099-1100 [same]; see also *In re Martin* (1987) 44 Cal.3d 1, 51 [holding that lengthy deliberations indicates the jury struggled with their verdict]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [same, where deliberations lasting merely twelve hours were considered to be lengthy for a harmless error analysis]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [same, where deliberations lasted less than six hours].)

The prosecutor's closing argument at the penalty phase retrial also demonstrates the error was not harmless. Capitalizing on the absence of Dr. Kormos's testimony that would have connected appellant's childhood trauma to his perceptions and behavior at the time of the crime, the prosecutor exhorted the retrial jury to sentence appellant to death because there was "no answer" to whether his childhood experiences affected his choices as an adult and because "Daniel Silveria the child did not kill Jim Madden." (RT 279:33426.) He urged the jury to minimize the weight they gave Dr. Kormos's testimony concerning the risk factors that appellant experienced because there had been no evidence explaining how those risk

factors could be expected to manifest and affect a person as an adult. (RT 279:33425-33429.) The prosecutor's extensive argument exploiting the fact that the defense had been precluded from presenting the very testimony that would have explained such a connection further evinces that the error was not harmless. (See, e.g., *People v. Varona* (1983) 143 Cal.App.3d 566, 570 [error not harmless where prosecutor's closing argument called attention to the defense's failure to present evidence on a point where a prior ruling or prosecutorial action had precluded the defense from such presentation]; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 [holding that "statements from the prosecutor matter a great deal" to a prejudice analysis].)

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

As appellant detailed in the AOB, after unlawfully and prejudicially limiting the direct examination of Dr. Kormos, the court compounded its error by permitting the prosecutor to cross-examine Dr. Kormos on the very subjects that the court had ruled were inadmissible under *Aranda/Bruton*. (AOB 144-149.) Pursuant to the court's ruling that the jury could not hear testimony from Dr. Kormos that expressly or implicitly relied on the *Aranda/Bruton*-infected statement, the court permitted the parties to stipulate that they would not elicit from Dr. Kormos any testimony concerning his opinion of appellant after age twenty-one, including any reference to appellant's post-arrest statements. (RT 262:31060-31063, 31086-31089, 31091-31095; 271:32557-32558.) Appellant's counsel adhered to this stipulation, as the trial court expressly found. (RT 263:31228-31230 [finding that defense counsel had not "gone beyond the agreement" in his direct examination]; see RT 261:30992-31029;

262:31097-31191; 263:31214-31228 [direct examination of Dr. Kormos].) On cross-examination, however, the prosecutor violated the stipulation, examining Dr. Kormos in depth concerning appellant's *Aranda/Bruton*-infected statements and Dr. Kormos's opinion of them. (RT 271:32570-32571, 32604-32612, 32644-32647.) The court, after having found that defense counsel had not "opened the door" to this line of cross-examination, nevertheless overruled defense counsel's objections to it and denied defense counsel's motion for a mistrial, and permitted the testimony to occur before the jury unabated. (RT 271:32572-32573, 32599-32602, 32604-32612, 32644-32647.) In so doing, the court violated appellant's rights under the federal Constitution to a fair trial, due process of law, and to a reliable sentencing determination. (AOB 150-151.)

1. The Trial Court Abused its Discretion

The court's rulings were erroneous. The court's rulings that permitted the prosecutor to cross-examine Dr. Kormos beyond the parameters of the stipulation were contrary to the court's prior factual findings and were unsupported by any justification on the record. The record shows that defense counsel, consistent with the stipulation, did not examine Dr. Kormos on matters beyond appellant's twenty-first birthday, including his post-arrest statements. (See generally RT 261:30992-31029. 262:31097-31191; 263:31214-31228 [direct examination of Dr. Kormos].) After the defense's direct examination, the prosecutor objected that the appellant had examined Dr. Kormos beyond the scope of the stipulation. (RT 263:31228-31230.) Although the prosecutor argued in propounding his objection that defense counsel violated the stipulation by asking Dr. Kormos whether the effects of childhood abuse would resonate "later in life" (RT 263: 31223, 31226), defense counsel's question plainly and facially

referenced that period after which appellant ceased suffering abuse, which Dr. Kormos and other witnesses had testified ended when appellant was in his mid-teens. (See RT 255:29872-29873, 29893, 29895 [testimony of John Gamble], RT 263:31224-31228 [testimony of Dr. Kormos]; see also RT 279:33427 [in closing argument, prosecutor references the fact that the evidence had shown that appellant had been abused until age thirteen].) Appropriately, therefore, the court found that appellant had not exceeded the scope of the stipulation. (RT 263:31228-31230.) To the extent that the court later determined that defense counsel had indeed exceeded the scope of the stipulation, there was no factual basis for this ruling. As such, the court abused its discretion in failing to sustain appellant's objections to the prosecutor's cross-examination or to grant his request for a mistrial. (See, e.g., *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773 [holding a trial court abuses its discretion when there is no reasonable basis for its ruling apparent on the record]; *In re Cortez* (1971) 6 Cal.3d 78, 85-86 [holding trial court abused its discretion by basing its ruling on a factual error].)[2]

