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IN THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY

ERIK MENENDEZ, Petitioner, On Habeas Corpus. _____ LYLE MENENDEZ, Petitioner, On Habeas Corpus. _____	No.: Court of Appeal Case No. B104022 Superior Court Case No. BA068880

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The state's theory of this case was that Erik and Lyle Menendez shot their parents in a cold blooded, premeditated scheme to inherit their money. The defense theory was far different; the shootings were not murder but manslaughter, committed out of an honest though unreasonable belief in the need for self-defense after a lifetime of sexual and physical abuse. In light of these two diametrically opposed theories, jurors had one critical factual question to answer: was there a lifetime of sexual abuse, as the defense contended, or was sexual abuse simply a lie manufactured by the two defendants as the prosecution contended?

The first trial, at which each defendant had their own jury, resulted in two separate juries unable to reach agreement on this question, evenly divided between jurors adopting the manslaughter theory of the defense and the murder theory of the prosecution. The second trial, at which there was a single jury and substantial defense evidence excluded, resulted in a unanimous finding of guilt as to each defendant.

As discussed more fully below, separate and apart from the defense evidence excluded from the second trial -- such as the remarkable testimony from Jose Menendez's own niece, Diane Vandermolen, that when he was only 8 years old Lyle revealed that Jose was forcing him to massage Jose's genitals -- it turns out there was other significant evidence supporting the defense theory that sexual abuse occurred, just as so many jurors from the first trial had concluded. This new evidence is discussed below and merits issuance of an Order to Show Cause.

PROCEDURAL HISTORY

On April 16, 1993, the Los Angeles County Grand Jury filed a three-count amended indictment against petitioners Lyle and Erik Menendez. (CT 548-550.)[1] The information charged as follows:

> (1) Count one charged both defendants with the August 20, 1989 murder of Jose Menendez in violation of Penal Code section 187. (CT 548.)
>
> (2) Count two charged both defendants with the August 20, 1989 murder of Kitty Menendez in violation of section 187. (CT 548.)
>
> (3) Count three charged both defendants with conspiracy to murder in violation of section 182, subdivision (1). This count added three specific overt act allegations. (CT 550.)

As to each of the first two counts, the indictment added two special circumstance allegations: lying in wait and multiple murder. (CT 548-549.)

Trial began in June of 1993 in front of two separate juries. (CT 4755, 4921.) With respect to counts one and two (the first degree murder charges), the jury was given the option of convicting both defendants of the lesser included offenses of second degree murder, voluntary manslaughter, or involuntary manslaughter. (CT 6095-6110, 6234-6241.) With respect to count three (the conspiracy charge), the jury was given the option of convicting both defendants of conspiracy to commit second degree murder and voluntary manslaughter as lesser offenses to the charged conspiracy to commit first degree murder. (CT 6093, 6242.)

On January 13, 1994, the trial court declared a mistrial on all charges against Erik

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[1] "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript. All statutory references are to the Penal Code unless otherwise noted.

Menendez due to jury deadlock. (CT 6125.) On January 28, 1994, the trial court declared a mistrial on all charges against Lyle Menendez due to jury deadlock. (CT 6311; RT 26177.) As to Erik, the specific breakdown was as follows:

> **Count one:** The jury split six votes for manslaughter, one vote for second degree murder and five votes for first degree murder. (RT 26185-26186.)
>
> **Count two:** The jury split four votes for voluntary manslaughter, three votes for second degree murder and five votes for first degree murder. (RT 26186.)
>
> **Count three:** The jury split six votes for not guilty, one vote for conspiracy to commit second degree murder and five votes for conspiracy to commit first degree murder. (RT 26186.)

As to Lyle, the specific breakdown was as follows:

> **Count one:** The jury split six votes for manslaughter, three votes for second degree murder and three votes for first degree murder. (RT 26185.)
>
> **Count two:** The jury split one vote for involuntary manslaughter, five votes for voluntary manslaughter, three votes for second degree murder and three votes for first degree murder. (RT 26185.)
>
> **Count three:** The jury split six votes for not guilty, three votes for conspiracy to commit second degree murder and three votes for conspiracy to commit first degree murder. (RT 26185.)

The state elected to retry both defendants. (CT 6311.) Over objection, both defendants were retried by a single jury. (CT 8996.) Trial began in October 1995.

The original panel of jurors at the second trial deliberated for over 35 hours over the course of seven court days before two of the jurors were replaced with alternates. (CT 13094-13104.) After the replacement, the jurors deliberated more than 20 hours over the course of five more court days before finding both defendants guilty as charged on March 20, 1996. (CT 13104-13107, 13231-13232.) After a penalty phase, jurors fixed the penalties for both defendants at life without parole. (CT 13319.)

At sentencing, the trial court imposed consecutive terms of life without possibility of parole on counts one and two. (CT 13403.) The court stayed the 25-year-to-life term on count three pursuant to section 654. (CT 13403.)

Both defendants appealed. The state appellate court affirmed their convictions in an unpublished opinion. The state supreme court denied review and federal courts subsequently denied habeas relief.

STATEMENT OF FACTS

Introduction

On August 20, 1989, Jose and Kitty Menendez were shot and killed. Their sons, 18-year-old Erik and 21-year-old Lyle Menendez, were charged with premeditated murder.

At trial, both Erik and Lyle admitted the shooting. Their defense was that they killed without malice because of a combination of threats received from their parents in the days leading up to the shooting itself and a lifetime of sexual and physical abuse at their parents' hands. Under the defense theory, Erik and Lyle were guilty of manslaughter, not murder.

The state's theory was that the killings were premeditated and motivated by money. The state theorized that the relationship between defendants and their parents had disintegrated to the point that Jose and Kitty planned to disinherit their sons. Erik and Lyle knew of this and premeditated a plan to shoot their parents before the will could be changed.

In light of the two very different theories presented, the central issue for the jurors was stark. Did the shooting occur out of fear caused by a lifetime of sexual and physical abuse? Or was the sexual abuse all a lie and the killings were, instead, a planned execution so Erik and Lyle would not be disinherited?

The Relationship Between Defendants And Their Parents

a. The prosecution evidence.

The state's theory was that Erik and Lyle had a financial motive to kill their parents. For a number of reasons, the relationship between defendants and their parents had disintegrated so defendants killed their parents to avoid being cut out of the will. To prove this, the state offered statements made by Jose Menendez in 1989 in which he told others that he was "disappointed" in his children and had disinherited them.

For example, the state called Brian Andersen, Kitty's brother, to testify. Andersen said that in early August 1989 Jose told him, "I've got to have a major conversation with my son, Lyle. He has to get the message that we're not going to be supporting them for the rest of their lives." (236 RT 39689.)

A friend of Lyle's, Perry Berman, testified that Jose was sharply critical of Lyle's girlfriends, whom Jose considered to be "golddiggers" upon whom Lyle lavished too much money and attention. According to Berman, Jose intensely disliked Jamie Pisarcik, who Lyle dated seriously from 1988 to 1989. (224 RT 36931; 234 RT 36932.) Jose also forced Lyle to break off a relationship with Christie, a woman Lyle began dating in 1989, after he broke up with Jamie. (224 RT 36870-36873, 36932.) In April 1989, in a conversation with Carlos and Teresita Baralt (Jose's sister), Jose said he did not approve of Christie because she was several years older than Lyle. (286 RT 48646.) Again, Jose

expressed displeasure with Lyle because he was too generous with his money and this resulted in a lot of people "hanging" around. (286 RT 48646-48647.)

Further, attorney Randy Wright and his wife, Klara, testified that Lyle and Erik consulted Randy the day after the shooting. (226T 37282-37291.) The brothers told Wright that their father probably had a will, but he might have changed it before he died. (2256 RT 37283-37285, 37301.) They did not discuss whether or not the brothers were beneficiaries under the will. (226 RT 37305.) The brothers asked Wright if he could probate the will. (226 RT 37282.)

However, numerous family members who had spoken to Jose about his will -- some called by the prosecution -- explicitly contradicted the state's theory, testifying not only that well *before* the shooting, Jose had already told Lyle and Erik they were out of the will, but that Lyle and Erik knew they had already been taken out of the will. Thus, it was implausible that the killings were intended to prevent what had already happened.

Carlos Baralt, Jose's brother-in-law and the executor of Jose's will, heard Jose say at some point in early 1989 that he was "disappointed and frustrated with his kids" and wanted to "remove them from the will as beneficiaries." (226 RT 37353-37354.) According to Carlos, Jose was upset with Lyle because Lyle spent money too freely on his friends and girlfriends, had been suspended for a year from Princeton University, and in general was not doing well at school. (226 RT 37354-37358.) Carlos told Jose that his expectations were unreasonable because Lyle was not academically strong enough to succeed at Princeton. (227 RT 37588-37589.)

