

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Criminal Division

Clara Shortridge Foltz Criminal Justice Center Dept. - 56W

XCNBA068880-01

September 15, 2025

The People of the State of California

8:30 AM

vs.

MENENDEZ, ERIK GALEN

Honorable William C. Ryan, Judge

C. J. Candell, Judicial Assistant

Not Reported, Court Reporter

PC187(a), PC187(a), PC182(a)(1)

NATURE OF PROCEEDINGS: Judicial Action

The following parties are present for the aforementioned proceeding:

No Appearances

The matter is called for Judicial Action.

MEMORANDUM OF DECISION

(HABEAS CORPUS)

AT CHAMBERS

Petition for writ of habeas corpus by Petitioners Erik Menendez and Lyle Menendez, represented by Mark Geragos, Esq., Cliff Gardner, Esq., Michael S. Romano, Esq., and Milena Blake, Esq. Respondent, the People of the State of California, Represented by Deputy District Attorney Seth Carmack.

BACKGROUND

In 1993, Petitioners, who are brothers, were tried for the first time for the murder of their parents, Kitty Menendez and Jose Menendez *1. In this first trial, prosecutors argued that the brothers killed their parents to inherit their parents' money. Petitioners admitted they shot their parents but argued imperfect self-defense *2. Though tried together, Petitioners had separate juries. Both juries in the first trial hung, unable to unanimously agree on first degree murder, or one of the lesser included offenses of second degree murder, voluntary manslaughter, or involuntary manslaughter.

In 1996, Petitioners were retried. At this second trial, the parties' theories remained essentially the same, but the evidence of abuse was limited. This time, because of this exclusion, the prosecution argued that the brothers

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likely fabricated the abuse allegations, there was no way to corroborate these allegations, Jose was not the kind of man who would abuse his sons, and Cano lied on the stand. The trial court refused to give the jury an imperfect self-defense instruction, finding the Petitioners failed to demonstrate they believed they were in imminent danger during the second trial, and the jury convicted Petitioners of two counts of first degree murder with lying-in-wait and multiple murder special circumstance allegations, plus one count of conspiracy to murder their parents. Their convictions were affirmed in full on appeal. (People v. Menendez (B104022, Feb. 27, 1998) [nonpub. opn.] (Menendez).)

On May 3, 2023, filed the Petition alleging the discovery of two new pieces of evidence that would have more likely than not changed the outcome of their second trial, at which they were convicted of murdering of their parents. (Pen. Code *3, §1473, subd. (b)(3(A)).) First, Petitioners present a letter from Erik Menendez to Andy Cano, which Petitioners allege corroborates Cano's testimony and the sexual abuse allegations Petitioners made at trial. (Petn. at p. 4; Exh. A.) Second, Petitioners present a declaration of Roy Rossello, a member of the popular 1980's band named Menudo, admitting he was anally raped and orally copulated by Jose in 1983 or 1984. (Exh. F.) Petitioners allege that this new admission counters the prosecution's argument that Jose was "restrained and forgiving", "not a violent and brutal man", and "not the kind of man" that would abuse his children". (Petn. at p. 5.)

On October 24, 2025, Respondent filed a motion requesting the recall and resentencing of Petitioners pursuant to section 1172.1, stating that the brothers "have demonstrated exceptional post-conviction conduct" and that "they no longer present a public safety risk pursuant to Penal Code Section 667.5 such that their current sentence is no longer in furtherance of justice". (Motion at p. 3.) Ultimately, on May 13, 2025, Petitioners were resentenced to 25 years to life. (Amended AOJ, dated May 15, 2025.)

Meanwhile, Respondent filed an Informal Response to the instant Petition on February 21, 2025, and Petitioners filed their Reply to the Informal Response on May 22, 2025. The court issued an order to show cause on July 7, 2025.

Respondent filed a Return on August 2, 2025, arguing that the Cano Letter does not qualify as new evidence that was discovered after trial, is inadmissible hearsay as to Lyle, is not credible because it contradicts in part the testimony of Cano and Erik at both trials *4 and in light of Petitioners' history of fabricating evidence, deceitfulness, and suborning perjury. Respondent also assert that Petitioners substantially delayed bringing these claims and that neither the Cano Letter nor the Rossello Declaration would have changed the outcome at trial.

On August 14, 2025, Petitioner filed a Traverse arguing the Cano Letter and Rossello Declaration are relevant to what they assert was the central factual question presented by the defense at trial: whether Petitioners were sexually abused by Jose. Petitioners also argue that there was no delay in bring these claims, both pieces of

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newly discovered evidence are admissible, and the court should order an evidentiary hearing to determine the credibility of the Cano Letter and the Rossello Declaration.