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[2] Even if the court had properly concluded that defense counsel had exceeded the bounds of the stipulation, the proper remedy was to strike the improper testimony, not to permit the prosecutor to elicit additional improper testimony. (See *People v. Wells* (1949) 33 Cal.2d 330, 340 [in bank], superseded on other grounds by Pen. Code, §§ 28, 29 [holding that "[l]egitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. [Citation]"]; *People v. Robinson* (1997) 53 Cal.App.4th 270, 285 [holding that, where defense counsel's direct examination was improper, the "prosecutor's proper response . . . was to object and move to strike . . . . The prosecutor's failure to make the

(continued...)

2. The Trial Court's Errors Were Not Harmless

As above, the difference between the juries' verdicts and length of deliberations at the first penalty phase and second penalty phase illustrates that the evidentiary differences between the two proceedings was not harmless. (See Argument III.A, *ante*.) The prosecutor's improper cross-examination of Dr. Kormos was especially prejudicial, however, because it focused on appellant's post-arrest statements and implied to the jury – due to defense counsel's inability to elicit testimony about those statements on direct examination of Dr. Kormos – that he was not credible in his assessment of those statements. The United States Supreme Court has observed that jurors are very attentive to and persuaded by evidence of a defendant's post-arrest statements. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 296 [holding that evidence of a defendant's confession "is probably the most probative and damaging evidence" that a jury may hear].) The record demonstrates that the retrial jury was particularly interested to know details of appellant's post-arrest statements, indicating that the prosecutor's improper cross-examination of Dr. Kormos on this issue likely weighed strongly in their deliberations. (CT 20:5308-5309; RT 279:33494-33497 [during penalty retrial deliberations, the jury sent a note to the court requesting appellant's post-arrest statements, which had not been introduced into evidence]; see, e.g., *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [holding that "[j]uror questions and requests to have testimony reread are indicating that deliberations were close"].) This error cannot be shown to have been harmless beyond a reasonable doubt.

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[2] (...continued)
proper response, however, did not 'open the door' to evidence" that the court had otherwise ruled was inadmissible].)

VII

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

In the AOB, appellant assigned error to a series of the court's rulings that all related, in various ways, to different inflammatory and irrelevant acts attributed to appellant. (AOB 184-195.) As appellant demonstrated in the AOB, these rulings contravened state law. (*Ibid.*) Additionally, the court's erroneous rulings on these issues violated appellant's rights under federal constitutional law and were not harmless.

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

In his AOB, appellant argued that the trial court erred in overruling appellant's objections to the prosecutor's elicitation of testimony that constituted nonstatutory aggravation evidence, namely, that appellant had committed unlawful acts of theft by fraud and statutory rape, which neither resulted in a felony conviction (see Pen. Code, § 190.3, factor (c)) nor involved the use or attempted use of force or violence or the threat of use of force or violence (see Pen. Code, § 190.3, factor (b)). (AOB 184-188, 191-192.)

1. The Trial Court's Rulings Were Constitutional Error

A capitally-charged defendant has a federal constitutional interest in a reliable, non-capricious sentencing determination. (*Tuilaepa v. California*

(1994) 512 U.S. 967, 973; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Gardner v. Florida* (1977) 430 U.S. 349, 363-364; *Gregg v. Georgia* (1976) 428 U.S. 153, 189.) Indeed, a state's capital sentencing scheme is only constitutional if it provides the fact finder sufficient guidance in its exercise of discretion to ensure that a death sentence is only rendered to the most deserving of offenders for the most egregious crimes. (*Gregg v. Georgia, supra,* 428 U.S. at p. 189.) Pursuant to this principle, the sentencer may not render a death verdict on the basis of consideration of irrelevant evidence. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885 [holding that the Eighth Amendment does not permit a death sentence to be predicated on "factors that are . . . irrelevant to the sentencing process"]; see also *Brown v. Sanders* (2006) 546 U.S. 212, 220-221 [holding that a death sentence is unconstitutional where the jury hears aggravating evidence, i.e., a "sentencing factor," that is inadmissible under state or federal law].) The Supreme Court has held that California's capital sentencing scheme provides the sentencer constitutionally-required guidance because the jury may only impose the death penalty upon application of a "statutory list of relevant factors" of aggravating and mitigating circumstances. (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [holding that California's "statutory list of relevant factors, applied to defendants within th[e] subclass [of death-eligible offenders], provides the jury guidance and lessens the chance of arbitrary application of the death penalty, [citation] guaranteeing that the jury's discretion will be guided and its consideration deliberate"].) Under California's death penalty statute, aggravation evidence that is not specified within Penal Code section 190.3 is irrelevant as a matter of law. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) In addition to *Furman*'s mandate, the State's adherence to its statutory scheme in capital sentencing is also