In another conversation, Jose again told Carlos that he was going to cut Erik and Lyle out of his will. Carlos expressed his concern to Jose as to how the brothers would react to that. Jose responded that "he had *already* told Lyle and Erik." (226 RT 37360,

emphasis added.) According to Baralt, Jose said he told the brothers in the early summer of 1989 that "they were no longer in the will." (226 RT 37425.) In the first trial, Carlos was asked, "What did Jose tell you he had told the boys?" Carlos answered, "That he . . . he had told the boys that they were no longer in the will." (227 RT 37583.) In the second trial, Carlos confirmed that was his "exact impression" of what Jose told him. (227 RT 37583.)

Marta Cano, Jose's sister, had extensive conversations with both brothers about financial matters in the week after the homicides. Marta, a financial planner, was directly involved in Jose's financial affairs and had sold him life insurance in 1981. (284 RT 48242-48244.) She came to Los Angeles on Monday, August 21, the day after Kitty and Jose died. (284 RT 48252.) When she arrived, she called Marzi Eisenberg, Jose's secretary, and told her that she wanted to look though Jose's financial papers to see if there was anything that needed immediate attention. (284 RT 48253.) Marta also immediately made claims on behalf of Erik and Lyle under the life insurance polices that she had sold to Jose. (284 RT 48258.)

On Wednesday, August 24, Marta suggested to Erik and Lyle that they accompany her to a meeting with Peter Hoffman, the chairman of Jose's company, because they would be talking about Jose's insurance and other assets the brothers stood to inherit. (285 RT 48471.) Both told her they did not believe they were beneficiaries under the will. (285 RT 48471.) Lyle told her expressly, "We're not in the will." (RT 285 RT 48472.) Marta said he was wrong, she knew they were in the will because she was a witness. (285 RT 48472.) Erik replied, "My father took us out of the will a year ago." (285 RT 48472.) In his own testimony, Erik said that Jose had told him he had been disinherited. (262 RT 43719-43720.)

Marta did not believe that the brothers had been disinherited, but she told them that

even if they were not in the will, there was still a five-million dollar insurance policy through Jose's work, and another policy that Marta had sold to Jose years earlier. (285 RT 48472.) The brothers knew of the five-million dollar policy because it had been discussed at the dinner table many times. (262 RT 43772.) However, they also knew that Jose had a physical examination scheduled for September 1989, and that the policy could not be issued until Jose passed that examination. (262 RT 43772.) Lyle told Marta that the five-million dollar policy had not yet been issued. (285 RT 48472-48473.)[2]

The prosecution also introduced evidence to show that Lyle and Erik attempted to destroy a will on the family computer. Erik and Lyle raised the possibility of a will on a computer in their conversation with Randy and Klara Wright on August 21. (225 RT 37157.) A day or two later, when the brothers' aunts and uncles were at the Menendez house looking for the will and financial papers, someone discovered entries in the computer that suggested the presence of a will. (227 RT 37605.) However, no computer will was found. (227 RT 37605.)

Carlos Baralt recalled that the search for a will began as soon as he could get into the Menendez home, which was either Tuesday, August 22, or Wednesday, August 23. (226 RT 37363.) Carlos was not at the Menendez house when the will was found. He learned of the discovery in a telephone call from someone at the house. (226 RT 37363.) Carlos drove to the house with Lyle, and perhaps Erik, to read the will. (226 RT 37363.)

Based upon what Jose had told him earlier in the year, Carlos believed that there

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[2] As far as Marta knew, neither brother was aware of the life insurance policy that Marta sold to Jose in 1981. (285 RT 48475.) Marta herself could not find a copy of that policy in the Menendez house in Los Angeles. (285 RT 48475.) The 1981 policy was rolled into a bigger policy in 1986. (284 RT 48244.) The 1986 policy had a value of $400,000, with an additional benefit of $250,000 in the case of accidental death. (285 RT 48473.)

might be another will. (226 RT 37406, 37410.) Carlos continued to search to see if another will could be found in the house. (226 RT 37411.) He looked at the computer in the house, which contained three files named "Will," "Erik," and "Lyle." (227 RT 37605.) The files appeared to be empty; no one could retrieve any documents from them. (227 RT 37605.) The family discussed hiring a computer expert to check the computer to see if any information could be retrieved, but nothing was done at that time. (227 RT 37605.)

A week later, on Thursday, August 31, Lyle called a computer expert, Howard Witkin, to the house to determine if the computer files could be recovered. (227 RT 37653-37655.) Witkin found the same three files named "Will," "Erik," and "Lyle." (227 RT 37661.) No documents existed in these files. (227 RT 37664.) Witkin explained to Lyle that using the delete command on the computer does not permanently erase a file or document from the computer; the file or document is erased from the directory, but not from the hard disk. (227 RT 37709-37711.) Thus, it is possible for an expert to search the hard disk to determine if someone deleted files from a directory. (227 RT 37711.) Witkin himself scanned the hard disk of the Menendez computer; he found that no files had been deleted. (227 RT 37711.)

Lyle then asked Witkin to remove all information from the hard disk and to make it look as if the disk had not been erased. (227 RT 37667.) Witkin did so by reformatting the computer with new software. (227 RT 37666-37669.)

A former employee of Lyle's restaurant in Princeton, Glen Stevens, testified that Lyle later told him he had to fly to Los Angeles after the shootings because he had learned that one of the family members had found three entries in a computer labeled "Will," "Erik," and "Lyle." (234 RT 39103.) Lyle said he was nervous that the original will gave him and his brother everything, but he was not sure what provisions would have

been in a new will. (234 RT 39103.) According to Stevens, Lyle told him after his trip to Los Angeles that a computer expert had determined that whatever was in the computer was illegible. He had the expert then erase whatever was there. (234 RT 39103.)

In support of its theory that the motive for the killings was financial gain, the state also presented evidence that after the shooting, the brothers used money received from Jose's life insurance policies to purchase certain expensive items.

In fact, both brothers received $326,747.62 under Jose's life insurance. (256 RT 39683.) Each transferred the money into accounts managed by their aunt, Marta Cano, through an investment company. (285 RT 48451, 48452.) Both Erik and Lyle purchased Rolex watches and money clips on August 24 and charged the purchases to Jose's American Express card, which they were authorized to use. (228 RT 37873-37883; 236 RT 39684-39685.) Nevertheless, before paying, Lyle called his uncle, Carlos Baralt, to ask how he should pay for the purchases. (262 RT 43783.) Carlos told him to use Jose's credit card. (262 RT 43783.) The sales clerk noted that both brothers were "subdued" and neither seemed to be enjoying themselves. (228 RT 37938.)

In October 1989, Erik purchased a new Jeep Wrangler. (231 RT 38635-38650.) Erik had earlier discussed the purchase of the Jeep with Marta Cano and Steve Goldberg, the family attorney. (262 RT 43778.) Neither one told Erik not to buy the Jeep, and Goldberg accompanied Erik to the dealership to negotiate the purchase price. (262 RT 43779.) The saleswoman noticed that Erik was not "enthusiastic" about the purchase; she thought he was acting "appropriately" for one whose parents had just died. (231 RT 38668-38669.)

In Princeton, Lyle went ahead with a purchase of a condominium that Jose and Kitty had initiated in July 1989. (286 RT 48653-48654.) After the death of his parents,

Lyle was involved in the purchase of two other pieces of property in Princeton. (226 RT 37393-37395.) These transactions were never completed. (236 RT 39681-39682.)

Erik hired a tennis coach, Mark Heffernan, in the fall of 1989 out of the insurance proceeds. (262 RT 43821.) Heffernan had been coaching Erik and Lyle part-time since the fall of 1988. (229 RT 38064.) After their parents died, Erik and Lyle met with Heffernan to decide whether they should pursue their tennis careers. (229 RT 38071.)

Ultimately, Erik decided to begin training full-time with Heffernan and then attempt to join the professional tour. (262 RT 43821.) Lyle was undecided whether to pursue a tennis career or to go into business. (229 RT 38182.) With the help of Marta Cano and attorney Steven Goldberg, the brothers negotiated an agreement with Heffernan that would pay him $5,000 a month to train Erik and $6,000 a month to coach both Erik and Lyle. (229 RT 38073.)[3]

Erik and Lyle rented two apartments in the Marina City Club in Marina Del Rey because the complex had the facilities necessary to train for tennis. (229 RT 38150.) Heffernan trained the brothers 10 hours a day. (229 RT 38152-38153.) Heffernan trained both brothers for three or four months, until Lyle decided to pursue other ventures. (229 RT 38077.)