COMMITMENT OFFENSE

The foregoing facts are taken from the unpublished opinion affirming Petitioners' convictions on appeal in *People v. Menendez* (Feb. 27, 1998, B104022) [nonpub. opn.] (Menendez)), including the footnotes, renumbered here.

Prosecution's Case-in-Chief

On the morning of August 18, 1989, two days before the slayings, Mark Heffernan, Erik's tennis coach, gave Erik a two-hour lesson at the Menendez residence. Mr. Heffernan did not notice anything unusual in Erik's demeanor.

On August 18, 1989, Erik and Lyle purchased two Mossberg shotguns at a Big 5 Sporting Goods store in San Diego for \$200 each.

Erik presented a California driver's license in the name of "Donovan Jay Goodreau." *5 Erik gave a nonexistent address in San Diego. Erik indicated that the address on the driver's license was incorrect since he had just moved. Erik signed the firearm transaction form and two entries on the federal firearm log using the name "Donovan Goodreau." Perry Berman received a telephone call from Lyle during the afternoon of August 20, 1989. They discussed getting together in the evening. Berman said he planned to go to the "Taste of L.A.," a food festival at the Santa Monica Civic Auditorium. Lyle indicated that he and Erik were going to see the movie "Batman" in Century City, but after the movie was over, at about 9 or 9:30 p.m., he would go to the food festival. Berman waited until about 10:20 p.m. for Lyle and Erik to show up. However, the brothers did not arrive, and Berman went home.

At about the time that Berman was leaving the food festival, Avrielle Krom, a neighbor of the Menendez family, heard a series of 10 to 12 popping sounds. There was a series of popping sounds and then a lapse and then another series. Krom's son picked up the phone to call 911 but was dissuaded from doing so because Krom thought the sounds were simply firecrackers.

Berman received two calls from Lyle at about 11 p.m. In the first, Lyle explained that he had gotten lost on the way to Santa Monica and the festival had closed by the time he arrived. Lyle suggested that Berman meet him and Erik at a restaurant in Beverly Hills. Berman was reluctant, but because Erik was very insistent, Berman agreed. During the conversation, Lyle sounded "anxious" and "excited." The second call was just a few minutes later, and Lyle asked Berman to meet at the Menendez home instead of the restaurant. Berman demurred and agreed to wait to give Lyle and Erik time to go home and pick up Erik's fake identification.

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Neither Lyle nor Erik showed up at the restaurant. Berman, upset at the turn of events, left the restaurant and decided to drive to the residence so he could "yell at" Lyle and Erik. When he arrived, he saw numerous police cars outside and was told by the police that there was some "trouble." Berman went home.

A 911 dispatcher, received an emergency call at 11:47 p.m. concerning a possible shooting at the residence. The call made by Lyle said, "someone killed my parents." Lyle indicated that he had not heard anything unusual, he had just come home and discovered his parents had been shot to death.

Beverly Hills police officers responded to the 911 call. When the officers reached the front of the Menendez residence, Lyle and Erik ran out the front door of the house, toward the officers, screaming.

Leslie H. Zoeller was the investigating officer. He recovered "wadding," "spacers" for shotgun shells, and shotgun pellets. Zoeller opined that a total of 13 to 15 shotgun blasts were fired in the den. No ammunition was found inside the residence. No weapons were found in the den. The only weapons found in the house were two unloaded .22 caliber rifles in a closet off the upstairs master bedroom.

The brothers spoke to the police after the bodies of their parents had been removed from the den and again in September 1989. In both interviews they said they were elsewhere at the time of the killings. After the initial interview, they returned to the residence and requested entry so they could remove their tennis rackets from the den. During the initial interview, Lyle indicated the possibility that the killings were "business-related."

Jose and Kitty expired from multiple gunshot wounds. Jose suffered four gunshot blasts with buckshot ammunition. Kitty suffered seven gunshot blasts with buckshot ammunition and two gunshot blasts with birdshot ammunition. The wounds to Jose's legs occurred after death.

Randolph Wright, an attorney and friend of the family, talked to Erik and Lyle the day after the murders. Erik mentioned the possibility of a Mafia murder and discussed the possibility of probating his father's will. Lyle told Wright that he thought his father might have changed his will and that changes might be in the family computer. Lyle told Wright that there was a family safe, and Lyle said he could get the safe immediately. He did so and brought it back to Wright's residence. Erik spent two nights in the spare bedroom with the safe before it was opened. Lyle did not want anyone else present when the safe was opened except for his brother. After the safe was opened in privacy, Lyle informed the family and friends that the safe was empty. Later that day, other relatives found Jose's 1981 will, and under the terms, Lyle and Erik were the sole remaining beneficiaries.