required pursuant to the general principle that all criminal defendants have a federal due process interest in the state following its own noticed procedures before it deprives the defendant of life or liberty. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Here, the jury improperly heard testimony elicited by the prosecutor that constituted nonstatutory aggravation. First, the prosecutor elicited lengthy testimony from codefendant Travis that he and appellant had engaged in a "scam" (RT 269:32163) on a trade school whereby they applied for and received loans on the pretext of attending the school, but intended to use the money to buy drugs instead, and that they effectuated this plan by receiving loan checks, attending the school for only part of a term, then dropping out. (RT 269:32163-32166, 32169-32170.) This conduct would, if true, constitute theft by fraudulent representation under the Penal Code. (Pen. Code, §§ 484, 487, 488.) Theft is not a crime of violence within the meaning of Penal Code section 190.3, factor (b) (*People v. Cooper* (1991) 53 Cal.3d 771, 840-841 [in bank] [holding that vehicle theft was not a crime of violence under section 190.3, factor (b), so it was error for the court to instruct the jury on its elements at the penalty phase]), and the testimony that the prosecutor elicited describing the alleged theft did not indicate that violence or threat of violence was in any way present in the course of appellant's alleged fraud on the school. (See RT 269:32163-32166, 32169-32170.) This evidence therefore constituted nonstatutory aggravation evidence, the admission of which violated appellant's federal constitutional rights.

Second, the prosecutor presented to the jury additional nonstatutory aggravation evidence by eliciting from Deanna Travis testimony that appellant impregnated her when she was fifteen years old. (RT 264:31350-

31351.) Sexual intercourse with a person who is less than eighteen years old constitutes a crime under Penal Code section 261.5. This crime is not one that is intrinsically violent or contains a threat of violence. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874, fn. 2 [holding that "the offense defined by section 261.5 . . . do[es] not involve the perpetrator's use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" [citation]].) Deanna Travis's testimony indicated that appellant did not use violence or threat of violence in his intimate relations with her. (RT 264:31350-31351.) As such, the testimony was inadmissible under Penal Code section 190.3 and its admission against appellant contravened the federal constitutional guarantees that govern the penalty phase. (AOB 184-188, 191-192.)

2. The Error Was Not Harmless

Evidence of the defendant's misdeeds tends, by its very nature, to prejudice a jury against him. (See, e.g., *People v. Holt* (1984) 37 Cal.3d 436, 459 [holding the erroneously admitted evidence was prejudicial because it portrayed the defendant as "an often-convicted felon with a history of unpunished crimes, a person with a propensity for crime and an associate of criminals"]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1385 [holding erroneous instruction about prior offense was prejudicial due to the "tendency of propensity evidence to prejudice the jury"].) Indeed, evidence of a defendant's prior bad acts is excluded, as a policy matter, for the very reason that such evidence powerfully influences the jury's assessment of the defendant. (*People v. Schader* (1969) 71 Cal.2d 761, 772, fn. 6 [holding that evidence of defendant's prior misdeeds "is objectionable, not because it has no appreciable probative value, but because it has too much" in light of the

jury's "natural and inevitable tendency . . . to give excessive weight" to this evidence].)

The State cannot show that the error was not harmless in this instance. The theme of appellant's penalty phase presentation was that appellant, on the day of the capital homicide, "was a villain and he did a horribly villainous act" but he "has not been a villain for his entire life, or even for most of his life, or for any appreciable length of time at all." (RT 279:33441; see also RT 279:33453-33454 [expounding on same theme].) Defense counsel urged the jury to spare appellant's life because appellant had spent his childhood suffering extreme abuse, but nevertheless had grown into a young adult who "lived without hurting anyone else or trying to hurt anyone else." (RT 279:33457.) The erroneously admitted evidence of appellant's bad acts likely provoked jurors' skepticism of this theory. In this way, the error was doubly prejudicial: it undermined the defense's case in mitigation while giving inordinate force to the prosecutor's case in aggravation. Such an error is not harmless. (See, e.g., *People v. Rucker* (1980) 26 Cal.3d 368, 391 [holding that erroneous admission of "statements which intimated that appellant was fabricating his defense were most prejudicial"]; *People v. Wagner* (1975) 13 Cal.3d 612, 621 [holding that erroneous impeachment of defendant required reversal since "the resolution of defendant's guilt or innocence turned on his credibility"]; *People v. Vargas* (1973) 9 Cal.3d 470, 481 [holding that error was prejudicial where it touches a "live nerve" of the defense theory].)