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[3] Erik had spent the summer of 1989 training for and competing in amateur tournaments throughout the United States. (229 RT 38117-38122.) Erik was ranked number 9 in the Southern California Tennis Association. (229 RT 38101.)

Lyle was a strong athlete capable of training for long hours. In Heffernan's opinion, Lyle had the ability to become a highly-ranked, world class tennis player. (229 RT 38181.) Heffernan gave up coaching other students because he believed that Erik and Lyle had a chance to be successful professional tennis players. (229 RT 38106.)

In January 1990, Lyle purchased a fast-food restaurant in Princeton. (234 RT 39120.) Teresita Baralt, Lyle's aunt and godmother, encouraged her husband Carlos to lend Lyle the money from the Menendez estate to buy the restaurant. She felt this would help give Lyle some focus in his life. (286 RT 48666.) Once Lyle took over the business he poured his energy into it, working morning-to-night, waiting on customers, cleaning tables, doing whatever was required to make the business a success. (286 RT 48667.)[4]

b. The defense evidence.

The defendants also presented a picture of their relationship with their parents. It was a very different picture than the prosecutor had painted.

Lyle had been abused by Jose Menendez throughout Lyle's childhood. Jose frequently hit and "whip[ped]" Lyle. (258 RT 43163-43164; 259 RT 43241.) While staying with the Menendezes in the summer of 1977, Lyle's cousin, Brian Andersen, often heard Jose beat Erik and Lyle with belts and saw bruises on them. He estimated these beatings occurred more than once a week. (276 RT 46356-46358, 46364, 46365.)

When the defendants were young, Jose often tormented both of them in the pool, grabbing them by the hair and holding them under water. (258 RT 43121.) Diane Vandermolen and Kathleen Simonton, the boys' cousins, both witnessed this behavior. (277 RT 46599-46600; 278 RT 46962.)

As a boy, Lyle brought home a pet rabbit. (260 RT 43498.) Jose was displeased; he killed the rabbit by crushing its skull. (260 RT 43498-43499.)

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[4] Carlos Baralt, the executor of the Menendez estate, agreed to lend Lyle $300,000 from the estate for the purchase of the restaurant. (226 RT 37390.)

Jose often hit Erik for not doing well enough in sports. (257 RT 43090.) On other occasions Jose punched, slapped, or hit Erik with a belt. (257 RT 43091-43092.) Jose reacted violently if Erik cried, for he considered crying a sign of "weakness." (257 RT 43090, 43092.)

Beginning in their early childhood, Lyle became Erik's protector. (259 RT 43233, 43235, 43239-43240, 43243, 43247.) On one occasion, Erik went to Lyle in a panic because a canoe he had failed to secure floated away. (259 RT 43240-43241.) Erik was afraid he would be beaten for his mistake. (259 RT 43240-43241.) Lyle took the blame for him. (259 RT 43241.) Later that day, Erik heard the sounds of Lyle being beaten with a belt. (259 RT 43241.)

On another day, Jose took both brothers boating on a lake. Jose ordered them out of the boat and demanded they swim to shore, 150 feet away. The swim was too long for Erik; he weakened and started to go under. (259 RT 43236-43239.) Lyle swam to Erik and helped him to shore. (259 RT 43236-43239.)

Jose became enraged. (259 RT 43236-43239.) He grabbed both boys, forced them back in the boat, sailed again to the middle of the lake, and ordered Lyle to swim to one shore. When Lyle was halfway there, Jose ordered Erik to swim to the opposite shore. (259 RT 43238-43239.)

During family dinners, Jose cross-examined Lyle regarding his daily activities. When Kitty Menendez disagreed with Lyle's accounts, Jose would attack him. Sometimes Jose would hit Lyle; other times he would throw Lyle out the sliding glass door. (259 RT 43226-43227; 43229.) Brian Andersen testified that on many of these occasions, Jose would take off his belt, snap it in front of the entire family, and take Lyle

into the bedroom, from where Brian could hear the sound of Lyle being beaten. (276 RT 46352-46356.)

At times, Kitty Menendez would disagree with Lyle's accounts, even though they were true, simply to watch Lyle get into trouble. (259 RT 43230-43231.) According to Erik, it was not at all unusual for Kitty to falsely accuse Lyle of some trespass so that Jose would punish him. (259 RT 43231-43233.) Indeed, Brian Andersen described an incident in which he cut off the flower heads in Kitty's garden. Although he admitted to Kitty that he had done the deed, she told Jose that Lyle had done it. (276 RT 46400.) Lyle was punished. (276 RT 46400.)

Kitty made the boys write out lists of things they had done wrong during the day. (258 RT 43141, 43159.) When Jose got home, she would order the boys to read the list aloud to Jose who would then punish them. (258 RT 43141, 43159.)

Kitty herself often drank and flew into rages. (259 RT 43243, 43272, 43276, 43345, 43415.) Several other family members -- Marta Cano, Diane Vandermolen, Brian Andersen -- witnessed these rages. (273 RT 46607, 46390-46391, 48508.) Brian Andersen testified that during these rages, Kitty would often scream that she wished the boys had never been born. (276 RT 46391.)

When enraged, Kitty often beat Lyle. (260 RT 43515-43516.) Sometimes, Lyle would try to protect Erik during these rages by physically placing himself between Erik and Kitty. Kitty hit him when he did so. (259 RT 43243.) Erik recalled one incident in which Kitty was cutting something in the kitchen when Lyle called out to her, causing her to cut herself. (260 RT 43515.) Kitty chased Lyle around the house, caught him, and smeared blood on his face, blaming him for the accident. (260 RT 43515.)

Similarly, the record contained testimony that both brothers had been sexually molested by Jose Menendez. As to Erik, the molestation began when he was six years old. (257 RT 43074.) Jose Menendez would come into Erik's room, demand that he disrobe and massage his body. (257 RT 43086-43088.) Jose would touch Erik's penis with his hands and mouth; he told Erik this was how love was expressed. (257 RT 43088.)

Jose would close the bedroom door before initiating the "massages" of his sons. (258 RT 43111-43113.) Erik recalled a strict family rule: when Jose was in the bedroom with either him or Lyle, no one was permitted to walk down the hallway toward the bedroom doors. (258 RT 43113.)

But Erik was not the only family member to recall this chilling rule. Numerous other family members confirmed this edict: no-one was permitted in the hallway past the bedrooms when Jose was alone with one of the boys. (276 RT 46367 [Jose Menendez's nephew Brian Andersen]; 277 RT 46622-46623 [Jose Menendez's niece Diane Vandermolen]; 278 RT 46963-46964 [Jose Menendez's niece Kathy Simonton].) The rule was so strict, Kathy Simonton recalled, that guests could not even go down the hallway to use the bathroom if Jose was in the bedroom with one of the boys. (278 RT 46964.) The state has never offered an innocent explanation for this rule.

Over time, Jose began to insist that Erik "massage" Jose's penis. (258 RT 43116-43117.) He then began to force Erik to orally copulate him. (258 RT 43117-43118.) Erik was not yet eight years old. (258 RT 43118-43119.) Anal intercourse was next. (258 RT 43131.)

Jose's sexual abuse of Erik was corroborated by Andy Cano, one of the few friends Erik was allowed to have growing up. (259 RT 43319.) In his own testimony,

Erik said he told Andy about the sexual molestation when he was 12 or 13 years old. (259 RT 43319.) Erik was trying to find out if this type of behavior was normal for fathers. (259 RT 43319.) After broaching the subject with Andy, Erik swore him to secrecy. (259 RT 43351.)

Andy Cano confirmed this exact version of events. In his testimony, Andy said that when Erik was approximately 13, he asked Andy if Andy's father ever gave him "massages" in the genital area. (284 RT 48149.) In particular, Andy recalled Erik saying that Jose was massaging his "dick." (284 RT 48140.) Erik wanted to know if it was normal for fathers to give such massages. (284 RT 48149.) On several occasions over the next few months, Erik and Andy spoke about Jose's massages and Erik made clear that the massages were continuing and they were starting to hurt. (284 RT 48153-48155.)

Because Andy's parents were divorced, and he did not see his father often, he was unable to tell Erik if these massages were normal. (284 RT 48149.) Andy wanted to ask his mother if this was normal, but Erik told him not to do so. (284 RT 48150-48151.) He made Andy promise to keep the subject a secret; Andy promised. (284 RT 48151-48153.)