At about the same time the 1981 will was found, family members realized there were entries on the family computer possibly relating to a new will. Three files on the computer directory were named "Will," "Erik" and "Lyle." No one was able to retrieve the contents of the files.

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Howard Witkin, a computer expert, testified that he received an "emergency call" from Lyle regarding files on a home computer. Witkin found the files but no information. Lyle asked Witkin to erase the disk because he was selling the computer and wanted to make sure that information relating to family financial matters was not discovered. Lyle also told Glenn Stevens that he found a computer expert to erase whatever was on the disk.

Richard Wenskoski was hired by Lyle within a few days of the killings to provide security services. Wenskoski provided 24-hour "around the clock" protection while Lyle was on the East Coast. Lyle told Wenskoski that either the Colombian Cartel or the Mafia was responsible for the killings. Lyle also told his girlfriend, Jamie Pisarcik, that the killings must have been mob related. Lyle terminated Wenskoski's services after about a week saying a deal had been reached and his life was no longer in danger. Both brothers continued to perpetuate the Mafia hoax. Lyle hired bodyguards to protect him during the Fall 1989 semester at Princeton University. Erik told Beinian, in late September or early October, that the killings were "business-related" and involved a man named Noel Bloom. His father had a problem with Bloom after the purchase of a distribution company.

At the time of his death, Jose was Chairman of the Board at L.I.V.E. Entertainment with an annual salary and benefit package of approximately \$1,300,000. His assets included the family home in Beverly Hills valued at between \$3,500,000 and \$4,000,000 with a net value of approximately \$1,500,000; property in Calabasas with a value of approximately \$1,350,000; and stock in L.I.V.E. Entertainment valued at \$5,000,000.

Erik and Lyle each received \$326,747.62 in life insurance proceeds as a result of their father's demise at age 45. Following the murders, Erik and Lyle went on shopping and spending sprees. Just four days after the murders, Lyle purchased three Rolex watches and two money clips, charging more than \$15,000 on his father's American Express account. Erik and Lyle purchased automobiles, houses, businesses, clothing, and expensive tennis services. The automobiles included a Jeep Wrangler for Erik and a Porsche 911 Carrera Cabriolet for Lyle.

Erik and Lyle made videotaped statements to their therapist, Dr. Jerome Oziel, on December 11, 1989 *6. On the tape, Erik and Lyle discussed their relationship with their parents and the reasons they killed them. Basically, Erik and Lyle told Dr. Oziel that they hated their father, and the murder of their mother was a "mercy killing." The contents of the Oziel tape were corroborated by Erik's confession to his friend Craig Cignarelli. In fact, shortly after the murders, Erik walked Cignarelli through the den of the Menendez home explaining where his mother and father had been located when he and Lyle had shot them to death.

Two witnesses, Amir Eslaminia and Jamie Pisarcik, testified about efforts to fabricate evidence. Eslaminia, a high school friend of Erik's from Beverly Hills High School, started visiting the brothers in jail. Lyle asked Eslaminia to give testimony favorable to the defense, specifically to testify falsely that the day before the murders, Lyle and Erik came to him and said they needed a handgun for protection from their parents. Eslaminia's testimony was corroborated by a letter Eslaminia received from Lyle, dated July 7, 1991.

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Pisarcik was the other witness who testified that Lyle had asked her to give false testimony. 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." Pisarcik was familiar with this movie, having seen it with Lyle. In the movie, a man 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. Lyle said Pisarcik had to do it because a large sum of money was to be placed in her bank account. Pisarcik said if money appeared in her account she would tell the police. The prosecution introduced into evidence nine pages police seized from Lyle's cell before the first trial. These pages contained references to "safe houses in foreign cities." The materials also contained references to international travel and visas for different countries.

Dr. Roger McCarthy testified in an effort to reconstruct the crime scene. McCarthy concluded that 12 shots were fired, Kitty and Jose were seated when the first shot was fired, the second shot killed Jose, the first shots were aimed at the head, and later shots were aimed at the knees.

Defense Case

The defendants presented evidence disputing the crime scene reconstruction, concluding that the crime scene was too complex to do an accurate reconstruction. The defendants also presented witnesses relating to various matters and incidents occurring before and after the murders, and expert testimony that Erik suffered from post-traumatic stress disorder.

Erik testified on his own behalf. He maintained that he had been physically and sexually abused by his father between the ages of 6 and 18. He loved his parents but killed them because they were going to kill him after he had disclosed to Lyle that his father had been sexually abusing him. Erik also feared his mother. She participated in her husband's abusive behavior by condoning it. Erik, in his testimony, placed great emphasis on the last few days of his parents' lives in an effort to show he thought his parents were going to kill him.