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

In addition to considering erroneously admitted aggravation evidence, as described above, the jury was further misled by the prosecutor's improper

questioning of codefendant Travis, in which the prosecutor baselessly suggested that appellant had used a stun gun in a prior crime. (AOB 188-191.) This, particularly in conjunction with the other misconduct alleged in the AOB and herein, deprived appellant of a fair trial, reliable sentencing determination, confrontation of the evidence against him, and due process of law under the United States Constitution.

1. The Prosecutor's Baseless Cross-Examination Violated Appellant's Federal Constitutional Rights

Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, corollary provisions of the state Constitution, and state law were violated by the prosecutor's misconduct. Misconduct by the prosecution in seeking a conviction or death sentence is repugnant to the basic values underlying the criminal justice system. "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88; see also *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 [holding that prosecutorial misconduct offends the principle that a "fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law"].) Particularly in cases where the crime charged is serious, such as in capital cases, the Court must be exceedingly vigilant towards prosecutorial misconduct. (*People v. Evans* (1952) 39 Cal.2d 242, 251 [holding "[i]n a case such as this where the crime charged is of itself sufficient to inflame the mind of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and the conduct of the trial"].) A conviction or sentence that results from misconduct by the

prosecutor violates a defendant's rights to due process of law under the Fifth and Fourteenth Amendments, where the misconduct has been of a nature that rendered the trial fundamentally unfair, and where it denied a defendant a reliable sentencing determination under the Eighth Amendment. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [Fifth and Fourteenth Amendments]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 333 [Eighth Amendment].)

Generally, a prosecutor commits misconduct where he has used "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) This includes the prosecutor asking a witness an inflammatory question that he has reason to expect will be answered in the negative:

> It was improper to ask questions which clearly suggest the existence of facts which would have been harmful to the defendant, in the absence of a good faith belief by the prosecutor that the questions would have been answered in the affirmative, or with a belief on his part that the facts could be proven, and a purpose to prove them, if their existence should be denied.

(*People v. Perez* (1962) 58 Cal.2d 229, 241, quoting *People v. Lo Cigno* (1961) 193 Cal.App.2d 360, 388.) Factually baseless questions are error because they tend to "make the prosecutor his own witness offering unsworn testimony not subject to cross examination. It has been recognized that such testimony can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*People v. Bolton* (1979) 23 Cal.3d 208, 212, quoting Vess, *Walking a Tightrope: A Survey of Limitations On The Prosecutor's Closing Argument* (1973) 64 J. Crim.L. & Criminology 22, 28.) For this reason, this

form of misconduct also violates a defendant's Sixth Amendment right to confront and cross-examine witnesses against him. (*Id.* at p. 213.)

Where, as here, prosecutorial misconduct has occurred that impinged on the defendant's Fifth and Fourteenth Amendment rights, the criminal defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the misconduct was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In making this determination, the Court must consider the cumulative impact of all instances of misconduct, in both the guilt and penalty phases of the trial. (*See, e.g.*, *People v. Hill* (1998) 17 Cal.4th 800, 815, 844; *People v. Pitts* (1990) 223 Cal.App.3d 606, 815; *People v. Hudson* (1981) 126 Cal.App.3d 733, 741.)

Here, the prosecutor committed misconduct by repeatedly questioning codefendant Travis in a manner that implied appellant had committed untoward, and possibly criminal, acts, when the prosecutor knew such acts did not occur. As described in the AOB, on cross-examination the prosecutor elicited from codefendant Travis testimony in which Travis described a fight he had with another codefendant, Matthew Jennings. (AOB 188; RT 269:32200.) Travis testified that appellant, among others, was present at the fight. (*Ibid.*) The prosecutor then asked Travis if he saw that appellant possessed, displayed, and triggered a stun gun during the fight. (AOB 188; RT 269:32201.) Travis replied that he did not recall that. (AOB 188; RT 269:32207.) The prosecutor then attempted to refresh Travis's recollection with an unidentified document and asked if it helped him to recall "as to whether any one of [his] friends displayed the stun gun and kept hitting the test button?" (AOB 189; RT 269:32211.) Travis again replied that he did not recall that. (*Ibid.*) The prosecutor persisted, asking pointedly if Travis had been aware that "either Matt or Danny [appellant] had a stun

gun." (*Ibid.*) Travis replied that he recalled having seen the stun gun at an entirely different person's house. (*Ibid.*) At this point, the prosecutor finally relinquished this line of questioning. (*Ibid.*)