Kitty Menendez was usually at home during these encounters. (258 RT 43112, 43133-43134.) On the occasions when Jose would ejaculate in Erik's mouth, Erik would often vomit afterwards in the bathroom. (258 RT 43132-43133, 43183.) Kitty never came to his aid. (258 RT 43133-43134, 43183.) On other occasions after these encounters, Erik would be so upset that Jose would tell him not to come down to dinner. (258 RT 43135.) Kitty never came to check on him. (258 RT 43136.)

Before he was 11 years old, Jose told Erik that if he ever told anyone about the molestation, Erik would get no attention from Jose at all. (258 RT 43172-43173.) Later, Jose said that if he ever told anyone, he (Jose) would kill both Erik and the person he told.

(259 RT 43251.) The molestation continued through August of 1989, only days before the shooting. (259 RT 43223.)

The record contained substantial evidence that Lyle too had been sexually molested as a child. (260 RT 43511; 265 RT 44214-44215; 270 RT 45263, 45267, 45348, 45359.) For example, Erik testified that after he revealed that Jose had been molesting him for 12 years, Lyle told him "about some of the things that had happened to him with dad; that it had also happened to him for a period in his childhood." (260 RT 43511.) The prosecutor himself introduced testimony from Erik that Lyle did not want to speak about the molestation for several years after the offense. (265 RT 44214.) Lyle was trying to avoid ever having to talk about it. (270 RT 45263.)

In fact, in speaking to mental health expert Jerome Oziel, Lyle was "adamant;" he "did not want to talk about his own -- the sex between him and dad." (270 RT 45348.) Lyle "just wanted to avoid getting into the sex, and his molestation in particular . . . ." (270 RT 45360.) The prosecutor introduced evidence that Lyle ultimately **did** testify at the first trial to having been molested. (265 RT 44214.)

A number of witnesses provided circumstantial evidence corroborating the molestation. As noted above, Erik, Alan Andersen, Diane Vandermolen, and Kathy Simonton all confirmed the strict rule in the Menendez home; when Jose was alone in the bedroom either with Erik **or** Lyle, no one was permitted to walk down the hallway toward the room. (273 RT 45701; 276 RT 46367l 277 RT 46621; 278 RT 46963-46964.) When Jose Menendez was in a bedroom with Erik or Lyle, he was not to be disturbed. (*Ibid*.)

But the trial court did not allow Diane Vandermolen to testify about an incident that occurred when Lyle was only 8 years old. Diane was the niece of Jose and Kitty Menendez who stayed with them during the summer of 1976 when Lyle was 8 years old.

During the first trial, she testified that one night 8-year old Lyle came down to her bedroom and asked if he could sleep in her room because "he and his dad had been touching each other" in the "genital area." (RT 11797.) When Diane immediately told Kitty about this, Kitty dragged Lyle away by the arm. (RT 11798-11799.)

Evidence Showing Defendants' Mental State At The Time Of The Shooting

Both parties introduced evidence from which they could argue about defendants' mental state at the time of the shooting. The state's evidence consisted primarily of a December 11, 1989, tape recording made of the defendants by Dr. Oziel, a psychotherapist. In addition, the state introduced evidence regarding the purchase of the guns used in the shooting and attempts by Erik and Lyle to present an alibi. The state also presented direct testimony about the events which occurred from August 15, 1989, through the actual moment of the shooting itself.

a. The Oziel tape.

During the testimony of its first witness, Detective Les Zoeller of the Beverly Hills Police Department, the prosecution played a tape of statements the defendants made to a therapist, Dr. Jerome Oziel, on December 11, 1989. (222 RT 36459.) On the December 11 tape, the defendants discussed their relationship with their parents and the reasons why they killed them. (People's Exhibit 59.) The prosecution offered the tape to show premeditation and that neither brother had been abused or molested by Jose because there was no reference to such acts on the December 11 tape. In his testimony, however, Erik explained that he and Lyle had agreed not to discuss sexual abuse issues with Dr. Oziel so as to keep them a secret. (270 RT 45359.)

b. Purchase of the guns.

Erik and Lyle purchased two Mossberg shotguns from a sporting goods store in San Diego on Friday, August 18, 1989. (260 RT 43529.) The clerk told them they needed a California driver's license to purchase the guns. (260 RT 43525.) To make the purchase, they used a driver's license belonging to Donovan Goodreau, a friend of Lyle's, because Lyle's California license had been suspended and Erik had lost his wallet and license earlier in the summer. (260 RT 43523, 43544.) The court took judicial notice that Erik had been stopped for a vehicle violation in July 1989 and cited for driving without a valid driver's license. (260 RT 43544-43546.) Later, Marta Cano was with Erik when he obtained a Florida license because he had no California license. (287 RT 48805-48806.)[5]

They paid for the guns with cash and bought ammunition to go with them. (260 RT 43530.) Erik loaded one of the guns and placed both guns in the back of his car, which was filled with clothes and tennis equipment. (260 RT 43532-43534.) On Saturday, Erik and Lyle brought the shotguns to a rifle range to target practice. (260 RT 43559.) They learned that they could not fire shotguns at a rifle range; they also learned that they had purchased bird shot, which would be ineffective in self-defense. (260 RT 43559.) The clerk at the rifle range recommended they buy buckshot, which they did. (260 RT 43560.)

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[5] Goodreau lived with Lyle in Lyle's Princeton dormitory room in April-May, 1989. (230 RT 38352-38354, 38371.) Lyle asked Goodreau to move out after he discovered that Goodreau had lied and was not attending school. (230 RT 38375.) Apparently, Goodreau had been lying to everyone, pretending that he had been accepted at the university and planned to attend school the next year. (230 RT 38379.) Lyle was hurt and angry when he discovered that Goodreau had been lying to him. (230 RT 38388.) Goodreau left the dormitory hurriedly, and in his haste apparently left his driver's license behind. (230 RT 38357.) Goodreau moved to New York; he left no forwarding address with Lyle. (230 RT 38394.)

c. The false alibi, attempts to fabricate evidence, and "escape plans."

The prosecution introduced statements the defendants made to various people before and after the killings to show that the defendants attempted (1) to create an alibi for the night of the homicides, and (2) to raise a suspicion that the killings were committed by the Mafia and had some connection to Jose's business dealings.

Perry Berman was Lyle's friend and former tennis coach. (224 RT 36866-38667.) At 5:00 or 6:00 p.m. on August 20, 1989, Berman received a call from Lyle, who wanted to make plans to see Berman later that evening. (224 RT 36883.) Under careful questioning by the prosecutor, Berman testified that Lyle said he and Erik were going to the movies; Berman agreed to meet them after the movie at a food festival in Santa Monica. (224 RT 36883.) In closing argument, the prosecutor would suggest that this showed a pre-existing plan to set up an alibi for that night. (300 RT 51045-51046.)

In fact, however, on cross-examination Berman revealed that Lyle had called Berman not to meet after the movie, but to actually go with Erik and Lyle to the movie. (224 RT 37041.) Only when Berman revealed that he already had plans did Lyle arrange to meet him after the movie at the food festival. (224 RT 37041.)

Berman arrived at the food festival around 10:15 p.m. It was late and most of the concessions were closing; he did not see the brothers. (224 RT 36884.) Later, at about 11:00 p.m., Berman received two calls at home from Lyle. In the first, Lyle explained that he had gotten lost on the way to Santa Monica and the festival was closed by the time he arrived. Lyle suggested that Berman meet him and Erik at a restaurant in Beverly Hills. (224 RT 36887.) Berman at first demurred, but eventually agreed to come out. (224 RT 36887-36889.) In the second call, a few minutes later, Lyle asked Berman to come to his house; Berman said no. (224 RT 36891.)

Berman then left to meet Lyle and Erik at the restaurant. When he arrived, however, neither brother was there. (224 RT 36891.) Berman, angry at being stood up, decided to drive to the Menendez home to see why the brothers had not come. When he arrived, he saw numerous police cars outside. The police took his name and phone number, then told him there was some "trouble." Berman went home. (224 RT 36895-36896.)

Early the next morning, police called Berman and asked him to come to the police station to give a statement. (224 RT 36896.) Berman saw Erik and Lyle at the station. By this time Berman knew that Jose and Kitty had been killed; he asked the brothers if they suspected a robbery. Lyle said no, it was "business-related." (224 RT 36898.) Weeks later, Lyle again told Berman that his father's death was related to his business dealings. (224 RT 36904.)

The brothers spoke to the police immediately after the shootings and again in September 1989. (221 RT 37050, 36364.) In both interviews they said they were elsewhere at the time of the killings. (221 RT 36365; 222 RT 36409; Ex. 51 & 52.)