On Sunday, August 13, one week before the shootings, Jose discussed the courses Erik would be taking at UCLA in the fall. Jose told Erik that he would have to come home several nights a week and sleep over. Erik believed that he would be required to continue to have sex with his father, and his hope of escaping the abuse was gone.

On Tuesday, August 15, Erik told Lyle about the sexual activity between him and their father over the last 12 years. Lyle told Erik he would talk to their father and the sexual activity would cease. On Wednesday, August 16, four days before the shootings, Lyle told his mother that he wanted to speak to his father when he returned from a business trip the following day.

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On Thursday, August 17, three days before the shootings, Jose returned home from his business trip. Erik stayed away from the family home until nearly midnight because he did not want to be present when Lyle talked to their father. When Erik returned home, his father confronted him and as Erik ran from the house, he saw his mother. He had a conversation with his mother and she informed him that she was aware of what had been going on. Lyle told Erik about his earlier conversation with his father. Lyle indicated that he had threatened to tell the police or relatives if the abuse did not stop. Erik told Lyle they would both die as a result of Lyle's threats to Jose. Erik, who feared for his life, concluded that he needed a gun because he believed his father would kill him if the information about the sexual activity were revealed. The idea of running away was dismissed as impossible even though Erik had traveled extensively in the United States and had false identification.

On Friday, August 18, two days before the shootings, the brothers drove to San Diego and purchased two shotguns. After arriving home, the shotguns were left in the car. Erik acknowledged that he intended to use a shotgun, if necessary, to shoot his parents.

On Saturday, August 19, the day before the shootings, the brothers stopped at a firing range so they could practice firing the shotguns, but were told they could not use shotguns at the firing range. They also purchased buckshot ammunition after talking with a sales clerk, who told them birdshot ammunition was essentially "useless" for "stopping" a person. The brothers stayed away from home in order to avoid going on a family shark fishing expedition planned for three o'clock that afternoon. Erik was afraid his parents had planned to kill him and his brother during the trip. When they returned home late in the afternoon, the family went on the fishing trip. The trip lasted from 4 p.m. to 11:30 p.m. Erik and Lyle remained at the front of the boat because they were afraid of their parents *7. After the fishing trip, the family returned home. Erik slept in the house and Lyle in the rear guest house. After Erik retired to his room, Jose pounded on the door, but Erik did not open it.

On Sunday, August 20, the day of the shootings, the brothers had agreed that Lyle was going to talk to their father to see if they could come to some resolution of the problem concerning the sexual abuse. Erik talked to Lyle about noon in the guest house and Lyle said he had not yet gone into the main house to talk to his father because he was scared. Lyle said he would talk to his father later that afternoon. Erik left the house about 1 p.m.

Erik returned to the mansion about 9:30 p.m. and talked to Lyle in the guest house. The brothers decided to go out, but their parents forbade it. Jose told Erik to go upstairs to his room. Lyle told his father not to touch Erik, and his father said he would do as he wanted. Lyle asked his mother if she was going to let this happen, to which she responded, "You ruined this family." Jose and Kitty went into the den and closed the doors behind them.

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Lyle ran to the top of the stairs to where Erik was standing. Erik was in a panic and told Lyle he could not let his father into his bedroom. Even though Jose never expressly threatened him that day, Erik thought they were going to come and kill him. Erik ran to his bedroom and thought about locking the door behind him, but instead got his shotgun out of the closet and ran outside to his car. He ejected the two "worthless" birdshot shells he had placed in the shotgun while returning from San Diego on Friday and loaded the shotgun with the buckshot ammunition he had purchased the previous day. Lyle arrived at the car and loaded his shotgun. They entered the house together, each with a loaded shotgun.

Lyle and Erik, who believed their parents had guns inside the den, burst through the closed doors to the den off the foyer *8. The lights in the den were off but the room was illuminated by the flickering television. According to Erik, his parents were both standing. He indicated on direct examination that he began firing only after his father began walking toward him and Lyle. However, on cross-examination, Erik indicated that he had no idea if Jose took a step in their direction. Erik said that as soon as he saw his parents, he immediately started firing. Erik heard the sound of Lyle's shotgun. Lyle shot his father in the back of the head. The brothers ran out of ammunition and went out to the car and reloaded. Lyle returned to the den. Erik heard one more shot and saw Lyle leave the den.