Despite his repeated insinuations that appellant brandished a stun gun during the fight at issue, the prosecutor knew that there was no such evidence to justify these questions. At a pretrial hearing, the prosecutor informed the court that the evidence demonstrated that the witnesses had "put [the stun gun] in Mr. Rackley's possession," that "Mr. Rackley tried to use the stun gun," and that "I'm not sure that anyone actually put it in Mr. Silveria's possession." (AOB 190; RT 45:3711-3712.) During the guilt phase, the prosecutor elicited testimony from his own witness, Tom Swenor, that during the incident in question "Troy Rackley had [the stun gun] and he tried to stun – stun gun one of the guys" involved in the fight. (AOB 190-191; RT 99:9467-9468.) The record, therefore, is clear that at the time of the prosecutor's questioning of codefendant Travis, he had no reason to believe that appellant had possessed, brandished, used, attempted to use, or threatened people with a stun gun during the Matthew Jennings fight. His repeated intimations to the contrary were plain misconduct, designed to suggest to the jury that appellant had engaged in improper acts, in contravention of appellant's constitutional rights.

2. The Misconduct Was Not Harmless Beyond a Reasonable Doubt

The State cannot carry its burden to prove that this misconduct was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.) As with the introduction of inadmissible evidence of appellant's prior bad acts, discussed *supra*, the prosecutor's repeated allusions to appellant having used a stun gun in another violent incident

would have inflamed the jury's passions against appellant, warped the jurors' assessment of his moral deservingness of the death penalty, and induced their reluctance to be persuaded by the defense penalty phase presentation that had sought to portray appellant as an essentially good person whose involvement in the capital homicide was aberrational. (See Argument VII.A, *ante*; Argument I [improper argument on special circumstances that the jury had not found to be true] .) The insinuations that appellant had used a stun gun in a prior violent act were especially prejudicial, in light of the competing penalty phase theories that had been placed before the jury: appellant had, at the guilt and penalty phases, argued that he had not intended that the victim of the capital homicide die, he had not known that Mr. Madden would be killed, and that he had participated in the homicide due to pressure from his co-perpetrators–including having reluctantly used a stun gun on Mr. Madden. (See AOB 18, 23-27; RT 44:3666, 3668 [defense guilt phase opening statement], ACT 10:2466-2530 [testimony of appellant submitted at penalty retrial].) The prosecutor urged the jury that this was not credible, and argued that the evidence demonstrated that appellant had planned and premeditated the crime. [See RT 276:33077-33078 [prosecutor's penalty phase closing argument].) In this context, the jury's belief that appellant had previously assaulted or had threatened to assault another person with a stun gun reasonably would have influenced the jury's assessment of the parties' competing theories. As such, the prosecutor's misconduct was not harmless beyond a reasonable doubt. (See, e.g., *People v. Rucker, supra,* 26 Cal.3d at p. 391; *People v. Wagner, supra,* 13 Cal.3d at p. 621; *People v. Vargas, supra,* 9 Cal.3d at p. 481.)

When considered cumulatively with the prosecutor's other instances of misconduct at the penalty phase, which encouraged the jurors to give

aggravating weight to inadmissible evidence (see *ante*; Argument I [improper argument on special circumstances that the jury had not found to be true]; Argument V [improper evidence and argument concerning victim impact]) and to minimize the consideration they gave mitigating evidence (see Argument III [improper cross-examination of defense expert Dr. Kormos]; Travis AOB Argument X, joined *post* [improper denigration of 190.3, factor (k) evidence]) and discount the seriousness of a death verdict (see Argument X [*Caldwell* error]), the entirety of the prosecutor's misconduct rendered the trial fundamentally unfair and was not harmless beyond a reasonable doubt. (See *Darden v. Wainwright, supra,* 477 U.S. at p. 181; *Chapman v. California, supra*, 386 U.S. at p. 24.)

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IX

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

At the penalty phase, appellant sought to call as a witness Michael George, appellant's former foster father who repeatedly sexually abused him when appellant was in his care. (AOB 221-227; RT 252:29112-29125.) Mr. George refused to testify, invoking his Fifth Amendment privilege, and the trial court denied appellant's requests to compel Mr. George's testimony. (AOB 222-225; RT 252:29112-29125.) That denial was error, which deprived appellant of his rights under state and federal law and which prejudiced him.