Richard Wenskoski, a bodyguard hired by Lyle to provide security while Lyle was in New York in September 1989, said that Lyle told him his father was killed by the "mob," or a Columbian drug cartel. (230 RT 38420.) Randy Wright, the attorney who lived near the Menendez home and whom the brothers saw the day after the killings, testified that Erik mentioned the possibility that his father was killed by the Mafia. (226 RT 37278.)

However, Detective Zoeller, the investigating officer, acknowledged that Lyle **never** suggested to him that the Mafia was connected to his parents' deaths. Lyle told Zoeller directly, "I don't believe the organized crime stuff." (222 RT 36469-36470.)

According to Zoeller, Lyle was most concerned with the family's privacy and keeping the family's name untarnished. (222 RT 36469.)

Two witnesses, Amir Eslaminia and Jamie Pisarcik, testified about Lyle's efforts to fabricate evidence. Eslaminia and Erik were classmates at Beverly Hills High School in 1988. (232 RT 38854-38855.) Eslaminia visited Erik in jail after Erik's arrest and later began visiting Lyle. (232 RT 38856.) At some point, Lyle asked him if he would give testimony favorable to the defense. (232 RT 38858.) The jailhouse conversations that Eslaminia had with Lyle on this subject were not specific. (232 RT 38859.) In July 1991, however, Lyle sent Eslaminia a letter in which Lyle asked him to testify to specific facts. (232 RT 38876; Ex. 121.) In general, the letter described a scenario in which Eslaminia would testify that Erik called him on August 19 (the Saturday before the homicides) and asked if Eslaminia could meet that day with Erik and his brother Lyle; that when he met them, Erik told him that they were in great danger and needed two handguns, but they could not say why; that Lyle seemed nervous or afraid; that Eslaminia told them he had one handgun at his house; that he retrieved it and gave it to Lyle; that Erik and Lyle then drove off; that Eslaminia realized after he heard of the deaths of Kitty and Jose that Erik and Lyle were in danger; and that Erik returned the gun to him on August 22 and did not discuss the situation, except to say that he and Lyle were not in danger. (232 RT 38878-38883.)

Eslaminia discussed the scenario set forth in the letter a bit with Lyle over the telephone, but never agreed to give this testimony. (232 RT 38868; 233 RT 38911.) Ultimately, Eslaminia did not testify for either side at the first trial. (233 RT 38920.) This was because several months prior to the first trial, Eslaminia got a telephone call from Lyle in which Lyle said that he would not be asking Eslaminia to testify. (233 RT 38917-38920.) Lyle said he had decided to take the stand and tell the truth as to what

happened. (233 RT 38912.)[6]

Lyle's girlfriend, Jamie Pisarcik, was the other witness who testified that Lyle asked her to give false testimony. Pisarcik and Lyle first met in 1986. (234 RT 39251.) She and Lyle stopped seeing each other in late spring 1989, but reunited after his parents' deaths. (234 RT 39265-39268.) At Lyle's request, Pisarcik moved to Los Angeles in November 1989. (234 RT 39268.)

Pisarcik visited Lyle in jail almost every day after he was arrested in March 1990. (235 RT 39279.) In December 1990, Lyle asked her to testify that his father had done to her what had been done to a character in a movie called "At Close Range." (235 RT 39279.) Pisarcik was familiar with this movie as she had seen it with Lyle. In the movie, a man surreptitiously gives his son's girlfriend a sedative, then tells the girl to stop seeing his son. The girl refuses, and the father violently rapes the girl. (235 RT 39279-39281.) Pisarcik said to Lyle, "I can't believe you're asking me to do this. It's a lie; nothing like that ever happened." (235 RT 39281.) Lyle said she had to do it because a large sum on money was to be placed in her bank account. (235 RT 39282.) Pisarcik said if money appeared in her account she would tell the police. Lyle said, "I figured you wouldn't go for this." (235 RT 39282.) Pisarcik continued to visit Lyle after this incident. (235 RT 39283.)

Eventually, Lyle told her that his parents had abused him when he was a child. (235 RT 39285.) Pisarcik did not believe him. She eventually stopped visiting him in jail and became estranged from him. (235 RT 39286-39288.)

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[6] Erik explained that for awhile before the first trial, Lyle was "adamant" about not revealing Jose's sexual abuse of them. (270 RT 45348; see also 289 RT 49175; 265 RT 44214l 279 RT 45263.) Lyle's aborted attempt to enlist Eslaminia was done to avoid having to reveal the molestation. (263 RT 43896; 270 RT 45262.)

Finally, the prosecution introduced nine pages police seized from Lyle's jail cell before the first trial. (231 RT 38751.) These pages contain references to "safehouses" in foreign cities and musings regarding possible travel routes. (*See* Exhibit 142.) They contain no plan to actually leave prison, however; thus, after reviewing the documents itself, the court precluded the prosecution witnesses from characterizing the evidence as "escape plans." (231 RT 38692.)[7]

d. Erik Menendez's testimony about the days and moments leading up to the shooting.

Once again, the defendants also presented evidence about their mental state at the time of the shooting. Once again, this evidence painted a very different picture than the prosecutor sought to paint.

In this regard, Erik testified to a series of emotionally-charged events that occurred during the five days preceding the shootings. On Sunday, August 13, one week before the shootings, Jose called Erik into his office to discuss the courses that Erik would be taking that fall at UCLA. (260 RT 43403.) In the course of this discussion, Jose told Erik that Erik would be expected to come home several nights a week to have dinner with Jose, so Jose could keep abreast of Erik's work. (260 RT 43406.) On those occasions, Erik would also be expected to stay the night. (260 RT 43406.)

Erik was devastated by this. It meant to him that sex with his father would continue, and his hope of escaping the abuse was gone. (260 RT 43407.) Erik left his father's study and went to his room in tears. He began packing clothes into his overnight bag. (260 RT 43409.) Kitty asked what he was doing. Erik said he was going to spend a

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[7] Again, Erik explained that Lyle was adamantly opposed to revealing their father's abuse. (265 RT 44175-44176, 44214; 270 RT 45263, 45348-45349.)

few days at a friend's house. Kitty said he could not go; she began pulling his clothes out of the bag. (260 RT 43410.) His mother left the room and his father entered a few minutes later. Jose told Erik he was not going anywhere. (260 RT 43410.)

On Tuesday, August 15, five days before the shooting, Erik saw his mother rip off Lyle's hairpiece and throw it at him, causing Lyle to break down. (260 RT 43413-43416.) Erik was shocked; he had not known about his brother's hairpiece before that incident. (260 RT 43416.)

Erik tried to comfort Lyle. During the course of the ensuing conversation, Erik for the first time revealed that Jose had been molesting him for 12 years. (259 RT 43224.) Erik told Lyle because Lyle had always been his protector. (259 RT 43224.) They stayed up talking most of that night. (260 RT 43427.)

Lyle promised Erik that he would talk to Jose about the abuse and make it stop. (260 RT 43428-43429.) The following day, Lyle told Kitty he wanted to speak to Jose about Erik. (260 RT 43435.)

Lyle planned to confront Jose when he returned from a business trip on Thursday. (260 RT 43444.) Erik stayed away from the house on Thursday until midnight; when he returned Jose confronted him, enraged that he had told Lyle. (260 RT 43444, 43453.) As he ran from Jose out of the house, Erik saw his mother. (260 RT 43456.) Kitty angrily told him that she had "always known." (260 RT 43456.) With Kitty chasing him, Erik ran to the guest house where Lyle was staying. (260 RT 43458.) Erik told Lyle that Kitty knew all along; Lyle asked her why she had not intervened. (RT 43460.) In a rage, Kitty responded:

> No one's ever helped me, why should I help you? I hate you, I hate you, I

wish you were never born.

(260 RT 43460.)[8]

Lyle then explained that he had told Jose earlier that day that the sexual abuse had to stop. (260 RT 43462.) When Jose told him to forget their conversation ever happened and to go back to Princeton, Lyle threatened to tell police or relatives if the abuse did not end. (260 RT 43463.) Jose accused Lyle of planning to reveal abuse regardless of what happened. (260 RT 43463.) He warned Lyle that he was ruining his life. (260 RT 43462-43464.) Erik told Lyle they would both die as a result of Lyle's threats to Jose. (260 RT 43464.)