After the shootings, the brothers picked up the shells because they believed their fingerprints might be on them. When the police did not arrive, Erik and Lyle decided to leave the house. They drove to a movie theater in an effort to purchase tickets for a movie in an effort to fabricate an alibi. They purchased tickets for the 10:30 showing of "Batman," but had to throw the tickets away because they were time-stamped. On their way to meet Berman, they stopped at a car wash and dumped the incriminating evidence (i.e., shotgun shells, bloody pants, shoes with blood spatter) into the trash. Rather than meeting Berman, they returned home and "discovered" the dead bodies of their parents.

The defense offered several witnesses to buttress their argument of abuse. 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. When the boys were young, Jose would grab them by the hair and hold them under water. Erik was often hit by his father for not doing well in sports.

A number of witnesses provided circumstantial evidence corroborating the molestation. When Jose was alone in the bedroom with either Erik or Lyle, no one was permitted to walk down the hallway toward the room. When Erik was 12 or 13, he confided a secret to his younger cousin, Andy Cano. Erik told Cano that his father had been touching him in a sexual manner. Erik made Cano promise to keep the matter a secret and never to reveal it to anyone.

Dr. Wilson, a clinical psychologist who specialized in the area of post-traumatic stress disorder, interviewed Erik for over 30 hours. Dr. Wilson concluded that he suffered from chronic post-traumatic stress disorder (PTSD) as well as from Battered Person's Syndrome and depression. Dr. Wilson opined that Erik's symptoms

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of post-traumatic stress disorder were as severe as they were because his father subjected him to repeated episodes of sexual molestation and repeated physical assaults or threats of assaults.

Dr. Wilson also opined Erik did not believe he could change his environment because of "learned helplessness." According to Dr. Wilson, Erik felt helpless because there was nothing he could do to change his environment. Dr. Wilson also opined that Erik was "hypervigilant." "Hypervigilance" refers to an excessive scanning of the environment for cues of threats or harm where, in fact, none exist. Dr. Wilson's conclusion was that by the night of August 20, Erik was in a panic state in which he had no time or ability for reflective thought. Dr. Wilson also diagnosed Erik as suffering from depression, with symptoms currently in remission because of medication.

Dr. Kerry English, a medical doctor with a specialization in pediatrics and a sub-specialty in the area of child abuse and sexual abuse, examined Erik in August of 1993. Dr. English found no physical evidence of sodomy. Dr. English also reviewed Erik's 1977 medical records which indicated Erik had been examined for a "hurt posterior pharynx, ulva and soft palate." Dr. English explained that although the injury could have been caused by an erect penis being shoved against the back of the throat, thereby bruising the posterior pharynx, there was no indication in the medical records as to the cause of the injury. Dr. English acknowledged that the injury was consistent with being caused by a toy which could have been placed inside the mouth, or falling on a popsicle stick.

Prosecution's Rebuttal

Sometime after the killings, Cignarelli, Erik's best friend, received a tour of the den and was told by Erik what happened on the evening of August 20. Cignarelli gave a statement to the police on November 17, 1989, when he related the substance of Erik's confession although he was not entirely truthful in his comments to the police. Some of the things Cignarelli mentioned in his interviews were not known to the public.

Dr. Park Dietz, a forensic psychiatrist, reviewed materials and interviewed Erik on three separate occasions. Dr. Dietz concluded Erik was suffering from a life-long mental disorder, at least from early childhood, known as general anxiety disorder. This disorder did not affect the critical reasoning aspects of the brain. Dr. Dietz indicated that post-traumatic stress disorder did not impair brain functioning. Dr. Dietz did not diagnose Erik with battered person's syndrome. Dr. Dietz disputed psychologist Wilson's claim that Erik was "hypervigilant" immediately prior to the crimes. Dr. Dietz also contradicted Wilson's conclusion of "learned helplessness." In sum, Dr. Dietz opined that at the time of the shootings, Erik did not suffer from any mental disorder that would preclude him from exercising reflective thought.

Defense's Surrebuttal

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Dr. William Vicary, a forensic psychiatrist, treated Erik for approximately a year and one-half. Dr. Vicary opined that general anxiety disorder can affect a person's mental state at the time of an event. A person suffering from this disorder, if in a state of panic, could suffer an impairment in his ability to engage in reflective thought. In addition, the symptoms of post-traumatic stress disorder (PTSD) overlap with those of generalized anxiety disorder, and the latter disorder makes a person more prone to developing PTSD. Child abuse, including sexual abuse, is more likely to cause PTSD than generalized anxiety disorder.

NEWLY DISCOVERED EVIDENCE

Petitioners present two pieces of claimed newly discovered evidence attached as exhibits A and F to the Petition.