A. The Court Erred in Denying Appellant's Request to Compel George's Testimony

A witness has a Fifth Amendment right to refrain from testifying to facts that may incriminate him. (See, e.g., *People v. Leach* (1975) 15 Cal.3d 419, 438.) This right may only be invoked where the witness "is entitled to assert it," which is a legal determination for the trial court, which, as such, is reviewed de novo. (*People v. Seijas* (2005) 36 Cal.4th 291, 303-304.) A witness is only entitled to invoke his privilege against self-incrimination where he has "reasonable cause to apprehend danger from a direct answer." (*Hoffman v. United States* (1951) 341 U.S. 479, 486; see also *People v. Seijas, supra,* 36 Cal.4th at p. 304 [quoting same].) A witness does not have reasonable cause to apprehend danger from his testimony where there is a legal impediment to his future prosecution on the basis of the testimony, for

example, where the witness is protected from later prosecution by the double jeopardy clause (see, e.g., *Reina v. United States* (1960) 364 U.S. 507, 513), by a pardon (see *Brown v. Walker* (1896) 161 U.S. 591, 599-600), or – as occurred here – where "the testimony relate[s] to criminal acts long since past, and against the prosecution of which the statute of limitations has run" (*Hale v. Henkel* (1906) 201 U.S. 43, 67 abrogated on other grounds by *Murphy v. Waterfront Com'n of New York Harbor* (1964) 378 U.S. 52; see also *Ex parte Cohen* (1894) 104 Cal. 524, 528 [holding there was no Fifth Amendment privilege for protection from prosecution for crimes for which the limitations period had expired]).[3]

A witness may not elide this rule by invoking the mere possibility of a future prosecution for another crime, for which his testimony may "furnish a link in the chain of evidence needed to prosecute" him. (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 428.) Rather, to meet his burden, the witness must make a particular showing that the testimony could

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[3] *Hale*'s and *Cohen*'s conceptualization of the criminal statute of limitations as defining the period in which a person is in reasonable apprehension of danger of prosecution, for Fifth Amendment purposes, is consonant with that of the California courts in the civil context. Routinely, California courts will stay a civil proceeding until the statute of limitations has run on related criminal conduct, as a means of preventing the civil litigant's invocation of his Fifth Amendment rights stymying the resolution of the civil suit. (See, e.g., *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686, 690-691 [affirming stay of proceedings in civil case "until the expiration of the criminal statute of limitations" for the conduct for which petitioner had invoked the Fifth Amendment privilege]; see also *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 309 [endorsing "a stay [of] the civil proceedings until the criminal statute of limitations expires" as "a possible solution," though holding it was not an abuse of discretion not to order such a stay].)

be used against him in a future, hypothetical prosecution for a different crime, as evidence of "acts so distinctive and unique that the evidence could be admitted in [the] later prosecution" as modus operandi or propensity evidence. (*Id.* at p. 431.) This standard is so exacting that appellant has found no cases – either in California nor any other jurisdiction – in which fear of such a possibility was found sufficient basis for the witness's invocation of his Fifth Amendment privilege.

As set forth in the AOB, the trial court abused its discretion by failing to apply this standard. (See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) The court denied appellant's requests to compel Mr. George's testimony because it reasoned that there "could be other victims out there" of sexual abuse for which the statute of limitations had not run and "if there was and there very well could be I suppose a prosecution of" those crimes, Mr. George's testimony at appellant's penalty phase "could be used against him under section 1101 of the Evidence Code." (AOB 224; RT 251:29125.) This was rank speculation by the trial court, not grounded in any showing by Mr. George that he had a "reasonable cause" to fear such future prosecution nor that, even if such prosecution were possible, his testimony in appellant's case would reflect sufficient similarities to the allegations in the future hypothetical cases that it might be admissible as "motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident" under Evidence Code section 1101, subdivision (b). (See *Hoffman v. United States, supra,* 341 U.S. at p. 486; *Blackburn v. Superior Court, supra,* 21 Cal.App.4th at p. 428.) The wrongful exclusion of the relevant testimony of Mr. George violated appellant's federal constitutional rights. (AOB 221-222, 227.)