The brothers discussed running away or going to the police. (260 RT 43466.) They dismissed the idea because they were afraid their parents would track them down. (260 RT 43468, 43470-43471, 43486-43489, 43497.) They knew their parents had rifles in the house. (260 RT 43467-43469.) In fact, Erik was with Kitty when she purchased one of these rifles in June of 1988. (260 RT 43469-43493.) Exhibit 61 was a sales receipt which reflected Kitty's purchase of the rifle on June 29, 1988. (260 RT 43493.) That night, defendants decided to purchase guns for protection. (260 RT 43466, 43498.)[9]

On Friday, the brothers drove to San Diego and purchased two shotguns. (260 RT 43509, 43533.) During the drive, Erik shared more details about the sexual abuse, revealing more of the violent aspects. (260 RT 43511-43513.) Lyle paled and became "hyper-anxious." (260 RT 43513.) He was very scared; he now understood the threat to

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[8] As noted above, other family members frequently observed Kitty tell the boys she wished they had never been born. (276 RT 46391.)

[9] Police corroborated this testimony about the guns, finding two rifles in Kitty's bedroom closet when they searched the house. (221 RT 36336.)

them their father posed. (260 RT 43513, 43520.)

On Saturday, the boys left the house and stayed away in order to avoid going on a shark fishing expedition planned for 3:00 that afternoon. (260 RT 43556.) Erik was afraid his parents had planned to kill him and his brother during the trip. (260 RT 43564.)

When they returned to the house at around 4:00, their parents were still there. (260 RT 43560.) Their mother told them they were late, but still going on the trip. (260 RT 43561.) When they arrived at the marina, Erik overheard his mother express concern to the captain that other people were on the boat; this confirmed his belief his parents had planned for something to happen on the trip. (260 RT 43564-43565.) Robert Anderson, the boat's captain, corroborated that the Menendezes were supposed to have arrived at the Marina by 3:00 p.m, but did not get there until 4:30 p.m. (257 RT 42998-42999.)

The brothers spent almost the entire trip -- until roughly 11:00 or 12:00 at night -- at the front of the boat, while their father remained at the back. (257 RT 42970-42971; 270 RT 43567-43568.) Anderson and Leslie Gaskill, a deckhand, both noticed that the boys huddled together at the front of the boat throughout the trip. (257 RT 42970, 43016-43017.) Gaskill observed a palpable tension between Jose, Kitty, Erik, and Lyle. (257 RT 42961.)

On Saturday night, Jose tried to break into Erik's bedroom. (261 RT 43585-43587.) Erik told Lyle about it on Sunday morning. (261 RT 43591-43292.) Erik stayed away from the house until around 9:30 p.m. that night. (261 RT 43599.) Lyle told Erik of the conversations he had with his parents that day. When Lyle mentioned a summer tennis camp that Jose had been encouraging Lyle to enroll in, Jose asked him, "[w]hat does it matter anymore?" (261 RT 43600-43601.) This response concerned Erik. (261 RT 43601.) Lyle told Erik that Perry Berman had telephoned and that Jose had lied to

Perry, telling him that Lyle was not at home. (261 RT 43600-43602.)

The brothers wanted to leave. (261 RT 43604.) However, when Lyle told Kitty they were going out, she told them they could not leave. (261 RT 43610-43611.) Jose also told them they could not leave the house. (261 RT 43612.) Jose ordered Erik to go up to his bedroom; he (Jose) would "be there in a minute." (261 RT 43612.)

For the first time in his life, Lyle stood up to Jose and told him "[y]ou're not going to touch my little brother. You're never going to touch him again." (261 RT 43614.) Jose was closing in on Lyle and was very angry. (261 RT 43617.) Lyle was backing away. (261 RT 43617.) Lyle's face was drawn and pale; he was scared and shaking. (261 RT 43621; 265 RT 44208.) Erik had never seen him like that. (261 RT 43621.)

Lyle asked Kitty if she was going to "let this happen?" (261 RT 43618.) After she replied that he had "ruined this family," Jose pulled her into the den telling her "let's go Kitty." (261 RT 43619.) Lyle then ran upstairs and yelled, "It's happening now. They were waiting for you to get home and it's happening now." (261 RT 43620.) Erik testified as to his understanding of what Lyle meant. At the time, Lyle's face was drawn and pale. Lyle was scared and shaking. Erik had never seen Lyle like that. From the look on Lyle's face, Erik believed that Lyle thought they were about to die. (261 RT 43620-43621; 265 RT 44208.)

Erik ran to his room to get his gun. (261 RT 43621.) He then ran outside to the car where the shotgun shells were. (261 RT 43621-43622.) He was in a panic; he thought his father was going to come out of the den any moment with the rifles. (261 RT 43623.) Like Lyle, he too thought they were about to die. (261 RT 43623.) Both Erik and Lyle loaded their guns at the car. (261 RT 43624.)

Erik loaded his gun as quickly as he could; his goal was to get back to the den before his father came out. If Jose got out of the den first, it was all "over." (261 RT 43624.) Erik told Lyle to hurry and ran back to the den. (261 RT 43624-43625.)

When he got there, he pushed open the doors. (261 RT 43627.) Erik burst into the room; the lights were off and he saw Jose's shadow. (261 RT 43628.) His parents were both standing; his father was walking towards him. (261 RT 43629-43630.) Erik immediately fired his gun and continued to fire at his parents until there was no more ammunition. (261 RT 43629-43631.) He did not remember where Lyle was at this time. (261 RT 43631.) Not until after he finished firing did he hear the sounds of Lyle's gun. (261 RT 43632.)

Erik ran out toward the car. (261 RT 43633.) Lyle joined him there a moment later. (261 RT 43635.) Erik was scrambling for more shells. (261 RT 43636.) Lyle returned to the den; Erik heard one more shot and saw Lyle leave the den. (261 RT 43637-43638.)

Without objection Erik explained that the shooting occurred "[b]ecause **we** were afraid." (257 RT 43073, emphasis added.) His father had said he would kill him and whomever he told if he ever revealed the molestation; that is what they thought was about to happen. (257 RT 43073-43074; 261 RT 43623-43624, 43645.)

The two sat down outside the den. Erik began to cry. (261 RT 43640.) Lyle put his arm around him. (261 RT 43640.) Both assumed that police would arrive within moments. (261 RT 43640-43641.) When police did not arrive, they decided to pick up the shells and leave the house. (261 RT 43642.) Later they looked in the den to see if the rifles were there. (261 RT 43669-43671.) It was not until they saw that Jose and Kitty did not have rifles that they realized they had been wrong about believing the guns were

in the den. (269 RT 45079.)

Evidence Kept From The Jury At The Second Trial.

The record of the second trial is most notable for what is missing: a wealth of evidence from relatives and family friends regarding the sexual, physical, and psychological abuse that Lyle suffered as a child. Most of it was presented at the first trial, little of it at the second. As discussed above, at the first trial Lyle's older cousin, Diane Vandermolen, testified that when Lyle was only eight years old he asked if he could sleep in her room; Lyle was scared to sleep in his own room because Jose Menendez was touching Lyle's genitals and forcing Lyle to touch his. (RT 11797.) Diane told Kitty, who angrily dragged Lyle upstairs by his arm. (RT 11798-11799.) Although this directly corroborated the defense theory of a lifetime of sexual abuse, the trial judge at the second trial excluded this evidence. (277 RT 46572-46574.) The trial court also excluded evidence of an essay Lyle wrote for school when he was 14 years old; the essay is about a man put on death row for killing the person who "had just sexually molested and nifed [sic] his son." (CT 12252; 260 RT 43481.)

Similarly, the prosecutor excluded the testimony of family members, close friends, and a variety of coaches and teachers, who at the first trial described numerous incidents of physical and psychological abuse they witnessed Lyle and Erik suffer at the hands of their parents. These incidents ranged from public humiliation and mocking, belittling comments to physical assaults intended to terrify a young child.

The Prosecutor's Closing Argument

The prosecutor argued in some detail about the type of parent Jose Menendez was and the warm and loving relationship he had with his sons. Having kept out a wealth of

information showing the type of abuse to which the defendants were subjected, the prosecutor argued with a straight face that Jose Menendez was a patient man, a loving father who was not the "kind of man that would be abusing his sons." (300 RT 50991.) He loved both Lyle and Erik and wanted to "nurture their development." (300 RT 50971.) Jose Menendez was not a "punitive man." (300 RT 50972.) Jose Menendez was neither a harsh nor a ruthless man toward his sons. (300 RT 50972, 50976-50977.)