Cano Letter

Exhibit A is an undated, three-page letter written by Erik to his cousin Andy Cano. In the letter, Erik laments that the two have been out of touch for "a long time". Erik describes his parents hosting a company Christmas party and his relationship with Kitty, stating "she freaks out about anything", he does not "know why she puts up with his shit", and that he wishes he could talk to her but he fears that she will tell Jose "whatever I say" and "I just can't risk it". He then goes on to presumably discuss the sexual abuse.

I'm stuck here alone and I've been trying to avoid dad. It's still happening Andy but it's worse for me now. I can't explain it. He's so ever weight that I can't stand to see him. I never know when when (sic) it's going to happen and it's 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 I'm afraid. You just don't know dad like I do. He's crazy! He's warned me a hundred times about telling anyone especially Lyle. Am I a serious whimpus? I don't know. I'll make it through this. I can handle it, Andy. I need to stop thinking about it.

Erik concluded the correspondence asking Cano about his girlfriend, his trip to Puerto Rico, and school then signs off with holiday wishes and doodles.

Rossello Declaration

Exhibit F is a declaration by Roy Rossello, executed on April 4, 2023, in Natal, Brazil via DocuSign. In this declaration, Rosello avers the following statements. He was a member of a Puerto Rican boy band from 1983 through 1986. While performing in New York, Rossello was told by the band's founder that the two would be dining that night at the home of RCA executive Jose Menendez. At the Menendez home, Jose offered Rossello a glass of wine. Rossello states, "I felt sick after drinking it; things looked blurry and I felt like I could not move. I was partially pushed and partially carried down a hallway. It felt like I had no control over my body." Rossello continues, "Jose took me to a room. He closed the door. I could not move my body; he put me into a

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bed. I felt him take off my pants, and felt him penetrate me in the ass. I think that I told him I did not want to do this but he continued to rape me in the anus very hard.” Rossello describes that later at his hotel he was bleeding from his anus and in unbearable pain for a week.

Rossello avers two other occurrences of rape. First, was told to meet Jose in the bathroom of Radio City Music Hall before a performance and Jose orally copulated Rossello. Second, Rossello was taken to Jose’s hotel where Jose put Rossello on a bed, removed Rossello’s pants, and penetrated Rossello’s anus.

LEGAL STANDARD

Petitioners allege that new evidence exists that was “presented without substantial delay, is admissible, and sufficiently material and credible that it more likely than not would have changed the outcome of the case.” (§ 1473, subd. (b)(1)(C)(i).) “New evidence” is evidence that has not previously been presented and heard at trial and has been discovered after trial. (§ 1473, subd. (b)(1)(C)(i).) “Since the [section 1473] standard requires that [a court] engage in the retrospective analysis of deciding whether the new evidence would have changed the trial outcome, [the court] consider[s] only the new evidence identified by the petitioner and the trial record. [The court does] not consider other evidence outside the record.” (In re Sagin (2019) 39 Cal.App.5th 570, 580, fn. 2.) “The ultimate question is whether [the newly discovered evidence] would have produced a reasonable doubt in the mind of at least one juror. “ (Id. at p. 581.) This standard has “a sliding scale: in a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas corpus relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner.” (Id. at p. 580.)

DISCUSSION

The crux of Petitioners’ claims are that these two new piece of evidence, if shown to the jury in the second trial, would have resulted in at least one juror finding the brothers were in actual, but unreasonable, fear for their safety when they killed their parents. According to Petitioners, “in determining if this was an imperfect self-defense*9 case of manslaughter, or a case of premeditated murder, jurors had one critical factual question to decide: were Erik and Lyle victims of sexual abuse.” (Petn. at p. 1.) Petitioners’ portrayal of the jury’s deliberation is flawed. The jurors had to decide, even if they believed the evidence of sexual abuse, did the Petitioners act with premeditation and deliberation. Assuming, without deciding, that the Cano Letter and Rossello Declaration have been presented timely and are admissible, material, and credible, the court finds that these two pieces of evidence presented here would not have resulted in a hung jury, nor in the conviction of a lesser instructed offense.

Petitioners heavily rely on the prosecution’s closing arguments to support their perception that the jury’s sole decision was whether the abuse happened. Petitioners cite to statements such: there was no corroboration of sexual abuse, there was no evidence that Jose was abusive, and the sexual abuse was not proven in court.

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(Petitioners' Memorandum of Points and Authorities, at p. 31, citing to the Reporter's transcript.) To be clear, the Court of Appeal long ago ruled that this was a permissible argument for the prosecution to make on the state of the evidence before the jury. (Menendez at p. 105.) So too did the United States Court of Appeals for the Ninth Circuit in Petitioners' 2005 federal habeas petition. (Menendez v. Terhune (2005) 422 F.3d 1021,1037.)