B. The Error Was Not Harmless

This error was not harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.) Evidence that the defendant suffered childhood sexual abuse is profoundly mitigating (see, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 535-537), and its effect on the jury is amplified when the assailant him- or herself describes the abuse that he or she perpetrated. (See, e.g., *Johnson v. Secretary, Dept. of Corrections* (11th Cir. 2011) 643 F.3d 907, 936-938 [reversing denial of habeas corpus relief where trial counsel had elicited some testimony that defendant had suffered abuse from his father, but had not elicited testimony from the father himself detailing the abuse]; *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100, 1120-1125 [reversing denial of habeas corpus relief where defendant's mother had testified in penalty phase that there were "some problems . . . with abuse" in the home when defendant was a child, but counsel could have elicited testimony from the mother detailing her extensive sexual abuse of defendant and his siblings]; see also *Cooper v. Secretary* (11th Cir. 2011) 646 F.3d 1328, 1352-1353 [holding defendant suffered prejudicial ineffective assistance of counsel where trial counsel had presented some evidence from a third party that defendant had been abused as a child, but had not called as witnesses those family members who observed "the specifics of the abuse directed toward" defendant and therefore "would have had much more credibility" than the third party].)[4] Where, as here, the jury

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[4] Appellant notes that these cases resulted in sentence reversals under a more exacting standard for petitioner – the petitioner bearing the burden to prove there was a reasonable probability the error affected the sentence – than that which governs the instant assignment of error, where respondent bears the burden to prove the error was harmless beyond a reasonable

(continued...)

manifestly struggled with the determination that appellant deserved the death penalty, as evidenced by the hung jury at the first penalty phase, the erroneous exclusion of powerful mitigation evidence cannot be deemed harmless. (See *People v. Duarte, supra,* 24 Cal.4th at p. 619.)

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[4] (...continued)
doubt. (Compare *Strickland v. Washington* (1984) 466 U.S. 668, 694 with *Chapman v. California, supra*, 386 U.S. at p. 24.)

XVI

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

In appeals arising from judgments of death, a party may "as part of its brief . . . join in or adopt by reference all or part of a brief in the same or related appeal." (Cal. Rules of Court, rules 8.200(a)(5), 8.630(a); see also *People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11 [acknowledging that joinder of codefendants' arguments is "broadly permitted" under the Rules of Court].) In cases where one appellant seeks to join the claims or arguments of his codefendant, the party seeking to join must make clear what aspects of the briefing he joins and, where necessary, provide argument setting forth his distinct right to relief on the ground that is joined. (*People v. Bryant* (2014) 60 Cal.4th 335, 363-364.)

In their respective Opening Briefs, appellant and codefendant Travis raised many of the same assignments of error, which have the same factual predicates and implicate the same legal rights and issues. (See RB 61, fn. 10 [recognizing that some of appellant's and codefendant's arguments "overlap" so as to require only a single response by Respondent].) Because, however, appellant's arguments in support of some of his assignments of error omit essential legal arguments that are contained in codefendant's briefing, appellant seeks to join those aspects of his codefedant's Opening Brief and Reply Brief. In each of the following instances, appellant has, in his Opening Brief and Reply Brief, previously identified how "the claim is applicable and preserved" as to appellant (see *People v. Bryant, supra*, 60 Cal.4th at p. 363), such that no further exposition is necessary in order for the Court to resolve appellant's claim.

Accordingly, appellant seeks to join the following portions of codefendant Travis's Opening Brief and Reply Brief:

Appellant Joins These Portions of Codefendant Travis's Briefing	**In Support of These Portions of Appellant's Briefing**
Codefendant Travis's Opening Brief ("Travis AOB") 228-293; Codefendant Travis's Reply Brief ("Travis ARB") 60-70	Argument Two, Appellant's Opening Brief ("AOB") 115-134; Appellant's Reply Brief ("ARB") 18-36
Travis AOB 451-464; Travis ARB 133-138	Argument Six, AOB 175-183; ARB 72-77
Travis AOB 294-326; Travis ARB 71-80	Argument Eight, AOB 196-220; ARB 89-96
Travis AOB 327-371; Travis ARB 81-89	Argument Eleven, AOB 238-257; ARB 108-120
Travis AOB 487-502; Travis ARB 155-158	Argument Fourteen, AOB 382-390; ARB 165-174

Additionally, appellant joins the claim that codefedant Travis raised as the tenth assignment of error in his Opening Brief,[5] which appellant has not previously raised in any form. This claim alleges that the trial court erred in overruling a defense objection to the prosecutor's derisive description of mitigation evidence, thereby violating appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution. The factual and legal arguments made by codefendant apply in

[5] Specifically, appellant joins the arguments contained at pages 465-468 of the Travis AOB and pages 139-142 of the Travis ARB.

equal force to appellant. Appellant preserved this error in the proceedings below. (RT 276:33021.)