There was "no evidence whatsoever that the sexual abuse ever took place." (302 RT 51377.) "There is no corroboration of sexual abuse." (302 RT 51378.) Jose Menendez was "restrained and forgiving. [He was] not a violent and brutal man." (302 RT 51472.) There was "no evidence" presented that Jose Menendez was abusive. (306 RT 52216.) The prosecutor asked the jury "where . . . do we have evidence of physical and sexual abuse?" (306 RT 52217.) Having successfully excluded Diane Vandermolen's testimony about Lyle having been molested when he was 8 years old, the prosecutor looked jurors in the eye and told them that "[]in this whole trial you did not hear any evidence, other than from Erik Menendez, of . . . physical and sexual abuse." (306 RT 52218-52219.) The physical and sexual abuse "wasn't proven here in court." (306 RT 52119.) As to Andy Cano, who testified that Erik revealed the molestation when he was 12 or 13 years old, the prosecutor's position was simple: Andy was a liar. (302 RT 51481-51485.)

Apparently agreeing that the sexual abuse had not been proven, jurors convicted of first degree murder.

The New Evidence.

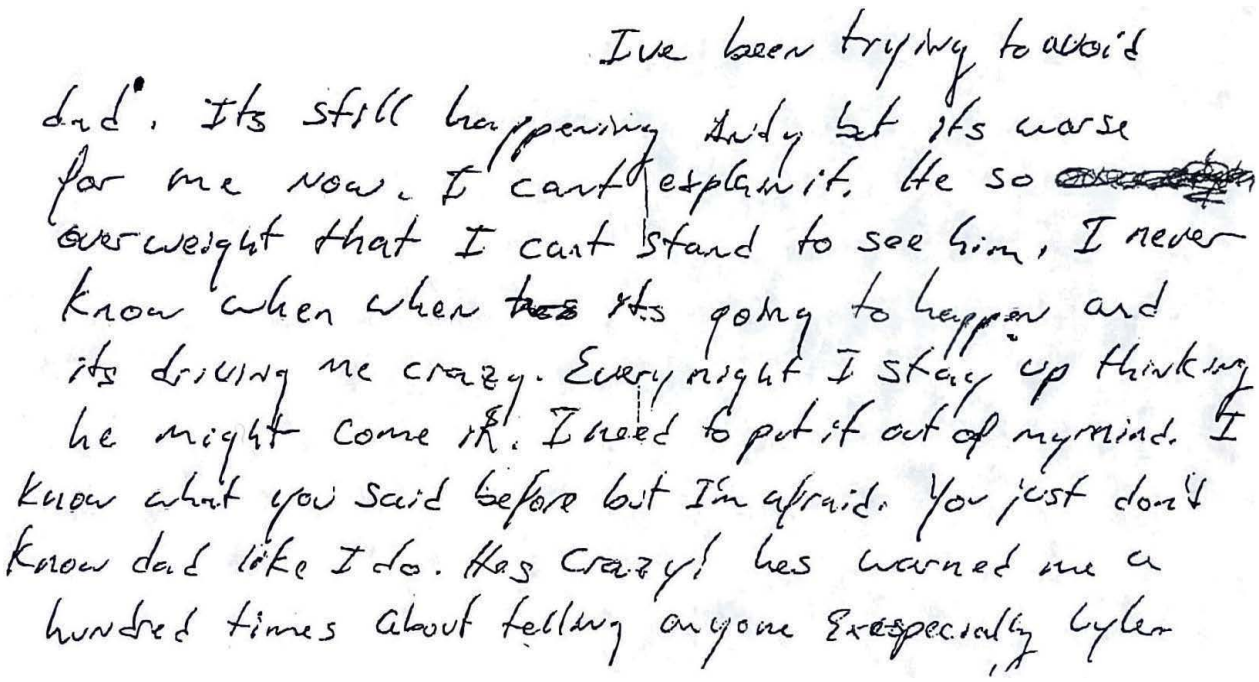
In evaluating the prosecutor's position that "the abuse never happened" and that Andy Cano was lying, jurors were unaware of a letter Erik wrote to Andy shortly after the

holidays in 1988, and months before the August 1989 shootings. In that letter, Erik first describes a company holiday party held at the Menendez home for the holidays. He then turns to more personal matters, telling Andy that he (Erik) wished he could talk to his mother about "dad and I" but he could not "risk it" because she would just tell Jose:

> At times I wish I could talk to her [mom] about things you know? Some day. . . Especially dad and I but the way she worships him and tells him everything, I (sic) so afraid she'll tell him whatever I say. I just can't risk it. (Exhibit A.)

Of course, this directly supports the defense theory that Jose had warned the boys that if they told anyone about the abuse, he (Jose) would kill them. (259 RT 43251.)

But the letter goes on. Erik tells Andy that Jose is continuing to molest him:


Ive been trying to avoid dad. Its still happening Andy but its worse for me now. I cant explain it. He so overweight that I cant stand to see him, I never know when when ~~hes~~ its going to happen and its driving me crazy. Every night I stay up thinking he might come in. I need to put it out of my mind. I know what you said before but Im afraid. You just don't know dad like I do. Hes crazy! hes warned me a hundred times about telling anyone Exespecially Lyle

This portion of the letter directly supports the defense theory that (1) sexual abuse had

occurred, (2) the abuse was continuing as recently as a month before the shooting (3) Jose warned the boys not to divulge the molestation and (4) Erik was frightened as a result.[10]

In evaluating the prosecutor's position that Jose Menendez was "not a violent and brutal man" and "not the kind of man" that would abuse children, jurors never heard from Roy Rossello. In 1983, when he was 13 years old, Mr. Rossello became a member of the Latin boy band Menudo. (Rossello Declaration at para. 1.) At the time, Jose Menendez,

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10. The letter is undated. Nor is there an envelope which has a post mark. But the letter can be dated by its contents in five ways:

- On page one of the letter Erik talks about a Christmas party held at the house for Jose Menendez's business. That party was held in December 1988, eight months before the shooting. (Declaration of Robert Rand at para. 2-4, attached as Exhibit I.)

- On page three of the letter Erik talks about a "new [tennis] coach Mark." At trial, prosecution witness Mark Heffernan testified that he was the tennis coach hired to coach Erik and Lyle in the fall of 1988. (229 RT 38064.)

- Also on page three of the letter, Erik writes that next year[]'s the important year" for Andy since "11th grade transcripts are what colleges look at." This means that at the time the letter was written, Andy was in 10th grade. Andy Cano began 10th grade in the fall of 1988. (Erik Menendez Declaration at para. 7.)

- Erik writes on page three that he is looking forward to starting college "next year." Erik Menendez's senior year in high school was 1988-1989; he would be starting college in the fall of 1989. (Erik Menendez Declaration at para. 7.)

- Finally, Erik signs the letter "Merry Christmas."

Taken together, these references show that the letter was written (1) after the fall of 1988 (when Mark Heffernan was hired and the Menendez holiday party was held), (2) while a "Merry Christmas" greeting was still timely and (3) before the 1989-1990 school year began (Andy's "important" 11th grade year and Erik's freshman year at college). In short these references all point to the letter as being written around Christmas, 1988, eight months before the shooting.

was an executive at RCA Records. (*Id*. at para. 3.) Jurors never knew that in the fall of 1984, when the group was appearing in New York, the group's manager Edgardo Diaz asked Roy to "do a favor," and instructed him to go downstairs at the hotel and join Jose Menendez in a limousine. (Rossello Declaration at para. 3.) Roy did so, and was taken to a home in New Jersey, given wine by Jose Menendez and anally raped. Roy lost consciousness and woke up back in his hotel. His was bleeding from the anus. (Rossello Declaration at para. 4-6.) Jurors never knew that Jose Menendez raped Rossello a second time in a New York City hotel. (Rossello Declaration at para. 8.)

ARGUMENT

I. BECAUSE THE NEW EVIDENCE -- IF CREDIBLE -- WOULD RESULT IN A DIFFERENT OUTCOME AT TRIAL, AN ORDER TO SHOW CAUSE SHOULD ISSUE.

To warrant habeas corpus relief based on "new evidence," a habeas petitioner must provide evidence "that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." (Pen. Code, § 1473, subd. (b)(3)(A).) "New evidence" is "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible . . . ."

The new evidence has been described in detail above. Both pieces of new evidence went to the central factual question jurors were asked to resolve: did the sexual abuse occur? The letter to Andy Cano directly undercuts the state's claim that there was no sexual abuse, and the testimony of Roy Rossello just as directly undercuts the state's claim that Jose Menendez was neither a violent nor brutal man and was not the "kind of man" who would sexually abuse a child.

In assessing whether this evidence "would have more likely than not changed the outcome at trial," it is important to note that "change the outcome at trial" does not mean the new evidence would have to result in a unanimous acquittal. Instead, since a hung jury is a more favorable result, the question is whether the new evidence could reasonably have persuaded one or more jurors that the sexual abuse did, in fact, occur and that manslaughter was the proper verdict under an imperfect self-defense theory. (*See People v. Hendrix* (2022) 13 Cal.5th 933, 947 n.6; *People v. Soojian* (2010) 190 Cal.App.4th 491, 518-521.)