The principal issue at trial was the state of mind of the Petitioners at the time they shot their parents. The prosecution asserted the theory that Petitioners, concerned about Jose rewriting his will to exclude them, deliberately planned the murder of their parents. In their defense, Petitioners asserted that Jose abused the brothers and Kitty was complicit in the abuse, therefore, Petitioners could not have had the requisite state of mind for first degree murder. The prosecution argued to the jury, "You can have totally different opinions regarding why the defendant killed their parents and still agree that this was a premeditated and deliberate murder." (Traverse at p. 78, citing the Reporter's Transcript.) The prosecution even walked the jury through a hypothetical scenario where there jury accepts that the Petitioners were abused, but that abuse lead to rage and revenge and premeditated murder. (Traverse at pp. 79, citing the Reporter's Transcript.) "You're here to respond to a legal question, that is, the degree of homicide that the defendants are guilty or, that is the sole issue..." (Traverse at p. 79, citing the Reporter's Transcript.) The critical issue the jurors had to consider when deciding what level of malice the brothers harbored was with what mental state did the Petitioners act. At the end of the trial, the jury was instructed on first degree murder, second degree murder with malice aforethought, and voluntary manslaughter.

If the murder is willful, deliberate, and premeditated, it is first degree murder. (§ 189, subd. (a).) Second degree murder is the unlawful killing of a human but the intent to kill is not formed after willful premeditation and deliberation. (§ 189, subd. (b).) Voluntary manslaughter is defined as an unlawful killing "upon a sudden quarrel or heat of passion." (Pen. Code, § 192.)

Petitioners sought to argue at trial that they acted in self-defense and were scared for their own lives, though the imperfect self-defense instruction was ultimately not given. Alternatively, they sought a conviction of one of the lesser included offenses. Petitioners would have the court find that the prosecution's closing argument is proof that more evidence of sexual abuse would have resulted in a more favorable outcome (i.e., a hung jury or convictions for a lesser offense) in the second trial as well; however, the jury's ultimate finding of guilt did not indicate their rejection of the sexual abuse evidence. It indicates that, regardless of the sexual abuse evidence, the jury rejected the arguments that (1) the Petitioners acted the intent to kill but without premeditation and deliberation or (2) that the Petitioners acted in the heat of passion.

What is more, the jury assessed and determined Petitioners' premeditation and deliberation a second time when the jury found true the lying in wait special circumstance allegations. As summarized by the Court of Appeal in the direct appeal, "The evidence at trial clearly showed that the [Petitioners] purchased the shotguns in San Diego two days before the murders, premeditated during that period of time, waiting for an opportune time to strike, specifically at 10 p.m. on a Sunday evening, while Jose and Kitty were unarmed, watching television,

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eating and possibly going over Erik's application to UCLA which was found on the table in the den." (People v. Menendez (Feb. 27, 1993) [nonpub. opn.] at p. 100.) The jury was instructed that "[W]hen a defendant intentionally murders another person, under circumstances which include (1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established." (Id. at p. 99, fn. 47, citing CALJIC No. 8.81.15.) Finding this to be true underlines just how strong the evidence was that this was a planned attack, and that the jury rejected the argument that they acted in self-defense or that their abuse caused them to act upon a sudden quarrel or heat of passion.

Petitioners would also have this court find that it was the lack of abuse evidence lead to the jury's rejection of the defense presented. While it is true that some evidence of abuse presented in the first trial was not allowed to be presented to the jury in the second trial, Petitioners were still allowed to present two full months-worth of testimony about Kitty and Jose's parenting, abuse, and behavior, including a cousin who testified often heard Jose beat Erik and Lyle with belts and saw bruises on them, would hold their head under water, and would hit Erik when he did not do well in sports. Other testimony from witnesses corroborated the molestation. When Jose was alone in the bedroom with either Erik or Lyle, no one was permitted to walk down the hallway toward the room. When Erik was 12 or 13, he confided a secret to his younger cousin, Andy Cano. Erik told Cano that his father had been touching him in a sexual manner. Erik made Cano promise to keep the matter a secret and never to reveal it to anyone. Erik, himself, testified about Jose's physical, sexual, and mental abuse of him beginning at age six. The Cano Letter now corroborates his own testimony at trial that Erik told Cano about the sexual abuse and the Rossello Declaration supports the general allegation that Jose sexually abused young boys, but this evidence does nothing to overcome or negate the strength of the premeditation and deliberation evidence presented at trial.