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XVII

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

In his opening brief, appellant challenged the California death penalty scheme on grounds that this Court has rejected in previous decisions holding that the California law does not violate the federal Constitution. (AOB 391-414.) Recently, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 624] [hereafter "*Hurst*"].) *Hurst* provides new support to appellant's claims in Arguments XV.C.1, XV.C.2, XV.C.3 and XV.4 of his opening brief. (AOB 393-399, 403-404.) In light of *Hurst*, this Court should reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14); does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106); and does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

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A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, must Be Found by a Jury Beyond a Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst*, *supra*, 136 S.Ct. at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst*, *supra*, 136 S.Ct. at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid.*)[6]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme

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[6] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra*, 136 S.Ct. at p. 622.)

violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[7] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530

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[7] See *id.* at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id.* at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* by Not Requiring That the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman, supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel, supra,* 62 Cal.4th at p. 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another

factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[8]

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that

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[8] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with

special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[9]

C. This Court's Interpretation of the California Death Penalty Statute in *People V. Brown* Supports the Conclusion That the Jury's Weighing Determination Is a Factfinding Necessary to Impose a Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds

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[9] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___ [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

sub nom. California v. Brown (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id.* at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id.* at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id.* at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id.* at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to

> require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, 40 Cal.3d at p. 541, [hereafter "*Brown*"], footnotes omitted.)[10]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

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[10] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the sentencing instruction.

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He *may* impose death if

> satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id.*, subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[11] The requirement that the jury must find that the aggravating

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[11] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate

(continued...)

circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst, supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

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[11] (...continued)
by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To 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.

D. This Court Should Reconsider its Prior Rulings That the Weighing Determination Is Not a Factfinding under *Ring* and Therefore Does Not Require Proof Beyond a Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond

a reasonable doubt under the due process clause].)[12] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 [hereafter "*Rauf*"] supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf, supra*, at *1 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at *18.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[13] One reason the court invalidated Delaware's law is relevant here:

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[12] The *Apprendi/Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

[13] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf, supra*, at *1-2 (*per curiam* opn.) [addressing Questions 1-2] and at *37-38 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating

(continued...)

the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id.* at *2; see *id.* at *39 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Ibid.*) The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the

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[13] (...continued)
circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at *2 (*per curiam* opn.) [addressing Question 3] and at *39 (conc. opn. of Holland, J.)).

mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt. As appellant's jury was not required to make this finding, appellant's death sentence must be reversed.

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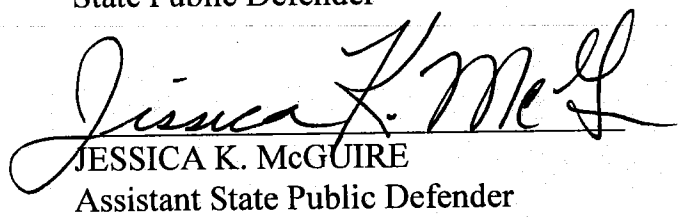
CONCLUSION

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

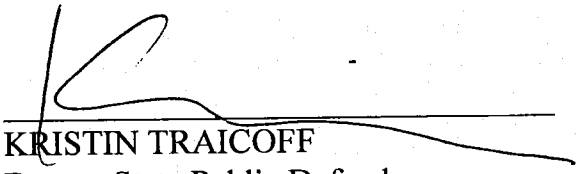
DATED: April 21, 2017

Respectfully submitted,

MARY K. McCOMB
State Public Defender



JESSICA K. McGUIRE
Assistant State Public Defender



KRISTIN TRAICOFF
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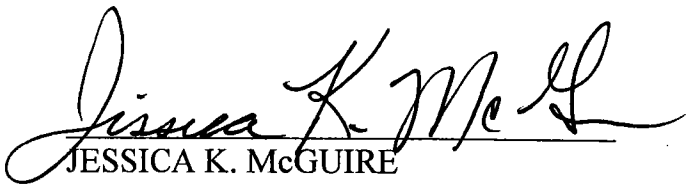
CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I am the Assistant State Public Defender and represent appellant, DANIEL TODD SILVERIA, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 14,302 words in length.

Dated: April 21, 2017.



JESSICA K. McGUIRE

DECLARATION OF SERVICE

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

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

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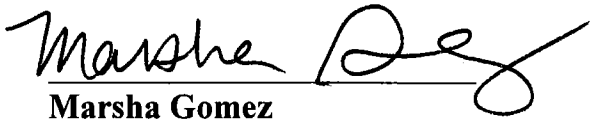
I declare under penalty of perjury that the foregoing is true and correct. Signed on **April 21, 2017**, at Sacramento, California.



Marsha Gomez