Here, the new evidence could certainly have changed the outcome and resulted in, at a minimum, a hung jury. As to both petitioners, the juries at the first trial -- *even without hearing this new evidence* -- reached a very different outcome, splitting nearly evenly between convicting of murder and convicting of manslaughter. And while the evidence at the second trial was different, the fact of the matter is that the objective record of deliberations shows that even with the trial court's exclusion of substantial defense evidence, the second jury also struggled with the case. Thus, as noted above, jurors deliberated for over 35 hours over the course of seven court days before two of the jurors were replaced with alternates. (CT 13094-13104.) After the replacement, the jurors deliberated more than 20 hours over the course of five more court days before convicting. (CT 13104-13107, 13231-13232.) Of course, the length of jury deliberations has long been recognized as an indication of a close case. (*See*, *e.g.*, *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour deliberations was a "graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation shows close case].)

In making this argument petitioners recognize that the statutory definition of new evidence excludes evidence which is "merely cumulative, corroborative, collateral, or

impeaching." (Pen. Code § 1473, subdivision (b)(3)(B).) This parallels the longtime federal rule, which bars granting a new trial based on new evidence which is "merely cumulative or impeaching." (*Mesarosh v. United States* (1956) 352 U.S. 1, 9.)

The salutary purpose of these limitations is to prevent the granting of a new trial for evidence that is of little consequence -- evidence that is properly described as "*merely* cumulative, corroborative collateral or impeaching." But where evidence corroborates a theory presented at trial, or impeaches a prosecution theory, it will still be considered new if it is "sufficiently important in the ascertainment of the truth" such that it is not "*merely* cumulative, corroborative, collateral, or impeaching." (*See United States v. Atkinson* (E.D.N.C. 1977) 429 F.Supp. 880, 885. *Accord United States v. Davila* (9th Cir. 1970) 428 F.2d 465, 466 [impeaching evidence will nevertheless require a new trial where a different result is probable had the evidence been introduced]; *United States v. King* (E.D. Va. 2002) 232 F.Supp.2d 636, 645, aff'd (4th Cir. 2003) 71 Fed.Appx. 192 [same]; *United States Lipowski* (D.N.J. 1976) 423 F.Supp. 864, 867 [same]; *Unites States v. Gordon* (D.D.C 1965) 246 F.Supp. 522, 525 [impeaching evidence sufficient to require new trial where it was "impeaching evidence of a very serious nature under the circumstances of this case."].)

So at the end of the day, in determining if an Order to Show Cause should issue in this case, the question is not whether the new evidence can mechanically be characterized as either cumulative, corroborative or impeaching. The question is whether, if credible, the new evidence could have resulted in a different outcome at trial. If so, then an Order to Show cause should issue so the Court can assess whether, in fact, the evidence is credible. (*See In re Bacigalupo* (2012) 55 Cal.4th 312, 333 [credibility assessments are not made at the early, prima-facie-case stage of habeas proceedings, but instead are made

later -- if necessary -- with the benefit of an evidentiary hearing.].)[11]

II. BECAUSE PETITIONERS HAVE FILED THIS PETITION WITHIN FIVE MONTHS OF LEARNING THAT JOSE MENENDEZ ANALLY RAPED A 14 YEAR-OLD CHILD IN 1984, THE PETITION IS TIMELY FILED.

California law does not contain a defined time limit within which a habeas petition must be filed; instead, the rule is flexible and provides that a habeas petition should be filed without "substantial delay." (*In re Robbins* (1998) 18 Cal.4th 770, 780.) "Substantial delay is measured from the time a petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*Ibid*.) The facts supporting the claim and the legal basis for the claim are referred to as "triggering facts." (*Ibid*.)

A petitioner may avoid a finding of substantial delay by alleging "facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time." (*Ibid*.) Although there are no hard and fast rules, a delay of five months between discovery of triggering facts and filing a petition is not considered substantial. (*Compare In re Stankewitz* (1985) 40 Cal.3d 391 [finding no delay where petition filed a year and a half after obtaining the operative declarations]; *Robbins*, *supra*, 18 Cal.4th at pp. 795-796 [no delay where petition filed five months after discovery of triggering facts.].) Indeed, in explaining the "substantial delay" rule to the United States Supreme Court, the state itself has conceded that "a 5-month span from discovery of the claims to presentation of the claims would be reasonable." (*Walker v. Martin*, 2010 WL 4818791 at * 12.)

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11. Section 1473 also requires the new evidence to be presented "without substantial delay." As discussed in Argument II addressing timeliness, because this petition has been filed within five months of Mr. Rossello's declaration, there is no substantial delay.

Here, because petitioners were indigent they had appointed counsel at both trial and on appeal. Their appeal was final in state court when the state supreme court denied review in May of 1998. Because petitioners were and are indigent, they have had no funds to hire counsel or investigators. (Erik Menendez Declaration at para. 2-3; Lyle Menendez Declaration at para. 2-3.)

In November 2022 petitioners were told about Roy Rossello by journalist Robert Rand. (Erik Menendez Declaration at para. 10; Lyle Menendez Declaration at para. 10.) Mr. Rossello provided a signed declaration in April of 2023. (Rossello Declaration at page 3.) This petition, based largely on Mr. Rossello's declaration, has been filed within months of learning of Mr. Rossello's existence, and within weeks of obtaining his declaration. This is well within five months of counsel's discovery of "triggering facts." The petition was timely. (*See In re Robbins*, *supra*, 18 Cal.4th at pp. 795-796 [no delay where petition filed five months after discovery of triggering facts.].)

It is true, of course, that petitioners became aware that the Andy Cano letter was new evidence sometime in 2020. (Erik Menendez Declaration at para. 5-8; Lyle Menendez Declaration at para. 4-8.) But at that time, investigation into the case was ongoing. (Erik Menendez Declaration at para. 9; Lyle Menendez Declaration at para. 9.) In order to avoid the prospect of filing numerous and successive habeas petitions, petitioners waited until the investigation was complete to file for relief. (Erik Menendez Declaration at para. 9-10; Lyle Menendez Declaration at para. 9-10.) This is precisely the approach suggested by the California Supreme Court. (*In re Robbins*, *supra*, 18 Cal.4th at p. 780. *Accord In re Gallego* (1998) 18 Cal.4th 825, 838, n.13; *In re Sanders* (1999) 21 Cal.4th 697, 730, n. 1; *In re Douglas* (2011) 200 Cal.App.4th 236, 244.) And because further investigation did in fact reveal the basis for additional claims -- the Roy Rossello declaration -- petitioners' forbearance actually did prevent the filing of successive habeas

petitions.[12]

12. As noted in the Petition, petitioners each filed a habeas petition in the state supreme court back in 1998 and 1999; those petitions were denied in 1999. There is a general policy of courts to "refuse[] to consider newly presented grounds for relief which were known to the petitioner at the time of [a] prior [petition]." (*In re Clark* (1993) 5 Cal.4th 750 at p. 768; *see also In re Horowitz* (1949) 33 Cal.2d 534, 546-547.) The rule is not absolute, however. A court may entertain a successive petition if the petitioner can adequately explain the need for the new petition. Thus, "[b]efore considering the merits of a second or successive petition, a California court will first ask whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether the explanation justifies the piecemeal presentation of the petitioner's claims." (*In re Clark*, *supra*, 5 Cal.4th at p. 774.)

Where the factual basis for a claim is unknown to a petitioner, a second petition raising that claim will not be barred as successive. "[W]here the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made, or where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible." (*In re Clark*, *supra*, 5 Cal.4th at p. 775.) Here, the factual components of the new evidence claims were unknown to petitioners when they filed their prior habeas petitions. Thus, these petitions may not be summarily denied as successive.

CONCLUSION

At this early stage of the habeas process, the Court need not decide if relief is proper. Nor is the Court yet charged with making credibility findings. Instead, the Court must assume the truth of petitioner's factual allegations and decide whether an Order to Show Cause should issue. For all the reasons discussed above, and assuming the truth of petitioner's factual allegations, one or more jurors could have reached a different verdict had the new evidence been presented. Accordingly, an Order to Show Cause should issue.

DATED: 5/2/23

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, declare as follows: I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, California 94702.

On May 3, 2023, I served the within:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

upon the parties names below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

Mr. Lyle Menendez, K13758
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I declare under penalty of perjury that the foregoing is true. Executed on May 3, 2023 in Berkeley, California.



Declarant