Petitioners assert that the only difference between the two trials was the limited sex abuse evidence. Not so. Some sex abuse evidence was limited from the second trial because the trial court deemed it cumulative or that it lacked foundation due to Lyle's strategic decision to not testify the second time, likely to avoid impeachment *10, and Erik's decision not to have the transcript of Lyle's prior testimony read to the jury. But the prosecution also presented new evidence in the second trial to support the theory that Petitioners murdered their parents out of greed. At the second trial, the neighbors Klara and Randolph Wright testified that after the murders, Erik was seeking Randolph's assistance because he was an attorney and Erik believed their parents' will was on a computer. Randolph testified that Erik asked about the legality of a will written on a computer and Klara testified that the Petitioners were concerned about the possibility that Jose had drafted a new will. An accident reconstruction expert also testified that Jose and Kitty were sitting down when they were shot, contrary to Petitioners' assertions at the first trial that Jose had been standing and moving toward them before they began shooting. More evidence substantiating the already-presented evidence of abuse does not refute the presented evidence of a motive or premeditation and deliberation.

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Neither piece of newly discovered evidence is particularly strong. The Cano Letter contradicts in part the testimony of Erik and Cano. It also only corroborates what was already discussed at length by both witnesses: that the two discussed Jose's abuse. At best, it does not additionally inform the jury of Petitioners' alleged fear at the time of the murders, and at worst, it puts a crack in the credibility of both witnesses. As for the Rossello Declaration, it corroborates the general allegation that Jose was sexually abusive of boys and young men, but is not relevant to the Petitioners' state of mind at the time of the murders. Neither piece of evidence adds to the allegations of abuse that the jury already considered, yet found that the brothers planned, then executed that plan, to kill their abusive father and complicit mother.

Petitioners have not demonstrated that the trial court would have actually admitted the Cano Letter and Rossello declaration after excluding much of the sex abuse evidence from the first trial, based on the cumulative and foundational issues. What is more, the introduction of either of these two pieces of evidence would not have resulted in the trial court giving an imperfect self-defense instruction because neither demonstrate the brothers experienced a fear of imminent peril.

CONCLUSION

In sum, the purported new evidence that slightly corroborates that Petitioners were sexually abused, does not negate the finding of premeditation and deliberation and the lying in wait special circumstance. The evidence alleged here is not so compelling that it would have produced a reasonable doubt in the mind of at least one juror or supportive of an imperfect self-defense instruction.

DISPOSITION

The order to show cause, having served its purpose, is **DISCHARGED**. The petition for writ of habeas corpus is **DENIED**.

The Clerk is ordered to serve a copy of this order upon Mark Geragos, Esq., and Cliff Gardner, Esq., as counsel for Petitioners and upon Deputy District Attorney Seth Carmack, as counsel for Respondent, the People of the State of California.

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- *1 Because Petitioners and both victims share the same last name, each will be subsequently referred to by their first name.
- *2 Petitioners argued they had a genuine, but unreasonable, fear or imminent peril that negated their actual malice. (In re Christian S. (1994) 7 Cal.4th 768, 773.)
- *3 All further undesignated statutory references are to the Penal Code
- *4 According to Cano and Erik's testimony, the two had not discussed the sex abuse for six years prior to the murders, yet Petitioners allege the undated Cano Letter was written eight months prior to the murders.
- *5 Donovan Jay Goodreau lived with Lyle in Princeton, New Jersey, for approximately six weeks in the Spring of 1989. On the day the two shotguns were purchased in San Diego, Goodreau was working at a restaurant in New York. After Goodreau moved out of Lyle's apartment, Lyle was in possession of Goodreau's wallet which contained credit cards and a California driver license belonging to Goodreau.
- *6 Dr. Oziel first began seeing Erik and Lyle in September 1988, after Erik was involved in two burglaries in Calabasas in July 1988.
- *7 Robert Anderson, the operator of the boat charter, corroborated Erik's testimony that there was very little interaction between the family. Erik and Lyle spent most of the trip at the front of the 31-foot boat.
- *8 Neither Lyle nor Erik saw their parents with any weapons on the day of the murders. The belief that Jose and Kitty had guns in the den was based on Erik "knowing my mother and father."
- *9 An imperfect self-defense instruction was not given to the jury in the second trial because the trial court found as a matter of law, Petitioner had not presented evidence of imminent peril. (Menendez at p. 89.) Thus the jury did not actually consider the imperfect self defense theory.
- *10 The police discovered multiple instances of after the first trial was declared a mistrial, such as letters asking friends to fabricate stories about how they obtained the firearms, Kitty attempting to poison her family, and Jose trying to rape Lyle's girlfriend. The police also discovered a recorded conversation where Lyle discusses perjuring himself.

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